

**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

**ANASCAPE'S RESPONSE TO NINTENDO'S MOTION FOR
REMITTITUR OR, IN THE ALTERNATIVE, A NEW TRIAL ON DAMAGES**

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Anascape, Ltd. (“Anascape”) files its response to Nintendo of America, Inc.’s (“Nintendo”) Motion for Remittitur or, in the Alternative, a New Trial on Damages (the “Motion”), and respectfully shows as follows:

I. SUMMARY OF THE RESPONSE

The jury found that Nintendo infringed all of the asserted claims of United States Patent No. 6,906,700 (the “700 patent”) and that \$21 million was an adequate sum of money to compensate Anascape for this infringement. The jury applied a reasonable 5% royalty rate to a reasonable base of infringing sales to arrive at its award of \$21 million. Because this amount of damages is not “grossly excessive or monstrous”—but is, on the contrary, reasonable and based on the relevant evidence—Nintendo’s Motion should be denied. If this Court were to grant the Motion, however, it is clear that Nintendo’s requested amount is erroneous, as it fails to account for sales of Wii Remotes, as required by the evidence.

II. ARGUMENT

A. The Jury’s Damages Award is Entitled to Broad Deference and Any Doubt as to the Amount of Damages Must be Resolved Against Nintendo

The standard for remittitur is clear—and high. The jury’s damages award must be upheld unless Nintendo¹ proves that “the amount is grossly excessive or monstrous, clearly not supported by the evidence or based only on speculation or guesswork.” *Monsanto Co. v. McFarling*, 488 F.3d 973, 981 (Fed. Cir. 2007) (citations and quotations omitted);² *see also DSU*

¹ It is Nintendo’s burden to show that the jury’s award is unsupportable. *See, e.g., Monsanto Co. v. Ralph*, 382 F.3d 1374, 1383-84 (Fed. Cir. 2004) (defendant challenging jury award for patent infringement must meet remittitur burden).

² Nintendo states that Fifth Circuit law applies to the remittitur issue. (Motion at 2 n.2.) Although the *duty* to remit excessive damages may be a procedural issue, *see Shockley v.*

Med. Corp. v. JMS Co., 471 F.3d 1293, 1309 (Fed. Cir. 2006) (same); *Union Carbide Chems. & Plastics Tech. Corp. v. Shell Oil Co.*, 425 F.3d 1366, 1373 (Fed. Cir. 2005) (same); *State Contracting & Eng'g Corp. v. Condotte Am., Inc.*, 346 F.3d 1057, 1072 (Fed. Cir. 2003) (same).³

“Broad deference” must be given to the conclusions reached by the finder of fact in reviewing a damages award in a patent case. *McFarling*, 488 F.3d at 981; *Brooktree Corp. v. Advanced Micro Devices, Inc.*, 977 F.2d 1555, 1580 (Fed. Cir. 1992) (“To the extent that there were conflicts in the evidence, neither the trial court upon motion for judgment n.o.v. nor the

Arcan, Inc., 248 F.3d 1349, 1358 (Fed. Cir. 2001) and *Imonex Services, Inc. v. W.H. Munzprufer Dietmar Trenner GMBH*, 408 F.3d 1374, 1380 (Fed. Cir. 2005), the question of whether patent damages are excessive is unique to patent law and, as such, the Federal Circuit applies its own law when determining whether to uphold a patent damages award. *See, e.g., Monsanto Co. v. McFarling*, 488 F.3d 973, 981 (Fed. Cir. 2007); *DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1309 (Fed. Cir. 2006); *Aero Prods. Int'l, Inc. v. Intex Recreation Corp.*, 466 F.3d 1000, 1016 (Fed. Cir. 2006) (damages for patent infringement are unique to patent law); *Unisplay, S.A. v. Am. Elec. Sign Co., Inc.*, 69 F.3d 512, 517 (Fed. Cir. 1995).

