

**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 RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, A NEW TRIAL**

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Anascape, Ltd. (“Anascape”) files its response to Nintendo of America, Inc.’s (“Nintendo”) Renewed Motion for Judgment as a Matter of Law (“JMOL Motion”) or, in the Alternative, a New Trial (“New Trial Motion”) (collectively, the “Motion”), and respectfully shows as follows:

I. SUMMARY OF THE RESPONSE

Nintendo’s JMOL Motion takes a shotgun approach, raising issues relating to (i) infringement, (ii) anticipation, (iii) obviousness, (iv) the written description requirement, (v) the ‘700 patent’s effective filing date, and (vi) sufficiency of damages evidence. Should the Court not find these JMOL arguments persuasive, Nintendo’s New Trial Motion requests a new trial because of the allegedly erroneous (i) claim constructions, (ii) jury instructions, (iii) admission of evidence, and (iv) failure to provide a lump sum line in the verdict form.

Nintendo’s Motion attempts to raise JMOL arguments not made previously, and purports to “incorporate by reference” nearly the *entire record* of this case (including 1,414

pages of Invalidity Contentions never filed by Nintendo with the Court, which, in turn, incorporate, among other things, over 1,400 pages worth of *Microsoft's* Invalidity Contentions and *Microsoft's* P.R. 3-4 document production in this case), apparently in the hopes of manufacturing error. Nintendo also raises the borderline-frivolous argument that Anascape introduced no “legally sufficient evidence” of damages at trial.

Because Nintendo has not demonstrated that the jury’s verdict is not supported by substantial evidence, Nintendo’s JMOL Motion should be denied. In particular, substantial record evidence supports the jury’s findings relating to validity, written description support, infringement and damages. The alleged “errors” pointed to by Nintendo in its New Trial Motion are, in fact, proper rulings by this Court. Even assuming *arguendo* that they were errors, they were harmless and not so prejudicial as to require a new trial.

II. NINTENDO’S RENEWED JMOL MOTION SHOULD BE DENIED

A. Nintendo Faces a Heavy JMOL Burden

Nintendo must, for each issue on which it has moved for judgment as a matter of law, show that “a reasonable jury would not have a legally sufficient evidentiary basis to find for the party [i.e., Anascape] on that issue.” Fed. R. Civ. P. 50(a)(1). A JMOL motion should be granted only if

the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict. . . . On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied.

Brown v. Bryan County, 219 F.3d 450, 456 (5th Cir. 2000) (quoting *Boeing v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc)).

The Court may grant Nintendo’s JMOL with respect to its affirmative defense of invalidity “only if the record shows that [Nintendo] established the defense so clearly that no rational jury could have found to the contrary.” *Delli Santi v. CNA Ins. Cos.*, 88 F.3d 192, 203 (3d Cir. 1996) (quotations and citation omitted). “Courts grant JMOL for the party bearing the burden of proof only in extreme cases, when the party bearing the burden of proof has established its case by evidence that the jury would not be at liberty to disbelieve and the only reasonable conclusion is in its favor.” *Mentor H/S, Inc. v. Medical Device Alliance, Inc.*, 244 F.3d 1365, 1375 (Fed. Cir. 2001). As this Court has recognized, with respect to JMOL motions on affirmative defenses,

[A] court must be careful to determine which party had the burden of proof, and what that burden is. If a party has the burden of proof and the jury fails to find in its favor, it is not precisely correct to say that there must be substantial evidence supporting the non-movant. If there is no evidence on an issue, the party with the burden of proof should lose. Even where movant presented an interested witness on an issue, and non-movant presented no witnesses, the jury might simply have decided that movant’s witness was not credible and was impeached by cross-examination. *Where the party with the burden of proof by clear and convincing evidence fails to obtain a favorable finding, more will be needed to overturn the verdict.*

TGIP, Inc. v. AT&T Corp., 527 F. Supp. 2d 561, 569 n.3 (E.D. Tex. 2007) (Clark, J.) (citing *Eli Lilly & Co. v. Aradigm Corp.*, 376 F.3d 1352, 1363 (Fed. Cir. 2004) (emphasis added).

In deciding a JMOL motion, the court must consider the entire trial record, “drawing all reasonable inferences and resolving all credibility determinations in the light most favorable to the non-moving party.” *Brown*, 219 F.3d at 456; *see also Tec Air, Inc. v. Denso Mfg. Mich. Inc.*, 192 F.3d 1353, 1358 (Fed. Cir. 1999) (court may not substitute its own “resolutions of conflicting evidence for those of the jury”).

Nintendo faces a heavy burden, as “[t]he jury’s verdict is afforded great deference.” *Pineda v. United Parcel Serv., Inc.*, 360 F.3d 483, 486 (5th Cir. 2004). “A post-judgment motion for judgment as a matter of law should only be granted when ‘the facts and inferences point so strongly in favor of the movant that a rational jury could not reach a contrary verdict.’” *Thomas v. Tex. Dep’t of Criminal Justice*, 220 F.3d 389, 392 (5th Cir. 2000) (quoting *Waymire v. Harris County*, 86 F.3d 424, 427 (5th Cir. 1996)). “If reasonable persons could differ in their interpretation of the evidence, then the motion should be denied.” *Thomas*, 220 F.3d at 392 (citing *Baltazor v. Holmes*, 162 F.3d 368, 373 (5th Cir.1998)).

B. Substantial Evidence Supports the Jury’s Determination That the Asserted Claims of the ‘700 Patent are Valid

Nintendo suggests in its Motion that, based on the trial record, a reasonable jury could only find that (i) the asserted claims of the ‘700 patent are not entitled to claim priority to the 1996 Application, (ii) each asserted claim of the ‘700 patent is anticipated or rendered obvious by prior art, and (iii) the asserted claims do not find written description support in the specification of the ‘700 patent. Nintendo has not demonstrated that this is the type of “extreme” case that warrants a finding of JMOL on an affirmative defense, especially given the “clear and convincing” standard applicable to findings of invalidity.

1. A Reasonable Jury Need Not Find that the Asserted Claims of the '700 Patent Could Not Claim Priority to the 1996 Application

Nintendo's entire anticipation/obvious case hinges on whether the asserted claims of the '700 patent were entitled to a 1996 priority date, as all of its prior art post-dates 1996. Because the jury was reasonable in finding that the asserted claims were entitled to a 1996 priority date, the jury's verdict as to anticipation and obviousness should be upheld.

