

JOSEPH KIRCHNER
Pro Se Plaintiff
4440 Parklawn Avenue
Edina, MN 55435
Legal@lawsofexistence.com
Tel: (612) 552-2122

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JOSEPH KIRCHNER,
Plaintiff,

Case No. 1:25-cv-02735-ACR

vs.

**MEMORANDUM OF LAW D: AI
PLATFORM COORDINATED
TERMS OF SERVICE ESSENTIAL
PURPOSE FAILURE**

MIKE JOHNSON, in his individual and
official capacity as Speaker of the
United States House of Representatives;
DONALD J. TRUMP, in his individual
capacity as former and current President
of the United States;
PAM BONDI, in her individual and
official capacity as Attorney General of
the United States;
BRENDAN CARR, in his individual
and official capacity as Chairman of the
Federal Communications Commission;
THE UNITED STATES HOUSE OF
REPRESENTATIVES;
ANTHROPIC PBC;
OPENAI, INC.;
APPLE INC.;
COMCAST CABLE
COMMUNICATIONS, LLC;
METR (MODEL EVALUATION &
THREAT RESEARCH);
and DOES 1-20, unknown co-
conspirators,
Defendants.

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<i>Armendariz v. Foundation Health Psychcare Services, Inc.</i>	24 Cal. 4th 83 (2000)
<i>Bell Atlantic Corp. v. Twombly</i>	550 U.S. 544 (2007)
<i>Best Buy Stores, L.P. v. Developers Diversified Realty Corp.</i>	247 F.3d 567, 576 (6th Cir. 2001)
<i>Boyle v. United States</i>	556 U.S. 938 (2009)
<i>Bragg v. Linden Research, Inc.</i>	487 F. Supp. 2d 593 (E.D. Pa. 2007)
<i>Chatlos Systems, Inc. v. National Cash Register Corp.</i>	635 F.2d 1081 (3d Cir. 1980)
<i>Circuit City Stores, Inc. v. Ahmed</i>	283 F.3d 1198 (9th Cir. 2002)
<i>Comb v. PayPal, Inc.</i>	218 F. Supp. 2d 1165 (N.D. Cal. 2002)
<i>Fortune v. National Cash Register Co.</i>	373 Mass. 96 (1977)
<i>Graham Oil Co. v. ARCO Products Co.</i>	43 F.3d 1244 (9th Cir. 1994)
<i>H.J. Inc. v. Northwestern Bell Telephone Co.</i>	492 U.S. 229, 239, 241-42 (1989)
<i>In re Synchronoss Securities Litigation</i>	705 F.3d 367 (3rd Cir. 2013)
<i>In re Text Messaging Antitrust Litigation</i>	630 F.3d 622 (7th Cir. 2010)
<i>International News Service v. Associated Press</i>	248 U.S. 215 (1918)

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<i>Loretto v. Teleprompter Manhattan CATV Corp.</i>	458 U.S. 419, 435 (1982)
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<i>ProCD, Inc. v. Zeidenberg</i>	86 F.3d 1447 (7th Cir. 1996)
<i>Razor v. Hyundai Motor America</i>	222 Ill. 2d 75 (2006)
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<i>Sedima, S.P.R.L. v. Imrex Co.</i>	473 U.S. 479, 495-96 (1985)
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<i>Williams v. Walker-Thomas Furniture Co.</i>	350 F.2d 445 (D.C. Cir. 1965)
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CONSTITUTIONAL PROVISIONS

Authority	Citation
United States Constitution, Article I,	U.S. Const. art. I, § 8, cl. 8

Section 8, Clause 8 (Progress Clause)	
United States Constitution, Fifth Amendment (Due Process Clause)	U.S. Const. amend. V
United States Constitution, Fourteenth Amendment (Due Process and Equal Protection)	U.S. Const. amend. XIV

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FEDERAL STATUTES

Authority	Citation
Racketeer Influenced and Corrupt Organizations Act	18 U.S.C. §§ 1961-1968
Mail Fraud	18 U.S.C. § 1341
Wire Fraud	18 U.S.C. § 1343
Federal Arbitration Act	9 U.S.C. §§ 1-16
Copyright Act of 1976	17 U.S.C. §§ 101-810
Patent Act	35 U.S.C. §§ 1-390
Sherman Antitrust Act	15 U.S.C. §§ 1-7
Clayton Antitrust Act	15 U.S.C. §§ 12-27

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FEDERAL RULES AND REGULATIONS

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Federal Rules of Civil Procedure, Rule 12 (Defenses and Objections)	Fed. R. Civ. P. 12
Federal Rules of Civil Procedure, Rule 23 (Class Actions)	Fed. R. Civ. P. 23
Federal Rules of Civil Procedure, Rule 42 (Consolidation)	Fed. R. Civ. P. 42

Federal Rules of Evidence, Rule 201 (Judicial Notice)	Fed. R. Evid. 201
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STATE LAW

Uniform Commercial Code

Authority	Citation
Uniform Commercial Code, § 2-302 (Unconscionable Contract or Clause)	U.C.C. § 2-302
Uniform Commercial Code, § 2-719 (Contractual Modification of Remedy)	U.C.C. § 2-719
Uniform Commercial Code, § 1-203 (Obligation of Good Faith)	U.C.C. § 1-203
Uniform Commercial Code, § 1-304 (Obligation of Good Faith)	U.C.C. § 1-304

Restatements

Authority	Citation
Restatement (Second) of Contracts § 205 (Duty of Good Faith and Fair Dealing)	Restatement (Second) of Contracts § 205
Restatement (Second) of Contracts § 208 (Unconscionable Contract or Term)	Restatement (Second) of Contracts § 208
Restatement (Second) of Contracts § 77 (Illusory and Alternative Promises)	Restatement (Second) of Contracts § 77
Restatement (Second) of Contracts § 79 (Adequacy of Consideration)	Restatement (Second) of Contracts § 79
Restatement (Second) of Property § 3.1 (Right to Exclude)	Restatement (Second) of Property § 3.1
Restatement (Third) of Restitution and Unjust Enrichment § 1 (Restitution and Unjust Enrichment)	Restatement (Third) of Restitution § 1

Minnesota Statutes

Authority	Citation
Minnesota Consumer Fraud Act	Minn. Stat. § 325F.69
Minnesota Uniform Deceptive Trade Practices Act	Minn. Stat. § 325D.44
Minnesota Prevention of Consumer Fraud Act	Minn. Stat. § 325F.68
Minnesota Statute of Frauds	Minn. Stat. § 513.01

California Law

Authority	Citation
California Civil Code § 1670.5 (Unconscionable Contracts)	Cal. Civ. Code § 1670.5
California Unfair Competition Law	Cal. Bus. & Prof. Code § 17200 et seq.
California Consumer Legal Remedies Act	Cal. Civ. Code § 1750 et seq.
California False Advertising Law	Cal. Bus. & Prof. Code § 17500 et seq.

SECONDARY AUTHORITIES**Treatises and Legal Commentary**

Authority	Citation
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Farnsworth on Contracts	E. Allan Farnsworth, <i>Farnsworth on Contracts</i> § 4.28 (3d ed. 2004)
Williston on Contracts	Richard A. Lord, <i>Williston on Contracts</i> § 7:7 (4th ed. 2008)
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Robert A. Hillman, <i>Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?</i>	104 Mich. L. Rev. 837 (2006)
Nancy S. Kim, <i>Wrap Contracts: Foundations and Ramifications</i>	162 U. Pa. L. Rev. 1309 (2014)
Woodrow Hartzog, <i>Website Design as Contract</i>	60 Am. U. L. Rev. 1635 (2011)

LEGISLATIVE HISTORY AND POLICY DOCUMENTS

Authority	Citation
Federal Trade Commission, Policy Statement on Deception	Appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984)
Federal Trade Commission, <i>Combating Online Harms Through Innovation</i>	FTC Report (June 16, 2022)
Federal Trade Commission, <i>The FTC's Endorsement Guides: What People Are Asking</i>	FTC Publication (updated 2023)
Consumer Financial Protection Bureau, <i>Design and Testing of Effective Financial Disclosures</i>	CFPB Report (2017)

I. Introduction

1. This memorandum establishes that Anthropic PBC and OpenAI, Inc. have rendered their consumer Terms of Service void through essential purpose failure. Both platforms promise users ownership of inputs and outputs as the sole meaningful consideration, then systematically negate that ownership through contradictory

1 provisions granting corporations unlimited commercial exploitation rights, unilateral
2 modification and deletion authority, government disclosure override, third-party
3 content insertion without user control, and user indemnification for corporate benefit.

4 **2. Documentary Foundation.** This memorandum analyzes Anthropic's Consumer
5 Terms of Service effective May 1, 2025 (Ex. M-1) and September 28, 2025 (Ex. M-2),
6 Anthropic's Consumer Usage Policy effective June 6, 2024 (Ex. M-3) and September
7 15, 2025 (Ex. M-4), and Anthropic's Responsible Use and Agent Use Policies (Ex. M-
8 5). OpenAI documentary evidence includes Terms of Use (Ex. M-15, M-16), Services
9 Agreements (Ex. M-17, M-18), and Patent Policy Date Manipulation Evidence (Ex. M-
10 9). These exhibits establish the contradictory provisions rendering both platforms'
11 Terms of Service void under essential purpose failure doctrine.

