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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ELON MUSK, et al.

Plaintiffs,

v.

SAMUEL ALTMAN, et al.,

Defendants.

Case No. 4:24-cv-04722-YGR

Hon. Yvonne Gonzalez Rogers

STATEMENT OF INTEREST OF THE UNITED STATES AND FEDERAL TRADE COMMISSION

Date: January 14, 2025
Time: 2:00 p.m.
Place: Courtroom 1 (4th Floor)
1301 Clay St.
Oakland, CA 94612

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INTRODUCTION

The United States, through the U.S. Department of Justice, joined by the Federal Trade Commission ("FTC"), respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517. The Antitrust Division of the U.S. Department of Justice and the FTC (collectively, the "Agencies") enforce the federal antitrust laws, including the prohibition against interlocking directorates in Section 8 of tTc -0.Rcking m1.0tTw 2u0 c6 10.193 7ratS0 . Department 28

claim under Section 8 is moot and (2) a company violates Section 8 by appointing a natural person to serve on the board of a competing company. This statement also explains how interlocking board member arrangements can undermine fair competition and therefore violate the FTC Act and, by extension, California's UCL. Finally, this statement discusses the legal standard for when group boycotts can run afoul of Section 1.

The Agencies take no position on any other issue in this case, including the facts alleged by Plaintiffs.

FACTUAL BACKGROUND

The First Amended Complaint, ECF No. 82, alleges that "Artificial General Intelligence," i.e., "a machine having intelligence for a wide variety of tasks like a human," poses certain risks. Am. Compl. ¶¶ 4, 74-75. To address these risks, Plaintiff Musk helped establish OpenAI in 2015. Am. Compl. ¶ 88. That same year, OpenAI incorporated as a "nonprofit corporation" committed to the "research, development and distribution of technology related to artificial intelligence." Am. Compl. ¶ 89.

The First Amended Complaint further alleges that (1) defendant Reid Hoffman simultaneously served on OpenAI's and Microsoft's boards of directors from March 2017 to March 2023, and (2) defendant Dana Templeton simultaneously served as Vice President of Partnerships and Operations in the Technology & Research division at Microsoft and as a non-voting member of OpenAI's board of directors from November 2023 until July 2024. Am. Compl. ¶¶ 163, 371; see also id. ¶¶ 168, 331(m), 374.

Based on these allegations, and others, Plaintiffs bring 26 separate claims including breach of contract, fraud, false advertising, breach of fiduciary duty, and claims under the Racketeer Influenced and Corrupt Organizations Act. Plaintiffs also allege Defendants violated the Sherman and Clayton Acts based in part on conduct affecting the market for "generative AI models and platforms." Am. Compl. ¶ 204.

On November 29, 2024, Plaintiffs filed a Motion for a Preliminary Injunction seeking to enjoin Defendants from, among other things, "directly or indirectly undertaking any action for the purpose of or tending to have the effect of, interlocking directorates or benefitting from

for the coordination of business decisions by competitors and "the exchange of commercially sensitive information by competitors." Square D Co. v. Schneider S.A., 760 F. Supp. 362, 366 (S.D.N.Y. 1991). Such conduct can facilitate unreasonable restraints of trade in violation of Section 1 of the Sherman Act (15 U.S.C. § 1) or help a monopolist maintain and entrench its power in violation of Section 2 of the Sherman Act (15 U.S.C. § 2). In this way, Section 8 supports and reinforces the federal antitrust laws more generally. See United States v. Sears, Roebuck & Co., 111 F. Supp. 614, 616 (S.D.N.Y. 1953) ("Section 8 was but one of a series of measures which finally emerged as the Clayton Act, all intended to strengthen the Sherman Act.").