As recognized by Nintendo (*see* Motion at 7), the written description analysis governs the question of priority: the jury must determine whether the specification of the 1996 Application supports the asserted claims. *See Noelle v. Lederman*, 355 F.3d 1343, 1348 (Fed. Cir. 2004) ("Thus the test to determine if an application is to receive the benefit of an earlier filed application is whether a person of ordinary skill in the art would recognize that the applicant possessed what is claimed in the later filed application as of the filing date of the earlier filed application."); *Cordis Corp. v. Medtronic AVE, Inc.*, 339 F.3d 1352, 1364 (Fed. Cir. 2003) (stating that the written description requirement is evaluated under a "clear and convincing" standard).

The trial record contains sufficient evidence on which a jury could reject Nintendo's contention that the asserted claims of the '700 patent are not entitled to claim priority to the 1996 Application. First, Anascape's technical expert, Dr. Robert Howe, provided extensive testimony about how, to one of skill in the art, the 1996 Application provided adequate written description support for the asserted claims. (Tr. 1412:16-20; 1425:17-1447:1; 1474:3-1475:7; 1509:15-1512:21; 1513:4-1514:22.)¹ Brad Armstrong, also one skilled in the art, testified that the 1996 Application disclosed a wealth of technology, which supports Dr. Howe's

¹ Cited excerpts from the Trial Transcript are attached hereto as Ex. A.

conclusions. (*Id.* at 156:18-157:6; 157:11-158:3; 168:16-172:12; 173:19-175:15; 178:4-179:15; 188:1-190:18; *see also id.* at 225:19-235:17; 380:7-382:20 (noting that the 1996 Application discloses multiple embodiments).) Furthermore, various witnesses, including Nintendo’s own expert Mr. Dezmelyk and employee Mr. Koshiishi, testified as to their understanding of the scope of the 1996 Application, and the jury was entitled to consider this testimony in arriving at its conclusions.² In light of the above testimony, when considered with the 1996 Application (DX306, attached hereto as Ex. B) and the claims of the ‘700 patent (PX1, attached hereto as Ex. C), a reasonable jury need not find in Nintendo’s favor.³

Nintendo contends that the 1996 Application only provides support for controllers with a single input member moveable in 6DOF relative to a reference member of the controller, and does not support a device having multiple input members to achieve 6DOF. The trial record

² (See, e.g., Tr. 841:24-847:16; 1050:4-20; 1051:8-1052:11; 1104:13-1106:10; 1107:15-1108:21; 1109:11-1110:16; 1110:22-1111:15; 1114:2-14; 1116:7-22; 1119:21-1120:7; 1121:10-22; 1122:13-1126:1; 1127:2-7; 1132:1-8; 1133:15-1134:2; 1151:1-25; 1169:22-1171:10; 1190:4-1191:4.)

³ Nintendo argues, for the first time, that *PowerOasis, Inc. v. T-Mobile USA, Inc.*, 522 F.3d 1299 (Fed. Cir. 2008) stands for the proposition that the issue of priority date is one of law, not fact. (See Motion at 8 n.3.) This argument is unavailing for three reasons. First, Nintendo provides no analysis to support this proposition and, as such, it has waived this argument. See *Trevino v. Johnson*, 168 F.3d 173, 181 n.3 (5th Cir. 1999) (“At the end of his brief, Trevino lists 11 additional, undeveloped arguments relating to his state-court conviction. Because they are inadequately argued, we consider these issues waived.”). Second, Nintendo failed to raise this argument earlier in the litigation. See Letter from R. Gunther, counsel for Nintendo, to Judge Clark dated Apr. 28, 2008, attached hereto as Ex. E (arguing that *PowerOasis* shifted the burden of proving written description to the plaintiff, not that the determination is made as a matter of law); Tr. 1523:2-12 (noting that Nintendo’s JMOL moved on an evidentiary basis, not as a matter of law); Nintendo’s JMOL, Docket No. 316 at 9 (“The court should further grant Nintendo’s motion because there is no legally sufficient *evidentiary basis* for a reasonable jury to find for Anascape on the issue of priority/earlier effective filing date under 35 U.S.C § 120.”) (emphasis added).) Third, *PowerOasis* itself directly contradicts Nintendo’s argument. See *PowerOasis*, 522 F.3d at 1307 (“Compliance with the written description requirement is a question of fact[.]”).

supports a contrary conclusion. In particular, a reasonable jury could find that the embodiment shown at Figures 1-6 of the 1996 Application uses two input members, instead of a single input member, and that Figure 47 shows an input member capable of accepting inputs along only two axes. Furthermore, the 1996 Application (and the '525 patent) refer to controllers with less than 6DOF. (See PX4, attached hereto as Ex. D, '525 patent at 7:40-41, 1:41-48, 2:60-65.) A reasonable jury could agree that the discussion of the Chang reference in the 1996 Application does not limit the scope of allowable claims, as the application disclosed multiple shortcomings of Chang, and thus the inventor did not expressly disclaim any particular one of Chang's features. (Tr. 235:18-239:22); see also *Honeywell, Inc. v. Victor Co.*, 298 F.3d 1317, 1326 (Fed. Cir. 2002) (noting that when a patent identifies multiple problems with the prior art, each claim need not provide a solution to each problem). As noted above, Dr. Robert Howe, one of skill in the art, testified that the asserted claims found written description support in the 1996 Application. (Tr. 1432:11-1433:17.)

Furthermore, based on the testimony of Kazunori Koshiishi, an engineer at Nintendo Co., Ltd. who assisted in the development of the GameCube controller, a reasonable jury could find that the disclosure of the 1996 Application would reasonably convey to one of skill in the art the use of controllers that did not use a single input member moveable in 6DOF relative to a reference member of the controller. In particular, Mr. Koshiishi recognized that a controller similar to the one at Figure 2 in the '525 patent (which is also found in the 1996 Application) could be constructed by using two trackballs, rather than a trackball combined with a collet. (Tr. 841:24-847:16.) Such a controller would use multiple input members, and would still achieve 6DOF. Mr. Koshiishi is one skilled in the art. (Tr. 883:14-21; 885:6-886:4; 1442:11-23.) Based on this testimony, a reasonable jury could find that the 1996 Application

would reasonably convey to a person skilled in the art that Mr. Armstrong had possession of controllers that did not use a single input member moveable in 6DOF.

