

# Exhibit F

# Final Pretrial Hearing

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
LUFKIN DIVISION

ANASCAPE, LTD.	DOCKET 9:06CV158
VS.	MAY 1, 2008
	9:15 A.M.
MICROSOFT CORP., ET AL	BEAUMONT, TEXAS

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VOLUME 1 OF 1, PAGES 1 THROUGH 155

REPORTER'S TRANSCRIPT OF FINAL PRETRIAL HEARING

BEFORE THE HON. RON CLARK  
UNITED STATES DISTRICT JUDGE

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APPEARANCES:

FOR THE PLAINTIFF: DOUGLAS A. CAWLEY  
ANTHONY MATTHEW GARZA  
CHRISTOPHER THOR BOVENKAMP  
JAMIE MOZOLA SHOUSE  
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FOR THE DEFENDANT MICROSOFT CORP.:

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<p>1 FOR THE DEFENDANT NINTENDO OF AMERICA, INC.:</p> <p>2 LAWRENCE LOUIS GERMER 3 CHARLES W. GOEHRINGER, JR. 4 GERMER GERTZ 5 550 FANNIN 6 SUITE 500 7 BEAUMONT, TEXAS 77701</p> <p>8 ROBERT J. GUNTHER, JR. 9 WILMER HALE - NEW YORK 10 399 PARK AVENUE 11 NEW YORK, NEW YORK 10022 12 JOSEPH S. PRESTA 13 NIXON &amp; VANDERHYE 14 901 N. GLEBE ROAD 15 11TH FLOOR 16 ARLINGTON, VIRGINIA 22203 17 JAMES S. BLANK 18 LATHAM &amp; WATKINS 19 885 THIRD AVENUE 20 NEW YORK, NEW YORK 10022</p> <p>21 COURT REPORTER: CHRISTINA L. BICKHAM, CRR, RMR 22 FEDERAL OFFICIAL REPORTER 23 300 WILLOW, SUITE 221 24 BEAUMONT, TEXAS 77701</p> <p>25 PROCEEDINGS REPORTED USING COMPUTERIZED STENOGRAPHY; TRANSCRIPT PRODUCED VIA COMPUTER-AIDED TRANSCRIPTION.</p>	<p>1 and Microsoft have, in fact, settled; is that correct?</p> <p>2 MR. HEARTFIELD: That is correct.</p> <p>3 THE COURT: All right. Do one of you want to 4 outline what has been settled?</p> <p>5 MR. HEARTFIELD: Judge, Anascape and 6 Microsoft have settled all claims with prejudice. 7 Microsoft has taken a license to all patents and pending 8 applications. There is a lump-sum payment that will be 9 made within about 13 days from today. The settlement 10 document has been fully signed by both Anascape and 11 Microsoft. There is going to be a stipulated dismissal 12 filed Monday, May 5th; and we intend to attach the 13 settlement document with all terms at that time. If the 14 court would like to see the settlement agreement 15 in camera, I am prepared to give that to the court. If 16 Nintendo must see it, I can provide it to them under the 17 protective order.</p> <p>18 THE COURT: Does the settlement agreement -- 19 do the amounts paid and cross-licensing and so forth 20 cover all costs of court and attorney's fees?</p> <p>21 MR. HEARTFIELD: Yes. Yes, your Honor.</p> <p>22 THE COURT: All right. And let me hear from 23 Anascape, then. Is that your understanding of the 24 agreement?</p> <p>25 MR. CAWLEY: It is, your Honor.</p>
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<p>1 (REPORTER'S NOTES ANASCAPE V. MICROSOFT, 2 9:15 A.M., THURSDAY, 05/01/2008, BEAUMONT, TEXAS, 3 HON. RON CLARK PRESIDING)</p> <p>4 (OPEN COURT, ALL PARTIES PRESENT)</p> <p>5 THE COURT: All right. I call Anascape 6 versus Microsoft and Nintendo, Number 9:06cv0158. 7 Is Anascape ready?</p> <p>8 MR. CAWLEY: Good morning, your Honor. 9 Douglas Cawley for Anascape.</p> <p>10 THE COURT: Welcome back.</p> <p>11 MR. CAWLEY: Thank you, your Honor. It's 12 good to be back; and, yes, we're ready.</p> <p>13 THE COURT: Okay. And is Microsoft ready?</p> <p>14 MR. HEARTFIELD: Good morning, your Honor. 15 Thad Heartfield for Microsoft, and we are ready.</p> <p>16 THE COURT: Okay.</p> <p>17 MR. HEARTFIELD: We do have a settlement to 18 announce.</p> <p>19 THE COURT: Right. And you might as well 20 stay right there because that will be the first thing I 21 take up.</p> <p>22 And is Nintendo ready?</p> <p>23 MR. GUNTHER: Your Honor, Bob Gunther. 24 Nintendo is ready.</p> <p>25 THE COURT: Okay. I understand that Anascape</p>	<p>1 THE COURT: Okay. So, this settlement 2 agreement disposes of all of Anascape's claims -- past, 3 present and future -- dealing with the patents in 4 question, whether they were asserted or not, correct?</p> <p>5 MR. CAWLEY: Yes.</p> <p>6 THE COURT: Okay. And all possible causes of 7 action, whether they were asserted or not, whether it's 8 under patent or antitrust or tort law, contract law, in 9 other words --</p> <p>10 MR. CAWLEY: Yes, your Honor.</p> <p>11 THE COURT: -- it's everything?</p> <p>12 MR. CAWLEY: It's a complete, global release.</p> <p>13 THE COURT: Okay. And all possible 14 counterclaims of Microsoft for declarations of 15 invalidity, whether asserted or not, those are also 16 disposed of by this settlement, correct?</p> <p>17 MR. HEARTFIELD: Yes, your Honor.</p> <p>18 THE COURT: Okay. In that case I will expect 19 the settlement documents to be filed as you've stated 20 and will consider the cause of action between Anascape 21 and Microsoft to be dismissed.</p> <p>22 Anything further? I noticed someone was 23 making a comment. Is there something else that needed 24 to be added?</p> <p>25 MR. CAWLEY: Oh, no. There's nothing</p>

