



**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.<sup>1</sup> 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

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<sup>1</sup> 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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