IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

DATED: March 26, 2008

YAHOO! INC.'S AND INDIVIDUAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR EXPEDITED PROCEEDINGS

Defendant Yahoo! Inc. ("Yahoo!" or the "Company") and individual defendants Jerry Yang, Roy Bostock, Ron Burkle, Eric Hippeau, Vyomesh Joshi, Arthur Kern, Robert Kotick, Edward Kozel, Maggie Wilderotter, and Gary Wilson (the "Individual Defendants") respectfully submit this response in opposition to Plaintiffs' request for an "immediate" trial on the validity of Yahoo! employee severance plans (the "Severance Plans"). Plaintiffs contend that these Severance Plans will derail Microsoft Corporation ("Microsoft") from proceeding with its unsolicited proposal to acquire Yahoo! (the "Microsoft Proposal").

PRELIMINARY STATEMENT

1. Plaintiffs have not shown that good cause exists for imposing on the Court, Yahoo! and its board of directors (the "Yahoo! Board") the well-recognized burdens and costs of expedited litigation at the present time. Plaintiffs' theory of the case – that Microsoft has been, or will be, deterred from its pursuit of Yahoo! as a result of the Severance Plans – is completely unsupported by the record. Microsoft has not been deterred in the least.

2. Even after Yahoo! implemented the Severance Plans, Microsoft has publicly affirmed on numerous occasions that its Proposal still stands. Microsoft has also recently signaled its intent to run a proxy contest for the election of directors at Yahoo!'s next annual meeting. (Ex. A). In addition, Microsoft made it known, even before Yahoo! adopted the Severance Plans, that it intended "to offer significant retention packages to [Yahoo!'s] engineers, key leaders and ***employees across all disciplines.***" (Ex. B) (emphasis added).

3. Further, as Plaintiffs note in their Letter, the value of the Severance Plans appears to be less than 2% of the total transaction value of the Microsoft Proposal (Margules Letter at 3) – an amount that can hardly be considered preclusive to Microsoft, or any other suitor.

4. In addition, Plaintiffs' suggestion that the Yahoo! Board is acting improperly by exploring alternatives to the Microsoft Proposal is based entirely on speculation derived from newspaper articles and internet blog entries (Compl. ¶¶ 58, 61, 67, 71, 75), and is also contrary to well-established Delaware law. *See, e.g., In re CompuCom Sys. Stockholders Litig.*, C.A. No. 499-N, 2005 Del. Ch. LEXIS 145 (Del. Ch. Sept. 29, 2005) (dismissing breach of fiduciary duty claims where plaintiffs' pleading acknowledged that the board was acting on an informed basis by exploring various strategic alternatives).

5. In fact, Delaware courts have refused to hear claims for injunctive relief before a board has had an opportunity to thoroughly evaluate potential strategic alternatives, and where "there is no corporate transaction . . . to attack." *See Dover Diversified v. Margaux*, C.A. No. 13829, 1994 WL 1751667, at *2 (Del. Ch. Nov. 4, 1994); *see also In re Cox Commc'ns, Inc. S'holder Litig.*, 879 A.2d 604, 609 (Del. Ch. 2005) (denying motion to expedite, "for the obvious

reason that there was as yet no transaction to enjoin," and the only thing on the table was a "proposal" that was subject to ongoing examination and negotiation by the board).

6. Under the circumstances, it is simply not in the best interests of Yahoo! and its stockholders (whom Plaintiffs purport to represent) for the Yahoo! Board to be preparing for an "immediate" trial on the discrete matter of the Severance Plans while in the midst of making vital decisions regarding the future of the Company. Even Plaintiffs concede that "this Court will typically allow a board a reasonable amount of leeway in implementing good faith strategic efforts" (Compl. ¶ 49) -- exactly what the Yahoo! Board is engaged in here. Once the Yahoo! Board has made a decision about which alternative, if any, to pursue, and the parties and the Court have a better understanding about what claims, if any, are appropriate for a preliminary injunction hearing or an expedited trial, the parties can address further scheduling issues at that time.

7. Accordingly, Yahoo! and the Individual Defendants respectfully suggest that the proper course for proceeding at this time is to deny Plaintiffs' request for an expedited trial and to continue moving forward with discovery consistent with the Case Management Order. This will allow the Yahoo! Board, which consists of a majority of independent and disinterested directors, to continue exploring alternatives to the Microsoft Proposal and make a decision about the various options under consideration.

