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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

MICROSOFT CORPORATION, a
Washington corporation,

Plaintiff,

v.

KAI-FU LEE and GOOGLE, INC., a
Delaware corporation,

Defendants.

No. 05-2-23561-6 SEA

MICROSOFT'S MOTION FOR
PRELIMINARY INJUNCTION

REDACTED PUBLIC VERSION

I. INTRODUCTION AND RELIEF REQUESTED

1 From 2000 until July 18, 2005, Dr. Lee, a well-recognized computer scientist, held
2 senior leadership positions at Microsoft with respect to Microsoft's efforts to develop new and
3 improved speech, natural language, and advanced search technologies. He led the Natural
4 User Interaction Division at Microsoft, which was responsible for key technologies that were
5 broadly distributed to Microsoft product groups. He was responsible for Microsoft's search,
6 language translation and speech research and development efforts.

7 Dr. Lee also was intimately involved with Microsoft's research and development,
8 investment, government relations and staff recruiting in China. He was the Redmond
9 "sponsor" of Microsoft's China R&D operations and regularly advised Bill Gates and Steve
10 Ballmer about how Microsoft could succeed in China. Dr. Lee authored a comprehensive
11 internal memorandum to Bill Gates and others entitled "Making it in China," which he labeled
12 "Microsoft Confidential." He attended China planning meetings with Mr. Ballmer and other
13 Microsoft executives and he prepared presentations that were given in those meetings. He
14 was a key recruiter for Microsoft in the competition for talented employees in China.

15 Regrettably, documents produced by Dr. Lee and Google since the July 27, 2005 TRO
16 hearing reveal that Dr. Lee used his knowledge of Microsoft's technologies and business
17 strategies to obtain his highly paid position at Google. On May 7, 2005, while still a Microsoft
18 employee, Dr. Lee sent an email to Google's CEO noting that he had heard Google was
19 opening facilities in China and inquiring about Google's interest in talking to him. In that
20 email, Dr. Lee described his duties at Microsoft as "Corporate VP at Microsoft, *working on*
21 *areas very related to Google*" (emphasis added).¹ In support of his claim that his work was
22 "very related to Google," Dr. Lee offered a link to his Microsoft biography. This is the very
23 same biography cited in Google's Opposition to the TRO as proof that his work at Microsoft
24 was *not* competitive with Google.²

25
¹ Second Declaration of Jeffrey Johnson ("Second Johnson Decl."), Ex. 1 (KFL 000001). All fact citations in this brief are to the exhibits to the Second Declaration of Jeffrey Johnson.

² "Microsoft's own promotional materials confirm . . . , Lee did not engage in development of core search technologies which might be competitive with Google, and that his work for Google will not be competitive

1 Shortly after offering his services to Google, and while still in Microsoft's employ, Dr.
2 Lee sent a document he prepared for Steve Ballmer entitled "Making it in China" to Google,
3 after removing the "Microsoft Confidential" label from the document and making other
4 changes. Also while still on Microsoft's payroll, he advised Google on its business in China,
5 including where it should locate its offices, who it should hire, how it should strategize for the
6 market, and advising that Google should look to Microsoft as a source of talented employees.
7 Not surprisingly, Google quickly agreed with Dr. Lee on a compensation package worth in
8 excess of \$10 million, including a \$2.5 million cash "signing bonus" and another \$1.5 million
9 cash payment after one year, a package referred to internally at Google as "unprecedented."
10 Expecting Microsoft's lawsuit, Google also agreed to indemnify Dr. Lee and to pay all agreed
11 compensation even if he were enjoined from actively working for Google.

12 Dr. Lee is a talented manager and distinguished scientist, and it is no surprise that
13 Google would want to employ him. He is familiar with Microsoft's plans to compete with
14 Google generally and with various advanced search technologies in particular, knowledge of
15 crucial importance to Google's future success. He was also important to Microsoft's success
16 in China. It makes sense that Google would want him to replicate that success by leading its
17 entry into that very competitive market. But Dr. Lee agreed to a valid non-compete and non-
18 disclosure agreement with Microsoft and Google was well aware of this before hiring him.
19 That agreement has real value to Microsoft, and Dr. Lee was paid well for it. Microsoft simply
20 seeks an order that will assure Microsoft receives the protection to which it is entitled under
21 the agreement pending a full trial on the merits. An order that Dr. Lee not work in areas that
22 overlap with his work at Microsoft, or about which he learned confidential Microsoft
23 information, is not an undue hardship on Google or Dr. Lee. Microsoft respectfully requests
24 that the Court enter the proposed Preliminary Injunction submitted herewith.

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with work he was performing at Microsoft Exhibit 67 (Droke Decl., ¶ 5 and Exs. C, D (Lee's Microsoft bio));
Exhibit 34 at page 4

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II. FACTS AND PROCEDURAL HISTORY

A. Microsoft and Google Are Directly Competing in the Internet Search Market and on a Host of Related Products.

It is undisputed that Google and Microsoft are competitors. In fact, Google identifies Microsoft in its SEC filing as one of its primary competitors in the search engine market.

"We consider our primary competitors to be Microsoft Corporation and Yahoo! Inc."³

Likewise, Microsoft considers Google to be a significant competitor.⁴

Google and Microsoft are competitors in the market for "search" related products and services. Google describes itself as "the world's largest search engine" and advertises that it answers "more questions than any other service online."⁵ Google's revenue is derived primarily from advertising on its Internet search engine, and from paid online search services.⁶ Microsoft, through MSN and related products, competes directly with Google for these revenues.⁷

Google also offers a desktop search application called "Google Desktop Search." This application allows users to search for information stored on their own computers.⁸ Microsoft offers a directly competing product called Windows Desktop Search.⁹ Google is also currently working on (and seeking employees "passionate about") machine learning, natural language processing, operating systems, and user interface design.¹⁰ Google is also researching a speech responsive interface for the Google search engine.¹¹

At Microsoft, Dr. Lee was engaged in research, product development and strategy

³ Exhibit 2 (Declaration of Jeffrey Johnson, Ex D at 30 (Google Inc.'s SEC 10-Q filing from May 16, 2005))
The Declarations of Jeffrey Johnson, David Dawson, Sin Lew, Marla Mellies, Craig Mundie, Christopher Payne, and Eric Rudder were originally filed with Microsoft's TRO Motion, but they attached as exhibits here for the Court's convenience.

⁴ Exhibit 3 at 4 (Steve Ballmer, July 28, 2005 Financial Analyst Meeting); Ex 4 at 10 (Steve Ballmer, July 10, 2005 "Microsoft Worldwide Partner Conference")

⁵ Exhibit 5 at 1 (Google Corporate Information: Quick Profile, "By the Numbers")

⁶ Exhibit 5 at 3 (Google Corporate Information: Quick Profile, "Business Model")

⁷ Exhibit 6, ¶ 2 (Declaration of Christopher Payne ("Payne Decl"))

⁸ Exhibit 7 (Google Press Center, March 7, 2005, "Google Launches Desktop Search 1.0.")

