IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE YAHOO! INC. SHAREHOLDERS LITIGATION	:	CONSOL. C.A. No. 3561-CC **PUBLIC VERSION**

DEFENDANTS' SUPPLEMENTAL BRIEFING IN OPPOSITION TO PLAINTIFFS' CHALLENGE TO RULE 5(G) REDACTIONS

Defendant Yahoo! Inc. ("Yahoo!" or the "Company") and individual defendants Jerry Yang, Roy Bostock, Ron Burkle, Eric Hippeau, Vyomesh Joshi, Arthur Kern, Robert Kotick, Edward Kozel, Maggie Wilderotter and Gary Wilson (the "Individual Defendants") respectfully submit this response in further support of Defendants' opposition to Plaintiffs' letter dated May 16, 2008.

PRELIMINARY STATEMENT

Defendants are not trying to prevent the press or the general public from learning about Plaintiffs' claims in this action. The press and general public are already well aware of the existence of this litigation and the claims Plaintiffs are raising.[1] Rather, as we explained previously, this dispute involves Plaintiffs' violation of the Confidentiality Order -- which occurred when they ignored the agreed upon dispute resolution procedures and went directly to the press with statements that selectively disclose and mischaracterize the very contents of

[1] Plaintiffs publicly filed their initial complaint without any need for confidential treatment, and the vast majority of Plaintiffs' Proposed Amended Complaint is publicly available, as well.

Yahoo!'s non-public confidential information -- most likely in an attempt to influence the ongoing proxy contest. Moreover, Defendants' Rule 5(g) redactions were made in good faith and for good cause, and those portions of Plaintiffs' Proposed Amended Complaint that characterize and quote confidential communications between Yahoo! officers and directors (and their advisors) should remain under seal at least through the conclusion of the proxy contest.[2] As explained further below, Defendants respectfully request that the Court enter an order preventing Plaintiffs from further violations of the Confidentiality Order (necessitated by the obvious disagreement between the parties), and holding that Defendants' Rule 5(g) redactions were made in good faith and should remain under seal at least through the pendency of the proxy contest.[3] (A form of Order is attached hereto).

PLAINTIFFS VIOLATED THE CONFIDENTIALITY ORDER

1. In violation of the Confidentiality Order agreed upon by the parties and ordered by this Court, Plaintiffs (i) disregarded the dispute resolution procedures that required them to first attempt to resolve their dispute with Defendants (Confidentiality Order ¶ 19), (ii) rushed to the Court to publicly file their May 16 letter that summarized the categories of redacted

[2] Because it is presently unknowable what, if any, other events may occur between now and the conclusion of the proxy contest, Defendants are not in a position to evaluate the need to maintain the redacted material under seal beyond the conclusion of the proxy contest. Accordingly, Defendants respectfully urge the Court to maintain the redacted material under seal through the conclusion of the proxy contest, and permit Defendants an opportunity when the proxy contest is concluded to evaluate whether there is a continuing need to maintain such material under seal at that time.

[3] Defendants maintain that all of the redactions they made initially to the Proposed Amended Complaint fall in this category. Indeed, had Defendants not made all of their Rule 5(g) redactions originally, Plaintiffs would have undoubtedly argued that Defendants waived the ability to redact *any* non-public confidential information. Defendants are willing, however, to lift some of the redactions as discussed below and as reflected on a copy of the Proposed Amended Complaint attached hereto as Ex. 1, so long as such an attempt to reach a middle ground would not be construed as a waiver of the remaining Rule 5(g) redactions or Defendants' other confidentiality designations or future 5(g) redactions.

confidential information (Confidentiality Order ¶¶ 5, 19), and (iii) contacted the press to flaunt their letter and negatively comment about the very contents of the redacted information (Confidentiality Order ¶¶ 3, 5, 19) – thereby broadcasting Yahoo!'s non-public information that the Confidentiality Order and the Rule 5(g) redactions were intended to protect and effectively granting themselves much of the relief that they are now seeking from the Court.

