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The Acquisition of Twitter: The Legal Interplay Between Elon Musk, Shareholders, Employees, and the Government

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The Acquisition of Twitter: The Legal Interplay Between Elon Musk, Shareholders, Employees, and the Government

Florence Shu-Blankson*

This article examines the acquisition process of Twitter by Elon Musk. It will analyze the legal validity of Musk’s initial claims for rescinding his offer, as well as Twitter’s defense arguments. It will consider questions such as: Did Twitter cause a material adverse effect to its operations that would be a basis for Musk to avoid the deal? Did Musk run afoul of any regulatory requirements under the Securities and Exchange Commission (SEC) and Federal Trade Commission (FTC) regulations? What impact did the ultimate sale of Twitter have on other stakeholders, such as corporate executives and non-executives, shareholders, employees. The paper further examines some of the resulting pre- and post-acquisition issues that emerged, why they may remain nagging issues, and the lessons learned from the Twitter purchase debacle for the future of corporate governance.

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INTRODUCTION

Elon Musk, the CEO of Tesla, Inc. has had a Twitter account since 2009 and boasts over 100 million followers. With a 9.1% stake in Twitter, he was its biggest shareholder when, on April 14, 2022, he made an unsolicited, non-binding proposal to pay a cash price of \$54.20 for its outstanding common stock.¹

¹ Kate Conger & Lauren Hirsch, *Elon Musk Completes \$44 Billion Deal to Own Twitter*, N.Y. TIMES (Oct. 27, 2022), <https://www.nytimes.com/2022/10/27/technology/elon-musk-twitter-deal-complete.html>.

A few days later, on April 25, 2022, Musk, through his exclusively owned businesses, agreed to purchase the company for \$54 per share.² This amounted to a total purchase price of about \$44 billion, a price representing over 38% of the premium over the share price.³ However, a few weeks thereafter, Musk experienced buyer's remorse and attempted to put the agreement on hold. Some speculated that this change of heart was triggered by the decline of Musk's Tesla stock from its peak of over \$100 billion in November 2021.⁴ Musk, however, explained his decision by claiming that Twitter executives had made false and misleading representations about the amount of spam accounts on the platform. He claimed that the true figure was far higher than the 5% estimate he was provided and that fake accounts were pervasive across the site. By July 2022, he had made it clear that he was no longer interested in owning the company and attempted to terminate the deal. It was reported that Twitter admitted it was removing 1 million fake accounts every day before Musk completed the purchase. Musk retained Cyabra to study the issue and Cyabra concluded that spam or bot accounts represented 13.7% of all Twitter accounts.⁵

In response, Twitter launched a lawsuit to compel Musk to comply with the purchase agreement. The complaint included the accusation that "Musk apparently believes that he - unlike every other party subject to Delaware contract law-is free to change his mind, trash the company, disrupt its operations, destroy stockholder value, and walk away."⁶ Musk responded with counterclaims attempting to justify his termination of the transaction. However, facing a lengthy deposition process and a highly

² *Id.*

³ SAMUEL C. THOMPSON, JR., APPENDIX 11H TO MERGERS ACQUISITIONS AND TENDER OFFERS, AND APPENDIX 1 J OF CORPORATE VALUATION IN M & A: SEC AND RELATED DOCUMENTS REGARDING THE PROPOSED ACQUISITION IN 2022 OF TWITTER, INC. BY AFFILIATES OF ELON R. MUSK (2022), <http://elibrary.law.psu.edu/valuation/56>; This 38% represented a Control Premium, and in fact a Total Control Premium since Musk was purchasing total control without any minority shareholders to get in his way. This outcome was different in the landmark case of *Smith v. Van Gorkem*, where the court struck down a 38% control premium because the Board of Directors had not engaged in an informed decision-making process and therefore the business judgment rule could not protect them. *See generally* Florence Shu-Acquaye, *Smith v. Van Gorkem: Revisited in Light of the Sarbanes Oxley Act of 2002*, 3 DEPAUL BUS. & COM. L.J. 19 (2004)

⁴ *Id.*

⁵ Clare Duffy and Brian Fung, *Elon Musk Commissioned This Bot Analysis in His Fight with Twitter. Now it Shows What He Could Face if He Takes Over the Platform*, CNN Bus. (Oct. 10, 2022, 2:50 PM), <https://www.cnn.com/2022/10/10/tech/elon-musk-twitter-bot-analysis-cyabra/index.html>.

⁶ Verified Complaint at 1-2, *Twitter, Inc. v. Musk*, No. 2022-0613 (Del. Ch. July 12, 2022), 2022 WL 2713259.

uncertain outcome, he reconsidered his position and attempted to negotiate a lower selling price. When this negotiation was unsuccessful, he agreed to proceed with the original deal, if Twitter would withdraw its lawsuit. The judge granted a period of three weeks to allow Musk and Twitter to conclude the deal, which was done on October 27, 2022.

This article examines the acquisition process of Twitter by Elon Musk and will analyze the legal validity of Musk's initial claims for rescinding his offer, as well as Twitter's defense arguments. The article considers questions such as: Did Twitter cause a material adverse effect to its operations that would be a basis for Musk to avoid the deal? Did Musk run afoul of any regulatory requirements under the Securities and Exchange Commission (SEC) and Federal Trade Commission FTC regulations? What impact did the ultimate sale of Twitter have on other stakeholders, such as corporate executives and non-executives, shareholders, employees?

This paper will further examine some of the resulting pre- and post-acquisition issues that emerged, why they may remain nagging issues, and the lessons learned from the Twitter purchase debacle for the future of corporate governance.

I. HISTORICAL BACKGROUND OF TWITTER

"Twitter is an online news and social networking site where people communicate in short messages called tweets."⁷ It originally had a 140-character limit and, in the age of smartphone, increased the character limit to 280 in 2017.⁸

Twitter originally resulted from the podcasting Venture Odeo, which was founded by Evan Williams, Biz Stone and Noah Glass in 2004.⁹ However, in 2005, when Apple decided to add podcasts to its media application iTunes, Odeo, clearly intimidated, felt they could not compete with Apple and started to look in another direction. Jack Dorsey, an engineer (and co-founder of Twitter), proposed the idea of a short message service (SMS) based communication platform where one could share short bloglike messages with others.¹⁰ Consequently, in March 2006, Jack Dorsey, Noah Glass, Biz Stone and Evans Williams founded Twitter. Dorsey sent out the very first tweet that said, "just setting up my twttr

⁷ Paul Gil, *What Is X (Formerly Twitter)?* LIFEWIRE, <https://www.lifewire.com/what-exactly-is-twitter-2483331> (July 26, 2023).

⁸ Amanda MacArthur, *The Real History of X (Formerly Twitter), in Brief*, LIFEWIRE, <https://www.lifewire.com/history-of-twitter-3288854> (July 28, 2023).

⁹ *Twitter*, BRITANNICA, <https://www.britannica.com/topic/Twitter> (Sept. 4, 2023).

¹⁰ *Id.*

[sic].”¹¹ Noah Glass has been credited for this original name “twtr” as well as for the now defunct name Twitter.¹² Today Twitter is considered “one of the most iconic companies to come out of Silicon Valley in the past 20 years.”¹³

In 2007, after receiving \$100,000 in funding led by Union Square Ventures and becoming very popular due to massive promotion carried out by the tech community at its annual South By Southwest Interactive Conference,¹⁴ Twitter, Inc. was incorporated.¹⁵ The popularity of Twitter was heightened by the appearance of Evan Williams and celebrity Ashton Kutcher on the Oprah Winfrey Show in 2009.¹⁶ Twitter’s popularity was also heightened with the first live tweet from space sent by NASA Astronaut, Timothy Creamer.¹⁷ In 2012 Twitter had grown to 200 million active users.¹⁸ The platform was used by President Barack Obama to announce his presidential election victory, which was viewed about 25 million times.¹⁹

In November 2013, Twitter went public with a combined wealth of its founders totaling about \$4 billion.²⁰ Twitter’s growth plans, at the time, were expressed on CNBC by Dick Costolo, then-CEO, who had great thoughts and strategies to upsurge the growth curve.²¹ He explained, “I would consider some of them tactics, some of them broader strategies, in service of doing what I referred to as bridge the gap between the massive awareness of Twitter and deep engagement of the platform.”²²

¹¹ See MacArthur, *supra* note 4.

¹² *Id.*

¹³ Jonathan Vanian, *Twitter Is Now Owned by Elon Musk—Here’s a Brief History from the App’s Founding in 2006 to the Present*, CNBC (Oct. 30, 2022, 1:53 PM), <https://www.cnbc.com/2022/10/29/a-brief-history-of-twitter-from-its-founding-in-2006-to-musk-take-over.html>.

¹⁴ *Id.* There was a huge explosion of Twitter users following the conference.

¹⁵ Dorsey was the first Twitter CEO. However, in 2008 Williams ousted Dorsey as the CEO and two years after, Dick Costolo (Chief Operating Officer) replaced Williams as CEO. See *Twitter*, *supra* note 9.

¹⁶ See Vanian, *supra* note 13. Kutcher further promoted Twitter by writing about Williams and Stone in Time Magazine. The Twitter platform was widely used as the main social medium of communication during the Arab Spring in 2011 by protesters from Egypt, Libya and Tunisia and was the source of breaking news.

¹⁷ See *id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

II. A SUMMARY TIMELINE OF THE BACK AND FORTH OFFER BY ELON MUSK TO BUY TWITTER

Elon Musk is an enthusiastic user of Twitter with over 109 million followers. Mr. Musk describes himself as a “free speech absolutist”²³ whose mindset is that that the Twitter platform should be “a more freewheeling place for all types of commentary.”²⁴ On April 4, 2022, Elon Musk had acquired a 9.1% stake in Twitter.²⁵

On April 14, 2022, Twitter confirmed the receipt of unsolicited, non-binding proposal from Elon Musk to pay a cash price of \$54.20 per share for Twitter’s outstanding common stock.²⁶ The price presented was offered on a take-it-or-leave it basis and represented a 38% premium over Twitter’s share price.²⁷ Even though this price was higher than the stock’s then-current trading price, it nevertheless was considered low, especially given that that the stock had traded for \$60 to \$70 per share only a year before.²⁸

Musk negotiated a deal to buy the company for \$44 billion.²⁹ However, a few weeks thereafter, he seemed to have had buyer’s remorse and was no longer interested in owning Twitter, even though, in his binding agreement with Twitter, Musk promised to use his best efforts to get the deal done.³⁰ His rationale for souring on the deal was that the Twitter executives had made false and misleading representations about the estimates regarding the amount of spam accounts on Twitter.³¹ By July 2022, Musk then changed his mind to buy the company. Consequently, he made it known he was dumping the acquisition.³²

With that “advertised” withdrawal of the potential purchase, Twitter sued Musk seeking to oblige him to comply with the purchase agreement.³³ The complaint stated, “Musk apparently believes—unlike every other

²³ Conger & Hirsch, *supra* note 1

²⁴ *Id.*

²⁵ Bob Van Voris, *Musk Says Twitter Shareholder Suit Exploiting His ‘Spectacle’*, BLOOMBERG (Jan. 31, 2023, 2:17 PM), <https://www.bloomberg.com/news/articles/2023-01-31/musk-says-twitter-shareholder-suit-exploiting-his-spectacle#xj4y7vzkg>.

