EFiled: Jul 15 2022 04:44PM EDT
Transaction ID 67827012
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

DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION TO EXPEDITE PROCEEDINGS

1. This Court should reject Plaintiff Twitter, Inc.'s ("Twitter") unjustifiable request to rush this $44 billion merger case to trial in just two months. Twitter's bid for extreme expedition rests on the false premise that the Termination Date in the merger agreement ("Agreement") is October 24, glossing over that this date ***is automatically stayed*** if either party files litigation. By filing its complaint, Plaintiff has rendered its supposed need for a September trial moot.

2. Nor does the remainder of the Motion To Expedite ("MTE") remotely justify extreme expedition, instead highlighting the complexity of the case and the impossibility of completing discovery on the timeline proposed. In fact, Twitter has engaged in tactical delay for two months by resisting Defendants' information requests, causing Defendants "obvious prejudice" through an overly compressed schedule. *Juwell Invs. Ltd. v. Carlyle Roundtrip, L.P.*, C.A. No. 2020-0338-JRS, at

92 (Del. Ch. May 14, 2020) (TRANSCRIPT) ("Amex"). Twitter's sudden request for warp speed after two months of foot-dragging and obfuscation is its latest tactic to shroud the truth about spam accounts long enough to railroad Defendants into closing.

3. The core dispute over false and spam accounts is fundamental to Twitter's value. It is also extremely fact and expert intensive, requiring substantial time for discovery. Twitter is a social media platform whose self-professed key performance metric is monetizable daily active users ("mDAU"). Since the Agreement was first signed, new facts have come to light that call into doubt the truthfulness of Twitter's curiously static representation in SEC filings that less than 5% of its accounts are false or spam.

4. On April 28, just three days after signing the Agreement, Twitter restated three years of its mDAU numbers, despite never disclosing the issue to Defendants pre-signing. Post-signing, Defendants promptly sought to understand Twitter's process for identifying false or spam accounts. In a May 6 meeting with Twitter executives, Musk was flabbergasted to learn just how meager Twitter's process was. Human reviewers randomly sampled 100 accounts per day (less than 0.00005% of daily users) and applied unidentified standards to somehow conclude every quarter for nearly three years that fewer than 5% of Twitter users were false or spam. That's it. No automation, no AI, no machine learning.

5. Alarmed, Defendants exercised their information rights to validate Twitter's user claims. At every turn, however, Twitter deliberately erected artificial roadblocks and frustrated Defendants' efforts. Indeed, on June 20 Twitter admitted the information it provided "is insufficient to perform the spam analysis. . . ." Put simply, Defendants asked for—and were refused—the same information that Twitter relies on in making its <5% representation. The limited information Twitter has provided calls its representations into serious doubt. Meanwhile, Twitter has adopted significant personnel changes without consent.

6. Resolving these issues will require complex, technical discovery—including the forensic review and analysis of large swaths of data. Twitter's Complaint only adds to that complexity. Rather than simply challenging Defendants' termination, Twitter has manufactured a hodgepodge of baseless new claims, none of which were ever noticed.[1] The extensive discovery required for all of these claims cannot be completed within six weeks.

7. Given that the Agreement's Termination Date is automatically stayed, it is unnecessary to resolve these weighty considerations on a breakneck schedule.

[1] With the sense of humor of a bot, Twitter claims that Musk is damaging the company with tweets like a Chuck Norris meme and a poop emoji. Twitter ignores that Musk is its second largest shareholder with a far greater economic stake than the entire Twitter board.

Plaintiff's proposed schedule would severely prejudice Defendants by depriving them of a meaningful opportunity to take discovery, conduct expert analysis, and present their case. The only relevant date is the outside date for the debt financing, April 25, 2023. Accordingly, Defendants respectfully request trial on or after February 13, 2023, an extremely rapid schedule for a case of this enormous magnitude that provides the Court time for reasoned adjudication before the true outside date.

