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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

J. DOE 1, et al.,
 Individual and
 Representative Plaintiffs,
 v.
 GITHUB, INC., et al.,
 Defendants.

Case No. 4:22-cv-6823-JST

Consolidated with Case No. 4:22-cv-7074-JST

**DEFENDANT GITHUB'S ANSWER TO
 SECOND AMENDED COMPLAINT IN
 CONSOLIDATED ACTIONS**

Date: May 16, 2024
 Time: 2:00 p.m.
 Courtroom: 6, 2d Floor
 Judge: Hon. Jon S. Tigar

AND CONSOLIDATED ACTION

SAC Filed: January 24, 2024

1 Defendant GitHub, Inc. (“GitHub”) submits this Answer to the Second Amended
2 Complaint (“SAC”) filed by Plaintiffs on January 24, 2024 in the above-captioned matters.
3 Where the SAC combines allegations about GitHub and Microsoft and/or OpenAI together,
4 GitHub’s responses below apply solely to allegations related to GitHub. GitHub omits the
5 headers from the SAC as no response is required. To the extent a response is required to the
6 headers, GitHub denies any allegations contained therein. To the extent not expressly admitted
7 below, GitHub denies each and every allegation of the SAC.

8 1. GitHub admits that Plaintiffs have made code available publicly in repositories on
9 github.com and that they assert the code is subject to various licenses. The remainder of
10 paragraph 1 states conclusions of law and Plaintiffs’ characterization of their claims as to which
11 no response is required. To the extent a response is nonetheless deemed necessary, GitHub
12 denies the remaining allegations in paragraph 1.

13 2. GitHub admits Plaintiffs’ definitions of “Artificial Intelligence” and “Machine
14 Learning” as “defined for the purposes of [the] Complaint.”

15 3. GitHub admits that it was founded in 2008 to support open-source development
16 and hosts open-source source code on its website. GitHub admits that over 100 million
17 developers use GitHub’s platform. GitHub otherwise lacks knowledge or information sufficient
18 to form a belief as to the truth of the allegations in paragraph 3 and therefore denies them.

19 4. GitHub admits that some developers publish material to GitHub pursuant to
20 written licenses. Otherwise, denied.

21 5. GitHub admits that Microsoft acquired it for \$7.5 billion in stock on October 26,
22 2018. GitHub otherwise lacks knowledge or information sufficient to form a belief as to the truth
23 of the allegations in paragraph 5 and therefore denies them.

24 6. GitHub admits that Copilot runs on Microsoft’s Azure platform. GitHub lacks
25 knowledge or information sufficient to form a belief as to the truth of the remaining allegations
26 in paragraph 6 and therefore denies them.

27 7. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
28 the allegations in paragraph 7 and therefore denies them.

8. GitHub admits that in June 2021, it launched Copilot, which is a product that assists software coders by using a large language model (“LLM”) to suggest code. GitHub admits that it charges individual users \$10 per month or \$100 per year for the use of Copilot. GitHub denies the remaining allegations in paragraph 8.

9. The allegations of this paragraph are directed to OpenAI, and/or GitHub lacks knowledge or information sufficient to admit or deny the allegations of this paragraph about OpenAI, and on that basis denies them.

10. GitHub admits that OpenAI used data from some publicly accessible repositories on Github.com as part of the training data for at least one of its models. GitHub lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 10 and therefore denies them.

11. Denied.

12. Admitted that Copilot is run on Microsoft’s Azure cloud-computing platform.

13. Denied.

14. Denied.

15. Denied.

16. Paragraph 16 states conclusions of law for which no response is required. To the extent a response is nonetheless deemed necessary, GitHub admits that Plaintiffs bring this action on their own behalf and purportedly on behalf of unnamed class members and that Plaintiffs seek injunctive relief and damages. Except as expressly admitted, GitHub denies the allegations of paragraph 16.

17. Paragraph 17 states conclusions of law for which no response is required. To the extent a response is nonetheless deemed necessary, GitHub admits that venue is proper in the Northern District of California and that GitHub transacts business in this district. Except as expressly admitted, GitHub denies the allegations of paragraph 17.

18. Paragraph 18 states conclusions of law for which no response is required. To the extent a response is nonetheless deemed necessary, GitHub admits that assignment to the San Francisco Division of the United States District Court of the Northern District of California is

1 proper, and that GitHub is headquartered within this division. Except as expressly admitted,
2 GitHub denies the allegations of paragraph 18.

3 19. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
4 the allegations in paragraph 19 and therefore denies them.

5 20. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
6 the allegations in paragraph 20 and therefore denies them.

7 21. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
8 the allegations in paragraph 21 and therefore denies them.

9 22. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
10 the allegations in paragraph 22 and therefore denies them.

11 23. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
12 the allegations in paragraph 23 and therefore denies them.

13 24. GitHub admits that GitHub is a Delaware corporation with its principal place of
14 business located at 88 Colin P Kelly Jr Street, San Francisco, CA 94107. GitHub admits that it
15 sells, markets, and distributes Copilot in this District. GitHub admits that it released Copilot on a
16 limited “technical preview” basis on June 29, 2021 and that on June 21, 2022, Copilot was
17 released to the public as a subscription-based service for individual developers. Except as
18 expressly admitted, GitHub denies the allegations of paragraph 24.

19 25. GitHub admits that Defendant Microsoft Corporation is a Washington corporation
20 with its principal place of business located at One Microsoft Way, Redmond, Washington
21 98052. GitHub admits that Microsoft announced its acquisition of Defendant GitHub, Inc. on
22 June 4, 2018, and that the acquisition was finalized on October 26, 2018. GitHub admits that
23 Microsoft sells, markets, and distributes Copilot. Except as expressly admitted, GitHub denies
24 the allegations of paragraph 25.

25 26. GitHub admits that OpenAI provided Codex to GitHub to develop Copilot.
26 GitHub denies that Copilot violates any rights or that it is engaged in any unlawful conduct. The
27 remaining allegations of this paragraph are directed to OpenAI, and/or GitHub lacks knowledge
28 or information sufficient to admit or deny the allegations of this paragraph about OpenAI, and on

1 that basis denies them.

2 27. GitHub denies that Copilot violates any rights or that it is engaged in any unlawful
3 conduct. GitHub denies that OpenAI jointly offers Copilot with GitHub or derives revenue from
4 Copilot. The remaining allegations of this paragraph are directed to OpenAI, and/or GitHub
5 lacks knowledge or information sufficient to admit or deny the allegations of this paragraph
6 about OpenAI, and on that basis denies them.

7 28. GitHub denies that it is engaged in any unlawful conduct. GitHub denies that
8 OpenAI jointly offers Copilot with GitHub or derives revenue from Copilot. The remaining
9 allegations of this paragraph are directed to OpenAI, and/or GitHub lacks knowledge or
10 information sufficient to admit or deny the allegations of this paragraph about OpenAI, and on
11 that basis denies them.

12 29. GitHub denies that it is engaged in any unlawful conduct. The remaining
13 allegations of this paragraph are directed to OpenAI, and/or GitHub lacks knowledge or
14 information sufficient to admit or deny the allegations of this paragraph about OpenAI, and on
15 that basis denies them.

