



**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

TWITTER, INC.,	)	
	)	
Plaintiff and	)	
Counterclaim-	)	
Defendant,	)	
	)	C.A. No. 2022-0613-KSJM
v.	)	
	)	
ELON R. MUSK, X HOLDINGS I,	)	
INC., and X HOLDINGS II, INC.,	)	
	)	
Defendants and	)	
Counterclaim-Plaintiffs.	)	

**NON-PARTIES MORGAN STANLEY & CO. LLC AND MORGAN  
STANLEY SENIOR FUNDING, INC.'S OPPOSITION TO  
PLAINTIFF'S MOTION TO COMPEL**

Non-parties Morgan Stanley & Co., LLC ("MSCO") and Morgan Stanley Senior Funding, Inc. ("MSSF" and with MSCO, "Morgan Stanley"), respectfully submit this Opposition to Plaintiff's Motion to Compel Production of Documents (the "Motion").

**INTRODUCTION**

1. Although Morgan Stanley is not a party to this litigation, it has gone to extraordinary lengths to respond to Plaintiff's sprawling and constantly evolving discovery demands on the expedited schedule Plaintiff requested. Within about a month of receiving Plaintiff's subpoenas, Morgan Stanley had reviewed over a hundred thousand documents from eleven custodians. Morgan Stanley has produced

over 65,000 of those documents to date—far exceeding the productions made by either Twitter or Musk, the actual parties to the litigation, and dwarfing the productions of any other third party. Morgan Stanley has also accommodated Plaintiff’s numerous other demands, including offering to produce all available witnesses for depositions on (or about) the dates they were noticed (which depositions Plaintiff thereafter postponed) and participating in countless meet-and-confer conferences to resolve disputed issues promptly and without resorting to unnecessary judicial intervention. In short, Morgan Stanley has bent over backwards to expeditiously meet Plaintiff’s demands and engaged in good faith to resolve any disputes throughout the discovery process.

2. Notwithstanding Morgan Stanley’s efforts, and without any advance notice, Plaintiff—through its counsel, Kobre & Kim, who has been handling Plaintiff’s third-party discovery with Morgan Stanley and other third-party banks—filed a motion with this Court at 9:45 p.m. on Saturday, September 10 seeking the production of unspecified documents that Plaintiff alleges are being “improperly withheld as privileged.” Motion at 1. Plaintiff did not even provide counsel the simple courtesy of a warning that the motion was coming before filing.

3. The Motion is fatally premature and wholly without merit.

4. As the Motion concedes (at ¶ 17), the parties were still engaged in the meet-and-confer process when Plaintiff abruptly sought judicial intervention. Prior

to the Motion, Plaintiff had only abstractly disputed the scope of applicable privileges—just as Plaintiff does now in the Motion. Morgan Stanley repeatedly invited Plaintiff to identify specific documents to give context to those discussions, as is the proper course for resolving privilege disputes. Plaintiff refused to do so.

5. Nor was Plaintiff in the dark on Morgan Stanley's privilege determinations. For nearly a month, Plaintiff has had Morgan Stanley's first productions (of over 20,000 documents) containing 841 documents redacted in part to protect privilege, but nonetheless making clear the participants of the communication, their roles, and its subject matter—in other words, exactly the information necessary to lodge challenges to specific privilege determinations, if warranted. Yet Plaintiff still failed to raise any concrete challenge regarding any specific privilege determination.

6. Regarding a privilege log, although Morgan Stanley stated that it did not believe a formal log was necessary given the highly expedited schedule and the scope of the requested document production, it repeatedly offered to discuss further, including on September 6, following the parties' last meet and confer on these issues. Rather than engaging in those discussions, Plaintiff went straight to Court. Morgan Stanley plans to provide Plaintiff with a vendor-generated metadata logs for documents withheld for privilege—both for the lending and financial advisory custodians—tomorrow, effectively mooted this point.

7. By not meeting and conferring about any specific privilege determinations and by seeking judicial relief while the parties were still meeting and conferring about privilege logs, Plaintiff has failed to comply with its obligations to meet and confer in good faith. The motion should be denied on this ground alone.

