

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a
Washington corporation,

Plaintiff,

v.

IMMERSION CORPORATION, a
Delaware corporation,

Defendant.

No. 2:07-cv-936RSM

**[PROPOSED] STIPULATED
PROTECTIVE ORDER
REGARDING TREATMENT BY THE
PARTIES OF CONFIDENTIAL
DOCUMENTS**

I. STIPULATIONS

In connection with litigating the parties' respective claims asserted in this action, the parties expect that they will need to exchange documents and other information during discovery regarding non-public, confidential, and sensitive commercial information, including without limitation confidential business, financial, licensing, technical and trade secret information. This information is, by nature, highly confidential and proprietary to each party and deserving of protection regarding use and dissemination. Pursuant to Fed. R. Civ. P. 26(c)(7), the Court has the authority to issue an order that "a trade secret or other

1 confidential . . . or commercial information not be revealed or be revealed only in a
2 designated way." Accordingly, the parties request that the Court enter as an
3 Order the following Stipulated Protective Order ("Order") which shall govern the
4 use, handling and/or return of documents, depositions, deposition exhibits,
5 interrogatory responses, and other written recorded or graphic material produced
6 during discovery or on a party's own initiative for use in this action, and all copies
7 thereof, and shall govern the use, handling, and/or return of the documents,
8 materials and information.

9 1. Any party, or third party subject to discovery in this action, may
10 designate the information it produces as "Confidential" if it believes, in its good
11 faith judgment, that the material contains confidential, market sensitive or
12 proprietary information, including without limitation financial information, trade
13 secrets, product development information, personnel and payroll information or
14 other commercially sensitive or personally sensitive information of a non-public
15 nature. The party shall make this designation by placing on every document or
16 other material (including portions of deposition transcripts) containing such
17 information the legend "CONFIDENTIAL" (except that in the case of multipage
18 documents, the legend need only be placed on the first page of the document in
19 order for the entire document to be treated as "Confidential") prior to providing
20 such document or other material pursuant to this Order.

21 2. Any party may designate the information it produces as "Attorneys
22 and Consultants Only" if it believes, in good faith judgment, that the material is not
23 generally known to others and has significant competitive value such that
24 unrestricted disclosure to others would create a substantial risk of serious injury,
25 and which the Designating Party (*i*) would not normally reveal to third parties
26

1 except in confidence or has undertaken with others to maintain in confidence, or
2 (ii) believes in good faith is significantly sensitive and protected by a right to
3 privacy under federal or state law or any other applicable privilege or right related
4 to confidentiality or privacy. The party shall make this designation by placing on
5 every document or other material (including portions of deposition transcripts)
6 containing such information the legend "ATTORNEYS AND CONSULTANTS
7 ONLY" (except that in the case of multipage documents, the legend need only be
8 placed on the first page of the document in order for the entire document to be
9 treated as "ATTORNEYS AND CONSULTANTS ONLY") prior to providing such
10 document or other material pursuant to this Order.

11 3. When used in this Order, the word "documents" mean all written,
12 recorded or graphic matter whatsoever, however created and whatever the
13 medium on which it was produced or reproduced, including, but not limited to,
14 documents produced by any party, whether pursuant to Fed. R. Civ. P. 33 or 34,
15 subpoena, or by agreement, and may also include deposition transcripts and
16 exhibits, and any portions of any court papers which quote from or summarize any
17 of the foregoing. When used in this Order, the term "other information" means
18 any portion of any answer or response to any written discovery request.

19 4. All "Confidential" and "Attorneys and Consultants Only" documents
20 and all information contained therein, and any other confidential information, shall
21 be used by the parties to whom the documents are disclosed solely for the
22 prosecution and/or defense of this action, and shall not be further disseminated,
23 except as specifically set forth below.