⁹ Exhibit 28, ¶¶ 2-5 (Declaration of David Dawson ("Dawson Decl"))

¹⁰ Exhibit 8 at 2 (Labs google.com home page)

¹¹ Exhibit 9 (Alexander Franz and Brian Milch, "Searching the Web by Voice," available at <http://labs.google.com/papers/index.html>)

1 regarding all of these search businesses and technologies. He was also deeply enmeshed in
2 Microsoft's plans and strategies for succeeding in China.

3 **B. Dr. Lee Agreed to a Narrowly Drawn Non-Compete at Microsoft that is Valid
4 Under Washington Law.**

5 Dr. Lee was employed by Microsoft (or a Microsoft affiliate) from 1998 through July,
6 2005. From 1998 to 2000, he worked for a Microsoft affiliate in China, setting up Microsoft's
7 first research and development facility there. In August 2000, after two years managing that
8 facility, Dr. Lee was rehired by Microsoft at Microsoft's Redmond, Washington campus and
9 promoted to Vice President of the Natural Interactive Services Division ("NISD").¹²

10 As a condition of his return to Microsoft as Vice President, Dr. Lee executed an
11 Employee Agreement with Microsoft.¹³ Paragraph 9 of the Agreement provides:

12 **9. Non-Competition and Non-Solicitation.** While employed at Microsoft
13 **and for a period of one year thereafter, I will not (a) accept employment or**
14 **engage in activities competitive with products, services or projects**
15 **(including actual or demonstrably anticipated research or development)**
16 **on which I worked or about which I learned confidential or proprietary**
17 **information or trade secrets while employed at Microsoft[.] . . . If during or**
18 **after my employment with Microsoft I seek work elsewhere, I will provide a**
19 **copy of this Agreement to any persons or entities by whom I am seeking to be**
20 **hired before accepting employment with or engagement by them.**¹⁴ [emphasis
21 added]

22 Dr. Lee was well paid in exchange for these promises. He received well over \$3
23 Million in total compensation since he returned to Redmond in August of 2000, including
24 more than \$1 Million in 2004 alone.¹⁵

25 **C. Dr. Lee Was Intimately Involved in Microsoft's Efforts to Develop New and
Improved Search Technologies and Products to Compete Directly with Google.**

As Vice President in Microsoft's NISD, one of Dr. Lee's primary responsibilities was
to lead Microsoft's efforts in developing new search technologies to compete with Google.¹⁶
Dr. Lee managed technical teams working on key future technology for desktop and internet

¹² Exhibit 11, ¶¶ 3-7 and at Exs A-D (Declaration of Marla Mellies ("Mellies Decl"))

¹³ Exhibit 11 at Ex F (Mellies Decl.)

¹⁴ Dr Lee also promised to maintain the confidentiality of Microsoft's confidential and proprietary information
This pledge is not limited to one year Exhibit 11 at Ex. F, p 1 (Mellies Decl)

¹⁵ Exhibit 11, ¶ 8 (Mellies Decl)

¹⁶ Exhibit 6, ¶ 2 (Payne Decl); Exhibit 14 at 1-2 (February 2005 Mid-Year Performance Review); Exhibit 15 at
1-2 (June 2005 Performance Review)

1 search as well as other Microsoft products¹⁷

2 **1. Dr. Lee Managed the Development of Search Technologies Designed to**
3 **Compete with Google.**

4 Much of the technical work managed by Dr. Lee is integral to Microsoft's future
5 advanced search innovations.¹⁸ Through this work, Dr. Lee became familiar with Microsoft's
6 competing search technologies and its future plans for enhancing its search functionality. He
7 is also intimately familiar with Microsoft's strategic business plans to market and monetize
8 search products – actions directly competitive with Google.¹⁹

9 Many technologies developed at Microsoft under Dr. Lee's direction have been or will
10 be incorporated into the MSN search engine and/or Microsoft's desktop search application.
11 These technologies include Microsoft's work -- through the Assistance Platform Group -- on
12 machine learning to improve ranking results.²⁰ It is anticipated that this new technology will
13 greatly improve Microsoft's desktop search capability as well as the MSN search engine.²¹
14 Microsoft's innovations in natural language processing and speech will also be used to
15 improve the MSN search engine.²² Dr. Lee -- a recognized expert in these areas -- was
16 integrally involved in Microsoft's development of technology related to speech and natural
17 language for search products.²³

18 Dr. Lee's recent descriptions of his work reveal his intimate knowledge of
19 Microsoft's advanced search technologies. For example, Dr. Lee's February 23, 2005 "Mid-
20 Year discussion" indicated that his first "Commitment" for the year was to "deliver search,
21 ... NL [natural language]/help/speech APIs to Longhorn" and "Deliver structured search[...]"
22 Dr. Lee stated that he planned to "Get two new committed customers to new core pillar

23
24 ¹⁷ Exhibit 6, ¶¶ 3-4 (Payne Decl.); Exhibit 12, ¶ 2 (Declaration of Sin Lew ("Lew Decl.")).

¹⁸ Exhibit 6, ¶ 3 (Payne Decl.); Exhibit 12, ¶¶ 2-3 (Declaration of Sin Lew ("Lew Decl.")).

¹⁹ Exhibit 6, ¶ 4 (Payne Decl.); Exhibit 12, ¶¶ 2-3 (Lew Decl.)

²⁰ Exhibit 12, ¶ 2 (Lew Decl.)

²¹ *Id.*

²² Exhibit 6, ¶ 3 (Payne Decl.)

²³ Exhibit 33, ¶ 9 (Declaration of Kai Fu Lee ("Lee Decl."), filed on July 26, 2005); Exhibit 69 (MS 90133);
Exhibit 70 (MS 19367)

1 deliverables –

REDACTED

”²⁴ His 2005

2 Annual Performance Review indicated that Dr. Lee was to “Deliver search/learning/NL
3 [natural language], AP [assistance platform] technologies to REDACTED” Dr.

4 Lee stated that “AP is really delivering – REDACTED

5 REDACTED”²⁵ “We just restaffed the search effort for and
6 you should expect good numbers soon.”²⁶ For 2006, he committed to “Apply AP to

7 and partner with”²⁷

8 During Dr. Lee’s management within the NISD, that division developed and applied
9 for many patents involving the inventions and technologies discussed directly above, and
10 many others.²⁸ Even a basic description of these patent applications discloses the breadth
11 and the scope of the technological work done by the NISD in the areas of search, natural
12 language, machine learning, machine translation, and speech.²⁹ Dr. Lee is himself named as
13 an inventor for seven United States patent applications submitted during his work at
14 Microsoft.³⁰ These include a patent granted in 2004 for a search engine product utilizing
15 natural language technology.³¹ He is also named as an inventor in a number of patent
16 applications designated for China through the Patent Cooperation Treaty.³²

17 Nor were Dr. Lee’s efforts purely managerial. He led technical development teams
18 and he provided direct technical input to Microsoft’s senior executives, including Bill
19 Gates.³³ Dr. Lee himself stated that “*I know a lot about all the technologies I manage,*

21 ²⁴ Exhibit 14 at 1-2

22 ²⁵ Exhibit 15 at 1-2

23 ²⁶ *Id* at 2

24 ²⁷ *Id* at 4 While they are too numerous to discuss in detail, Dr. Lee’s performance reviews – containing his
own descriptions of his job duties at Microsoft – demonstrate that he was intimately involved in all aspects of
search technology, natural language processing, machine learning, and speech recognition at Microsoft. See
Exhibit 16 (otherwise un-cited Performance Reviews of Dr. Lee)

