

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

ANASCAPE, LTD.,

Plaintiff,

vs.

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

Defendants.

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

JURY TRIAL

**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS
TO EXCLUDE TESTIMONY BY WALTER BRATIC AND MARK BALDWIN**

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT	1
A.	Walter Bratic’s Testimony Regarding the Reasonable Royalty Rate and Base is Admissible Under Rule 702.	1
1.	Bratic’s Usage of the Average Price of Controllers Sold Separately Provides No Basis For Excluding His Testimony.	2
2.	Bratic’s Factual Observations and Conclusions Relating to the Importance of the Patented Technology Provide No Basis For Excluding His Testimony.	3
3.	Bratic’s Discussion of the Prominent Failure of a Non-infringing Alternative Provides No Basis For Excluding His Testimony.	5
B.	Mark Baldwin’s Testimony Regarding the Importance of Six-Axis Graphics Control and Vibration Feedback is Admissible Under Rule 702.	6
1.	Baldwin’s Testimony is Reliably Supported By His 26 Years of Specialized Experience.	7
2.	Baldwin’s Testimony Regarding Two Controller Features at the Center of This Case is Relevant to This Case.	8
III.	CONCLUSION	9

TABLE OF AUTHORITIES

CASES

<i>Allison v. Nibco, Inc.</i> , No. 9:02-CV-172-TH, 2003 U.S. Dist. LEXIS 27617 (E.D. Tex. May 21, 2003).....	7, 8
<i>Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579 (1993).....	1, 2, 8
<i>Freeman v. Gerber Prods. Co.</i> , 450 F. Supp. 2d 1248 (D. Kan. 2006).....	2, 4, 5
<i>Fresenius Med. Care Holdings, Inc. v. Baxter Int’l, Inc.</i> , No. C-03-1431, 2006 WL 1390416 (N.D. Cal. May 18, 2006).....	5, 9
<i>Inline Connection Corp. v. AOL Time Warner Inc.</i> , 470 F. Supp. 2d 435 (D. Del. 2007).....	2, 3, 4
<i>Kumho Tire Co., Ltd. v. Carmichael</i> , 526 U.S. 137 (1999).....	1, 7
<i>Mathis v. Exxon Corp.</i> , 302 F.3d 448 (5th Cir. 2002)	7, 9
<i>Micro Chem., Inc. v. Lextron, Inc.</i> , 317 F.3d 1387 (Fed. Cir. 2003).....	passim
<i>Pipitone v. Biomatrix, Inc.</i> , 288 F.3d 239 (5th Cir. 2002)	2, 3, 9
<i>Riles v. Shell Exploration & Prod. Co.</i> , 298 F.3d 1302 (Fed. Cir. 2002).....	5
<i>State Contracting & Eng’g Corp. v. Condotte Am., Inc.</i> , 346 F.3d 1057 (Fed. Cir. 2003).....	2, 3, 4
<i>Taylor Pipeline Constr., Inc. v. Directional Rd. Boring, Inc.</i> , 438 F. Supp. 2d 696 (E.D. Tex. 2006).....	6
<i>Tex. Digital Sys., Inc. v. Telegenix, Inc.</i> , 308 F.3d 1193 (Fed. Cir. 2002).....	2, 5

RULES

FED. R. EVID. 401	9
FED. R. EVID. 702.....	7, 8, 9
FED. R. EVID. 705.....	4

I. INTRODUCTION

Plaintiff Anascape, Ltd. (“Anascape”) files this response in opposition to Defendants’ motions to exclude certain testimony of Walter Bratic and Mark Baldwin under Rule 702. [Dkt. Nos. 211, 212]. Because the expert reports submitted by Bratic and Baldwin reflect testimony that is both relevant and reliable, *see Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 594-95 (1993), Defendants’ motions should be denied in their entirety.

II. ARGUMENT

A. Walter Bratic’s Testimony Regarding the Reasonable Royalty Rate and Base is Admissible Under Rule 702.

Walter Bratic has submitted a 63-page expert report on damages that offers two principal opinions: 1) his conclusion as to the reasonable-royalty rate for the ’700 Patent; and 2) his conclusion as to the reasonable royalty due based upon that rate. [Bratic Rpt. ¶¶ 7-8 (filed under seal with Dkt. No. 212)]. Bratic’s report explains the bases for these opinions in great detail, and includes, in part, an exhaustive step-by-step analysis of each of the fifteen *Georgia-Pacific* factors relevant to royalty-rate determinations. [*Id.* ¶¶ 40-140].

