IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TWITTER, INC., Plaintiff and Counterclaim-Defendant, v. ELON R. MUSK, X HOLDINGS I, INC., and X HOLDINGS II, INC., Defendants and Counterclaim-Plaintiffs.	)	C.A. No. 2022-0613-KSJM

DEFENDANTS AND COUNTERCLAIM-PLAINTIFFS' MOTION TO STAY PENDING CLOSING OF THE TRANSACTION

Defendants Elon R. Musk, X Holdings I Inc., and X Holdings II, Inc. ("Defendants"), by and through their undersigned attorneys, hereby move to stay this action and remove the October 17 trial from the Court's calendar based on changed circumstances that have effectively mooted this action.

PRELIMINARY STATEMENT

1. This Court ordered an expedited trial on Twitter's sole equitable claim for relief that Defendants "specifically perform their obligations under the merger agreement and consummate the closing in accordance with the terms of the merger agreement." Defendants have agreed to do exactly that. They have stated they are willing to close the transaction at $54.20, the Debt Financing parties are working cooperatively to fund the close, and closing is expected on or around October 28,

2022. As a result there is no need for an expedited trial to order Defendants to do what they are already doing and this action is now moot. "Delaware courts do not address 'disagreements that have no significant current impact.'" *Crescent/Mach I Partners, L.P. v. Dr Pepper Bottling Co. of Texas*, 962 A.2d 205, 209 (Del. 2008). (quoting *Stroud v. Milliken Enter., Inc.*, 552 A.2d 476, 480 (Del.1989)).

2. Yet, Twitter will not take yes for an answer. Astonishingly, they have insisted on proceeding with this litigation, recklessly putting the deal at risk and gambling with their stockholders' interests.[1] Proceeding toward trial is not only an enormous waste of party and judicial resources, it will undermine the ability of the parties to close the transaction. Failing to stay the litigation would send a signal to the market that—despite Defendants' commitment to perform their obligations under the Merger Agreement and Equity Commitment Letter—Twitter is demanding that the Court impede the deal moving forward. Instead of allowing the parties to turn their focus to securing the Debt Financing necessary to consummate the transaction and preparing for a transition of the business, the parties will instead remain distracted by completing discovery and an unnecessary trial. In effect, a trial would keep the merger transaction in limbo for longer, casting an unnecessary cloud of uncertainty over the company.

[1] As this Court held during the Motion to Expedite hearing, each day of litigation poses harm to the company that Defendants have agreed to acquire. Dkt. 103 at 62-63.

3. Further, although Twitter resists a stay based on the theoretical possibility of a future failure to obtain the Debt Financing, no such failure has occurred to date. Quite to the contrary, counsel for the debt financing parties has advised that each of their clients is prepared to honor its obligations under the Bank Debt Commitment Letter on the terms and subject to satisfaction of the conditions set forth therein. We have so advised Twitter, again to no avail. Not only has Twitter's baseless speculation been refuted by the banks themselves, any theoretical claims Twitter could concoct based on a potential financing failure that has not happened are unripe and unpled, making them well outside the scope of the trial set to begin in eleven days.

4. Simply put, there are two possibilities at this stage. By far the most likely possibility is that the debt is funded in which case the deal will close on or around October 28. Shareholders would receive their payments far faster than would be possible if Twitter were to proceed to trial and ***win***, win again on appeal, and only then first proceed toward funding and closing. This process could take months. The other much less likely possibility is the debt is not funded and the deal does not close, in which case any potential claims Twitter may have will have just arisen based on brand new facts. Either way, a trial on October 17 based on the existing claims and the existing factual record is at best an utter futility for Twitter.

BACKGROUND

5. Given Twitter's recalcitrance, Defendants have no choice but to submit a proposed Stipulation and Order, effective upon entry by the Court, that would bind them to take all actions necessary, proper or advisable to consummate the Debt Financing and perform the Merger Agreement and Equity Commitment Letter upon their terms and conditions. We ask the Court to enter that Order to put an end to this dispute and facilitate the prompt closing of this transaction.

6. Twitter filed this lawsuit on July 12, 2022, seeking specific performance of Defendants' obligations under the Merger Agreement and requesting that Defendants be enjoined from further breaches, ordered to work toward satisfying the Merger Agreement's closing conditions, and ordered to close upon satisfaction of those conditions. Compl. ¶ 11.

7. Twitter alleged that it is entitled to specific performance under Section 9.9(b) of the Merger Agreement, assuming the following conditions are met: (i) all of the conditions set forth in Section 7.1 and Section 7.2 have or will be satisfied at the closing; (ii) ***the debt financing has been funded or will be funded at the closing if the equity financing is funded***; and (iii) the company has confirmed that the closing will occur. *Id.* at ¶ 153 (emphasis added).