24 5. Except with prior written consent of the party asserting confidential
25 treatment, or court order, documents designated as "Confidential" and the
26

1 information contained therein, and any other confidential information, may be
2 disclosed only to the following persons:

3 (a) counsel for the parties (including attorneys and staff
4 associated with or employed by the legal counsel);

5 (b) five (5) in-house business or legal representatives to whom
6 access to the designated materials is deemed necessary for the prosecution,
7 defense, or settlement of this litigation;

8 (c) court reporters and stenographers employed in connection
9 with this suit;

10 (d) outside consultants and experts employed by counsel of
11 record for the parties[, to the extent such consultants and experts are approved
12 pursuant to paragraph 7 below][**include if Immersion's Paragraph 7 is**
13 **included**]; and

14 (e) any witness or deponent at deposition, when such witness or
15 deponent is believed in good faith to be the author or recipient, or otherwise have
16 personal knowledge, of the documents or things designated as "Confidential" or
17 the contents thereof.

18 6. Except with prior written consent of the party asserting confidential
19 treatment, or court order, documents designated as "Attorneys and Consultants
20 Only" and the information contained therein, and any other confidential
21 information, may be disclosed only to the following persons:

22 (a) outside counsel of record for the parties (including attorneys
23 and staff associated with or employed by the outside legal counsel);

24 (b) court reporters and stenographers employed in connection
25 with this suit;

1 (c) outside consultants and experts employed by counsel of
2 record for the parties[, to the extent such consultants and experts are approved
3 pursuant to paragraph 7 below][**include if Immersion's Paragraph 7 is**
4 **included**]; and

5 (d) any witness or deponent at deposition, when such witness or
6 deponent is believed in good faith to be the author or recipient, or otherwise have
7 personal knowledge, of the documents or things designated as "Attorneys and
8 Consultants Only" or the contents thereof.

9 [7. Immersion asks that the following paragraph be included.

10 **Microsoft's Statement:**

11 Immersion requests that the following paragraph regarding pre-
12 disclosure of experts be included. Microsoft objects and contends that this
13 protection is inappropriate in this case. First, this is simply a breach of
14 contract case. This is not a case where the parties would be giving experts
15 computer code or financial information that should not be given to an expert
16 associated with a competitor. Second, pre-disclosure of experts violates the
17 work-product rule; the rules do not provide for any disclosure of experts
18 who will not testify at trial. Third, it is uncertain whether testifying experts
19 will be necessary or appropriate in this case. Any expert with whom
20 confidential material is shared must sign the attached acknowledgment in
21 any event.

22
23
24 **Immersion's Statement:**

1 Immersion seeks protection against Microsoft's potential unfettered
2 dissemination of Immersion confidential and business sensitive information
3 to "experts" and "consultants." Specifically, Immersion asks that the
4 Protective Order include a provision providing that a receiving party who
5 wishes to disclose the producing party's "Confidential" or "Attorneys and
6 Consultants Only" material to an expert or consultant must notify the
7 producing party of the identity of the expert or consultant before the
8 disclosure is made. The provision would simply require identification of the
9 expert or consultant's name, business address, employer, professional
10 experience, affiliations with the disclosing party, and an executed
11 agreement to be bound by the terms of the protective order. The provision
12 would allow the producing party an opportunity to object to such disclosure
13 for good cause, and if the matter is not resolved, a short amount of time to
14 file a motion with the court.

15 Such protection is routine in commercial litigation involving discovery
16 of confidential business information. Microsoft has propounded document
17 requests seeking Immersion confidential and business sensitive
18 information, including information related to pricing, budgets, financing, and
19 negotiations with Microsoft and third parties relating to licensing of
20 Immersion technology. Immersion takes great effort to guard the secrecy of
21 this information, and it would be of significant value to Immersion's
22 competitors. Microsoft's refusal to agree to such protection is unjustifiable.
23 Microsoft's argument that "this is simply a breach of contract case" misses
24 the point. The issue is not the parties' legal claims, but the nature of the
25 information sought to be disclosed to the expert or consultant. Microsoft's
26

1 speculation regarding two categories of information that it believes are not
2 likely to be disclosed to experts in this case (i.e., "computer code" and
3 "financial information") is irrelevant. In any event, Microsoft has specifically
4 sought discovery relating to Immersion's confidential business and financial
5 information. Moreover, Microsoft's claim that this provision "violates the
6 work-product rule" is without merit. The provision does not require
7 disclosure of facts known or opinions held by non-testifying experts. See
8 Fed. R. Civ. P. 26(b)(4)(B). It simply requires the identification of any expert
9 or consultant to whom the receiving party intends to disclose the producing
10 party's confidential information, and only in such detail that the producing
11 party may determine whether such disclosure represents an unreasonable
12 risk to its interests. Finally, Microsoft's argument that "it is uncertain
13 whether experts will be necessary or appropriate in this case" makes no
14 sense. If experts are not used, then Microsoft's objection to this provision is
15 moot. In that event, there would be no need to disclose any confidential
16 information to experts, and hence no need to disclose their identity.