8. The Motion also fails on the merits. Because Plaintiff does not challenge the *application* of any privilege to particular documents or communications, Plaintiff is left to challenge the *existence* of asserted privileges in the abstract. That effort is doomed to fail because these privileges are deeply rooted in Delaware (and elsewhere) and can—and do—apply on the facts here. In particular, it is well established that the attorney-client privilege applies when one lawyer represents one client with multiple legal needs or affiliates within the same company. It is likewise well established that transactional counterparties can assert a common-interest privilege as to certain post-signing communications. Whether either of these privileges applies to a particular communication depends on the nature and the circumstances of that communication. But the existence of both of these privileges—all that Plaintiff meaningfully challenges here—is firmly established and, respectfully, not subject to bona fide debate.

9. To seek to avoid these well-established principles, Plaintiff offers a gross misunderstanding or mischaracterization of the facts. Plaintiff's arguments rely on the erroneous assumption that MSSF and MSCO were freestanding

independent entities that were adverse to one another with respect to every single communication at issue. Plaintiff contends—without any factual support—that Morgan Stanley’s counsel at Davis Polk & Wardwell LLP (“Davis Polk”) represented only one of several Morgan Stanley affiliates and that the sharing of Davis Polk’s advice among Morgan Stanley employees somehow constituted a waiver. But as is clear from the supporting affidavit that Morgan Stanley is submitting with this opposition, Davis Polk has represented and continues to represent *Morgan Stanley* broadly in connection with this transaction; its representation has never been limited to any isolated aspect of the transaction (whether lending or advisory) or any specific Morgan Stanley affiliate. Likewise, the distinction that Plaintiff seeks to draw between Morgan Stanley affiliates MSSF and MSCO is illusory. MSSF has no employees, and all relevant Morgan Stanley employees involved in the transaction—including those involved in the debt commitment—were employees of MSCO. There is no basis to assert that sharing legal advice among employees of the same entity acting within their job responsibilities could ever waive a privilege.

10. This motion is procedurally improper and meritless. It should be denied.

## **BACKGROUND**

### ***Morgan Stanley Retained Davis Polk to Advise on Multiple Aspects of the Transaction***

11. Beginning in April 2022, Morgan Stanley provided a number of services to Elon Musk and/or one or more entities controlled by him (together, “Musk”) in connection with his potential acquisition of Twitter (the “Transaction”). These services included: (1) serving as Musk’s financial advisor in connection with the Transaction; (2) assisting Musk in efforts to syndicate his anticipated equity stake in Twitter in connection with the Transaction; (3) serving as a lead arranger, bookrunner, and lender, together with a syndicate of other lenders, to provide \$13 billion of debt financing to Musk in connection with the Transaction; and (4) serving as lead arranger, a bookrunner, and a lender, together with a syndicate of other lenders, to provide a \$12.5 billion margin loan financing in connection with the Transaction (the “Services”). Lee Affidavit ¶ 3.

12. Davis Polk is a long time legal advisor to Morgan Stanley (including but not limited to MSCO and MSSF). *Id.* ¶ 4. Morgan Stanley retained Davis Polk to represent Morgan Stanley in connection with Morgan Stanley’s provision of these services. *Id.* In particular, Davis Polk provided advice to Morgan Stanley relating to both Morgan Stanley’s provision of financial advisory services and Morgan Stanley’s provision and arranging of the financings to Musk. *Id.*

13. All of the Morgan Stanley business people to whom Davis Polk

provided advice in connection with the Services were employed by MSCO. *Id.* ¶ 5. MSSF, an entity through which Morgan Stanley extends lending commitments to its clients, was the entity that committed to serve as one of the lenders in the Transaction. *Id.* ¶ 6. MSSF, however, has no employees of its own. *Id.* Accordingly, the debt financing commitment letter defines MSSF as “Morgan Stanley Senior Funding , Inc. . . . acting through such of [its] affiliates or branches as it deems appropriate,” including MSCO. *Id.*; *see also* Motion Ex. 2 at 1.

***Morgan Stanley Cooperates with Twitter’s Broad Subpoenas***

14. Plaintiff filed this lawsuit on July 12, 2022. Although Plaintiff contends that it “promptly” served MSCO and MSSF with subpoenas (Motion ¶ 7), Plaintiff in fact delayed two weeks to serve the subpoenas. The subpoenas were exceedingly broad and included dozens of requests. From that point on, Morgan Stanley has been thoroughly cooperative with Twitter.

15. Specifically, after numerous meet-and-confers, Morgan Stanley agreed to review over a hundred thousand documents from eleven different custodians on an expedited schedule that Twitter demanded. Within a month, Morgan Stanley produced over 65,000 documents—more than either of the two parties to the litigation and far more than any other third party (among the dozens who have received subpoenas).

