

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

ANASCAPE, LTD.

Plaintiff,

v.

**MICROSOFT CORPORATION, and
NINTENDO OF AMERICA INC.,**

Defendants.

§
§
§
§
§
§
§
§
§

Hon. Ron Clark

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

**DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT
OF NON-INFRINGEMENT OF ALL ASSERTED CLAIMS OF THE
'525 PATENT AND PARTIAL SUMMARY JUDGMENT OF
NON-INFRINGEMENT OF CLAIMS 1-11, 21, 26-29 AND 31 OF THE '700 PATENT**

TABLE OF CONTENTS

I. SUMMARY.....1

II. UNDISPUTED MATERIAL FACTS.....1

III. ARGUMENT.....2

IV. CONCLUSION.....2

I. SUMMARY

This motion is based on Plaintiff, Anascape, Ltd.'s stipulation of Defendants, Nintendo of America Inc.'s ("Nintendo") and Microsoft Corporation's ("Microsoft") non-infringement of all asserted claims of U.S. Patent No. 6,222,525 (the "'525 patent") and claims 1-11, 21, 26-29 and 31 of U.S. Patent No. 6,906,700 (the "'700 patent"). (Specifically, as to the '525 Patent, claims 1, 5-6, and 12-20 were asserted against Microsoft, and claims 5, 12-17 and 19-20 were asserted against Nintendo, and as to the '700 Patent, claims 1-11, 26-29, and 31 were asserted against Microsoft, and claims 21, 26-27 and 31 were asserted against Nintendo.)¹

II. UNDISPUTED MATERIAL FACTS

1. Asserted claims 1, 5-6, and 12-20 of the '525 patent and 1-11, 21, 26-29, and 31 of the '700 patent (the "Claims") each contain as an element a "flexible membrane sheet."
2. The Court has construed "flexible membrane sheet" to mean "a thin, flat, non-conductive material that can be easily bent into a three dimensional shape, and which includes circuitry and one or more sensors, or circuitry that functions as one or more sensors." *See* Doc. # 186 at 6.
3. Following the Court's Order construing the term "flexible membrane sheet," the parties entered into a "Stipulation Regarding the Claim Term 'Flexible Membrane Sheet'" dated February 11, 2008 (the "Stipulation"). A copy of the Stipulation is attached hereto as Exhibit 1.
4. The Stipulation provides, in pertinent part:

"The undersigned parties to the above-captioned action hereby stipulate and agree that the products accused in the above-captioned action, including the Microsoft Xbox Controller, the Microsoft Xbox Controller S, the Nintendo GameCube Controller (both the wired GameCube controller and the Wavebird wireless GameCube controller), and the Nintendo Wii Classic Controller ("Accused

¹ On March 13, 2008, Nintendo submitted a letter brief to the Court requesting permission to file this motion. Thereafter, Ms. Chen directed Nintendo and Microsoft to file this motion.

Products”), do not include a “flexible membrane sheet” under the Court’s construction of that term, as reflected in the Court’s Order of Monday, February 4, 2008 (docket no. 186).”

* * *

“[P]laintiff Anascape, Ltd. (“Anascape”) hereby stipulates that, to the extent that the claim term “flexible membrane sheet” is construed in accordance with the Court’s Order of Monday, February 4, 2008 (docket no. 186), the “flexible membrane sheet” limitation is not met in the Accused Products, and for this reason, Defendants Microsoft Corporation (“Microsoft”) and Nintendo of America Inc. (“Nintendo”) do not infringe, literally or under the doctrine of equivalents, asserted claims 1-11, 21, 26-29, and 31 of U.S. Patent No. 6,906,700 and any asserted claim of U.S. Patent No. 6,222,525.”

* * *

“Based on the above stipulation, Microsoft and Nintendo will file a motion for partial summary judgment of non-infringement of the [flexible membrane sheet] Claims. Anascape’s opposition will agree that under the Court’s present construction of the term “flexible membrane sheet,” there is no issue of fact that Microsoft and Nintendo do not infringe the [flexible membrane sheet] Claims.”

III. ARGUMENT

Pursuant to the above-referenced stipulation, there is no fact issue that Defendants do not infringe the Claims based on the Court’s construction of the term “flexible membrane sheet.” Accordingly, Defendants are entitled to summary judgment of non-infringement of the Claims as a matter of law.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully requests that the Court grant summary judgment of non-infringement of all asserted claims of the ‘525 patent and partial summary judgment of non-infringement of asserted claims 1-11, 21, 26, and 31 of the ‘700 patent.

Dated: February 27, 2008

Respectfully submitted,

By: /s/ Lawrence L. Germer
Texas Bar No. 07824000

(lgermer@germer.com)
Charles W. Goehringer, Jr.
(cwgoehringer@germer.com)
GERMER GERTZ L.L.P.
550 Fannin, Suite 400
P.O. Box 4915
Beaumont, Texas 77704
Tel.: (409) 654-6700
Fax: (409) 835-2115

Robert J. Gunther, Jr.
(robert.gunther@wilmerhale.com)
WILMER HALE
399 Park Avenue
New York, NY 10022
Tel: (212) 230-8830
Fax: (212) 230-8888

/s/ James S. Blank
James S. Blank
(james.blank@lw.com)
Sabrina Hassan
(sabrina.hassan@lw.com)
LATHAM & WATKINS LLP
885 Third Avenue
New York, NY 10022
Tel.: (212) 906-1200
Fax: (212) 751-4864

Robert W. Faris
(rwf@nixonvan.com)
Joseph S. Presta
(jsp@nixonvan.com)
NIXON & VANDERHUYE, P.C.
1100 North Glebe Road, 8th Floor
Arlington, VA 22201
Tel.: (703) 816-4000
Fax: (703) 816-4100

ATTORNEYS FOR DEFENDANT AND
COUNTERCLAIMANT NINTENDO OF
AMERICA, INC.

By: /s/ John D. Vandenberg
J. Christopher Carraway (admitted *pro hac vice*)
christopher.carraway@klarquist.com
Joseph T. Jakubek (admitted *pro hac vice*)
joseph.jakubek@klarquist.com
Stephen J. Joncus (admitted *pro hac vice*)
stephen.joncus@klarquist.com
Richard D. McLeod (Bar No. 24026836)

rick.mcleod@klarquist.com

Derrick W. Toddy (admitted *pro hac vice*)

derrick.toddy@klarquist.com

John D. Vandenberg (admitted *pro hac vice*)

john.vandenberg@klarquist.com

KLARQUIST SPARKMAN, LLP

121 S.W. Salmon Street, Suite 1600

Portland, Oregon 97204

Telephone: 503-595-5300

J. Thad Heartfield (Bar No. 09346800)

thad@jth-law.com

Law Offices of J. Thad Heartfield

2195 Dowlen Road

Beaumont, Texas 77706

Telephone: 409-866-3318

Facsimile: 409-866-5789

Clayton E Dark Jr. (Bar No. 05384500)

clay.dark@yahoo.com

Clayton E Dark Jr., Law Office

207 E Frank Ave # 100

Lufkin, TX 75901

Telephone: 936-637-1733

Stephen McGrath, Esq. (admitted *pro hac vice*)

MICROSOFT CORPORATION

One Microsoft Way, Building 8

Redmond, Washington 98052-6399

Telephone: 425-882-8080

Facsimile: 425-706-7329

Attorneys for Defendant Microsoft Corporation