25 ²⁸ Exhibit 17 (list of NISD patent disclosures)

²⁹ *Id*

³⁰ Exhibit 18 (Abstract of U S Patent Applications)

³¹ Exhibit 19

³² Exhibit 20 (Abstract of Patent Applications designated for China)

³³ Exhibit 13 at 3, ¶ 5 c (August 2001 Performance Review)

1 perhaps more than any VP in the company for their respective divisions.”³⁴ His then-
2 supervisor repeated a description of him as having “great technical depth regarding [natural
3 language], speech, search, and [user interfaces] in general.”³⁵ Meeting notes from Dr. Lee’s
4 May 18, 2004 “BillG 1:1 on Search” meeting with Bill Gates demonstrate that Dr. Lee was
5 intimately involved with Microsoft’s search strategies, technical product development, and
6 Google competition at the highest level of the company.³⁶

7 **2. Google is Actively Pursuing Research and Development with Respect to**
8 **Natural Language Processing and Speech Technologies for Use in Search.**

9 At the TRO hearing and in its opposition papers, Google argued that Dr. Lee’s areas
10 of expertise -- natural language, speech and advanced search -- were irrelevant to Google’s
11 product strategies.³⁷ This is simply untrue. In fact, Google is actively seeking to recruit
12 experts in natural language processing and speech, and advertises as much on the internet.³⁸
13 Moreover, Dr. Lee’s supervisor at Google, Alan Eustace, supervises research teams working
14 on natural language processing for Google products.³⁹ Mr. Eustace sees obvious product
15 application for the work being performed, and is seeking to expand his team of natural
16 language process researchers. Indeed, absent legal prohibitions, Mr. Eustace would gladly
17 hire more natural language processing experts from Microsoft.⁴⁰ Moreover, during his first
18 week of employment at Google, Dr. Lee received an email from a Google colleague
19 discussing a potential recruit for Google’s China research center stating that the candidate’s
20 “experience on machine learning and language processing is highly relevant to what we are
21 doing here at Google.”⁴¹ “I think he is a good candidate for our China team.”⁴²

22 ³⁴ *Id.* at 8.

23 ³⁵ *Id.* at 9.

24 ³⁶ Exhibit 21 (notes of “BillG 1:1” meeting regarding “search”).

25 ³⁷ The second sentence of Dr. Lee’s TRO Opposition reads: “In truth, Kai-Fu Lee’s work for Microsoft had only
the most tangential connection to search and no connection whatsoever to Google’s work in this space”
Exhibit 34 at 1

³⁸ Exhibit 71 (Eustace deposition transcript at 80:16 - 81:5)

³⁹ Exhibit 71 (Eustace deposition transcript at 81:6 - 87:13)

⁴⁰ Exhibit 71 (Eustace deposition transcript at 87:14 - 88:6)

⁴¹ Exhibit 65 (GOOGMS 00685-86)

⁴² *Id.*

1 Contrary to Google's earlier claims, Mr. Eustace also has a team of engineers
2 working on speech recognition technologies for use with search.⁴³ In particular, Mr. Eustace
3 sees obvious application for speech recognition technology in mobile search (using wireless
4 phones) and in the automotive industry.⁴⁴ Indeed, Mike Cohen, a Google scientist who leads
5 Google's speech research effort, was specifically selected to interview Dr. Lee because of
6 Mr. Cohen's lifetime achievement award in speech technologies.⁴⁵ The fact that Google has
7 plans for Dr. Lee that go well beyond supervising construction of an office in China, is made
8 clear by an email from Google's Director of Business Development, Jonathan Rosenberg,
9 wherein he says with respect to the recruitment of Dr. Lee: "I all but insist that we pull out
10 all the stops and close him like wolves. He's an all star and will contribute in ways that go
11 substantially beyond China."⁴⁶

12 **C. Dr. Lee Has Been a Leader in Microsoft's Growth in China and Has Been
13 Involved in Microsoft's China Recruitment Efforts.**

14 Clearly, China is a key market for U.S. businesses. Dr. Lee was the first director of
15 Microsoft's original research facility, which was established in 1998. Google recently
16 announced its own intention to establish R&D facilities in China.

17 Throughout his tenure at Microsoft, Dr. Lee was intimately involved in the planning
18 for Microsoft's China operations and the implementation of those plans. One of the top
19 priorities of Microsoft Research China has always been recruiting and hiring top talent. This
20 was true in 2000, when Dr. Lee described his second most important performance objective
21 in China as "Recruiting . . . Continue to hire the best people for MSRCn [Microsoft Research
22 China]."⁴⁷ It was true in 2003, when in a detailed Microsoft memorandum Dr. Lee described
23 the "top priority" of Microsoft's China strategy as "recruiting good people."⁴⁸ And it was
24 true in May of 2005, when Dr. Lee gave a presentation on China Research & Development

25 ⁴³ Exhibit 71 (Eustace deposition transcript at 97:5 – 100:1).

⁴⁴ *Id.*

⁴⁵ Exhibit 71 (Eustace deposition transcript at 166:22 – 167:10)

⁴⁶ Exhibit 66 (GOOGMS 02723)

⁴⁷ Exhibit 23 at 1, ¶ 2, and at 4, ¶ 2 (August 2000 Performance Review)

⁴⁸ Exhibit 24 at 12 and at 18-19 (citing Steve Ballmer)

1 and Outsourcing to Steve Ballmer, Microsoft's CEO, in which Dr. Lee addressed what
2 approach Microsoft would "use to grow the R&D research base in China . . . and capture the
3 R&D potential that China has to offer," part of which entailed "attract[ing] and retain[ing]
4 China's top development talent" and "captur[ing] talent before our competitors."⁴⁹

5 Dr. Lee was one of the lead executives in charge of developing and implementing
6 Microsoft's overall business strategies with respect to China. In a January 16, 2005 email to
7 Microsoft Chairman Bill Gates, Dr. Lee stated that he viewed it "as a part of my job to help
8 Microsoft in China. I certainly spend 10-15% of my time on various activities that relate to
9 this goal."⁵⁰ In a performance review dated August 1, 2003, Dr. Lee was more explicit,
10 stating:

11 **I wrote several documents which became the cornerstone of**
12 **our Microsoft China plan. I proposed the strategy,**
13 **government relationship, and organization plan, which Steve**
14 **[Ballmer] and Kevin adopted. I drove the Made-in-China task**
15 **force which started some of the key initiatives needed in China. I**
16 **took the initiative to go to China ahead of BillG to avoid disasters**
17 **during his visit. Our employees in China trust me and confide in**
18 **me, so I am able to also gauge employee issues and make**
19 **appropriate recommendations. I was also able to mobilize the**
20 **Redmond Chinese community and engage them to help with our**
21 **challenges and opportunities in China. I believe Steve and Kevin**
22 **would say that I am one of the key people for Microsoft's**
23 **future success in this incredibly important market.**⁵¹ (emphasis
24 added).

