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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF ORANGE-CENTRAL JUSTICE CENTER**

13 SOFTWARE FREEDOM CONSERVANCY,
14 INC., a New York Non-Profit Corporation,

15 Plaintiff,

16 v.

17 VIZIO, INC., a California Corporation; and
18 DOES 1 through 50, Inclusive,

19 Defendant.

CASE NO. 30-2021-01226723-CU-BC-CJC

**DEFENDANT VIZIO INC.'S NOTICE OF
MOTION FOR SUMMARY JUDGMENT
OR IN THE ALTERNATIVE FOR
SUMMARY ADJUDICATION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

**[DECLARATION OF MICHAEL E.
WILLIAMS AND COMPENDIUM OF
EXHIBITS FILED CONCURRENTLY
HEREWITH]**

Assigned for All Purposes to Judicial Officer:
The Honorable James Crandall

Dept. C33

Action Filed: October 19, 2021

Hearing Date: July 13, 2023, 10:00 a.m.

Hearing Reservation ID: 73955114

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on July 13, 2023 at 10:00 a.m., in Department C33 of the Central Justice Center at 700 Civic Center Drive, Santa Ana, CA 92701, Defendant VIZIO, Inc. (“VIZIO”) will move this Court for summary judgment or, alternatively, summary adjudication, as to Software Freedom Conservancy, Inc.’s (“SFC’s”) first and second causes of action for breach of contract and declaratory relief. VIZIO makes this motion on the grounds that: (1) VIZIO is entitled to summary judgment or adjudication on SFC’s first claim for breach of contract because it is preempted by the Copyright Act; (2) VIZIO is entitled to summary judgment or adjudication on SFC’s first claim for breach of contract because SFC is not an intended third-party beneficiary to the open-source software licenses at issue (the GPLv2 and LGPLv2.1); and (3) VIZIO is entitled to summary judgment or adjudication on SFC’s second claim for declaratory relief because that claim is duplicative of SFC’s failed breach of contract claim. VIZIO bases this motion on the attached memorandum of points and authorities, declaration of Michael E. Williams, compendium of exhibits, all other briefing submitted in connection with this motion, and all matters for which this Court can take judicial notice.

DATED: April 28, 2023

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By /s/ Michael E. Williams
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1 **PRELIMINARY STATEMENT**

2 Plaintiff Software Freedom Conservancy, Inc. (“SFC”) seeks to bypass the broad preemptive
3 scope of the Copyright Act and enforce two copyright licenses, claiming it is a third-party
4 beneficiary of these licenses. Neither the Copyright Act nor California’s law on third-party
5 beneficiaries permits this result and SFC’s claims must be dismissed on summary judgment. SFC’s
6 state-law claims for breach of contract and declaratory relief are preempted by the Copyright Act
7 because they seek to enforce the exclusive rights granted to the copyright holder to control the
8 manner in which a copyrighted work may be copied and distributed. Only the copyright holder—
9 which SFC does not claim to be—has the right to enforce the license terms at issue in this case.
10 Copyright law prohibits third-party enforcement of exclusive rights under the Copyright Act, thus
11 precluding SFC’s third-party beneficiary theory as a matter of law. SFC’s claims are legally and
12 factually unfounded and summary judgment should be entered for Defendant VIZIO, Inc.
13 (“VIZIO”).

14 This case involves two copyright licenses: the GNU General Public License version 2
15 (“GPLv2”) and the GNU Lesser General Public License version 2.1 (“LGPLv2.1,” collectively, “the
16 GPLs”). The GPLs are copyright licenses by which the copyright holder grants licensees the right
17 to copy, modify, and distribute “open source” software under certain conditions specified in the
18 GPLs. One of these conditions, which is at issue in this litigation, grants licensees the right to copy
19 and distribute the software so long as the licensee provides, or makes a written offer to provide, the
20 underlying source code for the licensed software and any modifications thereto (hereinafter the
21 “source code condition” of the GPLs). SFC alleges VIZIO violated the GPLs when it copied and
22 distributed software, some of which is subject to the GPLs, in certain VIZIO Smart TVs without
23 providing, or making a written offer to provide, the underlying source code. SFC alleges it has
24 standing to enforce the source code condition solely as a third-party beneficiary to the GPLs. SFC’s
25 arguments are without merit.

26 *First*, SFC’s contract claim is preempted by the Copyright Act. Under controlling law, a
27 contract claim is preempted when it seeks to enforce an exclusive right under the Copyright Act,
28 which includes the right to control the copying and distribution of a copyrighted work. SFC seeks

1 to do just that. It is attempting to substitute itself for the copyright holder to enforce a condition of
2 the GPLs that permits licensed software to be *copied and distributed* only with the accompanying
3 source code or a written offer to provide that source code upon request. SFC’s allegations, if true,
4 would give rise to a claim for copyright infringement by the copyright holder, not breach of contract
5 by a third party. Because SFC’s claim does not contain any “extra element” that transforms it into
6 a claim that is qualitatively different from a claim for copyright infringement, it is preempted by the
7 Copyright Act and must be dismissed.

8 *Second*, and independent of copyright preemption, SFC does not have standing to enforce
9 the GPLs as a third-party beneficiary. Because the GPLs are copyright licenses that govern the
10 exclusive rights to control the copying and distribution of the software, the copyright holder is the
11 only party with the right to enforce the GPL license terms as a matter of copyright law. Moreover,
12 under California law, third-party beneficiary standing is not permitted where it would contradict the
13 objective goals or reasonable expectations of the parties to the license. Here, the author and ultimate
14 authority on the GPLs, the Free Software Foundation (“FSF”), has publicly acknowledged that only
15 the copyright holders have the right to enforce the GPLs’ terms because the GPLs are copyright
16 licenses. Prior to filing this lawsuit, SFC also publicly acknowledged this fact. Thus, SFC’s third-
17 party beneficiary theory is inconsistent with copyright law, the objective goals of the GPLs, the
18 reasonable expectations of the parties and the GPLs’ author, and SFC’s own prior admissions.

19 *Finally*, SFC’s claim for declaratory relief—which is based on the same allegations
20 supporting its claim for breach of contract—is duplicative and fails for the same reasons as its claim
21 for breach of contract.

22 For the reasons explained herein, VIZIO is entitled to summary judgment, or in the
23 alternative, summary adjudication, on each of SFC’s claims.