Defendants nevertheless ask the Court to exclude “portions” of Bratic’s testimony as unreliable under Rule 702. [Dkt. No. 212 at 4-6]. In particular, Defendants complain about: 1) Bratic’s “assum[ption] that the revenue attributable to [Microsoft’s] bundled controllers is the price of the unbundled controller times the quantity of bundled controllers actually sold”; 2) certain other factual observations and conclusions regarding the “importance of the ’700 [P]atent in the video game industry”; and 3) an alleged insufficiency of analysis of non-infringing alternatives. [*Id.* at 4-6].

Not one of these complaints, however, provides any reason to doubt either the adequacy of Bratic’s damages-assessment qualifications, or the reliability of the hypothetical-negotiation methodology employed in his report. *See Daubert*, 509 U.S. at 495-95 (noting that the Court’s focus “must be solely on principles and methodology”). Instead, they relate to particular factual

assumptions and observations underlying Bratic’s application of a few of the fifteen *Georgia-Pacific* factors. [Dkt. No. 212 at 4-6]. The case law is clear that, when an expert’s damages testimony is grounded in “a hypothetical negotiation between the plaintiff and the accused infringers”—and especially when that analysis is guided by the *Georgia-Pacific* factors—“disagree[ment] with some of the assumptions and analysis that [the expert] used in constructing his hypothetical negotiation” will not be grounds for excluding the testimony under Rule 702. *State Contracting & Eng’g Corp. v. Condotte Am., Inc.*, 346 F.3d 1057 (Fed. Cir. 2003).¹

Defendants’ arguments, properly understood, thus “go to the weight, not the admissibility, of [Bratic’s] opinion.” *Freeman*, 450 F. Supp. 2d at 1262; *Tex. Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1219 (Fed. Cir. 2002). “Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking” this admissible evidence. *Daubert*, 509 U.S. at 596; *see also Micro Chem.*, 317 F.3d at 1392; *Pipitone*, 288 F.3d at 250.

1. Bratic’s Usage of the Average Price of Controllers Sold Separately Provides No Basis For Excluding His Testimony.

By the very terms of their argument, Defendants’ complaints concerning Bratic’s royalty-base analysis relate solely to “whether the predicate facts on which [he] relied are accurate.” *Pipitone*, 288 F.3d at 250; [Dkt. No. 212 at 6]. This is “not a valid basis for excluding testimony under Rule 702.” *Freeman*, 450 F. Supp. 2d at 1262; *Pipitone*, 288 F.3d at 250.

The formula Bratic employed to determine the royalty base was this: Royalty base =

¹ *See also Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1392 (Fed. Cir. 2003) (“The parties disputed many of the facts relevant in determining a reasonable royalty When, as here, the parties’ experts rely on conflicting sets of facts, it is not the role of trial court to evaluate the correctness of facts underlying one expert’s testimony.”); *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 249-50 (5th Cir. 2002) (same); *Inline Connection Corp. v. AOL Time Warner Inc.*, 470 F. Supp. 2d 435, 439 (D. Del. 2007) (“A court should not consider the strength or weakness of the basis of an expert’s testimony, because ‘[r]ule 705, together with rule 703, places the burden of exploring facts and assumptions underlying the testimony of an expert witness on opposing counsel during cross-examination.’ . . . When the factual underpinning of an expert’s opinion is weak, it is a matter of affecting the weight and credibility of the testimony—a question to be resolved by the jury.”) (citations omitted); *Freeman v. Gerber Prods. Co.*, 450 F. Supp. 2d 1248, 1262 (D. Kan. 2006) (“Where an expert utilizes the accepted *Georgia-Pacific* analysis and explains the effect that each factor would have on a negotiated royalty, . . . the issue of whether that opinion is based on sufficiently reliable facts is not a valid basis for excluding testimony under Rule 702.”).

