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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE-CENTRAL JUSTICE CENTER

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

Plaintiff,

v.

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

Defendant.

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

DEFENDANT VIZIO, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION

Assigned for All Purposes to Judicial Officer: The Honorable Sandy N. Leal

Dept. C33

Action Filed: October 19, 2021

Hearing Date: August 21, 2025

Hearing Time: 10:00 a.m.

Trial Date: September 22, 2025

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Rules/Statutes

Other Authorities

PRELIMINARY STATEMENT

For more than four years in this case, Plaintiff Software Freedom Conservancy ("SFC") has attempted to enforce two copyright licenses—the General Public License version 2 ("GPLv2") and the Lesser General Public License version 2.1 ("LGPLv2.1," and together with GPLv2, the "GPL")—as a purported third-party beneficiary of the GPL. Now, with trial fast-approaching, SFC seeks to change its theory of the case entirely, asking the Court to grant judgment in its favor on the theory that it has a *direct* contract with VIZIO—even though it has repeatedly said it has no such contract. At the same time, to hedge its bets, SFC seeks to relitigate its failed motion for summary adjudication arguing that SFC is an intended third-party beneficiary of the GPL, while ignoring the strict requirements for a reconsideration motion. SFC's motion is fatally defective on both grounds and the Court should deny it in full.

First, it is well established in California that the pleadings determine the issues to be resolved on summary adjudication. *See, e.g.*, *Conroy v. Regents of Univ. of Cal.*, 45 Cal. 4th 1244, 1250 (2009) ("the pleadings . . . set the boundaries of the issues to be resolved at summary judgment"). A plaintiff cannot seek summary adjudication on a question that was never put in issue through the operative complaint. From the beginning of this case, SFC has repeatedly claimed in its pleadings that it is suing VIZIO as a third-party beneficiary of the GPL and, consistent with that theory, that it does *not* have a contract with VIZIO. SFC's brand-new assertion that it has a direct contract with VIZIO is at war with its own pleadings. If SFC wanted to change its theory of the case, it needed to obtain leave of Court to amend its complaint, which it never did. And now, on the eve of trial, it is too late for SFC to do so. The Court should deny SFC's attempt to change its claims on a summary adjudication motion by switching to a theory of direct contract.

Second, SFC's effort to re-argue its failed motion for summary adjudication on its third-party beneficiary theory is procedurally defective because SFC does not even ask for reconsideration of the Court's earlier ruling. In particular, the Code of Civil Procedure requires SFC to establish "by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." Cal. Civ. Proc. Code § 1008. SFC's failure to do any of this is not a mere technical defect. The California

Legislature and courts have made clear that the failure to follow these requirements strips the Court of jurisdiction to consider an improperly renewed motion. SFC also fails to establish any material change in the relevant facts or law that would justify reconsideration of the Court's earlier ruling. SFC's self-serving witness declarations present no new facts, and SFC even admits that such evidence is not relevant to its claimed status as a third-party beneficiary. SFC's motion should be denied.

STATEMENT OF FACTS

SFC filed this lawsuit against VIZIO in October 2021, seeking to enforce copyright licenses known as GPLv2 and LGPLv2.1. GPLv2 and LGPLv2.1 are "open-source" copyright licenses that allow others to freely copy, modify, and distribute the copyrighted software covered by these licenses so long as they comply with certain conditions of the licenses. SFC alleges that VIZIO violated certain conditions of GPLv2 and LGPLv2.1 in connection with VIZIO's incorporation of such software in its Smart TVs. But SFC is not suing as a copyright holder to any of these software programs. Rather, SFC filed this lawsuit claiming it has the right to enforce these copyright licenses as a third-party beneficiary. When it filed suit, SFC publicly stated that this is "the first legal case that focuses on the rights of individual consumers as third-party beneficiaries of the GPL." (*See* VIZIO's Compendium of Exhibits ("VIZIO Comp.") Ex. 1.)

