

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

Anascape, Ltd.,

Plaintiff,

v.

Microsoft Corp., and
Nintendo of America, Inc.,

Defendants.

Civil Action No. 9:06-cv-158-RC

JURY TRIAL REQUESTED

**AMENDED ORDER ON ANASCAPE'S
OBJECTIONS TO DEFENDANTS' TRIAL EXHIBITS [Doc. #281]**

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
DX 7 Microsoft's Request for Reexamination of U.S. Patent No. 6,906,700 dated 5/4/07	Admission of this document is subject to Anascape's Motion in Limine No. 17 (reference to the reexamination of the patent-in-suit). This statement is Microsoft's counsel's views on why the patent is invalid, and is therefore objectionable hearsay, and states numerous legal conclusions. Finally, this is objectionable under 403, as the multiple proceedings in front of the patent office will confuse the jury, and is unfairly prejudicial, in light of its minimal probative value.	The Patent Office re-examination of the '700 patent is strong evidence that Defendants have not willfully infringed (i.e., have not acted despite an objectively high likelihood that their actions constituted infringement of a valid patent). 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. <i>See</i> Defs.' Resp. at 6-7. This Request is not offered for the truth of the matters asserted.	Sustained.

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
<p>DX 8 PTO Order dated 10/9/07 granting reexamination of U.S. Patent No. 6,906,700</p>	<p>Admission of this document is subject to Anascape's Motion in Limine No. 17 (reference to the reexamination of the patent-in-suit). This statement is a preliminary statement by the patent office as to why the patent is invalid, and is therefore objectionable hearsay, and states numerous legal conclusions. This exhibit is objectionable under 403, as the multiple proceedings in front of the patent office will confuse the jury, and is unfairly prejudicial, in light of its minimal probative value. Furthermore, the jury may become confused about the presumption of validity in light of this second, preliminary statement of the patent office.</p>	<p>The Patent Office Order granting re-examination of the '700 patent is strong evidence that Defendants have not willfully infringed (i.e., have not acted despite an objectively high likelihood that their actions constituted infringement of a valid patent). 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. <i>See</i> Defs.' Resp. at 6-7. This Order is a public record under FRE 803(8), and relevant even if not admitted for the truth of the matters asserted.</p>	<p>Sustained.</p>
<p>DX 9 File History of Reexamination of U.S. Patent No. 6,906,700 (Reexamination Control No. 95/000,221)</p>	<p>Admission of this document is subject to Anascape's Motion in Limine No. 17 (reference to the reexamination of the patent-in-suit). The file history of the reexamination should not be admitted for the same reasons listed for DX7 and DX8.</p>	<p>The file history of the Patent Office re-examination of the '700 patent is strong evidence that Defendants have not willfully infringed (i.e., have not acted despite an objectively high likelihood that their actions constituted infringement of a valid patent). Should the Court deny Defendants' motion for summary judgment on this issue, Defendants should be allowed to offer evidence of</p>	<p>Sustained.</p>

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
		the re-examination, in order to defend against a claim of willfulness. <i>See</i> Defs.’ Resp. at 6-7. This file history is a public record under FRE 803(8), and relevant even if not admitted for the truth of the matters asserted.	
DX 10 PTO Order dated 7/10/07 granting reexamination of U.S. Patent No. 6,222,525	This exhibit is objectionable under FRE 403, as the multiple proceedings in front of the patent office will confuse the jury and is unfairly prejudicial in light of its minimal probative value, especially considering that the ’525 Patent is no longer asserted against either defendant.	This document is relevant as the ’525 patent is the parent of the patent in suit. Questions regarding novelty of the ’525 patent bear directly on novelty of the ’700 patent. DX10 is not unfairly prejudicial, and its probative value far outweighs any possible risk of jury confusion. Additionally, the re-examination of the ’525 patent is relevant to Defendants’ inequitable conduct defense and evidences the materiality of the withheld Cyberman prior art reference, among other things.	Sustained.
DX 11 File History of Reexamination of U.S. Patent No. 5,222,525 (Reexamination Control No. 90/008,767)	<i>See</i> objections to DX9 and DX10.	See response from DX10.	Sustained.
DX 19 Red-lined comparison chart of applications of U.S. Patent Nos.	Not authenticated; demonstrative without foundation.	A witness at trial can authenticate that this fairly shows the differences between the 1996 and 2000 patent applications filed by	Exhibit Withdrawn

