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
Monday, September 22, 2025

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND RECORDING 2:02 - 2:46 = 44 MINUTES

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Monday, September 22, 2025 2:02 p.m.

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(Call to order of the Court.)

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

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

MR. MOLO (via Zoom): Steven Molo and Robert Kry for the Plaintiff.

THE COURT: Good afternoon.

MR. PARKKINEN (via Zoom): And Jaymie Parkkinen for Plaintiff, as well as non-parties Shivon Zilis, Jared Birchall, Musk Foundation and Excession.

THE COURT: Good afternoon.

MR. CULLERTON (via Zoom): Good afternoon, your Honor. Nate Cullerton from Wachtell Liptom for the OpenAI Defendants.

THE COURT: Good afternoon.

MR. ULLMAN (via Zoom): And good afternoon, your Honor. Howard Ullman on behalf Microsoft.

THE COURT: Good afternoon.

We're here today to discuss the joint discovery letter briefs at ECF numbers 240 and 264. And I would also like to discuss the joint discovery letter brief that was filed on

Friday at ECF number 273.

First with respect to 240 and 264, let me turn to counsel for Zilis. The joint discovery letter brief gave a status update concerning her Gmail documents. Can you please tell me where that stands today?

MR. KRY (via Zoom): Your Honor, I can weigh on this, and I should clarify that we also represent non-parties Birchall and Zilis.

THE COURT: Okay. Thank you.

MR. KRY: So on -- as we stated in our letter, we made three productions of Gmails prior to Ms. Zilis' deposition on September 12th. That was a production on September 10th of 106 Gmails, a production on September 11th of 189 Gmails, and then a second production on September 11th of 184 Gmails.

The following week on September 17th we made a final production of 419 Gmails, and we confirmed to Plaintiffs -- pardon me, to defense counsel that day that the production of the Gmails was complete.

THE COURT: Okay. So from your point of view, the production with respect to Zilis is complete, is that correct?

MR. KRY: Yes, your Honor.

THE COURT: Is that not only Gmails, but in general her production is complete?

MR. KRY: I'm not aware of anything else that's outstanding. Mr. Parkkinen can maybe confirm that.

MR. PARKKINEN: Yes, that's correct.

THE COURT: And what about with Birchall. Is -- are the production of his documents complete?

MR. KRY: So, Birchall's texts, which were produced by Birchall as set forth on the first of those discovery letters, we produced 28 of his text strings on September 5th, another five of his text strings on September 9th, and then he sat for his deposition on September 10th. And then we had confirmed that the production of the texts was complete.

Birchall also had work emails through Excession Foundation, which is a different, non-party on the case, but it's Mr. Musk's family office, and so they are also represented by us. And so the Birchall emails had been produced by Excession and Musk Foundation, and that process was also understood to be complete earlier than this, but before issue about the Birchall texts came up.

I will note that there's an issue, which we don't think is ripe for resolution today, but as to which OpenAI's counsel has raised concerns in that that there was a third-party production from non-party BMO that's separately represented, that included some Birchall emails that did not show up in the production from Excession to Musk Foundation.

The -- and so we've been investigating that. That matter has currently been raised with the -- the in-house team that did the collection of those emails. And we're told that we should expect a report back this -- this week. And so we certainly plan to continue to engage over that, because we don't at this time have an explanation for that discrepancy.

THE COURT: I see. Okay.

Is there anything else that Plaintiff's counsel or counsel for the non-parties would like to add in terms of the status of Birchall and Zilis' productions?

MR. KRY: Not from us, your Honor.

THE COURT: Let me turn to OpenAI. Your thoughts respect to these two witnesses?

MR. CULLERTON: Thank you, your Honor. And I think just stepping back, I mean I think the primary issue that is addressed by all -- at this point by all three pending motions, both as to Mr. Musk and Mr. Birchall and Ms. Zilis, is that we don't believe that we've received a fair or complete or timely production on behalf of the three most important witnesses on the Musk side in this case. And we don't believe that we've received fair or reasonable cooperation from Musk's counsel, who also represents Ms. Zilis and Mr. Birchall, to address those issues.

An upshot is that in an expedited case initiated by Mr. Musk, where we are nearing the end of the deposition period,

we are still learning about significant discovery deficiencies as recently as Friday evening. And this is in a case where discovery started in April, and which we were repeatedly assured since then by counsel, every time we raised an issue or a question that there's nothing to worry about and the documents are going to be forthcoming, only to find out later that that's not the case.

