

IN THE CHANCERY COURT OF THE STATE OF DELAWARE

IN RE YAHOO! INC.  
SHAREHOLDERS LITIGATION

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: Consolidated  
: C. A. 3561-CC  
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Chancery Court  
34 The Circle  
Georgetown, Delaware  
Monday, March 24, 2008  
11:00 a.m.

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BEFORE: WILLIAM B. CHANDLER, III, Chancellor.

- - -

TELECONFERENCE

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34 The Circle  
Georgetown, Delaware 19947  
(302) 856-5645

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1 APPEARANCES:

2 (via telephone)

3 DAVID J. MARGULES, ESQ.

JOEL FRIEDLANDER, ESQ.

4 EVAN O. WILLIFORD, ESQ.

Bouchard, Margules & Friedlander, P. A.

5 -and-

MARK LEBOVITCH, ESQ.

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6 BRETT M. MIDDLETON, ESQ.  
Bernstein, Litowitz, Berger & Grossmann, LLP  
7 of the New York Bar  
for Plaintiffs Police and Fire Retirement  
8 System of the City of Detroit and the  
General Retirement System of the City of  
9 Detroit

10 EDWARD P. WELCH, ESQ.  
EDWARD B. MICHELETTI, ESQ.  
11 Skadden, Arps, Slate, Meagher & Flom, LLP  
for Defendant Yahoo! Inc.

12 BRUCE I. SILVERSTEIN, ESQ.  
13 Young, Conaway, Stargatt & Taylor, LLP

-and-  
14 JOHN W. SPIEGEL, ESQ.  
Munger, Tolles & Olson, LLP  
15 of the California Bar  
for Defendants Jerry Yang, Roy Bostock,  
16 Ron Burkle, Eric Hippiau, Vyomesh Joshi,  
Arthur Kern, Robert Kotick, Edward Kozel,  
17 Maggie Wilderotter, and Gary Wilson

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1 THE COURT: Good morning, counsel.  
2 This is Bill Chandler speaking.

3 ALL COUNSEL: Good morning, Your  
4 Honor.

5 MR. MARGULES: David Margules, Joel  
6 Friedlander and Evan Williford here for the  
7 plaintiffs, from Bouchard, Margules and Friedlander.

8 MR. LBOVITCH: Mark Lebovitch and  
9 Brett Middleton, also for plaintiffs, from Bernstein,  
10 Litowitz, Berger and Grossmann.

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Ed Micheletti from Skadden Arps for Yahoo!.

MR. SILVERSTEIN: Your Honor, this is Bruce Silverstein from Young Conaway. We represent the individual director defendants. Also on the line, I believe, is John Spiegel from Munger Tolles.

MR. SPIEGEL: Good morning, Your Honor. John Spiegel here.

THE COURT: Good morning, Mr. Spiegel. And welcome to everyone.

MR. MARGULES: Good morning, Your Honor. This is David Margules. I will be speaking on behalf of the plaintiffs.

Your Honor, this is the time that the

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Court has set to discuss the motion for an expedited trial in this proceeding.

I think there's really two issues at the moment: One is does the complaint state a colorable claim; and then the other is there's some irreparable harm out there that creates a reason to expedite the proceedings. And I'd like to focus most of my time on the question of a colorable claim.

Over the past several years, Yahoo! has been severely criticized for its performance. There has been -- during that period, periodically, Microsoft, and possibly others, have approached Yahoo! about an acquisition, and they have consistently rebuffed. Yahoo! has, instead, preferred to pursue a number of internal business

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16 strategies to boost its earnings and its value; and  
17 they have been -- to be polite -- an abject failure.

18 On January 29th, during the course of  
19 an earnings call, Yahoo! announced what they refer to  
20 euphemistically as a strategic work force  
21 realignment, which is really just corporate speak for  
22 massive layoffs and redeployment of employees. As  
23 part of that plan, they announced 1,000 employees out  
24 of a total of 14,000, or about seven percent of the

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1 work force, would be fired. And in addition to that,  
2 they described in general terms that there would be a  
3 decrease of investment in some business areas and an  
4 increase in others, which makes it clear that of the  
5 13,000 remaining employees many of them would have  
6 had their jobs redefined.

7 So, in other words, this is a  
8 recognition that in order for Yahoo! to increase its  
9 value for stockholders, that there is a need for  
10 major job cuts and major, major employee  
11 redeployments.

12 On January 31st, just two days later,  
13 Microsoft wrote to Yahoo! and offered \$31 in cash and  
14 stock to buy the company which is, in the aggregate,  
15 \$44.6 billion; and that's a 62 percent premium over  
16 the close of the stock the prior day.

17 On February 12th, less than two weeks  
18 after the Microsoft offer, the company announced --  
19 or I'm sorry, the company approved a work force plan  
20 that reflects an erratically different view of the

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21 company's value that is completely inconsistent with  
22 the logic that underlies the strategic work force  
23 realignment. All 14,000 employees of the company  
24 were given contracts that permit them to terminate

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1 their employment with lucrative severance benefits,  
2 if after a change of control there is substantial  
3 adverse alteration in duties and responsibilities;  
4 and this is at any time within two years following  
5 the change of control.

