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Case No. 2022-0613-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TWITTER, INC.,

Plaintiff and
Counterclaim-Defendant,

v.

ELON R. MUSK, X HOLDINGS I, INC., and X HOLDINGS II, INC.,

Defendants and
Counterclaim-Plaintiffs.

C.A. No. 2022-0613-KSJM

REDACTED PUBLIC VERSION
DATED: September 12, 2022

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO AMEND THEIR PLEADING AND EXTEND THE CASE SCHEDULE

1. On April 25, Elon Musk agreed to purchase Twitter for $54.20 per share. Musk waived all due diligence and signed a seller-friendly merger agreement designed to provide Twitter with maximum certainty of closing.

2. In early May, Musk came down with buyer's remorse. Breaching the agreement, he used his limited information access right to search for a way out of the deal—to conduct the very due diligence he had forgone.

3. On July 8, Musk purported to terminate the agreement, claiming that Twitter's disclosures regarding its estimate of false or spam accounts were inaccurate. After that claim went nowhere, Musk filed counterclaims emphasizing

another basis to terminate—that Twitter's disclosures regarding its "mDAU" metric were false.

4. After weeks of abusive discovery confirmed the emptiness of that claim, Musk has served up another termination theory. Relying on the unsubstantiated allegations of a disgruntled former employee, Musk now claims fraud in Twitter's data-privacy disclosures. Solely on the basis of these allegations—which Musk cannot even say are true—Musk asks the Court to delay trial to allow yet another discovery witch-hunt.

5. Musk's new theory is as unavailing as its predecessors. To escape his obligation to close, Musk must show a failure of one of Twitter's representations that creates a Material Adverse Effect. Musk cannot even plead this adequately, let alone prove it.

6. Musk's motion is just his latest pretext to delay Twitter's ability to enforce its rights. For months, he has deployed his limitless resources to subsidize scorched-earth litigation and manufacture one excuse after another to avoid a reckoning on his contractual obligations.

7. Leave to amend Defendants' counterclaims should be denied. More important, the Court should maintain an October trial date even if leave is granted. The parties can readily develop a robust evidentiary record to try the amended counterclaims beginning October 17.

BACKGROUND

8. Peiter Zatko became Twitter's Head of Security in February 2021. [redacted] Ex. 1.

9. [redacted] Ex. 2. [redacted] Ex. 3. [redacted] Ex. 4.

10. [redacted] *Id.* at 4.

11. [redacted] Ex. 6. [redacted] Ex. 7.

12. [redacted] Ex. 5

at 5. [redacted]

[redacted] *Id.*

13. [redacted]

[redacted] Ex. 8. [redacted]

[redacted] *Id.*

14. [redacted]

[redacted] Ex. 5 at 5-6.

[redacted] *Id.* [redacted]

[redacted] *Id.*

15. [redacted]

Id. at 6. [redacted]

[redacted] *Id.*

16. [redacted]

Id. at 9.

Id.

Id.

17. Meanwhile, Musk had been buying Twitter stock since January 2022. Dkt. 1 ("Compl.") ¶ 19; Dkt. 42 ("Counterclaims") ¶ 31. He did not disclose those purchases until April 4, when he had acquired enough shares to make him the company's largest stockholder. Compl. ¶ 19. On April 14, Musk announced an offer to buy Twitter. *Id.* ¶¶ 24-25.

18.

Ex. 9.

Id. at 20.

19. On April 25, Musk and Twitter entered into a "seller-friendly" merger agreement. Compl. ¶¶ 30-39. After the stock market (and the price of Tesla stock) declined in early May, Musk invoked § 6.4 of the merger agreement to demand detailed information about Twitter's methods of calculating monetizable daily average users ("mDAU") and the proportion of false or spam accounts in mDAU. Compl. ¶¶ 50, 70-100. On May 13, he Tweeted that the deal was "on hold" until Twitter proved its estimate that less than 5% of its mDAU were false or spam accounts. *Id.* ¶ 73. On May 17, Musk Tweeted that the deal "cannot move forward" until Twitter's estimate was analyzed. *Id.* ¶ 81.

