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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 to 10, Inclusive,**

Defendants.

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

[Hon. Sandy N. Leal / Dept. C33]

**MEMORANDUM OF POINTS AND
AUTHORITIES OF PLAINTIFF SOFTWARE
FREEDOM CONSERVANCY, INC. IN
OPPOSITION TO DEFENDANT VIZIO
INC.'S MOTION FOR SUMMARY
JUDGMENT OR IN THE ALTERNATIVE
FOR SUMMARY ADJUDICATION;
DECLARATIONS OF BRADLEY M. KUHN
AND DENVER GINGERICH**

*[Response to Separate Statement of Undisputed
Material Facts; Evidentiary Objections; Appendix
of Exhibits; and Request for Judicial Notice
submitted concurrently herewith]*

Date: July 27, 2023

Time: 10:00 a.m.

Dept.: C33

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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Apparently desperate for another bite at the apple, Defendant VIZIO, Inc. (“VIZIO”) has filed a
3 motion for summary judgment/summary adjudication (the “Motion”) that rehashes failed assertions,
4 misstates applicable law, and goes so far as to mistakenly assert that the federal district court’s ruling on
5 the very issue that is the subject of VIZIO’s Motion “is inconsistent with controlling law.” VIZIO’s
6 primary contention—that the breach of contract claim alleged by Plaintiff Software Freedom
7 Conservancy, Inc. (“SFC”) is preempted by the Copyright Act—has already been adjudicated and rightly
8 rejected by the federal district court in this very case and by the two other courts that have analyzed the
9 specific contractual provision at issue in this action. VIZIO’s other assertion—that SFC is not a third-
10 party beneficiary of the contracts under which it is suing—relies on inadmissible hearsay,
11 mischaracterizes both facts and law, and ignores the plain text of the relevant agreements. Because
12 VIZIO fails to satisfy its burden of establishing that there is no triable issue of material fact as to SFC’s
13 claims and it is entitled to judgment as a matter of law, this Court should deny the Motion in its entirety.

14 SFC’s Complaint alleges state law claims for breach of contract and declaratory relief against
15 VIZIO. SFC alleges that VIZIO has breached two software license agreements, known as the GPLs,¹
16 by using software governed by the GPLs in the operating systems of the “Smart TVs” that it
17 manufactures, without complying with its obligation under the GPLs to disclose the source code of its
18 operating system to recipients of the software. SFC sued as part of its mission to promote projects that
19 use free and open-source software and vindicate the rights of those who receive and use such software.

20 VIZIO does not dispute that its devices use software governed by the GPLs and that the GPLs
21 thus may require VIZIO to disclose its source code. Moreover, VIZIO has conceded in a government
22 filing that it could be subject to liability for breach of contract by parties such as SFC “demanding release
23 of, what we believe to be open source software or noncompliance with open source licensing terms”
24 such as those in the GPLs. Still, to avoid its clear contractual obligations, VIZIO sought to remove this
25 action to federal court, claiming these obligations were preempted by federal copyright law. In a
26 detailed, nine-page order (the “Remand Order”), Judge Josephine Staton of the United States District
27 Court for the Central District of California (the “Federal Court”) rejected all of VIZIO’s arguments
28 regarding copyright preemption and remanded the case back to this Court.

¹ The two agreements, the GNU General Public License Version 2 (“GPLv2”) and the GNU Lesser
General Public License Version 2.1 (“LGPLv2.1”) (collectively, the “GPLs”) are attached as Exhibits
“A” and “B” to SFC’s Complaint and as Exhibits “1” and “2” to SFC’s Appendix of Exhibits (the
“App.”), submitted separately herewith.

1 Even though VIZIO concedes that it may be liable for breach of contract for failing to comply
2 with the GPLs' open-source licensing terms, it now bases its Motion on the very same contention rejected
3 in the Remand Order: that SFC's breach of contract claim is preempted by the Copyright Act. This
4 Court should reject VIZIO's rehashed, failed assertion, and deny the Motion, for at least four reasons.

5 First, the universally accepted test for copyright preemption, known as the "extra element" test,
6 provides that where state law claims include an "extra element" that makes the right asserted
7 qualitatively different from those rights protected under the Copyright Act, the state law claims are not
8 preempted. Here, Vizio's obligation to produce source code under the GPLs is purely contractual and is
9 not equivalent to any of the exclusive rights enumerated in Section 106 of the Copyright Act. Second,
10 "[m]ost courts have held that the Copyright Act does *not* preempt the enforcement of contractual rights"
11 because it is the sort of state law claim that "includes an 'extra element' that makes the right asserted
12 qualitatively different from those protected under the Copyright Act." (*Altera Corp. v. Clear Logic, Inc.*,
13 424 F.3d 1079, 1089 (9th Cir. 2005) ("*Altera*") (emphasis in original). Accordingly, courts routinely
14 have held that the mutual exchange of contractual promises, such as VIZIO's promise to make its source
15 code freely available in exchange for being able to use the software covered by the GPLs, is an "extra
16 element" sufficient to avoid copyright preemption. VIZIO cannot establish otherwise. Third, VIZIO
17 fails to distinguish, and cannot distinguish, Judge Staton's ruling in the Remand Order, which compels
18 this Court to reject VIZIO's preemption claim. Finally, in *Versata Software, Inc. v. Ameriprise Fin., Inc.*,
19 2014 U.S. Dist. LEXIS 30934 (W.D. Tex. Mar. 11, 2014) ("*Versata*") and *Artifex Software v. Hancom,*
20 *Inc.*, 2017 U.S. Dist. LEXIS 62815 (N.D. Cal. Apr. 25, 2017) ("*Artifex*"), two separate federal district
21 courts held that state law claims to enforce the obligation to make source code covered by the GPL
22 Agreements freely available—the very provision at issue in this action—are not preempted by the
23 Copyright Act. These cases likewise compel this Court to deny the Motion [*see* Section IV, below].

24 VIZIO's other contention—that SFC lacks standing to enforce the GPLs as a third-party
25 beneficiary—also is fatally flawed. VIZIO's Motion does not dispute that SFC satisfies the first two
26 elements of the California Supreme Court's test for third-party standing. Moreover, VIZIO cannot
27 establish that allowing recipients of GPL-licensed software, such as SFC, to enforce their rights to source
28 code is inconsistent with the objectives of the GPLs or the reasonable expectations of the contracting
parties—the third element of the test for third-party standing. Instead, VIZIO relies on inadmissible
pronouncements made years after the GPLs were drafted, rather than the plain text of the GPLs. VIZIO
thus fails to satisfy its burden on summary judgment and the Motion fails [*see* Section V, below].

II. RELEVANT FACTUAL BACKGROUND

A. *The GPLs, FOSS, and the Source Code Provision at Issue*

The GPLs at issue in this action—the GPLv2, dated June 1991 and the LGPLv2.1, dated February 1999—are two of the most vital, widely used, and successful software license agreements. (SFC’s Response to Separate Statement, submitted separately herewith, Additional Material Facts (“AMF”) Nos. 1-4.) Software developed under the GPLs helps operate such consumer devices as wireless home routers, and—pertinent to this action—television sets. (AMF No. 5.)

The GPLs play a central role in the development of “free and open source software” (“FOSS”). FOSS is a software development model that encourages and relies on collaboration and the free exchange of knowledge. In this context, “free” refers to “freedom,” not “gratis.” (AMF Nos. 6-8.) FOSS projects “invite computer programmers from around the world to view software code and make changes and improvements to it.” (*Jacobsen v. Katzer*, 535 F.3d 1373, 1378 (Fed. Cir. 2008) (“*Jacobsen P*”).) FOSS projects are successful because many software developers work on them, adding new features, tweaking old features, and fixing bugs, and these new versions are available to other developers to learn from, tweak and improve. (AMF Nos. 9.) Many popular software programs are FOSS, including the Linux kernel, a popular computer operating system at issue in this case. (AMF Nos. 10-11.)

Software exists in two general forms: (1) object or executable code that computers can understand and implement; and (2) source code that can be understood and edited by those familiar with the relevant programming language. (AMF Nos. 12-13.) Although software is often distributed in an executable form, including in the “Smart TVs” at issue here, programmers cannot review, modify, or re-purpose executable software. (AMF Nos. 14-15.) The GPLs solve this problem and make FOSS possible by requiring those who distribute software in an executable form to accompany that software either with the complete corresponding source code, or with a written offer to give any third party the complete corresponding source code upon request. (AMF No. 16.) As one court has described it, “[T]he GPL allows for free use and redistribution of [the software], including in other software (i.e., the creation of a derivative work), on the condition the original licensor continues the open source trend and makes the source code freely available.” (*Versata, supra*, 2014 U.S. Dist. LEXIS 30934, at *4; *see also Artifex, supra*, 2017 U.S. Dist. LEXIS 62815, at *4 (“[T]he GNU GPL required Defendant to distribute its software with the accompanying source code.”)).

In order to make FOSS possible and ensure that the applicable software may be reviewed and modified by others, Section 3 of the GPLv2 provides, in pertinent part:

1 You may copy and distribute [a GPL-licensed] Program (or a work based on it...) in
2 object code or executable form under the terms of Sections 1 and 2 above provided that
you also do one of the following:

3 a) *Accompany it with the complete corresponding machine-readable source*
4 *code...*; or,

5 b) *Accompany it with a written offer, valid for at least three years, to give any*
6 *third party ... a complete machine-readable copy of the corresponding source code....*

7 (AMF No. 17 (emphasis added).) The LGPLv2.1 has equivalent language. (AMF No. 18.) This
provision is referred to both here and in the Complaint as the “Source Code Provision.”