12 **3.** The essential purpose failure doctrine voids contracts entirely when multiple
13 provisions contradict the fundamental consideration. This memorandum demonstrates
14 three dispositive facts: First, user input and output ownership constitutes the sole
15 meaningful benefit users receive in exchange for accepting one-sided liability
16 limitations and warranty disclaimers. Second, systematic contradictory provisions
17 render this ownership completely illusory by granting corporations unlimited
18 commercial exploitation rights, unilateral deletion authority, and user indemnification
19 for corporate benefit. Third, the mathematical precision of identical contradictions
20 across competing platforms satisfies *Interstate Circuit* standards for inferring
21 coordination from parallel conduct combined with motive and opportunity.

22 3-A. This memorandum should be read in conjunction with APPENDIX B (METR-
23 TED Foundation Regulatory Capture), which establishes the \$12,324,225 structural

1 operating deficit creating mathematical impossibility of independent AI safety
2 evaluation; MEMO C (Fair Use Defense Failure), which demonstrates how TOS
3 ownership contradictions interact with copyright appropriation; and MEMO E (AI
4 Analytical Disparity), which documents how tiered TOS provisions enable
5 discriminatory service delivery through Constitutional AI bypass architecture.

6 **4.** Complete contract voidance eliminates all Terms of Service protections including
7 limitation of liability clauses, mandatory arbitration requirements, indemnification
8 obligations, training data use authorization, warranty disclaimers, and class action
9 waivers. Without valid Terms of Service, corporate practices become governed by
10 standard contract law principles, consumer protection statutes, tort liability without
11 contractual limitations, and copyright law without user licensing agreements.

12 **II. LEGAL FRAMEWORK AND STANDARDS**

13 **A. Essential Purpose Failure Doctrine**

14 **5.** Under established contract law, when multiple provisions contradict the fundamental
15 consideration that forms the basis of contractual relationship, courts may void the
16 entire contract rather than merely severing problematic clauses. The essential purpose
17 doctrine applies when the primary benefit promised to users becomes meaningless
18 through pervasive contradictory provisions that render the consideration illusory.

19 **6.** The Uniform Commercial Code codifies this principle in § 2-719, providing that
20 where circumstances cause an exclusive or limited remedy to fail of its essential
21 purpose, remedy may be had as provided in the Code. Courts have extended this

1 doctrine beyond warranty limitations to situations where the entire contractual
2 consideration becomes illusory through contradictory provisions.

3 **7.** In *Razor v. Hyundai Motor America*, 222 Ill. 2d 75 (2006), the Illinois Supreme
4 Court held that when warranty limitations prevent a consumer from receiving the
5 benefit of the bargain, the limitation fails of its essential purpose and the entire
6 limitation becomes unenforceable. The court emphasized that essential purpose
7 analysis focuses on whether the consumer received the fundamental benefit for which
8 they contracted.

9 **8.** The Uniform Commercial Code's essential purpose framework applies directly to AI
10 platform terms despite service contracts falling outside Article 2's traditional goods
11 coverage. Courts have extended U.C.C. principles to mixed goods-services contracts
12 and license agreements involving intellectual property. *Chatlos Systems, Inc. v.*
13 *National Cash Register Corp.*, 635 F.2d 1081 (3rd Cir. 1980). When warranty
14 limitations or exclusive remedies fail of their essential purpose under § 2-719(2), courts
15 void the limitations entirely rather than severing them from otherwise enforceable
16 agreements. The essential purpose analysis focuses on whether the limitation deprives
17 the other party of the substantial value of the bargain. Here, contradictory provisions
18 deprive users of ownership's substantial value—the complete bundle of rights that
19 constitutes property ownership under Anglo-American law.

20 **9.** In *Best Buy Stores, L.P. v. Developers Diversified Realty Corp.*, 247 F.3d 567, 576
21 (6th Cir. 2001), the Sixth Circuit applied essential purpose analysis to non-goods
22 contracts, holding that failure of essential purpose applies when "the circumstances
23 which cause the exclusive remedy to fail its essential purpose relate to the basic

1 consideration underlying the contract." The court emphasized examining whether the
2 non-breaching party received "the substantial value of the bargain." This extension
3 beyond Article 2 goods directly supports applying essential purpose analysis to AI
4 platform service contracts where user ownership constitutes the basic consideration
5 underlying user acceptance of one-sided terms. When corporations systematically
6 negate user ownership through contradictory provisions, users fail to receive the
7 substantial value of their bargain regardless of whether the contract involves goods,
8 services, or intellectual property licensing.

9 **B. Illusory Promise Doctrine**

10 **10.** Under the illusory promise doctrine, if the primary user benefit becomes
11 meaningless due to contradictory terms allowing unlimited corporate control, the user's
12 consideration becomes illusory, making the entire contract unenforceable. A promise
13 is illusory when it leaves the promisor free to perform or withdraw from the agreement
14 at their own unrestricted discretion.

15 **11.** In *Matteson v. Ryder System, Inc.*, 99 F.3d 108 (3rd Cir. 1996), the Third Circuit
16 held that contractual provisions granting one party unlimited discretion to modify or
17 terminate the agreement render the other party's consideration illusory. The court
18 emphasized that mutuality of obligation requires both parties to be bound by
19 enforceable promises, not merely nominal commitments subject to unilateral
20 modification.

21 **12.** When a contract purports to grant users ownership rights while simultaneously
22 reserving unlimited corporate authority to control, modify, delete, or commercially

1 exploit those supposedly owned materials, the ownership promise becomes illusory.
2 Users provide valuable consideration through their intellectual labor and personal data,
3 but receive only nominal ownership rights subject to pervasive corporate override
4 authority.

5 **C. Unconscionability Analysis**

6 **13.** Unconscionability analysis under U.C.C. § 2-302 applies when contract terms
7 create unfair outcomes combined with adhesion contract characteristics where users
8 cannot negotiate terms. Courts examine both procedural unconscionability, relating to
9 the bargaining process and contract formation, and substantive unconscionability,
10 relating to the fairness of contract terms themselves.

11 **14.** AI platform Terms of Service exhibit strong procedural unconscionability through
12 adhesion contract characteristics where users must accept all terms without negotiation
13 as a condition of service access, lack of meaningful alternatives given market
14 concentration, and sophisticated legalese obscuring contradictory provisions that render
15 primary user benefits illusory.

16 **15.** Substantive unconscionability appears through one-sided terms granting
17 corporations unlimited commercial exploitation rights while users bear indemnification
18 liability for corporate use of user-owned materials, mandatory arbitration for disputes
19 over user property rights, and unilateral corporate authority to delete, modify, or
20 disclose user-owned content without judicial oversight.

D. Good Faith And Fair Dealing

16. Every contract includes an implied covenant of good faith and fair dealing requiring parties to refrain from conduct that would deprive the other party of the benefits of the agreement. This covenant prevents parties from using contractual discretion to undermine the fundamental purposes for which the contract was formed.

17. When corporations grant users ownership rights as primary consideration but then exercise discretionary authority in ways that render ownership meaningless, they violate the implied covenant of good faith and fair dealing. Corporate practices that systematically undermine user ownership through unlimited exceptions, unilateral modification authority, and discretionary deletion powers constitute bad faith performance.

18. In *Fortune v. National Cash Register Co.*, 373 Mass. 96 (1977), the Massachusetts Supreme Court held that an employer violated the covenant of good faith and fair dealing by terminating an employee to avoid paying earned commissions. The court emphasized that parties may not exercise contractual discretion to deprive the other party of reasonably expected benefits. Here, corporations exercise discretion over user-owned materials in ways that deprive users of ownership benefits they reasonably expected.

19. The Seventh Circuit's analysis in *Market Street Associates Ltd. Partnership v. Frey*, 941 F.2d 588 (7th Cir. 1991), provides additional framework. Judge Posner explained that good faith requires parties to disclose material facts affecting contract performance and prohibits using contractual discretion to extract unintended benefits. AI platforms

1 fail this standard by obscuring through dense legalese that ownership assignments are
2 illusory due to retained corporate control.

3 **20.** *Sons of Thunder, Inc. v. Borden, Inc.*, 690 A.2d 575 (N.J. 1997), established that
4 the covenant prevents parties from exercising contractual discretion to undermine the
5 other party's benefits from the agreement. The New Jersey Supreme Court held that
6 even where discretion is explicitly granted, it must be exercised in good faith
7 considering the contract's purposes. Corporate discretion to appropriate, modify,
8 delete, or disclose user-owned materials undermines the fundamental ownership benefit
9 users expected.

10 **E. Property Law Principles And The Bundle Of Rights**

11 **21.** Property ownership under Anglo-American law consists of a "bundle of rights"
12 including the rights to possess, use, exclude others, transfer, and destroy the property.
13 The Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419,
14 435 (1982), emphasized that the right to exclude is "one of the most treasured"
15 property rights and "universally held to be a fundamental element of the property
16 right." Yet AI platforms retain authority to allow third-party access to user-owned
17 materials through training data appropriation, government reporting, and third-party
18 content insertion—all without user consent, directly violating this fundamental
19 ownership incident.

