EFiled: Jul 27 2022 04:34PM EDT
Transaction ID 67866842
Case No. 2022-0613-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TWITTER, INC., Plaintiff, v. ELON R. MUSK, X HOLDINGS I, INC., and X HOLDINGS II, INC., Defendants.	C.A. No. 2022-0613-KSJM

PLAINTIFF'S CROSS-MOTION FOR ENTRY OF A CASE SCHEDULE

1. While the parties were in the midst of meeting-and-conferring, Musk submitted a preemptive letter (the "Letter Motion") moving for entry of a scheduling order that Musk had not even previously sent to Twitter. Dkt. 34 ("Mot."). That order requires Twitter's immediate compliance with extravagant and onerous one-way discovery demands unrelated to the issues to be tried, before Twitter has served responses and objections, before Musk has answered the complaint, and while Musk refuses even to say whether he intends to assert counterclaims. The Letter Motion also misstates the facts and Twitter's stated positions, as confirmed by the parties' correspondence (which the Letter Motion omits).

2. Twitter has in good faith proposed that the parties cooperate to craft an evenhanded, expedited schedule, consistent with the precedents of this

Court, to ensure that the case is trial-ready in October. Musk refuses. Twitter thus cross-moves for entry of its proposed scheduling order.

BACKGROUND

3. On July 12, Twitter filed this action seeking specific performance of Musk's obligations under their merger agreement and a motion to expedite proceedings. Dkt. 1. Opposing expedition, Musk argued that the lawsuit "require[d] complex, technical discovery . . . of large swaths of data" that could not feasibly be completed in time for a trial before February. Dkt. 7 ¶¶ 6-7.

4. Musk already has much of this data. At oral argument on July 19, Musk's counsel affirmed that Musk was "running or had been running millions of data searches on the limited [information] access that we've gotten [from Twitter] so far," which presented "a tremendous amount of data to analyze." MTE Tr. 59.

5. After hearing argument, the Court ordered an October trial. *Id*. at 70. The Court explained that it "has consistently scheduled trial in busted deal cases within 60 to 90 days of filing" and rejected Musk's contention that "the unique complexities of this case impose extreme burdens warranting an extended schedule." *Id.* at 65, 68. "[I]n [the Court]'s view, [Musk] underestimate[d] the ability of this [C]ourt and counsel selected by the parties to quickly process complex litigation." *Id*. at 68.

6. Later that afternoon, the Court's assistant informed counsel that trial would be held the week of October 10 or October 17 and that the Court would contact the parties once it had determined available dates during those weeks.

7. That night and the next day, July 20, Musk sent Twitter forty-seven individual document requests and fifty-three numbered interrogatories. Exs. 1-3.

8. On July 20, Twitter sent Musk a proposed scheduling order anticipating trial the week of October 10 that included a July 22 deadline for Musk's answer and an August 26 deadline for substantial completion of document production. Ex. 4 at Att. 3, pp. 1-3. Musk responded with a proposed schedule anticipating trial beginning October 17 that included an August 1 deadline for Twitter to substantially complete production of "material large data sets in response to initial requests" and an August 3 deadline for him to "answer . . . or move to dismiss." Ex. 5 at 1-3.

9. At a meet-and-confer that evening, Musk asked Twitter to jointly request an October 17 trial start date. Ex. 6 at 13. Twitter responded that, while it preferred an October 10 start date, it believed the parties should await the Court's guidance before requesting specific dates. *Id*. Musk also demanded that Twitter immediately provide its position on individual document requests he had served just

hours earlier. *Id.* Twitter requested that Musk file his answer as soon as possible. *Id.*

10. After the meet-and-confer, Musk e-mailed Twitter that he would "seek relief from the Court" unless Twitter acceded to his scheduling and discovery demands by the next day. *Id.* at 11-12.

11. Attempting to find common ground, Twitter advised Musk the next day, July 21, that it would not oppose an October 17 trial start date if the Court had sufficient availability to complete the trial that week. *Id.* at 9. Twitter also reiterated its request that Musk answer the complaint as promptly as possible, committed to serve its responses and objections to his July 20 discovery requests two business days after he answered, and asked whether he intended to assert any counterclaims. *Id.*

12. In response, Musk stated that he would file his answer by July 29 and refused to say whether he intended to assert any counterclaims. *Id.* at 8. Musk demanded that Twitter "immediately" confirm that it would begin "tomorrow" a rolling production of "undoubtedly relevant" documents, "including but not limited to":

> board meeting minutes and related materials regarding the Merger; all drafts of the Merger Agreement exchanged; executive level org charts and org charts for Twitter's growth team, metrics task force, product management, investor relations, revenue team, engineering team, trust & safety, safety & integrity, and cybersecurity; documents

> cited, quoted, or referenced in the Complaint and Motion to Expedite; manuals and policies regarding mDAU, ad sales, advertising metrics, growth metrics, suspension rules, machine learning, and AI; documents responsive to RFP 1 in Defendants' Second Requests for the Production of Documents; all documents, materials and/or data you said you were ready to produce in your July 15 letter; all OC consent requests and responses; all items provided in the data room; all exchanged drafts of the Credit Agreement, Limited Guarantee, and Debt Commitment Letter.