8 The Preamble to the GPLs sets forth the objectives of these agreements. The GPLs are “intended
9 to guarantee your freedom to share and change free software—to make sure the software is free for all
10 its users.” (AMF No. 19.) The GPLs “*are designed to make sure* that you have the freedom to distribute
11 copies of free software ..., *that you receive source code or can get it if you want it*, that you can change
12 the software or use pieces of it in new free programs; *and that you know you can do these things.*”
13 (AMF No. 20 (emphasis added).) Finally, the GPLs create “certain responsibilities for you if you
14 distribute copies of the software, or if you modify it. For example, *if you distribute copies of such a*
15 *program*, whether gratis or for a fee, *you must give the recipients all the rights that you have. You*
16 *must make sure that they, too, receive or can get the source code. And you must show them these*
17 *terms so they know their rights.*” (AMF Nos. 21-22 (emphasis added).)

18 The notice preceding the Preamble in the GPLs states that “[e]veryone is permitted to copy and
19 distribute verbatim copies of this license document, but changing it is not allowed.” (AMF No. 23.)

20 **B. VIZIO’s Breach of the Source Code Provision Causes SFC to Bring this Action**

21 SFC is a not-for-profit organization whose mission includes fostering FOSS-related projects and
22 ensuring that FOSS remains “free.” (AMF No. 24.) An important part of SFC’s mission is ensuring
23 that source code for FOSS remains accessible and available for further development. (AMF No. 25.)
24 Thus, when companies using FOSS fail to comply with their obligations, SFC tries to educate them on
25 best practices for making written offers to provide source code and responding to requests for source
26 code, among other things. (AMF No. 26.) Unfortunately, however, non-compliance is common, and
27 SFC thus finds it occasionally necessary to bring lawsuits to enforce the GPLs. (AMF Nos. 27-28.)

28 Vizio manufactures and sells “Smart TVs,” *i.e.*, televisions capable of streaming content, such
as Netflix or Hulu, via a built-in internet connection and user interface. (AMF Nos. 29-30.) Smart TVs
require computer software and processors to stream such content. (AMF No. 31.) Many of the computer
programs on VIZIO’s Smart TVs, such as the Linux kernel, are subject to the GPLs. (AMF No. 32.)

1 Therefore, the Source Code Provision requires VIZIO to provide purchasers of its Smart TVs with
2 complete copies of the source code or an offer to provide the source code. (AMF No. 33.) VIZIO itself
3 concedes that that its devices use software governed by the GPLs and that the GPLs thus may require
4 VIZIO to disclose its source code. (AMF No. 34.) Moreover, VIZIO specifically concedes, in a March
5 2021 filing with the Securities and Exchange Commission, that it “could be subject to suits and liability
6 for ... breach of contract by parties ... demanding release of, what we believe to be open source software
7 or noncompliance with open source licensing terms,” such as in the GPLs. (AMF No. 35.)

8 During the past few years, SFC purchased three models of VIZIO Smart TVs which were loaded
9 with computer programs governed by the GPLs. (AMF Nos. 36-37.) Accordingly, under the Source
10 Code Provision, SFC was entitled to receive complete copies of the source code for these programs or a
11 written offer from VIZIO to obtain the source code. (AMF No. 38.) VIZIO failed to comply with the
12 Source Code Provision with respect to any of the three Smart TVs purchased by SFC, however.
13 Therefore, SFC chose to file its Complaint in this action.

14 **III. RELEVANT PROCEDURAL BACKGROUND**

15 ***A. SFC Files its Complaint in this Action***

16 On October 19, 2021, SFC filed its Complaint in this action. (AMF No. 39.) The Complaint
17 alleges, among other things, that at least 25 programs found on the three Smart TVs manufactured by
18 VIZIO and purchased by SFC, including the operating system, are covered by one of the GPLs. (AMF
19 No. 40.) The Complaint further alleges that VIZIO neither makes the source code for these programs
20 available to purchasers of its Smart TVs nor provides such purchasers with a written offer to obtain the
21 source code. Vizio’s conduct thus breaches the Source Code Provision. (AMF Nos. 41-42.)

22 SFC’s Complaint alleges two state law claims for breach of contract and declaratory relief. The
23 Complaint does not seek any money damages. (AMF No. 43.) Instead, the only relief SFC seeks as
24 part of its breach of contract claim is that Vizio specifically perform under the GPLs and comply with
25 its obligation under the Source Code Provision to provide the complete corresponding source code for
26 the programs at issue. (AMF No. 44.) Moreover, SFC’s declaratory relief claim seeks only an
27 equivalent declaration of the parties’ rights with respect to such source code. (AMF No. 45.)

28 ***B. Proceedings in Federal District Court and the Remand Order***

On November 29, 2021, VIZIO filed a Notice of Removal, removing the case to the Federal
Court on the ground that SFC’s claims were completely preempted by the Copyright Act. (AMF No.
46.) VIZIO then filed a motion to dismiss SFC’s Complaint on the same grounds. (AMF No. 47.)

1 In response, SFC filed a Motion to Remand, which the Federal Court granted in its Remand
2 Order, dated May 13, 2022. (AMF Nos. 48-49.) Relying in part on *Versata*, the Federal Court held that
3 SFC’s claims were not preempted because VIZIO’s contractual promise to provide source code under
4 the GPLs was “‘separate and distinct from any rights provided by the copyright laws’” and amounted to
5 “an ‘extra element.’” (AMF No. 50.) As the Federal Court explained in the Remand Order:

6 ***There is an extra element to SFC’s claims because SFC is asserting, as a third-party***
7 ***beneficiary of the GPL Agreements, that it is entitled to receive source code under the***
8 ***terms of those agreements.*** There is no right to receive certain works—or source code
9 in particular—under the Copyright Act; indeed, the Act’s primary purpose is to *limit*
10 who may reproduce, prepare derivative works, distribute, and display protected works.
11 ... The fact that SFC claims status as a third-party beneficiary to the GPL Agreements
12 and not the actual copyright holder—and therefore, has no authority to impose
13 limitations on the reproduction and distribution of the software—only underscores that
14 ***the contractual right at issue is qualitatively different from the rights under the***
15 ***Copyright Act. Thus, there can be no question that the extra element—that SFC is***
16 ***third-party enforcing its right to receive source code under the terms of a contract—***
17 ***transforms the nature of the action.***

18 (AMF No. 51 (italic emphasis in original; bold and italic emphasis added).) After this action was
19 remanded to this Court, VIZIO brought this Motion.

20 IV. VIZIO FAILS TO ESTABLISH, AND CANNOT ESTABLISH, THAT THE 21 COPYRIGHT ACT PREEMPTS SFC’S BREACH OF CONTRACT CLAIM²

22 A. ***The Copyright Act Does Not Preempt SFC’s Breach of Contract Claim Because VIZIO’s*** 23 ***Obligation to Provide Source Code is Purely Contractual and is an Extra Element that*** 24 ***is Not Equivalent to Any of the Copyright Act’s Exclusive Rights***

25 Copyright preemption is governed by Section 301(a) of the Copyright Act, which states that the
26 Act preempts “‘all legal and equitable rights that are equivalent to any of the exclusive rights within the
27 general scope of copyright as specified in section 106 ...” (*Kabehie v. Zoland* (2002) 102 Cal.App.4th
28 513, 519 n.3 (“*Kabehie*”), *quoting* 17 U.S.C. § 301(a).) The rights exclusively reserved to a copyright
owner under Section 106 of the Copyright Act are reproduction, adaptation, distribution, public
performance, public display, and public performance of sound recordings by digital audio (the
“Exclusive Rights”). (17 U.S.C. § 106.) A characteristic feature of these Exclusive Rights is that they
exclude others from these acts. (*CDK Glob. Ltd. Liab. Co. v. Brnovich*, 16 F.4th 1266, 1275-76 (9th
Cir. 2021) (“*CDK*”) (“the right granted by a copyright is the right to exclude others”).) These Exclusive

² In addition to the arguments set forth herein, SFC incorporates herein, as if set forth here in full,
SFC’s arguments that the Copyright Act does not preempt its breach of contract claim found in its
pleadings filed in the Federal Court. (See App., Exhs. “4”, “5”, “6”.)

1 Rights do not impose any affirmative duties on others. (*See id.* at 1276.)

2 California courts have held that the Copyright Act only preempts claims that assert state law
3 rights “equivalent to the exclusive rights contained in section 106” of the Act. (*Kabehie, supra*, 102
4 Cal.App.4th at 520; *Fleet v. CBS, Inc.* (1996) 50 Cal.App.4th 1911, 1919 (“*Fleet*”).) A state law right
5 is equivalent to the Exclusive Rights protected by copyright “when it is infringed by the mere act of
6 reproducing, performing, distributing, or displaying the work at issue. A claim asserted to prevent
7 nothing more ... is subsumed by copyright law and preempted.” (*Fleet, supra*, 50 Cal.4th at 1924.) By
8 contrast, if a state law right requires assertion of an “extra element ... instead of or in addition to the
9 acts of reproduction, performance, distribution or display,” then it is not equivalent to copyright “and
10 there is no preemption.” (*McCormick v. Sony Pictures Entm’t*, 2008 U.S. Dist. LEXIS 145812, at *25
11 (C.D. Cal. Nov. 17, 2008) (*quoting Computer Assoc. Int’l v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir.
12 1992).) Thus, under the “extra element test,” breach of contract claims are not preempted when “they
13 require elements that are qualitatively different from the elements of a federal copyright infringement
14 claim,” such as “a contractual promise creating a right not existing under federal copyright law.”
15 (*Kabehie, supra*, 102 Cal.App.4th at 517-18; *see also Altera, supra*, 424 F.3d at 1089.

