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

In re Patent of: Darbee

Universal Remote Control, Inc.

Patent No.: 5,414,761

v.

Filed: Oct. 8, 1993

Universal Electronics, Inc.

Issued: May 9, 1995

Case No. IPR2014-01104

Assignee: Universal Electronics Inc.

Trial Paralegal: Cathy Underwood

Title: REMOTE CONTROL SYSTEM

PETITIONER'S MOTION TO EXCLUDE CERTAIN INADMISSIBLE TESTIMONY OF PATENT OWNER'S WITNESS ALEX COOK

Certificate of Filing: I hereby certify that this correspondence is being electronically filed with the USPTO on this 20th day of July, 2015.

By: / Jeannie Ngai / Jeannie Ngai



TABLE OF CONTENTS

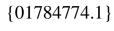
			Page
I.	Intro	oduction	1
II.	Lega	al Authority	2
III.		Cook's Cross-Examination Testimony That The Ciarcia Reference ks The Claimed "Input Means" Should Be Excluded	
	A.	Background	3
	B.	Analysis	4
IV.	Mr. Cook's Redirect Testimony Regarding His Erroneous Claim Construction Date Should Be Excluded		6
	A.	Background	6
	B.	Analysis	8
V.	Con	clusion	9





TABLE OF AUTHORITIES

	Page(s)
Cases	
SkinMedica, Inc. v. Histogen Inc., 727 F.3d 1187 (Fed. Cir. 2013)	2
Waddington North Am., Inc. v. Sabert Corp., No. 09-4883, 2011 U.S. Dist. LEXIS 86632 (D. N.J. Aug. 5, 2011)	2, 9
Regulations	
37 C.F.R. 42.65	3, 5
Rules	
Federal Rule of Evidence 611	2, 5
Federal Rule of Evidence 702	. 5, 6, 9





I. Introduction

Inadmissible testimony should not be part of this trial record. Petitioner moves for exclusion of certain inadmissible deposition testimony provided by Patent Owner's technical expert, Mr. Alex Cook. *See* Paper 28 at 2 (providing deadline for motion to exclude). First, during Mr. Cook's cross examination, he offered a new basis for distinguishing the Ciarcia reference. *See* Ex. 1053 at 418:18–423:6. But Mr. Cook admitted that he provided no analysis to support this new basis and that it was not included in his direct testimony. Thus, the testimony should be excluded because it is unreliable and is outside the scope of the direct testimony. Specifically, Petitioner requests exclusion of Ex. 1053 at 419:1–:2, 419:14–:15, 420:5–:21, 421:8–422:2, and 422:9–:13.

Second, Patent Owner engaged in a redirect examination of Mr. Cook during which Patent Owner asked improper and leading questions aimed at retroactively curing an erroneous opinion offered by Mr. Cook. *See* Ex. 1054 at 727:9–751:5.

This testimony should be excluded because it was provided in response to leading, yes-or-no questions that were essentially attorney argument parading as expert testimony, and because the procured testimony is unreliable in that it lacked foundation and was speculative. Specifically, Petitioner requests exclusion of Ex. 1054 at 745:4–:8, 745:15–746:1, 746:13–747:4, 747:11–:16, 747:22, 748:2, 749:10–:11, 749:17–:21, and 750:23–751:3.



II. Legal Authority

In general, the Federal Rules of Evidence apply in this proceeding. 37 C.F.R. 42.62(a). Federal Rule of Evidence 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Federal Rule of Evidence 611(b) provides: "Cross examination should not go beyond the subject matter of the direct examination"

"Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. . . . " Fed. R. Evid. 611(c);

SkinMedica, Inc. v. Histogen Inc., 727 F.3d 1187, 1209–10 (Fed. Cir. 2013)

(finding an expert's brief responses to leading questions unhelpful); Waddington

North Am., Inc. v. Sabert Corp., No. 09-4883, 2011 U.S. Dist. LEXIS 86632, at

*46–*50 (D. N.J. Aug. 5, 2011) (explaining that if "a witness cannot recall the events and has difficulty answering an open-ended question, a [trier of fact] is entitled to find that testimony not credible. Leading questions rob the [trier of fact] of the ability to make that determination. Repeated leading questions cause

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-2-



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