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
6,906,700 and 6,222,525		Mr. Armstrong.	
DX 37 U.S. Patent No. 4,414,537, Dezmelyk Ex. 4	This exhibit is objectionable because Defendants appear to offer it as alleged prior art but Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	This exhibit is offered not as invalidating prior art but as evidence of the state of the art. It was properly disclosed in conjunction with Mr. Dezmelyk's report and in Defendants' Identification of Prior Art Pursuant to 35 U.S.C. § 282 ("282 Notice").	For the reasons stated on the record, sustained.
DX 49 U.S. Patent No. 4,386,914, Dezmelyk Rebuttal Ex. 29	This exhibit is objectionable because Defendants appear to offer it as alleged prior art but Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	This exhibit is offered not as invalidating prior art but as evidence of the state of the art regarding the use of multiple joysticks. It was properly disclosed in conjunction with Mr. Dezmelyk's report. It is relevant to rebut allegations of copying.	For the reasons stated on the record, sustained.
DX 50 U.S. Patent No. 5,128,671, Dezmelyk Rebuttal Ex. 32	This exhibit is objectionable because Defendants appear to offer it as alleged prior art but Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	This exhibit is offered not as invalidating prior art but rather is relied upon to distinguish an accelerometer from a bi-directional proportional sensor. It was properly disclosed in conjunction with Mr. Dezmelyk's report.	For the reasons stated on the record, sustained.
DX 53 U.S. Patent No. 6,004,134 (MS- ANAS0005268- 78)	This exhibit is objectionable because Defendants appear to offer it as alleged prior art but Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	This exhibit is not offered as invalidating prior art, and Defendants have agreed not to use the exhibit as such. Instead, this exhibit is offered for the following reasons: <i>(a) Rebut Copying:</i> Based on Plaintiff's willfulness position in opposition to Defendants' motion for summary judgment, Mr. Armstrong's deposition testimony, and Anascape's inclusion of a jury instruction	Exhibit Withdrawn

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
		<p>on copying, it is expected that Plaintiff will argue at trial that Mr. Armstrong through a meeting in 1999 taught Microsoft how to make the accused controllers. This exhibit shows that, prior to that meeting, Microsoft had its own internal technology on game controllers having accused features later used in the accused Xbox controllers. Microsoft's own history and expertise in game controllers, which is illustrated in this patent, is highly relevant to rebut this false charge by Anascape that Microsoft copied from Mr. Armstrong.</p> <p><i>(b) Show State of the Art:</i> This patent shows the state of the art in game controllers and 3D games.</p> <p>Because this exhibit is not offered to show invalidating prior art but instead for other reasons, Anascape's objection that the exhibit was not disclosed under P.R. 3-3, 3-4, and 3-6 (which relate to invalidity documents), is not applicable.</p>	
<p>DX 54 Fiorito Summary Exhibit D</p>	<p>Demonstrative without foundation. Additionally, this exhibit should not be admitted before the jury, because inequitable conduct will be tried to the Court (Docket No. 219).</p>	<p>This exhibit is proper pursuant to Fed. R. Civ. P. 26(a)(2)(B)(iii), and FRE Rules 702, 703, and 705. To the extent necessary, Defendant's expert will provide a foundation for this exhibit at trial. Additionally, this exhibit is properly admitted before the jury if Anascape's willful infringement allegation is</p>	<p>Sustained. Willfulness is gone. Inequitable conduct goes to court.</p>

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
		before the jury.	
DX 58 Bristow Exhibit: Annotated Photograph of Logitech CyberMan Controller, Bristow Ex. R	Demonstrative without foundation.	This exhibit is proper pursuant to Fed. R. Civ. P. 26(a)(2)(B)(iii), and FRE Rules 702, 703, and 705. To the extent necessary, Defendant’s expert will provide a foundation for this exhibit at trial.	Exhibit Withdrawn
DX 59 Bristow Exhibit: Annotated Photograph of Sega Saturn 3D Control Pad, Bristow Ex. W	Demonstrative without foundation.	See response from DX58.	Exhibit Withdrawn
DX 60 Bristow Exhibit: Annotated Photograph of Sony “Flightstick,” Bristow Ex. X	Demonstrative without foundation.	See response from DX58.	Exhibit Withdrawn
DX 62 Bristow Exhibit: Annotated Photograph of Sony Dual Shock 2 Controller, Bristow Ex. BB	Demonstrative without foundation.	See response from DX58.	Exhibit Withdrawn
DX 63 Bristow Summary Exhibit: 6DOF Summary Exhibit, Bristow Ex. LL	This appears to be Defendants’ expert testifying by a video clip created for purposes of the instant litigation. This is hearsay, and the Court should require Defendants’ expert to testify live at trial, rather than through a video. Additionally, this is a demonstrative without foundation, and is argument, not evidence, and should be excluded	See response from DX58.	Exhibit Withdrawn