24 **STATEMENT OF FACTS**

25 VIZIO designs, markets, and sells Smart TVs. (Register of Actions (“ROA”) #2 (Complaint
26 at ¶¶ 32-35).) SFC is a non-profit that recently launched a “New Strategy for GPL Enforcement,”
27 including “[l]itigation to enforce against [alleged] license violators that do not voluntarily comply
28 in a timely manner.” (Compendium of Exhibits (“Compendium”) at 3 (Exh. 1 (New Strategy

1 Announcement)).) SFC sued VIZIO on October 19, 2021 in this Court, seeking specific
2 performance and declaratory relief on the basis of a breach of contract theory, claiming standing as
3 a third-party beneficiary to the copyright licenses at issue. (ROA #2 (Complaint at ¶¶ 87-134).)
4 The copyright licenses are the GNU General Public License version 2 (“GPLv2”) and the GNU
5 Lesser General Public License version 2.1 (“LGPLv2.1”). (*Id.* at ¶ 15; *see also* Compendium at 11
6 (Exh. 3 (GPLv2)); *id.* at 18 (Exh. 4 (LGPLv2.1))). These are “open-source licenses,” intended to
7 foster collective progress in software design. (ROA #2 (Complaint at ¶¶ 18-21).) They govern the
8 “copying, distribution and modification” of certain open-source software (in the case of GPLv2)
9 and certain libraries of software functions (in the case of LGPLv2.1). (*Id.* (Complaint at ¶¶ 15, 28,
10 37); *see also* Compendium at 11 (Exh. 3 (GPLv2)); *id.* at 18 (Exh. 4 (LGPLv2.1))). The GPLs travel
11 with each software distribution, binding each licensee to the same terms and conditions.
12 (Compendium at 12-13 (Exh. 3 (GPLv2 § 1-2, 6)); *id.* at 20, 22 (Exh. 4 (LGPLv2.1 § 1-2, 10))).

13 The FSF created the GPLs as part of the GNU Project for open-source software with the
14 purpose of “protect[ing] your rights with two steps: (1) *copyright* the software, and (2) offer you
15 this license which gives you legal permission to copy, distribute and/or modify the software.” (*Id.*
16 at 11 (Exh. 3 (GPLv2 Preamble)) (emphasis added); *see also id.* at 26 (Exh. 5 (SFC August 7, 2018
17 Letter at 1))). The GPLv2 applies to “any program or other work which contains a notice placed by
18 *the copyright holder* saying it may be distributed under the terms of this General Public License.”
19 (*Id.* at 12 (Exh. 3 (GPLv2 § 0)) (emphasis added).) It provides “**TERMS AND CONDITIONS**
20 **FOR COPYING, DISTRIBUTION AND MODIFICATION.**” (*Id.* (Exh. 3 (GPLv2))). It also
21 states that “[a]ctivities other than copying, distribution and modification are not covered” by them;
22 “they are outside [their] scope.” (*Id.* (Exh. 3 (GPLv2 § 0))).

23 Sections 1, 2(b) and 6 of the GPLv2 require that the license travel with the software and bind
24 downstream recipients of the software. Section 1 requires “a copy of this License along with the
25 Program” to accompany each software distribution. (*Id.* (Exh. 3 (GPLv2 § 1))). Section 2(b)
26 provides that software may be copied or modified, and then distributed, “provided that” it is
27 “licensed as a whole at no charge to all third parties under the terms of this License.” (*Id.* (Exh. 3
28 (GPLv2 § 2(b))).) Section 6 provides that “[e]ach time you redistribute the Program (or any work

1 based on the Program), the recipient automatically receives a license from the original licensor to
2 copy, distribute or modify the Program subject to these terms and conditions. You may not impose
3 any further restrictions on the recipients’ exercise of the rights granted herein. You are not
4 responsible for enforcing compliance by third parties to this License.” (*Id.* at 13 (Exh. 3 (GPLv2
5 § 6)).)

6 Section 3 of the GPLv2 is the source code condition. It provides that software covered by
7 GPLv2 may be distributed, but only “provided that you” also “[a]ccompany it with the complete
8 corresponding machine-readable source code” or “with a written offer . . . to give any third party . .
9 . a complete machine-readable copy of the corresponding source code” (*Id.* (Exh. 3 (GPLv2
10 § 3)).)

11 Section 4 conditions the license on Sections 1-3: “You may not copy, modify, sublicense, or
12 distribute the Program except as expressly provided under this License. Any attempt otherwise to
13 copy, modify, sublicense or distribute the Program is void, and will automatically terminate your
14 rights under this License.” (*Id.* (Exh. 3 (GPLv2 § 4)).)

15 The LGPLv2.1 imposes similar conditions on the copying and distribution of software
16 “libraries,” which are “collection[s] of software functions and/or data prepared so as to be
17 conveniently linked with application programs (which use some of those functions and data) to form
18 executables.” (*Id.* at 19-22 (Exh. 4 (LGPLv2.1 §§ 0-6)).)

19 SFC admits that the FSF is the “GPL’s author and primary interpreter since 1989.” (*Id.* at
20 26 (Exh. 5 (SFC August 7, 2017 Letter at 1)); *see also id.* at 34 (Exh. 7 (SFC Announcement of GPL
21 Guide) (“[The FSF is] the author, primary interpreter, and ultimate authority on the GPL”).) On
22 the GNU Project website maintained by the FSF, the FSF provides a “Frequently Asked Questions”
23 page, which states clearly that “the copyright holders of the software are the ones who have the
24 power to enforce the GPL.” (*Id.* at 68 (Exh. 8 (GNU FAQs)).) The FSF further explains that “we
25 cannot act on our own where we do not hold copyright. Thus, be sure to find out who are the
26 copyright holders of the software, and report the violation to them.” (*Id.* at 82 (Exh. 9 (Violations
27 of the GNU Licenses)).) Thus, according to the FSF—the author of, and ultimate authority on, the
28

1 *Diego Transit Corp.*, 210 Cal. App. 3d 614, 620-621 (1989). VIZIO then filed a motion to dismiss
2 on the ground that SFC’s state-law claims were preempted by the Copyright Act and SFC lacked
3 standing to assert copyright infringement claims because it was not the copyright holder.
4 (Compendium at 123 (Exh. 15 (Federal District Court Docket at Entry (“Dk. Entry”) #12)).) SFC
5 filed a motion to remand, arguing that the complete preemption doctrine did not apply and that
6 subject-matter jurisdiction was therefore lacking. (*Id.* (Ex. 15 (Dk. Entry #16)).)

7 On May 13, 2022, the federal District Court granted SFC’s motion to remand finding that
8 the complete preemption doctrine did not apply, without ruling on the merits of VIZIO’s motion to
9 dismiss. (*Id.* at 108-09 (Exh. 13 (Remand Order at 8-9)).) Because the District Court’s remand
10 order was based on a lack of subject-matter jurisdiction, it was not reviewable on appeal. *See, e.g.*,
11 *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995) (“As long as a District Court’s
12 remand is based on a timely raised defect in removal procedure or on lack of subject-matter
13 jurisdiction . . . a court of appeals lacks jurisdiction to entertain an appeal of the remand order under
14 § 1447(d).”). Therefore, on June 21, 2022, VIZIO answered SFC’s complaint, asserting copyright
15 preemption and lack of standing, among others, as affirmative defenses to SFC’s claims. (ROA #30
16 (Answer at 2-3).)

