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11 *Attorneys for GitHub, Inc. and Microsoft Corporation*

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

16 J. DOE 1, et al.,
17 Individual and
Representative Plaintiffs,
18 v.
19 GITHUB, INC., et al.,
20 Defendants.

Case No. 4:22-cv-6823-JST
Consolidated with Case No. 4:22-cv-7074-JST
**DEFENDANT MICROSOFT’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

22 AND CONSOLIDATED ACTION
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SAC Filed: January 24, 2024

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1 Defendant Microsoft Corporation (“Microsoft”) submits this Answer to the Second
2 Amended Complaint (“SAC”) filed by Plaintiffs on January 24, 2024 in the above-captioned
3 matters. Where the SAC combines allegations about Microsoft or GitHub and OpenAI together,
4 Microsoft’s responses below apply solely to allegations related to Microsoft. Additionally,
5 Microsoft offers more than one product using the name Copilot, and the responses herein pertain
6 only to the product at issue in this lawsuit, GitHub Copilot. Microsoft omits the headers from
7 the SAC as no response is required. To the extent a response is required to the headers,
8 Microsoft denies any allegations contained therein. To the extent not expressly admitted below,
9 Microsoft denies each and every allegation of the SAC.

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

15 2. Microsoft admits Plaintiffs’ definitions of “Artificial Intelligence” and “Machine
16 Learning” as “defined for the purposes of [the] Complaint.”

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

22 4. Microsoft admits that some developers publish material to GitHub pursuant to
23 written licenses. Microsoft states it lacks knowledge or information sufficient to form a belief as
24 to the truth of the remaining allegations in paragraph 4 and therefore denies them.

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

28 6. Microsoft admits that in July 2019 it entered into an agreement for a \$1 billion

1 capital commitment to OpenAI with a target redemption amount of \$20 billion. Microsoft
2 admits that it became the exclusive licensee of the GPT-3 language for commercial use, but
3 denies that it is the exclusive licensee of the GPT-3 model for non-commercial research use.
4 Microsoft admits that it offered GPT-3 through its Azure cloud-computing platform and that
5 Copilot runs on Microsoft's Azure platform. Except as expressly admitted, Microsoft denies the
6 remaining allegations set forth in paragraph 6.

7 7. Microsoft admits that, in 2019, Microsoft committed to invest \$1 billion in
8 OpenAI and that it is a minority investor in OpenAI Global LLC. Except as expressly admitted,
9 Microsoft denies the remaining allegations set forth in paragraph 7.

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

14 9. The allegations of this paragraph are directed to OpenAI, and/or Microsoft 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 10. Microsoft admits that OpenAI used data from some publicly accessible
18 repositories on Github.com as part of the training data for at least one of its models. Microsoft
19 lacks knowledge or information sufficient to form a belief as to the truth of the remaining
20 allegations in paragraph 10 and therefore denies them.

21 11. Denied.

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

23 13. Denied.

24 14. Denied.

25 15. Denied.

26 16. Paragraph 16 states conclusions of law for which no response is required. To the
27 extent a response is nonetheless deemed necessary, Microsoft admits that Plaintiffs bring this
28 action on their own behalf and purportedly on behalf of unnamed class members and that

1 Plaintiffs seek injunctive relief and damages. Except as expressly admitted, Microsoft denies the
2 allegations of paragraph 16.

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

7 18. Paragraph 18 states conclusions of law for which no response is required. To the
8 extent a response is nonetheless deemed necessary, Microsoft admits that assignment to the San
9 Francisco Division of the United States District Court of the Northern District of California is
10 proper, and that GitHub is headquartered within this division. Except as expressly admitted,
11 Microsoft denies the allegations of paragraph 18.

12 19. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
13 of the allegations in paragraph 19 and therefore denies them.

14 20. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
15 of the allegations in paragraph 20 and therefore denies them.

16 21. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
17 of the allegations in paragraph 21 and therefore denies them.

18 22. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
19 of the allegations in paragraph 22 and therefore denies them.

20 23. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
21 of the allegations in paragraph 23 and therefore denies them.

