

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' BRIEF IN SUPPORT OF CERTAIN GROUPS
OF SIMILAR OBJECTIONS TO PLAINTIFF'S TRIAL EXHIBITS**

Defendants Microsoft Corporation (“Microsoft”) and Nintendo of America, Inc. (“Nintendo”) file this Brief in support of their joint objections to Plaintiff Anascape’s Trial Exhibit List. Many of the objections to Anascape’s trial exhibits can be grouped into certain categories and argued together. The Court stated in its Order ruling on Blackboard’s Objections to Deposition Designations, Case No. Case No. 9:06-CV-155, Docket No. 299, that parties should phrase their objections succinctly (e.g., hearsay) in the objections chart and suggested filing an accompanying brief that categorized groups of similar objections. This brief follows that advice from the Court for seven categories of Anascape’s trial exhibits.

**A. Defendants Object to the Admission of Exhibits
Evidencing Defendants’ Foreign Sales/Profits and/or
Their Overall Sales/Profits for Unaccused Products**

Defendants’ overall revenues, profits and wealth are irrelevant to any issue in this case. Likewise, Defendants’ sales outside the United States are irrelevant. Anascape agreed to the following Motions *in Limine* excluding such evidence:

16. Exclude evidence, testimony, or reference regarding the parties' overall revenues, profits or wealth, including any evidence or argument that Anascape is seeking a small portion of either Defendants' overall revenues, profits or wealth
17. Exclude evidence, testimony, or reference regarding sales (existence, units, or revenue) of products or services outside the United States, except that Anascape may refer to Canadian and Latin American sales by Nintendo's affiliates that have passed through the United States before sale.

Defendants' Joint Motions *in Limine* (Docket No. 263), at 17 (Agreed Motions Nos. 16 and 17).

Nonetheless, Anascape includes on its exhibits list the very evidence it agreed would not be admissible. For example:

- PX 77-78—Microsoft's worldwide unit and revenue figures for accused controllers. Comparable numbers for the United States only are available and are marked as PX76, 79, so there is no excuse to introduce worldwide figures.
- PX 94—Nintendo Company, Limited (Japan)'s 2006-07 Business Report. This report describes third-party NCL's overall, worldwide sales and profits regarding all products.
- PX 113—Microsoft's 2007 Annual report. This report contains little if any information directly related to the accused controllers, but demonstrates Microsoft's revenue, profits and wealth.
- PX 17, 219-25—Microsoft's corporate profit and loss statements. These statements do not show the profit or loss for just the accused products, but do show the profit and loss for the company and some of its various divisions and units, which encompass products not accused in this case.

Admission of these types of exhibits showing sales and profit information for Microsoft, its divisions and for unaccused products, and similar exhibits for Nintendo and third party NCL, is a clear violation of the parties' agreed Motions *in Limine*. Its only real purpose can be to prejudice the jury by showing Defendants' wealth and profitability. This information is irrelevant (Rule 401, 402), and unduly prejudicial (Rule 403) and the parties have agreed it should be excluded.

This category of objections encompasses the following Anascape exhibits:

Overall and/or Foreign Sales/Profits:	PX: 13, 25, 74, 77-78, 94, 97, 102-03, 113, 185, 216, 219-20, 222-25, 270,
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	316-17, 338, 367.
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B. Defendants Object to the Admission of Exhibits Evidencing Defendants’ Pre-Suit Meetings and Communications with Mr. Armstrong or Anascape

Anascape lists numerous exhibits evidencing pre-suit communications between Mr. Armstrong and Defendants. None of these exhibits refers to the ‘700 patent or to any discussion of the ‘700 patent. Anascape admits that it did not give Defendants’ pre-suit notice of the ‘700 patent. (Plaintiff’s Response to Microsoft’s Request for Admission No 40). And none describes a controller design within the ‘700 patent. Rather, these exhibits relate and refer to discussions with Mr. Armstrong relating to computer mice designs and product prototypes not at issue here, and patents that are not asserted in this case. However, their presentation at trial will confuse the jury and lead it to incorrectly believe that the Defendants were aware of the ‘700 patent and were discussing it with Mr. Armstrong. Such exhibits are improper under Rule 403. *See* Defendants’ Joint Motions *in Limine* (Docket No. 263), at 8-9 (MIL No. 5).

