

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

2 Michael E. Williams (Bar No. 181299)  
michaelwilliams@quinnemanuel.com

3 Daniel C. Posner (Bar No. 232009)  
danposner@quinnemanuel.com

4 John Z. Yin (Bar No. 325589)  
johnyin@quinnemanuel.com

5 Arian J. Koochesfahani (Bar No. 344642)  
ariankoochesfahani@quinnemanuel.com

6 865 South Figueroa Street, 10th Floor  
Los Angeles, CA 90017-2543

7 Telephone: (213) 443-3000

8 Fax: (213) 443-3100

9 *Attorneys for Defendant*  
VIZIO, INC.

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

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

15 Plaintiff,

16 v.

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

19 Defendant.

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

**DEFENDANT VIZIO INC.'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN REPLY TO  
PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S MOTION FOR SUMMARY  
JUDGMENT OR IN THE ALTERNATIVE  
FOR SUMMARY ADJUDICATION**

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

Dept. C33

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23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

**Page**

PRELIMINARY STATEMENT ..... 1

ARGUMENT ..... 2

I. SFC FAILS TO SHOW THAT ITS CONTRACT CLAIM IS NOT PREEMPTED ..... 2

    A. SFC Misapplies The “Extra Element” Test For Preemption ..... 2

    B. SFC’s Argument That It Can Elect To Sue For Copyright Or Breach Of  
        Contract Would Render Preemption Meaningless ..... 6

II. SFC FAILS TO RAISE ANY ISSUE OF FACT SUGGESTING THAT IT IS AN  
    INTENDED THIRD-PARTY BENEFICIARY ..... 8

CONCLUSION ..... 10

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page**

**Cases**

*Aguilar v. Atl. Richfield Co.*,  
25 Cal. 4th 826 (2001) .....9

*Altera Corp. v. Clear Logic, Inc.*,  
424 F.3d 1079 (9th Cir. 2005) .....2

*Artifex Software, Inc. v. Hancorn, Inc.*,  
2017 WL 1477373 (N.D. Cal. Apr. 25, 2017) .....6

*Brown v. Goldstein*,  
34 Cal. App. 5th 418 (2019) .....9

*Cassady v. Morgan, Lewis & Bockius LLP*,  
145 Cal. App. 4th 220 (2006) .....3

*CDK Glob. Ltd. Liab. Co. v. Brnovich*,  
16 F.4th 1266 (9th Cir. 2021) .....5

*City of Oakland v. Oakland Raiders*,  
83 Cal. App. 5th 458 (2022) ..... 10

*Civic Partners Stockton, LLC v. Youssefi*,  
218 Cal. App. 4th 1005 (2013) .....3, 6

*Detomaso v. Pan Am. World Airways, Inc.*,  
43 Cal. 3d 517 (1987).....3, 6

*Goonewardene v. ADP, LLC*,  
6 Cal. 5th 817 (2019).....8, 9, 10

*Kabehie v. Zoland*,  
102 Cal. App. 4th 513 (2002) .....2, 3, 5

*In re Marriage of Green*,  
213 Cal. App. 3d 14 (1989) ..... 1

*MDY Industries, LLC v. Blizzard Entertainment, Inc.*,  
629 F.3d 928 (9th Cir. 2010) ..... 8

*ML Genius Holdings LLC v. Google LLC*,  
2022 WL 710744 (2d Cir. Mar. 10, 2022) .....3

*Moreau v. San Diego Transit Corp.*,  
210 Cal. App. 3d 614 (1989) .....2

1 *Quishenberry v. UnitedHealthcare, Inc.*,  
2 2023 WL 4511572 (Cal. S271501 July 13, 2023)..... 7

3 *S.O.S., Inc. v. Payday, Inc.*,  
4 886 F.2d 1081 (9th Cir. 1989) ..... 5

5 *Vernor v. Autodesk, Inc.*,  
6 621 F.3d 1102 (9th Cir. 2010). (Opp. .) ..... 4, 5

7 *Versata Software, Inc. v. Ameriprise Fin., Inc.*,  
8 2014 WL 950065 (W.D. Tex. Mar. 11, 2014)..... 6

9 *Williams v. Apple, Inc.*,  
10 338 F.R.D. 629 (N.D. Cal. 2021) ..... 10

11 *Wolff v. Institute of Elec. & Electronics Eng., Inc.*,  
12 768 F. Supp. 66 (S.D.N.Y. 1991) ..... 5

11 **Statutes**

12 17 U.S.C. § 106..... 3, 4

13 17 U.S.C. § 301..... 7

14 17 U.S.C. § 504(c)..... 9

15 17 U.S.C. § 505..... 9

16 Cal. Evid. Code § 1220 ..... 6, 9

17 Cal. Evid. Code § 1221 ..... 9

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1 **PRELIMINARY STATEMENT**

2 SFC’s Opposition provides no basis for denying summary judgment. SFC does not dispute  
3 the facts in VIZIO’s Separate Statement of Undisputed Facts. SFC offers no evidence to rebut  
4 VIZIO’s showing that SFC’s state law claims are preempted by the Copyright Act and that SFC is  
5 not an intended third-party beneficiary under the GPLs. SFC instead offers only factually and  
6 legally unsupported arguments which are insufficient to defeat summary judgment.

