UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE OPENAI, INC., COPYRIGHT INFRINGEMENT LITIGATION This document relates to: No. 1:23-cv-08292 (SHS) (OTW) No. 1:23-cv-10211 (SHS) (OTW)	Case No. 25-md-3143-SHS-OTW Hon. Sidney H. Stein

CLASS PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO OPENAI'S OBJECTION TO DISCOVERY ORDER AT MDL ECF NO. 846

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

INTRODUCTION

In the summer of 2022, and after consultation with business personnel, in-house counsel, and its outside litigation counsel, OpenAI deleted everything it had downloaded from the pirate site Library Genesis ("LibGen"). This deletion included the destruction of two key datasets at issue in this litigation—Books1 and Books2—as well as the other pirated content OpenAI downloaded from LibGen. To hide the fact that it sourced these datasets from a known pirate site OpenAI publicly called these datasets Books1 and Books2, but internally it knew them as "LibGen1" and "LibGen2." These remain the only training datasets that, according to OpenAI, have *ever* been deleted.

From the start of this case, Class Plaintiffs sought to obtain a copy of these datasets and any other material OpenAI pirated from LibGen. In March 2024, OpenAI informed Plaintiffs that the pirated datasets had been destroyed. Class Plaintiffs have since sought to answer a simple question: Why?

At every turn, OpenAI has abused the attorney-client privilege to block Plaintiffs from exploring the full reasons that OpenAI obliterated contemporaneous evidence of copyright infringement from pirate sites—evidence that would show the full scale of OpenAI's infringement and that goes to the heart of OpenAI's defenses in this case. OpenAI has done so while selectively disclosing one seemingly innocent explanation for this improper conduct: it supposedly deleted the data "due to non-use." And OpenAI has completely changed its assertions of privilege over the reasons for deletion *five times* to manipulate the scope of discovery and seek favorable rulings from the Court. This gamesmanship, as Judge Wang found in her 28-page Opinion and Order, Dkt. 846 ("Order") more than justifies waiver here.

Judge Wang carefully analyzed both the record and the law to hold on three grounds that OpenAI waived privilege over the reasons it deleted the LibGen material. *First*, Judge Wang

found that OpenAI had expressly disclosed what it now claims was privileged information regarding the reasons for deletion. OpenAI then invoked privilege to avoid *any* discovery about those reasons, even instructing witnesses to not answer deposition questions concerning the circumstances of deletion. Such a selective and misleading presentation of evidence waives the privilege. *See id.* at 15–17, 22–24. *Second*, OpenAI took at least *five inconsistent positions* in the course of the twenty months of briefing, hearings, depositions, and discovery practice leading up to the Order. Courts regularly find waiver when a party makes its privilege claims a moving target, and this case should be no exception, as Judge Wang correctly decided. *See id.* at 1–9, 17. *Third*, it is well-established that a copyright defendant cannot advance a defense that it believed its infringement was above-board or in good faith while using privilege to prevent discovery into information central to its state of mind. That is exactly what OpenAI has done here, and as Judge Wang recognized, this litigation conduct constitutes "at issue" waiver under long-settled principles of fairness. *See id.* at 17–24.[1]

OpenAI asks this Court to reverse the Order based on arguments never raised to Judge Wang and on supposed facts that have no foundation in the record. As OpenAI would have it: (1) OpenAI did not reveal reasons for the deletion in letters to Plaintiffs' Counsel and the Court, Dkt. 926 ("Obj."), at 12; (2) OpenAI did not leave those letters untouched on the docket for 15 months even as the parties engaged in depositions, briefing, hearings, and discovery disputes regarding those reasons and even as that letter formed the backdrop for Plaintiffs' litigation strategy, *id.* at 16; (3) OpenAI was consistent that all reasons for the deletion are privileged, *id.* at 17–18; (4) OpenAI did not opportunistically weaponize privilege to prevent discovery into

[1] The Order also held that a document (Log No. 18) containing internal hyperlinks to materials pirated from LibGen is not privileged. Order 12. OpenAI does not object to this holding in its Rule 72(a) objection, and thus any such challenge is waived.

what it concedes now were non-privileged facts, *id.* at 14; and (5) OpenAI is not arguing its state of mind, *id.* at 20–21. But *none* of this is correct, and even on OpenAI's current view—that "all reasons" for the deletion are privileged—OpenAI committed textbook waiver when it *voluntarily disclosed* that these datasets were deleted "due to non-use" and left those representations untouched for 15 months.

Finally, even if OpenAI's objections to waiver had merit, the Court should affirm on the alternative ground that the crime-fraud exception applies because OpenAI deleted pirated material both to cover-up past piracy and to spoliate evidence.

BACKGROUND

On May 28, 2020, OpenAI published the paper "Language Models Are Few-Shot Learners," detailing its newest and most powerful LLM called "GPT-3." *See* Brown et al., https://arxiv.org/pdf/2005.14165. In that paper, OpenAI disclosed that the training data for GPT-3 included two huge datasets of books which the paper labeled as "Books1" and "Books2" and which were described generically as being "internet-based books corpora." *Id.* p.8. Far from being generically sourced from "the internet," Books1 and Books2 were comprised entirely of materials OpenAI downloaded from the notorious pirate site LibGen—a site repeatedly ordered shutdown due to copyright infringement by courts in this district. *See* Order 1 (citing *Elsevier Inc. v. Sci-Hub*, 2017 WL 3868800 (S.D.N.Y. 2017)). OpenAI labeled these sets "Books1" and "Books2" in public, but internally they were known by names reflecting their pirated origins: LibGen1 and LibGen2. Order 1-2. OpenAI went on to use many different versions of LibGen materials to train GPT-3 and 3.5 models, *see, e.g., id.* at 7, including the model which powered ChatGPT at launch.

Shortly after filing suit, Plaintiffs sought production of these datasets and the identities of the employees who created them. In response, OpenAI sent a letter to Plaintiffs in March 2024

stating that, in 2022, they had deleted the datasets. *Id.* at 2-3. These are the only training datasets ever deleted by OpenAI. *Id.* at 2. OpenAI's letter disclosed that the datasets were deleted "due to their non-use." *Id.* at 2-3; Dkt. 413-6 (March letter). OpenAI repeated this reason to the Court in a discovery brief filed in April 2024. *See* Order 3, Dkt. 413-7 at 3. Subsequent discovery has revealed that the datasets were deleted with the involvement of in-house and outside litigation counsel, and that the datasets were, in fact, in use at the time of the deletion. *See supra* § A.1. But OpenAI has inconsistently and opportunistically attempted to assert privilege over *all* reasons for the deletion, used those assertions to obstruct discovery into the facts surrounding deletion, and continued to argue that its behavior with respect to the LibGen material was innocuous.

