5-20-08-CC-TC-Yahoo-3561

IN THE CHANCERY COURT OF THE STATE OF DELAWARE

IN RE YAHOO! INC. SHAREHOLDERS LITIGATION	:	Consolidated C.A. 3561-CC

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Chancery Court
34 The Circle
Georgetown, Delaware
Tuesday, May 20, 2008
10:15 a.m.

- - -

BEFORE: WILLIAM B. CHANDLER, III, Chancellor.

- - -

TELECONFERENCE

CHANCERY COURT REPORTERS
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APPEARANCES:

(via telephone)

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THE COURT: Good morning, counsel.

MR. FRIEDLANDER: Good morning, Your Honor.

MR. WELCH: Good morning, Your Honor.

MR. SILVERSTEIN: Good morning, Your Honor.

THE COURT: I have with me in the office -- that's why we're on speaker phone -- a court reporter. And I was told by my secretary that the three individuals on the line with me who are

going to speak this morning are Mr. Friedlander -- are you there?

MR. FRIEDLANDER: I am.

THE COURT: Mr. Welch, are you there?

MR. WELCH: I am, Your Honor.

THE COURT: And, Mr. Silverstein, are you there?

MR. SILVERSTEIN: I'm here as well, Your Honor.

THE COURT: All right. I assume there are others on the line.

MR. FRIEDLANDER: There are. Would you like a run-down?

THE COURT: I think it probably would

take too long.

MR. WELCH: Your Honor, I wonder -- with respect to that issue, we should confirm on the record our understanding, on behalf of Yahoo!, that there are no members from the press on the line at this time?

MR. FRIEDLANDER: There won't be throughout the call.

THE COURT: There are none to my knowledge.

MR. FRIEDLANDER: Or to ours, as well.

We spoke off-line about that, and I understand that no one on the call believes that there's anyone from the press, and that the number

for the call has not been distributed to anyone in the press.

THE COURT: That was Mr. Welch.

You will have to identify yourselves in order for the court reporter to get that.

MR. FRIEDLANDER: This is Joel Friedlander. I was just confirming what Mr. Welch said.

THE COURT: All right.

Mr. Friedlander, your letter precipitated this conference call, so why don't you begin.

MR. FRIEDLANDER: I'd be glad to, Your Honor, and thank you for hearing us on short notice.

This -- our application, I don't think is unusual. I think what is unusual in this case is that the defendants are trying to have a cloak of secrecy over the allegations in the complaint that form the basis for the claims we have been litigating for the last three months.

Anything that can be traced back to anything learned in a deposition or in a Yahoo! document or a director's document has been redacted. And the redaction has not been done in a discriminating way; it has been done in a wholesale way, such that all 6 exhibits, 24 entire paragraphs, portions of 12 other paragraphs have been redacted. And the consequence is that there's none of the

factual allegations -- there are virtually none of the factual allegations that would support plaintiffs' claims, especially as it relates to the severance plan which is the focus of the discovery,

that are on the public record.

And that situation would be unusual enough, but it's aggravated by the fact that the defendants, in their own filings with this Court, have decided when they choose what information from their own records they wish to make public. It's further aggravated that when the defendants have done that, they have done it in a false and misleading way such that what's currently before the public about this case is the defendant's spin about their own internal communications and their own version of the facts of what happened inside Yahoo!, and there is nothing about what we say actually happened based on our intense discovery into this matter.

And I think the easiest way to illustrate that is, if I could briefly address some of the redactions, one category we identified is what have any of the advisors to Yahoo! said or not said, or did or did not do in relation to the creation and adoption of these severance plans. Yahoo! saw fit to disclose publicly that Compensia, a consulting firm, advised the company, and Frederick W. Cook, another consulting firm, advised the members of the compensation committee.

But when -- anything that we say in the complaint about what Fred Cook or Compensia, or anyone within those firms, said or didn't say, or did or did not do, is redacted. And that's perhaps best illustrated by Exhibit B to the complaint, which shows the view of the top guy at Compensia when he learned about what management was proposing be adopted, about the scope of the severance plan that management was adopting.

And we -- I won't say in this call, we haven't said it in our papers -- we won't categorize or characterize the plain words on top of Exhibit B. And similarly, Exhibit F shows the level of what cost estimates they would have considered reasonable and the limit of their inquiry, and advice and e-mails sent after the board had already adopted the plan, and just minutes before the compensation committee was doing the final adoption of the plans, and this informal advice that was given about the parameters for a reasonable plan and the limited basis of what the compensation advisors had actually done, and that's Exhibit F.

Similarly, comments by Yahoo!'s senior executives about the severance plans are

redacted. For instance, the e-mail in Exhibit D about -- written by the head of integration, the person who does acquisitions at Yahoo! and has to deal with these types of issues, how severance plans

work when you are the buyer and the integration problems they cause. His views about this severance plan are in Exhibit D; they're redacted from public view.

Similarly, once the directors are told what they were told, that's redacted from public view. For example, paragraph 68 and 69 which say what was -- what was not done, what information was not provided to the directors, how it came to be the scenario that was adopted, the parameters of the plan that was adopted, how they evolved -- all of that is shielded from public view. And perhaps most notably, the cost estimates of the plan. The numbers are laid out in Exhibit E and described in paragraph 70.

And we addressed in our papers, and it was addressed on our prior call, was addressed in the public version of the defendant's opposition to the motion to expedite to seek a trial, certain numbers that Yahoo! calculated. You can see them based on assumptions of about 15 percent reduction in

force and 30 percent reduction in force for a $31 bid. Those numbers are Yahoo! numbers. We never endorsed them, never agreed with them, never verified them, never endorsed any of the assumptions that went into them.

In fact, as we allege in our complaint, we think the true cost of this plan -- because of its unusual nature that allows any employee to assert that they can get a huge cash

severance, full acceleration of equity based on a substantial adverse change to their duties and responsibilities, which makes it incredibly hard to estimate who would get the money and how any acquirer would deal with 13,000 people with potential claims of this sort -- we think the real number of the cost of the plan is something closer to the column of about a 100 percent reduction in force, if the acquirer just decides to pay everybody off to simplify matters so that people are not incentivized to quit.

And we see those numbers and the parameters of those numbers on the first three columns on the bottom line, the Exhibit E. And keep in mind, Your Honor, it was 1.3 billion shares out

there, and $31 dollars a share, when you see the magnitude of those numbers -- you can see what the effect is if somebody offers $35 a share, what somebody has to pay in order to buy the company at 35 dollars a per share, if they have to pay the severance plans the board adopted. All of that is about the defendant's spin of what they think the numbers are, and what they falsely attribute to plaintiffs as endorsing those numbers or even creating those numbers.

And then, additionally, there's information about Yahoo!'s strategic plan prior to the Microsoft merger. You can't open the paper any day of the week for the last three months without

hearing something about some deal that Yahoo! is looking at. And we know that Yahoo! is looking at a bunch of different scenarios, not because we've gotten them in discovery, but -- because the defendants have foreclosed discovery because they say all of these scenarios are still being pondered -- but what they have redacted is what Yahoo! was thinking about, the strategic planning, the day before the Microsoft public merger proposal. That they wish to see under seal. So everybody can read

about what Yahoo! is doing now, but somehow it's a big secret of what Yahoo! was thinking the day before Microsoft same along.