Id. Notwithstanding his demand that Twitter immediately begin producing documents, Musk made no reciprocal commitment. Musk again threatened "to raise these issues with the Court" unless Twitter confirmed its agreement to "all of the above by no later than 5pm tomorrow." *Id*.

13. The next day, July 22, Twitter again offered to jointly request a trial the week of October 17, if the Court was available—provided that Musk agree not to seek more than five trial days, thus ensuring that trial would be completed that week. *Id.* at 6. Twitter also objected to Musk's one-way discovery demands as unreasonable. *Id.* at 6-7.

14. Musk responded that Twitter's "suggestion that discovery here will be 'bilateral' is, to put it bluntly, absurd. Twitter . . . holds substantially all of the information that will be at issue in this litigation." *Id.* at 5. He again threatened to seek relief from the Court unless Twitter agreed to his demands by the next day. *Id.* at 5-6.

15. The next day, July 23, Twitter agreed to make an initial production by the end of the week of responsive documents from the categories Musk had identified, provided he likewise agreed to make an initial production by the same date. *Id.* at 4. Twitter also reiterated that the first step in an orderly discovery program was entry of a scheduling order and offered to meet and confer. *Id*.

16. Musk did not respond to Twitter's invitation to meet and confer. Instead, on July 24 he stated that he would answer no earlier than July 28 and insisted on Twitter's "final position" on his demands by 8 a.m. the next morning. *Id.* at 2-3. Twitter responded that its positions remained the same, attached a proposed scheduling order with two sets of deadlines (depending on whether the trial started on October 10 or 17), and again asked to meet and confer. *Id.* at 1 & Att. 1, pp. 1-5.

17. Musk did not respond. Instead, at midnight on July 25, he served another thirty-two document requests and fifteen interrogatories. Exs. 7, 8. To date Musk has served on Twitter seventy-nine distinct requests for documents and sixty-eight distinct interrogatories, many of which call for massive amounts of data unrelated to the contractual issues to be tried. *See* Exs. 1-3, 7, 8.

18. On July 26, Musk filed his Letter Motion for entry of an order setting his proposed schedule and compelling Twitter to provide the discovery he

demanded on the schedule he demanded. The proposed order he filed was one he never sent Twitter in the course of meeting-and-conferring and included new positions—such as a provision that all depositions would be held remotely unless the parties agreed otherwise. Mot. Proposed Order at 6.

19. Also on July 26, the parties exchanged initial custodian lists and search terms. Exs. 9, 10. Twitter proposed to search the files of twelve custodians; Musk proposed to search two. Twitter proposed a robust series of search terms calculated to address all the issues in dispute, including connective terms and wild cards designed to ensure completeness. Ex. 9 at Att. 1, pp. 3-5. Musk, ignoring nearly all the allegations of the complaint, proposed no search terms to identify documents related to the claimed breach of his best efforts, financing, confidentiality, and non-disparagement obligations. Ex. 10 at 1-3. Twitter's initial proposal thus contemplated a review of at least 65,000 e-mails. Confirming Musk's unwillingness to engage in reciprocal discovery, his initial proposal contemplated a review of less than 2,500.

20. On July 27, Twitter scheduled its stockholder vote on the merger for September 13 and filed definitive proxy materials with the SEC.

21. Since entering into the merger agreement, Twitter has made available to Musk vast quantities of data in response to his information requests

under the agreement—data that Musk has used for months, and continues to use, to prepare for this litigation. Musk has produced nothing.

ARGUMENT

22. To justify his premature motion practice, Musk asserts that in the week since this Court granted expedition he has sought to advance the case, while Twitter "at every turn has sought to delay." Mot. at 2. The parties' correspondence refutes that assertion. This Court should deny Musk's Letter Motion and—once it determines available trial dates—enter a schedule consistent with Twitter's proposed order.

23. *Trial Start Date.* Musk asserts that Twitter "has continued to insist upon an October 10 trial without justification" and asks the Court to set trial "for the week of October 17, 2022." *Id.* His assertion is false. Twitter repeatedly informed Musk that it does *not* object to beginning trial on October 17 if the Court has sufficient availability to complete a five-day trial that week, provided only that Musk commit not to seek more than five trial days. *See, e.g.*, Ex. 6 at 1, 6. Twitter sought that commitment because it believes Musk's objective remains to delay trial, render impracticable the Court's expedition order, and thus avoid adjudication of his contractual obligations. Absent the conditions Twitter requested, Musk has offered no assurance that a trial beginning on October 17 will be completed within the timeframe contemplated in the expedition order. *See* MTE Tr. 65, 70.