A. OpenAI Downloads and Uses Pirated Books from LibGen and then Deleted the Evidence

On at least three occasions uncovered so far by Plaintiffs, OpenAI downloaded pirated copies of books from LibGen to create the deleted datasets at issue in this litigation.

First, OpenAI employee [redacted] downloaded a huge trove of pirated material from LibGen in 2018. Order 1. He may have attempted to download [redacted] Some portion of this material became the dataset known as "Books1," but which, internally, was known as "LibGen1." Order 1, Dkt. 479 at 1-2. While there were many versions of this dataset at OpenAI, one version was used to train the "GPT-3" models. Dkt. 479 at 2. And a separate, distinct version, was used to train the "GPT-3.5" models. *Id.*

Second, around September 2019, OpenAI employee [redacted]

Third, in October 2019, OpenAI employee Benjamin Mann [redacted] a huge quantity of books from LibGen. Dkt. 479 at 1. Some portion of this material became the dataset known externally as "Books2" but which, internally, was called "LibGen2." *See* Order 1-2. As with "LibGen1," there were several versions of "LibGen2," with one version used to train the GPT-3 models and a different version used to train GPT-3.5 models.[2] *Id.* at 2-3.

During the course of this piracy, OpenAI submitted a comment to the United States Patent and Trademark Office stating that, due to the lack of fair use case law addressing AI training, it faced "substantial legal uncertainty" regarding its conduct. *See* Dkt. 479 at 2-3.

Three years later, with the involvement of in-house and outside litigation counsel, OpenAI deleted LibGen1, LibGen2, and all materials pirated from LibGen at OpenAI. As of the date of this motion, OpenAI has never recovered (1) the versions of LibGen1 or LibGen2 used to train the GPT-3.5 models, (2) the full set of books and files pirated from LibGen, or (3) numerous other versions of the LibGen datasets used at OpenAI for a variety of purposes.

B. OpenAI Discloses One Reason for the Deletion to the Court and Class Plaintiffs then Changes Its Position Regarding Whether Such Reasons Are "Privileged" at Least Five Times

Class Plaintiffs first learned that the LibGen materials were deleted in March 2024 via a letter from OpenAI's counsel that stated the datasets had been deleted "due to their non-use." Order 2-3. That letter was sent in response to Class Plaintiffs efforts—nearly from the moment they filed suit—to secure production of the datasets and identification of the OpenAI employees

[redacted]

who created them. The same counsel who signed this letter [redacted] OpenAI then repeated the statement that these datasets were deleted "due to non-use" in a filing to the Court in April 2024 regarding a discovery dispute. Order 3.

Plaintiffs sought to ask about the reason for the deletion at a court-ordered 30(b)(6) deposition in January 2025, but OpenAI changed course and refused to permit its witness to answer on the grounds that all such reasons are privileged. *Id.* at 4-5. This touched off a wave of correspondence, conferrals, briefing, arguments, hearings, and court orders over the course of which OpenAI adopted at least five mutually inconsistent positions.

First, in spring 2024 OpenAI disclosed a reason—"non-use"—for the deletion of this material in letters to both Plaintiffs and the Court. *Id.* at 2-4.

Second, when Class Plaintiffs tried to ask about the reasons for the deletion, OpenAI claimed that all reasons for the deletion were privileged—first at a court-ordered 30(b)(6) deposition in January 2025 and later in February 2025 when Class Plaintiffs moved the Court for an order that OpenAI had waived privilege over these reasons. *See id.* at 4-5.

Third, at the May 2025 hearing on this issue, OpenAI changed its position to argue instead that it was "not asserting privilege and [has] not blocked plaintiffs from exploring the question of [non-use] of the [datasets] to be [the] cause of the deletions." *Id.* at 5. The Court specifically cited to "OpenAI's representations on the record" when ordering a 30(b)(6) deposition on deletion and denying Plaintiffs' motion without prejudice. *Id.*

Fourth, in June 2025, three days after Class Plaintiffs served their deposition notice—and nearly *15 months* after the letters were first filed stating that the data had been deleted "due to non-use"—OpenAI purported to withdraw the letters. *Id.* at 6. In OpenAI's objections to

Plaintiffs' notice, OpenAI adopted another new position, claiming now that it would not "advance any non-privileged reason for the deletion" of this material "in connection with this litigation." *Id.* At the deposition in July 2025, OpenAI prevented its witness from answering yes-or-no questions regarding whether any *non-privileged* facts existed about the reasons for the deletion of LibGen1 and LibGen2. Order 6-7, 15 n.14, 22 n.22.

Fifth, in July 2025 shortly after the deposition, OpenAI changed tack again and claimed that there were no "non-privileged reasons for the deletion" and that all such reasons were privileged. *Id.* at 7. This, at least for now, appears to be OpenAI's position.

In short, OpenAI's conduct during the twenty-month period from disclosure of "non-use" to the Order included multiple misleading and inconsistent representations regarding the "reasons" for the deletion of the pirated material and whether those reasons were privileged. *See Id.* at 2-9. These shifting positions substantially frustrated discovery and Plaintiffs' efforts to determine and the full scope of infringement.

C. The Order

Following the July 2025 deposition, Class Plaintiffs renewed their February 2025 waiver motion on the grounds that OpenAI had waived privilege through its selective disclosures and inconsistent privilege claims, and by advancing arguments that put OpenAI's state of mind at-issue. *Id.* at 8. Class Plaintiffs also sought a ruling that the crime-fraud exception applied to these materials. *See id.* at 8, Dkt. 413 at 4-5, Dkt. 479 at 7-8.

The Order extensively analyzed the record of OpenAI's inconsistent privilege claims, disclosures, and representations to the Court and found that waiver was justified due to (1) OpenAI's disclosure of one reason—"non-use"—for the deletion of the LibGen material, (2) OpenAI's shifting and selective invocations of privilege over the reasons for deletion, and (3) OpenAI's intent to oppose Plaintiffs' claims on the basis that it acted in good faith. Order 13–24.

As a result, the Order directed OpenAI to log and produce "all [] written communications with in-house counsel in 2022 regarding the reasons for the deletion of (a) the Books1 and Books2 datasets and (b) all internal references to LibGen that OpenAI has redacted or withheld on the basis of attorney-client privilege" and make the in-house counsel involved with the deletion available for 2 hour depositions. *Id.* at 27.

