

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION**

<b>CAVE CONSULTING GROUP, INC.,</b>	§	
	§	
<b>Plaintiff,</b>	§	<b>CIVIL ACTION NO. 6:17-CV-00344-RWS</b>
	§	
v.	§	
	§	
<b>HEALTH CARE SERVICE</b>	§	
<b>CORPORATION,</b>	§	
	§	
<b>Defendant.</b>	§	

**REPORT AND RECOMMENDATION OF  
UNITED STATES MAGISTRATE JUDGE**

Before the Court is Defendant Health Care Service Corp.’s (“HCSC”) Motion to Dismiss for Failure to State a Claim pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 19.) Plaintiff Cave Consulting Group, Inc. (“Cave”) has filed a Response (Doc. No. 30), to which HCSC filed a Reply (Doc. No. 33). Upon consideration, the Court **RECOMMENDS** the Motion (Doc. No. 19) be **GRANTED** as set forth herein.

**BACKGROUND**

On June 12, 2017, Cave filed the above-captioned action alleging infringement of at least claim 13 of U.S. Patent No. 8,340,981 (“the ’981 Patent”). (Doc. No. 1.) On August 25, 2017, Cave filed an amended complaint adding allegations relevant to the validity of the ’981 Patent under 35 U.S.C. § 101. (Doc. No. 15, at ¶¶ 13–29.) On September 8, 2017, HCSC filed the instant motion to dismiss Cave’s complaint for failure to state a claim on the grounds that all of the claims of the ’981 Patent are directed to patent ineligible subject matter under 35 U.S.C. § 101. (Doc. No. 19.)

The '981 Patent is entitled “Method, System, and Computer Program Product for Physician Efficiency Measurement and Patient Health Risk Stratification Utilizing Variable Windows for Episode Creation” and relates “to management of medical information to perform and report measurements of physician efficiency.” '981 Patent at 1:25–27. Claim 13 of the '981 Patent recites:

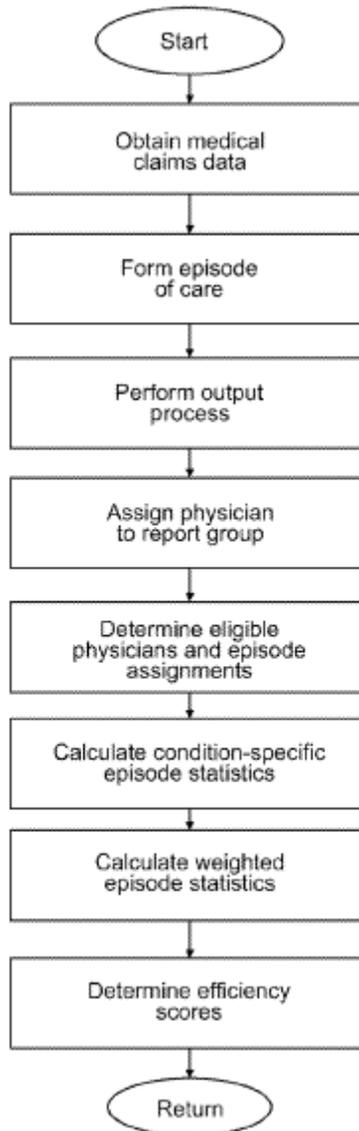
13. A method implemented on a computer system of determining physician efficiency, the method comprising:
  - obtaining medical claims data stored in a computer readable medium on the computer system;
  - performing patient analysis using said obtained medical claims data to form episodes of care utilizing the computer system;
  - performing output process based on performed patient analysis utilizing the computer system, the output process comprising:
    - assigning episodes of care to physicians; and
    - applying a first maximum duration rule utilizing a set consisting of static window periods to identify episodes of care;
  - assigning at least one physician to a report group utilizing the computer system;
  - determining eligible physicians and episode of care assignments utilizing the computer system;
  - calculating condition-specific episode of care statistics utilizing the computer system;
  - calculating episode of care statistics across medical conditions utilizing a predefined set of medical conditions for a specific specialty type utilizing the computer system;
  - and
  - determining efficiency scores for physicians from said calculated condition-specific episode of care statistics and said episode of care statistics calculated across medical conditions utilizing the computer system.

