Legal Document

Delaware Court of Chancery
Case No. 2022-0613-KSJM
Twitter, Inc. v. Elon R. Musk, X Holdings I, Inc., and X Holdings II, Inc.

Document 592

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By E-File and Hand Delivery

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:

Here we are again. Defendants were supposed to produce the responsive, non-privileged messages from their two custodians, Elon Musk and Jared Birchall. They didn't. Instead, they made a production with blatant gaps. After Twitter moved for sanctions, Defendants' counsel claimed it was all an innocent mistake, produced a few more messages, and assured the Court that this time they had gotten it right. However, because of the "clear deficiencies" in that production, the Court ordered Defendants to produce phone records that Twitter could use to verify the text message production.

Defendants responded by playing more games, delaying the production of phone records and attempting to impose invented conditions on their compliance. The limited records that Defendants have belatedly produced make clear that more

messages are missing from their production. Some of these have since shown up in third-party productions. Others have not. And because the phone records reflect only the SMS text messages that Musk and Birchall sent and received, they do not capture another universe of missing documents—self-deleting Signal messages.

The Court should not permit Defendants to proceed on this manicured record. Twitter respectfully requests that the Court sanction Defendants by ordering a phone message production and adopting the only inference that can explain their conduct: Defendants have not produced relevant, contemporaneous messages because those messages would be damaging to their counterclaims and defenses.

BACKGROUND

The Court ordered expedition of this litigation on July 19. Three days later, Defendants declared "absurd" the notion that discovery in this matter would be "bilateral." Ex. 1. at 2. The Court's July 28 Scheduling Order corrected this misconception: "Discovery is bilateral. . . . [and e]ach side shall use best efforts to comply with its discovery obligations." Dkt. 39 at ¶ 6. It further directed the parties to substantially complete document productions by August 29. *Id.* at ¶ 1(f).

Defendants obfuscated. *See* Dkt. 159 at 4-8. For weeks, they refused to tell Twitter what they were willing to produce and to identify persons with and sources of relevant information. Defendants' productions were similarly unforthcoming;

Court-ordered rolling productions trickled. As of August 15, Defendants had produced only 619 documents. Dkt. 221 at 9.

Twitter moved for relief. Dkt. 159. Although the Court accepted Defendants' representation that they were "working diligently to review and produce documents," it observed that their discovery effort was "suboptimal." Dkt. 221 at 3, 9. The Court thus reminded the parties that discovery is not a game of "hide the ball," and invited Twitter to again seek relief "in the event Defendants' behavior persists." *Id.* at 2, 4.

Defendants' behavior persisted. Despite the Court's order that productions be made on a rolling basis, Defendants had not produced any non-email communications until ten minutes before the substantial completion deadline. Over the ensuing two hours, Defendants produced 966 of Musk's texts. Defendants then confirmed that their production was substantially complete. Ex. 2.

That confirmation proved inaccurate. Defendants' production was riddled with omissions. It contained:

- just four text messages sent or received on May 6, the date Musk purportedly realized that Twitter's disclosures were "reckless," *see* Dkt. 42 ¶¶ 10-11;
- zero messages sent or received in the four days that followed that alleged realization; and
- zero messages between June 1 and June 7, the days preceding and day after Musk's assertion that Twitter breached the merger agreement.

Inexplicably missing from Defendants' production were May 8 texts between Musk and Michael Grimes—one of Musk's bankers, who produced the texts in third-party discovery—suggesting "[l]et's slow down just a few days. . . . It won't make sense to buy Twitter if we're heading into WW3." Ex. 3. Shortly thereafter, Musk told Grimes he intended to conduct "due diligence" on the parties' no-diligence merger: "An extremely fundamental due diligence item is understanding exactly how Twitter confirms that 95% of their daily active users are both real people and not double-counted." Ex. 4. That text hadn't made it into Defendants' productions either.

Likewise missing from Musk's production were any communications on the messaging app Signal, a platform on which messages can be set to automatically delete.