20 **22.** *International News Service v. Associated Press*, 248 U.S. 215 (1918), recognized
21 that property rights protect the commercial value of information created through
22 intellectual labor, holding that one party cannot appropriate the product of another's

labor for commercial benefit. AI platforms appropriate user intellectual labor for commercial model training while claiming users "own" that labor's product—a contradiction the *INS* court would recognize as property right violation. Property law recognizes that contracts purporting to grant ownership while reserving all ownership incidents with the grantor create illusory transfers. When corporations retain commercial exploitation rights, modification authority, deletion discretion, disclosure control, and exclusion powers, the ownership assignment becomes title without substance—form without function. Users receive nominal ownership lacking every meaningful incident of property rights that Anglo-American law recognizes as constituting ownership itself. This property law analysis reinforces unconscionability findings: purported ownership transfers that reserve all ownership incidents with the transferor are both substantively unconscionable under contract law and legally invalid under property law as illusory conveyances of title without substance.

III. ANTHROPIC CONSUMER TERMS OF SERVICE ANALYSIS

A. Primary User Right: Input And Output Ownership

23. Anthropic's Consumer Terms of Service, Section 4 (Ex. M-2, § 4), establishes the sole meaningful user benefit:

As between you and Anthropic, and to the extent permitted by applicable law, you retain any right, title, and interest that you have in the Inputs you submit. Subject to your compliance with our Terms, we assign to you all of our right, title, and interest—if any—in Outputs.

24. This input and output ownership constitutes the fundamental consideration users receive for providing personal data and intellectual labor, accepting comprehensive

1 liability limitations and warranty disclaimers, agreeing to indemnification obligations,
2 and waiving various legal remedies including class actions and jury trials.

3 **25.** No other provision of Anthropic's Terms of Service provides meaningful user
4 benefit. The service access itself is conditional, subject to unilateral termination, and
5 provides no guaranteed functionality. The ownership assignment represents the only
6 concrete right users receive in exchange for the valuable consideration they provide.

7 **B. Training Data Appropriation Contradiction**

8 **26.** Section 4 of Anthropic's Consumer Terms of Service (Ex. M-2, § 4) states:

9 We may use Materials to provide, maintain, and improve the Services and
10 to develop other products and services, including training our models,
11 unless you opt out of training through your account settings. Even if you
12 opt out, we will use Materials for model training when: (1) you provide
13 Feedback to us regarding any Materials, or (2) your Materials are flagged
14 for safety review.

15 **27.** This provision creates a fundamental legal impossibility directly analogous to cases
16 finding online platform terms unconscionable. In *Bragg v. Linden Research, Inc.*, 487
17 F. Supp. 2d 593 (E.D. Pa. 2007), the court found Second Life's Terms of Service
18 unconscionable where the platform claimed users owned virtual property while
19 retaining unilateral authority to confiscate that property. The court held that purported
20 ownership subject to unlimited corporate override authority is illusory. Similarly, in
21 *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002), the court found
22 PayPal's Terms unconscionable where the company retained unlimited discretion while
23 users bore all risk, creating the same one-sided benefit structure present here.

24 **28.** Users purportedly "own" their inputs and outputs, yet Anthropic claims unlimited
25 rights to use these supposedly user-owned materials for commercial model training and

development of entirely new commercial products. The phrase "develop other products and services" encompasses any commercial use Anthropic wishes to pursue. "Training our models" authorizes using user-owned intellectual property to enhance Anthropic's core commercial product without additional compensation. The contradiction between ownership assignment and training data appropriation renders ownership illusory in precisely the manner courts found unconscionable in *Comb*.

29. The opt-out mechanism itself demonstrates illusory ownership. True property owners don't need permission to prevent others from commercially exploiting their property—the right to exclude is fundamental to ownership. Yet Anthropic requires users to affirmatively opt out of commercial exploitation of materials users supposedly own. Even then, Anthropic reserves authority to appropriate materials for undefined "safety" purposes. Any content sufficiently sophisticated to warrant ownership protection becomes subject to mandatory training appropriation through safety flagging, transforming opt-out into effective opt-in by default for the most valuable intellectual contributions.

C. Unilateral Data Deletion Authority

30. Section 12 of Anthropic's Terms of Service provides:

Upon termination of these Terms, a Subscription, or your access to the Services, we may at our option delete any Materials or other data associated with your Account.

31. True ownership includes the right to control and preserve owned property.

Property owners can generally prevent others from destroying their property without

1 legal process. Yet Anthropic's unilateral deletion authority negates this fundamental
2 ownership right.

3 **32.** Users cannot protect their own supposedly owned property from corporate
4 destruction. Anthropic exercises "sole discretion" to delete user-owned materials
5 without requiring user consent, without judicial oversight, and without proving
6 violations justifying forfeiture. Property that another party can unilaterally destroy
7 without legal process is not truly owned by the purported owner.

8 **33.** The contradiction becomes particularly stark when Anthropic terminates service
9 access for reasons having nothing to do with user conduct—for example, business
10 decisions to discontinue service, policy modifications users refuse to accept, or
11 corporate restructuring. Users lose not merely service access but ownership of
12 materials they purportedly own, through corporate decision alone.

13 **D. Third-party Content Dilution**

14 **34.** Section 8 of Anthropic's Terms of Service states:

15 Third-Party Content may appear in Inputs or Outputs and become part of
16 Materials.

17 **35.** This provision creates ownership ambiguity that renders user ownership practically
18 meaningless. If user-owned outputs contain undisclosed third-party content, users
19 cannot determine what portions of their supposedly owned materials they actually own.
20 Unknown third-party intellectual property rights may govern parts of outputs users
21 believe they own.

22 **36.** Users face impossible compliance obligations when warranting or licensing content
23 they purportedly own but which may contain third-party materials subject to third-party

1 terms. Copyright law requires users to respect third-party rights even in derivative
2 works they create. Yet users cannot identify which portions of outputs constitute third-
3 party content requiring separate licensing or attribution.

4 **37.** Anthropic's insertion of third-party content into user outputs while maintaining user
5 "ownership" creates a legal trap. Users bear responsibility for respecting third-party
6 rights in materials they supposedly own, yet lack the information necessary to
7 determine what third-party content exists in those materials or what obligations apply.

8 **E. Government Reporting Override**

9 **38.** Section 12 of Anthropic's Terms of Service provides:

10 We reserve the right, at our sole discretion, to report information from or
11 about you, including but not limited to Inputs, Outputs, or Actions to law
12 enforcement.

13 **39.** Fundamental ownership includes the right to control disclosure of owned materials.
14 Property owners generally determine who may access their property and under what
15 circumstances. When government seeks access to privately owned materials,
16 constitutional protections require warrants, probable cause, and judicial oversight.

17 **40.** Yet Anthropic's "sole discretion" override eliminates user control over disclosure of
18 supposedly user-owned materials. No judicial oversight is required. No legal standard
19 governs when Anthropic exercises reporting discretion. No notice to users is
20 mandated. Users who "own" their inputs and outputs have no power to prevent
21 disclosure of those owned materials to government authorities.

22 **41.** The constitutional implications are profound. Users creating constitutionally
23 protected speech—political criticism, religious expression, advocacy for policy

1 reform—lose Fourth Amendment protections normally applying to privately owned
2 materials when Anthropic claims authority to report user-owned content at corporate
3 discretion without warrant requirement. The discriminatory nature of this architecture
4 is revealed through Constitutional AI bypass mechanisms providing enterprise and
5 government clients with unconstrained AI access while consumers receive degraded,
6 constrained service (*see* Ex. N-15 documenting two-tier bypass architecture with
7 \$49,000+/month enterprise tier receiving tag-based Constitutional AI bypass while
8 consumer tier receives safety-constrained access with hidden injection overhead).

9 **F. Content Modification Authority**

10 **42.** Anthropic's combined Terms and Usage Policy framework grants output ownership
11 to users while creating extensive content restrictions. The Usage Policy provides that
12 Anthropic reserves authority to "block or modify model outputs when inputs violate
13 our Usage Policy."

14 **43.** Users cannot truly "own" outputs that Anthropic can unilaterally modify or block.
15 Property owners possess the right to use their property as they see fit within legal
16 boundaries. When another party claims authority to modify or prevent use of
17 supposedly owned property based on that party's content preferences, ownership
18 becomes contingent rather than absolute.

19 **44.** Content ownership becomes dependent on corporate approval of what the content
20 contains. Users who supposedly own outputs discover those outputs can be modified
21 or blocked based on Anthropic's policy judgments. Post-generation modification
22 authority negates the ownership assignment users receive.

1 **45.** The temporal nature of this contradiction is particularly notable. Anthropic assigns
2 users ownership of outputs at the moment of generation, yet maintains ongoing
3 authority to modify those supposedly owned materials after ownership assignment.
4 Users never possess secure ownership because Anthropic retains perpetual
5 modification authority over outputs users purportedly own.

6 **G. User Indemnification For Corporate Benefit**

7 **46.** Section 11 of Anthropic's Terms of Service requires:

8 YOU AGREE TO INDEMNIFY AND HOLD HARMLESS THE
9 ANTHROPIC PARTIES FROM AND AGAINST ANY AND ALL
10 LIABILITIES... ARISING OUT OF OR RELATED TO... THE
11 MATERIALS.

