

1 The Hon. Ricardo S. Martinez
2 Noted on Motion Calendar: March 28, 2008

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9 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

10 MICROSOFT CORPORATION, a
11 Washington corporation,

12 Plaintiff,

13 v.

14 IMMERSION CORPORATION, a
15 Delaware corporation,

16 Defendant.

NO. CV7-936RSM

**MICROSOFT'S OPPOSITION TO
IMMERSION'S MOTION TO
COMPEL PRODUCTION OF
DOCUMENTS RESPONSIVE TO
REQUEST NOS. 53, 54 AND 71**

17 **I. RELIEF REQUESTED**

18 Through its motion to compel, Immersion seeks to force Microsoft to
19 produce numerous confidential settlement agreements that Microsoft has entered
20 into with other parties in cases that are wholly unrelated to this case or
21 Immersion's prior lawsuit against Microsoft. This request does not seek
22 information that is relevant to the issue involved in this case, namely – Did
23 Immersion settle its lawsuit with Sony through the March 1, 2007 Sony/Immersion
24 Agreement? Revealing the terms of Microsoft's settlements with others in
25 completely unrelated cases will not help resolve this issue.

26 MICROSOFT'S OPPOSITION TO IMMERSION'S MOTION TO
COMPEL DOCS. RESP. TO 53, 54 & 71 (No. CV7-936RSM) - 1
4811-6848-5890.01
032408/1546/20363.00411

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1 In addition, Immersion's requests are unduly burdensome because to
2 comply, Microsoft would have to gather and review thousands of documents that
3 span the course of potentially more than 30 years.

4 Finally, many, if not all, of the settlement agreements are subject to
5 confidentiality provisions. Settlement agreements are protected from discovery
6 because the policy in favor of encouraging settlements is stronger than the
7 inquiring party's need to know the terms of a settlement.

8 Microsoft requests that the Court deny Immersion's motion to compel
9 production of documents responsive to request numbers 53, 54 and 71.

10 II. STATEMENT OF FACTS

11 In 2002 Immersion sued Microsoft and Sony for patent infringement ("Sony
12 Lawsuit"). As part of a settlement agreement between Microsoft and Immersion in
13 2003, Immersion agreed to make certain payments to Microsoft in the event it
14 settled with Sony. The payback provisions became part of the Sublicense
15 Agreement ("SLA"). The SLA broadly defines "settlement amount" to encompass
16 numerous scenarios including Immersion providing a license to Sony. The
17 payback provisions of the SLA apply regardless of what form the settlement took.
18 See SLA, sec. 2(e) attached as Ex. A to the Declaration of Wendy E. Lyon ("Lyon
19 Decl.").

20 In March 2007, after the court had entered a judgment against Sony and
21 the case was up on appeal, Immersion resolved the litigation with Sony through
22 the Sony/Immersion Agreement. During the negotiations of that agreement,
23 Immersion and Sony exchanged settlement proposals, marked "Confidential
24 Settlement Communication." See December 2006 and January 2007 Proposals,
25 attached as Ex. B to the Lyon Decl. During February 2007, Immersion and Sony
26 also exchanged numerous drafts of their agreement. See Drafts, attached as Ex.

1 C to the Lyon Decl. The drafts contained all of the terms of the final agreement,
2 including terms that would resolve the Sony Lawsuit, pay the outstanding
3 judgment, provide mutual releases, dissolve the permanent injunction and provide
4 Sony with a license to Immersion's technology which was the subject of the
5 litigation. Each page was stamped "Confidential, For Settlement Purposes Only."
6 Id.

7 Through operation of the Sony/Immersion Agreement all aspects of the
8 Sony Lawsuit were resolved. Sony dismissed its appeals, released funds from
9 escrow to satisfy the amended judgment, allowed Immersion to keep the
10 compulsory license fees. Immersion, in turn, gave a license to Sony, agreed not
11 to enforce the permanent injunction and signed a stipulation to dissolve the
12 permanent injunction. See Sony/Immersion Agreement, Recitals C, D, sec. 1.9,
13 2.1(c) and (d), 4.1, and 5.3, attached as Ex. D to the Lyon Decl.

