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Case No. 2022-0613-

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TWITTER, INC., Plaintiff, v. ELON R. MUSK, X HOLDINGS I, INC., and X HOLDINGS II, INC., Defendants.	C.A. No. _____

MOTION TO EXPEDITE PROCEEDINGS

1. This is an action for specific performance of the merger agreement between Elon Musk and Twitter, Inc. Twitter seeks an order of expedition consistent with this Court's customary practice. Expedition is essential to permit Twitter to secure the benefit of its bargain, to address Musk's continuing breaches, and to protect Twitter and its stockholders from the continuing market risk and operational harm resulting from Musk's attempt to bully his way out of an airtight merger agreement.

2. On April 25, 2022, Musk and two entities he solely owns (collectively, "Musk"), entered into a binding agreement to acquire Twitter for $54.20 per share. Musk signed the deal twelve days after he sent Twitter's board a take-it-or-leave-it offer that he threatened to present directly to Twitter's stockholders; four days after he publicly announced that his offer was no longer

subject to either a financing contingency or a due diligence condition; and one day after he sent Twitter what he described as a "seller friendly" draft merger agreement. To fund the merger price, Musk, the CEO and largest stockholder of Tesla, Inc., planned to rely on his Tesla shareholdings.

3. As finally negotiated, the merger agreement expressly disclaims any financing condition to Musk's obligation to close the merger, entitles Twitter to specific performance of Musk's obligations under the agreement, and sets a presumptive drop-dead date of October 24, 2022 for completion of the merger.

4. After Musk entered the deal, the stock market in general—and Tesla stock in particular—began to fall. Musk started looking for a way out. Musk began publicly disparaging the very company he was contractually bound to buy. At the same time, Musk secretly stopped taking steps necessary to secure financing for the closing and unreasonably rejected or failed to respond to Twitter's requests for his consent to important operational decisions. He directed his advisors to demand increasingly detailed information about Twitter's user accounts and financial projections—notwithstanding the absence of either a due diligence or financing condition to closing. On July 8, Musk sent Twitter a notice of termination of the merger agreement, alleging that Twitter was in breach.

5. But Musk, not Twitter, is in breach of the merger agreement. Accordingly, as fully set forth in its concurrently filed complaint, Twitter seeks this

Court's assistance in remedying Musk's breach and enforcing its contractual entitlements. This Court has historically exercised its equitable powers to hold sophisticated parties to the terms of bargains freely entered. Musk should be no exception to the rule.

6. Given the October 24th drop-dead date, Twitter seeks a four-day trial on its action against Musk to be completed in September 2022. Expedition of trial proceedings is essential to ensure sufficient time for this Court to grant effective relief and for the Delaware Supreme Court to review this Court's decision. And a trial in September still leaves the parties and this Court more than two months to complete pre-trial discovery and briefing—a timeline appropriately tailored to the needs of this case and consistent with expedited schedules this Court has ordered in similar merger enforcement cases.

BACKGROUND

7. In March 2022, Musk began accumulating a substantial position in Twitter stock. Musk did not publicly disclose his position until April 4—when he had already acquired 9.1% of Twitter's outstanding shares, making him the company's largest individual stockholder. Compl. ¶ 19.

8. On April 14, Musk announced an unsolicited offer to acquire Twitter. *Id.* ¶ 25. On April 21, he announced that offer was no longer conditioned on obtaining financing or subject to due diligence. *Id.* ¶ 30. On April 24, Musk

proposed what he called a "seller-friendly" draft merger agreement to Twitter. *Id.* ¶ 32. Over the course of twenty-four hours, Twitter negotiated with Musk to obtain terms that were even more seller-friendly. *Id.* ¶¶ 33-36.

9. Musk and Twitter executed the merger agreement on April 25. *Id.* ¶ 39. The final agreement is exceptionally seller-friendly:

10. *Minimal Closing Conditions.* Musk's obligations to close the merger are not subject to a financing or due diligence condition. *Id.* ¶¶ 44-45. Musk is required to close two business days after all closing conditions are satisfied. *Id.* ¶ 145.

11. *Robust Efforts Covenants.* Musk is required to use his "reasonable best efforts" to consummate the merger and cause all of the closing conditions to be satisfied. *Id*. ¶ 46. Musk has a "hell-or-high-water" obligation to obtain and close the financing commitments for the transaction. *Id.* ¶ 47. And Musk is unconditionally obligated to do all things "necessary, proper, or advisable" to obtain equity financing, including the funding of his personal equity commitment. *Id.*

12. *Information Sharing.* Musk is required to keep Twitter "reasonably informed on a current basis of the status of . . . efforts to arrange and finalize the Financing" and to "promptly provide and respond to any updates

reasonably requested by the Company with respect to the status" of those efforts. *Id.* ¶ 49.

