

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.

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Hon. Ron Clark

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

**ORAL ARGUMENT REQUESTED**

**NINTENDO OF AMERICA INC.'S MOTION FOR REMITTITUR  
OR, IN THE ALTERNATIVE, A NEW TRIAL ON DAMAGES**

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Defendant Nintendo of America Inc. respectfully submits this motion for remittitur or, in the alternative, a new trial on damages.<sup>1</sup>

## I. INTRODUCTION

The *only* evidence in this case concerning the amount of a reasonable royalty was that offered by Anascape's damages expert, Walter Bratic, who opined that a reasonable royalty would be 5% on sales of allegedly infringing controllers. No record evidence supporting a royalty rate higher than 5% was introduced by Anascape and no royalty base other than that provided by Mr. Bratic was submitted to the jury. Once the jury determined that the only infringing controllers were the Wii Classic and the older generation GameCube and Wavebird wireless controllers, under the time-honored maximum recovery rule, the highest damages supported by the record was an award of 5% on the sales of the controllers found by the jury to infringe.

Based on Mr. Bratic's calculation of the royalty base for the accused controllers, which was not disputed at trial by Nintendo, the royalty base for the controllers found to infringe was \$54,555,999. Accordingly, the highest damages award supported by the record is 5% of that base, *i.e.*, \$2,727,799.95. The Court should therefore require either that Anascape accept a

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<sup>1</sup> This motion is timely and proper under Fed. R. Civ. P. 59(b) even though judgment has not yet been entered. *See Greater Houston Chapter of the American Civil Liberties Union v/ Eckels*, 755 F.2d 426, 427 (5<sup>th</sup> Cir. 1985) ("Rule 59(b) of the Federal Rules of Civil Procedure provides that '[a] motion for a new trial shall be served not later than ten days after the entry of judgment.' This language does not explicitly require that a motion for a new trial be made *after* judgment is entered, and it has not been interpreted to include this requirement.") (emphasis in original); *Garrett v. Blanton*, 1993 U.S. Dist. LEXIS 639, \*9-10 (E.D. La. Jan. 19, 1993) ("The courts, including the Fifth Circuit, have uniformly held that Rule 59 motions may be filed before the entry of judgment.") (citing cases). Nintendo expressly reserves all of its rights to file a motion for judgment as a matter of law and/or a new trial pursuant to Fed. R. Civ. P. 50 and 59 on any liability or damages related issues not addressed herein after the entry of judgment.

remittitur of the damages award to this lower amount, or, in the alternative, order a new trial on damages in the event that Anascape refuses to accept the remitted damages amount.

## II. ARGUMENT

### A. Legal Standard

Remittitur is appropriate when the damages award is “excessive or so large as to appear contrary to right reason.” *Laxton v. Gap, Inc.*, 33 F.3d 572, 586 (5<sup>th</sup> Cir. 2003); *Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 275 (5<sup>th</sup> Cir. 1998); *Frazier v. Honeywell Int’l Inc.*, 518 F. Supp. 2d 831, 836 (E.D. Tex. 2007).<sup>2</sup> “[W]hen th[e] court is left with the perception that the verdict is clearly excessive, deference [to the jury’s damages award] must be abandoned.” *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 488 (5<sup>th</sup> Cir. 2001) (quoting *Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176, 183 (5<sup>th</sup> Cir. 1995)). In such cases, the plaintiff is offered a choice between “[a] remitted award [or] a new trial on the issue of damages alone.” *Giles*, 245 F.3d at 488; *Shockley*, 248 F.3d at 1362. In the Fifth Circuit, the size of the remitted award is determined by the “‘maximum recovery rule,’ reducing the damages to the maximum amount a reasonable jury could have awarded.” *Giles*, 245 F.3d at 488-89 (citing *Dixon v. Int’l Harvester Co.*, 754 F.2d 573, 590 (5<sup>th</sup> Cir. 1985)); *see also Shockley*, 248 F.3d at 1362 (“maximum recovery rule” remits an excessive jury award to the highest amount the jury could “properly have awarded *based on the relevant evidence*”) (emphasis added).