22 24. Microsoft admits that GitHub is a Delaware corporation with its principal place of
23 business located at 88 Colin P Kelly Jr Street, San Francisco, CA 94107. Microsoft admits that
24 GitHub sells, markets, and distributes Copilot in this District. Microsoft admits that GitHub
25 released Copilot on a limited “technical preview” basis on June 29, 2021 and that on June 21,
26 2022, Copilot was released to the public as a subscription-based service for individual
27 developers. Except as expressly admitted, Microsoft denies the allegations of paragraph 24.

28 25. Microsoft admits that Microsoft is a Washington corporation with its principal

1 place of business located at One Microsoft Way, Redmond, Washington 98052. Microsoft
2 admits that Microsoft announced its acquisition of Defendant GitHub, Inc. on June 4, 2018, and
3 that the acquisition was finalized on October 26, 2018. Microsoft admits that it sells, markets,
4 and distributes Copilot. Except as expressly admitted, Microsoft denies the allegations of
5 paragraph 25.

6 26. Microsoft admits that OpenAI provided Codex to GitHub to develop Copilot.
7 Microsoft denies that Copilot violates any rights or that it is engaged in any unlawful conduct.
8 The remaining allegations of this paragraph are directed to OpenAI, and/or Microsoft lacks
9 knowledge or information sufficient to admit or deny the allegations of this paragraph about
10 OpenAI, and on that basis denies them.

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

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

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

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

1 31. Microsoft denies that it is engaged in any unlawful conduct. The remaining
2 allegations of this paragraph are directed to OpenAI, and/or Microsoft lacks knowledge or
3 information sufficient to admit or deny the allegations of this paragraph about OpenAI, and on
4 that basis denies them.

5 32. Microsoft denies that it is engaged in any unlawful conduct. The remaining
6 allegations of this paragraph are directed to OpenAI, and/or Microsoft lacks knowledge or
7 information sufficient to admit or deny the allegations of this paragraph about OpenAI, and on
8 that basis denies them.

9 33. The allegations of this paragraph are directed to OpenAI, and/or Microsoft 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 34. Microsoft admits that it is a minority investor of OpenAI Global, LLC. Microsoft
13 denies that it controls OpenAI Global, LLC. The remaining allegations of this paragraph are
14 directed to OpenAI, and/or Microsoft lacks knowledge or information sufficient to admit or deny
15 the allegations of this paragraph about OpenAI, and on that basis denies them.

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

19 36. The allegations of this paragraph are directed to OpenAI, and/or Microsoft 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 37. The allegations of this paragraph are directed to OpenAI, and/or Microsoft 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 38. The allegations of this paragraph are directed to OpenAI, and/or Microsoft lacks
26 knowledge or information sufficient to admit or deny the allegations of this paragraph about
27 OpenAI, and on that basis denies them.

28 39. The allegations of this paragraph are directed to OpenAI, and/or Microsoft 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 40. The allegations of this paragraph are directed to OpenAI, and/or Microsoft 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 41. Denied.

7 42. Denied.

8 43. Denied.

9 44. Denied.

10 45. Denied.

11 46. Paragraph 46 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, Microsoft denies that this action is suitable for class treatment under Rule 23.

14 47. Paragraph 47 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, Microsoft denies that this action is suitable for class treatment under Rule 23.

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

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

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

26 51. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
27 of the allegations in paragraph 51 and therefore denies them.

28 52. Paragraph 52 states conclusions of law and Plaintiffs' characterization of their

1 claims as to which no response is required. To the extent a response is nonetheless deemed
2 necessary, Microsoft denies that this action is suitable for class treatment under Rule 23.

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

6 54. Paragraph 54 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, Microsoft denies that this action is suitable for class treatment under Rule 23.

9 55. Microsoft admits it offers a product called Copilot and OpenAI offers a product
10 called Codex. Except as expressly admitted, Microsoft denies the allegations in paragraph 55.

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

14 57. Admitted.

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

21 59. Microsoft admits that the GitHub website stated, "GitHub Copilot uses the
22 OpenAI Codex to suggest code and entire functions in real-time, right from your editor."
23 Microsoft admits that OpenAI provided Codex to GitHub to develop Copilot as part of a
24 partnership between the two companies. The remaining allegations of this paragraph are directed
25 to OpenAI, and/or Microsoft lacks knowledge or information sufficient to admit or deny the
26 allegations of this paragraph about OpenAI, and on that basis denies them.

27 60. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
28 of the allegations in paragraph 60 and therefore denies them.