16 30. GitHub denies that it is engaged in any unlawful conduct. The remaining
17 allegations of this paragraph are directed to OpenAI, and/or GitHub lacks knowledge or
18 information sufficient to admit or deny the allegations of this paragraph about OpenAI, and on
19 that basis denies them.

20 31. GitHub denies that it is engaged in any unlawful conduct. The remaining
21 allegations of this paragraph are directed to OpenAI, and/or GitHub lacks knowledge or
22 information sufficient to admit or deny the allegations of this paragraph about OpenAI, and on
23 that basis denies them.

24 32. GitHub denies that it is engaged in any unlawful conduct. The remaining
25 allegations of this paragraph are directed to OpenAI, and/or GitHub lacks knowledge or
26 information sufficient to admit or deny the allegations of this paragraph about OpenAI, and on
27 that basis denies them.

28 33. The allegations of this paragraph are directed to OpenAI, and/or GitHub lacks

1 knowledge or information sufficient to admit or deny the allegations of this paragraph about
2 OpenAI, and on that basis denies them.

3 34. The allegations of this paragraph are directed to OpenAI, and/or GitHub lacks
4 knowledge or information sufficient to admit or deny the allegations of this paragraph about
5 OpenAI, and on that basis denies them.

6 35. The allegations of this paragraph are directed to OpenAI, and/or GitHub lacks
7 knowledge or information sufficient to admit or deny the allegations of this paragraph about
8 OpenAI, and on that basis denies them.

9 36. The allegations of this paragraph are directed to OpenAI, and/or GitHub lacks
10 knowledge or information sufficient to admit or deny the allegations of this paragraph about
11 OpenAI, and on that basis denies them.

12 37. The allegations of this paragraph are directed to OpenAI, and/or GitHub lacks
13 knowledge or information sufficient to admit or deny the allegations of this paragraph about
14 OpenAI, and on that basis denies them.

15 38. The allegations of this paragraph are directed to OpenAI, and/or GitHub lacks
16 knowledge or information sufficient to admit or deny the allegations of this paragraph about
17 OpenAI, and on that basis denies them.

18 39. The allegations of this paragraph are directed to OpenAI, and/or GitHub lacks
19 knowledge or information sufficient to admit or deny the allegations of this paragraph about
20 OpenAI, and on that basis denies them.

21 40. The allegations of this paragraph are directed to OpenAI, and/or GitHub lacks
22 knowledge or information sufficient to admit or deny the allegations of this paragraph about
23 OpenAI, and on that basis denies them.

24 41. Denied.

25 42. Denied.

26 43. Denied.

27 44. Denied.

28 45. Denied.

1 46. Paragraph 46 states conclusions of law and Plaintiffs' characterization of their
2 claims as to which no response is required. To the extent a response is nonetheless deemed
3 necessary, GitHub denies that this action is suitable for class treatment under Rule 23.

4 47. Paragraph 47 states conclusions of law and Plaintiffs' characterization of their
5 claims as to which no response is required. To the extent a response is nonetheless deemed
6 necessary, GitHub denies that this action is suitable for class treatment under Rule 23.

7 48. Paragraph 48 states conclusions of law and Plaintiffs' characterization of their
8 claims as to which no response is required. To the extent a response is nonetheless deemed
9 necessary, GitHub denies that this action is suitable for class treatment under Rule 23.

10 49. Paragraph 49 states conclusions of law and Plaintiffs' characterization of their
11 claims as to which no response is required. To the extent a response is nonetheless deemed
12 necessary, GitHub denies that this action is suitable for class treatment under Rule 23.

13 50. Paragraph 50 states conclusions of law and Plaintiffs' characterization of their
14 claims as to which no response is required. To the extent a response is nonetheless deemed
15 necessary, GitHub denies that this action is suitable for class treatment under Rule 23.

16 51. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
17 the allegations in paragraph 51 and therefore denies them.

18 52. Paragraph 52 states conclusions of law and Plaintiffs' characterization of their
19 claims as to which no response is required. To the extent a response is nonetheless deemed
20 necessary, GitHub denies that this action is suitable for class treatment under Rule 23.

21 53. Paragraph 53 states conclusions of law and Plaintiffs' characterization of their
22 claims as to which no response is required. To the extent a response is nonetheless deemed
23 necessary, GitHub denies that this action is suitable for class treatment under Rule 23.

24 54. Paragraph 54 states conclusions of law and Plaintiffs' characterization of their
25 claims as to which no response is required. To the extent a response is nonetheless deemed
26 necessary, GitHub denies that this action is suitable for class treatment under Rule 23.

27 55. GitHub admits it offers a product called Copilot and OpenAI offers a product
28 called Codex. Except as expressly admitted, GitHub denies the allegations in paragraph 55.

1 56. The allegations of this paragraph are directed to OpenAI, and/or GitHub lacks
2 knowledge or information sufficient to admit or deny the allegations of this paragraph about
3 OpenAI, and on that basis denies them.

4 57. Admitted.

5 58. GitHub admits that Copilot is an AI-based product that can assist in writing code.
6 GitHub further admits that Copilot receives prompts and emits outputs based on those prompts.
7 GitHub further admits that Copilot does not retain copies of the materials on which the
8 underlying LLMs were trained. The remaining allegations of this paragraph are directed to
9 OpenAI, and/or GitHub lacks knowledge or information sufficient to admit or deny the
10 allegations of this paragraph about OpenAI, and on that basis denies them.

11 59. GitHub admits that the GitHub website stated, “GitHub Copilot uses the OpenAI
12 Codex to suggest code and entire functions in real-time, right from your editor.” GitHub admits
13 that OpenAI provided Codex to GitHub to develop Copilot as part of a partnership between the
14 two companies. The remaining allegations of this paragraph are directed to OpenAI, and/or
15 GitHub lacks knowledge or information sufficient to admit or deny the allegations of this
16 paragraph about OpenAI, and on that basis denies them.

17 60. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
18 the allegations in paragraph 60 and therefore denies them.

19 61. GitHub does not know what actions Plaintiffs undertook to allegedly generate the
20 responses identified in this paragraph. Accordingly, GitHub lacks knowledge or information
21 sufficient to form a belief as to the truth of the allegations in paragraph 61 and therefore denies
22 them.

23 62. GitHub does not know what actions Plaintiffs undertook to allegedly generate the
24 responses identified in this paragraph. Accordingly, GitHub lacks knowledge or information
25 sufficient to form a belief as to the truth of the allegations in paragraph 62 and therefore denies
26 them.

27 63. GitHub does not know what actions Plaintiffs undertook to allegedly generate the
28 responses identified in this paragraph. Accordingly, GitHub lacks knowledge or information

1 sufficient to form a belief as to the truth of the allegations in paragraph 63 and therefore denies
2 them.

3 64. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
4 the allegations in paragraph 64 and therefore denies them.

5 65. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
6 the allegations in paragraph 65 and therefore denies them.

