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August 3, 2022

By E-File and Hand Delivery

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

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

Dear Chancellor McCormick:

Plaintiff Twitter, Inc. respectfully seeks the Court's intervention to prevent Defendants from violating this Court's Rules. Court of Chancery Rule 5.1 and Rule 6 provide that Defendants should file the public version of their 163-page Counterclaims and Answer five business days after initial filing, on August 5. In violation of the Rules, Defendants informed Twitter that they intend to file a public version of that filing today, two days early, cutting off Twitter's time to decide whether to propose redactions of the confidential Twitter information included in the Counterclaim. Notwithstanding Twitter's objection, Defendants confirmed late last night their intention to resort to self-help and to file before Twitter decides what information in the filings, if any, to designate as confidential.

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Defendants filed their responsive pleading on Friday, July 29, 2022—17 days after Twitter filed its complaint. This responsive pleading refers extensively to internal Twitter information and data provided to Defendants pursuant to a nondisclosure agreement. Accordingly, and as required by the Stipulation and Order for the Production and Exchange of Confidential and Highly Confidential Information (Dkt. # 31), Defendants filed their responsive pleading under seal. That night, counsel to Defendants sent Twitter’s counsel notice under Rule 5.1 of a proposed public version of their responsive pleading that contained no redactions. Exhibit A (Email from Ryan Lindsay, 7.29.22 @ 5.55pm). The notice stated that Defendants would file their proposed public version “if no one designates Confidential Information in response to this notice by 3:00 p.m. on August 3, 2022.”

That proposed timing is inconsistent with the Court’s Rules. Rule 5.1(d)(1) provides that “the filer of a Confidential Filing shall file a public version [of a Confidential Filing] on the fifth day after the Confidential Filing.” And Rule 6(a) provides that where “the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and other legal holidays shall be excluded in the computation” of time. Because Defendants filed their Counterclaims and Answer

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on Friday, the ensuing Saturday and Sunday are to be excluded from the computation of the five-day period. Accordingly, under the clear language of the Rules, Defendants “shall file a public version” of the Counterclaims and Answer on but not before Friday, August 5.

Twitter promptly so informed Defendants and asked them to confirm that they would not file the public version of their responsive pleading until Friday, August 5. Exhibit B. Defendants refused. They insisted that they were entitled to make their public filing on August 3 under Rule 5.1(e), which governs “[c]onfidential treatment for complaints.” *See id.* As Twitter explained to Defendants, Rule 5.1(e) does not apply, because a responsive pleading is not a “complaint” under the Rules, regardless of whether it contains counterclaims. *See* Exhibit C. Rule 3(a) defines a complaint, and only a complaint, as a filing that commences an action. Consistent with that definition, the Rules refer to “pleadings”—not “complaints”—that state a counterclaim, *see* Rule 13, and separately refer to complaints and counterclaims, *see, e.g.*, Rules 3(aa), 7, 8, 10(b), 12(a)-(b), 18, 22(b), 42, 54(b), 55(d), and 56(b). To further establish the point, Twitter provided Defendants with an example of a public version of a responsive pleading filed by Musk’s counsel five business days after the confidential filing.

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Belying their assertion that Rule 5.1(e) applies because their responsive pleading is a “complaint,” Defendants did not file, as required by Rule 5.1(e)(1), “a cover letter addressed to the Register in Chancery that certifies compliance with this Rule in accordance with Rule 5.1(c).” Defendants also did not “give notice to [Twitter’s] registered agent,” as required by Rule 5.1(e)(2).

Defendants offered no credible response justifying their plan to violate the clear language of the Rules. Exhibit D. They provided no legitimate basis in the text of the Court of Chancery Rules for the determination to cut off Twitter’s time to review their filing. They provided no relevant precedent in this Court’s practice for the interpretation of the Rules they propose. They provided no explanation why their counsel had previously interpreted the Rules contrary to the interpretation they now sponsor. Instead, Defendants asserted that, as a matter of “policy,” a responsive pleading containing a counterclaim should be treated the same as a complaint. *Id.*

In an effort to compromise and avoid burdening the Court with this dispute, Twitter offered to provide its proposed redactions, if any, to Defendants by 3 p.m. on Thursday, August 4—one day early. Defendants rejected this compromise. Exhibit E.

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Few cases attract as much public interest as this one, and Twitter is mindful of this Court's commitment to ensuring maximum public access to its proceedings. Twitter has no interest in proposing any more redactions to Defendants' responsive pleading than are necessary. Twitter seeks this Court's intervention because the Rules should apply as written and equally to all parties, and because, as Twitter explained to Defendants, the additional time to which Twitter is entitled is needed to permit Twitter to do the work required to responsibly minimize proposed redactions.

We regret burdening the Court with this request, but we saw no other means to enforce our adversary's compliance with the Rules. We have attached a proposed form of order compelling Defendants to comply with Rule 5.1(d)(1). We are available should the Court wish to confer with counsel.

Respectfully,



Kevin R. Shannon (No. 3137)

Words: 879

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Enclosures

cc: Register in Chancery (by E-File)
Edward B. Micheletti, Esquire (by E-File)
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