'981 Patent at 2:58–3:20.<sup>1</sup>

Figure 2 shows a representative flow diagram of the claimed processes:

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<sup>1</sup> Column and line numbers for citations to the claims are to the amended claims as set forth in the the ex parte re-examination issued on May 12, 2017.



**FIG. 2**

'981 Patent Fig. 2.

**LEGAL STANDARD**

**I. Motion to Dismiss**

In order to survive a Rule 12(b)(6) motion to dismiss for failure to state a claim, a complaint must allege “sufficient factual matter, accepted as true, to ‘state a claim that is plausible on its face’” to show that the plaintiff is plausibly entitled to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A

claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). This determination is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 1950.

When patent claims on their face are plainly directed to an abstract idea, it is proper to make a determination of patent validity under § 101 at the pleading stage and such conduct has been repeatedly sanctioned by the Federal Circuit. *See, e.g., Coffelt v. NVIDIA Corp.*, 680 F. App’x 1010, 1011 (Fed. Cir. 2017); *Evolutionary Intelligence LLC v. Sprint Nextel Corp.*, 677 F. App’x 679, 680 (Fed. Cir. 2017); *FairWarning IP, LLC v. Iatric Sys., Inc.*, 839 F.3d 1089, 1092 (Fed. Cir. 2016); *Internet Patents Corp. v. Active Network, Inc. et al.*, 790 F.3d 1343, 1345 (Fed. Cir. 2015); *OIP Tech. Inc. v. Amazon.com, Inc.*, 788 F.3d 1359, 1362 (Fed. Cir. 2015). However, in some circumstances, the legal analysis required for determining patent validity under § 101 “may contain underlying factual issues,” that would render such a ruling premature. *Mortg. Grader, Inc. v. First Choice Loan Servs.*, 811 F.3d 1314, 1325 (Fed. Cir. 2016) (citing *Accenture Global Servs. v. Guidewire Software, Inc.*, 728 F.3d 1336, 1341 (Fed. Cir. 2013)).

## **II. Patent-Eligible Subject Matter**

A patent may be obtained for “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.” 35 U.S.C. § 101. “Congress took this permissive approach to patent eligibility to ensure that ingenuity should receive liberal encouragement.” *Bilski v. Kappos*, 561 U.S. 593, 601 (2010) (internal quotations omitted). The Supreme Court has long recognized three specific exceptions to § 101’s broad patentability principles: laws of nature, physical phenomena, and abstract ideas. *Id.*; *Mayo Collaborative*

*Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66, 89 (2012); *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2116 (2013).

The Supreme Court has set forth a two-part test for patent eligibility. *Alice Corp. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2354 (2014). First, the court must determine “whether the claims at issue are directed to a patent-ineligible concept,” such as an abstract idea. *Id.* at 2355. The “‘directed to’ inquiry applies a stage-one filter to claims, considered in light of the specification, based on whether ‘their character as a whole is directed to excluded subject matter.’” *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016) (quoting *Internet Patents Corp.*, 790 F.3d at 1346). While there is no conclusive rule for determining what is an abstract idea, both the Federal Circuit “and the Supreme Court have found it sufficient to compare claims at issue to those already found to be directed to an abstract idea in previous cases.” *Id.* at 1334. Where “the focus of the claims is on the specific asserted improvement in computer capabilities” and not “a process that qualifies as an ‘abstract idea’ for which computers are invoked merely as a tool,” the claims are directed to patent-eligible subject matter. *Id.* at 1336.

If the court concludes that the claims are directed to an abstract idea under the first step, the court must then “consider the elements of each claim both individually and ‘as an ordered combination’ to determine whether the additional elements ‘transform the nature of the claim’ into a patent-eligible application.” *Id.* (quoting *Mayo*, 566 U.S. at 79). The Court has described this second step as a search for an “inventive concept”—“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 *Mayo*, 566 U.S. at 73). An inventive concept transforming a claim to patent-eligible may result from the “non-conventional and non-generic arrangement of known conventional pieces.” *Bascom Global Internet Servs. v. AT&T Mobility*

*LLC*, 827 F.3d 1341, 1350 (Fed. Cir. 2016). Additionally, an inventive concept may result from the specific implementation of an abstract idea limited to a technological solution. *Id.* at 1350–1352.

