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

ANASCAPE, LTD.	§	
	§	Hon. Ron Clark
Plaintiff,	§	
	§	
v.	§	Civil Action No. 9:06-CV-00158-RC
	§	
MICROSOFT CORPORATION, and	§	JURY TRIAL DEMANDED
NINTENDO OF AMERICA, INC.,	§	
	§	
Defendants.	§	

MICROSOFT'S SURREPLY OPPOSING PLAINTIFF ANASCAPE, LTD.'S MOTION TO COMPEL PRODUCTION OF SETTLEMENT AND LICENSE AGREEMENTS FROM DEFENDANT MICROSOFT CORP.

I. INTRODUCTION

In support of its fishing expedition into Microsoft's confidential settlement materials, Anascape's Reply brief (a) disregards the fundamental legal standard laid out in the Federal Rules of Civil Procedure governing the scope of discovery, (b) proposes inadmissible and implausible uses of the Immersion Agreements, and (c) mischaracterizes the precedent of this Court. Because Anascape cannot show the relevance of the requested Immersion Agreements, Microsoft requests that Anascape's motion be denied.[1]

II. ANASCAPE IGNORES THE STANDARD OF RELEVANCE SET FORTH IN THE FEDERAL RULES OF CIVIL PROCEDURE

In arguing for production of the Immersion Agreements, Anascape has thus far ignored the issue of admissibility entirely, and criticizes Microsoft for addressing the inadmissibility of the Immersion Agreements "rather than" their lack of relevance. (Pl. Reply at 1-2.) What

[1] A Proposed Order denying Anascape's motion is attached as Exhibit A.

Anascape fails or declines to recognize is that relevance cannot be untethered from the issue of admissibility. Under the standard set forth in the Federal Rules of Civil Procedure, the Immersion Agreements are only relevant and discoverable if (1) they themselves constitute admissible evidence, or (2) they are reasonably calculated to lead to the discovery of other admissible evidence. Fed. R. Civ. P. 26(b)(1); *See Am. Standard Inc. v. Pfizer, Inc.*, 828 F.2d 734, 742 (Fed. Cir. 1987) ("Discovery of matter not 'reasonably calculated to lead to the discovery of admissible evidence' is outside [Rule 26's] scope.") (emphasis added). Anascape has shown neither in this case.

Anascape appears to argue that, because the scope of relevance may go beyond the scope of admissibility, it can simply ignore admissibility until "another day" and continue its fishing expedition into documents with no plausible link to admissible evidence. (Pl. Reply at 1.) This is simply not true. *Piacenti v. Gen. Motors Corp.*, 173 F.R.D. 221, 223-24 (N.D. Ill. 1997) ("The legal tenet that relevancy in the discovery context is broader than in the context of admissibility should not be misapplied so as to allow fishing expeditions in discovery.") (quoting *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992)); *Block Drug Co. v. Sedona Labs., Inc.*, No. CIV A 06-350, 2007 WL 1183828, at *1 (D. Del. Apr. 19, 2007) ("[W]hile admissibility and discoverability are not equivalent, it is clear that the object of the inquiry must have some evidentiary value before an order to compel disclosure of otherwise inadmissible material will issue.") (quoting *Bottaro v. Hatton Assoc.*, 96 F.R.D. 158, 159 (E.D.N.Y. 1982)) (emphasis added); *Gutter v. E.I. DuPont de Nemours & Co.*, No. 95-2152-CIV-GOLD, 2001 WL 36086590, at *1 (S.D. Fla. Jan 31, 2001) (Although Fed. R. Evid. 408 is aimed at admissibility, relevance under Fed. R. Civ. P. 26(b)(1) "still requires a showing that settlement-related materials must appear reasonably calculated to lead to the discovery of admissible evidence

before they may be discovered.").[2]. Because Anascape has deliberately ignored whether the Immersion Agreements are admissible or will lead to admissible evidence, it has failed to establish relevance.