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
	from the record pursuant to 403.		
DX 64 Bristow Summary Exhibit: Prior Art Invalidity Claim Chart, Bristow Ex. MM	This appears to be Defendants' expert testifying by a video clip created for purposes of the instant litigation. This is hearsay, and the Court should require Defendants' expert to testify live at trial, rather than through a video. Additionally, this is a demonstrative without foundation, and is argument, not evidence, and should be excluded from the record pursuant to 403.	This exhibit is proper pursuant to Fed. R. Civ. P. 26(a)(2)(B)(iii), and FRE Rules 702, 703, and 705. To the extent necessary, Defendant's expert will provide a foundation for this Rule 1006 expert summary at trial.	Exhibit Withdrawn
DX 65 Bristow Exhibit: Official U.S. PlayStation Magazine, excerpts from November 1999 issue, including "Two-rific article", Bristow Ex. RR	Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6, not produced or identified until March 20, 2008.	As set forth in detail in Defendants' opposition and sur-reply to Plaintiff's motion to strike portions of Defendants' technical expert reports, and in Defendants' motion to amend its invalidity contentions and Reply brief in support thereof [Docket Nos. 226, 228, 258 and 262], this exhibit is proper. It relates to a piece of prior art (Sony Dual Shock 2) that is central to Defendants' invalidity case. Dual Shock 2 was previously identified and mapped in detail by Defendants in their original invalidity contentions.	Exhibit Withdrawn
DX 66 Bristow Exhibit: GameFan magazine, excerpts from January 1996	Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6, not produced or identified until March	As set forth in detail in Defendants' opposition and sur-reply to Plaintiff's motion to strike portions of Defendants' technical expert reports, and in Defendants'	Exhibit Withdrawn

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
issue, including photos of Sony “Flightstick”, Bristow Ex. TT	20, 2008	motion to amend its invalidity contentions and Reply brief in support thereof [Docket Nos. 226, 228, 258 and 262], this exhibit is proper.	
DX 68 Bristow Exhibit: Official U.S. PlayStation Magazine, additional excerpts from November 1999 issue, Bristow 2d Suppl. Ex. WW	Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6, not produced or identified until February 20, 2008.	This exhibit is offered not as invalidating prior art but as evidence supporting Defendants’ experts’ opinion regarding the publication date of invalidating prior art. This exhibit is proper pursuant to Fed. R. Civ. P. 26(a)(2)(B)(iii), and FRE Rules 702, 703, and 705. As set forth in detail in Defendants’ opposition and sur-reply to Plaintiff’s motion to strike portions of Defendants’ technical expert reports, and in Defendants’ motion to amend its invalidity contentions and Reply brief in support thereof [Docket Nos. 226, 228, 258 and 262], this exhibit is proper.	Exhibit Withdrawn
DX 70 Bristow Exhibit: Official U.S. PlayStation Magazine, 1999- 2000 Publishing Schedule, Bristow 2d Suppl. Ex. XX	Not authenticated, Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	See response from DX68.	Exhibit Withdrawn
DX 71 Bristow Exhibit: Ziff-Davis Publication Schedule 2008- 2009, Bristow 2d Suppl. Ex. YY	Not authenticated, Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	See response from DX68.	Exhibit Withdrawn
DX 72 Bristow Exhibit:	Hearsay, Defendants failed to timely identify	This document is not being offered for the truth of the	Exhibit Withdrawn

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
<p>Google Groups website printout regarding Sony PlayStation Magazine November 1999 Issue, Bristow 2d Suppl., Ex. ZZ</p>	<p>or produce this reference as required by P.R. 3-3, 3-4, and 3-6, not authenticated.</p>	<p>matter asserted, but as evidence that the publication containing DX 65 was on sale no later than a specified date. Additionally, even if the document were offered for a hearsay purpose, it is admissible as a present sense impression, as it purports to contain a review of a game that the author of the document was playing immediately prior to preparing the review. This exhibit is offered not as invalidating prior art but as evidence supporting Defendants' experts' opinion regarding the publication date of invalidating prior art. As set forth in detail in Defendants' opposition and sur-reply to Plaintiff's motion to strike portions of Defendants' technical expert reports, and in Defendants' motion to amend its invalidity contentions and Reply brief in support thereof [Docket Nos. 226 and 228, 258 and 262], this exhibit is proper. This exhibit is proper pursuant to Fed. R. Civ. P. 26(a)(2)(B)(iii), and FRE Rules 702, 703, and 705.</p>	
<p>DX 73 Bristow Summary Exhibits on 6DOF, Bristow Rebuttal Ex. 2</p>	<p>This appears to be Defendants' expert testifying by a video clip created for purposes of the instant litigation. This is hearsay, and the Court should require Defendants' expert to testify live at trial, rather</p>	<p>This exhibit is proper pursuant to Fed. R. Civ. P. 26(a)(2)(B)(iii), and FRE Rules 702, 703, and 705. To the extent necessary, Defendant's expert will provide a foundation for this exhibit at trial.</p>	<p>Exhibit Withdrawn</p>