6 Now, what is meant by a substantial  
7 adverse alteration in duties and responsibilities is  
8 not defined in the plan. And the point is that it's  
9 not just the key executives or the most valuable  
10 engineers who receive these benefits, but it applies  
11 to every janitor, every file clerk, every secretary,  
12 every security guard; everybody. So, while Yahoo!  
13 retains great flexibility to deal with its employees,  
14 the kind of flexibility that's reflected in this  
15 strategic work force realignment, any acquirer would  
16 face punishing consequences if it does anything other  
17 than freeze everybody in their jobs exactly as they  
18 are today for at least two years following an  
19 acquisition.

20 Now, we submitted the affirmation of  
21 James Reda, who is the founder and managing director  
22 of James F. Reda and Associates, who is a respected  
23 executive compensation consultant, and he described  
24 the effect of this plan on a potential acquirer.

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1 Let's assume that an acquiror wants to do something  
2 that's similar to the strategic work force  
3 realignment that Yahoo! says is necessary to increase  
4 the value of the company. Obviously, all of the  
5 1,000 employees that would get laid off would get  
6 severance benefits.

7 In addition, every other employee  
8 arguably affected in any way may also be able to  
9 claim benefits. So, if a secretary gets transferred  
10 from one manager to a new manager, that secretary may  
11 be able to claim -- may be able to leave and claim  
12 benefits. If a software engineer is asked to work on  
13 Microsoft Outlook instead of the Yahoo! search  
14 engine, that could be claimed arguably as a condition  
15 permitting termination and severance benefits. If a  
16 manager is moved from quality control to sales, and  
17 on and on and on.

18 So, even employees that the acquiror  
19 may want to retain may be in a position to take money  
20 and leave, or at least use the threat that they will  
21 do so to grab some additional benefit from their  
22 employer. There's potentially thousands and  
23 thousands of disputes that will have to be dealt with  
24 by the acquiror, with all the intended costs and

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1 administrative burden, the risk of having to pay the  
2 benefits and the overall effect on the morale of the  
3 employee base.

4 As Your Honor is well aware, the  
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5 economic engine that drives many acquisitions in the  
6 acquisition market, in general, is the acquirer's  
7 belief that they can extract additional value from  
8 a company, either by exploiting synergies between the  
9 two companies or redeploying assets to follow with a  
10 certain business plan.

11 As Mr. Reda shows, the universal  
12 parachute plan as they call it eviscerates that  
13 value. Any assets -- the assets redeployed can be  
14 redeployed only by paying significant benefits to  
15 employees who are terminated, or those who claim  
16 substantial adverse alteration in duties and  
17 self-terminate.

18 Even if an acquirer doesn't intend to  
19 do anything other than put in its own management in  
20 some places, doesn't intend to change anything,  
21 there's still potentially employees who will claim  
22 the benefit and leave, and take -- you know, and take  
23 these benefits. You know, there will be a ripple  
24 effect. If you put in new managers, people who are

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1 reporting to that new manager may claim a substantial  
2 adverse alteration. And anybody -- and Your Honor  
3 can see how it would ripple out like the stone cast  
4 into a still pond.

5 The disruption dislocation that the  
6 plan creates gives incentives to people who leave  
7 even if their retention is desired. And the  
8 ambiguity of the terms prevents any acquirer from  
9 predicting with any certainty what employees will

10 leave, how many employees will decide to leave.

11 We saw a February 12th slide book,  
12 that's attached to Mr. Reda's affidavit at tab four,  
13 in which there's estimates of the costs of this plan.  
14 The estimates that are in those books assume that  
15 there's a force reduction between 15 and 30 percent.

16 And defendants take those numbers and  
17 they compare it to breakup fees that have been  
18 approved by the Court, and they say the cost to be  
19 paid out, if there's a 15 to 30 percent reduction is  
20 not that great if you look at it as a breakup fee.  
21 But that completely ignores the effect on a company  
22 of 15 to 30 percent of its work force walking out the  
23 door when -- if that is unplanned or undesired by the  
24 acquirer. Those additional costs, that additional

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1 uncertainty is what makes this plan so onerous, or at  
2 least one of the things that makes it so onerous.

3 Yahoo! admits in its papers, as it  
4 must, that the universal parachute plan was adopted  
5 in reaction to the Microsoft bid. But they claim  
6 that we should not be permitted to challenge that  
7 measure, at least not at this stage, because they say  
8 it was approved by an independent board, and that the  
9 board acted on the advice of counsel and financial  
10 advisors, and that the sole purpose was to calm  
11 employees who may be frightened by the Microsoft  
12 offer. And they say, in essence, that this was not  
13 adopted as an anti-takeover device.

14 Your Honor, there's no evidence for  
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15 Yahoo!'s blind submission and blank statement in the  
16 Court's submission. We don't see any affidavits or  
17 documents demonstrating the basis for the statement  
18 that Yahoo! employees considered leaving because of  
19 Microsoft bids.