Average price of accused product x Total number of accused products sold. [Bratic Rpt. ¶¶ 144-145]. As Bratic straightforwardly acknowledges, some of Microsoft’s accused products are sold separately, and some are sold as part of a bundle. [*Id.* ¶ 144]. For the bundled sales, Microsoft failed to provide “information on the portion of the revenues associated specifically with the [accused] controllers.” [*Id.*]. Bratic was thus forced to make a factual assumption regarding those products—and, as Defendants explain, he assumed that the “revenue attributable to [a] bundled controller” is equal to the average price of a controller sold separately. [Dkt. No. 212 at 6; Bratic Rpt. ¶ 144].

This was undoubtedly an entirely reasonable assumption. But in any event, Defendants’ attack on this assumption does not undermine the reliability of Bratic’s royalty-base formula; it simply reflects an underlying factual dispute concerning whether a bundled controller generates less revenue for Microsoft than an unbundled controller. As in *Micro Chemical*, the fact “[t]hat [Bratic’s] reasonable royalty analysis relied on his resolution of th[is] factual issue is not grounds for excluding his testimony under Rule 702.” 317 F.3d at 1393; *see also State Contracting*, 346 F.3d at 1072 (noting that “disagree[ment] with some of the assumptions . . . used” is not grounds for exclusion under Rule 702); *Inline Connection*, 470 F. Supp. 2d at 439, 442. To the contrary, the “fact-finder is entitled to hear [Bratic’s] testimony and decide whether it should accept or reject that testimony after considering all factors that weigh on credibility, including whether the predicate facts on which [he] relied are accurate.” *Pipitone*, 288 F.3d at 250.

2. Bratic’s Factual Observations and Conclusions Relating to the Importance of the Patented Technology Provide No Basis For Excluding His Testimony.

Defendants also argue that certain “opinions” in the Bratic report relating to the “importance” of the patented technology should be excluded on the grounds that Bratic is not an expert in the patented technology. [Dkt. No. 212 at 4-5]. This facile argument is met by the simple observation that, contrary to Defendants’ misleading suggestion, Bratic is not offering opinions on the “importance of the ’700 [P]atent in the video game industry.” [*Id.* at 5]. Instead,

as his report makes clear, he is offering opinions on the reasonable royalty due to Anascape for Defendants' infringement of the '700 Patent. [Bratic Rpt. at ¶¶ 7-8]. He is undoubtedly qualified to testify as an expert on that subject, and Defendants do not suggest otherwise.

The particular paragraphs and statements highlighted by Defendants reflect nothing more than Bratic's careful explication of a few of the many factual observations, assumptions, and conclusions that informed portions of his reasonable-royalty analysis. [Bratic Rpt. ¶¶ 76 ("It is my understanding that . . ."), 89 ("According to Mr. Penello . . ."), 94 ("The above discussion . . . illustrates . . ."), 120 ("In a November 18, 2000 e-mail . . ."), 134 ("Microsoft and Nintendo recognized . . ."), 138 ("This fact was confirmed by Mr. Baldwin . . ."), 141 ("In reaching my conclusion regarding the reasonable royalty rate and royalty base, I have considered various factors . . ."); Dkt. No. 212 at 4]. Defendants may take issue with some of these factual observations and assumptions, but that is no reason to exclude Bratic's testimony under Rule 702. *Micro Chem.*, 317 F.3d at 1393; *State Contracting*, 346 F.3d at 1072; *Inline Connection*, 470 F. Supp. 2d at 439, 442; FED. R. EVID. 705. The case law cited above applies with equal force here:

Where an expert utilizes the accepted *Georgia-Pacific* analysis and explains the effect that each factor would have on a negotiated royalty, as [Bratic] did here, the issue of whether that opinion is based on sufficiently reliable facts is not a valid basis for excluding testimony under Rule 702. . . . [Defendants'] arguments which target one aspect of his opinion go to the weight, not the admissibility, of his opinion.

Freeman, 450 F. Supp. 2d at 1262.²

² It is worth noting that Defendants' argument on this point is fundamentally at odds with the deeply entrenched practice of asking a damages expert—typically someone with an economic background—to consider and testify regarding each of the fifteen *Georgia-Pacific* factors, a number of which relate to the utility and character of the patented invention. [Bratic Rpt. ¶¶ 106-139]. Damages experts have never been required to have particular expertise, for example, relating to "[t]he nature of the patented invention." [*Id.* ¶ 106]. Instead, they are permitted and expected to rely on the opinions and conclusions of others with respect to such underlying factual issues—just as Bratic has done here. [*Id.* ¶¶ 107, 109, 138, 139]; *Micro Chem.*, 317 F.3d at 1392-93.

