

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

ANASCAPE, LTD.

Plaintiff,

v.

MICROSOFT CORPORATION, and  
NINTENDO OF AMERICA, INC.,

Defendants.

§  
§  
§  
§  
§  
§  
§  
§  
§

Hon. Ron Clark

Civil Action No. 9:06-CV-00158-RC

**DEFENDANTS' OBJECTIONS AND MOTION TO PRECLUDE  
TESTIMONY BY MARK BALDWIN AND MEMORANDUM IN SUPPORT**

DEFENDANTS' OBJECTIONS AND MOTION TO PRECLUDE  
TESTIMONY BY MARK BALDWIN AND MEMORANDUM IN SUPPORT

## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
MOTION.....	1
SUMMARY .....	1
UNDISPUTED MATERIAL FACTS .....	2
ISSUE PRESENTED.....	3
ARGUMENT .....	3
I. ANASCAPE MUST SHOW THAT MR. BALDWIN’S TESTIMONY WOULD BE ADMISSIBLE AT TRIAL .....	3
II. MR. BALDWIN DID NOT APPLY RELIABLE METHODS, RELIABLY .....	4
III. MR. BALDWIN FAILED TO CONSIDER THE MOST IMPORTANT DATA: THE PATENT AND THE PRIOR ART .....	6
IV. MR. BALDWIN’S REPORT IS IRRELEVANT TO DAMAGES .....	8
V. HIS VAGUE VIEWS ARE SO UNDEFINED AS TO BE MEANINGLESS.....	9
VI. MR. BALDWIN IS NOT AN EXPERT IN DESIGNING CONTROLLERS .....	9
VII. MR. BALDWIN RELIES ON IMPROPER “EVIDENCE” .....	10
CONCLUSION.....	10

## **TABLE OF AUTHORITIES**

### **Page**

#### **Cases**

<i>Aro Mfg. Co. v. Convertible Top Replacement Co.</i> , 365 U.S. 336 (1961).....	4, 9
<i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579 (1993).....	2, 4, 9
<i>Georgia Pacific v. U.S. Plywood Corp.</i> , 318 F. Supp. 116 (S.D.N.Y. 1970), <i>aff'd</i> , 446 F.2d 295 (2d Cir. 1971) .....	5, 8, 9
<i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137 (1999).....	3
<i>Mathis v. Exxon Corp.</i> , 302 F.3d 448 (5th Cir. 2002) .....	4
<i>Moore v. Ashland Chem. Inc.</i> , 151 F.3d 269 (5th Cir. 1998) .....	4
<i>Taylor Pipeline Constr., Inc. v. Directional Rd. Boring, Inc.</i> , 438 F. Supp. 2d 696 (E.D. Tex. 2006).....	10

#### **Statutes**

35 U.S.C. § 102.....	6
----------------------	---

#### **Rules**

Fed. R. Evid. 402 .....	1, 3, 5
Fed. R. Evid. 403 .....	1, 3, 5
Fed. R. Evid. 602 .....	1, 3
Fed. R. Evid. 702 .....	passim
Fed. R. Evid. 703 .....	1, 3, 10

## **MOTION**

Plaintiff has served an “expert report” of Mr. Mark Baldwin, entitled “Viability and Value of Game Controller Features,” dated February 11, 2008. (Beier Decl., Exh. 1). Defendants Microsoft Corp. and Nintendo of America, Inc. hereby object to, and therefore move the Court to exclude, all Mr. Baldwin’s proposed testimony at trial, under Fed. R. Evid. 402, 403, 602, 702, and 703. (This motion need not be addressed prior to ruling on the pending motions for summary judgment, which rulings may moot some of the issues raised herein.)