16. Twitter also served eleven subpoenas for fact depositions on Morgan

Stanley witnesses, as well as two separate (and duplicative) 30(b)(6) deposition subpoenas on MSCO and MSSF, with upwards of 53 subject matters (with multiple sub-parts). Morgan Stanley immediately accommodated Twitter's requested fact depositions, offering available witnesses for dates on (or about) the noticed deposition dates and before the fact discovery cut-off in the scheduling order governing this case. *See, e.g.*, Andrade Aff. Ex. 1 at 5. Twitter ultimately postponed those depositions. And while Morgan Stanley believes 30(b)(6) testimony is unnecessary here given the expedited nature of the proceeding and the testimony of witnesses' with personal knowledge, Morgan Stanley has also largely agreed to provide 30(b)(6) testimony on many broad topics, subject to its objections. (Notably, even as Plaintiff filed this motion, it is itself fighting to substantially curtail its own 30(b)(6) testimony.)

***Morgan Stanley Conducts a Thorough, Good Faith Privilege Review***

17. Throughout its review, Morgan Stanley made a good faith effort to review each document for potential privilege issues. Always painstaking, the privilege analysis in this case is made more complex by the nature of the parties involved. Morgan Stanley had to evaluate not only its own privilege, but also Musk's, and any common interest among them. That is a highly fact- and context-dependent analysis that requires a document-by-document review to appropriately consider the nature and circumstances surrounding any particular communication.

In the end, Morgan Stanley produced several thousand documents with privilege redactions, and withheld approximately 3,000 documents as privileged. Morgan Stanley made its first productions within weeks of service of the subpoenas and substantially completed its production in about a month.

18. Twitter was well aware of the nature of Morgan Stanley's privilege assertions and, at least by virtue of the redacted documents, had countless specific examples of how Morgan Stanley had applied those privileges in practice.<sup>1</sup>

19. The parties had several meet-and-confers and email exchanges concerning Morgan Stanley's privilege assertions. Morgan Stanley explained repeatedly that privilege questions could not be evaluated in a factual vacuum, and invited Twitter to identify specific documents to further understand or challenge Morgan Stanley's position. *See, e.g., Andrade Aff. Ex. 1 at 1, 3, 5, 8.*

20. Plaintiff refused. Indeed, except for several weeks ago when it raised a handful of documents for Morgan Stanley to reconsider (where the dispute was resolved through the meet-and-confer process), Plaintiff has not identified a single document that it asserts was improperly redacted. Nor did it do so in its Motion.

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<sup>1</sup> Moreover, many of the withheld documents were email attachments in which the original email was produced, revealing sufficient information for Twitter to fully understand the nature of the privilege assertion (namely, the sender, recipient, and subject matter of the document).

21. The parties also discussed producing privilege logs. For the lending custodians, Twitter agreed that given the expedited nature of the case and the burden of producing a full log, a vendor generated metadata log would suffice. *See Andrade Aff. Ex. 1* at 4. Likewise, for the financial advisory custodians, Morgan Stanley thought it inefficient to dedicate its resources to a traditional, comprehensive privilege log, and instead focused resources on completing the document production and responding to Twitter’s many other discovery demands, including preparing multiple witnesses for fact and Rule 30(b)(6) depositions. Morgan Stanley raised the possibility of producing a vendor-generated metadata log, as it had for the lending custodians.

22. On September 6, following the parties’ last meet-and-confer on these issues, Morgan Stanley reiterated that third parties in expedited litigation generally do not complete formal privilege logs given the resource demands. (Indeed, it is Morgan Stanley’s understanding that Twitter’s own banks have not produced their own privilege logs.) Nonetheless, Morgan Stanley clearly stated that it was “prepared to discuss your request for a privilege log on our next meet and confer.” Motion Ex. 9.

23. That meet and confer never happened. Instead, without even the courtesy of advance notice, Twitter ran to court and filed this Motion at 9:45 p.m. on a Saturday night, demanding a response two business days later. Morgan Stanley

will provide Plaintiff with vendor-generated metadata log for documents withheld for privilege for the financial advisory and lending custodians tomorrow, and will provide a supplemental log with additional privilege descriptions for the financial advisory custodians in the coming days.

