

Judge Marsha J. Pechman

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

ANCORA TECHNOLOGIES, INC.)

Plaintiff)

vs.)

**TOSHIBA AMERICA
INFORMATION SYSTEMS, INC.,
ET AL.,**)

Defendants)

**TOSHIBA AMERICA
INFORMATION SYSTEMS, INC.,
ET AL.,**)

Counterclaimants)

vs.)

**ANCORA TECHNOLOGIES,
INC.**)

Counterdefendant)

MICROSOFT CORPORATION,)

Intervenor)

**CIVIL NO. 2:09-cv-00270-MJP
Judge Marsha J. Pechman**

**ANCORA TECHNOLOGIES, INC.'S
REPLY IN SUPPORT OF ITS MOTION
TO DISMISS COUNTS I-V OF
MICROSOFT CORPORATION'S
SECOND AMENDED COMPLAINT IN
INTERVENTION AGAINST PLAINTIFF
ANCORA TECHNOLOGIES, INC. AND
THIRD-PARTY COMPLAINT AGAINST
MIKI MULLOR (DKT. #63)**

ORAL ARGUMENT REQUESTED

1 Microsoft's response fails to address the keystones of Ancora's motion. As a matter
2 of law, Mullor's fiduciary obligations to Microsoft are defined by the scope of his employment
3 agreement, and that employment agreement as drawn by Microsoft *expressly excludes Ancora's*
4 *'941 patent*. Mullor owed Microsoft no duty or other obligation with respect to Ancora's assertion
5 of the '941 patent. Regardless, the '941 patent was publicly available like all patents, and Microsoft
6 has known about it since the inception of Mullor's employment when he told Microsoft about it.
7 Patent infringement is a strict liability tort, and there is no claim for an inventor's failure to tell his
8 employer it is infringing his patent, let alone a patent that was expressly excluded from the scope of
9 the inventor's employment agreement.
10

11
12 Microsoft also fails to address the fact it sold millions of copies of the SLP 2.0
13 technology accused of infringement, and published a litany of "white papers" and other technical
14 documents on its website explaining in detail how SLP 2.0 works, all long before Ancora filed suit.
15 Microsoft has reversed course, and now admits that SLP 2.0 is **not** a trade secret. Microsoft's
16 allegations of disclosure and misuse are tied to the filing of the patent lawsuit, and this lawsuit only
17 pertains to SLP 2.0 These undeniable realities swallow any hope Microsoft has of claiming that this
18 lawsuit arose out of confidential or trade secret information.
19

20 Microsoft's fraud claims fail as a matter of law because Mullor had no affirmative
21 duty of disclosure, and Microsoft has failed to plead key elements of its narrow case for affirmative
22 fraud. To fill the gaps in its CFAA claim for computer fraud, Microsoft asks for "inferences" that it
23 is not entitled to under Rule 9(b).
24

25 Finally, Microsoft goes to great length to falsely impugn Mullor's credibility,
26 independent of this Motion. Microsoft's allegations are unsupported by evidence, and its Response
27
28

1 reveals fundamental defects.¹ Ancora will take these allegations head on, but this motion is not the
2 proper place. The allegations are not relevant to any of Microsoft's claims at issue in *this motion* to
3 dismiss. The Court has set a briefing schedule for Microsoft's request for sanctions, and Ancora will
4 address those allegations at that time.
5

6 For the reasons expressed in Ancora's opening brief, and in its Reply here, Counts I –
7 V of Microsoft's Second Amended Complaint in Intervention should be dismissed for failure to state
8 a claim.

9 **A. Microsoft's Response Regarding Mullor's Duty Of**
10 **Loyalty Turns The Terms Of Microsoft's Employment**
11 **Agreement On Their Head**

12 Microsoft's duty of loyalty claims arise from two sets of allegations: (1) Mullor's
13 alleged competition and conflict of interest with respect to Ancora's assertion of the '941 patent, and
14 (2) Mullor's alleged misuse of Microsoft confidential information. Ancora takes each in turn.

