

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

ANASCAPE, LTD.	§	
	§	Hon. Ron Clark
Plaintiff,	§	
	§	
v.	§	Civil Action No. 9:06-CV-00158-RC
	§	
MICROSOFT CORPORATION, and	§	
NINTENDO OF AMERICA, INC.,	§	
	§	
Defendants.	§	

**DECLARATION OF J. CHRISTOPHER CARRAWAY IN SUPPORT OF
MICROSOFT'S RENEWED MOTION TO STAY PROCEEDINGS**

1. I, J. Christopher Carraway, am an attorney with the firm of Klarquist Sparkman, LLP, counsel for defendant Microsoft Corporation, and I have been admitted *pro hac vice* to practice in this Court for this case. I have personal knowledge of the facts herein and, if called as a witness, could testify competently thereto.

2. The following reflects the status of the reexaminations of the Anascape patents for which litigation has not yet been stayed:

<i>Patent No. (Not Stayed)</i>	<i>Number of Asserted Claims</i>	<i>Status of Reexamination (as of 7/30/07)</i>
6,102,802	18	<i>All claims rejected. (7/12/07)</i>
6,343,991	46	<i>All claims rejected. (7/18/07)</i>
5,999,084	3	<i>Ex parte reexamination ordered. (2/23/07) Awaiting Office Action.</i>
6,906,700	30	<i>Inter partes reexamination ordered. (7/13/07) Anascape's claim of priority to earlier applications rejected. Office Action expected by Sep. 13.</i>
6,135,886	1	<i>Ex parte reexamination ordered. (7/27/07) Awaiting Office Action.</i>
6,222,525	12	Request pending.

3. As of July 30, 2007, the United States Patent and Trademark Office (“PTO”) has issued Office Actions rejecting all claims of the following two Anascape patents that are not yet subject to a stay:

- a. 6,102,802: On July 12, 2007, the PTO issued an Office Action rejecting all claims of the ‘802 patent, finding that every claim was anticipated and/or rendered obvious for two or more reasons each. A true and correct copy of this 15-page Office Action was attached as Exhibit A to a Notice filed with the Court as Docket No. 117 (July 17, 2007). The PTO’s rejections largely mirrored the “substantial new questions of patentability” that the PTO had found in its earlier order of reexamination. The Office Action was signed by examiner Beverly Flanagan, and two additional examiners initialed to show their agreement with Ms. Flanagan’s rejections. (*Id.*, p. 15). In the litigation, Anascape asserts that Microsoft infringes eighteen (18) claims of the ‘802 patent, all of which now stand rejected by the PTO.
- b. 6,343,991: On July 18, 2007, the PTO granted Microsoft’s request for the *inter partes* reexamination of U.S. Patent No. 6,343,991 and, on the same day, issued an Office Action rejecting all of the claims of the patent, finding that every claim was anticipated and/or rendered obvious for two or more reasons each. In its 64-page Office Action, the PTO agreed with and adopted thirty (30) separate grounds for rejecting the claims that had been proposed by Microsoft in its request. A true and correct copy of this Office Action was attached as Exhibit A to a Notice filed with the Court as Docket No. 121 (July 23, 2007). In the Office Action, the PTO rejected the claims on each and every “substantial new question of patentability”

that the PTO found in its simultaneous order of reexamination. The Office Action was signed by examiner Beverly Flanagan, and two additional examiners initialed to show their agreement with Ms. Flanagan's rejections. (*Id.*, p. 64). In the litigation, Anascape asserts that Microsoft infringes forty-six (46) claims of the '991 patent, all of which now stand rejected by the PTO.

4. As of July 30, 2007, the PTO has ordered reexamination of the asserted claims of the following three additional Anascape patents that are not yet subject to a stay:

- a. 5,999,084: On February 23, 2007, the PTO granted Microsoft's request for *ex parte* reexamination of U.S. Patent No. 5,999,084. A true and correct copy of this order was attached as Exhibit A to a Notice filed with the Court as Docket No. 77 (Feb. 27, 2007). The order was signed by primary examiner Margaret Rubin, and two additional examiners signed to show their agreement with Ms. Rubin's findings of substantial new questions of patentability. (*Id.*, p. 12). In the litigation, Anascape asserts that Microsoft infringes three (3) claims of the '084 patent, all of which are now being reexamined along with the other claims in the patent.
- b. 6,906,700: On July 13, 2007, the PTO granted Microsoft's request for *inter partes* reexamination of U.S. Patent No. 6,906,700. A true and correct copy of this order was attached as Exhibit B to a Notice filed with the Court as Docket No. 117 (July 17, 2007). In the order, the PTO agreed with Microsoft that twelve prior art references raise over forty "substantial new questions of patentability" for the claims of the '700 patent. *Id.*, pp. 4, 6-11, 20. Additionally, after a lengthy analysis (*see id.*, ¶¶ 8-24), the PTO stated that "the '700 Patent is not seen

to be entitled to the priority date of the Armstrong ‘525 patent,” (*id.*, ¶ 24). The PTO’s order also stated that an office action would soon follow. (*Id.*, p. 1). The order was signed by primary examiner Joseph R. Pokrzywa, and two additional examiners signed to show their agreement with Mr. Pokrzywa’s findings of substantial new questions of patentability. (*Id.*, p. 48). In the litigation, Anascape asserts that Microsoft and/or Nintendo infringe thirty-three (33) claims of the ‘700 patent, all of which are now being re-examined.

