

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

**ANASCAPE, LTD.,**

**Plaintiff,**

**vs.**

**MICROSOFT CORPORATION and  
NINTENDO OF AMERICA, INC.,**

**Defendants.**

**Civil Action No. 9:06-CV-158-RC**

**JURY TRIAL**

**PLAINTIFF'S SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTIONS  
TO EXCLUDE TESTIMONY BY WALTER BRATIC AND MARK BALDWIN**

## I. INTRODUCTION

Plaintiff Anascape, Ltd. (“Anascape”) files this sur-reply in opposition to Defendants’ motions to exclude certain testimony of Walter Bratic and Mark Baldwin under Rule 702. [Dkt. Nos. 211, 212].

## II. ARGUMENT

### A. Walter Bratic’s Testimony is Admissible Under Rule 702.

Reading Defendants’ reply to their motion to exclude Bratic’s testimony, one might think that courts have rarely, if ever, addressed Rule 702 challenges to reasonable-royalty opinions. For Defendants cite only one arguably relevant case: *Riles v. Shell Exploration & Prod. Co.*, 298 F.3d 1302 (Fed. Cir. 2002). [Dkt. No. 238 at 4]. The expert in that case, however, did not even attempt to employ the *Georgia-Pacific* methodology. *Riles*, 298 F.3d at 1313 (“At no time did Riles present evidence that this royalty rate reflected an agreement between Shell and Riles in a hypothetical negotiation.”). Here, there is no dispute that Bratic employed the approved *Georgia-Pacific* methodology. [Dkt. No. 212 at 5; Dkt. No. 238 at 2; Bratic Rpt. ¶¶ 40-140 (filed under seal with Dkt. No. 212)]. And as the many cases cited in Anascape’s response make clear, when an expert’s reasonable-royalty opinion is grounded in “a hypothetical negotiation between the plaintiff and the accused infringers . . . disagree[ment] with some of the assumptions and analysis that [the expert] used in constructing his hypothetical negotiation” will not be grounds for excluding his testimony under Rule 702. *State Contracting & Eng’g Corp. v. Condotte Am., Inc.*, 346 F.3d 1057, 1072 (Fed. Cir. 2003); [Dkt. No. 231 at 2].<sup>1</sup>

Notwithstanding this substantial case law—which Defendants do not bother to address—Defendants continue to complain about certain discrete factual observations and conclusions that Bratic “used in constructing his hypothetical negotiation.” *See State Contracting*, 346 F.3d at 1072; [Dkt. No. 238 at 2-4]. In particular, Defendants dispute Bratic’s conclusion—which

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<sup>1</sup> *See also Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1392 (Fed. Cir. 2003); *Tex. Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1219 (Fed. Cir. 2002); *Inline Connection Corp. v. AOL Time Warner Inc.*, 470 F. Supp. 2d 435, 439 (D. Del. 2007); *Freeman v. Gerber Prods. Co.*, 450 F. Supp. 2d 1248, 1262 (D. Kan. 2006).

follows six pages of supporting analysis—that it would have been important for Defendants to license the patent-in-suit in order to remain competitive. [Dkt. No. 238 at 2-3; Bratic Rpt. ¶ 94; *see also id.* ¶¶ 76-94]. This conclusion is relevant to the fifth of *Georgia-Pacific*'s fifteen factors. [Bratic Rpt. ¶ 94]. Defendants also dispute Bratic's conclusion—which follows thirteen pages of supporting analysis, and additionally cites Baldwin's confirmation—that the technology at issue was important. [Dkt. No. 238 at 2-3; Bratic Rpt. ¶ 138; *see also id.* ¶¶ 106-34]. This conclusion is relevant to the thirteenth of *Georgia-Pacific*'s fifteen factors. [Bratic Rpt. ¶ 138]. It should be clear that Defendants are not complaining about the methodology employed by Bratic—all agree that he used the approved fifteen-factor analysis. Instead, Defendants are complaining about Bratic's factual conclusions relating to two of the fifteen relevant factors. Such discrete, fact-based complaints are not grounds for exclusion of testimony under Rule 702. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 594-95 (1993); *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 249-50 (5th Cir. 2002); *Micro Chem.*, 317 F.3d at 1393; *Inline Connection*, 470 F. Supp. 2d at 439; *Freeman*, 450 F. Supp. 2d at 1262.