District courts, faced with remittitur motions in patent cases, routinely cite Federal Circuit decisions regarding remittitur. *See, e.g., QPSX Developments 5 Pty Ltd. v. Nortel Networks, Inc.*, Civil Action No. 2:05-CV-268, 2008 WL 728201, at *3 (E.D. Tex. Mar. 18, 2008); *Trading Techs Int'l, Inc. v. eSpeed, Inc.*, No. 04 C 5312, 2008 WL 345604, at *1-2 (N.D. Ill. Feb. 5, 2008); *Hynix Semiconductors, Inc. v. Rambus, Inc.*, No. CV-00-20905 RMW, 2006 WL 1991760, at *2 (N.D. Cal. July 14, 2006); *Harris Corp. v. Ericsson, Inc.*, No. 3:98-CV-2903-M, 2003 WL 21750710, at *1 (N.D. Tex. July 17, 2003). Regardless, the Federal Circuit’s and Fifth Circuit’s standards for remittitur are substantially the same. *See* n.3, *infra*.

³ The Fifth Circuit is in accord. *See, e.g., Giles v. General Elec. Co.*, 245 F.3d 474, 488 (5th Cir. 2001) (“There is a strong presumption in favor of affirming a jury award of damages.”) (quoting and citing *Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176, 183 (5th Cir. 1995)); *King v. Ames*, 179 F.3d 370, 377 n.8 (5th Cir. 1999) (same); *Pendarvis v. Ormet Corp.*, 135 F.3d 1036, 1041 (5th Cir. 1998) (defendant’s “evidentiary objection to the damage award is not sufficient to overcome the presumption in favor of the jury’s verdict”); *Caldarera v. E. Airlines, Inc.*, 705 F.2d 778, 784 (5th Cir. 1983) (“The jury’s award is not to be disturbed unless it is entirely disproportionate to the injury sustained. We have expressed the extent of distortion that warrants intervention by requiring such awards to be so large as to ‘shock the judicial conscience,’ ‘so gross or inordinately large as to be contrary to right reason,’ so exaggerated as to indicate ‘bias, passion, prejudice, corruption, or other improper motive,’ or as ‘clearly exceed[ing] that amount that any reasonable man could feel the claimant is entitled to.’”) (citations omitted).

appellate court may substitute its choice of result for that of the jury.”). The jury is accorded discretion to resolve conflicts in the evidence of damages, and the court must “resolve any doubts about the amount . . . against the infringer.” *DSU Med.*, 471 F.3d at 1309 (citing *Kalman v. Berlyn Corp.*, 914 F.2d 1473, 1482 (Fed. Cir. 1990)).

B. Nintendo Has Not Demonstrated that the Evidence Cannot Support the Jury’s Award

It is Nintendo’s burden to demonstrate that the evidence cannot support the jury’s award. It has not, and cannot, prove that the jury’s award was grossly excessive or monstrous, as ample relevant evidence in the record supports the \$21 million award.

1. Section 284 entitles Anascape to not less than a reasonable royalty for Nintendo’s infringement

Damages for patent infringement must be “adequate to compensate for the infringement, but in no event less than a reasonable royalty[.]” 35 U.S.C. § 284. “The determination of the amount of damages based on a reasonable royalty is an issue of fact.” *Unisplay, S.A. v. Am. Elec. Sign Co., Inc.*, 69 F.3d 512, 517 (Fed. Cir. 1995); *see also Oiness v. Walgreen Co.*, 88 F.3d 1025, 1029 (Fed. Cir. 1996).

The Federal Circuit has stated that “deciding how much to award as damages [in a patent infringement case] is not an exact science” and the analysis “necessarily involves an element of approximation and uncertainty[.]” *Kalman v. Berlyn Corp.*, 914 F.2d 1473, 1482 (Fed. Cir. 1990) (quoting *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 883 F.2d 1573, 1576-77 (Fed. Cir. 1989); *Unisplay*, 69 F.3d at 517. This is because

[t]he methodology [employed to establish a royalty rate during the hypothetical negotiation] encompasses fantasy and flexibility; fantasy because it requires a court to imagine what warring parties would have agreed to as willing negotiators; flexibility because it speaks of negotiations as of the time infringement began, yet permits and often requires a court to look to events and facts that

occurred thereafter and that could not have been known to or predicted by the hypothesized negotiators.

Fromson v. W. Litho Plate & Supply Co., 853 F.2d 1568, 1575 (Fed. Cir. 1988), *rev'd on other grounds by Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1343-44 (Fed. Cir. 2004).

