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Case No. 2022-0613-KSJM



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. 2022-0613-KSJM

**PLAINTIFF’S REPLY IN FURTHER SUPPORT OF
MOTION TO EXPEDITE PROCEEDINGS**

1. “[R]efusal to close cases” like this one “are routinely expedited” because they “readily fit within the standards for expedition.” *Juwell Invs. Ltd. v. Carlyle Roundtrip, L.P.*, C.A. No. 2020-0338-JRS, at 82-83 (Del. Ch. May 14, 2020) (Transcript). Musk does not dispute that Twitter’s suit meets those standards.

2. Rather than address the relevant legal standard, Musk doubles down on the pretextual narrative he has already floated in the court of public opinion, now asserting that determining the accuracy of Twitter’s public disclosures concerning its estimates of false or spam accounts is so extraordinarily complex that a trial cannot feasibly be completed for more than seven months, until February 24, 2023. Opp. ¶¶ 6-7, 30-33.

3. The opposition fails at every level. Musk agreed to use “reasonable best efforts” to close this deal and to close two business days after

satisfaction of all closing conditions. Mot. ¶¶ 10-11. The only remaining condition—shareholder approval—is expected to be satisfied before the September trial Twitter requests. *Id.* ¶¶ 2, 37. Conclusions aside, Musk offers no reason to think discovery must be so expansive that a trial must wait until next year. Musk’s alleged core issue—the number of spam Twitter accounts—is a contractually irrelevant sideshow that Musk wants to use to disparage Twitter and prolong this litigation. Nor does Musk offer any reason that the overbroad and diversionary discovery program he proposes cannot be completed on the schedule Twitter seeks. This Court has repeatedly demonstrated that merger-enforcement disputes can be litigated in sixty to seventy-five days. Twitter’s proposed schedule falls in the heartland of this Court’s precedents.

4. The earliest possible trial date is imperative. This very public dispute harms Twitter with each passing day Musk is in breach. Musk amplifies this harm by using the Company’s own platform as a megaphone to disparage it. As set out in the complaint, Musk is using his consent rights to straightjacket the Company’s operations, and the overhang of his breach jeopardizes Twitter’s relationships with employees and customers. Millions of Twitter shares trade daily under a cloud of Musk-created doubt. No public company of this size and scale has ever had to bear these uncertainties.

5. Musk knows all this of course. His proposed schedule is calculated to complicate and obfuscate. But this Court has never permitted tactical delay to interfere with a party's contractual rights in these circumstances. To the contrary, this Court recognizes that "these types of cases need to be resolved as quickly as possible...[I]t is [not] good for anyone, either buyer or seller, 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." *Akorn, Inc. v. Fresenius Kabi AG*, C.A. No. 2018-0300-JTL, at 47 (Del. Ch. May 2, 2018) (Transcript).

6. These considerations apply with maximum force here. The motion should be granted.

ARGUMENT

I. The risk of irreparable harm to Twitter justifies trial as soon as reasonably feasible

7. Musk says this Court need not set trial before the October 24, 2022 presumptive termination date because that date does not constrain the Court's ability to order specific performance. Opp. ¶¶ 28, 33. He observes that a suit for specific performance "automatically . . . extend[s]" the termination date for twenty business days after resolution of the suit. Merger Agreement § 9.9(c). Because the debt commitments do not expire until April 25, 2023, Musk says, they will still be in place if the Court orders specific performance next year. Opp. ¶¶ 28, 33.

8. Musk distorts § 9.9(c) to justify delay. That provision—titled “Specific Performance”—is designed to ensure that the target, Twitter, can obtain specific performance even for an opportunistic breach so close to the presumptive termination date that judicial relief before that date is impracticable. The provision should not be turned on its head to allow a breaching party to delay the very relief it is intended to safeguard.

9. Musk’s contention that trial can be delayed until next year rests on the fallacy that Twitter bargained merely for a closing no later than the drop-dead date. But Twitter, like most sellers, instead bargained for Musk to use “reasonable best efforts” to advance the transaction and to swiftly close the merger upon satisfaction of the closing conditions. *See* Kling, Nugent & Dyke, *Negotiated Acquisition of Companies, Subsidiaries and Divisions* (2022) § 1.04[1][d] (“The closing will usually occur as soon as possible.”).

10. The drop-dead date thus does not indicate the target date for closing, but rather the *maximum* period “the parties intended for themselves to be in the contractual limbo of operating subject to interim covenants.” *AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC*, C.A. No. 2020-0310-JTL, at 38 (Del. Ch. May 8, 2020) (Transcript). This Court has never used a termination date to justify a trial date that is later than reasonably feasible. *See Akorn*, C.A. No. 2018-0300-JTL, at 47 (“[I]t is incumbent upon the court to try to get the parties to a point as quickly

as possible where some type of certainty ... can be provided”); *Rohm & Haas Co. v. Dow Chem. Co.*, 2009 WL 10425286, at *16 (Del. Ch. Jan. 27, 2009) (“each day of delay is another day of threatened harm”). All Musk cites in response is an irrelevant decision denying expedition because the contract at issue called for arbitration. *See BFI Waste Sys. of N. Am. v. Waste Mgmt. Holdings, Inc.*, 1998 WL 671277, at *3 (Del. Ch. Sept. 1, 1998).

11. Equally incorrect is Musk’s contention that a trial next year leaves ample time to ensure that the committed financing can be used to fund a court-ordered acquisition. Opp. ¶¶ 28, 33. A trial ending on February 24 leaves only eight weeks until the debt commitments expire on April 25. Even with commitments in place, weeks may be required to negotiate the credit agreements and take other actions, such as perfection of security interests, necessary to make the funds available. All those actions must be done by the lenders and the recalcitrant Musk—they are outside Twitter’s control. Months more would be required should litigation be necessary to compel the debt to close.

