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11 *Corporation*

12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **OAKLAND DIVISION**

15 ELON MUSK, et al.,

16 Plaintiffs,

17 v.

18 SAMUEL ALTMAN, et al.,

19 Defendants.

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

**DEFENDANT MICROSOFT
CORPORATION'S PROPOSED
FINDINGS OF FACT AS TO
LIABILITY**

Date: April 27, 2026
Action Filed: August 5, 2024
Trial Date: April 27, 2026

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INTRODUCTION

1
2 1. At the center of this case is a falling out between Elon Musk, Samuel Altman, and
3 Greg Brockman over the future of OpenAI, Inc. (“OpenAI”). That is not Microsoft’s dispute.

4 2. Shortly after launching OpenAI, its founders all recognized that the company
5 needed massive amounts of computing power and capital to continue OpenAI’s mission of
6 benefiting all humanity. The founders, including Musk, understood that this meant they needed a
7 new corporate structure for OpenAI that would enable it to attract investors, not just donors. To
8 this end, Musk and his co-founders proposed many for-profit configurations and collaborations.
9 Musk himself proposed converting OpenAI into a public benefit corporation or attaching it to his
10 company Tesla. But for all the structures Musk proposed, he also demanded control. And when
11 he did not get it, he ceased his donations and walked away from OpenAI.

12 3. OpenAI’s nonprofit board agreed with the founders that the company could not raise
13 sufficient funds from donations alone. So it decided to form a for-profit subsidiary to raise the
14 capital and carry on the commercial activities that OpenAI needed to pursue its mission.

15 4. OpenAI undertook this effort independent of Microsoft and before Microsoft’s
16 involvement. In 2018, the OpenAI nonprofit board created a capped investment structure. OpenAI
17 reached out to many investors. And OpenAI raised over \$100 million from these other investors.

18 5. Almost ten months later, in July 2019, Microsoft agreed to make an initial \$1 billion
19 investment and build the custom supercomputers that OpenAI needed for its artificial intelligence
20 (“AI”) research. In return for taking all this risk in what was at the time an unproven research lab,
21 Microsoft would have the right to eventually commercialize OpenAI’s technology when it had
22 products to commercialize.

23 6. That partnership has been a huge success. Microsoft’s supercomputers and funding
24 have enabled OpenAI to advance its research and widely distribute its technology, which hundreds
25 of millions of people use every day. And building on OpenAI’s technology, Microsoft has
26 developed leading AI development tools and services that thousands of AI developers and millions
27 of Microsoft customers use to achieve more of their goals.

28 7. Only one claim remains for trial against Microsoft. Musk alleges that he and

1 OpenAI, Altman, and Brockman (the latter three together, the “OpenAI Defendants”) created a
2 charitable trust. Musk claims that the OpenAI Defendants breached the alleged charitable trust
3 when they created OpenAI’s for-profit subsidiary and closed-sourced some of OpenAI’s
4 technology. And Musk seeks to hold Microsoft liable for aiding and abetting that supposed breach.
5 In particular, he says Microsoft aided and abetted this breach of charitable trust through its
6 investments in and partnership with OpenAI’s for-profit subsidiary.

7 8. But Musk faces several insurmountable hurdles on that claim—even if he can
8 prevail on the underlying claim for breach of charitable trust.

9 9. The first is timeliness. Altman told Musk that OpenAI’s nonprofit board created a
10 for-profit subsidiary in 2018. Musk knew about Microsoft’s investment and commercial
11 partnership no later than July 2019. He openly criticized that partnership in a tweet in September
12 2020. And Altman informed Musk in advance of Microsoft’s planned 2021 investment of that
13 forthcoming investment. Still, Musk waited well over three years—until November 14, 2024—to
14 name Microsoft as a defendant in his fight with OpenAI.

15 10. Musk’s claim against Microsoft is therefore untimely. And even if it were not, his
16 claim separately fails due to his laches. His unreasonable delay in filing suit has significantly
17 prejudiced Microsoft. The company has steadily increased its collaborative efforts and investments
18 in OpenAI while foregoing other opportunities in the global race to develop artificial general
19 intelligence—all while Musk sat on his hands for years.

20 11. Musk fares no better on the elements of the claim itself. To prevail, Musk must
21 show at least: (1) that Microsoft knew of the specific charitable purposes for which Musk made his
22 donations, and that the OpenAI Defendants committed a breach of charitable trust by using the
23 donations for other inconsistent purposes; (2) that Microsoft gave substantial assistance or
24 encouragement to the OpenAI Defendants in breaching the charitable trust Musk alleges he created;
25 and (3) that Microsoft’s conduct was a substantial factor in causing harm to Musk. The evidence
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27
28

1 will support none of those elements.¹

2 12. **First**, Microsoft never learned about Musk’s purported charitable trust or its breach
3 and so did not have the required knowledge. Microsoft was not involved with OpenAI at its
4 founding, was not privy to any oral or written communications purportedly establishing Musk’s
5 charitable trust, was not involved in Musk’s separation from OpenAI, and had nothing to do with
6 the OpenAI nonprofit board’s decision to create a for-profit entity. OpenAI made all those
7 decisions and took those actions, including conducting a first funding round via the for-profit entity,
8 before Microsoft became involved. Microsoft thus had no visibility into Musk’s private alleged
9 donation conditions—and no one ever told Microsoft about them. Just the opposite. When
10 Microsoft learned about the OpenAI nonprofit board’s commercial venture plans, it asked questions
11 because it wanted to be sure OpenAI could pursue those plans. And Microsoft did not stop there.
12 Microsoft also conducted due diligence before entering the OpenAI partnership. It reviewed many
13 documents during its diligence process. It confirmed those documents were consistent with what
14 OpenAI was telling Microsoft it was authorized to do. It asked more questions about OpenAI’s
15 venture. And it never found any evidence of Musk’s purported conditions. There was no document
16 or writing containing them in all of Microsoft’s due diligence. Nor did anybody at OpenAI say
17 anything to Microsoft about those (non-existent) conditions. On the contrary, OpenAI’s nonprofit
18 board approved each of Microsoft’s investments and associated commercial partnerships, and each
19 time, Microsoft received specific written assurances from OpenAI that the deals would not violate
20 any third party’s rights.

21 13. **Second**, Microsoft did not substantially assist any breach of charitable trust. The
22 OpenAI nonprofit board’s decision to create a for-profit subsidiary predated Microsoft’s first
23 investment by almost ten months. Microsoft could not have possibly assisted conduct that predated
24 its involvement. What’s more, the capital and computational resources that Microsoft later did
25 provide advanced OpenAI’s nonprofit mission. That is why OpenAI’s nonprofit board approved

27 ¹ Microsoft maintains its position that Musk’s aiding-and-abetting claim requires a further showing
28 that Microsoft intended to assist the alleged breach of charitable trust. But Musk’s claim fails
regardless of whether intent is a separate element.

1 each and every Microsoft investment and associated commercial partnership. For the 2021 and
2 2023 deals, that nonprofit board even included Shivon Zilis, Musk’s co-parent and business partner,
3 whom Musk himself viewed as his eyes and ears on the board. Zilis and the rest of the OpenAI
4 nonprofit board recognized that the transactions with Microsoft furthered the nonprofit’s mission
5 of developing artificial general intelligence to benefit all of humanity.

6 14. **Third**, Microsoft’s conduct was not a substantial factor in causing any harm that
7 Musk alleges. Again, the OpenAI nonprofit board independently decided to create a for-profit
8 structure, independently raised capital from other investors, and independently made the
9 governance and commercialization decisions that Musk now challenges. Microsoft was a
10 downstream participant in a structure the OpenAI nonprofit board had already independently
11 established—not a driver of the conduct at issue.