And additionally, there's this whole subject about the Microsoft earmark, the $1.5 billion earmark that counsel for defendants made such a big deal of at the motion to expedite, and tried to say -- and said this is what the board thought was so important, how much Microsoft was retaining, was allocating for the retention of executives, that somehow meant Yahoo! spent less to pay the terminated executives, that that somehow made it okay; any discussion of that is redacted.

So, Your Honor, these are the basic categories. It's hard to imagine how any of this is a secret; how any of this is protected under any standard. What Yahoo! is trying to do, what they have successfully done up to now is to have their own version of this case in the press, and have any

discussion of actual facts obtained in discovery shielded from public view.

And Your Honor has ruled on repeated occasions on the factual allegations, the basis of the claim for breach of fiduciary duty because that

might be embarrassing or it might cause public relations problems for the defendant, that is not a reason to shield it from public disclosure. Public disclosure is the tradition of the Court. It's honored by the Court. It's required as a matter of constitutional law, under tough restrictions requiring the articulation of injury if a public judicial record is unsealed.

And there's none of that here, Your Honor. There's no effort to say, oh, this particular fact is a big secret. This is a tremendous harm that will come to us if we disclose this particular fact to the public. It's just a complete wholesale redaction of everything learned in discovery.

And even -- you know, even leading up to this call, there has been no effort to say: Oh, maybe ten of these paragraphs, or five of these paragraphs, they can be seen publicly. There has been no -- no effort to say that anything should be made public. And we're just left with just this blanket assertion that the public shouldn't know about this, about the merits of the case, about the facts of the case.

And, you know, defendants even say,

well, maybe they will file a motion to dismiss. Well, if they do, the briefs are under seal? Your Honor's opinion is under seal? I mean, it would be absurd to think that anything in this complaint would not be open to public scrutiny.

I think really what's going on here is it's temporizing by the defendants to keep as much under seal as possible for as long as they can. And I think that's exactly what Your Honor said in the Disney case which is something that should not be done.

We addressed in our papers, Your Honor, the accusations leveled against us, and I think we addressed them pretty clearly and concisely in our letter. I don't intend to make that as part of my affirmative argument, and I will wait to see what the defendants say about that. But if Your Honor has no more questions, that's our presentation.

THE COURT: Not right at the moment, Mr. Friedlander. Let me move forward, though, if you are through.

Do you want to go next, Mr. Welch?

MR. WELCH: Yes. I'd be happy to, Your Honor. Good morning, Your Honor.

Going into this case, we had a problem. Our opposition discusses their cases in the

press, and they do it a lot. So we addressed the issue in the negotiations of a confidentiality agreement. It took us about, Your Honor, a week for Mr. Micheletti to negotiate this. It was really contentious, unlike some others. And the confidentiality order was so ordered by this Court on March 12th.

What it says is the parties can designate information as confidential if it contains confidential information, proprietary and/or commercially sensitive information. The agreement was that non-public information had to be kept confidential. So if it's non-public, the opposing party can't just take it and distribute it to the press.

The parties also agreed that the confidential information could not be summarized, described, characterized or otherwise communicated publicly. That's paragraph 5.

What else? The parties agreed, and the Court ordered, that the confidential discovery information could be used only for purposes of this

action, not for any other purpose. That's pretty traditional. So if a party wanted to use it for attorney advertising, or to support a proxy contest, or to stir things up with the public, you couldn't do it. It was so ordered by the Court.

Now, in thinking about this issue, Your Honor, we were guided by the case law; case law

that counsel has not today even mentioned, and didn't mention in their submission to the Court this morning, or in their submission earlier.

One of those cases was the Pershing case. Now, in Pershing, the shareholder sought access to the letters the senior executives had written to the board; and the apparent purpose of requesting information was to use that confidential information in a proxy contest. Well, first the Court said -- the Courts words were the letters were non-public.

Now, that's the exact test that we used in our confidentiality order. They contain candid communications about personnel issues and potential mismanagement issues.

Now, it's important, as I read the opinion, Your Honor, that the other side in that

litigation, in Pershing, wanted to use those documents in a proxy contest. This Court said, I apologize for quoting back Your Honor's own language, "If any shareholder can make public preliminary discussions, opinions, assessments of board members and other high ranking employees, it would have a chilling effect on board deliberations and communications between directors and executives."

So, publicly broadcasting non-public information which is not appropriate in the Pershing case, they don't even mention. Particularly, though, in what area? In the context of a proxy contest.

Again, Pershing is not even mentioned. What did we do? The confidentiality agreement and the order of March 12th embodies these concepts.

Now, we were also mindful of the specific context here which is an awful lot like Pershing. We had a proxy contest. First, we had a proxy contest threatened by Microsoft. Microsoft said they were going to run a slate, identified a few directors. Now Mr. Icahn says he is running the slate. Now, Microsoft came out over the weekend and said they may do some more things by way of potential transactions, and undisclosed and undesignated I

might add. But we don't know what we're dealing with when dealing with Microsoft. The proxy fight, Your Honor, is a heavily regulated area of the State and Federal law. Even the Court is conscious, the Court is careful about their own public statements, as well as public statements by the parties.

Now, what else did the confidentiality agreement do? Well, it had its own dispute resolution provisions. If a dispute arises, then you talk about it, give written notice of the specific reasons why a party thinks confidential designations are inappropriate. If -- after good faith negotiation motions can be filed, that's fine, while that motion is pending, it's treated as confidential, the documents are.

Now, what did the plaintiffs do here? Well, first they moved to amend the complaint, and

they referred to redacted confidential information, non-public information -- to use the Pershing words, and to use the language of the Court Order. They attached Yahoo's non-public designations. When we stood by those designations, what did they do? First they summarized them in a letter. They publicly filed the letter with the Court in violation of the

confidentiality agreement; they posted the letter on a website in violation of the confidentiality agreement; and they talked about it to the press in violation of the confidentiality agreement. In essence, they granted their own relief.

Then, hours later, they got the real relief that they really wanted: The media was chock-full of articles about hiding breaches of fiduciary duty and whitewashing and clandestine behavior. They got what they wanted.

Now, the order says we're supposed to use this information strictly for purposes of the litigation. That makes sense. Lays it out very clearly. Nothing unusual about that.

Now, what about the information itself that Yahoo! has designated? Now here, Your Honor, I'm going to be a little more specific than Mr. Friedlander. I'm talking to the Court; I think I have an obligation to layout our position. I'm going to refer to specific documents. We will, of course, respect and defer to the Court's decision as to what part of this transcript should be released. He

summarized the documents. I'm going to refer to them specifically.

All right. First point, every scrap of information that we designated is non-public. There is no dispute about that. The order bars them from granting relief to themselves about non-public information. But there's more to it. Each item of information presents the very risks described in the Pershing case.

Let me give you an example. The specific example that Mr. Friedlander started with, and indeed the only specific example he mentioned, plaintiffs say in paragraph 61 of the complaint that a Yahoo! compensation expert described a compensation plan design feature which allowed for 100 percent equity acceleration as nuts. Just nuts. Plaintiffs, Your Honor, got it exactly, precisely wrong.

