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PUBLIC VERSION
DATED: September 7, 2022

The Honorable Kathaleen St. Jude McCormick
Chancellor
Court of Chancery
Leonard L. Williams Justice Center
500 North King Street, Suite 1551
Wilmington, Delaware 19801

Re: *Twitter, Inc.* v. *Elon R. Musk, et al.*, C.A. No. 2022-0613-KSJM

Dear Chancellor McCormick:

Defendants' eleventh-hour motion to compel an extraordinarily burdensome review of more than 240,000 pages of additional Slack messages from up to three dozen more Twitter custodians is another effort to blow up the Court-ordered schedule in this expedited proceeding. As the Court is aware, discovery to date has been lopsided: Twitter has collected and reviewed documents from 42 custodians; Defendants from two. Twitter has reviewed more than 210,000 documents; Defendants less than a quarter of that amount. And as of last night's substantial completion deadline, Twitter had produced more than 41,000 documents; Defendants fewer than 2,100. Nevertheless, and notwithstanding the Court's clear command of bilateral discovery, Defendants have filed multiple motions seeking to

inflate Twitter's review burden and *widen* the disparity. This motion, filed one business day before the substantial completion deadline, is the latest example.

The dispute over Twitter's review of Slack messages is one that Defendants manufactured. In the ten days before this motion was filed, the parties exchanged five detailed, written proposals governing this very issue (the "Message Protocol"). Defendants drafted the original Message Protocol, and each of the subsequent drafts of that Protocol maintained Defendants' defined terms and structure. Defendants' proposed Message Protocol had two key elements: (1) It identified the custodians subject to the Protocol and defined them as the "Messaging Platform Custodians"; and (2) it set forth search parameters that would govern the review of non-email messages, including Slack, sent or received by those defined custodians. Ex. 1.

In keeping with its purpose, every draft of the Message Protocol expressly included Slack—an electronic messaging platform—in its defined list of non-email communications governed by the Protocol. Indeed, every draft of the Message Protocol included a separate section that would govern the review and production of Slack messages specifically. And every draft of the Message Protocol limited the review of Slack messages to those sent or received by the previously defined Messaging Platform Custodians.

Defendants' initial proposal for that defined term included all 42 of Twitter's email custodians, but as the parties negotiated, Defendants agreed to reduce the number of Messaging Platform Custodians to eight, while Twitter agreed to increase its proposed list to six individuals. That was the bid/ask on August 21—eight Messaging Platform Custodians versus six—when Defendants informed Twitter that they believed the parties were "close to agreement" on the Protocol. *Id.* at 1.

Two days later, Defendants dramatically changed their position: They disavowed the plain language of the Message Protocol they had drafted and proposed; cast aside a week's worth of negotiation; and demanded that Twitter search Slack messages for *all 42 of its email custodians*. This about-face resulted in a proposal that was overbroad, disproportionate, and unreasonable on its face—as well as extraordinarily prejudicial coming as it did only six days before the substantial completion deadline. Twitter refused to be re-traded. Defendants moved to compel.

Reviewing and producing Slack messages for the custodians Twitter agreed to was already a massive undertaking given Slack's unique user interface, which requires a manual review for relevance and privilege of what are frequently 100-plus-page message threads. To finish this review on time, Twitter dedicated a

substantial percentage of its reviewer resources—including more than 50 contract attorneys, as well as multiple attorneys from the law firms of record—to the task. Complying with Defendants' current demand to expand Twitter's Slack custodians to roughly *7x* the current number would require a similar commitment of resources, and would take one to two weeks to complete.

There is no basis to impose that massive burden now. In addition to the tens of thousands of emails and centralized electronic files that it has produced over the past several weeks, Twitter is already reviewing and producing Slack messages from multiple key custodians, including its CEO and CFO and the employee with primary responsibility for calculating the mDAU metric at the heart of the counterclaims. Defendants' motion is untimely and prejudicial; seeks cumulative and unduly burdensome discovery; and is a transparent attempt to derail the expedited schedule. The motion should be denied.

BACKGROUND

Slack is an electronic messaging platform that allows multiple users to communicate in "channels" dedicated to specific topics or groups. Channels can remain open for extended periods of time, and therefore Slack threads often span 100 or more printed pages.

