IN THE COURT OF THE CHANCERY OF THE STATE OF DELAWARE

In re Yahoo! Shareholders Litigation	Cons. C.A. No. 3561-CC PUBLIC VERSION DATED: April 24, 2008

PLAINTIFFS' REPLY IN SUPPORT OF EMERGENCY MOTION TO COMPEL ATTENDANCE AT DEPOSITION

Plaintiffs respectfully write in reply to the director defendants' opposition to plaintiffs' emergency motion to compel the deposition of Arthur H. Kern, Chairman of the Compensation Committee of the Board of Directors of Yahoo! Inc. ("Yahoo"):

1. On April 7, 2008, plaintiffs asked counsel for the director defendants to provide dates for Arthur Kern's deposition. (Ex. A) During several follow-up conversations, counsel informed us that Kern was on vacation and that his documents had not been gathered. We were told last week that Kern would only be in the country for a one-week window between returning from vacation and leaving for an extended honeymoon. Plaintiffs offered to take a shortened deposition at a location, date and time of Kern's choosing any time this week. Counsel stated that Kern has no time available for even a shortened deposition.

2. Now, in the face of both a deposition notice and a motion to compel, Kern's counsel reveals that Kern is not departing the country on his honeymoon until May 4, two weeks from this past Sunday. (Opp. ¶ 16) Kern's counsel supplies no information, much less a sworn affidavit from Kern, explaining why Kern has no time to be deposed either this week or next week. The opposition blandly concludes that Kern's undisclosed "personal and business obligations," including unspecified "preparations for his honeymoon," "do not leave him adequate time to prepare for and sit for a deposition

prior to his departure." (*Id.* ¶¶ 16, 20) Kern has not cross-moved for a protective order, which may only be issued "for good cause shown." Ch. Ct. R. 26(c). Kern supplies no facts that permit defiance of a valid deposition notice.

3. Nor can Kern argue that the deposition notice is inconsistent with any Court Order. Under the negotiated and stipulated Case Management Order, plaintiffs agreed to "not seek to depose any of the defendants until at least March 31, 2008." (Ex. B ¶ 8) This Court advised the parties at the conclusion of the March 24, 2008 teleconference that plaintiffs should go forward with discovery "in a deliberate and prudent manner" and proceed "on a due course." (Motion Ex. B at 37, 38) That is what plaintiffs are doing. Plaintiffs have every right to question the Chairman of the Compensation Committee within a month of requesting his deposition.

4. We seek to depose Kern this week or next, in conjunction with the depositions of the two key human resources employees at Yahoo and the CEO of the Compensation Committee's outside consulting firm. Those depositions are scheduled for April 29, April 30 and May 1, and the relevant document productions should be substantially complete beforehand.[1]

5. Defendants should not be permitted unilaterally to foreclose a deposition of a critical director until mid-June, and thereby foreclose access to his testimony for purposes of a potential future motion to seek a prompt trial on the change-in-control severance plans. We may not even have his testimony in time for such a trial.

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6. To foreclose plaintiffs' reliance on the testimony of the Chairman of the Compensation Committee for a potential expedited trial application is especially inappropriate given the serious and unrebutted questions raised by plaintiffs concerning the reasonableness of the challenged severance plans, and the informational basis of the directors who approved them.

The Dubious Basis for Yahoo's Extraordinary Severance Plans

7. To justify Yahoo's extraordinarily expensive and highly unusual change-of-control severance plans,Yahoo's board "must carry its own initial two-part burden" of demonstrating that they "had reasonable grounds for believing that a danger to corporate policy and effectiveness existed," and that their "defensive response was reasonable in relation to the threat posed." *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1373 (Del. 1995). Even if a defensive measure is "clearly not coercive or preclusive," it can be enjoined if this Court determines that it is not "within the range of reasonable defensive measures available to the Board." *Id.* at 1390, 1391. Should the Board meet those burdens, plaintiffs can still prevail by showing that the directors' decision was based on "being uninformed." *Id.*[2]

8. The director defendants will apparently continue to rely on a canard to meet their burdens. They invoke 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

[2] The director defendants mischaracterize plaintiffs' challenge to the overall defensive tactics taken by the Board under the protective cover of a poison pill. Plaintiffs' Complaint nowhere says that Microsoft's $31 per share offer should have been accepted. The Complaint calls the Board to task for indulging Yang's refusal to deal with Microsoft at any price. (Compl. ¶ 1)

Plaintiffs' own forensic compensation consultant." (Opp. ¶ 9) The limited record exposes the illogic and falsity of any suggestion that the challenged severance plans are justified because they supposedly cost less than Microsoft was willing to pay for retention.

