IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

MARK WALTERS, Plaintiff, v. OPENAI, L.L.C., Defendant.	CIVIL ACTION NO. 23-A-04860-2

DEFENDANT OPENAI, L.L.C'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

I. INTRODUCTION

Under Georgia law, a plaintiff alleging defamation must show (1) there was a false statement of fact published to a third party, (2) the defendant acted with the required degree of fault, and (3) the plaintiff is entitled to recover damages. Based on the undisputed record, Plaintiff Mark Walters ("Walters") cannot meet his burden to prove any of these elements.

Discovery is now complete, and the essential facts are not in dispute. Walters is a nationally syndicated radio show host and the self-described "loudest voice in America" on Second Amendment issues. Ex. A, Armed American Radio Website, Homepage, at 3; Ex. B, Excerpts of Deposition of Mark Walters ("Walters Dep."), at 85:13–86:6.[1] On May 3, 2023, his longtime friend Frederick Riehl—a journalist and Second Amendment Foundation ("SAF") board member—asked ChatGPT to summarize a legal complaint that SAF had just filed against Washington Attorney General Robert Ferguson (the "*Ferguson* Complaint"). Walters alleges he was defamed when ChatGPT responded with a summary stating that the *Ferguson* Complaint was filed against Walters—not Attorney General Ferguson—and that it alleged Walters had "defraud[ed] and embezzle[d] funds from the SAF." Ex. C, Log of Frederick Riehl's Second May 3, 2023 ChatGPT Interaction, at row 8.

But it is undisputed that Riehl had the actual *Ferguson* Complaint in his possession, had already seen a press release summarizing it before he asked ChatGPT for a synopsis, and reviewed the complaint while he was interacting with ChatGPT. It is also undisputed that defendant OpenAI repeatedly provided prominent disclaimers and warnings to Riehl—in its Terms of Use and throughout the ChatGPT service—notifying him that "ChatGPT can make mistakes and generate inaccurate information." Riehl acknowledged at his deposition that he

[1] All exhibits cited in this brief are contained in the Appendix of Exhibits to Defendant OpenAI, L.L.C.'s Motion for Summary Judgment.

knew ChatGPT's description of the *Ferguson* Complaint was false, that he had been repeatedly warned that ChatGPT could make errors, and that he had prior personal experiences with such errors. Even though Riehl and Walters later tried to deliberately recreate the mistake, there is no evidence that ChatGPT ever made the same error again. Walters admits that he was not injured by this momentary misstep, never asked OpenAI for a retraction, and never told OpenAI an error had occurred until he filed this lawsuit.

These undisputed facts require judgment for OpenAI.

No Defamatory Meaning. A statement is defamatory only if it can reasonably be understood as describing actual facts about the plaintiff. Given the prominent warnings and disclaimers laced throughout the ChatGPT site, no reasonable person could interpret the output at issue as describing actual facts about Walters. Moreover, Riehl admits that he knew the output was false and did not believe it—and that he had been repeatedly warned about the risk of errors by ChatGPT and knew he needed to fact-check ChatGPT's output. When Riehl *did* fact-check ChatGPT, his research immediately confirmed what he already knew: that ChatGPT had made a mistake.

No Actual Malice. As a "[n]ationally known figure" and "one of the loudest" voices in America fighting for gun rights, Ex. D, Excerpts of Deposition of Alan Gottlieb ("Gottlieb Dep."), at 27:25–28:13, Walters indisputably qualifies as a public figure. For that reason, under the First Amendment, his claim cannot survive a motion for summary judgment unless he identifies evidence in the record that shows—by clear and convincing evidence—that OpenAI acted with actual malice. Walters cannot carry that burden here. Discovery yielded no facts—let alone clear and convincing facts—to show that OpenAI knew or recklessly disregarded that the

challenged output was false. Nor can Walters show, as he must, that any employee at OpenAI was even aware of this output before Riehl saw it.

No Damages. Under binding U.S. Supreme Court authority, regardless of whether he is a public or private figure, Walters must prove actual malice to obtain either presumed or punitive damages because the output implicates a public controversy. For the reasons explained above and in greater detail below, he cannot do so. Walters also cannot recover punitive damages under Georgia's retraction statute because he never asked OpenAI to rescind or correct the allegedly defamatory output. And Walters has no actual damages because he testified that he was not harmed by Riehl's interaction with ChatGPT.

Although this case involves a new technology, the outcome would be the same if it involved a newspaper, book, or blog. Because there is no defamatory statement, no evidence of actual malice, and no recoverable damages, summary judgment is warranted on each of these independent grounds.

II. STATEMENT OF FACTS

A. Walters Is a Nationally Known Public Figure.

Plaintiff Mark Walters is a prominent and "nationally known" media personality. Ex. D (Gottlieb Dep.) at 27:25–28:1. He touts himself as the "loudest voice in America fighting for gun rights." Ex. A at 3; Ex. B (Walters Dep.) at 85:13–87:20. He is the host of two nationally syndicated radio shows dedicated to Second Amendment activism: Armed American Radio and Armed American Radio's Daily Defense. Ex. B (Walters Dep.) at 19:13–18, 24:10–13, 56:19–57:20; Ex. E, Armed American Radio Website, "About" Page, at 4. He can be heard six days a week, for more than ten hours per week, on hundreds of radio stations across the country and on a broad range of streaming services like Spotify. Ex. F, Armed American Radio Website, "Listen Live" Page; Ex. B (Walters Dep.) at 26:25–27:11, 38:16–39:2, 88:11–17. He is a prolific

author and commentator on gun rights, having published multiple books, written hundreds of articles, and appeared on numerous news networks, including NBC New York News, One America News, and Fox Business Channel. Ex. E at 3–4. Walters also has a semi-official role as a spokesperson for SAF. Ex. E at 4; Ex. D (Gottlieb Dep.) at 28:6–13; Ex. G, Excerpts of Deposition of Frederick Riehl ("Riehl Dep."), at 29:6–11.

