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

Before the court is Defendants' Joint Motion to Exclude Portions of Walter Bratic's Opinions as Inadmissible under FRE 702 [Doc. # 212]. Defendants argue that Mr. Bratic's report should be excluded because: (1) accounting experience does not qualify him to opine on the importance of the ´700 patent or technology in the video game industry; (2) his opinions of the value of the patented invention are divorced from any consideration of non-infringing alternatives; and (3) his failure to provide a sound economic basis for his calculation of the value of bundled controllers.

Analyzing the proposed testimony in light of Fed. R. Evid. 702 and *Daubert v. Merrell Down Pharms., Inc.,* 509 U.S. 579 (1993), the court concludes that Defendants' arguments go to the weight, not the admissibility, of Mr. Bratic's opinion. Accordingly, Defendants' motion is denied.

Discussion

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.

1. Qualification

Defendants first argue that Mr. Bratic's opinions on the importance of the technology and the importance of the ´700 patent in the video game industry should be excluded because Mr. Bratic's "only credential is that he is an accountant." Defs.' Motion to Exclude [Doc. #212, p. 4].

Mr. Bratic is Anascape's damages expert. His thirteen-page resume shows that he is a Certified Public Accountant licensed to practice in the state of Texas, has an MBA from the Wharton Graduate School at the University of Pennsylvania, served as a partner at Pricewaterhouse Coopers LLP and is now Vice President of CRA International, Inc. He has testified in numerous patent cases over the past four years. Mr. Bratic's report does not opine on the importance of the ´700 patent; rather, he relies on a set of facts in determining a reasonable royalty.[1] Although Defendants are free to challenge Mr. Bratic's underlying assumptions at trial, the court finds that he is qualified to offer an opinion on the reasonable royalty due to Anascape for Defendants' alleged infringement of the ´700 patent.

[1]Specifically, Mr. Bratic relies on the disputed facts that 1) Microsoft and Nintendo would have realized that it had to obtain a license to avoid a competitive disadvantage to Sony, 2) the success of Microsoft Xbox depended on acceptance of its controller design, 3) the competitive nature of the video game industry made it "critical" for Microsoft and Nintendo to license the ´700 patent, 4) by taking a license Microsoft and Nintendo would be in a position to generate substantial sales, 5) Microsoft recognized the importance of using the patented features, and 6) Microsoft and Nintendo recognized that the rumble and six axes of control features were important, and were incorporated within their products in order to stay competitive.

Defendants' request to strike paragraphs 49, 76, 82, 89, 94, 102, 120, 134, 138, and 141 of Mr. Bratic's report is denied.

2. Alternatives

Defendants argue that Mr. Bratic's analysis fails to mention any claim of the ´700 patent and does not compare the patented combination of elements to any prior art controller that Anascape admits is non-infringing. Defendants suggest that Mr. Bratic's analysis must be struck because it does not address the value of the alleged improvement of the patented article over the known non-infringing alternatives.

Defendants conflate the question of whether the *methodology* involved is proper with whether the expert's *conclusions* are proper. The role of the court, under *Daubert*, is to ensure that "a theory or technique...can be (and has been) tested," *Daubert*, 509 U.S. 593, 113 S. Ct. at 2796, not "to evaluate the correctness of facts underlying one expert's testimony." *Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1391-92 (Fed. Cir. 2003). Defendants attack the data relied on by Mr. Bratic, namely whether a competitor who fails to offer controllers "that incorporate six axes of control technology combined with a rumble feature . . . will quickly find itself at a competitive disadvantage" [Bratic Rpt. ¶ 138], rather than the methodology he relied upon to reach his results. Defendants' argument goes to the weight to be given to, rather than the admissibility of, the expert's testimony. *See Liquid Dynamics Corp. v. Vaughan Co., Inc.*, 449 F.3d 1209, 1221 (Fed. Cir. 2006)(an attack on the underlying data of an expert's report goes to its weight rather than admissibility).

Here, Mr. Bratic relied on emails from Nintendo's employees, Nintendo Game Cube

"Fact Sheet," the deposition of Nintendo's employee Mr. Kanunori Koshiishi, Nintendo's marketing documents and public press releases. [Bratic Rpt. ¶ 106-134]. As a result of these documents, Mr. Bratic concluded that Microsoft and Nintendo recognized that the rumble and six axes of control features were important, and were incorporated within their products in order to stay competitive.

The court fails to see the flaw in such a methodology. Defendants' argument that the data relied upon was incorrect or incapable of being verified goes to the weight of Mr. Bratic's testimony. Defendants' motion to strike paragraphs 106-134 of Mr. Bratic's report is denied.

3. Royalty Base

Defendants' final argument is that Mr. Bratic incorrectly assumes that the revenue attributable to the bundled controllers is the price of the unbundled controller times the quantity of bundled controllers actually sold.

Anascape agrees that Mr. Bratic was forced to make a factual assumption regarding the bundled sales because "Microsoft failed to provide 'information on the portion of the revenues associated specifically with the [accused] controllers.'" In any event, Defendants' disagreement with some of the assumptions and analysis that Mr. Bratic used in constructing his royalty base simply reflect a factual dispute concerning the underlying data. Defendants have not pointed to any legal flaw that fatally infects his report. *See State Contracting & Engineering Corp. v. Condotte America, Inc.,* 346 F.3d 1057, 1072 (Fed. Cir. 2003).

Defendants' request to strike Mr. Bratic's calculation of damages on the bundled controllers is denied.

IT IS THEREFORE ORDERED that Defendants' Joint Motion to Exclude Portions of Walter Bratic's Opinions as Inadmissible under FRE 702 [Doc. # 212] is **DENIED.**

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

Ron Clark, United States District Judge