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
	<p>than through a video. Additionally, this is a demonstrative without foundation, and is argument, not evidence, and should be excluded from the record pursuant to 403.</p>		
<p>DX 74 Bristow Summary Exhibits on 6DOF, Bristow Rebuttal Ex. 3</p>	<p>This appears to be Defendants' expert testifying by a video clip created for purposes of the instant litigation. This is hearsay, and the Court should require Defendants' expert to testify live at trial, rather than through a video. Additionally, this is a demonstrative without foundation, and is argument, not evidence, and should be excluded from the record pursuant to 403.</p>	<p>See response from DX73.</p>	<p>Exhibit Withdrawn</p>
<p>DX 75 Bristow Summary Exhibits on 6DOF, Bristow Rebuttal Ex. 4</p>	<p>This appears to be Defendants' expert testifying by a video clip created for purposes of the instant litigation. This is hearsay, and the Court should require Defendants' expert to testify live at trial, rather than through a video. Additionally, this is a demonstrative without foundation, and is argument, not evidence, and should be excluded from the record pursuant to 403.</p>	<p>See response from DX73.</p>	<p>Exhibit Withdrawn</p>
<p>DX 76 Bristow Summary Exhibits on</p>	<p>This appears to be Defendants' expert testifying by a video clip</p>	<p>See response from DX73.</p>	<p>Exhibit Withdrawn</p>

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
6DOF, Bristow Rebuttal Ex. 5	created for purposes of the instant litigation. This is hearsay, and the Court should require Defendants' expert to testify live at trial, rather than through a video. Additionally, this is a demonstrative without foundation, and is argument, not evidence, and should be excluded from the record pursuant to 403.		
DX 77 Bristow Summary Exhibits on 6DOF, Bristow Rebuttal Ex. 6	This appears to be Defendants' expert testifying by a video clip created for purposes of the instant litigation. This is hearsay, and the Court should require Defendants' expert to testify live at trial, rather than through a video. Additionally, this is a demonstrative without foundation, and is argument, not evidence, and should be excluded from the record pursuant to 403.	See response from DX73.	Exhibit Withdrawn
DX 79 Bristow Summary Exhibits on 6DOF/Xbox only 2.5 DOF, Bristow Rebuttal Ex. 8	This appears to be Defendants' expert testifying by a video clip created for purposes of the instant litigation. This is hearsay, and the Court should require Defendants' expert to testify live at trial, rather than through a video. Additionally, this is a demonstrative without foundation, and is argument, not evidence,	See response from DX73.	Exhibit Withdrawn

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
	and should be excluded from the record pursuant to 403.		
DX 86 Translation of JP PlayStation® Manual	Not authenticated.	This is a certified translation that is of record in the file history of the ‘700 Patent reexamination, and was also disclosed in Defendants’ original invalidity contentions. Additionally, this document will be introduced through Defendants’ technical expert(s) at trial, and is proper pursuant to FRE Rules 702, 703, and 705.	Objection withdrawn.
DX 88 Translation of JP Laid-Open Utility Model Publication S61103836	Not authenticated. Furthermore, this exhibit is objectionable if relied on by Defendants’ technical experts, as it is not referenced in their expert reports.	This is a certified translation. It is offered not as a basis of expert testimony but to show independent development by Nintendo, the the evolution of Nintendo’s accused controllers, and the state of the art. It is relevant to rebut allegations of copying and to show the development history of the accused controllers.	Reserved.
DX 89 Documents obtained from the website The Internet Archive (http://web.archive.org)	This exhibit is only a placeholder stating “This exhibit will be replaced with the certified copy when it is received from the Internet Archive.” Defendants have not disclosed what this exhibit will be, therefore it is untimely. Also, this exhibit was not specifically disclosed in Defendants’ notice of intent to offer certified records (Docket No. 245). Anascape reserves	Defendants are awaiting a document from the custodian of records certifying DX70, which Defendants have already provided to Plaintiff. Upon receipt, Defendants will provide a copy to Plaintiff.	Reserved.

