

Exhibit E



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April 28, 2008

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

J. CHRISTOPHER CARRAWAY
Attorney
chris.carraway@klarquist.com

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

Dear Judge Clark:

Six business days before trial, long after the deadline for expert reports and after expert depositions, Anascape served a supplemental expert report for Dr. Robert Howe. (Exhibit 1). Anascape offered no advance warning for this belated supplementation and states no reason why it could not have provided this report in a timely manner. The supplemental report does not rely on any new information and does not address any new issues. Rather, the untimely report addresses the issue of whether Mr. Armstrong's 1996 patent application adequately describes the claims he later added to the '700 patent. If not, the later-added claims are not entitled to claim priority to a 1996 filing date and are invalid. This has been a central issue in this case since its outset and was addressed at length in the February 11 report of Microsoft's expert, Stephen Bristow, and in Dr. Howe's response to that report, which was due March 3, 2008. Indeed, Dr. Howe concedes in his new supplemental report that he has "already submitted a rebuttal expert report to rebut Defendants' claims that Anascape is not entitled to claim a 1996 priority date for the '700 Patent." (Exhibit 1, at 1.) Yet, Dr. Howe nonetheless goes on to include four pages of new opinions supporting his view that the '700 Patent should receive the 1996 priority date.

The proffered excuse for Dr. Howe's tardy report is a recent decision in which the Federal Circuit clarified that where, as here, a patent owner seeks an effective filing date earlier



than its actual filing date, it bears the burden of proving entitlement to the earlier date. *PowerOasis, Inc. v. T-Mobile USA, Inc.*, No. 2007-1265, slip op. at 8-9 (Fed. Cir. April 11, 2008). Under this ruling, in order to establish its entitlement to the 1996 effective filing date, Anascape bears the burden of proving that the 1996 application provides an adequate written description of the later-filed claims. This clarification of who bears the burden of proof on the issue does not excuse Dr. Howe's belated supplementation. Had this decision been issued sooner, Anascape would have had to address the issue in its initial report and Microsoft would have addressed it in its reply. However, despite the switched order of addressing the issue, both parties have already had a full opportunity to address the issue and, in fact, did address the issue. The Court should not allow Anascape to use the change in the burden of proof as an excuse to shoe-horn new, untimely expert opinions on the priority issue into the case on the eve of trial.

Dr. Howe's untimely and unexcused supplemental report should be stricken.

Sincerely,

KLARQUIST SPARKMAN, LLP

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

Anascape, Ltd.,

Plaintiff,

v.

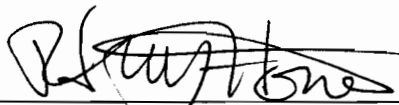
Microsoft Corp., and
Nintendo of America, Inc.,

Defendants.

Civil Action No. 9:06-cv-158-RC

JURY TRIAL REQUESTED

SUPPLEMENTAL EXPERT REPORT OF ROBERT HOWE, PH.D.



Dr. Robert Howe

Date: 4/24/08

I. INTRODUCTION

1. My name is Dr. Robert Howe. I am an independent expert witness and I submit this Supplemental Expert Report in support of Plaintiff Anascape, Ltd. (“Anascape”). I understand that in light of the recent Federal Circuit decision of *PowerOasis v. T-Mobile*, the parties disagree as to whether Defendants must prove that Anascape is *not* entitled to claim priority to the filing date of the application for the ’525 Patent, or whether Anascape must prove that it *is* entitled to claim priority to that application. I understand that Anascape contends that *PowerOasis* is inapposite to the present factual situation, and that the burden remains with Defendants to prove, by clear and convincing evidence, that the ’700 Patent is not able to claim priority to the 1996 application for the ’525 Patent. I have already submitted a rebuttal expert report to rebut Defendants’ claims that Anascape is not entitled to claim a 1996 priority date for the ’700 Patent. As explained in that report, I have reviewed the ’700 Patent and the original ’525 Application, and in light of the knowledge of one in ordinary skill in the art, it is my opinion that the asserted claims of the ’700 Patent are entitled to claim priority to the filing date of the ’525 Application.

II. ANALYSIS

2. I have already rebutted Defendants’ written description assertions and Defendants’ claims that the ’700 Patent is not entitled to claim priority to the filing date of the ’525 Patent, in my rebuttal report served on March 3, 2008, at pages 62-73. I incorporate that analysis by reference.

3. Various asserted claims require an element or platform moveable on two axes, that activates four unidirectional sensors. Armstrong disclosed this element in his

original application at, *inter alia*, ANS64551, ANS64557 (describing benefits of sensor pairs); Figs.¹ 21, 28, 32, 36.

