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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 July 28, 2022 Order Governing Case Schedule to seek an order compelling Plaintiff to produce documents responsive to Defendants' Requests for Production.

PRELIMINARY STATEMENT

According to Twitter, MDAU is foundationally materials to Twitter's financial success. Twitter's SEC disclosures make this clear to investors, and paint a rosy picture that by growing MDAU Twitter is successfully growing its business. Indeed, Twitter's 2021 10-K mentions mDAU—Twitter's monetizable daily active userbase—approximately 100 times. Twitter's filings claim that “mDAU, and its related growth, is the best way to measure our success against our objectives,” and that mDAU is also the “best way to measure” the “size of [Twitter's] audience and engagement.” mDAU, which was introduced in Q1 2019, is the first metric listed among Twitter's key metrics. And Twitter's “ability to increase our mDAU” or “engagement” is listed first among the risk factors in the company's 10-K. And, according to Twitter, mDAU has steadily increased since it was first introduced as a “key metric” (to replace the prior key metric after six straight quarters of decline).

In short, Twitter touts mDAU as its most crucial measure of success. However, early discovery has already revealed significant cracks in that foundation. Specifically, it is becoming clear that, internally, Twitter does

not rely on mDAU as the best measure of its success or its engagement. Internal operational documents, for example, focus on other metrics, such as specific engagement metrics like User Active Minutes (“UAM”) (total minutes spent on Twitter), UAM/mDAU (minutes per mDAU), mDAU/MAU (days per month mDAU come to Twitter), and the engagement of Twitter’s heaviest users. This internal focus makes sense, as, unbeknownst to investors, Twitter’s data shows that the engagement of a tiny portion of Twitter’s mDAU is responsible for the bulk of Twitter’s revenue: just 7% of Twitter’s total mDAU see over 50% of total ads. (Counterclaims ¶ 141) Critically, Twitter’s internal documents show that Twitter recognizes that many of those measures are *stagnant or declining*. While it omits these material measures, Twitter misleadingly deflects investors to mDAU as the “best way to measure” engagement, asserting in investor calls that other metrics are not “particularly useful ... measure[s] to look at.” (Counterclaim ¶ 136) Defendants sought discovery into Twitter’s reliance upon mDAU and Twitter’s hidden internal metrics, in order to continue to prove that contrary to what Twitter tells its investors, mDAU is not the main driver of its business, the best way to measure its success, or the best way to measure

engagement, all of which are relevant to Defendants' counterclaims. Twitter has improperly tried to block Defendants from seeking those documents by making improper relevance and burden objections (notwithstanding hit counts that suggest burden is minimal).

Additionally, for nearly three months, Defendants have been seeking information from Twitter to verify Twitter's SEC disclosures stating its internal audits reveal that less than 5% of mDAU are false or spam accounts (the "5% Disclosure"). Defendants served their first requests for production ("RFPs") nearly a month ago on July 19 and July 20.¹ Of these, RFPs 2-4 and 18-19 seek data associated with the user accounts counted in mDAU and Twitter's monthly audits of mDAU on which it bases the 5% Disclosure. Twitter itself has put this data at issue by alleging that the data it has provided to date cannot "be used to accurately estimate the prevalence of false or spam

¹ Under the Scheduling Order Defendants served consolidated RFPs on July 29.

accounts.” (Compl. ¶ 83) Twitter has nevertheless refused to produce *any* additional data in response to these RFPs.²

These refusals are improper. Twitter cannot affirmatively defend its 5% Disclosure by claiming it is supported by data in its sole possession while simultaneously refusing to produce that same data so Defendants may independently assess both Twitter’s estimate of false and spam accounts and the reliability of Twitter’s audit process. The data is clearly relevant, and Twitter’s vague burden claims are belied by its own public statements for years about its capacity to collect and transmit enormous quantities of production data.³ Worse yet, Twitter has refused to even identify what categories of data it provides to its human reviewers tasked with identifying spam and false accounts in the mDAU audit, and to what extent that data has been preserved. Indeed, Twitter’s statements to date, asserting that at least

² Twitter’s attempts to limit discovery extends to its flat refusal to provide witnesses with knowledge of numerous topics, including mDAU, for 30(b)(6) depositions.

