UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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

Plaintiff,

vs.

MICROSOFT CORPORATION, a Washington Corporation,

Defendant.

NO. CV6 1801P

MEMORANDUM IN SUPPORT OF TEMPORARY RESTRAINING ORDER AND MOTION FOR EXPEDITED DISCOVERY

NOTE FOR MOTION CALENDAR:

EX PARTE

INTRODUCTION

Plaintiff In-Fusio, S.A. ("In-Fusio") is defendant Microsoft Corporation's ("Microsoft") exclusive licensee to develop mobile applications for Halo, Microsoft's most successful computer video game and one of the most popular video games in the world. To obtain these exclusive rights, In-Fusio paid Microsoft $500,000 under a Development and Distribution Agreement dated September 25, 2005 (the "Agreement") and In-Fusio has since spent thousands more in development costs. Nevertheless, Microsoft has never let In-Fusio enjoy the benefit of its bargain:

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- Since February 2006 Microsoft has ignored or ultimately rejected every one of In-Fusio's approximately 20 Halo concepts, which blocked In-Fusio from developing any game under the Agreement;
- Microsoft demanded that In-Fusio dumb-down its Halo concepts in return for a royalty reduction under the Agreement and threatened to reject every In-Fusio concept while requiring payment of $1.5 million more unless In-Fusio agreed to do so;
- When the parties failed to agree to new parameters for the Agreement, Microsoft then demanded In-Fusio pay the next $500,000 due under the Agreement even though Microsoft still had not approved any Halo game;
- Microsoft then issued a notice of termination effective December 27, 2006.

But the Agreement explicitly prevents Microsoft from terminating when Microsoft is in pre-existing breach and Microsoft has implicitly admitted that it failed to perform. For example, even though Microsoft may not unreasonably withhold approval of In-Fusio's proposed Halo concepts, in March 2006 Microsoft claimed that it could not approve the Halo game concepts *because Microsoft could not internally agree over these submissions*. This is not an objectively reasonable basis to find In-Fusio's concepts not acceptable. Indeed, Microsoft acknowledged its fault by agreeing to postpone In-Fusio's second $500,000 payment, originally due June 1, 2006, pending the parties' attempt to agree on Halo concepts. Thereafter Microsoft offered to renegotiate the Agreement's royalty obligations *in return for In-Fusio's agreement to dumb-down its Halo concepts*. This reflects Microsoft's understanding that it was not performing according to the parties' original intention that In-Fusio would develop a "hard core" Halo game, which would likely generate dramatically increased license fees over a dumbed-down Halo game.

But under the Agreement, In-Fusio was responsible for developing the Halo concept and Microsoft could not unreasonably withhold approval of an In-Fusio submission. If

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Microsoft did not approve of an In-Fusio submission, Microsoft was required to explain its concerns in writing so that In-Fusio could adjust its concept to meet with Microsoft's approval. Notwithstanding its repeated refusal to accept In-Fusio's proposed concepts, Microsoft never explained its concerns in writing and could not do so because Microsoft refused to approve the Halo concepts due to its own internal dissention, not any objective fault with In-Fusio's design concepts. Moreover, under Washington law, given Microsoft had agreed to reasonably accept In-Fusio's future performance, Microsoft may not disapprove the Halo concepts with impunity and Microsoft waived approval rights if it failed to act in good faith because it changed its mind as to the Halo bargain. In re Hollingsworth's Estate, 88 Wash. 2d 322, 330 (1977) ("Because respondent rejected the tax compromise not because he, in fact and in good faith, found the tax compromise unacceptable, but because he later decided he had made a bad bargain, the law will regard him as finding the tax compromise acceptable.").

In sum, Microsoft has stonewalled every In-Fusio attempt to develop Halo mobile phone applications by (1) unreasonably withholding approval of nearly all of In-Fusio's submissions and (2) refusing to provide In-Fusio any substantive feedback in connection with Microsoft's disapprovals. Now Microsoft has purported to terminate the Agreement effective December 27, 2006 unless In-Fusio pays Microsoft $500,000 notwithstanding Microsoft's refusal to allow In-Fusio to exercise its rights to exploit Halo. In-Fusio brings this application to preserve the status quo pending resolution of the dispute between it and Microsoft over whether Microsoft wrongfully withheld approval of In-Fusio's Halo game concepts. In-Fusio also seeks expedited discovery to move for preliminary injunction motion on a more fully developed record.

