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August 9, 2022

**REDACTED VERSION -**

**Filed on August 16, 2022**

**BY HAND DELIVERY & EFILE**

The Honorable Kathaleen St. J. McCormick  
Chancellor  
Court of Chancery  
Leonard L. Williams Justice Center  
500 N. King Street, Suite 11400  
Wilmington, Delaware 19801

RE: *Twitter, Inc. v. Musk, et al.*,  
C.A. No. 2022-0613-KSJM (Del. Ch.)

Dear Chancellor McCormick:

Defendants write the Court pursuant to paragraph 14(d) of the Court's  
Order Governing Case Schedule to respectfully seek an order compelling  
Plaintiff to produce discovery from specific custodians.

### **PRELIMINARY STATEMENT**

This matter is scheduled for trial on October 17 on Twitter's claim *and* on Defendants' Counterclaims, including its Counterclaims alleging fraud. Those Counterclaims, which Twitter has not sought to dismiss, are based on bona fide and well-pleaded allegations that Twitter has fraudulently induced Defendants into entering the Merger Agreement through SEC disclosures that falsely represented (1) the rate of false or spam accounts on Twitter's platform and (2) the significance of mDAU—the number of “monetizable daily average users”—to Twitter's long term growth. As set forth in the Counterclaims, preliminary analysis based on Twitter's own information and documents has already revealed that

- a) false and spam accounts make up at least 10% of Twitter's mDAU, more than twice than Twitter's estimate, (Counterclaims ¶¶ 117-19);
- b) false and spam accounts comprise a disproportionate portion of mDAU that generates ad revenue, comprising 14% of that group, (*id.* ¶¶ 120-21);
- c) contrary to its representations, Twitter does not remove suspended accounts from its quarter-end mDAU figures, (*id.* ¶¶ 114, 122-29);

- d) Twitter failed to disclose that nearly a third of Twitter's mDAU see no ads, rendering its disclosures regarding mDAU materially false, (*id.* ¶ 138);
- e) Twitter failed to disclose that a small group (7%) of the most engaged users generate more than 50% of Twitter's revenue, (*id.* ¶¶ 139-41); and
- f) Twitter failed to disclose that over half of mDAU growth is among the group that sees no ads, and less than 1% of mDAU growth is among the most engaged user group generating the bulk of Twitter's revenue, (*id.* ¶¶ 142-46).

Twitter disputes these findings in its Answer, putting them squarely at issue for trial. Defendants are therefore unquestionably entitled to discovery of relevant materials within Twitter's possession, custody, and control.

Those materials are likely to be in the possession of Twitter employees, past and present, who have or had day-to-day responsibilities for setting Twitter's policies for counting mDAU; evaluating its utility compared to other key performance indicators and metrics; measuring and projecting Twitter's financial and operational performance; interacting with investors and advertisers; and otherwise performing functions within Twitter that bear upon Twitter's representation that mDAU is "the best way to measure [Twitter's] success." To that end, Defendants have spent weeks

seeking Twitter's agreement to collect and produce documents from custodians with such day-to-day responsibilities—to no avail. Instead, Twitter has persisted in offering to collect documents primarily from a self-selected list of c-suite and other senior management employees and outside directors, and has persistently refused to engage with Defendants to either identify additional custodians with day-to-day responsibilities or explain why the individuals Defendants have identified are not appropriate custodians.

Twitter's refusal to collect and produce documents from the employees Defendants have identified is problematic in light of documents produced by Twitter in discovery to date that conclusively demonstrate the relevance of those employees. As discussed further herein, the limited discovery produced to date confirms that many of the individuals Defendants have requested as custodians based on publicly available information were in fact directly involved in internal discussions regarding the calculation of mDAU, among other relevant topics.

