IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

X CORP. and X.AI LLC, Plaintiffs, v. APPLE INC., OPENAI, INC., OPENAI, L.L.C., and OPENAI OPCO, LLC, Defendants.	Civil Action No. 4:25-cv-00914-P

THE OPENAI DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO COMPEL AND FOR APPROPRIATE REMEDY

WACHTELL, LIPTON,
ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
Telephone: (212) 403-1000
Facsimile: (212) 403-2000

LYNN PINKER HURST
& SCHWEGMANN LLP
2100 Ross Avenue, Suite 2700
Dallas, TX 75201
Telephone: (214) 981-3800
Facsimile: (214) 981-3839

Dated: February 2, 2026

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

PRELIMINARY STATEMENT

xAI, plaintiff in this case, is engaging in the systematic and intentional destruction of documents relevant to (at least) this lawsuit. This motion, supported by the accompanying evidence, seeks to put xAI's illegal conduct to an end and to secure an appropriate remedy.

xAI is one of many companies controlled by Elon Musk. Mr. Musk has repeatedly touted the virtues of ephemeral messaging platforms like Signal and XChat — means of communication that "disappear" after being sent, leaving no trace, and thereby escaping discovery in litigation. Musk-controlled companies have also been repeatedly reprimanded by courts for failing to meet their discovery obligations. In this case, xAI has produced virtually nothing — not one internal document about the merits of claims plaintiffs chose to bring. Nothing about the alleged barriers to entry they face in the generative AI market. Nothing to allow OpenAI to probe the claim that ChatGPT's integration with Apple somehow deprives xAI's Grok of essential training data.

OpenAI asked xAI (in a request for admission) to admit or deny that its senior officers used ephemeral messaging that would cause the mass destruction of evidence. xAI responded with a non-denial denial, saying (in effect) that it had seen no such messages and therefore denied the request for admission. Left unsaid: Of course counsel had not seen any disappearing messages. They disappeared. That is the point.

Now we have evidence that xAI employees at every level have been directed to use "disappearing" ephemeral messaging tools that auto-delete everything in a week or even less. Communications about every aspect of xAI's business, including matters highly relevant to this case, have been routed through these message-destruction tools, even as plaintiffs knew they were planning to sue and were under a legal duty to preserve. Destroying evidence was the whole point. And it leaves OpenAI and the other targets of Musk's litigation at an inequitable disadvantage. This serious and intentional misconduct calls for a commensurate remedy.

BACKGROUND

A. Musk has long celebrated ephemeral messaging while multiple courts have criticized his discovery practices.

Elon Musk has for years expressed his preference to communicate using ephemeral or "disappearing" messaging tools. As early as 2021, Musk posted on the platform then known as Twitter that he uses Signal — a leading ephemeral communication platform — and urged others to "[u]se Signal" as well.[1] Musk has since repeated his preference for disappearing messaging services, including his own homegrown XChat application.[2]

Musk and the companies he controls are serial litigants, having appeared in more than 1,000 cases in the past five years. In many of those cases, Musk or his companies are the plaintiffs, using the courts to seek to advance his commercial or personal interests. Given their proclivity to sue, Musk and his affiliates are familiar with court rules requiring the preservation of evidence — the "honor code" that litigants must respect for the adversarial system to function properly.

But courts that have examined Musk's communication practices have found that Musk and his affiliates have not respected that code. A Delaware court, for example, was "forced to conclude that it is likely that [Musk's] custodians permitted the automatic deletion of responsive Signal communications between them and possibly others, and that those communications are irretrievably lost." *Twitter, Inc.* v. *Musk*, 2022 WL 5078278, at *5 (Del. Ch. Oct. 5, 2022). More recently, in a California federal case where Musk produced next to nothing, the court found that Musk's counsel had "not been transparent in their handling of the document productions" and that "for the text message productions from . . . Musk, . . . something has likely gone significantly

---

[1] Elon Musk (@elonmusk), X (Jan. 7, 2021 7:56 AM), https://x.com/elonmusk/status/1347165127036977153?lang=en (App'x Tab 1 at A002).

