

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 REPLY IN SUPPORT OF MOTION FOR  
REMITTITUR OR, IN THE ALTERNATIVE, A NEW TRIAL ON DAMAGES**

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## I. SUMMARY

Anascope relies upon a series of speculative arguments in an effort justify the jury's \$21 million damages award for sales of the products found to infringe that totaled \$54,555,999, *i.e.*, \$21,780,530 in GameCube and Wavebird wireless controller sales and \$32,775,469 in Wii Classic controller sales. Anascope's primary argument is the bizarre effort to include in the royalty base more than \$300 million of Wii Remote sales that both sides agreed to be non-infringing on their own. Response at 5-7. Anascope also argues that the jury could have found a royalty rate higher than 5% and that this also could have supported the damages award. *Id.* at 7. Finally, Anascope argues that the Sony license supports the \$21 million jury verdict. *Id.* at 8-10. Each of these arguments boils down to bald speculation which is unsupported by any record evidence. Because there is no record evidence that supports the damages award, it was clearly excessive and cannot stand.

Anascope's fallback position that, should the Court decide to remit the damages verdict, the remitted figure should be somewhere in the range of \$6 million to \$10 million suffers from a similar defect to its argument that the damages award is not excessive – there is no record evidence to support Anascope's proposed remittitur range. *Id.* at 11-12. The \$6 million figure is devoid of any evidentiary basis because Anascope failed to introduce any evidence of either Wii Classic unit sales or Wii Classic average sales price during the damages period, thereby making it impossible to calculate and include an equal number of Wii Remotes in the royalty base. Anascope's additional arguments that a royalty rate higher than 5% and the Sony license support a remitted figure of somewhere between \$8 million and \$10 million are equally without merit.

The record in this case concerning damages – an issue on which Anascape bore the burden of proof – is exclusively of Anascape’s own doing, and Anascape must live with its consequences. Specifically, Anascape’s decision not to present the jury with any alternative theory or evidence in the event that the Wii Remote/Wii Nunchuk combination were found not to infringe means that the maximum amount the jury could have awarded based on the record evidence was \$2,727,799.95.

## **II. ARGUMENT**

### **A. The Jury’s \$21 Million Award Was Clearly Excessive And Unsupported By The Record Evidence**

#### **1. No Record Evidence Supports Anascape’s Inclusion Of \$358,312,387 in Non-Infringing Wii Remote Controller Sales In The Royalty Base**

Notwithstanding the undisputed fact that total sales of GameCube, Wavebird wireless and Wii Classic controllers during the damages period amounted to \$54,555,999, Anascape argues (for the first time in this case) that an additional \$358,312,387 in Wii Remote controller sales should also be included in the royalty base for a total royalty base of \$412,868,386, nearly half a billion dollars. *See id.* at 6. Anascape then multiplies this concocted royalty base by 5% to get to \$20,643,419 and claims the jury “rounded” this figure up to \$21 million. *Id.*

In attempting to justify the \$358,312,387 in Wii Remote sales that it includes in the royalty base, Anascape does not cite to a single piece of evidence – documentary, testimonial or otherwise. Rather, Anascape’s entire argument in this regard is based exclusively on speculation and conjecture.

Without citing any evidence, Anascape speculates that the jury, in conducting what Anascape calls an “imputation” analysis, must have considered that the “Wii Classic may be paired with many Wii Remotes;” “a Wii console can operate with up to four Remotes at any given time;” and, “[i]f a Wii Remote broke or was lost, another could be purchased to use with

the Wii Classic.” *See* Response at 6.<sup>1</sup> Next, Anascape further speculates about how the jury supposedly used the results of this “imputation” analysis to back out from the royalty base \$296,983,034 in Wii Nunchuk sales and \$296,983,034 in Wii Remote sales, to reach a royalty base of \$412,868,386. *Id.*

This entire line of argument must be rejected because there is no record evidence to support any of it, and, even if there was, it would not support inclusion of \$358,312,387 in Wii Remote sales in the royalty base.<sup>2</sup> As explained in Section B, *infra*, the only number of Wii Remotes that could conceivably be included in the royalty base (assuming there was supporting record evidence) would be an amount equal to the number of units of Wii Classics sold during the damages period multiplied by the average sales price of the Wii Remote during the damages

