

**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 RESPONSE TO ANASCAPE'S  
OBJECTION TO IMPROPERLY DISCLOSED  
NINTENDO WITNESSES AND WITNESS TESTIMONY**

Nintendo of America Inc. ("Nintendo") submits this memorandum in opposition to Anascape's Objection to Improperly Disclosed Nintendo Witnesses and Witness Testimony.

Anascape's motion seeks to exclude three declarations (from Nintendo's damages expert, Keith Ugone, and from two Nintendo employees, Terrance Bask and Nathan Clark) that Nintendo has submitted solely in connection with post-verdict issues to be addressed at the July 18 hearing, namely, ongoing royalties, permanent injunction, and prejudgment interest. Following the filing of this motion, Anascape agreed, and represented to the Court during a call with Ms. Chen yesterday, that, subject to this motion, Anascape has no objection to these declarations serving as the witnesses' direct testimony. During the same call, Anascape agreed, and represented to the Court, that Anascape will not cross-examine the declarants so long as Nintendo does elicit additional direct testimony from the witnesses at the July 18 hearing. Based on these agreements and representations, Nintendo does not intend to call any of these witnesses

at the July 18 hearing and will rely on their declarations as constituting their direct testimony.

Accordingly, Anascape's motion is limited to the three declarations themselves.<sup>1</sup>

**I. PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE  
37(A), THE DECLARATIONS OF TERRANCE BASK AND  
NATHAN CLARK SHOULD NOT BE EXCLUDED**

Anascape objects to the Bask and Clark declarations on the ground that these witnesses were not disclosed to Anascape during discovery. Br. at 2. The Bask and Clark declarations, however, relate solely to post-verdict issues that were not, by definition, implicated until after the verdict was rendered.<sup>2</sup> Specifically, the two page Bask declaration (attached hereto as Exhibit 4) states that Nintendo has not shipped any WaveBird wireless controllers since February 2007; quantifies the number of GameCube controllers in inventory as of June 30, 2008; sets forth Nintendo's sales forecast for Wii Classic controllers for fiscal year 2009; and quantifies actual sales of Wii Remote and Wii Classic controllers as of June 30, 2008. The four page Clark declaration (attached hereto as Exhibit 5) simply provides information regarding the Wii Classic controller and the available games with which it can be used as of July 7, 2008.

Both of these declarations have been submitted solely to address issues of an ongoing royalty

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<sup>1</sup> In view of the foregoing, Messrs. Bask and Clark will not attend the July 18 hearing in person. However, each will be available by telephone to answer any questions that the Court may have. Given his presence at a jury trial on July 18, the Court has granted Nintendo's motion for Dr. Ugone to testify by telephone. Thus, Dr. Ugone will also be available by telephone to answer any questions the Court has. With respect to Mr. Ikeda, who also submitted a declaration, Anascape has also agreed that his declaration may serve as his direct testimony and that they will not cross-examine him either. In contrast, Anascape is not content to rely on the Armstrong and Tyler declarations it submitted in connection with the July 18 hearing. During yesterday's call with Ms. Chen, Anascape stated that it intends to call these witnesses live at the July 18 hearing. According to Anascape's witness list (attached hereto as Exhibit 1), Messrs. Tyler and Armstrong will testify on a range of issues, including "Anascape's ability to become a third party video game accessory company." This subject was not included in Anascape's Mandatory Disclosures. See Exhibits 2 and 3 attached hereto. Nor was the subject of prejudgment interest listed in the Mandatory Disclosures, which the Tyler and Armstrong declarations also address.

<sup>2</sup> In determining an ongoing royalty, the court may receive additional evidence "to account for additional economic factors..." *Paice LLC v. Toyota Motor Corp.*, 504 F.3d 1293, 1314 (Fed. Cir. 2007); see also *Boston Scientific Corp. v. Johnson & Johnson*, 2008 WL 480193, at \*16 (N.D. Cal. Feb 19, 2008) ("On the hand, before ordering ... a reasonable royalty going forward, the Court must receive evidence in order to justify the award of a particular royalty rate.").

and a permanent injunction with respect to the three controllers found to infringe, which issues were not implicated prior to the verdict. Accordingly, Nintendo respectfully submits that it was under no obligation to disclose these witnesses during discovery or, if the Court determines there was, there was a substantial justification for not disclosing these witnesses during discovery. *See* Fed. R. Civ. P. 37(c).

Moreover, in view of Anascape's decision and agreement to not cross-examine either Mr. Bask or Mr. Clark, the contents of their declarations appear to be uncontroverted. Anascape's decision and agreement to not cross examine either of these witnesses belies, and renders moot, its claim that "Anascape's failure to depose or take discovery related to these witnesses is prejudicial, as it cannot effectively prepare to cross-examine these witnesses at the hearing or controvert any statement in the submitted declarations." Br. at 2. Accordingly, the fact that these witnesses were not disclosed during discovery is harmless and provides an independent basis to not exclude their declarations. *See* Fed. R. Civ. P. 37(c).

## **II. THE DECLARATION OF KEITH UGONE IS NOT UNTIMELY AND SHOULD NOT BE EXCLUDED**

Anascape claims Dr. Ugone's declaration (attached as Exhibit C to Anascape's motion) should be excluded because the opinions set forth therein were not included in his March 3, 2008 rebuttal report. Br. at 3. The contents of Dr. Ugone's declaration relate exclusively to post-verdict issues of ongoing royalties and prejudgment interest. Dr. Ugone's opinions in his declaration as to an ongoing royalty are grounded in the jury's verdict of non-infringement of the Wii Remote/Wii Nunchuk combination, which was a fact that did not exist at the time of his March 3, 2008 rebuttal report and which was not addressed in the report of Anascape's damages' expert, Walter Bratic, which Dr. Ugone's report rebutted. Likewise, Dr. Ugone's opinions and calculations with respect to prejudgment interest are inherently post-verdict exercises. Moreover, like with Messrs. Bask and Clark, Anascape has decided and

agreed not to cross-examine Dr. Ugone on his declaration. Given these facts, Nintendo respectfully submits that there is no justification for the Court to exclude the Ugone declaration.<sup>3</sup>

### **III. CONCLUSION**

For the foregoing reasons, Anascape's objection should be overruled in its entirety.

Dated: July 16, 2008

Respectfully submitted,

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<sup>3</sup> None of the case cited in Anascape's motion are on point, as none of them deal with testimony submitted solely for resolution of post-verdict issues.

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a) on July 16, 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  
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