Twitter should not be permitted to stymie Defendants' discovery efforts and frustrate Defendants' ability to prove their case by depriving

Defendants of discovery from custodians whose relevance cannot be—*and has not been*—questioned, particularly where Twitter has at the same time launched a sweeping discovery campaign. To date, Twitter has issued *seventy-one* third-party subpoenas, including to dozens of entities and individuals with no involvement in issues relevant to this case, and will likely seek multiple custodians from these entities. Accordingly, pursuant to Paragraph 14(d) of the Order Governing Case Schedule, Defendants respectfully request an order compelling Twitter to collect and produce documents from Defendants’ requested document custodians, as set forth in the attached proposed order.

## **BACKGROUND**

### **A. Defendants Have Made Detailed Allegations of Fraudulent Misrepresentations by Twitter<sup>1</sup>**

Twitter and Defendants are parties to a Merger Agreement executed on April 25, 2022 in which Twitter specifically represented that none of its 2022 SEC filings “contained any untrue statement of a material fact or omitted to state any material fact...” (Agreement §4.6(a)) That representation was critical to Defendants’ decision to enter into the Agreement, because those SEC filings contained specific statements and representations regarding Twitter’s mDAU, a measure of the “people, organizations, or other accounts who logged in or were otherwise authenticated and accessed Twitter on any given day...” (Counterclaims ¶ 27) Twitter has represented to the marketplace, including through statements of senior employees, that mDAU is “the best way to measure” Twitter’s success. (*Id.* ¶ 66)

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<sup>1</sup> Defendants provide a short summary of the facts most relevant to this motion. For a more thorough background, Defendants refer the Court to their Counterclaims. (*See* Dkt. 42)

When evaluating a bid to purchase Twitter, Defendants and their independent advisors at Morgan Stanley relied upon mDAU to determine an appropriate purchase price. (*Id.* ¶ 166) Only three days after the parties executed the Agreement, however, Twitter re-stated its calculations of mDAU for every quarter dating back to Q4 2020. (*Id.* ¶ 79) The limited discovery to date has already revealed that Twitter knew about the issues requiring this restatement as early as March 2022, and yet made no mention of the issue throughout its negotiations with Defendants, including when it represented that its SEC disclosures were accurate. (*Id.* ¶¶ 70-80) When Defendants subsequently asked senior Twitter executives—including CEO Parag Agrawal and CFO Ned Segal—about the mDAU metric, they were shocked to discover that these senior executives were unable to answer even simple questions, including how Twitter determines the percentage of mDAU that are actually false and spam accounts. (*Id.* ¶¶ 82-84) Together, Twitter’s surprise restatement of its mDAU calculations and senior management’s inability to speak knowledgeably about Twitter’s mDAU calculations caused Defendants serious concern regarding the reliability of Twitter’s SEC disclosures.

Accordingly, as detailed in the Counterclaims, Defendants attempted to exercise their information rights under the Agreement to obtain information that would confirm—or refute—Twitter’s representations regarding mDAU and false or spam accounts. (*Id.* ¶¶ 87-108) Those efforts were comprehensively stymied: although Twitter ultimately provided limited access to certain data sets regarding user activity, Twitter has admitted that the data provided is insufficient to test its calculations regarding the prevalence of false and spam accounts. (*Id.* ¶ 102)

Nevertheless, preliminary analysis of that partial data suggests that Twitter’s user base representations—including the representations incorporated into the Merger Agreement—are false or materially misleading. For example, Twitter has represented that “the average of false or spam accounts during the fourth quarter of 2021 represented fewer than 5% of our mDAU during the quarter.” (*Id.* ¶ 111) Yet analysis of Twitter’s own ‘Firehose’ data feed—which reflects the activity of the roughly 30% of Twitter accounts that perform public actions—reveals that ***thirty-three percent*** of these accounts were false or spam accounts. (*Id.* ¶ 117) Even if every one of the other 70% of Twitter accounts (not reflected in the Firehose)



were legitimate, this preliminary analysis suggests that *at least* 10% of Twitter's mDAU is comprised of false or spam accounts, rendering Twitter's 5% representation false. (*Id.* ¶ 118)