1 61. Microsoft does not know what actions Plaintiffs undertook to allegedly generate
2 the responses identified in this paragraph. Accordingly, Microsoft lacks knowledge or
3 information sufficient to form a belief as to the truth of the allegations in paragraph 61 and
4 therefore denies them.

5 62. Microsoft does not know what actions Plaintiffs undertook to allegedly generate
6 the responses identified in this paragraph. Accordingly, Microsoft lacks knowledge or
7 information sufficient to form a belief as to the truth of the allegations in paragraph 62 and
8 therefore denies them.

9 63. Microsoft does not know what actions Plaintiffs undertook to allegedly generate
10 the responses identified in this paragraph. Accordingly, Microsoft lacks knowledge or
11 information sufficient to form a belief as to the truth of the allegations in paragraph 63 and
12 therefore denies them.

13 64. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
14 of the allegations in paragraph 64 and therefore denies them.

15 65. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
16 of the allegations in paragraph 65 and therefore denies them.

17 66. Microsoft admits that Codex does not write code the way a human would because
18 it does not understand the meaning of code. Microsoft lacks knowledge or information sufficient
19 to form a belief as to the truth of the remaining allegations in paragraph 66 and therefore denies
20 them.

21 67. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
22 of the allegations in paragraph 67 and therefore denies them.

23 68. Denied.

24 69. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
25 of the allegations in paragraph 69 and therefore denies them.

26 70. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
27 of the allegations in paragraph 70 and therefore denies them.

28 71. Microsoft lacks knowledge or information sufficient to form a belief as to the truth

1 of the allegations in paragraph 71 and therefore denies them.

2 72. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
3 of the allegations in paragraph 72 and therefore denies them.

4 73. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
5 of the allegations in paragraph 73 and therefore denies them.

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

10 75. Microsoft admits that a paper titled “Evaluating Large Language Models Trained
11 on Codex” was published in 2021. Except as expressly admitted, Microsoft denies the allegations
12 in paragraph 75.

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

17 77. Denied.

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

20 79. Microsoft admits that Copilot can be used in conjunction with Visual Studio and
21 VS Code, that user inputs are treated as prompts in real time, and that the model underlying
22 Copilot runs on Azure servers. Except as expressly admitted, Microsoft denies the allegations in
23 paragraph 79.

24 80. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
25 of the allegations in paragraph 80 and therefore denies them.

26 81. Microsoft does not know what actions Plaintiffs undertook to allegedly generate
27 the responses identified in this paragraph. Accordingly, Microsoft lacks knowledge or
28 information sufficient to form a belief as to the truth of the allegations in paragraph 81 and

1 therefore denies them.

2 82. Microsoft does not know what actions Plaintiffs undertook to allegedly generate
3 the responses identified in this paragraph. Accordingly, Microsoft lacks knowledge or
4 information sufficient to form a belief as to the truth of the allegations in paragraph 82 and
5 therefore denies them.

6 83. Microsoft admits that Copilot's outputs are in part a result of the semantic
7 relationships learned by the underlying model from code during the training process. Microsoft
8 admits that the online book *Mastering JS* was written by Valeri Karpov. Microsoft lacks
9 knowledge or information sufficient to form a belief as to the truth of the remaining allegations
10 in paragraph 83 and therefore denies them.

11 84. Microsoft does not know what actions Plaintiffs undertook to allegedly generate
12 the responses identified in this paragraph. Accordingly, Microsoft lacks knowledge or
13 information sufficient to form a belief as to the truth of the allegations in paragraph 84 and
14 therefore denies them.

15 85. Microsoft denies that Copilot reproduces the contents of data used to train the
16 underlying model in most circumstances. Microsoft does not know what actions Plaintiffs
17 undertook to allegedly generate the responses identified in this paragraph. Accordingly,
18 Microsoft lacks knowledge or information sufficient to form a belief as to the truth of the
19 allegations in paragraph 85 and therefore denies them.

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

25 87. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
26 of the allegations in paragraph 87 and therefore denies them.

27 88. Microsoft admits that a version of the GNU Free Documentation License is
28 available at <https://matt.curinga.com/think-js/#gnu-free-documentation-license> and contains the

1 quoted language. Microsoft lacks knowledge or information sufficient to form a belief as to the
2 truth of the remaining allegations in paragraph 88 and therefore denies them.