²⁶ TIMOTHY S. FARBER, CORPORATE COMMUNICATIONS HANDBOOK app. C:16 (Nov. 2022). The Twitter Board in keeping with the best interest of the corporation and shareholders were to examine the offer carefully. *Id.*

²⁷ See Thompson, Jr., *supra* note 3, at 38.

²⁸ Ann M. Lipton & Eric L. Talley, *Twitter v. Musk: The “Trial of the Century” That Wasn’t*, 40 DEL. LAW. 8, 9 (2022).

²⁹ Conger & Hirsch, *supra* note 1.

³⁰ See Thompson, Jr., *supra* note 3, at 37.

³¹ *Id.* Musk says he thinks the pervasiveness of spam and fake accounts on the platform is higher than the 5% estimates.

³² Conger & Hirsch, *supra* note 1.

³³ *Id.*

party subject to Delaware contract law—is free to change his mind, thrash the company, disrupt its operations, destroy stockholder value, and walk away.”³⁴ Twitter alleged that Musk took steps to lower Twitter’s stock price to get a chance to renegotiate the buyout price of \$54.20 per share or even get out of the deal.³⁵ These investors alleged that Musk’s failure to disclose when his Twitter holdings exceeded 5%, compounded by his public statements and tweets indicating he would put the buyout deal on hold, artificially reduced Twitter’s stock price.³⁶ That is, Musk’s confusing journey of in one moment having the deal on hold and then in the next stating he is still committed to fight spam on the platform was unsettling.³⁷

Musk said that Twitter violated the terms of the agreement, thereby giving him the grounds to walk away from the deal without paying a \$1 billion penalty.³⁸ On July 8, Musk’s attempt to formally end the deal, which resulted in Twitter filing a law suit a few days after in the Delaware Court of Chancery.³⁹ In his answer, as well as counterclaims, Musk—without any legal basis—made weak arguments as to why he should be allowed to rescind or terminate the transaction, and what was apparently more evident, besides the celebrity trappings, was nothing short of buyer’s remorse.⁴⁰ Because of the certainty of Musk facing many days of deposition buttressed by an uncertain outcome, and after an unsuccessful negotiation to lower the price, he reconsidered his position and agreed to proceed with the original deal if Twitter would end the lawsuit.⁴¹ The judge agreed for the case to be stayed until October 28, thus allowing Musk to close the deal in three weeks.⁴² Musk completed the acquisition

³⁴ See Thompson, Jr., *supra* note 3, at 37.

³⁵ Robert Burnson, *Musk Sued by Twitter Investor Over Fraudulent Buyout Flip Flop*, BLOOMBERG (Oct 10, 2022, 11:54 PM), <https://www.bloomberg.com/news/articles/2022-10-11/musk-sued-by-twitter-investor-over-fraudulent-buyout-flip-flop>.

³⁶ Shweta Watwe, *Twitter Investor Group Leads Suit Against Elon Musk Over Buyout*, BL (Apr. 25, 2023, 10:22 AM), <https://news.bloomberglaw.com/securities-law/twitter-investor-group-leads-suit-against-elon-musk-over-buyout>.

³⁷ See Lipton & Talley, *supra* note 28, at 9. It is worth noting that since Musk agreed to the buyout deal, global markets fell with especially tech stocks taking a great hit.

³⁸ Shannon Bond, *Twitter Has Vowed to Sue Elon Musk. Here’s What Could Happen in Court*, NPR (July 11, 2022, 6:27 PM), <https://www.npr.org/2022/07/11/1110916343/twitter-to-sue-elon-musk>.

³⁹ See *id.*; see also Shweta Watwe, *supra* note 26 (“The Twitter Investor Group, made up of four investors, led a securities-fraud class action alleging that Elon Musk manipulated Twitter Inc.’s stock price from May to October 2022 during his buyout of the company[.]”)

⁴⁰ See Lipton & Talley, *supra* note 22, at 9.

⁴¹ See Conger & Hirsch, *supra* note 1.

⁴² *Id.*

transaction as agreed on October 27, following his announcement tweet stating, “the bird is freed.”⁴³

Musk was taken seriously when he had secured several banks to fund about \$13 billion of the \$44 billion purchase price.⁴⁴ Twitter’s executives eventually agreed to the terms of the merger, although they initially fought against the purchase with a poison pill as discussed below.⁴⁵

III. DIAGNOSIS OF MUSK’S LEGAL CLAIMS AS HE WAS TRYING TO ESCAPE THE PURCHASE DEAL AND DEFENSES.

When Twitter’s board accepted the acquisition deal on Musk’s terms, and signed onto the merger agreement, Musk nonetheless followed certain routes to get out of the deal. Taking a closer look at Musk’s defenses should highlight some of the salient terms of the merger agreement and understand why some of Musk’s claims were considered factually inaccurate, legally insufficient, and commercially irrelevant by Twitter.

A. The Twitter Deal - Its Negotiations

As stated above, Musk started buying Twitter shares in January 2022. Once Musk acquired over 9.1 % of the Twitter stock, making him the biggest shareholder, he started making noise calling for a change. In April 2022, he subsequently offered to buy the company.⁴⁶ Having made the announcement about the purchase of over 91.1 % of the company, Twitter, developed a poison pill that would prevent or discourage an outsider buyers interest, consequently giving Musk incentive to bargain with the board of directors.⁴⁷ This strategy would in turn reduce the prospects for an acquisition through a hostile tender offer.⁴⁸

The Board’s initial reluctance to negotiate was tremendously dampened when Musk divulged that he had actually secured financing for his offer.⁴⁹ Twitter and Musk therefore entered into an agreement on April 25, 2022.⁵⁰ Among other things, Twitter obtained a “specific performance” provision, that would give Twitter the ability to enforce the agreement per

⁴³ See Elon Musk (@elonmusk), TWITTER (Oct. 27, 2022, 11:49 PM), <https://twitter.com/elonmusk/status/1585841080431321088>.

⁴⁴ See Lipton & Talley, *supra* note 28, at 9.

⁴⁵ *Id.*

⁴⁶ Lucien A. Bebchuk et al., *How Twitter Pushed Stakeholders Under the Bus*, 28 STAN. J.L. BUS. & FIN. 307, 311 (2023).

⁴⁷ *Id.*

⁴⁸ *See id.*

⁴⁹ *See id.* at 311-12.

⁵⁰ *Id.*

its terms, *i.e.* obtain the promised price by Musk.⁵¹ In the same vein, Musk also obtained some favorable concessions, which included an ordinary course of business covenant preventing Twitter from making major changes between the signing and closing of the transaction and a penalty fee if Twitter entered into a superior purchase price agreement with a third party.⁵² As already stated, shortly after Twitter made an announcement about Musk's offer, its price per share declined precipitously.⁵³ On July 8, Musk then sought to formally terminate the negotiated deal in vain, resulting in Twitter filing a lawsuit against Musk in the Delaware Court of Chancery.⁵⁴ In its complaint, Twitter alleged that the deal was not terminated and that Musk "knowingly, intentionally, willfully, and materially breached" his agreement to buy the company.⁵⁵ Taking a look at the defenses Musk raised for getting out of the deal or terminating the agreement is imperative in understanding if there could be a legitimate shift in contracts regarding corporate acquisition.

B. Contract Claim

In his July 8, 2022, notice of termination of the merger agreement, Musk raises three grounds:⁵⁶

- 1) "[P]urported breach of information-sharing and cooperation covenants." Musk alleged that Twitter was in breach of the covenant to provide information for any reasonable business purpose that belies the merger because Musk was not given access to information pertaining to Twitter's spam finding and mDau numbers.⁵⁷ It turned out that this information being sought by Musk was less connected with "consummating the deal" and rather more concerned with rescinding the agreement.⁵⁸
- 2) "[P]urported failure to comply with the ordinary course covenant by terminating certain employees, slowing hiring and failing to retain key personal." Musk alleged that by carrying out the layoffs and freezing

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *See id.*

⁵⁵ Bond, *supra* note 38.

⁵⁶ Thompson Jr., *supra* note 3, at 38-39.

⁵⁷ *See id.* at 39-40.

⁵⁸ *See id.*

hiring, Twitter was in breach of the obligations to manage its operations in the ordinary course of business between the signing and closing.⁵⁹ However, the covenant only talks of the use of “commercially reasonable efforts to conduct the business . . . in the ordinary course,” and this, under Delaware law, is taken to mean as in accordance with similarly placed companies. This argument was seen as feeble given that there was widespread layoffs and hiring freezes in the tech industry at that time.⁶⁰

3) “[S]upposed ‘materially inaccurate representations’ in the merger agreement that allegedly are ‘reasonably likely to result in’ a Company Material Adverse Effect.”

Focusing on the materially adverse effects, Musk alleged “materially inaccurate representations” in the merger agreement that are likely to lead to a material adverse effect.⁶¹

MAE is defined in the Merger Agreement as “any change, event, effect or circumstance which, individually or in the aggregate, has resulted in or would reasonably be expected to result in a material adverse effect on the business, financial condition or results of operations of the Company and its Subsidiaries, taken as a whole.”⁶²

Thus, the issue is whether Musk will suffer a material adverse effect that would be a basis for him to avoid the deal. Musk apparently claimed reliance only on the representation and warranties in the merger agreement which in turn guaranteed only the accuracy of representations and warranties of the SEC reports filed after January 1, 2022.⁶³ Accordingly, closing the deal was contingent on the SEC representations being accurate and not so removed from the truth as to be considered a materially adverse effect.⁶⁴ Besides, closing was predicated on the governing approval and the lack of MAE.⁶⁵ That is, Musk could get out of the deal if he could demonstrate that Twitter had endured an MAE as a result of a misrepresentation in the agreement.⁶⁶ Consequently, Musk claimed that

⁵⁹ *Id.* at 39.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Anna Restuccia, *Twitter v. Musk: Plaintiff's Response to Defendant's Counterclaim*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 10, 2022), <https://corpgov.law.harvard.edu/2022/08/10/twitter-v-musk-plaintiffs-response-to-defendants-counterclaim/>.

⁶³ *Id.*

⁶⁴ See Lipton & Talley, *supra* note 28, at 9.

⁶⁵ *Id.*

⁶⁶ *Id.* at 10.

