



July 12, 2022

Musk Pulls Out of Twitter Deal; Twitter Plans Litigation

We reported in April on social media company Twitter's adoption of a "Poison Pill" as a defense to Tesla and SpaceX founder Elon Musk's offer to buy the company at \$54.20 per share, an offer that valued Twitter at approximately \$44 billion. The parties then agreed to and signed a modified version of the deal, in which Musk would finance the takeover in part with bank debt and in part with his Tesla stock. Since then, the parties have been sparring over Musk's claims that Twitter's subscriber base is inflated due to fake accounts and "bots," a type of artificial intelligence ("AI") computer program able to simulate human activity on social media and elsewhere. A copy of the April 25, 2022 Twitter - Musk Agreement and Plan of Merger ("Merger Agreement") can be found [Here](#).

On July 8, Musk announced that he was pulling out of the deal, and that the allegedly inflated accounts constituted a "Material Adverse Event," a "MAE," which, like its cousin, a "Material Adverse Change," or "MAC," can excuse a party from closing a transaction when its non-occurrence has been made a condition of closing in the Merger & Acquisition ("M&A") agreement (MAE and MAC clauses are described

in greater detail, as is the reverse triangular merger structure of the Merger Agreement, in our "Mergers & Acquisitions: Deal Points" series, available at [Kurtin PLLC Mergers & Acquisitions](#)). Twitter, whose market value has dropped by over \$3 billion in the days since Musk's announcement, immediately threatened litigation to force Musk to close the deal, called "specific performance" of the transaction. The Merger Agreement also provides for a termination "breakup" fee of \$1 billion, which Twitter is likely to pursue from Musk if it does not succeed in forcing specific performance of the buyout.

Whether Musk's claim that the alleged Twitter subscriber shortfalls constitute a MAE justifying termination of the deal is doubtful and likely a settlement gambit for several reasons: (i) the reason it is called a "Material Adverse EVENT" or "Material Adverse CHANGE" is because the terms are supposed to refer to an occurrence AFTER signing the M&A agreement but BEFORE closing. Parties are supposed to conduct due diligence on each other and verify their representations and warranties and financial and other disclosures before signing a M&A agreement; (ii) the Merger Agreement's MAE definition mainly refers, like most such clauses in M&A agreements, to events external to the company, such as wars or pandemics, general market downturns and similar events; and (iii) only one decision by the Delaware Chancery Court, the corporate law-specialized court that will adjudicate any dispute under the Merger Agreement, has found that a MAE or MAC justifying termination of a transaction has occurred, in a proposed 2018 takeover of drugmaker Fresenius SE of rival Akorn. However, court rulings requiring specific performance of a transaction are also rare. More likely is payment of at least the \$1 billion breakup fee, and perhaps a settlement somewhere north of that. Stay tuned!

For additional information, please contact us at info@kurtinlaw.com.

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