3 89. Copilot does not output verbatim identical copies of copyrighted works such that
4 attribution would be required. Paragraph 89 states conclusions of law and Plaintiffs’
5 characterization of their claims as to which no response is required. To the extent a response is
6 nonetheless deemed necessary, Microsoft denies the allegations in paragraph 89.

7 90. Microsoft admits that Codex is a model. Microsoft lacks knowledge or
8 information sufficient to form a belief as to the truth of the remaining allegations in paragraph 90
9 and therefore denies them.

10 91. Microsoft admits that the Codex model was trained using a corpus of material,
11 operates via a complex probabilistic process, and is able to determine likely successful code
12 completions from user prompts. Microsoft denies the remaining allegations in paragraph 91.

13 92. Denied.

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

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

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

28 96. Paragraph 96 states conclusions of law and Plaintiffs’ characterization of their

1 claims with respect to fair use to which no response is required. To the extent a response is
2 nonetheless deemed necessary, Microsoft denies the allegations in paragraph 96 regarding
3 illegality. Microsoft lacks knowledge or information sufficient to form a belief as to the truth of
4 the remaining allegations in paragraph 96 regarding and therefore denies them.

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

10 98. Microsoft admits that a blog post titled “If Software is My Copilot, Who
11 Programmed My Software?” by Bradley M. Kuhn was published on February 3, 2022.
12 Microsoft lacks knowledge or information sufficient to form a belief as to the truth of the
13 remaining allegations in paragraph 98 and therefore denies them.

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

17 100. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
18 of the allegations in paragraph 100 and therefore denies them.

19 101. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
20 of the allegations in paragraph 101 and therefore denies them.

21 102. Microsoft admits that GitHub has stated, “[t]he vast majority of the code that
22 GitHub Copilot suggests has never been seen before. Our latest internal research shows that about
23 1% of the time, a suggestion may contain some code snippets longer than ~150 characters that
24 matches the training set. Previous research showed that many of these cases happen when GitHub
25 Copilot is unable to glean sufficient context from the code you are writing, or when there is a
26 common, perhaps even universal, solution to the problem.” Paragraph 102 otherwise states
27 conclusions of law and Plaintiffs’ characterization of their claims to which no response is
28 required. To the extent a response is nonetheless deemed necessary, except as expressly

1 admitted, Microsoft denies the allegations in paragraph 102.

2 103. Microsoft admits that in June 2022, Copilot had approximately 1,200,000 users.
3 The remainder of paragraph 103 states conclusions of law and Plaintiffs' characterization of
4 their claims to which no response is required. To the extent a response is nonetheless deemed
5 necessary, Microsoft denies the allegations in paragraph 103.

6 104. Microsoft admits that the study *Quantifying Memorization Across Neural*
7 *Language Models* was authored by Nicholas Carlini and others. Microsoft lacks knowledge or
8 information sufficient to form a belief as to the truth of the remaining allegations in paragraph
9 104 and therefore denies them.

10 105. Paragraph 105 states argument to which no response is required. To the extent a
11 response is nonetheless deemed necessary, Microsoft denies the allegations in paragraph 103.

12 106. Microsoft admits that it is committed to Copilot and that Copilot continues to
13 grow. Except as expressly admitted, Microsoft denies the allegations in paragraph 106.

14 107. Admitted.

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

18 109. Denied.

19 110. Paragraph 110 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, Microsoft denies the allegations in paragraph 110.

22 111. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
23 of the allegations in paragraph 111 and therefore denies them.

24 112. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
25 of the allegations in paragraph 112 and therefore denies them.

26 113. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
27 of the allegations in paragraph 113 and therefore denies them.

28 114. Microsoft does not know what actions Plaintiffs undertook to allegedly generate

1 the responses identified in this paragraph. Accordingly, Microsoft lacks knowledge or
2 information sufficient to form a belief as to the truth of the allegations in paragraph 114 and
3 therefore denies them.

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

8 116. Denied.

9 117. Microsoft denies that Copilot suggested a "modified copy of code written by Doe
10 1." Paragraph 117 states conclusions of law and Plaintiffs' characterization of their claims as to
11 which no response is required. To the extent a response is nonetheless deemed necessary,
12 Microsoft denies the allegations in paragraph 117.

13 118. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
14 of the allegations in paragraph 118 and therefore denies them.

