QUINN EMANUEL URQUHART & SULLIVAN, LLP
Alex Spiro (*pro hac vice* forthcoming)
alexspiro@quinnemanuel.com
51 Madison Ave 22nd floor
New York, NY 10010
Telephone: (212) 849-7000
Facsimile: (212) 849-7100

Michael T. Lifrak (Bar No. 210846)
michaellifrak@quinnemanuel.com
Joseph C. Sarles (Bar No. 254750)
josephsarles@quinnemanuel.com
Alex Bergjans (Bar No. 302830)
alexbergjans@quinnemanuel.com
Aubrey L. Jones (Bar No. 326793)
aubreyjones@quinnemanuel.com
865 S. Figueroa Street, 10th Floor
Los Angeles, California 90017
Telephone: (213) 443-3000
Facsimile: (213) 443-3100

Attorneys for Elon Musk, X HOLDINGS I, INC., and X HOLDINGS II, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WILLIAM HERESNIAK, on behalf of himself and all others similarly situated, Plaintiff, vs. ELON R. MUSK, X HOLDINGS I, INC., X HOLDINGS II, INC., and TWITTER, INC., Defendant.	CASE NO. 3:22-CV-03074-CRB (SK) **DEFENDANTS ELON MUSK, X HOLDINGS I, INC. AND X HOLDINGS II, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO EXPEDITE AND COORDINATE DISCOVERY** Judge: Hon. Sallie Kim Courtroom: C, 15th Floor

PRELIMINARY STATEMENT

Plaintiff seeks—without credible justification—overbroad and disruptive discovery from Defendants Elon Musk, X Holdings I, Inc., X Holdings II, Inc. ("Musk Defendants"), and Twitter, Inc. before the scheduled deadline to file motions to dismiss and before the Rule 26 conference has been conducted. Defendants are currently engaged in a complex and compressed action in Delaware Chancery Court over Mr. Musk's prospective buy-out of Twitter, with discovery set to close in September and an expedited trial set to begin on October 17 (*Twitter, Inc. v. Musk, et al.*, C.A. No. 2022-0613 KSJM ("Delaware Action")).

In an effort to inject himself into the Delaware Action, Plaintiff filed a slap-dash complaint that is unlikely to survive pleading motions, and now seeks premature discovery in a transparent fishing expedition. Plaintiff asks that the Court order Defendants to produce ***all discovery exchanged*** and permit him to participate in ***all depositions*** in the Delaware Action. (Dkt. 26; Declaration of Joseph Sarles ("Sarles Decl.") ¶ 2, Ex. 2.) To justify his extraordinary and burdensome request, Plaintiff claims he needs this discovery in order to prepare a potential motion for a preliminary injunction or declaratory judgment before the trial concludes in the Delaware Action or the merger closes. (Dkt. 26 at 2.)

Plaintiff's explanation and sudden claim of urgency are contradicted by the record and his counsel's admissions in this case. Plaintiff has not sought an injunction or emergency relief in the three months since he filed this case. He is not seeking to block the merger or to obtain any interim relief that will not be available at the conclusion of the Delaware Action—to the contrary, his pleaded theory is that he has been damaged by the decline in Twitter's stock price following Mr. Musk's announcement that the merger was temporarily on hold. In fact, Plaintiff has conceded this entire dispute is not even ripe yet, because he will not even know what type of declaratory judgment or injunction he will seek until ***after*** the Delaware Action is resolved. (Sarles Decl. ¶ 2.) Plaintiff's request for a declaratory judgment or equitable relief is contingent on the outcome of the Delaware trial and may even be moot if Twitter prevails. (*Id.*) And as Plaintiff's motion makes clear, he will not suffer any irreparable harm if he is not permitted to conduct discovery before the Delaware Action concludes. (Dkt. 26 at 9.)

There is no good cause to grant Plaintiff's request for expedited and coordinated discovery. In the absence of urgency, threat of irreparable harm, or even an explanation of what kind of injunctive relief he intends to seek, Plaintiff's motion is nothing more than a request to ride along on another case's truncated schedule, unbounded by Rule 26's relevance and proportionality requirements. Plaintiff has not even identified any particular witness he must depose or category of documents he needs to review. Nor has Plaintiff demonstrated that his lawsuit can survive a motion to dismiss, which suggests that the real purpose of this motion is to go in search of a viable case theory. On top of all that, Plaintiff's proposal that he participate in the Delaware Action will create an unnecessary distraction and disruptive side show to Defendants as they race to complete discovery and prepare for trial in less than two months. This is the kind of request that the good cause analysis is designed to prevent. It should be denied.

BACKGROUND

Plaintiff files this lawsuit; does not seek a preliminary injunction or any interim relief. Three months ago, on May 25, 2022, Plaintiff, a purported Twitter shareholder, filed this lawsuit. (Dkt. 1.) Plaintiff did not file a motion for preliminary injunction or seek any emergency or interim relief. Plaintiff did not even serve the Defendants with his Complaint and Summons in the month after he filed this lawsuit. (*See generally,* Dkt.) Instead, Plaintiff filed the FAC on July 1, 2022; the parties agreed to a September 9, 2022 deadline to file motions to dismiss and for the motions to be heard on November 21, 2022. (Dkt. 20.)