8. Twitter further alleged that "[a]ll of the conditions set forth in Sections 7.1 and 7.2 have been satisfied or waived, or are expected to be satisfied or waived

at the closing, ***and the closing will occur if the debt and equity financing are funded***, which funding is solely within the control of defendants." *Id.* at ¶ 154 (emphasis added).

9. In its prayer for relief, Twitter requested the Court enter judgment and relief against Defendants as follows: "(A) [g]ranting all relief requested in this complaint to the extent permitted under the merger agreement; (B) [o]rdering Defendants to specifically perform their obligations under the merger agreement and consummate the closing in accordance with the terms of the merger agreement; and (C) [g]ranting such injunctive relief as is necessary to enforce the decree of specific performance." *Id.* at 61.

10. On July 19, 2022, although acknowledging that the committed Debt Financing was not set to expire until April 2023, the Court granted expedition, reasoning that "the longer the merger transaction remains in limbo, the larger the cloud of uncertainty cast over the company, and the greater the risk of irreparable harm to the sellers and to the target itself." Dkt. 103 at 62-63.

11. Defendants filed their answer and counterclaims on July 29, 2022.

12. On October 3, 2022, Defendants' counsel delivered a letter to Twitter stating "that the Musk Parties intend to proceed to closing of the transaction contemplated by the April 25, 2022 Merger Agreement, on the terms and subject to the conditions set forth therein and pending receipt of the proceeds of the debt

financing contemplated thereby, provided that the Delaware Chancery Court enter an immediate stay of the action, *Twitter vs. Musk, et al*. (C.A. No. 202-0613-KSJM) (the "Action") and adjourn the trial and all other proceedings related thereto pending such closing or further order of the Court." Dkt. 698, Ex. A at 1. Defendants also filed this correspondence with the SEC.

13. On October 4, 2022, Twitter responded to Defendants' letter, noting that "[t]he intention of the Company is to close the transaction at $54.20 per share."

A STAY OF TRIAL IS WARRANTED

14. This Court has the power to stay proceedings based on "efficiency or simple common sense." *Paolino v. Mace Sec. Int'l, Inc.*, 985 A.2d 392, 397 (Del. Ch. 2009). A stay is appropriate "to conserve limited judicial resources and to avoid rendering a legally binding decision that could result in premature and possibly unsound lawmaking." *In re Straight Path Commc'ns Inc. Consol. S'holder Litig.*, 2017 WL 5565264, at *3 (Del. Ch. Nov. 20, 2017) (quotation omitted). "[A] stay may be granted if it will substantially simplify the proceeding and the moving party can clearly show that hardship or inequity will be avoided." *Harbor Ins. Co. v. Newmount Min. Corp.*, 564 A.2d 352, 356 (Del. Super. Ct. 1989).

15. At the threshold, this Court should stay the action and remove the trial from the calendar because no live dispute exists to be litigated. Accordingly, a stay makes "common sense." *Paolino*, 985 A.2d at 397.

16. "[T]he law requires that a dispute not be moot and that it be ripe for adjudication to avoid wasting judicial resources on academic disputes." *Crescent/Mach I Partners*, 962 A.2d at 208–09. "If a claim is moot or not ripe, the Court cannot assert subject matter jurisdiction over it." *Feldman v. AS Roma SPV GP, LLC*, 2021 WL 3087042, at *10 (Del. Ch. July 22, 2021); *Multi-Fineline Electronix, Inc. v. WBL Corp. Ltd.*, 2007 WL 431050, at *8 (Del. Ch. Feb. 2, 2007) (finding claims moot explaining that, "a court generally will not grant relief if the substance of a dispute disappears due to the occurrence of certain events following the filing of an action.") (citation omitted).

17. *First*, Defendants' agreement to move forward to closing in accordance with the Merger Agreement will moot the relief Twitter seeks, justifying entry of a stay. *See Supernus Pharms., Inc. v. Reich Consulting Grp., Inc.*, 2021 WL 5046713, at *3-4 (Del. Ch. Oct. 29, 2021) (holding that Securityholder Representative's counterclaim for specific performance under Merger Agreement was moot because acquirer had since performed); *Osborne v. City of Wilmington*, 2009 WL 608536, at *1 (Del. Ch. Feb. 25, 2009) (staying action "in the interest of judicial economy" when Senate bill "will moot some or all of the issues in this litigation").

18. Defendants have proffered a stipulation that they are prepared to consummate the transaction under the Merger Agreement upon receipt of the proceeds of the Debt Financing. They are complying with their obligations under

Section 6.10. The Debt Financing parties have indicated that they are prepared to honor their commitments and are working in good faith with Defendants on this transaction and a closing is anticipated by approximately October 28. Thus, this action is, or imminently will become, moot.

