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FUND SPV I, L.P., and OPENAI STARTUP FUND SPV GP I, L.L.C.

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 J. DOE 1, et al.,
13
14 Plaintiffs,
15
16 v.
17 GITHUB, INC., MICROSOFT
CORPORATION, OPENAI, INC., et al.,
18
19 Defendants.

Case No. 4:22-cv-06823-JST
Case No. 4:22-cv-07074-JST

Hon. Jon S. Tigar

CLASS ACTION

**DEFENDANTS OPENAI, INC.,
OPENAI, L.P., OPENAI OPCO, L.L.C.,
OPENAI GP, L.L.C., OPENAI
STARTUP FUND GP I, L.L.C., OPENAI
STARTUP FUND I, L.P., OPENAI
STARTUP FUND MANAGEMENT,
LLC, OPENAI, L.L.C., OPENAI
GLOBAL, LLC, OAI CORPORATION,
OPENAI HOLDINGS, LLC, OPENAI
HOLDCO, LLC, OPENAI
INVESTMENT LLC, OPENAI
STARTUP FUND SPV I, L.P., AND
OPENAI STARTUP FUND SPV GP I,
L.L.C.'S REPLY IN SUPPORT OF
THEIR MOTION TO DISMISS
SECOND AMENDED COMPLAINT**

Date: May 16, 2024
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1 **I. INTRODUCTION**

2 The issues before the Court are narrow and specific to Plaintiffs’ claims in the Second
3 Amended Complaint (“SAC”): (1) whether the SAC cures the failure of the First Amended
4 Complaint (“FAC”) to plausibly allege that Codex or Copilot outputs identical copies of
5 Plaintiffs’ code; and (2) whether Plaintiffs have pleaded that OpenAI breached an obligation to
6 Plaintiffs by failing to satisfy certain conditions of particular open-source licenses in connection
7 with outputs by Copilot. Plaintiffs have not done so, and their claims should be dismissed, with
8 prejudice.

9 **II. PLAINTIFFS’ CLAIMS AGAINST OPENAI SHOULD BE DISMISSED**

10 **A. DMCA Section 1202(b)**

11 Plaintiffs concede that the SAC contains no new allegations showing that Codex outputted
12 identical copies of their works without CMI. Instead, Plaintiffs attempt to relitigate the DMCA’s
13 identity requirement. But Plaintiffs do not address the Court’s conclusion that the DMCA
14 applies only if Plaintiffs can allege “additional facts” plausibly showing that Codex outputted
15 identical copies of their works without CMI. (ECF No. 189 at 16.) Plaintiffs have therefore
16 failed to cure the “fundamental defect” that caused the Court to dismiss their DMCA claim
17 previously. (*Id.* at 15.) The Court should do so again, this time with prejudice.

18 **1. Plaintiffs Have Not Alleged the “Additional Facts” Necessary to Meet the DMCA’s Identity Requirement**

19 **a. Plaintiffs Admit They Pled No New Facts Alleging the Identical Output of Their Works by Codex or Copilot**

20 Plaintiffs’ opposition concedes that the SAC pleads no additional facts about identical
21 copying of Doe Plaintiffs’ works. (ECF No. 219 (“Mot.”) at 3-4.) First, it is un rebutted that Does
22 3 and 4 have not plausibly pled a DMCA claim. These claims should thus be dismissed. (*Id.*)

23 Second, Plaintiffs admit that Copilot has not reproduced identical copies of Does 1 and 2’s
24 code. (ECF No. 235 (“Opp.”) at 10.) Plaintiffs acknowledge that the Copilot output alleged to
25 have copied those works contains “deviations” and “variations,” or “differences,” from the
26 original code (*id.*), which the Court found falls short of the DMCA’s identity requirement.
27 (ECF No. 189 at 15.) The Court should thus also dismiss the DMCA claims of Does 1 and 2.

28 Finally, Plaintiffs’ opposition confirms that the SAC fails to allege identical copying of

1 Doe 5’s works. Plaintiffs merely repeat allegations that the Court already deemed insufficient.
 2 (ECF No. 189 at 15.) The Court was correct then because even the FAC characterized the
 3 copying as non-identical and lacked any showing of identical output of any entire work or that
 4 such output is likely. (ECF 97-3 ¶¶ 113-120 (“Copilot Outputs the Code of Doe 5 in *Modified*
 5 Format”), ¶¶ 121-128 (“Copilot Outputs the Code of Doe 5 *Essentially* Verbatim”) (emphases
 6 added).) Nothing Plaintiffs argue in their motion warrants a reconsideration of that conclusion.

7 **b. Plaintiffs Confirm the Only Two New Facts in the SAC
 8 Fail to Allege Identical Copying**

9 This Court granted leave to amend “out of an abundance of caution” in the “unlikely”
 10 event that Plaintiffs could cure the deficiencies the Court identified by alleging “additional facts.”
 11 (ECF No. 189 at 16.) Plaintiffs alleged only two new facts: (1) the existence of the “Carlini
 12 Study” (ECF No. 219-1; SAC (ECF No. 197-3) ¶¶ 104, 209) and (2) the existence of the GitHub
 13 code referencing feature (SAC ¶ 145). Neither shows identical copying of Plaintiffs’ code.