17 [7. Before disclosing "Confidential" or "Attorneys and Consultants Only"
18 information to a person under Paragraph 5(d) and 6(c), the party that wishes to
19 make such a disclosure to an expert or consultant shall send a notice to the party
20 that produced the designated material that identifies the name, business address
21 and telephone number of such expert or consultant and their present employer, a
22 copy of the expert or consultant's most recent curriculum vitae, along with a
23 description of their consulting activities and job history for the past three years,
24 and past or present relationship, if any, with the party seeking to make the
25 requested disclosure, and an executed Acknowledgment Regarding Confidential
26

1 Information. The party that produced the designated material shall be entitled to
2 object to such disclosure to the expert or consultant within ten (10) business days
3 after receipt of the Acknowledgment of Protective Order and notice containing the
4 information required by this paragraph by stating in writing the reasons for the
5 objection to the requested disclosure. The parties shall meet and confer within
6 five (5) business days after service of an objection, and if the objection is not
7 resolved by the parties, the party that produced the designated material must file
8 and serve a motion to prevent disclosure within ten (10) calendar days after such
9 meet and confer, otherwise the objection shall be deemed withdrawn. No
10 disclosure shall be made to the proposed expert or consultant until the parties
11 resolve the matter, the objection is withdrawn, or the Court permits such
12 disclosure.]

13 7[8]. Before disclosing "Confidential" documents or information to any
14 person enumerated in paragraphs 5(b) or (e) above or "Attorneys and Consultants
15 Only" documents or information to any person enumerated in paragraphs 6(d)
16 above, counsel for the disclosing party must first inform that person that the
17 information or document to be disclosed contains confidential or proprietary
18 information which must be held in confidence and may be used solely for the
19 purpose of preparing for this litigation or settlement and, further, that these
20 restrictions are imposed by a Stipulated Protective Order signed by the parties
21 and their counsel and entered by the Court. Each person granted access to
22 "Confidential" or "Attorneys and Consultants Only" information shall not reveal or
23 disclose the contents of the confidential or proprietary information for any purpose,
24 including, without limitation, any business, professional, or commercial purpose,
25 other than those relating to this litigation. Each such person shall read this Order
26

1 or be advised by counsel as to its contents, and shall agree to be bound by its
2 terms by signing Exhibit A, attached hereto.

3 8[9]. It is the obligation of the party producing confidential or proprietary
4 documents to identify specific documents as “Confidential” or “Attorneys and
5 Consultants Only.” If the party receiving such documents objects to that
6 identification, and counsel for the parties are unable to resolve the objection
7 informally, the receiving party may file a motion with the Court requesting relief.
8 The burden of persuasion to justify the designation in any such challenge
9 proceeding shall be on the party asserting the designation. Unless and until the
10 Court issues a ruling allowing disclosure, all materials designated “Confidential” or
11 “Attorneys and Consultants Only” shall remain as designated.

12 9[10]. Upon the production of “Confidential” or “Attorneys and Consultants
13 Only” material from one party to another party, and in the normal course of
14 discovery, the receiving party may seek to depose a witness from the producing
15 party regarding these materials. During such a deposition, only counsel for the
16 parties, party representatives of the producing party, permitted party
17 representatives of the receiving party, expert witnesses or consultants for the
18 parties (if permitted to attend by the rules of civil procedure and/or agreement of
19 the parties), the witness, and the witness’s counsel may be present during any
20 portion of the interrogation concerning the material deemed “Confidential” or
21 “Attorneys and Consultants Only” except that party representatives of the
22 receiving party other than counsel may not attend any portion of the deposition
23 during which “Attorneys and Consultants Only” material is being reviewed or
24 discussed. If appropriate, the witness may be asked to review this Order and to
25 sign Exhibit A, attached hereto.