Although Nintendo points to the opinions of its retained expert in support of its written description argument, the Fifth Circuit has recognized that a district court, reviewing a verdict, should not question the jury’s resolution of a “classic battle of the experts”:

[T]he trial was fought in a classic battle of the experts. . . . It was for the jury to decide which of the experts was more credible, which used the more reliable data, and whose opinion—if any—the jury would accept. The jury might credit one or more of the expert opinions or it might reject them all. Post-*Boeing*, the argument that, when the jury accepts one expert rather than another, we substitute our appraisal for theirs will not fly, for the standard is fastly placed: after reviewing all of the evidence “in the light and with all reasonable inferences most favorable to the party opposed to the motion,” we must be persuaded that “the facts and inferences point strongly and overwhelmingly in favor of one party that . . . reasonable [jurors] could not arrive at a contrary verdict.” *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc).

Grenada Steel Indus., Inc. v. Ala. Oxygen Co., 695 F.2d 883, 889-890 (5th Cir. 1983). Here, the experts disagreed on whether one skilled in the art would recognize that the asserted claims of the ‘700 patent were supported by the 1996 Application. The jury was free to determine which expert’s testimony to credit.⁴

⁴ Anascape successfully raised doubts as to Mr. Dezmelyk’s credibility during trial. (*Compare* (Tr. 1296:24-1298:18 (Mr. Dezmelyk testifying that the Classic controller is intended for “really old games,” and suggesting that both joysticks of the Wii Classic controller could not be used to control a game) *with id.* at 1447:15-1451:22 (Dr. Howe demonstrating the Wii Classic controller in use with a current Wii title, and showing that both joysticks of the Wii Classic controller could be used to control objects and navigate viewpoints); *see also* 1306:18-1307:9; 1363:19-1364:4 (Mr. Dezmelyk failed to speak with any Nintendo engineer in forming his opinions); 1314:20-1316:17 (Mr. Dezmelyk was not familiar with whether the 1996 Application disclosed capacitive sensors).) As such, the jury was free to ignore any or all of his conclusions, especially in light of Dr. Howe’s contrary testimony. *See Grenada*, 695 F.2d at 889; *TGIP*, 527 F. Supp. 2d at 569 n.3.

Even if the Court concluded that the specification of the 1996 Application is narrower than the claims of the '700 patent, the analysis is not done. There are added questions of fact to consider as the Federal Circuit recognized in *Bilstad v. Wakalopulos*: “We cannot agree with the broad proposition . . . that in every case where the description of the invention in the specification is narrower than that in the claim there has been a failure to fulfill the description requirement in section 112.” 386 F.3d 1116, 1123 (Fed. Cir. 2004) (quoting *In re Smythe*, 480 F.2d 1376, 1382 (C.C.P.A. 1973)).

Although the above-cited evidence shows how the full scope of the claim, in view of one of ordinary skill in the art, is supported by the 1996 Application, even if the Court were to find otherwise, at the very least, record evidence shows that *some* scope of the claim is supported by the 1996 Application. (See Tr. 1336:21-1362:25; 1425:17-1446:1.) This results in a “genus/species” situation, which leads to a *Bilstad* analysis. *Bilstad*, 386 F.3d at 1125-26 (“The Board relied heavily on *Tronzo* [in finding no written description support.] However, the Board failed to recognize how *Tronzo* fits within the spectrum of cases involving written description for a genus when only one or more species are disclosed.”).

Under *Bilstad*, (i) the understandings of one skilled in the art, (ii) whether the written description would reasonably convey to a person skilled in the art that the inventor had “possession” of the claimed subject matter, and (iii) the degree of predictability in the field must be considered in determining whether a claim is supported by the written description. *Id.* at 1125-26 (remanding because the Board did not consider the knowledge of one skilled in the art and the level of predictability in the field). In this case, the trial record supports a conclusion that, under *Bilstad*, one of skill in the art would find that the disclosure of the 1996 Application is

not limited to a single input member moveable in 6DOF relative to a reference member of the controller. (See Tr. 1432:11-1433:17; 1435:8-1441:7; 1468:1-1470:25.)

Because the evidence supports a finding that the asserted claims were supported by the 1996 Application, the Court should not overturn the jury's verdict on anticipation and obviousness.⁵

2. A Reasonable Jury Need Not Find that the Asserted Claims of the '700 Patent Do Not Find Written Description Support in the Specification of the '700 Patent

Although some changes were made, the 1996 Application and the specification of the '700 patent contain similar disclosure, as noted during trial. (Tr. 306:17-307:7; 1254:6-15 (noting that the figures are the same in the two specifications).) Dr. Howe noted that the asserted claims were supported by the specification of the '700 patent, for virtually the same reasons that they were supported by the 1996 Application. (Tr. 1412:21-24; 1447:2-14.) The same evidence outlined in Section II.B.1 above supporting the finding that the asserted claims are supported by the 1996 Application also supports the jury's finding that Nintendo did not prove, by clear and convincing evidence, that the asserted claims are not supported by the specification of the '700 patent.⁶

⁵ Of course, even if the asserted claims were not entitled to a 1996 priority date, the jury need not credit Mr. Dezmelyk's conclusion that the claims would be rendered invalid by the Dual Shock, Dual Shock 2, or Goto Reference. First, the jury is free to ignore Mr. Dezmelyk's testimony, in light of his damaged credibility. See *Grenada*, 695 F.2d at 889; *TGIP*, 527 F. Supp. 2d at 569 n.3. Second, Nintendo has not demonstrated that a reasonable jury could not have found that these references do not invalidate the claims, notwithstanding Anascape's claimed priority date.

⁶ Nintendo's Motion raises, for the first time, a new written description argument involving claim 16—that there is allegedly no support for a “3D graphics controller having a first element structured to activate four unidirectional sensors and a second element structured to activate a first two bi-directional sensors, where both the first element and second element are connected to the first claimed sheet.” (Motion at 15.) Nintendo never raised this argument at

C. Substantial Evidence Supports the Jury’s Determination That Nintendo Infringes All of the Asserted Claims of the ‘700 Patent

A reasonable jury could find that, with respect to the ‘700 patent, (i) the GameCube Controller infringes claims 14, 16, 19, 22, and 23, (ii) the WaveBird Wireless Controller infringes claim 14, and (iii) the Wii Classic connected to the Wii Remote infringes claims 19, 22, and 23. Accordingly, Nintendo’s Renewed JMOL as to infringement issues should be denied.