2. In defense of their inappropriate conduct, Plaintiffs make meritless arguments, largely ignoring the provisions of the Confidentiality Order that they violated. First off, Plaintiffs deny that they ever publicly disclosed or commented on any of the redacted information. This is simply untrue. In addition to publicly filing and posting on the Bernstein, Litowitz website the May 16 letter that summarized the very contents of the redacted information, Plaintiffs publicly accused Defendants of attempting to "whitewash embarrassing documents," knowing full well that Defendants' redactions were consistent with prior redactions, made in good faith and in compliance with the Confidentiality Order. (Pls.' May 16 Letter at 2).[4]

3. Further, Plaintiffs' counsel took the extra step of going directly to the press and making a public statement, ***outside of any judicial proceeding***, that the redactions are "hiding evidence of the Yahoo board's improper actions in response to Microsoft's offer. They are hiding evidence of breaches of fiduciary duty." (Defs.' May 19 Letter, Ex. 2). Plaintiffs' counsel crossed the line with this false accusation that mischaracterizes the very contents of the redacted non-public information as evidence of breaches of fiduciary duty. It cannot reasonably be disputed that this statement made to the press was a violation of the Confidentiality Order, which expressly prohibits public characterization of non-public documents (Confidentiality

[4] Plaintiffs do not contest that Defendants acted in good faith when they redacted the non-public information pursuant to Rule 5(g).

Order ¶ 5), and is not protected by any qualified immunity. *See, e.g., Barker v. Huang,* 610 A.2d 1341, 1345 (Del. 1992).

4. Most importantly, Plaintiffs' conduct is especially egregious given that the manipulation of the contents of Yahoo!'s non-public information may well have the ***unavoidable effect of inappropriately influencing the ongoing proxy contest.*** Such tactical disclosures clearly violate paragraph three of the Confidentiality Order, which expressly provides that confidential discovery material, or information derived therefrom, shall be used ***"solely for purposes of the Action and shall not be used for any other purpose***, including, without limitation, any business or commercial purpose, or any communications with, between or among stockholders not involved in the Action or any third-party not involved in the Action." (Confidentiality Order ¶ 3).

5. Plaintiffs' statements and conduct are tactical and are evidence of abuse of Defendants' confidential information to their own perceived advantage. *See, e.g., Pershing Square, L.P. v. Ceridian Corp.,* 923 A.2d 810 (Del. Ch. 2007) (holding that disclosure of company confidential information during an ongoing proxy contest will "have a chilling effect on board deliberations and on important relations and communications between directors and executives"); *Gioia v. Texas Air Corp.*, C.A. No. 9500, 1988 Del. Ch. LEXIS 30, at *10 (Del. Ch. Mar. 4, 1988) (recognizing the need to protect confidential information, and noting that sometimes even disclosures made under confidentiality agreements may be "abused for advantage").

6. Defendants therefore ask this Court to grant their proposed order (attached hereto) prohibiting Plaintiffs from further violating the Confidentiality Order and the procedures specified under the Confidentiality Order and Rule 5(g). Specifically, the Court should prohibit

Plaintiffs from publicly disclosing, summarizing, describing, commenting, or otherwise characterizing – whether through a filing with the Court, a posting on their website, or a direct communication to the press – Yahoo!'s non-public confidential information before Defendants have had an opportunity to properly respond and, if necessary, the Court has ruled on the matter.

DEFENDANTS' RULE 5(g) REDACTIONS

7. In assessing whether a portion of a public filing should remain under seal pursuant to Rule 5(g), the Court must determine whether "good cause" exists by balancing "the general principle that items filed in this Court become a part of the public record with the need to protect the sensitive information of parties to litigation." *Cantor Fitzgerald, Inc. v. Cantor*, C.A. No. 16297-NC, 2001 WL 422633, at *2 (Del. Ch. Apr. 17, 2001). Here, the Court must balance the potential harm to Yahoo! of widespread dissemination and potential manipulation of Yahoo!'s non-public confidential information during its contested election of directors with Plaintiffs' interest, if any, of disclosing such information.