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<sup>1</sup> Anascape also argues that “the jury could have reasonably concluded that the sales of Wii Classics drive sales of Wii Remotes, because the Wii Classic cannot be used without a Wii Remote.” Response at 6. This is a backdoor attempt to argue that Wii Remotes constitute “convoyed” sales to Wii Classics. Anascape introduced no evidence to support such a theory, and its damages expert, Mr. Bratic, never articulated such a theory. Specifically, there is no record evidence of any “functional relationship” between Wii Remote sales and Wii Classic sales that is required to prove convoyed sales. *See, e.g., Am. Seating Co. v. USSC Group*, 514 F.3d 1262, 1268-69 (Fed. Cir. 2008); *Rite-Hite Corp. v. Kelley Corp.*, 56 F.3d 1538, 1549-50 (Fed. Cir. 1995) (en banc). In fact, the record evidence was to the contrary. Specifically, Nintendo’s financial comptroller, Colette Meader, testified that every Wii console sold to date contained both a Wii Remote and a Wii Nunchuk. *See* Tr. 957:3-6. Anascape’s assertion that Wii Classic sales drive Wii Remote sales and that purchasers of Wii Classics also buy vast numbers of Wii Remotes for use with their Wii Classics, purportedly analogous to purchasers of cell phones buying multiple chargers for such phones, is a speculative fantasy. *See* Response at 6, n.5.

<sup>2</sup> Mr. Bratic testified that the total royalty base for Wii Remote sales during the damages period, assuming the Wii Remote/Wii Nunchuk combination was found to infringe (it was not) was \$655,295,421. *See* Response at 5 (Anascape exhibit used by Mr. Bratic). Thus, even though the Wii Remote/Wii Nunchuk combination was found not to infringe, Anascape now seeks to include in the royalty base for the Wii Classic/Wii Remote combination 55% of Wii Remote sales included in the non-infringing Wii Remote/Wii Nunchuk royalty base testified to by Mr. Bratic. Such an argument is directly contrary to the evidentiary record created by Anascape’s own damages expert. Having failed in its effort to demonstrate infringement by the Wii Remote/Wii Nunchuk combination, Anascape cannot now, after the jury has rendered its verdict, shift 55% of those Wii Remotes over to the Wii Classic/Wii Remote combination.

period.<sup>3</sup> Anything in excess of such number of units would constitute Wii Remotes that the jury found to be non-infringing and thus may not be properly included in the royalty base.<sup>4</sup>

In sum, Anascape never presented or suggested to the jury a royalty base figure that included \$358,312,387 (or any variation thereof) in Wii Remote sales. In fact, Anascape never presented any theory of recovery to the jury based on a finding of infringement for only the GameCube, Wavebird wireless and Wii Classic, *i.e.*, based on the assumption (which the jury ultimately found) that the Wii Remote/Wii Nunchuk combination did not infringe. Nonetheless, Anascape now asks the Court to endorse its speculation that the jury somehow divined the royalty base proposed above based on an intricate “imputation” theory that was never presented or suggested to the jury and is not supported by any record evidence. Because the damages award vastly exceeded what could be supported by the evidence, it was necessarily based upon impermissible speculation and cannot stand. *See, e.g., Oiness v. Walgreen Co.*, 88 F.3d 1025, 1031 (Fed. Cir. 1996) (“This Court upholds a jury’s damages award unless grossly excessive or monstrous, clearly not supported by evidence, *or* based on speculation or guesswork.”) (emphasis added); *see also Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1427 (5<sup>th</sup> Cir. 1988)

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<sup>3</sup> For example, if the record evidence showed that Nintendo sold 50,000 Wii Classics during the damages period, the only conceivable number of Wii Remotes that could be included in the royalty base would be 50,000 units. However, as explained in Section B, *infra*, Anascape failed to introduce any record evidence regarding the number of Wii Classics sold during the damages period. Thus, there is no evidentiary basis for Anascape to include in the royalty base any Wii Remotes at all.

<sup>4</sup> Anascape’s arguments that the “Wii Classic may be paired with many Wii Remotes;” “a Wii console can operate with up to four Wii Remotes at any given time;” and “[t]he Wii Classic can be paired with any one of these four Wii Remotes” (Response at 6) are also irrelevant because the claims of the ‘700 patent found to be infringed are apparatus claims, not method claims. Thus, for royalty base purposes, it is of no moment as to how and when a user uses the Wii Classic in conjunction with the Wii Remote. Anascape’s argument that multiple Wii Remotes can be included in the royalty base for each Wii Classic is also contrary to Mr. Bratic’s damages methodology, which, for the Wii Remote/Wii Nunchuk combination, only included one Wii Remote in the base for each Wii Nunchuk sold. Tr. 757:23-758:10.