[2] Elon Musk (@elonmusk), X (June 1, 2025 2:06 PM), https://x.com/elonmusk/status/1929238157872312773?lang=en (App'x Tab 2 at A004).

wrong." *Musk* v. *Altman*, No. 24-cv-04722-YGR, Dkt. 276 (N.D. Cal. Sept. 22, 2025) (App'x Tab 3 at A006).

B. Musk and his companies continue to use ephemeral messaging to avoid preserving relevant documents in advance of this litigation.

The Apple-OpenAI transaction at issue in this lawsuit was announced on June 10, 2024. That same day, Musk posted a series of public criticisms of the transaction, including threatening that "[i]f Apple integrates OpenAI at the OS level, then Apple devices will be banned at my companies."[3] Musk had thus already zeroed in on — and likely anticipated litigation about — the same integration that he alleges to be an antitrust violation in this action.

Even as Musk was focused on the Apple-OpenAI transaction that plaintiffs claim in this lawsuit caused Musk's companies grave harm, he continued to ensure that his employees used ephemeral messaging tools that would destroy evidence relevant to the impending case. This conduct has now been confirmed in a sworn declaration by xAI's former CFO submitted with this motion. The former CFO worked at xAI between April and July 2025 — the months immediately before the filing of plaintiffs' August 2025 complaint in this case.[4] The declaration describes xAI's use of ephemeral and "disappearing" messaging tools as "the default way to communicate within the company" during this time.[5] The former CFO was instructed to follow that practice by John Hering, an xAI investor and close personal friend of Musk, immediately upon being hired.[6] He states that "xAI's senior leaders communicated about business matters almost exclusively using

---

[3] Elon Musk (@elonmusk), X (June 10, 2024 4:35 PM), https://x.com/elonmusk/status/1800265431078551973?s=20 (App'x Tab 4 at A010).

[4] Decl. ¶ 3 (App'x Tab 5 at A013). The former CFO left xAI on July 25, 2025 and is now employed at OpenAI.

[5] *Id.* ¶ 4.

[6] *Id.*

the 'disappearing' messaging application Signal."[7] He "underst[ood] that most senior leaders, including Mr. Musk, encouraged widespread use of Signal for business communications."[8] The former CFO "observed many other employees, at all levels of the company, using Signal as a regular means of business communication."[9] As instructed, he personally "communicated with Mr. Musk about business matters exclusively over Signal and XChat," and Musk "set those messages to be automatically deleted within one week."[10] Subjects of his communications included "xAI's business strategy, financial performance, and operations," as well as "the performance of Grok (xAI's chatbot product) relative to OpenAI's and other competitors' product offerings."[11]

According to the declaration, the widespread and regular use of Signal and other disappearing messaging tools significantly reduced the amount of email sent and preserved at xAI. The former CFO explains that "[e]mail was used much less frequently at xAI than at any of the other companies [he] worked for in [his] twenty-five year career."[12] He "believe[d] that xAI's document retention practices were far outside the norm for a company of its size and prominence and not customary for a company subject to ongoing litigation-related document preservation requirements."[13]

---

7 *Id.*

8 *Id.* ¶ 5.

9 *Id.*

10 *Id.* ¶ 7.

11 *Id.* ¶¶ 6-7.

12 *Id.* ¶ 5.

13 *Id.*

Musk was personally involved in directing the use of ephemeral messaging. After X developed its own encrypted messaging service, XChat, with auto-delete capabilities, Musk "began directing xAI employees to use XChat, rather than Signal, to communicate on business matters."[14] Such xAI company communications over XChat "were typically deleted shortly after being sent or received pursuant to XChat's auto-delete settings."[15] The declaration is corroborated by Musk's public statements around the same time, which celebrated X's creation of XChat and its "vanishing messages" feature:[16]

xAI's policy and widespread practice of using disappearing messaging tools like Signal and XChat were put in place with the intent to deprive litigation adversaries of documents and communications.[17] While employed by xAI in 2025, the former CFO was "aware that xAI and Mr. Musk had sued OpenAI and some of its senior executives, including Sam Altman, and the litigation remained pending for the duration of [his] employment at xAI."[18] Notwithstanding the preservation obligations that the litigation imposed, the former CFO did "not recall ever having

---

14 *Id.* ¶ 6.