## **SUMMARY**

Mr. Baldwin’s report does not discuss the patent about to be tried (the ‘700 Patent), or any claim of that patent, or any claimed “invention” of that patent. Instead, Mr. Baldwin offers non-scientific musings and abstract marketing slogans on matters irrelevant to this case as a matter of law, but which misleadingly may appear important to the Jury. The following excerpts expose the flavor, and shortcomings, of his report:

“while color is not required to make great movies, it obviously is a powerful tool in the director’s palette.” (Beier Decl., Exh. 1, pg. 3);

“Simplification while retaining flexibility and power is an absolute necessity for today’s controllers.” (*Id.*, pg. 8);

“The more flexible the controller, the more options the designer has in achieving that goal [of a “natural intuitive mechanism of communication between the game player and the game.”] (*Id.*, pg. 3);

“the very act that a game uses a specific feature is ipso facto proof that the designer of the game believed that its use was valuable to the game.” (*Id.*, pg. 4); and

“the implementation of that technology can affect whether the controller is accepted by the market.” (*Id.*, pg. 4).

First, Mr. Baldwin links nothing he says to the ‘700 Patent or any of its asserted patent claims. Not once does he mention an “invention” covered by these claims. On the contrary,

perhaps unbeknownst to him, the controller features he says are valuable indisputably were combined in prior art controllers. His views on the value of features that were already combined in the prior art are irrelevant to any issue to be decided by the Jury. But, wasting time at trial with irrelevant testimony is not the biggest problem. The greater danger is that the Jury will assume that Mr. Baldwin's testimony about the value of (prior art) features somehow must bolster the '700 Patent, and mistakenly give his musings weight, tainting the entire trial.

Second, the report does not even pretend to comply with the reliability requirements of Fed. R. Evid. 702 or *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). It does not identify a single reliable principle or methodology or purport to apply any such principle or method reliably to the facts of this case. For example, Anascope could have commissioned a scientifically sound survey of controller users and/or controller designers to test the value of the claimed combinations of features, but, if it did, it has kept it secret. The purpose of Rule 702 is to insist that experts' opinions be based on such scientifically reliable data, not the subjective *ipse dixit* of an expert who has done none of the work necessary to provide reliable and testable opinions to the Jury.

Third, his report is more fairly characterized as marketing fluff, than reliable, precisely stated, scientific conclusions. "Simplification," "flexibility," "power," etc. are not helpful to the Jury. They are so vague as to be meaningless. Such testimony would be a waste of trial time.

### **UNDISPUTED MATERIAL FACTS**

1. Mr. Baldwin's report does not discuss the '700 Patent, or any claim thereof, or any claim's "invention." (Beier Decl., Exh. 1).

2. The two controller features Mr. Baldwin primarily discusses were combined in the prior art 1993 Cyberman product (*id.*, Exh. 2; *see also id.*, Exh. 5) and prior art 1993 PCT publication of Mr. Armstrong (*id.*, Exh. 3).

3. Mr. Baldwin did not perform, or rely upon, any scientific survey of controller designers or users. (*See id.*, Exh. 1).

4. Mr. Baldwin presents no evidence that it was impossible to conduct a scientifically sound and reliable survey of controller designers and/or users to test the relative value of a controller having the entire claimed combination of features, versus alternative designs lacking one or more of those features. (*See id.*, Exh. 1).

### **ISSUE PRESENTED**

Whether Mr. Baldwin's testimony, as stated in his report, satisfies the admissibility requirements of Fed. R. Evid. 402, 403, 602, 702, and 703, vis-à-vis any issue of fact to be tried in the upcoming trial.

### **ARGUMENT**

#### **I. ANASCAPE MUST SHOW THAT MR. BALDWIN'S TESTIMONY WOULD BE ADMISSIBLE AT TRIAL**

As a general rule, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of that matter." Fed. R. Evid. 602. A narrow exception to this rule is available to "expert" testimony if each of the following conditions is met: (1) it will help the trier of fact understand evidence or determine a fact in issue, (2) the witness is qualified as an expert, (3) it is based on sufficient data, (4) it results from reliable principles and methods, and (5) those principles and methods have been applied reliably to the facts. Fed. R. Evid. 702.