## **DISCUSSION**

While HCSC argues that all of the claims of the '981 Patent are invalid, the focus of the motion, and indeed the allegations in Cave's live complaint, are directed to claim 13. (Doc. Nos. 19, 15.) The Court of course does not consider validity of an entire patent based on broad argument directed to all claims, but must analyze the validity of each challenged claim on a claim-by-claim basis. *See Ultramercial, Inc. v. Hulu, LLC*, 722 F.3d 1335, 1340 (Fed. Cir. 2013) ("the question of eligible subject matter must be determined on a claim-by-claim basis."). Accordingly, the Court will take up the challenged claims in turn.

### **I. Claim 13 of the '981 Patent**

HCSC first argues that claim 13 of the '981 Patent is directed to the abstract idea of grouping and analyzing medical claims data to determine physician scores. (Doc. No. 19, at 16.) HCSC contends that the Federal Circuit has consistently found claims directed to information and collection analysis, similar to the claims of the '981 Patent, patent ineligible under § 101. *Id.* citing, *inter alia*, *Electric Power Group, LLC v. Alstom, S.A.*, 830 F.3d 1350, 1353–54 (Fed. Cir. 2016); *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat. Ass'n.*, 776 F.3d 1343, 1349 (Fed. Cir. 2014); *Dealertrack, Inc. v. Huber*, 674 F.3d 1315, 1333 (Fed. Cir. 2012); *In re TLI Commc'ns LLC Patent Litig.*, 823 F.3d 607, 613 (Fed. Cir. 2016); *Affinity Labs of Tex. v. DirecTV, LLC*, 838 F.3d 1253, 1258 (Fed. Cir. 2016); *Affinity Labs of Tex., LLC v. Amazon.com, Inc.*, 838 F.3d 1266, 1269 (Fed. Cir. 2016). HCSC further argues that determining doctor efficiency is abstract because it is something a person could do without a computer using

just a pen and paper and it has been done in the prior art. *Id.* at 19–20. Finally, HCSC argues that “the claims recite the type of purely functional language that courts have routinely held to reflect an abstract idea.” *Id.* at 20.

Cave argues that the claims of the ’981 Patent are not directed to an abstract idea because they are directly comparable to the claims found patent-eligible in *McRO* and argues that HCSC’s cited cases are distinguishable. (Doc. No. 30, at 16, 26, citing 837 F.3d 1299 (Fed. Cir. 2016)). Specifically, Cave argues that the claims are more than mere recitations of something old and that they “disclose and claim a new, improved method for conducting physician efficiency measurement.” *Id.* Cave further argues that because the claims do not preempt the field of invention, they are not abstract. *Id.* at 20. Further, Cave argues that the claims are directed to a specific way of measuring efficiency rather than a mere result, therefore rendering them patent eligible. *Id.* Cave also argues that the court cannot make the determination of patent eligibility without considering facts outside the pleadings. *Id.* at 22. Finally, Cave argues that even if the claims are abstract, the claims are still patent-eligible at step one because there is no abstract idea in the ’981 Patent that exists independent of computer technology. *Id.*

In determining patent eligibility under § 101, the court must first determine whether the claims are directed to an abstract idea. *Alice*, 134 S.Ct. at 2355. In making this determination, the court looks at what the claims cover. *Ulramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 714 (Fed. Cir. 2014). “Existing precedent does not establish a definitive rule to determine what constitutes an ‘abstract idea’ within the meaning of *Alice*.” *My Health Inc. v. DeVilbiss Healthcare, LLC*, No. 2:16-cv-00535, 2017 WL 3836124, at \*1 (E.D. Tex. Feb. 14, 2017) (citing *Enfish*, 822 F.3d at 1335). “[T]he Supreme Court h[as] found it sufficient to compare claims at

issue to those claims already found to be directed to an abstract idea in previous cases.” *Enfish*, 822 F.3d at 1334.