## **ARGUMENT**

### ***The Motion is Procedurally Improper and Premature***

24. Plaintiff's Motion, filed in the middle of the parties' meet-and-confer process, is premature and should be denied for that reason alone. A motion to compel is ripe "[o]nly after the parties engage in good faith efforts to meet and confer, are at an impasse, and Petitioner confirms that deficiencies remain in Respondent's production." *Cowan v. Furlow*, 2019 WL 6791426, at \*1 (Del. Ch. Dec. 11, 2019); *see also* Court of Chancery Guidelines § 7(e)(i) ("The Court will not be inclined to consider arguments or authorities that have not previously been presented to the other side.").

25. Plaintiff cannot blame Morgan Stanley for Plaintiff's own premature Motion. Plaintiff received Morgan Stanley's proposed redactions weeks ago, yet still fails in its Motion to identify any particular documents it believes were improperly withheld. Had Plaintiff engaged in good faith efforts to meet and confer and raised any such documents with Morgan Stanley before rushing into Court, the parties could perhaps have resolved the issue, as they have in the past. Or else, if the parties

reached an impasse with respect to particular documents, Plaintiff could have presented that concrete dispute for the Court's resolution.

26. Plaintiff likewise cannot blame Morgan Stanley for its own refusal to continue the meet and confer process in connection with Morgan Stanley's privilege log. As Plaintiff concedes, Morgan Stanley never refused to provide a privilege log. *See* Motion ¶ 17. At the time the Motion was filed, Morgan Stanley had agreed to provide a metadata-populated log for the lending custodians (agreed to by Plaintiff) and offered to meet and confer on such logs for the financial advisory custodians. But Plaintiff waited nearly a week without revisiting the issue and filed the Motion with no prior notice. Morgan Stanley will provide its metadata log for the financial advisory and lending custodians tomorrow. Accordingly, Plaintiff's request that the Court "remedy [MSCO]'s failure to provide a privilege log" and Plaintiff's related suggestion that Morgan Stanley's supposed "refusal" to provide a privilege log "justifies a finding a waiver" are moot. *See* Motion ¶ 35.

***To the Extent They Should Be Addressed in the Abstract, Plaintiff's Arguments are Meritless***

27. Because Plaintiff's premature motion does not challenge the application of Morgan Stanley's privilege assertions to any specific documents, its

motion amounts to a challenge to the *existence* of these privileges in the abstract.<sup>2</sup> Because the privileges are longstanding and deeply rooted, Plaintiff's effort entirely fails.

28. As a threshold matter, the Court need not address Plaintiff's manufactured choice-of-law dispute and, in any event, Delaware law applies. Although Plaintiff engages in a choice-of-law analysis, Plaintiff does not claim the issue is dispositive, meaning that this Court need not address it. *See* Motion ¶ 24 ("Delaware law is largely in accord" with New York law). Even so, this Court—on Twitter's invitation—has already applied Delaware law to resolve a privilege dispute in this case arising in connection with certain of Musk's emails. *See* Memorandum Opinion at 8 (Sept. 13, 2022) (applying Delaware law, as Twitter had in its briefing on the issue). This is the right result: Delaware law applies where "[t]he parties selected Delaware law to govern the Merger Agreement, and chose Delaware as the forum for any disputes arising out of the Merger Agreement." *3Com Corp. v. Diamond II Hldgs., Inc.*, 2010 WL 2280734, at \*5 (Del. Ch. July 9, 2009); *see*

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<sup>2</sup> Even in the cases Plaintiff cites to claim that the issues it raises "are ... routinely resolve[d] categorically," Motion ¶ 28, the courts resolved only specific challenges to specific documents. *See Twin Willows, LLC v. Pritzkur, Tr. for Gibbs*, 2022 WL 593908, at \*5 (Del. Ch. Feb. 28, 2022) ("To accurately resolve [the] privilege claims, I requested in *camera review* of the documents being withheld."); *Glassman v. Crossfit, Inc.*, 2012 WL 4859125, at \*3 (De. Ch. Oct. 12, 2012) (addressing specific "documents in the privilege logs").

Merger Agreement § 9.8.

29. On the merits, Plaintiff radically mischaracterizes the facts and the law to argue for the non-existence of two well-recognized privileges.

