UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of CERTAIN ACTIVITY TRACKING DEVICES, SYSTEMS, AND COMPONENTS THEREOF	Inv. No. 337-TA-963

ORDER NO. 40: INITIAL DETERMINATION GRANTING RESPONDENTS' MOTION FOR SUMMARY DETERMINATION THAT THE '546 AND '275 PATENTS ARE DIRECTED TO INELIGIBLE SUBJECT MATTER

(March 3, 2016)

I. INTRODUCTION

A. Procedural Summary

On January 8, 2016, Respondents Fitbit, Inc. ("Fitbit"), Flextronics International Ltd. and Flextronics Sales & Marketing (A-P) Ltd. (Flextronics") (collectively, "Fitbit") filed a motion for summary determination that the U.S. Patent Nos. 8,398,546 (the "'546 patent"), 8,446,275 (the "'275 patent"), and 8,793,522 (the "'522 patent),[1] are directed to ineligible subject matter under 35 U.S.C. § 101. Motion Docket No. 963-028. On January 19, 2016, Complainants AliphCom d/b/a/ Jawbone and BodyMedia, Inc. (collectively, "Jawbone") filed their opposition. On January 20, 2016, Commission Investigative Staff filed their Response. On January 22, 2016, Fitbit filed a reply brief.

B. Legal Background

For decades, courts have struggled to decide whether "software and business methods, or computer-related processes," constitute patent eligible subject matter under 35 U.S.C. § 101.

[1] On February 22, 2016, Order No. 32 terminated the '522 patent from this Investigation. Accordingly, this opinion does not address Respondents' motion regarding the '522 patent's eligibility.

Mark Patrick, *The Federal Circuit And Ultramercial: Software And Business Method Patents Tumble Further Down The Rabbit Hole*, 64 Am. U. L. Rev. 1089, 1092 (2015). "The concern" is "one of pre-emption." *Alice Corp. v. CLS Bank International,* 134 S. Ct. 2347, 2354 (2014) (citing *Bilski v. Kappos*, 561 U.S. 593, 611-612 (2010)). In interpreting section 101, courts seek to avoid granting a monopoly on "'the basic tools of scientific and technological work.'" *Id.* (citing *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2116 (2013). The Supreme Court has "'repeatedly emphasized this . . . concern that patent law not inhibit further discovery by improperly tying up the future use of'" the "building blocks of human ingenuity." *Alice*, 134 S. Ct. at 2354 (citing *Mayo Collaborative Services v. Prometheus Laboratories, Inc.,* 132 S. Ct. 1289, 1301 (2012) (citing *O'Reilly v. Morse*, 15 How. 62, 113 (1854)). The Court's concern has manifested itself in a series of decisions invalidating method patents that implement abstract ideas on a computer.

At the same time, an invention "is not rendered ineligible for patent simply because it involves an abstract concept." *Alice*, 134 S. Ct. at 2354 (citing *Diamond v. Diehr*, 450 U.S. 175, 187 (1981). *Alice* recognized that "'[a]t some level,' all inventions . . . embody, use reflect, rest upon, or apply laws of nature, natural phenomena or abstract ideas.'" *Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 715 (Fed. Cir. 2014), *cert. denied sub nom., Ultramercial, LLC v. WildTangent, Inc.*, 135 S.Ct. 2907 (Jun. 29, 2015) (quoting *Alice*, 134 S. Ct. at 2354) (quoting *Mayo*, 132 S. Ct. at 1293)). Applications of abstract concepts "'to a new and useful end,'" remain patent-eligible. *Alice*, 134 S. Ct. at 2354 (citing *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972)).

Rather than identifying particular factors that distinguish abstract ideas that are patentable from abstract ideas that are not patentable, the Supreme Court based its decision in *Alice* on

"prior cases, and *Bilski* in particular." 134 S. Ct. at 2356. The Court in *Alice* compared the "method of exchanging financial obligations between two parties using a third-party intermediary to mitigate settlement risk," to the claimed method in *Bilski* for hedging risk in financial transactions. *Id.* at 2355-56. The Court also pointed to its decisions in *Benson*, where it "rejected as ineligible patent claims involving an algorithm for converting binary-coded decimal numerals into pure binary form," and *Parker v. Flook*, 437 U.S. 584, 594-595 (1978), where the Court "held that a mathematical formula for computing 'alarm limits' in a catalytic conversion process was also a patent-ineligible abstract idea." *Id.* at 2355.

Having determined that the patented method embodied an abstract idea, the Court in *Alice* asked a second question: whether the method's claims "transform that abstract idea into a patent-eligible application." 134 S. Ct. at 2357. This second step demands an "'inventive concept,'" or "'additional features" to ensure that the patent does not seek simply to monopolize the abstract idea. *Id.* (citing *Mayo*, 132 S. Ct. at 1294, 1298, 1297). At this step, courts look for limitations on the claimed method that narrow its applicability and establish that something new has been achieved.

As stated in *Alice*, the *Mayo* decision is "instructive." 134 S. Ct. at 2357. The patents in *Mayo* "claimed a method for measuring metabolites in the bloodstream in order to calibrate the appropriate dosage of thiopurine drugs in the treatment of autoimmune diseases." *Id.* The Court held the patent ineligible because the "methods for determining metabolite methods were already 'well known in the art,' and the process at issue amounted to 'nothing significantly more than an instruction to doctors to apply the applicable laws when treating their patents.'" *Id.* (citing *Mayo*, 132 S. Ct. at 1298). "'Simply appending conventional steps, specified at a high level of generality,' was not '*enough*' to supply an 'inventive concept.'" *Id.* (citing *Mayo*, 132 S. Ct. at

1300, 1297, 1294). Again, "introduction of a computer into the claims does not alter the analysis . . . ." *Id.; see also Bancorp Services, LLC v. Sun Life Assur. Co. of Can.*, 687 F.3d 1266, 1278 (Fed. Cir. 2012), *cert. denied*, 134 S. Ct. 2870 (2014) ("[A]dding a 'computer aided' limitation to a claim covering an abstract concept, without more, is insufficient to render the claim patent eligible.'") (quoting *Dealertrack, Inc. v. Huber*, 674 F.3d 1315, 1333 (Fed. Cir. 2012). Significantly for the case at bar, *Alice* also stands for the principle that "a method of organizing human activity" may be ineligible for patent protection notwithstanding that it is "not a 'truth' about the natural world 'that has always existed.'" *Alice*, 134 S. Ct. at 2356 (citing Brief for Petitioner 22 (quoting *Flook*, 437 U.S. at 593 n. 15)).

Alice has spawned a multitude of cases in which patents for business methods relying on computer technology have been challenged successfully.[2] *See* Patrick, *supra*, at 1109. While we have no definitive answer to the question of which methods are patent-eligible under section 101, we do know, based on the current case law, that a method that (1) uses conventional technology in a computerized system, (2) does not purport to improve known technology, and (3) does not transform any object or substance in a way that enhances its usefulness, is probably not eligible for protection.[3]

---

[2] For example, in *Ultramercial,* the Federal Circuit, following *Alice*, held ineligible a patent (that it had twice previously approved) claiming a method for distribution of media products over the Internet. 772 F.3d at 709.

