610

1. OA Foundation

-last night on the livestream I made reference to rescusciating dead laws. That’s what the TX Supreme Court – which is 9-0 Republicans, that what happens when you control the governorship for a generation – literally at midnight dissolved a TRO that will enable 1925 laws to go into effect for the first time in half a century.

-Guttmacher institute

<https://states.guttmacher.org/policies/>

Interactive map

-Texas SB8 prohibits abortion after the imaginary “fetal heartbeat,” that’s 6 weeks.

-But, if you were 135 years old, Texas’s 1925 criminal laws prohibited

Tex. Civ. Stat. arts. § 4512.1-.4 <https://statutes.capitol.texas.gov/Docs/SDocs/VERNON'SCIVILSTATUTES.pdf>

Art. 4512.1. ABORTION. If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman’s womb or that a premature birth thereof be caused.

Art. 4512.2. FURNISHING THE MEANS. Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

Art. 4512.3. ATTEMPT AT ABORTION. If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

Art. 4512.4. MURDER IN PRODUCING ABORTION. If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

-ACLU filed to get a TRO – said, hey, there are good arguments to think these laws have been implicitly repealed, so let’s just preserve the squo until July 12 (2.5 weeks!)

<https://reproductiverights.org/wp-content/uploads/2022/06/TX-Pre-Roe-Ban-TRO.pdf>

-Ken Paxton Petition for writ of Mandamus

<https://texasattorneygeneral.gov/sites/default/files/images/executive-management/SCOTEX%20Mandamus%20FINAL%202__FM.pdf>

How do you get injunctive relief? IRREPARABLE HARM

How do you get irreparable harm? (p.4)

Relators and the people of Texas will be irreparably harmed by the TRO. Although Plaintiffs and their employees can later be prosecuted for crimes committed under cover of a TRO, post hoc enforcement cannot restore the lives of unborn children lost in the interim. The Court should immediately stay the TRO and grant the petition for mandamus.

(p.1)

This Court should issue an emergency stay and mandamus relief. Should Plaintiffs’ employees commit abortions while the TRO is in place, nothing will prevent prosecution once the TRO erroneously prohibiting enforcement is vacated. But prosecuting abortionists will not restore the unborn children’s lives lost in the interim. That irreparable loss necessitates this Court’s immediate action. Relators therefore respectfully request that this Court immediately stay the TRO and, absent a stay, issue mandamus relief by Wednesday, July 6

-TX Supreme Court said nope

<https://www.txcourts.gov/supreme/orders-opinions/2022/july/july-01-2022/>

Dissolved the TRO

-enforceable under civil penalties

-jurisdictional question about criminal statutes

This is why we’re coming at it from both directions. Telling you the legal nonsense & also empowering the boots on the ground.

1. Musk/Twitter

Tesla down to $650, has been bouncing between $650 and $700

Twitter at 38.23 – again, if you think the deal will go through, you’ll get $54.20 in October. Twitter was in the low 30s pre-Musk, so you’re getting close to investors saying “this is what we think Twitter is worth.”

2 questions:

1. Elon Musk says there are too many twitter bots! Can he cancel the deal like a bad home inspection?
2. OK, smarty, the arguments are so good that he has to go through with the deal that maybe Twitter will get specific performance?

Not either.

1 – bots

What Musk has told the public is different than what he’s told the SEC

To the public he’s said, “oh, if there are too many spam bots, I’m gonna bail”

NOPE

-Twitter agreement 4/22

<https://www.sec.gov/Archives/edgar/data/0001418091/000119312522120461/d310843dex21.htm>

-what Musk agreed to

Article 4 – Section 4.25: “No other Representations or Warranties” (p.31)

-no due diligence provision

-essentially buying “as is”

Section 4.25 No Other Representations or Warranties. **Except for the representations and warranties expressly set forth** in this Article IV, **neither the Company nor any other Person makes or has made any representation or warranty of any kind whatsoever, express or implied, at Law or in equity, with respect to the Company or any of its Subsidiaries or their respective business, operations, assets, liabilities, conditions (financial or otherwise), notwithstanding the delivery or disclosure to Parent and the Acquisition Sub or any of their Affiliates or Representatives of any documentation, forecasts or other information** with respect to any one or more of the foregoing. Without limiting the generality of the foregoing, **neither the Company nor any other Person makes or has made any express or implied representation or warranty** to Parent, Acquisition Sub or any of their respective Representatives **with respect to (a) any financial projection, forecast, estimate or budget relating to the Company, any of its Subsidiaries or their respective businesses** **or**, (b) except for the representations and warranties made by the Company in this Article IV, **any oral or written information presented** to Parent, Acquisition Sub or any of their respective Representatives **in the course of their due diligence investigation of the Company, the negotiation of this Agreement or the course of the Merger, or the accuracy or completeness thereof**.