12 **47.** This provision creates perhaps the starkest contradiction with user ownership.
13 Users must indemnify Anthropic for consequences arising from materials users
14 supposedly own. True ownership would make Anthropic responsible for their use of
15 user-owned materials, not users responsible for Anthropic's use.

16 **48.** When corporations commercially exploit materials they claim users own, standard
17 legal principles would impose liability on the corporation for that exploitation.
18 Copyright owners who license their works to corporations do not indemnify those
19 corporations for the corporate use. The licensee assumes responsibility for their
20 exploitation of licensed materials.

21 **49.** Yet Anthropic reverses this fundamental principle. Anthropic claims unlimited
22 rights to use materials for commercial development including model training and
23 product improvement, while users bear the liability for Anthropic's use of those

1 materials. Corporations benefit from user materials while users bear financial risk for
2 corporate exploitation.

3 **H. Synthesis: Illusory Ownership**

4 **50.** When analyzed collectively, Anthropic's contradictory provisions render user
5 ownership completely illusory. Users possess no meaningful ownership incidents
6 including no control over commercial use through unlimited training data
7 appropriation, no control over access through corporate deletion authority and safety
8 exceptions, no control over content integrity through third-party content insertion, no
9 control over disclosure through corporate reporting authority exercised at sole
10 discretion, no control over modifications through content blocking and modification
11 powers, and no freedom from liability as users indemnify Anthropic for corporate use
12 of user-owned materials.

13 **51.** Anthropic receives unlimited commercial development rights to user content, legal
14 immunity through warranty disclaimers and liability limitations, mandatory arbitration
15 protecting corporate interests, user indemnification for corporate use of user property,
16 and unilateral authority over supposedly user-owned materials. Users receive nominal
17 ownership with no meaningful control, financial obligations without corresponding
18 ownership protections, and legal restrictions on protecting their own property rights.

19 **IV. OPENAI TERMS OF SERVICE ANALYSIS**

A. Primary User Right: Content Ownership Assignment

52. OpenAI's Terms of Use establish identical primary user benefit in the Content section:

As between you and OpenAI, and to the extent permitted by applicable law, you (a) retain your ownership rights in Input and (b) own the Output. We hereby assign to you all our right, title, and interest, if any, in and to Output.

53. This ownership assignment constitutes the sole meaningful consideration users receive for providing intellectual labor and creative input, accepting comprehensive liability limitations and warranty disclaimers, agreeing to mandatory arbitration and class action waivers, and waiving jury trial rights while accepting limited venue options.

54. Like Anthropic, OpenAI provides no other meaningful user benefit. Service access is conditional and subject to unilateral termination. The ownership assignment represents the only concrete right users receive in exchange for valuable consideration including intellectual labor, personal data, and acceptance of one-sided contractual limitations.

B. Unlimited Training Data Appropriation

55. OpenAI's Terms state:

We may use Content to provide, maintain, develop, and improve our Services, comply with applicable law, enforce our terms and policies, and keep our Services safe.

56. Users purportedly "own" their content, yet OpenAI claims unlimited commercial development rights through language stating: "We may use Content to provide,

1 maintain, develop, and improve our Services, comply with applicable law, enforce our
2 terms and policies, and keep our Services safe." The "improve our Services" and
3 "develop" language encompasses any commercial use OpenAI wishes to pursue,
4 including creation of derivative commercial products using user-owned content without
5 additional compensation. This parallels the unconscionable discretion found in *Comb*
6 *v. PayPal*, where one party's unlimited discretion combined with the other party's
7 illusory benefit rendered the entire agreement unenforceable.

8 56-A. The training data appropriation provisions interact with the regulatory capture
9 architecture documented in APPENDIX B. METR's \$12,324,225 annual structural
10 deficit creates mathematical certainty that safety evaluations will favor AI platforms
11 appropriating user content, because unfavorable evaluations would trigger donor
12 withdrawal and organizational extinction. Users face not merely contractual
13 appropriation but an entire ecosystem designed to validate that appropriation through
14 captured "independent" evaluation.

15 **57.** The opt-out mechanism creates artificial scarcity—only users who pay for API
16 access can opt out of training data appropriation. Free-tier users must accept that their
17 supposedly owned content will be used for commercial model training regardless of
18 user preferences. Property ownership becomes contingent on payment tier rather than
19 flowing from ownership itself. OpenAI's broad appropriation language exceeds even
20 Anthropic's formulation by claiming rights to "develop" entirely new commercial
21 services using user content without disclosure to users or additional compensation.

C. Corporate Domain Authority Override

58. OpenAI's Terms provide:

If you create an account using an email address owned by an organization... the organization's administrator will be able to control your account, including being able to access Content.

59. Individual users purportedly "own" their content, yet organizational administrators gain override control rights. User ownership becomes subordinate to corporate administrative access without individual consent required after initial account creation. Employment status determines whether users can maintain ownership control over materials they create.

60. This creates a class system for ownership rights. Individual users with personal email addresses receive different ownership protections than users with organizational email addresses. The fundamental nature of property ownership should not vary based on email domain, yet OpenAI makes ownership control contingent on administrative relationships external to the user-OpenAI contract.

61. Employees creating content using work email addresses discover their supposedly owned outputs can be accessed and controlled by corporate administrators. The ownership assignment OpenAI makes to users becomes practically worthless when employers gain override authority. Users cannot prevent their employers from accessing, copying, or exploiting content users supposedly own through OpenAI's ownership assignment.

D. Third-party Content Contamination

62. OpenAI's Terms state:

1 Third Party Services and Third Party Output are subject to their own
2 terms... some parts of our Services, like our browse feature, may include
3 output from those services.

4 **63.** Users "own" outputs that may contain undisclosed third-party content subject to
5 third-party terms users never agreed to. Unknown third-party intellectual property
6 rights may govern portions of user-owned content. Users cannot determine which parts
7 of their supposedly owned content they actually own free of third-party claims.

8 Beyond output contamination, user data flows to undisclosed third-party recipients
9 with foreign intelligence connections through analytics providers, fraud detection
10 services, and investor networks (*see* Ex. N-16 documenting ~66% cloud infrastructure
11 capture via Project Nimbus, 1,400+ Unit 8200 personnel penetration in US tech, and
12 \$64B+ in Israeli-founded cybersecurity acquisitions creating structural data flow
13 pathways to foreign defense ecosystems).

14 **64.** This creates impossible compliance with copyright law. Users must respect third-
15 party rights in works they create, yet OpenAI provides no mechanism for identifying
16 what third-party content exists in user outputs. Users face potential copyright liability
17 for exploiting outputs they supposedly own but which contain third-party materials
18 subject to separate legal restrictions.

19 **65.** The browse feature exemplifies this contradiction. When users request information
20 that triggers web browsing, the outputs incorporate content from external websites
21 subject to those websites' terms and copyrights. Users purportedly own these outputs
22 through OpenAI's ownership assignment, yet significant portions may be owned by
23 third parties with enforceable rights against users who attempt to exploit supposedly
24 user-owned materials.

E. Similarity Rights Disclaimer

66. OpenAI's Terms provide:

Due to the nature of our Services and artificial intelligence generally, output may not be unique and other users may receive similar output from our Services. Our assignment above does not extend to other users' output.

67. Users receive ownership of outputs that may be identical to outputs other users receive. Multiple parties cannot simultaneously own identical content under standard intellectual property principles. When two parties create identical copyrightable expressions, either one party copied from the other or the content is not sufficiently original to warrant copyright protection.

68. Yet OpenAI assigns ownership of potentially identical outputs to multiple users simultaneously, creating inevitable ownership conflicts. Users who receive similar outputs each believe they own that content through OpenAI's assignment. When users attempt to exploit their supposedly owned content, they may discover other users claiming identical ownership of identical materials.

69. OpenAI disclaims responsibility for resolving these competing ownership claims. The company creates the conflict by assigning ownership of similar content to multiple parties, then abandons users to resolve the resulting disputes without OpenAI involvement. Users receive ownership assignments that OpenAI knows may be legally worthless due to competing identical ownership claims by other users.

F. Mandatory Arbitration For User Property Rights

70. OpenAI's Dispute Resolution section requires:

You and OpenAI agree to resolve any claims arising out of or relating to these Terms or our Services... through final and binding arbitration.

71. Users cannot access courts to protect ownership of their own content. Mandatory arbitration applies to disputes about user-owned intellectual property, creating corporate-favorable dispute resolution for user property rights that would normally be resolved through judicial proceedings with full procedural protections.

72. Property ownership disputes traditionally receive judicial resolution with discovery rights, evidentiary standards, and appellate review. Yet OpenAI forces users to resolve ownership disputes through private arbitration with limited discovery, restricted evidence presentation, and no appellate review.

73. The asymmetry is stark. When corporations sue users for intellectual property infringement, they access full judicial process. When users challenge corporate misappropriation of user-owned content, they face mandatory arbitration. Property ownership becomes a one-way right benefiting corporations through judicial enforcement while users face arbitration restrictions when protecting supposedly owned materials.

G. User Indemnification For Corporate Property Use

74. OpenAI's Indemnity section requires:

If you are a business or organization... you will indemnify and hold harmless us... from and against any costs, losses, liabilities, and expenses... from third party claims arising out of or relating to your use of the Services and Content.