14 First, Plaintiffs fail to rebut OpenAI’s argument that the Carlini Study does not support
 15 the existence of a “substantial risk” that Defendants will violate Section 1202(b)(3) of the
 16 DMCA. (Mot. at 5.) Plaintiffs’ only mention of the study is an unexplained citation to the FAC.
 17 (*See* Opp. at 3 (citing SAC ¶¶ 104-07, without analyzing the study itself).)

18 Second, Plaintiffs also do not (and cannot) rebut OpenAI’s explanation for why the
 19 existence of the GitHub code referencing feature fails to support their DMCA claim. (Opp. at 11-
 20 12.) Plaintiffs’ allegations do not suggest a substantial risk that identical copies of Plaintiffs’
 21 entire works will be outputted because the feature can only check for code-snippets of up to about
 22 150 characters. (Mot. at 9-10.) Such limited, partial copying, even if identical, would not show
 23 removal of CMI from an identical copy of a work, and at any rate Plaintiffs do not even allege
 24 that *their* code has been detected by that feature.

25 Plaintiffs’ sole argument that the GitHub code referencing feature saves their complaint is
 26 the following: because GitHub’s Copilot allegedly has features to prevent the reproduction of
 27 identical output, it “by definition establishes Copilot’s ability to reproduce verbatim copies of
 28 code.” (Opp. at 11.) But even if true (it is not), the mere *ability* to reproduce verbatim copies of
 code is insufficient to allege a DMCA violation. *See* S. Rep. No. 105-190, at 34 (1998)

1 (discussing Section 1202) (“Furthermore, this section imposes liability for specified acts. It does
 2 not address the question of liability for persons who manufacture devices or provide services.”).
 3 A printing press, a photocopier, and the copy-paste function of a computer can all reproduce
 4 verbatim copies of code. That does not make Xerox liable for violating Section 1202. For
 5 Plaintiffs to rely on the code referencing feature to cure the defects of the FAC, they must allege
 6 facts that plausibly show that Copilot (despite that feature) or Codex (which they cannot even
 7 allege has such a feature) either has actually reproduced verbatim copies of *their* code or is likely
 8 to do so. Because Plaintiffs fail to make this showing, they have failed to cure the FAC’s defects.

9 **2. The Court Correctly Dismissed Plaintiffs’ DMCA Section
 10 1202(b)(1) Claim for Failure to Allege Removal of CMI**

11 Plaintiffs try to save their Section 1202(b)(1) claim by retrofitting it to satisfy the
 12 identity requirement. (Opp. at 4 (“To the extent an identity requirement can be read into
 13 § 1202(b)(1), it should focus on how the copy was made and CMI removed.”).) As Plaintiffs
 14 observe, Section 1202(b)(1) “makes the mere removal of CMI from digital copies illegal before
 15 distribution of copies.” (*Id.*) To the extent Plaintiffs now focus on the pre-distribution removal
 16 of CMI, their claim fails because Plaintiffs do not allege any such removal.¹ In fact, the SAC
 17 admits that no pre-distribution removal occurred. (SAC ¶¶ 109, 143-44 (alleging Copilot was
 18 trained on files from which CMI had not been removed); *see also* ECF No. 95 at 19 (“CMI
 19 appeared repeatedly across the data used to train Codex and Copilot”).) Because Plaintiffs do not
 20 allege removal of CMI from any pre-distribution copies, it is irrelevant to the Section 1202(b)(1)
 21 analysis whether such copies are identical to Plaintiffs’ works. Plaintiffs have only ever alleged
 22 removal upon—not before—distribution of the alleged copies via Copilot or Codex output. (*See*
 23 SAC ¶¶ 204-235.) Their new pre-distribution argument therefore fails.

24 **3. The Court Correctly Recognized the DMCA’s Identity
 25 Requirement**

26 **a. The Identity Requirement Applies to Code**

27 Plaintiffs admit that they are foreclosed from relitigating previously decided issues. (Opp.
 28 at 5.) As a workaround, Plaintiffs seek to cast the identity requirement’s “application to

¹ To the extent Plaintiffs allege removal of CMI *after* distribution (*e.g.*, when Codex/Copilot outputs code), it fails because the alleged code is not identical to Plaintiffs’ works. (ECF 189 at 15 (“Courts have held that no DMCA violation exists where the works are not identical.”).)

1 software code in particular” as an issue “never previously raised or addressed in prior briefing or
2 the Court’s Second MTD Order.” (*Id.*) Plaintiffs’ efforts fail for at least three reasons.

3 First, Plaintiffs raised this issue in both prior oppositions. (ECF No. 67 at 17 (“This case
4 is about code published subject to open-source licenses.”); *see also id.* at 18 n. 11 (distinguishing
5 Defendants’ cases because “none of [them] deal with computer code”); ECF No. 141 at 15
6 (“Critically, this case is about the copying of licensed code.”).) The Court has already considered
7 and rejected their arguments.

8 Second, Plaintiffs’ effort to frame the issue as a code-specific application of the
9 identity requirement fails because the case forming the primary basis for Plaintiffs’ argument
10 is about PowerPoint slides, not code. (Opp. at 5-6 (requesting reconsideration in view of *ADR*
11 *Int’l Ltd. v. Inst. For Supply Mgmt. Inc.*, 667 F. Supp. 3d 411 (S.D. Tex. 2023)); *cf. ADR Int’l Ltd.*
12 at 429 n. 8 (“the issue is whether the DMCA’s § 1202 is limited to identical copies and involves
13 PowerPoint slides allegedly distributed over the Internet”).)