12 15. In any event, Musk has unclean hands. Musk himself proposed converting OpenAI
13 to a public benefit corporation—*i.e.*, a for-profit corporate structure—and he attempted to attach
14 OpenAI to his own for-profit company (Tesla). In both instances, he did so because he knew
15 OpenAI required a different corporate structure to raise the funds it needed to pursue its mission.
16 He also fueled the situation that led the OpenAI nonprofit board to form a for-profit subsidiary and
17 seek out Microsoft as an investor by walking away from OpenAI when his co-founders refused to
18 give him control. Musk left OpenAI to fail, and he waited until after ChatGPT took the world by
19 storm in 2022 and until after he launched a direct OpenAI competitor (xAI) in 2023 to sue. It would
20 be fundamentally unfair to allow Musk to recover in these circumstances, even if he could somehow
21 satisfy the elements of his untimely equitable claim.

22 16. For all these reasons, Microsoft cannot be found liable.

23 **AIDING AND ABETTING BREACH OF CHARITABLE TRUST**

24 **I. Microsoft Had No Knowledge of Either the OpenAI Defendants’ Supposed Duties to** 25 **Musk or the Purported Breach of Those Duties.**

26 17. Microsoft never learned about the OpenAI Defendants’ purported breach of
27 charitable trust. Nor did Microsoft even learn that the OpenAI Defendants owed the alleged duties
28 to Musk in the first instance. After all, Microsoft: (1) was not involved in the formation of OpenAI

1 in late 2015 and was neither privy to Musk’s private alleged donation conditions nor involved with
2 Musk’s separation from OpenAI in 2018; (2) was not involved in the OpenAI nonprofit board’s
3 decision to create a for-profit subsidiary in late 2018 and did not invest in OpenAI until July 2019,
4 after the nonprofit board had already conducted an investment round with other investors; (3) asked
5 questions and conducted due diligence before its first investment and found no evidence that
6 Musk’s donations came with the alleged strings attached; (4) was never informed by OpenAI or
7 Musk, or anybody else for that matter, of Musk’s supposed conditions; and (5) invested in 2019,
8 2021, and 2023 only after the OpenAI nonprofit board approved each of the transactions, and only
9 after OpenAI repeatedly assured Microsoft that its investments and associated commercial
10 partnerships would not violate any third party’s rights.

11 **A. Microsoft Was Not Involved in OpenAI’s Formation, Not Privy to Musk’s**
12 **Private Alleged Donation Conditions, and Not Involved in Musk’s Separation**
13 **from OpenAI.**

14 18. OpenAI was first publicly announced in December 2015. DX-512. Its founders
15 described OpenAI as “a non-profit artificial intelligence research company,” with a broad goal to
16 “benefit humanity.” *Id.* In this initial press release, OpenAI identified various well-known
17 individuals associated with the effort, and it named Altman and Musk as “co-chairs.” *Id.* The
18 company also announced that Musk, along with five other individuals, Amazon Web Services,
19 Infosys, and YC Research, were “donating to support OpenAI.” *Id.* OpenAI did not specify any
20 conditions for those donations—either for Musk or anyone else. *See id.*

21 19. Microsoft was not involved in OpenAI’s formation in any way. DX-512; PX-221;
22 Altman; Brockman; Nadella.

23 20. Nor was Microsoft privy to Musk’s supposed donation conditions. There is no
24 dispute that Musk donated to OpenAI without creating or entering into a written charitable trust
25 agreement. Rather, Musk claims that the purported duties to him were created by *private* oral and
26 email communications between him, OpenAI, and the company’s co-founders. No one from
27 Microsoft is copied on any of these communications, and no evidence suggests that any of these
28 private communications were later shared with Microsoft—because they were not. *See* PX-003;

1 PX-007; PX-012; DX-502; Altman; Brockman. These communications long predate Microsoft's
2 investments in and collaboration with OpenAI. *See infra* at ¶¶ 33-37. And there is no single
3 document showing that the OpenAI Defendants accepted Musk's donations with the conditions he
4 now claims.

5 21. Musk separated from OpenAI in February 2018. Musk; DX-770. Microsoft was
6 not involved with Musk's separation, either. Nadella; Scott. This was still well before Microsoft's
7 first investment in the OpenAI for-profit subsidiary in July 2019. Nadella; Scott. And Microsoft
8 was not aware of any potential dispute between the parties. Nadella; Scott.

9 **B. Microsoft Was Not Involved in the OpenAI Nonprofit Board's Independent**
10 **Decision in Late 2018 to Create a For-Profit Subsidiary to Address OpenAI's**
11 **Substantial Capital and Computation Needs.**

12 22. Microsoft had only limited dealings with OpenAI as it got off the ground. For
13 several years, OpenAI's leadership, including Musk, independently explored options to address the
14 company's increasing needs for capital and computational power. In 2018, the OpenAI nonprofit
15 board decided to launch a for-profit subsidiary after Musk left OpenAI. He left OpenAI after his
16 proposals to convert the company into a for-profit structure under his control all failed. Microsoft
17 did not invest until nearly a year later.

18 **1. OpenAI Had Ever-Increasing Needs for Capital and Computing Power.**

19 23. OpenAI focused its early-stage research on reinforced machine learning. Nadella
20 Tr. at 61-62. The company initially used Amazon's cloud computing resources to support this
21 research. Nadella Tr. at 38; DX-512.

22 24. In 2016, Musk expressed his preference that OpenAI change its cloud services
23 provider from Amazon to Microsoft. Musk Tr. at 344; DX-556. Musk then helped arrange for
24 Microsoft's supply of Azure cloud computing services to OpenAI. Musk Tr. at 344; Nadella Tr. at
25 27-28, 51; MDX-1509. For the next year, the two companies had "a regular Azure marketing
26 customer relationship." Nadella Tr. at 197. Nobody told Microsoft that the OpenAI Defendants
27 had any duties to Musk during that time (or otherwise). Nadella; Scott; Hood; Wetter. And
28 Microsoft never learned of any such duties. Nadella; Scott; Hood; Wetter.

1 25. In August 2017, OpenAI defeated a professional human player in the multiplayer,
2 online Dota 2 video game using Microsoft’s cloud computing services. MDX-1501; Nadella Tr. at
3 59-61. Musk thanked Satya Nadella of Microsoft for the role its cloud computing services played
4 in that accomplishment. MDX-1501; MDX-1535.

5 26. But OpenAI sought to do far more than beat humans at video games. OpenAI
6 required vast amounts of resources to continue its research and grow, and its founders, including
7 Musk, discussed the need to increase their computing power capabilities by almost tenfold
8 “ASAP.” MDX-1587. To that end, OpenAI approached Microsoft in late 2017, seeking a much
9 larger allotment of discounted Azure compute resources. Nadella. Microsoft, however, struggled
10 to justify the benefits of that arrangement, which it viewed as effectively asking it to donate
11 “compute” without any strategic benefit. Nadella Tr. at 61-62. As a result, Microsoft declined and
12 OpenAI contracted with Google for those services instead. Nadella Tr. at 61.

13 27. But OpenAI’s need for computing power only continued to grow. Brockman;
14 Sutskever. OpenAI pivoted the focus of its AI research—without any input from Microsoft—from
15 reinforced machine learning to building large language models (“LLMs”). Reinforced machine
16 learning involves an AI agent learning to make decisions within a controlled, simulated
17 environment—such as a video game or chess engine—where it receives rewards or penalties for its
18 actions and iteratively refines its behavior to maximize cumulative reward. Musk, Nadella;
19 Altman; Brockman. LLMs are systems trained on massive text datasets to predict the next word in
20 a sequence and generate fluent text output. Nadella; Scott. Training LLMs at the scale that OpenAI
21 envisioned would require custom supercomputers and large-scale clusters of sophisticated cloud
22 computing resources. Altman; Brockman; Sutskever. This would require a massive hardware
23 infrastructure build, as well as massive amounts of capital to finance that build. Altman; Brockman;
24 Sutskever.