20 The plaintiff -- the defendants have  
21 submitted some minutes this morning, and there's  
22 nothing in those minutes that says anything. In  
23 fact, the only thing that I have seen in board  
24 minutes that have been produced to us is a -- a board

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1 meeting on the day that Microsoft approached, which  
2 is I think -- I guess it's the January 31st, the  
3 President Decker reports it.

4 It says, "She then reported to the  
5 board on her meeting with company employees and  
6 senior vice president and executive vice president  
7 level, noting her emphasis at those meetings on the  
8 need to keep focused on execution of the company's  
9 strategic initiative, and the fact that the board has  
10 a number of alternatives that need to be considered  
11 and evaluated." She then goes on to say that she has  
12 a concern about the employee retention issues, but  
13 she doesn't say that employees -- at least the  
14 minutes don't reflect her saying -- and there's  
15 nothing anywhere that says that anybody has any facts  
16 suggesting that a single employee is thinking of  
17 leaving.

18 There's certainly nothing that  
19 reflects that up and down the work force, that

20 there's this generalized fear of Microsoft. They do  
21 point out that Microsoft has given some pretty  
22 significant assurances to employees. And there's no  
23 discussion anywhere in any of the documents of the  
24 effect of Microsoft's assurances to employees in

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1 terms of calming any concerns that they may have.

2                   Your Honor, to the extent that  
3 there's concerns in the employee base, truly those  
4 concerns are driven more sharply by Yahoo!'s own  
5 intent to reduce 1,000 jobs and to redeploy other  
6 workers. And nothing to show that if there is -- if  
7 the employees are concerned or unsettled, that it's  
8 because of Microsoft and not because of the announced  
9 layoffs.

10                   This is clearly a takeover attempt.  
11 It's admittedly a reaction to Microsoft, and it's  
12 employed supposedly in an effort to mitigate some  
13 threat posed to employees. But as the minutes show,  
14 there's no investigation as to whether or not there  
15 really is a threat. Critically, there's no  
16 indication that the board consulted anyone other than  
17 its takeover team.

18                   There are -- in the minutes that the  
19 defendants put in reflect the discussion. The  
20 discussion is joined by some management employees who  
21 will benefit from the plan. The only outside  
22 advisors in the room are the lawyers who are  
23 specializing in this takeover defense.

24                   So, while it may be technically

1 accurate that the board consulted outside consultants  
2 and experts, they weren't experts or consultants on  
3 any issue relating to employee retention, employee  
4 compensation or anything else. They're takeover  
5 specialists.

6                   The evidence shows that even if one  
7 accepts the notion that this was intended to protect  
8 employees, that it's not a reasonable response. It's  
9 completely inconsistent with the judgments underlying  
10 the contemporaneous strategic work force  
11 redeployment, that the work force needs to be trimmed  
12 and redeployed. The book that describes this plan  
13 that apparently was used with the compensation  
14 committee states that the goal of it was to protect  
15 critical employees. Surely not every single employee  
16 of this company is a critical employee.

17                   And the minutes at page 13 that the  
18 defendants put in today -- and I'm going to quote,  
19 says "That a consensus emerged, that the costs of the  
20 plan were justified in light of the risks posed to  
21 the company's ability to retain key employees."  
22 Again, key employees; not every employee is a key  
23 employee.

24                   Aside from the fact that the

1 universal coverage goes well beyond critical or key  
2 employees, the plan accomplishes that result by

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3 destroying shareholder value for which an acquiror  
4 would pay for eliminating the ability to induce  
5 bidders to pay top dollar.

6 The minutes also say that the board  
7 directed that the plan should expire or be capable of  
8 being removed so that it wasn't so onerous. The plan  
9 doesn't do that. The only explicit time limit in the  
10 plan is that the right to claim the change-in-control  
11 benefits continue -- expires two years after the  
12 change of control. There's no expiration date and no  
13 expressed authority to remove.

14 Now, the plan says at Section 5 --  
15 and the plans are attached to Mr. Reda's affidavit,  
16 as the Court may recall -- but at Section 5 of the  
17 plans, it says that the board can amend the plans,  
18 but it cannot amend it during what's defined as a  
19 potential change of control period. A potential  
20 change of control period, according to Sections 1.8  
21 and 1.9, is any period after any person publicly  
22 announces an intention to take or consider taking  
23 actions which, if consummated, would constitute a  
24 change of control.

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1 So, right now, because Microsoft has  
2 announced an intent to pursue a change of control, a  
3 transaction, the board cannot amend or modify or  
4 rescind this plan, even if -- even if it concludes  
5 that Microsoft, or some other bidder, has put enough  
6 money on the table that the plan -- that the offer is  
7 fabulously fair and rich and generous to

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8 stockholders, the plan stays there. It is a pure and  
9 treacherous device that has a detrimental effect, and  
10 that deters any change of control regardless of how  
11 fair.

12 And it's important to recall that it  
13 was adopted by Microsoft -- adopted by Yahoo! after  
14 Microsoft announced its intent to acquire control.  
15 So it's retroactively effective, and retroactively --  
16 the inability to rescind is retroactive.