Having decided that OpenAI had waived the privilege, the Order declined to also apply the crime-fraud exception to OpenAI's conduct. The Order assumed that because the deletion of the material took place after the pirated acquisition and use, the deletion could not be "in furtherance" of the underlying crime. *Id.* at 24–26. The Order also concluded that there were as-yet insufficient grounds to apply the exception based on pre-litigation misconduct. *Id.* at 27.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 72(a), non-dispositive discovery orders by a magistrate judge can be set aside only where "clearly erroneous or . . . contrary to law." "It is well settled that a magistrate judge's resolution of a non-dispositive matter should be afforded substantial deference." *Rowe Plastic Surgery of N.J., L.L.C. v. Aetna Life Ins. Co.*, 2025 WL 2218097, at *2 (S.D.N.Y. Aug. 5, 2025) (Stein, J.) (citation and quotation marks omitted). Because "[m]agistrate judges have broad discretion in resolving such nondispositive matters," any "party seeking to overturn a discovery order bears a heavy burden." *V.S. v. Muhammad*, 2009 WL 936711, at *1 (E.D.N.Y. Apr. 3, 2009).

ARGUMENT

Judge Wang correctly construed both the record and the law, and did not clearly err, in finding waiver as a factual matter. Judge Wang made a finding that OpenAI had selectively disclosed one reason for deleting the datasets, *see, e.g.*, Order 16–17, 22–23; Judge Wang made a finding that OpenAI turned its privilege claims into a moving target through a series of about-

faces, *id.* at 16–17; and Judge Wang made a finding that OpenAI had wielded privileged as a sword to prevent discovery into its state of mind while putting its good faith at issue, *id.* at 19–20, 21–24. OpenAI thus failed to meet its burden to show that its privilege had not been waived. *See EEOC v. Episcopal Diocese of Long Island*, 2009 WL 10702666, at *7 (E.D.N.Y. Dec. 7, 2009). And OpenAI now fails to meet its heavy burden to show that *any* of those findings, which are independent bases for waiver, were clearly erroneous.

In the alternative, the crime-fraud exception applies. OpenAI deleted the LibGen material to conceal criminal copyright infringement, and the deletion was an act of spoliation, both of which justify applying the crime-fraud exception here.

A. OpenAI Waived Privilege Through Selective and Partial Disclosure of Material It Claims Is Privileged

Judge Wang did not clearly err in finding that OpenAI had waived privilege via selective disclosure of privileged information.

Because the attorney-client privilege "cannot at once be used as a shield and a sword," "[a] defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes." *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). The privilege may thus be impliedly waived where a defendant makes "selective disclosure during litigation of otherwise privileged information." *In re von Bulow*, 828 F.2d 94, 101 (2d Cir. 1987).

Judge Wang correctly decided, based on a straightforward application of these basic principles, that OpenAI waived the privilege by selectively disclosing one purportedly privileged reason for deleting the data.[3] By OpenAI's telling, it has consistently asserted that "*all* reasons"

[3] The Order held that OpenAI waived privilege *even assuming* that any privilege applies; there is no need for the Court to make a *de novo* determination in the first instance as OpenAI requests.

for the deletion of LibGen material are privileged. But, if true, then OpenAI *deliberately revealed* one "reason" for the deletion of this material to both Class Plaintiffs and the Court when it stated that the LibGen material was deleted "due to non-use." OpenAI left those apparently "privileged" statements untouched on the public docket for 15 months while, at the same time, using privilege to obstruct Class Plaintiffs' inquiry into "non-use" and any other reasons for the deletion of the material. In short, if all the reasons for deletion are privileged, then OpenAI necessarily waived privilege via selective disclosure when it publicly and deliberately disclosed one of those reasons ("non-use"). *See* Order 16–17, 23.

None of OpenAI's arguments to the contrary has merit. OpenAI's principal response is that its multiple statements that the "datasets were deleted due to non-use" do not actually mean that the datasets were deleted "*due to* non-use." OpenAI says that the phrase "due to non-use" wasn't a *reason* for deletion, but merely "provided the occasion for discussions with in-house counsel" regarding deletion. Obj. 2, 13. Whatever that means, this argument was never raised with Judge Wang and is not before this court on a Rule 72(a) objection. *See In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, 336 F.R.D. 400, 404 (S.D.N.Y. 2020) (collecting cases). Regardless, OpenAI's new theory defies common sense, basic grammar, and the record. In no way does OpenAI's story reflect how OpenAI has actually invoked privilege here. *See supra* § B. OpenAI's fallback position that this selective disclosure did not constitute waiver under Federal Rule of Evidence 502 is similarly flawed. OpenAI never raised Rule 502 to Judge Wang, but even if it had, that standard is easily met here as well.

Obj. 10. Even so, OpenAI's privilege claim is baseless. *See Complex Sys., Inc. v. ABN AMRO Bank N.V.*, 279 F.R.D. 140, 150 (S.D.N.Y. 2011) *(*"[T]he business aspects of [a] decision are not protected simply because legal considerations are also involved." (citation omitted)); *accord* Order 15-16 & n.14.

1. "Due to Non-Use" Means "Due to Non-Use"

The Order correctly found that OpenAI selectively disclosed one reason for destroying the data by asserting that the materials were deleted "due to non-use." As any dictionary will show, "due to" means "because of." *See* Order 15–16 n.14 (citing Am. Heritage Coll. Dictionary (5th Ed. 2022)). OpenAI asks this Court to hold that what the words mean is "beside the point" because what OpenAI really meant was something it never actually said: that "[t]he non-use of Books1 and Books2 provided the occasion for discussions with in-house counsel about whether OpenAI should remove the datasets." Obj. 13. But OpenAI had multiple opportunities to clarify what it meant over the *15 months* of briefing, hearings, and depositions prior to OpenAI's attempted withdrawal of the letters. Each time, OpenAI insisted either that non-use *was* a reason for the deletion of this material which Plaintiffs could investigate, or that all such reasons (including non-use) were privileged and could not be inquired about. *See* Order 4-8. Even before Judge Wang, OpenAI did not raise this incoherent "occasion" theory, and it cannot now seek to reverse the Order on a ground never presented below. *Keurig*, 336 F.R.D. at 404.

This Court need go no further than the Order: OpenAI cannot show that Judge Wang erred in any way, much less clearly erred, by understanding the phrase "due to non-use" as having its ordinary meaning. As such, OpenAI selectively disclosed what it now claims was privileged—a reason for the deletion of the LibGen material—and waiver was warranted.[4]

OpenAI insists that Judge Wang somehow ignored the context of its representations regarding "non-use," Obj. 12, but Judge Wang considered these statements in light of the record that developed for the 20 months prior to the Order, and made a factual finding that OpenAI had

[4] OpenAI does not (and cannot) explain why an occasion for a decision is not a reason for the decision. And because OpenAI contends that all the reasons for deleting the data were privileged, non-use as an occasion for deleting the data would implicate selective disclosure and waiver, too.

disclosed a reason for deleting the materials. Far from unrelated, the exchange which prompted OpenAI to reveal a reason for the deletion arose out of Plaintiffs' attempts to secure production of the datasets and identification of the employees who compiled them. And the very first letter to Plaintiffs' counsel stating that the sets were deleted "due to their non-use" intended to communicate the reason that these materials would not be produced in the case. *See* Dkt. 413-6. That letter was sent and signed [redacted] [5] The context of the letters thus confirms that OpenAI intended to disclose a reason for deleting these datasets, as Judge Wang found—one it believed would secure it an advantage in this litigation.