20. While Musk Tweeted falsehoods regarding Twitter's spam-estimation process, [redacted] Ex. 10. [redacted] *Id.* ¶ 7.

21. [redacted] on July 6, Zatko sent a complaint to the Federal Trade Commission, SEC, and Justice Department alleging Twitter's violation of the 2011 FTC consent order and fraud by Twitter and Agrawal. Ex. 11; Ex. 12. The complaint included extensive allegations regarding Musk and the merger agreement that Zatko had never previously raised and which were outside Zatko's field of responsibility at Twitter. The second section of the complaint is a ten-page

discussion of Musk's Tweets regarding Twitter's estimate of false or spam accounts in mDAU and Agrawal's response. Ex. 12 at 9-18. The complaint also includes fifteen-page section alleging that Twitter is in breach of its representations in §§ 4.5, 4.6, 4.7, and 4.14 of the merger agreement. *Id.* at 66-80.

22. On July 8, Defendants sent Twitter a letter purporting to terminate the merger agreement, principally on the basis that Twitter's disclosed estimate that fewer than 5% of mDAU were false or spam accounts was inaccurate. Ex. 13 at 6-7. In their answer and counterclaims, Defendants alleged a new basis for termination: that Twitter had also misleadingly "touted mDAU as a 'key metric' for revenue growth" in its SEC disclosures. Counterclaims ¶ 3.

23. On August 23, the *Washington Post* published a copy of Zatko's complaint. Ex. 11. The next day, Defendants repeatedly quoted Zatko's complaint at a hearing in this Court. *See, e.g.*, Ex. 14 at 10, 28, 29, 35, 42. On August 25, Defendants issued a subpoena to Zatko. Ex. 15.

24. On August 29, Defendants sent Twitter a letter purporting to terminate the merger agreement a second time. The letter asserted that Zatko's "allegations, if true, demonstrate that Twitter has breached . . . the Merger Agreement." Ex. 16 at 2. Shortly before midnight, Defendants moved for leave to amend their complaint based on Zatko's allegations and to postpone trial by at least a month. Dkt. 282 ("Mot."); *see id.* Ex. A ("Am. Counterclaims") ¶¶ 183-249.

ARGUMENT

25. Defendants' proposed amendment should be denied because it would cause unfair prejudice to Twitter. "Prejudice to the nonmoving party is the touchstone for the denial of an amendment." *Lloyd's London* v. *Nat'l Installment Ins. Servs., Inc.*, 2008 WL 2133417, at *7 (Del. Ch. May 21, 2008), *aff'd*, 962 A.2d 916 (Del. 2008). The proposed amendment—like the rest of Defendants' litigation conduct—is calculated to evade resolution of the case on the merits, by expanding discovery and extending the trial date to render Twitter's claim for specific performance difficult to enforce.

26. As the Court recognized when it ordered expedited proceedings, "the longer the delay [until trial], the greater the risk" of irreparable harm to Twitter. Dkt. 103 ("Tr.") 70. Each passing day has vindicated that assessment. Twitter has suffered increased employee attrition, undermining the company's ability to pursue its operational goals. The company has been forced for months to manage under the constraints of a repudiated merger agreement, including Defendants' continued refusal to provide any consents for matters under the interim operating covenants.

27. Defendants contend that "any prejudice to Twitter can be easily mitigated by . . . continu[ing] the trial date." Mot. 13. Continuing the trial date would exacerbate the prejudice to Twitter, not mitigate it. Defendants' argument that Twitter will not be prejudiced as long as trial occurs before April 25, 2023—the

outside date for financing—is the same self-serving one the Court rejected in setting an October trial date. Tr. 68-70.

28. Defendants' proposed amendment should also be denied as futile. *See In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1125 (Del. Ch. 2011) ("undue prejudice or futility of amendment" are grounds to deny amendment). The new theories Defendants have drawn from Zatko's complaint to escape the merger agreement are as factually and legally deficient as their predecessors.

