

Whitney Tilson's recent writings on Twitter

Monday, July 11

After the close on Friday, Elon Musk in a [regulatory filing](#) announced that he's walking away from his deal to buy Twitter (TWTR). In response, Twitter's board chair [tweeted](#):



Bret Taylor ✓
@btaylor

...

The Twitter Board is committed to closing the transaction on the price and terms agreed upon with Mr. Musk and plans to pursue legal action to enforce the merger agreement. We are confident we will prevail in the Delaware Court of Chancery.

5:51 PM · Jul 8, 2022 · Twitter for iPhone

5,050 Retweets 4,100 Quote Tweets 30.7K Likes

What Musk is doing here makes a lot of sense if he still wants to own Twitter, but at a lower price.

By creating all sorts of chaos and uncertainty and pushing the stock down as much as possible, he's increasing the odds that the company will accept a price per share at, say, \$45 rather than, say, \$52 (versus his commitment to pay \$54.20). It's all very logical – albeit totally scummy.

But maybe Musk really does want out. I had always assumed that he really wanted to own Twitter for ego reasons, but now I'm not so sure.

He may think he can get out with a slap on the wrist (i.e., pay the \$1 billion termination fee and that's it). He has always acted like he's above the law... and, so far, he has been right – bullying regulators at the SEC, National Transportation Safety Board, and in California when they wanted to shut down Tesla's (TSLA) plant during COVID-19.

But if Musk thinks he's going to bully a Delaware chancery judge, he's sorely mistaken – especially since he doesn't have a legal leg to stand on. The three reasons his lawyers cite for why he has the right to abandon the deal are laughable, as Bloomberg columnist Matt Levine details in his Saturday column, [Elon's Out](#). Excerpt:

The pretexts in this letter are pretty laughable, and I doubt a court would side with Musk on any of this. He has been too *open* about the fact that he's messing around; it's impossible to take any of this bot stuff seriously.

Levine thinks a Delaware judge might be intimidated:

The fact that Musk is working in such bad faith here – that he seems so unconcerned with law and the contract he signed – cuts both ways. On the one hand, it will certainly annoy a Delaware chancellor; Delaware likes to think of itself as a stable place for corporate deals, with predictable law and binding contracts, and Musk's antics undermine that. On the other hand it might *intimidate* a Delaware chancellor: What if the court orders Musk to close the deal and he says no? They're not gonna put him in Chancery jail. The guy is pretty contemptuous of legal authority; he thinks he is above the law and he might be right. A showdown between Musk and a judge might undermine Delaware corporate law more than letting him weasel out of the deal would.

NYU marketing professor Scott Galloway disagrees. In his latest [Pivot podcast](#) with Kara Swisher, he argues that a judge is likely to either order "specific performance," meaning that Musk would have to fund his entire \$33.5 billion equity commitment and buy Twitter, or slap him with an enormous fine of \$10 billion or more.

On this point, I agree with Galloway and disagree with Levine.

I do, however, agree with Levine's conclusion:

I like Twitter's odds – its odds of getting specific performance and making Musk close the deal – in court, but I don't think anything is a certainty at this point. And obviously Musk will make this fight as unpleasant as possible... It is all going to be pretty awful and stupid.

I also agree with this blogger: [Musk's Attempt To Get Out Of The Twitter Deal Proceeding Exactly As Predicted; What Happens Next?](#) Excerpt:

Perhaps the most likely outcome is that the two sides will come to some sort of agreement – with the most probable outcome being that Musk agrees to pay some amount for Twitter to drop the case and walk away. The question, though, is what number will satisfy both parties...

All that said, there's a separate question of what happens to Twitter.

Some – who were opposed to the Musk takeover – may look at this as the best scenario, if Musk walks away but has to hand Twitter a lot of cash, that could be useful to keep Twitter going. However, the way these things usually work is that Twitter is now seen as wounded and vulnerable. And I can't see Twitter's current board (or major institutional investors) being able to leave Twitter alone as an independent company like this. As such, my guess would be that some third party now tries to swoop in and buy up the pieces.

