

**IN THE 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

**ANASCAPE, LTD.'S UNOPPOSED MOTION TO ALLOW
KELLY TYLER TO TESTIFY BY TELEPHONE AT THE JULY 18 HEARING**

Anascape, Ltd. (“Anascape”) files this Unopposed Motion to Allow Kelly Tyler to Testify by Telephone at the July 18 Hearing, and shows as follows:

Anascape respectfully requests that the Court allow Kelly Tyler to testify at the July 18 hearing by telephone. Mr. Tyler is a co-owner of Anascape, and testified during the jury trial in May 2008. Months ago, Mr. Tyler committed to attend a Scout camp for his son’s Scout troop that runs from July 14 through July 19 at Camp Pendleton Marine Corp Base in Pendleton, California. (*See* Ex. A, Declaration of Kelly Tyler). Mr. Tyler had planned to attend the post-trial hearing live when it was scheduled on July 22, but the post-trial hearing was rescheduled to July 18. Shortly following the hearing being rescheduled, Anascape’s counsel inquired with the Court’s staff as to whether the hearing could be rescheduled, but was informed that rescheduling was not possible.

Mr. Tyler is expected to offer sworn testimony (and be cross-examined) at the post-trial hearing relating to Anascape’s request for an injunction and an ongoing royalty.

Because Mr. Tyler testified at the jury trial, this Court had the opportunity then to observe Mr.

Tyler testify in person and assess his credibility. The post-trial hearing on July 18 does not involve a jury, and the concerns¹ favoring in-court testimony do not appear to apply here.²

Anascape has met and conferred with Nintendo, and Nintendo has agreed not to oppose this Motion so long as the parties agree to use their best efforts and be reasonable in terms of the logistics of Mr. Tyler's telephone testimony (e.g., allowing Nintendo's representatives to be with Mr. Tyler during his testimony should Nintendo request this, coordinating so that Mr. Tyler can be shown and testify with respect to exhibits). Anascape is amenable to this, and, accordingly, the present motion is unopposed.

¹ See, e.g., *Dagen v. CFC Group Holdings Ltd.*, No. 00 Civ. 5682(CBM), 2003 WL 22533425, at *1 (S.D.N.Y. Nov. 7, 2003) (“Even before the Federal Rules were amended in 1996, federal trial courts have repeatedly, in civil cases, taken testimony by telephone and closed circuit television. The jury has never had any difficulty in evaluating such testimony.”) (quotations omitted).

² Federal Rule of Civil Procedure 43(a) allows, in certain circumstances, *trial* testimony to be taken by “contemporaneous transmission from a different location.” See *Thornton v. Snyder*, 428 F.3d 690, 698 (7th Cir. 2005) (“[T]he district court did not abuse its discretion in conducting the trial by videoconference.”); *Adam v. Carvalho*, 138 Fed. Appx. 7, 9 (9th Cir. 2005) (allowing out-of-court testimony from a sworn, out-of-state witness was not error and such testimony was not hearsay) (unpublished); *Beltran-Tirado v. INS*, 213 F.3d 1179, 1185-86 (9th Cir. 2000) (allowing the use of telephonic testimony where the witness “was a sworn, out-of-state witness, and her testimony was subject to cross-examination” and finding that telephone testimony is “taken in open court” and not hearsay); *Sussel v. Wynne*, No. 05-00444 ACK-KSC, 2006 WL 2860664, at *4 (D. Haw. Oct. 4, 2006) (allowing out-of-court telephone testimony where “the witness is in Alabama and it would be difficult and costly to have him testify in person . . .”); *Dagen*, 2003 WL 22533425, at *1 (allowing five of defendant's employees to testify by telephone during trial); *T.C. v. Swedish Match N. Am. Inc.*, 197 F.R.D. 1, 2 (D.D.C. 2000) (finding good cause for contemporaneous transmission of testimony where witness, a resident of Oklahoma, would have had to travel to Washington, D.C. to testify).

Anascape notes that, although it believes good cause exists to allow Mr. Tyler to testify by telephone, Fed. R. Civ. P. 43(a) does not appear to apply here since it, on its face, applies to trials, not post-trial motion hearings. Compare Fed. R. Civ. P. 43(a) with Fed. R. Civ. P. 43(c) (“When a *motion* relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.”) (emphasis added).

DATED: July 2, 2008

Respectfully submitted,

McKool Smith, P.C.

By: /s/ Douglas A. Cawley

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CERTIFICATION OF CONFERENCE

The undersigned has met and conferred with Nintendo's counsel regarding the relief requested in this motion. With the parties' agreement as articulated above, Nintendo is not opposed to the relief sought in this motion.

/s/ Steven Callahan
Steven Callahan

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a) on July 2, 2008. As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A).

/s/ Steven Callahan
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