UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Thomas S. Hixson, Magistrate Judge

MUSK, Plaintiff,	)	
vs.	)	No. C 24-04722-YGR
ALTMAN, et al., Defendants.	)	

San Francisco, California
Friday, September 5, 2025

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND RECORDING 3:30 - 4:24 = 54 MINUTES

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(Call to order of the Court.)

THE CLERK: We are now calling Civil Case 24-4722-YGR, Musk versus Altman, et al.

Counsel, starting with the Plaintiff, please state your appearances for the record.

MR. KRY (via Zoom): Good afternoon, your Honor. This is Robert Kry from MoloLamken. I represent the Plaintiff, Elon Musk, as well as non-parties Jared Birchall and Shivon Zilis, and I'm joined today by Jen Schubert, also from MoloLamken.

THE COURT: Good afternoon.

MR. WILSON (via Zoom): Good afternoon, your Honor. Bradley Wilson from the Wachtell, Liptom, firm, counsel to OpenAI, Inc., and the other OpenAI Defendants. I'm joined here today by my partner, Nate Cullerton.

THE COURT: Good afternoon.

MR. COHEN (via Zoom): And good afternoon, your Honor. Russell Cohen from the Dechert firm on behalf of Microsoft, and I am joined by Mr. Howard Ullman.

THE COURT: Good afternoon.

We are here on two joint discovery letter briefs, ECF Numbers 139 and 141, to deal with the business strategy

doctrine, and first we have -- one of the letter briefs is between Plaintiffs and OpenAI, and the other is between Plaintiffs and Microsoft.

I would like to turn first to the Microsoft dispute. Is it correct that the deposition is still scheduled for this upcoming Monday?

MR. KRY: It is, your Honor.

MR. COHEN: Yes, it is. Yes, it is, your Honor. It's scheduled for Monday as a 30(b)(6) deposition here in Seattle at 9:00 a.m.

THE COURT: All right. Thank you for that update.

Under the case law, the business strategy doctrine applies during a live corporate takeover situation, and so, as to Microsoft and its ongoing negotiations with OpenAI, I think the first thing I need to determine is whether there is a live corporate takeover situation, and in the discovery letter briefs, OpenAI and Microsoft did not necessarily characterize the relationship between those two entities in that day. They talked about recapitalization and things like that that seemed maybe a little bit to the side of the business strategy doctrine.

So I do want to turn to Microsoft, and get your thoughts about whether you fit within the business strategy doctrine, because there is a live corporate takeover situation.

Of course, I also want to be sensitive to the fact that this is a public hearing, and so you shouldn't say things that are confidential, and so I'm going to leave it to the parties to decide what they are able to say in a public hearing. It is perfectly fine for any party to tell me that there is something that you don't want to say in a public hearing, and that's an acceptable answer, and then I'll just have to deal with that.

So let me turn to Microsoft. Are you able to explain more, or to characterize whether the relationship between Microsoft and OpenAI is similar to a live corporate takeover situation?

MR. COHEN: Thank you, your Honor. I'd like to say two things. First of all, I'll describe what the situation is, mindful of the fact that this is a public hearing, and, second of all, I would like to explain to your Honor that this doctrine is not so limited to live takeover situations. It does extend to other sensitive matters like what is going on presently.

So, as is reported in the letter briefs, OpenAI is in the process of a recapitalization. As I believe your Honor knows, Microsoft is a significant early investor in OpenAI, and has been negotiating with OpenAI regarding its interest following the recapitalization. Those negotiations are going on, and they are very active, and they are very

sensitive.

We raised with the Plaintiffs whether they intend to take discovery into the matters that are currently being negotiated, and they confirmed that they would be taking that discovery. Now, your Honor, we would say that is not at all relevant, but, even if it were, it would be protected by the business strategy doctrine.

I would refer the Court to the Matter of Heiser Corp. (phonetic) case, which is referenced in both briefs. That's a matter that did not involve the live takeover situation. It involved a dispute over trust assets, and the Court there was mindful of the sensitivity of disclosing such information in the midst of a dispute between the parties, and that is precisely the situation here.

There is a deposition that's scheduled for Monday. You could imagine, your Honor, a situation in which the Plaintiff asks the Microsoft witness what it is willing to accept in a negotiation, what its strategy is for continuing the negotiation, what sorts of analysis it's done to support its position and how it intends to advance it. Those are precisely the kinds of sensitive questions that could derail the negotiation at this stage.

And let me be clear, your Honor. There is no relevance in this dispute to any of that internal undisclosed negotiating strategy or positions. To Plaintiff's claims

against Microsoft, what is relevant is what Microsoft knew, what Microsoft did, and what Microsoft obtained, and what Microsoft is negotiating for, actively and presently, and what it internally assesses it is entitled to, and how it intends to seek that in a negotiation, is none of those things.