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FACTS

Microsoft owns 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"). Declaration of William Gross ("Gross Decl."),¶ 2). Halo is Microsoft's most popular computer video game and playable on both computers and Microsoft's X-Box system and is one of the most popular computer video games in the world. (Affidavit of Jeffrey C. Lapin ("Lapin Aff."), ¶ 9). According to Microsoft's web site, Halo was named "Game of the Year" by Electronic Gaming Monthly, IGN, EDGE and the Academy of Interactive Arts and Sciences and is the best selling X-Box game. (Id. ¶ 9 and Exh. A). According to Microsoft, Halo will also be developed into a motion picture. (Id.).

In-Fusio is a software developer and publisher based in Bordeaux, France, with offices in Los Angeles and elsewhere, that provides mobile software games for use on cell phones and other mobile devices. (Lapin Aff., ¶ 6). In-Fusio was one of the first developers to launch the concept of downloadable games for mobile phones. Id.

The Agreement

The Agreement 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'" (Gross Decl., Exh. A, §§ 2.1 and 2.1.1). The Agreement also granted In-Fusio exclusive rights to advertise, sell, license and sublicense Halo and related products on a worldwide basis. (Id.) In-Fusio agreed to develop Halo for the mobile device market at its

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sole cost and expense and assumed full responsibility for the creation, development and production. (Id. Exh. A, § 4.1).

Under the Agreement, Microsoft retained the right of final approval over In-Fusio's Halo development and the Agreement required In-Fusio to submit its Halo concepts called "deliverables" for approval by Microsoft at certain identified developmental stages. (Id. Exh. A., § 4).[1] But the Agreement expressly provided that Microsoft could not unreasonably withhold its approval of In-Fusio's deliverables. (Id. Exh. A, § 4.6.1). In the event Microsoft failed to approve a particular In-Fusio deliverable, Microsoft was required to provide In-Fusio with sufficient information in writing from which In-Fusio could understand Microsoft's reason for withholding approval and take the steps necessary to modify the deliverable to obtain Microsoft's approval. (Id. Exh. A, § 4.6.5). In short, absent Microsoft's approval of In-Fusio deliverables, which approval may not be unreasonably withheld, In-Fusio was barred from exploiting Halo.

In-Fusio agreed to pay Microsoft a minimum guaranteed royalty of $2,000,000 consisting of $500,000 payments due on or before January 1, 2006, June 1, 2006, June 1, 2007, and June 1, 2008. (Id. Exh. A, § 6.2). After In-Fusio released the Halo products, Microsoft and In-Fusio agreed to split income and royalties. (Id. Exh. A, § 4).

The Agreement explicitly provided that neither party could terminate it if they were in pre-existing breach. (Id. Exh. A, § 8.3). Indeed, Microsoft's breach did not cause the

[1] Plaintiff In-Fusio will make copies of design concepts and "deliverables" available for the Court's convenience at a hearing on this matter. Plaintiff has not included copies with this memorandum due to the voluminous nature of the materials.

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Agreement to terminate unless In-Fusio specifically elected in writing to terminate the Agreement. (Id. Exh. A, § 8.5).

In-Fusio Performs and Microsoft Breaches the Agreement

Shortly after the parties executed the Agreement, In-Fusio's exclusive rights to develop Halo for mobile games was widely reported in the United States and Europe as a major achievement for In-Fusio and dramatically elevated prospects for In-Fusio (Lapin Aff., ¶ 10). Soon thereafter In-Fusio began work on the first stage of its Halo development, a "Halo Portal" that allowed mobile phone users to download certain Halo images and information. (Lapin Aff.,, ¶ 11).[2] In early 2006, In-Fusio made the initial license fee payment of $500,000 to Microsoft and wanted to commence work on an actual Halo mobile game, which was the next stage of In-Fusio's development of its Halo license. (Id. ¶ 12). In or around February 2006, In-Fusio submitted to Microsoft a Halo game concept as a deliverable under the Agreement (the "February Deliverable"). (Id. ¶ 13) Under the Agreement, Microsoft was to reasonably approve this February Deliverable or give In-Fusio reasons in writing why Microsoft did not find it acceptable. (Gross Decl., Exh. A, § 6). Microsoft did not do so, but rather delayed in responding to In-Fusio's February Deliverable and never provided adequate reasons how it could be changed to make it acceptable. (Lapin Aff., ¶ 13).