15 *Id.*

16 Elon Musk (@elonmusk), X (June 1, 2025 2:06 PM) (App'x Tab 2 at A004).

17 Decl. ¶ 5.

18 *Id.* ¶ 9.

been advised by anyone at xAI that [he] should preserve any documents or communications in connection with that pending litigation" and did "not recall ever being provided with a document preservation notice in connection with that pending litigation."[19] Based on the former CFO's "interactions with Mr. Musk," Musk "preferred to communicate over Signal or XChat, using retention settings of one week or less, to ensure that communications were not preserved."[20] And xAI employees calibrated their retention settings to match the sensitivity of the communication: The former CFO revealed that "the more sensitive the information that was shared at xAI, the shorter the duration of visibility of the message among executives."[21] xAI employees thus recognized the litigation sensitivity of particular communications and ensured that the most sensitive communications would be automatically deleted within the shortest amount of time.

Within weeks of when the former CFO left xAI, Musk made his intent to bring this suit public. In an X post on August 12, 2025, he claimed that Apple was engaged in an "unequivocal antitrust violation" and that he would take "immediate legal action."[22] Plaintiffs then filed this suit on August 25, 2025.

C. Plaintiffs evade their obligation to admit use of ephemeral messaging tools.

On November 6, OpenAI served discovery requests to ascertain whether plaintiffs destroyed relevant evidence through ephemeral messaging tools. OpenAI's Requests for Admission Nos. 23 and 24 seek admissions that, "since June 10, 2024, Plaintiffs' executives and employees" — including Musk — "have used Ephemeral Messaging Tools to send

---

19 *Id.*

20 *Id.* ¶ 8.

21 *Id.* ¶ 5.

22 Elon Musk (@elonmusk), X (Aug. 11, 2025 9:07 PM), https://x.com/elonmusk/status/1955073616996975095 (App'x Tab 6 at A018).

Communications concerning matters relevant to the claims asserted by Plaintiffs in the Complaint."[23] Messages sent by Musk and other senior executives would almost certainly discuss the state of xAI's business, xAI's ability to compete in the generative AI services market, the purported impact of ChatGPT's integration with Apple, and xAI's valuation, all of which bear directly on plaintiffs' claims of both liability and damages. Despite the clear importance of this information, on December 8, 2025, plaintiffs refused to respond to these requests for admission, invoking summary relevance objections.[24]

Challenged to justify their refusal to answer this simple question, plaintiffs served amended responses and objections on December 31, but their answer remained qualified and evasive. After reiterating their relevance objection, plaintiffs asserted that they are not currently aware of such communications and denied the requested admission on that basis. But by their nature and by design, communications sent by ephemeral messaging no longer *currently* exist. The response nowhere addressed the requested admission: whether plaintiffs *used* ephemeral messaging tools to send communications concerning matters relevant to plaintiffs' claims. And plaintiffs provided no indication that they conducted a reasonable inquiry into whether their executives and employees used ephemeral messaging in the past.

As of the filing of this motion and more than two months after OpenAI served document requests, the only nonpublic documents produced by plaintiffs are a handful of corporate policies. Plaintiffs have not produced a single nonpublic document concerning the substance of their

---

23 OpenAI's First Set of Requests for Admission Nos. 23-24 (App'x Tab 7 at A027).

24 Plaintiffs designated their initial responses to OpenAI's requests for admission as "outside counsel's eyes only" and their amended responses as "Confidential" on a wholesale basis. Accordingly, OpenAI describes the specific responses at issue on this motion, which do not reveal any confidential internal information of plaintiffs. OpenAI can provide the responses in full at the Court's request, either with a motion to seal or publicly if plaintiffs remove their confidentiality designation.

allegations or that OpenAI could use in its defense. Plaintiffs have produced no emails, no text messages, no Signal messages, and no XChat messages of any kind.

