

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

PLAINTIFF’S REPLY TO VERIFIED COUNTERCLAIMS

Plaintiff Twitter, Inc. (“Twitter”), by and through its undersigned counsel, replies as follows to the Verified Counterclaims (the “Counterclaims”) of Elon R. Musk (“Musk”), X Holdings I, Inc., and X Holdings II, Inc. (each a “Defendant” and together, “Defendants” or the “Musk Parties”) as follows.

INTRODUCTION

Musk begins his answer to Twitter’s claims for breach of their merger agreement with more than ninety pages of counterclaims. According to Musk, he—the billionaire founder of multiple companies, advised by Wall Street bankers and lawyers—was hoodwinked by Twitter into signing a \$44 billion merger agreement.

That story is as implausible and contrary to fact as it sounds. And it is just that—a story, imagined in an effort to escape a merger agreement that Musk no longer found attractive once the stock market—and along with it, his massive

personal wealth—declined in value. After spending months looking for an excuse to get out of the contract, Musk claimed to terminate it, explaining his supposed reasons for doing so in a July 8 letter to Twitter. When Twitter sued to enforce its rights and exposed the weakness of those reasons, Musk spent weeks coming up with more supposed reasons—the Counterclaims—which offer up an entirely new set of excuses for his breach.

The Counterclaims are a made-for-litigation tale that is contradicted by the evidence and common sense. Musk invents representations Twitter never made and then tries to wield, selectively, the extensive confidential data Twitter provided him to conjure a breach of those purported representations. Yet Musk simultaneously and incoherently asserts that Twitter breached the merger agreement by stonewalling his information requests. As explained below and will be demonstrated at trial, the Counterclaims are factually inaccurate, legally insufficient, and commercially irrelevant:

The Counterclaims fail to justify Musk’s plan to dishonor the merger agreement. Musk claims that he has the right to walk away from the deal if Twitter was “miscounting” the number of false or spam accounts on its platform. That is incorrect—as the facts and terms of the merger agreement show. When Musk offered to buy Twitter, he did not ask for—and Twitter did not make—any representations regarding the number of false or spam accounts. The merger

agreement does not contain a single reference to false or spam accounts. Nor did Musk ask Twitter for any information to “verify” the number of false or spam accounts before he entered into the merger agreement. To the contrary, Musk forwent all due diligence—giving Twitter twenty-four hours to accept his take-it-or-leave-it offer before he would present it directly to Twitter’s stockholders.

What Musk did ask for—and what he got—was a customary representation that Twitter’s SEC filings since January 1, 2022 did not contain any false or misleading statement of material fact, with no right to terminate the deal based on any inaccuracies in those filings unless they have a “material adverse effect” on Twitter, as narrowly defined in the “seller-friendly” merger agreement. Musk neither sought nor obtained any “information rights” that would allow him to investigate the accuracy of those SEC filings as part of some post-signing due diligence project. All Musk got was a limited right to receive information only for “a reasonable business purpose related to the consummation” of the merger—that is, for the purpose of closing the deal, not abandoning it. Musk’s repeated mischaracterizations of the merger agreement cannot change its plain words.

The facts Musk pleads do not even state a claim. In the disclosure Musk claims was false or misleading, Twitter stated: “We have performed an internal review of a sample of accounts and estimate that the average of false or spam accounts during the fourth quarter of 2021 represented fewer than 5% of our mDAU”

or “monetizable daily active users,” which Twitter defines not as all accounts, but only as accounts who logged in or were otherwise authenticated and accessed Twitter through a variety of ways on any given day. Twitter 2021 10-K at 5, 24. Twitter cautioned that “[i]n making this determination, we applied significant judgment, so our estimation of false or spam accounts may not accurately represent the actual number of such accounts, and the actual number of false or spam accounts could be higher than we have estimated.” *Id.* at 24.

Musk does not identify any false or misleading statement of fact in this disclosure. Instead, he asserts that his own analysis, using a publicly available website, indicates that false or spam accounts constitute at least 10% of Twitter’s monetizable daily active users. But that claim is untenable on its face, because Musk is not measuring the same thing as Twitter or even using the same data as Twitter. Musk can produce a higher estimate only by running a data set neither limited to nor inclusive of mDAU through a generic web tool that designated his own Twitter account a likely “bot.” The result is a distortion that Musk is hoping will nonetheless make waves.

Musk also attacks Twitter’s process for estimating the proportion of false or spam accounts among monetizable daily active users as unreasonable because Twitter’s quarterly estimates are based on daily samples of 100 mDAU, combined for a total sample of approximately 9,000 mDAU per quarter. But attacking an

estimate as unreliable based merely on the size of the sample relative to the size of the population is an elementary statistical error.

Unable to identify any false or misleading statement in Twitter's disclosures regarding false or spam accounts, Musk takes a swing at alleged inaccuracies in the company's disclosures about the implications of the mDAU metric generally. Musk just now invented this new pretext for avoiding the merger agreement, as these supposed inaccuracies are nowhere mentioned in his July 8 letter to Twitter explaining the bases for his purported termination of the merger agreement, nor in any other communication with Twitter since signing the merger agreement. In any event, Twitter never made the disclosures he now asserts are false. For example, Musk says Twitter misled investors when it "represent[ed]" that the mDAU metric "is determinative of 'long-term financial performance.'" While Twitter has repeatedly described mDAU as an indicator of revenue growth, Twitter has not described mDAU as solely "determinative" of either revenue growth or long-term financial performance. Twitter's actual disclosures concerning mDAU as a business metric make this clear. One example: "Our mDAU *and their level of engagement with advertising* are critical to our success and our long-term financial performance will continue to be significantly determined by our success in increasing the growth rate of our mDAU *as well as the number of ad engagements.*" Twitter 2021 10-K at 13 (emphasis added). Musk also asserts that Twitter's disclosures misleadingly

suggest that accounts counted in mDAU necessarily generate ad revenue. But mDAU is a measure of *monetizable* daily active users, not *monetized* daily active users—by its nature, mDAU represents an opportunity to monetize those users, rather than a confirmation that each user has generated ad revenue on any given day. And in addition to mDAU, Twitter reports other key metrics closely related to advertising revenue, such as changes in ad engagements and in cost per ad engagement.

The other pretexts Musk offers—supposed failures to gain Musk’s consent for ordinary-course actions like employee terminations and protection of users’ rights in foreign jurisdictions—offer no more valid basis to escape the deal. As detailed in the Complaint and set out below, Twitter has complied in every respect with the merger agreement. Musk’s Counterclaims, based as they are on distortion, misrepresentation, and outright deception, change nothing. Musk signed and is obligated to consummate the merger agreement. Twitter is entitled to specific performance.

ANSWER

The headings and footnotes in the Counterclaims are repeated herein for convenience of reference only and are not statements or admissions by Twitter. To the extent a response to the headings and footnotes in the Counterclaims is required, Twitter denies any allegations therein. All allegations not expressly admitted herein are denied.

PRELIMINARY STATEMENT

1. This action arises out of Twitter's misrepresentations to the Musk Parties regarding the condition of the company and the "key metrics" Twitter uses to evaluate the number of users on its platform. While the Musk Parties negotiated for representations as to the truth of Twitter's SEC disclosures, relying on their accuracy, the statements in these SEC disclosures were far from true. Instead, they contain numerous, material misrepresentations or omissions that distort Twitter's value and caused the Musk Parties to agree to acquire the company at an inflated price. Twitter's Complaint, filled with personal attacks against Musk and gaudy rhetoric more directed at a media audience than this Court, is nothing more than an attempt to distract from these misrepresentations.

RESPONSE: Denied. Twitter's SEC disclosures are accurate and Twitter misrepresented nothing. Musk's allegations attacking Twitter's SEC disclosures are not supported by any facts. Musk's allegations regarding negotiation and reliance are likewise contrary to the facts. Musk sought an urgent deal, undertook no due diligence, and offered a self-described "seller friendly" merger agreement that contained no representations about false or spam accounts or mDAU. Twitter respectfully refers the Court to the Complaint, to its SEC disclosures, and to the Agreement and Plan of Merger by and among X Holdings I, Inc., X Holdings II,

Inc., and Twitter, Inc., dated as of April 25, 2022 (“the Merger Agreement”) for their complete and accurate contents.

2. In fact, that has been Twitter’s strategy all along: to distract from and obfuscate the truth about its disclosures—first from its investors and then from the Musk Parties when they began to discern the truth. Following the adage “trust but verify,” the Musk Parties negotiated not only for representations and warranties about the truthfulness of Twitter’s SEC filings, but also for significant information rights entitling them to access to the company’s books and records. They fully expected that Twitter would hide nothing from its would-be owner, including about the magnitude of its false or spam account problem. Instead, the opposite happened. Twitter played a months-long game of hide-and-seek to attempt to run out the clock before the Musk Parties could discern the truth about these representations, which they needed to close. The more Twitter evaded even simple inquiries, the more the Musk Parties grew to suspect that Twitter had misled them.

RESPONSE: Denied. Twitter’s conduct, and the evidence, shows that Twitter’s only strategy has been to advance the interests of the company and its stockholders and comply with the Merger Agreement. Musk, on the other hand, has been on a months-long campaign to repudiate the contract he signed. As to Musk’s claim that Twitter has played “hide-and-seek,” the truth is the exact opposite—Musk has received massive amounts of information from Twitter, for months, and has been unable to find a valid excuse to back out of the contract. Twitter respectfully refers the Court to the Merger Agreement for its complete and accurate terms and to the parties’ correspondence for the truth of what unfolded post-signing.

3. In its disclosures, Twitter claims to have nearly 238 million monetizable daily active users (“mDAU”) who participate on the platform, and tells its investors that this userbase metric is a bellwether for its ability to generate revenue and the “best way to measure [Twitter’s] success” As the Musk Parties began to peel the onion of false and spam accounts, two things became abundantly

clear. *First*, Twitter was miscounting the number of false and spam accounts on its platform, as part of its scheme to mislead investors about the company's prospects by focusing on its purported hundreds of millions of mDAU. *Second*, while Twitter has repeatedly touted mDAU as a "key metric" for revenue growth, mDAU is not as closely tied to revenue as Twitter leads the public to believe.

RESPONSE: Denied. The Musk Parties have spent months trying to invent a spam disclosure problem and have found nothing. Their complaints about the mDAU metric were not even among their reasons for termination—they are a newly invented litigating position. Twitter accurately discloses in its SEC filings its efforts to estimate the percentage of its mDAU that are false or spam accounts after it detects and removes spam. Twitter also accurately discloses in its SEC filings the definition and significance of the mDAU metric. Twitter respectfully refers the Court to those disclosures for their complete and accurate contents.

4. Musk is an avid Twitter user who believes in free speech and open debate, and he appreciates Twitter's role as the world's town hall. Musk, who has owned and founded several successful companies, including PayPal, Tesla, and SpaceX, invests only in companies that make products he uses and enjoys. Thus, when Musk decided to identify another public company in which to invest, Twitter was a natural option.

RESPONSE: Twitter admits that Musk is a Twitter user and has founded several companies. Twitter otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 4, and denies them on that basis.

5. While Musk actively uses Twitter, he has grown increasingly concerned in recent years with the company's direction and poor user experience, given the flood of misinformation, scams, and other undesirable content he regularly

sees. Twitter has attempted to solve issues like these through aggressive content moderation and suspension of accounts that propagate misinformation. But to Musk, and many others, eliminating free speech is a cure worse than the disease, and that open discourse is essential to a functioning democracy.

RESPONSE: Twitter admits that Musk actively uses Twitter and that many people believe that open discourse is essential to a functioning democracy. Twitter lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 5 concerning Musk’s beliefs and experience, and denies them on that basis. Twitter otherwise denies the allegations in Paragraph 5.

6. Musk believes that a key issue for Twitter is the elimination of false and spam accounts and discerning who Twitter’s verifiable, real users are. Musk believes that by verifying who is real, and eliminating false and spam accounts—accounts that bad actors employ to manipulate public discourse or propagate scams on a global scale—Twitter would be able to flourish.

RESPONSE: To the extent Paragraph 6 contains allegations about Musk’s beliefs in general, Twitter lacks knowledge or information sufficient to form a belief as to the truth of the facts alleged and denies them on that basis. Twitter otherwise denies the allegations in Paragraph 6. As facts alleged in the Complaint demonstrate, Musk’s recent complaints about the prevalence of spam and the mDAU metric are a pretext to avoid honoring the Merger Agreement.

7. Musk’s thesis for Twitter was simple—false and spam accounts have an outsized effect on public discourse, and are often amplified by Twitter’s timeline algorithm—the algorithm that determines what posts users see on their feed. Together, both problems detract from Twitter’s user experience, which Twitter has deprioritized in service of focusing all of its efforts on growing mDAU.

RESPONSE: To the extent Paragraph 7 contains allegations about Musk’s “thesis,” Twitter lacks knowledge or information sufficient to form a belief as to the truth of the facts alleged and denies them on that basis. Twitter otherwise denies the allegations in Paragraph 7.

8. At the same time, Musk believed Twitter was over-reliant on advertising revenue, with over 90% of its revenue generated by ads. When he signed the deal, Musk believed he could kill two birds with one stone: by implementing certain changes, such as requiring effective verification of all users, he could eliminate what he thought—based on what Twitter misrepresented—was a less-than-5% false or spam account problem. Musk could then better engage the over 220 million mDAU that Twitter represented were real, monetizable users, to create greater engagement and subscription revenue.

RESPONSE: To the extent Paragraph 8 contains allegations about Musk’s beliefs, Twitter lacks knowledge or information sufficient to form a belief as to the truth of the facts alleged and denies them on that basis. Twitter otherwise denies the allegations in Paragraph 8. Twitter avers that Musk’s voluminous post-signing requests for information have not been undertaken in an effort to close the deal—as required by the contract—but rather to undermine it. Twitter respectfully refers the Court to the Merger Agreement and Twitter’s SEC disclosures for their complete and accurate contents.

9. After signing the Merger Agreement, however, the Musk Parties learned troubling facts that have called into serious doubt Twitter’s representations. Just three days after signing the Agreement, Twitter restated three years of its mDAU figures because it had been double-counting certain users. Twitter failed to advise the Musk Parties that the restatement was coming before they signed the Merger Agreement.

RESPONSE: Denied. Musk’s unsupported claims of misrepresentation and his claim to be “troubled” are pretext aimed at escaping his contractual obligations. Twitter denies that it “restated three years of its mDAU figures,” and respectfully refers the Court to its responses to Paragraphs 79 and 149. Twitter admits that it did not provide the information in the April 28, 2022 press release to the Musk Parties before the Merger Agreement was signed and before the parties had a non-disclosure agreement in place. Twitter avers that Musk failed to mention that information among his purported bases of termination or in any conversation with Twitter. Moreover, Musk did not seek any diligence information at all before signing the Merger Agreement, including information related to the subject matter of the April 28, 2022 press release.

10. Shortly thereafter, at a May 6, 2022 introductory meeting, Musk began asking questions, expecting to be reassured that Twitter’s SEC filings were the product of a thoughtful, robust process. Musk wanted to understand Twitter’s mDAU figure, Twitter’s representations that less than 5% of that figure is comprised of false or spam accounts, and the processes Twitter used to reach those figures.

RESPONSE: Twitter admits that on May 6, 2022, there was a meeting between Musk and Twitter at which Musk asked some questions on a range of topics, and otherwise denies the allegations of Paragraph 10. Twitter further states that it has not “represented” that false or spam accounts comprise less than 5% of mDAU (but rather that it *estimates* as much), that the Merger Agreement contains no representations about either mDAU or spam, and that the SEC filings Twitter has

made regarding its estimates of false or spam accounts in mDAU are accurate (as Musk's inability to point to any inaccuracy in those disclosures confirms).

11. But at that meeting, Musk was astonished to learn just how meager Twitter's processes were. Human reviewers (not AI) apply unidentified standards to somehow conclude every quarter for nearly three years that fewer than 5% of Twitter users were false or spam on the basis of a sample of just 100 accounts per day (less than 0.00005% of daily users). Even worse, Twitter's CEO and CFO were unable to explain both how those 100 accounts per day were selected to ensure a representative sample or what criteria were applied other than a reviewer's gut judgment. Unlike other platforms, Twitter did not send email, text, or other push notifications to users to verify them. Musk realized that, at best, Twitter's reliance on and touting of its process was reckless; at worst, it was intentionally misleading.

RESPONSE: Denied. In Paragraph 11, Musk intentionally misrepresents what Twitter does to detect and combat spam—all of which is well known to the Musk Parties. As Twitter has explained repeatedly and in detail to the Musk Parties, and summarized publicly, Twitter deploys spam-detection capabilities that typically remove more than one million spam accounts each day during or shortly after creation, including both automated and manual reviews of accounts and activity on the Twitter platform during and after signup. Twitter also locks millions of accounts each week that cannot pass human-verification challenges, such as CAPTCHAs or phone verifications. Separate from these automated and manual spam-detection processes, Twitter estimates the prevalence of false or spam accounts within mDAU reported each quarter through multiple human reviews (in replicate) of thousands of randomly selected accounts each quarter using both public and private data. Twitter respectfully refers the Court to its SEC disclosures

concerning its estimate of spam or false accounts in quarterly mDAU and to the May 16, 2022 Tweet Thread posted by its CEO concerning the company's spam-fighting efforts.

12. Since then, Twitter's disclosures have slowly unraveled, with Twitter frantically closing the gates on information in a desperate bid to prevent the Musk Parties from uncovering its fraud. Twitter's delay tactics have been two-fold: it has dragged its feet in responding to the Musk Parties' data requests and has repeatedly provided sanitized, incomplete information that it admits does not answer the Musk Parties' most basic questions. Moreover, Twitter continues to refuse to explain which accounts it includes in mDAU and why, what criteria it tells its human reviewers to apply, and how often it overrides those reviewers' determinations.

RESPONSE: Denied. The allegations that Twitter's disclosures have "unraveled" and that Twitter is "closing the gates on information" are not true. Twitter has made and continues to make available to Musk massive flows of data. Moreover, as set forth in detail in its Complaint, Twitter spent significant time and resources to compile, and in many instances create, data collections and information requested by the Musk Parties. As the Musk Parties know, and contrary to these allegations, Twitter has explained what accounts it includes in mDAU and why they are included there, just as it has explained the criteria and indicators used to estimate spam or false accounts and the data showing the determinations made by the human reviewers.

13. What limited information has come to light proves Twitter's disclosures about the number of false or spam accounts are false. Notwithstanding Twitter's stonewalling, preliminary expert estimates of the false or spam accounts in Twitter's mDAU population, based on the data Twitter has provided and using a

publicly available machine learning algorithm, yield findings that are shocking.¹ They show that in early July fully one-third of visible accounts may have been false or spam accounts—resulting in a conservative floor of at least twice as many false or spam accounts as the 5% that Twitter discloses for the entire mDAU population.² Moreover, Twitter’s own post-signing disclosures indicate that those false or spam accounts most likely formed a disproportionate portion of monetized users (those that actually see ads). Twitter even admitted on diligence calls with the Musk Parties that, contrary to Twitter’s disclosures that they remove false or spam accounts from mDAU figures once they are suspended, millions of accounts suspended in any given quarter (including for spam) are nevertheless included in the mDAU calculations of that same quarter.

RESPONSE: Denied. Musk’s “preliminary expert estimates” are nothing more than the output of running the wrong data through a generic web tool. The data are wrong because, as Musk knows, the “Firehose” from which the data were collected reflects many Twitter accounts that are not included in mDAU and, at the same time and as Musk admits in footnote 2, does not reflect the majority of those accounts that are included in mDAU because those accounts, though logged in, are not Tweeting or taking other actions. Confirming the unreliability of Musk’s conclusion, he relies on an internet application called the “Botometer”—which applies different standards than Twitter does and which earlier this year designated

¹ The results of this analysis are preliminary in nature and may change, due at least in part to Twitter’s failure to disclose critical data required for both sampling and analysis and the Musk Parties’ resulting inability (based on insufficient data and time) to undertake a complete analysis.

² Accounts that publicly tweet, re-tweet, or “like” tweets are “visible accounts” on Twitter’s Firehose and make up approximately 30% of the accounts Twitter counts in its mDAU figures. Other accounts that Twitter counts in mDAU cannot be evaluated without data that Twitter continues to withhold.

Musk himself as highly likely to be a bot. Twitter further denies that it “admitted on diligence calls” that its disclosures regarding the removal of false or spam accounts from mDAU are inaccurate. Twitter respectfully refers the Court to those disclosures, which, as explained below in response to Paragraphs 75 and 122, are accurate.

14. Most concerning of all, the Musk Parties’ investigation revealed that Twitter’s misrepresentations run far deeper than simply providing incorrect numbers of false or spam accounts. In fact, while Twitter represents that mDAU—a proprietary metric³ that only Twitter uses and is first among its “Key Metrics”—is “*critical* to [Twitter’s] success” and is determinative of “long-term financial performance,” that is misleading. Twitter’s own disclosures to the Musk Parties show that although Twitter touts having 238 million “monetizable daily active users,” those users who actually see ads (and thus, would reasonably be considered “monetizable”) is about **65 million lower** than what Twitter represents. Moreover, mDAU is not by itself a useful metric to forecast revenue growth, despite Twitter’s public statements to the contrary, because while mDAU has grown, Twitter relies on advertising revenue, and users that see zero or almost zero ads account for almost all of the growth in mDAU. Thus, many users who are counted as “monetizable” do not bear on Twitter’s long-term financial success, as Twitter represents. In fact, the majority of ads are served to less than **16 million users**—a mere fraction of the 238 million mDAU figure that Twitter misleadingly touts to the market.

RESPONSE: Denied. Twitter’s disclosures regarding mDAU in its SEC filings—to which Twitter respectfully refers the Court for their complete contents—are accurate. As set out below in response to Paragraphs 138-46, the allegations of Paragraph 14 are Musk’s attempt to distort data received from Twitter to sponsor

³ Twitter has further disclosed that “[o]ur mDAU are not comparable to current disclosures from other companies, many of whom share a more expansive metric that includes people who are not seeing ads.” Q4 2018 Fiscal Year Letter to Shareholders.

wild conclusions about Twitter’s mDAU, reflecting his apparent and inappropriate effort to use this litigation to undermine Twitter’s business. But here again, as set out below in response to Paragraphs 141-42, Musk has pleaded nothing inconsistent with Twitter’s public disclosures.