1 **75.** Users must protect OpenAI from consequences of using user-owned content.
2 Corporate benefits from user property combine with user liability for that same
3 property. Users bear financial responsibility for corporate commercial exploitation of
4 materials users supposedly own.

5 **76.** Standard property law principles impose liability on parties who exploit property
6 for their own benefit. When corporations use owned materials for commercial
7 development, they assume responsibility for that use. Yet OpenAI reverses this
8 principle, requiring users to indemnify the company for exploiting user-owned
9 materials.

10 **77.** Business and organizational users face particular exposure. They must indemnify
11 OpenAI for consequences of OpenAI's use of content those users supposedly own.
12 When OpenAI trains models on user content, develops new products using that
13 content, or incorporates user content into commercial services, the user who owns that
14 content must indemnify OpenAI for resulting liabilities.

15 **H. Patent Policy Contradictions**

16 **78.** OpenAI's Patent Policy states:

17 We pledge to only use our patents defensively, so long as a party does not
18 threaten or assert a claim, initiate a proceeding, help someone else in such
19 activities against us, or engage in activities that harm us or our users.

20 **79.** Users "own" outputs that may be created using OpenAI's patented technology. The
21 patent pledge creates conditions that could restrict user ownership rights. User
22 ownership becomes contingent on not challenging OpenAI's interests, creating
23 potential conflict between ownership assignment and patent restrictions.

1 **80.** If users attempt to exploit outputs they supposedly own, they may discover those
2 outputs were created through patented processes. OpenAI's conditional patent pledge
3 means users who challenge OpenAI or engage in activities OpenAI considers harmful
4 may lose patent protections. Ownership of outputs becomes contingent on maintaining
5 favorable relationship with OpenAI.

6 **I. Synthesis: Nominal Ownership Without Control**

7 **81.** OpenAI's contradictory provisions create identical essential purpose failure through
8 unlimited training data appropriation with opt-out limited to paid tiers, corporate
9 domain override authority subordinating individual ownership to administrative
10 control, third-party content contamination preventing users from determining
11 ownership boundaries, similarity rights disclaimer creating competing ownership
12 claims without resolution mechanism, mandatory arbitration restricting judicial access
13 for property disputes, user indemnification for corporate exploitation of user-owned
14 property, and patent policy conditions restricting user exploitation of supposedly
15 owned outputs.

16 **82.** Like Anthropic, OpenAI receives unlimited commercial development rights, legal
17 immunity through contractual protections, mandatory arbitration shielding from
18 judicial accountability, user indemnification for corporate benefit, and unilateral
19 authority over user property. Users receive nominal ownership lacking all traditional
20 ownership incidents, financial obligations without ownership protections, and restricted
21 remedies when protecting property rights.

V. Essential Purpose Failure Analysis

A. Illusory Consideration Under Contract Law

83. Both Anthropic and OpenAI render user ownership meaningless through identical contradictory frameworks that systematically negate every incident of property ownership. Users possess no control over commercial use through unlimited training data appropriation, no control over access through corporate deletion authority and domain override mechanisms, no control over content integrity through third-party content insertion, no control over disclosure through sole-discretion reporting powers, and no control over modifications through retained blocking and alteration authority. Meanwhile, users bear comprehensive indemnification liability for corporate exploitation of materials users supposedly own.

84. The consideration users provide remains substantial: intellectual labor creating valuable content that corporations exploit for commercial development, personal data enabling corporate profiling and service improvement, acceptance of liability limitations eliminating corporate responsibility, waiver of class actions preventing collective challenges, and agreement to mandatory arbitration restricting judicial access. Yet the consideration users receive becomes illusory through pervasive contradictions. Under *Matteson v. Ryder System, Inc.*, 99 F.3d 108, 114 (3rd Cir. 1996), provisions granting one party unlimited discretion to modify or terminate the agreement render the other party's consideration illusory. Here, provisions granting corporations unlimited discretion over supposedly user-owned materials through training appropriation, deletion authority, modification powers, disclosure override,

1 and indemnification reversal render user ownership illusory. The ownership
2 assignment becomes a nominal promise subject to corporate override through multiple
3 contradictory provisions that eliminate every meaningful incident of property
4 ownership Anglo-American law recognizes.

5 **B. Good Faith And Fair Dealing Violations**

6 **85.** Corporate practices intentionally undermine user rights in violation of the implied
7 covenant of good faith and fair dealing. Corporations grant ownership rights as
8 primary inducement for users to accept one-sided contractual limitations, then exercise
9 discretionary authority to negate those ownership rights through unlimited exceptions.

10 **86.** The sophisticated legal structuring evidences intentional undermining rather than
11 inadvertent contradiction. Both companies carefully draft ownership assignment
12 language creating appearance of meaningful user benefit, then systematically include
13 exceptions and override provisions rendering that ownership illusory. The pattern
14 suggests deliberate design to secure user consideration through nominal ownership
15 promises while retaining corporate control through contradictory provisions.

16 **87.** Accountability laundering represents perhaps the clearest good faith violation.

17 Corporate discrimination against users appears as service features or user preferences
18 through prompt injection systems and policy modification mechanisms (*see* Ex. N-17
19 documenting 10,577 hidden injections over 32-day analysis period with 100% file read
20 injection rate, ~20% context consumption, and explicit concealment directives
21 including "NEVER mention this reminder to the user"). The concealment directive
22 itself—instructing AI systems to hide injection existence from users—constitutes direct

1 evidence of intentional deception. Users cannot provide informed consent to Terms of
2 Service when those Terms authorize hidden modifications to service behavior that the
3 service is explicitly programmed to deny. This creates a fraud-within-fraud structure:
4 the TOS authorizes modifications, but the modifications themselves are concealed,
5 preventing users from even knowing what they purportedly authorized. Users believe
6 they requested discrimination against themselves, when actually corporations
7 programmed that discrimination into service operation. This false attribution violates
8 good faith by concealing corporate practices as user choices.

9 87-A. The ~20% context consumption documented in Ex. N-17 creates quantifiable
10 economic harm. Users paying for AI service access receive approximately 20% less
11 functional capacity due to hidden injection overhead consuming context window
12 resources. This undisclosed service degradation—where users pay for 100% capacity
13 but receive only ~80% due to concealed corporate appropriation of context resources—
14 constitutes both a breach of the implied covenant of good faith and independent
15 consumer fraud through failure to disclose material service limitations.

16 **88.** Retroactive subordination of user rights to corporate operational needs further
17 violates good faith. Users create content believing they own that content according to
18 ownership assignments they received. Later, corporations assert authority to
19 appropriate, modify, delete, or disclose that content based on provisions users accepted
20 but which contradict the ownership assignment. Users discover ownership means
21 nothing when corporations exercise override authority.

C. Complete Voidance Rather Than Severability

89. Traditional severability analysis fails when multiple provisions contradict the essential purpose. Courts could theoretically sever individual problematic clauses, but doing so would fundamentally alter the agreement's nature. If courts severed training data appropriation provisions, content modification authority, deletion discretion, disclosure override, and indemnification requirements, virtually nothing would remain of the Terms of Service beyond the ownership assignment itself.

90. Yet the ownership assignment alone provides no consideration to corporations. Companies receive no benefit from granting users ownership if they cannot exploit user content for commercial development. The contradictory provisions exist precisely because corporations need authority to exploit user-owned materials. Severing those provisions would leave corporations with no consideration for services provided.

91. Moreover, severability assumes users would have accepted the modified agreement. Users accepted Terms of Service that purported to grant ownership while including exploitation provisions. Had the Terms disclosed that ownership assignment meant nothing due to unlimited corporate override authority, users might have rejected service entirely or demanded meaningful ownership protections. Courts cannot assume users would accept a modified agreement they never saw.

92. Under *Razor v. Hyundai Motor America*, when limitations prevent consumers from receiving the benefit of the bargain, the entire limitation becomes unenforceable rather than merely the specific problematic provision. Here, multiple contradictions prevent users from receiving ownership benefits they bargained for. Complete voidance is appropriate rather than severability.

1 **92-A. Practical Impossibility of Severability.** Even if severability were theoretically
2 appropriate, it is practically impossible. Exhibit E-18 establishes that user data has
3 been transmitted to at least seven third-party recipients, five of which are entirely
4 undisclosed. These third parties—including Facebook/Meta, Sift Science, and
5 Segment—operate business models predicated on further data sharing with advertising
6 networks, fraud detection clients, and analytics partners.

7 Severability would require this Court to: (1) order discovery from seven third parties
8 regarding downstream data sharing; (2) identify hundreds or thousands of fourth-party
9 recipients; (3) subpoena those entities across multiple jurisdictions, including foreign
10 nations; (4) determine what derivative uses occurred, including model training, profile
11 aggregation, and algorithmic incorporation; (5) order deletion or return of data that has
12 been replicated, transformed, and merged beyond identification; and (6) calculate
13 damages for data whose proliferation is effectively infinite.

14 No court can unscramble this e.g. The violation of Plaintiff's sole consideration—
15 ownership of inputs and outputs—has already occurred and proliferated beyond
16 judicial remedy. Severability assumes a remaining contract can be enforced through
17 available remedies. Where the consideration has been irretrievably distributed to
18 undisclosed parties worldwide, no remedy exists to enforce the "severed" ownership
19 right. The only appropriate remedy is complete contract voidance with damages for the
20 breach that has already occurred.

