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Case No. 2022-0613-KSJM



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October 6, 2022

By E-File

The Honorable Kathaleen St. Jude McCormick
Chancellor
Court of Chancery
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware 19801

Re: *Twitter, Inc. v. Elon R. Musk, et al.*, C.A. No. 2022-0613-KSJM

Dear Chancellor McCormick:

We write on behalf of Twitter in response to Defendants' motion of this afternoon seeking a stay of this litigation.

Twitter opposes Defendants' motion. The obstacle to terminating this litigation is not, as Defendants say, that Twitter is unwilling to take yes for an answer. The obstacle is that Defendants still refuse to accept their contractual obligations. For months, Defendants have pursued increasingly implausible claims and over and over sought to delay trial on the merits to enforce the Merger Agreement. Discovery has shown each and every one of those claims to be utterly without merit. It has also shown that Defendants have repeatedly breached their

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obligation to exercise reasonable best efforts to move toward closing. The merger should have closed long ago, as Defendants' recent concessions confirm.

Now, on the eve of trial, Defendants declare they intend to close after all. "Trust us," they say, "we mean it this time," and so they ask to be relieved from a reckoning on the merits. To justify that relief, they propose an order that allows them an indefinite time to close on the basis of a conditional withdrawal of their unlawful notices of termination coupled with an explicit reservation of all "claims and defenses in the event a closing does not occur." Defendants' proposal is an invitation to further mischief and delay.

The proposal is also inconsistent on its face. Defendants say the "Merger Agreement, Equity Commitment Letter, and Bank Debt Commitment Letter are in effect, valid and enforceable." Defs. Proposed Order ¶ 1. They admit "that the conditions to the completion of the Merger set forth in Article VII have been satisfied." *Id.* And so they promise to be "bound by the[] terms and conditions" of the Merger Agreement. *Id.* But at the same time they make that promise, they proceed to break it. Section 2.2 of the Merger Agreement requires Defendants to close the transaction "no later than the second (2nd) business day after the satisfaction or waiver of all of the conditions set forth in Article VII." Merger

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Agreement § 2.2. That date came and went on September 15. At a minimum—on the basis of their current concessions—Defendants should be arranging to close on Monday, October 10.

But they aren't. Instead they refuse to commit to any closing date. They ask for an open-ended out, at the expense of Twitter's stockholders (who are owed \$44 billion plus interest), all the while remaining free to change their minds again or to invent new grounds to avoid the contract "[w]ithout any admission of liability and without waiver of or prejudice to [their] claims and defenses." Defs. Proposed Order ¶ 1. Nor have they supplied any reason to believe that closing cannot be achieved in the days before trial. Just this morning, a corporate representative for one of the lending banks testified that Mr. Musk has yet to send them a borrowing notice and has not otherwise communicated to them that he intends to close the transaction, let alone on any particular timeline. The bank further testified that the main task necessary to close the deal—memorializing the debt financing—could have happened in July but didn't because Mr. Musk purported to terminate the deal.

Defendants have provided no justification for their failure to schedule closing on the contractually-required timeline. That failure confirms Defendants' breach of their obligations to use their "reasonable best efforts" to close the merger and to "do

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. . . all things necessary, proper or advisable” to close the financing at or before closing. Nor are Defendants’ correct that any financing failure will excuse their performance. Mot. 24. They remain answerable as a matter of law for the consequences of their breaches.

Until Defendants commit to close as required, Twitter is entitled to its day in Court, to demonstrate its entitlement to specific performance and prove Defendants’ breaches so as to ensure complete relief in the event the closing should for any reason not occur. Defendants can and should close next week. Until they do, this action is not moot and should be brought to trial.

Respectfully,

/s/ Kevin R. Shannon

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