8. This Court held in *Pershing Square, L.P. v. Ceridian Corp*. that it would be contrary to public policy to permit a plaintiff to publicly disclose a company's "non-public business and personnel matters" while the company was in the middle of an ongoing proxy contest. 923 A.2d at 821. In *Pershing Square,* just like here, the plaintiff sought to publicly broadcast confidential company information, including confidential communications between senior executive officers and the board of directors. *Id.* at 813. However, unlike in this case, the parties in *Pershing Square* did not even agree on a confidentiality order. *Id.* at 821. Nevertheless, this Court refused to permit Plaintiffs to publicly disclose the company's confidential information, on the ground that "[i]f any stockholder can make public the

preliminary discussions, opinions, and assessments of board members and other high-ranking employees, it will surely have a chilling effect on board deliberations and on important relations and communications between directors and executives." *Id.*

9. The Court should apply the same reasoning here and prohibit Plaintiffs from publicizing Yahoo!'s non-public confidential information until, at the very least, after the Yahoo! shareholders' meeting for the election of directors.[5] *See id.*; *see also e.g., Davis Acquisition, Inc. v. NWA, Inc.*, C.A. No. 10761, 1989 Del. Ch. LEXIS 39, at *13-14 (Del. Ch. Apr. 25, 1989) (observing that the Court itself must be cautious when making public statements that could have an impact on a contested election); *Highland Select Equity Fund, L.P. v. Motient Corp.*, C.A. No. 2092-VCL, 2007 Del. Ch. LEXIS 37, at *5-6 (Del. Ch. Feb. 26, 2007) (observing that the potential for abuse in disclosing confidential information during an ongoing proxy contest is "very much alive"), *aff'd mem.,* 2007 Del. LEXIS 157 (Del. Apr. 4, 2007).

10. Plaintiffs argue that they have an unfettered right to publicly disclose any non-public information marked in good faith by Yahoo! as confidential pursuant to the Confidentiality Order so long as they are making such disclosure in any type of pleading filed

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[5] Indeed, at such time, this issue may become moot because Defendants intend to file a motion to dismiss in the event Plaintiffs' motion for leave to amend is granted. As explained in our opening papers, Plaintiffs' proposed Amended Complaint fails to state a claim under Delaware law and should be dismissed. *See, e.g., Gantler v. Stephens*, C.A. No. 2392-VCP, 2008 Del. Ch. LEXIS 20 (Del. Ch. Feb. 14, 2008) (dismissing claims challenging a board's decision not to sell a company to a third-party bidder on the ground that the plaintiffs failed to allege sufficient facts to overcome the presumption of the business judgment rule) (Defs.' May 19 Letter Ex. 11); *see also In re First Interstate Bancorp Consol. S'holder Litig.*, 729 A.2d 851, 866 (Del. Ch. 1998) (holding that "claims arising from transactions which operate to deter or defeat offers to purchase the subject company's stock, *i.e.*, entrenchment claims, are generally found to be derivative in nature"); *Pogostin v. Rice*, 480 A.2d 619 (Del. 1984) (affirming dismissal of action challenging directors' decision to reject an unsolicited offer under Rule 23.1 for failure to make demand or plead demand futility).

with the Court -- whether in a letter, complaint or brief, or any attachment thereof. If Plaintiffs were correct, then any Confidentiality Order, such as the one we have in this case, would be meaningless because a plaintiff could circumvent the Court's order and the parties' negotiated agreement by simply filing a pleading with the Court. Without any protection from a Confidentiality Order, every corporate document or communication made in confidence would potentially be at risk of being publicized. Such a result would have a chilling effect on the candor and openness of communications between executives and the board – a harm that this Court found to be "significant" in *Pershing Square*, 923 A.2d at 823, and would be especially harmful in the context of a proxy contest. *See Davis Acquisition*, 1989 Del. Ch. LEXIS 39, at *13-14.

11. Further, the cases that Plaintiffs rely on are easily distinguishable from the case at hand because none of them involves a plaintiff attempting to abuse the discovery process by waging a campaign against Defendants in the press during an ongoing proxy contest. For example, *In re The Walt Disney Co. Derivative Litigation* did not involve the harmful disclosure of non-public information during a proxy contest. C.A. No. 15452-NC, let. op. at 1-2 (Del. Ch. Feb. 24, 2004) (Pls.' Ex. B). Rather, in that case, defendants failed to put forth any reasons or demonstrate any potential harm to justify the continued sealing of parts of the record. *Id.* Unlike *In re The Walt Disney Co. Derivative Litigation*, this case is more closely aligned with *Pershing Square* because the potential harm to Defendants of publicizing Yahoo!'s non-public confidential information while the Company is in the midst of a proxy contest substantially outweighs the potential benefit, if any, of publicly disclosing such information. *Pershing Square*, 923 A.2d at 823-24 (holding that in the context of a proxy contest the Court should "exercise caution in

requiring disclosure absent special circumstances"); *see also Davis Acquisition, Inc.*, 1989 Del. Ch. LEXIS 39, at *13-14; *Highland Select Equity Fund, L.P.*, 2007 Del. Ch. LEXIS 37, at *5-6.