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<p style="text-align: right;">Page 22</p> <p>1 say "sale"; but it's an exclusive license and transfer 2 of all substantial rights. So, that's license 1; and, 3 in fact -- 4 THE COURT: And that's from Anascape -- it's 5 Anascape's patent to Sony, right? 6 MR. GUNTHER: That's correct. That's the 7 '606 patent. It has something to do with multiplying 8 sheets. Sony apparently infringed that patent. But 9 Mr. Armstrong has admitted in his deposition, as 10 Anascape's representative in this case, that Nintendo 11 does not infringe that patent. So, that's License 1; 12 although, I would frankly call it "Sale 1." That's the 13 sale of the '606 patent to Sony, \$10 million. 14 Then the second license, your Honor, is a 15 bulk license of every -- a nonexclusive license of 16 everything else, everything else that Anascape had at 17 that time both in terms of patents and patent 18 applications; and there was no value that was exchanged 19 for that. In fact, your Honor, in that part of the 20 license, the second part of the license, they explicitly 21 agreed -- there was a cross-license of some Sony 22 technology, some three Sony patents; and I think it was 23 39 patent and patent applications from Anascape. They 24 said we can't value these; and, so, we're not going to 25 have any exchange of money with respect to them at all.</p>	<p style="text-align: right;">Page 24</p> <p>1 improper under 408. But even if your Honor doesn't 2 agree with me on 408, on 403, given the incendiary 3 nature of that document, it should be out. 4 And, your Honor, while you're looking at 5 that, let me just say one last thing. Their expert -- 6 their damages expert says that this agreement is not 7 instructive of a reasonable royalty in this case. And 8 that goes directly to the 403 point, as well. 9 THE COURT: And I guess that was my last 10 question on that, is why should this come in if your 11 expert is saying it is not instructive? If everyone 12 agrees it is not instructive, what's the point? 13 MR. CAWLEY: Well, I don't think everyone 14 does agree that it's not instructive, your Honor. He 15 considered many factors of which this was only one. But 16 clearly under Georgia-Pacific, there's no question that 17 prior licenses relating to the technology are highly 18 relevant. And their expert considered this agreement. 19 It's all over his report. 20 THE COURT: I guess in my mind that's what's 21 kind of odd, because usually defendant really wants one 22 of these lump-sum relatively small-dollar payments. I 23 mean, \$10 million is a lot of money to everybody else in 24 the world but given the amounts that are being asked for 25 in this case -- if defendant was so unfortunate as to</p>
<p style="text-align: right;">Page 23</p> <p>1 And, your Honor, to make the cheese more binding, it 2 wasn't just a bulk transfer, a free cross-license of 3 patents. The patent that's involved in this case, in 4 this suit, wasn't even a patent then. It was a patent 5 application. 6 So, your Honor, in terms of Sony, the really 7 problematic thing from our point of view, your Honor -- 8 and, now, I recognize I'm getting past your specific 408 9 question. Butt really problematic thing for us is that 10 that goes in front of the jury. The jury's going to 11 look at it and say, boy, Sony paid them 10 million 12 bucks. You know, these patents must have some value. 13 And why isn't Nintendo doing that? 14 And, your Honor, the unfairness to us in 15 terms of that, the unfair prejudice to us, is that the 16 '606 patent where the \$10 million was paid, that has 17 nothing to do with this case; and they're not suing us 18 on it. That's A. And, B, with respect to the patents 19 that are -- that were bulk transferred cross-licensed 20 for free, there is absolutely no nexus that that '700 21 patent application that was part of that nonexclusive 22 grant of the bulk license had any value to Sony or to 23 anyone; and, in fact, they made that part of the free 24 exchange. 25 So, your Honor, that's why we think it's</p>	<p style="text-align: right;">Page 25</p> <p>1 get an adverse verdict on liability, they would probably 2 be quite happy to get a 10 million-dollar lump-sum 3 verdict on damages so -- 4 MR. CAWLEY: Well, we're going to have to 5 basically explain that away, your Honor. That's 6 absolutely correct. 7 THE COURT: Well, that's what I'm saying is 8 it's an odd -- usually the arguments are going the other 9 way. You're trying to keep it out -- the plaintiffs 10 trying to keep out the lump sum; the defendants are 11 trying to get it in. 12 MR. CAWLEY: That's very true. 13 THE COURT: All right. I am familiar with 14 the Georgia-Pacific factors, obviously, and the Hanson 15 case; and it's not much different than the law on proof 16 of value for almost anything, including condemnation or 17 land. And the cases make it quite clear that we're 18 supposed to be looking at this hypothetical willing 19 buyer, willing seller; and settlements made under the 20 threat of litigation or as part of litigation or that 21 have some other factor in there that really makes them 22 based on something other than a desire to exchange the 23 properties start to become suspect. And it's on a 24 continuum. I mean, clearly if it's in the middle of a 25 lawsuit and the settlement of a lawsuit, those are out.</p>

