

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

ANASCAPE, LTD.	§	
	§	
<i>Plaintiff,</i>	§	
	§	Civil Action No. 9:06cv158
MICROSOFT CORPORATION and	§	
NINTENDO OF AMERICA, INC.	§	
	§	
<i>Defendants.</i>	§	

ORDER ON PLAINTIFF’S MOTION IN LIMINE [Doc. #264]

Evidence Plaintiff Seeks to Exclude	Defendants’ Response	Court’s Ruling
1. Any evidence, testimony, or reference regarding post-filing mediation, settlement or licensing negotiations between Anascape and Defendants. (Pl.’s Br. at 1.)	Unopposed.	Sustained.
2. Any evidence, testimony, or reference regarding the possible issuance of an injunction, an award of treble damages, and attorneys’ fees. (Pl.’s Br. at 2.)	Unopposed.	Sustained.
3. Any evidence, testimony, or reference regarding Plaintiff’s counsel representing Anascape on a contingency fee basis. (Pl.’s Br. at 2.)	Unopposed.	Sustained.
4. Any evidence, testimony, or reference to Court orders other than the specific claim construction definitions adopted by the Court, including comments contrary to the Court’s <i>Markman</i> Order. (Pl.’s Br. at 2-3.)	Unopposed.	Sustained.

Evidence Plaintiff Seeks to Exclude	Defendants' Response	Court's Ruling
5. Any evidence, testimony, or reference regarding any purported prior art references that were not in Defendants' Invalidity Contentions (including any supplements allowed by the Court), not disclosed in accordance with 35 U.S.C. § 282, or not properly disclosed pursuant to the requirements of P.R. 3-3 and 3-6. (Pl.'s Br. at 3.)	Unopposed.	Sustained.
6. Any evidence, testimony, or reference to Anascape as a "patent troll" or similar characterization. (Pl.'s Br. at 3-4.)	Unopposed.	Sustained.
7. Any evidence, testimony, or reference regarding any reference to the workload of the PTO or any attempt to disparage the PTO. (Pl.'s Br. at 4.)	Unopposed.	Sustained.
8. Any evidence, testimony, or reference regarding charges of sexual assault against Brad Armstrong. (Pl.'s Br. at 4-5.)	Unopposed.	Sustained.
9. Any evidence, testimony, or reference regarding the religious beliefs of any witness. (Pl.'s Br. at 5.)	Unopposed.	Sustained.
10. Any testimony by witnesses not properly disclosed. (Pl.s Br. at 5-6.)	Opposed—All witnesses listed on Defendants' witness lists have been properly disclosed. For those witnesses, information provided in depositions, reports, documents and the like has been "properly disclosed" and is the proper subject of testimony. Such testimony is not unfairly prejudicial under FRE 403. (Defs.' Resp. at 1.)	Sustained as to undisclosed witnesses. Sustained as to references not listed in invalidity contentions. Overruled as to remainder. Make timely objections.

Evidence Plaintiff Seeks to Exclude	Defendants' Response	Court's Ruling
11. Any evidence, testimony, or reference suggesting that the Patent-in-Suit issued under the wrong obviousness standard. (Pl.'s Br. at 6.)	Opposed—Given the recent change of the obviousness standard, if Anascape is allowed to argue that the PTO has already decided the issue of obviousness in its favor, Defendants must be allowed to explain the proper obviousness standard to the jury. (Defs.' Resp. at 1-2.)	Sustained – goes both ways. Willfulness is moot and inequitable conduct is for court.
12. Any evidence, testimony, or reference regarding Anascape's duty of candor or any claim of inequitable conduct. (Pl.'s Br. at 6-7.)	Opposed—Defendants should be allowed to show that statements Mr. Armstrong made to the PTO were incorrect. This is relevant to the priority date of the '700 patent and Mr. Armstrong's credibility, and should not be excluded under FRE 401, 402, or 403. (Defs.' Resp. at 2-3.)	Sustained. Plaintiff can get benefit of earlier priority based on written description but not based on credibility of inventor. If good faith basis for attack on credibility, bring up outside presence of jury.
13. Any evidence, testimony, or reference regarding Brad Armstrong's property in Nevada. (Pl.'s Br. at 7-8.)	Opposed—Defendants should be allowed to explain the history of Anascape's formation, as well as the fact that Mr. Armstrong moved to Texas partially in order to bring this lawsuit in this District. (Defs.' Resp. at 3.)	Overruled as to history of company. Sustained as to any inference about motive or filing of lawsuit in this jurisdiction.
14. Any evidence, testimony, or reference regarding the sufficiency of Brad Armstrong's pre-filing investigation. (Pl.'s Br. at 8.)	Opposed—Defendants should be allowed to offer evidence regarding Mr. Armstrong's drafting of the asserted claims of the '700 patent. This evidence is relevant to the issues of invalidity and non-infringement, and have nothing to do with Mr. Armstrong's pre-filing investigations, and should not be excluded under FRE 401, 402, or 403. (Defs.' Resp. at 3-4.)	Sustained. Defendants do not help themselves by making arguments that have nothing to do with motion.

