

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

K/S HIMPP,
Petitioner,

v.

III HOLDINGS 4, LLC
Patent Owner.

Case IPR2017-00781
Patent 8,654,999 B2

Before SALLY C. MEDLEY, DAVID C. MCKONE, and
KIMBERLY MCGRAW, *Administrative Patent Judges*.

MCKONE, *Administrative Patent Judge*.

FINAL WRITTEN DECISION
35 U.S.C. § 318(a) and 37 C.F.R. § 42.73

I. INTRODUCTION

A. Background

K/S HIMPP (“Petitioner”) filed a Petition (Paper 3, “Pet.”) to institute an *inter partes* review of claims 1–9 and 16–19 of U.S. Patent No. 8,654,999 B2 (Ex. 1001, “the ’999 patent”). Petitioner indicates that GN Hearing A/S (formerly GN Resound A/S), GN Store Nord A/S, IntriCon Corporation, Sivantos GmbH, Sivantos Inc., Sonova Holding AG, Sonova AG (formerly Phonak AG), Starkey Laboratories, Inc. (aka Starkey Hearing Technologies), Widex A/S, and William Demant Holding A/S are also real parties in interest. Pet. 1. III Holdings 4, LLC (“Patent Owner”), filed a Preliminary Response (Paper 7, “Prelim. Resp.”).

Pursuant to 35 U.S.C. § 314, in our Institution Decision (Paper 8, “Dec.”), we instituted this proceeding as to claims 1–9 and 16–19.

Patent Owner filed a Patent Owner’s Response (Paper 12, “PO Resp.”), and Petitioner filed a Reply to the Patent Owner’s Response (Paper 15, “Reply”).

Patent Owner also filed a Motion to Exclude Evidence (Paper 17, “Mot. to Exclude”), Petitioner filed an Opposition to the Motion to Exclude (Paper 21, “Opp. to Mot. to Exclude”), and Patent Owner filed a Reply to the Opposition to the Motion to Exclude (Paper 22, “Reply Mot. to Exclude”).

Petitioner relies on the Declaration of Les Atlas, Ph.D. (Ex. 1008, “Atlas Decl.”).¹ Patent Owner relies on the Declaration of Clyde Brown (Ex. 2003, “Brown Decl.”).

An oral argument was held on May 1, 2018 (Paper 25, “Tr.”).

We have jurisdiction under 35 U.S.C. § 6. This Decision is a final written decision under 35 U.S.C. § 318(a) as to the patentability of claims 1–9 and 16–19. Based on the record before us, Petitioner has proved, by a preponderance of the evidence, that claims 1–9 and 16–19 are unpatentable.

B. Related Matters

Petitioner challenges claims 10–15 and 20 of the ’999 patent in *K/S HIMPP v. III Holdings 4, LLC*, Case IPR2017-00782 (PTAB). Pet. 2.

C. Asserted Prior Art References

Petitioner relies on the following prior art:

Ex. 1003 (“Fichtl”)	US 8,787,603 B2	July 22, 2014 (filed June 19, 2012)
Ex. 1004 (“Sacha”)	US 2003/0215105 A1	Nov. 20, 2003
Ex. 1006 (“Bisgaard”)	US 6,741,712 B2	May 25, 2004
Ex. 1007 (“Mangold”)	US 4,972,487	Nov. 20, 1990

¹ Patent Owner argues that we should give Dr. Atlas’s Declaration no weight because it merely repeats the arguments in the Petition. PO Resp. 37–39. In the cases of both Dr. Atlas’s testimony and that of Mr. Brown (whose Declaration suffers from essentially the same defect Patent Owner ascribes to Dr. Atlas’s testimony) we evaluate the extent to which expert testimony discloses the underlying facts or data on which it is based as a factor in determining the weight to give that testimony. *See* 37 C.F.R. § 42.65(a). We are not persuaded to discount either expert’s testimony entirely.

Ex. 1009 (“DE961”) DE 195 42 961 C1 May 15, 1997²

D. The Asserted Grounds

We instituted on the following grounds of unpatentability (Dec. 38):

References	Basis	Claim(s) Challenged
Fichtl, Mangold, and Bisgaard	§ 103(a)	1–5 and 16
Fichtl, Mangold, Bisgaard, and Sacha	§ 103(a)	18
Fichtl, Sacha, Mangold, and DE961	§ 103(a)	6–9 and 17
Fichtl, Mangold, Bisgaard, Sacha, and DE961	§ 103(a)	19

E. The '999 Patent

The '999 patent describes a hearing aid system. By way of background, the '999 patent explains that an individual's hearing loss can vary across audio frequencies and that an audiologist typically measures the individual's hearing capacities in various environments and tunes or calibrates a hearing aid for the individual to compensate for that individual's particular hearing loss. Ex. 1001, 1:46–55. The patent further notes that the

² Petitioner relies on a verified English translation of a German publication. We cite to the English translation. Exhibit 1009 is a subject of Patent Owner's Motion to Exclude. Paper 17, 1–4. In particular, Patent Owner argues that the translator's verification is not compliant with 37 C.F.R. § 42.63. In response, Petitioner submitted Exhibit 1015, the same translation with a new verification compliant with Rule 42.63. We discuss the Motion to Exclude in detail below. To be consistent with the citations in the parties' papers, we cite to Exhibit 1009 when referring to DE961, although cites to Exhibit 1015 would be the same.

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abrupt transition to a hearing aid can be traumatic or distressful for the individual. *Id.* at 1:58–67. To address this, the '999 patent describes a hearing aid system in which, “rather than abruptly implementing the hearing correction for the user immediately, the hearing aid progressively applies incremental adjustments to progressively or gradually adjust the user’s experience from an uncompensated hearing level to a fully compensated hearing level.” *Id.* at 2:30–34.

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