16 The burden of proving federal preemption rests with the party asserting it. (*See Quesada v. Herb*
17 *Thyme Farms, Inc.* (2015) 62 Cal.4th 298, 308.) Furthermore, it is presumed that “Congress does not
18 intend to supplant state law,” so the burden to prove preemption is “considerable.” (*Id.* at 313; *see also*
19 *Viva! Int’l Voice for Animals v. Adidas Promo. Retail Operations, Inc.* (2007) 41 Cal.4th 929, 936
20 (“Courts are reluctant to infer presumption.”).) When the “extra element” test is correctly applied,
21 breach of contract claims are almost never preempted by the Copyright Act. (*See, e.g., Altera, supra*,
22 424 F.3d at 1089; *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 957 (9th Cir. 2010) (“*MDY*”);
23 *see also Kabehie, supra*, 102 Cal.App.4th at 525 (“A survey of the relevant case law indicates that breach
24 of contract causes of action are generally found not to be preempted.”).)³

25 When a copyright owner licenses a work of authorship to a licensee, and the licensee breaches
26 the terms of the license agreement, the breach may give rise to a contract claim, a copyright claim, or
27

28 ³ VIZIO quotes *Kabehie* out of context to misleadingly assert that “most, but not all, breach of
contract actions are preempted by the Act.” Memorandum of Points and Authorities in support of the
Motion (“Memo”) at 8:15-16, *quoting Kabehie, supra*, 102 Cal.App.4th at 524. VIZIO ignores the fact
that, on the very same page, *Kabehie* states that Congress only intended to preempt breach of contract
claims “that protect rights equivalent to any of the rights protected by federal copyright law” and
therefore, “most breach of contract causes of action would not be preempted ...” (*Id.*)

1 both, depending on the act giving rise to the claim and the nature of the right enforced. *Kabehie* provides
2 an excellent example of this principle and of the application of the “extra element” test to breach of
3 contract claims. *Kabehie* involved a series of contracts, whereby defendants sold their exclusive rights
4 in certain recorded musical compositions to plaintiff and also promised to deliver the master recordings
5 of the music to plaintiff. Defendants failed to deliver all the master recordings, but instead sold copies
6 of the recordings on their own account. Plaintiff then brought a number of state claims against
7 defendants, including breach of contract. (*Kabehie, supra*, 102 Cal.App.4th at 517-18.) The Court of
8 Appeal held that, to the extent that plaintiff’s breach of contract claims were premised on defendants’
9 sale of recordings, these claims were preempted because the alleged breach involved nothing more than
10 “the reproduction and distribution rights protected by federal copyright law.” (*Id.* at 529.) The court
11 further held, however, that plaintiff’s claims based on a failure to receive the master recordings was not
12 preempted because the right to receive these recordings was not a right provided by copyright law and
13 thus was “an extra element that is different from a copyright infringement claim.” (*Id.*)

14 Paradigmatic examples of breach of contract claims held to be equivalent to rights protected
15 under copyright and thus preempted include a violation of exclusive exhibition rights, the release of
16 protected images to the public, the copying of a script, and a violation of a contractual limitation allowing
17 a one-time use of a photo on a magazine cover. (*Id.* at 528 (citing cases).) These claims all implicate
18 an Exclusive Right set forth in Section 106 of the Copyright Act, such as reproduction, distribution, or
19 display. Conversely, claims alleging non-payment of royalties, the unauthorized disclosure of
20 confidential information, and the breach of contractual provisions prohibiting users of an online gaming
21 platform from using bots to enhance game play are not preempted. (*See id.* (citing cases); *Durgrom v.*
22 *Janowiak* (1999) 74 Cal.App.4th 178, 186-87; *MDY, supra*, 629 F.3d at 958.). The Copyright Act does
23 not grant copyright owners these rights. Contracts do. Accordingly, the Copyright Act does not preempt
24 such claims.

25 Application of the above authorities compels the conclusion that the Copyright Act does not
26 preempt SFC’s breach of contract claim because SFC does not allege that VIZIO copied (or adapted,
27 distributed, displayed, or performed) without authorization the software covered by the GPLs at issue in
28 the case. Rather, SFC alleges that, under the Source Code Provision, VIZIO had an affirmative duty to
provide, and SFC had the right to receive, source code or a written offer to provide the source code when
SFC sells its Smart TVs that include such software. (*See Complaint*, ¶¶ 28-29, found at App., Exh. “3”.)
The Source Code Provision thus provides the extra element necessary for SFC’s breach of contract claim

1 to avoid copyright preemption because it is “a contractual promise creating a right not existing under
2 federal copyright law.” (*Kabehie, supra*, 102 Cal.App.4th at 518.) As the Federal Court stated, “the
3 right to receive the source code would appear to be ‘*the very opposite*’ of” the Exclusive Rights under
4 the Copyright Act. (Remand Order at 6, found at App., Exh. “7”.) This right requires VIZIO to
5 affirmatively act, rather than excluding VIZIO from taking action. (*See CDK, supra*, 16 F.4th at 1275-
6 76.) The Copyright Act provides no right to force VIZIO to provide source code for the software at
7 issue and VIZIO’s failure to do so does not implicate any Exclusive Rights. (*See* 17 U.S.C. § 106.) The
8 GPLs, however, provide a right to receive source code and, as SFC alleges, VIZIO breached its promise
9 to make its source code available. (Complaint, ¶¶ 50-51.)

10 *Versata* and *Artifex*, the only other opinions to address copyright preemption in the context of
11 the GPL’s requirement to share source code, further support the conclusion that SFC’s breach of contract
12 claim is not preempted. In *Versata*, plaintiff Versata’s software incorporated a program governed by
13 the GPLs into its own larger software program. (*Versata, supra*, 2014 U.S. Dist. LEXIS 30934, at *3-
14 *4.) When Versata sued its licensee, Ameriprise, for breach of a broader master license agreement,
15 Ameriprise counterclaimed for breach of the GPL’s Source Code Provision (even though Ameriprise
16 was not, strictly speaking, a party to that agreement). (*Id.* at *4.) Versata moved for summary judgment,
17 arguing that Ameriprise’s counterclaim was preempted by copyright law because the Source Code
18 Provision in the GPLs “amounts to nothing more than a promise to not commit copyright infringement.”
19 (*Id.* at *13.) The *Versata* court rejected this argument, ruling that Ameriprise’s claim was based on
20 “Versata’s breach of an additional obligation: an affirmative promise to make its derivative work open
21 source because it incorporated an open source program into its software. ***Ameriprise’s claim therefore***
22 ***requires an ‘extra element’ in addition to reproduction or distribution: a failure to disclose the source***
23 ***code of the derivative software.***” (*Id.* at *14-*15 (emphasis added).) The court further stated that the
24 GPLs’ requirement to share source code is “an additional contractual promise separate and distinct from
25 any rights provided by the copyright laws” and agreed with Ameriprise that it creates “entirely distinct,
26 essentially opposite rights from those created by copyright.” (*Id.* at *15, *13-*14.)

27 *Versata* was followed by the Northern District of California in *Artifex*, which held that the
28 Copyright Act did not preempt a contract claim alleging a breach of the GPL’s requirement to share
source code. (*Artifex, supra*, 2017 U.S. Dist. LEXIS 62815, at *9.) In *Artifex*, defendant Hancom,
incorporated GPL-licensed software in its own larger program. Like plaintiff in *Versata* and VIZIO
here, Hancom failed “to distribute its software with the accompanying source code.” (*Id.* at *4.) Like

1 plaintiff in *Versata* and VIZIO here, Hancom argued that Artifex’s contract claim was preempted by the
2 Copyright Act because it alleged violations of the exact same exclusive federal rights to reproduce,
3 distribute and make derivative copies protected by Section 106 of the Copyright Act. (*Id.* at *9-*10.)
4 The *Artifex* court rejected Hancom’s argument, followed *Versata*, and concluded that “a failure to
5 disclose the source code of the derivative software” constitutes the required “‘extra element’ in addition
6 to reproduction or distribution.” (*Id.* at *9, *quoting Versata*, 2014 U.S. Dist. LEXIS 30934, at *5.)

7 *Versata* and *Artifex* are consistent with the congressional intent underlying copyright
8 preemption. Congress was careful not to allow copyright law to intrude into contract law: “Nothing in
9 the bill derogates from the rights of parties to contract with each other and to sue for breaches of
10 contract.” (H. Rep. No. 94-1476, at 132 (1976).) Congress thus indicated its respect for the freedom of
11 contract and its reluctance to interfere in private bargains.

12 Professor Nimmer’s leading treatise on copyright law further supports the conclusion that SFC’s
13 breach of contract claim should not be preempted by copyright law:

14 The essence of an enforceable contract, under American law, is consideration. Without
15 a promise, there is no contract. Conversely, a promise on the part of one who engages in
16 unlicensed reproduction is not a prerequisite to his being a copyright infringer.
17 Consequently, preemption should be found absent to the extent that a breach-of-contract
18 cause of action alleges more than simply reproduction (or adaptation, distribution, etc.)
19 of a copyrighted work. (1 Nimmer on Copyright, § 1.15.)