Ex. 5 (Signal's "Set and manage disappearing messages" instructions). That Musk uses Signal is evident. Third-party productions revealed that co-investor Marc Andreessen's involvement in the deal arose through the app: "If you are considering equity partners, my growth fund is in for $250M with no additional work required."

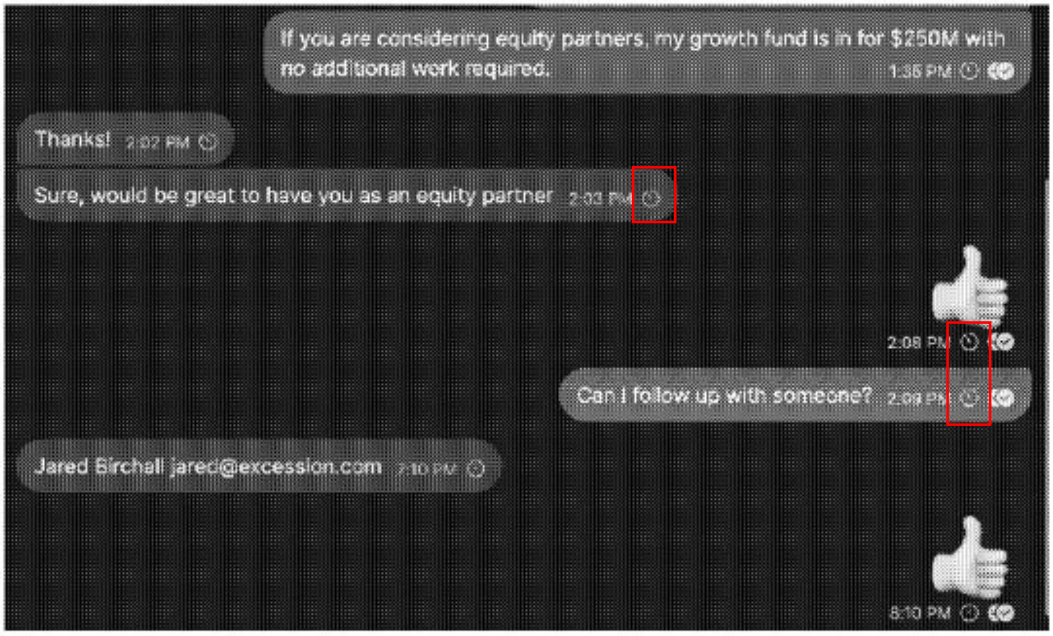
Ex. 6. That message was deleted by preset design (as indicated by the red-boxed timers), and is only available to Twitter because Andreessen's fund took steps to preserve it.

Message

From: Marc Andreessen [ma@a16z.com]
Sent: 4/25/2022 10:35:55 PM
To: jared@excession.com; David George [dg@a16z.com]; Marc Andreessen [ma@a16z.com]
Subject: followup from conversation with Elon
Attachments: image.png

Hi Jared -- Elon gave me your name and address and said to follow up with you --

Here's what he and I discussed today --



David George CC'd here and I run our growth fund and are speaking for the money. We're good to go. Please advise on next steps, and thank you!

Best,
Marc

Defendants have not preserved any of Musk's Signal messages and have conceded they are unable to restore any Signal messages Musk may have sent. Ex. 7 at 4-5.

Twitter again moved for relief. Dkt. 376. Because Defendants' discovery efforts showed that they had no intention of voluntarily complying with this Court's rules, Twitter requested that the Court exercise its broad discretion to remedy discovery misconduct by ordering Defendants to produce to Twitter all of Musk's and Birchall's text messages. *Id.* at 16. Defendants' text message production, the Court found, "revealed glaring deficiencies" and again evidenced "[d]efendants' suboptimal conduct." Dkt. 427 at 2-3. The Court concluded that an order requiring the production of "*all* text messages from Defendants' two custodians" would be "too extreme" at that time. *Id.* at 3. To allow Twitter to further probe the accuracy of Defendants' assertions that Musk "did not text about Twitter during key periods," the Court granted alternate relief requested by Twitter, ordering Defendants on September 7 "to obtain and produce phone company records" of Musk's text messages sent or received during the relevant period. *Id.* at 4.