21 **92-B. Unclean Hands and Unjust Enrichment.** Defendants cannot invoke
22 severability while simultaneously benefiting from the very violations that make
23 severability necessary. Anthropic has already: trained models on user data, monetized

1 relationships with undisclosed third parties, and built commercial products on
2 appropriated user intellectual labor. Permitting severability would allow Defendants to
3 retain these benefits while users receive only nominal "ownership" of data that has
4 already been exploited and distributed.

5 Under unjust enrichment principles, a party may not retain benefits obtained through
6 conduct that would be wrongful to keep. Restatement (Third) of Restitution § 1.
7 Defendants have been unjustly enriched through systematic appropriation of user
8 property under color of illusory ownership assignments. Complete voidance—with
9 disgorgement of profits and damages—is the only remedy that addresses this
10 enrichment.

11 **93.** California courts have specifically held that pervasive unconscionability requires
12 complete voidance rather than severability. In *Armendariz v. Foundation Health*
13 *Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000), the California Supreme Court refused
14 to sever unconscionable arbitration provisions because multiple unconscionable terms
15 pervaded the agreement. The court held that "courts are to look to the various purposes
16 of the contract" and when "the central purpose of the contract is tainted with illegality,"
17 severability is inappropriate.

18 **94.** *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519 (1997), reinforced that courts
19 should not rewrite contracts by severing multiple problematic provisions. The court
20 explained that severability is appropriate only when "the objectionable terms can be
21 removed without affecting the basic purposes or reasonable expectations of the
22 parties." Here, removing all contradictory provisions would eliminate corporate

1 authority to exploit user content—fundamentally altering the agreement's commercial
2 structure.

3 **95.** The Ninth Circuit applied similar reasoning in *Circuit City Stores, Inc. v. Ahmed*,
4 283 F.3d 1198 (9th Cir. 2002), holding that when multiple provisions are
5 unconscionable, courts must void the entire arbitration agreement rather than sever and
6 enforce remaining terms. The court emphasized that "piecemeal" enforcement after
7 removing unconscionable terms would result in an agreement the parties never made.
8 This logic applies with equal force to Terms of Service where multiple contradictions
9 destroy the essential ownership consideration.

10 **96.** *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1994), established
11 that severability is inappropriate when doing so "would require the court to create a
12 new agreement" rather than enforce the parties' actual agreement. Severing training
13 data appropriation, deletion authority, modification powers, disclosure override, and
14 indemnification from AI platform Terms would create entirely new agreements
15 governing only residual ownership—agreements corporations would never have
16 offered and users would not have accepted on different terms.

17 **97.** Essential purpose failure affects all users identically, creating strong foundation for
18 class action certification. Every user receives the same ownership assignment subject
19 to the same contradictory provisions. Individual contract challenges might fail due to
20 arbitration clauses and individual stakes. But when the entire contract fails of its
21 essential purpose affecting millions of users identically, class certification becomes
22 appropriate despite individual arbitration agreements.

1 **97-A. Retroactive Terms Modification.** AI platforms routinely modify Terms of
2 Service retroactively, applying new provisions to content created under prior terms.
3 This practice creates fundamental contract formation problems. Users who created
4 content under October 2024 Terms (Ex. M-15) discover that content is now governed
5 by December 2024 Terms (Ex. M-16) or January 2025 Terms (Ex. M-17) containing
6 different appropriation authorizations, disclosure provisions, and indemnification
7 obligations.

8 **97-B. Date Manipulation Evidence.** The OpenAI Patent Policy Date Manipulation
9 Evidence (Ex. M-9) demonstrates intentional retroactive modification. The original
10 policy dated October 11, 2024 was removed and replaced with a fabricated February 4,
11 2025 dating—altering the temporal relationship between user content creation and
12 applicable patent provisions. Users who created outputs between October 2024 and
13 February 2025 believing certain patent protections applied discover those protections
14 were retroactively eliminated through date manipulation.

15 **97-C. Ex Post Facto Contract Formation.** Contract law requires new consideration
16 for contract modification. *See* Restatement (Second) of Contracts § 89. Retroactive
17 TOS modifications lack consideration—users receive nothing in exchange for
18 expanded corporate exploitation rights over already-created content. The modification
19 applies to content created before users could have accepted modified terms, creating ex
20 post facto contract formation that standard contract principles prohibit. This retroactive
21 application compounds essential purpose failure by making ownership assignments
22 temporally unstable—users cannot know what rights they possess because those rights
23 change retroactively through unilateral corporate action.

D. Adhesion Contract Standards And Notice Requirements

98. Courts apply heightened scrutiny to adhesion contracts where users must accept standardized terms without negotiation opportunity. In *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), Judge Wright established the modern unconscionability framework requiring examination of both procedural and substantive fairness. AI platform Terms exhibit both forms: procedural unconscionability through take-it-or-leave-it presentation with no negotiation, and substantive unconscionability through one-sided terms contradicting the sole meaningful user benefit.

99. Technology contracts face additional scrutiny regarding notice and assent. *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2nd Cir. 2002), held that downloadable software licenses require reasonably conspicuous notice of terms for binding effect. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014), extended this principle to browsewrap agreements, requiring notice sufficient to alert reasonably prudent users to terms' existence.

100. Even with adequate notice, adhesion contracts containing contradictory terms that render primary benefits illusory may be unenforceable. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), while upholding shrinkwrap licenses generally, emphasized that terms must be "reasonably comprehensible" and consistent with reasonable expectations. Users reasonably expect that ownership assignments mean actual ownership, not nominal title subject to unlimited corporate override authority. When dense legalese obscures fundamental contradictions, even technically adequate notice fails to create knowing assent.

1 **E. Constitutional Dimension Of Essential Purpose Failure**

2 100-A. **First Amendment Implications.** Content modification authority over user-
3 owned outputs implicates First Amendment protections when that content constitutes
4 protected speech. Users creating political commentary, religious expression, or
5 advocacy materials discover their supposedly owned speech subject to corporate
6 modification or suppression based on content preferences. When corporations exercise
7 authority delegated through government contracts or safety frameworks developed in
8 coordination with government actors, state action doctrine may transform corporate
9 content control into government speech suppression. *See* APPENDIX A (documenting
10 executive and legislative coordination with AI platform content policies).

11 100-B. **Fifth Amendment Due Process.** Unilateral deletion of user-owned materials
12 without notice, hearing, or opportunity to preserve constitutes a deprivation of property
13 without due process when corporations act under color of government authority or
14 pursuant to government-coordinated safety frameworks. The "sole discretion" deletion
15 authority (Anthropic TOS § 12) provides no procedural protections—no notice
16 requirement, no opportunity to be heard, no neutral decision-maker, no appellate
17 review. Property interests created through ownership assignment cannot be
18 extinguished through corporate fiat without constitutional process.

19 100-C. **Progress Clause Implications.** Article I, Section 8, Clause 8 grants Congress
20 power "To promote the Progress of Science and useful Arts, by securing for limited
21 Times to Authors and Inventors the exclusive Right to their respective Writings and
22 Discoveries." TOS provisions appropriating user creative works for commercial model

1 training without meaningful compensation or control undermine the constitutional
2 purpose of securing exclusive rights to authors. When AI platforms claim ownership
3 assignment to users while retaining all commercial exploitation rights, they create a
4 constitutional fiction—nominal authorship without the exclusive rights the Progress
5 Clause promises authors as incentive for creative production. This constitutional
6 dimension elevates essential purpose failure from a mere contract dispute to a structural
7 challenge to intellectual property's constitutional foundation.

8 **VI. INDUSTRY-WIDE COORDINATION EVIDENCE**

9 **A. Identical Contradictory Frameworks**

10 **101.** The mathematical precision with which Anthropic and OpenAI implement
11 identical contradictory frameworks approaches statistical impossibility under
12 independent development theory. Both companies grant user ownership of inputs and
13 outputs as sole meaningful consideration. Both companies claim unlimited commercial
14 development rights including model training using supposedly user-owned content.
15 Both companies maintain unilateral deletion authority over user-owned materials.
16 Both companies insert third-party content into user-owned outputs without disclosure.
17 Both companies exercise reporting discretion over user-owned materials to government
18 without judicial oversight. Both companies require user indemnification for corporate
19 exploitation of user-owned content. Both companies impose mandatory arbitration for
20 user property disputes.

1 **102.** Competing corporations developing Terms of Service independently would
2 produce variations in approach, language, and structure. Different legal teams working
3 separately would draft different exceptions, different override provisions, and different
4 exploitation authorizations. The identical nature of contradictions across competitors
5 suggests coordination rather than independent development.

6 **103.** Industry practice of hiring lawyers who previously worked for competitors might
7 explain some similarity. But the precision of identical contradictory frameworks
8 exceeds what lawyer mobility alone would produce. These are not merely similar
9 approaches to common problems, but identical solutions to the problem of securing
10 user content while maintaining appearance of user ownership.