1 10[11]. Deposition transcripts shall be treated as “Attorneys and
2 Consultants Only” for a 21-day period following receipt of the transcript by all
3 parties. Within the 21-day time period, any party may make a preliminary
4 designation of the entire transcript, or portions of the transcript as “Confidential” or
5 “Attorneys and Consultants Only” by page and line number, by providing written
6 notice to all parties. Within 21 days after the day of the deposition, a designating
7 party must make a final designation, listing only those portions of the deposition
8 transcript by page and line that the designating party, in good faith, believes
9 should be protected.

10 11[12]. Documents containing “Confidential” material or “Attorneys
11 and Consultants Only” material of any party shall not be filed with the Court unless
12 it is necessary to do so for purposes of trial, substantive motions, including without
13 limitation, motions for preliminary injunction or summary judgment, or other Court
14 matters. The parties shall take all reasonable steps to file “Confidential” material
15 and “Attorneys and Consultants Only” material under seal pursuant to FRCP
16 26(c)(7) and Local Rule 5(g).

17 12[13]. Any party including “Confidential” material or “Attorneys and
18 Consultants Only” material in a filing with the Court (whether in pleadings,
19 declarations, exhibits, or otherwise) shall file such material pursuant to Local Rule
20 5(g)(3), and shall contemporaneously with such filing, file a motion to seal any
21 “Confidential” material or “Attorneys and Consultants Only” material included in
22 the filing, regardless of which party designated the materials as such. Such a
23 motion to seal shall be noted for consideration seven (7) judicial days after filing in
24 accordance with Local Rule 7(d). The party filing the motion to seal will within the
25 motion make a good faith effort to show why any materials that it designated as
26

1 "Confidential" or "Attorneys and Consultants Only" should be sealed pursuant to
2 FRCP 26(c)(7) and Local Rule 5(g). If any documents or information included in
3 the court filing were designated "Confidential" or "Attorneys and Consultants Only"
4 by a non-moving party, that party may file a response in support of the motion to
5 seal no later than three (3) judicial days before the note date showing why such
6 materials should be sealed pursuant to FRCP 26(c)(7) and Local Rule 5(g).

7 13[14]. The Clerk of the Court is directed to maintain under seal all
8 documents and all transcripts of deposition testimony filed with this Court in this
9 litigation by any party which are, in whole or in part, designated as "Confidential"
10 or "Attorneys and Consultants Only," including all pleadings, deposition
11 transcripts, exhibits, discovery responses or memoranda purporting to reproduce
12 or paraphrase such information, **PROVIDED** that such documents are ordered
13 sealed by the Court or are the subject of a pending motion to seal. The party filing
14 such material shall designate to the Clerk that all or a designated portion thereof is
15 subject to this Order and is to be kept under seal. A complete, unredacted set of
16 documents filed under seal shall be provided by the filing party to opposing
17 counsel the same day the documents are filed.

18 14[15]. In the event the Court denies a motion to seal documents
19 containing either "Confidential" material or "Attorneys and Consultants Only"
20 material, the Clerk of the Court shall remove the documents subject to the motion
21 to seal from the Court file and such documents shall not be considered by the
22 Court. In this situation, not later than three (3) judicial days after the date of the
23 Court's denial of a motion to seal, the filing party may, at its option, (a) file
24 replacement documents that do not contain either "Confidential" material or
25 "Attorneys and Consultants Only" material, which shall be considered by the
26

1 Court, or (b) inform the Clerk of the Court that it may return to the Court file the
2 documents which had been previously removed and allow such documents to be
3 considered by the Court and to become part of the public Court record.

4 15[16]. In the event that any “Confidential” material or “Attorneys and
5 Consultants Only” material is used in any court proceeding in connection with this
6 litigation, it shall not lose its “Confidential” or “Attorneys and Consultants Only”
7 status through such use, and the parties shall take all steps reasonably required to
8 protect its confidentiality during such use.

