

October 6, 2022

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REDACTED PUBLIC VERSION
DATED: October 13, 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:

At some point, apparently in early July and long after he left Twitter, self-proclaimed whistleblower Peiter “Mudge” Zatkó took it upon himself to burn what he described as his “personal notebooks.” Twitter did not ask Zatkó to torch his own documents, much less demand that he do so. Twitter had no knowledge of Zatkó’s notebooks and no idea what information they contained. Indeed, at the time of the supposed conflagration, Twitter was unaware that Zatkó had filed a purported whistleblower complaint—much less that Defendants would one day make Zatkó’s allegations the centerpiece of their litigation strategy.

Defendants nevertheless ask the Court to sanction *Twitter* because their star witness made the inexplicable, but undoubtedly voluntary, decision to destroy his own documents without providing copies to Twitter. This makes no sense: Even

putting aside that Zatko described these as his “personal” documents, Zatko had the opportunity to submit whatever he wanted to regulators under the terms of the applicable agreements, described below. And there is no basis for presuming that anything *not* in regulators’ hands would corroborate his allegations. The Court should reject Defendants’ illogical request for an adverse inference, as well as their legally unsupported claim that Twitter has waived privilege over certain Zatko-related documents, for the reasons discussed below.

BACKGROUND

I. Zatko’s Standard Confidentiality Agreement

When Zatko joined Twitter in the fall of 2020, he signed a standard Employee Invention Assignment and Confidentiality Agreement (the “2020 Confidentiality Agreement”), which included an undertaking that, upon separation, he would “immediately deliver to the Company . . . any and all Company property,” including confidential information and “all electronically stored information[,] . . . records, data, notes, notebooks, reports, files, proposals, lists, correspondence, . . . materials, photographs, charts, [and] any other documents and property.” Ex. A at ’307-08 ¶ 8(b). The 2020 Confidentiality Agreement required Zatko to “delete and expunge all Company Information” maintained in personal electronic media upon his

separation, but only after identifying that information for, and providing copies of it to, Twitter. *Id.* at '308 ¶ 8(d). Zatko acknowledged that “nothing in this Agreement limits or prohibits me from filing a charge or complaint with, or otherwise communicating or cooperating with or participating in any investigation or proceeding” before a government agency, “including, but not limited to disclosing documents or other information as permitted by law, without giving notice to, or receiving authorization from, the Company.” *Id.* at '307 ¶ 7(e).

II. Zatko’s Termination

In the fall of 2021, [REDACTED] lodged an Employee Relations complaint against Zatko, [REDACTED] [REDACTED] Ex. B at '648. [REDACTED] alleged that Zatko [REDACTED] [REDACTED] and [REDACTED] also accused Zatko [REDACTED] *Id.* at '648-49. An Employee Relations investigation was launched, and, by mid-December, General Counsel Sean Edgett was involved. Ex. C (Edgett Tr.) 112:18-113:18.

The tensions between Zatko and [REDACTED] came to a head around the time of a December 16, 2021 meeting of the Twitter Board’s Risk Committee, at which [REDACTED] and Zatko were both scheduled to present. Ex. D at '391. Zatko sought to fire [REDACTED]

before the meeting, but the investigation into [REDACTED] claims against Zatko was still pending. Ex. E (Agrawal Tr.) at 32:2-7. With that investigation ongoing, Zatko's termination of [REDACTED] could be viewed as retaliatory, and CEO Parag Agrawal and HR head Dalana Brand declined to permit the termination until the investigation concluded. Ex. F (Brand Tr.) at 100:3-7. Zatko also sought to prevent [REDACTED] from attending the Risk Committee meeting and from presenting materials she had prepared. Ex. D at '390. Here, too, Agrawal advised caution, though he instructed Zatko to correct any misleading or inaccurate information and suggested that Zatko avail himself of a closed session of the Risk Committee to do just that if necessary. *Id.*

On December 15, the eve of the Risk Committee meeting, Zatko wrote [REDACTED] a long email detailing deficiencies he perceived in the materials she intended to present. Ex. G. [REDACTED] complained that Zatko's email came too late for her to respond to Zatko's criticisms; the materials had already been submitted to the Committee, with Zatko's approval. Ex. H. During the Risk Committee meeting itself, Zatko messaged with others in attendance and indicated that he planned to correct [REDACTED] presentation during the closed session. Ex. I at '574-75. But when the time came for the closed session, Zatko spent no more than three minutes of his allotted time

discussing the issues in [REDACTED] presentation. Ex. J (Zatko Tr. Vol. 2) at 356:5-357:25.

