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06-CV-01801-CMP

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN-FUSIO, S.A., a French Corporation,

Plaintiff,

v.

MICROSOFT CORPORATION, a Washington
Corporation,

Defendant.

NO.

CV6 1801P

COMPLAINT

JURY TRIAL DEMANDED

For its complaint against Microsoft Corporation ("Microsoft"), In-Fusio, S.A. ("In-Fusio") alleges as follows:

I. INTRODUCTION

1. This is an action for injunctive relief and damages arising out of Microsoft's breach of a "Development and Distribution Agreement" entered into by In-Fusio and Microsoft on or about September 26, 2005 (the "Agreement").¹

2. The Agreement grants In-Fusio exclusive rights to develop and produce the computer video game called "Halo" for use on certain delineated mobile devices, the most significant of which is cellular phones. Halo is one of the most successful computer video

¹ The Agreement is confidential on its own terms and contains trade secret information. A copy of the Agreement has been submitted under seal in conjunction with a Motion to File Under Seal.

COMPLAINT - 1

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

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ORIGINAL

1 games in history, with millions of users world-wide playing individually and against others
2 over the Internet. Accordingly, the potential market for the distribution of a Halo-based mobile
3 phone product is enormous and the good will garnered by In-Fusio from an exclusive license to
4 exploit Halo in that market is incalculable.

5 3. Under the Agreement, In-Fusio's Halo programming designs are subject to
6 Microsoft's approval, which cannot be unreasonably withheld. Nevertheless, Microsoft has
7 thwarted In-Fusio's efforts to develop Halo under the Agreement. Indeed, in the last 11
8 months, Microsoft has approved no fully-developed In-Fusio Halo game designs; ignoring and
9 then refusing to accept In-Fusio's game design concepts with little or no explanation and
10 leaving In-Fusio little basis to revise its concepts to obtain Microsoft's approval.

11 4. Microsoft implicitly recognized the impact of its rejection of In-Fusio's
12 development concepts and, in June 2006, Microsoft agreed to delay further payments due from
13 In-Fusio under the Agreement pending efforts to agree on acceptable Halo game design
14 concepts. After four more months of Microsoft recalcitrance, Microsoft then demanded the
15 next \$500,000 payment from In-Fusio while at the same time acknowledging that Microsoft
16 had not approved any fully-developed Halo game design concepts and claiming that it had no
17 obligation to do so notwithstanding the \$2 million price tag on the Agreement. On November
18 27, 2006, Microsoft served In-Fusio with a purported breach notice under the Agreement and
19 indicated that it would take no further steps under the Agreement.

20 5. Urgent action is now required to prevent In-Fusio from suffering irreparable
21 harm. Microsoft was already in breach of the Agreement by failing to reasonably approve any
22 of In-Fusio's fully-developed design concepts and game designs for the Halo product.
23 Microsoft should not be permitted to benefit from its repeated breaches by denying In-Fusio
24 the ability to develop a marketable Halo product and then capitalize upon Microsoft's own
25

COMPLAINT - 2

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

1 recalcitrance to claim In-Fusio has lost the exclusive rights under the Agreement to develop
2 and distribute Halo into the mobile phone market.

3 6. Accordingly, In-Fusio brings this action to enjoin Microsoft from terminating
4 the Agreement prior to In-Fusio's achievement of the benefit of its bargain and to enforce In-
5 Fusio's exclusive rights for development of Halo under the Agreement. Given Microsoft's
6 unreasonable refusal to approve In-Fusio's concepts for Halo products, In-Fusio seeks
7 declaratory judgment that Microsoft has waived creative control over In-Fusio's distribution of
8 Halo in the mobile device market. In-Fusio also seeks the maximum damages permitted by
9 law.

10 II. PARTIES

11 7. Plaintiff In-Fusio, S.A. is a French corporation with its principal place of
12 business at Le Millennium, 12 Quai de Queyries, 33072 Bordeaux Cedex, France.

13 8. Defendant Microsoft Corporation is a Washington Corporation with a principal
14 place of business at One Microsoft Way, Redmond, Washington 98052.

