IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PUBLIC VERSION
DATED: April 24, 2008

IN RE YAHOO! SHAREHOLDERS LITIGATION	:	Cons. C.A. No. 3561-CC

DIRECTOR DEFENDANTS' OPPOSITION TO PLAINTIFFS' "EMERGENCY" MOTION TO COMPEL ATTENDANCE AT DEPOSITION

PRELIMINARY STATEMENT

1. Plaintiffs' self-styled "emergency" motion is premised upon Plaintiffs' claim that they may be prejudiced if they are unable to take the deposition of one specific member of the Yahoo! Board before June 13. Specifically, Plaintiffs' claim that that an immediate deposition is required in order to preserve their ability to obtain an expedited trial. *See* Motion at ¶ 13. The trouble with Plaintiffs' argument is that the Court already has denied Plaintiffs' motion to expedite these proceedings, and Plaintiffs' motion to compel does not identify any information they seek to obtain from their "emergency" deposition that would change that result.[1]

[1] In denying Plaintiffs' motion to expedite the litigation, the Court indicated that Plaintiffs' would not be barred from making a further application if they could demonstrate that Yahoo!'s adoption of the employee retention plan at issue herein actually were having a preclusive effect on Microsoft's efforts to acquire Yahoo!. *See* Ruling of the Court (Exhibit B to Plaintiffs' Motion) at 36-38. Nowhere in their motion to compel, however, do Plaintiffs so much as suggest, much less establish, that Mr. Kern is likely to have information that bears on the effect, if any, that the employee retention plan has had, or will have, on Microsoft.

Notably, certain portions of Plaintiffs' motion to compel read more like a test balloon for a motion for reconsideration of their failed motion to expedite, rather than a genuine motion to compel. Plaintiffs even trot out the affirmation of their forensic compensation consultant, which

2. Plaintiffs' rhetoric aside, the narrow question presented by the motion is whether in a non-expedited proceeding commenced just two months ago, one of nine different outside director defendants should be forced to disrupt personal and business commitments and be compelled to sit for a deposition just before departing on his honeymoon, or if the deposition can wait until June 13, 2008 (which is less than four months after the action was commenced), when the individual returns from his honeymoon? Defendants submit that it is entirely appropriate for the deposition to proceed on June 13, after Mr. Kern's honeymoon.

3. Plaintiffs claim that they have been "stymied" in their efforts to obtain discovery and, in particular, assert that "[t]he director defendants have not yet produced a single document." Motion at 1. Plaintiffs' assertion is incorrect. The vast majority of the director defendants' documents have been produced to Plaintiffs. Indeed, most of these documents were produced by Yahoo! during the early stage of document production. By agreement, the individual directors simply did not re-produce duplicate copies of the same board packages and minutes that Yahoo! produced on their behalf.

4. More broadly, any innuendo that Plaintiffs have been thwarted in their efforts to develop their case is mistaken. In addition to the voluminous documents that they already have received, within the next two weeks, Plaintiffs will be receiving additional documents from Yahoo!'s two outside compensation consulting firms who advised the Yahoo! Board and the Compensation Committee of the Yahoo! Board in connection with the adoption of the employee

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was prepared to support Plaintiffs' failed motion to expedite the proceedings. Because the deficiencies of that affirmation previously have been addressed in connection with the Court's consideration and denial of Plaintiffs' motion to expedite, we will not waste the Court's time repeating that analysis herein. Moreover, inasmuch as Plaintiffs have not filed a motion for reconsideration of the Court's denial of their motion to expedite, we will not waste the Court's time repeating the various reasons that support the Court's decision.

retention plan at issue herein. Defendants also have cooperated with Plaintiffs in arranging for the depositions of five different individuals on the topic of the employee retention plan about which Plaintiffs complain. These depositions will occur between April 29 and May 15.

5. In denying Plaintiffs' motion to expedite this matter, the Court expressed the view that Plaintiffs ought to pursue discovery "in a deliberate and prudent manner." Ruling of the Court (Exhibit B to Plaintiffs' Motion) at 37. Instead of heeding the Court's advice, Plaintiffs continue to seek to conduct discovery as if this were an expedited litigation. Inasmuch as this is not an expedited matter, document production (from third parties) is not yet completed, and Plaintiffs will have the opportunity to depose five other witnesses over the next month, there is simply no prudent or deliberate reason why Mr. Kern's deposition cannot wait until after he returns from his honeymoon.

