

1 JORDAN ETH (CA SBN 121617)
JEth@mofo.com
2 DAVID J. WIENER (CA SBN 291659)
DWiener@mofo.com
3 MORRISON & FOERSTER LLP
425 Market Street
4 San Francisco, CA 94105
Telephone: (415) 268-7000
5 Facsimile: (415) 268-7522

6 WILLIAM SAVITT (admitted *pro hac vice*)
WDSavitt@wlrk.com
7 SARAH K. EDDY (admitted *pro hac vice*)
SEddy@wlrk.com
8 WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
9 New York, NY 10019
Telephone: (212) 403-1000
10 Facsimile: (212) 403-2000

11 *Attorneys for Defendants Samuel Altman, Gregory Brockman,*
OpenAI, Inc., OpenAI L.P., OpenAI, L.L.C., OpenAI GP, L.L.C.,
12 *OpenAI OpCo, LLC, OpenAI Global, LLC, OAI Corporation, LLC,*
OpenAI Holdings, LLC, OpenAI Startup Fund Management, LLC,
13 *OpenAI Startup Fund GP I, L.L.C., OpenAI Startup Fund I, L.P.,*
OpenAI Startup Fund SPV GP I, L.L.C., OpenAI Startup Fund SPV GP II, L.L.C.,
14 *OpenAI Startup Fund SPV GP III, L.L.C., OpenAI Startup Fund SPV GP IV, L.L.C.,*
OpenAI Startup Fund SPV I, L.P., OpenAI Startup Fund SPV II, L.P.,
15 *OpenAI Startup Fund SPV III, L.P., OpenAI Startup Fund SPV IV, L.P.,*
Aestas Management Company, LLC, and Aestas LLC

16 UNITED STATES DISTRICT COURT
17
18 NORTHERN DISTRICT OF CALIFORNIA
19
20 OAKLAND DIVISION

20 ELON MUSK,
21 Plaintiff,
22 v.
23 SAMUEL ALTMAN, et al.,
24 Defendants.

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

**OPENAI DEFENDANTS' NOTICE OF
MOTION AND MOTION TO DISMISS
COMPLAINT OF PLAINTIFF
ELON MUSK; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: November 12, 2024
Time: 2:00 p.m.
Courtroom: 1 – 4th Floor
Judge: Hon. Yvonne Gonzalez Rogers
Compl. Filed: August 5, 2024

NOTICE OF MOTION TO DISMISS

1
2 TO ALL PARTIES AND THEIR COUNSEL: Please take notice that on November 12,
3 2024 at 2:00 p.m., or at such other time as the matter may be heard, in the courtroom of the
4 Honorable Yvonne Gonzalez Rogers, in Courtroom 1 of the U.S. District Court for the Northern
5 District of California, 1301 Clay Street, Oakland, CA 94612, Defendants Samuel Altman, Gregory
6 Brockman, OpenAI, Inc., OpenAI L.P., OpenAI, L.L.C., OpenAI GP, L.L.C., OpenAI OpCo, LLC,
7 OpenAI Global, LLC, OAI Corporation, LLC, OpenAI Holdings, LLC, OpenAI Startup Fund
8 Management, LLC, OpenAI Startup Fund GP I, L.L.C., OpenAI Startup Fund I, L.P., OpenAI
9 Startup Fund SPV GP I, L.L.C., OpenAI Startup Fund SPV GP II, L.L.C., OpenAI Startup Fund
10 SPV GP III, L.L.C., OpenAI Startup Fund SPV GP IV, L.L.C., OpenAI Startup Fund SPV I, L.P.,
11 OpenAI Startup Fund SPV II, L.P., OpenAI Startup Fund SPV III, L.P., OpenAI Startup Fund SPV
12 IV, L.P., Aestas Management Company, LLC, and Aestas LLC (the “OpenAI Defendants”) will,
13 and hereby do, move the Court pursuant to Federal Rules of Civil Procedure 8, 9(b), and 12(b)(6),
14 for an order dismissing the complaint of Plaintiff Elon Musk dated August 5, 2024.

15 The OpenAI Defendants’ motion is based on this Notice of Motion and Motion to Dismiss,
16 the accompanying Memorandum of Points and Authorities, the OpenAI Defendants’ Request for
17 Judicial Notice, the Declaration of David J. Wiener and exhibits attached thereto, and such other
18 argument and materials as may be presented before the Court takes this matter under submission.
19
20
21
22
23
24
25
26
27
28

STATEMENT OF ISSUES TO BE DECIDED

1
2 1. Whether Musk’s contract claims (Counts VI, VII, VIII, XIV) should be dismissed
3 for failure to plausibly plead either (a) mutual assent to the terms alleged to have been breached or
4 (b) bargained-for consideration.

5 2. Whether Musk’s claim for breach of the implied covenant of good faith and fair
6 dealing (Count VIII) should be dismissed for the additional, independent reason that it is based on
7 the same conduct as his contract claims and is thus impermissibly duplicative.

8 3. Whether Musk’s claim for tortious interference with contract (Count XIV) should
9 be dismissed for the additional, independent reasons that: (a) the “OpenAI For-Profit Entities,” as
10 alleged agents of a party to the purported contract, cannot be liable for tortious interference; and
11 (b) Musk fails to plead an intentional act directed at disturbing a contract.

12 4. Whether Musk’s claims for promissory fraud (Count I), aiding and abetting fraud
13 (Count III), violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”),
14 18 U.S.C. § 1962(c) (Count IV), conspiracy to violate RICO, 18 U.S.C. § 1962(d) (Count V), and
15 unjust enrichment (Count IX) should be dismissed for: (a) failure to plausibly plead a cognizable
16 promise made to Musk by any OpenAI Defendant; and (b) failure to plead with the requisite
17 particularity the other elements of fraud, including falsity of any purported promise and fraudulent
18 intent.

19 5. Whether Musk’s claim for aiding and abetting fraud (Count III) should be dismissed
20 for the additional, independent reasons that: (a) Musk fails to adequately allege that the OpenAI
21 For-Profit Entities substantially assisted in the purported underlying fraud; and (b) the claim runs
22 afoul of the agency immunity rule.

23 6. Whether Musk’s claims for violation of RICO (Count IV) and conspiracy to violate
24 RICO (Count V) should be dismissed for the additional, independent reasons that Musk: (a) fails
25 to allege with particularity all the elements of the RICO predicate of wire fraud; and (b) does not
26 adequately plead conduct of an enterprise.

27 7. Whether Musk’s claims for constructive fraud (Count II), unfair competition under
28 Cal. Bus. & Prof. Code §§ 17200 *et seq.* (Count XI), and aiding and abetting breach of fiduciary

1 duty (Count XIII) should be dismissed because: (a) as a non-profit donor with no reversionary
2 interest in OpenAI's assets, Musk lacks standing to assert breach of fiduciary duty in connection
3 with OpenAI's alleged misuse of his donations; and (b) Musk fails to allege particularized facts to
4 support these claims.

5 8. Whether Musk's claim for unfair competition under Cal. Bus. & Prof. Code
6 §§ 17200 *et seq.* (Count XI) should be dismissed for the additional, independent reason that he fails
7 to identify the statutory prong or the source of law that purportedly grounds the claim.

8 9. Whether Musk's claim for aiding and abetting breach of fiduciary duty (Count XIII)
9 should be dismissed for the additional, independent reason that it is barred under the agency
10 immunity rule.

11 10. Whether Musk's claims for false advertising under the Lanham Act, 15 U.S.C.
12 § 1125(a)(1)(B) (Count X), and California's false advertising statute, Cal. Bus. & Prof. Code
13 §§ 17500 *et seq.* (Count XII), should be dismissed because Musk: (a) identifies no commercial
14 advertisement or statement made primarily out of economic motivation; and (b) fails to allege
15 particularized facts to support these claims.

16 11. Whether Musk's claim for false advertising under the Lanham Act (Count X) should
17 be dismissed for the additional, independent reason that Musk's failure to allege a cognizable
18 commercial injury deprives him of standing.

19 12. Whether Musk's claim for declaratory relief (Count XV) should be dismissed
20 because: (a) Musk pleads no viable claim for which the Court may order declaratory relief; and
21 (b) Musk's request for declaratory relief is redundant of his other claims.

22
23
24
25
26
27
28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

INTRODUCTION 1

BACKGROUND 3

I. MUSK’S ALLEGATIONS..... 3

II. MUSK’S STATE COURT SUIT..... 4

III. THIS ACTION..... 5

ARGUMENT 6

I. MUSK’S ALLEGATIONS CANNOT SUPPORT ANY CONTRACT CLAIM. 6

 A. Musk does not plead an express contract. 7

 B. Musk does not plead an implied contract. 10

 C. Musk’s implied covenant and tortious interference claims cannot stand absent a contract, and fail for other reasons as well. 11

II. MUSK’S ALLEGATIONS CANNOT SUPPORT ANY FRAUD CLAIM. 13

 A. Musk does not plead promissory fraud. 14

 B. Musk’s duplicative claim for unjust enrichment falls with his fraud claim. 15

 C. Musk does not plead aiding and abetting fraud..... 16

 D. Musk does not plead the RICO predicate of wire fraud..... 17

III. MUSK’S RICO CLAIMS ARE SEPARATELY UNTENABLE FOR FAILURE TO PLEAD CONDUCT OF AN ENTERPRISE..... 18

IV. MUSK LACKS STANDING TO ASSERT HIS FIDUCIARY CLAIMS, WHICH ARE IN ANY EVENT NOT COGNIZABLE. 19

 A. Musk’s constructive fraud claim cannot stand. 20

 B. Musk’s UCL claim cannot stand. 21

 C. Musk does not plead aiding and abetting fiduciary breach. 22

V. MUSK’S CLAIMS FOR FALSE ADVERTISING SHOULD BE DISMISSED. 22

VI. MUSK’S CLAIM FOR DECLARATORY RELIEF SHOULD BE DISMISSED. 24

CONCLUSION 24

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allen v. Ocwen Loan Servicing, LLC</i> , 2019 WL 13254112 (N.D. Cal. June 12, 2019)	17
<i>Allied Anesthesia Med. Grp., Inc. v. Inland Empire Health Plan</i> , 80 Cal. App. 5th 794 (2022).	10
<i>Am. Emps. Grp., Inc. v. Emp. Dev. Dep’t</i> , 154 Cal. App. 4th 836 (2007)	8
<i>AngioScore, Inc. v. TriReme Med., LLC</i> , 70 F. Supp. 3d 951 (N.D. Cal. 2014)	16
<i>Aniel v. PHH Mortg. Corp.</i> , 2022 WL 2164702 (N.D. Cal. June 1, 2022)	17
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	6
<i>Behnke v. State Farm Gen. Ins. Co.</i> , 196 Cal. App. 4th 1443 (2011)	14
<i>Bernardo v. Planned Parenthood Fed’n of Am.</i> , 115 Cal. App. 4th 322 (2004)	23
<i>Berryman v. Merit Prop. Mgmt., Inc.</i> , 152 Cal. App. 4th 1544 (2007)	21
<i>Casey v. U.S. Bank Nat’l Ass’n</i> , 127 Cal. App. 4th 1138 (2005)	16
<i>Charlotte’s Web, Inc. v. AAXLL Supply Co. LLC</i> , 2020 WL 6891876 (N.D. Cal. Nov. 24, 2020)	23
<i>Children’s Health Def. v. Meta Platforms, Inc.</i> , 112 F.4th 742 (9th Cir. 2024)	22, 23
<i>Cisco Sys., Inc. v. Dexon Comput., Inc.</i> , 2022 WL 2222962 (N.D. Cal. June 21, 2022)	24
<i>County of Marin v. Deloitte Consulting LLP</i> , 836 F. Supp. 2d 1030 (N.D. Cal. 2011)	17
<i>Davidson v. Sprout Foods, Inc.</i> , 106 F.4th 842 (9th Cir. 2024)	23-24