13. *Ordinary Course Covenant.* Twitter is required to use only "commercially reasonable efforts" to "conduct the business of the Company and its Subsidiaries in the ordinary course of business" and may take action outside the ordinary course if "agreed to in writing by" Musk. Musk's consent "shall not be unreasonably withheld, delayed or conditioned." *Id.* ¶ 51.

14. *Public Statements.* The counterparties must consult with each other before issuing certain public statements. Musk may Tweet about the proposed merger only "so long as such Tweets do not disparage [Twitter] or any of its Representatives." *Id.* ¶ 52.

15. *Termination.* The agreement has a presumptive drop-dead date of October 24, 2022. *Id.* ¶ 53. But Musk has no termination right if he is in material breach of his obligations. To further protect Twitter, the merger agreement provides that Musk cannot terminate on the basis of the drop-dead date until this action is adjudicated. *Id.* ¶ 53; Merger Agreement § 9.9(c).

16. *Specific Performance.* Twitter may seek specific performance, an injunction, or other equitable relief to enforce Musk's obligations. Compl. ¶ 54. And Twitter has the right to compel Musk to fund the equity financing and close the

merger, provided the closing conditions are met or can be met, the debt financing has been or will be funded at the closing, and Twitter is prepared to close. *Id.*

17. At the time of signing, the financing for the merger had three components: loans to the post-closing Twitter, a personal loan on margin to Musk (against his Tesla stock), and an equity commitment from Musk. *Id.* ¶ 55. Within a week, the stock market began to decline and the price of Tesla shares descended sharply, along with Musk's net worth. *Id.* ¶ 5.

18. Almost immediately, Musk stopped taking contractually required actions to close the deal and began manufacturing claims of breach as a pretext for escaping the deal. *See generally id.* ¶¶ 63-122. In particular, Musk began publicly disparaging Twitter, including by accusing it of filing inaccurate disclosures with the SEC regarding false or spam accounts. *Id.* ¶¶ 64-81. Musk also covertly abandoned efforts to finalize the committed debt financing for the deal and failed to respond to Twitter's inquiries regarding the status of efforts to obtain financing. *Id.* ¶¶ 109-14.

19. As a result of these and other actions, Musk materially breached his obligations under the agreement, among them his obligation to use reasonable best efforts to complete the merger, the hell-or-high-water covenant requiring him to do all things necessary to consummate financing, his obligation to provide Twitter with information regarding the status of debt financing, his obligation to refrain from

unreasonably withholding consent to operational decisions, and his obligation not to disparage Twitter or its representatives in Tweets about the merger. *Id.* ¶¶ 63-130.

20. On July 8, 2022, Musk sent Twitter a letter purporting to terminate the merger agreement and asserting Twitter's breach of the agreement as the basis for termination. *Id.* ¶ 123. In particular, Musk accused Twitter of breaching information-sharing and cooperation covenants, making inaccurate representations reasonably likely to result in a "Company Material Adverse Effect," and failing to comply with the ordinary course covenant with respect to employee retention and termination. *Id.* ¶ 124.

21. On July 12, Twitter brought this action to enforce its rights against Musk.

ARGUMENT

22. It is the "traditional practice in this court" to expedite trial where, as here, a target seeks specific performance of a merger agreement. *In re IBP, Inc. S'holders Litig.*, 2001 WL 406292, at *6 (Del. Ch. Apr. 18, 2001). That practice reflects this Court's recognition that "damages are often an unsatisfactory substitute to the bargained-for rights to specific performance." *Gilat Satellite Networks Ltd.* v. *Comtech Telecomms. Corp.*, C.A. No. 2020-0605-JRS, at 47 (Del. Ch. July 27, 2020) (Transcript).

23. To be entitled to expedited proceedings, Twitter need only show "a sufficiently colorable claim" and "a sufficient possibility of a threatened irreparable injury." *Alpha Nat. Res., Inc.* v. *Cliffs Nat. Res., Inc.*, 2008 WL 4951060, at *2 (Del. Ch. Nov. 6, 2008). Both elements are well met here.