BACKGROUND

A. Musk Agrees To Acquire Twitter

8. In early April 2022, Musk began exploring an acquisition of Twitter. (Compl. ¶23) From the start, he announced his intent to "defeat" the "bots" that plague the platform, degrading the user experience. (Compl. ¶67) Although Musk was aware there were bots, he was unaware that Twitter's disclosures regarding mDAU were false. (Ex. 1 at 1[2])

9. On April 25, 2022, Defendants and Musk entered into the Agreement to purchase Twitter. (Compl. ¶39) Rather than engaging in prolonged diligence pre-

[2] Exhibits referenced herein are attached to the Affidavit of Edward Micheletti filed contemporaneously herewith.

signing, Defendants bargained for and received representations and warranties regarding Twitter's condition and broad information rights. (MTE Ex. 3 at 5-6)

10. The Agreement contains a representation that Twitter's SEC filings—and thus its userbase disclosures—are accurate. Specifically, Twitter represented that "none of the Company SEC Documents at the time it was filed . . . contained any untrue statement of a material fact" or omitted facts necessary to make the statements included misleading. (MTE Ex. 1 ("Agreement") § 4.6(a)) Musk relied on this representation—and Twitter's SEC disclosures—to sign the deal. (Ex. 1 at 1)

11. The Agreement also contains an information covenant, requiring Twitter to "furnish promptly to [Defendants] all information concerning the business, properties and personnel of the Company and its Subsidiaries . . . for **any reasonable business purpose related to the consummation of the transactions** contemplated by this Agreement . . . ." (Agreement §6.4) Similarly, Twitter must provide information relevant to obtaining financing. (*Id.* §6.11)

12. Separately, Twitter must "use its commercially reasonable efforts" to run Twitter "in the ordinary course of business." (*Id.* §6.1)

13. Defendants are not obligated to close if (a) the Company has not materially performed the covenants; (b) its representations and warranties are inaccurate and cause a "Company Material Adverse Effect," ("MAE") or (c) an

MAE has occurred and is continuing. (*See id.* §7.2) An MAE means "any change, event, effect or circumstance which [] has resulted in or would reasonably be expected to result in a material adverse effect on the business, financial condition or results of operations of the Company" subject to several carve-outs. (*Id.* at 5)

14. Following a thirty-day cure period, Defendants may terminate the Agreement (i) due to a material covenant breach or (ii) if any of the representations and warranties are untrue as of the closing date and have or will be reasonably expected to result in an MAE. (*See id.* §8.1(d)(i))

15. Either party can also terminate if closing does not occur by October 24, 2022, but that date ***automatically*** extends during litigation. (*Id.* §§8.1(b)(i), 9.9(c)) The debt financing supporting the deal has an outside termination date of April 25, 2023. (MTE Ex. 2 ("DCL") ¶ 15; Ex. 2 at 109)

B. Musk Meets With Twitter To Discuss Bots

16. Just three days after Defendants signed the Agreement, Twitter restated its mDAU figures in its Q-1 2022 10-Q, disclosing it had been double counting users since the first quarter of 2019. (Ex. 3 at 2) By restating its financials, Twitter effectively admitted that changes in mDAU are material and portrayed its "estimates" as precise.

17. Defendants promptly sought to validate Twitter's userbase representations. Thus, on May 6, 2022, Musk met with Twitter's leadership,

including its CEO and CFO to discuss, among other items, how Twitter calculates its spam population. (Comp. ¶71)

18. Musk was stunned to discover that Twitter's process for identifying spam accounts relied on human reviewers to eyeball a minuscule portion of the userbase rather than utilizing the company's machine learning capabilities. (Ex. 4 at 3-4) Musk quickly understood that management did not have a handle on the bot and spam issue.[3] (Ex. 1 at 1)

C. Twitter's Information Covenant Breaches

19. In a series of formal, follow up requests starting on May 9, Defendants requested numerous categories of information regarding userbase issues, including access to the Twitter Firehose[4] (on May 17). (MTE Ex. 3 at 2-5; Ex. 5) One diligence request couldn't be plainer: "How do you estimate that fewer than 5% of mDAU are false or spam accounts?" (Ex. 5) Another request made clear that Mr. Musk also sought to verify Twitter's key metric independently. (Ex. 1 at 1)

[3] Twitter also fudges the timeline to make its pretext argument (MTE ¶4). The post-announcement price of the SOCL social media ETF was essentially unchanged by May 6.

