

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

In the Matter of

CERTAIN VIDEO GAME
SYSTEMS AND CONTROLLERS

Investigation No. _____

VERIFIED COMPLAINT OF MOTIVA, LLC.
UNDER SECTION 337 OF THE TARIFF ACT OF 1930, AS AMENDED

COMPLAINANT

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PROPOSED RESPONDENTS

Nintendo Co., Ltd.
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Nintendo of America, Inc.
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Exhibit 2	Certified copy of U.S. Patent No. 7,492,268
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Exhibit 4	Consolidated 2009 and 2010 Results for NCL
Exhibit 5	NCL's 2009 Annual Report
Exhibit 6	Page from NOA's website discussing sales of the Wii video game system in the United States
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Exhibit 19	Confidential: Declaration of Catherine A. Pope in support of Motiva, LLC's Verified Complaint
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PHYSICAL EXHIBIT LIST

Physical Exhibit	Description
Physical Exhibit 1	Motiva's demonstration prototype remote
Physical Exhibit 2	A Nintendo Wii system including a Wii Console, Wii Remote, Wii Nunchuk and Wii MotionPlus device

APPENDIX LIST

Appendix	Description
Appendix 1	Certified copy of the '151 patent's prosecution history
Appendix 2	Four (4) electronic copies (on CD-ROM) and one (1) paper copy of the '151 patent's prosecution history
Appendix 3	Four (4) electronic copies (on CD-ROM) and one (1) paper copy of each technical reference mentioned in the '151 patent's prosecution history
Appendix 4	Certified copy of the '268 patent's prosecution history
Appendix 5	Four (4) electronic copies (on CD-ROM) and one (1) paper copy of the '268 patent's prosecution history
Appendix 6	Four (4) electronic copies (on CD-ROM) and one (1) paper copy of each technical reference mentioned in the '268 patent's prosecution history

I. INTRODUCTION

1. Motiva, LLC, files this pursuant to Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, based on the unlawful importation into the United States, the sale for importation and the sale within the United States after importation of certain video game systems and related controllers that infringe United States Patent Nos. 7,292,151 (the “’151 patent”) and 7,492,268 (the “’268 patent”) (together the “Asserted Patents”). Motiva asserts claims 16, 27-32, 44, 57, 68, 81, and 84 of the ’151 patent and claims 1-6 and 8-15 of the ’268 patent.

2. The proposed respondents are Nintendo Co., Ltd. (“NCL”) and its wholly-owned subsidiary Nintendo of America, Inc. (“NOA”).

3. A certified copy of the ’151 patent is attached as Exhibit 1 and a certified copy of the ’268 patent is attached as Exhibit 2.

4. Motiva owns all right, title, and interest in the Asserted Patents. A certified copy of the recorded assignment for the Asserted Patents is attached as Exhibit 3.

5. An industry as required by 19 U.S.C. § 1337(a)(2) and (3) exists or is in the process of being established in the United States relating to products and technology protected by the Asserted Patents.

6. Complainant seeks, as relief, a permanent limited exclusion order barring from entry into the United States all infringing video game systems and related controllers. Complainant also seeks, as relief, a cease and desist order prohibiting the importation, sale, offer for sale, advertising, or other commercialization of these infringing products by NCL and NOA.

II. THE PARTIES

A. Complainant

7. Complainant Motiva has its corporate headquarters and principal place of business located at 8156 Campden Lakes Blvd., Dublin, Ohio 43106.

8. Kevin Ferguson and Donald Gronachan – the two principals of Motiva and the inventors of the Asserted Patents – have worked to integrate the fitness and video game fields through motion detection for over two decades. Systems they helped develop have been featured on Oprah, the Today Show and ESPN, and have received other positive reviews from companies including Disney, Reebok and Nike.

9. Gronachan received a Bachelor of Physical Education from the State University of New York College at Cortland and a Master of Exercise Physiology from Adelphi University in Long Island, New York.

10. Ferguson received a Bachelor of Science in Electrical Engineering from Case Western Reserve University in Cleveland, Ohio and a Bachelor of Arts in Physics from Thiel College in Greenville, Pennsylvania.