III. ANASCAPE FAILS TO SHOW HOW THE IMMERSION AGREEMENTS MIGHT BE ADMISSIBLE OR LEAD TO ADMISSIBLE EVIDENCE

Anascape's Reply does not remedy its failure to identify admissible uses for the Immersion Agreements or admissible evidence to which they might plausibly lead. First, Anascape still proposes using the Immersion Agreements in support of its damages claim, which is an inadmissible purpose. (*See* Def. Resp. at 5-7.) For example, Anascape suggests it might use the Immersion Agreements as evidence of the value of haptic technology and the Immersion patent portfolio to support its contentions regarding the value of Anascape's patent(s) and its license to Sony. (Pl. Reply at 3.) Furthermore, Anascape's argument that the Immersion Agreements are relevant and discoverable because Microsoft might somehow open the door to their admissibility for some purpose is a recipe for justifying any and all discovery fishing trips. After all, almost any document could become admissible in some hypothetical factual scenario divorced from the reality of the case. This does not meet Anascape's burden to show that the Immersion Agreements are reasonably calculated to lead to admissible evidence in this case.[3]

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[2] Copies of unpublished opinions cited herein are attached as Exhibit B.

[3] Furthermore, all of Anascape's proposed "admissible" purposes to which Microsoft might hypothetically open the door are, in fact, simply ways to support Anascape's damages claim—an inadmissible purpose for the Immersion Agreements.

IV. ANASCAPE MISCHARACTERIZES EASTERN DISTRICT PRECEDENT

Anascape argues that the Eastern District of Texas "[r]equires [p]roduction of [s]ettlement [a]greements," but cites only to dicta in orders that do not support this sweeping proclamation. For example, Anascape quotes dicta from a one-paragraph order stating that a particular settlement agreement (that had already been produced) was relevant to the issues in that case, without any explanation of what the issues in that case were, nor why the settlement agreement was relevant. (Pl. Reply at 4 (citing *Intergraph Hardware Techs. Co. v. Dell Computer Corp.*, 2:202-CV-312, at 1 (E.D. Tex. June 3, 2004) (Ward, J.)).) Microsoft does not dispute that some settlement agreements may be relevant in some cases for some reason, but Anascape's citation to *Intergraph* has no bearing on the discoverability of the Immersion Agreements in this case, and certainly does not establish a blanket requirement that all settlement agreements must be produced in discovery. Anascape also cites to dicta in another order in which the Court expressly declined to rule on the issue of whether requested agreements were relevant and discoverable. (Pl. Reply at 4 (citing *Soverain Software LLC v. Amazon.com, Inc.*, 6:04-CV-14, at 2 (E.D. Tex. March 16, 2005)).) Both orders are irrelevant to the facts of this case.[4] These orders certainly do not allow Anascape to ignore its duty to identify how the Immersion Agreements are admissible in this case or might lead to other admissible evidence for this case.

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[4] Notably, however, both orders cited by Anascape endorse the policy of encouraging settlement of claims by maintaining the confidentiality of settlement-related materials. *See Intergraph*, 2:202-CV-312, at 1 (citing *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 967 (6th Cir. 2003) in support of a settlement communication privilege); *Soverain*, 6:04-CV-14, at 2 ("If mediation and settlement negotiations are not kept confidential from other parties to the litigation, parties will be less forthright in their negotiations and less likely to resolve their differences without the need for trial...[T]he Court's policy favoring mediation slightly outweighs its policy favoring broad discovery.").

V. CONCLUSION

Because Anascape seeks to compel production of evidence that is inadmissible for its intended purposes, and Anascape has not proposed any plausible scenario in which such evidence would lead to the discovery of other, admissible evidence, Microsoft respectfully requests that Anascape's motion be denied.

Respectfully submitted,

Dated: February 25, 2008

By: /s/ J. Christopher Carraway

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this the 25th day of February, 2008. Any other counsel of record will be served by first-class mail.

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