UNITED STATES DISTRICT COURT **ORIGINAL**

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable YVONNE GONZALEZ ROGERS, Judge

Elon Musk, et al. Plaintiffs, vs. Samuel Altman, et al., Defendants.	**Motion for Preliminary Injunction** NO. C 24-04722 YGR Pages 1 - 107 Oakland, California Tuesday, February 4, 2025

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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(Appearances continued next page)

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Proceedings reported by electronic/mechanical stenography; transcript produced by computer-aided transcription.

A P P E A R A N C E S (CONT'D.)

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Tuesday, February 4, 2025 10:01 A.M.

P R O C E E D I N G S

(Reported remotely via Zoom Webinar)

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THE CLERK: Good morning, everyone. These proceedings are being court-reported by this court. Any other recording of this proceeding, either by video, audio, including screenshots or other copying of the hearing is strictly prohibited.

Your Honor, now calling the civil matter 24-CV-4722-YGR, Musk versus Altman, et al.

Parties, please step forward, state your appearances for the record starting with the plaintiff.

Lecterns, please.

MR. TOBEROFF: Good morning. Marc Toberoff for the plaintiffs, Elon Musk, xAI, and Shivon Zilis.

THE COURT: Okay. And who's here with you, sir?

MR. TOBEROFF: I'm here with my colleague Jaymie Parkkinen.

THE COURT: How do you spell that last name?

MR. TOBEROFF: P-a-r-k-k-i-n-e-n.

THE COURT: And everyone up here is praying for the best for those of you in Southern California. I know that's why we had to postpone the hearing. I've got family and

friends down there myself, so I know it's a difficult circumstance.

MR. TOBEROFF: Thank you, Your Honor. Appreciate your kind words.

THE COURT: On the defense?

MR. ETH: Morning, Your Honor. Jordan Eth for the OpenAI defendants.

THE COURT: Okay. I don't have you on -- oh, it's E-t-h.

MR. ETH: E-t-h, yes, Your Honor.

THE COURT: Okay.

MS. EDDY: Good morning, Your Honor. Sarah Eddy for the OpenAI defendants.

MR. SAVITT: Your Honor, good morning. William Savitt for the same defendants.

THE COURT: Okay.

MR. COHEN: Good morning, Your Honor. Russell Cohen on behalf of Microsoft, Reid Hoffman, and Deannah Templeton. And with me at counsel table is Nisha Patel.

THE COURT: With an "N" or an "M"?

MR. COHEN: "N" as in "Nancy."

THE COURT: Okay.

Anybody else?

I see one more person at that table.

MS. EDDY: We have at counsel table with us Ioannis

Drivas, D-r-i-v-a-s.

THE COURT: Okay. Who's going to be doing the arguing on the defense side?

MS. EDDY: Your Honor, I will be conducting part of the argument. Mr. Savitt as well for the OpenAI defendants.

THE COURT: Okay. Tell me what you're doing.

MS. EDDY: I will be handling the two antitrust claims, and Mr. Savitt had been handling the state law claims.

THE COURT: Okay.

MR. COHEN: And on behalf of the Microsoft defendants including Mr. Hoffman and Templeton, I will be handling the argument today.

THE COURT: Okay. Everybody take a mic.

Let's see. In terms of starting off, well, we'll start with the state law claims first, so I think, Mr. Savitt, that would be you. I want people at microphones, please.

That means you, too. Mr. Cohen, at a microphone.

All right. So we'll talk primarily today about the pending motion for preliminary injunction. You -- everyone should understand that these motions are rarely granted. It is extraordinary leave. Extraordinary relief.

I'd like to know when everybody's planning to be ready for trial. We'll start with the plaintiff. When are you planning to be ready for trial, sir?

MR. TOBEROFF: We would be ready for trial this year.

THE COURT: By the end of the year?

MR. TOBEROFF: Well, what's -- actually --

THE COURT: Yeah, I'd like a month. When do you think you'll be ready for trial?

MR. TOBEROFF: June of next year.

THE COURT: Do you anticipate motions for summary judgment?

MR. TOBEROFF: Yes, we do, Your Honor.

THE COURT: How much discovery do you need? When would you be prepared to have discovery close in this case?

MR. TOBEROFF: February?

THE COURT: February of 2026, correct?

MR. TOBEROFF: Correct.

THE COURT: And is that expert and fact or just fact?

MR. TOBEROFF: Fact.

THE COURT: Do you anticipate experts?

MR. TOBEROFF: Yes, Your Honor.

THE COURT: Do you already have experts in your antitrust case that you're consulting with?

MR. TOBEROFF: No, Your Honor.

THE COURT: How long do you anticipate expert discovery to take?

MR. TOBEROFF: Thirty to 45 days.

THE COURT: How many experts do you anticipate?

MR. TOBEROFF: I can't tell you that at this -- at

this time.

THE COURT: Well, you brought an antitrust claim.

MR. TOBEROFF: I understand.

THE COURT: So how many -- how many --

(Simultaneous colloquy.)

MR. TOBEROFF: Let's say two.

THE COURT: Okay. So what kind? An economist, I would expect.

MR. TOBEROFF: Yes.

THE COURT: And what else?

MR. TOBEROFF: An expert with respect to the AI industry.

THE COURT: Now, you have a whole bunch of state law claims. Do you not anticipate damages experts for those?

MR. TOBEROFF: I do. So --

THE COURT: So would it be the same economist for your antitrust or separate?

MR. TOBEROFF: It could be the same, or it may be separate.

THE COURT: Okay.

MR. TOBEROFF: So we'll say -- to be on the safe side, I'd say three to four experts.

THE COURT: And you would be prepared to have expert reports disclosed in February of 2026 and then receive rebuttals and do depositions all within 45 days?

MR. TOBEROFF: Maybe that's too optimistic.

THE COURT: Sounds optimistic.

MR. TOBEROFF: Sixty days to -- 60 to 90 days, we'll say.

THE COURT: How many antitrust cases have you tried?

MR. TOBEROFF: This is my first, Your Honor.

THE COURT: Do you have anyone on your team who has done an antitrust case?

MR. TOBEROFF: Not that I could -- can identify at the moment.

THE COURT: Okay.

So when you say discovery closing in February, are you talking about February 1st or February 28th?

MR. TOBEROFF: The end of February.

THE COURT: All right.

So end of February. Let's say March, April, and May for expert discovery.

Are you still sure you're ready to go to trial in June?

MR. TOBEROFF: To be honest, Your Honor, I didn't come here with the schedule in mind.

THE COURT: Well, I always start --

MR. TOBEROFF: Perhaps --

THE COURT: I always start it this way. And the reason I start it this way is because you're asking for a preliminary injunction, which in my mind means that you should

have sorted through virtually all of these pieces because I don't grant injunctions, which are extraordinary, without knowing what the end game is. The last time I issued one was in *Epic Games vs. Apple*. It was partial, and we went to trial in eight months. It was extraordinary.

So expert discovery -- I mean, you're not going to be ready to go to trial until the end of 2026, it seems to me, 'cause you still have motions for summary judgment, which means that you probably have to have expert discovery closed. Then we have to have briefing on summary judgment. And I need to have time to resolve your motion.

MR. TOBEROFF: Understood.

THE COURT: Do you see where I'm going with this?

MR. TOBEROFF: Yes, I do, Your Honor.

I think it's safer to say the end of 2026. I think you're correct.

At the same time, given that we are moving for preliminary injunction, I -- the -- the time period -- I'd like to move at a fairly quick pace, if possible.

THE COURT: Well, I would expect that you would, and that's why I'm asking these questions.

MR. TOBEROFF: I appreciate that, Your Honor.

THE COURT: On the motions to dismiss, I've already taken -- I've spent a lot of time with this complaint. I can tell you right now it will be granted in part and denied in

part. Something is going to trial in this case.

So there are a couple of things that I want you all to remember before we get into the nitty-gritty of the current motion. One is that the standard is plausibility. It is not certainty. It is absolutely plausible that there was an oral contract.

It is plausible that lots of these state law claims have a sufficient basis. Some of the statutory claims, not so sure about. The antitrust, not so sure about.

But the state law claims, you should not be pushing hard on these things. It's common law. There are podcasts between -- you know, talking about Altman and Musk's various discussions about what they thought. I don't know what the -- what happened, but I certainly am not throwing something out on a motion to dismiss when it is plausible that what Mr. Musk is saying is true.

We'll find out. They'll sit on the stand. They'll present it to a jury. A jury will decide who's right. So something's going to trial.

When do you think you'd be ready to go for trial if you're still in this case?

MR. COHEN: Your Honor, if the antitrust claims remain in the case, then, as you know, antitrust discovery takes considerable time, typically 12 to 18 months. Antitrust expert discovery can take 3 or 4 months. And there will be

complex summary judgment motions.

So depending on how the Court rules on the motion to dismiss and whether these claims include antitrust and -- as Your Honor appreciates from looking at the motion to dismiss, it's not simply claims relating to exclusive agreements. But there's also below-cost pricing claims and all manner of other claims.

So depending on what we're talking about, I would anticipate 12 to 18 months for discovery, 3 to 4 months for summary judgment following that, and extensive expert testimony.

(Off-the-record discussion.)

THE COURT: If you do it a few times, she's incredibly terrific court reporter, she'll remember. But you have to do it a few times.

So you're saying, then, 2027?

MR. COHEN: I think that's more realistic, Your Honor.

THE COURT: All right.

Mr. Savitt.

MR. SAVITT: Your Honor, thank you. William Savitt.

I -- generally speaking, I think I agree with Mr. Cohen. It -- the antitrust claims, assuming they survive a motion to dismiss, will be complex and will require the steps that he's outlined, trial by the end of next year seems possible. It

might be more realistic to think early in 2027.

We -- having -- fully appreciating Your Honor's comments respecting the motion to dismiss, some of this might be -- affected by the outcome of motion to dismiss and the extent to which the various claims are adjudicated and which ones survive and how.

THE COURT: If the antitrust claims do not survive, when do you think you'd be ready for trial?

MR. SAVITT: If all the antitrust claims fall away, it becomes a simpler case. And while I do think there will be expert practice in that instance, we -- I should think that the case could readily be brought to trial by the end of 2026, and maybe not even at the very end, assuming that -- I don't know my -- my friend's plans for summary judgment and summary judgment briefing, but it seems to me that makes it a 2026 event, Your Honor, at any rate.

THE COURT: All right.

All right. Let's start with irreparable harm.

It is a stretch to claim irreparable harm in this case. Mr. Toberoff. I am -- billionaires versus billionaires.

MR. TOBEROFF: Your Honor, the focus here is not Elon Musk's net worth. It's on the AI industry. It's a nascent industry, and anticompetitive conduct in a nascent industry is --

THE COURT: It's not only nascent, it is fluctuating

by the day.

MR. TOBEROFF: Correct, Your Honor.

THE COURT: And so for me to say as a matter of law that something -- that you should be granted leave in this kind of environment is a stretch.

MR. TOBEROFF: Your Honor, I don't believe it's a stretch. We've had --

First of all, the evidence we presented on a motion -- this motion for preliminary injunction where the evidentiary standards are more relax than at trial, where we have --

THE COURT: The -- you understand that the -- that the -- it may be relaxed, but the -- the hurdle -- we don't even call it a hurdle. Maybe we call it a high jump -- is significant.

It is not a low standard. There must be certainty.

MR. TOBEROFF: Your Honor, I think the evidence is clear when you have reputable news outlets, like The Wall Street Journal, Financial Times, Reuters, all speaking to a verbal mandate from Sam Altman that if they want to invest in the -- in their October 2024 funding round and get an allocation, which was vastly oversubscribed, they would need to commit to not fund competitors, not just Musk's xAI but Safe Superintelligent [sic] started by their former chief scientist. Another --

THE COURT: How much -- how much is xAI -- haven't

they raised -- how many billions at this point after the alleged mandate?

MR. TOBEROFF: I don't have the exact number, Your Honor. I think --

THE COURT: Does anybody --

MR. TOBEROFF: -- seven billion.

MR. COHEN: It's 11 billion, Your Honor.

THE COURT: Eleven billion?

MR. TOBEROFF: Yeah.

THE COURT: Look, someone can say it's a mandate. That doesn't mean anybody thinks it's a mandate, especially when your client's raised $11 billion. How is that -- how is that any --

Again, we'll find out what happens. But how can I say as a matter of law there is a -- there is likelihood of restraint on trade when your client has raised $11 billion?

Answer that question.

MR. TOBEROFF: I will.

Because he -- it takes billions of dollars to start up in this industry. XAI has to build its own infrastructure from scratch. They're not being handed Compute by Microsoft at less than it costs to produce it. They have to produce it themselves.

THE COURT: Well, the Chinese seem to think that it's not that expensive.

MR. TOBEROFF: Well, it's expensive here in the United States. And -- and that's --

(Simultaneous colloquy.)

MR. TOBEROFF: That's why these companies require billions of dollars. OpenAI projects that its annual burn rate is at $14 billion a year. And right now it's at $5 billion. So you're talking about a massive need for amounts of money.

THE COURT: You can be right as of today, but, like I said, the industry's changing on a daily basis.