7 66. GitHub admits that Codex does not write code the way a human would because it
8 does not understand the meaning of code. GitHub lacks knowledge or information sufficient to
9 form a belief as to the truth of the remaining allegations in paragraph 66 and therefore denies
10 them.

11 67. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
12 the allegations in paragraph 67 and therefore denies them.

13 68. Denied.

14 69. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
15 the allegations in paragraph 69 and therefore denies them.

16 70. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
17 the allegations in paragraph 70 and therefore denies them.

18 71. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
19 the allegations in paragraph 71 and therefore denies them.

20 72. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
21 the allegations in paragraph 72 and therefore denies them.

22 73. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
23 the allegations in paragraph 73 and therefore denies them.

24 74. GitHub admits that the MIT license states, “The above copyright notice and this
25 permission notice shall be included in all copies or substantial portions of the Software.” GitHub
26 lacks knowledge or information sufficient to form a belief as to the truth of the remaining
27 allegations in paragraph 74 or Appendix A and therefore denies them.

28 75. GitHub admits that a paper titled “Evaluating Large Language Models Trained on

1 Codex” was published in 2021. Except as expressly admitted, GitHub denies the allegations in
2 paragraph 75.

3 76. To the extent the allegations in this paragraph purport to refer to the contents of
4 open-source licenses, including the Suggested Licenses, the full texts of those licenses speak for
5 themselves. GitHub lacks knowledge or information sufficient to admit or deny the remaining
6 allegations in paragraph 76, and on that basis denies them.

7 77. Denied.

8 78. GitHub admits that Codex was provided to GitHub to develop GitHub Copilot.
9 Except as expressly admitted, GitHub denies the allegations in paragraph 78.

10 79. GitHub admits that Copilot can be used in conjunction with Visual Studio and VS
11 Code, that user inputs are treated as prompts in real time, and that the model underlying Copilot
12 runs on Azure servers. Except as expressly admitted, GitHub denies the allegations in paragraph
13 79.

14 80. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
15 the allegations in paragraph 80 and therefore denies them.

16 81. GitHub does not know what actions Plaintiffs undertook to allegedly generate the
17 responses identified in this paragraph. Accordingly, GitHub lacks knowledge or information
18 sufficient to form a belief as to the truth of the allegations in paragraph 81 and therefore denies
19 them.

20 82. GitHub does not know what actions Plaintiffs undertook to allegedly generate the
21 responses identified in this paragraph. Accordingly, GitHub lacks knowledge or information
22 sufficient to form a belief as to the truth of the allegations in paragraph 82 and therefore denies
23 them.

24 83. GitHub admits that Copilot’s outputs are in part a result of the semantic
25 relationships learned by the underlying model from code during the training process. GitHub
26 admits that the online book *Mastering JS* was written by Valeri Karpov. GitHub lacks
27 knowledge or information sufficient to form a belief as to the truth of the remaining allegations
28 in paragraph 83 and therefore denies them.

1 84. GitHub does not know what actions Plaintiffs undertook to allegedly generate the
2 responses identified in this paragraph. Accordingly, GitHub lacks knowledge or information
3 sufficient to form a belief as to the truth of the allegations in paragraph 84 and therefore denies
4 them.

5 85. GitHub denies that Copilot reproduces the contents of data used to train the
6 underlying model in most circumstances. GitHub does not know what actions Plaintiffs
7 undertook to allegedly generate the responses identified in this paragraph. Accordingly, GitHub
8 lacks knowledge or information sufficient to form a belief as to the truth of the remaining
9 allegations in paragraph 85 and therefore denies them.

10 86. GitHub denies that most of Copilot's outputs include verbatim copies of code
11 contained in repositories on github.com. GitHub admits that the book *Think JavaScript* was
12 written by Matthew X. Curinga and others. GitHub lacks knowledge or information sufficient to
13 form a belief as to the truth of the remaining allegations in paragraph 86 and therefore denies
14 them.

15 87. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
16 the allegations in paragraph 87 and therefore denies them.

17 88. GitHub admits that a version of the GNU Free Documentation License is available
18 at <https://matt.curinga.com/think-js/#gnu-free-documentation-license> and contains the quoted
19 language. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
20 the remaining allegations in paragraph 88 and therefore denies them.

21 89. Copilot does not output verbatim identical copies of copyrighted works such that
22 attribution would be required. Paragraph 89 states conclusions of law and Plaintiffs'
23 characterization of their claims as to which no response is required. To the extent a response is
24 nonetheless deemed necessary, GitHub denies the allegations in paragraph 89.

25 90. GitHub admits that Codex is a model. GitHub lacks knowledge or information
26 sufficient to form a belief as to the truth of the remaining allegations in paragraph 90 and
27 therefore denies them.

28 91. GitHub admits that the Codex model was trained using a corpus of material,

1 operates via a complex probabilistic process, and is able to determine likely successful code
2 completions from user prompts. GitHub denies the remaining allegations in paragraph 91.

3 92. Denied.

4 93. GitHub admits that “training” and “learning” are terms used in connection with AI
5 to describe algorithmic reasoning. GitHub admits that outputs generated by AI models derive
6 from algorithmic patterns. GitHub lacks knowledge or information sufficient to form a belief as
7 to the truth of the remaining allegations in paragraph 93 and therefore denies them.

8 94. GitHub admits that OpenAI used public code from some repositories on
9 github.com in the training of Codex. GitHub denies the characterization of Copilot as a model
10 that was trained. GitHub lacks knowledge or information sufficient to form a belief as to the
11 truth of the remaining allegations in paragraph 94 and therefore denies them.

12 95. GitHub admits that a blog post titled “GitHub Copilot research recitation,” by
13 Albert Ziegler, was published on June 30, 2021 and contains the quoted language. GitHub
14 admits that a podcast episode titled “Eddie Aftandilian on GitHub Copilot” on Software
15 Engineering Radio Podcast was published on October 11, 2022 and contains the quoted
16 language. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
17 the remaining allegations in paragraph 95 and therefore denies them.

18 96. GitHub admits that GitHub sent a customer support message containing the quoted
19 language. The remaining allegation in paragraph 96 state conclusions of law and Plaintiffs’
20 characterization of their claims with respect to fair use to which no response is required. To the
21 extent a response is nonetheless deemed necessary, GitHub denies the allegations in paragraph
22 96 regarding illegality.

23 97. GitHub admits that Nat Friedman said in a post that “training ML systems on
24 public data is fair use” and “the output belongs to the operator.” Paragraph 97 otherwise states
25 conclusions of law and Plaintiffs’ characterization of their claims to which no response is
26 required. To the extent a response is nonetheless deemed necessary, except as expressly
27 admitted, GitHub denies the allegations in paragraph 97.

28 98. GitHub admits that a blog post titled “If Software is My Copilot, Who

1 Programmed My Software?” by Bradley M. Kuhn was published on February 3, 2022. GitHub
2 lacks knowledge or information sufficient to form a belief as to the truth of the remaining
3 allegations in paragraph 98 and therefore denies them.

4 99. GitHub denies that Copilot regularly outputs verbatim copies of code contained in
5 repositories on github.com. GitHub lacks knowledge or information sufficient to form a belief
6 as to the truth of the remaining allegations in paragraph 99 and therefore denies them.