Agrawal, who had received a preliminary report on the ongoing Employee Relations investigation into [REDACTED] allegations, decided [REDACTED]
[REDACTED] Ex. E (Agrawal Tr.) at 33:5-34:16.

Meanwhile, by December, Zatko had retained counsel. Ex. J (Zatko Tr. Vol. 2) at 351:4-13. He had also begun sending Twitter documents from his Twitter email account to his personal gmail account. *E.g.*, Exs. K, L, M. On January 4, 2022, Zatko wrote an email to Agrawal and Brand, blind-copying his attorneys and reiterating concerns with [REDACTED] December Risk Committee presentation. Ex. N. Zatko now ratcheted up his characterization of the presentation, calling it for the first time “at worst fraudulent” and “at best hiding the truth.” *Id.* In view of this inflammatory characterization, Agrawal referred the matter to the Audit Committee. Ex. O. Under the auspices of in-house counsel and with the assistance of outside counsel, Twitter’s Compliance department, headed by [REDACTED] opened an investigation into Zatko’s allegations. Ex. C (Edgett Tr.) 87:5-88:16. Zatko was given yet another opportunity to make any clarifying or explanatory

comments about [REDACTED] presentation to the Risk Committee on January 18, but again failed to do so in detail. Ex. D at '392.

Twitter terminated Zatko's employment on January 19, 2022. Ex. P. By this time, the Employee Relations team had issued its final written report of investigation concerning Zatko and [REDACTED] which concluded that [REDACTED] allegations [REDACTED] [REDACTED] were unsubstantiated but that the working relationship between Zatko and [REDACTED] had become "irreparably fractured" [REDACTED] [REDACTED] Ex. B at '654-55.

III. Post-Termination Communications

Twitter offered Zatko a standard separation agreement. Ex. Q. He rejected it. Ex. J (Zatko Tr. Vol. 2) at 360:10-12. Instead, Zatko threatened litigation against Twitter for alleged wrongful termination and retaliation: Zatko's initial litigation demand, in March 2022, was for [REDACTED] Ex. R. That jumped to [REDACTED] upon the news that Musk planned to buy Twitter. Ex. S at '462. After mediation, on June 28, 2022, Twitter and Zatko executed a settlement agreement that included a \$7.75 million payment to Zatko (the "Settlement Agreement"). Ex. A at '295.

Meanwhile, in a special session of the Risk Committee on February 10, new CISO [REDACTED] discussed the context that Zatko had alleged was missing from

██████ December presentation. Ex. T; Ex. D at '392. The members of the Risk Committee considered the presentation and concluded they had not been misled; the context was not new to them. *Id.* at '392-93.

About a week later, Zatko submitted to Twitter a document called “Issues and Objections Regarding Twitter InfoSec Information and the Q4 2021 Twitter Risk Committee,” which elaborated on the same criticisms he had made in his December 15 email to ██████ and that the Risk Committee had just considered in special session. Ex. U. The report contained images of Twitter documents Zatko had apparently exfiltrated from the company before or close to the time of his termination. Ex. J (Zatko Tr. Vol. 2) at 352:2-13; *compare* Ex. U at '469 *with* Ex. M at '856. It made no reference to handwritten notes. It made no reference to spam, or mDAU, or supposed intentional misleading of the FTC.

In April, the Audit Committee received and considered the factual findings that ██████ as head of Compliance, had made concerning Zatko’s allegations following the investigation that she had undertaken under the direction of counsel. Ex. D; Ex. V at '923. That report noted that the Risk Committee had not been misled, and observed that Zatko’s February submission, which had been provided to the Risk Committee, had not changed the analysis. *See* Ex. D at '395-96.