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
	its right to offer additional objections to this “exhibit” once Defendants have obtained and disclosed the certified copy.		
DX 92 Internet pages on Robotron: 2084, Dezmelyk Rebuttal Ex. 28	Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6, not authenticated.	This exhibit is offered not as invalidating prior art but to show evidence of the state of the art regarding the use of multiple joysticks. It was properly disclosed in conjunction with Mr. Dezmelyk’s report. It is relevant to rebut allegations of copying.	Sustained as to authentication.
DX 93 Internet pages on Twin Rifles Arcade Game, Dezmelyk Rebuttal Ex. 30	Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6, not authenticated.	This exhibit is offered not as invalidating prior art but to show evidence of the state of the art regarding tactile feedback. It was properly disclosed in conjunction with Mr. Dezmelyk’s report. It is relevant to rebut allegations of copying.	Sustained as to authentication.
DX 100 Model Airplane Remote Controllers, Dezmelyk Rebuttal Ex. 35	Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6, not authenticated.	Authenticity will be established by a testifying witness. This exhibit is offered not as invalidating prior art but to show evidence of the state of the art regarding the use of multiple joysticks. It was properly disclosed in conjunction with Mr. Dezmelyk’s report. It is relevant to rebut allegations of copying.	Sustained as to authentication.
DX 101 Playstation Analog Joystick (“Flightstick”) (Dep. Ex. 299)	Not authenticated.	DX101 is publicly available for purchase. This exhibit will be authenticated at trial. Additionally, this exhibit satisfies the requirements of FRE 901(b)(4).	Sustained as to authentication.

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
DX 102 Flightstick Pro, Dezmelyk Rebuttal Ex. 31	Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6, not authenticated.	DX102 is publicly available for purchase. This reference is disclosed in the ‘700 patent under “Other Publications”, where Mr. Armstrong admits that it is “prior art sold in stores.”	Overruled.
DX 113 Sega Dreamcast Controller (with rumblepack) (on sale 9/9/99)	Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6, not authenticated.	DX113 is publicly available for purchase. It is offered not as invalidating prior art but as evidence of the state of the art, and it was properly disclosed in Defendants’ 282 Notice. It is also relevant to show suitable non-infringing alternatives to the claimed controllers, which is probative of the hypothetical royalty under <i>Georgia-Pacific</i> ’s Factor 9. In addition, this exhibit will be authenticated at trial. This exhibit is proper pursuant to FRE Rules 702, 703, and 705.	Admissible to show suitable non-infringing alternative. Not admissible for invalidating prior art if not listed.
DX 125 U.S. Patent No. 6,102,803 Dep. Ex. 304	This patent covers one of Defendants’ game controllers. This exhibit should be excluded under 403, as the jury may be confused as to whether a controller that is covered by one patent can infringe another patent. Also, Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	This patent is offered not as invalidating prior art but to show independent development by Nintendo, the evolution of Nintendo’s accused controllers, and the state of the art. It is relevant to rebut allegations of copying and to show the development history of the accused controllers. The potential “confusion” identified by Plaintiff is easily remedied and is not the type contemplated by Rule 403. The jury instructions will explain to the jury how to determine infringement.	Overruled.
DX 128	This patent covers one	This patent is offered not as	Overruled.

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
U.S. Patent No. 7,040,986 Dep. Ex. 313	of Defendants' game controllers. This exhibit should be excluded under 403, as the jury may be confused as to whether a controller that is covered by one patent can infringe another patent. This patent issued too late to be considered as prior art. Also, Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	invalidating prior art but to show independent development by Nintendo and the evolution of Nintendo's accused controllers. It is relevant to rebut allegations of copying and to show the development history of the accused controllers. It was properly disclosed in Defendants' 282 Notice. The potential "confusion" identified by Plaintiff is easily remedied and is not the type contemplated by Rule 403. The jury instructions will explain to the jury how to determine infringement.	
DX 129 U.S. Patent No. 6,872,139 NAA00016896-16927	This patent covers one of Defendants' game controllers. This exhibit should be excluded under 403, as the jury may be confused as to whether a controller that is covered by one patent can infringe another patent. This patent issued too late to be considered as prior art. Also, Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	See response from DX128.	Overruled.
DX 130 U.S. Patent No. 6,811,489 B1 NAA00016853-16895	This patent issued too late to be considered as prior art. Also, Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	This patent is offered not as invalidating prior art but to show independent development by Nintendo and the evolution of Nintendo's accused controllers. It was properly disclosed in Defendants' 282 Notice. It is relevant to rebut	Overruled.