MR. TOBEROFF: We're talking about the damages today --

THE COURT: We're talking about irreparable harm.

MR. TOBEROFF: Okay.

So when you take an industry like this where -- which costs billions of dollars to start up, and there are only a handful of high-value investors that can invest at these levels, it's a small community. And you --

For example, in their last funding round --

THE COURT: But yet, you don't have a single declaration from a single person who said -- who supports your client's claim. Despite all of the influence that Mr. Musk has, he's not able to get a single person to say that they viewed the statement as a mandate. Correct? Am I -- so -- right?

Remind me if I -- if I got the record wrong, but that's my memory of the record. Am I right?

MR. TOBEROFF: Your --

THE COURT: Am I right?

MR. TOBEROFF: Your Honor, if I may address that point?

THE COURT: I want to know, am I right about the record, yes or no?

MR. COHEN: Your Honor, I can tell you exactly what was said in the Birchall declaration, which was the reply declaration from somebody at xAI. And I would say that is the -- the high point of the evidence that is on the record.

And in that declaration, what Mr. Birchall says is that "a reputable venture capital investor and an investor in OpenAI informed me that they would not invest in xAI because of Altman's funding restriction," so that's in the Birchall declaration, 75 -- Docket 75-32 at paragraph 5.

MR. TOBEROFF: And Mr. Birchall was participated [sic] and coordinating xAI's last funding round. But the effect of this "Fund No Competitors" edict, which both the Department of Justice and the Federal Trade Commission stated alleges a per se violation in Section 1 of the Sherman Act, is not just in the latest funding round.

And the -- the damage is obvious. If you have a limited pool of high-value investors consisting of the likes of

sovereign funds, et cetera, and you limit that further, not just in this funding round of OpenAI but in next funding rounds because the -- in the next funding round where OpenAI has now valued itself at 340 billion, although it's a charity where a tiny trickle goes to the charity. It all goes to the for-profit enterprise.

When you look at that, it's a cumulative effect in a nascent industry where OpenAI already with 70 percent of the market in conjunction with Microsoft is seeking to strangle their competitors in -- in the crib.

The standard is not that they have to put a competitive [sic] out of business. Most of the achievements of xAI that are touted by defendants were done before this -- this "Fund No Competitors" edict.

This is a serious violation of the Sherman Act. It's clear that Microsoft, because of its dominant position over OpenAI, or as its CEO Nadella said, "We're above them, we're below them. We're there. We're around them."

It worked in conjunction when it's -- when -- with regard to this "Fund No Competitors" edict.

It -- it doesn't take imagination to understand that by strangling or diminishing the number of high-value investors that can invest in competing companies --

THE COURT: Has --

MR. TOBEROFF: -- that is anticompetitive.

THE COURT: Is there evidence that he has withdrawn that edict?

MR. TOBEROFF: None, Your Honor.

THE COURT: All right.

Ms. Eddy, maybe you need to stand up.

MS. EDDY: Happily, Your Honor.

There is -- there is no evidence establishing even the vertical agreement.

THE COURT: He -- there is evidence as was reported that he issued this statement. Correct?

MS. EDDY: Your Honor, there were un- --

THE COURT: Yes or no?

MS. EDDY: There are -- there are unsourced news articles saying that OpenAI had this condition imposed.

THE COURT: Okay.

And has he -- has he -- has he stated that he never did that, never said that? Has he -- what has he done, if anything.

MS. EDDY: He has, Your Honor. He gave an interview to DealBook in which he denied this. And we have put the evidence in the record, is that the only agreement that existed here was an information -- a customary information rights agreement, pursuant to which some investors agreed that in the event -- some investors in OpenAI agreed that in the event they became nonpassive investors with -- or with

governance rights in other competitors, they would cease getting certain confidential information from OpenAI.

That is the agreement that's established by the evidence, by the Wu declaration. There are -- the only evidence even of this edict that is provided by plaintiffs is the -- the virtual declaration, that line that Mr. Cohen read, and it's actually not even that line. That just refers to a funding restriction, which is a vague statement. It's not clear if it's referring to the information rights agreement or to this supposed edict.

The other line in Mr. Birchall's declaration says that an unidentified investor told Mr. Birchall that Sam Altman imposed this condition.

There's no evidence that -- we don't know who that investor was. It's untested. It's untestable. We -- we think Your Honor should not rely on that secondhand hearsay.

But even if you were, Your Honor, there is no evidence that that edict was an agreement.

And -- and I want to just note because this is something that happened after our -- our papers went in, xAI announced on its website -- and this is at our motion to dismiss page 21 and note 7, that two investors, Nvidia and MGX, had invested in xAI after the October 2024 funding round for OpenAI. And these are two investors who are publicly reported as having invested in the October round for OpenAI as well.

So there is just no evidence that -- of any boycott or anything that -- that supports that this edict was issued, much less that it was an agreement with anyone.

THE COURT: All right. A response on that second point, the lack of an agreement as opposed to what you might have is -- a unilateral statement.

MR. TOBEROFF: First of -- if I may, I just want -- would like to address --

THE COURT: No, answer my question first.

MR. TOBEROFF: Okay.

THE COURT: Make a note, and then you can go back to yours.

(Simultaneous colloquy.)

THE COURT: That's the way it works.

MR. TOBEROFF: -- is a horizontal restraint in trade by virtue of the relationship between OpenAI and Microsoft. Microsoft has such a dominant position. Those are competitors in the AI industry --

THE COURT: You didn't answer my question.

MR. TOBEROFF: I'm attempting to, Your Honor.

THE COURT: Oh, so you're claiming that the agreement has nothing to do with the edict. The agreement is between Microsoft and OpenAI?

MR. TOBEROFF: No. I'm saying that the agreement is attributable to Microsoft and OpenAI, and together, that

constitutes a horizontal restraint of trade under Section 1 of the Sherman Act.

THE COURT: And okay.

MR. TOBEROFF: Now, as to the other comment --

THE COURT: But you don't actually -- you're assuming the agreement.

MR. TOBEROFF: It's hard not to Your Honor, when --

THE COURT: Just to be clear, I don't have evidence in the record of an agreement. You're assuming the agreement based upon the statement that you say exists that was sent out to third parties.

Is that right? Do I understand your theory?

MR. TOBEROFF: Yes. By virtue -- I'm assuming the agreement and the participation of Microsoft by virtue that it invested $700 million in that round and its dominant position in the relationship with OpenAI such that after its CEO was furious when -- when Sam Altman was fired by the only neutral board that's existed there, at that point, within four days, due to the dominant position of Microsoft, he was reinstated and the board was purged.

In the SEC filings of Microsoft, OpenAI is listed as his only strategic partner, and they've been long-time partners. They participated in the October round to the tune of 75 -- 750 million, as I have said. And it's impossible to imagine that they -- this wasn't coordinated with them. It can be

inferred as a matter of fact and as a matter of law.

That creates a horizontal restraint of trade in violation of Section 1.

I'd like to address the question of the existence of the edict. Conspicuous in the absent [sic] is any declaration by Sam Altman.

Where's the declaration from Sam Altman say, I didn't issue this edict? Instead, they talk past and are unresponsive by referring to written documents --

THE COURT: Okay. Fair point.

Where is it? Why don't I have it?

MS. EDDY: Your Honor, there's no declaration from Sam Altman because there was no need for one. There's no --

THE COURT: But if I asked you for it, could you file it this week?

MS. EDDY: I'm sure, Your Honor, we could go back and do that, but -- but I would --

THE COURT: All right. File it this week.

Next.

MR. TOBEROFF: There is also a violation of the Sherman Act and horizontality by vir- -- under a hub and spokes theory that we described to you.

All of the plus factors that a Court looks to infer an agreement here would be an agreement among the investors of what they call an agreement around the rim in the hub and

spoke theory, such as it's in the economic interest of each investor to comply with this mandate because those investors who do not are at a competitive advantage -- disadvantage.

Generally, investors in a nascent industry like to diversify their investment so if one complies with the edict, and others don't, they are at a competitive disadvantage and, obviously --

THE COURT: Yeah, but there's issues of -- once you get to the rule of reason, there isn't going to be an injunction.

MR. TOBEROFF: I --

THE COURT: You -- I mean, there are so many different competitive reasons for why people do things or they don't do things. But I am not going to find at this juncture, right, because if I grant this, it gives you a leg up. It changes the playing field. So I would not do it unless I'm pretty certain. And right now, I'm not.

MR. TOBEROFF: Your Honor, as articulated by the DOJ and the FTC in their statement of interest, this is not a rule of reason case.

THE COURT: I agree. But that's what you're arguing. Once you start arguing about competitive advantages and competitive reasons, you've moved away from per se into the rule of reason.

MR. TOBEROFF: That goes to the irreparable harm,

Your Honor, not to the antitrust violation. That's why I mentioned it.

MS. EDDY: Your Honor, may I respond on --

THE COURT: You may.

MS. EDDY: -- horizontal agreement point.

Two things, the -- wholly apart from the absence of a vertical agreement, there is no established horizontal agreement. The theory that there's evidence demonstrating an agreement with Microsoft between OpenAI and Microsoft is -- rests entirely on an imputation theory, and there is no law to support that.

The cases that -- that Mr. Toberoff has cited, *American Needle* and *Best Food*, do not support that proposition even remotely. *American Needle* is -- is just saying that people who are independent decision-makers coming into a joint venture are not immune from Section 1 liability. But it doesn't -- it doesn't dispense with the agreement requirement.

And *Best Food* is just a case about veil-piercing in -- in the environmental context, so there is no agreement with Microsoft.

(Pause in the proceedings.)

MS. EDDY: And then as to the supposed hub and spoke conspiracy, the horizontal agreement among investors, there is nothing to establish that here. There is not even parallel conduct. We come back to the one statement from Jared

Birchall that one investor allegedly told him that they were not going to invest in xAI because of the funding restriction undefined.

There's no -- no parallel conduct here. As noted, there are investors who are invested in both xAI and OpenAI, including in the funding rounds that were of recent vintage, so there's no parallel conduct. And there is zero plus factors here.

The -- the theory that -- that it would somehow be irrational --

I'm sorry, Your Honor. I'll pause for a moment.

(Pause in the proceedings.)

THE COURT: Okay. Continue.

MS. EDDY: Thank you, Your Honor.

I just -- the two plus factors that are cited by -- by plaintiffs here, one is that it would supposedly be economically irrational for investors to invest only in OpenAI -- even if that were happening -- invest only in OpenAI and not in competitors. That's -- there's no support for that.

There are plenty of reasons, as there were in the *Honey Bum* case for investors to be selecting one -- one investment vehicle rather than the other.

And the other plus factors cited is supposed opportunity for communication, but that's -- that's not a plus factor on

its own. And *Honey Bum* talks about this. There has to be some evidence of atypical communication, something to suggest that even if you had parallel conduct here, it was the product of concerted action rather than independent decision-making, and we don't have anything like that here.

THE COURT: All right. A response.

MR. TOBEROFF: Firstly, with respect to Microsoft, no one would believe given their relationship with OpenAI that Microsoft was not complicit in this "Fund No Competitors" edict.

Together, they have 70 percent of the marketplace, and they're further trying to cement that monopoly. Nobody -- it's not credible. That's why I believe it can be implied that there's a horizontal agreement with Microsoft given their relationship and the dominant position Microsoft has in that relationship and the track record Microsoft has for anticompetitive conduct.

THE COURT: I don't know -- track record you're talking about specifically, but I was looking for a response on the two plus factors.

MR. TOBEROFF: On the two plus factors, there was -- the case law allows a court to infer an agreement around the rim.

THE COURT: What case are you talking about in particular?

MR. TOBEROFF: I don't have a citation for you.

THE COURT: Okay. What are -- so -- so --

MR. TOBEROFF: But I would -- I would be happy to file a supplemental brief, if you'd like, on that issue.

THE COURT: Well, is it in your papers?

MR. TOBEROFF: I believe -- yes, it is.

THE COURT: Okay. Well, take a look at your papers, tell me what you're referring to because, frequently, I would expect that that inference that you're talking about does not refer to this procedural posture.

MR. TOBEROFF: You talking about on a motion for preliminary injunction.

THE COURT: Correct, as opposed to a motion to dismiss.

MR. TOBEROFF: Your Honor, Microsoft itself in this case --

THE COURT: So do you not want to take a look at your papers and tell me --

MR. TOBEROFF: If I can go back to our --

THE COURT: Go ahead.

MR. TOBEROFF: -- desk. Thank you.

MR. COHEN: Your Honor, and I would appreciate an opportunity to address the claims regarding Microsoft and the absence of any agreement with Microsoft.

THE COURT: All right. Well, give him a minute to

look.

(Pause in the proceedings.)

THE COURT: So come back, you can bring your computer up with you.

Go ahead.

MR. TOBEROFF: Thank you, Your Honor, for allowing me to do that.

I believe it's the *Honey* -- the *Honey Bum LLC* case, Ninth Circuit 2023 --

THE COURT: And remind me the procedural posture.

MR. TOBEROFF: I don't have the procedural posture of that case, Your Honor.