14 Immersion denies that it settled its lawsuit with Sony. In its Motion to
15 Compel, Immersion advances several arguments about why it did not settle with
16 Sony. However, the discovery sought here – namely, Microsoft's settlement
17 agreements with third parties – has no bearing on any of these arguments, making
18 the requested discovery irrelevant to this dispute. Immersion's primary argument
19 is that these other settlement agreements are relevant to the interpretation of the
20 SLA between Immersion and Microsoft. However, the terms of Microsoft's other
21 settlement agreements were not known to Immersion when the parties negotiated,
22 drafted, and executed the SLA, and therefore cannot serve as evidence of mutual
23 intent.

24 In addition, the requests are overly broad and burdensome. Microsoft has
25 been in business for over 30 years. Declaration of Steve Aeschbacher
26 ("Aeschbacher Decl."). During that time it has been involved in hundreds of

1 lawsuits and entered into hundreds of settlement agreements in a wide range of
2 cases, including many patent lawsuits. Id. Responding to Immersion’s requests
3 would be an arduous task, requiring Microsoft to locate and review thousands of
4 pages of documents. Id.

5 Further, most of Microsoft’s settlement agreements are subject to
6 confidentiality provisions, which preclude Microsoft from disclosing them to
7 Immersion. Aeschbacher Decl.

8 III. ARGUMENT

9 A. The Requests Seek Irrelevant and Inadmissible Information

10 The discovery that Immersion seeks through this motion to compel is not
11 relevant to the interpretation of the SLA. Microsoft’s unrelated confidential
12 settlement agreements with other parties cannot prove or disprove anything about
13 the SLA or Sony/Immersion Agreement and therefore are not likely to lead to
14 admissible evidence.

15 Immersion argues that Sony’s payment of the amended judgment cannot
16 be part of any settlement with Sony. However, payment of the judgment was an
17 expressly negotiated part of the Sony/Immersion Agreement. In fact, the
18 agreement could not become effective until the judgment was paid. Lyon Decl.,
19 Ex. D, sec. 1.9. Nothing precludes a party from paying all, part, or more than a
20 judgment in order to settle a case. The fact that the Sony/Immersion Agreement
21 includes payment of the judgment in full, along with other consideration, does not
22 make the agreement any less of a settlement.

23 Nevertheless, Immersion seeks discovery of Microsoft’s unrelated
24 agreements with others in hopes of finding that Microsoft has never settled a case
25 in which a judgment was paid in full. It will then argue that Microsoft knew that
26 “settlement” in the SLA does not include payment of a judgment. It will then urge

1 the Court to adopt Immersion's interpretation of "settle" and find that the
2 Sony/Immersion Agreement is not a settlement agreement because Sony paid a
3 judgment.

4 However, under the Washington rules of contract interpretation, Microsoft's
5 unilateral understanding of the term "settlement" and subjective understanding of
6 what constitutes a settlement agreement based on its other settlement
7 agreements is inadmissible for purposes of contract interpretation. Hearst
8 Communications, Inc. v. Seattle Times, 154 Wn.2d 493, 503, 115 P.2d 262 (2005)
9 (Extrinsic evidence may not be introduced which solely constitutes one party's
10 unilateral, unexpressed understanding); Go2Net, Inc. v. C I Host, Inc., 115
11 Wn.App. 73, 60 P.3d 1245 (2003) (admissible extrinsic evidence does not include
12 evidence of a party's unilateral or subjective intent as to contract's meaning). Only
13 evidence of mutual intent is admissible as context evidence to help determine the
14 meaning of a contract. Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990)
15 (The primary goal of the interpretation of a contract is to determine the mutual
16 intent of the parties.)¹ In determining the mutual intent, courts look to the
17 objective manifestations of the agreement, rather than on the unexpressed
18 subjective intent of the parties. Max L. Wells Trust v. Grand Cent. Sauna & Hot
19 Tub Co. of Seattle, 62 Wn.App. 593, 602, 815 P.2d 284 (1991).