15 119. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
16 of the allegations in paragraph 119 and therefore denies them.

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

21 121. Paragraph 121 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, Microsoft denies the allegations in paragraph 121.

24 122. Microsoft 122 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, Microsoft denies the allegations in paragraph 122.

27 123. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
28 of the allegations in paragraph 123 and therefore denies them.

1 124. Paragraph 124 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, Microsoft denies the allegations in paragraph 124.

4 125. Microsoft denies that Copilot suggested “multiple modified copies of code written
5 by Doe 5.” Paragraph 125 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, Microsoft denies the allegations in paragraph 125.

8 126. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
9 of the allegations in paragraph 126 and therefore denies them.

10 127. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
11 of the allegations in paragraph 127 and therefore denies them.

12 128. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
13 of the allegations in paragraph 128 and therefore denies them.

14 129. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
15 of the allegations in paragraph 129 and therefore denies them.

16 130. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
17 of the allegations in paragraph 130 and therefore denies them.

18 131. Paragraph 131 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, Microsoft denies the allegations in paragraph 131.

21 132. Paragraph 132 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, Microsoft denies the allegations in paragraph 132.

24 133. Microsoft denies that Copilot suggested “multiple modified copies of code written
25 by Doe 5.” Paragraph 133 states conclusions of law and Plaintiffs’ characterization of their
26 claims as to which no response is required. To the extent a response is nonetheless deemed
27 necessary, Microsoft denies the allegations in paragraph 133.

28 134. Microsoft lacks knowledge or information sufficient to form a belief as to the truth

1 of the allegations in paragraph 134 and therefore denies them.

2 135. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
3 of the allegations in paragraph 135 and therefore denies them.

4 136. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
5 of the allegations in paragraph 136 and therefore denies them.

6 137. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
7 of the allegations in paragraph 137 and therefore denies them. Paragraph 137 also states
8 conclusions of law and Plaintiffs' characterization of their claims as to which no response is
9 required. To the extent a response is nonetheless deemed necessary, Microsoft denies the
10 allegations in paragraph 137.

11 138. Paragraph 138 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, Microsoft denies the allegations in paragraph 138.

14 139. Denied.

15 140. Denied that Microsoft or GitHub "control[s] all the information about the training
16 dataset." The remainder of paragraph 140 states conclusions of law and Plaintiffs'
17 characterization of their claims as to which no response is required. To the extent a response is
18 nonetheless deemed necessary, Microsoft denies the allegations in paragraph 140.

19 141. Denied.

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

23 143. Microsoft admits that a blog post titled "GitHub Copilot research recitation" by
24 Albert Ziegler was published on June 30, 2021 and contains the quoted language. Except as
25 expressly admitted, Microsoft denies the allegations in paragraph 143.

26 144. Denied.

27 145. Microsoft admits that GitHub offers a duplicate detection feature that when
28 implemented by the user prevents Copilot from suggesting excerpts of about 150 characters that

1 match code in public repositories on github.com. Except as expressly admitted, Microsoft
2 denies the allegations in paragraph 145.

3 146. Microsoft admits that a GitHub Doc titled “Managing Copilot policies as an
4 individual subscriber” includes the quoted language and is available at
5 [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)
6 [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)
7 [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). Except as expressly admitted, Microsoft denies the allegations in
8 paragraph 146.

9 147. Microsoft admits that a GitHub Doc titled “Finding public code that matches
10 GitHub Copilot suggestions” includes the quoted language and is available at
11 [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)
12 [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
13 which no response is required. To the extent a response is nonetheless deemed necessary,
14 Microsoft denies the allegations in paragraph 147.

15 148. Microsoft admits that GitHub offers a code referencing tool as described by
16 GitHub on its webpage available at [https://docs.github.com/en/copilot/using-github-](https://docs.github.com/en/copilot/using-github-copilot/finding-public-code-that-matches-github-copilot-suggestions)
17 [copilot/finding-public-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
18 in paragraph 148 contain argument for which no response is required. To the extent a response
19 is nonetheless deemed necessary, Microsoft denies the allegations in paragraph 148.

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

23 150. Microsoft admits that GitHub offers a code referencing tool as described by
24 GitHub on its webpage available at [https://docs.github.com/en/copilot/using-github-](https://docs.github.com/en/copilot/using-github-copilot/finding-public-code-that-matches-github-copilot-suggestions)
25 [copilot/finding-public-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
26 admitted, Microsoft denies the allegations in paragraph 150.