17 **ARGUMENT**

18 **I. THE FEDERAL COURT’S REMAND ORDER HAS NO BEARING ON VIZIO’S**
19 **ABILITY TO RAISE COPYRIGHT PREEMPTION AS A DEFENSE IN STATE**
20 **COURT**

21 As an initial matter, a remand order declining to exercise federal subject-matter jurisdiction
22 under the complete preemption doctrine has no effect on a defendant’s ability to raise preemption
23 as a defense in subsequent state-court proceedings. *See Moreau*, 210 Cal. App. 3d at 620-21.
24 Complete preemption is a jurisdictional doctrine which looks to whether the complaint raises an
25 essentially federal question, not whether there is “any preemption defense which might be raised in
26 state court and which might ultimately defeat the cause of action.” *Id.* at 620. As such, “[w]hen a
27 federal court grants a motion to remand in the present context, it does nothing more than determine
28 the complaint fails, either directly or by operation of ‘the artful pleading’ doctrine, to state a question

1 arising under federal law. It does not determine whether a preemption defense can be successfully
2 offered in state court when the entire case is considered.” *Id.* at 621; *see also United Airlines, Inc.*
3 *v. Superior Court*, 234 Cal. App. 3d 1085, 1090 (1991) (“The exercise of a federal District Court’s
4 unreviewable power to remand claims to state court, of course, is not necessarily the same as a
5 determination of whether those claims on their merits—even though not removable to federal
6 court—would nonetheless be preempted by federal law if asserted by way of defense in state
7 court.”).

8 Thus, because a remand ruling does not address the merits of a preemption defense, it is not
9 uncommon for California courts to find state-law claims preempted by federal law despite a prior
10 federal court’s remand order finding no complete preemption. *See, e.g., AT&T Commc’ns, Inc. v.*
11 *Superior Ct.*, 21 Cal. App. 4th 1673, 1684 (1994) (finding state-law claims preempted under ERISA
12 despite federal court’s remand order finding no complete preemption); *Moreau*, 210 Cal. App. 3d
13 at 625 (finding state-law claims preempted by § 301 of the NLRA despite federal court’s remand
14 order finding no complete preemption). The same situation arises here. Notwithstanding the
15 District Court’s remand order finding no complete preemption, SFC’s state-law claims are
16 preempted by the Copyright Act.

17 **II. SFC’S CLAIMS ARE PREEMPTED BECAUSE THEY SEEK TO ENFORCE**
18 **EXCLUSIVE RIGHTS UNDER THE COPYRIGHT ACT**

19 **A. The California Court Of Appeal Has Provided The Analytical Framework For**
20 **Determining When A Contract Claim Is Preempted By The Copyright Act.**

21 In *Kabehie v. Zoland*, the California Court of Appeal established the framework for
22 analyzing when a contract claim is preempted by the Copyright Act. 102 Cal. App. 4th 513, 520-
23 28 (2002). The Copyright Act preempts ““all legal and equitable rights that are equivalent to any of
24 the exclusive rights within the general scope of copyright[.]” *Id.* at 519 n.3 (quoting 17 U.S.C. §
25 301(a)). “[F]or preemption to occur under the Act, two conditions must be met: first, the subject of
26 the claim must be a work fixed in a tangible medium of expression and come within the subject
27 matter or scope of copyright protection ..., second, the right asserted under state law must be
28 equivalent to the exclusive rights contained in section 106.” *Id.* at 520 (cleaned up). The exclusive

1 rights contained in section 106 include the right “to do and to authorize” the reproduction,
2 modification, and distribution of the copyrighted work. 17 U.S.C. § 106.

3 Under *Kabehie*, determining whether a contract claim enforces a right equivalent to an
4 exclusive right under the Copyright Act requires a “fact-specific analysis of the particular promise
5 alleged to have been breached and the particular right alleged to have been violated.” *Kabehie*, 102
6 Cal. App. 4th at 521. All “breach of contract actions seeking to enforce the plaintiffs’ exclusive
7 right to reproduce, perform, distribute or display copyrightable material” are preempted. *Id.* at 523.
8 To avoid preemption, the “particular promise” and “particular right” must involve an “extra
9 element” that “makes the causes of action qualitatively different from a copyright infringement
10 action.” *Id.* at 529. For example, “a right to payment, a right to royalties, or any other independent
11 covenant” would constitute an extra element sufficient to avoid preemption, as these rights are not
12 exclusive rights under the Copyright Act. *Id.* at 528. In most cases, however, “the promise is
13 equivalent to copyright . . . [because t]he promisor has merely agreed to do that which the promisor
14 is already obligated to do under federal copyright law.” *Id.* (cleaned up). Indeed, “Congress
15 intended to preempt most breach of contract actions, but not all.” *Id.* at 522; *see also id.* at 524
16 (“most, but not all, breach of contract actions are preempted by the Act”). Applying *Kabehie* to the
17 facts here confirms that SFC’s breach of contract claim is preempted.

18 **B. The First Prong Of The Preemption Test Is Satisfied Because Source Code Falls**
19 **Within The Subject Matter Of Copyright.**

20 SFC’s claims are based on computer programs and source code, some of which are subject
21 to the GPLs. (ROA #2 (Complaint at ¶¶ 15-31).) It is well-established that these fall within the
22 subject matter of copyright. *See, e.g., Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1355 (Fed.
23 Cir. 2014). SFC does not dispute this. (Compendium at 104 (Exh. 13 (Remand Order at 4)).)