20 Therefore, evidence demonstrating whether Microsoft knew or did not
21 know, based upon its prior experience, that a settlement agreement could involve
22 payment of some, all or more than the amount of judgment, is not admissible
23 because the understanding was not mutual. Immersion certainly did not know of

24 ¹ Immersion will not be able to present any evidence that there was any understanding between it
25 and Microsoft that an agreement such as the Sony/Immersion Agreement would not be considered
26 a settlement and would not trigger Immersion's payment obligations under the SLA. Any attempt to
submit a statement of alleged subjective understanding that limits the scope of "settle" "settlement"
or "settlement amount" under the SLA should be rejected as inadmissible extrinsic evidence.

1 the terms of confidential settlements between Microsoft and third parties in
2 unrelated lawsuits when it negotiated, drafted and executed the SLA. The terms
3 of those agreements and any understanding that Microsoft had based on those
4 agreements was not communicated to Immersion and is therefore inadmissible.
5 See West American Ins. Co. v. State Farm Mut. Auto. Ins. Co., 4 Wn.App. 221,
6 480 P.2d 537 (1971) (reversed on other grounds).

7 Even if Microsoft's unilateral understanding of its prior settlements was
8 relevant, Immersion's argument based upon that understanding is a non-sequitr.
9 What Microsoft has done to resolve other disputes does not and cannot change
10 the nature of the Sony/Immersion Agreement, to which Microsoft is not even a
11 party. If Microsoft had entered into a thousand settlement agreements just like the
12 Sony/Immersion Agreement, it would not prove that the Sony/Immersion
13 Agreement is a settlement agreement. Likewise, if Microsoft had never entered
14 into such an agreement, it would not change the fact that Sony and Immersion
15 chose to settle the Sony Lawsuit through such an agreement, which called for the
16 payment of a judgment.

17 Moreover, Immersion's requests for "all" settlement agreements would
18 include those settlement agreements which Microsoft entered into after it
19 executed the SLA with Immersion. These agreements could not even shed light
20 on Microsoft's unilateral understanding of settlement agreements at the time of the
21 SLA.

22 In sum, Microsoft's other settlement agreements would not provide
23 evidence of the circumstances surrounding the formation of the SLA or
24 Sony/Immersion Agreement, Immersion and Microsoft's course of dealing, or
25 Immersion and Sony's course of dealing. Microsoft's other settlement agreements
26

1 simply were not part of or considered during the negotiations, drafting and
2 performance of the SLA or Sony/Immersion Agreement.

3 Immersion also argues that the Sony/Immersion Agreement was not a
4 settlement agreement because it does not contain an explicit release of the claims
5 over the two litigated patents. However, the Sony/Immersion Agreement provided
6 a license to Sony for use of the litigated patents and a clause precluding
7 Immersion from enforcing the permanent injunction, which in effect released all
8 future claims; and Sony paid the judgment issued by the court, which released all
9 past claims. As Ms. Liu, Sony's in house counsel stated, between satisfying the
10 amended judgment for the two litigated patents and obtaining a license to the
11 litigated patents, "Sony, in effect, got a full release of any claims Immersion might
12 have on the litigated patents." Deposition of Jennifer Liu., v.2, 327:9-12, 14,
13 attached as Ex. E to the Lyon Decl. According to Ms. Liu, there was no need for
14 an express release of the Litigated Patents. Liu Dep., v.2, 280:9-21, Ex. E to the
15 Lyon Decl. Reviewing Microsoft's settlement agreements with others will not help
16 resolve the issue of whether the Sony/Immersion Agreement had to have a direct,
17 rather than indirect, release of the litigated patents in order to be a settlement
18 agreement.