4. Various asserted claims require two elements moveable on two perpendicular axes that are structured to activate two bi-directional proportional sensors. Armstrong disclosed this element in his original application at, *inter alia*, ANS64558 (disclosure of bidirectional sensors for use with Figs. 20-28); Figs. 20-25 (element 321 is moveable on three mutually perpendicular linear axes and one rotational axis, and activates rockers 342 and 340, while element 322 is moveable on two mutually perpendicular linear axes and activates rockers 344 and 346, in concert with element 339); Figs. 45-47 (showing bidirectional sensors used with rockers and handle of earlier figures).

5. At least one asserted claim requires four separate bidirectional sensors. Armstrong disclosed this element in his original application at, *inter alia*, ANS64558; Figs. 20-25, Figs. 45-47.

6. Various asserted claims require a plurality of buttons, including buttons that pivot. Armstrong disclosed this element in his original application at, *inter alia*, ANS64548, ANS64551, ANS64552, ANS64560, Figs. 8, 9, 20, 28, 50.

7. Various asserted claims require proportional buttons. Armstrong disclosed this element in his original application at, *inter alia*, ANS64524, ANS64526-27, ANS64556-58, Figs. 38-40, 50.

8. Various asserted claims require sheet-connected sensors. Armstrong disclosed this element in his original application at, *inter alia*, ANS64515, ANS64522, ANS64525, Figs. 14, 17, 18, 20-22, 28.

¹ All citations to figures also include references to the associated text in the specification of the patent.

9. Various asserted claims require active tactile feedback, or a motor and offset weight. As discussed in my rebuttal report served March 3, 2008, Armstrong disclosed this element in his original '525 Application, as well as in his '828 Application. *See also* ANS64526, ANS64548, Fig. 21.

10. Various asserted claims require rotary potentiometers. Armstrong disclosed this element in his original application at, *inter alia*, ANS64524, ANS64558, Fig. 45.

11. At least one asserted claim requires a housing, and elements supported by a housing. Armstrong disclosed this element in his original application at, *inter alia*, ANS64527, ANS64531, Figs. 1-6, 9, 19.

12. At least one asserted claim requires a circuit board. Armstrong disclosed this element in his original application at, *inter alia*, ANS64515, ANS64523, ANS64526, Fig. 17, 32.

13. Armstrong understood that his disclosure could be used with controllers having multiple input members. Armstrong disclosed this at, *inter alia*, ANS64527 (describing Fig. 5 with two rotational input members, a trackball and a collet), ANS64532, ANS64533, ANS64538, ANS64539, ANS64540, ANS64552, Figs. 1-6 (trackball and collet); Figs. 20, 28 (pivotal input members).

14. Armstrong understood that his disclosure could be used with controllers that did not have one or more input members moveable or operable on three linear axes and three rotational axes. *See, e.g.*, ANS64516-17 (disclosing 2DOF and 3DOF joysticks in explaining one drawback to 6DOF devices -- a generally higher cost of manufacture); ANS64524 (suggesting that a controller need not provide outputs providing control over six axes); ANS64525 (disclosing a controller manipulatable or operable in "up to 6DOF"); ANS64539; ANS64556-57 (suggesting disclosed technology could be used with "any

multiple axes controller”); ANS64560 (suggesting disclosed technology could be used with “non 6DOF applications”, including “two axis joysticks”); ANS64543 (suggesting disclosed technology could be used with “the field of 3D graphic image controllers”).

15. Armstrong understood that the outputs of these various features could be used by software for many uses. *See* ANS64539 (“ the rotatable collet can serve as an additional secondary input member *for whatever use may be desired* by a software designer or end-user”); ANS64530 (outputs “control information”); ANS64556-57 (outputs used with 3D graphics programs).

16. In light of the above analysis, including the analysis found in my previous expert reports, it is my opinion that one of skill in the art would recognize that Armstrong had possession of the inventions embodied by the asserted claims in 1996, as all of the features claimed are found in the original ’525 Application, and one of skill in the art would recognize that Armstrong had possession of those claims based on that application.

17. It is my opinion that one of skill in the art, based on the extensive disclosure in the specification, including the disclosure outline above and the disclosure in my other expert reports, would understand that Armstrong had possession of the claimed subject matter through the disclosure in the original ’525 Application.

18. It is my opinion that the asserted claims fulfill the written description requirement vis-à-vis the original ’525 Application, and that the asserted claims are entitled to claim priority to the filing date of the ’525 Patent.