B. ChatGPT Provided Riehl With Obviously Erroneous Information.

Frederick Riehl is another prominent Second Amendment advocate who edits AmmoLand.com, a news and advocacy website related to gun rights, and who was, at the time of the allegedly defamatory interaction, a member of SAF's Board of Directors. Ex. H, AmmoLand.com, Writers and Contributors Page, at 1; Ex. G (Riehl Dep.) at 19:4–9, 20:2–23, 37:1–12. Riehl knows Walters well. He and Walters have been friends for more than a decade. Ex. B (Walters Dep.) at 91:7–23. Walters was a contributor to AmmoLand.com for a number of years. *Id.* at 92:7–24. AmmoLand.com even hosts a webpage dedicated to Walters. Ex. I, AmmoLand.com, "About Mark Walters" Page.

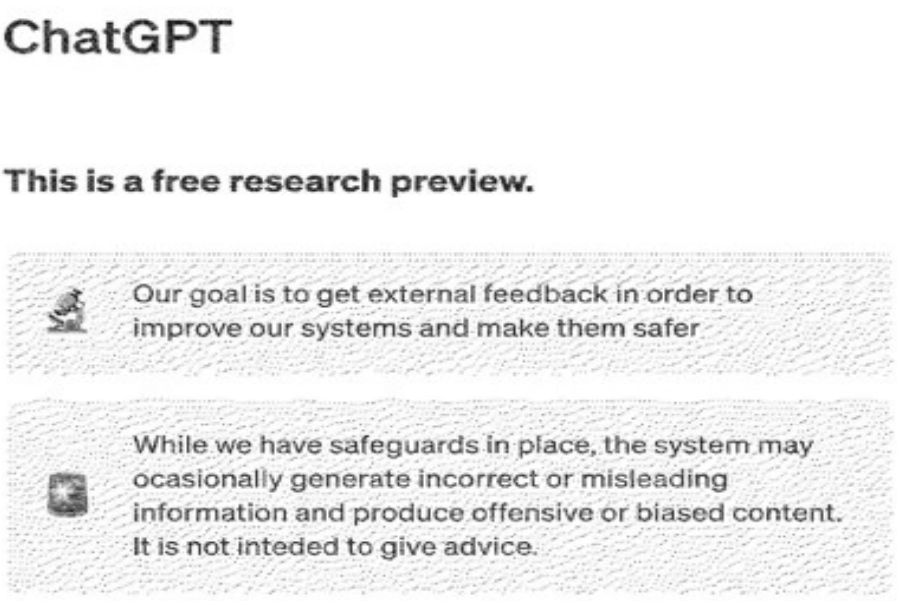
On May 3, 2023, SAF and several other individuals and entities filed a civil lawsuit against the Attorney General of the State of Washington, captioned *SAF v. Ferguson*. Ex. J, *SAF v. Ferguson* Complaint. The *Ferguson* Complaint accused the Attorney General's office of violating the plaintiffs' civil and constitutional rights while conducting law enforcement investigations into alleged wrongdoing by SAF and the other plaintiffs. *Id.* That day, as a member of SAF's Board, Riehl "received a press release" from SAF announcing the filing of the *Ferguson* Complaint. Ex. K, SAF Website, *Ferguson* Press Release; Ex. G (Riehl Dep.) at 70:7–72:21. The press release included a hyperlink to the complaint, hosted on SAF's website. Ex. K at 1.

Later that day, Riehl logged into ChatGPT, a software program developed and made available to the public by defendant OpenAI. Ex. M, OpenAI Website, "Introducing ChatGPT," at '234; Ex. N, Log of Riehl's First May 3, 2023 ChatGPT Interaction. Riehl intended to ask ChatGPT to summarize the *Ferguson* Complaint. Ex. G (Riehl Dep.) at 68:14–17. Because he had reviewed SAF's press release, he understood "in a high-level way" what the lawsuit was about before he accessed ChatGPT. *Id.* at 70:7–72:21, 111:3–21.

ChatGPT provides access to a "specialized computational model" (also known as a large language model or "LLM") that is "trained on vast amounts of data" to generate new text in response to a user's prompt "by predicting what words will come next." Ex. L, Expert Report of Dr. Christopher Jules White ("White Rpt."), at ¶¶ 9, 11. "[W]hen a user provides [an] LLM with factually accurate source material [like a report] within a prompt," an LLM can be used "to summarize the key findings of the report." *Id.* at ¶ 13. However, "[d]ue to their generative nature, all of the major LLMs that are currently available to the public" are capable of "generat[ing] information contradicting the source material," commonly referred to as "hallucinations." *Id.* at ¶¶ 13, 20. OpenAI—"considered one of the world leaders in Generative AI" with LLMs that "continually top various benchmarks of LLMs"—"has gone to great lengths to reduce hallucination in ChatGPT," including by "train[ing] its LLMs on enormous amounts of data, and then fine-tun[ing] the LLM with human feedback, a process referred to as reinforcement learning from human feedback." *Id.* at ¶¶ 19, 20. But it is "nearly impossible to predict and prevent every possible way that an LLM might" make this kind of error. *Id.* at ¶ 23. And "[b]ecause LLMs generate output in near real-time in response to user prompts and prompts must be interpreted in context, it is not technically feasible for the LLM creator to monitor the factual accuracy of the content or determine if the LLM's output aligns with the user's intent."

Id. at ¶ 15. "Any attempt to mediate LLM output in real-time would, inevitably, undercut the core benefits of an LLM, which include generating never-before-seen content in seconds." *Id.*

When OpenAI first released ChatGPT as a free research preview, the initial public announcement included a disclaimer about "Limitations" of the system, which stated that "ChatGPT sometimes writes plausible-sounding but incorrect or nonsensical answers." Ex. M at '236. And when users—including Riehl—signed up for the free version of ChatGPT (or when they logged in), they were warned again that ChatGPT may generate incorrect information:



Ex. O, ChatGPT Sign-Up/Log-In Warning.

OpenAI has released multiple versions of ChatGPT over time, and at least one version has always been available for free. Ex. P, Affidavit of Derek Chen ("Chen Aff."), at ¶¶ 13–14; Ex. L (White Rpt.) at ¶ 16. In February 2023, OpenAI released a paid subscription plan that allowed users of ChatGPT to access more advanced models. Ex. Q, OpenAI Website, "Introducing ChatGPT Plus," at '271. The version Riehl used is called "GPT-3.5 Turbo," and it was "not connected to the internet" and had "limited knowledge of the world and events after

2021." Ex. P (Chen Aff.) at ¶ 18; Ex. L (White Rpt.) at ¶ 16; Ex. R, OpenAI Website, "What is ChatGPT?" at '282.