THE COURT: Ms. Eddy, you talked about that case. Do you know the procedural posture?

MS. EDDY: I do, Your Honor. Just a moment, please.

This was an appeal from the grant of summary judgment to the defendant. And --

THE COURT: Okay.

MS. EDDY: -- there was a discussion of plus factors in that case. Our position is those -- that discussion indisputably favors defendants here, not -- not plaintiffs.

THE COURT: Well, I mean, again, on a motion for summary judgment what we're looking for is are there material disputes of fact. And if there are material disputes of fact, then as a matter of law, a judge cannot find in favor of one

side or the other; it has to go to the jury.

That's why procedural posture matters. So here, given the hurdle, that doesn't help you. But go ahead.

There was two plus factors. What else do you want to say in that regard?

MR. TOBEROFF: The other -- the -- I was going to say that Microsoft admits in its papers that it would be not -- not be in the economic interest of an investor not to diversify their investments. So they admit the first plus factor.

And the second plus factor is that there was an opportunity for coordination and agreement among the investors. There are only 12 high-value investors in a small community, so both the opportunity and the incentive for an agreement by the investors existed.

THE COURT: All right. A response.

MR. COHEN: Thank you, Your Honor.

First off, the evidence that Microsoft put in in opposition makes clear there was no agreement whatsoever with Microsoft. Mr. Wetter's declaration. Mr. Wetter was the person who was deeply involved in negotiating the investment with OpenAI, made clear that he did not ask, they did not ask, and he's not aware of anyone else asking for such an agreement. That's the evidence.

In terms of the newspaper articles that plaintiffs refer

to, they don't even mention Microsoft, nor do the reply declarations that plaintiffs put in.

What I hear from Mr. Toberoff now is that rather it's about the collaboration between Microsoft and OpenAI, and the Court should effectively view them as one. And there's certainly no evidence and legal support to do that.

I believe what he's asking is that you pierce the corporate veil and effectively treat OpenAI as a -- an appendage of Microsoft, that it's not a separate organization, that it's not separately incorporated, that it doesn't have separate books.

There is no basis for doing anything like that on this record.

THE COURT: Well, since you used that term, and before I forget, I would encourage plaintiffs in their response to the motions to dismiss to go back to and look at their complaint and dismiss claims, where appropriate, especially claims that Mr. Musk is asserting allegedly on his own behalf as opposed to those being brought by OpenAI because the natural consequence of what you are doing is saying that Musk is the -- is -- not OpenAI, but xAI -- is the alter ego of xAI. Your complaint makes no distinctions between the two.

There are two paragraphs where Musk identifies -- I mean, frankly, it's quite dangerous for your client the way you've outlined this complaint. He gets sued all the time. And for

you to say that they are one and the same in this complaint, which is a natural consequence of the arguments, is quite dangerous.

I don't think that they're probably -- they probably are the same. Are they?

MR. TOBEROFF: No, they're not, Your Honor.

THE COURT: Then you should not be bringing the kind of claims that you are on behalf of both of them.

MR. TOBEROFF: I understand your point. I'll look -- go back in the complaint and look at it with that regard -- in that regard.

THE COURT: He obviously as an individual has claims that he wants to bring this was his money that he was investing that he claimed or thought it was a nonprofit. But to collapse them as one for antitrust claims purposes is to say that he's the alter ego in a verified complaint.

Does he really want to be viewed as the alter ego of xAI?

MR. TOBEROFF: I take your point, Your Honor.

MR. COHEN: Your Honor, if I may briefly address the plus factors. The plaintiffs have alleged or said in argument that Microsoft admitted that investors want to diversify. That is not at all what Microsoft said.

What Microsoft explained is that its business model, Microsoft's business model, is do make available Generative AI models from the lots of different providers. It is a platform

provider. It provides services to customers who are able to access those models via Microsoft.

And so it is in Microsoft's interest, which further makes any such agreement implausible, to have a wide variety of successful Generative AI companies.

As the Court already noted, there are lots of reasons why individuals may choose to focus on one company rather than many, so we don't think there's any basis to see any plus factors here.

MR. TOBEROFF: Your -- Your Honor --

THE COURT: Are they competitors or are they collaborators?

MR. COHEN: They --

THE COURT: And the reason that I ask is that in Microsoft's form 10K, they identify OpenAI as a competitor. And yet, they've got two people sitting on that board for a period of time.

MR. COHEN: Yes, for a period of time when there was no material competition between the two firms.

Now, the case is they are competitors, and they're also collaborators, as we explained in the brief. This is not uncommon. We see it with Tesla and General Motors and Ford, who are collaborating to improve the electrification of the electric vehicle industry.

So this is a competitor collaboration where Microsoft

provided capital and the kinds of customized computing power and super computers that OpenAI needed to develop its models. OpenAI develops the models. And then Microsoft sells those models to its customers, along with the services that Microsoft provides.

OpenAI is also competing in the marketplace in selling its own products. So there is a collaboration on the development of models. And there is competition and -- in marketing the services relating to those models.

MR. TOBEROFF: Your Honor may I address this point?

THE COURT: You may.

MR. TOBEROFF: Microsoft and OpenAI -- first, Microsoft is the exclusive supplier of OpenAI's most precious resource, which is Compute, which it -- which it supplies at less than it costs to produce.

It at the same time is OpenAI's exclusive licensee of technology -- the charity's technology that has been transferred to for-profit entities in which Microsoft holds a significant stake. The two are inextricably intertwined.

Their competition in the AI industry isn't just the -- the -- OpenAI's ChatGPT and Microsoft's Copilot, which is Generative AI. It goes back to 2021 with significant revenues from AI-based -- cloud-based -- excuse me -- cloud-based AI products and services in which, although it was not our burden on the interlocking directorate's claim to show, we show that

it far exceeds the 2 percent safe harbor defense claimed by defendants.

MS. EDDY: Your Honor, may I address that point, the point about the alleged competition?

THE COURT: You may.

MS. EDDY: The -- the complaint in this case alleges only -- and this is paragraph 374 of -- of the complaint, that the rel- -- the competition that's alleged here is between the chat bots. It's between Co- -- the Copilot on the Microsoft side and ChatGPT.

That is the basis upon which plaintiffs have alleged that Reid Hoffman's service on -- on the two boards violated Section 8.

And that -- the undisputed evidence -- the evidence in the record is that any competition between those two products did not begin until approximately February or March of 2023, and there was a grace period of a year after that under the statute for Mr. Hoffman to -- to step down, and he did so. He stepped down March 2023.

THE COURT: So why did he equivocate on the declarations that they would not -- I mean, you're trying to moot it, but I have significant concerns with Microsoft having put two members or two people on the board, whether or not they were voting. They're still information-sharing. And the point of the section is to nip in the bud, as the Court said,

nip in the bud incipient antitrust violations by removing the opportunity or temptation for such violations through interlocking directorates.

MS. EDDY: That's right, Your Honor. It's a prophylactic rule.

THE COURT: Right.

MS. EDDY: And has formal application, and it did not apply here. When Reid Hoffman was sitting on the board, Microsoft and OpenAI were not competing. So that -- that -- that ends sort of the inquiry under -- under the statute.

And with respect to Ms. Templeton, she was not a director or an officer of OpenAI. And she was not an officer or director of Microsoft --

THE COURT: -- still getting information and passing it along.

MS. EDDY: Well, the -- the uncontroverted evidence in -- before Your Honor in the -- in the affidavits that have been submitted is that she was not --

THE COURT: So you think.

MS. EDDY: -- privity to --

THE COURT: You want me to believe that she was sitting there listening to all the discussions and not telling anybody?

What would the point be for her to sit there and listen to everybody if not to communicate what she was listening? There

would be no point for her to be there, which is why she actually should not be there.

MS. EDDY: Your Honor, I -- I -- I understand Your Honor's concern. But there was no competitively sensitive information that was shared with Ms. Templeton.

THE COURT: So information was shared; it just wasn't competitively --

Is that what you're saying?

MS. EDDY: Well, there is information shared between these companies as part of their collaboration which as -- as not just regulators but the Ninth Circuit has -- has recognized in the *Paladin* case is appropriate. That's not an antitrust violation. And there is no evidence here that Ms. Templeton or Mr. Hoffman shared any -- any compet- -- competitively secret or sensitive information between these two companies at a time when they were competitors or ever.

MR. COHEN: Your Honor, if I may?

THE COURT: No.

MR. TOBEROFF: Your Honor, Reid Hoffman was on the board of both companies for five years --

THE COURT: What she is saying --

MR. TOBEROFF: -- notwithstanding.

THE COURT: -- at the time, they were not competitors. So your evidence that at the time they were competitors, what is it?

MR. TOBEROFF: We provided reams of documents showing they're -- both company's involvement in cloud-based AI products and services to -- even though it wasn't our burden on their safe harbor defense, we showed that they been competitors.

The focus is not just -- and the complaint is not just limited. The fact we point out ChatGPT and Copilot doesn't mean that when we're broadly speaking about the two being competitors, we're limited to those two products.

They're focusing on those two products and saying that they were no longer on the board when those two products were generating revenues.

Reid Hoffman was on the board there for five years, as I've said. He claimed in a declaration that he was not involved in the AI products even though he's on the board of OpenAI.

And there's a recent news report that before ChatGPT was even released, he showed Microsoft's founder, Bill Gates, a prototype of it in his home while claiming in his declaration that he's not involved with AI. He has his own AI company, Inflection AI, which has since, because it couldn't compete, was absorbed by Microsoft.

The -- the interlocking directorate's claim is bulletproof and --

THE COURT: It's not -- it's strong. It is your

stronger claim. In terms of it being bulletproof, there is this issue. It concerns me, but there is an issue about -- that the statute, if you look at the plain language of the statute, it's specific to officers and directors. And Ms. Templeton was neither.

Now, I think there's a -- well, I have my own thoughts on that, but that certainly isn't bulletproof from your vantage point.

MR. TOBEROFF: The -- the response to that is as -- as the FTC and the DOJ agreed -- and they are by sure the larger authorities on our antitrust law than any counsel here today -- they both agreed that is irrelevant.

As you pointed out, Your Honor, the focus is on access to competitively sensitive information. And, of course, having a seat on the board, you have that access.

Reid had that access hands down for five -- Reid Hoffman had that access hands down for five years. Deannah Templeton was specifically put on the board after Sam Altman was fired so that Microsoft can look over the board's shoulder and make sure something like that never happened again and so they could be involved in their competitor's governance.

After she left, she has been in charge of Microsoft's cross-functional team for looking after the -- and coordinating the relationship between OpenAI and Microsoft.

And, of course -- so the focus is on access to

competitively sensitive information, not voting power. And Reid Hoffman had that voting power in any event.

THE COURT: Like I said, it's your stronger claim.

MR. COHEN: Your Honor, may I address the arguments relating to Ms. Templeton and Mr. Hoffman?

THE COURT: You may.

MR. COHEN: Thank you.

First, with respect to Ms. Templeton, it is clear that when she was appointed as a board observer. There was a requirement that she be excused and not receive competitively sensitive information. She had independent counsel advising her on that.

THE COURT: But the way, whose burden is this? Whose burden --

MR. COHEN: In terms of the safe harbor, Your Honor?

THE COURT: Yes.

MR. COHEN: There are no cases in the record on this, but I think it's fair to say that in advancing a safe harbor -- that the party advancing it ought to put forward the evidence. I think we have here. But as to --

THE COURT: Do I have that in the record, that there was a directive that she leave?

MR. COHEN: There was a directive that was in the appointment letter, which I believe is Exhibit A to her declaration, which is Docket 65-15.

And -- and she also testified to the fact that she left. And four of the meetings --

THE COURT: Let me ask you this, what prejudice is there for me to say -- to grant that portion of the request. Neither of them have any business being on that board.

MR. COHEN: Well --

THE COURT: Period. So what prejudice is there?

MR. COHEN: So first of all, they're not on the board, but --

THE COURT: I know, but -- so that they do not go back to the board, so I don't have to deal with this again.

MR. COHEN: Well, in terms of going back, as Ms. Templeton also explained in her declaration, when she came off the board, when she resigned, Microsoft relinquished its right to put anybody back on the board, so that's not an issue.

But in terms of prejudice, I mean, Your Honor, under *Winter*, you have to find that there is likelihood of success under each of these claims, or at least a serious issue. And we can talk about that as well.

And there is no violation of Section 8, certainly not with Ms. Templeton, who wasn't a director or officer, and not with Mr. Hoffman, who came off the board almost two years ago when they weren't competing in any material way.

THE COURT: *TRW* makes pretty clear that I need to

look at competition much more broadly than you'd like me to. So it's not just about the product. It's about competition.

MR. COHEN: Well, I -- I'd like to respond to that.

In terms of the complaint and in terms of the motion, as Ms. Eddy mentioned, the plaintiffs have focused on Generative AI, and -- and that is the appropriate focus here, Your Honor.

In reply, in response to the evidence from Microsoft, it definitively showed that its Generative AI products, which are the, quote, competitive sales under the Clayton Act are -- were zero in fiscal year 2022 and less than 2 percent of total sales in fiscal year 2023.