And we think that's still where we are today, and boiled all the way down, the core issue is that the Musk side has produced virtually no text messages exchanged between the three most important witnesses on their side.

And just focusing on Birchall and Zilis because that's the first motion that's teed up. Birchall has produced 31 text chains over a 10-year period. Thirty-one. And this despite counsel's representation to us over the Labor Day weekend that Mr. Birchall had 450,000 text messages extracted from his mobile device. Birchall has produced only three text messages with Elon Musk over a 10-year period. Similar for Ms. Zilis, 13 text chains with Musk over a 10-year period, 13 with Birchall over a 10-year period.

And we don't think, and we set this out in both of our letters, that it's remotely credible or plausible that that is the sum total of the text message production between these three individuals, Mr. Musk, Mr. Birchall and Ms.

Zilis.

And just focusing in on Ms. Zilis for a second, she has been one of Musk's closest advisors for nearly a decade on matters relating to OpenAI and to AI generally. She has four children with Mr. Musk. She served on the board at OpenAI from 2020 through 2023, and worked with Mr. Musk on OpenAI matters for years before that, and was a Plaintiff in this case until her claims were dismissed.

Birchall has likewise been one of Musk's closest advisors for a decade, runs Musk family office at Excession, senior role at the Musk Foundation, was responsible for the donations that are the heart of this case. Runs day-to-day operations at Musk's AI company, XAI. And the notion that he has produced three text messages with Mr. Musk over a decade is just simply not credible.

And we raised all these issues and questions over the last two months, and have gotten nothing in response but stonewalling. We asked how many texts between Birchall and Musk have been reviewed by Plaintiff's counsel. We asked how many texts between Birchall and Zilis had been reviewed by Plaintiff's counsel. We asked how many Zilis/Musk texts had been reviewed, or how many Zilis/Birchall texts had been reviewed. Plaintiff's counsel has refused to answer all of those questions.

We asked Ms. Zilis at her deposition whether she

believed it was possible that she only exchanged 14 text messages with Mr. Musk over a decade, and her counsel instructed her not to answer on the basis of privilege. So we are left in a position where we're not getting any responses from Plaintiff's counsel, and we've gotten no production from the three most key witnesses in the case.

And so I think for the Zilis and Birchall motion that is pending, the one piece of outstanding relief that we are asking for today is that they be -- Zilis and Birchall's counsel be ordered to conduct a linear review of all their text messages exchanged with each other and with Mr. Musk, because we think something has obviously gone wrong with the review process, whether that be the search terms, which aren't picking up relevant text messages, or the review itself, or some involvement by Tesla's counsel.

Because your Honor knows on Friday night we learned for the first time that there's some sort of Tesla screen of these documents that is being conducted, and that some issue with this Tesla screen caused some unknown number of Musk's post-2020 text messages to not have been sent to Plaintiff's counsel for review.

We have asked -- on Saturday we asked what the nature of that issue was, whether it impacted any Birchall or Zilis' text messages, and we've gotten no response to that question either. So we think for the Zilis and Birchall

motion at this time the limited review of a -- the limited relief of a linear review is totally appropriate and warranted. That's something the OpenAI Defendants did on their side with the custodian text messages for the reason I just said, that often search terms don't adequately pick up the texts. And given the number of issues that we've encountered and the paltry production that we've received to date from these key witnesses, that's what we're asking for today on Birchall and Zilis.

THE COURT: You've used the term "linear review" a number of time without explaining that you mean by that. Do you mean that counsel should review every single text message?

MR. CULLERTON: Not -- sorry, and I should have been more precise, your Honor. So every message exchanged between Zilis and Birchall and every text message each of Zilis and Birchall exchanged with Mr. Musk during the relevant time period.

So, in other words, rather than limiting the universe through search terms, reviewing each of the message, which is the approach that the OpenAI Defendants took for their key custodians, Mr. Altman and Brockman, for the reasons I just said, which is, search terms are not always adequate. And clearly here, there's been some type of issue on the -- with the review or the search terms, given the virtual

blackout we've gotten in terms of the text messages produced.

THE COURT: I see. So the request is that counsel for Plaintiffs and the non-parties should review every text message as between Zilis and Birchall, or as between either of them and Musk, is that correct?

MR. CULLERTON: That's correct, your Honor.