24 **C. The Second Prong Of The Preemption Test Is Met Because SFC Seeks To**
25 **Enforce Exclusive Rights Under The Copyright Act To Control The Copying**
26 **And Distribution Of Copyrighted Works.**

27 SFC’s breach of contract claim seeks to enforce rights equivalent to the copyright owner’s
28 exclusive rights under the Copyright Act, which include the right to control the copying and

1 distribution of copyrighted works. *See* 17 U.S.C. § 106(1), (3).¹ Specifically, SFC seeks to enforce
2 the GPLs’ “**TERMS AND CONDITIONS FOR COPYING, DISTRIBUTION AND**
3 **MODIFICATION**” of copyrighted software. (Compendium at 12 (Exh. 3 (GPLv2)); *id.* at 19 (Exh.
4 4 (LGPLv2.1)).) The licenses state that “[a]ctivities other than copying, distribution and
5 modification are not covered by th[e GPLs]; they are outside its scope.” (*Id.* at 12 (Exh. 3 (GPLv2
6 § 0)); *id.* at 19 (Exh. 4 (LGPLv2.1 § 0)).) Thus, the GPLs grant a license to copy, modify, and
7 distribute copyrighted software provided that the recipient complies with specified conditions,
8 including the source code condition at issue, which states:

9 You may *copy and distribute* the Program (or a work based on it, under Section 2)
10 in object code or executable form under the terms of Sections 1 and 2 above *provided*
11 *that* you also do one of the following:

- 12 a) Accompany it with the complete corresponding machine-readable source
13 code . . .
14 b) Accompany it with a written offer . . . to give any third party . . . a
15 complete machine-readable copy of the corresponding source code[.]

16 (*Id.* at 13 (Exh. 3 (GPLv2 § 3(a)-(b))) (emphasis added).)²

17 SFC alleges that VIZIO “breached” this source code condition when it distributed Smart
18 TVs incorporating GPL-licensed software without providing the underlying source code. (ROA #2
19 (Complaint at ¶¶ 37-38, 48-77).) Indeed, SFC seeks specific performance to enforce the GPLs’
20 source code conditions on copying and distributing the software. (*Id.* (Complaint at 24-25, (a)-(d)).)
21 SFC’s breach of contract claim thus seeks to enforce the copyright holder’s exclusive right to control
22 the copying and distribution of their copyrighted software. The ability to place restrictions or
23 conditions on the copying and distribution of software—e.g., by requiring source code to be
24 provided with each distribution—is part and parcel of the exclusive right in the Copyright Act “to

25 _____
26 ¹ SFC considered VIZIO’s alleged conduct to constitute copyright infringement before filing this
27 lawsuit. *See supra* at 5.

28 ² The LGPLv2.1 equivalent language is: “You may *copy and distribute* the Library (or a portion or
derivative of it, under Section 2) in object code or executable form under the terms of Sections 1
and 2 above *provided that* you accompany it with the complete corresponding machine-readable
source code . . .” (Compendium at 21 (Exh. 4 (LGPLv2.1 § 4)) (emphasis added).)

1 do and to authorize” the manner in which copying and distribution occurs. 17 U.S.C. § 106. As the
2 Ninth Circuit has explained, the copyright owner of software has the exclusive right to “significantly
3 restrict[] the user’s ability to transfer the software[.]” *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111
4 (9th Cir. 2010). A transfer of software in violation of these restrictions “infringe[s the copyright
5 holder’s] exclusive right to distribute copies of its work.” *Id.* at 1112; *see also Jacobsen v. Katzer*,
6 535 F.3d 1373, 1381 (Fed. Cir. 2008) (“Copyright holders who engage in open source licensing
7 have the right to control the modification and distribution of copyrighted material.”). Thus, by
8 seeking to enforce the GPLs’ source code condition on the copying and distribution of copyrighted
9 software, SFC’s breach of contract claim is an attempt to enforce the copyright holder’s exclusive
10 right to control how this software may be copied and distributed. *See* 17 U.S.C. § 106(1), (3).

11 In fact, the drafter and primary interpreter of the GPLs, the FSF, has publicly confirmed its
12 intent that the GPLs are copyright licenses and that the right to enforce the GPLs, including the
13 source code condition, belongs exclusively to the copyright holder. The website maintained by the
14 FSF includes a link to Frequently Asked Questions about the GPLs. (Compendium at 68 (Exh. 8
15 (GNU FAQs)).) The “Frequently Asked Questions about the GNU Licenses” includes the following
16 statements:

17 **Q:** Who has the power to enforce the GPL?

18 **A:** Since *the GPL is a copyright license, the copyright holders of the software are*
19 *the ones who have the power to enforce the GPL.* If you see a violation of the GPL,
20 you should inform the developers of the GPL-covered software involved. They
21 either are the copyright holders, or are connected with the copyright holders.

22 (*Id.* (Exh. 8 (GNU FAQs)) (emphasis added).) The FSF even states: “If you think you see a violation
23 of the GNU GPL [or] LGPL . . . you should send a precise report to the copyright holders of the
24 packages that are being wrongly distributed . . . The FSF offers assistance and advice to any other
25 copyright holder who wishes to enforce GNU licenses. *But we cannot act on our own where we do*
26 *not hold copyright.* Thus, be sure to find out who are the copyright holders of the software, and
27 report the violation to them.” (Compendium at 82 (Exh. 9 (GNU Violations)) (emphasis added).)

28

1 Similarly, SFC’s president, Bradley Kuhn, has admitted that “[a] GPL violation occurs when
2 someone fails to meet the license requirements and thereby infringes copyright. The copyright rules
3 themselves then are the *only remedy* to enforce the license . . . the parties who may enforce are
4 copyright holders (and their designated agents).” (Compendium at 93 (Exh. 11 (“Some Thoughts
5 on Conservancy’s GPL Enforcement”)) (emphasis added).) These statements by FSF and
6 admissions by SFC are entirely consistent with copyright law, which only allows the copyright
7 holder to enforce exclusive rights under the Copyright Act. 17 U.S.C. § 501(b); *see also infra* at
8 17-18.

9 **D. There Is No Extra Element That Makes SFC’s Breach of Contract Claim**
10 **Qualitatively Different From Copyright Infringement.**

11 SFC’s claim here does not contain any extra element “that changes the nature of the action
12 so that it is *qualitatively different* from a copyright infringement claim.” *Kabehie*, 102 Cal. App.
13 4th at 521. This is because the distribution of copyrighted software in violation of the GPLs gives
14 rise to a claim for copyright infringement, not breach of contract. *See Vernor*, 621 F.3d at 1111-12
15 (transferring software in violation of restrictions in the license constitutes copyright infringement);
16 *Jacobsen*, 535 F.3d at 1381 (same).

