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7 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 MICROSOFT CORPORATION,

10 Plaintiff,

11 v.

12 IMMERSION CORPORATION,

13 Defendant.

CASE NO. C07-936RSM

ORDER GRANTING MICROSOFT'S
MOTION TO COMPEL

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15 **I. INTRODUCTION**

16 This matter comes before the Court on “Microsoft’s Motion to Compel Responses to
17 Requests for Production Nos. 3 and 19.” (Dkt. #38). Plaintiff Microsoft Corporation
18 (“Microsoft”) seeks an order from the Court compelling Defendant Immersion Company
19 (“Immersion”) to produce all settlement-related documents, including mediation documents,
20 from an underlying patent lawsuit between Immersion and the Sony Corporation (“Sony”).
21 Specifically, Microsoft argues that: (1) the documents at-issue are highly relevant; (2) they are
22 not protected by any privileges; and (3) even if any privileges applied, they have been waived
23 by Immersion. Immersion maintains that the information Microsoft seeks is irrelevant, and in
24 any event, privileged. Immersion further argues that no waiver of the privilege has occurred.

25 For the reasons set forth below, the Court GRANTS “Microsoft’s Motion to Compel
26 Responses to Requests for Production Nos. 3 and 19.”

27 **II. DISCUSSION**

1 **A. Background**¹

2 On September 11, 2007, Microsoft issued its first set of Interrogatories and Requests
3 for Production (“RFP”) to Immersion. (Decl. of Mark-Dias, ¶ 8). Immersion timely
4 responded on October 11, 2007. (*Id.* at ¶ 9). However, Immersion objected and ultimately
5 did not respond to RFP Nos. 3 and 19. Microsoft’s RFP No. 3 specifically provides:

6 Produce all documents and communications relating to the mediation of the Sony
7 Lawsuit with [Immersion], including documents prepared in anticipation of the
8 mediation, submitted to the mediator or sent to Sony.

8 (*Id.*, Ex. 7).

9 Microsoft’s RFP No. 19 provides:

10 Produce all communications with Sony relating to attempts to settle, resolve or
11 terminate the Sony Lawsuit with Sony, including any mediation, whether successful or
12 not.

12 (*Id.*).

13 Immersion specifically responded, among other things, that the documents were not
14 relevant, and that the production of such documents were protected by the mediation
15 privilege. (*Id.*). The parties conducted a Rule 37 conference with respect to this dispute to
16 no avail. (*Id.* at ¶ 10). Thus, Microsoft now brings the instant motion to compel.

17 **B. Relevance**

18 At the outset, the Court must determine the relevance of the requested information at
19 issue. Pursuant to Fed. R. Civ. P. 26(b), “[p]arties may obtain discovery regarding any
20 nonprivileged matter that is relevant to any party’s claim or defense.” *Id.* To be relevant,
21 evidence must have a “tendency to make the existence of any fact that is of consequence to
22 the determination of the action more probable or less probable than it would be without the
23 evidence.” Fed. R. Evid. 401. Information relevant to the subject matter of an action means
24 information that might reasonably assist a party in evaluating a case, preparing for trial, or

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26 ¹ The Court has previously discussed the relevant facts that gave rise to this lawsuit in its “Order
27 Denying Microsoft’s Motion to Disqualify.” (Dkt. #54). Accordingly, a detailed discussion of these facts
28 is unnecessary here.

1 facilitating settlement. *See generally Hickman v. Taylor*, 329 U.S. 495, 506-07, 67 S.Ct. 385
2 (1947). Relevance has been construed broadly to encompass any matter that bears on, or that
3 reasonably could lead to other matter that could bear on, any issue that is or may be in the
4 case. *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380 (1978). District
5 courts have a broad range of discretion to determine relevance. *Herbert v. Lando*, 441 U.S.
6 153, 177, 99 S.Ct. 1635 (1979).

7 Here, the Court finds that the information requested by Microsoft is highly relevant to
8 Microsoft's breach of contract claim. As both parties are fully aware, they entered into a
9 Sublicense Agreement ("SLA") wherein Immersion agreed to pay Microsoft certain amounts
10 in the event that Immersion settled its remaining claims with Sony in an underlying patent
11 litigation case. (Pl.'s Am. Compl., ¶ 9). Immersion and Sony eventually reached an
12 agreement, but at the heart of the instant lawsuit is whether this agreement triggered
13 Immersion's obligations to pay Microsoft under the SLA. Thus, settlement-related documents
14 between Immersion and Sony in the underlying patent litigation are directly relevant to
15 Microsoft's breach of contract claim, because such communications may potentially show
16 whether Immersion intended to keep its agreement with Sony within or outside the scope of
17 the SLA. Further, to the extent that Immersion argues that this case turns on whether it
18 "elected in its discretion to 'settle the Sony Lawsuit'" (Dkt. #41 at 11), settlement-related
19 documents are equally relevant to determine the veracity of this statement.

