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UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE PATENT TRIAL APPEAL BOARD

K/S HIMPP,

Petitioner(s),

v.

BRAGI GmbH,

Patent Owner(s).

CASE NO. IPR2023-00901  
PATENT NO. 10,635,385

DEPOSITION UNDER ORAL EXAMINATION OF  
KAI JOHNSON

DATE: April 17, 2024

REPORTED BY: MICHAEL FRIEDMAN, CCR

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TRANSCRIPT of the deposition of the  
KAI JOHNSON, called for Oral Examination in the  
above-captioned matter, said deposition being taken  
by and before MICHAEL FRIEDMAN, a Notary Public and  
Certified Court Reporter of the State of New Jersey,  
located at ZOOM VTC, all parties remote, on April  
17, 2024, commencing at approximately 12:00 in the  
afternoon.

1       A P P E A R A N C E S:

2       MCKOOL SMITH  
3       300 Crescent Court  
4       Dallas, TX 75201  
5       BY: KAYLEE HOFFNER, ESQ.  
6       Attorneys for Petitioner

7       WILMER HALE  
8       7 World Trade Center  
9       New York, NY 10007  
10      BY: BRIAN LAMBSON, ESQ.  
11      Attorneys for Patent Owner

12                               \* \* \* \* \*

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## 1 I N D E X

2 WITNESS NAME PAGE

3 KAI JOHNSON

4 By Mr. Lambson 7

5

6 \* \* \* \* \*

7

## 8 E X H I B I T S

9 EXHIBIT NO. PAGE

10 EXHIBIT 1 Exhibit 2020 to the IPR 10

11 EXHIBIT 2 1/5/06 press release 17

12 EXHIBIT 3 '385 patent 31

13 EXHIBIT 4 Wiki article 50

14

15 (Exhibits retained by counsel.)

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Deposition Support Index

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Direction to witness not to answer

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None

Request for production of documents

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None

Questions marked

Page Line   Page Line   Page Line   Page Line

None

1                   THE COURT REPORTER: My name is  
2                   Michael Friedman, a Certified Shorthand  
3                   Reporter. This deposition is being held  
4                   via videoconferencing equipment.

5                   The witness and reporter are not in  
6                   the same room. The witness will be sworn  
7                   in remotely, pursuant to agreement of  
8                   all parties. The parties stipulate that  
9                   the testimony is being given as if the  
10                  witness was sworn in person.

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1       K A I   J O H N S O N,

2                   called as a witness, having been first  
3       duly sworn according to law, testifies as follows:

4

5       EXAMINATION BY MR. LAMBSON:

6           Q     Good morning, Mr. Johnson.

7           A     Good morning.

8           Q     Will you state your full name for  
9       the record?

10          A     My name is Kai Johnson.

11          Q     Where are you located for today's  
12       deposition?

13          A     I'm in San Diego, California.

14          Q     And are you in your home right now?

15          A     Yes, my home office where I  
16       normally work.

17          Q     Is anyone else in the room with  
18       you?

19          A     No.

20          Q     Do you have any notes or documents  
21       with you today?

22          A     No, I do not.

23          Q     Will you agree not to have any  
24       communication with anyone while we're on the  
25       record throughout today's deposition?

1           A     Yes, I do agree. And that reminds  
2     me that I should at least turn my phone off  
3     so we don't have some interruptions.

4           Q     Thank you. I appreciate that.

5           A     Yeah.

6           Q     Have you been deposed before?

7           A     I have.

8           Q     About how many times?

9           A     Oh, I've lost count now, but  
10    probably four or five. Four probably.

11          Q     Does that include IPR proceedings  
12    like this one?

13          A     Yes, it does.

14          Q     So you've probably heard this  
15    before.

16                I will just reiterate that the  
17    court reporter is going to be writing down  
18    everything we say.

19                Please give verbal answers and  
20    avoid talking over me, I will do the same,  
21    and that will help us create a clear record.  
22    Okay?

23          A     Okay.

24          Q     You understand that you took an  
25    oath today to tell the truth?

1           A     Yes.

2           Q     And is there any reason why you  
3 would not be able to answer questions  
4 truthfully today?

5           A     No.

6           Q     You understand that we're here  
7 today to discuss IPR 2023-00901 regarding  
8 U.S. '385, patent number 10635385. Correct?

9           A     Sounds right.

10          Q     And if I refer to that as the '385  
11 patent today, will you understand what I'm  
12 referring to?

13          A     Yes.

14          Q     You submitted a declaration in  
15 support of BRAGI as response to the 385 IPR  
16 petition?

17          A     Yes.

18          Q     I will just repeat the question.  
19 You submitted a declaration in support of  
20 BRAGI's response to the 385 IPR petition.  
21 Correct?

22          A     Correct, yes.

23          Q     So I'm going to drop in exhibit --  
24 an exhibit into the chat.

25                   If you can, just let me know when

1       you first see it.

2               Everybody should have access to  
3       this. Exhibit 1.

4               I just dropped into the chat what  
5       is Exhibit 2020 to the IPR, and that's  
6       Exhibit 1 to the deposition.

7               (Whereupon the above mentioned was  
8       marked for Identification.)

9               Q     Mr. Johnson, if you can, just  
10       confirm once you've received that and opened  
11       it up.

12              A     Yes, I have received it and I have  
13       opened it up.

14              Q     The document in front of you is  
15       your declaration in support of BRAGI's  
16       response to the IPR petition?

17              A     Yes, it is.

18              Q     How long did you spend preparing  
19       your declaration?

20              A     Oh, I don't recall the exact amount  
21       of time but it was quite a bit of hours over  
22       the span of several days, possibly as much as  
23       a week or more.