In its initial complaint, SFC alleged that it is "not a contracting party" to the GPL. (Compl. ¶ 116.) SFC alleged instead that it "is an intended third-party beneficiary of the GPLv2 and LGPLv2.1 between V[IZIO] and the developers of the SmartCast Programs at Issue and, because of this, may seek to enforce the Source Code Provision against V[IZIO]." (Compl. ¶ 120.) SFC further alleged that VIZIO failed to comply with the conditions of GPLv2 and LGPLv2.1 because it did not provide the source code for the software covered by these licenses and incorporated into its Smart TVs. (Compl. ¶ 126.) And SFC alleged that VIZIO failed to make a written offer to provide the source code upon request. (Compl. ¶¶ 51–52, 54–55, 67, 70, 73, 75, 77, 95, 98, 99, 100, 102, 105.) VIZIO later served responses to SFC's written discovery in which VIZIO described in detail where and how it made the written offer to provide source code, as the GPL requires. (VIZIO

Comp. Ex. 2 at 15–17.) Yet even though it had VIZIO's discovery responses in hand, SFC persisted in its position that VIZIO never provided a written offer.

On December 1, 2023, SFC filed its first motion for summary adjudication (ROA #156 ("Initial MSA")) seeking a ruling that VIZIO "has a duty under [GPLv2 and LGPLv2.1] to produce to SFC: a. the complete source code . . . for any GPL-licensed software on VIZIO Smart TV Model Nos. V435-J01, D32h-J09, or M50Q7-J01; and b. the complete source code or object code for any software that links to an LGPLv2.1-licensed library on VIZIO Smart TV Model Nos. V435-J01, D32h-J09, or M50Q7-J01 (or otherwise comply with LGPLv2.1 § 6)." (Initial MSA at i.) SFC argued it was entitled to this source code as a third-party beneficiary of GPLv2 and LGPLv2.1. (Initial MSA at 5.)

On January 10, 2024, while its motion for summary adjudication was still pending, SFC filed the First Amended Complaint ("FAC"). SFC continued to allege it "was not a contracting party" to the GPL (FAC ¶ 152) and that it was suing as a third-party beneficiary (FAC ¶ 156). SFC also continued to allege that VIZIO violated the GPL by failing to make a written offer. (FAC ¶ 131.) Alternatively, SFC alleged that VIZIO's written offers to provide the source code were invalid. (FAC ¶ 104.) SFC elsewhere explained in an interrogatory response why, in its view, VIZIO failed to make a written offer as the GPL requires. (VIZIO Comp. Ex. 3.) Since then, SFC has not amended this interrogatory response to assert otherwise. (Williams Decl. ¶ 6.)

On March 26, 2024, the Court denied SFC's initial motion for summary adjudication, finding that "a triable issue of fact exists as to whether Plaintiff is a third party beneficiary."[1] (Order dated March 26, 2024 (ROA # 211) ("Initial MSA Order") at 5.)

On May 23, 2025, SFC filed this motion (ROA #496), seeking a determination that VIZIO has a duty to provide SFC with the source code because VIZIO purportedly "entered into a binding contract with SFC to provide SFC with the applicable source code . . . ." (Mot. at 8.) In addition,

[1] The Court also found that SFC is not entitled to summary adjudication on the issue of duty because the GPL requires a licensee to either provide the source code *or* make a written offer to provide the source code, and SFC failed to establish by undisputed facts that VIZIO failed to make a written offer to provide the source code. (Initial MSA Order at 5.)

SFC seeks a determination that VIZIO has a duty to provide SFC with the source code as a third-party beneficiary under the GPL. (Mot. at 10.)