Twitter misrepresented information pertaining to its “monetizable daily active users” or mDAU.⁶⁷ In other words, there was a misrepresentation of the number of actual humans (and not bots or spam accounts) that would use the Twitter platform.⁶⁸

This claim was problematic for Musk because he failed to link these supposed flaws to the standard required under Delaware MAE, which requires “an adverse change in the target’s business that is consequential to the company’s long-term earning power over a commercially reasonable period.”⁶⁹ The agreement between the parties of course provided that it will be governed by Delaware law and any litigation will take place in Delaware.⁷⁰

C. Blue Sky Laws-Texas Securities Act Claim

The issue here was whether Musk could rescind the contract based on the misrepresentation allegedly made by Twitter and therefore in contravention of Blue-Sky laws that regulate the sale of securities within its territory. Like the Federal Securities Act, most Blue-Sky laws would

⁶⁷ *Id.* Per note 8 in this article, Twitter’s SEC filings stated that in its judgment, no more than 5% of mDAU is made up of spam accounts. Musk repeatedly translated this to mean that a user would conclude that more than 5% of the users were spam. This misunderstanding by Musk of Twitter’s representation concerning its mad counts and its spam on the platform shows musk could not have relied on mDAU numbers as he said they were false and neither on the mDAU numbers because he did comprehend the calculations. Musk alleged that “they negotiated for representations as to the truth of Twitter’s SEC disclosures, relying on their accuracy, the statements in these SEC disclosures were far from true. Instead, they contain numerous, material misrepresentations or omissions that distort Twitter’s value and caused the Musk Parties to agree to acquire the company at an inflated price.” In response Twitter In response, Twitter stated that “twitter’s SEC disclosures are accurate. Musk’s allegations attacking Twitter’s SEC disclosures are not supported by any facts. Musk’s allegations regarding negotiation and reliance are likewise contrary to the facts. Musk sought an urgent deal, undertook no due diligence, and offered a self-described “seller friendly” merger agreement that contained no representations about false or spam accounts or mDAU.” See Restuccia, *supra* note 62. A counter argument by Musk’s attorney was that approximately 90% of its revenue was derived from advertisement and thus a major and significant aspect of the business Consequently, should advertisers come to realize or believe that a “great proportion of the attention and response they pay for is not real, then social media hyper-population may precipitate a subprime attention crisis.” This is even more alarming given that 28-40 % of the clicks and traffic are apparently non-human (bots) and simply employed for the primary goal of creating revenue “from manufactured attention.” Likewise, recognizing these fake accounts is a step in curtailing the growing fraud problem online, especially given that these accounts have been widely employed to “commit fraud, launch attacks’ as well as commit financial crimes. See Martin Moore, *Fake Accounts on Social Media, Epistemic Uncertainty and the Need for an Independent Auditing of Accounts*, 12 INTERNET POL’Y REV 1 (2023).

⁶⁸ See Lipton & Talley, *supra* note 28, at 10.

⁶⁹ *Id.*

⁷⁰ *Id.* at 9.

allow an investor to rescind the contract if such sale were procured because of a misstatement, regardless of whether the misstatement was negligent or that it was relied upon by the investor.⁷¹ These laws cannot be avoided by contractual agreement. Thus, Texas Blue-Sky law could have been invoked by Musk to rescind the contract if he could sway the court that Texas has a materially greater interest in the case than Delaware and thus could rescind the contract based on those misrepresentations, despite the MAE or lack of reliance.⁷²

Given the case did not progress to trial, it is safe to say Twitter would have been able to defend itself by denying the falsity of the allegations and more importantly, argue against Texas law being applied to a sales transaction relating to a public company. Besides, Musk would have been acting opportunistically given he would be invoking that argument only because he was in Texas for a part of the deal's negotiations.⁷³ A resounding defense against invoking Texas Blue-Sky law is also based on the intrinsic nature of Delaware law as a paramount and predominant state in handling corporate issues in the country in mergers and acquisition disputes. It would have been farfetched to think the Delaware court would agree that Texas had a materially greater interest in the dispute than itself, and this is buttressed by the fact that the agreement itself provided for any resulting dispute be litigated in Delaware.⁷⁴

D. Common Law Fraud Claim

Musk sought to rescind the contract based on fraud, specifically misrepresentation, on Twitter's legal compliance, data privacy, false user counts and more. A successful fraud claim would have required proof of intent, or scienter, on the part of Twitter management, as well as reliance on the fraudulent statements supposedly made. Musk had difficulty proving the reliance element, given he seemed to have "sought an urgent deal, undertook no due diligence, and offered a self-described 'seller friendly' merger agreement that contained no representations about false or spam accounts or mDAU."⁷⁵ In fact, Musk jumped into the deal while he constantly declared through tweets that his main goal and contribution to Twitter would be to solve the "bot problem."⁷⁶

⁷¹ *Id.* at 10.

⁷² *Id.*

⁷³ *Id.* at 10-11; *see also* Defendants' Verified Amended Counterclaims, Answer and Affirmative Defenses to Plaintiff's Verified Complaint at 87-88, *Twitter, Inc. v. Musk*, (No. 2022-0613), 2022 WL 3213362 (Del. Ch. Aug. 4, 2022).

⁷⁴ *See* Lipton & Talley, *supra* note 28, at 11.

⁷⁵ *See* Restuccia, *supra* note 62.

⁷⁶ *See* Lipton & Talley, *supra* note 28, at 10.

E. Could Twitter Have Invoked the Remedy of Specific Performance?

The issue here was whether Twitter could compel Musk to carry out the agreement to purchase based on the equitable remedy of specific performance. Per Section 9.9 of the Merger Acquisition Agreement, the parties:

“[A]gree that irreparable damage for which monetary damages, even if available, would not be an adequate remedy, would occur in the event that the parties hereto do not perform the provisions of this Agreement (including failing to take such actions as are required of it hereunder to consummate this Agreement in accordance with its specified terms or otherwise breach such provisions”⁷⁷

Although the equitable remedy of specific performance is available where monetary damages are inadequate, the chancery court has never ordered such performance where a public company is to be acquired in an all-cash sale.⁷⁸ However, based on the merger agreement, Twitter could not avail itself of this remedy if some conditions, such as securing bank’s funding towards the debt, or the failure of the of regulatory agencies were, not met.⁷⁹ But the question here was whether funding could be procured because of Musk’s behavior in disparaging the company. Based on the “prevention doctrine,” where a buyer disrupts its own funding, the Chancery court ordered the buyer to complete the deal is exemplified in the similar case of *Snow Phipps Group*.⁸⁰ It should be noted that, under the agreement, Musk was not obligated to pay money beyond his agreed equity contribution.⁸¹ The remaining payments were to be made by X Holdings, a separate limited liability company. The inevitable question therefore was what would have happened if Musk using his flawed reasoning for flip-flopping resulted in the banks refusal to finance the debt? Could the Chancery Court have ordered specific performance by Musk? The likely answer is yes, based on the precedent in the *Snow Phipps Group* case, if indeed Musk would have been liable for the financing

⁷⁷ See Thompson, Jr. *supra* note 3, at 13.

⁷⁸ *Id.* at 11. However, this was ordered in *IPB, Inc. v. Tyson Foods, Inc.*, 789 A.2d 14 (Del. Ch. 2001), but the transaction was a mixed cash and stock deal. The Delaware Supreme Court has never affirmed the ordering of specific performance.

⁷⁹ Lipton & Talley, *supra* note 28, at 11.

⁸⁰ See *Snow Phipps Grp., LLC v. KCAKE Acquisition, Inc.*, No. CV 2020-0282, 2021 WL 1714202, at *52-56 (Del. Ch. Apr. 30, 2021).

⁸¹ See Lipton & Talley, *supra* note 28, at 11

failure. Nonetheless, this ultimate outcome is doubtful and a contributing reasoning to why Musk agreed to the deal in October 22.⁸²

Legal experts expressed the opinion that Twitter had a strong case against Musk, given he promised to buy the company for a price. In fact, a former SEC commissioner remarked, “[H]e better show up and buy the Company for that price.”⁸³ As exemplified by the court of chancery in the *Tyson Foods* case, where the buyers were foot dragging in going through with the deal to buy a meat processor, the court compelled the buyers to carry out the deal even though they had questions about the business.⁸⁴

Could the court have simply ordered Musk to pay damages for breach of contract instead?

Although, as indicated in the above case of *Tyson Foods*, where the court can simply force the reluctant buyer to complete the agreement, the court may not necessarily follow that precedent.⁸⁵ The court may instead award damages that would put the parties in a position they were in before the disagreement took place. It would not have been unusual therefore to make Musk pay billions of dollars in damages.⁸⁶ The amount of damages would likely have been less than the \$44 billion Musk was to pay for Twitter, but he was, however, going to be spared the embarrassment of him having to buy a company he was no longer interested in owning.⁸⁷

IV. THE SALE OF TWITTER AND IMPACT ON OTHER STAKEHOLDERS

Twitter eventually negotiated a deal with Musk. Taking a closer look at the various stakeholders impacted by the negotiated deal may shed some light as to whether basic norms of corporate governance in merger agreements were followed. From the Proxy statement filed by Twitter with the SEC relating to the shareholder vote, as well as the acquisition agreement, it was found that the high-level executives made a huge windfall from the deal.⁸⁸

A. Corporate Executives and Non-Executives

The monetary gains by the executives as shareholders based on their equity holding in Twitter as shareholders resulted in a total of \$ 74.3

⁸² See *id.* at 11–12.

⁸³ See Bond, *supra* note 38.

⁸⁴ *IBP, Inc.*, 789 A.2d at 38.

⁸⁵ Bond, *supra* note 38.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See Bebachuk et al., *supra* note 46, at 315-16.

million going to the top four executives.⁸⁹ Payments to these same top executives qua executives, meaning as additional payments to them as executives and not as shareholders, including severance payments, perquisites benefits and their cashing out of uninvested equity, resulted in an aggregate amount of roughly \$141 million.⁹⁰ Consequently, putting together the gains made by these top executives as shareholders and executives resulted to approximately \$215 million in total gains.⁹¹

Although the non-executives' directors received less than the top executives, they nonetheless also profited from the Musk acquisition. Directors, just like officers, own shares of the company they tend to lead and, like the executives, also obtained gains from the negotiations with the buyer qua shareholders. The aggregate amount obtained by these non-executive directors from the Twitter negotiations resulted in over \$90 million.⁹² As directors, they received a total amount of \$4.9 million in additional payments, with each of them being given at least \$200,000.⁹³ Thus, the total amount obtained as non-executive directors and as office holders gave them a windfall of about \$93 million for them as non-executive directors.⁹⁴

Although the Twitter Board has been criticized for jumping at the Musk bid of \$54.20, it was not that straight forward to accept the bid.⁹⁵ As some commentators postulated, the bid outcome did not seem plausible in the early days of the decision to buy Twitter, as commentators still thought it was better for the Twitter Board to get out of the deal and pay a billion dollar in breakup fees than to succumb to Musk's public outbursts and unpredictable comments.⁹⁶ On Kara Swisher and Scott Galloway's podcast, Swisher projected that the Board was "scared" and wanted out of the deal and to just get away from Musk. Swisher believes the Board should ask Musk to sell back his shares, even at a loss, pay the billion in fees, and go.⁹⁷ It was accordingly better to "let him move." Galloway said, "there is a lot of ego involved, and the Twitter Board has said, "Here's \$50

⁸⁹ *Id.* at 315.

⁹⁰ *Id.* at 315. The four listed executives and their total sums include, Parag Agrawal (\$65.8 million), Ned Segal (\$66.5 million), Vijaya Gaddu (\$54.8 million), and Sarah Personette (\$28.4 million.) Although the proxy statement names six executives, two of them, Jack Dorsey and Mike Montano, were no longer serving as such in 2021.

⁹¹ *Id.* at 315-16.

⁹² *Id.* at 316.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *See id.* at 314.

⁹⁶ Intelligencer Staff, The Twitter Lawsuit Could Be Very Bad for Elon Musk, INTELLIGENCER (July 12, 2022), <https://nymag.com/intelligencer/2022/07/the-twitter-lawsuit-could-be-very-bad-for-elon-musk.html>.