15 III. JURISDICTION AND VENUE

16 9. This court has jurisdiction under 28 U.S.C. §1332(a)(2) as an action between a
17 citizen of a foreign state and a citizen of a State and where the matter in controversy exceeds
18 \$75,000, exclusive of interest and costs.

19 10. Venue is proper in this District because Microsoft resides here and the parties
20 stipulated in the Agreement that Washington courts have exclusive jurisdiction over disputes
21 relating to the Agreement.

IV. STATEMENT OF CLAIM

The Agreement

11. Upon information and belief, Microsoft owns and controls the rights in and to the Halo computer video game and other intellectual property related to Halo as developed by Microsoft's Bungie Studios (collectively, "Halo").

12. On or about September 26, 2005, In-Fusio and Microsoft entered into the Agreement, which granted In-Fusio an exclusive "non-transferable, terminable, right and license" for three years to develop and produce products based on Halo for the use on "mobile/cellular telephones, combination mobile/cellular telephones, and personal digital assistant-wireless telephone devices generally known as 'smart phones' or 'convergent devices'". The Agreement also granted In-Fusio exclusive rights to advertise, sell, license and sublicense Halo and related products for mobile phones use worldwide.

13. The Agreement set forth a development process in which In-Fusio's designs and submissions for Halo were identified as "deliverables." In-Fusio assumed full responsibility for the creation, development and production of Halo for the mobile phone market. In-Fusio was to submit the deliverables to Microsoft for approval in developmental stages.

14. Microsoft retained the right of approval of In-Fusio's Halo deliverables, which approval could not be unreasonably withheld. In the event Microsoft withheld approval of a deliverable, Microsoft was required explain in writing the basis for its disapproval sufficient to permit In-Fusio to modify the deliverable for acceptable resubmission.

15. Under the Agreement, In-Fusio agreed to pay Microsoft minimum guaranteed royalties of \$2,000,000 in \$500,000 increments due on January 1, 2006, June 1, 2006, June 1, 2007, and June 1, 2008. After In-Fusio released its Halo products, Microsoft and In-Fusio

1 were to split income and royalties from the marketing and distribution of Halo in the mobile
2 device market.

3 16. The Agreement could only be terminated by a party not in breach. Microsoft's
4 breach of this Agreement would not cause the Agreement to terminate unless In-Fusio elected
5 in writing to terminate the Agreement.

6 In-Fusio's Performance Under The Agreement

7 17. After the parties executed the Agreement in September 2005, In-Fusio
8 commenced creative discussions with Microsoft to lead to a design deliverable, which included
9 a meeting in November 2005.

10 18. Microsoft's agreement to give In-Fusio exclusive rights to develop Halo mobile
11 games was widely reported in the United States and Europe as a major achievement for In-
12 Fusio and dramatically elevated expectations.

13 19. Soon thereafter In-Fusio began work on the first stage of its Halo development,
14 a "Halo Portal" that allowed users to download certain Halo ring tones and wallpapers to their
15 mobile phones, which Halo Portal was approved by Microsoft.

16 20. In early 2006, In-Fusio made the initial license fee payment of \$500,000 and
17 wanted to commence work on an actual Halo game, which was the next stage of In-Fusio's
18 development of its exclusive Halo license.

19 21. In or around February 2006, In-Fusio submitted to Microsoft a detailed Halo
20 design document as its deliverable under the Agreement (the "February Deliverable"). Under
21 the Agreement, Microsoft was to reasonably approve this February Deliverable or give In-
22 Fusio reasons in writing why Microsoft did not find it acceptable.

1 Microsoft's Breach of the Agreement

2 22. Microsoft did not do so. Instead, Microsoft delayed in responding to In-Fusio's
3 February Deliverable and never provided adequate reasons how it could be changed to make it
4 acceptable. Even after In-Fusio met in person with Microsoft to ask for guidance, Microsoft
5 was unable to articulate reasons for refusing to accept the February Deliverable and repeatedly
6 asked for more time respond. On this basis alone, Microsoft did not comply with its
7 obligations to reasonably accept In-Fusio's February Deliverable and Microsoft was in breach.

8 23. Nevertheless, In-Fusio continued to attempt work with Microsoft and submitted
9 concepts to exploit Halo in the mobile phone market. In or around June 2006 In-Fusio
10 submitted two concepts for Microsoft's consideration (the "June Deliverables"), which
11 Microsoft also did not accept.