20 Immersion also argues that the SLA and its agreement with Sony are integrated
21 documents that speak for themselves, and therefore any prior documents regarding any
22 unsuccessful attempts to settle are irrelevant. While it is well established under Washington
23 contract law that contracts are interpreted according to the objective manifestation of the
24 parties, *see Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wash. 2d 493, 503, 115
25 P.3d 262 (2005) (citation omitted), Washington courts have held that a trial court may
26 examine extrinsic evidence "for the purpose of aiding in the interpretation of what is in an
27 instrument." *Berg v. Hudesman*, 115 Wash. 2d 657, 669, 801 P.2d 222 (1990). As a result,
28

1 the negotiating history of the agreement between Immersion and Sony in the underlying patent
2 litigation may potentially be relevant in interpreting the language of their final agreement.

3 Given the liberal rules regarding discovery, the Court will not preclude Microsoft from
4 having access to information that is potentially germane to its case on relevancy grounds.
5 Whether such information is subsequently admissible is a separate question that the Court will
6 determine when the time arises. *See In re Potash Anitrust Litig.*, 161 F.R.D. 405, 409 (D.
7 Minn. 1995) (“[O]ur analysis at [the discovery stage] is not driven by issues of admissibility,
8 but by fairly minimalistic precepts of relevancy.”).

9 **C. Mediation Privilege**

10 Having established that the documents at issue are relevant, the Court turns to whether
11 Immersion is justified in precluding the production of these documents based on the mediation
12 privilege. Initially, the Court addresses the respective parties’ arguments regarding
13 which specific mediation privilege applies to the instant motion. Immersion argues that the
14 California mediation privilege, as codified by California Evidence Code § 1119, applies
15 because California has the “most significant relationship” to the underlying events. (Dkt. #41
16 at 6). On the other hand, Microsoft argues that the Federal Rules of Evidence (“Fed. R.
17 Evid.”) govern the instant dispute. To support their argument, Microsoft contends that the
18 underlying mediation between Immersion and Sony was ordered and conducted pursuant to a
19 federal question case, and litigated in federal court. (Dkt. #44 at 5).

20 However, both parties’ arguments in this regard are unpersuasive given the plain
21 language of the Fed. R. Evid. 501. This rule provides in pertinent part:

22 [I]n civil actions and proceedings, with respect to an element of a claim or defense as
23 to which *State law supplies the rule of decision*, the *privilege* of a witness, person,
24 government, State, or political subdivision thereof *shall be determined in accordance*
25 *with State law.*

26 *Id.* (emphasis added).

27 In other words, a federal court is compelled to apply the state law privilege of the state
28 that supplies the rule of the decision. Therefore where a federal court obtains subject matter
jurisdiction by way of diversity of citizenship, privileges provided by state law shall apply. *See*

1 *Babasa v. LensCrafters, Inc.*, 498 F.3d 972, 974 (9th Cir. 2007); *Home Indem. Co. v. Lane*
2 *Powell Moss and Miller*, 43 F.3d 1322, 1328 (9th Cir. 1995); *see also Samuelson v. Susen*,
3 576 F.2d 546, 549 (3d Cir. 1978) (holding that Fed. R. Evid. 501 “requires a district court
4 exercising diversity jurisdiction to apply the law of privilege which would be applied by the
5 courts of the state in which it sits”). Federal common law generally applies only where subject
6 matter jurisdiction is based on a federal question. *See, e.g. Northwestern Memorial Hospital*
7 *v. Ashcroft*, 362 F.3d 923, 926 (7th Cir. 2004) (applying federal law of privilege in suit
8 brought under the United States Constitution); *see also United States v. Gertner*, 873 F.Supp.
9 729, 734 (D.C. Mass. 1995) (applying federal law of privilege in proceeding to enforce IRS
10 subpoena).

11 In the instant case, the parties are properly before the Court based on diversity of
12 citizenship.² Microsoft is asserting a breach of contract claim based on Immersion’s alleged
13 violation of the SLA entered into between the parties. The SLA explicitly provides that it
14 “shall be construed and controlled by the laws of the State of Washington.” (Decl. of Marks-
15 Dias, Ex. 2, SLA ¶ 8(c)). Thus, Washington State law “supplies the rule of decision,” and
16 Washington State’s law on privileges very clearly controls this discovery dispute.

17 **1. RCW 5.60.070**

18 Washington’s mediation confidentiality statute, enacted in 1991 and codified by RCW
19 5.60.070, provides in pertinent part:

20 If there is a court order to mediate, a written agreement between the parties to
21 mediate, or if mediation is mandated under RCW 7.70.100 [Mandatory mediation of
22 health care claims], then any communication made or materials submitted in, or in
connection with, the mediation proceeding . . . are *privileged and confidential* and are
not subject to disclosure in any judicial or administrative proceeding[.]

23 *Id.* (emphasis added).³

24 _____
25 ² Microsoft is a Washington corporation, Immersion is a Delaware corporation, and the amount in
26 controversy exceeds \$75,000. (Pl.’s Am. Compl., ¶¶ 1-3); 28 U.S.C. § 1332.

