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The Hon. Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MICROSOFT CORPORATION, a
Washington corporation,

Plaintiff,

v.

IMMERSION CORPORATION, a
Delaware corporation,

Defendant.

NO. CV7-0936RSM

**MOTION TO LIMIT SPEAKING
OBJECTIONS**

**Note on Motion Calendar:
May 2, 2008**

Without Oral Argument

I. Relief Requested

Immersion's counsel, primarily, Richard Birnholz, has unnecessarily obstructed depositions by making inappropriate and disruptive objections that coach Immersion witnesses on how to answer the questions or discourage them from answering questions. Microsoft requests that the Court issue an order precluding counsel from making speaking and coaching objections in future depositions.

II. Statement of Facts

On February 11, 2002, Immersion filed a lawsuit against Microsoft and Sony Computer Entertainment in the Northern District of California ("Sony

1 Lawsuit”), alleging that the defendants violated certain patents held by Immersion
2 pertaining to forced feedback technology used in computer games. Among other
3 things, this technology provides vibration and other motion in hand-held controllers
4 for video games. Microsoft and Immersion settled on July 25, 2004. As part of
5 that settlement, the parties executed a Sublicense Agreement (“SLA”), which
6 provided that “in the event Immersion elects in its discretion to settle the Sony
7 Lawsuit,” Immersion would owe Microsoft certain sums depending upon the value
8 of the settlement with Sony.

9 After Immersion obtained a verdict against Sony and while the case was on
10 appeal, Immersion and Sony entered into an agreement (“Sony/Immersion
11 Agreement”), which resulted in the release of all claims against Sony, the
12 dissolution of the permanent injunction against Sony, licensing rights to Sony, the
13 dismissal of the Sony’s appeals, the retention by Immersion of approximately
14 \$32.6 million in compulsory license fees that Sony had been making to Immersion
15 pending the appeals, the payment of another \$22.5 million, and the payment of
16 the outstanding judgment of approximately \$97 million.

17 Microsoft contends that Immersion and Sony settled the Sony Lawsuit, and
18 that Immersion has breached the SLA by failing to make the required payments. .

19 In this case, Microsoft has conducted the depositions of four witnesses to
20 date: Jenifer Liu (In-house counsel for Sony), Laura Peter (in-house counsel for
21 Immersion), Patrick Reutens (former in-house counsel for Immersion) and Shoichi
22 Endo (Immersion executive who participated in the settlement negotiations with
23 Sony). Microsoft plans to conduct the depositions of several other witnesses,
24 including Immersion’s CEO, Victor Viegas, on May 8, 2008.

1 Through these depositions, Immersion's counsel has objected to a very
2 large percentage of the substantive questions. They have also made speaking
3 and coaching objections discussed below.

4 **III. Evidence Relied Upon**

5 The declaration of Wendy E. Lyon with attachments.

6 **IV. Argument**

7 "It is common to refer to objections that are argumentative or which suggest
8 an answer to the witness, as 'speaking objections.'" In re Stratosphere Corp.
9 Securities Litigation, 182 F.R.D. 614 (D.Nev.,1998). The Federal Rules of Civil
10 Procedure have long recognized that speaking, argumentative and leading
11 objections made during depositions are disruptive to the discovery process. As
12 the Advisory Committee Note to the 1993 Amendments to Federal Rule of Civil
13 Procedure 30 states:

14 "Depositions frequently have been unduly prolonged, if
15 not unfairly frustrated, by lengthy objections and
16 colloquy, often suggesting how the deponent should
17 respond. . . . they ordinarily should be limited to those
18 that under Rule 32(d)(3) might be waived if not made
19 at that time, *i.e.*, objections on grounds that might be
20 immediately obviated, removed, or cured, such as to
the form of a question or the responsiveness of an
answer. Under Rule 32(b), other objections can, even
without the so-called "usual stipulation" preserving
objections, be raised for the first time at trial and
therefore should be kept to a minimum during a
deposition."

21 Therefore, Fed. R. Civ. P. 30(d)(1) requires: "Any objection must be stated
22 concisely in a nonargumentative and nonsuggestive manner." Fed. R. Civ. P.
23 30(d)3 provides: "If the court finds that any impediment, delay, or other conduct
24 has frustrated the fair examination of the deponent, it may impose upon the
25 person responsible an appropriate sanction, including the reasonable costs and
26 attorney's fees incurred by any parties as a result thereof."