ARGUMENT

I. THE COURT SHOULD DEEM PLAINTIFFS' INADEQUATE RESPONSES ABOUT EPHEMERAL MESSAGING TO BE ADMISSIONS.

Fed. R. Civ. P. 36 governs Requests for Admission. It provides that "[i]f a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it." Fed. R. Civ. P. 36(a)(4). Plaintiffs purport to deny OpenAI's Requests, but predicate the denials on a lack of knowledge — a lack of current awareness of responsive communications. Under Rule 36, "[t]he answering party may assert lack of knowledge or information as a reason for failing to admit or deny *only if* the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny." *Id.* (emphasis added). Plaintiffs' responses fail this test. They provide no information about any inquiry that counsel conducted, including whether they contacted Musk and other senior executives. For a party complying with its discovery obligations, the Requests would not be difficult to answer directly. Had counsel discovered that xAI's executives and employees do not use ephemeral messaging as a matter of practice — despite Musk's public touting of such messaging and X's development of its own "disappearing" messaging service — plaintiffs could have simply said so.

Courts in this District have rejected similar attempts to deny requests for admission on the basis of insufficient knowledge. "[A] party cannot both claim insufficient knowledge to admit or deny a request and, on th[at] basis, deny it." *VeroBlue Farms USA Inc.* v. *Wulf*, 345 F.R.D. 406, 425 (N.D. Tex. 2021) (citing *Hawthorne* v. *Bennington*, 2020 WL 3884426, at *4 (D. Nev. July 8, 2020) ("A plain reading of the text shows that parties may not deny based on lack of knowledge.")).

An interpretation of Rule 36 under which "an answering party may deny a request based on a lack of knowledge . . . would render the provision requiring a reasonable inquiry superfluous," because "a party confronted with a lack of knowledge could merely deny the request and thereby avoid its duty to provide a reasonable inquiry." *Id.* Plaintiffs' denial on the ground they are currently unaware of responsive communications, without establishing the basis of their inquiry, does not satisfy plaintiffs' obligations under the Federal Rules.

Rule 36 empowers the Court to determine the sufficiency of an answer or objection and provide appropriate relief: "On finding that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served." Fed. R. Civ. P. 36(a)(6). Given plaintiffs' delays, deficient responses, and failure to identify any inquiry into the use of ephemeral messaging, the Court should deem plaintiffs to have admitted OpenAI's RFA Nos. 23 and 24. *See, e.g.*, *Alford* v. *State Parking Servs., Inc.*, 2015 WL 477267, at *2 (N.D. Tex. Feb. 5, 2015) (deeming noncompliant responses admissions); *CHU de Quebec - Universite Laval* v. *DreamScape Dev. Grp. Holdings, Inc.*, 2022 WL 1719405, at *9 (E.D. Tex. May 27, 2022). OpenAI reserves its right to seek fees and costs as Rule 37 provides. Fed. R. Civ. P. 37(c)(2); *Longoria* v. *County of Dallas*, 2016 WL 6893625, at *10 (N.D. Tex. Nov. 22, 2016).

II. PLAINTIFFS SPOLIATED RELEVANT COMMUNICATIONS ABOUT THE SUBJECT MATTER OF THIS LITIGATION.

Plaintiffs' use of ephemeral messaging tools undermines the judicial process and prejudices OpenAI's defense. "A federal court has the inherent power to sanction a party who has abused the judicial process." *Ashton* v. *Knight Transp., Inc.*, 772 F. Supp. 2d 772, 799 (N.D. Tex. 2011). "Spoliation of evidence is the destruction or the significant and meaningful alteration of evidence." *Van Winkle* v. *Rogers*, 82 F.4th 370, 374 (5th Cir. 2023). "The duty to preserve evidence is a duty

owed to the *court*, not to the party's potential adversary, hence, spoliation is considered an abuse of the judicial process." *Ashton*, 772 F. Supp. 2d at 800.