Defendants briefly assert two additional arguments in their reply. First, they suggest that the *Riles* case requires exclusion of Bratic's testimony. [Dkt. No. 238 at 4]. As explained above, however, the expert in *Riles* did not apply the *Georgia-Pacific* methodology. *See Riles*, 298 F.3d at 1313; [Dkt. No. 231 at 8]. That case thus has no bearing here. Second, they argue that Bratic's opinion is unreliable because “he just picked a number for the royalty base of bundled controllers out of thin air.” [Dkt. No. 238 at 4]. This is, at best, a gross overstatement. There was nothing random about the number Bratic “picked”: he used the average price of the controllers that Defendants sell separately. [Bratic Rpt. ¶ 144]. This reasonable factual assumption can hardly be considered to have “fatally infected his testimony.” *State Contracting*, 346 F.3d at 1072. As in *Pipitone*, the “fact-finder is entitled to hear [Bratic's] testimony and decide whether it should accept or reject that testimony after considering all factors that weigh on credibility, including whether the predicate facts on which [he] relied are accurate.” 288 F.3d

at 250.<sup>2</sup>

**B. Mark Baldwin’s Testimony is Admissible Under Rule 702.**

In its response, Anascape explained that Baldwin’s testimony is offered for the limited purpose of providing background information on the significance of two controller features—six-axis graphics control and vibration feedback—to the video-game industry. [Dkt. No. 231 at 9-12]. Anascape also demonstrated that this educational purpose is entirely appropriate under Rule 702; that Baldwin’s twenty-six years of specialized experience reliably supports his testimony; and that his testimony regarding the significance of two of the controller features at issue in this litigation is relevant to the case. [*Id.*]; *see also* FED. R. EVID. 702; *id.*, Notes of the Advisory Committee on Rules; *Allison v. Nibco, Inc.*, No. 9:02-CV-172-TH, 2003 U.S. Dist. LEXIS 27617, at \*8, \*11-\*12 (E.D. Tex. May 21, 2003).

In reply, Defendants address none of these very specific points. Instead, they simply parrot the same arguments made in their opening brief—arguments which are not implicated by Baldwin’s experience-based, background-related testimony. [Dkt. No. 237 at 2-3]. The answer to Defendants’ “unreliable” and “improper evidence” arguments is that Baldwin relies principally on his two-and-a-half decades of design-related experience in forming his design-related opinions. *See Allison*, 2003 U.S. Dist. LEXIS 27617, \*11-\*12; FED. R. EVID. 702, Notes of the Advisory Committee on Rules (“experience [can be] the predominant, if not sole, basis for a great deal of reliable testimony”). The answer to Defendants’ “irrelevant” and “confusing” points is that Baldwin is not presenting an element-by-element opinion on the patent-in-suit. He is testifying, in a more general manner, on the significance of two of the controller features at issue in this case. *See* FED. R. EVID. 702, Notes of the Advisory Committee on Rules (“[it can] be important in some cases for an expert to educate the factfinder about general principles”). The jury will benefit from Baldwin’s expertise, and should have no trouble understanding both

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<sup>2</sup> Defendants also assert that Anascape did “not response to Section III of Defendants’ motion.” [Dkt. No. 238 at 4]. That section, however, presented an argument concerning non-infringing alternatives, [Dkt. No. 212 at 5-6], and Anascape’s response addressed that argument. [Dkt. No. 231 at 8].

the substance of his testimony and the purpose for which it is offered. *See id.*

Defendants insist that the Court should exclude Baldwin's testimony based on the status of some alleged prior art references. [Dkt. No. 237 at 2-4]. But exactly what was or was not contained in the prior art, and exactly how the prior art relates to the patent-in-suit, represent substantive factual questions that are not appropriately resolved in the context of a Rule 702 motion. *See Daubert*, 509 U.S. at 594-95; *Micro Chem.*, 317 F.3d at 1392; *Pipitone*, 288 F.3d at 249-50; *Inline Connection*, 470 F. Supp. 2d at 439. Those are jury questions, and Defendants are wrong to suggest that the jury will be unable to distinguish between what is patented and what is unpatented. [Dkt. No. 237 at 3]. The Court should therefore decline Defendants' improper invitation "to transform a *Daubert* hearing into a trial on the merits." *Pipitone*, 288 F.3d at 250. The only two questions relevant to this motion should be: 1) whether Baldwin's twenty-six years of design-related experience reliably supports his design-related testimony; and 2) whether Baldwin's testimony concerning six-axis graphics control and vibration feedback is relevant to this case, in which those controller features play a prominent role. Both of these questions must be answered in the affirmative.<sup>3</sup>

### III. CONCLUSION

For the foregoing reasons, Anascape respectfully requests that the Court deny Defendants' motions to exclude testimony of Walter Bratic and Mark Baldwin. [Dkt. Nos. 211, 212].

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<sup>3</sup> It should be noted that, notwithstanding Defendants' suggestion to the contrary, [Dkt. No. 237 at 2], Anascape does not "concede" any "material fact" listed in Defendants' reply brief, with the exception of the second—that Baldwin's report "does not discuss the '700 Patent." [*Id.*].

DATED: April 3, 2008

Respectfully submitted,

**McKOOL SMITH PC**

/s/ Douglas A. Cawley

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**ATTORNEYS FOR PLAINTIFF  
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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who have consented to electronic service on this the 3<sup>rd</sup> day of April, 2008. Local Rule CV-5(a)(3)(A).

/s/ Anthony M. Garza  
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