BACKGROUND

8. On January 31, 2008, in a letter to Yahoo!'s Board, Microsoft made an unsolicited proposal to acquire all of the outstanding shares of Yahoo! common stock for $31 per share in cash or 0.9509 shares of Microsoft common stock. (Compl. ¶¶ 4, 50-51). According to Microsoft, its proposal has a total equity value of approximately $44.6 billion. (Compl ¶ 50).

The next day, the Yahoo! Board publicly announced that it would "evaluate the [Microsoft Proposal] carefully and promptly in the context of Yahoo!'s strategic plan and pursue the best course of action to maximize the long-term value for shareholders." (Compl. ¶ 56; Ex. C).

9. Nearly two weeks later, on February 11, 2008, Yahoo! issued a press release explaining that "the Yahoo! board of directors has carefully reviewed Microsoft's unsolicited proposal with Yahoo!'s management team and financial and legal advisors and has unanimously concluded that the proposal is not in the best interests of Yahoo! and our stockholders." (Ex. D). The Board determined after extensive deliberations that Microsoft's Proposal "substantially undervalues" Yahoo!, including its global brand, large worldwide audience, significant recent investments in advertising platforms and future growth prospects, free cash flow and earning potential, as well as its substantial unconsolidated investments. *Id.*[1]

10. Faced with the reality that the Microsoft Proposal was causing many of its employees to look elsewhere for work, the Yahoo! Board, upon the advice of the Compensation Committee, directed the Compensation Committee to implement the Severance Plans. (Ex. F). The Severance Plans were designed for the primary purpose of retaining Yahoo! employees during this period of uncertainty, maintaining a stable work environment, and providing certain economic benefits to eligible employees in the event their employment is terminated following a change of control. *Id.*

11. Importantly, the Severance Plans contain a "double trigger," which means that there are two conditions that must be satisfied in order for an employee to be eligible for benefits. *Id.* First, a change in control must occur. Second, an eligible employee must be

[1] Recently, Yahoo! publicly filed an investor presentation that details the Company's three-year financial plan and strategic initiatives that was presented to the Yahoo! Board ***before*** the Company received the Microsoft Proposal. (Ex. E). The presentation supports the unanimous determination by the Yahoo! Board that the Microsoft Proposal "substantially undervalues" Yahoo!. *Id.*

terminated by the Company without "cause"[2] or the employee must resign for "good reason"[3] within two years from the date of the change in control. *Id.* An employee is not eligible for benefits under the Severance Plans unless ***both*** events occur.

12. A few days after Yahoo! announced the terms of the Severance Plans, Plaintiffs filed for expedited proceedings, alleging that the Severance Plans would somehow deter Microsoft (or other suitors) from moving forward with a bid for Yahoo!. The parties thereafter agreed to the Case Management Order that has governed the discovery proceedings in this action to date.

13. Plaintiffs' speculation that the Severance Plans would have a chilling effect on Microsoft's original interest in acquiring Yahoo! was completely unfounded. Since the Severance Plans were announced, Microsoft has publicly affirmed that it is standing by its Proposal. (Exs. H, I). Microsoft also has signaled its intent to move forward with a proxy contest to replace a majority of the Yahoo! Board at Yahoo!'s annual meeting. (Ex. A).

14. Microsoft's professed willingness to proceed with its Proposal in the face of the Severance Plans is not surprising given that Microsoft has publicly announced from the outset that it considers Yahoo! employees the "key part of our success as a combined company" and that it would "dedicate significant rewards and compensation" to retain Yahoo! employees. (Ex. H). In fact, Microsoft made it clear when it launched the Microsoft Proposal that it intended

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[2] In general, Yahoo! has "cause" to terminate employment under the Severance Plans if an employee has been grossly negligent in the performance of his or her job duties, continuously fails to perform his or her job duties, violates company policies, breaches his or her agreements with the company or has been convicted of a felony. (Ex G).

[3] In general, an employee has "good reason" to resign under the Severance Plan if there is a substantial negative change in the employee's duties or responsibilities, work location or compensation following a change in control compared to the employee's employment terms prior to a change in control. (Ex G).

"to offer significant retention packages to [Yahoo!'s] engineers, key leaders and employees across all disciplines." (Ex. B).

THE MOTION TO EXPEDITE SHOULD BE DENIED

15. Plaintiffs are not entitled to expedited proceedings simply because they assert that Yahoo!'s Severance Plans are unlawful and ought to be enjoined or invalidated. Rather, Plaintiffs must show "good cause" why expedition is "necessary" to justify imposing on the Court, Yahoo!, and the Yahoo! Board the well-recognized burdens and costs of expedited litigation. *See Greenfield v. Caporella,* C.A. No. 8710, 1986 WL 13977, at *2 (Del. Ch. Dec. 3, 1986) ("This Court does not set matters for an expedited hearing or permit expedited discovery unless there is a showing of good cause why that is necessary.") (citation omitted); *Giammargo v. Snapple Beverage Corp.*, C.A. No. 13845, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994) (holding that expedited proceedings will not be allowed unless a plaintiff has "articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury").

