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

ANASCAPE, LTD.	§	
	§	Hon. Ron Clark
Plaintiff,	§	
	§	Civil Action No.: 9:06-CV-00158-RC
v.	§	
	§	
MICROSOFT CORP. and NINTENDO OF AMERICA INC.,	§	
	§	
Defendants.	§	

NINTENDO OF AMERICA INC.'S RESPONSE TO ANASCAPE, LTD.'S MOTIONS FOR (1) PREJUDGMENT INTEREST; (2) POSTJUDGMENT INTEREST; AND (3) COSTS

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Nintendo respectfully submits this memorandum in response to Anascape's motions for prejudgment interest, post-judgment interest and costs.[1]

I. PREJUDGMENT INTEREST SHOULD BE CALCULATED AT THE TREASURY BILL RATE

District court have broad discretion to determine the rate and structure of prejudgment interest. *See Studiengelsellschaft Kohle v. Dart Indus., Inc.*, 862 F.2d 1564, 1580 (Fed. Cir. 1988). The purpose of prejudgment interest is to place the patentee in as good of a position as it otherwise would have been had the accused infringer paid a reasonable royalty. *See In re Seagate Tech. LLC*, 497 F.3d 1360, 1380 (Fed. Cir. 2007); *Hoechst Celanese Corp. v. BP Chem. Ltd.*, 846 F. Supp. 542, 550-51 (S.D. Tex. 1994).

While some courts have found it appropriate to award prejudgment interest at the prime rate, many others, including the Federal Circuit and this Court, have determined that the Treasury Bill rate is more appropriate. *See* Hearing Tr. at 74, No. 9:06 CV 259, *Grantley Patent Holdings, Inc. v. Clear Channel Comms., Inc.*; *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 955 (Fed. Cir. 1997); *Datascope Corp. v. SMEC, Inc.*, 879 F.2d 820, 829 (Fed. Cir. 1989); *Transocean Offshore Deepwater Drilling, Inc. v. GlobalSantaFe Corp.*, No. H-03-2910, 2006 U.S. Dist. LEXIS 80931 at **17-18 (S.D. Tex. November 6, 2006); *Ericsson Inc. v. Harris Corp.*, No. 4:98cv325, 2004 U.S. Dist. LEXIS 28388, at *6 (E.D. Tex. June 10, 2004); *Hoechst Celanese Corp.*, 846 F. Supp. at 551.

Anascape argues that the Court should, "ideally," "determine the rate of return *Nintendo* could have received on its borrowed royalties during the period of infringement." Br. at 2 (emphasis added). However, as noted above, the purpose of prejudgment interest is to put

[1] Nintendo does not contest Anascape's motion for post-judgment interest at the statutory rate. In responding to this motion, Nintendo does not waive any of its appellate rights with respect to liability and damages issues, all of which are reserved.

the *patentee* in the position it otherwise would have been had it received royalties from the accused infringer. Consequently, the focus should be on the return that *Anascape* would have received, not Nintendo.

Anascape attempts to address the rate of return it purportedly would have received, not by discussing the rate of return of Anascape itself, as a corporate entity and the named plaintiff, but rather by discussing the alleged investment strategies of two of its principals, Kelly Tyler and Brad Armstrong. *See* Br. at 3, n.5. ("during the period of infringement, neither Mr. Armstrong or Mr. Tyler were in a financial position such that either invested in instruments that received as low a return as T-bills"). For this reason alone, Anascape's request to apply the prime rate should be rejected, as it has proffered no evidence regarding its actual rate of return as a corporate entity. Instead of producing evidence of Anascape's investment history and return rates, Mr. Tyler and Mr. Armstrong each claim, in hindsight, that they, as individuals, would have invested the royalty proceeds in vehicles bearing a higher rate of return than T-Bills. *See* Declaration of Kelly Tyler ¶¶10-11; Declaration of Brad Armstrong ¶2-3. They then go on to list the types of investments they made in the 2006-2008 time period but, tellingly, fail to provide the Court with any evidence showing the rates of return on those investments. This type of hindsight, speculation does not support an award of prejudgment interest at the prime rate. *See Intex Plastic Sales Co. v. Hall*, 1991 U.S. Dist. LEXIS 20476, *14 (N.D. Cal. July 10, 1991) ("Hall argues that the higher rate is more appropriate because there was no evidence at trial that he would have simply have invested the money in T-bills. By the same token, he could have easily invested it all in some speculative unsuccessful venture and lost every penny. Either argument is too speculative...").