7 100. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
8 the allegations in paragraph 100 and therefore denies them.

9 101. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
10 the allegations in paragraph 101 and therefore denies them.

11 102. GitHub admits that it has stated, “[t]he vast majority of the code that GitHub
12 Copilot suggests has never been seen before. Our latest internal research shows that about 1% of
13 the time, a suggestion may contain some code snippets longer than ~150 characters that matches
14 the training set. Previous research showed that many of these cases happen when GitHub Copilot
15 is unable to glean sufficient context from the code you are writing, or when there is a common,
16 perhaps even universal, solution to the problem.” Paragraph 102 otherwise states conclusions of
17 law and Plaintiffs’ characterization of their claims to which no response is required. To the extent
18 a response is nonetheless deemed necessary, except as expressly admitted, GitHub denies the
19 allegations in paragraph 102.

20 103. GitHub admits that in June 2022, Copilot had approximately 1,200,000 users. The
21 remainder of paragraph 103 states conclusions of law and Plaintiffs’ characterization of their
22 claims to which no response is required. To the extent a response is nonetheless deemed
23 necessary, GitHub denies the allegations in paragraph 103.

24 104. GitHub admits that the study *Quantifying Memorization Across Neural Language*
25 *Models* was authored by Nicholas Carlini and others. GitHub lacks knowledge or information
26 sufficient to form a belief as to the truth of the remaining allegations in paragraph 104 and
27 therefore denies them.

28 105. Paragraph 105 states argument to which no response is required. To the extent a

1 response is nonetheless deemed necessary, GitHub denies the allegations in paragraph 103.

2 106. GitHub admits that it is committed to Copilot and that Copilot continues to grow.
3 Except as expressly admitted, GitHub denies the allegations in paragraph 106.

4 107. Admitted.

5 108. Paragraph 108 states conclusions of law and Plaintiffs' characterization of their
6 claims as to which no response is required. To the extent a response is nonetheless deemed
7 necessary, GitHub denies the allegations in paragraph 108.

8 109. Denied.

9 110. Paragraph 110 states conclusions of law and Plaintiffs' characterization of their
10 claims as to which no response is required. To the extent a response is nonetheless deemed
11 necessary, GitHub denies the allegations in paragraph 110.

12 111. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
13 the allegations in paragraph 111 and therefore denies them.

14 112. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
15 the allegations in paragraph 112 and therefore denies them.

16 113. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
17 the allegations in paragraph 113 and therefore denies them.

18 114. GitHub does not know what actions Plaintiffs undertook to allegedly generate the
19 responses identified in this paragraph. Accordingly, GitHub lacks knowledge or information
20 sufficient to form a belief as to the truth of the allegations in paragraph 114 and therefore denies
21 them.

22 115. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
23 the allegations in paragraph 115 and therefore denies them. Whether Doe 2's code is distinctive
24 expression is a conclusion of law to which no response is required. To the extent a response is
25 nonetheless deemed necessary, GitHub denies the allegations in paragraph 115.

26 116. Denied.

27 117. GitHub denies that Copilot suggested a "modified copy of code written by Doe 1."
28 Paragraph 117 states conclusions of law and Plaintiffs' characterization of their claims as to

1 which no response is required. To the extent a response is nonetheless deemed necessary,
2 GitHub denies the allegations in paragraph 117.

3 118. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
4 the allegations in paragraph 118 and therefore denies them.

5 119. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
6 the allegations in paragraph 119 and therefore denies them.

7 120. GitHub denies that a Copilot suggestion that differs from Doe 1's code means the
8 suggestion is "necessarily a modification based on a copy of Doe 1's code." GitHub otherwise
9 lacks knowledge or information sufficient to form a belief as to the truth of the allegations in
10 paragraph 120 and therefore denies them.

11 121. Paragraph 121 states conclusions of law and Plaintiffs' characterization of their
12 claims as to which no response is required. To the extent a response is nonetheless deemed
13 necessary, GitHub denies the allegations in paragraph 121.

14 122. Paragraph 122 states conclusions of law and Plaintiffs' characterization of their
15 claims as to which no response is required. To the extent a response is nonetheless deemed
16 necessary, GitHub denies the allegations in paragraph 122.

17 123. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
18 the allegations in paragraph 123 and therefore denies them.

19 124. Paragraph 124 states conclusions of law and Plaintiffs' characterization of their
20 claims as to which no response is required. To the extent a response is nonetheless deemed
21 necessary, GitHub denies the allegations in paragraph 124.

22 125. GitHub denies that Copilot suggested "multiple modified copies of code written by
23 Doe 5." Paragraph 125 states conclusions of law and Plaintiffs' characterization of their claims
24 as to which no response is required. To the extent a response is nonetheless deemed necessary,
25 GitHub denies the allegations in paragraph 125.

26 126. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
27 the allegations in paragraph 126 and therefore denies them.

28 127. GitHub lacks knowledge or information sufficient to form a belief as to the truth of

1 the allegations in paragraph 127 and therefore denies them.

2 128. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
3 the allegations in paragraph 128 and therefore denies them.

4 129. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
5 the allegations in paragraph 129 and therefore denies them.

6 130. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
7 the allegations in paragraph 130 and therefore denies them.

8 131. Paragraph 131 states conclusions of law and Plaintiffs' characterization of their
9 claims as to which no response is required. To the extent a response is nonetheless deemed
10 necessary, GitHub denies the allegations in paragraph 131.

11 132. Paragraph 132 states conclusions of law and Plaintiffs' characterization of their
12 claims as to which no response is required. To the extent a response is nonetheless deemed
13 necessary, GitHub denies the allegations in paragraph 132.

14 133. GitHub denies that Copilot suggested "multiple modified copies of code written by
15 Doe 5." Paragraph 133 states conclusions of law and Plaintiffs' characterization of their claims
16 as to which no response is required. To the extent a response is nonetheless deemed necessary,
17 GitHub denies the allegations in paragraph 133.

18 134. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
19 the allegations in paragraph 134 and therefore denies them.

20 135. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
21 the allegations in paragraph 135 and therefore denies them.

22 136. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
23 the allegations in paragraph 136 and therefore denies them.

24 137. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
25 the allegations in paragraph 137 and therefore denies them. Paragraph 137 also states
26 conclusions of law and Plaintiffs' characterization of their claims as to which no response is
27 required. To the extent a response is nonetheless deemed necessary, GitHub denies the
28 allegations in paragraph 137.

1 138. Paragraph 138 states conclusions of law and Plaintiffs’ characterization of their
2 claims as to which no response is required. To the extent a response is nonetheless deemed
3 necessary, GitHub denies the allegations in paragraph 138.

4 139. Denied.

5 140. Denied that GitHub “control[s] all the information about the training dataset.” The
6 remainder of paragraph 140 states conclusions of law and Plaintiffs’ characterization of their
7 claims as to which no response is required. To the extent a response is nonetheless deemed
8 necessary, GitHub denies the allegations in paragraph 140.

9 141. Denied.

