2018-1817, -1819, -1820, -1821, -1822, -1823, -1824, -1825, -1826

United States Court of Appeals for the Federal Circuit

CELLSPIN SOFT, INC.,

Plaintiff-Appellant,

v.

FITBIT, INC., MOOV, INC., dba Moov Fitness, Inc., NIKE, INC., FOSSIL GROUP, INC., MISFIT, INC., GARMIN INTERNATIONAL, INC., GARMIN USA, INC., CANON U.S.A., INC., GOPRO, INC., PANASONIC CORPORATION OF NORTH AMERICA, JK IMAGING LTD.,

Defendants-Appellees,

Appeals from the United States District Court for the Northern District of California in, respectively, case nos. 4:17-cv-05928, 4:17-cv-05929, 4:17-cv-05931, 4:17-cv-05933, 4:17-cv-05934, 4:17-cv-05938, 4:17-cv-05939, 4:17-cv-05941, 4:17-cv-06881, Judge Yvonne Gonzalez Rogers

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REPLY BRIEF OF CELLSPIN

October 3, 2018

/s/ John J. Edmonds

John J. Edmonds
COLLINS, EDMONDS, & SCHLATHER, PLLC
355 South Grand Avenue, Suite 2450
Los Angeles, California 90071
Telephone: (213) 973-7846
Facsimile: (213) 835-6996

Counsel for Cellspin, CELLSPIN SOFT, INC.

CERTIFICATE OF INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1 and Federal Circuit Rule 47.4, the undersigned counsel for Cellspin hereby certifies that:

1. The full names of every party or amicus represented by me is:

Cellspin Soft, Inc.

2. The names of the real parties in interest (if the party named in the caption is not the real party in interest) represented by me is:

None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None.

4. The names of all law firms and the partners or associates that appeared for any of the parties represented by me in the District Court or are expected to appear in this court are:

COLLINS, EDMONDS & SCHLATHER, PLLC
John J. Edmonds
Shea N. Palavan
Brandon G. Moore

5. The title and number of any cases know to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

Cases pending in the District Court below:

Cellspin Soft, Inc. v. adidas America, Inc., C.A. 4:17-cv-05930-YGR
Cellspin Soft, Inc. v. Under Armour, Inc., C.A. 4:17-cv-05932-YGR
Cellspin Soft, Inc. v. Nikon Americas, Inc. and Nikon, Inc., C.A. 4:17-cv-05936-YGR

Cases pending in this Court:
Cellspin Soft, Inc. v. Fitbit, Inc., No. 2018-2178
Cellspin Soft, Inc. v. Moov, Inc. d/b/a Moov Fitness, Inc., No. 2018-2179
Cellspin Soft, Inc. v. Nike, Inc., No. 2018-2180
Cellspin Soft, Inc. v. Fossil Group, Inc. and Misfit, Inc., No. 2018-2181
Cellspin Soft, Inc. v. Canon U.S.A., Inc., No. 2018-2183
Cellspin Soft, Inc. v. GoPro, Inc., No. 2018-2184

Dated: October 3, 2018 */s/ John J. Edmonds*
John J. Edmonds

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AMENDED STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5(a), Cellspin Soft, Inc. ("Cellspin"), hereby states that no other appeal from the civil actions in the United States District Court for the Northern District of California ("District Court") that are the subject of the present appeal was previously before this Court, or any other court.

Pursuant to Federal Circuit Rule 47.5(b), Cellspin further states that the following cases are presently pending in this Court; are related to those cases in the pending appeal, including as companion cases[1]; and will be directly affected by this Court's decision in the pending appeals:

Cellspin Soft, Inc. v. Fitbit, Inc., No. 2018-2178
Cellspin Soft, Inc. v. Moov, Inc. d/b/a Moov Fitness, Inc., No. 2018-2179
Cellspin Soft, Inc. v. Nike, Inc., No. 2018-2180
Cellspin Soft, Inc. v. Fossil Group, Inc. and Misfit, Inc., No. 2018-2181
Cellspin Soft, Inc. v. Canon U.S.A., Inc., No. 2018-2183
Cellspin Soft, Inc. v. GoPro, Inc., No. 2018-2184

Further, the following cases are presently pending in the District Court below; are related to those cases in the pending appeal; and will be directly affected by this Court's decision in the pending appeals:

Cellspin Soft, Inc. v. adidas America, Inc., C.A. 4:17-cv-05930-YGR
Cellspin Soft, Inc. v. Under Armour, Inc., C.A. 4:17-cv-05932-YGR
Cellspin Soft, Inc. v. Nikon Americas, Inc. and Nikon, Inc., C.A. 4:17-cv-05936-YGR.

Cellspin further states that there are no other cases known to the undersigned counsel to be pending in this or any other court or agency that will directly affect or

[1] *See* Docs. 2 & 3 in *Cellspin Soft, Inc. v. Fitbit, Inc.*, No. 2018-2178 (Lead).

be directly affected by this Court's decision in the pending appeal.

I. REPLY TO INTRODUCTION AND STATEMENT OF THE CASE

A. Reply to Introduction

Essentially Appellees entire argument in their Motion to Dismiss,[2,3] boils down to their argument that the asserted claims are merely generic, conventional components acting generic, in conventional ways, which is factually unsupported, based upon a mis-reading of the shared specification, and contrary to the facts noted in Cellspin's Opening Brief, including from the specification, prosecution history and Amended Complaint. As noted in Cellspin's Opening Brief, the claimed inventions indeed have specific technological improvements, substantial inventive and unconventional aspects, and performance of methods automatically or with minimal intervention is only one of many benefits and technological improvements, for example applying HTTP in transit on a mobile device; polling, event notification and request/response over an already paired Bluetooth connection, including an encrypted one.

Just because an invention facilitates methods comprising data transfers or those performed automatically or with minimal intervention does not mean the invention is unpatentable. Appellees fail to point to anywhere in the patents (or elsewhere in the record) where there is a non-automated process that was merely

[2] For simplicity, unless otherwise noted, references herein to docket entries will be to the lead, related *Fitbit* case for identical filings made in each related case.
[3] For ease of reference, the Omnibus 101 Motion and Garmin's 101 Motion are collectively referenced herein as the "Motions to Dismiss."

automated. As noted in Cellspin's Opening Brief, the claimed methods are substantially different from prior art manual processes such as Kennedy.

That Cellspin's novel software-implemented systems and methods may be implemented "*in*" technologies that were known "pervasive" does not mean Cellspin's novel software-implemented systems and methods could have been implemented "*with"* known or pervasive technologies at the time of Cellspin's invention. That Cellspin's novel software-implemented systems and methods may be implemented in connection with a software application running on an "ubiquitous mobile phone," and they involve in part of Bluetooth connectivity, does not mean the patented software-implemented systems and methods, especially in combination, were known ubiquitous at the time of invention. Appellees cite to the specification of the '794 patent (which the parties agree is representative) at Appx290 at 9:37-10:61 as allegedly supporting their argument Cellspin's claimed inventions use allegedly "generic applications"; however, ***nothing*** in the specification states or even supports this argument.

