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October 3, 2022

BY HAND DELIVERY & EFILING

REDACTED VERSION - Filed October 10, 2022

The Honorable Kathaleen St. J. McCormick
Chancellor
Court of Chancery
Leonard L. Williams Justice Center
500 N. King Street, Suite 11400
Wilmington, Delaware 19801

RE: *Twitter, Inc. v. Musk, et al.*,
C.A. No. 2022-0613-KSJM (Del. Ch.)

Dear Chancellor McCormick:

Defendants and Counter-Claim Plaintiffs Elon R. Musk, X Holdings I, Inc. and X Holdings II, Inc. (together, "Defendants") hereby move for sanctions based on Plaintiff Twitter, Inc.'s ("Twitter") direction to whistleblower Peiter "Mudge" Zatko to destroy critical corroborating evidence of Twitter's willful violations of a 2011 FTC Consent Decree (the

"2011 Consent Decree") and 2022 FTC Consent Decree (the "2022 Consent Decree") in June 2022, and attempts to cover those violations up by Twitter executives including CEO Parag Agrawal, Head of Legal, Policy, and Trust Vijaya Gadde, General Counsel Sean Edgett, Chief Privacy Officer Damien Kieran, and others.

Specifically, following Mr. Zatko's firing in January 2022 and his notification to Twitter that he was seeking whistleblower protection under New Jersey law and the Sarbanes-Oxley Act, Twitter negotiated a unique "severance package" with Mr. Zatko in June 2022 that was plainly intended to procure Mr. Zatko's silence and prevent him from coming forward with his whistleblower disclosures. In addition to making a severance payment far greater than typical for other former executives, Twitter required Mr. Zatko to agree, as a condition to payment, to return ***or destroy*** all documents in his possession containing Twitter information—an instruction that once again differed from Twitter's ordinary course severance agreements requiring an employee simply to "return" such documents.

Mr. Zatko has now testified that, pursuant to this directive, he "[redacted]

[redacted]" when he destroyed (by burning) ten handwritten "[redacted]" notebooks containing "[redacted]" of meetings with Twitter executives in which they admitted to knowingly and intentionally misleading Twitter's regulators. Mr. Zatko also deleted over 100 electronic files, including notes from executive meetings. Twitter's improper instruction to Mr. Zatko, and its failure to ensure that Mr. Zatko instead preserved his notes and records, has deprived Defendants of critical corroborating evidence of Mr. Zatko's allegations which would support his account of key meetings and conversations relevant to this case.

Twitter's failure to ensure the preservation of Mr. Zatko's relevant materials was unlawful, as it violates the plain terms of two FTC Consent Orders—the 2011 Consent Order, and an amended order entered in May 2022 based on Twitter's violation of the 2011 Consent Order through its deceptive use of customer information, both of which require Twitter to preserve "[f]or 5 years from the date created or received, all records, whether prepared by or on behalf of Respondent, that contradict, qualify, or call into question Respondent's compliance with this Order." The destruction of Mr. Zatko's notebooks at Twitter's direction also violates Securities and

Exchange Commission ("SEC") Rule 240.21F-17, which prohibits any person from taking "any action to impede an individual from communicating" with SEC staff about a possible securities law violation. Mr. Zatko has testified that he has been contacted by the SEC, as well as the United States Department of Justice, the FTC, and foreign regulators, regarding his disclosures; Twitter's unlawful instruction to Mr. Zatko in contravention of the FTC Consent Orders and SEC Rule 240.21F-17 has deprived these governmental agencies of evidence of Twitter's wrongdoing.

Sanctions are warranted here. Aware that Mr. Zatko intended to blow the whistle on Twitter's knowing and intentional violation of the 2011 FTC Consent Order, as well as other deceptive conduct, Twitter nevertheless failed to ensure the preservation of Mr. Zatko's evidence by instructing and allowing him to delete that evidence as a precondition to his receipt of an extraordinary [redacted] severance payment—which payment was itself a violation of Section 6.1(e) of the Merger Agreement prohibiting Twitter from granting severance to former employees outside the ordinary course without Defendants' consent. Twitter's attempt to buy Mr. Zatko's silence failed, but Twitter achieved its secondary aim of ensuring that Mr. Zatko's