12. Plaintiffs' reliance on *In re Bank One Secs. Litig.*, 222 F.R.D. 582 (N.D. Ill. 2004), is similarly misplaced. In that case the non-public information concerned a merger that had occurred six *years* before the litigation and thus the information had become stale. *Id.* at 584, 592. Here, in contrast, the non-public information concerns potential employment related costs associated with potential future transactions. Thus, the release of the non-public information here might well effect Yahoo!.

13. Moreover, the public dissemination of Yahoo!'s non-public information would place Yahoo! in an untenable position as it would allow Plaintiffs to selectively disclose and mischaracterize portions of confidential communications between Yahoo!'s executives and directors, taken out of context, and in some instances, in a manner that is facially inconsistent with the testimony of those who purportedly made those statements, thereby forcing Yahoo! to release even more non-public information in order to provide the missing context during this critical period where the Company is in the midst of an ongoing proxy contest. In such a situation, Yahoo! would be repeatedly called upon to clarify any negative spin that Plaintiffs may put on its non-public confidential information. This cannot possibly be in the best interests of the corporation or its shareholders whom Plaintiffs purport to represent in a litigation that, notably, does not relate to the corporate election being conducted. In light of the proxy contest, the Court should not apply the Rule 5(g) balancing test in a manner that would allow this to occur.

14. As Plaintiffs acknowledged at the May 20, 2008 hearing, Defendants acted in good faith when they redacted the non-public information in the proposed Amended Complaint

pursuant to Rule 5(g). In light of the Court's comments at the May 20 hearing, Defendants have reconsidered their redactions to the Proposed Amended Complaint and would be willing to lift some of them so long as they would not be subject to a claim of waiver. Defendants redacted these portions of the Complaint initially, in large part, out of a concern that Plaintiffs would accuse Defendants of waiving any claim of confidentiality over any portions of the confidential documents from which this information was derived.[6] A copy of the Proposed Amended Complaint, with unredacted portions highlighted, that Yahoo! proposes to publicly file, subject to agreement that it will not be subject to a claim of waiver is attached hereto as Exhibit 1.

15. The specific portions of the Proposed Amended Complaint that Defendants continue to maintain should remain under seal contain [redacted] Accordingly, "good cause" exists pursuant to Rule 5(g), *Pershing Square*, and *Davis Acquisition* for keeping the following allegations and the attached exhibits under seal:

[redacted]

[6] Such disclosure here is not meant to waive any applicable defenses or claim of confidentiality as to these documents or any information contained therein, nor should such disclosure be construed as an admission of any of Plaintiffs' demonstrably false allegations in the Proposed Amended Complaint.

[redacted]

16. Given the sensitivity of the proxy contest and the intense press coverage of this matter, Defendants believe that a full unsealing of the Proposed Amended Complaint, at this time, would unduly and unfairly harm the Individual Defendants, Yahoo! and its shareholders. For these reasons, Defendants request that the Court keep the confidential non-public information identified above under seal until after the conclusion of the proxy contest.

CONCLUSION

For these reasons, the Court should grant Defendants proposed Order enforcing the Confidentiality Order and approving the Rule 5(g) designations, and Plaintiffs' application should be denied.

Respectfully submitted,

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DATED: May 23, 2008

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EXHIBIT 1

REDACTED IN ENTIRETY

EXHIBIT 2

REDACTED IN ENTIRETY

CERTIFICATE OF SERVICE

I, Edward B. Micheletti, hereby certify that I caused to be served Defendants' Supplemental Briefing In Opposition To Plaintiffs' Challenge To Rule 5(g) Redactions with Exhibits and Public Version of Defendants' Supplemental Briefing In Opposition To Plaintiffs' Challenge To Rule 5(g) Redactions with Exhibits thereto on this 23rd day of May, 2008 upon:

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