19 One of the papers referred to above was Dr. Lee's Microsoft Confidential white paper
20 titled "Making It In China: Strategic Recommendations for Microsoft." This paper addressed
21 numerous aspects of Microsoft's China strategy, including what was described as Microsoft
22 China's "top priority" -- "recruiting good people."⁵²

23 Microsoft was surprised and disappointed to learn that Dr. Lee forwarded an edited
24

25 ⁴⁹ Exhibit 25 at 2 and at 4 (May 10, 2005 "SteveB China R&D and Outsourcing Discussion") (MS-LEEGGL
5000741, 5000743)

⁵⁰ Exhibit 30 at 3

⁵¹ Exhibit 26 at 2 (August 1, 2003 Performance Review)

⁵² Exhibit 24 at 12 and at 18-19

1 version of his confidential "Making It In China" strategy memorandum to Google on June 7,
2 2005, while he was still an employee of Microsoft and before he had given notice of his
3 intention to leave.⁵³ Before forwarding the document, Dr. Lee apparently removed the
4 "Microsoft Confidential" label from each page, eliminated credit for the other Microsoft
5 contributors, deleted a chapter entitled "Recommendations for Microsoft," and made minor
6 textual changes.⁵⁴

7 **1. Dr. Lee was intimately involved with Microsoft's highest-level decision**
8 **making about China.**

9 While at Microsoft, Dr. Lee was an active member of the China Redmond Advisory
10 Board (the "CRAB"), an executive committee at Microsoft that reviews the company's most
11 important plans for the China market in highly confidential meetings.⁵⁵ The CRAB reviews
12 detailed and confidential information regarding Microsoft's present initiatives and
13 expenditures in China, relations with the Chinese government, private investment strategies,
14 and Chinese companies targeted for acquisition.⁵⁶ Dr. Lee regularly attended these meetings,
15 including the most recent CRAB meeting that occurred on May 16, 2005.⁵⁷

16 Dr. Lee was also a member of Microsoft's Executive Staff, which includes only Vice
17 Presidents and above. The executive staff meets quarterly and attends an annual retreat at
18 which a broad range of technical, strategic and business planning is done. Dr. Lee also was
19 the "sponsor" or representative of Microsoft China R&D efforts in Redmond.⁵⁸ He was an
20 advisor to Chairman Bill Gates and CEO Steve Ballmer on China issues.⁵⁹ And he was a
21 crucial liaison figure between Microsoft's Redmond campus and its employees and facilities
22 in China.⁶⁰ Accordingly, Dr. Lee knows as much or more about Microsoft's plans and
23 strategies for China as anyone at Microsoft. He should not be performing a similar role at

24 ⁵³ Exhibit 27 (KFL 00196-219).

⁵⁴ Compare Exhibit 24 with Exhibit 27.

25 ⁵⁵ Exhibit 29, ¶¶ 2-4 (Declaration of Craig Mundie ("Mundie Decl.")).

⁵⁶ Exhibit 29, ¶¶ 4-5 (Mundie Decl.).

⁵⁷ Exhibit 41, ¶ 13 (Declaration of Michael Ensing ("Ensing Decl.")).

⁵⁸ Exhibit 30 (January 18, 2005 e-mail to Bill Gates).

⁵⁹ Exhibit 30; Exhibit 31 (e-mail to Steve Ballmer about China issues); *see also* Exhibit 26 at 2; Exhibit 25

⁶⁰ Exhibit 32 ("MS PRC: A Personal Perspective").

1 Google during the remaining period of his non-compete agreement.

2 **2. Dr. Lee was directly involved in Microsoft's recruiting efforts for China.**

3 Dr. Lee and Google admit that Dr Lee will be "recruiting" while in China,⁶¹ but have
4 argued that this does not constitute competition with any "products or services" of
5 Microsoft.⁶² This is belied by what Dr. Lee actually did at Microsoft.⁶³ In fact, Dr. Lee
6 remained involved in staff recruitment efforts for Microsoft's China R&D center until very
7 recently. In early May, 2005, he attended interviews and gave substantive input on a job
8 candidate for an important post in Microsoft's China operation.⁶⁴ In reporting on the
9 interview, Dr. Lee strongly recommended that Microsoft hire Dr. Li Gong, stating: "There
10 was some indirect suggestion that he may have talked to Google about starting a China
11 operations [sic]. So we should move quickly."⁶⁵

12 The very next day, Dr Lee contacted Google for the first time (as far as is known at
13 this writing) about a possible employment opportunity, e-mailing Google CEO Eric Schmidt:
14 "I have heard that Google is starting an effort in China."⁶⁶ It appears that Dr Lee heard about
15 the Google China opportunity *while recruiting for Microsoft's China R&D operations*.

16 **D. Dr. Lee Began Advising Google on China Recruiting and China Strategy While
He was Still Working on Those Issues for Microsoft.**

17 Despite Dr. Lee's close involvement in China recruiting for Microsoft and the
18 constraints placed upon him by his non-competition agreement, it is now apparent that *Dr.*
19 *Lee began helping Google with its China business plans and recruiting shortly after he*
20 *applied for a job there, while he was still a Microsoft employee* In early June 2005, Dr. Lee
21 engaged in active e-mail correspondence with Google employees, including James Mi,

22 ⁶¹ Exhibit 33, ¶ 5 (Lee Decl)

23 ⁶² Exhibit 34 at 10 (Defendants' Opposition to Plaintiff's Motion for a Temporary Restraining Order). Of
course, the Microsoft non-compete is not limited to "products or services" and specifically covers "projects" as
24 well

25 ⁶³ Exhibit 23 at 1, ¶ 2, and at 4, ¶ 2 (August 2000 Performance Review, listing second, among future objectives,
"Recruiting – Continue to hire the best people for MSRCn"); *see also id.* at 2 (improving the "Image and
Awareness" of Microsoft Research China described by Dr Lee as his fourth most important performance
objective)

⁶⁴ Exhibit 35 (May 6, 2005 e-mail with Rick Rasheed regarding the Dr Li Gong hire)

⁶⁵ *Id*

⁶⁶ Exhibit 1 (KFL 00001)

1 regarding specific candidates that Google was considering -- or candidates Dr. Lee wanted
2 them to consider -- for Google's China R&D facility. Dr. Lee gave detailed feedback and
3 Google acted on his recommendations.⁶⁷

4 Dr. Lee also advised Google on the possibility of recruiting candidates in China *from*
5 *Microsoft*. On July 16, 2005 (before Dr. Lee resigned from Microsoft), Kannan Pashupathy
6 reported to Alan Eustace on a conversation he had "last week" with Dr. Lee. "[O]ne of the
7 key challenges I confirmed with him ... is our ability to find senior engineers locally who
8 would function as tech leads for our projects. In Beijing he said that *our opportunity to get*
9 *them would primarily be from Microsoft and Intel and that both would be difficult.*" Mr.
10 Eustace responded as follows: "The big bet here is that the game will change with KF. I
11 have pursued him very hard because he has incredible hiring ability. This, along with ex-pat
12 packages, might shake a few more people loose, both inside of Google, and outside."⁶⁸

13 Dr. Lee gave Google other advice about China strategy while still a Microsoft
14 employee. On June 7, 2005, he sent a long e-mail to Google's Alan Eustace, summarizing
15 his recommendations to Google for their planned growth into China.⁶⁹ He continued this
16 consulting in conversations and correspondence with Omid Kordestani, Google's Senior
17 Vice President for Global Sales and Business Development. On June 7, 2005, Mr.
18 Kordestani wrote: "It was very nice talking to you and learning about your insights into a
19 successful approach to Google's operations in China."⁷⁰ Dr. Lee also engaged in active
20 correspondence with Google regarding site selection for its R&D facility in China. He gave
21 feedback to Google about the possible sites and advised them to hold off signing a lease until
22 he was employed by Google so he could help them negotiate a better deal.⁷¹ These activities
23 and others contradict statements from Defendants' opposition to Microsoft's TRO motion,
24 which stated that Dr. Lee was "simply participating in the Google corporate orientation

25 ⁶⁷ Exhibit 36 (KFL 00146, 00652, 00655, 00657, 00668, 00679).