THE COURT: Let me stop you right there. You do make a relevance argument in the joint discovery letter brief, and I did see that. Broadly speaking, Microsoft is moving for a protective order on two categories of documents and information. I am not able to say that, categorically speaking, every single document or every single piece of information in those two subjects is absolutely irrelevant to phase one. I just -- that would be a very sweeping declaration, and I'm not able to paint with that broad a brush.

So I'm not going to grant the protective order on relevance grounds, because I'm not able to say that absolutely everything in those categories is irrelevant. It would depend, in part, on what particular documents say, and what a witness might give as an answer. So you're not going to win the protective order on the sweeping relevance grounds.

I do want you to focus on the business strategy doctrine, and you make a good point that it's -- that --

about whether it's limited to a live corporate takeover. That's the heart of the doctrine. However, because the doctrine is itself just an application of Rule 26(c), it's more a matter of discretion.

So, if you could turn back to discussing the nature of the negotiation. In the case law, there are sometimes referred to bids that are being considered, or the company, the target company, has to decide on the defensive strategy, in other words, decisions that will be made at a certain point of time, and, once they are decided, then there's no bar to discovery anymore. Are you -- and that's why courts say that this doctrine is really about when discovery happens, not whether discovery happens.

Are you able to tell me anything more about potential timing, to fit it within the scope of the case law that says this is a ban on discovery for a limited period of time? Can you talk to me about that?

MR. COHEN: Right. Your Honor, I read the cases in the same way. If you're asking me when these negotiations are going to be concluded, I cannot answer that question. They are ongoing, and they have been ongoing for some time. They may be concluded at some point in the near term, or they may not. I cannot say that for certain. But, when they are concluded, Microsoft acknowledged in its papers that it would provide the term sheet or the

agreement, or whatever it is that documents that agreement, and Plaintiffs can take discovery into that. What we have focused on here is far narrower, and it is the internal undisclosed negotiating positions.

So your Honor asked, why is this analogous to a takeover situation, and how would we look at the Rule 26(c) balancing? This is a situation in which, as I explained, Microsoft is negotiating with OpenAI regarding an interest in a potentially recapitalized OpenAI for-profit entity that is controlled by the not-for-profit, and so those negotiations are ongoing, and they are sensitive, and, to the extent Microsoft were required to disclose in discovery, in a deposition as early as Monday, what its position is that has not yet been communicated to OpenAI, or the rationale for its position, as you could imagine, that would have serious repercussions for Microsoft at the negotiating table, if it were required to disclose it.

As we noted in our papers, OpenAI is represented by members of the same firm who are advising it on the restructuring or recapitalization, and so the protective order does not provide the protections that we need here. So what we are asking for -- and I understand your Honor's position on relevance. We continue to maintain that these internal negotiating positions are not relevant. We can discuss whether a term sheet at the end of the day is

relevant, but, for these purposes, your Honor, there will be discovery into these matters at some point.

At this point, there is limited, if no, utility in getting discovery into Microsoft's internal positions, and there is significant prejudice. So we think this is precisely the kind of situation that is analogous to the cases that raise the business strategy doctrine, because you have these out-of-litigation concerns that have to be balanced against litigation interests.

THE COURT: Understood. And if I understand correctly, the focus of Microsoft's concern is having this type of information be turned over to OpenAI, because they're the counterparty in the negotiations. Is that correct?

MR. COHEN: That is correct, your Honor. And I understand OpenAI has a further concern regarding Mr. Musk's prior bid for OpenAI. I will let them speak to that, but yes, Microsoft's focus is on having to disclose information to a counterparty in an active negotiation.

THE COURT: Are there modifications that could be made to the protective order that would allow the Plaintiffs to take the deposition that they think is relevant, while also protecting Microsoft's interests? For example, you mentioned that some of OpenAI's litigation counsel are at the same firm as their restructuring counsel. That could be

dealt with in a protective order by specifying, for example, by name, who is able to see this among -- by outside counsel. What are your thoughts about that?

MR. COHEN: Your Honor, we remain concerned about it, given the highly, highly sensitive information that we're talking about, and the marginal relevance, if any, of that information to Plaintiff's case, particularly at this time.

We're talking about Microsoft's negotiating positions, the undisclosed negotiating positions, being disclosed in the course of this litigation, for no utility in the litigation to the counterparties that Microsoft is actively negotiating with, and we simply don't view a protective order, even modified, as providing sufficient protection under those circumstances.

We recognize this is a balancing, and I appreciate your Honor inquiring into the protective order, but I think, given the high sensitivity and the very low relevance of the information, and the fact that there can be discovery at a point in the future where there is something concrete, if there is something concrete, then we don't believe that that would solve the problem.

I also don't know to what extent there is any crossover on the OpenAI counsel side. I have no reason to believe there is, but I also don't know whether there isn't, and so

I simply don't know whether a modification would even accomplish that, but we remain highly concerned, given the sensitivity of the information.

THE COURT: I see. So, even if I'm not able to say that, categorically, everything in these two subjects is irrelevant, you would take the view that, even if there is some relevance, the great sensitivity to Microsoft on these matters would counterbalance that under Rule 26. Is that right?