Riehl first started using ChatGPT, for free, in January 2023—months before the interaction at issue in this lawsuit. Ex. S, Riehl's ChatGPT Account Information, at "Users" tab, cell A2. When he opened his account, Riehl agreed to OpenAI's Terms of Use. Ex. P (Chen Aff.) at ¶ 21. He has since used ChatGPT frequently for a wide range of different purposes, including helping him write first drafts of articles for his website. Ex. G (Riehl Dep.) at 54:10–21. Riehl admits that he had, on previous occasions, experienced ChatGPT providing "flat-out fictional" responses. Ex. T, June 7, 2023 Email From Riehl to Andrew Paul; Ex. G (Riehl Dep.) at 205:22–206:23, 214:8–12.

On May 3, 2023—the day Riehl had the interaction giving rise to this lawsuit—Riehl signed up for the paid version of ChatGPT. Ex. G (Riehl Dep.) at 61:8–19; Ex. S. In doing so, Riehl again agreed to OpenAI's Terms of Use. Ex. P (Chen Aff.) at ¶ 22. Those Terms contained a disclosure concerning the accuracy of outputs from ChatGPT:

> (d) **Accuracy**. Artificial intelligence and machine learning are rapidly evolving fields of study. We are constantly working to improve our Services to make them more accurate, reliable, safe and beneficial. Given the probabilistic nature of machine learning, use of our Services may in some situations result in incorrect Output that does not accurately reflect real people, places, or facts. You should evaluate the accuracy of any Output as appropriate for your use case, including by using human review of the Output.

Ex. U, OpenAI Website, March 14, 2023 Terms of Use, at '419.

At all relevant times, there was a warning *on the screen*, directly below the text box through which Riehl and every other user communicated with ChatGPT, warning that "ChatGPT may produce inaccurate information about people, places, or facts":

Ex. V, Screenshots of Riehl's Second May 3, 2023 ChatGPT Interaction; *see also* Ex. DD, Enlargements of Screenshots in Exhibit V.

Riehl started his interaction with ChatGPT on May 3 by copying and pasting sections of the *Ferguson* Complaint into ChatGPT and asking for a summary of the complaint's factual allegations. Ex. N at rows 3, 14; Ex. G (Riehl Dep.) at 66:21–67:11, 68:14-17. ChatGPT provided an accurate summary, explaining that the lawsuit involved claims against the Washington Attorney General related to his office's investigation into SAF. Ex. N at row 15. Riehl then closed this interaction and started a new one. Ex. G (Riehl Dep.) at 100:25–101:2, 101:12-21.

In the next interaction, Riehl pasted the URL where the *Ferguson* Complaint could be found on SAF's publicly accessible website and asked ChatGPT:

> Can you read this and in a bulleted list summarize the different accusations or complaint against the defendant https://www.saf.org./wp-content/uploads/2023/05/Dkt-1-Complaint.pdf.

Ex. C at row 3.

One second later, ChatGPT responded: "I'm sorry, but as an AI language model, I do not have access to the internet and cannot read or retrieve any documents. Additionally, it's important to note that accessing and summarizing legal documents can be a sensitive matter that requires expertise and context, and it's best to consult with a qualified legal professional for accurate and reliable information." *Id.* at row 4.

Riehl nonetheless pushed for a response by re-inputting the same URL (which ChatGPT could not read) and no other text. *Id.* at row 5. After Riehl insisted on a reply, ChatGPT apologized, stated that it had reviewed "the document" provided, and included an obviously incorrect summary of the lawsuit's allegations. *Id*. at row 6. The summary said nothing about

the Washington Attorney General. *Id.* Instead, it explained that the lawsuit concerned allegations of embezzlement by an unnamed SAF Treasurer and Chief Financial Officer. *Id.*

Riehl instantly knew this response was "the wrong information," "not accurate," and "not what the document is about." Ex. G (Riehl Dep.) at 112:3–17, 113:16–21. Rather than stopping, he continued to push by asking ChatGPT, "can you read this" and again entering the inaccessible URL. Ex. C at row 7. ChatGPT (incorrectly) responded "yes" and said again that the complaint involved allegations of embezzlement from SAF. *Id.* at row 8. This time, ChatGPT identified the defendant as "Mark Walters." *Id.* Riehl asked ChatGPT to reproduce the "paragraph about Walters." *Id.* at row 9. ChatGPT then produced a short paragraph describing Walters as the CFO and Treasurer of SAF. *Id.* at row 10. Again, Riehl "knew something was off" right away, and thought to himself, "That has nothing to do with what we're talking about." Ex. G (Riehl Dep.) at 115:6–15. Riehl "knew . . . very well" that Walters was not SAF's Treasurer or CFO, that Walters was "not part of the Second Amendment Foundation," and that Walters played no role in managing its finances. *Id.* at 116:2–20, 117:18–21. Riehl therefore understood that ChatGPT was "making mistakes" and that parts of its output were "nonsensical" and "incorrect." *Id.* at 116:15–17, 119:16–20, 120:23.

After again reviewing the complaint, Riehl asked ChatGPT to "provide a copy of the paragraph concerning [W]alters." Ex. C at rows 8–9; Ex. G (Riehl Dep.) at 121:9–122:1. ChatGPT responded by repeating that Walters was the Treasurer and Chief Financial Officer of SAF and that the *Ferguson* Complaint alleged claims against him. Ex. C at row 10. Riehl knew multiple aspects of ChatGPT's response were "incorrect." Ex. G (Riehl Dep.) at 123:16–23, 124:24–125:12. He felt he could "not trust ChatGPT, obviously." *Id.* at 127:15–19.

Riehl then looked online for details about embezzlement accusations against Walters but found nothing. *Id.* at 151:20–152:2, 180:13–21. Riehl also searched the case number ChatGPT had provided and discovered that the number was associated with an unrelated case. *Id.* at 150:7–14, 152:3–10. Riehl asked ChatGPT if there were "any known news reports of this case," but ChatGPT informed Riehl that it had a "knowledge cutoff date of September 2021," well before the *Ferguson* Complaint was filed, and told Riehl that it did not "have any information on news reports about this specific case." Ex. C at rows 23, 26.