17 Yahoo! -- and you know, there's a  
18 structure here that is ingenious in a diabolical way,  
19 that it pits the stockholders against the employees  
20 of the company. And by doing so, it effectively  
21 sterilizes an acquiror's ability to fight it. No  
22 acquiror is going to criticize this plan or challenge  
23 it, and take the risk of alienating the perspective  
24 new employees of Yahoo!. So, unless this challenge

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1 by this group of plaintiffs goes forward, this  
2 plan -- this plan will be unchallenged forever.

3 To say that there's a colorable claim  
4 under Unocal, Your Honor, we submit is an  
5 understatement. It's clearly a defensive response to  
6 a claim -- to a threat of a takeover. And that  
7 standard puts the burden on the defendants to prove  
8 that the plan is a reasonable and tailored response  
9 to a threat; and we submit that they can't do that.

10 There's no indication of any  
11 investigation to validate the existence of a threat.  
12 There's no indication of consultation with

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13 independent advisors with expertise on the issues  
14 posed here. And then the remedy of the plan goes far  
15 beyond its stated purpose and far beyond the claim of  
16 threat.

17 In addition, the response is to take  
18 value from the shareholders and to transfer it to a  
19 non-shareholder constituency. But even if that  
20 credits the defendants' protestation that the board  
21 was independent and well advised, and that the plan  
22 described was a takeover defense, all that does is to  
23 create issues of fact that need to be resolved at  
24 trial.

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1 THE COURT: What I am most interested  
2 in, Mr. Margules, is what is the imminent threat of  
3 irreparable harm that is going to occur in the next  
4 six weeks if we don't have a trial?

5 MR. MARGULES: Your Honor, Yahoo's  
6 last annual meeting was January 12th, 2007. So,  
7 under the structure of the DGCL, they have to have  
8 their 2008 annual meeting no later than mid-July.

9 THE COURT: Is this a 211 action?

10 MR. MARGULES: No, Your Honor.

11 THE COURT: All right.

12 MR. MARGULES: But just based on the  
13 schedule, they're going to have their annual meeting  
14 in that timeframe.

15 Microsoft, as part of its takeover  
16 bid, is massing a proxy -- or has announced an intent  
17 to mount a proxy fight. We think it's critical the

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18 shareholders have an opportunity to consider the  
19 Microsoft bid and the Microsoft proxy solicitation,  
20 and anything else that may come out there in an  
21 atmosphere that is not coerced or not distorted by  
22 the existence of this parachute plan that prevents  
23 Microsoft from making its best bid. So -- and absent  
24 proper relief, the stockholders will face an annual

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1 meeting and a proxy fight in that atmosphere.

2                   And so, we're requesting, Your Honor,  
3 a trial of four to five days. If it turns out that  
4 we can release some of those trial days as the facts  
5 clarify, we certainly would advise the Court of that  
6 immediately. Obviously, under the circumstances, it  
7 is not uncommon for certain facts on the ground and  
8 circumstances to change, and for claims to evolve.  
9 If that happens, we would of course notify the Court  
10 and the defendants promptly.

11                   Given the significance of the annual  
12 meeting, however, it's not clear whether the need for  
13 the schedule would change, although the specific  
14 relief might evolve. But we think the schedule is  
15 probably the schedule. Although, again, if that  
16 changes, we would of course advise the Court and the  
17 defendants immediately as well.

18                   THE COURT: Have they announced the  
19 meeting date?

20                   MR. MARGULES: They have not, Your  
21 Honor.

22                   THE COURT: So we don't know when

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23 that's going to be?

24 MR. MARGULES: That's correct, Your

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1 Honor.

2 THE COURT: All right. Anything  
3 else, Mr. Margules?

4 MR. MARGULES: No, Your Honor, that's  
5 it.

6 THE COURT: Mr. Welch.

7 MS. WELCH: Good morning, Your Honor.

8 THE COURT: Good morning.

9 MS. WELCH: Your Honor, Yahoo! does  
10 not think it's appropriate at this time to set a  
11 trial date. It's helpful to me in this context to  
12 keep in mind the basic theory of plaintiff's case,  
13 which we talked a little bit about last week. That  
14 theory is Yahoo! should not look for alternatives;  
15 should not explore other options; should not look for  
16 the best current value reasonably available; should  
17 make the Microsoft deal, and take it now. That's it.

18 And the reason for that theory, or  
19 the rationale underlying it is essentially because  
20 plaintiffs say so. And they look to bloggers and  
21 they look to newspaper articles, and things of that  
22 nature.

23 Now, here, plaintiffs attempt to  
24 leverage that theory into an overall attack on Yahoo!

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1 severance plans; and they want to trial date on that

2 issue. Yahoo!'s response, Your Honor, in summary, is  
3 this: Plaintiffs are correct on the standard  
4 governing a request for an expedited trial schedule.  
5 Plaintiffs are very much wrong on the facts. The  
6 plaintiffs are very much wrong on the law.