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<p>1 The problem I'm having here, as I mentioned 2 before, is that in the sale of patent property, since 3 what you have in a patent is intellectual property right 4 and basically the right to sue somebody and to exclude 5 them, there's always in the background, when someone 6 comes and says, "I want to sell you this," if they're in 7 the business of producing the same kind of product, the 8 threat of litigation. There is just no way to get 9 around it.</p> <p>10 I don't find that there is enough evidence 11 before me to find that that is Sony's basis. The 12 negotiations went on for some four years. Counsel's 13 quite correct. The documents do have warnings on them 14 and protections on them, but that is probably -- or 15 that, not probably, is the kind of thing that prudent 16 lawyers will probably do.</p> <p>17 On balance I can't see, though, that there's 18 been a showing that this could not be considered by 19 experts as some indication of what a reasonable royalty 20 would be under the Georgia-Pacific factors. And the 21 fact that defendant's expert has considered it and 22 plaintiff's expert has indicated that perhaps it is less 23 probative -- I think the term he used was "not 24 instructive" -- reduces any possibility of unfair 25 prejudice to defendant by bringing this in. I mean,</p>	<p>1 ruling on everything else.</p> <p>2 And the reason I'm handing those to you is -- 3 and, again, I'm not asking for arguments on rehash; but 4 if there is some question -- last night, for example, I 5 found that on one of the rulings either a typo or my 6 mistake had put basically an incomprehensible ruling 7 there in that answer block; and when I proofread it, I 8 realized this doesn't make any sense. Now, as you read 9 through those, I don't really need to know which ones 10 you disagree with. I assume if I ruled against you, you 11 disagree with me. But if there is something there that 12 is just incomprehensible, for example, on the order on 13 plaintiff's motion in limine that I think you already 14 have and then when you get this one, let me know; and 15 we'll deal with it right now. I want to be sure that 16 we're at least clear on the ground rules right now.</p> <p>17 Now, let's take a look at the objections to 18 exhibits. And I guess I understand that there is a 19 tendency to -- and I don't want to cast any aspersions, 20 and I used to really dislike certain judges when I was 21 younger who were hassling attorneys. That just didn't 22 seem appropriate. But let's take a look at this Trial 23 Exhibit 37, DX 37, which is on page 4 of this 24 defendant's responses chart, at least on my copy of it. 25 So, we have Defendant's Exhibit 37. We have</p>
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<p>1 you've got plaintiff's expert himself saying this isn't 2 one of the things he relied on. Although, it is one of 3 the things to be considered. And I have to weigh that 4 against the problem of in many of these patent cases 5 there may not be a large number of prior licenses in the 6 general field.</p> <p>7 The argument as to the \$10 million was for 8 another patent, that doesn't make it inadmissible. I 9 think the test is licenses for similar kinds of 10 technology, and that can be brought out in 11 cross-examination.</p> <p>12 So, for those reasons and -- and admittedly 13 it's a question that with a little more evidence one way 14 or the other might come up with a different ruling. I 15 just don't find that there is enough here to show that 16 this negotiation and this license was the result of 17 threatened litigation, and that's partly on the basis 18 that we would get to the point where almost every 19 negotiation of patent rights has that threat behind it. 20 So, I am going to overrule the defendant's motion in 21 limine on that point.</p> <p>22 MR. GUNTHER: Thank you, your Honor. 23 THE COURT: And then -- that's the only 24 question I had on defendant's, and what we'll do before 25 you leave is we'll go ahead and get you the printed</p>	<p>1 plaintiff's objection about failure to timely identify 2 or produce as required; and the response is that it was 3 provided in defendant's identification of prior art 4 pursuant to 35 USC, Section 282. I'd be interested to 5 know which attorney came up with that. I mean, who is 6 the attorney who actually came up with that response?</p> <p>7 Okay. You'll take responsibility? 8 MR. BLANK: I'll take responsibility. 9 THE COURT: All right. 10 MR. BLANK: I'll also blame it on the 11 Microsoft attorneys who aren't here anymore. 12 THE COURT: All right. 13 MR. BLANK: I'll take joint responsibility on 14 that one.</p> <p>15 THE COURT: Let me -- I don't know if you 16 have read the Local Rules or not, but we're not the only 17 district that has them -- or read any of the cases that 18 talk about the reasoning for the Local Rules. But the 19 whole reason we have the requirement for infringement 20 contentions and invalidity contentions is 35 USC, 21 Section 282, with about a 30-day notice before trial, as 22 you can imagine, would be literally impossible. I mean, 23 I don't -- you know, you must have sat through this case 24 long enough to understand that there's just no way if 25 everybody -- if they had dumped all their stuff on you</p>