In Zatko's June 28 Settlement Agreement, and consistent with the 2020 Confidentiality Agreement appended as Attachment A thereto, Zatko agreed to provide to Twitter within 7 days '[REDACTED]
[REDACTED]' and to '[REDACTED]
[REDACTED]' Ex. A at '300 ¶ 20. The Settlement Agreement [REDACTED] *id.* at '299 ¶ 15, but, like the 2020 Confidentiality Agreement, made express exception for '[REDACTED]
[REDACTED]' Ex. A at '296-97 ¶ 10. Although Zatko represented in the Settlement Agreement that he had not '[REDACTED]
[REDACTED]' *id.* at '296 ¶ 7, the agreement expressly permitted him to do so in the future: '[REDACTED]
[REDACTED]
[REDACTED]' *Id.* ¶ 10.

IV. Zatko's July 6 Complaint

Zatko availed himself of that exception. As Twitter would learn in late August 2022, Zatko filed a complaint on July 6 with government authorities attaching copies of Twitter documents he believed supported his allegations. *See* Ex. W at '118-20; Ex. J (Zatko Tr. Vol. 2) at 228:23-229:3. Included among the list of attachments, which is heavily redacted, are several of the documents that Zatko exfiltrated from Twitter in his final weeks at the company, completely unbeknownst to Twitter. Ex. J (Zatko Tr. Vol. 2) at 352:2-13. The lead allegation in the July 6 complaint was that Twitter had misled Musk in statements about spam and mDAU—something Zatko had *never* raised before during his employment or in all his settlement talks with Twitter. *See* Ex. W at '45-54; Ex. J (Zatko Tr. Vol. 2) at 390:21-391:9. Zatko did not have direct involvement in remediating spam or calculating mDAU; those topics were the province of others at Twitter. Ex. J (Zatko Tr. Vol. 2) at 385:22-386:20.

The July 6 complaint also contained new allegations that Twitter had misled the FTC. Ex. W at '038-39; *compare* Ex. X at '20 (Zatko claiming during settlement negotiations that he '[REDACTED]' of supposed [REDACTED] but never stating he

warned the company was misleading the FTC). While at Twitter, Zatko had no contact with the FTC in his role as Head of Security. Ex. Y (Zatko Tr. Vol. 1) at 191:22-192:3.

Only after the July 6 complaint was filed, on July 7, did Zatko provide any attestation concerning Twitter documents and property. Zatko chose to return no documents to Twitter, instead attesting only that he had “destroyed all of the Company’s documents, video and/or audio recordings, and data.” Exs. Z, AA. The attestation included an attachment that referenced “personal notebooks” and other materials that Zatko had never described or provided to Twitter. *Id.* at ’286; Ex. E (Agrawal Tr.) at 51:10-17. According to Zatko, he “burned” these materials, and videotaped himself doing so. Ex. J (Zatko Tr. Vol. 2) at 392:2-12.

ARGUMENT

I. Defendants’ request for sanctions has no basis in fact

Defendants say they are entitled to an adverse inference—at one point, even a “case-terminating sanction,” Mot. 16—because Twitter purportedly instructed Zatko to “deprive[]” government agencies of evidence relating to Zatko’s allegations. Mot. 4. That argument is baseless and rests on false characterizations of the record.

First, Twitter did not even know what documents Zatko was going to destroy—or that he was going to choose to destroy rather than return them—before he submitted an attestation that he had done so, with a list of what he had apparently torched. *Cf.* Ex. J (Zatko Tr.) at 227:18-228:14; Ex. E (Agrawal Tr.) at 51:10-23. The suggestion that Twitter engineered the destruction of its own records is thus ludicrous.

Second, there was no instruction to deprive the government of anything. The Settlement Agreement, together with the 2020 Confidentiality Agreement attached to it, required Zatko to *return* any Company property, destroy copies remaining in his possession, and attest that he had done so within 7 days of the effective date of the agreement. Ex. A at '300 ¶ 20, '307 ¶ 8(b). The Settlement Agreement also expressly carved out from its prohibitions Zatko's provision of information to government agencies. In all these respects, the Settlement Agreement tracked the terms to which Zatko agreed in the 2020 Confidentiality Agreement he signed upon hiring. There was nothing bespoke, unusual, or nefarious about these provisions—such provisions are standard. *See* Ex. AB ¶ 25.

Third, Zatko understood that the Settlement Agreement allowed him to provide Twitter records to government agencies in support of asserted whistleblower

claims—he did just that in the complaint he submitted on July 6. *See* Ex. W at ’118-20. Far from “depriving” regulators of any allegedly corroborating materials, Zatko was allowed to and did attach to his submission whatever he thought supported his allegations. Zatko’s destruction attestation came a day *after* he filed the complaint.