THE COURT: Okay. And the concern there is that the search terms might not be adequate. They -- I guess maybe there are two concerns. One is whether they've collected things from the right place, but the linear review would not address that concern. It should address whether -- assuming the collections were adequate, whether their search terms or other mechanism to search the other text messages, whether that were sufficient, is that the idea?

MR. CULLERTON: That's correct. And I mean, we'd ask, since we're here talking about these issues, that we get answers to the questions that we've asked regarding the -- you know, which is part of the relief we asked for in the Musk motion regarding what the nature of the Tesla review was. Why Tesla's counsel is involved? How that as -- that may or may not have impacted the collection and review of text messages from Mr. Musk, as well as Mr. Birchall and Ms. Zilis.

But, yes, for purpose of the Birchall and Zilis motion,

your Honor is correct, we would ask for the linear review, which would at least address the existing messages and whether they were -- you know, the search protocol appropriately captured all responsive messages.

THE COURT: Well, one of the other forms of relief that OpenAI asked for with respect to Zilis and Birchall was a declaration explaining the steps that counsel took to comply with the subpoenas. Are you still seeking that relief?

MR. CULLERTON: Well, we think -- we certainly are seeking that relief, your Honor, given the numerous issues and the inability to receive any answers for the numerous questions we've asked, yes, your Honor.

THE COURT: Let me turn then to Plaintiff's counsel, who are also counsel for Zilis and Birchall. Can you please give me your thoughts on the two questions of linear review, as OpenAI has described its request, and then also with respect to a declaration.

MR. KRY: Sure. Just as context though, first of all, your Honor. The suggestion that this has been some sort of paltry production that demonstrates prima facie that there's some problem with it, I just don't think is accurate.

For Zilis we produced over 800 text strings from Ms. Zilis. That number is more than half of the total text

string production that OpenAI made for all of its witnesses combined. That is a very, very large production of text strings from Ms. Zilis, and certainly does not suggest that obviously there must be something missing.

With respect to Mr. Birchall, for sure it was -- it was smaller. It was a few dozen responsive texts on top of the hundreds of responsive emails that we produced for him. But that's consistent with what we were expecting, because Mr. Birchall was not involved with OpenAI at all. He shows up in the documents mainly because he's a financial advisor for Musk, and so he was involved in connection with some of the contributions that Mr. Musk made to OpenAI, but that does not mean that you would expect to see large numbers of texts from Mr. Birchall to Mr. Musk.

You know, unlike Ms. Zilis who has children with Mr. Musk and otherwise has a -- you know, many connections with him not related to the case, Mr. Birchall just doesn't have the same sort of pervasive relationship in all aspects of this case that would lead one to suspect that there would be a large number of texts from him.

And so I -- like I think before undertaking or ordering additional burdensome steps, there are other types of evidence that OpenAI could have identified if they thought there were missing texts that would be located by a linear review. For example, finding texts out of the 800 texts

sent by Ms. Zilis that don't show up in Musk's production or don't show up in Birchall's production, like those are the sorts of real -- real issues that would then warrant further investigation from us. But just complaining that we want more, we don't want -- you know, we want a great number of texts than we got, I have concerns that that's not a -- not a strong justification for ordering very burdensome steps.

And so turning to those steps now, first of all, the linear review, the obvious problem with that, your Honor, is that it's not limited to responsive documents. I -- or even documents hitting on search terms. I mean, they're asking for every single text message between Ms. Zilis and Mr. Musk to be reviewed, or between Mr. Birchall and Mr. Musk to be reviewed, regardless of whether it even hits on search terms. And that's an enormous volume of documents, and it just is not proportional to trying to identify any discovery issues.

So with respect to Mr. Zilis (sic) and Mr. Musk, again, they have children together. They have I don't know how many untold numbers of text communications they would be sending among each other, that there's no realistic prospect of having anything to do with this case whatsoever. And having to go through every one of those single communications and try and, you know, trace conversations about whose going to pick up the kids or something like

that, it's crazy, your Honor. There's no justification for that kind of relief.

And, ditto, for Mr. Birchall, even though he's not in some sort of personal relationship or family relationship with Mr. Musk, he handles Mr. Musk's finances across the board. And that expands well beyond anything remotely relating to OpenAI.

And so a text-by-text review of every single communication Mr. Birchall had with Mr. Musk, whether or not it had any relationship to OpenAI, whether or not it hits on search terms, is just very disproportionate from any -- any problem that OpenAI is trying to identify here.