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<p style="text-align: right;">Page 146</p> <p>1 word, your Honor, is that it seems to imply some kind of 2 intent, that it seems to require that you somehow get a 3 designer who testifies, Yeah, well, it was my intention 4 that it do certain things. 5 THE COURT: Okay. 6 MR. CAWLEY: I know that's not required by 7 the law, and it's not required in the claim. This is an 8 apparatus claim. And the testimony that your Honor will 9 hear in the trial is that game designers, the people who 10 write the software, the actual game themselves, need to 11 have a controller that is capable of doing a wide 12 variety of things so that they can use that essentially 13 as a tool to design their games. And they may use all 14 of the tools that comes in that controller toolbox, and 15 they may choose not to. 16 What Nintendo is trying to do here is trying 17 to say, Well, wait a minute. Unless you can go find a 18 game where a designer has chosen to use the capability 19 that we provide people in our controllers, then you 20 don't show infringement. But the answer is the 21 controller is capable of what the controller is 22 capable -- of what it's capable of whether or not there 23 is any proof that it actually got used that way. The 24 proof is in the controller itself, in the apparatus. 25 It's not a method claim; it's an apparatus claim.</p>	<p style="text-align: right;">Page 148</p> <p>1 go ahead and -- because I may not have time and may not 2 have the cases in front of me. Let me go ahead and 3 state for the record my basis for the decision. 4 I'm looking at the Microprocessor Enhancement 5 Corporation versus Texas Instruments case. That was 6 decided April 1 of 2008, and it dealt with a somewhat 7 similar issue and talked about the IPXL Holdings case 8 and pointed out the problem of a claim being invalid for 9 indefiniteness on the grounds that the claim 10 impermissibly mixes two distinct classes of patentable 11 subject matter and that, therefore, they are insolubly 12 ambiguous. And in that particular case, there was 13 claim 1 which was a method claim and claim 7 which was 14 an apparatus claim. 15 They point out that there was no ambiguity in 16 that case in claim 1 because it was clearly limited to 17 practicing the method. And, similarly, claim 7, the 18 apparatus claim, doesn't cover both an apparatus and a 19 method. And it referred back to the Halliburton case 20 that I mentioned, Halliburton Energy Services versus M-I 21 LLC at 514 F.3d 1244, page 1255, Fed Circuit 2008, where 22 the court said that an apparatus claim is not 23 necessarily indefinite for using functional language. 24 And where you get into trouble, the court is 25 saying, is where functional language fails to provide a</p>
<p style="text-align: right;">Page 147</p> <p>1 THE COURT: All right. 2 MR. PRESTA: Which would be fine with us, 3 your Honor. If the word "capability" was in the claim, 4 we wouldn't have a dispute. The problem is they have to 5 live with the way the claim is drafted. That's just the 6 point we would make. They want to insert words into the 7 claim. All we want the court to do is be true to the 8 words as they are. 9 So, it's true we don't really have a claim 10 construction for that because we want the words just to 11 be construed the way they read without inserting 12 words -- without inserting extra words. The plaintiff 13 would like to insert words into it, and we just want it 14 to read as is. 15 THE COURT: The words mean exactly what you 16 say they mean and nothing more and nothing less. I 17 think that was the "Red Queen." 18 MR. PRESTA: And, your Honor, again, we truly 19 are bringing these issues up only because we think they 20 are going to come up at trial. And whether your Honor 21 feels the need to rule on them now, we think it was our 22 duty least at to give you a heads up on these issues. 23 And that's the real goal, is to give you a heads up. 24 THE COURT: All right. Well, to save some 25 time at trial since the dispute comes out, I'm going to</p>	<p style="text-align: right;">Page 149</p> <p>1 clear-cut indication of the scope of the subject matter 2 embraced by the claim and, thus, can be indefinite. And 3 they're referring back there to claim 7. 4 In this particular case we're looking at 5 claim 19. It's quite clearly an apparatus claim, "a 6 hand operated controller." And those second and third 7 elements discuss that it is capable of doing something, 8 It is not a method claim as to how it is used; it is 9 talking about the controller itself capable of 10 "providing outputs at least in part controlling 11 objects." 12 And since everyone agrees that I don't have 13 to try to re-construe it so that I redefine the words 14 "providing outputs at least in part controlling objects 15 and navigating a viewpoint" -- everyone seems to 16 understand what that all means -- other than the scope, 17 I will state for the record that in this court's view 18 based on my review of those cases and based upon the 19 specification itself which talks about it and the claim 20 language itself, it seems fairly clear that those are -- 21 that 19 reads on a -- or describes an apparatus that can 22 do these things. 23 If that provides some clarity, I would -- 24 well, not "if" it provides clarity. I would -- you 25 know, that's going to be my ruling on that. Is there</p>