19 Immersion also asserts, without support, that its payback obligations to
20 Microsoft expired after 24 months when Microsoft's right to sublicense the
21 technology to Sony expired. While Microsoft only had the right to sublicense Sony
22 for 24 months, Microsoft's right to payment had no time limit. Immersion's
23 interpretation directly contradicts the express language of the SLA, which reads:

24 In the event Immersion elects in its discretion to settle
25 the Sony Lawsuit prior to Microsoft's granting Sony the
26 Game Platform Sublicense (and regardless of whether
such Immersion settlement occurs during or after the
twenty-four (24) month period following the Effective

1 Date), then Immersion shall pay Microsoft an amount
2 determined as follows. . .

3 Ex. A, sec. 2(e) to the Lyon Decl. (emphasis added). Moreover, in sworn
4 statements, made after the 24 months in which Microsoft had sublicensing rights
5 (i.e. after July 25, 2005), Immersion repeatedly and publicly announced that even
6 though Microsoft's sublicensing rights had expired, it would still owe Microsoft
7 under the SLA if it settled with Sony. See, e.g., Immersion's September 30, 2005
8 10-Q, attached as Ex. F to the Lyon Decl. Microsoft's settlement agreements with
9 third parties will not help resolve whether Immersion's payback provisions expired
10 after 24 months.

11 Immersion argues that Microsoft has opened the door to this discovery
12 because it identified a few examples of settlement of patent cases post verdict.
13 However, Immersion fails to mention that Microsoft expressly made the same
14 objections that it is making here, and provided a limited response without waiving
15 those objections. In particular, Microsoft objected that the information sought was
16 irrelevant. See January 2, 2008 letter from Wendy Lyon to Brad Keller, and
17 Microsoft's response to Immersion's First Set of Interrogatories, No. 7, attached
18 as Exs. 5 and 8 to the Alan Heinrich Declaration. Microsoft's providing a limited
19 answer in the hope of convincing Immersion that this line of discovery would not
20 be fruitful does not make irrelevant information relevant to an argument that
21 Microsoft itself is not advancing. Microsoft has not asserted that its settlement
22 agreements with third parties prove that settlements can be reached post-verdict
23 and can include the payment of a judgment. Immersion is not entitled to review
24 Microsoft's settlement agreements with third parties.

24 / / /
25 / / /

1 B. The Requests Are Overly Burdensome

2 Immersion's requests seek (1) all Microsoft settlement agreements in
3 patent disputes that occurred post-verdict, and (2) all Microsoft settlement
4 agreements where a judgment was paid as part of the settlement. Microsoft is a
5 very large company that has been in business for over 30 years. Aeschbacher
6 Decl. Throughout this time it has been involved in hundreds of lawsuits and has
7 entered into hundreds of settlement agreements in antitrust, patent, trade secret,
8 copyright, consumer class actions, contract disputes, employment, anti-piracy,
9 trademark, digital enforcement, anti-phishing and personal injury cases. Id.

10 Therefore, to comply with these requests, Microsoft would have to locate
11 and review all of these agreements which span more than 30 years; determine
12 which ones involved patent disputes, which ones were entered post-verdict (an
13 inquiry which would likely require research and review of other case documents
14 because many settlement agreements do not reveal which stage of litigation the
15 parties are in when they settle); and determine which ones involved the payment
16 of a judgment. Id.

17 C. Confidential Settlement Agreements are Not Discoverable

18 Immersion mistakenly dismisses Microsoft's objection to producing
19 settlement agreements that are subject to confidentiality provisions, by relying on
20 inapplicable cases that did not involve requests for confidential settlement
21 agreements. The discovery rules do not require disclosure or production of
22 settlement agreements between one party and third parties, absent unusual
23 circumstances. See Long v. American Red Cross, 145 F.R.D. 658, 667
24 (S.D.Ohio, 1993).

