

WILMERHALE

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**By Email**

Honorable Ron Clark  
United States District Court  
300 Willow Street, Suite 221  
Beaumont, Texas 77701

RE: *Anascape v. MS & Nintendo* (Case No. 9:06-CV-00158-RC)

Dear Judge Clark:

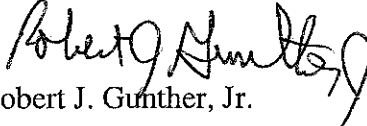
Nintendo requests that Anascape be precluded from arguing during closing or otherwise that it contacted Nintendo about taking a license to Anascape's technology and that Nintendo refused to take a license or pay fair value for the '700 patent. In Anascape's opening, counsel stated:

One of the others that they [Anascape] hoped to license was Nintendo. They talked to Nintendo, but Nintendo refused and to this day refuses to pay fair value for the use of Brad Armstrong's invention. (Trial Tr. at 112:19-22)

Mr. Armstrong continued this theme in his direct testimony. (*See, e.g.*, Tr. at 223:5-23) In fact, all contacts between Armstrong/Anascape and Nintendo occurred years before the '700 patent issued in 2005.<sup>1</sup> After the '700 patent issued, the first time that Armstrong/Anascape brought that patent to Nintendo's attention was by the filing of this lawsuit.

Anascape's argument is improper (1) since Nintendo never refused to pay fair value for the '700 patent prior to the filing of this lawsuit—the fact is that Anascape never asked; and (2) since willful infringement is out of the case, Anascape should not be permitted to make an improper end-run around that ruling.

Respectfully submitted,

  
Robert J. Gunther, Jr.

cc: All counsel of record (by email)

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<sup>1</sup> Mr. Armstrong's meeting with Nintendo's Howard Cheng took place in 1997 before the '700 patent was even filed. (Trial Tr. at 223: 5-9) Mr. Tyler's April 23, 2002 letter to Juana Tingdale of Nintendo (DX 217) was sent years before the '700 patent issued in 2005.