- c. 6,135,886: On July 27, 2007, the PTO granted Microsoft’s request for *ex parte* reexamination of U.S. Patent No. 6,135,886. A true and correct copy of this order is attached as Exhibit A to a Notice filed with the Court today (July 30, 2007) as Docket No. 122. The PTO agreed with Microsoft on every issue and found three or more “substantial new questions of patentability” per claim. (*Id.*, pp. 5-14). The order was signed by primary examiner Beverly Flanagan, and two additional examiners also signed to show their agreement with Ms. Flanagan’s findings of substantial new questions of patentability. (*Id.*, p. 15). In the litigation, Anascape asserts that Microsoft infringes one (1) claim of the ‘886 patent, which is now being reexamined along with all of the other claims in the patent.
5. As of July 30, 2007, the PTO has not yet ruled on Microsoft’s request for reexamination of U.S. Pat. No. 6,222,525. In the litigation, Anascape asserts that Microsoft and/or Nintendo infringe twelve (12) of the claims of this patent.
6. The following reflects the status as of July 30, 2007 of the six asserted Anascape patents on which the Court has stayed litigation:

Patent No. (Stayed)	Status of Reexamination (as of 7/30/07)
6,347,997	<i>All asserted claims rejected. (7/17/07)</i>
6,351,205	<i>Inter partes reexamination ordered. (6/15/07)</i>
6,400,303	<i>Inter partes reexamination ordered. (7/26/07)</i>
6,563,415	<i>Inter partes reexamination ordered. (6/4/07)</i>
6,208,271	<i>Ex parte reexamination ordered. (7/26/07)</i>
6,344,791	Request pending. Decision expected by Aug. 10.

7. The PTO has assigned all twelve reexaminations to a five experienced examiners in the PTO's Central Reexamination Unit. The following chart identifies the primary examiners who have been assigned to each reexamination:

Patent	Primary Examiner Assigned to Reexamination
6,102,802	Beverly Meindl Flanagan
6,343,991	Beverly Meindl Flanagan
6,135,886	Beverly Meindl Flanagan
6,347,997	Beverly Meindl Flanagan
6,344,791	Beverly Meindl Flanagan
5,999,084	Margaret R. Rubin
6,351,205	Margaret R. Rubin
6,906,700	Joseph R. Pokrzywa
6,222,525	My Trang Ton
6,563,415	My Trang Ton
6,400,303	Scott Louis Weaver
6,208,271	Scott Louis Weaver

8. On February 23, 2007, and March 21, 2007, Anascape took the 30(b)(6) depositions of Microsoft and Nintendo, respectively, on the structure and operation of their products that have been accused of infringement by Anascape in this case. The transcripts show that Anascape questioned Microsoft's and Nintendo's witnesses for approximately four hours

each before indicating that it had no more questions. In the many months since, Anascape has never suggested that the witnesses provided by Microsoft and Nintendo failed to provide answers to questions on these topics, nor did Anascape ask either defendant to produce another witness.

9. Before the Court issued its February 23 Order, the parties had already produced their documents as part of their mandatory disclosures, and Anascape had taken one deposition. Since the Order, very few additional documents have been produced, only three additional depositions have been taken, and the parties have submitted their claim construction briefs.

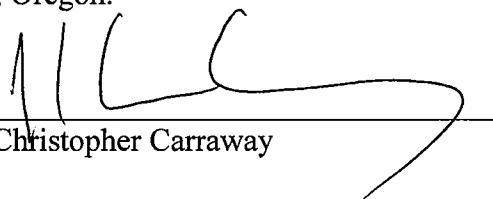
10. Anascape has already served a subpoena on third-party Interlink Electronics, and took a 30(b)(6) deposition of that company on July 20, 2007. Microsoft anticipates that in order to support claims and defenses regarding invalidity, inequitable conduct, and damages, it will need to serve a dozen or more third parties with subpoenas seeking documents and/or deposition testimony before discovery closes.

11. At the case management hearing, the parties estimated combined litigation budgets of \$10 million. The transcript pages of the case management hearing showing these estimates were attached to my declaration filed in support of the previous motion for stay, Docket No. 58, Ex. 3, pp. 5-7.

12. Attached hereto as Exhibit 1 is a true and correct copy of Joseph D. Cohen, "What's Really Happening in Inter Partes Reexamination" (2005).

13. I declare under penalty of perjury that the foregoing statements are true.

Executed this 30th day of July, 2007 at Portland, Oregon.



J. Christopher Carraway

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this the 30th day of July, 2007.

/s/ J. Christopher Carraway