15. The Musk Parties’ investigation has determined that, contrary to what Twitter leads investors to believe, mDAU’s relationship with financial performance is much more indirect and nuanced. While other social media platforms provide investors with markers of daily engagement beyond mDAU, Twitter continues to push mDAU as “the *best way* to measure” performance.

RESPONSE: Denied. Twitter’s disclosures regarding mDAU are accurate. Musk’s Counterclaims seek to distort them through selective omission and misleading bolding. Twitter respectfully refers the Court to its SEC disclosures for their complete and accurate contents.

16. In fact, Twitter concocted the mDAU metric after three straight quarters of declining numbers of monthly active users (“MAUs”)—its previous “key metric,” and one that is widely used in the social media industry. Twitter also ties mDAU goals to executive compensation. In 2020 Twitter based its executives’ cash bonus pool on revenue, operating income, and adjusted EBITDA. After Twitter missed those targets in 2020, and only 32% of the cash bonus pool was funded, Twitter determined that mDAU (a highly manipulable number) should be considered in determining whether executives received these bonuses. Following that change, in 2021, 100% of this executive bonus pool was funded. And since Twitter’s adoption of mDAU over MAU, it has reported ten straight quarters of “growth” despite stagnant financial results.

RESPONSE: Denied. The allegations of Paragraph 16 are manifestly irrelevant to the Merger Agreement and aimed at disparaging the company. Only SEC filings since January 1, 2022 can serve as a basis for any claim by Musk under

that agreement. Twitter’s adoption of mDAU occurred and was disclosed and explained in 2019. Musk’s reliance on this issue is further demonstration that he has found nothing, in months of trying, to justify his refusal to perform under the Merger Agreement. To the extent the allegations of Paragraph 16 purport to characterize Twitter’s SEC filings, Twitter respectfully refers the Court to those documents for their complete and accurate contents.

17. The Musk Parties’ preliminary analysis shed light as to why Twitter has stonewalled—Twitter did not want the Musk Parties (or the market) to discover that Twitter has been misleading investors regarding its “key metric.” As a long bull market was coming to a close, and the tide was going out, Twitter knew that providing the Musk Parties the information they were requesting would reveal that Twitter had been swimming naked.

RESPONSE: Denied. Musk does not have and has not pleaded a shred of evidence for the rhetoric-heavy, fact-free allegations of Paragraph 17.

18. These obfuscations and misrepresentations are not Twitter’s only sins. Since the Merger Agreement was signed, Twitter has also made significant changes to its business without obtaining the consent required by the Merger Agreement. Twitter has terminated its product lead and another key executive, retained a board member whose reelection was rejected by stockholders, instituted a hiring freeze, and disobeyed orders from and initiated risky litigation against the Indian government—thereby placing Twitter’s third largest market at risk.

RESPONSE: Twitter admits that it ended its employment relationship with certain employees, declined to accept the resignation of a board member, and initiated litigation in India. Twitter denies that it instituted a “hiring freeze.” Twitter also denies that any of this required Musk’s consent, insofar as Twitter negotiated

for the ability under the Merger Agreement to retain control over hiring and terminating employees, and otherwise denies the allegations in Paragraph 18.

19. On July 8, 2022, faced with Twitter's misrepresentations, breaches of its information-sharing obligations, ordinary course violations, and the prospect of an MAE, the Musk Parties terminated the Merger Agreement. While Twitter asks the Court to force the Musk Parties to close over Twitter's misrepresentations and contractual breaches, the Musk Parties seek relief from the grave inequity of such a result. Accordingly, the Musk Parties bring their counterclaims for breach of contract and rescission on the basis of Twitter's fraud.

RESPONSE: Twitter admits that on July 8, 2022 Defendants purported to terminate the Merger Agreement, that Twitter subsequently filed litigation seeking specific performance of the Merger Agreement, and that Defendants have filed counterclaims. Twitter otherwise denies the allegations in Paragraph 19.

PARTIES

20. Defendant and Counterclaim-Plaintiff Elon R. Musk is a Texas citizen. Musk is the CEO of Tesla, Inc., the world's most valuable automobile manufacturer and fifth largest company by market capitalization in the world. Tesla has revolutionized electric cars and helped accelerate the world's move to sustainable energy, preventing tens of millions of metric tons of carbon from entering the atmosphere. Musk also founded and leads SpaceX, which works with NASA and the International Space Station to both launch satellites into orbit and to send astronauts into space. SpaceX also provides "Starlink," a satellite system that provides internet access to dozens of countries. Indeed, when Russia disrupted internet service in Ukraine during its invasion of that country, Ukrainian officials reached out to Musk on Twitter and worked to bring Starlink to Ukraine, providing crucial internet access in under 11 hours.⁴

⁴ Minda Zeltin, *Here's The Untold Story Of How A Single Tweet To Elon Musk Changed History*, Inc. (Mar. 26, 2022), available at <https://www.inc.com/minda-zetlin/elon-musk-starlink-ukraine-mykhailo-fedorov-tweet-twitter.html>.

RESPONSE: Twitter admits that Musk is the CEO of Tesla, Inc., and that Tesla, Inc. manufactures automobiles. Twitter lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in the body of Paragraph 20, and therefore denies them on that basis. Footnote 4 purports to refer to an Inc. article, to which Twitter respectfully refers the Court for its complete and accurate contents.

21. Defendant and Counterclaim-Plaintiff X Holdings I, Inc. (“Parent”), is a Delaware corporation. Parent is wholly owned and controlled by Musk.

RESPONSE: Admitted.

22. Defendant and Counterclaim-Plaintiff X Holdings II, Inc. (“Acquisition Sub” and together with Parent “Buyers”), is a Delaware corporation. Acquisition Sub is wholly owned and controlled by Parent.

RESPONSE: Admitted.

23. Plaintiff and Counterclaim-Defendant Twitter is a publicly traded Delaware corporation with its principal place of business in San Francisco, California. Twitter operates a microblogging social network on which users write and share short messages, or “tweets.”

RESPONSE: Twitter admits that it is a publicly traded Delaware corporation headquartered in San Francisco, California. Twitter denies the remaining allegations in Paragraph 23 and avers that it owns and operates a global platform for real-time self-expression and conversation, including in the form of Tweets.

FACTUAL ALLEGATIONS

A. Twitter's Business

24. Twitter was founded in March 2006 by Jack Dorsey, Noah Glass, Biz Stone, and Evan Williams. Twitter's primary business is operating a microblogging social media network where users share 280 character messages called "tweets."

RESPONSE: Twitter admits it was launched by its founders in 2006.

Twitter denies the remaining allegations in Paragraph 24 and avers that its primary product, Twitter, is a global platform for real-time self-expression and conversation, including in the form of Tweets. Twitter further avers that Tweets have a maximum length of 280 characters.

25. Twitter is free to use for most users and generates the vast majority of its revenue through advertising.⁵ For example, for the fiscal year ending December 31, 2021, Twitter reported revenue of just over \$5 billion. Of that, \$4.5 billion was generated through advertising services. For the fiscal year ending December 31, 2020, Twitter reported \$3.7 billion in revenue, with \$3.2 billion generated through advertising services.

RESPONSE: Twitter admits that its primary product, Twitter, is free of monetary charge to use for its users and that Twitter generates the majority of its revenue through advertising. Twitter otherwise denies the allegations in the first sentence of Paragraph 25. The remaining allegations in the body of Paragraph 25 purport to characterize Twitter's Fiscal Year 2020 and 2021 Annual Reports, to

⁵ Under the recently-launched Twitter Blue feature, a small number of users pay subscription fees of \$9.99 per month for premium features such as data feeds. In Q2 2022 Twitter recognized \$101 million in revenue from subscription and other services, compared to \$1.18 billion from advertisements.

which Twitter respectfully refers the Court for their complete and accurate contents. Twitter denies the allegations in the first sentence in footnote 5. The second sentence in footnote 5 purports to characterize Twitter’s Quarterly Report for the second quarter of 2022, to which Twitter respectfully refers the Court for its complete and accurate contents.

26. Twitter uses the site’s mDAU count to induce investors to purchase Twitter securities. This wasn’t always the case. Until late 2018, Twitter told investors that its key metric was MAU—a widely accepted metric in the social media industry. But after three straight quarters of decreasing MAUs, Twitter developed a new proprietary “key” metric—mDAU—that conveniently resulted in ten straight quarters of “growth.” In its disclosure replacing MAU with mDAU Twitter noted that “we believe that mDAU, and its related growth, are the best ways to measure our success against our objectives and to show the size of our audience and engagement going forward, so we will discontinue disclosing MAU after the first quarter of 2019,” clearly implying that mDAU predicted future revenue better than MAU. Twitter went on to stress that “*[o]ur mDAU and their level of engagement with advertising are critical to our success and our long-term financial performance* will continue to be significantly determined by our success in increasing the growth rate of our mDAU as well as the number of ad engagements” and that “*our revenue growth is primarily driven by increases in the number of our mDAUs*, increases in ad pricing or number of ads shown driven by strong advertiser demand, increases in our clickthrough rate, as well as other factors.”

RESPONSE: To the extent Paragraph 26 purports to quote from and characterize the contents of Twitter’s SEC filings, Twitter respectfully refers the Court to those filings for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 26.

27. Twitter defines mDAU in its 2021 10-K as “people, organizations, or other accounts who logged in or were otherwise authenticated and accessed Twitter on any given day through twitter.com, Twitter applications that are able to show ads,

or paid Twitter products, including subscriptions.”⁶ Twitter calculates the average mDAU for a period as “the number of mDAU on each day of such period divided by the number of days for such period.” The average mDAU figure was 217 million for the fourth quarter of 2021, 229 million for the first quarter of 2022, and 238 million for the second quarter of 2022.

RESPONSE: Paragraph 27 purports to quote from and characterize the contents of Twitter’s SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 27.

28. Twitter represents that mDAU reflects how many Twitter users access the site on a daily basis, reflects the population that is being exposed to advertisements, is crucial to understanding Twitter’s total audience for advertisers, and thus is the central metric to understand in estimating future revenue growth. As such, Twitter prominently touts mDAU as its first “Key Metric[]” in its SEC disclosures:

Key Metrics

We review a number of metrics, including the key metrics discussed below, to evaluate our business, measure our performance, identify trends affecting our business, formulate business plans and make strategic decisions.

Monetizable Daily Active Usage or Users (mDAU). We define mDAU as people, organizations, or other accounts who logged in or were otherwise authenticated and accessed Twitter on any given day through twitter.com, Twitter applications that are able to show ads, or paid Twitter products, including subscriptions⁽²⁾.

We believe that mDAU, and its related growth, is the best way to measure our success against our objectives and to show the size of our audience and engagement. Average mDAU for a period represents the number of mDAU on each day of such period divided by the number of days for such period. Changes in mDAU are a measure of changes in the size of our daily logged in or otherwise authenticated active total accounts. To calculate the year-over-year change in mDAU, we subtract the average mDAU for the three months ended in the previous year from the average mDAU for the same three months ended in the current year and divide the result by the average mDAU for the three months ended in the previous year. Additionally, our calculation of mDAU is not based on any standardized industry methodology and is not necessarily calculated in the same manner or comparable to similarly titled measures presented by other companies.

In the three months ended December 31, 2021, we had 217 million average mDAU, which represents an increase of 13% from the three months ended December 31, 2020. The increase was driven by product improvements, as well as global conversation around current events. In the three months ended December 31, 2021, we had 38 million average mDAU in the United States and 179 million average mDAU in the rest of the world, which represent increases of 2% and 15%, respectively, from the three months ended December 31, 2020.

⁶ Some users can log into twitter through platforms that do not allow the showing of ads, and are thus purportedly excluded from the mDAU count. Platforms that are included in the mDAU count include Twitter for iPhone, iPad, and Android.

RESPONSE: Twitter admits that mDAU is a “Key Metric” Twitter uses to evaluate its business because, among other reasons, it reflects daily engagement with Twitter and the size of its audience capable of being monetized. Twitter denies that mDAU reflects the population of its users that is being exposed to advertisements on a daily basis. Twitter defines mDAU “as people, organizations, or other accounts who logged in or were otherwise authenticated and accessed Twitter on any given day through twitter.com, Twitter applications that are able to show ads, or paid Twitter products, including subscriptions.” Paragraph 28 purports to quote from and characterize the contents of Twitter’s SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 28.

29. Twitter’s only other Key Metric—ad engagements—is itself a metric that Twitter links with mDAU, noting that “[w]e believe that *mDAU*, and its related growth, *is the best way to measure our success* against our objectives *and to show the size of our audience and engagement*.” Similarly, during earnings calls, Twitter touts its mDAU growth alongside its revenue numbers as the most important information for investors.⁷

RESPONSE: Twitter admits that year-over-year changes in ad engagements (not “ad engagements”) are a Key Metric that Twitter has disclosed to investors. Twitter avers that Defendants have omitted important disclosures about

⁷ Twitter, Twitter Q4 2021 Earnings Report, Twitter Investor Relations (February 10, 2022), available at: https://s22.q4cdn.com/826641620/files/doc_financials/2021/q4/Q4_2021_Twitter_Earnings_Transcript.pdf

the relationship between ad engagements and revenue. Twitter has disclosed that the growth of its advertising revenue depends on increases in the number of mDAU; increases in ad pricing or the number of ads shown, which is driven by advertiser demand; increases in the clickthrough rate; as well as other factors. Paragraph 29 purports to quote from and characterize the contents of Twitter's SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 29.

B. Musk's Relationship With Twitter

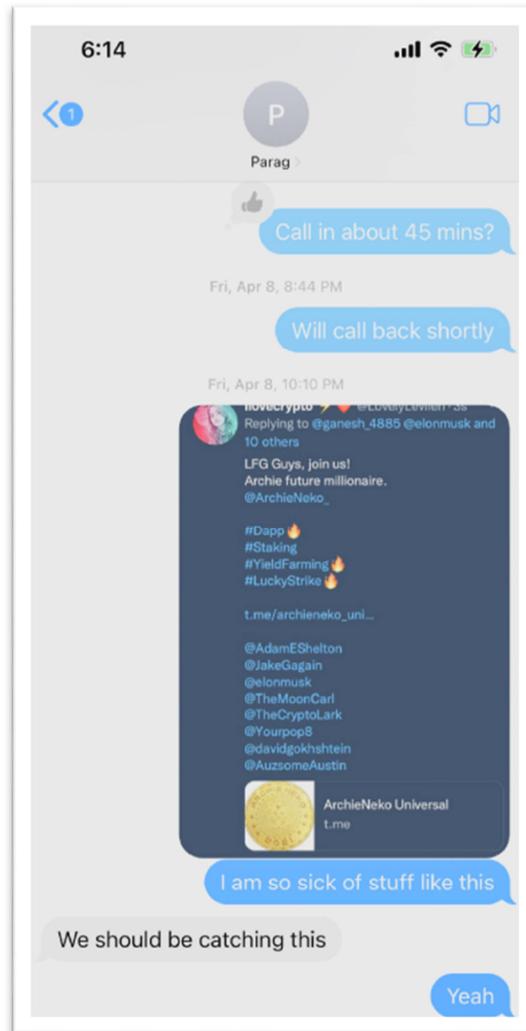
30. Musk is an active Twitter user with over 100 million Twitter followers, making his the sixth most followed account on the site. Musk tweets frequently and enjoys the direct interaction he can have with his followers on the site. He has previously stated that he prefers communicating over Twitter to more traditional mediums, such as press releases or interviews.

RESPONSE: Twitter admits that Musk is a Twitter user and has over 100 million followers, but otherwise denies the allegations in the first sentence of Paragraph 30. Twitter admits that Musk Tweets frequently, but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in the second and third sentences of Paragraph 30, and therefore denies them on that basis.

31. Despite his growing concerns with the company's direction, he still believed in Twitter as a product—one that provided a necessary public good while still offering significant untapped opportunity for monetization. He thus invested in the company in early 2022 by buying common stock in the market.

RESPONSE: Twitter admits that Musk bought Twitter’s common stock in early 2022. Twitter lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 31, and therefore denies them on that basis.

32. In late March 2022, Dorsey and other members of Twitter’s board approached Musk to ask him to join the board. Musk was hesitant at first, but listened to their pitches over the next couple weeks. During that time, he had several conversations with Twitter CEO Parag Agrawal about his views of free speech on the platform, ideas for improving Twitter’s algorithm, and the need to improve user experience by removing bots. Specifically, Musk places tremendous importance on the value of free speech and believes that it is “the bedrock of a functioning democracy.” He considers Twitter to be “the digital town square where matters vital to the future of humanity are debated,” and therefore believes that open discourse on Twitter must be protected. Over time, Musk began growing concerned that Twitter’s content moderation policies were leading to a chilling effect on debate and public discourse. Given the importance of Twitter as a public platform, this chilling effect could not only drive users away from Twitter, harming the company’s finances, but also have a broader detrimental impact on the free speech climate. Among other things, Musk believed that a better way to protect the platform from abuse was through greater transparency and more robust user verification: by limiting discourse to actual humans, truth and good ideas can defeat misinformation and hateful content—rather than getting drowned out by false and spam accounts that have an outsized impact in relation to actual humans. For example, on April 8, 2022, Musk sent Agrawal an example of a scam tweet from a spam account, stating “I am so sick of stuff like this.” Agrawal replied, acknowledging “[w]e should be catching this.”



RESPONSE: Twitter denies the allegations in the first and second sentences of Paragraph 32. Twitter admits that Musk had multiple conversations with Parag Agrawal in March 2022, and that they discussed, among other topics, Musk’s ideas for improving the platform, but otherwise denies the allegations in the third sentence of Paragraph 32. Twitter lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the fourth, fifth, sixth, seventh, and eighth sentences of Paragraph 32, and therefore denies them on that basis.

Twitter admits that the correspondence referenced in the ninth and tenth sentences of Paragraph 32 occurred, and respectfully refers the Court to that correspondence for its complete and accurate contents.

33. Musk eventually realized that Twitter’s current management was not up to the task of fixing Twitter as it needed to be fixed. He determined that to do the job right, he would need more than a single board seat. Musk thus rejected Twitter’s offer to join the board on April 9, 2022, and instead, notified Agrawal of his intent to submit an acquisition offer.

RESPONSE: Twitter admits that Musk abruptly changed his mind about joining Twitter’s board (after first negotiating an offer to join the board,, accepting it in writing, and Tweeting that he was “looking forward” to taking the position), notified Mr. Agrawal of the same, and also notified Mr. Agrawal of his intent to make an offer to buy Twitter. Twitter lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 33, and therefore denies them on that basis.

34. On April 13, 2022, Musk sent Twitter’s board an offer to purchase all outstanding shares of the company at \$54.20 per share—a total acquisition price of about \$44 billion. Twitter’s stock closed at a trading at a price of \$44.48 the day before the offer. Musk’s offer price was based on a financial model prepared by his bankers at Morgan Stanley, which relied, in significant part, on Twitter’s representations that mDAU was “the best way to measure [Twitter’s] success” and only a small group comprising less than 5% of mDAU were non-monetizable false or spam accounts. Indeed, a model that Musk relied on directly ties Twitter’s revenue growth to its mDAU growth.

RESPONSE: The first sentence of Paragraph 34 purports to characterize a letter sent by Musk to Twitter’s Board of Directors on April 13, 2022, to which

Twitter respectfully refers the Court for its complete and accurate contents. The second sentence of Paragraph 34 purports to characterize publicly available information pertaining to the public trading price of shares of Twitter's common stock, to which Twitter respectfully refers the Court for an accurate record of such trading price as of any particular point in time. To the extent the third sentence of Paragraph 34 purports to quote from or summarize Twitter's public SEC filings, Twitter respectfully refers the Court to those filings for their complete and accurate contents. Twitter lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in the third sentence of Paragraph 34, and therefore denies them on that basis. Twitter lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the fourth sentence of Paragraph 34, and therefore denies them on that basis.

35. In response to Musk's offer, Twitter's board formed a transaction committee and hired J.P. Morgan, Goldman Sachs, and Allen & Co. as financial advisors. On April 15, 2022, the board adopted a poison pill to try to make it harder for Musk to purchase the Company.

RESPONSE: Twitter admits that its Board of Directors formed a Transactions Committee to, among other things, assist the board's evaluation of Musk's acquisition proposal and that the board retained financial advisors to Twitter and its board in connection with Musk's proposal and potential strategic alternatives thereto, and otherwise denies the allegations in the first sentence of Paragraph 35. Twitter admits that its board adopted a shareholder rights plan on April 15, 2022,

and otherwise denies the allegations in the second sentence of Paragraph 35. Twitter avers that Musk himself admitted this allegation is not true, having Tweeted on April 16 that the Twitter board may have adopted the rights plan due to “a concern about other potential bidders.”

36. Musk’s thesis for Twitter is based on two principal concepts. *First*, he believes that Twitter’s approach to combatting false or spam accounts is flawed. Instead of suspending or banning accounts that violate Twitter’s rules, which keeps the company a step behind spammers and stifles the open exchange of ideas, Twitter should instead require users to be effectively authenticated at the front end. This would prevent false or spam accounts from being created in the first instance and requires less subjective and unevenly applied content moderation. He further believes that solving Twitter’s false or spam account problem through effective authentication would make the platform more attractive to use, driving further engagement by existing users and attracting new active users.

RESPONSE: Twitter lacks knowledge or information sufficient to form a belief as to Musk’s “thesis” and therefore denies the allegations of Paragraph 36 on that basis. Twitter further denies that it does not “effectively authenticate[]” users “at the front end.” As Twitter has publicly disclosed, it typically detects and removes more than a million spam accounts each day during or shortly after creation.

37. Musk’s Twitter feed has long been plagued by an ever-present swarm of false or spam accounts that incessantly reply to tweets with scams and misinformation.⁸ But, like any reasonable public company investor, Musk relied on Twitter’s SEC filings for the truth. In those filings, he saw that the company represented that it had a constantly growing mDAU population, that this growth was

⁸ For example, a Newsweek investigation using SparkToro’s fake follower audit tool found that 70.2% of the accounts that follow Musk’s Twitter are fake. *See* Darragh Roche, *Half of Joe Biden’s Twitter Followers Are Fake, Audit Reveals* (May. 17, 2022), available at <https://www.newsweek.com/half-joe-biden-twitter-followers-are-fake-audit-elon-musk-1707244>.

the “best way to measure our success against our objectives,” and that no more than 5% of its mDAU was comprised of false or spam accounts. Musk thus assumed that his own experience was unique because of his high profile and that spam accounts were simply disproportionately visible to him.