15 **1. Duty of Loyalty With Respect To The '941 Patent**

16 In its opening brief, Ancora explained that it owed Microsoft no duty of loyalty with
17 respect to the '941 patent because it was expressly excluded from Mullor's employment agreement.
18 Microsoft's lead response is that "Mullor made no effort to attach a list of inventions." (Response, p.
19 6.) That argument defies the reality pled in Microsoft's own complaint. Microsoft's complaint
20 quotes Mullor's January 26, 2006 e-mail sent just **three days** after Mullor took employment with
21 Microsoft:
22
23

24 _____
25 ¹ Microsoft makes bold references to "spying" and "lies under oath" with no citations to any actual
26 evidentiary support. Microsoft alleges that Mullor ran "No File Recovery" to "wipe" documents on
27 June 2, 2008, but then on June 5, 2008, downloaded "more confidential documents bearing directly
28 on Ancora's patent infringement claims." (Response, pp. 7-8.) If Mullor was so intent on covering
his tracks as Microsoft alleges, why did he download allegedly confidential documents *after*
allegedly deleting them in the first place?

1 [T]he [employment] agreement asks to list all prior inventions and
2 prior work that was completed before joining MS, **but doesn't**
3 **actually provide a way to actually do that. Who should I talk to**
about completing that part of the agreement?

4 (Dkt. # 56, ¶30.) Just days later, on January 31, 2006, **Microsoft** recorded Mullor's express
5 exclusion of the '941 patent from the scope of his employment agreement. (Dkt. # 56, Ex. D.)
6 Microsoft also recorded that Mullor's invention related to "using the PC BIOS as a key storage
7 container." (*Id.*) That is precisely how SLP 2.0 infringes the '941 patent.

8
9 It has been a matter of public record since December 21, 2004 that **Ancora** owns the
10 '941 patent. (Exhibit 4 to Ancora's Opening Brief.)

11 As of January 31, 2006 — long before SLP 2.0 was released — Microsoft knew full
12 well (1) that the '941 patent existed, (2) that it related to "using the PC BIOS as a key storage
13 container," (3) that Mullor had an interest in the '941 patent, and (4) that Microsoft did not. With
14 just seconds of diligence, Microsoft would have known that the patent was owned by Ancora at that
15 time. Mullor owed Microsoft no contractual or fiduciary duty with respect to the '941 patent.

16
17 Microsoft cites case law establishing, in general, that employees owe their employer
18 duties of loyalty. Ancora does not dispute this. Ancora disputes that Mullor had a duty of loyalty
19 *with respect to the '941 patent expressly excluded from the scope of his employment agreement.*
20 Certainly, Mullor had general duties of loyalty to his employer that are unrelated to this case.

21
22 Microsoft also attempts to downplay the exclusion in its Response, describing it as a
23 "safe haven from any contention that the invention was developed at Microsoft." (Response, p. 13.)
24 Microsoft cites nothing for this legal conclusion. Regardless, the agreement unambiguously states
25 the purpose of the provision:

26
27 6. **Excluded** and Licensed Inventions. I have attached a list describing
28 all inventions that I am currently developing and all inventions

1 belonging to me and made by me prior to my employment with
2 MICROSOFT that **I wish to have excluded from this Agreement.**

3 (Dkt. #56, Ex. A, 6, emphasis added.) The sole and express purpose of this provision is to “exclude”
4 inventions from “this Agreement.” Microsoft drafted this language, and any ambiguous terms are to
5 be construed in Mullor’s favor. *Queen City Sav. & Loan Ass’n v. Mannhalt*, 111 Wash.2d 503, 513
6 (1988).

