

HONORABLE STEVEN GONZALEZ
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KING COUNTY
SUPERIOR COURT

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

MICROSOFT CORPORATION, a
Washington corporation,)
)
Plaintiff,)
)
vs.)
)
KAI-FU LEE, and GOOGLE INC., a)
Delaware corporation,)
)
Defendants.)

CIVIL ACTION No. 05-2-23561-6

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING
ORDER**

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I. INTRODUCTION

In a shocking display of hubris, Microsoft has rushed into court claiming the entire field of search as its own. 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. Microsoft can make no showing that anything Lee will do for Google will in any way be competitive with his past work for Microsoft – especially the work he had done in his last year there.

Lee has not disclosed any of Microsoft's secrets to Google. Google has told Lee repeatedly not to disclose Microsoft's confidences. Both Defendants have behaved honorably. Despite weeks of time to scour Lee's e-mails and hard drive, Microsoft asks this Court, on the basis of mere speculation and innuendo, simply to assume that Lee will breach his nondisclosure obligations. It seeks to impugn Lee's good reputation with no evidence in support. But that is not how the legal system works. Microsoft, in order to obtain the extraordinary relief it seeks, must prove that there is an imminent threat to a legitimate interest it holds. Its "evidence," however, does no such thing.

The issue is not whether Google competes with Microsoft, but at best what Lee is doing for Google is competitive with what Lee did for Microsoft. Lee is not doing anything at Google that would compete with what he did at Microsoft. Lee is a new employee still undergoing orientation and just learning about Google - not violating his Employment Agreement. Even after his orientation period, Lee's efforts in locating a new facility and other related start-up activities will not violate his Employment Agreement.

This lawsuit is a charade. Indeed, Microsoft executives admitted to Lee that their real intent is to scare other Microsoft employees into remaining at the company. Microsoft's scant showing reveals the truth of its motion: the TRO Microsoft seeks would be a blatant prior restraint on speech, in violation of the First Amendment.¹ A prior restraint is constitutional only

¹ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights").

1 if it “sweeps no more broadly than necessary.”² Microsoft has made no showing of imminent
2 harm, and thus no showing of the necessity of a prior restraint. Microsoft’s public litigation
3 strategy guarantees the maximum negative impact on Lee, seeking his termination from Google
4 under a clouded name. Microsoft cannot prove its case and this motion must be denied.

5
6 **II. STATEMENT OF FACTS**

7 **A. Microsoft.**

8 Microsoft is the world’s largest and most widely recognized software manufacturer. In
9 2004, Microsoft employed 28,000 people in King County alone. Droke Decl., ¶ 3. It is presently
10 unknown how many of these employees were hired either from a Microsoft competitor or
11 another company at which they learned trade secrets they were unable to disclose to Microsoft.
12 Microsoft is projected to add another 10,000 workers in the next ten years. *Id.*, ¶ 4, Exh. A.
13 Microsoft has subsidiaries and business interests in computers, software products, information
14 systems, internet, and technology, around the world. *Id.*, ¶¶ 4-5, Exh. B. Microsoft has an
15 existing infrastructure and employee base of over 900 in China. Droke Decl., Exh. E.

16 **B. Google.**

17 Google is a public company founded in September 1998, best known for its web search
18 product, an algorithmic Internet search engine available at many international domains. Eustace
19 Decl., ¶ 2.³ Google's technology and continued innovation serve the company's mission of
20 “organizing the world's information and making it universally accessible and useful.” Eustace
21 Decl., ¶ 5. As of December 31, 2004, Google employed 3,021 individuals worldwide - about
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25 ² *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973).

³ Google’s systems constantly search the World Wide Web (“crawl the web”) to automatically identify and index web pages. Eustace Decl., ¶ 3. When a user submits a search query, Google applies its proprietary algorithms to identify and rank web pages relevant to that query from the vast database of indexed. Google also provides advertising and search services to advertisers, content publishers and site managers. Eustace Decl., ¶¶ 3, 4.

1 10% of Microsoft's King County employment alone and only three times Microsoft's China
2 presence. Google presently has no research operations in China. Eustace Decl., ¶ 11.