9. To the extent Microsoft earmarked funds for employee retention, it can safely be assumed that those funds were meant to compensate employees that Microsoft intends to retain, not employees it intends to terminate, or who chose to terminate their own employment. Any severance payments to terminated employees would represent an incremental, added cost to Microsoft.

10. The only record estimate of the cost of severance benefits to terminated employees was prepared by Yahoo's compensation consultant, not by plaintiffs' expert. As stated in the Affirmation of James F. Reda, "Yahoo's internal documents estimate that

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the cost of the plans could range from an acquiror who paid $31 a share to purchase Yahoo, depending on the force magnitude of the force

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reduction." (Motion Ex. H ¶ 3.c.)

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(Motion Ex. G)

11. Payments to terminated employees represent a fraction of the true cost of the severance plans. The loose standard for a constructive termination makes the Yahoo severance plans resemble a single-trigger plan in which all employees must be compensated upon a change-of-control. An acquiror must pay extra retention to induce employees to forego claiming a "good reason" termination and triggering their severance rights.

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12. Microsoft's CEO has publicly criticized Yahoo's Board for adopting the severance plans, which "made any change of control more costly." (Motion Ex. C) The director defendants claim not to understand what this supposedly "Delphic sentence" means. (Opp. at 6 n.4) There is nothing "Delphic" about Ballmer's statement. We have served a subpoena on Microsoft so that this point can be delivered even more clearly to the director defendants.

13. The existence of the severance plans may affect the price of any future proposal by Microsoft. The director defendants cite to a single article from February 20, 2008, stating that "[s]ome analysts said that [the severance plans] will do little to deter Microsoft from moving forward with its $44.6 million bid for Yahoo." (Opp. Ex. D at 2) Other analysts disagreed.

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The New York Times reported last week that "[t]he hidden cost of 'flight insurance' against employee defections may also be a reason Microsoft has resisted raising its bid." (Ex. D)

14. Plaintiffs' dispute the director defendants' assertion that a constructive discharge for a material change in job duties "is a common concept in employee retention plans." (Opp. ¶ 7) That assertion is unsupported by any citation, and certainly not by any citation to any document provided to any of the director defendants. Yahoo's document production is barren of any written analysis by anyone of the prevalence of

allowing all employees to terminate their employment and obtain accelerated vesting of all equity and cash upon a material change in job duties. Nor is there any indication that any executive compensation consultant or other advisor provided a written or oral opinion about the reasonableness of the severance plans.

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The Importance of Kern's Deposition

17. We thought it uncontroversial to state in our motion that Kern's central role respecting the severance plans is apparent from documents produced by Yahoo. Yet the director defendants accuse us of "ignorance of the documentary record that has already been produced" and deny that Kern had a central role. (Opp. ¶ 21)

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What the emails do show is that deposing Kern is essential to understanding what he or any other outside director knew about the process, terms and effects of the challenged severance plans.

For all the foregoing reasons, plaintiffs respectfully request that the Court grant plaintiffs' motion to compel the deposition of Arthur Kern.

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EXHIBIT C

REDACTED IN ITS ENTIRETY

EXHIBIT E

REDACTED IN ITS ENTIRETY

EXHIBIT F

REDACTED IN ITS ENTIRETY

EXHIBIT G

REDACTED IN ITS ENTIRETY

EXHIBIT H

REDACTED IN ITS ENTIRETY

EXHIBIT I

REDACTED IN ITS ENTIRETY

EXHIBIT J

REDACTED IN ITS ENTIRETY

EXHIBIT K

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EXHIBIT L

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CERTIFICATE OF SERVICE

I, Edward B. Micheletti, hereby certify that I caused to be served the Public Version of Plaintiffs' Reply in Support of Emergency Motion To Compel Attendance At Deposition and Exhibits C, E-L on this 24th day of April, 2008 upon:

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