

**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.

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Hon. Ron Clark

Civil Action No.: 9:06-CV-00158-RC

**NINTENDO’S UNOPPOSED MOTION  
TO ALLOW KEITH UGONE TO TESTIFY  
BY TELEPHONE AT THE JULY 18 HEARING**

Nintendo of America Inc. (“Nintendo”) files this Unopposed Motion to Allow Keith Ugone to Testify By Telephone at the July 18 Hearing, and shows as follows:

Nintendo requests that the Court allow Keith Ugone to testify at the July 18 hearing by telephone. Dr. Ugone is Nintendo’s damages expert, who has submitted a Declaration dated July 2, 2008 (the “Declaration”) regarding ongoing royalties, if any, to be awarded by the Court as well as prejudgment interest. If allowed by the Court, Nintendo will rely on the Declaration as constituting Dr. Ugone’s direct testimony, will not conduct a direct examination of Dr. Ugone, and will tender Dr. Ugone for cross-examination and any questions the Court may have of Dr. Ugone.<sup>1</sup> Thus, if so allowed, Dr. Ugone’s telephonic testimony will be limited in the foregoing way.

<sup>1</sup> If allowed by the Court, Nintendo will rely on the declaration testimony of all of its post-trial hearing witnesses (e.g., Messrs. Ikeda, Bask, Clark, and Ugone) as constituting their direct testimony and will tender each for cross-examination and any questioning by the Court. In an abundance of caution, unless the Court directs otherwise, Messrs. Bask and Clark will travel from Seattle to Beaumont to appear live at the July 18 hearing so that they may be cross-examined and respond to any questions by the Court. By separate motion to be filed today,

(continued...)

The circumstances necessitating this motion are as follows. Dr. Ugone is scheduled to testify as plaintiff's damages expert on July 18, 2008 in federal district court in San Francisco in a jury trial captioned *Therasense, Inc. v. Becton, Dickinson and Company*, No. c 04-02123 (N.D. Cal.) pending before Judge William Alsup. By Order dated July 1, 2008, the jury trial in that case began yesterday, July 14, 2008. *See* Final Pretrial Order at ¶1, attached hereto as Ex. 1. The Court has allotted each side 18 hours to try its case. *Id.* at ¶2. Counsel for Therasense, Mr. Steven Mitby, has advised Nintendo that he expects Dr. Ugone to be called on July 18, following testimony from Therasense's fact witnesses. When Nintendo learned of the *Therasense* trial's July 14 start date, Nintendo informed Mr. Mitby of the July 18 hearing in this case and asked Mr. Mitby to call Dr. Ugone on a day other than July 18. Mr. Mitby informed Nintendo that this was not possible given the need for Dr. Ugone to rely on testimony from Therasense's fact witnesses who are scheduled to testify from July 14 through July 17. Mr. Mitby also noted Judge Alsup's rule which provides that "[f]ailure to have the next witness ready or to be prepared to proceed with the evidence will usually constitute resting." *See* Guidelines for Trial and Final Pretrial Conference in Civil Jury Cases before the Honorable William Alsup ¶12, attached hereto as Ex. 2. Dr. Ugone 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.<sup>2</sup>

The post-trial hearing on July 18 does not involve a jury, and concerns favoring in-court testimony do not appear to apply here.<sup>3</sup> Nintendo has met and conferred with Anascape,

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Nintendo will request that Mr. Ikeda, who resides in Japan and testified live at trial, be allowed to testify at the July 18 by telephone, assuming the Court wants to hear any live testimony from him.

<sup>2</sup> If this motion is granted, Nintendo respectfully requests that Dr. Ugone be permitted to testify in the morning at the July 18 hearing before the trial day begins in the *Therasense* case, which begins at 7:30 a.m. PDT each day. *See* Ex. 1 at ¶1.

<sup>3</sup> *See* Order dated July 3, 2008 (Dkt. No. 361); *see also* Anascape, Ltd.'s Unopposed Motion to Allow Kelly Tyler to Testify by Telephone at the July 18 Hearing (Dkt. No. 357), notes 1 and 2.

and Anascape 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 Dr. Ugone's telephone testimony (*e.g.*, allowing Anascape's representatives to be with Dr. Ugone should Anascape request this, coordinating so that Dr. Ugone can be shown and testify with respect to exhibits, etc.). Nintendo is amenable to this, and accordingly, the present motion is unopposed.

Dated: July 15, 2008

Respectfully submitted,

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Attorneys for Defendant and  
Counterclaimant  
Nintendo of America Inc.

### **CERTIFICATE OF CONFERENCE**

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

/s/ James S. Blank  
James S. Blank

### **CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a) on July 15, 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/ James S. Blank  
James S. Blank