Honorable Steven Gonzalez

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 **PUBLIC VERSION OF GOOGLE INC.'S OPPOSITION TO MICROSOFT'S MOTION FOR PRELIMINARY INJUNCTION** **(WITH REDACTIONS DEMANDED BY MICROSOFT)** **(WITH CORRECTED FOOTNOTES)**

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"I started out the meeting by announcing Kai-Fu's departure [from Microsoft Research China] . . . The reaction of the team was similar to what I would expect if I had announced a death. . . . Clearly, Kai-Fu did an incredible job in creating his team in China. He inspired not just loyalty but the kind of love and respect that you attribute to a beloved leader." ***Microsoft Senior Vice President Rick Rashid to Bill Gates and Steve Ballmer, August 7, 2000***[1]

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" ***Bill Gates, January 20, 2003***[2]

"I'm going to F.....g kill Google." ***Steve Ballmer to Mark Lucovsky, November 2004***[3]

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I. INTRODUCTION

11 To address Microsoft's purported concerns about Dr. Lee's knowledge of "confidential"
12 Microsoft information, Defendants have stipulated that, pending trial to determine what technical
13 or strategic information Dr. Lee actually worked on or knew, and whether it could be put to
14 competitive use for Google, Dr. Lee will not work or consult in any of the technical areas
15 identified in Microsoft's proposed preliminary injunction. Rather, pending trial, he will open a
16 product development center in China, and staff it with non-Microsoft personnel.

17 But Microsoft wants far more. It interprets its standard non-compete agreement to ban
18 Dr. Lee from doing any work for Google—or for any other software company—in China, or
19 anywhere else, that falls within the range of all of Microsoft's business globally.[4] Microsoft
20 brought this preliminary injunction motion not out of concern for any confidential information,
21 which Google and Lee have stipulated to protect, but out of a desire to delay Google's entry into
22 China, and make an example of Dr. Lee for other Microsoft employees who might have the
23 audacity to "defect" from Microsoft. See Microsoft TRO Mtn. at 1.

24 Microsoft has no legal right, contractual or otherwise, to prevent Dr. Lee from utilizing
25 his charismatic, personal qualities and general skills to start up a facility and hire from China's

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27 [1] Declaration of Ragesh Tangri ("Tangri Decl."), Exh. 59. Hereafter all exhibits references are to the Tangri Decl. unless otherwise noted.
[2] Exh. 18.
28 [3] Exh. 11, compare Exh. 63 (Ballmer Depo. at 70:17-72:4).

universities, and from companies other than Microsoft. Microsoft's claim that its non-compete covers recruiting is contrary to the terms of the non-compete covenant itself, which applies only to "products, services and projects," such as research, for which Dr. Lee was responsible, and not to the general activities Dr. Lee engaged in as a vice president, such as interviewing prospective executive hires. Dr. Lee has not been "recruiting" Chinese students or engineers for Microsoft for five years. Microsoft's non-compete covenant may not be construed to prevent Google and Dr. Lee from using Lee's personal skills to compete; employee non-competes will be enforced under Washington law only where they are necessary to protect an employer's confidential information or customer relations from being put to use for a competitor. Neither circumstance exists here, as Microsoft has not identified any confidential recruiting information or relations, and Dr. Lee knows of none, that could be put to competitive use for Google. Every aspect of what Microsoft has alleged is its "confidential" recruiting information and relations—such as hiring "the best engineers" and utilizing university relations to attract them—has been publicly disclosed on Microsoft's website and in public presentations by its management, besides being generally known.

II. STATEMENT OF FACTS

A. Google hired Dr. Lee to start and staff its product development center in China because of his reputation in China, and with Chinese students, not to obtain Microsoft information.

Google hired Dr. Lee to help it start up a China development center because of his stature in China, his integrity, his leadership and managerial skills, his technical credentials, and his commitment to and connection with Chinese students. Every Google executive deposed in this case has so testified.[5] With these personal qualities, Lee can attract Chinese computer science graduate students and engineers to work at a Google development lab. Seven years ago, Microsoft recruited Dr. Lee from Silicon Graphics to start-up a China research center for its affiliate, TRMC, for these same purposes: to tap into China's immense talent pool of students

[4] Exh. 6, Mundie Depo. at 121:15-128:21.

[5] Exh. 4, Eustace Depo. at 73:9-74:1; 74:5-6; Exh. 60, Schmidt Depo. at 48:6-49:6; Exh. 61, Page Depo. at 18:17-20:1; Exh. 1, Brin Depo. at 66:11-24; Exh. 3, Coughran Depo. at 99:6-24; Exh. 2, Singh Depo. at 53:14-24.

and scientists, including some who had emigrated, but could be enticed back.[6] Like Google, Microsoft has great respect for Dr. Lee's unique knowledge of China, his reputation there, his perception of how to do business there, his personal relations with Chinese officials, and his ability to talk with and gain access to China's leaders.[7] As Google co-founder Larry Page testified, people such as Dr. Lee "Don't grow on trees...."[8]

Google did not hire Dr. Lee to obtain Microsoft information. Google is admittedly ahead of Microsoft in search technology.[9] Google CEO Eric Schmidt did not even know of Dr. Lee's technical work at Microsoft until after this suit was filed.[10] Google's engineering VP, Alan Eustace, knew only that Dr. Lee was involved in a group that developed natural language technologies, but had "no idea of what his technical or managerial responsibilities were."[11]

B. Dr. Lee's unique personal skills belong to him—not Microsoft.

The unique skills and qualities that make Dr. Lee an ideal recruiter for Google are personal to him—Microsoft does not own them and cannot prevent Dr. Lee from using them on behalf of Google.[12] Dr. Lee has a legendary reputation in China's academic and government circles. In January 2005, *People Weekly* selected Dr. Lee as one of the 100 most influential people in China in 2004.[13] In making this award, the Committee described Dr. Lee as a "legendary character" who is "in the process of creating miracles upon miracles."[14] These miracles have nothing to do with Microsoft—they concern "university reform" and "teaching

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[6] Exh. 51, Technology Review, May 13, 2004, MS-LEEGGL 30591.
[7] Exh. 6, Mundie Depo. at 67:16-69:1, 88:2-17, 115:5-116:3.
[8] Exh. 61, Page Depo. at 19:14-20:1. Exh. 6, Mundie Depo. 67:21-23. Of course, one of the unique skills Dr. Lee brought to Microsoft was that he "speaks Chinese" – one assumes that even Microsoft would agree he can take this skill with him to other companies. Id. at 68:1-13.
[9] Exh. 5, Gates Depo. at 98:14-23.
[10] Exh. 60, Schmidt Depo. at 29:22-30:24, 46:22-47:17.
[11] Exh. 4, Eustace Depo. at 93:6:8. Eustace added that VPs of engineering "are managerial. They are not technical...[A]s a VP of engineering, the amount of depth that you're going to get in any of those areas is very shallow. You hire experts under you that understand the deep technical details." Id. at 27:21-28:2, 30:8-12.
[12] Dr. Lee's strength as a recruiter is based on his personal reputation and qualities. He recruited Ya-Qin Zhang to Microsoft Research China within a few months of starting work; Zhang was motivated to work with Dr. Lee in part because Zhang "respect[ed] Dr. Lee's management capability." Exh. 9, Zhang Depo. 11:8-14. Dr. Lee's reputation, and his sincerity, played an important role in attracting talent to the lab. Id. at 26:18-21; 27:24-28:1. Even after he left China, his practice of giving career advice to students, "which he cared [about] very deeply," enhanced his reputation among the students. Id. at 86:7-17.
[13] Exh. 10, Xu Decl. ¶ 9.
[14] Id.

