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By E-File and Hand Delivery

REDACTED PUBLIC VERSION
DATED: August 18, 2022

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:

Over the course of nearly two weeks of negotiations with Defendants, Twitter offered 41 of its directors, employees, and contractors as documentary discovery custodians. Defendants now ask this Court to require Twitter to collect documents from an additional 22 custodians. They do this after backtracking on their own proposals and dropping custodians they had themselves proposed—all the while knowing that Twitter was expending substantial resources to gather and review the documents of custodians they confirmed they wanted.

To justify the addition of 22 custodians to the broad group of custodians to which Twitter has already agreed, Defendants present a mixture of unsupported assertions, erroneous statements, and self-serving omissions. Defendants fail to

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show that the documents of these 22 individuals will add anything significant to the information that will be collected from the 41 custodians Twitter offered. And having caused Twitter to waste valuable time and resources in this expedited litigation, Defendants are ill-positioned to argue for 22 new custodians now—only 18 days before the substantial completion deadline.

Meanwhile, Defendants have offered only two custodians—insisting they have no control over even consultants they hired to analyze data Twitter provided. And Defendants have taken weeks to provide reports showing the number of times Twitter’s proposed search terms hit documents in those custodians’ files. To protect its rights in this expedited litigation, Twitter has proceeded with the burdensome task of subpoenaing dozens of third parties—without the assistance of Defendants’ counsel, despite their obligation to facilitate discovery from third parties with relevant information.

Defendants’ conduct is the latest in their campaign to effectively stonewall bilateral discovery while seeking to impose extensive, unilateral discovery demands on Twitter designed to impede the litigation of this case on the schedule the Court ordered. Defendants’ motion to require Twitter to add 22 custodians should be denied. Twitter’s offer to search the files of 41 custodians is more than adequate.

BACKGROUND

On July 26, the parties exchanged initial proposals for document custodians.¹ Defendants proposed just two custodians. Ex. A at 1. Twitter proposed 12 custodians. Ex. B at 2. Twitter sought confirmation that Defendants did not object to these 12, so that Twitter could “proceed with reviewing their documents in an orderly and efficient manner.” Ex. C at 58. Defendants confirmed they had “no objection.” *Id.* at 55.

On July 27, the parties exchanged counterproposals.² Relying on Defendants’ representation that no custodians under their control other than the two proposed had relevant evidence, Twitter did not ask Defendants to add any new custodians. Ex. D at 1. Defendants asked Twitter to add 48 more, for a total of 60 custodians. Ex. E at 1-2.

¹ Defendants make no reference to the initial proposals the parties exchanged on July 26, *see* Letter 11, incorrectly asserting that Twitter made its initial proposal on July 30, *id.* at 12. Defendants also fail to attach Twitter’s initial proposal to their letter motion, in violation of paragraph 14(d) of the Court’s scheduling order, which requires the parties to “attac[h] the relevant communications” to their submissions.

² Defendants omit any mention of the parties’ counterproposals. *See* Letter 11. And Defendants also fail to attach either party’s July 27 counterproposal, again in violation of paragraph 14(d).

On July 28, the parties met and conferred. Twitter advised Defendants that it was “actively reviewing documents.” Ex. C at 49. Defendants identified five individuals from their list of 48 who they were “particularly interested in”: (1) Jack Dorsey, (2) Kayvon Beykpour, (3) [REDACTED] (4) [REDACTED] and (5) [REDACTED] [REDACTED] *Id.*

On July 29, Defendants filed their answer and counterclaims. The following day, July 30, Twitter provided a counterproposal. *Id.* at 39-44. Twitter offered to add eight more custodians to its initial proposal of 12, for a total of 20. *Id.* Each of the eight was taken from the list of 48 names that Defendants proposed. Ex. E at 1-2. And one of the eight, Jack Dorsey, was on Defendants’ short list of five individuals of “particular[] interest[].” Ex. C at 49.

On July 31, Defendants rejected Twitter’s counterproposal as “insufficient” because it included the “heads of relevant departments” but omitted individuals “with day-to-day roles and responsibilities *within* those departments.” *Id.* at 36-37. Defendants expressed particular interest in adding as custodians the contractor employees who reviewed accounts as part of Twitter’s process for estimating false or spam accounts as a percentage of mDAU. *Id.* at 37. Defendants said they were willing to drop individuals from Twitter’s list of proposed custodians to account for

burden concerns. *Id.* at 35. Twitter asked Defendants to identify who they would drop, because Twitter’s email review was well underway and there was a “very real possibility that Twitter [was] actively reviewing emails belonging to individuals that defendants expect to drop as custodians eventually.” *Id.* Defendants refused to say which custodians they were considering withdrawing. *Id.*; *see also id.* at 31.