³ (Ex. 2 at 5-6)

some of the requested data is no longer available,⁴ leave Defendants deeply concerned that Twitter has not attempted to preserve relevant data since June 6, 2022, when Defendants first asserted a breach, and that relevant data has been lost entirely.

Time is of the essence. After seeking an expedited trial on a three-month timeline, Twitter has already successfully stonewalled Defendants for almost a month on its requests. In particular, prompt production of the requested data is of paramount importance if Defendants are to have any hope of processing the data, analyzing the results, and drafting expert reports before the September 9, 2022 expert report deadline. Twitter's delay must end.

Twitter has broadly objected to Defendants' requests on grounds of relevance and burden. Twitter's burden objections are unsubstantiated: Twitter's hit counts show that the additional burden from producing documents to Defendants' open requests will be minimal. And Twitter's

⁴ (Ex. 3 at 2)

relevance objections are baseless: as set forth below and evidenced above, each request is plainly relevant to the parties' claims.

FACTUAL BACKGROUND

Defendants agreed to acquire Twitter on April 25, 2022, with the terms of that acquisition set forth in the Merger Agreement. Twitter represented in Section 4.6 of that agreement 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.” Twitter’s SEC filings, including its 2021 10-K, released on February 16, 2022, disclose monetizable daily active users, or mDAU, as first among its key metrics, and Twitter claims “[w]e believe that mDAU, and its related growth, is the best way to measure our success against our objectives” (2021 10-K at 42) Twitter’s “ability to increase our mDAU” and “engagement” is listed first among the risk factors in the company’s 10-K, and nearly every risk facing the business is discussed in the context of Twitter’s mDAU growth. (Counterclaims ¶¶ 64-65)

Because false and spam accounts on Twitter cannot be monetized, Twitter discloses that it attempts to remove those accounts from its mDAU

calculation to avoid inflating that metric. Specifically, Twitter discloses that “[w]e have performed an internal review of a sample of accounts and estimate that the average of false or spam accounts during the fourth quarter of 2021 represented fewer than 5% of our mDAU during the quarter.” (Counterclaims ¶ 64) It then notes that “[w]e are continually seeking to improve our ability to estimate the total number of spam accounts and eliminate them from the calculation of our mDAU, and have made improvements in our spam detection capabilities that have resulted in the suspension of a large number of spam, malicious automation, and fake accounts. We intend to continue to make such improvements.” (*Id.*)

The limited data Defendants have obtained from Twitter through the Merger Agreement’s information covenant and initial discovery in this action reveal that not only are SEC representations incorporated into the Merger Agreement false, but those misrepresentations warrant rescission of the agreement. Accordingly, Defendants filed Counterclaims on July 29, 2022 asserting, among other causes of action, fraud. These Counterclaims allege that, based on Defendants’ preliminary analysis of the limited information Twitter has provided, the true number of spam and false

accounts is significantly higher than 5% of mDAU. (Counterclaims ¶¶ 111-29) Although Defendants' analysis is ongoing, Twitter's misrepresentations appear to be the result of a fundamentally flawed methodology, which contradicts Twitter's assertion that the 5% Disclosure is the result of analysis by spam experts as part of a reasoned, constantly improving audit process. (Counterclaims ¶ 64) Defendants have also learned that Twitter's representations that mDAU is the best predictor of the company's future business prospects are materially misleading because Twitter omits material information necessary for investors to properly assess mDAU's relevance to Twitter's business prospects, including the omission that nearly a third of mDAU and more than half of mDAU growth see no ads. (Counterclaims ¶¶ 130-146)