ARGUMENT

I. SFC MAY NOT ASSERT ITS NEW DIRECT CONTRACT CLAIM FOR THE FIRST TIME ON SUMMARY ADJUDICATION

The plaintiff is the master of the complaint, and the complaint controls the litigation of the case. As the California Supreme Court has repeatedly held, "the materiality of a disputed fact is measured by the pleadings, which set the boundaries of the issues to be resolved at summary judgment." *Conroy*, 45 Cal. 4th at 1250 (cleaned up) (collecting cases); *see Lavely v. Nonemaker*, 212 Cal. 380, 385 (1931) ("[I]t is a fundamental principle of pleading that 'a plaintiff must recover, if at all, upon the cause of action set out in the complaint, and not upon some other which may be developed by the proofs.'"). "Affidavits on a motion for summary judgment must be directed to the issues raised by the pleadings." *Keniston v. Am. Nat. Ins. Co.*, 31 Cal. App. 3d 803, 812 (1973) (declarations in support of summary judgment improper because they were not directed to issues raised by pleadings and were contradictory to allegations in complaint). A plaintiff that "wishes to expand the issues" considered in a motion for summary adjudication "must seek leave to amend the complaint." *Alvis v. Cnty. of Ventura*, 178 Cal. App. 4th 536, 548 (2009) (denying motion for summary adjudication based on theory asserted in discovery responses but not alleged in complaint).

SFC pleaded in its complaint that it is entitled to source code as a third-party beneficiary of the GPL, not that it has a contractual right to source code through a direct contract with VIZIO. That is the "cause of action" on which SFC may "recover, if at all." *Lavely*, 212 Cal. at 385. SFC may not seek summary adjudication on a new direct-contract theory that appears nowhere in the complaint.

A. Until Now, SFC Never Alleged (Or Argued) It Had A Direct Contract With VIZIO

SFC argues that this Court should determine on summary adjudication that SFC *accepted VIZIO's written offer* to provide applicable source code and thereby entered into a direct contract with VIZIO. (Mot. at 8–10.) That argument fails because it is contrary to SFC's complaint—and,

indeed, it is contrary to SFC's representations in its initial motion for summary adjudication and contrary to numerous interrogatories and interrogatory responses previously served by SFC. SFC's improper attempt to assert a direct-contract theory for the first time here should be firmly rejected.

In its initial October 2021 complaint and its FAC filed in January 2024, SFC alleged only a third-party beneficiary claim. Specifically, SFC asserted that it "is an intended third-party beneficiary of the GPLv2 and LGPLv2.1 between V[IZIO] and the developers of the SmartCast Programs at Issue and, because of this, may seek to enforce the Source Code Provision against V[IZIO]." (Compl. ¶ 120, FAC ¶ 156). Consistent with those allegations, SFC expressly conceded in its initial complaint and FAC that it "is not a contracting party." (Compl. ¶ 116, FAC ¶ 152.)

Until now, SFC never alleged in its pleadings (or elsewhere) that it had a direct contract with VIZIO, much less that it formed a contract with VIZIO by accepting VIZIO's written offer to provide source code. To the contrary, SFC repeatedly asserted that VIZIO never made a written offer at all, and it alternatively asserted that VIZIO's written offers were invalid and unenforceable. SFC pleaded *at least fifteen times* in its initial complaint that VIZIO did not provide a written offer. (Compl. ¶¶ 51–52, 54–55, 67, 70, 73, 75, 77, 95, 98, 99, 100, 102, 105.) And in the FAC, after the parties exchanged significant discovery, SFC alleged again that VIZIO did not provide a written offer (FAC ¶ 131 ("Defendants did not accompany the Subject TVs with the source code […] or a written offer for such materials")), or alternatively, that any purported written offer was not valid (FAC ¶ 128 ("VIZIO did not accompany the Subject TVs with either the source code […] or with a valid written offer to provide such source code on demand.")). These allegations were consistent with SFC's interrogatory responses in discovery that explained why, in SFC's view, VIZIO's written offers were invalid. (CITE.) Indeed, after all that discovery, SFC specifically alleged in the FAC that the "purported written offer made via the SmartCast user interface at Extras/About/License List is not a valid written offer." (FAC ¶ 104.)