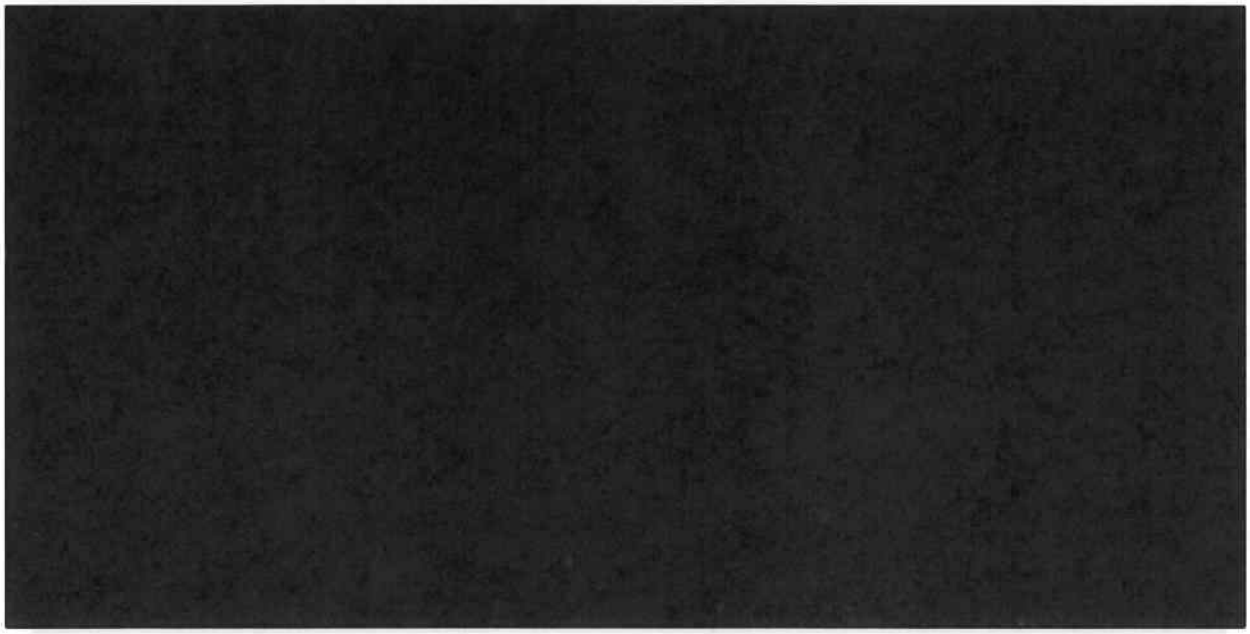
corroborating evidence would never come to light. For the reasons herein, Defendants' request for sanctions should be granted.

I. BACKGROUND

Peiter "Mudge" Zatko served as Twitter's Head of Security from November 2020 to January 2022. In December 2021, in connection with a quarterly meeting of the Risk Committee of Twitter's Board of Directors, Mr. Zatko became concerned that Twitter's Chief Information Security Officer intended to present information to the committee that was inaccurate and misleading. Ex. 1 (Zatko Dep. Tr.) at 73:20-84:4. To address this concern, between December 4 and December 7, Mr. Zatko proposed to Mr. Agrawal that he would [redacted] *Id.* at 74:5-19. Mr. Agrawal instructed Mr. Zatko not to correct the misleading presentation. *Id.* at 75:10-77:7. On December 15, 2021, in advance of the misleading presentation to Twitter's Risk Committee, Mr. Zatko sent Mr. Agrawal and Dalana Brand—Twitter's Head of People—an email detailing the ways in which the presentation was misleading. Ex. 2 (TWTR_000210300). That same day, Mr. Agrawal had

a conversation with Mr. Zatko [redacted]

[redacted]



Ex. 3 at TWTR_000215122 (highlighting added).

On December 16, 2021, the Risk Committee was presented with misleading information over Mr. Zatko's objection. Following the meeting, Mr. Zatko sent Mr. Agrawal a screenshot of a Slack thread between [redacted] in which they both expressed agreement with Mr. Zatko's view that the information being presented to the board was inaccurate. Ex. 4 (TWTR_000211857). On January 4, 2022, Mr.