OpenAI's new theory—that non-use merely occasioned discussions about deleting the data—contradicts the record because the data *was* being used at the time of the decision. OpenAI notably does not cite any evidence supporting its "occasioned" theory. That is because the facts so far show that the LibGen material *was in-use* at OpenAI at the time of deletion, [redacted]

[5] OpenAI attempts to spin the statements in the letters as reflecting what it implies is a common practice, i.e. simply "delet[ing] two datasets that had fallen out of use." Obj. 13. But, in context, this material comprises the *only training datasets ever deleted by OpenAI*.

[redacted] OpenAI's concerns regarding [redacted] a less-flattering "reason" for the deletion—were the occasion for the discussion about deleting the materials, not non-use. Describing the deletion as "due to non-use" is at best an incomplete explanation designed to depict OpenAI's conduct as unrelated to the data's pirated origins or OpenAI's anticipation of litigation. That incomplete factual picture painted by OpenAI's representations is precisely why further discovery into the validity of "non-use" as a "reason" and OpenAI's other, as yet undisclosed, reasons for the deletion is justified here.

Finally, OpenAI suggests that Judge Wang erred in concluding that OpenAI must view the fact of non-use itself as privileged, Obj. 14, but this argument misconstrues the Order, is irrelevant to the selective disclosure analysis, and again contradicts the record. OpenAI states that "Judge Wang's footnote also suggested—without record citation—that OpenAI must view 'non-use' as privileged because it had 'refus[ed] to testify about 'non-use' . . . based on its potential to waive privilege' and used 'privilege to block any inquiry into 'non-use…..'" Obj. 19 (quoting Order 15 n.14). But OpenAI conveniently omits the key phrases: that "OpenAI's steadfast refusal to testify about 'non-use' *as a reason*" and "OpenAI's wielding of attorney-client privilege to block any inquiry into 'non-use' clearly suggests that OpenAI considers it to

be a privileged 'reason,' regardless of whether 'reasons' as a category can even be privileged." Order 15–16 n.14 (emphasis added).

Nor does OpenAI address the portions of the Order which explain how counsel for OpenAI instructed a witness not to answer whether "non-privileged facts regarding the reasons . . . OpenAI deleted the Books1 and Books2 datasets" *even existed*. *See* Order 22–23 n.22. Faced with that reality, OpenAI can only assert that—when it prevented its witness from answering direct questions regarding the facts surrounding the deletion—it was "careful[ly] protect[ing] . . . its privilege." Obj. 14. OpenAI cites no authority permitting a party to "protect" its privilege in this fashion. Nor can a party under court order to produce a witness for a 30(b)(6) deposition on a given topic unilaterally condition that testimony on an agreement that any such testimony will not be used to make certain arguments. It was incumbent upon OpenAI to seek a protective order if it wanted such a restriction, *see* Fed. R. Civ. P. 26(c)(1), but it did not. Judge Wang was therefore justified in concluding that OpenAI must view the non-use *rationale* for deletion as privileged because it refused to permit its witness to testify about non-use "*as a reason*" for the deletion. Order 16 n.14. This finding about OpenAI's conduct is nowhere near clear error.

In any event, whether OpenAI has inconsistently allowed discovery about when the LibGen materials were or were not used is immaterial to whether OpenAI selectively disclosed one purportedly privileged justification for deleting the data to engender an impression that its conduct was above-board. *See supra* § A. Moreover, OpenAI's claim that Plaintiffs have suffered no prejudice because they obtained some discovery into whether the datasets were used, Obj. 14, is simply an admission that OpenAI *has been inconsistent* regarding its privilege invocations and instructions regarding the scope of its privilege claims. The salient point warranting waiver—which the Order recognized and which OpenAI attempts to ignore—is that

this inconsistency has resulted in an incomplete picture regarding what actually happened with these datasets and why.

2. OpenAI Never Raised Federal Rule of Evidence 502 Below and It Supports Waiver Here

OpenAI's final refuge is to claim that, even if it had disclosed privileged material in its letters, Rule 502 prevents finding waiver.

At the outset, OpenAI did not even cite Rule 502 in its briefing before Judge Wang, *cf.* Dkt. 368 (23-cv-8292), Dkt. 381, Dkt. 505, Dkt. 615 (OpenAI's briefing on this issue)—and it cannot now seek to reverse the Order on a ground never presented below. *Keurig*, 336 F.R.D. at 404. Even applying Rule 502, OpenAI's conduct justifies a finding of waiver.

OpenAI argues that Rule 502(b) applies because its disclosure was "inadvertent." Obj. 15. Not so. OpenAI purposefully and repeatedly represented that the datasets were deleted due to non-use. And OpenAI did not "promptly [take] reasonable steps to rectify the error." *Id.* (citation omitted). Instead, as the Order recognized, OpenAI left these disclosures on the docket for 15 months, including through multiple sets of conferrals, correspondence, briefing, and hearings on the issue. Order 2– 9, 16.

OpenAI claims that it submitted "revised versions of the letters as soon as OpenAI realized that the plaintiffs misread them as disclosing a privileged reason for deletion." Obj. 16. This is verifiably false. OpenAI did not retract the letters until June 13, 2025. Order 6. But it was on notice of Plaintiffs position long before then. For example, in a March 2025 email, Plaintiffs' counsel wrote to OpenAI: "OpenAI made an affirmative factual representation as to why these datasets were deleted in ECF 145 and Ex. D to ECF 143. Namely that they were deleted due to 'non-use.'" Dkt. 368-2 at 8 (email from Smyser to Goldberg). As the Order recounts, OpenAI did not act "as soon as" it received this correspondence, instead waiting months before belatedly

attempting to withdraw the letters. Order 5-6. In that intervening time period, the parties fiercely litigated the issue of whether the letters waived privilege, and OpenAI represented to the Court that it has "not blocked plaintffs from exploring the question of [non-use] of the [dataset] to be [the] cause of the deletions." Order 5 (alterations in original).

OpenAI's decision to retract the letters was, in reality, nothing more than a change in strategy. After a hearing on Plaintiffs' initial motion at which OpenAI told the Court that it was not claiming privilege over "non-use" as the "cause" of the deletions, the Court ordered a 30(b)(6) deposition on the deletion based on that representation, Plaintiffs served their notice for this deposition, and then, and only then, did OpenAI attempt to withdraw the letters. Order 5–6. Waiting until it had already lost a dispute on the issue is not "promptly" taking steps to "rectify the error." Obj. 15.