3. Bratic's Discussion of the Prominent Failure of a Non-infringing Alternative Provides No Basis For Excluding His Testimony.

Defendants also ask the Court to exclude paragraphs 106 to 134 of Bratic's report—which address the ninth and tenth *Georgia-Pacific* factors—on the ground that this section of the report “completely fails to address” non-infringing alternatives. [Dkt. No. 212 at 5-6]. This assertion, however, is simply incorrect: that section contains an extensive discussion of the failure of a non-infringing alternative controller produced by Sony, as well as the impact of that failure on Defendants and on the industry in general. [Bratic Rpt. ¶¶ 112-119; *see also id.* ¶ 138]. The entirety of the section Defendants ask the Court to strike, in fact, is dedicated to an analysis “of the advantages of the patent property”—which include six-axis graphics control with vibration feedback—over controllers lacking either six-axis control or vibration feedback. [Dkt. No. 212 at 5; Bratic Rpt. ¶¶ 9, 106-134]. Contrary to Defendants' argument, Bratic's testimony is by no means “divorced of all relation to a potential non-infringing alternative [device].” *See Riles v. Shell Exploration & Prod. Co.*, 298 F.3d 1302, 1312 (Fed. Cir. 2002); [Dkt. No. 212 at 5].

More fundamentally, Defendants' complaints once again relate principally to disagreements concerning an underlying factual matter—here, whether a competitor who fails to offer controllers “that incorporate six axes of control technology combined with a rumble feature . . . will quickly find itself at a competitive disadvantage” [Bratic Rpt. ¶ 138]—and not to the overall reliability of the *Georgia-Pacific* methodology employed in Bratic's report. And once again, Defendants' “arguments which target one aspect of his opinion go to the weight, not the admissibility, of his opinion.” *Freeman*, 450 F. Supp. 2d at 1262; *Tex. Digital Sys.*, 308 F.3d at 1219; *see also, e.g., Fresenius Med. Care Holdings, Inc. v. Baxter Int'l, Inc.*, No. C-03-1431, 2006 WL 1390416, at *7 (N.D. Cal. May 18, 2006) (holding that the existence of a viable non-infringing alternative “is not an issue for the Court to determine under a *Daubert* review”).

B. Mark Baldwin's Testimony Regarding the Importance of Six-Axis Graphics Control and Vibration Feedback is Admissible Under Rule 702.

Under the controlling damages-assessment case law, Bratic was fully entitled to resolve disputed factual issues—such whether the patented technology is important and valuable—in applying his reasonable-royalty methodology. *Micro Chem.*, 317 F.3d at 1392. There was thus no need to provide additional expert testimony regarding such issues. *See id.* at 1393 (“[T]he trial court properly did not rule inadmissible [the expert’s] damages testimony simply because it was based on [one party’s] version of the contested facts.”). Even so, Anascape elected to submit additional expert testimony regarding the general importance of two of the key controller features at issue—six-axis graphics control and vibration feedback. [Baldwin Rpt. at 1 (filed as Exh. 1 to Dkt. No. 211); *see also* Dkt. No. 11, Exh. 4 at 1].

Baldwin’s report provides background information on video gaming and considerations relevant to controller design, and focuses in particular on the value of controllers providing both six-axis graphics control and vibration feedback. [Baldwin Rpt. at 1-9]. Baldwin has substantial expertise on these topics: over the last twenty-six years, he has, among other things, “written, programmed, designed, directed, and/or produced over 30 commercial computer games and . . . won numerous awards including ‘Game of the Year.’” [*Id.* at 9].³ Defendants offer a scattershot of complaints regarding Baldwin’s report, but these can fairly be reduced to two principal arguments: 1) that Baldwin’s testimony is unreliable because it is not “based on the scientific