It seems unlikely that either Google or (especially) Facebook would be allowed to do so by the DOJ or the FTC, but you could see some other large companies jumping into the fray – including Microsoft (who once wanted to buy TikTok and Discord, and already owns GitHub and LinkedIn) and Walmart (who also wanted TikTok, and still pretends

that it wants to be a digital giant, rather than just a commerce giant). There are some more "out of left field" options as well. A large media company (Comcast? Disney!?) could make a play for it. I *think* AT&T and Verizon have been chastened and shamed by their internet service failures, but who knows?

Either way, at some point in this process, it seems likely that Twitter's ownership is going to change drastically.

Finally, here's interesting commentary from veteran arbitrageur Alan Greenberg (posted by my colleague Herb Greenberg): [A Merger Arbitrageur's Take on Twitter and Musk – Not Over 'Till It's Over](#). Excerpt:

But what if Musk instead chose Twitter as a diversionary smokescreen...

As a way to justify the sale of billions in dollars of Tesla stock, to fund SpaceX and then – by sleight of hand – to use the imaginary bot trap door to parachute out the imaginary bot-leaking rocket ship called Twitter?

If that was his intention, then conducting **real** due real diligence would have left him little legal recourse to abandon the Twitter deal and land safely back to Earth.

My initial reaction upon the Twitter merger announcement was that the twisted nature of the fact set was smelling-salt audacious.

In conclusion, I'm: a) very happy we got our subscribers out of Twitter above \$50 per share... and b) continue to believe the stock is highly attractive at today's price.

Tuesday, July 12

This front-page story in today's *New York Times*, [How Elon Musk Damaged Twitter and Left It Worse Off](#), is undoubtedly correct. Excerpt:

For years, Twitter (TWTR) was a runner-up social media company. It never grew to the size and scale of a Facebook or an Instagram. It simply muddled along.

Then, Elon Musk, a power user of the service, stormed in. He offered \$44 billion to buy Twitter and declared that the company could perform far better if he were in charge. He disparaged Twitter's executives, ridiculed its content policies, complained about the product, and confused its more than 7,000 employees with his pronouncements. As Mr. Musk revealed the company's lack of business and financial prospects, Twitter's stock plunged more than 30%.

Now, as Mr. Musk, a billionaire, tries to back out of the blockbuster deal, he is inexorably leaving Twitter worse off than it was when he said he would buy it. With each needling tweet and public taunt, Mr. Musk has eroded trust in the social media company, walloped employee morale, spooked potential advertisers, emphasized its financial difficulties, and spread misinformation about how Twitter operates.

"His engagement with Twitter took a severe toll on the company," said Jason Goldman, a member of Twitter's founding team who has also served on its board of directors.

"Employees, advertisers and the market at large cannot have conviction in a company whose path is unknowable and which will now go to court to complete a transaction with a bad-faith actor."

But rather than making me bearish on the stock, it makes me bullish. Here's why...

Over my nearly two decades as a hedge fund manager, I invested in a handful of companies whose stock value depended on the outcome of a case before the Delaware Court of Chancery, where Musk and Twitter are set to face off. I even took the train to Delaware once to sit in on a hearing.

So I speak with some experience when I say that these judges are no-nonsense and not subject to Musk's bullying, which has worked so well with other (gutless) regulators.

I think whichever Delaware judge that's assigned to this case will take an *extremely* dim view of Musk's actions from a legal perspective, with his laughable excuses to try to weasel his way out of the contract he signed.

But what Musk (and investors) aren't fully appreciating, in my view, is that these judges are humans, so their *feelings* – not just their unemotional analysis of the facts and the law –have a significant impact on their rulings.

And in this area, they are going to *hate* Musk and his juvenile shenanigans. For example, just yesterday, he [tweeted](#) this, acting as if this was some big joke or game:



Elon Musk

@elonmusk

...



12:04 AM · Jul 11, 2022 · Twitter for iPhone

124.7K Retweets 15.9K Quote Tweets 1M Likes

And then he added this [tweet](#), which shows his overwhelming arrogance:



Elon Musk  @elonmusk · Jul 11



 10.5K

 29.1K

 350.1K



Elon Musk  @elonmusk

Chuckmate

1:11 AM · Jul 11, 2022 · Twitter for iPhone

7,970 Retweets 607 Quote Tweets 176.4K Likes

My take: Musk is in a terrible legal position, and his antics are making a bad situation even worse.