29. The first theory Defendants seized upon to avoid the merger was the supposed falsity of Twitter's disclosed estimate that 5% of mDAU in the fourth quarter of 2021 were false or spam accounts. Zatko's complaint *rejects* this theory, expressly recognizing that "Twitter is already doing a decent job excluding spam bots and other worthless accounts from its calculation of mDAU." Ex. 12 at 15. Nor does Zatko's complaint support Defendants' back-up theory that Twitter's disclosures regarding mDAU as a "key metric' were misleading. Nowhere does his complaint allege any false or misleading disclosure concerning mDAU.

30. Defendants nonetheless rely on Zatko's complaint to assert brand new theories for avoiding the merger—Twitter's supposed breach of its representations in §§ 4.5, 4.8, and 4.14. *See*, *e.g.*, Am. Counterclaims ¶ 36. These allegations are insufficient to state a claim, let alone justify expansive discovery.

31. Twitter represented in § 4.5 and § 4.14 that it was not in violation of any law, including data privacy laws, excepting any violations that would not have a Material Adverse Effect. *See* Ex. 17 §§ 4.5, 4.14. Defendants allege that Twitter breached these representations because it is "material[ly]" violating the 2011 FTC consent order, which required Twitter to maintain a security program to protect the privacy of user data. Am. Counterclaims ¶ 239.

32. Defendants' proposed amendment does not include any well-pleaded factual allegations showing a breach of the legal compliance representations. Defendants do not dispute that Twitter complied with the biennial audit and certification requirement for the security program imposed by the consent order. Ex. 18 at 3-4. Nor do they allege facts suggesting any possible Material Adverse Effect. They assert only the conclusion that various breaches of user data, including "a data breach . . . in July 2022" have resulted from Twitter's alleged non-compliance. Am. Counterclaims ¶¶ 205-06. But "any . . . cyberattack" or "data breach" is expressly excluded from the definition of Material Adverse Effect. Ex. 17 Art. I.

33. Twitter represented in § 4.8 that it "disclosed, based on its most recent evaluation of the Company's internal control over financial reporting . . . to the Company's Auditors and the audit committee . . . any fraud to the Knowledge of the Company . . . that involves management or other employees who have a significant

role in the Company's internal control over financial reporting." *Id.* § 4.8. Invoking Zatko's allegations, Defendants allege that Twitter is in breach of this representation because Agrawal caused fraudulent statements to be made at the December 2021 Risk Committee meeting. Am. Counterclaims ¶¶ 227, 234, 322-24.

34. Even Zatko did not assert any breach of § 4.8—despite expressly linking his allegations to other supposed breaches of Twitter's representations. Moreover, Zatko expressly alleges that "Twitter's Chief Compliance Officer opened a fraud investigation based on [his] allegations" regarding the December 2021 Risk Committee meeting" and that he submitted a "final report to the Board to articulate specific fraud he was identifying." Ex. 12 at 3-5. This concession negates Defendants' allegation that Zatko's fraud claim was not disclosed to the Audit Committee.

35. Twitter represented in § 4.14 that, "to the Knowledge of the Company," its business is not violating any intellectual property rights, excepting any violations that would not have a Material Adverse Effect. Ex. 17 § 4.14. Again relying on Zatko, Defendants allege that Twitter is in breach of this representation. Am. Counterclaims ¶ 218. Zatko never had any responsibility for intellectual property at Twitter, and his complaint makes no allegation to the contrary. All Zatko alleges is that, "in the days before he was terminated, [he] learned that Twitter had never

acquired proper legal rights to training materials used to build . . . [its] key Machine Learning models." Ex. 12 at 38.