⁶⁸ Exhibit 37 (GOOGMS 04117; GOOGMS 06614)

⁶⁹ Exhibit 38 (KFL 00223).

⁷⁰ Exhibit 39 (KFL 00231)

⁷¹ Exhibit 40 (KFL 00444; KFL 00907-909; KFL 00697-702)

1 program,” and that he would “spend the first several months of his employment in California,
2 understanding the company and developing a plan for ultimately opening an office.”⁷²

3 During this same time period, Dr. Lee remained deeply involved in Microsoft’s own
4 China strategizing. On May 10, 2005, only two months before he left Microsoft and three
5 days *after* he contacted Google, Dr. Lee oversaw a formal presentation to Microsoft CEO
6 Steve Ballmer concerning China Research & Development and Outsourcing. During this
7 presentation, Dr. Lee addressed what approach Microsoft would “use to grow the R&D
8 research base in China . . . and capture the R&D potential that China has to offer,” part of
9 which entailed “attract[ing] and retain[ing] China’s top development talent” and “captur[ing]
10 talent before our competitors.”⁷³ Therefore, immediately prior to his departure from
11 Microsoft, and while in active discussion with Google, Dr. Lee held a leading role for
12 managing Microsoft’s continued growth into China, including its recruitment efforts

13 Recruiting is centrally important to Microsoft’s ultimate success in the China market.⁷⁴
14 There is growing competition among multinational corporations and native Chinese
15 corporations for the top computer scientists being trained in China. Hiring and retaining the
16 most qualified employees will determine the long range success of Microsoft and indeed any
17 company that makes a long range investment in R&D in China.⁷⁵

18 **E. Dr. Lee Had Recent Access to Microsoft’s Confidential Plans Regarding Search
and Competition with Google.**

19 As a senior Microsoft executive, Dr. Lee had frequent access to highly confidential
20 competitive plans including plans to compete with Google. Dr. Lee attended a March 24,
21 2005, highly confidential Executive Staff briefing entitled “The Google Challenge.”⁷⁶
22 Through this briefing, and as an executive working on search product strategy, Dr. Lee was
23 made aware of: (1) Microsoft’s overarching plan to compete with Google in the search

24 _____
25 ⁷² Exhibit 34 at 6 and at 10

⁷³ Exhibit 25 at 2 and at 4; *see also* Exhibit 41, ¶¶ 4-9 (Declaration of Michael Ensing (“Ensing Decl.”))

⁷⁴ Exhibit 41, ¶¶ 6 (Ensing Decl.)

⁷⁵ *Id.*

⁷⁶ Exhibit 6, ¶ 5 (Payne Decl.), Exhibit 42 (“The Google Challenge” Power Point presentation, with list of attendees)

1 marketplace, (2) specific product characteristics and product components that Microsoft is
2 developing to advance that competition, and (3) specific strategic opportunities identified by
3 Microsoft as the most promising means to compete effectively with Google. In short, Dr. Lee
4 was recently handed Microsoft's entire Google competition "playbook."⁷⁷

5 In addition, in the weeks before his departure, Dr. Lee attended several other highly
6 confidential meetings at Microsoft wherein he was exposed to technologies and plans for
7 competing with Google. For example, on April 8, 2005, Dr. Lee attended a meeting with
8 Microsoft researchers wherein Microsoft's machine translation technologies and strategies
9 were presented to him, including a detailed discussion regarding how these technologies could
10 compete with Google's machine translation technologies.⁷⁸ In addition, on June 8, 2005, Dr
11 Lee attended a presentation by his teams to Eric Rudder wherein all of the latest developments
12 in desktop and internet search created by his staff were demonstrated.⁷⁹ During his first few
13 days with Google, Dr. Lee was provided documents related to Google's own highly publicized
14 machine translation products.⁸⁰

15 **F. Dr. Lee Engaged in a Long Negotiation Process with Google While Continuing to**
16 **Access Confidential Competitive Information at Microsoft.**

17 On May 7, 2005 Dr. Lee e-mailed Eric Schmidt, Google's CEO, and its founders Larry
18 Page and Sergey Brin, stating: "[I]f Google has great ambitions for China, I would be
19 interested in having a discussion with you. I am currently a Corporate VP at Microsoft,
20 *working on areas very related to Google.*" (emphasis added).⁸¹ Shortly thereafter, Google's
21 Vice President of Engineering wrote back, stating: "We would love to talk to you. Please call
22 me as soon as possible, 24 hours a day, on my cell phone :-)"⁸²

23 This began a series of communications between Dr. Lee and Google about the

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25 ⁷⁷ Exhibit 42

⁷⁸ Exhibit 73 (Power Point presentation); Exhibit 74 (Dr. Lee Outlook calendar page, April 8, 2005)

⁷⁹ Exhibit 74 (Dr. Lee Outlook calendar page, June 8, 2005)

⁸⁰ Exhibit 72 (e-mail dated July 24, 2005)

⁸¹ Exhibit 1 (KFL 00001)

⁸² Exhibit 43 (KFL 00004)

1 possibility of Dr. Lee leaving Microsoft to run Google's new China R&D center.⁸³ Dr. Lee
2 traveled to Google headquarters on May 27, 2005, where he was interviewed in a "remote area
3 on the Google campus"⁸⁴ by Eric Schmidt, the Chairman and CEO of Google, Sergey Brin and
4 Larry Page, Google's founders, and Alan Eustace, Google's Vice President of Engineering
5 and Research, among others.⁸⁵ The Google team was impressed with Dr. Lee, and began to
6 formulate an offer package to try and lure him away from Microsoft.⁸⁶

7 **1. Google and Dr. Lee negotiated around the possibility of a Court Order**
8 **enforcing his non-compete.**

9 At the time, Google was well aware of Dr. Lee's non-competition promises to
10 Microsoft. In fact, Google and Dr. Lee explicitly discussed these non-competition provisions,
11 well in advance of his hiring. On May 31, 2005, Alan Eustace e-mailed Dr. Lee, asking:

12 Here is the language from a 1997 Microsoft employment contract. Does
13 this sound familiar? [Enclosing the non-competition language]. . . .
14 Did you sign anything additional when you went to China?
15 One final note, you should be careful about getting exposed to highly
16 confidential or proprietary information while you are considering your
17 future.