MR. COHEN: That's right, your Honor.

THE COURT: Okay. Then let me turn to Plaintiffs for your response.

MR. KRY: Sure, your Honor. I have several responses. First of all, your Honor is correct to focus on the question of whether this is or is (sic) analogous to a live takeover situation. That's the language of the one and only California case that's ever recognized this doctrine, and that nothing has been publicly reported about this transaction, and there's no reason to think that this transaction is in any way comparable to a live corporate takeover situation.

Microsoft, as has been reported in the press previously, has some equity stake in the for-profit arm of OpenAI, and it's in the course of renegotiating what the exact contours of that stake are going to be, but nobody, to

my knowledge, thinks that this negotiation is going to end with Microsoft controlling or taking over OpenAI. All the cases applying this doctrine involve, you know, the corporate matters of who is going to control the company, whether a takeover or a proxy context, or even the trust case that Mr. Cohen referred to. That was a case where it was basically an asset sale. They were completely liquidating the entire trust, so it was not just an important transaction with one, effectively, minority stake LP investor in the company. It was a -- they were all much more foundational than that. And so this would be quite an extension of what any case has applied this doctrine to.

The other point I want to make about that, though, is, as this doctrine has been traditionally applied, it is not a doctrine that says that, if there is a takeover dispute, the sensitive documents relating to that can be shielded from anyone in the world. The traditional application of this doctrine is the party that's making the takeover bid is seeking during that takeover bid to find out its adversaries' thinking and defense mechanisms to that big.

So, in the leading Delaware case, the BNS (phonetic) case, that was exactly the fact pattern. You had a plaintiff that had a takeover bid for a corporation, and then it served discovery demands, saying, "Show me your defense mechanisms."

This is completely different because, as your Honor pointed out, even if there are ongoing discussions between something far sort of a takeover bid between Microsoft and OpenAI, Musk, the Plaintiff in this case, is not a party to those discussions, and so a deposition or other order that results in information that's relevant to Musk's claims being shared with him does not share that information with the adversary in an ongoing takeover situation, the way that is present in the typical case applying this doctrine, and the reason your Honor can ensure that is exactly the one your Honor raised, which is the protective order.

As currently written, that protective order limits highly confidential information to the parties' outside litigation counsel and other counsel at the same firm, and so, no question, your Honor can and should supplement that order by telling OpenAI that they cannot share any of this material with their restructuring counsel, but there has been no showing, despite the opportunity to make it, that there is any overlap between the counsel who are litigating this matter, at whichever firm that is, and the ones that are advising OpenAI in the restructuring, and in the absence of any evidence that there's some kind of overlap there, your Honor can just, on the record today, tell OpenAI that they cannot share that highly confidential information with their restructuring counsel.

And OpenAI is represented by highly reputable and experienced counsel in this case. There's simply no reason to believe they wouldn't abide by such an order, and I think Microsoft is really trying to play up concerns that are not even speculative. They just don't exist on this record, to try and say that that would not be an adequate remedy.

The last point I wanted to make, your Honor, goes to relevance, and we do appreciate and are grateful for your Honor's conclusion that there is some relevance to the information we're seeking through this deposition, but I want to go even a step further than that because, to the extent your Honor might think this case is on the outside margins, or maybe a modest extension of the business strategy doctrine as it's traditionally been applied, your Honor might want to consider whether this information is only marginally relevant to Mr. Musk's claims, and it is not, by any measure. This is critically important information, and that's so for a couple reasons.

First of all, one of the claims we brought in this case is a claim to get a permanent injunction enjoining the very transaction that Microsoft and OpenAI are negotiating over. It's hard to imagine any evidence that could be more relevant to a claim seeking to enjoin a transaction than the parties' very discussions about what that transaction is going to look at.

Mr. Cohen said, "Well, they can just wait until the transaction is done, and then they'll know," but that defeats the whole purpose of getting an injunction against doing the transaction. So that's -- it's -- you know, that is a very straightforward analysis, and I did not see any response to it in the letter. If we are seeking to enjoin a transaction, then the parties' secret negotiations of how they are going to transact is incredibly relevant. And so that's one point.

The second point is on the breach of trust and the breach of contract, and the similar claims like that. The basic thrust of this case is that Mr. Musk contributed to OpenAI in his early years, on the understanding that it was going to be and going to engage in nonprofit activities for the public benefit of mankind, and the breach that is alleged of those trust obligations, those fiduciary and contractual obligations, is that, over the years since then, OpenAI has taken increasingly egregious steps to transform itself into a for-profit entity.

And so I don't think there's any dispute that whatever shape this transaction takes, once Microsoft and OpenAI conclude it, is going to be highly relevant to that, because that would establish one of the breaches we're complaining about. The only claim is that all the discussions leading up to that aren't, but that's not correct, your Honor,

because, if you have a fiduciary duty, if you're a charity, and you have a duty to your contributor not to engage in for-profit activities, the fact that you're spending 14 months engaged in intensive negotiations about how, exactly, to go about transforming this charity into a for-profit entity, that itself is part and parcel of the breach.