25 28. The company’s founders explored many ways to obtain the additional computing
26 resources and capital that they needed, including converting OpenAI to a for-profit entity. Altman
27 Tr. at 303; Brockman Tr. at 213-15; Sutskever Tr. at 241-43; Birchall. Microsoft was not involved
28 in any of these discussions. Altman; Brockman.

1 29. Musk himself previously recognized that OpenAI desperately and immediately
2 “needed to raise capital”—to the tune of “billions per year.” MDX-1570; Musk Tr. at 78-79. And
3 he was “a go on [the] for profit” route. MDX-1578. Musk and one of his chief financial advisors,
4 Jared Birchall, even formed a for-profit corporation for OpenAI to use. Birchall Tr. at 107.

5 **2. In Late 2018, the OpenAI Nonprofit Board Independently Decided to**
6 **Create and Operationalize a For-Profit Subsidiary.**

7 30. The OpenAI nonprofit board then decided to create a for-profit subsidiary known as
8 OpenAI, L.P. in late 2018. MDX-1531. Microsoft was not involved in that decision either. MDX-
9 1531; Altman Tr. at 352; Zilis Tr. at 321.

10 31. Nor did Microsoft have any involvement with the public announcement of OpenAI’s
11 for-profit subsidiary in March 2019. DX-865; Nadella.

12 32. The OpenAI nonprofit board also independently decided to allow its for-profit
13 subsidiary to use the company’s intellectual property to carry out commercial operations in October
14 2018. MDX-1534. Once again, Microsoft was not involved in the decision. Altman; Nadella. Nor
15 was it involved in the decision to transfer assets to the for-profit subsidiary. Altman; Nadella.

16 **C. Ahead of Its First Investment in July 2019, Microsoft’s Diligence Did Not**
17 **Reveal Musk’s Alleged Donation Conditions.**

18 33. In July 2019, after the OpenAI nonprofit board had already conducted a fundraising
19 round with other investors, Microsoft agreed to invest \$1 billion in OpenAI’s for-profit subsidiary.
20 Altman Tr. at 332-33; MDX-1573. OpenAI’s shift from reinforcement learning to developing
21 LLMs happened to better align with Microsoft’s own AI priorities. Nadella Tr. at 61-62. And,
22 from Microsoft’s perspective, the fact that the OpenAI nonprofit board had formed a “commercial”
23 for-profit subsidiary was a “foundational piece that allowed [it] to even do [a] deal.” Nadella Tr.
24 at 93.

25 34. Before agreeing to this billion-dollar investment, Microsoft conducted extensive due
26 diligence. Scott; Wetter. To start, Microsoft’s Chief Technology Officer Kevin Scott asked
27 questions. MDX-1599; Scott. He did so because he wanted to be sure OpenAI could even do what
28 it was proposing to do before Microsoft spent time considering it. Scott. Scott spoke with Altman

1 multiple times in 2018 about OpenAI and what it was trying to accomplish. Scott. He also spoke
2 with Reid Hoffman, an early donor to OpenAI and a former colleague of Mr. Scott's from LinkedIn.
3 Scott; MDX-1598. Scott even visited OpenAI in mid-2018 for a demonstration of OpenAI's
4 technology and to learn more about it. Scott. Throughout these visits and conversations, and
5 despite Scott's questions, nobody told Scott about Musk's purported conditions. Scott.

6 35. Microsoft also conducted extensive written due diligence prior to its investment.
7 The process included a review by Microsoft's bankers and outside counsel of documents OpenAI
8 provided relating to both the nonprofit and its for-profit subsidiary's governance, structure,
9 capitalization, tax status, actions, and policies. Wetter. That search revealed no conditions on
10 Musk's donations to OpenAI either. Wetter. None of the documents noted conditions on Musk's
11 donations or duties owed by the OpenAI Defendants to Musk. Wetter. Nor did any of the due
12 diligence reveal that the OpenAI Defendants owed Musk any duties. Wetter; Hood; Nadella.

13 36. On the contrary, the evidence actually pointed the other way. OpenAI's IRS Tax
14 Exempt Application, for example, did not list any agreements with Musk in response to express
15 questions by the government about agreements with officers, directors, trustees, and others. MDX-
16 1518; Microsoft 30(b)(6) Tr. at 124-26. Microsoft also learned in November 2018 that OpenAI's
17 nonprofit board had approved creating the for-profit subsidiary—and that OpenAI had already
18 raised more than \$100 million dollars in capital through this subsidiary from reputable investors.
19 MDX-1516; Scott.

20 37. All that evidence supported Microsoft's understanding that it *could* invest without
21 violating the rights of any third parties. And after conducting further diligence, Microsoft verified
22 that it could make such an investment and enter a partnership with OpenAI. *See infra* at ¶¶ 43-51.

23 **D. No One Told Microsoft About Musk's Alleged Donation Conditions.**

24 38. Meanwhile, nobody told anyone at Microsoft that the OpenAI Defendants had any
25 duties or obligations to Musk. This fact is confirmed by one witness after another from all sides of
26 this case.

27 39. Three of Musk's closest associates—including Shivon Zilis, who was on the
28 OpenAI nonprofit board when it approved two of Microsoft's investments and partnership

1 agreements—have testified that they could not recall any conditions on Musk’s donations being
2 agreed upon or established, let alone communicated to Microsoft. Teller Tr. at 276-79; Zilis Tr. at
3 312-19; Birchall Tr. at 162-65.

4 40. Musk did not tell Microsoft about the purported duties owed to him either—even
5 though he knows how to communicate with Microsoft when he wants to. Indeed, he “[id]n’t
6 think” that he told anyone—much less Microsoft—that Microsoft’s 2019 investment “broke a
7 promise that had been made to [him] by OpenAI.” Musk Tr. at 164.

8 41. The same goes for the witnesses from OpenAI. Neither Altman, nor Brockman, nor
9 Mira Murati, nor Ilya Sutskever, nor Tasha McCauley—nor anyone else from OpenAI or its
10 nonprofit board—ever communicated with Microsoft about any purported agreement between
11 Musk and the OpenAI Defendants relating to the use of Musk’s donations. Altman Tr. at 369-70;
12 Brockman Tr. at 304-10; Murati Tr. at 226-28; Sutskever Tr. at 327-28; McCauley Tr. at 279-82.

13 42. Microsoft’s witnesses have all said the same thing. Satya Nadella, Microsoft’s
14 CEO, was never told about Musk’s alleged donation conditions. Nadella Tr. at 273-77. Neither
15 was Michael Wetter, Microsoft’s 30(b)(6) witness. Wetter. Other Microsoft employees will testify
16 to the same effect at trial. Scott; Hood.

17 **E. Microsoft Received Contractual Assurances from OpenAI that Each of Its**
18 **Investments and Associated Commercial Partnerships Would Not Violate Any**
19 **Third-Party Rights, and OpenAI’s Nonprofit Board Approved Each**
20 **Transaction with Microsoft.**

21 43. Not only was Microsoft never told about Musk’s alleged donation conditions, and
22 not only did Microsoft’s diligence not reveal any such conditions, but Microsoft also received
23 affirmative, contractual assurances from OpenAI that Microsoft’s investments would *not* violate
24 any third-party rights. And Microsoft knew that the OpenAI nonprofit board approved each
25 OpenAI deal with Microsoft.

26 44. These agreements were heavily negotiated at arm’s length. Wetter; Murati Tr. at
27 158-59. And the representations and warranties in those agreements were important parts of the
28 deals. Wetter.