RESPONSE: Twitter denies the allegations in the first sentence of Paragraph 37, and lacks sufficient knowledge or information to form a belief as to the truth of the allegations in the second sentence and so denies them on that basis. The third sentence of Paragraph 37 purports to quote from and characterize Twitter’s SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter avers that its SEC filings do not make a representation as to the percentage of spam included in its mDAU; rather, Twitter provides its estimate thereof pursuant to an estimation methodology detailed therein. Twitter lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the fourth sentence of Paragraph 37, and therefore denies them on that basis. Footnote 8 purports to characterize a *Newsweek* article, to which Twitter respectfully refers the Court for its complete and accurate contents.

38. Musk also believes that Twitter’s algorithm is fundamentally flawed in a way that compounds the false or spam account problem. Twitter allows a user’s feed to sort others’ posts by chronology, but the default setting is for the algorithm to provide a generated list of “Home Tweets.” Twitter notes that “Home serves Tweets from accounts and Topics you follow as well as recommended Tweets.” Thus, if a user frequently interacts with tweets regarding a certain topic, Twitter will push more tweets about that topic onto one’s feed, regardless of whether the user follows that account. The Home Tweets algorithm boosts tweets with high engagement, regardless of whether they are generated by real humans or false or spam accounts. This results in Russian propaganda accounts like the now-banned @ten_GOP account going viral by posting misinformation. Musk has previously

spoken out about the problems with this algorithm and how it amplifies false or spam accounts.



RESPONSE: Twitter lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of Paragraph 38, and therefore denies them on that basis. Twitter admits the allegations in the second sentence of Paragraph 38. The third and fourth sentences of Paragraph 38 purport to quote from the webpage “About your Home timeline on Twitter,” <https://help.twitter.com/en/using-twitter/twitter-timeline>, to which Twitter respectfully refers the Court for its complete and accurate contents. Twitter denies the allegations in the fifth and sixth sentences of Paragraph 38. Twitter expressly denies that its algorithm “results in Russian propaganda accounts ... going viral by posting misinformation.” Twitter further avers that the account referenced in

Paragraph 38 was, in fact, permanently suspended. To the extent that the seventh sentence of Paragraph 38 quotes from or characterizes any Tweets or communications from Musk, Twitter respectfully refers the Court to those Tweets or communications for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 38.

39. *Second*, Musk believes that Twitter's ad-based revenue model is dated. Prior to the Merger Agreement, Musk believed he could unlock Twitter's true potential by shifting away from an advertising-only model (in Q2 2022, advertising made up over 90% of Twitter's revenue) to other forms of revenue, like a hybrid subscription-based model for verified users and enabling payments and creator monetization tools. Because these additional business models require legitimate users, the Musk Parties calculated their purchase price with reference to Twitter's mDAU figures, in accordance with the company's representations as to the mDAU figure's accuracy and the reliability of that measure in predicting revenue.

RESPONSE: To the extent the allegations in Paragraph 39 make assertions about Musk's beliefs, Twitter lacks knowledge or information sufficient to form a belief as to the truth of those allegations and denies them on that basis. To the extent that the allegations in Paragraph 39 purport to characterize Twitter's SEC filings, Twitter respectfully refers the Court to those disclosures for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 39.

40. This thesis makes his investment in Twitter distinctly vulnerable to any misstatements about how many mDAU were *actually* real, monetizable users. First, misrepresentations regarding the number of active users on Twitter would, according to Twitter, impact Twitter's advertising revenue because it discloses that "[o]ur advertising revenue growth is primarily driven by increases in mDAU" and other factors. As explained further below at *infra* ¶¶130-46, contrary to Twitter's representations, a total mDAU figure does not accurately reflect Twitter's revenue generation capacity. But, separately, Musk understood that each mDAU represented

an active Twitter user who could potentially be convinced to pay a nominal monthly subscription fee for the service. If that number were inflated, then the number of potential subscribers would drop in tandem, endangering the viability of Musk's proposed subscription model.

RESPONSE: Denied. Twitter's SEC disclosures are accurate and Twitter misrepresented nothing regarding mDAU. To the extent the second sentence of Paragraph 40 purports to quote from or characterize Twitter's SEC filings, Twitter respectfully refers the Court to those disclosures for their complete and accurate contents, and otherwise denies the allegations in the second sentence of Paragraph 40. Twitter denies the allegations in the third and fourth sentences of Paragraph 40. The allegations in the fifth sentence of Paragraph 40 contain a hypothetical to which no response is required; to the extent a response is required, Twitter denies the allegations in the fifth sentence of Paragraph 40. To the extent not otherwise addressed, Twitter denies the allegations of Paragraph 40.

41. Thus, both principles of Musk's investment thesis were supported by Twitter's disclosures, which represented that Twitter had over 220 million mDAU (with that number consistently growing), that mDAU was an approximate measure of the users who used Twitter enough to see ads each day, that mDAU was a "key" metric for assessing growth, and that the false or spam account problem, while truly frustrating, was a relatively contained, fixable issue. And while he believed there would be some pain in shedding user counts through removing false or spam accounts and requiring verification, he believed that in the long run, this would attract more users and provide more diverse revenue streams for the Company, all while supporting his vision of Twitter as the public square.

RESPONSE: To the extent that Paragraph 41 purports to quote from or characterize Twitter's SEC filings, Twitter respectfully refers the Court to those

disclosures for their complete and accurate contents. To the extent that Paragraph 41 makes allegations about Musk's "thesis" and what he "believed," Twitter lacks knowledge or information sufficient to form a belief as to the truth of those allegations and therefore denies them on that basis. Twitter otherwise denies the allegations in Paragraph 41.

42. Musk announced on April 21, 2022, that he had secured financing sufficient to fund his \$54.20 per share offer. On April 23, 2022, he communicated to Twitter that he was unwilling to increase his offer, and that he was willing to take the offer directly to Twitter's stockholders if the board rejected it. He reiterated that promise on April 24, 2022, and his counsel delivered a draft merger agreement to Twitter shortly thereafter. The parties negotiated a merger agreement on April 24 and April 25, 2022.

RESPONSE: As to the allegations in the first, second, and third sentences of Paragraph 42, Twitter admits that the referenced announcements and communications occurred, and respectfully refers the Court to those announcements and communications for their complete and accurate contents. Twitter admits the allegations in the fourth sentence of Paragraph 42.

43. On April 25, 2022, Goldman Sachs and J.P. Morgan delivered opinions that Musk's \$54.20 offer was fair to Twitter's shareholders, and Twitter's board formally voted to approve the merger.

RESPONSE: Twitter admits the allegations in Paragraph 43, except Twitter avers that Goldman Sachs and J.P. Morgan opined on the fairness of the proposed merger consideration to Twitter's shareholders from a financial point of view.

C. The Merger

44. On April 25, 2022, the Musk Parties entered into the agreement to purchase Twitter. From the start, consistent with his goals to promote free speech and verify users, Musk announced his intent to “defeat” the “bots” that plague the platform and degrade the user experience.

RESPONSE: Twitter admits the allegations in the first sentence of Paragraph 44. To the extent the allegations in the second sentence of Paragraph 44 purport to quote from or characterize certain statements by Musk, Twitter respectfully refers the Court to those statements for their complete and accurate contents. Twitter otherwise denies the allegations in the second sentence of Paragraph 44.

45. The acquisition, if completed, would be funded with two financing streams. First, Musk (along with certain co-investors) would provide equity funding of \$33.5 billion (as memorialized in a May 24, 2022 Equity Commitment Letter). Second, a syndicate of banks, led by Morgan Stanley, would provide debt financing of \$13 billion under a Debt Commitment Letter.⁹ The Debt Commitment Letter expires on April 25, 2023.

RESPONSE: The allegations in the first sentence of Paragraph 45 purport to characterize the terms of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents. The remaining allegations in the body of Paragraph 45 purport to characterize the terms of the

⁹ Musk’s original financing offer comprised only \$21 billion of equity financing, with an additional \$12.5 billion in margin loan commitments. Those margin loan commitments subsequently expired and Musk increased the equity commitment to \$33.5 billion.

Equity Commitment Letter and the Debt Commitment Letter, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter admits that Musk increased his equity commitment to \$33.5 billion, but avers that Musk replaced his margin loan because Tesla's declining share price would have required Musk to pledge far more Tesla shares or cash as collateral to the margin lenders than Musk originally anticipated. The allegations in the first sentence of footnote 9 purport to characterize the terms of Musk's original financing arrangements in connection with the Merger Agreement, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter admits the allegations in the second sentence of footnote 9.

46. Musk also agreed to a Limited Guarantee setting forth the limited circumstances under which he may be liable for certain fees in connection with the Merger Agreement.

RESPONSE: To the extent the allegations in Paragraph 46 purport to characterize the terms of the Limited Guarantee, Twitter respectfully refers the Court to the Limited Guarantee for its complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 46.

i. Conditions to Closing

47. The conditions to closing the merger appear in Article VII of the Merger Agreement. Section 7.2(b) requires that all representations and warranties be "true and correct as of the Closing Date" and does not require Buyers to close if a representation is false and the result is a material adverse effect. More broadly, under Section 7.3(c) the occurrence of a "Company Material Adverse Effect" relieves Buyers of their obligation to close.

RESPONSE: The allegations in Paragraph 47 purport to quote from and characterize the terms of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents.

48. Company Material Adverse Effect (“MAE”) is defined, in relevant part, as “any change, event, effect or circumstance which, individually or in the aggregate, has resulted in or would reasonably be expected to result in a material adverse effect on the business, financial condition or results of operations of the Company and its Subsidiaries, taken as a whole,” subject to certain carveouts.

RESPONSE: The allegations in Paragraph 48 purport to quote from or characterize the terms of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents.

49. Section 7.2(a) requires that Twitter “shall have performed or complied, *in all material respects*, with its obligations required under this Agreement. . . .” (the “Covenant Condition”) (emphasis added). The Covenant Condition contains no MAE qualifier.

RESPONSE: The allegations in Paragraph 49 purport to quote from or characterize the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents.

ii. Termination

50. Under Section 8.1, the parties can terminate the Merger Agreement at any time by mutual consent.

RESPONSE: The allegations in Paragraph 50 purport to characterize the terms of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents.

51. Buyers may also unilaterally terminate if the transaction does not close before October 24, 2022, although that termination date automatically extends under Section 9.9I if either party is seeking an order of specific performance to enforce the terms of the Merger Agreement.

RESPONSE: The allegations in Paragraph 51 purport to characterize the terms of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents.

52. The Musk Parties are not obligated to close if (a) the Company has not materially performed the covenants; (b) its representations and warranties are inaccurate and cause an MAE; or, (c) an MAE has occurred and is continuing. *See* Merger Agreement § 7.2.

RESPONSE: The allegations in Paragraph 52 purport to characterize the terms of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents.

53. Following a thirty-day cure period commencing upon notice of a covenant breach or the inaccuracy of a representation, the Musk Parties may terminate the Merger Agreement (a) due to a material covenant breach or (b) if any of the representations and warranties are untrue as of the closing date and have or will be reasonably expected to result in an MAE. *See id.* § 8.1(d)(i).

RESPONSE: The allegations in Paragraph 53 purport to characterize the terms of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents.

54. If the Company terminates because Buyers have breached their representations and warranties or have not complied with their covenants such that a closing condition has failed, then Buyers are required to pay \$1 billion (the “Termination Fee”).¹⁰ If Buyers terminate because the Company’s board has

¹⁰ Musk signed a Limited Guarantee under which he guarantees payment of this fee.

recommended against the deal or if Twitter enters into a different merger agreement, then Twitter must pay Buyers a \$1 billion Termination Fee. The parties agreed the Termination Fee is the sole and exclusive remedy for damages resulting from a failure to close.

RESPONSE: The allegations in Paragraph 54 and footnote 10 purport to characterize the terms of the Merger Agreement and Limited Guarantee, to which Twitter respectfully refers the Court for their complete and accurate contents.

iii. Twitter's Covenants

55. The Merger Agreement contains several covenants, and a material breach of these covenants may excuse closing. In Section 6.1, Twitter covenanted to “use its commercially reasonable efforts to conduct the business of the Company and its Subsidiaries in the ordinary course of business” between the date of the Merger Agreement and closing. While there is a carve-out for actions taken in response to COVID-19, there is no carve-out related to executive and employee departures.

RESPONSE: The allegations in Paragraph 55 purport to quote from or characterize the terms of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents.

56. While Twitter attempted to insert flexibility into this provision, by including express language allowing Twitter to adopt employee retention plans without seeking consent, the Musk Parties rejected those attempts. The signed Merger Agreement contains neither a carveout to the ordinary course covenant nor any other express provision authorizing Twitter to make material personnel and compensation changes without consent.

RESPONSE: Twitter denies the allegations in the first sentence of Paragraph 56. The allegations in the second sentence of Paragraph 56 purport to characterize the terms of the Merger Agreement, to which Twitter respectfully refers

the Court for its complete and accurate contents. Twitter also avers that, during the negotiation of the Merger Agreement, it rejected Musk’s proposal that would have required Twitter to obtain Musk’s consent prior to terminating the employment of any executive above the level of Vice President.

57. The Merger Agreement also contains an information covenant, requiring Twitter to “furnish promptly to [The Musk Parties] all information concerning the business, properties and personnel of the Company and its Subsidiaries . . . for **any reasonable business purpose related to the consummation of the transactions** contemplated by this Agreement . . .” Merger Agreement § 6.4 (emphasis added). Similarly, Twitter must provide information relevant to obtaining financing. *Id.* § 6.11. Twitter can only decline to provide this information if it reasonably determines doing so would “cause significant competitive harm to the Company or its Subsidiaries . . . violate applicable Law or the provisions of any agreement to which the Company or any of its Subsidiaries is a party, or (iii) jeopardize any attorney-client or other legal privilege.” *Id.* § 6.4.

RESPONSE: The allegations in Paragraph 57 purport to quote from or characterize the terms of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents.

58. Buyers covenanted in Section 6.10 to take necessary action to obtain the requisite financing to consummate the transaction. If financing becomes unavailable, Buyers must “use their respective reasonable best efforts to arrange and obtain, as promptly as practicable . . . and to negotiate and enter into definitive agreements with respect to alternative financing . . . not less favorable” to the terms of the extant financing.

RESPONSE: The allegations in Paragraph 58 purport to quote from or characterize the terms of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents.

59. In turn, the Company covenanted in Section 6.11 to use its “commercially reasonable best efforts” to assist Buyers in securing financing, including by providing information related to the efforts to secure financing.

RESPONSE: The allegations in Paragraph 59 purport to quote from or characterize the terms of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents.

iv. Twitter’s Representations And Warranties

60. Believing that due diligence processes can be costly and inefficient, the Musk Parties instead focused on bargaining for contractual representations that the information they relied upon in deciding to acquire Twitter is accurate.

RESPONSE: Twitter avers that the Musk Parties declined to undertake any due diligence prior to signing the Merger Agreement. To the extent that Paragraph 60 purports to characterize the terms of the Merger Agreement, Twitter respectfully refers the Court to the Merger Agreement for its complete and accurate contents. Twitter lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 60, and therefore denies them on that basis.

61. If these representations cannot be “brought down” at Closing, they may excuse a party from closing if the failure to bring such representations down results in an MAE.

RESPONSE: The allegations in Paragraph 61 purport to characterize the terms of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents.

a. Twitter’s Representations That Its SEC Filings Are True

62. In Section 4.6(a), the Musk Parties secured a representation from Twitter that its SEC filings—and thus its userbase disclosures and identification of mDAU as a key metric—are accurate. Twitter represented that “none of the Company SEC Documents at the time it was filed . . . contained any untrue statement of a material fact” or omitted facts necessary to make the statements included misleading. The Musk Parties relied on this representation—and Twitter’s SEC disclosures—to sign the deal.

RESPONSE: The first and second sentences of Paragraph 62 purport to quote from or characterize the terms of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents. Twitter denies the allegations in the third sentence of Paragraph 62. Twitter avers that the Merger Agreement contains no specific representations related to Twitter’s “userbase disclosures” or mDAU.

63. Importantly, this representation encompasses Twitter’s disclosures regarding its mDAU, including what share of its mDAU calculation is comprised of genuine accounts and spam accounts. In substance, this representation means that Twitter’s representations in its SEC filings regarding mDAU and false accounts must be true to comply with the Merger Agreement.

RESPONSE: Twitter avers that the Merger Agreement contains no representations about Twitter’s mDAU or false or spam accounts. The allegations in Paragraph 63 purport to characterize and interpret the terms of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents. To the extent the second sentence of Paragraph 63 states a legal

conclusion, no response is required. To the extent any further response is required, Twitter denies the allegations in the second sentence of Paragraph 63.

64. Twitter makes numerous representations regarding mDAU in its 2021 10-K, published on February 16, 2022, including:

- “We have performed an internal review of a sample of accounts and estimate that the average of *false or spam accounts during the fourth quarter of 2021 represented fewer than 5% of our mDAU* during the quarter.” (emphasis added).
- “In making this determination, we applied significant judgment, so our estimation of false or spam accounts may not accurately represent the actual number of such accounts, and the actual number of false or spam accounts could be higher than we have estimated.”
- “We are continually seeking to improve our ability to estimate the total number of spam accounts and eliminate them from the calculation of our mDAU, and have made improvements in our spam detection capabilities that have resulted in the suspension of a large number of spam, malicious automation, and fake accounts. We intend to continue to make such improvements.”
- “After we determine an account is spam, malicious automation, or fake, we stop counting it in our mDAU, or other related metrics.”
- “Our advertising revenue growth is primarily driven by increases in mDAU, increases in ad pricing or number of ads shown and increases in our clickthrough rate.”

RESPONSE: Paragraph 64 purports to quote from Twitter’s SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 64.

65. Twitter consistently discusses its risk factors in terms of mDAU:

- “*If we fail to increase our mDAU*, ad engagement or other general engagement on our platform, *our revenue, business and operating results may be harmed*;” “If we are not able to compete effectively for audience, content and platform partners, *our mDAU* and engagement *would decline and our business and operating results would be materially and adversely impacted*,” (emphasis added).
- “*Our mDAU and their level of engagement with advertising are critical to our success and our long-term financial performance will continue to be significantly determined by our success in increasing the growth rate of our mDAU* as well as the number of ad engagements.” (emphasis added).
- “Our content and platform partners may choose to publish content on, or develop applications for, other platforms, and if they cease to utilize our platform or decrease their use of our platform, *then mDAU*, engagement, and advertising revenue *may decline*;” “If we are not able to compete effectively for advertiser spend, *our mDAU* and engagement *would decline and our business and operating results would be materially and adversely impacted*,” (emphasis added).
- “*If we make a sudden improvement* in one of the algorithms we use to detect spammy or suspicious behavior, *we may remove a larger number of accounts as a result* and *impact the year-over-year average of mDAU growth*.” (emphasis added).

RESPONSE: Paragraph 65 purports to quote from Twitter’s SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 65.

66. Twitter broadly touts its mDAU metric to the investing public. Indeed, Twitter’s CFO has said “[w]hen we look at other markets, we’ve been really pleased with the DAU growth, *which is the foundation of any revenue opportunity that we*

have.”¹¹ Similarly, Twitter’s former head of its consumer division told analysts that “[u]ltimately, we measure our long term success through our ability to grow monetizable daily active usage (mDAU),” and that while “there are a variety of metrics that help us gauge whether our product solutions are working, [] in [the] aggregate *the best way* to measure our success is mDAU.”¹²

RESPONSE: Paragraph 66 purports to quote from and characterize Twitter’s public statements, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 66.

67. Pages 20 and 158 of the July 26, 2022 definitive proxy disclose that “Twitter stands behind the accuracy of its public disclosures, including with respect to its estimates of false and spam accounts.”

RESPONSE: Paragraph 67 purports to quote from Twitter’s Definitive Proxy Statement, to which Twitter respectfully refers the Court for its complete and accurate contents.

68. Section 4.7 represents that “[n]one of the information supplied or to be supplied by or on behalf of the Company or any of its Subsidiaries expressly for inclusion or incorporation by reference in the proxy statement relating to the matters to be submitted to the Company’s stockholders at the Company Stockholders’ Meeting (such proxy statement and any amendments or supplements thereto, the ‘Proxy Statement’) shall, at the time the Proxy Statement is first mailed to the Company’s stockholders and at the time of the Company Stockholders’ Meeting to be held in connection with the Merger, contain any untrue statement of material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they were made,

¹¹ Citi Global Technology Conference 2019, New York, New York (September 4, 2019) (Ned Segal) at p. 6. When Twitter adopted its mDAU metric it frequently interchangeably referred to mDAU and DAU.

¹² Twitter, Inc. Feb. 25, 2021 Analyst Day Tr. at 14.

not misleading at such applicable time” Twitter’s proxy incorporates its 2021 10-K and Q-2 2022 10-Q by reference.

RESPONSE: Paragraph 68 purports to quote from or characterize the terms of the Merger Agreement and to characterize the contents of Twitter’s Definitive Proxy Statement. Twitter respectfully refers the Court to those documents for their complete and accurate contents.

b. Twitter’s Other Representations

69. The Merger Agreement also contains several other representations and warranties. Section 4.9 represents that “Since January 1, 2022 and until the date of this Agreement, (a) the businesses of the Company and its Subsidiaries have been conducted in the ordinary course of business (other than as a result of COVID-19 and COVID-19 Measures or with respect to the Existing 2030 Notes or the transactions contemplated hereby) and (b) there has not been any adverse change, event, development or state of circumstances that has had a Company Material Adverse Effect.”

RESPONSE: Paragraph 69 purports to quote from or characterize the terms of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents.