⁹⁷ *Id.*

million . . . pursue this guy to the end of the Earth.”⁹⁸ The Twitter Board has acted within reason and done what they needed to do as fiduciaries.⁹⁹

B. The Twitter Company Shareholders

The issue here is whether the Twitter Board of Directors acted in the best interest of the shareholders? Does it matter that the ultimate share price paid to shareholders was higher than the intrinsic value of the shares at the time of sale?

The Twitter stock price before any information was leaked out about the potential deal to buy was \$39.31 per share.¹⁰⁰ The acquisition price was \$54.20 per share with a premium of about 38%. The resulting total premium received by shareholders was about \$11.4 billion.¹⁰¹ But keeping in mind that Musk was a holder of 9.1% of the shares at the time of acquiring the company, Musk received a premium as reflected by his shareholding. The total aggregate premium received by the non-Musk shareholder amounted to \$10.3 billion.¹⁰² If there was a premium, why were some shareholders suing Twitter?

C. The Fate of Employees During and Post-Acquisition Agreement and the Irony of Twitter’s Work Mantra.

1. Fate of Employees During Acquisition of Twitter

Before the Musk acquisition, Twitter had tended to pride itself as a company that had the interests and welfare of its employees (the “tweeps”) as a core value and a fundamental principle of the company.¹⁰³ Its pro-employee expressions at the website and Careers page included:

- “Our Business Resource Groups (BRGs for short) are made up of Tweeps and their allies who dedicate time to shaping our culture by uplifting and empowering our communities. They work to make Twitter a place where anyone, anywhere can belong.”¹⁰⁴

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Bebhuk et al., *supra* note 46, at 314.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 317.

¹⁰⁴ *Id.*

- “[W]e put people first . . . Together we are creating a culture that is supportive, respectful, and has a pretty cool vibe.”¹⁰⁵

“We take care of our Tweeps. We know that feeling your best allows you to do your best. That’s where perks & benefits come in”¹⁰⁶ and “We take care of the whole of you—from physical and mental to financial and professional. So, no worries, we got you.”¹⁰⁷ Given some of these well-articulated words about Twitter’s workplace and how Twitter takes its employees welfare into account as well as examining how these employees were treated once Musk acquired Twitter and even thereafter, aids in understanding what may lie ahead for the “new” Twitter company.

As discussed above, the deal did result in significant monetary gains to shareholders, executives, and non-executives of the company, but surprisingly, none of the surplus gains would be used to ease the exit of the employees.

In negotiating the Twitter/Musk deal, how were the employees considered and did the company live up to its publicly vaunted “pro-employee” mantra? Twitter authorities did not negotiate how the employees who were laid off would be taken care of for a proper exit or how they would be compensated or dealt with after the fact. They did not make any arrangement for the incorporation of terms into the agreement regarding employee rights pertaining to their job termination.¹⁰⁸ The terms of the deal instead gave unfettered discretion to “Musk’s freedom of choice with respect to the scale and speed of post deal layoffs.”¹⁰⁹ Thus, between the signing and closing of the deal, there was generally no compensation or financial benefits to employees who were to be laid off.¹¹⁰ Without any explicit agreement, for example to pay employees who were to be laid off at least a three months’ additional salary, the employees were provided no protections beyond their individual contracts.¹¹¹

The leaders of Twitter were said to have failed to raise the matter with Musk for discussion or attempt to obtain any concessions on their behalf. This lack of effort and nonchalant treatment towards the employees was evident in an exchange between the employees and the Twitter CEO, Parag Agrawal. At a town hall meeting convened shortly after the deal was

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 318.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* Although some employees may have had severance arrangements per the terms of their contract prior to the purchase deal.

¹¹¹ *Id.*

signed, the CEO informed employees that there were no plans for layoffs and this statement was also buttressed by reassurance from the Chair of the Board, Bret Taylor, when he stated that agreement with Musk “prioritized continuity.”¹¹² This misrepresentation was becoming more apparent given that at the first employee FAQ session after the deal was announced, the company leaders still refused to say that they had knowledge of any information regarding laying off employees. In fact, “[i]n response to the question of ‘[i]s there a possibility for layoffs, now or post-close?’, the company statement replied that ‘[t]here are no plans for layoffs at this time.’”¹¹³ The truthfulness of these statements was put to the test shortly after the acquisition of Twitter was effectuated.

About a week after the deal was closed, Musk cut 50 percent of the company’s 7,500 employees.¹¹⁴ The head office in San Francisco endured the brunt of the layoffs with 890 jobs slashed.¹¹⁵ Mr. Musk, at an October 28 meeting with human resource executives, bluntly told them he wanted to cut down the work force instantaneously and wanted to do so before November 1, a date whereby employees were to obtain their customarily arranged retention bonuses as vested stock.¹¹⁶ Musk noted that Twitter “will need to be extremely hard core” to succeed.¹¹⁷

However, Musk agreed to slow down once he realized the resulting costs of layoffs based on a financial model built by the Twitter team that showed how much more he may wind up paying in legal fees and fines if he insisted on the rapid lay off process.¹¹⁸ So, employees, who were given assurances in the company mantra with statements such as “We take care of the whole you—from physical and mental to financial and professional,” were surprised to learned that they were fired when their

¹¹² *Id.* at 319.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Kate Conger et al., *Two Weeks of Chaos: Inside Elon Musk’s Takeover of Twitter*, N.Y. TIMES (Nov. 11, 2022), <https://www.nytimes.com/2022/11/11/technology/elon-musk-twitter-takeover.html>.

¹¹⁷ Faiz Siddiqui and Jeremy B. Merrill, *Musk Issues Ultimatum to Staff: Commit to ‘Hardcore’ Twitter or Take Severance*, WASH. POST (Nov. 16, 2022, 2:59 PM), <https://www.washingtonpost.com/technology/2022/11/16/musk-twitter-email-ultimatum-termination/>.

¹¹⁸ Conger et al., *supra* note 102. Apparently, “Musk was informed on October 30 that the rapid approach could cost him millions more than simply laying off employees on their scheduled bonuses.” *Id.* Musk was concerned about paying ghost employees and therefore required that a payroll audit be conducted to ensure the Twitter employees were “real humans.” *Id.* Musk directed Robert Kaiden, Twitter’s Chief accounting officer to conduct this audit. When the November 1 deadline came and passed without mass layoffs, Musk fired Kaiden the following day. *Id.*

laptops and emails were deactivated late on November 3.¹¹⁹ This date was a week after closing. Workers were officially notified of their layoffs from a company-wide e-mail from a generic address which simply stated, “In an effort to place Twitter on a healthy path, we will go through the difficult process of reducing our global work force” and signed, “Twitter.”¹²⁰

No comprehensive reasons for the layoffs were provided. To make matters worse, the communications failed to take into consideration the different time zones in which the company operates, leading to employees in Europe and Japan receiving layoff notices while still at work.¹²¹ Pandemonium was prevalent and the layoffs enormous. In Redbird, for example, which is the Twitter platform and infrastructure unit, about 80% of the engineers were let go including numerous managers.¹²² In the same vein, in Twitter’s consumer division, Bluebird, many product managers were laid off, leaving behind a ratio of 70 engineers to one manager.¹²³ There were also mass employee resignations, with estimates indicating that of the 7,500 full time employees working at Twitter in October only about 3,700 remained by November.¹²⁴

Although employees who were laid off were offered a three-months’ severance package, much more than legally required,¹²⁵ the entire layoff process was said to be not only chaotic but also exhibiting a “lack of care and thoughtfulness,”¹²⁶ and was an “inhumane way to treat employees.”¹²⁷ An attorney described in an interview with the Hollywood Reporter that “[t]he way Musk/Twitter let people know they might be laid off, and then informed those who were laid off that they were in fact chosen for layoff, was extremely disrespectful of the workers and how much a job loss affects their lives.”¹²⁸

While others think Musk caused the problems Twitter is facing, tech investor, Sarah Kunst, for example, said that “the real reason Twitter is facing difficulties is because the takeover has saddled the company with

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Bebachuk et al., *supra* note 40, at 320 n.39.

¹²² *See* Conger et al., *supra* note 116.

¹²³ *See id.*

¹²⁴ Ryan Mac et al., *Elon Musk’s Twitter Teeters on the Edge After Another 1200 Leave*, N.Y. TIMES (Nov. 18, 2022), <https://www.nytimes.com/2022/11/18/technology/elon-musk-twitter-workers-quit.html>.

¹²⁵ *See* Bebachuk et al., *supra* note 46, at 320.

¹²⁶ *Id.*

¹²⁷ *Id.* Rival tech companies like Meta and Google could not pass the opportunity of benefiting from the layoffs by attempting to recruit some of those who were laid off.

¹²⁸ Ashley Cullins, *Elon Musk’s Mass Twitter Layoffs Spur Legal Headaches*, THE HOLLYWOOD REPORTER (Nov. 9, 2022, 8:54 AM), <https://www.hollywoodreporter.com/business/business-news/elon-musk-twitter-layoffs-lawsuits-1235258453/>.

debt.”¹²⁹ Kunst also asserts that Musk’s behavior since the takeover has also contributed to some advertisers halting their spending, but she notes that “[h]e’s now trying to inflict that pain and uncertainty on the employees.”¹³⁰

Having realized that the retrenchment may have been too profound, Musk through his advisers, asked for the return of some engineers, designers, and product managers.¹³¹ The Twitter Revenue Unit, Goldbird, had to bring back those who were responsible for the money generating products that “no one else knows how to operate.”¹³²

The flip-flop and chaos were palpable. Employees were confused in figuring out who were still staff members, how to keep the company running by knowing what area of the infrastructure needed support, and an employee who wanted to tender his/her resignation could not figure out who the manager was to be able to tender the resignation to because so many had resigned.¹³³ Employees were asked to oversee functions with which they had no familiarity, changes took place in an information vacuum given the layoff of inside communication staff, and workers looked to the media for information.¹³⁴

2. The Aftermath and the Twitter Employees

The question is whether the retained employees fared any better in their treatment by their new company owner, Musk. Musk after the deal closed wasted no time and moved to reshape the company by orchestrating some unexpected changes that left employees bewildered.

Musk changed hourly compensation terms for continuing employees, by reducing their hourly compensation but requiring employees to spend more time at work, i.e., 80 hours work week with a minimum of 40 hours in the office, except otherwise approved by him.¹³⁵ Musk gave the employees an option to leave or stay with Twitter. However, Musk made employees who chose to remain with Twitter fill out a form consenting to the understanding that if they do, they are simultaneously agreeing to work for long and intensive hours.¹³⁶ As such Musk was indirectly exacting from employee who would stay consent to more work time and intensity.¹³⁷

¹²⁹ Noor Nanji, *Elon Musk Tells Twitter Staff to Work Long Hours or Leave*, BBC NEWS (Nov. 17, 2022), <https://www.bbc.com/news/business-63648505>.

¹³⁰ *Id.*

¹³¹ Conger et al., *supra* note 116.

¹³² *Id.*

¹³³ *See* Mac et al., *supra* note 124.

¹³⁴ *Id.*

¹³⁵ Bebachuk et al., *supra* note 46, at 322.