Similarly, the limited materials produced by Twitter to date reveal that Twitter's affirmative statements touting mDAU and its growth as a "key metric," "the best way to measure [Twitter's] success," and the "primar[y] driver" of Twitter's "advertising revenue growth," were rendered materially misleading by, among other things, Twitter's failure to disclose adverse information about its inability to generate revenue from many mDAU and the declining "quality" of its mDAU and mDAU growth. (*Id.* ¶¶ 130-46)

For example, no reasonable investor reviewing Twitter's disclosures would have understood that nearly one-third of user accounts in Twitter's mDAU metric do not see *any* ads, (*id.* ¶ 138); that most of Twitter's ad revenue is generated by only 7% of mDAU, (*id.* ¶ 141); that more than 50% of the mDAU growth touted by Twitter saw zero ads, (*id.* ¶ 142); or that growth in user accounts that account for most of Twitter's ad revenue represents less than 1% of overall mDAU growth, (*id.* ¶ 142).

Together, these preliminary findings—based on Twitter’s own documents and data—demonstrate the materially misleading nature of Twitter’s representations regarding critical aspects of its finances and performance, which Defendants have alleged Twitter knowingly failed to disclose for the purpose of inducing Defendants to enter into the Agreement. (*Id.* ¶¶ 109-49) Twitter contests Defendants’ allegations, which Defendants therefore intend to prove at trial. Defendants are entitled to “broad and far-reaching” discovery from Twitter of “all relevant information, however remote,” if there is “any possibility that the discovery will lead to relevant evidence.” *In re Oxbow Carbon LLC Unitholder Litig.*, 2017 WL 959396, at \*1 (Del. Ch. Mar. 13, 2017) (citations omitted). Yet Twitter is frustrating Defendants’ ability to obtain that evidence by refusing to collect documents from the employees most likely to possess e-mails and other materials that demonstrate the falsity of Twitter’s representations.

**B. Twitter Has Refused to Collect from Relevant Custodians**

From the moment this Court granted Twitter’s motion to expedite on July 19, Defendants have tried to reach agreement with Twitter regarding an appropriate list of custodians. The parties’ correspondence on this issue is

attached hereto as Exhibit 1, with cited exchanges highlighted for the Court's convenience; Defendants recount the key points of that correspondence in brief.<sup>2</sup>

Following initial correspondence, the parties met and conferred on July 26, 2022 to discuss various discovery issues. As reflected in Plaintiff's summary of that call, Defendants requested the production of organizational charts to assist in the identification of relevant custodians. (Ex. 1 at 45) Plaintiff responded that it did not create such charts in the ordinary course, and it therefore "requested that [Defendants] identify specific groups/functions within Twitter from which [Defendants] are seeking documents..." (*Id.*)

Defendants provided that information during a meet and confer on July 28. In correspondence exchanged on July 28 and 29, Defendants expressly identified the functions within Twitter from which they sought discovery, including specifically "spam detection and prevention," "the

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<sup>2</sup> The Designated Discovery Liaison was involved in all relevant discovery communications. Defendants exhausted all reasonable measures to narrow the issues before the Court.

mDAU audit process,” “the relationship between mDAU and advertising revenues,” “modeling the projected performance,” “determining they key performance indicators and metrics,” and “creating financial and operational projections.” (*Id.* at 36-38) Defendants specifically indicated that they sought custodians relevant to these functions from within Twitter’s Security, Engineering, Products/Revenue, Investor Relations, Finance/Accounting, and Legal departments.” (*Id.* at 38)

Twitter made an initial proposal of custodians on July 30 that was plainly designed to focus on Twitter’s own claims: of the nineteen individuals listed, twelve were either independent members of the board of directors, C-suite executives, or the company’s general counsel, and Plaintiff acknowledged in its descriptions of these individuals that their relevance (if any) related only to their involvement in the negotiation of the Agreement. (*Id.* at 32-34) Twitter likewise proposed three other employees based on their “management” or “coordinating” (i.e. non-substantive) roles in responding to Defendants’ pre-termination information requests. (*Id.*)