24. Musk's statement that "Twitter has also attempted to use the lack of a decided trial date to delay all other scheduling discussions," Mot. at 2, is also false. Even after Musk rejected Twitter's conditions, Twitter sought to advance scheduling discussions by sending Musk a proposed scheduling order with two sets of deadlines, corresponding to a trial start date of either October 10 or October 17. Ex. 6 at Att. 1, pp. 1-5. Musk never responded.

25. *Commencement of Rolling Document Productions.* Musk also asserts that "Twitter refuses to begin immediate rolling document productions of certain categories of documents requested by Defendants." Mot. at 3. These consist of at least nine discrete categories of documents, many of which are already in Musk's possession and cannot be identified without electronic e-mail searches and are thus far outside any reasonable conception of a "core" production.[1] In any event, Musk's characterization of Twitter's position is false. As Musk acknowledges a page later, Twitter agreed to begin a rolling production of documents if Musk did the same. *Id.* at 4. Refusing that reasonable request, Musk sought to impose yet another one-way obligation on Twitter, insisting that Twitter also provide an immediate explanation of its grounds for considering any requested documents

[1] For example, Musk demands immediate production of all versions of various draft agreements the parties "exchanged" before and after the signing of the merger agreement. Mot. at 3 n.1.

irrelevant and agree to a separate August 1 production deadline for data sets. *Id.* at 4-5.

26. The only reason Musk does not yet have Twitter's responses and objections to his discovery requests is that he has dragged his feet in filing an answer (and refused to even say whether he will assert counterclaims). Discovery must be "relevant to any party's claim or defense." Ct. Ch. R. 26(b)(1). Twitter advised Musk that it would file its responses and objections to his (overbroad and lengthy) July 20 document requests within two business days of Musk joining issue. Ex. 6 at 9.

27. Musk is the party holding up productive and disciplined discussions on the scope of discovery by delaying filing an answer. The prompt filing of an answer is especially important in expedited cases precisely "to clarify the issues . . . actually in dispute" and thus inform the appropriate scope of discovery. *See, e.g.*, *CP Carco, LP* v. *Americas Leading Finance, LLC*, C.A. No. 2020-0120-JTL, at 49 (Del. Ch. Mar. 12, 2020) (Transcript) ("I'm directing you to answer the complaint in a meaningful way so that we can attempt to figure out what you're actually disputing. . . . Because this is an expedited case, we need to try to clarify the issues that are actually in dispute . . . ."); *see also Sixth St. Partners Mgmt. Co., L.P.* v. *Dyal Cap. Partners III (A) LP*, C.A. No. 2021-0127-MTZ, at 5-6, 46 (Del.

Ch. Mar. 11, 2021) (Transcript); *Stream TV Networks, Inc.* v. *Seecubic, Inc.*, C.A. No. 2020-0766-JTL, at 29 (Del. Ch. Sept. 23, 2020) (Transcript).

28. Twitter's proposed case schedule—like its proposed trial dates—falls in the heartland of precedents in refusal-to-close cases litigated in this Court. It sets forth an accelerated but orderly sequence for pleading and discovery: a deadline for the answer, followed by reciprocal deadlines for responding to document requests and other written discovery. This approach is in line with all relevant precedent scheduling orders. *See, e.g.*, *Bardy Diagnostics Inc.* v. *Hill-Rom, Inc.*, C.A. No. 2021-0175-JRS (Del. Ch. Mar. 8, 2021); *Forescout Techs., Inc.* v. *Ferrari Grp. Holdings, L.P.*, C.A. No. 2020-0385-SG (Del. Ch. June 1, 2020); *Bed Bath & Beyond Inc.* v. *1-800-Flowers.com, Inc.*, C.A. No. 2020-0245-SG (Del. Ch. Apr. 9, 2020); *Akorn, Inc.* v. *Fresenius Kabi AG*, C.A. No. 2018-0300-JTL (Del. Ch. May 10, 2018); *Hexion Specialty Chems., Inc*. v. *Huntsman Corp*., 3841-VCL (July 15, 2008).

29. *August 1 deadline for production of "material large data sets."* Musk asks this Court to set an August 1 deadline for Twitter's production of any "material large data sets" sought in the seventy-nine document requests he has served between July 20 and July 25. Mot. Proposed Order at 2. Thus, in the guise of a proposed scheduling order, Musk asks the Court to order the production of vast quantities of information before responses and objections are served, before the

parties meet and confer, and without the opportunity to test the proper limits of discovery.

30. Musk asserts that his deadline is easy to meet because it requires Twitter "to produce raw data that it maintains in the ordinary course" that is "easy-to-send." Mot. at 5. But Musk's submission nowhere even identifies the "material large data sets" he demands be produced by August 1, let alone any reason to believe those data sets can be easily produced.

31. Contrary to Musk's speculation, much of the information he requests is not maintained in the ordinary course and cannot be provided by simply copying or transferring electronic files. And the discovery demanded is mind-bogglingly expansive. For example, Request No. 2 in Musk's third set of RFPs seeks at least 25 different data points for roughly 215 million Twitter accounts for each day in a 30-month period—in total, some 5 *trillion* data points. Ex. 7 at 12-14. The data also implicates complex statutory user privacy rights.