11. In or around October 2003, Ferguson and Gronachan teamed up – under the banner of *Motiva Health and Fitness* – to collaborate on a new video-game-based exercise and rehabilitation system that became the subject of the Asserted Patents. Ferguson and Gronachan sought and received investor funding for their new collaboration.

12. The two inventors worked on their inventions through 2004. On July 29, 2004, they filed a patent application on their new system.

13. After Ferguson and Gronachan filed their patent application, they set out to attract investors and bring their new product to market. Initially, interest was high.

14. But then, in October 2006, Nintendo released its own game and fitness platform – the Wii. In the face of the Wii – a system stunningly similar to the one described in Ferguson and Gronachan’s pending patent application – they saw plummeting investor interest and stymied hopes of bringing their inventions to market.

15. When the '151 patent issued at the end of 2007, the fledgling company was left with little recourse but to seek justice in the courts. Ferguson and Gronachan formalized Motiva, LLC, in October 2008 and sued Nintendo for infringement of the '151 patent in November 2008.

B. Proposed Respondents

1. NCL

16. On information and belief, proposed respondent NCL is a Japanese corporation with its principal place of business at 11-1 Kamitoba hokotate-cho, Minami-ku, Kyoto 601-8501, Japan.

17. On information and belief, NCL is the corporate parent of a multinational corporation that designs, develops, manufactures, exports and distributes video game machines and related system accessories. Exhibit 4 is the Consolidated 2009 and 2010 Results for NCL from NCL's website, discussing sales and use of the Wii in the United States.

18. On information and belief, NCL owns proposed respondent NOA as well as several other subsidiaries. Exhibit 5 is NCL's 2009 Annual Report, which, on page 45, lists NOA as one of NCL's consolidated subsidiaries.

2. NOA

19. On information and belief, proposed respondent NOA is a corporation formed under the laws of the State of Washington with its principal place of business at 4820 150th Avenue N.E., Redmond, WA 98052.

20. On information and belief, NOA, through its distribution centers in Atlanta, Georgia, and North Bend, Washington, imports and sells infringing video game systems and controllers throughout the United States. Exhibit 6 is a page from NOA's website saying that it had sold 19 million Wii Systems in the United States by early 2009 and that it had sold – separately from Wii Systems – 22.7 Wii Remotes in the United States in the same period.

III. THE ASSERTED PATENTS

A. Identification of the Patents and Ownership by Motiva

21. United States Patent No. 7,292,151 entitled “Human Movement Measurement System,” issued on November 6, 2007 to inventors Kevin Ferguson and Donald Gronachan. The ’151 patent expires on July 30, 2024 and claims priority to United States provisional patent application Serial No. 60/592,092, filed on July 29, 2004.

22. The ’151 patent has three independent claims and 89 dependent claims. Complainant asserts dependent claims 16, 27-32, 44, 57, 68, 81, and 84.

23. United States Letters Patent No. 7,492,268 entitled “Human Movement Measurement System,” issued on February 17, 2009 to inventors Kevin Ferguson and Donald Gronachan. The ’268 patent expires on July 30, 2024 and claims priority to United States provisional patent application Serial No. 60/592,092, filed on July 29, 2004. The application that issued as the ’268 patent is a continuation of the application that issued as the ’151 patent and shares the same specification.

24. The ’268 patent has three independent claims and 12 dependent claims. Complainant asserts: independent claim 1, and its dependent claims 2, 3, 5, 6, 8 and 9; independent claim 10 and its dependent claims 11, 12, 13 and 14; and independent claim 15.

25. Motiva owns by assignment the entire right, title, and interest in and to the Asserted Patents. *See Exhibit 3.*

26. Pursuant to Commission Rule 210.12(c), this Complaint is accompanied by one certified copy of the ’151 patent’s prosecution history, three additional copies of the prosecution history, and four copies of each patent and applicable pages of each technical reference mentioned in the prosecution history. *See Appendices 1 to 3.*

27. Pursuant to Commission Rule 210.12(c), this Complaint is accompanied by one certified copy of the ’268 patent’s prosecution history, three additional copies of the prosecution

history, and four copies of each patent and applicable pages of each technical reference mentioned in the prosecution history. *See* Appendices 4 to 6.