7 Let me turn to the legal standard  
8 first that Your Honor touched upon. I don't think  
9 much needs to be said.

10 The legal standard plaintiff stated  
11 for expedited trial says a colorable claim and  
12 threatened -- significant possibility of threatened  
13 irreparable harm. We think that's the right  
14 standard. It appears on page four of their brief.  
15 The question becomes, have they shown that? Well, if  
16 we could focus on the facts first.

17 They rely, Your Honor, upon the Reda  
18 affidavit. Now, Mr. Reda says that he personally  
19 hasn't seen a severance plan like this. He thinks it  
20 creates uncertainty for Microsoft; that Microsoft is  
21 really going to be upset about this; really going to  
22 be puzzled and dismayed at the whole thing; that the  
23 estimated cost of this runs from about 460 to about  
24 750 million. And the big issue is that they cover

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1 every Yahoo! employee, as Mr. Margules has appointed  
2 out today.

3 Now, Yahoo!'s response on the facts,  
4 Your Honor, is this: Microsoft hasn't been deterred  
5 one bit by this plan. There's no lawsuits by  
6 Microsoft. The severance plans were adopted; and

7 Microsoft has repeatedly said, since that time, it's  
8 proposal still stands.

9 Microsoft has also said, indicated at  
10 least, that it's going to run a proxy contest. But  
11 just as important -- and perhaps, Your Honor, more  
12 importantly -- Microsoft has something very similar  
13 to the severance plan in mind itself.

14 Even before Yahoo! announced its  
15 severance plan, Microsoft said, in its offer to  
16 Yahoo!, it intended to offer significant retention  
17 packages to Yahoo!'s employees; not just to the  
18 engineers or the key leaders, but to employees across  
19 all disciplines. Those were Microsoft's words. That  
20 was -- that is the Microsoft plan.

21 Indeed, Exhibit H to our submission  
22 that went in last week points out that Microsoft has  
23 told its own employees, "Yahoo! employees will be a  
24 key part of the success of the combined company."

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1 And after the severance was adopted, they said  
2 exactly that on February the 22nd. If that's the  
3 case, there is no impact whatsoever from this plan on  
4 Microsoft.

5 Now, plaintiff also says that the  
6 amount of this is just huge, it's just depressing.  
7 They say it's 460 million and may go as high as 750  
8 million; and they look to some of our numbers for  
9 that. Well, it's interesting, Your Honor, we  
10 produced documents over the weekend, in particular --  
11 and it was referenced in Mr. Margules'

12 presentation -- it was in the form of Yahoo! minutes.  
13 And those minutes, on page 13, reference a  
14 communication between the general counsels of Yahoo!  
15 and Microsoft.

16 The minutes point out that Microsoft  
17 itself has said and represented that it has earmarked  
18 \$1.5 billion for employee retention at Yahoo!. Now,  
19 using the numbers that Mr. Reda uses, 460 to 750  
20 million, Microsoft is not higher than Yahoo!;  
21 Microsoft is way higher than Yahoo!, perhaps even by  
22 a factor of two. And that appears at page 13 of the  
23 February 8th Yahoo! minutes. And oh, by the way, the  
24 Yahoo! Board was well aware of this, and considered

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1 this fact and then put it in the minutes when it  
2 adopted the severance plan.

3 Now, Your Honor, why would Microsoft  
4 do something like this? Well, it makes perfect  
5 sense. Why would they have their own plan? And why  
6 would they not be complaining about our plan? Again,  
7 it makes perfect sense.

8 Severance packages or retention  
9 packages -- however you choose to characterize  
10 them -- really work in a situation like this,  
11 particularly in an uncertain environment like the  
12 takeover context. This is Silicon Valley. There's  
13 huge competition for all employees at all levels.

14 At all levels? Again, Your Honor, it  
15 was Microsoft that said, "We want it across all  
16 disciplines." It makes sense for everyone involved

17 to have a plan like this. It makes sense for Yahoo!.  
18 It makes sense for Microsoft. That's why Microsoft  
19 is not complaining; and that's why Mr. Reda is wrong.

20 Now, again, Mr. Reda may well be  
21 upset, and the bloggers may be upset. But  
22 apparently, by its own conduct, and by its own  
23 statements which we have attached in many cases to  
24 our submission, Your Honor, Microsoft isn't upset.

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1 Microsoft isn't selling out. Microsoft is apparently  
2 moving forward.

3 Now, admittedly, the Microsoft Board  
4 might do it a little differently than Yahoo! did; I  
5 don't know. But that's not threat or irreparable  
6 harm. Microsoft, in addition, apparently plans to  
7 spend a whole lot more than even plaintiffs argue  
8 than Yahoo! does. These plans are common sense. The  
9 harm is purely speculative.

10 Now, another factor, Your Honor, the  
11 cost of Yahoo!'s plan represents between 1 percent  
12 and 1.7 percent of the Microsoft's \$44.6 billion bid.  
13 Again, that's using the numbers that the plaintiffs  
14 rely upon. That's not irreparable harm.

15 That's not even a questionable  
16 breakup fee. This year we've seen breakup fees:  
17 Topps, 1 percent; Toys-R-Us, 3.7; McMillan against  
18 Intercargo, 3.5.

