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SPARRING PARTNER: MAY A BUSINESSMAN COMPETE AGAINST HIS PARTNERSHIP?

Adapted from the writings of Dayan Yitzhak Grossman

Ars Technica reports:

A group of Tesla investors yesterday sued Elon Musk, the company, and its board members, alleging that Tesla was harmed by Musk's diversion of resources to his xAI venture. The diversion of resources includes hiring AI employees away from Tesla, diverting microchips from Tesla to X (formerly Twitter) and xAI, and "xAI's use of Tesla's data to develop xAI's own software/hardware, all without compensation to Tesla," the lawsuit said...

"Could the CEO of Coca-Cola loyally start a competing soft-drink company on the side, then divert scarce ingredients from Coca-Cola to the startup? Could the CEO of Goldman Sachs loyally start a competing financial advisory company on the side, then hire away key bankers from

Goldman Sachs to the startup? Could the board of either company loyally permit such conduct without doing *anything* about it? Of course not," the lawsuit says...¹

In this article, we discuss the halachic duty of loyalty that applies to a partner in a business.

The Rambam rules:

One who enters into a partnership agreement without any stipulations shall not deviate from the local custom with regard to that merchandise. He shall not go to another place, he shall not partner in it with others, he shall not be involved with other merchandise, he shall not sell on credit except something generally sold on credit, and he shall not deposit with others unless they so stipulated initially or

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¹Zion Brodtkin, Tesla investors sue Elon Musk for diverting carmaker's resources to xAI, Ars Technica, <https://arstechnica.com/tech-policy/2024/06/tesla-investors-sue-elon-musk-for-diverting-carmakers-resources-to-xai/>

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PARSHAS SHLACH LOST COUNT

Excerpted and adapted from a shiur
by Rabbi Yaakov Rappaport

But the men who had ascended with him said, "We cannot ascend to that people, for it is too strong for us."

Bemidbar 13:31

The Shulchan Aruch (O.C. 55:11) says that a sinner may be counted in a minyan, unless he has been placed in *nidui* (excommunication). But the Pri Megadim says that since the Shulchan Aruch (Y.D. 2) rules that a *mechaleil* Shabbos *befarhesya* (one who violates Shabbos in public) is disqualified from performing shechitah because he has the status of a non-Jew, he likewise cannot be counted in a minyan.

R' Moshe Feinstein (Igros Moshe O.C. 2:19) disagrees with the Pri Megadim. He explains that the Gemara (Megillah 23a) derives the requirement of ten men for a minyan from the spies. R' Moshe notes that Rashi, citing the Gemara in Sotah 35a, understands the words of the *meraglim*, "*ki chazak hu mimenu*," to mean that they thought Bnei Yisrael could not conquer the nations dwelling in Kna'an not

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O&A from the
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Graft Rejection

Q May I graft a fruit tree outside of Eretz Yisrael? May I purchase a grafted tree?

A Grafting a branch onto a tree of a different species is a type of forbidden *kil'ayim* mixture. Other forms of *kil'ayim*, like *kil'ei zra'im* (grains) and *kil'ei hakerem* (grapevines), as mitzvos *hathuyos ba'aretz*, are only forbidden *mide'Oreisa* in Eretz Yisrael. But the mitzvah of *kil'ei ilanot* (trees) is an exception, applying in *chutz la'aretz* even *mide'Oreisa* (Y.D. 295:1).

Kil'ei ilanot applies to all trees—fruit bearing or not—but there's a difference: Fruit trees are distinguished by species, and one species may not be grafted onto another, whether

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he did so with his friend's consent...And all these things do not require a *kinyan*; words are sufficient.²

Regarding the admonition against being "involved with other merchandise," this author has previously written:

Some interpret this as barring moonlighting, "for when one partners with his fellow, it is in order that he focus his heart and soul on the business of the partnership, and if he deals in other merchandise, he will not pay enough attention (*lo yitein einav kol kach*) to the business of the partnership."³ Others understand it as referring to a partner's activity on behalf of the partnership, denying him the right to substitute a type of merchandise different from the agreed upon, or standard, type.⁴

Some *poskim* do allow moonlighting;⁵ and even within the former, stringent view, there is an opinion that distinguishes between involvement in a different area of business—which is forbidden, as this detracts from the partner's focus on the partnership business—and involvement in a similar area of business, which will not interfere with his conduct of partnership business.⁶

Secular law is somewhat more relaxed about moonlighting, with no general prohibition against the practice as long as assets, including intellectual property, are not misappropriated,⁷ and generally, that the duty of loyalty is not violated.⁸ But in the context of partners, the corporate opportunity doctrine, a common law doctrine that limits a corporate fiduciary's ability to pursue new business prospects individually without first offering them to the corporation, a subspecies of the fiduciary duty of loyalty,⁹ might apply.¹⁰

So on the one hand, halacha is somewhat

stricter than secular law with regard to a partner engaging in business independent of the partnership, even when there is no specific concern of misappropriation. But on the other hand, there is the view of R' Yosef Halevi Nazir, author of *Matei Yosef*, who is actually more lenient about doing personal business in the kind of merchandise the partnership sells than in some other merchandise, because the former will not detract from the partner's focus on the partnership business, whereas the latter will. As we noted in a footnote, however:

Of course, one might argue the opposite, that dealing in the same merchandise as the partnership is more problematic, as this involves a direct conflict of interest, because his private dealing competes with the partnership's business.