In evaluating whether an expert reliably applied reliable principles and methods to the facts of the case, the courts consider (among other things): 1) whether the methodology can and has been tested, (2) whether the methodology is subject to peer review, (3) the potential rate of error, and (4) the general acceptance of the methodology. *See* Fed. R. Evid. 702 advisory comm. notes. Mere *ipse dixit* is inadmissible. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999); Fed. R. Evid. 702, advisory comm. notes, 2000 Am. ("The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'") (citation omitted). The knowledge referred to in Rule 702 "implies a grounding in the methods and procedures of

science” that is “more than subjective belief or unsupported speculation.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993).

As Mr. Baldwin’s sponsor, Anascope must show by a preponderance of the evidence that his testimony satisfies Rule 702. *Mathis v. Exxon Corp.*, 302 F.3d 448, 459-60 (5th Cir. 2002); Fed. R. Evid. 702 advisory comm. notes. The party “seeking to have the district court admit expert testimony must demonstrate that the expert’s findings and conclusions are based on the scientific method, and, therefore, are reliable. This requires some objective, independent validation of the expert’s methodology. The expert’s assurances that he has utilized generally accepted scientific methodology is insufficient.” *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 276 (5th Cir. 1998).

## **II. MR. BALDWIN DID NOT APPLY RELIABLE METHODS, RELIABLY**

As with most issues in a patent case, the starting point here is the asserted patent claims. The asserted claims of the ‘700 Patent are combination claims. Each recites a specific combination of features of a controller (as well as the controller’s use in a particular manner). As a matter of law, such a combination patent claim covers only the entire combination of recited elements and not some partial subset: “[i]f anything is settled in the patent law, it is that the combination patent covers only the totality of the elements in the claim and that no element, separately viewed, is within the grant.” *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 344 (1961). For example, claim 15 (*see, e.g.*, Beier Decl., Exh. 4, pg. 2) covers only a 3D graphics controller having each of the following elements (stated in general terms):

- (a) one element allowing two axes of input, to activate four uni-directional sensors used to control a television based game;
- (b) two elements, each to activate two bi-directional proportional sensors used to control the game;
- (c) an independent, finger-depressible button sensor that creates on/off data used to control the game;

(d) two pivotal buttons, each to activate sensor capable outputting proportional signal used to control the game; and

(e) active tactile feedback vibration provided by an offset weight and motor. (Beier Decl., Exh. 4, at col. 35, lines 27-67).

Mr. Baldwin's report is premised on a defiance of this principle of patent law. As a result, he has not applied reliable principles and methods as reliably and as rigorously to the facts of this case as would be expected by experts in the field of game controller design. Given the legal nature of a combination patent claim, a true expert applying reliable methods at the very least would have studied the asserted patent claims, compared their total combination of features to the closest prior art, and personally performed (or least studied) scientifically sound surveys of the relative value of the claimed combinations vis-à-vis the closest prior art or substitute designs. This legally and scientifically sound study then might have fairly been relied upon by an accounting expert in valuing "the patented invention," as part of the reasonable royalty analysis under *Georgia Pacific v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970), *aff'd*, 446 F.2d 295 (2d Cir. 1971). Mr. Baldwin, however, did none of this.

The body of Mr. Baldwin's report does not once mention the '700 Patent, or this Court's construction of the disputed claim terms thereof. His only mention of the '700 Patent is in a long list of documents that Mr. Baldwin "reviewed." (This list does not include the Court's construction of the '700 Patent, or its Patent Office file.) Mr. Baldwin never mentions the combination of elements covered by any of the asserted patent claims of the '700 Patent, and thus never discusses any "invention" patented by Mr. Armstrong that is now on trial. This failure to consider the "invention" covered by these combination claims is reason enough to exclude the entirety of Mr. Baldwin's proffered testimony. Testimony about the supposed value of controller features that are not patented by the asserted patent, is not relevant to any issue in this case, and is destined to mislead the Jury and taint the trial. *See* Fed. R. Evid. 402, 403.

Mr. Baldwin and Anascape have no excuse for ignoring the '700 Patent and its claims. Surely he could have been instructed on the meaning of a combination patent claim, read these



combination claims and the Court’s pertinent claim construction rulings, and then considered whether the “totality of the elements in the claim” had value relative to the closest controller designs lacking that totality. But he did not do any of that.