Now, SFC seeks to pull off a breathtaking about-face, arguing in its motion here that "VIZIO made an offer" via the user interface's "License List" sufficient to form a binding contract with

SFC. (Mot. at 8.) That assertion is flatly contrary to SFC's own pleaded allegations.[2] Accordingly, that assertion cannot serve as a basis for summary adjudication absent amendment of the complaint. *Alvis*, 178 Cal. App. 4th at 548.

B. SFC May Not Amend Its Complaint On The Eve Of Trial

Not only has SFC failed to seek leave to amend its complaint, but any request for leave to amend should be denied at this late date. As a general matter, courts are "reluctant to open the pleadings" for motions set for hearing shortly before trial. Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (Rutter 2025) Ch. 10-B, ¶ 10:51.12. "The law is also clear that even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial." *Roemer v. Retail Credit Co.*, 44 Cal. App. 3d 926, 939–40 (1975). Courts abuse their discretion if "by permitting the amendment new and substantially different issues are introduced in the case or the rights of the adverse party prejudiced." *Trafton v. Youngblood*, 69 Cal. 2d 17, 31 (1968) (collecting cases).

SFC's backdoor attempt to change its theory of the case at this stage is indefensibly tardy. SFC alleged in its initial complaint that VIZIO never made a written offer to provide the source code. (Compl., ¶¶ 51–52, 54–55, 67, 70, 73, 75, 77, 95, 98, 99, 100, 102, 105.) On January 9, 2023, VIZIO responded to SFC's written discovery requests by explaining how and where it made a written offer as the GPL requires. (VIZIO Comp. Ex. 2 at 15–17.) One year later, on January 10,

[2] In any event, SFC's new direct-contract theory is factually unsupported, precluding summary adjudication. SFC presents no evidence that *it* ever accepted VIZIO's written offer to provide source code, which SFC previously asserted was non-existent or invalid. Rather, SFC relies on the declaration of non-party Paul Visscher, who claims SFC asked him to request source code from VIZIO in April 2023 (in the midst of this litigation), and that in response, Mr. Visscher received a source-code candidate from VIZIO, which he never bothered to examine. (Visscher Decl. ¶¶ 3-4.) Mr. Visscher never identified himself to VIZIO as purportedly acting on SFC's behalf. (SFC's App., Ex. 4.) Nor is there any evidence that Mr. Visscher was authorized to enter into contracts on SFC's behalf. Yet now, SFC relies on Mr. Visscher's communication with VIZIO via an online chat to support its brand-new theory that SFC *as an entity* accepted an offer from VIZIO *through* Mr. Visscher, thereby forming a contract. SFC's attempt to advance this meritless argument on a surprise basis for the first time here, after the parties engaged in extensive discovery, only underscores why it is vital that the pleadings—and the discovery process designed to test the pleadings—must govern summary adjudication.

2024, SFC filed its FAC, repeating its allegations that VIZIO never made a written offer, while asserting in the alternative that any written offer VIZIO purported to have made was invalid. (FAC ¶¶ 63–65, 87–89, 91, 98, 104, 128, 131, 134–135, 140, 166.) And in response to VIZIO's interrogatories, SFC also proceeded to set forth in great detail all the facts supporting its contention that VIZIO never made a written offer to provide the source code. (VIZIO Comp. Ex. 3.)

Despite all of this, SFC now argues that VIZIO actually *did* make a written offer through its License List "to provide applicable source code upon request for a processing fee covering the cost of fulfilling the distribution" (Mot. at 8), and that SFC accepted this offer by requesting the source code in a Live Chat with a VIZIO representative (Mot. at 9). To establish this alleged contract, SFC relies on the Declaration of Paul Visscher, the current System Administrator for SFC, who states that he learned about the written offer in March or April 2023 and requested the source code through Live Chat "[o]n or about April 26, 2023." (Visscher Decl. ¶¶ 2–3.) Thus, according to SFC, SFC learned from Mr. Visscher in April 2023—*eight months before it filed its FAC*—that VIZIO made a written offer to provide source code. Yet in its FAC, filed in January 2024, SFC continued to deny that VIZIO made a written offer and alternatively asserted that any written offer was invalid. SFC provides no explanation for why it has abruptly reversed tack now, even though the relevant information has been available to SFC for over two years.

