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SLEEPER AGENT: WHEN A PROXY FAILS TO ACT

Adapted from the writings of Dayan Yitzhak Grossman

One of the most controversial events in the GameStop saga was the decision by the Robinhood trading platform (followed by other brokerages) to halt purchases of GameStop (along with several other “meme” stocks), resulting in dozens of lawsuits, with the first accusing Robinhood of “purposefully, willfully, and knowingly removing the stock ‘GME’ from its trading platform in the midst of an unprecedented stock rise thereby deprived (sic) retail investors of the ability to invest in the open market.”

Although various apparently confused critics of Robinhood and the stock market system in general claimed that Robinhood “stole” from them and that its decision somehow indicated that “On trading apps and platforms like Robinhood, the stock you think you own is not actually yours,” it is crucial to understand that Robinhood apparently never prevented anyone from selling any securities he owned, but mere-

ly refused to accept purchase orders for certain securities. In this article, we consider the halachic consequences of the failure of an agent to fulfill a commitment made to his principal to purchase something on his behalf (though Robinhood apparently did not fail to execute purchase orders that it accepted, but merely refused to accept new purchase orders).

The Shulchan Aruch rules:

One who gives money to his agent to purchase specific¹ merchandise for him, and he does not purchase it, he has nothing more than complaints (*tar'umos*) against him (i.e., valid complaints but no actionable claim).²

This is based on a Tosefta³ that is widely ac-

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¹ The Sema (s.k. 1) explains that “specific” is *lav davka*, and that this halacha is not limited to one who instructs his agent to purchase (e.g.) a particular garment from a particular individual, but applies equally to one who instructs him generally to purchase a garment. Cf. Taz; Nesivos Hamishpat *chidushim* s.k. 1.

² Shulchan Aruch C.M. 183:1.

³ Tosefta Bava Metzlia 4:11.

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 Dedicated in loving memory of
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PARSHAS KI SISA
TEA TIME
 Excerpted and adapted from a shiur by
 Rav Yosef Jacobovits

And the B'nei Yisrael shall keep the Shabbos, to make the Shabbos for their generations an everlasting covenant...

Shemos 31:16

The Mishnah Berurah (O.C. 289:2) writes that many people customarily recite this *pasuk* and the following one as part of the Shabbos daytime kiddush. Others have the custom to recite the *pesukim* of “Zachor...” (Shemos 20) as well, though the Mishnah Berurah cautions against reciting only the words “*al kein beirach...*” because one should not recite only part of a *pasuk*. The Aruch Hashulchan (O.C. 289) defends the custom by explaining that only one recites the passage to introduce the kiddush with ideas about Shabbos, not as a reading of the *pasuk*. In either case, reciting these *pesukim* is only a matter of custom and not required.

Although wine (or grape juice) is generally used for kiddush, on Shabbos day it is also permitted to use *chamar medinah*, an important drink in one's time and place. R' Moshe Feinstein says it should be a drink one would serve a prominent

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Sales Tacks

Q Can one sell chametz over the phone or online?

A Contemporary *poskim* permit a person to appoint a *rav* to sell his chametz over the phone. (See Mechiras Chametz Kehilehaso 17:11.) This verbal communication is sufficient to make the *rav* his *shaliach* (proxy) to sell the chametz. Since the seller is not selling the chametz directly to the *rav*, no formal *kinyan* is absolutely required. The *rav* can write down the details of the chametz—value, (continued on page 2)

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cepted by the *Rishonim*.⁴ The Yerushalmi cites this Tosefta, and infers from it the famous principle that

One who causes the assets of another to be unproductive (*hamevatel kiso shel chaveiro*), [the victim] has nothing more than *tar'umos* against him.⁵

The Nesivos Hamishpat, however, argues that the lack of liability for failing to execute a commission is limited to an unpaid agent (since an unpaid employee or agent has the right to renege on his commitment), but a paid agent is indeed liable.⁶ This is based on the important and far-reaching doctrine articulated by the Ritva (who calls it a “great law”)⁷ that the halachic concept of *arvus* (guarantorship) includes a general cause of action for reliance damages: If a promisor makes a promise to a promisee, and the promisee relies upon it and thereby suffers damage (“detrimental reliance”), the promisor is liable even in the absence of an explicit stipulation to this effect. (This is strikingly similar to the common law, under which reliance damages can be awarded for a claim of promissory estoppel.)

But while the Nesivos in several places in his work,⁸ as well as several other *Acharonim*,⁹ accept the Ritva’s doctrine as normative,

with the Chasam Sofer going so far as to declare that in his opinion “all the *poskim*” accept the doctrine,¹⁰ many, perhaps most, *Acharonim* vigorously dispute this, arguing that many earlier *poskim* either explicitly or implicitly reject the doctrine.¹¹ Some point out that the unqualified language of the *Shulchan Aruch* (cited above) and the *poskim* asserting that an agent is not liable for failing to execute his commission implies a rejection of the concept of reliance damages,¹² and others retort in bafflement to the Chasam Sofer’s claim that “as a matter of halacha, no one will disagree with the Ritva” that on the contrary, “from virtually all *Rishonim* it is clear” that there is no liability for detrimental reliance in the absence of an explicit stipulation to that effect.¹³ Even the Chasam Sofer himself concedes that the matter is not entirely clear-cut: “Still, since I did not find this [that all the *poskim* agree with the Ritva] stated explicitly, and in the *Mordechai*...it does not entirely seem this way, therefore, when such a case shall come before me I shall try to arrange for compromise and settlement.”