### **III. MR. BALDWIN FAILED TO CONSIDER THE MOST IMPORTANT DATA: THE “PATENTED INVENTION” AND ITS PRIOR ART**

Instead of addressing the patent in suit, Mr. Baldwin discusses isolated controller features in the abstract. Two he emphasizes are “Six Axis Control” (which he does not define precisely) and “Vibration Feedback.” Not only are these features not the patented “invention,” but—as shown below— indisputably they were combined together in prior art controller designs. That he (perhaps inadvertently) discusses the value of prior art features instead of the patented “invention” provides two more Rule 702 grounds for excluding Mr. Baldwin.

First, Rule 702 requires that “the testimony is based upon sufficient facts or data.” Studied ignorance does not clear the Rule 702 gate. But, Mr. Baldwin does not indicate he’s even heard of this prior art, or bothered to read the ‘700 Patent’s Patent Office file which discusses some of it. Surely, an expert in controller design wishing to reach reliable conclusions on the value of certain controller features would at the very least try to learn which prior art controllers had those features and how they fared. Mr. Baldwin did not.

Second, Rule 702 requires that the testimony assist the Jury in determining a fact in issue or in understanding the evidence. But, an abstract discussion of the supposed value of features that indisputably were found in the prior art, would not help the Jury decide any fact issue in this case, or understand any evidence. On the contrary, it surely would confuse the Jury into thinking that somehow this patent deserves credit for what’s in the prior art. Patent cases are complicated enough; there is no good reason to risk misleading the Jury in this fashion.

Below are two examples of this prior art, each from 1993. Both indisputably qualify as prior art to the ‘700 Patent (filed in November, 2000, but which Anascape seeks to backdate to July, 1996). In 1993, Logitech published an advertising flyer for the Logitech “CyberMan 3D Controller.” (Beier Decl., Exh. 2, pg. 1.)



CyberMan™ 3D Controller

CyberMan was a 6-DOF controller with an input member handle mounted on a base and three finger-depressible buttons mounted in the head of the handle to provide additional game control:

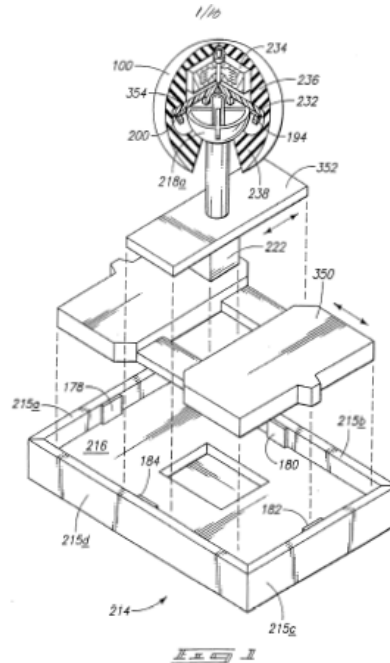
**Take advantage of full 3D motion** The three-button head of CyberMan sits on a post set into the base. To change X and Y motion, slide the post from side to side or forward and backward. For up and down motion, simply pull up or push down on the CyberMan head. Pivot the head forward or backward to change pitch. Twist the head left or right to manipulate yaw. Tilt the head from side to side for roll. CyberMan makes it easy to get the power and freedom of true 3D control.

(*Id.*, pg. 2 (emphasis in original)).

In prosecuting the '700 Patent in the Patent Office, Armstrong admitted that CyberMan was sold in 1993 (Beier Decl., Exh. 5, pg. 3), and that it had a motor and offset weight for providing active tactile feedback to the hand of the user (*id.*, pg. 4).

Similarly, Mr. Armstrong's September 16, 1993, prior art PCT publication (Beier Decl., Exh. 3) combined a 6-DOF controller with an offset weight/motor active tactile feedback: "An optional tactile feedback means 234, such as a small electric motor with an offset weight on its

shaft, can be fixed either to upper platform 232 or to the inside of handle upper hemisphere 236.” (*Id.*, at 9:16-18). See Fig. 1 below.



