

**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

JURY TRIAL REQUESTED

**ANASCAPE, LTD.'S SURREPLY TO DEFENDANT MICROSOFT CORPORATION'S
REPLY SUPPORTING ITS MOTION FOR PARTIAL SUMMARY JUDGMENT --
NONINFRINGEMENT OF PSVC CLAIMS**

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I. INTRODUCTION

Claims 66-69 of the '991 patent claim the “macro” surface effect described in the specification. These claims do not require “PSVC Material,” and do not require Anascape to show any sort of material with a “volume effect;” thus, Microsoft has not shown that it is entitled to summary judgment as to these claims. Even further, however, the Court’s bare construction of “PSVC Material” does not require a volume effect, and Anascape has provided sufficient evidence to avoid summary judgment related to literal infringement for any asserted claims that require that claim term.

In its claim construction order, the Court noted the propriety of the doctrine of equivalents in this case. Based on the record evidence, there is a clear fact issue as to whether the FSR Material is not substantially different from the claimed PSVC Material. Thus, the Court should deny Microsoft’s Motion as directed to the doctrine of equivalents.

II. ANALYSIS

A. The Preamble of Claims 66-69 of the '991 Patent is Not a Limitation.

Both Microsoft and Anascape addressed Claim 66 during claim construction briefing. At that time, Microsoft argued that the “surface with an apex . . .” limitation of claim 66—not the preamble—required the Court to include a “volume effect” limitation. *See* Microsoft Claim Construction Br. (Dkt. No. 93) at 23-24. Anascape argued that this claim did not incorporate the “PSVC Material” claim limitation, and instead, that the claim should be given its plain and ordinary meaning. *See* Anascape Claim Construction Br., Part I (Dkt. No. 88) at 21-23. Having chosen a different claim term to use as its hook, Microsoft never raised the issue of the preamble

of claim 66 also having limiting effect.¹ As a result, Anascape did not address it either. Anascape did, however, clearly argue that claim 66 did not incorporate the volume effect and was solely limited to the surface effect. The following is a portion of Anascape’s brief regarding claim 66 where Anascape sets forth its position:

66. A pressure-sensitive variable-conductance sensor for a control device, said sensor comprising;
a depressible resilient dome cap having a surface with an apex positioned above
circuit trace means for conducting electricity, said resilient dome cap depressible for creating analog output proportional to varying physical pressure applied to said dome cap; said surface with an apex is flexible, deforming with additional physical pressure to flatten and cause additional surface area contact to provide changes in electrical conductivity in said sensor; said sensor electrically connected to
active electronics means for interpreting the electrical conductivity of said sensor.

Nothing in the claim requires pressure-sensitive material. Nor does the specification or the file history of the '991 patent. To the contrary, the specification shows an embodiment that has a dome-cap with a lower surface with a flexible apex that is not pressure-sensitive variable conductance material.

After mentioning a “pressure sensitive variable-conductance sensor” in the preamble, the elements of claim 66 *go on to actually claim only the “macro” surface area effect*. The patentee, in claim 66, made his intent clear that he was only claiming the surface area effect. The second element is the only element that discusses how the sensor claimed in claim 66 accomplishes pressure sensitivity, and *the only mechanism claimed* is that the surface of the dome cap deforms “with additional physical pressure to flatten and cause additional surface area contact to provide changes in electrical conductivity in said sensor.”

Moreover, this claim was not argued at the claim construction hearing, because Microsoft changed its position, and *agreed* to Anascape’s construction of the disputed claim term in claim

¹ Microsoft argues that, as a default rule, this means that the preamble must be construed as a claim limitation. The opposite is true—the default rule is that the preamble is *not* a claim limitation, unless there are extenuating circumstances. See Resp. Br. at 10-11 (citing *Catalina Marketing v. Coolsavings.com, Inc.*, 289 F.3d 801, 808 (Fed. Cir. 2002)).