Here, claim 13 of the '981 Patent is a method implemented on a computer system that includes the following general steps for determining a physician's efficiency: (1) obtaining medical claims data; (2) performing patient analysis using the claims; (3) performing output process based on patient analysis and assigning episodes of care to physicians and applying a rule using static window periods; (4) assigning at least one physician to a report group; (5) determining eligible physicians and episode of care assignments; (6) calculating condition-specific episode of care statistics; (7) calculating episode of care statistics across medical conditions; and (8) determining efficiency scores for physicians from said care statistics across medical conditions. '981 Patent at 2:58–3:20. The claim generally recites a method for obtaining, organizing, calculating, and outputting data that is implemented on a computer system and uses the “computer system” as a tool. *Id.* Based on this claimed method, the Court finds claim 13 analogous to the claim considered by the Federal Circuit in *Electric Power Group*. 830 F.3d 1350 (Fed. Cir. 2016).

In *Electric Power Group*, the Federal Circuit considered a method claim for detecting events on a power grid to derive a composite indicator of reliability of the grid. *Id.* at 1351–52. The Federal Circuit found that the focus of the claim was on collecting information, analyzing it, and displaying certain results of the collection and analysis. *Id.* at 1353. Ultimately, the court found that claim 12 was directed to an abstract idea because the advance it purports to make “is a process of gathering and analyzing information of a specified content, then displaying the results, and not any particular assertedly inventive technology for performing those functions.” *Id.* at 1354. Similarly, here, the advance claim 13 purports to make is an improved determination of

physician efficiency by using a claimed process of obtaining medical data, performing patient analyses, assigning physician groups, and calculating statistics. '981 Patent at 2:58–3:20. At its core, claim 13 is simply directed to the abstract idea of obtaining, organizing, analyzing medical data to calculate a physician efficiency score. *Id.*

While Cave argues that the claim discloses a new, improved method for conducting physician efficiency measurement, Cave fails to elicit what aspect of the claim removes this claim from mere abstraction and how the generically claimed “computer system” is critical to implementation or technological improvement. Indeed, there is no provided significance of the “computer system” claimed; it is merely a generic implementation. *See* '981 Patent at 2:58–3:20. Cave simply maintains that the computer is intangible because the claims require electronically-stored medical claims as input and because of the “extreme” and “astronomical” number of calculations combined with the practical need to manage all of the resulting data. (Doc. No. 30, at 22–25.) However, storing information electronically is not enough to show a computer is necessary. *See In re Salwan*, 681 F. App'x 938, 941 (Fed. Cir. 2017) (finding that calculating patient's bill based on electronically stored information was just an automation of “a method of organizing human activity”). Moreover, the disclosures of the '981 Patent describe the claimed invention as “provid[ing] a computer program product tangibly embodied in computer instructions, which, when executed by a computer, determine physician efficiency.” '981 Patent at 7:58–61. The claims and the disclosures provide no significance to the computer system to carry out the claimed methods; it is merely a conduit for data processing of the provided information. Further, neither the claim nor the specification places any emphasis on the “astronomical” amount of data that must be processed; tellingly, claim 13 does not recite any language regarding the quantity or complexity of the data. '981 Patent at 2:58–3:20.