7
8 Microsoft then turns to language in Paragraph 6 granting Microsoft a license to an
9 employee’s invention if the employee “permit[s] Microsoft to use or incorporate such an Invention.”
10 (Response, p. 13.) This is a remarkable contention. Microsoft sued Mullor for his efforts to stop
11 Microsoft’s infringement — infringement that began *after* Mullor took employment. Yet, in its
12 Response, Microsoft alleges that Mullor had a *duty* to warn Microsoft not to infringe. This is what
13 Ancora’s patent suit is trying to do. Under Microsoft’s view, an employee can **never** prevail when
14 Microsoft infringes his or her patent before the employee inventor finds out about it.
15

16 Microsoft is grasping at straws to create a fiduciary duty or contractual obligation
17 between Mullor and Microsoft with respect to the ‘941 patent. Mullor expressly excluded the ‘941
18 patent, and his interest in it, when he took employment with Microsoft pursuant to the clear terms of
19 Microsoft’s employment agreement. Microsoft’s duty of loyalty claims pertaining to the ‘941 patent
20 must be dismissed because there is no legal basis for them.
21

22 **2. Duty of Loyalty With Respect To Microsoft’s Confidential Information**

23 Microsoft does not and cannot rebut the reality that it sold millions of copies of the
24 SLP 2.0 technology more than a year *before* Ancora filed suit. To the extent that any of the
25 *technical* aspects of SLP 2.0 were confidential at one time, they were not confidential at the time
26 Ancora filed suit. Microsoft admits in its Response, as it must, that the “SLP 2.0 software code” is
27 **not** a trade secret. (Response, p. 15: “In any event, the SLP 2.0 software code Microsoft provided to
28

1 its OEMs does **not** comprise the trade secrets at issue.” Emphasis added.) Yet it is SLP 2.0 as used
2 by the OEMs that Ancora accuses of patent infringement. This reveals a glaring gap in Microsoft’s
3 confidentiality claim. Microsoft states that Mullor breached its duty of confidentiality by suing the
4 OEMs for using SLP 2.0 that Microsoft openly admits is not confidential, or a trade secret.
5

6 Microsoft deflects pointing to matters unrelated to its infringement of the ‘941 patent
7 with SLP 2.0, such as its “business considerations,” “timing,” and “financial implications.” To the
8 extent these documents do not describe SLP 2.0 technology, they are not relevant to, and could not
9 give rise to, Ancora’s patent infringement claim, or Microsoft’s counter-suit.
10

11 **B. Microsoft’s WUTSA Claim Fails Because Microsoft**
12 **Admits The SLP 2.0 Software At Issue Is NOT a Trade Secret**

13 SLP 2.0 is the only technology accused of infringement in Ancora’s patent case.
14 (Dkt.# 51, p. 12.) Microsoft alleges that Mullor misappropriated trade secrets to gather information
15 upon which Ancora sued the OEMs for infringement of the ‘941 patent. (Dkt. # 56, ¶ 35-37.) Yet,
16 Microsoft admits “the SLP 2.0 software code Microsoft provided to its OEMs does **not** comprise the
17 trade secrets at issue.” (Response, p. 15, emphasis added.) What, then, are the “trade secrets at
18 issue” that give rise to Microsoft’s claim? In its Response, Microsoft makes reference to *other*
19 documents. (Response, p. 15.) To the extent they disclose trade secrets beyond SLP 2.0, they are
20 not relevant to Ancora’s patent case, and they are not relevant to Microsoft’s claim against Mullor
21 resulting from Ancora’s patent case.
22

23 Microsoft alleges that “Ancora has not even attempted to show when specific
24 information allegedly became available or that Mullor first obtained the trade secrets from publicly
25 available, as opposed to inside, sources.” (Response, p. 16.) That is not true. In his opening brief,
26 Mullor proved, based on a Microsoft press release submitted to the SEC, that Vista (including SLP
27 2.0) was released on or before January 25, 2007. (Dkt.# 63, p. 4.) Mullor also identified **ten**
28

1 technical documents that describe the details and inner workings of SLP 2.0 that Microsoft and
 2 others published before Ancora filed this lawsuit. (Dkt.# 63, p. 11, f.n. 5.)²