The jury's damages award should be upheld if there is any evidence a reasonable jury could have based it on. *Unisplay*, 69 F.3d at 519; *see also Sun Studs, Inc. v. ATA Equip. Leasing, Inc.*, 872 F.2d 978, 985 (Fed. Cir. 1989) ("If the jury verdict is reasonable it must be upheld.") (citing *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944)); *Foradori v. Harris*, 523 F.3d 477, 485 (5th Cir. 2008) ("A jury verdict must be upheld unless there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did.") (internal quotations omitted); *Fontenot v. Wal-Mart Stores, Inc.*, 158 F.3d 584 (5th Cir. 1998) ("In reviewing a damage award, the evidence must be viewed in a light most favorable to the jury's verdict, and the verdict must be upheld unless the evidence points so strongly and overwhelmingly in favor of one party that the court believes that reasonable persons could not arrive at a contrary conclusion.").

It is clear that a jury may award a royalty other than one "specifically articulated" by the parties during trial. *Unisplay*, 69 F.3d at 519; *SmithKline Diags., Inc. v. Helena Labs. Corp.*, 926 F.2d 1161, 1167 (Fed. Cir. 1991) ("[T]he factual determination of a reasonable royalty, however, need not be supported, and indeed, frequently is not supported by the specific figures advanced by either party."). "Rather, a jury's choice simply must be within the range encompassed by the record as a whole." *Unisplay*, 69 F.3d at 519.

In the instant case, the Court properly instructed the jury on the reasonable royalty inquiry and applicable *Georgia-Pacific* factors. (Tr. 1582:17-1586:14, attached hereto as Ex. 1.)

Juries are presumed to follow their instructions. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). For the reasons described below, the jury’s damages award was within the range encompassed by the record as a whole, and should be upheld.

2. A 5% royalty rate supports the jury’s award

A 5% royalty rate, as testified to by Anascape’s expert Walt Bratic, supports the jury’s award of \$21 million when applied to a reasonable base of infringing sales. At trial, the undisputed facts⁴ indicated that the royalty bases for the accused products were as follows:

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 22019-07, NAA 23150-01, NAA 23031-1-22, NAA 22010-10

The undisputed evidence at trial also established that the Wii Classic must be used with some number of Wii Remotes, as the Wii Classic cannot be used alone. (Tr. 434:3-10; 435:15-19; 1029:6-9.) The jury found that the Wii Classic connected to the Wii Remote infringed the ‘700 patent. (Tr. 434:11-15; Verdict Form, Question No. 1(b) (Docket No. 333).)

⁴ Nintendo’s Motion admits that Nintendo did not at trial, and does not now, dispute the royalty bases for the accused products. (Motion at 1.)

The value of Wii Remotes to impute to this combination was a question of fact for the jury. At least one Wii Remote is required for each Wii Classic to function, but a Wii Classic may be paired with many Wii Remotes, and any Wii Classic is compatible with all Wii Remotes. For instance, a Wii console can operate with up to four Wii Remotes at any given time. The Wii Classic can be paired with any one of these four Wii Remotes. If a Wii Remote broke or was lost, another could be purchased to use with the Wii Classic. Additionally, the jury could have reasonably concluded that sales of Wii Classics drive sales of Wii Remotes, because the Wii Classic cannot be used without a Wii Remote.⁵

The jury resolved this fact issue as follows: After finding that the Wii Nunchuk/Wii Remote combination did not infringe, the jury removed the Wii Nunchuk sales (\$296,983,034) from the accused products base. Next, the jury determined that some number of Wii Remote sales should be removed to account for its finding that the Wii Remote did not infringe when connected to the Wii Nunchuk. Only *some* number of Wii Remote sales was removed, however, because the jury found that the Wii Remote *did* infringe when connected to the Wii Classic, and a royalty for some amount of Wii Remotes was therefore appropriate. The jury thus deducted from the base of accused Wii Remotes an amount equal to its deduction for accused Nunchuks (\$296,983,034). When \$593,966,068 ($\$296,983,034 \times 2 = \$593,966,068$) was deducted from the \$1,006,834,454 accused products royalty base, the royalty base for *infringing* controllers was \$412,868,386.