Appellees' argument that "[t]he patents claim nothing more than the conventional use of generic computer technology, behaving in its expected manner, to automate the abstract idea of acquiring, transferring, and publishing data" lacks a citation because it lacks factual support. Similarly, Appellees' argument the patented systems and methods use "generic devices" misses the point that common devices such as mobile phones and capture devices, such as electronic cameras, can be

programmed to perform non-generic methods.

Appellees' argument that "[t]here no plausible factual allegations that, even if true, would alter the conclusion that the asserted claims are not patentable" lacks support and is refuted by the facts noted in Cellspin's Opening Brief. Further, the District Court did **not** find the factual allegations in Cellspin's Amended Complaint were not plausible; rather, it improperly disregarded them. Appx040.

B. Reply to Statement of the Case

As noted above, Appellees' reliance on the "automatically or with minimal user intervention" language in the specifiation does not support or substantiate their argument the claims are merely directed to automation, are merely directed to automating any abstract idea, or are merely directed to automating any process that was generic, conventional, or practiced at the time. Appellees' over-simplification of "simply automating the process of uploading data to one or more websites" improperly glosses over the claim limitations and inventive aspects noted in Cellspin's Opening Brief.

Appellees argue existing Bluetooth technology provided for a "paired connection and the availability of push and pull modes of communication," and "[t]he specification does not disclose any unconventional ways of using or modifying these functionalities." Most of what Appellees cite for this proposition is merely describing Bluetooth pairing, and the remaining refer to aspects of embodiments of the claimed inventions *not to any prior art*. *See* Appx287 at 3:49-

52. To the contrary, as noted in Cellspin's Opening Brief, there is no record evidence of Bluetooth supporting polling or event notifications at the time of the invention, and, in fact, Cellspin was the first to practice multiple unconventional techniques, including for polling, event notifications, and request/response for capctured data between capture devices to mobile devices, including over an already-paired Bluetooth connection. This is in addition to the other inventive and unconventional aspects of the claims noted in Cellspin's Opening Brief, *see* Op.Br. I.H & Appx2289-2291; Appx2332-2334, and juxtaposed against conventional solutions such as Kennedy. *See* II.B.

Appellees' argument "[t]he patents do not describe any unconventional hardware or software modifications to these generic components and known techniques" fails to note the unconventional software modifications, including in connection with "client application 203," set forth throughout the specification, and as embodied in the claims. *See id.* Further, Appellees fail to factually support any argument the claimed methods or systems were conventional, known, ubiquitious or the like beyond their misreading of the specification.

Contrary to Appellees' assertions, the specification does not "admit" exemplary investigative reporter Jane, *i.e.*, "user 502" (*see* Appx290/9:12-36), allegedly "already had at her disposal all the tools and technology needed to accomplish the stated purpose of the invention." For example, prior to the patented invention, *investigative reporter Jane would have lacked mobile "client application*

203," she would have used the deficient prior art techniques noted in the specification and Cellspin's Opening Brief, and not have performed Bluetooth request/response, polling, or event notification, including over an already-paired Bluetooth connection.

In their Statement of the Case, Appellees correctly quote the District Court's erroneous opinion, but fail to provide factual support for the quoted statements, which are unfounded and erroneous, including as noted herein and Cellspin's Opening Brief.

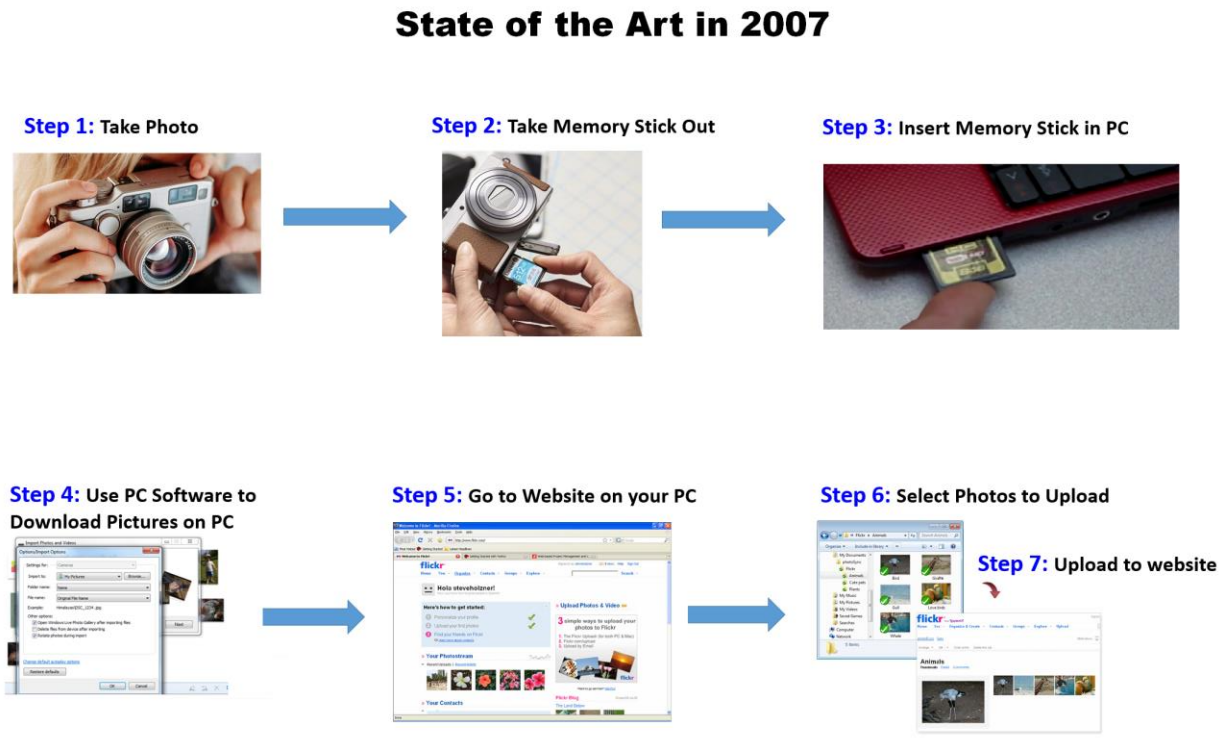
II. ARGUMENT

A. The District Court Erroneously Ruled That All Asserted Claims Are Unpatentable Under 35 U.S.C. §101.

Appellees advocate the same overgeneralization and oversimplification of the claims the District Court erroneously found. However, what the asserted claims are "directed to" is noted at §III.C of Cellspin's Opening Brief. Appellees allege the instant claims are "the type of data manipulation claims that this Court has routinely held unpatentable." *See, e.g.,* Resp. Br., *passim* (*citing Electric Power Group v. Alston,* 830 F.3d 1350, 1353-54 (Fed.Cir. 2016); *Intellectual Ventures I v. Capital One Financial*., 850 F.3d 850 F.3d 1332, 1339-1341 (Fed.Cir. 2017); and *EasyWeb Innovations v. Twitter*, 689 F. App'x 969, 970-971 (Fed.Cir. 2017). However, no attempt is made to meaningfully support this argument, including by meaningfully comparing claim limitations. Appellees' argument erroneously presupposes the