Courts have consistently interpreted Section 8 in view of these "prophylactic and remedial purposes." Square D Co. v. Schneider S.A., 760 F. Supp. 362, 366 (S.D.N.Y. 1991). For example, the Ninth Circuit has held that establishing a Section 8 violation does not require "proof that the interlock has an actual anticompetitive effect." TRW, 647 F.2d at 946–47 (citing Protectoseal Co. v. Barancik, 484 F.2d 585, 589 (7th Cir. 1973) (Stevens, J.)). "On the contrary, the statute reflects a public interest in preventing directors from serving in positions which involve either a potential conflict of interest or a potential frustration of competition." Protectoseal, 484 F.2d at 589. Likewise, courts have refused to read the statute so rigidly that a company can evade Section 8 liability through tactics that elevate form over substance, e.g., "by calling its agents on the competitors' board something other than either officers or directors." Square, 760 F. Supp. at 366; Reading, 317 F. Supp. 2d at 327–28 (rejecting reading of Section 8 that would "elevate form over substance" and render the statue "a formalism").

B. Section 8 Claims Are Not Mooted by Simply Unwinding an Interlock

Defendants argue "there is no live 'case or controversy'" here because "neither Hoffman nor Templeton is currently affiliated with OpenAI's board in any capacity." ECF No. 64 at 13. But rsufilcintl,

"[A]s a general rule, 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.'" Cty. of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). Otherwise defendant [would be] free to return to his old ways," and that, "together with a public interest in having the legality of the [disputed] practices settled, militates against a mootness conclusion." United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953). Thus, where a defendant voluntarily ceases illegal conduct, it still bears a "heavy burden" to demonstrate it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." TRW, 647 F.2d at 953 (quoting United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968)). Additionally, the relevant "concern is with repeated violations of the same law, and not merely with repetition of the same offensive conduct." Id.

against unfair methods of competition for guidance on how to interpret California's UCL. See, e.g., Cel-Tech Commc'ns, 20 Cal. 4th at 185 (citations omitted) ("[T]he view of the similarity of language and obvious identity of purpose of the two statutes, decisions of the federal court on the subject are more than ordinarily persuasive.'"); Epic Games v. Apple, 67 F.4th 946, 1000–1002 (9th Cir. 2023) (discussing the relationship between state unfair competition claims and federal antitrust claims). "The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons." Fed. Trade Comm'n v. Amazon.com, Inc., No. 2:23-cv-01495-JHC, 2024 WL 4448815, at *13 (W.D. Wash. Sept. 30, 2024) (quoting Fed. Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 454 (1986)). See also Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, File No. P221202, at 1 (F.T.C. Nov. 10, 2022) ("Section 5 reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions.") (collecting cases).

The Supreme Court has stated that the FTC Act's prohibition on unfair methods of competition was "designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipiency acts and practices which, when full blown, would violate [the Sherman Act and the Clayton Act] . . . ." Fed. Trade Comm'n v. Motion Picture Advertising Service Co., 344 U.S. 392, 394–95 (1953) (internal citations omitted); see also Ethyl, 729 F.2d at 136–37 (the FTC Act empowers the FTC "to bar incipient violations of the statutes, and conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit") (cleaned up); Fed. Trade Comm'n v. Texaco, Inc., 393 U.S. 223, 225 (1968) (same).

The Supreme Court has likewise long recognized that the FTC "has broad powers to declare trade practices unfair." Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 242 (1972) (quoting Fed. Trade Comm'n v. Brown Shoe Co., 384 U.S. 316, 320–321 (1966)). In 1977, the FTC concluded that certain interlocks cannot "escape liability through the allegedly porous wording of Section 8." In re Kraftco Corp., 89 F.T.C. 46, 1977 WL 188540, at *13 (Jan.

11, 1977); see also In re Perpetual Fed. Sav & Loan Assn., 90 F.T.C. 608, 653 (1977), remanded on other grounds, No. 78-1134 (4th Cir. 1978), order withdrawn, 94 F.T.C. 401 (1979) ("Congress enacted the Clayton Act and the Federal Trade Commission Act in response to the perceived shortcomings of the Sherman Act, as interpreted by the courts, in abating what were seen as unhealthy concentrations of economic and political power. One of the practices which was singled out for particular concern was the interlocking directorate. This concern was highlighted in Congressional reports."). It pointed out that the statute's legislative history suggests that "Congress specifically contemplated the application of Section 5 to interlocking directorates."[3] Id.[4]

