

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.

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Hon. Ron Clark

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

**DEFENDANTS' REPLY IN SUPPORT OF THEIR OBJECTIONS
AND MOTION TO PRECLUDE TESTIMONY BY MARK BALDWIN**

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AND MOTION TO PRECLUDE TESTIMONY BY MARK BALDWIN

I. ANASCAPE DISPUTES NO MATERIAL FACT

There is no need for an evidentiary hearing on this Motion. The material facts are conceded or uncontested, including:

- Mr. Baldwin does not tie his testimony to the facts of this case (Jt. Mot. at 1-2; Response at 9);
- Mr. Baldwin does not discuss the ‘700 Patent or any invention patented thereby (Jt. Mot. at 2, 5; Response at 8-9);
- Instead, he discusses features that were combined together in prior art controllers (although Mr. Baldwin may not realize that) (Jt. Mot. at 2, 6-8; Response at 8-9);
- Mr. Baldwin did not try to learn which prior art controllers had the controller features he discusses, or how those controllers fared (Jt. Mot. at 6);
- Mr. Baldwin gives opinions on matters that could have been reliably tested in a survey, but were not (Jt. Mot. at 2-3, 5; Response at 8); and
- Mr. Baldwin is not an expert in controller design, and does not have even ordinary skill in the art (Jt. Mot. at 9-10; Response at 6 n. 3).

II. ANASCAPE HAS NOT SHOWN ADMISSIBILITY UNDER FED. R. EVID. 402, 403, 602, 702, OR 703

Mr. Baldwin’s testimony is irrelevant and unreliable; the “evidence” he relies upon is improper; and the risk of confusion greatly outweighs any probative value.

Irrelevant: Anascape has identified no issue to be decided by the Jury on which this testimony is relevant. Mr. Baldwin opines on the supposed value of some controller features. It is undisputed, however, that these features were found, together, in prior art controller designs. (See Jt. Mot. at 6-8). And, it is undisputed that this combination of features is not covered by the claims of the patent in suit. (See *id.* at 4-5). Anascape offers no explanation of how the value of

unpatented, prior art features—free to be used by anyone—has any relevance to any element of a claim, counterclaim, or defense in this case. And, it concedes through its silence that Mr. Baldwin’s testimony is not relevant to damages under *Georgia Pacific*. (Jt. Mot. at 8-9).

Unreliable: Rule 702 mandates that the testimony of all experts, not just scientists, satisfy each of these three reliability mandates: sufficient data + reliable method + applied reliably to the facts of this case. (Jt. Mot. at 3-4). Anascape offers no defense of Mr. Baldwin’s testimony on any of these three counts. On the contrary, Anascape leaves undisputed (*id.* at 2-3) that Mr. Baldwin did not review the asserted patent claims, compare their total combination of features (which combination is all that they patent) to the closest prior art, and personally perform or study scientifically sound surveys of the relative value of the claimed combinations vis-à-vis the closest prior art or substitute designs. (See Jt. Mot. at 2-3, 5). In other words, Anascape could have mustered admissible evidence on this topic, but did not bother to do so.

Improper Evidence: Defendants noted Anascape’s burden to show that the evidence cited by Mr. Baldwin is admissible or of a type reasonably relied upon by experts in the particular field in forming opinions upon the subject. (Jt. Mot. at 10). Anascape again has no answer.

Confusing: Even if the Court finds some relevance to some issue of something said by Mr. Baldwin, any probative value is outweighed by the potential for jury confusion. (See Jt. Mot. at 5-6). Anascape’s Response punctuates this lack of value by saying that there is “no need” for Mr. Baldwin’s testimony. (Response at 6). And, Anascape highlights the risk of confusion by saying his testimony is offered to show the value of the patented invention (*id.* at 6), despite conceding that Mr. Baldwin is not analyzing the patented invention (*id.* at 7, 9). This is the crux of the problem. There is a real danger that unscientific musings about unpatented features in the public domain (prior art) will be confused by jurors, with Anascape’s assistance, as testimony about the patented “invention.”

III. THE COURT SHOULD NOT CONSIDER POINTS IN A SUR-REPLY THAT COULD HAVE BEEN MADE IN THE RESPONSE, BUT WERE NOT

Anascape leaves most of Defendants' points unanswered. Anascape should not be permitted to use its sur-reply on this motion to argue points it could have argued in its response but did not—thereby avoiding rebuttal by Defendants. For example, Defendants' motion showed that Mr. Baldwin's testimony is about the alleged value of features combined together in prior art controllers, and thus as a matter of law has no relevance to damages. (*Id.* at 6-8). Anascape's Response does not disagree. It should not be permitted to disagree for the first time in its Sur-Reply.

IV. CONCLUSION

Defendants know that problems with some expert testimony can be exposed to a watchful juror through skillful cross examination. But that was true when the rules of evidence were adopted, including the mandates for relevance and reliability. In essence, Anascape asks the Court to disregard these rules of evidence, and instead trust that cross examination can fully debunk the unsubstantiated *ipse dixit* of a witness presented to the Jury as an expert. That, of course, would abandon the Court's gate-keeping duty. (*See* Jt. Mot. at 3-4).

The Court should preclude all of Mr. Baldwin's proposed testimony at trial.

Respectfully submitted,

Dated: March 24, 2008

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 24th 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:

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