27 151. Microsoft admits that GitHub offers a code referencing tool as described by
28 GitHub on its webpage available at [https://docs.github.com/en/copilot/using-github-](https://docs.github.com/en/copilot/using-github-copilot/finding-public-code-that-matches-github-copilot-suggestions)

1 copilot/finding-public-code-that-matches-github-copilot-suggestions. Except as expressly
2 admitted, Microsoft denies the allegations in paragraph 151.

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

7 153. Microsoft admits that GitHub offers a code referencing tool as described by
8 GitHub on its webpage available at [https://docs.github.com/en/copilot/using-github-](https://docs.github.com/en/copilot/using-github-copilot/finding-public-code-that-matches-github-copilot-suggestions)
9 copilot/finding-public-code-that-matches-github-copilot-suggestions. Except as expressly
10 admitted, Microsoft denies the allegations in paragraph 153.

11 154. Microsoft admits that a GitHub Doc titled “Managing Copilot policies as an
12 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)
13 copilot/managing-copilot-as-an-individual-subscriber/managing-copilot-policies-as-an-
14 individual-subscriber#enabling-or-disabling-duplication-detection. Microsoft admits the
15 contents of the document. Except as expressly admitted, Microsoft denies the allegations in
16 paragraph 154.

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

20 156. Admitted.

21 157. Paragraph 157 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, Microsoft denies the allegations in paragraph 157.

24 158. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
25 of the allegations in paragraph 158 and therefore denies them.

26 159. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
27 of the allegations in paragraph 159 and therefore denies them.

28 160. Microsoft admits that the GNU General Public License (“GPL”) is a software

1 license. Microsoft lacks knowledge or information sufficient to form a belief as to the truth of
2 the remaining allegations in paragraph 160 and therefore denies them.

3 161. Paragraph 161 states conclusions of law and Plaintiffs' characterization of their
4 claims as to which no response is required. To the extent a response is nonetheless deemed
5 necessary, Microsoft denies the allegations in paragraph 161.

6 162. Microsoft admits that version 1 of the GPL is available at
7 <https://www.gnu.org/licenses/old-licenses/gpl-1.0.en.html> and includes the quoted language.
8 Paragraph 162 otherwise states conclusions of law and Plaintiffs' characterization of their claims
9 as to which no response is required. To the extent a response is nonetheless deemed necessary,
10 Microsoft denies the allegations in paragraph 162.

11 163. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
12 of the allegations in paragraph 163 and therefore denies them.

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

16 165. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
17 of the allegations in paragraph 165 and therefore denies them.

18 166. Admitted.

19 167. Admitted.

20 168. Microsoft admits that Linux, like Windows, is a personal computer operating
21 system. Microsoft lacks knowledge or information sufficient to form a belief as to the truth of
22 the remaining allegations in paragraph 168 and therefore denies them.

23 169. Denied.

24 170. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
25 of the allegations in paragraph 170 and therefore denies them.

26 171. Microsoft admits that the webpage available at
27 <http://www.catb.org/esr/halloween/halloween1.html> states "we must target a process rather than
28 a company." Microsoft lacks knowledge or information sufficient to form a belief as to the truth

1 of this webpage or the remaining allegations in paragraph 171 and therefore denies them.

2 172. Microsoft admits that the webpage available at [https://lwn.net/2001/0607/a/esr-](https://lwn.net/2001/0607/a/esr-big-lie.php3)
3 [big-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-
4 source software, you have to make the rest of your software open source.... Linux is a cancer that
5 attaches itself in an intellectual property sense to everything it touches.” Microsoft lacks
6 knowledge or information sufficient to form a belief as to the truth of this webpage or the
7 remaining allegations in paragraph 172 and therefore denies them.

8 173. Microsoft admits that it was a defendant in a case brought by the U.S. Department
9 of Justice. Microsoft admits that the quoted language is in a 2001 opinion penned by Judge
10 Thomas Penfield Jackson. Microsoft lacks knowledge or information sufficient to form a belief
11 as to the truth of the remaining allegations in paragraph 173 and therefore denies them.