9 16[17]. At the conclusion of the litigation of this action, or upon
10 settlement or dismissal, documents or other information designated as
11 confidential, and all copies of such documents or other information (other than
12 exhibits of record), shall be returned, within 30 days, to the source from which they
13 were produced or at the direction of the producing party, or destroyed with the
14 party destroying the documents providing a certificate of destruction to the
15 producing party.

16 17[18]. In the event additional parties join this action they shall not
17 have access to “Confidential” and “Attorneys and Consultants Only” material until
18 each newly joined party by its counsel has executed and filed with the Court its
19 agreement to be fully bound by this Order.

20 18[19]. The inadvertent production of a confidential document without
21 the “Confidential” or “Attorneys and Consultants Only” identifier shall not waive the
22 confidential nature of that document and does not alter the confidential or
23 proprietary nature of any other “Confidential” or “Attorneys and Consultants Only”
24 documents. Upon discovery that a confidential document has been produced
25 without the “Confidential” or “Attorneys and Consultants Only” identifier, the
26

1 producing party shall promptly notify the other parties, in writing, and shall request
2 that all parties treat the document in accordance with this Order. Such other
3 parties may challenge the confidentiality designation in accordance with
4 Paragraph 8 [9] **[if Immersion's paragraph 7 is included]**, supra.

5 19[20]. The undersigned parties and counsel shall keep material
6 identified as "Confidential" or "Attorneys and Consultants Only" in a secure and
7 segregated location, shall not disclose those documents, and shall not use or
8 disclose them other than as authorized by this Order. The undersigned parties
9 and counsel understand that this Order continues after the conclusion of this
10 litigation.

11 20[21]. In the event of a violation of this Order, the party injured by
12 the violation shall be entitled, in addition to any other rights and remedies it may
13 have at law or in equity, to have an injunction issued by the Court, or any court of
14 competent jurisdiction, enjoining the party violating this Order (and/or any third
15 party involved in the violation) from continuing such violation.

16 21[22]. To expedite the production of information, parties may
17 inadvertently produce documents that are privileged or otherwise immune from
18 discovery. Inadvertent production of privileged documents shall not be deemed a
19 waiver of any applicable privilege. If a party unintentionally discloses documents
20 or material that is privileged or otherwise immune from discovery, the party shall,
21 within seven (7) business days upon discovery of the disclosure, so advise in
22 writing the party to whom the materials were produced, request the documents or
23 material be returned or destroyed, and attach a privilege log with an entry
24 pertaining to the documents or material that is privileged or otherwise immune
25 from discovery. If that request is made and the privilege log provided, no party to
26

1 this action shall thereafter assert on this basis that the disclosure waived any
2 privilege or immunity. It is further agreed that the receiving party will return or
3 certify the destruction of the inadvertently produced documents or material, and all
4 copies and derivations, within two (2) business days of the receiving party's
5 receipt of a written request for the return of the documents or material. The
6 receiving party having returned the inadvertently produced documents or material
7 may thereafter seek production of the documents or material in accordance with
8 the Federal Rules of Civil Procedure. To the extent that any such inadvertently
9 produced material has been used, included, referenced or summarized in a
10 pleading, deposition or other proceeding, nothing in this paragraph shall require a
11 receiving party to purge, redact or excise any such information that has been used
12 in good faith before a request for the return of the unintentionally produced
13 material.

14 22[23]. Entry of this Order is without prejudice to the right of any party
15 to seek a protective order imposing additional restrictions upon discovery of
16 confidential information or documents, including but not limited to an order that
17 production thereof not be made.

18
19 DATED this 12th day of February, 2007.

20 RIDDELL WILLIAMS P.S.

21
22 By Blake Marks-Dias
23 Paul J. Kundtz, WSBA #13548
24 Blake Marks-Dias, WSBA #28169
25 Wendy E. Lyon, WSBA #34461
26 Attorneys for Plaintiff MICROSOFT CORPORATION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

BYRNES & KELLER LLP

By *B. McWilliams Dir per email authorization*
Bradley S. Keller, WSBA #10665
Jofrey M. McWilliam, WSBA #28441
Attorneys for Defendant IMMERSION CORPORATION

IRELL & MANELLA LLP

By *B. McWilliams Dir per email authorization*
Richard M. Birnholz
Morgan Chu
Alan J. Heinrich
David R. Kaplan
Pro Hac Vice Attorneys for Defendant IMMERSION CORPORATION

1 EXHIBIT A

2 **ACKNOWLEDGMENT REGARDING CONFIDENTIAL INFORMATION**

3
4 The undersigned hereby acknowledges that:

5 1. I have read and understand the terms of the Stipulated Protective
6 Order ("Order").