Slack messages present special challenges in e-discovery. Users can come in and out of Slack channels and post messages that are preserved in the larger chain, and the individual messages in a channel can relate to a variety of topics. For these reasons, reviewing Slack messages requires significant time and resources: If a Slack thread hits on a single search term, the entire thread must be manually reviewed for responsiveness—here, the parties agreed that non-responsive messages within a Slack channel could be redacted, subject to certain parameters—and privilege. This imposes a far greater burden on the producing party than a review of other forms of electronic communications, which can be separated into discrete segments for search and review.[1] Defendants do not face any commensurate challenge, as they have offered only two custodians and claim that neither used Slack to communicate about relevant topics.

To meet this unilateral burden, Twitter proposed to Defendants on August 5—three weeks before Defendants filed this motion—a protocol for the review of non-email communications. In it, Twitter offered three high-level custodians, CEO Parag Agrawal, CFO Ned Segal, and Board Chairman Bret Taylor. Ex. 2. In the

[1] Twitter attempted to "unitize" the Slack channels it was collecting to break them down into more manageable one-day units, but as it advised Defendants during the meet-and-confer process, this effort was not successful.

accompanying email, Twitter expressed an interest in "finalizing a protocol for the review of non-email communications on our next meet-and-confer." *Id.* at 2. Defendants ignored the proposal. So Twitter followed up, on August 10, expressing concern that Defendants had failed to engage given the rapidly approaching substantial completion deadline. Ex. 3. But Defendants continued to stonewall, responding only that Twitter's proposed custodians were "far from sufficient," while refusing to provide a counter-proposal until after the Court ruled on their motion to compel additional email custodians. *Id.* at 1.

After letting nearly another week slip by, and with the substantial completion deadline then less than two weeks away, on August 16, Defendants finally provided their proposed Message Protocol. Ex. 4. That Message Protocol listed all 42 of Twitter's email custodians as Messaging Platform Custodians; required Twitter to apply broad search terms to all messaging platforms used by those custodians (including Slack); and contemplated a review period spanning more than 42 months. *Id.* Defendants also demanded that Twitter conduct a linear review of *all* non-email messages that its custodians exchanged between October 1, 2021 and July 8, 2022 with a wide array of individuals, and between April 9, 2022 and July 6, 2022 with a variety of others. *Id.* Defendants even demanded that Twitter review *all* non-email

messages that the 42 Messaging Platform Custodians exchanged *with anyone in the world* over a 34-day period between June 4, 2022 and July 8, 2022. *Id.*

Twitter rejected this proposal the next day, citing Defendants' unjustified delay in engaging, and its facially overbroad terms. Ex. 5. Twitter did not make a counter-proposal, but expressed a willingness to "consider adding a small number of additional text message custodians in the interest of avoiding another discovery dispute." *Id.* at 2. Twitter also explained that it had commenced the collection and review of Slack messages, "including by exporting to its review platform Slack channels for the relevant time period for all of Twitter's agreed custodians who use Slack." *Id.* at 1. To that point, Twitter had only offered three non-email custodians, albeit Twitter anticipated that it would likely agree to include a small number of additional non-email custodians through the meet-and-confer process. Ex. 2.

Twitter also informed Defendants on August 17 that, in light of its having received "no engagement" from them, Twitter had commenced its review of Slack messages based on the previously agreed email search terms. Ex. 5 at 1. Twitter concluded this message by making clear that the parties would be at an immediate impasse if Defendants did not substantially revise their proposed Message Protocol: "[I]f defendants intend to insist on Twitter undertaking any sort of collection and

review akin to what is described in the proposal you sent yesterday evening, we unfortunately do not believe there will be anything we can productively discuss." *Id.* at 2.

Defendants responded on August 18 by sending a heavily revised Message Protocol. Ex. 6. Most significantly, the revised Protocol reduced the number of Messaging Platform Custodians from 42 to eight. *Id.* Just as the initial Protocol had done, the first paragraph of the revised Protocol expressly provided that only the non-email communications of the Messaging Platform Custodians—including, explicitly, Slacks—would need to be reviewed and produced:

> The following proposal ***governs the review of any messages sent or received*** by Plaintiff's document custodians ***on any messaging device and/or messaging platform used by each custodian identified below ("Messaging Platform Custodians")*** to engage in potentially relevant communications, ***including without limitation*** SMS, MMS, iMessage, ***Slack***, WhatsApp, Facebook, Instagram DM, Twitter DM, Signal, Snapchat, WeChat, Skype, Viber, Line, and Telegram (each, a "Messaging Platform").