Only four of Twitter’s proposed custodians—[REDACTED], who manages the mDAU audit process; [REDACTED], who interacts with

Twitter investors on matters contained in the company's SEC disclosures; [REDACTED], who leads the team responsible for calculating mDAU; and [REDACTED], who is responsible for combatting spam—had responsibilities related to the functions Defendants had previously identified. Moreover, while these four were plainly relevant custodians, Plaintiff's descriptions indicated that they occupied senior positions. As Defendants subsequently explained, they sought "not only the heads of the relevant departments ... but also those with day-to-day roles and responsibilities *within* those departments." (*Id.* at 29)

The parties engaged in a lengthy call on July 31, during which they discussed the parties' custodian proposals; in summary correspondence the same day, Plaintiff stated it "intend[s] to devote significant attention to this issue as a priority matter to obtain answers to [Defendants'] open questions and determine whether it is appropriate to supplement [Plaintiff's] proposed email custodian list based on the further details [Defendants] provided." (*Id.* at 27) To assist Plaintiff in that effort, Defendants provided a further detailed explanation of the functions within Twitter for which it sought discovery and

explained in detail its concerns regarding the apparent inadequacy of the custodians Plaintiff had proposed. (*Id.* at 22-24)

Despite its promise to promptly address Defendants' concerns, Plaintiff initially provided only a partial response. (*Id.* at 20-21) When Defendants pressed for a more comprehensive response, (*id.* at 18-19), Plaintiff responded by wrongly accusing Defendants of having "no genuine interest in reaching agreement" and declaring its intent to unilaterally "bring these discussions to a close" by offering to "consider adding" one additional e-mail custodian and indicating that it was "willing to discuss" one other. (*Id.* at 15-16)

In light of Twitter's refusal to provide further information regarding the types of custodians Defendants sought, Defendants were required to compile their own list of current and former Twitter employees who, based on publicly available information, appear to have (or have had) day-to-day responsibility for the functions in question relevant to Defendants' Counterclaims. Defendants provided that list to Plaintiffs on August 3, noting that Twitter was "best placed to confirm the roles and responsibilities

of these individuals” and asking Plaintiff to either add the listed individuals as custodians or explain why they should not be added. (*Id.* at 12-14)

Instead, Plaintiff responded by once again wrongly accusing Defendants of “not [being] interested in reaching a reasonable agreement with Twitter on this issue” before offering to add two custodians to its original list. (*Id.* at 10) Defendants responded the next day, explaining once again that Twitter’s proposed set of custodians almost entirely ignored the functions within Twitter that are relevant to Defendants’ Counterclaims. (*Id.* at 6-9)

In response to Twitter’s complaints regarding the number of custodians Defendants had identified, and based on further review of public information, Defendants presented a revised proposal focusing more specifically on custodians Defendants believed to be relevant, and agreeing to forego discovery from seven of Twitter’s proposed custodians. (*Id.*) Defendants also, once again, expressly “invite[d] [Plaintiff] to engage with us in a meaningful dialog regarding the individuals we have identified,” and offered to meet and confer to that end. (*Id.*)

Instead, Plaintiffs sent a further revised proposal on August 7 that accepted Defendants' offer to *remove* seven previously proposed custodians while proposing to *add* just three of the employees Defendants had identified. (*Id.* at 2-4) In addition, and apparently in an effort to inflate the number of custodians on its list, Plaintiff offered to search the Twitter e-mail accounts of *twenty-three* third-party contractors who apparently played a role in the mDAU audit process overseen by [REDACTED]. (*Id.*) Putting aside those contractors (about whom Plaintiff has provided no specific information), Plaintiff's proposal amounted to eighteen e-mail custodians—fewer than initially proposed on July 30—of whom only seven even arguably had day-to-day responsibilities for the functions at issue, and only three of whom Defendants proposed. Plaintiff continues to wholly ignore the more than twenty other custodians Defendants have identified and requested.