On August 2, Twitter informed Defendants they would consider adding more individuals with the types of day-to-day responsibilities Defendants described. *Id.* at 18-20. In response to Defendants’ inquiry regarding contractor employees involved in the process for estimating false or spam accounts in mDAU, Twitter identified the two vendors that Twitter had recently engaged for that process and confirmed that the vendor Cognizant had assisted in the process for the fourth quarter of 2021 (the quarter for which the disclosed estimate is at issue). *Id.* at 19-20. Twitter also explained that it would not produce documents from [REDACTED]—one of the five custodians Defendants was particularly interested in—because he had left the organization before October 2021—the beginning of Defendants’ own proposed date range for Twitter’s document collection. *Id.* at 19.

On August 3, Defendants made a new proposal. This time they sought 71 custodians. *Id.* at 15-17. That included the 20 custodians to which Twitter had

already agreed, plus 51 *additional* individuals.³ *Id.* For reasons they did not explain, Defendants named 23 of these 51 additional individuals for the first time. *See id.*

On August 4, Twitter agreed to two more custodians—[REDACTED] one of the individuals Defendants were particularly interested in, and [REDACTED] a Twitter employee involved in the day-to-day operations of designing and executing spam identification and suspension policies. *Id.* at 13. This brought Twitter’s list to 22 custodians—all agreed to or proposed by Defendants. *Id.*

On August 5, Defendants turned down Twitter’s offer and proposed a new list of 50 individual custodians. *Id.* at 9-10. Although the list did not include Cognizant contract agents, Defendants clarified that they also “expect[ed] Twitter to collect and produce documents from [them].” *Id.* at 10. In the new list, Defendants dropped seven individuals who they had expressly agreed to or previously proposed. *See id.* at 5. By the time Defendants withdrew their agreement to these custodians, Twitter had already collected many of these custodians’ files and reviewed 30,000 of their

³ Defendants state that their discovery liaison “was involved in all relevant discovery communications.” Letter 11 n.2. But Defendants’ discovery liaison, David Mader, neither participated in meet-and-confers nor was included on discovery correspondence until August 3.

documents as part of its effort to make rolling productions and substantially complete its review of all custodians' files by August 29.

On August 7, Twitter responded with a new counterproposal. *Id.* at 2. It dropped the seven individuals who Defendants themselves had abandoned, added three more custodians who Defendants had requested, and added 23 Cognizant contract agents with the day-to-day responsibilities Defendants sought. *See id.* at 3. In total, Twitter's new proposal included 41 custodians—18 current or former Twitter employees and 23 contract agents.

Twitter's proposal would require Twitter to review a minimum of approximately 160,000 emails and 31,000 Google Docs (a total of 191,000 documents)—not including the thousands of Slack channels that Twitter is reviewing and text messages for a subset of custodians. *See Ex. F* at 1, 80, 85. Defendants, by contrast, have so far committed to searching fewer than 45,000 documents. *See Ex. G* at 81, 86. What's more, Twitter already has produced more than 750 emails, while Defendants have produced only four. Twitter thus did not agree to add the 32 additional individuals on Defendants' August 5 list. *Ex. C* at 4. Instead, Twitter asked Defendants to identify any additional custodians they wanted included and to explain why. *Id.*

On August 9, Defendants responded to Twitter’s latest counterproposal. *Id.* at 1. They refused to explain why they needed any of the 32 individuals left off Twitter’s August 7 list. To the contrary, they demanded that Twitter “explain—in detail—why each [of the 32] custodian[s] Defendants have proposed and Twitter has rejected is non-additive.” *Id.* The parties then met and conferred but could not reach resolution.

Later that day, Defendants filed their motion—and changed their position once again. Despite last presenting Twitter with a take-it-or-leave-it proposal to add 32 employees to those it had already agreed to, Defendants sought in their motion the addition of only 22 of those 32 employees. And Defendants expressed a willingness to accept fewer Cognizant contract agents as custodians—a position they had not previously taken with Twitter. Letter 19-30.

ARGUMENT

Parties are not entitled to “unreasonably cumulative or duplicative” discovery. Ct. Ch. R. 26(b)(1). That rule applies with special force in expedited litigation. As this Court has recognized, “there are tradeoffs to be made” as a result of an expedited schedule, so the parties “have got to focus on what is most important.” *Yucaipa Am.*

Alliance Fund II, L.P. v. Riggio, C.A. No. 5465-VCS, at 19 (Del. Ch. May 25, 2010) (Transcript).