1 *Davis v. Nadrich*,
174 Cal. App. 4th 1 (2009) 13

2

3 *Desoto v. Condon*,
371 Fed. App’x 822 (9th Cir. 2010)..... 18

4 *Ebeid ex rel. U.S. v. Lungwitz*,
616 F.3d 993 (9th Cir. 2010)..... 6

5

6 *Eclectic Props. E., LLC v. Marcus & Millichap Co.*,
751 F.3d 990 (9th Cir. 2014)..... 17

7

8 *EcoHub, LLC v. Recology Inc.*,
2023 WL 3852700 (N.D. Cal. June 6, 2023) 22

9 *Ellis v. J.P. Morgan Chase & Co.*,
950 F. Supp. 2d 1062 (N.D. Cal. June 13, 2013)..... 19

10

11 *Ferrari v. Mercedes-Benz USA, LLC*,
2016 WL 7188030 (N.D. Cal. Dec. 12, 2016) 18

12

13 *Flores v. EMC Mortg. Co.*,
997 F. Supp. 2d 1088 (E.D. Cal. 2014)..... 21-22

14 *Gregory v. Albertson’s, Inc.*,
104 Cal. App. 4th 845 (2002) 21

15

16 *Haskins v. Symantec Corp.*,
2013 WL 6234610 (N.D. Cal. Dec. 2, 2013) 9

17

18 *Haskins v. Symantec Corp.*,
2014 WL 2450996 (N.D. Cal. June 2, 2024) 11

19

20 *Heritage Pac. Fin., LLC v. Monroy*,
215 Cal. App. 4th 972 (2013) 7

21

22 *HomeLight, Inc. v. Shkipin*,
694 F. Supp. 3d 1242 (N.D. Cal. 2023) 23

23

24 *Horiike v. Humane Soc’y of the U.S.*,
2016 WL 11744969 (C.D. Cal. June 20, 2016) 19, 20, 21

25

26 *Hsu v. OZ Optics, Ltd.*,
211 F.R.D. 615 (N.D. Cal. 2002)..... 15

27

28 *In re Apple Inc. Device Performance Litig.*,
386 F. Supp. 3d 1155 (N.D. Cal. 2019) 9

In re iPhone Application Litig.,
2011 WL 4403963 (N.D. Cal. Sept. 20, 2011) 12

1 *In re Mortg. Fund '08 LLC,*
 2 527 B.R. 351 (N.D. Cal. 2015) 22

3 *Ixchel Pharma, LLC v. Biogen, Inc.,*
 4 9 Cal. 5th 1130 (2020) 12, 13

5 *Jara v. Suprema Meats, Inc.,*
 6 121 Cal. App. 4th 1238 (2004) 10

7 *JMP Secs. LLP v. Altair Nanotechnologies Inc.,*
 8 880 F. Supp. 2d 1029 (N.D. Cal. 2012) 13

9 *Kearns v. Ford Motor Co.,*
 10 567 F.3d 1120 (9th Cir. 2009)..... 21

11 *Klein v. Anaheim Memorial Hosp. Ass’n,*
 12 2009 WL 3233914 (Cal. Ct. App. Oct. 8, 2009)..... 8 n.9

13 *Langan v. United Servs. Auto. Ass’n,*
 14 69 F. Supp. 3d 965 (N.D. Cal. 2014) 7, 12

15 *Lazar v. Hertz Corp.,*
 16 69 Cal. App. 4th 1494 (1999) 21

17 *Levy v. Only Cremations for Pets, Inc.,*
 18 57 Cal. App. 5th 203 (2020) 10

19 *Louis v. Nailtiques Cosmetic Corp.,*
 20 423 Fed. App’x 711 (9th Cir. 2011)..... 14

21 *Markels v. AARP,*
 22 689 F. Supp. 3d 722 (N.D. Cal. 2023) 15

23 *McGraw Co. v. Aegis Gen. Ins. Agency, Inc.,*
 24 2016 WL 3745063 (N.D. Cal. July 13, 2016) 16

25 *Meyer v. One West Bank, F.S.B.,*
 26 91 F. Supp. 3d 1177 (C.D. Cal. 2015) 17

27 *Mintz v. Blue Cross of Cal.,*
 28 172 Cal. App. 4th 1594 (2009) 12

Navient Sols., LLC v. BPG Office Partners XIII Iron Hill LLC,
 2023 WL 3120644 (Del. Super. Ct. Apr. 27, 2023)..... 8 n.9

Neder v. United States,
 527 U.S. 1 (1999)..... 17

Netbula, LLC v. BindView Dev. Corp.,
 516 F. Supp. 2d 1137 (N.D. Cal. 2007) 9

1 *Oberly v. Howard Hughes Med. Inst.*,
 2 472 A.2d 366 (Del. Ch. 1984)..... 8 n.9

3 *Oberly v. Kirby*,
 4 592 A.2d 445 (Del. 1991) 8 n.9

5 *OpenAI, Inc. v. Open Artificial Intelligence, Inc. et al.*,
 6 No. 23-cv-03918-YGR (N.D. Cal. Sept. 25, 2024)..... 23

7 *Orcilla v. Big Sur, Inc.*,
 8 244 Cal. App. 4th 982 (2016) 10

9 *Pac. Bay Recovery, Inc. v. Cal. Physicians’ Servs., Inc.*,
 10 12 Cal. App. 5th 200 (2017) 7, 8

11 *Pac. Recovery Sols. v. United Behav. Health*,
 12 481 F. Supp. 3d 1011 (N.D. Cal. 2020) 6, 17

13 *Perkowski v. Belvill*,
 14 2020 WL 3891674 (C.D. Cal. Mar. 2, 2020) 15

15 *Peterson v. Cellco P’ship*,
 16 164 Cal. App. 4th 1583 (2008) 15

17 *Pinkert v. Schwab Charitable Fund*,
 18 2021 WL 2476869 (N.D. Cal. June 17, 2021) 19, 20, 21

19 *Prager University v. Google LLC*,
 20 951 F.3d 991 (9th Cir. 2020)..... 23

21 *Richardson v. Reliance Nat’l Indem. Co.*,
 22 2000 WL 284211 (N.D. Cal. Mar. 9, 2000)..... 13-14, 15

23 *Rigsby v. GoDaddy Inc.*,
 24 59 F.4th 998 (9th Cir. 2023) 24

25 *Ross v. Sioux Honey Ass’n, Coop.*,
 26 2013 WL 146367 (N.D. Cal. Jan. 14, 2013) 11

27 *Sandy v. McClure*,
 28 676 F. Supp. 2d 866 (N.D. Cal. 2009) 15

Sanford v. MemberWorks, Inc.,
 625 F.3d 550 (9th Cir. 2010)..... 18 n.10

Semegen v. Weidner,
 2780 F.2d 727 (9th Cir. 1985)..... 6

Seva v. Shri Shirdi Sai Baba Sansthan L.A.,
 2013 WL 1431673 (C.D. Cal. Apr. 9, 2013) 18

1 *Shoemaker v. Myers*,
 2 52 Cal. 3d 1 (1990) 12

3 *Shvarts v. Budget Grp., Inc.*,
 4 81 Cal. App. 4th 1153 (2000) 21

5 *Smith v. GlaxoSmithKline Consumer Healthcare Holdings (US) LLC*,
 6 660 F. Supp. 3d 863 (N.D. Cal. 2023) 13

7 *Sonoma Foods, Inc. v. Sonoma Cheese Factory, LLC*,
 8 634 F. Supp. 2d 1009 (N.D. Cal. 2007) 20, 21

9 *Strome v. DBMK Enters., Inc.*,
 10 2014 WL 6485533 (N.D. Cal. Nov. 19, 2014)..... 24

11 *UMG Recordings, Inc. v. Glob. Eagle Ent., Inc.*,
 12 117 F. Supp. 3d 1092 (C.D. Cal. 2015) 15

13 *Valencia v. Sharp Elecs. Corp.*,
 14 561 Fed. App'x 591 (9th Cir. 2014)..... 15

15 *Verde Media Corp. v. Levi*,
 16 2015 WL 374934 (N.D. Cal. Jan. 28, 2015) *passim*

17 *Villains, Inc. v. Am. Economy Ins. Co.*,
 18 870 F. Supp. 2d 792 (N.D. Cal. 2012) 16

19 *Weddington Prods., Inc. v. Flick*,
 20 60 Cal. App. 4th 793 (1998) 9

21 *Westron v. Zoom Video Commc'ns, Inc.*,
 22 2023 WL 3149262 (N.D. Cal. Feb. 15, 2023) 12

23 *Wier v. Howard Hughes Med. Inst.*,
 24 407 A.2d 1051 (Del. Ch. 1979)..... 8 n.9

25 *Winebarger v. Pa. Higher Educ. Assistance Agency*,
 26 411 F. Supp. 3d 1070 (C.D. Cal. 2019) 10-11

27 *Yari v. Producers Guild of Am., Inc.*,
 28 161 Cal. App. 4th 172 (2008) 11

Yetter v. Ford Motor Co.,
 428 F. Supp. 3d 210 (N.D. Cal. 2019) 6, 13

Zenith Ins. Co. v. O'Connor,
 148 Cal. App. 4th 998 (2007) 10

1 **Statutes**

2 15 U.S.C. § 1125(a)(1)(B) 22

3 18 U.S.C. § 1962(c) 17

4 18 U.S.C. § 1962(d) 18 n.10

5 Fed. R. Civ. Pro. 9(b) *passim*

6 Cal. Bus. & Prof. Code §§ 17500, *et seq.* 22, 23

7 Cal. Civ. Code § 1565 8

8 Cal. Civ. Code § 1573 20

9 Cal. Civ. Code § 1605 10

10 Cal. Corp. Code § 5142(a) 19

11

12 **Other Authorities**

13 Cade Metz, *Elon Musk Revives Lawsuit Against OpenAI and Sam Altman*,
 14 N.Y. TIMES (Aug. 5, 2024),
 15 <https://www.nytimes.com/2024/08/05/technology/elon-musk-openai-lawsuit.html> 1 n.2, 5 n.6

16 *Farnsworth on Contracts*, § 2.02 (4th ed. 2022) 10

17 Judicial Council of California Civil Jury Instruction 4111 *Constructive Fraud*
 (Cal. Civ. Code, § 1573) 20

18 Mike Scarcella, *Elon Musk Taps Copyright Law Vet Toberoff for OpenAI Lawsuit*,
 19 REUTERS (Aug. 7, 2024), <https://www.reuters.com/legal/litigation/elon-musk-taps-copyright-law-vet-toberoff-openai-lawsuit-2024-08-07/> 1 n.2, 1 n.3, 5 n.7

20 Nick Robins-Early, *Elon Musk Sues OpenAI Again, Alleging 'Deceit of Shakespearean Proportions,'* GUARDIAN (Aug. 5, 2024),
 21 <https://www.theguardian.com/technology/article/2024/aug/05/elon-musk-openai-lawsuit> 5 n.6

22

23 *OpenAI and Elon Musk*, OPENAI (Mar. 5, 2024) 5 n.8

24 Restatement (Second) of Contracts, § 71 10

25

26

27

28

INTRODUCTION

1
2 This suit is the latest move in Elon Musk’s increasingly blustering campaign to harass
3 OpenAI for his own competitive advantage. OpenAI is dedicated to the safe and beneficial
4 development of artificial general intelligence (“AGI”). Musk once supported OpenAI in that
5 mission, but abandoned the venture when his bid to dominate it failed. Since launching a competing
6 artificial intelligence company, xAI, Musk has been trying to leverage the judicial system for an
7 edge. The effort should fail; Musk’s complaint does not state a claim and should be dismissed.