14 Finally, Plaintiffs’ cited cases that *do* mention code do not suggest that the identity
15 requirement should apply differently to code. *Oracle International Corp. v. Rimini Street, Inc.*
16 only references the identity requirement’s application to “copyright holders” generally. No.
17 14-cv-01699, 2023 WL 4706127 at *82 (D. Nev. July 24, 2023). *Splunk Inc. v. Cribl, Inc.* does
18 not discuss the identity requirement at all (nor was it briefed). 662 F. Supp. 3d 1029 (N.D.
19 Cal. 2023); *id.*, ECF No. 31 at 24-25; *id.*, ECF No. 35 at 25; *id.*, ECF No. 41 at 15. The Court
20 should decline Plaintiffs’ wholly unsupported request to exempt software code from the DMCA’s
21 identity requirement.

22 **b. Plaintiffs’ Newly Cited Case Law Confirms the Court
23 Correctly Applied the Identity Requirement**

24 **i. *ADR International***

25 The Court previously recognized that “no DMCA violation exists where the works are not
26 identical.” (ECF 189 at 15.) This recognition is in accord with case law across the Ninth Circuit.
27 *See Advanta-STAR Auto. Rsch. Corp. of Am. v. Search Optics, LLC*, No. 22-cv-1186, 2023 WL
28 3366534, at *12 (S.D. Cal. May 9, 2023); *Kirk Kara Corp. v. W. Stone & Metal Corp.*, No. 20-
cv-1931-DMG, 2020 WL 5991503, at *6 (C.D. Cal. Aug. 14, 2020); *Frost-Tsuji Architects v.*

1 *Highway Inn, Inc.*, No. 13-cv-00496, 2015 WL 263556, at *3 (D. Haw. Jan. 21, 2015), *aff'd*, 700
2 F. App'x 674 (9th Cir. 2017). Seeking to relitigate the issue, Plaintiffs rely on an out-of-circuit
3 district court case—*ADR International Ltd. v. Institute For Supply Management Inc.*—in which
4 the court adopted a recommendation by a magistrate judge who applied a different standard, 667
5 F. Supp. 3d 411, 428 (S.D. Tex. 2023). (Opp. at 5-6.) *ADR International*, however, merely
6 confirms that the Court decided the issue correctly.

7 The *ADR International* court expressly distinguished *Kipp Flores Architects, LLC v.*
8 *Pradera SFR, LLC*, No. 21-cv-00673, 2022 WL 1105751, at *3 (W.D. Tex. Apr. 13, 2022)—a
9 case with facts that mirror the facts here. *ADR Int'l*, 667 F. Supp. 3d at 428. In *Kipp Flores*, the
10 plaintiff alleged that the defendant “generate[d] nonidentical renditions of [the plaintiff’s]
11 copyrighted works” that failed to include the plaintiffs’ CMI. *Kipp Flores*, 2022 WL 1105751, at
12 *3. Accordingly, the *Kipp Flores* court held that the plaintiff failed to allege a DMCA violation
13 because the DMCA does not apply when the plaintiff alleges CMI was removed from a new work
14 that is not identical to the plaintiff’s works. *Id.* The *Kipp Flores* court relied on the same cases
15 that this Court did in reaching the same conclusion. *Id.* (citing *Kirk Kara Corp.* and *Frost-Tsuji*
16 *Architects*). (See also ECF No. 189 (same).)

17 *ADR International* does not contradict *Kipp Flores*. Instead, it deemed *Kipp Flores*
18 inapplicable because the plaintiff in *ADR International* “allege[d] that Defendants reproduced
19 Plaintiff’s training materials without its CMI and replaced it with [Defendants’] CMI.” *ADR Int'l*
20 *Ltd.*, 667 F. Supp. 3d at 429. Plaintiffs here have made no such allegation. Additionally, *ADR*
21 *International*’s characterization of the holding in *Kipp Flores* would apply with equal force here:
22 *Kipp Flores* was a case “interpreting the plain meaning of ‘remove,’ finding the DMCA does not
23 apply when the plaintiff alleges CMI was removed from a new work that is a nonidentical or
24 derivative rendition of the plaintiff’s copyrighted works because the new work never had the CMI
25 on it to be removed.” *ADR Int'l Ltd.*, 667 F. Supp. 3d at 428-29. Thus, *ADR International*
26 confirms that the Court correctly applied the DMCA’s identity requirement.

27 ii. Pre-DMCA Copyright Cases

28 Plaintiffs also argue that a defendant may copy less than the entire work and still satisfy

1 the DMCA’s identity requirement. (Opp. at 12.) Plaintiffs provide no relevant authority for
2 this assertion. Each of the three cases they cite were decided years before the 1998 passage of the
3 DMCA and thus are irrelevant to what the statute requires; they were about copyright
4 infringement, not the removal of CMI or distribution of works with CMI removed. *See Horgan v.*
5 *Macmillan, Inc.*, 789 F.2d 157, 162 (2d Cir. 1986); *Burroughs v. MGM, Inc.*, 683 F.2d 610, 624
6 n.14 (2d Cir. 1982); *Shaw v. Lindheim*, 919 F.2d 1353, 1362 (9th Cir. 1990).