19 What does this really show? All  
20 these facts about Microsoft's own enthusiasm for such  
21 a plan -- and the size of this particular plan, which

22 is a fraction of what Microsoft considers -- but what  
23 it really shows is that the severance plan is not a  
24 defensive measure against the Microsoft deal in any

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1 Unocal sense. Right? Again, Microsoft is moving  
2 forward. They don't feel slowed up. It's a response  
3 of a threat of losing employees from turbulent  
4 uncertain situations, a concern which Microsoft  
5 itself acknowledges.

6 Now, what about the 1,000 employees  
7 that they say Yahoo! is treating inconsistently?

8 Well, Your Honor, that reduction in force has, I  
9 believe in large part, already happened. There are  
10 no more reductions in force planned for the future.  
11 It's not affected in any way, shape or form by the  
12 severance plan. All that shows is that the board is  
13 doing its job.

14 It's the board's job, under Section  
15 1450, to eliminate employees that the board doesn't  
16 think it should keep, and it's done that; and  
17 preserve employees that it does think it should keep,  
18 and it's done that. It's two different things.

19 And again, if Microsoft wants to keep  
20 Yahoo! employees, and it says it does, there is no  
21 impact at all, let alone no irreparable harm from  
22 this plan.

23 Those are the facts, Your Honor, we  
24 think they got them completely wrong.

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1                   Now, what about the legal side of the  
2 analysis? Well, it's interesting. Plaintiffs really  
3 rely upon one case in their submission; and that case  
4 rises or falls in essence on this, and that's the  
5 Buckhorn decision, a 1987 decision out of the  
6 Southern District of Ohio. And the plaintiff pointed  
7 out that the Court in that case was unhappy with some  
8 accelerated investing of options that occurred in the  
9 takeover context.

10                   They completely overlooked the fact  
11 that the case upholds a decision to adopt severance  
12 agreements. It's interesting yet, Your Honor, they  
13 were double triggered severance agreements just like  
14 those here. The first trigger is you got to have a  
15 change of control. And, secondly, something bad has  
16 to happen. That's the second trigger. Perhaps  
17 you're fired, in which case it could be triggered.  
18 Perhaps you quit after a substantial change in work  
19 responsibilities. That's the good cause analysis in  
20 the plans that Mr. Reda attached to his -- pardon me,  
21 to his submission.

22                   But the case -- the plans in Buckhorn  
23 were double triggered plans just like the plans here.  
24 And what did the Court say? The Court said it made

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1 perfect sense. It wasn't going to enjoin these  
2 things; that the board was legitimately concerned  
3 about losing key employees at a critical time. And  
4 that's the only case that the plaintiffs have relied

5 upon; and they got it completely wrong. The  
6 severance plan in that case was upheld.

7 Now, again, Yahoo's plan is little  
8 different, little broader -- somewhat broader, but  
9 the rationale is identical. Again, Microsoft has  
10 said from the outset that it intends to have  
11 retention plans across all disciplines; and that's  
12 exactly what Yahoo! has done.

13 Now, turning to the Unocal point.  
14 Even if this was a transaction subject to Unocal  
15 review, where are we? Well, we have an independent  
16 board; there's really no claim to the contrary.  
17 There were financial advisors involved. These are  
18 double trigger plans which plaintiffs own cases  
19 squarely support. There's no authority in this  
20 record indicating that there's anything wrong with a  
21 double trigger plan. Buckhorn certainly doesn't, and  
22 that's the case that they rely upon.

23 This plan may be bigger, but it  
24 doesn't matter. This plan is a lot smaller than what

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1 Yahoo! -- pardon me, than what Microsoft has in mind.

2 Now, there are a few other cases.

3 I'll just mention one of them, Your Honor. We cite  
4 them in the brief and don't need to belabor them here  
5 this morning. But the Pennaco case, also considered  
6 by this Court, by Your Honor's Court, also considered  
7 severance plans. And there were a few aspects of the  
8 severance plan in Pennaco case that the Court wasn't  
9 really all that happy with, but the Court went on to

2008-03-24 Transcript of Hearing Corrected Copy  
10 deny the relief. The Court said, "Look, it's only 1  
11 percent of the transaction value, and I'm not going  
12 to disrupt the transaction over this. It doesn't  
13 make any sense."

14 Well, those are the same facts here.  
15 Your Honor, our plan runs from 1.1 percent, perhaps  
16 as high as 1.7 percent, if 30 percent of the  
17 employees get laid off; and even Reda doesn't suggest  
18 there's any likelihood of that.

19 To sum up, if I could, Your Honor,  
20 plaintiffs got the standard for expedited trial  
21 correct. They've got to show threatened imminent,  
22 irreparable harm. They haven't done it. They got  
23 their facts completely wrong.

24 Their whole theory hinges upon

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1 Microsoft being upset, and Microsoft wanting to walk  
2 and Microsoft having all kinds of problems; it never  
3 happened.

4 Microsoft is moving forward. It  
5 intended itself a retention plan all along, one  
6 that's about twice the size of the one that we have.