3 Microsoft alleges that Mullor had a belief that Microsoft infringed the '941 patent in
 4 2006, and "delay[ed] the litigation until after SLP 2.0 had been finalized and released to its OEMs
 5 for use with Vista, dramatically increasing any potential infringement royalties." (Response, p. 17.)
 6 Microsoft alleges that Mullor set a "litigation trap." (*Id.*) These allegations pertain to Microsoft's
 7 claim for laches, and have absolutely nothing to do with Microsoft's claim for trade secret
 8 misappropriation.³

11 **C. Microsoft's Fraud Claim Failure To Disclose Turns**
 12 **On Mullor's Duties Vis-a-Vis The '941 Patent**

13 Microsoft's allegations of fraud arising from Mullor's alleged failure to disclose are
 14 identical to its breach of loyalty claim. Microsoft concedes that a failure to disclose only constitutes
 15 fraud if there is a threshold duty to disclose in the first place. (Response, p. 19.) The sole basis for
 16 that duty, according to Microsoft, is an unidentified and unsupported "privity during the hiring
 17 process." (*Id.*) As explained in Ancora's opening brief, however, the Restatement of Agency
 18 followed by Washington courts defines the "scope" of one party's fiduciary duty to another by "the
 19 parties' agreement." Comment to Restatement (Third) of Agency, §8.01. Mullor expressly excluded
 20 the '941 patent from the scope of his employment agreement. In doing so, he also excluded the '941
 21 patent from the scope of his duty of loyalty to Microsoft. Mullor owed Microsoft no duty of loyalty
 22

24 _____
 25 ² Ancora filed these ten documents with the Central District of California in the predecessor patent
 litigation. (Dkt. # 133, 13-22, in predecessor Case No. SACV08-626.)

26 ³ There is a presumption of laches if a patent infringement claim is not filed within six years of the
 27 time infringement is determined. *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*, 960 F.2d
 28 1020 (Fed. Cir. 1992). Even if Microsoft's allegations were true, and they are not, the alleged two
 year delay could not possibly give rise to a claim or defense of laches.

1 with respect to the '941 patent, and there can be no fraud as a matter of law for his failure to disclose
2 alleged "superior knowledge," even if it existed. Mullor had no "superior knowledge," however,
3 because Microsoft did not release SLP 2.0 until a year after Mullor took employment.
4

5 **D. Microsoft's Affirmative Fraud Claim Fails Because**
6 **Microsoft Never Properly Pled Factors 6 and 9**

7 Microsoft's *only* affirmative fraud claim arises from Mullor's statement in response to
8 Microsoft's electronic employment application form that Ancora "went out of business." (Response,
9 p. 20.)⁴ Microsoft concedes that it must plead each of the nine elements of fraud with respect to this
10 allegation. (*Id.*)

11 Element 6 requires that Microsoft was ignorant of the alleged falsity of Mullor's
12 statement that Ancora "went out of business." (*Id.*) Microsoft never pled that **it** was ignorant of
13 Ancora's status as an ongoing business entity. All of the citations in Microsoft's Response are to
14 allegations that **Mullor** made an allegedly false statement, not that Microsoft was ignorant of the
15 alleged falsity. (*Id.*) While Microsoft alleges in paragraph 73 of its 2nd Complaint that it would not
16 have extended Mullor an employment offer had Mullor made "full disclosure" to Microsoft,
17 Microsoft never pled ignorance of Ancora, which is required for its very narrow fraud claim. In fact,
18 Microsoft and Ancora (with Mullor's signature) entered into a formal written agreement in June
19 2005. (Dkt. #77 in predecessor Case No. SACV08-626.) Microsoft knew exactly who Ancora was
20 and what Mullor's relationship with Ancora was at the time Mullor took employment with
21 Microsoft. Microsoft has not, and cannot possibly, plead ignorance of Ancora's existence and
22
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25
26
27 ⁴ Microsoft makes reference to an alleged misrepresentation regarding Mullor's association with
28 "Beeble" (the original assignee of the '941 patent), but Microsoft made no allegations concerning
"Beeble" in its complaint.