16. As explained below, Plaintiffs have failed to state a colorable claim or demonstrate that they are threatened with imminent, irreparable harm. *See, e.g., Giammargo,* 1994 WL 672698, at *2 (denying request for expedited proceedings, noting that "where there clearly is no demonstrable need for the remedy of preliminary injunction or, in the rarer case when there is not even any colorable claim pleaded, [the Court should] decline to impose the costs associated with [an expedited] proceeding"); *In re Tri-Star Pictures Inc. Litig.*, C.A. No. 9477, transcript at 3-4 (Del. Ch. Sept. 29, 1989) (finding that initiating expedited proceedings based on pleadings that are legally inadequate on their face would "inflict[] an injustice upon the parties and waste[] the resources of the Court"). Moreover, the balance of the equities here weighs in favor of denying Plaintiffs' request for an expedited trial.

PLAINTIFFS HAVE FAILED TO STATE A COLORABLE CLAIM

17. Plaintiffs' case is centered on their view that the Severance Plans will somehow deter Microsoft from its attempt to acquire Yahoo!. (Complaint ¶ 81; Margules Letter at 4). As explained below, Plaintiffs' claim is unsupported by any evidence, and fails as a matter of Delaware law.

18. The Severance Plans were implemented for a rational and reasonable business purpose – *i.e.*, to retain employees. (Ex. F). Because the decision was not a "defensive measure," it does not trigger *Unocal* review. *See, e.g., Glazer v. Zapata Corp.*, 658 A.2d 176, 183 (Del. Ch. 1993) (denying request for preliminary injunction; holding transaction with a third party was not a "defensive measure" under *Unocal*); *Doskocil Cos. v. Griggy*, C.A. No. 10095, 1988 Del. Ch. LEXIS 113, at *18-19 (Del. Ch. Aug. 18, 1988) (denying request for preliminary injunction; holding that a proposed issuance of preferred stock was not a "response" to a "threat" under *Unocal*). As such, the Yahoo! Board is entitled to the benefit of the business judgment rule. *See, e.g., Gantler v. Stephens*, C.A. No 2392-VCP, 2008 Del. Ch. LEXIS 20 (Del. Ch. Feb. 14, 2008) (dismissing claims; finding *Unocal* inapplicable and holding board's decision to reject proposal for company protected by business judgment rule).

19. Even assuming that the heightened scrutiny imposed under *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d. 949, 954-56 (Del. 1985) applies in this context, Plaintiffs' attack on the Severance Plans fares no better. *First*, a vote by independent and disinterested directors, coupled with advice rendered by an investment banker and legal counsel, constitutes a *prima facie* showing of good faith and reasonable investigation. *See Tomczak v. Morton Thiokol, Inc.*, C.A. No. 7861, 1990 Del. Ch. LEXIS 47, at *26 (Del. Ch. Apr. 5, 1990). Here, a majority of disinterested and independent directors, along with the aid of independent financial and legal

advisors, determined that the Microsoft Proposal was inadequate and constituted a threat to Yahoo!'s corporate policy and effectiveness. Plaintiffs have failed to provide any support sufficient to overcome this record evidence. *Id.* (finding first prong of *Unocal* satisfied on ground that a majority of directors were independent and sought the advice of legal and financial advisors); *see also Polk v. Good*, 507 A.2d 531, 537 (Del. 1986) (finding first prong of *Unocal* satisfied where plaintiff had not met its "heavy" burden of overcoming the presumption attaching to an independent board's decision).

20. *Second*, the Severance Plans have not "precluded" Microsoft from proceeding with its Proposal. (Exs. H, I). Steven Ballmer, Microsoft's Chief Executive Officer, made it clear – ***before*** Yahoo! adopted the Severance Plans – that Microsoft intended "to offer significant retention packages to [Yahoo!'s] engineers, key leaders and ***employees across all disciplines***." (Ex. B) (emphasis added). Since the Severance Plans were announced, Microsoft has publicly affirmed that it is standing by its Proposal. (Ex. H).

21. Moreover, even taking Plaintiffs' alleged estimation that the Severance Plans are worth between $462.4 million and $757.4 million (Margules Letter at 3), this constitutes only ***1.03% and 1.7%, respectively***, of Microsoft's $44.6 billion bid for Yahoo!. Therefore, it cannot reasonably be argued that the Severance Plans are a "lock-up" or that they will in any way impede Microsoft, or any other potential acquirer, from purchasing Yahoo!.