Defendants served their first set of RFPs on July 19, mere hours after this Court decided Twitter's motion to expedite, and served their second set of RFPs the next day. (Ex. 4-5) After the Court entered the Scheduling Order, Defendants served a consolidated set of RFPs. (Ex. 6) The parties

have met and conferred numerous times over these requests, and have reached impasse over the RFPs on which Defendants move to compel.⁵

ARGUMENT

“[P]retrial discovery rules are to be afforded broad and liberal treatment.” *Levy v. Stern*, 687 A.2d 573 (Del. 1996) (TABLE). “[D]iscovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought can have no possible bearing upon the subject matter of the action.” *Boxer v. Husky Oil Co.*, 1981 WL 15479, at *2 (Del. Ch. Nov. 9, 1981) (quotation omitted). If a party objects to providing discovery, “[t]he burden is on the objecting party to show why the requested information is improperly requested.” *Prod. Res. Grp., L.L.C v. NCT Grp., Inc.*, 863 A.2d 772, 802 (Del. Ch. 2004) (internal quotations omitted). The burdens of expedited cases provide a heightened need for parties to engage

⁵ Defendants are not moving to compel on all relevant requests they served on Twitter in an effort to reduce burden on the Court. Defendants’ decision not to move on certain requests is not an admission that these requests are irrelevant or that Twitter may withhold documents that are responsive to other requests for which Twitter has agreed to produce documents.

in a good faith discovery process. *See AB Stable VIII LLC, v. Maps Hotels & Resorts One LLC*, 2020-0310-JTL, at *53 (Del. Ch. May 8, 2020) (TRANSCRIPT) (“And particularly in an expedited proceeding, that means you have an obligation to prepare the case in a way that allows the Court to make a just decision. Particularly for purposes of discovery in a case like this, I want people to cooperate.”).

I. PLAINTIFF MUST IMMEDIATELY PRODUCE DOCUMENTS RELATED TO ITS MDAU AND OTHER METRICS

Defendants have alleged that Twitter has falsely claimed “that mDAU growth was the best proxy for engagement and revenue growth,” (Counterclaims ¶¶ 130-149), and that Twitter “has sought to downplay the importance of other metrics” in order to tout the importance of mDAU, (*id.* ¶ 135) These allegations place Twitter’s mDAU figures and analyses of other metrics directly at issue. Yet Twitter has made baseless relevance and burden objections to Defendants’ requests for documents relating to these issues. *See Feeley v. NHAOCG, LLC*, C.A. No. 7304-VCL, 31 (Del. Ch. July 9, 2013) (TRANSCRIPT) (“If you say ‘unduly burdensome,’ you better explain why it’s unduly burdensome.”); *In re Oxbow Carbon LLC*

Unitholder Litig., 2017 WL 959396, at *1 (Del. Ch. Mar. 13, 2017) (objecting party must show burden for “each discovery request” by offering evidence revealing the nature of the burden.” (internal quotations omitted)). As explained below, none of Twitter’s objections pass muster.⁶

A. RFPs 12, 27, 39

RFP 12 requests all documents and communications relating Twitter’s “use of mDAU” as a key metric including all documents “relating to the relationship between mDAU” and Twitter’s revenue or EBITDA. RFP 27 requests all documents and communications relating to Twitter’s use of metrics other than mDAU. RFP 39 requests documents related to Twitter’s analysis and calculation of its key performance indicators, such as mDAU.

In response to RFPs 27 and 39, Twitter has agreed only to produce documents that “discuss the relative importance of other user metrics, as compared to mDAU.” But this is insufficient. For example, documents

⁶ To the extent Twitter claims there is no impasse on RFPs 27, 49, and 55, Defendants’ motion is still ripe. Defendants sent a deficiency letter on August 9, and have diligently met and conferred. Twitter cannot delay by stating that it is continuing to consider compromises.