Id. (emphases added).

Further down, the Protocol included a section directed specifically to Slack. In keeping with Paragraph 1, that section expressly defined "Slack Messages" as those sent or received by the eight proposed Messaging Platform Custodians:

III. Search Term Review For Slack[1]

1. Plaintiff agrees to collect all messages from each channel, thread, and DM ***that the Messaging Platform Custodians were members of*** at any time between January 1, 2020 and July 8, 2022 (the "Slack Messages").

Id. (emphasis added). Every draft of the Message Protocol exchanged over the following week maintained the same structure and defined terms.

On August 19, in response to this constructive proposal, Twitter proposed revisions to the Message Protocol that eliminated two of the eight Messaging Platform Custodians that Defendants had proposed. Ex. 7. In other words, Twitter doubled the number of non-email custodians that it had initially proposed back on August 5. Defendants responded with additional revisions on August 21. Among other changes, this further revised proposal from Defendants reverted to eight proposed Messaging Platform Custodians. Ex. 1. In the email transmitting this proposal, Defendants expressed their belief that the parties were "close to agreement" on the Message Protocol. *Id.* at 1.

On the morning of August 23, Twitter sent another revised draft of the Message Protocol, in which it again removed two of the eight Messaging Platform Custodians that Defendants had proposed, while compromising on other points.

Ex. 8. Twitter proposed convening a meet-and-confer that evening in the hopes of reaching a final agreement. *Id.* Defendants ignored that request.

Instead, at 10:19 p.m. that night, Defendants dramatically reversed course, disavowing their prior proposal of eight Messaging Platform Custodians for all Messaging Platforms—Slack included—and insisting for the first time since August 16 that Twitter was required to collect Slack messages for "all agreed e-mail custodians" (*i.e.*, all 42 custodians). Ex. 9 at 1. At this point, the substantial completion deadline was not even six days away.

Twitter responded the next day, and explained that Defendants' new position on Slacks was inconsistent with their prior written proposals, an obvious re-trade, and unworkable in any event given the rapidly approaching substantial completion deadline. Ex. 10. Defendants responded by claiming that the language in all of their prior Message Protocols limiting review of Slack messages to a defined set of Messaging Platform Custodians was simply a mistake. More specifically, Defendants insisted they had "inadvertently failed to remove references in the preamble and Section III [of the Message Protocol] suggesting that Slack review would be limited to the individuals listed in Section 1." Ex. 11. That implausible contention was an implicit concession that the plain language of the prior proposals

contradicted the position Defendants were now taking. Defendants nevertheless threatened to move to compel if Twitter did not accede to their demands. *Id.* Twitter did not.

Instead, with only days remaining before substantial completion, Twitter continued with its review of Slack messages and other non-email communications based on its most recent proposal (sent on August 23). That proposal includes six Messaging Platform Custodians, including Twitter's CEO, CFO, and Board Chairman; the data scientist principally responsible for calculating mDAU; the individual principally charged with coordinating the response to Musk's information requests; and a key finance employee also involved in that effort. *See* Ex. 8.

The review of Slack messages for just these five Twitter executives and employees (the Board Chair does not use Slack) imposed an enormous burden. Twitter collected and reviewed more than 250,000 pages of Slack messages for responsiveness and privilege, applied appropriate redactions, and prepared the documents for production. This process took more than a week to complete, despite an essentially full-time commitment from a team of more than 50 attorneys.