"A court may impose appropriate sanctions '[i]f a party with a duty to preserve evidence fails to do so and acts with culpability.'" *Manzanares* v. *El Monte Rents, Inc.*, 2026 WL 59763, at *3 (E.D. Tex. Jan. 7, 2026). "In the Fifth Circuit, the elements of spoliation are: (1) a duty to preserve the information; (2) a culpable breach of that duty; and (3) resulting prejudice to the innocent party." *Carter* v. *Burlington N. Santa, LLC*, 2016 WL 3388707, at *4 (N.D. Tex. Feb. 8, 2016). Rule 37(e) further provides that, upon a finding of prejudice, the Court may order "measures no greater than necessary to cure the prejudice," and upon a finding of "intent to deprive another party of the information's use in the litigation," the Court may also:

> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

Fed. R. Civ. P. 37(e). Each of these elements is met in this case.

A. Plaintiffs had a duty to preserve communications about xAI's business and competition in the generative AI market.

Plaintiffs had "an obligation to preserve, through 'reasonable steps,' electronic evidence" at issue in ephemeral messages sent after the announcement of the Apple-OpenAI transaction. *Calsep A/S* v. *Dabral*, 84 F.4th 304, 310 (5th Cir. 2023) ("Failure to do so is . . . sanctionable by 'dismiss[al]' or 'default judgment.'"). "The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." *Lopez* v. *Kempthorne*, 684 F. Supp. 2d 827, 890 (S.D. Tex. 2010). As the parties who brought this litigation, plaintiffs necessarily anticipated it — and knew that they would need to preserve relevant evidence — well before they filed the

complaint. Plaintiffs had an unambiguous duty to preserve Signal, XChat and other ephemeral communications at that time. By June 10, 2024, Musk was already attacking the Apple-OpenAI transaction at the center of plaintiffs' case, and his public criticism and threats of litigation carried into 2025. The declaration of xAI's former CFO makes clear, however, that in the months leading up to plaintiffs' filing of this lawsuit, Musk and his top lieutenants were using, and insisting their subordinates use, ephemeral messaging for business purposes, including to discuss xAI's business strategy, financial performance, operations, and the performance of Grok relative to other AI chatbots — all relevant to plaintiffs' claims of liability and harm in this case.[25]

B. Plaintiffs engaged in culpable conduct.

Plaintiffs' breach of their preservation obligation was "culpable." *Carter*, 2016 WL 3388707, at *4. As the Fifth Circuit has held, a party acts in "[b]ad faith" for purposes of spoliation when it engages in "destruction for the purpose of hiding adverse evidence." *Van Winkle*, 82 F.4th at 375; *see also Ashton*, 772 F. Supp. 2d at 800 ("The term 'bad faith' has been described as conduct involving 'fraudulent intent and a desire to suppress the truth.'"). That standard is satisfied. As xAI's former CFO states, Musk "preferred to communicate over Signal or XChat, using retention settings of one week or less, to ensure that communications were not preserved."[26] The declaration indicates that this conduct occurred during his tenure at xAI from April through July 2025, at the very time when Musk and plaintiffs were aware of the Apple-OpenAI agreement that led them to file this litigation and only a month before plaintiffs filed their complaint.[27] This impending litigation was in addition to other litigation that Musk had already brought against

---

25 Decl. ¶¶ 5-7.

26 *Id.* ¶ 8.

27 *Id.* ¶ 3.

OpenAI by that time, creating independent preservation obligations for his companies, including X and xAI. Moreover, as the declaration also makes clear, "xAI's document retention practices were far outside the norm for a company of its size and prominence and not customary for a company subject to ongoing litigation-related document preservation requirements."[28] The widespread adoption of these practices and careful calibration of retention settings to the sensitivity of the communication even while xAI was actively engaged in preparing for litigation each confirm that the deletion of these messages was intentional. So was the result: to minimize preserved documents and deprive adversaries in general, and OpenAI specifically, of the communications.