19. *Second*, any potential new relief Twitter might seek in the event the debt is not funded is not ripe, is not pled in the existing complaint, and cannot possibly be tried in eleven days.

20. A ripe dispute is "'one where litigation sooner or later appears to be unavoidable,' and 'one in which the material facts are static.' This 'common sense' approach requires the court to decide whether the interests of those who seek relief outweigh the interests of the court and of justice 'in postponing review until the question arises in some more concrete and final form.'" *Bebchuk v. CA, Inc.*, 902 A.2d 737, 740 (Del. Ch. 2006) (quoting *Stroud* 552 A.2d at 480).

21. Any claims grounded in baseless speculation that the Debt Financing may not successfully fund are not ripe for judicial determination. *See Stroud*, 552 A.2d at 480 ("Whenever a court examines a matter where facts are not fully developed, it runs the risk not only of granting an incorrect judgment, but also of taking an inappropriate or premature step in the development of the law."). Further, unable to allege that the Debt Financing will not occur, Twitter can assert no cognizable harm. *See Matter of Scottish Re (U.S.), Inc.*, 274 A.3d 1019, 1025, 1045

(Del. Ch. 2022) (explaining party lacks standing absent "a legally cognizable injury" that is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical").

22. Under analogous circumstances, the court in *Hexion v. Spec. Chems., Inc. v. Oak-Bark Corp.*, 965 A.2d 715 (Del. Ch. 2008), deemed a similar issue unripe. In *Hexion*, a party sought a declaration that, in the event the merger closed, the combined entity would be insolvent. *Id.* at 757. The court declined to reach the issue because insolvency was relevant only to the obligation of the lending banks to ultimately fund the transaction, and thus unripe because the banks providing debt financing had not yet determined whether to fund the debt. *Id.* at 758. The court recognized that a "ripe dispute is therefore one not only where litigation 'sooner or later appears to be unavoidable,' but in which 'the material facts are static.'" *Id.* at fn. 115 (quoting *Stroud*, 552 A.2d at 481).

23. This Court should likewise not make a ruling regarding debt issues that are "not now properly framed by the terms of the merger agreement and the status of the transaction." *Id.*

24. In any event, the Merger Agreement ***does not*** permit an order of specific performance causing Musk to fund the equity commitment or close the transaction ***until*** the debt component of the merger consideration is funded. Section 9.9(b) of the Merger Agreement provides "***Notwithstanding anything herein to the***

contrary . . . the Company shall be entitled to specific performance or other equitable remedy to enforce Parent and Acquisition Sub's obligations to cause [Musk] to fund the Equity Financing, or to enforce [Musk's] obligation to fund the Equity Financing directly, and to consummate the Closing ***if and for so long as*** . . . (ii) the Debt Financing (or, as applicable, the Alternative Financing) has been funded or will be funded at the Closing if the Equity Financing is funded at the Closing." (emphasis added).

25. If the Debt Financing does not fund, Twitter may not obtain an order of specific performance under Section 9.9(b) causing Musk to fund the equity or close the transaction. The Merger Agreement, which Twitter is seeking to enforce at trial, unambiguously prohibits any court-ordered closing based on specific performance absent funding of the debt.[2] The absence of any basis for specific performance in that scenario knocks the props out from under the original application for expedited proceedings, warranting adjournment of the October 17 trial date. And, of course,

[2] If Defendants refuse to close because the debt has not funded, Twitter could only pursue a claim for breach against X Holdings I, Inc. The remedy for such breach is that Twitter may terminate the Merger Agreement and seek a Parent Termination Fee of $1 billion under Section 8.3(b). The Merger Agreement expressly caps the amount under Section 8.3(c) even in the case of "knowing and intentional breach." Consistent with that cap, Musk signed a Limited Guarantee of the Parent Termination Fee in the amount of $1 billion, which itself has an express cap at that amount as well as a non-recourse provision. Ex. A.

if the debt does fund, as Defendants fully expect, then the transaction will close, entirely mooting the need for specific performance.

26. *Further*, requiring Defendants to litigate moot or unripe disputes would be a waste of the parties' and the court's resources. *See In re Straight Path*, 2017 WL 5565264, at *3. Accordingly, interests of judicial economy favor a stay.

27. A stay likewise is warranted because failing to issue a stay would lead to an inequitable result.

28. Proceeding with trial will interfere with ongoing efforts to consummate the transaction. Defendants are working diligently, cooperatively, and in good faith with the financing banks to prepare for the closing. That funding, however, will take time because the parties are working through the complex process of arranging $12.5 billion dollars of debt financing, including drafting required documentation, arranging security interests for a portion of the debt financing, and finalizing funding mechanics. Understandably, that cannot happen before the October 17 trial.[3]

29. This litigation will not expedite the financing, rather it will impede Defendants' and their counsel's ability to work toward financing.[4] Rather than

---

[3] Counsel for the financing banks have estimated they will need until October 28 to fund the loans.