Zatko sent Mr. Agrawal and Ms. Brand a follow-up email re-raising his concern that misleading information had been presented to Twitter's Risk Committee. Ex. 5 (TWTR_000210643). In response, Mr. Agrawal told Mr. Zatko that he would investigate the matter and referred it to the Audit Committee. *Id.*

What followed was not an investigation, but an attempt by Twitter to smear Mr. Zatko. [redacted] Ex. 6 (TWTR_000171552). [redacted] *Id.* Mr. Agrawal also asked for and received the results of an internal investigation into allegations by the then-Chief Information Security Officer that Mr. Zatko had discriminated against her based on her race and gender. Ex. 7 (TWTR_000213645).

The findings of that investigation, sent to Mr. Agrawal on January 18, 2022, ***cleared*** Mr. Zatko of the allegations of discrimination, [redacted]

[redacted] *Id.* at TWTR_000213652. [redacted] *Id.* at TWTR_000213654. Clinging on to that barest of justifications, Mr. Agrawal terminated Mr. Zatko on January 19, 2022. Ex. 8 (TWTR_000210286). Mr. Agrawal's motivation appears to have been self-preservation—the serious technological and information security deficiencies that Mr. Zatko had identified, and which had not been accurately conveyed to the Board, had developed in part under Mr. Agrawal's watch when he was Twitter's CTO; in fact, Mr. Agrawal had previously become "[redacted]" at Mr. Zatko for presenting information to the Risk Committee that [redacted]

On January 21, 2022, Twitter offered Mr. Zatko an ordinary course severance agreement drafted on the same terms as other severance agreements and offering to pay Mr. Zatko [redacted] Ex. 9 (TWTR_000215472). That agreement did not require Mr. Zatko to affirm

that he had not filed a complaint with any government agencies, and it contained a standard clause requiring Mr. Zatko to warrant that he had "[redacted]" *Id.* at TWTR_000215477. Over the subsequent three months, Mr. Zatko and Twitter negotiated his severance package. In his correspondence with Twitter during those negotiations, Mr. Zatko expressly asserted protection under the New Jersey Conscientious Employee Protection Act ("CEPA"), N.J. Stat. Ann. § 34:19-3, which protects against retaliation when an employee discloses or threatens to disclose legal violations by the employer, as well as the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, which protects against retaliation when an employee discloses information regarding a violation of federal securities law by the employer. Ex. 10 (TWTR_000211403). He also reminded Twitter that he had repeatedly warned Twitter's executive team and its Board of Twitter's systemic violations of the 2011 Consent Decree. Dkt. 390 at 6.

Meanwhile, on April 25, 2022, Twitter and Defendants executed the Merger Agreement. Among other provisions, Section 6.1(e) of the Merger Agreement required Twitter to obtain Mr. Musk's consent in order to "grant or provide any severance or termination payments or benefits to any [employee] ***other than the payment of severance amounts or benefits in the ordinary course of business consistent with past practice*** ...." Aware (unlike Defendants) that Mr. Zatko had asserted whistleblower protection, and in an apparent attempt to avoid having to ask for Defendants' approval for their plan to buy Mr. Zatko's silence, Twitter sought to insert a provision into the Company Disclosure Letter modifying Section 6.1(e) to give Twitter more flexibility in administering their employee severance packages—but Defendants rejected Twitter's proposal. Ex. 11 at SKADDEN_0006164-65. Twitter also warranted in the Merger Agreement that "[n]either the Company nor any of its Subsidiaries is in default or violation of any Law applicable to the Company," Merger Agreement Section 4.5(b), and it agreed that as a condition to closing, "each of the representations and warranties of the Company . . . shall be true and correct as of the Closing Date," Merger Agreement Section 7.2(b).

Despite its failure to obtain the flexibility it had sought to make extraordinary severance payments to departing employees, but aware that Mr. Zatko's disclosures would blow up the Merger (and subject Twitter to severe regulatory and legal sanction), Twitter proceeded with its attempt to orchestrate Mr. Zatko's silence. In June of 2022, Twitter increased its severance payment offer to Mr. Zatko from [redacted] to [redacted] Ex. 12 (TWTR_000215295) § 5. [redacted] *Id.* § 7. [redacted] *Id.* § 20. Together, these unusual provisions revealed Twitter's goal of (i) ensuring that Mr. Zatko had not yet filed a whistleblower complaint and (ii) preventing him from using his notes and documents to prepare one in the future.