On Saturday, August 26, at 12:16 a.m., Defendants filed their motion. Although that motion will not be decided until after the substantial completion

deadline, Defendants seek an order compelling Twitter to review the Slack messages for as many as 36 additional custodians. Based on Twitter's calculations, this would entail a review of more than 245,000 pages of additional Slack messages.[2]

ARGUMENT

Expedited proceedings impose unavoidable burdens on the parties and the Court. Navigating an expedited schedule thus requires close cooperation and communication between the parties, who are expected to work together to reasonably limit the number of custodians and the burdens of electronic discovery. *See* Donald J. Wolfe & Michael A. Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 6.04 (2021); Ct. of Chancery Guidelines for Persons Litigating in the Ct. of Chancery § 7(g)(vi) ("Parties should identify the key custodians [in the context of expedited litigation] and focus their document collection efforts on those custodians."); *Yucaipa Am. Alliance Fund II, L.P.* v. *Riggio*, C.A. No. 5465-VCS, at 19 (Del. Ch. May 25, 2010) (TRANSCRIPT) (Ex. 12) ("yes, you do electronic discovery, but it's not of every custodian").

[2] Twitter has collected Slacks for all of its email custodians who use Slack, and has utilized that collection to estimate for the Court's benefit the burden of conducting the additional review that Defendants now seek.

Given the practical realities, this Court has repeatedly emphasized that expedited discovery must be reasonably targeted. *See, e.g.*, *Yucaipa*, at 19 ("there are tradeoffs to be made," and the parties "have got to focus on what is most important"); *In re Comtech/Gilat Merger Litig*, Consol. C.A. No. 2020-0605-JRS, at 44 (Del. Ch. Aug. 19, 2020) (TRANSCRIPT) (Ex. 13) (the parties "get what they need," not "all that they want."). The Court explicitly endorsed this principle in the Scheduling Order and directed each side not to "inflict unreasonable demands on or extract unreasonable benefits from the opposing party." Dkt. #39 ¶ 6.

Defendants' conduct in negotiating the protocol for Twitter's review of Slack messages—belated engagement; illusory progress followed by abrupt retreat; and a last-minute motion—falls far short of these expectations.

1. *The Motion is an untimely attempt to re-trade Defendants' own negotiating positions.* Twitter first sought to discuss a protocol for the collection and review of non-email messages more than three weeks ago, on August 5,

proposing three custodians. Ex. 2. Rather than engage, Defendants burned valuable time by refusing to provide a counter-proposal until 11 days later.[3]

Once Defendants finally came to the table, Twitter spent an additional week (from August 16 through August 23) negotiating the Message Protocol that Defendants drafted and that expressly called for a review of Slack messages from only a defined set of Messaging Platform Custodians. Over the course of those negotiations, which included the exchange of five different drafts of the Protocol, *Defendants* proposed reducing the number of Slack and other non-email custodians from 42 to eight. That concession is directly at odds with the relief Defendants now seek. But Twitter was entitled to, and did, rely on it, by immediately targeting its Slack review on a subset of the eight individuals whom Defendants had proposed as Messaging Platform Custodians.

It would be highly prejudicial to require Twitter to conduct a lengthy and burdensome additional review of Slack messages, commencing after the substantial completion deadline. *See, e.g.*, *Tang Cap. Partners, LP* v. *Norton*, C.A. No. 7476-

[3] Defendants claimed they could not do so until the Court had ruled on their pending motion to compel an additional 22 email custodians (which the Court denied except as to one custodian). Ex. 4. But since Defendants apparently planned to include all of Twitter's custodians in their counter-proposal, there was no legitimate reason for them to wait.

VCG, TR. at 20-21 (Del. Ch. July 11, 2012) (TRANSCRIPT) (Ex. 14) ("Where a party is seeking discovery and has slept on its rights in an expedited matter, denial on motions to compel are often appropriate."). Indeed, the Court already rejected another of Defendants' late-breaking motions—filed ten days before the substantial completion deadline—for precisely that reason. *See* Aug. 25 Ruling on Defendants' Third Discovery Motion at 2 (denying motion to compel expanded date range "[g]iven the timing of Defendants' demand" for additional discovery and "the burden [it] would place on Plaintiff"). Defendants' latest motion, filed *one business day* before the substantial completion deadline, in an obvious attempt to frustrate adherence to Court-ordered discovery deadlines, is even more improper.

2. *Defendants mischaracterize the record.* To justify their motion, Defendants assert that notwithstanding the plain language of their own proposals and the extensive written record of the parties' negotiations, they actually believed that Twitter had agreed to review Slack messages from 42 custodians. Mot. at 1. That is neither accurate nor credible.