18 Dr. Lee responded: "Yes this is the language, and no I did not sign anything else."⁸⁷

19 During the negotiations with Google, Dr. Lee insisted that Google offer him an
20 indemnity agreement to protect him in the event he was enjoined through a legal proceeding
21 from violating his non-competition agreements with Microsoft by working at Google.⁸⁸
22 Google agreed, promising to pay all defense costs and also agreeing to pay Dr. Lee's salary
23 and benefits – including his \$2.5 million signing bonus and an additional \$1.5 million bonus
24 after one year – even if he were prohibited from working for Google.⁸⁹

25 ⁸³ Exhibit 44 (GOOGMS 02408); see also Exhibit 2 at Ex. C (Johnson Decl.).

⁸⁴ Exhibit 45 (KFL 00082)

⁸⁵ Exhibit 46 (KFL 00104).

⁸⁶ Exhibit 47 (GOOGMS 02723)

⁸⁷ Exhibit 48 (KFL 00127). Contrary to this statement, Dr. Lee did sign separate non-competition contracts when he worked for Microsoft in China – Exhibit 11 at Exs. B and C (Mellies Decl.). He signed a new non-competition agreement when he moved to Microsoft's Redmond campus in August 2000.

⁸⁸ Exhibit 51 (KFL 00240-41)

⁸⁹ Exhibit 49 (KFL 00476-78)

1 2. **During the negotiations with Google, Dr. Lee continued to be exposed to**
2 **Microsoft's highest level strategizing about China.**

3 Despite Mr Eustace's warning to him that he should "be careful about getting
4 exposed to highly confidential or proprietary information," Dr Lee continued to be exposed
5 to Microsoft's highest level strategizing regarding its China R&D facilities. On June 20,
6 2005, Microsoft's "China R&D forum" held a meeting and discussed Microsoft's ongoing
7 efforts for R&D development in China.⁹⁰ The meeting minutes reflected that Dr. Lee
8 continued to be viewed at Microsoft as a primary leader of Microsoft's China R&D effort.
9 "Kai-fu is working on authoring guideline for China R&D management and developments."⁹¹
10 Dr. Lee received the Power Point presentation given at this meeting. *This presentation*
11 *summarized all of Microsoft's R&D plans for the China market*, including but not limited to:
12 (1) plans for Microsoft's China Technology Center, (2) planned product releases, (3) "FY 05
13 On-going projects," and (4) plans for the "ATC Group," stating its goal to "Tap on the huge
14 talent pool in China ... Hire the best."⁹² During this same period, Dr Lee was providing
15 Google with potential candidates to staff its China R&D facility,⁹³ and negotiating a \$10
16 million dollar compensation package to run Google's facility.⁹⁴

17 3. **Google offered Dr. Lee an "unprecedented" compensation package.**

18 On July 1, 2005, after extensive negotiations, Google forwarded a formal Offer Letter
19 to Dr. Lee outlining the terms of his potential employment with Google. He was offered an
20 extremely generous compensation package, described internally at Google as
21 "unprecedented."⁹⁵ It included: (1) a signing bonus of \$2.5 million, (2) an additional bonus
22 of \$1.5 million after the first year, (3) a base salary of \$250,000 per year (with a potential
23 additional bonus of up to 25% of that amount), (4) options for 10,000 shares of Google stock,
24 (5) a grant of 20,000 Google Stock Units over four years (with a value of over \$5 million at

25 ⁹⁰ Exhibit 50 (e-mail minutes of June 20 China R&D Forum meeting, with Power Point presentation)

⁹¹ Exhibit 50

⁹² *Id*

⁹³ Exhibit 36 (KFL 00146, 00652, 00655, 00657, 00668, 00679)

⁹⁴ Exhibit 51 (KFL 00292-298; KFL 00240; KFL 00300)

⁹⁵ Exhibit 52 (GOOGMS 04907)

1 today's stock price).⁹⁶ He was also offered a package of extra compensation for his
2 "expatriate" status in China, including: (1) a \$10,000 per month housing allowance, (2) a
3 "hardship allowance" of \$2,000 per month, (3) an "auto allowance" of \$3,000 per month "to
4 assist you in the hiring of a car and driver for use by you and your family," and (4) tuition
5 reimbursement of \$1,500 per month for private school for each of his two children.⁹⁷

6 On July 18, 2005, Dr. Lee told Eric Rudder of Microsoft that he had decided to resign
7 from Microsoft and accept the offer from Google to work in China.⁹⁸ Google publicly
8 announced its hiring of Dr. Lee the next day.⁹⁹

9 **G. Dr. Lee Will Be Intimately Involved in the Development of Google's Search
10 Products and Actively Recruiting for Google in the China Labor Market.**

11 Google's press releases and public statements confirm that absent an injunction, Dr.
12 Lee will be working on Google's search engine product in China. "The opening of an R&D
13 center in China will strengthen Google's efforts in delivering *the best search experience* to
14 users and partners worldwide." (emphasis added).¹⁰⁰ "As Google continues to explore the
15 Chinese market, *the center will focus on the development of the company's existing products,*
16 *as well as developing new innovative technologies and projects.*" (emphasis added).¹⁰¹

17 Moreover, talking points issued by Google made clear that recruiting in China will be
18 a primary goal, just as it was for Dr. Lee at Microsoft.¹⁰² Google has stated that the
19 competition "with Microsoft, Yahoo" and others for qualified recruits in China is "without
20 exaggerating, ... an all out war. Whether we can win the war and build a world class
21 engineering team largely depends on how successful [sic] we can attract, recruit, and retain
22 top ... software talents in China."¹⁰³ As discussed above, even before his hiring Dr. Lee

23 ⁹⁶ Exhibit 53 (KFL 00303)

24 ⁹⁷ Exhibit 54 (KFL 00317-324)

25 ⁹⁸ Exhibit 55, ¶ 8 (Declaration of Eric Rudder ("Rudder Decl")); Exhibit 11 at Ex. G (Mellies Decl.) (Dr. Lee's
resignation letter)

⁹⁹ Exhibit 2 at Ex. B (Johnson Decl.) (Google Press Release)

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at Ex. C (Johnson Decl.) (China Business News On-Line, July 20, 2005, quoting a Google media
representative from China)

¹⁰² Exhibit 56 (GOOGMS 02406)

¹⁰³ Exhibit 57 (GOOGMS 00791)

1 made recommendations for recruiting targets in China, and Google followed those
2 recommendations.¹⁰⁴ He began vetting candidates for hire, including candidates with
3 "experience on machine learning and language processing[.]"¹⁰⁵ Dr. Lee also began assisting
4 Google with plans for a "China beachhead team," reviewing a spreadsheet of potential
5 Google employees who might be asked to move to China.¹⁰⁶

6 Dr. Lee immediately became involved in Google's highest level strategizing for the
7 China market. On July 19, 2005, the day after he resigned from Microsoft, he apparently
8 attended a "special meeting" with Google's "cross-functional team," and a "china
9 ops/strategy review with Eric [Eric Schmidt, Google's Chairman and CEO][]"¹⁰⁷ He was
10 forwarded a Power Point presentation entitled "China Strategy and Operations Review,"¹⁰⁸
11 which disclosed Google's highest level strategizing for the China market. It included an
12 "operational review," a "China marketing plan," a "compensation update,"¹⁰⁹ and a
13 discussion of "possible Google projects" for China.¹¹⁰ The Google presentation also
14 contained a "case study" summarizing Microsoft's history in the China marketplace.¹¹¹

15 III. STATEMENT OF THE ISSUE

16 Should the Court enter a preliminary injunction prohibiting Dr. Lee from working for
17 Google in violation of his Employment Agreement, through the trial of this case in January?

