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 OBJECTIONS, MOTION, AND SUPPORTING MEMORANDUM, TO EXCLUDE THE EXPERT TESTIMONY OF ROBERT HOWE AS LEGALLY FLAWED

Before the court is Defendants' Joint Objections, Motion, and Supporting Memorandum, to Exclude the Expert Testimony of Robert Howe as Legally Flawed [Doc. #217]. Defendants argue that Dr. Howe's methodology is flawed because he 1) fails to acknowledge and selectively applies the claim construction and definitions of the Court; and 2) fails to compare the construed claim to the actual accused controllers.

Dr. Howe's report engages in an element-by-element comparison of the claims as construed by the court to each of the accused product, taking into consideration the court's claim construction Orders. Dr. Howe's reliance on the use of accused controllers with particular games as a means of determining some of the controllers' capabilities is not improper under Fed. R. Evid. 702 and *Daubert v. Merrell Down Pharms., Inc.,* 509 U.S. 579 (1993). 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. Dr. Howe's Use of the Court's Claim Construction

Defendants argue that Dr. Howe "plans to tells the jury that the Court's construction of ['3-D' and 'controller'] is meaningless and can be disregarded because they are not really claim limitations." Defs.' Motion at 4 [Doc. #217]. Defendants also state that Dr. Howe impermissibly twists and ignores the court's construction. *Id.* at 5.

If Dr. Howe attempts to twist or ignore the court's definition at trial, the court expects that competent counsel will know how to properly and timely object during the proceedings. The court will not preemptively strike testimony that has not yet been given.

2. Dr. Howe's Use of Certain Video Games

Defendants contend that Dr. Howe "did not analyze the correct games and did not use an acceptable methodology to analyze the games he did review." Defs.' Motion at 6 [Doc. #217]. Defendants state that "[i]t goes without saying that simply looking at a small video clip of what appears on the screen during a game is insufficient to determine what movements are controlled by a video game controller, and which movements might be in the software of the game itself." *Id.*

Defendants' argument attacks the credibility of Dr. Howe, but does nothing to undermine the methodology actually employed by Dr. Howe in his report. At trial, Defendants are free to point out that the Super Mario Galaxy is not an Xbox game and cannot be played with the Xbox

controllers. However, there is no reason to exclude Dr. Howe's entire testimony under Rule 702 or *Daubert.*

3. Dr. Howe's Use of Accused Controllers with Particular Games

Defendants' last objection relates to Dr. Howe's report to the extent that it goes beyond Anascape's infringement contentions. Defendants argue that Dr. Howe relied on the use of accused controllers with particular games, none of which were identified in the infringement contentions.

Dr. Howe used the accused controllers with certain games to determine the capabilities of the accused controllers, not to demonstrate or showcase the video games played with those controllers. There is no requirement in the local or federal rules for a plaintiff to disclose every possible use of the accused product.

IT IS THEREFORE ORDERED that Defendants' Joint Objections, Motion, and Supporting Memorandum, to Exclude the Expert Testimony of Robert Howe as Legally Flawed [Doc. #217] is **DENIED.**

So **ORDERED** and **SIGNED** this **1** day of **May, 2008.**

Ron Clark, United States District Judge