B. Non-Technical Description of the Patents

28. The Asserted Patents cover systems and controllers for tracking a user's position, orientation and movement in three dimensions. The systems include a wireless hand-held and/or body-worn controller and a processing system or base station. The controller detects and measures a user's position, orientation and/or movement and sends this information to the base station. The base station processes the information and then sends feedback signals back to the controller based on that information. The controller then provides feedback through vibration, lights or sounds to the user based on the signals sent from the base station.

29. The Asserted Patents also cover using two controllers where the second controller is connected to the first controller and the base station evaluates the position, orientation and/or movement of the controllers relative to each other.

30. The Asserted Patents teach that by using position, orientation and movement, the claimed systems and controllers allow users to interact with video games through an intuitive gesture-based and movement-based interface.

C. Foreign Counterparts to the Patents

31. The following is a list of foreign counterparts to the Asserted Patents.

Jurisdiction	Status	Publication No.	Date of Last Action
Canada	Published, entered into national phase	2,578,653	January 25, 2007
European Patent Office	Published, first examination report issued	1,779,344	November 18, 2009
World Intellectual Property Organization	Published	2006/014810	February 9, 2006

32. The applications listed above are pending. No other foreign applications related the Asserted Patents have been filed.

D. Licenses

33. Motiva has not licensed the Asserted Patents.

IV. THE DOMESTIC INDUSTRY

34. Motiva has established a domestic industry or is in the process of establishing a domestic industry, as defined by 19 U.S.C. § 1337(a)(3)(C), in the United States by substantially investing in the exploitation of the Asserted Patents, including through engineering, research and development.

A. Economic Prong

35. Motiva and its predecessors in interest have made substantial investments in engineering, research and development in the United States to exploit the Asserted Patents.

36. In October, 2003, Ferguson and Gronachan conceived of several of the inventions that went into the application that issued at the '151 patent and the '268 patent. They worked through January 2004 developing a proof of concept of an embodiment of their ideas. Pictures of the proof-of-concept prototype are attached as Exhibit 7.

37. From February until August 2004, Ferguson and Gronachan worked to develop a prototype incorporating further aspects of their inventions that they could use to demonstrate potential investors in order to bring their invention to market. Ferguson's engineering journal documenting his work from October 2003 to August 2004 is attached as Confidential Exhibit 8.

38. During this period, Ferguson and Gronachan also worked with their patent prosecution counsel to draft the application that issued as the '151 patent. On July 29, 2004, they filed provisional application 60/592,092 to which the Asserted Patents claims priority. And in June 2004, Ferguson and Gronachan sought a freedom-to-operate opinion from counsel for the prototyped embodiment of their inventions to ensure that they would have the right to bring their invention to market. Ferguson, Gronachan and their investors spent approximately \$11,000 on the freedom-to-operate analysis.

39. From August 2004 through 2007, Ferguson and Gronachan continued to work on the prototype. They developed software and games for the prototype and refined its operation.

40. In January 2005, Ferguson and Gronachan met with James Reiss, the CEO of Biodex Medical Systems, Inc. – a world leader in physical medicine and rehabilitation equipment – to demonstrate their prototype. At the meeting, Reiss, Ferguson and Gronachan discussed the possibility of collaboration with Biodex to market embodiments of inventions in the Asserted Patents. Reiss also inquired about the compatibility of the prototype with the LCD display Biodex used on its existing equipment.

41. At the meeting Reiss asked to see the patent application that Ferguson and Gronachan had filed. Attached as Exhibit 9 is a copy of a January 26, 2005, email that Ferguson sent to Reiss discussing the potential of working with Biodex and the integration of the of the demonstrated technology into Biodex's existing product line. Attached as Exhibit 10 is a copy of a January 27, 2005, email Reiss sent to Ferguson discussing integration of the demonstrated technology with Biodex's products. Attached as Exhibit 11 is a copy of a February 10, 2005, email that Ferguson sent to Reiss discussing the January meeting. After reviewing the patent application, Reiss told Ferguson and Gronachan that they would revisit the matter when their patent issued.

