



SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

ONE RODNEY SQUARE
P.O. BOX 636
WILMINGTON, DELAWARE 19899-0636

TEL: (302) 651-3000
FAX: (302) 651-3001
www.skadden.com

DIRECT DIAL
(302) 651-3220
EMAIL ADDRESS
EDWARD.MICHELETTI@skadden.com

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August 22, 2022

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**PUBLIC VERSION -
Filed on August 29, 2022**

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:

Pursuant to this Court's August 19, 2022 Order (Dkt. 184),
Defendants respectfully submit this sur-reply in response to Twitter's

August 18, 2022 Letter Regarding Defendants' Second Discovery Motion ("Opp'n") and the accompanying Affidavit of Sean Edgett (Dkt. 169).¹

I. DEFENDANTS HAVE REQUESTED RELEVANT DATA

Twitter's 2021 10-K contains scores of statements about mDAU, Twitter's metric that purports to count "monetizable daily active users" on the platform, including statements (1) indicating that mDAU and mDAU growth best reflect Twitter's audience and engagement, Counterclaims ¶¶ 130-46; (2) regarding the percentage of false and spam accounts in mDAU, and how Twitter calculates that number, *id.* ¶¶ 111-29; and (3) regarding the number of mDAU in each quarter of 2020 and 2021, which Twitter restated three days after the Merger Agreement was signed, *id.* ¶¶ 147-49.

The truth of each of those statements, as represented by Twitter in the Merger Agreement, was a precondition to Defendants' obligation to consummate the Merger. Merger Agreement §§ 4.6(a), 7.2(b) (Dkt. 1 Ex.

¹ Consistent with the Court's Order, Defendants address only Twitter's Argument Section II, regarding Defendants' data requests. Defendants also dispute the balance of Twitter's response, which Defendants will be prepared to address at oral argument.

1); Counterclaims ¶¶ 47, 62-68 (Dkt. 42). Defendants are entitled to test the truth of those statements in support of their Counterclaims and in defense of Twitter’s action seeking specific performance.

Defendants have thus sought to compel production of three broad categories of data. Twitter addresses all of these data requests together, ignoring important differences in the types of data requested.

First, Defendants have requested, in RFP No. 2, historical “public” data regarding Twitter’s user-base, which Twitter makes available through its APIs “enterprise software tools [containing] current realtime and historical data reflecting user activity....” Dkt. 163 (“Motion”) Ex. 6 at 12-13. Although Defendants have access to certain APIs, Twitter acknowledges that some information that was *once* contained in the APIs is no longer available, rendering its historical data incomplete. Opp’n 18 n.7. Defendants have therefore requested data reflecting “all content that would

have been available to [an API] subscriber” during the period covered by Twitter’s 2021 10-K.² Mot. Ex. 6 at 12-13.

Twitter contends that a singular record of the historical data for each API “do[es] not exist.” Opp’n 8. But RFP No. 2 is not limited to such a record; as Defendants have explained, “Defendants’ request is directed to the underlying data...regardless of the ‘form’ in which it was stored.” Mot. Ex. 2 at 4. Both Twitter’s response and Mr. Edgett’s affidavit are silent regarding whether and to what extent Twitter possesses data responsive to RFP No. 2 in forms other than a singular “historical replay.” Twitter should be compelled to produce any such data in its possession.

Second, Defendants have requested, in RFP Nos. 3 and 4, additional internal Twitter data regarding users counted in mDAU. Mot. Ex. 6 at 13.

² Twitter asserts, without citation, that Defendants “do not press RFP Nos. 2, 3, or 4, except to the extent they overlap with RFP Nos. 18 and 19.” Opp’n 18. That is incorrect: the requested data responsive to RFP Nos. 2, 3, and 4 is relevant to Defendants’ allegations regarding mDAU generally, not only to Twitter’s process for estimating the prevalence of false or spam accounts within mDAU. Neither Twitter nor Mr. Edgett separately addresses Twitter’s possession of data responsive to RFP Nos. 2, 3, or 4.

These requests seek, for example, information regarding an account's creation date, selected language, initial geolocation, associated device, software, and carrier, time spent on the Twitter platform, and advertising impressions. *Id.* This information, which is not available through Twitter's APIs, is all relevant to assessing whether accounts included in mDAU are in fact genuine, revenue-producing accounts. Counterclaims ¶¶ 120-21, 138, 142.