And so we would -- and all this is in the context of the parties, both sides, are very, very busy right now, your Honor. We have 15 depositions being taken in the span of 30 days. We're -- everyone on both sides of this case is extremely busy right now. And just pulling people off the work that actually needs to get done to get through the deposition period to do this sort of linear review of texts that are not responsive, and that do not hit on search terms, and that have no other reason to believe they'll be helpful except for looking in like a -- for a needle on a haystack of thousands and thousands of non-responsive texts just isn't going to be useful.

And to put this in perspective to the -- Mr. Cullerton

referred to the 425,000 text figure for Mr. Birchall, and I think that's actually very, very telling. Because the reason why that number came about is that when the text extraction from his phone was initially done, there was a technical problem with the application of the search terms to it, and so that ended up spitting out like everything that was on the phone -- or that it was everything, but it was at least a wildy broader set of parameters than what should have been run based on the search terms, and that's where that 425,000 number came from.

Once we actually ran the search terms on that case, you know, then we got it down to a few -- a few hundred texts. And when those were reviewed, that came down to a few dozen texts. And so that -- those are the numbers that matter. But that 425,000 number, that's the one that matters for a linear review. Because if we're going to go text by text, regardless of search terms, regardless of responsiveness, and figure out who texted to who on any topic whatsoever, like we are dealing with those kinds of numbers. And that's just -- you know, that will be a enormous burden and distraction in a case where counsel are very busy.

THE COURT: Well, it's not all of their text messages. It would be as between Zilis and Birchall or either of them and Musk. Do you have any numbers for that?

MR. KRY: I don't, your Honor, but it would be --

I mean, logically, it would be a very large number because, again, Mr. Zilis (sic) and -- I'm sorry, Ms. Zilis and Mr. Musk are -- have a personal relationship, and, I mean, she also works at many different -- several different companies in the Musk broader group of companies. So, there are going to be many, many non-responsive, irrelevant texts in that set.

And for Mr. Birchall, again, it -- there will be a very large number just because he does not much work -- and he does hardly any work in connection with OpenAI, but does plenty of work in terms of Mr. Musk's other -- other finances. And so the proportion of responsive or relevant emails is just going to be very, very small, which means that a -- a linear review is going to involve hundreds of thousands of times more documents than what you would get through a traditional approach with search terms.

And so I do -- you're absolutely right. It's not -- it's not -- we don't have to review every text out of the 425,000, but it's still going to be a very large number, and I don't think those are burdens that should be imposed on parties in their current expedited schedule.

THE COURT: I am going to order the linear review because I do not have confidence that Plaintiff's counsel has reviewed the text messages in an appropriate way. OpenAI has made an evidentiary showing that the text

messages produced for Zilis are -- or what has been produced just can't possibly be right. That's less clear for Birchall, but definitely for Zilis, and then for Musk as well. I think OpenAI has carried that evidentiary burden, and so we need to do something about that, something that will address the problem and hopefully solve it. And I think there are two components.

One is for counsel to serve one or more declarations explaining the steps that counsel took to comply with the subpoenas to Zilis and Birchall. That addresses, you know, where you looked at what devices were searched and things like that.

But then the other is for counsel to do this linear review. Something happened that wasn't supposed to happen, and there was a breakdown in the review and production. And I do not have confidence that Plaintiff's counsel have done the search for text messages in a way that is rigorous and necessary for this case. So I am going to order that.

I understand that Zilis and Birchall have both been deposed, is that correct?

MR. MOLO: Yes, your Honor.

MR. CULLERTON: Yes, your Honor.

THE COURT: And one of the remedies OpenAI asked for was another deposition. I'm not going to order that right now. I am going to order the declaration, and then

the linear review. My view on a second deposition is that OpenAI would need to show that documents produced after the deposition are of sufficient importance that they justify a second deposition.

How exactly you make that showing, if you make it, would be open to -- up to OpenAI as the moving party, but I'm just -- I'm not going to automatically say that if text messages or other documents are produced after the depositions, then you automatically get a second one. I think you have to show that it would be worthwhile to have another deposition. And so that burden would be on you, if further text messages or other documents are produced. So that's my thought on how to deal with the request for a second deposition.

I do want to -- at the end of the hearing, I want to talk about the big picture and where this leaves the parties as they go forward. Right now I'm ready to move on to ECF number 273, but let me first turn to Plaintiffs.