A new trial may be granted “on all or some of the issues – and to any party – . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court.” Fed. R. Civ. P. 59(a)(1)(A) (2008). Such a motion “may invoke the discretion of

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<sup>2</sup> A district court’s duty to remit excessive damages is a procedural issue, not unique to patent law. *Shockley v. Arcan, Inc.*, 248 F.3d 1349, 1358 (Fed. Cir. 2001). Accordingly, the law of the Fifth Circuit applies to this issue. *See, e.g., Imonex Servs., Inc. v. W.H. Munzprufer Dietmar Trenner GmbH*, 408 F.3d 1374, 1380 (Fed. Cir. 2005).

the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of out alleged substantial errors in admission or rejection of evidence or instructions to the jury.” *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940), *quoted by QPSX Devs. 5 Pty Ltd. v. Nortel Networks, Inc.*, No. 2:05-CV-268, 2008 WL 728201, at \*3 (E.D. Tex. Mar. 18, 2008).

**B. The \$21 Million Damages Award Should Be Reduced To \$2,727,799.95 Or, In The Alternative, A New Trial On Damages Should Be Ordered**

The jury determined that the Wii Remote when used with the Wii Nunchuk did not infringe any of the asserted claims of the ‘700 patent. *See* Verdict Form (Doc. # 333), Question No. 1(a). Based on Mr. Bratic’s own testimony, the only record evidence was that 94% of the damages sought by Anascape related directly to these two products, which were found not to infringe. *See id.*, Question Nos. 1(b), (c), and (d). The jury’s \$21 million damages award for the sale of the three products it found to infringe – the GameCube controller, the GameCube WaveBird wireless controller, and the Wii Classic controller – is not simply against the weight of the evidence, it is entirely unsupported by *any* record evidence. As illustrated in Anascape’s own exhibit, reproduced below, that summarized Mr. Bratic’s opinion, total cumulative sales of these three controllers during the damages period amounted to \$54,555,999. Using Mr. Bratic’s 5% royalty rate, the damages award based on this undisputed royalty base should have amounted to no more than \$2,727,799.95.

Reasonable Royalty Damages Due from Nintendo of America

**Sales of Accused Nintendo of America Products**  
(7/31/06 – 5/4/08\*)

GAMECUBE Controller	\$ 16,588,674
GAMECUBE Wavebird Wireless Controller	5,191,856
Nunchuk	296,983,034
Wii Classic Controller	32,775,469
Wii Remote Controller	655,295,421

**Total Sales of Accused Products \$1,006,834,454**

**Reasonable Royalty Rate 5%**

**Reasonable Royalty Damages Due to Anascape \$50,341,723**

\* Actual Sales (July 31, 2006 – March 31, 2008); Projected Sales (April 1, 2008 – May 4, 2008) Cite: NAA 23303-07; NAA 23150-61; NAA 23081-129; NAA 23310 -16 6

In awarding \$21 million in damages based on sales of \$54,555,999, the effective royalty rate on sales found to infringe was 38%. However the jury reached its damages verdict, it was not based on the record evidence, which at most could only support a 5% royalty on the sales of the controllers which the jury found to infringe.

Mr. Bratic was the only witness to testify at trial on the issue of a reasonable royalty, including the royalty base and royalty rate. As set forth in the exhibit above, he calculated the royalty base, broken down by accused controller, and concluded that the royalty base for the GameCube controller, GameCube Wavebird Wireless controller, and Wii Classic controller was \$54,555,999. *See* May 7, 2008 Tr. at 724:11-725:13. Mr. Bratic expressed no opinion that the royalty base should be greater than \$54,555,999 in the event that the jury determined that the Wii Remote and Wii Nunchuk controllers did not infringe, and that the GameCube, Wavebird wireless, Wii Classic controllers did infringe. There is thus no record evidence from which the royalty base could be increased above Mr. Bratic's \$54,555,999.

At trial, Mr. Bratic testified to his opinion that a reasonable royalty rate in this case is 5%. *See* May 7, 2008 Tr. at 728:5-10; *see also* 725:11-13; 734:20-24; 754:6-8; 760:1-5; 773:12-14; 826:15-17. The exhibits used during Mr. Bratic's testimony were in accord with his testimony in this regard. *See* Ex. A (using 5% in calculating damages). Accordingly, there is no record evidence that would support any upward deviation from the 5% rate advocated by Mr. Bratic.

