Is Elon Musk Atwitter or a Quitter?
Adapted from the writings of Dayan Yitzhak Grossman
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Weeks after signing a contract to purchase Twitter for $44,000,000,000, Elon Musk tweeted on May 13:

> Twitter deal temporarily on hold pending details supporting calculation that spam/fake accounts do indeed represent less than 5% of users.[1]

According to Stephen Diamond, an associate law professor at Santa Clara University,

> Musk looks to be fishing for a valid argument under which he could back out of paying $44 billion for a company that would be lucky to trade for half that valuation without the bid—and is trading nearly 30% lower even with it—but likely hoping to avoid responsibility for the $1 billion breakup fee that is built into the contract.[2]

In this article and a follow-up, we discuss halachic perspectives on some of the legal issues raised by Musk's gambit.

The billion-dollar breakup fee

> Filings with the Securities and Exchange Commission made public Tuesday afternoon show a $1 billion breakup fee that goes both ways…Musk will owe Twitter $1 billion if he fails to consummate the deal once it is ready to close, or if Musk breaches the agreement in a way that precludes the deal from closing. Twitter would owe Musk $1 billion if shareholders vote against the deal or another entity steps in with an offer that the board accepts instead of Musk's.[3]

The classic halachic precedent for such fees are the stipulations in medieval engagement contracts, among both Ashkenazim and Sephardim, of penalty fees that would be triggered if either side failed to meet its obligations—including both financial commitments and the pledge to be prepared to marry by the specified deadline. The halachic problem with such penalties is that they seem to constitute *asmachta*, a form of conditional obligation that normative halacha considers non-binding because the obligating party did not make a firm decision in his heart (*lo gamar belibo*) to obligate himself.[4]

As recorded by the Rambam, the Spanish *Rishonim* did indeed consider such stipulations to be *asmachta*, so they utilized a contractual mechanism to get around the problem:

> When the chachamim of Spain desired to make a *kinyan* with regard to an *asmachta,* they would do as follows: They would establish a *kinyan* with one party that he is obligated to the other party one hundred *zuz*. After he has undertaken such an obligation, a *kinyan* is made with the person to whom he indebted himself, that as long as a certain condition prevails or if he does such and such, the obligation is waived, effective retroactively to the time of the agreement, but that if this condition does not prevail or if he does not do such and

such, he will sue him for the payment of the money for which he obligated himself.

This is the procedure that is followed in all stipulations that are made between a man and his wife with regard to engagements and other similar matters.[5]

In medieval Ashkenaz, however, no such special mechanisms were utilized, and Ashkenazi *poskim* offered various justifications for why the penalty clauses that were standard in engagement contracts do not constitute *asmachta*:

- Rabeinu Tam maintains that the problem of *asmachta* does not apply to mutual obligations, where each party obligates himself to the other. Consequently, the mutual penalties of engagement contracts are not *asmachta*.[6]
- Some suggest that a contractual clause that is ubiquitous ("a custom followed by the whole world") is not subject to the rule of *asmachta*.[7]
- The dominant approach, however, is that justifiable penalties are not considered *asmachta*, and one who breaks an engagement is liable according to the law for compensation,[8] because jilting the other party causes embarrassment."[9]

The halachic enforceability of the billion-dollar breakup fee in our case depends on which of these various approaches is accepted as normative:

- According to the Spanish chachamim, unless the contract was drafted in a way that avoids *asmachta*, the penalties would indeed constitute *asmachta*. (This is the position of the Rambam and Shulchan Aruch.[10])
- According to Rabeinu Tam, because the breakup fees are mutual, they do not constitute *asmachta*.
- According to the approach that ubiquitous clauses are not subject to the rule of *asmachta*, it would have to be determined whether the type of breakup clause in question is ubiquitous or not. (It should be noted, however, that the normativity of this approach is debated by the *Acharonim*.[11])
- According to the approach that the penalties for breaking engagements do not constitute *asmachta* because they are fair and just compensation for the harm such an action causes, it would have to be determined whether it is reasonable to assume that the harm that Musk and Twitter would cause each other by breaking their agreement is on the order of a billion dollars.[12]

[1]https://twitter.com/elonmusk/status/1525049369552048129.

[2]Therese Poletti. Opinion: Elon Musk doesn't want to buy Twitter anymore, but Twitter can squeeze $1 billion—or more—out of him anyway. MarketWatch. https://www.marketwatch.com/story/elon-musk-doesnt-want-to-buy-twitter-anymore-but-twitter-should-make-him-pay-for-it-11652833353.

[3]Jeremy C. Owens. If Elon Musk and Twitter don't complete their deal, one of them will have to pay $1 billion. MarketWatch. https://www.marketwatch.com/story/if-elon-musk-and-twitter-dont-complete-their-deal-one-of-them-will-have-to-pay-1-billion-11651009838.

[4]Rambam *Hilchos Mechirah* 11:20.
[5]Ibid. 18.
[6]Tosafos Sanhedrin 25a s.v. *Kol ki hai gavna*.
[7]Tosafos Bava Metzia 66a s.v. *Uminyumi amar*.
[8]There is considerable debate among the *Acharonim* about whether this means that one who breaks an engagement is actually legally liable for the humiliation he causes as a tortfeasor—and would thus be liable even in the absence of any contractual stipulation to this effect—or only that there is reasonable basis for the assumption of such an obligation, and these grounds are sufficient legal basis to cure the problem of *asmachta* when a penalty stipulation is actually made. See Shach C.M. *siman* 207 *s.k.* 24; Ketzos Hachoshen ibid. *s.k.* 7; Shu"t Maharik *shoresh* 29 (cited in Bais Shmuel *siman* 50 *s.k.* 14); Sefer Hamiknah *(Kuntres Acharon)* E.H. 50:6; Bais Meir ibid.; Yeshuos Yaakov ibid.; Erech Shai ibid. s.v. Maharik; Shu"t Avodas HaGershuni *siman* 74 s.v. *Amnam*; Shu"t Rav Pe'alim *cheilek* 2 E.H. *siman* 3 s.v. *Ve'atah avo*.
[9]Ibid. Cf. Bais Yosef C.M. *siman* 207 s.v. *Va'adoni avi* HaRosh *z"l kasav*.
[10]C.M. 207:16.
[11]Tikun Sofrim (Rashbash) *sha'ar* 22 p. 65a s.v. *Va'asmachta*; Shu"t Chasam Sofer C.M. *siman* 66 *os* 2 s.v. *Umah shekasav ma'alaso* (cited in Pis'chei Teshuvah C.M. *siman* 200 *os* 2); Shu"t Tshuras Shai (Kama) *siman* 208 s.v. *Va'adayin*; *siman* 413 s.v. *Vegam, siman* 456 s.v. *Ve'efshar* (but see also the same author's Erech Shai C.M. 207:15 s.v. *Hagah*); Piskei Din Shel Batei Hadin HaRabani'im BeYisrael *kerech* 5 pp. 265-70 (R' Yosef Shalom Elyashiv and R' Ovadia Hedaya), *kerech* 14 pp. 36-41; Eimek Hamishpat (Chozim) 31:19; Shimru Mishpat 30:3. Cf. Dibros Moshe Bava Metzia *cheilek* 2 *he'arah* 46.
[12]Bais Meir ibid. (cited in Pis'chei Teshuvah E.H. ibid. *s.k.* 9) allows the penalty to be "a little more" than the precise amount of the harm caused without triggering the rule of *asmachta*, but not "a much larger amount."