



Musk-Twitter Saga In Uncharted Waters, With Ending Unclear

By [Tom Zanki](#)

Law360 (July 11, 2022, 10:49 PM EDT) -- Elon Musk's effort to terminate his agreement to buy [Twitter Inc.](#) could end through several scenarios depending on how variables play out, ranging from negotiated settlements to protracted litigation, legal experts said.

Musk's lawyer informed regulators Friday that the [Tesla Inc.](#) CEO wanted out of his **\$44 billion deal** to acquire the social media giant — reiterating, among other things, the billionaire's belief that Twitter undercounts the presence of spam accounts on its platform. Twitter countered that it **will sue Musk** in [Delaware Chancery Court](#) to enforce a signed agreement, raising the stake in this extraordinary takeover battle marked by plot twists.

Here are key points to watch as the dispute unfolds.

Settlements Could End Dispute

Twitter's agreement with Musk contains a so-called specific performance clause, meaning the company can sue to force Musk to close the deal, assuming debt financing is in place. Whether Twitter is willing to risk a costly legal battle to achieve this outcome is less certain.

"While my read of the contract and the situation is that Twitter has the better legal argument here, I still do not believe that this is a likely endgame," Oscar Gomez, a partner at [EPGD Business Law](#), told Law360. "My sense is that the court and the parties will push for a settlement to be worked out if it looks like Musk will not prevail on his theory that Twitter misrepresented their user base."

Anat Alon-Beck, a Case Western Reserve University School of Law professor who teaches corporate law and governance, noted that there is precedent for Delaware courts enforcing a specific performance clause. She referred to a 2019 case in which health care technology conglomerate [Boston Scientific Corp.](#) was **forced to complete a \$275 million acquisition** of medical device company Channel MedSystems Inc., despite Boston Scientific's claims that Channel materially breached the agreement after revelations of fraud by a Channel executive. The chancellor said the fraud claims did not amount to a "material adverse effect" that would justify terminating the agreement.

Musk's **offer to buy Twitter** amounts to \$54.20 a share — a 66% premium compared with the company's current stock price, which closed at \$32.65 on Monday. Technology stocks have broadly declined in 2022, and Twitter's shares have further plunged since Musk first bid for the company in April, making the offer price enticing to shareholders.

Yet it's not clear how much Twitter wants a long-term marriage with Musk, who has frequently disparaged the platform since offering to buy it. Musk, who in a series of tweets on Monday mocked Twitter's threat to sue him, has also vowed to shake up Twitter's content moderation policies, which he claims restrict discourse.

Alon-Beck raised the prospect that Musk could refuse to comply with an order to buy the company, which would further plunge this atypical deal into uncharted waters. Twitter could also end the arrangement by seeking damages from Musk of more than \$1 billion, which is the current maximum allowed in the contract.

"I personally feel that damages is the better course of action from the company's perspective," Alon-Beck said.

If a Delaware orders an agreement on specific performance grounds, or appears likely to, Ann Lipton of Tulane University Law School noted that Musk might settle and pay more than \$1 billion.

"It would have to be a large enough number, though, that the Twitter board could accept consistent with their fiduciary duties to Twitter investors," said Lipton, a former corporate and securities litigator who teaches on corporate governance.

Musk's refusal to proceed on the deal's original terms has also fueled speculation that the founder of Tesla and rocket company [SpaceX](#) has buyer's remorse and wants to negotiate buying Twitter for less than the \$54.20-per-share price tag he proposed.

"This is the most likely scenario," said Gomez of EPGD Business Law. "Twitter likely does not want to [get] mired in discovery and reveal too much regarding the amount of bots/nonauthentic accounts in their user base, and Musk likely will not be able to prove this in the end with the kind of clarity needed to back out of the deal. So both parties have an interest in negotiating a lower price and walking away."

Jamie Wright, founder of [The Wright Law Firm](#) in California, told Law360 she can see Twitter taking a strong stance against Musk and litigating to force the initial deal to close.

"This is, however, risky, because Twitter will have to turn over a lot of financial documents pertaining to its executives," Wright said, adding that some of Twitter's financial documents could be subject to a protective order. "Essentially, the litigation will force Twitter to open its books."

Twitter declined to comment on its strategy. The company has hired law firm [Wachtell Lipton Rosen & Katz](#) as it prepares to sue Musk.

"Mr. Musk's and the other Musk parties' purported termination is invalid and wrongful, and it constitutes a repudiation of their obligations under the agreement," Wachtell partner William Savitt wrote in an SEC filing dated Sunday, responding to Musk's Friday filing. "Contrary to the assertions in your letter, Twitter has breached none of its obligations under the agreement, and Twitter has not suffered and is not likely to suffer a company material adverse effect."

Attempts to reach Musk and Ringler were not immediately successful Monday.

Absent a quick settlement, one law professor said he expects Twitter will bring its suit, and the resolution of these disputes will depend on the clarity of the merger agreement. If the contractual language is considered ambiguous, a courtroom showdown could follow, according to Marc Steinberg, a professor at Southern Methodist University's Dedman School of Law and a former SEC enforcement attorney.

"It's very much a matter of contractual interpretation and whether the language of the contract is sufficiently clear to render judgment in favor of Twitter," Steinberg said.

--Editing by Alanna Weissman and Jay Jackson Jr.

Musk States His Case

According to a Friday filing with the [U.S. Securities and Exchange Commission](#), Musk sent Twitter's chief legal officer a letter written by [Skadden Arps Meagher & Flom LLP](#) partner Mike Ringler alleging Twitter has materially breached certain provisions of the merger agreement that amount to a "material adverse effect."

Musk alleges that Twitter has failed to provide complete information that would enable him to independently verify how many bogus accounts populate Twitter's platform. Twitter has disclosed that it regularly combats phony accounts, which it said amount to less than 5% of users on the site, although Musk believes the percentage is "wildly higher," according to Friday's SEC filing.

Friday's filing also states that Musk is seeking information related to Twitter's financial condition, which he said is necessary for him to secure debt financing from various banks who have committed to the deal. Musk would put up about \$33.5 billion to pay for the deal, plus about \$13 billion in debt from various banks, according to prior filings.

Musk's SEC filing also alleges that Twitter breached its agreement by not seeking Musk's consent for recent business changes such as layoffs, a hiring freeze and the firing of two high-ranking employees amid the current economic downturn.