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The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MICROSOFT CORPORATION, a Washington corporation,)	No. CV07 936RSM
)	
Plaintiff,)	IMMERSION CORPORATION'S
)	OPPOSITION TO MICROSOFT
v.)	CORPORATION'S "MOTION FOR
)	PARTIAL SUMMARY JUDGMENT
IMMERSION CORPORATION, a Delaware corporation,)	REGARDING IMMERSION'S
)	COUNTERCLAIM"
Defendant.)	NOTE FOR MOTION CALENDAR:
)	May 9, 2008

I. INTRODUCTION

Microsoft admits that it violated the written "Confidentiality Agreement" that Microsoft signed as an express pre-condition to Immersion's sending Microsoft a copy of an agreement between Immersion and Sony ("Immersion-Sony Agreement"). Microsoft also concedes that Microsoft published in its publicly-filed original complaint in this case confidential option payment amounts and per-unit royalty figures from the document. Although Immersion promptly objected, and Microsoft filed an amended complaint deleting this information ten days later, discovery revealed that Microsoft's PR firm had already emailed the original complaint to various media outlets for widespread distribution—including The Seattle Times, the Seattle Post-Intelligencer, as well as popular technology websites. To vindicate its rights, and to make sure that Microsoft gets the message that it cannot ignore the agreements it makes with others,

1 Immersion asserted a counterclaim against Microsoft for breach of the Confidentiality
2 Agreement (“Counterclaim”).

3 With the confidential information made public by its own doing, Microsoft now tries to
4 avoid the consequences of its misconduct by moving for partial summary judgment based on its
5 contention that Immersion has not suffered damages. In other words, Microsoft constructs the
6 misguided argument of “no harm, no foul” and asks the Court to whitewash its breach of
7 contract. Microsoft confuses the distinction between a legal “injury” and “damages.” Contrary
8 to Microsoft’s assertion, proof of actual pecuniary damages is not a necessary element of a
9 breach of contract claim. Rather, where a party has violated another’s legal rights, the injured
10 party is entitled to nominal damages. *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 158, 43
11 P.3d 1223 (2002). In this case, Microsoft’s actions in ignoring the confidentiality agreement and
12 failing to honor its contractual duty to preserve the Immersion-Sony Agreement as confidential is
13 itself a legal wrong—a wrong that entitles Immersion at least to an award of nominal damages.
14 *See id.* Microsoft may not widely disseminate previously confidential information in direct
15 contravention of its express promise not to do so and then ask Immersion to suffer in silence
16 without a remedy.

17 Moreover, discovery is ongoing. Depositions remain to be taken of party and third-party
18 witnesses. And evidence of the full scope of Microsoft’s wrongful disclosure is entirely within
19 the possession, custody or control of Microsoft or third parties. Microsoft may not short circuit
20 the judicial process. Immersion is entitled to investigate its claim, and recover nominal or actual
21 damages as appropriate. Microsoft’s Motion must be denied.

22 **II. FACTUAL BACKGROUND**

23 On May 1, 2007, Microsoft wrote Immersion asking for documentation relating to
24 Immersion’s agreement with Sony. *See* Declaration of Jofrey M. McWilliam, dated May 6,
25 2008, (“McWilliam Decl.”), Ex. 1, p. 2 (referencing May 1, 2007, letter). Although Microsoft
26 had not even seen this document, Microsoft asserted that it was owed substantial sums under the
earlier 2003 “Sublicense Agreement” between Microsoft and Immersion. Immersion responded

1 by telling Microsoft that Immersion had no obligations to Microsoft under the Sublicense
2 Agreement given that Sony satisfied a final judgment in Immersion’s patent infringement suit
3 against Sony, and also paid all other amounts the Court ordered Sony to pay. Immersion also
4 informed Microsoft that Immersion’s business agreement with Sony was confidential. *Id.*

5 After Immersion obtained Sony’s consent to the production of the agreement to
6 Microsoft’s counsel on a confidential basis, Immersion informed Microsoft that it would provide
7 Microsoft with an unredacted copy of the Immersion-Sony Agreement if Microsoft agreed to
8 keep the agreement and its terms confidential. *Id.* Immersion also provided Microsoft with a
9 draft confidentiality agreement which strictly limited the number of persons to whom the
10 Immersion-Sony Agreement could be shared. *Id.* On May 11, 2007, Microsoft executed and
11 returned the signed “Confidentiality Agreement.” *Id.*, Ex. 2.