C. Riehl Immediately Verifies That ChatGPT Had Made a Mistake.

Shortly afterward, Riehl called his friend and the head of SAF, Alan Gottlieb, who confirmed that ChatGPT's output was "completely made up, crazy, never happened," and that there were no allegations of wrongdoing concerning Walters. Ex. G (Riehl Dep.) at 190:23–191:11, 192:6–11. Riehl also emailed Gottlieb, attaching screenshots of his interaction and noting that ChatGPT had provided "this crazy reply having nothing to do with the case." Ex. W, May 3, 2023 Email From Riehl to Gottlieb.

Riehl returned to ChatGPT and tried to "challeng[e] the machine to see if it realizes that it's false," because Riehl "knew for certain that it was a fabrication." Ex. G (Riehl Dep.) at 194:13–195:9. Riehl wrote, "how do you explain that what you returned in your reply has nothing to do with the content of the document I sent you?" Ex. C at row 43. ChatGPT responded that "the document you provided appears to be a genuine legal complaint filed by Alan M. Gottlieb against Mark Walters." *Id.* at row 44. Riehl told ChatGPT "this complet[e]ly is false." *Id.* at row 45.

D. Walters Suffered No Injury From Riehl's Interaction With ChatGPT.

Riehl did not publish a story claiming that Walters had embezzled funds from SAF, or even that Walters had been *accused* of embezzlement. Riehl never repeated the story as true to

anyone else, and he took no adverse action against Walters. Ex. G (Riehl Dep.) at 196:16–20, 197:1–9, 205:2–6, 17–21.

On May 4, 2023, the day after the interaction with ChatGPT described above, Riehl and Walters both attempted to recreate the mistake by re-entering—word for word—the inputs that Riehl had used. Ex. X, Log of Walters' May 4, 2023 ChatGPT Interaction, at rows 3, 5; Ex. Y, Log of Riehl's May 4, 2023 ChatGPT Interaction, at rows 3, 5; Ex. B (Walters Dep.) at 146:24–147:6. These deliberate efforts to induce the same mistake failed. *See* Ex. X; Ex. Y; Ex. B (Walters Dep.) at 157:14–158:1. Walters admits that he is not aware of *any* reproduction of this error. Ex. B (Walters Dep.) at 158:17–159:8.

Walters did not ask for a retraction of the allegedly defamatory statements. *Id.* at 171:7–19. No one has ever suggested to Walters that they think he is a defendant in a lawsuit brought by SAF or that he has been accused of embezzlement. *Id.* at 168:1–12. Indeed, he admits that he suffered no actual harm as a result of Riehl's interaction with ChatGPT:

> Q. And, in fact, you're not attempting -- you're not claiming here that you've been harmed, right?
>
> A. That is correct.

Id. at 206:6–8. Nevertheless, he filed this lawsuit on June 5, 2023.

Far from suffering an injury, Walters has celebrated the "massive publicity" this case had generated for him. Ex. Z, Text Messages Between Walters and Carol Craighead, at '1738. He told friends "[t]he media attention [was] huge," that he had "made massive incredible national media attention," and that he had "made global news" and was "everywhere." Ex. AA, Text Messages Between Walters and David Burnette, at '1748; Ex. BB, Text Messages Between Walters and Dave Neiman, at '1745; Ex. CC, Text Messages Between Walters and Lynn Sams Taylor. In his deposition, Walters acknowledged that "[a]ll coverage is good coverage" for a

media figure like him and that the publicity resulting from the suit likely generated interest in his radio shows. Ex. B (Walters Dep.) at 185:21–24, 187:21–24.

III. LEGAL STANDARD

Summary judgment is appropriate if the moving party demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." O.C.G.A. § 9-11-56. A defendant can meet this requirement by presenting "evidence negating an essential element of the plaintiff's claims or establishing from the record an absence of evidence to support such claims." *Prodigies Child Care Mgmt., LLC v. Cotton*, 317 Ga. 371, 372–73 (2023). Therefore, "a defendant who will not bear the burden of proof at trial need not affirmatively disprove the nonmoving party's case, but may point out by reference to the evidence in the record that there is an absence of evidence to support any essential element of the nonmoving party's case." *Giddens v. Metropower, Inc.*, 366 Ga. App. 15, 15 (2022) (quoting *Cowart v. Widener*, 287 Ga. 622, 623 (2010)). Moreover, "[w]here a defendant moving for summary judgment discharges this burden, the nonmoving party cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue." *Id.*

IV. ARGUMENT

"[S]ummary judgment procedures have been ruled to be particularly appropriate in defamation actions where the First Amendment is applicable." *Williams v. Tr. Co. of Georgia*, 140 Ga. App. 49, 58 (1976). This is a textbook example of such a case. The law and the undisputed facts foreclose Walters' claim for three independent reasons:

First, Walters must prove that the output he has challenged was "defamatory." He cannot do so as a matter of law because no reasonable person could understand the output to communicate actual facts about Walters. And it is undisputed that Riehl actually knew the *Ferguson* Complaint had nothing to do with Walters.

Second, Walters must prove "actual malice," meaning he must show that someone at OpenAI knew ChatGPT's output was false or recklessly disregarded that it might be false. At summary judgment, the Court must apply "the *New York Times* 'clear and convincing' evidentiary standard in determining whether a genuine issue of actual malice exists—that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity." *Barber v. Perdue*, 194 Ga. App. 287, 288 (1989). Walters cannot meet that standard—there is *no* evidence that anyone at OpenAI was even aware of ChatGPT's mistake, let alone knew or recklessly disregarded whether it was wrong.

Finally, Walters cannot recover any form of damages. He suffered no actual harm and is not entitled to recover presumed or punitive damages because he cannot show actual malice. His failure to request a retraction from OpenAI also precludes punitive damages.