Rather than promptly comply with the Court's order, Defendants flouted it. On September 11, Defendants produced Birchall's text message activity for the preceding 90 days and Musk's text message activity for periods when he was "travelling outside of the United States." Ex. 8. These records were partial and thus useless for their intended purpose. Moreover, even though the records were

produced with a "highly confidential" designation, Defendants demanded that Twitter review them within three days and identify to Defendants each text message that Twitter "contend[ed] to be relevant," so that Defendants could reproduce a censored version. Thus, Defendants sought to convert a discovery sanction into a time-sensitive burden on Twitter. Twitter declined that invitation.

Defendants escalated their obstruction. In a September 13 email, Defendants indicated that they were "prepared to make a supplemental production of additional text message logs," but that they would not do so until Twitter agreed to assume the burden identifying the text messages that it deemed relevant. Ex. 8. at 2. Twitter again declined, reminding Defendants that the Court had ordered it to produce Musk and Birchall's text records, without qualification. *Id.* at 1.

Although Defendants had only provided partial and piecemeal records, Twitter was nevertheless able to identify multiple suspiciously timed messages with Morgan Stanley bankers that had not been produced. Later on September 13, Twitter emailed Defendants to request an explanation for those omissions, and to once again demand that Defendants comply with the Court's order by producing the text records within their control. In addition, based on the apparent deletion of Signal communications with Andreessen, Twitter also asked Defendants to re-confirm that Musk had not used any self-deleting messaging services (such as Signal or Telegram). Ex. 7. at 11.

Defendants doubled down. On September 14, they again refused to produce phone records unless Twitter "agree[d] to take steps necessary to safeguard" the "personally identifiable information that is necessarily included" in the records—*i.e.*, the telephone numbers themselves. *Id.* at 8. Defendants further attested that "neither Elon Musk nor Jared Birchall conducted business related to the Merger using Signal messages." *Id.* at 9.

None of that made any sense. First, the Court's July 22 protective order (recently amended at Defendants' insistence) adequately safeguards documents produced in this litigation. Dkt. 31. Second, Defendants' attestation was contrary to their concession to the Court that Musk used Signal to communicate with Marc Andreessen about the transaction in late April 2022. *See* Dkt. 393 at 12 n.2 (discussing Ex. 6). That filing stated that "Musk *does not ordinarily* use [Signal] for business." *Id.* (emphasis added). Twitter informed Defendants that it intended to move the Court for relief.

On September 15, counsel for Defendants made a third attempt at responding to Twitter's simple questions about Musk and Birchall's use of self-destroying messaging services: Defendants "*do not recall* sending or receiving any other messages relating to the Merger through Signal or any other ephemeral messaging client." Ex. 7 at 4-5 (emphasis added). Defendants further reported that "it was not possible" to "restore" Signal messages "sent or received during the requested

discovery period." *Id.* at 5. Musk and Birchall's deleted Signal messages are forever lost.

Later that afternoon, Defendants "produced" more of Musk's phone records. The files were uploaded to a portal that allowed only for online review such that Twitter cannot print, sort, notate, or otherwise integrate the records into its broader discovery efforts. This method of production has the purpose and effect of obstructing Twitter's ability to use the evidence.

Even an initial review of Musk's records explains Defendants' extreme reluctance to produce them. They lay bare Defendants' moth-eaten production.

- On April 25, the day the transaction was announced, Musk exchanged four text messages with James Gorman ([redacted]), chief executive officer of Morgan Stanley, Musk's bankers. Ex. 9. The exchange was neither produced nor logged.
- During the relevant time period, Musk exchanged 19 text messages with Alex Spiro ([redacted]), one of his closest advisors. Exs. 9-11. None of those messages were produced and only three were logged.
- Most concerning, during the evening of May 12 and into the early morning hours of May 13, Musk exchanged text messages with Larry Ellison ([redacted]), his largest co-investor at $1 billion. Musk sent his final message to Ellison at 12:20 a.m. on May 13. Ex. 9. Approximately four hours later, Musk tweeted, "Twitter deal temporarily on hold pending details supporting calculation that spam/fake accounts do indeed represent less than 5% of users." Not one of the texts with Ellison was produced or logged.