[students] how to conduct themselves and handle matters, and...how to be a real Chinese."[15]

Dr. Lee's publications about and for China's computer science students are widespread. He has authored two books on the Chinese education system and Chinese youth.[16] His student-dedicated website provides articles, letters and advice to some 40,000 registered members, and he has used it to answer more than 3,000 student questions.[17] Dr. Lee has given approximately 300 lectures at more than 20 Chinese universities since 1990.[18]

In short, Dr. Lee is a "hero" to many Chinese students—"a person they can learn from, respect, and trust in a time of confusing contradictions in China."[19] It is these unique personal skills that Dr. Lee will use for Google, not any skills that are peculiar or related to Microsoft—and it is these skills that Google has every legal right to employ.[20]

C. Defendants have stipulated that, pending trial, Dr. Lee will not work on technical areas such as search, natural language, and speech technology.

Microsoft has exaggerated the scope of the technical products and projects on which Dr. Lee worked. Google will show at trial that its search and search-related technologies are ahead of Microsoft's, and that Dr. Lee will be given no responsibility for directing or participating in any product development projects for the term of his non-compete that correspond to those on which he actually worked for Microsoft.

Google and Dr. Lee, however, have stipulated that, pending trial, Dr. Lee will not "engage in, manage, supervise, provide services, or consult with others at Google regarding any research and development projects or any products in the fields of computer search technologies, speech technology, and natural language processing"—the three technology areas that Google has identified in ¶¶ 1 and 2 of its proposed Preliminary Injunction. In addition, he will not

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[15] Id. (People Weekly article)
[16] Declaration of Dr. Kai-Fu Lee ("Lee Decl."), ¶85.
[17] Lee Decl. ¶ 86.
[18] Lee Decl. ¶ 83.
[19] Exh. 10, Xu Decl. ¶¶ 4, 7.
[20] By contrast, as set forth in detail in Dr. Lee's declaration, he made repeated attempts, during his time in Redmond, to educate Microsoft's senior management on how properly to deal with the Chinese government, and to suggest a rational structure for Microsoft's numerous, and increasingly complicated and contentious, R&D groups in China. His attempts in both regards were consistently unsuccessful: Microsoft continued to repeat its mistakes, and could not summon up the institutional will to rationalize the structure of its disparate R&D groups in China. Dr. Lee eventually despaired of succeeding in educating Microsoft, and looked elsewhere. Lee Decl. ¶¶ 49, 58-74.

discuss Microsoft with any candidate being recruited for potential employment by Google, he will not solicit any Microsoft employees, and he will not disclose or use any Microsoft confidential information.[21] This stipulation was voluntary and unilateral, and both Google and Dr. Lee have agreed to abide by it under penalty of perjury.[22] Microsoft has nevertheless declined to withdraw its motion.

D. Dr. Lee has not been recruiting for Microsoft in China for five years.

Dr. Lee has not been actively recruiting for Microsoft in China for over five years, as reflected in Dr. Lee's performance reviews.[23] Part of his job in China was to recruit computer scientists for an academic research center, Microsoft Research China ("MSRC"), which did no product development work.[24]

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.[25] Google is planning a product development center, the talent pool for which will be different from the one that Dr. Lee drew on five years ago for MSRC.[26]

Since Dr. Lee left MSRC in China more than five years ago, his only activities relating to "recruiting" have been no more than any other Vice President or high-level employee: occasionally making public appearances and interviewing a few external job candidates—only three, in fact—and passing along the resumes of less than a handful of people who have contacted him.[27] As Bill Gates himself acknowledged, "

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.[28] Dr. Lee's recruiting for MSRC five years ago, therefore, is different than

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[21] Exh.13 (August 26, 2005 letter from John W. Keker to Karl J. Quackenbush and Jeffrey C. Johnson).
[22] Exh. 12, (Declaration of Dr. Alan Eustace ("Eustace Decl.")) at ¶ 6; Lee Decl. at ¶ 98).
[23] Lee Decl. ¶¶ 33-35; Microsoft Exhs. 13-16. The last time recruiting in China was mentioned, was in August 2000, when Dr. Lee had just left China. Microsoft Exh. 23 at ¶ 2.
[24] Lee Decl., ¶ 35; Tangri Decl. Exh. 53 (Rick Rashid; MSR Faculty Summit 2004); Exh. 51, (Microsoft Builds R&D Dream Team in Beijing); Exh. 9, (Zhang 28:4-30:17).
[25] Lee Decl. ¶¶ 58-59; Tangri Decl. Exh. 49 (Technology Review: Getting from "R" to "D"), Exh. 9, Zhang 30:7-20.
[26] Exh. 3 Coughran Depo. at 53:20–56:13.
[27] Lee Decl. ¶¶ 39-41.
[28] Exh. 5, Gates Depo. at 30:15–31:3.

recruiting for the product development center that Google intends to start in China.[29]

Microsoft also asserts that Lee is intimately familiar with its "China strategy," including information useful for recruitment by virtue of his role as "Executive Sponsor" for China, and his membership on the China Redmond Advisory Board (or "CRAB"). It is a misnomer to suggest that there is a "China strategy," as opposed to organizational proposals for how to deal with internal competition for resources and bickering within Microsoft's poorly coordinated China organization.[30] Even if there were, however, Lee would not be intimately familiar with it because of the CRAB. Ya-Qin Zhang, who succeeded Lee as head of MSRA from 2000-2004, testified that as a member of the CRAB who has reviewed the meeting materials, he was not aware of (a) additional product development work taken by the ATC since his departure (with the exception of one area that affects his current duties); (b) the identity of any companies with which MSN has entered into a joint venture; or (c) whether Microsoft has opened additional technical centers in China.[31] As for Lee's role as "Executive Sponsor" for China, Christopher Payne, the head of Microsoft's Search Division, testified that an executive sponsor within Microsoft is someone whom the sponsored group can talk to at the executive level, not someone who directs or supervises the activities of the sponsored group.[32]

E. Microsoft has not identified any Microsoft proprietary strategy or information relating to recruitment that is known to Dr. Lee.