¹³⁶ *See id.*

¹³⁷ *Id.*

Why did these employees agree to sign these Musk forms? Did Musk run afoul of regulations regarding mass layoffs? Under the Federal Worker Adjustment Retaining Notification (WARN) Act, notice of a layoff is required if it affects over 50 people.¹³⁸ This number could be less if it involves a third of any workforce. In California, if a company has 75 or more employees, then notice is required within 30 days for the layoff of 50 or more employees notwithstanding the percentage of the work force.¹³⁹ On the other hand, in New York, for private sector employers with 50 or more employees, WARN notices are required where 33 % of the workforce is to be laid off (at least 25 employees) or 250 from a single site.¹⁴⁰ The Twitter emails regarding the layoffs to employees seemed to have complied with and were consistent with the 60-day and 90-day notice periods in California and New York, respectively.¹⁴¹ The laid off employees were informed that they will no longer be working for Twitter but “will remain employed by Twitter and will receive compensation and benefits through your separation date of January 4, 2023” and in other cases, a parting date of February 2, 2023 was given, as was contractually appropriate.¹⁴²

Although the Twitter deal made provisions for Twitter’s continuing employees to receive “at least the same base salary and wage rate” for 12 months, the agreement, however, did not permit the employees to enforce the provision.¹⁴³ Consequently, Musk’s was empowered and did not violate the tenets of the agreement by indirectly extracting from continuing employees a lower hourly work rate by having them sign forms to agree to do intense work and for longer hours at the same rate.¹⁴⁴ However, but for the agreement precluding the enforcement of said provision, it is likely the affected employees could have avoided signing the forms and raised the issue that Musk exercising bad faith in bypassing the provision.¹⁴⁵

Musk did not only make things worse contractually for these continuing employees, but also muddied the work environment in a manner that was inconsistent with the core values and policies of Twitter. In its commitment to look after the welfare of its employees, Twitter expressed, for example, that “at Twitter, we do our work where it makes the most sense, most roles can be done from home.”¹⁴⁶

¹³⁸ Cullins, *supra* note 128.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *See id.*

¹⁴² *Id.*

¹⁴³ Bebachuk et al., *supra* note 46, at 322-23.

¹⁴⁴ *See id.* at 323.

¹⁴⁵ *Id.* at 323.

¹⁴⁶ *Id.* at 317.

Shortly after closing the deal, Musk promptly sent out his first email to his employees stating that he is “changing Twitter policy such that remote work is no longer allowed, unless you have a specific exception.”¹⁴⁷ Yet, prior to Musk’s acquisition of Twitter, Twitter prided itself on its commitment to a flexible work environment and for being one of the first companies to allow remote work during the COVID-19 pandemic—even going so far to say that remote working would be allowed forever.¹⁴⁸

Office benefits were diminished or made redundant. For example, free food at the cafeteria was to be no longer available and what came to be known as “days of rest,” a day per month in which an employee would be “off to rest and recharge,” were eliminated.¹⁴⁹ Musk in cultivating the new work culture also expected the workers to “work strenuously to keep the company afloat,” and he apparently converted some offices into bedrooms for the workers.¹⁵⁰ He surmised his expectation for this new work environment by stating that “[t]hose who are able to go hard core and play to win, Twitter is a good place,” while for “those who are not, totally understand, but then Twitter is not for you.”¹⁵¹

V. LAWSUITS, THE GOVERNMENT, AND THE TWITTER DEBACLE

A. Securities and Exchange Commission (SEC)

Section 10(b) of The Securities and Exchange Act authorizes the SEC to adopt rules governing any manipulative or deceptive device in relation to the purchase or sale of any security. The SEC adopted Rule 10b-5 pursuant to Section 10(b).¹⁵² The issue here was whether Musk ran afoul of any of the securities regulations or rules in the acquisition of Twitter.

¹⁴⁷ *Id.* at 323; see Nanji, *supra* note 129; see also Sarah Needleman & Alexa Corse, *Elon Musk Tells Twitter Staff to Work ‘Long Hours at High Intensity’ or Leave*, WALL ST. J., <https://www.wsj.com/articles/elon-musk-gives-twitter-staff-an-ultimatum-work-long-hours-at-high-intensity-or-leave-11668608923> (Nov. 16, 2022, 2:54 PM).

¹⁴⁸ Bechuk et al., *supra* note 46, at 323.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 323-24

¹⁵¹ *Id.* at 324; see Kate Conger, Ryan Mac & Mike Isaac, *Confusion and Frustration Reign as Elon Musk Cuts Half of Twitter’s Staff*, N.Y. TIMES (Nov. 4, 2022), <https://www.nytimes.com/2022/11/04/technology/elon-musk-twitter-layoffs.html>.

¹⁵² STEPHEN CHOI & A.C. PRITCHARD, SECURITIES REGULATION, CASES AND ANALYSIS 33, 303 (5th ed. 2019).

1. *Rasella v. Musk*¹⁵³

The first lawsuit filed in April 2022 against Musk in the United States District Court for the Southern District of New York alleged that he violated Rule 10b-5 because of a late filing of Schedule 13D¹⁵⁴ or 13G¹⁵⁵ after his acquisition was over 5%. As a 5% owner of the company stock, Musk was supposed to have timely filed a Schedule 13G or 13D regarding his acquisition stake of 5%. Musk only reported he had over 9% of the company's stock on April 4, 2022, and according to the lawsuit, he missed the regulatory deadline of March 24, 2022.¹⁵⁶ The plaintiffs alleged that the delay in reporting gave Musk the ability to buy the Twitter shares at an “artificially low price.”¹⁵⁷ The price of the shares went up by 27% on April 4, when Musk made the offer to buy.¹⁵⁸ Thus, the shareholders who sold their shares before April 4, 2022 did not benefit from the 27% increase between April 1 and the close of the market on April 4, 2022. Consequently, the plaintiff asserted that Musk made materially false and misleading statements by failing to reveal that he had indeed amassed 5% of the Twitter stock and therefore was in violation of Section 13(d) of the Securities Exchange Act and the SEC Rule 13d-1.¹⁵⁹

Musk, in seeking to dismiss the action, claims that the supposed failure to disclose “can’t be characterized as fraud under Securities and Exchange Commission rules” and that the “[p]laintiff fails to plead a cogent reason for embarking upon a scheme to conceal the acquisition of Twitter Shares beginning on March 25, 2022, only to disclose that purported scheme 10 days later.”¹⁶⁰

¹⁵³ *Rasella v. Musk*, 342 F.R.D. 74 (S.D.N.Y. 2022).

¹⁵⁴ Musk filed a Schedule 13D on April 5, 2022, as a person seeking a controlling interest in a company would file. Musk also amended this filing on April 11 to indicate that he was invited by the Twitter Board on April 4 to join the Board but that he did reject that offer by April 9, 2022.

¹⁵⁵ A passive investor could just file a Schedule 13 G, which is a short form statement intended for such investor.

¹⁵⁶ Van Voris, *supra* note 25.

¹⁵⁷ *Id.* Mark Bain Rasella filed this suit on April 12, 2022, but it is now being spearheaded by the Oklahoma Firefighters Pension and Retirement System and will represent a class of investors who sold the Twitter share from March 25 to April 4, 2023.

¹⁵⁸ *Id.*

¹⁵⁹ Mark S. Nelson, *Securities Regulation Daily Wrap Up, Fraud and Manipulation-S.D.N.Y.: Shareholder Suit Targets Elon Musk’s Allegedly Untimely Twitter Stake Disclosures*, VITALLAW (Apr. 13, 2022), <https://www.vitallaw.com/news/fraud-and-manipulation-s-d-n-y-shareholder-suit-targets-elon-musk-s-allegedly-untimely-twitter-stake-disclosures/sld01b48e3dec7e231000bb4a000d3a8b5a8e09>

¹⁶⁰ Van Voris, *supra* note 25.

After March 24, Musk bought about \$513 million in Twitter stock, making him 9.2% owner of Twitter shares.¹⁶¹ It has been estimated that Musk saved over \$143 million by not reporting that he had crossed the 5% threshold as required. On April 4, the day he disclosed his percentage holdings, the closing price was \$49.97, resulting in him saving over \$143 million.¹⁶²

2. *Pampena v. Elon Musk*, on Behalf of Twitter Investors¹⁶³

A subsequent lawsuit was brought in the United States District Court for the Northern District of California by Twitter, Inc., Investors and on behalf of a class consisting of all those who sold the traded securities during the class period of May 13, 2022, and October 4, 2022.¹⁶⁴ The complaint alleged that Musk maneuvered Twitter, Inc.'s stock price during the buyout to his whim and caprices. The complaint further alleged that Musk made about putting the purchase deal on hold to deliberately mislead and cause the stock price to fall because Musk had waived due diligence and as such could not have been able to exercise any right to cancel the contract.¹⁶⁵ Not only were Musk's actions alleged to have caused the price drop, but his tweets were also alleged to have erased billions of dollars in Twitter's valuation.¹⁶⁶ Musk's actions were alleged to have resulted in financial damage to those who sold their shares for the lower price than offered by Musk.¹⁶⁷ That is, Musk was alleged to have deliberately taken steps to lower Twitter's stock price in order to renegotiate the agreed buyout price.¹⁶⁸

Musk is no stranger to fighting the SEC. In 2018, he was investigated by the agency over fraudulent statements on Twitter regarding securing financing to take Tesla private.¹⁶⁹ Musk reached a settlement with the SEC

¹⁶¹ Dave Michaels, *Elon Musk's Belated Disclosure of Twitter Stake Triggers Regulators' Probes*, WALL ST. J. (May 11, 2022, 5:18 pm), <https://www.wsj.com/articles/elon-musks-belated-disclosure-of-twitter-stake-triggers-regulators-probes-11652303894>.

¹⁶² *Id.*

¹⁶³ *Pampena v. Musk*, No. 2022-cv-05937-CRB, 2023 WL 3082341 (N.D. Cal. Apr. 24, 2023).

¹⁶⁴ *See* Watwe, *supra* note 36. Giuseppe Pampena initially filed suit against Musk for violations of the Securities Act on Oct. 10, which was a week after Musk announced he would go through with the deal and the stock price surged. The Investors Inc. collectively sold over 28,000 shares during the class period and alleges losses of \$560,000. *Id.*

¹⁶⁵ *See id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Michaels, *supra* note 161.

that including paying a \$20 million fine, stepping down as Tesla's chairman, and having his tweets reviewed by his company lawyers.¹⁷⁰

B. *The Federal Trade Commission (FTC)*

The massive layoffs and exodus of staff after Musk's acquisition of Twitter raised concerns for the Federal Trade Commission ("FTC") about Twitter's ability to comply with rules provided to protect user's data.¹⁷¹ A data governance committee was formed in November 2021—before Musk's acquisition—to oversee Twitter's compliance with an FTC consent decree to protect user personal data. When two of the members of the committee were fired and others resigned, the FTC was attracted to scrutinize the operations based on the consent decree.¹⁷² The committee would oversee how data was collected, accessed, and disclosed, as well as administer compliance with Twitter's Privacy policy.¹⁷³

This FTC probe is invariably connected to a previous violation in relation to an FTC settlement in 2011.¹⁷⁴ That is, the consent agreement that was signed in 2011 and then updated in 2022, requires Twitter to "maintain a robust information security program that would protect user data."¹⁷⁵ This was a legally binding order that involved and included, among other things, the formation of "sufficient safeguards" to protect users' personal information.¹⁷⁶ Thus, the exodus and lay off of staff translate to the fact that Twitter no longer has adequate personnel to manage and maintain the roughly 400 different information standards.¹⁷⁷ Not surprising, the FTC in its letters to Twitter from November 10 to February 1 requested to the number of layoffs and resignations in the various departments as well a specified accounting of who the new

¹⁷⁰ *Id.* Musk has unsuccessfully petitioned the court to clear the settlement and abandon the requirement that his tweets be monitored by lawyers, asserting that he was compelled by the SEC to settle. See Jack Ewing, *Judge Refuses to Strike Down Elon Musk's Settlement with the S.E.C. over his Twitter Posts*, N.Y. TIMES (Apr. 27, 2022), <https://www.nytimes.com/2022/04/27/technology/musk-twitter-sec.html>.