[3] It appears that patent eligibility has not been addressed by the Commission since the Supreme Court's decision in *Alice*. In a pre-*Alice* opinion, the Commission held ineligible, under the "'machine or-transformation'" test, method claims for "generating, receiving, analyzing, providing, comparing, and computing," on the ground that "neither they nor the patent specification limit the claims to patentable industrial processes." *Certain Machine Vision Software, Machine Vision Systems, and Prods. Containing Same*, Inv. No. 337-TA-680, Commission Op. at 2, 4 (Nov. 16, 2010). In *Bilski*, the Supreme Court held that the "machine or transformation test is not the sole test for determining eligibility of a method patent, but that the test is "a useful and important clue, an investigative tool, for determining whether some claimed inventions are processes under § 101." 561 U.S. at 604.

C. The Patents At Issue

The '546 Patent

The '546 patent issued on March 19, 2013 to BodyMedia, Inc. It has a filing date of September 13, 2004 and claims priority to various provisional applications and continuation-in-part applications. *See* Mot. Ex. 1 ('546 patent). It is entitled "System for Monitoring and Managing Body Weight And Other Physiological Conditions Including Iterative and Personalized Planning, Intervention and Reporting Capability." *Id.*

The patent discloses a nutrition and activity management system that monitors energy expenditure through the use of a body-mounted sensing apparatus. *Id.* at Abstract. The weight management system is directed to "achieving an optimum or preselected energy balance between calories consumed and energy expended by the user." *Id.* The system uses "an adaptable computerized nutritional tracking system to provide the user with "relevant and predictive feedback" regarding progress toward weight loss. *Id.*

According to the specification, the system is an improvement on previous programs because it does not depend on manual input of data and instead utilizes "an apparatus on the body that continuously monitors the heat given off by a user's body in addition to motion, skin temperature and conductivity." *Id.* at 4:38-40. "The data collected by the apparatus is uploaded to the software platform for determining the number of calories burned, the number of steps taken and the duration of physical activity." *Id.* at 4:52-55. The advantage of the system is faster and easier entry of relevant data and the ability "to provide feedback information regarding the user's progress and recommendations for reaching dietary goals." *Id.* at 4:56-5:21. The embodiments include an apparatus that includes a processor "adapted to generate data" indicative of various characteristics of the individual, *e.g.*, "ovulation state, sleep state, calories burned,

basic metabolic rate, basal temperature, physical activity level, stress level, relaxation level, oxygen consumption rate, rise time, time in zone, recovery time, and nutrition activity." *Id.* at 5: 54-67. The patent describes many applications of the claimed system that are unrelated to weight loss management, *e.g.*, sleep disorders, personal hygiene, medication compliance, paying bills, and performing household chores. *Id.* at 32:5-10, 30: 34-52.

Complainants assert claims 1-18 and 20-28 of the '546 patent. Independent Claim 1, which is representative, states:

What is claimed is:

1. A system to provide feedback for an individual's weight-loss goal, said system comprising:
   a. a wearable sensor device for detecting data; and
   b. a processing unit in electronic communication with said sensor device, said processing unit configured to accomplish the following steps, thus providing said feedback:
      (i) derive physiological and contextual data of the individual from data detected by said sensor device;
      (ii) prompt said individual to establish a weight-loss goal;
      (iii)generate a first suggestion to engage in an activity to assist said individual to achieve said weight-loss goal;
      (iv)determine weight-loss;
      (v) generate a second suggestion to engage in an activity to assist said individual to achieve said weight-loss goal if said weight-loss goal is not progressing toward the goal;
      wherein said second suggestion is based upon a determination of whether or not the individual complied with said first suggestion; and
      wherein said determination of whether or not the individual complied with said first suggestion is based on said derived physiological and contextual data of the individual.

Id. at 60:14-38.

Other asserted claims in the '546 patent are directed to various uses of the data collected, *e.g.*, determining an "energy balance" using caloric intake and expenditure (claims 2-5), identifying and recording a pattern of behavior (claims 6-9); storing the information collected in

a database (claims 10-13), analyzing the stored data in a "processing unit," (claims 14-17), reporting results (claims 18-21), and using an algorithm to calculate weight loss and gain (claim 25).

The Parties' Arguments

Fitbit argues that the '546 patent claims the abstract idea of providing weight loss suggestions based on an individual's activity levels, and that the claims merely implement abstract concepts on a computing device. Fitbit asserts that the '546 patent includes no technological advances, consisting only of a wearable computing device that makes it "easier and more convenient to keep track of the data, by using well-known technology (preexisting sensors and processors) to do so." Mot. at 13.

Fitbit states that the '546 patent fails the "pen and paper" test. *See CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1372 (Fed. Cir. 2011) (invalidating a patent for a process that "can be performed in the human mind, or by a human using a pen and paper"). Fitbit says the dependent claims only add detail, but not inventiveness, to the abstract idea embodied in the '546 patent. *See* Mot. at 15-16 (citing *Ultramercial* and *Alice).*

Fitbit asserts that wearable data sensors are not innovations but are well known in the prior art, citing examples in the '546 patent itself. Fitbit states that the '546 patent's reduction of the need for manual entry of data by the user does not confer patent eligibility. *See* Mot. at 18 (citing *Intellectual Ventures 1 LLC v. Capital One Bank (USA)*, 792 F.3d 1363, 1370 (Fed. Cir. 2015); *Planet Bingo, LLC v. VKGS LLC*, 576 Fed. Appx. 1005, 1007 (Fed. Cir. 2014).

Fitbit also states that a process using mathematical algorithms to manipulate data to generate a report is not patent eligible. *Id.* at 18 (citing *Digitech Image Techs., LLC v. Elecs. For Imaging, Inc.*, 758 F.3d 1344, 1351 (Fed. Cir. 2014)). Fitbit asserts that the '546 patent employs

"a highly similar" process to the one found unpatentable in *Digitech*: "applying equations to sensor data (*e.g.*, accelerometer data used to measure steps walked) in order to calculate a more specific weight-loss target (*e.g.*, number of calories burned), as well as generate status reports with suggested activities." *Id.* at 18. Fitbit states that the '546 patent uses a standard computing unit that contains no element of inventiveness.