All of the e-mails read together -- and they separate them into two batches, I might add -- and the discussions with the author make clear that what he was referring to was not the plan, but a modeling assumption that 100 percent of the equity would, in fact, accelerate. What was the exact point? It's simple that an assumption of 100 percent of the employees is going to accelerate is nuts. Microsoft won't take over Yahoo! and then fire 100

percent of its employees.

He was referring to a modeling assumption; not a compensation design parameter of the plan. This was confidential communications on a preliminary basis by a compensation expert that supported the plan. That compensation expert supported the plan.

What plaintiffs want to do is use it in the press to show that that compensation expert thought the plan was nuts. It's abuse. It's misleading. It's improper. It violates Pershing.

Now, it looks like an effort, potentially, to deliberately confuse the public in the context that Pershing was talking about -- the case they don't mention. We have a proxy fight. That's Pershing.

Yahoo! is not whitewashing embarrassing documents. Yahoo! is in full compliance with the order. Yahoo! is not going to permit, to the extent it has the power to do, deceit to the public.

By the way, those specific documents, Your Honor, are broken into two pieces by plaintiffs. They're Exhibits A and B to the complaint. There is

no basis for releasing those under Pershing, under the confidentiality agreement or anything else.

Now, what about Exhibit C? Exhibit C is a non-public document. It involved preliminary discussions between various people about the compensation plan. Again, it's non-public. It's

like Pershing. They want to use it in a proxy contest, potentially in a misleading way.

Same with respect to Exhibit D. It's a non-public document. Full compliance with the Court Order; involves preliminary viewpoints on some issues. That's protected by Pershing.

Same with respect to E, the cost of the plan itself at various percentage of triggers. That's information that could readily be twisted up. That's not public. It's an internal analysis. It should be used for purposes of litigation. Your Honor should have access to it, and others as appropriate, but it shouldn't be spun out to the press in the context of a proxy fight, or perhaps multiple proxy fights.

What about Exhibit F? Well, that's a preliminary non-public analysis of certain opinions involving these issues. Again, it's a Pershing case.

Plaintiffs are not depriving the Court of it. We can talk about it on the transcript, and indeed we have; and we should continue to talk about it on the transcript. What they want to do is use it in the press, which is what they have done with some of this other information.

Now, we get called out this morning -- and in their letter -- for indiscriminately releasing information to the press. What are they talking about in that? What they're talking about is the argument I made to Your Honor in

a transcript before the Court. We didn't release confidential information to the press. We're not conducting a proxy fight. That's not what they're talking about.

What they're saying is I talked to Your Honor about certain components, certain design features of the plan and, therefore, that's a waiver. I don't know how I can possibly defend the claims that they have made, which I think we were successful on without describing the plan components. That's what we did. That's not a waiver. That's not unfair. That's not inappropriate.

That's not just distributing

information to the press. That's doing what you have to do in litigation; and the Court Order says you are supposed to use the information for purposes of the litigation only; not for a press fight, not for a public relations campaign. That's my answer to that.

What about the Bloomberg letter? Your Honor got a letter this morning from Bloomberg saying you got to let all this information out. Well, short answer, Your Honor: Public relations campaign worked. Worked like a charm.

Now, surely Bloomberg would have this Court overturn the Pershing decision as well. No doubt about that. The more colorful rhetoric out there, the better. That's what the press is going to say. It sells papers. It does a lot that the press like. Talk about whitewashing; talk about hiding

secrets. Things like that sell a lot of papers. But Pershing is clear.

In a proxy contest we have to be careful. NWA is clear: We have to be careful in a proxy contest. The Court is even careful. You don't allow the abuse of information where the parties have agreed to maintain non-public information as confidential. You don't allow it to be summarized,

characterized or distributed to the public; and they did every one of those things.

The confidentiality order is clear. Information is to be used for litigation only. It's not to be used for other purposes.

Now, what should happen here, Your Honor? Your Honor, what should happen? Well, confidentiality agreements negotiated between the parties are important. They're an important aspect of how litigation is conducted. Confidentiality orders are even more important. Yahoo! fully complied with the confidentiality order here. All information was non-public, and there is no dispute about that, potentially subject to abuse, fits right within the Pershing case. Just like Pershing.

Plaintiffs violated the order. They granted their own motion in conducting a PR campaign. That PR campaign is undisputable. That PR campaign is manifested by the Bloomberg letter we all got this morning. Your Honor, the short answer is, their request for relief should be denied.

THE COURT: Thank you, Mr. Welch.

MR. WELCH: Thank you, Your Honor.

THE COURT: Mr. Silverstein, did you

want to speak?

MR. SILVERSTEIN: Yes, please, Your Honor. It would be appreciated.

THE COURT: Certainly.

MR. SILVERSTEIN: Your Honor, we represent the individual defendants who are all -- who are all of the members of the Yahoo! Board.

I have two preliminary general observations, and a few specific comments that I would like to make.

First, the preliminary observations -- and there are two -- on occasion, stockholder litigation is brought in this Court for the purpose of furthering the interests of lawyers representing the stockholder plaintiffs, and not because the litigation is truly in the best interests of the stockholders at large. I am not saying that's the case here, but it's a danger that needs to be guarded against in this type of litigation.

The second general observation is that it is also the case that the reputations of honorable directors may be sullied by baseless allegations that are protected by a rule of immunity that exists to serve a legitimate public interest,

but which is subject to abuse. As explained in our Supreme Court's decision in Barker versus Huang, which is cited in our response papers, this rule of immunity shields plaintiffs even in sham litigation brought for the purpose of defaming the defendant.

Because of this, stockholder plaintiffs have a virtually unchecked ability to craft their pleadings when the -- with the most careless and scurrilous of allegations, without fear of reprisal. Again, I am not saying that this occurred here in this case, but I do believe it is relevant by the issues posed by the plaintiffs' present application.

With the Court's indulgence, I will come back to those general observations in a few moments in connection with this specific matter.

Turning to the specific application before the Court, I want to offer the following remarks: First, the members of the Yahoo! Board are all highly successful, well respected and honorable individuals. Ever since Microsoft first announced its unsolicited acquisition proposal -- and at all relevant times before that -- the members of the Yahoo! Board have been focused on serving the best

interests of Yahoo!'s stockholders in the best manner they can. When the appropriate time comes, Your Honor, the public record will reflect the substantial good faith efforts of the Yahoo! Board to maximize

the value of Yahoo! for the stockholders -- either by way of a transaction with Microsoft, a transaction with another party, or through remaining an independent company.

Now, plaintiffs and their counsel herein claim to represent the interests of the Yahoo! stockholders. That may or may not be correct within the narrow confines of this litigation. But outside of this litigation, however, our law entrusts the Yahoo! Board with the responsibility to represent the interests of Yahoo! and its stockholders, and our jurisprudence presumes that the Yahoo! Board has acted consistent with that trust.

Now, the interests of the plaintiffs and their counsel in this adversarial litigation posture is to vigorously prosecute their complaint. They have made an investment in litigation, and they now seek to develop their case to realize a benefit from that investment. When Microsoft abruptly walked away from active, good faith negotiations being

undertaken on behalf of Yahoo! by the Yahoo! Board, the plaintiffs had a choice to make -- they could have withdrawn this litigation in recognition of the obvious fact that the employee retention plan that formed the centerpiece of their original complaint obviously did not serve as the impediment to Microsoft's increasing its initial proposal by approximately $5 billion.

