

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 DEFENDANTS’ MOTION IN LIMINE [Doc. #263]

	Defendants’ Motion in Limine	Plaintiff’s Response	Court’s Ruling
1	Any evidence or argument regarding the Sony-Anascape License Agreement. (pg. 1-6)	Opposed: Anascape does not consider this license as occurring as a part of a settlement, and even assuming it was, Anascape is not offering it for a purpose prohibited under FRE 408. The Court can prevent any confusion with a limiting instruction. (pg. 1-5)	Overruled.
2	Any argument or evidence regarding settlement agreements generally, including Immersion’s settlement agreement with Microsoft and Sony. (pg.6-7)	Opposed: Anascape will not offer this settlement agreement for any prohibited purpose under FRE 408. Anascape will agree to this motion, unless Defendants open the door, including any discussion of the rumble feature being insignificant or unimportant or any reference to the pre-suit license with Immersion. (pg. 5-6)	Sustained.
3	Any argument or evidence that Logitech stole or misappropriated Mr. Armstrong’s technology or ideas and used them to develop Cyberman. (pg. 7)	Opposed: Anascape does not intend on arguing that Logitech stole or misappropriated the technology but does intend to offer evidence of that Mr. Armstrong attempted to license the technology to Logitech. (pg. 6-7)	Sustained.
4	Any argument that the PTO has decided that any asserted claim of the ’700 patent is entitled to an effective filing date of July 5,	Opposed: the PTO did determine that the claims are entitled to a priority date of July 5, 1996 when the examiner considered whether	Sustained unless Plaintiff wants later PTO action in also.

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	1996. (pg. 7-8)	the '700 patent was a continuation or continuation-in-part of the '525 patent. (pg. 7)	
5	Any evidence or argument regarding pre-suit meetings and communications between Armstrong and/or Anascape, on one hand, and Microsoft and Nintendo, on the other hand (conditioned on the grant of Defendants' motion for summary judgment of no willful infringement) (pg. 8-9)	Opposed: these meetings and communications are relevant to willfulness, to demonstrate Defendants' interest in Anascape's technology, to serve as circumstantial evidence of infringement, and to rebut any inference that Anascape was not interested in licensing its technology. (pg. 8-9)	Based on Anascape's brief -- overruled as to communication with Nintendo 1997 – 2002. Sustained as to other communications.
6	Any evidence or argument of settlement discussions with Microsoft. (pg. 9-10)	Opposed: Anascape views these discussions as licensing, not settlement discussions, and, even assuming that they were settlement discussions, Anascape does not plan to use them for a purpose prohibited by FRE 408. (pg. 9-10)	Sustained.
7	Any evidence or argument that Nintendo or Microsoft infringes because the accused controllers are structurally similar to Sony's Controllers. (pg. 10)	Opposed: Anascape is not relying on its license agreement with Sony in support of this argument. Instead, Anascape is relying upon Defendants' invalidity assertions regarding Sony's controllers. (pg. 10)	Statements by Defendants that their products were similar to Sony, or the like, are admissible. Otherwise, sustained.
8	Any argument or evidence that Nintendo copied the prototype controller Armstrong provided to Howard Cheng in 1997. (pg. 10-11)	Opposed: This is relevant to Anascape's willfulness and copying arguments. (pg. 10-11)	Sustained.
9	Any evidence or argument that any employee of non-party Nintendo Co., Ltd. has not attended or testified at trial. (pg. 11)	Opposed: Nintendo has demonstrated the ability to obtain Nintendo Co., Ltd. witnesses. (pg. 11)	Sustained unless Plaintiff can show why particular witnesses should be here.
10	Any argument regarding the presumption of validity. (pg. 11-12)	Opposed: As the presumption is a correct statement of law, Anascape should be able to reference it. The Court can cure any confusion or prejudice with a limiting instruction. (pg. 11-12)	Overruled.

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11	Any evidence or argument of infringement under the doctrine of equivalents. (pg. 12-13)	Opposed: Based upon Anascape's evidence of literal infringement, the jury could find literal infringement or infringement under the doctrine of equivalents. (pg. 12-13)	Overruled.
12	Any argument or evidence not identified in its interrogatory responses of an "invention date" earlier than November 16, 2000. (pg. 13)	Opposed: This is not a proper topic for a motion <i>in limine</i> because there is conflicting evidence that the jury should be able to weigh. (pg. 13)	Overruled.
13	Any argument urging the jury to draw adverse inferences from the assertion of the attorney/client privilege. (pg. 13-14)	Opposed: Anascape's reference to privilege log entries is not an attempt to have the jury draw an adverse inference from the assertion of the attorney-client privilege. (pg. 13-14)	Objection withdrawn – sustained.
14	Any argument or evidence that Defendants have failed to provide discovery, or otherwise engaged in improper litigation conduct. (pg. 14)	Opposed: Anascape wants to be able to argue that Defendants have failed to provide proper discovery in the event that a witness attempts to evade a question by referencing documents that have not been produced. (pg. 14)	Sustained as to improper conduct. Sustained as to failure to provide but if Defendants rely on documents not produced or Defs ask Pl.'s witness why facts in documents not produced was not considered, then door is opened.
15	Any argument or evidence that either Defendant has not elected to produce an opinion of counsel to rebut Anascape's willfulness claim. (pg. 14-15)	Opposed: Defendants' failure to obtain an opinion of counsel is still relevant to the determination of whether enhanced damages should be awarded. (pg. 14-15)	Objection withdrawn – sustained.
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,	Unopposed	Sustained.

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	profits or wealth (pg. 15)		
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 (pg. 15)	Unopposed	Sustained.
18	Exclude evidence, testimony, or reference regarding the desire or need to punish either Defendant, to send a message to either Defendant, or to make either Defendant pay more than the patent infringement damages requested by Plaintiff (pg. 15)	Unopposed	Sustained.
19	Exclude evidence, testimony, or reference that either Defendant used the '700 patent, as issued, to develop or create the accused products (pg. 15)	Unopposed	Sustained.
20	Exclude testimony in the form of opinions by any fact witness and by any witness who did not submit an expert report during the expert disclosure period in the litigation, except for any opinion testimony that is admissible under FRE 701 (pg. 15)	Unopposed	Sustained.
21	Exclude evidence, testimony, or reference regarding any other litigation involving Plaintiff or either Defendant, with the exception of the Immersion v. Sony and Microsoft litigation (pg. 15)	Unopposed	Sustained.
22	Exclude evidence, testimony, or reference regarding any discovery disputes, motions to compel, or orders compelling discovery (pg. 15)	Unopposed	Sustained.

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23	Exclude evidence, testimony, or reference concerning the Court's denial of any dispositive motion (pg. 15)	Unopposed	Sustained.
24	Exclude evidence, testimony, or reference concerning any motion in limine brought by any party (pg. 15)	Unopposed	Sustained.

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



Ron Clark, United States District Judge