In March 2006, In-Fusio requested a meeting with Microsoft to ask for guidance as to why Microsoft could not approve In-Fusio's February Deliverable concept, but Microsoft was unable to articulate reasons for its refusal. (Id. ¶ 14). Then, Microsoft admitted that it could

[2] The Halo Portal, a loss-leader designed to spark interest in Halo among mobile game consumers, cost In-Fusio in excess of $300,000 to develop and was ultimately released in with Microsoft's approval. (Lapin Aff., ¶ 11; Gross Decl., ¶ 5). The Halo Portal is not a game and was contemplated under the Agreement to be only the first step toward the release of profitable Halo mobile games. (Lapin. Aff., ¶ 11).

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not approve In-Fusio's Halo game concepts because Microsoft could not internally agree over these submissions and Microsoft asked for more time to respond. (Id. ¶ 14).

Nevertheless, In-Fusio continued to attempt work with Microsoft and submitted concepts to exploit Halo in the mobile game market. In June 2006 In-Fusio submitted two concepts for Microsoft's consideration (the "June Deliverables"), which Microsoft also did not accept. (Gross Decl., ¶ 7). Again, Microsoft provided In-Fusio with no good faith basis for rejecting the June Deliverables. (Id. ¶ 9). On June 19, 2006, In-Fusio notified Microsoft by email that Microsoft was not abiding by the Agreement's design and approval process. (Gross Decl., ¶ 8, Exh. B). Indeed, at around this time Microsoft acknowledged its failures by agreeing to postpone In-Fusio's second $500,000 payment, originally due June 1, 2006, pending the parties' attempt to agree on Halo concepts. (Lapin Aff., ¶ 14; Gross Decl., ¶ 8).

While representatives of In-Fusio and Microsoft continued discussions, Microsoft never approved In-Fusio's June Deliverables and provided In-Fusio with little written guidance regarding what Microsoft found unacceptable. (Gross Decl., ¶ 9). Instead, Microsoft offered to renegotiate the Agreement's royalty obligations in return for In-Fusio's agreement to dumb-down its Halo concepts. (Gross Decl., ¶ 11).

On or about July 9, 2006, In-Fusio submitted additional game concepts for Microsoft's review (the "July Deliverable"). (Gross Decl., ¶ 10). For nearly six weeks, Microsoft failed to provide In-Fusio with its substantive final response to the July Deliverable. (Gross Decl., ¶ 10) Only on August 20, 2006 did Microsoft finally provide In-Fusio with comments that neither approved the July Deliverable nor provided In-Fusio with sufficient written guidance to allow In-Fusio to produce an acceptable design. (Gross Decl., Exh. 10).

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On September 14, 2006, In-Fusio submitted another Halo game concept for Microsoft's review (the "September Deliverable"). (Gross Decl., ¶ 10). At around the same time, Microsoft asserted for the first time that In-Fusio's second $500,000 payment under the Agreement was due October 20, 2006, but acknowledged that Microsoft had accomplished little in letting In-Fusio develop a Halo game for the mobile market. (Gross Decl., ¶ 14 and Exh. E thereto). Having received no response from Microsoft regarding the September Deliverable, In-Fusio sent an e-mail to Microsoft on October 6, 2006 requesting feedback. (Gross Decl., ¶ 13). Microsoft did not provide any substantive response to this request. (Id.)

Even though Microsoft had not yet approved any Halo game, Microsoft's counsel wrote to In-Fusio on October 13, 2006 demanding that In-Fusio pay Microsoft $500,000 by October 20, 2006 (the "October 13th Letter"). (Gross Decl., ¶ 14 and Exh. E). In-Fusio responded to the October 13th Letter stating that it strongly disagreed with the facts and conclusions expressed in the October 13th Letter. (Gross Decl., ¶ 14 and Exh. F). Still having received no substantive response from Microsoft regarding the September Deliverable, on October 31, 2006, In-Fusio sent a second e-mail to Microsoft requesting feedback on the September Deliverable. (Id. ¶ 15 and Exh. G).[3]

On November 27, 2006, even though Microsoft had approved no In-Fusio game designs, Microsoft through counsel sent a letter to In-Fusio declaring In-Fusio in breach of the Agreement and stating that the Agreement would be terminated in 30 days if In-Fusio did not cure by making payment of $500,000. (Id. ¶ 16 and Exh. H).