Moreover, Anascape does not manufacture, produce or sell products, but rather, licenses patents and pursues alleged infringers. Thus, Anascape has not borne the risk of companies such as Nintendo that develop and market products, and should be compensated accordingly at the T-Bill rate. *See* Ugone Dec. ¶¶ 31-32. The T-Bill rate is sufficient to place Anascape in the position it otherwise would have been had Nintendo paid a reasonable royalty on the products found to infringe. As this Court has found in a patent case involving a non-manufacturing patentee, the appropriate prejudgment rate is the T-Bill rate as it reflects a return on investing money in a safe investment. *Grantley* June 4, 2008 Hearing Tr. at 74. The prime rate would provide a windfall to Anascape, by giving it an increased royalty, which this Court has previously recognized as reason for denying a request to award prejudgment interest at the prime rate. *Id.* at 74. Accordingly, the T-Bill rate as calculated in the Ugone Declaration, which amounts to $982,363, adequately compensates Anascape. *See* Ugone Dec. ¶33-34 and Ex. G.[2]

II. ANASCAPE IS NOT THE "PREVAILING PARTY" AND THUS NOT ENTITLED TO COST

Under Federal Rule of Civil Procedure 54(d), costs can be awarded to the "prevailing party." However, the court must first determine who, if anyone, was the prevailing party. In patent cases, this determination is controlled by Federal Circuit law. *Manildra Milling Corp. v. Ogilvie Mills, Inc.*, 76 F.3d 1178, 1182 (Fed. Cir. 1996). In cases where one party wins on every claim, this determination is simple. *Id.* However, where, as here, each party has had claims adjudicated in its favor, the determination is more difficult. *Id.* In order to determine

[2] Anascape's reliance on non-patent cases, including *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992) and *Alberti v. Klevenhagen*, 896 F.2d 927, 938 (5th Cir. 1990), to support its prime rate claim should be rejected. Neither case is instructive here. *Amoco Cadiz* concerned the clean up of an oil spill. *Alberti* was a civil rights lawsuit on behalf of prison inmates. Neither case involves a claim of prejudgment interest at the prime rate by a nonmanufacturing patentee.

who the prevailing party is in these situations, the Federal Circuit applies the general principle that "to be a prevailing party, one must receive at least some relief on the merits, which alters the legal relationship of the parties." *Inland Steel Co. v. LTV Steel Co.*, 364 F.3d 1318, 1320 (Fed. Cir. 2004) *quoting Former Employees of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 1364 (Fed. Cir. 2003) (internal quotation marks and citations omitted.). When both parties succeed on some of their claims, no prevailing party may exist. *See Ruiz v. A.B. Chance Co.*, 234 F.3d 654, 670 (Fed. Cir. 2000) (holding that since both parties won certain claims, neither party prevailed sufficiently to require an award of costs).

Both Anascape and Nintendo prevailed on claims and defenses in this case. Therefore, each should bear their own costs. Following the Court's *Markman* ruling, the Court granted Nintendo's motion for summary judgment of non-infringement of the '525 patent. *See* Dkt. No. 249. With respect to the '700 patent, the jury returned a verdict that the Wii Remote/Wii Nunchuk combination does not infringe and that the GameCube, WaveBird wireless and Wii Classic controllers do infringe. *See* Dkt. No. 333. The grant of summary judgment of non-infringement of the '525 patent; the jury verdict of non-infringement with respect to the Wii Remote/Wii Nunchuk combination; and the jury verdict of infringement with respect to the GameCube, WaveBird wireless and Wii Classic controllers altered the legal relationship between Anascape and Nintendo in a manner favorable and unfavorable to each party. *See Manildra Milling Corp.*, 76 F.3d at 1183. ("A judicial declaration that one is free from another's right to exclude alters the legal relationship between the parties."). Anascape completely fails to address the fact that Nintendo prevailed on the '525 patent and on the '700 patent with respect to the Wii Remote/Wii Nunchuk combination, which constituted over 95% of its claimed damages base at trial. *See* Br. at 4-5. Given this mixed outcome, which actually favored Nintendo more than

Anascape, Anascape should not be declared the prevailing party. *See, e.g., Tao of Sys. Integration, Inc. v. Analytical Servs. and Materials, Inc.*, 412 F. Supp.2d 571, 574-76 (E.D. Va. 2006) ("Clearly, this case produced a mixed outcome and there is no prevailing party.")

III. CONCLUSION

For the foregoing reasons, Nintendo respectfully requests that prejudgment interest be calculated at the T-Bill rate and that the Court deny Anascape's request for costs.

Dated: July 11, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was filed electronically pursuant to Local Rule CV-5. Parties may access this filing through the Court's case management electronic filing system. Notice of this filing will be sent to all counsel of record by the Court's electronic filing system on this the 11th day of July, 2008.

/s/ Lawrence L. Germer
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