



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TWITTER, INC.,)
)
)
Plaintiff and)
Counterclaim-Defendant,) **REDACTED VERSION -**
) **Filed on September 6, 2022**
v.) C.A. No. 2022-0613-KSJM
)
ELON R. MUSK, X HOLDINGS I, INC.,)
and X HOLDINGS II, INC.,)
)
Defendants and)
Counterclaim-Plaintiffs.)

**DEFENDANTS AND COUNTERCLAIM-PLAINTIFFS MOTION FOR
LEAVE TO AMEND DEFENDANTS' VERIFIED COUNTERCLAIMS,
ANSWER, AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S
VERIFIED COMPLAINT AND MOTION TO EXTEND
CASE SCHEDULE AND CONTINUE TRIAL**

Defendants Elon R. Musk, X Holdings I Inc., and X Holdings II, Inc. ("Defendants"), by and through their undersigned attorneys, hereby move pursuant to Court of Chancery Rule 15(a) for leave to file Verified Amended Counterclaims, Answer and Affirmative Defenses (the "Amended Counterclaims") in the form attached hereto as Exhibits A-B,¹ and for an order continuing the trial schedule to permit an additional four weeks of discovery to allow Defendants an opportunity to

¹ Attached hereto as Exhibit 1 is a redlined version of the Amended Counterclaims.

investigate newly-surfaced allegations and a corresponding adjustment to the trial schedule.

PRELIMINARY STATEMENT

1. Defendants seek leave to amend their counterclaims and extend the schedule in light of allegations revealed by a whistleblower complaint filed by Peiter Zatko, Twitter's former Head of Security. Zatko's complaint reveals extensive misconduct and misrepresentations in Twitter's 2021 10-K related to Twitter's compliance with binding FTC orders, mass-intellectual property violations, and inadequate security systems, among other matters. Although Zatko raised these complaints directly with Twitter's CEO and its board over two months before the signing of the Merger Agreement, Twitter concealed them; thus Defendants did not become aware of Zatko's allegations until they were reported by the Washington Post last week.

2. Defendants did, however, seek Zatko's documents from Twitter as early as August 3, 2022 in connection with their existing counterclaims given his responsibilities encompassed "information security, including preventing hackers from compromising accounts and using them to post spam." Dkt. 146 at 21-22. But Twitter attempted to shield Zatko's documents. On August 11, 2022, in opposing Defendants' requests to add Zatko as a custodian, Twitter asserted that Zatko had

“nothing to do with spam elimination or even spam at all” and “had no involvement in Twitter’s efforts to mitigate spam.” Dkt. 147 at 15.

3. On August 23, 2022, the Washington Post published two whistleblower complaints by Zatkan—one submitted internally to Twitter, on February 14, 2022, and one submitted to governmental agencies on July 6, 2022. Zatkan’s external complaint describes his role while at Twitter—he was “responsible for some of [Twitter’s] hardest problems, ... [including Twitter Service,] the division tasked with ... *processing and the removal of various spam and spam bots.*”²

4. In addition to identifying that he was, in fact, involved in “Twitter’s efforts to mitigate spam,” Zatkan’s complaints reveal widespread fraud at Twitter, covered up by Twitter CEO Parag Agrawal and other senior executives, ranging into subjects far beyond Twitter’s misleading representations about mDAU and false and spam accounts. These allegations, coming from a renowned security expert who was one of Twitter’s top executives until a few months ago, give rise to additional, independent claims, including fraud and breach of the merger agreement, and prevent Twitter from seeking to enforce the transaction as detailed in the accompanying proposed amended counterclaims.

² Documents produced by Twitter reveal that [REDACTED]
[REDACTED] Ex. 2.

5. Justice requires that Defendants have the opportunity to amend their counterclaims to incorporate allegations relating to misconduct Zatkan revealed, and to seek discovery on those new topics. Any delay is of Twitter's own making, as it improperly concealed Zatkan's allegations at every opportunity. Twitter will not be prejudiced as the outside termination date for the debt financing is seven months away.

BACKGROUND

6. On February 14, 2022, Zatkan filed a complaint with Twitter alleging material defects in Twitter's security systems and regulatory compliance, and detailing Twitter CEO Parag Agrawal's efforts to present misleading information regarding those issues to the board.

7. On February 16, 2022, Twitter filed its 2021 10-K, which did not disclose Zatkan's allegations.

8. On April 25, 2022, Defendants and Twitter entered into the merger agreement. Twitter did not disclose Zatkan's allegations to Defendants prior to executing the agreement. The agreement's termination date of October 24, 2022 is automatically stayed if litigation is commenced, and debt financing has an outside date of April 25, 2023.