[4] The Firehose reflects all *public* Tweets and likes, but only approximately 30% of the accounts Twitter counts in mDAU interact with the platform in these ways.

20. In response, Twitter has led Defendants on a two-month treasure hunt of delays, technical bottlenecks, evasive answers, and, ultimately, refusals. For example, on June 15, Twitter provided Defendants with something it misleadingly labeled the "Twttr Firehose Internal," which the media has widely reported was Twitter's "Firehose," but it was not, in fact, the Firehose. (Ex. 6 at 1-2) Instead Defendants received a bespoke partial data set structured to make the necessary machine analysis impossible. (*Id.*)

21. Defendants attempted to navigate these roadblocks with requests from Morgan Stanley beginning May 9, and sent follow-up letters on May 25 and 31, and June 6 (putting Twitter on notice of breach), 17, and 29, before ultimately concluding that Twitter was intentionally withholding requested information. (Ex. 5) Twitter itself admitted as much, writing to Defendants on June 20 that while it would finally provide its existing Firehose stream (over a month late), that data would be "insufficient to perform the spam analysis" Defendants sought to conduct, because Twitter still refused to provide the "private data required." (Ex. 7 at 3) Twitter even refused to provide the basic account lists necessary for an analysis based on public information. (*See* Ex. 8 at 4) The user information requested relates directly to the closing conditions, the availability of financing, and transition planning for the business.

D. Twitter's Conduct Raised Red Flags About Whether Its Representations are True and There is an MAE

22. The partial information that Twitter did provide only heightened Defendants' concerns. In its SEC disclosures, Twitter lists mDAU first among its "Key Metrics," touting it as the leading measure of the company's performance, including its much-hyped goal of delivering 315 million mDAU by the fourth quarter of 2023. (Ex. 9; Ex. 10 at 5) mDAU is defined as "people, organizations, or other accounts who logged in or were otherwise authenticated and accessed Twitter on any given day . . . ." (Ex. 10 at 5) Twitter also represents that no more than 5% of these accounts in a given quarter consist of false or spam accounts, and claims to remove them from its mDAU count. (*Id.*)

23. mDAU is critical, according to Twitter, because it bears directly on Twitter's prospective value to users and advertisers. (*Id.* at 13 ("Our mDAU and their level of engagement with advertising are critical to our success and our long-term financial performance")) As Twitter noted at its 2021 Analyst Day "without an audience, there's no revenue." (Ex. 11 at 57) Thus, if Twitter's actual mDAU is materially less than represented, not only has Twitter made a misrepresentation that may justify rescission, but that is also likely to reduce Twitter's value, which could constitute an MAE.

E. Twitter's Ordinary Course Violation

24. Since the deal was signed, Twitter has adopted significant personnel changes that violate its "Ordinary Course" obligations by instituting a hiring freeze that extended to existing offers, firing the company's Revenue Product Lead and Head of Product, and terminating a third of its talent acquisition team. (MTE Ex. 3 at 7-8) Contrary to what the Complaint implies, Twitter did not give notice nor request consent for these employment decisions. (*Id.*)

F. Musk's Termination of the Agreement and Twitter's New Claims

25. Following Twitter's persistent disregard of its contractual obligations, on July 8, 2022, Musk terminated the Agreement. (*Id.*) Until then, Defendants had met all their contractual obligations, devoting substantial resources to pursuing the transaction, including financing. (*Id.*; DCL)