7 **c. Plaintiffs’ Policy Arguments Misunderstand the**
8 **Relationship between the DMCA and Copyright Law**

9 Plaintiffs conclude their attack on the DMCA’s identity requirement by arguing that it
10 would “render the DMCA toothless by allowing anyone to copy another’s work so long as they
11 only copied a part of it.” (Opp. at 12.) But the DMCA isn’t about copying; it’s about the removal
12 of CMI (or the addition of false CMI). The DMCA was intended to serve a limited purpose: to
13 “assist in tracking and monitoring uses of copyrighted works, as well as licensing of rights and
14 indicating attribution, creation and ownership.” S. Rep. No. 105-190, at 16 (1998). Without
15 requiring identity with the entire works from which CMI is allegedly removed, the DMCA
16 would swallow copyright whole. It would create a right of action for the copying of any part of a
17 work in which someone failed to include CMI, even if the CMI was found in an entirely different
18 part of the work. Such a right of action already exists—a claim for copyright infringement—as
19 Plaintiffs’ citations to copyright infringement cases illustrate. *See Horgan*, 789 F.2d at 162;
20 *Burroughs*, 683 F.2d at 624 n.14; *Shaw*, 919 F.2d at 1362. The DMCA does not (and was not
21 intended to) create an end run around the limitations on copyright infringement claims (such as
22 the registration requirement), which would be the result of Plaintiffs’ interpretation.

23 **B. Breach of Contract**

24 Plaintiffs’ contract claim against OpenAI should also be dismissed. (Mot. at 6-19.)
25 Plaintiffs fail to state any claim for breach based on the operation of OpenAI’s Codex, as opposed
26 to GitHub’s Copilot. In addition, Plaintiffs’ theory based on Copilot fails for two independent
27 reasons: (1) it is based on Copilot’s outputs, which OpenAI does not control; and (2) it is based
28 on OpenAI’s alleged failure to fulfill conditions, not covenants, to the licenses at issue and thus
cannot give rise to a contract claim. None of Plaintiffs’ arguments warrant a different outcome.

1 **1. The Court Should Consider OpenAI’s Contract Arguments in**
2 **the Interests of Judicial Economy**

3 Plaintiffs argue that, under Rule 12(g)(2), OpenAI has “waived” its right to challenge
4 Plaintiffs’ breach of contract claim because OpenAI did not previously move to dismiss that
5 claim. (Opp. at 13-15.) OpenAI can, at minimum, assert its challenge via other procedural means
6 under Rule 12(h)(2). *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 317-18 (9th Cir. 2017),
7 *aff’d sub nom. Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (“A defendant who omits [from a
8 Rule 12 motion] a defense under Rule 12(b)(6)—failure to state a claim upon which relief can be
9 granted—does not waive that defense.”). In any event, Rule 12(g)(2) does not preclude a court
10 from reviewing new arguments in a later motion to dismiss; pursuant to Rule 1, Rule 12(g)(2)
11 should “be construed, administered, and employed by the court and the parties to secure the just,
12 speedy, and inexpensive determination of every action and proceeding.” *Id.* at 318. “Denying
13 late-filed Rule 12(b)(6) motions and relegating defendants to the three procedural avenues
14 specified in Rule 12(h)(2) can produce unnecessary and costly delays, contrary to the direction of
15 Rule 1.” *Id.* Accordingly, where new arguments “do not appear to have been filed for any
16 strategically abusive purpose,” it is proper for a court to consider those arguments in a later
17 motion to dismiss; otherwise, the defendant would be forced to assert those arguments via other
18 means, “substantially delay[ing] resolution” of the issues “for no apparent purpose.” *Id.* at 320.
19 That is why courts in this District have regularly considered new arguments on a later motion to
20 dismiss “where doing so would serve the interests of judicial economy.” *Symantec Corp. v.*
21 *Zscaler, Inc.*, No. 17-CV-04426-JST, 2018 WL 1456678, at *2 (N.D. Cal. Mar. 23, 2018)
22 (finding the Ninth Circuit’s “more flexible and efficiency-oriented view” warranted consideration
23 of a new argument on a second motion to dismiss and collecting cases from this District).

24 The same reasoning applies to OpenAI’s present arguments for dismissal of Plaintiffs’
25 breach of contract claim. Like the later filed motions considered in *In re Apple* and *Symantec*,
26 OpenAI’s motion was not brought for any “strategically abusive” purpose and should be
27 considered in the interests of judicial economy. Plaintiffs more specifically articulated their
28 theory of breach at the last motion to dismiss hearing when Plaintiffs’ counsel made clear that