3 Google's search technology does not rely on natural language processing. *Id.*, ¶ 6. Lee
4 is not expected to supervise any natural language processing projects at Google. *Id.* Google has
5 no plans to pursue natural language processing projects at its future China research and
6 development center, and especially not in the next year. Google's search technology does not
7 rely on speech recognition technology. Google has no plans to pursue speech recognition
8 projects at its future China research and development center, particularly not in the next year.
9 *Id.*, ¶ 7. Lee will not supervise any "machine learning projects"⁴ that would require him to use
10 or disclose any confidential and proprietary Microsoft information.

11 **C. Kai-Fu Lee.**

12 Kai-Fu Lee already had a distinguished career at Silicon Graphics and Apple when he
13 started at Microsoft in 1998. Lee Decl., ¶ 12; Lee Supp. Decl., ¶ 1. He took steps to ensure that
14 he did not disclose or use any trade secret he had learned while at a prior employer. Lee Supp.
15 Decl., ¶ 2. He similarly took steps to make sure he protected Microsoft's trade secrets. Lee
16 Supp. Decl., ¶ 3. He was consistently rated as "exceptional" in the area of integrity, including
17 protection of Microsoft assets and intellectual property, by the same people who have now
18 signed declarations against him. Lee Supp. Decl., ¶ 4.

19 Lee is not a search expert. Throughout his career, both before Microsoft and while
20 employed there, Lee was an executive who managed groups developing technologies primarily
21 in the area of speech recognition and enhancing the user interface. Lee Decl., ¶ 11. This
22 information was not being actively considered for any search application when Lee left
23 Microsoft's employment just days ago. Lee Supp. Decl., ¶ 5. He had limited access to or
24
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4 "Machine learning" is a very broad term that could include a huge number of research ideas.

1 knowledge of the purported trade secret information asserted in the Complaint and Microsoft's
2 motion. *Id.* He is not a "search expert," nor has his personal work focused on search. *Id.*

3 **a. Microsoft's China Academic Research Facility, 1998-2000.**

4 In 1998, Lee opened and ran an academic research facility in China, he left that position
5 over five years ago. *Id.*, ¶ 6. The focus of the facility's work during Lee's tenure was to conduct
6 academic research and issue research publications. *Id.*, ¶ 6. In contrast, Google's center will
7 focus on product development, not academic publication, based on technical issues generated by
8 a staff that has yet to be hired. *Id.*, ¶ 6. Lee has no way of knowing whether Google's ultimate
9 research and development efforts will, in some respect, overlap whatever Microsoft's efforts
10 have been to date. *Id.*, ¶ 6. Moreover, Lee will not be responsible for Google's overall Internet
11 search application development during the next year. *Id.*, ¶ 6.

12 **b. Lee Had Limited Access To Microsoft's Purported Trade Secret
13 Information About China.**

14 Since 2000, Lee has had only limited involvement in Microsoft's China operations.
15 Lee's involvement was limited to attendance at occasional "CRAB" meetings where updates
16 were provided as to its China operations. *Id.*, ¶ 7. This did not involve a "project," but instead a
17 high-level advisory committee focusing on issues specific to Microsoft which would not be
18 beneficial to Google. *Id.*, ¶ 7. Lee does not recall any discussion of Internet Search or MSN
19 China other than already-public information. *Id.*, ¶ 7. Lee does not recall any specific
20 information from the most recent CRAB meeting he attended in May. Lee Supp. Decl., ¶ 9.
21 Microsoft's own promotional materials confirm that after transferring to Redmond, Lee did not
22 perform substantial work in China, did not engage in development of core search technologies
23 which might be competitive with Google, and that his work for Google will not be competitive
24 with work he was performing at Microsoft. Droke Decl., ¶ 6, Exhs. D, E. Information about
25 Microsoft's existing operation will be stale (12 months old) by the time the future Google R&D
center in China has been staffed.

1 c. **Lee's Limited And Tangential Involvement With Search Issues Ended**
2 **In Mid-2004.**

3 Microsoft fails to explain the current algorithmic-search-MSN Search and the past
4 partner-reliant MSN Search, and significantly overstates Lee's responsibilities. Both Google and
5 MSN Search today are algorithmic Internet Search. But Lee was never responsible for
6 algorithmic Internet search at Microsoft, never saw that code, and never participated in a code
7 review. Lee Decl., ¶ 8. Lee had oversight responsibility for a team named "MSN Search" for
8 only about one year between 2001 and 2002. *Id.* This "MSN Search" did not search itself;
9 instead it sent queries to be run on algorithmic-based search engine partners such as Inktomi and
10 Alta Vista. *Id.* At the time, Google competed with Inktomi and Alta Vista, not with Microsoft –
indeed, Google was a potential partner, not a competitor. *Id.*