42. After the January 2005 meeting, Ferguson and Gronachan continued their work on the prototype. They redesigned the housing for their prototype; developed new games; improved their existing games; refined the movement, position and orientation tracking of their system; improved the system's response time; refined their system's wireless communication and feedback including designing and developing LED feedback; and engineered, designed and developed a touch-screen interface for the system. Attached as Confidential Exhibit 12 are designs for Ferguson and Gronachan's system that they developed during this period.

43. In 2006, Gronachan met with Greg Highsmith about bringing the Motiva inventions to market. Greg Highsmith is the Product Marketing Director for Technogym, a world leader in the design of fitness equipment for professional, private and commercial applications.

44. Also in 2006, Gronachan met with Steve Williams about bringing the Motiva inventions to market. Steve Williams is a former executive involved in the fitness and wellness products market with over 30 years of senior level experience in both the fitness and consumer electronic industries. Williams served as a strategic advisor to Koko Fitness, as the president of Technogym, and as president of Cybex – all leaders in the fitness equipment industry.

45. In late 2006, Ferguson and Gronachan also began discussions with Koko Fitness – a developer of interactive software and hardware for top-tier commercial fitness facilities, including health clubs, hotels, resorts, corporate fitness facilities, medical wellness centers and schools – about bringing their inventions to market. After several attempts, Ferguson and Gronachan scheduled a meeting with Koko Fitness executives for January 2007.

46. But then, in October 2006, Nintendo released its own game and fitness platform – the Wii. Nintendo's Wii went on to revolutionize gaming and bring Nintendo billions in new U.S. revenues. Exhibit 4 is the Consolidated 2009 and 2010 Results for NCL from NCL's website, disclosing sales of the Wii in the United States.

47. In January 2007, Ferguson and Gronachan met with executives from Koko Fitness including: Michal Lannon, the CEO of Koko Fitness; Mary Obana, the Senior Vice President of Design and Customer Experience at Koko Fitness; Michael Wood, the Chief Fitness Officer of Koko Fitness; and Josh Roman, the Vice President of Product and Technology at Koko Fitness, Inc.

48. At this meeting, Ferguson and Gronachan demonstrated the prototype, distributed copies of the patent application that resulted in the '151 patent and discussed the possibility of

collaboration with Koko Fitness to bring to market devices covered by the pending application. The Koko representatives said that they liked the technology and talked with Ferguson and Gronachan about integrating the technology into their products. Exhibit 13 is a copy of the presentation that Ferguson and Gronachan presented to Koko Fitness.

49. But the Koko representatives also expressed concerns about the effect of the newly-released Nintendo Wii on the market for Motiva's technology. The Koko representatives asked about the similarities between the Motiva technology and the Wii. After Ferguson and Gronachan showed the Koko representatives their pending patent application, the Koko representatives asked how Nintendo could sell the Wii if Ferguson and Gronachan had a patent pending on the technology. The Koko representatives also questioned Ferguson and Gronachan's right to produce the technology.

50. When the '151 patent issued at the end of 2007, Ferguson and Gronachan were left with little recourse but to seek justice in the courts. Ferguson and Gronachan formalized Motiva, LLC, in October 2008 and sued Nintendo for infringement of the '151 patent in November 2008.

51. Confidential Exhibit 14 lists the time Ferguson and Gronachan spent in the exploitation of the intellectual property covered by the Asserted Patents. Based on industry experience, a standard hourly rate for an electrical engineer with dual degrees and embedded systems design experience similar to Ferguson's for 2003 to the present is approximately \$100 to \$125 per hour. And based on industry experience, a standard hourly rate for an exercise physiologist with a master's degree and experience similar to Gronachan's for 2003 to the present is approximately \$100 to \$150 per hour. Confidential Exhibit 14 list the value of Ferguson and Gronachan's time at the lower hourly rate for each of the inventors.