A 5% royalty rate applied to a royalty base of infringing controllers of \$412,868,386 results in a royalty of \$20,643,419, which was rounded to \$21 million. A \$21

⁵ An analogous example of this phenomenon is found with cell phones. Cell phones need cell phone chargers to work, and many consumers have found it advantageous to purchase multiple chargers (e.g., for home, work, and in their cars) for their cell phone.

million royalty would result from an actual rate of 5.086% applied to this base of infringing sales. The jury's rounding thus fell well within the 3-7% royalty rate testified to by Mr. Bratic (Tr. 733:25-734:9; 809:3-12), and is supported by Mr. Bratic's testimony that a reasonable royalty rate would be, at minimum, 5% (Tr. 729:5-10; 753:19-754:8; 826:12-17). The \$21 million award is therefore fully supported by the evidence.

3. The evidence supports a royalty rate higher than 5%

Mr. Bratic testified that, *at a minimum*, the parties would have agreed to a 5% royalty rate. (Tr. 729:5-10; 753:19-754:8; 826:12-17.) It is clear that 5% was a floor, and not a ceiling. Mr. Bratic also testified that his study uncovered royalty rates higher than 5%. For example, he testified that Immersion, a leader in controller technology in the gaming industry, has widely licensed its patents. (Tr. 729:22-10; 808:10-13; *see also* Tr. 668:19-669:3.) Immersion had seventeen licenses for joystick or controller technology that were all at a minimum royalty rate of 5%. (Tr. 731:15-21.) Mr. Bratic testified that he reviewed two Immersion licenses that had royalty rates between 3-7%. (Tr. 733:25-734:9; 809:3-12.) His testimony therefore supports a rate higher than 5%, and the jury was not limited to only a 5% royalty but could choose any royalty supported by the record as a whole. *Unisplay*, 69 F.3d at 519.

4. The evidence supports a royalty base higher than \$54.6M

In the relevant damages period, Nintendo sold approximately 45 million controllers accused of infringement for a total of \$1,006,834,454. (Tr. 735:3-736:1; PX 364, attached hereto as Ex. 2.) Removing the Wii Nunchuks, which were not found to infringe, the overall infringing sales were as follows:

Infringing Controller	Infringing Sales
GameCube Controller	\$16,588,674
GameCube Wavebird Wireless Controller	\$5,191,856
Wii Classic Controller	\$32,775,469
Wii Remote Controller	\$655,295,421

Nintendo is mistaken in its claim that the base of infringing controllers was \$54,555,999. (Motion at 4.) The base argued by Nintendo does not include any Wii Remotes, which is undeniably an error because the Wii Classic cannot be used without a Wii Remote. (Tr. 434:3-10.) It must be connected to a Wii Remote in order to communicate with the console, and every time a Wii Classic is used it is connected to a Wii Remote. (Tr. 434:3-10; 435:15-19; 1029:6-9.) The rumble structure found in the Wii Remote also provides the “tactile feedback” required for infringement of many of the asserted claims. Based on these facts, the jury was justified in adding Wii Remotes to the royalty base.

5. The Sony License Agreement supports the jury’s award

The Sony license agreement also provides support for the jury’s award.⁶ In 2004, after four years of negotiations, Anascape and Sony entered into a patent license agreement (the “License Agreement”). (PX 54, attached hereto as Ex. 3; Tr. 676:3-5.) Under the terms of the License Agreement, Sony paid Anascape \$10 million, cross-licensed three Sony patents relating to video game controllers and other devices, and granted Anascape rights in technology relating

⁶ Although Mr. Bratic did not rely on the Sony License Agreement to arrive at his reasonable royalty calculation, the jury could consider it in awarding damages. *See, e.g., Unisplay*, 69 F.3d at 519; *SmithKline*, 926 F.2d at 1167. As explained in n.8, *infra*, the License Agreement is probative under *Georgia-Pacific*.

to the cross-licensed patents. (PX 54, §§ 2.5, 3.1.) In exchange, Anascape gave Sony an exclusive license to United States Patent No. 6,310,606 (the “‘606 patent”)⁷ and a non-exclusive license to the other patents in its portfolio, including a non-exclusive license to the patent application that eventually became the ‘700 patent. (*Id.*, §§ 1.4, 2.1, 2.2, p. 13.) The ‘606 patent, like the ‘700 patent, is a continuation of United States Patent No. 6,222,525. (Tr. 677:20-678:5.) The technology of the ‘606 patent is similar to the technology of the inventions disclosed in the ‘700 patent. (Tr. 677:20-678:5.)⁸

Trial testimony indicated that the Sony cross-licensed patents were “very valuable” to Anascape. (Tr. 217:3-13; 797:23-798:5; 803:15-804:14.) Anascape, at the time, intended to use its rights under the Sony cross-licensed patents to manufacture products and controllers. (Tr. 797:16-798:5; 803:15-804:14.) For this reason, the consideration received by Anascape for the rights licensed to Sony under the License Agreement was substantially more than \$10 million.