Federal courts have recognized that this kind of misuse of ephemeral messaging tools while subject to preservation obligations constitutes "intentional, bad-faith spoliation of evidence" warranting sanctions. *Herzig* v. *Arkansas Found. for Med. Care, Inc.*, 2019 WL 2870106, at *5 (W.D. Ark. July 3, 2019). A party's "use of ephemeral messaging for relevant communications after a duty to preserve has arisen may be particularly problematic, as it would have the potential to deprive adversaries and the court of relevant evidence." *Fed. Trade Comm'n* v. *Noland*, 2021 WL 3857413, at *7 (D. Ariz. Aug. 30, 2021) (quoting The Sedona Conference, *The Sedona Conference Primer on Social Media, Second Edition*, 20 SEDONA CONF. J. 1, 90-91 (2019)). Musk's ongoing use of ephemeral messaging tools supports an inference of intentional, culpable conduct all the more because he is not only a serial litigant but also a recidivist spoliator already on notice of the deficiencies of his (and his controlled companies') discovery practices in multiple courts. "[W]hen a party not only fails to meet his obligation to preserve evidence, but does so intentionally, and, as here, affirmatively destroys evidence *multiple* times, the sanction must be severe, as civil litigants must know that actions such as these will not be tolerated, lest more parties

---

[28] *Id.* ¶ 5.

engage in them." *Balancecxi, Inc.* v. *Int'l Consulting*, 2020 WL 6886258, at *13 (W.D. Tex. Nov. 24, 2020); *Calsep*, 84 F.4th at 317 (more severe sanction justified by "a pattern of repeated violations").

C. OpenAI has suffered prejudice because of plaintiffs' spoliation.

When, as here, "'a party acted with the intent to deprive,' Rule 37(e)(2) 'does not include a requirement that the court find prejudice to the party deprived of the information.'" *BHI Energy I Power Servs. LLC* v. *KVP Holdings, LLC*, 730 F. Supp. 3d 308, 322 (N.D. Tex. 2024). But the prejudice element is readily satisfied here at any rate.

Because of plaintiffs' spoliation, OpenAI is deprived of contemporaneous communications from plaintiffs' executives and employees regarding xAI's ability to compete with OpenAI, the absence of any effect or harm to plaintiffs from the non-exclusive integration between ChatGPT and Apple, and Plaintiffs' improper purpose for bringing this suit. *Calsep*, 84 F.4th at 314 (affirming finding of prejudice where "deletions and discovery violations harmed [party's] ability to litigate its claims"). Absent judicial relief, OpenAI will be disadvantaged in defending plaintiffs' claims and will be forced to prepare expert reports and examine key witnesses, including xAI's senior executives and advisors, at deposition and trial without the benefit of the main form of communications that xAI's senior executives used to discuss relevant business matters.

D. OpenAI is entitled to an appropriate remedy, including an order barring further spoliation.

"Courts have broad discretion in crafting a remedy that is proportionate to both the culpable conduct of the spoliating party and resulting prejudice to the innocent party." *Ashton*, 772 F. Supp. 2d at 801. "[A]n appropriate sanction should (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful

destruction of evidence by the opposing party." *Id.* The following remedies are in order in this case:

(1) The Court should issue an order requiring plaintiffs and their executives to immediately cease use of Signal, XChat, or any other ephemeral messaging tools for business purposes, whether by disabling any "disappearing" features or otherwise preserving such communications in full. The Court's order should "prohibit[] the destr[uction] [of] any potentially relevant evidence, including electronically stored information." *Calsep*, 84 F.4th at 309; *see also Gilscot-Guidroz Int'l Co.* v. *Milek*, 2024 WL 3011013, at *11 (E.D. La. June 3, 2024) (ordering defendant to "preserve all evidence that may be relevant to [plaintiff]'s claims and not delete . . . communications (i.e., email, voicemail, text, or instant messages)"). The order should also require Plaintiffs to certify their compliance. *See Am. Oversight* v. *Hegseth*, No. 1:25-cv-00883, Minute Order (D.D.C. Mar. 27, 2025) (requiring preservation of Signal communications and requiring "a Status Report with declarations [from the spoliating parties] setting forth the steps that they have taken to implement such preservation") (App'x Tab 8 at A035).