If you have a fiduciary duty to a charity, you cannot be out there for 14 months negotiating about how to transform it into a for-profit entity, and claim that you have done nothing wrong, claim that you have been a faithful fiduciary until the very moment when you sign on the bottom line. That's just not the way that those sorts of fiduciary duties and trust duties work.

And so, these negotiations, it's not just Microsoft's subjective view. We don't know what the final deal is going to look like, but, if those documents or that testimony shows that, for example, Microsoft and OpenAI both agree on point A, B, C, and D, and the only dispute is about point E, but those undisputed points, A, B, C, and D, are all extremely relevant to our claim for breach of duty and breach of trust, why would we not be entitled to that information?

The fact that both parties to this deal have as a common ground that they're going to adopt the structure, which would be a flagrant breach of the trust in the

fiduciary duties on which our claim is based, your Honor, that's not marginally relevant. That is extremely relevant. And so I think it's -- what they're trying to shield here is core information that goes to our claim.

If this was a case like BNS, if Mr. Musk still had a bid pending in front of the company to take it over, we could talk about the implications of this, but this is not a case where the Court should engage in some expansive, unprecedented interpretation of the business strategy doctrine to cover something, to avoid a result where the plaintiff is seeking marginally relevant information. This is core relevant information.

The prejudice can absolutely be completely addressed just by a modest supplementation to the protective order, which your Honor can enter on the record this evening as -- you know, for our purposes. And so, whether you approach it under the lens of the business strategy doctrine or just as a matter of Rule 26 balancing, we think that they have not made the showing that would justify putting these documents and this testimony off limits.

THE COURT: So, then, to make sure I understand, is it Plaintiff's point of view that what Microsoft and OpenAI are currently negotiating is what you say is the breach of fiduciary duty and the breach of the charitable obligations, and you are seeking an injunction to prevent

this transaction from going forward?

MR. KRY: This is one of multiple breaches, but this latest breach that we're trying to enjoin from happening is what they are negotiating over.

THE COURT: Understood.

Well, let me turn back to Microsoft, then, and to have your thoughts on what the other side has just said, and, in particular, their arguments about how they think this is very important information, including that they believe that this transaction that's currently being negotiated is, I guess they clarified, not the first or the beginning breach, but would kind of be the culmination, and is the transaction they're seeking to enjoin. What are your thoughts about that?

MR. COHEN: Yes, your Honor. And let me be crystal clear about what Microsoft is asking the Court for. It is a narrow, narrow protective order that is limited to the internal Microsoft deliberations or communications regarding its engagement strategy or its negotiation positions vis-a-vis OpenAI's potential restructuring, and it is also the valuations and analyses that support that.

Let me be clear about what Microsoft is not saying. Microsoft is not saying that Plaintiffs can -- Microsoft is not saying that Plaintiffs are prohibited from asking about the recapitalization, Microsoft's role in it, the

negotiations to date, positions that Microsoft has taken to date, Microsoft's understanding and expectations. It can ask about those things. We are not seeking a protective order around any of those things.

We are seeking a narrow protective order to preserve the sanctity of an ongoing negotiation as part of a balancing under Rule 26(c), to ensure that the litigation is balanced against the potential harm from outside of the litigation. So, to be clear, this is a very, very narrow request from Microsoft.

In terms of Plaintiff's statement about the breach, I mean, Plaintiffs, as you know, your Honor, moved for a preliminary injunction. It was denied, and that was earlier in the case. And so, at this point, Plaintiffs are engaged in discovery, and, as I said, they are free to ask the Microsoft witnesses about the ongoing process. We're simply trying to protect the negotiations as they stand, and protect Microsoft from having to disclose on the record in such a situation, to its counterparty, its internal positions that it's going to be taking or anticipating taking in that negotiation.

THE COURT: And what would be reasons why a revised protective order would be insufficient? You stated that you don't think that any modification to the protective order would be sufficient, but don't you think that, if we

entered an appropriate order, that we could count on OpenAI to comply with it?

MR. COHEN: I have absolutely no hesitation with respect to the counsel for OpenAI. They are represented by excellent and reputable counsel. I am not suggesting anything to the contrary. It is simply that what we are talking about are highly sensitive ongoing negotiations, and there is simply, in our view, no reason to require disclosure of that internal information to Plaintiffs at this point, given the discovery that Microsoft has and is prepared to provide.

And so there is simply a concern, a deep-seated concern, that, in the midst of such a sensitive negotiation, that even disclosing it under a modified protective order still poses significant risk to the integrity of the negotiation, and it's simply not necessary, in our view, your Honor, because of the marginal or lack of relevance of this limited category of information.

THE COURT: All right. Thank you, Counsel.

