

1 The Hon. Ricardo S. Martinez  
2 Noted on Motion Calendar: March 28, 2008  
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9 UNITED STATES DISTRICT COURT  
10 WESTERN DISTRICT OF WASHINGTON

11 MICROSOFT CORPORATION, a  
12 Washington corporation,

13 Plaintiff,

14 v.

15 IMMERSION CORPORATION, a  
16 Delaware corporation,

17 Defendant.

NO. CV7-936RSM

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

18 Microsoft submits this sur-reply to address the limited issue of whether  
19 Microsoft should be forced to produce confidential settlement agreements with  
20 third parties in light of the Court's recent order (Dkt. # 64), requiring Immersion to  
21 produce evidence of its settlement discussions and efforts to mediate with Sony.<sup>1</sup>  
22 In its reply in support of its Motion to Compel (Dkt. # 65) Microsoft's unrelated  
23 settlement agreements, Immersion suggests that confidential settlement  
24 agreements are freely discoverable, that Microsoft's position has been

25 <sup>1</sup> Microsoft requests that the Court accept this sur-reply in part because the Court's Order (Dkt #64)  
26 was issued just minutes before Microsoft submitted its response to the pending motion, and  
therefore Microsoft did not have an opportunity to address this ruling in its response to Immersion's  
Motion to Compel.

1 inconsistent, and that Microsoft's position is inconsistent with the Court's recent  
2 order. They are not.

3 As stated in Microsoft's Motion to Compel settlement and mediation-  
4 related documents between Immersion and Sony (Dkt. # 38):

5 Under certain circumstances, FRE 408 protects from  
6 disclosure evidence of settlement negotiations. The  
7 primary rationale behind Rule 408 'is the obvious public  
8 policy interest in encouraging settlement of private  
9 disputes.' *Lo Bosco v. Kure Eng. Ltd.*, 891 F.Supp.  
10 1035, 1037-38 (D.N.J. 1995).

11 However, as described in Microsoft's Motion to Compel and the Court's Order,  
12 some circumstances require that the public policy interest be set aside. For  
13 example, in this case, evidence of settlement discussions is directly relevant to  
14 prove that Sony and Immersion did in fact settle, which is the primary issue in this  
15 case. *See, e.g., Cates v. Morgan Portable Bldg. Corp.*, 708 F.2d 683 (7<sup>th</sup> Cir.  
16 1985). Such circumstances constitute a well-recognized exception to the general  
17 bar against disclosure of settlement negotiations.

18 By contrast, Immersion is seeking evidence of unrelated settlement  
19 agreements between Microsoft and third parties that span the course of 30 years.  
20 Those agreements have nothing to do with any issues in this case.

21 Under these circumstances, "the policy in favor of encouraging settlements  
22 is stronger than the inquiring party's need to know the terms of a settlement."  
23 *Long v. American Red Cross*, 145 F.R.D. 658, 667 (S.D.Ohio, 1993) (citing *Gaull*  
24 *v. Wyeth Laboratories*, 687 F.Supp. 77 (S.D.N.Y.1988) ("Considering the small  
25 evidentiary value of the terms of the settlement agreement, and the chilling effect  
26 an order of disclosure of agreements entered into with the understanding of  
confidentiality would have on future settlement negotiations in other litigation, the  
Court declines as a matter of policy to order its disclosure."). Unlike Microsoft's



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 SUR-REPLY TO IMMERSION'S MOTION TO COMPEL**

7 **PRODUCTION OF DOCUMENTS RESPONSIVE TO REQUEST NOS. 53, 54**

8 **AND 71** with the Clerk of the Court using the CM/ECF system which will send

9 notification of such filing to the following counsel for Immersion Corporation:

10 11 12 13 14 15	Bradley S. Keller Jofrey M. McWilliam Byrnes & Keller LLP 1000 Second Avenue, 38 <sup>th</sup> Floor Seattle, WA 98104-4082 Phone: (206) 622-2000 Fax: (206) 622-2522 Email: <a href="mailto:bkeller@byrneskeller.com">bkeller@byrneskeller.com</a> <a href="mailto:jmcwilliam@byrneskeller.com">jmcwilliam@byrneskeller.com</a>	Richard M. Birnholz Morgan Chu Irell & Manella LLP 1800 Avenue of the Stars, Suite 900 Los Angeles, CA 90067-4276 Phone: (310) 277-1010 Fax: (301) 203-7199 Email: <a href="mailto:rbirnholz@irell.com">rbirnholz@irell.com</a> <a href="mailto:mchu@irell.com">mchu@irell.com</a>
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16 I declare under penalty of perjury under the laws of the State of  
17 Washington that the foregoing is true and correct.

18 Executed at Seattle, Washington this 3<sup>RD</sup> day of April, 2008.

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