7 2. I hereby agree to be bound by the Order's terms with respect to any
8 documents, material, or information marked "Confidential" or "Attorneys and
9 Consultants Only" that are furnished to me as set forth in the Order.

10 3. I hereby agree not to disclose to anyone any documents, material or
11 information marked "Confidential" or "Attorneys and Consultants Only" other than
12 as permitted by the Order.

13 4. I hereby consent to the jurisdiction of the United States District Court
14 for the Western District of Washington with regard to any proceedings to enforce
15 the terms of the Order.

16 5. I hereby agree that any documents, materials or information marked
17 "Confidential" or "Attorneys and Consultants Only" furnished to me will be used by
18 me only for the purposes of this litigation and for no other purpose and will not be
19 used by me in any business affairs of my employer or of my own or be imparted
20 by me to any other person.

21 6. I declare under penalty of perjury that the foregoing is true and
22 correct.

23 [signature block on following page]
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

DATED this _____ day of _____, 2007.

Name

Title or Position

Telephone Number

1 II. ORDER

2
3 The Court hereby orders as stipulated by the parties above.

4 DATED this ____ day of _____, 2007

5
6
7
8 HONORABLE RICARDO S. MARTINEZ

9 Presented By:

10 RIDDELL WILLIAMS P.S.

11
12 By: *P. Marks-Dias*
13 Paul J. Kundtz, WSBA #13548
14 Blake Marks-Dias, WSBA #28169
15 Wendy E. Lyon, WSBA #34461
16 Attorneys for Plaintiff MICROSOFT CORPORATION
17 BYRNES & KELLER LLP

18 By: *B. Marks-Dias per email authorization*
19 Bradley S. Keller, WSBA #10665
20 Jofrey M. McWilliam, WSBA #28441
21 Attorneys for Defendant IMMERSION CORPORATION
22 IRELL & MANELLA LLP

23 By: *P. Marks-Dias per email authorization*
24 Richard M. Birnholz
25 Morgan Chu
26 Alan J. Heinrich
David R. Kaplan
Pro Hac Vice Attorneys for Defendant IMMERSION CORPORATION

1 CERTIFICATE OF SERVICE

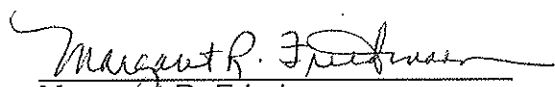
2 The undersigned certifies that on the 13th day of February, 2007, I
3 electronically filed the foregoing with the Clerk of the Court using the CM/ECF
4 system which will send notification of such filing to the following:

5 Bradley S. Keller
6 Jofrey M. McWilliam
Byrnes & Keller LLP
7 1000 Second Avenue, 38th Floor
Seattle, WA 98104-4082
8 Phone: (206) 622-2000; Fax: (206) 622-2522
Email: bkeller@byrneskeller.com
9 jmcmwilliam@byrneskeller.com and

10 Richard M. Birnholz
Morgan Chu
11 Irell & Manella LLP
1800 Avenue of the Stars, Suite 900
12 Los Angeles, CA 90067-4276
Phone: (310) 277-1010; Fax: (301) 203-7199
13 Email: rbirnholz@irell.com
mchu@irell.com

14
15 Alan J. Heinrich and David R. Kaplan of Irell & Manella are not being
16 served by mail or electronically; they are considered served through notification of
17 the two other associated attorneys at their firm.

18 Executed at Seattle, Washington this 13th day of February, 2007.

19 
20 Margaret R. Friedmann
Legal Secretary, Riddell Williams P.S.
21 1001 Fourth Avenue Plaza, Suite 4500
Seattle, WA 98154
22 Phone: (206) 624-3600
23 Fax: (206) 389-1708
email: mfriedmann@riddellwilliams.com