Defendants rely essentially entirely on an email from August 17 in which Twitter *expressly rejected* Defendants' initial proposed Message Protocol—the very proposal that called upon Twitter to review non-email communications for all 42 of

its email custodians. In other words, Defendants claim that Twitter said "yes" to the demands they make now by citing an email in which Twitter expressly said "no" to those very same demands.[4]

While the August 17 email noted that, given Defendants' delay in proposing the Message Protocol, Twitter had collected Slack messages from all of its custodians who used Slack and commenced a review of Slack messages, Twitter did not agree to engage in the massively burdensome review of all of the Slack messages that Defendants demanded. Instead, Twitter said the opposite, stating in no uncertain terms that "if defendants intend to insist on Twitter undertaking any sort of collection and review akin to what is described in the proposal you sent yesterday evening, we unfortunately do not believe there will be anything we can productively discuss." Ex. 5 at 2. And in any event, whatever Defendants supposedly took from Twitter's

[4] Defendants also rely (Mot. at 6) on a *footnote* in their August 18 revised Message Protocol, which stated: "Plaintiff has confirmed its custodians used Slack to discuss matters relevant to the parties' dispute and further confirmed by email on July 31, 2022 that it was collecting relevant Slack communications." Ex. 6. But nothing in this footnote about Slack *collection* could reasonably be read to suggest that Defendants were persisting with their demand that Twitter *review* messages from all 42 of its custodians. And that interpretation becomes all the more untenable when the footnote is read in the context of the August 18 Message Protocol as whole, as that Protocol made explicit in the very first paragraph that only eight custodians' Slack messages should be reviewed. *See* p. 8, *supra*.

August 17 email was superseded the very next day, when *Defendants* proposed a revised Message Protocol that reduced the number of Messaging Platform Custodians for all non-email communications, including Slack, from 42 to eight.

Defendants' final attempt to disavow their own discovery proposals is meritless and cynical. Defendants claim that because Twitter did not accept Defendants' proposal to search eight Slack custodians, Defendants are no longer bound by that proposal and are free to demand 42 custodians instead. Mot. at 12. This defies common sense. Before Defendants suddenly reversed course, the bid and the ask were six custodians and eight custodians. By Defendants' own admission, at that point, the parties were "close to agreement." Ex. 1 at 1. But Defendants effectively ended the negotiation at that point by reneging on their prior compromise proposal. That is reason to deny their motion, not grant it.

3. *The Motion seeks unreasonable, unnecessary, and unduly burdensome discovery.* The review of Slack messages from 42 custodians would impose an extraordinary and unreasonable burden under normal circumstances. It is wholly unjustified at this stage in an expedited proceeding, with depositions starting today and fact discovery scheduled to close in less than two weeks. If granted, Defendants' demand to add up to 36 more custodians to Twitter's Slack review would require

burdensome manual review of more than 240,000 pages of additional Slack communications on top of the significant review Twitter has already conducted. Twitter estimates that even if it committed its full review team to the effort full time, to the exclusion of all else, completing the process would take well more than a week.

And to what end, other than burden for burden's sake? Defendants do not identify a single custodian that they believe is important that Twitter isn't already searching, or a single category of communications they believe will be missed under the existing Message Protocol, or any reason to believe that having more than 50 lawyers spend the next two weeks reviewing every Slack message under the sun will meaningfully advance the litigation. The fact that Twitter has already produced 20x as many documents as Defendants only amplifies the inequity of their demands.

Defendants' failure to explain why they *need* these additional documents is no surprise, because the custodians whose Slacks Twitter has already produced are ones that Defendants themselves requested for all other forms of non-email communications—they are the key directors, executives, and employees involved in the key events at issue. Nothing more is reasonable or necessary.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to compel Twitter to review Slack messages sent or received by all 42 of its email custodians.

Respectfully,

/s/ Kevin R. Shannon

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2022, copies of the Public Version of Letter to Chancellor McCormick from Kevin R. Shannon on behalf of Twitter, Inc. in Opposition to Defendants' Motion to Compel documents from the Slack Messaging Platform, were served via File & Serve*Xpress* upon the following attorneys of record:

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