What plaintiffs did in response is said, "Well, this is about cloud computing," and cloud computing is a big Microsoft business, so, of course, it's more than 2 percent. But -- but that is made up on reply.

There -- there is no competition in cloud computing between Microsoft and OpenAI. There -- there is no question it's an important business for Microsoft. And as Your Honor may appreciate, cloud computing simply means moving the servers from businesses where they were on premises up to the cloud. Microsoft does a lot of that. OpenAI does none of that.

And in -- in the reply brief, what the plaintiffs do is they have a sentence that says, OpenAI offers cloud-based access to Generative AI. That doesn't mean they're in the

cloud business. They aren't in the cloud business. They're in the Generative AI model development business and services business, and that is the sphere of competition.

And as the Microsoft evidence makes clear, that was less than 2 percent in fiscal year 2023 at the time that Mr. Hoffman came off so he was well within the safe harbor.

MR. TOBEROFF: Your Honor, if I may?

THE COURT: You didn't respond to my question about what harm is it, to make sure that I don't have to deal with this again to grant that portion of the motion.

If you have no intent to put anyone back on, then it's resolved.

MR. COHEN: Your Honor, there's prejudice in a couple of ways. One relates to work that Ms. Templeton does as part of her job. As she explained, she is the person that is responsible for the OpenAI relationship at Microsoft among others.

And so enjoining Ms. Templeton from some kind of vague or non-script action relating to information doesn't make any sense, would interfere with her duties and --

THE COURT: How --

(Simultaneous colloquy.)

THE COURT: -- enjoining her not to attend any board meetings.

MR. COHEN: Well, she has no ability to attend any

board meetings.

THE COURT: Well, currently.

MR. COHEN: Well --

THE COURT: Currently.

MR. COHEN: Yes. That right was relinquished by Microsoft, so there is no right to attend those board meetings.

THE COURT: Currently.

MR. COHEN: There's no indication that OpenAI would welcome her to those board meetings, but --

THE COURT: They can always change their mind. That's the problem.

MR. COHEN: Your Honor, what the cases say, both *TRW* and the *U.S. v. Grant* case is that there has to be some dangerous cognizable danger of recurrence, I think is the language it uses, and not a mere possibility.

At most, Your Honor, you are talking about a mere possibility and not cognizable danger of recurrence.

I think there's another important argument that we haven't made yet, which has to do with whether xAI has any kind of antitrust standing to bring this claim at all, because there is no evidence in the record that xAI is in any way injured from an overlap.

There -- there's cases that we cite in our brief, the *Bearden* case, *Bearden v. Ballad Health*. It is a Sixth Circuit

case, Your Honor, but it is very instructive on this issue. That is a case in which there was a private Section 8 claim brought, and the Court held that the plaintiffs in that case did not have standing to bring it because they could not show the injury that was necessary.

TRW and *US v. Grant*, as you know, Your Honor, are government enforcement actions, which have a very different standard for establishing whether the -- whether the plaintiff, the government in that case, can bring those claims.

MS. EDDY: Your Honor, may I --

MR. TOBEROFF: Your Honor --

MS. EDDY: -- add a point on that as well?

THE COURT: All right. Go ahead. And then I'll go to you.

MS. EDDY: I think it's -- it's not just a matter of antitrust standing, but also Article III standing, and this is -- this is a point that was fleshed out in -- in the briefing concerning DOJ and FTC's statement of interest in this matter.

Mr. Musk and xAI did not have initial standing at the beginning of the case because by the time they brought suit, both of these alleged interlocs are already ended. And the plaintiffs and the regulators have pointed to the voluntary cessation doctrine to -- to say, well, the fact that the

interlocs ended doesn't necessarily mean that -- the case is moot --

THE COURT: Correct.

MS. EDDY: -- but it does if the inter- -- the alleged interlocs ended before the suit by a private plaintiff --

THE COURT: Yeah, but the problem that you have with that, that temporal component to the statute, which I think courts imply all the time, is that they only acted after government action.

That is, you don't have to get a complaint to be -- to move. There were government actors who expressed concern, and it was only because of that pressure, or one could -- easily assume that it was because of that pressure that they decided to leave the board.

So the cases that you cite, the temporal distinction between when the action happened and when the claim was brought was substantially more than exists here. So that does not persuade.

MS. EDDY: Well, Your Honor, I guess for -- for the *WT Grant* case, it -- the -- so for the *WT Grant* case, that was a government action. It's not a private -- private suit. The interloc -- that -- that issue is not raised.

What we are talking about is the standing that a private plaintiff has and in *WT Grant*, actually I think the -- the

cessation happened after the action was brought by the government.

TRW is the case where the cessation happened before. But, again, that was a regulatory enforcement action.

The *Renne* case and, you know, *Steel Co.*, those cases make very clear from the Supreme Court that you cannot have Article III standing on the part of a private plaintiff when the complained-of conduct ceased before the action began.

That -- that is our point and -- that's what we have here so you don't even reach the question of whether -- whether the standard for seeking an injunction has been met, the cognizable danger --

THE COURT: Response on standing.

MR. TOBEROFF: Your Honor, defendants claim that this issue is moot because they resigned under FTC pressure has been totally debunked by the FTC itself and the DOJ in their statement of interest briefing.

It's not moot. And the -- as you point out the whole purpose of Section 8 is to nip anticompetitive conduct in the bud. It has to do with the exposure to competitively sensitive information at a very high level.

They have the burden on their safe harbor defenses, and they did not supply the Court with sufficient evidence. First of all, there's no declaration -- in order to -- to figure out the look-back period, the Court needs a declaration as to when

Reid Hoffman and Deannah Templeton were last elected to the OpenAI board. That's how you compute -- that's how you --

THE COURT: -- was never elected to the board.

MR. TOBEROFF: Placed --

THE COURT: That --

MR. TOBEROFF: Placed on the board. Which makes it even worse.

THE COURT: Well, in your --

MR. TOBEROFF: I -- I understand.

THE COURT: -- double-edged sword for you.

MR. TOBEROFF: I understand, Your Honor.

They didn't supply that basic evidence. And then they didn't supply the data as to their competing products and services.

You're not -- you don't look -- competition in products and services is broadly defined specifically due to the remedial purposes of Section 8 of the Clayton Act.

And we're not talking about them both using the cloud. We're talking about cloud-based AI products and services. And we show in our papers that both OpenAI and Microsoft have been competing in that sector since 2021, and although they've -- failed to meet their burden by providing --

THE COURT: But that -- but that -- where in your complaint do you complain about the cloud computing? What -- where does the phrase cloud computing show up in your

complaint?

MR. TOBEROFF: It's not cloud computing, Your Honor. It's cloud-based AI products and services. It's not just cloud computing in general. That's how they phrased it, but that's not what it is.

And -- and I would ask that Your Honor when she reviews this point look at our detailed evidence on this point, because what -- they fail to meet their burden. We shouldn't even have to be providing that data, but we did. Since it's their burden, they waived their -- their 2 percent safe harbor defense.

MS. EDDY: Your Honor, may we have one last response to that?

THE COURT: You may.

MS. EDDY: This is a bait-and-switch. Plaintiffs, not just in their complaint -- and if you look at their paragraphs 204 to 207, which describe the competition --

THE COURT: Hold on.

(Pause in the proceedings.)

THE COURT: Okay. Do you want me at 204? I'm there.

MS. EDDY: So these -- the relevant market they say is -- is that of Generative AI models and platforms. That's what they identify as the relevant market.

And then if you look at paragraph 374, says that Hoffman served on OpenAI's board --

THE COURT: Okay. Let me get there.

MS. EDDY: Oh, sorry.

(Pause in the proceedings.)

MS. EDDY: In the competition there, they are competitors. It's defined as Microsoft's Copilot against OpenAI's ChatGPT.

There's nothing in the complaint that blows open the allegations of competition in the way that it's blown open in the reply brief. It's just sandbagging.

THE COURT: I understand the argument.

The word "cloud" only shows up twice in the complaint and certainly never been in the paragraphs regarding competition.

MR. TOBEROFF: Your -- Your Honor, we're not limited by the complaint in terms of addressing their affirmative defenses, which they bring up in their opposition.

THE COURT: Well --

MR. TOBEROFF: We can address it in reply, as we did. We're not constrained by the complaint to predict their affirmative defense and affirmatively plead facts debunking their affirmative defenses. We can do that in our reply, as we did.

Your Honor, the --

THE COURT: Your claim is based on -- your affirmative claims are based on what you've pled in your complaint. That's it.

MR. TOBEROFF: I understand, Your Honor.

Our complaint is -- there -- there are many statements in the complaint incorporated by reference referring to OpenAI and Microsoft as competitors. That doesn't mean --

THE COURT: But --

MR. TOBEROFF: -- we have to --

THE COURT: -- not with respect to this issue. I just told you, the word "cloud" comes up twice in a complaint that is 102 pages long.

MR. TOBEROFF: Yes, Your Honor. But as I've said, they raised this in -- in -- they raised this --

THE COURT: No, I understand. I understand the perspective.

MR. TOBEROFF: Okay.

THE COURT: But understand that you've brought a claim. And you've got to be able to prove your claim based upon the allegations in your complaint. And that is not something that you argued. So when I review it, I review it in that context.

MR. TOBEROFF: If I may, Your Honor, I don't believe that in our complaint we need to debunk the arguments that they make in their opposition.

THE COURT: Well -- all right. Let's move on.

MR. TOBEROFF: And -- and, Your Honor, they have not provided the evidence to satisfy their burden. The

interlocking directorates --

THE COURT: You've said that now three times. I heard it the first.

MR. TOBEROFF: The interlocking --

THE COURT: Let's move on --

MR. TOBEROFF: Okay.

THE COURT: -- to a for profit.

MS. EDDY: I'll cede the podium.

THE COURT: The third restatement of trust says that a settler of a charitable trust has a special interest in the performance of the trust charitable purposes.

Why isn't that enough you never address it in your brief?

MR. SAVITT: Your Honor, the -- the question when and who can sue in respect of a charitable trust is governed by statute in California. It's section 5142(a).

Section 5142(a) substantially endorses the rule of law set out in the *Holt* case from 1964. In that case, the Supreme Court was faced with the question, "well, is the only one who can sue to enforce a charitable trust the attorney general?"

Over an annoyed dissent, Justice Traynor held that that's not quite right. The boundaries for who can bring a lawsuit to enforce a charitable trust need to be very narrowly circumscribed but just the attorney general was too circumscribed. For a variety of policy reasons that Justice

Traynor set out, and he announced a rule of law that limited standing in precisely this context to the attorney general, to officers, directors, and members, to beneficiaries, and to persons with a reversionary interest.

That rule is the same rule that is -- that is enshrined in 5142(a), and it was the law Justice Traynor believed before this. It certainly is the law now. And since then, it has been reaffirmed.

In the *Pinkert* case in this court, the Court held donors who parted with their interest in and control over their donated assets generally have no standing to complain.

The *Patton* case on which Mr. Toberoff relies, it says this in these words, "it is well established that the settler of a charitable trust who retains no reversionary interest in the trust property lacks standing to bring an action."

And I suppose accordingly, my answer to your question, Your Honor, is that the restatement third, to the extent that is its express command, is not the law of California. The law of California is different. And it limits special interest standing to those with reversionary interest -- precisely the interest that plaintiffs here have expressly disclaimed in their -- in their moving papers.

THE COURT: A response.

MR. TOBEROFF: Your Honor, the California Court of Appeals in a 2022 case *Narcotics Anonymous* said exactly what

you've said, and I quote, a suit for the enforcement of a charitable trust may be maintained by a settler.

Justice Traynor in *Holt* said and, I quote, persons having a sufficient special interest such as, quote, donors who have directed that their contributions be used for certain charitable purposes may bring an action for breach of charitable trust.

The statutory -- there's a common law basis adopted by the restatement, adopted by the California Court of Appeals, adopted by the California Supreme Court, the statutory basis in addition has a disjunctive test. It refers not simply to a reversionary interest but to a contractual interest.

And in *LB Research*, a 2005 California appellate court -- appeals court -- appeal court case, they found that a donor who makes donations in that case to establish a -- a chair at UCLA medicine, has a -- by virtue of that donation and the commitment of the charity, established a contract subject to a condition subsequent.

THE COURT: Can you remind me, Mr. Toberoff, the total amount of money that Mr. Musk put into OpenAI?

MR. TOBEROFF: Approximately 45 million.

THE COURT: And --

MR. TOBEROFF: And he --

THE COURT: And why is it that he would not get anything -- he didn't get a written contract after giving

45 million?

MR. TOBEROFF: He -- he -- because it was a relationship built on trust. He was very close at the time to Sam Altman. He was essentially a cofounder of this charity. He named it OpenAI due to the mutual intention that its technology, when safe to do so, would be open-sourced so this very powerful technology was not in the hands -- concentrated in the hands of a giant corporation. And --

(Simultaneous colloquy.)

THE COURT: -- 45 million blank check without anything in writing is interesting.

MR. TOBEROFF: Your Honor, I wouldn't say "without anything in writing." There are multiple exchanges and emails and representations.