36. Zatko is a disgruntled, terminated employee whose shifting narrative has evolved to support Musk's equally flexible view of the facts. Musk's termination letter cannot even bring itself to adopt Zatko's narrative, saying only that Zatko's allegations give rise to a termination right "if true." Ex. 16 at 2. But even crediting Defendants' third-hand reliance on Zatko's allegations, Defendants' new allegations are insufficient to show a breach of the representation in § 4.14 because they do not suggest a Material Adverse Effect. Defendants allege that Twitter has been operating since its inception without intellectual property rights over the machine learning training materials. Am. Counterclaims ¶ 221. Defendants' failure to allege that Twitter has incurred any ensuing liability confirms that any imagined breach of the representation could not be expected to have a Material Adverse Effect.

37. Defendants' proposed amendment is thus properly denied as futile, as well as unduly prejudicial to Twitter. But regardless of whether Defendants' proposed amendment is granted, it does not justify their request to delay trial.

38. Defendants do nothing to explain why they need an additional four weeks for discovery on their new claims—a period more than half as long as the current six-week fact discovery period. Defendants instead invoke *Akorn* to assert

they are entitled to broad discovery. Mot. 11-12. Like the *Akorn* defendants, they say, they "are entitled to investigate . . . Zatko's complaint to verify the accuracy of [Twitter's] representations in the contract and 10-K." Mot. 12.

39. But the contract in *Akorn* was decisively different. The buyer there "bargained for a right of reasonable access to" information about the target to "evaluate [the target']s contractual compliance," and terminated after exercising that right. *Akorn, Inc.* v. *Fresenius Kabi AG*, 2018 WL 4719347 at *2, *18 (Del. Ch. Oct. 1, 2018). Defendants here obtained only a narrow right to information "related to the consummation of the [merger]" and terminated after breaching that provision. Compl. ¶¶ 50, 70-100. *Akorn* provides no support for allowing Defendants to undertake—in litigation—the very due diligence they waived before entering into the merger agreement, in search of a valid basis to terminate they have yet to find.

40. If the proposed amendment is granted, Defendants are entitled only to additional discovery relevant to new claims. Ct. Ch. Rule 26(b)(1). That discovery can be accommodated while maintaining an October trial date. Only limited discovery is necessary to address Defendants' new theories of breach—which concern discrete factual matters relating to the company's current compliance with the 2011 FTC consent order, the disclosure of Zatko's allegations to the Audit Committee, and the intellectual property status of certain machine-learning training materials. Given the large number of custodians and deponents Twitter has already

agreed to provide, incremental discovery relevant to Defendants' new allegations can be provided by making a targeted document production, allowing an additional expert, and adding one to two more custodians and deponents.

41. If the Court permits Defendants' proposed amendment, Twitter therefore requests that the Court order the parties to attempt to negotiate a reasonable program of incremental discovery to be completed before trial in October. Twitter respectfully submits that this approach will avoid further efforts to delay trial and to ensure that this action is tried approximately 90 days from filing—the typical schedule in an action seeking specific performance of a merger agreement.

CONCLUSION

42. For the foregoing reasons, the Court should deny Defendants' leave to amend their pleading. If the Court permits Defendants' proposed amendment, Twitter requests that the Court maintain an October trial date.

POTTER ANDERSON & CORROON LLP

By: */s/ Kevin R. Shannon*
Peter J. Walsh, Jr. (No. 2437)
Kevin R. Shannon (No. 3137)
Christopher N. Kelly (No. 5717)
Mathew A. Golden (No. 6035)
Callan R. Jackson (No. 6292)
1313 North Market Street
Hercules Plaza, 6th Floor
Wilmington, DE 19801
(302) 984-6000

Counsel for Twitter, Inc.

Words: 2,999

OF COUNSEL:

William Savitt
Bradley R. Wilson
Sarah K. Eddy
Ryan A. McLeod (No. 5038)
Anitha Reddy
Noah B. Yavitz
WACHTELL, LIPTON,
ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
(212) 403-1000

Brad D. Sorrels (No. 5233)
WILSON SONSINI GOODRICH & ROSATI, P.C.
222 Delaware Avenue, Suite 800
Wilmington, DE 19801
(302) 304-7600

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