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

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

Dear Chancellor McCormick:

Elon Musk is presently under investigation by federal authorities for his conduct in connection with the acquisition of Twitter. Through counsel, he has exchanged substantive correspondence with those authorities concerning their investigations. Twitter wants those documents, because they bear upon key issues in this litigation. Twitter requested the production of those documents months ago. But with trial just 11 days away, Defendants have still not produced them.

Defendants initially resisted production by reserving the right to withhold communications based on something they called "investigative privilege." After the Court cast doubt on that species of "privilege," Defendants have adopted a new approach. Instead of logging the communications as privileged, they simply deemed

them outside the scope of discovery, on the theory that the search protocol Twitter negotiated with Defendants' counsel somehow missed the mark.

This game of "hide the ball" must end. Twitter therefore seeks the Court's assistance in obtaining the production of Defendants' lawyers' communications with the government concerning Twitter and the Twitter transaction. Producing them would create no real burden, because they are a discrete set of easily identifiable materials within the files of the attorneys who wrote, reviewed, or received them. The obvious explanation for Defendants' stonewalling is that they do not want Twitter to obtain documents that will further undermine Defendants' position in this litigation. But that is no excuse. Defendants should be compelled to cause their law firms to collect and produce the requested communications immediately.

BACKGROUND

On July 22, Twitter served Defendants with its first set of document requests. Request No. 18 sought "production of all communications with any governmental authority concerning the merger, the merger agreement, the proxy statement, or Twitter." Dkt. 221 at 7. Defendants objected on the basis of "investigative privilege." *Id.*

On August 1, Twitter served a subpoena on Quinn Emanuel, with a return date of August 21. Ex. 1. Twitter's Request No. 23 sought "[a]ll Communications with any Governmental Authority . . . concerning (i) the Merger; (ii) the Merger Agreement; (iii) the Proxy Statement; (iv) Twitter; or (v) any public disclosures or filings made by Twitter . . . ." *Id.* at 34. Equivalent subpoenas were served on Defendants' other outside counsel. Exs. 2-3. All of the law firms likewise asserted "investigative privilege." Exs. 4-6.

Twitter moved to challenge the assertion of investigative privilege. Dkt. 159. In an August 23 letter decision, this Court agreed that "it would seem unusual that documents in the possession of a private party could be subject to the investigative privilege or that a private litigant would have standing to assert that privilege." Dkt. 221 at 8. However, because Defendants represented they did not yet know whether they would assert the purported privilege, the Court did not reach the issue, instead concluding that "[i]f Defendants assert the investigative privilege to withhold any documents, then Twitter may renew this request." *Id.* at 8-9.

Defendants never had to decide whether to invoke the investigative privilege. They sidestepped that conundrum by claiming that their custodial records did not contain communications with any governmental authorities. But Defendants have

never represented that these documents do not exist. Instead, they have suggested that it is their lawyers—and their lawyers alone—who retained the relevant documents.

While Twitter has sought government communications from each of Defendants' counsel, the negotiation has focused primarily on Quinn Emanuel, because Quinn Emanuel attorney Alex Spiro serves as Musk's personal attorney. On August 5 and 9, Twitter emailed Quinn Emanuel to schedule a call to discuss the subpoena to that firm. Ex. 7; Ex. 8 at 6. Quinn Emanuel did not respond. On August 10, Twitter provided Quinn Emanuel a proposed discovery protocol, including search terms (e.g., "Twitter"), and again requested to schedule an initial meet-and-confer. Ex. 8 at 6-13.

Counsel held their initial meet-and-confer on August 15, more than two weeks after the subpoena was served. *Id.* at 1. On that call, Quinn Emanuel objected to searching the records of any custodian other than Spiro, objected to reviewing or logging any internal communications, and objected to the subpoena's proposed date range. Ex. 9 at 36-37.