showing that Twitter relies on other metrics internally to assess audience or engagement would be relevant to show that Twitter's touting of its mDAU metric is a sham, even if the document does not directly compare the metrics. Indeed, early discovery has already revealed that internally, Twitter focuses on metrics other than mDAU, such as measuring engagement through UAM, and tying revenue to ad engagements and ad impressions rather than mDAU. Internal documents show that Twitter concluded these metrics reflect the declining "engagement of Twitter's heaviest users" at the same time that it was telling the world in SEC filings that mDAU was increasing and was the "best way to measure" Twitter's "engagement." (Ex. 7 at TWTR_000013246) In the same documents, Twitter tied revenue growth opportunities to "site visits optimization," while giving mDAU just a throwaway mention in one line. (*Id.*) Such documents are clearly relevant to Defendants' claims, as Defendants are entitled to discover to what extent Twitter knew that the internal performance metrics it chose to hide from investors painted a bleaker picture than its reported mDAU metric. But under Twitter's proposed narrowing of RFP 27, Twitter may improperly withhold precisely these types of documents as non-responsive. Twitter's

proposed narrowing would also exclude: (1) discussions stating some other metric is a strong predictor of revenue or performance without reference to mDAU; (2) a presentation showing that mDAU is going up in one section, but that other metrics are going down in others, without comparing the two; or (3) discussions considering but rejecting reporting some other metric in disclosures because it is trending down. Documents about Twitter's use, calculation, and analysis of *both* mDAU *and* other metrics are all plainly relevant, regardless of whether those other metrics are compared to mDAU.

Similarly, in response to RFP 12, Twitter has agreed to provide only documents that discuss the relationship between mDAU and Twitter's revenue or EBITDA,⁷ and objects to the remainder of the request for all other documents relating to mDAU on the basis of relevance and burden.⁸

⁷ In response to RFP 27, Twitter has agreed to produce documents related to "Twitter's belief that mDAU, and its related growth, is a key metric that Twitter uses to measure success against its objectives." But limiting productions just to what Twitter "believes" rather than how Twitter *actually uses* the metric is improper.

⁸ In response to RFP 24, Twitter has agreed to produce documents relating to mDAU that went to management. But at least three of Twitter's custodians are not management, and may have relevant communications
Continued on next page.

However, any information about Twitter's use of mDAU is clearly relevant, as Defendants allege that, among other things, Twitter "has sought to downplay the importance of other metrics" in order to tout the purported importance of mDAU, (Counterclaims ¶ 135), and Twitter has misleadingly failed to disclose that a nearly a third of its mDAU sees no ads, (*id.* ¶ 138). Documents relevant to these allegations need not involve discussions of the relationship between mDAU and Twitter's revenue or EBITDA. For example, documents comparing Twitter's use of mDAU to engagement are relevant to Defendants' claims, but would not be produced under Twitter's limitation. Twitter's limitation is also unworkable, because it would exclude documents showing that Twitter reduces other controls in order to help meet mDAU targets. (*See, e.g.*, Ex. 9 at TWTR_000014242 (discussing initiative

with others. Further, Defendants have requested that Twitter provide documents for additional non-management employees. To the extent Twitter claims that the burden for producing documents responsive to RFP 12 would increase if they must add additional custodians, (Ex. 8 at 1), Defendants have asked Twitter to run relevant terms on those custodians' inboxes and Twitter has refused, *id.*, thereby waiving any objection to burden.

to “remediate[]” “anti-spam rules” to increase mDAU in markets with significant spam such as Nigeria, India, and Indonesia))

Twitter’s objection to burden is wholly unsubstantiated and may be resolved through the use of appropriate search terms. For example, Twitter’s most recent hit report for the term “mDAU” across the custodians it claims are relevant resulted in only 11,263 documents total, corresponding to 3,762 unique documents. Twitter will already have to review those documents, even under its narrow interpretation of responsiveness, to determine if they relate to the relationship between mDAU and revenue or EBITDA. Accordingly, there is no additional burden to simply complying with RFP 12 as drafted. As for RFPs 27 and 39, Twitter’s hit reports for search terms associated with other metrics also show manageable review populations in light of the size of this case.