[3] Nearly two months after receiving the September Deliverable and a week after receiving In-Fusio's second request for feedback, Microsoft sent an email that, while not approving the September Deliverable, instructed In-Fusio to proceed to the next step of game production that would allow Microsoft to accept or reject the concept. (Gross Decl., ¶ 15).

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ARGUMENT

I. THE COURT SHOULD PRESERVE IN-FUSIO'S EXCLUSIVE RIGHTS FOR HALO

Under Ninth Circuit standards, preliminary injunctive relief is appropriate upon a finding of "'either a likelihood of success on the merits and the possibility of irreparable injury or that serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor.'" Cadence Design Sys., Inc. v. Avant! Corp., 125 F.3d 824, 826 (9th Cir. 1997) (injunction upon finding of copyright infringement). These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. U.S. v. Odessa Union Warehouse Co-op, 833 F.2d 172, 174 (9th Cir. 1987) (stating "well established" standards applicable to preliminary injunctions and citing Oakland Tribune, Inc. v. Chronicle Publ'g Co., 762 F.2d 1374, 1376 (9th Cir.1985)); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir. 2001) (directing preliminary injunction remain in place and citing Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 874 (9th Cir. 2000)).[4]

As set forth below, the court should preserve the status quo because irreparable harm will most certainly occur absent injunctive relief and In-Fusio is likely to prevail on the merits. Indeed, even if Microsoft quibbles over In-Fusio's likelihood of success, In-Fusio is still entitled to injunctive relief under the Ninth Circuit's sliding scale test since, at best for Microsoft, serious questions go to the merits, but the balance of hardships tips sharply in In-Fusio's favor.

[4] The standard for issuing a temporary restraining order is the same as for a preliminary injunction, but emphasizes irreparable harm since the purpose of a temporary restraining order is to maintain the status quo. Motor Vehicle Bd. of California v. Orrin W. Fox, et al., 434 U.S. 1345, 1347 n. 2 (1977).

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A. An Injunction Should Issue Preserving the Status Quo

"It is so well settled as not to require citation of authority that the usual function of a preliminary injunction is to preserve the status quo ante litem." Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 808 (9th Cir. 1963) cert. den. 375 U.S. 821 (1963) (injunction properly issued to preserve status quo and prevent licensor from terminating exclusive licensee and entering competition with licensee); Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725, 732 (9th Cir. 1999) (sliding scale test for injunctive relief applies when injunction seeks to preserve the status quo). The status quo is the last uncontested status which preceded the pending controversy. Bay Area Addiction, 179 F.3d at 732.

In this case, the status quo ante litem is In-Fusio that holds an exclusive right to exploit Halo in the mobile phone market. Indeed, there can be no dispute that as of the date of filing, the Agreement provides In-Fusio with that exclusive right, which should be preserved pending resolution of the contractual dispute between Microsoft and In-Fusio. Moreover, given the Agreement expressly prevents a party in breach from terminating the Agreement, the parties contemplated the preservation of their rights pending dispute resolution for claimed breaches. (Gross Decl., Exh. A, § 8.3).

The Ninth Circuit's analysis in Tanner Motor Livery is instructive. There, Avis purported to terminate Tanner's exclusive license to use the Avis name in Southern California and Nevada because, Avis claimed, Tanner had not paid all fees due. 316 F.2d at 806. Avis then granted its own subsidiary rights to use the Avis name in Tanner's exclusive territory. Id. In the litigation that followed, Tanner claimed it was not in default and any breaches were waived by Avis. Id. The District Court first enjoined Avis from competing with Tanner under

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the Avis name in the territory, but a different judge vacated that injunction and enjoined Tanner from using the Avis name during the litigation. Id. at 808. On appeal, the Ninth Circuit reversed and noted that the original injunction properly preserved the status quo pending the outcome of the litigation. Id. at 811. See also Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472, 476 (1969) (trial court properly preserved the status quo by enjoining Rick Barry from playing for San Francisco Warriors pending litigation over Barry's pre-existing contract with the Washington Capitols).

Likewise, here the status quo is that In-Fusio has an exclusive right to develop Halo games for the mobile phone market. Microsoft is purporting to change that status quo by issuing a termination notice. (Gross Decl., ¶ 16 and Exh. H). Given, as discussed below, Microsoft's performance under the Agreement is in serious question and thus its rights to terminate In-Fusio are dubious, the Court should preserve the status quo by prohibiting Microsoft from terminating In-Fusio's exclusive rights to exploit Halo in the mobile phone market. Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d at 811 (injunction proper to prevent licensor from terminating exclusive licensee.)