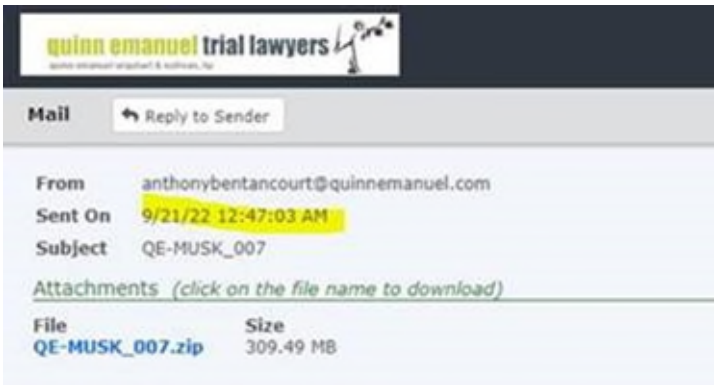
Twitter and Quinn Emanuel subsequently exchanged additional correspondence regarding the subpoena and participated in a second meet-and-

confer on August 17. *Id.* at 35. To eliminate any claim of undue burden, Twitter offered to forgo a traditional privilege log and instead accept a machine-generated metadata log. *Id.* at 30. Quinn Emanuel, meanwhile, offered a second custodian, Andrew Rossman, but only on the condition that Twitter waive any future request for additional custodians. *Id.* Twitter rejected that offer, reserving its right to seek additional custodians. *Id.*

On August 16, Quinn Emanuel shared hit reports showing that Twitter's proposed search terms returned 14,511 documents, families included. Ex. 10. Claiming burden and asserting that Twitter's terms were insufficiently targeted, Quinn Emanuel proposed further revisions to cut the total number of documents in the review universe in half. Ex. 11. The parties ultimately arrived at a compromise, based on Quinn Emanuel's representations concerning the burden of review and the sufficiency of the negotiated search terms. Ex. 9 at 1.

By the end of August, Quinn Emanuel had still not produced a single document. Ex. 11 at 7. After multiple inquiries, Quinn Emanuel finally responded on September 9 and 16, agreeing to complete production by September 18 and provide a privilege log by September 19. Ex. 12 at 3-4. Quinn Emanuel missed those deadlines.

Quinn Emanuel completed its production at 8:15 a.m. on September 21—approximately one hour before Jared Birchall's deposition was scheduled to begin. Ex. 13. When Twitter accessed the production, the timestamp on the file sharing site indicated it had been uploaded almost eight hours earlier:



Quinn Emanuel provided a privilege log later that day. The log contained more than 1,700 entries, Ex. 14, several of which reference draft communications with governmental authorities—indicating that they were captured by the parties' search protocol. *See, e.g.*, Log Nos. 389, 392, 611-16, 620-22, 629, 632, 748-51 and 777-78. The log references, for example, drafts of a May 13 email to the SEC (Log No. 654) and a slide presentation to the FTC (Log Nos. 655-56). Yet the final communications themselves were neither produced nor logged.

On September 25, Twitter emailed Quinn Emanuel regarding these and other deficiencies in its privilege log. Ex. 15 at 1-3. In its September 29 letter response,

Quinn Emanuel stated that "[n]either Defendants nor Quinn Emanuel have withheld any documents based on an 'investigative privilege'" and "[c]orrespondence with the SEC . . . was not captured by the universe of documents Quinn Emanuel agreed to review in response to the subpoena." Ex. 16 at 2.

The parties scheduled a meet-and-confer for October 2. Ex. 17 at 7-8. In advance, Twitter sent a letter describing the issues it wished to discuss on the meet-and-confer. Ex. 18. Twitter explained, among other things, that there is no legitimate basis to withhold non-privileged communications with governmental authorities, and asked Quinn Emanuel to identify all attorneys who were communicating with any governmental authority concerning Twitter and produce all such communications immediately. *Id.* at 1-2.