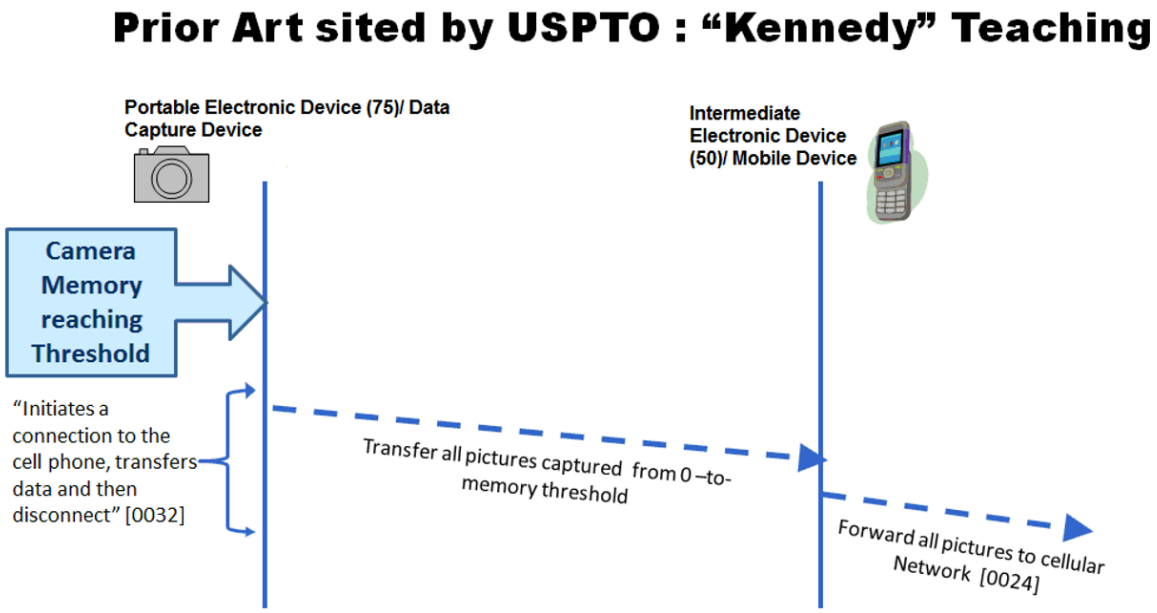
asserted claims are directed to merely "acquiring, transferring, and publishing data" using merely generic components.

Appellees overemphasize the words "automatically or with minimal intervention" in the specification. Indeed, this is *one* benefit of the claimed invention, *e.g.*, Appx286 at 2:52-54, but Cellspin has noted many other benefits, including when one juxtaposes the claimed inventions against what was conventional in the prior art, including as noted in the specification, prosecution history and Cellspin's Amended Complaint. However, contrary to what Appellees, and District Court, contend, the patents do not involve automating a prior manual process, nor do they teach or claim merely use of known technologies in conventional ways. The manual process available in 2007 and described in the specification is as follows:



The Claims amount to significantly more than merely automating this, or another, manual process. In fact, they involve very different processes.

For example, the Kennedy prior art cited during the prosecution of the '794 patent, which is evidence of the state of the art at the time, functioned as follows:



Much unlike the prior art, or state of the art, manual processes disclosed by Kennedy, the claimed inventions comprise a data capture device transferring or sending data to a mobile device over a previously-established paired wireless connection through an event notification, request/response, and/or polling regime, using a cryptographic encryption key in pairing, cryptographically authenticating the mobile device identity, and translating captured data into HTTP format in transit on the mobile device.

As noted in Cellspin's Opening Brief, there are many benefits flowing from (§III.F); specific technological and functional improvements within (§III.E); and many unconventional aspects of (§III.H), the claimed combinations. The claim elements, the benefits from the claimed inventions, and the unconventional aspects of them are substantially different than what the evidence, *i.e.*, manual processes and Kennedy, shows to be the prior art or conventional.

The common specification of the patents-in-suit ***never*** states, or even implies, any of the following was known, practiced, or conventional in 2007: (1) totality of what the claims cover or are directed to (*see* Op. Br. at §§III.B); (2) Bluetooth pairing; (3) Bluetooth paring a data capture device; (4) Bluetooth pairing a data capture device with a mobile device before capturing digital data; (5) sending event notifications from an Internet-*incapable* data capture device to an Internet-*capable* mobile device over a paired connection; (6) sending a polling request from the mobile device over a paired connection to an Internet-*incapable* data capture device; (7) sending a request from the mobile device to a cryptographically paired data capture device for new data; (8) adding user information on a mobile device to data received over a paired connection; or (9) applying HTTP on a mobile device to data received over a paired connection.

The passages from the specification relied upon by Appellees, and District Court, do not support the conclusions erroneously drawn therefrom. The passage in Appx286 at 1:32-54 is a "Background" section merely providing general statements about what "in general" the invention "relates to," including "pairing a digital data capture device in conjunction with a mobile device for automatically publishing data…" The passage in Appx290 at 9:37-40 states the "method and system disclosed herein may be ***implemented in*** technologies that are pervasive, flexible, and capable enough of accomplishing the desired tasks of the method and system," not that any invention may be ***implemented with***, much less implemented *solely* with, pervasive,

known, conventional technologies, or anything of the sort.