⁷ Evidence supports the view that, for tax reasons, the parties structured the License Agreement so that the \$10 million payment was for an exclusive license to the ‘606 patent. (Tr. 220:18-22; 221:15-20; PX 54, § 3.1 (“*All of the rights and releases provided by the Anascape Parties in Section 2 are conditioned on the Anascape Parties’ timely receipt of this sum.*” (emphases added).))

⁸ While it is true that Anascape opposed a lump sum jury verdict line, it is not true that, as Nintendo argues, “Anascape submitted no record evidence which would have permitted the jury to use the amount of the Sony license in rendering its damages award.” (Motion at 5.) The License Agreement provided Sony with rights to the ‘700 patent upon its issuance, and the ‘606 patent contains technology similar to the technology found in the ‘700 patent. Under *Georgia-Pacific*, amounts paid for licenses to the patent-in-suit or for licenses for patents similar to the patent-in-suit are probative of a reasonable royalty. 318 F. Supp. 1116, 1120 (D.C.N.Y. 1970). The fact that Anascape opposed a lump sum line on the jury verdict form does not mean that Anascape believes that the License Agreement is not probative in the reasonable royalty analysis. Moreover, Nintendo argued at trial that the License Agreement was probative of a reasonable royalty. (Tr. 796:24-797:25; 801:6-802:20; 805:4-7; 822:10-824:3; 825:1-10; 1549:11-1551:19.)

Trial testimony also established that the License Agreement was a “very good deal” for Sony, as it was “a very low amount of money compared to what they were selling.” (Tr. 222:1-7.) Mr. Tyler testified that he believed the deal was “low,” and that it did not “represent a fair royalty” but rather a “sweetheart deal.” (Tr. 678:6-9; 679:1-5.)

Anascape agreed to this low amount for a number of reasons. First, Sony’s taking of a license showed responsibility on its part and acknowledged its use of Mr. Armstrong’s inventions. (Tr. 222:8-15.) Second, Sony received a very favorable deal because it was the first major company to sign an agreement with Anascape. (Tr. 678:19-679:5.) Third, Anascape believed that it could use the License Agreement as momentum in carrying it forward to negotiate with other players in the industry. (Tr. 222:8-18.) Fourth, Anascape wanted Mr. Tyler, who had invested \$1.5 million in Anascape, to recoup his investment. (Tr. 217:3-21; 649:6-9.) And fifth, Anascape wanted to provide Mr. Armstrong with financial resources, as he had limited means at the time. (Tr. 678:6-16.) Additionally, it goes without saying that Anascape did not know at the time of the License Agreement that the patents licensed to Sony were valid and infringed, unlike what is presumed in the hypothetical negotiation. (Tr. 753:9-13; 822:24-823:4.) None of these reasons for giving Sony a “sweetheart” deal would have been present during the hypothetical negotiation with Nintendo in 2005.

Based on this evidence, the jury could have reasonably concluded that, during the hypothetical negotiation in 2005, Anascape and Nintendo would have agreed on a \$21 million royalty (which is just over two times the amount of *cash* that changed hands in the Sony deal) for Nintendo’s infringing sales from July 31, 2006 through May 14, 2008.⁹

⁹ The fact that Anascape licensed a number of patents—and one exclusively—to Sony in the License Agreement does not mean that it would have licensed the ‘700 patent to Nintendo during the hypothetical negotiation for less than \$10 million or that, as Nintendo

C. The Evidence Supports an Award of Far More than Nintendo's Claimed \$2.7M

Nintendo's Motion repeats its argument—rejected by the jury—that the maximum possible recovery of damages for its infringement with its GameCube, Wii Classic, and Wavebird controllers was \$2.7M. (Tr. 1632:7-10.) This Court, like the jury, should reject this argument, as the evidence supports a much higher damages award.