12 Under the Confidentiality Agreement, Microsoft agreed not to provide, share, or
13 otherwise disclose the Immersion-Sony Agreement to any person or entity, including any person
14 or entity inside or outside of Microsoft Corporation, other than the Managing Director of
15 Microsoft’s IP Acquisitions and Investments group, two business persons in Microsoft’s IP and
16 Licensing group, three in-house counsel, and Microsoft’s outside counsel, all of whom agreed to
17 be bound by the Confidentiality Agreement. *Id.* In addition, Microsoft and its counsel reserved
18 the right to use the Immersion-Sony Agreement “in connection with a future dispute or litigation
19 relating to the Immersion/Microsoft Sublicense Agreement, subject to an appropriate
20 confidentiality agreement or court order that may be negotiated or otherwise entered.” *Id.*,
21 (emphasis added). On May 14, 2007, Immersion provided Microsoft with an unredacted copy of
22 the Immersion-Sony Agreement. Immersion’s cover letter made clear that Immersion was doing
23 so pursuant to the express Confidentiality Agreement that Microsoft had just signed. *Id.*, Ex. 4.

24 On June 18, 2007, Microsoft publicly filed its original complaint in this case (“Original
25 Complaint”). (Dkt. #1.) In the Original Complaint, Microsoft publicly disclosed the terms of the
26 Immersion-Sony Agreement, including confidential financial terms that had never been publicly
disclosed prior to Microsoft’s filing of the Original Complaint. In particular, paragraph 21 of the

1 Original Complaint contained an option payment amount and a royalty rate that had never been
2 publicly disclosed prior to Microsoft's filing of the Original Complaint. *Id.*

3 Microsoft did not seek a court order to protect the confidential information it decided to
4 put in the Complaint. In fact, Microsoft did exactly the opposite. On the same day that
5 Microsoft publicly filed its Complaint, Microsoft's public relations firm of Waggener Edstrom
6 Worldwide emailed the Original Complaint to The Seattle Times and the Seattle Post-
7 Intelligencer. *Id.*, Ex. 4. As the Court is aware, these publications are widely read, having a
8 combined weekday circulation of 350,000, and a combined weekday readership of 1,290,700
9 adults. McWilliam Decl., Ex. 5. Microsoft's public relations firm at the same time also emailed
10 the Original Complaint to CNET.com and ARS Technica, popular internet websites providing a
11 global audience with information and analysis on technology, including electronic products and
12 video gaming. *See id.* Microsoft's public relations firm also emailed the Original Complaint to a
13 well-known journalist in Seattle who maintains a news blog on Microsoft's affairs. This resulted
14 in articles/posts describing the lawsuit, and the specific confidential terms of the Immersion-
15 Sony Agreement, and a link to the Original Complaint.

16 On June 22, 2007, although Microsoft had irretrievably made the information public,
17 Immersion's counsel sent a letter to counsel for Microsoft demanding that corrective steps be
18 taken concerning Microsoft's public disclosure in the Original Complaint of the confidential
19 financial terms of the Immersion-Sony Agreement. McWilliam Decl., Ex. 6. On June 25, 2007,
20 Microsoft filed in this Court a Motion to Seal Original Complaint. (Dkt. #3.) On the same day,
21 Microsoft filed in this Court an amended complaint ("Amended Complaint"). (Dkt. #2.) The
22 Amended Complaint is identical to the Original Complaint except that it omits the confidential
23 financial terms of the Sony Agreement contained in paragraph 21 of the Original Complaint.

24 On September 4, 2007, Immersion filed its Answer, Affirmative Defenses, and
25 Counterclaims (the "Counterclaim"). (Dkt. #8.) The Counterclaim asserts a cause of action
26 against Microsoft for breach of contract. *Id.*, ¶¶ 65-68 The Counterclaim alleges that "Microsoft
breached the Confidentiality Agreement by, among other things, publicly disclosing confidential

1 terms of the Sony Agreement in its Original Complaint, which Microsoft publicly filed without
2 first negotiating a confidentiality agreement or obtaining a court order to seal, as required by the
3 Confidentiality Agreement between Microsoft and Immersion.” *Id.*, ¶ 68. The Counterclaim
4 also seeks damages for Microsoft’s breach, “in an amount to be determined at trial, plus interest,
5 costs, and attorneys’ fees.” *Id.*, ¶ 69.