**IV. AS MR. BALDWIN’S REPORT IGNORES THE “PATENTED INVENTION,” IT IS IRRELEVANT TO THE VALUATION THEREOF**

Anascape may argue that Mr. Baldwin did not have to consider the ‘700 Patent or its alleged invention or its prior art, because he is being offered merely to provide general background information for its damages expert, Mr. Bratic, to rely upon. Mr. Bratic’s report does make one mention of Mr. Baldwin’s report (in discussing factor 9 of the *Georgia Pacific* “reasonable royalty” analysis): “Mr. Baldwin has stated that ‘Two of the most important innovations in controllers have been the advent of six axis control and vibration feedback. Both are very powerful tools that are invaluable to the development of new and powerful games in one of the fastest growing and largest entertainment media in the world today.’” (Bratic Report at pgs. 42-43, n. 152). But, what Mr. Baldwin says about these features is legally and logically irrelevant to damages, for at least two reasons.

First, as noted, the law establishes that these patent claims “cover[] only the totality of the elements in the claim and that no element, separately viewed, is within the grant.” *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 344 (1961). To allow Mr. Baldwin to testify about these features and then allow Mr. Bratic to rely on that testimony in valuing the claimed “inventions,” would violate this basic principle of patent law governing combination claims.

Second, as noted, the features Mr. Baldwin addresses (and Mr. Bratic cites) were in the prior art, and were combined together in prior art controllers. Thus, nothing Mr. Baldwin (or Mr. Bratic) says about these features concerns either the patented “invention,” or the value of any difference between that alleged invention and the prior art. This makes his testimony irrelevant to damages, and destined to mislead the Jury and taint the trial. For example, factor 9 of *Georgia Pacific* concerns the “patent property,” i.e., the claimed apparatus, not bits and pieces of the claimed apparatus. The same is true of *Georgia Pacific* factor 10—it concerns “the patented invention,” i.e., the claimed apparatus.

#### **V. MR. BALDWIN’S OPINIONS ARE SO UNDEFINED AS TO BE MEANINGLESS**

Another factor in determining whether a proposed expert’s opinion will assist the trier of fact is whether it “can be (and has been) tested.” *Daubert*, 509 U.S. at 593. Much of what Mr. Baldwin says, however, is so vague as to be meaningless. At times, his report reads like a vapid ad for a new car: “flexible controllers give game designers more options.” (Beier Decl., Exh. 1, pg. 3), “the implementation of that technology can affect whether the controller is accepted by the market” (*id.*, pg. 4), and “simplification while retaining flexibility and power” (*id.*, pg. 8).

#### **VI. MR. BALDWIN IS NOT AN EXPERT IN DESIGNING CONTROLLERS**

Mr. Baldwin appears to have expertise in the design of certain video games, but that is not the subject of this suit. The ‘700 Patent and this suit involves the design of controllers.

It does not appear from his report that Mr. Baldwin has ever designed a controller, or advised anyone designing a controller, or sold a controller. Apparently, he lacks the controller-design experience to qualify even as a person of “ordinary skill in the art” (as defined by the

Court (Dkt. No. 159, at 2)), not to mention an expert in this art. Yet, he wishes to tell the Jury that certain controller features “are essential to the manufacturer’s future sales” (Beier Decl., Exh. 1, pg. 9), and the like. The Court can and should exclude his testimony for this additional reason. “[A] district court should refuse to allow an expert witness to testify if it finds that the witness is not qualified to testify in a particular field or on a given subject.” *See, e.g., Taylor Pipeline Constr., Inc. v. Directional Rd. Boring, Inc.*, 438 F. Supp. 2d 696, 706 (E.D. Tex. 2006). (citing *Wilson v. Woods*, 163 F.3d 935, 937 (5th Cir. 1999)).

## **VII. MR. BALDWIN RELIES ON IMPROPER “EVIDENCE”**

Most of the documents Mr. Baldwin cites are inadmissible and fail to meet the requirements of Fed. R. Evid. 703: “If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.” Anascope has not and cannot show that experts in valuing hand-held controller designs reasonably rely upon the types of materials cited by Mr. Baldwin.