30. Plaintiff's arguments rely on the erroneous assumption that MSSF and MSCO were fully independent entities that were adverse to one another with respect to every single communication in connection with the Transaction. But the record reflects that Morgan Stanley and its affiliates engaged Davis Polk to provide advice and Davis Polk provided that advice both in connection with Morgan Stanley's provision of financial advisory services and Morgan Stanley's provision and arranging of financing. *See Lee Aff.* ¶ 4. Each of the Morgan Stanley business people to whom Davis Polk provided advice in connection with the Services—whether concerning lending or advisory work—were employees of MSCO at all relevant times. *Id.* ¶ 5. MSSF itself has no employees and instead is an entity through which Morgan Stanley, among other things, extends lending commitments to its clients. *Id.* ¶ 6.

31. Plaintiff's attempts to draw distinctions between MSCO and MSSF also ignore the debt commitment letter and the engagement letter between Morgan Stanley and Musk, which both define the Morgan Stanley entities to include all "affiliates." *See Motion Ex. 2 at 1* ("Morgan Stanley Senior Funding , Inc. . . . acting through such of [its] affiliates or branches as it deems appropriate"); *Motion Ex. 1*

at (“Morgan Stanley may provide its services through or in conjunction with one or more of its affiliates and references in this letter agreement to ‘Morgan Stanley’, ‘we’ and ‘us’ shall, except where the context otherwise requires, include any such affiliates.”). MSSF’s affiliates include, of course, MSCO. The distinctions Plaintiff purports to draw between MSSF and MSCO are, therefore, illusory.<sup>3</sup>

32. Plaintiff’s allegation that Morgan Stanley has somehow changed positions, *see, e.g.*, Motion ¶¶ 9-17, is false and not supported by the record, which instead shows that Weil and Davis Polk have clearly and consistently communicated their positions. *See* Motion Ex. 9 at 3-4 (“Morgan Stanley engaged Davis Polk to provide advice to Morgan Stanley in connection with the transaction, including in connection with Morgan Stanley’s roles both as financial advisor and as lender in the transaction, without regard to distinctions between affiliates. Accordingly, absent the presence of any privilege-breaking third-party, all confidential communications reflecting legal advice between Davis Polk and any members of the advisory and funding teams at Morgan Stanley are subject to attorney-client privilege.”); Motion

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<sup>3</sup> Plaintiff issued separate subpoenas to MSSF and MSCO, and Morgan Stanley opted to address the massive burdens imposed by these subpoenas by using two firms to respond, with Davis Polk focused on documents and witnesses most relevant to the debt commitment and Weil, Gotshal & Manges LLP (“Weil”) focused on documents and witnesses most relevant to Morgan Stanley’s financial advisory work. Both Davis Polk and Weil, however, have collected documents from the same sources and answer to the same client, Morgan Stanley.

Ex. 9 at 1-2 (same); Motion Ex. 8 at 2-3 (same); *see also* Andrade Aff. Ex. 2 at 1 (directing to foregoing correspondence).

33. Moreover, after the Transaction was signed, Morgan Stanley and Musk were jointly engaged in a number of activities with the shared aim of seeing the merger to its completion. For example, Morgan Stanley and Musk were each reviewing drafts of filings with the SEC, with counsel weighing in, and there was a joint legal interest on behalf of both Musk and Morgan Stanley to ensure that the proposed public disclosure was accurate. Similarly, Morgan Stanley was assisting Musk in syndicating his equity, reaching out to potential investors, and entering into commitments with third parties on Musk's behalf. Counsel, in turn, was advising Morgan Stanley on legal issues related to those activities.

34. In the face of these undisputed facts, Plaintiff's arguments that neither the joint-representation nor common-interest privilege could possibly apply fall apart.

35. As to ***joint-representation privilege***, it is hornbook law that Davis Polk's legal advice to its client, Morgan Stanley, is protected as privileged under Delaware law. *See, e.g., Zirn v. VLI Corp.*, 621 A.2d 773, 781 (Del. 1993) ("The attorney-client privilege finds full application where a corporation is the client seeking professional advice and assistance" and extends to "all communications, whether written or oral, made for the purpose of facilitating the rendition of

professional legal services.”); *see also* D.R.E. 502(b). It is likewise bedrock law that counsel for Morgan Stanley can have communications with employees acting within the scope of their job responsibilities that provide or reflect legal advice without waiving privilege. *See Int’l Bus. Machs. Corp. v. Comdisco, Inc.*, 1992 WL 52143, at \*2 (Del. Super. Ct. 1992) (“The fact that the communication was not sent directly by an attorney does not render the privilege inapplicable given that the Delaware rule contemplates privileged communications between representatives of the client[.]”).