In response, Jawbone claims as "essential innovative elements – wearable data sensors that provide continuous and accurate feedback free of human reporting error and respond, without the requirement of human input, to changes in physiological and contextual data by updating the weight loss and activity suggestions based, in part, on the acquired data." Opp. at 12. Jawbone does not argue that any of the dependent claims, standing alone, discloses a patentable invention, but that the '546 patent "viewed as a whole" "discloses a significant technological improvement." *Id.* Jawbone relies on *Diamond* and a recent district court case, *Motio v. BSP Software LLC*, No. 4:12-CV-647, 2016 WL 26043 (E.D. Tex. January 4, 2016), contending that the "specific, technologic solution" identified by Jawbone for the problem of obtaining accurate information on caloric intake and output is "a system of sensors that can collect the necessary data accurately and continuously and, in conjunction with a processor, use that data to provide weight-loss suggestions." Opp. at 14, 15. Jawbone adds that the dependent claims 10-18 add the "ability to predict future data" providing a "more complete and comprehensive picture from which to monitor compliance with, and efficacy of weight loss suggestions." *Id.* at 15.

Jawbone asserts that the '546 patent does not utilize a generic computer, because "*no* device was previously able to combine all of this data *and* generate iterative feedback." *Id.* at 16. Jawbone says human beings cannot do this. Jawbone asserts that summary determination is

inappropriate because the issues concerning whether a human could do the calculations indicated in the '546 patent are factual. Opp. at 17 (citing *France Telecom S.A. v. Marvell Semiconductor Inc.*, 39 F. Supp. 3d 1080, 1096 (N.D. Cal. 2014). Jawbone asserts that the '546 patent does not simply state an abstract idea while adding the words "apply it," *see Mayo*, 132 S. Ct. at 1294, because it "provides a solution to a problem that humans could not solve, by hand or with a generic computer, through implementation of a specific wearable technological device that is part of a detailed system." *Id.* at 18.

Staff says the '546 patent is ineligible, noting that the methods for data collection are well known, as described in the patent itself. Staff stays the system also lacks specificity, in that the processing may be performed "by not only a 'microprocessor' but also a 'microcontroller, or any other device that can be programmed to perform the functionality described therein.'" Staff Response at 7 (citing '546 patent at 13:34-40).

Staff asserts that the idea of using information about the user and providing feedback in a weight loss program is abstract, and that none of the claimed elements limit the abstract idea through inclusion of an inventive concept. Staff notes that there are no limitations in the '546 patent on the combination of sensors that collect data or the type of sensor to be used. There is "almost no limitation on how the data is manipulated or how the results are applied so long as 'physiological and contextual data of the individual' is derived." *Id.* at 8. In sum, Staff says, "[T]here is no indication that the inventors went beyond anything routine and ordinary in the field in describing how to use a general purpose computer and a standard sensor to apply known weight loss techniques." *Id.* at 9.

The '275 Patent

The '275 patent was filed April 23, 2012 and is entitled "General Health and Wellness Management Method and Apparatus for A Wellness Application Using Data from a Data-Capable Band." Mot. Ex. 2 ('275 patent). The Abstract discloses "[g]eneral health and wellness management techniques and devices" configured for use with a "data-capable personal worn or carried device." *Id.* at Abstract. One embodiment is described as "a method receiving data representing a profile upon which a target score is established based on one or more health-related activities, and acquiring data representing a profile upon which a target score is established based on one or more health-related activities, and acquiring data representing one or more subsets of acquired parameters based on, for example, one or more sensors disposed in a wearable computing device." *Id.* The patent describes many variations. "Various embodiments or examples may be implemented in numerous ways, including as a system, a process, an apparatus, a user interface, or a series of program instructions on a computer readable medium such as a computer readable storage medium or a computer network where the program instructions are sent over optical, electronic, or wireless communications links," the patent states. Id. at 11:66-12:5. Moreover, the patent is not limited to such variations. "The scope is limited only by the claims and numerous alternatives, modifications, and equivalents are encompassed." *Id.* at 12:11-13.

Jawbone originally asserted claims 1, 2, 4, 5, 8, 9, 10, 13, 14, 15, 18, and 19. Pursuant to Order No. 32 (February 22, 2016), Jawbone withdrew all claims of the '275 patent except 1-7, 15, and 19. Independent Claim 1 states:

> A method comprising:
> receiving data representing a profile defining parameters upon which a target score is established based on one or more health-related activities;

acquiring data representing one or more subsets of acquired parameters based on one or more sensors disposed in a wearable computing device;
determining data representing values for the one or more subsets of the acquired parameters based on reference values for the parameters set forth in the profile;
calculating at a first processor a score based on data representing the values, the score representing an attained portion of the one or more health-related activities;
causing presentation of a representation of the score relative to the target score; and
adjusting a determination upon which to modify the target score,
wherein the target score is indicative of one or more standards against which to compare one or more groups of the values aggregated to form the score.

'275 patent at 47:25-44.

Except for claim 19 (discussed below), the remaining claims depend from claim 1. These dependent claims place additional requirements on the data collection, processing, and reporting set forth in claim 1, *i.e.*, calculating a score that indicates the ability of the user to "achieve a targeted level of health and wellness" (claim 2), using sleep, nutrition, or movement data (claim 4), aggregating a "sleep score," "nutrition score," and/or "activity score" (claim 5), and providing feedback in the form of a specific visual interface or a vibration signal (claim 15). '275 patent at 47:45-48:59.

Independent Claim 19 discloses:

A device comprising:
a first interface configured to receive data representing acquired parameters from one or more sensors, at least one sensor being disposed in a wearable computing device;
an aggregation engine comprising:
a repository configured to store data representing a profile defining parameters upon which a target score is established; and
one or more managers including one or more processors, at least one manager being configured to receive data representing a subset of the acquired parameters and further configured to determine data representing values for the subset of the acquired parameters, the values representing a point value relative to reference values for the parameters set forth in the profile;

a score generator configured to:
calculate a score based on data representing the values; and
adjust the score based on threshold amounts for one or more of the values to form an adjusted score;
a general health and wellness module configured to facilitate modification of a value of an acquired parameter associated with a state of a user to change the target score; and
a status manager configured to cause presentation of a representation of the target score, wherein the score is indicative of relative proximity to the target score.

'275 patent at 49:14-50:21.

The Parties' Arguments

Fitbit argues that aggregating a variety of health-related data to calculate a score and presenting the score to the individual as feedback "is a basic and abstract concept." Mot. at 19. Fitbit maintains that these types of calculations can be performed "in the head, even without the aid of pen and paper." *Id.* at 20 (citing '275 patent at 44:6-21). Fitbit asserts that the '275 patent, like the '546 patent, attempts to claim an abstract idea. Fitbit says the '275 patent describes routine, conventional steps and "'contains no restriction on how the result is accomplished.'" *Id.* (quoting *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1348 (Fed. Cir. 2015)). Fitbit notes that "no specific formulas or algorithms are disclosed or claimed in any part of the '275 patent." *Id.*

Fitbit says that claim 19 comprises elements that "have vague and generic descriptions that do not suggest inventive concepts." *Id.* at 21. Fitbit asserts that the "listed computing components do not constitute, individually or collectively, the claimed invention itself, but instead serve as conventional means to carry out the abstract tasks" of collecting and storing data, calculating scores "by the use of formulas and other manipulations that are not disclosed in the patent," alerting the user, and displaying the score. *Id.*

Citing *Alice*, 134 S. Ct. at 2359, Fitbit maintains that adding computer functionality to tasks that could be carried out by humans without the aid of computers does not make abstract ideas eligible for patent protection. Fitbit says, "[T]he '275 patent is not patent eligible because it reflects the abstract idea of assigning a 'score' to a person's health status and comparing it with an aggregate 'target score,' and this concept is merely applied on a generic computing device with preexisting sensor technology," without effecting any technological advance. *Id.* at 22-23.