California courts have denied leave to amend pleadings in connection with motions for summary judgment under similar circumstances. *See, e.g.*, *Record v. Reason*, 73 Cal. App. 4th 472, 486–87 (1999) (affirming denial of leave to amend at the time of summary judgment hearing because plaintiff "had knowledge of the circumstances on which he based the amended complaint" before he filed the original complaint); *Champlin/GEI Wind Holdings, LLC v. Avery*, 92 Cal. App. 5th 218, 225 (2023) (affirming summary judgment without allowing leave to amend complaint to assert "a broader view of breach of contract" because appellant "had access at all times" to the agreements underlying the proposed amendment to add a new theory of breach of contract). To the extent that SFC tacitly seeks to amend its complaint through this motion, the Court should bar it from doing so for the same reasons other courts have properly rejected late-breaking amendments.

Allowing SFC to amend its complaint now would also prejudice VIZIO. In particular, allowing SFC to add a new theory of liability on the eve of trial would "put [VIZIO] in a position of defending against a theory and cause of action [VIZIO] w[as] not prepared for," and require reopening discovery, causing undue delay and prejudice. *See Stockton v. Ortiz,* 47 Cal. App. 3d 183, 194 (1975). The circumstances surrounding SFC's new direct-contract theory are opportunistic at best. SFC presents no evidence that it ever made a request for source code from VIZIO. Instead, as noted, a non-party witness, Mr. Paul Visscher, claims that SFC asked him to make a request for source code. (Visscher Decl. ¶ 3.) Mr. Visscher did not identify himself as a representative from SFC when he made the request. (SFC App., Ex. 4.) SFC presents no evidence that Mr. Visscher was authorized to enter into contracts on SFC's behalf. Had VIZIO known that SFC would later attempt to assert a direct-contract theory based on interactions with Mr. Visscher during the course of this litigation, then, at the very least, VIZIO would have undertaken discovery into Mr. Visscher's communications with SFC, his purported role at SFC, his authority to enter into contracts on SFC's behalf, the purported formation of this supposed direct contract with VIZIO, and the lack of any consideration provided by Mr. Visscher. In addition, VIZIO would have pursued a defense to SFC's claim on the grounds that any purported contract would have been between Mr. Visscher, who is not a party to this litigation, and VIZIO. These issues cannot be cured at this late stage of the case when trial is just weeks away. For all these reasons, the Court should not permit SFC to effectively amend its complaint to assert a wholly new theory of contract liability.

II. THE COURT LACKS JURISDICTION TO CONSIDER SFC'S RENEWED MOTION FOR SUMMARY ADJUDICATION ON ITS THIRD-PARTY BENEFICIARY THEORY

On March 26, 2024, the Court denied SFC's motion for summary adjudication on the question whether SFC is a third-party beneficiary of the GPL. (Initial MSA Order.) The Court held that triable issues of fact exist "as to whether allowing third parties, such as Plaintiff, to enforce the GPL is consistent with the objectives of the contract or the intent of the parties." (*Id.* at 5.) SFC now asks the Court to rule on the same issue of third-party beneficiary status in a renewed motion for summary adjudication. But, as discussed below, SFC has not complied with the jurisdictional requirements for a motion for reconsideration. Its motion therefore fails.