-I would never let my client sign this

-fraud vitiates everything but there isn’t a chance in hell there’s fraud

So, what did Twitter say about bots?

-Twitter 10-Q 3/31/22

<https://www.sec.gov/ix?doc=/Archives/edgar/data/1418091/000141809122000075/twtr-20220331.htm>

**We review a number of metrics, including monetizable daily active usage or users (mDAU) … We define mDAU as people, organizations, or other accounts who logged in or were otherwise authenticated and accessed Twitter on any given day** through twitter.com, Twitter applications that are able to show ads, or paid Twitter products, including subscriptions. Average mDAU for a period represents the number of mDAU on each day of such period divided by the number of days for such period. Changes in mDAU are a measure of changes in the size of our daily logged in or otherwise authenticated active total accounts. To calculate the year-over-year change in mDAU, we subtract the average mDAU for the three months ended in the previous year from the average mDAU for the same three months ended in the current year and divide the result by the average mDAU for the three months ended in the previous year. Additionally, our calculation of mDAU is not based on any standardized industry methodology and is not necessarily calculated in the same manner or comparable to similarly titled measures presented by other companies. Similarly, our measures of mDAU growth and engagement may differ from estimates published by third parties or from similarly-titled metrics of our competitors due to differences in methodology.

**The numbers of mDAU presented in this Quarterly Report on Form 10-Q are based on internal company data. While these numbers are based on what we believe to be reasonable estimates for the applicable period of measurement, there are inherent challenges in measuring usage and engagement across our large number of total accounts around the world. Furthermore, our metrics may be impacted by our information quality efforts, which are our overall efforts to reduce malicious activity on the service, inclusive of spam, malicious automation, and fake accounts**. **For example, there are a number of false or spam accounts in existence on our platform.** **We have performed an internal review of a sample of accounts and estimate that the average of false or spam accounts during the first quarter of 2022 represented fewer than 5% of our mDAU during the quarter**. The false or spam accounts for a period represents the average of false or spam accounts in the samples during each monthly analysis period during the quarter. In making this determination, we applied significant judgment, so our estimation of false or spam accounts may not accurately represent the actual number of such accounts, and the actual number of false or spam accounts could be higher than we have estimated. We are continually seeking to improve our ability to estimate the total number of spam accounts and eliminate them from the calculation of our mDAU, and have made improvements in our spam detection capabilities that have resulted in the suspension of a large number of spam, malicious automation, and fake accounts. We intend to continue to make such improvements. After we determine an account is spam, malicious automation, or fake, we stop counting it in our mDAU, or other related metrics. We also treat multiple accounts held by a single person or organization as multiple mDAU because we permit people and organizations to have more than one account. Additionally, some accounts used by organizations are used by many people within the organization. **As such, the calculations of our mDAU may not accurately reflect the actual number of people or organizations using our platform.**

That is absolutely enough.

So what did Musk say?

b- Musk SEC letter re bots

<https://www.sec.gov/Archives/edgar/data/0001418091/000110465922068347/tm2217761d1_ex99-o.htm>

Mr. Musk does not agree with the characterizations in Twitter’s June 1 letter. **Twitter has, in fact, refused to provide the information that Mr. Musk has repeatedly requested since May 9, 2022 to facilitate his evaluation of spam and fake accounts on the company’s platform.** Twitter’s latest offer to simply provide additional details regarding the company’s own testing methodologies, whether through written materials or verbal explanations, is tantamount to refusing Mr. Musk’s data requests. Twitter’s effort to characterize it otherwise is merely an attempt to obfuscate and confuse the issue. **Mr. Musk has made it clear that he does not believe the company’s lax testing methodologies are adequate so he must conduct his own analysis. The data he has requested is necessary to do so.**

As noted, under various terms of the merger agreement, Twitter is required to provide data and information that Mr. Musk requests in connection with the consummation of the transaction. Twitter’s obligations to provide Mr. Musk with information is not, as the company’s June 1 letter suggests, limited to a “very specific purpose: facilitating the closing of the transaction.” **To the contrary, Mr. Musk is entitled to seek, and Twitter is obligated to provide, information and data for, inter alia, “any reasonable business purpose related to the consummation of the transaction” (Section 6.4). Twitter must also provide reasonable cooperation in connection with Mr. Musk’s efforts to secure the debt financing necessary to consummate the transaction, including by providing information “reasonably requested” by Mr. Musk (Section 6.11).** Mr. Musk’s requests for user data not only satisfies both criteria, but also meets even Twitter’s narrowed interpretation of the merger agreement, as this information is necessary to facilitate the closing of the transaction.