9. On July 6, 2022, Zatkan filed an eighty-four page whistleblower complaint with the DOJ, SEC, and FTC (the "Whistleblower Complaint"). Dkt. 244.

10. On July 8, 2022, Defendants gave Twitter notice of termination for the reasons set forth in Defendants' counterclaims.

11. Twitter filed this lawsuit on July 12, 2022, and Defendants filed counterclaims on July 29, 2022.

12. On August 3, 2022, Defendants first requested Twitter add Zatko as a custodian. Ex. 3 at 13.

13. On August 23, 2022, The Washington Post published Zatko's Whistleblower Complaint.

14. Zatko is one of the most respected cybersecurity professionals in the world. Zatko was responsible at Twitter for a broad portfolio of issues, with hundreds of staff below him, including information security, privacy, corporate security, information technology, and Twitter Service, the division "tasked with operational enforcement of global content moderation at scale, including processing and the removal of various spam and spam bots." Whistleblower Compl. ¶ 43.

15. Zatko's Whistleblower Complaint supports many of Defendants claims. For example, he explains that Twitter switched from reporting MAU to mDAU "because it could internally define the mDAU formula, and thereby report numbers that would reassure shareholders and advertisers." *Id.* ¶ 14. He similarly explains that Twitter executives disabled anti-spam restrictions in order to boost mDAU. *Id.* ¶ 19.

16. Zatkan's Whistleblower Complaint also describes repeated efforts by Twitter's senior-most executives, including Agrawal, to mislead Twitter's board, investors, and regulators.

17. *First*, Zatkan explains that Twitter "had never been in compliance" with a 2011 FTC Consent Decree due to serious deficiencies in privacy and security, which developed under Agrawal's watch as Twitter's CTO. *Id.* ¶¶ 46, 50. When Zatkan attempted to present his findings regarding Twitter's compliance with the FTC Consent Decree to the board, the executive team "instructed [him] not to send a detailed written report to the [Board], but instead convey his findings orally, at a high level only." *Id.* ¶ 52. Zatkan explained that Agrawal and other executives misled Twitter's board for years by "reporting their efforts, not actual results." *Id.* ¶ 59.

18. *Second*, Zatkan commissioned a report on Twitter's platform integrity, including its abilities to "fight spam." *Id.* ¶ 61. The findings "were devastating,"³ causing executives to hire a law firm, which removed factual information from the report, returned a "clean" version, and improperly applied a privilege label "to hide the findings." *Id.*

³ Documents produced by Twitter have supported Zatkan's allegations. For example,

19. *Third*, Twitter used “[u]nlicensed machine learning materials” for core algorithms without “acquiring proper legal rights.” *Id.* ¶ 70. Twitter executives were “informed of this glaring deficiency several times” but “never took remedial action.” *Id.* Twitter provided regulators with non-responsive materials in response to requests because they “realized that truthful answers would implicate the company in extensive” intellectual property violations. *Id.* ¶ 71.

20. *Fourth*, Zatkan identified that materials prepared for two December 2021 board meetings “contained false and misleading statements.” *Id.* ¶¶ 78-79. Zatkan brought this to Agrawal’s attention, who insisted that the materials would be presented as is. *Id.* ¶ 85. Zatkan internally described the December 16 meeting as “at worst fraudulent,” *id.* ¶ 95, and was terminated just fourteen days later, on January 19, 2022, *id.* ¶ 101.

21. Zatkan’s complaint also identifies a series of material misrepresentations made in Twitter’s SEC filings about privacy, intellectual property, compliance with laws, and descriptions of its security systems. *Id.* ¶¶ 110-21.

22. Twitter and its attorneys have been aware of Zatkan’s allegations since at least January 2022, when Twitter’s attorneys corresponded with Zatkan after his termination. *Id.* ¶ 7d. At the latest, Twitter became aware of the substance of many of Zatkan’s allegations by February 14, 2022, when he filed his internal report. Twitter never disclosed Zatkan’s allegations to Defendants.

23. The Senate Judiciary Committee has scheduled a hearing on this matter at which Zatkan will testify on September 13, 2022, the same day on which the shareholder vote is currently scheduled to approve the merger. The press has reported that regulators in Ireland and France are also investigating the allegations in the Whistleblower Complaint.

24. Defendants had no awareness of and never reviewed the Whistleblower Complaint until it was reported by the Washington Post on August 23, 2022 and have not communicated with Zatkan or his representatives other than in connection with serving a subpoena after August 23, 2022.

25. After the Whistleblower Complaint became public, Defendants emailed Twitter that afternoon to request production of Zatkan's documents and other information revealed for the first time in Zatkan's complaint. Ex. 5 at 11.

