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	§	
NINTENDO OF AMERICA, INC.,	§	
	§	
Defendants.	§	

DEFENDANTS REPLY IN SUPPORT OF JOINT MOTION TO EXCLUDE PORTIONS OF WALTER BRATIC'S OPINIONS AS INADMISSIBLE UNDER FRE 702

SUMMARY

Defendants disagree with Walter Bratic's opinions—but that is not the basis for their *Daubert* motion. For Mr. Bratic's opinions to be admissible, Anascape must demonstrate that they are sufficiently reliable to satisfy the admissibility established by FED. R. EVID. 702. Anascape's response does not meet its burden to show that the challenged portions of Mr. Bratic's report are based on reliable "principles and methodolog[ies]."

ARGUMENT

I. DEFENDANTS' OBJECTIONS GO TO PRINCIPLES AND METHODOLOGY

Defendants' motion is based on the failure of Mr. Bratic to base his opinions on reliable "principles and methodology." *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 594-95 (1993). As noted in Anascape's cite to *Daubert*, the "principles and methodology" employed by the expert is the sole focus for the Court. (Dkt. No. 231 at 1.) Neither Mr. Bratic's report, nor Anascape's response, show how Mr. Bratic employed reliable "principles and methodolog[ies]" in the four areas challenged by Defendants.

II. ANASCAPE DOES NOT DISPUTE THAT MR. BRATIC IS NOT QUALIFIED TO OFFER OPINIONS ON THE IMPORTANCE OF THE TECHNOLOGY

Anascape does not contend that Mr. Bratic is qualified to reach opinions on the importance of the technology. Indeed, Anascape asserts that Mr. Bratic will not offer opinions on the importance of the technology. (Dkt. No. 231 at 3-4.) The Court should so restrict Mr. Bratic at trial.

Defendants are concerned that, while Anascape says that he will not offer such opinions, Mr. Bratic's report is chock-full of opinions about the importance of the technology. (*See e.g.*, Bratic Rpt. ¶ 94 (it was "critical" for NOA and Microsoft to take a license to the '700 patent), ¶ 138 (the "technology taught by the '700 Patent is fundamentally important"), ¶¶ 76, 141 (unless

NOA and Microsoft took a license to the '700 Patent, they would be at a "competitive disadvantage").)

Apparently, Anascape contends that Mr. Bratic's Georgia-Pacific factor analysis allows him to testify concerning opinions as to which he would otherwise be unqualified to give. That is not the case. Under FED. R. EVID. 702, Anascape is required to show that Mr. Bratic engaged in a reliable methodology. *Georgia-Pacific* factor no. 13, for example, is addressed to the portion of the profit that should be credited to the invention as distinguished from the non-patent elements. Anascape fails to show that Mr. Bratic followed any "principles and methodolog[ies]," much less reliable ones. (Dkt. No. at 56-57.) Rather, he just summarily concludes that the '700 patent is "fundamentally important."

If another expert had reached opinions (that it was "critical" for Microsoft and NOA to license, and the'700 Patent was "fundamentally important") in a manner that satisfied FED. R. EVID. 702, then Mr. Bratic could utilize such opinions in his Georgia-Pacific analysis. However, Mr. Bratic cannot reach these opinions on his own because he is not qualified in that area and he has not applied any reliable "principles and methodology."

The opinions (that it was "critical" for Microsoft and NOA to license, and the '700 Patent was "fundamentally important") are not mere factual observations or assumptions as Anascape contends. (*See* Dkt. No. 231 at 4.) It is attorney argument offered under the guise of an opinion. If spoken by an individual elevated by the Court to the position of an expert, these statements would be highly prejudicial.

Rule 702 exists because cross-examination is insufficient to expose the unreliability of opinions that are not based on reliable "principles and methodology" and for which the expert is unqualified. Before such opinions may be offered, Anascape must show that they were formed

in a manner that satisfies FED. R. EVID. 702. In this case, Anascape makes no showing that Mr. Bratic is qualified or followed reliable "principles and methodolog[ies]" to reach these opinions.