24              Q     So possibly up to make 50 hours?

25              A     Yeah. Like I said, I have to go

1 back and look at the records but I don't  
2 remember off the top of my head but it was  
3 quite a few hours, yes.

4 Q Did you write every word of your  
5 declaration?

6 A You know, other than some of the  
7 boilerplate that was pasted in, yes.

8 Q Do you recall what that boilerplate  
9 was?

10 A Oh, yeah. The title page, the  
11 legal principles, I think that's pretty much  
12 it.

13 Q Do you consider everything to your  
14 declaration to be accurate?

15 A Yes.

16 Q Let's turn to page 2 of your  
17 declaration. I will ask you a question about  
18 paragraph 6.

19 This paragraph says that you have a  
20 Bachelor's degree in computer science.  
21 Correct?

22 A Yes.

23 Q When did you receive that degree?

24 A I guess that would have been '94.  
25 I would have to look.

1           Q    Do you have any graduate education  
2   after undergraduate?

3           A    I did not complete a Master's  
4   degree but I did take some Master's level  
5   classes while I was studying at the  
6   University of Wisconsin.

7           Q    While you were studying for your  
8   Bachelor's you also took Master's level  
9   courses?

10          A    Exactly.

11          Q    Do you have any teaching  
12   experience?

13          A    No.

14          Q    Let's take a look at the next  
15   paragraph. This paragraph says that you're  
16   currently the president of Sutton Abinger in  
17   San Diego, California.

18               Is that correct?

19          A    Yeah, that's Sutton Abinger, yes.

20          Q    I was going to ask you the  
21   pronunciation.

22          A    Yeah.

23          Q    Besides you, are there any other  
24   employees of Sutton Abinger?

25          A    No, there aren't.

1           Q    You're an independent consultant  
2 then. Correct?

3           A    Yes, I am.

4           Q    And you were also an independent  
5 consultant back in 2015?

6           A    Oh, let me think about that. Yes.

7           Q    Looking at the same paragraph,  
8 paragraph 7, it says that your consulting  
9 work is focused on solutions for payment  
10 systems, security transit and mobile  
11 applications. Right?

12          A    Yes.

13          Q    When you say you're focused on  
14 solutions, what does that mean?

15          A    Well, as an independent consultant,  
16 I get a variety of different engagements of  
17 different types.

18               And you know, sometimes it's a  
19 matter of helping clients build systems or  
20 advising them on compliance or advising them  
21 on cryptography or, you know, providing  
22 assessments for startups or private equity.

23               It varies quite a bit but it's  
24 generally related to things in those areas,  
25 payment systems, security, transit and mobile

1 applications.

2 Q So on a day-to-day basis, do you  
3 design software applications?

4 A Sometimes, when the engagement  
5 calls for it.

6 Q Okay. It sounds like you also get  
7 involved with things like business and  
8 financial strategy for mobile applications?

9 A Less financial strategy but, you  
10 know, for example, sometimes I will help a  
11 startup with their pitch deck.

12 Q Do you consider yourself to be an  
13 expert in mobile applications? Correct?

14 A Yes.

15 Q Do you make an effort to stay up to  
16 speed with significant investments in that  
17 field?

18 A It's something that happens  
19 naturally in the course of my work.

20 Q Can you elaborate like what you do  
21 that keeps you up to speed with developments  
22 in the field?

23 A Oh, let me see if I have a good  
24 example for you.

25 So one of my clients, one of the

1 recent clients has a financial services  
2 technology application. It's a mobile  
3 application.

4 I work with them to do technology  
5 review of their application development, both  
6 on the mobile devices and on the back end  
7 server systems and give them some advice on  
8 outsourcing and on structuring their  
9 organization to sort of better meet their  
10 customer's needs.

11 So, you know, in the course of  
12 that, I get to see what is going on with the  
13 latest technologies that they're using.

14 Q Do you ever read journal articles?

15 A When it's relevant, sometimes I do.

16 Q When is the first time you became  
17 aware of BRAGI?

18 A Oh, when I started working on this  
19 engagement as an expert.

20 Q So you haven't heard of BRAGI  
21 before you were contacted --

22 MS. HOFFNER: Objection.

23 A Sorry? Can you repeat that?

24 Q So you had not heard of BRAGI  
25 before you were contacted about serving as an

1 expert in this proceeding. Correct?

2 MS. HOFFNER: Objection, form.

3 A No, no, not that I recall.

4 Q When is the first time that you  
5 became aware of the '385 patent?

6 A When I was contacted about  
7 participating in this engagement.

8 Q So again, you had not heard of the  
9 '385 patent before you were contacted about  
10 serving as an expert in this IPR. Correct?

11 A Correct.

12 Q Do you know Martin Steiner?

13 A As a person, no. I recognize the  
14 name from the patent.

15 Q So outside of recognizing the name  
16 from the patent, you never heard of Martin  
17 Steiner?

18 A No.

19 Q Let's go to the next paragraph,  
20 paragraph 8 of your declaration.

21 At the top of page 3, you say that  
22 you had the responsibility of launching the V  
23 CAST Music product in 2006. Right?

24 A Yes.

25 Q And you described V CAST as a

1 product that allows customers to play music  
2 on their mobile phones with Bluetooth  
3 headphones. Right?

4 A Yeah.

5 Q How long did you work on V CAST  
6 for?

7 A I don't recall the exact amount of  
8 time but it certainly took more than a year,  
9 possibly two years for us to get the product  
10 to launch.

11 MR. LAMBSON: Going to -- I'm going  
12 to drop another exhibit into the chat.

13 Just a moment.

14 This will be Exhibit 2.

15 (Whereupon the above mentioned was  
16 marked for Identification.)

17 Q If you can let me know again once  
18 you have that opened up.

19 A Yes.

20 Q So I will represent that this  
21 document is a Verizon press release, dated  
22 January 5, 2006. The title is "Verizon  
23 Wireless Introduces V CAST Music."