Further, some such exhibits refer to settlement discussions. These are inadmissible also under Rule 408. *See* Defendants’ Joint Motions *in Limine* (Docket No. 263), at 9-10 (MIL No. 6). This category of objections encompasses the following Anascape exhibits:

Pre-Suit Interactions:	PX: 9-12, 38, 57, 58-60, 81-82, 121-24, 138-55, 252-53, 258, 262, 267, 277, 313, 329, 1430.
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C. Defendants Object to the Admission of Anascape’s Expert Reports as Trial Exhibits

Contrary to this Court’s Order (Docket No. 219, at 2), Anascape includes its own expert reports on its exhibit list (PX 274-76). These reports are out-of-court statements by Anascape’s experts and, if not offered for the truth of the matters asserted, are irrelevant (Rule 401) and

inadmissible (Rule 402). Even if they contain some marginally relevant material, the reports would confuse the jury and prejudice the Defendants (Rule 403) because they contain reference to many documents and facts that are subject to Motions in Limine, including many agreed to by Anascape. If offered for their truth, the reports are inadmissible hearsay (Rule 801, 802) not subject to any exception (Rule 803). Two of Anascape's exhibits (PX 191, PX 370) are even more objectionable because they are expert reports of an expert for a third party (Immersion) in another case.

Defendants also list one of Anascape's expert reports (Mark Baldwin) as an exhibit. However, it is being offered not for its truth (Rule 801(c)), but rather in connection with an admission Mr. Baldwin made in his deposition and may again make at trial regarding design motivations of persons skilled in the art in 1996.

This category of objections encompasses the following Anascape exhibits:

Expert Reports:	PX: 191, 274-76, 370
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D. Defendants Object to the Admission of Their Privilege Logs

Anascape lists Defendants' privilege logs as exhibits. The only possible reason for this is to improperly cause the jury to draw an adverse inference from Defendants' assertion of privilege. Privilege logs, however, are not evidence. *See Old Republic Ins. Co. v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, No. 03 C 5238, 2006 WL 3782994, at 13 (N.D. Ill. Dec. 21, 2006) ("This court agrees that the privilege log itself is not evidence; rather, the document named in the privilege log is the evidence."). At best, a privilege log is evidence that a communication took place and of the general content of that communication, not the substance of the communications. Further, the use of a privilege logs is improper to show the content of these communications. (Rule 1002).

In the absence of real evidence, Anascape is relying on speculation and improper innuendo. Anascape argues that, because Defendants engaged in privileged and work product discussions with counsel concerning their ongoing negotiations with Mr. Armstrong about patents not asserted in this trial, they must have known of the ‘700 patent. On top of this speculation, Anascape adds the improper innuendo that Defendants have improperly “hidden” their communications with counsel to cover up their alleged willful infringement of the ‘700 patent. Drawing such strained adverse inference from the assertion of privilege is both prejudicial (403) and undermines the foundation of the attorney-client privilege. (*See* Defendants’ Joint Motions *in Limine* (Docket No. 263), at 13-14 (MIL No. 13).

Surely if the roles were reversed Anascape would see impropriety. Defendants could pick documents identified on Anascape’s privilege log, based solely on the fact that the dates of the underlying communications were near various events in the prosecution of the ‘700 patent. Defendants could then argue that the withheld documents would surely show that Mr. Armstrong was advised by his lawyers that having filed the original application for the ‘700 patent as a continuation-in-part would render the claims invalid. Or that the claims Mr. Armstrong added in 2002 were not described in the ‘700 application or its parent and were invalid. Such arguments would be no different in character than the ones Anascape seeks to advance regarding Defendants’ privilege logs.