In the event that this Court decides to remit the jury's verdict, it is clear that “a court is not at liberty to simply substitute its own judgment as to the amount of damages for the findings of a jury.” *Unisplay*, 69 F.3d at 519. Rather, a remittitur is only proper to “the highest amount of damages that the jury could properly have awarded based on the relevant evidence.” *Id.* This is known as the “maximum recovery rule,” and is employed by the Federal Circuit when calculating an amount to remit.¹⁰ *Id.*

Even though the Court must determine the *maximum* recovery Anascape is entitled to, Nintendo's proposed royalty is lower than the *minimum* recovery justified by the evidence, because Nintendo failed to include any Wii Remotes in its proposed royalty base.

suggests, \$10 million would “serve as a proxy for the maximum amount that could be recovered by Anascape.” (Motion at 5.) First, the value received by Anascape under the License Agreement was greater than \$10 million, as it included valuable cross-licenses and related technology rights. Second, as Mr. Bratic testified, it is incorrect to believe that a patent holder stands to receive more money if it licenses more patents, or if the patent license is exclusive. (Tr. 793:21-794:4; 810:20-811:10.) And third, for those reasons stated above, Anascape would have demanded a far greater reasonable royalty payment from Nintendo in 2005 than it did from Sony in 2004.

¹⁰ The Fifth Circuit also employs the maximum recovery rule. *See, e.g., Vogler v. Blackmore*, 352 F.3d 150, 156 (5th Cir. 2003) (“This Circuit employs the ‘maximum recovery’ rule when granting a remittitur. To this end, damages are reduced to the maximum amount a reasonable jury could have awarded.”); *Caldarera v. E. Airlines, Inc.*, 705 F.2d 778, 784 (5th Cir. 1983) (“We determine the size of the remittitur in accordance with this circuit’s ‘maximum recovery rule,’ which prescribes that the verdict must be reduced to the maximum amount the jury could properly have awarded.”).

Although a reasonable jury may include all Wii Remote sales in the applicable royalty base as described above, at minimum, the royalty base includes \$72,302,685 of Wii Remote sales (one Wii Remote for each Wii Classic),¹¹ plus the undisputed \$54,555,999 (from the sales of Wii Classics, Wavebirds, and GameCubes) for a total of \$126,858,684. A 5% royalty rate applied to this base of infringing sales results in a royalty of \$6,342,934.

Furthermore, as there was specific evidence of royalty rates as high as 7%, if the Court remits the verdict, it should assume a royalty rate of at least 7% under the maximum recovery rule. A 7% royalty rate applied to the minimum royalty base articulated above results in a royalty of \$8,880,108.

Finally, for the reasons described in Section II.B.5 above, the Sony License Agreement supports a minimum royalty of at least \$10 million.

III. CONCLUSION

It is clear that the jury used the evidence adduced at trial to award Anascape a reasonable royalty of \$21 million for Nintendo's infringement. The jury's award was not "grossly excessive or monstrous." For these reasons, as well as those described in more detail above, Anascape respectfully requests that Nintendo's Motion be denied.

¹¹ The Wii Remote is approximately 2.206 times as expensive as the Wii Classic, determined as follows: Mr. Bratic testified that there were 20.7 million Wii Nunchuks sold (Tr. 757:23-25), for a total of \$296,983,034 (PX 364). This means that each Wii Nunchuk sold for an average of \$14.35 ($\$296,983,034 / 20.7M = \14.347). Mr. Bratic testified that his damages analysis included only 20.7 million Wii Remotes (Tr. 757:23-758:2), which sold for \$655,295,421 (PX 364). Each Wii Remote would therefore have sold for an average of \$31.66 ($\$655,295,421 / 20.7M = \31.657), which is approximately 2.206 times more than the Wii Nunchuk. PX 215, attached hereto as Ex. 4, at NCA00043412 indicates that the units to revenue ratio of Wii Nunchuks is almost exactly the same as the units to revenue ratio of Wii Classics (i.e., the Wii Nunchuk and Wii Classic are sold for almost identical prices). A 1:1 ratio between *units* of Wii Classics and Wii Remotes results in \$72,302,685 of sales of Wii Remotes being added to the royalty base ($\$32,775,469 \times 2.206 = \$72,302,685$).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a) on May 28, 2008. As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A).

/s/ Steven Callahan
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