³ Defendants briefly suggest that Baldwin is insufficiently qualified to opine on these topics because he has “expertise in the design of certain video games, [but not in] the design of controllers.” [Dkt. No. 211 at 9]. This suggestion has no merit; in fact, one of the central points of Baldwin’s testimony is that “specific game controller features add to the game designer’s ability to create popular and effective entertainment. The use of a specific feature is tied directly to the nature of the game and what the designer is trying to accomplish.” [Baldwin Rpt. at 5]. As an expert in game design, Baldwin is necessarily qualified to opine on the value of controller features that permit “popular and effective” game design. This is nothing like the situation in *Taylor Pipeline Constr., Inc. v. Directional Rd. Boring, Inc.*, 438 F. Supp. 2d 696 (E.D. Tex. 2006), the case cited by Defendants, in which the court found that a construction manager was qualified to opine on topics related to “the quality or methods of construction,” but not those related to “construction law.” *Id.* at 706.

method” and not “testable,” [Dkt. No. 211 at 2, 4]; and 2) that his testimony is irrelevant because it addresses only six-axis graphics control and vibration feedback, and does not include an element-by-element analysis of the asserted claims of the ’700 Patent, [*id.* at 1, 4, 6-9]. Neither of these arguments has merit.

1. Baldwin’s Testimony is Reliably Supported By His 26 Years of Specialized Experience.

Defendants’ argument that Baldwin’s testimony is unreliable because it is not “testable” and not “based on the scientific method” relies on pre-*Kumho* case law, [Dkt. No. 211 at 2, 4], and fails to appreciate that Rule 702 permits expert testimony regarding any form of “specialized knowledge,” and not merely “scientific . . . knowledge.” FED. R. EVID. 702. In *Kumho* the Supreme Court made clear that the science-related “factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert’s particular expertise, and the subject of his testimony.” 526 U.S. at 150. Rather than requiring slavish devotion to reliability tests that might be inapplicable to the “specialized knowledge” at issue, the Court held that “the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.” *Id.* at 152.

Courts following *Kumho* have confirmed that they “must bear in mind the purpose of [an expert’s] testimony when addressing its reliability.” *Mathis v. Exxon Corp.*, 302 F.3d 448, 461 (5th Cir. 2002); *see also Allison v. Nibco, Inc.*, No. 9:02-CV-172-TH, 2003 U.S. Dist. LEXIS 27617, at *8 (E.D. Tex. May 21, 2003) (“The test of reliability and relevance is flexible, and courts are given broad latitude to determine which factors are appropriate based upon the type of testimony at issue.”). The purpose of Baldwin’s testimony is to provide relevant background information on video gaming, the considerations relevant to game-controller design, and the significance of the principal controller features generally at issue in this litigation. [Baldwin Rpt. at 1, 9]. As Defendants repeatedly emphasize, Baldwin’s report does not explicitly address the ’700 Patent; instead it constitutes an example of “the venerable practice of using expert

testimony to educate the factfinder on general principles.” FED. R. EVID. 702, Notes of Advisory Committee on Rules.

This educational and background testimony, which “is based upon [Baldwin’s] experience . . . , and not on any novel scientific method or technique,” is reliably supported by Baldwin’s 26 years of experience as a video-game designer. *Allison*, 2003 U.S. Dist. LEXIS 27617, at *11-*12 (noting that an expert’s “29 years of experience as a safety consultant” provided a reliable basis for related testimony). As the Advisory Committee Notes to Rule 702 make clear,

[n]othing in [the post-*Kumho*] amendment is intended to suggest that experience alone . . . may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable testimony.

FED. R. EVID. 702, Notes of Advisory Committee on Rules. Baldwin’s discussion of the relationship between video games and controllers, and in particular the relationship between certain controller features and effective game design, is not based on the scientific method—it is based on his substantial experience as a game designer. That experience “provide[s] a sufficient foundation for [his] expert testimony.” *Id.*⁴

2. Baldwin’s Testimony Regarding Two Controller Features at the Center of This Case is Relevant to This Case.

Defendants’ arguments that Baldwin’s testimony is irrelevant also suffer from a failure to appreciate the limited purposes of his report. In particular, Defendants complain that Baldwin did not engage in an element-by-element analysis of the ’700 Patent’s claims, [Dkt. No. 211 at 4-5], and that he did not consider certain references that they allege constitute prior art for the ’700

⁴ Defendants also suggest that some of the language in Baldwin’s report is too “abstract” or “vague.” [Dkt. No. 211 at 1, 9]. To the extent that Defendants are confused by Baldwin’s use of terms such as “flexible,” “valuable,” “more options,” and “simplification,” [*see id.*], they will be free to explore the meaning he attaches to those terms on cross-examination. *See Daubert*, 509 U.S. at 596; *Micro Chem.*, 317 F.3d at 1392.