I. Twitter's claim against Musk for breach of the merger agreement easily meets the colorability standard

24. Twitter's claim is more than colorable. The colorability standard is "even lower tha[n] the 'conceivability' standard applied on a motion to dismiss" and requires a party merely to identify a "non-frivolous set of issues." *Sinchareonkul* v. *Fahnemann*, 2015 WL 292314, at *1 & n.1 (Del. Ch. Jan. 22, 2015).

25. Here, Twitter has set forth detailed allegations in its complaint of Musk's numerous, ongoing breaches of multiple provisions of the merger agreement, culminating in his invalid attempted termination of it. Under the agreement's plain terms, Musk's breaches are remediable by an order of specific performance. *See* Merger Agreement § 9.9 ("Specific Performance").

26. In circumstances such as these, this Court has consistently found that a target's claim for breach of a merger agreement is colorable. *See, e.g.*, *Gilat*, C.A. No. 2020-0605-JRS, at 45 (Del. Ch. July 27, 2020) (Transcript); *AB Stable VIII LLC* v. *MAPS Hotels & Resorts One LLC*, C.A. No. 2020-0310-JTL, at 38 (Del. Ch. May 8, 2020) (Transcript).

27. Musk's unsubstantiated assertion of breach changes nothing. To the contrary, this Court has repeatedly granted expedition of a target's claim for breach of a merger agreement when the counterparty has accused the target of breach. *See, e.g.*, *AB Stable VIII LLC*, C.A. No. 2020-0310-JTL, at 38 (Del. Ch. May 8, 2020) (Transcript); *Akorn, Inc.* v. *Fresenius Kabi AG*, C.A. No. 2018-0300-JTL, at 45 (Del. Ch. May 2, 2018) (Transcript). Should Musk assert allegations of breach as a defense to Twitter's breach claim, Twitter will show those allegations to be meritless in the expedited litigation of its claim.

II. Twitter will suffer irreparable harm absent expedition

28. Musk stipulated in the merger agreement that his breach of the agreement would irreparably harm Twitter. *See* Merger Agreement § 9.9(a). Such stipulations are enforceable under Delaware law and "alone suffice to establish th[e] element" of "irreparable harm." *Martin Marietta Materials, Inc.* v. *Vulcan Materials Co.*, 68 A.3d 1208, 1226 (Del. 2012).

29. This Court has routinely relied on such stipulations to expedite claims just like this one. Indeed, when the parties to an agreement have included "a stipulation as to irreparable harm and as to the availability of specific performance," there is "a relatively easy case for expedition." *Akorn, Inc.*, C.A. No. 2018-0300-JTL, at 45 (ordering trial 74 days after filing of expedition motion).

30. Moreover, this Court has acknowledged that whenever a merger is held in "limbo" by a buyer's refusal to close, the seller is at risk of irreparable injury. *See id.* at 47 ("I don't think that it is good for anyone . . . to be tied up in limbo under an agreement, while at the same time dealing with external pressures, be they stock market driven, customer market driven, supplier market driven, employment market driven, whatever the source."). Delaware courts have accordingly "been solicitous in accommodating parties with expedited proceedings to address a cloud over a merger transaction." *Channel Medsystems, Inc.* v. *Boston Sci. Corp.*, C.A. No. 2018-0673-AGB, at 52 (Del. Ch. Oct. 9, 2018) (Transcript).

31. These considerations apply with special force here. In the months since he began breaching the merger agreement, Musk has attacked the company's credibility with regulators, customers, and advertisers and abused his consent rights to impede the company's ability to effectively manage its operations.

32. Without presenting even a shred of supporting evidence, Musk has questioned the accuracy of Twitter's disclosures concerning false or spam accounts, publicly suggested that the actual number of such accounts could be many times greater than Twitter's public estimates, and asserted that Twitter's estimates could be so inaccurate as to give rise to a Company Material Adverse Effect under the merger agreement. Even in the days since his invalid attempted termination, Musk has taken to Twitter's own platform to mock and undermine the company.

Compl. ¶¶ 139-43. As one commentator concluded, Musk risks "weaken[ing] trust in the company" by continuing to "jackhammer[] the product" and lob "barbs about fake accounts." Andrew Ross Sorkin, *Musk's Damaged Goods*, N.Y. Times: DealBook (July 12, 2022, 10:10am), https://tinyurl.com/z2xx8uzh.