17 In *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, the Ninth Circuit explained how to
18 determine whether the violation of a term in a copyright license gives rise to a claim for copyright
19 infringement or instead for breach of contract. 629 F.3d 928, 939 (9th Cir. 2010). “[C]ontractual
20 terms that limit a licensee’s scope [are referred to] as ‘conditions’, the breach of which constitute
21 copyright infringement. We refer to all other license terms as ‘covenants,’ the breach of which is
22 actionable only under contract law. We distinguish between conditions and covenants according to
23 state contract law, to the extent consistent with federal copyright law and policy.” *Id.* Courts thus
24 look to state law to determine whether the license provision at issue constitutes a condition (resulting
25 in copyright infringement) or a covenant (resulting in breach of contract). *See, e.g., Jacobsen*, 535
26 F.3d at 1383 (applying state law to conclude that the terms of an open-source license were
27 “enforceable copyright conditions” giving rise to copyright infringement); *Sohm v. Scholastic Inc.*,
28 959 F.3d 39, 45-48 (2d Cir. 2020) (applying state law to conclude that “the print-run limitations

1 were conditions precedent, the violation of which gave rise to claims for copyright infringement”);
2 *Rimini St., Inc. v. Oracle Int’l Corp.*, 473 F. Supp. 3d 1158, 1207, 1029 (D. Nev. 2020) (evaluating
3 defendant’s argument that its breach of the license “is not a copyright violation, but is instead a
4 contract violation,” and concluding that the violation was a “copyright-enforceable condition, not a
5 contract violation”).

6 The Federal Circuit’s opinion in *Jacobsen v. Katzer* is particularly instructive, where facts
7 similar to those here gave rise to copyright infringement claims rather than a breach of contract
8 claim. 535 F.3d 1373 (Fed. Cir. 2008). In *Jacobsen*, the plaintiff alleged copyright infringement of
9 an open-source license, contending that the defendant distributed software without including, as
10 required, “a description of how the files or computer code had been changed from the original source
11 code.” *Id.* at 1376. The defendant argued that the plaintiff failed to state a claim for copyright
12 infringement. *Id.* at 1376-77. The Federal Circuit began by explaining the *either-or* analysis it
13 needed to apply: “The heart of the argument on appeal concerns whether the terms of the Artistic
14 License are conditions of, or merely covenants to, the copyright license.” *Id.* at 1380. If the terms
15 are conditions, “they may serve to limit the scope of the license and are governed by copyright law.”
16 *Id.* If the terms are “merely covenants,” they would be governed by contract law and support only
17 a claim for breach of contract. *Id.*

18 *Jacobsen* then applied California law to explain why the license provisions were
19 “enforceable copyright conditions” giving rise only to a claim for copyright infringement. *Id.* at
20 1381-83. First, the license “states on its face that the document creates conditions: ‘The intent of
21 this document is to state the *conditions* under which a Package may be copied.’” *Id.* at 1381.
22 Second, the license “uses the traditional language of conditions by noting that the rights to copy,
23 modify, and distribute are granted ‘*provided that*’ the conditions are met. Under California contract
24 law, ‘provided that’ typically denotes a condition.” *Id.* (citing *Diepenbrock v. Luiz*, 159 Cal. 716,
25 115 (1911)). *Jacobsen* thus reversed the district court for failing to “credit the explicit restrictions
26 in the license that govern a downloader’s right to modify and distribute the copyrighted work.” *Id.*

27 The facts here similarly give rise to a claim for copyright infringement, not breach of
28 contract. Like the license in *Jacobsen*, the GPLs state on their face that they create the “conditions

1 for copying, distribution and modification.” (Compendium at 12 (Exh. 3 (GPLv2 (Preamble))); *id.*
2 at 19 (Exh. 4 (LGPLv2.1 (Preamble))).) Similar to the license in *Jacobsen*, which conditioned
3 copying and distribution on providing a description of changes to the software’s source code, the
4 GPLs condition the recipient’s right to copy and distribute software on providing the source code
5 itself. (*Id.* at 13 (Exh. 3 (GPLv2 § 3)); *id.* at 21 (Exh. 4 (LGPLv2.1 § 4))).) Further, like the license
6 in *Jacobsen*, the GPLs grant the recipient a right to copy and distribute the software “*provided that*”
7 the recipient comply with the source code condition. (*Id.*) The use of the term “provided that”
8 establishes a “condition” under California law (*see Jacobsen*, 535 F.3d at 1381), the violation of
9 which gives rise to a claim for copyright infringement. *See MDY Industries*, 629 F.3d at 939. Even
10 SFC’s president, Bradley Kuhn, has publicly admitted that “[a] GPL violation occurs when someone
11 fails to meet the license requirements and thereby infringes copyright.” (Compendium at 93 (Exh.
12 11 (“Some Thoughts on Conservancy’s GPL Enforcement”))).)

13 Thus, because the allegations here, if true, give rise to copyright infringement rather than
14 breach of contract, it follows that SFC’s contract claim is preempted. As *Kabehie* explained, the
15 “extra element” needed to avoid preemption must transform the claim into one that is qualitatively
16 different from a copyright infringement claim. *See Kabehie*, 102 Cal. App. 4th. at 521. Here, the
17 particular condition underlying SFC’s breach of contract claim is “merely agree[ing] to do that
18 which the promisor is already obligated to do under federal copyright law”—namely, to comply
19 with the source code condition of the GPLs when copying and distributing the software—and, as
20 such, SFC’s claim is preempted. *Kabehie*, 102 Cal. App. 4th at 528.

21 **E. The District Court’s Remand Order Is Inconsistent With Controlling Law.**

22 As noted above, the District Court’s remand order based on the lack of subject-matter
23 jurisdiction has no effect on the merits of VIZIO’s preemption defense. *See supra* at 6-7.
24 Nevertheless, the District Court’s remand ruling does not survive scrutiny for a number of reasons.³

25 *First*, the District Court assumed that most breach of contract claims are not preempted.
26 (Compendium at 105 (Exh. 13 (Remand Order at 5))).) But the California Court of Appeal rejected

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28 ³ The District Court’s remand order was not reviewable on appeal precisely because it was based
on a lack of subject-matter jurisdiction. *See Things Remembered*, 516 U.S. at 127.

1 this notion in *Kabehie*, noting to the contrary that “Congress intended to preempt most breach of
2 contract actions, but not all.” *Kabehie*, 102 Cal. App. 4th at 522.

