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# Did Twitter deliberately mislead Elon Musk in his acquisition bid?

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*Elon Musk has officially ended his bid to acquire Twitter on the grounds that it misled the market in its disclosures, writes UNSW Business School's Mark Humphery-Jenner*

Elon Musk has officially terminated his bid for Twitter. He has alleged misleading conduct and obfuscation. Twitter has fired back, stating that it would sue to force him to complete the acquisition.

But, does Elon Musk have a point? To explore this, we need to look at what exactly he is arguing. He makes four main arguments:

1. Twitter's regulatory filings were misleading because they understated the number of spam/bot/fake accounts on Twitter. This contravenes Section 4.6 of the merger agreement.
2. Twitter failed to provide his team with sufficient documents to verify Twitter's regulatory filings. This would violate Section 6.4 of the merger agreement.
3. Twitter failed to continue operating ordinarily due to staff turnovers, and removals, thereby violating Section 6.1 of the merger agreement.
4. Twitter caused a "material adverse effect" to its operations due to the above, especially the opacity surrounding user numbers and information. He argues that this would allow him to terminate the deal.

The first two arguments are the primary focus. Argument four is a corollary of arguments one and two. Argument three is unlikely to succeed given that staff turnovers are commonplace and Twitter can hardly force employees to stay if they choose to leave.

## DO THE NUMBER OF FAKE ACCOUNTS MATTER?

Here we see why Elon Musk has an arguable case. Twitter's regulatory filings state that fewer than five percent of its "users" were fake, spam, or bot accounts.

If the number were materially different from this, this significantly impacted Twitter's financial operations, and Elon Musk relied on these filings when making the bid, Elon Musk could claim he had been duped into buying something substantially different from what he thought he was buying. This could render the contract 'void ab initio' (i.e., void from the beginning), enabling him to rescind the contract.

So how many spam accounts does Twitter have? This is not clear. Elon Musk indicated that Twitter's five percent estimate was based on a sample size of only 100 accounts. At face value, the sample is small. It indicates that Twitter might have been reckless as to whether the five percent figure is correct. Alternatively, Twitter might have been willfully blind as to the accuracy of the 5 per cent figure. Given that most estimates are that more than 5 per cent of accounts are spam, Twitter will need to show how accurate that five percent figure is to prevail.

Does the number of spam accounts even matter? The number of fake 'users' can have a material impact on a company such as Twitter. Its revenue comes from advertising and subscriptions to its 'Twitter blue' premium offering. However, if the number of users is significantly lower than Twitter intimated, then advertisers would logically be willing to pay less. Similarly, the total number of potential subscribers would be lower.

If the number of fake accounts is 'significantly' different from what Twitter asserts, this would likely impact Twitter's revenue; and thus, its share price. The court can determine whether it has by looking at how Twitter's share price has reacted in the past when it has revised the number of users down.

There are good policy reasons for a court to side with Elon Musk here. If Twitter's regulatory filings were misleading, a court will hardly want to reward a company for duping potential investors or acquirers and for misleading the market.

If Twitter's regulatory filings were misleading, Elon Musk might also have cause to counter-sue for loss or damage suffered by being duped into paying too much. This would implicitly lower the acquisition price. Ordinary investors would have a similar cause of action.

## **WHAT ABOUT ACCESS TO INFORMATION?**

What then about obfuscation? Does it matter that Twitter has allegedly stymied his attempts to verify the number of fake accounts?

Section 6.4 of the merger agreement requires Twitter to provide such information as is necessary "for any reasonable business purpose related to the consummation of the transactions contemplated by this Agreement".

At present, Elon Musk's primarily relates to his argument about whether the number of spam accounts is 5 per cent. And thus, it is not a totally separate argument. However, verifying the accuracy of Twitter's SEC filings is reasonable. This is because Twitter could be liable for misleading the market should its filings be inaccurate. Thus, it would be necessary to determine what, if any, liability might arise from such actions.

Elon Musk might also allege that failing to provide appropriate user data has made it more difficult to obtain an accurate picture of Twitter's financial position; and thus, has made the transition more difficult.

What then for the bid?

At present, the bid is in limbo. Oft times, Elon Musk is argued to be grandstanding. However, here, he has a point. If Twitter genuinely misled the market in its disclosures, it should not be rewarded. Both Elon Musk and other investors would be rightly aggrieved if Twitter did so. Thus, the market will watch this case with interest. Whoever prevails, the lawyers will evidently be the real winner.

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