Alternatively, they could continue to

press on with their claim in the face of the overwhelming evidence that the claim was without merit; or, as they have done, they could choose to amend their complaint in search of a new claim, a claim that they assert that the Yahoo! Board somehow rebuffed Microsoft.

Now, the public record already reflects that the Yahoo! Board did not, in fact, rebuff Microsoft. Rather, they countered Microsoft's $33 proposal with a $37 proposal. And I might add that there is no suggestion by anybody, not even Microsoft, that this proposal was delivered as an ultimatum or non-negotiable final offer.

Now, in any event, all that was necessary for the plaintiffs to do to amend their

complaint was to add a few paragraphs recounting, in addition to what was already in their original complaint, that Microsoft had withdrawn its proposal, and asserting -- however misguided the assertion may be -- that their belief that the Yahoo! Board breached its fiduciary duties by allegedly spurning Microsoft, which claim, I might add, the record ultimately will dispel if the plaintiffs' proposed amended complaint survives the motion to dismiss.

However, in any event, it was not necessary for the plaintiffs to rewrite their entire complaint in the form of a brief, by pleading evidentiary matters and incorporating the content of confidential discovery materials. That's exactly

what they did. There's maybe two paragraphs of the original complaint that remains in the new 45-page complaint.

Now, indeed, it is arguable that such a pleading runs afoul of the command of Rule 8(a) that a complaint should contain a short and plain statement of the plaintiffs' claim. In the federal system, there are numerous authorities -- including the commentary of Wright and Miller -- that would support striking allegations of the type contained in

the plaintiffs' proposed amended complaint and which are the subject of Yahoo!'s redactions. There's also authority for the proposition that it is inappropriate to attach to a complaint the type of evidentiary material that the plaintiffs have appended as exhibits to their proposed amended pleading. With some additional time, we could collect those authorities for the Court.

In this case, the e-mails and other evidentiary material that plaintiff seeks to publicly publish by discussing them in the amended complaint and appending them as exhibits thereto constitute an isolated sampling of thousands of pages of confidential discovery materials that are quoted and described out of context, as Mr. Welch just described. Indeed, plaintiffs don't even know what these materials mean, as the authors of the materials have not been deposed. Nor, for that matter, do plaintiffs know whether the authors were speaking

from actual knowledge of the subject of their statements or merely speculating about matters. And discovery, as this case proceeds -- if this case proceeds -- will show that.

Moreover, and as covered by

Mr. Welch, the incumbent members of the Yahoo! Board are now faced with the prospect of a very public proxy battle with Carl Icahn -- an individual well known to this Court.

Now, this brings me back to the general observations with which I began. Your Honor, under our system of jurisprudence, plaintiffs are relatively unconstrained in what they may say about the Yahoo! Board in their filings with this Court. Moreover, to the extent it's available for public inspection, everything the plaintiffs file in this matter is scrutinized and reported by the press, who are privileged to report whatever is contained in the plaintiffs' legal filings without fear of public reprisal.

In the circumstances of this case, it would create a dramatically unlevel playing field in the pending proxy contest if plaintiffs were permitted to plaster the public record with confidential discovery records that they are free to pick and choose to paint a one-sided story. It's these dangers that we believe this Court has been sensitive to protect against in the Pershing Square and Davis cases cited in our reply papers.

Moreover, these dangers, to which I alluded, are even more keen where it is utterly unnecessary for the plaintiffs to include the offending material in their pleading, and it may even be improper for them to do so. At a bare minimum, when plaintiffs seek to use a complaint as a platform for seeking to publicly disparage the director defendants -- especially in the face of proxy contest -- the defendants should be free to exercise what limited ability they have to protect themselves from such tactics by relying on the terms of the negotiated confidentiality agreement and order -- the terms of which plaintiffs agreed to in consideration for their ability to obtain the very disputed discovery materials that they seek to put into the record.

Now, Mr. Friedlander began his remarks -- and I tried to write down the quote verbatim. One of the very first things he said was that, "None of the allegations that would support plaintiffs' claims are before the public." That was his first contention. Well, first of all, I question whether he can seriously believe that his complaint didn't state a claim until he was able to take

discovery, because that would be the result of his statement that none of the allegations that are redacted are -- that are redacted allegations are the

ones they need to make their claim.

The other and perhaps more significant point, though, is his concern that the allegations be before the public. That is not the point of litigation. The point of litigation is that the Court be able to resolve plaintiffs' claims; not that the public be able to resolve them, especially when there's a public contest. That is not a dispute about discovery.

Mr. Friedlander's arguments sound like the type of arguments that the Court often hears when it's deciding whether certain material should be provided to plaintiffs. There has been no claim by the plaintiffs that discovery has been withheld. All they are arguing about is their ability to make a public record. That's not their job, and the confidentiality order expressly restricts them from doing that.

Unless Your Honor has any other questions, that would conclude my remarks.

THE COURT: I don't. Thank you,

Mr. Silverstein.

MR. FRIEDLANDER: Your Honor, may I reply? This is Joel Friedlander.

THE COURT: Briefly.

MR. FRIEDLANDER: Yes, Your Honor. The defendants have not shied from being blunt, so I will be blunt as well.

We believe there are serious claims

of breach of fiduciary duty here. The defendants did not seek to dismiss our complaint which was based on public facts in the course of the media and the like about the severance plans.

They allowed us to get discovery. We have been seeking discovery. We have obtained discovery. We have obtained documents.

We're taking depositions. We're going to depose Mr. Sparks of Compensia tomorrow. We look forward to that deposition, and to a resolution on the merits; and Your Honor can decide whether to believe his words or what he says or how he will explain what he wrote.

We have done what litigants are supposed to do. We have dug into the facts; we have put the facts into a complaint, as we're required to

do.

The defendants themselves acknowledge they would like to move to dismiss the complaint. Well, good luck on that, but it only shows the need why facts have to be in complaints.

This is not that Ceridian case. This is not a 220 case where someone is running a proxy contest who wants to obtain documents from a company's files and wants to waive them around, you know, Wall Street and put them wherever. This is about documents obtained in discovery in a breach of fiduciary duty action that were put in a pleading; and it's the defendants efforts to keep a pleading, a

judicial public record, under seal.

The question is not whether the defendants have complied with the confidentiality order. The question is whether they're complying with the First Amendment, and complying with the common law right of access to seeking to keep a pleading that contains factual allegations, and I submit factual allegations of breach of fiduciary duty out of public view because it would be damaging to them. That it is a by-product of litigation, this litigation.

People knew about -- I will get rid of the adjective -- the manner in which the severance plans were adopted; that the severance plans were adopted based on a statement about what Microsoft earmarked. And you don't see nothing -- there's nothing in here about an opinion, a written opinion from any advisor saying, "Oh, this is how the costs of the plan really are. This is how the assumptions are; this why they make sense. This is why you can rely on my expert advice."