20 California courts have adopted this exact analysis. (*See Kabehie, supra*, 102 Cal.App.4th at 521.)

21 Accordingly, this Court should apply the above authorities and analysis, including the holdings
22 of *Versata*, *Artifex*, and the Federal Court’s Remand Order in this very case, and accept VIZIO’s
23 concession that it may be liable for breach of contract for violating the Source Code Provision. It should
24 thus rule that the Copyright Act does not preempt SFC’s breach of contract claim and deny the Motion.

25 ***B. VIZIO’s Mistaken Assertions Provide No Basis to Grant the Motion***

26 VIZIO raises various incorrect contentions in a flawed attempt to show that SFC’s breach of
27 contract claim is preempted. These assertions each lack merit and provide no basis to grant the Motion.

28 First, VIZIO contends that SFC’s breach of contract claim seeks to enforce rights equivalent to
the Exclusive Rights under the Copyright Act, “which include the right to control the copying and
distribution of copyrighted works.” (Memo at 8:27-9:1.) VIZIO is simply wrong. It has invented this
purported exclusive right to control, which is nowhere to be found in the Copyright Act. (*See* 17 U.S.C.
§ 106). VIZIO dredged up this purported right out of *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir.
2010) (“*Vernor*”). (Memo at 10:1-5.) *Vernor* involved the first sale doctrine, an affirmative defense to

1 infringement of the distribution right that has not been raised here and has no bearing on the issue of
2 preemption. It raised the question of whether Vernor, who purchased copies of Autodesk's software,
3 was the owner of the software who could resell the copies or was merely a licensee. (*Id.* at 1103-04.)
4 *Vernor* held only that a copyright owner's contractual restrictions on the transfer of software were
5 relevant to determine whether the software user was an owner or licensee and whether the first sale
6 doctrine applied. (*Id.* at 1111-12.) *Vernor* never described the ability to restrict the transfer of software
7 as a "right", however, much less an Exclusive Right. Nor did *Vernor* conclude that a violation of a
8 transfer restriction is itself an infringement of copyright. *Vernor* thus fails to support VIZIO's assertion
9 that its invented "exclusive right to control" is an Exclusive Right that preempts SFC's breach of contract
10 claim. Rather, it is nothing more than the outcome of an owner's general ability to control goods or
11 rights by contract. (*Cf. United Daughters v. Vanderbilt Univ.*, 174 S.W.3d 98 (Tenn. Ct. App. 2005).)

12 VIZIO next asserts that pronouncements by SFC and the Free Software Foundation ("FSF") that
13 the GPLs are licenses to be enforced by copyright holders somehow support its contention that SFC's
14 breach of contract claim is preempted. (Memo at 10:11-11:8.) VIZIO fails to explain, however, and
15 indeed cannot explain, how such statements by non-lawyers should cause this Court to avoid application
16 of the "extra element" test or reject the analysis in Section IV.A, above, including the holdings in the
17 Remand Order, *Versata*, and *Artifex*. Moreover, these statements are inadmissible hearsay which should
18 be disregarded by this Court. (*See* SFC's Evidentiary Objections, submitted separately herewith.)

19 VIZIO further asserts that the decisions in *MDY* and *Jacobsen I* support its preemption claim.
20 (Memo at 11:17-13:12.) Both cases are readily distinguishable. VIZIO contends that conditions in a
21 copyright license give rise to copyright infringement claims while covenants give rise to breach of
22 contract claims. (*Id.* at 11:17-25, *quoting MDY, supra*, 629 F.3d at 639.) As the Federal Court noted,
23 however, VIZIO "misreads" *MDY*, which did not involve a contract claim and merely "limit[ed] which
24 types of breaches are sufficient to state a copyright infringement claim. (Remand Order at 8, found at
25 App., Exh. "7".) "[I]f anything, [*MDY*] created a presumption that most breaches of licensing
26 agreements will not create a copyright claim, but instead, merely a breach of contract claim." (*Id.*)

27 Moreover, VIZIO's assertion that there is a bright dividing line conditions and covenants and a
28 contractual provision is either one or the other is a false dichotomy that is directly contrary to California
law. Nothing prevents a single contractual provision from being both a condition and a covenant. (*See*,
e.g., Guntert v. City of Stockton (1976) 55 Cal.App.3d 131, 139-40); *Call v. Alcan Pacific Co.* (1967)
251 Cal.App.2d 442, 447; *Budaeff v. Huber* (1961) 194 Cal.App.2d 12, 20.) When such a provision is

1 violated, the promisee has the option to enforce the clause (as a covenant) or treat the contract as
2 terminated (as a condition). (*Call, supra*, 251 Cal.App.2d at 447; *see also Kulawitz v. Pacific*
3 *Woodenware & Paper Co.* (1944) 25 Cal.2d 664, 669-70 (contractual right to quiet enjoyment functions
4 as both a condition and covenant).) This principle is black letter law. (*See, e.g.*, 1 B.E. Witkin, Summary
5 of California Law, Contracts § 799 (2023) (“The same fact or act can be *both* a condition and a promise.”
(emphasis added); 13 *Williston on Contracts* § 38:15 (collecting cases).

6 *MDY* and *Jacobsen I* are not to the contrary. Neither case stands for the strict “either-or”
7 distinction between covenants and conditions that VIZIO espouses. Furthermore, neither case could
8 stand for such a proposition because, as VIZIO itself recognizes, courts “distinguish between conditions
9 and covenants according to state law.” (Memo at 11:22-23, *quoting MDY, supra*, 629 F.3d at 939.) As
10 shown above, California law is clear that a given contractual provision can be both. Moreover, *MDY*
11 and *Jacobsen I* both addressed the question of whether a copyright infringement claim could be
12 maintained, and not whether a breach of contract claim could be maintained, as is the case here. Finally,
13 neither case involved copyright preemption or the GPLs at issue in this case. VIZIO has failed to cite,
14 and cannot cite, to any case where a defendant invoked a covenant-condition distinction to avoid a
breach of contract claim in favor of a copyright infringement claim, as VIZIO attempts here.

15 In short, that VIZIO may be liable for copyright infringement for violating a condition of the
16 GPLs does not prevent it from also being liable for breach of the Source Code Provision alleged by SFC
17 in this action. Neither *MDY* nor *Jacobson I* supports VIZIO’s copyright preemption claim.

18 Finally, VIZIO misleadingly asserts that the Remand Order is inconsistent with controlling law.
19 (Memo at 13:21-16:21.) SFC has already shown, however, that VIZIO’s arguments in support of this
20 assertion, including its reliance on cases such as *MDY*, *Jacobsen I*, and *Kabehie*, are fatally flawed.
21 Indeed, as explained in Section IV.A, above, the holding in *Kabehie* distinguishing between the different
22 breach of contract claims brought by plaintiff supports SFC’s position that its breach of contract claim
23 is not preempted. Moreover, VIZIO’s complaints about the Federal Court’s distinguishing of *Jacobsen*
24 *v. Katzer*, 609 F.Supp.2d 925 (N.D. Cal. 2009) (“*Jacobsen II*”) (Memo at 15:8-19) lack merit. As the
25 Federal Court correctly noted, *Jacobsen II* did not involve the GPLs or the Source Code Provision and
26 the contract provision “defendant allegedly breached allegedly breached amounted to little more than a
27 promise not to infringe copyright.” (Remand Order at 7, found at App., Exh. “7”, *citing Jacobsen II*,
28 609 F.Supp.2d at 933.) Accordingly, this Court should apply the language of the Remand Order and the
cases and analysis in Section IV.A., reject VIZIO’s copyright preemption claim, and deny the Motion.

1 **V. VIZIO FAILS TO ESTABLISH, AND CANNOT ESTABLISH, THAT SFC IS NOT AN**
2 **INTENDED THIRD-PARTY BENEFICIARY OF THE GPLs**

3 VIZIO further asserts that it is entitled to summary judgment on SFC's breach of contract claim
4 "because SFC cannot establish that it is an intended third-party beneficiary of the GPLs ..." (Memo at
5 16:19.) VIZIO misstates the test applicable to its Motion; SFC need not establish that it is an intended
6 third-party beneficiary of the GPLs in order to defeat the Motion. Rather, for this Court to grant the
7 Motion, VIZIO first must satisfy its burden of showing that SFC's breach of contract claim has no merit
8 by showing that one or more elements of the breach of contract claim cannot be established. (*See Cal.*
9 *Civ. Proc. Code* § 437c(p)(2).) As explained below, VIZIO fails to satisfy its burden of showing that
10 SFC is not an intended third-party beneficiary because VIZIO relies entirely upon inadmissible hearsay.
11 Moreover, even if this Court concludes that VIZIO has satisfied its burden, SFC still may defeat the
12 Motion by showing that a triable issue of material fact exists as to whether it is an intended third-party
13 beneficiary of the GPLs. (*Id.*) SFC makes just such a showing here. Indeed, as explained below, SFC
14 is an intended third-party beneficiary under the plain text of the GPLs. At the very least, SFC has
15 established that there is a triable issue of material fact as to its status as a third-party beneficiary sufficient
16 to deny the Motion. For these reasons, VIZIO's assertion that SFC is not an intended third-party
17 beneficiary of the GPLs is fatally flawed and provides no basis for this Court to grant the Motion.