B. RFPs 49, 50, and 55

RFP 49 requests documents relating to financial statements, performance, or projections generated by Twitter or third parties, including the inputs to those forecasts, the ability of Twitter or any third party to forecast or project Twitter’s future financial results, the accuracy of such

forecasts, and any decision not to perform such forecasts.⁹ RFP 50 requests key performance and operational indicators used by Twitter, or that Twitter considered in order to generate projections. RFP 55 requests documents sufficient to show Twitter's financial and operating models and approved operating plan and models for 2022 and 2023.¹⁰

Twitter improperly objects to these requests on the grounds of relevance and burden. As detailed above, however, the performance indicators used internally by Twitter are directly relevant to Defendants' Counterclaims, as are any projections prepared using those indicators. Twitter's projections, operating plans, and budgets are all relevant because they will show the extent to which mDAU is or is not playing a role in operational decisions and being used internally as a predictor of revenue and

⁹ Twitter objects to RFP 49 on the basis that it is an additional request propounded after the initial deadline without good cause. This objection is baseless. Defendants consolidated July 25 RFPs 14 and 15 into RFP 49, such that RFP 49 is *less* expansive than those initial requests. (Ex. 13 at 18)

¹⁰ Defendants have offered to narrow the time frame of these requests to January 2021 to present and to narrow to projections and budgets presented to management or the board.

success. Additionally, Twitter's projections and budgets are probative to whether Twitter breached the bring-down condition because an MAE has occurred. Twitter's burden objections fail for the same reason its burden objections to RFPs 12, 27, and 39 fail: such objections are best resolved using search terms, and Twitter's hit reports show there will be no undue burden.

C. RFPs 59-61

RFP 59 requests documents relating to Twitter's reporting of a 25% increase in users and 35% increase in daily signups in Q4 2021. RFP 60 requests documents relating to Twitter's 315 million mDAU goal. RFP 61 requests Twitter's business plans or analyses for achieving its mDAU targets.

In response to all three RFPs, Twitter improperly objects based on relevance and burden. Twitter asserts the documents sought are not relevant because "there is no representation in the Merger Agreement" regarding the subject of the requests. These documents are directly relevant to Defendants' Counterclaims, (*see, e.g.*, ¶¶ 109-10), because they are relevant to Defendants' theory that Twitter used mDAU targets in order to mask poor

performance in other areas of its business, such as engagement. Moreover, because Twitter listed its 315 million mDAU target as one of its three target goals in many analyst calls in 2021, the way in which Twitter achieved its alleged mDAU growth is central to Defendants' Counterclaims. If, for example, Twitter achieved mDAU growth by increasing unengaged users who do not see ads, that information would certainly be probative as to whether mDAU is indeed the "best" predictor of Twitter's future performance. As with the other mDAU-related requests, Twitter's objections of burden are unsubstantiated and best addressed through the use of search terms.

II. PLAINTIFF MUST IMMEDIATELY PRODUCE DATA REQUIRED TO TEST PLAINTIFF'S 5% DISCLOSURE

Since early May, Defendants have persistently requested the data necessary to test the 5% Disclosure, first under the information covenant of the Merger Agreement, and now through the discovery process. And while Twitter has alleged that it "bent over backwards" to provide this information to Defendants, (Compl. ¶ 27), Twitter also contends that the data it has provided to date—including access to the Twitter Firehose—cannot "be used

to estimate the prevalence of spam and false accounts” because Twitter’s estimate “depends in part on private data not available in the firehose,” (*id.* ¶ 83) Accordingly, Twitter itself has put at issue the data necessary to generate an accurate estimate of spam and false accounts in mDAU; it cannot now refuse to produce the same data by disputing relevance or alleging undue burden.

Twitter has never disclosed what data it contends *is* sufficient for estimating the prevalence of spam and false accounts. Thus, Defendants served Requests for Production directed to categories of data they reasonable believed to be maintained by and accessible to Twitter, and that even Twitter could not contend is insufficient to obtain an accurate estimate. These requests include the following:

- RFP 2, requesting historical data for the Twitter Firehose and three other data feeds containing public information about account activity¹¹;

¹¹ With one exception, these are the same data feeds Twitter provided access to beginning in late June. The exception is the “Follow, search, and get users” API.