70. Company Material Adverse Effect (“MAE”) is defined, in relevant part, as “any change, event, effect or circumstance which, individually or in the aggregate, has resulted in or would reasonably be expected to result in a material adverse effect on the business, financial condition or results of operations of the Company and its Subsidiaries, taken as a whole” There are certain carveouts from this provision, but there is no carve-out applicable to an MAE resulting from the impact of the market’s discovery that Twitter’s mDAU calculations are materially misleading.

RESPONSE: Paragraph 70 purports to quote from or characterize the terms of the Merger Agreement, to which Twitter respectfully refers the Court for

its complete and accurate contents. Twitter avers that the definition of MAE in the Merger Agreement excludes any “changes, events, effects, or circumstances” that, “directly or indirectly . . . relate to or result from” “any litigation . . . arising out of” the proposed merger.

71. Additionally, in Section 4.11, Twitter represents that as the date of the agreement, there “is no suit, action or proceeding pending or, to the Knowledge of the Company, threatened in writing” or any “investigation by any Governmental Authority involving the Company or any of its Subsidiaries” that would lead to an MAE.

RESPONSE: Paragraph 71 purports to quote from or characterize the terms of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents.

D. Twitter Restates Its mDAU Figures And Musk Exercises His Information Rights To Investigate Twitter’s mDAU Disclosures

72. Based on Twitter’s representations that mDAU is “the best way to measure [Twitter’s] success,” Musk relied upon Twitter’s calculation of the mDAU figure in making his decision to purchase the company.

RESPONSE: Twitter denies that in signing the Merger Agreement Musk relied upon Twitter’s calculation of mDAU in the manner alleged, and avers that Defendants invented their allegations with respect to reliance on Twitter’s disclosures concerning mDAU for purposes of their Counterclaims. Paragraph 72 purports to quote from Twitter’s SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents.

73. One complication in calculating the mDAU metric is that Twitter's platform contains a significant number of accounts that cannot be monetized, including false or spam accounts.

RESPONSE: Denied.

74. False or spam accounts can engage in a variety of behaviors that would lead them to be counted as mDAU in the ordinary course, for example by logging into Twitter and generating a high volume of tweets, retweets, and replies. But, because they are generally not designed to engage with advertisements and ultimately buy products, false and spam accounts are of no interest to advertisers and would be unlikely to ever pay for subscription services. Additionally, these false or spam accounts often engage in disruptive or abusive behavior—for example by mass replying to a user's account or by attempting to scam real users—that make the Twitter platform less appealing to its legitimate users.

RESPONSE: To the extent the allegations of Paragraph 74 purport to characterize Twitter's SEC filings and disclosures concerning false or spam accounts, Twitter respectfully refers the Court to such filings for their complete and accurate contents. Twitter states that it refers to "spam" as a range of abusive activities that are prohibited by its terms of service, and spam is generally defined as unsolicited, repeated actions that negatively impact other people with the general goal of drawing attention to a given account, site, product or idea. Twitter avers that it deploys an array of spam-detection capabilities, including automated tools developed using machine learning techniques and human review of accounts, that have resulted, and continue to result, in the suspension of a large number of spam, malicious automation, and fake accounts. Twitter otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the second

sentence of Paragraph 74, and therefore denies them on that basis. Twitter otherwise denies the allegations in Paragraph 74.

75. Understanding that many spam accounts would ordinarily be captured in the mDAU metric, but do not represent actually monetizable users, Twitter purports to exclude these accounts from its mDAU calculation. Accordingly, Twitter disclosed that spam accounts “represented fewer than 5% of our mDAU” in its 2021 10-K and Q1 2022 10-Q. Despite extremely volatile social, political, and economic conditions, this less-than-5% figure has been unchanged since Twitter began disclosing the mDAU metric in its 2018 10-K. And Twitter has publicly represented that the figure is actually *far lower* than 5%.

RESPONSE: Twitter avers that it deploys an array of spam detection capabilities that have resulted, and continue to result, in the suspension of a large number of spam, malicious automation, and fake accounts. Twitter further avers that, after it determines an account is spam, malicious automation, or fake, Twitter stops counting it in mDAU on subsequent days. Musk is well aware that Twitter’s estimate of the percentage of false or spam accounts within mDAU reported each quarter *does* fluctuate (between numbers under 5%), because Twitter provided him—on July 1, 2022—the actual data going back to January 2021. To the extent that Paragraph 75 also purports to quote from and characterize Twitter’s SEC filings and public statements, Twitter respectfully refers the Court to those filings and statements for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 75.

76. But false and spam accounts may not be the only problem. To the extent that Twitter includes within mDAU accounts that are only barely engaged in the platform at all, and yet calls all of these accounts “monetizable,” that too is

misleading. For instance, if an account does not visit Twitter long enough to see any advertising and does not use the platform enough to indicate the user would ever verify himself, let alone purchase a subscription, that account would not be monetizable.

RESPONSE: Denied.

77. Thus, including accounts in the mDAU count that are not actually “monetizable,” whether because they are spam accounts, false accounts, insufficiently engaged with the platform to generate revenues, or nonmonetizable for any other reason, paints a misleading picture to investors.

RESPONSE: Denied.

78. The Musk Parties’ advisors at Morgan Stanley based their valuations of Twitter in significant part on the company’s mDAU disclosures. Relying on Twitter’s disclosure that mDAU is the best way to measure the company’s success, Morgan Stanley constructed models supporting a \$54.20 per share price by directly tying Twitter’s future revenue projections to the Company’s mDAU growth. Had the Musk Parties known mDAU’s real relationship with the company’s business performance, their valuation of Twitter would have been materially different.

RESPONSE: Twitter denies that in signing the Merger Agreement Musk relied upon Twitter’s calculation of mDAU in the manner alleged, and avers that Defendants invented their allegations with respect to reliance on Twitter’s disclosures related to mDAU for purposes of their Counterclaims. Twitter otherwise denies the allegations in Paragraph 78, except, to the extent those allegations purport to characterize certain documents allegedly created by Morgan Stanley, Twitter respectfully refers the Court to those documents for their complete and accurate contents.

79. *Just three days* after the Musk Parties signed the Agreement, Twitter restated its mDAU figures from Q4 2020 to Q4 2021 by approximately 1.4 to 1.9

million per quarter, disclosing in its Q1 earnings release that it had been double counting accounts since the fourth quarter of 2020. By restating its financials, Twitter effectively admitted that changes in mDAU of at least this magnitude are material and portrayed its “estimates” as precise. This imminent restatement was not disclosed to the Musk Parties before the Merger Agreement was signed.

RESPONSE: Twitter denies that it “restated its mDAU figures.” Twitter admits that on April 28, 2022 it provided updated values for mDAU from the fourth quarter of 2020 to the fourth quarter of 2021, avers that in each quarter those updated mDAU values reflected a less than 1% change in reported mDAU, and respectfully refers the Court to the April 28, 2022 press release concerning that update for a complete and accurate description of its contents. Twitter admits that it did not provide the information in that press release to the Musk Parties before the Merger Agreement was signed and before the parties had entered into a nondisclosure agreement. Twitter denies that the press release made any statements or constituted any admission as to the materiality of the figures discussed therein, or the precision of any mDAU figures. Twitter otherwise denies the allegations in Paragraph 79.

80. Twitter knew that disclosing the upcoming mDAU restatement would have likely caused the Musk Parties to ask further questions that could delay the signing of the Merger Agreement beyond April 25, 2022. Had the parties not reached agreement by April 25, 2022, Twitter would have followed its April 28, 2022 earnings release, which disclosed the mDAU restatement, with an earnings call to answer questions from analysts.¹³ By April 28, 2022, Twitter was almost a month into the second quarter, which ultimately proved to be disastrous—Twitter’s Q2 2022 results disclosed a 60% EBITDA miss, and a 10% revenue miss with revenue lower than Q2 2021. Twitter knew analysts would ask questions not just about Q1 earnings, but about the restatement and about guidance for Q2 and beyond. Twitter

¹³ This call did not occur due to the Musk Parties’ announced acquisition.

avoided this result by hiding the upcoming mDAU restatement from the Musk Parties and locking in a deal on April 25, 2022.

RESPONSE: Twitter denies the allegations in the first sentence of Paragraph 80. As to the second sentence of Paragraph 80 and footnote 13, Twitter admits that it reached agreement with Defendants on April 25, that it planned to release its earnings figures on April 28, and that a call regarding those figures did not occur on April 28 due to the agreement between Twitter and Defendants. Twitter otherwise denies the allegations in the second sentence of Paragraph 80. The allegations in the third sentence of Paragraph 80 purport to characterize Twitter's SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter denies the allegations in the fourth and fifth sentences of Paragraph 80.

81. Once they saw this restatement, the Musk Parties promptly sought to validate Twitter's userbase representations, just as Twitter expected. Thus, on May 6, 2022, Musk met with Twitter's leadership, including its CEO and CFO to discuss, among other items, how Twitter calculates its spam population. Contrary to Twitter's narrative, the May 6, 2022 meeting was not requested by the Musk Parties due to any market concerns. Rather, it was a pre-scheduled introductory meeting in order to verify Twitter's representations and warranties in light of the restatement, plan for the post-closing transition, and aid in securing deal financing.

RESPONSE: Twitter denies the allegations in the first sentence of Paragraph 81. Twitter admits that there was a meeting on May 6, 2022 between Musk and certain Twitter executives, and otherwise denies the remainder of the allegations in Paragraph 81, including in particular the false statement that the

meeting was scheduled “in light of the restatement.” Twitter avers that the Musk Parties did not raise the subject of the updated mDAU values before this litigation, and Twitter respectfully refers the Court to the July 8, 2022 letter in which Defendants purported to terminate the Merger Agreement, which letter does not mention the updated mDAU values.

82. During this May 6, 2022 meeting, Musk was struck by Twitter executives’ inability to answer simple questions about its foundational mDAU metric and how it determines what percentage of mDAU are comprised of legitimate accounts that generate revenue. Having been denied access to the front-line engineers and reviewers, Musk had expected that Twitter’s executives would have gathered the information necessary for them to be able to engage in a productive conversation with him regarding the Company’s key metrics.

RESPONSE: Twitter denies that its executives were unable to answer questions during the May 6, 2022 meeting between Musk and Twitter, and denies that Musk was struck thereby. Twitter further denies the remainder of the allegations in Paragraph 82. Twitter avers that it held an informational call, prior to Musk’s purported termination, at which the data scientist responsible for calculating the mDAU metric was in attendance and answered questions from Musk’s representatives; Musk himself declined to attend. Twitter further avers that it prepared a detailed summary document for Musk of Twitter’s process for estimating the prevalence of false or spam accounts within mDAU, which Musk later admitted he had not read.

83. Musk was particularly alarmed by revelations that Twitter’s CEO and CFO could not explain basic questions about the basis for Twitter’s disclosures about

its self-professed “key” mDAU metric. He was also concerned about just how meager Twitter’s process was for *counting* the number of false or spam accounts, particularly in light of Twitter’s use of separate processes for *removing* false or spam accounts, which rely on more advanced methods. The Musk Parties had assumed that Twitter employed a rigorous, modern methodology, relying on automation, artificial intelligence, and machine learning to assess the portion of its users that were false or spam, or more generally non-monetizable, with constant backward-looking analysis to ensure it was capturing such accounts promptly, and adjusting where it was not.

RESPONSE: Twitter denies the allegations in the first sentence of Paragraph 83. Twitter lacks knowledge sufficient to form a belief as to the truth of the remaining allegations in Paragraph 83 and therefore denies them on that basis. Twitter avers that the human review Musk denigrates as less “advanced” is in fact appropriate for evaluating whether an account is engaged in false or spam behaviors for purposes of estimating false or spam accounts that are not removed by Twitter’s spam detection and removal systems. Twitter further avers that the “rigorous, modern” machine learning methodologies Musk touts *require* human review and input for initial training and calibrations.

84. Twitter executives revealed that was far from the truth. Instead, Twitter’s process was shockingly thin: human reviewers randomly sampled 100 accounts per day (0.00005% of putative daily users) and applied unidentified subjective standards, rather than objective verification, to somehow conclude every quarter for two years running that far fewer than 5% of Twitter users were false or spam. That’s it. No automation, no AI, no machine learning, no material checks on the validity of the process or its results, no continuous improvements over time. Twitter executives could not even explain how they selected the 100 account sample, or explain any criteria that were applied other than a reviewer’s gut judgment—when a much better verification mechanism would involve sending users an email, text, or other push notification with a CAPTCHA or other challenge-response test that is

commonly used by other websites seeking to verify users (and even by Twitter itself, when it is removing false and spam accounts).

RESPONSE: Denied. Twitter avers that it deploys an array of spam-detection capabilities that typically result in the removal of more than a million spam accounts each day during or shortly after creation, including both automated and manual reviews of accounts and activity on the Twitter platform. Twitter also locks millions of accounts each week that cannot pass human-verification challenges, such as CAPTCHAs or phone or email verifications. Separate from these automated and manual spam-detection processes, Twitter estimates the prevalence of false or spam accounts within mDAU through multiple human reviews (in replicate) of thousands of randomly selected accounts each quarter using both public and private data. Twitter further avers that its sample set for that estimation—which, as Musk was informed, is selected according to a random process—is, as a matter of basic statistics, of sufficient size for the extrapolation Twitter performs.

85. As discussed *infra* at ¶106 Twitter executives, including CFO Ned Segal, later revealed that they *knew* that accounts their human reviewers judged to be “real” were later found by Twitter itself to be false or spam, and yet they made the conscious decision not to update mDAU counts to exclude accounts suspended *within the same quarter* before publishing quarterly figures, and knowingly failed to disclose this information to investors.

RESPONSE: Denied. As was explained to Musk’s representatives, Twitter immediately removes accounts identified as false or spam from its mDAU counts on a going-forward basis—consistent with Twitter’s disclosures and with the

basic premise that Twitter does not know that an account has engaged in false or spam behaviors until it detects such behaviors. Twitter separately deploys a human-led review of a random sample of accounts in mDAU to estimate the percentage of false or spam accounts that are not detected and removed by Twitter's spam detection and removal processes.

86. After these discussions, Musk's doubts crystallized regarding whether Twitter's calculations of both its mDAU and the prevalence of spam accounts were accurate. He soon came to believe that Twitter may be dramatically overcounting its monetizable userbase as a result of an inadequate process for calculating mDAU.

RESPONSE: Denied.

E. Twitter Stonewalled Musk To Prevent Discovery Of Its Misstatements

87. Following the May 6, 2022 meeting, the Musk Parties made it clear to Twitter that understanding how many real users Twitter has and evaluating the truthfulness of Twitter's SEC filings was their top priority. Beginning on May 9, 2022, the Musk Parties promptly exercised their information rights under the Merger Agreement to request that information to, among other things, verify Twitter's representations and warranties which were a condition to closing, plan for the post-closing transition, and aid in securing deal financing.

RESPONSE: Twitter denies the allegations in the first sentence of Paragraph 87. Twitter admits that beginning in early May 2022, Defendants requested certain information from Twitter, purportedly in accordance with Defendants' limited information rights under the Merger Agreement. Twitter denies the remaining allegations in the second sentence of Paragraph 87.

88. The Musk Parties made it crystal clear what they were seeking: they wanted to understand how Twitter calculated its mDAU and spam figures, and they wanted the data necessary to test Twitter's calculations given their concerns with the

lack of rigor behind Twitter's process. What began as a simple request to understand a simple question resulted in an unending game of cat-and-mouse, with Twitter obfuscating the truth at every turn. Rather than opening its doors to work cooperatively with its presumptive owner, Twitter seized upon the Musk Parties' ignorance of Twitter's internal terminology and forced them to embark on a game of battleship, taking blind guesses at what data sets would be sufficient with little to no guidance from Twitter.

RESPONSE: Denied. Twitter avers that it provided Defendants with an unprecedented amount of data and information in response to their increasingly unreasonable and improper demands, as detailed in Paragraphs 70-107 of the Complaint.

89. Indeed, one of the Musk Parties' first requests could not have been clearer: "How do you estimate that fewer than 5% of mDAU are false and spam accounts?" Twitter's response was to provide a short, six-page document providing high-level information about how Twitter defines spam accounts, certain factors that Twitter assesses, and an explanation that accounts are reviewed by human reviewers. However, this document contained no explanation of: how the sample population is selected, how human reviewers are selected, the reviewers' incentives, the directions and feedback reviewers receive, how many factors must be present for an account to be determined to be a false or spam account, how the process was developed, how the process is tested, which accounts Twitter counts in mDAU and why, how often Twitter overrides its reviewers' determinations, or why the process does not leverage other automated technology that Twitter already uses to delete spam accounts.

RESPONSE: Twitter admits that, among their many requests, the Musk Parties asked how Twitter estimates that fewer than 5% of mDAU are false or spam accounts. Twitter further admits that it provided a six-page memorandum that answered that question. To the extent Paragraph 89 quotes from and purports to characterize communications between Defendants and Twitter, Twitter respectfully refers the Court to those communications for their complete and accurate contents.

Twitter otherwise denies the remaining allegations in Paragraph 89. Twitter avers that its representatives met on multiple occasions with representatives of the Musk Parties to explain its processes.

90. Concerned that Twitter’s feigned confusion was an attempt to avoid fully responding to their information requests, the Musk Parties requested information with increasing specificity so there could be no doubt as to the information they needed to understand how Twitter calculates mDAU and arrives at the 5% spam figure. Thus, on May 17, 2022 the Musk Parties specifically requested access to the Twitter Firehose¹⁴ showing public tweet and like activity so that they could run their own analysis of false or spam accounts. On May 19, 2022, the Musk Parties enumerated several categories of necessary information, such as how Twitter derives the 5% spam figure; Twitter’s key user metrics; Twitter’s suspension of users; Twitter’s accounting for suspended users in its metrics, including mDAU; and information about advertisements rendered to suspended accounts. By May 23, there could be no doubt that Musk sought information to not only understand how Twitter arrived at the 5% figure but also to verify Twitter’s key metric independently.

RESPONSE: Paragraph 90 purports to characterize various communications between Defendants and Twitter. Twitter respectfully refers the Court to those communications for their complete and accurate contents. Twitter admits that Defendants continued to request information from Twitter, and otherwise denies the remaining allegations in Paragraph 90, expressly including that Twitter “feigned confusion” about any matter and that the Firehose is “necessary” or sufficient to “run [an] analysis of false or spam accounts.” As to footnote 14, Twitter

¹⁴ The Firehose reflects all *public* Tweets and likes, but only approximately 30% of the accounts Twitter counts in mDAU interact with the platform in these ways.

admits that the Firehose does not reflect all accounts counted in mDAU, and further avers that the Firehose reflects activity by many accounts not counted in mDAU.

91. But rather than provide real-time, live data, Twitter provided only stale data sets and high-level summaries without providing any actual criteria or tests applied. As Twitter well knows, its userbase is constantly changing, and many accounts active in earlier time periods are no longer visible on the platform. Therefore, stale data was not sufficient to allow the Musk Parties to test Twitter's representations.

RESPONSE: Twitter admits that it provided Defendants with data sets and summaries in response to their requests, including custom data sets and pulls created to Musk's specifications, and Twitter respectfully refers the Court to those materials for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 91.

92. At the same time, Twitter provided responses to other broad categories of information requests without delay. For example, when the Musk Parties requested documents related to all of Twitter's leases, that information was provided within days. And rather than responding to the Musk Parties' most pressing concerns, Twitter populated the data room with frivolous materials such as a copy of its agreement with the Golden State Warriors for courtside basketball tickets and VIP parking.

RESPONSE: Twitter admits that it provided responses to broad categories of information requests without delay. Twitter admits the allegations of the second sentence of Paragraph 92. Twitter also admits that it populated the data room with materials requested by Defendants, including information regarding Twitter's contractual obligations. Twitter denies the remaining allegations in Paragraph 92.

93. So the Musk Parties became even more specific. On May 25, 2022, through Morgan Stanley and an accompanying letter, the Musk Parties reiterated their requests for certain enterprise application programming interfaces (“API”), specifically requesting Twitter’s “enterprise firehose,” which the Musk Parties clarified was “100% of tweets and favoring activity”; the “Decahose,” which provides a 10% random sample of the Firehose; the “favoriting” or “like” Firehose; the compliance Firehose; and the historical PowerTrack, which provides a historical archive of public Twitter data using various filters. On May 31, the Musk Parties again sent requests through Morgan Stanley and an accompanying letter, noting that Twitter had “refused to provide the requested data and information *despite daily requests* since May 9” and—in an attempt to preempt any further delays—reaffirmed the Musk Parties willingness to implement protocols to protect the privacy of Twitter’s data.

RESPONSE: Paragraph 93 purports to quote from and characterize communications between Defendants and Twitter. Twitter respectfully refers the Court to those communications for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 93. Twitter further avers that despite Musk’s claimed “willingness to implement protocols to protect the privacy of Twitter’s data,” Musk himself had previously Tweeted details about confidential information provided to Musk under the Merger Agreement.

94. Instead of working cooperatively with the Musk Parties and despite the Musk Parties’ increasingly specific requests, Twitter blamed “miscommunication” for its unsatisfactory responses to date, although it knew the Musk Parties’ precise goals and knew precisely which information would be responsive. And instead of providing responsive information, Twitter demanded “detailed” explanations regarding the analysis that would be performed on any data set Twitter provided and the steps taken to ensure the data is not used for any “illegal” purpose, and that the Musk Parties sign a “Master License Agreement” that apparently would supersede Musk’s obligations under the Merger Agreement.

RESPONSE: Paragraph 94 purports to quote from and characterize communications between Defendants and Twitter. Twitter respectfully refers the Court to those communications for their complete and accurate contents. Twitter admits that, as permitted under the Merger Agreement, it sought clarity about why Musk believed the information he demanded was relevant to any permitted purpose under the Merger Agreement, and avers that Musk refused to provide any meaningful response. Twitter otherwise denies the allegations in Paragraph 94.

95. But these requests were pretext—the Musk Parties had previously offered to alleviate concerns about privacy through mechanisms such as third-party review, but Twitter ignored those suggestions. As such, Twitter’s belated concerns about the Musk Parties’ use of its data rang hollow and appeared to be nothing more than another excuse to delay providing the requested information.

RESPONSE: Denied.