Instead, they have to trumpet in board minutes a statement about Microsoft's earmark about retention to the severance costs. We think the costs greatly exceed what they themselves have put in the record, the public record, and what they chose to make public, and their public version of their opposition to the motion to expedite.

This is a claim we're litigating.

We're litigating in this Court; we're continuing to litigate it. As a by-product of that, we have to file pleadings. We put facts in our pleadings, and then those pleadings become public judicial records. And if the defendants want to keep them secret, they have to satisfy the common law standards, as Your

Honor articulated in the Disney case and the other cases.

And the by-product of that is something they have to live with when they approve transactions in the way they do. They realize they couldn't dismiss the complaint. They allowed for discovery, and we filed an amended complaint. That's litigation.

This is not about just seeking to waive documents around for a proxy fight. We're not running a proxy fight. We have no interest in creating press about documents.

Our intention is to get the disclosure documents, because they deserve to be disclosed because there's no ground for veil of secrecy and the one-sided view that the defendants have put on this case up until today.

There's talk of violations of the Court Order. The only example of anything we say that summarize -- stated what Mr. Sparks said, what Mr. Dillon said, what any of these other people said or did, it's not in -- it's not in our letters to the Court; it's not on any website. It's under seal, and

it doesn't belong under seal; and that's why we made

this application.

That's all I have, Your Honor.

MR. LEBOVITCH: Your Honor, this is Mark Lebovitch. May I speak very briefly?

THE COURT: Well, I thought we had a ground rule, but if there's no objection, Mr. Lebovitch, I will let you speak.

MR. LEBOVITCH: Thank you, Your Honor. We have seen in the papers and we just heard a lot of rhetoric directed towards us. And as with the prior rhetoric, we prefer not to respond to that. But I do need to comment about the sense of indignation, and this idea that we're running a PR campaign.

The plaintiffs and the plaintiff's counsel are not the ones who hired Abernathy McGregor and paying millions of dollars for PR advice. In fact, going back to the initial Microsoft withdrawal, there were news articles talking about a flood of lawsuits that were coming. Okay? And as I explained to counsel to the defendants during a conversation which I don't want to get into, but there was laughter about some of the comments coming out. There was no offense or indignation.

And what I said was -- I explained to

them we were forced to issue a press release because of all the talk about the flood of lawsuits, and I explained to them that we were saving Yahoo! from 20 lawsuits being filed in California. And that's why there was a press release.

And the fact of the matter is the press is interested in this. When somebody pulls a $45 billion bid, we allege because of the way the CEO handled himself in negotiations, of course people will ask about lawsuits. Of course, they will call us.

Okay. We believe in our case. When people call us, we have the right, as we list in our letter, under the Delaware ethical rules, to state the substance of our claim, okay, to say that we believe in our claim. I can't imagine that anyone would have wanted to not believe in our claim. It's just the opposite.

So we didn't violate any order. Again, we laid that out in the letter. But the paragraphs that they cite have nothing to do with this. The comments about the way we pled the complaint -- let's be frank. If we didn't plead

enough, we would have arguments that there should be a motion to dismiss. Now, there are arguments we violated Rule 8.

So really -- and the final point is just that this talk about the harm that we are committing, the shareholders can make a judgment.

We're not fighting a proxy fight. But in the end, the shareholders can make a judgment based on a two-sided record. And what's happened is Yahoo! is strategically and selectively disclosing their story and trying to muffle us.

That's all, Your Honor.

THE COURT: Thank you, Mr. Lebovitch.

Anyone else?

MR. WELCH: Your Honor, it's Ed Welch. The only comment I guess I would make is there was some suggestion that this was a lighthearted situation. We don't think this is funny at all. We think the Court Order was very clear. We think it was violated.

That's all I have, Your Honor.

THE COURT: Well, let me ask Mr. Friedlander this.

Mr. Friedlander, you have a form of

confidentiality order that the Court signed off on back in early March. Do you believe that there had been violations of that Order in the sense that there have been over designations -- that is, Yahoo! has produced documents pursuant to the confidentiality order that are marked confidential or highly confidential that should not have been?

MR. FRIEDLANDER: Well, I mean, frankly, Your Honor, I think it's common in litigation for virtually every single document of this nature to be marked confidential. I think

that's essentially the practice taken by the defendants. If it wasn't -- it wasn't an analyst report or some news article, it's designated confidential. So there are wholesale designations.

And our issue is not on a piece-by-piece basis going through every single redaction -- not redaction, designation. I think that's a practical way of no interest in publicly waiving around discovery material.

It's really about the stuff that is worthy of being part of a court record, and then the heightened level of standard to apply, the good cause standard. So yeah, I don't think you can justify

every single internal document being designated confidential. That's what happened here.

THE COURT: Well I ask that, because I'm trying to understand how this rule will work going forward, practically. Because you, yourself, Mr. Friedlander, represented, and have represented in the past, companies and their board of directors; and you, yourself, have in the past, I'm sure, negotiated confidentiality orders whereby discovery that was produced by your clients as defending a company's board of directors would produce information subject to certain rules about it being held in confidence.

Now, I'm just curious when you do that, do you advise your clients that the other side may very well reveal confidential documents that are designated confidential and produced in discovery

when they file pleadings with the court, or file briefs with the Court? Because if that's the way it works, then I'm not sure, practically, what value the confidentiality order has.

Do you follow me?

MR. FRIEDLANDER: Respectfully, yes and no, Your Honor, because I think we have complied with the confidentiality order throughout. We filed

papers under seal. We respected the confidentiality order. And I think the advice generally given is, you can, in pretty liberal fashion, designate in discovery materials as confidential.

But when this becomes part of a court paper, then new rules apply. Then 5(g) rules kick in, and the common law kicks in and you need to specify good cause; and good cause is a real standard. And if you want to keep something under seal, you have to give the specification under 5(g)(5) for good cause.

And you can't just rely on the blanket statement of the certification of 5(g) as we just saw: The continued sealing of this information is appropriate because the redacted portions contain non-public information. The case law is clear about that. That is not good cause for sealing public judicial records.

You can't just rely on a confidentiality order. You have to articulate a specific injury if specific information is publicly

disclosed. So I think that is the advice I give, and just about any lawyer would give; that you can control the designations in discovery, but there is a

new realm and a new body of law takes over when it becomes part of a public pleading or brief, or motion or letter. And that's why we have 5(g), and that's why we have the common law right of access in the abundant case law interpreting it.

THE COURT: So your view, then, is that the confidentiality order only protects the information in the context of discovery production; and that once it then is transformed from discovery material into a pleading or a brief that's filed, or a motion that's filed, or any other document that's filed with the Court, that it's transformed then into a document which, under rule 5(g), the opponent who does not want it to be revealed publicly in that court filing must come forward and bears the burden of demonstrating why it should be under seal?

MR. FRIEDLANDER: Exactly, Your Honor.

THE COURT: And so, with respect to each of the designations or each of the categories under the amended complaint that Yahoo! has designated as confidential, it's their burden, under Rule 5, to demonstrate why that information should be treated as confidential and the record should be

sealed?

MR. FRIEDLANDER: Yes. They have to set forth the grounds for such continued restriction.

THE COURT: Then precisely how does the -- how does the -- I'm still grappling with the confidentiality order which has, as I understand it, a dispute resolution process which includes motions to the Court to unseal or to publicly make available the confidential records.