1 Mullor's association with Ancora as a business entity. Microsoft's affirmative fraud claim fails on
2 this basis.

3 In addition, element 9 requires that Microsoft be damaged by the alleged
4 misrepresentation. The *only* damage Microsoft alleges in its Response is Ancora's patent lawsuit.
5 (*Id.*, p. 21.) Microsoft unapologetically states that the OEM's would not have been sued for SLP 2.0
6 if Microsoft could have kept its infringement a secret. (*Id.*) Patent infringement is a strict liability
7 tort. *In re Seagate Technology, Inc.*, 497 F.3d 1360, 1368 (Fed.Cir. 2007). If Microsoft is liable for
8 patent infringement, it cannot shift its infringement damages to Mullor for simply stating in an online
9 employment application form that his company was no longer in business. This is a dramatic case of
10 the tail wagging the dog.
11

12
13 **E. Microsoft's Unjust Enrichment Claim Is Not Appropriate As A Matter Of Law**

14 As explained in Ancora's opening brief, Ancora has received no improper benefit that
15 could give rise to a claim for unjust enrichment. Taking Microsoft's claim to its logical conclusion,
16 even if Ancora is successful in its patent infringement lawsuit, it must return damages for a strict
17 liability tort back to tortfeasor Microsoft. In other words, Ancora losses even if it wins. Microsoft's
18 unjust enrichment claim is both premature and circular, and must be dismissed.
19

20 **F. Microsoft's CFAA Claims Fail Because Mullor Had "Unfettered"**
21 **Access To Microsoft Computers And Microsoft's Computers**
22 **Are Not "Protected" Within The Meaning Of The Statute**

23 In its complaint, Microsoft alleges that Mullor had "unfettered" access to Microsoft's
24 confidential information. (Dkt.# 56, p. 35.) Microsoft argues in response that Mullor's access rights
25 were defined according to contract and agency principles not his daily employment privileges.
26 (Response, pp. 22-23.) There was, at least at one time, a split of authority on whether the *Shamrock*
27 line of cases that Ancora relied upon in its opening brief, or the *Shurgard* approach that Microsoft
28

1 relies upon in its Response, is the proper approach when a person has authority by means of his or
2 her employment to access his or her employer’s computers, regardless of the purpose. For the
3 reasons already detailed in Ancora’s opening brief, Ancora believes the *Shamrock* line of cases is the
4 modern approach, and the approach followed throughout the country today. Under that approach,
5 Mullor cannot be liable for any CPAA violation because, as an employee of Microsoft, he had
6 “unfettered” access to information on Microsoft computers. He was not a “computer hacker” that
7 the Act was intended to thwart.
8

9 Microsoft’s CFAA claims fail for another reason, however. To prevail, Microsoft
10 must plead with particularity that its computers are “protected computers” within the meaning of the
11 statute, *i.e.* that they are “used in or affecting interstate or foreign commerce.” 18 U.S.C.
12 §1030(e)(2). Microsoft did not plead this in its complaint. In its Response, Microsoft claims that it
13 is entitled to the “inference” that Mullor improperly used his computer in interstate commerce in
14 violation of the statute. (Response, p. 24.) Microsoft’s claims under the FCAA are for fraud,
15 however, and under Rule 9(b), Microsoft is not entitled to such “inferences.”
16
17

18 For the above reasons and the reasons expressed in Ancora’s Opening Brief, Counts I-
19 V of Microsoft’s Complaint in Intervention should be dismissed under Rule 12(b)(6).

20 Dated: July 10, 2009

Respectfully submitted,
BROOKS KUSHMAN P.C.

21
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CERTIFICATE OF ELECTRONIC SERVICE

I, Marc Lorelli, swear under penalty of perjury that under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.

2. On the 10th day of July, 2009, I caused the preceding document to be served on counsel of record by ECF delivery through the CM/ECF System: Arthur W. Harrigan, Jr., Chad S. Campbell, Christopher T. Wion, Daniel J. Walker, Drew D. Hansen, Floyd G. Short, John S. LeRoy, Lauren Sliger, Marc Lorelli, Mark Cantor, Stacy Quan, T. Andrew Culbert.

/s/ Marc Lorelli