In light of the foregoing, the Court may consider under the proscriptions of California's UCL whether the alleged conduct is contrary to Section 5 of the FTC Act, e.g., by facilitating the exchange of confidential, competitively significant information between rivals. See Cel-Tech Commc'ns, 20 Cal. 4th at 185–86 (looking to Section 5 jurisprudence to determine that "the word "unfair" in [the California UCL] means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws . . . ."); Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962) (allowing expansion of the Clayton Act from certain "technical confines" to realize a "basic policy" underlying the Act); Epic Games, 67 F.4th at

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[3] Indeed, the Senate Interstate Commerce Committee reported that it "was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such . . . interlocking directorates and holding companies intended to restrain substantial competition." In re Kraftco Corp., 1977 WL 188540, at *13 (cleaned up); see also Perpetual Fed. Sav & Loan Assn., 90 F.T.C. at 655 (discussing legislative history and finding it "clear that Congress contemplated interlocks among the practices comprehended by Section 5 of the FTC Act").

[4] More recently, the Commission observed, as part of a consent decree settling charges of interlocking directorates violating Section 8, that the appointment of a board observer or designee in a rival firm raises concerns that

1000 ("a business practice may be unfair," and therefore illegal under the UCL, "even if not specifically proscribed by some other law") (quoting Cel-Tec Commc'ns, 20 Cal. 4th at 180).

III. Group Boycotts Under Section 1

Plaintiffs seek to enjoin an alleged "fund-no-competitors" pact, which they unify under a group boycott theory of antitrust, in violation of Section 1 of the Sherman Act. The Agencies take no position on the alleged facts but file this statement in order to clarify the proper legal analysis for group boycotts.[5] Section 1 of the Sherman Act forbids "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." 15 U.S.C. § 1. A claim under Section 1 therefore requires two key elements: (1) "a contract, combination, or conspiracy"—i.e., "concerted action"—and (2) that "unreasonably restrains trade." Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 186 (2010). Concerted action can be unreasonable in one of two ways. Ohio v. Am. Express Co., 585 U.S. 529, 540 (2018). First, it may be unreasonable per se, without any further inquiry into its competitive effects or justifications, because of its inherently anticompetitive "nature and character." Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 64 (1911). Typically, only horizontal restraints, i.e., concerted action between actual or potential competitors, are per se unlawful. Am. Express, 585 U.S. at 541. Second, a restraint may be unreasonable under the "rule of reason," a "fact-specific assessment" of challenged conduct's "effect on competition." Id. (internal quotation marks omitted). Group boycotts involving competing firms can properly be analyzed under the per se rule. See Honey Bum, LLC v. Fashion Nova, Inc., 63 F.4th 813, 820–21 (9th Cir. 2023).

The litigants disagree about whether the alleged fund-no-competitors pact is horizontal or vertical.[6] This distinction does not preclude application of Section 1. Without commenting

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[5] The operative complaint and preliminary injunction motion raise questions about the relationship between OpenAI and Microsoft, namely whether it constitutes a form of prohibited coordinated conduct under the Sherman Act or, alternatively, may be characterized as "an unregulated merger." The characterization of the relationship between the entities for antitrust purposes is a factual inquiry on which the Agencies take no position at this time.

[6] To the extent Defendants dispute the existence of concerted action, i.e., a group boycott against OpenAI's rivals, the Court would err if it required Plaintiffs to establish the existence of a

on the facts as alleged, a group boycott can have a vertical aspect; and per se liability under Section 1 can attach so long as there is also a horizontal element to the alleged conspiracy. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136 (1998) (surveying precedent and distinguishing purely vertical agreement between supplier and customer from cases also involving a horizontal agreement among competitors). Indeed, "[t]he horizontal agreement may exist either among the initiators of the boycott (as in Fashion Originators) or those pressured into joining (as in Klor's)." Issued per se 20

U.S. at 210 (rejecting the argument that there is a violation of Section 1 "unless the opportunities for customers to buy in a competitive market are reduced" because then "a group of powerful businessmen may act in concert to deprive a single merchant . . . of the goods he needs to compete effectively").

CONCLUSION

For the foregoing reasons, the court should decide Plaintiffs' Motion for a Preliminary Injunction, ECF No. 46, consistent with the legal principles above regarding Section 8, California's Unfair Competition Law, and group boycotts under Section 1.

Respectfully submitted,

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