Without limitation, the specification describes preferred embodiments comprising "client application 203" running on the mobile device. Cellspin did not invent a "ubiquitous mobile phone." However, as disclosed and claimed, Cellspin ***did*** invent, *inter alia*, unconventional methods and systems implemented in connection with an application, *i.e.*, preferred "*client application*" 203 mentioned in the specification *65 times*. The specification, written in 2007, discloses step-by-step details and workings of the unconventional preferred "client application 203" that runs on a mobile phone, for example at Fig. 2:

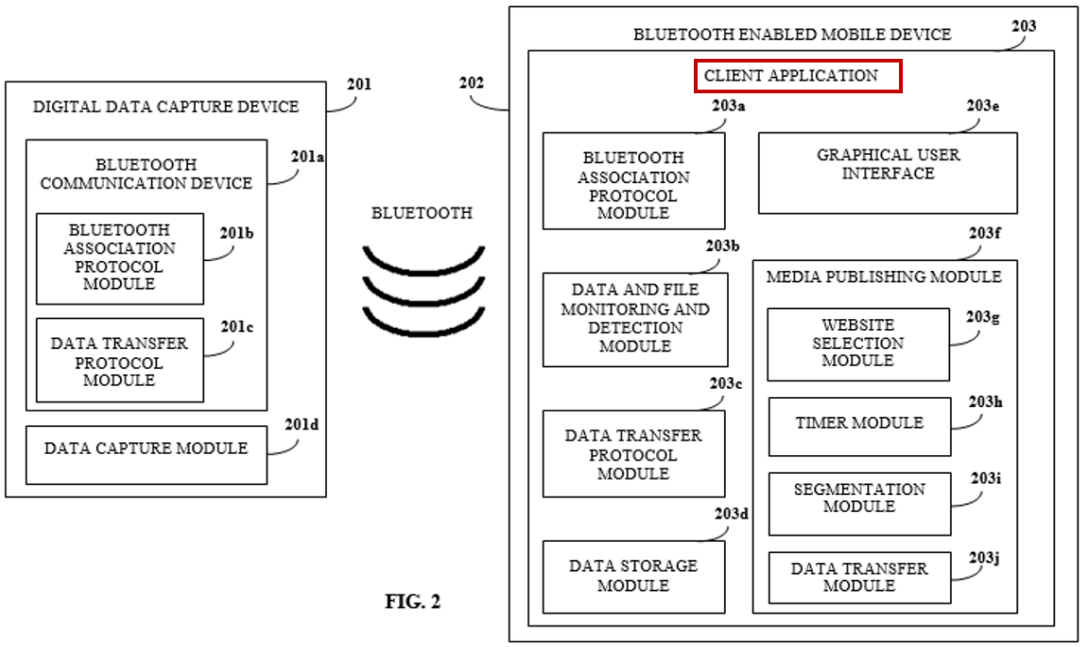


FIG. 2

This **unconventional preferred client application**, *inter alia*, employs one-to-one "pairing" between the Internet-*incapable* data capture device and Internet-*capable* mobile device before capturing data, and this client application uses cryptographic authentication. This client application uses event notification, polling,

and receives data on a paired connection; converts the received Bluetooth data for cellular wireless upload; and uploads the data using HTTP on the transit mobile device over the mobile device's Internet connection for the data received over the paired connection, including by storing user information, applying user information to received-data, storing website destination information, and applying the destination information. *see* Op. Br. at §III.B.

Benefits, including noted in §III.E-F of Cellspin's Opening Brief, flow from the claimed invention, including because of what, in 2007, was an inventive and unconventional application running on the mobile device and performing unconventional steps. When client application 203 is performing certain functions, that means the "data capture device" does ***NOT*** have to perform those functions. This trade off, of the mobile device running the "*client application*," results in significant benefits for data capture devices, including reduced power consumption, reduced need for extra cellular antenna and circuitry, and costly cellular data connection. *See* Op. Br. at §III.F.

Multiple passages cited by Appellees from the specification reference this preferred client application 203 and its various aspects. *See* Appx287-Appx291 at 3:39-4:54, 5:65-6:32, 7:62-8:55, & 9:37-10:9. The text at 11:16-28 merely notes aspects of the invention may be configured to work in various network environments, not that any claimed invention consists of elements that are pervasive, known, conventional, or anything of the sort.

Appellees' statement that "[a]ccording to the patents, the conventional use of these known technologies allows performance of a previously manual process "automatically or with minimal user intervention," citing Appx286 at 1:53-54 in support thereof, is deeply flawed. Nothing in the specification states what Appellees represent is stated. Nor do Appellees, or District Court, cite any such disclosure. Although the specification notes the mobile device can "automatically detect" captured data, for example, via polling, and such data can be published to websites "automatically or with minimal user intervention" (*see, e.g.,* Appx286 at 1:48-54 & 2:46-52), there is no statement anywhere in the specification that what is being accomplished automatically was previously a manual process. To the contrary, the conventional manual process described in the specification is far different than the claimed inventions. About all that is in common is data was captured by a captured device and ultimately uploaded, via ***very*** different processes, to the Internet.

1. The Claims Satisfy Alice Step One Because They Are Not Directed To Abstract Ideas.

Appellees' attempted defense of the District Court's erroneous holding all asserted claims across four patents directed to the same abstract idea of "acquiring, transferring, and publishing data and multimedia content on one or more websites" (Appx34), is unavailing. The District Court's, and Appellees', overly simplistic claim characterization is too broad, and does not account for the specifics of the limitations, including core claimed features. What the claims are actually directed

to, including those core features, is noted in §III.B of Cellspin's Opening Brief, and elsewhere therein. For example,

> (a) '794 claim 1 is directed to, *inter alia*, methods comprising transferring newly captured data from an Internet-*incapable* data capture device to an Internet server via a separate, intermediary Internet-*capable* mobile device *by pushing event notifications* within an *already- paired* Bluetooth connection between the data capture device and mobile device;
>
> (b) '794 claim 16 is directed to, *inter alia,* somewhat similar methods except, instead of *pushing event notifications* within an already-paired Bluetooth connection, it comprises "*polling* the capture device using the software module on the mobile device *over the established paired Bluetooth connection*, wherein the capture device *listens for the polling request*; and determining the existence of new data on the Bluetooth enabled data capture device.";
>
> (c) '752 claim 1 is directed to, *inter alia*, methods comprising transferring newly captured data from an Internet-*incapable* data capture device to an Internet server via a separate, intermediary Internet-*capable* mobile device *by pushing event notifications* within an *already-paired* and *encrypted* Bluetooth connection and using a *cryptographic encryption key*;
>
> (d) '847 claim 1 is directed to, *inter alia*, systems comprising an encrypted, paired Bluetooth connection between an *Internet-incapable* data capture device and a separate Internet-capable (*i.e.*, HTTP) mobile device wherein *event notifications* are pushed within an *already-paired* and *encrypted* Bluetooth connection;
>
> (e) '698 claims 1 and 5 are directed to, *inter alia*, methods and systems comprising an *Internet-incapable* digital camera device capable of forming a *paired* short-range wireless connection with a separate Internet-capable (*i.e.*, HTTP) cellular phone. New media from the *Internet-incapable* digital camera is transferred to the *cryptographically authenticated* cellular phone in response to a *request initiated by the software application on the cellular phone* over an *already-paired* short-range wireless connection between the digital camera device and cellular phone

Appellees', and District Court's, reliance upon *Elec. Power*, *Capital One*, *EasyWeb* and *TLI* is misplaced, including because the asserted claims are directed to different, more specific, and less abstract (in fact, non-abstract), and more improved and inventive, inventions. *See Elec. Power, Capital One, & EasyWeb*, *supra*. The claims in *Elec. Power*, are directed to passively receiving data, doing analysis, and display of the analyzed data. *See Elec. Power*, 830 F.3d at 1351-52. In *Capital One*, the claims were, on their face, directed to simply "manipulating" a data document. *See Capital One*, *supra*. In *EasyWeb* the claims were directed to a system "to process a message" via converting message formats. *EasyWeb*, *supra*. In *TLI*, claims were directed to assigning classification data to digital images and considering such when storing them. *See In re TLI Commc'ns LLC Patent Litig.*, 823 F.3d 607 (Fed.Cir. 2016).