SUMMARY OF THE LITIGATION

6. Plaintiffs filed their complaint just two months ago, on February 21, 2008. The complaint alleges that Microsoft's unsolicited proposal to acquire Yahoo! represents a "gift for Yahoo! shareholders" (Complaint ¶52), presumably suggesting that Plaintiffs would have had the Yahoo! Board agree to the unsolicited proposal on the spot. Elsewhere in the complaint, however, Plaintiffs acknowledge that Microsoft "may be willing to raise its bid in a negotiation context" (Complaint ¶83; *see also id.* at ¶¶9, 84 (similar)), thus suggesting that even Plaintiffs agree with the Yahoo! Board's unanimous determination that Microsoft's proposal was inadequate.

7. The majority of the allegations in the complaint advance, in various versions, Plaintiffs' fact-free hypothesis that some members of the Yahoo! Board are acting on "emotion"

and not rationality. *See* Complaint ¶1 (directors allegedly bent on pursuing "value destructive" transactions instead of a deal with Microsoft; *id.* at ¶5 (certain directors allegedly worried that the CEO will act on "pride over prudence"); *id.* at ¶10 (directors allegedly have a "personal distaste for Microsoft"). One strand of this theme is Plaintiffs' quarrel with the Yahoo! Board's decision to adopt an employee retention plan in an effort to stem employee departures and facilitate the recruitment of qualified employees during the period of uncertainty facing the company. Although Plaintiffs are short on specifics, they appear to believe that it was a mistake to extend the plan to all employees and to include a provision that the second trigger of the plan shall be deemed satisfied if an employee resigns for "good cause" – namely, in the face of a material change in job duties. Complaint ¶¶8, 77-82. In other plans, with which the Court has familiarity from prior matters, this "good cause" resignation may be referred to as a "constructive discharge." This is a common concept in employee retention plans.

8. Notwithstanding Plaintiffs' cavalier aspersions, the Yahoo! Board acted well within its authority and responsibility to manage the business and affairs of Yahoo! and determined, in good faith and after receiving the advice of experienced outside advisors, that the employee retention plan was a reasonable and appropriate method of stemming employee defections and shoring up the company's ability to attract new employees during a time of substantial uncertainty created by Microsoft's unsolicited acquisition proposal.[2] As explained in Yahoo!'s internal documentation prepared in connection with the adoption of the employee retention plan:

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[2] *See, e.g.*, YE00000655 (February 13, 2008 article noting that "competitors are reportedly poaching [Yahoo!] employees") (appended hereto as Exhibit B);

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9. The Yahoo! Board was not seeking to make a potential acquisition of Yahoo! unduly expensive for Microsoft (or any other party), and the "double-trigger" employee retention program did not, and does not, have such an effect.[3] Indeed, in denying Plaintiffs' motion to expedite this matter, the Court noted that the minutes of the meeting of the full Yahoo Board!, at which the employee retention plan was adopted, reflected the fact that Microsoft already had earmarked funds to retain Yahoo!'s employees in the event of an acquisition, and that the amount earmarked by Microsoft exceeded the potential cost of the employee retention program estimated by Plaintiffs' own forensic compensation consultant. *See* Ruling of the Court (Exhibit B to Plaintiffs' motion) at 37.[4]

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[3] *See, e.g.*, Yi-Wyn Yen, *Yahoo sweetens employees' severance package*, CNNMoney.com (Feb. 20, 2008) (reproduced at http://techland.blogs.fortune.cnn.com/2008/02/20/yahoo-sweetens-employees-severance-package/?source=yahoo_quote) (reporting that analysts are of the view that the potential costs associated with the employee severance plan "will do little to deter Microsoft from moving forward with its $44.6 billion bid for Yahoo," and quoting an Oppenheimer analyst, who formerly worked as an analyst at Microsoft as stating that "I just don't think these costs will be significant") (appended hereto as Exhibit D).