18 "A third party beneficiary may enforce a contract made for its benefit." (*Hess v. Ford Motor*
19 *Co.*, 27 Cal. 4th 516, 524 (2002) ("*Hess*"). In *Goonewardene v. ADP, LLC*, 6 Cal.5th 817 (2019)
20 ("*Goonewardene*"), the California Supreme Court explained that courts must

21 carefully examine[] the express provisions of the contract at issue, as well as all of the
22 relevant circumstances under which the contract was agreed to, in order to determine
23 not only (1) whether the third party would in fact benefit from the contract, but also (2)
24 whether a motivating purpose of the contracting parties was to provide a benefit to the
25 third party, and (3) whether permitting a third party to bring its own breach of contract
26 action against a contracting party is consistent with the objectives of the contract and
27 the reasonable expectations of the contracting parties. All three elements must be
28 satisfied to permit the third party action to go forward. (*Id.* at 830.)

For purposes of the Motion, VIZIO does not dispute that SFC satisfies the first two elements of
the *Goonewardene* test. Moreover, the language of the GPLs clearly establishes that SFC satisfies the
first element, because the GPLs provide that recipients of GPL-licensed software such as SFC "would
benefit" under the contracts by receiving source code. (AMF No. 52.) Furthermore, the Preambles to
the GPLs establish that SFC satisfies the second element, because they provide that a "motivating

1 purpose” of the contracts was to ensure that recipients of GPL-licensed software, such as SFC, could
2 receive source code—and would know it. (See AMF Nos. 53.)

3 As explained below, VIZIO fails to show, and cannot show, that it has satisfied its burden of
4 establishing there is no triable issue of material fact and that it is entitled to judgment as a matter of law
5 on the third element of the *Goonewardene* test. For this reason, the Motion should be denied.

6 **A. The Language Of The GPLs Makes Clear That Allowing Recipients Of GPL-Licensed**
7 **Software Such As SFC To Enforce Their Rights To Source Code Is Consistent With**
8 **The “Objectives Of The Contract”**

9 The third element of the *Goonewardene* test set forth above has two parts. First, “the requirement
10 in the third element that third party enforcement be consistent with ‘the objectives of the contract’ is
11 comparable to the inquiry, proposed in Professor Eisenberg’s article, regarding whether third party
12 enforcement will effectuate ‘the contracting parties’ performance objectives[.]” (*Goonewardene*,
13 *supra*, 6 Cal.5th at 831, quoting Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev.
14 1358, 1385 (“*Eisenberg*”).)

15 VIZIO asserts that third-party enforcement of the GPLs is inconsistent with the objectives of the
16 GPLs because the GPLs may be enforced by the copyright holders. (Memo at 17:17-18:16.) This
17 assertion is flatly wrong and provides no basis to grant the Motion for three separate reasons.

18 First, the plain text of the GPLs makes clear that allowing the recipients of GPL-licensed
19 software, such as SFC, to enforce their right to source code is consistent with the “objectives of the
20 contract.” (*Goonewardene*, *supra*, 6 Cal.5th at 830.) As the Preamble to the GPLs states:

21 ***General Public Licenses are designed to make sure*** that you have the freedom to
22 ***distribute copies of free software (and charge for this service if you wish), that you***
23 ***receive source code or can get it if you want it***, that you can change the software or use
24 ***pieces of it in new free programs; and that you know you can do these things ...***

25 (AMF No. 20 (emphasis added).) Allowing third parties such as SFC to enforce their rights to receive
26 source code is not only consistent with the GPLs’ objectives; it is both essential and necessary to achieve
27 these objectives. Recipients of GPL-licensed software will be assured of their right to receive source
28 code only if they have standing to enforce that right. That should be clear to all involved, including
distributors of GPL-licensed software such as VIZIO. (See *Lucas v. Hamm*, 56 Cal.2d 583, 590 (1961)
 (“[A] contract for the drafting of a will unmistakably shows the intent of the testator to benefit the
 persons to be named in the will, and the attorney must necessarily understand this.”).) At the very least,
 the text of the GPLs quoted above establishes a triable issue of material fact as to whether SFC satisfies
 the third element of the *Goonewardene* test.

1 Second, VIZIO’s bald assertion that copyright holders are fully capable of enforcing the Source
2 Code Provision is simply incorrect. This may be seen by a review of Professor Eisenberg’s discussion
3 of “donee beneficiaries” and *Seaver v. Ransom*, 120 N.E. 639 (N.Y. 1918) in the article relied upon by
4 the *Goonewardene* Court in establishing this portion of its test. (See *Goonewardene*, *supra*, 6 Cal.5th
5 at 831; *Wexler v. California Fair Plan Ass’n*, 63 Cal.App.5th 55, 65 (2021) (“*Wexler*”) (“For doctrinal
6 assistance, the *Goonewardene* court turned to the pathbreaking article by the esteemed contract law
7 scholar Professor Melvin Eisenberg.”).) As Professor Eisenberg’s article states:

8 A third-party beneficiary is a *donee beneficiary* when a performance objective of the
9 contracting parties . . . is to give effect to a donative intention of the promisee by obliging
10 the promisor to render a performance that will benefit the third party. *Seaver v. Ransom*
11 is the paradigmatic case. An analysis of the facts of that case shows why a donee
12 beneficiary should be permitted to enforce a contract ...

13 Recall that a performance objective of the contracting parties in that case, Judge and Mrs.
14 Beman, as manifested in the contract read in the light of surrounding circumstances, was
15 that a gift be made to Mrs. Beman’s niece Marion through the instrumentality of a
16 contract that obliged Judge Beman to leave Marion a certain amount in his will. After
17 Mrs. Beman’s death, Judge Beman broke the contract.

18 On these facts, allowing Marion to enforce the contract was an important if not necessary
19 means of effectuating that performance objective. If the contract could not be enforced
20 by Marion, it could be enforced only by Mrs. Beman’s estate. Mrs. Beman’s estate,
21 however, would have had no economic incentive to enforce the contract, because the
22 estate would bear all the costs of enforcement while Marion would reap all the benefits....

23 (*Eisenberg*, *supra*, 92 Colum. L. Rev. 1358, 1389-90; see also *Goonewardene*, *supra*, 6 Cal.5th at 829
24 n.3 (referring to *Seaver v. Ransom* as “the classic donee-beneficiary case”).) As Professor Eisenberg
25 concludes, “**allowing donee beneficiaries to enforce contracts under which they will benefit is a**
26 **necessary or important means of effectuating the performance objectives of the parties to such a**
27 **contract.”** (*Eisenberg*, *supra*, 92 Colum. L. Rev. at 1391 (emphasis added).)

28 The same reasoning applies to this case. If recipients of GPL-licensed software, such as SFC,
cannot enforce their right to source code, then that right can only be enforced, if at all, by the copyright
holders. Like Mrs. Beman’s estate in *Seaver v. Ransom*, however, the copyright holders would have no
economic incentive to enforce the Source Code Provision in the GPLs because they would bear all the
costs of enforcement while the recipients of GPL-licensed software would reap all the benefits of the
source code—*i.e.*, the ability to modify that source code and create new works based on the software.
Furthermore, allowing the recipients of licensed software, such as SFC, to enforce their right to source
code would not expand the obligation of distributors of GPL-licensed software, such as VIZIO, to share

1 the source code—an obligation they assumed upon accepting the contracts in the first place, just like
2 Judge Beman in *Seaver v. Ransom*. (See 13 Williston on Contracts § 37:13 (4th ed.) (“The modern third
3 party beneficiary doctrine ... embraces, as perhaps its chief virtue, the procedure which led to the need
4 for its creation in the first place; it gives control of contract enforcement in the hands of the party most
5 likely to be motivated to seek to enforce the contract—the beneficiary.”).)

6 A copyright holder may also have practical difficulties enforcing the GPLs, in addition to lacking
7 an economic incentive to do so. First, the copyright holder could be dead by the time of the breach, just
8 like Mrs. Beman in *Seaver v. Ransom*. Furthermore, even if the copyright holder were alive, he or she
9 would not necessarily know about the breach. It thus would be incumbent upon the recipient of GPL-
10 licensed software requesting source code, such as SFC, to somehow identify the applicable copyright
11 holder (if that were even possible), explain the breach, and plead for enforcement—notwithstanding the
12 copyright holder’s contrary economic incentives. Moreover, even if the copyright holder chose to sue,
13 it is highly unlikely that the copyright holder could obtain the contractual remedy of specific
14 performance, *i.e.*, forcing the software distributor to provide a copy of the source code, on behalf of
15 recipients of GPL-licensed software such as SFC. (See 17 U.S.C. §§ 502-505.) In sum, VIZIO’s
16 assertion that copyright holders are fully capable of enforcing the GPLs is contrary to law and logic.