THE COURT: Yeah, but do you understand my point, right? $45 million and no specific writing regarding the terms and conditions upon which that money was to be spent.

MR. TOBEROFF: I --

THE COURT: -- one document that I could look at that says, "yes, Mr. Musk, you're right" or "no, you're not." There is not a single document.

MR. TOBEROFF: Your Honor --

THE COURT: It is a compilation of everything.

MR. TOBEROFF: Your Honor, on September 20th, 2-7 [sic] we have an email dated September 20th, 2017. And in

response to Sam Altman and Greg Brockman's push to turn OpenAI into a -- convert OpenAI into a for-profit structure, Musk unequivocally states that, if your intention is to do so, I'm out. I'm not -- I'm paraphrasing.

THE COURT: And didn't he also --

(Simultaneous colloquy.)

THE COURT: But didn't he also say in an email that Tesla was the only path that could compete with Google?

He said the only path that it could even hope to hold a candle to Google -- isn't that suggesting that he was thinking of Tesla run this, a for-profit corporation?

MR. TOBEROFF: When they -- when they came to the conclusion that in order develop AI, they needed a lot more money, him offering, based on the suggestion of -- of someone who worked for him that perhaps Tesla could fund it, that's still a company under his control. That's not taking -- OpenAI was created as a -- as a antidote to Google's acquisition of Deep Mind.

And the fact that -- that -- that he toyed with that idea and then didn't move forward on it, you still have an unequivocal agreement when they want to bring in third-party investors, it -- to his mind, Tesla is not a third-party investor.

When they want to bring in third-party investors and convert to a non-profit [sic], and he unequivocally says

"either you remain a non-profit or I'm out," and then they affirm to him that they were just kidding, that they're going to remain a nonprofit and he proceeds to put in another 10 million, that creates a contract.

There is no --

THE COURT: I know the argument. It just -- it's a lot of money to do on a handshake.

MR. TOBEROFF: There's no requirement --

THE COURT: I understand there's no requirement -- I'm just telling -- I'm just stating the obvious. 45 million on a handshake and what do you end up with? You end up in -- in a court. So --

All right. Let's keep going.

MR. SAVITT: Your Honor, if I might just reply briefly on -- on two of the points that Mr. Toberoff has made?

THE COURT: You can respond on the Court of Appeal case that he referenced.

MR. SAVITT: Thank you. I'd be glad to do that.

The -- the *LB Research* case on which plaintiff -- plaintiffs rely couldn't be clearer, that the only ground for relief in that case was because there was a reversionary interest.

The *Horiike* case that we've cited in our papers says a donor without a reversionary interest lacks standing to sue a charitable trust.

As for the court of appeal case that Mr. Toberoff invokes, that was a case that rejected standing every which way. The quotation that plaintiff seeks to put in Justice Traynor's mouth was actually an outtake from a document that didn't even exist at the time the *Holt* case was written.

The fact is that every case that even plaintiffs site, *Holt*, *LB*, they all turn, of course, importantly on the idea that there is a reversionary interest, which has here been disclaimed.

THE COURT: *LB Research* uses a disjunctive, and one of the questions that it focuses on for purposes of the issue is whether the donor intended to impose an enforceable obligation on the donees to devote it to specific purposes. That is disjunctive from the other approach, which is the one you focus on, which is a reversionary interest.

So I can ignore the reversionary interest, and there's still a test that is more consistent with plaintiff's view.

MR. SAVITT: Your Honor, I -- the *LB Research* case was an attempt -- a successful attempt to cohere the body of case law and enshrined now in statute.

THE COURT: Let's just stop for a minute.

MR. SAVITT: Yes.

THE COURT: You understand there's disjunctive, right?

MR. SAVITT: I do.

THE COURT: Have you read their -- I'm sure you have. You're a smart guy. You read the quote, right?

MR. SAVITT: I -- I've read -- yes.

THE COURT: At pages 177 to 178?

MR. SAVITT: Yes.

THE COURT: There is a two-part test. Part one or part two. I understand part one doesn't apply. There is no reversionary interest. But part two still exists.

MR. SAVITT: Part -- part two is -- in the section of that opinion that is -- it's the section related to the alter -- not the alternative holding, the -- the dictum, what would have happened were there no contract.

The Court is referencing the law of the state of California and -- and respectfully, Your Honor, it's -- it's interpreting 5142(a) necessarily because that is the law and 5142(a) is -- is express that it's limited to reversionary interest, other than -- than those with -- with the statutory standing.

THE COURT: All right.

MR. TOBEROFF: Your Honor, that --

(Simultaneous colloquy.)

MR. TOBEROFF: That's actually incorrect. The test in 5142(a) is stated -- it's a disjunctive test --

THE COURT: Okay. I understand your argument.

(Simultaneous colloquy.)

THE COURT: I'll go back and look at that one.

All right. Moving on.

Raynee, how are you doing?

THE OFFICIAL CERTIFIED STENOGRAPHIC REPORTER: I'm fine, Your Honor. Thank you.

THE COURT: Plaintiffs lump all of your irreparable harm arguments. You don't make any distinctions between the various claims. You just say it's all the same.

Is there any distinction relative to this claim in particular?

MR. TOBEROFF: The self-dealing claim?

THE COURT: Conversion is what we're on.

MR. TOBEROFF: Okay.

The -- the harm in the conversion -- is --

THE COURT: Irreparable harm.

MR. TOBEROFF: The irreparable harm exists on multiple levels. You -- when you take in money based on -- subsidized by the public, based on claims that that money will be used in the public interest, and then you use that money instead for private gain, betraying the public trust, the -- there is a distortion -- you're at a competitive advantage, which leads to a market distortion.

The market distortion, as Your Honor pointed out in *Epic Games* is -- cannot be remedied by damages. And in this particular -- with this particular technology --

THE COURT: This case is nothing like *Epic Games*. And the injunction that I issued -- well, which injunction are you talking about? The preliminary injunction that I issued looks nothing like this case. It does not help you. I lived that case.

MR. TOBEROFF: I understand. But the point from that case that I'm borrowing is the point that you will never know what the market would have looked like, and this is not something --

THE COURT: I don't -- I don't think that -- I don't think that -- you should move on because the injunction that was issued -- the preliminary injunction, not the final injunction -- but the preliminary injunction that was issued had nothing to do with what you're talking about. So you should try a different argument.

MR. TOBEROFF: Okay.

Well, Your Honor, in this case, you have a situation with Microsoft and OpenAI with already close to 70 percent of Generative AI market.

THE COURT: Okay. Can you focus on the claim about converting to a for-profit company? Can you focus on that claim?

MR. TOBEROFF: Yes.

You --

THE COURT: Or is it all the same? Because it

sounds -- where you're going, it sounds like it's all the same.

MR. TOBEROFF: They're interrelated.

THE COURT: So it is the same.

MR. TOBEROFF: They combound [phonetic] -- they compound each other.

THE COURT: Okay. There is no irreparable harm specific to this claim; it's at all same.

MR. TOBEROFF: It's -- it's similar. The irreparable harm is similar. You can -- you -- a company taking in publicly subsidized funds as a charity and then diverting the technology developed with those funds for a for-profit company -- they've been acting as a for-profit now for quite some time, it appears, without any regulatory approval.

Even if they get that approval, which at this point, is very unclear, that does not sanitize the years of acting as a for-profit.

THE COURT: So there's no --

MR. TOBEROFF: The evidence shows --

THE COURT: So there's no remedy to your client.

MR. TOBEROFF: There is not -- there -- damages do not suffice in a situation like that when you're dealing with an industry in its nascent form and there's a market distortion by their anticompetitive conduct, including the -- the advantage of taking money as a charity and diverting that

money and diverting the technology established for that money, which is fairly outrageous, breaching --

THE COURT: So when was the last time that Mr. Musk made a payment? When was his final payment? Can you remind me, please.

MR. TOBEROFF: I believe it was in -- prior to February 2018.

THE COURT: So from February of 2018 to now, seven years later, how does that play into your argument? It seems -- I don't understand your argument given that seven years has lapsed.

MR. TOBEROFF: Well, they haven't been doing what they're doing now seven years ago. In fact, after he withdrew from -- from the board of OpenAI, he continued to communicate and be supportive of them. It wasn't till I believe that the -- the members of the board fired Altman and he was reinstated by Microsoft in four -- in four days when Microsoft demonstrated its dominant position with OpenAI, that he wanted nothing further to do with them, which happened later.

THE COURT: All right. Is that all you have to say on the topic?

MR. TOBEROFF: No, Your Honor.

I think the -- I just want to make sure that -- that the damage theory is under -- the irreparable harm theory is -- is conveyed and understood here.

It first has to be taken in the context of their dominant position -- already dominant position in the market. Then you add to that flagrant anticompetitive conduct such as the "Fund No Competitors" edict for which there's significant evidence. And by the way, it's not just one declaration from Birchall. There are four declarations, including declarations from one fund -- $25 billion fund -- from the CEO of that fund, and from another fund, from the former head of Fidelity's tech investment fund who now has another Altreides [phonetic], Gavin Baker, all saying that that edict was common knowledge. That --

You add to that the fact that you're dealing with a technology that has pronounced network effects and in addition --

THE COURT: Okay. None of that has anything to do with a conversion of a nonprofit to a for-profit.

MR. TOBEROFF: I was addressing the harm from that conversion.

THE COURT: So every claim that you are asking for an injunction on requires a separate and independent finding of irreparable harm.

Do you understand that fundamental principle?

MR. TOBEROFF: Yes, Your Honor.

THE COURT: Okay. I thought you did.

What I said to you earlier was that it appeared to me that

you have collapsed irreparable harm for all of your various requests as to one generic notion of irreparable harm. And that's fine.

I asked whether there was anything specific to this claim. That was my question.

MR. TOBEROFF: The competitive advantage --

THE COURT: Of being a for-profit as being a nonprofit?

MR. TOBEROFF: -- of being able to raise tax -- publicly tax-subsidized money to develop technology, and then transferring technology to an opaque web of for-profit entities and benefiting from that when competitors are supposed to compete on a level playing field.

THE COURT: Okay.

MR. TOBEROFF: That's not a level playing field.

THE COURT: So what I hear you saying is that people shouldn't be able to take a tax deduction from a nonprofit who then can convert that money for for-profit enterprises.

Is that --

MR. TOBEROFF: Yes, while other people have to do it legitimately.

THE COURT: Okay. Now I understand.

Response.

MR. SAVITT: Your Honor -- Thank you, Your Honor.

In respect of the question of irreparable harm for the

claim sounding in breach of charitable trust, the baseline facts are that a plaintiff can obtain damages for a breach of a charitable trust. The case law says that. The treatise say that. Section 5142(a) says that.

THE COURT: Why should OpenAI be able to obtain funds in a nonprofit context and then convert those funds for use in a for-profit context?

MR. SAVITT: Your Honor, reason it should be able -- without wanting -- I apologize, Your Honor.

I don't want to characterize what any potential restructuring might be, but the -- the reason a restructuring to include for-profit entities should be permitted and has been permitted in a variety of the circumstances, is because such an endeavor is necessary to facilitate the mission of the not-for-profit as best as its directors believe that it could.

And that's what's happened here. And it's happened elsewhere. And it's also what Mr. Musk proposed in connection with his desire to make OpenAI tied to Tesla as a cash cow.

This is not a unique circumstance. It's not -- it's not tremendously commonplace, but the not-for-profit has the right, if it's consistent with its mission, to undertake -- to engage in commercial activities to create the commercial backdrop that will allow it to facilitate its objective.

And I also want to be very clear on this --

THE COURT: -- continue to raise funds -- maybe I'm

just wrong. I mean, maybe I don't understand.

Are people getting a tax deduction for contributing to OpenAI?

Did Mr. Musk get a tax deduction for giving 45 million to OpenAI?

MR. TOBEROFF: I'm sure he did, Your Honor.

MR. SAVITT: Your Honor, that is the point I wanted to -- to just make sure I clarified.

People who give to the not-for-profit receive a tax deduction. Investors don't receive a tax deduction. It's not as though all of the people putting money into the for-profit arm are getting any of these funds in an unfair way. They're commercial investors.

It's only the -- donations to the not-for-profit that are subject to the unfair advantage about which my adversary complains. And there isn't any sense in which those investors are getting an unfair advantage the -- and the commercial investors are investing just as they would in -- in any commercial or for-profit undertaking.

THE COURT: So I think he has sued how many OpenAI companies? I didn't count them. But it looks like at least a dozen maybe? I can count them, but -- 12, 14? Maybe more?

MR. SAVITT: Yes, Your Honor, there are a bunch.

THE COURT: Why is it that those entities can't do their fund-raising and OpenAI for the pendency of this case

remain a not for profit? What -- what's the difference?

You've got -- well, it looks like 20.

MR. SAVITT: I think that's the number that have been sued. It's something like that --

THE COURT: Yeah, 20 entities. Why can't the -- the circumstance be placed in a pause for this case to, you know, resolve and the other 19 entities do all the fund raising they want? But OpenAI remain a nonprofit pending resolution of this case.

MR. SAVITT: Well, I should say, Your Honor, OpenAI -- even in the contemplated restructuring will remain a not-for-profit. But that's not the real answer to Your Honor's question, I don't think.