24 I'm just going to read a passage  
25 and ask some questions.

1           The second paragraph begins with  
2     the following, quote, "V CAST Music combines  
3     the immediacy of over the air full music  
4     downloads with the ability to move a digital  
5     music collection between a Windows XP PC and  
6     a wireless phone. The service lets customers  
7     browse, review, download and play high  
8     quality digital music from their phones or  
9     online in the Verizon Wireless V CAST Music  
10    Store. "

11           Did I read that correctly?

12           A     Yes.

13           Q     So this press release seems to  
14    describe V CAST as a comprehensive music  
15    platform with a bunch of different  
16    capabilities?

17           A     That's a fair characterization of V  
18    CAST.

19           MS. HOFFNER: Objection.

20           A     Yeah, that's a reasonable  
21    characterization.

22           Q     One of V CAST's features is playing  
23    music from a phone. Correct?

24           A     Yes.

25           Q     So I will represent that the press

1 release never specifically mentions that V  
2 CAST can play music through Bluetooth  
3 headphones but I gather from your declaration  
4 that it did have that capability. Correct?

5 A Yes.

6 Q Is it fair to say that V CAST is  
7 not limited to playing back music through  
8 Bluetooth headphones. Right?

9 MS. HOFFNER: Objection, form.

10 A V CAST Music could play music  
11 through the phone speaker, through -- or  
12 through Bluetooth headphones.

13 Q So V CAST simply plays back music  
14 through whatever output device is connected  
15 to the phone at that time?

16 A Whatever output devices is  
17 currently selected in the phone, yes.

18 Q Bluetooth is one potential option.  
19 Correct?

20 A Yeah. Bluetooth was one of the  
21 options that I worked with the device  
22 manufacturers to add to the devices so that  
23 we can support that for V CAST Music.

24 Q Outside of your work on V CAST,  
25 have you ever worked on any other, is it fair

1 to say, applications that are used to  
2 interface with wireless earpieces?

3 A With wireless earpieces, I've  
4 worked on a lot of software applications.

5 Let me think if there were other  
6 ones or that was -- where that was  
7 specifically relating.

8 Okay. There were a number of other  
9 multimedia or other type of applications that  
10 we worked on at Verizon Wireless that could  
11 also interface with Bluetooth headphones.

12 Q Outside of your work at Verizon  
13 Wireless, were there any other software  
14 applications that could interface with  
15 wireless earpieces?

16 A Not that I recall off the top of my  
17 head.

18 There might have been something but  
19 not that I recall immediately.

20 Q You don't have any experience in  
21 the field of pulse oximetry. Correct?

22 A Correct.

23 Q You haven't been involved in  
24 developing or designing products that measure  
25 heart rate. Correct?

1           A     Correct.

2           Q     You've never been involved in  
3     designing or developing fitness tracking  
4     software applications?

5           A     Oh, was there something related to  
6     that? Let me think.

7                     Not that I can recall. It's  
8     possible it might have been something but not  
9     that I can recall immediately.

10          Q     You've never been involved in  
11     developing or designing wireless earpiece  
12     hardware. Correct?

13          A     Correct.

14          Q     Let's go back to your declaration,  
15     at paragraph 10, which is on page 3.

16                     In this paragraph you say that  
17     you're a named inventor of six issued patents  
18     relating to wireless technologies involving  
19     mobile devices and contact-less payments.  
20     Correct?

21          A     Correct.

22          Q     And none of those patents describe  
23     software applications that are used to  
24     interface with wireless earpieces. Right?

25          A     I don't believe so. I don't

1       remember exactly which patents get issued. I  
2       would have to go back and have a look.

3               Some of the patent applications did  
4       relate to Bluetooth devices of other sorts  
5       but not specifically earpieces.

6       Q     None of those patents describe a  
7       pulse oximetry technology. Right?

8       A     Correct.

9       Q     None of those patents describe  
10      products that measure heart rate. Right?

11      A     Sorry. I didn't quite catch that.

12      Q     None of those products describe  
13      patents that measure heart rate. Correct?

14      A     Correct.

15      Q     And none of those patents describe  
16      fitness tracking software. Correct?

17      A     Correct.

18      Q     And none of those patents describe  
19      wireless earpiece hardware. Correct?

20      A     Correct.

21      Q     Let's go now to page 4 of your  
22      declaration, the next page.

23             This page has a table that  
24      indicates that you reviewed Exhibit 1011,  
25      which is the file history for the '385

1 patent. Correct?

2 A Yes.

3 Q And am I correct that your  
4 declaration does not include a summary of the  
5 '385 patent's file history? Right?

6 A Correct.

7 Q You would agree that the file  
8 history of the '385 patent is relevant to  
9 your opinions?

10 MS. HOFFNER: Objection, form.

11 A Oh, I don't know if I cited it  
12 anywhere specifically.

13 Q So you're not sure if it's relevant  
14 to your opinions?

15 MS. HOFFNER: Objection to form.

16 A I would have to have a look and see  
17 in the document if I cited it. There might  
18 have been one or two places where it came up.

19 Q Outside of the potential places  
20 where you cited to it, you're not sure if  
21 it's otherwise relevant to your opinions?

22 MS. HOFFNER: Objection, form.

23 A Oh, you know if I cited to it, then  
24 it was certainly relevant.

25 Q I will ask you outside of specific

1 passages that you may have cited, do you  
2 consider the file history as a whole to be  
3 relevant to your opinions?