11 Even for this relatively simple "MSN Search of 2001-2002" application, Lee was an
12 executive – he did not participate in the review of software code and did not work on any
13 architecture or algorithm design that was a part of the actual product. *Id.* In 2002, the Microsoft
14 team responsible for MSN development was transferred to Christopher Payne. *Id.* E-mail
15 messages at the time declared that "competing with Google was Chris Payne's job," not Lee's.
16 *Id.*; Lee Supp. Decl., ¶ 11. Since 2002, Lee has made no contribution in algorithm designs to
17 improve Microsoft's Internet search engine, has not participated in review of the software code,
18 and has had no involvement with any of the advertising or monetization architecture. Lee Decl.,
19 ¶ 8, 9. He was not invited to and did not attend any MSN Internet Search technical or strategic
20 planning meetings. *Id.*, ¶ 9. Lee has not had any involvement in search-related issues since
21 2002, except a single brief meeting in 2004.

22 In approximately April 2004, about 5 people on the team led by Lee started an unofficial
23 desktop search project without consulting him. Lee Decl., ¶ 10. It was June 2004 before Lee
24 heard of this skunk works project, reviewed and approved it. Approximately one month later, it
25 was transferred to MSN, a team not directed by Lee, because Bill Gates designated MSN to
compete against other algorithmic Internet Search companies (such as Google); *Id.* Lee does

1 not have any proprietary knowledge regarding that project nor would any such knowledge be of
2 use or relevant to any anticipated responsibilities at Google. *Id.* Lee has not met with any
3 member of the MSN Desktop Search team since their departure from his division in
4 approximately July 2004; Lee does not know their project plan. *Id.*

5 **d. Lee's Current Work Will Not Involve Competitive Activities During**
6 **The First Twelve Months After His Microsoft Separation.**

7 Lee is currently working at Google's world headquarters in Mountain View, California.
8 Lee Decl., ¶ 5. Presently and over the next year, Lee will focus on helping Google create and
9 establish a new research and development facility in China. Lee Decl., ¶ 5. For the next several
10 months, Lee will live and spend most of his working time in Mountain View overseeing the
11 progress of Google's new research and development center. Lee Decl., ¶ 5.

12 Lee is simply participating in the Google corporate orientation program in Mountain
13 View. Lee Decl., ¶ 5; Eustace Decl., ¶ 14. He is meeting members of the Google management
14 team with whom he will maintain a continuing relationship while stationed in China, developing
15 the timetables for the recruitment of professional personnel and the construction of Google's new
16 China facility, and pursuing a personal writing project. Lee Decl., ¶ 5. Recruiting is expected to
17 begin in late 2005. *Id.*; Eustace Decl., ¶ 15. The bulk of the new hires will be students
18 graduating at the end of the 2005-2006 school term; there will be a critical mass in
19 approximately August-September 2006. Lee Decl., ¶ 5; Eustace Decl., ¶¶ 15, 16.

20 **D. Lee's Separation From Microsoft.**

21 Lee informed Microsoft's Eric Rudder, the head of Lee's department and Senior Vice
22 President, Servers and Tools, that he was leaving Microsoft at the end of his sabbatical
23 considering taking a position at Google. This meeting occurred on July 5, 2005, while Lee was
24 on a break from a sabbatical that began on June 9 and was to continue until the end of
25 September. Lee Decl., ¶ 15. Lee offered to remain employed for several months to ensure a
smooth transition. Lee Decl., ¶ 15. Microsoft began courting Lee to remain with the company,
offering him numerous options. *Id.*; *see also*, Rudder Decl., ¶ 6. Microsoft representatives made

1 several statements to him confirming that if he left they would file a lawsuit against him. The
2 issue was not his non-compete – to the contrary, it was recognized that he could work at Google.
3 Lee Decl., ¶¶ 18-21.⁵ Lee was careful to avoid taking any Microsoft proprietary, confidential or
4 trade secret information from his office upon his departure, as directed by Google. Lee Decl.,
5 ¶¶ 15, 4. While Microsoft has known of Lee’s Google position since July 5, it has produced no
6 evidence whatsoever that he in any way copied, forwarded, or accessed any confidential
7 information for the purpose of using it at Google.