Consequently, I think a Delaware judge is going to look to make an example of him and come down on him like a ton of bricks – mostly likely by forcing him to consummate the transaction he agreed to (at \$54.20 per share) or pay a massive fine of \$10 billion or more.

Wednesday, July 13

It's good to see Twitter (TWTR) standing up for itself and its long-suffering shareholders: [Twitter Sues Elon Musk to Enforce \\$44 Billion Merger](#). This is exactly right:

"Having mounted a public spectacle to put Twitter in play, and having proposed and then signed a seller-friendly merger agreement, 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," Twitter said in the complaint.

Here's a link to the [62-page complaint](#). Twitter seeks a four-day trial to be completed before the end of September.

I agree with [this letter](#) from Rangeley Capital, a fund with a 10% position in Twitter. Excerpt:

If the board chooses to negotiate a token price cut, we don't see how anything in excess of a 2-3% reduction would be reasonable based on precedent and the facts and circumstances of this case as we understand them.

One last point: we've seen a lot of bad takes on the acquisition saga in the public discourse. For example, we saw a former board member suggest Twitter should just "let the whole ugly episode blow over." Others have argued that, "Elon owning Twitter is bad for the public sphere, and employees don't want to work for him. The board should take whatever fee they can get and remain independent."

We strongly disagree.

The board represents owners, and the best thing for shareholders is to aggressively pursue legal action against Mr. Musk to compel him to close. Anything less would be a tacit admission that Musk's claims about the company's false reporting are true. We'd also note that this is in the board's best interest: the current drama with Mr. Musk will be cited as a precedent and taught for decades to come. This case will be the first thing mentioned when recapping the career of each director and will be the first thing shareholders use when considering Twitter's board members as potential future executives/board members at other companies.

It is clear the facts are overwhelmingly on Twitter's side to enforce the agreement. We are heartened by the board's serious and professional initial response to Mr. Musk's childish antics and meritless attempt to terminate the deal. Any potential price cuts or settlements should be negotiated from a position of extreme strength on Twitter's side – the best outcome for shareholders would be that Mr. Musk is the owner of the company when this process ultimately concludes.

I also agree with one of my friends, who wrote:

How does Musk come back from this filing?

There is no such thing as a Nobel Prize in Law, but there is a Nobel Prize in Literature. Maybe this complaint will be one of the finalists in Stockholm this year.

It does appear that Twitter played its cards exactly right, in anticipation of this course of events. It bent over backwards and met every request, while Musk put his foot in his mouth constantly. Terrific job by Twitter and presumably its legal and financial advisors.

One does get the impression here, that Musk has met an immovable object, an opponent that he can't bully. It may be his Waterloo in court.

And guess who [weighed in](#) with his own legal and market analysis? "Driverless cars that crash, rocketships to nowhere" – hysterical!



Donald J. Trump ✓

@realDonaldTrump

30m

When Elon Musk came to the White House asking me for help on all of his many subsidized projects, whether it's electric cars that don't drive long enough, driverless cars that crash, or rocketships to nowhere, without which subsidies he'd be worthless, and telling me how he was a big Trump fan and Republican, I could have said, "drop to your knees and beg," and he would have done it...



Popcorn time! And for Musk, check-writing time – after first selling another \$25 billion or so worth of Tesla (TSLA) stock. Will that be another \$200 billion hit to the market cap?

My take: To repeat what I wrote [yesterday](#):

Musk is in a terrible legal position, and his antics are making a bad situation even worse.

Consequently, I think a Delaware judge is going to look to make an example of him and come down on him like a ton of bricks – mostly likely by forcing him to consummate the transaction he agreed to (at \$54.20 per share) or pay a massive fine of \$10 billion or more.

Thursday, July 14

I can't get enough of the Elon Musk-Twitter (TWTR) saga...

I confidently predict that there will be multiple books, movies, and podcasts about it, especially now that former President Donald Trump has [gotten involved](#), because Musk is highly entertaining to the average person, and a spectacle like this is pure catnip for people (like me) with an interest in stocks and our legal system. So pop some popcorn, pull up a chair, and enjoy the show!

Twitter's stock jumped 8% yesterday as investors digested the [complaint](#) Twitter filed against Musk after the close on Tuesday and concluded – correctly in my opinion – that the company has an airtight case.