Nowhere in its response or in Mr. Edgett's affidavit does Twitter deny that it possesses data containing at least some of the requested parameters. In fact, Twitter has conceded that it "possesses in some form or other at least some of the data identified in RFP No. 3 for accounts counted in mDAU," and that much of the data identified in RFP No. 4 "was never maintained *in the specified form* or is retained in the ordinary course for only up to 90 days." Mot. Ex. 3 at 2 (emphasis added). As with RFP No. 2, however, RFP Nos. 3 and 4 are not limited to data in any particular form, but rather seek data "sufficient" to disclose the requested parameters. Whatever Twitter has, it should be compelled to disclose.

Third, Defendants have separately requested, in RFP Nos. 18 and 19, data relating to the mDAU “audit” Twitter conducts in order to conclude that false and spam accounts “represented fewer than 5% of our mDAU during [Q4 2021].” Mot. Ex. 6 at 23-24; 2021 10-K at 4 (Dkt. 169 Ex. 1). Twitter acknowledges that it conducts this “audit” by “having a team of agents review the public and private data associated with each of approximately 9,000 accounts selected quarterly....” Opp’n 19. RFP Nos. 18 and 19 seek, among other things, production of this data. Mot. Ex. 6 at 23-24.

Twitter has agreed to produce responsive data that is stored in the ADAP system its agents use to perform their review, but it concedes that ADAP does not store the data its agents review. Opp’n 19; Mot. Ex. 3 at 2-3. That data, Twitter says, is accessed in “real time,” but “Twitter does not save snapshots of the realtime data the reviewers or their supervisors consult.” Opp’n 19; Edgett Aff. ¶ 5. In his affidavit, however, Mr. Edgett concedes that “underlying data that the reviewers accessed in realtime in conducting their review *may still exist* in Twitter’s systems.” Edgett Aff. ¶ 6 (emphasis added). Once again, if Twitter possesses this data, Defendants are entitled to it in discovery.

II. TWITTER CANNOT JUSTIFY ITS REFUSAL TO PRODUCE THE REQUESTED DATA

Despite acknowledging that it possesses at least *some* data responsive to Defendants' RFP Nos. 2, 3, 4, 18, and 19, Twitter refuses to collect and produce that data for three reasons.

First, Twitter argues that the requested data is irrelevant. Focusing narrowly on one specific aspect of Defendants' counterclaims, Twitter argues that its representation regarding false and spam accounts in mDAU is simply an "estimate," and that Defendants are only entitled to test that Twitter "has a process" that "yields an estimate of less than 5% of spam or false accounts among mDAU." Opp'n 21.

That is not correct. Even if Twitter's representation were merely an estimate or opinion—which Defendants do not concede—"a reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion....Thus, if a [regulated] statement omits material facts about the [speaker's] inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the

statement itself,” the speaker may be liable for that omission. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 188-89 (2015) (addressing omissions in a registration statement). Here, Defendants have specifically alleged that Twitter misrepresented its “audit” process and that “false or spam accounts represent materially more than 5% of mDAU.” Counterclaim ¶¶ 116-19, 122-29. The data underlying Twitter’s mDAU “audit” is relevant to both misrepresentations.³

Moreover, the data Defendants seek in RFP Nos. 2, 3, and 4 is also relevant to Twitter’s other representations regarding mDAU. This data will allow Defendants to investigate the proportion of mDAU that generates little or no revenue or otherwise is not engaged, as well as the prevalence of false and spam accounts among the subsets of mDAU that see ads and generate revenue. *See* Counterclaim ¶¶ 137-45. Twitter’s relevance arguments miss the mark.

³ The extent to which the true percentage of false or spam accounts differs from 5% is also relevant to the materiality of Twitter’s misrepresentation.