32. Compounding their abusive character, these requests are irrelevant to Twitter's complaint and Musk's asserted bases for attempting to terminate. The vast amount of data related to Twitter's user activity and platform that Musk seeks has no apparent connection to any term of the merger agreement. And even imagining (contrary to fact) that Musk had come forward with facts to justify inquiry into the accuracy of Twitter's disclosures of false or spam accounts,

Musk remains unable to explain how his data requests are relevant to that issue. Having waived due diligence before entering into the merger agreement, Musk should not now be permitted to conduct the invasive inquiry into all aspects of Twitter's business that he forwent—all in an effort to derail an October trial.

33. Musk's own statements undermine his contention that he "will be severely prejudiced in [his] ability to present [his] expert case if" Twitter does not produce by August 1 the "material large data sets" he seeks. Mot. at 5. His counsel acknowledged that Musk "ha[s] been running millions of data searches" on the "tremendous amount of data" Twitter provided him before his purported termination of the agreement. MTE Tr. 59. And Musk indicated in his termination letter that the data he already has justified his attempted termination. Ex. 11 at 6-7.

34. *Eighteen-day deadline to produce documents.* Musk asks the Court to enter a schedule that contains no single deadline for the substantial completion of document production, but instead imposes an eighteen-day deadline for document productions in response to document requests (excluding his requests for "material large data sets"). Mot. Proposed Order at 4-5. That approach is unworkable and inefficient because it requires the parties to re-review potentially responsive documents to meet arbitrary staged production deadlines as additional document requests come in. For good reason, scheduling orders in prior refusal-to-close cases—like Twitter's proposed schedule here—imposed a single deadline for

substantial completion of document production. *See supra* p. 11 (citing scheduling orders).

CONCLUSION

35. The Court should enter an order consistent with Twitter's proposed scheduling order.

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EXHIBIT 11

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July 8, 2022

Twitter, Inc.
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Attn: Vijaya Gadde, Chief Legal Officer

Dear Ms. Gadde:

We refer to (i) the Agreement and Plan of Merger by and among X Holdings I, Inc., X Holdings II, Inc. and Twitter, Inc. dated as of April 25, 2022 (the "Merger Agreement") and (ii) our letter to you dated as of June 6, 2022 (the "June 6 Letter"). As further described below, Mr. Musk is terminating the Merger Agreement because Twitter is in material breach of multiple provisions of that Agreement, appears to have made false and misleading representations upon which Mr. Musk relied when entering into the Merger Agreement, and is likely to suffer a Company Material Adverse Effect (as that term is defined in the Merger Agreement).

While Section 6.4 of the Merger Agreement requires Twitter to provide Mr. Musk and his advisors all data and information that Mr. Musk requests "for any reasonable business purpose related to the consummation of the transaction," Twitter has not complied with its contractual obligations. For nearly two months, Mr. Musk has sought the data and information necessary to "make an independent assessment of the prevalence of fake or spam accounts on Twitter's platform" (our letter to you dated May 25, 2022 (the "May 25 Letter")). This information is fundamental to Twitter's business and financial performance and is necessary to consummate the transactions contemplated by the Merger Agreement because it is needed to ensure Twitter's satisfaction of the conditions to closing, to facilitate Mr.

Musk's financing and financial planning for the transaction, and to engage in transition planning for the business. Twitter has failed or refused to provide this information. Sometimes Twitter has ignored Mr. Musk's requests, sometimes it has rejected them for reasons that appear to be unjustified, and sometimes it has claimed to comply while giving Mr. Musk incomplete or unusable information.

Mr. Musk and his financial advisors at Morgan Stanley have been requesting critical information from Twitter as far back as May 9, 2022—and repeatedly since then—on the relationship between Twitter's disclosed mDAU figures and the prevalence of false or spam accounts on the platform. If there were ever any doubt as to the nature of these information requests, the May 25 Letter made clear that Mr. Musk's goal was to understand how many of Twitter's claimed mDAUs were, in fact, fake or spam accounts. That letter noted that "Items 1.03 to 1.13 of the diligence request list contain high-priority requests for enterprise data and other information intended to enable Mr. Musk and his advisors to make an independent assessment of the prevalence of fake or spam accounts on Twitter's platform…" The letter then provided Twitter with a detailed list of requests to this effect.