1 45. As part of the 2019 Joint Development and Collaboration Agreement (“JDCA”)
2 between OpenAI and Microsoft, the OpenAI nonprofit and its for-profit subsidiary each
3 “continuously” represented and warranted that “it ha[d] full power and authority to enter into, and
4 perform its obligations under, and grant the rights granted pursuant to, th[e] Agreement.” MDX-
5 1522. OpenAI further warranted that “its (or its Affiliate’s) performance of activities pursuant to
6 th[e] Agreement will not violate any rights of third parties, any agreement or obligation between it
7 and any third party, or any applicable Law.” MDX-1522; *see also* Altman Tr. 361-64.

8 46. In the 2019 Subscription Agreement, the OpenAI nonprofit and its for-profit
9 subsidiary similarly represented and warranted that each: “has all requisite power and authority to
10 carry on its business and to execute, deliver and satisfy its obligations under this Subscription
11 Agreement and the Partnership Agreement,” and that “such actions will not cause it to be in breach
12 or violation of any contractual, legal or regulatory duty or obligation.” MDX-1559; Altman Tr. at
13 353-58.

14 47. The 2021 Amended JDCA repeated these assurances before Microsoft made a
15 second investment in OpenAI of \$2 billion. MDX-1527; Microsoft 30(b)(6) Tr. at 201. Again, the
16 OpenAI nonprofit and its for-profit subsidiary each “continuously” represented and warranted that:
17 “it ha[d] full power and authority to enter into, and perform its obligations under, and grant the
18 rights granted pursuant to, th[e] Agreement,” and “its (or its Affiliate’s) performance of activities
19 pursuant to th[e] Agreement will not violate any rights of third parties, any agreement or obligation
20 between it (or its Affiliates) and any third party, or, to its knowledge, any applicable Law.” MDX-
21 1527; *see also* MDX-1524 (2021 Subscription Agreement); Altman Tr. at 358-61, 365-66.

22 48. Microsoft invested an additional \$10 billion in OpenAI’s for-profit subsidiary in
23 2023. MDX-1542; Nadella. And, as part of that deal, the Second Amended JDCA repeated
24 OpenAI’s assurances yet again. The OpenAI nonprofit and its for-profit subsidiary “continuously”
25 represented and warranted that: “it ha[d] full power and authority to enter into, perform its
26 obligations under, and grant the rights granted pursuant to, th[e] Agreement,” and “its (or its
27 Affiliate’s) performance of activities pursuant to th[e] Agreement will not violate any rights of third
28 parties, any agreement or obligation between it (or its Affiliates) and any third party, or, to its

1 knowledge, any Law.” MDX-1521; Altman Tr. at 366-67.

2 49. Over the course of these three investments, Microsoft relied upon and trusted
3 OpenAI’s nonprofit board to raise any issues and make decisions that advanced OpenAI’s mission.
4 Nadella Tr. at 277; Wetter; *see also* MDX-1528. After all, the nonprofit board was best positioned
5 to tell Microsoft what OpenAI could or could not do.

6 50. The nonprofit board tellingly never raised any issues. On the contrary, OpenAI’s
7 nonprofit board specifically approved the 2019 Investment and the JDCA, with the representations
8 and warranties language. OAI 30(b)(6) Tr. at 126-27. The nonprofit board then authorized a group
9 of directors, including Musk’s former co-Plaintiff Zilis, to review and approve the 2021 Investment
10 and the Amended JDCA, which they did. OAI 30(b)(6) Tr. at 136; MDX-1572. Two years later,
11 the nonprofit board, still including Zilis, unanimously approved the 2023 Investment and the
12 Second Amended JDCA as well. MDX-1569.

13 51. All that only further reassured Microsoft. The representations and warranties were
14 consistent with and reinforced Microsoft’s own due diligence, which did not uncover any evidence
15 of conditions on Musk’s donations to OpenAI. The representations and warranties thus confirmed
16 Microsoft’s understanding that its partnership would not violate any third-party rights. And these
17 contractual guarantees were only part of the broader picture that Microsoft saw. Before partnering
18 with OpenAI, Microsoft asked appropriate questions. It got answers. It tested those answers for
19 itself. And it got them in writing from OpenAI’s nonprofit board—again, and again, and again.
20 Microsoft never learned about Musk’s alleged charitable trust.

21 **F. Nothing Musk Points to as Evidence of Knowledge Shows that Microsoft Knew**
22 **the OpenAI Defendants Owed or Breached Any Duties to Musk.**

23 52. Musk seeks to establish Microsoft’s knowledge largely based on a single March 7,
24 2018 email from Microsoft’s Chief Technology Officer, Kevin Scott. But that email only raised
25 questions. It did not reflect that Microsoft knew or even suspected that the OpenAI Defendants
26 owed any duties to Musk:

27 Satya, *one of the big questions* I would have for him is *whether or not they intend*
28 to make the hardware and software open source in the original spirit of OpenAI.

1 IMO that would be good competitive insurance and something that might be worth
2 funding. *I wonder* if the big OpenAI donors are aware of these plans? Ideologically,
3 I can't imagine that they funded an open effort to concentrate [machine learning]
4 talent so that they could then go build a closed, for profit thing on its back.”

5 PX-230 (emphasis added).

6 53. Scott's speculation-riddled email said nothing about whether OpenAI's donations
7 were conditioned on any promises. More importantly, it said nothing about whether *Musk* himself
8 made his donations subject to conditions, or even what those conditions were. The email does not
9 even mention Musk.

10 54. And Scott will testify at trial—like every other Microsoft witness—that he did not
11 know about Musk's purported charitable trust. Scott. In fact, Scott's email was the very first step
12 in an involved, months-long effort to learn about what OpenAI was trying to accomplish, how it
13 intended to proceed, and whether it could. Scott. At no point during Microsoft's diligence did
14 anyone (or anything) suggest that there were conditions on Musk's donations, much less conditions
15 that would prevent Microsoft from entering its partnership. Scott.

16 55. Musk's other evidence likewise does not suggest that Microsoft had knowledge of
17 the alleged charitable trust. Take OpenAI's introductory blog post. At most, it could establish
18 notice that OpenAI was formed as a nonprofit and that Musk was one of OpenAI's donors. PX-17.
19 But that is beside the point. The post contains no allusion to any *promises* made to donors, let alone
20 to Musk in particular. *See id.* Nor do any of the smattering of tweets (or anything else) that Musk
21 relies upon. PX-251; PX-257; PX-266.

22 56. Musk has also emphasized that Reid Hoffman served on the OpenAI and Microsoft
23 boards. But there is no evidence that Hoffman knew about duties owed to Musk or their breach—
24 or, even if he somehow did, that he relayed that knowledge to Microsoft. Nadella. In fact, Hoffman
25 recused himself from Microsoft's board discussions related to OpenAI. Nadella Tr. at 181-82.

26 57. In the end, there is no evidence that anybody at Microsoft learned about either the
27 OpenAI Defendants' supposed duties to Musk or the purported breach of those duties. That alone
28 is fatal to Musk's claim.

1 **II. Microsoft Did Not Substantially Assist or Encourage the OpenAI Defendants to**
2 **Breach the Alleged Charitable Trust.**

3 58. Musk’s claim separately fails on the substantial assistance element. Microsoft did
4 not assist or encourage the OpenAI Defendants to breach Musk’s alleged charitable trust. Far from
5 it. Microsoft advanced OpenAI’s mission through a mutually beneficial partnership.²

6 **A. Microsoft Did Not Assist or Encourage the Alleged Breach.**

7 59. Again, Microsoft was not even involved in the contemplation or creation of
8 OpenAI’s for-profit entity. *See supra* ¶¶ 23-32. By 2017, OpenAI’s leaders, including Musk before
9 he left the organization, independently recognized that the company needed significantly more
10 compute and capital to achieve its mission. Sutskever Tr. at 81; Brockman; MDX-1584. In 2018,
11 OpenAI’s nonprofit board independently determined that a capped for-profit subsidiary, nested
12 under the control of the nonprofit parent, was the best way to achieve that goal. Altman; DX-858;
13 MDX-1531. On September 19, 2018, OpenAI’s nonprofit board independently formed the for-
14 profit entity. MDX-1531; MDX-1601. And, on October 10, 2018, OpenAI’s nonprofit board
15 independently contracted with that entity to carry on any OpenAI commercial venture. MDX-1534.