Second, Twitter argues that although it *does* have much of the requested data, collecting it would “at best yield a patchwork of data from myriad sources and in different formats,” Edgett Aff. ¶ 6, which according to Twitter renders the exercise “not warranted.” Opp’n 22. Yet Mr. Edgett’s affidavit provides no substantiating detail, stating generally that “Twitter stores data in a variety of forms, across tens of thousands of distinct databases and systems” by teams that “maintain different pieces of data for varying periods of time based on applicable retention policies,” which he suggests would make “even locating” the requested data “highly burdensome.” Edgett Aff. ¶ 6. Such general assertions of burden are not enough. *See Solow v. Aspect Res., LLC*, 2007 WL 3256944, at *1 (Del. Ch. Oct. 30, 2007) (“Merely stating...that searching for documents generated from 1993 to 2000 would add to some undue burden that [the producing party] does not describe with any precision or particularity does not make that search unduly burdensome.”). Indeed, Twitter has already confirmed that it “possesses in some form or other at least some of the data identified in RFP No. 3” and that most of the data requested by RFP 4 “is retained in the ordinary course”—suggesting that much of the work of locating the

requested data has already been completed. Mot. Ex. 3 at 2.⁴ Twitter has not substantiated its claims of burden.

Third, Twitter argues that Defendants’ data requests “implicate[] serious privacy and security concerns,” citing both the Stored Communications Act (“SCA”) and the European Union’s General Data Protection Regulation (“GDPR”). Opp’n 22-24. Twitter’s claim that the GDPR “contains no applicable exceptions for civil discovery,” Opp’n 23, is incorrect. In fact, the GDPR expressly permits the transfer of personal data where “necessary for the establishment, exercise or defence of legal claims.” GDPR Art. 49(1)(e).⁵ Moreover, statutes such as GDPR “do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.” *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for the S. Dist.*

⁴ Twitter has refused to produce a Rule 30(b)(6) witness knowledgeable regarding how Twitter stores its data.

⁵ See *Arigna Tech. Ltd. v. Nissan Motor Co.*, 2022 WL 3020136, at *2 (E.D. Tex. July 29, 2022) (“The European Union...states that information disclosed ‘for the purpose of formal pre-trial discovery procedures in civil litigation’ would fall under Article 49.”).

Of Iowa, 482 U.S. 522, 544 n.29 (1987); *In re Activision Blizzard, Inc.*, 86 A.3d 531 (Del. Ch. 2014). In any event, “[t]he party relying on foreign law has the burden of showing that such law bars production,” *United States v. Vetco, Inc.*, 691 F.2d 1281, 1289 (9th Cir. 1981), and Twitter has made no such showing here.

Nor does the SCA bar production of the requested data. The SCA has been interpreted to prohibit disclosure of the *content* of private social media posts, *see Davis v. HDR Inc.*, 2022 WL 2063231, at *6-7 (D. Ariz. June 8, 2022), but it permits disclosure of other “record[s] or other information pertaining to a subscriber,” including “name,” “address,” “records of session times and durations,” “length of service,” “types of service utilized,” and “telephone...number or other subscriber number or identity, including any temporarily assigned network address.” 18 U.S.C. §§ 2702(c)(6), 2703(c)(2).⁶ In short, Twitter has not identified any statute prohibiting its

⁶ *See Facebook, Inc. v. Superior Court*, 417 P.3d 725, 739 (Cal. 2018) (“[S]ubsection (c) of section 2702 describes six circumstances under which a covered provider may divulge *non-content information*.... [T]he last of these exceptions permits disclosure ‘to any person other than a
Continued on next page.

compliance with Defendants' actual discovery demands, nor any reason why this Court's July 22, 2022 Protective Order (Dkt. 31) is inadequate to protect the data that Defendants have requested.

CONCLUSION

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

Respectfully,

/s/ Edward B. Micheletti

Edward B. Micheletti (ID No. 3794)

Words: 1,994

Enclosures

cc: Register in Chancery (via eFiling)
Peter J. Walsh, Esq. (via eFiling)
Kevin R. Shannon, Esq. (via eFiling)
Christopher N. Kelly, Esq. (via eFiling)
Mathew A. Golden, Esq. (via eFiling)
David J. Margules, Esq. (via eFiling)
Elizabeth A. Sloan, Esq. (via eFiling)
Brittany M. Giusini, Esq. (via eFiling)
Brad D. Sorrels, Esq. (via eFiling)

governmental entity' (§ 2702(c)(6))—which includes defendants in this case.”) (emphasis in original).

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Daniyal M. Iqbal, Esq. (via eFiling)
Leah E. León, Esq. (via eFiling)
Jacob R. Kirkham, Esq. (via eFiling)
Robert A. Weber, Esq. (via eFiling)
Joseph B. Cicero, Esq. (via eFiling)
Elliot Covert, Esq. (via eFiling)