In its papers, Microsoft asserts that it has a "confidential" recruitment strategy for China

[29] Although Microsoft makes much of the fact that Dr. Lee was asked (along with a dozen others) to interview Li Gong, Dr. Lee did not know him, and did not recruit him. Lee Decl. ¶ 41. Li Gong originally approached Microsoft employee Hong Jiang Zhang, and Dr. Lee's superior, Rick Rashid, who forwarded Gong's resume in an email to Bill Gates, Steve Ballmer, and others—but not to Dr. Lee, Microsoft's alleged "recruiter" for China. Exh. 23, MS-LEEGGL 45499-503. Dr. Lee later joined Li Gong for dinner. Microsoft Exh. 35 at MS-LEEGGL 55673. And contrary to Microsoft's assertions, Dr. Lee did not hear about Google's effort in China in connection with the Gong interview, but on Sina.com, a Chinese website. Lee Decl. ¶ 41. Microsoft's remaining "recruitment" evidence is that Dr. Lee similarly was asked to interview two other executives over five years—Tim Chen and Delan Beah—neither of whom Dr. Lee knew or recruited. Lee Decl., ¶ 39.

[30] See, e.g., Lee Decl., ¶¶ 44, 58-74.

[31] Exh. 9, Zhang Depo., 36:12-37:6; 39:4-12; 39:13-40:9; 42:16-43:5.

[32] Exh. 7, Payne Depo at 116:15-119:2; See also, Lee Decl. ¶ 43. Dr. Lee has approximately 50 acquaintances at Chinese universities, but he has no relationships with any "key faculty" who regularly refer students for hire by Microsoft. The one professor whom Dr. Lee knows has a close relationship with Microsoft—Professor Yu of Shanghai Jiatung University—has no relationship with Dr. Lee, who does not even know his first name. Lee Decl ¶¶ 36-38. Unsurprisingly, Microsoft's designated representative on China recruitment, Mr. Mundie, could not identify what confidential recruitment plans Dr. Lee is now aware of. Exh. 6, Mundie Depo. at 39:18-40:8.

known by Dr. Lee. Every aspect of the so-called "confidential" strategy that Microsoft has identified has been publicly disclosed by Microsoft.

1. Microsoft's allegedly "confidential" recruitment strategy is public.

As articulated by Microsoft, the confidential strategy includes the following aspects:

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Microsoft also maintains that . Redacted At Microsoft's Demand [34].

Microsoft, however, has publicly disclosed all of these allegedly "confidential" strategies. Microsoft's Chairman, Bill Gates, has described virtually all of the aspects of this strategy in public presentations, including one to 6,000 students and 2,000 developers in Beijing in February 2003. Gates' presentations disclose

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[35].

Microsoft's China recruitment "strategy" is also disclosed at numerous locations on Microsoft's U.S. and China websites. In addition to disclosing the "confidential" strategy to develop world class software talent, the website discloses the amount of Microsoft's investment

[33] Exh. 6, Mundie Depo. at 43:2-45:23 and Microsoft Exh. 41, Ensing Decl. ¶6.
[34] See Microsoft Brief at p. 13:5-6, 16:8 and Microsoft Exhs. 25 and 50.
[35] Exh. 15, Microsoft and Academia: Collaborating for the Digital Decade, Bill Gates PowerPoint Slide Deck, MS-LEEGL 8252-94 and Exh. 19, Next Generation Technology Key Note (China): Programming in the Digital Decade, Bill Gates, PowerPoint Deck, MS-LEEGGL 1742-1769.

in various training programs, the complete details of the university relations program in China, the number and type of research scientists hired by Microsoft, the specific universities with which Microsoft has research labs or agreements, the specific universities and faculty members with whom Microsoft collaborates, and of course, the jobs for which Microsoft is recruiting.[36] Microsoft's web posting for a College Program Coordinator position describes the details of Microsoft's college recruiting program, including its goals of "attracting and hiring the best university talent into Microsoft," "build[ing] robust relationship with MS business partners," and "develop[ing] and deploy[ing] programs like Internship Scholarship, and Projects."[37]

Microsoft's designated representative on its China recruitment strategy, Mundie, has admitted that Microsoft's involvement with key universities is not a secret, nor are its efforts to hire interns or post-doctoral fellows, to have Microsoft personnel take adjunct faculty positions, its presentations at universities, and its strategy to give research grants.[38] And of course, the identity and ranking of China's top university graduate schools from which engineers might be recruited is public knowledge, just as it is in the United States.[39]

2. Microsoft's research and development focus in China is publicly known.

Through Microsoft's website, public presentations, and press releases, it is publicly known that it is, or will be, developing the following:

> Mobile software and services including text messaging; instant messaging; an MSN China on-line portal to integrate communications; information and content services; on-line auctions; community services; news, ring tone and picture downloads; a smart phone operating system; web-search technologies; speech recognition technologies; MPEG 4, object-oriented multimedia and new internet technologies; information management and systems; visual computing; wireless and networking technologies; internet graphics; multimodel user interfaces; natural language processing; systems research; Gaming

[36] Examples of just some of Microsoft's web postings disclosing such information are collected at Exh. 50. See also Exh. 53, Rick Rashid: MSR Faculty Summit 2004.

[37] Exh. 50. Just three of countless news articles about Microsoft in China disclose most of the elements of Microsoft's "confidential strategy," in addition to describing the amount of Microsoft's Investments, the number of job applicants it receives, and how it recruits and handles such applicants. Exh. 51.

[38] Exh. 6, Mundie Depo. at 45:13-23, 49:12-53:15.

[39] Exh. 42, 2002 list of top 100 graduate schools of Chinese universities has been published, www.zju.edu.cn, November 4, 2002.