26. On August 25, 2022, Defendants met and conferred with Twitter regarding their requests. The following day, Twitter offered to produce Zatkan's documents from October 1, 2022 to present, but only if Defendants were willing to sign a declaration stating they were not involved with Zatkan's complaint. *Id.* at 4. Twitter also refused to provide discovery that Twitter felt was not covered by Defendants' existing counterclaims. *Id.* at 5.

27. On August 27, 2022, Defendants wrote back, confirming they had no awareness of or involvement in Zatkan's complaints and asked when Twitter became

aware of the substance of Zatko’s allegations, Zatko’s intent to file a complaint, and the filing of Zatko’s complaint. *Id.* at 2-3.

28. On August 28, 2022, Twitter carefully replied only that Twitter and its counsel were not aware of Zatko’s specific Whistleblower Complaint—without responding as to their knowledge of his allegations—as of August 15, 2022. *Id.* at 1.

29. Substantial production of documents is due today, the fact discovery deadline is September 12, 2022, and trial is scheduled for October 17-21, 2022.

**DEFENDANTS SHOULD BE PERMITTED
TO AMEND THE COUNTERCLAIMS**

30. In light of the Whistleblower Complaint, Defendants seek leave to amend their Counterclaims to assert additional claims and defenses arising from Twitter’s misrepresentations in the 2021 10-K and the merger agreement that were previously unknown to defendants.⁴

31. Twitter’s newly-revealed malfeasance provides Defendants with additional grounds to terminate the contract, even though Defendants were not previously aware of those facts. “A party to a contract who is sued for its breach may

⁴ The proposed Amended Counterclaims also supplement certain allegations already present in Defendants’ Counterclaims with facts uncovered in discovery. *See n re TGM Enters., L.L.C.*, 2008 WL 4261035, at *1-2 (Del. Ch. Sept. 12, 2008) (granting motion to amend after new facts learned “[a]s a result of discovery”).

ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him although he was then ignorant of the fact. He may, likewise, justify an asserted termination, ... of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later.” *BRYWIL, INC. v. STP Corp.*, 1980 Del. Ch. LEXIS 595, at *30-31 (Del. Ch. July 15, 1980) (quoting *Coll. Point Boat Corp. v. United States*, 45 S. Ct. 199, 201 (1925)). Where grounds for termination exist, it is immaterial that the alleged motivation for the termination was for an unrelated reason. *See Barisa v. Charitable Research Foundation, Inc.*, 287 A.2d 679, 682 (Del. Super. 1972), *aff'd* 299 A.2d 430 (Del. 1972).

32. Zatkan's Whistleblower Complaint demonstrates that Twitter breached the merger agreement in additional ways previously unknown to Defendants. *First*, given its non-compliance with the 2011 Consent Decree, Twitter's representations in the 10-K and in Section 4.5 of the merger agreement that it is in compliance with all applicable laws are false. *Second*, Twitter's 10-K is also materially misleading in that it discloses “*potential*” risks from concerns with “privacy, data protection, safety [and] cybersecurity” while omitting the significant existing risks Zatkan identified prior to the filing of the 10-K. *Third*, Twitter violated Section 4.8 of the merger agreement by failing to disclose Agrawal's fraudulent concealment of negative security reports from Twitter's board. *Fourth*, Twitter violated Section

4.14 of the merger agreement by falsely representing that it was not infringing on intellectual property of others. *Fifth*, Twitter may have violated Section 4.11 of the merger agreement by failing to disclose pending investigations related to Zatko's allegations.

33. Zatko's whistleblower allegations are reminiscent of *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *2 (Del. Ch. Oct. 1, 2018). There, buyer became aware of an anonymous whistleblower complaint which "uncovered serious and pervasive data integrity problems that rendered Akorn's representations about its regulatory compliance sufficiently inaccurate...." *Id.* Seller sued buyer for specific performance, and buyer prevailed on the grounds that seller's representations about its "compliance with regulatory requirements were not true and correct." *Id.* at 3. Here, as in *Akorn*, Zatko's Whistleblower Complaint alleges that Twitter is noncompliant with regulatory requirements, including the 2011 FTC Consent Decree. As in *Akorn*, Defendants are entitled to investigate those allegations and others in Zatko's complaint to verify the accuracy of representations in the contract and 10-K.

34. Under Rule 15(a), leave to amend should "be freely given when justice so requires." Ch. Ct. R. 15(a). This Court has interpreted Rule 15(a) to "allow for liberal amendment in the interest of resolving cases on the merits." *Gould v. Gould*, 2011 WL 141168, at *7 (Del. Ch. Jan. 7, 2011).