1 their theory presumes that the attribution and notice terms are obligations imposed on the
2 licensee, as opposed to conditions to the grant of license by the licensor—and OpenAI brings this
3 motion in response to Plaintiffs’ refined articulation. (See ECF No. 174 at 20:13-21:6 (“[I]f you
4 were a human programmer using this code that is subject to an open source license..., the
5 moment you do so, you incur the obligations under the license. And when the license has a
6 provision that says you must provide attribution and a copy of the license, that is, right, a CMI
7 obligation that is being incurred.”).) In addition, this motion presents an opportunity to end the
8 case with respect to OpenAI. If the Court does not consider OpenAI’s contract arguments now,
9 OpenAI will have to raise those arguments via other avenues, such as a substantively identical
10 Rule 12(c) motion, which would at minimum require the parties to re-brief the issues. In the
11 meantime, as Plaintiffs note, Plaintiffs have already issued numerous discovery requests to
12 OpenAI relating to their contract claim and the parties have expended substantial resources
13 engaging in meet and confers and discovery correspondence—and will continue to do so. (Opp.
14 at 15.) Considering OpenAI’s arguments now could “materially expedite[] the district court’s
15 disposition of the case,” and avoid unnecessarily delay and cost to both parties related to the
16 contract claim, consistent with the direction of Rule 1. See *In re Apple*, 46 F.3d at 320. The
17 Court should thus exercise its discretion to consider OpenAI’s present contract arguments.

18 2. Plaintiffs Fail to State a Claim Based on Codex

19 “Under California law, to state a claim for breach of contract a plaintiff must plead ‘the
20 contract, plaintiffs’ performance (or excuse for nonperformance), defendant’s breach, and damage
21 to plaintiff therefrom.’” *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1028 (N.D. Cal. 2012)
22 (quoting *Gautier v. Gen. Tel. Co.*, 234 Cal. App. 2d 302, 305 (1965)). As detailed in OpenAI’s
23 opening brief, the SAC fails to plead any facts supporting a theory of breach based on OpenAI
24 **Codex**, which Plaintiffs acknowledge is a different product from GitHub **Copilot**. (Mot. at 7-8
25 (citing SAC ¶¶ 24, 26).) In response, Plaintiffs assert that “OpenAI’s copying and use of
26 Plaintiffs’ licensed code through Codex” gives rise to a contract claim. (Opp. at 15.) But the
27 SAC is silent as to any copying and use of **Doe Plaintiffs’** code via Codex. Plaintiffs’ general
28 allegation that Codex “has not been trained to provide Attribution” and does not include “a

1 Copyright Notice nor any License Terms attached to the Output” is based on the single example
2 of a supposed output from Codex in the SAC, which is described as “taken from *Eloquent*
3 *Javascript* by Marijin Haverbeke,” who is not a named Plaintiff. (See SAC ¶¶ 60-61, 68.) The
4 SAC does not identify the contracts at issue or explain how the Doe Plaintiffs and OpenAI
5 entered those contracts, how OpenAI purportedly breached those contracts with respect to the
6 Doe Plaintiffs, or how Doe Plaintiffs suffered damage from that breach. See *Gautier*, 234 Cal.
7 App. 2d at 305-06 (dismissing contract claim where the plaintiffs failed to allege the terms of the
8 contract, what constituted the defendant’s breach, or legally actionable damage to plaintiffs
9 resulting from that breach). Plaintiffs have thus failed to state a claim for breach of contract
10 based on the operation of Codex.

11 3. Plaintiffs Fail to State a Claim Based on Copilot

12 a. Plaintiffs’ Theory Based on Copilot Does Not Give Rise 13 to a Breach of Contract Claim Against OpenAI

14 Plaintiffs agree that the only allegations in the SAC supporting their theory for breach of
15 the Doe Licenses are in paragraphs 238 and 244-247 and that all of those allegations are directed
16 to *Copilot’s* (not Codex’s) outputs. (See Mot. at 8-9; Opp. at 15-16.) Plaintiffs also agree that
17 they alleged that *GitHub* (not OpenAI) controls what Copilot outputs through a “Copilot filter”
18 that “*GitHub* introduced” (SAC ¶ 145 (emphasis added)), which provides “an option to either
19 allow or block code completion suggests that match publicly available code” (*id.* ¶ 146) and an
20 option to include a link to the applicable open-source license (*id.* ¶ 147)—and which Plaintiffs
21 rely on to assert claims against *GitHub* (*id.* ¶ 149). (See Mot. at 9-10; Opp. at 15-16.) Plaintiffs’
22 claim for breach of the Doe Licenses against OpenAI fails for these reasons alone.

23 Plaintiffs attempt to confuse the issues by arguing that if Copilot is a joint venture
24 between OpenAI and GitHub, OpenAI would be liable for breach of the Doe Licenses by GitHub
25 related to Copilot. (Opp. at 15-16.) But a joint venture requires (among other elements) “equal
26 authority and right to direct and control the conduct of all co-venturers with respect to the joint
27 venture.” *Forest v. Equitable Life Assurance Soc’y of U.S.*, No. C99-5173 SI, 2001 WL 1338809,
28 at *5 (N.D. Cal. June 12, 2001). The SAC pleads facts that establish that, at minimum, Copilot is
not a joint venture because OpenAI lacks “equal authority and right to direct and control the

1 conduct” of GitHub with respect to Copilot, as demonstrated by the fact that GitHub alone has
 2 released features altering Copilot’s outputs (*see* SAC ¶¶ 145-157). *See Orosco v. Sun-Diamond*
 3 *Corp.*, 51 Cal. App. 4th 1659, 1666 (1997) (raisin production was not a joint venture in part
 4 because no “entity other than Sun-Maid ha[d] any control over the production of raisins”).