In its opposition, Jawbone says the '275 patent "does not claim the abstract concept of aggregating data to calculate a health score. Rather, it solves the significant problem in the health industry of getting individuals to be accurate and consistent in their reporting of the relevant data so that such data can be compiled and used to provide individuals with information about their health and to set goals for improvement." Opp. at 19. Jawbone asserts that the '275 patent is eligible because the method "collects, without user input, a wide variety of data, on a single wearable device, which is then aggregated with input data to calculate a health score *and* to modify the target score that was calculated based on input data." *Id.* at 19-20 (comparing *Digitech*, 758 F.3d at 1351). Jawbone says the requirement for input from a wearable sensor device confers eligibility, and that the aggregation of data "does not invalidate the method as a whole, which comprises much more." *Id.* Jawbone argues that the method is appropriately limited because the "wearable sensors permit compilation and analysis of personal data in a manner that is unavailable through use of a generic computer." *Id.* Jawbone relies on *Diamond*, arguing that while the "calculation of health-related target and actual scores – is a known industry process," the "innovation of the '275 is that it enables improved measurement of the

data . . . through the use of wearable sensors, and then uses that data to calculate *and adjust* health related target scores, better enabling the user to reach his or her health-related goals." *Id.*[4]

Staff says claim 1 of the '275 patent is "generally directed to a system for wellness monitoring based on upon the generation and monitoring of a target score for a health parameter. This is quite clearly an abstract idea for health maintenance." Staff's response at 11. Staff says that the description of the invention is broad and general, without meaningful limitations. Staff says that the patent lacks an inventive concept, noting that the only hardware elements recited are a processor and one or more sensors disposed in a wearable computing device. For the same reasons as the '546 patent, Staff says, claim 1 of the '275 patent is ineligible for patent protection. The dependent claims, according to Staff, add no significant limitation to the abstract idea described in claim 1 and simply involve "'well-understood, routine, conventional activity.'" *Id.* at 12 (citing *Mayo*, 132 S. Ct. at 1298). Staff says independent claim 19 is similarly ineligible, notwithstanding that it "applies some different functional labels to the claim elements." *Id.* at 12. Claim 19, Staff says, claims "the abstract idea of a target score for health and wellness management." *Id.*

II. DISCUSSION

A. The Issue Is Ripe for Summary Determination.

Commission Rule 210.18 governing summary determination states, in part:

> The determination sought by the moving party shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.

[4] Jawbone says Fitbit's arguments in support of its motion conflict with statements made by Fitbit in connection with Fitbit's own patents. *Id.* at 21. Jawbone cites no support for its argument that this should be considered in connection with the instant motion.

19 C.F.R. § 210.18(b).

By analogy to Fed. R. Civ. P. 56 (a), in deciding whether to grant summary determination, the evidence "must be viewed in the light most favorable to the party opposing the motion ...with doubts resolved in favor of the nonmovant." *Crown Operations Int'l, Ltd. v. Solutia, Inc.*, 289 F.3d 1367, 1375 (Fed. Cir. 2002) (citations omitted); *see also Xerox Corp. v. 3Com Corp.*, 267 F.3d 1361, 1364 (Fed. Cir. 2001) ("When ruling on a motion for summary judgment, all of the nonmovant's evidence is to be credited, and all justifiable inferences are to be drawn in the nonmovant's favor."). "Issues of fact are genuine only 'if the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party.'" *Crown Operations Int'l*, 289 F.3d at 1375 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The trier of fact should "assure itself that there is no reasonable version of the facts, on the summary judgment record, whereby the nonmovant could prevail, recognizing that the purpose of summary judgment is not to deprive a litigant of a fair hearing, but to avoid an unnecessary trial." *EMI Group N. Am., Inc. v. Intel Corp.*, 157 F.3d 887, 891 (Fed. Cir. 1998) (citations omitted). "In other words, '[s]ummary judgment is authorized when it is quite clear what the truth is,', and the law requires judgment in favor of the movant based upon facts not in genuine dispute." *Paragon Podiatry Lab., Inc. v. KLM Labs., Inc.*, 984 F.2d 1182, 1185 (Fed. Cir. 1993) (citations omitted).

Jawbone asserts that deciding patent eligibility at the summary determination stage is premature, but Jawbone has not established that there is any genuine issue of material fact that precludes summary determination. Several courts have held, moreover, that patent eligibility can be decided as early as the pleadings stage. *See Wireless Media Innovations, LLC v. Maher Terminals, LLC*, 100 F. Supp. 3d 405, 410 (D.N.J. 2015), *aff'd*, ___ Fed. Appx. ___, Nos. 2015-

1634, 2015-1635, 2016 WL 463218 (Fed. Cir. Feb. 8, 2016). The issue certainly can be decided upon motion for summary judgment when, as in this instance, there are no genuinely disputed issues of material fact. *See Mortgage Grader, Inc. v. First Choice Loan Servs., Inc.*, No. 2015-1415, 2016 WL 362415 at *8 (Fed. Cir. Jan. 20, 2016) (affirming summary judgment under section 101 where the district court relied solely on the claims and specification, without resolving disputed factual issues.)

There are no disputed claim constructions that would affect the determination as to satisfaction of section 101. Fitbit states that for the purpose of deciding this motion, Jawbone's proposed claim constructions can be used; and, in any event, claim construction has been completed. Indeed, there was no disputed claim construction with respect to the '546 patent or the '275 patent that could affect the section 101 determination. *See* Order No. 31 (Feb. 17, 2016).

Jawbone asserts that determining whether a human being could perform the system set forth in the '546 patent presents a factual dispute. This argument misconstrues the law. "[T]he category of patent-ineligible abstract ideas is not limited to methods that can be performed in the human mind." *Cyberfone Sys., LLC v. CNN Interactive Grp., Inc.,* 558 Fed. Appx. 988, 992 (Fed. Cir. 2014) (citing *Bilski*, 130 S. Ct. at 3230). It is obvious, moreover, that human beings cannot do what computers do, but the case law is by now well established that the greater speed and efficiency gained by computerizing mental functions does not warrant patent protection. The system that is described in the '546 patent collects and analyzes various kinds of data to determine an individual's caloric intake and expenditure, in order to devise a weight loss program. Human beings, if they had the time and training, could monitor caloric intake and expenditure based on these same measurements, *e.g.*, heart rate, activities, food consumption, in

order to devise a plan for losing weight. More esoteric measurements mentioned in the '546 patent, such as time of ovulation, also can be taken by human beings having the technological means to do so. Critically, those technological means are not claimed in the '546 patent.