¹⁷¹ Brian Fung, *FTC Says It's Investigating Twitter's Privacy Practices*, CNN (Mar. 8, 2023, 11:19 AM), <https://www.cnn.com/2023/03/08/tech/ftc-twitter-privacy-investigation/index.html>.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *See id.*

¹⁷⁷ See Ryan Gallagher, *Twitter Risks Drawing More Fines After Compliance Teams Gutted*, BLOOMBERG L. (Dec. 2, 2022, 2:42 PM), <https://news.bloomberglaw.com/tech-and-telecom-law/twitter-risks-drawing-more-fines-after-compliance-teams-gutted>. Twice a year, the compliance with the standard is accessed to make sure the company is adhering to the FTC consent decree requirements.

executives are and their responsibilities—those who will be responsible for security and privacy matters.¹⁷⁸

The FTC also tracked the company to ensure it was complying and executing product changes. For example, the FTC monitored the new version of Twitter Blue as provided under the 2022 order by conducting deep privacy reviews first.¹⁷⁹ This undertaking to ensure compliance was reiterated in November 2022 when the FTC said, in complimenting the 2022 settlement, that the order “gives us new tools to ensure compliance, and we are prepared to use them . . . no CEO or company is above the law.”¹⁸⁰

Mudge Zatko, the former head of security at Twitter,¹⁸¹ made the FTC probe even more significant when he disclosed to authorities in an almost 200 pages showing how Twitter is riddled with information securities flaws and stating that “— and that in some cases its executives have misled its own board and the public on the company’s condition, if not perpetrated outright fraud.”¹⁸² Zatko’s condemning disclosure further asserts that over half of Twitter employees, plus all its engineers, have unfettered internal access to the company’s live product, referred to within the company as “production,” along with actual user data.¹⁸³ The disclosure further alleges that Twitter lacks the ability not only to defend against insider threats, but also against foreign governments and unintended data leaks.¹⁸⁴ These allegations could have a significant impact on Twitter’s business in terms of billions in fines, limitations on its operations, tougher regulatory obligations, or even other punishments from the government.¹⁸⁵

Likewise, these security concerns reverberated in Europe when the board of directors charged with managing the Europe Union’s General Data Protection Regulation (GDPR) was no longer functional because

¹⁷⁸ Ryan Tracy, *FTC Twitter Investigation Sought Elon Musk’s Internal Communications, Journalist Names*, WALL ST. J. (Mar. 8, 2023, 11:50 AM), <https://www.wsj.com/articles/twitter-investigation-ftc-musk-documents-db6b179e>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Brian Fung, *How Much Trouble is Twitter in with Regulators*, CNN (Aug. 25, 2022, 8:04 AM), <https://www.cnn.com/2022/08/25/tech/ftc-twitter-whistleblower/index.html>. Zatko is a highly regarded cybersecurity expert with experience in senior roles at Google, Stripe and the Defense Department. Zatko, worked at Twitter from November 2020 until January 2022 when he was fired.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* (“A fundamental engineering and security principle is that access to live production environments should be limited as much as possible,” the disclosure says. “But at Twitter, engineers built, tested, and developed new software directly in production with access to live customer data and other sensitive information in Twitter’s system.”).

¹⁸⁵ *Id.*

Musk had fired two of the three members.¹⁸⁶ The controller of the European citizens' data for GDPR compliance is in Dublin, Twitter's EU headquarters, and its privacy watchdog expressed concerns about Twitter complying with the European Union laws sparking safeguarding fears.¹⁸⁷ Should Irish regulators determine that Twitter's Irish branch is no longer in control over the EU citizen's data, any member state of the EU could open investigations that could ultimately result in fines.¹⁸⁸

VI. POST ACQUISITION NAGGING ISSUES

So, one would imagine that after the acquisition, the layoffs and firings, resignation and all the discussions under after math of acquisition, all should be well at Twitter company as it then focuses on business, governance, and company growth. There are some critical issues that Twitter in negotiating with Musk, declined to seek restrictions or limitations on or even seek soft pledges regarding some of these issues. Consequently, these issues remain nagging issues that may continue to plague the company as it moves forward under Musk. These issues include hateful conduct and civility, diversity, climate risk and human rights.

A. *Hateful Conduct & Civility of Account Holders*

Before the acquisition deal with Musk was completed, Twitter had a clear and firm hateful conduct policy designed to prevent violence, threats, and attack against others.¹⁸⁹ Because people who are more prone to such online attacks tend to be minorities and people from underrepresented communities, Twitter was proactive in its approach in reviewing accounts that "seemed to threaten or incite violence" and acted against the account holders.¹⁹⁰ Such action included suspension of an account, as was the decision in former President Trump's case, when it was perceived that he incited violence during the January 6 attack on the U.S. Capitol Building.¹⁹¹ His account was permanently suspended to minimize any risk of further incitement or violence. As was put out by the then CFO, "[r]emember our policies are designed to make sure that people are not

¹⁸⁶ Gallagher, *supra* note 177.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Bebachuk et al., *supra* note 46, at 325.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

inciting violence. And if anyone does that, we have to remove them from the service. And our policies don't allow people to come back.”¹⁹²

However, shortly after the acquisition agreement, Musk did not only move to reverse the permanent ban of Donald Trump, but he also reinstated virtually all those who had been banned from the platform for violent threats and harassment.¹⁹³ To add insult to injury, content moderators tasked with working with the civic integrity team to pursue hateful content were fired by Musk.¹⁹⁴ Musk, prior to closing, has often shown his favoritism toward slackening the company's controls on political speech. Keep in mind that Musk is a self-described “free speech absolutist” and would like the social media platform to be a “freewheeling place for all types of commentary.”¹⁹⁵

Thus, there has been a spike in hate speech after the acquisition deal closed with racist, misogynistic, and anti-Semitic tweets at their peak.¹⁹⁶ In fact, in a recent letter dated March 28, 2023, from the United States Congress members to Musk, Representatives Adam Schiff and Mark Takano stated that new studies have again revealed that hate speech has “dramatically increased” on the Twitter platform and that Twitter is “not adequately or consistently acting on the hate speech.” The Representatives want to know how Twitter is planning to manage this increase in “harmful and hateful content.”¹⁹⁷

Connected to hateful conduct on Twitter before the acquisition, was the core value of “civic integrity” designed with the goal to protect conversations related to elections or other civic processes.¹⁹⁸ The Twitter

¹⁹² *Id.* at 326; Mark Moore, *Trump's Twitter Ban is Permanent, Executive Says*, N.Y. POST (Feb. 10, 2021, 12:25 PM), <https://nypost.com/2021/02/10/trumps-twitter-ban-is-permanent-even-if-he-returns-to-white-house-exec/>.

¹⁹³ Bebachuk et al., *supra* note 46, at 326.

¹⁹⁴ *Id.*

¹⁹⁵ Conger & Hirsch, *supra* note 1.

¹⁹⁶ See *The Musk Bump: Quantifying the Rise in Hate Speech Under Elon Musk*, CTR. FOR COUNTERING DIGIT. HATE (Dec. 6, 2022), <https://counterhate.com/blog/the-musk-bump-quantifying-the-rise-in-hate-speech-under-elon-musk/>.

¹⁹⁷ Letter from Adam Schiff & Mark Takano, Reps., U.S. Congress, to Elon Musk, CEO, Twitter (Mar. 28, 2023), <https://schiff.house.gov/imo/media/doc/lettertotwitter2.pdf>. (“Of particular concern to us were the rise in antisemitic tweets and anti-LGTBQ rhetoric. When we wrote to you in December, there was an 61.3% increase in the volume of tweets (excluding retweets) referencing ‘Jews’ or ‘Judaism’ with an antisemitic sentiment We are writing three months later as new research has been published showing your claims about a decrease in hate speech to be false. In a new study by the Institute for Strategic Dialogue (ISD), analysis shows that “the weekly average number of antisemitic tweets increas[ed] by 106% when comparing the period before and after Musk’s acquisition. Additionally, the Center for Countering Digital Hate (CCDH) released a new study today, which shows there was a 119% increase in anti-LGBTQ rhetoric and slurs on the platform under your leadership.”).

¹⁹⁸ Bebachuk et al., *supra* note 46, at 327.

integrity team would look at elections throughout the world and assess any potential risks associated with the use of Twitter's platform to spread false or misinformation regarding the elections.¹⁹⁹ The integrity team would then take steps to foil the use of Twitter to spread misinformation.²⁰⁰ Upon reaching the acquisition agreement, Musk undermined these goals under the auspices of freedom of speech by reinstating previously banned accounts that had been eliminated because of misinformation, and cutting content moderation, all of which point to what Musk's wants for the future of Twitter.²⁰¹ Thus, these issues will continue as nagging ones for Twitter, especially given that no constraints or pledges were made as part of the negotiations with Musk to uphold the commitment to civic integrity. In the same vein, Musk, after the takeover, eliminated Twitter's ban on political advertisements, reversing a position adopted in 2019.²⁰²

B. Human Rights Protections

One of Twitter's core values before Musk's acquisition was its strong commitment to human rights on the platform.²⁰³ As Twitter stated, "[d]efending and respecting the user's voice is one of our core values at Twitter."²⁰⁴ Likewise, transparency is quintessential to this commitment.²⁰⁵ This value is a two-prong commitment to freedom of expression and privacy.²⁰⁶ Musk's commitment to human rights seems questionable by his actions. After the closing of the deal, Musk proceeded to dismiss all of the human rights team at Twitter, which could be interpreted to mean Musk undermines human rights protections on the platform.²⁰⁷ This alarming action drew the attention of United Nations ("U.N.") High Commissioner for Human Rights who had to remind Musk in a letter insisting that Musk "[ensures] human rights are central to the management of Twitter" and that his actions were not a promising

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *See id.*

²⁰² Sheila Dang, *Elon Musk's Twitter Lifts Ban on Political Ads*, REUTERS (Jan. 4, 2023, 1:47 PM), <https://www.reuters.com/business/media-telecom/twitter-expand-permitted-political-advertising-2023-01-03/> ("Twitter Inc will reverse its 2019 ban on political ads . . . [and] . . . relax its advertising policy for 'cause-based ads' in the United States and align its ad policy with TV and other media outlets."). Perhaps Justice Kennedy in *United States v. Alvarez* (2012), statement is appropriate here, that "one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace."