33. As a party in breach of his obligations under a merger agreement, Musk should not be permitted to continue his smear campaign against his contractual counterparty without an obligation to face prompt legal accountability. Musk's actions have distorted the price of Twitter shares held by its many public stockholders. And just today it was reported that the "Musk drama" risked causing "lasting damage to Twitter's ad sales department." Garett Sloane, *Twitter's Ad Sales in Disarray Over Elon Musk Drama, Advertisers Say*, Ad Age (July 12, 2022), https://tinyurl.com/2tc5zs7x. Especially in this situation, "each day of delay is another day of threatened harm to [the seller]." *Rohm & Haas Co.*, 2009 WL 10425286, at *17 (Del. Ch. Jan. 26, 2009).

34. The recent downturn in the economy and stock market exacerbates those risks. Operating a complex organization such as Twitter in an unusually difficult business environment requires the ability to manage through and in response to evolving challenges. By virtue of the interim operating covenants in the merger agreement, however, Twitter management is subject to Musk's veto—in circumstances where Musk is now an adversary and has announced his interest in

launching a competitor to Twitter. Compl. ¶¶ 89; 116-22; *see, e.g.*, *Tiffany & Co.* v. *LVMH Moët Hennessy-Louis Vuitton SE*, C.A. No. 2020-0768-JRS, at 53 (Del. Ch. Sep. 21, 2020) (Transcript) ("I'm sympathetic to the fact that [the seller's] operations are restricted by interim covenants . . . . while this litigation is pending . . . ."). The adverse overhang of a pending merger, always a risk for targets, is therefore extraordinarily acute here.

35. Accordingly, and as this Court has recognized, Musk's breach of the merger agreement should not be permitted to force Twitter to operate subject to the constraints of the merger agreement for any longer than contractually agreed and certainly not for a period that extends beyond the bargained-for drop-dead date. That is because, as this Court has explained, the termination date provides "an indication of how long the parties intended for themselves to be in the contractual limbo of operating subject to interim covenants." *AB Stable VIII LLC*, C.A. No. 2020-0310-JTL, at 38.

36. The need for expedition is especially urgent here, where Musk has refused or delayed consent to important Twitter initiatives—including proposed employee retention programs critical to retaining talent in the challenging current environment—and has done so not only unreasonably but without even agreeing to discuss them. Compl. ¶¶ 116-21.

37. Moreover, in the prevailing high-inflation environment any delay harms Twitter stockholders, who will receive the same cash payout no matter when the deal closes. Musk is obligated to close the transaction two days after closing conditions are satisfied. *Id.* ¶ 145. Musk has helped himself to a later closing date by virtue of his breach—which costs Twitter stockholders, and enriches him, to the tune of an annualized 8 percent.

III. Twitter's proposed expedited schedule is reasonable and no more burdensome than necessary

38. Twitter's proposed schedule, attached hereto, allows enough time for a final appellate decision before the October 24th drop-dead date, while still giving the parties two months to complete pre-trial practice.

39. In seeking a trial approximately sixty to seventy-five days from the filing of its complaint, Twitter's expedition request is consistent with expedition requests granted by this Court in analogous circumstances. In several recent cases, the Court has approved expedited schedules that also allow roughly two months for pre-trial practice. *See Forescout Techs., Inc.* v. *Ferrari Grp. Holdings, L.P.*, C.A. No. 2020-0385-SG, at 4-7 (Del. Ch. May 26, 2020) (Transcript) (setting trial in 61 days); *Bardy Diagnostics Inc.* v. *Hill-Rom, Inc.*, C.A. No. 2021-0175-JRS (Del. Ch. Mar. 8, 2021) (Scheduling Order) (setting trial in 66 days); *Hexion Specialty Chems., Inc.* v. *Huntsman Corp.*, C.A. No. 3841-VCL, at 5 (Del. Ch. July 9, 2008)

(Transcript) (setting trial in 68 days); *Gilat*, C.A. No. 2020-0605-JRS, at 51-52 (setting trial in 76 days).

40. Indeed, this Court has frequently scheduled even less time for pre-trial practice. For example, in *Rohm & Haas Co.* v. *Dow Chem. Co.*, 2009 WL 445612, at *1 (Del. Ch. Feb. 6, 2009), the Court set trial in forty-two days. In *IBP, Inc.* v. *Tyson Foods, Inc.*, C.A. No. 18373, at 34 (Del. Ch. Apr. 16, 2001) (Scheduling Order), the Court set trial in forty-five days. Litigation on the schedule Twitter proposes thus permits the parties and their experienced counsel ample time to assemble a trial record for the benefit of the Court.

CONCLUSION

41. For the foregoing reasons, Twitter respectfully requests that the Court order expedited proceedings, set trial at the Court's earliest convenience in mid-September, and enter its proposed schedule or one substantially similar.

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