II. Musk’s proposed schedule is unreasonably elongated

12. To defend his dilatory schedule, Musk asserts that this case is unlike other merger-enforcement cases because assessing the accuracy of Twitter’s disclosures of its estimates of false or spam accounts will require extensive “complex, technical discovery.” Opp. ¶ 6. Musk explains neither how that issue has

any significant relationship to the legal issues raised by Twitter’s breach claim nor why it is more complex than issues this Court regularly addresses. And even if Musk is right about the discovery necessary to resolve it, this Court has approved expedited schedules in merger-enforcement cases that accommodate that level of discovery and still proceed to trial in two to three months, not seven.

13. Musk contends that the number of false or spam accounts “is fundamental to Twitter’s value.” Opp. ¶ 3. Everything before the Court suggests this is a remorseful buyer’s pretext. Particularized factual allegations establish that Musk was fully aware of this issue when he waived any due diligence and signed the merger agreement without any representation relating to it. Compl. ¶¶ 67-68. Only after the transaction became less financially attractive did Musk raise his alleged concern with false or spam accounts. The suggestion of pretext is overwhelming: Musk abused his information rights under the merger agreement, secured massive amounts of information relating to false or spam accounts, declined to participate in discussions to understand Twitter’s assessment processes, and admitted he had not even read materials provided. *Id.* ¶¶ 82-102, 126-30. Having received all that information, Musk can still identify no valid basis to terminate.¹

¹ Contrary to Musk’s suggestion, Twitter’s recent disclosure of revised mDAU figures was unrelated to “how Twitter calculates its spam population,” *see* Opp. ¶¶ 16-17, as evidenced by the fact that Musk did not even mention it among his bases for termination. Mot. Ex. 3.

14. Musk suggests that the accuracy of Twitter’s disclosures concerning its estimates of false or spam accounts is nevertheless important because he need not close if Twitter breached its representation that none of its SEC filings contained a false or misleading statement of material fact and that breach caused a “Company Material Adverse Effect.” Opp. ¶ 13. Musk does not identify any supposedly false or misleading statement in Twitter’s SEC filings, let alone explain how such a statement could possibly have caused an MAE. And while Musk (wrongly) complains that he has received insufficient information regarding false or spam accounts, he does not explain how that information is “for any reasonable business purpose related to the consummation of the [merger] transactions”—the only proper purpose under § 6.4 of the merger agreement. That is unsurprising because Musk is seeking information to blow up the deal, not close it.

15. Nor does Musk offer any basis to think that assessing the accuracy of Twitter’s disclosures is so complex as to warrant denial of expedition. Resolution of the issue requires only understanding the methodology and inputs employed to calculate the estimates. This Court routinely assesses the adequacy of disclosures of numerical estimates in expedited proceedings.

16. Musk has thus done nothing to explain why this action requires “at least 30-40 fact depositions” and “at least 12 expert depositions,” as he asserts. Opp. ¶ 32. But even if Musk is correct, previous merger-enforcement actions prove

that a like number of depositions can be completed in time for trial in September. In *Akorn*, trial was held seventy-four days after the expedition motion and the parties completed fifty-four depositions, including fourteen expert depositions. *See Akorn*, 2018 WL 4719347, at *4 (Del. Ch. Oct. 1, 2018); *Akorn*, C.A. No. 2018-0300-JTL (Del. Ch. May 10, 2018) (Scheduling Order). In *Hexion*, trial was sixty-eight days after the expedition motion and the parties completed seventy-one depositions. *See Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008); *Hexion*, No. 3841-VCL (July 15, 2008) (Scheduling Order); *Hexion*, C.A. No. 3841-VCL, Dkt. Nos. 449, 451-452.

17. Nor can Musk’s demand for a two-week trial justify the stretched-out schedule he seeks. In *IBP*, which “involved massive amounts of discovery,” the parties prepared for a two-week trial in forty-five days. *See In re IBP, Inc. S’holders Litig.*, 789 A.2d 14, 23 (Del. Ch. 2001); *IBP, Inc. v. Tyson Foods, Inc.*, C.A. No. 18373, at 2 (Del. Ch. Apr. 16, 2001) (Scheduling Order).

18. Musk cites *Snow Phipps* and *WeWork*, Opp. ¶ 36, but neither supports slow-walking this case. Both were filed at the outset of the pandemic. In neither did the Court identify a supposedly complex factual issue as a reason for its scheduling decision. In *WeWork*, the Court denied expedition after concluding the case was “not . . . like many of the MAC cases where specific performance is warranted” because “damages should be able to afford full relief.” *The We Co. v.*

Softbank Grp. Corp., C.A. No. 2020-0258-AGB, at 53-54 (Del. Ch. Apr. 17, 2020) (Transcript). In *Snow Phipps*, a case brought by a privately-held target, the Court granted expedition but offered trial dates in November 2020, not September 2020 as the plaintiff had requested, because the plaintiff had delayed three weeks in renewing its motion. *Snow Phipps Grp., LLC v. KCAKE Acq. Inc.*, C.A. No. 2020-0282-KSJM, at 9 (Del. Ch. May, 21 2020) (Transcript).

19. Musk resorts to arguing that his schedule should be adopted because “any exigency stems from [Twitter]’s strategic delay.” Opp. ¶ 37. But Twitter filed suit and sought expedition two business days after it received Musk’s purported termination notice. Twitter’s immediate action is the opposite of the plaintiff’s dilatory conduct in the cases Musk cites. *See id.*

CONCLUSION

20. The Court should grant expedition and set trial in September.

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