B. In-Fusio Is Likely To Prevail On The Merits

Under Washington law, a breach of contract is actionable where "the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant." Nw. Mfrs. v. Dep't of Labor, 78 Wash. App. 707, 712 (1995) (citing Larson v. Union Inv. & Loan Co., 168 Wash. 5 (1932)). "A material failure by one party gives the other party the right to withhold further performance as a means of securing his expectation of an exchange of performances." Bailie Commc'n v. Trend Bus. Sys., 53 Wash. App. 77, 81 (1988) (citing Restatement (2d) Contracts § 241 cmt. c (1981)).

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Washington law also implies in every contract a covenant of good faith and fair dealing. In re Hollingsworth's Estate, 88 Wash. 2d 322, 328 (1977) (citing Miller v. Othello Packers, Inc., 67 Wash. 2d 842, 844 (1966) ("There is an implied covenant of good faith and fair dealing in every contract, a covenant or implied obligation by each party to cooperate with the other so that he may obtain the full benefit of performance."). And, where one party must perform to the satisfaction of another, any dissatisfaction with the performance must be genuine, i.e., made in good faith. In re Hollingsworth's Estate, 88 Wash. 2d at 328 (when party's dissatisfaction is with the bargain he made, he may not avoid his own performance under the guise of dissatisfaction with the other party's performance). See also Zim v. W. Publ'g Co., 573 F.2d 1318, 1325 (5th Cir. 1978) ("Under these circumstances, we have no hesitation in concluding that Zim failed to exercise his power of disapproval within the time and in the manner required, and in so doing effectively waived his right to reject the proposed revisions.")

Here, under the Agreement, In-Fusio had the exclusive right to exploit Halo in the mobile phone market in return for payments totaling $2 million. (Gross Decl., Exh. A, §§ 2.1 (exclusive license), 6.2 (payments). The parties agreed on an explicit concept proposal and review protocol, in which In-Fusio was charged with envisioning the nature of the Halo game to be developed and Microsoft had approval rights, which were not to be unreasonably withheld. (Id. at §§ 4.6.1, 4.6.2). To the extent Microsoft in good faith withheld approval, it was required to advise In-Fusio in writing what was necessary to make the In-Fusio concept acceptable to Microsoft. (Id. at § 4.6.5).

There will be no dispute that In-Fusio made the initially required payment and that In-Fusio submitted multiple concepts for Microsoft's approval. (Lapin Aff., ¶ 12 (timely

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payment); Gross Decl., ¶¶ 6, 7, 10 (multiple concepts submitted to Microsoft.) There is no dispute that In-Fusio first developed a "Halo Portal" at significant cost in the hundreds of thousands of dollars with Microsoft's approval, which was to be a loss-leader to attract interest in a Halo mobile game. (Gross Decl., ¶ 5.) There will be no dispute that Microsoft thereafter ultimately rejected every single In-Fusio proposal for a Halo game.[5] (Gross Decl., ¶ 6, 7, 9, 10, 15 (Microsoft rejects proposals).

Microsoft implicitly acknowledged its failure to perform and the resulting financial impact on In-Fusio when Microsoft first agreed to put off the June 1, 2006 $500,000 royalty payment due from In-Fusio and then sought to renegotiate In-Fusio's royalty obligations in return for In-Fusio agreeing to dumb-down its proposed Halo concepts. (Gross Decl., ¶ 11) Finally, notwithstanding its contractual and legal obligation to act in good faith in approving In-Fusio's design concepts, Microsoft has never been able to articulate a principled basis for its repeated rejection of those concepts. (Gross Decl., ¶ 6, 10). Accordingly, under Washington law, Microsoft materially failed to meet its contractual obligations and In-Fusio is likely to prevail on the merits. Nw. Mfrs. v. Dep't of Labor, 78 Wash. App. at 712.

C. In-Fusio Will Suffer Irreparable Harm If Microsoft Terminates The Agreement

Preliminary injunctive relief against threatened conduct is appropriate where money damages cannot compensate the plaintiff for the resulting harm. Triad Sys., Corp. v. Se. Express Co., 64 F.3d 1330, 1334-1335 (9th Cir. 1995) ("The basis of injunctive relief in the federal courts is irreparable harm and inadequacy of legal remedies."). In the context of loss of an exclusive right, "[i]Irreparable harm is an injury that is not remote or speculative but actual and imminent, and 'for which a monetary award cannot be adequate compensation.' "

[5] On November 11, 2006, Microsoft asked for more detail on an In-Fusio concept for Halo. Sixteen days later and before In-Fusio could respond, Microsoft sent a notice of termination and indicated that Microsoft would take no further steps under the Agreement.