"'Patentability is a question of law 'that may be informed by subsidiary factual issues.'" *Wireless Media*, 100 F. Supp. 3d at 410 (quoting *Cyberfone,* 885 F. Supp. 2d at 715 (D.Del. 2012) (citing *In re Comiskey*, 554 F.3d 967, 976 (Fed. Cir. 2009))). In this instance, there are no genuinely disputed facts that need to be resolved in order to determine patentability.

B. Burden of Proof

For purposes of deciding whether the claims meet the demands of section 101, no presumption of eligibility applies. *See Wireless Media*, 100 F. Supp. at 411. "'[T]he Supreme Court has taken up several section 101 cases in recent years, [but] it has never mentioned – much less applied – any presumption of eligibility.'" *Id.* (quoting *Ultramercial*, 772 F.3d 720-721 (Mayer, J., concurring).

C. Section 101 – Ineligible Subject Matter

Section 101 of the Patent Act sets forth four categories of patentable inventions, stating: "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title." 35 U.S.C. §101. *Intellectual Ventures I LLC v. Capital One Bank (USA),* 792 F.3d 1363, 1366 (Fed. Cir. 2015). The Supreme Court has recognized three exceptions to section 101, holding ineligible for patenting "'[l]aws of nature, physical phenomena, and abstract ideas.'" *Ultramercial*, 772 F.3d at 714 (quoting *Alice*, 134 S. Ct. at 2354).

"Patents that merely claim well-established, fundamental concepts fall within the category of abstract ideas." *Cyberfone*, 558 Fed. Appx. 988, 991 (Fed. Cir. 2014) (citing *Bilski*, 130 S.Ct. at 3231). A two-part test determines whether claims are patent-ineligible "abstract ideas." *See Wireless Media,* 100 F. Supp. 3d at 412 (citing *Alice).* The first step requires the court to determine whether the claims at issue actually do recite an abstract idea. If not, there is no question of subject matter ineligibility. If the answer is affirmative, however, the court in the second step determines whether the claims contain "'an element or combination of elements that is 'sufficient to ensure that the patent in practice amounts to significantly more than a patent upon' the [ineligible concept] itself.'" *Id. (*quoting *Alice,* 134 S. Ct. at 2355 *(*quoting *Mayo*, 132 S.Ct. at 1294)).

"[M]ethods which can be performed mentally, or which are the equivalent of human mental work, are unpatentable abstract ideas ...." *CyberSource,* 654 F.3d at 1371. While application of an abstract idea to a known structure or process may well be deserving of patent protection, *see Diamond*, 450 U.S. at 187, the idea must have "a particular concrete or tangible form," *Wireless Media*, 100 F. Supp. 3d at 414. Many decisions have by now made clear that "an abstract idea is not rendered patentable [] just because of connections to the physical world, " and "the mere presence of a physical step, such as inputting information into a computer, to collect data, will not render a claim patent eligible." *Id.* at 415 (citing *In re Grams*, 888 F.2d 835, 840 (Fed. Cir. 1989); *see also Bilski*, 561 U.S. at 611).

The second step in the analysis requires identification of an "'inventive concept' sufficient to 'transform' the claimed abstract idea into patent-eligible subject matter." *Alice*, 134 S. Ct. at 2357 (quoting *Mayo*, 132 S. Ct. at 1294, 1298). The claim limitations must disclose additional features indicating more than "well-understood, routine, conventional activity" as part

of the patented subject matter. *Mayo*, 132 S.Ct. at 1292. The limitations must "'narrow, confine, or otherwise tie down the claim so that, in practical terms, it does not cover the full abstract idea itself.'" *Cyberfone*, 558 Fed. Appx. at 992 (quoting *Accenture Global Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1341 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 2871 (Jun. 30, 2014)).

Configuring a standard computerized system to implement an abstract idea does not make the configuration patent-eligible. "[M]onitoring, recording, and inputting information represent insignificant "'data-gathering steps,'" *Wireless Media*, 100 F. Supp.3d at 416 (quoting *CyberSource*, 654 F.3d at 1370), and "thus add nothing of practical significance to the underlying abstract idea." *Id.*, *see OIP Technologies, Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1364 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 701 (Dec. 14, 2015) (invalidating patent implementing the abstract idea of price optimization on a generic computer).

The second step includes the machine-or-transformation test, although it is not the sole test, as a "clue" to whether a claimed process is patent-eligible. *See Bancorp*, 687 F.3d at 1278 (citing *Bilski*, 130 S. Ct. at 3227). Using this analytical tool, the court inquires whether the claimed process "(1) is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing." *In re Bilski*, 545 F.3d 943, 954 (Fed. Cir. 2008), *aff'd on other grounds sub nom. Bilski v. Kappos*, 561 U.S. 593 (2010). Again, the use of computers as such does not satisfy the machine-or-transformation test. *See Wireless Media*, 100 F. Supp.3d at 417 (holding that generic computer functions are not inventive). Manipulation of abstractions on a computer "'cannot meet the test because they are not physical objects or substances, and they are not representative of physical objects or substances.'" *Ultramercial,* 772 F.3d at 717 (quoting *Bilski*, 545 F.3d at 963).

D. The Patents at Issue Seek Protection of An Abstract Idea.

1. The '546 patent

Summary determination is appropriate because there is no issue of material fact in dispute and the law regarding ineligibility in these circumstances is clear. The '546 patent, like other "methods of organizing human activity" that collect and manipulate data using a general-purpose computer, discloses an abstract idea "directed towards ineligible subject-matter." *Intellectual Ventures,* 792 F.3d at 1367-68. Managing a weight loss program certainly qualifies as organizing human activity.

Step One: The system described in the '546 patent is an abstract idea. The patent's claims describe general steps and means for collecting and recording information that has, in the past, been collected and recorded by human minds and hands. Indeed, a system for making suggestions based on calculating and comparing caloric intake and expenditure using nutrition and activity levels describes the core of any realistic weight loss program, and cannot be monopolized by Jawbone.[5]

Intellectual Ventures provides a useful comparison. In that case, the patent claims were "directed to an abstract idea: tracking financial transactions to determine whether they exceed a pre-set spending limit (*i.e.*, budgeting). 792 F.3d at 1367. The Federal Circuit found that "budgeting" is an abstract idea and that "using a "communication medium" (broadly including the Internet and telephone networks) . . . does not render the claims any less abstract." *Id.* In the present case weight loss management is a similarly abstract idea, and using generic sensors and computer processors does not make the '546 patent's claims less abstract. *See also, e.g., Planet*

[5] The discussion of the law that follows applies as well to the '275 patent and is not repeated in the consideration of that patent's validity.