Finally, even applying Rule 502, OpenAI *has* obtained a tactical advantage by shaping the record around a supposedly innocent "non-use" justification for deleting the data. OpenAI disclosed that non-use was one cause for the deletion of pirated material and then foreclosed any further inquiry into that or any other rationale. This is a clear example of a party manipulating privilege to advance "a selective and misleading presentation of evidence to the disadvantage of the adversary." Fed. R. Evid. 502(a) note. The Order describes how OpenAI has invoked privilege to prevent inquiry not only into the putatively privileged reasons for deletion, but *even* into facts which it admits are not privileged. Order 15 n.14, 23 n.22. Moreover, OpenAI has not disavowed that it will argue that its good faith in dealing with this material prevents a finding of willfulness. OpenAI insists that because it is not raising an "innocent infringement" affirmative defense, it has not argued good faith. Obj. 21–22. But governing waiver law is clear that, whether or not a party explicitly asserts an affirmative defense of good faith innocent

infringement," waiver still applies where a party will argue its state of mind defeats a claim. *See Okla. Firefighters Pension & Ret. Sys. v. Musk,* 2025 WL 2982003, at *4–6 (S.D.N.Y. Oct. 23, 2025); *Arista Recs. LLC v. Lime Grp. LLC*, 2011 WL 1642434, at *1–3 (S.D.N.Y. Apr. 20, 2011). OpenAI's abuse of the privilege is thus fundamentally unfair and textbook waiver under Rule 502(a).

B. OpenAI Waived Privilege Through Shifting And Inconsistent Privilege Invocations

In addition, the Order properly found that OpenAI waived privilege through its inconsistent and opportunistic invocations of privilege. That finding is based on careful analysis of a factual record developed over more than 20 months of litigation which could only be set aside if "clearly erroneous." OpenAI cannot show any error, let alone clear error, and the Order should therefore be affirmed on this independent basis.

"Neither the Federal Rules of Civil Procedure nor the Local Civil Rules permit any party to make its assertions of privilege a moving target." *S.E.C. v. Yorkville Advisors, LLC*, 300 F.R.D. 152, 166 (S.D.N.Y. 2014). Courts in this District have accordingly found waiver of untimely or inconsistent privilege claims. *See In re DiDi Glob. Inc. Sec. Litig.*, 2025 WL 1735412, at *7 & n.59 (S.D.N.Y. June 23, 2025) (collecting cases). And waiver is especially warranted where the record demonstrates that a party opportunistically uses privilege assertions to "engage[] in a pattern of delay and [to] obscure[] genuine issues related to discovery." *Digital-Vending Servs. Int'l, LLC v. Univ. of Phoenix Inc.*, 2010 WL 11450510, at *3 (E.D. Va. Apr. 22, 2010).

The majority of courts in the Southern District strictly require waiver where a party later attempts to assert a privilege which it initially failed to claim. *See, e.g., Yorkville Advisors,* 300 F.R.D. at 166–68 & n.7; *In re Honeywell Int'l, Inc. Sec. Litig.*, 230 F.R.D. 293, 299 (S.D.N.Y.

2003). A minority of courts look to "the nature of the violation, its willfulness or cavalier disregard for the rule's requirements, and the harm which results to other parties." *Honeywell*, 230 F.R.D. at 299 (quoting *AFP Imaging Corp v. Philips Medizin Sys.*, 1993 WL 541194, at *3 (S.D.N.Y. Dec. 28, 1993)).

Judge Wang applied these straightforward rules to the record of inconsistencies laid out in the Order. *See* Order 1–9, 16–17. That record shows that OpenAI has changed its privilege claims regarding the reasons for deletion at least five times. OpenAI has adopted mutually inconsistent positions in correspondence with Plaintiffs' counsel, in filings on the docket, in response to direct questions by the Court, and in depositions. So what the record shows is precisely what the Order found: that OpenAI has been inconsistent and opportunistic in its privilege assertions at every possible turn. Under any conceivable standard, these constantly shifting privilege claims constitute waiver.

1. The Order Correctly Found That OpenAI Had Shifted Its Position Regarding Discovery Into "Facts" Versus "Reasons"

Against the record of inconsistency laid out in the Order, *see* Order 1– 9, OpenAI asks this Court to ignore what OpenAI actually did and said before Judge Wang, and instead find that it has asserted from the start that all reasons for the deletion of the LibGen material are privileged. OpenAI's briefing implausibly claims that it has been consistent because Judge Wang overlooked the distinction between "the fact of non-use and OpenAI's privileged reasons for deletion." Obj. 18 (emphases omitted). That is incorrect.

The premise of OpenAI's theory is that it has permitted unrestricted discovery into "facts" while preventing inquiry into privileged "reasons." *Id.* OpenAI's sole factual basis for its claim is a statement by its counsel at the May 27, 2025 discovery hearing that OpenAI had "not assert[ed] privilege . . . [or] blocked plaintiffs from exploring the question of nonuse" as a factual

matter. Obj. 17. But, as rendered in OpenAI's brief, this quotation badly mischaracterizes the actual exchange:

> THE COURT: Let's take it one by one, because that actually -- why are you asserting privilege over [non-use], or are you not?
> MR. SUN: We are not asserting privilege and we have not blocked plaintiffs from exploring the question of nonuse of the data set *to be [the] cause of the deletions.*
> Dkt. 128-1 at p. 71:1-6.

OpenAI's counsel thus clearly—and in a response to a direct question from Judge Wang—stated that it was not asserting privilege over and would not prevent discovery into non-use as a "cause" for the deletion of these datasets. That statement cannot be squared with OpenAI's claim that "all reasons" are privileged and that OpenAI has only ever permitted discovery into the "facts" regarding non-use.

OpenAI has not even consistently allowed for discovery into the fact of non-use. As explained above, OpenAI instructed a witness not to answer whether "non-privileged facts regarding the reasons . . . OpenAI deleted the Books1 and Books2 datasets" *even existed*. *See* Order 22 n.22. And OpenAI did so *after* representing to the Court that it would permit discovery into "the question of nonuse of the data set." Dkt. 128-1 at p. 71:1-6. OpenAI is trying to have it both ways: claiming it has been consistent in permitting discovery into purportedly non-privileged "facts" while asking the Court to ignore that it instructed witnesses not to answer questions regarding non-privileged facts—all after representing to the Court that those questions were fair game, *see*, *e.g.*, Order 5. This "heads I win, tails you lose" ploy is an abuse of the privilege and, as courts in this district have repeatedly found, results in waiver. *See*, *e.g.*, *Yorkville Advisors*, 300 F.R.D. at 166.