8 Earlier this year, Musk sued OpenAI entities and individuals in California Superior Court.
9 He claimed that OpenAI, Inc.’s Certificate of Incorporation (“COI”), an email with OpenAI CEO
10 Sam Altman from 2015, and a blog post from the same year together comprised an enforceable
11 written contract—a “Founding Agreement” in which all of the defendants purportedly promised
12 Musk they would open-source their latest technology and would not license it, nor grant a board
13 observer seat, to a for-profit company.¹ That state court action—which Musk’s current counsel has
14 called a “Goldfish” that “lacked teeth”²—was dismissed on Musk’s own initiative, hours before
15 argument on defendants’ fully-briefed demurrer.

16 Two months later, Musk brought this action—boasting through counsel that the goldfish
17 has morphed into a “Great White.”³ How? Not with new evidence; the core documents and facts
18 alleged are the same. And not with a new narrative; this complaint, though more hyperbolic,
19 recycles the same story. Instead, what’s new is that the carcass of the “Founding Agreement” (now
20 lowercased and shunted to the back of the complaint, *see* ¶ 248⁴) is larded with allegations of fraud,
21

22
23 ¹ *See* Complaint, *Musk v. Altman et al.*, Case No. CGC-24-612746 (filed February 29, 2024)
24 (“OC”), included at Ex. A to the Declaration of David J. Wiener. Citations of “Ex.” are to the
25 Wiener Declaration.

26 ² *See* Cade Metz, *Elon Musk Revives Lawsuit Against OpenAI and Sam Altman*, N.Y. TIMES (Aug.
27 5, 2024), <https://www.nytimes.com/2024/08/05/technology/elon-musk-openai-lawsuit.html>; Mike
28 Scarcella, *Elon Musk Taps Copyright Law Vet Toberoff for OpenAI Lawsuit*, REUTERS (Aug. 7,
2024), <https://www.reuters.com/legal/litigation/elon-musk-taps-copyright-law-vet-toberoff-openai-lawsuit-2024-08-07/>.

³ *See* Scarcella, *supra* note 2.

⁴ Citations of “¶ ___” are to Musk’s complaint in this action.

1 racketeering, and false advertising. Citing RICO and the Lanham Act, Musk now claims entitlement
2 to treble damages.

3 But Musk offers neither the factual nor the legal scaffolding needed to sustain his claims.
4 His express contract claim (Count VI) pleads no mutual assent and no bargained-for
5 consideration—the two essential elements of any contract. The same goes for Musk’s implied
6 contract claim (Count VII), pursuit of which Musk disclaimed in his earlier action. Musk’s claims
7 for breach of the implied covenant (Count VIII) and tortious interference (Count XIV) fall with his
8 contract claims and fail for independent reasons.

9 Musk’s new claim for promissory fraud (Count I) and its unjust enrichment tag-along
10 (Count IX) are puffed-up versions of his untenable contract claims. Musk cannot clearly identify
11 any promises made to him that were then broken, much less any facts supporting his spurious
12 accusation of intent to defraud. He comes nowhere near satisfying the heightened pleading
13 requirement of Federal Rule of Civil Procedure 9(b). Nor, as a result, can he sustain his
14 aiding-and-abetting claim (Count III)—which is in any event asserted against entities that did not
15 exist at the time of the purported false promises.

16 Musk’s RICO claims (Counts IV and V), predicated on supposed acts of wire fraud, bear
17 the same defects, and also rest on the implausible premise—supported by zero facts pleaded—that
18 Altman, OpenAI President Greg Brockman, and various entities within and outside the OpenAI
19 organization infiltrated and corrupted OpenAI, Inc. as the mob might a business.

20 Musk’s claims for constructive fraud (Count II), unfair competition (Count XI), and aiding
21 and abetting fiduciary breach (Count XIII) are improper efforts to avoid standing rules designed to
22 prevent precisely what Musk is attempting here: using one’s status as a non-profit donor to try to
23 control the affairs of the non-profit.

24 Musk’s claims for false advertising under California law and the Lanham Act fail for,
25 among other things, want of an advertisement.

26 Finally, Musk’s request for a judicial declaration respecting what constitutes AGI should
27 be dismissed for lack of any well-pleaded substantive claim to ground it.
28

1 In short, Musk’s second attempt to muster a cognizable legal claim against any of the
2 OpenAI Defendants fails in its entirety.

3 BACKGROUND

4 I. Musk’s Allegations

5 For purposes of this motion, the OpenAI Defendants accept as true the facts alleged in the
6 complaint and documents incorporated by reference therein.

7 In 2015, Altman, Brockman, and Musk launched OpenAI as a non-profit dedicated to
8 researching and developing artificial intelligence and AGI. ¶¶ 68-77. Altman proposed the idea for
9 the venture to Musk in May 2015. ¶ 70. He suggested “start[ing] an AI ‘Manhattan
10 Project’ . . . structure[d] [] so that the tech belongs to the world via some sort of nonprofit.” *Id.* In
11 June 2015, Altman proposed that the new “AI lab” have the “mission” of “creat[ing] the first
12 general AI and us[ing] it for individual empowerment.” ¶ 72. “[S]afety [would] be a first
13 class-requirement,” and “[t]he technology would be owned by the foundation and used ‘for the
14 good of the world.’” *Id.*; Ex. A (OC) at *41 (Ex. 2). Altman added, “[w]e’d have an ongoing
15 conversation about what work should be open-sourced and what shouldn’t.” Ex. A (OC) at *41
16 (Ex. 2).

17 Six months later, in December 2015, OpenAI, Inc. was incorporated as a non-profit entity
18 in Delaware. ¶ 75. Its COI stated that OpenAI would be a “nonprofit corporation organized
19 exclusively for charitable and/or educational purposes” and that it would seek to “open source” its
20 artificial intelligence technology “for the public benefit when applicable.” *Id.* The public blog post
21 announcing OpenAI’s founding named Altman and Musk as “co-chair[s]” and said the company’s
22 core mission would be advancing AI “in the way that is most likely to benefit humanity as a whole,
23 unconstrained by a need to generate financial return.” ¶ 76; Ex. A (OC) at *44, *46 (Ex. 3).

24 In 2016 and 2017, Musk made donations to OpenAI, Inc. of approximately \$15 million and
25 \$20 million, respectively. ¶ 82. He stepped down as co-chair on February 21, 2018. *Id.* Thereafter,
26 and until September 14, 2020, Musk made further contributions to OpenAI, Inc. totaling
27 approximately \$9 million. *Id.* Musk also at one point leased OpenAI, Inc.’s office space and paid
28 its overhead expenses. *Id.*

1 OpenAI released the second generation of its “Generative Pre-Trained Transformer”
 2 model—GPT-2—in 2019. ¶ 114. As part of that release, OpenAI open-sourced GPT-2’s underlying
 3 code and published a detailed report describing the model. *Id.* In 2020, OpenAI published a similar
 4 report accompanying the release of its next model, GPT-3, without open-sourcing the model’s code.
 5 ¶ 115. OpenAI did not open-source or publish a detailed report in connection with the release of
 6 GPT-4 in March 2023. ¶ 117. Nor did it do so in releasing any of its subsequent models. ¶ 121.

7 In March 2019, while Musk was still involved in the organization, OpenAI launched a
 8 “capped-profit” subsidiary called OpenAI, L.P. to enable greater fundraising in support of OpenAI,
 9 Inc.’s mission. ¶ 93. Other capped-profit entities were later incorporated under the umbrella of
 10 OpenAI, Inc. ¶¶ 93-100. OpenAI has entered commercial partnerships with Microsoft Corporation
 11 (“Microsoft”), and has granted Microsoft a license to certain of OpenAI’s GPT products. ¶ 119.
 12 For a time, from November 2023 to July 9, 2024, Microsoft had a non-voting observer seat on
 13 OpenAI, Inc.’s board. ¶ 135.

14 **II. Musk’s State Court Suit**

15 On February 29, 2024, Musk sued Altman, Brockman, OpenAI, Inc., OpenAI, L.P., and
 16 several other OpenAI entities in California Superior Court. In that action, as here, Musk accused
 17 the named defendants of abandoning OpenAI, Inc.’s mission, and asserted that they violated a
 18 supposed “Founding Agreement” with Musk by (1) licensing OpenAI’s then-latest large language
 19 model, GPT-4, to a for-profit enterprise, Microsoft; (2) failing to open-source and erecting a
 20 paywall around GPT-4; and (3) permitting Microsoft to occupy a non-voting observer seat on
 21 OpenAI, Inc.’s board. Ex. A (OC) ¶ 125 (list of alleged breaches). The narrative offered to support
 22 these allegations was largely the same as the one offered in this matter.⁵ On the back of that
 23 narrative, Musk asserted claims for breach of contract, promissory estoppel, breach of fiduciary
 24 duty, unfair business practices, and accounting. He did not claim fraud or any variant thereof.

25 Defendants in the Superior Court action promptly filed a demurrer as to each of Musk’s
 26 claims and moved to strike his more sweeping demands for relief (including a request for specific

27 _____
 28 ⁵ Compare Ex. A (OC) ¶¶ 15-19, with ¶¶ 59-63; compare Ex. A (OC) ¶¶ 46-64, with ¶¶ 69-85;
 compare Ex. A (OC) ¶¶ 67-75, with ¶¶ 93-98; compare Ex. A (OC) ¶¶ 93-112, with ¶¶ 122-37.