Since then, Mr. Musk has provided numerous additional follow-up requests, all aimed at filling the gaps in the incomplete information that Twitter provided in response to his broad requests for information relating to Twitter's reported mDAU counts and reported estimates of false and spam accounts.[1] For example, in our letter to you dated June 29, 2022 (the "June 29 Letter"), we referenced Mr. Musk's request in the May 25 Letter for "information that would allow him 'to make an independent assessment of the prevalence of fake or spam accounts on Twitter's platform.'" Because Twitter, by its own admission, provided only incomplete data that was not sufficient to perform such an independent assessment,[2] the June 29 Letter "endeavored to be *even more* specific, and to reduce the burden of the

[1] Mr. Musk sought the same information in letters dated June 6, 2022, June 17, 2022, and June 29, 2022. In each of these letters, Mr. Musk referenced his information rights under Section 6.4 of the Merger Agreement. Twitter has thus been on notice of the information sought by Mr. Musk—and the contractual bases for these requests—for two months. For the past month, Mr. Musk has been clear that he views Twitter's non-responsiveness as a material breach of the Merger Agreement giving him the right to terminate the Merger Agreement if uncured. *See* June 6, 2022 (explaining that Twitter was "refusing to comply with its obligations under the Merger Agreement"). Thus, Mr. Musk has been clear about his requests, his right to seek such information, and his view regarding Twitter's material breach of the Merger Agreement.

[2] *See* your letter to us dated June 20, 2022 (noting that the information Twitter was agreeing to provide was "insufficient to perform the spam analysis that [Mr. Musk] purport[s] to wish to do.").

[original] request," by identifying a specific subset of high priority information, responsive to Mr. Musk's prior requests, for Twitter to immediately make available.

Notwithstanding these repeated requests over the past two months, Twitter has still failed to provide much of the data and information responsive to Mr. Musk's repeated requests, including, but not limited to:

1. *Information related to Twitter's process for auditing the inclusion of spam and fake accounts in mDAU*. Twitter has still not provided much of the information specifically requested by Mr. Musk in Sections 1.01-1.03 of the May 19 diligence request list that is necessary for him to make an assessment of the prevalence of false or spam accounts on its website. As recently as the June 29 Letter, Mr. Musk reiterated this long-standing request for information related to Twitter's sampling process for detecting fake accounts. The June 29 Letter identified specific data necessary to enable Mr. Musk to independently verify Twitter's representations regarding the number of mDAU on its platform—including, but not limited to (1) daily global mDAU data since October 1, 2020; (2) information regarding the sampling population for mDAU, including whether the mDAU population used for auditing spam and false accounts is the same mDAU population used for quarterly reporting; (3) outputs of each step of the sampling process for each day during the weeks of January 30, 2022 and June 19, 2022; (4) documentation or other guidance provided to contractor agents used for auditing mDAU samples; (5) information regarding the user interface of Twitter's ADAP tool and any internal tools used by the contractor agents; and (6) mDAU audit sampling information, including anonymized information identifying the contractor agents and Quality Analyst that reviewed each sampled account, the designation given by each contractor agent and Quality Analyst, and the current status of any accounts labelled "compromised." A subsequent request along these lines should not have been necessary, as this information should have been provided in response to Mr. Musk's original diligence request. Yet, to date, Twitter has not provided any of this information.

2. *Information related to Twitter's process for identifying and suspending spam and fake accounts*. In addition to information regarding Twitter's mDAU audits, the June 29 Letter also reiterated requests for data specifically identified in Sections 1.04-1.05 of the May 19 diligence request list regarding Twitter's methodology and performance data relating to identification and suspension of spam and false accounts,

including, but not limited to, information regarding account suspensions, including information sufficient to identify daily numbers of account suspensions since October 2020 and numbers of account suspensions for each of Twitter's internal reasons for suspension. In addition, during the June 30, 2022 call, Twitter's representatives indicated for the first time that the workflow and processes for detecting spam and false accounts in the mDAU population is different and separate from the workflow and processes for identifying and suspending accounts in violation of Twitter's policies. On that call, Twitter indicated that it would not be willing to provide information regarding the methodologies employed to identify and suspend such accounts.

3. *Daily measures of mDAU for the past eight (8) quarters*. On June 17, 2022 (the "June 17 Letter") Mr. Musk reiterated his request for "access to the sample set used and calculations performed, as well as any related reports or analysis, to support Twitter's representation that fewer than 5% of its mDAUs are false or spam account." To that end, Mr. Musk requested that Twitter provide "daily measures of mDAU for the previous eight quarters, and through the present." This information is derivative of the information Mr. Musk first sought in Sections 1.01-1.03 of the May 19 diligence request list. Although Twitter has provided certain summary data regarding the mDAU calculations, Twitter has not provided the complete daily measures as requested.

4. *Board materials related to Twitter's mDAU calculations*. In the June 17 Letter, Mr. Musk requested a variety of board materials and communications related to Twitter's mDAU metric, its calculation of the number of spam and false accounts, its disclosure of the mDAU metric, and the company's disclosure of the number of spam accounts on the platform. Twitter has provided an incomplete data set in response to this request, and has not provided information sufficient to enable Mr. Musk to make an independent assessment of Twitter's board and management's understanding of its mDAU metric.