Bloomberg's Matt Levine has the best analysis I've seen of it: [Twitter Still Wants Musk's Money](#). Excerpt:

We have not yet seen Musk's reply, and perhaps I am missing something, but so far this case seems very simple to me. We talked [yesterday](#) about the DecoPac case, decided last year by Delaware Chancellor Kathaleen McCormick. A private equity buyer agreed to buy a company, the market went down, the buyer manufactured pretexts to get out of the deal and blow up its financing, and the target sued for specific performance.

The buyer's pretexts there were not as laughable as Musk's here, and the buyer there did not go around tweeting about how gleefully it was violating the terms of the merger agreement, but the judge ordered it to close anyway. "This court has not hesitated to order specific performance in cases of this nature," she wrote, and she didn't.

One of my friends commented:

We may have entered a situation here in which Musk has so angered both Twitter's board and the lawyers involved, that they are going to pursue this on a total "We win 100% or we lose everything, nothing else matters" principle.

That sort of thing can happen when someone acts in such extremely bad faith that the victim becomes beset with revenge and embarks on a mission to pursue justice at all cost. That's the sense one gets from reading the 62-page complaint.

I added:

I agree. I think Twitter's board (and shareholders) are so angry and have lost so much money that they won't settle for anything less than a token reduction in the purchase price – and there's no way Musk, with his enormous ego, capacity for self-deception, and unblemished track record of successfully bullying judges and regulators, will agree to that.

So this is going to a verdict, in which the only two outcomes are that Musk is forced to buy Twitter at \$54.20 or he walks away, paying nothing more than the \$1 billion breakup fee. I think the former is 80% likely. Here's why...

The case will be heard by a single judge who, we [just learned](#), will be Kathaleen McCormick, who became the first female Chancellor (chief judge) of the Delaware Court of Chancery 14 months ago.

I have to imagine that she cares a great deal about the credibility of courts, the rule of law, and the sanctity of contracts. And, in particular, I'm sure she cares a lot about the reputation of the court she now leads.

More than two thirds of the companies in the Fortune 500 are incorporated in Delaware, which means, in most cases, they're relying on the Delaware Court of Chancery to handle their biggest, most important cases – like this one.

I think Chancellor McCormick recognizes that this case will be cited for generations because it goes to the core of our business legal system, which is rooted in the enforceability of contracts.

If Musk gets away with blatantly ignoring the airtight contract he signed, harming a major company and inflicting tens of billions of dollars of pain on shareholders, it will call into question *every* contract. I can't even begin to wrap my head around the chaos and damage it would cause...

So I think, rather than being intimidated by Musk, Chancellor McCormick is going to be *eager* to make an example of him – to rein in a rogue actor and send a clear message to the world that no individual, even the richest in the world, is above the law.

Lastly, the idea that Musk will simply ignore a ruling forcing him to buy Twitter and there's nothing the court will be able to do about it is ridiculous.

It's actually very simple: the court will order the bank holding Musk's Tesla (TSLA) stock to sell as much of as is necessary to get to the purchase price of \$44 billion (including the debt financing in place, other investors, etc.), hand the proceeds to Twitter shareholders, and give the company to Musk.

Musk has been conditioned to think he's above the law, but he's about to get a massive, rude, expensive awakening.

I can't wait to see (and profit) from it...

That said, I always like to present the other side of the argument... so if you want to hear it, read this op-ed in yesterday's *Wall Street Journal*: [Twitter's Lawsuit Against Elon Musk Looks Like a Loser](#). I think it's one of the stupidest things I've ever read, but you can judge for yourself...

Friday, July 15

Tesla (TSLA) shareholders should be following the Twitter saga carefully because, if I'm right and the court rules that Musk has to honor the contract that he signed and buy Twitter for \$54.20, he's going to have to sell a bunch more Tesla shares – and everyone will know it and front-run him, tanking the stock.

Also, you can be sure that his usual tricks to prop up the stock like promising total nonsense (like a million Tesla robotaxis on the road within a year, generating income for owners) will finally fall flat.

Lastly, he's going to have to spend a ton of time undoing the damage he's inflicted on Twitter...

So with that in mind, here are three more quick items about it...