3 *Second*, the District Court relied on an unpublished remand ruling from the Western District
4 of Texas, which found that the source code condition of the GPLs was the “extra element” avoiding
5 preemption because “copyright law imposes no open source obligations.” (Compendium at 105
6 (Exh. 13 (Remand Order at 5 (discussing *Versata Software, Inc. v. Ameriprise Fin., Inc.*, 2014 WL
7 950065, at *4-5 (W.D. Tex. Mar. 11, 2014))))). Relying on *Versata*, the District Court concluded
8 that the source code condition constituted “an additional contractual promise separate and distinct
9 from any rights provided by the copyright laws.” (*Id.* at 106 (Exh. 13 (Remand Order at 6))). But
10 that conclusion ignores that the copyright holder is free to place conditions or restrictions on the
11 copying, distribution or transfer of the software, the violation of which constitutes copyright
12 infringement. *See Vernor*, 621 F.3d at 1111-12; *Jacobsen*, 535 F.3d at 1383. Contrary to the District
13 Court’s reasoning, the copyright holders have permitted the copying and distribution of their
14 software on the condition that the source code is provided, which they are entitled to do pursuant to
15 their exclusive rights to control the manner in which their copyrighted works are copied and
16 distributed under the Copyright Act. *See* 17 U.S.C. § 106(1),(3). Even SFC’s president, Bradley
17 Kuhn, has admitted that “[t]he copyright rules themselves then are the only remedy to enforce the
18 license[s.]” (Compendium at 93 (Exh. 11 (“Some Thoughts on Conservancy’s GPL
19 Enforcement”))).⁴

20 *Third*, the District Court made much of the fact that SFC, as the master of its complaint, was
21 not suing for copyright infringement and, in fact, could not assert such a claim because it “is not the
22 copyright holder.” (Compendium at 107 (Exh. 13 (Remand Order at 7))). That reasoning, too,
23 ignores California law. “The fact that one may not *successfully* sue for copyright infringement
24 because he or she is not the copyright holder does not mean he or she is not preempted from
25 attempting to sue on a claim that amounts to copyright infringement . . . it is the nature of the action

26 _____
27 ⁴ The GNU Comprehensive Tutorial and Guide that SFC hosts and sponsors similarly states that
28 the “copyright holders (or their agents) are the [sic] *ultimately the sole authorities* to enforce [the
GPL] and protect the rights of users.” (Compendium at 150 (Exh. 23 (Chapter 13)) (emphasis
added).)

1 not the identity of the plaintiff that controls.” *Civic Partners Stockton, LLC v. Youssefi*, 218 Cal.
2 App. 4th 1005, 1017 (2013) (emphasis in original); *see also AT&T Commc’ns*, 21 Cal. App. 4th at
3 1679 (“Preemption depends upon the factual basis for the complaint, not whether the complaint on
4 its face states a [federal] cause of action[.]”). In other words, neither SFC’s standing to sue for
5 copyright infringement nor its decision to sue under contract law has any bearing on the preemption
6 analysis; the relevant inquiry is whether the plaintiff is seeking to enforce rights that are equivalent
7 to exclusive rights under the Copyright Act.⁵

8 *Fourth*, the District Court attempted to distinguish *Jacobsen*, but the court’s analysis only
9 further supported VIZIO’s position. The District Court noted that the violation of the open source
10 condition in *Jacobsen* “amounted to little more than a promise not to infringe copyright” because
11 the rights being asserted under the contract were equivalent to those under the Copyright Act,
12 including “*the exclusive right to reproduce, distribute and make derivative copies.*” (Compendium
13 at 107 (Exh. 13 (Order at 7 (quoting *Jacobsen v. Katzer*, 609 F. Supp. 2d 925, 933 (N.D. Cal.
14 2009))))). As discussed above (*see supra* at 11-13), exactly the same is true here, where the rights
15 being asserted under the GPLs are equivalent to the exclusive right to control the copying and
16 distribution of licensed software. The District Court also relied on the fact that in *Jacobsen*, the
17 plaintiff was the copyright holder and thus able to assert a claim for infringement. (Compendium
18 at 107-08 (Exh. 13 (Order at 7-8)).) As noted above, however, this fact is irrelevant for purposes of
19 the copyright preemption analysis. *See Civic Partners*, 218 Cal. App. 4th at 1017.

20 *Finally*, the District Court failed to properly apply *MDY Industries*, 629 F.3d at 939.
21 (Compendium at 108 (Exh. 13 (Order at 8)).) While the District Court correctly recognized that
22

23 ⁵ The District Court similarly erred in stating that even if VIZIO violated the source code condition
24 of the GPLs, SFC is free to ignore a copyright claim and only assert a state law claim, citing an
25 unpublished case with virtually no analysis of this point. (Compendium at 107 (Exh. 13 (Remand
26 Order at 7 (citing *Garcia v. Lopez*, 2009 WL 292492, at *1-2 (C.D. Cal. Feb. 5, 2009))))). A
27 violation of the *same license term* cannot give rise to both a claim for copyright infringement and
28 breach of contract without violating the express preemption clause of 17 U.S.C. § 301, which
preempts all state law claims that seek to enforce legal or equitable rights covered by the Copyright
Act. It is conceivable that a plaintiff could have a claim for copyright infringement based on the
violation of a *condition* in a license while also having a separate claim for breach of contract based
on the violation of an independent *covenant* in the same license. But that is not the case here.

1 there, the Ninth Circuit explained that the breach of a “condition” in a copyright license gives rise
2 to copyright infringement (*id.*), the District Court failed to apply that analysis correctly by
3 examining, as required, the language of the GPLs under California law. As explained above (*see*
4 *supra* at 11-13), applying California law to the language of the source code provision makes clear
5 that it is a condition of the license, the violation of which terminates all rights and results in copyright
6 infringement. (*See* Compendium at 13 (Exh. 3 (GPLv2 § 4 (“You may not copy, modify, sublicense,
7 link with, or distribute the Program except as expressly provided under this License. Any attempt
8 otherwise to copy, modify, sublicense, link with, or distribute the Program is void, and will
9 automatically terminate your rights under this License.”))); *id.* at 22 (Exh. 4 (LGPLv2.1 § 8
10 (same))); *see also* *S.O.S. Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989) (“A licensee
11 infringes the owner’s copyright if its use exceeds the scope of its license.”). Thus, the District
12 Court’s remand ruling is both non-binding (*see supra* at 6-7), and contrary to controlling law.

13 Because SFC’s breach of contract claim contains no “extra element” transforming it from
14 one that is qualitatively different than a claim for copyright infringement, it follows, under both
15 *Kabehie* and federal copyright law, that SFC’s contract claim is preempted. *Kabehie*, 102 Cal. App.
16 4th at 529.

17 **III. VIZIO IS SEPARATELY ENTITLED TO SUMMARY JUDGMENT BECAUSE SFC**
18 **IS NOT AN INTENDED THIRD-PARTY BENEFICIARY**

19 Separate and apart from the preemption analysis, VIZIO is entitled to summary judgment
20 because SFC cannot establish it is an intended third-party beneficiary of the GPLs, which is essential
21 to its claims. In *Goonewardene v. ADP, LLC*, the California Supreme Court clarified the standard
22 for determining when an agreement contemplates an intended third-party beneficiary who may
23 enforce a contract. 6 Cal. 5th 817, 830 (2019). Each of the following elements must be satisfied:
24 “(1) whether the third party would in fact benefit from the contract . . . (2) whether a motivating
25 purpose of the contracting parties was to provide a benefit to the third party, and (3) whether
26 permitting a third party to bring its own breach of contract action against a contracting party is
27 consistent with the objectives of the contract and the reasonable expectations of the contracting
28 parties.” *Id.* In applying this test, courts must “tak[e] into account the language of the contract and

1 all of the relevant circumstances under which the contract was entered into.” *Id.* The aim is to give
2 effect to the parties’ intentions, as determined by “the words used in the agreement, as well
3 as extrinsic evidence of such objective matters as the surrounding circumstances under which the
4 parties negotiated or entered into the contract; the object, nature and subject matter of the contract;
5 and the subsequent conduct of the parties.” *Eloquence Corp. v. Home Consignment Ctr.*, 49 Cal.
6 App. 5th 655, 661 (2020) (cleaned up).