Moreover, a review of the '981 Patent does not compel the conclusion that any of the claim limitations remove the claim from abstraction. Although the claim recites an output process for assigning “episodes of care,” the '981 Patent describes this concept as a mere organizational process of elimination for determining an efficiency score for a doctor. *See* '981 Patent 2:58–3:20; 7:18–45. Indeed, the recited “episodes of care” assignment is an analysis in which the computer may simply eliminate physicians not assigned to a grouping of medical conditions, physicians with a specialty type not assigned to a grouping of medical conditions, or physicians not in a group of interest, to ultimately calculate condition-specific episode statistics from these eliminations. *See, e.g.,* '981 Patent at 7:28–45 (“...eliminating physicians from the report group, the eliminated physicians having specialties that are not assigned to a grouping of medical conditions that account for some episodes treated by a physician having a specialty type; eliminating physicians that are not in a report group of interest; and eliminating episode assignments not meeting a selected criterion; calculating condition-specific episode statistics; calculating weighted episode statistics across medical conditions; and determining efficiency scores for physicians from the calculated condition-specific episode statistics and the weighted episode statistics calculated across medical conditions.”). Thus, the “episodes of care” assignment is simply a process of sorting physician data through mathematical calculations, and similar processes have been found to be abstract ideas by other courts. *See Digitech Image Tech., LLC v. Electronics of Imaging, Inc.*, 758 F.3d 1344, 1350–51 (Fed. Cir. 2014) (finding a process of taking two data sets and combining them into a single data set an abstract idea that is not patent eligible under § 101); *RecogniCorp, LLC v. Nintendo Co., Ltd.*, 855 F.3d 1322, 1326–27 (Fed. Cir. 2017) (finding the claimed process that began with data, added an algorithm, and ended with a new form of data, was directed to an abstract idea).

Cave argues that claim 13 is analogous to *McRO, Inc. v. Bandai Namco Games America Inc.*, and that it is innovative due to the rules set forth in the claim. (Doc. No. 30 at 12, citing 837 F.3d 1299 (Fed. Cir. 2016)). However, in *McRO*, the Federal Circuit’s finding was based on the fact that the claim involved a specific set of limiting rules that allowed the computer to produce an image previously only done by human animators, and thus added to prior art. 837 F.3d at 1313. Here, claim 13 does not articulate a set of limiting rules in any meaningful way. Any claimed limiting rules, such as the assignment of “episodes of care,” are simply broad concepts used to assign and organize data through a series of calculations. ’981 Patent at 2:58–3:20. As discussed, claim 13 is more analogous to a computer being used to improve the existing technological process—not the claimed rule improving the process—because the claimed method simply uses the computer to obtain, organize, and calculate data, and uses the resulting information to determine a physician’s efficiency score. *Id.*

Further, Cave’s argument that claim 13 is not abstract because it does not preempt the field is not persuasive. Although the claim may not preempt other similar patents, the lack of preemption does not change the fact that this claim is abstract. *FairWarning*, 839 F.3d at 1098 (“even assuming that the [] patent does not preempt the field, its lack of preemption does not save these claims”). As explained above, claim 13 simply covers a method of obtaining information and processing it to determine the output data. ’981 Patent at 2:58–3:20.

Similarly, Cave’s argument that claim 13 is not directed to an abstract idea because it is directed to a specific way of measuring efficiency, rather than a result, is also unpersuasive because claim 13 simply obtains information and puts it through a formula to determine a physician efficiency score as a result. ’981 Patent at 2:58–3: 20; compare *FairWarning*, 839 F.3d at 1093–94 (finding the claim abstract when “[t]he patented method . . . collects information

regarding accesses of patient's personal health information, analyzes the information according to one of several rules . . . to determine if the activity indicates improper access, and provides notification if it determines that improper access has occurred"). Moreover, any argument that the claim is valid because it is novel over the prior art does not alter the Court's § 101 analysis with respect to whether the claim is directed to an abstract idea. *Ulramercial*, 772 F.3d at 715 ("the addition of merely novel or non-routine components to the claimed idea [does not] necessarily turn[ ] an abstraction into something concrete."). Here, Cave simply points to its amended complaint to argue that the claims "improved upon existing technology for measuring physician efficiency by describing new methodologies which correct, in different embodiments, various errors in the prior art, including errors that can result from measuring physician efficiency based on the entire universe of medical conditions a physician treats over a given period of time." (Doc. No. 15, at ¶ 15.) But even if the claimed invention was an improvement over the prior art by limiting the universe of medical conditions imputed, or limiting the period of time for care, those limitations do not somehow make the conventional steps of the claim less abstract. Rather, those limitations simply limit the data being processed by an otherwise conventional method. *See Affinity Labs of Texas*, 838 F.3d at 1259 ("merely limiting the field of use of the abstract idea to a particular existing technological environment does not render the claims any less abstract.").