This category of objections encompasses the following Anascape exhibits:

Privilege Logs:	PX: 91-92, 264, 271-72.
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E. Defendants Object to the Admission of Exhibits Evidencing the Settlement Agreement and Discussions Between Anascape and Sony

Defendants have moved *in limine* to exclude the settlement agreement signed by Anascape and Sony in 2004. (Motions *in Limine* (Docket No. 263), at 1-3 (MIL No. 1)). As set forth in that motion, the agreement on its face shows that it was a settlement of a dispute, and for that reason, is not admissible in this lawsuit. *See id.* at 1-3. As expected, Anascape includes this settlement agreement on its exhibit list (PX 54), but also includes other documents that refer to the settlement agreement and its terms (e.g., PX 46, 112, 372). All of these documents are objectionable for the same reasons as set forth in MIL No. 1, including Rule 408 and Rule 403. Anascape also includes documents constituting or referring to settlement discussions between Anascape and Sony before the agreement was negotiated and signed. (PX 37, 57). Defendants likewise object to all of these documents as hearsay where offered to prove the truth of the matters asserted in them (Rule 802) and on authenticity grounds (Rule 901).

This category of objections encompasses the following Anascape exhibits:

Sony-Anascape Settlement:	PX: 37, 46, 54, 57, 112, 372..
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F. Defendants Object to the Admission of Exhibits Evidencing Pre-Suit Sales of the Accused Products

Anascape agrees that it is not entitled to recover damages for sales of accused products prior to the filing of this lawsuit. Nonetheless, it lists exhibits showing the extent of such sales. Admission of such exhibits is likely to confuse or prejudice the jury and lead it to improperly consider pre-suit sales if it needs to assess damages. (Rule 403) Anascape argues that such sales are evidence of “commercial success.”¹ However, Defendants are willing to stipulate that the

¹ This objection is conditioned on the granting of Defendants’ Motion in Limine No. 1. If that motion is denied and the Sony-Anascape settlement agreement is allowed to be seen by the jury,

accused devices have been commercially successful (albeit that success has no nexus to any invention described and claimed in the '700 patent). Thus, the marginal relevance of exhibits showing pre-suit sales for the purpose of showing commercial success is outweighed by the potential for confusion and prejudice. (Rule 403). Furthermore, to the extent any exhibit contains information separately describing *both* pre-suit sales and post-suit sales, the pre-suit sales can easily be redacted to remove the prejudice from the full document.

This category of objections encompasses the following Anascape exhibits:

Pre-Suit Sales:	PX: 76, 217-18, 221-25, 369.
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G. Defendants Object to the Admission of Third-Party Media Articles

Anascape identifies as exhibits various articles and publications authored by third parties and published in periodicals, newspapers and other media. There is no apparent reason why these exhibits would be relevant if not offered for the truth of their contents. If offered for the truth of the matter asserted, such articles and publications are hearsay (Rules 801, 802) and are not subject to any exception (Rule 803). And there is no showing that the authors of these articles, or others quoted in these articles, had the required personal knowledge of the matters they assert (Rule 602). Furthermore, many of these articles include opinion testimony by those who have not been qualified as experts; as such, these articles constitute inadmissible lay opinion testimony (Rule 701).²

This category of objections encompasses the following Anascape exhibits:

then some information of pre-suit sales by Defendants and Sony may be relevant to show how Defendants' sales have been a fraction of those of Sony, thereby showing that the royalty Defendants would have paid would have likewise been a fraction of what Sony paid in its settlement.

Third-Party Articles:	PX: 95, 111, 124, 128-30, 172-73, 203-04, 235-37, 254, 314, 339-47, 362, 398-401, 404, 421.
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H. Defendants Object to the Admission of Unreliable Expert Testimony in PX 242 and PX 243

Rule 803(6) provides an exception to the rule excluding hearsay for records of regularly conducted activity, “unless the source of information or the method or circumstances or preparation indicate lack of trustworthiness.” PX242 and PX243 are business records that are untrustworthy and should therefore be excluded from evidence.