26. On July 12, 2022, Twitter sued Defendants, challenging not only their termination, but introducing blunderbuss claims regarding Defendants' supposed breach of their obligations to close, consummate financing, provide information, consent to operational changes, refrain from disparagement, and preserve confidentiality, most of which are premature and all of which are meritless. (Compl. ¶¶148-155)

ARGUMENT

27. "[T]here is no automatic right to expedition." *Ortsman v. Green*, 2007 WL 702475, at *2 (Del. Ch. Feb. 28, 2007). "[T]he standards for expedition must be considered against the backdrop of the burden imposed on the parties, the Court, and the public, when this Court orders that parties litigate on an expedited schedule." *Amex*, C.A. No. 2020-0338-JRS, at *83.

I. PLAINTIFF'S SCHEDULE IS UNNECESSARY AND UNDULY BURDENSOME

28. Twitter's unjustified bid for an expedited trial in September 2022 must be rejected. Twitter premises its request on a supposed October 24, 2022 "drop-dead date" in the Agreement, (MTE ¶¶3, 6, 35, 38) but obscures that such date is ***automatically extended for litigation***. Specifically, if any suit is brought for specific performance of the Agreement the Termination Date automatically extends to either 20 business days following this action's adjudication or as the court establishes. (Agreement § 9.9(c)) Thus, the only relevant date by which litigation must conclude is the debt's expiration date: April 25, 2023. (DCL ¶15) This alone warrants rejecting Twitter's schedule. *See BFI Waste Sys. of N. Am., Inc. v. Waste Mgmt. Holdings, Inc.*, 1998 WL 671277, at *3 (Del. Ch. Sept. 1, 1998) (denying expedition where contract provided "one hundred day timetable" to resolve disputes and "and [parties] must have understood that a claim of breach would be subject to that bargain").

29. While Twitter has proposed a trial within sixty days (MTE ¶41), this court has observed it would be an "extraordinary feat" to try a complex busted deal case within even five to six months. *The We Co. v. Softbank Grp. Corp.*, C.A. No. 2020-0258-AGB, at 56 (Del. Ch. Apr. 17, 2020) (TRANSCRIPT) ("*WeWork*"). Twitter's request to compress the schedule into a fraction of that time is implausible.

30. Indeed, this case goes well beyond the significant complexities of a typical "busted deal" case, implicating complex data science questions concerning the accuracy of Twitter's disclosures regarding the number of false and spam accounts. (MTE Ex. 3 at 3-7) The factual record regarding these representations will likely involve sifting through ***hundreds of billions*** of actions on Twitter and reviewing related sampling and control processes. (*Id.*) Just the time it will take to load, process and analyze the hundreds of terabytes of relevant data will exceed Plaintiff's hasty schedule.

31. Additional discovery is required regarding all four of Defendants' bases for termination, as well as the makeshift collection of six meritless breach claims Twitter first introduced in its complaint. (Compl. ¶¶75-81, 103-22)

32. Defendants anticipate that these issues will require at least 30-40 fact depositions, and at least 12 expert depositions in total. These include fact depositions of the principals and advisors that negotiated the merger, top management, board members, data science and audit personnel familiar with

Twitter's spam and false account detection procedures, finance and advertising executives, and executives knowledgeable about Twitter's operational changes. It will also require 30(b)(6) depositions of witnesses who can explain Twitter's information systems and processes for identifying spam and false accounts, as well as its procedures and controls governing Twitter's disclosures. Experts may include advertising, data science, valuation, finance, and industry experts.

33. Completing this amount of discovery by early September is unworkable, let alone readying the case for trial that same month. (MTE ¶41) Instead, holding trial in February 2023 would balance the interests of the parties and the Court by allowing sufficient time for a merits judgment and appeal before the debt expires.