1 Trial courts have ruled that inappropriate and disruptive objections are
2 prohibited. See Universal Trading & Investment Co. v. Kiritchenko, 2007 WL
3 2300740 (N.D.Cal.,2007) (where court cautioned the witness and his counsel,
4 ordering them to: “comply with the rules for deposition and not make speaking
5 objections or unduly delay responses.”); Synbiotics Corp. v. Heska Corp., 2000
6 WL 35632582 (S.D.Cal.,2000) (ordering plaintiff “not to assert any speaking
7 objections during the deposition, or to assert any objections except on the grounds
8 of improper form of the question and privilege.”).

9 For many years in the Western District of Washington, Judge Dwyer issued
10 a standard order in most, if not all of his civil cases, limiting depositions objections
11 to those based upon privilege and form, requiring that objections be concise and
12 not suggest answers, and prohibiting argumentative interruptions. See Order
13 Regarding Discovery and Depositions issued by Judge Dwyer in Branin v. Asarco,
14 Inc., No. C93-5132(T)WD on May 27, 1993, attached to the Declaration of Wendy
15 E. Lyon as Exhibit A. Judge Dwyer’s order prohibited direction to the deponent
16 not to answer question, except on the ground of privilege or for purpose of
17 bringing a motion.. Id.

18 Throughout the depositions in this case, counsel for Immersion, Richard
19 Birnholz, has repeatedly made speaking objections that interfere with the
20 witnesses’ testimony, suggest the answer to the question and generally disrupt the
21 deposition process. For example, during the deposition of Laura Peter, Mr.
22 Birnholz repeatedly instructed her to only to answer with **certain words**, pg. 63,
23 line 6 (“If I say you can answer yes, no, or I don’t recall, those literally are the
24 words that you can answer the question...Please don’t editorialize or expand on
25 that. Yes, no, or I don’t recall.”); see also Deposition of Patrick Reutens (“Reutens
26 Dep.”) pg. 30, line 16 (“ I think you can answer just yes or no or I don’t recall at

1 this point.”); pg. 24, line 21; pg. 26, line 24; pg. 90, line 15. He **corrected** Ms.
2 Peter’s answers: pg. 83, line 12 (when Ms. Peter stated the “litigation was over
3 PSP, the PS2-“ Mr. Birnholz said “Not PSP.”); pg. 140, line 12 (“I think that is not
4 accurate what the witness – what you just said.”); see also Liu Dep., pg. 133, line
5 25 (After Ms. Liu’s answer, Mr. Birnholz stated, “That’s wrong. It’s talking about
6 the escrow instruction.”). He **interpreted the questions** for her: pg. 21, line 24
7 (“So he’s asking about communications from Sony”); pg. 89, line 23 (“So, he’s
8 broadened the time frame now...All right? So put this away...Because he’s asked
9 you a broader question.”), pg. 129, line 16 (“He just asked if it refreshed your
10 recollection. Why don’t you hear the question again.”); pg. 131, line 14 (“That’s a
11 different question than he asked before”) see also pg. 165, line 20-24; pg. 211,
12 line 16-20.

13 Mr. Birnholz made several inappropriate statements to **alert** Ms. Peter to
14 certain questions, pg. 104, line 6 (“I direct the witness to listen to the question and
15 hear the question, please. Okay.”) pg. 108, line 23 – pg. 109, line 1 (“So he didn’t
16 ask on any particular subject, an agreement, period. He’s going to characterize if
17 he wants, but – unless he’s trying to mislead you.”), pg. 145, line 16 (“You got to
18 watch for all these assumptions that he’s building into his questions”); see also pg
19 26, line 14-17; pg. 73, line 6-7; pg. 105, line 17; pg. 165, line 17; pg. 174, line 25,
20 pg. 175, line 13-14, 21-25; 209, line 7-11; Reutens Dep. pg. 123, line 22; pg. 147,
21 line 7, 17, and 21-25.

22 Mr. Birnholz **cut off** Ms. Peter’s testimony, pg. 106, line 11 (When Ms.
23 Peter began to answer a question, Mr. Birnholz interrupted, “You’ve answered the
24 question.”), pg. 116, line 13 (“You can just ask him to clarify – why don’t you just
25 ask him to clarify the question. That’s all your obligations are to do here, Ms.
26 Peter.”); pg. 129, line 16 (While Ms. Peter was in mid-sentence, Mr. Birnholz