A. The Code Of Civil Procedure Imposes Strict Limitations On The Court's Ability To Consider Renewed Motions For Summary Adjudication

A court lacks jurisdiction to reconsider a prior order or renewal of a prior motion unless the moving party complies with Civil Procedure Code Section 1008. Section 1008 "specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions," and it expressly states that "[n]o application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section." Civ. Proc. Code § 1008 (e). The California Legislature "expressly intended to make section 1008 both jurisdictional and applicable to all motions for reconsideration of interim orders, as well as all renewed motions for interim orders previously denied." *Kerns v. CSE Ins. Grp.*, 106 Cal. App. 4th 368, 383 (2003). The statute provides that if a party's application for an order was refused in whole or part, the party may only "make a subsequent application for the same order upon new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." Civ. Proc. Code § 1008. Moreover, Civil Procedure Code Section 437c(f)(2) provides that a "party shall not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court unless that party establishes, to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion."

As the Supreme Court has explained, Sections 1008 and 437c(f)(2), taken together, "serve a purpose." *Le Francois v. Goel*, 35 Cal. 4th 1094, 1104 (2005). Specifically, "[t]hey are 'designed to conserve the court's resources by constraining litigants who would attempt to bring the same motion over and over.'" *Id.* The new-facts-or-law requirements in the two statutes are "essentially the same" and "any language differences between the statutes do not warrant different treatment of the issue." *Id.* at 1099. Thus, to satisfy either statute, a moving party must "give a satisfactory explanation for the previous failure to present the allegedly new or different evidence or legal authority offered in the second application." *Kerns v. CSE Ins. Grp.*, 106 Cal. App. 4th 368, 383 (2003); *see also Baldwin v. Home Savings of Am.*, 59 Cal. App. 4th 1192, 1198–1201 (1997) (same);

Garcia v. Hejmadi, 58 Cal. App. 4th 674, 688–691 (1997) (same). In other words, Section 1008 "has long required" a "threshold showing of diligence" to explain why the "newly discovered matter was not presented earlier." *Garcia*, 58 Cal. App. 4th at 688.

B. SFC Presents No New Material Facts, Circumstances, Or Law That Would Justify Renewal Or Reconsideration

Even if SFC had attempted to comply with Sections 437c(f)(2) and 1008, it could not do so because SFC's motion does not present new facts, circumstances, or law that would justify reconsideration or a renewed motion for summary adjudication. SFC provides no affidavit explaining its prior motion, when it was made, how the Court ruled, or what new and/or different facts, circumstances, or law are claimed to be shown to justify reconsideration. Rather, SFC simply filed a new motion asking the Court (again) to grant summary adjudication on third-party beneficiary status, as if the prior motion never existed. (Mot. at 10.)

SFC does not identify any change of law following the Court's prior ruling that would justify a motion for reconsideration. Nor does SFC identify any newly discovered facts that justify reconsideration. SFC submits declarations from Ms. Kooyman of the Free Software Foundation ("FSF") ("Kooyman Declaration") and from SFC's "Hacker-in-Residence" Mr. Kuhn ("Kuhn Declaration"), but neither contains new or different facts that SFC could not have presented earlier.

1. SFC's Evidence Is Not New

In particular, the Kooyman Declaration states FSF's supposed current position on GPL enforcement—*i.e.*, that the FSF "encourage[s] the use of any legal mechanism available to users for obtaining complete and corresponding source code"—and notes that FSF accordingly updated its Frequently Asked Questions ("FAQ") webpage captioned "Who has the power to enforce the GPL" after FSF "learned of this litigation." (Kooyman Decl. ¶¶ 14–26.) Ms. Kooyman's declaration does not justify reconsideration because SFC has known of FSF's supposed "real" position for years. At her deposition, Ms. Kooyman testified that in May and June 2023, she worked with SFC to prepare a draft affidavit "that spoke about whether or not users"—meaning not just copyright holders—"can enforce the GNU general public license." (VIZIO Comp. Ex. 4 at 32:9–20.) SFC received Ms. Kooyman's draft affidavit but told her "they weren't going to use it" because "[t]hey felt it wasn't