Is there more that you wanted to say about Zilis and Birchall before I turn to the other joint discovery letter brief?

MR. KRY: Nothing, your Honor.

THE COURT: And how about from AI?

MR. CULLERTON: No, your Honor. Thank you.

THE COURT: And then from Microsoft?

MR. ULLMAN: No, your Honor.

THE COURT: All right. Thank you.

Let's turn to ECF number 273. One of the items that Plaintiffs identified was that Tesla was apparently able to locate an image of one of Musk's prior phones. And can you please give me a status update -- and you said that it may contain data from the 2015 to 2020 period. You weren't sure as of the writing. Can you please give me an update on the status of that?

MR. KRY: Well, it's that Tesla identified that -- well, so for context. Your Honor ordered a search for prior phones held by different attorneys on the 12th of September, so a week ago Friday. And then we learned about this data at Tesla which is -- it's not a phone or an image technically, it's a backup extraction of texts that were on a phone. But our understanding from the -- the Tesla team that recovered this, is that it could well recover -- it could have texts that cover the entire five-year period from 2015 to 2020.

THE COURT: Do you now have possession of that extraction?

MR. KRY: No. So, as we mentioned in prior letters, under Tesla's policies before they release data from their own systems to outside counsel, there needs to be a screen on that data that's done. The most recent

information we have from them is that we're expecting -- we're expecting to receive that data within the next day or two.

THE COURT: I see. And at that point you would then review for responsive text messages?

MR. KRY: Correct. And then at that point we'd also have a hit count of the number of documents in the review, and so we'd be able to provide a much more reliable estimate as to when that review would be complete.

THE COURT: Okay. Thank you.

Is there anything that OpenAI could like to say with respect to that image extraction?

MR. CULLERTON: We look for ward to understanding what's on it and whether it is complete, and whether it contains the text messages. I'll just make two quick points, and I'm sure your Honor has zeroed in on this.

I mean, we're asking for the same relief with respect to Musk, which would be a linear review of his messages with Zilis and with Birchall for any preserved texts, whether they be on the pre-2020 -- whether they be pre-2020 or post-2020, and we think that relief is warranted for all the reasons we discussed with Birchall and Zilis.

And, in addition, because of these kind of new and additional and 11th hour disclosures about post-2020 issues that were never previously disclosed to us, and that only

came up after we, you know, made multiple joint letter statements and engaged in lengthy correspondence with Musk's counsel. So that's the first I would make.

The second point I would make about the pre-2020 is as of the last update, we got -- Musk's counsel had reached out to something like 33 former counsel, had not yet heard back from -- from all those counsel. And we certainly think that process should continue as your Honor ordered initially. I think there's a status report due on the 26th, if I'm not mistaken, on those efforts.

Until we know whether this Tesla image is complete or has all the relevant pre-2020 messages, I think the -- the process that's currently underway with other counsel should continue.

THE COURT: All right. Thank you, counsel.

Then also relating to Tesla, but for the post-2020 time frame, it looks like on the day before this joint discovery letter brief was submitted, Plaintiff's counsel commenced an investigation into other text messages that Tesla had. Can you give me a status update on that, please?

MR. KRY: I can, your Honor. So, our understanding of this has evolved between last Thursday when it was brought to our attention and the situation today. And unlike location of the initial phone backup that could yield a considerable number of additional texts that we

didn't previously have, it sounds now that based on our current understanding, this issue with the post-2020 texts is actually much more discrete. There were two texts that had been produced from Zilis that OpenAI's counsel pointed out, we did not have corresponding texts from in the Musk production.

And so recognizing that that was an issue, we -- and investigation was done to look into the cause of that. And initially, we weren't sure, and it seemed like it may have been a situation where an entire batch of texts had not been transmitted from Tesla to the outside review platform. We now no longer believes that's the case.

And the reason why is, with text strings, it's tricky because you don't always have the exact same documents on both sides. If you're pulling like a day's worth of texts around the particular text, that can end up being a different set of texts than the ones you would see on the other phone, and that complicated the situation here.

For one of the two text strings they identified that showed up in Zilis but not in Musk, on further review we were able to locate the corresponding one, which was a different subset, but it -- we were able to locate it in the Musk production. And the conclusion was, it should have been produced and it just wasn't because of a responsiveness coding error. And so that's the situation with that one.