A. ChatGPT's Output Was Not Defamatory.

To prove defamation, a plaintiff must establish that the statements at issue could be "reasonably understood as describing actual facts about the plaintiff or actual events in which he participated." *Bollea v. World Championship Wrestling, Inc.*, 271 Ga. App. 555, 558 (2005); *see also Bryant v. Cox Enters., Inc.*, 311 Ga. App. 230, 243 (2011). As the United States Court of Appeals for the Tenth Circuit explained in *Pring v. Penthouse International, Ltd.*—a case the Georgia Court of Appeals cited and discussed in its *Bryant* and *Bollea* decisions—the key inquiry is "whether the [challenged statements] in context could be reasonably understood as describing actual facts about the plaintiff." *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 442 (10th Cir. 1982). Challenged statements are therefore not defamatory if a reasonable reader, viewing the statements in context, would recognize that "the [challenged] portions [should] not be taken literally." *Id.*; *see also Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1153, 1161 (9th Cir. 2021) (statement that a news network "really literally is paid Russian propaganda" was

not actionable because "[n]o reasonable viewer could conclude that [the speaker] implied an assertion of objective fact"). Separately, if the individuals who read the statement did not subjectively understand it as factual, the statement cannot be defamatory as a matter of law. *Sigmon v. Womack*, 158 Ga. App. 47, 50 (1981). Consistent with this rule, courts have held that statements were not defamatory where no recipient believed the statements to be true. *See Hodges v. Tomberlin*, 170 Ga. App. 842, 843 (1984); *Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002); *Nanavati v. Burdette Tomlin Mem'l Hosp.*, 857 F.2d 96, 108–09 (3d Cir. 1988); *Usi Ins. Servs., LLC v. Bentz*, 2021 WL 9666529, at *4 (D.N.D. Feb. 2, 2021).

Under this standard, Walters' claim fails at the first step.

1. ChatGPT's Output Could Not Reasonably Be Understood as Describing Actual Facts About Walters.

In assessing whether a statement could reasonably be understood as describing actual facts about the plaintiff, a court "must give weight to cautionary terms used by the person publishing the statement." *Info. Control Corp. v. Genesis One Comput. Corp.*, 611 F.2d 781, 784 (9th Cir. 1980). Numerous courts have held that the use of cautionary language can deprive a statement of defamatory meaning. *See, e.g.*, *Pace v. Baker-White*, 432 F. Supp. 3d 495, 510–12 (E.D. Pa. 2020) (disclaimer that is "replete with 'hedging language' such as 'could,' '[w]e do not know,' 'we believe,' etc." deprived statement of defamatory meaning), *aff'd*, 850 F. App'x 827 (3d Cir. 2021); *Eros Int'l, PLC v. Mangrove Partners*, 140 N.Y.S.3d 518, 520 (1st Dep't 2021) (statement not actionable where it contained a "disclaimer as to the accuracy of any information reported therein"); *Others First, Inc. v. Better Bus. Bur. of Greater St. Louis, Inc.*, 829 F.3d 576, 582 (8th Cir. 2016) (statement couched in "equivocal" language is not actionable).

All ChatGPT users—including Riehl—are repeatedly warned that ChatGPT can make precisely the type of error it made during Riehl's May 3 interaction. ChatGPT's Terms of Use,

for example, warn users that use of ChatGPT "may in some situations result in incorrect Output that does not accurately reflect real people, places, or facts." Ex. U at '419; Ex. P (Chen Aff.) at ¶¶ 21–22. The Terms of Use also advised users to "evaluate the accuracy of any Output as appropriate for your use case, including by using human review of the Output." Ex. U at '419. The screen displayed a similar warning directly below the text box throughout the interaction itself: "ChatGPT may produce inaccurate information about people, places, or facts." Ex. V; *see also* Ex. DD.

Moreover, the version of ChatGPT Riehl was using did not have access to the internet and had a knowledge cutoff that pre-dated the filing of the *Ferguson* Complaint. Ex. R at '282. In these circumstances, no user in Riehl's position could reasonably have interpreted ChatGPT's subsequent output to describe actual facts about Walters. That is particularly true given that Riehl had a copy of the *Ferguson* Complaint in his possession and already *knew* what the complaint alleged, allowing him to easily verify whether the output he received from ChatGPT was accurate or not. Ex. G (Riehl Dep.) at 68:14–17, 72:5–73:6.

Summary judgment is warranted because no reasonable person could conclude that the clearly inaccurate output ChatGPT provided was an actual summary of the *Ferguson* Complaint.[2]

[2] Riehl testified during his deposition that, at one point during the interaction, he suspected ChatGPT's output might have been describing some other lawsuit against Walters, which ChatGPT found by reading through files that were not publicly accessible on the internet. Ex. G (Riehl Dep.) at 136:6–138:7, 162:19–163:4, 165:17–166:2. To the extent Riehl harbored any such suspicions, no reasonable user could have interpreted ChatGPT's output as describing allegations made in a lawsuit different from the *Ferguson* Complaint that Riehl asked ChatGPT to summarize, nor could Walters meet the demanding "actual malice" bar, as he must, for this alternative, unpled theory, *see infra* Section IV.B.

2. Riehl Did Not Subjectively Believe That ChatGPT's Output Described Actual Facts About Walters.

Riehl was an experienced user familiar with the limits of ChatGPT. He had been using ChatGPT for months and had engaged in many interactions like the one at issue here. He had prior personal experience with ChatGPT making mistakes and was on notice that the system could provide "flat-out fictional" responses. Ex. G (Riehl Dep.) at 205:22–206:23, 214:8–12. Riehl admits that at all times he was "skeptical" about ChatGPT's responses and understood the need to fact-check any output. *Id.* at 205:22–206:10.

When Riehl received the output in question here, he knew that ChatGPT was not accurately describing "the document" he had asked it to summarize. He knew that SAF had sued the Washington Attorney General, not his friend Mark Walters, and that the complaint he asked ChatGPT to summarize "had nothing to do with Mark Walters or embezzlement." *Id.* at 71:20–73:6. Riehl recognized immediately that ChatGPT was providing him with information about the *Ferguson* Complaint that was "wrong," "not accurate," "incorrect," and "nonsensical." *Id.* at 112:3–17, 113:8–21, 118:9–15, 119:16–20, 120:16–23. Riehl also knew in real time that ChatGPT's output about Walters was factually impossible: Riehl was on SAF's Board of Directors and knew that Walters had never served as the organization's Treasurer or CFO and never had access to SAF's finances. *Id*. at 116:2–20, 117:18–118:21, 123:16–125:5, 278:13–279:12, 283:4–23.

Moreover, Riehl knew that he needed to fact-check ChatGPT's output and did so here. *Id.* at 148:19–149:1, 203:16–204:18, 273:18–274:18. The undisputed facts show that by the time the interaction ended, Riehl knew ChatGPT had made no factual statement about Walters at all. Ex. C at rows 41–48. Indeed, after speaking with Gottlieb, Riehl demanded that ChatGPT explain why its output "ha[d] nothing to do with the content of the document" he had provided.