52. Attached as Confidential Exhibit 14 is a table summarizing the time Ferguson, Gronachan, their investors, Motiva and Motiva's attorneys spent and the fees and expenses they

incurred in (1) the engineering, research, design and development, and build of the proof of concept and demonstration prototypes; (2) development, drafting, revision, and prosecution of the patent applications that issued as the Asserted Patents and related applications; (3) meetings with potential investors to bring their inventions to market, including developing business plans, preparing presentations and demonstrating the prototype; and (4) litigating the '151 patent against Nintendo.

B. Technical Prong

53. Motiva's engineering, research and development activities listed in Confidential Exhibit 14 are directed toward products – including the product embodied in the demonstration prototype – covered by the Asserted Patents. Claim charts demonstrating how the prototype practices at least one claim of each of the Asserted Patents are attached as Confidential Exhibits 15 and 16.

54. Motiva's litigation activities are related to the development of the patented technology and represent efforts to facilitate and hasten the practical application of the inventions of the Asserted Patents. Motiva initiated litigation against Nintendo when it became clear that Motiva could not bring the technology covered in the Asserted Patents to market so long as Nintendo was selling the Wii in the United States. The purpose of Motiva's suit against Nintendo is to enjoin Nintendo from selling infringing devices in the United States thereby opening the market again to Motiva's efforts to bring the inventions covered in the Asserted Patents to market.

V. UNLAWFUL UNFAIR ACTS OF PROPOSED RESPONDENTS-PATENT INFRINGEMENT

55. The Accused Products are the Wii Console (including model No. RVL-001), the Wii Remote (including model No. RVL-003); the Wii Nunchuk (including model No. RVL-004); and the Wii MotionPlus (including model No. RVL-026).

56. On information and belief, the accused products are sold for importation, imported, and sold after importation in the United States, and infringe claims 16, 27-32, 44, 57, 68, 81, and 84 of the '151 patent and claims 1-6 and 8-15 of the '268 patent.

57. The Accused Products are covered by the Asserted Patents as shown by the claim charts in Exhibit 17 and 18.

VI. SPECIFIC INSTANCES OF UNFAIR IMPORTATION AND SALE

58. The specific instances of importation and sale of infringing certain video game systems and related controllers set forth below are only a representative sample of unlawful importation and sale of the Accused Products and are not meant to limit the scope of the infringement.

59. On information and belief, proposed respondents import, sell for importation, and/or sell within the United States after importation, the accused articles identified herein.

60. On information and belief, the Accused Products are imported under heading 9504.10.0000 of the Harmonized Tariff Schedule of the United States.

A. NCL

61. On information and belief, NCL manufactures, has manufactured or directs another party to manufacture the Accused Products at least at one facility outside the United States and thereafter sells the products for importation into the United States through NOA. On information and belief, these products are imported and sold after importation in the United States by NCL's wholly-owned subsidiary NOA, as set forth below and fully incorporated herein.

62. The specific instances of NCL's importation and sale of infringing products through its subsidiary NOA are set forth below and fully incorporated herein.

B. NOA

63. On information and belief, NOA imports and sells after importation into the United States the Accused Products made outside the United States by, for, or at the direction of NCL.

64. Exhibits 19 and 20 set forth in detail the purchase of the Accused Products in the United States. See Confidential Exhibit 19 ¶¶ 3-4 and Exhibit 20 ¶ 3.

VII. RELATED LITIGATION

65. On November 10, 2008, Motiva filed suit against NCL and NOA for infringement of the '151 patent in United States District Court for the Eastern District of Texas (Civil Action No. 6:08-CV-429). The district court case involves the '151 patent and the same Accused Products as this matter.

66. In January 2009, Nintendo moved to transfer under 28 U.S.C. § 1404(a) arguing that the Western District of Washington was a clearly more convenient venue. Nintendo lost its motion and the case proceeded in Texas. The parties exchanged initial claim construction positions, infringement contentions and invalidity contentions; conducted depositions; and certified to the court that they had produced all of their relevant documents. Then, on July 15, 2009, Nintendo moved the Texas court to reconsider its transfer denial.

67. On October 16, 2009, without awaiting the district court's order on reconsideration, Nintendo petitioned the Federal Circuit for a writ of mandamus commanding the Texas court to transfer the action. On December 17, 2009, the Federal Circuit issued a writ of mandamus transferring the case to the Western District of Washington (Civil Action No. 10-CV-00349-RSL).

