



The exceptions in the material adverse effect clause seek to shift the risk away from the seller back to the buyer because the seller can't be responsible for them.



K-NOTES

Can Elon Musk Escape His Twitter Deal?



James Raanan
Attorney

Was there really a breach?

Breaking Elon Musk's Twitter Contract

Elon Musk made headlines when he offered to buy Twitter in April 2022. Not long after, he implied publicly that he wanted out of the deal. Then, his lawyers claimed Musk could opt out of the Agreement and Plan of Merger because Twitter wouldn't disclose its true number of active users. According to their interpretation, this constituted a breach of contract.



We'll see two sophisticated parties and may be skeptical that questions that the buyer could have asked before the deal closed are now being asked."

Key Takeaways

- ➔ **Twitter Spam Accounts: the back and forth**
Twitter has referenced spam accounts in its public filings. They use the number 5% and highlight how difficult it is to compute that figure. They caution everyone reading the document that these are estimations and should not be relied on.
- ➔ **Material Adverse Effect**
If this deal ends up in Delaware Chancery Court, the interpretation of this clause will be crucial. If you wanted to get out of the agreement, you might argue that the spam account count is an effect or circumstance that either constitutes a material adverse effect or is otherwise a breach of a different representation.

- ➔ **Chance to Terminate**
If he does not have valid grounds for terminating the agreement and does not close or terminate it, or if he terminates it wrongfully, one of two things can happen. Under clause 8.3 (b), Twitter might pursue payment of the billion-dollar termination fee, or, more riskily, they could seek to enforce the agreement and specific performance.
- ➔ **Drafting Approach you can Incorporate**
It's a matter of discussing with your client what the most essential value drivers are in a specific transaction. Then determining if any change in those drivers before the transaction is closed will lead you to reject the transaction, as well as how much they would be, and evaluate whether or not it is covered.