III. FAILURE TO ADDRESS NON-INFRINGING ALTERNATIVES

Anascape argues that it did discuss non-infringing controllers. (*See* Dkt. No. 231 at 5.) Anascape missed the point. It is required to value the incremental advantages of the alleged invention in relation to non-infringing alternatives. *See Riles v. Shell Exploration & Prod. Co*., 298 F.3d 1302, 1312 (Fed. Cir. 2002). Instead, Mr. Bratic applied the royalty rate to the *entire value* of the hand controller. As explained in *Riles*, the value of the entire hand controller bears no relation to the incremental advantages of the alleged invention over the prior art. *See id*. Accordingly, Anascape has not shown how Mr. Bratic followed reliable "principles and methodolog[ies]" in his analysis.

IV. PRICE OF BUNDLED CONTROLLERS

Mr. Bratic made no analysis of the value of the bundled controllers. He merely states the mathematical calculation that he made and fails to show that he applied reliable "principles and methodolog[ies]."

Anascape contends that Mr. Bratic's approach is "an entirely reasonable assumption." (Dkt. No. 231 at 3.) Nothing in Mr. Bratic's reports shows that it is. There is nothing to show the Court that Mr. Bratic followed reliable "principles and methodolog[ies]." Nor is this a "resolution" of competing facts. (*See id*.) Mr. Bratic did no analysis—he just picked a number for the royalty base of bundled controllers out of thin air. Anascape has not satisfied its burden to show that Mr. Bratic's opinion is the result of reliable "principles and methodolog[ies]."

V. NO METHOLOGY FOR PICKING LICENSES

Anascape does not respond to Section III of Defendants' motion that Mr. Bratic did not apply reliable "principles and methodolog[ies]" to the selection of comparable licenses. For the

reasons stated in Defendants' motion, there is nothing to show that Mr. Bratic applied reliable "principles and methodolog[ies]" to the selection of comparable licenses.

CONCLUSION

For the reasons stated above, Microsoft and Nintendo respectfully request that the Court grant Defendants' motion and exclude portions of Mr. Bratic's opinions and testimony as set forth in the Proposed Order.

Respectfully submitted,

Dated: March 24, 2008

By: /s/ Stephen J. Joncus_____

J. Christopher Carraway (admitted *pro hac vice*)
christopher.carraway@klarquist.com
Joseph T. Jakubek (admitted *pro hac vice*)
joseph.jakubek@klarquist.com
Stephen J. Joncus (admitted *pro hac vice*)
stephen.joncus@klarquist.com
Richard D. Mc Leod (Bar No. 24026836)
rick.mcleod@klarquist.com
Derrick W. Toddy (admitted *pro hac vice*)
derrick.toddy@klarquist.com
John D. Vandenberg (admitted *pro hac vice*)
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
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
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

Dated: March 24, 2008

By: /s/ Robert J. Gunther, Jr. (with permission by Stephen J. Joncus)

Robert J. Gunther, Jr.
James S. Blank
LATHAM & WATKINS LLP
885 Third Avenue, Suite 1000
New York, NY 10022-4802

Robert W. Faris
Joseph S. Presta
NIXON & VANDERHYE P.C.
901 North Glebe Road, 11th Floor
Arlington, VA 22203

Lawrence L. Germer
Charles W. Goehringer , Jr
GERMER GERTZ, L.L.P.
550 Fannin, Suite 500
Beaumont, TX 777013

Attorneys for Defendant Nintendo of America, Inc.

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule CV-7(h), counsel for Microsoft conferred with opposing counsel regarding this matter in an attempt to resolve it without court intervention. Anascape opposes the relief sought in this motion.

By:/s/ Stephen J. Joncus
Stephen J. Joncus

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 24th day of March, 2008. Any other counsel of record will be served by first-class mail.

By:/s/ Stephen J. Joncus
Stephen J. Joncus