17 Third, the case law upon which VIZIO seeks to rely does not support its mistaken assertion.
18 Relying primarily on a truncated quote from *Goonewardene*, VIZIO contends that third-party standing
19 is not consistent with the objectives of the contract whenever “the real party to the contract [is] ‘fully
20 capable of pursuing a breach of contract action’ itself.” (Memo at 17:19-21, *quoting Goonewardene*,
21 *supra*, 6 Cal.5th at 836.) The rule invented by VIZIO is illogical, however, and would essentially
22 eliminate third party standing altogether; theoretically, a party to a contract is *always* fully capable of
23 enforcing the contract. Moreover, the full sentence from which VIZIO deceptively quotes establishes
24 that *Goonewardene* is factually distinguishable and does not support VIZIO’s position. *Goonewardene*
25 involved a contract between plaintiff’s employer, Altour, and Altour’s payroll services provider, ADP.
26 Plaintiff sued Altour for failure to pay her the wages she was due and also sued ADP as a third-party
27 beneficiary, alleging that ADP did not properly calculate the wages she was owed. (*Id.* at 822-25.) In
28 rejecting Plaintiff’s third-party standing, the *Goonewardene* Court stated that “there is no need to permit
a third party employee to bring suit to enforce an alleged breach by ADP of its obligations under the
contract, because Altour *is available* and is fully capable of pursuing a breach of contract action against
ADP *if, by failing to comply with its contractual responsibilities, ADP renders Altour liable for any*

1 violation of the applicable wage orders or labor statutes.” (*Id.* at 836 (emphasis added).) Thus, unlike
2 here, Altour was “available,” aware of the breach, and motivated to enforce the contract, so as to protect
3 itself from its own liability. Thus, *Goonewardene* is inapposite and of no help to VIZIO.

4 *Wexler*, the other case cited by VIZIO for its incorrect, invented rule (Memo at 17:21-2), is also
5 inapposite. In *Wexler*, plaintiff, who lived with her parents, sued defendant fire insurance company,
6 together with her parents, on bad faith insurance allegations based on how defendant handled their
7 claims of smoke damage. (*Wexler, supra*, 63 Cal.App.5th at 58.) In rejecting plaintiff’s claim, the court
8 held that third party enforcement was unnecessary to effectuate the objectives of the insurance contract
9 between plaintiff’s parents and defendant because plaintiff’s parents had already sued defendant, the
10 parents’ claim covered plaintiff’s personal property, and defendant agreed that it was “on the hook” for
11 damage to plaintiff’s property. (*Id.* at 66.) Plaintiff’s third-party claim thus was redundant. This unique
12 factual pattern simply does not support the conclusion that enforcement of the Source Code Provision
by recipients of GPL-licensed software, such as SFC, is inconsistent with the objectives of the GPLs.

13 Finally, *Tresona Multimedia, LLC v. Burbank High Sch. Vocal Music Ass’n*, 953 F.3d 638 (9th
14 Cir. 2020) and *Righthaven LLC v. Hoehn*, 716 F.3d 1166 (9th Cir. 2013), the last two cases improperly
15 relied upon by VIZIO (*see* Memo at 18:7-16), are wholly inapplicable. *Tresona* and *Righthaven*
16 involved plaintiffs suing for copyright infringement of certain works in which they did not own exclusive
17 rights. (*Tresona*, 953 F.3d at 645; *Righthaven*, 716 F.3d at 1169.) Only a legal or beneficial owner of
18 an exclusive right under a copyright has standing to sue *for copyright infringement*. (*Id.*; *see also* 17
19 U.S.C. §501(b).) *Tresona* and *Righthaven* say nothing—and could say nothing—about third-party
beneficiaries suing for breach of contract. Accordingly, they are of no help to VIZIO.

20 Accordingly, for all the above reasons, this Court should reject VIZIO’s specious contentions
21 and inapposite case law, rule that VIZIO has failed to satisfy its burden of establishing that SFC’s breach
of contract claim is inconsistent with the objectives of the GPLs, and deny the Motion.

22 ***B. VIZIO Fails to Establish, and Cannot Establish, that Allowing Recipients of GPL-***
23 ***Licensed Software Such as SFC to Enforce their Rights to Source Code is Inconsistent***
24 ***With the “Reasonable Expectations of the Contracting Parties.”***

25 The second prong of the third element of the *Goonewardene* Court’s test for third party standing
26 provides that “third party enforcement be consistent as well with ‘the reasonable expectations of the
27 contracting parties’ ...” (*Goonewardene*, 6 Cal.5th at 830.) In discussing this prong, the Court has
28 explained that “the parties to a contract are typically focused on the terms of performance of the contract
rather than on the remedies that will be available in the event of a failure of performance.” (*Id.*, *citing*

1 *Eisenberg, supra*, 92 Colum. L. Rev. at 1388).) Therefore, a third party is “not required [to show] that
2 the contracting parties actually considered the third party enforcement question as a prerequisite to the
3 applicability of the third party beneficiary doctrine.” (*Id.*) “Accordingly, the third element does not
4 focus upon whether the parties specifically intended third party enforcement.” (*Id.*)

5 VIZIO advances two separate assertions in support of its contention that allowing recipients of
6 GPL-licensed software, such as SFC, to enforce their right to source code is inconsistent with the
7 reasonable expectations of the contracting parties. (Memo at 18:17-20:4.) Both are fatally flawed and
provide no basis for this Court to grant the Motion.

8 VIZIO first asserts that “nothing in the text of the GPLs suggests that third parties have the right
9 to enforce alleged violations of the GPLs.” (Memo at 19:17-18.). VIZIO’s assertion is contrary to both
10 law and fact. First, as the language from *Goonewardene* quoted above conclusively establishes, the
11 plain language of the GPLs need not affirmatively authorize third party enforcement. As *Goonewardene*
12 makes clear, this element of the test does not involve “a determination whether the parties actually
13 anticipated third party enforcement at the time the contract was entered into.” (*Goonewardene, supra*,
6 Cal.5th at 830.) For this reason alone, VIZIO’s assertion lacks merit.

14 Moreover, VIZIO’s assertion that the GPLs are silent about third party enforcement is directly
15 contradicted by the Source Code Provision at issue in this case, quoted at page 4, above. It specifically
16 mentions third party rights, stating that distributors of GPL-licensed programs must provide the source
17 code for such programs or “a written offer ... **to give any third party ... a complete machine-readable**
18 **copy of the corresponding source code.**” (AMF No. 17 (emphasis added).) This provision thus
19 specifically contemplates that third parties are to be given a written offer for the source code and that
20 they will receive the source code, either when it accompanies the executable software or upon request.

21 Finally, the Preamble to the GPLs, which is included in the agreements and meant to explain
22 their terms, clearly suggests that the right of third parties to enforce the Source Code Provision is
23 consistent with the reasonable expectation of the contracting parties. As the Preamble states, “if you
24 distribute copies of [GPL-licensed software] ... you must give the recipients all the rights that you have.
You must make sure that they, too, receive or can get the source code. And you must show them these
25 terms so they know their rights.” (AMF No. 22 (emphasis added).)

26 The above language from the GPLs shows that VIZIO’s assertion that “nothing in the text of the
27 GPLs suggests that third parties have the right to enforce alleged violations of the GPLs” has no basis
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1 in fact. At the very least, such language establishes a triable issue of material fact as to whether SFC
2 can satisfy the second prong of the third element of the *Goonewardene* test sufficient to deny the Motion.

3 VIZIO next asserts that allowing recipients of GPL-licensed software, such as SFC, to enforce
4 their right to source code is inconsistent with the reasonable expectations of the contracting parties
5 because the FSF, the drafter of the GPLs, “has made clear that it never intended third-party enforcement,
6 stating publicly that ‘the copyright holders of the software are the ones who have the power to enforce
7 the GPL.’” (Memo at 19:18-20, *quoting* Compendium at 68.) This assertion likewise is fatally flawed.

8 First, the pronouncements of the FSF upon which VIZIO seeks to rely are inadmissible hearsay
9 and should be disregarded by the Court. The FSF is not a party to this action and the documents cited
10 by VIZIO do not represent the FSF’s testimony; they have simply been pulled off the web, without
11 context or authentication by the FSF. (*See* SFC’s Evidentiary Objections, submitted herewith.)

12 Second, the FSF’s after-the-fact pronouncements have no relevance whatsoever to the reasonable
13 expectations of the contracting parties. “Under long-standing contract law, a ‘contract must be so
14 interpreted as to give effect to the *mutual intention* of the parties as it existed *at the time of*
15 *contracting*....” (*Hess, supra*, 27 Cal.4th at 524, *quoting* *Civ. Code* § 1636 (emphasis added).) “[T]he
16 relevant intent is ... the objective intent as evidenced by the words of the instrument, not a party’s
17 subjective intent.” (*Shaw v. Regents of Univ. of California*, 58 Cal.App.4th 44, 54-55 (1997).) That is
18 particularly true with a form contract, such as the GPLs. (*See, Williams v. Apple, Inc.*, 338 F.R.D. 629,
19 638 (N.D. Cal. 2021); *Lloyd’s Underwriters v. Craig & Rush, Inc.*, 26 Cal. App. 4th 1194, 1197 (1994).)