And then with the other one, upon investigation it was determined that that had been screened from Tesla. We don't -- or by Tesla, and we don't -- what we've been advised is that the -- the text that showed up on the Musk side of that included personal sort of family type information. And so that had been pulled out by Tesla, and this was -- this was news to us. But that's what we were told, and that's why that particular one did not show up. And so that's the information we have with respect to that.

So we don't think this is a broader systemic with an entire batch of texts being not transmitted or lost somewhere. We think they're one-offs, and they're certainly legitimate concerns for OpenAI to raise, but that's where our investigation stands.

THE COURT: And when do you anticipate completing the production of the responsive text messages for this time period?

MR. KRY: Responsive -- sorry. For the post-2020 time period? So, I mean, based on -- we will conduct the limited -- pardon me, the linear review that your Honor ordered. And if additional texts need to be produced as a result of that, that will be done. I do not have a -- not having personally done the linear review, like what OpenAI is asking for here, and also not knowing what the volume of texts going into that linear review is going to be, I'm not

able to quantify an estimate for that.

In terms of an investigation into the -- an investigation resulting from the two Zilis emails that OpenAI's counsel identified, I'm not sure there's something further to be done there, because our current assessment is that those were both just one-off issues and not symptomatic of any broader problem.

I mean, again, Zilis we did produce over 800 text strings for more than half of all of OpenAI's entire text string production for all witnesses. So I don't -- for Zilis, we just see that there's a issue of having less texts than one would expect, but I don't -- yeah. Then we'll do the linear review. I don't know how long that will take, but I'm not sure what other -- what other steps we have to do with respect to the Zilis texts.

THE COURT: All right. Thank you.

Let me turn to OpenAI. Is there anything you would like to say concerning Musk's texts messages in the post-2020 time frame?

MR. CULLERTON: There is, your Honor, because I still feel like I have no understanding what the issue was on the Tesla side. I don't think that explanation really told the Court or us anything about what the problem was.

And you'll recall, your Honor, that the very first motion we made to your Honor in this case was a motion to

ensure that Musk's counsel was responsible for discovery over Musk's documents, and not all of Musk controlled entities. And what it sounds like I've just heard from Mr. Kry, who did not respond to our emails on this subject in advance of this hearing asking for this very information, is that there are messages being screened out by Tesla on apparently grounds that they are personal Musk messages, not even Tesla-related information. And that is a process that Plaintiff's counsel doesn't seem to have any visibility into.

We have no idea what criteria is being used by Tesla's counsel to review Mr. Musk's text messages and release them for review to Plaintiff's counsel. And that is just not a tenable situation for discovery in this case for a source of evidence that this -- that is this critical.

So we would ask for the declaration that clearly sets out what is going on, what is Tesla's counsel doing? What messages does Musk's counsel have access to? Is it all of them or not? And what's being done to remedy the situation in addition to linear review?

THE COURT: Right. My relief with respect to Musk's text messages is going to be similar as to Zilis and Birchall. I think OpenAI has proven that there was a significant problem here. That much is clear. Whether it's the sources that were searched or whether it was the search

terms that were used, or whether it's both remains unclear to me. But I think OpenAI is entitled to a declaration explaining what steps were taken. And then OpenAI is also entitled to a linear review, meaning that Plaintiff's counsel should review the text messages between Musk and Zilis or Musk and Birchall to see which ones are responsive.

If there were search terms used, it seems like either there was a big problem with the search terms. And so counsel will need to lay eyes on these text messages and see what should be produced.

The Court's efforts with the declaration and the linear review are an attempt to solve the problem, but it is clear from what OpenAI has shown that there is a problem and something has indeed gone wrong for the production for Plaintiff's text messages.

So that's going to be my ruling with respect to ECF number 273. I'm going to issue a written order stating this.

Now we'd like to move on to where this leaves the parties, but first let me ask Plaintiff's counsel, is there more that you wanted to say with respect to ECF number 273?

MR. KRY: We understand your Honor's order. I -- obviously we would definitely like to discuss the scheduling of the Musk deposition, but perhaps that's what your Honor was going to turn to next.

THE COURT: It wasn't, and that's precisely why I ask questions like that. Thank you for raising that.

My thought with respect to the Musk deposition is -- OpenAI, is it correct that you still want to proceed with that deposition on September 26?

MR. CULLERTON: Yes, your Honor.