[4] While Twitter may assert that the Debt Financing is not a closing condition *per se*, it is nevertheless a requirement for closing because X Holdings I, Inc. is a holding company with *de minimis* assets entirely reliant on the debt and equity financing to fund the transaction. Musk's obligation to fund his equity *(cont'd)*

focusing on coordinating with the banks to finalize financing, Defendants will instead be forced to complete discovery and proceed to trial on claims that no longer require disposition.

30. *Finally*, Twitter cannot show any prejudice from a brief stay of this action to allow the parties to focus on closing. In the event a closing does not occur, the litigation can promptly resume based on the then existing facts and whatever issues remain at the time.

---

commitment portion was and remains expressly conditioned on receipt of the debt financing. Musk is not a party to Sections 2 and 3 of the Merger Agreement, which govern the obligation to close and make payments to stockholders at $54.20 per share. Instead, X Holdings I, Inc.'s obligations to make such payments are supported by (i) an Equity Commitment Letter ("ECL") provided by Musk in the amount of $27.25 billion and (ii) a Bank Debt Commitment Letter in the amount of $12.5 billion. The ECL itself is expressly conditioned on "**substantially contemporaneous receipt by Parent or Acquisition sub of the cash proceeds of the Debt Financing** contemplated by the Debt Commitment Letters in accordance with the terms and conditions of such Debt Commitment Letters or any Alternative Financing." Ex. B § 1(iii).

CONCLUSION

The trial should be adjourned proceedings stayed pending funding of the Debt Financing and closing of the transaction, and the Court should enter the proposed stipulation and order.

/s/ Edward B. Micheletti

Edward B. Micheletti (ID No. 3794)
Lauren N. Rosenello (ID No. 5581)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
920 North King Street, 7th Floor
P.O. Box 636
Wilmington, Delaware 19899-0636
(302) 651-3000

Attorneys for Defendants and Counterclaim-Plaintiffs Elon R. Musk, X Holdings I, Inc., and X Holdings II, Inc.

OF COUNSEL:

Alex Spiro
Andrew J. Rossman
Christopher D. Kercher
Silpa Maruri
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010

Words: 2,873

DATED: October 6, 2022

CERTIFICATE OF SERVICE

I, Edward B. Micheletti, hereby certify that on October 6, 2022, a copy of Defendants and Counterclaim-Plaintiffs' Motion to Stay Pending Closing of the Transaction with Exhibits A-B and [Proposed] Order was served electronically via File & Serve*Xpress* upon the following counsel of record:

Peter J. Walsh, Jr. (ID No. 2437)
Kevin R. Shannon (ID No. 3137)
Christopher N. Kelly (ID No. 5717)
Mathew A. Golden (ID No. 6035)
Callan R. Jackson (ID No. 6292)
Justin T. Hymes (ID No. 6671)
POTTER ANDERSON
& CORROON LLP
1313 North Market Street
Hercules Plaza, 6th Floor
Wilmington, Delaware 19801
(302) 984-6000

Attorneys for Plaintiff and Counterclaim Defendant Twitter, Inc.

David J. Margules (ID No. 2254)
Elizabeth A. Sloan (ID No. 5045)
Elizabeth S. Fenton (ID No. 5563)
Jessica C. Watt (ID No. 5932)
Brittany M Giusini (ID No. 6034)
BALLARD SPAHR LLP
919 North Market Street, 11th Floor
Wilmington, Delaware 19801
(302) 252-4465

Attorneys for Plaintiff and Counterclaim Defendant Twitter, Inc.

Brad D. Sorrels (ID No. 5233)
Daniyal M. Iqbal (ID No. 6167)
Leah E. León (ID No. 6536)
WILSON SONSINI GOODRICH
& ROSATI, P.C.
222 Delaware Avenue, Suite 800
Wilmington, Delaware 19801
(302) 304-7600

Attorneys for Plaintiff and Counterclaim Defendant Twitter, Inc.

Jacob R. Kirkham (ID No. 5768)
KOBRE & KIM LLP
600 North King Street, Suite 501
Wilmington, Delaware 19801
(302) 518-6460

Attorneys for Plaintiff and Counterclaim Defendant Twitter, Inc.

Robert A. Weber (ID No. 4013)
Joseph B. Cicero (ID No. 4388)
Elliott Covert (ID No. 6540)
CHIPMAN BROWN CICERO
& COLE, LLP
Hercules Plaza
1313 North Market Street, Suite 5400
Wilmington, Delaware 19801
(302) 295-0191

Attorneys for Defendants and Counterclaim-Plaintiffs Elon R. Musk, X Holdings I, Inc., and X Holdings II, Inc.

/s/ Edward B. Micheletti
Edward B. Micheletti (ID No. 3794)