16 60. Microsoft played no role whatsoever in these decisions. Altman; Brockman;
17 Nadella. Nor did Microsoft play any role in OpenAI’s nonprofit board’s independent decisions to
18 allow its for-profit subsidiary to use the company’s intellectual property and other assets. MDX-
19 1534; Wetter.

20 61. Nor did Microsoft substantially assist the OpenAI nonprofit board’s decision to
21 pursue a model in which not all technology would be open-sourced. OpenAI contemplated being
22 and even expected to be “much less ‘open’” as early as January 2016, when Musk was still involved
23 and long before negotiating its licensing agreements with Microsoft. MDX-1588; Altman;
24 Brockman; Sutskever. Microsoft could not substantially assist decisions or actions that predated
25 its involvement.

26 62. Moreover, Microsoft was not even the first investor in OpenAI’s for-profit

27 _____
28 ² And regardless of whether intent is an element of the aiding-and-abetting claim, the same evidence shows that Microsoft did not intend to aid and abet any supposed breach of charitable trust.

1 subsidiary. By the end of 2018, OpenAI had raised over \$100 million in capital from other investors
2 through OpenAI, L.P. under a capped structure that was, again, set up and agreed to independently
3 by OpenAI’s nonprofit board. Altman; Brockman. Microsoft did not invest until July 2019—nine
4 months *after* OpenAI’s nonprofit board formulated and carried out its own idea to establish a for-
5 profit subsidiary, and *after* the nonprofit board approved capped investments from other investors.
6 Altman; Brockman.

7 63. Microsoft thus did not substantially assist any purported breach of a charitable trust.
8 Long after that alleged breach, Microsoft designed and provided custom-built supercomputers for
9 OpenAI and provided the funding necessary to utilize them. And it did so only after it had been
10 told and verified that its investment was nonprofit board-approved and did not violate any third-
11 party interests. *See supra* at ¶¶ 43-51. Those are not the actions of a tortfeasor. They are the
12 actions of a responsible business.

13 **B. Microsoft’s Partnership Advanced OpenAI’s Mission.**

14 64. If anything, Microsoft helped OpenAI form a mutually beneficial partnership *that*
15 *advanced the nonprofit’s mission*. Nadella; Altman. OpenAI reached out to Microsoft and
16 decided to partner with it for many reasons, including:

- 17 a. Microsoft had advanced supercomputing technology that could fulfill OpenAI’s
18 need for significant “computational power.” MDX-1573; Altman; Nadella Tr.
19 at 198-99.
- 20 b. Microsoft could provide the vast amounts of capital that OpenAI needed to
21 pursue its goal of achieving artificial general intelligence. MDX-1573; Altman;
22 Nadella Tr. at 198-99.
- 23 c. Microsoft “shared” OpenAI’s “value of empowering everyone” and ensuring
24 that artificial general intelligence “is deployed safely and securely.” MDX-
25 1573; Altman; Scott; Nadella.
- 26 d. And Microsoft could help widely distribute OpenAI’s technology. Nadella;
27 Altman.

28 65. The resulting partnership was therefore a “win-win for both organizations.” Nadella

1 Tr. at 83; Altman. While OpenAI received the capital and compute it needed to grow and develop
2 its technology, Microsoft received the opportunity to license and commercialize OpenAI’s models,
3 which advanced Microsoft’s own mission to empower every person and every organization on the
4 planet to achieve more. Nadella. And the decision to ultimately commercialize its products was
5 OpenAI’s decision, independent of Microsoft. Murati Tr. at 231.

6 66. In short, the OpenAI-Microsoft arrangement furthered the nonprofit’s mission.
7 Nadella; Altman; Sutskever. That is why the nonprofit board—which at different times included
8 the independent board members Zilis, McCauley, Helen Toner, and Adam D’Angelo—approved
9 every Microsoft investment in OpenAI and associated commercial partnership. *See supra* at ¶ 50.
10 The influx of compute and capital helped distribute OpenAI’s models widely to “accomplish
11 [OpenAI’s] mission” of ensuring that artificial intelligence “benefits all of humanity.” MDX-1573;
12 Altman. And OpenAI’s nonprofit always remained in control of the for-profit subsidiary. Altman;
13 Brockman; DX-865.

14 67. No evidence is to the contrary. Musk’s contentions that Microsoft “embedded”
15 engineers within the for-profit subsidiary—something it had the right to do under the JDCAs—are
16 irrelevant to the question of whether Microsoft substantially assisted a breach of the alleged
17 charitable trust owed to Musk. The fact that a limited number of Microsoft engineers worked
18 alongside OpenAI does not demonstrate control over OpenAI nor interference with the nonprofit’s
19 mission. Indeed, this sort of employee collaboration is standard practice for the effective sharing
20 of knowledge and know-how relating to IP. Nadella. And the collaboration was important, because
21 all partnerships end at some point and Microsoft needed to ensure it could continue serving its
22 customers in that eventuality. Nadella.

23 68. In the same vein, Microsoft’s approval rights in connection with major decisions
24 concerning the for-profit are not evidence of substantial assistance. In addition to being standard
25 investor protections, such approval rights highlight, rather than contradict, Microsoft’s lack of
26 control. Hood; Wetter. An entity that controlled OpenAI or its for-profit operations would not
27 have needed to negotiate discrete approval rights over defined categories of decisions; it could have
28 simply exercised that control directly. Hood. The existence of those commercially standard

1 negotiated rights reflects the position of a significant but minority commercial partner seeking
2 reasonable contractual protection—precisely because it lacked operational authority.

3 69. The fact that Microsoft’s contractual rights grew under each successive iteration of
4 the JDCA does not support a finding of substantial assistance either. That merely reflects the
5 natural and expected deepening of a mutually beneficial commercial technology partnership in
6 which the parties jointly created the underlying IP. Nadella. Microsoft obtained greater access to
7 the fruits of the parties’ collaboration only because Microsoft was contributing greater resources to
8 produce that work. Nadella.

9 70. Similarly, Altman’s statement to Microsoft’s Jonathan Tinter during the 2021 JDCA
10 negotiations that OpenAI’s “preference is to make you all a bunch of money as quickly as we can
11 and for you to be enthusiastic about making this additional investment soon” is not evidence of
12 substantial assistance. PX-253. At most, it shows Altman’s desire for commercialization to be
13 successful for OpenAI’s strategic partner, which in turn would further OpenAI’s research mission
14 by increasing its partner’s ability to invest in OpenAI. Altman. Nadella’s asking OpenAI about
15 subscriber numbers was similar. PX-272; Nadella; *see also* Murati Tr. at 106 (“I believe, in fact,
16 commercialization is more consistent with the mission[.]”). That was one of the reasons Microsoft
17 partnered with OpenAI, and that partnership helped to ensure that OpenAI’s technology is widely
18 accessible, including to developers through Microsoft’s Application Programming Interface, and
19 to Microsoft’s customers across the globe. Nadella; Scott.