2. The Order Correctly Found That OpenAI's Opportunistic and Shifting Privilege Invocations Met The Standard For Waiver

OpenAI's last fall back is to claim that, even if it was inconsistent, its shifting privilege invocations do not meet the legal standard for waiver.

First, OpenAI never raised this argument to Judge Wang—instead preferring only to argue that it had always been consistent—and it is thus not before the Court on review. *Keurig*, 336 F.R.D. at 404

Second, even if the Court were to consider this argument, OpenAI's conduct easily satisfies the relevant standards. The majority of courts in this district strictly apply waiver where a party untimely attempts to modify its privilege assertions, a condition which the Order correctly found OpenAI's conduct easily satisfies here.

OpenAI argues that under *In re Honeywell Int'l, Inc. Sec. Litig.*, 230 F.R.D. 293 (S.D.N.Y. 2003) only "willful" or "cavalier" behavior waives the privilege, and that its conduct does not meet that bar. Obj. 3, 17. But even applying that minority approach, OpenAI waived the privilege. In *Honeywell,* the Court found waiver of privilege over the challenged materials where the parties "waited until after they briefed the issues" to amend their privilege log. 230 F.R.D. at 299. The Court held that such "practice[s] . . . promote[] the kind of gamesmanship that courts discourage in discovery." *Id.* at 299–300. As detailed above, OpenAI's conduct far outstrips the gamesmanship in *Honeywell*. OpenAI shifted its position on privilege not once but repeatedly. Those shifts took place before and (as in *Honeywell*) after briefing, before and after depositions, and even before and after discovery hearings at which OpenAI *responded to direct questions from Judge Wang regarding its position*. *Compare* Order 5, *with id.* at 8; *see also id.* at 14–15. That is precisely the sort of gamesmanship which courts do not permit.

C. OpenAI Waived Privilege By Putting Its State of Mind At Issue

Finally, as a third independent basis to affirm the Order, Judge Wang correctly held that OpenAI waived the privileged by simultaneously putting its good faith at issue while asserting privilege over evidence central to its state of mind. Order 17–23

Courts in the Second Circuit "routinely" find waiver where, as here, a party "asserts that it acted in good faith." *Okla. Firefighters*, 2025 WL 2982003, at *4; *see also, e.g., id.* (collecting cases). That simple rule controls whether or not good faith is an affirmative defense or, instead, is asserted to "defeat[]" an element of the plaintiff's case. *Id.* at *2; *see also id.* at *4–6. In other words, so-called "at-issue" waiver applies regardless of whether a party offers an affirmative defense which turns on its state of mind (or advice of counsel), and regardless whether the party "intends to rely on advice given by counsel in aid of its defense." *Id.* at *2; *see also id.* at *4–6.

Applying these rules, Judge Wang correctly held that "OpenAI has put its state of mind at issue, and OpenAI may not selectively use attorney-client privilege to restrict Class Plaintiffs' inquiry into evidence concerning OpenAI's purported good faith." Order 22 (emphasis omitted). Throughout this litigation, OpenAI has consistently maintained that it acted appropriately and with due regard to the rights of copyright holders when it pirated their works and used them to build a business worth—at last report—half a trillion dollars. Plaintiffs, unsurprisingly, disagree and intend to argue as much to a jury. But OpenAI is using privilege to block discovery into the reasons why it destroyed evidence of copyright infringement—which of course bears on whether OpenAI had knowledge that its infringing conduct was wrongful, or acted with respect to the pirated materials in bad faith—while selectively disclosing what it would contend is an entirely benign reason for deleting the data. Judge Wang's conclusion that waiver was justified "as a matter of fairness to prevent the selective and potentially misleading presentation of evidence"

reflects the consistent approach of courts in this district. Order 23; *see*, *e.g.*, *Okla. Firefighters*, 2025 WL 2982003, at *6; *Arista Recs.*, 2011 WL 1642434, at *3.

To avoid that result, OpenAI distorts the requirements for waiver in this Circuit, arguing that it turns on whether a party relies on privileged advice to make a claim or defense. Obj. 20. But that rule is inconsistent with decades of precedent and would allow defendants such as OpenAI free reign to wield privilege as a sword.

1. OpenAI Misconstrues the Law of At-Issue Waiver

As Judge Wang recognized, there is no reason here to depart from how other courts in this Circuit have resolved privilege waiver issues in the copyright context. The case most directly on-point is *Arista Records,* 2011 WL 1642434. In *Arista Records*, the Court considered whether the defendants—who faced a damages trial after having been found liable for copyright infringement related to their operation of the filesharing service LimeWire—would be permitted to assert a "purported good faith belief in the lawfulness of their conduct" while "repeatedly invok[ing] privilege to block Plaintiffs' inquiry into any facts that may have served as the basis for Defendants' alleged good faith belief in the lawfulness of their conduct." *Arista Recs.*, 2011 WL 1642434, at *1. Like OpenAI, the *Arista Records* defendants argued that they would be able to divorce any trial testimony regarding their beliefs about their conduct from advice received from counsel and would "not defend against assertions that they acted willfully . . . by testifying that they relied upon . . . the advice of counsel, or that their conduct was based on the advice of lawyers." *Id.* at *2. The court rejected this argument, finding that the defendants, by asserting their belief in the propriety of their conduct, placed the advice they had received from counsel regarding that conduct at-issue. *Id.* at *2–3. Because discovery had closed, the court precluded the defendants from "offering evidence or argument at trial regarding their purported belief in the lawfulness of their conduct." *Id.*

As the *Arista Records* court recognized, even if a copyright defendant *could* separate its non-privileged beliefs regarding the legality of its conduct from those beliefs informed by privileged material, "[p]laintiffs still would be entitled to know if [the defendant] ignored counsel's advice." *Id.* (citation omitted). As such, "a party 'cannot be permitted, on the one hand, to argue that it acted in good faith and without an improper motive and then, on the other hand to deny . . . access to the advice given by counsel where that advice . . . played a substantial and significant role in formulating actions taken by [the defendant].'" *Id.* (quoting *Pereira v. United Jersey Bank,* 1997 WL 773716, at *6 (S.D.N.Y. Dec. 11, 1997)).

OpenAI principally seeks to distinguish *Arista Records* on the grounds that, in its view, *Arista Records* only concerned the defendants' argument "that they should *pay reduced damages* because they 'had a good faith belief with respect to . . . the lawfulness of their conduct in operating LimeWire.'" Obj. 24 (emphasis added) (quoting *Arista Recs.*, 2011 WL 1642434 at *1). Because OpenAI now states it will not argue for reduced damages by asserting an innocent infringement defense, it argues *Arista Records* does not apply. Obj. 25.