1 performance of OpenAI’s purported obligation to open-source GPT-4 and a judicial declaration
 2 that “next generation large language models” not yet in existence constitute AGI, *see* Ex. B (Mot.
 3 to Strike) at 7-8, 10). Musk, meanwhile, quickly served broad discovery requests on all defendants
 4 and sought the immediate depositions of non-party former directors of OpenAI, Inc.’s board.

5 With the demurrer and strike motion fully briefed, argument was set for 10 a.m. PT on June
 6 12, 2024. At 11:40 a.m. PT on June 11, 2024, Musk, through counsel, informed defendants he was
 7 withdrawing his lawsuit. He offered no explanation.

8 **III. This Action**

9 Less than two months later, on August 5, 2024, Musk filed this action. Where the state court
 10 complaint asserted five claims, led by the “Founding Agreement”-based contract claim, this one
 11 asserts 15 claims, leading with new counts of fraud and RICO, and subordinating the “founding
 12 agreement”-based contract claims. Where the state court complaint named as defendants OpenAI,
 13 Inc. and various of its subsidiaries, this one names the parent, more of its subsidiaries, OpenAI
 14 Startup Fund entities (which are not under the OpenAI, Inc. umbrella), and an entity called OpenAI
 15 Investment LLC (which is not affiliated with any other named defendant).

16 By early morning Eastern Time on August 5, the media were reporting statements by
 17 Musk’s new counsel that this action held vast differences from the previously-withdrawn one,
 18 which “lacked teeth.”⁶ A few days later, Musk’s counsel called the California state court action “a
 19 Goldfish,” and touted this one as “a Great White.”⁷

20 In truth, the only substantive differences between this complaint and the one in February—
 21 aside from new and even more implausible legal theories—are:

- 22 • an acknowledgment by Musk that his abandonment of OpenAI followed his failed effort to
 23 merge OpenAI with Tesla—that is, to use “Tesla as OpenAI, Inc.’s ‘cash cow’” (¶ 83);⁸

24 _____
 25 ⁶ *See Metz, supra* note 2; Nick Robins-Early, *Elon Musk Sues OpenAI Again, Alleging ‘Deceit of*
 26 *Shakespearean Proportions,*” GUARDIAN (Aug. 5, 2024),
<https://www.theguardian.com/technology/article/2024/aug/05/elon-musk-openai-lawsuit>.

27 ⁷ Scarcella, *supra* note 2.

28 ⁸ Musk did not reference the Tesla connection in his first complaint; it was the subject of an OpenAI
 blog post after that filing. *See* Ex. D (*OpenAI and Elon Musk*, OPENAI (Mar. 5, 2024)).

- 1 • fact-free speculation that certain defendants created corporate entities with a nefarious purpose (¶¶ 99-105);
- 2 • allegations of supposed “self-dealing” by Altman, based on “information and belief” and a
- 3 source that does *not* (contrary to Musk’s allegation) “report[]” that “Altman deliberately
- 4 withheld key information and lied about his personal holdings and investments” (¶¶ 106-10);
- 5 • gratuitous invocation of criticism levied against OpenAI related to copyright, safety, and
- 6 • citation of a press report concerning a potential corporate reorganization of OpenAI (¶ 146).

7 ARGUMENT

8 “To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual

9 matter that, when accepted as true, states a claim that is plausible on its face.” *Pac. Recovery Sols.*

10 *v. United Behav. Health*, 481 F. Supp. 3d 1011, 1021 (N.D. Cal. 2020) (citing *Ashcroft v. Iqbal*,

11 556 U.S. 662, 678 (2009)). In addition, any claim grounded in allegations of fraud or false

12 representations must satisfy the heightened pleading standard dictated by Rule 9(b): it must plead

13 with particularity “what is false or misleading about a statement, and why it is false,” and be

14 “specific enough to give defendants notice of the particular misconduct which is alleged to

15 constitute the fraud charged so that they can defend against the charge and not just deny that they

16 have done anything wrong.” *Yetter v. Ford Motor Co.*, 428 F. Supp. 3d 210, 219-20 (N.D. Cal.

17 2019) (first quoting *Ebeid ex rel. U.S. v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010), then quoting

18 *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985)).

19 Musk’s allegations flunk these tests. His complaint is a PR stunt comprising:

20 (1) unimproved and implausible variants of contract and fiduciary claims he was not prepared to

21 defend in state court; and (2) implausible theories of fraud and false advertising that do not identify

22 particular false representations, what made them false, or what knowledge defendants had of their

23 supposed falsity. Defendants address the contract claims first because, although Musk’s other

24 claims bear additional defects, they all share with the contract claims a core failure to plead

25 cognizable promises made to Musk and then broken.

26 I. MUSK’S ALLEGATIONS CANNOT SUPPORT ANY CONTRACT CLAIM.

27 Mere months ago, Musk’s headline claim was that he had a written contract with a host of

28 OpenAI entities *and* Altman *and* Brockman, memorialized in OpenAI, Inc.’s COI and a June 2015

1 email. Ex. A (OC) at ¶¶ 123-27. That supposed contract was breached, Musk alleged, when
2 defendants failed to open-source GPT-4 and licensed it to Microsoft, and when defendants granted
3 a non-voting board observer seat to Microsoft. *Id.* ¶ 125. Musk disclaimed any reliance on an
4 implied contract theory in his prior action. *See* Ex. C (Musk Dem. Opp.) at 2. He sought to dodge
5 the requirement of bargained-for consideration, asserting (incorrectly) that “[a]dequate
6 consideration is presumed for written contracts.” *Id.* at 6.

7 The claim made no sense, and Musk withdrew it rather than defend it. Musk could point to
8 no facts showing any defendant promised him anything—much less the specific undertakings (like
9 open-sourcing GPT-4) he complained had been breached. Ex. A (OC) ¶ 125. Nor could Musk show
10 any bargained-for exchange—nothing to suggest the contributions Musk made to OpenAI in its
11 early years were made on condition of the (fictitious) promises Musk had pleaded.

12 Yet Musk re-asserts his deficient contract claim here, only slightly reimagined and with the
13 addition of an implied contract claim that was absent from the abandoned state court complaint.
14 ¶¶ 254-64. Musk still alleges the existence of an express written contract, but with different
15 counterparties (just Altman and OpenAI, Inc. this time) and different evidencing documents (no
16 longer invoking the COI—just “a series of express written correspondence in 2015” (¶ 248)).

17 The changes do not cure the infirmities in the original complaint, and Musk’s contract-based
18 claims (Counts VI, VII, VIII, XIV) must be dismissed.

19 **A. Musk does not plead an express contract.**

20 First, Musk fails to plead the essential elements of an express contract. The terms of an
21 express contract are “stated in words,” *Pac. Bay Recovery, Inc. v. Cal. Physicians’ Servs., Inc.*, 12
22 Cal. App. 5th 200, 215 (2017) (citing Cal. Civ. Code § 1620), and there are only two ways to plead
23 an express written contract, as Musk purports to have done here (*see* ¶ 248): (1) by attaching or
24 quoting verbatim the writing; or (2) by pleading in detail the writing’s “legal effect.” *Heritage Pac.*
25 *Fin., LLC v. Monroy*, 215 Cal. App. 4th 972, 993 (2013); *see also Langan v. United Servs. Auto.*
26 *Ass’n*, 69 F. Supp. 3d 965, 979 (N.D. Cal. 2014) (“[I]t is absolutely essential to plead the terms of
27 the contract either in haec verba or according to legal effect.”). What must be apparent from the
28 complaint—in the attached writing or its recitation—are the essential elements of (1) mutual assent

1 to the terms alleged to have been breached and (2) bargained-for consideration. *Pac. Bay Recovery,*
 2 *Inc.*, 12 Cal. App. 5th at 215-16 (for an express contract, the “mode of proof” of the “vital elements”
 3 of “mutual assent . . . and consideration” must be the terms stated in words).

4 Neither is present here.

5 **1. Musk does not plead mutual assent to the allegedly breached terms.**

6 Mutual assent—a meeting of the minds—is the most rudimentary element of a contract, and
 7 “is determined under an objective standard applied to the outward manifestations or expressions of
 8 the parties.” *Am. Emps. Grp., Inc. v. Emp. Dev. Dep’t*, 154 Cal. App. 4th 836, 847 (2007); *see* Cal.
 9 Civ. Code § 1565 (consent must be “[c]ommunicated by each [party] to the other”). Yet Musk
 10 identifies no writing that can plausibly be construed as memorializing mutual assent to the terms
 11 he claims defendants have breached.

12 There is no writing attached to the complaint, and Musk nowhere attempts to recite the
 13 terms of the contract verbatim. Instead, Musk invokes his “express written correspondence in 2015”
 14 with Altman (¶ 248), but identifies no language therein constituting an undertaking to Musk to
 15 (a) open-source all technology “subject only to genuine safety considerations”; (b) not license
 16 certain technology to Microsoft; (c) refrain from granting Microsoft a board observer seat; (d)
 17 refrain from charging for use of any technology; (e) make no business deals with entities in which
 18 Altman has an interest; or (f) never contemplate a corporate reorganization. *See* ¶¶ 248, 250
 19 (alleged breaches).⁹ As a direct competitor of OpenAI in 2024, Musk evidently wishes he had these

20 _____
 21 ⁹ Musk alleges, for the first time, that Altman and OpenAI, Inc. breached his fictional contract
 22 “by . . . working to convert the non-profit into a fully for-profit commercial entity.” ¶ 250(f); *see*
 23 *also* ¶ 261. But any alteration of OpenAI’s organizational structure would be governed by the
 24 corporate law of Delaware, OpenAI, Inc.’s state of incorporation—not Musk’s dictates. *See Oberly*
 25 *v. Howard Hughes Med. Inst.*, 472 A.2d 366, 391 (Del. Ch. 1984) (noting “fundamental principle”
 26 that Delaware law “is designed to permit a corporation—and particularly a nonprofit corporation—
 27 to regulate its own affairs”), *abrogation on other grounds recognized by Navient Sols., LLC v. BPG*
 28 *Office Partners XIII Iron Hill LLC*, 2023 WL 3120644, at *10 n.144 (Del. Super. Ct. Apr. 27,
 2023); *see also Wier v. Howard Hughes Med. Inst.*, 407 A.2d 1051, 1056 (Del. Ch. 1979) (donor
 lacks standing under Delaware law to challenge the “disposition and control” of charitable assets);
Oberly v. Kirby, 592 A.2d 445, 467 (Del. 1991) (nonprofit corporations “must be managed on
 behalf of [their] beneficiaries,” whose interests are not represented by private plaintiffs); *Klein v.*
Anaheim Mem’l Hosp. Ass’n, 2009 WL 3233914, at *4, *6-8 (Cal. Ct. App. Oct. 8, 2009) (donor
 lacked standing to challenge sale of non-profit public benefit corporation to a for-profit entity).