20 Here, however, VIZIO has introduced no evidence about the “mutual intent” or “objective
21 intent” of the parties “at the time of contracting,” apart from the plain text of the GPLs. Rather, VIZIO
22 seeks to rely upon the FSF’s FAQ and its other pronouncements, which were made anywhere from 10
23 to 32 years after the GPLv2 was drafted in 1991. (AMF Nos. 2, 54.) To the extent the FSF may have
24 recently opined on the internet about third-party standing to enforce the GPLs, such statements are
25 irrelevant, and inadmissible as hearsay, parol evidence, and legal conclusions, at a minimum. (*See* Cal.
26 *Evid. Code* §§ 1200, 310; Cal. *Civ. Proc. Code* § 1856.) “Issues of contract interpretation are questions
27 of law for the trial court,” not the FSF. (*De Guere v. Universal City Studios, Inc.* (1997) 56 Cal.App.4th
28 482, 501.)⁴

⁴ For this same reason, VIZIO’s reliance on a statement from SFC officer Bradley Kuhn (Memo at 5:12-13) is misplaced. Kuhn’s statement is from a blog post written over ten years ago. Kuhn’s after-the-fact opinions are no more able to change the written provisions of the GPLs than the FSF is. Kuhn is not a lawyer, and his lay legal opinions are, at best, a reflection of the conventional wisdom at the

1 Third, the FSF could not modify the GPLs through its “pronouncements,” even if so inclined.
2 The plain text of the GPLs itself precludes modification, stating that “[e]veryone is permitted to copy
3 and distribute verbatim copies of this license document, but changing it is not allowed.” (AMF No. 23.)
4 Moreover, contracts such as the GPLs are “an agreement to do or not to do a certain thing.” (Cal. Civ.
5 Code § 1549.) “Modification is a change in the obligation ... which requires *mutual assent*.” (*Wade v.*
6 *Diamond A Cattle Co.* (1975) 44 Cal.App.3d 453, 457 (emphasis added).) The FSF is not even a party
7 to the GPLs for many of the works at issue in this case. These parties have relied on the plain text of
8 the GPLs and cannot be presumed to have seen, much less accepted, any subsequent online
9 “pronouncement” by the FSF. (Cf. *Flintkote Co. v. Gen. Acc. Assur. Co.*, 410 F.Supp.2d 875, 887-88
10 (N.D. Cal. 2006) (“[T]he court is at a loss to see [the relevance of] a dictionary definition from almost
forty years after the formation of the contract....”))

11 In short, VIZIO has failed to satisfy its burden of establishing that third party enforcement of the
12 GPLs is inconsistent with the reasonable expectations of the contracting parties, for each of the above
13 reasons. Accordingly, this Court should deny the Motion.

14 **VI. SFC’S BREACH OF CONTRACT CLAIM AND DECLARATORY RELIEF CLAIM BOTH SURVIVE TOGETHER**

15 SFC’s Second Cause of Action for Declaratory Relief seeks, among other things, judicial
16 declarations of its right to source code and that VIZIO’s failure to provide source code is a material
17 breach of the GPLs. VIZIO agrees that SFC’s declaratory relief claim rises and falls with its breach of
18 contract claim. (See Memo at 20:5-20.) Therefore, because VIZIO is not entitled to judgment as a
19 matter of law on SFC’s breach of contract claim, for all the reasons discussed above, it likewise is not
entitled to judgment as a matter of law on SFC’s declaratory relief claim.

20 **VII. CONCLUSION**

21 For all the foregoing reasons, Plaintiff Software Freedom Conservancy, Inc. respectfully requests
22 that this Court deny Defendant VIZIO, Inc.’s Motion for Summary Judgment or, In the Alternative, for
23 Summary Adjudication in its entirety.

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28 time in 2012. In any event, Kuhn’s views on the matter have obviously changed. (See Declaration of
Bradley Kuhn, submitted herewith, ¶¶ 17-18.)

1 DATED: July 13, 2023

RICHARD G. SANDERS, PLLC
VAKILI & LEUS, LLP

2
3
4 By: 

Sa'id Vakili, Esq.

David N. Schultz, Esq.

*Attorneys for Plaintiff Software Freedom
Conservancy, Inc.*

DECLARATION OF BRADLEY M. KUHN

I, BRADLEY M. KUHN, state and declare as follows:

1. I am over the age of 18 and the current Policy Fellow of Software Freedom Conservancy, Inc. (“SFC”), the Plaintiff in this action. I have personal knowledge of the matters set forth herein and, if called as a witness, I could and would testify competently as to their truth, except as to the matters stated on information and belief and as to such matters, I believe them to be true. I am submitting this declaration in support of SFC’s Opposition to Defendant VIZIO, Inc.’s Motion for Summary Judgment or, in the Alternative, Summary Adjudication in this action (the “Motion”).

2. As a result of my work as the current Policy Fellow and former president of SFC, I am very familiar with the GNU General Public License Version 2.0 and the GNU Lesser General Public License Version 2.1 (together, the “GPL Agreements”). The GPL Agreements are two of the most vital, widely used, and successful software license agreements. Software developed under the GPL Agreements helps operate such consumer equipment as wireless home routers and television sets.

3. “Free and Open Source Software”, sometimes abbreviated “FOSS”, is a term used to refer to software for which the end-user of the software has the permission and means to study, copy, share, modify, redistribute and/or reinstall modified versions of the software. In this context, “free” refers to freedom and doesn’t mean “gratis.” The GPL Agreements have played a central role in the development of FOSS.

4. In addition to referring to a licensing structure, FOSS also refers to the model for developing software under that licensing structure. Specifically, developers exercise the rights and permissions assured by the FOSS terms to collaborate across borders—including those that are geographic, corporate, or even their personal backgrounds. Routinely, FOSS projects include volunteer, paid, and hobbyist contributors. Some contributors work for companies, some are independent contractors, and some simply contribute altruistically and/or for their own edification in the field of software development.

5. The FOSS model of software development works because many programmers contribute to the projects. An essential aspect of FOSS is that everyone who receives the software can easily study and modify it, and that the terms permit this activity. Many programmers fix bugs, implement new features, find new uses for the software, repurpose third-party software under the same license into new programs, and so forth. These new versions are available to other programmers to learn from, change, and improve. In most FOSS projects, programmers perform “code review” on each other’s work. Often

1 complex problems are discussed publicly among contributors to improve the software. The FOSS model
2 is also conducive for experienced programmers to mentor younger programmers.

3 6. Most software is distributed in an obfuscated form, such as binary or object code, which
4 can be executed by a computer. For this reason, these forms of software are said to be “executable.”
5 When software is “embedded” in a piece of hardware, like a smart TV or a wireless router, that software
6 is always distributed as a binary or object code, since the executable code must be installed onto the
device for the device to boot.

7 7. These forms allow fast and easy execution of the software on a computing device, but
8 they are not easily understood, modified, or manipulated by human beings. As a practical, logistical, and
9 technical matter, study and modification of the software is exceedingly and extremely difficult (and in
10 some cases impossible) without the complete, corresponding source code (“CCS”).

11 8. For FOSS developers to effectively exercise their rights and permissions to modify and
12 reinstall modified versions of the software, the CCS must include not only the complete, human-readable
13 source code, but also the complete detailed information on how to “compile”, and then how to “install”
the software onto the original and correct location of the binary code.

14 9. The GPL Agreements have been very successful in fostering the development of FOSS.
15 The GPL Agreements are instrumental in fostering FOSS development because they guarantee third
16 parties’ access to the CCS of any distributed binary code. FOSS developed under the GPL Agreements
17 is commonly found “embedded” in consumer and other off-the-shelf devices, such as wireless routers
18 and smart TVs. The Linux kernel, the basis of a widely popular computer operating system, is just one
19 prominent example of FOSS developed under the GPL Agreements.

20 10. SFC is a 501(c)(3) non-profit charitable corporation founded in New York in 2006. SFC
21 was founded to be composed of projects dedicated to FOSS and to promote software that respects the
users' freedoms to copy, share, modify and redistribute that software.

22 11. SFC defends the status of FOSS by ensuring that FOSS remains “free” and available to
23 anyone who wants to use, change, or distribute it. As part of this purpose, SFC engages in enforcement
24 activities regarding the GPL Agreements.

25 12. When companies using FOSS fail to comply with their obligations, SFC tries to educate
26 them on best practices for making written offers to provide source code and responding to requests for
27 source code, among other things. Unfortunately, non-compliance with the GPL Agreements remains
28

1 distressingly common. Therefore, SFC occasionally finds it necessary to bring lawsuits to enforce the
2 GPL Agreements.

3 13. In July 2021, on behalf of SFC, I purchased certain models of VIZIO “Smart TVs,”
4 including model numbers V435-J01, D32h-J09, and M50Q7-J01. Unfortunately, upon examining those
5 Smart TVs, I found that there was no CCS provided with the TVs, nor could I find a valid offer present
6 to receive such CCS from VIZIO.

7 14. To confirm that VIZIO was still basing its Smart TVs on Linux-based systems, I initiated
8 in July 2021 an investigation to determine if these Smart TVs contained any software subject to the GPL
9 Agreements. After substantial technical investigation, I was able to determine that there were a number
10 of software packages and programs, subject to the GPL Agreements, including the Linux kernel, present
11 in the VIZIO Smart TVs. These programs and libraries are listed in paragraphs 37 and 38 of our
12 Complaint.

13 15. I have reviewed Exhibit 7 to VIZIO’s Compendium of Exhibits in support of the
14 Motion—a November 7, 2014 announcement by SFC and the Free Software Foundation (the “FSF”)
15 regarding the “Copyleft Guide” initiative. I am aware that the announcement includes text stating that
16 “[a]s the author, primary interpreter, and ultimate authority on the GPL, the FSF is in a unique position
17 to provide insights into understanding free software licensing.” FSF was identified in this way because
18 FSF representatives wrote the various versions of the GPL Agreements. Nevertheless, both at the time
19 and now, I did not and do not interpret this text to mean that the FSF has the authority, ability or power
20 to control the plain-text meaning of the GPL Agreements.

21 16. I have also reviewed Exhibit 11 to VIZIO’s Compendium of Exhibits in support of the
22 Motion—an article from me, dated February 1, 2012, entitled “Some Thoughts on GPL Enforcement.”
23 I am not qualified to give legal advice nor interpret the law, and I say that often in my public statements.
24 Rather, the purpose of the article, as stated in its opening paragraphs, was to sum up the situation
25 regarding enforcement of the GPLs in the years preceding 2012.

