



POINT: Buyer's remorse isn't an out for Elon Musk

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We've all had buyer's remorse, but few people ever find themselves regretting a \$44 billion purchase. Since Elon Musk agreed to buy Twitter at a substantial premium in April, the stock market has tumbled, with tech stocks among the worst hit. Twitter now seems much less valuable. And for Musk, borrowing against Tesla stock to pay for the company is much more expensive.

Although Musk has good financial reasons to renegotiate his acquisition of Twitter, he can't void the purchase agreement by pleading poor market timing. Musk faces an uphill battle against Twitter in court to get out of the deal.

In his rush to acquire Twitter, Musk left himself little legal room to maneuver. He argues that his exit is justified by inaccurate spambot numbers and Twitter's failure to provide certain information about spambot calculations. Neither argument seems supported by the available evidence or, more important, relevant to the contract Musk signed.

Musk says he is walking away because Twitter misrepresented the percentage of its daily monetizable active users, or dMAUs, that are bots or spam accounts. For years, Twitter represented that bots made up less than 5% of its dMAUs, though it qualified the percentage as an estimate. Whether or not he agreed with it, Musk accepted this number when committing to buy Twitter.

Indeed, Musk made Twitter's bot problems — an issue more visible to power users like himself — a focus of his acquisition effort. When discussing his bid at TedX Vancouver in April, he said, "A top priority I would have is eliminating the spam and scam bots and the bot armies that are on Twitter." He later tweeted, "If our Twitter bid succeeds, we will defeat the spam bots or die trying!"

To the extent they are a problem, spambots were something Musk was aware of and ostensibly planned to solve. These statements make Musk's efforts to recast bots as a reason to terminate the deal unpersuasive. Thus far, Musk has criticized Twitter's bot measurement methodology but has shown no real evidence of its inaccuracy.

In any case, the deal is not contingent on accurate bot counts — even if Twitter’s dMAU numbers are inaccurate, their inaccuracy would have to have a “materially adverse effect” on Twitter’s business to give Musk any potential out.

The agreement requires Twitter to provide Musk with “information concerning its business, properties and personnel” for “any reasonable business purpose related to the consummation” of the deal. Musk claims that Twitter has failed to do so. In his apparent efforts to learn more about how dMAU numbers are calculated, Musk requested not just internal bot reports and metrics but also records of texts and emails about bots and Twitter’s financial models for the deal.

By asking for more information than Twitter is willing to provide, Musk may be able to contrive a legally adequate justification for walking away — but these requests could simply be deemed unreasonable or unrelated to the deal.

Musk’s agreement with Twitter includes a billion-dollar break-up fee (pocket change for Musk) and a specific performance clause. The clause allows Twitter to sue to force Musk to fulfill the terms of the contract and purchase the company for \$54.20 a share. When Musk announced the deal was off in early July, Twitter sued for specific performance.

Now, the Delaware Chancery Court must decide if the contract Musk signed and his behavior since entitle Twitter to this remedy. Twitter argues that it has a contractual right to specific performance and that because Musk breached the contract by publicly denigrating Twitter, he lost any termination options he might have had. The court will consider Musk’s claim that he legitimately terminated the deal because errors in Twitter’s dMAU measurement would have a “materially adverse effect” on the business, and his requests for information weren’t met.

Although the suit boils down to a contract dispute, it has much wider implications.

For Twitter shareholders and its board, being bought out at \$54.20 is preferable to owning Twitter at its current price of \$38 a share or whatever price it might fall to were Musk’s offer to go away. They are the ones suing Musk, but they are not the only ones who care about what happens to Twitter.

Musk’s high-profile battle to acquire — and now to avoid acquiring — Twitter should serve as a reminder of the downsides of centralized social media. Twitter occupies a central place in American political discourse. Unlike other platforms, it is largely open by default — tweets are not limited to friends or groups — so it is a place where the everyman and members of Congress can rub shoulders or shout at one another. As a result, Twitter’s rules have become the subject of political conflict.

Musk’s purchase has been seen as everything from a solution to mismanagement and overbearing content moderation to the capture of vital communications infrastructure by a rogue billionaire. In reality, if Musk comes to own Twitter, both imagined extremes will be tempered by the need to maintain profitability.

Ultimately, this range of concerns militates in favor of decentralization. Reasonable users will always disagree about how to set and enforce platform rules. Many platform governance decisions are simply trade-offs — ridding Twitter of bots would probably require a level of user verification that would discourage anonymous speech. The more users can decide how the content they see is selected and whom they interact with, the less who owns Twitter matters.

Whether the deal goes through or not, the last thing this dispute, or social media, needs is a political solution. Whatever the court's judgment, it will be limited to the parties involved and won't affect other social media platforms. Even with Elon Musk involved, Delaware corporate law and precedent provide a more stable mechanism for passing the torch than a seesaw of partisan speech regulations or punitive antitrust enforcement.

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