4 A Oh, I certainly considered it in  
5 forming my opinions, so yes.

6 Q You chose not to provide your own  
7 summary of the file history though. Right?

8 A I'm sorry, can you say that again?

9 Q You chose not to provide your own  
10 summary of the file history. Correct?

11 MS. HOFFNER: Objection, form.

12 A Correct.

13 Q So, is it fair to say that you  
14 agree with the petitioner's summary of the  
15 file history?

16 MS. HOFFNER: Objection, form.

17 A No, I haven't provided an opinion  
18 specifically about that.

19 Q Let's move to page 21 of the  
20 declaration.

21 Let's look at paragraph 52, which  
22 is at the bottom of the page.

23 This paragraph is describing the  
24 home screen of the smartphone application  
25 disclosed by Henson video. Correct?

1           A     Yes.

2           Q     At the end of the paragraph,  
3     there's a screenshot showing the app's home  
4     screen. Right?

5           A     Yes.

6           Q     So at the -- towards the top of the  
7     home screen, there's a row of icons.

8                   Towards the center of that there's  
9     a pair of icons with the letters L and R  
10    written on them.

11                  Do you see that?

12          A     Yes, I do.

13          Q     You would agree those icons are  
14    shaped like wireless earpieces. Correct?

15                  MS. HOFFNER: Objection, form.

16          A     Those icons are shaped in the  
17    general shape of the Freewavs' earpieces.

18          Q     And so a user looking at those  
19    icons would understand that they represent  
20    the Freewavs' wireless earpieces. Correct?

21                  MS. HOFFNER: Objection, form.

22          A     Yes, I think that a user would see  
23    that.

24          Q     That's because they look like  
25    earpieces. Right?

1 MS. HOFFNER: Objection, form.

2 A They look like the Freewavs  
3 earpieces.

4 Q Let's move now to page 6, or move  
5 back to page 6, sorry, of your declaration.

6 And I'm looking at paragraph 17,  
7 which starts at the bottom of the page.

8 This paragraph states, quote, "I  
9 understand that a claim in an issued patent  
10 is unpatentable as anticipated if the recited  
11 invention is described in a single prior art  
12 reference that discloses each limitation,  
13 either expressly or inherently," end quote.

14 Did I read that correctly?

15 A Yes.

16 Q And is this an accurate statement  
17 of your understanding of what it means for a  
18 prior art reference to anticipate a claim?

19 A Yes.

20 Q You would agree that a reference  
21 that does not anticipate a claim can still  
22 render the claim obvious. Right?

23 MS. HOFFNER: Objection, form.

24 A Oh, there were additional criteria  
25 for obviousness in paragraph 21 that I would

1       certainly consider and in paragraph 22 and  
2       23, as well as 24.

3           Q     You would consider those additional  
4       criteria because your understanding is that  
5       even if the reference does not anticipate a  
6       claim, it can still render that claim  
7       obvious.   Correct?

8           A     You know, I suppose it's possible,  
9       given the consideration of the legal  
10      principles, that are provided in the  
11      declaration.

12          Q     You say you suppose it's possible.  
13      It is possible.   Right?

14               MS. HOFFNER:   Objection, form.

15          A     Oh, you know, presuming that all  
16      the principles have been satisfied.

17          Q     Understood.

18               Now let's jump to page 43 of your  
19      declaration.   I will read from paragraph 97.

20               The second sentence of paragraph 97  
21      says, quote, "So the petition has not shown  
22      by a preponderance of the evidence that the  
23      combination of Henson patent and Henson video  
24      anticipates Claim 1 of the challenged  
25      claims."

1                   Is that correct?

2           A     Yes.

3           Q     I would like to understand what you  
4           mean when you say that the combination of  
5           Henson patent and Henson video does not  
6           anticipate Claim 1.

7                   Are you saying that neither Henson  
8           patent nor Henson video individually  
9           discloses each limitation of Claim 1?

10                   MS. HOFFNER: Objection to form.

11           A     I think what I cite in paragraph 97  
12           is pretty clear, and the commentary  
13           specifically is about the petition as it's  
14           the petitioner's obligation to show that the  
15           prior art hasn't anticipated the patent.

16                   So the commentary here is that the  
17           petition fails to show that the alleged prior  
18           art satisfies two specific elements of Claim  
19           1 of the '385 patent.

20                   And that's the -- that's the reason  
21           for the statement that the petition has not  
22           shown a police department that the  
23           combination of Henson patent and Henson video  
24           anticipates Claim 1.

25           Q     But it is your understanding that a

1 combination of references can render a claim  
2 obvious even if it doesn't anticipate the  
3 claim. Correct?

4 A Oh, based on the -- I should say,  
5 if it satisfies all the other criteria that  
6 we discussed in the legal principles that are  
7 laid out in the declaration.

8 Q If it does -- if the references do  
9 satisfy those principles, then in that case  
10 they would render the claim obvious.  
11 Correct?

12 MS. HOFFNER: Objection, form.

13 A Oh, hypothetically, yes, as to  
14 those.

15 Q Let's go to page 45 of your  
16 declaration.

17 A Okay.

18 Q And I will read from paragraph 102,  
19 the first sentence says, "However, Henson  
20 video does not show that the software  
21 application in the video allows a user to  
22 interact with the earpieces by sending  
23 commands to the earpieces and displaying  
24 information received from the earpieces."

25 Did I read that correctly?

1           A     Yes.

2           Q     So your opinion is that Henson  
3     video does not disclose a software  
4     application that sends commands to earpieces.  
5     Correct?

6                     MS. HOFFNER:  Objection, form.

7           A     So that's specifically addressed  
8     here and elsewhere in the declaration.

9                     What I cite is that Henson video  
10    does not show at any point that a command can  
11    be sent from the software application to the  
12    earpieces.