Bingo, 576 Fed. Appx. at 1008) (finding patents for computer-aided management of bingo games ineligible).

The *Wireless Media* decision, which recently was affirmed by the Federal Circuit without opinion, also provides a good example of an ineligible abstract idea. The patents in that case were directed to the abstract idea of "monitoring locations, movement, and load status of shipping containers within a container-receiving yard, and storing, reporting and communicating this information in various forms through generic computer functions." 100 F. Supp. 3d at 414. The system described in *Wireless Media* is comparable to the system and method described in the '546 patents, which are directed to monitoring activities in the human body, storing and reporting information derived from these activities, and communicating the results in various forms to the system's user through generic computer functions. These are all abstract ideas.

Ultramercial provides another useful model. The patent at issue in *Ultramercial* involved 11 steps for distributing products over the Internet via a "facilitator." 772 F.3d at 712, 714. The patent owner argued that the claims were "directed to a specific method of advertising and content distribution that was previously unknown and never employed on the Internet before." *Id.* at 714. The Federal Circuit disagreed, holding that "the addition of merely novel or non-routine components to the claimed idea [does not] necessarily turn [] an abstraction into something concrete." *Id.* at 715. "In any event," the Circuit continued, "any novelty in implementation of the idea is a factor to be considered only in the second step of the Alice analysis." *Id.*

Like the patent-at-issue in *Ultramercial*, the '546 patent consists of an "ordered combination of steps [that] recites an abstraction . . . an idea, having no particular concrete or tangible form." 772 F.3d at 715. In substance, the '546 patent recites a system of using a

wearable sensor device for detecting data and a processing unit to (1) derive data detected by the sensor; (2) prompt the individual to establish a weight-loss goal; (3) generate a suggestion to engage in activity; (4) determine weight loss; and (5) generate a second suggestion based on whether the individual complied with the first suggestion. '546 patent at 60:15-38. As set forth in the *Ultramercial* decision, the process of collecting data, organizing it in a computer database, and generating reports from the database to be communicated to the product's user, "recites an abstraction." *Id.*

Jawbone's arguments that the '546 patent does not disclose an abstract idea are unpersuasive. Jawbone notes that the patent discloses "a management system that can accurately and automatically monitor daily activity and energy expenditure . . . to reduce the need for strict compliance with and the repetitive nature of manual data entry of information." '546 patent at 4:7-11. Elimination of vagaries in data collection and storage due to manual input by humans may be an improvement, but that does not make the idea of managing weight through monitoring caloric consumption and expenditure any less abstract.

Jawbone identifies as a significant advance the '546 patent's use of sensors linked to computer processors to detect and manipulate various measurements related to physical activity. *See* Opp. at 16, 18. The abstract idea of using sensors in a computerized weight loss system is not patentable, however. "[A]n abstract idea is not rendered patentable [] just because of connections to the physical world, " and "the mere presence of a physical step, such as inputting information into a computer, to collect data, will not render a claim patent eligible." *Wireless Media*, 100 F. Supp. 3d at 415 (citing *Grams*, 888 F.2d at 840; *Bilski*, 561 U.S. at 611).

Importantly, the '546 patent does not claim to have invented wearable sensing devices. The '546 patent claims instead an idea—its nutrition and activity management system—for using

a wearable sensing device. Using sensors "in conjunction with a software platform for monitoring caloric consumption and/or caloric expenditure of an individual," '546 patent at 1:27-29, is just an idea. The abstract idea exception precludes patents that "'would pre-empt use of [a particular] approach in all fields, and would effectively grant a monopoly over an abstract idea.'" *Wireless Media*, 100 F. Supp.3d at 412 (citing *Bilski*, 130 S. Ct. at 3231); *see also, Ultramercial, supra* (novel use of the Internet is abstract). Under the law, Jawbone may be permitted to patent a particular physical apparatus, but not a generic system for using an apparatus it did not invent – which is exactly what the '546 patent describes.

Similarly, Jawbone asserts that the '546 patent "discloses a significant technological improvement in the health and fitness industry in the form of a system of wearable sensors . . . ." Opp. at 12-13. Again, the patent does not claim the sensors, and "improvement in the health and fitness industry" is an abstraction. "An abstract idea does not become nonabstract by limiting the invention to a particular field of use or technological environment . . . ." *Intellectual Ventures*, 792 F.3d at 1366 (citing *Alice*, 134 S. Ct. at 2358). As in *Wireless Devices*, which involved a system for monitoring and moving shipping containers, the '546 patent "articulates nothing more than the process of monitoring, recording, sorting, communicating, and generating information . . . These are all abstract ideas themselves." 100 F. Supp. 3d at 414.

In *Cyberfone*, the Federal Circuit noted that although the method claims required a telephone, which played "an integral role in the method," the function of the phone was not claimed as part of the invention. 558 Fed. Appx. at 992. In addition, the Circuit held, the claim recited "a range of different" telephones that could be used, leading the court to conclude that the telephone "is not a specific machine, and adds nothing of significance to the claimed abstract idea." *Id.* The telephone discussed in *Cyberfone* parallels the sensors and processors used in the

'546 and '275 patents, which also lack specific, innovative technological limitations and innovations that would add substance to the patent's abstract ideas.

Step Two: When the first step of the analysis reveals that a patented system is only an abstract idea, step two of the test for ineligibility requires examination of the patent to determine whether the claims add significantly to the abstract system described. "[T]here must be an 'inventive concept' to take the claim into the realm of patent-eligibility." *Intellectual Ventures*, 792 F.3d at 1367 (quoting *Alice*, 134 S. Ct. at 2358). The invention must "'transform' the claimed abstract idea into patent-eligible subject matter." *Ultramercial*, 772 F.3d at 715 (citing *Alice*, 134 S. Ct. at 2357).

Claim 1 of the '546 patent discloses no inventive concept – describing only deriving data, prompting an individual, generating suggestions, determining weight loss, and determining compliance. As set forth above, the dependent claims describe specific aspects of the '546 patent's system, in particular data-gathering, but at a high level of generality, without indicating that there are technological aspects of the system that add "practical significance to the underlying abstract idea." *See Ultramercial*, 772 F.3d at 716 (citing *Alice*, 134 S. Ct. at 2357) (rejecting the idea that an "active" rather than "passive" data management system confers eligibility). Jawbone only references the dependent claims to contend that "[d]ependent claims 10-18 add to Claim 1 elements whereby through continuous data monitoring the system is able to 'predict future data,'" Opp. at 15, but these dependent claims only describe "routine additional steps," which are insufficient to supply an "inventive concept." *Ultramercial*, 772 F.3d at 716 (citing *Alice*, 134 S. Ct. at 2357). None of the other asserted claims of the '546 patent adds

meaningful limitations to the abstract concepts.[6] As in *Ultramercial*, the limitations of the '546 claims "do not transform the abstract idea that they recite into patent-eligible subject matter because the claims simply instruct the practitioner to implement the abstract idea with routine, conventional activity." *Id.* at 715; *see Mayo*, 132 S. Ct. at 1298. Even if some of the steps in the process were new to the industry, that fact alone would not transform an abstract idea into patentable subject matter. *Ultramercial*, 772 F.3d at 716 ("That some of the eleven steps were not previously employed in this art is not enough – standing alone – to confer patent eligibility . . . .") The rewards of the patent system "do not flow to ideas – even good ones – outside of the technological arena." *Ultramercial,* 772 F.3d at 721 (Mayer, J., concurring).[7]