5 **b. Plaintiffs’ Theory Based on Copilot Fails on the Merits**

6 Plaintiffs’ contract claim based on Copilot also fails on the merits because they do not and
 7 cannot allege that OpenAI made or breached any promise. No breach, no claim; it is that simple.

8 **i. The Attribution and Notice Terms Are Conditions
 and Do Not Give Rise to a Contract Claim**

9 As OpenAI explained in its opening brief, a condition is an event that triggers an
 10 obligation under a contract, whereas a covenant is an affirmative promise to do something. (Mot.
 11 at 10, 17-18.) Plaintiffs do not dispute this basic premise. (*See* Opp. at 18-19.) Plaintiffs also
 12 agree that failure to fulfill a condition to a copyright license grant does not give rise to a contract
 13 claim and may only give rise to a claim for copyright infringement. (*See id.*) Plaintiffs argue,
 14 however, that the attribution and notice terms of the Doe Licenses are covenants, not conditions,
 15 and thus OpenAI’s purported failure to fulfill those terms is breach of the Doe Licenses. (*Id.*)

16 “In interpreting a contract, the objective intent, as evidenced by the words of the contract,
 17 is controlling.” *Lloyd’s Underwriters v. Craig & Rush, Inc.*, 26 Cal. App. 4th 1194, 1197 (1994).
 18 As detailed in OpenAI’s opening brief (Mot. at 11-18), the words of the Doe Licenses show that
 19 the attribution and notice terms are conditions on the grant of a license by the Doe Plaintiffs, not
 20 covenants undertaken by OpenAI.² Each license uses the ordinary language of conditions in
 21 describing those terms: all the licenses except the MIT License grant permission to copy, modify,
 22 and distribute the licensed code “provided that” the licensor includes the specified attribution and
 23 notices with the code (*see* Mot. at 11-16); the MIT License similarly grants permission “subject to
 24 the following conditions” related to attribution and notice (*id.* at 16-17). *See Jacobsen v. Katzer*,
 25 535 F.3d 1373, 1381 (Fed. Cir. 2008) (“Under California contract law, ‘provided that’ typically
 26 denotes a condition.”); 1 Witkin, Summary 11th Contracts § 800 (2023) (“Express conditions”
 27

28 ² Plaintiffs do not dispute that the Doe Licenses are part of the SAC. (*See* Mot. at 7; Opp. at 13-25.)

1 can be stated with the words “provided” and “upon the condition”). The Doe Licenses thus
 2 contain “plain, unambiguous language” that requires finding the attribution and notice terms
 3 conditions, not covenants. *See Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 559 n.7 (9th Cir.
 4 1990). (Opp. at 19.) Indeed, Plaintiffs concede this language is unambiguous by failing to even
 5 offer an alternative interpretation, let alone showing that it is reasonable. *S. Cal. Edison Co. v.*
 6 *Superior Ct.*, 37 Cal. App. 4th 839, 847 (1995) (“When a dispute arises over the meaning of
 7 contract language, the first question to be decided is whether the language is ‘reasonably
 8 susceptible’ to the interpretation urged by the party. If it is not, the case is over.”).

9 Plaintiffs’ own authorities also make clear that the attribution and notice terms are
 10 conditions, not covenants. The court in *Netbula, LLC v. Storage Technology Corp.* explained:

11 A covenant is another word for a contractual promise. A promise
 12 for contract purposes is a manifestation of intention to act or refrain
 13 from acting in a specified way, so made as to justify a promisee in
 14 understanding that a commitment has been made. . . . A condition,
 on the other hand, is an event, not certain to occur, which must
 occur, unless its non-occurrence is excused, before performance
 under a contract becomes due.

15 No. 06-cv-07391, 2008 WL 228036, at *3 (N.D. Cal. Jan. 18, 2008) (cleaned up); *see also*
 16 *Ticketmaster L.L.C. v. Prestige Ent., Inc.*, 306 F. Supp. 3d 1164, 1172 (C.D. Cal. 2018) (“Under
 17 California law, a covenant is a promise to do or refrain from doing a specific act. A condition is a
 18 qualification to the parties’ obligations; if it occurs, the interest is terminated or enlarged.”)
 19 (cleaned up). (Opp. at 18-19.)³ The attribution and notice terms in the Doe Licenses are not
 20 covenants because the licensee (*e.g.*, OpenAI) never ***promises*** to fulfill those terms. Rather, the
 21 licensor (*e.g.*, Doe Plaintiff) grants certain permissions to the licensee ***on the condition that*** the
 22 licensee fulfill the attribution and notice terms. (*See Mot.* at 11-17.) The Doe Licenses do not
 23 reflect any “manifestation of ***intention***” by the licensee to fulfill the attribution and notice terms;
 24 the licensee simply has the option of doing so, and receives a benefit if he or she chooses to do so.
 25 *See Netbula*, 2008 WL 228036, at *3. Accordingly, the licensee’s fulfillment of the attribution
 26 and notice terms is a condition—an uncertain event that must occur before the licensor’s

27
 28 ³ A party’s obligations under a contract can arise, of course, only if a contract has been formed. OpenAI does not separately address formation in this motion, but does not concede formation.