& Graphics; and embedded systems.[40]

Indeed, Mr. Mundie has admitted that Microsoft's research areas in China are not confidential and are published on its website.[41]

F. Microsoft's refusal to allow Dr. Lee to recruit is based on a fear of competition.

1. Microsoft fears competition from Google.

By its own admission, Microsoft is behind Google in the development of internet search technologies. Redacted At Microsoft's Demand .[42] By early 2003, Gates remarked: " Redacted At Microsoft's Demand ."[43]

More troubling to Gates, however, is that Google's lead in search challenges Microsoft's core business strategy to leverage its Windows monopoly into the internet browser space and, from there, into the internet as a whole. Gates wrote: " Redacted At Microsoft's Demand ."[44] Gates later admitted publicly that Microsoft had been "stupid as hell" for not building its own search engine sooner, and that Google has "kicked our butts" in internet search.[45] While Microsoft shipped its own internet search engine in February 2005, the MSN search engine Redacted At Microsoft's Demand .[46] Moreover, Google's success and innovative environment has made it an attractive alternative for Microsoft employees, causing Gates to write that Google is " Redacted At Microsoft's Demand

[40] Exh. 50 (website pages), Exh. 51 (articles from Newsweek, EE Times, and Technology Review), and Exh. 49 (articles describing technology and product plans).
[41] Exh. 6, Mundie Depo. at pp. 53:16-54:2.
[42] Exh. 5, Gates Depo at p. 82:3-19.
[43] Exh. 18, MS-LEEGGL 104695 (emphasis added).
[44] Id. (emphasis added).
[45] Exh. 5, Gates Depo. at 82:20-84:13, 84:19-22; Exh. 43, (Seattle Times "Microsoft Learns to Crawl" May 2, 2005), and Exh. 46 (Business Week Online "Microsoft Mission: Search and Destroy" February 2, 2005).
[46] Exh. 5, Gates Depo., at 98:14-23.

Redacted At Microsoft's Demand ."[47] Redacted At Microsoft's Demand

."[48] Microsoft sued Google and Dr. Lee on July 18, 2005—the day Lee resigned from Microsoft—without ever contacting Dr. Lee to discuss the supposed "concerns" Microsoft now claims are paramount.[49]

The Court will recall that Microsoft in its TRO papers made much of Dr. Lee's alleged responsibility for all things "search." Microsoft's strategy to "tie" Dr. Lee to search appears to have come from the top: the day after Microsoft filed suit, Gates wrote Christopher Payne, Microsoft's executive in charge of internet search, stating: " Redacted At Microsoft's Demand " (emphasis added).[50] The next day, two employees who had worked under Dr. Lee through mid-2004, but who had subsequently transferred to the MSN division to develop a desktop search product, had the following email exchange:

> "Reading the brief, it actually appears that KF's association with desktop search is a major part (if not ***the*** major part) of the suit...."
>
> "Actually though... From our side that totally makes sense. <u>They had to some how tie him directly to working on search technology and us coming from his division was probably the best tie-in they had.</u> Kai Fu's probably saying 'I did?' himself..."[51]

2. Microsoft itself regularly hires top managers from its competitors.

The day after Microsoft sued Google and Dr. Lee, Bill Gates wrote: " Redacted At Microsoft's Demand ."[52] Microsoft's Tim Chen independently wrote: " Redacted At Microsoft's Demand ."[53]

Microsoft's position that Google cannot hire Dr. Lee and have him recruit is the grossest

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[47] Exh. 20, MS-LEEGGL 92435-37; Exh. 21, MS-LEEGGL 92438-39.
[48] Exh. 5, Gates Depo. at 115:15-116:15; Lee Decl. ¶ 79.
[49] Lee Decl. ¶ 81.
[50] Exh. 38, MS-LEEGGL 162317.
[51] Exh. 39, MS-LEEGGL 156067 (emphasis added).
[52] Exh. 38, MS-LEEGGL 162317.

hypocrisy. In 2003, Microsoft hired Tim Chen, a ten year veteran and President of Motorola China.[54] Recently it hired Redacted At Microsoft's Demand

.[55] In June, it hired Dr. Li Gong, Managing Director of archrival Sun Microsystem's China & Engineering Research Institute, to become General Manager of Microsoft's Advanced Technology Center—MSN China R&D Center.[56] Microsoft openly brags on its website about "luring" star developers from Lotus and IBM.[57] None are barred from recruiting for Microsoft.[58]

G. During his negotiations with Google, Dr. Lee did not at any time breach his Employment Agreement with Microsoft.

1. Dr. Lee did not recruit anyone for Google before starting employment.

Microsoft's assertions that Dr. Lee began recruiting for Google while still at Microsoft, and that Dr. Google has solicited or will solicit Microsoft employees to work for Google, are both false. Dr. Lee simply corresponded about working for Google with two individuals whom he had long mentored. Neither was working for Microsoft, both were looking for new jobs and had made clear to Dr. Lee that they had no interest in working for Microsoft, and one already had an offer from Google prior to talking to Dr. Lee.[59]

Microsoft also misinterprets an email by Google employee Kannan Pashupathy, stating that Dr. Lee had said that Google's "opportunity to get [senior engineers] in China would primarily be from Microsoft and Intel and that both would be difficult." Mot. at 12. Dr. Lee did not tell Mr. Pashupathy that Google should hire from Microsoft; he said it would be difficult to

[53] Exh. 37, MS-LEEGGL 194132.
[54] Exh. 51, (Newsweek article).
[55] Exh. 7, Payne Depo. at 112:19-113:18; 111:16-112:5; Exh. 57, MS-LEEGGL 94248-49.
[56] Exh. 33, MS-LEEGGL 92983-92986.
[57] Exh. 52, Microsoft Careers Homepage, Spotlights "Microsoft Lures Former Lotus Development Stars to Exchange Team, Aug. 10, 2005.
[58] Exh. 5, Gates Depo. at 125:8-13; Exh. 7, Payne Depo. at 112:19-113:18.
[59] Lee Decl. ¶¶ 87-92; Microsoft Exh. 36. Microsoft also misleadingly refers to Dr. Lee "vetting candidates" and making plans for a "China beachhead team" before he was hired by Google. Mot. at 17-18. The only "candidate" Dr. Lee vetted before he left Microsoft was Kiktor Ku, his competitor for the job at Google, who also was not a Microsoft employee. All of the emails discussing Google's "beachhead team" were written after Dr. Lee joined Google. See Microsoft Exh. 58-60.

recruit from Microsoft because he could not participate in any such recruiting.[60] Dr. Lee had already informed Google that he could not "comment on" or recommend "MS employee[s]."[61]

2. Dr. Lee's "Making it in China" paper contained general, public information.

The version of "Making it in China" that Dr. Lee gave Google contains general and publicly available ideas about how a multinational company should do business in China. It does not contain any Microsoft confidential information.[62] This paper was originally written by Dr. Lee on his own initiative and as part of his effort to prevent Microsoft from continuing to act counterproductively in China.[63] Dr. Lee prepared Making it in China as "a basic 'primer' on how to behave (and, equally importantly, how not to behave) as a multinational company trying to do business in China."[64] Dr. Lee then authored a Section 4, containing specific recommendations for Microsoft, and marked the document "Microsoft Confidential."[65]

Since 2003, Dr. Lee has had multiple versions of his "Making it in China" paper, some that he has distributed publicly to university students and others *without* the section containing Microsoft specific information, and one "Microsoft Confidential" version containing Section 4.[66] Dr. Lee also posted on his website a presentation that contains much of the same, publicly available information he gave to Google.[67] The information contained in the non-confidential version is all available in numerous public sources.[68] Microsoft executives regularly use their own judgment to decide what information is not confidential and maybe presented publicly.[69]