The FAC asserts three causes of action for aiding and abetting a breach of fiduciary duty, unjust enrichment, and a declaration of the parties' rights under the purported merger agreement between the Defendants. (FAC ¶¶ 155-69.) The merger agreement contains a mandatory forum selection clause requiring that any action relating to the agreement be brought in Delaware and Twitter's bylaws mandate that "any action asserting a claim of breach of a fiduciary duty owed by any director" likewise be brought in Delaware. (Sarles Decl. Ex. 3, at Art. VIII.)

Plaintiff's claim against the Musk Defendants for aiding and abetting a breach of fiduciary duty alleges that two of the eleven directors on Twitter's Board of Directors—not the Board as a whole or even a majority—breached various duties to Twitter in connection with the merger

process. (FAC ¶¶ 155-62.) The FAC does not allege that the two directors at issue, Egon Durban and Jack Dorsey, dominated or even influenced the rest of the Board's unanimous decision to approve the merger agreement. The FAC does not plead any facts to allege that the Musk Defendants created or exploited any breach of fiduciary duty. The FAC does not allege that the Musk Defendants agreed to any side deals with the Board in connection with the merger agreement (the only allegation of any additional transaction is that ***after*** the execution of the merger agreement, Dorsey and Mr. Musk discussed the possibility that Dorsey might continue to hold equity in the surviving corporation). (*Id.* ¶ 85.) Nor does the FAC allege that Board negotiated an unfair price for the merger.

To the contrary, despite being pleaded solely as a direct suit, Plaintiff is not challenging the merger agreement but rather suing to *enforce* it on Twitter's behalf. (FAC ¶¶ 163-65; Dkt. 26 at 9.) Plaintiff does not plead damages beyond the diminution in Twitter's stock price allegedly caused by Mr. Musk's post-April 25 statements. (FAC ¶¶ 133-35;140-41.) In his second cause of action, he seeks vague and unspecified declaratory and injunctive relief the scope of which, his counsel admits, is contingent on the outcome in Delaware. (*Id.* at ¶¶ 163-65; Sarles Decl. ¶ 2.)

Plaintiff's third cause of action for unjust enrichment appears to arise from Mr. Musk's alleged violations of federal securities laws and regulations, principally an alleged failure to timely disclose his purchase of Twitter stock on Form 13D. (FAC ¶¶ 46-52, 62-63, 166-69.)

Plaintiff attempts to insert himself into the Delaware Action. On July 12, 2022, Twitter sued the Musk Defendants in Delaware Chancery Court for specific performance of the merger agreement; the Musk Defendants answered and filed counterclaims. On July 19, the Chancery Court expedited the Delaware Action, setting trial for October 17 and the close of fact discovery for September 12. Meanwhile, in this case, the Court set the Case Management Conference for September 30 and ordered the parties to submit a joint Case Management Statement by September 14. (Dkt. 24.)

In late July—after expedited discovery was ordered in the Delaware Action—Plaintiff began demanding that the parties expedite and "coordinate" discovery with the Delaware Action. Specifically, Plaintiff requested that the Defendants provide him with all discovery produced and

allow him to participate in all depositions in the Delaware Action. (Sarles Decl. ⁋ 2.) When asked to justify this extraordinary and burdensome request, counsel claimed that Plaintiff needed the discovery to prepare a motion for preliminary injunction or declaratory judgment. (*Id.*; Sarles Ex. 1.) When pressed to identify the specific declaration or injunction he sought, Plaintiff's counsel admitted that Plaintiff ***did not yet know*** and that any request ***would be contingent on the outcome of the Delaware Action***. (Sarles Decl. ⁋ 2.) Any motion for an injunction or declaratory judgment would likely be mooted if Twitter succeeded in the Delaware Action, but Plaintiff could still seek some unspecified remedy should Mr. Musk prevail in Delaware or the Defendants reach some negotiated resolution. (*See id.*) Plaintiff is not contemplating bringing any injunction to block the potential merger: neither the FAC, Plaintiff's Motion to Expedite Discovery, nor Plaintiff counsel make any reference to such relief. (*Id.* at ⁋ 5; Dkt. 7, 26.)

On August 10, before the parties conducted a Rule 26(f) conference, Plaintiff served his First Requests for Production. (Sarles Ex. 2.) The RFPs seek "all Discovery produced…by any party or third party in" the Delaware Action, "all transcripts of depositions taken in" the Delaware Action, and "all documents and information" provided to the SEC in connection with acquisition. (*Id.*) To date, Plaintiff has not identified any specific categories of information or witnesses relevant to his hypothetical motion for declaratory or injunctive relief. (*Id.* at ⁋ 6.)

ARGUMENT

I. THERE IS NO GOOD CAUSE FOR COORDINATED OR EXPEDITED DISCOVERY

Plaintiff seeks an order from the Court permitting him to interfere with the Delaware Action and conduct a burdensome fishing expedition months before the Court hears the Defendants' motions to dismiss his defective FAC and before discovery even formally commences in this action. There is no good cause to grant this request. Because the factors courts consider in whether to grant expedited discovery—"(1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with the requests; and (5) how far in advance of the typical discovery process the request was made," *American LegalNet, Inc. v. Davis*,

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.