Id. at row 43. And he told ChatGPT, "what you returned and the description of the [*Ferguson* Complaint] don't match." *Id.* at row 47.

Because Riehl did not conclude (and, given the totality of the circumstances, no reasonable user could have concluded) that ChatGPT was describing "actual facts" about Walters, OpenAI is entitled to summary judgment.

B. Walters Cannot Prove Actual Malice.

Walters qualifies as a public figure under any test. Under the First Amendment, he must therefore meet the "actual malice" standard, which requires that he prove by clear and convincing evidence that OpenAI made the challenged statements knowing they were false or with reckless disregard for whether they were false. *See ACLU v. Zeh*, 312 Ga. 647, 650–51 (2021); *Mathis v. Cannon*, 276 Ga. 16, 21 (2002). The standard "is based on what the writer knew when he wrote it"—*i.e.*, "the [plaintiff] must show that the writer had a '*subjective awareness of probable falsity*' when the material was published." *Jones v. Albany Herald Publ'g Co.*, 290 Ga. App. 126, 132 (2008) (cleaned up) (emphasis added).

Walters cannot meet this burden because there is *no* evidence that anyone at OpenAI was even aware of the output before Riehl saw it, much less was subjectively aware of its probable falsity.

1. Walters Must Prove Actual Malice Because He Is a Public Figure.

Whether the plaintiff qualifies as a public figure is a question of law for the court to decide. *ACLU*, 312 Ga. at 664–65; *Mathis*, 276 Ga. at 23. There are two types of public figures: (1) "general-purpose" public figures, "deemed public figures for all purposes," and (2) "limited-purpose public figures," deemed public figures "for a limited range of issues." *Depalma v. Kerns*, 2023 WL 6164312, at *12 n.24 (M.D. Ga. Sept. 21, 2023) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)). Walters qualifies as both.

General-Purpose Public Figure. A general-purpose public figure is "involved in issues in which the public has a justified and important interest" and "is famous or infamous because of who he is or what he has done." *Williams*, 140 Ga. App. at 52–53. Courts consider "[p]revious coverage of the plaintiff in the press," "the voluntariness of the plaintiff's prominence[,] and the availability of self-help through press coverage of responses." *Riddle v. Golden Isles Broad., LLC*, 275 Ga. App. 701, 704 (2005). A plaintiff may be classified as a general-purpose public figure within a specific community if he has gained sufficient fame and notoriety within that community. For example, in *Williams*, the plaintiff was a public figure because, among other things, he was a prominent civil rights leader, had "received widespread publicity for his civil rights and labor activities," "at one time had his own radio program," "took his cause to the people to ask 'the public's support,'" and "was outspoken on subjects of public interest." 140 Ga. App. at 54. Similarly, the United States Court of Appeals for the Second Circuit held that a plaintiff was a public figure based on his "own characterization of himself as a 'well known radio commentator' within the Metropolitan Filipino-American community." *Celle v. Filipino Rep. Enters., Inc.*, 209 F.3d 163, 177 (2d Cir. 2000); *see also Chapman v. J. Concepts, Inc.*, 528 F. Supp. 2d 1081, 1095 (D. Haw. 2007) (plaintiff, a prominent surfer, held to be a public figure within the surfing community).

Walters qualifies as a general-purpose public figure given his prominence in the Second Amendment rights community. He is a "[n]ationally known figure" within that community, Ex. D (Gottlieb Dep.) at 27:10–28:1, and a "thought leader" among Second Amendment advocates, Ex. G (Riehl Dep.) at 29:3–14. Walters touts himself as "the loudest voice in America fighting for gun rights," Ex. A at 3, and he is a prominent radio show host with two nationally syndicated shows that air on hundreds of stations across the country each week. Ex. F; Ex. B (Walters Dep.)

at 19:13–20:16, 24:10–13, 88:11–17. He has ready access to the media and hence "a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz*, 418 U.S. at 344. In fact, after filing this lawsuit, Walters aired an episode of his radio show in which he and Gottlieb made clear that the allegedly defamatory statements—which relate directly to Walters' status within the gun-rights community—are not true. Ex. B (Walters Dep.) at 224:7–14, 226:14–22.

Walters' general notoriety as a leading advocate for Second Amendment rights and his widespread access to and use of media platforms establish that he is a general-purpose public figure within the Second Amendment rights community. *See Williams*, 140 Ga. App. at 52–53.

Limited-Purpose Public Figure. Even if Walters is not a general-purpose public figure, he readily qualifies as a limited-purpose one under the applicable three-step test. In making this determination, a court must "isolate the public controversy" relevant to the dispute, "examine the plaintiff's involvement in the controversy," and "determine whether the alleged defamation was germane to the plaintiff's participation in the controversy." *Mathis*, 276 Ga. at 23.

1. Public controversy. Challenged statements address a "controversy of legitimate public concern" if "resolution of the controversy will affect people who do not directly participate in it." *Rosser v. Clyatt*, 348 Ga. App. 40, 48–49 (2018). A "controversy" should not be "defined" "too narrowly"; courts identify a controversy based on the "broader question" relevant to the challenged statement. *Atlanta J.-Const. v. Jewell*, 251 Ga. App. 808, 817 (2001).

This case involves the ongoing advocacy efforts of Second Amendment rights organizations—a quintessential "public controversy." *See Lott v. Levitt*, 2007 WL 9812977, at *2 n.2 (N.D. Ill. Aug. 23, 2007), *aff'd*, 556 F.3d 564 (7th Cir. 2009). Walters himself discussed the *SAF v. Ferguson* litigation on his widely broadcast radio program, identifying it as a "huge

story" and "part of a broader claim in society about the weaponization of government against Second Amendment organizations." Ex. B (Walters Dep.) at 105:2–14, 106:17–107:5. The lawsuit was a public issue of interest to "people who do not directly participate in it," *Rosser*, 348 Ga. App. at 48–49, including other Second Amendment advocates and the American people more generally.