36. Plaintiff seeks to avoid this result by conjuring a false, counterfactual version of reality. Plaintiff asserts—with no support—that Davis Polk’s representation was limited to advising only MSSF and, therefore, the sharing of Davis Polk’s advice between and among employees of MSCO could somehow effect a waiver of privilege. *See* Motion ¶ 32. But these unfounded assertions are directly at odds with the Lee Affidavit—the only evidence before the Court. The Lee Affidavit confirms that Davis Polk’s advice to Morgan Stanley was broad, including advice about both Morgan Stanley’s lending and its advisory work. Lee Aff. ¶ 4. It likewise confirms that each of the Morgan Stanley business people to whom Davis Polk provided advice—whether concerning lending or advisory work—were employees of a single affiliate: MSCO. *Id.* ¶ 5.

37. Plaintiff has no support for its notion that a client can somehow waive

privilege by sharing legal advice among employees acting within the scope of their job responsibilities. Instead, Plaintiff offers citations to wholly inapposite case law. For example, *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 630-31 (2016), addresses waiver in common-interest scenarios in which two *different* entities are represented by *different* counsel, and expressly distinguishes scenarios where entities share a “common identity” and single attorney. *See also*, e.g., *Gulf Islands Leasing, Inc. v. Bombardier Cap., Inc.*, 215 F.R.D. 466, 473-74 (S.D.N.Y. 2003) (different entities with different attorneys). Even were there some relevant distinction between MSSF and MSCO—which there is not—the provision of legal advice by Davis Polk to both entities would not effect a waiver since the cases Plaintiff cites expressly distinguish situations where affiliated entities are represented by a common attorney. *Id.* at 474; *Ambac* 27 N.Y.3d at 630-31. The only Delaware case Plaintiff cites, *In re Teleglobe Communications Corp.*, 493 F.3d 345 (3d Cir. 2007), decisively rejects Plaintiff’s argument that privilege is somehow waived when related corporate entities use the same legal counsel. *Id.* at 369. As the court explained, “any other result would wreak havoc on corporate counsel offices.” *Id.*

38. Plaintiff, at times, implies that there was some conflict between and among employees at Morgan Stanley or between and among Morgan Stanley and Davis Polk’s other clients who were also lenders to Musk in connection with the

Transaction. *See, e.g.*, Motion ¶¶ 26-27. That assertion is baseless. But even if there were some conflict here—which there is not—it would not be Twitter’s to assert and would not make the documents any less privileged. *See In re Teleglobe*, 493 F.3d at 369 (“[C]ounsel’s failure to avoid a conflict of interest should not deprive the client of the privilege.” (citing *Eureka Inv. Corp., N.V. v. Chicago Title Ins. Co.*, 743 F.2d 932, 938 (D.C. Cir. 1984))).

39. As to ***common-interest privilege***, this Court’s precedents establish that counterparties to an agreement can have aligned interests sufficient for common-interest privilege to attach with respect to specific communications. *See, e.g.*, 3Com, 2010 WL 2280734, at \*7 (“[A]ttorney-client privilege [extends] to certain communications made by the client, his representative, or lawyer, to a lawyer ‘representing another in a matter of common interest’” (quoting D.R.E. 502(b))). The appropriate analysis turns on whether there is adversity between the parties to the communication, or whether *with respect to the specific communication*, the parties’ interests are sufficiently aligned to invoke the common-interest privilege. *See id.* at \*8 (“Newco and Huawei appear to have had a common interest in obtaining CFIUS approval and seeing the merger to its completion. The two companies, however, had adverse interests [in other contexts]. Because of their potentially conflicted relationship, the Court will review the challenged communications *in camera* to determine Newco and Huawei’s position vis-à-vis one another at the time

each challenged communication was made.”).

40. Morgan Stanley has diligently applied this rule, document-by-document. Morgan Stanley has produced, *without redaction*, many documents containing legal discussions among Musk and Morgan Stanley’s respective counsel, to the extent those discussions were adversarial. And Morgan Stanley has withheld post-signing communications where the parties have a common interest, including in the situations described above. *See, e.g., id.* at \*7 (in action by target to recover termination fee under terminated merger agreement, certain non-adversarial communications between acquirer and entity with a 16% interest in the acquisition reflected common interest); *In re Lululemon Athletica Inc.* 220 Litig., 2015 WL 1957196, at \*9 (Del. Ch. Apr. 30, 2015) (corporation and its founder shared a common legal interest when they exchanged privileged communications for the purpose of responding to a press inquiry about the founder’s stock trades).