1 performance (grant of certain permissions) is due. *See id.*

2 Lastly, contrary to Plaintiffs’ suggestion (Opp. at 21-22), *ProCD, Inc. v. Zeidenberg*, 86
3 F.3d 1447 (7th Cir. 1996), does not support finding otherwise. *ProCD* addressed an entirely
4 different issue than that presented here: whether a purchaser of software is bound by the terms of
5 a contract enclosed with the software packaging. *See id.* at 1450-53. The underlying assumption
6 was that the contractual terms were a **promise** to use the software only for non-commercial
7 purposes; the issue was whether the purchaser assented to that promise. *See id.* at 1450-51
8 (analogizing to a concert ticket wherein “[t]he back of the ticket states that the patron **promises**
9 not to record the concert; to attend is to agree”) (emphasis added). *ProCD* is thus irrelevant to
10 whether the attribution and notice terms are conditions or covenants—because, as explained
11 above, nothing in the Doe Licenses suggests that the licensee made a **promise**.

12 **ii. *Jacobsen v. Katzer* Is Relevant**

13 Plaintiffs attempt to sidestep the plain language of the Doe Licenses by trying (and
14 failing) to distinguish *Jacobsen*. (Opp. at 20-24.) First, Plaintiffs argue that *Jacobsen* does not
15 apply to this case because the Artistic License at issue in *Jacobsen* had a preamble stating, “The
16 intent of this document is to state the **conditions** under which a Package may be copied.” *Id.* at
17 21 (citing *Jacobsen*, 535 F.3d at 1381.) But that was not the court’s sole basis for finding the
18 terms of the Artistic License to be conditions: the court went on to find that “[t]he Artistic
19 License also uses the traditional language of conditions by noting that the rights to copy, modify,
20 and distribute are granted ‘**provided that**’ the conditions are met” (*Jacobsen*, 535 F.3d at 1381)—
21 the exact language use in five of the six Doe Licenses. (*See* Mot. at 11-16.) But even if the
22 Artistic License’s characterization of its attribution and notice terms as “conditions” were
23 dispositive, that would not distinguish *Jacobsen* from the facts here: each of the Doe Licenses
24 also characterizes its attribution and notice terms as “conditions.” (*See* ECF No. 98-1 at 29 (“You
25 may modify your copy or copies of the Program...provided that you also meet all of these
26 **conditions**”) (GPL version 2.0); *id.* at 37 (“All rights granted under this License are granted for
27 the term of the copyright on the Program, and are irrevocable provided the stated **conditions** are
28 met”) (GPL version 3.0); *id.* at 38 (“You may convey a work based on the Program...provided

1 that you also meet all of these *conditions*”) (same); *id.* at 18-19 (same) (Affero GPL version 3.0);
 2 *id.* at 9 (“Redistribution and use...are permitted provided that the following *conditions* are met”)
 3 (3-Clause BSD License); *id.* at 3 (“You may reproduce and distribute copies of the Work or
 4 Derivative Works...provided that You meet the following *conditions*”) (Apache version 2.0); *id.*
 5 at 58 (Permission is hereby granted...subject to the following *conditions*”) (MIT License)
 6 (emphases added).)

7 Second, Plaintiffs argue that *Jacobsen* is inapposite because it addressed whether the
 8 plaintiff could bring a claim for copyright infringement, not a claim for breach of contract. (Opp.
 9 at 21.) Plaintiffs miss the point: *Jacobsen* is relevant because it found that terms similar to those
 10 in the Doe Licenses were conditions to the license grant (giving rise to a copyright claim), and not
 11 covenants undertaken by the licensee (giving rise to a contract claim). (See Mot. at 11-16.) The
 12 same analysis applies whether the plaintiff ultimately brings a copyright or contract claim.

13 Lastly, Plaintiffs note that *Jacobsen* involved code that had been registered with the
 14 Copyright Office, thus allowing the plaintiff to bring a claim for copyright infringement, whereas
 15 none of the Plaintiffs in this case have registered their code. (Opp. at 22 n.3.) Plaintiffs cite no
 16 authority, however, for the novel proposition that they should be entitled to bring a claim not
 17 available to them simply because they have chosen not to meet the requirements necessary to
 18 enforce their rights through legally cognizable means.

19 **iii. Plaintiffs’ Policy Arguments Are Both Wrong and** 20 **Irrelevant to the Issue Presented**

21 Plaintiffs rely heavily on the unsupported assertion that dismissing their contract claim
 22 will “imperil the entire ecosystem of open-source licensing” because software developers will
 23 only be able to enforce their rights under copyright law. (See Opp. at 19-25.) Plaintiffs
 24 mischaracterize the open-source ecosystem, which has long been supported by copyright (not
 25 contract) enforcement actions.⁴ Plaintiffs upend the standard practice by bringing a contract
 26 claim. Indeed, Columbia Law School Professor Eben Moglen, who serves as President and
 27 Executive Director of the Software Freedom Law Center,⁵ describes the GPL as “a true copyright

28 ⁴ See, e.g., <https://softwarefreedom.org/news/2009/dec/14/busybox-gpl-lawsuit>.

⁵ See <https://softwarefreedom.org/about/team>.