Mr. Zatko executed the severance agreement on June 24, 2022, and Mr. Edgett executed it on Twitter's behalf on June 28, 2022—***two weeks after*** Twitter began anticipating litigation in this lawsuit. *See, e.g.,* Ex. 13 (Twitter's privilege log at entry 5488). There can be no doubt that Twitter understood that Mr. Zatko's allegations related to the litigation Twitter anticipated. Just as this litigation arose from Mr. Musk's well-founded concerns regarding the accuracy of Twitter's SEC disclosures, Mr. Zatko had identified a series of significant information security and privacy failures that together establish a knowing failure by Twitter to comply with the 2011 FTC Consent Decree, thereby rendering Twitter's SEC disclosures (including its disclosures regarding its compliance with laws) false. And while Mr. Zatko has credibly testified that he is pursuing his claims based on his deeply held belief that Twitter was engaged in serious misconduct, Ex. 1 at 374:24-376:5, Twitter has repeatedly suggested that Mr. Zatko has opportunistically bootstrapped his claims to Defendants' claims, Ex. 1 at 381:8-25. Twitter plainly understood the relevance of Mr. Zatko's claims to Mr. Musk's, and yet it nevertheless instructed Mr. Zatko to destroy evidence.

Mr. Zatko filed his Whistleblower Complaint on July 6, 2022, and destroyed the documents that he has testified Twitter instructed him to destroy on July 7, 2022. Ex. 14 (TWTR 000215282). As part of this destruction of evidence, Mr. Zatko burned a series of notebooks which he testified contained [redacted] notes of his time at Twitter. Ex. 1 at 387:22-25; 403:5-17. The Court need not guess what Mr. Zatko's notebooks said—Mr. Zatko testified that he prepared his July 6 Whistleblower complaint based in part on the notes contained in the notebooks that Twitter directed him to destroy. *See id.* at 387:20-24 (Mr. Zatko testifying that he quoted from his notebooks in his Whistleblower complaint, including conversations between Yoel Roth regarding bots and spam accounts on Twitter).

Twitter's instruction to Mr. Zatko to destroy his records deprives Defendants of key contemporaneous evidence corroborating Mr. Zatko's testimony about Twitter's misrepresentations to the government and to its investors. Among other things, Mr. Zatko has testified that Twitter [redacted] *id.* at 114:3-5, that he informed Twitter's executive team (including CEO Parag Agrawal) on multiple occasions that Twitter [redacted] *id.* at

116:9-117:15, and that Mr. Edgett affirmed to Mr. Zatko that Twitter was [redacted] *id.* at 120:20-121:8.

In addition to its desperate attempts to smear Mr. Zatko, *see, e.g.* Dkt. Dkt. 390 at 13, or its even more desperate attempts to link him to Defendants and their counsel in an unhinged, unsupported, and irrational conspiracy theory, *see, e.g.*, Dkt. 671, Twitter has responded to Mr. Zatko's damning disclosures by suggesting that Mr. Zatko's recollection of events is not corroborated because he did not [redacted] Ex. 1 at 387:16-24. Of course, as Twitter knew and as discovery has revealed to Defendants, Mr. Zatko *did* make a record of all the meetings he attended at Twitter—in the [redacted] he took while at Twitter, *id.*at 387:20-24, which Twitter directed him to destroy.

On top of instructing Mr. Zatko to destroy evidence as a precondition of receiving his severance, Twitter has shielded many documents regarding Mr. Zatko's termination in privilege. But attorney client privilege cannot be claimed where legal advice is "sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have

known to be a crime or fraud." Delaware Rule of Evidence 502. Additionally, Twitter is selectively wielding privileged information as both sword and shield in connection with its investigation into Mr. Zatko—producing privileged information when it is helpful, and withholding when it is not. For example, while Twitter has produced the results of its Audit Committee investigation into Mr. Zatko's allegations, which purports to clear the Company of wrongdoing, Twitter has withheld as privileged all communications between the Audit Committee and the company regarding the determination.

