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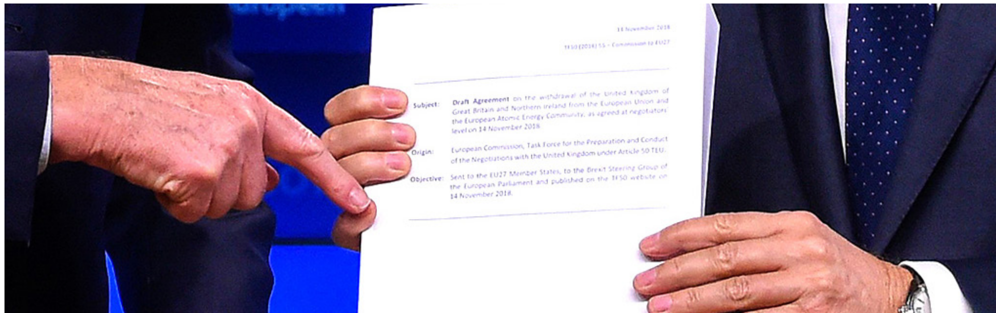
Dedicated in loving memory of HaRav Yosef Grossman zt"l



RENEGING ON A DEAL: IS ELON MUSK AN UNRELIABLE TWIT?

Adapted from the writings of Dayan Yitzhak Grossman

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, which 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

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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.

PARSHAS BEMIDBAR

SERVICE INTERRUPTION

Excerpted and adapted from a shiur by Rav Moshe Zev Granek

Each morning we recite *birchos* haTorah. According to the Rosh (Brachos *perek* 1), one who takes a significant nap during the day must repeat them afterward, because sleep is a *hesach hada'as*. But Rabeinu Tam maintains that the morning's *birchos* haTorah are effective for the entire day. The Bais Yosef quotes the Agur, who adopts the position of Rabeinu Tam and rules that one who sleeps in the daytime does not repeat *birchos* haTorah, because the morning's *brachos* are still in effect. The Shulchan Aruch (O.C. 47:11) cites both views but favors Rabeinu Tam's.

Later, the Shulchan Aruch (O.C. 47:13) addresses the case of someone who sleeps at night but rises before dawn. He rules that if he wishes to study Torah, the man should recite *birchos* haTorah immediately. This would imply that he sides with the Rosh, as Rabeinu Tam

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Service Area

Q On a construction site, may I make a *bracha* in an area designated in the blueprints for a bathroom?

A Prayers, *brachos,* and words of Torah may not be spoken in the presence of waste, as the Torah (Devarim 23:15) says, *vehaya machanecha kadosh* (and your camp shall be holy). It is sufficient to distance oneself four *amos*, provided that the odor doesn't reach his location

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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.

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.

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RAV ARYEH FINKEL

and the object is not visible. A *mechitzah* is also effective; see Shulchan Aruch (O.C. 79:1-2) for details.

A bathroom is a designated place of waste and so is subject to this halacha even when clean. To be considered a bathroom, a room must have been used for that purpose at least once (Shulchan Aruch O.C. 83:1), because of the halachic principle that *hazmanah lav milsa hi* (verbal designation is immaterial). But this only applies to the areas *adjacent* to a new bathroom; to daven or study *inside* it is degrading and forbidden (ibid.). Some even require a separation of four *amos* if there are no walls (Mishnah Brurah ibid. 7). So during construction, *brachos* should not be made inside the future bathroom but beside it (Mishnah Brurah ibid. 9). But contemporary *poskim* suggest that a blueprint alone isn't *hazmanah* at all, and until the bathroom studs are erected one may daven in the room itself (Piskei Teshuvos ibid.).

Today's bathrooms are viewed more leniently by the *poskim* because the waste is quickly flushed out of the room. But since this leniency is uncertain, one shouldn't make a *bracha* in the room designated as the bathroom (see Chazon Ish O.C. 17:4).

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holds that the obligation of *birchos* haTorah each day only begins at dawn.

This apparent contradiction in the Shulchan Aruch is addressed by the *Acharonim*. See, e.g., Magein Avraham (to 47:12), Machatzis Hashekel, and Tzlach (Brachos 11b).

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