**C. Twitter's Initial Document Production Confirms Its Custodian List Is Inadequate**

Twitter's refusal to collect from the custodians Defendants have identified is particularly inappropriate given its production of documents that demonstrate the direct involvement of many of those employees in



discussions relating to the calculation and application of mDAU within Twitter. For example, Twitter has produced minutes of a meeting of its Disclosure Committee reflecting a discussion of [REDACTED]

[REDACTED]<sup>3</sup> This committee is almost exclusively comprised of individuals whom Twitter has not offered as custodians—including three members and one presenter who appear on Defendants’ list of proposed custodians.<sup>4</sup>

Similarly, documents produced by Twitter to date demonstrate that Kayvon Beykpour, Twitter’s former General Manager of Consumer—whom Twitter terminated in violation of its ordinary course covenant, (Counterclaims ¶¶ 186-88)—was intimately involved with many mDAU calculation and spam issues. For example, documents reflecting Twitter’s quarterly [REDACTED] show Mr. Beykpour as the “owner” of two initiatives: (1) [REDACTED]

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<sup>3</sup> (Exhibit 2)

<sup>4</sup> Bruce Falck, Kayvon Beykpour, and [REDACTED] were committee members. [REDACTED] presented projections to the committee.

\_\_\_\_\_”<sup>5</sup> and (2) an initiative to \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_6

Yet Twitter has repeatedly rejected Defendants' request to include Mr. Beykpour as a document custodian.

## ARGUMENT

“The scope of discovery pursuant to Court of Chancery Rule 26(b) is broad and far-reaching.” *Oxbow*, 2017 WL 959396, at \*1 (quotations omitted). “Relevance must be viewed liberally, and discovery into relevant matters should be permitted if there is any possibility that the discovery will lead to relevant evidence.” *Id.*, *see also id.* at \*4 (“The objecting party must show specifically how each discovery request is burdensome or oppressive by submitting affidavits or offering evidence revealing the nature of the burden.” (internal quotations omitted)).

5 (Exhibit 3 at -14390)

<sup>6</sup> (Exhibit 4 at -14242)

As set forth below, Twitter has neither agreed to collect documents from an adequate set of custodians nor explained—for any of the custodians it has rejected—why the custodians Defendants proposed for each function would be inappropriate. Defendants therefore seek an order compelling Twitter to collect documents from the employees Defendant has identified.

**Kayvon Beykpour.** Defendants have alleged that Twitter’s statements about mDAU are misleading in light of Twitter’s failure to disclose adverse information about, among other things, the declining “quality” of its mDAU. Initial document discovery has revealed that Mr. Beykpour has information directly relevant to these allegations. Specifically, documents reflecting Twitter’s quarterly [REDACTED] show Mr. Beykpour as the “owner” of an initiative addressing Twitter’s [REDACTED] [REDACTED]<sup>7</sup> and an initiative to [REDACTED] [REDACTED]<sup>8</sup> Defendants also allege that Twitter terminated Mr. Beykpour in

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<sup>7</sup> (Exhibit 3 at -14390)

<sup>8</sup> (Exhibit 4 at -14242)

violation of its ordinary course covenant. (Counterclaims ¶ 188) In light of his clear relevance to several key issues, Twitter’s refusal to include Mr. Beykpour as a custodian, or even provide a justification for its refusal, is simply inexcusable.

*Custodians Responsible For Eliminating Spam.* Defendants have alleged that Twitter’s use of human reviewers to count false or spam accounts was unreasonable in light of the rigorous, advanced methods Twitter applied elsewhere. (See Counterclaims ¶ 83) These individuals will possess documents demonstrating the methods Twitter has available to *eliminate* spam and call into question why those methods are not applied to *quantify* spam.