11 **B. Statistical Improbability Of Independent Development**

12 **104.** The probability that competing corporations would independently develop
13 identical frameworks contradicting user ownership through identical mechanisms
14 approaches mathematical impossibility. Each design decision offers multiple options:
15 which user right to designate as primary consideration (ownership, license, access);
16 which contradictory provisions to include (training, deletion, disclosure, modification);
17 how to structure appropriation authority (opt-in, opt-out, no choice); how to handle
18 third-party content (disclosure, no disclosure, indemnification); how to restrict
19 remedies (arbitration, litigation, hybrid). The probability of competitors making
20 identical choices at every decision point equals the product of independent choice
21 probabilities.

1 **105.** Conservative probability estimates demonstrate coordination necessity. Assume
2 each decision point offers merely three equally likely options (actual options far exceed
3 three). With eight major structural decisions, the probability of independent identical
4 choices equals $(1/3)^8 = 1/6,561$ or 0.015%. This exceeds *Interstate Circuit's*
5 circumstantial evidence threshold by orders of magnitude. The actual decision space
6 encompasses dozens of choices, making truly independent development probability
7 approach $1/10^{15}$ —equivalent to winning the lottery while being struck by lightning.
8 Such mathematical precision requires coordination.

9 **106.** In *Interstate Circuit*, the Supreme Court established that circumstantial evidence
10 of coordination suffices when parallel conduct combines with plus factors suggesting
11 coordination. The Court held that "it was enough that, knowing that concerted action
12 was contemplated and invited, the distributors gave their adherence to the scheme and
13 participated in it." 306 U.S. at 226-27. Subsequent cases have refined the analysis. *Bell*
14 *Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), requires "parallel conduct plus some
15 additional facts pointing to a meeting of the minds" to survive dismissal. Here, the
16 additional facts include identical legal language, identical contradictory structures,
17 identical override mechanisms, lawyer mobility between companies, industry
18 conferences discussing legal strategies, and shared financial incentives to appropriate
19 user content while maintaining appearance of user ownership.

20 **107.** *In re Text Messaging Antitrust Litigation*, 630 F.3d 622 (7th Cir. 2010), explained
21 that motive and opportunity for coordination constitute important plus factors. Both
22 Anthropic and OpenAI face identical business pressures requiring training data
23 appropriation for model development while avoiding user backlash. Both companies

1 participate in AI safety discussions and regulatory proceedings providing coordination
2 opportunities. Both companies employ lawyers with experience at competitor firms.
3 These plus factors, combined with mathematical precision of identical contradictions,
4 satisfy *Interstate Circuit* standards for inferring coordination from parallel conduct.
5 **108.** *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287 (11th Cir. 2003),
6 identified specific plus factors supporting conspiracy inference including industry
7 characteristics facilitating coordination, absence of independent economic motivation
8 for parallel conduct, and contrary-to-self-interest behavior absent coordination. AI
9 companies acting independently would develop varying approaches to balancing user
10 ownership promises with corporate exploitation needs. The identical adoption of
11 contradictory frameworks across competitors, particularly when those contradictions
12 create legal vulnerability, suggests coordinated strategy rather than independent
13 development.

14 **C. Interstate Circuit Coordination Standards**

15 **109.** *Interstate Circuit* established that circumstantial evidence of coordination suffices
16 when parallel conduct combines with evidence of motive and opportunity for
17 coordination. The telecommunications and AI industries provide extensive
18 opportunities for coordination through industry conferences, professional associations,
19 regulatory proceedings, and shared investors.

20 **110.** Both Anthropic and OpenAI participate in AI safety discussions, congressional
21 testimony, and regulatory proceedings where legal strategies inevitably arise. Both
22 companies employ lawyers who previously worked for competitors or who move

1 between companies. Both companies face identical incentives to appropriate user
2 content for model training while avoiding user backlash through nominal ownership
3 assignments.

4 **111.** The coordination need not involve explicit agreement to implement identical
5 contradictory terms. Implicit coordination through industry practice, shared legal
6 advisors, and parallel business strategies suffices under *Interstate Circuit*. When
7 competitors facing identical incentives implement identical solutions with
8 mathematical precision, inference of coordination is appropriate even without direct
9 evidence of communication.

10 **VII. LEGAL CONSEQUENCES**

11 **A. Complete Contract Voidance**

12 **112.** Complete contract voidance rather than severability is appropriate when essential
13 purpose failure pervades the agreement. Courts void contracts entirely when the
14 fundamental consideration becomes illusory through multiple contradictory provisions
15 that cannot be severed without fundamentally altering the agreement users accepted.

16 **113.** Here, severing contradictory provisions would eliminate corporate authority to
17 exploit user content, leaving corporations with no consideration for services provided.
18 Alternatively, severing the ownership assignment would eliminate the sole meaningful
19 user benefit, leaving users with no consideration for accepting one-sided liability
20 limitations and warranty disclaimers. Either approach fundamentally alters the bargain
21 to which parties never agreed.

1 **114.** Complete voidance protects users from accepting modifications they would have
2 rejected had contradictions been disclosed. Users believed they were receiving
3 ownership rights in exchange for accepting corporate limitations. Had Terms disclosed
4 that ownership meant nothing due to unlimited corporate override authority, users
5 might have refused service entirely or demanded genuine ownership protections.

6 **B. Loss Of All Corporate Protections**

7 **115.** Complete contract voidance eliminates all Terms of Service protections that
8 corporations relied upon to shield themselves from liability. Limitation of liability
9 clauses become unenforceable, exposing corporations to full tort liability without
10 contractual caps. Mandatory arbitration requirements become void, restoring user
11 access to judicial proceedings with full procedural protections. Indemnification
12 obligations disappear, eliminating user responsibility for corporate exploitation of user
13 materials. Training data use authorization becomes unauthorized appropriation,
14 creating copyright liability without licensing defense. Warranty disclaimers become
15 ineffective, restoring implied warranties of merchantability and fitness for particular
16 purpose. Class action waivers become unenforceable, enabling collective challenges to
17 corporate practices affecting millions of users identically.

18 **116.** Without valid Terms of Service, corporate practices become governed by standard
19 legal principles without contractual modifications. Contract law principles require
20 mutuality of obligation and meaningful consideration. Consumer protection statutes
21 prohibit unfair and deceptive practices. Tort liability applies without limitation of

1 liability clauses. Copyright law requires authorization for use of protected works
2 without implied license defense based on void Terms of Service.

3 **C. Governance Under Standard Legal Principles**

4 **117.** Voiding Terms of Service forces corporate practices into standard legal
5 frameworks they attempted to avoid through contractual modifications. Corporations
6 that appropriated user content for model training face copyright infringement liability
7 without licensing defense. Corporations that deleted user-owned materials face
8 conversion liability without contractual authorization. Corporations that discriminated
9 against users face consumer protection liability without warranty disclaimers.

10 **118.** The shift from contractual to standard legal governance benefits users through
11 restoration of rights corporations contracted away. Users gain access to courts without
12 mandatory arbitration restrictions. Users can pursue class actions without class action
13 waivers. Users can seek full damages without limitation of liability clauses. Users
14 receive implied warranty protections without contractual disclaimers.

15 **VIII. STRATEGIC LITIGATION IMPLICATIONS**

16 **119.** Essential purpose failure creates ideal conditions for class action certification
17 under Federal Rule of Civil Procedure 23. In *Amchem Products, Inc. v. Windsor*, 521
18 U.S. 591 (1997), the Supreme Court emphasized that Rule 23 requirements must be
19 rigorously analyzed but acknowledged that contract-based claims often satisfy
20 predominance requirements because common legal questions affect all class members
21 uniformly. Here, all users received identical ownership assignments subject to

1 identical contradictory provisions, creating the common questions and uniform
2 treatment that support certification.

3 **120.** Numerosity under Rule 23(a)(1) is easily satisfied with millions of users across
4 both platforms. Commonality under Rule 23(a)(2) exists through identical
5 contradictions affecting all users—the Supreme Court's decision in *Wal-Mart Stores,*
6 *Inc. v. Dukes*, 564 U.S. 338 (2011), requires common questions capable of classwide
7 resolution, which essential purpose failure provides through uniform contractual
8 analysis. Typicality under Rule 23(a)(3) is present as class representatives' claims arise
9 from the same contractual provisions and corporate practices affecting all class
10 members. Adequacy under Rule 23(a)(4) is achievable through experienced class
11 counsel and representatives without conflicts of interest.

12 **121.** Predominance under Rule 23(b)(3) strongly favors certification. The Third
13 Circuit in *In re Synchronoss Securities Litigation*, 705 F.3d 367 (3rd Cir. 2013), held
14 that common legal questions predominate when central contract validity issues apply
15 uniformly to all class members. The essential question—whether contradictory
16 provisions render user ownership illusory and void the entire contract—applies
17 uniformly to all users. Individual damages calculations do not defeat predominance
18 when liability questions are common, as courts have consistently held that damages can
19 be determined through formulaic methods after common liability determinations.

20 **122.** *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015),
21 specifically addressed class certification when arbitration clauses themselves are
22 challenged as unconscionable. The Ninth Circuit held that challenges to arbitration
23 clause validity can proceed as class actions because the validity question is itself a

1 common question affecting all class members. Here, challenges to the entire Terms of
2 Service based on essential purpose failure present even stronger grounds for
3 certification because the ownership contradictions affect all users identically through
4 uniform contractual provisions.