Defendants’ insistence that Twitter search the files of 22 custodians—beyond those of the 41 custodians Twitter has already agreed to search—flouts that rule. “When the discovery schedule is compressed by court order,” the parties “get what they need,” not “all that they want.” *Gilat Satellite Networks Ltd. v. Comtech Telecomms. Corp.*, C.A. No. 2020-0605-JRS, at 44 (Del. Ch. Aug. 19, 2020) (Transcript). Litigants are thus “expected to agree to limit the number of custodians from which each party collects.” Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 6.04 (2021). Yet contrary to this Court’s guidance, Defendants have made no effort to limit their requested custodians to key custodians, but instead ask this Court to order Twitter to search the files of multiple custodians working in the very same corporate function. *See* Ct. of Chancery Guidelines for Persons Litigating in the Ct. of Chancery § 7(g)(vi) (“Parties should identify the key custodians [in the context of expedited litigation] and focus their document collection efforts on those custodians.”).

Defendants contend that they are entitled to documents relating to the accuracy of specific statements in Twitter’s SEC filings concerning Twitter’s estimates of false or spam accounts in “mDAU” or “monetizable daily average users” and other characteristics of mDAU. Letter 2-3. According to Defendants, the additional 22 custodians they seek are necessary because “[t]hose materials are likely to be in the possession of Twitter employees . . . who have or had day-to-day-responsibilities” relating to the mDAU metric. *Id.* 3-4.

Defendants offer nothing to support that assertion, which is neither plausible nor consistent with common corporate practice. For business and legal reasons, SEC disclosures by public companies are commonly reviewed by top management before they are made. Twitter is no different. Furthermore, mDAU, as one of three disclosed “key metrics,” is one of the most important of the company’s business metrics. *See* Ex. H at 5. There is thus no reason to think that evidence relevant to the accuracy of the SEC disclosures at issue is primarily or only found in the files of lower-level employees.

In any event, Defendants’ assertion that Twitter “persisted in offering” them a “self-selected list of c-suite and other senior management employees and outside directors” that did not include individuals with “day-to-day responsibilities” relating

to the mDAU metric is false. Letter 4. Every single one of the 41 custodians Twitter offered was someone Defendants expressly approved or proposed, by name or job function. And many of those custodians are not senior officers and directors, but rather subordinate executives, employees, and contractors.

Defendants expressly confirmed their agreement to the 12 custodians Twitter offered in its initial July 26 proposal—custodians that included Twitter’s CEO, CFO, and four outside directors. Ex. C at 55. And Twitter later offered its former CEO, [REDACTED] and four additional outside directors because Defendants expressly identified each of those individuals in the list of 48 additional custodians Defendants sent Twitter on July 27. *Id.* at 39-44.

Furthermore, more than half of the 41 custodians Twitter offered include employees and contractors who report to senior or middle management—*i.e.*, individuals with “day-to-day responsibilities” in those reporting lines. Such individuals include [REDACTED]

[REDACTED] *Id.*
at 8. And 23 of the 41 proposed custodians are line contractors who reviewed or re-reviewed accounts as part of the false or spam account estimation process. *Id.* at 3.

Defendants' repeated suggestion that Twitter's group of custodians excludes Twitter employees with "day-to-day responsibilities" is thus incorrect. What Defendants are seeking are 22 such custodians in addition to the at least 25 such custodians already included in the group of 41 custodians Twitter has offered.

Hit reports for just the 18 employee custodians (plus some of the Cognizant contractor custodians) show that Twitter will need to review at least 191,000 emails and centralized electronic files from these individuals. Ex. F at 1, 80, 85. Twitter has not yet been able to run hit reports on the additional custodians Defendants now seek (many of whom were proposed for the first time on August 3), but given current hit rates, it is reasonable to assume that adding those custodians would raise the number of documents that need to be reviewed by another 200,000.

Especially given Defendants' dilatory and inconsistent conduct, that is an immense additional burden to impose on Twitter when the substantial completion deadline is less than three weeks away. But even setting aside Defendants' conduct and the limited time remaining for document review, Defendants fail to show that documents from these custodians will make any significant incremental contribution to the documentary record.