THE COURT: Then here in my thought. If you want to proceed with the deposition on September 26, you are free to do so, but you should know that if you want to get a second deposition of him, you'll have to make the same showing that you will with respect to Zilis and Birchall. In other words, if text messages or other documents are produced after his September 26 deposition, you will need to make an evidentiary showing that a second deposition is warranted. So that will be your burden if you decide to go ahead on September 26, understood?

MR. CULLERTON: Understood, your Honor.

MR. MOLO: Your Honor, Steven Molo for Plaintiffs. I just want to, if I may, add a comment to that.

What we're talking about with Musk here, and we can't represent the exact volume, but his phone image from the period 2015 to 2020, so it's five years, and it's a rather -- I think rather likely that we're going to find some text messages. How important they are to the case isn't clear, but we're going to find some that will certainly be

responsive and be produced.

So, without prejudging anything and without having looked at any of these messages, I think the likelihood of having to come back for a second deposition is substantial.

So rather than go through that and -- and go through the process of, you know, apply -- having OpenAI apply for the opportunity to take the deposition and make that showing that your Honor has said that they would have to make, it seems to us more prudent and reasonable to pick another date. We've offered six specific dates to OpenAI, which would allow us to complete that review.

And I'll be very, very direct with your Honor, part of this is the fact of representing Mr. Musk and everyone is busy. Mr. Altman is busy, everyone is busy. But having him, you know, come back a second time is going to be a challenge for us.

I understand, you know, we're going to do whatever the Court directs us to do, but it would be much simpler and I think much more productive to simply pick another date that's in the not-too-distant future, whereby, you know, for which time we could have done this review and produced Mr. Musk's responsive text messages from that period.

THE COURT: Well, I don't agree with that. Plaintiff should have produced these text messages a long time ago. And it's entirely Plaintiff's fault that OpenAI

is not in possession of these text messages. And I don't think that OpenAI should be punished for something that is Plaintiff's fault.

So I'm going to let them go ahead with the deposition on the date that they had noticed, and then they will have to make or satisfy an evidentiary burden to have a second day of deposition. That burden will be on them. But Plaintiffs have been dilatory and not diligent in producing these items for discovery, and I don't think that OpenAI should be punished for that.

MR. MOLO: Okay. I wasn't suggesting that they be punished, I was just suggesting that it might be more efficient to just do it one time. But --

THE COURT: I understand. I was -- they -- I think they were count -- what they said in the joint discovery letter brief is that they had been planning on the September 26 date and looking to do the deposition on that date and gearing up for that. And that's what -- why they characterized it as being punished, but obviously it's not a sanction or anything like that. I know you weren't suggesting that.

MR. MOLO: Thank you.

THE COURT: Is there anything further Plaintiffs wanted to discuss with respect to the September 26 deposition?

MR. KRY: Not from Plaintiffs, your Honor.

THE COURT: For OpenAI?

MR. CULLERTON: No, your Honor. Thank you.

THE COURT: And for Microsoft?

MR. ULLMAN: No, your Honor.

THE COURT: Okay. Then let's turn to the picture going forward. My understanding is that the last fact discovery related deadline is the October 1st deadline to complete fact witness depositions.

So Plaintiffs agree that's the last fact discovery deadline?

MR. KRY: Your Honor, with one qualification, which is that the parties on consent have agreed to take one third-party witness deposition after the deadline. There was a certain witness that the third party's lawyer couldn't -- couldn't make work, but she offered -- offered it up on a subsequent date. And then the Defendants, to their credit, agreed with us that that could go ahead. And so we're going to be doing that one on October 8th.

THE COURT: What date was that?

MR. KRY: October 8th in Washington, D.C.

THE COURT: Okay. Thank you.

And then let me turn to OpenAI. With the exception of that third-party deposition on October 8th, do you agree that the last court-ordered fact discovery deadline is

October 1st?

MR. CULLERTON: Yes, your Honor.

THE COURT: And, Microsoft, do you agree with that as well?

MR. ULLMAN: Yes, your Honor.

THE COURT: Then in my opinion, October 1st is the close of fact discovery within the meaning of Civil Local Rule 37-3. As a reminder, that's the local rule that says that any discovery related motions have to be brought within seven days after the close of fact discovery.

Now in my opinion, when the parties stipulate to conduct a deposition after the close of fact discovery, and here it seems that you have, then that deadline under Local Rule 37-3 is automatically tolled until that deposition for issues that arise at that deposition.

So, for example, if a motion to compel comes out of the October 8th deposition due to an issue that arose at that deposition, you would have seven days after that deposition to raise it. But other than that, I think that all discovery related motions are due seven days after October 1st.