To date, Twitter has offered to collect relevant documents from (1) [REDACTED], whom Twitter has identified as overseeing Twitter’s efforts to “combat impermissible conduct [Twitter],” (2) [REDACTED] [REDACTED] involved with Twitter’s policies for detecting false or spam accounts, and (3) [REDACTED]

[REDACTED]

Although these custodians are undoubtedly relevant, Twitter has refused to also collect from: (a) [REDACTED], who Defendants believe is likely to possess documents reflecting Twitter's strategies for identifying spam and false accounts on Twitter independent of the false and spam account audit process; (b) [REDACTED] an engineering manager who leads a team of thirty-five professionals [REDACTED] according to his public profile; (c) [REDACTED] who is expected to possess materials relating to the development of Twitter policies relating to Twitter's analysis of and response to spam and false accounts; (d) [REDACTED], who is focused on fighting misinformation, a subcategory of spam and false accounts which is largely unaddressed by Twitter's spam audit policies<sup>9</sup>; and (e) [REDACTED], whose responsibilities according to public reports encompassed information

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<sup>9</sup> (See generally Exhibit 5)

security, including preventing hackers from compromising accounts and using them to post spam.

*Custodians Involved in Calculating mDAU.* Defendants' allegations have placed Twitter's methods for calculating mDAU and Twitter's reliance on mDAU as a KPI at issue. Documents relating to the calculation of mDAU are necessary to establish that mDAU was selected not because it is the best measure of Twitter's growth, but, in part, because (1) Twitter's previous metric, monthly active users ("MAU") was declining, (*id.* ¶ 26), and (2) mDAU was a manipulable number that allowed Twitter executives to reach bonus targets, (*id.* ¶¶ 156-59).

To date, Twitter has offered to collect relevant documents from just [REDACTED], whom Twitter has identified as the data scientist responsible for calculating mDAU. Although [REDACTED] is undoubtedly relevant, Twitter has refused to also collect from [REDACTED] [REDACTED] who oversees Twitter's analysis not just of mDAU, but also other key metrics that Twitter measures. [REDACTED] is expected to possess relevant materials relating to metrics that are better proxies for revenue than mDAU.

***Custodians Responsible For Financial Planning & Analysis.***

Discovery is necessary regarding Twitter's financial projections and analysis. To date, Twitter has offered to collect relevant documents only from [REDACTED]. Although [REDACTED] is undoubtedly relevant, Twitter has refused to also collect from [REDACTED], who, importantly, held his role from 2019-21 when mDAU was adopted over MAU and other metrics.

***Custodians Responsible For Twitter's Operational Strategy.***

Discovery is also necessary regarding Defendants' allegations that Twitter has disguised its long-term financial weakness with its mDAU disclosures. Defendants reasonably expect to find that individuals involved with operational projections will rely on more common industry metrics, (*id.* ¶ 135), such as engagement per day or time spent on the app (which correlates to power-users that generate most revenue), while individuals involved with external reporting focus largely on mDAU given Twitter's misrepresentations that mDAU is a better predictor of revenue.

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<sup>10</sup> [REDACTED] appears in produced board minutes. (Exhibit 6 at -23632)

Early discovery has already borne out the obvious divide between internal, operational outlooks and external, financial presentations. Documents recently produced by Twitter include an *internal* Q1 Operating Review document, which tracks metrics other than mDAU; specifically, the document evaluates [REDACTED]

[REDACTED]<sup>11</sup> mDAU is given just a throwaway mention in one line referencing Twitter's global mDAU target, but is not actually correlated to revenue or revenue growth in any way. This document stands in stark contrast to an *external* Company Overview presentation from a February 2022 road show to investors, which links mDAU to revenue,<sup>12</sup> and extensively discusses the number and growth of mDAU,<sup>13</sup> but fails to even

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<sup>11</sup> (Exhibit 7 at -13246)

<sup>12</sup> (Exhibit 8 at -5028)

<sup>13</sup> (*Id.*)



reference engagement in its key figures slide.<sup>14</sup> This also directly contradicts the disclosure in Twitter's 2021 10-K that "advertising revenue growth is primarily driven by increases in mDAU." Thus, comparing the discussions among custodians within these groups is highly relevant.