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Mastercard Int'l Inc., v. Fédération Internationale De Football Ass'n, --- F.Supp.2d ----, 2006 WL 3531196 at * 56 (S.D.N.Y. Dec. 7, 2006) (entering permanent injunction against sports sanctioning body from terminating Mastercard world-wide sponsorship of soccer World Cup competition). See also Tom Doherty Assocs., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 37 (2d Cir. 1995) (enforcing a publisher's right of first refusal with respect to the Power Rangers, on the grounds that when "the supplier of a unique, lucrative and possibly short-lived property refuses to supply that property in breach of a contract, the distributor is entitled to an injunction compelling performance").

In the context of exclusive rights to exploit intellectual property, such irreparable harm includes loss of goodwill and loss of associated unquantifiable economic benefits. For example, in Mastercard Int'l Inc., v. Fédération Internationale De Football Ass'n, Mastercard had an exclusive financial services sponsorship contract with Fédération Internationale De Football Ass'n ("FIFA") for the World Cup cycle leading up to the 2006 soccer World Cup. Id. at *1. The contract gave Mastercard the first right to acquire the FIFA World Cup financial services sponsorship for the following four year World Cup cycle. Id. While Mastercard and FIFA negotiated and Mastercard signed an agreement for the post-2006 World Cup cycle, FIFA was also negotiating with VISA for the same sponsorship. Id. After Mastercard signed and returned the new agreement, FIFA purported to terminate the previous contract and then entered into an agreement with VISA for the post-2006 cycle. Id. at *1-2.

In entering a permanent injunction commanding FIFA to proceed with Mastercard, the court found Mastercard would suffer several forms of irreparable harm if an injunction did not issue. First, Mastercard would lose the "indisputably unique and irreplaceable sponsorship property." Id. at *56 (relying on Tom Doherty Assocs. Inc. v. Saban Entm't, Inc., 869 F. Supp. 1130, 1141 (S.D.N.Y. 1994). Second, Mastercard would lose indeterminate existing and

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prospective goodwill. Id. (also relying on Doherty, 60 F.3d at 38 ("we hold that a loss of prospective goodwill can constitute irreparable harm")). Third, Mastercard would lose significant competitive advantage. Id. (relying on Muze v. Digital On-Demand, Inc., 123 F. Supp. 2d 118, 131 (S.D.N.Y. 2000)). And, above all else, Microsoft would suffer a threatened imminent loss that will be very difficult to quantify at trial. Id. (citing Doherty, 60 F.3d at 38; Muze, 123 F. Supp. 2d at 131 (granting injunction where "short--and long-term harm" was not "precisely calculable in money damages")).

Here, In-Fusio will suffer the same irreparable harm if Microsoft is permitted to terminate In-Fusio's exclusive license to develop Halo in the mobile phone market. Indeed, given Halo's enormous popularity and the prestige that is associated with developing mobile games based on it, the exclusive right to exploit Halo in the mobile phone market is unique and irreplaceable. (Lapin Aff., ¶ 17). Indeed, In-Fusio's receipt of exclusive rights to develop Halo games was widely reported in the United States and Europe as a major achievement for In-Fusio. (Lapin Aff., ¶ 10) Accordingly, the loss of Halo development rights will cause incalculable injury to In-Fusio's present and prospective goodwill in the mobile application programming industry. (Lapin Aff., ¶ 18).

In sum, such potential irreparable harm to In-Fusio warrants injunctive relief. Tom Doherty Assocs., Inc. v. Saban Entm't, Inc., 60 F.3d at 38 (loss of prospective goodwill can constitute irreparable harm where a product has no reasonable substitute and presents a truly unique opportunity, such as the Power Rangers, which are a unique product with an established exceptional appeal to children). And, in this case, unlike in Mastercard and Tom Doherty, In-Fusio seeks only a prohibitive injunction to preserve the status quo and prevent Microsoft from terminating an exclusive right between them, not a mandatory injunction prohibiting Microsoft

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from entering into agreements with third parties. Compare Tom Doherty, at 35-36 (upholding on appeal that mandatory portion of a preliminary injunction commanding grant of license to movant was mandatory); Mastercard at *71 (granting Mastercard permanent injunctive relief).