Patent, [*id.* at 6-9]. Baldwin’s testimony is not offered, however, for the purpose of analyzing the ’700 Patent and potentially related references. It is offered for the purpose of providing background information on the significance of certain controller features to the video-game industry. As shown above, this is an entirely appropriate purpose for Rule 702 testimony. *See* FED. R. EVID. 702, Notes of Advisory Committee on Rules.

And contrary to Defendants’ assertions, [Dkt. No. 211 at 9], the generalized nature of Baldwin’s testimony does not make it irrelevant under Rule 702. The notes to that Rule, in fact, leave no doubt that it can “be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case.” FED. R. EVID. 702, Notes of Advisory Committee on Rules. Baldwin’s report speaks to some of the reasons that one designing a video-game controller would want to include features providing for both six-axis graphics control and vibration feedback. [Baldwin Rpt. at 5-9]. Baldwin does not “tie [his] testimony into the facts of the case,” *see* FED. R. EVID. 702, Notes of Advisory Committee on Rules, but the relevance of his testimony to this case—which alleges infringement of a patent entitled “3D Controller With Vibration”—cannot reasonably be doubted, *see* FED. R. EVID. 401.⁵

III. CONCLUSION

For the foregoing reasons, Anascape respectfully requests that the Court deny Defendants’ motions to exclude testimony of Walter Bratic and Mark Baldwin. [Dkt. Nos. 211, 212].

⁵ Defendants also suggest that it could be prejudicial to require the jury to tie Baldwin’s testimony to the facts of the case, [Dkt. No. 211 at 2], but that gives the jury far too little credit. To the contrary, Defendants’ principal objection on this issue—that the value of the ’700 Patent is limited by the existence of alleged prior art references—“is precisely the type of objection a juror can evaluate. The *Daubert* analysis should not supplant trial on the merits.” *Mathis*, 302 F.3d at 461. And as with Defendants’ complaints relating to Bratic’s report, their arguments relating to the existence and status of alleged prior art references, [Dkt. No. 211 at 6-9], are directed to underlying factual disputes—and thus provide no basis no exclude Baldwin’s testimony under Rule 702. *See Micro Chem.*, 317 F.3d at 1392; *Pipitone*, 288 F.3d at 249-50; *Fresenius*, 2006 WL 1390416 at *7.

DATED: March 20, 2008

Respectfully submitted,

McKOOL SMITH PC

/s/ Douglas A. Cawley

Douglas A. Cawley

Lead Attorney

Texas State Bar No. 04035500

dcawley@mckoolsmith.com

Theodore Stevenson, III

Texas State Bar No. 19196650

tstevenson@mckoolsmith.com

Anthony M. Garza

Texas State Bar No. 24050644

agarza@mckoolsmith.com

Jason D. Cassady

Texas State Bar No. 24045625

jcassady@mckoolsmith.com

McKool Smith PC

300 Crescent Court, Suite 1500

Dallas, Texas 75201

Telephone: (214) 978-4000

Telecopier: (214) 978-4044

Sam Baxter
Texas State Bar No. 01938000
sbaxter@mckoolsmith.com
McKool Smith PC
104 E. Houston Street, Suite 300
P.O. Box 0
Marshall, Texas 75670
Telephone: (903) 923-9000
Telecopier: (903) 923-9099

Robert M. Parker
Texas State Bar No. 15498000
rmparker@pbatyler.com
Robert Christopher Bunt
Texas State Bar No. 00787165
rbunt@pbatyler.com
Charles Ainsworth
Texas State Bar No. 00783521
charley@pbatyler.com
Parker, Bunt & Ainsworth P.C.
100 E. Ferguson Street, Suite 1114
Tyler, Texas 75702
Telephone: (903) 531-3535
Telecopier: (903) 533-9687

**ATTORNEYS FOR PLAINTIFF
ANASCAPE, LTD.**

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who have consented to electronic service on this the 20th day of March, 2008. Local Rule CV-5(a)(3)(A).

/s/ Anthony M. Garza
Anthony M. Garza