II. DISCUSSION

Twitter should not be rewarded for its repeated attempts to hide Mr. Zatko's whistleblower information and related discovery; sanctions are appropriate here. Defendants respectfully request that the Court: (1) draw an adverse inference that the contents of Mr. Zatko's notebooks and files that Twitter instructed him to destroy would have corroborated his testimony, and (2) order Twitter, within one week, to produce all privileged communications and work product surrounding Mr. Zatko's termination,

severance agreement, and instruction to destroy documents under the crime-fraud exception and due to Twitter's selective waiver.

"Discovery abuse has no place in [Delaware] courts, and the protection of litigants, the public, and the bar demands nothing less than that [Delaware] trial courts be diligent in promptly and effectively taking corrective action to 'secure the just, speedy and inexpensive determination of *every* proceeding' before them." *James v. Nat'l Fin. LLC*, 2014 WL 6845560, at *8 (Del. Ch. Dec. 5, 2014) (alteration and emphasis in original) (citation omitted).

Twitter's conduct here warrants sanction. In fact, given that Twitter appears to have knowingly and intentionally procured the destruction of whistleblower evidence in bad faith in order to hide it from discovery (and from regulators), in violation of an FTC Consent Order and federal law, Defendants believe that Twitter's conduct warrants a case-terminating sanction. *See Positran Mfg., Inc. v. Diebold, Inc.*, 2003 WL 21104954, at *2 (D. Del. May 15, 2003) (case-terminating sanctions appropriate where a party has spoliated evidence "willfully or in bad faith" and with the intent "to prevent the other side from examining the evidence.").

At the very least, Twitter's wrongful procurement of the destruction of Mr. Zatko's evidence warrants an adverse inference that those materials would corroborate Mr. Zatko's sworn testimony. *See Terramar Retail Ctrs., LLC v. Marion #2-Seaport Tr. U/A/D June 21, 2002*, 2018 WL 6331622, at *14 (Del. Ch. Dec. 4, 2018) (Court would be "justified" in granting adverse inference where party obstructed discovery and failed to produce documents); *see generally James*, 2014 WL 6845560, at *13 (recognizing the appropriateness of "the entry of an order under Rule 37(b)(2)(A) that deems designated facts to be established or which draws an inference as to a particular issue that is adverse to the party that failed to comply with its discovery obligations."). Courts have granted adverse inferences under similar circumstances involving intentional destruction of handwritten notes. *See Positran*, 2003 WL 21104954, at *4 (imposing an adverse inference where a party destroyed handwritten notes that would have been relevant to the case). Twitter's instruction to Mr. Zatko to destroy his notes deprived Defendants of the opportunity to obtain evidence corroborating Mr. Zatko's testimony over that of self-interested Twitter employees; an adverse

inference that his notes would have supported his testimony is thus warranted.

In addition, Twitter should be compelled to produce all documents and communications regarding Mr. Zatko's termination that have previously been withheld on the basis of attorney-client privilege, given the appropriate application of the crime-fraud exception here. "The crime-fraud exception rests on the premise that 'when a client seeks out an attorney *for the purpose* of obtaining advice that will aid the client in carrying out a crime or a fraudulent scheme, the client has abused the attorney-client relationship and stripped that relationship of its confidential status.'" *Buttonwood Tree Value Partners, L.P. v. R.L. Polk & Co.*, No. CV 9250-VCG, 2018 WL 346036, at *6 (Del. Ch. Jan. 10, 2018) (emphasis in original). The crime-fraud exception is properly invoked when the proponent makes a "prima facia showing that a reasonable basis exists to believe a fraud has been perpetrated or attempted." *Princeton Ins. Co. v. Vergano*, 883 A.2d 44, 54 (Del. Ch. 2005).

Here, Twitter included bespoke provisions in Mr. Zatko's severance agreement that were plainly designed to silence Mr. Zatko by depriving

him—and regulators, law enforcement agencies, and Defendants—of evidence corroborating his whistleblower disclosures. That intention was not lost on Mr. Zatko, who has testified that he understood he [redacted] when he destroyed his notebooks and other files. Ex. 1 at 403:5-17.