6 On September 11, 2007, Immersion served Microsoft with Immersion’s First Set of
7 Requests for Production (“Requests”). Immersion asked Microsoft to produce “[a]ll documents
8 related to any communication, disclosure, provision, or sharing of the Sony Agreement or any of
9 its terms to any person other than those persons identified in roman numerals (i) – (iv) of the
10 Confidentiality Agreement.” Microsoft responded on October 11, 2007, stating that subject to
11 the attorney-client privilege, “there are no responsive documents.” McWilliam Decl., Ex. 7,
12 p. 22 (response to Request #65). This representation was not true. On January 14, 2008,
13 Immersion served Microsoft with Immersion’s First Set of Interrogatories (“Interrogatories”), in
14 which Immersion asked Microsoft to “[i]dentify the date, participants, and subject matter of all
15 communications between any representative of Microsoft and any third party [] in which
16 Microsoft’s original Complaint in this action was provided, including, for each third party
17 identified, the date on which the original Complaint was provided and the Microsoft
18 representative who provided the Complaint.” Microsoft responded on February 13, 2008, by
19 producing numerous emails between Microsoft’s public relations firm and the media, including
20 newspapers and popular technology websites, which show that Microsoft widely disseminated
21 the confidential terms of the Immersion-Sony Agreement to the general public. *Id.*, Ex. 4.

1 **III. ARGUMENT**

2 **A. Immersion Is Not Required to Prove Actual Pecuniary Damages in Order to Pursue**
3 **a Counterclaim for Breach of the Confidentiality Agreement.**

4 Microsoft’s entire Motion¹ is based on the incorrect assertion that every claimant for
5 breach of contract must prove that it suffered actual pecuniary damages as a result of the breach.
6 However, it is well settled that “for every breach of contract, a cause of action exists,” even
7 where the breach does not result in pecuniary damages. 11 Arthur L. Corbin, Corbin On
8 Contracts § 55.10 (Rev. ed. 2005). “If the aggrieved party has suffered no compensable
9 damages, a judgment for nominal damages will be entered.” *Id*; *Shields v. DeVries*, 70 Wn.2d
10 296, 300, 422 P.2d 828 (1967) (directing entry of nominal damages in case where substantial
11 damages could not be proved, even though claimant “failed to name a single customer that they
12 had lost in consequence” of the breach, and noting that the court will not condone the failure to
13 keep a promise); *Sweet v. Johnson*, 169 Cal. App. 2d 630, 632, 337 P.2d 499 (1959) (stating the
14 rule that nominal damages “are presumed as a matter of law to stem merely from the breach of a
15 contract”). It is the failure to keep the promise “that is the foundation of” the breach of contract
16 action. *Shields*, 70 Wn.2d at 300.

17 There is no question that Microsoft flagrantly breached the Confidentiality Agreement.
18 Microsoft does not dispute that the Confidentiality Agreement is a binding contract between
19 Microsoft and Immersion which created a duty on Microsoft not to publicly disclose the
20 Immersion-Sony Agreement or its terms. Just one month after Microsoft agreed not to provide,
21 share, or otherwise disclose terms of the Immersion-Sony Agreement to any unauthorized person
22 or entity, Microsoft did exactly that. Microsoft carelessly filed a complaint in which Microsoft
23 publicly disclosed confidential financial terms of the Immersion-Sony Agreement and then went
24 on to zealously disseminate the complaint to various newspapers, popular technology websites,

25 _____
26 ¹ In connection with Immersion’s and Microsoft’s meet-and-confer discussions as part of their continuing
effort to resolve certain discovery issues, Microsoft’s counsel agreed to a one-day extension of the time
for Immersion to file its oppositions to outstanding discovery motions and this motion for partial
summary judgment.

1 and internet bloggers. Immersion has identified in discovery responses at least some of the
2 places where the information appeared.