²⁰³ Bechuk et al., *supra* note 46, at 331.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *See id.* at 331-32.

beginning.²⁰⁸ The High Commissioner also drew attention to the fact that, before the acquisition of Twitter by Musk, Twitter was “an active participant in the Community of Practice’ of the U.N. B-tech project, which seeks to apply the U.N. Guiding Principles on Business and Human rights in the technology sector.”²⁰⁹

Thus, it was obvious that Musk would undermine human rights given he considers himself a “free speech absolutist”²¹⁰ and with his reluctance to moderate content, which should have been expected. Musk’s stance is contrary to the views and expectations of human rights organizations, which although advocating for the right to freedom of expression, also admonish that that right “[is not] an absolute right” and “[t]reating it as one has real consequences.”²¹¹ Human rights organizations advocate for companies to walk a “fine line between protecting free speech and addressing online content and behavior that threatens people’s rights.”²¹²

To the question “What are Twitter’s or any social media company’s human rights responsibilities?” Musk responded that “[c]ompanies have a responsibility to respect human rights and address and remedy abuses they cause or contribute to under the United Nations Guiding Principles on Business and Human Rights. They should do this in a transparent and accountable way, enforcing their actions in a consistent manner.”²¹³

Again, Musk’s stance regarding human rights protections as risky was not a surprise and therefore Twitter’s leaders could have negotiated some constraints on or pursue some soft pledges on the matter prior to closing. This will remain a nagging issue as Twitter seeks to thrive as a profitable company.

C. Climate Change Stance

Before Musk’s acquisition, Twitter acknowledged the existence of climate change and was therefore committed to “protecting the environment, reducing [its] carbon footprint, and fostering long term

²⁰⁸ *Id.* at 332; see Open Letter from Volker Türk, High Commissioner for Human Rights, United Nations, to Elon Musk, CEO, Twitter (Nov. 5, 2022), https://www.ohchr.org/sites/default/files/documents/press/2022-11-05/22-11-05_Letter_HC_to_Mr_Elon_Musk.pdf; Barbara Ortutay & Matt O’Brien, *Elon Musk Defends Twitter Layoffs as Critics See a ‘Lack of Care and Thoughtfulness’*, FORTUNE (Nov. 5, 2022, 10:27 AM), <https://fortune.com/2022/11/05/elon-musk-twitter-layoffs-critics-lack-of-care-thoughtfulness/>.

²⁰⁹ Bebachuk et al., *supra* note 46, at 332.

²¹⁰ Frederike Kalthener & Amy Braunschweiger, *Interview: Elon Musk, Twitter, and Human Rights*, HUM. RTS. WATCH (May 10, 2022, 12:09 AM), <https://www.hrw.org/news/2022/05/10/interview-elon-musk-twitter-and-human-rights>.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

sustainability projects”²¹⁴ It carried out this commitment of reducing its own carbon footprint through a number of projects, some of which included the announcement, in 2019, of its target goal to attain “a 100% carbon-neutral power sourcing in their data centers by the end of 2022.”²¹⁵ In 2021, Twitter signed the Science-Based Target Initiative (SBTi) agreeing to “reduce greenhouse gas emissions by 2030.”²¹⁶ Twitter joined the EU Climate Pact, pledging to use 100% carbon neutral energy in its EU leased buildings by 2025 through the use of renewable electricity.²¹⁷ In the same vein, Twitter in April of 2022 implemented a new “climate forward approach to ads” that allowed Twitter to prohibit advertisements that “contradict the scientific consensus on climate change.”²¹⁸ Twitter’s primary motive for so doing was to demonstrate its commitment not to benefit from companies in favor of climate denialism.²¹⁹ In 2021, Twitter also created a Risk Committee Board of Directors whose main attention was to focus on Environment, Sustainability and Governance (ESG) issues.²²⁰ Consequently, and in line with its mission, this board stated its commitment “to leverage the Sustainability Accounting Standards Board (SASB) to make sure [they] focus on the ESG risks and opportunities most relevant to [their] investors.”²²¹

Musk before and after the purchase of Twitter expressed some skepticism to Twitter’s commitments, the general agreement on climate issues and on the ESG movement. He has explicitly stated that he is not in favor of the government’s rationale for seeking to combat climate change²²² and has made strong criticism of ESG rules and ratings, even

²¹⁴ Bebachuk et al., *supra* note 46, at 330.

²¹⁵ *Id.* at 330 n.105; *see also Taking Steps Toward Sustainability His Earth Day*, TWITTER (Apr. 22, 2019), https://blog.twitter.com/en_us/topics/company/2019/taking-steps-toward-sustainability-this-earth-day.

²¹⁶ Bebachuk et al., *supra* note 46, at 330 n.105; *see also* Twitter Global Government Affairs (@GlobalAffairs), TWITTER (Apr. 22, 2021, 11:20 AM), <https://twitter.com/GlobalAffairs/status/1488890378107424774>.

²¹⁷ Bebachuk et al., *supra* note 40, at 330 n.105; *see also* Twitter Public Policy (@policy), TWITTER (May 16, 2023), <https://twitter.com/GlobalAffairs/status/1488890378107424774?s=20&t=jkutu3xVvuB53nb-lZsLHQ> (last visited June 3, 2023).

²¹⁸ Bebachuk et al., *supra* note 46, at 330; *see also Accelerating Our Climate Commitments on Earth Day*, TWITTER (April 22, 2022), https://blog.twitter.com/en_us/topics/company/2022/accelerating-our-climate-commitments-on-earth-day.

²¹⁹ *See* Bebachuk et al., *supra* note 46, at 330.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*; *see also* Margo Oge, *Where Does Elon Musk Really Stand On Fighting Climate Change?*, FORBES (Jan. 17, 2022, 5:00 AM), <https://www.forbes.com/sites/margooge/2022/01/17/where-does-elon-musk-really-stand-on-fighting-climate-change/?sh=60e1ea0471dc>.

writing that “ESG rules have been twisted to insanity”²²³ and that “ESG should be deleted if not fixed.”²²⁴ Musk has further stated that he is “increasingly concerned that corporate ESG is the Devil Incarnate” and that “ESG ratings make no sense.”²²⁵

Armed with this information, yet in negotiating the acquisition deal, the Twitter leaders turned a blind eye to these issues and as a result obtained “no constraint or even soft pledges” from Musk on this subject.²²⁶ This is bound to be a continuing nagging issue as the company seeks to thrive in a profitable manner.

D. Diversity

Prior to Musk acquiring Twitter but amid ongoing discussions about the company’s possible sale and how that may undermine diversity and inclusion initiatives, a candid breakdown of gender and race for the second quarter of 2022 was developed. The numbers were that across all roles, 45.8 % were women, and the goal was to increase that percentage to 50% by 2025.²²⁷ 53% of the twitter workforce were men, and 38.5 % were white and representing the largest racial population.²²⁸ In the US cohort, 31.3% were Asian employees, while 9.6% were Black and 8.5% were Latinx.²²⁹ Less than 1% of the Twitter personnel were indigenous, and 7.3 % were military veterans, while 3.3 % of the personnel described themselves as having a disability and 13.5 % of personal were LGBTQIA.²³⁰ This is ironic in light of what was happening after the sale of Twitter, given that the projected goal envisioned at that time was to have 25% of the Twitter workforce come from underrepresented groups by 2025.²³¹ Putting all these percentages in context, one could say Twitter was relatively diversified even if there was still more to be done.²³²

²²³ Bebhuk et al., *supra* note 46, at 331.

²²⁴ *Id.*

²²⁵ *Id.* This stance is a paradox in Musk’s world, given that he has established companies that focus on renewable technologies like Tesla and Solar City.

²²⁶ *Id.*

²²⁷ Caroline Colvin, *Twitter Showcases Diversity Efforts Amid Elon Musk Tension*, HRDIVE (July 26, 2022), <https://www.hrdive.com/news/twitter-diversity-report-2022-q2/628145/>.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² See *Inclusion, Diversity, Equity, and Accessibility*, TWITTER, <https://careers.twitter.com/en/diversity.html> [<https://perma.cc/55BF-CJX3>] (last visited Nov. 17, 2022); see also *Introducing Twitter’s Global Impact Report*, TWITTER (Apr. 7, 2021), https://blog.twitter.com/en_us/topics/company/2021/introducing-twitters-global-impact-report (“Strengthening our communities is core to our social impact philosophy, and our goal is to bring our company and community together as a positive societal force around the world”).

Musk, however, ended all the business resource groups (BRGs) like Blackbirds and Twitter Women.²³³ This was compounded by the fact that many of these leaders lost their jobs.²³⁴ Musk cancelled the “work from anywhere” policy created during the pandemic, which was said to have increased diversity—in particular, Black and Latinx hires.²³⁵ In addition, that policy opened the company up to more diverse areas of the country.²³⁶ Musk was condemned for the layoffs involving BRGs. These groups were “critical,” and “not just for the employees, but for the communities they are connected to.”²³⁷

Amid threatening that the company could go bankrupt, Musk admonished the remaining employees to accept hardcore work or leave the company.²³⁸ He terminated some workers during their pregnancy or leave.²³⁹ Diversity experts hold that tech industry layoffs for the most part tends to unwind the workforce diversity because they view the role of diverse staff as dispensable.²⁴⁰ Sarah Kaplan, a professor at the University of Toronto’s Rotman School of Business Management, intimated that when companies decide to tighten their belts, diverse initiatives are not of paramount consideration and thus pushed to the side.²⁴¹ Based on a LinkedIn analysis which confirms that Musk’s policy of requiring Twitter employees to work in the office may actually hurt underrepresented groups like Blacks, Hispanics and female job applicants as they make up a greater share of jobseekers for jobs that can be done remotely in comparison with their White and male colleagues. Besides, surveys have revealed that “[b]lack employees who work remotely are more likely to say they are valued and treated fairly.”²⁴²

²³³ See Kumba Kpakima, *Musk’s Twitter Layoffs Take a Hammer to Diversity and Inclusion Efforts*, POCIT (Nov. 6, 2022), <https://peopleofcolorintech.com/articles/musks-twitter-layoffs-takes-a-hammer-to-diversity-and-inclusion-efforts/> (“For many Black people, blackbirds are the reason they chose to work at Twitter . . . it is more than an BRG, it is a community. What we built can never be dissolved.”).

²³⁴ *See id.*

²³⁵ *See id.*

²³⁶ Jeff Green et al., *Twitter Upheaval Hits Diversity Ranks in Setback of Recent Gains*, BLOOMBERG (Nov. 4, 2022, 7:18 AM), <https://www.bloomberg.com/news/articles/2022-11-04/twitter-upheaval-hits-diversity-ranks-in-setback-of-recent-gains>.

²³⁷ *Id.*

²³⁸ *See discussion supra* Part IV.C.2

²³⁹ Chris Stokel-Walker, *They Wanted a Baby, Then Twitter Fired Them*, WIRED (Nov. 25, 2022, 7:00 AM), <https://www.wired.com/story/twitter-layoffs-health-benefits-ivf/>.

²⁴⁰ Kpakima, *supra* note 233.

²⁴¹ *Id.*

²⁴² *See* Green et al., *supra* note 236.

On May 13, 2023, Musk stepped down as Executive Chairman and Chief Technology Officer and named Linda Yaccanno in his place.²⁴³ What happens next for Twitter's diversity initiatives remains to be seen under Musk and Yaccanno. However, Musk has been hounded by a spotty track record for diversity at his electric-vehicle company Tesla Inc.²⁴⁴ The company has been dogged by many lawsuits on behalf of Black workers at its auto plant in Fremont, California.²⁴⁵ Musk like a Leopard has shown his spots and it is not so sure those spots will change or be different as Twitter moves forward. A leopard never changes its spots.