7 They got the law all wrong. Buckhorn  
8 doesn't support the claims that they're making here.  
9 It squarely supports -- not only the reasoning of it  
10 but the structure of the two-tiered, double triggered  
11 plan -- supports exactly what Yahoo! did here.

12 Now, the harm is utterly speculative  
13 at best. There is nothing irreparable. Indeed, even  
14 Reda can't say that, you know, in light of

15 Microsoft's apparent commitment to keeping employees  
16 around, that there's going to be any financial  
17 impact, let alone irreparable financial impact from  
18 this plan.

19 The board of Yahoo! is evaluating its  
20 strategic alternatives now. Their work is ongoing.  
21 There is no need for a trial on the severance plan to  
22 be conducted in the middle of all of that. For  
23 depositions, for all of the disruptive things that  
24 expedited trials can cause.

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1 Indeed, there's no basis for any  
2 trial of anything until the board has decided what  
3 alternative it will pursue. Things, Your Honor,  
4 respectfully, should be allowed to develop more.  
5 Plaintiffs should not be permitted to leverage this  
6 deficient complaint with the severance plan claim.

7 We think, Your Honor, respectfully,  
8 the motion for expedited trial ...

9 THE COURT: Are you still there,  
10 Mr. Welch? You trailed off. I didn't hear you.

11 MS. WELCH: I apologize, Your Honor.

12 My final point was that the  
13 plaintiffs should not be permitted to leverage their  
14 deficient complaint with the severance plan claim,  
15 and the motion for expedited trial should be denied.

16 THE COURT: All right. I thought  
17 that's what you were saying.

18 MS. WELCH: I'm sorry.

19 THE COURT: Mr. Silverstein, do you

20

want to say anything?

21

MR. SILVERSTEIN: No. I have nothing

22

further to add. I think Mr. Welch did an excellent

23

job.

24

THE COURT: Thank you very much.

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Mr. Margules?

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MR. MARGULES: Yes, Your Honor, just

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briefly. Although, I'm sure I heard Mr. Welch say it

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should be granted when his voice trailed off.

5

THE COURT: Well, the transcript will

6

prove it one way or the other.

7

(Laughter).

8

MR. MARGULES: Your Honor, I just

9

want to respond to a few of Mr. Welch's points. The

10

plaintiffs' posture isn't: Take this deal, take it

11

now, you know, take the money and run. We are

12

challenging what we perceive to be a just say no at

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any price posture being taken by the Yahoo! Board,

14

which we understand, and allege in the complaint, has

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led to a split in the board.

16

And that, you know, in part, it's

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reflected in a defense that that doesn't just give

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the board leverage to negotiate and extract the best

19

deal out of an acquiror, but that it poses a

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permanent cost on any acquisition that cannot be

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rescinded.

22

Mr. Welch argues that Microsoft has

23

not been deterred because they're still out there.

24

Well, what we don't know -- and what I don't think

1 Mr. -- any of us can - you know, Mr. Welch, I think,  
2 is one of the great lawyers of our time and a good  
3 friend, but I don't think he's a mind reader. And  
4 none of us can say whether to what extent the amount  
5 of money that Microsoft is prepared to bid is  
6 affected by this.

7                   None of us can say for certainty that  
8 alternative bidders have not been deterred from  
9 showing up. And to argue that a provision that  
10 creates a risk of a mass employee walk-out after an  
11 acquisition with no effect on the value of a company  
12 to an acquirer seems to me to be something of a  
13 reach. It certainly is not the most reasonable  
14 inference to put on the facts, particularly at this  
15 stage of the proceedings.

16                   Yes, it's true that Microsoft has  
17 talked about reserving a significant amount of money  
18 for -- to encourage employees to stay. But that's a  
19 pot of money that the acquirer, which -- you know, I  
20 think at this stage is not -- they're not  
21 contractually bound to do it. Microsoft can change  
22 its mind and take that money off the table tomorrow.

23                   But even if they don't, that's money  
24 that they will use in a way that they see fit to

1 retain those employees that they want to retain, as  
2 opposed to being locked into retaining everybody, or  
3 providing benefits to everybody whether or not it's

4 an employee that Microsoft wants to save or to keep.  
5 To say that they intend to extend those benefits  
6 across all disciplines is fundamentally different  
7 from saying that it's going to be extended to every  
8 single employee.

9                         So, I submit, Your Honor, that the  
10 only reasonable inference on the facts today is that  
11 the market for a control of Yahoo! and its value to  
12 an acquirer is being impaired by these plans.

13                         Mr. Welch talked about the Buckhorn  
14 case, and there's significant differences between  
15 this case and the Buckhorn. He says the plan here  
16 is, in his phrase, a little broader than the Buckhorn  
17 plan. Yes, 14,000 is a little broader than six. Six  
18 was the number of employees covered in Buckhorn.

19                         And in that case, while the severance  
20 agreements were upheld, the Court did -- and it was  
21 upheld on the rationale that the company reasonably  
22 perceived a risk that those key employees would  
23 leave, you know, under the cover of this takeover  
24 fight -- but the Court then went and invalidated

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1 stock options which they said really were not related  
2 to that purpose, and all of that was done after a  
3 full evidentiary hearing.