10 142. GitHub admits that license text is sometimes included at the top of a source file in
11 a codebase. GitHub states it lacks knowledge or information sufficient to form a belief as to the
12 truth of the remaining allegations in paragraph 142 and therefore denies them.

13 143. GitHub admits that a blog post titled “GitHub Copilot research recitation” by
14 Albert Ziegler was published on June 30, 2021 and contains the quoted language. Except as
15 expressly admitted, GitHub denies the allegations in paragraph 143.

16 144. Denied.

17 145. GitHub admits that it offers a duplicate detection feature that when implemented
18 by the user prevents Copilot from suggesting excerpts of about 150 characters that match code in
19 public repositories on github.com. Except as expressly admitted, GitHub denies the allegations
20 in paragraph 145.

21 146. GitHub admits that a GitHub Doc titled “Managing Copilot policies as an
22 individual subscriber” includes the quoted language and is available at
23 [https://docs.github.com/en/copilot/managing-copilot/managing-copilot-as-an-individual-](https://docs.github.com/en/copilot/managing-copilot/managing-copilot-as-an-individual-subscriber/managing-copilot-policies-as-an-individual-subscriber#enabling-or-disabling-duplication-detection)
24 [subscriber/managing-copilot-policies-as-an-individual-subscriber#enabling-or-disabling-](https://docs.github.com/en/copilot/managing-copilot/managing-copilot-as-an-individual-subscriber/managing-copilot-policies-as-an-individual-subscriber#enabling-or-disabling-duplication-detection)
25 [duplication-detection](https://docs.github.com/en/copilot/managing-copilot/managing-copilot-as-an-individual-subscriber/managing-copilot-policies-as-an-individual-subscriber#enabling-or-disabling-duplication-detection). GitHub admits that it offers a duplicate detection feature that when
26 implemented by the user prevents Copilot from suggesting excerpts of about 150 characters that
27 match code in public repositories on github.com. Except as expressly admitted, GitHub denies
28 the allegations in paragraph 146.

1 147. GitHub admits that a GitHub Doc titled “Finding public code that matches GitHub
2 Copilot suggestions” includes the quoted language and is available at
3 [https://docs.github.com/en/copilot/using-github-copilot/finding-public-code-that-matches-](https://docs.github.com/en/copilot/using-github-copilot/finding-public-code-that-matches-github-copilot-suggestions)
4 [github-copilot-suggestions](https://docs.github.com/en/copilot/using-github-copilot/finding-public-code-that-matches-github-copilot-suggestions). The remaining allegations in paragraph 147 contain argument for
5 which no response is required. To the extent a response is nonetheless deemed necessary,
6 GitHub denies the allegations in paragraph 147.

7 148. GitHub admits that it offers a code referencing tool as described by GitHub on its
8 webpage available at [https://docs.github.com/en/copilot/using-github-copilot/finding-public-](https://docs.github.com/en/copilot/using-github-copilot/finding-public-code-that-matches-github-copilot-suggestions)
9 [code-that-matches-github-copilot-suggestions](https://docs.github.com/en/copilot/using-github-copilot/finding-public-code-that-matches-github-copilot-suggestions). The remaining allegations in paragraph 148
10 contain argument for which no response is required. To the extent a response is nonetheless
11 deemed necessary, GitHub denies the allegations in paragraph 148.

12 149. Paragraph 149 states conclusions of law and Plaintiffs’ characterization of their
13 claims as to which no response is required. To the extent a response is nonetheless deemed
14 necessary, GitHub denies the allegations in paragraph 149.

15 150. GitHub admits that it offers a code referencing tool as described by GitHub on its
16 webpage available at [https://docs.github.com/en/copilot/using-github-copilot/finding-public-](https://docs.github.com/en/copilot/using-github-copilot/finding-public-code-that-matches-github-copilot-suggestions)
17 [code-that-matches-github-copilot-suggestions](https://docs.github.com/en/copilot/using-github-copilot/finding-public-code-that-matches-github-copilot-suggestions). Except as expressly admitted, GitHub denies the
18 allegations in paragraph 150.

19 151. GitHub admits that it offers a code referencing tool as described by GitHub on its
20 webpage available at [https://docs.github.com/en/copilot/using-github-copilot/finding-public-](https://docs.github.com/en/copilot/using-github-copilot/finding-public-code-that-matches-github-copilot-suggestions)
21 [code-that-matches-github-copilot-suggestions](https://docs.github.com/en/copilot/using-github-copilot/finding-public-code-that-matches-github-copilot-suggestions). Except as expressly admitted, GitHub denies the
22 allegations in paragraph 151.

23 152. GitHub admits that it offers a code referencing tool as described by GitHub on its
24 webpage available at [https://docs.github.com/en/copilot/using-github-copilot/finding-public-](https://docs.github.com/en/copilot/using-github-copilot/finding-public-code-that-matches-github-copilot-suggestions)
25 [code-that-matches-github-copilot-suggestions](https://docs.github.com/en/copilot/using-github-copilot/finding-public-code-that-matches-github-copilot-suggestions). Except as expressly admitted, GitHub denies the
26 allegations in paragraph 152.

27 153. GitHub admits that it offers a code referencing tool as described by GitHub on its
28 webpage available at <https://docs.github.com/en/copilot/using-github-copilot/finding-public->

1 code-that-matches-github-copilot-suggestions. Except as expressly admitted, GitHub denies the
2 allegations in paragraph 153.

3 154. GitHub admits that a GitHub Doc titled “Managing Copilot policies as an
4 individual subscriber” is available at [https://docs.github.com/en/copilot/managing-](https://docs.github.com/en/copilot/managing-copilot/managing-copilot-as-an-individual-subscriber/managing-copilot-policies-as-an-individual-subscriber#enabling-or-disabling-duplication-detection)
5 [copilot/managing-copilot-as-an-individual-subscriber/managing-copilot-policies-as-an-](https://docs.github.com/en/copilot/managing-copilot-as-an-individual-subscriber/managing-copilot-policies-as-an-individual-subscriber#enabling-or-disabling-duplication-detection)
6 [individual-subscriber#enabling-or-disabling-duplication-detection](https://docs.github.com/en/copilot/managing-copilot-as-an-individual-subscriber/managing-copilot-policies-as-an-individual-subscriber#enabling-or-disabling-duplication-detection). GitHub admits the contents
7 of the document. Except as expressly admitted, GitHub denies the allegations in paragraph 154.

8 155. Paragraph 155 states conclusions of law and Plaintiffs’ characterization of their
9 claims as to which no response is required. To the extent a response is nonetheless deemed
10 necessary, GitHub denies the allegations in paragraph 155.

11 156. Admitted.

12 157. Paragraph 157 states conclusions of law and Plaintiffs’ characterization of their
13 claims as to which no response is required. To the extent a response is nonetheless deemed
14 necessary, GitHub denies the allegations in paragraph 157.

15 158. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
16 the allegations in paragraph 158 and therefore denies them.

17 159. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
18 the allegations in paragraph 159 and therefore denies them.