13          Q     You would agree that the claim does  
14    not recite the term command.  Correct?

15          A     This is Claim 1?

16          Q     Claim 1, yeah.

17          A     Do you mind if I review the claim  
18    language?

19          Q     Not at all.

20          A     Give me a minute to open up the  
21    '385 patent, if you would.

22          Q     Why don't I drop it in as an  
23    exhibit, just to make it clear.

24          A     Sure.

25          Q     You're welcome to refer to -- I

1 will just drop it in for the record.

2 A I will pick up your copy. Thanks.

3 MR. LAMBSON: This is Exhibit 3.

4 (Whereupon the above mentioned was  
5 marked for Identification.)

6 A Okay. Looks like I received it,  
7 thank you.

8 (Witness reviewing.)

9 Now that I have the claim language  
10 in front of me, could I ask you to repeat the  
11 question?

12 Q Sure.

13 The question was, you would agree  
14 that Claim 1 does not recite the term  
15 command. Correct?

16 A (Witness reviewing.)

17 Claim 1 does not use that term, but  
18 Claim 1 uses the term "interact," which is  
19 specifically what I'm referring to in the --  
20 in that paragraph of the declaration.

21 Q Is it your opinion that the only  
22 way to interact with an earpiece is to send a  
23 command to the earpiece?

24 MS. HOFFNER: Objection, form.

25 A The language that I used here is

1       actually specifically from the petition, and  
2       I chose to use that language so that it would  
3       be clear that this is something that's  
4       commonly understood between the petitioner  
5       and myself, seems like a reasonable  
6       explanation, that allowing the user to  
7       interact with the earpieces would include  
8       sending commands to the earpieces and playing  
9       information received from the earpieces.

10               That might not be the only  
11       interface with wireless earpieces that you  
12       can interpret interaction but that seems to  
13       be a clear way to explain the point given a  
14       common understanding with petitioner.

15               Q     Well, would you agree it's possible  
16       to satisfy limitation 1-V without sending a  
17       command to the earpieces?

18               MS. HOFFNER:  Objection, form.

19               A     In order to -- sorry, this is 1-D.

20               In order to satisfy 1-D, the  
21       software application must provide a user  
22       interface for use by the user to interact  
23       with the wireless earpiece.

24               Interaction, in general, requires  
25       that there's communication in both directions

1       and that both sides of the communication  
2       affected by that communication. So a command  
3       would be one way to affect them.

4           Q     Let's say the software application  
5       sends a request to the earpieces. That's --  
6       in that scenario is the user -- strike that.

7                     In that scenario, is the software  
8       application interacting with the earpiece?

9           MS. HOFFNER: Objection, form.

10          A     Oh, that could be one aspect of  
11       interaction with the earpieces.

12          Q     So it would be possible in that  
13       scenario to satisfy limitation 1-D without  
14       sending a command. Correct?

15          A     Well, sending a request on its own  
16       is not quite enough to show interaction  
17       between the software application and the  
18       wireless earpiece. So we would need to see  
19       more than that.

20          Q     Are you saying we would need to see  
21       the response as well?

22           MS. HOFFNER: Objection, form.

23          A     So as I said before, the  
24       interaction requires a two-way communication  
25       and -- and effect on both sides of the

1 communication. So in effect on the earpiece  
2 and in effect on the software application, as  
3 is stated in the claim language, this is --  
4 this is the user interacting with the  
5 earpiece, not just the software application.

6 Q Let's go to the next page of your  
7 declaration.

8 A Would that be 46, is that where  
9 we're going?

10 Q Yes, page 46 of your declaration.  
11 And specifically, paragraph 104.

12 A Okay.

13 Q We're addressing element 1-E. And  
14 you say that the petitioner improperly splits  
15 this element into two separate phrases.

16 I would like to understand why you  
17 find petitioner's approach to be improper.

18 Does this represent your legal  
19 understanding?

20 MS. HOFFNER: Objection, form.

21 A I'm not a lawyer, but I do try to  
22 read the claim language and read it as  
23 closely as I can.

24 And when I'm reading the claim  
25 language, it's important to understand all

1 the terms in the claim language and  
2 particularly to find their antecedents in the  
3 claim language.

4 And by splitting this claim into  
5 two pieces, the antecedents are separated  
6 from each other and the analysis in the  
7 petition doesn't properly account for the  
8 antecedents of the terms used in this element  
9 of the claims.

10 Q When you say that it's important to  
11 find antecedents in the claim language, are  
12 you suggesting that if a claim element is  
13 split up into two, it's impossible to find  
14 the antecedent in the claim language?

15 MS. HOFFNER: Objection, form.

16 A Well, certainly not impossible,  
17 just that the petition failed to do it.

18 Q Well, I read the sentence to say  
19 that the petition improperly splits the  
20 element into two separate phrases, and  
21 correct me if I'm wrong, are you saying that  
22 the splitting of the element itself is  
23 improper?

24 A No. I mean that's not the whole  
25 sentence.

1           The petition improperly splits the  
2       element into two phrases and attempts to show  
3       that the alleged prior art anticipates the  
4       individual portions of this element. That's  
5       where the splitting matters, is that by  
6       looking only at a portion of the claim  
7       element and not looking at the antecedents  
8       for the terms in that claim element, the  
9       split is improper.

10          Q     So it is possible to split up a  
11       claim into separate phrases and still have  
12       the prior art satisfy the antecedent basis  
13       requirements. Correct?

14               MS. HOFFNER: Objection, form.

15          A     I'm justed going to have to ask you  
16       to rephrase that.

17               Can you try one more time?

18          Q     So it's possible to split a claim  
19       element into two phrases and also to satisfy  
20       the antecedent basis requirements of the  
21       claim. Correct?

22          A     If the claim language is improperly  
23       interpreted, I suppose so, but that's not  
24       what happened in the petition.

25          Q     Just to be clear, the petitioner --

1       you're not contending that the petitioner  
2       omitted words from the claim element.  
3       Correct?

