

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE MICROSOFT CORP.
ANTITRUST LITIGATION.

MDL Docket No. 1332

This Document relates to:

Hon. J. Frederick Motz

Burst.com, Inc. v.
Microsoft Corp.,

UNDER SEAL

Civil Action No JFM-02-cv-2952

**BURST'S SUPPLEMENTAL REPLY TO COMPEL MICROSOFT TO PRODUCE
DOCUMENTS RELATING TO ITS DOCUMENT PRESERVATION POLICY**

Burst deposed Chris Phillips on September 28, 2004, the day after it served its reply brief. Accordingly, we submit this very short supplemental brief to include in the motion record Mr. Phillips' testimony.

Mr. Phillips testified that Eric Engstrom asked him to negotiate a contract with RealNetworks in the spring of 1998. Phillips Deposition, September 28, 2004 at 10:20-25. After an internal meeting at Microsoft to discuss strategy, he started the negotiations. *Id.* at 46:6-10. He began the process in late March, and worked on the matter for more than three months. *Id.* at 96:12-15. He personally met with numerous RealNetworks' representatives, including having two meetings with the president of the company, Bruce Jacobson. Through this negotiation, he and Mr. Jacobson first arrived at a "deal" sheet, or term sheet, which reflected their agreement on the central business issues. *Id.* at 50:13-14 ("We had a deal understanding....").

Mr. Phillips brought an in-house lawyer, Cory Van Arsdale, to the final meeting with Mr. Jacobson. Mr. Jacobson attended the meeting with RealNetworks' General Counsel, Kelly-Joe

McArthur. Id. at 49:13-20. At this meeting, the parties hashed out the terms of an actual contract, which Mr. Phillips believes they reduced to writing. Id. at 49:13-14 (“Well, we had a draft of an agreement that the lawyers had produced.”).

Mr. Phillips testified he was taken “out of the loop” in late June to early July. The contract was signed in mid-July. He does not know how many of the deal points he negotiated ended up in the executed contract. He recognizes however that Microsoft executives frequently referred to the contract as the “Chris Phillips deal.” Id. at 96:16-102:25.

Mr. Phillips does not know why he was not identified to the Department of Justice in Microsoft’s interrogatory response. Id. at 103:3-105:22. He testified that he did not even know about the streaming media investigation until almost a year later, in the fall of 1998. Id. at 103:13-18. See also p. 145:21-146 (denying in Microsoft counsel’s examination that he knew about the CID investigation prior to fall 1998). He testified that he did not receive a document retention notice in 1997, nor did any Microsoft counsel review his documents at that time. Id. at 112:3-25. As a consequence, he routinely deleted all of his e-mail through 1997 and 1998. Id. at 112:8-11 (“if I’m not under retention then yes, I mass delete.”).

DATED: September 29, 2004

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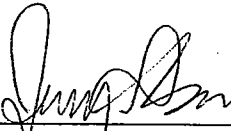
PROOF OF SERVICE

I am employed in the State of California, County of San Francisco. I am over 18 years of age and am not party to the within action. My business address is One Market, Spear Tower, Suite 2200, San Francisco, California 94105.

On September 29, 2004, I served BURST'S SUPPLEMENTAL REPLY TO COMPEL MICROSOFT TO PRODUCE DOCUMENTS RELATING TO ITS DOCUMENT PRESERVATION POLICY upon counsel named below as indicated:

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Executed this 29th day of September, 2004.



Jerry Shaw