False or Spam Account Estimation Process. Defendants purported to terminate the merger agreement on the ground that Twitter’s SEC disclosures concerning its estimate of false or spam accounts as a percentage of mDAU were inaccurate. Ex. I at 6. Defendants have made that allegation a centerpiece of their defense and counterclaims. Dkt. 115 ¶¶ 109-70, 223-27. In a strong indicator of the adequacy of Twitter’s custodian proposal, Defendants do not identify a single custodian involved in that estimation process that Twitter should have included but did not. Letter 29-30. The 41 custodians Twitter offered included not only the employee who oversees that process [REDACTED] but also the 23 Cognizant contract agents who reviewed accounts in connection with determining the estimate for the fourth quarter of 2021—the specific disclosed estimate that Defendants allege to be false or misleading. *Id.*

Defendants go so far as to accuse Twitter of offering the 23 Cognizant agents as custodians in “a transparent attempt to artificially inflate its total number of custodians.” Letter 30. But Twitter offered those custodians only after Defendants informed Twitter that they “expect[ed] Twitter to collect and produce documents from [those custodians].” Ex. C at 10. Now, in an implicit recognition that the total number of custodians Defendants seek is excessive, Defendants do an about-face

and say they are “willing to accept production from a limited number of Cognizant employees with oversight responsibility.” Letter 30. That position is, of course, inconsistent with their supposed general desire for custodians with “day-to-day responsibilities” in important functions, not custodians with supervisory responsibilities. *See id.* 2-3.

Spam Elimination. Defendants assert that they need custodians involved in Twitter’s spam elimination efforts because their documents will “call into question” Twitter’s methods for estimating false or spam accounts for purposes of its mDAU disclosures. *Id.* 20. As a preliminary matter, Twitter’s general spam elimination efforts are independent of Twitter’s process for estimating false or spam accounts for purposes of its mDAU disclosures. But even if documents relating to spam elimination efforts showed that Twitter could theoretically estimate false or spam accounts differently, they would not show that Twitter’s disclosures concerning its past estimates of false or spam accounts are false or misleading. In any event, as Defendants acknowledge, Twitter offered multiple custodians involved in this function. *Id.* Those include CEO Parag Agarwal, who has ultimate responsibility for this important function; [REDACTED]

██████████ See Ex. C at 12, 19, 25, 43.

Defendants concede all of these custodians have relevant documents and do not suggest they would give any of them up. Letter 20, 30 n.20. They complain, however, that Twitter has not offered to *also* search the files of five other employees they say are involved in this function. See *id.* 21 (listing ██████████
██████████). But many of these individuals have nothing to do with spam elimination or even spam at all. ██████████ for instance, oversaw compromised Twitter accounts and had no involvement in Twitter’s effort to mitigate spam. ██████████ as Defendants recognize, “is focused on fighting misinformation,” an issue that also is unrelated to spam. Letter 21. Defendants make no effort to explain why any of these individuals are likely to possess information that is sufficiently connected to the issues in dispute to justify adding them as custodians. And, in any event, Defendants also fail to explain why these individuals would be in possession of non-duplicative documents given the other custodians already offered. *Id.*

Financial Planning & Analysis. Defendants say they need custodians involved in financial planning and analysis, particularly of revenue metrics. *Id.* 23.

The custodians Twitter offered amply address that asserted need. The offered custodians include Ned Segal, CFO; [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ex. C at 3.

Again, Defendants do not contest the propriety of any of these custodians, all of whom they proposed or requested. But they insist that Twitter review documents from seven more custodians who are involved in financial planning and analysis.

Defendants ask this Court to order Twitter to search the files of [REDACTED]

[REDACTED] But, as Twitter informed Defendants, [REDACTED] left Twitter before October 2021—and thus before the relevant period Defendants specified for their document requests. Ex. C at 19. Defendants do not explain how [REDACTED] is an appropriate custodian in light of the timing of his departure from Twitter. Letter 23. Nor do they explain why he would be expected to have non-duplicative documents of significance when he worked in the same group as [REDACTED] two agreed custodians. *Id.*

Defendants also seek the addition of six more custodians on the ground that their work relates to advertising revenue. *Id.* 27-28 (listing [REDACTED])

[REDACTED] and Bruce Falck).