As Twitter’s prospective owner, Mr. Musk is clearly entitled to the requested data to enable him to prepare for transitioning Twitter’s business to his ownership and to facilitate his transaction financing. **To do both, he must have a complete and accurate understanding of the very core of Twitter’s business model—its active user base.** In any event, Mr. Musk is not required to explain his rationale for requesting the data, nor submit to the new conditions the company has attempted to impose on his contractual right to the requested data. At this point, Mr. Musk believes Twitter is transparently refusing to comply with its obligations under the merger agreement, which is causing further suspicion that the company is withholding the requested data due to concern for what Mr. Musk’s own analysis of that data will uncover.

**If Twitter is confident in its publicized spam estimates, Mr. Musk does not understand the company’s reluctance to allow Mr. Musk to independently evaluate those estimates.** As noted in our previous correspondence, Mr. Musk will of course comply with the restrictions provided under Section 6.4, including by ensuring that anyone reviewing the data is bound by a non-disclosure agreement, and Mr. Musk will not retain or otherwise use any competitively sensitive information if the transaction is not consummated.

**Based on Twitter’s behavior to date, and the company’s latest correspondence in particular, Mr. Musk believes the company is actively resisting and thwarting his information rights (and the company’s corresponding obligations) under the merger agreement. This is a clear material breach of Twitter’s obligations under the merger agreement and Mr. Musk reserves all rights resulting therefrom, including his right not to consummate the transaction and his right to terminate the merger agreement.**

So he’s not arguing that he was materially misled. He’s saying, “I think number of fake users is material to this purchase, and I want to conduct my own investigation, and Twitter isn’t giving me the information I need to do that.”

Those legal arguments suck.

I don’t know that “figuring out the number of twitter bots” is, in fact “any reasonable business purpose related to the consummation of the transaction.” But let’s assume it is:

1. 6.4

Section 6.4 Access to Information; Confidentiality. **Upon reasonable notice, the Company shall** (and shall cause each of its Subsidiaries to) **afford** to the representatives, officers, directors, employees, agents, attorneys, accountants and financial advisors (“Representatives”) of Parent **reasonable access** (at Parent’s sole cost and expense), in a manner not disruptive in any material respect to the operations of the business of the Company and its Subsidiaries, during normal business hours and upon reasonable written notice throughout the period commencing on the date of this Agreement until the earlier of the Effective Time and the termination of this Agreement pursuant to Article VIII, to the properties, books and records of the Company and its Subsidiaries **and**, during such period, shall (and shall cause each of its Subsidiaries to) **furnish promptly** to such Representatives **all information** **concerning the business, properties and personnel of the Company and its Subsidiaries as may reasonably be requested in writing**, in each case, for any reasonable business purpose related to the consummation of the transactions contemplated by this Agreement; **provided, however, that nothing herein shall require the Company or any of its Subsidiaries to disclose any information** to Parent or Acquisition Sub **if such disclosure** **would, in the reasonable judgment of the Company**, (i) **cause significant competitive harm to the Company** or its Subsidiaries **if the transactions contemplated by this Agreement are not consummated**, (ii) violate applicable Law or the provisions of any agreement to which the Company or any of its Subsidiaries is a party, or (iii) jeopardize any attorney-client or other legal privilege. No investigation or access permitted pursuant to this Section 6.4 shall affect or be deemed to modify any representation or warranty made by the Company hereunder. Each of Parent and Acquisition Sub agrees that it will not, and will cause its Representatives not to, use any information obtained pursuant to this Section 6.4 (or otherwise pursuant to this Agreement) for any competitive or other purpose unrelated to the consummation of the transactions contemplated by this Agreement. Parent will use its reasonable best efforts to minimize any disruption to the respective business of the Company and its Subsidiaries that may result from requests for access under this Section 6.4 and, notwithstanding anything to the contrary herein, the Company may satisfy its obligations set forth above by electronic means if physical access is not reasonably feasible or would not be permitted under applicable Law as a result of COVID-19 or any COVID-19 Measures. Prior to any disclosure, the Company and Parent shall enter into a customary confidentiality agreement with respect to any information obtained pursuant to this Section 6.4 (or otherwise pursuant to this Agreement).

1. 6.11

Similar access to secure financing, but again subsection (VII) says no cooperation under this section shall “**require the Company or its Subsidiaries to take any action that, in the good faith determination of the Company** or such Subsidiary **would create a risk of damage or destruction to any** property or **assets of the Company** or such Subsidiary

Think about it like this: if you buy a house, and you waive the home inspection, and it turns out that the roof report the seller gave you was fraudulent, you might be able to unwind the purchase. But if the roof report *wasn’t* fraudulent, but you demanded the right to climb up on the roof and inspect it yourself, and they denied you access until after closing, that’s probably going nowhere.

