

Musk's 'swing for the fences' suit against OpenAI has long odds



Elon Musk, CEO of X and Tesla, in Washington on Sept. 13. (New York Times News Service)

Corporate law academics say that Elon Musk's suit against OpenAI alleging breach of contract faces long odds, with "too many ambiguities" at play over the nature of the agreement and the limitations of OpenAI's corporate charter.

Musk filed suit against OpenAI, its CEO Sam Altman and co-founder Greg Brockman in the San Francisco County Superior Court, alleging that they had broken the company's founding agreement, claiming breach of contract, breach of fiduciary duty and unfair business practices. Musk v Altman, CGC-24-612746 (S.F. Super. Ct. filed Feb. 29, 2024)

Musk alleges the agreement breach stems from the company prioritizing profit over "the benefit of humanity," citing the company's business agreements with Microsoft and the decision not to make the latest version of its generative AI technology, GPT-4, closed source.

Musk, who is represented by Irell & Manella LLP, is seeking relief including an injunction compelling OpenAI to make its latest technology public and to prevent the use of OpenAI for financial benefit, as well as restitution and punitive damages.

The decision to bring a breach of contract case was surprising, said Eric Talley, a professor at Columbia Law School who specializes in corporate law and governance as well as machine learning.

“The lawsuit itself is a little bit surprising, because there’s not even an obvious way in which Elon Musk was in contract,” Talley said.

He said that documents cited in the complaint, such as the Certificate of Incorporation as a nonprofit and “a bunch of text messages or emails that were sent back in 2015,” could constitute a contract in principle but were “relatively informal for doing so.”

“Right off the bat, just not having the sort of standard types of things that you would usually going to have for a tens-of-millions-of-dollars type contract kind of stacks the deck against them,” he added.

“This doesn’t fit neatly as a contracts case, as the agreement among founders seems perhaps unclear,” agreed Jeff Ward, clinical professor of law and director of the Duke Center on Law & Technology.

Defining what constituted activities for the “benefit of humanity” was also a “murky” area where it was “hard to imagine clear judicial guidance emerging,” Ward wrote in an email.

“Seeking to legally define what constitutes ‘benefit of humanity’ seems like an extremely difficult endeavor in this instance. People disagree over what innovations truly provide collective social good, and without specific articulated goals and metrics, companies can argue that profitability aligns with benefiting customers and society,” he wrote.

Talley said that defining ‘benefit of humanity’ was akin to trying to clearly delineate “a corporate charter that says the company is supposed to maximize awesomeness.”

“Who the heck knows what awesome is? When you don’t know what awesomeness is, you pretty much say, ‘Well, let’s delegate that to the business judgment of the board.’ That’s a standard move that you would make in the context of trying to understand whether a company is discharging its very general aspirational purpose. And this is a Delaware charter, and Delaware has got a long history of doing exactly that,” he said.

What was clear was that benefiting humanity and engaging in profit-making were not mutually exclusive, Talley added.

“It can’t possibly be the case that the only things that benefit humanity is stuff that doesn’t involve cooperating in some way with for profit companies,” he said.

Regardless of Musk’s success, Ward believed the case did present clear issues around who is making

key decisions on the future application of AI.

“This case seems to pose bigger questions about the governance of powerful emerging technologies and whether our current entity structures, governance tools, and laws provide effective guardrails,” he wrote.

Both professors said that the case also highlighted the unorthodox nature of OpenAI’s corporate governance, raising questions about when fiduciary duties beyond profit maximization should be enforced by the court.

“OpenAI’s evolution from non-profit, to for-profit with a non-profit subsidiary with certain caps on profits and public benefit pledges does present more angles for litigation attack,” Ward said.

“There is strong precedent, for example, that the benefits of tax-exemption should not inure to the benefit of private parties, but this case does not map perfectly to that analysis, even if it’s rooted in the same concern that companies will use commitments to public purposes to gain trust and then pivot to commercial ends,” he added.

Ward wrote that it was unlikely that the Court would be favorable to Musk’s suit.

“There seem to be too many ambiguities here — i.e. ambiguity regarding the precise agreement among the founders, ambiguity over what benefits humanity, etc. This combined with judicial deference to businesses makes a ruling favorable to Musk seeking specific performance of this sort seem quite unlikely,” he wrote.

Talley said that it was unlikely the Court would provide any injunctive relief to Musk by restraining OpenAI from corporate deals or compelling them to publish their current learning models, with restitution for the amount he had invested in the company (named as ‘more than \$44 million in the suit) likely the best result he could hope for.

“At the end of the day, the case strikes me as kind of a ‘swing for the fences’ kind of case that, even if he wins on the liability amount, it’s unlikely he’s going to be able to get an injunctive form of relief. You know, he’ll get 40 million bucks back, maybe,” he said.

“I guess you can spend that on whatever, bailing out X, but it doesn’t really sort of add up from a legal merits sort of perspective as the type of thing that is actually worth much of one’s time.”

Regardless, the buzz caused by the case would generate “pretty good PR” for Musk’s own AI efforts, he added.

A spokesperson for Irell & Manella declined to comment.

The Daily Journal contacted OpenAI for comment on the case but had not received a response at time of publication.

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