The reason that an order impairing the ability of OpenAI to consider restructuring would be problematic even though the entities that are raising funds commercially could continue to do so, is that it has been -- at least as a concern of the board of directors of OpenAI -- and I want to say a word about them if I have the opportunity -- is concerned. And if the restructuring is proposed, will have reached the conclusion that the ability of those entities to raise the funds necessary to compete with, for example, Mr. Musk's organization, would have to do so in a restructured environment where the not-for-profit would have different roles and responsibilities relative to the investors.

That is to say -- that's a lot of words. Here's a few words. The restructuring is being proposed because it's the only way for the not-for-profit to continue to facilitate its mission.

And it's not for nothing that a competitor here is trying to use a claim under the charitable trust doctrine to essentially undermine the ability of a promising competitor to compete with it. Never has that been the office of this body of law, and there's certainly no showing that --

THE COURT: Well, there's --

MR. SAVITT: -- damages won't do.

THE COURT: There's a significant amount of evidence that Musk, who is the primary contributor to the -- to OpenAI in its infancy, that it was intended to be a nonprofit. And intended to be open, which is now obviously changed.

But in the interim, I don't know -- I don't understand how competition is impacted at all given that you've got approximately 20 other entities who could do -- continue to do what they're doing while this one entity is in litigation about its status?

MR. SAVITT: All of those entities are under the not-for-profit umbrella. They are controlled by the not-for-profit and they are therefore subject to the not-for-profit.

And I think, Your Honor, it -- it would be wrong to

conclude that those entities would be able to compete in this marketplace for both innovation and capital in the same way that a public benefit corporation would be able to, a corporation such as Mr. Musk has, because the constraints of the governance arrangement here are meaningful to investors is to the point that the OpenAI board of directors is considering whether it can actually continue to maintain its mission in a competitive way with all of them essentially operating in a nonprofit environment, which they all are, because they are underneath a not-for-profit controlling holding company.

MR. TOBEROFF: Your Honor, if I may address these points?

THE COURT: Okay.

MR. TOBEROFF: The charity -- a charity is allowed to engage in for-profit activity but must, as they've admitted, control the company's engaging in that activity. And the money is supposed to go back -- fall back to the charity.

Here, we have the 2022 tax return that's part of the record where they showed 200 million in revenues to the for-profit enterprise, and 44,000, I believe, 400 -- $485 going to the charity.

The 2023 annual report for OpenAI that was just published -- that's why it's not in the record -- shows a billion six going to the for-profit enterprise, and 5 million going to the charity.

That's not how this is supposed to work.

In addition, the charity's certificate of incorporation states that the property -- and I quote, the property of this corporation is irrevocably dedicated to charitable purposes. No part of the net income or asset of this corporation shall ever inure to the benefit of any director, officer, or member thereof, or to the benefit of any private person.

They proceeded to violate that, violate their charter, violate their representations to Musk, the public, and to regulators, and transferred their technology and their leading employees all to the nonprofit enterprise and all without regulatory approval.

THE COURT: All right. Hold on just a moment.

(Off-the-record discussion.)

THE COURT: All right. let's go ahead and take a 15-minute break.

(Recess taken at 11:44 A.M.; proceedings resumed at 12:01 P.M.)

THE COURT: All right. We're back on the record. The record will reflect the parties are present.

Raynee, can we do a test?

Great. Thank you.

Okay.

We'll go ahead and move to self-dealing, California Corporations Code Section 5233.

Again, here, the words of the statute specifically indicate that in order to bring the action, you need to be a member of the corporation.

Is not that a ground for -- well, he's not a member of the corporation.

MR. TOBEROFF: Yes, Your Honor.

THE COURT: Neither -- neither of them are.

MR. TOBEROFF: The -- 5710(b)(1) specifically uses the past tense and says "plaintiff" meaning an action has commenced, alleges in the complaint that plaintiff was a member at the time of the transaction or any part thereof. And we have done so for Musk and Zilis.

The fact it uses the past tense is significant because under 5033 (c)(2), which applies to directors, not former members, they don't use the past tense.

THE COURT: Response?

MR. SAVITT: The one thing that I think we think emerges clearly, Your Honor, from the standing case law is that you may not institute a lawsuit at such time as you are no longer a member or director.

There is no case at all ever holding that you cannot institute -- that you can institute a -- a claim on the corporation's behalf after you have ceased to have that relationship.

And so --

THE COURT: I mean, it is a derivative claim by definition.

MR. TOBEROFF: Correct, Your Honor.

MR. SAVITT: And -- and on that point, Your Honor, it's a derivative claim, and it would be passing strange [sic] and it's just lawless to have a circumstance where someone is no longer affiliated with the corporation to bring that claim.

The law is crystal clear. And the law is even clearer in respect to the other requirements for standing in a derivative action that demand has to be made upon the board, which it was not here. And it needs to be pleaded with particularity, why demand would have been futile, which it absolutely has not been here.

And there is talk in the papers about this board being controlled by Sam Altman. There is not a word pleaded to suggest that. It's an important point to consider throughout this motion, Your Honor, because the people who will be making the decisions about the matters in dispute, they are independent directors. You're talking about a former Secretary of the Treasury, the former CEO of Sales Force, the former global general counsel of Sony, a former four-star general.

These are -- these are the people who the statute and the state and the corporation has confided decision-making authority. And that goes, among other things, for the

question whether to bring a self-dealing claim. And there hasn't even been a whisper of an effort made, and that is disqualifying without more.

THE COURT: A response.

MR. TOBEROFF: Your Honor, first of all, these are the people who have --

THE COURT: No, I meant a response on demand futility. It's explicitly required. I can't ignore it. But you have.

MR. TOBEROFF: We have not, Your Honor. It's -- the statute requires that it be alleged, and it was alleged that demand was made and that it was otherwise futile.

In addition, we have the declaration of Shivon Zilis, who stated that she objected to the Helion Energy transaction and -- and stated to the board that there was not sufficient due diligence to move forward with that transaction to establish that it was in the best interests of the charity. And realized that her complaints were being -- were -- fell on deaf ears, and that after that experience, in addition to her experience complaining about the lack of safety standards, it's been reported and -- and -- and Zilis states this as well that the board didn't know about the release of ChatGPT until they read about it on Twitter.

THE COURT: Could you point me to your best paragraph in the complaint that identifies that on which you rely with

respect to demand futility because the statute or the -- or the law requires that I assess whether it's done with sufficient particularity.

What are you relying on?

MR. TOBEROFF: I'd have to pull the complaint, Your Honor.

THE COURT: All right.

(Pause in the proceedings.)

THE COURT: While he's finding that, the statute indicates that you need to be a member at the time or a member at the time of the complained-of transaction. He was a member at the time of the complained-of transaction, at least for part of it.

Why isn't that enough?

MR. SAVITT: The -- the reason we say, Your Honor, it's not enough is because the -- that requirement -- that condition allows one to -- and the case law says this, and we've cited it, it allows you to file suit if you're a member but you don't have to maintain standing throughout. And that's the lesson of the *Turner* case, which -- which Mr. Toberoff invoked that we think actually rather powerfully supports our position.

And what we -- the -- the preliminary portion of 5233 says that an action maybe brought only by a member and director. And that has been interpreted in the cases adjacent to this

issue, including the *Grosset* case, including the *Turner* case, to establish that while you may not -- it's an open question whether you have to maintain your position at the company.

But there is no case ever allowing derivative standing to be brought -- a derivative action to be brought by a plaintiff who had ceased his or her engagement with the company. Ever. Not a case.

And I should add that the plaintiffs here, they allow that past -- for purposes of this motion, Your Honor, past transactions are remedial in damages. They concede that point on page 21 of their opening brief.

So as to the -- everything that's happened in the past, there can't be an injunction. And as to everything that happened in the future, well, they obviously don't have standing because they aren't part of the organization anymore, so there's no conceivable for an injunction to issue in respect to the self-dealing claims.

THE COURT: Okay. Response.

MR. TOBEROFF: Your Honor, to answer your question, the complaint at paragraph 236, 461, and 463.

THE COURT: Hold on. You said 236?

MR. TOBEROFF: 461, and 463 alleges that the board was adversely dominated, and the composition of the adversely dominated board is detailed in paragraph 162 to -72.

Also the fact that the board have -- has allowed nine

documented instances of self-dealing by Sam Altman speaks to the adverse domination as well as the purging of the board within four days after Altman was fired and the re- -- and the -- the enstatement [sic] of Altman allies on the board alleged in the complaint -- all alleged in the complaint.

MR. SAVITT: Your Honor, might I respond to that?

MR. TOBEROFF: There's sufficient -- Zilis states in her declaration with particularity how she objected to OpenAI's prioritizing profits over safety as -- was a mass exodus, multiple whistleblowers, part of the safety alignment teams, she objected to that.

Musk has been quite to -- vociferous in terms of his objections on social media and --

THE COURT: A response to the statement that there has never been a case asserting this particular claim where a plaintiff's membership ceased.

MR. TOBEROFF: There's not a lot of case law on this particular provision, Your Honor. In *Turner*, the --

THE COURT: Is that -- okay. There may be just limited case law. But is that right, that there's never been a case?

Is what he told me accurate or not?

MR. TOBEROFF: I believe it's inaccurate to the extent in *Turner vs. Victoria*, the California Supreme Court, a 2023 case, recognized standing of former directors who left

the nonprofit's board for reasons related to the claims --

THE COURT: And --

MR. TOBEROFF: -- would apply here.

THE COURT: After they left, did they file suit?

MR. TOBEROFF: I don't have the -- the time line on the top of my head.

THE COURT: Back to my issue on the temporal component. Does anybody know?

MR. SAVITT: It was essentially contemporaneously, Your Honor. That, I do know. And that was the point of the *Turner* decision, that in that case because the conduct that gave rise to the action also resulted in the departure, it was an appropriate exercise of -- of derivative standing.

THE COURT: All right. And I think in *Turner*, it was pretty clear that the Court was dealing with a whistleblower and that there was a claim of retaliation, which distinguishes it from the -- six- to eight-year gap we have here.

When did -- when did Tellis [phonetic] -- do I know when Tellis -- when her relationship ceased?

MR. TOBEROFF: Zilis was on the board, I believe, from 2018 to 2023.

THE COURT: Okay. Is that in the complaint?

MR. TOBEROFF: Yes.

THE COURT: She doesn't claim retaliation, does she, in the complaint?

MR. TOBEROFF: She has not claimed retaliation, and the statute which seems to allow former members to sue derivatively for self-dealing, if a transaction occurred or even a part of the transaction occurred when they were members.

The -- we believe the statutory language is clear in -- if it's -- in its use of the past tense.

THE COURT: You know, the word "clear" to me never persuades because if things were clear -- plain? I don't know. I just don't think that's a very good word.

MR. TOBEROFF: I -- it says plaintiff was a member in the past tense.

THE COURT: Okay.

MR. TOBEROFF: And -- and both of them were.

THE COURT: Everybody -- everybody argues "clear," and, rarely, is it. That's the reason I'm saying that.

(Simultaneous colloquy.)

MR. TOBEROFF: I see -- I see the --

THE COURT: -- take it with a grain of salt.

MR. TOBEROFF: I actually -- I -- 100 percent agreement.

THE COURT: Any time a lawyer tells me "clear," I go back 'cause I figure there's a lot of mud.

But we'll check.

MR. TOBEROFF: What's --

THE COURT: Not a problem.

MR. TOBEROFF: -- noteworthy here, they don't even attempt to refute the flagrant self-dealing here. They say it may have benefited the corporation.

There are procedures in place in California when you enter into a transaction that -- an interested director transaction.

THE COURT: What is the remedy here?

MR. TOBEROFF: The remedy is like our other --

THE COURT: What's the statutory remedy?

MR. TOBEROFF: For -- for self-dealing?

THE COURT: Yeah.

MR. TOBEROFF: I believe the statutory remedy is you can unwind the self-dealing, which we haven't asked for. We haven't asked for a mandatory injunction. We're asking solely compliance with the law, that they don't engage in further self-dealing.

The thing -- I understand your point --

THE COURT: But that's -- that's of particular concern as well, because injunctions need to be specific.

Injunctions need to be -- things that I can look at and figure out whether -- if I issue such a -- such an order that I can -- that I can assess conduct against the specificity of the order.

So if I told all of -- you know, if I told you, you have to follow the law, well, that's not a good injunction because

it's not specific enough.

MR. TOBEROFF: It can --

THE COURT: If I told you, you can't self-deal, that's not sufficient because it's not specific enough.

MR. TOBEROFF: The definition, Your Honor of, "self-dealing" here in this context is a -- a -- the charity entering into a contract in which a director or member, officer, has a material financial interest.

That can be quite -- that's -- that's plain. But it's also sufficiently specific.

There's been numerous documented accounts of self-dealing.

THE COURT: But as I look at your request for injunctive relief, that's not what you state. If I look at your language -- your proposed language would have me effectively running this business.

MR. TOBEROFF: To -- are you speaking about the self-dealing claim?