1 stated, "He just asked if it refreshed your recollection. Why don't you hear the
2 question again."); pg. 167, line 1 ("Okay. Just leave it alone."); see also pg. 39,
3 line 15; Reutens Dep., pg. 29, line 8-11 (Mr Reutens began, "Primarily I discussed
4 these – " and Mr. Birnholz interrupted, "He's just asking what you reviewed to
5 refresh your recollection, any other sections. Just listen to his particular question,
6 please. Thanks."); pg. 24, line 4;. He **qualified** Ms. Peter's testimony, pg. 107,
7 line 22 (after stating "That's correct" in response to a question, Mr. Birnholz stated,
8 "I need to object, move to strike. Okay? You answered the last part of the question
9 . . . And he's got this whole nonsense in front of it."); pg. 158, line 6 (When Ms.
10 Peter answer "I don't know," Mr. Birnholz added, "Its just Immersion's bank
11 number, right?"). He even **answered directly for** Ms. Peter at times: pg. 155, line
12 1 (When asked if a document referred to something, Mr. Birnholz answered for
13 Ms. Peter, "No." When Microsoft's counsel asked the follow-up question, "Why is
14 that incorrect?" Mr. Birnholz again answered for Ms Peter, "Well, it just is
15 incorrect... You can say because it's incorrect."); pg. 34, line 5 ("She already
16 testified she didn't know if it went to Sony."); see also pg 44, line 6-8.

17 He also instructed her **not to answer** on numerous occasions on a basis
18 other than privilege: pg. 25, line 12 ("I'll direct the witness not to answer, no
19 foundation"), pg. 106, line 23 ("You don't have to give the same answer again,
20 You've answered the question.") pg. 116, line 20 ("She doesn't have to answer
21 that. You give questions she can answer. She doesn't have to parse your
22 question."); see also pg. 107, line 18-24.

23 He inappropriately objected based on work product during the deposition of
24 Jennifer Liu, Sony's in house counsel even though (1) it was not his client being
25 deposed or his privilege to assert, and (2) the work product privilege "does not
26 protect the work product of an attorney who did not or does not represent a party

1 to the litigation in which the discovery is sought.” Tubar v. Cliff, 2007 WL 30872
2 (W.D.Wash., January 4, 2007). See, e.g. Liu Dep. pg.157, line 9-10 and 158, line
3 10-11 and 18-19 (“You’re going to let her answer that? . . . Why isn’t that just work
4 product? Objection, work product.” He then instructed Ms. Liu, who is not his
5 client, that she could “answer yes or no or I don’t recall.”).

6 Mr. Birnholz was also generally **argumentative** with counsel: pg. 35, line 9
7 (“Well, don’t create a misleading record, which is your entire mission in this
8 deposition and this case.”); see also pg. 24, line 10-16; pg. 34, line 15; pg. 171,
9 line 15-22; pg. 209, line 22- 210, line 4. In the deposition of Patrick Reutens, Mr.
10 Birnholz stated: pg. 68, line 9 (“Tell me you’re not going to use this as- you’re just
11 going to skip the one where Microsoft sent the sublicense to Mr. Reutens. Is that
12 what you’re doing to create a misleading record?”). See Exhibit B to the Lyon
13 Declaration. These inappropriate, leading, and disruptive objections warrant the
14 Court’s intervention so that the remaining depositions in this case can proceed
15 without these interruptions.

16 These are just some of the many speaking and coaching objections made
17 by Mr. Birnholz. The Federal Rules and the practice of this District prohibit this
18 conduct.

19 **V. Conclusion**

20 Microsoft requests that the Court preclude Immersion’s counsel from
21 further disrupting depositions with speaking and coaching objections. Counsel
22 should be limited to objecting to privilege, form and foundation. A short phrase to
23 explain form foundation, such as “object to form, vague” or “objection to form
24 “compound”, may be stated. The order presented by Microsoft applies to all
25 counsel, and was adapted from Judge Dwyer’s standard order regarding
26 deposition conduct.

1 CERTIFICATE OF SERVICE

2 I, Margaret Friedmann, declare as follows:

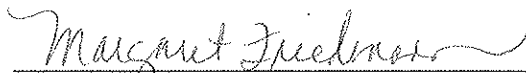
3 I am over 18 years of age and a citizen of the United States. I am
4 employed as a legal secretary by the law firm of Riddell Williams P.S.

5 On the date noted below, I electronically filed the foregoing document
6 entitled **MOTION TO LIMIT SPEAKING OBJECTIONS** with the Clerk of the Court
7 using the CM/ECF system which will send notification of such filing to the following
8 counsel for Immersion Corporation, as well as others on the CM/ECF notification
9 list:

<p>10 Bradley S. Keller 11 Jofrey M. McWilliam Byrnes & Keller LLP 12 1000 Second Avenue, 38th Floor Seattle, WA 98104-4082 13 Phone: (206) 622-2000 Fax: (206) 622-2522 14 Email: bkeller@byrneskeller.com jmcwilliam@byrneskeller.com</p>	<p>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: rbirnholz@irell.com mchu@irell.com</p>
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15 I declare under penalty of perjury under the laws of the State of
16 Washington that the foregoing is true and correct.

17 Executed at Seattle, Washington this 17th day of April, 2008.

18 

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