96. So on June 6, 2022, with the closing date bearing down and time running out to perform a proper analysis, the Musk Parties put Twitter on notice that it was in breach of the Merger Agreement by continuing to withhold properly requested information. Notwithstanding this breach, the Musk Parties continued to hope that Twitter would finally be transparent, continued to press for relevant information, and provided further assurances to Twitter that they would preserve the confidentiality of any sensitive information that Twitter provided. Remarkably, even after the Musk Parties put Twitter on notice of its breach, Twitter still did not provide the answers or information it knew the Musk Parties were seeking.

RESPONSE: The first sentence of Paragraph 96 purports to characterize a communication between Defendants and Twitter. Twitter respectfully refers the Court to that communication for its complete and accurate contents. Twitter denies the remaining allegations in Paragraph 96.

97. Twitter did not respond until June 16, 2022. Twitter repeated the same unsupported assertions as in its June 1, 2022 letter that the Musk Parties were requesting information for an improper purpose, but finally offered to provide the Musk Parties access to certain of the Enterprise APIs the Musk Parties had sought, including the Twitter Firehose and Historical PowerTrack.

RESPONSE: Paragraph 97 purports to characterize a communication between Twitter and Defendants. Twitter respectfully refers the Court to that communication for its complete and accurate contents. Twitter avers that its June 16 letter agreed to provide only “secure access to the thirty days of Historical PowerTrack Archive data consistent with ongoing discussions.”

98. But Twitter did not provide the true Firehose. Instead, a Twitter engineering team with no day-to-day responsibility for the Firehose or related tools and interfaces created a *different*, partial data set, and misleadingly named that data set “Twtr Firehose Internal.” Twitter’s engineers configured that mislabeled data set to make machine analysis largely unusable (unlike the true Firehose) and to give Twitter a back door into tracking the Musk Parties’ analysis.

RESPONSE: Twitter denies the allegations of the first sentence of Paragraph 98. Twitter avers that it provided Defendants access to a data set, and that, pursuant to the parties’ agreement, such data set was not the Firehose of all public Tweets and Likes. Twitter otherwise denies the allegations in Paragraph 98.

99. And instead of providing the mDAU calculations and projections the company uses in the ordinary course, Twitter provided only a limited subset of its daily internal mDAU counts hard-coded in a spreadsheet, without detail regarding how it performs its calculation and thus any insight into how Twitter arrived at those numbers.

RESPONSE: Paragraph 99 purports to characterize a communication between Twitter and Defendants. Twitter respectfully refers the Court to that

communication for its complete and accurate contents. Twitter avers that the process it employs for calculating mDAU is set out in its SEC filings, and it respectfully refers the Court to those disclosures for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 99.

100. Twitter proposed subsequent meetings with Musk to discuss its business. But, at the same time, Twitter was refusing to provide information the Musk Parties had properly requested under the Merger Agreement. Musk saw these meetings for what they were—distractions from the important requests his team was making about user data. Musk did not see the use in further meetings because until Twitter could provide data verifying its representations, there was nothing productive to discuss.

RESPONSE: Twitter admits that it offered to meet with Musk on multiple occasions and admits that Musk declined to meet, demonstrating no actual interest in learning about Twitter’s estimation of false or spam account prevalence within mDAU. Twitter otherwise denies the allegations in Paragraph 100.

101. The Musk Parties wrote to Twitter on June 17, 2022 identifying these issues and providing even more specificity regarding what information they sought. This included requests for the Twitter Firehose and for specifically named Enterprise APIs that Twitter was withholding.

RESPONSE: Paragraph 101 purports to characterize a communication between Defendants and Twitter, to which Twitter respectfully refers the Court for its complete and accurate contents.

102. Twitter responded on June 20, 2022, once again pretending to have misunderstood what the Musk Parties had been requesting for over six weeks. Twitter admitted it was not giving the Musk Parties the information required to investigate Twitter’s representations regarding its mDAU and spam calculations, noting that, while it would finally provide its existing Firehose stream (over a month

late), that data would be “insufficient to perform the spam analysis” the Musk Parties sought to conduct, because Twitter still refused to provide the “private data required.” Twitter even refused to provide the basic account lists necessary for an analysis based on public information. In other words, while Twitter was happy to tell the Musk Parties the information it was willing to provide was insufficient to allow the Musk Parties to answer the overarching question it had posed since early May— “How do you estimate that fewer than 5% of mDAU are false and spam accounts?”—Twitter never offered or provided information it knew would allow the Musk Parties to answer that question.

RESPONSE: Twitter admits that it responded on June 20, 2022, and Twitter respectfully refers the Court to that letter for its complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 102, and in particular expressly denies that it “pretend[ed] to have misunderstood” the Musk Parties’ ever-changing information requests.

103. So the Musk Parties became even more specific. On June 29, 2022, the Musk Parties again wrote to Twitter asking that the company comply with its contractual obligations and provide the information the Musk Parties had been requesting since May regarding the company’s mDAU and spam calculations. This time, the Musk Parties provided a detailed list of mDAU-related requests to prevent any further delay or obfuscation, including: Twitter’s historical global daily mDAU count in such a form so as to allow the Musk Parties to understand how many of these mDAU perform tweet actions and how many only view the platform; information regarding how suspended accounts are factored into the mDAU calculation; outputs from Twitter’s sampling process for determining the spam portion of the mDAU count; and information regarding Twitter’s process of reviewing its mDAU to determine the spam count. The Musk Parties further noted that board and executive level communications regarding the subject matter of these information requests were within the May diligence requests, as well as information regarding Twitter’s financial modeling. The Musk Parties also noted that Twitter had been limiting the data analysis the Musk Parties could perform on the information Twitter had provided, and requested immediate removal of all search caps on that data.

RESPONSE: Paragraph 103 purports to characterize a communication between Defendants and Twitter, to which Twitter respectfully refers the Court for its complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 103.

104. The Musk Parties later determined that the various historical Enterprise APIs and other interfaces to which Twitter provided access excluded tweets from accounts that had since been suspended. That is, it was impossible to analyze these data sets to determine what percentage of users were spam because the data was sanitized of all the spam accounts that Twitter had suspended.

RESPONSE: Twitter admits that it detects and removes spam from its platform, and that as a result accounts suspended for spam behavior do not exist in Twitter's historical Enterprise APIs, which are commercial products built for Twitter's customers' needs. Twitter otherwise denies the allegations in Paragraph 104.

105. By this point, the only conclusion the Musk Parties could draw from Twitter's obfuscation and delay was that Twitter knew that it had something to hide.

RESPONSE: Denied.

106. On July 1, 2022 the parties had a phone call to discuss Musk's information requests and Twitter's mDAU calculations. That call laid to rest any lingering hope that Twitter's spam detection process was adequate or that it was providing information in good faith. Shockingly, on the call, Twitter CFO Ned Segal revealed that Twitter knowingly includes *a significant number of accounts that it has already suspended for being false or spam as of the end of the quarter* in its quarterly reported average mDAU. Beyond this revelation, Twitter provided only buzzwords and high-level descriptions, parroting the mantra that its process was robust, while simultaneously refusing to tell the Musk Parties what the process actually entailed. Twitter could not explain who reviews for spam, how those

reviewers are trained, the criteria it uses, the process it follows, the standards it applies, or how Twitter verifies the accuracy of the reviewers' results.

RESPONSE: Twitter admits that Twitter and Defendants participated in a call on July 1, 2022. Twitter otherwise denies the allegations in Paragraph 106. Twitter avers that it defines monetizable daily active usage or users (i.e., "mDAU") as people, organizations, or other accounts who logged in or were otherwise authenticated and accessed Twitter on any given day through twitter.com, Twitter applications that are able to show ads, or paid Twitter products. Average mDAU for a period represents the number of mDAU on each day of such period divided by the number of days for such period. After Twitter determines an account is spam, malicious automation, or fake, Twitter stops counting it in mDAU. Twitter discloses this all publicly. Thus, to the extent an account was not suspended for certain days during a quarter—and thus was able to see ads on those days—that account would not be retroactively removed from the mDAU count for those days. Once an account is suspended—and thus no longer able to see ads—Twitter does not count the account in mDAU on a going-forward basis.

107. In sum, despite numerous requests, Twitter still has not provided, among other items: (1) information related to Twitter's process for suspending and removing spam accounts from mDAU, including the global daily mDAU population; (2) information related to Twitter's identification of spam accounts, including the outputs of the sampling process; (3) board materials relating to Twitter's mDAU metric; and (4) information necessary to understand Twitter's

current and future financial condition.¹⁵ This refusal to provide the requisite information can only be understood as Twitter attempting to hide evidence of its false and misleading representations.

RESPONSE: Twitter denies the allegations in Paragraph 107 and footnote 15, except admits that at Defendants' request Twitter increased the limit on the number of queries Defendants could run on the APIs to which Defendants had access. Twitter avers that it provided Musk, prior to his purported "termination," data reflecting the determination made by Twitter as to every individual account in mDAU sampled and reviewed in the false or spam account estimation process for a particular period of time, as well as detailed information (much prepared specifically at Musk's request) regarding Twitter's current and projected future financial condition. As to API access, Twitter avers that it initially provided Defendants with the ability to run one-hundred thousand queries per month, a rate consistent with the access it customarily provides its commercial customers. At Defendants' request, Twitter thereafter increased that cap by a factor of one hundred: to *ten million* queries per month.

¹⁵ And the information that Twitter did provide often came with strings attached such as to make the information difficult to interpret. For example, when Twitter finally provided access to the developer APIs Musk had requested, it did so with lower data rate limits than it provides to its enterprise customers, thwarting Musk's ability to analyze the data. It also placed a "cap" on the number of queries Musk can run on the APIs, preventing much of the analysis Musk wishes to perform. Twitter only removed the query cap on July 6, despite having been informed of the problems this cap caused on June 29.

108. The Musk Parties have sought this information since May, and the Musk Parties informed Twitter on June 6, 2022, that its failure to provide this information breached Sections 6.4 and 6.11 of the Merger Agreement. Twitter had thirty days to cure this breach and did not do so. The Musk Parties, therefore, are entitled to terminate the Merger Agreement under Section 8.1(d)(i).

RESPONSE: Paragraph 108 purports to characterize communications between Defendants and Twitter, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 108. Twitter avers that it provided Musk access to all the information required under the Merger Agreement, and more, notwithstanding his disregard of his confidentiality obligations and his threats to launch a competitor.

F. The Information Twitter Provided Evidences Numerous False And Misleading Representation In Twitter’s SEC Filings

109. The partial information that Twitter did provide only heightened the Musk Parties’ concerns that Twitter’s mDAU count could not possibly be accurate and that its methodology for calculating mDAU is unreasonable.

RESPONSE: Twitter denies that it provided misleading partial information. Twitter lacks knowledge sufficient to admit or deny Defendants’ alleged concerns, but as the alleged concerns are not based in fact, denies them.

110. The Musk Parties’ investigation to date has revealed that, as detailed below, Twitter made numerous false and misleading statements and omissions regarding its highly-touted mDAU figure. Twitter’s misrepresentations include: (i) understating the extent to which mDAU and revenues were impacted by false or spam accounts by relying on a bad faith process for calculating the prevalence of false or spam accounts; (ii) overstating the extent to which mDAU and its growth was the key proxy for and contributing to increased ad engagement and revenue growth; and (iii) overstating mDAU by double-counting users with multiple accounts. More specifically, the statements detailed below misrepresented or

omitted the following information, which rendered them materially false and misleading:

RESPONSE: Denied. Twitter avers that all of its disclosures are accurate, that it employs a rigorous process for estimating the prevalence of false or spam accounts within mDAU, and that it has accurately disclosed its mDAU and other metrics in all material respects. Twitter respectfully refers the Court to its SEC filings for their complete and accurate contents.

i. Twitter’s mDAU Was Overstated By Understating False And Spam Accounts

111. In Twitter’s 2021 10-K, Twitter represented that following “an internal review of a sample of accounts” Twitter calculated “that the average of false or spam accounts during the fourth quarter of 2021 represented fewer than 5% of our mDAU during the quarter.”

RESPONSE: Paragraph 111 purports to quote from Twitter’s SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents.

112. Twitter’s 10-K further represented that in the fourth quarter of 2021, it had “217 million average mDAU, which represents an increase of 13% from the three months ended December 31, 2020.” The implication of that representation—when combined with Twitter’s representation that fewer than 5% of mDAU were false or spam—is that fewer than approximately 10.85 million accounts were false or spam.

RESPONSE: The first sentence of Paragraph 112 purports to quote from Twitter’s SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations of

Paragraph 112. In particular, Twitter avers that the statements from Twitter’s SEC filings cited in Paragraph 112 refer to accounts *counted in mDAU*, not accounts generally. To the extent Defendants allege that Twitter’s securities filings indicate that there are 10.85 million false or spam accounts in total on the platform, Twitter denies the allegations of Paragraph 112. Twitter denies that its securities filings make any representation as to the number of false or spam accounts on its platform. Twitter further avers that Twitter’s SEC filings expressly state that Twitter’s “estimation of false or spam accounts [within mDAU] may not accurately represent the actual number of such accounts, and the actual number of false or spam accounts could be higher than we have estimated.”

113. In addition to representing the amount of false or spam accounts, Twitter portrays its process of calculating false or spam accounts as a good-faith process. For example, in its 2021 10-K, Twitter represents that it “performed an internal review of a sample of accounts” for which Twitter “applied significant judgment,” and that Twitter “continually seek[s] to improve [its] ability to estimate the total number of spam accounts and eliminate them from the calculation of our mDAU.”

RESPONSE: Paragraph 113 purports to quote from and characterize Twitter’s SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter avers that these disclosures accurately describe the good-faith process Twitter employs to estimate the prevalence of false or spam accounts within mDAU.

114. Twitter’s 2021 10-K also discloses that “[a]fter we determine an account is spam, malicious automation, or fake, we stop counting it in our mDAU, or other related metrics.”

RESPONSE: Paragraph 114 purports to quote from Twitter’s SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents.

115. The same day Twitter disclosed its mDAU growth for the fourth quarter of 2021, Twitter disclosed that its revenue for the fourth quarter of 2021 was “\$1.57 billion, an increase of 22% year over year.” Read together, Twitter’s disclosures regarding the limited impact of spam or false accounts lead to the logical conclusion that Twitter’s revenues were not materially impacted by spam or false accounts.

RESPONSE: Paragraph 115 purports to quote from and characterize Twitter’s SEC filings and a February 10, 2022 press release announcing Twitter’s fourth quarter and fiscal year 2021 results, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 115.

116. But contrary to Twitter’s representations that its business was minimally affected by false or spam accounts, the Musk Parties’ preliminary estimates show otherwise.¹⁶ Accordingly, the statements above in ¶¶111-15 were materially false and misleading because, among other reasons:

¹⁶ To date, the Musk Parties’ analysis has been constrained due to the limited data that Twitter has provided and limited time in which to analyze that incomplete data. The Musk Parties’ analysis processed accounts visible on the Firehose using the University of Indiana Botometer tool, which was initially developed with support from the DARPA program and has been improved and honed over the past eight years. The academic developers of the Botometer tool have published numerous articles about their work, including one seminal paper that has received over 1,000 citations in the academic literature. Defendants’ experts

- a. Twitter failed to disclose that false or spam accounts represent materially more than 5% of its mDAU;
- b. Twitter failed to disclose that false and spam accounts comprised a comparatively larger portion of the mDAU that generate material ad revenue; and,
- c. Twitter misrepresented key steps in its process for counting fraud and spam accounts.

RESPONSE: Twitter denies the allegations in Paragraph 116. Twitter denies the allegations in the first sentence of footnote 16 and lacks knowledge or information sufficient to form a belief as to the truth of the other allegations in footnote 16 and therefore denies them on that basis. Insofar as Defendants rely on the Botometer for their analysis of spam, Twitter avers that the Botometer’s own FAQ website cautions that “Bot detection is a hard task” and that if it “were easy to do with software, there wouldn’t be any bots—Twitter would have already caught and banned them!” Twitter further avers that in May 2022, protocol.com reported that the Botometer indicated that Elon Musk’s own Twitter account was likely a bot, scoring it 4/5.

117. *Twitter failed to disclose that its false or spam accounts represent materially more than 5% of its mDAU.* An analysis of Firehose data from the first week of July, including processing visible accounts using a publicly-available

are continuing their analysis even now and, in anticipation of production of additional data by Twitter (including “private” data that Twitter makes available to its human reviewers and contends is necessary to verify its reported less-than-5% spam and false user rate), intend to conduct a more comprehensive analysis and expect to present updated estimates and findings in expert reports and at trial.

machine-learning spam detection model, shows that, during that timeframe, false or spam accounts accounted for 33% of visible accounts.

RESPONSE: Twitter denies that applying the Botometer to Firehose data is a reliable measure of the prevalence of false or spam accounts in mDAU. Twitter avers that the Botometer describes itself as “a machine learning algorithm trained to calculate a score where low scores indicate likely human accounts and high scores indicate likely bot accounts.” The Botometer thus does not even purport to apply Twitter’s definition of a false or spam account. In fact, some bots (like those that report earthquakes as they happen or updates on the weather) are often helpful and permissible under Twitter’s platform manipulation and spam policy, to which Twitter respectfully refers the Court. Moreover, Defendants have not indicated what score they are applying to conclude an account constitutes spam; thus, their allegation is unverifiable. Twitter incorporates by reference its response to Paragraph 90, and denies the allegations of Paragraph 117.

118. While Twitter has not provided any data regarding the approximately 70% of mDAU that are invisible in the Firehose (because they do not perform any public Tweeting or liking activity), even assuming that *every single one* of the invisible accounts is a legitimate user, and not a false or spam account (an assumption as conservative as mathematically possible), these preliminary findings indicate a floor for the prevalence of false or spam accounts among Twitter’s mDAU of 10%, rendering Twitter’s statements that less than 5% of mDAU is comprised of false or spam accounts materially misleading.

RESPONSE: Denied.

119. Accordingly, contrary to the implication in the 2021 10-K that fewer than 10.85 million mDAU were false or spam accounts, preliminary findings suggest that more than 20 million mDAU were false or spam accounts.

RESPONSE: Denied.

120. Twitter failed to disclose that false or spam accounts comprised a disproportionate portion of the mDAU that generate material ad revenue. Not only does preliminary analysis reveal that Twitter's false or spam accounts exceed 10% of mDAU, the Musk Parties estimate that false and spam accounts make up an even more significant portion of the mDAU that actually see ads based on Twitter's own data regarding ad engagement among its userbase. Specifically, false or spam accounts may have comprised approximately 14% of all mDAU that actually saw any ads, and potentially a larger portion of the power-user mDAU that generate significant ad revenue. Thus, false or spam accounts may have an even bigger impact on revenues than on overall mDAU.

RESPONSE: Twitter denies the allegations of the first sentence of Paragraph 120. The remaining allegations of Paragraph 120 constitute Defendants' speculation, and thus require no response. To the extent any response is required, Twitter denies the remaining allegations of Paragraph 120.

121. If false or spam accounts are disproportionately present in the accounts that see the most ads and generate significant revenue, then a large portion of Twitter's overall revenues are attributable to ads that are not being served to legitimate users. Should advertisers come to realize this, they will take their money elsewhere, making Twitter's failure to disclose that risk false and misleading.

RESPONSE: Denied.

122. *Twitter misrepresented key steps in its process for counting fraud and spam accounts.* Even taking Twitter's internal methodology at face value, Twitter's disclosures to the Musk Parties reveal that it enables Twitter to include millions of accounts in its quarterly reported mDAU that are suspended for spam *during that same quarter*—none of which was disclosed to investors.

RESPONSE: Denied. Twitter avers that it defines monetizable daily active usage or users (i.e., “mDAU”) as people, organizations, or other accounts who logged in or were otherwise authenticated and accessed Twitter on any given day through twitter.com, Twitter applications that are able to show ads, or paid Twitter products. Average mDAU for a period represents the number of mDAU on each day of such period divided by the number of days for such period. After Twitter determines an account is spam, malicious automation, or fake, Twitter stops counting it in mDAU. Twitter discloses this all publicly. Thus, to the extent an account was not suspended for certain days during a quarter—and thus was able to see ads on those days—that account would not be retroactively removed from the mDAU count for those days. Once an account is suspended—and thus no longer able to see ads—Twitter does not count the account in mDAU on a going-forward basis.

123. Specifically, information provided by Twitter indicates that Twitter suspends millions of accounts per quarter that it also *includes in mDAU*. For example, in Q1 2021, Twitter’s records indicate that nearly 5 million accounts included in mDAU were suspended that very quarter. And that number has been steadily increasing quarter over quarter, from nearly 5 million in Q1 2021 to over 14 million in Q1 2022.

RESPONSE: Paragraph 123 purports to quote from information provided by Twitter to Defendants, to which Twitter respectfully refers the Court for the complete and accurate contents. As disclosed there, Twitter’s process is designed to estimate the number of false or spam accounts *within* average mDAU in

a given quarter. Twitter avers that the impact of accounts subsequently suspended in the quarter on average quarterly mDAU is under 1 million mDAU for each of Q1 2021 and Q1 2022. The quarterly average mDAU for Q1 2021 was 197.6 million; the quarterly average mDAU for Q1 2022 was 229 million. Suspended accounts that may have been counted within mDAU in days prior to suspension are eligible to be sampled within Twitter's process for estimating false or spam accounts. That process is disclosed in Twitter's SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 123.

124. Twitter executive Ned Segal admitted during Twitter's July 1, 2022 call with the Musk Parties that *the quarter-end average mDAU it reports to investors includes these millions of suspended accounts within it*. And while Twitter has argued that its approach is justified, its contentions defy logic and Twitter's own data regarding suspensions.

RESPONSE: Twitter denies the allegations of the first sentence of Paragraph 124. Twitter admits that it believes its approach to calculating mDAU is justified, and it respectfully refers the Court to its public disclosures regarding those justifications for their complete and accurate contents. Twitter avers that it defines monetizable daily active usage or users (i.e., "mDAU") as people, organizations, or other accounts who logged in or were otherwise authenticated and accessed Twitter on any given day through twitter.com, Twitter applications that are able to show ads, or paid Twitter products. Average mDAU for a period represents the number of

mDAU on each day of such period divided by the number of days for such period. After Twitter determines an account is spam, malicious automation, or fake, Twitter stops counting it in mDAU. Twitter discloses this all publicly. Thus, to the extent an account was not suspended for certain days during a quarter—and thus was able to see ads on those days—that account would not be retroactively removed from the mDAU count for those days. Once an account is suspended—and thus no longer able to see ads—Twitter does not count the account in mDAU on a going-forward basis. Twitter otherwise denies the allegations in Paragraph 124.