4           A     No, I'm not aware of that  
5       happening.

6           Q     Let's go to paragraph 107, which is  
7       on the next page, page 47 of your  
8       declaration.

9           A     Uh-huh.

10          Q     So this paragraph describes  
11       embodiments of the claimed visual  
12       representations shown in figures 4 and 5 of  
13       the '385 patent. Correct?

14          A     (Witness reviewing.)  
15                I'm going to ask you to repeat the  
16       question to be sure I got it.

17          Q     So the paragraph is describing  
18       embodiments of the visual representation  
19       shown in figures 4 and 5 of the '385 patent.  
20       Correct?

21          A     Yes.

22          Q     All right. You say that the visual  
23       representation in figures 4 and 5 includes  
24       lights on the earpieces. Correct?

25          A     (Witness reviewing.)

1 Yes.

2 Q Then you say that the lights are a  
3 function or property of the wireless  
4 earpiece. Correct?

5 A Yes.

6 Q What function or property of the  
7 wireless earpiece do those lights represent?

8 MS. HOFFNER: Objection, form.

9 A Well, the lights themselves are a  
10 property of the wireless earpiece, just in  
11 and of themselves.

12 And -- well, the patent may  
13 describe some other uses for them but the  
14 patent describes at least one use that's  
15 particularly relevant, which is that these  
16 lights may be used to identify the left  
17 earpiece as opposed to the right one or the  
18 right earpiece as opposed to the left one,  
19 which then is a function of the earpieces.

20 Q How is information about the lights  
21 communicated to the smartphone?

22 MS. HOFFNER: Objection, form.

23 A Presumably using the method that's  
24 described in the patent of communicating  
25 information between the wireless earpiece and

1 the smartphone, which I believe was claim 14,  
2 which includes communicating data from one or  
3 more of the wireless earpieces to the  
4 computing device, and then updating the  
5 screen displays using the data.

6 Q Paragraph 107 also says that the  
7 lights can convey different information based  
8 on the context or mode of operation of the  
9 device.

10 What is the context or mode of  
11 operation of the device?

12 A Oh, that's a quote from the patent.

13 Let me have a look back at the  
14 patent reference to see what that was  
15 referring to.

16 Q Sure.

17 A That's column 364 to 67.

18 (Witness reviewing.)

19 Okay. So I don't think I cited to  
20 this in the declaration.

21 But just looking through the  
22 patent, we were -- the bottom of column 3,  
23 but the middle of column 4 describes some  
24 various modes of operations of the earpieces,  
25 at line 25 through about 34.

1                   And so in the context of the  
2           reference at the bottom of column 3, I would  
3           understand that to be some of the modes of  
4           operations that might be indicated by the  
5           LEDs.

6           Q     You would agree that the term  
7           "light" does not appear in element 1-E?

8                   I will repeat the question.

9                   You would agree that the term  
10          "light" does not appear in element 1-E.  
11          Correct?

12          A     Correct.

13          Q     So it's possible for a prior art to  
14          satisfy element 1-E using earpieces that do  
15          not have lights. Correct?

16                  MS. HOFFNER: Objection, form.

17          A     Oh, presuming that the prior art  
18          could satisfy the remainder of Claim 1, which  
19          the petition hasn't shown in relation to the  
20          prior art that's been cited.

21          Q     And just to be clear, so the answer  
22          to the question is yes, presuming that the  
23          prior art could satisfy the remainder of  
24          Claim 1?

25                  Again, I will repeat the question.

1                   (Whereupon a discussion was held  
2   off the record.)

3           Q     Your answer to the prior question  
4   didn't have a yes or a no with it. So I just  
5   wanted to confirm that the answer was yes,  
6   that it's possible to satisfy element 1-E  
7   using earpieces without lights. Correct?

8                   MS. HOFFNER: Objection, form.

9           A     Yes. So as I said, it's possible  
10   to satisfy -- it is possible for prior art to  
11   satisfy Claim 1, if it satisfies all of the  
12   elements of Claim 1, including the aspects of  
13   the element 1-E.

14           Q     Let's turn back to the  
15   declaration -- scratch that.

16                   Let's stay on the patent for a  
17   second, so Exhibit 1001. Let's go to column  
18   6 of the patent.

19                   And I will read from the paragraph,  
20   beginning at line 26.

21                   It starts, "Figure 7 illustrates  
22   another example of a screen display. In this  
23   instance, the screen display is for tracking  
24   activity."

25                   So Figure 7, your understanding is

1       that it describes the embodiments of  
2       techniques for tracking a physical activity.  
3       Correct?

4               MS. HOFFNER: Objection, form.

5           A     Yes. So as the patent says, it's  
6       an example of a screen display that is for  
7       tracking activity.

8           Q     A few sentences later, starting at  
9       line 32, it says that the various information  
10      associated with one of -- strike that.

11               The description says various  
12      information associated with one or more  
13      activities may be displayed. This may  
14      include heart rate.

15               Do you see that?

16          A     Yes.

17          Q     So the user's heart rate is  
18      displayed on the screen shown in Figure 7  
19      while the user is participating in some sort  
20      of a physical activity. Correct?

21          A     Let me just flip up to Figure 7, if  
22      you don't mind, while we're looking at this  
23      text.

24          Q     Sure.

25          A     (Witness reviewing.)

1                   Okay. Column 6, this was, various  
2                   information associated with one or more  
3                   activities may be displayed. This may  
4                   include heart rate, number of steps, duration  
5                   or different information which may vary based  
6                   on the type of activity.

7                   And your question again was?

8                   Q     So the question is, your  
9                   understanding of Figure 7 is that a user's  
10                  heart rate is displayed on the screen while  
11                  the user is participating in a physical  
12                  activity. Correct?