1 imagined undertakings. But nothing in the “cobble[d] together” correspondence and other
2 documents Musk cites from 2015 shows that Altman or OpenAI, Inc. assented to any of Musk’s
3 purported contractual terms. *See Haskins v. Symantec Corp.*, 2013 WL 6234610, *10 (N.D. Cal.
4 Dec. 2, 2013) (dismissing contract claim where plaintiff “attempt[ed] to cobble together the terms”
5 of an alleged contract from disparate sources); *see also, e.g., Verde Media Corp. v. Levi*, 2015 WL
6 374934, at *7 (N.D. Cal. Jan. 28, 2015) (“Plaintiff ha[d] not alleged sufficient facts to render
7 plausible the existence of an agreement . . . arising merely from an in-person discussion and a few
8 short and vague instant messages with [the defendant].”).

9 Recognizing he can point to no writing specifying the undertakings to which he wants
10 defendants bound, Musk tries to frame his “contract” in abstract terms, presumably to make them
11 seem capacious enough to encompass the acts he complains constituted breach. *See, e.g., ¶ 248*
12 (“Altman promised that OpenAI, Inc. (i) would be a non-profit and develop AI/AGI for the benefit
13 of humanity, not personal profits, and (ii) to that end, would make OpenAI, Inc.’s technology
14 largely open source”). But in trying to solve one problem, Musk creates another: the ideas
15 Musk and Altman actually discussed in the correspondence cited, and that are reflected in OpenAI,
16 Inc.’s founding documents, are not the “sufficiently definite terms” required to “form an
17 enforceable contract.” *Netbula, LLC v. BindView Dev. Corp.*, 516 F. Supp. 2d 1137, 1156 (N.D.
18 Cal. 2007). To “support enforcement,” contract terms must be certain enough to “provide a basis
19 for determining what obligations the parties have agreed to” and “make possible a determination
20 of whether those agreed obligations have been breached.” *Weddington Prods., Inc. v. Flick*, 60 Cal.
21 App. 4th 793, 811-12 (1998); *see also, e.g., In re Apple Inc. Device Performance Litig.*, 386 F.
22 Supp. 3d 1155, 1183 (N.D. Cal. 2019) (plaintiffs “fail[ed] to allege how Apple breached any alleged
23 contract,” where they simply “allege[d] that Apple’s Devices did not perform as advertised or
24 promised . . . but without identifying the terms of the contract, the Court [could not] evaluate this
25 allegation”); *Verde Media*, 2015 WL 374934, at *7 (dismissing contract claim where “the terms of
26 the contract as alleged [were] vague” and undefined). The ideas and mission statements Musk
27 points to, by contrast, are not the stuff of contracts.
28

1 Having failed to plausibly plead that Altman and OpenAI, Inc. assented to deliver to him
2 the things he complains were not delivered, Musk cannot sustain his claim. *See, e.g., Allied*
3 *Anesthesia Med. Grp., Inc. v. Inland Empire Health Plan*, 80 Cal. App. 5th 794, 809 (2022).

4 **2. Musk does not plausibly plead bargained-for consideration.**

5 Nor does Musk plausibly allege bargained-for consideration merely by pointing to
6 contributions he made to OpenAI, Inc. in its early years. *See* ¶ 248. “It is not enough . . . to confer
7 a benefit or suffer prejudice for there to be consideration.” *Orcilla v. Big Sur, Inc.*, 244 Cal. App.
8 4th 982, 1006 (2016). “To constitute consideration, a performance or a return promise must be
9 bargained for.” *Jara v. Suprema Meats, Inc.*, 121 Cal. App. 4th 1238, 1249 (2004) (quoting
10 Restatement (Second) of Contracts § 71); Farnsworth on Contracts § 2.02 (4th ed. 2022) (adequacy
11 of consideration depends on “the process by which the parties had arrived at that exchange—was
12 it the product of ‘bargain?’”). Musk’s only allegations of exchange or bargain are conclusory: he
13 asserts that Altman and OpenAI, Inc. agreed to act and refrain from acting “[i]n exchange, and as
14 consideration for” Musk’s contributions, ¶ 248, while pleading no supporting fact—no writing, no
15 conversation, nothing suggesting the parties engaged in bargaining of any kind. The contract is said
16 to have been formed in 2015, yet Musk’s donations did not begin until 2016, and none of the
17 correspondence Musk cites evidences a *quid pro quo*.

18 This shortcoming is independently fatal to Musk’s claim. Because Musk pleads no facts
19 showing that his contributions were “an inducement to the promisor,” Cal. Civ. Code § 1605, he
20 has failed to plead an enforceable contract.

21 **B. Musk does not plead an implied contract.**

22 The same defects render Musk’s new implied contract claim untenable as well. Asserting
23 that a contract is implied rather than express does not excuse a failure to plead mutual assent and
24 bargained-for consideration. *Zenith Ins. Co. v. O’Connor*, 148 Cal. App. 4th 998, 1010 (2007)
25 (“[A]n implied contract in no less degree than an express contract, must be founded upon an
26 ascertained agreement of the parties to perform it.” (cleaned up)); *Levy v. Only Cremations for*
27 *Pets, Inc.*, 57 Cal. App. 5th 203, 211 (2020) (“As to the basic elements, there is no difference
28 between an express and implied contract.”); *see also Winebarger v. Pa. Higher Educ. Assistance*

1 *Agency*, 411 F. Supp. 3d 1070, 1093 (C.D. Cal. 2019) (“fail[ure] to allege the existence of any
2 bargained-for consideration” in connection with an asserted implied contract dooms the claim). It
3 just means one looks to the parties’ alleged conduct rather than their alleged words to see if the
4 elements are adequately pleaded. *Yari v. Producers Guild of Am., Inc.*, 161 Cal. App. 4th 172, 182
5 (2008) (“A cause of action for breach of implied contract has the same elements as does a cause of
6 action for breach of contract, except that the promise is not expressed in words but is implied from
7 the promisor’s conduct.”). No conduct alleged here plausibly demonstrates mutual assent or
8 bargained-for consideration.

9 Musk does not even identify the specific conduct that allegedly gave rise to his implied
10 contract, instead vaguely alluding to the “relationship, surrounding circumstances, and intentional
11 course of conduct between Musk . . . and Altman and OpenAI, Inc.” ¶ 255. Where a plaintiff
12 “alleges only that the parties’ implied contract arose in some nonspecific manner from the Parties’
13 acts and conduct” and fails to identify the “source of [the] claimed terms,” or to “explain how those
14 terms became part of the parties’ legal agreement,” an implied contract claim cannot be sustained.
15 *Haskins v. Symantec Corp.*, 2014 WL 2450996, at *4 (N.D. Cal. June 2, 2024) (quotation marks
16 omitted). To the extent Musk is seeking to rely for his implied contract claim on the same
17 “correspondence” cited for the express contract claim, *see* ¶¶ 254-59, that reliance is just as
18 misplaced here as it was there; the communications do not “manifest[] an intent to create a
19 contract,” nor do they reveal “what the terms of that contract might be,” *Ross v. Sioux Honey Ass’n,*
20 *Coop.*, 2013 WL 146367, at *18 (N.D. Cal. Jan. 14, 2013). No facts of any kind are pleaded to
21 establish supposed promises from Altman or OpenAI, Inc. to Musk that they would presumptively
22 open-source all technology and refrain from the acts Musk catalogs. *See* ¶ 261 (summary of alleged
23 breaches). Nor are any facts pleaded to show a bargain.

24 **C. Musk’s implied covenant and tortious interference claims cannot stand**
25 **absent a contract, and fail for other reasons as well.**

26 Musk claims that Altman and OpenAI, Inc. breached the “covenant of good faith and fair
27 dealing,” implied “in every agreement,” “not [to] do anything to unfairly interfere with the right of
28 any other party to receive the benefits of the agreement.” ¶ 266. He also alleges that a collection of

1 entities he calls the “OpenAI For-Profit Entities” (*see* ¶ 100 & n.3) tortiously interfered with his
2 “contract with Altman and OpenAI, Inc.” ¶ 330. Because these claims presume the existence of an
3 enforceable contract, and none has been pleaded, they must be dismissed. *See Langan*, 69 F. Supp.
4 3d at 980 (“The prerequisite for any action for breach of the implied covenant of good faith and
5 fair dealing is the existence of a contractual relationship between the parties.” (cleaned up)); *Ixchel*
6 *Pharma, LLC v. Biogen, Inc.*, 9 Cal. 5th 1130, 1141 (2020) (“[I]nterference with contractual
7 relations requires [] the existence of a valid contract between the plaintiff and a third party . . .”).

8 Even had Musk pleaded a contract, these claims could not stand.

9 Musk’s implied covenant claim just mimics his contract claims and fails to identify non-
10 duplicative contractual “purposes” allegedly frustrated. *See In re iPhone Application Litig.*, 2011
11 WL 4403963, at *9 (N.D. Cal. Sept. 20, 2011) (where plaintiffs had not identified “the contract’s
12 purposes,” court could not “determine whether Plaintiffs were deprived of the benefits of the
13 contract at issue”). Musk complains that “Altman and OpenAI, Inc. did not act fairly and in good
14 faith by fraudulently inducing Musk to make significant contributions, failing to disclose material
15 information to him, closing off the non-profit’s technology for personal monetary gain, and
16 engaging in brazen self-dealing and other profiteering.” ¶ 269. Though more colorfully stated, the
17 facts asserted here are the same ones offered to support Musk’s contract claims, and therefore
18 cannot state a cognizable implied covenant claim. *Westron v. Zoom Video Commc’ns, Inc.*, 2023
19 WL 3149262, at *2 (N.D. Cal. Feb. 15, 2023) (dismissing “impermissibly duplicative” implied
20 covenant claim “based on the same conduct as [] breach of implied contract”).

21 The tortious interference claim, for its part, is incoherent. First, one cannot—as Musk tries
22 to do here—bring a claim for tortious interference against an alleged agent of a party to the
23 purported contract. *Shoemaker v. Myers*, 52 Cal. 3d 1, 24 (1990); *Mintz v. Blue Cross of Cal.*, 172
24 Cal. App. 4th 1594, 1604, 1607 (2009) (a “representative of a contracting party may not be held
25 liable for the tort of interfering with its principal’s contract”). Having asserted that
26 “Altman . . . formed the OpenAI For-Profit Entities” as agents of fraud against Musk, ¶ 190, Musk
27 has pleaded himself out of this claim. Second, Musk fails to plead any “intentional acts” by the
28 OpenAI For-Profit Entities “designed to induce a breach or disruption of [a] contractual

1 relationship.” *Ixchel*, 9 Cal. 5th at 1141. He claims these entities “siphon[ed] the non-profit’s most
2 valuable assets into their for-profit apparatus,” ¶ 332, but nowhere explains how that caused (or
3 indeed is distinct from) any breach of the supposed contract. That failure to plead a key element is
4 independently dispositive of the tortious interference claim. *See, e.g., Davis v. Nadrich*, 174 Cal.
5 App. 4th 1, 10 (2009) (intent to disrupt contract is an essential element).