Because Twitter earns most of its revenue through advertising, Ex. H at 14, there is no reason to think that searching the files of these six custodians will yield important documentary evidence on advertising revenue that would not otherwise be collected from the already agreed custodians. For example, [REDACTED] an agreed custodian, is personally involved in analyzing and tracking the relationship between mDAU and advertising revenue. Ex. C at 26. Defendants do not explain why these particular custodians should be added given the many other custodians already offered. *See* Letter 27-28.

mDAU Calculation. As Defendants acknowledge, Twitter offered as a custodian [REDACTED] the employee with “day-to-day” responsibility for calculating mDAU and other metrics relevant to Twitter’s consumer organization. Letter 13, 22. Defendants nevertheless also demand Kayvon Beykpour as a custodian on the ground that he was “intimately involved with many mDAU calculation . . . issues.” *Id.* 17. They do not, however, offer any reason to conclude that a search of his files will yield important information regarding mDAU calculations that would not be found in [REDACTED] files. Defendants also demand as a custodian [REDACTED] asserting that she oversees “key

metrics” other than mDAU. *Id.* 22. But, as Twitter discloses in its SEC filings, its other “key metrics” are few and relate to advertising engagement. Ex. H at 5. They have nothing to do with any basis for Defendants’ purported termination. Moreover, Segal, as the CFO, is ultimately responsible for tracking those metrics. *See* Ex. C at 26, 43. Defendants do not explain why Segal’s documents, along with those of other agreed custodians in the finance function, such as the [REDACTED] [REDACTED] and [REDACTED] are insufficient to address any perceived need for documents relating to other “key metrics.” *See* Letter 22.

SEC Disclosures. Twitter has offered several custodians with direct responsibility for preparing and ensuring the accuracy of its SEC disclosures. Agrawal and Segal, as the company’s CEO and CFO, are responsible for certifying the accuracy of Twitter’s annual and quarterly reports under the Sarbanes-Oxley Act of 2002. *See, e.g.,* Ex. H at Exs. 31.1-2, 32.1. [REDACTED] is responsible for preparing the company’s financial statements. Ex. C at 42. [REDACTED] [REDACTED] participates in the preparation of the company’s SEC filings. In addition, Twitter has offered the company’s top two legal officers as custodians: Vijaya Gadde, Head of Legal,

Policy, and Trust, and [REDACTED] *Id.* at 3. Defendants have asked for, and Twitter has agreed, to produce documents from the files of all these individuals. *Id.*

To this long list, Defendants say [REDACTED] [REDACTED] should be added. Letter 26-27. According to Defendants, she is likely to possess “relevant, unique, non-privileged documents relating to Twitter’s financial reporting (as opposed to preparation of its accounting statements)” that other agreed custodians will not have. *Id.* at 27. But given Twitter’s offer to include as custodians not only Agrawal, the CEO; Segal, the CFO; [REDACTED] and multiple other custodians in Twitter’s finance function, Defendants do not offer anything to substantiate their assertion that [REDACTED] files contain important information that will not be collected from other custodians.

Operational Strategy. Defendants say they need documents from custodians “with operational responsibilities,” ostensibly because such documents will show that internal discussions regarding operations somehow contradict the company’s SEC disclosures. Letter 25-26. But Twitter has offered custodians whose files will include internal documents relating to the company’s operations and strategy. Those

include the CEO, ultimately responsible for operational strategy, and multiple directors, including the Chairman of Twitter's Board. *See* Ex. C at 3, 39-44.

Product Design. Defendants seek the addition of four custodians in the product design function. Letter 28-29. But Defendants do not explain how engineers whose job it is to design new products or improve the Twitter platform will have documents with more than remote relevance, at best, to the accuracy or inaccuracy of Twitter's specific, historical disclosures concerning mDAU and false or spam account estimates that Defendants are challenging.

Challenged Employment Actions. Defendants seek the addition of Kayvon Beykpour as a custodian on the ground that he was allegedly terminated in violation of the merger agreement's ordinary course covenant. Letter 19-20. And they seek the addition of [REDACTED] the [REDACTED] until 2021, on the related ground that she is "likely to possess documents relevant to the challenged employment actions." *Id.* 29. But the decision to terminate Beykpour was made by Twitter's top officers, who are already agreed custodians. Defendants do not explain why the subject employee's own files would contain documents relevant to assessing whether his termination violated the ordinary course covenant. Furthermore, Defendants offer no basis to believe that [REDACTED] has any significant non-duplicative

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documents relevant to that issue given the inclusion of Twitter's top officers as custodians.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' letter motion to compel Twitter to search the documents of 22 custodians in addition to those of the 41 custodians that it has already agreed to search.

Respectfully,



Kevin R. Shannon (No. 3137)
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Enclosures

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

I hereby certify that on August 18th, 2022, copies of the Redacted Public Version of Kevin R. Shannon's correspondence to Chancellor McCormick dated August 11, 2022 were served via File & Serve*Xpress* upon the following attorneys of record:

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