66 before the hearing, and noted its agreement on the record at the claim construction hearing. *See Ex. S* (Excerpt from the transcript of the Claim Construction hearing) at 77:5-11.

Importantly, Anascape never conceded or waived argument that the sensor of claim 66 had to contain pressure sensitive *material* exhibiting a volume effect. To the contrary, Anascape's main argument in its brief and at the claim construction hearing was the term pressure-sensitive variable conductance sensor covered a sensor that used *either* the surface area effect or the volume effect. (Anascape Claim Construction Brief I (Dkt. 88) at 10). *See Harris v. Ericsson*, 417 F.3d 1241, 1251 (Fed. Cir. 2005) (finding no waiver of a claim construction position on appeal when the appellant advocated the "same concept" as it argued before the district court). Anascape has always argued that pressure sensitive variable conductance material is not a part of claim 66.²

This is not a case where Anascape or Microsoft laid behind the log to try to gain tactical advantage. Instead, Microsoft already agreed that the body of the claim did not advance its arguments, and now, given the Court's ruling on the "PSVC Sensor" term, tries to give the preamble of claim 66 a significance it did not raise previously. Trial is one year away,³

² Furthermore, Microsoft misrepresents the Court's questioning at the claim construction hearing. *See* Def. Br. at 3. The Court did *not* ask Anascape to identify a claim that did not use PSVC Material; rather, the discussion at Tr. 47:2-48:1 was a continuation of the section of the argument directed to Anascape's proposed interpretation of the "PSVC Sensor" claim term. *See Ex. S* at 33:14-16 ("How am I supposed to define PSVC Sensor without using the term PSVC Material?") As a part of that discussion, the Court asked Anascape to identify its best examples of claim differentiation to support its proposed interpretation of PSVC Sensor. *See Ex. S* at 44:11-12 ("Do you have any other examples of what you say is claim differentiation?") The Court next repeated its request after a short exchange. *See Ex. S* at 45:9-10 ("So, go ahead and give me some other examples.") Finally, at the point cited in Defendants' brief, the Court stated "Any other examples in either the claim language or the specification? I mean, I'm telling you. Give me your best argument now, because you can obviously tell from my questions, you know, the concern I have on this particular issue." *See Ex. S* at 47:2-6. In other words, the Court asked Anascape for its best shot at pointing to claims that supported Anascape's *claim differentiation argument*. The Court did not address, and did not ask Anascape to address, whether claim 66 required either a PSVC Sensor or PSVC material. Again, the preamble was not an issue in claim 66, because Microsoft had instead asked the Court to construe the "said surface with an apex is flexible . . ." term in the body of claim 66, and then agreed to Anascape's proposed construction of that term.

³ The Court is free to construe claim terms at any time, up until it charges the jury. *See Bateman v. Por-Ta Target, Inc.*, Civ. No. 01-5599, 2004 U.S. Dist. LEXIS 28487, at *13 (N.D. Cal., July 28, 2004) (holding that a district court

Anascape has candidly presented this issue squarely for the Court’s consideration, and Anascape respectfully requests that the Court issue a ruling on the substantive merits of this claim. This issue is of dispositive importance.

B. Claims 66-69 Do Not Require A Volume Effect

Ultimately, Anascape asks that the Court consider the substantive merits of whether claims 66-69 require a volume effect. The claims only discuss the “macro” surface area effect and not the volume effect, and therefore, the Court should hold that there is a fact issue precluding summary judgment of non-infringement.

The claim language itself is clearly limited to the surface area embodiment. Claim 66 has three elements. The first and last elements, a “dome cap” and “active electronics means,” are consistent with a sensor that uses *either* the surface area effect or the volume effect. As a result, they shed no light on whether the patentee intended to limit his claim to the surface area effect, the volume effect, or both.