THE COURT: I'm dealing -- I'm looking at your proposed language for an injunction from which this flows.

MR. TOBEROFF: Your Honor, the Court can fashion an appropriate injunction here on each of these claims.

THE COURT: So you want me to do your job now.

MR. TOBEROFF: Not -- not do our job. We --

THE COURT: Well, then, look at your language and tell me --

(Pause in the proceedings.)

MR. TOBEROFF: The self-dealing claim, Your Honor, would be an injunction prohibiting OpenAI from entering into any transaction where any current OpenAI board member, director or officer --

THE COURT: Okay.

MR. TOBEROFF: -- with an entity.

THE COURT: This is all new. You understand that that's actually not in your motion.

MR. TOBEROFF: I believe it's in -- I believe it's --

THE COURT: I'm -- I'm looking at the language from your motion. And that's not there.

MR. TOBEROFF: I believe it's inherent in our motion that the Court can file an order.

THE COURT: Motions for preliminary injunction are not very conducive for inherent arguments.

MR. TOBEROFF: I'm reading -- let me find the provision in our proposed order.

THE COURT: I took this from your motion at Docket 46.

MR. TOBEROFF: Okay. In fact, this is stated in paragraph four of our proposed order, Docket 46, defendants are hereby enjoined and restrained from directly or indirectly undertaking any action for the purpose of tending to have the effect of or causing OpenAI, Inc. to contract or to do

business with any entity in which any defendant has a material financial interest.

THE COURT: That's pretty broad.

MR. TOBEROFF: We can narrow it, Your Honor, to any director, officer, or member of OpenAI, Inc.

I think it's fairly --

THE COURT: The thing is -- well, your complaint is with Altman. I don't have any evidence about all the officers and directors violating this provision. You want me to enjoin, right? You just said that you want me to enjoin any officer, director, or member of OpenAI, Inc.

But you've not given me evidence -- at best, you've only given me evidence relative to Altman.

How am I supposed to -- how do I -- how do I justify an injunction when you've given me no evidence?

MR. TOBEROFF: Because these nine -- at least nine instances, and we suspect there's more than what we know of, of blatant self-dealing were carried forward and never stopped by the board of OpenAI.

THE COURT: Well, doesn't that, then, just limit it to at most Altman?

MR. TOBEROFF: No, because you're dealing with the other directors of the board that inherently approved these self-dealing transactions.

THE COURT: Do you even have the names of the board

members in your complaint?

MR. TOBEROFF: They've -- they've changed. We have -- we have --

THE COURT: Do you have any names of board members in your complaint?

MR. TOBEROFF: We have -- I don't believe we've listed all the board members.

THE COURT: So how am I supposed to identify them?

MR. TOBEROFF: They've identified their board members in their papers.

THE COURT: This is your motion.

MR. TOBEROFF: I understand, Your Honor.

I -- I don't -- I don't -- you know, I understand that a preliminary injunction is not often granted. But here, what we've asked for in the form of an -- enjoining them to obey the law when they have admitted that they've engaged -- that Altman has engaged in these self-dealing transactions.

THE COURT: Okay. Could you -- somebody respond to the admissions.

MR. SAVITT: Yeah. Thank you, Your Honor.

I -- there has been nothing even remotely like an admission there will be no admission and, in fact, there's been no evidence been adduced here to indicate that the elements of 5233(d) have not been respected here and there won't be.

And -- and I wanted to -- zero in on a point that you were just discussing with -- with Mr. Toberoff. He cited to the court paragraphs 162 to 172 to justify his identification of the -- of the board and why it was conflicted.

As the Court's pointed out -- and this is a remarkable thing -- the names of the directors aren't even in the complaint, still less any allegation why this isn't a matter for them. And it is an issue, Your Honor. We'd suggest that it cuts across the motion.

The -- the plaintiffs want to pretend that the directors aren't there, that these independent directors of substance aren't there. They are the ones who are supposed to run the company. They are the ones who are running the company. And they haven't even named them, let alone give a single allegation that with respect to self-dealing or any of the other matters before the Court, respecting, for example, the -- the charitable trust claim with the potential restructuring, that they aren't doing their job.

There are stakeholders in the world here. There are attorneys general to whom they answer.

But the -- the company's run by the directors. And there isn't a thing pleaded here, let alone established by evidence to suggest that that authority ought to be handed over to a competitor.

MR. TOBEROFF: Your Honor, we name -- the focus of

the self-dealing, it's true, has been Sam Altman.

THE COURT: Yeah.

MR. TOBEROFF: But those self-dealing -- the board never stopped the self-dealing transactions. And we're not talking about one or two things --

(Simultaneous colloquy.)

THE COURT: Didn't the board members change?

MR. TOBEROFF: There've been different board compositions.

THE COURT: That is, until Sam Altman was removed, the board members were all -- had backgrounds -- and I actually don't even remember if this is in the complaint. This is from news report.

I thought that all of the members of the board had had nonprofit backgrounds, right? They came from nonprofit entities?

MR. TOBEROFF: I -- I believe some of them came from nonprofit entities, but the relevant point was that they had experience in AI governance and AI safety.

THE COURT: I'm not -- but -- but that group is not the same group that currently exists, correct?

MR. TOBEROFF: That's part of the problem, Your Honor.

THE COURT: Great. So now I have a new group. And yet, I don't know anything about the new group. I don't

know -- there -- well --

MR. TOBEROFF: With -- with a history of self-dealing transactions --

THE COURT: But -- but if there's a long history, it would have been under the group --

(Simultaneous colloquy.)

THE COURT: -- that was the nonprofit set of directors, right?

MR. TOBEROFF: I understand, Your Honor.

But asking -- enjoining with this -- with this history of multiple self-dealing transactions --

THE COURT: But the history --

MR. TOBEROFF: I see the point, Your Honor.

THE COURT: -- is that if you're -- if you're claiming that it is a history, then you're going back to the group of nonprofit board -- and I don't want to say "nonprofit" 'cause you're right, they had significant AI background.

But you're going back to a separate and distinct group of board of directors, who, by the way, were operating even when Musk was there, right? Those --

MR. TOBEROFF: I don't believe that's --

THE COURT: -- for a long time.

MR. TOBEROFF: I don't believe that's the case with respect to these self-dealing transactions. These

self-dealing transactions were more -- are more recent and happened after Altman and Microsoft purged the board and got rid of those people.

THE COURT: It's -- then it's not a history. Then it's a recent.

MR. TOBEROFF: It's more recent, correct.

The -- the Reddit deal in which Altman's -- Altman's one of the largest stakeholders in Reddit. He entered into a contract with OpenAI, Inc. and Reddit for Reddit's content while ignoring the content of *New York Times*, *Chicago Tribune*, *The Daily News*, who have a massive lawsuit exposing the charity to massive damages.

And in the Reddit deal, it's been reported that his personal stock went up by over 200 million after the announcement of that deal. That was a 220 -- the 2024 transaction.

I believe most of the listed self-dealing transactions happened far more recently.

THE COURT: Okay. So there --

MR. TOBEROFF: Under the current board composition.

THE COURT: So then not a history but a recent set of activity.

MR. TOBEROFF: I think the -- the -- my emphasis would be better put on the fact that they're repeated multiple instances of blatant self-dealing.

We have the limitless transaction, the transaction with Humane, the transaction with Stripe.

THE COURT: I'm looking -- looking at your complaint.

And there's one page, paragraphs 139 to 144, so less than a page, that addresses these topics; is that right?

That's what I'm looking at? Paragraphs 139 to 144?

MR. TOBEROFF: -- turning to those, Your Honor.

(Pause in the proceedings.)

MR. TOBEROFF: Yes, Your Honor. That's where those specific transactions are listed in the complaint.

THE COURT: All right.

And do you -- attached to your complaint anything to support these 20 lines of text.

MR. TOBEROFF: Multiple news reports from reputable journals exposing this -- this self-dealing.

THE COURT: Because none of these paragraphs reference any attachments. And all of them say "on information and belief."

MR. TOBEROFF: We provided those -- we provided those attachments, Your Honor.

THE COURT: Okay.

MR. TOBEROFF: It's part of the record.

THE COURT: So pretty significant request for one page in a complaint, but I'll look at it.

MR. TOBEROFF: I believe.

THE COURT: You understand I can't take your word for it.

MR. TOBEROFF: I understand that, Your Honor.

THE COURT: All right.

MR. TOBEROFF: But I believe this self-dealing has been number of -- of clear investigative reports. And more -- more to the point, Your Honor, they have not denied the self-dealing. They have --

THE COURT: We --

(Simultaneous colloquy.)

MR. TOBEROFF: -- opposition.

THE COURT: We haven't gotten there yet. We're still -- we haven't even finished briefing on motions to dismiss.

MR. TOBEROFF: No, but in their opposition, they do not deny the self-dealing. They say, well, it may have benefited the corporation. That's not the test. Nor did they make any attempt to go through the procedures --

THE COURT: And why isn't money damages sufficient? Why isn't money damages sufficient? Don't -- wouldn't you want money damages?

Wouldn't you want the money damages to go back to the nonprofit or for -- whoever? Why -- I don't understand why money's not enough.

MR. TOBEROFF: Money's not enough on a number of

levels, Your Honor. Specifically, they keep taking in more and more money. By the time you reach the merits, you won't -- we won't be able to unwind any of these transactions.

THE COURT: Well, maybe I have to have an evidentiary hearing, then.

All right. Let's keep going.

MR. TOBEROFF: Your Honor, if I may, on the conversion point, because of the computer issues, I -- I would like to be able to finish the point I was making.

On the conversion point, we have a situation -- well, up until now, have they -- has they've just stated, the charity has control over the for-profit enterprise.

And what they're proposing to do after transferring the technology that was developed with charitable donations to for-profit enterprise and then transferring all of their top scientists and engineers to the for-profit enterprise, they now -- the most important part of this conversion is they want to swap the charity's majority control over the for-profit enterprise for a minority interest -- a minority interest. And that's what's really at play here.

First, they raise money based on proclamations and promises to Musk, regulators, and the public that they're doing this for the benefit of mankind, that in no event will their assets be used for private gain. And then they produce -- proceed to do the exact opposite. And now after

doing that --

THE COURT: Well, I don't understand -- I mean, those are grand proclamations, but I need specificity. And I say that because I think there certainly was a point in time when that was the case, that they were raising money for the benefit of humanity.

It's clearly not the case now. And it hasn't been for a while. And everybody who's investing knows it. So I don't understand -- you've collapsed a lot into some generic statements. So I don't -- so it's either meaningless or you need to be more specific, one of the two.

MR. TOBEROFF: As to -- as to which point, Your Honor?

THE COURT: Your --

MR. TOBEROFF: Specific -- it's specific that in 2019 --

THE COURT: Are you suggesting that today, investors in OpenAI don't know that they're investing in a for-profit venture?

MR. TOBEROFF: No, they -- they do know, but --

THE COURT: That's my point.

MR. TOBEROFF: But the problem is -- and the problem with the proposed conversion is they're going to take the charities -- what board member of a charity would vote to swap a majority interest in a for-profit enterprise, which they

themselves now value at $340 billion, for a minority interest?

That's what's going on here. First, they raise money in the charity. They develop technology. They transfer it to this opaque -- opaque web of for-profit LLCs. They enter into an agreement with Microsoft for private gain. Microsoft has private gain.

Sam Altman lied to the senate when he said he had no interest and it's since been revealed that he had an interest through Y Combinator and through a Sequoia capital fund in the for-profit enterprise. And he certainly will have a major equity stake after the conversion.

This is, for lack of a better word, a shell game. And it's outrageous. And this is not a common occurrence converting a $340 billion charity -- or at their last valuation $157 billion charity to a for-profit corporation.

And this has been going on now incrementally. And it's reached the breaking point where something has to be done. And all we're asking the Court to do is to preserve the status quo, because, otherwise, if you find in our favor, it will be impossible to unwind these transactions. If they keep taking in more and more money involving more and more investors --

THE COURT: Well.

MR. TOBEROFF: -- who won't be able to get their money back.

THE COURT: So are you concerned with past investors

or future investors?

MR. TOBEROFF: I'm concerned about the -- if the status quo is not.

THE COURT: Well, I should just say -- well, go ahead. Finish what you were going to say.

MR. TOBEROFF: I'm concerned about the fact that as they raise more and more money -- and they're already on their next funding round, more and more people are going to be infected [sic] by this, and --

THE COURT: Yeah, but people who are investing know what's happening. So I don't understand -- I can -- it gives me concern that you've got a charity, frankly, that is worth 340 -- $357 billion, according to your statement. That in and of itself is mind-boggling, that a charity has that much value.

The notion that people don't know what's happening who are investing is not credible. They know exactly what's going on.

The fact that Musk wants to compete with them throws yet another level into this, especially given that he's, you know, running the government right now, so who knows.

There are a lot of moving parts. And -- and I was not being -- I have to work through some of your stuff because it's not as specific as it needs to be.

But I don't think you've given me a record to justify the kind of leave you are requesting. Now, that doesn't

necessarily mean that you're not -- there isn't a good reason to get some relief. But you haven't really given it to me. And it's not my job to do your job.