MR. FRIEDLANDER: Your Honor, I would be happy to clarify that. I think that's just a confusion about the confidentiality order.

What the confidentiality order says, in paragraph 19, is that there's a process to undesignate discovery material; and that's regardless of whether it's ever filed in court. For instance, like, let's take Disney, for example. If plaintiffs want to say, "Hey, all of this information, all of this stuff about Eisner or Ovitch in 1995, it's all moot; it's all history." Nothing should be confidential. I should be able to give it to family members, friends. I should be able to give it to anybody I want; anything produced in discovery. That would be -- paragraph 19 requests to vacate a

confidential designation.

Then there's a process for how to go about doing that. And then if there's a disagreement, you can go to the Court and say information in the discovery record, everything in

the deposition transcripts, whether it came to trial or not, all nine documents that have been produced, they should be made public. That's what paragraph 19 is all about.

Rule 5(g)(6) deals with a different circumstance. It deals with when things are publicly filed. And it says if there's a -- you can give notice to the -- you can give notice, you can object to continue a sealing, and we did. We put in our motion to amend. We said we think none of this should be under seal. And then the burden is on the person who is seeking to keep it under seal to articulate the good cause standard, whether good cause exists for continued restriction of the public filing.

And that's the proceeding we have right now, Your Honor. That's a different process. It's a different proceeding.

We requested expedited treatment of

it, so we don't get in a prolonged briefing schedule about it. But the other side has not tried to articulate that good cause standard for documents that are public.

We're not trying to vacate confidentiality designations of the thousands of pages produced in discovery. We're only seeking that our pleading, the core of our case, be publicly available; and in the absence of an articulation of a specific injury, serious injury, specified, then the

case law is clear that the good cause is not going -- has not been established and the document should be unsealed. So, there's a separate body of law.

There's no violation of the confidentiality order and the defendants cannot rest on the confidentiality designations once they have a public filing of a judicial record.

MR. WELCH: Your Honor, it's Ed Welch. Might I respond to that briefly?

THE COURT: Sure.

MR. WELCH: Number one, they never complied with the procedure provided in the Court Order. First of all, they filed the complaint. They then summarized the complaint, each category. They

characterized it. And they not only filed it publicly, number one, in violation of the order; number two, they posted it on their website in violation of the order. Number three, Mark Lebovitch talked about it to the press in violation of the order. They granted their own relief.

Number two, when it comes to supporting the specifics with respect to the good cause, I have no hesitation in citing and relying upon Your Honor's decision in Pershing. Pershing says you don't take non-public documents -- the very choice of words we use in the confidentiality order -- you don't take them, you don't summarize them, you don't characterize them or categorize them and make it available to the public. They did

exactly that.

I have no hesitation in supporting and relying upon the Court's admonition that if the parties to litigation can do that, there is absolutely no doubt that that would have an horrendous chilling effect between communications between senior officers, senior advisors, compensation experts, and everybody else with the board of directors, all of which occurs in the

context of a proxy fight.

Your Honor, this was deliberate. It was overt. It wasn't covert. They did it purposefully; they did it in the press. It had exactly the effect they intended.

The Court has letters to the Court, we had dozens of articles all over the press on Saturday. We've had them ever since; and now we have the press writing the Court.

There was a process. They could have written the Court under paragraph 19 of the order which the Court ordered and they ignored. They should have come to the Court and allowed the Court to make the decision. And again, I would not hesitate in relying upon, for each of those exhibits that I went over in detail, Your Honor's decision in Pershing. They should have let Your Honor decide. They didn't do it.

What they did was to go to the press. They went to the public. They violated the Court

Order.

THE COURT: Well, Mr. Welch, help me out. Make sure I understand you clearly. When you said at the outset that the plaintiffs have used

self-help, that the complaint -- the amended complaint I think you said has been posted on a website?

MR. WELCH: No, sir. No, Your Honor. That may have happened, but I don't know that. No, Your Honor, their letter that they wrote to the Court, which summarizes each of the categories of information that we redacted, summarizes them in considerable detail, was, A, filed publicly; B, posted on their website for the press to get it; C, made available to the press; and D, discussed with the press by Mr. Lebovitch. He went through it.

He's the one who stirred this up. He's the one who made the comments about, you know, to the press that we all read about on Saturday morning about Yahoo! trying to whitewash information; Yahoo! trying to hide facts; Yahoo! committing breaches of fiduciary duty. He's the one who did that, all of it in violation of the Court Order, instead of going to Your Honor, filing the motion and allowing us to argue Pershing.

I've argued Pershing; have no hesitation of relying on Pershing. They didn't touch it, and indeed didn't discuss it in the papers they

filed with the Court today. If that's not a powerful piece of reasoning that governs this situation, I don't know what is. But they didn't do that. They granted themselves self-help by going to the press.

THE COURT: The question that you perhaps have answered, but I want you to indulge me and answer again, is Mr. Friedlander's point that the confidentiality order is designed to and does cover the production of documents and other information during the discovery process, and that if a party wants particular documents to be able to be revealed publicly through a press release or by circulating it over the internet, posting it on a website, that there's a process which the confidentiality order creates for an application to the Court to do that, to open that information up to be used in any manner whatsoever. And that is the Disney case, where information that was being discussed internally by Mr. Eisner about other potential candidates for president of the Walt Disney Company, aside from Mr. Ovitz, was information that there was an application made for it to be able to be revealed. Actually, it was not in any pleading, I believe, but it was asked to be revealed.

It was asked to be revealed so that, authors of books who were writing this story wanted to be able to properly document it. And so, there

was an application made for that to be able to be disclosed, notwithstanding the confidentiality order; and I granted that. It was historical information to begin with. It was information that was in the mid-'90s, so it was quite old by the time the application came in early 2000 or 2001. And so, that is the process that Mr. Friedlander describes.

The corollary to that is if, in fact, a party who has had documents produced in discovery marked confidential incorporates those into a pleading or a court document that's being filed with the Court, that that's when Rule 5(G) becomes operative; and then it is incumbent upon the party who seeks to maintain confidentiality to demonstrate good cause for why that information, despite being filed in a court which is a public institution, should nevertheless remain under seal.

And so my question is: Do you agree with that, or don't you agree with that description of how the confidentiality order operates?

MR. WELCH: Your Honor, I think I

agree with it. I think what Your Honor described is the fair process. And I think no one from our side is saying you shouldn't scrutinize and consider the redactions that we made.

Our point on that is simple. Our point is it fits squarely within Pershing. And I understand Disney, and I understood the decision. And Your Honor makes a couple of good points. Number

one, there was no proxy fight. Number two, it was an old, old -- that was older information. I understand that. Number three, and most importantly, they followed the process. That's not what they did here.

What they did here was release a letter, made it available to the press and on their website, describing, characterizing, reviewing the information in violation of the Court Order; and on all those points, we are radically different from Disney.

The process you describe is fine. The only problem with the process is he didn't follow it. Your Honor ordered in paragraph 19 of the confidentiality agreement a process to be followed. Sure, they filed an amended complaint, but then they went around and summarized it and made it public.