1. Nintendo All But Admitted At Trial that the Gamecube, Wavebird, and Wii Classic/Wii Remote Controllers Infringed

As this Court recognized, it was Nintendo’s trial strategy to “hammer[] on its theme that the patentee wrote claims specifically to cover its Gamecube controller.” (Order Denying Defendant’s Motion for Remittitur or, in the Alternative, a New Trial on Damages

trial, and the citation provided by Nintendo as supporting this argument has nothing to do with claim 16—it is only a conclusory statement by Mr. Dezmelyk regarding lack of written description support. (*See* Tr. 1253:11-12 (“[T]here is no written description support in the application in November, 2000, for the asserted claims.”); 1253:17-18 (“There’s not enough information to show that he had that idea even at that point in time.”).)

A purpose of a motion for JMOL is “to alert the opposing party to the insufficiency of his case before being submitted to the jury.” *Taylor Pub. Co. v. Jostens, Inc.*, 216 F.3d 465, 472 (5th Cir. 2000) (quoting *Polanco v. City of Austin*, 78 F.3d 968, 974 (5th Cir. 1996)). Because of this, a Rule 50(b) motion, such as Nintendo’s Renewed JMOL, can only be granted on a ground raised in an earlier motion for JMOL. *See, e.g., McCann v. Tex. City Refining, Inc.*, 984 F.2d 667, 672 (5th Cir. 1993); *House of Koscot Dev. Corp. v. Am. Line Cosmetics, Inc.*, 468 F.2d 64, 68 (5th Cir. 1972). Because Nintendo did not raise this claim 16 argument in its initial JMOL briefing, the argument is waived.

Nevertheless, there is adequate support in the trial record for the jury to reject this argument. Based on Mr. Dezmelyk’s cross-examination, and a review of the 1996 Application, a jury could find: (i) the presence of multiple sheets in the 1996 Application (*see* Tr. 1351:4-1352:8); (ii) the presence of multiple elements activating sets of unidirectional sensors (*id.* at 1341:12-1342:10; 1343:10-1344:17); (iii) that one set of unidirectional sensors could be replaced by bidirectional sensors (*id.* at 1342:12-1343:4); and (iv) that the sensors of Figure 22 are on the same plane. This, along with a review of the 1996 Application and Dr. Howe’s testimony (*see*, Tr. 1412:16-20; 1425:17-1447:1; 1474:3-1475:7; 1509:15-1512:21; 1513:4-1514:22), provides adequate written description support for claim 16.

[hereinafter “Remittitur Order”], Docket No. 354 at 3-4 (citing Tr. 363:21 - 365:21); *see also* 456:8-457:2; 1044:9-1046:1.) Therefore, “[i]t is not surprising that the jury would find infringement as to the Gamecube.” (Remittitur Order at 4.) Indeed, Nintendo’s counsel basically admitted Nintendo’s infringement:

Q. Okay. Now, in view of the fact that Mr. Armstrong had Nintendo's products in his hands when he was writing this aspect of his patent, we didn't really need a Harvard professor to come in and read the claims onto those products and attempt to show that there is infringement. Would you agree with me?

(Tr. 457:16-21; *see also* Remittitur Order at 7 (“[Nintendo] virtually admitted that [its] three ‘old school’ products infringe[.]”).)

A review of the physical exhibits of the controllers also supports a finding that the WaveBird Wireless controller and Wii Classic connected to the Wii Remote infringe, as they are similar to the GameCube controller. Remittitur Order at 4 (“The Wavebird and the Wii Classic are very similar to the Gamecube. Minor enhancements and additions to an infringing product do not constitute a design-around that avoids infringement.”).

2. A Reasonable Jury Could Find that the Second and Third Elements of the Infringing Controllers Are Capable of Controlling Objects and Navigating Viewpoints

As this Court recognized, Claim 19 of the ‘700 patent is an apparatus claim, and Anascape did not need to show use of that apparatus to show infringement. (Final Pretrial Hearing Tr. 149:4-22, attached hereto as Ex. F (“[Claim 19] is not a method claim . . . it is talking about the controller itself capable of ‘providing outputs at least in part controlling objects.’”)); *Microprocessor Enhancement Corp. v. Tex. Instruments Inc.*, 520 F.3d 1367, 1375

(Fed. Cir. 2008).⁷ Trial testimony indicated how each of the accused elements provided outputs, and that these outputs could be used to control objects or navigate viewpoints. (Tr. 577:16-21; 581:13-20; 1029:14-1030:18; 1324:25-1326:9; 1419:8-1420:2; 1515:4-1516:6.) The jury heard specific testimony as to how the outputs of a directional pad, thumbsticks, buttons, and accelerometers could be used to control objects and navigate viewpoints. (Tr. 401:6-404:9; 406:12-408:3; 875:22-879:21; 892:15-893:8.) Finally, evidence demonstrated that the two thumbsticks on the Wii Classic and GameCube controllers are capable of controlling objects and navigating viewpoints. (Tr. 1321:11-23; 1322:4-1323:12; 1447:15-1451:22 (demonstrating Wii Classic).) Based on this testimony, along with a review of the physical exhibits of the accused products (*see* PX 413A, PX 414A, PX 416A, PX 440A) a reasonable jury could find that the thumbsticks of the infringing controllers are capable of controlling objects and navigating viewpoints.

3. A Reasonable Jury Could Find that the GameCube Controller and the Wii Classic connected to the Wii Remote Comprised “Tactile Feedback Means”

The Court ruled that the corresponding structure for “tactile feedback means” was “a motor having a shaft with an offset weight and equivalents thereof.” (Tr. 1545:7-13.) Mr. Pederson, Nintendo’s senior director of technical services who has been with Nintendo for 27

⁷ Nintendo’s Motion ignores this finding, focusing instead on the straw-man of whether any game currently available on the market uses both thumbsticks to control objects and navigate viewpoints. Although such evidence may certainly be sufficient to prove that a thumbstick is capable of controlling objects and navigating viewpoints, it is not required. (Tr. 1515:4-1516:6.)

years and who supervises 260 employees who repair Nintendo's controllers (*see* Tr. 1002:2-23),⁸ confirmed that this structure was present in the GameCube Controller and the Wii Remote:

Q. And just so there is not any confusion -- I think this is clear from your testimony, but I want to be sure. The GameCube controller has a motor with an eccentric weight in it that accomplishes rumble, correct?