22. Indeed, the Severance Plans pale in comparison to the other provisions or transactions that Delaware courts have previously held were not preclusive. *See, e.g., In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1000 (Del. Ch. 2005) (finding termination fee of 3.75% to be reasonable); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 505-06 (Del. Ch. 2000) (holding that 3.5% termination fee was within the range of reasonableness); *Goodwin v. Live*

Entm't, Inc., C.A. No. 15765, 1999 WL 64265, at *23 (Del. Ch. Jan. 25, 1999) (finding that a 3.125% termination fee is "commonplace" and "within the range of reasonableness"), *aff'd mem.*, 741 A.2d 16 (Del. 1999); *see also Paramount Commc'ns, Inc. v Time, Inc.*, 571 A.2d 1140, 1155 (Del. 1989) (merger transaction not preclusive where acquirer could have purchased the combined company); *City Capital Assocs. Ltd. P'ship v. Interco, Inc.*, 551 A.2d 787, 801 (Del. Ch. 1988) (refusing to enjoin sale of division of company on ground that sale was not a "show stopper"); *Unitrin, Inc., v. Am. Gen. Corp.*, 651 A.2d 1361,1383 (Del. 1995) (fully implemented repurchase program, super majority vote provisions, and poison pill not preclusive where proxy contest remained a viable alternative).

23. *Third*, this Court has refused to invalidate change of control severance provisions in similar contexts. For example, in *In re Pennaco Energy, Inc. Shareholders Litigation*, the Court observed that ***"it is advisable for [the Court] to be cautious about using the existence of such payments as the underpinning for an injunction. . . ."*** 787 A.2d 691, 709-10 (Del. Ch. 2001) (denying request for injunctive relief; holding that plaintiffs are not likely to succeed in proving that change in control severance payments were the product of a breach of fiduciary duty) (emphasis added); *see also In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 730 (Del. Ch. 1999) (dismissing claims challenging significant change of control employment agreements); *Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 278, 290 (Del. Ch. 1989) (denying request for preliminary injunction; holding that multiple defensive measures including ***formation of an ESOP***, issuance of convertible preferred stock to a friendly third-party investor, and a stock repurchase plan were within the range of reasonableness); *Kingsbridge Capital Group v. Dunkin Donuts, Inc.*, C.A. No. 10907, 1989 Del. Ch. LEXIS 87 (Del. Ch. Aug. 7, 1989) (refusing to enjoin defensive measures ***including newly created ESOP***, sale of a new

class of convertible preferred stock to institutional investor, and poison pill); *MAI Basic Four, Inc. v. Prime Computer, Inc.*, C.A. No. 10428, 1988 Del. Ch. LEXIS 161, at *2-3 (Del. Ch. Dec. 20, 1988) (refusing to enjoin defensive measures including shareholder rights plan, ***an employee retention plan***, an employee severance bonus plan, an employee pension plan, a stock appreciation rights plan, and stock options which accelerate with a change of control).

24. In fact, even *Buckhorn, Inc. v. Ropak Corp.*, the case Plaintiffs principally rely on to support their misguided theory that the Severance Plans should be invalidated under Delaware law, actually *upholds* the decision to adopt employee severance payments triggered upon a change in control. 656 F. Supp. 209, 232 (S.D. Ohio 1987). In *Buckhorn*, the board granted severance payments to its employees who were concerned about the threat to their job security posed by an unsolicited tender offer. *Id.* The Court held that the severance payments "reasonably advance the shareholders' interest in retaining key management personnel in their present positions during a critical transition period, without unduly entrenching management or over-burdening [the bidder]." *Id.* at 232-33.[4]

25. For these reasons, Plaintiffs have not alleged a colorable claim under Delaware law, and the Motion should therefore be denied.

PLAINTIFFS HAVE NOT SHOWN IRREPARABLE HARM

26. Even if Plaintiffs could demonstrate that the allegations in the Complaint state a colorable claim – which they cannot – expedition is unwarranted here because Plaintiffs have not demonstrated that they will suffer imminent, irreparable injury without an expedited trial. Plaintiffs admit that they are not entitled to an expedited trial unless they show "a

[4] Moreover, that Plaintiffs have found an expert who believes the Severance Plans are "atypical" does not support the conclusion that the Severance Plans are preclusive or unreasonable. Nor does it warrant the "immediate" trial on the Severance Plans that Plaintiffs are requesting.