They didn't do that in Disney. And again, I think that's wildly different than that case. This isn't Disney.

THE COURT: Let me ask you -- I'm sorry to interrupt you.

MR. WELCH: That's all right, Your Honor. Understood.

THE COURT: But what do you -- I know what Mr. Friedlander wants me to do. But you agree that I have to look at each of the redactions that Yahoo! has urged or justified here, and I have to determine whether, under our law, those redactions are in fact appropriate, and whether good cause has

been demonstrated that would justify those redactions or those confidential sealings of those aspects of the amended complaint. You agree that it's my job to do that.

Do you ask for any particular relief? Are you asking for me to do anything about the actions that were taken that you've complained about with respect to the May 16 letter and the statements made to the press, or not?

MR. WELCH: Your Honor, I have no hesitancy in saying to you that I believe that those

were blatant violations of the Court Order. At the same time, it's not my practice, it's not my firm's practice -- I avoid this as much as I can in seeking relief of things of that nature. We're not going to do it. We haven't done it.

We're not seeking relief against any of the firms involved. We don't do that, except in the rarest of circumstances; and we're not going to do it here.

THE COURT: Then my final question, Mr. Welch, is do you -- are you resting on the record, so to speak, with respect to your showing of good cause with respect to the redactions and the sealed aspects of the amended complaint?

MR. WELCH: No, sir, Your Honor, we're not. This arose in a very expedited context in a situation that doesn't justify expedition. It arose in a context where the opposing parties have

never once complained to us, since February, about any of our redactions which previously have been filed with the Court.

We got a letter, a one-and-a-half page letter on Friday. We got a call from them saying, "We want to argue this at 3 o'clock." We

said, "Look, we're dealing with people on the west coast, we can't do that."

I think the process that should be followed is the process that was so ordered by the Court in paragraph 19. In other words, I think if they wanted to make a motion to lift redactions, they ought to make that motion.

What they have done is to file a motion to amend the complaint and tried to jam us on a one-and-a-half page letter. We quickly responded. We filed a letter responsive to what they said on Monday, on yesterday. Now, again, I think the letter makes a powerful case, that every scrap of information falls within Pershing here. That having been said, I don't think the process has been followed.

I do think if they want to file a motion -- first of all, they ought to get back to us, as the order requires, and give us the specifics as to why each item of information is something that is problematic. Secondly, we ought to have a good faith dialogue; the order calls for that. Thirdly, if we don't have an agreement, and we may not -- based upon

these conversations, we may well not -- I think they

ought to file a motion that articulates their position. Fourth, I think we ought to file a response to it. And then all of this should be kept confidential until that -- until Your Honor has had a decision to resolve it.

Now, that's what was Court-ordered in the past, and that's what ought to happen now. We were predominantly responding to Your Honor in our correspondence, which was a crisis situation created by Bernstein and Litowitz when they released that letter to the press provoking dozens of articles in Saturday morning's press. I got calls all Saturday morning. We have all gotten them ever since.

We were responding to that crisis. We think that ought to be stopped. It shouldn't have happened, and should not happen going forward. That's predominantly what we're responding to.

I probably would have a lot more to say about individual redactions. Did I address each one of the attachments? Sure I did. Could I have more to say about that? Sure, we do.

There's also redactions in the complaint. I have no hesitation in saying every one of those is based upon confidential documents,

non-public documents, to use the words of Pershing, non-public documents, to use the words of the Court

Order, which form the basis for their allegations; and they shouldn't do that. But I think we ought to have the process that this Court's order calls for, and I think that's how it ought to run out.

I think we would have a lot more to say given the time. And, by the way, Your Honor, there is absolutely no crisis here that calls for a super-expedited process, which they did try to jam not only on us but on the Court as well on Friday. I think we should have an opportunity to do this right.

MR. SILVERSTEIN: Your Honor, this is Bruce Silverstein. I don't mean to prolong this, but Your Honor said something that prompted --

THE COURT: Sure.

MR. SILVERSTEIN: The process being proposed by Mr. Friedlander -- and I have a hard time believing that he believes this is the right process, because he's been on the other side many times -- would create a change in the way we litigate cases in Delaware. It would circumvent the confidentiality orders that are negotiated and ordered by the Court which have dispute resolution procedures within them,

because it would allow a party who receives confidential information to, through the artifice of simply drafting up a new pleading or, as Mr. Friedlander argues, even a brief and make it chock-full of confidentiality material, and then arguing that the confidentiality order falls to the wayside and now we're governed exclusively by Rule 5.

I don't believe that is what was intended by Rule 5.

Separate from that, good cause is arguably shown pursuant to Rule 5 simply by virtue of the fact that the Court has entered -- so ordered a confidentiality agreement that describes what types of documents may be kept confidential, and the documents which are at stake are designated confidential pursuant to that order, it is incumbent upon the plaintiffs in that circumstance to establish, through the procedures and the Court Order, why the designations are inappropriate; and we hear no argument to that effect in this matter. Moreover, as Mr. Welch has said a number of times -- and I concur -- the good cause is shown in this case by the existence of a proxy contest, and that these documents are non-public and are being quoted out of context without even an understanding by the

plaintiffs of what they mean.

Lastly, the plaintiffs haven't even followed Rule 5, the rule they claim to champion. Rule 5 requires that they give us notice that they believe that there are materials in the public filing, in the sealed public filing, that they believe should not be sealed; and we then have seven days on our own accord to seek the continued sealing of those documents. They didn't even follow the rule they claim to apply, which we don't believe does apply in the first instance.

MR. FRIEDLANDER: Your Honor, this is

Joel Friedlander. May I speak briefly?

THE COURT: Last one.

MR. FRIEDLANDER: Thank you, Your Honor. I think we have a lot of opposition and a request for delay here. This is not a Pershing situation. This is not a 220 case. This is not a paragraph 19 of the Court Order case. This is not about confidential information.

It's about Rule 5. Rule 5 -- the defendants have their chance under Rule 5. When we filed our motion to amend, we wrote in our motion to amend, "We don't believe that anything in this

complaint should be filed under seal, and we are requesting the defendant's permission to file it publicly." The defendants then, on Thursday, three days later, put the wholesale redactions of everything from the discovery under seal, and they did not file a 5(g) certification about the good cause basis for doing so. There's a blanket redaction of everything.

Then when we brought this to Your Honor's attention and asked to be heard on an expedited basis. The defendants chose not to try to justify their redactions. Instead, they went on the attack.

And this is my final point, Your Honor, we have heard a lot about the violations of the Court Order. There is nothing in any extra judicial statement about the contents of what's in

these redactions. Much of the complaint is under seal.

What's on the website is the public version of the complaint. What's on the website is the May 16th letter which everybody invokes, but nobody wants to actually read what it says. There's one sentence which is the issue. It says, "For

example, these are categories of information Defendants seek to shield from public view: Comments by Yahoo's compensation advisers about the scope and cost of the change in control employee severance plans that Plaintiffs seek to invalidate." We didn't summarize, describe, characterize or categorize any of what the compensation advisers said or didn't say.

Another category: "Comments by Yahoo senior executives relating to the Yahoo severance plans." Again, we did not summarize, describe, characterize or categorize what those senior executives said. If anybody wants to know that, the only people who know that are people with access to the sealed version of the complaint, the litigators in this case and Your Honor. Nobody else knows. It's under seal.