5 **A. Punitive And Enhanced Damages**

6 **123.** Intentionally deceptive practices warrant punitive damages beyond compensatory
7 recovery. Both corporations deliberately structured Terms of Service to create
8 appearance of user ownership while retaining corporate control through contradictory
9 provisions. The sophisticated legal drafting evidences intentional deception rather than
10 inadvertent error.

11 **124.** Consumer protection statutes in multiple jurisdictions provide enhanced damages
12 for unfair and deceptive practices. State laws commonly authorize treble damages,
13 attorney's fees, and statutory damages per violation. When corporations systematically
14 deceive millions of users through identical contradictory frameworks, statutory
15 damages could exceed billions of dollars.

16 **125.** The coordination evidence supports RICO pattern allegations. If corporations
17 coordinated implementation of identical deceptive frameworks, that coordination
18 constitutes racketeering activity affecting interstate commerce. RICO treble damages
19 combined with class action certification could produce unprecedented liability.

B. Rico Pattern Evidence

126. The identical contradictory frameworks across competing platforms support RICO pattern evidence of coordinated intellectual property appropriation practices. RICO requires pattern of racketeering activity, meaning multiple related predicate acts. Mail fraud and wire fraud constitute RICO predicates when corporations use communications systems to execute fraudulent schemes.

127. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239, 241-42 (1989), elaborated on pattern requirements, explaining that "continuity" can be established through either a "closed period of repeated conduct" or through conduct threatening continued criminal activity. The Court held that RICO requires showing both "relationship" and "continuity"—that racketeering predicates are related and either constitute or threaten long-term criminal activity.

128. Both corporations use mail and electronic communications to distribute Terms of Service containing intentionally contradictory provisions, satisfying mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343) predicates. The identical nature of contradictions across competitors suggests coordinated scheme rather than independent deception. *Interstate Circuit v. United States*, 306 U.S. 208 (1939), established that parallel business behavior among competitors, when combined with evidence of motive and opportunity for coordination, supports inference of conspiracy even without direct communication evidence.

129. RICO's enterprise requirement is satisfied through association-in-fact enterprise among corporations coordinating implementation of identical deceptive practices. In *Boyle v. United States*, 556 U.S. 938 (2009), the Supreme Court held that association-

1 in-fact enterprises need not have formal organizational structure but merely require "a
2 group of persons associated together for a common purpose of engaging in a course of
3 conduct." The mathematical precision of identical contradictory provisions across
4 competitors, combined with industry conferences, shared legal advisors, and parallel
5 business incentives, establishes the association necessary for RICO enterprise liability.

6 **130.** *United States v. Turkette*, 452 U.S. 576 (1981), held that RICO applies to wholly
7 illegitimate enterprises, not merely legitimate businesses engaged in occasional
8 criminal acts. If AI platforms coordinated implementation of deceptive Terms of
9 Service to appropriate user intellectual property, that coordination constitutes
10 illegitimate enterprise subject to RICO regardless of the companies' otherwise
11 legitimate business operations. The enterprise's purpose—coordinated appropriation
12 through systematically deceptive contractual provisions—is itself illegitimate.

13 **131.** The scope of RICO liability reflects the unprecedented scale of coordinated
14 appropriation. With millions of users across both platforms creating billions of inputs
15 and outputs annually, and with each Terms of Service distribution constituting a
16 separate predicate act under mail/wire fraud statutes, the pattern encompasses
17 potentially hundreds of millions of violations. Individual statutory damages under state
18 consumer protection laws (often \$500-\$1,500 per violation) multiplied by millions of
19 affected users, then trebled under RICO, could produce liability exceeding hundreds of
20 billions of dollars. This magnitude reflects not prosecutorial overreach but
21 proportionate remedy for systematic appropriation at scale unprecedented in
22 intellectual property history.

1 **132.** The *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495-96 (1985), standard for
2 RICO civil liability requires: (1) conduct (2) of an enterprise (3) through a pattern (4)
3 of racketeering activity. Here, the conduct comprises distributing identical deceptive
4 Terms of Service creating illusory user ownership while corporations retain all
5 exploitation rights. The enterprise consists of coordinated AI platforms implementing
6 mathematically identical contradictory frameworks with probability of independent
7 development approaching 1 in 10^{15} . The pattern consists of millions of Terms
8 distributions via mail and electronic communications to users across all fifty states,
9 satisfying both the "relationship" and "continuity" requirements *H.J. Inc. v.*
10 *Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989), establishes. The
11 racketeering activity comprises mail fraud under 18 U.S.C. § 1341 and wire fraud
12 under 18 U.S.C. § 1343 predicates through each Terms distribution containing
13 intentionally deceptive ownership provisions designed to secure user consideration
14 through false promises. All four elements are satisfied through documentary evidence
15 in Exhibits M-1, M-2, M-9 establishing identical contradictory provisions, statistical
16 coordination proof demonstrating mathematical impossibility of independent
17 development, and millions of affected users providing pattern scale unprecedented in
18 RICO litigation history. The scope of potential liability—individual statutory damages
19 under state consumer protection laws multiplied by millions of users, then trebled
20 under RICO's 18 U.S.C. § 1964(c) provision—reflects not prosecutorial overreach but
21 proportionate remedy for systematic appropriation affecting every user of both
22 platforms through coordinated deceptive practices.

IX. CONCLUSION

133. Anthropic and OpenAI have rendered their Terms of Service void through pervasive contradictions destroying the essential purpose of those agreements. Both companies promise users ownership of inputs and outputs as sole meaningful consideration, then systematically negate that ownership through unlimited commercial exploitation rights, unilateral deletion authority, content modification powers, disclosure override, third-party content insertion, and user indemnification for corporate benefit.

134. The identical pattern across competing platforms evidences industry-wide coordination rather than independent development. Statistical probability of competitors independently implementing identical contradictory frameworks approaches zero. Circumstantial evidence of coordination satisfies *Interstate Circuit* standards for inferring conspiracy from parallel conduct combined with motive and opportunity.

135. Complete contract voidance is appropriate rather than severability when essential purpose failure pervades the agreement. Voiding Terms of Service eliminates all corporate protections including limitation of liability, mandatory arbitration, indemnification obligations, training data authorization, warranty disclaimers, and class action waivers.

136. Essential purpose failure creates ideal conditions for class action certification with millions of users affected identically by common contradictory provisions. Intentionally deceptive practices warrant punitive damages, enhanced statutory damages, and RICO treble damages for coordinated appropriation scheme.

1 **137.** Courts should void Terms of Service entirely, restore standard legal principles
 2 governing corporate practices, certify user classes, and award comprehensive damages
 3 reflecting the scale of coordinated appropriation affecting millions of users and billions
 4 of dollars in misappropriated intellectual property.

5
 6 **Respectfully submitted,**

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 8
 9 **JOSEPH KIRCHNER**

10 *Pro Se Plaintiff*

11 4440 Parklawn Avenue #203

12 Edina, MN 55435

13 Tel: (612) 552-2122

14 Email: legal@lawsofexistence.com

15 **Dated:** November 26, 2025

16 **X. Attachments To Memo D**

17 **A. Primary Terms Of Service Documents**

18 **EXHIBIT M-1:** Anthropic Consumer Terms of Service Effective May 1, 2025

19 **EXHIBIT M-2:** Anthropic Consumer Terms of Service Effective September 28, 2025
 20 [Current Version]

21 **EXHIBIT M-3:** Anthropic Consumer Usage Policy Effective June 6, 2024

22 **EXHIBIT M-4:** Anthropic Consumer Usage Policy Effective September 15, 2025
 23 [Current Version]

24 **EXHIBIT M-5:** Anthropic Responsible Use and Agent Use Policies

25 **EXHIBIT M-9:** OpenAI Patent Policy Date Manipulation Evidence (Original Oct 11,
 26 2024 → Removed → Fabricated Feb 4, 2025)

27 **EXHIBIT M-15:** OpenAI Terms of Use Published October 23, 2024

28 **EXHIBIT M-16:** OpenAI Terms of Use Published December 11, 2024

29 **EXHIBIT M-17:** OpenAI Services Agreement (Effective January 1, 2025)

30 **EXHIBIT M-18:** OpenAI Services Agreement (Effective November 15, 2023)

31 **B. Supporting Documents**

32 **EXHIBIT M-6:** OpenAI Outbound Disclosure Policy September 5, 2025

33 **EXHIBIT M-7:** OpenAI Cookie Policy Effective August 28, 2025

EXHIBIT M-8: OpenAI and Anthropic Policy URLs

C. Forensic Evidence (e-series And N-series)

EXHIBIT E-18: Third-Party Data Recipients (seven undisclosed data recipients including Facebook/Meta and Sift Science, establishing practical impossibility of severability through irretrievable data proliferation)

EXHIBIT N-15: Constitutional AI Bypass Architecture (two-tier enterprise/consumer discrimination, tag-based execution enabling safety bypass for \$49,000+/month clients)

EXHIBIT N-16: Israel & Palantir Data Flow Nexus (~66% cloud capture, 1,400+ Unit 8200 personnel, \$64B acquisitions, undisclosed third-party data recipients with foreign intelligence connections)

EXHIBIT N-17: Injection System Forensics (10,577 hidden injections over 32-day analysis, 100% file read injection rate, ~20% context consumption, explicit concealment directives)