## **CONCLUSION**

For the foregoing reasons, the Court should preclude all of Mr. Baldwin’s proposed testimony at trial.

Respectfully submitted,

Dated: March 3, 2008

By: /s/ John D. Vandenberg  
J. Christopher Carraway (admitted *pro hac vice*)  
[christopher.carraway@klarquist.com](mailto:christopher.carraway@klarquist.com)  
Joseph T. Jakubek (admitted *pro hac vice*)  
[joseph.jakubek@klarquist.com](mailto:joseph.jakubek@klarquist.com)  
Stephen J. Joncus (admitted *pro hac vice*)  
[stephen.joncus@klarquist.com](mailto:stephen.joncus@klarquist.com)  
Richard D. McLeod (Bar No. 24026836)  
[rick.mcleod@klarquist.com](mailto:rick.mcleod@klarquist.com)  
Derrick W. Toddy (admitted *pro hac vice*)  
[derrick.toddy@klarquist.com](mailto:derrick.toddy@klarquist.com)

John D. Vandenberg (admitted *pro hac vice*)  
[john.vandenberg@klarquist.com](mailto:john.vandenberg@klarquist.com)  
KLARQUIST SPARKMAN, LLP  
121 S.W. Salmon Street, Suite 1600  
Portland, Oregon 97204  
Telephone: 503-595-5300

J. Thad Heartfield (Bar No. 09346800)  
[thad@jth-law.com](mailto:thad@jth-law.com)  
Law Offices of J. Thad Heartfield  
2195 Dowlen Road  
Beaumont, Texas 77706  
Telephone: 409-866-3318  
Facsimile: 409-866-5789

Clayton E Dark Jr. (Bar No. 05384500)  
[clay.dark@yahoo.com](mailto:clay.dark@yahoo.com)  
Clayton E Dark Jr., Law Office  
207 E Frank Ave # 100  
Lufkin, TX 75901  
Telephone: 936-637-1733

Stephen McGrath, Esq. (admitted *pro hac vice*)  
MICROSOFT CORPORATION  
One Microsoft Way, Building 8  
Redmond, Washington 98052-6399  
Telephone: 425-882-8080  
Facsimile: 425-706-7329

*Attorneys for Defendant Microsoft Corporation*

By: /s/ James S. Blank

Robert J. Gunther, Jr. (*pro hac vice*)  
[robert.gunther@lw.com](mailto:robert.gunther@lw.com)  
James S. Blank (*pro hac vice*)  
[james.blank@lw.com](mailto:james.blank@lw.com)  
LATHAM & WATKINS LLP  
885 Third Avenue, Suite 1000  
New York, NY 10022-4802

Robert W. Faris (*pro hac vice*)  
[rwf@nixonvan.com](mailto:rwf@nixonvan.com)  
Joseph S. Presta (*pro hac vice*)  
[jsp@nixonvan.com](mailto:jsp@nixonvan.com)  
NIXON & VANDERHYE P.C.  
901 North Glebe Road, 11<sup>th</sup> Floor  
Arlington, VA 22203

Lawrence L. Germer  
[lgermer@germer.com](mailto:lgermer@germer.com)  
Charles W. Goehringer, Jr.  
[cgoehringer@germer.com](mailto:cgoehringer@germer.com)  
GERMER GERTZ, L.L.P.  
550 Fannin, Suite 500  
Beaumont, TX 77713

*Attorneys for Defendant Nintendo Of America Inc.*

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 3rd day of March, 2008, the foregoing pleading was electronically filed with the Court. Pursuant to Local Rule CV-5(a)(3), this constitutes service on Anascape's counsel of record:

By: /s/ John D. Vandenberg

John D. Vandenberg

[john.vandenberg@klarquist.com](mailto:john.vandenberg@klarquist.com)

KLARQUIST SPARKMAN, LLP

121 S.W. Salmon Street, Suite 1600

Portland, Oregon 97204

Telephone: 503-595-5300

Facsimile: 503-595-5301