But, as noted above, *Arista Records* was not narrowly concerned with a *reduction* in damages due to an innocent infringement defense. Instead it dealt with the defendants' professed intention to present their belief in the propriety of their conduct writ large to defend "against assertions that they acted willfully." 2011 WL 1642434 at *2. Such a belief is, of course, relevant to *both* a claim of innocent infringement and an assertion that the defendant did not act willfully under 17 U.S.C. 504(c). Nothing in *Arista Records* indicates any intent to cabin its holding to the former—for example, the court did not limit its preclusion holding to the defendants' innocent infringement defense but instead included all "evidence or argument . . . regarding their

purported belief in the lawfulness of their conduct." 2011 WL 1642434 *3. *Arista Records* thus squarely applies to OpenAI's assertion in this case that it did not act willfully.

Arista Records is just one example of the "routine[]" application of basic privilege law to assertions of good faith. *Okla. Firefighters*, 2025 WL 2982003, at *4. For instance, in *Oklahoma Firefighters*, the court found that a defendant in a securities class action was required to waive privilege or be precluded from asserting that it acted in good faith, regardless of whether the defendant asserted good faith as an affirmative defense or only as means of rebutting scienter (an issue on which the plaintiffs bore the burden). *See* 2025 WL 2982003, at *2–6.

OpenAI attempts to downplay these cases by arguing that *In Re County of Erie*, 546 F.3d 222 (2d Cir. 2008) stands for the proposition that a defendant must "rely" on the advice of counsel to waive privilege. Obj. 20. But as *Oklahoma Firefighters* explained when rejecting a similar "frivolous" argument, that case is entirely consistent with the general waiver rule:

> [*In re County of Erie*] went out of its way to note that a good faith defense "involves an inquiry into state of mind, which *typically calls forth the possibility of implied waiver of the attorney-client privilege.*" Further, *In re County of Erie* cited with approval case law noting that waiver can occur not only "when a client asserts reliance on an attorney's advice as an element of a claim or defense" but also "when a client places the attorney-client relationship directly at issue." A claim of a good faith belief in the lawfulness of one's conduct is, as *In re County of Erie* and *Bilzerian* recognize, just such a situation.
> 2025 WL 2982003, at *5 (citations omitted); a*ccord Arista Records,* 2011 WL 1642434 at *3.

Attorney-client privilege has not been rendered a "nullity" in the 14 years since *Arista Records* was decided, or the 34 years since *Bilzerian*. *See* Obj. 22–23. The question is not and has never been whether the plaintiff has merely pleaded a claim implicating a defendant's knowledge. For example, a plaintiff claiming willful infringement under Section 504 must put forward evidence that the defendant acted intentionally irrespective of what materials the defendant shields through privilege. But what the defendant cannot do is advance in response to

evidence of willfulness an assertion that it believed its conduct was appropriate—and then invoke privilege over evidence regarding its state of mind.

For its part and despite carefully worded suggestions in its briefing, OpenAI has never disavowed its intent to rely on its belief about the lawfulness and propriety of its conduct to rebut willfulness. OpenAI retains the same options available to any defendant faced with an at-issue waiver: produce the material or "explicitly and unambiguously state[] its intention to forego asserting its good faith defense and any factual arguments in opposition to Class Plaintiffs' allegations of willfulness." Order 23 (emphasis omitted). That OpenAI refuses to do so underscores its intent to argue that it acted in good faith while precluding Plaintiffs from discovering the facts which might contradict that claim.[6] That lopsided presentation is fundamentally unfair and justifies waiver.

2. OpenAI's State of Mind at the Time of Deletion is At-Issue Because OpenAI Was Using The LibGen Material at the Time of Deletion

OpenAI next argues that, even if *Arista Records* applies here, waiver is not justified because its state of mind at the time of the deletion cannot bear on its understanding of the legality of its conduct when it used the datasets "years earlier" and does not concern the "very issue in dispute." Obj. 23–25. That is mistaken.

First, even if OpenAI were correct that its use of the LibGen material had ceased as of the deletion date, OpenAI is incorrect that conduct post-dating infringement cannot be probative of a party's state of mind when committing the infringement in question. *See*, *e.g.*, *Mango v. BuzzFeed, Inc.*, 316 F. Supp. 3d 811, 815 (S.D.N.Y. 2018) (explaining that post-infringement

[6] It makes no difference that OpenAI—through "artful[]" pleading—excised some language from its latest answer, Order 19, because OpenAI *still* will not disavow arguing that it acted appropriately with respect to the pirated LibGen materials, and because OpenAI has retained a catchall affirmative defense. *See* Dkt. 754 at 42.

conduct is relevant to state of mind). Indeed, the Court's *in camera* review of Log Nos. 14, 15, 17, and 18 confirmed that such communications are likely probative of willfulness. Order 20.

Second, as set forth above, OpenAI *was, in fact, using the datasets at the time of the deletion*. *See supra* § A.1. As such, even if OpenAI were correct that the inquiry into its state of mind only extends so long as the datasets were used at OpenAI, Obj. 24, that would encompass the time of deletion. Moreover, because [redacted] LibGen material *was* in use at the time of deletion, OpenAI's good faith bears directly on its affirmative defense of fair use. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) ("Fair use presupposes good faith and fair dealing." (citation and quotation marks omitted)).

Third, OpenAI's state of mind when deleting the pirated material while possessing "substantial legal uncertainty" regarding whether its conduct constituted fair use clearly bears on Class Plaintiffs' forthcoming spoliation motion. Spoliation applies equally to a party's conduct in destroying evidence when the party reasonably anticipated litigation. *See*, *e.g.*, *Kronisch v. United States*, 150 F.3d 112, 127 (2d Cir. 1998); *Jacquety v. Baptista*, 538 F. Supp. 3d 325, 342 (S.D.N.Y. 2021). OpenAI's own public statements make clear it anticipated precisely these lawsuits years before it deleted the material in question. Thus OpenAI's state of mind as to the deletion of this material is, as Class Plaintiffs argued below, *see* Dkt. 413 4 n.1, 5, directly at-issue for spoliation.

D. The Court Can Alternatively Affirm On the Grounds That the Crime-Fraud Exception Applies to OpenAI's Conduct

The Order correctly concluded that (1) Plaintiffs had made a sufficient showing under the crime-fraud exception to justify *in camera* review of documents reflecting OpenAI's decisions to delete the LibGen material, *see* Order 25 n.24, and (2) otherwise privileged advice given during

the course of criminal copyright infringement would satisfy the crime-fraud exception, *see id.* at 26. The Order found, however, that the crime-fraud exception was not satisfied as to information reflecting the decision to delete the pirated material at issue. But OpenAI's deletion of pirated books material amply satisfies the crime-fraud exception.