12 174. Microsoft admits that a blog post titled “Open XML – The Vote in Sweden” was
13 published on August 30, 2007 by Jason Matusow. Microsoft denies the remaining allegations in
14 paragraph 174.

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

18 176. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
19 of the allegations in paragraph 176 and therefore denies them.

20 177. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
21 of the allegations in paragraph 177 and therefore denies them.

22 178. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
23 of the allegations in paragraph 178 and therefore denies them.

24 179. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
25 of the allegations in paragraph 179 and therefore denies them.

26 180. Admitted.

27 181. Admitted.

28 182. Microsoft admits that GitHub encouraged open-source developers to understand

1 and use open-source licenses for their works and that the GitHub interface allows for the
2 selection of several suggested licenses if a user so chooses. Microsoft denies that many public
3 repositories carry an open-source license. Most repositories do not. Microsoft lacks knowledge
4 or information sufficient to form a belief as to the truth of the remaining allegations in paragraph
5 182 and therefore denies them.

6 183. Admitted.

7 184. To the extent the allegations in this paragraph purport to refer to the contents of
8 open-source licenses, including the Suggested Licenses, the full texts of those licenses speak for
9 themselves. Microsoft lacks knowledge or information sufficient to admit or deny the remaining
10 allegations in paragraph 184, and on that basis denies them.

11 185. Microsoft admits that there are many public repositories on github.com that do not
12 carry a license. Microsoft admits that GitHub has encouraged awareness of open-source licenses
13 to its users. Microsoft admits that GitHub has never imposed a default license on public
14 repositories. Paragraph 185 otherwise states conclusions of law and Plaintiffs' characterization
15 of their claims as to which no response is required. To the extent a response is nonetheless
16 deemed necessary, except as expressly admitted, Microsoft denies the allegations in paragraph
17 185.

18 186. Admitted.

19 187. Microsoft admits that it acquired GitHub in October 2018 for \$7.5 billion in stock.
20 Microsoft admits that it adopted the mantra "Microsoft Loves Open Source." Except as
21 expressly admitted, Microsoft denies the allegations in paragraph 187.

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

25 189. Admitted.

26 190. The allegations of this paragraph are directed to OpenAI, and/or Microsoft lacks
27 knowledge or information sufficient to admit or deny the allegations of this paragraph about
28 OpenAI, and on that basis denies them.

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

4 192. Microsoft admits that an article titled “Elon Musk's Billion-Dollar AI Plan Is
5 About Far More Than Saving the World” by Cade Metz was published on December 15, 2015.
6 The remaining allegations of this paragraph are directed to OpenAI, and/or Microsoft lacks
7 knowledge or information sufficient to admit or deny the allegations of this paragraph about
8 OpenAI, and on that basis denies them.

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

12 194. Microsoft admits that, in 2019, Microsoft committed to invest \$1 billion in
13 OpenAI and it is a minority investor in OpenAI Global LLC. Microsoft further admits that there
14 were joint efforts between Microsoft and OpenAI to create supercomputer technologies suitable
15 for developing and operating LLMs. Microsoft admits that it built and operates the Azure
16 hosting platform, that it worked with OpenAI to design supercomputers suitable for training and
17 operating large language models as part of the Azure hosting platform, and that the Azure
18 hosting platform was used by OpenAI to train and operate one or more of its LLMs. Microsoft
19 denies the remaining allegations in paragraph 194.

20 195. Microsoft admits that as a public company, Microsoft’s quarterly results are a
21 matter of public record and speak for themselves.

22 196. Microsoft admits that it built and operates the Azure hosting platform, that it
23 worked with OpenAI to design supercomputers suitable for training and operating large
24 language models as part of the Azure hosting platform, and that the Azure hosting platform was
25 used by OpenAI to train and operate one or more of its LLMs. Microsoft further admits an
26 article titled “What to expect from OpenAI’s Codex API” by Ben Dickson was published on
27 August 16, 2021. Microsoft denies the remaining allegations in paragraph 196.

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

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

3 198. Admitted.

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

7 200. Admitted.

8 201. Denied.

9 202. Denied.

10 203. Denied.

11 **COUNT 1**
12 **VIOLATION OF THE DIGITAL MILLENNIUM COPYRIGHT ACT**
13 **17 U.S.C. §§ 1201–1205**
14 **(For Injunctive Relief)**
15 **(Against All Defendants)**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 236. Microsoft realleges and incorporates by reference its foregoing responses to the
27 preceding paragraphs as if fully set forth herein.
28

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

6 238. Paragraph 238 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, Microsoft denies the allegations in paragraph 238.