5. *Materials related to Twitter's financial condition*. Mr. Musk is entitled, under Section 6.4 of the Merger Agreement to "all information concerning the business … of the Company … for any reasonable business purpose related to the consummation of the transactions" and under Section 6.11 of the Merger Agreement, to information "reasonably requested" in connection with his efforts to secure the debt

> financing necessary to consummate the transaction. To that end, Mr. Musk requested on June 17 a variety of board materials, including a working, bottoms-up financial model for 2022, a budget for 2022, an updated draft plan or budget, and a *working* copy of Goldman Sachs' valuation model underlying its fairness opinion. Twitter has provided only a pdf copy of Goldman Sachs' final Board presentation.

In short, Twitter has not provided information that Mr. Musk has requested for nearly two months notwithstanding his repeated, detailed clarifications intended to simplify Twitter's identification, collection, and disclosure of the most relevant information sought in Mr. Musk's original requests.

While Twitter has provided some information, that information has come with strings attached, use limitations or other artificial formatting features, which has rendered some of the information minimally useful to Mr. Musk and his advisors. For example, when Twitter finally provided access to the eight developer "APIs" first explicitly requested by Mr. Musk in the May 25 Letter, those APIs contained a rate limit lower than what Twitter provides to its largest enterprise customers. Twitter only offered to provide Mr. Musk with the same level of access as some of its *customers* after we explained that throttling the rate limit prevented Mr. Musk and his advisors from performing the analysis that he wished to conduct in any reasonable period of time.

Additionally, those APIs contained an artificial "cap" on the number of queries that Mr. Musk and his team can run regardless of the rate limit—an issue that initially prevented Mr. Musk and his advisors from completing an analysis of the data in any reasonable period of time. Mr. Musk raised this issue as soon as he became aware of it, in the first paragraph of the June 29 Letter: "we have just been informed by our data experts that Twitter has placed an artificial cap on the number of searches our experts can perform with this data, which is now preventing Mr. Musk and his team from doing their analysis." That cap was not removed until July 6, after Mr. Musk demanded its removal for a second time.

Based on the foregoing refusal to provide information that Mr. Musk has been requesting since May 9, 2022, Twitter is in breach of Sections 6.4 and 6.11 of the Merger Agreement.

Despite public speculation on this point, Mr. Musk did not waive his right to review Twitter's data and information simply because he chose not to seek this data and information before entering into the Merger Agreement. In fact, he negotiated access and information rights within the Merger Agreement precisely so

that he could review data and information that is important to Twitter's business before financing and completing the transaction.

As Twitter has been on notice of its breach since at least June 6, 2022, any cure period afforded to Twitter under the Merger Agreement has now lapsed. Accordingly, Mr. Musk hereby exercises X Holdings I, Inc.'s right to terminate the Merger Agreement and abandon the transaction contemplated thereby, and this letter constitutes formal notice of X Holding I, Inc.'s termination of the Merger Agreement pursuant to Section 8.1(d)(i) thereof.

In addition to the foregoing, Twitter is in breach of the Merger Agreement because the Merger Agreement appears to contain materially inaccurate representations. Specifically, in the Merger Agreement, Twitter represented that no documents that Twitter filed with the U.S. Securities and Exchange Commission since January 1, 2022, included any "untrue statement of a material fact" (Section 4.6(a)). Twitter has repeatedly made statements in such filings regarding the portion of its mDAUs that are false or spam, including statements that: "We have performed an internal review of a sample of accounts and estimate that the average of false or spam accounts during the first quarter of 2022 represented fewer than 5% of our mDAU during the quarter," and "After we determine an account is spam, malicious automation, or fake, we stop counting it in our mDAU, or other related metrics." Mr. Musk relied on this representation in the Merger Agreement (and Twitter's numerous public statements regarding false and spam accounts in its publicly filed SEC documents) when agreeing to enter into the Merger Agreement. Mr. Musk has the right to seek rescission of the Merger Agreement in the event these material representations are determined to be false.

Although Twitter has not yet provided complete information to Mr. Musk that would enable him to do a complete and comprehensive review of spam and fake accounts on Twitter's platform, he has been able to partially and preliminarily analyze the accuracy of Twitter's disclosure regarding its mDAU. While this analysis remains ongoing, all indications suggest that several of Twitter's public disclosures regarding its mDAUs are either false or materially misleading. *First*, although Twitter has consistently represented in securities filings that "fewer than 5%" of its mDAU are false or spam accounts, based on the information provided by Twitter to date, it appears that Twitter is dramatically understating the proportion of spam and false accounts represented in its mDAU count. Preliminary analysis by Mr. Musk's advisors of the information provided by Twitter to date causes Mr. Musk to strongly believe that the proportion of false and spam accounts included in the reported mDAU count is wildly higher than 5%. *Second*, Twitter's disclosure that it ceases to count fake or spam users in its mDAU when it determines that those

users are fake appears to be false. Instead, we understand, based on Twitter's representations during a June 30, 2022 call with us, that Twitter includes accounts that have been suspended—and thus are known to be fake or spam—in its quarterly mDAU count even when it is aware that the suspended accounts were included in mDAU for that quarter. *Last*, Twitter has represented that it is "continually seeking to improve our ability to estimate the total number of spam accounts and eliminate them from the calculation of our mDAU…" But, Twitter's process for calculating its mDAU, and the percentage of mDAU comprised of non-monetizable spam accounts, appears to be arbitrary and ad hoc. Disclosing that Twitter has a reasoned process for calculating mDAU when the opposite is true would be false and misleading.