First, this op ed in yesterday's *New York Times* by Yale and Georgetown law professors is spot on: [Elon Musk Bought Twitter. Now He Must Own It](#). Excerpt:

Elon Musk is trying to walk away from his \$44 billion agreement to buy Twitter, but the Court of Chancery in Delaware, where the company is incorporated and is now suing Mr. Musk, should order him to buy the social media company...

A failure to hold Mr. Musk to his bargain could reverberate throughout corporate boardrooms, deterring otherwise beneficial mergers, for years to come...

The fact that Mr. Musk and Twitter may be a bad fit should give the court no pause. The parties are still free to mutually bargain for a breakup after the court has ruled. The question is what the starting point for those negotiations should be. The answer should be given by the agreement Mr. Musk signed, not his after-the-fact maneuvering.

The remedy in this case will set expectations that will shape the merger market for decades. Litigators have long said that bad facts make bad law. Allowing Mr. Musk to walk away from the deal he struck would do just that. Instead, in light of evidence that the market has applauded such steps in the past, the court should order Mr. Musk to perform the contract he signed.

Second, here's a follow-up blog post by Rangeley Capital, which has a 10% position in Twitter and yesterday published an [open letter](#) to the board: [Some updated \\$TWTR thoughts](#). Excerpt:

I believe a lot of investing is pattern recognition. As I was reading Twitter's complaint against Elon, I was struck by how familiar the feeling I got reading it was to the AT&T / Time Warner case against the DOJ...

T handily won the case, and the merger closed shortly after.

I'm reminded of that case when reading Twitter's complaint against Musk. If you assume TWTR's downside in a break is \$20 and the upside is the deal price (\$54.20), Twitter's current stock price of ~\$37 is pricing in ~50/50 chances of TWTR winning. We've yet to see Musk's response to the Twitter case, but based on the facts as I've seen from the outside and as alleged in the court case, I think it's crazy to think the case is a coin flip...

Twitter is overwhelmingly likely to win (based on my read of the case!); the only question is if Musk will get off on some technicality where a judge doesn't want to order specific performance (I'll discuss this risk later).

Lastly, I couldn't agree more with NYU marketing professor Scott Galloway in his [latest podcast](#), *The Prof G Pod*, who said, in part:

Twitter is still an operating business with employees and shareholders to worry about, so a lengthy legal battle isn't what they want to endure.

That's the narrative out there right now, and I think that's total bullsh*t and people are getting it wrong.

As someone who has been a shareholder of Twitter a couple times, I think every shareholder here is entitled to \$54.20. Why? Because the company has endured a tremendous amount of damage and distraction, whether it's advertisers losing faith in the platform, whether it's management and the board being wildly distracted, whether it's a decrease in morale among employees, many of whom have likely left, this company has been significantly damaged by Elon Musk.

Now, why did they incur that bullsh*t, that brain damage, that sort of abuse? Because he signed an agreement saying that, on closing, he would show up and give every shareholder \$54.20 per share.

Twitter has lived up to their end of the agreement. They have done everything he has asked. And now, he owes every shareholder \$54.20.

So what do I think's going to happen here? I think the board understands this, and I think the media has it wrong.

They keep saying, "Well, Twitter doesn't want to endure discovery." *Twitter* doesn't want to endure discovery?!

This is an individual who, last year, decided to that have a baby with his girlfriend – good for him – but at the same time had a subordinate carrying twins and no one knew about them. They didn't disclose it until six months after he'd given birth to the other kid. By the way, do we realize that, at approximately the same time, the company had paid hush money to someone accusing him of sexual misconduct?

Let's pick another really popular person. What if Tom Brady in the same month/quarter/year had said, "Oh, I'm having a baby through surrogate with my partner. Oh, by the way, someone in the franchise who I have power over who reports into me is also carrying twins and, oh, the Patriots had to pay off somebody for hush money."

I don't think he'd be on the Patriots. As a matter of fact, I think he'd be kicked out of the league.

Our idolatry of innovators here has to stop. And where does it stop? In my opinion, in the [Delaware] Chancery Court. What is the Chancery Court? It's a court set up to deal with corporate disputes. It does not have juries. They have a lot of discretion here, it's usually over economic settlements requiring a decent amount of nuance here.

And this is simple: for an economy to work, you have to have agreements that people, when they sign and review these agreements, live up to!