68. On March 3, 2010, the Western District of Washington docketed the case. Then, over sixteen months after Motiva filed its complaint, but just nine days after the Washington court docketed the case, Nintendo filed a 1,600-page petition for *inter partes* reexamination of the '151 patent. Two days later, on March 18, 2010, the day after the parties appeared in the Washington court, Nintendo moved to stay the case pending *inter partes* reexamination of the '151 patent. Motiva opposed the motion to stay the case pending reexamination.

69. On June 4, 2010, the PTO ordered *inter partes* reexamination of the '151 patent. Subsequently, on June 11, 2010, the Judge in the Western District issued an order staying the case pending reexamination of the '151 patent and exhaustion of all appeals.

70. On June 25, 2010, Motiva moved the Western District of Washington to reconsider its order staying the case. Motiva based its motion on that court's misapprehension of the delay incumbent in *inter partes* reexamination and exhaustion of all appeals – approximately seven to ten years – and the court's misapprehension of the speculative benefits of reexamination. On July 12, 2010, the district court denied Motiva's motion. The district court case is currently stayed.

71. On July 13, 2010, in its first office action, the PTO denied Nintendo's proposed rejections and confirmed the patentability of all of the Asserted Claims.

72. The '268 patent issued on February 17, 2009, fourteen months after Motiva filed suit against Nintendo for infringement of the '151 patent. The '268 patent is not in reexamination and no petition for reexamination has been filed.

VIII. RELIEF REQUESTED

73. WHEREFORE, by reason of the foregoing, Complainant respectfully requests that the United States International Trade Commission:

(a) Institute an immediate investigation, pursuant to Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337(a)(1)(B)(i) and (b)(1), with respect to violations of Section 337 by NCL and NOA based upon the importation, sale for importation, and sale after importation, into the United States of certain video game systems and related controllers that infringe one or more claims of any of U.S. Patent Nos. 7,292,151 and 7,492,268;

(b) Schedule and conduct a hearing on said unlawful acts and, following said hearing;

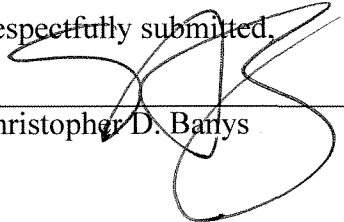
(c) Issue a permanent limited exclusion order, pursuant to 19 U.S.C. § 1337(d)(2) barring from entry into the United States all imported video game systems and related controllers that infringe one or more claims of any of U.S. Patent Nos. 7,292,151 and 7,492,268;

(d) Issue a permanent cease and desist order, pursuant to 19 U.S.C. § 1337(f), directing proposed respondent NOA to cease and desist from importing, marketing, advertising, demonstrating, warehousing, distributing, selling, or using video game systems and related controllers that infringe one or more claims of any of U.S. Patent Nos. 7,292,151 and 7,492,268; and

(e) Grant such other and further relief as the Commission deems just and proper based on the facts determined by the investigation and the authority of the Commission.

Dated: September 29, 2010

Respectfully submitted,

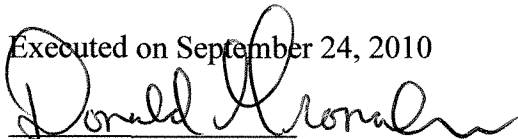


Christopher D. Barys

VERIFICATION OF COMPLAINT

I, Donald Gronachan, declare, in accordance with 19 C.F.R. §§ 210.4 and 210.12(a), under penalty of perjury, that the following statements are true:

1. I am a co-inventor of the Asserted Patents and co-owner of Motiva, LLC and am duly authorized to sign this Complaint on behalf of Complainant;
2. I have read all the paragraphs in the foregoing Complaint;
3. To the best of my knowledge, information, and belief, based on reasonable inquiry, the foregoing paragraphs in the Complaint are well-founded in fact and are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
4. The allegations and other factual contentions in the paragraphs of the Complaint have evidentiary support or are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
5. The foregoing paragraphs in the Complaint are not being filed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Executed on September 24, 2010

Donald Gronachan