1 license: a unilateral permission, in which no obligations are reciprocally required by the
2 licensor”:⁶

3 Because the GPL does not require any promises in return from licensees,
4 it does not need contract enforcement in order to work. A GPL licensor
5 doesn’t say in the event of trouble “But, judge, the licensee promised me
6 he wouldn’t do what he’s doing now.” The licensor plaintiff says “Judge,
7 the defendant is redistributing my copyrighted work without permission.”

8 In other words, failure to meet the terms of the GPL gives rise to a claim for copyright
9 infringement, not a claim for breach of contract—which is exactly OpenAI’s point.

10 In any event, Plaintiffs’ purported policy arguments are irrelevant to the issue before the
11 Court—whether Plaintiffs have met their burden of stating a claim against OpenAI for breach of
12 the Doe Licenses—and thus should be rejected for two independent reasons. First, Plaintiffs’
13 arguments rely entirely on attorney assertions that appear nowhere in the SAC. (*See* Opp. at 19-
14 25.) “[W]hen the legal sufficiency of a complaint’s allegations is tested by a motion under Rule
15 12(b)(6), review is limited to the complaint”—with limited exceptions that Plaintiffs do not argue
16 apply here. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (cleaned up).

17 Second, even if Plaintiffs’ policy assertions were included in the SAC, they would still be
18 improper extrinsic evidence to the Doe Licenses. “Where the parties have reduced their
19 agreement to writing, their mutual intention is to be determined, whenever possible, from the
20 language of the writing alone.” *Netbula*, 2008 WL 228036, at *3 (cleaned up). Extrinsic
21 evidence may only be considered to determine the intent of the parties if the agreement is
22 “uncertain or ambiguous,” or to show “the parties’ understanding and intended meaning of *the*
23 *words used in their written agreement.*” *See id.* (cleaned up; emphasis added) (other exception
24 not relevant here). As detailed above, the Doe Licenses clearly and unambiguously identify the
25 attribution and notice terms as conditions, not covenants—and Plaintiffs have identified nothing
26 in the Doe Licenses suggesting otherwise. In addition, although Plaintiffs make sweeping
27 proclamations about the peril to the “entire ecosystem of open-source licensing” (*e.g.*, Opp. at
28 19), they do not attempt to tie those broad assertions to the specific language of the Doe Licenses.
Plaintiffs’ public policy arguments are thus irrelevant to the intended meaning of “the words

⁶ <https://lwn.net/Articles/61292>.

1 used” in the Doe Licenses—and certainly do not support finding that those words reflect an
2 intention to create covenants (as opposed to conditions), contrary to their plain meaning.

3 **iv. The Publishing Terms Are Subject to the Same**
4 **Analysis as the Attribution and Notice Terms**

5 Plaintiffs assert that, in addition to the attribution and notice terms, three of the six Doe
6 Licenses (GPL versions 2.0 and 3.0 and Affero GPL version 3.0) contain provisions related to
7 publishing the licensee’s modifications of the licensed code, which Plaintiffs refer to as
8 “copyleft” terms. (Opp. at 24 & n.5.) These terms are provided in the same format and with the
9 same “provided that” language as the attribution and notice terms, and thus are conditions (not
10 covenants) for the same reasons. (See Mot. at 12 (GPL version 2.0, section 3), 13-14 (GPL
11 version 3.0, section 6), 14 (Affero GPL version 3.0, section 6).)

12 Plaintiffs also cite to three cases that specifically address the GPL publishing terms:
13 *Versata Software, Inc. v. Ameriprise Financial, Inc.*, No. A-14-CA-12-SS, 2014 WL 950065
14 (W.D. Tex. Mar. 11, 2014); *Artifex Software, Inc. v. Hancorn, Inc.*, No. 16-cv-06982-JSC, 2017
15 WL 1477373 (N.D. Cal. Apr. 25, 2017); and *Software Freedom Conservancy, Inc. v. Vizio, Inc.*,
16 No. 21-cv-01943, 2022 WL 1527518 (C.D. Cal. May 13, 2022) (“*SFC*”). (Opp. at 24-25.) None
17 of those cases controls here. *Versata* found a contract claim not preempted because those terms
18 impose an additional element distinct from rights provided by copyright laws. 2014 WL 950065,
19 at *5. But *Versata* assumed that the publishing terms were a “contractual promise,” without
20 considering whether they were conditions or covenants. See *id.* *Artifex* discussed the publishing
21 terms in dicta but ultimately found the contract claim not preempted because the parties agreed
22 that the action was “premised upon possible extraterritorial infringement to which the Copyright
23 Act would not apply.” 2017 WL 1477373, at *3-4. *SFC* found *Versata* persuasive and found
24 contract claims not preempted for the same reasons. 2022 WL 1527518, at *3.⁷

25 **III. CONCLUSION**

26 The Court should dismiss Plaintiffs’ claims against OpenAI with prejudice.

27 ⁷ Although *SFC* also briefly addressed whether the publishing term was a “condition” to the
28 license, it did so to determine whether copyright preemption applied. 2022 WL 1527518, at *4.
The court was not presented with, and did not address, arguments regarding the language of the
license and whether that required finding the term to be a condition, not a covenant. See *id.*; see
also *SFC*, ECF No. 25 (Opp. to Vizio Mot. to Dismiss).

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