Twitter has tellingly refused to collect from any custodians with operational responsibilities. Twitter should collect from (a) [REDACTED] [REDACTED],<sup>15</sup> [REDACTED] responsible for Twitter's revenue durability and operational strategy, who will have documents showing that operational planning was not focused on mDAU<sup>16</sup>; and (b) [REDACTED]  
[REDACTED]

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<sup>14</sup> (*Id.* at -5027) Instead, mentions of Engagement are relegated to small print on a slide about forward-looking statements.

<sup>15</sup> [REDACTED] appears in produced board minutes. (Exhibit 6)

<sup>16</sup> [REDACTED] also holds a dual role as [REDACTED], and will likely possess responsive documents from that role as well, given Mr. Agrawal's central involvement in negotiating the Merger Agreement.

<sup>17</sup> [REDACTED] appears in produced board minutes. (Exhibit 6)

who was responsible for developing Twitter's long range plans, including Twitter's 315M mDAU goal.

*Custodians Involved In Preparing Twitter's Disclosures.*

Defendants allege that Twitter's disclosures are not accurate for the reasons discussed above and in ¶¶110-149 of the Counterclaims. Defendants require discovery into the individuals who prepared Twitter's disclosures, as Defendants reasonably expect their documents will reveal they were aware that alternative metrics should be disclosed over mDAU. For example, draft February 2022 minutes of Twitter's Disclosure Committee meeting indicate that [REDACTED]

[REDACTED]<sup>18</sup> To date, Twitter has offered to collect relevant documents from (1) [REDACTED], Twitter's [REDACTED], (2) [REDACTED], and (3) **Vijaya Gadde**, another Twitter in-house attorney.

Twitter has refused to collect from [REDACTED], Twitter's [REDACTED] [REDACTED]—a non-lawyer responsible for presenting

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<sup>18</sup> (Exhibit 2)

financial results to the disclosure committee.<sup>19</sup> As a financial professional involved with Twitter's disclosures, [REDACTED] will likely possess relevant, unique, non-privileged documents relating to Twitter's financial reporting (as opposed to preparation of its accounting statements) that Twitter's proposed custodians do not possess.

***Custodians With Insight Into Twitter's Advertisers & Revenue Generation.*** In their Counterclaims, Defendants allege that Twitter's SEC disclosures are false because although Twitter represents that mDAU drives future profitability, in fact, Twitter realizes a majority of its revenue from a small minority of its mDAU. Documents regarding Twitter's advertisers and its revenue generation bear directly on whether mDAU growth drives advertising revenue. (*Id.* ¶¶ 142-46)

Twitter has refused to collect from any custodians in this category. Defendants believe Twitter should collect from: (a) [REDACTED]  
[REDACTED], (b) [REDACTED]  
[REDACTED], (c) [REDACTED], Twitter's former head of [REDACTED]

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<sup>19</sup> (*Id.*)

[REDACTED], (d) [REDACTED] responsible for ad sales and ad agency relationships, (e) [REDACTED] [REDACTED], and (f) **Bruce Falck**, Twitter's former GM of Revenue Product, responsible for monetizing Twitter, who was terminated in breach of the ordinary course provision, (Counterclaims ¶¶ 186-87) These custodians are all likely to possess unique documents due to their varied roles in setting revenue policy, developing monetization products, tracking ad performance, responsibility for ad sales, and ad engagement prediction.