The second element, on the other hand, clearly recites only the surface area effect. That element requires “circuit trace means for conducting electricity, said resilient dome cap depressible for creating analog output proportional to varying physical pressure applied to said dome cap; said surface with an apex is flexible, deforming with additional physical pressure to flatten and cause additional surface area contact to provide changes in electrical conductivity in said sensor.” The structures set forth in this element are circuit traces, which are part of what

has discretion to review and amend the claim construction at any time prior to final adjudication, and may even do so *sua sponte*) (citing Fed. R. Civ. P. 54(b) (“[A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims or rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.”)); *see also Jack Guttman, Inc. v. KopyKake Enters., Inc.*, 302 F.3d 1352, 1361 (Fed. Cir. 2002) (“District courts may engage in a rolling claim construction, in which the court revisits and alters its interpretation of the claim terms as its understanding of the technology evolves.”))

causes the surface area effect, and a dome cap which flattens as additional pressure is applied. The final portion of this element sets forth the mechanism—the surface area effect—by which the sensor operates.

Given that the claim elements clearly recite a sensor which only uses a surface area effect, it would be incorrect to read the preamble to incorporate a volume effect limitation that is not contained in the recited claim elements. If anything, the recited claim elements argue away from a volume effect.

C. Based on the Record Evidence, a Reasonable Jury Could Find That The FSR Material in the Xbox Accused Products Meets the “PSVC Material” Claim Limitation, Under the Court’s Bare Construction.

Anascape has presented evidence such that a reasonable jury may find that the FSR material changes conductivity as pressure is applied to it. The *Mitchell* reference, which Microsoft has cited to as an exemplar of “PSVC Material,” confirms that the number of conductive paths through a material is related to the conductivity of that material. *See* Resp. Br. at 7 (citing Ex. K at 7:41-46, Figs. 3-6). The “micro” surface area effect is the same phenomenon, with a slightly different take—the give in the polysulfone layer allows for the rearrangement of the semiconductive layer, such that the number of available conductive paths through the semiconductive layer increases, reducing the conductivity of the material. *See* Resp. Br. at 6-8. Additionally, Microsoft made no effort to distinguish the statement in its own document, which stated that the resistance of the FSR decreased under increasing pressure. *See* Ex. M at MSANAS25182. In light of the evidence cited in Anascape’s responsive brief, especially when considered with the opinion of Anascape’s expert and the disclosure of the *Mitchell* reference, a reasonable jury could find the same.

Microsoft draws a false dichotomy between the resistance of the sensor and that of the material. In the declaration of Microsoft’s expert, Dr. Yaniger attempts to quantify the resistance

of the FSR Material by measuring the current flow through the sensor. *See* Resp. Br. at 8 (citing Ex. A at ¶ 17). The resistance of the material may be partially inferred from the current flow through the sensor. *See id.* Furthermore, Anascape has presented evidence that the current flow through the sensor increases with pressure, notwithstanding any “macro” surface effect due to the domed actuator, which supports a finding that the resistance of the FSR Material decreases with increasing pressure. *See* Resp. Br. at 7-8 (citing Ex. D at 50:10-52:13). A reasonable jury could find that any increase of current flow through the sensor, with increasing pressure, supports a finding that the resistance of the FSR Material decreases with increasing pressure, especially in light of the structure and composition of the FSR Material, and the opinion of Anascape’s retained expert. *See* Resp. Br. at 8.

D. Microsoft Infringes Under the Doctrine of Equivalents

A reasonable jury could find that there are no substantial differences between the claimed PSVC Material and the FSR Material found in the Xbox Accused Products. *See* Resp. Br. at 11-12. Additionally, a reasonable jury could find that the FSR Material performs substantially the same function, in substantially the same way, with substantially the same result as the claimed PSVC Material.⁴

As explained in Anascape’s Response Brief, both the claimed PSVC Material and the FSR Material reduce flow through an associated sensor by increasing the number of circuit paths through the material under increased pressure, as noted in the *Mitchell* reference, which was cited in the specifications. *See* Resp. Br. at 11-12 (citing Ex. K at 7:41-46, *see also* Ex. K at Figs. 3-6.) Due to the micro-protrusions in the FSR Material, whether or not a domed-shaped