Even those who do accept the Ritva’s doctrine of reliance damages limit it to where the promisor was definitely able to carry out his promise and his causation of injury is established with certainty. While the Chasam Sofer himself apparently includes in this category

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location, etc.—as they were reported to him.

One concern with phone authorization is that since no *shtar harsha’ah* (authorization) is signed, there is no proof of the *rav*’s appointment, which could possibly invalidate the sale. A remedy would be to additionally sign a *shtar harsha’ah* and send it to the *rav* by email or otherwise.

The Chasam Sofer (Shu”t, Even Ha’ezer 1:43) allows authorization of the *rav* by mail. Doing so online or by email, text message, or the like would seem no different. An electronic communication that leaves a record is superior to a phone call.

Another concern with phone or online appointment of the *rav* as a *shaliach* is the absence of the *kinyan sudar*. Some have suggested that a *kinyan sudar* be made between the seller and a third party. R’ Dovid Grossman was told by R’ Zalman Nechemia Goldberg that although it is preferable, per the Rambam, to make a *kinyan sudar* when appointing a *shaliach*, if it is difficult it is not required.



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a promisor who causes the promisee to miss an opportunity to engage in what turns out to have been a profitable business venture, the Nachalas Tzvi rejects this.

In the next entry in this series, we shall iy”H continue this discussion and consider the application of these halachos to a broker who fails to execute a client’s purchase order.

4 See Tur and Bais Yosef *ibid*.

5 Yerushalmi 5:3, daf 20b. Cf. Shach C.M. *siman* 292 s.k. 15.

6 Nesivos Hamishpat *siman* 183 *biurim* s.k. 1.

7 Chidushei HaRitva Bava Metzia 73b.

8 In addition to the aforementioned citation, see *siman* 176 *biurim* s.k. 3; *siman* 304 *biurim* s.k. 2; and *siman* 306 *biurim* s.k. 6. Strangely, however, in *siman* 333 *biurim* s.k. 3 the Nesivos does not invoke the Ritva’s doctrine, despite the fact that the Ritva himself explicitly applies it in the very context under discussion there (of an employee who reneges on his commitment to work and thereby causes his employer a loss!).

9 Shu”t Chessed L’Avraham *kama* C.M. *siman* 49 and *tinyana* C.M. *siman* 29 defends and endorses the position of the Ritva and his own teacher and grandfather, the Nesivos; Erech Shai C.M. 312:4. Cf. Chidushei R’ Akiva Eiger to Bava Metzia 76 end of s.v. *Gemara: Chazru zeh bazeh lo katani*.

10 Shu”t Chasam Sofer C.M. end of *siman* 178 s.v. *Hay-Hanosein maos l’shlucho*, cited in Nachalas Tzvi C.M. *siman* 292 se’if 7.

11 Mar’ei Hapanim to the Yerushalmi *ibid*; Nachalas Tzvi *ibid*; Divrei Geonim *klal* 104 os 19 pp. 384-5 (in response to the Erech Shai, and cf. the author of the Erech Shai’s response to the Divrei Geonim in his Shu”t Teshuras Shai *kama siman* 613); Chochmas Shlomo C.M. beginning of *siman* 183; Shu”t Yeshuos Molcho C.M. *siman* 22 from s.v. *Amnam*; Imrei Bina C.M. Dinei Halva’ah *siman* 15 from s.v. *UveNesivos sham*; Shu”t Even Shesiah C.M. *siman* 79 from s.v. *V’hinei lich’orah*; Chazon Ish Bava Kama *siman* 20 os 3 s.v. *Kasav od*, and cf. *siman* 23 os 22. Cf. Shu”t Poras Yosef *siman* 68 s.v. *Amnam hagaon*.

12 Nachalas Tzvi *ibid*.

13 Imrei Binah *ibid*, and see also Mar’ei Hapanim *ibid*.

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guest. In Europe, beer was often used as *chamar medinah*, though

coffee or tea are more commonly used that way today in the U.S. One who uses these drinks must be careful to drink the proper *shiur* (the majority of a *revi’is*) immediately following the *bracha* (some allow up to a

minute). Schnapps is also acceptable halachically, though here too, most *poskim* hold that one must be careful to drink the proper *shiur* and ensure that the cup contains a *revi’is*. Iced coffee may also be used today according to many *poskim*, since it has recently become quite popular as a special drink. But most *poskim* hold that iced tea and soda do not qualify as *chamar medinah*.

(For other, more lenient opinions concerning soft drinks, see R’ Moishe Dovid Lebovits, Halachically Speaking, at <http://www.shemayisrael.com/parsha/halacha/Volume%206%20Issue%201.pdf> and R’ Eliezer Melamed, Peninei Halacha, at <https://ph.yhb.org.il/plus/01-08-04/>.)

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