

Reneging on a Deal: Is Elon Musk an Unreliable Twit?
Adapted from the writings of Dayan Yitzhak Grossman
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Our previous article discussed the halachic enforceability of the mutual breakup fees in Elon Musk's agreement with Twitter to purchase the company, in light of the principle that certain forms of conditional obligations are not binding (*asmachta la kanya*). In this article, we consider the halachic perspective on Musk's justification for putting the deal "on hold":

Twitter deal temporarily on hold pending details supporting calculation that spam/fake accounts do indeed represent less than 5% of users...[1] I have yet to see *any* analysis that has fake/spam/duplicates at <5%...[2] There is some chance it might be over 90% of daily active users, which is the metric that matters to advertisers.[3]

Various responses to Musk argued that he could and should have done due diligence before committing to the purchase. Moreover:

Musk waived his right to perform due diligence on Twitter before signing the deal, as outlined in Twitter's SEC filing detailing the run-up to the acquisition that was filed Tuesday morning.

"Mr. Musk also disclosed that his acquisition proposal was no longer subject to the completion of financing and business due diligence,"

Twitter stated in its recap of how the deal took shape.[4]

In halacha, Musk's claim is one of *ta'us* (error), in particular *mum bemekach*: a material defect in the property to be purchased of which the purchaser was unaware. This is grounds for reversal even of a sale that has already taken place, a fortiori for the withdrawal without consequence from a mere commitment to purchase.

A substantial undercounting of problematic Twitter accounts could certainly be considered a *mum*. There is, however, an opinion of an anonymous *Rishon* (cited by the Magid Mishneh as "there is someone who has written") that any defect discernible by the purchaser prior to the purchase ("e.g., he could have tested and tasted [the merchandise] and did not make the effort to do so") does not constitute grounds for reversing the sale.[5]

Remarkably, however, there is apparently no other explicit discussion among the *Rishonim* of such a fundamental principle in the laws of purchases, so later authorities disagree over whether this principle is normative or not. Some maintain that it is logical, undisputed by any other *Rishon*, and thus normative,[6] while others argue that on the contrary, it is an outlier opinion, since the distinction between discernible and indiscernible defects is not found (explicitly) in any major *Rishon*,[7] and some important major *Rishonim* imply that they make no such distinction.[8]

Further, several *Acharonim* qualify the aforementioned principle in various ways:

- The Mishneh Lamelech maintains that the principle applies only if the

purchaser has already paid for the item, but if he has not yet paid, his failure to inspect the item does not constitute a waiver of his right to reverse the sale in the event of a defect.[9]

- The Nesivos Hamishpat explains that the failure to make the effort to discover the defect only vitiates the right to reverse the sale if the purchaser proceeds to use the purchased item subsequent to his opportunity to discover the defect.[10] (The Nesivos does accept the principle as normative, with that qualification.[11]) The Maharsham, however, defends the applicability of the principle even to where the purchaser has not yet used the item.[12]
- The Maharsham suggests that the buyer's failure to inspect the item does not constitute a waiver of his right to reverse the sale upon the discovery of a completely unanticipated defect.[13]
- Some maintain that the buyer's failure to inspect the item only constitutes a waiver of his right to reverse the sale if such an inspection would not require time or effort.[14]
- Some maintain that the buyer's failure to inspect the item only constitutes a waiver of his right to reverse the sale if such an inspection is customary and expected.[15]
- Some authorities maintain that where the seller expressly declared the item to be free of the defect in question, or the buyer expressly stated his expectation of it being so, then the buyer has no obligation to inspect the item, and his failure to do so does not constitute a waiver of his right to reverse the sale.[16] Others disagree.[17]

In our case, according to the approaches of the Mishneh Lamelech and the Nesivos, Musk, who has not yet completed the sale nor paid for the company, would certainly be entitled to renege on his agreement in the event of the discovery of a defect. This is of course also the case according to those who simply reject the entire distinction between discernible and indiscernible defects as non-normative. Moreover, perhaps even those who do accept the principle that the buyer's failure to inspect the item for a discernible defect constitutes a waiver of the right to reverse the sale in the event that he discovers one—and do not accept the distinctions of the Mishneh Lamelech and the Nesivos—would still limit its application to an actual sale, as opposed to our case of a mere purchase agreement. The Maharsham's point regarding completely unanticipated defects would not seem to be relevant here, since Musk was well aware of the potential problem when he entered into his agreement:

Musk is also not learning about bots on Twitter for the first time. As [Stephen] Diamond (an associate law professor at Santa Clara University) noted, Musk talked about solving the bot issue as a reason he was buying Twitter in the news release announcing the deal. "Isn't the whole point of him buying it to make it better, so he could improve it?" Diamond asked.[18]

The satisfaction of the criteria of the neglected inspection not requiring time or effort and being customary and expected are factual questions that need to be resolved.

According to the opinion that the buyer's failure to inspect the item is immaterial if the seller explicitly represented it to be free of the defect in question, then if Twitter can be shown to have misrepresented the number of its accounts, Musk would have a strong case to withdraw from his commitment.

The halachic significance of Musk's disclosure that "his acquisition proposal was no longer subject to the completion of financing and business due diligence" is beyond the scope of this article.

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

[2]<https://twitter.com/elonmusk/status/1525723506805288962>.

[3]<https://twitter.com/elonmusk/status/1525727450872926209>.

[4]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>.

[5]Magid Mishneh *Hilchos Mechirah* 15:3. Cf. Pis'chei Teshuvah C.M. *siman* 232 *s.k.* 1.

[6]Shu"t Radvaz *cheilek* 4 *siman* 1206 [136]; Sma C.M. *ibid.* *s.k.* 10.

[7]Shu"t Maharsham C.M. *siman* 385.

[8]Mishneh Lamelech *ibid.* The Mishneh Lamelech implies, however, that where the buyer **has** already used the item, then his failure to inspect it for defects may indeed vitiate his right to reverse the sale upon the discovery of a defect. This position parallels that of the Nesivos Hamishpat cited below.

[9]*Ibid.*

[10]Nesivos Hamishpat *ibid.* *biurim s.k.* 1.

[11]*Ibid.* *chidushim s.k.* 5

[12]Mishpat Shalom *ibid.* *s.v. Sham shelo yada bo*, Shu"t Maharsham *cheilek* 2 *siman* 35 *s.v. Od alah belibi*. The Maharsham concludes by ruling that insofar as the seller has already been paid and is in possession of the purchase funds (*muchzak*), he cannot be compelled to return it, but the implication is that where the buyer has not yet paid and is still in possession of his money, then he too cannot be compelled to pay it to the seller. Elsewhere (Shu"t Maharsham *cheilek* 2 *siman* 231 *s.v. Aval lan"d*) the Maharsham states that once the buyer has used the item, his failure to inspect the item "certainly" (i.e., according to all authorities) vitiates his right to reverse the sale, even where the inspection would have required effort (see below).

Cf. Machanei Efraim *Hilchos Mechirah Dinei Ona'ah siman* 4; Shu"t Chessed Le'Avraham *tinyana* C.M. *siman* 31; Trumas Hakri *ibid.*

[13]Mishpat Shalom *ibid.*

[14]Kiryas Melech Rav *ibid.* *s.v. Od ra'isi lehaRav Hamagid*; Mishpat Shalom *ibid.* *s.v. Ve'ayein Shevus Yaakov*.

[15]Shu"t Kerem Shlomo *siman* 62 *s.v. Uvar min dein*; Kessef Hakodoshim 232 *s.v. Ayein* Sma *s.k.* 10.

[16]Maharsham *ibid.*; Shu"t Divrei Chaim *cheilek* 1 E.H. end of *siman* 92;

Mishpat Shalom ibid. s.v. *Ve'ayein Shevus Yaakov*. Cf. Shu"t Radvaz ibid.
[17]Shu"t Ra'anach *siman* 41 (s.v. *Teshuvah le'inyan hamagazin*); Kerem
Shlomo ibid. s.v. *Uvar min dein*; Erech Hashulchan ibid. *os* 7.
[18]Poletti ibid.