VII. LESSONS LEARNED FROM THE TWITTER PURCHASE DEBACLE AND THE IMPLICATIONS FOR CORPORATE GOVERNANCE POLICY DEBATE

A. *Significance to Corporate Law*

The purpose of corporate law is to create value rather than to destroy it. Even where there is a merger with the value being destroyed, the legal structure makes room for the deal while the destruction looms in the background. In the *Twitter v. Musk* situation, the legal merits of the case steered the outcome. It was obvious to most and even Musk that the eventual outcome to closing the deal on its original terms was propelled and overshadowed by the fact that Musk was likely to lose in a court of law.²⁴⁶ Nevertheless, it is hard to fathom that anyone else besides the Twitter shareholders ended up better off from the transaction after it closed.²⁴⁷ So, what did the back-and-forth of the deal really ultimately reveal? Consequently, the impact on Twitter as a business speaks volumes about the "social utility of corporate law" and thus the challenge in figuring out the lessons from the case as it impinges on corporate law itself.²⁴⁸ However, one could consider this eventual outcome of the case as a significant validation of corporate law. The contrary thinking of Musk just getting out of the deal because he wanted to would have "totally upend

²⁴³ Chris Isidore, CNN Business, Elon Musk Names NBCU Ad Chief Linda Yaccanno as Twitter CEO, CNN (May 13, 2023), <https://www.cnn.com/2023/05/12/tech/twitter-ceo-linda-yaccanno/index.html> (last visited June 9, 2023).

²⁴⁴ *Id.*; See Green et al., *supra* note 236. "'As a general rule, layoffs typically disenfranchise people in protected categories: age, race, gender, disability, pregnancy and people who have complained about discrimination in the past,' said Bernard Alexander, an employment lawyer in Los Angeles who represented a worker in a case against Tesla."

²⁴⁵ *Id.*

²⁴⁶ Lipton & Talley, *supra* note 28, at 14.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

how mergers and acquisitions work.” This would have resulted in reconsidering how merger agreements mechanics would work if “Musk found a new way to blow them up.”²⁴⁹

B. Delaware Corporate Law a Winner Too

Delaware still prevailed as a champion in corporate law despite all the media spectacle and Musk’s capricious attitude in the acquisition of Twitter. The chaos that ensued with the on and off deal by Musk and his detailed probing and exploration into all aspects of the Twitter business, did not shake chancellor McCormick who presided over the case. She “played it by the book, issuing early discovery rulings promptly and fairly, refusing to be sidetracked, and maintaining exemplary control over her courtroom.”²⁵⁰ This straightforward, stern but fair manner of handling the case did not only polish her great reputation but also that of the state of Delaware as a “no nonsense litigation venue” in the country.²⁵¹ McCormick dismissed “any and all claims and counterclaims” over Musk’s bid to walk from the \$54. 20 per share deal ushering the four months court ordeal to an end.²⁵²

C. The Twitter Board Stress Test

Musk’s unconventional way of deal making was a test to the Twitter Board. As Musk proceeded to purchase the company and then refusing to do so by raising assorted reasons as already discussed above, the Twitter Board was resilient in the face of it, and endured ridicule from commentators and others.²⁵³ While the tech stock fell after the deal was reached, commentators were optimistic, Twitter would simply walk away from the deal and pay the break-up fees than stomach Musk’s condescending public outbursts. It was alleged the Board was scared and wanted a way out of the deal²⁵⁴ and that Musk should sell back his shares, even if at a loss, pay the billion dollar fee, and just go away.²⁵⁵ If the Board had timidly shied away from the deal, it probably would have raised other litigation concerns from the shareholders as to the Board’s passivity and whether they were acting in the best interests of the company.

²⁴⁹ Matt Levine, *Elon Musk Never Jokes*, BLOOMBERG (Jan. 24, 2023, 2:24 PM), <https://www.bloomberg.com/opinion/articles/2023-01-24/elon-musk-never-jokes>.

²⁵⁰ Lipton & Talley, *supra* note 28, at 12.

²⁵¹ *Id.*

²⁵² Jef Feeley, *Twitter-Musk Legal Fight Officially Ends as Judge Dismisses Suit*, BLOOMBERG L. (Nov. 15, 2022, 11:46 AM), <https://news.bloomberglaw.com/litigation/twitter-musk-legal-fight-officially-ends-as-judge-dismisses-suit>.

²⁵³ See Lipton & Talley, *supra* note 28, at 12.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

The Board chose to fight instead of quitting, especially when one sees how capricious Musk became when the tech stocks were plummeting. The Board refused to budge and in absolute contrast with Musk conduct, chose to keep steady “with a strategy of litigating in court filings rather than in the public arena.”²⁵⁶ They stuck to what they thought was right for the company and were mindful of the fact that even if they decided to dump the law suit or settled for a smaller price per share, if contested in court they would be insulated by the Business Judgement Rule.²⁵⁷ So, the Twitter Board was commended for acting consistently with what is expected from Delaware boards, “relentlessly pursuing the best outcome for Twitter’s shareholders, despite any personal tolls”²⁵⁸ Therefore one could say corporate governance policy regarding the board and shareholder interest was upheld.

D. Stakeholder Governance Issue

One of the core values of Twitter and one in which it prided itself before the acquisition was effectuated was its commitment to its stakeholders as expressed in its mission and purpose statements. Among the corporate mission and purpose statements most specifically pertaining to the stakeholders are the following: to “serve the public conversation,”²⁵⁹ “to promote the long-term interests of . . . stakeholders and help build public trust in Twitter,”²⁶⁰ “to bring our company and community together as a force for good,”²⁶¹ and “[t]o give everyone the power to create and share ideas and information instantly without barriers, with a commitment that its ‘business and revenue will always follow that mission’”²⁶²

The question is whether such pro stakeholder rhetoric proclamations are indeed effective or only serve as window dressing and how is it manifested in the Twitter of today.

Stakeholder governance (“stakeholderism”) is the view that corporate management should not only be paying attention to shareholder’s

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ Sarah Personette, *Reimagining the Public Conversation*, TWITTER, <https://business.twitter.com/en/blog/reimagining-the-public-conversation.html> (last visited Oct. 4, 2023); *see also* Bebchuk et al., *supra* note 46, at 324.

²⁶⁰ *Governance Resources*, TWITTER, <https://investor.twitterinc.com/corporate-governance/Governance-Resources/default.aspx#impact-report> [<https://perma.cc/5SGH-4GT9>] (last visited June 9, 2023); *see also* Bebchuk et al., *supra* note 46, at 324.

²⁶¹ *Governance Resources*, TWITTER, <https://investor.twitterinc.com/corporate-governance/Governance-Resources/default.aspx#impact-report> [<https://perma.cc/5SGH-4GT9>] (last visited June 9, 2023); *see also* Bebchuk et al., *supra* note 46, at 324.

²⁶² Bebchuk et al., *supra* note 46, at 324; *see also* *Investor Resources*, TWITTER, [<https://perma.cc/57NF-GHC5>] (last visited June 9, 2023).

paramount interests but rather should also exercise discretion and serve other non-shareholder constituencies.²⁶³ It therefore did not come as a surprise when in 2019, at the Business Round Table represented by business companies and their CEOs, companies embraced this commitment of considering stakeholders in apportioning value.²⁶⁴ Likewise a similar philosophy was expressed by the World Economic Forum stating that companies should ditch “shareholder primacy and embrace stakeholder capitalism.”²⁶⁵ Needless to say, this stakeholder governance philosophy has been criticized, stipulating that corporate management should not promote stakeholders interest beyond that which enhances shareholder interest.²⁶⁶

How was the long-term interest of these stakeholders and building public trust managed? How did Twitter use their “company and community as a force for good”?²⁶⁷ With the above Twitter policy and mission statements of commitments to stakeholders coupled with the discussion above about the stakeholders’ fate in the deal between Twitter and Musk, it is obviously doubtful that corporate management would ensure that other stakeholders benefit from any surplus resulting from an acquisition.

E. The Relevance of Corporate Mission and Purpose Statements

In the same manner that stakeholders have been increasingly advanced as a trend, so too has been the trend for companies to declare their mission statement and purpose.²⁶⁸ Some companies and firms are adhering to this trend and adopting mission and purpose statements and therefore giving business to consulting firms that monitor and issue reports on their adoptions.²⁶⁹

When one takes a close look at the deal between Twitter and Musk and the pertaining mission statement as discussed above, there is a disconnect between those statements and their practical implementation. The study of the Musk-Twitter deal demonstrates a misplaced importance to purpose and mission statements.²⁷⁰ As discussed above, Twitter management was very proudly displaying their pro-stakeholder mantra in these statements, yet when it came to negotiating the acquisition deal, these leaders were unable to stand behind the statements they had publicly

²⁶³ See Bebachuk et al., *supra* note 46, at 333.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 333-34.

²⁶⁷ *Id.* at 324.

²⁶⁸ *See id.*

²⁶⁹ *See id.* at 334.

²⁷⁰ *Id.* at 335.

embraced as the core value of Twitter. They could have sought some concessions from Musk to protect their stated mission, and core values if it were truly that important to the company's intrinsic nature. This suggests that these mission and purpose or core value statements do not appear to substantively affect corporate decisions and therefore unlikely to severely enhance stakeholders' position or vulnerability.²⁷¹

CONCLUSION

While the purchase of Twitter was highlighted by all the celebrity and media trappings, it is also clear that a lot more was taking place in the realm of corporate acquisition. This article has examined and showed what was taking place legally and during the four months from when Musk acquired a 5% interest in Twitter until the eventual purchase of the company.

Musk did not perform due diligence in the process and decisions were simply unravelling as he went along on a flip-flopping mind journey. Musk "bought Twitter to own Twitter, the thing that you can see on your screen when you go to Twitter.com; he didn't buy Twitter for its employees," stakeholders, "and contracts and codebase and whatever else. His diligence was using Twitter. Everything else was unnecessary."²⁷² A commentator aptly described Musk as "interesting because he is clever, forceful, a good pitchman, and not at all interested in how things are supposed to be done."²⁷³ What lies ahead for Twitter remains to be seen, but the lessons learned from the entire process and the nagging issues discussed will likely continue to reverberate not only at Twitter but in the realm of corporate governance.

It is worth noting that Twitter on July 22, 2023, rebranded to X and according to Musk, the name change is intended to align with it being "the everything app." Linda Yaccarino, Twitter's CEO puts it even more aptly, stating, "X is the future state of unlimited interactivity — centered in audio, video, messaging, payments/banking — creating a global marketplace for ideas, goods, services, and opportunities." This is an expansive promise, but apparently not much seems to have changed about the social media platform, at least not yet. For now, both X.com and twitter.com lead to the same place.²⁷⁴

²⁷¹ *See id.*

²⁷² Levine, *supra* note 249.

²⁷³ *Id.*

²⁷⁴ Jacob Roach, *Why is Twitter Called X Now? Here's Everything You Need to Know*, DIGIT. TRENDS (July 31, 2023), <https://www.digitaltrends.com/computing/why-twitter-called-x-now/>.