41. The bottom line is that whether either privilege applies to a particular communication needs to be evaluated on a document-by-document basis. The undisputed factual record and blackletter law make clear that these privileges can (and do) apply here. Morgan Stanley has endeavored to carefully and efficiently comply with its obligations and make careful privilege calls, consistently and clearly explaining its approach to Plaintiff along the way.

42. Any challenge to Morgan Stanley’s privilege determinations must be

made with respect to the particular circumstances of particular communications— exactly the type of challenge Plaintiff fails to raise. And any such challenge should have first been raised through the good-faith meet-and-confer process rather than in a motion to this Court—exactly what Plaintiff failed to do.

### **CONCLUSION**

43. For the foregoing reasons, Morgan Stanley respectfully requests that the Court deny the Motion.

OF COUNSEL:

Jonathan Polkes  
Stacy Nettleton  
Amanda K. Pooler  
WEIL, GOTSHAL & MANGES LLP  
767 Fifth Avenue  
New York, New York 10153  
(212) 310-8000

OF COUNSEL:

Edmund Polubinski III  
James McClammy  
Pascale Bibi  
DAVIS POLK & WARDWELL LLP  
450 Lexington Avenue  
New York, New York 10017  
(212) 450-4000

YOUNG CONAWAY STARGATT  
& TAYLOR, LLP

/s/ Martin S. Lessner  
Martin S. Lessner (No. 3109)  
Tammy L. Mercer (No. 4957)  
Lakshmi Muthu (No. 5786)  
M. Paige Valeski (No. 6336)  
Rodney Square  
1000 North King Street  
Wilmington, Delaware 19801  
(302) 571-6698

BAYARD, P.A.

/s/ Brett M. McCartney  
Brett M. McCartney (#5208)  
Elizabeth A. Powers (#5522)  
Sarah T. Andrade (#6157)  
600 North King Street, Suite 400  
Wilmington, Delaware 19801  
(302) 655-5000

*Counsel for Non-Parties Morgan  
Stanley & Co., LLC and Morgan  
Stanley Senior Funding, Inc.*

Words: 4,495

Dated: September 14, 2022

## **CERTIFICATE OF SERVICE**

I, M. Paige Valeski, Esquire, hereby certify that on September 14, 2022, a copy of the foregoing document was served on the following counsel in the manner indicated below:

### **BY FILE & SERVEXPRESS**

Peter J. Walsh, Jr., Esq.  
Kevin R. Shannon, Esq.  
Christopher N. Kelly, Esq.  
Mathew A. Golden, Esq.  
POTTER ANDERSON  
& CORROON LLP  
1313 North Market Street  
Hercules Plaza, 6th Floor  
Wilmington, Delaware 19801

Jacob R. Kirkham, Esq.  
KOBRE & KIM LLP  
600 North King Street, Suite 501  
Wilmington, Delaware 19801

Edward B. Micheletti, Esq.  
Lauren N. Rosenello, Esq.  
SKADDEN, ARPS, SLATE,  
MEAGHER & FLOM LLP  
One Rodney Square  
P.O. Box 636  
Wilmington, Delaware 19899-0636

David J. Margules, Esq.  
Elizabeth A. Sloan, Esq.  
Elizabeth S. Fenton, Esq.  
Jessica C. Watt, Esq.  
Brittany M Giusini, Esq.  
BALLARD SPAHR LLP  
919 North Market Street, 11th Floor  
Wilmington, Delaware 19801

Brad D. Sorrels, Esq.  
Daniyal M. Iqbal, Esq.  
Leah E. León, Esq.  
WILSON SONSINI GOODRICH  
& ROSATI, P.C. 222  
Delaware Avenue, Suite 800  
Wilmington, Delaware 19801

Robert A. Weber, Esq.  
Joseph B. Cicero, Esq.  
Elliott Covert, Esq.  
CHIPMAN BROWN CICERO &  
COLE, LLP Hercules Plaza 1313  
North Market Street, Suite 5400  
Wilmington, Delaware 19801

/s/ M. Paige Valeski

M. Paige Valeski (No. 6336)