II. EXPEDITED DISCOVERY IS REASONABLE AND NECESSARY

This Court may allow expedited discovery upon a showing of good cause. Fed. R. Civ. P. 26(d), 34(b); Semitool, Inc. v. Tokyo Electron Am., Inc., 208 F.R.D. 273, 276 (N.D. Cal. 2002) (ordering expedited discovery). Good cause exists "where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." Semitool, 208 F.R.D. at 276 (noting that other courts have held similarly). Expedited discovery in this case will assist the administration of justice and conserve party and judicial resources by allowing In-Fusio to rapidly seek a preliminary injunction to prevent irreparable harm by Microsoft's threatened termination of the Agreement before the parties engage in expensive, full-scale discovery, enter a case management order or make mandatory disclosures. Semitool, 208 F.R.D. at 276 (benefits of expedited discovery to the administration of justice outweigh any prejudice to defendants).

In-Fusio's proposed discovery is narrowly tailored to only three requests designed to obtain information and documentation that is both central to the underlying case and easily accessible to Microsoft such that it will suffer no prejudice in responding before the time that the Federal Rules of Civil Procedure generally allow. Semitool, 208 F.R.D. at 276 (allowing narrowly-tailored discovery of documents). Moreover, within the normal course of discovery, Microsoft will be required to produce all of the documents In-Fusio now requests. Attached as Exhibit A to the proposed order is a copy of the proposed, expedited document requests.

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In contrast, In-Fusio is likely to be prejudiced if it must wait the normal time to initiate discovery because it must rapidly seek preliminary injunctive to preserve the status quo before Microsoft deprives In-Fusio of the exclusive rights to exploit Halo in the mobile phone market. If In-Fusio is forced to wait it will be irreparably harmed by losing its exclusive license to develop, advertise, promote, market, distribute and sub-distribute, sell, license and sublicense Halo and related products for cellular phone use through out the entire world.

Furthermore, some of the information In-Fusio seeks here is electronic evidence that "can easily be erased and manipulated." See Physicians Interactive v. Lathian Sys., Inc., No. CA 03-1193-A, 2003 WL 23018270, at *10 (E.D. Va. Dec. 5, 2003) (allowing expedited discovery). Accordingly, In-Fusio also requests that this Court issue a document preservation order to require Microsoft to preserve and hold inviolate any documents, communications, or other information relating to the Agreement.

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CONCLUSION

Based on the foregoing, and in light of the irreparable harm that will be caused if Microsoft is not enjoined from terminating the Agreement, In-Fusio respectfully requests that its motion for a temporary restraining order be granted and the status quo preserved pending resolution of this matter.

Dated: December 19, 2006

By _____
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EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

IN-FUSIO, S.A., a French Corporation, Plaintiff, vs. MICROSOFT CORPORATION, a Washington Corporation, Defendant.	NO. FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Fed. R. Civ. P. 26 and 34, In-Fusio hereby requests that Microsoft produce any and all responsive, non-privileged Documents[1] in its possession, custody or control for inspection and copying within 72 hours from service hereof at Williams, Kastner & Gibbs, PLLC, Two Union Square 601 Union Street, Suite 4100 Seattle, Washington 98101, concerning, reflecting, relating to, or referring to:

DOCUMENTS REQUESTED

Request No. 1: Microsoft's review, analysis, evaluation, discussion, treatment and/or consideration of the Submissions made by In-Fusio pursuant to the Agreement, including, but

[1] *See Definitions and Instructions below.*

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not limited to, any and all documents and/or communications relating to Microsoft's planned or expected review, analysis, evaluation, discussion, treatment, and/or consideration of any and all anticipated or expected future Submissions.

Request No. 2: Microsoft's decision to demand In-Fusio make a second $500,000 payment under the Agreement after Microsoft agreed to postpone that payment, including, but not limited to, any and all documents and/or communications relating to or supporting the decision to re-set a deadline of October 20, 2006 for the payment.

Request No. 3: Microsoft's decision to draft and send the November 27th Letter, including, but not limited to, any and all documents and/or communications relating to or supporting the decisions to terminate the Agreement if In-Fusio did not pay $500,000 within 30 days.