A. Yes. There is a vibration motor.

Q. And the way that vibration motor works is through a small electric motor with an offset weight on a shaft, correct?

A. That's my understanding, correct.

Q. And when the motor spins, it spins that eccentric weight and causes vibration, fair?

A. Yeah. I haven't disassembled one personally, but that's my understanding.

Q. Well, would you like to see one? We happen to have a couple in the courtroom here, in case you're curious. Maybe you can catch that on the way out, since I don't have any questions to ask you about it, if you're curious.

And in the same way, the Wii Remote also has a motor like that that provides rumble or vibration, correct?

A. Correct.

(Tr. 1028:3-25.)

Other trial testimony, and the demonstration of the vibration feature performed by Mr. Armstrong, confirms Mr. Pederson's testimony. (*See* Tr. 162:19-166:18; 404:18-406:11; 446:4-7; 870:17-22; 1295:23-1296:11 (recognizing that the Wii Remote has features sufficient to meet the "rumble" limitation in claim 19).) Based on this testimony, a reasonable jury could find

⁸ Mr. Pederson was also Nintendo's 30(b)(6) witness during discovery as to the structure and function of its controllers.

that the GameCube controller and the Wii Classic connected to the Wii Remote comprise a “tactile feedback means,” or an equivalent thereof, as required by claim 19.

4. A Reasonable Jury Could Find that the Wii Classic Connected to the Wii Remote Comprises a “Controller”

As a threshold matter, Anascape contends that the term “controller,” found in the preamble of certain claims, does not act to limit the claims.⁹ Even if it did, however, the jury was presented with sufficient evidence to find that the Wii Classic connected to the Wii Remote comprises a “controller” (i.e., “a device held in the user’s hand . . .”).¹⁰ Like the Wii Nunchuk, the Wii Classic controller only works when it is connected to the Wii Remote. (Tr. 434:3-23, 439:12-19.) As a result, at least one Nintendo employee referred to such peripherals as “extensions” of the Wii Remote, and Dr. Howe testified that this combination should be considered one controller. (Tr. 434:11-15, 1423:11-1425:16; *see also id.* at 939:12-15 (recognizing that the Wii Remote has an “extension connector”); 1307:5-9; 1496:2-1498:18; 1514:23-1515:3.) Dr. Howe also used the Wii Remote connected to the Wii Classic to demonstrate the video game “Super Smash Brothers Brawl.” (Tr. 1447:15-1451:22.) Based on this testimony and demonstration, along with an examination of the actual controllers in evidence (*see* PX 413A, PX 414A, PX 416A, PX 440A), a reasonable jury could find that the Wii Classic connected to the Wii Remote constitutes a “controller,” sufficient to satisfy claim 19.

⁹ Claim preambles rarely limit the scope of a claim. *See Allen Engineering Corp. v. Bartell Industries, Inc.*, 299 F.3d 1336, 1346 (Fed. Cir. 2002). “It is well settled that if the body of the claim sets out the complete invention, and the preamble is not necessary to give life, meaning, and vitality to the claim, than the preamble is of no significance to claim construction because it cannot be said to constitute or explain a claim limitation.” *Altris, Inc. v. Symantec Corp.*, 318 F.3d 1363, 1371 (Fed. Cir. 2003).

¹⁰ At trial, the Court recognized that Nintendo’s counsel’s actions during the *Markman* hearing were at odds with its newly discovered “controller” argument. (Tr. 1528:13-1529:8.)

5. A Reasonable Jury Could Find that the GameCube Controller and the WaveBird Wireless Controllers Comprise a “3-D Graphics Controller”

The bodies of claims 14 and 16, which include the “3-D graphics controller” preamble,¹¹ require specific combinations of structural components that provide for control on various sets of axes.¹² The jury heard testimony as to the functionality of the directional pad and the thumbstick; specifically, that each could be used to provide control over two axes. (Tr. 394:3-395:7; 401:6-404:9; 406:12-409:17.) The GameCube controller and the WaveBird Wireless controller each have one directional pad and two thumbsticks, which allow for control over six axes. (See PX 413A, PX 440A; see also Tr. 429:14-432:10 (noting on the similarities between the GameCube and WaveBird Wireless controllers).) Control over six axes is certainly sufficient and capable to control graphics moving in six degrees of freedom. (Tr. 179:16-180:7.) The jury also heard testimony that rotational movement on the controller could be translated to linear movement on a screen. (Tr. 880:2-18.) Dr. Howe testified, and a jury could find, that the structures of these controllers are sufficient to meet the Court’s definition of “3-D graphics controller.” (See Tr. 417:15-421:7.)

D. Substantial Evidence Supports the Jury’s Damages Finding

Nintendo argues that “no legally sufficient evidentiary basis exists for an award of damages as a matter of law” and that “Anascape does not offer and cannot establish an

¹¹ Anascape disputes that the preambles of claims 14 and 16 act as claim limitations, but nevertheless addresses Nintendo’s arguments regarding those preambles.

¹² (See claim 14 (claiming (i) a first element activating 4 unidirectional sensors, providing two axes of control, and (ii) four bi-directional sensors, providing four additional axes of control); claim 16 (claiming (i) a first element activating four unidirectional sensors, providing two axes of control, (ii) a second element activating two bidirectional sensors, providing two axes of control, and (iii) a second element activating two bidirectional sensors, providing two axes of control, for a total of six axes of control.); cf. Tr. 412:15-24 (stating that claim 19 claims a six-degree-of-freedom controller because the number of inputs add up to six).)

evidentiary basis to calculate a reasonable royalty.”¹³ (Motion at 23.) Besides this Court already ruling on this issue (*see* Remittitur Order, Docket No. 354), Nintendo must have forgotten that it was the only party at trial not calling a damages expert, and that it already admitted in its Motion for Remittitur that the evidence adduced at trial supports a 5% royalty: “[T]he highest damages supported by the record was an award of 5% on the sales of the controllers found by the jury to infringe.” (Nintendo’s Motion for Remittitur or, in the Alternative, a New Trial on Damages, Docket No. 337 at 1.)