35. Applying Rule 15(a)'s liberal standard, this Court routinely grants motions to amend. *See In re Tile Shop Holdings, Inc. Litig.*, 2020 WL 3097679, at *2 (Del. Ch. June 11, 2020) (granting motion to amend answer in expedited action); *Fitzgerald v. Cantor*, 1999 WL 66529, at *1 (Del. Ch. Jan. 27, 1999) (granting motion to amend). Furthermore, “[n]ew allegations must be accepted as true, and provided they may be read to posit circumstances entitling the complainant to relief, the motion will be granted.” *Fitzgerald*, 1999 WL, at *1.

36. “Motions to amend often are granted at the discretion of the court unless there is *serious* prejudice to the party opposing the motion.” *Hendry v. Hendry*, 2005 WL 3359078, at *6 (Del. Ch. Dec. 1, 2005) (emphasis added). Leave to amend should be granted unless Plaintiff can establish “undue prejudice, undue delay, bad faith, dilatory motive or futility.” *TGM Enters.*, 2008 WL 4261035, at *2; *In re Sauer-Danfoss Inc. S’holders Litig.*, 65 A.3d 1116, 1125 (Del. Ch. 2011) (same).

37. Twitter will suffer no undue prejudice from this amendment nor have Defendants unduly delayed in seeking leave to amend their Counterclaims. Importantly, any prejudice to Twitter can be easily mitigated by granting Defendants’ motion to extend the case schedule and continue the trial date. *See In re Tile Shop Holdings, Inc. Litig.*, 2020 WL, at *2 (granting motion for leave in

expedited case and stating any “resulting prejudice, I believe, can be ameliorated by adjusting the outstanding scheduling order”).

38. Additionally, any prejudice to Twitter from the timing of these allegations are Twitter’s own doing. Had Twitter disclosed Zatkan’s allegations in its 10-K, disclosed his allegations to Defendants prior to executing the merger agreement, agreed to add Zatkan as a custodian at Defendants’ request on August 3, 2022, or not improperly opposed discovery from Zatkan on August 11, 2022, these issues would have already come to light.

39. Defendants acted extremely swiftly. They learned of this new evidence on August 23, 2022, informed the Court the next day, drafted amended pleadings, and filed this motion three business days later.

**THE CASE SCHEDULE AND TRIAL SHOULD
BE CONTINUED TO PERMIT DISCOVERY**

40. In light of the newly-uncovered allegations, Defendants seek extension of the case schedule to permit an additional four weeks of discovery.

41. “A trial judge has broad discretion to control scheduling and the court’s docket.” *Goode v. Bayhealth Med. Ctr., Inc.*, 931 A.2d 437 (Del. 2007). Modification to a scheduling order is warranted when the requesting party demonstrates “good cause.” *In re Asbestos Litig.*, 2020 WL 1465924, at *4 (Del. Mar. 24, 2020). “[T]he court examines whether the moving party has been generally diligent, the need for more time was neither foreseeable nor its fault, and refusing to

grant the continuance would create a substantial risk of unfairness to that party.” *Id.* (quotation omitted). “The good cause standard does not separately weigh prejudice to the non-moving party.” *Id.* at *4 n.29.

42. Defendants have good cause. Defendants seek additional time to conduct proper discovery regarding the allegations raised in the Whistleblower Complaint. *See Brunswick Corp. v. Colt Realty, Inc.*, 253 A.2d 216, 220 (Del. Ch. 1969) (“I am moved by the desire to see the litigation decided on its merits and to get before the Court all of the facts which will help achieve that objective.”).

43. Defendants have been diligent in their request. *First*, Defendants immediately asked Twitter for discovery relevant to Zatko’s allegations, but Twitter agreed to produce only documents it self-determined were relevant to Defendants’ existing claims. *Second*, Defendants filed this motion within days of the Whistleblower Complaint’s publication. Additionally, there is good cause because “the need for more time was neither foreseeable nor [Defendants] fault, and refusing to grant the continuance would create a substantial risk of unfairness to [Defendants]” who would not—absent an extension—have a full opportunity to investigate and prepare in light of this new evidence.

44. Extending the schedule will not prejudice Twitter because the outside date for debt financing is April 25, 2023. By contrast, denying Defendants the opportunity to amend their pleading and take discovery of these stunning revelations

threatens grave prejudice. Defendants could be forced to close a \$44 billion transaction that was premised on fraud and left without an adequate remedy. Public shareholders would be cashed out and, while senior executives and other corporate wrongdoers may face personal liability, they surely do not have deep enough pockets to answer for the damage they caused.

WHEREFORE, Defendants respectfully requests that this Court grant Defendants' motion and enter the order attached hereto.

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DATED: August 29, 2022