necessary at that time." (*Id.* at 43:2–15.) This shows that approximately six months before SFC filed its Initial MSA on December 1, 2023, SFC already had a draft affidavit from Ms. Kooyman representing FSF's supposed actual position on third-party enforcement of the GPL. Because SFC inexplicably waited years before presenting the FSF's supposed actual position to the Court on this motion and "no *satisfactory* explanation appeared for not bringing [the declarations] out earlier," SFC does not meet the "strict requirement of diligence" to satisfy Section 1008. *Garcia*, 58 Cal. App. 4th at 690 (emphasis in original).

The Kuhn Declaration is similarly unhelpful to SFC because it is not new either. It seeks to explain away statements Mr. Kuhn publicly made in an article titled "Some Thoughts on GPL Enforcement," which confirmed that only copyright holders (not third-party beneficiaries) could enforce the GPL. (Kuhn Decl. ¶¶ 27–37.) Mr. Kuhn attempts to "explain in great detail why [his prior] statements are not relevant to the [previous] Motion and how his views about enforcement of the GPLs have changed over time." (Mot. at 17 n.2.) As with the insufficient evidence presented in *Garcia*, the Kuhn Declaration consists of Kuhn's "own declared knowledge," which "was obviously always within his possession," and "there is no showing [Kuhn] had been unavailable to counsel [for SFC] anytime during preparation of the initial [motion]." 58 Cal. App. 4th at 690. On the contrary, Mr. Kuhn filed a declaration in support of SFC's Initial MSA. (ROA # 156.) Nothing Mr. Kuhn says here could not have been presented to the Court in support of SFC's Initial MSA.

2. SFC's Evidence Is Irrelevant

Moreover, even if Ms. Kooyman's and Mr. Kuhn's declarations offered anything "new" (and they do not), SFC admits they are not relevant to whether the GPL permits third-party enforcement. Thus, they cannot justify reconsideration or renewal. *See Garcia*, 58 Cal. App. 4th at 690 (not "all facts not previously presented to a court would suffice" under Section 1008, and matters "clearly collateral to the merits" are "no ground for reconsideration"). SFC ultimately concedes that after-the-fact "pronouncements have no relevance whatsoever to the reasonable expectations of the contracting parties." (Mot. at 17.)

Indeed, the reasonable expectations of the parties were set through decades of prior statements from the FSF and SFC (including from Mr. Kuhn) that *only* copyright holders have the

power to enforce the GPL. Ms. Kooyman admitted at her deposition (consistent with overwhelming publicly available information) that until FSF changed its website FAQ just two days before her deposition, "the FSF made statements in the past that make it seem like we believed that the copyright holders were the only ones to be able to enforce" the GPL. (VIZIO Comp. Ex. 4 at 76:13–17.) Thus, even if, as Ms. Kooyman dubiously asserts, the FSF had always maintained a secret contrary position, it never publicly disclosed that position. That secret, undisclosed position is irrelevant to whether the GPL actually permits third-party enforcement because it could not have influenced the reasonable expectations of parties to the GPL on that issue. (Initial MSA Order at 5) ("If FSF has published or caused to be published statements which call into question this issue [of whether allowing third parties to enforce the GPL is consistent with the objectives of the contract or the intent of the parties], then it is possible that it never intended to create such a right at the time the licensing agreement was created.") Similarly, Mr. Kuhn's after-the-fact attempt to discredit his prior public statements about GPL enforcement are likewise irrelevant.

Accordingly, SFC cannot possibly argue that there are any new material facts or changes in law that would justify reconsidering the Court's prior denial of SFC's motion for summary adjudication or allowing SFC to renew that motion.

CONCLUSION

For the foregoing reasons, Defendant VIZIO respectfully requests that the Court deny SFC's Motion for Summary Adjudication in its entirety.

DATED: August 1, 2025

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