12 24. In June 2006, Microsoft postponed In-Fusio's second payment of \$500,000 due
13 under the Agreement. By postponing this payment, Microsoft implicitly agreed that it would
14 be unreasonable to force In-Fusio to make regularly scheduled payments given that Microsoft
15 had prevented In-Fusio from realizing benefits under the Agreement.

16 25. On June 19, 2006, In-Fusio notified Microsoft by email that Microsoft was not
17 abiding by the Agreement's design and approval process, which was notice of breach to
18 Microsoft.

19 26. While representatives of In-Fusio and Microsoft continued discussions,
20 Microsoft never approved In-Fusio's June Deliverables and provided In-Fusio with little
21 written guidance regarding what Microsoft found unacceptable. This too was in breach of
22 Microsoft's obligations under the Agreement.

23 27. On or about July 9, 2006, In-Fusio submitted additional game concepts for
24 Microsoft's review (the "July Deliverable").
25

1 28. For nearly six weeks, Microsoft failed to provide In-Fusio with its substantive
2 final response to the July Deliverable. Only on August 20, 2006 did Microsoft finally provide
3 In-Fusio with comments, which neither approved In-Fusio's July Deliverable, nor provided In-
4 Fusio with sufficient written guidance to allow In-Fusio to produce an acceptable design. This
5 too was in breach of Microsoft's obligations under the Agreement.

6 29. On September 14, 2006, In-Fusio submitted another Halo game concept for
7 Microsoft's review (the "September Deliverable").

8 30. In September 2006, Microsoft claimed that In-Fusio's obligation to make the
9 \$500,000 second payment was due October 20, 2006, but acknowledged that Microsoft had
10 accomplished little in letting In-Fusio develop a Halo game for the mobile phone market.

11 31. Having received no response from Microsoft regarding the September
12 Deliverable, In-Fusio sent an e-mail to Microsoft on October 6, 2006 requesting feedback.
13 Microsoft did not provide any substantive response to this request.

14 32. Even though Microsoft had not yet provided substantive feedback regarding the
15 September Deliverable, Microsoft's counsel wrote to In-Fusio on October 13, 2006 demanding
16 that In-Fusio pay Microsoft \$500,000 by October 20, 2006 (the "October 13th Letter").

17 33. In-Fusio responded to the October 13th Letter stating that it strongly disagreed
18 with the facts and conclusions expressed in the October 13th Letter.

19 34. Still having received no substantive response from Microsoft regarding the
20 September Deliverable, on October 31, 2006, In-Fusio sent a second e-mail to Microsoft
21 requesting feedback on the September Deliverable.

22 35. Nearly two months after receiving the September Deliverable and a week after
23 receiving In-Fusio's second request for feedback, Microsoft withheld approval of the
24 September Deliverable asking In-Fusio to develop a full game design before Microsoft could
25

1 provide detailed feedback. By unreasonably withholding approval of the September
2 Deliverable, failing to provide sufficient guidance to gain approval, and forcing In-Fusio to
3 undertake the additional expense and effort of developing a game design prior to receiving
4 game concept approval, Microsoft further breached of the Agreement.

5 36. On November 27, 2006, even though Microsoft had approved no In-Fusio
6 designs since Microsoft agreed to suspend payments in June 2006, Microsoft through counsel
7 sent a letter to In-Fusio declaring In-Fusio in breach of the Agreement and stating that the
8 Agreement would be terminated in 30 days if In-Fusio did not cure by making payment of
9 \$500,000.

10 Irreparable Harm

11 37. The Agreement provided In-Fusio with an exclusive license to develop Halo in
12 the mobile phone market.

13 38. Halo is among the most popular computer video games in the world and In-
14 Fusio's exclusive right to develop Halo in the mobile phone market garnered In-Fusio
15 significant good will on a world wide basis and was a substantial contributing factor to In-
16 Fusio's good will, reputation and standing in its industry.