Accordingly, Defendants have made out a prima facie case that Twitter intentionally instructed Mr. Zatko to destroy evidence, in violation of Twitter's FTC Consent Orders, SEC Rule 240.21F-17, and Twitter's duty to preserve documents in anticipation of litigation. Twitter has thereby waived the privilege over all legal advice it sought related to its violation of those laws in connection with Mr. Zatko's termination and severance agreement.

Even aside from the crime-fraud exception, Twitter has waived privilege over materials relating to its investigation into Mr. Zatko's disclosures. Specifically, Twitter produced a copy of its investigative report into Mr. Zatko's complaints in its entirety, even though this document was stamped attorney client privileged and attorney work product. Ex. 15 (TWTR_000210464). At the same time, Twitter has withheld dozens of

documents and communications pertaining to that investigative report as privileged. Ex. 16 (September 25, 2022, 8:00 pm ET email from K. Bonacorsi dated September 25, 2022, listing privileged log entries reflecting sword and shield issues). It is well-established that "[a] party cannot use the attorney-client privilege as both a sword and shield by 'tak[ing] a position in litigation and then erect[ing] the attorney-client privilege in order to shield itself from discovery by an adverse party who challenges that position.'" *In re Est. of Tigani*, 2013 WL 1136994, at *3 (Del. Ch. Mar. 20, 2013) (quoting *Pfizer Inc. v. Warner-Lambert Co.*, 1999 WL 33236240, at *1 (Del. Ch. Dec. 8, 1999)). Here, Twitter improperly seeks to do exactly that, by relying on its internal investigation of Mr. Zatko and then claiming privilege to prevent Defendants from examining the communications and documents that were relied on and form the basis of the conclusions reached by the investigation. *See In re Estate of Tigani*, 2013 WL 1136994, at *3-4 (Del. Ch. 2013).

Even worse, Twitter has selectively disclosed certain portions of communications that it believes are favorable to its case, while redacting the remainder of the communications on the basis of privilege. *See, e.g.*, Ex. 17, Entry 251, September 22 Privilege Log (TWTR_000210653); Ex. 18, Entry

194, September 22 Privilege Log (TWTR_000210522). In one particularly egregious example, Twitter produced an e-mail sent by Dalana Brand relating to security concerns raised by Mr. Zatko with substantial redactions. Ex. 19 (TWTR_000210831). Ms. Brand was questioned on this document during her deposition, and both she and Twitter's counsel purported to affirm that the redactions concealed attorney-client privileged information. Ex. 20 (Brand Dep. Tr.) at 89:22-90:11 [redacted].

Then, apparently deciding that it liked the substance of her redacted email, Twitter produced this email in unredacted form *after* Ms. Brand's deposition. Ex. 19 (TWTR_000210831). In these circumstances, the Court should find that privilege has been waived. *See, e.g., Am. Bottling Co. v. BA Sports*

Nutrition, LLC, 2021 WL 529099, at *6 (Del. Super. Ct. Feb. 11, 2021) (finding waiver where, "[a]fter asserting privilege over [witness's] statement in the August 10 email, [party] decided late in the discovery process to produce that email without redacting [witness's] statements about [party's] counsel's conclusion…).

III. CONCLUSION

Defendants respectfully request an order (1) drawing an adverse inference that the contents of Mr. Zatko's notebooks and files that Twitter instructed him to destroy would have corroborated Mr. Zatko's sworn testimony, and (2) compelling Twitter to produce, within one week, all documents and communications relating to Mr. Zatko's termination, severance agreement, and instruction to destroy documents that have been withheld to date based on an assertion of attorney-client privilege (or withheld for any other reason).

Respectfully,

/s/ Edward B. Micheletti

Edward B. Micheletti (ID No. 3794)

Words: 3,899

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CERTIFICATE OF SERVICE

I, Edward B. Micheletti, hereby certify that on October 10, 2022, a Redacted Version of the Letter to The Honorable Kathaleen St. J. Mccormick From Edward B. Micheletti, Esquire, Regarding Defendants' Motion for Sanctions Regarding Twitter's June Instruction to Whistleblower to Destroy Evidence was served electronically via File & Serve*Xpress* upon the following counsel of record:

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