[4] In a desperate effort to establish that the employee retention program is, somehow, preclusive to Microsoft, Plaintiffs quote a single sentence in a letter from Microsoft's CEO, Steven Ballmer, to

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Indeed,

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the Yahoo! Board, in which Mr. Ballmer noted that Yahoo! has "adopted new plans at the company that have made any change in control more costly." *See* Motion at ¶ 7. Mr. Ballmer's letter does not, however, identify what "plans" he was referencing, does not purport to quantify the cost of the unidentified "plans," and does not even suggest, much less assert, that the additional cost of these "plans" was unanticipated by Microsoft or beyond the cost that Microsoft is prepared to absorb in order to acquire Yahoo!. Indeed, if it were assumed that the employee retention plan were among the "plans" referenced in Mr. Ballmer's letter, one reason Microsoft might view an employee severance plan to make a potential acquisition of Yahoo! more costly is because the plan preserves value for Yahoo! that might otherwise be lost by employee defections and recruiting difficulties. If, as Plaintiffs try to suggest, Microsoft viewed the employee retention plan as a material impediment to an acquisition of Yahoo!, Microsoft surely knows how to say as much in a clear and direct manner, and not through some Delphic sentence in a letter from its CEO.

Plaintiffs also

REDACTED

Lastly, Plaintiffs claim that one of Yahoo!'s largest stockholders, Legg Mason, has stated that just $1 per share more "could be outcome determinative." *See* Motion at ¶ 10. In fact, however, the report cited by Plaintiffs says no such thing, and Legg Mason has publicly supported the Yahoo! Board's determination that Microsoft's unsolicited proposal undervalues Yahoo!. *See* Kevin Delaney, *Legg Mason Wades Into the Yahoo Fray – Manager Says Shareholder Would Back Independence If Microsoft Lowers Its Bid*, The Wall Street Journal, at C19 (April 9, 2008) (appended hereto as Exhibit E). Significantly, Plaintiffs identify no criticism from Legg Mason of the employee retention program challenged by Plaintiffs herein.

[5] *See, e.g.*,

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it would have been irresponsible if the Yahoo! Board had failed to take action to retain the company's valuable work-force, who were being actively recruited by Yahoo!'s competitors – including Microsoft. Even Plaintiffs must concede that it is not in the stockholders' interest for Yahoo!'s business to be impaired by employee defections and recruiting difficulties at a time when the Yahoo! Board is actively considering the company's strategic options for maximizing stockholder value.

11. On March 24, 2008, Plaintiffs sought an expedited trial limited to their claim that the members of the Yahoo! Board committed a breach of fiduciary duty in adopting the employee retention plan. This Court denied that request.

12. In the short time since Plaintiffs commenced this action, Yahoo has produced all of the non-privileged, responsive board materials that were sent to directors, as well as substantial additional documentation.

13. The individual director defendants did not reproduce board materials that the Company produced. Instead, they undertook to confirm that they had no additional documents. That process has been substantially completed for the majority of the directors.[6]

14. Additionally, Plaintiffs more recently have applied for commissions to obtain documents, but not the depositions, of Compensia, Inc. ("Compensia") and Frederick W. Cook ("Cook"), the two outside compensation consultants who advised the Yahoo! Board and the Compensation Committee of the Yahoo! Board in connection with the adoption of the severance plan challenged by Plaintiffs. Yahoo! and the individual defendants consented to the

[6] As reflected in an e-mail to Plaintiffs' counsel, which is included as Exhibit I to Plaintiffs' motion, Mr. Kern's travels prevented him from sending his documents from his home office until just recently. Nonetheless, approximately 80% of his electronic data already has been reviewed and no non-privileged responsive documents (other than those already produced by Yahoo!) have been identified.

commissions, have been working to encourage Compensia and Cook to make a prompt production of their relevant, non-privileged materials, and have arranged for Plaintiffs to take the depositions of Compensia and Cook without the necessity of Plaintiffs' obtaining further commissions. Those depositions currently are expected to occur on May 1 and May 13.