And this is only a glimpse at what is missing from Defendants' production. Musk and Birchall communicated primarily through iMessage, not traditional text

messaging. Because iMessages—like Signal messages and other app-based communications—are treated as data transmissions, they do not show up as itemized entries on phone records.

In the meantime, productions from third parties continued to demonstrate even more holes in Defendants' production. For example, on September 15, Morgan Stanley produced 58 text messages between Birchall and Kate Claassen—one of Musk's bankers at Morgan Stanley. The production—as with Morgan Stanley's prior productions—revealed substantive messages that had not been produced by Defendants. *See* Exs. 12, 13 (May 3 texts regarding the deal model); Ex. 14 (June 24 text from Claassen noting that "working team in position to be ready to move forward ti [sic] launch whenever you have line of sight on model and say go, and right now you are pending the results of data analysis").

On September 16, Twitter informed Defendants that their responses were not satisfactory, and that, given Defendants' misconduct, it did not believe further meet-and-confers on this issue would be productive. Ex. 7. In response, and notwithstanding the parties' plain impasse, Defendants advised Twitter that, "should [it] move to compel today, Defendants will inform the Court that Twitter has refused to meet and confer prior to filing." *Id.*

Three hours later, Defendants produced an additional 185 texts they described as "non-substantive." Another after-the-buzzer attempt to avoid accountability for

Defendants' hide-and-seek. Most of these texts were duplicates that Morgan Stanley had produced in the preceding days, demonstrating once again Defendants' lackadaisical efforts to identify documents for production. But some were new, and substantive. For example, less than 24 hours before Musk sent his "seller friendly" merger agreement, Morgan Stanley's Anthony Armstrong asked Birchall, "[p]ossible for us to get a few minutes with E? Want to pitch this plan I previewed with you. Best if we can talk soon. If he likes it we need tonight to prepare and would execute tomorrow late morning PT." Ex. 15. Armstrong and Birchall appear to have been in contact throughout the night as the parties negotiated the final merger agreement. *See, e.g.*, *id*. ("Need to finalize our position on 2 points and respond to other side. I will walk you through them and we can game out who to involve/ how to handle."). As with the large tranche of messages Defendants produced on the eve of the September 6 hearing, and over the course of Labor Day weekend, Defendants produced these communications to Twitter only in the face of impending motion practice.

Faced with Defendants' ongoing defiance of the Court's orders and mounting prejudice to its ability to conduct discovery, Twitter filed this motion.

ARGUMENT

I. Musk's Destruction of Evidence Warrants an Adverse Inference

Notwithstanding Defendants' obfuscation, the discovery record shows that Musk has intentionally deleted highly relevant evidence, including through his use of the messaging app Signal. To remedy this misconduct, the Court should adopt

the obvious inference—Musk deleted these messages because he anticipated litigation and he knew that they would undermine his counterclaims and defenses. An adverse inference is appropriate where, as here, a party has acted to "intentionally or recklessly destroy evidence" and the aggrieved party can make "some showing that the allegedly destroyed evidence . . . supported [its] position." *TR Invs., LLC* v. *Genger*, 2009 WL 4696062, at *17 (Del. Ch. Dec. 9, 2009), *aff'd*, 26 A.3d 180 (Del. 2011); *see Kan-Di-Ki, LLC* v. *Suer*, 2015 WL 4503210, at *29 (Del. Ch. July 22, 2015). The remedy is appropriate here as a sanction for Defendants' continuing production deficiencies and ongoing defiance of the Court's orders.