Twitter's representation in the Merger Agreement regarding the accuracy of its SEC disclosures relating to false and spam accounts may have also caused, or is reasonably likely to result in, a Company Material Adverse Effect, which may form an additional basis for terminating the Merger Agreement. While Mr. Musk and his advisors continue to investigate the exact nature and extent of this event, Mr. Musk has reason to believe that the true number of false or spam accounts on Twitter's platform is substantially higher than the amount of less than 5% represented by Twitter in its SEC filings. Twitter's true mDAU count is a key component of the company's business, given that approximately 90% of its revenue comes from advertisements. For this reason, to the extent that Twitter has underrepresented the number of false or spam accounts on its platform, that may constitute a Company Material Adverse Effect under Section 7.2(b)(i) of the Merger Agreement. Mr. Musk is also examining the company's recent financial performance and revised outlook, and is considering whether the company's declining business prospects and financial outlook constitute a Company Material Adverse Effect giving Mr. Musk a separate and distinct basis for terminating the Merger Agreement.

Finally, Twitter also did not comply with its obligations under Section 6.1 of the Merger Agreement to seek and obtain consent before deviating from its obligation to conduct its business in the ordinary course and "preserve substantially intact the material components of its current business organization." Twitter's conduct in firing two key, high-ranking employees, its Revenue Product Lead and the General Manager of Consumer, as well as announcing on July 7 that it was laying off a third of its talent acquisition team, implicates the ordinary course provision. Twitter has also instituted a general hiring freeze which extends even to reconsideration of outstanding job offers. Moreover, three executives have resigned from Twitter since the Merger Agreement was signed: the Head of Data Science, the Vice President of Twitter Service, and a Vice President of Product

Management for Health, Conversation, and Growth. The Company has not received Parent's consent for changes in the conduct of its business, including for the specific changes listed above. The Company's actions therefore constitute a material breach of Section 6.1 of the Merger Agreement.

Accordingly, for all of these reasons, Mr. Musk hereby exercises X Holdings I, Inc.'s right to terminate the Merger Agreement and abandon the transaction contemplated thereby, and this letter constitutes formal notice of X Holding I, Inc.'s termination of the Merger Agreement pursuant to Section 8.1(d)(i) thereof.

Sincerely,

/s/ Mike Ringler
Mike Ringler
Skadden, Arps, Slate, Meagher & Flom LLP

cc:
Katherine A. Martin, Wilson Sonsini Goodrich & Rosati, Professional Corporation
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EFiled: Jul 27 2022 04:34PM EDT
Transaction ID 67866842
Case No. 2022-0613-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWAR

TWITTER, INC., Plaintiff, v. ELON R. MUSK, X HOLDINGS I, INC., and X HOLDINGS II, INC., Defendants.	C.A. No. 2022-0613-KSJM

[PROPOSED] ORDER GOVERNING CASE SCHEDULE

WHEREAS, Plaintiff Twitter, Inc. ("Plaintiff") filed its Verified Complaint (the "Complaint") on July 12, 2022, against defendants Elon R. Musk, X Holdings I, Inc., and X Holdings II, Inc. (collectively, "Defendants"), as well as a Motion to Expedite Proceedings, which the Court granted on July 19, 2022;

IT IS HEREBY ORDERED as follows:

1. The following schedule shall govern the proceedings in this matter:

	Event	**Date**
(a)	Defendants to file answer to Complaint.	July 26, 2022 [July 26, 2022]
(b)	Parties to serve initial requests for production of documents and initial interrogatories, which may be multiple requests.	July 28, 2022 [July 28, 2022]

(c)	Parties to serve initial discovery on third parties.	July 28, 2022 [July 28, 2022]
(d)	Identification of Opening Expert Witnesses and general subject matter of expert testimony.	August 15, 2022 [August 8, 2022]
(e)	Deadline to serve final requests for production of documents and interrogatories (later requests permissible for good cause only).	August 15, 2022 [August 8, 2022]
(f)	Parties to substantially complete document productions. The Parties will undertake reasonable efforts to prioritize productions responsive to specific requests identified by opposing counsel on a rolling basis in advance of this date.	August 28, 2022 [August 24, 2022]
(g)	Exchange of privilege logs.	September 5, 2022 [August 31, 2022]
(h)	Exchange of Opening Expert Reports and production of all materials relied upon by Experts and not produced previously by the parties.	September 9, 2022 [September 2, 2022]
(i)	Parties to serve initial list of trial witnesses (including adverse and third-party witnesses).	September 9, 2022 [September 2, 2022]