Including as already noted in Cellspin's Opening brief, and herein, this case is very different from *Elec. Power*, *Capital One*, *EasyWeb*, and *TLI*, including in terms of very different technologies, very different specifications, what is conventional versus the claimed inventions, and what is claimed by very different claims. *See* Op. Br. at 63-64. Unlike those cases, the claims, here, recite specific communications and functionality in and between an Internet-*incapable* data capture device and Internet-*capable* mobile device, including via an unconventional "client application," providing much more than simply manipulating data. Further, in all of the above cases, the claims were directed to an abstract idea and highly functional

and high level, and the elements were merely generic and conventional. However, including as stated in Cellspin's Opening Brief, and herein, none of these labels is applicable here, including when the mobile phone is programmed with one or more of "client application 203" as noted.

Appellees' contention "the patents use only generic computer and software components and known processes like Bluetooth and event notifications to automate the process of transmitting data from a data capture device to a website" lacks support from, is contrary to, and mischaracterizes, the factual record, including as noted in Cellspin's Opening Brief. Appellees' contention the claims "'merely provide a generic environment in which to carry out' the abstract ideas of acquiring, transferring, and publishing data" likewise lacks support and rings hollow. Appellees' contention Cellspin's claims are "focused on the combination of…abstract-idea processes" such as "collecting information" and "analyzing information," then "presenting the results of abstract processes of collecting and analyzing information" likewise lacks support. To the contrary, the claims provide for what they are directed to, which is described in detail in Cellspin's Opening Brief, and herein. Without limitation, the claimed steps and elements are significantly and meaningfully more specific than "acquiring, transferring, and publishing data" and are significantly and meaningfully more than a generic environment of merely a capture device and a mobile device. For example, the claims comprise a multitude of other, more specific steps, including, *inter alia*,

providing a client application on the mobile device; establishing a secure paired connection; using cryptographic keys, including for establishing the paired connection and encrypting/decrypting data; and communicating specific messages between the data capture device and mobile device relating to new data acquired.

As in *Carnegie Mellon*, these claims comprise unconventional methods for improving a physical process, including by overcoming physical device limitations (*e.g.*, no need for cellular circuitry in data capture devices), such as limitations of processing power and size, which permits the data capture devices to more accurately and frequently perform their functions, including capturing media or fitness data, and be sized for more comfortable use. *Carnegie Mellon Univ. v. Marvell Tech. Group*, 807 F.3d 1283, 1297 (Fed.Cir. 2015).

Appellees contend the District Court did not overgeneralize the claims because its analysis allegedly "aligns" with the abstract-idea analysis undertaken in *TLI*, *Elec. Power*, and other unspecified cited "precedents." To the contrary, whether a court overgeneralizes the claims depends upon the facts of each individual case, including upon what the claims are properly directed to, including in view of the specific claim language. As noted in Cellspin's Opening Brief, the District Court missed much of the specific claim language detailing the core claim features, including ones constituting meaningful and substantial improvements, when erroneously overgeneralizing the claims and missed the specifics of what the claims are actually directed to. Appellees' citation to Appx482 wherein Cellspin wrote the

patentee characterized the patents as relating to "specific and concrete approaches comprising, among other things, pairing, transferring, and publishing data to the Internet," is unavailing and mischaracterizes the record. Clearly, "comprising" connotes more than Appellees' alleged abstract idea, and, in context of the larger Response, Cellspin was clearly disputing Appellees' characterization of the alleged abstract idea to which the claims are directed. Appx450-Appx482. Appellees' citation to Cellspin's Opening Brief is likewise unavailing. Here, Cellspin wrote "there have been many, albeit greatly inferior, means outside of the claimed inventions for achieving the ends of acquiring and transferring data for publication, including on the Internet." Op. Br. at 6. Clearly, Cellspin was taking the erroneously determined District Court abstract idea, which Cellspin clearly disputed in that Brief, and noting many other "means" for achieving the erroneously held overbroad, overgeneralized end.

Appellees allege "[Cellspin] does not contend that the applicants invented push notifications to a paired Bluetooth device or any improvements to this known technology." Contrarily, Cellspin was not required to make such a showing at the pleadings stage beyond such a plausible factual assertion, which must be accepted as true, including absent any contrary evidence provided. Here, Appellees' had the burden of proof on their Motions and failed to provide any record evidence push notifications were performed over paired Bluetooth connections prior to Cellspin's 2007 invention. Moreover, '794 claim 1 is directed to, *inter alia*, pushing event

notifications within an already-paired Bluetooth connection between a data capture device and a mobile device. No record evidence shows pushing event notifications within an already-paired Bluetooth connection was done before 2007. Indeed, as described in Cellspin's Opening Brief, the state of the art Kennedy patent cited by the examiner did not involve pushing event notifications over already-paired Bluetooth connections. Cellspin set forth, including facts alleged in Cellspin's Amended Complaint, taken as true absent contrary evidence (which is not of record) at the pleadings stage, the unconventional nature of this method and systems practicing it.

As to push notifications or pushing event notifications in an already-paired Bluetooth connection, Appellees repeat their mantra Cellspin is merely trying to limit abstract ideas to "conventional means" or "conventional technological environments." However, Appellees have no record evidence backing this, or similar, recitations other than attorney argument – which is not evidence. Contrary to what Appellees allege, as stated in Cellspin's Opening Brief, this aspect of the claims, and many others, were unconventional.

Appellees' allegation the claims lack "inventive technology" and are not directed to a "specific improvement in technology" are likewise unsupported by record evidence and refuted by Cellspin's Opening Brief, including wherein Cellspin notes the state of the art and some problems solved by the claims (*see* Op. B. at §III.B); technological improvements, inventive concepts, and concrete applications

of inventive concepts contained in the claims (*id*. at §III.E); benefits flowing from these technological improvements, inventive concepts, and concrete applications of inventive concepts (*id*. at §III.F); and how elements and combinations within the claims are unconventional (*id*. at §III.H). Here, Appellees, and District Court, erroneously and myopically focus upon one stated improvement of "automating" the process of publishing data to one or more websites to make it less "time-consuming" and requiring "minimal user intervention." Appx286 at 1:37-54. However, as noted herein, their discussion of "automation" fails to pass muster.