First, courts in the Second Circuit are unanimous that a defendant's attempts to "cover-up" or "conceal" criminal conduct is "in furtherance" of the misconduct in question—here criminal copyright infringement—for purposes of the crime-fraud exception. *See, e.g., In re John Doe Corp.*, 675 F.2d 482, 491 (2d Cir. 1982) (crime-fraud exception satisfied by "probable cause to believe that other actions were taken to cover up the criminal scheme after completion"); *Duttle v. Bandler & Kass*, 127 F.R.D. 46, 54 (S.D.N.Y. 1989) (applying crime-fraud exception to documents related to a cover-up); *Zimmerman v. Poly Prep Country Day Sch.,* 2012 WL 2049493, at *6, 17 (E.D.N.Y. June 6, 2012).

Second, as Plaintiffs argued below, OpenAI's destruction of the LibGen material while possessing "substantial uncertainty" regarding the legality of its conduct constitutes (at least) spoliation, *see, e.g.,* Dkt. 413 at 4 n.1, 5; Dkt. 479 at 8; Dkt. 368 (23-cv-8292) at 5. And spoliation is a sufficient grounds justifying the application of the exception. *See Zimmerman*, 2012 WL 2049493, at *17.

To the extent the Order concluded otherwise, the Court should alternatively apply the crime-fraud exception on either of these grounds.

CONCLUSION

For those reasons, the Order should be affirmed.

Dated: December 19, 2025

/s J. Craig Smyser
J. Craig Smyser
SUSMAN GODFREY L.L.P.
One Manhattan West, 51st Floor
New York, NY
Telephone: (212) 336-2023
csmyser@susmangodfrey.com

/s/ Justin A. Nelson
Justin A. Nelson
SUSMAN GODFREY L.L.P.
1000 Louisiana Street, Suite 5100
Houston, TX 77002
Telephone: 713.651.9366
jnelson@susmangodfrey.com
Interim Lead Counsel for Class Plaintiffs

CERTIFICATE OF WORD COUNT

In accordance with Local Civil Rule 7.1(c), I certify that the foregoing Memorandum of Law is 8,733 words, including footnotes but exclusive of the caption page, table of contents, table of authorities, certificates and signature block. The basis of my knowledge is the word count feature of the word-processing system used to prepare this memorandum.

/s/ J. Craig Smyser
Signature

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2025, I caused the foregoing document to be electronically filed with the Clerk of the United States District Court for the Southern District of New York using the CM/ECF system, which shall send electronic notification to all counsel of record.

/s/ J. Craig Smyser
Signature

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2025, and pursuant to the Parties' email service agreement in this regard, a copy of the foregoing was served via electronic mail on counsel for Defendants via the following list-serves:

<table>
<tr><td colspan="2">KVPOAI@keker.com
Attorneys for OpenAI Defendants</td></tr>
<tr><td>Robert A. Van Nest
Katie L. Joyce
Michelle S. Ybarra
Nicholas S. Goldberg
Thomas E. Gorman
Paven Malhotra
Christopher S. Sun
Andrew S. Bruns
Andrew Dawson
Edward A. Bayley
Keker & Van Nest LLP
633 Battery Street
San Francisco, CA 94111</td><td>R. James Slaughter
Keker & Van Nest, LLP
710 Sansome Street
San Francisco, CA 94111</td></tr>
<tr><td colspan="2">OpenAICopyrightLitigation.lwteam@lw.com
Attorneys for OpenAI Defendants</td></tr>
<tr><td>Allison L. Stillman
Rachel R. Blitzer
Latham & Watkins LLP
1271 Avenue of the Americas
New York, NY 10020</td><td>Andrew M. Gass
Joseph R. Wetzel, Jr.
Latham & Watkins, LLP
505 Montgomery Street, Ste. 2000
San Francisco, CA 94111</td></tr>
<tr><td>Sarang V. Damle
Elana N. Dawson
Lathan & Watkins LLP
555 Eleventh Street NW, Suite 1000
Washington, D 200004</td><td></td></tr>
</table>

<table>
<tr><td colspan="2">OpenAICopyright@mofo.com
Attorneys for OpenAI Defendants</td></tr>
<tr><td>Joseph C. Gratz
Vera Ranieri
Andrew L. Perito
Tiffany Cheung
Daniel Mello
Caitlyn Sinclaire Blythe
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105-2482</td><td>Eric Nikolaides
Morrison & Foerster LLP
250 W. 55th Street
New York, NY 10019</td></tr>
<tr><td>Rose S. Lee
Morrison & Foerster LLP
707 Wilshire Boulevard
Los Angeles, California 90017-3543</td><td>John R. Lanham
Sarah Vandervalk
Morrison & Foerster LLP
12531 High Bluff Drive
San Diego, CA 92130-2040</td></tr>
<tr><td>Carolyn M. Homer
Morrison & Foerster LLP
2100 L Street NW, Suite 900
Washington, DC 20037</td><td></td></tr>
</table>

<table>
<tr><td colspan="2">MicrosoftNYClassActionFDBR@faegredrinker.com
Attorneys for Defendant Microsoft Corporation</td></tr>
<tr><td>Jeffrey S. Jacobson
Faegre Drinker Biddle & Reath LLP
1177 Avenue of the Americas
New York, New York 10036
Telephone: (212) 248-3191</td><td>Jared Barrett Briant
Kirstin L. Stoll-DeBell
Faegre Drinker Biddle & Reath LLP
1144 15th Street, Suite 3400
Denver, Colorado 80202
Telephone: 303 607 3500</td></tr>
<tr><td>Carrie A. Beyer
Faegre Drinker Biddle & Reath LLP
320 South Canal Street, Suite 3300
Chicago, IL 60606
Telephone: (312) 569-1000</td><td>Elizabeth Scheibel
Faegre Drinker Biddle & Reath LLP
2200 Wells Fargo Center
90 S. 7th Street
Minneapolis, MN 55402
Telephone: (612) 766-6000</td></tr>
</table>

NYClassActions_Microsoft_OHS@orrick.com **Attorneys for Defendant Microsoft Corporation**	
Annette L. Hurst Daniel D. Justice **ORRICK, HERRINGTON & SUTCLIFF LLP** The Orrick Building 405 Howard Street San Francisco, CA 94105 Phone: 415.773.5700	Christopher J. Cariello Marc R. Shapiro **ORRICK, HERRINGTON & SUTCLIFF LLP** 51 West 2nd Street New York, NY 10019 Phone: 415.773.5700
Sheryl Koval Garko Laura Brooks Najemy **ORRICK, HERRINGTON & SUTCLIFFE LLP** 222 Berkley Street Boston, MA 02116 Telephone: 617-880-1800	

/s/ Justin A. Nelson