9 239. Paragraph 239 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, Microsoft denies the allegations in paragraph 239.

12 240. Paragraph 240 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, Microsoft denies the allegations in paragraph 240.

15 241. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
16 of the allegations in paragraph 241 and therefore denies them.

17 242. Microsoft lacks knowledge or information sufficient to form a belief as to the truth
18 of the allegations in paragraph 242 and therefore denies them.

19 243. Denied.

20 244. Denied.

21 245. Denied.

22 246. Denied.

23 247. Denied.

24 248. Denied.

25 249. Denied.

26 250. Denied.

27 251. Denied.

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COUNT 3
BREACH OF CONTRACT — SELLING LICENSED MATERIALS
IN VIOLATION OF GITHUB’S POLICIES
California Common Law
(Against GitHub)

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5 252. Microsoft realleges and incorporates by reference its foregoing responses to the
6 preceding paragraphs as if fully set forth herein.

7 253. Paragraph 253 states Plaintiffs’ characterization of their claims as to which no
8 response is required. To the extent a response is nonetheless deemed necessary, Microsoft
9 denies the allegations in paragraph 253.

10 254. Paragraph 254 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, Microsoft denies the allegations in paragraph 254.

13 255. Paragraph 255 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, Microsoft denies the allegations in paragraph 255.

16 256. Microsoft admits the contents of GitHub’s Privacy Statement and Terms of
17 Service.

18 257. Denied.

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

21 259. Denied.

22 260. Denied.

23 261. Denied.

24 262. Denied.

25 263. Microsoft denies that this action may be maintained as a class action under Rule
26 23 of the Federal Rules of Civil Procedure as alleged in the Second Amended Complaint.

27 Microsoft denies that Plaintiffs, each of them, and the proposed Class are entitled to any relief
28 whatsoever, including but not limited to the relief sought in the section of the Second Amended

1 Complaint titled “Demand for Judgment.” Furthermore, no response is required to sub-part (e)
2 because the Court denied that Plaintiffs are entitled to damages related to unjust enrichment or
3 punitive damages. Dkt. No. 253. To the extent that this section contains any allegations requiring
4 a response, Microsoft denies them.

5 264. Denied.

6 265. Denied.

7 266. Denied.

8 267. Denied.

9 **JURY TRIAL DEMANDED**

10 Microsoft hereby demands a trial by jury on all claims, defenses, and issues in this action
11 so triable.

12 * * *

13 **DEFENSES**

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

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

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

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SECOND DEFENSE
(No Contract Between Plaintiffs and Microsoft)

Plaintiffs' claims and the putative class members' claims fail, in whole or in part, because the Second Amended Complaint fails to allege a contract formed between Plaintiffs and Microsoft.

THIRD DEFENSE
(Conduct Permitted by Law)

Plaintiffs' claims and the putative class members' claims fail, in whole or in part, to the extent that Microsoft'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 Microsoft 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 Microsoft 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 Microsoft 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)

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

4 **NINTH DEFENSE**
5 **(Unavailability of Injunctive Relief)**

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

11 **TENTH DEFENSE**
12 **(Preemption)**

13 Plaintiffs' claims and the putative Class Members' claims are preempted, in whole or in
14 part, by the Copyright Act, 17 U.S.C. § 101 et seq.

15 **ELEVENTH DEFENSE**
16 **(Impracticability)**

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

19 **TWELFTH DEFENSE**
20 **(Lack of Consideration)**

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

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

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

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

RESERVATION OF ADDITIONAL DEFENSES

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

REQUEST FOR RELIEF

Therefore, Microsoft respectfully requests that this Court:

1. Enter judgment in Microsoft’s favor and against Plaintiffs;
2. Deny certification of any class;
3. Dismiss all claims by Plaintiffs with prejudice;
4. Award Microsoft its costs of suit;

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- 5. Award Microsoft its attorneys' fees to the extent permitted by law; and
- 6. Grant Microsoft such other and further relief as this Court deems just and proper.

Dated: July 22, 2024

Orrick, Herrington & Sutcliffe LLP

By: /s/ Annette L. Hurst

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