125. On that call, Segal speculated that this approach *might be* justified because it *might be* the case that the vast majority of suspended accounts were not engaged in false or spam behavior before their suspension. But he did not represent this to be true, and in other public statements, Twitter has publicly admitted that “[m]ost of the accounts we suspend are suspended because they are spammy, or just plain fake, and they introduce security risks for Twitter and for everyone using Twitter.”¹⁷ Any assertion that Twitter may reasonably assume these same suspended accounts were generally legitimate (*i.e.*, not spam or false) prior to suspension is not plausible.

RESPONSE: Twitter denies the allegations of the first sentence of Paragraph 125. To the extent Paragraph 125 and footnote 17 purport to quote from and characterize Twitter’s Help Center webpage, Twitter respectfully refers the Court to that webpage for its complete and accurate contents. Twitter avers that it suspends accounts for multiple reasons, only one of which is that the account is false

¹⁷ Twitter Help Center, *About suspended accounts*, <https://help.twitter.com/en/managing-your-account/suspended-twitter-accounts> (accessed July 28, 2022).

or spam. Accounts can also be suspended for violating Twitter's Rules, which violations (including violations relating to spammy behavior) can be committed by humans who were, prior to their accounts' suspension, capable of seeing and engaging with ads. Furthermore, suspended accounts may have been engaged in legitimate behavior before they were compromised or otherwise violated Twitter's rules. Twitter otherwise denies the allegations in Paragraph 125.

126. On the same call, Twitter executives also asserted that Twitter is so effective at quickly detecting and suspending spam accounts that their impact on the *average* mDAU for the quarter is presumably trivial. But they again did not assert they knew this to be true, and this assertion appears contradicted by Twitter's own suspension data. For example, the data provided by Twitter indicates that over 13 million accounts suspended in Q4 2021 were counted in mDAU for that quarter and that over 4.7 million of accounts suspended in Q4 2021 were *also* counted in mDAU for Q3 2021. In other words, it appears that millions of suspended accounts were not detected and suspended by Twitter for *at least one quarter*—in stark contrast to Twitter's representation that such accounts are suspended within days of sign up. Not restating previous mDAU calculations to account for these suspensions has resulted in inflated historical mDAU counts.

RESPONSE: Twitter denies the allegations of Paragraph 126 to the extent they attempt to compare statements made by Twitter about *average* mDAU with data concerning total accounts counted in mDAU at least one day in a quarter. Paragraph 126 purports to characterize documents and data provided by Twitter, to which Twitter respectfully refers the Court for their complete and accurate contents. The allegations of Paragraph 126 otherwise comprise Defendants' speculation, to which no response is required. To the extent any further response is required,

Twitter otherwise denies the allegations in Paragraph 126, and incorporates by reference its response to the allegations in Paragraph 125.

127. Twitter discloses that “[w]e are continually seeking to improve our ability to estimate the total number of spam accounts . . . and have made improvements in our spam detection capabilities that have resulted in the suspension of a large number of spam, malicious automation, and fake accounts.” This implies that improvements in Twitter’s spam detection and suspension process lead to improvements in Twitter’s process for calculating the number of false or spam accounts. But, this is false. As Twitter has told the Musk Parties, it does not use its spam detection capabilities to assist in its calculation of the number of false or spam accounts.

RESPONSE: Paragraph 127 purports to quote from and characterize Twitter’s SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter avers that, as Musk is aware, Twitter’s estimation of false or spam account prevalence within mDAU each quarter is derived from a sampled population that has *already* been subjected to “Twitter’s spam detection and suspension process.” Twitter otherwise denies the allegations in Paragraph 127.

128. Twitter has provided no explanation for why the automated processes it uses to catch fake accounts is not also used to quantify fake accounts in the mDAU counts, rather than the meager 100-per-day human review Twitter currently employs.

RESPONSE: Denied. Twitter avers that its CEO publicly Tweeted a detailed explanation of the company’s spam detection and removal efforts, which include use of both automated and human review, and of Twitter’s separate process for estimating the percentage of false or spam accounts in quarterly mDAU. On

May 16, 2022, Mr. Musk publicly replied to that Tweet Thread with a poop emoji. Twitter further avers that, as a basic statistical matter, the approximately 9,000-account sample Twitter reviews of accounts included in mDAU each quarter is sufficiently sized to extrapolate across the mDAU population. Twitter also incorporates by reference its response to the allegations in Paragraph 127.

129. Notwithstanding the above, Twitter has turned a blind eye to its flawed methodology, which has enabled Twitter to continue making its false and misleading representation that false or spam accounts represent fewer than 5% of mDAU.

RESPONSE: Denied.

ii. Twitter Falsely Claims That mDAU Growth Was The Best Proxy For Engagement And Revenue Growth

130. When Twitter introduced its mDAU metric—after a number of quarters of declines in its prior user metric—Twitter explained in its Q4 2018 and Fiscal Year Letter to Shareholders that “[o]ur mDAU are not comparable to current disclosures from other companies, many of whom share a more expansive metric that includes people who are not seeing ads.” Rather than report those broader metrics, Twitter represented that it “want[ed] to align our external stakeholders around one metric that reflects our goal of delivering value to people on Twitter every day and monetizing that usage.” The implication of Twitter’s mDAU description is that the metric measures actual users who see ads. Certainly, this is what Twitter’s disclosures have led the market to understand.¹⁸

RESPONSE: Paragraph 130 and footnote 18 purport to quote from and characterize Twitter’s SEC filings and a Reuters article, to which Twitter

¹⁸ See, e.g., Sheila Dang, “Twitter gears up for most ambitious quarter of user growth – internal meeting,” *Reuters* (June 7, 2022), available at <https://www.reuters.com/article/twitter-users-idCAKBN2NO1JU> (describing “monetizable daily active users” as “users who see advertising”).

respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 130 and footnote 18.

131. Consistent with that message, Twitter repeatedly represents that mDAU—which Twitter discloses as a “key metric”—is the best proxy for the Company’s growth and success. Indeed, Twitter referenced mDAU and its importance nearly 100 times in its 2021 10-K. For example, in Twitter’s 2021 10-K, in the section titled “Key Metrics,” Twitter represents that “mDAU, and its related growth, is the *best way* to measure our success *against our objectives and to show the size of our* audience and *engagement.*” (emphasis added).

RESPONSE: Paragraph 131 purports to quote from and characterize Twitter’s SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 131.

132. Twitter also claims that mDAU growth drives its advertising revenue growth. For example, Twitter represented in its 2021 10-K that its advertising revenue growth—which represented approximately 95% of Twitter’s 2021 revenue growth—“is primarily driven by *increases in mDAU*, increases in ad pricing or number of ads shown and increases in our clickthrough rate.”

RESPONSE: Paragraph 132 purports to quote from and characterize Twitter’s SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 132.

133. Twitter similarly lists its “ability to increase our mDAU” first among its business and operational risk factors. Indeed, the risk factors in Twitter’s 2021 10-K are consistently discussed in terms of its impact on mDAU. *See supra* ¶65.

RESPONSE: Paragraph 133 purports to quote from and characterize Twitter’s SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 133.

134. Consistent with Twitter’s claims regarding the importance of mDAU, Twitter prominently touts its mDAU growth. For example, in its 2021 10-K, Twitter represents “[a]verage monetizable daily active usage (mDAU) was 217 million for the three months ended December 31, 2021, an increase of 13% year over year.” Twitter’s 2021 10-K even contains a full-page graphical breakdown of its historical mDAU growth:

For additional information on how we calculate changes in mDAU and factors that can affect this metric, see the section titled “Note Regarding Key Metrics.”



* Please note the sum of average mDAU in the United States and average mDAU in the rest of the world may not equal the total average mDAU indicated due to rounding.

RESPONSE: Paragraph 134 purports to quote from and characterize Twitter’s SEC filings, to which Twitter respectfully refers the Court for their

complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 134.

135. And as part of its strategy of touting the importance of mDAU and mDAU growth, Twitter has sought to downplay the importance of other metrics. For example, at Twitter’s 2021 analyst day—where mDAU was referenced over 40 times—an analyst at Wells Fargo noted that “[a] number of your peers have given us data points on markers of daily engagement beyond mDAU, in terms of time spent, app opens, or engagements per day.” The analyst then asked if Twitter “could give a sense of where you are today, in terms of engagements; maybe some sense of how that’s been growing lately.”

RESPONSE: Twitter denies the allegations in the first sentence of Paragraph 135. The remainder of Paragraph 135 purports to quote from and characterize a transcript of a communication between a Wells Fargo analyst and Twitter, to which Twitter respectfully refers the Court for its complete and accurate contents.

136. Twitter’s then-product lead—Kayvon Beykpour, who Twitter terminated without seeking the Musk Parties’ consent—responded that “we look at a number of metrics to understand whether our solutions to the customer problems we’re focused on are actually working. And those metrics, you know, are quite different whether you’re looking at topics or onboarding flow or product solutions, like spaces are our work on newsletters with review. But in aggregate, *the best way to sort of measure whether we’re solving customer problems is mDAU, which is why we sort of focus on that metric.* On time spent specifically, we absolutely are capable and do measure time spent and how our product changes impact it. *We don’t think it’s a particularly useful single measure to look at in terms of our aggregate performance.*”

RESPONSE: Twitter admits that it ended its employment relationship with Kayvon Beykpour without seeking Defendants’ consent, as permitted under the Merger Agreement. The remainder of the allegations in Paragraph 136 purport to

quote from a transcript of a communication between Twitter and an investment analyst, to which Twitter respectfully refers the Court for its complete and accurate contents.

137. But contrary to Twitter’s representations that mDAU growth is the best proxy for engagement and revenue growth, Twitter’s internal data tells a different story. Accordingly, the statements above in ¶¶130-36 were materially false and misleading because, among other reasons:

- a. Twitter failed to disclose that nearly a third of its mDAU sees no ads;
- b. Twitter failed to disclose that a minimal portion of users drive a majority of revenue; and,
- c. Twitter failed to disclose that the vast majority of mDAU growth is not occurring among high-value users.

RESPONSE: Denied. Twitter avers that it has never represented that all mDAU see ads every day or that all mDAU drive revenue equally. To the contrary, Twitter has disclosed that mDAU *and their level of engagement with advertising* are critical to the company’s success, and that Twitter generates a substantial majority of its revenue based upon *engagement* with the ads that it displays. In other words, and as conveyed by the name itself, mDAU represent monetizable opportunity.

138. *Twitter failed to disclose that nearly a third of its mDAU sees no ads.* Twitter’s own internal data demonstrates that more than 65 million mDAU in Q1 2022—nearly a third of the 229 million reported total for that quarter—do not appear to be seeing any ads. This is a shocking revelation. Twitter states that mDAU includes accounts accessing Twitter (a) through *twitter.com* or (b) through Twitter applications *that are able to show ads*.¹⁹ No one reading Twitter’s disclosures would

¹⁹ In Q4 2021, Twitter “updated our mDAU definition . . . to also include ‘paid Twitter products, including subscriptions,’” however Twitter also represented that

think that nearly a third of Twitter’s mDAU in fact see no ads and appear to generate no revenue at all.

RESPONSE: Twitter denies the allegations of Paragraph 138 to the extent they imply that the internal data provided to Musk demonstrates that more than 65 million accounts counted in mDAU in Q1 2022 did not see any ads in that quarter. In Q1 2022, there were significantly more than 229 million accounts that contributed to Twitter’s average quarterly mDAU. Therefore, even though not every account in mDAU sees ads on a given day, far more accounts see ads in a quarter than the allegations of Paragraph 138 imply. Twitter further denies that it is “shocking” that some portion of mDAU on any given day do not see ads. Twitter avers that it has never represented that all accounts in quarterly average mDAU see ads every day, and it has explained to Musk that there are several legitimate and intentional business reasons why an account in mDAU may not see an ad on any given day. For example, Twitter does not typically show ads to accounts in the days after creation. To the extent the allegations in Paragraph 138 purport to quote from or characterize Twitter’s SEC filings, Twitter respectfully refers the Court to those filings for their complete and accurate contents. To the extent any further response is required, Twitter otherwise denies the allegations in Paragraph 138.

139. *Twitter failed to disclose that a minimal portion of users drive a majority of revenue.* Moreover, despite Twitter’s grouping together all

“[t]his change had no material impact on the number of mDAU reported in the fourth quarter of 2021, and is unlikely to do so in the near future.”

“monetizable” users into one “mDAU” population, its disclosures to the Musk Parties have revealed that there are in fact important differences between different users.

RESPONSE: Twitter denies the allegations in Paragraph 139 and avers that it has disclosed that some accounts in mDAU generate more revenue than others. Twitter respectfully refers the Court to, for example, its Q1 2022 earnings release, where it discloses that while less than 20% of its mDAU are in the United States, it generates over 50% of its advertising revenue from the United States.

140. mDAU can be broken into four groups based on Twitter’s internal data. The first group, 29% of mDAU, is that discussed above which sees no ads and appears to generate no revenue, despite being called “monetizable.” The second group, which is 41% of mDAU, sees very few ads and generates little revenue (estimated at roughly \$0.38 per user per month, or \$107 million per quarter in total, based on data provided by Twitter). The third group, which is 24% of mDAU, sees some ads and generates some revenue (roughly \$3.16 per user per month, or \$512 million per quarter). The last group of power users, a mere 7% of mDAU, views lots of ads and generates the most revenue per user (roughly \$11.55 per user per month, or \$527 million per quarter).

RESPONSE: To the extent that Paragraph 140 purports to characterize documents or data, Twitter respectfully refers the Court to such documents or data for their complete and accurate contents. Twitter does not break mDAU into the various groups alleged by Defendants; these are concepts invented by Defendants for purposes of their Counterclaims. Twitter avers that it is well understood that different users have varying levels of engagement with the platform, and that the same users may have varying levels of engagement from day to day, and may generate different amounts of revenue for Twitter, and incorporates by reference its

response to the allegations in Paragraph 139. To the extent any further response is required, Twitter otherwise denies the allegations in Paragraph 140.

141. In short, Twitter’s internal data indicates that 70% of its mDAU are worth approximately \$0 to \$0.01 per day and generate only about 10% of its revenue, while a small group representing 7% of Twitter’s mDAU generates more than 50% of its total ad impressions and revenue. Any public disclosure of this stratification of mDAU to investors would have enormous implications. If all mDAU generate similar revenue, then Twitter’s strategy of maximizing mDAU growth makes sense. But, if only a small percentage of users are generating significant revenue, then indiscriminately maximizing total mDAU may not grow revenues. Rather than disclose that it makes almost all its revenues from a small group of users and virtually no revenues from the large majority of users, Twitter portrays a story in which all mDAU are contributing materially to the Company’s ad engagement and revenues. Indeed, Twitter scoffed at the idea that more specific “engagement” disclosures would be a more meaningful metric despite the fact that Twitter’s internal data demonstrated that a small sliver of the most engaged users generate a disproportionate amount of its revenue.

RESPONSE: Twitter incorporates by reference its response to the allegations in Paragraph 140. Twitter denies that it seeks to “indiscriminately maximiz[e] total mDAU” or that it “portrays a story in which all mDAU are contributing materially to the Company’s ad engagement and revenues” and avers that accounts in mDAU, including accounts not currently generating substantial revenue for Twitter, present opportunities for future growth. To the extent a further response is required, Twitter otherwise denies the allegations in Paragraph 141.

142. *Twitter failed to disclose that the vast majority of mDAU growth is not occurring among high-value users.* In addition to concealing the highly-concentrated nature of its revenue-driving mDAU, Twitter failed to disclose that the mDAU growth it touted was disproportionately falling *outside* the highly-engaged group responsible for the majority of Twitter’s ad engagement and revenues. Specifically, while Twitter touted its mDAU growth in 2021, Twitter failed to

disclose that more than *half* of that growth was among the mDAU subpopulation that sees *zero ads*. Meanwhile, Twitter also failed to disclose that *less than 1%* of the mDAU growth reflected growth within the highly-engaged user group that was responsible for the bulk of Twitter’s engagement and revenue. In other words, while the size of the user group who sees no ads grew at a rate of 27% over the period from Q2 2021 to Q1 2022, the highly-engaged group that sees half of all Twitter ads remained effectively stagnant in size over that same period. Twitter failed to disclose that while mDAU is growing, the new users added contribute to revenue at significantly lower rates relative to the overall mDAU population. Twitter, thus, misleadingly failed to disclose that mDAU growth would not fully drive actual revenue growth as the vast majority of its mDAU growth were not engaging with ads in any material way.

RESPONSE: Twitter incorporates by reference its response to the allegations in Paragraph 140. Twitter denies that it “concealed” anything or that its disclosures were in any way misleading. Twitter further avers that new accounts present opportunities for future growth, even as the accounts of more established users or those in more established geographies may on average generate greater revenue per account. Twitter respectfully refers the Court to its SEC disclosures, which include information regarding revenue growth in addition to mDAU growth, and which make clear that mDAU growth is not uniform and could differ “in general or in certain geographies or among certain groups.” Twitter otherwise denies the allegations of Paragraph 142.

143. Twitter’s disappointing second quarter 2022 financial results bear this out. In the second quarter of 2022, Twitter grew its mDAU to 237.8 million, 16.6% higher than the second quarter of 2021. Yet, while its mDAU grew by nearly 17%, Twitter’s revenue actually fell 1% from the second quarter of 2021. Twitter’s decrease in revenue in the face of rapid growth of its “key” metric is further evidence that Twitter’s reliance on the metric is a sham.

RESPONSE: The first, second, and third sentences of Paragraph 143 purport to characterize a July 22, 2022 press release announcing Twitter’s second quarter financial results, to which Twitter respectfully refers the Court for its complete and accurate contents. Twitter otherwise denies the allegations in the first, second, and third sentences of Paragraph 143 and denies the fourth sentence of Paragraph 143 in its entirety.

144. Twitter’s risk warnings in the 2021 10-K also gloss over the significant flaws with Twitter’s mDAU calculations. For example, the 10-K warns that “[t]o the extent our mDAU growth rate slows or the absolute number of mDAU declines, our revenue growth will become dependent on our ability to increase levels of engagement on Twitter, generate advertiser demand, and increase revenue growth from third-party publishers’ websites and applications, data licensing and other offerings.”

RESPONSE: Twitter denies the allegations in the first sentence of Paragraph 144. The remainder of Paragraph 144 purports to quote from and characterize Twitter’s SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents.

145. The statements in ¶¶142-44 were materially false and misleading because Twitter failed to disclose that the vast majority of mDAU do not contribute materially to revenue growth and, therefore, Twitter was already dependent on its ability to increase levels of engagement—specifically, because less than 1% of mDAU growth was falling within the highly concentrated group of highly-engaged users who saw the majority of ads on Twitter.

RESPONSE: Denied.

146. In short, Twitter’s heavy reliance on mDAU is a sham. Twitter developed its own proprietary metric—one that it could easily grow without performing the hard work necessary to attract new, returning, highly active,

legitimate users—and began promoting it to investors in an attempt to manufacture steady growth in share price even when financial results faltered.

RESPONSE: Denied.

iii. Twitter Misrepresented Its mDAU Figures By Double-Counting Accounts

147. In addition to the false statements above, Twitter falsely represented the number of mDAU by double-counting certain accounts.

RESPONSE: Denied.

148. Specifically, in its 2021 10-K, Twitter represented that it had 199 million mDAU in Q1 2021, 206 million mDAU in Q2 2021, 211 million mDAU in Q3 2021, and 217 million mDAU in Q4 2021.

RESPONSE: Paragraph 148 purports to characterize Twitter’s SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents.

149. This statement was false and misleading because these figures were artificially inflated by Twitter’s double-counting of accounts that were linked. Indeed, three days after the Merger Agreement was signed, Twitter restated and publicly disclosed that the mDAU figures in the 2021 10-K were false and that Twitter had overcounted mDAU by up to 1.9 million in each quarter. By restating its mDAU results, Twitter effectively acknowledged the materiality of its mDAU figures. At the same time, by restating its mDAU results to the decimal point, it conveyed false precision in this metric.

RESPONSE: Twitter denies the allegations of the first sentence of Paragraph 149. Twitter admits that on April 28, 2022 it provided updated values for mDAU from the fourth quarter of 2020 to the fourth quarter of 2021 and avers that in each quarter the updated values reflected less than a 1% change in reported

mDAU. Twitter respectfully refers the Court to its press release of that date for its complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 149.

G. Twitter Knowingly, Or At Least Recklessly, Made False Representations

150. Twitter has reported its mDAU count since its 2018 10-K, and consistently represents that genuine human accounts comprise at least 95% of this monetizable population. In reality, as discussed above, preliminary estimates based on only the 30% of mDAU visible in the Twitter Firehose already indicate that one-third of visible accounts and 10% of the mDAU count may be made up of false or spam accounts.

RESPONSE: Paragraph 150 purports to characterize Twitter’s SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 150.

151. Twitter’s less-than-5% representation is so far afield from a reasonable false or spam count that it cannot have been the result of a good-faith process. Twitter could only have disclosed that it has 229 million “monetizable” daily active users, with only 5% being comprised of spam accounts, either knowing such a disclosure was false, or being reckless as to the truth given that such a large portion of visible accounts appear to be false or spam accounts.

RESPONSE: Denied.

152. At the very least, Twitter is reckless as to the falsity of its mDAU metric. Twitter represents in its 2021 10-K that its mDAU calculation is based on “reasonable estimates for the applicable period of measurement,” that its spam account calculation is based on an “internal review of a sample of accounts,” that the company is “continually seeking to improve our ability to estimate the total number of spam accounts and eliminate them from the calculation of our mDAU” and that “we regularly review and may adjust our processes for calculating our internal metrics to improve their accuracy.”

RESPONSE: Twitter denies the allegations in the first sentence of Paragraph 152. The remainder of Paragraph 152 purports to characterize Twitter’s SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 152, and avers that each of the quoted statements is true and correct in all material respects.