1. specific performance

Operative provision paragraph 9.9

(b) Notwithstanding anything herein to the contrary, including the availability of the Parent Termination Fee or other monetary damages, remedy or award, it is hereby acknowledged and agreed that the Company shall be entitled to specific performance or other equitable remedy to enforce Parent and Acquisition Sub’s obligations to cause the Equity Investor to fund the Equity Financing, or to enforce the Equity Investor’s obligation to fund the Equity Financing directly, and to consummate the Closing if and for so long as, (i) all of the conditions set forth in Section 7.1 and Section 7.2 (other than those conditions that are to be satisfied at the Closing; provided, that such conditions are capable of being satisfied if the Closing were to occur at such time) have been satisfied or waived and Parent has failed to consummate the Closing on the date required pursuant to the terms of Section 2.2, (ii) the Debt Financing (or, as applicable, the Alternative Financing) has been funded or will be funded at the Closing if the Equity Financing is funded at the Closing, and (iii) the Company has confirmed that, if specific performance or other equity remedy is granted and the Equity Financing and Debt Financing are funded, then the Closing will occur. For the avoidance of doubt, (A) while the Company may concurrently seek (x) specific performance or other equitable relief, subject to the terms of this Section 9.9, and (y) payment of the Parent Termination Fee or other monetary damages, remedy or award if, as and when required pursuant to this Agreement), under no circumstances shall the Company be permitted or entitled to receive both a grant of specific performance to cause the Equity Financing to be funded, on the one hand, and payment of the Parent Termination Fee or other monetary damages, remedy or award, on the other hand; provided, however, that in no event shall the Company be permitted or entitled to receive aggregate monetary damages in excess of the Parent Termination Fee (except in all cases that Parent shall also be obligated with respect to its expense reimbursement and indemnification obligations contained in Section 6.11 and its applicable obligations under Section 8.3(d)(iii) and Section 8.6(b)).

Operative law

*In re IBP, Inc. v. Tyson Foods, Inc.*

789 A.2d 14 (Del. Ch. 2001)

<https://casetext.com/case/in-re-ibp-inc-v-tyson-foods-inc>

Under either New York or Delaware law, IBP bears the burden of persuasion to justify its entitlement to specific performance. Under New York law, IBP must show that: (1) the Merger Agreement is a valid contract between the parties; (2) IBP has substantially performed under the contract and is willing and able to perform its remaining obligations; (3) Tyson is able to perform its obligations; and (4) IBP has no adequate remedy at law. These elements must be proved by a preponderance of the evidence under New York law. Delaware law, by contrast, requires that a plaintiff demonstrate its entitlement to specific performance by clear and convincing evidence. The reasons for this are not entirely clear, but seem to rest in the policy concern that a compulsory remedy is not typical and should not be lightly issued, especially given the availability of the more usual legal remedy of money damages.

**Tyson Wins The Auction — Twice**

On December 30, 2000, Smithfield advised the special committee that $30 was its best and final offer. Special committee chair Smith called John Tyson and told him that if Tyson bid $28.50 in cash it would have a deal. John Tyson agreed and Smith said they had a deal. Later, the IBP special committee met to consider the Tyson and Smithfield bids. With the advice of J.P. Morgan, the special committee considered Tyson's $28.50 cash and stock bid to exceed the value of Smithfield's all stock $30 bid. The special committee decided to accept Tyson's bid, subject to negotiation of a definitive merger agreement.

As a courtesy, the special committee and its counsel informed Smithfield that it had lost the auction. On December 31, Smithfield increased its all stock bid to $32.00. With deep chagrin, Smith went back to John Tyson and explained what had happened and the committee's duty to consider the higher bid. John Tyson was justifiably angry, but understood the realities of the situation.

Tyson Foods went to the well again and drew out another $1.50 a share, increasing its bid to $30 per share. IBP agreed and this time the price stuck.

-Tyson could be ordered to do it with no outside agency

The Merger Agreement contemplated that:

• Tyson would amend its existing cash tender offer (the "Cash Offer") to increase the price to $30 per share.

• Tyson would couple the cash tender offer with an "Exchange Offer" in which it would offer $30 of Tyson stock (subject to a collar) for each share of IBP stock. This would permit IBP stockholders who wished to participate in the potential benefits of the Tyson/IBP combination to do so.

-massive bidding war, couldn’t calculate damages

1. HR 7910

<https://www.congress.gov/bill/117th-congress/house-bill/7910/text>

<https://www.cnn.com/2022/06/21/politics/whats-in-senate-gun-reform-bill/index.html>