What happens when nobody feels a need, because they're rich or their superpower is shamelessness, they no longer have to live up to agreements?

What happens when you agree to show up for work because you have a signed contract and the employer says, "You know what? Fu*k you, we decided we don't really need you. Sorry you quit your job."

What happens when you agree to buy a house and you show up and you sell your own house and the seller says, "You know what? The market's gone up. I'm not going to sell you my house. You're sh*t out of luck."

What happens when you sign adoption papers?

If we don't have a rule of law here, or if we have rule of law for everyone else except for billionaires, and specifically billionaire tech innovators, the economy doesn't work.

Emerging from Silicon Valley over the past decade has been a culture that has been very damaging to capitalism. One, the way you make a lot of money has been to exploit your users, to radicalize them, to play on their depression, to play on their need for addiction. And two, that management can act like total fu*king a**holes and have no decorum and believe that the law does not apply to them.

This needs to stop. You signed a contract, he's a big boy, he has the money. Twitter shareholders are entitled to \$54.20 per share.

Elon, pay the fu*k up!

Hear hear!

Tuesday, July 19

Speaking of EVs, Tesla (TSLA) CEO Elon Musk's [initial response](#) to Twitter's (TWTR) lawsuit, arguing that the trial shouldn't take place until February, is laughable.

If this is all he's got, Chancellor Kathaleen McCormick, head of Delaware's Chancery Court, will quickly order "specific performance" – meaning Musk will have to buy Twitter for the contractually agreed-upon price of \$54.20 per share.

Here's Techdirt's take on it: [Elon Musk's Response To Twitter's Legal Filing May Impress His Fans on Twitter, But Is Not a Good Legal Argument](#). Excerpt:

I expected that Musk would have a strong comeback, but many of the points Twitter raised would be difficult to refute.

Well, Musk has filed his opening in reply... and he (1) doesn't have a strong comeback, (2) basically just ignored the points he's going to need to refute, and (3) seems entirely focused on pushing the narrative about spam accounts (which is legally meaningless). Musk has good lawyers, and they've been dealt a tough hand by their client. But, still.

Amusingly, as a PR strategy, perhaps this is working. If you sample the discussions on Twitter, there are lots of very ignorant people who seem to think this filing is a strong one. They're wrong. Musk could still succeed in this case, but it will be in spite of this filing, not because of it...

Again, anything can happen in court, and the Delaware Chancery Court is no exception. But, if you can get past the narrative and some fairly ignorant Musk fans, this case still looks like Twitter has a massive advantage. Musk may enjoy spinning narratives for his fans online, but it seems like it will be harder to string along a Delaware chancellor the same way...

And here's Doomberg: [Deal or No Deal](#). Excerpt:

We would argue that *specific performance is not drastic whatsoever*. It was intentionally bargained for by Twitter and conceded to by Musk, it has comfortable precedence in Delaware law, and is strongly supported by the fact set of this case. If specific performance cannot be imposed here, when could it ever again in the future?

Others point to the rarity of specific performance rulings as proof of the Court's reluctance. We would counter that *such infrequency can be explained by the evolving strength of [merger and acquisition] M&A agreements*. While the Rohm and Haas case did not formally set legal precedence through a decision handed down in the Court, you can bet it set a strong commercial precedence for countless target companies that dissected every detail of Liveris' foolishly signed agreement to improve their own. The reason specific performance rulings are rare is that merger agreements have become

virtually ***bulletproof***, and it takes a special combination of recklessness and hubris to cut a seller-friendly deal like Musk did and then try to get out of it in a matter of weeks. In fact, we estimate the global size of the population set to attempt such a thing to be precisely one...

Have we dissolved so far as a society that one man – rich, reckless, and combative – can flout fundamental tenets of contract law with no ramifications? The Delaware Court of Chancery has been fairly adjudicating contract disputes since 1792. The equity owners of Twitter are due \$54.20 a share for their stock. Twitter's bondholders are due the benefits that come with a change of control. Will fear of one man undo 230 years of excellence in jurisprudence? Here's to hoping McCormick is firing up a little mojo of her own.

Finally, it's clear that Chancellor McCormick understands the urgency of the situation. She just contracted COVID-19, but rather than delaying the initial hearing, scheduled in court for 11 a.m. today, she simply moved it to Zoom.