The Sony License (PX 54) provides no support for a damages award greater than \$2,727,799.95 because Anascape submitted no record evidence which would have permitted the jury to use the amount of the Sony license in rendering its damages award. Mr. Bratic did not testify that the Sony License was probative of a reasonable royalty rate. In addition, the evidence showed that the \$10 million payment under the Sony License was for the '606 patent and that at the time the Sony License was executed the '700 patent had not even issued. Finally, at Anascape's urging, the Court ruled that the evidence, including the Sony License, did not support either a jury instruction or a line on the jury verdict form with respect to a reasonable royalty in the form of a lump sum payment. Having deliberately chosen not to rely on the Sony license as evidence to support its damages claim, Anascape must be held to the consequences of that decision. In sum, there is no record evidence that would permit the payment amount of the Sony License to serve as a proxy for the maximum amount that could be recovered by Anascape.

Based on the foregoing, the maximum amount that a reasonable jury could award with respect to the GameCube, Wavebird wireless, and Wii Classic controllers was \$2,727,799.95, *i.e.*, \$54,555,999 x 5%. Judge Ward's recent opinion in *QPSX* is instructive on this point, *i.e.*, how to determine the maximum amount a reasonable jury could award. *See QPSX*, 2008 WL 728201, at \*3. In that patent case, plaintiff's damages expert, once again Walter Bratic, testified that the damages were \$11.82 million, based on a "*minimum*" reasonable royalty rate of 2%.

*See* Nortel’s Renewed Motion for Judgment as a Matter of Law, Motion for a New Trial and Motion for Remittitur and Brief in Support at 17-18, Case No. 2:05-cv-00268-TJW-CE, Doc. # 432, attached hereto as Ex. B and QPSX’s Response to Nortel’s Renewed Motion for Judgment as a Matter of Law, Motion for a New Trial and Motion for Remittitur and Brief in Support at 23, Doc. # 446, attached hereto as Ex. C.

At trial in *QPSX*, Mr. Bratic attempted to introduce a higher royalty rate (3.5%) than the specific rate (2%) set forth in his report, but Judge Ward sustained the objection to it. Notwithstanding Mr. Bratic’s testimony that reasonable royalty damages should be \$11.82 million, the jury awarded \$28 million. *See QPSX*, 2008 WL 728201, at \*3. On defendant’s motion for remittitur, Judge Ward reduced the award to Mr. Bratic’s \$11.82 million figure, which was based on Mr. Bratic’s “minimum” rate of 2%. *Id.* The result should be the same here – based on Mr. Bratic’s testimony regarding the 5% royalty rate and the \$54,555,999 royalty base he calculated on the controllers found to infringe, the maximum amount a reasonable jury could award in this case is \$2,727,799.95.

Where, as here, the damages award exceeds the highest amount suggested by the plaintiff by more than 700% and where there is no record evidence to support the amount of damages awarded, the Court should reduce the amount of damages to no more than the highest amount supported by the record evidence. *See, e.g., Eiland*, 58 F.3d at 183 (remitting compensatory damages from \$5 million to \$3 million); *Dixon*, 754 F.2d at 590 (applying “maximum recovery rule” and remitting damages from \$2.8 million to \$892,139.64); *Oiness v. Walgreen Co.*, 88 F.3d 1025, 1030 (Fed. Cir. 1996) (applying “maximum recovery rule” to reverse jury award of \$1.1 million in lost profits and \$10.15 million in projected lost profits); *QPSX*, 2008 WL 728201, at \*3 (remitting reasonable royalty damages from \$28 million to \$11.82 million).

### III. CONCLUSION

For the foregoing reasons, Nintendo respectfully requests that the Court grant its motion for remittitur or, in the alternative, a new trial.

Dated: May 21, 2008

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 21<sup>st</sup> day of May, 2008, a true and correct copy of the above document was filed with the Eastern District's CM/ECF system, and a copy was forwarded this date to all known attorneys of record.

/s/ James S. Blank

James S. Blank