19 160. GitHub admits that the GNU General Public License (“GPL”) is a software
20 license. GitHub lacks knowledge or information sufficient to form a belief as to the truth of the
21 remaining allegations in paragraph 160 and therefore denies them.

22 161. Paragraph 161 states conclusions of law and Plaintiffs’ characterization of their
23 claims as to which no response is required. To the extent a response is nonetheless deemed
24 necessary, GitHub denies the allegations in paragraph 161.

25 162. GitHub admits that version 1 of the GPL is available at
26 <https://www.gnu.org/licenses/old-licenses/gpl-1.0.en.html> and includes the quoted language.
27 Paragraph 162 otherwise states conclusions of law and Plaintiffs’ characterization of their claims
28 as to which no response is required. To the extent a response is nonetheless deemed necessary,

1 GitHub denies the allegations in paragraph 162.

2 163. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
3 the allegations in paragraph 163 and therefore denies them.

4 164. GitHub admits that the internet and open-source code fostered developer
5 collaboration. GitHub otherwise lacks knowledge or information sufficient to form a belief as to
6 the truth of the allegations in paragraph 164 and therefore denies them.

7 165. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
8 the allegations in paragraph 165 and therefore denies them.

9 166. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
10 the allegations in paragraph 166 and therefore denies them.

11 167. Admitted.

12 168. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
13 the allegations in paragraph 168 and therefore denies them.

14 169. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
15 the allegations in paragraph 169 and therefore denies them.

16 170. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
17 the allegations in paragraph 170 and therefore denies them.

18 171. GitHub admits that the webpage available at
19 <http://www.catb.org/esr/halloween/halloween1.html> states “we must target a process rather than
20 a company.” GitHub lacks knowledge or information sufficient to form a belief as to the truth of
21 this webpage or the remaining allegations in paragraph 171 and therefore denies them.

22 172. GitHub admits that the webpage available at [https://lwn.net/2001/0607/a/esr-big-](https://lwn.net/2001/0607/a/esr-big-lie.php3)
23 [lie.php3](https://lwn.net/2001/0607/a/esr-big-lie.php3), dated June 1, 2001, states “The way the license is written, if you use any open-source
24 software, you have to make the rest of your software open source.... Linux is a cancer that
25 attaches itself in an intellectual property sense to everything it touches.” GitHub lacks knowledge
26 or information sufficient to form a belief as to the truth of this webpage or the remaining
27 allegations in paragraph 172 and therefore denies them.

28 173. GitHub admits that Microsoft was a defendant in a case brought by the U.S.

1 Department of Justice. GitHub admits that the quoted language is in a 2001 opinion penned by
2 Judge Thomas Penfield Jackson. GitHub lacks knowledge or information sufficient to form a
3 belief as to the truth of the remaining allegations in paragraph 173 and therefore denies them.

4 174. GitHub admits that a blog post titled “Open XML – The Vote in Sweden” was
5 published on August 30, 2007 by Jason Matusow. GitHub otherwise lacks knowledge or
6 information sufficient to form a belief as to the truth of the remaining allegations in paragraph
7 174 and therefore denies them.

8 175. GitHub admits that Microsoft offers many cloud-based services under the Azure
9 name. GitHub otherwise lacks knowledge or information sufficient to form a belief as to the
10 truth of the remaining allegations in paragraph 175 and therefore denies them.

11 176. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
12 the allegations in paragraph 176 and therefore denies them.

13 177. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
14 the allegations in paragraph 177 and therefore denies them.

15 178. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
16 the allegations in paragraph 178 and therefore denies them.

17 179. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
18 the allegations in paragraph 179 and therefore denies them.

19 180. Admitted.

20 181. Admitted.

21 182. GitHub admits that it encouraged open-source developers to understand and use
22 open-source licenses for their works and that the GitHub interface allows for the selection of
23 several suggested licenses if a user so chooses. GitHub denies that many public repositories
24 carry an open-source license. Most repositories do not. GitHub lacks knowledge or information
25 sufficient to form a belief as to the truth of the remaining allegations in paragraph 182 and
26 therefore denies them.

27 183. Admitted.

28 184. To the extent the allegations in this paragraph purport to refer to the contents of

1 open-source licenses, including the Suggested Licenses, the full texts of those licenses speak for
2 themselves. GitHub lacks knowledge or information sufficient to admit or deny the remaining
3 allegations in paragraph 184, and on that basis denies them.

4 185. GitHub admits that there are many public repositories on github.com that do not
5 carry a license. GitHub admits that it has encouraged awareness of open-source licenses to its
6 users. GitHub admits that it has never imposed a default license on public repositories.
7 Paragraph 185 otherwise states conclusions of law and Plaintiffs' characterization of their claims
8 as to which no response is required. To the extent a response is nonetheless deemed necessary,
9 except as expressly admitted, GitHub denies the allegations in paragraph 185.

10 186. Admitted.

11 187. GitHub admits that Microsoft acquired GitHub in October 2018 for \$7.5 billion in
12 stock. GitHub lacks knowledge or information sufficient to form a belief as to the truth of the
13 remaining allegations in paragraph 187 and therefore denies them.

14 188. The allegations of this paragraph are directed to OpenAI, and/or GitHub lacks
15 knowledge or information sufficient to admit or deny the allegations of this paragraph about
16 OpenAI, and on that basis denies them.

17 189. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
18 the allegations in paragraph 189 and therefore denies them.

19 190. The allegations of this paragraph are directed to OpenAI, and/or GitHub lacks
20 knowledge or information sufficient to admit or deny the allegations of this paragraph about
21 OpenAI, and on that basis denies them.

22 191. The allegations of this paragraph are directed to OpenAI, and/or GitHub lacks
23 knowledge or information sufficient to admit or deny the allegations of this paragraph about
24 OpenAI, and on that basis denies them.

25 192. GitHub admits that an article titled "Elon Musk's Billion-Dollar AI Plan Is About
26 Far More Than Saving the World" by Cade Metz was published on December 15, 2015. The
27 remaining allegations of this paragraph are directed to OpenAI, and/or GitHub lacks knowledge
28 or information sufficient to admit or deny the allegations of this paragraph about OpenAI, and on

1 that basis denies them.

2 193. The allegations of this paragraph are directed to OpenAI, and/or GitHub lacks
3 knowledge or information sufficient to admit or deny the allegations of this paragraph about
4 OpenAI, and on that basis denies them.

5 194. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
6 the allegations in paragraph 194 and therefore denies them.

7 195. GitHub admits that Microsoft published its Earnings Release FY23 Q1 on October
8 25, 2022. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
9 the remaining allegations in paragraph 195 and therefore denies them.

10 196. GitHub admits that an article titled “What to expect from OpenAI’s Codex API”
11 by Ben Dickson was published on August 16, 2021. GitHub lacks knowledge or information
12 sufficient to form a belief as to the truth of the remaining allegations in paragraph 196 and
13 therefore denies them.

14 197. The allegations of this paragraph are directed to OpenAI, and/or GitHub lacks
15 knowledge or information sufficient to admit or deny the allegations of this paragraph about
16 OpenAI, and on that basis denies them.

17 198. Admitted.