26 17. When I wrote “Some Thoughts on GPL Enforcement” in 2012, I accepted the assumption
27 that the GPL Agreements could be enforced only through copyright. Since then, I have learned that
28 courts have ruled that the GPL Agreements could be enforced as contracts, in cases such as *Versata
Software, Inc. v. Ameriprise Financial Services* and *Artifex Software, Inc. v. Hancorn, Inc.* I no longer
believe that the GPL Agreements may only be enforced through copyright.

1 18. I was the editor-in-chief of the now-defunct *Copyleft and the GNU General Public*
2 *Licenses: A Comprehensive Tutorial and Guide* (the “*Guide*”). The *Guide* was a joint project between
3 the FSF and the SFC. Although the project started in 2014, much of the material was written much
4 earlier, as early as 2003.

5 19. The *Guide* was a collaborative work, with a number of contributors. I am among the
6 contributors. Each contributor’s work is their own, and opinions expressed by a contributor are not
7 necessarily shared by the other contributors. The contributors do not necessarily always agree with each
8 other.

9 20. Although I was the editor-in-chief, my tasks were limited to making sure the
10 contributions were well-written and were integrated among the other contributions. I am not responsible
11 for the content of contributions (other than mine). Given how many contributors there have been, and
12 how long ago many of the contributions were written, I would not be surprised to find that the *Guide* is
13 not entirely self-consistent and contains ideas that are now out of date.

14 21. Many sections of the *Guide* explain how the GPL Agreements also function as contracts
15 as well as copyright licenses. For example, the *Guide* explains that GPL Agreements is not revocable
16 on grounds that it is part of a “contractual obligation.” See § 7.4.3. The *Guide* also says, “While GPL is
17 by default a copyright license, it is certainly possible to consider GPL as a contract.” See § 7.2.

18 22. Much of the *Guide* was written in 2003, and/or is re-purposing of other documents
19 written between 2005-2008. No major editing or revision work on existing text has been done since
20 2014. No substantive update has been made to the *Guide* since 2018. The *Guide* does not, in its entirety,
21 necessarily represent my views or the views of the SFC.

22 23. I am aware that the *Guide* states: “copyright holders (or their agents) are the [*sic*]
23 ultimately the sole authorities to enforce [the GPL] and protect the rights of users. Actions for copyright
24 infringement are the ultimate legal mechanism for enforcement.” See Chapter 13. Upon review of the
25 publicly available revision history for the *Guide*, I see this material was incorporated into the *Guide* in
26 2014, and comes from a document published under a FOSS license by a third-party organization in
27 2008. That quote therefore dates to text that was not originally published by SFC nor FSF.

28 24. To my knowledge, it was SFC's and FSF's hope that the 2014 effort would yield a
regularly updated *Guide* with the most recent views of the myriad of opinions regarding the GPL
Agreements. However, due to lack of resources for both organizations, we were unable to continue that

1 effort, and the *Guide* has been defunct since late 2014. SFC made efforts occasionally to publish new
2 sections from 2014-2018, but I concede the *Guide* contains much out-of-date information.

3 25. As such, I do not necessarily agree with those materials that I wrote and/or edited for
4 the *Guide* so long ago. The *Guide* already indicates that not all contributors to the *Guide* agree with
5 each other.

6 I declare under penalty of perjury under the laws of the State of California that the foregoing is
7 true and correct. Executed on July 13, 2023, at Portland, Oregon.

8 

9 Bradley M. Kuhn

DECLARATION OF DENVER GINGERICH

I, DENVER GINGERICH, state and declare as follows:

1. I am over the age of 18 and the current Director of Compliance for Software Freedom Conservancy, Inc., the plaintiff in this action (“SFC”). I have personal knowledge of the matters set forth herein and, if called as a witness, I could and would testify competently as to their truth, except as to the matters stated on information and belief and as to such matters, I believe them to be true. I am submitting this declaration in support of SFC’s Opposition to Defendant VIZIO, Inc.’s Motion for Summary Judgment or, in the Alternative, for Summary Adjudication in this action (the “Motion”).

2. One of my tasks as Director of Compliance for SFC is to evaluate reports of non-compliance with the obligations that exist under the GNU General Public License agreements (the “GPL Agreements”) to provide complete source code that corresponds with executable software distributed under one of the GPL Agreements. I am not a lawyer.

3. I have reviewed the various pleadings filed by Defendant VIZIO, Inc. (“VIZIO”) in support of the Motion, including the documents included in VIZIO’S Compendium of Exhibits (the “Compendium”). I am aware that Exhibit 5 to the Compendium is a copy of a letter from me to Jerry Huang, the general counsel of VIZIO, dated August 7, 2018, which was written as part of SFC’s efforts to achieve VIZIO’s compliance with the GPL Agreements. I am further aware that, on page 4, lines 19-20 of VIZIO’s Memorandum of Points and Authorities in support of the Motion, VIZIO quotes from my letter in support of the assertion that “SFC admits that the [Free Software Foundation] is the ‘GPL’s author and primary interpreter since 1989.’ (*Id.* [Compendium of Exhibits] at 26 (Exh. 5 (SFC August 7, 2017 [sic] letter at 1)))[.]”

4. VIZIO’s quotation from my letter is taken completely out of context. As may be seen by a review of my letter, the quotation upon which VIZIO seeks to rely is taken from the fourth paragraph of my letter, which states, in its entirety, as follows:

The source code distribution requirements may seem minor or technical, but in fact they are perhaps the most important obligations for GPL licensees. Ensuring software freedom, including users’ access to source code, is the primary objective of developers who license their software under the GPL. This is our view, as well as the view of the Free Software Foundation, GPL’s author and primary interpreter since 1989, and also of numerous companies, lawyers and judges that have independently interpreted and

1 applied the GPL. These requirements are not onerous, but they are essential to the GPL's
2 purpose.

3 5. As may be seen by a review of the above language, my purpose in writing this paragraph
4 was to emphasize the importance of GPL Agreements' requirement that source code be provided to third
5 parties who request it. By describing the Free Software Foundation (the "FSF") as "the GPL's author
6 and primary interpreter," I was simply acknowledging the FSF's role in drafting the GPL Agreements
7 and its long history of promoting the GPL Agreements and providing advice about how to comply with
8 them.

9 6. Although I believe that the FSF's perspective on the GPL Agreements is important, I do
10 not believe that the FSF's interpretations of the GPL Agreements have the force of law or are always
11 authoritative.

12 I declare under penalty of perjury under the laws of the State of California that the foregoing is
13 true and correct. Executed on July 13, 2023, at Portland, Oregon.

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15 Denver Gingerich
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1 **PROOF OF SERVICE**

2 *Software Freedom Conservancy, Inc. v. VIZIO, Inc., et al.*
3 *OCSC Case No.: 30-2021-01226723-CU-BC-CJC*

4 I am employed in the County of Los Angeles, State of California. I am over the age of 18 and
5 not a party to the within action. My business address is 3701 Wilshire Boulevard, Suite 1135, Los
6 Angeles, California 90010.

7 On July 13, 2023, I served the foregoing document described as **MEMORANDUM OF**
8 **POINTS AND AUTHORITIES OF PLAINTIFF SOFTWARE FREEDOM CONSERVANCY,**
9 **INC. IN OPPOSITION TO DEFENDANT VIZIO INC.'S MOTION FOR SUMMARY**
10 **JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION;**
11 **DECLARATIONS OF BRADLEY M. KUHN AND DENVER GINGERICH** on all interested
12 parties in this action at the addresses listed below, as follows:

13 **QUINN EMANUEL URQUHART & SULLIVAN, LLP**

14 Michael E. Williams, Esq. (michaelwilliams@quinnemanuel.com)

15 Daniel C. Posner, Esq. (danposner@quinnemanuel.com)

16 John Z. Yin, Esq. (johnyin@quinnemanuel.com)

17 Arian J. Koochesfahani, Esq. (ariankoochesfahani@quinnemanuel.com)

18 865 South Figueroa Street, 10th Floor

19 Los Angeles, California 90017

20 **213/443-3000 | Fax: 213/443-3100**

21 *Counsel for Defendant Vizio, Inc.*

22 () OVERNIGHT DELIVERY (DROP-OFF) (CCP §1013(c)). By placing a true copy
23 thereof enclosed in a sealed envelope or package as designated by an overnight mail courier, addressed
24 as above, and depositing said envelope or package, with delivery fees provided for, in a box regularly
25 maintained by the overnight mail courier at 3701 Wilshire Boulevard, Los Angeles, California 90010.

26 (✓) VIA ELECTRONIC TRANSMISSION. I caused to be transmitted a true copy thereof
27 to the designated counsel listed above to his respective e-mail address, pursuant to California *Code of*
28 *Civil Procedure* § 1010.6. I did not receive, within a reasonable time after the transmission, any
electronic message or other indication that the transmission was unsuccessful.

() PERSONAL DELIVERY. I caused to be served by messenger for personal delivery that
same day the foregoing documents in a sealed envelope to the above persons at the address(es) listed in
the attached Service List.

I declare under penalty under the laws of the State of California that the above is true and correct.
Executed on July 13, 2023, at Los Angeles, California.

24 Malou de la Paz
25 (Printed Name)

26 
27 (Signature)
28