Finally, although Cave argues that a ruling at the pleadings stage would be premature, Cave provides no meritorious basis for why the Court must consider essential facts outside of the pleadings that would warrant deferring a ruling. On this point, Cave argues that there remains a factual issue regarding whether anyone ever practiced "the process required by the claims" before the date of the '981 Patent. However, for the reasons just explained, whether the claims

were known or used in the prior art (or by a person of ordinary skill prior to the issuance of the '981 Patent) does not alter the Court's analysis that claim 13 is directed to an abstract idea.

Perhaps most importantly, Cave's insistence that the Court look outside the pleadings is based upon Cave's argument that the Court should consider related U.S. Patent No. 8,768,726 ("the '726 Patent"). In its amended complaint, Cave states that the '726 Patent is in the same family as the '981 Patent, that both patents share the same specification and claim priority to the same application, that both include claims that recite software-based methods and systems for measuring physician efficiency, and that both contain limitations that recited similar elements, including "using medical claims data to form episodes of care," "using longitudinal episodes of care," "assigning at least one physician to a report group," and "using a predefined set of medical conditions for a specific specialty type." (Doc. No. 15, at ¶¶ 18–21.) Cave therefore urges the Court to look at expert testimony provided with respect to the '726 Patent by Dr. Bryan Bergeron. *Id.* at ¶ 22. Notably, on December 15, 2017, the district court for the Northern District of California found the asserted claims of the '726 Patent invalid under 35 U.S.C. § 101. *See Cave Consulting Group, Inc. v. Truven Health Analytics Inc. et al*, No. 15-cv-02177 (N.D. Cal. Dec. 15, 2017) (Doc. No. 342). The court's opinion is instructive and persuasive with respect to the question of patent-eligibility of claim 13 of the '981 Patent, and indeed Cave's concessions regarding the similarity of the two patents is an agreement to as much.

For example, as to the similarity of the claims, claim 1 of the '726 Patent recites:

1. A method implemented on a computer system of determining physician efficiency, the method comprising:
  - obtaining medical claims data stored in a non-transitory computer readable medium on the computer system;
  - performing patient analysis using said obtained medical claims data to perform episodes of care utilizing the computer system;

assigning complete (non-partial) episodes of care to physicians utilizing an assignment rule that allows assignment of an episode of care to more than one physician;

assigning at least one physician to a report group based on geographic area designation utilizing the computer system, each physician assigned to no more than one report group;

determining eligible physicians and episode of care assignments utilizing the computer system;

calculating condition-specific episode of care statistics utilizing the computer system;

calculating weighted episode of care statistics across medical conditions utilizing a predefined set of medical conditions for a specific specialty type utilizing the computer system; and

determining efficiency scores for physicians from said calculated condition-specific episode of care statistics and said weighted episode of care statistics calculated across medical conditions utilizing the computer system.

'726 Patent at 110:8–34.

Claim 1 of the '726 Patent and claim 13 of the '981 Patent are nearly identical, both reciting a method for determining physician efficiency by obtaining medical data, analyzing the data, assigning the data, and calculating statistics. '981 Patent at 2:58–3: 20; '726 Patent at 110:8–34. The district court in the Northern District of California similarly found claim 1 of the '726 Patent comparable to the claim language in *Electric Power Group. See Cave Consulting Group, Inc. v. Truven Health Analytics Inc. et al*, No. 15-cv-02177 (N.D. Cal. Dec. 15, 2017) (Doc. No. 342, at 12). Ultimately, the court found the claim extremely broad and directed to the abstract idea of “collecting, organizing and analyzing medical claims data to calculate physician efficiency scores.” *Id.* For the reasons discussed herein, the Court agrees with this conclusion and similarly finds claim 13 of the '981 Patent directed to an abstract idea.

Because the Court has found claim 13 directed to an abstract idea, the Court must continue its analysis to decide whether the claim covers an inventive concept. *Mortg. Grader*, 811 F.3d at 1324 (“[T]he next step is to look for an “inventive concept”— i.e., 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.”) (citation omitted). A patent covers an inventive concept if it improves an existing technological process. *Bascom*, 827 F. 3d at 1351; *see also Trading Techs. Int’l, Inc. v. CGQ, Inc. et al.*, No. 2016-1616, 2017 WL 192716, at \*3 (Fed. Cir. Jan. 18, 2017). The Court looks at “the limitations of the claims, taken individually” and sees if they are generic both independently and in an ordered combination to determine if they are patent-eligible. *Bascom*, 827 F. 3d at 1349. Claims are not inventive if they “simply recite ‘well-understood, routine, conventional activit[ies].’” *Id.* (quoting *Alice*, 134 S. Ct. at 2359).