I would now like to turn to ECF Number 139, and that's the dispute between Plaintiffs and OpenAI, and let me first ask OpenAI that -- I understand, or I think I understand, what OpenAI is saying as to Musk. You've said that Musk and xAI must, therefore, be regarded as active bidders for OpenAI's assets, and so you're characterizing Musk as the

attempted takeover, and then OpenAI, in that view, would be the target.

I'm having a little bit of difficulty understanding where you're putting Microsoft in the business strategy doctrine. For the target company, there are things that would be protected, at least during the period of consideration, is responses to a takeover bid, and then defensive strategies, or the decisions about which defensive strategies to employ.

Where is Microsoft in this? Is Microsoft another attempted takeover, or is Microsoft defensive strategies in the face of a takeover, or is there maybe a third or a fourth bucket that you think Microsoft would go in? I see where you've put Musk and xAI, but it's less clear to me where in this doctrine you've located Microsoft. So, if you could talk to that, please.

MR. WILSON: Certainly, your Honor. Microsoft is the negotiating counterparty on what has been a very significant, long-running, high-stakes negotiation over the amount of capitalization or the recapitalized entity that each of the respective nonprofit -- the other vehicles that have investments in Microsoft will own in this venture.

So they're an ongoing negotiating counterparty, and your Honor is correct that, although a lot of these cases do arise in the takeover context, a lot of them don't, and they

really all flow from Rule 26(c). All of the cases say that, that this is a specific application of the good cause balancing test that's recognized under Rule 26(c). And so there are a number of cases.

I would specifically cite to the Goya (phonetic) case, which is cited in our papers, which is cited with approval in the leading BNS case that our adversaries cite. That is not a takeover case. It's not a proxy contest. It was a case in which class action plaintiffs were also representatives of a labor union that was involved in ongoing discussions with Eastern Airlines, and they were seeking discovery into Eastern Airlines' strike-planning documents, how they would prepare in the event that the employee union decided to strike, and the Delaware judge in that case held that the sensitivity of those documents and their marginal relevance -- they were not irrelevant, but they were marginally relevant -- was outweighed in that case by the very significant harm that would flow to the company, the airline, if their negotiating adversaries in the labor bargaining union saw how they were planning to deal with the possibility of there being a strike.

So I would submit to you, your Honor, that Rule 26(c) -- and these cases are generally bucketed as business strategy -- allows for people to be bucketed as either a takeover counterparty or as a negotiating counterparty, and

here Microsoft is in the negotiating counterparty bucket.

THE COURT: I see. So, if we take a broader view of the doctrine, and it's not just takeovers, but also negotiators, then Microsoft would be a negotiator. So they're not defense strategies. It would be, they're not the same as Musk, but would be, in your view, sufficiently similar, because they're a counterparty. Is that right?

MR. WILSON: That's correct. And, your Honor, counsel for the Plaintiff made the point that, in a lot of these cases, it is the party that is the counterparty in the lawsuit that is seeking the documents, that that is the party that you're worried about, and, as you've alluded to, we have very significant concerns, because we do regard Mr. Musk and xAI as active takeover candidates. They are candidates that have bid, promised to bid again.

But, leaving that to the side, Mr. Kry, I think, ignores the fact that Microsoft is a party to this case. So, even if it's not Mr. Cohen's client, Microsoft, who's asking for the documents, the consequence of our producing the documents to Mr. Musk is that Microsoft will get those documents. So the notion that it doesn't matter who's -- or it matters who's asking, I think, is a little bit oversimplifying a very significant problem.

We have the fact that Microsoft is in this case. Mr. Musk chose to add Microsoft as a Defendant. They're still

here, and we're going to have to give our documents to them. We don't want to do that. They're going to have to give their documents to us, and they understandably don't want to do that, either. We don't want those documents. We want this issue to be negotiated fairly, at arm's length, across a bargaining table, but, if we have to turn the documents over to Mr. Kry's clients, then Mr. Cohen is going to get those documents all the same, and I think Plaintiffs ignore that very significant problem.

THE COURT: This didn't come across as well in your joint discovery letter brief. You focused more on Musk and xAI. But I hear what you're saying now, and it sounds like the flip side of what Microsoft is saying. Is it correct that, in some instances where you've invoked this privilege, sometimes it was concerns about producing things to Musk, and other times it was concerns about having things end up in Microsoft's hands?

MR. WILSON: I think it's the same set of documents, your Honor, or the same redacted documents. It's showing either our negotiating counterparty or the potential bidder for the assets of OpenAI, Inc., how we are valuing ourselves in the context of the recapitalization, what strategies we are employing vis-a-vis Microsoft to maximize the value and the interest that the not-for-profit gets in this PBC (phonetic), should this transaction happen.

I mean, that's what we're talking about here. The concern that we have -- it is the flip side, your Honor, but the concern that we have is that if Microsoft gets access to our internal documents, our internal reserve price, our internal strategies, the not-for-profit is going to get a lower share of this entity than it otherwise would, which is going to harm all of the beneficiaries of this not-for-profit.