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
		allegations of copying and to show the development history of the accused controllers.	
DX 131 JPA No. 254-134042 NAA00014859-14871	The translation of this document has not been authenticated. Furthermore, this document was not cited in Defendants' expert reports, thus, its experts cannot rely on this document.	This patent is offered not as a basis for expert testimony but to show independent development by Nintendo, the evolution of Nintendo's accused controllers, and the state of the art. It is relevant to rebut allegations of copying and to show the development history of the accused controllers. Authenticity will be established at trial.	Sustained as to authentication. (Authenticate at trial).
DX 132 U.S. Patent No. 5,207,426 NAA00007045-7056	This patent covers one of Defendants' game controllers. This exhibit should be excluded under 403, as the jury may be confused as to whether a controller that is covered by one patent can infringe another patent. Also, Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	This patent is offered not as invalidating prior art but to show independent development by Nintendo, the evolution of Nintendo's accused products, and the state of the art. It was properly disclosed in Defendants' 282 Notice and is relevant to rebut allegations of copying and to show the development history of the accused controllers. The potential "confusion" identified by Plaintiff is easily remedied and is not the type contemplated by Rule 403.	Overruled.
DX 133 U.S. 2007/0066394 Patent Application	This patent application features one of Defendants' game controllers. This exhibit should be excluded under 403, as the jury may be confused as to whether a controller that is covered by one patent can infringe another	This patent is offered not as invalidating prior art but to show independent development by Nintendo and the evolution of Nintendo's accused controllers. It is relevant to rebut allegations of copying and to show the development history of the accused	Overruled.

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
	patent.	controllers. The potential “confusion” identified by Plaintiff is easily remedied and is not the type contemplated by Rule 403.	
DX 134 U.S. 2007/0050597 Patent Application	This patent application features one of Defendants’ game controllers. This exhibit should be excluded under 403, as the jury may be confused as to whether a controller that is covered by one patent can infringe another patent.	See response from DX133.	Overruled.
DX 135 U.S. D559,254 S	This design patent covers one of Defendants’ game controllers. This exhibit should be excluded under 403, as the jury may be confused as to whether a controller that is covered by one patent can infringe another patent.	See response from DX133.	Overruled.
DX 136 U.S. Patent No. 4,687,200	Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	This patent is offered not as invalidating prior art but to show independent development by Nintendo, the evolution of Nintendo’s accused controllers, and the state of the art. It was properly disclosed in Defendants’ 282 Notice. It is relevant to rebut allegations of copying and to show the development history of the accused controllers.	Overruled.
DX 137 U.S. Patent No. 5,184,830	Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	This patent is offered not as invalidating prior art but to show independent development by Nintendo, the evolution of Nintendo’s	Overruled.

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
		accused controllers, and the state of the art. It was properly disclosed in Defendants' 282 Notice. It is relevant to rebut allegations of copying and to show the development history of the accused controllers.	
DX 138 U.S. Patent No. 5,207,426	Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	See response from DX137.	Overruled.
DX 139 U.S. Patent No. 5,396,225	This exhibit is Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	See response from DX137.	Overruled.
DX 140 U.S. Patent No. 5,552,799	Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	See response from DX137.	Overruled.
DX 141 U.S. Patent No. 5,602,569	Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	See response from DX137.	Overruled.
DX 142 U.S. Patent No. 5,963,196	Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	See response from DX137.	Overruled.
DX 143 U.S. Patent No. 5,984,785	This patent covers one of Defendants' game controllers. This exhibit should be excluded under 403, as the jury may be confused as to whether a controller that is covered by one patent can infringe another patent. Also, Defendants failed to	This patent is offered not as invalidating prior art but to show independent development by Nintendo, the evolution of Nintendo's accused controllers, and the state of the art. It was properly disclosed in Defendants' 282 Notice. It is relevant to rebut allegations of copying and to show the	Overruled.

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
	timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	development history of the accused controllers. The potential “confusion” identified by Plaintiff is easily remedied and is not the type contemplated by Rule 403.	
DX 144 U.S. Patent No. 6,155,926	Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	This patent is offered not as invalidating prior art but to show independent development by Nintendo, the evolution of Nintendo’s accused controllers, and the state of the art. It was properly disclosed in Defendants’ 282 Notice. It is relevant to rebut allegations of copying and to show the development history of the accused controllers.	Overruled.
DX 145 U.S. Patent No. 6,482,010 dated 11/19/02 MS- ANAS0007345	This patent issued too late to be considered prior art, and thus may confuse the jury under rule 403. This exhibit is Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	This exhibit is not being asserted as prior art, but rather as showing the state of the art and to rebut charges of copying. As such, it was timely disclosed in a notice under 35 U.S.C. Section 282.	Exhibit Withdrawn