13                A     Well, as it says in the patent,  
14                  that's one of the pieces of information that  
15                  may be displayed along with other  
16                  information.

17                Q     So would you agree that displaying  
18                  a user's heart rate while the user is  
19                  participating in an activity is an embodiment  
20                  of tracking a physical activity?

21                MS. HOFFNER: Objection, form.

22                A     Well, no. Simply displaying an  
23                  instantaneous heart rate measurement is not  
24                  tracking an activity.

25                Q     Does the description of Figure 7

1       refer to -- does it use the word "storing" or  
2       anything equivalent to storing in connection  
3       with the heart rate?

4           A     Give me a minute to reread that.

5                   And your question was, does it use  
6       the word "storing" or anything equivalent to  
7       storing?

8           Q     Yes.

9           A     Okay. Just bear with me for a  
10       minute.

11                   (Witness reviewing.)

12                   Okay. So the question was, does  
13       the description of Figure 7 include the word  
14       "storing"? It does not. Or something  
15       equivalent to storing.

16                   And I would say that in order to  
17       track an activity, that it's necessary to  
18       record measurements over time.

19                   And there are examples of  
20       measurements being recorded over time, such  
21       as -- sorry, I will say that again -- a count  
22       of the number of steps that have been taken  
23       during the activity.

24           Q     You would agree that it does not  
25       describe measuring or recording heart rate

1 measurements over time. Correct?

2 MS. HOFFNER: Objection, form.

3 A Oh, it does not say that explicitly  
4 but to the extent it's tracking the activity  
5 as described at the introduction to the  
6 paragraph, it might be. But I don't think it  
7 says it explicitly.

8 Q Let's go to -- back to the  
9 declaration. We will jump ahead to page 81,  
10 paragraph 177.

11 So in the first sentence, you cite  
12 to a portion of the '385 patent's file  
13 history. Correct?

14 A Oh, referring to the petition's  
15 citation of the file history, yes.

16 Q And you -- you quote one of the  
17 applicant's arguments that were made in an  
18 appeal brief. Correct?

19 A (Witness reviewing.)

20 Yes.

21 Q And those arguments relate to the  
22 lighting limitations of Claim 7. Correct?

23 A (Witness reviewing.)

24 Oh, it does reference that.

25 I think the context may have been

1       slightly different, though.

2           Q     In what way?

3           A     Oh, I mean, I could go back and  
4       look at the file history but let me just take  
5       a minute to just take a look at the context  
6       here in the declaration.

7                   (Witness reviewing.)

8                   Okay. Can I ask you to repeat the  
9       question?

10          Q     Sure.

11                   Just at a high level, the arguments  
12       that you've cited from the applicant, the  
13       context of those arguments is the lighting  
14       limitations of Claim 7. Correct?

15          A     Well, Claim 7's limitation, of  
16       course, is a dependent claim, so it's in  
17       relation to Claims 1, 5 and 6.

18                   But Claim 7 specifically is  
19       relating to the case in which the property is  
20       the remaining battery life.

21                   So Claim 7 is not specific to  
22       lighting, however, this is one of those cases  
23       where it's important to follow your  
24       antecedents.

25                   If you trace back the term "the

1 property", in Claims 1, 5 and 6, then you  
2 find that that's in relation to lighting.

3 But the argument that the  
4 petitioner was making here was generally in  
5 relation to Claim 7, which was relating to  
6 battery life.

7 Q Understood. Thank you for that  
8 clarification. That's really all I was going  
9 for there, was just to understand what the  
10 arguments related to. So thanks for laying  
11 that out in some detail.

12 So in your declaration, you say  
13 that -- I will read a passage here -- "The  
14 applicant's arguments center on whether the  
15 prior art shows displaying a visual  
16 representation of at least one wireless  
17 earpiece on a screen of both computing device  
18 wherein the visual representation includes  
19 lighting associated with the function or  
20 property of at least one wireless earpiece,  
21 and wherein the property is the remaining  
22 battery life."

23 Did I read that correctly?

24 A Yes.

25 Q And so, the applicant is trying to

1 explain to the patent office here how Claim 7  
2 should be interpreted. Correct?

3 A Oh, there's a lot of argument in  
4 that in relation to Claim 7.

5 I would have to go back and look at  
6 the appeal brief to see exactly where this  
7 fit in.

8 Q Let's just break that sentence down  
9 a little, then.

10 So the -- according to the  
11 applicant, the Claim 7 requires that the  
12 visual representation includes lighting.  
13 Correct?

14 A Yeah. Yes, we have to be careful  
15 when trying to break this claim down.

16 When you add in all of the claims  
17 it depends on, it ends up being quite a  
18 mouthful. So it does say, Wherein the visual  
19 representation includes lighting, but we need  
20 to be sure to keep in mind the antecedents  
21 for those terms, particularly visual  
22 representation and lighting.

23 Q Okay. So again, understanding that  
24 this is the applicant's characterization of  
25 the claim, at least under the applicant's

1        characterization of the claim, the visual  
2        representation includes lighting. Correct?

3                MS. HOFFNER: Objection, form.

4                A     Oh. As I said, I took this -- I  
5        quoted this from the appeal brief to show an  
6        example of what that argument was about, but  
7        I have to go back and look at the appeal  
8        brief to see exactly what the remainder of  
9        the article was.

10               I remember what the argument was.

11        I remember there being several paragraphs and  
12        they're pretty wordy like this. It's worth  
13        reading closely.

14               Q     Let's jump -- sorry, not ahead,  
15        let's jump back to page 65 of your  
16        declaration.

17               I understand we've been going a  
18        little over an hour since we started. I  
19        don't know that we have much longer to go.  
20        We plow through or take a break.

21               (Brief recess taken.)