ARGUMENT

15. Plaintiffs do not deny that they are asking the Court to impose on Mr. Kern to sit for a deposition at a time when it is most inconvenient for him to do so. Nor do Plaintiffs offer any reason why the Court should undertake such an imposition – other than Plaintiffs' repeated assertion that they may be prejudiced if there is an expedited trial, which they already have been denied.

16. Mr. Kern was married on March 1, 2008. He delayed his honeymoon to satisfy personal and business obligations, including to Yahoo!. Those obligations do not leave him adequate time to prepare for and sit for a deposition prior to his departure. His honeymoon will take him out of the country from May 4, and he will not return until June 9. On June 10, Mr. Kern will be attending a Yahoo! board meeting. He will be available to meet with his counsel on June 11 in order to prepare for his deposition, and then will be available to sit for his deposition two days later on June 13. Given that Plaintiffs will remain free to continue to prepare their case in the interim, it would be unreasonable to compel Mr. Kern to prepare for and attend a deposition before his honeymoon.

17. A letter ruling from the *Express Scripts* litigation is the sole precedent upon which Plaintiffs rely to justify their extraordinary request to interfere with an outside director's efforts to put his affairs in order prior to taking an already deferred honeymoon. The *Express Scripts* ruling provides no support for Plaintiffs' position, and fully supports Mr. Kern. To begin, the

Express Scripts ruling resolved a dispute respecting the *location* of a deposition, and not a dispute over the *timing*. *Second*, in *Express Scripts*, the case was set for an expedited preliminary injunction hearing scheduled in advance of a stockholders' meeting scheduled to vote on the proposed merger of the company. Moreover, as noted in the Court's letter ruling in *Express Scripts*, the compressed time available to hear the matter was the result of the defendants' own decision to accelerate the date of the stockholder meeting. By contrast, this is not an expedited proceeding. Indeed, Plaintiffs' request for expedition has been denied. *Third*, in *Express Scripts*, the director at issue had been unavailable and largely out of contact during the entire time available for discovery. Here, Mr. Kern's honeymoon will only require that his deposition be deferred from Plaintiffs' preferred date until June 13, hardly a substantial delay. *Fourth*, the director at issue in *Express Scripts* was the "lead outside director" and most of the other directors (as well a great number of other witnesses, including certain officers, investment bankers, and other advisors) already had been deposed. Here, Plaintiffs have yet to take a single deposition, and are stubbornly insisting that Mr. Kern must go first despite the undisputed material inconvenience to him in doing so. *Finally*, in *Express Scripts*, the director at issue offered no explanation for his lack of availability. In this case, Mr. Kern's explanation is compelling.

18. Moreover, Plaintiffs are so eager to depose Mr. Kern at a time that is most inconvenient to him that Plaintiffs seek to conduct that deposition before Yahoo!'s two outside compensation experts, Compensia and Cook, make their document productions. Thus, even if Mr. Kern were otherwise available to be deposed on Plaintiffs' preferred schedule, Plaintiffs' haste to depose Mr. Kern likely would result in a request to conduct a second deposition after Plaintiffs have received documents from the compensation consultants. In a similar setting, the

Superior Court entered an order precluding the conduct of any depositions until after document production was completed. *See Lone Star Indus., Inc. v. Liberty Mutual Ins. Co.*, 1990 Del. Super. LEXIS 398, at *2 (Del. Super. Nov. 13, 1990) ("It is premature to take depositions now when those depositions would have to be repeated after most of the document production is completed.") (appended hereto as Exhibit I); *cf. SLM Corp. v. J.C. Flowers II, L.P.*, Del. Ch., C.A. No. 3279-VCS, Transcript at 19-21 (Nov. 5, 2007) (expressing skepticism regarding plaintiffs' impractical proposal to depose witnesses before document production was substantially complete) (appended hereto as Exhibit J).

19. Plaintiffs' insistence on taking Mr. Kern's deposition before the documents are even produced by Compensia and Cook would make no sense – even if Mr. Kern were otherwise available to be deposed on Plaintiffs' preferred schedule. As would be expected with a matter such as this, the employee retention plan at issue in this litigation was created with substantial assistance, advice and input from outside compensation consultants – namely, Compensia and Cook – and the directors relied upon that advice and input in adopting the plan. It is, therefore, difficult to imagine that Plaintiffs would be content with the result of a deposition of Mr. Kern that preceded the production of documents by Compensia and Cook. Notably, even before defense counsel learned of the nature and extent of Mr. Kern's scheduling difficulties, Plaintiffs' counsel were asked to stipulate that they would agree to forgo deposing Mr. Kern a second time after the outside compensation consultants' documents are produced. Plaintiffs refused to so stipulate – offering only that defendants could reserve their right to argue that any such request would be improper.