⁴ The function-way-result test is not a rigid requirement, and is instead one way of showing equivalents. Because Anascape has shown that there are no substantial differences between the claimed PSVC Material and the FSR Material found in the Xbox

actuator is used, the number of circuit paths through the material increases with increasing pressure. *See id.* (citing Ex. D at 50:17-52:13, 75:8-13, 76:6-11, 77:7-80:18; Ex. J at MSANAS22135; Ex. M at MSANAS25182; Ex. N; Ex. O at 3:57-68; Ex. L.) A jury could find that this satisfies the “way” prong of the function-way-result test, notwithstanding the fact that the FSR Material does not have a “volume effect.”

Microsoft argues that FSR material is sufficiently different, as a factual matter, from PSVC material that it cannot be an equivalent. This highly factual argument is a poor candidate for summary judgment, where the Court must credit Anascape’s evidence and indulge all reasonable inferences from the evidence in Anascape’s favor. *See Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 338 (5th Cir. 2005).

Microsoft makes a critical concession in the way it frames the issue in its reply:

whole. (Resp. at 12-13.) When the element, PSVC material, is divorced from the sensor, the evidence is that the FSR material performs a different function, in a different way, with a different result. (*See* Mot. at 6-7.) Anascape’s own brief demonstrates that it works in a different way.

Def. Reply at 4. Microsoft couches its argument that PSVC material is different from FSR material when they are “divorced from the sensor.” Microsoft does not attempt to argue that when PSVC is used in a sensor and FSR is used in a sensor they have similar functions, ways, and results. Every claim refers to the use of PSVC material in a sensor, and in many cases, it is part of the claim because it is incorporated through the definition of the term PSVC sensor. So, Microsoft’s argument is moot because it is not appropriate to analyze the differences in PSVC and FSR divorced from their claimed uses.

Microsoft also argues that a failure to present evidence of empirical testing shows a lack of “particularized” evidence. Microsoft fails to note that Anascape has cited to a wealth of

evidence that shows the structure and function of the FSR Material, and Anascape's expert's opinion on the doctrine of equivalents is sufficiently supported by that evidence. Thus, Anascape has provided particularized evidence to support its doctrine of equivalents argument.

E. Anascape's Doctrine of Equivalents Analysis Does Not Implicate the "All Elements Rule"

Microsoft argues that the doctrine of equivalents is unavailable to Anascape because it would read out the requirement of PSVC material. The Court has already given a preliminary indication that the doctrine of equivalents is available in its Claim Construction Ruling. *See* Dkt. No. 159 at 17 ("Anascape argues that a skilled artisan would realized that a depressible sensor suitable for game controllers that varies electric current in response to varying pressure only by action of a surface effect is equivalent to such a sensor with PSVC material. That is an argument for infringement by equivalents—a matter for trial, not claim construction.")

Microsoft entitles its argument the "All Elements Rule Applies," which says little because the all elements rule applies in all patent cases and requires that all elements of a claim be met to prove infringement. This is not contrary to the doctrine of equivalents. The doctrine of equivalents merely states that one can substitute proof under equivalents if one or more elements is not met. Microsoft's argument to the contrary vitiates the existence of the doctrine of equivalents, which accepts as a premise that the accused product does not literally infringe the limitations of the claim. The Court should reject Microsoft's improper use of the all elements rule to unduly restrict the doctrine of equivalents.

III. CONCLUSION

For the reasons above, the Court should deny summary judgment as to literal infringement as to at least claims 66-69 of the '991 patent, and should deny summary judgment in its entirety as to infringement under the doctrine of equivalents.

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Respectfully submitted,

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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 January 24, 2008. As such, this motion was served on all counsel who have consented to electronic service. Local Rule CV-5(a)(3)(A).

/s/ Anthony M. Garza
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