Dr. Lee forwarded the public version to Google not for any competitive purpose, but to make sure that Google agreed with its basic tenets, as Dr. Lee did not want again to work for a U.S. company that did not share his views on what a multinational corporation needed to do to

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[60] Lee Decl. ¶ 95.
[61] Microsoft Ex. 36 at KFL 146; Exh. 56, GOOGMS 00001568-71.
[62] Exh. 12, Eustace Decl., ¶ 2; Lee Decl. ¶¶ 51-54, Exhs. 1-24.
[63] Lee Decl. ¶ 51.
[64] Id. ¶ 51.
[65] Id. ¶ 51.
[66] Id. ¶¶ 51-53.
[67] Exh. 45.
[68] Lee Decl., Exhs. 1-24, listing publicly available sources for each section.
[69] Exh. 7, Payne Depo. at 115:5-116:14.

succeed in China.[70]

3. Dr. Lee did not breach any promise to return to Microsoft after his sabbatical.

Microsoft has accused Dr. Lee of breaching a formal, written policy, allegedly set forth in a document he signed, requiring him to return after his sabbatical term ended.[71] Senior Microsoft VP Eric Rudder, who declared to those facts under oath, has now admitted, also under oath, that no such written policy is set forth in the documents signed by Lee.[72]

H. Microsoft has numerous engineers in China and extensive recruiting resources; Google does not.

As Microsoft's documents show, it has Redacted At Microsoft's Demand .[73] Microsoft reports that China is its "highest growth" country.[74] Microsoft has in place an extensive recruiting program drawing on its considerable and external resources.[75] And, as set forth above, Microsoft has achieved its record employment growth in China without any active recruiting by Dr. Lee for the past five years.

While Google's search technology is well known in China, unlike Microsoft, Google only recently obtained a license to do business there.[76] Having no established development presence in China, and no network or organization for recruiting engineers, Google needs Dr. Lee's administrative skills, personal qualities and unique reputation to attract Chinese engineers.

III. STATEMENT OF THE ISSUES

Can Microsoft's Non-Competition Agreement ("Agreement") be read so broadly that it would prohibit Dr. Lee from using his own unique personal skills and qualities, unrelated to Microsoft's proprietary information, to establish and staff a Google product development center in China, and if so read, does it violate Washington law, which prohibits covenants not to compete that impose greater restraints than are necessary to protect against competitive use of a former employer's confidential information?

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[70] Lee Decl. ¶53.
[71] Microsoft Exh. 55 (Rudder Decl., at ¶ 4 & Exh. A).
[72] Exh. 8, Rudder Depo. at 144:4 – 145:13
[73] Microsoft Exh. 50 at MS-LEEGGL 5000821-843.
[74] Id. at MS-LEEGGL 5000819-20.
[75] Exh. 6, Mundie Depo. at 43:21-45:23. 129:18-130:3.

IV. EVIDENCE RELIED UPON

This Opposition relies upon the Declarations of Kai-Fu Lee and Ragesh Tangri, the exhibits thereto (including declarations), the pleadings and other papers on file, and such further evidence and argument as may be presented at or prior to the hearing of this matter.

V. AUTHORITY AND ARGUMENT

As Microsoft acknowledges, it bears the burden of showing "(1) that 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 in or will result in actual and substantial injury to Microsoft." Mot. at 19 (citing Fed. Way Family Physicians, Inc. v. Tacoma Stands Up for Life, 106 Wn.2d 261, 265 (1986)). Moreover, "[s]ince injunctions are addressed to the equitable powers of the court, the listed criteria must be examined in light of equity including balancing the relative interests of the parties and, if appropriate, the interests of the public." Kucera v. Dep't of Trans., 140 Wn. 2d 200, 209 (2000). "If a party seeking a preliminary injunction fails to establish any one of these requirements, the requested relief must be denied." Id. at 210 (emphases added). A preliminary injunction is an extraordinary remedy that "should not be lightly indulged in, but should be used sparingly and only in a clear and plain case." Id. at 209 (emphasis added); see also Fed. Way Family Physicians, 106 Wn.2d at 265 (moving party must establish "a clear legal or equitable right and . . . a preliminary injunction will not issue in a doubtful case." (emphasis added, quotation marks omitted).

As an initial matter, Microsoft must show that the Agreement even applies to the activities Dr. Lee will undertake for Google pending trial—establishing a new product development facility for Google in China and staffing it with non-Microsoft personnel. Under Washington law, covenants not to compete must be narrowly construed, and Microsoft has not shown that its non-compete covenant, narrowly construed, clearly prohibits Dr. Lee from engaging in these activities.

Even assuming that the terms of the Agreement could properly be read to apply to setting up a product development center in China, Microsoft cannot meet its burden to show that such an

[76] Exh. 47 ("Google Goes to China" article); see also Exh. 3, Coughran Dep. at 52:21–53:4.

interpretation is "reasonable." See Sheppard v. Blackstock Lumber Co., 85 Wash.2d 929, 933 (1975) ("[T]he burden must be on the employer to establish the reasonableness of any restrictions....") Washington courts will uphold a covenant not to compete as "reasonable" only in three circumscribed situations: (1) where it is ancillary to the sale of a business, (2) to the extent necessary to protect the employer's customer relationships, and (3) to the extent necessary to protect trade secrets or other confidential information from competitive use. See Perry v. Moran, 109 Wash. 2d 691, 702 (1987). Neither of the first two circumstances has any application here. As to the third, Microsoft does not have any confidential information that Dr. Lee might use to start-up and staff a Google product development facility and has not proven that barring Dr. Lee from that work is necessary to protect confidential Microsoft information.

Finally, Microsoft bears a third burden to show that it will suffer "actual and substantial" harm in the absence of a preliminary injunction. Fed. Way Family Physicians, 106 Wn.2d at 265. But all that Microsoft has really shown is that Dr. Lee will help Google compete "for the top computer scientists being trained in China." Mot. at 12. Such competition is not a legally cognizable "harm," and avoiding it is not a legitimate business interest.

A. Microsoft has not shown that its covenant applies to recruiting.

Covenants not to compete are disfavored in Washington, and must be interpreted narrowly to minimize their restraint on employee mobility and competition:

> [P]ublic policy requires us to carefully examine covenants not to compete, even when protection of a legitimate business interest is demonstrated, because of equally competing concerns of freedom of employment and free access of the public to professional services. A covenant not to compete should be no greater in scope than is necessary to protect the business or good will of the employer.

Knight, Vale & Gregory v. McDaniel, 37 Wash. App. 366, 370 (1984) (emphasis added); see also Organon v. Hepler, 23 Wash. App. 432, 436 n.1 (1979) ("A covenant not to compete is in restraint of trade, and such restraints are disfavored.").