I mean, the irony of Mr. Musk's position is that he is asking this not-for-profit that he says is straying from its missions to protect humanity, and he's asking it to turn over some of its most sensitive internal corporate documents, at a point of maximum sensitivity, to the party that it's negotiating with. He says Microsoft is the bad guy in the story, but he wants us to give Microsoft the documents. It doesn't make any sense.

And, your Honor, if I could, I do want to chime in a little bit on the point you were discussing with both the Plaintiffs and Microsoft regarding the balancing here and the relevance of these issues, because I take your Honor's point. This is relevant in some way to phase one, and that's why we've produced quite a number of board documents, board decks, e-mails, text messages about this transaction. The Plaintiffs know the general structure of the transaction that's being discussed. They know the arc of that story.

They know who's involved. They know who is negotiating this.

What they don't know is the most sensitive pieces. What are the numbers that are being discussed? Who is getting what share of the PBC under various proposals, and how are the two sides coming up with those numbers, and how are they presenting them to each other? There is no need for them to have that information at this time.

This issue, if there is going to be a claim for breach of contract, will ripen when there is a transaction. If tomorrow the negotiations collapse -- and I'm not saying there's any reason to think that they will, but, if they were to do that, there would be no claim for breach of contract based on this transaction. We would revert to the transaction structure that we've had for a number of years, and the Plaintiffs would have to try this case based on the facts that existed before we started negotiating this recapitalization.

Mr. Kry says it's relevant to his breach of contract claim, but he's never said why, how it could be that an inchoate transaction that doesn't happen is a breach of contract. Plaintiffs were here last week, your Honor, when we were seeking discovery about the bid, which was very much a response to this very transaction, and they told your Honor that this was all a sideshow, that this was after the

complaint was filed, it was a transaction that doesn't really tie back to the alleged breaches of contract or charitable trust that they've alleged in this case.

That's what they told you last week, and your Honor ruled, and we respect the Court's ruling, and we have now had to stand down. We are not seeking any more bid discovery in this case. But, if we can't seeking discovery about the transaction that was a response to the recapitalization, I don't see how we can be fairly ordered to turn over all of our internal files to both the bidder and to Microsoft. It can't be both ways. Either this is in or it's out, and it sounds like it's out, at least until such time as we have a transaction.

So I think that, on the balancing test, we come out very, very far ahead. We are talking about the most sensitive materials in the company, and we are talking about something that is essentially relatedly to a potential claim that could exist at some point in the future when, as, and if there's a transaction, and, as Mr. Cohen said, if there is a transaction, we can revisit this, and these documents can be produced, and we can have a trial about that, but there very well may not be.

THE COURT: So is it correct, then, that the true confidentiality concern for OpenAI isn't so much Plaintiffs, but Microsoft?

MR. WILSON: I would not agree with that, your Honor. It's both. If you asked me to rank them, certainly Microsoft is the most immediate problem, because they are currently the negotiating counterparty. These discussions are ongoing at the highest levels of both organizations. But there is the fact that we had a bid from Mr. Musk, xAI, and a number of other for-profit entities back in February, and when they made that bid for $97,000,000,000, Mr. Toberoff, who is representing -- he's not here today, but he's representing the Plaintiffs in this case -- stood up and said, "I represent this group of bidders, and they will beat or match any other bid that comes along the way."

They said that. They said that to the Wall Street Journal. It's been widely reported publicly, and I had a conversation with Mr. Kry two weeks ago on a meet-and-confer, and I pointed this out to him, and I said, "Are you prepared to withdraw that statement? Is Mr. Toberoff and Mr. Musk -- are they prepared to disavow any intention to bid in the future?"

And Mr. Kry didn't say anything, because they're not prepared to do that, because what Mr. Toberoff said was true, and they have every intention of seriously considering bidding for this entity. So Mr. Musk and his bidding consortium are very much a concern for this board, and they are very concerned about the same materials they don't want

to put in Microsoft's hands getting turned over to Mr. Musk.

THE COURT: Well, as to Musk, it seems that, under the business strategy doctrine, you've run into the problem that he made an offer, the board considered it, and the board said no, so that's done. The argument you're making now is that he might potentially make another offer in the future, and maybe that's true, but I didn't see anything in the case law that says that maybe potential offers in the future would justify the business strategy doctrine. It looked more like there has to be something actually on the table that's being considered.

MR. WILSON: Well, I will grant you, your Honor, that the cases don't match this fact pattern, but I think, if you step back and actually think about what the rationale of the rule is, it should apply with full force here.

In BNS, the case that you're referring to, there was one bidder. There was a hostile bidder that made a bid for the company, and it was live at the time of the Court's decision, but the Court said, "If this bid is rejected, then there will be no longer a business strategy immunity case," and what it would shift to is a court proceeding where the stockholder that was bringing the hostile bid would sue in court and say that "The board breached its fiduciary duties by not taking my offer." And at that point, there would be no active board discussions about the bid, and you could

have discovery into the reasons why the board rejected the prior bid, and you'd have a case.