22               Q     We're going ahead back on the  
23        record, if that works for Mr. Johnson.

24               A     Yes.

25               MS. HOFFNER: Good here.

1           Q     Let's go ahead and turn to  
2     paragraph 143 of your declaration on page 65.

3           A     Okay.

4           Q     At a high level, this paragraph is  
5     relating to the term -- the claim term  
6     "playlist." Correct?

7           A     Yes.

8           Q     And you cite to -- in the second  
9     sentence, you cite to the original iPod user  
10    manual published in 2002 where Apple  
11    describes playlists as the songs you  
12    organized into lists. Correct?

13          A     Correct.

14               MR. LAMBSON: I'm going to drop on  
15    exhibit into the chat.

16               (Whereupon the above mentioned was  
17    marked for Identification.)

18               MR. LAMBSON: This will be Exhibit  
19    4 to the deposition.

20          Q     Please just let me know once you  
21    have that open.

22          A     Okay. Yes.

23          Q     So I will represent that this is a  
24    Wiki article describing the first generation  
25    iPod.

1                   This is the same generation of iPod  
2           that is covered by the user manual that we  
3           cited.   Correct?

4           A     I believe so.

5           Q     The first paragraph of this article  
6           says that the original iPod was discontinued  
7           in 2003.   Correct?

8                   MS. HOFFNER:  Objection, form.

9           A     It -- well, it says specifically it  
10          was still available on the market until April  
11          of 2003.

12          Q     And so it was no longer available  
13          after April of 2003 on the market.   Correct?

14          A     Oh, I don't know.   But if we take  
15          the statement of the document at face value,  
16          that would seem to be so.

17          Q     So the original iPod had been not  
18          available on the market for over a decade by  
19          the time the '385 patent was filed.   Correct?

20          A     Well, the original iPod had been  
21          replaced by several new generations by that  
22          time, I suppose.

23          Q     Let's go to -- back to your  
24          declaration.   We will go to page 67 and  
25          paragraph 149.

1                   And in the first -- actually, the  
2                   second sentence, you quote Dr. Henson saying  
3                   he paired the earpieces with the smartphone.  
4                   Correct?

5                   A     Correct. Dr. Henson says, I paired  
6                   them, the earpieces, with each other and also  
7                   paired them with the source device in this  
8                   case, which is the smartphone.

9                   Q     Would you agree that pairing is a  
10                  type of connecting?

11                  MS. HOFFNER: Objection, form.

12                  A     Yeah. In this case, Dr. Henson has  
13                  connected the earpieces to the smartphone.

14                  Q     Let's go to the patent that's,  
15                  again, Exhibit 3 to the deposition. And turn  
16                  to Column 2.

17                  A     Okay.

18                  Q     I will read from the paragraph  
19                  starting at line 57.

20                         The second sentence of that  
21                         paragraph reads, "Each of the left earpiece  
22                         12-A and the right earpiece 12-B is in  
23                         operative communication with a mobile device  
24                         for, which includes a screen."

25                         Would you agree that in this

1 sentence, the term "operative communication"  
2 means connecting?

3 MS. HOFFNER: Objection, form.

4 A Oh, the -- it's not quite the same  
5 thing.

6 Communication and connecting are  
7 separate. Connecting is the act of  
8 establishing the communication.

9 Q And does this sentence describe how  
10 the operative communication was established  
11 between the earpieces and the mobile device?

12 MS. HOFFNER: Objection to form.

13 THE WITNESS: Sorry?

14 MS. HOFFNER: Sorry. Just  
15 objection to form.

16 THE WITNESS: Thank you.

17 A No, it doesn't say anything  
18 specific about that.

19 Q Does it say how a software -- how  
20 the software and -- does this paragraph  
21 describe how a software application provides  
22 for establishing operative communication  
23 between earpieces and the mobile device?

24 A No, that does not appear to be a  
25 subject of the paragraph.

1                   MR. LAMBSON: Thank you,  
2                   Mr. Johnson. That's all I have.

3                   I will pass the witness.

4                   MS. HOFFNER: Nothing from me.

5                   THE COURT REPORTER: I have Wilmer  
6                   Hale's order on file. Ms. Hoffner, we  
7                   did a realtime hookup. You're getting a  
8                   rough and regular final?

9                   MS. HOFFNER: Yes.

10                  (Whereupon the deposition was  
11                  concluded at 1:20 p.m.)

12                  (Witness was excused.)

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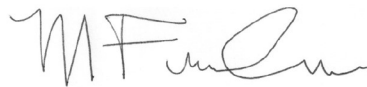
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C E R T I F I C A T E

I, MICHAEL FRIEDMAN, a Certified Court Reporter and Notary Public, qualified in and for the State of New Jersey do hereby certify that prior to the commencement of the examination KAI JOHNSON was duly sworn by me to testify to the truth the whole truth and nothing but the truth.

I DO FURTHER CERTIFY that the foregoing is a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place and on the date hereinbefore set forth.

I DO FURTHER certify that I am neither a relative of nor employee nor attorney nor counsel for any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel, and that I am not financially interested in the action.



MICHAEL FRIEDMAN, CCR of the  
State of New Jersey  
License No: 30XI00228600  
Date: April 17, 2024

| 1  | LAWYER'S NOTES |       |       |
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DEPOSITION ERRATA SHEET

Case Caption: HIMPP v. BRAGI

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury  
that I have read the entire transcript of  
my Deposition taken in the captioned matter  
or the same has been read to me, and  
the same is true and accurate, save and  
except for changes and/or corrections, if  
any, as indicated by me on the DEPOSITION  
ERRATA SHEET hereof, with the understanding  
that I offer these changes as if still under  
oath.

Signed on the \_\_\_\_\_ day of  
\_\_\_\_\_, 20\_\_\_\_

\_\_\_\_\_  
KAI JOHNSON

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