Appellees' argument "an alleged improvement in efficiency or speed through performance of a known process with conventional computer technology is not enough to avoid abstractness" ignores the specific patent disclosures. Contrarily, the claims do more than improve efficiency or speed of a known process. Firstly, Appellees fail to state this supposed "known process," nor do they provide evidence to support their assertions. Rather, (1) there is no known process being improved, the claims provide an improved *replacement* for prior art processes and (2) such improved process is provided by non-conventional technologies, as noted above. There was nothing routine about the prior, physical process of removing a storage device from the data capture device and physically inserting it into a computer to transfer the captured data to a computer and then manually enter the user's information into the computer and upload the captured data, including where the process of removing the storage and going to a computer is based on solely the user's

need. Arbitrarily performed tasks are not routine.[4] Nor do the claimed inventions merely automate such tasks. Appellees dispute that whether the benefits that flow from the claimed combinations actually flow from them, and whether they flow from anything fairly deemed unconventional, but that is a factual dispute inappropriate for disposition on a Motion to Dismiss. *See* Op.B. §§III.E-f)

Appellees are incorrect the District Court correctly found "Cellspin failed to show the claimed process was 'something more than a simple automation of the conventional (manual) process.'" Rather, the claimed inventions are more than automation of any conventional process, including because the *claims wholly eliminate (not automate) the need for the user to be near a computer, remove a storage device, insert the storage device in the computer, and enter the information used for uploading on the computer*. The claimed inventions further eliminate the need for a larger, less mobile, computing device. This is done, at least in part, via the use of the claimed client application 203, which performs different steps, which, as noted above, include receiving the data from the data capture device over a paired Bluetooth connection, attaching user information to the data, creating a data packet for transfer via a cellular *non-paired* connection, and transferring the data packet to the web service. Nor is it proper to state the application's performance of these steps is merely the automation of the physical steps taken by the user. There is nothing in the steps performed by the mobile client application which constitute the automated

[4] Routine: "a sequence of actions ***regularly*** followed; a fixed program."

equivalent of removing or inserting a physical storage device. Nor is it proper to state the application, which continuously performs these steps, is merely automating the arbitrarily performed steps by the user. Nor are all of the steps performed by the mobile client application necessarily tied to the realm of generic computers in 2007.

Appellees', and District Court's, reasoning requiring explicit disclosures in the specification of the claimed inventions' benefits represent a fundamental misunderstanding of both the law and facts of this case. As an initial matter, as noted above, it is the burden of Appellees to show, by clear and convincing evidence, the intrinsic evidence makes a showing the patents-in-suit are invalid. Cellspin, however, is not required to prove every single reason to the contrary, but, rather, must only point to intrinsic evidence which defeats any showing by Appellees. In making such a contrary showing, any reasonable inferences must be viewed in favor of Cellspin. Reasonable inferences may include allegations not explicitly disclosed in the intrinsic evidence, but that are apparent from the disclosures, including to a POSITA.

Here, while Appellees repeatedly contend there was no intrinsic showing of an explicit disclosure of battery savings or elimination of bulky hardware, they have made no showing Cellspin's allegations of such are untrue. Indeed, while not explicitly disclosed, it is a fact of scientific certainty, including to a POSITA (or even a lay man), that a reduction in the number of processes performed by a device will result battery life improvement. Similarly, where less processing is performed

on the data capture device, or where a removable storage device is not needed on the device because of the use of the application, the data capture device can necessarily be made smaller by virtue of the fact that less parts like cellular or external storage circuitry are required within the device.

Nothing cited, or even argued, by Appellees, or found by the District Court, come close to a showing these inferences are untrue or unreasonable. Rather, they merely claim "Cellspin simply makes unsubstantiated claims" and these clearly apparent improvements are not *explicitly* disclosed. Here, Cellspin's inferences are based on scientific certainty, including the simple fact of physical constraints of materials, the veracity of which are not contested. In view of these facts, and complete lack of contrary evidence, such inferences are entirely reasonable and represent distinct improvements not otherwise contested by Appellees, or District Court. At best, Appellees' argument amounts to competing allegations as to what inferences can be drawn from the intrinsic evidence; and, on a motion to dismiss, such inferences must be drawn in favor of Cellspin, including where, as here, such inferences are correct and reasonably based on the intrinsic evidence.

Appellees' assertion "[t]he patents alone confirm that the claims are directed to an abstract idea implemented only with conventional computer technology" is likewise unsupported. Including as noted above, the claims are directed to, *inter alia*, many unconventional steps and unconventional uses of a client application. Including as noted in Cellspin's Opening Brief, unlike the inventions in *TLI*, these

unconventional steps and application are not mere basic computer functions of sending and receiving data.

Contrary to Appellees' assertion the claims are directed to merely "the abstract idea of acquiring, transferring, and publishing data" --as noted in Cellspin's Opening Brief, and above, the claims are directed to improvements in computer processes, including, *inter alia*, improvements to functionality of Internet-*incapable* data capture devices and improvements to communications between Internet-*incapable* data capture devices and Internet-*capable* mobile devices, including via a client application. Further, as noted previously, the claims more than transcend the conventional processes, including by eliminating and replacing them via implementing these improvements. The claimed inventions are more than simply the implementation of the oversimplified abstract idea erroneously being asserted.

The claims are directed to what is noted in §III.C of Cellspin's Opening Brief, and above, not to mere automation. Appellees argument that Cellspin somehow waived these issues by not arguing them below is meritless. *See, e.g.,* Appx468-469; Appx2324-2326; Appx2411:1-Appx2414:2.

2. The Claims Do Not Fail* Alice *Step Two Because They Recite Inventive Concepts Further Rendering Them Patentable.

Even if the claims were directed to the alleged abstract idea stated by Appellees and the District Court, at minimum they recite multiple inventive concepts which render them patentable.

i. The claims provide more than merely a generic environment to carry out any alleged abstract idea.

Appellees, and the District Court, are incorrect in arguing the claims "merely provide a generic environment." *See* Appx38. The claims provide specific components and method steps which are part of the invention itself. Simply because each element, in isolation, was conventional or known, does not mean the claim, as a whole, or any portion thereof, was conventional or known. Rather, the patents-in-suit comprise novel steps which function using known and unknown technology in new and novel ways. Again, Appellees focus simply on the individual components involved in performing the method, rather than the method itself and the new, novel use of those components. Appellees simply quote a laundry list of components and then conclude the method itself is generic, but fail to provide any linking of these quoted lines and conclusions. Other than merely arguing "the specification merely discloses the use of these conventional devices in their ordinary and expected manner," Appellees have provided no support for this statement. *Nor have Appellees proven the ordered combination of steps to be conventional*.