HCSC argues that the use of generic and conventional computer components in claim 13 does not transform the claim. (Doc. No. 19, at 22.) HCSC emphasizes that claim 13 merely states the source or type of content information to be analyzed, which is insufficient to bring the abstract idea within the requirements of § 101. *Id.* at 23–24. HCSC contends that the only narrowing limitation of claim 13 is “applying a first maximum duration rule utilizing a set consisting of static window periods to identify episodes of care,” but argues that limiting a static window to a number of days does not provide technological improvement that could render the claim patent eligible. *Id.* at 25. Finally, HCSC argues that considering the claim limitations as an ordered combination does not alter the conclusion that the claim is abstract with no transformative elements. *Id.*

Cave argues that HCSC cannot meet its burden on the clear and convincing evidence standard at step two because the Court cannot resolve on the pleadings whether the claim reflects well understood, conventional activities known to the industry. (Doc. No. 30, at 30.) Cave argues that the Court must consider whether the method is conventional and routine, and that claim 13

recites a new and innovative method. *Id.* at 31–32. Cave further contends that novelty is relevant to the § 101 analysis and the lack of preemption supports the conclusion that the claims cover an inventive concept. *Id.* at 32–33.

Claim 13 of the '981 Patent does not present an inventive concept because the limitations cover a well-understood, routine, and conventional method implemented on a generic computer system. '981 Patent at 2:58–3:20. While Cave argues that HCSC incorrectly contends that the computer system is conventional, Cave provides no argument for why the claimed method is more than conventional. As discussed above, claim 13 is a method that assesses information stored within the computer system and calculates an efficiency score using conventional functions of the computer. *Id.* It does nothing more than broadly and generically claim the use of a computer to perform the abstract purpose of the asserted claim. *Id.* The Court agrees with HCSC that the only purported limiting step of “applying a first maximum duration rule utilizing a set consisting of static window periods to identify episodes of care,” fails to render the claim patent eligible. The limitation of utilizing static window periods is not really a limitation at all, but rather simply narrows the field of data for identification of episodes of care. '981 Patent at 3:2–5. While this may narrow the claim, it does little to provide a transformative element of the claimed subject matter. *See Affinity Labs of Texas*, 838 F.3d at 1259 (“merely limiting the field of use of the abstract idea to a particular existing technological environment does not render the claims any less abstract.”).

Moreover, the limitations of claim 13 taken individually or in an ordered combination do not transform the claim into a patent-eligible application of the abstract idea. As discussed above, although the claim has an ordered process for determining physician efficiency, the claimed steps merely select information, assign a physician to a report group, determine

condition-specific episode of care statistics, and calculate the episode of care to determine efficiency scores for physicians. ’981 Patent at 2:58–3:20. The Federal Circuit has found that “merely selecting information, by content or source, for collection, analysis and display does nothing significant to differentiate a process from ordinary mental process.” *Electric Power Group*, 830 F.3d at 1355. Because claim 13 amounts to the routine practice of determining physician efficiency scores via its claimed steps, those steps, even as ordered, do not transform the subject matter into an inventive concept.

Further, in this case, any novelty over the prior art does not in and of itself change the fact that the claim as a whole and its limitations are well-understood, routine, conventional activities used to determine physician efficiency scores. *Ulramercial*, 772 F.3d at 716 (“[t]hat some of the [] steps were not previously employed in this art is not enough—standing alone—to confer patent eligibility upon the claim[] at issue.”); *see also Verint Sys. Inc. v. Red Box Recorders Ltd.*, 226 F. Supp. 3d 190, 196 (S.D.N.Y. 2016) (finding the proper question at step two is “not whether the invention is novel or whether it would be obvious to someone skilled in the art, but whether the claims contain an inventive concept such that the invention does not claim an abstract idea.”). Similarly, as discussed above, even if the claims do not preempt the field and there are other ways to determine physician scores, that fact also does not render the claim a patent-eligible. *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015) (“[w]hile preemption may signal patent ineligible subject matter, the absence of complete preemption does not demonstrate patent eligibility.”).