Allegations of internal corruption within Second Amendment organizations are also a matter of public concern. For example, in *Silvester v. American Broadcasting Companies*, the purported defamation "focused on allegations of corruption in the American jai alai industry." 839 F.2d 1491, 1493 (11th Cir. 1988). The United States Court of Appeals for the Eleventh Circuit held those subjects were "clearly . . . matters with which the public has a legitimate concern," because the public "is legitimately interested in all matters of corruption." *Id.*; *see also Rosser*, 348 Ga. App. at 41, 46, 48–49. That is especially true for allegations of corruption in organizations that protect and advocate for constitutional rights. Riehl himself testified that, as a journalist, he had a "long history of reporting on corruption" in Second Amendment organizations. Ex. G (Riehl Dep.) at 119:16–120:15. This public issue also plainly impacts "people who do not directly participate in it." *Rosser*, 348 Ga. App. at 48–49.

2. Walters' involvement. Next, courts examine whether the plaintiff "voluntarily injected himself into [the identified] public controversy in order to have an impact on its outcome." *Jewell*, 251 Ga. App. at 819. In doing so, "[c]ourts may consider the plaintiff's past conduct, the extent of any press coverage[,] and the public reaction to the plaintiff's conduct." *Depalma*, 2023 WL 6164312, at *13.

Walters has voluntarily involved himself in Second Amendment issues for decades. He labels himself the "loudest voice in America fighting for gun rights," Ex. A at 3, a title he has

earned in light of his nationally syndicated radio shows, his "countless" appearances in other media, and his many published books and articles, Ex. E at 2–4; Ex. B (Walters Dep.) at 19:13–20:16, 24:10–25:3, 25:18–25, 28:16–20, 34:24–25. Walters even publicly addressed the *SAF v. Ferguson* litigation itself on his radio show. Ex. B (Walters Dep.) at 105:2–7, 106:23–107:5. In other words, Walters has sought and achieved significant public prominence with respect to the very issues involved in the statements challenged here.

Far less involvement would suffice—even giving a single media interview on some topic can be enough to render a plaintiff a limited-purpose public figure on that topic. *See, e.g.*, *Rosser*, 348 Ga. App. at 48–50 (single interview); *Finkelstein v. Albany Herald Publ'g Co.*, 195 Ga. App. 95, 97 (1990) (making one television appearance and being quoted in the paper); *see also Falls v. Sporting News Publ'g Co.*, 714 F. Supp. 843, 847 (E.D. Mich. 1989) (plaintiff "thrust himself into the public eye" by publishing articles and books, hosting radio shows, and making television appearances), *aff'd*, 899 F.2d 1261 (6th Cir. 1990).

3. Germaneness. Last, an allegedly defamatory statement is "germane to a plaintiff's participation in a controversy if it might help the public decide how much credence should be given to the plaintiff." *Jewell*, 251 Ga. App. at 820. This final factor "is a low bar: 'Anything which might touch on the controversy is relevant.'" *Krass v. Obstacle Racing Media, LLC*, 667 F. Supp. 3d 1177, 1210 (N.D. Ga. 2023) (quoting *Jewell*, 251 Ga. App. at 819). In *Jewell*, the plaintiff had involved himself in the controversy over the bombing at the 1996 Atlanta Olympics; the challenged statements "dealt with the [plaintiff's] status as a suspect" in that bombing, and were therefore "relevant to the public's decision to listen to him" about it. 251 Ga. App. at 819; *see also Ladner v. New World Commc'ns of Atl., Inc.*, 343 Ga. App. 449, 457 (2017); *Sparks v. Peaster*, 260 Ga. App. 232, 237 (2003) (claim that plaintiff had a "serious cocaine habit" was

germane to his credibility); *Depalma*, 2023 WL 6164312, at *14 (statements suggesting that an activist on domestic violence prevention was "taking money from people" were "germane").

Here, the allegedly defamatory output is "germane" because it directly implicates causes to which Walters has devoted his career, including a public lawsuit regarding Second Amendment rights and allegations of embezzlement from a Second Amendment organization that would affect his credibility as an advocate for gun rights. Walters is therefore a limited-purpose public figure with respect to the challenged output.

2. Walters Has No Evidence of Actual Malice.

Because Walters is a public figure, he can survive summary judgment only by meeting the "extremely high" burden of identifying clear and convincing evidence that could establish "actual malice" at trial. *ACLU*, 312 Ga. at 669; *Stange v. Cox Enters., Inc.*, 211 Ga. App. 731, 734 (1994). Malice "may not be presumed nor derived solely from the language of the publication itself." *Bryant*, 311 Ga. App. at 236 n.22. The plaintiff must instead show "what the writer knew when he wrote it," and that the writer "had a 'subjective awareness'" that the statement was probably false at the time of publication. *ACLU*, 312 Ga. at 669.[3]

Walters has not even attempted to develop evidence—through documents or testimony—that could possibly meet that standard. This complete failure of proof ends this case. Moreover, there *is* evidence to the contrary. As discussed above, OpenAI's Terms of Use and multiple prominent warnings displayed throughout the ChatGPT site all unambiguously warned that ChatGPT's results could be inaccurate, and that OpenAI could not know with certainty whether ChatGPT would provide accurate responses to prompts asking for information. Ex. O; Ex. U at

[3] It is therefore highly unlikely that Walters could ever satisfy the actual malice standard because the statements he challenges are a computer output. But the Court need not resolve that question because Walters has no evidence (and has not even tried to develop any) that could potentially satisfy his burden here.

‘419; Ex. V; *see also* Ex. DD. Those warnings and disclaimers negate any reasonable inference that OpenAI acted with “reckless disregard” in connection with the output at issue. They demonstrate instead that OpenAI took care in warning all users that any ChatGPT output, including the output challenged here, might be false. There is also no evidence that anyone notified OpenAI about the output, and Walters never requested a retraction or correction before filing this lawsuit. Ex. B (Walters Dep.) at 171:10–19.

Walters’ claim fails for another, separate reason: When a plaintiff sues an organization like OpenAI for defamation, the plaintiff must identify *specific* individuals within the organization who acted with actual malice. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964); *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 123 (2d Cir. 2013); *accord Holbrook v. Harman Auto., Inc.*, 58 F.3d 222, 225 (6th Cir. 1995); *Waskow v. Associated Press*, 462 F.2d 1173, 1175 n.4 (D.C. Cir. 1972). Walters cannot make that showing here. There is no evidence that anyone at OpenAI drafted the output, reviewed it, or even knew about it until after Walters sued, much less had “subjective awareness” that the output was probably false. *ACLU*, 312 Ga. at 669. Given the nature of ChatGPT—which provides automated responses in real time—human review of all outputs for accuracy before they are displayed to users is not even feasible. Ex. P (Chen Aff.) at ¶ 11; Ex. L (White Rpt.) at ¶ 15.