6 **II. Musk’s Allegations Cannot Support Any Fraud Claim.**

7 With no cognizable contract claim, Musk tries to repackage his grievances as fraud: Rather
8 than claim that defendants made and then broke enforceable promises, Musk says those same
9 promises were made to him with no present intention to fulfill them and therefore constituted fraud.
10 *See* ¶¶ 149-70, 200-06, 276. These allegations undergird Musk’s claims for promissory fraud
11 (Count I), aiding and abetting fraud (Count III, against the OpenAI For-Profit Entities), and unjust
12 enrichment (Count IX). They also form the predicate for Musk’s RICO claims (Counts IV and V).
13 But a failed contract claim cannot be so easily repurposed; a plaintiff cannot simply take
14 “allegations underpinning a straightforward claim for breach of a commercial contract and recast
15 them as [a] tort[.]” *JMP Secs. LLP v. Altair Nanotechnologies Inc.*, 880 F. Supp. 2d 1029, 1043-44
16 (N.D. Cal. 2012). The fraud packaging may allow Musk to side-step the required elements of
17 mutual assent and bargained-for consideration necessary to plead a contract claim, but it carries
18 with it an obligation to plead the supposed promises—and their falsity, and the fraudulent intent
19 with which they were made—with a heightened particularity that Musk comes nowhere near
20 mustering.

21 Pleading fraud requires an account of “the time, place, and specific content of the false
22 representations,” as well as “what is false or misleading about [the] statement, and why it is false.”
23 *Yetter*, 428 F. Supp. 3d at 220, 231; *see also* Fed. R. Civ. P. 9(b); *Smith v. GlaxoSmithKline*
24 *Consumer Healthcare Holdings (US) LLC*, 660 F. Supp. 3d 863, 875 (N.D. Cal. 2023) (“[C]ourts
25 have consistently applied Rule 9(b)’s heightened pleading requirements to claims . . . for fraudulent
26 misrepresentation, negligent misrepresentation, fraud by omission, and unjust enrichment.”). A
27 plaintiff cannot merely “add to [the] complaint a general allegation that the defendant never
28 intended to keep her promise.” *Richardson v. Reliance Nat’l Indem. Co.*, 2000 WL 284211, at *5

1 (N.D. Cal. Mar. 9, 2000). Musk does far less even than that; as discussed above, he fails even to
2 identify a cognizable promise made to him. He also fails to plead facts demonstrating falsity of any
3 purported promise, or facts establishing any defendant’s contemporaneous intent not to perform.

4 **A. Musk does not plead promissory fraud.**

5 A claim for promissory fraud under California law “is a subspecies of the action for fraud
6 and deceit.” *Behnke v. State Farm Gen. Ins. Co.*, 196 Cal. App. 4th 1443, 1453 (2011). To plead
7 this claim, a plaintiff must allege with particularity “(1) a promise made regarding a material fact
8 without any intention of performing it; (2) the existence of the intent not to perform at the time the
9 promise was made; (3) intent to deceive or induce the promisee to enter into a transaction;
10 (4) reasonable reliance by the promisee; (5) nonperformance by the party making the promise; and
11 (6) resulting damage to the promisee.” *Id.* Far from pleading all of these elements with the
12 particularity required by Rule 9(b), Musk cannot clear the first prong of the first element even on a
13 plausibility standard.

14 Musk fails to allege the sort of promise that governing authority recognizes. For this claim,
15 Musk invokes the same collection of preliminary thoughts and discussions cited for the contract
16 claims—including Altman’s vision of an AI lab with a “mission . . . to create the first general AI
17 and use it for individual empowerment,” which would use “[t]he technology . . . ‘for the good of
18 the world’”—plus similar statements reflected on OpenAI’s website. ¶¶ 151, 154-60. These are not
19 promises of fact, but rather thoughts, ideas, and aspirations. They therefore cannot form the basis
20 for a fraud claim. *See, e.g., Louis v. Nailtiques Cosmetic Corp.*, 423 Fed. App’x 711, 713 (9th Cir.
21 2011) (“allegedly fraudulent promises about [] future success” were insufficient to ground fraud
22 claim).

23 Even if the statements identified could be construed as actionable promises, and even if
24 Musk had alleged with particularity their non-performance, the claim would still fail for want of
25 particularized pleading that any defendant lacked the contemporaneous intent to perform. That is
26 an independent defect. Sustaining a claim of promissory fraud requires alleging with particularity
27 “why the promise was false when made,” which in turn “requires pleading facts from which it can
28 be inferred that the promisor had no intention of performing at the time the promise was made.”

1 *UMG Recordings, Inc. v. Glob. Eagle Ent., Inc.*, 117 F. Supp. 3d 1092, 1108 (C.D. Cal. 2015).
 2 “Mere nonperformance of a promise does not suffice to show the falsity of the promise.” *Id.*; *accord*
 3 *Perkowski v. Belvill*, 2020 WL 3891674, at *3 (C.D. Cal. Mar. 2, 2020). Instead, there must be
 4 “clear, specific and unequivocal” allegations “differentiating the [assertedly] false promise from a
 5 mere broken promise.” *Valencia v. Sharp Elecs. Corp.*, 561 Fed. App’x 591, 593-94 (9th Cir.
 6 2014); *see also Richardson*, 2000 WL 284211, at *4-5 (claim for promissory fraud based on
 7 defendants’ purported representations that they “intended to allow plaintiff to own and control” an
 8 entity failed, as plaintiff “allege[d] no facts from which the Court [could] infer that the allegedly
 9 fraudulent statements were actually false when made” (quotation marks omitted)).

10 No false promise is alleged here. While Musk makes a conclusory assertion of no intent to
 11 perform, ¶ 162, he alleges no fact known contemporaneously to any defendant and not then known
 12 to Musk that would render any identifiable representation false, *see* ¶¶ 162-69. Courts have
 13 consistently rejected attempts to plead promissory fraud on this basis. *See, e.g., Sandy v. McClure*,
 14 676 F. Supp. 2d 866, 882 (N.D. Cal. 2009) (claims for promissory fraud “fail[ed]” where there was
 15 “no evidence that Defendants intended to not perform” a promise to “repay a substantial amount of
 16 the loan with [specific] funds . . . at the time that the promise was made”); *Hsu v. OZ Optics, Ltd.*,
 17 211 F.R.D. 615, 620 (N.D. Cal. 2002) (Rule 9(b) requires pleading “facts from which the Court can
 18 infer that the allegedly fraudulent statements were actually false when made” (emphasis omitted));
 19 *Verde Media*, 2015 WL 374934, at *9 (dismissing claim rooted in promissory fraud where plaintiff
 20 failed, *inter alia*, to allege a “contemporaneous intention not to perform [that was] clear, specific
 21 and unequivocal”). The Court should do the same here.

22 **B. Musk’s duplicative claim for unjust enrichment falls with his fraud claim.**

23 Musk’s unjust enrichment claim must be dismissed along with his fraud claim. Unjust
 24 enrichment under California law amounts to a claim for restitution and requires the plaintiff to plead
 25 “the receipt of a benefit and the unjust retention of the benefit at the expense of another.” *Markels*
 26 *v. AARP*, 689 F. Supp. 3d 722, 731 (N.D. Cal. 2023) (quoting *Peterson v. Cellco P’ship*, 164 Cal.
 27 App. 4th 1583, 1593 (2008)). Where, as here, the claim is predicated on “allegations of fraudulent
 28 conduct,” “such allegations must [] meet the heightened pleading standard of Rule 9(b),” and failure

1 to plead fraud to that standard is fatal to the claim. *See Verde Media*, 2015 WL 374934, at *8.
2 Because Musk fails to adequately plead his fraud claim, his unjust enrichment claim fails as well.

3 **C. Musk does not plead aiding and abetting fraud.**

4 Musk’s tack-on claim of aiding and abetting fraud, asserted against the OpenAI For-Profit
5 Entities, should likewise be dismissed for want of pleading an underlying fraud. *Casey v. U.S. Bank*
6 *Nat’l Ass’n*, 127 Cal. App. 4th 1138, 1148 (2005) (pleading aiding and abetting under California
7 law requires a “primary violation” of which the defendant has “actual knowledge”). It suffers from
8 two other defects as well.

9 First, Musk has not adequately alleged substantial assistance in the underlying fraud—an
10 element that must be pled with “heightened specificity.” *McGraw Co. v. Aegis Gen. Ins. Agency,*
11 *Inc.*, 2016 WL 3745063, at *6 (N.D. Cal. July 13, 2016). He asserts that the OpenAI For-Profit
12 Entities “willfully drain[ed] the non-profit’s most valuable assets” by “employ[ing] much of the
13 non-profit’s former staff . . . , hous[ing] its research and intellectual property, . . . facilitat[ing]
14 rampant self-dealing, . . . and hav[ing] been greatly enriched as a result.” ¶ 191. The complaint is
15 devoid of any particularized allegations evidencing this purported “draining.” *Id.* Nor does Musk
16 attempt to explain how any of the alleged conduct could amount to “substantial assistance” by the
17 OpenAI For-Profit Entities—that is, how the Entities’ receipt of IP and resources from the non-
18 profit shows they intentionally assisted Altman in defrauding Musk years earlier through promises
19 Altman purportedly had no intention of keeping. The Entities did not even exist at the time. *See*
20 *AngioScore, Inc. v. TriReme Med., LLC*, 70 F. Supp. 3d 951, 958 (N.D. Cal. 2014) (aiding and
21 abetting claim against an entity that “did not exist . . . at the time of [the] alleged breach [of fiduciary
22 duty]” could survive only on the basis of factual allegations that “plausibly suggest[ed]
23 circumstances that [could] support successor liability”).

24 Second, Musk’s allegations that the For-Profit Entities are agents of Altman and Brockman,
25 or alternatively, that Altman and Brockman are these Entities’ agents (¶ 190), doom his aiding and
26 abetting claim. An agent cannot aid and abet its principal, nor vice versa. *See, e.g., Villains, Inc. v.*
27 *Am. Econ. Ins. Co.*, 870 F. Supp. 2d 792, 795-96 (N.D. Cal. 2012) (an “agent is, in effect, immune
28 from liability” because “a principal cannot aid and abet itself”).

1 **D. Musk does not plead the RICO predicate of wire fraud.**

2 Musk’s preposterous RICO claims fail for another reason, addressed below, but also
3 founder at the threshold for failure to plead with plausibility and particularity the underlying
4 predicate act of wire fraud.