Finally, the notion that Twitter knowingly deprived *Defendants* of evidence relevant to this litigation—because there supposedly “can be no doubt that Twitter understood that Mr. Zatko’s allegations [as of June 28] related to the litigation Twitter anticipated,” Mot. 12—is absurd. Before the publication in late August 2022 of Zatko’s allegations that Musk had been “misled” by Twitter’s disclosures concerning spam and mDAU, Twitter had no reason to believe there was any connection at all between Zatko and Musk, or between their two sets of allegations. At no point during his settlement negotiations with Twitter did Zatko raise concerns about spam or mDAU, and not until Zatko’s complaint became public in August 2022 did Defendants expand the issues in this litigation to include the information security allegations Zatko presented, unbeknownst to Twitter, in his July 6 complaint.

II. Defendants' privilege arguments should be rejected

Defendants pair their spurious sanctions request with an argument that the crime-fraud exception to attorney-client privilege prevents Twitter from asserting privilege over “legal advice it sought related to its violation of” FTC and SEC books-and-records preservation rules by “intentionally instruct[ing] Mr. Zatko to destroy evidence.” Mot. 19. The imagined universe of attorney-client communications is a null set. The “instruction” Defendants posit never happened and was never contemplated; as explained above, Zatko’s apparent destruction of his personal notebooks and other items he never shared with Twitter occurred after he made his July 6 submissions to the government, and the Settlement Agreement did not prohibit him from using the documents for those purposes but rather expressly contemplated that he could. Then he did. Moreover, even if there had been an instruction of the kind Defendants imagine, that instruction—the supposed instrument of the “crime” or “fraud”—would not be an attorney-client privileged communication but rather a communication to a counterparty in a settlement negotiation. The crime-fraud exception is irrelevant.

Nor is there merit to Defendants’ argument that Twitter’s disclosure of the final, factual report prepared by Twitter’s Compliance department for the Audit

Committee into Zatko's January 4, 2022 allegations should be deemed a waiver of privilege over all underlying communications with counsel in connection with the investigation. Mot. 20-21. The report, though labeled "privileged," contains no legal advice; it is a report of facts collected and found during the underlying investigation. Twitter accordingly did not "waive" any privilege by producing it. *See SerVaas v. Ford Smart Mobility LLC*, 2021 WL 5226487, at *6 (Del. Ch. Nov. 9, 2021) (in the employee termination context holding "[d]ocuments regarding factual aspects of the investigation are not privileged. They must be produced and cannot be withheld simply because counsel was involved in the investigation"); *see also Maverick Therapeutics, Inc. v. Harpoon Therapeutics, Inc.*, 2019 WL 3763953, at *2 (Del. Ch. Aug. 9, 2019) ("[M]erely labeling a communication as 'privileged' does not make it so."). The communications among the investigators, Chief Legal Officer, General Counsel, and outside employment counsel about the investigation, by contrast, are plainly privileged. *See, e.g., In re Oracle Corp. Deriv. Litig.*, 2020 WL 3867407, at *5-10 (Del. Ch. July 9, 2020) (in the special litigation committee context, denying motion to compel the production of documents and communications reviewed and relied upon by the committee in forming its final conclusions); *cf. Ryan v. Gifford*, 2007 WL 4259557, at *3 (Del. Ch. Nov. 30, 2007)

The Honorable Kathaleen St. Jude McCormick
Chancellor
Court of Chancery
October 6, 2022
Page 15

(in the special litigation committee context ordering the production of certain materials underlying the investigation because there was no final written report and therefore the underlying materials were necessary).

Finally, Twitter has not engaged in “selectiv[e] disclos[ure]” of privileged communications. Mot. 20. The document Defendants highlight for this claim is one that initially included redactions for privilege erroneously applied to a purely factual account provided by Ms. Brand. After Defendants questioned Ms. Brand about the redacted document during her deposition, Twitter’s counsel reviewed the unredacted version of the document, noted the error, and corrected it.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants’ motion.

Respectfully,

/s/ Kevin R. Shannon

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Enclosures

cc: Register in Chancery (by E-File)
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