(reducing damages award because “[t]here is no evidence in the record to support an award of this size, and so it is necessarily based on impermissible conjecture); *Enterprise Ref. Co. v. Sector Ref., Inc.*, 781 F.2d 1116, 1118 (5<sup>th</sup> Cir. 1986) (“[A] damages award cannot stand when the only evidence to support it is speculative or purely conjectural.”).

2. The Record Evidence Regarding Royalty Rates Does Not Support The \$21 Million Damages Award

Anascape also attempts to support the \$21 million damages verdict by arguing that the jury was entitled to conclude that Anascape and Nintendo would have agreed on a royalty rate greater than 5% during a hypothetical negotiation. Response at 7. However, Anascape never tells the Court what that higher rate could be (or what base it would be applied to), other than making a passing reference to two licenses (neither of which was received into evidence) having a royalty rate range of 3%-7%. *Id.* Without the royalty base being inflated to \$300 million, which, as set forth above, has no basis in the record evidence, a 7% royalty rate provides no support for the \$21 million damages award. Moreover, as set forth in Nintendo’s Motion at 4, the effective royalty rate on sales found to infringe, which Anascape does not dispute, was 38%. No record evidence supports such an exorbitant royalty rate, and Anascape does not even contend as much.<sup>5</sup>

3. The Sony License Does Not Support The \$21 Million Damages Award

Anascape also asserts that the Sony license (PX 54) supported the jury’s \$21 million damages award. Response at 8-10. Specifically, Anascape asserts that, based on the Sony

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<sup>5</sup> In Nintendo’s Motion at 5-6, Nintendo explained how Judge Ward’s recent decision in *QPSX Devs. 5 Pty Ltd. v. Nortel Networks, Inc.*, 2008 WL 728201 (E.D. Tex. Mar. 18, 2008) belies any claim by Anascape that the jury was entitled to conclude that the royalty rate should be higher than 5%. Anascape’s Response fails to even address the *QPSX* decision, including Judge Ward’s decision to remit the damages in that case based on, among other things, Mr. Bratic’s “minimum royalty” testimony in that case.



license and certain testimony related thereto, “Anascape and Nintendo would have agreed on a \$21 million royalty [] for Nintendo’s infringing sales from July 31, 2006 through May 14, 2008.” *Id.* at 10. The record evidence in no way supports such a conclusion for multiple reasons.

To begin with, at Anascape’s urging, the Court concluded that the record evidence, including the Sony license, did not support a lump sum award and thus decided not to give the jury an instruction on a lump sum damages award and not to include a line item for a lump sum damages award on the verdict form. *See* Tr. at 1554:16-1555:1 (“It’s obviously a lump sum for all time, and they’ve had no evidence on that at all.”). Thus, the jury’s \$21 million award (plus potential future royalties that the Court may determine) represents damages found for a subset of Nintendo products sold during a less than two-year period of time, not a “lump sum for all time.” In contrast, the payment under the Sony license was, in fact, a lump sum of \$10 million for all past and future sales of Sony products under the ‘606 patent. *See* PX 54 at §§ 2.2 and 3.1; Tr. 685:14-20; 686:4-16. Moreover, this payment was for “all substantial rights” in the ‘606 patent, including an exclusive license, whereas the hypothetical license between Anascape and Nintendo was for a non-exclusive license.

In addition, the Sony license itself explicitly states that due to the “uncertainty” of the value attributable to the patents subject to the cross-license (including the ‘700 application), the parties “are unable to arrive at appropriate royalties” and “agreed to forego any royalties or other payment of any kind for the patents subject to the cross-licenses.” *Id.* at § 3.2. No witness, including Mr. Bratic, attempted to quantify the value the cross-license, including the ‘700 application that was a part thereof. No witness, including Mr. Bratic, attempted to extrapolate a reasonable royalty rate from the Sony license. Indeed, as noted in Nintendo’s Motion at 5 and undisputed by Anascape, Mr. Bratic’s position was that the Sony license was not probative of a

reasonable royalty rate in this case. The only point he made at trial regarding the license was that Nintendo would have been at a competitive disadvantage to Sony by not taking a license to the '700 patent and the parties would have known this during the hypothetical negotiation. Tr. 754:1-5.