sufficient possibility of a threatened irreparable injury." (Margules Letter at 4). Plaintiffs' claim that they ***might*** be irreparably harmed because "a potential acquiror, such as Microsoft, ***may*** decide that the added cost and uncertainty makes it untenable to continue the pursuit of an acquisition" (Margules Letter at 4), is entirely speculative, not supported by any evidence, and insufficient to show imminent, irreparable harm. *See, e.g., Nomad Acquisition Corp. v. Damon Corp.*, C.A. No. 10173, 1988 Del. Ch. LEXIS 133, at *19 (Del. Ch. Sept. 20, 1988) (finding alleged irreparable injury to plaintiff as purely speculative and holding that, for the Court to grant injunctive relief, irreparable harm to plaintiff must be "imminent," "unspeculative," and "genuine") (citation omitted).

27. In contrast, if the Court invalidates the Severance Plans, there will be real harm to Yahoo!, which faces a significant risk of losing its most valuable asset – its employees. *See, e.g., Kingsbridge Capital Group*, 1989 Del. Ch. LEXIS 87, at *21 (refusing to invalidate an ESOP on ground that "rescinding the ESOP would surely have negative effects on employee morale which would redound to the detriment of the company and its shareholders"); *see also MAI Basic Four, Inc.*, 1988 Del. Ch. LEXIS 161, at *12-13 (holding that harm from alleged takeover defenses being struck down was clearly greater than any harm to plaintiff).

28. Ultimately, Plaintiffs' claim boils down to a concern over the potential loss of an alleged premium for their shares. For example, Plaintiffs speculate that Microsoft may not offer as much money for their shares than it otherwise might if it ends up completing an acquisition because of the Severance Plans. (Complaint ¶ 81; Margules Letter at 4). Money damages would provide an adequate remedy for any such alleged harm. *See, e.g., Sonet v. Plum Creek Timber Co.*, C.A. No. 16639, 1998 WL 749445, at *1 (Del. Ch. Sept. 23, 1998) (denying request for expedited proceedings where harm alleged was "not irreparable, but susceptible to

adequate remedy through damages"); *Giammargo*, 1994 WL 672698, at *3 (denying expedited preliminary injunctive relief on ground that there is no plausible reason why a money award would not be sufficient).

29. Accordingly, there is no merit to Plaintiffs' argument that, without an expedited trial, Plaintiffs will suffer irreparable harm.

THE BALANCE OF EQUITIES WEIGHS AGAINST EXPEDITED DISCOVERY

30. Finally, the balance of equities favors denying Plaintiffs' request for expedited proceedings. It would be unduly burdensome and counterproductive for Yahoo! and the Yahoo! Board to have to explore strategic alternatives in the face of an imminent trial over the Severance Plans. *See, e.g., Dover Diversified,* 1994 WL 1751667, at *2 (refusing to hear claims for injunctive relief before a board has had an opportunity to thoroughly evaluate potential strategic alternatives, and "there is no corporate transaction . . . to attack"). Indeed, having to prepare now for an expedited trial will undoubtedly interfere with the Yahoo! Board's ability to manage the affairs of the company at this crucial stage, and could serve to undermine the Yahoo! Board's ability to act in the best interest of Yahoo! and its stockholders.

31. Accordingly, the equities favor having the Court delay consideration of whether to schedule an expedited hearing or trial until after the Yahoo! Board has made a decision about how to proceed. At such time, the parties and the Court will have a better picture of the issues, if any, that need to be adjudicated.

32. In the meantime, Yahoo! will continue producing documents to Plaintiffs pursuant to the Case Management Order, so they will not be prejudiced in the event that litigation proceeds on an expedited basis after the Yahoo! Board makes a decision. In fact, Yahoo! has already produced substantially all of the paper documents, consisting of, among

other things, all non-privileged, responsive Board minutes and presentations since January 2007, the resolutions approving the Severance Plans, and the Severance Plans themselves. In addition, Yahoo! has already produced over 1500 pages of electronic documents and is continuing to review electronic documents pursuant to the Case Management Order, and intends to produce electronic documents on a rolling basis over the coming weeks.

CONCLUSION

For all of the above-stated reasons, Plaintiffs' request for an expedited trial should be denied.

Respectfully submitted,

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DATED: March 20, 2008

EXHIBIT A

REDACTED IN ITS ENTIRETY

CERTIFICATE OF SERVICE

I, Edward B. Micheletti, hereby certify that I caused to be served the Public Version of Yahoo! Inc.'s and Individual Defendants' Opposition To Plaintiffs' Motion For Expedited Proceedings that was filed on March 20, 2008 and Public Version of Exhibit A thereto on this 26th day of March, 2008 upon:

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