*Custodians Involved in Engineering and Product Design.*

Custodians responsible designing Twitter's product are also relevant because they may possess documents establishing either that product improvements were targeted not at mDAU but at other metrics that truly drive revenue, or that product improvements were designed to prioritize mDAU growth over elimination of false and spam accounts.

Twitter has refused to collect from any custodians in this category. Defendants believe Twitter should collect from: (a) [REDACTED] [REDACTED] who will possess documents relevant to

efforts to improve the platform, (b) [REDACTED], responsible for making engineering decisions to drive mDAU, (c) [REDACTED], who is responsible for designing products to improve revenue, and (d) [REDACTED], who was responsible for designing products to fight misinformation spam.

*Custodians Responsible for HR Functions.* Defendants challenge several of Twitter's employment decisions as being made in violation of the ordinary course covenant. (Counterclaims ¶ 221) Twitter has refused to collect from any custodians in this category. Defendants believe Twitter should collect from [REDACTED], who is likely to possess documents relevant to the challenged employment actions.

*Custodians Involved in Auditing False And Spam Accounts.* To date, Twitter has offered to collect relevant documents from (1) [REDACTED], whom Twitter has identified as the sole employee responsible for overseeing Twitter's third-party audit quantifying false and spam accounts within its calculation of mDAU; and (2) **twenty-three third-party consultants from Cognizant** responsible for actually performing Twitter's

false or spam account audit. Twitter's collection from twenty-three consultants is a transparent attempt to artificially inflate its total number of custodians—while Defendants do not contest their relevance, Defendants would be willing to accept production from a limited number of Cognizant employees with oversight responsibility.

In addition to the custodians discussed above, the parties have agreed on the relevance of certain Twitter executives, board members, and other employees involved in negotiating the Merger Agreement.<sup>20</sup>

\* \* \*

Twitter cannot genuinely dispute that the discovery sought is appropriate for the needs of this action. Twitter has suggested that the mere number of custodians is a basis for rejecting Defendants proposal, but it has not substantiated its claims of burden with any concrete information.<sup>21</sup>

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<sup>20</sup> **Parag Agrawal, Ned Segal, Bret Taylor,** [REDACTED],  
[REDACTED], **Egon Durban, Jack Dorsey,** [REDACTED].

<sup>21</sup> Twitter's prior attempts to compare the parties' number of custodians fall flat—out of the handful of custodians Twitter has requested, Defendants possess and control documents for just two. The remainder are third-parties to whom Twitter has issued third-party subpoenas.

Indeed, Twitter has refused to engage in any such discussions at all, flatly refusing Defendants' custodian proposal *without explaining why the additional custodians sought are unnecessary, duplicative, or unduly burdensome*. While steadfastly resisting Defendants' attempts to secure documents with vague charges of undue burden, Twitter has already served *seventy-one* third-party subpoenas, each containing dozens of document requests. Twitter thus asserts an entitlement to documents from a wide-ranging number of individuals tangentially related to either parties' claims, while refusing to provide reciprocal discovery of its own employees that have demonstrated knowledge about the claims in this action.

### CONCLUSION

For the foregoing reasons, Defendants respectfully request an Order compelling Plaintiff to produce information as set forth above and as detailed in the proposed Order submitted herewith.

Respectfully,

/s/ Edward B. Micheletti

Edward B. Micheletti (ID No. 3794)

**Words: 4,998**

The Honorable Kathaleen St. J. McCormick  
August 9, 2022  
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Enclosures

cc: Register in Chancery (via eFiling)  
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Elliot Covert, Esq. (via eFiling)



## **CERTIFICATE OF SERVICE**

I, Edward B. Micheletti, hereby certify that on August 16, 2022, a Redacted Version of Letter to The Honorable Kathaleen St. J. McCormick from Edward B. Micheletti, Esquire, pursuant to paragraph 14(d) of the Court's Order Governing Case Schedule Compelling Twitter, Inc. to Produce Discovery from Additional Custodians was served electronically via File & ServeXpress upon the following counsel of record:

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