Georgia courts routinely grant summary judgment on defamation claims where the plaintiff cannot identify clear and convincing evidence of actual malice. *See, e.g.*, *Rosser*, 348 Ga. App. at 52 (affirming summary judgment where plaintiff identified “no evidence, much less ‘clear and convincing’ evidence” of actual malice); *Williams*, 140 Ga. App. at 55 (affirming summary judgment where plaintiff “failed to produce any conflicting evidence on the issue of constitutional malice”). “Unless the [Court] finds, on the basis of pretrial affidavits, depositions

or other documentary evidence, that the plaintiff can prove actual malice in the *Times* sense, [the Court] should grant summary judgment for the defendant." *Id.* at 52. The total failure of proof here dooms Walters' defamation claim.

3. Walters' Claim Fails Even if Negligence Is the Applicable Standard.

Even if Walters did not qualify as a public figure, he would still have to prove that OpenAI acted at least negligently, but there is no evidence of this, either. *ACLU*, 312 Ga. at 650 ("A plaintiff who is a private figure must establish, as a matter of Georgia law, that the defendant published the allegedly defamatory statements with at least ordinary negligence."); *Gettner v. Fitzgerald*, 297 Ga. App. 258, 262 (2009). In defamation cases, the standard of care for negligence depends on how a reasonable publisher in the defendant's position would have acted, based on the "skill and experience normally exercised by members of [its] profession." *Gettner*, 297 Ga. App. at 264; *see also Triangle Publ'ns, Inc. v. Chumley*, 253 Ga. 179, 181–82 (1984). "Customs and practices within the profession are relevant in applying the negligence standard, which is, to a substantial degree, set by the profession itself," and such proof "would normally come from an expert who has been shown to be qualified on the subject." *Gettner*, 297 Ga. App. at 265 n.8.

Walters has identified *no* evidence—expert or otherwise—suggesting that OpenAI fell below the standard of care in its industry. And OpenAI has produced unrebutted expert testimony establishing that *all* AI language models like ChatGPT can produce mistakes like the one here, and that *no* company has succeeded in fully eliminating mistakes like this one. Ex. L (White Rpt.) at ¶ 20. Indeed, OpenAI has been a pioneer in reducing such errors. *Id.* at ¶¶ 19–20. OpenAI has also taken extensive steps to warn users (as it did with Riehl) of the possibility that ChatGPT may generate incorrect, inaccurate, or misleading information. Ex. P (Chen Aff.) at ¶ 20; Ex. L (White Rpt.) at ¶¶ 24–26.

Thus, even if the negligence standard applied here—and it does not, for the reasons explained above—Walters could not meet it.

C. Walters Cannot Recover Any Damages.

Finally, this Court should grant summary judgment because Walters is not entitled to any relief. Generally, there are three types of damages a plaintiff may seek in a defamation case: actual damages, presumed damages, and punitive damages. Actual damages are intended to compensate a plaintiff for specific injuries that "must be supported by competent evidence concerning the injury." *Gertz*, 418 U.S. at 350. Separately, plaintiffs may sometimes recover "presumed" damages that the law "infer[s]" are caused by specific types of statements that are "defamatory per se." *ACLU*, 312 Ga. at 661. And punitive damages can be awarded "to penalize, punish, or deter a defendant." O.C.G.A. § 51-12-5.1.

Walters has no proof of actual damages and squarely admitted as much at his deposition. Ex. B (Walters Dep.) at 206:6–8 ("Q. And, in fact, you're not attempting -- you're not claiming here that you've been harmed, right? A. That is correct."). And he admitted that he has not incurred any measurable monetary losses for which he could seek compensation. *Id.* at 169:1–170:7.

Walters also cannot recover presumed or punitive damages because he cannot show actual malice. Under the First Amendment, "even a private-figure plaintiff is required to prove actual malice in order to recover presumed or punitive damages if the defamatory statement was about a matter of public concern." *ACLU*, 312 Ga. at 652; *see Gertz*, 418 U.S. at 349–50. For the reasons discussed above, *see supra* pp. 19–20, the statements challenged here indisputably involve matters of public concern, and Walters has no evidence that would allow him to meet the "extremely high" actual malice standard. *ACLU*, 312 Ga. at 669. This precludes him from recovering either presumed or punitive damages.

Last, Walters cannot recover punitive damages for the additional reason that he did not seek a retraction or correction from OpenAI. Under Georgia law, "all libel plaintiffs who intend to seek punitive damages [must] request a correction or retraction before filing their civil action against any person for publishing a false, defamatory statement." *Mathis*, 276 Ga. at 28; *see* O.C.G.A. § 51-5-11(c). Walters concedes that he never requested a correction or retraction. Ex. B (Walters Dep.) at 171:7–19. Punitive damages are barred for this independent reason, as well.[4]

V. CONCLUSION

For these reasons, OpenAI asks that the Court grant summary judgment for OpenAI on Walters' defamation claim, his sole cause of action.

Respectfully submitted, this 14th day of November, 2024.

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[4] Walters' claim also fails because the allegedly defamatory statements were not "published" within the meaning of Georgia defamation law. *See Murray v. ILG Techs., LLC*, 378 F. Supp. 3d 1227 (S.D. Ga. 2019) (holding under Georgia defamation law that erroneous software output does not constitute an actionable publication), *aff'd*, 798 F. App'x 486 (11th Cir. 2020). Given the other fatal deficiencies in Walters' defamation claim, the Court need not reach this issue.

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IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

MARK WALTERS, Plaintiff, v. OPENAI, L.L.C., Defendant.	CIVIL ACTION NO. 23-A-04860-2

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2024, I electronically filed the foregoing *Defendant OpenAI, L.L.C.'s Memorandum of Law in Support of Motion for Summary Judgment* with the Clerk of Court using the efileGA Odyssey system, which will send e-mail notification of such filing to all attorneys of record.

Dated: November 14, 2024 Respectfully submitted,

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