7 The third element of the *Goonewardene* test has two parts. First, “the requirement in the
8 third element that third party enforcement be consistent with ‘the objectives of the contract’ is
9 comparable to the inquiry . . . regarding whether third party enforcement will effectuate the
10 contracting parties’ performance objectives[.]” *Goonewardene*, 6 Cal. 5th at 831 (cleaned up).
11 Second, “the additional requirement in this element that third party enforcement be consistent as
12 well with the reasonable expectations of the contracting parties reflects the teaching of prior
13 California decisions that have denied application of the third party beneficiary doctrine when
14 permitting the third party to maintain a breach of contract action would not be consistent with the
15 reasonable expectations[.]” *Id.* (cleaned up). Applying this two-pronged standard here, it is clear
16 that SFC cannot satisfy the third element for third-party beneficiary standing to enforce the GPLs.⁶

17 **A. Third-Party Standing Is Inconsistent With The Objective Of The GPLs,**
18 **Because The GPLs Are Readily Enforceable By The Copyright Holders.**

19 In *Goonewardene*, the Court rejected third-party standing under the “contractual objectives”
20 prong because the real party to the contract was “fully capable of pursuing a breach of contract
21 action” itself. 6 Cal. 5th at 836; *see also Wexler v. California Fair Plan Ass’n*, 63 Cal. App. 5th 55,
22 66 (2021) (same). As the Court explained, “even if a motivating purpose of the contracting parties
23 is to provide a benefit to the [third parties], it still may be inconsistent with the objectives of the
24 contract and the reasonable expectations of the contracting parties to permit the [third parties] to sue
25 . . . for an alleged breach of contract.” *Goonewardene*, 6 Cal. 5th at 836. Such is the case here. The
26

27 ⁶ VIZIO does not concede that SFC can satisfy the other elements of the *Goonewardene* test, but
28 contends that SFC’s inability to satisfy the third element can be properly decided on summary
judgment and is fatal to SFC’s claim.

1 objective of the GPLs is to advance open-source software development through “two steps: (1)
2 copyright the software, and (2) offer you this license which gives you legal permission to copy,
3 distribute and/or modify the software.” (Compendium at 11 (Exh. 3 (GPLv2 Preamble)); *id.* at 19
4 (Exh. 4 (LGPLv2.1 Preamble (equivalent))).) As was the case in *Goonewardene* and *Wexler*, there
5 is no reason that the copyright holder, the intended enforcer of the GPLs (*see supra* at 10-11), is not
6 “fully capable of pursuing a[n] . . . action” itself. *Goonewardene*, 6 Cal. 5th at 836.⁷

7 Indeed, because the GPLs are copyright licenses governing exclusive rights under the
8 Copyright Act, there can be no third-party enforcement as a matter of law. Only the “legal or
9 beneficial owner of an exclusive right under a copyright” has standing to sue. 17 U.S.C. § 501(b);
10 *see also Tresona Multimedia, LLC v. Burbank High Sch. Vocal Music Ass’n*, 953 F.3d 638, 645 (9th
11 Cir. 2020) (holding that a licensee has no standing to sue unless granted exclusive rights by all
12 owners of the copyright); *Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1169 (9th Cir. 2013) (holding
13 that the assignment of the right to sue for infringement is insufficient to establish standing as an
14 exclusive owner under copyright law). Thus, third-party standing to enforce the GPLs is not only
15 unnecessary to effectuate the GPLs’ objectives under *Goonewardene*, it is prohibited by the
16 Copyright Act.

17 **B. Third-Party Standing Is Inconsistent With The Reasonable Expectations Of**
18 **The Contracting Parties As Well As Those Of The GPLs’ Creator, The FSF.**

19 Even if third-party standing were the *only* way to effectively enforce the GPLs—and it is
20 not—there would still be no third-party standing, because it would be inconsistent with the
21 reasonable expectations of the parties. *See, e.g., City of Oakland v. Oakland Raiders*, 83 Cal. App.
22 5th 458, 475-76 (2022) (“Even if the Relocation Policy’s benefits to host cities such as Oakland
23 could only be realized by giving host cities the right to enforce the Policy, such a result would not

24 _____
25 ⁷ SFC’s claim to the contrary rests on sheer speculation that the copyright holder “might not be
26 aware of the breach of, or have the motivation or means to enforce, this provision of the license
27 agreements.” (ROA #2 (Complaint at ¶ 111).) In fact, the FSF is the copyright holder for many of
28 the software programs and libraries listed in SFC’s Complaint. The FSF holds the copyright for at
least the following: GNU bash (*id.* at ¶ 37(c)), GNU awk (*id.* at ¶ 37(d)), coreutils (*id.* at ¶ 37(g)),
GNU tar (*id.* at ¶ 37(l)), and the GNU C Library (*id.* at ¶ 38(a)). (Compendium at 133-47 (Exh. 18-
22 (copyright registrations)).)

1 be consistent with the reasonable expectations of the parties under the language of the Policy and
2 the relevant circumstances surrounding its adoption.”).

3 Unlike a traditional contract negotiation between two parties where there is give and take,
4 the parties to the GPLs are prohibited from negotiating or changing the terms of the GPLs. The
5 GPLs expressly state: “[e]veryone is permitted to copy and distribute verbatim copies of this license
6 document, but changing it is not allowed.” (Compendium at 11 (Exh. 3 (GPLv2 (copyright
7 notice))); *id.* at 18 (Exh. 4 (LGPLV2.1 (copyright notices))).) The GPLs further state: “[y]ou are
8 not required to accept this License, since you have not signed it. However, nothing else grants you
9 permission to modify or distribute the Program [or Library] or its derivative works” and “[y]ou may
10 not impose any further restrictions on the recipients’ exercise of the rights granted herein.” (*Id.* at
11 13 (Exh. 3 (GPLv2 §§ 5-6)); *id.* at 22 (Exh. 4 (LGPLv2.1 §§ 9-10 (same))).) As FSF’s Executive
12 Director, Peter Brown, put it, “[t]he GPL is a software license, it is not a contract. It gives
13 permissions from the copyright holder. You don’t want to accept those permissions? End of
14 discussion.” (*Id.* 128 (Exh. 16 (FSF News Bulletin))). Thus, the reasonable expectations of the
15 parties are necessarily governed by the plain language of the GPLs and the pronouncements of its
16 drafter, the FSF.