Discovery has established that Musk intentionally deleted highly relevant messages, including through his use of Signal. As noted above, third party Andreessen Horowitz has produced a screenshot of a Signal message between Marc Andreessen and Musk discussing the transaction, Ex. 6. This message was set to automatically delete, and is only available to Twitter because Andreessen took steps to preserve it. Twitter has repeatedly sought a straight answer from Defendants regarding the scope and extent of Musk's use of ephemeral messaging, including Signal, but has received only a shifting story that establishes Musk's failure to preserve. *Compare* Dkt. 393 at 12 n.2 ("Musk *does not ordinarily* use [Signal] for business."), *with* Ex. 7 ("neither Elon Musk nor Jared Birchall conducted business related to the Merger using Signal messages") and *id.* ("Defendants have confirmed

to counsel that they *do not recall* sending or receiving *any other* messages relating to the Merger through Signal or any other ephemeral messaging client.").

According to Musk's account, he sent just one Signal message about the transaction, and that one message just happened to be captured in a screenshot by a third party that just happened to be issued a subpoena by Twitter. This account is astonishingly improbable. The far more obvious inference is that Musk, who is one of the most prominent public proponents of Signal,[1] and who Defendants conceded used Signal, in fact used Signal to communicate with advisors, friends, and colleagues about the transaction.[2]

And beyond his use of Signal, Defendants' text message production also confirms that Musk deleted relevant text messages that he had an obligation to preserve. Musk has produced *zero* messages sent or received between May 24 and May 30. He has similarly produced *zero* messages between June 1 and June 7, the days preceding and following his assertion that Twitter breached the merger agreement. And he has still not produced significant messages that have surfaced in

[1] Ex. 16 (January 7, 2021 Tweet from Musk: "Use Signal.").

[2] If the Court determines that further development of the record would aid its assessment on this point, Twitter requests that Musk be required to produce screenshots of any Signal chats with the contacts listed in the parties' agreed-upon protocol for the review of Defendants' non-email messages. While not dispositive, those screenshots will show whether Musk currently has self-deleting chat sessions open with key individuals.

third-party productions. There is no plausible explanation for these missing messages, and Defendants have offered none, other than Musk failed to preserve them.

Defendants' deficient "production" of Musk's phone company records itself confirms that Musk deleted text messages and did so just at the critical time that he Tweeted "Twitter deal temporarily on hold." Musk's phone company records show that he exchanged multiple text messages with Larry Ellison, his largest co-investor in the transaction, on May 12 and 13—none of which have been produced by Defendants despite their representation that Musk produced all relevant text messages.

This evidence, individually and taken together, supports a finding that Musk recklessly or intentionally deleted critical messages during the key timeframe in this dispute. *See Kan-Di-Ki, LLC* v. *Suer*, 2015 WL 4503210, at *29 (Del. Ch. July 22, 2015) (finding defendant "at least reckless in failing to take reasonable steps to ensure the preservation of potentially responsive information" and imposing adverse inference). The appropriate remedy is an adverse inference that his missing messages undermined Defendants' counterclaims and defenses. *See Beard Rsch., Inc.* v. *Kates*, 981 A.2d 1175, 1185 (Del. Ch. 2009).

II. Defendants Should Be Required to Produce All of Musk's Phone Messages

As Twitter previously requested, the Court should also order Defendants to produce, subject to an appropriate clawback right, all of Musk's phone messages. *See* Dkt. 376. Despite "clear deficiencies in Defendants' document production," the Court stopped short of ordering this relief in its September 7 Order. Dkt. 427. Instead, the Court ordered Defendants to "produce phone company records concerning the text messages that Musk and Birchall sent or received during the relevant period," in order to "allow Plaintiff to confirm whether Defendants' representations that Musk did not text about Twitter during key periods are accurate." *Id*. at 4. Defendants have failed to comply with this order, and continue to skirt their discovery obligations. *See supra* at 5-8. What Defendants have provided confirms that Musk failed to preserve critical text messages, or at the minimum refuses to produce them. More extreme relief is now necessary.

CONCLUSION

For the foregoing reasons, this Court should issue sanctions punishing Defendants for their discovery misconduct, including the adoption of an adverse inference against Defendants that will compensate for their efforts to deprive Twitter of evidence.

Respectfully,

/s/ Kevin R. Shannon

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