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
DX 146 U.S. Patent No. D453,932	This patent issued too late to be considered prior art, and thus may confuse the jury under rule 403. This exhibit is Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	This exhibit is not being asserted as prior art, but rather as showing the state of the art, to rebut charges of copying and to show value of Xbox controller features not claimed by Mr. Armstrong. As such, it was timely disclosed in a notice under 35 U.S.C. Section 282. The potential “confusion” identified by Plaintiff is easily remedied and is not the type contemplated by Rule 403.	Exhibit Withdrawn
DX 147 U.S. Patent No. D522,011	This patent issued too late to be considered prior art (issued 2006), and thus may confuse the jury under rule 403. This exhibit is Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	See response from DX146.	Exhibit Withdrawn
DX 153 U.S. Patent No. 6,452,586	This patent issued too late to be considered prior art, and thus may confuse the jury under rule 403.	See response from DX53.	Exhibit Withdrawn
DX 177 Xbox 360 - Annotated Internal Photographs	Demonstrative without foundation.	A foundation will be laid at trial.	Exhibit Withdrawn
DX 178 Microsoft Sidewinder 3D Pro Joystick (on sale 1996)	This exhibit is Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6,, not authenticated.	The exhibit will be authenticated through live witness testimony. This exhibit is not offered as invalidating prior art, and Defendants have agreed not to use the exhibit as such. Instead, this exhibit is offered for the following	Overruled.

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
		<p>reasons:</p> <p><i>(a) Rebut Copying:</i> Based on Plaintiff's willfulness position in opposition to Defendants' motion for summary judgment, Mr. Armstrong's deposition testimony, and Anascape's inclusion of a jury instruction on copying, it is expected that Plaintiff will argue at trial that Mr. Armstrong through a meeting in 1999 taught Microsoft how to make the accused controllers and that Microsoft copied based on that meeting. This exhibit shows that prior to that meeting, Microsoft had already developed its own game controllers having many of the features of the later accused Xbox controllers.</p> <p>Microsoft's own history and expertise in developing game controllers prior to that meeting, including this exhibit, is highly relevant to rebut this false charge by Anascape that Microsoft copied from Mr. Armstrong.</p> <p><i>(b) Show State of the Art:</i> This exhibit also shows the state of the art for game controllers.</p> <p><i>(c) Non-infringing alternatives:</i> In an interrogatory response, Anascape has admitted that this game controller does not infringe the asserted claims. Thus, it is relevant to show suitable non-infringing alternatives to the claimed</p>	

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
		<p>controllers, which is probative of the hypothetical royalty under <i>Georgia-Pacific's</i> Factor 9. Because this exhibit is <i>not</i> offered to show invalidating prior art but instead for other reasons, Anascape's objection that the exhibit was not disclosed under P.R. 3-3, 3-4, and 3-6 (which relate to invalidity documents), is not applicable.</p>	
DX 179 Microsoft Sidewinder Game Pad (on sale 10/96)	This exhibit is Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6,, not authenticated.	See response from DX178.	Overruled.
DX 180 Microsoft Sidewinder Force Feedback Pro Joystick (on sale 9/97)	This exhibit is Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6,, not authenticated.	See response from DX178.	Overruled.
DX 181 Microsoft Sidewinder Dual Strike (on sale 11/99)	This exhibit is Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6,, Defendants only provided a photo of what appears to be a package of this controller, Anascape reserves the right to object to this exhibit upon inspection, likely not authenticated.	See response from DX178.	Overruled.
DX 182 Microsoft Sidewinder Freestyle Pro (on	This exhibit is Defendants failed to timely identify or produce this reference as	See response from DX178.	Overruled.

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
sale 11/98)	required by P.R. 3-3, 3-4, and 3-6., Defendants only provided a photo of what appears to be a package of this controller, Anascape reserves the right to object to this exhibit upon inspection, likely not authenticated.		
DX 183 Microsoft Sidewinder Game Pad Pro dated 5/99 (on sale 11/99) (controller)	This exhibit is Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6., Defendants only provided a photo of what appears to be a package of this controller, Anascape reserves the right to object to this exhibit upon inspection, likely not authenticated.	See response from DX178.	Overruled.
DX 199 “Fundamentals of Interactive Computer Graphics” by J.D. Foley and A. Van Dam, Dezmelyk Rebuttal Ex. 27	Only shows the front cover of the book, and is therefore incomplete. Hearsay, and Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	This document is offered not as invalidating prior art but to show the state of the art regarding use of multiple input devices. The complete book will be made available for inspection at trial.	Sustained.
DX 229 4/6/04 Voice-mail (transcribed) from Brad Armstrong to Todd Holmdahl (MS-ANAS 175225)	Not authenticated, use of the transcription of a voicemail is a violation of the best evidence rule.	The exhibit will be authenticated through live witness testimony, and is the best evidence available of this voicemail. The original recording was destroyed in the ordinary course of business, without bad faith. <i>See</i> Fed. R. Evid. 1004(1).	Exhibit Withdrawn
DX 244	Demonstrative without	Expert will lay the	Make