5 The RICO statute makes it “unlawful for any person employed by or associated with any
6 enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise’s
7 affairs through a pattern of racketeering activity.” 18 U.S.C. § 1962(c). Reduced to its elements,
8 this claim—asserted against Altman, Brockman, and the OpenAI For-Profit Entities—requires
9 “(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” *Verde Media*,
10 2015 WL 374934, at *5 (cleaned up). To establish a pattern of racketeering based on wire fraud,
11 Musk must plead with particularity “(A) the formation of a scheme to defraud, (B) the use of
12 the . . . wires in furtherance of that scheme, and (C) the specific intent to defraud.” *Eclectic Props.*
13 *E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). And to plead the “scheme
14 to defraud,” Musk must identify, with specificity, material information that defendants
15 misrepresented or withheld from him. *See Meyer v. One West Bank, F.S.B.*, 91 F. Supp. 3d 1177,
16 1184 (C.D. Cal. 2015) (“[I]n the absence of any misrepresentations . . . [a] scheme to defraud
17 requires at least some nondisclosure in violation of an independent duty to disclose or fraudulent
18 omissions reasonably calculated to deceive.”). As with other fraud claims, a wire fraud claim will
19 not be sustained based on “expressions of opinion.” *Eclectic Props.*, 751 F.3d at 1000; *see also*
20 *Neder v. United States*, 527 U.S. 1, 24 (1999); *County of Marin v. Deloitte Consulting LLP*, 836 F.
21 Supp. 2d 1030, 1039 (N.D. Cal. 2011) (dismissing mail fraud claims where alleged “representations
22 [were] highly subjective, generalized statements of the superiority of [defendant’s] qualifications”
23 and thus “not quantifiable, actionable misstatements that can form the basis of a mail fraud claim”).
24 And consistent with courts’ “efforts to flush out frivolous RICO allegations at an early stage of the
25 litigation,” *Allen v. Ocwen Loan Servicing, LLC*, 2019 WL 13254112, at *6 (N.D. Cal. June 12,
26 2019) (cleaned up), “Rule 9(b)’s heightened pleading standard” for fraud is particularly “exacting
27 in the context of RICO claims,” *Aniel v. PHH Mortg. Corp.*, 2022 WL 2164702, at *6 (N.D. Cal.
28 June 1, 2022); *see also Pac. Recovery Sols.*, 481 F. Supp. 3d at 1028.

1 Musk’s RICO claims come nowhere close to meeting these exacting standards.¹⁰ Despite
 2 piling on a host of irrelevant allegations—covering everything from OpenAI’s content partnerships
 3 with publishers (*see* ¶ 212) to Altman’s dismissal and reinstatement as CEO in November 2023
 4 (*see* ¶¶ 222-24)—Musk’s allegations of wire fraud are largely duplicative of his promissory fraud
 5 allegations. At bottom, Musk alleges that defendants “fraudulently induc[ed] him to make
 6 significant financial and other contributions [to OpenAI] to develop valuable AI/AGI for ostensibly
 7 charitable purposes,” but purportedly “exploited [his donations] to enrich themselves instead.”
 8 ¶ 199. Yet Musk can identify no particular representation that was false when made, much less
 9 facts establishing an intent to defraud—that is, any defendant’s knowledge of falsity at the time the
 10 representation was made. Without plausible and particularized allegations to support these
 11 accusations, Musk’s wire fraud allegations collapse, and so, as a result, do his RICO claims. *See*,
 12 *e.g.*, *Desoto v. Condon*, 371 Fed. App’x 822, 824 (9th Cir. 2010) (affirming dismissal of RICO
 13 claims where allegations to support mail and wire fraud predicates were “vague and conclusory”);
 14 *see also Seva v. Shri Shirdi Sai Baba Sansthan L.A.*, 2013 WL 1431673, at *4 (C.D. Cal. Apr. 9,
 15 2013) (dismissing RICO claims predicated on mail and wire fraud relating to defendants’ alleged
 16 procurement of charitable donations).

17 **III. Musk’s RICO Claims Are Separately Untenable for Failure to Plead Conduct of an** 18 **Enterprise.**

19 Wholly independent of the failure to plead cognizable predicate acts, Musk’s RICO claims
 20 suffer from another defect that requires their dismissal: failure to plead that the supposedly
 21 fraudulent acts committed by the defendants named in these counts constituted the “conduct” “of
 22 an enterprise.” *Cf. Ferrari v. Mercedes-Benz USA, LLC*, 2016 WL 7188030, at *2 (N.D. Cal. Dec.
 23 12, 2016). Musk identifies the “enterprise” as OpenAI, Inc., *see* ¶¶ 227-30, but the only conduct he
 24 impugns is that of Altman and Brockman and their supposed agents, the OpenAI For-Profit Entities.
 25 That will not do; the “enterprise” cannot “simply be the same ‘person’ referred to by a different
 26

27 ¹⁰ The RICO conspiracy claim under 18 U.S.C. § 1962(d) (Count V) falls with the substantive
 28 RICO claim. *See Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 559 (9th Cir. 2010) (“Plaintiffs
 cannot claim that a conspiracy to violate RICO existed if they do not adequately plead a substantive
 violation of RICO.” (quoting *Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir.2000))).

1 name,” as “RICO enterprise liability depends on showing that the defendants conducted or
 2 participated in the conduct of the ‘enterprise’s affairs,’ not just their own affairs.” *Id.* (cleaned up);
 3 *see also Ellis v. J.P. Morgan Chase & Co.*, 950 F. Supp. 2d 1062, 1088 (N.D. Cal. June 13, 2013).

4 **IV. Musk Lacks Standing to Assert His Fiduciary Claims, Which Are In Any Event Not**
 5 **Cognizable.**

6 Among the claims that Musk advanced and then abandoned in state court earlier this year
 7 were claims that the named defendants breached their fiduciary duties and engaged in unfair
 8 business practices by purportedly violating California Business & Professions Code § 17510.8,
 9 which codifies the fiduciary duties owed by a non-profit charitable organization or a person acting
 10 on its behalf to donors. Ex. A (OC) ¶¶ 133-36, 142.¹¹ Those claims were manifestly defective. In
 11 addition to resting on an imaginary and ill-pled “Founding Agreement,” the claims were ones that
 12 Musk lacked standing to pursue: Under California law, only an officer or director of the non-profit
 13 to which duties are owed, or a party “with a reversionary, contractual, or property interest in” the
 14 entity’s assets, or the Attorney General (or a relator) has standing to sue the non-profit for fiduciary
 15 breach. Cal. Corp. Code § 5142(a)(1)–(5); *see also Pinkert v. Schwab Charitable Fund*, 2021 WL
 16 2476869, at *5-6 (N.D. Cal. June 17, 2021) (listing classes of plaintiffs with standing to assert
 17 breach of charitable trust under California law and noting that “a donor . . . is not among them”);
 18 *Horiike v. Humane Soc’y of the U.S.*, 2016 WL 11744969, at *16-17 (C.D. Cal. June 20, 2016)
 19 (dismissing claim for misuse of charitable donations asserted by settlor of charitable trust who
 20 retained no reversionary interest). Musk is none of those things. And his attempt to bootstrap
 21 himself into standing by asserting a fiduciary claim under the UCL is foreclosed by law. *See*
 22 *Pinkert*, 2021 WL 2476869, at *6 (plaintiff’s “lack[] [of] standing” to bring claims for breach of
 23
 24

25 ¹¹ Section 17510.8 provides: “Notwithstanding any other provision of this article, there exists a
 26 fiduciary relationship between a charity or any person soliciting on behalf of a charity, and the
 27 person from whom a charitable contribution is being solicited. The acceptance of charitable
 28 contributions by a charity or any person soliciting on behalf of a charity establishes a charitable
 trust and a duty on the part of the charity and the person soliciting on behalf of the charity to use
 those charitable contributions for the declared charitable purposes for which they are sought. This
 section is declarative of existing trust law principles.”

1 fiduciary duty “dispos[ed] of [his] UCL claim too because it [was] predicated on” those claims).

2 Yet Musk now seeks to resurrect his fiduciary claims, albeit partially under a different guise.
3 He again tries to use the UCL as an avenue for asserting violation of Section 17510.8 (Count XI),
4 but rather than straightforwardly plead fiduciary breach, as he did in his first action, Musk accuses
5 Altman, Brockman, and OpenAI, Inc. of “constructive fraud” (Count II). In addition, he charges
6 the OpenAI For-Profit Entities with aiding and abetting the supposed violations of Section 17510.8
7 (Count XIII). These claims all suffer from the same infirmities as Musk’s original fiduciary claims,
8 and, in addition, fail under Rule 9(b).

9 **A. Musk’s constructive fraud claim cannot stand.**

10 “To state a claim for constructive fraud under California law, [a plaintiff] must allege (1) a
11 fiduciary or confidential relationship; (2) an act, omission or concealment involving a breach of
12 that duty; (3) reliance; and (4) resulting damage.” *Sonoma Foods, Inc. v. Sonoma Cheese Factory,*
13 *LLC*, 634 F. Supp. 2d 1009, 1021 (N.D. Cal. 2007) (cleaned up); see Judicial Council of California
14 Civil Jury Instruction 4111 *Constructive Fraud* (Cal. Civ. Code, § 1573) (“[C]onstructive fraud is
15 a particular kind of breach of fiduciary duty in which the defendant has misled the plaintiff to the
16 plaintiff’s prejudice or detriment.”). Here, the only “fiduciary or confidential relationship” alleged
17 is that codified by Section 17510.8. ¶ 176. According to the complaint, Altman, Brockman, and
18 OpenAI, Inc. breached their “duty to use [Musk’s] contributions for [their] declared charitable
19 purposes” (¶ 177)—allegedly to “develop AI for the benefit of humanity, [to] predominantly open
20 source their technology, [to] avoid concentrating it, and [to] not operate for the profit of any person
21 or company” (¶ 178)—because they failed to disclose certain details of OpenAI’s GPT-4
22 technology and purportedly engaged in “self-dealing” (¶¶ 181-82).

23 As noted, Musk lacks standing to pursue a claim under Section 17510.8, and cannot cure
24 this by dressing a purported violation of Section 17510.8 in a different outfit. See *Pinkert*, 2021
25 WL 2476869, at *6; *Horiike*, 2016 WL 11744969, at *17, *19 (indicating that plaintiffs could not
26 ground UCL claim in Section 15710.8 absent standing). Separately, this claim also fails under Rule
27 9(b). The allegations quoted in the preceding paragraph form the entire factual predicate for this
28 claim; like the rest of Musk’s complaint, they do not identify with particularity the acts of purported

1 deception by any defendant. *Sonoma Foods*, 634 F. Supp. 2d at 1021 (dismissing constructive fraud
2 claim for failure to satisfy Rule 9(b)).