Although the system described in the '546 patent includes an electronic apparatus, the patent's subject matter is not the apparatus but a system in which the apparatus is used. The system's processor lacks specific limitations; its functions may be performed by a microprocessor, "a microcontroller, or any other device that can be programmed to perform the functionality described herein." '546 patent 1 at 13:36-40. *See Cyberfone*, 558 Fed. Appx. at 993 (holding that a patent specifying a range of different machines that can be used in the

---

[6] "The Federal Circuit has held that an extended claim-by-claim analysis is not necessary where multiple claims are "'substantially similar and linked to the same abstract idea.'" *See Wireless Media*, 100 F. Supp. 3d at 409 (quoting *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat. Ass'n*, 776 F.3d 1343, 1348 (Fed. Cir. 2014), *cert. denied*, 136 S. Ct. 119 (Oct. 5, 2015). For this reason, analysis of the individual dependent claims is not necessary with respect to the '546 patent.

[7] Jawbone cites a portion of the *Alice* decision recognizing that application of abstract concepts "to a new and useful end" remain eligible for patent protection. Opp. at 12-13 (citing *Alice*, 134 S. Ct. at 2354). The only way to read this *dictum* consistently with the Supreme Court's decision in *Alice* and the significant case law developed since *Alice* is to say that the abstract concept must satisfy the requirement of step two, which requires an appropriately limited disclosure and/or a concrete technological advance. *See OIP Technologies*, 788 F.3d at 1364 ("[W]e must read *Diehr* in light of *Alice*, which emphasized that *Diehr* does not stand for the general proposition that a claim implemented on a computer elevates an otherwise ineligible claim into a patent-eligible improvement.") (citing *Alice*, 134 S. Ct. at 2358).

method "adds nothing of significance to the claimed abstract idea."); *Internet Patents*, 790 F.3d at 1348 (rejecting a patent embodying the abstract idea of "retaining information in the navigation of online forms"). The Circuit observed in *Internet Patents* that where the claims at issue did not sufficiently restrict the method for achieving the result achieved, the patent was invalid. "The mechanism [] is not described, although this is stated to be the essential innovation." *Id.*

The processors used in the system described in the '546 patent similarly do not specify any mechanism for achieving the patent's purported innovations. As for the sensors, the '546 patent describes a wearable (only "preferably" worn on the body, it can also be part of a garment, *see* '546 patent at 10:12-15) device such as an armband. Again, the use of a generic device fails to make specific and tangible what is abstract and general.

In sum, the subject matter of the '546 patent is the collection and manipulation of information, not any specific, innovative technological means for performing these functions. "In general, according to the present invention, data relating to the physiological state, the lifestyle and certain contextual parameters of an individual is collected and transmitted either subsequently or in real-time, to a site, preferably remote from the individual, where it is stored for later manipulation and presentation to the recipient, preferably over an electronic network such as the Internet." '546 patent at 9:42-10:5. The '546 patent nowhere claims invention of the process through which the information is obtained (by the sensors) or manipulated (by the processor). In fact, the patent points out examples of many well-known methods "for generating data indicative of various physiological parameters and sensors to be used therefor." '546 patent at 10:36-38.

It is clear, moreover, that the claims of the '546 patent disclose no transformation of any article described in the '546 system into "a different state or thing." *In re Bilski*, 545 F.3d at 954 (citing *Benson*, 409 U.S. at 70). The data collected and manipulated remain just that – data. "Data in its ethereal, non-physical form is simply information that does not fall under any of the categories of eligible subject matter under section 101." *Digitech*, 758 F.3d at 1350.

In addition, it is established that under step two of the eligibility analysis, "claiming the improved speed or efficiency inherent with applying the abstract idea on a computer" does not provide "a sufficient inventive concept." *See Intellectual Ventures*, 792 F.3d at 1367 (citing *Bancorp*, 687 F.3d at 1278; *Ultramercial*, 772 F.3d at 717 (citing *Alice*, 134 S. Ct. at 2357)). As the Circuit explained in *Ultramercial*, "Any transformation from the use of computers or the transfer of content between computers is merely what computers do and does not change the analysis." *Id.* at 717 (emphasis added). The verdict on eligibility of the court in the *Intellectual Ventures* decision applies here as well: "[N]owhere does [the patentee] assert that it invented an interactive interface that manages web site content. Rather, the interactive interface limitation is a generic computer element." 792 F.3d at 1370.

In light of the discussion above, Jawbone's reliance on *Diamond* is unavailing. In that case the patented process involved the use of a mathematical formula to transform uncured synthetic rubber "into a different state or thing" and solved a technological problem: the over- or under- curing of rubber. *See* 450 U.S. at 184 ("that respondents' claims involve the transformation of an article, in this case raw, uncured synthetic rubber, into a different state or thing cannot be disputed."), 187 ("computer use incorporated in the process patent significantly lessens the possibility of "overcuring" or "undercuring"). There is no such transformation in the '546 patent and no such solution to a specific technological problem.

Jawbone cites *Motio*, where a district court found that the patent-at-issue expanded the functionality of existing computer software by providing "an automated agent to solve the problem of a business intelligence system lacking native version control." 2016 WL 26043 at *3. The improvement, the court said, "amounts to significantly more than a patent on the idea of maintaining versions of electronic documents itself." *Id.* The *Motio* court cited *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245, 1249 (Fed. Cir. 2014), in which the Federal Circuit found that the second step of the eligibility test was met where "the claimed solution is necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks." 2016 WL 26043 at *4. The same cannot be said of the '546 patent. Rather, the elements of the system described in the '546 patent, like the patent in *Wireless Media*, "merely require generic computer functions that are not inventive," 100 F. Supp. 3d at 417, and hence, are ineligible for patent protection under section 101.

Jawbone asserts that "*no* device was previously able to combine all of this data *and* generate iterative feedback," Opp. at 16, but the claims do not require any specific computer technology that constitutes an improvement over previous methods. A method that combines data in a computer, when the combination adds nothing "'that is not already present when the steps are considered separately,'" is still ineligible. *Alice*, 134 S. Ct. at 2359 (quoting *Mayo*, 132 S. Ct. at 1298).

2. The '275 patent[8]

The general principles discussed above also support summary determination with respect to the '275 patent.

[8] Pursuant to Order No. 32 (February 22, 2016), Jawbone withdrew claims 8, 9, 10, 13, 14, and 18 of the '275 patent. Those that remain are 1-7, 15, and 19.