Next category: "Factual allegations about what the Yahoo directors were told about the severance plans, and what their advisors failed to do before the severance plans were adopted." Again, we didn't say anything about what was done or what wasn't done, what steps were taken or what steps were

not taken. If you want to find that out, you have to have access to the sealed complaint, which nobody has

other than the litigants and the Court.

"Calculations of the cost of the severance plans under various scenarios." We did not say what any of those calculations actually were. The only people who have access to that are the public to the extent that the defendants voluntarily chose to put into the public realm two of the numbers on that page of numbers that's attached as Exhibit E to the complaint.

That's the spin they want to put out there. They very deliberately did it in public fashion, and in the transcript of this Court and the public filing. We have not put out a single number, other than the two numbers the defendants themselves decided to make public.

Last category: "Information about Yahoo's strategic planning prior to Microsoft's merger proposal." Did we say anything about what that strategic planning was? No. Did we summarize it, characterize it, categorize it? No. Yet we're faced with scurrilous accusations that we violated the Court Order, may be sanctioned and punished except for the grace and goodwill of Skadden Arps because they're not going to do that to us.

It's a falsehood, it's a calumny, and it's unwarranted. And what is warranted is a proper examination of this complaint under 5(g), which they refused to even take. They cite inept cases. They don't defend their own redactions. And that's the record we have now. And there shouldn't be rounds of briefing and weeks go by where they keep information that should be publicly available under seal.

That concludes my remarks.

THE COURT: Thank you, counsel. I appreciate your being available. I am going to take this question under advisement. I am not going to rule on this now, that's for several reasons. One of which is you argued very forcefully. I have not had a chance to read all of your written submissions, some of which arrived today. Accordingly, I want the opportunity to do that, before I make a decision.

Second, I believe it would be appropriate if you think that there is additional argument that you want to make regarding the appropriateness of sealing particular items of information, that you have an opportunity to do that in a prompt manner. Because if you have not had a full opportunity or believe that you have not had a

full chance because of the expedited way in which this matter has been brought before me to do so, then I think you deserve the opportunity to more fully present your position.

But let me explain that I'm not

inviting lengthy or drawn out briefing, or further submissions if there isn't any need for them. I'm only giving you a brief opportunity, between now and Thursday or Friday -- Thursday let's say, that's about as much time as I want to spend on this -- to make any further submissions, bring to my attention any other case law, or any of the rules that you believe are pertinent. I will consider those, and get everyone a decision promptly thereafter.

Frankly, there is a good deal of pressure on the Court to resolve this matter that doesn't come from the parties, and I'm sure you understand what I'm saying. I will address the problem as promptly as I can.

If there is nothing further, counsel, I appreciate your being available, appreciate your time and effort, and I will get back to you in due course.

MR. WELCH: Your Honor, this is Ed

Welch. I wonder, in light of Your Honor's comments, if I might say the following? Mr. Friedlander, for the first time, responded in his rebuttal argument to the points about the letter. He described them and says that he didn't characterize the redactions. What I would like to be able to do -- and I won't propose to do it right now, but what I would like to be able to do is quote for the Court what Mr. Lebovitch said in the press about that letter, that specific letter, and where he was trying to go

with that. Perhaps I can do that in the supplemental submissions?

THE COURT: That's fine.

MR. WELCH: The point is they did characterize it; and in describing the letter, they left out what they said to the press. I would like to be able to address that, perhaps, Your Honor, in the supplemental submissions, if that's all right?

THE COURT: That is, Mr. Welch. You can do that.

MR. WELCH: All right.

THE COURT: I'm not trying to short circuit anyone. So if my Thursday deadline is unnecessarily harsh, I am willing to consider being

more lenient. I am just trying -- I have found in the past that it is better to deal with these kinds of issues sooner rather than later, because the pressure on the Court and the phone calls and the letters that I get, and the inevitable threats to seek intervention and so forth, just makes life more difficult.

MR. WELCH: Your Honor, that's not right, and it shouldn't be. The one thought I have on scheduling, I'm supposed to catch a train up to New York to speak at a Vice Chancellor Lamb seminar for a PLI tomorrow. I'm going to have to work on that today, and I will be at the seminar all day tomorrow.

Mr. Micheletti, who is smarter than I

am, could do this too, though he has an argument in Activision on Thursday. And I'm just wondering if it would be all right -- since Your Honor raised it, I was wondering if we could have until Friday? We're jammed on the Activision and the PLI seminar.

THE COURT: I know Mr. Lebovitch is involved in that PLI seminar, isn't he?

MR. LEBOVITCH: I am, Your Honor.

THE COURT: So we're all going to be

there.

MR. WELCH: Now, I'm under even more pressure, Your Honor. I wasn't aware of all that.

THE COURT: So Friday -- I don't know if Mr. Friedlander is involved. Maybe we can get him to go up as well --

MR. WELCH: He should be, Your Honor.

THE COURT: Yeah. So Friday will work fine, Mr. Welch.

MR. FRIEDLANDER: Your Honor, this is Joel Friedlander. May we respond on Monday? The supplemental papers, I think, we should be entitled to respond on.

THE COURT: Monday is a holiday, Mr. Friedlander. That's okay, or you could file it Tuesday.

MR. FRIEDLANDER: Thank you, Your Honor.

MR. SILVERSTEIN: Your Honor, one last point. This is Bruce Silverstein. If we could

direct the transcript of this proceeding be sealed until Your Honor has an opportunity to rule on the underlying question?

MR. WELCH: Your Honor, with that in

mind -- Ed Welch -- I did reference specifically some of the documents that would be at issue, the "nuts" comment and that sort of thing. Your Honor knows why I did that. I think that one has huge potential for headline abuse, which -- and, of course, that's our position.

THE COURT: Well, I can tell you all that I am under intense pressure. There were media who contacted the Court about being available on this conference call, and I made it clear that they would be entitled to a transcript of this; and they relented in their demands to be on this conference call. I am going to have to release the transcript, but I will edit it, so that references that are part of the continuing sealed document remain under seal, and only things that are not sealed would be released as part of the transcript.

MR. WELCH: Your Honor, we appreciate it.

THE COURT: All right. And I may very well, after I have done that -- well, I will notify you before I do that.

MR. WELCH: Thank you, Your Honor. We very much appreciate it.

THE COURT: Anything further, counsel?
MR. WELCH: No, sir.
THE COURT: All right. I appreciate your being available. Thank you.
MR. WELCH: Thank you, Your Honor.
MR. SILVERSTEIN: Thank you, Your Honor.
MR. FRIEDLANDER: Thank you, Your Honor.
MR. LEBOVITCH: Thank you, Your Honor.
(The teleconference was concluded at 11:30 a.m.)

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CERTIFICATE

I, JENNIE L. WASHINGTON, Official Court Reporter of the Chancery Court, State of Delaware,

do hereby certify that the foregoing pages numbered 3 through 68 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Georgetown, this 2nd day of June, 2008.

/s/Jennie L. Washington
Official Court Reporter
of the Chancery Court
State of Delaware

Certification Number: 140-PS
Expiration: Permanent

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