Again, Appellees rely on the incorrect proposition benefits flowing from the invention must be *explicitly* stated in the specification. However, including as noted above, and in Cellspin's Amended Complaint, there are multiple benefits flowing from the invention which are apparent to a POSITA.

Appellees point out "the absence of complete preemption does not

demonstrate patent eligibility," *see Ariosa Diagnostics v. Sequenom*, 788 F.3d 1371, 1379 (Fed.Cir. 2015).yet provide no meaningful defense for the District Court's failure to even consider this issue. However, the "concern that undergirds [the] § 101 jurisprudence" is preemption. *Alice Corp. v. CLS Bank Int'l*, 134 S.Ct. 2347, 2358 (2014). At a minimum, the district court's failure to even consider preemption, including after Cellspin had clearly raised the issue --*see e.g.,* Appx459-Appx460; Appx474-Appx475; Appx2321; Appx2415:22-2416:3; Appx2417:12-- precluded a proper analysis and resulted in an erroneous analysis and result.

Appellees refute Cellspin's reliance upon *BASCOM* because they allege the claimed inventions lack inventive concepts, fail to provide "benefit…in a way that previously could not be achieved," and are conventional and generic. *See BASCOM Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1350 (Fed.Cir. 2016). However, including as noted in Cellspin's Opening Brief, the claimed inventions have inventive concepts, benefits that could not have been previously achieved, and material components that provide the inventive concepts and methods which are not conventional or generic.

Appellees rely upon the *BSG* case for the vague notion use of patent ineligible concept cannot provide an inventive concept. *See BSG Tech v. Buyseasons,* 899 F.3d 1281, 1286-87 (Fed.Cir. 2018). However, this argument misses the inventive aspects of the asserted claims, including as noted in Cellspin's Opening Brief.

Appellees attempt to distinguish *DDR Holdings*, alleging the asserted claims

cover generic hardware and software, disclose the routine process, and do not aim to solve a problem rooted in technology. Each of these arguments was refuted in Cellspin's Opening Brief, including where Cellspin detailed the applicability of *DDR Holdings*. *See DDR Holdings v. Hotels.com*, 773 F.3d 1245 (Fed.Cir. 2014).

Appellees vaguely rely upon *Capital One* for the notion that merely adding computer functionality to increase the speed or efficiency of the process does not confer patent eligibility on an otherwise abstract idea. *See Capital One*, 792 F.3d at 1370. However, Appellees again miss the point that the efficiency from automation is only ***one*** benefit flowing from the claimed inventions.

Appellees erroneously contend that Cellspin's Opening Brief has new facts or arguments. To the contrary, every noted fact is cited in the record below. *See, e.g.*, APPX2500-Appx2504 (summarizing most facts alleged in Amended Complaint). For example, Cellspin's Amended Complaint has over five pages of factual allegations concerning, *inter alia*, the inferior prior art (i.e., what was conventional) and specific improvements over such art. Appx2289-2294. It further states that the "*noted improvements* over the prior art represent meaningful limitations and/or inventive concepts" and that "including in view of these *specific improvements*, the inventions of the asserted claims, when such claims are viewed as a whole and in ordered combination, are not routine, well-understood, [or] conventional." *Id.* at Appx2293. The juxtaposition of the claimed inventions versus what was conventional is directly pertinent to the claimed inventions *not* being conventional

or generic. As to "cryptographically authenticating identity of the cellular phone," Cellspin previously noted this as a technological improvement and inventive concept. *See, e.g.,* Appx2289 ("Even in 2009 … APIs were … not [used] for the data that was received wirelessly over the secure paired connection …); Appx2328; Appx2334. Likewise, Appellee's argument that Cellspin's did not rely upon combinations comprising "applications" is meritless. *See, e.g.,* at Appx2319-Appx2339, *e.g.,* at Appx2332 & Appx2483-2514, *e.g.,* at Appx2507 ("…the applications on those devices, and the steps performed on those devices, are not stated to be conventional… Further, alleged combinations of conventional components can be patentable if they are not abstract, or if the combination, as a whole, provides meaningful limitations."); Appx2327 ("providing novel software (e.g., mobile applications) to facilitate communications between the data capture device and mobile device"); Appx2331 ("Technical solution … by use of applications on mobile devices"). Likewise, Appellee's argument that Cellspin's battery power argument was not argued below is meritless. *See, e.g.,* Appx471-Appx473; Appx2328. Appellees' suggestion Cellspin has waived any fact or argument is incorrect.

3. The District Court Erred In Not Considering All Independent Asserted Claims.

Appellees vaguely argue the asserted claims are "substantially similar" and only have "minor differences." To the contrary, as noted in Cellspin's Opening

Brief, in failing to meaningfully analyze the other Asserted Claims, the District Court, *inter alia*, missed non-generic, meaningful, and inventive claim limitations, including, without limitation, a data capture device transferring or sending data to mobile device over a previously-established paired wireless connection through a *request/response* and/or *polling regime*, using a *cryptographic encryption key in pairing*, and *cryptographically authenticating a mobile device identity*; and further methods and apparatuses for *translating captured data into HTTP format in transit*.

Appellees erroneously seek to dismiss these meaningful limitations as "nothing more than minor variations in the technological environment." To the contrary, these limitations are material inventive aspects of the inventions as claimed. At a minimum, the District Court's failure to even consider limitations from the other independent asserted claims constitutes error requiring either reversal or remand for proper consideration. Appellees' allegations of the differing aspects of these claims being conventional is already refuted in Cellspin's Opening Brief.

Appellees' attempt to dismiss '752 claim 1 as "substantially similar" misses the inventiveness and unconventionality of using a *secure paired Bluetooth connection with a cryptographic encryption key*, performing *event notification* over an encrypted and *already-paired* Bluetooth connection and/or applying *HTTP in transit* on a mobile device.

Appellees' attempt to dismiss '847 claim 1 as "substantially similar" misses the inventiveness and unconventionality of using a *cryptographically authenticated*

identity of the Bluetooth enabled cellular phone, performing *event notification* over an encrypted and *already-paired* Bluetooth connection and/or applying *HTTP in transit* on a mobile device.

Appellees' attempt to dismiss '698 claim 5 as "substantially similar" misses the inventiveness and unconventionality of performing *request/response* over an encrypted and *already-paired* short-range wireless connection and/or applying *HTTP in transit* on a mobile device.

Appellees' cites to Bluetooth and HTTP being known protocols misses the point of other inventive claim limitations.