DEFINITIONS AND INSTRUCTIONS

1. The meaning of all non-defined terms shall be in accordance with their ordinary and accepted usage.

2. In addition, "Documents" means the original and all non-identical copies (whether different from originals by reason of notations made on such copies or otherwise) of all papers; brochures; circulars; advertisements; letters; memoranda; minutes; e-mails; notes or records of meetings; reports; comments; affidavits; statements; summaries; messages; worksheets; notes; correspondence; surveys; interviews; diaries; calendars; appointment books; registers; travel records; stenographic notes; financial data; receipts; financial statements; annual reports; accountants' work papers; analyses; forecasts; statistical or other projections; newspaper articles; press releases; publications; tabulations; graphs; charts; maps; telegrams; books; facsimiles; agreements; opinions or reports of experts; records or transcripts of

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conversations, discussions, conferences, meetings or interviews, whether in person or by telephone or by any other means; printouts or other stores information from computer or other information retrieval systems; magnetic tapes, belts, and disks; e-mails (including their attachments); all data or information stored on computer-readable media, such as electro-magnetic or other disks, diskettes, hard drive disks, tapes, cartridges, DVD's, flash memory devices, and CD-ROM, including but not limited to, software, firmware, source code, and electronic mail; all drafts and preliminary copies of any of the foregoing; an all other forms or types of written or printed matter or tangible things on which any words, phrases or numbers affixed, however produced or reproduced and wherever located.

3. "Communication" means any oral, electronic or written transmission of information between persons, including but not limited to meetings, discussions, conversations, telephone calls, memoranda, letters, telecopies, telexes, facsimiles, conferences, emails or seminars.

4. "Relating to" means containing, consisting of, referring to, concerning, supporting, prepared in connection with, used in preparation for, commenting upon, quoting, regarding, involving, representing, evidencing, constituting, discussing, mentioning, containing, analyzing, embodying, reflecting, identifying, incorporating, describing, commenting on, referring to, considering, recommending, dealing with or pertaining to in whole or in part, or being in any way legally, logically or factually connected with or pertaining to, in whole or in part, the matter covered by a request.

5. The words "and" as well as "or" shall be construed disjunctively or conjunctively as necessary in order to bring within the scope of the request all answers that

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might otherwise be construed to be outside its scope.

6. The use of the male gender herein shall be construed to include the female gender and vice versa.

7. "In-Fusio" means plaintiff In-Fusio and its subgroups, subsidiaries, divisions, successor companies, predecessor companies, assignees, divisions, parent companies, and affiliates, and their respective officers, directors, shareholders, employees, agents, representatives, and attorneys, as well as any person or entity that has acted or purported to act on its behalf.

8. "Microsoft" means defendant Microsoft and its subgroups, subsidiaries, divisions, successor companies, predecessor companies, assignees, divisions, parent companies, and affiliates, and their respective officers, directors, shareholders, employees, agents, representatives, and attorneys, as well as any person or entity that has acted or purported to act on its behalf.

9. The "Agreement" means Contract No. 159824, a "Development and Distribution Agreement" entered into by In-Fusio and Microsoft on or about September 26, 2005 (the "Agreement").

10. The "Submissions" means any and all design documents, builds, deliverables, progress reports, versions, proposals, game concepts, portal concepts, game designs, and/or any other items or documents submitted by In-Fusio to Microsoft for Microsoft's consideration, review, evaluation, and/or approval pursuant to the Agreement.

11. The "June 1, 2006 payment" means the "Five hundred thousand dollars (USD$ 500,000) to be paid on or before June 1, 2006" by In-Fusio to Microsoft referenced in Section

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6.2 of the Agreement.

12. The "November 27th Letter" means the letter dated November 27, 2006 from Microsoft's counsel Kraig L. Martini Baker to In-Fusio.

13. For each and every Document that is produced, identify by number the specific Request or Requests pursuant to which the Document is being produced.

14. If an objection is made to any request contained herein, for each item or category objected to:

a. State the specific ground for each objection;

b. Identify each such document by giving its date, the name of each author (and each addresser, if different), the name of each addressee (and each recipient, if different) and by giving any other information necessary to identify such document or part thereof; and

c. Provide a description of the subject matter of each document or item.

15. If any document or part of any document requested is not produced, describe the factual basis for withholding the document or part, including any privilege asserted.

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16. This document request is continuing, and you have a duty seasonably to amend your responses and production if you later learn that the response and/or production is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to Microsoft during the discovery process or in writing.

Dated: December 19, 2006

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