3 Cases under the law of Washington and California² both explain that a plaintiff need not
4 show pecuniary damages in order to pursue a breach of contract claim. *Ford v. Trendwest*
5 *Resorts, Inc.*, 146 Wn.2d 146, 43 P.3d 1223, 1229 (2002) (awarding nominal damages to
6 employee who had proved breach of employment contract but who could not prove actual
7 damages); *Shields*, 70 Wn.2d at 300. Rather, recent authority rejects the proposition that actual
8 damages are a necessary element and reaffirms that nominal damages may be recovered in the
9 absence of proof of actual damages. *See, e.g., Merrell v. Renier*, No. C06-404JRL, 2006 WL
10 3337368, at *5 (W.D. Wash. Nov. 16, 2006) (noting that in *Ford, supra*, the Washington
11 Supreme Court awarded nominal damages to plaintiff who could not prove actual damages, and
12 distinguishing *Ketchum v. Albertson Bulb Gardens, Inc.*, 252 P. 523, 525 (Wash. 1927), cited in
13 Microsoft’s Motion). The same is the case under California law. *See* Cal. Civ. Code § 3360
14 (“When a breach of duty has caused no appreciable detriment to the party affected, he may yet
15 recover nominal damages.”); *Midland Pac. Bldg. Corp. v. King*, 157 Cal. App. 4th 264, 275, 68
16 Cal. Rptr. 3d 499 (2007) (“[I]n the absence of a showing of actual damages, nominal damages
17 are available.”); *Sweet*, 169 Cal. App. 2d at 632-33 (“A plaintiff is entitled to recover nominal
18 damages for the breach of a contract, despite inability to show that actual damage was inflicted
19 upon him, since the defendant’s failure to perform a contractual duty is, in itself, a legal wrong
20 that is fully distinct from the actual damages.”) (citations omitted).

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23 ² The Confidentiality Agreement does not contain a choice of law provision. Given that Immersion is
24 located in California, that the Confidentiality Agreement was drafted in California, and that the
25 agreement is intended to protect Immersion’s interests in California, California has the most significant
26 relationship with the Confidentiality Agreement and its breach. As a result, the Court should look to
California contract law. *Potlatch No. 1 Fed. Credit Union v. Kennedy*, 76 Wn.2d 806, 809, 459 P.2d 32
(1969) (in the absence of an effective choice of law provision agreed to by the parties, “the validity and
effect of a contract are governed by the law of the state which has the most significant relationship to the
contract”); Restatement (Second) of Conflict of Laws § 188 (1971). The law of both jurisdictions,
however, appears to be in sync that a contract plaintiff may recover nominal damages to vindicate
contract rights.

1 Immersion also may be entitled to recover its attorneys' fees with regard to the breach of
2 confidentiality Counterclaim. *See* RCW 4.84.250 (providing for award of attorney fees to
3 prevailing party in actions up to \$10,000); *Lay v. Hass*, 112 Wn. App. 818, 51 P.3d 130 (2002)
4 ("A court may award reasonable attorney fees to the prevailing party as provided by private
5 agreement, statute, or a recognized ground of equity.") citing *Fisher Props., Inc. v. Arden-*
6 *Mayfair, Inc.*, 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986). For example, in *Lay*, a property line
7 dispute involving nominal damages, the court affirmed an award of attorney fees under RCW
8 4.84.250 to the prevailing party, and awarded additional attorney fees under the statute for the
9 appeal. *Id. Cf. Merrell v. Renier*, No. C06-404JRL, 2006 WL 3337368, at *5 (W.D. Wash. 2006
10 Nov. 16, 2006) (attorney fees awardable in breach of contract action seeking no pecuniary
11 damages).

12 Microsoft's request that the Court dismiss Immersion's Counterclaim thus is without
13 basis. Immersion is entitled to have Microsoft's liability for breach of the Confidentiality
14 Agreement adjudicated. At a bare minimum, Immersion is entitled to pursue the claim and
15 recover nominal damages to vindicate its contractual rights—rights Microsoft ignored in its haste
16 to assert its misguided claim against Immersion.

17 **B. The Court May Retain Jurisdiction to Allow Immersion to Recover for Additional**
18 **Harm Immersion May Sustain.**

19 A further reason that Microsoft's motion for summary judgment should be denied is that
20 in the event that Immersion prevails on its Counterclaim and were to recover nominal damages,
21 the Court can still hold Microsoft accountable in this action for future monetary damages caused
22 by Microsoft's breach of the Confidentiality Agreement. For example, once Microsoft's liability
23 for breaching the Confidentiality Agreement has been adjudicated, and Immersion has been
24 awarded nominal damages or such other damages that it is able to prove at trial, the Court may
25 retain jurisdiction regarding future damages. *See, e.g., U.S. v. Burnett*, 262 F.2d 55, 59 (9th Cir.
26 1958) (holding that district court has the power to rule on liability and damages for tort claim
suffered as of the date of trial, and retain jurisdiction to assess future damages suffered by