- RFPs 3 and 4, requesting, for each account in mDAU, the type of non-public data Twitter uses, or that others could use, to assess whether an account is a spam or false account;
- RFPs 18 and 19, requesting data about the accounts reviewed in Twitter’s monthly mDAU audit, including all information that Twitter reviews in conducting that audit.¹²

In response to the above requests, Twitter has categorically refused to produce *any* data responsive to RFPs 2-4 and 19 beyond the data made available to Defendants prior to their termination of the Merger Agreement which data Twitter contends is insufficient to generate an accurate estimate of the number of spam and false accounts. And with respect to RFP 18, Twitter has only agreed to produce a small subset of the data requested, even though it concedes it “may” have other data requested and has asserted no burden regarding its production. Ex. 3.

Twitter’s purported justifications for its refusal to produce the requested data are entirely unreasonable and without merit.

¹² Twitter has agreed to produce documents responsive to other subparts of RFP 19, but refuses to produce the “private data” related to these accounts.

First, Twitter contends that the requested data is irrelevant because Twitter already produced a “significant amount of custom data pertaining to mDAU” prior to termination of the Merger Agreement.¹³ (Ex. 10 at 17, 19) Yet Twitter continues to assert that the data it previously provided is not sufficient to “mimic the rigorous process that Twitter employs by sampling accounts and using public and private data to manually determine whether an account constitutes spam.” (Compl. ¶ 88) Thus, Twitter cannot rely on its past production to shield discovery of the very data it has placed at issue and that it asserts is necessary to test the 5% Disclosure.

Second, Twitter contends that collecting and producing the requested data is overly burdensome because the data is voluminous and “would risk the stability of the Twitter platform.” (Ex. 10 at 15) Yet Twitter offers no support for this assertion, and it is belied by Twitter’s repeated public statements that it has the capability to transfer petabytes of data to developers per day. Without a specific explanation of the purported burden associated

¹³ Twitter also objects to the time frame of the request. However, Defendants are willing to narrow the time frame to Q4 2021.

with the collection and production of the requested data, Twitter cannot withhold information on this basis.

Third, Twitter contends it does not maintain the requested data “in the form requested in the ordinary course.” (*Id.* at 17, 19) Defendants, however, have not requested production in any particular form. RFPs 3, 4, and 18 seek ESI “sufficient” to identify the requested information, which encompasses data *in whatever form it is stored*. Similarly, RFP 19 seeks the “private” data Twitter makes available to its own reviewers, regardless of how it is maintained.¹⁴

Twitter has also taken the position that certain of the requested data is no longer maintained by Twitter in *any* form. Specifically, Twitter has stated that “[n]o existing document or data set contains the information requested in RFP No. 2,” (Ex. 3 at 2-3) and that at least some of the “private” data that is used in the mDAU audit process is inaccessible after it is revised. (Ex. 11 at 3-4) At the same time, Twitter has conceded that “[a]t least some of the

¹⁴ Twitter also contends that some of the private data implicates user privacy laws, but it has not identified any specific data subject to such protections, or even which provisions are implicated.

[private] data is available in other Twitter systems,” and yet it has refused to collect and produce whatever data *is* available. (Ex. 3. at 3) To the extent Twitter possesses data responsive to Defendants’ requests, it should be required to produce that data, even if it no longer possesses *all* of the data that Defendants have requested.