20 71. Musk also contends that Microsoft orchestrated the return of Altman when he was
21 briefly fired and reinstated by the nonprofit board in November 2023. But this event likewise had
22 nothing to do with the alleged obligations owed to Musk—and if anything, served to show
23 Microsoft’s lack of control. Microsoft had no advance knowledge of the firing, was “in shock,”
24 and was “just trying to figure out what happened.” Altman Tr. at 51-52. The ensuing situation was
25 chaotic. Virtually all of OpenAI’s leadership and employees rejected the board’s firing and
26 threatened to leave. DX-1046; PX-306; Murati; Sutskever. And OpenAI’s competitors (including
27 Musk) tried to poach these employees away. DX-1044; PX-306; PX-313. Microsoft’s offer to hire
28 OpenAI employees served as a last resort in the event that the mission could not be preserved.

1 Nadella. And there was “[n]o pressure” from Microsoft to restore Altman as CEO, Sutskever Tr.
2 at 160-61, even if it did ultimately support the OpenAI nonprofit board’s decision to reverse course.
3 Nadella.

4 72. Finally, Musk is wrong to suggest that Microsoft “selected” the board members who
5 joined OpenAI upon Altman’s return in November 2023. Altman sought Microsoft’s advice on
6 potential new board members after the nonprofit board reinstated him. Altman; Murati; Nadella.
7 But none of the candidates suggested by Microsoft were appointed to the newly constituted board.
8 Altman; Nadella. That, too, only underscores Microsoft’s lack of control over OpenAI.

9 73. The same goes for the appointment of Microsoft employee Dee Templeton. She
10 was briefly appointed as a nonprofit board *observer*, with no voting power, and she recused herself
11 from any Microsoft-related-discussion. Wetter. What’s more, the appointment ended just seven
12 months later. Wetter.

13 74. In sum, Microsoft acted throughout as a commercial partner committed to OpenAI’s
14 success, not as an entity directing or controlling its governance or mission. All of Microsoft’s
15 actions demonstrate that Microsoft did not substantially assist the alleged breach.

16 **III. Microsoft’s Conduct Was Not a Substantial Factor in Causing Musk’s Alleged Harm.**

17 75. In any case, Microsoft’s actions were not a substantial factor in causing Musk’s
18 alleged harm. Rather, the OpenAI nonprofit board has been the driving force behind its commercial
19 and governance decisions.

20 76. As already explained, OpenAI required massive amounts of compute and capital.
21 *See supra* at ¶¶ 26-29. In response to those needs, the OpenAI nonprofit board independently
22 formed a for-profit subsidiary. *See supra* at ¶¶ 30-32. And the newly established entity
23 independently raised over \$100 million dollars from investors other than Microsoft by November
24 2018 through the for-profit. MDX-1516. It did all that more than seven months before Microsoft’s
25 first investment in July 2019. *See supra* at ¶ 33.

26 77. If Microsoft did not provide additional capital, OpenAI could turn to other potential
27 investors. After all, OpenAI had several other compute partners before Microsoft’s investment.
28 Altman. “They had relationships with all the hyperscale cloud providers,” including tech

1 behemoths like Amazon. Nadella Tr. at 38, 103; Altman; Brockman. And OpenAI has since
2 partnered with many other large companies to support its need for capital and compute, including
3 Softbank and Oracle. Altman; Brockman.

4 78. As Musk recognized as early as 2016, OpenAI also had independent reasons not to
5 open-source all models, such as financial realities and security concerns. Murati; Altman;
6 Brockman. As CTO Mira Murati explained, “[i]t’s very difficult to contain the harms and the
7 misuse if you open source a technology.” Murati Tr. at 154-55. Or, as Sutskever put it, “by
8 openso[ur]cing everything, we make it easy for someone unscrupulous with access to [an]
9 overwhelming amount of hardware to build an unsafe AI,” so as OpenAI got “closer to building
10 AI, it will make sense to start being less open.” MDX-1508. “The Open in openAI means that
11 everyone should benefit from the fruits of AI after its built, but it’s totally OK to not share the
12 science.” MDX- 1508; *see also* Sutskever Tr. at 77-80. Musk agreed: “Yup.” MDX-1508.

13 79. Accordingly, Microsoft’s conduct was not a substantial factor in the alleged breach
14 of charitable trust. The OpenAI nonprofit board independently decided to create a for-profit
15 structure, independently raised capital from other investors, and independently made the
16 governance and commercialization decisions that Musk challenges. Microsoft was merely a
17 downstream participant in a structure that the OpenAI nonprofit board had already established.

18 80. As a result, Musk’s lone claim against Microsoft fails on the facts for every element
19 of his cause of action.

20 **STATUTE OF LIMITATIONS**

21 **I. Musk’s Claim Against Microsoft Accrued By 2021.**

22 81. Musk waited too long to sue in any event. His claimed harm is that he donated to
23 OpenAI “to create a nonprofit open-source organization,” and that OpenAI departed from that
24 contemplated structure. Musk Tr. at 52, 285-86. But Musk “started to suspect he was being
25 swindled” in this regard in 2017—long before Microsoft made its first investment. Musk Tr. at 76-
26 77; *see also* DX-704. He then stopped providing donations (aside from rent) later that year. Musk;
27 DX-704. Musk not only knew about the OpenAI for-profit in 2018, MDX-1585; Musk Tr. at 142-
28 43, he agreed that it was a necessary step for the nonprofit to take to gain the capital needed to

1 fulfill its mission. And he knew about Microsoft’s billion-dollar investment in OpenAI when the
2 partnership was publicly announced in 2019. Musk Tr. at 162-64; MSFT Trial Ex. 1511. He also
3 publicly stated in 2020 that he believed OpenAI was “essentially captured by Microsoft.” MDX-
4 1537. Nevertheless, Musk chose not to sue Microsoft until November 2024—only after the huge
5 success of ChatGPT, only after he launched a competing for-profit AI company, xAI, and only after
6 he twice sued OpenAI.

7 **A. Musk Was on Notice of OpenAI’s For-Profit Pivot Even Before Microsoft**
8 **Made Its First Investment.**

9 82. As explained in the OpenAI Defendants’ Proposed Findings of Fact, Musk knew
10 that OpenAI was contemplating a transition from its nonprofit roots long before Microsoft invested,
11 and Musk himself was involved in and fully supportive of those discussions. Indeed, Musk “gave
12 the green light” to form a for-profit entity in 2017, at which point he thought it was “time to do so
13 in order to gain access to more capital.” Sutskever Tr. at 85, 92; DX-691.

14 83. After Musk’s departure from OpenAI’s nonprofit board in February 2018, OpenAI’s
15 remaining co-founders continued exploring ways to raise the capital necessary to achieve the
16 company’s mission. And they kept Musk in the loop on these efforts. *See* DX-757; DX-806. They
17 discussed the creation of a for-profit subsidiary that would remain controlled by the OpenAI
18 nonprofit, while providing an opportunity to raise capital from investors. Altman Tr. at 329-32;
19 MDX-1579. They consulted Musk about this proposal prior to its implementation. MDX-1585;
20 Musk Tr. 142-43. Musk received a draft term sheet for a for-profit subsidiary in August 2018.
21 MDX-1575; MDX-1576; MDX-1579. And then, in September 2018, OpenAI’s nonprofit board
22 followed through with the plans that OpenAI sent to Musk: the board formed OpenAI, L.P. as a
23 for-profit subsidiary. MDX-1560; MDX-1561.

24 84. OpenAI publicly announced its for-profit subsidiary in March 2019. DX-865. The
25 OpenAI nonprofit board structured this entity to allow investors to earn a return on their investment
26 up to a certain multiple or cap. MDX-1576. And Musk received a draft press release announcing
27 this capped-profit structure as well. DX-862; DX-832. With that structure in place, OpenAI
28 reached out to cloud computing providers and others to consider investing in the endeavor. Altman;

1 Nadella Tr. at 103.

2 **B. Musk Knew About Microsoft’s Investment in OpenAI in July 2019.**

3 85. Around this time, Microsoft began discussing a potential strategic partnership with
4 OpenAI. Altman; Wetter. Altman “plann[ed] to tell [Musk] about the potential msft investment,”
5 as it was “getting serious.” DX-861. And OpenAI nonprofit board member Shivon Zilis “gave
6 him a heads up” about that potential investment. *Id.*

7 86. In July 2019, Microsoft invested \$1 billion in OpenAI’s for-profit subsidiary, as part
8 of a broader commercial collaboration with OpenAI. Altman; Wetter.