In sum, the \$10 million “lump sum for all time” payment by Sony for all substantial rights in the '606 patent covering all past and future Sony products, irrespective of their volume, does not and cannot support any damages award, let alone an award of \$21 million (plus potential future royalties) for \$54,555,999 in Nintendo controller sales over a period of less than two years.<sup>6</sup>

**B. Under the Maximum Recovery Rule, The Highest Amount The Jury Could Have Properly Awarded Based On The Record Evidence Was \$2,727,799.95**

The parties are in agreement that if the Court determines that the jury’s \$21 million damages award is excessive the Court should employ the “maximum recovery rule” to quantify how much the damages award should be reduced. Response at 11. Anascape’s only complaint about Nintendo’s application of the maximum recovery rule is that Nintendo did not include in the royalty base Wii Remotes equal to the number of Wii Classic sold during the damages period. *Id.* However, Anascape has a fundamental and fatal problem with this position – Anascape failed to present (and the record is devoid of) any evidence as to the number of units of Wii Classic controllers sold during the damages period. This state of the record is exclusively the result of Anascape’s go-for-broke approach to its damages case. Thus, there is no record evidence that would have enabled the jury to include in the royalty base an equal number of Wii Remote controllers as Anascape advocates. Given Anascape’s failure of proof on this crucial

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<sup>6</sup> For all of the reasons set forth in this Section, the Sony license also does not support a remitted damages award of \$10 million, as Anascape suggests. *See* Response at 12.

point, there was no way for the jury to multiply units of Wii Remotes equal to the number of Wii Classics sold during the damages period by the average sales price of Wii Remotes during the same period.

Anascape claims that \$72,302,685 in Wii Remote sales should be included in the royalty base under the maximum recovery rule. Response at 12. Anascape also asserts that the average sales price of Wii Remote controllers during the damages period was \$31.66. *Id.* Under this reasoning, there had to have been 2,283,723 Wii Classics sold during the damages period, *i.e.*,  $\$72,302,685/\$31.66 = 2,283,723$ . However, there is no record evidence supporting this (or any) figure for Wii Classic unit sales during the damages period, and Anascape cites to nothing in the record in this regard. Instead, Anascape relies upon PX 215, a document showing sales made by Nintendo Co., Ltd. to Nintendo of America Inc, which it buries in a footnote. *Id.* at 12, n.11. ***However, PX 215 was never offered or mentioned before the jury and is thus not part of the record.*** See Order Re: Replacement of Hard Copies of Exhibits dated May 21, 2008 (Dkt. # 338) (“Exhibits which were originally submitted but were not offered or mentioned before the jury are not part of the record.”); see also Anascape’s Eighth Amended Exhibit List filed on May 20, 2008 (not listing PX 215) (Dkt. #335).

For this fundamental reason, Anascape may not use PX 215 for any purpose and thus there is no record evidence establishing the number of units of Wii Classics sold during the damages period. As a result, Anascape cannot quantify an equal number of Wii Remotes sold during the damages period. Accordingly, Nintendo’s calculation of \$2,727,799.95 under the maximum recovery rule is the only one supported by the record evidence.<sup>7</sup>

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<sup>7</sup> The propriety of a reduction of the damages award to \$2,727,799.95 is confirmed by the May 14 email Mr. Bratic sent to counsel for Nintendo following the jury verdict. See Ex. A. In this email Mr. Bratic recognizes that all Wii Remote sales (\$655,295,421) and Wii Nunchuk

### III. CONCLUSION

For the foregoing reasons and the reasons set forth in Nintendo's Motion (Dkt. # 337), Nintendo respectfully requests that the Court remit the jury's damages award to \$2,727,799.95 or, in the alternative, grant a new trial on damages.

Dated: June 4, 2008

Respectfully submitted,

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sales (\$296,983,034) should be excluded from the royalty base because the jury found that these controllers do not infringe. The only flaw in Mr. Bratic's analysis is the incorrect assumption that such sales constitute 90% of the royalty base; in fact, they constitute almost 95% (0.9458 to be exact) of the royalty base, *i.e.*, \$952,278,455 of \$1,006,834,454. Using this correct percentage of sales yields a maximum recoverable amount of \$2,727,799.95. Anascape's counsel initially objected to any use by Nintendo of the Bratic email based on both the Agreed Protective Order (Dkt. # 43) and a Stipulation dated Sept. 26, 2007 (attached hereto as Ex. B). *See Ex. C.* On May 30, 2008, counsel for Anascape reiterated its objection to Nintendo's use of the Bratic email based on the Stipulation, but not based on the Protective Order. *See Ex. D.* On June 4, 2008, counsel for Nintendo responded to the May 30 letter making clear that the Stipulation is inapplicable to the Bratic email. *See Ex. E.* Mr. Bratic's email is thus part of the record that the Court can and should consider in deciding this motion.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 4th day of June, 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