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15. Any evidence, testimony, or reference regarding modifying claim 19 of the Patent-in-Suit. (Pl.'s Br. at 8-9.)	Opposed—Defendant should be allowed to offer evidence or testimony confirming that “providing outputs ... controlling objects and navigating a viewpoint” is a positive limitation of claim 19, because such evidence is relevant to the issue of non-infringement. (Defs.' Resp. at 4.)	Sustained.
16. Any evidence, testimony, or reference to “backdating,” including references to backdating and the stock market. (Pl.'s Br. at 9-10.)	Opposed—The term “backdating” accurately describes Anascape’s position regarding the priority date of the ‘700 patent. This term is not inflammatory, inaccurate or prejudicial, and its use should not be precluded under FRE 403. (Defs.' Resp. at 4-6.)	Overruled.
17. Any evidence, testimony, or reference to the reexamination of the Patent-in-Suit. (Pl.'s Br. at 10-11.)	Opposed—The re-examination of the ‘700 patent is relevant to the issue of whether Defendants willfully infringed. Should the Court deny Defendants’ motion for summary judgment on this issue, Defendants should be allowed to offer evidence of the re-examination, in order to defend against a claim of willfulness. (Defs.' Resp. at 6-7.)	Sustained.
18. Defendants should be required to identify now the prior art references they actually plans to rely upon at trial, and should be precluded, pursuant to Fed. R. Civ. P. 16, from offering evidence, expert opinions, and other testimony that pertains to prior art other than those references. (Pl.'s Br. at 11-12.)	Opposed—Defendants have identified the references and combination of references they will rely at trial in their expert reports, and will not go beyond them. (Defs.' Resp. at 7.)	Overruled. But only references properly identified in invalidity contentions may be mentioned before jury without prior permission from court.

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19. Any argument that the term "3-D graphics controller," or any other claim term of the Patent-in-Suit, requires an input member or input members moveable on three linear axes and three rotational axes. (Pl.'s Br. at 12.)	Opposed—Plaintiff's motion is contrary to the Court's claim construction order. (Defs.' Resp. at 7-8.)	Sustained. Although "any" is broad. If Defendant believes particularized focused argument is valid, discuss outside presence of jury.
20. Any argument that Anascape must prove method steps to show infringement of the asserted apparatus claims. (Pl.'s Br. at 13.)	Opposed—Defendants should not be precluded from submitting evidence and arguing that in order to infringe claim 19 the accused controllers must actually "provide outputs ... controlling objects and navigating a viewpoint." Defendants respectfully submit that the Court must resolve this disputed claim construction issue prior to trial. (Defs.' Resp. at 8-10.)	Reserved.
21. Any argument or suggestion that Defendants' products do not infringe because they do not comprise a "flexible membrane sheet" or any discussion of the stipulation entered into between the parties regarding the claim term "flexible membrane sheet." (Pl.'s Br. at 14.)	Opposed—Should the Court allow Anascape to offer its 2004 license agreement with Sony at trial, Defendants must be allowed to explain that they are not accused of infringing any claim that requires a "flexible membrane sheet." (Defs.' Resp. at 10-11.)	Sustained, other than that experts can point out that license is not for exact same technology.
22. Any testimony by fact witnesses regarding matters of law. (Pl.'s Br. at 14.)	Opposed—FRE 701 adequately limits the testimony of fact witnesses. Fact witnesses should not be precluded from testifying on factual matters just because the facts support legal issues. (Defs.' Resp. at 11.)	Overruled. Make appropriate objections.

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



Ron Clark, United States District Judge