(j)	Completion of fact discovery, including depositions (except for any fact discovery subject to a motion to compel or motion for protective order pending on this date).	September 29, 2022 [September 23, 2022]
(k)	Plaintiff's counsel to provide Defendants' counsel with a draft of the pre-trial order.	October 7, 2022 [September 30, 2022]
(l)	Identification of Rebuttal Expert Witnesses and general subject matter of rebuttal expert testimony.	September 13, 2022 [September 6, 2022]
(m)	Exchange of Rebuttal Expert Reports and production of all materials relied upon in Rebuttal Expert Reports and not produced previously by the parties.	September 23, 2022 [September 16, 2022]
(n)	Parties to identify any potential trial witnesses not previously deposed or scheduled for deposition and make such witnesses available for deposition.	September 23, 2022 [September 16, 2022]
(o)	Defendants' counsel to provide Plaintiff's counsel with a markup of the draft pre-trial order.	October 10, 2022 [October 3, 2022]
(p)	Completion of expert depositions.	October 7, 2022 [October 3, 2022]

(q)	Parties to serve final list of all trial witnesses. Any new witnesses identified on the final witness lists and not previously deposed shall be made available for deposition by the adverse party within seven (7) calendar days following identification of the witness.	September 29, 2022 [September 22, 2022]
(r)	Filing of motions in *limine* (if any).	October 11, 2022 [October 4, 2022]
(s)	Parties' joint submission of a pre-trial stipulation and proposed order, including identification of trial witnesses and a Joint Exhibit List.	October 12, 2022 [October 5, 2022]
(t)	Simultaneous filing of Pre-Trial Briefs, oppositions to motions in *limine*	October 13, 2022 [October 6, 2022]
(u)	Pre-trial conference.	October __, 2022
(v)	Trial.	October 17-21, 2022 [October 10-14, 2022]

2. The parties may amend the dates set forth in subparagraphs 1(a)-(s) of this Order by written agreement, without Court approval. All other deadlines, the pre-trial conference date, and the trial dates may be amended only by order of the Court.

3. The parties shall meet and confer promptly regarding a confidentiality agreement, search terms, custodians, the form of production of electronically stored information, the form and content of privilege logs, and arrangements for any discovery to be taken from the parties' agents and advisors.

4. Interrogatories shall be limited to a total of ten (10) interrogatories, including subparts, per side. The parties shall not be entitled to serve requests for admissions without leave of Court.

5. Responses and objections to requests for production and interrogatories requesting the identification of individuals, entities, or sources of information directed to the parties shall be due five (5) calendar days after service. Written responses and objections to all other interrogatories directed to the parties shall be due ten (10) calendar days after service.

6. In the event any party moves to compel or moves for a protective order, any opposition to such motion will be due by 11:59 p.m. on the third business day after the motion's filing, and any reply in support of such motion will be due by 11:59 p.m. one business day after the opposition's filing. The parties shall meet and confer before filing any such motion and shall work cooperatively in good faith to resolve discovery disputes without Court intervention whenever possible.

7. Production of documents shall commence on a rolling basis upon receipt of requests for production. The parties shall endeavor in good faith to

minimize the number of document requests served after July 28, 2022. The parties shall likewise endeavor in good faith to minimize the service of third-party discovery after July 28, 2022.

8. Prior to production, the parties shall use their best efforts to deduplicate any electronic material collected (including identical material transmitted between or among multiple custodians). All documents produced shall be produced in electronic form, in accordance with specifications agreed upon by the parties.

9. Subject to any other objections they may have, the parties will produce for deposition or appearance at trial officers, directors, or employees of their affiliates on reasonable notice and without the need for subpoena.

10. The parties will cooperate in good faith regarding arrangements for any discovery taken from a party's agents, advisors, or other third parties, including depositions.

11. The parties shall work together in good faith on the scheduling and location of depositions. To the extent that rolling document production may overlap with the commencement of depositions, the parties will endeavor to stagger the scheduling of depositions to allow custodians for whom document production has been substantially completed to be deposed before custodians for whom production has not been substantially completed. The parties will also endeavor to produce documents relating to any deposition witness reasonably before that witness is

deposed. The parties will not require a subpoena to produce for deposition, on reasonable notice, persons under their respective control, including their respective current directors, officers, employees, and experts and documents under the parties' control in the possession of such persons.

12. Any witness for trial identified pursuant to subparagraphs 1(n) and (q) who has not previously been deposed in this action shall be made promptly available for deposition. No witnesses shall be included on either party's final witness list who were not included on at least one party's initial witness list unless there is a good faith reason for including the new witness. Following the final identification of trial witnesses pursuant to subparagraph 1(q), a party may not designate additional witnesses for trial without leave of Court.

13. The parties shall work together to create a single set of trial exhibits and to cite to them in their pre-trial briefs.

IT IS SO ORDERED this _____ day of _____ 2022.

_____
Chancellor Kathaleen St. J. McCormick