Microsoft appears to acknowledge that its Agreement must be narrowly construed, arguing that the Agreement "is quite narrow, applying only to certain, defined competitive activities." Mot. at 22 (emphasis added). And, on its face, Microsoft's non-compete covenant prohibits Dr. Lee only from engaging in "activities competitive with products, services or

1 projects (including actual or demonstrably anticipated research or development) on which [he]
2 worked or about which [he] learned confidential or proprietary information or trade secrets while
3 employed at Microsoft." (emphasis added)[77]

4 Nevertheless, Microsoft asserts that the term "project" covers not only Dr. Lee's
5 technical work, but also "recruiting," "hiring," "university relations," "government relations,"
6 "mergers and acquisitions," and, indeed, everything that falls within the "scope of the range of
7 business activities" engaged in or even contemplated by Microsoft, Google, or any other
8 software company, anywhere in the world.[78]

9 **a. Microsoft's interpretation of the word "projects" is overbroad.**

10 Microsoft's attempt to apply its non-compete covenant here relies, first, on an overbroad
11 interpretation of what it means to engage in "activities competitive with products, services or
12 projects (including actual or demonstrably anticipated research and development)." Microsoft
13 Exh. 11 ¶9, Exh. F (emphasis added). Microsoft argues that "[t]here is growing competition
14 among multinational corporations and native Chinese corporations for the top computer
15 scientists being trained in China." Mot. at 13. That may be, but competition for the best Chinese
16 computer science graduates is not competition with Microsoft products, services or projects—
17 *i.e.*, things that Microsoft sells, or is developing for sale, or is researching.

18 Indeed, Microsoft concedes, as it must, that establishing and staffing a product
19 development center are not "activities competitive with products[or] services," but implies that
20 the word "project" should be interpreted to cover those activities. See Mot. at 11 n.62. The
21 Agreement, however, specifically states that examples of "projects" are "actual or demonstrably
22 anticipated research or development." General goals and tasks that all businesses share, such as
23 "recruiting good people" (Mot. at 8), cannot reasonably be interpreted as constituting "projects"
24 within the meaning of the Agreement.

25 Nevertheless, Microsoft argues that one of its "projects" is "recruiting and hiring top
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27 [77] Microsoft Exh. 11, ¶ 9, Exh. F.
[78] Exh. 6, Mundie Depo. at 121:22, 124:18-19, 120-128. Indeed, in opposing Dr. Lee's request for an evidentiary
28 hearing, Microsoft states that "work for a Microsoft competitor" is a *per se* violation of the Agreement. See
Microsoft Opp. to Evid. Hr'g at 8.

talent" for its facility in China, and that if Dr. Lee hires people for Google, he is competing with Microsoft's "project." See Mot. at 8-13; see also Microsoft Opp. to Evid. Hr'g at 4. This is like saying that a law firm that annually hires law school graduates has a "project" to recruit, and that a lawyer who has ever interviewed job candidates and who has signed a non-compete could not interview any associate candidates for another firm which she might join. This Court should reject Microsoft's overbroad interpretation of the word "projects."

Microsoft also argues that Dr. Lee "worked on" Microsoft's "recruiting projects" because he—like any other Vice President or senior employee—occasionally interviewed Chinese candidates at Microsoft, and because he has encouraged some of Microsoft's Redmond-based Chinese engineers to work in China. Even assuming that routine hiring constitutes a "project," Dr. Lee's infrequent interviews do not constitute "working on" such a project. Likewise, Microsoft's claim that he recruited because he was a member of the CRAB is meritless; there is no evidence that such membership involved recruiting, and assuming it did, simply attending internal meetings cannot be construed to mean "working on a [recruiting] project," particularly since covenants not to compete must be interpreted narrowly.

For example, in Ecolab, Inc. v. Gartland, 537 N.W.2d 291 (Minn. Ct. App. 1995), the non-compete at issue prohibited working on products that were competitive with those the employee "handled." The court held that despite the employee's "extensive participation" with other divisions, the term "handled narrowly construed, meant only" the work he did in his own division. Id. at 295. Thus, the court interpreted the word "handled" to exclude "product lines of other divisions with which [the employee] had significant interaction." Id. (emphasis added). Likewise here, the phrase "on which [Dr. Lee] worked" must be construed narrowly to exclude "projects" that were not Dr. Lee's direct responsibility.

Microsoft also argues that anything on which Dr. Lee "worked"—no matter how long ago—is "competitive with" Google's current "projects." For example, five years ago, Dr. Lee recruited Chinese engineers for an academic research facility in China. But aside from the facts that (a) Dr. Lee was not working for Microsoft at the time, but for an affiliate, TRMC, and (b) this was before Dr. Lee signed the August 8, 2000 Agreement that Microsoft seeks to apply here,

it simply cannot be the case that recruiting people five years ago is an activity "competitive with" Google's attempts to hire people now. Any information other than general skills—in which, as demonstrated below, Microsoft cannot claim any proprietary interest—is stale. To read the agreement to prevent Dr. Lee from recruiting in China for any software company in 2005-2006, because he did this back in 1998-1999, is to turn a one year non-compete into a six year non-compete, and to ignore what "competitive" means.

b. Microsoft's interpretation of the phrase "about which [Dr. Lee] learned confidential or proprietary information or trade secrets while employed at Microsoft" is overbroad.

The covenant's prohibition of "activities competitive with products, services or projects . . . about which [Dr. Lee] learned confidential or proprietary information or trade secrets while employed at Microsoft" must also be interpreted narrowly. By its own terms, the covenant does not preclude Dr. Lee from working in the software industry, in any capacity, simply because he received confidential Microsoft information over the course of his employment there. Rather, it only prohibits work in the specific areas about which Dr. Lee learned confidential Microsoft information. Microsoft has not carried its burden to show that it has, and that Dr. Lee learned, any confidential Microsoft information specifically "about" establishing and staffing a product development center.

B. Microsoft has not met its burden to show that its interpretation of the covenant does not impose any greater restraint on Dr. Lee than is necessary to protect against competitive use of its confidential information.

Even if the non-compete covered establishing a product development center for Google in China, Microsoft still cannot carry its burden to show that its interpretation is "reasonable" as a matter of Washington law.