34. Nearly every case Twitter cites to support its lightning-speed schedule either involved a genuine drop dead date or a stipulated trial date. *See Hexion Spec. Chems., Inc. v. Huntsman Corp.*, C.A. No. 3841-VCL, at 5, 37 (Del. Ch. July 9, 2008) (TRANSCRIPT) (drop-dead date within a month after trial); *Gilat Satellite Networks Ltd. v. Comtech Telecomms. Corp.*, C.A. No. 2020-0605-JRS, at 51-52 (Del. Ch. July 27, 2020) (TRANSCRIPT) (drop-dead date four weeks after trial); *Forescout Techs., Inc. v. Ferrari Grp. Holdings, L.P.*, C.A. No. 2020-0385-SG, at 4-7 (Del. Ch. May 26, 2020) (TRANSCRIPT) (stipulated drop-dead date seventeen days after trial).

35. Finally, while Plaintiff cites the uncertainty surrounding Twitter's ownership and market conditions as a basis for hyper-expedition (MTE ¶¶31-37) that is a truism in all busted deal cases. As Plaintiff acknowledges "the termination date provides an indication of how long the parties intended [] to be in the contractual limbo of operating subject to interim covenants." (*Id.* ¶35) Here, by including a provision automatically extending the Termination Date through litigation, the parties expressed their intent to ensure sufficient time to adjudicate any disputes.

36. Given the April 25, 2023 outside date for financing, this case should proceed on a pace akin to *Snow Phipps Grp., LLC v. KCAKE Acq. Inc.*, C.A. No. 2020-0282-KSJM, at 9 (May, 21 2020) (TRANSCRIPT) (trial seven months after filing) or *WeWork*, C.A. No. 2020-0258-AGB, at 51 (trial nine months after filing).

II. PLAINTIFF'S DELAY CONTRIBUTED TO ANY CURRENT NEED FOR EXPEDITION

37. Extreme expedition is also unwarranted because any exigency stems from Plaintiff's strategic delay. Defendants first requested information regarding mDAU on May 9, 2022. (MTE Ex. 3 at 2-5) Had Twitter either promptly complied with its contractual obligations or informed Defendants that it would not, this dispute would have ripened in early May. Plaintiff's attempt to impose "the burdens of expedited proceedings upon the Defendants and the Court cannot be reconciled with [its] failure to proceed with alacrity." *BMEF San Diego, L.L.C. v. Gray East Village San Diego L.L.C.*, 2014 WL 4923722, at *1 (Del. Ch. Sept. 30, 2014); *Amex*, C.A.

No. 2020-0338-JRS, at 92-93 (denying expedition and admonishing plaintiff for its delay).

CONCLUSION

38. Accordingly, the Court should adopt Defendants' schedule.

Respectfully submitted,

/s/ Edward B. Micheletti
Edward B. Micheletti (ID No. 3794)
Lauren N. Rosenello (ID No. 5581)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000

Attorneys for Defendants
Elon R. Musk, X Holdings I, Inc., and X Holdings II, Inc.

WORDS: 2,996

OF COUNSEL:

Alex Spiro
Andrew J. Rossman
Christopher D. Kercher
Silpa Maruri
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010

DATED: July 15, 2022

CERTIFICATE OF SERVICE

I, Edward B. Micheletti, hereby certify that on July 15, 2022, a copy of Defendants' Opposition to Plaintiff's Motion to Expedite Proceedings with Transmittal Affidavit, Exhibits 1-11 and Compendium of Selected Authorities was served electronically via File & Serve*Xpress* upon the following counsel of record:

OF COUNSEL:

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

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

Peter J. Walsh, Jr. (ID No. 2437)
Kevin R. Shannon (ID No. 3137)
Christopher N. Kelly (ID No. 5717)
Mathew A. Golden (ID No. 6035)
POTTER ANDERSON
& CORROON LLP
1313 North Market Street
Hercules Plaza, 6th Floor
Wilmington, Delaware 19801
(302) 984-6000

Attorneys for Plaintiff Twitter, Inc.

/s/ Edward B. Micheletti
Edward B. Micheletti (ID No. 3794)