9 87. Musk knew about this too. Microsoft and OpenAI publicly announced their
10 “exclusive computing partnership,” along with Microsoft’s \$1 billion investment and the plan that
11 Microsoft would become OpenAI’s preferred commercialization partner. MDX-1511; MDX-1573.
12 Shortly after the announcement, Musk mentioned to Zilis that “he thought it was an impressive
13 deal.” MDX-1563. Indeed, Musk admits that he learned about Microsoft’s investment in 2019 and
14 that he, at that point, “felt uneasy about the deal.” Musk Tr. at 164. He expressed his belief that
15 Microsoft’s investment in OpenAI was a “b.s.” way to promote Azure in a December 2019 text.
16 MDX-1512. And he tweeted in February 2020 that “OpenAI should be more open imo.” MDX-
17 1503.

18 **C. In September 2020, Musk Tweeted that Microsoft Controlled OpenAI.**

19 88. Musk also knew that Microsoft had an exclusive license to OpenAI’s GPT-3 model
20 (meaning OpenAI was not open sourcing that then-cutting-edge model) by September 2020. Musk.
21 This license was publicly announced in a blog post on September 20, 2020. MDX-1504. Musk
22 learned of this arrangement and thought that it “r[a]ng some alarm bells.” Musk Tr. at 358.

23 89. On September 24, 2020, Musk tweeted in response to a post about Microsoft
24 obtaining the exclusive license, saying that: “This does seem like the opposite of open. OpenAI is
25 essentially captured by Microsoft.” MDX-1537. This tweet alone shows that Musk believed—
26 more than four years before he filed his case against Microsoft—that OpenAI was no longer
27 sufficiently open-source and that it was controlled by a for-profit Microsoft. Those are exactly the
28 allegations he now raises against Microsoft. Musk then texted Altman about this tweet, suggesting

1 that Altman should “[a]t least change the name” of the company from OpenAI. MDX-1506.

2 **D. Altman Told Musk in 2020 About Microsoft’s Upcoming 2021 Investment.**

3 90. In October 2020, Altman texted Musk again, stating that he “would love to get
4 [some] advice from [Musk] on the next Microsoft investment.” MDX-1507. Musk responded:
5 “Ok. I can talk probably tomorrow or the next day.” *Id.*

6 91. The two had a “good call” shortly after. MDX-1565; *see also* MDX-1564. Musk
7 therefore knew in the fall of 2020 of the prospect of further investments from Microsoft.

8 92. Musk contends that Microsoft and OpenAI did not disclose the precise caps on
9 investor returns in the for-profit entity and did not contemporaneously disclose the 2021
10 investment. But that is immaterial. By October 2020 at the latest, Musk was aware of the facts
11 essential to his claim: that Microsoft had invested over \$1 billion in OpenAI, that it had received
12 an exclusive commercial license to OpenAI’s technology, that Microsoft was planning a new
13 investment in the for-profit subsidiary, and that these investments meant that, in Musk’s view,
14 OpenAI had been “captured” by Microsoft. In other words, he knew that OpenAI was no longer
15 open-sourcing all of its technology and that he believed Microsoft was controlling OpenAI. The
16 limitations period began to run at that point, if not well before.

17 93. Musk has also pointed to Microsoft’s 2023 investment as a basis for treating his
18 claim as timely. But that investment was a continuation of the existing Microsoft-OpenAI
19 commercial partnership, not a new or independent transaction that gave rise to a new limitations
20 period. The facts essential to Musk’s claim—Microsoft’s substantial investment in the for-profit
21 subsidiary and its exclusive commercial license—were known to Musk no later than the fall of
22 2020.

23 **II. Musk Waited More than Three Years to Sue Microsoft.**

24 94. In February 2024, Musk sued OpenAI and its subsidiaries in California state court.
25 *See* DX-1294. Microsoft was not named as a defendant in that action.

26 95. Musk then brought this lawsuit against the OpenAI Defendants on August 5, 2024.
27 *See* Undisputed Fact #51, Pretrial Conference Statement, ECF No. 427. Again, Microsoft was not
28 named as a defendant.

1 96. Musk added Microsoft as a defendant for the first time in his Amended Complaint,
2 filed November 14, 2024. *See* Undisputed Fact #52, Pretrial Conference Statement, ECF No. 427.

3 97. As a result, Musk waited more than three years from the time his claim accrued to
4 sue Microsoft. He plainly knew about—and at the very least should have reasonably known
5 about—Microsoft’s alleged wrongdoing before November 14, 2021.

6 **LACHES**

7 98. Even if Musk’s aiding-and-abetting claim were not barred by the statute of
8 limitations, it is nevertheless barred by the doctrine of laches. Musk’s delay in bringing his claim
9 was both (1) unreasonable and (2) prejudiced Microsoft.

10 **I. Musk Unreasonably Delayed Bringing His Claim Against Microsoft.**

11 99. By 2018 at the latest, OpenAI consulted with Musk on the OpenAI nonprofit board’s
12 plan to create a for-profit entity and raise outside investments. *See supra* at ¶ 83. Musk believed
13 then that creating a for-profit entity was “moving away” from OpenAI’s core mission, but he did
14 not file suit or notify potential investors of any purported duties or breaches. Musk Tr. at 149-50.

15 100. Musk also knew about Microsoft’s \$1 billion investment in July 2019. *See supra* at
16 ¶ 87. Again, Musk did not file suit or notify Microsoft of any purported duties or breaches.

17 101. Musk further knew that Microsoft had an exclusive license to OpenAI’s GPT-3
18 model by September 2020. *See supra* at ¶¶ 88-89. Once again, Musk did not file suit or notify
19 Microsoft of any purported duties or breaches.

20 102. Musk then learned in 2020 of the possibility that Microsoft would invest more in
21 OpenAI. *See supra* at ¶¶ 90-91. But Musk continued to sit on his hands.

22 103. Microsoft did in fact invest \$2 billion in 2021. *See supra* at ¶ 47. And Musk again
23 failed to assert his supposed rights, even though Zilis was on the OpenAI nonprofit board and voted
24 to approve the 2021 Microsoft transaction.

25 104. Musk also knew that Microsoft invested an additional \$10 billion into OpenAI in
26 January 2023. Musk. Yet Musk still did not do anything until nearly two years later, when he
27 blind-sided Microsoft with this lawsuit. That was *more than five years* after Microsoft invested in
28 OpenAI’s for-profit subsidiary. Musk’s delay was manifestly unreasonable.

1 **II. Musk’s Unreasonable Delay Prejudiced Microsoft.**

2 105. Microsoft significantly increased its investment in OpenAI from 2019 through the
3 filing of Musk’s lawsuit in November 2024. Microsoft’s investments in OpenAI now total nearly
4 \$14 billion, including the \$10 billion investment Microsoft committed to in 2023. MDX-1542;
5 Nadella; Hood.

6 106. Microsoft’s partnership with OpenAI is a multi-faceted collaboration, which
7 involved significant opportunity costs for Microsoft based on its commitments of computing
8 capacity, employee time, and investment capital. Nadella Tr. at 96, 149. Microsoft’s good-faith
9 reliance on its partnership with OpenAI has motivated many of Microsoft’s strategic decisions over
10 the past several years regarding its internal AI development efforts and other outside investments,
11 including building out data centers and incorporating OpenAI’s technology in the products and
12 services Microsoft provides to its customers. Nadella; Scott. Upending that partnership this late
13 in the game would require Microsoft to undertake substantial engineering and development efforts.
14 Nadella; Scott. And it would significantly impact Microsoft’s Azure OpenAI service and Copilot
15 software, which are used by millions of people. Nadella; Scott.