What didn't exist there was that there was an ongoing discussion with a counterparty other than the original bidder, that would present all of the same sensitivities in the circumstance where could be a follow-on bid from the bidder. So, in other words, here we have a situation where Mr. Musk made his bid. It was rejected, but he said, "Well, I'm going to hang here on the sidelines. I'm going to wait, and when there's another -- if there's a deal announced with Microsoft, then I'm going to make another bid." He's made that clear.

So, if we give Mr. Musk now the ongoing internal deliberations and valuations and calculations about what reserve price we have, for example, for these assets, Mr. Musk can use that to his advantage to formulate a new bid. It distinguishes this case from the Court was saying in BNS, because the documents that the board is creating now are very much relevant, and would be very useful to a bidder, and, therefore, detrimental to the target corporation.

THE COURT: I see.

Let me hear from Plaintiffs.

MR. KRY: Your Honor, a couple points I wanted to mention. First off, it seems to me that there's quite a significant difference between the position that Mr. Cohen

and the position that Mr. Wilson took, if I understood the articulations correctly.

I believe Mr. Cohen said that they would not invoke the doctrine to the extent we were asking about what was said during negotiations, what was communicated to OpenAI. It would only be sort of their undisclosed subjective intent about what to do. But my understanding is that OpenAI has invoked the doctrine more broadly to cover not only their reserve price, which they keep holding up as kind of the paradigm example of what they're going after, but anything about the internal negotiations.

Our position would be that, to the extent you're going to look at this as an effort to protect the discussions between OpenAI and Microsoft, first of all, we don't think the doctrine should apply at all, because the protective order with the modification we've suggested would be fully sufficient to address any potential prejudice, but, if your Honor for some reason don't think that's sufficient, then there is no justification that's been articulated for why the business strategy doctrine would allow OpenAI and Microsoft to withhold documents or information that reflects what they actually negotiated or communicated to each other, nor would there be anything that would justify withholding, for example, internal memos, but ones that don't reflect the reserve price, but instead reflect what they intend to

communicate or what they have communicated to each other.

You know, there's no valid, just -- if you're only trying to protect OpenAI and Microsoft as against each other, there's no conceivable justification that would extend that doctrine to those sorts of communications, whether they are actual communications between the parties or even if they're just internal documents, documenting what was communicated or what should or will be communicated.

At most, that would apply to a very narrow category of information that really is like the reserve price, the undisclosed internal deliberation about what not to say is, and so that -- I don't want that distinction between the two positions to be lost, because the one that OpenAI is advocating far outstrips the rationale, if what you're worried about is protecting their information against Microsoft.

I also want to respond to the -- your Honor was quite right that with -- to the extent OpenAI is trying to prevent this information from reaching Mr. Musk, the problem there is that that just outstrips anything the case law says. Your Honor quite rightly observed that. Once there is -- it's a doctrine that protects a company from having to disclose information to its adversary during a live bidding situation, and so, once the board rejected Musk's bid, the logic and the language of all the cases you've relied on say

that that protection expires at that point.

This one quote that they keeping mentioning from the Wall Street Journal about "Well, maybe we'll come back, you know, someday and pop some other bid," first of all, that was seven months ago. At some point, the business strategy doctrine cannot extend indefinitely after the board has rejected a bid. So it's always a possibility that someone may come back later with a different or additional bid, but the business strategy doctrine requires that there be a live corporate takeover decision, not a dead corporate takeover decision that may yet be resurrected at a future date and on different terms, and it seems to me like that's the kind of application that Mr. Wilson is advocating for here.

So, you know, the bottom line, to the extent you are invoking the business strategy doctrine in its traditional form to protect against disclosure to Musk, it just doesn't apply on these facts, because there is no live takeover situation with respect to Musk. To the extent you're invoking that doctrine to protect disclosures as between OpenAI and Microsoft, OpenAI is advocating a far over-broad application of that doctrine, because they're basically seeking to protect a wide range of documents, beyond what Microsoft is arguing for.

And to the extent you're relying on General Rule 26 principles, I just rely on what I said before. This is

extremely relevant information. The argument that Mr. Wilson made about how our position is inconsistent with what we said last week about the discovery and the bidding, your Honor was sensitive to the nuances of the arguments last week, and I think you appreciate it is not just a temporal issue.

It's not just the fact that the bid occurred several years after the formative years of OpenAI. It's also a subject matter issue. It's the fact that the bid that is being complained about in the counterclaims is basically a harassment-type claim. It's not related, in terms of its nucleus operative facts, to the underlying breach of trust and breach of contract claims.

The permanent injunction we're seeking is completely factually related. It is the same nucleus of facts. We are complaining about a breach of trust, based on having given charitable contributions to this entity back many years ago, and now having the entity turn around and use them for for-profit purposes, and this current negotiation that we're trying to enjoin is -- it cannot be more connected to that nucleus of operative facts.