18 199. The allegations of this paragraph are directed to OpenAI, and/or GitHub lacks
19 knowledge or information sufficient to admit or deny the allegations of this paragraph about
20 OpenAI, and on that basis denies them.

21 200. GitHub admits that a webpage available at [https://azure.microsoft.com/en-](https://azure.microsoft.com/en-us/products/ai-services/openai-service/)
22 [us/products/ai-services/openai-service/](https://azure.microsoft.com/en-us/products/ai-services/openai-service/) identifies a product known as Azure OpenAI Service.
23 GitHub lacks knowledge or information sufficient to form a belief as to the truth of the
24 remaining allegations in paragraph 200 and therefore denies them.

25 201. Denied.

26 202. Denied.

27 203. Denied.

28

COUNT 1
VIOLATION OF THE DIGITAL MILLENNIUM COPYRIGHT ACT
17 U.S.C. §§ 1201–1205
(For Injunctive Relief)
(Against All Defendants)

204. Microsoft incorporates by reference its responses to all allegations set forth in paragraphs 1–203 as if fully set forth herein.

205. No response to this paragraph is required because Count 1 of the SAC was dismissed with prejudice. Dkt. No. 253.

206. No response to this paragraph is required because Count 1 of the SAC was dismissed with prejudice. Dkt. No. 253.

207. No response to this paragraph is required because Count 1 of the SAC was dismissed with prejudice. Dkt. No. 253.

208. No response to this paragraph is required because Count 1 of the SAC was dismissed with prejudice. Dkt. No. 253.

209. No response to this paragraph is required because Count 1 of the SAC was dismissed with prejudice. Dkt. No. 253.

210. No response to this paragraph is required because Count 1 of the SAC was dismissed with prejudice. Dkt. No. 253.

211. No response to this paragraph is required because Count 1 of the SAC was dismissed with prejudice. Dkt. No. 253.

212. No response to this paragraph is required because Count 1 of the SAC was dismissed with prejudice. Dkt. No. 253.

213. No response to this paragraph is required because Count 1 of the SAC was dismissed with prejudice. Dkt. No. 253.

214. No response to this paragraph is required because Count 1 of the SAC was dismissed with prejudice. Dkt. No. 253.

215. No response to this paragraph is required because Count 1 of the SAC was dismissed with prejudice. Dkt. No. 253.

1 216. No response to this paragraph is required because Count 1 of the SAC was
2 dismissed with prejudice. Dkt. No. 253.

3 217. No response to this paragraph is required because Count 1 of the SAC was
4 dismissed with prejudice. Dkt. No. 253.

5 218. No response to this paragraph is required because Count 1 of the SAC was
6 dismissed with prejudice. Dkt. No. 253.

7 219. No response to this paragraph is required because Count 1 of the SAC was
8 dismissed with prejudice. Dkt. No. 253.

9 220. No response to this paragraph is required because Count 1 of the SAC was
10 dismissed with prejudice. Dkt. No. 253.

11 221. No response to this paragraph is required because Count 1 of the SAC was
12 dismissed with prejudice. Dkt. No. 253.

13 222. No response to this paragraph is required because Count 1 of the SAC was
14 dismissed with prejudice. Dkt. No. 253.

15 223. No response to this paragraph is required because Count 1 of the SAC was
16 dismissed with prejudice. Dkt. No. 253.

17 224. No response to this paragraph is required because Count 1 of the SAC was
18 dismissed with prejudice. Dkt. No. 253.

19 225. No response to this paragraph is required because Count 1 of the SAC was
20 dismissed with prejudice. Dkt. No. 253.

21 226. No response to this paragraph is required because Count 1 of the SAC was
22 dismissed with prejudice. Dkt. No. 253.

23 227. No response to this paragraph is required because Count 1 of the SAC was
24 dismissed with prejudice. Dkt. No. 253.

25 228. No response to this paragraph is required because Count 1 of the SAC was
26 dismissed with prejudice. Dkt. No. 253.

27 229. No response to this paragraph is required because Count 1 of the SAC was
28 dismissed with prejudice. Dkt. No. 253.

230. No response to this paragraph is required because Count 1 of the SAC was dismissed with prejudice. Dkt. No. 253.

231. No response to this paragraph is required because Count 1 of the SAC was dismissed with prejudice. Dkt. No. 253.

232. No response to this paragraph is required because Count 1 of the SAC was dismissed with prejudice. Dkt. No. 253.

233. No response to this paragraph is required because Count 1 of the SAC was dismissed with prejudice. Dkt. No. 253.

234. No response to this paragraph is required because Count 1 of the SAC was dismissed with prejudice. Dkt. No. 253.

235. No response to this paragraph is required because Count 1 of the SAC was dismissed with prejudice. Dkt. No. 253.

COUNT 2
BREACH OF CONTRACT—OPEN-SOURCE LICENSE VIOLATIONS
California Common Law
(Against All Defendants)

236. GitHub realleges and incorporates by reference its foregoing responses to the preceding paragraphs as if fully set forth herein.

237. GitHub lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 237 and Appendix A and therefore denies them. Paragraph 237 states conclusions of law and Plaintiffs' characterization of their claims as to which no response is required. To the extent a response is nonetheless deemed necessary, GitHub denies the allegations in paragraph 237.

238. Paragraph 238 states conclusions of law and Plaintiffs' characterization of their claims as to which no response is required. To the extent a response is nonetheless deemed necessary, GitHub denies the allegations in paragraph 238.

239. Paragraph 239 states conclusions of law and Plaintiffs' characterization of their claims as to which no response is required. To the extent a response is nonetheless deemed

1 necessary, GitHub denies the allegations in paragraph 239.

2 240. Paragraph 240 states conclusions of law and Plaintiffs' characterization of their
3 claims as to which no response is required. To the extent a response is nonetheless deemed
4 necessary, GitHub denies the allegations in paragraph 240.

5 241. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
6 the allegations in paragraph 241 and therefore denies them.

7 242. GitHub lacks knowledge or information sufficient to form a belief as to the truth of
8 the allegations in paragraph 242 and therefore denies them.

9 243. Denied.

10 244. Denied.

11 245. Denied.

12 246. Denied.

13 247. Denied.

14 248. Denied.

15 249. Denied.

16 250. Denied.

17 251. Denied.

18 **COUNT 3**
19 **BREACH OF CONTRACT — SELLING LICENSED MATERIALS**
20 **IN VIOLATION OF GITHUB'S POLICIES**
21 **California Common Law**
(Against GitHub)

22 252. GitHub realleges and incorporates by reference its foregoing responses to the
23 preceding paragraphs as if fully set forth herein.

24 253. Paragraph 253 states Plaintiffs' characterization of their claims as to which no
25 response is required. To the extent a response is nonetheless deemed necessary, GitHub denies
26 the allegations in paragraph 253.

27 254. Paragraph 254 states conclusions of law and Plaintiffs' characterization of their
28 claims as to which no response is required. To the extent a response is nonetheless deemed

1 necessary, GitHub admits the allegations in paragraph 254.

2 255. Paragraph 255 states conclusions of law and Plaintiffs' characterization of their
3 claims as to which no response is required. To the extent a response is nonetheless deemed
4 necessary, GitHub denies the allegations in paragraph 255.