153. These representations communicate that Twitter has an established process for determining its mDAU count as well as the accounts that must be removed from mDAU because they are non-monetizable false or spam accounts. But, in reality, Twitter employs no such reasoned process. In particular, Twitter knows that it determines the 5% spam representation from a human review of a sample of only 100 accounts each day. It does not perform even the most basic of human-verification processes—such as contacting the sampled accounts to determine if they are real, including by sending an email, text, or even a push notification on Twitter requiring them to enter a CAPTCHA. Twitter does not remove suspended accounts (which Twitter otherwise does not count as monetizable) from previous mDAU calculations—*even when they are suspended for spam within the same quarter*. And, Twitter does not leverage its learning from suspending accounts into its process for identifying spam accounts, despite its representation to the contrary.

RESPONSE: To the extent that the allegations of the first sentence of Paragraph 153 purport to characterize Twitter’s SEC filings, Twitter respectfully refers the Court to those filings for their complete and accurate contents. Twitter denies the allegations of the second sentence of Paragraph 153. Twitter denies that it does not use human-verification processes, and avers that the accounts included in Twitter’s sample of mDAU have *already* been subjected to Twitter’s automated spam-detection processes, which include processes requiring certain users to respond to phone or text notifications or complete a CAPTCHA. Twitter further

avers that, after it determines an account is spam, malicious automation, or fake, Twitter stops counting it in mDAU, and Twitter respectfully refers to and incorporates its response to Paragraphs 122 and 125. Twitter otherwise denies the allegations in Paragraph 153.

154. Additionally, as Agrawal’s text to Musk on April 8, 2022 revealed, even he recognized that Twitter “should be catching” false or spam accounts, *see supra* ¶32. Twitter’s reliance upon an unsound process is even more misleading when Twitter has access to data suggesting that its methodology is flawed, and that false or spam accounts may be active on the platform for extensive periods before they are caught. For example, Twitter’s own data regarding suspensions, as provided to the Musk Parties, shows that millions of accounts suspended in any given quarter were counted in mDAU in at least one quarter *preceding* their suspension. Rather than revisiting its 5% estimates when seeing this data quarter after quarter, Twitter buries its head in the sand.

RESPONSE: Paragraph 154 purports to quote from and characterize text messages and data, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 154.

155. Twitter’s failure to critically assess its own systems is even more alarming in light of the news that Twitter is receiving significantly more sign ups per quarter in recent years, despite plateauing revenues. For example, approximately 100 million users signed up between the first quarter of 2021 and the first quarter of 2022, but Twitter’s revenue actually *declined* from the second quarter of 2021 to the second quarter of 2022. It is likely that much of this increase is due to increased sophistication of false or spam accounts while Twitter allows its processes to stagnate.

RESPONSE: Twitter denies the allegations of the first sentence of Paragraph 155. The second sentence of Paragraph 155 purports to characterize Twitter’s publicly reported financial results, to which Twitter respectfully refers the

Court for their complete and accurate contents. Twitter avers that it applies rigorous processes for detecting and removing spam accounts from its platform, including multiple layers of automated and human review, and that it continually reviews and improves those processes. Twitter denies the allegations of the final sentence of Paragraph 155.

156. Twitter and its executives also have a strong motivation and opportunity to guide investors to rely on an easily manipulable metric in evaluating the company, because that metric determines those executives' compensation. Prior to 2020, Twitter's performance-based executive incentive compensation plans were based only on financial metrics like revenue, operating income, and adjusted EBITDA. In 2020, Twitter introduced a cash bonus scheme for its executives in order to offer some increased short-term incentives, but the Company "did not achieve the revenue and profitability expectations set by our compensation committee", resulting in Twitter only funding 32% of the target of that cash bonus pool.

RESPONSE: Paragraph 156 purports to quote from and characterize Twitter's SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 156.

157. The following year, in 2021, Twitter "broaden[ed]" its cash executive compensation plan funding metrics to include a target mDAU—a metric that is much easier to manipulate than revenue or income. At its 2021 Analyst Day, Twitter's executives promptly set a target to grow mDAU to 315 million mDAU by 2023, and began pushing for mDAU growth at all costs.

RESPONSE: Paragraph 157 purports to quote from and characterize Twitter's SEC filings and public statements, to which Twitter respectfully refers the

Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 157.

158. When Twitter announced its goal of 315 million mDAU, the market was initially skeptical, as reflected by a drop in Twitter's stock price following Analyst Day. Twitter nevertheless proceeded with making mDAU growth its core focus, and with mDAU included in the executive compensation format, Twitter's 2021 executive cash bonuses were funded at 100%.

RESPONSE: Paragraph 158 purports to characterize Twitter's SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 158.

159. In March 2022, a month before Musk agreed to acquire the company, CFO Ned Segal admitted that "we're going to need to accelerate our [m]DAU growth in order to hit this 315 million target." Having articulated a goal to the investing public—one that directly tied to their compensation—Twitter's executives were motivated to make sure that it met that goal.

RESPONSE: The first sentence of Paragraph 159 refers to remarks from the JP Morgan Global High Yield & Leveraged Finance Conference, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 159.

160. Twitter also had a strong motive to not disclose the imminent mDAU recast. Signing the Merger Agreement mooted the need for an April 28 Q1 earnings call with analysts, on which Twitter would have offered guidance on its Q2 performance. By this time Twitter was far enough into the second quarter that it would have known it was poised to dramatically miss Wall Street's revenue and EBITDA targets, and would have been required to truthfully answer analyst questions regarding these trends. These disclosures would have alerted the Musk Parties that Twitter's value was declining, which could have delayed the acquisition and resulted in a lower acquisition offer. Desiring to lock in the \$54.20 price on

April 25, Twitter stayed silent, avoided the need for an earnings call, and kept the Musk Parties in the dark about its looming financial difficulties.

RESPONSE: Denied.

161. Outside of Twitter's public disclosures there is little visibility into Twitter's user data, which includes hundreds of millions of daily tweets from hundreds of millions of active accounts. Yet, the behavior of these users is essential to Twitter's advertisers, who only wish to target real human users with ads. Twitter alone possesses the information necessary to determine this population. Yet, as explained above, while it would be most accurate to disclose information regarding the users who actually generate significant revenue, Twitter instead chose to highlight a metric that it knows is not the best predictor of revenue, but can easily report as growing to investors and meet analyst targets.

RESPONSE: Denied.

162. Transitioning users who do not generate any revenue into more active users, or adding new users who will actively use the platform, is no easy task. It requires creating a product that is enjoyable to use for extended periods, rather than one that merely has minimal sign-up barriers—a task that could take years to reach fruition. A company focused on adding these active users would invest substantial resources towards trying to improve Twitter to maximize engagement, such as by effectively targeting spam or false accounts, and would focus its disclosures on these highly active users who drive revenue. But, when the goal is to maximize total users, regardless of activity levels, the incentive is to lower barriers to entry. This allows Twitter to trumpet consistent user growth results to investors even when Twitter knows that such growth is not the best measure of future earnings potential.

RESPONSE: Twitter admits that its business is complex. The remainder of Paragraph 162 contains hypothetical statements to which no response is required. To the extent a response is required, Twitter denies the remainder of the allegations in Paragraph 162.

163. Consistent with this pattern, Twitter also does not publish the methodology it follows to determine its mDAU count, or how it excludes non-monetizable accounts from that metric. Thus, it is extremely difficult for any third-

party to completely recreate Twitter's mDAU calculations. What Twitter has revealed to the Musk Parties in its disclosures to date indicate that this calculation procedure includes tens of millions of accounts that see no ads.

RESPONSE: The first sentence of Paragraph 163 purports to characterize Twitter's SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter admits that the calculation by outsiders of mDAU is difficult and otherwise denies the allegations of the second and third sentences of Paragraph 163.

164. This dynamic gives Twitter near carte blanche to publish whatever user activity metrics it wishes. It is incentivized to report high mDAU numbers to stoke investor interest while having no third-party who is able to check the veracity of its reported figures.

RESPONSE: Denied.

165. Twitter has allegedly misled the market before regarding its userbase. In late 2014 and early 2015, Twitter was experiencing disappointing growth in its daily active user and user engagement metrics. Similar to what happened when Twitter switched from MAU to mDAU in 2018, Twitter allegedly responded to this failure by misleading the market about which metrics it was using and how those metrics were growing. In mid-2015, Twitter changed its leadership, including its CEO, and put out revised disclosures that contradicted its earlier, more optimistic disclosures, leading to a dramatic decline in Twitter's stock price. A securities class action suit was filed, with Twitter's motion to dismiss denied in late 2017. That case settled in September 2021, on the eve of trial, for \$809.5 million, making it one of the highest securities class action settlements in history.

RESPONSE: Twitter denies the allegations of Paragraph 165, except admits the existence of a securities suit against it, that such suit settled in September 2021 for \$809.5 million, and that Twitter changed certain of its leaders in 2015.

H. Twitter’s Representations Were Material

166. Given that Twitter directly ties together its revenue and its mDAU, Morgan Stanley’s model of Twitter’s value used Twitter’s mDAU as its starting point, and then built out Twitter’s revenues from its mDAU assumptions. *See supra* ¶34. Twitter repeatedly emphasizes the importance of mDAU in its SEC filings, mentioning the metric nearly *100 times* in its 2021 10-K alone.

RESPONSE: To the extent the first sentence of Paragraph 166 purports to characterize Twitter’s SEC filings, Twitter respectfully refers the Court to those filings for their complete and accurate contents. Twitter otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of Paragraph 166 and therefore denies them on that basis. The second sentence of Paragraph 166 purports to characterize Twitter’s SEC filings, to which Twitter respectfully refers the Court for their complete and accurate contents.

167. That Morgan Stanley valued Twitter in this way made sense given that Twitter’s disclosures and public statements emphasize the importance of its mDAU calculation, and directly tie the company’s revenue growth to mDAU growth. For example, in Twitter’s 2021 annual report, Twitter lists as its first business risk: “If we fail to increase our mDAU . . . our revenue, business and operating results may be harmed.” Because of Twitter’s focus on mDAU (and mDAU growth) in its disclosures, nearly all major Wall Street analysts focus on mDAU when assessing Twitter’s future financial performance, and ultimately its value.²⁰

²⁰ Jefferies Equity Research Report on Twitter dated February 10, 2022 (“Growth in mDAUs ... helps drive top line”; “Base Case . . . TWTR’s platform has a highly engaged 200M+ daily user base”); Truist Securities January 10, 2022 Analyst Report (“FY23 revenue and mDAU guide implies growth acceleration”); Deutsche Bank Research March 10, 2022 Analyst Report (“our lower mDAU estimates, drives our FY23 revenue estimate of \$7.27bn, modestly below guidance and street expectations of \$7.34bn”).

RESPONSE: Paragraph 167 and footnote 20 purport to quote from and characterize Twitter's 2021 annual report and various investment analyst reports, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 167 and footnote 20, except lacks knowledge or information sufficient to form a belief as to the truth of the allegations respecting the Morgan Stanley valuation that Paragraph 167 purports to characterize and so denies them on that basis.

168. Twitter's mDAU misrepresentations were material because they directly correlate to potential revenue from the Musk Parties' contemplated subscription model. Because Morgan Stanley's model uses the mDAU figure to estimate potential subscription revenue for a future Twitter, overstatements in mDAU caused the Musk Parties to seriously overvalue the Company's earning potential by exaggerating the number of potential subscribers.

RESPONSE: Twitter denies that it misrepresented mDAU, and otherwise denies the allegations in Paragraph 168, except lacks knowledge or information sufficient to form a belief as to the truth of the allegations respecting the Morgan Stanley model that Paragraph 168 purports to characterize, and so denies them on that basis.

169. Highlighting the importance of these metrics, Musk secured a representation in the Merger Agreement that Twitter's SEC disclosures were accurate in all material respects.

RESPONSE: Paragraph 169 purports to characterize the Merger Agreement, to which Twitter respectfully refers the Court for its complete and

accurate contents. Twitter avers that the Merger Agreement contains no representations concerning mDAU and does not mention the term mDAU.

170. Had the Musk Parties been aware of the falsity in Twitter’s SEC disclosures, and thus in the Merger Agreement, they would not have signed the Merger Agreement.

RESPONSE: Twitter denies that Twitter’s SEC filings were in any way “false,” and further denies that in signing the Merger Agreement Defendants relied upon Twitter’s SEC filings in the manner alleged. Twitter avers that Defendants invented their allegations with respect to reliance on Twitter’s SEC filings for purposes of their Counterclaims. To the extent any further response is required, Twitter otherwise denies the allegations in Paragraph 170.

I. Twitter Is Reasonably Expected To Experience A Material Adverse Effect

171. Independent of Twitter’s fraud, since January, Twitter has suffered a Company Material Adverse Effect (“MAE”) as defined in Article I of the Merger Agreement.

RESPONSE: Denied.

172. As explained above, mDAU is the metric Twitter discloses as most relevant to its present and future success. Following Twitter’s lead, investors focus on this metric, and frequently ask detailed questions after each Twitter earnings release about Twitter’s mDAU growth.

RESPONSE: The first sentence of Paragraph 172 mischaracterizes Twitter’s SEC filings, which make clear that it is “engagement with ads” itself, and not mDAU alone, that generates “a substantial majority” of Twitter’s revenue.

Twitter respectfully refers the Court to its SEC filings for their complete and accurate contents. The second sentence of Paragraph 172 purports to characterize unidentified communications with unidentified investors. Twitter responds by respectfully referring the Court to those communications for their complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 172.

173. In fact, roughly 29% of Twitter's mDAU see no advertisements and appear to generate no revenue for the company. An additional 41% see almost no advertisements, and appear to generate less than 10% of Twitter's quarterly revenue. A mere 7% of Twitter's most active users appear to generate nearly half of the company's quarterly revenue. Twitter does not disclose these breakdowns to investors. Thus, despite investors' understanding from Twitter that total mDAU is the most important metric to review when determining the company's business prospects, most reported mDAU have little relation to Twitter's revenue.

RESPONSE: Twitter incorporates by reference its responses to Paragraphs 137-146 and otherwise denies the allegations of Paragraph 173. To the extent the fourth sentence of Paragraph 173 purports to characterize Twitter's SEC filings, Twitter respectfully refers the Court for their complete and accurate contents.

174. Revealing to the market that Twitter's main performance metric does not drive the performance of the business, and that Twitter has been focused on growing this number instead of focusing on how to generate more revenue from existing users could result in a dramatic decrease in Twitter's valuation sufficient to constitute a MAE.

RESPONSE: Denied, except to admit that if Musk once again publicizes false and misleading statements concerning Twitter, that actionable misconduct could mislead the market and impact Twitter's share price.

175. Additionally, Twitter’s inclusion of false or spam accounts has artificially inflated mDAU. As detailed above, initial analysis indicates that spam and false accounts comprise more than 5% of mDAU and represent a disproportionate percentage of mDAU that see advertisements. Revelations that the spam number has been undercounted would reasonably be expected to cause a material, durationally significant decrease in Twitter’s value.

RESPONSE: Twitter denies the allegations in the first and second sentences of Paragraph 175, which rely upon running the wrong data through a generic algorithm that labeled Musk himself a bot earlier this year. Twitter further denies the allegations in the third sentence of Paragraph 175, except to admit that if Musk once again publicizes false statements concerning Twitter, that actionable misconduct could mislead the market and impact Twitter’s share price.

176. None of the carveouts identified in Article I of the Merger Agreement apply.

RESPONSE: Denied.

177. Because Twitter has suffered an MAE as defined in Article I of the Merger Agreement, Twitter cannot satisfy the representations and warranties in Sections 4.6, 4.7, and/or 4.9.

RESPONSE: Denied. Twitter further responds that while Paragraph 177 asserts that Twitter “has suffered an MAE,” the allegations of Paragraphs 174 and 175 simply speculate that Musk could diminish Twitter’s market valuation in the future through unfounded accusations.

178. More specifically, Twitter cannot satisfy its representation and warranty in Section 4.6 that its SEC filings did not contain “any untrue statement of a material fact or omit[] to state any material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which

they were made, or are to be made, not misleading”; it also cannot satisfy its representation in Section 4.7 that information in the Proxy Statement, as that term is defined in the Merger Agreement, lacks any misstatements or omissions; nor can it satisfy its representation in Section 4.9, which provides generally that between January and April 2022 there was no MAE.

RESPONSE: Denied. The SEC filings referenced in Section 4.6 and Section 4.7 of the Merger Agreement were complete and accurate. The citation to Section 4.9 of the Merger Agreement is inapposite; Defendants have not even attempted to allege that Twitter suffered an MAE between January and April 2022—because it did not.

179. Under Section 7.2(b)(i) Buyers are relieved of their obligation to close if any representation and warranty is untrue at closing, and the result of that causes an MAE. Under Section 7.2(c) Buyers are relieved of their obligation to close if Twitter has suffered an MAE for any reason.

RESPONSE: Denied.

180. Twitter’s failure to satisfy the representations and warranties in Sections 4.6, 4.7, and/or 4.9 has caused a failure of the condition to closing in Section 7.2(b)(i). And Twitter has suffered an MAE, causing a failure of the closing condition in Section 7.2(c). Accordingly, Section 8.1(d)(i) permits Buyers to terminate the Merger Agreement without paying the Termination Fee provided for in Section 8.3.

RESPONSE: Denied.

J. Twitter Failed To Disclose Litigation With And Investigations By The Indian Government

181. In 2021, India’s information technology ministry imposed certain rules allowing the government to probe social media posts, demand identifying information, and prosecute companies that refused to comply. While Musk is a proponent of free speech, he believes that moderation on Twitter should “hew close to the laws of countries in which Twitter operates.”

RESPONSE: The first sentence of Paragraph 181 purports to characterize rules promulgated by the Indian government, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of Paragraph 181 and therefore denies them on that basis.

182. As a result of India’s new rules, recent public reporting suggests that Twitter has faced various investigations by the Indian government, requests to moderate content, and requests to block certain accounts.

RESPONSE: Paragraph 182 purports to summarize “recent public reporting,” and Twitter respectfully refers the Court to such reporting for its complete and accurate contents. Twitter further responds that media outlets and Twitter’s own transparency disclosures have heavily documented the company’s interactions with Indian regulators since the Indian government announced restrictive regulations in February 2021, including requests by the Indian government that Twitter block certain accounts or otherwise moderate content. Twitter denies the remaining allegations of Paragraph 182.

183. India is Twitter’s third largest market, and thus any investigation into Twitter that could lead to suspensions or interruptions of service in that market may constitute an MAE.

RESPONSE: Twitter denies that India is its third-largest market. The remainder of the allegations in Paragraph 183 contain hypothetical statements or

legal conclusions to which no response is required. To the extent a response is required, Twitter denies the remainder of the allegations in Paragraph 183.

184. Twitter did not disclose any such investigations to the Musk Parties, as required by Section 4.11 of the Merger Agreement.

RESPONSE: Twitter admits that it did not contact Defendants regarding its interactions with the Indian government. Twitter avers that Defendants did not cite as a purported basis for termination the publicly reported dispute over blocking orders issued by the Indian government until filing the Counterclaims. The remainder of the allegations in Paragraph 184 contain a legal conclusion to which no response is required. To the extent a response is required, Twitter denies the remainder of the allegations in Paragraph 184, because Section 4.11 does not require the disclosure of the company's interactions with the Indian government.

185. However, on or around July 6, 2022, Twitter launched a legal challenge against India's government in Court, challenging certain demands made by the Indian Government—suggesting that Twitter was under investigation between the signing of the Merger Agreement and the filing of its legal challenge.

RESPONSE: Twitter admits that it brought a legal challenge against the Indian government and respectfully refers the Court to its July 5, 2022 petition to the Karnataka High Court. Twitter avers that it has challenged certain blocking orders issued by the Indian government under Section 69A of the Information Technology Act, directing Twitter to remove certain content from its platform, including content from politicians, activists, and journalists, and that Twitter's legal

challenge is contemplated by the law itself, which allows companies or persons to challenge government blocking orders. Twitter further avers that its legal challenge is consistent with its global practice of challenging government requests or laws where such requests are not authorized or properly scoped under local law, are procedurally deficient, or as necessary to defend its users' rights, including freedom of expression. Twitter otherwise denies the allegations of Paragraph 185, including the allegation that its legal challenge is related to any "investigation" by the Indian government.

K. Twitter Makes Key Decisions Outside The Ordinary Course Without Consulting The Musk Parties

186. Shortly after the Musk Parties' acquisition was announced, three senior Twitter executives announced they were departing the company—the company's Head of Data Science, the Vice President of Twitter Service, and a Vice President of Product Management for Health, Conversation, and Growth. Additionally, despite knowing that Musk cared deeply about Twitter's product team, Twitter terminated the employment of the company's Revenue Product Lead and GM of Consumer without first consulting him.

RESPONSE: Twitter admits that several executives announced their departures following the announcement of Twitter's transaction with Defendants, and also that Twitter ended its employment relationships with certain executives. Twitter otherwise denies the allegations in Paragraph 186.

187. The Revenue Product Lead, Bruce Falck, played a central role in Twitter's "Bluebird" product business. Falck was responsible for Twitter's revenue generation—obviously a critical component of any business—where he was intimately involved in supervising Twitter's advertising partnerships and promotions.

RESPONSE: Twitter admits that Bruce Falck was GM of Revenue and during his employment with Twitter managed the revenue product and other related teams. Twitter otherwise denies the allegations in Paragraph 187.

188. Kayvon Beykpour, the GM of Consumer, was the head of all things consumer-facing for Twitter and took a high profile role on Twitter's investor calls. He was therefore one of the Twitter executives that the Musk Parties believe would have been most intimately involved with how Twitter calculated its mDAU, how it suspended or moderated accounts on its platform, and how it determined that there was always less than 5% spam or false accounts within mDAU on every day of every month of every quarter for all time.

RESPONSE: Twitter admits that Keyvon Beykpour was Twitter's GM of Consumer and was involved in consumer-facing products. To the extent that the first sentence of Paragraph 188 purports to characterize communications between Twitter and investors, Twitter respectfully refers the Court to transcripts of such communications for their complete and accurate contents. Twitter lacks knowledge or information sufficient to form a belief as to the truth of the allegations regarding the beliefs of the Musk Parties in the remainder of Paragraph 188 and therefore denies them on that basis.

