IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

Anascape, Ltd.,	
Plaintiff,	
v.	Civil Action No. 9:06-cv-158-RC
Microsoft Corp., and Nintendo of America, Inc.,	JURY TRIAL REQUESTED
Defendants.	

PLAINTIFF ANASCAPE, LTD.'S REPLY BRIEF SUPPORTING ITS MOTION TO COMPEL PRODUCTION OF SETTLEMENT AND LICENSE AGREEMENTS FROM DEFENDANT MICROSOFT CORP.

Under the Local Rules of the Eastern District, Microsoft's agreements with Immersion must be produced. Microsoft's Response focuses on *admissibility*, rather than *relevance*. Admissibility is a fight for another day. Anascape has shown multiple reasons why the contested Agreements deserve to be considered by Anascape's counsel in the preparation, evaluation, and trial of the claims in this lawsuit. Whether or not the Agreements are admissible, under L.R. CV-26(d), Microsoft must produce these relevant agreements.

Anascape has recently located publicly-available versions of certain agreements entered into contemporaneously with the Immersion/Microsoft settlement, which were filed by Immersion with the SEC. Anascape has not yet had an opportunity to review the minutiae of these agreements, but it appears that various sections and terms in the attached versions of those agreements have been redacted. Microsoft and Immersion entered into (1) a settlement agreement (Ex. P); (2) a license agreement (Ex. Q); (3) a debenture agreement (Ex. R); (4) a stock purchase agreement, by which it appears that Microsoft purchased an interest in

Immersion, (Ex. T); and (5) a sublicense agreement, by which it appears that Microsoft may sublicense Immersion's technology to third parties (Ex. U) (collectively, "the Agreements"). Anascape has not been able to locate these Agreements in Microsoft's production, and Anascape respectfully requests that the Court require production of an unredacted version of each of the Agreements.[1]

I. Admissibility Aside, Anascape Deserves to Consider Unredacted Versions of the Agreements in Evaluating the Anascape/SCEA Agreement and the 1999 Microsoft/Immersion Agreement.

Microsoft has not controverted that it may mischaracterize the Anascape/SCEA Agreement, or that Anascape may use the 1999 Microsoft/Immersion Agreement to support its damages theory. As explained in its brief, Anascape deserves to review unredacted versions of the Agreements to (1) evaluate its characterization of the structure of the Anascape/SCEA Agreement, and (2) to provide context to the earlier Microsoft/Immersion Agreement, especially to the extent that any terms change between the two agreements. Whether or not the Agreements are *admissible* for any purpose, Anascape must analyze them to properly evaluate its positions vis-à-vis these unquestionably admissible agreements. For this reason alone, Microsoft must produce the Agreements under L.R. CV-26(d).

II. Microsoft May Open the Door to Admissibility of the Agreements

Even if the Court rules any particular Agreement as inadmissible during Anascape's case-in-chief, Microsoft may open the door to consideration of these Agreements. If Microsoft's corporate representatives or damages experts make statements about Microsoft's licensing

[1] Additionally, if the Court grants Anascape's Motion, Anascape reserves the right to seek further discovery regarding the subject matter of the Agreements.

practice or usual agreement structure that are inconsistent with the terms of the Agreements, Anascape would likely attempt to introduce a particular Agreement to impeach those statements.

For example, Microsoft may attempt to characterize haptic technology as "last-generation," or suggest that vibration is an unimportant feature in game controllers. To rebut this, Anascape may attempt to introduce: (1) the stock purchase agreement, to show that Microsoft purchased an interest in a company that focuses on haptic technologies, *see* Ex. T; and/or (2) the sublicensing agreement, to show that Microsoft contemplated that others would be interested in using haptic technologies, *see* Ex. U.[2] As another example, to the extent that Microsoft attempts to characterize patent lawsuits as improper, Anascape may attempt to show that Microsoft negotiated an interest in the litigation between Immersion and Sony, and thereby gained a financial interest in an analogous lawsuit. *See* Ex. R at 9.

Also, as noted in the opening Motion, Microsoft may argue that the jury should draw certain inferences due to the structure of the Anascape/SCEA Agreement. To the extent that Microsoft argues that the structure of the Anascape/SCEA Agreement results in specific valuations for any of Anascape's patents or Anascape's patent portfolio, Anascape may attempt to introduce the License Agreement, which shows a value of $19.9M ascribed to a license of Immersion's Patent Portfolio. *See* Ex. Q at 4.

The Agreements involve Microsoft, and relate to the same features of products at issue in this lawsuit. Due to these factors, there are multiple ways in which Microsoft could open the door to the admissibility of the Agreements. Thus, the Court should require Microsoft to produce them, because they may constitute admissible evidence.

[2] Furthermore, the Sublicensing Agreement and Stock Purchase Agreement may be independently admissible to show industry acceptance of vibration technology, whether or not Microsoft opens the door to their admission. Thus, the Court should require production of these agreements.

III. The Eastern District Requires Production of Settlement Agreements

Finally, other district courts in the Eastern District of Texas have required production of settlement agreements. *See Intergraph Hardware Techs. Co. v. Dell Comp. Corp.*, 2:02-CV-312, at 1 (E.D. Tex. June 3, 2004) (Ward, J.) (Dkt. No. 348) ("The [settlement] agreement itself is certainly relevant to certain claims and/or defenses . . .") (attached as Ex. N). Furthermore, as here, another Court in the Eastern District has suggested that a settlement agreement is more likely to be discoverable if it contains a licensing agreement. *See Soverain Software LLC v. Amazon.com, Inc.*, 6:04-CV-14 (E.D. Tex. Mar. 16, 2005) (Davis, J.) (Dkt. No. 216) (attached as Ex. O); *cf.* Pls.' Br. at 6 (citing *Rates Tech. Inc. v. Cablevision Sys. Corp.*, No. 05-CV-3583, 2006 U.S. Dist. LEXIS 76595, at *12 (E.D.N.Y. Oct. 20, 2006)). In line with this Eastern District precedent, this Court should compel production.

IV. Conclusion

The Court need not determine, for the purposes of the instant Motion to Compel, whether the Agreements are admissible for any or all purposes at trial. However, given the close relationship between the Agreements and the instant litigation, and the broad scope of discovery afforded by this Court, Anascape deserves to consider the Agreements in preparing its claims for trial, especially considering that some of the agreements show the importance of accused features in game controllers. For the reasons found here, and in its original Motion, Anascape respectfully requests that the Court grant the Motion in its entirety, and require production of the Agreements, and any other agreements associated with the Immersion/Microsoft settlement.

DATED: February 20, 2008.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF ANASCAPE, LTD.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed with the Court's ECF/PACER System on this 20th day of February, 2008, and was thereby served on all counsel using that system.

/s/ Anthony M. Garza