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

ANASCAPE, LTD.	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 9:06CV158
v.	§	
	§	
MICROSOFT CORPORATION and NINTENDO OF AMERICA, INC.	§	JUDGE RON CLARK
	§	
	§	
Defendants.		

ORDER GRANTING DEFENDANTS' OBJECTIONS AND MOTION TO PRECLUDE TESTIMONY BY MARK BALDWIN

Before the court is Defendants' Objections and Motion to Preclude Testimony by Mark Baldwin [Doc. #211]. Defendants argue that Mr. Baldwin's opinions are neither reliable nor helpful to the jury. Anascape responds that Mr. Baldwin's opinions will assist the jury in understanding the facts of this case. Because the court finds that Mr. Baldwin is not qualified to give the opinions he has offered and his opinions do not comply with the reliability requirements of Fed. R. Civ. P. 702 and *Daubert v. Merrell Down Pharms., Inc.,* 509 U.S. 579 (1993), Defendants' motion is granted.

I. Law

Fed. R. Evid. 702 provides that a witness who is "qualified by knowledge, skill, experience, training, or education," may provide opinion testimony if that testimony will assist the trier of fact and "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." The witness must possess "specialized knowledge,

skill, experience, training, or education in the relevant field," in order to be qualified to express his expert opinion on the topic in issue. *Christopherson v. Allied-Signal Corp*. 939 F.2d 1106, 1110 (5th Cir. 1991).

The Supreme Court in *Daubert* charged trial courts with the task of determining whether expert testimony under Rule 702 is "not only relevant, but reliable." *Daubert v. Merrill Dow Pharmas*., 509 U.S. 579, 589, 113 S. Ct. 2786, 2794 (1993).

> The *Daubert* opinion lists a number of factors that a trial court may use in determining an expert's reliability. Trial courts are to consider the extent to which a given technique can be tested, whether the technique is subject to peer review and publication, any known potential rate of error, the existence and maintenance of standards governing operation of the technique, and, finally, whether the method has been generally accepted in the relevant scientific community . . . . These factors are not mandatory or exclusive; the district court must decide whether the factors discussed in *Daubert* are appropriate, use them as a starting point, and then ascertain if other factors should be considered . . . . But the existence of sufficient facts and a reliable methodology is in all instances mandatory. Without more than credentials and a subjective opinion, an expert's testimony that 'it is so' is not admissible.

Hathaway v. Bazany, 507 F.3d 312, 318 (5th Cir. 2007)(internal citations omitted).

A court is not required to "admit opinion evidence that is connected to existing data only by the ipse dixit of the expert," and may "rightfully exclude expert testimony where a court finds that an expert has extrapolated data, and there is 'too great an analytical gap between the data and the opinion proffered.'" *Burleson v. Tex. Dep't. Crim. Justice*, 393 F.3d 577, 587 (5th Cir. 2004)(quoting *Gen'l Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Cit. 512, 519 (1997)). Neither side briefed the *Daubert* factors individually.

II. Analysis

A. Qualifications

Defendants argue that Mr. Baldwin is not qualified because he is not an expert in

designing controllers. Anascape states that Mr. Baldwin's testimony is supported by 26 years of specialized experience.

Although not dispositive, Mr. Baldwin does not possess the qualification of one of ordinary skill in the art, as defined by the court. A person of ordinary skill in the art would have at least three years of experience designing, developing or improving electronic systems that include sensors and/or controllers for computers, robotics, video games or other electronic devices. [Doc. #182]. Mr. Baldwin does not have this experience. *See Flex-Rest, LLC v. Steelcase, Inc.*, 455 F.3d 1351 (Fed. Cir. 2006)(affirming the lower court's exclusion of an expert witness whose experience was in ergonomics, while the person of ordinary skill in the art would be a keyboard designer).

Mr. Baldwin appears to have a Bachelors and Masters in Engineering from Purdue University and "programmed, designed, directed, and/or produced over 30 commercial computer games." Baldwin's Report, p. 9. But there is no evidence that Mr. Baldwin has ever had any experience designing a game *controller*. As described more clearly in the court's Claim Construction Order [Doc. #182], the ´700 patent relates to "graphic image controllers," commonly seen as the controllers used for video games. These controllers convert the movement of the user's hand or finger into an electrical impulse that controls the image on a display, such as a screen.

Anascape admits to "the generalized nature of Baldwin's testimony," but argues that it is offered solely for the purpose of analyzing the ´700 patent and providing background information on the significance of certain controller features to the video-game industry. Anascape's

Response, p. 9 [Doc. #231]. Mr. Baldwin is not precluded from testifying factually about the background of the video-game industry. This information may provide some of the basis for Mr. Bratic's (Anascape's damages expert) testimony. However, Mr. Baldwin should do so only as a fact witness, rather than an expert offering opinion testimony.

B. Reliability

Defendants also argue that Mr. Baldwin's report 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.

Mr. Baldwin's report does not discuss the ´700 patent or the court's construction of the disputed claim terms thereof. Mr. Baldwin never mentions the combination of elements covered by any of the asserted patent claims of the ´700 patent or any invention patented by Mr. Brad Armstrong, the inventor of the ´700 patent. Instead, he provides a simple 10-page background of the prior art that discusses isolated features abstractly.

When reaching his "conclusions," Mr. Baldwin does not indicate that he has heard of any specific prior art, or read the ´700 patent's patent office file. Much of what Mr. Baldwin says is vague and subjective. For example, he states:

> Video and computer games have evolved a great deal since the simple games like Pong first appeared on the audience's television. Today, they are a complex and powerful media, capable of art and entertainment that is as far reaching and popular as more traditional forms of entertainment like film and theater.
>
> . . .
>
> The controller . . . adds to the designer's palette of tools in which he entertains and tells his story. Baldwin's Report, p. 1 and 3.

Rule 702 requires that an expert's testimony be based on sufficient facts or data. This requirement is quantitative and imposes a "floor" on the amount of facts or data an expert must have to support an opinion. *See Rudd v. General Motors Corp.,* 127 F.Supp.2d 1330, 1339 (M.D. Ala. 2001). There is simply no evidence that Mr. Baldwin relied on sufficient facts or data to base his opinions. Mr. Baldwin's mere conjecture and discussion of the video game industry does not comply with the reliability requirements of Fed. R. Civ. P. 702 or *Daubert.*

IT IS THEREFORE ORDERED that Defendants' Objections and Motion to Preclude Testimony by Mark Baldwin [Doc. #211] is **GRANTED.**

So **ORDERED** and **SIGNED** this **28** day of **April, 2008.**

Ron Clark, United States District Judge