8 III. ARGUMENT

9 A. Microsoft Has No Clear Legal Or Equitable Right

10 “[A]n injunction will not issue in a doubtful case.” *Federal Way Family Physicians, Inc.*
11 *v. Tacoma Stands Up for Life*, 106 Wash.2d 261, 265 (1986). Further, public policy requires a
12 careful review of covenants not to compete. *Knight, Vale & Gregory v. McDaniel*, 37 Wn. App.
13 366, 370 (1984). Microsoft had failed to establish that it has a clear legal or equitable right for at
14 least three reasons: Microsoft has no legitimate protectable interest; (2) the non-compete is
15 unreasonable; and (3) Lee is not, in any event, competing. See, *Washington Fed. of State*
16 *Employees v. State of Washington*, 99 Wn.2d 878, 888 (1983).

17 1. Microsoft Does Not Have A Legitimate Protectable Interest.

18 Enforceability is counterbalanced against Washington’s constitutional prohibition on
19 restraints in trade. See, *Sheppard v. Blackstock Lumber Co., Inc.*, 85 Wn. 2d, 929, 931 (1975)
20 (citing Wash. Const., Art 12 §22; RCW 19.86.030). “A covenant no to compete is in restraint of
21 trade, and **such restraints are disfavored.**” *Organon, Inc. v. Hepler*, 23 Wn. App. 432 (1979)
22 (emphasis added). Microsoft, the largest software company in the world, now claims it must be
23

24 ⁵ He was also told that the intention of filing a lawsuit against him was “not personal” but was instead designed to
25 chill Google’s recruitment of Microsoft employees. *Id.* In response to Lee’s resignation, Eric Rudder stated:
“Good luck at Google ... You know, it's just going to be at worst some number of months you can't work. I know
you’ll be there sooner or later.” Lee Decl., ¶ 21. Upon leaving Rudder’s office, Microsoft served him with a copy
of the lawsuit. *Id.*

1 allowed “the benefit of the bargain” by freezing Lee out of any job at Google, despite repeated
2 admissions that the Agreement allows competing work. Microsoft’s market power, technical
3 strength and existing China operation preclude it from establishing any legitimate business
4 interest here.

5 Washington courts have consistently looked to an employer’s ability to maintain client
6 relationships as a primary legitimate business interest to potentially support a non-compete
7 agreement.⁶ There is no evidence whatsoever that Lee’s employment by Google will impair
8 Microsoft’s relationship with even a single customer.⁷ This singular focus of virtually every
9 non-compete case in Washington history is not available to Microsoft.

10 Microsoft breezily intimates, without any factual basis, that Lee is likely to disclose
11 confidential or trade secret information to Google.⁸ Yet Microsoft offers absolutely no evidence
12 that any such disclosure *has* occurred, and offers nothing other than wild conjecture in support of
13 its assertion that such a disclosure is even likely to occur.

14 Microsoft offers no explanation why the Agreement itself, which prohibits the disclosure
15 of confidential information, is insufficient to protect its interests. Microsoft’s argument is just a
16 thinly veiled attempt to create an “inevitable disclosure” case through its non-compete – a theory
17 never adopted in Washington. Even its complaint, however, does not assert that his employment
18 with Google will require him to disclose any confidential information. Complaint, p.2, l. 7. Lee
19 has a long history of protecting intellectual property rights at Apple, Silicon Graphics, as well as
20 his tenure at Microsoft. No Washington court has held that protection of confidential or trade
21 secret information alone is a sufficient legitimate protectable interest to support enforcement of a
22

23 ⁶ See, *Racine v. Bender*, 141 Wash. 606, 607 (1927); *Perry v. Moran*, 109 Wn. 2d 691, 700 (1987); *modified on*
24 *other grounds*, 111 Wn.2d 885, *cert. denied*, 492 U.S. 911 (1989). *Sheppard*, 85 Wn. 2d 99; *Knight, Vale*, 37
Wn. App. at 369.

25 ⁷ Moreover, courts have emphasized that in order to be enforceable, a non-compete must permit an employee to
use their training and experience to attract clients other than by their former connections alone. *Knight, Vale*, 37
Wn. App. at 370 - 71.

⁸ Defendants have moved herewith to strike numerous portions of Microsoft’s declarations, including on grounds
they lack foundation.