27 ³ The statute also contains a list of seven exceptions to the general exclusionary rule barring
28 mediation evidence, none of which apply here. *See* RCW 5.60.070(1)(a)-(g).

1 Because the widespread use of mediation is a relatively new phenomenon, Washington
2 state case law interpreting Washington’s mediation confidentiality statute is minimal at best.
3 Nevertheless, Washington cases that discuss this statute consistently use the rationale behind
4 Washington Evidence Rule (“ER”) 408 in analyzing RCW 5.60.070. *See Hoglund v. Meeks*,
5 139 Wn.App. 854, 877, 170 P.3d 37 (2007) (“We hold, therefore, consistent with ER 408,
6 that RCW 5.60.070 does not prohibit evidence of [a separate] mediation to prove [an]
7 entitlement of attorney fees in [this] litigation, a purpose separate from the statutorily
8 prohibited purpose of establishing liability in that underlying action.”); *Ladiser v. Huff*, 2004
9 WL 1057852, at *4 (2004) (citing ER 408 to find that RCW 5.60.070 does not apply where
10 settlement evidence “is offered not to prove the amount of the offer, but for another purpose,
11 such as to prove lack of good faith”).

12 Furthermore, ER 408 provides that “[e]vidence of (1) furnishing or offering to
13 furnish, or (2) accepting or offering or promising to accept a valuable consideration in
14 compromising or attempting to compromise a claim which was disputed as to either validity or
15 amount, is not admissible to prove liability for or invalidity of the claim or its amount.
16 Evidence of conduct or statements made in compromise negotiations is likewise not
17 admissible.” *Id.* However, ER 408 expressly states that “[t]his rule . . . does not require
18 exclusion when the evidence is offered for another purpose, such as proving bias or prejudice
19 of a witness [or] negating a contention of undue delay.” Washington courts have also
20 recognized that statements made in compromise negotiations may be admissible to prove a
21 lack of good faith. *See Matteson v. Ziebarth*, 40 Wash. 2d 286, 294, 242 P.2d 1025 (1952).

22 In an analogous situation to the case at bar, a Washington court specifically rejected an
23 argument that RCW 5.60.070 compelled exclusion of mediation evidence on the grounds that
24 ER 408 permitted evidence of compromise and offers to compromise for purposes other than
25 to establish liability. *See Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn.App. 383,
26 418-19, 161 P.3d 406 (2007). In that case, a group of insureds brought a breach of contract

1 and bad faith action against their insurer for the insurer's handling of an underlying wrongful
2 death claim brought by the insureds. *Id.* at 389. In the underlying proceeding, two
3 unsuccessful mediation sessions occurred. *Id.* at 391. The insurer argued that RCW 5.60.070
4 barred the admissibility of such evidence, but the court disagreed, finding that such evidence
5 was being offered for purposes other than liability. *Id.* at 419.

6 Similarly, the Court finds that Immersion is not entitled to the mediation privilege in
7 this case under Washington state law because, consistent with ER 408, the information
8 Microsoft seeks has no bearing on liability between Immersion and Sony in their underlying
9 mediation sessions. Additionally, the information Microsoft seeks has no bearing on the
10 validity of the amount that Immersion and Sony ultimately agreed upon to resolve their
11 dispute. Rather, the information Microsoft seeks is very clearly being sought for another
12 purpose: to determine whether the underlying agreement falls within the scope of the SLA
13 which is central to its breach of contract claim. Moreover, as *Sharbono* has made evident,
14 even communications made with respect to unsuccessful attempts to settle or mediate are
15 within the purview of admissible evidence under ER 408.

16 In any event, it is well established under Washington state case law that “[t]he burden
17 of showing that a privilege applies in any given situation rests entirely upon the party asserting
18 the privilege.” *Guillen v. Pierce County*, 144 Wn.2d 696, 716, 31 P.3d 628 (2001), *rev'd on*
19 *other grounds*, 537 U.S. 129, 123 S.Ct. (2003). Here, Immersion relies heavily on the
20 California mediation privilege to shield itself from producing the requested information at
21 issue. As established above, the California mediation privilege very plainly does not apply.
22 Thus, Immersion has not met its burden.

23 **2. Waiver of Privilege**

24 Because the Court has determined that the mediation privilege does not apply, it finds
25 it unnecessary to address the parties' arguments with respect to whether Immersion waived
26 the privilege.

27 **III. CONCLUSION**

1 Having reviewed Plaintiff's motion, Defendant's response, Plaintiff's reply, the
2 declarations and exhibits attached thereto, and the remainder of the record, the Court hereby
3 finds and orders:

4 (1) "Microsoft's Motion to Compel Responses to Requests for Production Nos. 3 and
5 19" (Dkt. #38) is GRANTED. Immersion is directed to respond to Microsoft's Requests for
6 Production Nos. 3 and 19 no later than twenty-one (21) days from the date of this Order.

7 (2) The Clerk is directed to forward a copy of this Order to all counsel of record.

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9 DATED this 24 day of March, 2008.

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11 RICARDO S. MARTINEZ
12 UNITED STATES DISTRICT JUDGE
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