5 256. GitHub admits the contents of its Privacy Statement and Terms of Service.

6 257. Denied.

7 258. GitHub admits that it holds itself out as a good citizen of the global open-source
8 community. Except as expressly admitted, GitHub denies the allegations in paragraph 258.

9 259. Denied.

10 260. Denied.

11 261. Denied.

12 262. Denied.

13 263. GitHub denies that this action may be maintained as a class action under Rule 23
14 of the Federal Rules of Civil Procedure as alleged in the Second Amended Complaint. GitHub
15 denies that Plaintiffs, each of them, and the proposed Class are entitled to any relief whatsoever,
16 including but not limited to the relief sought in the section of the Second Amended Complaint
17 titled "Demand for Judgment." Furthermore, no response is required to sub-part (e) because the
18 Court denied that Plaintiffs are entitled to damages related to unjust enrichment or punitive
19 damages. Dkt. No. 253. To the extent that this section contains any allegations requiring a
20 response, GitHub denies them.

21 264. Denied.

22 265. Denied.

23 266. Denied.

24 267. Denied.

25 **JURY TRIAL DEMANDED**

26 GitHub hereby demands a trial by jury on all claims, defenses, and issues in this action so
27 triable.

28 * * *

DEFENSES

In addition to the above, GitHub asserts the following defenses. Each defense is asserted as to all claims for relief against GitHub, unless otherwise noted. By setting forth these defenses, GitHub does not concede that these are affirmative defenses and does not assume the burden of proving any fact, issue, or element of a claim for relief where such burden properly belongs to Plaintiffs. Further, nothing stated herein is intended or shall be construed as an acknowledgement that any particular issue or subject matter necessarily is relevant to Plaintiffs' allegations. GitHub reserves the right to amend its Answer as additional information becomes available and to assert additional defenses to the extent such defenses are or become applicable.

**FIRST DEFENSE
(Failure to State a Claim)**

Plaintiffs' claims and the putative class members' claims fail, in whole or in part, because the Second Amended Complaint, and each purported cause of action therein, fails to state a claim upon which relief may be granted and/or to state facts sufficient to constitute a claim for relief against GitHub.

**SECOND DEFENSE
(No Contract Between Plaintiffs and GitHub)**

Plaintiffs' and the putative class members' claim for breach of open-source license fails, in whole or in part, because the Second Amended Complaint fails to allege a contract formed between Plaintiffs and GitHub.

**THIRD DEFENSE
(Conduct Permitted by Law)**

Plaintiffs' claims and the putative class members' claims fail, in whole or in part, to the extent that GitHub's conduct was permitted by law.

**FOURTH DEFENSE
(No Breach)**

Plaintiffs' claims and the putative class members' claims fail, in whole or in part, because GitHub did not breach any license or agreement alleged in the Second Amended Complaint, including without limitation because the asserted use of Plaintiffs' code constitutes fair use.

FIFTH DEFENSE
(Consent)

Plaintiffs' claims and the putative class members' claims fail are barred, in whole or in part, by the doctrine of consent.

SIX DEFENSE
(Lack of Injury)

Plaintiffs' claims and the putative class members' claims fail, in whole or in part, because Plaintiffs and the putative class members have not suffered and are not likely to suffer any injury or damages as a result of the conduct alleged of GitHub in the Second Amended Complaint.

SEVENTH DEFENSE
(Speculative or No Damages)

Plaintiffs' claims and the putative class members' claims fail, in whole or in part, because GitHub did not cause, directly or indirectly, the alleged damages complained of, and the alleged damages, if any, are speculative and impossible to ascertain.

EIGHTH DEFENSE
(Intervening or Superseding Cause)

Plaintiffs' claims and the putative class members' claims fail, in whole or in part, because the alleged damages, if any, were the result of one or more intervening or superseding causes or caused by the acts and/or omissions of persons other than GitHub.

NINTH DEFENSE
(Unavailability of Injunctive Relief)

Plaintiffs' claims and the putative class members' claims fail, in whole or in part, because Plaintiffs are not entitled to injunctive relief (temporarily, preliminarily, or permanently), including because any injury to them is not immediate or irreparable, Plaintiffs would have an adequate remedy at law, the balance of hardships favors no injunction, and the public interest is best served by no injunction.

TENTH DEFENSE
(Preemption)

Plaintiffs' claims and the putative Class Members' claims are preempted, in whole or in

part, by the Copyright Act, 17 U.S.C. § 101 et seq.

**ELEVENTH DEFENSE
(Impracticability)**

Plaintiffs' claims and the putative Class Members' claims are barred, in whole or in part, by the doctrine of impracticability.

**TWELFTH DEFENSE
(Lack of Consideration)**

Plaintiffs' claims and the putative Class Members' claims fail, in whole or in part, for lack or failure of consideration.

**THIRTEENTH DEFENSE
(Void Against Public Policy)**

To the extent the alleged contract(s) requires misattribution of ownership, the alleged contract is void as against public policy, because it is in contravention of or violates the spirit of, without limitation, Cal. Civ. Code §§ 1643, 1667, 1709, 1710, and/or 17 U.S.C. § 1202(a).

**FOURTEENTH DEFENSE
(Failure to Meet Condition Precedent)**

Plaintiffs' claims and the putative Class Members' claims fail, in whole or in part, for lack of occurrence of a condition precedent.

**FIFTEENTH DEFENSE
(Estoppel, Unclean Hands, Waiver)**

Plaintiffs' claims and the putative Class Members' claims are barred, in whole or in part, by one or more equitable doctrines, such as estoppel, unclean hands, or waiver.

**SIXTEENTH DEFENSE
(Failure of Performance)**

Plaintiffs' claims and the putative Class Members' claims are barred, in whole or in part, for failure of performance by Plaintiffs.

**SEVENTEENTH DEFENSE
(Failure to Mitigate)**

1 Plaintiffs' claims and the putative Class Members' claims are barred, in whole or in part,
2 due to Plaintiffs' failure to mitigate damages.

3 **RESERVATION OF ADDITIONAL DEFENSES**

4 GitHub's investigation of the claims and its defenses is continuing. GitHub reserves the
5 right to assert additional defenses, such as through amendment of its Answer, that may develop
6 through discovery in this action or otherwise.

7 **REQUEST FOR RELIEF**

8 Therefore, GitHub respectfully requests that this Court:

- 9 1. Enter judgment in GitHub's favor and against Plaintiffs;
- 10 2. Deny certification of any class;
- 11 3. Dismiss all claims by Plaintiffs with prejudice;
- 12 4. Award GitHub its costs of suit;
- 13 5. Award GitHub its attorneys' fees to the extent permitted by law; and
- 14 6. Grant GitHub such other and further relief as this Court deems just and proper.

15
16
17 Dated: July 22, 2024

Orrick, Herrington & Sutcliffe LLP

18
19 By: /s/ Annette L. Hurst

20 ANNETTE L. HURST
21 Attorneys for Defendants
22 GitHub, Inc. and Microsoft Corp.
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