18 IV. EVIDENCE RELIED UPON

19 This motion relies upon the Second Declaration of Jeffrey Johnson and the exhibits
20 thereto (which include the declarations of David Dawson, Mike Ensing, Jeffrey Johnson, Sin
21 Lew, Marla Mellies, Craig Mundie, Christopher Payne and Eric Rudder), and the pleadings
22 and other papers on file.

23 ¹⁰⁴ Exhibit 58 (KFL 00460, 00993, 00995, 01217-18, 01281)

24 ¹⁰⁵ Exhibit 59 (GOOGMS 00686; GOOGMS 01419; GOOGMS 01436)

25 ¹⁰⁶ Exhibit 60 (KFL 00625-35).

¹⁰⁷ Exhibit 61 (KFL 00567)

¹⁰⁸ Exhibit 62 (KFL 00588)

¹⁰⁹ Interestingly, just prior to his departure Dr. Lee received a detailed description of *Microsoft's* compensation structure in the China market Exhibit 68 (MS 22637-22640)

¹¹⁰ Exhibit 63 (KFL 00603)

¹¹¹ Exhibit 64 (KFL 00596)

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V. AUTHORITY AND ARGUMENT

Microsoft allowed Dr. Lee access to its confidential information and trade secrets only under express, written restrictions governing his conduct should he leave Microsoft's employment, restrictions to which he agreed as a condition of his employment. Dr. Lee has knowledge of sensitive and valuable Microsoft confidential competitive information concerning search technology and strategy and Microsoft's business plans and recruiting efforts in China. He promised not to compete directly with Microsoft for a period of one year. Dr. Lee breached this promise by accepting a leadership position in China with Google -- a company whose primary product stands in direct competition with Microsoft. He further breached these promises by assisting Google with its China operations and China strategy while he was still a Microsoft employee. Under these circumstances, the Court can and should exercise its equitable powers to order Dr. Lee and Google to live up to Dr. Lee's promises.

A. Microsoft Is Entitled To A Preliminary Injunction to Prevent Dr. Lee from Breaching His Promise Not To Compete With Microsoft.

Under Washington law, the showing necessary to obtain preliminary injunctive relief mirrors that required to obtain a TRO. Thus, to support such relief, Microsoft must show that: (1) it has a clear legal or equitable right; (2) that it has a well-grounded fear of immediate invasion of that right; and (3) that Dr. Lee's actions are either resulting or will result in actual or substantial injury to Microsoft. Federal Way Family Physicians v. Tacoma Stands Up for Life, 106 Wn.2d 261, 265 (1986). It is well-established that injunctive relief is an appropriate remedy for violations of a contractual promise not to compete, and such relief is warranted here. See, e.g., Wood v. May, 73 Wn.2d 307, 314 (1968)

1. Microsoft Has a Clear Legal and Equitable Right under the Employment Agreement.

Dr. Lee's agreement not to compete against Microsoft for one year gives Microsoft a legally enforceable right. See, e.g., Perry v. Moran, 109 Wn.2d 691, 700-01 (1987) (non-compete is an inherently reasonable way for employer to protect against defecting employees who might take advantage of employer's information), on reconsideration, modified on other

1 grounds by, 111 Wn 2d 885 (1989). Washington courts uphold non-competes if they are
2 “reasonable” and impose injunctive relief to enforce them. See, e.g., Washington Charcrete
3 Co. v. A.D. Campbell, 72 Wash. 566, 567-68 (1913); Barash v. Robinson, 142 Wash. 118,
4 122-25 (1927) (injunction granted to enforce oral non-compete agreement); Gemberling et al.
5 v. Heitman, 187 Wash. 412 413-17 (1936); United Dye Works v. Sophus Strom, 179 Wash.
6 41, 45-48 (1934) (injunction affirmed for violation of non-compete agreement); Lyle v.
7 Haskins, 24 Wn 2d 883, 905-09 (1946) (non-compete injunction upheld); Wood v. May, 73
8 Wn.2d 307, 314 (1968). To determine reasonableness, courts apply a three-part test to
9 determine if the agreement: 1) is reasonably necessary to protect the employer’s business; 2)
10 does not impose on the employee any greater restraint than is reasonably necessary for that
11 protection; and 3) is not contrary to public policy. Perry v. Moran, 109 Wn 2d 691, 698
12 (1995). Here, each element of this test is easily satisfied.

13 **a. The Restraint is Reasonably Necessary to Protect Microsoft’s**
14 **Confidential Business Information.**

15 Non-compete clauses such as the one agreed to by Dr. Lee serve a valid business
16 interest. “The essential purpose of the post-employment restraint . . . is . . . to prevent
17 competitive use, for a time, of information or relationships which pertain peculiarly to the
18 employer and which the employee acquired in the course of the employment.” Perry, 109
19 Wn.2d at 702 (citing Blake, *Employee Agreements Not To Compete*, 73 Harv. L. Rev. 625,
20 647 (1960)); see also Copier Specialists, Inc. v. Gillen, 76 Wn. App. 771, 774 (1995) (non-
21 compete intended to protect client relationships as well as the “acquisition of information ‘as
22 to the nature and character of the business’”). Courts routinely hold that the protection of
23 confidential information is a valid interest upon which to base a non-compete agreement. See,
24 e.g., Nike, Inc. v. McCarthy, 285 F. Supp 2d 1242, 1247 (D. Or. 2003) (“Plaintiff has a valid
25 interest in enforcement of the non-competition contract given the nature of the defendant’s
prior job duties and his access to confidential, valuable and proprietary information”);
Ingersoll-Rand Co. v. Ciavatta, 110 N.J. 609, 638 (1988) (employers need “protection against

1 the use or disclosure of valuable information regarding the employer's business")

2 Here, there is more than adequate justification to force Dr. Lee to fulfill the bargain he
3 made with Microsoft. Not only did Microsoft give Dr. Lee access to its proprietary and
4 confidential plans and strategies, it allowed him direct access to its most valuable trade secrets,
5 including the technical architecture and specifications for its search-engine technologies and
6 future plans. Indeed, Dr. Lee spent many hours -- while being paid handsomely by Microsoft
7 -- learning and refining this technical architecture. It took Microsoft several years and a
8 substantial monetary investment to develop these technologies. The architecture, design, code
9 and future development plans for Microsoft's search engine products are not known outside of
10 Microsoft, and Microsoft takes special precautions to ensure the secrecy of this information.
11 The same is true of Microsoft's confidential plans for competing with Google, such as those
12 Dr. Lee reviewed at Microsoft's Executive Google competition briefing in March, 2005.