Again, Cave devotes several pages of its briefing to suggest that the Court must consider factual issues outside the pleadings again addressed in the context of the related ’726 Patent. (Doc. No. 30, at 34–36.) As discussed above, the district court in the Northern District of

California recently found the asserted claims of '726 Patent invalid under 35 U.S.C. § 101. *See Cave Consulting Group, Inc. v. Truven Health Analytics Inc. et al*, No. 15-cv-02177 (N.D. Cal. Dec. 15, 2017) (Doc. No. 342). The district court found that claim 1 of the '726 Patent does “not contain an inventive concept that transforms the nature of the claims into a patent-eligible application.” *Id.* at 19. The court reasoned that limiting calculating scores based upon “predefined sets” of medical conditions is simply a way of organizing data and then performing an algorithm. *Id.* For the reasons discussed herein, the Court agrees and similarly finds that claim 13 of the '981 Patent does not contain an inventive concept that transforms the otherwise abstract subject matter.

Thus, for the reasons explained herein, the Court finds that claim 13 of the '981 Patent is directed to a patent-ineligible abstract idea and contains no transformative elements, either alone or in combination. Accordingly, claim 13 of the '981 Patent is invalid for failure to recite patent-eligible subject matter under 35 U.S.C. § 101.

## **II. Other Dependent and Independent Claims**

HCSC argues that claim 13 of the '981 Patent is representative of all the claims of the '981 Patent and that therefore the remainder of the claims are also invalid. (Doc. No. 19, at 27.) Cave argues that claim 13 is not representative and points out the unique limitations of the remaining claims. (Doc. No. 30, at 36–38.) The Court acknowledges that it may be appropriate in a § 101 analysis to consider a claim to be representative of another claim if “the claims of the asserted patents are substantially similar and linked to the same abstract idea.” *Content Extraction*, 776 F.3d at 1348 (internal quotation omitted). However, in this instance, the Court finds that HCSC’s conclusory arguments regarding claim 13 fail to meet its burden to show that claim 13 is indeed representative of all claims of the '981 Patent, particularly where other

independent claims are not method claims but instead claim computer implemented systems. *See, e.g.,* '981 Patent Claim 21. While the Court cannot conclude on the record before it today that claim 13 is representative, the Court does note the similarity between the remaining claims.

Importantly, at this point in time, Cave has only clearly asserted claim 13 in this action. (Doc. No. 15.) To the extent that Cave has added claims to its contentions in supplementation to its amended complaint, the Court is not apprised of those additional claims. Therefore, from the Court's perspective, based on the allegations of the amended complaint and HCSC's Rule 12(b)(6) motion to dismiss those allegations, the Court has addressed all of the claims before it on the pleadings and any remaining arguments would not be ripe to consider absent a further amended complaint.

In sum, because the Court has found that claim 13 of the '981 Patent is invalid for failure to recite patent-eligible subject matter under 35 U.S.C. § 101, the Court **RECOMMENDS** that HCSC's Motion (Doc. No. 19) be **GRANTED** as to claim 13 of the '981 Patent and that Cave's amended complaint (Doc. No. 15) be **DISMISSED** with prejudice.

### **CONCLUSION**

For the reasons discussed herein, the Court **RECOMMENDS** that HCSC's Motion to Dismiss (Doc. No. 19) be **GRANTED** as to claim 13 of the '981 Patent and that this action be **DISMISSED** with prejudice.

Within fourteen (14) days after receipt of the Magistrate Judge's Report, any party may serve and file written objections to the findings and recommendations contained in the Report. A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen (14) days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and

recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United States Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996).F

**So ORDERED and SIGNED this 22nd day of December, 2017.**

  
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JOHN D. LOVE  
UNITED STATES MAGISTRATE JUDGE