1 plaintiff as a consequence of the tort—“The power of the court to hear some of the [damages]
2 issues first and postpone a hearing on the others until a later date cannot be questioned.”); *see*
3 *also, e.g., Int’l Controls Corp. v. Vesco*, 535 F.2d 742 (2d Cir. 1976) (directing the district court
4 to retain jurisdiction over claims for which plaintiff may prove additional damages suffered after
5 entry of default judgment); *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.*, 1 Cal. 3d 586,
6 463 P.2d 770 (Cal. 1970) (trial court properly retained jurisdiction in order to amend its
7 judgment to include future damages in negligence claim in which liability had been established
8 but the amount of damages was not yet known); *Carlson Indus. v. E. L. Murphy Trucking Co.*,
9 168 Cal. App. 3d 691, 694, 214 Cal. Rptr. 331 (Cal. 1985). In addition, Washington courts are
10 “vested with a broad discretionary power to shape and fashion injunctive relief to fit particular
11 facts, circumstances, and equities of the case before it.” *Rupert v. Gunter*, 31 Wn. App. 27, 640
12 P.2d 36 (1982); RCW 7.40.020; *cf. Eden Hannon & Co. v. Sumitomo Trust & Banking Co.*, 914
13 F.2d 556 (4th Cir. 1990) (imposing a constructive trust on profits derived from breach of non-
14 disclosure agreement).

15 **C. Discovery Is Still Ongoing.**

16 Although Microsoft’s Motion is without merit given the recoverability of at least nominal
17 damages, Microsoft’s Motion should also be denied because Immersion is still conducting
18 discovery relating to its Counterclaim. Fed. R. Evid. 56(f). The discovery cut-off date in this
19 case is currently set for June 16, 2008, over a month and a half out. Evidence of the full scope of
20 Microsoft’s wrongful dissemination of confidential terms of the Immersion-Sony Agreement
21 remains within the possession, custody or control of Microsoft and third parties. Immersion also
22 is now finalizing for service a subpoena directed at Microsoft’s public relations firm, which
23 seeks information bearing on the full extent to which Microsoft shared with third parties its
24 Original Complaint, and/or the terms of the Immersion-Sony Agreement. Immersion also
25 intends to serve a subpoena on the PACER Service Center, and media outlets that were provided
26 the Original Complaint by Microsoft and posted/described the confidential information on their

1 websites, to determine the identity of persons who downloaded the Original Complaint and/or
 2 accessed the confidential information when it was publicly available.

3 Significantly, Microsoft initially concealed its sharing of the original Complaint. Over
 4 six months ago, at the start of discovery, Immersion asked Microsoft to produce documents
 5 “related to any communication, disclosure, provision, or sharing of the Sony Agreement or any
 6 of its terms” to any unauthorized person. At that time, Microsoft specifically represented that
 7 “there are no responsive documents.” McWilliam Decl., Ex. 7 (Response to Request No. 65).
 8 This was false. In February 2008, Microsoft produced emails showing that Microsoft, through
 9 its agents, widely disseminated the Original Complaint. *Id.*, Ex. 4. Immersion is entitled to
 10 conduct follow-up discovery on these documents and to question Microsoft witnesses in
 11 deposition, including Microsoft’s Fed. R. Civ. P. 30(b)(6) designee, on issues relating to the
 12 Counterclaim. One such issue is whether Microsoft deliberately included Immersion’s business-
 13 sensitive information in the Original Complaint in an effort to harm Immersion. *See* 11 Arthur
 14 L. Corbin, Corbin on Contracts § 56.16 (Rev. ed. 2005) (“In cases of willful breach, the trial
 15 court and jury have a greater degree of discretion and doubts will more readily be resolved
 16 against the party committing the breach.”).

17 **IV. CONCLUSION**

18 Microsoft breached the Confidentiality Agreement, and Immersion is entitled to an
 19 adjudication that Microsoft failed to honor its promise to keep the terms of the Immersion-Sony
 20 Agreement confidential and not to further disseminate them. Whether or not Immersion can
 21 show that it has suffered pecuniary damages at this time is of no moment. Immersion is entitled
 22 at least to an award of nominal damages for Microsoft’s breach of the Confidentiality
 23 Agreement. Moreover, discovery is not complete, and Microsoft failed to forthrightly comply

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1 with its discovery obligations in providing information regarding the extent to which it violated
2 its agreement with Immersion. Microsoft's Motion should be denied.

3 DATED this 6th day of May, 2008.

4 BYRNES & KELLER LLP

5 By /s/ Jofrey M. McWilliam

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1 **CERTIFICATE OF SERVICE**

2 The undersigned attorney certifies that on the 6th day of May, 2008, I electronically filed
3 the foregoing with the Clerk of the Court using the CM/ECF system which will send notification
4 of such filing to the following:

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