It is the latest example of the breaches that they have carried out, and the most egregious one, and the one that hasn't happened yet, and that's why we're still trying to enjoin it. And so those things cannot be said about the

counterclaim, about the bid. That was factually quite unrelated to the claims that were being made in the complaint. Our injunction claim seeking to prevent this latest for-profit transformation of the company is very much at the heart of what the phase one claim is about.

And the final thing I'll say is the Court denied our preliminary injunction. I recall the language she used was because she thought it was a "tossup on the merits." She couldn't tell on the record at that point who had -- which of the two sides had the better argument.

For purposes of discovery, the finder of fact on a full evidentiary record now will decide who has the better of the arguments, and so I think the Court's ruling at the preliminary stage that it was -- could go either way -- tends to reinforce the importance of this discovery, so that the Court can fully consider the merits of our claims in deciding whether to grant the permanent injunction. The fact that she thought we'd only fought it to a draw at the preliminary stage certainly does not justify denying us the information we need to prove our case on the ultimate merits. And so, for that reason, too, we don't feel that Microsoft or OpenAI has justified the extraordinary remedy they're seeking here.

THE COURT: All right. Thank you.

And would OpenAI like to respond?

MR. WILSON: Briefly, your Honor, I would. On the injunction point, I'll just said that -- I think I said this before, but it bears repeating -- if a transaction is announced, then this issue can become part of the case, from their perspective. They can seek discovery into the negotiating history, and they can seek an injunction against the transaction. But, as I said, it's also possible that there is no transaction, at which point there is going to be no claim.

It seems to me that, in circumstances where we're six and a half months out from trial, I understood your question to Mr. Cohen -- I'm not in a position now to say when these negotiations will be over, but I do know that there's plenty of runway now between the trial date and today to let those negotiations, hopefully, conclude one way or the other before we start turning over these files.

It's really akin to a situation where Mr. Musk has made a bid on an asset. Mr. Kry very clearly did not say -- it would have been very easy for him to say, "It was seven months ago, and, by the way, we're not bidding again." He didn't say that, and I think, reading between the lines, what he's saying is "Yes. What Mr. Toberoff said was true then, and it's true now. We're ready to bid again."

And I just don't see how, in circumstances where we're being told by opposing counsel that the bid is not related

to phase one -- if it's in phase one -- excuse me. If it's not in phase one, then I don't see how this, which the bid was a response to, this recapitalization, is in phase one in the way that he's describing it. If it's truly central to their case, as we're now hearing, then I think it is not correct that we should have been denied discovery into the bid last week. That's our position on that subject.

And, finally, I'll just say, this question about a delta between our position and Microsoft's, I don't think that there is any distinction between the reserve price and our internal deliberations and analyses about what numbers to propose. It will -- if you get that information, it is a road map to our strategy in the negotiation. It is a road map to what numbers we might be willing to accept, and an expert, such as an expert witness in this case or a financial advisor for Mr. Musk, could learn quite a lot of information that would essentially get you to the bottom line, by getting access to the kinds of documents that we're talking about.

THE COURT: I see. Plaintiffs say that OpenAI has withheld or redacted 159 documents based on this doctrine, 98 of them solely on that ground. I don't know if you have that information at your fingertips, but I wanted to ask OpenAI, do you agree with those numbers?

MR. WILSON: I have no basis to disagree with it,

your Honor. I think it's directionally correct. I assume that it's a calculation based on our privilege log.

THE COURT: Got it. And then is it correct that these documents span May 2024 to June 2025?

MR. WILSON: It is, your Honor.

THE COURT: Okay. All right. Well, thank you, Counsel. I found these arguments very helpful. I will think about them some more, and I will issue a written order. For planning purposes, you should not expect to receive a written order before Monday's deposition. I want to take some time to think about it before issuing a written order.

So I think, in the brief, Microsoft detailed that you have a backup plan in mind if you don't get a court order before Monday. Is that right?

MR. COHEN: We do, your Honor. We have an understanding with Plaintiffs that we will reserve all rights. If your Honor rules against us on this, we will bring back a witness, and they will have a chance to ask their questions, subject, of course, to seeking review of the decision, if that's something that we need to do, and, of course, if your Honor rules in favor us, there would be nothing to bring back. So we do have an understanding. Thank you.

THE COURT: And, Plaintiffs, do you agree that

that's the understanding?

MR. KRY: It is, your Honor.

THE COURT: Okay. All right. Well, thank you, Counsel. The matter is submitted, and I will issue a written order, but it will not come out before Monday.

MR. COHEN: Thank you, your Honor.

MR. WILSON: Thank you, your Honor.

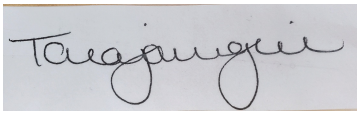
MR. KRY: Thank you.

(Proceedings adjourned at 4:24 p.m.)

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above 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.



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