(2) The Court should order tailored prompt discovery of plaintiffs necessary to evaluate the extent of their ephemeral messaging use. Federal courts in Texas and elsewhere have found good cause for such expedited discovery "[g]iven . . . the risk of spoliation or destruction of evidence." *Allstate Ins. Co.* v. *Hineman*, 2017 U.S. Dist. LEXIS 113071, at *2-3 (S.D. Tex. July 20, 2017) (App'x Tab 9 at A044); *see also Roberts* v. *Canadian Pac. Ry. Ltd.*, 2007 WL 118901, at *1-2 (D. Minn. Jan. 11, 2007) (ordering deposition of the "computer forensics expert" retained "to investigate whether electronic data was destroyed, and if so, whether any deleted material can be retrieved"). In parallel with discovery into plaintiffs' spoliation, the Court should order "the appointment of a neutral forensic inspector . . . to investigate th[e] destruction and a special master

to resolve any disputes related to [the] investigation." *WeRide Corp.* v. *Kun Huang*, 2020 WL 1967209, at *3 (N.D. Cal. Apr. 24, 2020). Courts have relied on such inquiries in determining the appropriate sanctions for spoliation. *See, e.g.*, *id.* at *5.

(3) Once compiled, this record will position the Court to evaluate whether and what further remedies are in order here. Courts in similar situations have often imposed substantive sanctions ranging from adverse inference instructions to terminating the litigation. *See* Fed. R. Civ. P. 37(e)(2) (empowering court to "dismiss the action or enter a default judgment" where "the party acted with the intent to deprive another party of the information's use in the litigation"); *Calsep*, 84 F.4th at 308 (affirming case-terminating sanctions and damages award following destruction of electronic evidence); *Balancecxi*, 2020 WL 6886258, at *16 (recommending default judgment as spoliation sanction); *WeRide*, 2020 WL 1967209, at *13 (issuing terminating sanctions after CEO "introduced" ephemeral messaging app to company and "instructed [them] that they 'better' use it"); *Avenu Insights & Analytics, LLC* v. *Kamel*, 2022 WL 16827594, at *5 (E.D. Tex. Oct. 4, 2022) (party "entitled to an adverse inference jury instruction to be determined by the Court at the time of trial").

III. EXPEDITED BRIEFING IS NECESSARY TO RESOLVE THESE ISSUES.

Given the expedited trial schedule, the parties' urgent need to identify the scope of the document destruction and prevent any ongoing losses, and the Court's strong interest in protecting the integrity of the record, expedited briefing is warranted.

CONCLUSION

For the foregoing reasons, OpenAI's motion to compel and for an appropriate remedy should be granted, and the Court should order expedited briefing.

Dated: February 2, 2026

Respectfully submitted,

/s/ Michael K. Hurst

Michael K. Hurst
mhurst@lynnllp.com
Texas Bar No. 10316310
Chris W. Patton
cpatton@lynnllp.com
Texas Bar No. 24083634
Andy Kim
akim@lynnllp.com
Texas Bar No. 24136638
LYNN PINKER HURST & SCHWEGMANN LLP
2100 Ross Avenue, Suite 2700
Dallas, TX 75201
(214) 981-3800 (Telephone)
(214) 981-3839 (Facsimile)

William Savitt (N.D. Tex. Bar No. 2900058NY)
WDSavitt@wlrk.com
Graham W. Meli (*pro hac vice* application forthcoming)
GWMeli@wlrk.com
Kevin S. Schwartz (N.D. Tex. Bar No. 4564241NY)
KSchwartz@wlrk.com
Stephen D. Levandoski (*pro hac vice*)
SDLevandoski@wlrk.com
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
(212) 403-1000 (Telephone)
(212) 403-2000 (Facsimile)

Attorneys for Defendants OpenAI Foundation (f/k/a OpenAI, Inc.), OpenAI, L.L.C., and OpenAI OpCo, LLC

CERTIFICATE OF SERVICE

I certify that on February 2, 2026, I served the foregoing document electronically in accordance with the Federal Rules of Civil Procedure.

/s/ Michael K. Hurst
Michael K. Hurst