Regardless of Nintendo’s about-face on the issue of damages, Anascape offered sufficient evidence at trial supporting compensable damages. First, Anascape offered testimony from Mr. Bratic—who employed the *Georgia-Pacific* factors and reviewed a wealth of material in formulating his expert opinion—that a reasonable royalty was at least 5% and that other licenses involving the technology of the ‘700 patent had rates between 3-7%. (Tr. 729:5-10; 733:25-734:9; 753:19-754:8; 809:3-12; 826:12-17.) *Georgia-Pacific* recognizes that testimony from an expert, in and of itself, is evidence of a reasonable royalty. 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970) (“A comprehensive list of *evidentiary facts* relevant, in general, to the determination of the amount of a reasonable royalty for a patent license [includes] . . . 14. The opinion testimony of qualified experts.”) (emphasis added).

Second, the Sony License Agreement is evidence sufficient to support a damages award. In 2004, Anascape and Sony entered into a patent license agreement (the “License Agreement”). (PX 54, attached hereto as Ex. G; Tr. 676:3-5.) Under the terms of the License

¹³ It is important to realize that Nintendo does *not* argue here that damages were improper because Anascape failed to prove infringement or because the ‘700 patent was invalid, as this Court recognized its first JMOL could be read to argue. (Tr. 1525:18-23 (“Well, I guess entitlement [to damages] is based on all the previous ones. So, if you’re talking about liability issues, I think I’ve already dealt with that.”).)

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 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”) 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.) 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. at 1120.

Third, Anascape introduced a license agreement involving two of the ‘700 patent’s parents (and relating to similar technology) which included a provision calling for a running royalty of 5%. (PX 43, attached hereto as Ex. H; Tr. 641:13-642:21.) This agreement, like the Sony License Agreement, is evidence supporting a damages award. *Georgia-Pacific*, 318 F. Supp. at 1120.

For these reasons, Nintendo’s claim that Anascape failed to establish an evidentiary basis for an award of damages is meritless.

III. NINTENDO’S MOTION FOR A NEW TRIAL SHOULD BE DENIED

A. It is Nintendo’s Burden to Show that a New Trial is Warranted

Federal Rule of Civil Procedure 59(a)(1)(A) allows, but does not require, a court to grant a new trial “for any reason for which a new trial has heretofore been granted in an action at law in federal court.” “Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial.” *Sibley v. Lemaire*, 184 F.3d 481, 487 (5th Cir. 1999) (quotations and citation omitted); *Gov’t Fin. Servs. One Ltd. P’ship v. Peyton Place, Inc.*, 62 F.3d 767, 774 (5th Cir. 1995) (“The district court has discretion to grant a new trial under Rule 59(a) of the Federal Rules of Civil Procedure when it is necessary to do so to prevent an injustice.”) (quotation omitted). “[A]ll the evidence must be viewed in a light most favorable to the jury’s verdict,” see *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 208 (5th Cir. 1992), and “[a] trial court should not grant a new trial on evidentiary grounds unless the verdict is against the great weight of the evidence” see *Dotson v. Clark Equip. Co.*, 805 F.2d 1225, 1227 (5th Cir. 1986). “Rule 59(a) should not be the avenue to which losing parties run after trial.” *Bradley v. Fed. Express Corp.*, No. A-04-CA-718 AWA, 2006 WL 1751775, at *1 (W.D. Tex. May 25, 2006).

Importantly, Nintendo’s Motion fails to address the “harmless error” rule, embodied in Federal Rule of Civil Procedure 61, which prohibits harmless error from being a basis for granting a new trial: “Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party’s substantial rights.” “[A] harmless error determination is concerned mainly

with whether an error has *affected the outcome of a case* to the substantial disadvantage of the losing party.” *United States v. O’Keefe*, 169 F.3d 281, 287 n.5 (5th Cir. 1999) (emphasis added).

B. The Court’s Claim Construction Does Not Warrant a New Trial

1. Nintendo has Waived its Claim Construction New Trial Argument

Nintendo devotes three sentences to its argument that “the Court’s construction of a number of claim terms” was erroneous (Nintendo leaves the Court and Anascape guessing as to which ones by not listing all of the terms Nintendo disputes).¹⁴ (Motion at 24.) Nintendo simply refers to “the record of this case” for the Court (and Anascape) to somehow divine what those disagreements are. Nintendo does, however, incorporate by reference, by Anascape’s count, 7,678 pages of “Invalidity contentions, *Markman* briefing and associated filings, oral argument on claim construction, summary judgment briefing, argument at trial and proposed jury instructions”—places where the “reasons for Nintendo’s disagreement with respect to the Court’s claim construction” can be found. (Motion at 24.)¹⁵

Even assuming one of the Court’s claim construction was erroneous, a claim construction error does not always require the granting of a new trial. *See, e.g., z4 Techs., Inc. v. Microsoft Corp.*, 507 F.3d 1340, 1349 (Fed. Cir. 2007); *Teleflex, Inc. v. Ficosa N. Am. Corp.*,

¹⁴ We do know that Nintendo disagreement “includ[es] (but [is] not limited to)” (*see* Motion at 24) the following terms: (i) controller, (ii) 3-D, (iii) movable on two axes, (iv) movable on two mutually perpendicular axes, (v) detectable by the user, (vi) navigating a viewpoint, (vii) operable, and (viii) tactile feedback means for providing vibration.

¹⁵ At trial, Nintendo’s counsel tried a similar tactic, and the Court remarked that it was unacceptable. (Tr. 1541:9-12 (Nintendo’s counsel: “Nintendo objects to the instructions set forth in Appendix A, which are the claim constructions, for the reasons set forth in its *Markman* briefing.” The Court: “No. That’s unacceptable.”).) Anascape objects to Nintendo’s attempt to raise arguments by incorporating other briefing, transcripts and discovery by reference, as this tactic is improper. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 736 n. 24 (2004); *Turner v. Quarterman*, 481 F.3d 292, 295 n.1 (5th Cir. 2007); *Conkling v. Turner*, 18 F.3d 1285, 1299 n. 14 (5th Cir.1994) (“Attorneys cannot circumvent [page limits] by incorporating by reference[.]”).