And it's not my job to somehow stop competition. And things are very murky still in terms of what's going on between Musk and his X.AI, whether they're one or separate entities, yet to be seen, and OpenAI and Microsoft on the other hand.

This country values competition.

MR. TOBEROFF: Exactly, Your Honor. And what we're asking for here --

THE COURT: You're asking me to get -- to get involved in the playing field.

MR. TOBEROFF: To --

THE COURT: And my job -- nope. My job is to make sure that judges are not -- or at least this particular judge is not making a playing field unlevel.

So --

MR. TOBEROFF: I --

THE COURT: There's still a lot for me to un- -- unravel here.

MR. TOBEROFF: If I may, Your Honor.

What we're asking here -- of course, X.AI is a competitor of OpenAI. We're asking that it be able, like other AI competitors Anthropic, Safe Superintelligence, other

safety-minded AI companies, be allowed to compete on a leveling playing field.

THE COURT: I don't have any complaints from them.

MR. TOBEROFF: I --

THE COURT: There are lots of other AI companies, none of whom are filing similar suits.

MR. TOBEROFF: That's -- that's still -- it's still the --

THE COURT: It's still what?

MR. TOBEROFF: It still holds that Musk should have the ability to compete on a laying -- on a level playing field.

And there's another aspect of this, that they can hardly complain that the balance of equities don't ship -- ship -- tip sharply against them when basically the subject of this preliminary injunction would be that they obey the law and there -- at this early stage without the benefit of discovery, I think we have put forward a plethora -- plethora of evidence. Numerous accounts --

THE COURT: Do you know that the Ninth Circuit -- you must know. The Ninth Circuit won't -- won't affirm an injunction that is not specific. I cannot just say, "go obey the law." It -- there are so many cases that are contrary to that notion that you just argued.

MR. TOBEROFF: I'm not suggesting that -- I'm talking

about the net effect of the injunction. I'm not suggesting that that would be the wording of the injunction.

THE COURT: All right. Good to know.

MR. TOBEROFF: And -- an injunction could also be fashioned with defendants' participation at a certain point.

They've -- they've made claims that this will damage certain aspects of their business. They can participate in helping the Court to fashion that injunction.

THE COURT: Hmm.

MR. TOBEROFF: But something, in our view, should be done to preserve the status quo as they take in more and more investors, even if those investors are investing under known conditions.

What if they go public? And you're now talking all the people that would be affected if we prevail on the merits? There's no ability -- and also as far as not -- not only when you look at unwinding the -- these transactions, that goes to irreparable harm. But also the fact that they -- when you have a projected burn rate of $14 billion a year, how could they even pay the damages at that point?

THE COURT: Well, okay.

Anything else you want to say?

MR. TOBEROFF: No, Your Honor.

THE COURT: All right. You each get five minutes so we can wrap this up. And then you'll get the rebuttal; it's

your motion.

MR. COHEN: Thank you, Your Honor.

THE COURT: You're on the clock.

MR. COHEN: An injunction is an extraordinary and drastic remedy, and the moving party has to satisfy all of the *Winter* factors.

And we submit that plaintiffs can satisfy none of them here. There's no evidence of an agreement. There's no evidence of an agreement with Microsoft. And any such agreement that they describe here is not horizontal. It is not per se.

And so, therefore, there's no likelihood of success, let alone a serious question on the Section 1 claim.

As to the Section 8 claim, there is no present overlap. And there is no dangerous likelihood of recurrence of that overlap. And at the time there was an overlap, it was entirely consistent with the law.

There is no basis to issue an injunction prospectively to ensure that the law is abided by going forward where there was no violation in the first place.

Winter says there has to be likelihood of success, and, here, there was none.

Finally, an injunction of the type that Mr. Toberoff has described threatens significant harm to Microsoft's customers and its customers' customers. As explained in the Arenas

declaration, the OpenAI models are accessed through Microsoft services and are accessed through the Copilot services, which are used by thousands of developers and millions of customers.

And if OpenAI is somehow unable to continue to develop its models or to transfer those models and to update those models, that is going to have a significant effect on the customers and the customers of the customers.

It's also going to have a dangerous effect because many of those updates provide safety and security updates for the customers of those services.

The premise that is at the core of plaintiffs' case is misguided. There is tremendous competition among firms like Google and Meta and Oracle and Microsoft and among startups like X.AI and Anthropic and Cohere and Mistral.

There is competition between Microsoft and OpenAI. And as a result of all of this competition, we see, as Your Honor noted, a dynamic emerging wave of Generative AI technology, so we're at the very beginning. We're at the very beginning of this wave of technology.

We're also at the very beginning of the case, Your Honor. And we would submit that on this record, there is simply no basis to award any injunction and that plaintiffs haven't satisfied any of the *Winter*' factors.

Thank you.

MR. SAVITT: Thank you, Your Honor.

OpenAI Inc. is a not-for-profit corporation, chartered under Delaware law, doing substantial business in California, in substantial dialogue with the attorneys general of those two states and it's -- it's a not-for-profit organization.

It's -- it's mission remains to facilitate the development of safe artificial intelligence whose benefits can be broadly distributed.

That not-for-profit corporation is governed by a board of directors, a board of directors as to whom plaintiffs here could not manage even a single non-sanctionable allegation as to undermine their independence or competence. Those are the persons to whom plenary authority to organize the affairs of this corporation are -- are confided.

Mr. Toberoff asked, well, why would they -- these directors consider a restructuring transaction. And I should say Mr. Toberoff talked about a proposed transaction, just so there's no confusion on the point, what's happening is there's a consideration of a -- of a potential restructuring. There isn't -- there isn't a proposal. There isn't a proposal to be had or rejected or accepted.

But why would they do it? Here's why. The not-for-profit is small and its growth is constrained --

THE COURT: I don't understand that. If they're -- what did he say?

MR. SAVITT: All that money.

THE COURT: -- hundreds of billions of dollars, how can you say it's small?

MR. SAVITT: And I appreciate, Your Honor, the opportunity to clarify that 'cause it's an important point.

The reason it's small is this: Those billions of dollars have been generated -- and they only could have been generated importantly through the for-profit -- the capped for-profit subsidiaries of OpenAI, Inc.

THE COURT: The what?

MR. SAVITT: They are capped for-profit subsidiaries. And the "capped" is important because they -- the investors have a certain claim on the proceeds of those investments. And only after what -- what the bankers call the waterfall is -- are funds distributed to the not-for-profit, and that waterfall takes a long time. So -- and that's why Mr. Toberoff was speaking about the relatively small income to the not-for-profit in the -- in the tax return. That's actually not a -- in our judgment, it's a point -- it makes our point, not -- not the contrary.

The not-for-profit is deeply restrained because of the structure that has necessarily been put in place to generate the value to make ChatGPT possible.

And one of the objectives --

THE COURT: What do you mean that it is deeply constrained?

MR. SAVITT: It's deeply -- the not-for-profit is resource constrained because the benefits that have been created by the -- the capped for-profit subsidiaries have not flowed in a meaningful way to the not-for-profit. It's in a structure that is very constraining for the nonprofit itself, OpenAI, Inc.

And I wanted to -- to recommend for the Court's attention the -- the blog post that was attached to the Delaware Attorney General's submission dated the 27th of December. And it essentially sets this out. The restructuring that's being contemplated would create the largest not-for-profit in history, dedicated to safe and beneficial open -- artificial intelligence.

It would also liberate the for-profit entities to be competitive with others in the market who are not constrained by the not-for-profit structure.

That is to say, it librates both parts of the equation and ensures that they work together under a common mission. That's why they would do it, because these directors would have determined that it's the best way, if not the only way, to facilitate the mission of OpenAI. That's why they would do it.

And, ultimately, it's their decision to make. There are others who certainly will have standing to object if objections are to be had. We don't think these plaintiffs do.

But what's clear at any rate to echo some of the points of the colloquy Your Honor's had with -- with others here at the podium, an injunction can't issue unless there's a -- convincing demonstration that it is in order, and it is specific in its terms.

And we submit, Your Honor, the plaintiffs -- they haven't established any harm they're going to suffer absent an -- objection. They claimed on access to capital. They're raising billions. They're claiming about the capped subsidiary but never complained about it ever until Mr. Musk decided he wanted to compete. He says that OpenAI should have no commercial interests; yet he proposes now to send it to auction so he can buy it.

He asks for sweeping release to straight-jacket a competitor and yet he has everything in the marketplace to compete that he needs.

And more, on the other side of the scale, the requested injunction is designed to -- let's make no mistake -- and if granted, would risk serious harm to OpenAI in the marketplace. That's why this is -- motion's being brought on.

It would sideline a leading innovator in the space. It would usurp the role of the board. It would usurp the role of the attorneys general, all at a time, as the Court's heard and I think appreciates, at a time of intense early-stage competition.

And while Mr. Musk and others may have a different vision of what OpenAI's mission requires, what it entails, the company's reputable board of directors continues to work towards that, subject to the regulatory environment in which it operates, and that objective is to safely distribute artificial intelligence in a way that benefits society broadly.

And the injunction -- any injunction if issued here, would I think you can be sure weaponizing as a means of suggesting that OpenAI is operating in a way that is inappropriate. There has been no showing of standing on the merits of irreparable harm that would justify that, and if -- to the extent there are claims that survive a motion to dismiss, Your Honor will be pleased to -- to try them to whoever the finder of fact and -- and legal arbiter is because there is not a claim here that will sustain evidence or the light of day.

THE COURT: Your response.

MR. TOBEROFF: Your Honor, this Court has broad discretion with respect to a motion for preliminary injunction. There -- we have documented massive misconduct on the part of Sam Altman and OpenAI, serial self-dealing which a board, which we believe is controlled by Altman and the dominant position of Microsoft, never objected to.

This has raised the concern of the FTC who have launched investigations into OpenAI. There have been senate hearings.

The FTC and the DOJ, and I should say the Biden FTC and DOJ filed a unprecedented statement of the interest supporting the antitrust claims, which I understand is fairly unprecedented.

THE COURT: When will we know if -- if the current administration is going to take a different view or not?

MR. TOBEROFF: I have no idea on that point.

The -- just looking at their cap for-profit structure, we show in our briefing -- I'm not certain, but I believe it's also maybe in the complaint -- that at the current -- Microsoft's interest at a hundred times comes to a trillion four -- $1.4 trillion before the charity sees any money.

They have used this -- abused the charitable form, and the public has an interest that a charity behaves like a charity. This is unprecedented, and I submit outrageous.

And given the Court's broad discretion, I believe some action must be taken to preserve the status quo and ensure in the interim that they comply with the law.

THE COURT: Why isn't it -- you know, we didn't discuss this today. If the FTC is investigating and the DOJ is investigating and the Delaware AG is investigating, why isn't that sufficient, as all of those entities have much more resources than one federal judge?

MR. TOBEROFF: We don't believe -- first of all, we don't believe that -- first of all, the Delaware AG is involved just by the happenstance of them happening to

register in Delaware. And we don't believe that -- we've seen no sign of Delaware AG investigating.

They've said that in their amicus, essentially saying to the Court, don't delve into this area. We've got this. But we don't --

THE COURT: Because don't those entities really represent the public? Mr. Musk represents Mr. Musk and X.AI. He doesn't represent the public.

I -- I have three government agencies that, in fact, do represent the public.

MR. TOBEROFF: I understand, Your Honor.

But I don't believe the two are mutually exclusive. I believe Musk and X.AI have the right to bring these claims and do their part in doing something about this travesty.

In terms of --

THE COURT: Does the -- does the FTC have injunctive power? Does the DOJ have injunctive investigative power?

MR. TOBEROFF: I can't tell you -- I don't know the answer to that question.

THE COURT: Okay.

MR. TOBEROFF: There is the -- this idea that they will create the largest charity in history by converting a majority control of their for-profit enterprise into some self-determined minority interest where they're on both sides of the negotiating table, Sam Altman has a fiduciary duty to

the charity, as does Brockman, and yet, this -- these self-interest -- these for-profit entities are themselves a self-dealing transaction because there are separate companies in which they would have a massive equity interest.

It's been reported that that equity interest for Brockman is approximately 7 percent and for Mr. Altman, 10 percent.

That it's the conversion itself is by itself a self-dealing transaction.

They are essentially going to try and sanitize their behavior where they've developed pivotal technological assets using publicly subsidized funds in the form of donations, completely violating their promises to Musk, regulators, and the public, and commercializing -- the moment that including their commitment to open-sourcing that technology, and the moment became commercially viable, they along with Microsoft shut it down. It's no longer open source.

We're dealing with an opaque -- opaque web of for-profit entities. And I can't find a better way the describe it, but just to say that it just stinks. And something needs to be done about it, and that's the purpose of this lawsuit.

THE COURT: Okay.

Thank you. I'll take it under submission.

MR. TOBEROFF: Thank you, Your Honor.

MR. ETH: Thank you, Your Honor.

MR. SAVITT: Thank you, Your Honor.

(Proceedings were concluded at 1:00 P.M.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.



Raynee H. Mercado, CSR, RMR, CRR, FCRR, CCRR

Wednesday, February 5, 2025