1. Washington courts will not enforce broad restrictions against working for a competitor.

In the employment context, Washington courts will not enforce broad non-compete restrictions. For example, in Copier Specialists v. Gillen, 76 Wash. App. 771 (1995)—on which Microsoft itself relies—the court held that a covenant precluding an employee from working "in any capacity involving activities competitive to [the employer] in the photocopy, typewriter, fax,

or like industries" was unreasonable and unenforceable. Id. at 773; see also Alexander & Alexander, Inc. v. Wohlman, 19 Wash. App. 670, 675-88 (1978) (broad restriction on competition held unreasonable); Sheppard, 85 Wash. 2d at 930-33 (same). The broad prohibitions on competition that were held to be unreasonable in Copier Specialists, Wohlman, and Sheppard cannot be distinguished, in any meaningful way, from the broad interpretation of the Agreement proffered by Microsoft and its 30(b)6 representative, Mr. Mundie.[79]

The question whether a covenant may bar recruiting has not come before a Washington Court so far as Google is aware. Those jurisdictions that have considered the issue have uniformly held that recruiting is a general skill, the use of which cannot be broadly restrained. In Moore v. Eggers Consulting Co., 562 N.W.2d 534 (Neb. 1997), a recruiter had signed a non-compete covenant providing that, for one year after the termination of his employment by the recruiting firm, he would not "[s]olicit or accept any business opportunity or arrange any placement in the area of executive and employee recruiting in the [data processing] business." Id. at 540. The court refused to enforce the covenant: "An employer does not ordinarily have a legitimate business interest in the postemployment preclusion of an employee's use of some general skill." Id. at 539. The covenant was held unreasonable and unenforceable because it "attempts to prohibit [the employee] from entering into business with anyone he had knowledge of, rather than just [the employer's] clients with whom [he] did business and had personal contact, and from working in employment recruitment anywhere in the continental United States." Id.; see also Diversified Human Res., Inc. v. Levison-Polakoff, 752 S.W.2d 8, 11 (Tex. Ct. App. 1988) (broad ban on recruiting was "oppressive on its face" and "injurious to the public as well because it prevents fair competition by going beyond its necessary purpose to protect" the plaintiff).

[79] Moreover, in her concurrence in Labriola v. Pollard Group, Inc., 152 Wash.2d 828 (2004), Justice Madsen considered the reasonableness of a strikingly similar covenant, which precluded the employee from "perform[ing] any work in competition with the services, sales and products of Employer" or "[b]ecom[ing] employed by any business competing with Employer." Id. at 847. The majority held that the agreement was invalid for lack of consideration. But Justice Madsen felt it important to give notice that the agreement also was "unreasonable because it bars [the employee] from working in his field of expertise even where he takes no unfair advantage of his former employer." Id. The employer's attempt to enforce such a broad covenant "represents an unfair attempt to stabilize [its] workforce and secure its business against legitimate competition. Postemployment restraints of this

As interpreted by Microsoft, its covenant unreasonably prohibits Dr. Lee from recruiting anyone for any software company throughout China (and elsewhere).[80] But given that courts will not uphold a broad restriction against recruiting where the only thing that the employee did for his former employer was to recruit, *a fortiori* this Court should not enforce Microsoft's covenant to preclude Dr. Lee from recruiting non-Microsoft employees. Notwithstanding Microsoft's vain efforts to characterize Dr. Lee as a primary recruiter for China (despite having previously characterized him in its TRO papers as its principal architect for all things having to do with search technology), it is clear that recruiting is a "general" activity at which Dr. Lee was personally skilled. This skill is not something which Microsoft can legitimately preclude Dr. Lee from using for a competitor. See Moore, 562 N.W.2d at 539-40.

2. Microsoft's attempt to rely on inapposite cases relating to covenants not to compete upon sale of a business illustrates the extent of its overreaching.

The only circumstance in which Washington courts will uphold restrictions against competition that are anywhere near as broad as the restriction Microsoft proposes here is when the covenant is ancillary to the sale of a business. Microsoft relies heavily on those cases. See Mot. at 19-20.[81] Sale-of-a-business cases, however, are inapposite: "A restriction which might be reasonable as applied to the seller of a business may be found unreasonable as applied to a former employee." Wohlman, 19 Wash. App. at 685; see also R.R. Donnelley & Sons, 767 F. Supp. at 1265 ("[A] court will scrutinize a restrictive covenant more closely when it is part of an employment agreement and not ancillary to the sale of a business.").

As the Restatement (Second) of Contracts explains, "[w]here a sale of good will is involved . . . the buyer's interest in what he has acquired cannot be effectively realized unless the seller engages not to act so as unreasonably to diminish the value of what he has sold." Restatement (Second) Contracts § 188, cmt. (b). Since no such restraint is necessary for an employer to get the full value of an employee's services, "courts have generally been more

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nature are never reasonable." Id.

[80] Exh. 6, Mundie Depo. at 120:15-128:21.

[81] Citing Washington v. Charcrete Co. v. A.D. Campbell, et al., 72 Wash. 566, 566-67 (1913); Barash v. Robinson, 142 Wash. 118, 119 (1927); Gemberling, et al. v. Heitman, et al., 187 Wash. 412, 414 (1936); United Dye Works v. Strom, 179 Wash. 41, 42-43 (1934); Lyle v. Haskins, 24 Wash.2d 883, 885-86 (1946).

willing to uphold promises to refrain from competition made in connection with sales of good will than those made in connection with contracts of employment." Id.; see also Knight, Vale & Gregory, 37 Wash. App. at 369 (Washington follows §188 of the Restatement). Reliance on sale-of business cases in an employment contract is inappropriate.

3. Employment covenants not to compete cannot be used to bar use of an employee's personal skills and qualities, only to prevent use of information or relationships that "pertain peculiarly to the employer."

The only Washington cases that Microsoft cites in which the courts actually upheld employee covenants not to compete involved accountants who had signed agreements that prohibited them from "poaching" clients from their firms. See Knight, Vale & Gregory, 37 Wash. App. at 370; Racine v. Bender, 141 Wash. 606, 611 (1927); Perry, 109 Wash. 2d at 696.

In its attempt to broaden the scope of these accountancy cases beyond their narrow factual context—and making careful use of ellipses—Microsoft misleadingly cites Perry for the proposition that "[t]he essential purpose of the post-employment restraint . . . is . . . to prevent competitive use, for a time, of information or relationships which pertain peculiarly to the employer and which the employee acquired in the course of the employment." 109 Wash. 2d at 702 (quoting Harlan M. Blake, *Employee Agreements Not To Compete*, 73 Harv.L.Rev. 625, 647 (1960)) (emphasis added). Tellingly, Microsoft deleted the following phrase from Perry: "[t]he essential purpose of the post-employment restraint is not to prevent the competitive use of the unique personal qualities of the employee—either during or after the employment." 109 Wash. 2d at 702 (emphasis added, ellipsis omitted). Microsoft also ignores the underlined qualification "which pertain peculiarly to the employer and which the employee acquired in the course of his employment." Id.