20. Both Compensia and Cook will be producing their documents within the next couple of weeks. Following that production, Plaintiffs will be taking five separate depositions

about the adoption of the employee retention plan. These include two depositions of Yahoo! Human Resources Personnel, the Chairman of Cook, the corporate designee of Compensia, and a member of the Yahoo! Compensation Committee, director Ron Burkle. Against this backdrop, Plaintiffs' request for an order compelling Mr. Kern's deposition in the midst of his preparations for his honeymoon should be denied.

21. In an effort to downplay the significance of the substantial discovery Plaintiffs will be receiving prior to Mr. Kern's return from his honeymoon, Plaintiffs advance the naked assertion that "Kern was the director who stood at the center of the development of the retention program." Motion at ¶ 14. As the minutes produced to Plaintiffs' within the first weeks of this litigation reflect, however, the employee retention plans were approved by both the full Yahoo! Board, as well as the Compensation Committee thereof, and were the product of substantial work and advice by two separate outside compensation consultants and outside legal advisors. For Plaintiffs to claim that any one member of the Yahoo! Board "stood at the center" of the development of the employee retention plan reflects Plaintiffs' ignorance of the documentary record that has already been produced to them, and further highlights the prudence of awaiting the production of the outside compensation consultants' documents before proceeding with depositions at a deliberate pace.

22. In sum, this case is in its nascent stages, yet Plaintiffs already have had the opportunity to obtain substantial documentation and to schedule several of their key depositions. That one outside director's personal circumstances do not as a practical matter afford him sufficient time to prepare and sit for a deposition until June 13 should not impair Plaintiffs' ability to continue to prepare their case. Indeed, once they actually question the five witnesses who are scheduled, Defendants are confident that the overwhelming body of evidence will

establish that the employee retention plan was a reasonable – indeed, essential – step to preserve Yahoo!'s work-force, its most valuable commodity, in the face of uncertainty over the company's future.

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Date: April 21, 2008

EXHIBIT A

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EXHIBIT B

February 13, 2008, 1:51 pm

Do or die time for Yahoo

By Michal Lev-Ram

Time is running out for Yahoo: Shareholders are starting to agitate, competitors are reportedly poaching employees and, following the rejection of its $44.6 billion bid for the Internet pioneer, Microsoft may be on the verge of instigating a hostile takeover.

What's more, it appears Yahoo has few defenses — if any — against the software giant. That's partly because Yahoo (YHOO) does not have a "staggered" board, meaning all 10 of its directors are up for re-election at the company's annual shareholders meeting this spring. That makes Yahoo particularly vulnerable to a proxy battle, should Microsoft (MSFT) decide to start one by nominating pro-Redmond board candidates by the March 14 deadline and campaigning for investors' votes.

If Microsoft opts for a hostile takeover, Yahoo does have some limited safeguards in place to protect itself. According to company documents filed with the Securities and Exchange Commission, its so-called "poison pill" is a rule that states the company can issue new shares at a reduced price if a hostile "acquiring person" buys 15% or more of its common stock. Should Microsoft make a tender offer to shareholders, those extra shares would make it harder for it to obtain a majority quickly. But it would only stall the inevitable — because of the structure of Yahoo's board, Microsoft would nominate a slate of board candidates and try to get them elected at the annual shareholders meeting when it is called

sometime this spring.

Other possible scenarios — such as a white knight emerging to rescue Yahoo, entering some kind of outsourcing deal with Google or trying to turn things around on its own — seem increasingly unlikely. While rumors of another potential buyer or partner (including News Corp. (NWS) and AOL (TWX), which is owned by Time Warner, Fortune and CNNMoney.com's parent) have been circulating the Web, so far no one has tried to outbid Microsoft, and it's not clear if any other company would benefit from such an acquisition.