4                         Mr. Welch's arguments really is  
5 saying that if you call something a severance plan,  
6 it's presumptively legal because there are cases that  
7 uphold severance plans. There's a fact intensive  
8 weighing that has to be done under the Unocal

9 standard that can only be done in a trial.

10 And then finally, Your Honor, I just  
11 want to stress that the importance of this plan and  
12 it's onerous effect is not simply the amount of money  
13 to be paid out to those employees that an acquiror  
14 may choose to terminate. It is the amount of money  
15 to be paid out to those employees, plus all of the  
16 others who perceive that their job circumstances have  
17 been changed and choose to leave. And it is the  
18 great uncertainty of that, that an acquiror will have  
19 about how many employees will claim that right and  
20 the burden of dealing with a potential mass walk-out  
21 of employees the day after they come -- that they  
22 come into control.

23 That's really the evil here, Your  
24 Honor. That that evil, I think, is palpable; that

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1 based on the facts that are in the record, it is not  
2 just a reasonable inference, but certainly the most  
3 reasonable inference, and very -- and in our view,  
4 the only reasonable inference on these facts.

5 There is a series Unocal question  
6 here, and a date by which we believe there will be  
7 detriment to the stockholders if it's not resolved.  
8 One cannot expect an acquiror to risk alienating the  
9 employees it seeks to acquire by challenging their  
10 benefits package. And, Your Honor, we submit that --  
11 that relief by this Court, this plan will be out  
12 there, and it will impair the contest for control and  
13 the ability of acquirors to put top dollar on the

14 table.

15 THE COURT: Out of curiosity,  
16 Mr. Margules, if we had a trial, you would be asking  
17 me at the end of the trial, based on the evidence, to  
18 invalidate the universal severance plans, right?

19 MR. MARGULES: That's correct, Your  
20 Honor.

21 THE COURT: So I would set aside the  
22 plan that was setup by the board for the benefit of  
23 employees of Yahoo!?

24 MR. MARGULES: That's what we're

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1 seeking, Your Honor.

2 THE COURT: All right. Then, let me  
3 tell you my thinking right now. I am not going to  
4 expedite a trial here because I am not convinced on  
5 two points. First, I am not convinced that you have  
6 anything in the record that you can point to  
7 suggesting that this threat of harm, whether it is  
8 irreparable or not, but the threat of harm is in some  
9 way imminent. We only expedite trials when there is  
10 a showing of a genuine threat that is imminent, that  
11 it is irreparable in nature.

12 Here, it certainly isn't imminent in  
13 a sense that it is going to occur at all because, at  
14 this point, all I have is indications from the only  
15 extant potential bidder for Yahoo!, that it doesn't  
16 care one wit about the adoption of the severance  
17 plans. If it did, I am pretty certain that Microsoft  
18 would be able to find itself to the door of my

19 courthouse and be able to make the very argument  
20 that you are making, that this is somehow a  
21 preclusive and coercive device that has been adopted  
22 and will prevent them from making a reasonable offer  
23 for Yahoo!. But they have not made any sounds or  
24 noise or effort to suggest that they view it that

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1 way.

2                   Indeed, from the evidence that I do  
3 have, the minutes of the meeting that were provided  
4 by the defendants, it appears that Microsoft itself  
5 has already set aside funds for exactly this purpose:  
6 Of retaining employees across all disciplines of  
7 Yahoo!, in an amount far greater than what the  
8 universal severance plan or potential or theoretical  
9 costs may be as opined by Mr. Reda.

10                   So, I am not at all confident  
11 that you have given me enough reason to believe that  
12 there is a threat of imminent harm here, or that it  
13 is irreparable in nature. So, my view is that this  
14 is just too soon to decide when to set this matter  
15 for trial. We don't know when the shareholders'  
16 meeting is even going to be. There has been no  
17 announcement about when they will have the meeting.

18                   So, my thought is you ought to just  
19 continue on as you have been, doing discovery in a  
20 deliberate and prudent manner, and go forward with  
21 that. If you learn something in the discovery that  
22 suggests that it is more than just speculation what  
23 this harm is, more than just speculation about when

24 this might occur, that it is having the effect you

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1 are claiming it is having on potential interests of  
2 acquiror's, than you may come back to ask me to  
3 schedule it on an expedited basis then.

4 But I think for now, the schedule is  
5 going to remain such that it is. You will go through  
6 with your discovery on a due course; and then if  
7 there is an appropriate application to be made in  
8 doing that, or after that, you can do it.

9 That's it for today, counsel.

10 MR. MARGULES: Thank you, Your Honor.

11 MS. WELCH: Thank you, Your Honor.

12 MR. SILVERSTEIN: Thank you, Your  
13 Honor.

14 (The teleconference adjourned at  
15 11:51 a.m.)

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1 CERTIFICATE

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I, JENNIE L. WASHINGTON, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 38 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 25th day of March, 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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