Thus, in Washington, as in other jurisdictions, covenants not to compete cannot be employed to prevent the competitive use of an employee's unique personal qualities; they can only be upheld to the extent that "they protect an employer's interest in trade secrets or other confidential information, and when they protect the good will generated between a customer and a business." Duneland Emergency Physician's Med. Group v. Brunk, 723 N.E. 2d 963, 966 (Ind. Ct. App. 2000); see also Perry, 109 Wash. 2d at 702; R.R. Donnelley & Sons, 767 F. Supp. at

1265. Microsoft's customer relationships are irrelevant here, so Microsoft must show that Dr. Lee would necessarily use Microsoft's confidential information in establishing Google's product development center.

4. Microsoft has not shown that Dr. Lee cannot establish a product development center and recruit non-Microsoft employees for Google without using Microsoft's confidential information.

The qualities for which Google hired Dr. Lee have nothing to do with any confidential Microsoft information, and Microsoft has identified no trade secrets or other confidential information "peculiar" to Microsoft that could be used by Dr. Lee in setting up and staffing a research facility for Google.[82] Microsoft's purported "recruiting strategy" amounts to nothing more than a set of high-level and non-confidential goals such as "hiring good people."

Microsoft's argument that it is necessary to enforce its non-compete covenant to "protect" its high-level and self-evident recruitment strategies is identical to the losing argument in R.R. Donnelley & Sons. There, the employer argued that its covenant should be enforced to protect its confidential "strategic and pricing information to which [the employee] had access as a senior executive." 767 F. Supp. at 1265. Although the employee "repeatedly affirmed his intention not to reveal any confidential information . . . [the employer] argues that it will be virtually impossible for him not to draw upon his knowledge, consciously or unconsciously, of [the employer's] new pricing policies and other strategic information in the performance of his duties [for his new employer]." Id. The court, however, found that the "strategies and pricing information" were insufficiently confidential to make enforcement reasonable, noting: "In contrast to sales, marketing, and pricing information, many of the cases cited by plaintiff involve actual 'trade secrets'. . . ." Id. at 1265-66. Moreover, the court rejected the argument that the covenant should be enforced because the employee had attended a presentation where the employer's "goals and new strategies to accomplish those goals" were discussed. Id. at 1267. The court observed that an employer's "ultimate goals or purposes" are not trade secrets: "The technical 'know-how' to achieve a particular goal may constitute a trade secret, but not untried

[82] See Section II.A and II.E, supra.

strategies or tactics at the discussion stage."[83]

Similarly, in Reed, Roberts Associates, Inc. v. Strauman, 40 N.Y.2d 303 (1976), the employer argued that "by virtue of [the employee's] position in charge of internal administration, he was privy to sensitive and confidential customer information which he should not be permitted to convert to his own use," and had "knowledge of the intricacies of their business operation." Id. at 308-09. The court, however, held that:

> absent any wrongdoing, we cannot agree that [the employee] should be prohibited from utilizing his knowledge and talents in this area. A contrary holding would make those in charge of operations or specialists in certain aspects of an enterprise virtual hostages of their employers.

Id. at 309 (emphasis added).

Microsoft, like the plaintiff in Reed, Roberts Associates, seeks nothing less than to hold Dr. Lee hostage for a year. By its own admission, Microsoft interprets its non-compete to preclude Dr. Lee from doing essentially any work whatsoever for any competitor.[84] Washington law does not allow such an overreaching restraint on competition. See, e.g., Copier Specialists, 76 Wash. App. at 773. Because Microsoft has not met its burden to show that its interpretation of the covenant imposes no greater restraint on Dr. Lee than is necessary to protect against competitive use of its confidential information, this Court should deny Microsoft's Motion for a Preliminary Injunction.[85]

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[83] Id. See also Wausau Mosinee Paper Corp. v. Magda, 366 F. Supp. 2d 212, 222-23 (D. Me. 2005) (rejecting the argument that a preliminary injunction should issue because it was "not possible" for the employee to perform his new job without using the former employer's confidential information); Medline Industries, Inc. v. Grubb, 670 F. Supp. 831, 838 (N.D. Ill. 1987) (denying request for injunction that was based "on speculation, conjecture and the mere possibility that [the former employee] used confidential information").

[84] Exh. 6, Mundie Depo. at 120:15-128:21.

[85] The cases that Microsoft cites from other jurisdictions, like the Washington cases, do not support its argument. In Ingersoll-Rand Co. v. Ciavatta, 110 N.J. 609 (1988), the court held that a covenant to assign the rights to an invention was unreasonable and unenforceable because "[m]atters of general knowledge throughout an industry cannot be claimed as secrets nor as 'unique information' derived as a result of current, ongoing research of the employer." Id. at 642. In Nike, Inc. v. McCarthy, 285 F. Supp. 2d 1242 (D. Or. 2003), the court conducted no analysis of whether the covenant not to compete at issue there was reasonable, and considered none of the factors that Washington courts evaluate in determining whether, and to what extent, to enforce such covenants. And in Cabot Corp. v. King, 790 F. Supp. 153 (N.D. Ohio 1992), the court interpreted the agreement at issue only to preclude the employee from working in an extremely circumscribed field—the "carbon black industrial market." Id. at 158. Here, in contrast, Microsoft seeks to preclude Dr. Lee from working for any competitor, in essentially any capacity. No court in Washington—or any other jurisdiction as far as Google is aware—has ever upheld such an overbroad interpretation of a non-compete.

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C. Microsoft has not shown that it will suffer actual and substantial injury if this Court denies its motion, while Google will suffer such injury if it is granted.

Microsoft has not carried, and cannot carry, its burden to show that it will suffer "actual and substantial harm" in the absence of a preliminary injunction.[86] Microsoft has extensive operations and an extensive recruiting network through which it has been successfully recruiting Chinese engineers for many years. Google, in contrast, has no established development presence or recruiting organization in China and needs Dr. Lee's unique personal skills and qualities to attract engineers for a Google product development center.

Google's use of Dr. Lee's general recruiting skills is not a legally cognizable "harm" to Microsoft. To the contrary, the law precludes Microsoft from using its covenant to stop Google from participating in what Microsoft characterizes as the "growing competition among multinational corporations and native Chinese corporations for the top computer scientists being trained in China." Mot. At 12.

VI. CONCLUSION

Because Microsoft has not carried any of its heavy burdens, this Court should deny its Motion for a Preliminary Injunction.

Dated: August 30, 2005

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By:

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GOOGLE INC.

[86] In fact, Microsoft essentially concedes that it has not shown actual and substantial harm by arguing that it need not show such harm because "trade secret misappropriation is at issue." Mot. at 24. As discussed in detail above, trade secret misappropriation is not at issue, so Microsoft has not carried its burden to show harm. Likewise, Microsoft has not carried its burden to show that it has no adequate remedy at law. The only case it cites for its argument that it does not have such a remedy deals with the availability of liquidated damages, not injunctive relief, in an inapposite sale-of-a-business case. See Mgmt. Inc. v. Schassberger, 39 Wn.2d 321, 328 (1951).