3 **B. Musk’s UCL claim cannot stand.**

4 For the same reasons, Musk’s claim under the UCL must be dismissed. As an initial matter,
5 Musk does not even say which UCL prong (unlawful, fraudulent, or unfair) he is purporting to
6 proceed under, and does not identify the source of law that purportedly grounds his claim of
7 unfairness, fraud, or unlawfulness. *See Gregory v. Albertson’s, Inc.*, 104 Cal. App. 4th 845, 854
8 (2002) (noting requirement to do so where, as here, alleged violation is predicated on offense to
9 “public policy”); *see also Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1505 (1999) (a UCL
10 “unlawfulness” claim requires the “predicate” of an identified “violation of . . . law[]”). Musk
11 appears here again to be asserting a violation of Section 17510.8. *See* ¶ 300 (alleging that
12 defendants “solicit[ed] contributions from Musk and others under the false pretense that such funds
13 would be used for [OpenAI’s alleged] non-profit purposes”). But Musk has no more standing to
14 allege such a violation under the UCL than he does to allege it under a constructive fraud theory.
15 *See Pinkert*, 2021 WL 2476869, at *6 (dismissing UCL claim that was “predicated” on charity’s
16 alleged breach of fiduciary duty); *Horiike*, 2016 WL 11744969, at *17, *19; *Berryman v. Merit*
17 *Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1555 (2007) (plaintiffs could not “bootstrap” a contract
18 claim they lacked standing to pursue into a claim under the UCL). And in any event, Musk offers
19 only conclusory allegations to support this claim, asserting that “[d]efendants engaged in unfair
20 competition and other unlawful and/or fraudulent business practices by soliciting contributions . . .
21 under the false pretense” that they would be used for “non-profit purposes,” as Musk would
22 construe those purposes. ¶ 300. These allegations lack both the plausibility and particularity
23 necessary to ground this claim. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009)
24 (affirming dismissal of UCL claim where “general pleadings [of nondisclosure] [did] not satisfy
25 the heightened pleading requirements of Rule 9(b)”; *see also Shvarts v. Budget Grp., Inc.*, 81 Cal.
26 App. 4th 1153, 1159-60 (2000) (dismissal warranted where plaintiffs offered no particularized
27 allegations that defendant’s business practices with respect to payment options were deceptive);
28 *Flores v. EMC Mortg. Co.*, 997 F. Supp. 2d 1088, 1119 (E.D. Cal. 2014) (dismissing UCL claim

1 where pleading lacked “exactitude of fraudulent circumstances”).

2 **C. Musk does not plead aiding and abetting fiduciary breach.**

3 In a third effort to justify naming the OpenAI For-Profit Entities as defendants, Musk asserts
4 against them a claim of aiding and abetting fiduciary breach, again on the basis of Section 17510.8.
5 ¶ 317. But because he has no standing to sue for the underlying breach, Musk cannot sue for aiding
6 and abetting. Likewise, Musk’s failure to plausibly plead the underlying breach with particularity
7 independently dooms this claim. *See EcoHub, LLC v. Recology Inc.*, 2023 WL 3852700, at *9
8 (N.D. Cal. June 6, 2023) (“[F]ailure to adequately plead a breach of fiduciary duty against [the
9 alleged principal] is fatal to [an] aiding and abetting claim.”). The agency immunity rule, moreover,
10 applies here just as it does to the claim that the For-Profit Entities aided and abetted promissory
11 fraud. *See supra* at 16-17. Finally, like Musk’s other accessory claims, this one is pled as a throw-
12 away, with nothing approaching a sufficient factual predicate. Musk says the For-Profit Entities
13 supposedly “help[ed Altman and Brockman] exploit OpenAI, Inc.’s intellectual property and staff
14 for Defendants’ private gain.” ¶ 321; *see also* ¶¶ 322-23. But there are no particularized allegations
15 that the subject Entities “actually knew [Altman, Brockman, and OpenAI, Inc. were] committing
16 the specific breach for which [Musk] seeks to hold [them] liable,” *In re Mortg. Fund ’08 LLC*, 527
17 B.R. 351, 361-62 (N.D. Cal. 2015), or that the Entities’ “conduct was a substantial factor in bringing
18 about the injury allegedly suffered,” *id.* at 365. Musk fails to identify the IP or staff the Entities
19 purportedly “exploit[ed]” or how exactly that assisted OpenAI in its alleged misuse of Musk’s
20 specific donations. ¶ 321.

21 **V. Musk’s Claims for False Advertising Should Be Dismissed.**

22 The last species of claim Musk asserts is false advertising—under the Lanham Act, 15
23 U.S.C. § 1125(a)(1)(B) (Count X), and California’s false advertising statute, Bus. & Prof. Code
24 §§ 17500 *et seq.* (Count XII). Neither of these counts should proceed.

25 First, Musk pleads no commercial advertisement. Lanham Act claims can be pursued only
26 on the back of commercial advertisements for “goods, services, or commercial activities.”
27 *Children’s Health Def. v. Meta Platforms, Inc.*, 112 F.4th 742, 764 (9th Cir. 2024) (quoting 15
28 U.S.C. § 1125(a)(1)(B)). Similarly, the California false advertising statute targets statements made

1 in connection with the disposal of “real or personal property” or the “perform[ance] [of] services.”
2 *Bernardo v. Planned Parenthood Fed’n of Am.*, 115 Cal. App. 4th 322, 356 (2004) (quoting Cal.
3 Bus. & Prof. Code § 17500).

4 None of the statements from OpenAI’s website that Musk has identified in his complaint—
5 each of which concerns OpenAI’s mission and general philosophy—is an advertisement for goods
6 or services sold, or otherwise made “primarily out of economic motivation,” *Children’s Health*
7 *Def.*, 112 F.4th at 765 (cleaned up). See ¶ 285 (e.g., OpenAI’s “mission is to ensure that [AGI]
8 benefits all humanity . . .”). Indeed, this Court recently concluded that many of these precise
9 statements, drawn from the same OpenAI blog post, did not qualify as “actionable commercial
10 speech” under the Lanham Act or Section 17500, as they were untethered to any “specific
11 promotion of goods or services.” *OpenAI, Inc. v. Open Artificial Intelligence, Inc. et al.*,
12 No. 23-cv-03918-YGR, at *5 (N.D. Cal. Sept. 25, 2024); see also *Prager University v. Google*
13 *LLC*, 951 F.3d 991, 999-1000 (9th Cir. 2020) (“[l]ofty” statements concerning defendant’s
14 commitment to free speech did not qualify as “advertising” of “goods, services, or commercial
15 activities”); *HomeLight, Inc. v. Shkipin*, 694 F. Supp. 3d 1242, 1256 (N.D. Cal. 2023) (“While a
16 statement that is quantifiable, that makes a claim as to the specific or absolute characteristics of a
17 product’ may support a false advertising claim, a general, subjective claim about a product is non-
18 actionable puffery.” (quotation marks omitted)). There is no plausible basis to conclude the
19 statements’ “purpose” was to “influenc[e] consumers to buy [OpenAI’s] goods or services.”
20 *Children’s Health Def.*, 112 F.4th at 764.

21 Second, as to the Lanham Act claim, Musk has no standing because he alleges no
22 commercial injury. See *Charlotte’s Web, Inc. v. AAXLL Supply Co. LLC*, 2020 WL 6891876, at *1
23 (N.D. Cal. Nov. 24, 2020). He complains that his reputation for technological openness has
24 somehow been tarnished by his association with OpenAI, ¶ 282, and insinuates that he has had
25 difficulty recruiting AI scientists to join his ventures, ¶ 294. But neither of these vague grievances
26 “establish[es] a sufficiently direct chain of causation” between the purported advertisements and a
27 commercial injury. *HomeLight*, 694 F. Supp. 3d at 1255.

28 Finally, Musk’s false advertising claims independently fail under Rule 9(b). See *Davidson*

1 v. *Sprout Foods, Inc.*, 106 F.4th 842, 852-53 (9th Cir. 2024) (allegations under California’s False
2 Advertising Law must satisfy “the heightened pleading requirements of Rule 9(b)”); *Cisco Sys.,*
3 *Inc. v. Dexon Comput., Inc.*, 2022 WL 2222962, at *5 (N.D. Cal. June 21, 2022) (Rule 9(b) applied
4 to Lanham Act claim “predicated on the theory that the defendant engaged in a knowing and
5 intentional misrepresentation” (cleaned up)). As with all his claims sounding in fraud, Musk has
6 pleaded his false advertising claims only conclusorily. *See* ¶ 288 (“Altman and Brockman made []
7 material, false, and misleading representations of fact about the nature, characteristics, and qualities
8 of Defendants’ products and services in commercial advertising . . .”); ¶ 308 (similar).

9 **VI. Musk’s Claim for Declaratory Relief Should Be Dismissed.**

10 As he did in state court, Musk asks this Court to declare that GPT-4 and later-generation
11 OpenAI models have achieved “AGI,” or artificial general intelligence. ¶¶ 342-44. But a request
12 for declaratory relief cannot stand where, as here, the plaintiff “has pleaded no viable claims that
13 would allow [the court] to provide [declaratory] relief.” *Rigsby v. GoDaddy Inc.*, 59 F.4th 998,
14 1010 (9th Cir. 2023) (affirming dismissal of declaratory relief requests where there was no viable
15 claim on which to ground a declaratory judgment). And even if one of his other claims were
16 cognizable, Musk’s request for declaratory relief “would be redundant,” as resolving the underlying
17 claim would dispose of the parties’ dispute. *Strome v. DBMK Enters., Inc.*, 2014 WL 6485533, at
18 *5 (N.D. Cal. Nov. 19, 2014). Musk alleges that one of the ways defendants breached their
19 contractual and fiduciary duties to him, and committed fraud upon him, was by “promising” not to
20 license AGI to a private party like Microsoft and then licensing GPT-4, which Musk alleges
21 (baselessly) constitutes AGI. *See* ¶¶ 167, 214, 250(b), 256. Were Musk allowed to proceed on those
22 outlandish allegations, and were his claims not first dismissed on other grounds, resolving them
23 would entail answering the question as to which Musk seeks a declaration.

24 **CONCLUSION**

25 For the foregoing reasons, the Court should grant the motion to dismiss without leave to
26 amend.

1 Date: October 8, 2024

MORRISON & FOERSTER LLP

2 */s/ Jordan Eth*

3 JORDAN ETH (CA SBN 121617)

JEth@mofo.com

4 DAVID J. WIENER (CA SBN 291659)

DWiener@mofo.com

5 MORRISON & FOERSTER LLP

425 Market Street

6 San Francisco, CA 94105

Telephone: (415) 268-7000

7 Facsimile: (415) 268-7522

8 WILLIAM SAVITT (admitted *pro hac vice*)

WDSavitt@wlrk.com

9 SARAH K. EDDY (admitted *pro hac vice*)

SEddy@wlrk.com

10 WACHTELL, LIPTON, ROSEN & KATZ

51 West 52nd Street

11 New York, NY 10019

Telephone: (212) 403-1000

12 Facsimile: (212) 403-2000

13 *Attorneys for Defendants Samuel Altman,*
14 *Gregory Brockman, OpenAI, Inc., OpenAI L.P.,*
15 *OpenAI, L.L.C., OpenAI GP, L.L.C., OpenAI*
16 *OpCo, LLC, OpenAI Global, LLC, OAI*
17 *Corporation, LLC, OpenAI Holdings, LLC,*
18 *OpenAI Startup Fund Management, LLC,*
19 *OpenAI Startup Fund GP I, L.L.C., OpenAI*
20 *Startup Fund I, L.P., OpenAI Startup Fund SPV*
21 *GP I, L.L.C., OpenAI Startup Fund SPV GP II,*
22 *L.L.C., OpenAI Startup Fund SPV GP III,*
23 *L.L.C., OpenAI Startup Fund SPV GP IV,*
24 *L.L.C., OpenAI Startup Fund SPV I, L.P.,*
25 *OpenAI Startup Fund SPV II, L.P., OpenAI*
26 *Startup Fund SPV III, L.P., OpenAI Startup*
27 *Fund SPV IV, L.P., Aestas Management*
28 *Company, LLC, and Aestas LLC*