Because Twitter itself has put at issue the data it is now refusing to produce, Defendants request that the Court compel Twitter to produce, at a minimum, whatever data (including private data) Twitter contends is necessary or sufficient to accurately estimate the percentage of spam and false accounts in mDAU, including the sampling set of accounts it reviews. To the extent Twitter has that data for Q4 2021 (Twitter’s letters suggest it “may” not), Defendants request production of the data for that time frame—a time frame that Twitter admits is relevant to Defendants’ claims because it is the period of time covered by the representations in the 2021 10-K that were incorporated into the Merger Agreement. (Merger Agreement § 4.6) To the extent the relevant data is not available for Q4 2021, Twitter should be compelled to produce the same data for any quarter for which the data *is* available. At a minimum, Twitter was obligated to preserve the relevant data

at least as of April 22, 2022, when Congress instructed Twitter to preserve documents relevant to Defendants' bid to purchase Twitter (Ex. 12 at TWTR_00041258) or June 6, 2022, when Defendants first asserted a breach.¹⁵

Prompt production of the requested data is critical in light of the expedited schedule in this case. Defendants' experts will require sufficient time to obtain the data, analyze it, create appropriate models and simulations, and generate estimates based on those models and simulations—all before the September 9, 2022 opening expert report deadline.

¹⁵ The veracity of Twitter's representations even after Q4 2021 demonstrates a pattern of conduct probative to Defendants' fraud claim, and is thus relevant, particularly if data for Q4 2021 no longer exists. *See Frank v. Engle*, 1998 WL 155553, at *3 (Del. Ch. Mar. 30, 1998) (where pattern of conduct is alleged, concluding that "documents created after the filing of plaintiffs' complaints may describe matters relevant to the events described in the complaint").

III. PLAINTIFF MUST IMMEDIATELY PRODUCE DOCUMENTS RESPONSIVE TO ADDITIONAL RFPS

In addition to RFPS related to Twitter's mDAU and other metrics and its false and spam account audit process, Defendants require additional documents responsive to other requests.

A. RFP 13

RFP 13 seeks documents related to government investigations and litigation surrounding Twitter's userbase metrics, including *Shenwick v. Twitter*, an action in which a stockholder alleged Twitter made misleading disclosures regarding its prior userbase metric that resulted in Twitter paying an \$809.5 million settlement to avoid trial. Twitter has only agreed to produce subpoenas and documents that "close investigations" in response to this request. While Defendants believe all documents responsive to this request are relevant, Defendants offered to accept only the production of deposition transcripts and exhibits from these lawsuits. Twitter refused.

These documents are plainly relevant. Defendants allege that Twitter has highlighted mDAU as the company's most important userbase metric while failing to disclose other metrics necessary to properly understand the

company's performance and outlook. These allegations are nearly identical to what is alleged in *Shenwick*. Documents from *Shenwick*, as well as government investigations into similar misconduct, are thus relevant to whether the misrepresentations alleged in Defendants' Counterclaims were made with the requisite scienter. See *J & R Ice Cream Corp. v. Cal. Smoothie Licen'g Corp.*, 31 F.3d 1259, 1268-69 (3d Cir. 1994) (evidence of modus operandi probative if prior and presently complained of acts "are parts of a single series of events" and may be admitted to intent).

Twitter can sustain no burden objection. The requested deposition transcripts and exhibits are likely stored in one centralized location and will not require the application of search terms.

B. RFP 43

RFP 43 seeks documents sufficient to identify how Twitter determines which ad impressions to deliver to users.

Twitter contends that documents sought by this request are burdensome and not relevant to any issue to be tried. But Twitter has offered no support for its burden contentions, and in any event, this request seeks documents "sufficient to identify" rather than all documents. As for

relevance, the documents sought are relevant to Defendants' contentions that "false or spam accounts most likely formed a disproportionate portion of monetized users (those that actually see ads)." (Counterclaims ¶¶ 13, 120-121) The documents sought are required to understand the mechanisms by which false and spam accounts may be generating advertising revenue for Twitter.

CONCLUSION

For the foregoing reasons, Defendants respectfully request an Order compelling Plaintiff to produce information as set forth above.

Respectfully,

/s/ Edward B. Micheletti

Edward B. Micheletti (ID No. 3794)

Words: 4,991

Enclosures

cc: Register in Chancery (via eFiling)
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