Claim 1 of the '275 patent sets forth a "method." *Id.* at 47:25. The steps in the method are (1) "receiving data representing a profile" based on health-related activities, (2) "acquiring data" based on sensors in a wearable computing device (3) "determining data representing values" based on the profile, (4) "calculating at a first processor a score" based on the values, (5) presenting a "representation of the score relative to the target score," and (6) "adjusting" the score. *Id.* at 47: 26-41.

Step One: Like the '546 patent, the '275 patent claims an abstract idea: collecting information about an individual's health status, assigning a score to the individual, and then comparing that to a target score to provide feedback on various purported measures of health and wellness. '275 patent claims 1-7.[9] Claims 2-7 describe additional manipulation of the target scores as well as calculations resulting in other scores, all relating to the abstract idea set forth in Claim 1. Claim 15 adds a graphic or haptic interface. '275 patent at 48:53-59. The patentees do not claim that they invented graphic and haptic interfaces, but only teach that an interface can be used as part of the method for deriving a health and wellness target score.

The activities described generally can be performed by human beings without computers (albeit less quickly and efficiently). Configuring a computer to perform the functions set forth in the '275 patent does not change the abstract nature of method described. Jawbone claims that the "wearable sensors permit compilation and analysis of personal data in a manner that is unavailable through use of a generic computer." Opp. at 20. Using wearable sensors to collect data for transmission to a computer cannot be described as anything other than an abstract idea, however, and the mere use of wearable sensors does not describe a patentable invention. To the

[9] As noted above, extended analysis is not necessary where multiple claims are linked to the same abstract idea. *See* note 6, *supra*.

contrary, the functions set forth involving sensors constitute "well-understood, routine, conventional activity." *Mayo*, 132 S. Ct. at 1298.

Independent Claim 19 describes a device, but the '275 patent nowhere discloses any specific physical or technological attributes of the device. Independent Claim 19 does not describe any specific technological innovation. Claimed are an "interface," an "aggregation engine," "one or more managers including one or more processors," a "score generator," a "general health and wellness module" and a "status manager." '275 patent at 49:14-50:18. These are generic labels indicating functions that can be carried out by means of conventional computing technology, according to the '275 patent. As Staff points out, claim 19 essentially re-labels the same abstract ideas set forth in the claims: receiving, storing, and configuring data, performing calculations, and presenting the results.

Step Two: A discussed, claim 1 describes no technological means for achieving any of the functions comprising the method. The dependent claims recite steps carried out by sensors connected to processors that calculate and manipulate data to generate numbers relating to health and wellness measures. The claims provide no meaningful limitations on the high-level description of the claimed invention, and Jawbone in its opposition points to no technological disclosure that would take the invention beyond the abstract idea of calculating target health and wellness scores using electronic media. The Federal Circuit has held that a machine that is part of a claimed method does not save a patent from ineligibility when the machine is used in a conventional manner.[10]

---

[10] Jawbone relies on *France Telecom*. Opp. at 20. Apart from the fact that this district court decision has not been reviewed and affirmed by the Federal Circuit, and that the district court applies an unwarranted presumption of validity, *see* 39 F. Supp. 3d at 1084-85, *France Telecom* is factually distinguishable. The district court found that the claims at issue in *France Telecom* provide "'inventive concepts' that exceed the prior art, namely, coding in parallel and a novel

The specification of the '275 patent underscores the lack of any inventive step. The '275 patent states that conventional devices are unable to "capture, analyze, communicate, or use data in a contextually-meaningful, comprehensive, and efficient manner," '275 patent at 9:64-66, but the specification never discloses how, technologically, its "data-capable" band works better to perform these tasks than other computerized equipment. The patent states that previous devices for performing the functions disclosed in the patent are expensive to manufacture and purchase. *Id.* at 10:13-14. The asserted claims, however, disclose no specific technological invention that would make such devices less expensive to make and buy. There is no support for the notion that simply combining a number of conventional elements in a method will transform an abstract idea into a patentable invention. As discussed above, an element or combination of elements must amount to significantly more than a patent upon the ineligible concept itself to satisfy section 101. *See Wireless Media* , 100 Fed. Supp. 3d at 412 (section 101 requires "'an element or combination of elements that is 'sufficient to ensure that the patent in practice amounts to significantly more than a patent upon' the [ineligible concept] itself'") (quoting *Alice,* 134 S. Ct. at 2355 (quoting *Mayo*, 132 S.Ct. at 1294)).

In a nutshell, the '275 patent claims the use of conventional electronic and computing technology to implement an abstract idea (among many other abstract ideas): using target scores to monitor health and wellness. All the florid verbiage in the specification fails to describe a patentable invention. Under the legal precedent discussed in detail above, the claims of the '275 patent describe no "new and useful process, machine, manufacture, or composition of matter" that is eligible under 35 U.S.C. § 101.

---

method of iterative coding," and further that the claimed method "takes digital data elements and turns them into a 'distinct series of coded data elements.'" 39 F. Supp. 3d at 1093-94. In contrast, the '275 patent does not claim any specific technological innovation or any specific transformation of data.

III. CONCLUSION

For the foregoing reasons, Motion Docket No. 963-028 is GRANTED. The asserted claims of U.S. Patent Nos. 8,398,546 and 8,446,275 are directed to ineligible subject matter under 35 U.S.C. § 101, and it is my Initial Determination that these patents are terminated from the Investigation.

This Initial Determination, along with supporting documentation, is hereby certified to the Commission. This Initial Determination shall become the determination of the Commission unless a party files a petition for review of the Initial Determination pursuant to Commission Rule 210.43(a), or the Commission, pursuant to Commission Rule 210.44, orders, on its own motion, a review of the Initial Determination or certain issues contained herein. 19 C.F.R. § 210.42(d).

SO ORDERED.

Dee Lord

Dee Lord
Administrative Law Judge

CERTAIN ACTIVITY TRACKING DEVICES, SYSTEMS, AND COMPONENTS THEREOF **Inv. No. 337-TA-963**

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorney, **Peter Sawert, Esq.**, and the following parties as indicated, on **March 3, 2016.**

Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainants AliphCom d/b/a Jawbone & BodyMedia, Inc.:

Kalpana Srinivasan
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067-6029

☐ Via Hand Delivery
☑ Via Express Delivery
☐ Via First Class Mail
☐ Other:_____

On Behalf of Respondent Fitbit, Inc. :

Josh A. Krevitt
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166

☐ Via Hand Delivery
☑ Via Express Delivery
☐ Via First Class Mail
☐ Other:_____

On Behalf of Respondents Flextronics International Inc. & Flextronics Sales & Marketing (A-P) Ltd.:

Mark L. Hogge
DENTONS US LLP
1900 K Street, NW
Washington, DC 20006

☐ Via Hand Delivery
☑ Via Express Delivery
☐ Via First Class Mail
☐ Other:_____