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1 important book and it is just difficult for me to find  
2 it.

3 Anything else, Mr. Germer?

4 MR. GERMER: Yes, sir, one other fairly small  
5 point but we just -- we can't work out an agreement.  
6 You said in your order that if there is someone that is  
7 necessary to the plaintiff's case, one of our people,  
8 that we're to make them available. We've done that as  
9 to one of the witnesses they have asked for. We're  
10 going to have a technical person available for them in  
11 their case on Wednesday. But we do have a dispute about  
12 Howard Cheng. And you may recall the court has said  
13 that the plaintiffs can go into the fact that --

14 MR. CAWLEY: We give up. We'll abandon our  
15 request for Mr. Cheng in our case-in-chief.

16 THE COURT: Okay.

17 MR. CAWLEY: But we do understand you are  
18 going to have Mr. Ikeda available for --

19 MR. GERMER: We'll have Mr. Ikeda available  
20 on Wednesday. That's what y'all told me, Wednesday or  
21 Thursday. But we'll have him Wednesday if you want him.

22 MR. CAWLEY: I think that's appropriate.  
23 Thank you.

24 THE COURT: Okay, good.

25 MR. GERMER: Thank you.

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1 THE COURT: Nothing else?

2 All right. In that case you are excused. I  
3 will see you, then, on Monday.

4 As in the past, please be sure that Ms. Chen  
5 has the cell phone number of someone on each side who  
6 can be contacted in case something comes up so we can  
7 get ahold of you, you know, locally and every other way.

8 And if some dispute starts to arise, if  
9 you'll let her know, it gives me a chance to get  
10 prepared so you actually get something close to a  
11 considered ruling rather than just a quick shot from the  
12 hip. That would seem to be better to give me a chance  
13 to actually think about it before I rule.

14 All right. In that case you are excused, and  
15 the court is in recess.

16 (Proceedings concluded, 2:19 p.m.)

17 COURT REPORTER'S CERTIFICATION

18 I HEREBY CERTIFY THAT ON THIS DATE, MAY 2,  
19 2008, THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE  
20 RECORD OF PROCEEDINGS.

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23  
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40 (Pages 154 to 155)

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