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
Chart—Top 20 “Biggest Buzz” Wii Games, Ugone Ex. 4	foundation.	foundation for this Rule 1006 expert summary.	objection at trial.
DX 245 Chart—Games Released at the Launch of Wii, Ugone Ex. 5	Demonstrative without foundation.	Expert will lay the foundation for this Rule 1006 expert summary.	Make objection at trial.
DX 246 Chart—Scenario I: “All Asserted Claims” or “Only Claim 19” Are Found to Be Valid and Infringed, Ugone Ex. 7	Attached expert report, which the Court specifically excluded. If just chart, it is a demonstrative without proper foundation.	Expert report will be removed. Expert will lay the foundation for this Rule 1006 expert summary.	Make objection at trial.
DX 247 Chart—Scenario II: “All Asserted Claims Except Claim 19” Are Found to Be Valid and Infringed, Ugone Ex. 8	Attached expert report, which the Court specifically excluded. If just chart, it is a demonstrative without proper foundation.	Expert report will be removed. Expert will lay the foundation for this Rule 1006 expert summary.	Make objection at trial.
DX 256 Martinez Summary Exhibit 4: U.S. Market Share	Demonstrative without proper foundation.	Defendants’ expert will testify at trial regarding the foundation for this Rule 1006 expert summary and will explain its preparation and significance to the jury.	Exhibit Withdrawn
DX 257 Martinez Summary Exhibit 5 (AF)	Demonstrative without proper foundation.	Defendants’ expert will testify at trial regarding the foundation for this Rule 1006 expert summary and will explain its preparation and significance to the jury.	Exhibit Withdrawn
DX 258 Martinez Summary Exhibit 6: Demand Drive	Demonstrative without proper foundation.	Defendants’ expert will testify at trial regarding the foundation for this Rule 1006 expert summary and will explain its preparation and significance to the jury.	Exhibit Withdrawn
DX 259 Martinez	Demonstrative without proper foundation.	Defendants’ expert will testify at trial regarding the	Exhibit Withdrawn

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
Summary Exhibit 7: Licensed Anascape Patents and Applications		foundation for this Rule 1006 expert summary and will explain its preparation and significance to the jury.	
DX 261 March 1998 Spreadsheet of royalties paid to Metamorfyx (MS-ANAS 175221-24)	Demonstrative without proper foundation.	The exhibit is not merely a demonstrative but constitutes documentary evidence. It will be authenticated through live witness testimony at trial.	Exhibit Withdrawn
DX 291 “The Ultimate Game Cube FAQ” (Ex 351)	Hearsay.	DX291 is offered not for the truth of the statements therein but to establish the substance of the Plaintiff’s research. It is relevant to invalidity and non-infringement.	Reserved.
DX 310 CNN.com Holiday Buying Guide article dated December 14, 1999.	Hearsay, not authenticated, Defendants failed to timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6.	The periodical is self-authenticating under Fed. R. Evid. 902(6). The exhibit is not offered for the truth of the matter asserted, and even if it were, is admissible as a present sense impression by a witness who is reporting on his review of game controllers available on the market at a given point in time. The exhibit is not being asserted as prior art, but rather as showing the state of the art. The controller in this article was produced by Mad Catz, a company once owned in whole or part by Kelly Tyler, a partner in Anascape who will be called as a live witness at trial by at least Anascape.	Sustained as to authentication.
DX 311 MadKatz	Defendants failed to	The exhibit is not being	Overruled.

TRIAL EXHIBIT	OBJECTIONS	RESPONSE	COURT RULING
Dual Force Controller	timely identify or produce this reference as required by P.R. 3-3, 3-4, and 3-6, not authenticated.	asserted as prior art, but rather as showing the state of the art. This controller was produced by Mad Catz, a company once owned in whole or part by Kelly Tyler, a partner in Anascape who will be called as a live witness at trial by at least Anascape.	
DX 312 Letter from Zappacosta to Armstrong dated 10/26/93 ANS0039044-45	Not authenticated, Hearsay, Prejudice under Rule 403, Confusion under Rule 403.	Authenticity will be established by a testifying witness. The document is offered not for the truth of the matter asserted but as evidence of what was communicated to the Plaintiff. DX312 is relevant to the validity and value of the claimed invention, and its probative value outweighs any Rule 403 concerns.	Sustained as to authentication. Sustained as to hearsay.
DX 313 Letter from Armstrong to Zappacosta dated 11/8/93 ANS0039039-40	Hearsay, Prejudice under Rule 403, Confusion under Rule 403.	This document is a party admission and not hearsay. The author of this document will be available at trial for cross-examination. DX313 is relevant to the validity and value of the claimed invention, and its probative value outweighs any Rule 403 concerns.	Overruled.

So **ORDERED** and **SIGNED** this **2** day of **May, 2008**.



Ron Clark, United States District Judge