13 Moreover, Dr. Lee was intimately involved in all aspects of Microsoft's activities in
14 China. He was directly involved in setting up Microsoft's R&D facility there, in leading the
15 company's highest level decision making regarding China, and in recruiting candidates to
16 work in China. He therefore had access to Microsoft's research and product development
17 plans, its plans for expansion, its recruiting and employment policies, its targeted
18 acquisitions, its relations with the Chinese government, and its long range future goals.
19 Allowing Dr. Lee to "turn on a dime" and use this highly confidential information to do
20 directly competing work *for Google* would undermine the most basic purpose of Dr. Lee's
21 non-competition and non-disclosure promises to Microsoft.

22 In responding to the TRO motion, Dr. Lee suggested that a Court Order was
23 unnecessary because he had no plans to do any competing work at Google for a year. But
24 non-compete agreements are enforceable despite an employee's insistence that he or she will
25 not disclose confidential business information. In fact, the very point of a non-compete is to
provide a company with the security of knowing that it does not have to rely on such
assurances See Cabot Corp. v. King, 790 F. Supp 153, 156-58 (N.D. Ohio 1992) ("[t]here

1 is no way, short of banning [employee] from working for [competitor] of insuring that
2 [employee] will not divulge the information he has regarding [former employer]”). Such
3 non-compete agreements allow employers to share confidential information with employees
4 without unknowingly advancing the interests of competitors or would-be competitors.
5 Copier Specialists, 76 Wn. App. at 774.

6 The record discloses, however, that Dr. Lee’s promises lack credibility. Despite his
7 non-competition promises, Dr. Lee began to assist Google with its China recruiting and China
8 strategy *while still employed at Microsoft*. He advised Google about site locations, business
9 strategies, and personnel issues and forwarded confidential China strategy documents to
10 Google *while still employed at Microsoft*. And during the same time period, Dr. Lee
11 continued to involve himself in the highest levels of Microsoft’s China strategy and decision
12 making, and continued to participate in highly confidential meetings regarding technologies
13 Microsoft was developing to compete with Google.

14 **b. The Restriction Is No Greater Than Is Reasonably Necessary to
15 Protect Microsoft’s Legitimate Business Interests.**

16 The non-compete provisions of the Employment Agreement are well within the bounds
17 of what courts typically consider to be reasonable restraints. The scope of the non-compete
18 provision agreed to by Dr. Lee is quite narrow, applying only to certain, defined competitive
19 activities and *continuing for only one year after termination of employment*. The non-compete
20 does not prohibit Dr. Lee from working for a Microsoft competitor. Instead, Dr. Lee’s
21 Agreement only prohibits competition in the specific areas where Dr. Lee worked for
22 Microsoft or in areas where he was exposed to confidential or proprietary information. Such a
23 narrowly crafted prohibition imposes little burden on Dr. Lee, and is far less restrictive than
24 non-compete agreements that courts in this state have enforced in other cases. Knight, Vale &
25 Gregory v. McDaniel, 37 Wn. App. 366, 369-71 (1984) (three-year non-compete reasonable);
Racine v. Bender, 141 Wash 606, 610 (1927) (three-year non-compete reasonable).

**c. The Agreement Imposes No Undue Hardship on Dr. Lee or the
Public.**

1 Although a failure to enforce the Employment Agreement will have substantial,
2 negative impacts on Microsoft, Dr. Lee will not suffer similar hardship. Unlike the former
3 employees restrained from competing in numerous Washington cases, Dr. Lee is guaranteed
4 that Google will pay him in excess of \$4.25 million *even if* he is restrained from working for
5 Google. This hardly qualifies as a hardship. See Nike, 285 F. Supp.2d at 1247 (no significant
6 hardship when new employer “contractually bound itself to hold defendant’s job open for a
7 one-year period” if old employer succeeded in enforcing non-compete).

8 Nor will there be a substantial impact to the public by enforcing Dr. Lee’s promise not
9 to compete. In fact, the public is best served by fair competition in the marketplace.
10 Ingersoll-Rand, 110 N.J. at 639 (“the public has a clear interest in safeguarding fair
11 commercial practices[.]”) Dr. Lee’s Employment Agreement serves to protect and enable
12 such fair competition by protecting Microsoft’s confidential information from misuse.

13 **2. Microsoft Has a Well-Founded Fear that Its Legal Rights Are Being and
14 Will Continue to Be Violated.**

15 Before the TRO was entered, Dr. Lee began work on behalf of Google and
16 participated, even while still employed at Microsoft, in assisting Google with its China
17 operations and China recruiting. Although Microsoft obtained temporary relief against Dr
18 Lee and Google, if the injunction is lifted Dr. Lee will be permitted to use the confidential and
19 proprietary information he learned at Microsoft to continue to aid Google in competing against
20 its number one competitor

21 **3. If Defendants Are Permitted to Unfairly Compete, Microsoft Will Suffer
22 Actual and Substantial Injury.**

23 Defendants’ conduct illustrates precisely why a limited non-compete provision was
24 included in Dr. Lee’s Employment Agreement, and why a preliminary injunction is necessary
25 to protect Microsoft’s proprietary and confidential information from improper use by a direct
competitor. If defendants are not enjoined, the essential purpose of the non-compete provision
will be frustrated. Perry, 109 Wn 2d at 702 (“The essential purpose of the post-employment
restraint . . . is . . . to prevent competitive use, for a time, of information or relationships which

1 pertain peculiarly to the employer and which the employee acquired in the course of the
2 employment.”). Microsoft will have no effective remedy because the harm is immediate, hard
3 to quantify, and because a substantial portion of the one-year limitation period will expire
4 before trial. Absent an injunction, Microsoft loses the benefit of its bargain, while Dr. Lee has
5 already obtained all the benefits. Such a result would be manifestly inequitable. Indeed, for
6 these reasons Dr. Lee *agreed* to injunctive relief in paragraph 12 of his Agreement.

7 Threatened misappropriation of a trade secret is itself grounds for injunctive relief.
8 RCW 19.108.020. A showing of harm is not required for injunctive relief when trade secret
9 misappropriation is at issue because the harm is inherent. See Boeing Co. v. Sierracin Corp.,
10 108 Wn.2d 38, 62-63 (1987). “[D]amages will not be an adequate remedy when the
11 competitor has obtained the secrets. The cat is out of the bag and there is no way of knowing
12 to what extent their use has caused damage or loss.” National Starch & Chem. Corp. v. Parker
13 Chem. Corp., 530 A 2d 31, 33 (N.J. Super. A.D. 1987).

14 Finally, injunctive relief is necessary because the actual and substantial injury
15 Microsoft has suffered and will continue to suffer as a result of defendants’ breach is unlikely
16 to be adequately remedied at law—*i.e.*, by monetary damages. As the Washington Supreme
17 Court has stated, monetary damages are difficult to ascertain when dealing with a breach of a
18 promise not to compete: “[I]t must be conceded that, in this type of case, the harm caused by
19 the breach *usually is incapable of accurate estimation.*” Management, Inc. v. Schassberger,
20 39 Wn.2d 321, 328 (1951) (emphasis added). In this case, the direct financial harm associated
21 with Dr. Lee’s use of Microsoft’s proprietary and confidential intellectual property at Google -
22 - while substantial -- will be very difficult to ascertain.

23 VI. CONCLUSION

24 For all of the aforementioned reasons, Microsoft is entitled to a Preliminary Injunction
25 holding Dr. Lee and Google to Dr. Lee’s promises.

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DATED this 22nd day of August, 2005.

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