299 F.3d 1313, 1328 (Fed. Cir. 2002) (even where the district court “has misinterpreted a patent claim, [the Federal Circuit] independently construe[s] the claim to determine its correct meaning,” and “may affirm the jury’s findings on infringement [] if substantial evidence appears in the record supporting the jury’s verdict and if correction of the errors in a jury instruction on claim construction would not have changed the result, given the evidence presented”) (quotations and citation omitted).

Nintendo must state the grounds supporting its motion for a new trial “with particularity.” Fed. R. Civ. P. 7(b)(1)(B). Failing to do so results in waiver of the argument. *See, e.g., TGIP, Inc. v. AT&T Corp.*, 512 F. Supp. 2d 696, 712 (E.D. Tex. 2007) (Clark, J.) (“Courts have consistently held that inadequate briefing results in a waiver of a party’s arguments.”); *see also United States v. Lopez-Velasquez*, 526 F.3d 804, 808 n. 4 (5th Cir. 2008) (failing to completely develop an argument in a brief results in waiver); *Signorelli v. Stalder*, No. 07-30442, 2008 WL 2325653, at *1 (5th Cir. June 3, 2008) (“Signorelli has inadequately briefed the remaining due process arguments, and, therefore, he has waived their review.”) (citing *Brinkmann v. Dallas County Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987)); *Trevino v. Johnson*, 168 F.3d 173, 181 n.3 (5th Cir. 1999) (waiver applies to undeveloped arguments); *z4 Techs., Inc. v. Microsoft Corp.*, No. 6:06-CV-142, 2006 WL 2401099, at *15 (E.D. Tex. Aug. 18, 2006) (Davis, J.) (vague and unclear arguments about allegedly erroneous jury instructions “do not warrant the granting of a new trial”). Because Nintendo has not even attempted to offer guidance as to what its disputes are vis-à-vis the Court’s claim construction, its claim construction arguments should be disregarded in considering its New Trial Motion.

2. The Court's Claim Construction Does Not Justify a New Trial

Anascape believes the Court properly instructed the jury as to claim construction. Rather than sift through the mass of pleadings, transcripts, invalidity contentions and the like Nintendo incorporated by reference, and then attempt to respond to every argument found therein, Anascape respectfully requests leave to file additional briefing on the claim construction issue should this Court find that Nintendo has not waived its claim construction argument in its New Trial Motion.

C. Failing to Place a Lump Sum Line in the Verdict Form Was Not Erroneous

Nintendo does not reference any law, case or other authority that suggests (much less requires) a lump sum line on a jury verdict form. (Motion at 25-26.) Failing to provide the jury with an option to award a lump sum royalty payment was not erroneous.

At trial, neither party's witnesses advocated that the jury award a lump sum. As noted by the Court, Mr. Bratic's statement that the amount Anascape sought in the form of a reasonable royalty post-suit "would be a 50.3-million-dollar payment, lump-sum payment, for past infringement" was inconsistent with a lump sum being a one time payment covering use for all time. (Tr. 819:2-10; Tr. 1554:19-23.) The Court also noted that, although there were licenses in the record involving lump sums, the jury heard no evidence as to how other provisions of these licenses, such as cross-licensing, would affect the lump sum. (Tr. 1553:19-1554:2.) Based on these concerns, the Court was justified in denying Nintendo's request for a lump sum line.

Additionally, Nintendo does not point out how the failure to offer a lump sum line worked a substantial injustice. Nintendo's claim of jury confusion is sheer speculation and does not make sense. The jury was properly instructed on damages (*see* Tr. 1582:17-1586:14), juries are presumed to follow their instructions, *see Richardson v. Marsh*, 481 U.S. 200, 211 (1987),

and the jury verdict form was clear as to what the jury was being asked to award (*see* Jury Verdict Form, Docket No. 333 at 5 (“What sum of money, if any, do you find is adequate to compensate Anascape, Ltd. for the conduct you found to infringe *from July 31, 2006 through today?* A reasonable royalty *from July 31, 2006 through today:* \$21,000,000.00.”) (emphasis added)).¹⁶

The jury’s award of \$21 million was not “far greater” than what Mr. Bratic testified to—it was less than half. And any jury misunderstanding (of which there is no evidence) “that the amount they awarded would be used to calculate a future running royalty” was not caused by the failure to include a lump sum line, but by Nintendo’s counsel’s improper statement in closing that “it’s not just \$50 million [that Anascape is asking for], ladies and gentlemen, because the patent continues out until 2012; and they are going to ask for a 5 percent royalty on all of that. So, it could be a hundred million or more at the end of the day.” (Tr. 1615:1-5.)

For these reasons, this Court should reject Nintendo’s argument that the failure to place a lump sum line on the jury verdict form was error.

¹⁶ The Court did not, as Nintendo claims, “in essence[] rule[] as a matter of law [that] a running royalty is the only appropriate measure of damages[.]” (Motion at 25.) The Jury Verdict form simply stated that the jury should award a “reasonable royalty from July 31, 2006 through today.” (Jury Verdict Form, Docket No. 333 at 5.) This did not prevent Nintendo from arguing that a lump sum, appropriately discounted for the period of infringement at issue, was the best way to calculate a reasonable royalty. For example, Nintendo could have argued that the parties would have settled on a lump sum of, say, \$20 million. Over the life of the patent, this figure would translate into \$1 million per year. The jury could then have been urged to award approximately \$1.7 million from July 31, 2006 through May 14, 2008 (the date of verdict) (\$1M x 18.5 months = \$1.7M). Nintendo, however, chose not to make such an argument.

D. The Admission of the Sony License Agreement Was Not Erroneous

The admission of the Sony License Agreement was entirely proper. Therefore, this is an improper ground for a new trial. As Anascape noted in its opposition to Defendant's Motion in Limine No. 1, the license was not negotiated against a backdrop of litigation such that the license should be excluded under Rule 408, and the license was nevertheless admissible to show: (i) the structure of the license agreement; (ii) the fact that Anascape seeks to license its patents; (iii) industry respect for Anascape's inventions; and (iv) Anascape's financial condition in 2005 when the hypothetical negotiation would have taken place. Fed. R. Evid. 408 (settlement agreements are inadmissible only "when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount"). The Court's finding as to Rule 408 is reviewable under an abuse of discretion standard. *See Mendelovitz v. Adolph Coors Co.*, 693 F.2d 570, 580 n.23 (5th Cir. 1982). Allowing the Sony License Agreement into evidence was a reasonable exercise of the Court's discretion, and thus the admission of that license is an improper ground for a new trial. (*See* Ex. F, Final Pretrial Conference Hearing Tr. 25:13-27:21 (explaining why the license is admissible).)