16 107. Musk’s unreasonable delay in filing suit thus caused significant prejudice to
17 Microsoft. If Musk had filed his claim earlier—or even notified Microsoft of the purported duty
18 or breach—Microsoft would have had a chance to investigate and evaluate its continued investment
19 and partnership with OpenAI. Instead, Musk stayed silent as Microsoft poured more and more
20 computing resources and billions of dollars in investments and employee time into its strategic
21 partnership with OpenAI, at the expense of other internal efforts and external investments. Nadella;
22 Scott; Hood. Laches bars Musk’s claim.

23 **UNCLEAN HANDS**

24 108. As detailed in the OpenAI Defendants’ Proposed Findings of Fact, Musk has
25 unclean hands, which precludes recovery for his primary breach of charitable trust claim. That
26 defense extends to the secondary aiding-and-abetting claim as well. And the conduct described
27 below only strengthens the defense for Microsoft. Musk engaged in unconscionable conduct
28 intimately related to his aiding-and-abetting claim that unfairly prejudiced Microsoft.

1 **I. Musk Engaged in Unconscionable Conduct.**

2 109. Musk helped create the very situation that caused OpenAI to seek out Microsoft as
3 a multi-billion-dollar investor.

4 110. As explained above, Musk has long recognized that advancing OpenAI’s mission
5 would require raising additional capital through the creation of a for-profit entity. MDX-1570;
6 MDX-1513; Musk Tr at 78-79. Yet, when it came to capitalizing a new for-profit entity, Musk was
7 only willing to participate if he would “unequivocally have initial control of the company.” DX-
8 686; MDX-1567; Zilis Tr. at 133-35.

9 111. When OpenAI’s other co-founders rejected Musk’s terms in September 2017, Musk
10 responded by halting most of his donations to OpenAI’s nonprofit entity. MDX-1510; Musk Tr. at
11 76-77. Losing most of Musk’s funding only exacerbated OpenAI’s need for outside capital.
12 Altman; Brockman.

13 112. By this time, Musk himself had initiated OpenAI’s relationship with Microsoft.
14 MDX-1509; Musk Tr. at 344. He made the original call to Microsoft’s CEO to ask if Microsoft
15 would donate Azure credits to OpenAI. Musk Tr. at 344. Microsoft answered that call and
16 provided OpenAI with compute. Musk; Altman.

17 113. In early 2018, Musk made another attempt to exploit OpenAI’s financial needs and
18 gain control of OpenAI. He advocated for OpenAI to “attach to Tesla as its cash cow.” MDX-
19 1584; Musk Tr. at 106-07. And Musk claimed that combining with Tesla—Musk’s own for-profit
20 company—was the “only path that could even hope to hold a candle to Google.” MDX-1584;
21 Musk Tr. at 106-07. This attempt also failed, and Musk left the OpenAI nonprofit board shortly
22 thereafter. DX-770; Musk.

23 114. Musk then waited until after ChatGPT succeeded in 2022 and after he had formed
24 his own AI competitor to bring this suit. By July 2019, Musk learned that Microsoft had invested
25 \$1 billion in OpenAI. Musk Tr. at 162-64. By September 2020, he learned that Microsoft had an
26 exclusive license to OpenAI’s GPT-3 model. MDX-1537; Musk Tr. at 358. Yet neither of these
27 events prompted Musk to file suit or even inform Microsoft of the alleged charitable trust duties
28 owed to him. While Musk said nothing, Microsoft deepened its financial commitment to nearly

1 \$14 billion. Musk filed suit only after he launched xAI as a direct (for-profit) competitor to
2 OpenAI. Musk; Birchall. xAI stands to benefit significantly if the Court enjoins OpenAI from
3 continuing its strategic partnership with Microsoft. Musk.

4 115. In February 2025, while this lawsuit was pending, Musk made yet another attempt
5 to acquire control of OpenAI through one of his for-profit companies. Acting in his capacity as
6 CEO of xAI, Musk submitted a bid to “acquire all assets [] of OpenAI, Inc.” for \$97.375 billion.
7 DX-1157. Once again, OpenAI rejected his takeover attempt.

8 **II. Musk’s Unconscionable Conduct Was Intimately Related to His Claim.**

9 116. Musk’s misconduct described above is intimately related to Musk’s claim against
10 Microsoft. At its core, Musk’s claim is that Microsoft has knowingly partnered with OpenAI in a
11 manner that subverts OpenAI’s nonprofit, open-source commitments. Musk Tr. at 52, 343. But
12 Musk’s accusations against Microsoft are directly undermined by his own dealings.

13 117. Despite asserting that Microsoft has assisted OpenAI’s conversion into a for-profit
14 company, Musk himself recognized that OpenAI needed outside capital, Musk himself endorsed
15 OpenAI’s creation of a for-profit entity, and Musk himself tried to attach OpenAI to one of his own
16 for-profit entities. MDX-1513; MDX-1584; DX-686; Musk Tr. at 78-79, 106-07.

17 118. Musk also complains of OpenAI abandoning its open-source commitments. But
18 Musk formed xAI as a for-profit company with no commitment to open source its models. Musk.
19 xAI consistently launches its new models as closed-source, including through Microsoft’s Azure
20 Foundry platform. Musk; Nadella; MDX-1549; MDX-1576. And Musk agreed as early as 2016
21 that OpenAI should transition away from a fully open-source model. *See supra* at ¶ 78.

22 119. Musk can hardly complain about Microsoft supporting a for-profit AI company
23 when he has done just that himself.

24 **III. Musk’s Conduct Resulted in Prejudice to Microsoft Such that it Would Be Unfair to** 25 **Allow Him to Assert His Claim.**

26 120. Given Musk’s course of inequitable conduct, it would be fundamentally unfair to
27 allow him to assert his claim against Microsoft.

28 121. Microsoft has publicly partnered with OpenAI for years. MDX-1573. The

1 partnership has delivered significant benefits to Microsoft, OpenAI, and the public. Nadella;
2 Altman; Scott. And that partnership has motivated many of Microsoft’s strategic decisions
3 concerning its AI development efforts and investments, with Microsoft deepening its financial
4 commitment in OpenAI from \$1 billion in 2019 to nearly \$14 billion today. Nadella; Scott; Hood;
5 MDX-1521; MDX-1522; MDX-1527.

6 122. Musk knew about Microsoft’s alleged wrongdoing for years. Musk Tr. at 162-64,
7 358; MDX-1537. Despite this knowledge—and despite his prior dealings with Microsoft on
8 OpenAI’s behalf—Musk never informed Microsoft of the alleged charitable trust owed to him by
9 the OpenAI Defendants before filing this suit. Musk; Nadella. Meanwhile, Musk created a for-
10 profit AI company of his own. Musk.

11 123. It would be patently unfair to permit Musk to benefit from his attacks on Microsoft’s
12 good-faith partnership with OpenAI after he has engaged in a pattern of related bad-faith conduct
13 to enrich himself.

14 * * *

15 124. The Court should find that Musk’s claim against Microsoft fails several times over
16 on the facts. Musk cannot satisfy a single element necessary to impose aiding-and-abetting liability.
17 And even if he somehow could establish all these elements, Musk’s claim would still be defeated
18 by a trio of affirmative defenses. That claim cannot withstand the statute of limitations. It is barred
19 by Musk’s laches. And it is foreclosed by his unclean hands. For all these reasons, the Court
20 should find that Microsoft is not liable.

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Respectfully Submitted,

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