PX242 and PX243 are “process review” reports authored by one or more unnamed individuals at Chipworks, Inc (“Chipworks”). Chipworks appears to be a litigation consulting firm that creates and sells process review reports, which are “a comprehensive analysis of the process technology and design rules used to fabricate a device.” Chipworks, Inc., Process Analysis: Information Technology Business Process Reengineering, http://chipworks.com/process_review_report.aspx (last visited Apr. 16, 2008). Chipworks claims that the process reports at issue were made in the ordinary course of business and not at the behest of either party to the litigation. *See* PX241, Declaration of Michael Thumm at 1-2, *Anascape, Ltd. v. Microsoft Corp.*, No. 9:06-cv-158-RC (Jan. 2, 2008) (the “Declaration”).

Regardless of whether PX242 and PX243 were created in the ordinary course of business and not per Anascape’s request, they should be excluded from evidence as untrustworthy under 803(6). These reports are highly technical and scientific, in the nature of expert testimony. But the individual author of these reports is unidentified, and his or her qualifications are unknown.

² For example, PX 343 purports to be an interview with an officer of Immersion Corporation, who is quoted as discussing his opinion about what is an appropriate patent license royalty for force feedback technology.

Further, the principles and methods used to create the reports are unknown. Finally, it is not known whether the principles and methods used were applied reliably to the facts analyzed.

None of these deficiencies is subject to cross-examination. For these reasons, PX242 and PX243 do not meet the trustworthiness requirement of 803(6) and are thus inadmissible hearsay. For the same reasons, these reports do not meet the expert testimony requirements of Rule 702. Finally, these documents also should be excluded because Anascape has not identified their author per Fed. R. Civ. P. 26(a)(2).

This category of objections encompasses the following Anascape exhibits:

Unreliable Expert Testimony:	PX: 242-43.
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I. Defendants Object to the Admission of Late-Produced Expert Opinions by Anascape’s Damages Expert, Walter Bratic

At his deposition this past week (April 15), Anascape’s damages expert, Walter Bratic, provided a brand new conclusion as to what he believes the royalty rate would have been in the hypothetical negotiation between the parties. While he never provided any specific number other than 5% in his expert report (February 11), he opined in his deposition that he now believes the royalty should be as much as 8% and will testify to that new conclusion at trial. Because this new opinion was not disclosed in his report and has been provided for the first time on the eve of trial, it is improper under the scheduling orders of this Court and Rule 26. Defendants are preparing a Motion to Strike these new, changed conclusions of Mr. Bratic.

A number of Anascape’s trial exhibits (PX 431-39) are brand new slides or charts—disclosed to Defendants for the first time at Mr. Bratic’s April 15 deposition—that incorporate Mr. Bratic’s new 8% conclusion. For the reasons set forth in Defendants’ forthcoming Motion to

Strike this new conclusion, which is incorporated herein by reference, Defendants object to the admission of these exhibits.

This category of objections encompasses the following Anascape exhibits:

Untimely Expert Opinions:	PX: 431-39.
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J. Defendants Object to the Admission of Documents Evidencing the Settlement Agreement between Microsoft and Immersion

Anascape includes a number of proposed trial exhibits (PX 191, 203, 346, 370) that refer to Microsoft's settlement with Immersion, including the alleged dollar figure Microsoft paid Immersion to end the patent litigation between them in 2003. As set forth in Defendants' Motion in Limine No. 1 regarding the Anascape-Sony Agreement, settlement agreements are not admissible in light of Rules 402, 403, and 408. For the same reasons, the alleged amount Microsoft has paid to settle other lawsuits regarding different patents is even less relevant, equally or even more prejudicial, and violates the same policy of precluding settlement discussions as evidence under Rule 408.

This category of objections encompasses the following Anascape exhibits:

Immersion Settlement:	PX: 191, 203, 346, 370.
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Dated: April 18, 2008

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served on all counsel of record via email this 18th day of April, 2008.

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