Furthermore, even if it were error, the admission of the license did not cause substantial injustice to any party. Instead, this is the type of harmless error that does not merit a new trial. The Fifth Circuit recognizes that "[c]laims of error with regard to the admission or exclusion of evidence are prime candidates for application of the harmless error rule." *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 271 (5th Cir. 1980) (quotations and citation omitted). Here, the jury considered questions of infringement, invalidity, and damages. Nintendo has not shown how testimony or argument related to Sony's "responsibility" affected the jury's decision on any of those questions. *See, e.g., Dresser-Rand Co. v. Virtual Automation*

Inc., 361 F.3d 831, 842 (5th Cir. 2004) (finding harmless error because the admitted evidence “had little or no effect on the jury’s verdict”); *United States v. Limones*, 8 F.3d 1004, 1008 (5th Cir. 1993) (finding harmless error in light of “the unlikelihood that the prejudicial evidence had a substantial influence on the outcome of the trial”). Nintendo has not carried its burden in showing how any claimed “prejudice” worked substantial injustice. The Court should deny its motion for new trial on this basis.

E. The Jury Instruction on the Written Description Requirement Was Not Erroneous

The Court’s written description requirement jury instruction properly guided the jury in its deliberations and was not erroneous. “To satisfy the written description requirement the disclosure of the prior application must ‘convey with reasonable clarity to those skilled in the art that, as of the filing date sought, [the inventor] was in possession of *the invention*.’”

PowerOasis, Inc. v. T-Mobile USA, Inc., 522 F.3d 1299, 1306 (Fed. Cir. 2008) (citing *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1563-64 (Fed. Cir. 1991)) (emphasis in original). The Federal Circuit has held that “[o]ne shows that one is ‘in possession’ of *the invention* by describing *the invention*, with all its claimed limitations, not that which makes it obvious.” *Lockwood v. Am. Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997) (emphasis in original).

The Court’s instruction on the written description requirement accurately stated the law:

[T]he July 5, 1996, application must disclose the invention of the new claim with all of its limitations. The question is not whether a claimed invention is an obvious variant of that which is disclosed in the specification. Rather, the 1996 application itself must describe the invention in the claim and do so in sufficient detail that one skilled in the art can clearly conclude that the inventor invented the claimed invention as of July 5, 1996. A disclosure in the application that merely renders the claim obvious is not sufficient to meet this written description requirement. The

disclosure must describe the claim of the ‘700 patent with all its limitations.

(Tr. 1569:22-1570:9; *see also* Jury Instructions, Docket No. 350 at 13.) This instruction closely parallels both the law recited above and Nintendo’s Proposed Final Jury Instructions on the written description requirement. (Proposed Final Jury Instructions, Docket No. 276 at 29-30.)

Nintendo argues that the Court “failed to convey the full meaning of the written description requirement.” (Motion at 27.) There are minimal differences, however, between the Court’s instruction and Nintendo’s proposed instruction:

Rather, the 1996 application itself must describe the invention in the claim and do so in sufficient detail that one skilled in the art can clearly conclude that the inventor invented *and possessed the full scope* of the claimed inventions *recited in the asserted claims* as of July 5th, 1996.

(Tr. 1546:9-17) (emphasis added).

Although the Court did not use the exact, italicized phrasing from Nintendo’s proposed instruction, the instruction as given fully addressed “possession” and “full scope”: “[T]he July 5, 1996, application must disclose the invention of the new claim with all of its limitations. The question is not whether a claimed invention is an obvious variant of that which is disclosed in the specification.” (Tr. 1569:22-1570:1; *see also id.* at 1570:5-9 (“A disclosure in the application that merely renders the claim obvious is not sufficient to meet this written description requirement. The disclosure must describe the claim of the ‘700 patent with all its limitations.”).) The same analysis applies to the Court’s instruction concerning the written description requirement regarding the November 2000 application for the ‘700 patent, and demonstrates that it is proper as well. (Tr. 1579:23-1581:9; Jury Instructions, Docket No. 350 at 23-24.)

In any event, a successful challenge to jury instructions must meet three requirements:

First, the appellant must show that viewing the charge as a whole, the charge creates “substantial and ineradicable doubt whether the jury has been properly guided in its deliberations.” Second, even if erroneous, the appellate court will not reverse if the error “could not have affected the outcome of the case.” Third, the appellant must show that the proposed instruction offered to the district court correctly stated the law. Perfection is not required as long as the instructions were generally correct and any error was harmless. This standard provides the district court with great latitude concerning the charge.

Taita Chem. Co., v. Westlake Styrene, LP, 351 F.3d 663, 667 (5th Cir. 2003) (citations omitted).¹⁷

Even if Nintendo was correct that the Court’s instruction on the written description requirement was technically erroneous (which it was not), Nintendo has not shown that the charge created “substantial and ineradicable doubt whether the jury has been properly guided in its deliberations” or how the error “affected the outcome of the case.” Finally, Nintendo’s objection to the Court’s instruction was not proper because, although Nintendo submitted an alternative instruction, it did not point out to the Court why the Court’s instruction was erroneous. *Taita Chem.*, 351 F.3d at 667 (“One may not complain of a jury instruction ‘unless that party objects thereto . . . , stating distinctly the matter objected to and the grounds of the objection.’”) (quoting and citing Fed. R. Civ. P. 51); (Tr. 1546:9-17; 1547:14-25; 1548:7-16) (offering Nintendo’s proposed jury instruction but *not* stating the grounds of the objection.)

¹⁷ See also *Advanced Display Sys. v. Kent State Univ.*, 212 F.3d 1272, 1281 (Fed. Cir. 2000) (“A party seeking to alter a judgment based on erroneous jury instructions must establish that (1) it made a proper and timely objection to the jury instructions, (2) those instructions were legally erroneous, (3) the errors had prejudicial effect, and (4) it requested alternative instructions that would have remedied the error.”) (citations omitted).

IV. CONCLUSION

Substantial evidence supports the jury's verdict as to validity, written description support, infringement and damages. None of the alleged error pointed to by Nintendo is, in fact, error. Accordingly, Nintendo's Motion should be denied.

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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 July 11, 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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