B. The District Court Erred In Ruling No Factual Disputes Preclude Dismissal At The Pleading Stage.

Appellees and the District Court fail to address the factual allegations from the patents-in-suit, the prosecution history and Cellspin's Amended Complaint head on, which should result in reversal with the facts viewed in the light most favorable to Cellspin. *See, e.g., Berkheimer v. HP*, 881 F.3d 1360, 1368-9 (Fed.Cir. 2018); *Aatrix Software, v. Green Shades Software*, 882 F.3d 1121, 1126-28 (Fed.Cir. 2018). Appellees feign ignorance of anything not improperly disregarded as conclusory. To the contrary, Cellspin's Opening Brief recites, *in detail*, the factual support, including from Cellspin's Amended Complaint. Without limitation, §§III.B-H cites intrinsic evidence, including specification and prosecution history, and Cellspin's Amended Complaints; namely, §III.B notes the state of the art which evidences what

is conventional; §III.C notes what the Claims are directed to; §III.E notes *technological improvements and concrete applications of inventive concepts*; §III.F notes multiple *benefits flowing from technological improvements and concrete applications of inventive concepts*; and §III.H notes how claim elements and combinations are *unconventional*.

Appellees also fail to meaningfully defend that the District Court erred in failing to view the factual allegations in Cellspin's Amended Complaints in the light most favorable, including in failing to accept the benefits and improvements noted by Cellspin --including in its Amended Complaint and consistent with the prosecution history-- which flow from, and are embodied in, the inventions covered by the claims. The District Court's erroneous ruling relied upon unsworn, unsubstantiated allegations made by Appellees, based largely upon their mis-reading of the misreading of the specification as admitting routineness or conventionality of the claimed invention and all components. Appx.40. *See, e.g., Berkheimer, supra*; *Aatrix, supra*.

The District Court did not find the facts alleged in Cellspin's Amended Complaints (see Cellspin's Opening Brief) as being conclusory under *Iqbal,* or as being "unwarranted deductions" or "unreasonable inferences" under *Gilead,* or as being insufficiently "concrete" under *Aatrix*. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *In re Gilead*, 536 F.3d 1049, 1055 (9th Cir. 2008); *Aatrix, supra*. Further, it would be error for this Court to now dismiss those facts under such

inapplicable grounds. The District Court erroneously disregarded Cellspin's concrete and specific factual allegations because they were not stated specifically in the specification, even though they are factually correct, and even though they reasonably flow from, and at a minimum are reasonable inferences from, the claimed inventions as described.

Appellees also dispute the asserted claims comprise improvements in computer functionality. However, Cellspin's Opening Brief, including at §III.E-F, showed specific factual support for this, including from the specification, prosecution history and Amended Complaint. Here again, Appellees erroneously focus on one benefit, automation, while ignoring inventive aspects and other benefits of the claimed inventions.

Appellees' attempt to distinguish *Berkheimer* is unavailing. "[W]hether a claim element or combination of elements is well-understood, routine and conventional…is a question of fact...." *See Berkheimer*, *supra*; *Aatrix*, *supra* ("…there can be subsidiary fact questions…"); *Automated Tracking Sols. v. Coca-Cola*, 723 F. App'x 989, 995 (Fed.Cir. 2018) ("conventional…is a question of fact.'"). As noted in its Opening Brief, Cellspin is relying specifically on facts from the specification, the prosecution history and its Amended Complaint, including facts which constitute plausible and reasonable inferences for the inventions described and claimed. As noted in cases already cited by Cellspin, on a motion to dismiss, courts are required to accept its facts in the light most favorable.

Appellees also have no explanation for this Court's precedent in *Aatrix*, wherein this Court reversed a Rule 12 dismissal because the district court refused to permit the patent owner to file an amended complaint which included factual allegations supporting the patent's eligibility. *See Aatrix*, *supra*. Specifically, the proposed amended complaint described problems in the prior art and presented specific allegations the claims had benefits, including improved efficiency. *Id.* The district court abused its discretion because the proposed allegations were sufficient to contradict the court's conclusion the claims did not recite an inventive concept. *Id*. Had the specification stated the same things alleged in the amended complaint, there would have been no need for amendment.

Here again, Appellees myopically focus on a single benefit of the claimed inventions, speed and efficiency, and misrepresent the specification as stating the invention is conventional. As noted above, Cellspin's novel software-implemented systems and methods' potential to be implemented "*in*" conventional technologies does not mean these novel software-implemented systems and methods could have been implemented *with* conventional technologies at the time of Cellspin's invention. Further, that Cellspin's novel software-implemented systems and methods may be implemented in connection with a software application running on a "ubiquitous mobile phone," and use, in part, Bluetooth connectivity, does not mean the patented software-implemented systems and methods were ubiquitous or conventional at the time of Cellspin's invention in 2007.

Appellees' reliance upon *Internet Patents* and *OIP* is misplaced, including because the shared specification of the patents-in-suit does not describe the claimed invention *itself* or *all* its components as being conventional, known, or common. *See Internet Patents v. Active Network*, 790 F.3d 1343, 1349 (Fed.Cir. 2015); *OIP Techs. v. Amazon.com.*, 788 F.3d 1359, 1363 (Fed.Cir. 2015). Further, at a minimum, the factual allegations in Cellspin's Amended Complaint preclude dismissal, a factor not present in *Internet Patents*. Similarly, Appellees' reliance upon *Content Extraction* and a concurrence in *Berkheimer* is misplaced, including because, here, there are no such admissions. *Content Extraction & Transmission v. Wells Fargo*, 776 F.3d 1343, 1347-48 (Fed.Cir. 2014); *Berkheimer, supra* 1370-71 (Moore, J., concurring in rehearing denial).

III. CONCLUSION

The erroneous ruling of patent ineligibility under §101, as well as the orders and judgments based thereon, should be reversed.

Dated: October 3, 2018

Respectfully submitted,

/s/ *John J. Edmonds*
John J. Edmonds
jedmonds@ip-lit.com
COLLINS, EDMONDS & SCHLATHER, PLLC
355 South Grand Avenue, Suite 2450
Los Angeles, California 90071
Telephone: (213) 973-7846
Facsimile: (213) 835-6996

Counsel for Cellspin,
CELLSPIN SOFT, INC.

IV. CERTIFICATE OF SERVICE

I, **John J. Edmonds**, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

On October 3, 2018, a copy of the foregoing Reply Brief of Cellspin was filed electronically with the Clerk of the Court using the CM/ECF System, which will serve via electronic mail notice of such filing to all counsel of record registered as CM/ECF users.

Upon acceptance by the Court of the electronically filed document, six paper copies will be filed with the Court via courier within the time provided by the Court's Rules and Orders.

Dated: October 3, 2018

/s/ *John J. Edmonds*
John J. Edmonds

COLLINS, EDMONDS & SCHLATHER, PLLC

V. CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPE-FACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(A), because it contains 6,887 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word, in 14 Point Times New Roman.

Dated: October 3, 2018

/s/ *John J. Edmonds*
John J. Edmonds

COLLINS, EDMONDS & SCHLATHER, PLLC