17 39. Microsoft's breach of the Agreement by unreasonably withholding its approval
18 of In-Fusio's design concepts deprived In-Fusio of the benefit from the exclusive rights it
19 obtained from Microsoft to develop Halo for the mobile phone market and is irreparably
20 *injuring In-Fusio's good will and standing in its industry.*

1 40. The right to develop Halo in the mobile phone market is exclusive and unique
2 and Microsoft's termination of that right will cause In-Fusio irreparable harm.

3 COUNT I: BREACH OF CONTRACT

4 41. In-Fusio specifically repeats, realleges, and incorporates by reference as though
5 fully set forth herein each and every allegation contained in Paragraphs 1 through 40 of this
6 Complaint.

7 a. In-Fusio performed all obligations required of it under the Agreement or
8 was excused from doing do.

9 b. In-Fusio submitted several designs for Halo for Microsoft's approval,
10 which could not be unreasonably withheld. Each such submission was a
11 "deliverable" under the Agreement.

12 c. Each In-Fusio deliverable complied with all contractual requirements for
13 Halo products and programming and, in all ways, complied with the
14 process for approval set forth in the Agreement.

15 42. Under Agreement § 4.6.1, Microsoft's approval "shall not be unreasonable [sic]
16 withheld." Under Agreement § 4.6.5, in the event that Microsoft did not approve an In-Fusio
17 Deliverable, Microsoft was to "provide In-Fusio with sufficient information in writing in which
18 to discern the nature of the disapproval and steps necessary for approval, and In-Fusio shall
19 modify the deliverable prior to resubmission."

20 43. Microsoft repeatedly breached the Agreement by unreasonably withholding
21 approval of each of In-Fusio's deliverables, including, but not limited to, the February
22 Deliverable, the June Deliverables, the July Deliverable, and the September Deliverable.

1 44. Microsoft further breached the Agreement by failing to provide In-Fusio with
2 sufficient information in writing as to the nature of Microsoft's disapproval of each In-Fusio
3 deliverable as required under Agreement § 4.6.5.

4 45. Microsoft's breach deprived In-Fusio of the benefits of the Agreement and
5 caused In-Fusio irreparable harm and damages in amount to be proven at trial, but not less than
6 \$10 million.

7 COUNT II: BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

8 46. In-Fusio specifically repeats, realleges, and incorporates by reference as though
9 fully set forth herein each and every allegation contained in Paragraphs 1 through 48 of this
10 Complaint.

11 47. A covenant of good faith and fair dealing is implied in the Agreement that
12 prohibits Microsoft from depriving In-Fusio of the benefits of the Agreement.

13 48. As a result of Microsoft's actions as described above, including repeated refusal
14 to approve of In-Fusio's Deliverables without adequate explanation, Microsoft deprived In-
15 Fusio of the benefit of the Agreement and violated the covenant of good faith and fair dealing.

16 49. Microsoft may not benefit from its own breach of the covenant of good faith and
17 fair dealing.

18 50. Microsoft's breach of the implied covenant of good faith and fair dealing caused
19 In-Fusio irreparable harm and damages in an amount to be proven at trial, but is in no event
20 less than \$75,000.

21 COUNT III: DECLARATORY JUDGMENT

22 51. In-Fusio specifically repeats, realleges, and incorporates by reference as though
23 fully set forth herein each and every allegation contained in Paragraphs 1 through 53 of this
24 Complaint.

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COMPLAINT - 10

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

1942880.1

1 52. Under Agreement § 8 only a party not in breach of the Agreement may
2 terminate it. In addition, Agreement § 8.5 provides that, if Microsoft is in breach of the
3 Agreement, In-Fusio retains all rights under the Agreement including, but not limited to, the
4 exclusive license to develop and distribute Halo in the mobile phone market.

5 53. As set forth above, as of March 2006 and thereafter Microsoft was in uncured
6 breach of the Agreement and Microsoft, therefore, was not and is not entitled to terminate the
7 Agreement.

8 54. Microsoft's bad faith refusal to approve designs submitted by In-Fusio breaches
9 Microsoft's obligations under Agreement § 4.6, waives Microsoft's rights to review and
10 approve In-Fusio's Halo designs and permits In-Fusio to develop Halo products for the mobile
11 phone market unfettered by Microsoft's review and approval constraints.

