

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 IPR2017-00782
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 10–15 and 20 of U.S. Patent No. 8,654,999 B2 (Ex. 1101, “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 10, 11, 13–15, and 20, but not claim 12.

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. 1108, “Atlas Decl.”).¹ Patent Owner relies on the Declaration of Clyde Brown (Ex. 2103, “Brown Decl.”).

An oral argument was held on May 1, 2018 (Paper 28, “Tr.”).

On April 24, 2018, the Supreme Court held that a decision to institute under 35 U.S.C. § 314 may not institute on less than all claims challenged in the petition. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1369–60 (2018). Following the Supreme Court’s decision, the parties filed a Joint Motion to Limit the Petition to remove claim 12 from the proceeding, Paper 26, which we granted, Paper 27.

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 10, 11, 13–15, and 20. Based on the record before us, Petitioner has proved, by a preponderance of the evidence, that claims 10, 11, 13–15, and 20 are unpatentable.

B. Related Matters

Petitioner challenges claims 1–9 and 16–19 of the ’999 patent in *K/S HIMPP v. III Holdings 4, LLC*, Case IPR2017-00781 (PTAB). Pet. 2.

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. 32–35. 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.

C. Asserted Prior Art References

Petitioner relies on the following prior art:

Ex. 1103 (“Fichtl”)	US 8,787,603 B2	July 22, 2014 (filed June 19, 2012)
Ex. 1104 (“Sacha”)	US 2003/0215105 A1	Nov. 20, 2003
Ex. 1107 (“Mangold”)	US 4,972,487	Nov. 20, 1990

D. The Asserted Grounds

We instituted on the following grounds of unpatentability (Dec. 33):

References	Basis	Claims Challenged
Fichtl and Mangold	§ 103(a)	10, 13, 14, and 20
Fichtl, Mangold, and Sacha	§ 103(a)	11 and 15

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. 1101, 1:46–55. The patent further notes that the 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.

Figure 2, reproduced below, illustrates an embodiment of the hearing aid system of the '999 patent:

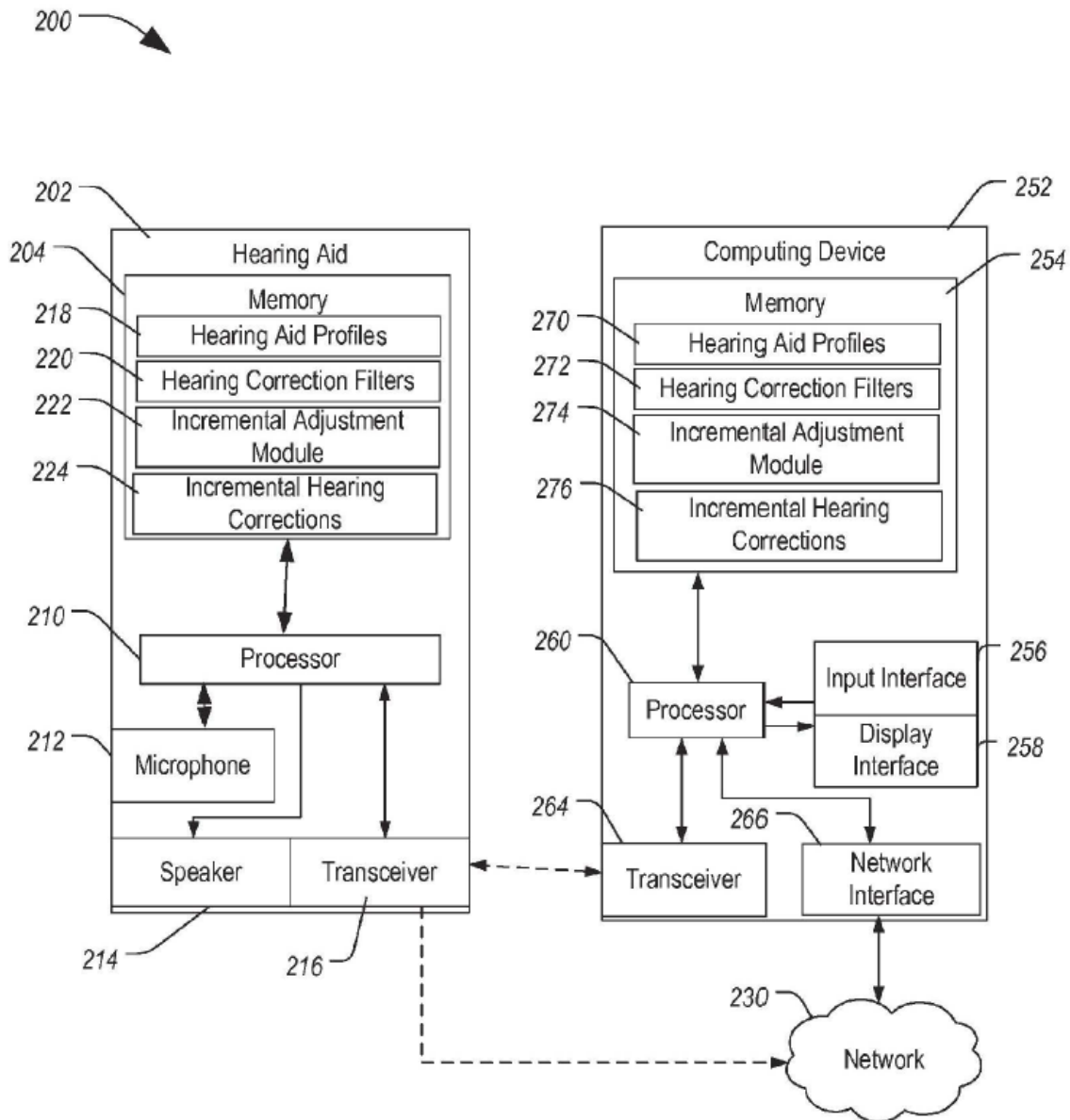


FIG. 2

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