17 As explained above (*see supra* at 8-10), nothing in the text of the GPLs suggests that third
18 parties have the right to enforce alleged violations of the GPLs. Further, the FSF has made clear
19 that it never intended third-party enforcement, stating publicly that “the copyright holders of the
20 software are the ones who have the power to enforce the GPL” (Compendium at 68 (Exh. 8 (GNU
21 FAQs))), and that “[i]f you think you see a violation of the GNU GPL [or] LGPL . . . you should
22 send a precise report to the copyright holders of the packages that are being wrongly distributed . . .
23 [because] we cannot act on our own where we do not hold copyright.” (*Id.* at 82 (Exh. 9 (GNU
24 Violations))). SFC cannot dispute this expectation because, as SFC admits, the FSF is the “ultimate
25 authority” on the GPLs. (*Id.* at 34 (Exh. 7 (SFC Announcement of GPL Guide))). Thus, SFC’s
26 “made-for-litigation” position in this case is fundamentally at odds with the intent of the GPLs’
27 drafter, the reasonable expectations of the parties, SFC’s own prior admissions, and fundamental
28

1 principles of copyright law. It is no wonder that SFC describes this lawsuit against VIZIO as
2 “historic” and “unique.” (*Id.* at 164 (Exh. 26 (Lawsuit FAQ)).)

3 Because SFC lacks third-party beneficiary standing, summary judgment and/or summary
4 adjudication should be entered against SFC on this ground as well.

5 **IV. SFC’S CLAIM FOR DECLARATORY RELIEF FAILS BECAUSE IT IS BASED ON**
6 **THE SAME ALLEGATIONS AS ITS FAILED BREACH OF CONTRACT CLAIM.**

7 A claim for declaratory relief must be dismissed where there is no justiciable controversy
8 between the parties. *See, e.g., Haddad v. Elec. Prod. & Dev., Inc.*, 219 Cal. App. 2d 137, 139, 141
9 (1963). There is no justiciable controversy where, as here, declaratory relief is sought “on the basis
10 of the facts alleged which entitle a plaintiff to no relief[.]” *Id.* (cleaned up) (affirming the dismissal
11 of a claim for declaratory relief because the underlying contract claim failed to state a claim); *see*
12 *also Dollinger DeAnza Assocs. v. Chicago Title Ins. Co.*, 199 Cal. App. 4th 1132, 1156 (2011)
13 (“Dollinger’s cause[] of action for breach of contract . . . lack[s] merit as a matter of law. Summary
14 adjudication of the remaining cause of action for declaratory relief, which seeks a declaration of the
15 parties’ rights, liabilities, and obligations under [the contract], is therefore appropriate.”). Here,
16 SFC’s claim for declaratory relief is a mirror-image of its claim for breach of contract, as it seeks a
17 determination that the GPLs require VIZIO to provide access to the underlying source code when
18 distributing GPL-licensed software. (ROA #2 (Complaint at ¶ 130).) Because SFC’s breach of
19 contract claim fails, as explained above, SFC’s declaratory relief claim based on the same facts and
20 seeking the same legal determinations fails as well.

21 **CONCLUSION**

22 VIZIO respectfully requests this Court grant its Motion for Summary Judgment, or in the
23 alternative for Summary Adjudication, on SFC’s claims for breach of contract and declaratory relief.

24 DATED: April 28, 2023

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

26 By /s/ Michael E. Williams
27 Michael E. Williams
28 *Attorneys for Defendant.*
VIZIO, Inc.

1 **PROOF OF SERVICE**

2 I am employed at the law firm of Quinn Emanuel Urquhart & Sullivan, LLP in the County
3 of Los Angeles, State of California. I am over 18 years old and not a party to the within action. My
4 business address is 865 South Figueroa Street, 10th Floor, Los Angeles, California 90017.

5 On April 28, 2023, I served a true and correct copy of the document described as
6 DEFENDANT VIZIO INC.’S NOTICE OF MOTION FOR SUMMARY JUDGMENT OR IN THE
7 ALTERNATIVE FOR SUMMARY ADJUDICATION; MEMORANDUM OF POINTS AND
8 AUTHORITIES IN SUPPORT THEREOF on the parties in this action via electronic service to the
9 emails below, pursuant to the parties’ joint stipulation: “Electronic service will count as personal
10 service on the day of that electronic service, if the electronic service occurs before midnight Pacific
11 Time. If the electronic service occurs after midnight Pacific Time, that service will count as personal
12 service for the following business day that is not a legal holiday.”

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20 I declare under penalty of perjury under the laws of the State of California that the foregoing
21 is true and correct.

22 Executed on April 28, 2023.

23
24
25 /s/ Arian Koochesfahani

26 Arian Koochesfahani
27
28

Arian Koochesfahani

From: donotreply@occourts.org
Sent: Friday, February 17, 2023 2:46 PM
To: Arian Koochesfahani
Subject: Superior Court of Orange County - Motion Reservation Request - CONFIRMATION

[EXTERNAL EMAIL from donotreply@occourts.org]



Superior Court of California, County of Orange RESERVE A MOTION DATE

Your reservation request has been **CONFIRMED** by the Superior Court. The hearing date and time below has been reserved. You will be asked to provide your reservation number to the court at a later date.

MOVING PAPERS MUST BE E-FILED WITHIN 24 HOURS AFTER COMPLETING THE ON-LINE RESERVATION. Failure to submit your moving papers within 24 hours will result in the automatic **CANCELLATION** of the reservation.

NOTE: To EXPEDITE your MOTION filing place the appropriate Court Reservation number (e.g. 7XXXXXXX) on each Motion being submitted.

Please do not reply to this email.

Reservation Number: 73955114

Hearing Date: July 13, 2023

Hearing Time: 10:00 AM

Department: C33

Motion Type: Motion for Summary Judgment and/or Adjudication

Case Number: 30-2021-01226723-CU-BC-CJC

Case Title: Software Freedom Conservancy, Inc. vs. Vizio, Inc.

Judicial Officer: Hon. James Crandall

Email: ariankoochesfahani@quinnemanuel.com

Requestor Name: Arian Koochesfahani

Requestor Phone: 5176430875

Filing Party: VIZIO, Inc.

Date of Request: February 17, 2023

Time of Request: 2:44 PM

Transaction Number: 1000383883