And I encourage the parties to look at the commentary associated with Civil Local Rule 37-3, which explains that discovery related has a broad meaning. It's not just motions to compel, it's motions that are related to

discovery, such as motions for sanctions, and spoliation motions and things like that. So those would generally be due on October 8th.

And I'm not highlighting this to be unduly pessimistic. I'm highlighting this because the parties have raised a number of important discovery related disputes, not all of which have been resolved. And I want the parties to be clear about what I think the deadline is to get further discovery motions on file and any motions related to discovery on file.

And, in general, for fact discovery that's October 8th, unless, as I've noted, a deposition takes place by the consent of the parties after the close of fact discovery on October 1st. And so -- so that's the deadline. So, I realize that as a result of my orders today, more documents are likely to be produced by Plaintiffs, but if -- you know, the deadline to get something on file to ask me to do something is October 8th.

Once that passes, if either side has a discovery issue you want to raise, you will need to go to Judge Gonzalez Rogers and ask her to modify the case schedule to enable you to raise that further discovery issue or discovery related issue, because the deadline in front of me will have run.

Let me turn to Plaintiff's counsel. Did you have any questions or commentary?

MR. MOLO: I do have a question about that, Judge. You've ordered this linear review, and I just -- we just don't know exactly how long that is going to take, particularly with respect to this long period of time with the data from Mr. Musk's phone.

If it -- I mean, we're not going to just do it in a haphazard way. We're going to do it in a meaningful way with the right resources applied to it. If that October 1st poses -- date poses a problem for us to do it in a proper way, what should we do? What would you like us to do?

THE COURT: I would like the -- it looks like Zoom froze there for a minute. Is it working now?

MR. MOLO: It's fine -- it's fine on my end now. Thank you.

THE COURT: Okay. Thank you. If that arises, and I hear what you're saying, that it might arise, then I would like the parties to meet and confer about what you would like to do. And if you need the discovery schedule pushed back, you will need to make that request for -- to Judge Gonzalez Rogers. I can't do it. I make no prediction about what she will or will not be willing to grant. However, if you run into that problem, she is the person you will need to take it to.

MR. MOLO: Okay.

THE COURT: And let me to turn to OpenAI. Did you

have any questions or commentary about these deadlines?

MR. CULLERTON: Yeah, just a point of clarification, your Honor. Thank you. Because obviously some of the relief is stemming from these pending motions and may implicate a request for a second deposition that, you know, would not occur until after the 10-8 cutoff. So do you view that as outside, you know, subject to the local rule or related to a pending motion sufficiently that it would -- it could trail?

For example, if we wanted to ask that Mr. Musk be deposed a second time because we receive a number of documents on -- just picking a date, October 1st or October 3rd or October 5th, that -- does the same apply, the same guidance you just gave Mr. Molo apply to us?

THE COURT: It does. For example, if the Plaintiffs produce a big stack of important documents to you on October 9th, and you want -- and the witnesses are unwilling to sit voluntarily for a second deposition, and you want to come into court and get relief, you would need to go to Judge Gonzalez Rogers and ask her to modify the case schedule to allow you to bring that motion, because it would be untimely in front of me.

MR. CULLERTON: Understood. Thank you for that clarification.

THE COURT: And, Microsoft, is there -- do you

have any questions or commentary about that?

MR. ULLMAN: No, your Honor.

THE COURT: All right. That covers the agenda that I had for this hearing. And, again, I'm going to issue a written order following this hearing. But let me ask the parties if there's anything else that you would like to address.

Plaintiffs, is there anything else that you would to address?

MR. MOLO: Mr. Kry?

MR. KRY: Not to my knowledge.

Mr. Parkkinen, anything else on our side?

MR. PARKKINEN: Nothing further at this time. Thank you.

THE COURT: And, OpenAI, anything else that you would like to raise?

MR. CULLERTON: No, your Honor. Thank you.

THE COURT: And, Microsoft, how about you?

MR. ULLMAN: No, your Honor.

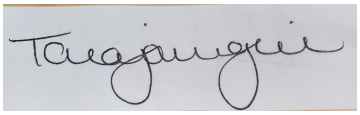
THE COURT: All right. Thank you, counsel. The matter is submitted. We're adjourned.

(Proceedings adjourned at 2:46 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.



Echo Reporting, Inc., Transcriber

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