When Quinn Emanuel finally agreed to begin discussing the issues raised by Twitter in its September 25 email and October 1 letter, Twitter reiterated that it was seeking a specific and narrow category of documents: non-privileged communications with any governmental authority relating to the subjects identified in Request No. 23 of the subpoena to Quinn Emanuel. *Id.* at 2. Quinn Emanuel responded that Twitter's request was "too late" and if Twitter wanted those documents, it should have negotiated different search terms. *Id.*

Quinn Emanuel followed up by letter on October 3. *Id.* at 1. It reiterated that it had "produced or logged all documents responsive to Request No. 23 *that were captured by the parties' agreed-upon search protocol.*" Ex. 19 at 2 (emphasis added). Quinn Emanuel refused to provide any more documents because the request "comes too late" and Twitter "could have raised additional search terms earlier in time, but failed to do so." *Id.* at 2-3. Defendants' other outside counsel have likewise failed to produce the relevant government communications that are absent from Quinn Emanuel's production. To ensure that the trial record reflects these missing communications, Twitter now moves for relief.

ARGUMENT

Defendants do not deny that their counsel exchanged responsive, non-privileged communications with governmental authorities concerning Musk's acquisition of Twitter. Instead, they seek to shield these documents from discovery by asserting that Twitter's request for production comes "too late" and that their counsel agreed only to produce documents identified through the application of agreed-upon search terms. Neither argument has any merit.

Twitter's request for communications with government authorities is long pending. The company issued party discovery requests in July. It served subpoenas

on Defendants' counsel seeking the same documents in early August. It filed a motion to compel production of those documents in mid-August, attacking Defendants' spurious assertion of privilege. Defendants have resisted and delayed production for months. They cannot now cite their own obstruction as a basis for denying Twitter the documents that it requested from the outset.

Nor can Defendants hide behind search terms to evade their clear discovery obligation. Search terms are used to locate relevant and responsive documents in connection with electronic discovery. They do not supply an excuse for avoiding the production of relevant responsive documents that are known to counsel, such as the government communications at issue on this Motion. *See Levy* v. *Stern*, 1996 WL 742818, at *3 (Del. Dec. 20, 1996) ("The withholding of discoverable information, either directly or through obfuscation, does not comport with the spirit of our discovery rules.").

Vice Chancellor Laster's decision in *BTG International Inc.* v. *WellStat Therapeutics Corp.* is instructive on this point. In that case, the Court granted motions to compel production of specific financial statements from new custodians, including lawyers, even though the party opposing discovery had already produced 75,000 documents from 26 different custodians. C.A. No. 12562-VCL, at 18, 37-46

(Del. Ch. Oct. 4, 2016) (Transcript, attached as Ex. 20). Like Defendants here, BTG International sought to avoid discovery by citing a search protocol. The Vice Chancellor observed, however, that "search terms are not the be-all and end-all" because "the party seeking the documents—doesn't know what you have or don't have." *Id.* at 37. The Court likewise rejected the claim that it would be too burdensome to gather financial statements that were not captured by the original search terms, since they consisted of data that would have been readily available. *See id.* at 39.

BTG International is exactly in point. Defendants have known since July that Twitter is focused on their communications with governmental authorities. Defendants knew that Twitter was seeking to negotiate search protocols that would capture those documents. If the negotiated search terms somehow missed the mark,[1] then it was Defendants' obligation to correct that omission—particularly since it was Defendants' counsel that insisted upon ever-narrower search terms, citing purported

[1] It is unclear how the negotiated search term captured draft communications but not final communications, but Twitter is forced to rely upon Defendants' representations concerning the fidelity of their review.

burden. Twitter has requested an easily identified, easily collected, and easily produced set of documents. The Court should order Defendants to produce them.

CONCLUSION

For the reasons stated above, Twitter's motion to compel should be granted.

Respectfully,

/s/ Kevin R. Shannon

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Words: 1,886

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