What's more, even if another suitor does emerge, it's likely Yahoo will just use that as a tactic to try and get Microsoft to up its offer. As for a commercial partnership with Google (GOOG), that would likely pose antitrust issues of its own, not to mention that its long-term benefit to Yahoo is murky at best. An independent Yahoo is also unlikely to survive — shareholders had already begun to lose faith in the company's ability to turn things around well before Microsoft announced its offer.

On Tuesday, Legg Mason fund manager Bill Miller, representing Yahoo's second-largest stockholder with 80 million shares, wrote in a letter to his investors that the company is "in a tough spot if it wishes to remain independent." Activist investor Eric Jackson told Fortune he doesn't believe in a "go it alone" approach. Both shareholders said they expect Microsoft to push forward, one way or another.

The danger for both predator and prey is that a hostile takeover will send valuable Yahoo employees heading for the door. Harvard law professor Guhan Subramanian says that there is there is an "old conventional wisdom" that you don't make a hostile bid for technology companies. Why? Because, as Subramanian says, "the most valuable assets — employees — leave the building every night."

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I do not agree with your assessment. Yahoo has options. Actually, before anything else, MSFT should up its offer. If it is right, then all should be satisfied.

Posted By New York : February 13, 2008 2:22 pm

What I don't understand is why all of these editorials continue to ignore the obvious—Microsoft should consider themselves lucky that Yahoo declined the initial offer and walk away. The fact is Microsoft, like Yahoo, has not been given enough time to prove their online strategies but instead, listens to the no-

nothings in the media for direction on their online strategies. Yahoo has some valuable assets—but they are not worth anywhere near the $44 billion Microsoft is offering—at least not to Microsoft.

The bottom line is Microsoft needs to stop listening to the media and other pundits and just continue building great software. Thre is nothing wrong with making selective small buys, but buying Yahoo will go down in the textbooks as one of the greatest disaster buys in the history of corporate acquisition if by some chance Microsoft is dumb enough to continue with this acquisition strategy.

Posted By William Schraeder, Palmyra, VA : February 13, 2008 2:04 pm

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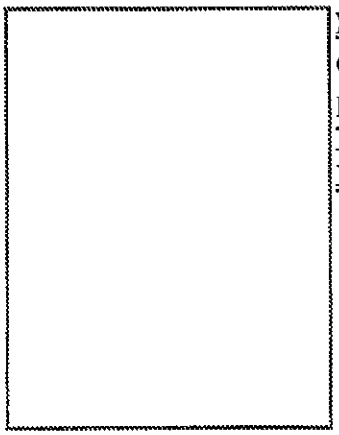

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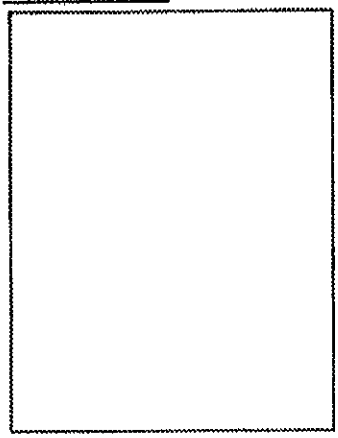

Hog wild for China

Legendary investor Jim Rogers made a bundle by anticipating a boom in commodities. Now he's focusing on the People's Republic.

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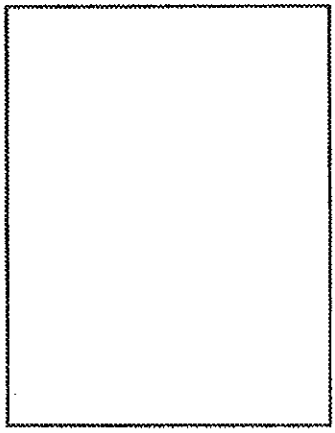

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CERTIFICATE OF SERVICE

I, Edward B. Micheletti, hereby certify that I caused to be served the Public Version of Director Defendants" Opposition to Plaintiffs' Emergency Motion To Compel Attendance At Deposition that was filed on April 21, 2008 and Public Version of Exhibits A, C, F, G and H thereto on this 24th day of April, 2008 upon:

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