25 One of the benefits of entering into a settlement agreement is the ability to
26 keep private the terms of the settlement. Therefore:

1 Parties who have agreed not to disclose the terms of a
2 settlement may legitimately withhold that information
3 from discovery, even if it might be relevant to some
4 other litigated matter, based upon the Court's view that
the policy in favor of encouraging settlements is
stronger than the inquiring party's need to know the
terms of a settlement.

5 Long, 145 F.R.D. at 667 (citing Gaull v. Wyeth Laboratories, 687 F.Supp. 77
6 (S.D.N.Y.1988) ("Considering the small evidentiary value of the terms of the
7 settlement agreement, and the chilling effect an order of disclosure of agreements
8 entered into with the understanding of confidentiality would have on future
9 settlement negotiations in other litigation, the Court declines as a matter of policy
10 to order its disclosure."); see also Abbott Diabetes Care Inc. v. Roche Diagnostics
11 Corp., 2007 WL 2255236 (N.D.Cal., 2007) ("When I weigh the confidentiality
12 expectation of Abbott [plaintiff] and LifeScan [third party] and the policy of
13 encouraging settlement against the questionable relevance of the documents, the
14 scale tips decidedly against disclosure."); Cai v. Fishi Cafe, Inc., 2007 WL
15 2781242 (N.D.Cal., 2007) (sustaining objection to offer of settlement agreement
16 as evidence based on confidentiality provision in agreement barring disclosure).

17 As discussed above, Microsoft's settlement agreements with third parties in
18 unrelated cases are not relevant to the issues in this case. Even if there was
19 some relevance, it would be minimal and remote, and not sufficient to overcome
20 the presumption that confidential settlement agreements should be protected from
21 discovery.

22 IV. CONCLUSION

23 Immersion seeks documents which are not relevant to determining the
24 mutual intent of Microsoft and Immersion regarding the terms of the SLA, or
25 determining the nature of the Sony/Immersion Agreement. Immersion's request is
26 also unduly burdensome and ignores the fact that the requested documents are

1 **CERTIFICATE OF SERVICE**

2 I, Margaret Friedmann, declare as follows:


3 I am over 18 years of age and a citizen of the United States. I am
4 employed as a legal secretary by the law firm of Riddell Williams P.S.

5 On the date noted below I electronically filed the foregoing document titled
6 **MICROSOFT'S OPPOSITION TO IMMERSION'S MOTION TO COMPEL**
7 **PRODUCTION OF DOCUMENTS RESPONSIVE TO REQUEST NOS. 53, 54**
8 **AND 71 and [PROPOSED] ORDER DENYING IMMERSION CORPORATION'S**
9 **MOTION TO COMPEL PRODUCTION OF DOCUMENTS RESPONSIVE TO**
10 **REQUEST NOS. 53, 54 AND 71** with the Clerk of the Court using the CM/ECF
11 system which will send notification of such filing to the following counsel for
12 Immersion Corporation:

| | |
|---|---|
| 13 Bradley S. Keller 14 Jofrey M. McWilliam 15 Byrnes & Keller LLP 16 1000 Second Avenue, 38 th Floor 17 Seattle, WA 98104-4082 18 Phone: (206) 622-2000 19 Fax: (206) 622-2522 20 Email: bkeller@byrneskeller.com 21 jmcwilliam@byrneskeller.com | 22 Richard M. Birnholz 23 Morgan Chu 24 Irell & Manella LLP 25 1800 Avenue of the Stars, Suite 900 26 Los Angeles, CA 90067-4276 Phone: (310) 277-1010 Fax: (301) 203-7199 Email: rbirnholz@irell.com mchu@irell.com |
|---|---|

19 I declare under penalty of perjury under the laws of the State of
20 Washington that the foregoing is true and correct.

21 Executed at Seattle, Washington this 24th day of March, 2008.

22 

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