189. Twitter also instituted a hiring freeze that extended to existing offers and terminated a third of its talent acquisition team. Contrary to what the Complaint implies, Twitter did not give notice nor request consent for these employment decisions. And while Musk believed that Twitter's workforce required right-sizing, he had bargained for a right to have a say in any such action and the ordinary course provisions required Twitter to seek and obtain the Musk Parties' consent prior to instituting the plan so that Musk could determine whether it was properly targeted at resolving his concerns.

RESPONSE: As to the allegations in the first and second sentences of Paragraph 189, Twitter admits that it determined to slow its hiring in light of the macroeconomic environment, in line with Twitter's past actions and Musk's stated priorities; that it announced on July 7, 2022 that it was reducing the size of its recruiting staff by about 30%; and that it did not and was not obligated to give advance notice of these decisions to Defendants. Twitter otherwise denies the allegations in the first and second sentences of Paragraph 189. The allegations in the third sentence of Paragraph 189 state a legal conclusion to which no response is required. To the extent a response is required, Twitter denies the allegations in the third sentence of Paragraph 189.

190. Additionally, in July 2022, Twitter determined to challenge the Indian government in a lawsuit rather than follow its instructions pursuant to 2021 Information Technology rules. In the past, Twitter has followed obligations imposed by governments, including going as far as blocking pro-Ukrainian accounts for the Russian government. Accordingly, its decision to challenge the Indian government's decisions is a departure from the ordinary course. And while the Musk Parties support free speech, they believe Twitter should follow the laws of the countries in which they operate. Regardless of how the Musk Parties would have decided to proceed, they bargained for the opportunity to understand the issues in the case, perform their own risk assessment, and have a say on strategy.

RESPONSE: Twitter admits that it filed suit to challenge certain blocking orders by the Indian government. Twitter further avers that, in its continuing effort to make its services available to people everywhere, if it receives a valid and appropriately scoped request from an authorized entity, it may withhold access to certain content in the specific jurisdiction that has issued the valid legal

demand or where the content has been found to violate local laws, but that it routinely pushes for limitations on, objects to, or otherwise challenges government requests or laws where such requests are not authorized or properly scoped under local law, are procedurally deficient, or as necessary to defend its users' rights. Twitter otherwise denies the allegations in the first and second sentences of Paragraph 190. Twitter denies the allegations in the third sentence of Paragraph 190. Twitter lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the fourth sentence of Paragraph 190 and therefore denies them on that basis. Twitter denies the allegations in the fifth sentence of Paragraph 190.

191. Twitter held its annual shareholder meeting on May 25, 2022. At that meeting, the shareholders rejected Twitter director Egon Durban's reelection to the board. As such, Durban tendered his resignation to Twitter's Nominating and Corporate Governance Committee. But, that committee did not accept Durban's resignation, and determined to keep him on the board. Twitter did not seek the Musk Parties' consent before rejecting the results of a shareholder vote.

RESPONSE: Twitter admits that it held its annual shareholder meeting on May 25, 2022; that Egon Durban's nomination to the Board of Directors did not receive the support of a majority of the votes cast at that meeting; that, in accordance with Twitter's Corporate Governance Guidelines, in advance of his nomination Mr. Durban tendered his resignation as a member of the board, to be effective on his not receiving a majority of the votes cast for his election at the meeting and the board's acceptance of such resignation; and that the board determined not to accept Mr. Durban's resignation without seeking Defendants' advance consent. Twitter

further avers that Defendants did not reference the board's determination concerning Mr. Durban in their July 8 letter purporting to terminate the Merger Agreement. Twitter otherwise denies the allegations in Paragraph 191.

192. The matters for which Twitter *did* request consent indicate that Twitter recognized it needed to request consent for these types of major actions. For example, Twitter sought the Musk Parties' consent for a formal retention plan. The Musk Parties withheld their consent because they did not believe, among other things, that the retention plan was sufficiently tailored to retain only top employees and that it would reward mediocre employees with unnecessary bonus payments. Consent to the plan was therefore reasonably withheld.

RESPONSE: Twitter denies the allegations in the first sentence of Paragraph 192. Twitter admits that it sought Defendants' consent to implement an employee retention plan on multiple occasions spanning from April to late June 2022, but that Musk refused to grant consent without explanation, and otherwise denies the allegations in the second sentence of Paragraph 192. Twitter lacks knowledge or information sufficient to respond to the allegations in the third sentence of Paragraph 192, because Musk never explained his refusal to authorize a retention plan in any detail or proposed a different retention plan, and denies the allegations on that basis. Twitter further denies the allegations in the fourth sentence of Paragraph 192.

193. Indeed, Twitter approached the Musk Parties for consent on much more minor issues than those outlined above. On June 21, 2022, Twitter sought consent to engage Matthews South (a financial advisor) to negotiate a settlement of Twitter's accelerated stock purchase agreement, which the Musk Parties approved within days of the request. Similarly, on June 24, 2022, Twitter sought approval for a change to employee benefits regarding reimbursement for out of state travel; again, the Musk

Parties provided consent within days. And on July 6, 2022, Twitter sought consent to create a plan to update the platform to allow monetary transfers, a request that the Musk Parties approved within one day.

RESPONSE: Twitter admits that it sought Defendants' consent on additional issues, and otherwise denies the allegations in the first sentence of Paragraph 193. The remainder of Paragraph 193 purports to characterize communications between Twitter and Defendants, to which Twitter respectfully refers the Court for their complete and accurate contents.

194. As late as July 7, 2022, the Musk Parties approved a request by Twitter to make changes to their reseller program by switching to direct sales in certain markets. These issues—far more minor than those for which Twitter failed to even seek consent, demonstrate that Twitter knew it should seek consent for major employment decisions. So too, do they lay waste to Twitter's false narrative that Musk has reflexively and unreasonably withheld consent for other actions.

RESPONSE: The first sentence of Paragraph 194 purports to refer to a July 7, 2022 communication between Twitter and Defendants, to which Twitter respectfully refers the Court for its complete and accurate contents. Twitter otherwise denies the allegations in Paragraph 194.

195. Twitter's failure to seek consent for employee departures, its hiring freeze, and its lawsuit against the Indian government constitute material breaches of Section 6.1 of the Merger Agreement. That provision requires Twitter to "use its commercially reasonable efforts to conduct the business of the Company and its Subsidiaries in the ordinary course of business" between the date of the Merger Agreement and closing. If Twitter wishes to take action outside the ordinary course it must first obtain Buyers' consent. But, Musk and Buyers were not given notice of these employment changes or the decision to litigate against the Indian Government and were not asked to provide consent.

RESPONSE: Twitter denies the allegations in the first sentence of Paragraph 195. The second and third sentences of Paragraph 195 purport to characterize Section 6.1 of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents. Twitter admits that it did not seek consent from Defendants before certain employees decided to terminate their employment, because neither Twitter nor the Defendants have a right to bar employees from voluntarily terminating employment. Twitter further admits that it did not provide Defendants notice or seek Defendants' consent before taking certain employment-related actions or initiating a suit against the Indian government. Twitter denies the allegations in the fourth sentence of Paragraph 195.

L. The Musk Parties Met All Of Their Contractual Obligations

196. As set forth above, the Musk Parties have repeatedly approved multiple consent requests by Twitter, thus complying with their obligations under Section 6.1. Contrary to Twitter's assertions, the Musk Parties have not improperly refused to consent to Twitter's (scattershot) requests under the ordinary course covenant, nor have they delayed responding to any of Twitter's requests for consent. Twitter has requested the Musk Parties' consent under that covenant on six occasions, and the Musk Parties approved four of those requests. In each instance that the Musk Parties provided their consent, such consent was given within a week.

RESPONSE: Twitter denies the allegations in the first and second sentences of Paragraph 196. The third sentence of Paragraph 196 purports to characterize communications between Twitter and Defendants, to which Twitter respectfully refers the Court for their complete and accurate contents. Twitter avers

that the Musk Parties have failed to respond to several additional requests for consent.

197. The Musk Parties rejected just two requests for consent. Both rejections were proper exercises of the Musk Parties' rights under the Merger Agreement. The first was Twitter's June 14 request to terminate its revolving credit facility. On June 15, 2022, the Musk Parties rejected this request because they felt it was premature to terminate the company's existing revolving credit facility before the new revolving credit facility contemplated by the Musk Parties' new financing commitments had been put in place at the closing of the transaction. The second was Twitter's June 20, 2022 request to initiate an extravagant new employee retention program. On June 22, 2022, the Musk Parties rejected this request because they did not believe spending lavishly to broadly retain employees was consistent with Musk's post-closing plans for Twitter or what appeared to be a looming economic downturn that would put stress on the company's finances and potentially require headcount reductions to control costs.

RESPONSE: Twitter admits that Defendants rejected two requests for consent, and otherwise denies the allegations in the first sentence of Paragraph 197. Twitter avers that the Musk Parties have failed to respond to several additional requests for consent, including over the last few weeks. Twitter denies the allegations in the second sentence of Paragraph 197. The third and fifth sentences of Paragraph 197 purport to characterize a communication between Twitter and Defendants, to which Twitter respectfully refers the Court for its complete and accurate contents. Twitter lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the fourth or sixth sentences of Paragraph 197, and therefore denies them on that basis.

198. Additionally, the Musk Parties complied with all obligations to obtain financing. Twitter complains that the Musk Parties asked Bob Swan, who the Musk

Parties briefly engaged to assist with the transaction, to depart the deal team, but the Musk Parties have no obligation to use any particular professionals in closing the deal. The Musk Parties quickly replaced Swan with Antonio Gracias, and Gracias dove in to the financing as soon as he was brought on. In any event, Twitter's reference to the removal of Swan from the team is a red herring—the Musk Parties' counsel were diligently working on obtaining financing up to the termination. For example, as late as June 27, 2022, the Musk Parties' deal counsel sent comments on the credit agreement back to Morgan Stanley (the lead arranger of credit for the transaction) and its counsel. And the Musk Parties' counsel continued having discussions with Morgan Stanley and its counsel about a perfection certificate, a necessary component of the debt financing for the transaction, right up to the afternoon of July 8, 2022.

RESPONSE: Twitter denies the allegations in the first sentence of Paragraph 198. As to the second and third sentences of Paragraph 198, Twitter admits that Defendants asked Bob Swan to depart the deal team. Twitter denies that Antonio Gracias—or anyone else—ever replaced Mr. Swan. Twitter avers that Defendants fired Mr. Swan abruptly and without explanation after weeks of work, and that Mr. Gracias never contacted Twitter or its advisors during the nine days between his nominal appointment and Defendants' purported termination of the Merger Agreement. Twitter otherwise denies the allegations in the second and third sentences of Paragraph 198. Twitter denies the allegations in the fourth sentence of Paragraph 198. The allegations in the fifth and sixth sentences of Paragraph 198 purport to characterize communications between Defendants' counsel and Morgan Stanley and its counsel, to which Twitter respectfully refers the Court for their complete and accurate contents.

M. The Musk Parties Properly Terminated The Merger Agreement And Twitter Brought Suit

199. Due to Twitter’s persistent disregard of its contractual obligations, on July 8, 2022, the Musk Parties terminated the Agreement. Until then, as discussed *supra* ¶¶196-98, the Musk Parties had met all their contractual obligations, devoting substantial resources to pursuing the transaction, including financing.

RESPONSE: Twitter admits that Musk purported to terminate the Merger Agreement on July 8, 2022. Twitter denies the remaining allegations in Paragraph 199.

200. On July 12, 2022, Twitter sued the Musk Parties, challenging not only their termination, but introducing blunderbuss claims regarding the Musk Parties’ supposed breach of their obligations to close, consummate financing, provide information, consent to operational changes, refrain from disparagement, and preserve confidentiality, most of which are premature and all of which are meritless.

RESPONSE: Twitter admits that on July 12, 2022 it filed litigation seeking specific performance of Defendants’ obligations under the Merger Agreement. Twitter denies the remaining allegations in Paragraph 200.

COUNT I
Fraud

201. Defendants/Counterclaim-Plaintiffs hereby incorporate by reference each of the foregoing paragraphs, as if fully set forth herein.

RESPONSE: Twitter repeats and incorporates by reference its responses to the foregoing allegations in the Counterclaims.

202. Section 4.6 of the Merger Agreement represents that Twitter’s SEC filings have “complied in all material respects with the requirements of the Securities Act and the Exchange Act, as the case may be, and the applicable rules and regulations promulgated thereunder, and none of the Company SEC Documents at

the time it was filed” and do not contain “any untrue statement of a material fact or omit[] to state any material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they were made, or are to be made, not misleading.”

RESPONSE: Paragraph 202 purports to quote from Section 4.6 of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents.

203. As described above, ¶¶109-49, Twitter’s Company SEC Documents contained numerous false and misleading statements.

RESPONSE: Denied.

204. Thus the representations in Section 4.6 of the Merger Agreement were false or misleading when made.

RESPONSE: Denied.

205. Twitter made these representations with knowledge that they were false or misleading, or with reckless disregard for their truth.

RESPONSE: Denied.

206. The representations were made with the intent to induce Defendants/Counterclaim-Plaintiffs into acquiring Twitter at an artificially inflated price.

RESPONSE: Denied. Twitter further responds that Musk disclaimed pre-signing diligence, advanced an unsolicited offer at a significant premium to market value, and refused to enter negotiations regarding purchase price.

207. Defendants/Counterclaim-Plaintiffs relied upon these representations in entering into the Merger Agreement.

RESPONSE: Denied.

208. Defendants/Counterclaim-Plaintiffs have been harmed as a result, and now thus seeks rescission of the Merger Agreement.

RESPONSE: Denied.

COUNT II
Violation of the Texas Securities Act
(Tex. Gov't Code § 4008.052 et. seq)

209. Defendants/Counterclaim-Plaintiffs hereby incorporate by reference each of the foregoing paragraphs, as if fully set forth herein.

RESPONSE: Twitter repeats and incorporates by reference its responses to the foregoing allegations in the Counterclaims.

210. Twitter offered to sell and sold Twitter securities by means of written and/or oral communications which included false or misleading statements of material fact and/or omissions of material fact that were necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

RESPONSE: Denied.

211. Twitter made the offers to sell to Defendants/Counterclaim-Plaintiffs in Texas and Counterclaim-Plaintiffs entered into the Merger Agreement with Twitter from Texas.

RESPONSE: Denied.

212. At the time of the Merger Agreement, Defendants/Counterclaim-Plaintiffs did not know the false or misleading statements and omissions.

RESPONSE: Denied.

213. Had Defendants/Counterclaim-Plaintiffs known about the false or misleading statements and omissions, they would not have entered into the Merger Agreement and agreed to purchase the Twitter securities.

RESPONSE: Denied.

214. Twitter's offer and sale violated Tex. Gov't Code § 4008.052.

RESPONSE: Denied.

215. Defendants/Counterclaim-Plaintiffs are therefore entitled to rescind the Merger Agreement pursuant to Tex. Gov't Code § 4008.052.

RESPONSE: Denied.

COUNT III
Breach of Contract

216. Section 6.4 of the Merger Agreement requires Twitter to “furnish promptly” to Defendants/Counterclaim-Plaintiffs and their representatives “all information concerning the business, properties and personnel of the Company and its Subsidiaries as may reasonably be requested in writing, in each case, for any reasonable business purpose related to the consummation of the transactions contemplated by this Agreement”

RESPONSE: Paragraph 216 purports to quote from Section 6.4 of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents.

217. Section 6.11 of the Merger Agreement requires Twitter to provide information to Buyers to assist them in securing financing.

RESPONSE: Paragraph 217 purports to characterize Section 6.11 of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents.

218. Defendants/Counterclaim-Plaintiffs made information requests under these provisions on May 19, 2022, May 25, 2022, May 31, 2022, and June 6, 2022, which was for a reasonable business purpose related to the consummation of the transaction and to secure financing. Twitter did not provide the requested information, relying on a series of extra-contractual justifications. On June 6,

Defendants/Counterclaim-Plaintiffs asserted that Twitter was in breach of the Merger Agreement by refusing to provide the information.

RESPONSE: Twitter admits that on June 6, 2022 Defendants asserted that Twitter was in breach of the Merger Agreement, and otherwise denies the allegations in Paragraph 218. Twitter further responds on information and belief that Defendants' information requests were propounded with the goal of developing a pretext to evade their obligations under the Merger Agreement.

219. Twitter did not cure this breach. Defendants/Counterclaim-Plaintiffs are thus entitled to terminate the Merger Agreement under Section 8.1(d)(i).

RESPONSE: Denied.

COUNT IV
Breach of Contract

220. Section 6.1 requires Twitter to “use its commercially reasonable efforts to conduct the business of the Company and its Subsidiaries in the ordinary course of business” between the date of the Merger Agreement and closing.

RESPONSE: Paragraph 220 purports to characterize Section 6.1 of the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents.

221. Twitter breached this provision by undertaking dramatic employment actions without first requesting the consent of Buyers, including but not limited to: terminating key employees, instituting a hiring freeze, refusing orders of the Indian government and subsequently initiating litigation in that country, and firing 30% of its recruiting workforce.

RESPONSE: Denied.

222. This breach cannot be cured. Defendants/Counterclaim-Plaintiffs are thus entitled to terminate the Merger Agreement under Section 8.1(d)(i).

RESPONSE: Denied.

COUNT V
Declaratory Judgment

223. Defendants/Counterclaim-Plaintiffs do not have to close the Merger Agreement if Twitter has suffered a MAE between signing and closing.

RESPONSE: Paragraph 223 purports to characterize the Merger Agreement, to which Twitter respectfully refers the Court for its complete and accurate contents. Paragraph 223 also states a legal conclusion, to which no response is required. To the extent a response is required, Twitter denies the allegations in Paragraph 223.

224. MAE is defined in the Merger Agreement as “any change, event, effect or circumstance which, individually or in the aggregate, has resulted in or would reasonably be expected to result in a material adverse effect on the business, financial condition or results of operations of the Company and its Subsidiaries, taken as a whole.”

RESPONSE: Denied. Twitter respectfully refers the Court to the Merger Agreement for the complete and accurate definition of an MAE.

225. The revelation that Twitter’s critical mDAU metric has little relation to the company’s current or future value, as well as the revelation that the mDAU count is materially lower than disclosed would breach Section 4.6 of the Merger Agreement because it will result or “would reasonably be expected to result” in a material adverse effect on the business, financial condition, or results of operations of the Company and its Subsidiaries.

RESPONSE: Denied.

226. Section 7.2(b) excuses Defendants/Counterclaim-Plaintiffs of the requirement to close if a representation and warranty is untrue, and Twitter has suffered an MAE as a result. If Section 7.2(b)'s closing condition has failed Defendants/Counterclaim Plaintiffs may terminate the Merger Agreement under Section 8.1(d)(i).

RESPONSE: Paragraph 226 purports to characterize Sections 7.2 and 8.1 of the Merger Agreement, to which Twitter respectfully refers the Court for their complete and accurate contents. Paragraph 226 also states a legal conclusion, to which no response is required. To the extent a response is required, Twitter denies the allegations in Paragraph 226.

227. Defendants/Counterclaim-Plaintiffs seek a declaration that an MAE has occurred under the Merger Agreement, and thus may terminate that agreement.

RESPONSE: Paragraph 227 does not state an allegation to which a response is required. To the extent a response is required, the allegations in Paragraph 227 are denied.

DEFENSES

Twitter asserts the following defenses with respect to the causes of action in the Counterclaims, without assuming the burden of proof or persuasion where such burden rests on Defendants. Twitter reserves the right to supplement, amend, modify, or withdraw its defenses as discovery progresses or as justice may require. Specifically and without limitation, Twitter reserves the right to assert any additional

defenses or third-party claims not asserted herein of which it becomes aware through discovery or other investigation.

FIRST DEFENSE

Defendants' Counterclaims are barred, in whole or in part, because they fail to state a claim upon which relief can be granted.

SECOND DEFENSE

Defendants' Counterclaims are barred, in whole or in part, because Twitter has complied in all material respects with all relevant representations, warranties, covenants, and obligations under the Merger Agreement.

THIRD DEFENSE

Defendants' Counterclaims are barred, in whole or in part, by the terms of the Merger Agreement.

FOURTH DEFENSE

Defendants' Counterclaims are barred, in whole or in part, because Defendants are in breach of their obligations under the Merger Agreement, as set forth herein and in Twitter's Complaint.

FIFTH DEFENSE

Defendants' Counterclaims are barred, in whole or in part, because Defendants have not suffered any injury or harm, irreparable or otherwise, as a result of any action, inaction, or conduct by Twitter.

SIXTH DEFENSE

Defendants' Counterclaims are barred, in whole or in part, because Twitter has not suffered and is not likely to suffer a Material Adverse Effect as alleged in the Counterclaims.

SEVENTH DEFENSE

Defendants' Counterclaims are barred, in whole or in part, by Defendants' failure to comply with Rule 9(b).

EIGHTH DEFENSE

Defendants' Counterclaims are barred, in whole or in part, because Defendants fail to identify any false or misleading statement by Twitter.

NINTH DEFENSE

Defendants' Counterclaims are barred, in whole or in part, because Twitter did not know, was not reckless in not knowing, and in the exercise of reasonable care could not have known, of any alleged untruths or omissions in the alleged false and misleading statements.

TENTH DEFENSE

Defendants' Counterclaims are barred, in whole or in part, because Defendants did not rely on any of the alleged false or misleading statements.

ELEVENTH DEFENSE

Defendants' Counterclaims are barred, in whole or in part, because any alleged false or misleading statements were not material.

TWELFTH DEFENSE

Defendants' Counterclaims are barred, in whole or in part, by the doctrine of unclean hands.

THIRTEENTH DEFENSE

Defendants' Counterclaims are barred, in whole or in part, by the doctrines of laches, waiver, estoppel, and/or quasi-estoppel, including, without limitation, because Defendants delayed in asserting their Counterclaims.

FOURTEENTH DEFENSE

Defendants' Counterclaim under the Texas Securities Act is barred, in whole or in part, because Delaware law governs all claims arising out of or relating to the Merger Agreement.

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2022, copies of Plaintiff's Reply to Verified Counterclaims were served via File & ServeXpress upon the following attorneys of record:

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