And indeed, this is basically what Musk is being sued for: allowing his conflict of interest to induce him to violate his duty of loyalty to Tesla and divert its resources toward his private interests.

From a halachic perspective, in the worst-case scenario, the improper diversion of property from a business could presumably constitute actual theft. The improper hiring away of employees from a business would not constitute theft, because employees are not the property of their employer, but could potentially violate other strictures against taking something away from someone else that he doesn't actually own, such as *ani hamehapeich bechararah*.¹¹

But even where these general strictures would not apply, it seems likely that a partner would still be forbidden to act directly against the interests of the partnership for his own benefit. We have seen that according to many authorities, a partner may not moonlight—even when there is no clear conflict of interest between his work on behalf of the partnership and his own business—due to the basic obligation of a partner to focus his heart and soul on the partnership. So it would seem that a fortiori, a partner is enjoined from acting explicitly against the interests of the

² Hilchos Shlichin Veshutafim 53. These fillings of the Rambam are codified in Shulchan Aruch C.M. 176:10.
³ Baiv Yosef C.M. *ibid.*, os 17. This is also the understanding of the Sma *ibid.* s.k. 32; Shach *ibid.* s.k. 22; Shu"t Matei Yosef (Nazir) chelek 1 siman 9; and apparently also that of Shu"t Maharashdam siman 168 (as noted by Matei Yosef).
⁴ Drishah *ibid.*, Shu"t Maharit Tzahalon siman 132.
⁵ Tur *ibid.*, as understood by Baiv Yosef *ibid.*; Maharit Tzahalon *ibid.*
⁶ Matei Yosef *ibid.* s.v. *Ve'el teshivni*. Of course, one might argue the opposite, that dealing in the same merchandise as the partnership is more problematic, as it involves a direct conflict of interest, because his private dealing competes with the partnership's business.
⁷ See, e.g., Matt Villano, *How to Moonlight as an Entrepreneur*, *The New York Times*, Oct. 29, 2006; Alexandra Lewis, *How to Moonlight Without Losing Your Job*.
⁸ See, e.g., Jim Barber, *HR & Employer Considerations for Moonlighting Employees*.
⁹ Eric Talley and Mira Hashmal, *The Corporate Opportunity Doctrine*, p. 1. I am indebted to my brother Menahem for bringing this doctrine, and this paper, to my attention.
¹⁰ In a partnership, the analogous principle is the firm-opportunity doctrine. USLegal.com.

¹¹ Kidushin 59a; Shulchan Aruch C.M. siman 237. Regarding the applicability of *ani hamehapeich bechararah* to the poaching of employees, see Tosfos *ibid.*, end of s.v. *Ani*; Shulchan Aruch *ibid.*, se'if 2; Pis'chei Choshen Hilchos Sechirus (Yerushalayim 5745) perek 7 se'if 21 and n. 50, pp. 161-63; Mishpetei HaTorah chelek 1 siman 50.

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fruit bearing or not. But all fruitless trees may be grafted onto one another, as if they were a single species (*ibid.* 6). Still, it is the correct practice to refrain from grafting even trees without fruit (Pis'chei Teshuvah *ibid.*, citing Chasam Sofer).



RAV ARVEH FINKEL

Halachic species taxonomy sometimes differs from that of botanists, based on factors including the appearance of the fruit and leaves and the taste of the fruit. Because of the subtleties of the matter, a layman may not use his own senses to determine species but must consult a *talmid* chacham proficient in the subject (see Chazon Ish, *Kitzur Hilchos Kil'ayim, Harkavas Ha'ilan*).

A grafted tree is forbidden to keep and must be uprooted (Y.D. *ibid.* 7). If the grafting was done by a non-Jew, a Jew may not purchase the tree (Chazon Ish *Kil'ayim* 2:9), but the fruit it bore may be eaten (Y.D. *ibid.*). Likewise, a branch that grew from the grafted tree may be removed and replanted elsewhere (*ibid.*).

partnership by diverting its resources for his own benefit, even where such diversion would not be prohibited for an outsider. Indeed, it would seem plausible that a partner might be forbidden to engage in private business that competes with the partnership, even absent any diversion of resources. We have seen that the Matei Yosef does allow a partner to sell on his own account the same type of merchandise that the partnership sells, but even the Matei Yosef would likely agree that a partner's *actual* diversion of resources for his own benefit is prohibited even where such diversion wouldn't be prohibited to someone who isn't a partner.

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because "they are stronger than us," but because "they are stronger than Him"—*chas milehazkir*—as the word *mimenu* sustains both meanings. For this reason, the *meraglim* had the status of *minim* (heretics), which the

Rambam defines as people who do not believe in Hashem or in His omnipotence. R' Moshe argues that if the *meraglim* serve as the source for having ten men for a minyan, then clearly *minim* are included, and so is a *mechaleil* Shabbos *befarhesya*. The Chazon Ish holds that

today's Shabbos violators do not have the status of non-Jews for a different reason: Because they were not raised in a religious environment, they have the status of *tinokos shenishbu* Jews taken captive as children; Shabbos 69b) and are treated as bona fide Jews. But the Chafetz Chaim says that *lashon hara*

about any Jews who do not keep mitzvos is not prohibited, which implies that he disagrees with the Chazon Ish.

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