12 55. On November 27, 2006, Microsoft sent a letter to In-Fusio declaring In-Fusio in
13 breach of the Agreement and stating that the Agreement would be terminated in 30 days if In-
14 Fusio did not make a payment to Microsoft of \$500,000.

15 56. An actual, present and justifiable controversy exists between Microsoft and In-
16 Fusio concerning their respective rights under the Agreement. In-Fusio contends that
17 Microsoft has no right to terminate the Agreement since Microsoft was in pre-existing breach
18 and that Microsoft has waived its rights under Agreement § 4.6 for the balance of the
19 Agreement's term, which must be extended due to Microsoft uncured breaches.

20 57. In-Fusio therefore seeks a judicial determination of the respective rights of In-
21 Fusio and Microsoft under the Agreement, including a declaration that:

22 a. Microsoft is in breach of the Agreement and may not terminate it;

23
24
25

1 b. The Agreement remains in full force and effect for an additional time as
2 determined after trial to permit In-Fusio to achieve the full benefit of its
3 bargain;

4 c. In-Fusio retains all rights under the Agreement including, but not limited
5 to, the exclusive license to develop and market Halo for mobile phones;
6 and

7 d. Microsoft's breach of Agreement § 4.6 waived Microsoft's right of
8 review and approval under the Agreement

9 COUNT IV: INJUNCTIVE RELIEF

10 58. In-Fusio specifically repeats, realleges, and incorporates by reference as though
11 fully set forth herein each and every allegation contained in Paragraphs 1 through 60 of this
12 Complaint.

13 59. Agreement § 8.5 provides that In-Fusio retains all rights under the Agreement,
14 including the exclusive license to develop and market Halo, and that Microsoft's breach of the
15 Agreement shall not cause the Agreement to terminate unless In-Fusio specifically elects in
16 writing to terminate the Agreement.

17 60. In-Fusio has not elected, and will not elect, to terminate the Agreement.

18 61. Microsoft's bad faith refusal to approve In-Fusio's concepts and designs for
19 Halo has interfered with In-Fusio's exclusive right to exploit Halo in the mobile phone market,
20 deprived In-Fusio of the benefit of its bargain and has caused and is causing In-Fusio
21 irreparable harm to its good will and reputation in the software development industry.

22 62. Microsoft's termination of In-Fusio's exclusive rights to develop Halo products
23 in the mobile phone market will cause In-Fusio irreparable harm.

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COMPLAINT - 12

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600

63. In-Fusio seeks injunctive relief to prevent Microsoft from terminating the Agreement and prohibiting Microsoft or any other Microsoft licensee from developing Halo products for the mobile phone market.

JURY TRIAL DEMAND

In-Fusio demands a jury trial on all issues so triable.

WHEREFORE, In-Fusio demands judgment as follows:

A. Declaring that In-Fusio has the exclusive right and license to develop, advertise, etc, market, distribute and sub-distribute, sell, license and sublicense Halo and related products for mobile phone use through out the entire world for the remaining term of the Agreement, the length of which to be determined at trial;

B. Enjoining Microsoft from terminating the Agreement;

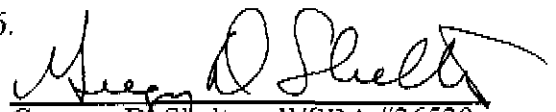
C. Enjoining Microsoft, and any related entity, from granting, or contracting to grant, the right and/or license to develop and produce products based on Halo for the use on mobile phones to any other entity;

D. Declaring that Microsoft has waived its right to review and approve the In-Fusio deliverables under the Agreement;

E. Awarding In-Fusio compensatory damages, consequential damages, reliance damages, costs, and attorneys' fees; and

F. Granting such other and further relief as the Court deems just and proper.

DATED this 18th day of December, 2006.


Gregory D. Shelton, WSBA #36530
Attorneys for IN-FUSIO, S.A.
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Telephone: (206) 628-6600
Fax: (206) 628-6611
Email: gshelton@wkg.com

COMPLAINT - 13

Williams, Kastner & Gibbs PLLC
Two Union Square, Suite 4100 (98101-2380)
Mail Address: P.O. Box 21926
Seattle, Washington 98111-3926
(206) 628-6600