7 With respect to preemption, SFC argues that the federal remand order is controlling, ignoring  
8 California law that holds the opposite. SFC pays lip-service to the “extra element” test, never  
9 providing a coherent explanation for how its breach of contract claim is qualitatively different than  
10 a copyright infringement claim, when both are based on the same alleged violation of the GPLs.  
11 Nor can it, because it is undisputed that the GPLs, by their terms, only cover exclusive rights under  
12 the Copyright Act—namely, the right to copy, distribute, and modify a copyrighted work. Thus,  
13 any rights asserted under the GPLs are necessarily rights protected by copyright. SFC even resorts  
14 to outlandish positions, claiming that VIZIO “invented” the copyright holder’s right to control the  
15 distribution of the copyrighted work, ignoring clear authority to the contrary. Ultimately, SFC  
16 argues that it can elect between claims for contract and claims for copyright—the *exact* thing that  
17 preemption forbids. SFC’s contract claim is preempted and should be dismissed.

18 SFC’s arguments fare no better on the issue of third-party beneficiary. VIZIO’s motion  
19 established that the objectives of the GPLs and reasonable expectations of the parties do not support  
20 third-party enforcement. Unable to submit evidence disputing this, SFC offers a series of  
21 unsupported and implausible hypotheticals suggesting copyright holders are incapable of enforcing  
22 the GPLs. SFC also claims, contrary to California law, that the Court should disregard the plain  
23 language of the GPLs and the drafter’s expressed intent regarding enforcement, even though they  
24 are undisputed evidence of the GPLs’ objectives and the reasonable expectations of the parties. The  
25 GPLs, and the circumstances surrounding their creation and objectives, confirm that the only parties  
26 who have the right to enforce the GPLs are the copyright holders. As such, summary judgment on  
27 SFC’s third-party beneficiary theory is appropriate.<sup>1</sup>

28 <sup>1</sup> SFC has attempted improperly to circumvent the page limit for opposition briefs (*see Rule of California Court 3.1113(d)*) by incorporating by reference more than 70 pages of argument submitted in prior proceedings (Opp. 6 n.2). *See In re Marriage of Green*, 213 Cal. App. 3d 14, 28 (1989). The Court should decline to consider the incorporated content.

1 **ARGUMENT**

2 **I. SFC FAILS TO SHOW THAT ITS CONTRACT CLAIM IS NOT PREEMPTED**

3 Ignoring California law to the contrary (Mot. 6-7), SFC incorrectly asserts (Opp. 2) that the  
4 federal court’s remand order “compels” this Court to deny VIZIO’s motion. Not so. California law  
5 is clear that a remand order on the jurisdictional question of complete preemption “does not  
6 determine whether a preemption defense can be successfully offered in state court when the entire  
7 case is considered.” *Moreau v. San Diego Transit Corp.*, 210 Cal. App. 3d 614, 621 (1989). Based  
8 on the record presented to this Court, SFC’s contract claim is preempted by the Copyright Act and  
must be dismissed on summary judgment.

9 **A. SFC Misapplies The “Extra Element” Test For Preemption**

10 SFC agrees that *Kabehie*’s “extra element” test applies to the question of preemption (Opp.  
11 6), and that it requires a showing that the rights protected by the state law claim are qualitatively  
12 different from the exclusive rights protected by copyright law. *Kabehie v. Zoland*, 102 Cal. App.  
4th 513, 528 (2002).<sup>2</sup> Yet SFC then proceeds to miscite California law and misapply the test.

13 *First*, SFC errs in asserting that “[w]hen the ‘extra element’ test is correctly applied, breach  
14 of contract claims are almost never preempted by the Copyright Act.” (Opp. 7 (citing *Altera Corp.*  
15 *v. Clear Logic, Inc.*, 424 F.3d 1079, 1089 (9th Cir. 2005)).) This assertion is at odds with *Kabehie*,  
16 which stated not once, but twice, that “Congress intended to preempt most breach of contract  
17 actions, but not all.” *Kabehie*, 102 Cal. App. 4th at 522, 524.<sup>3</sup>

18  
19 <sup>2</sup> SFC misplaces reliance (Opp. 5) on VIZIO’s supposed “concession” in a filing to the SEC. As  
20 the filing makes clear, there was no such concession: “Additionally, the terms of certain open  
21 source licenses to which we are subject have not been interpreted by U.S. or foreign courts, and  
22 there is a risk that open source software licenses could be construed in a manner that imposes  
23 unanticipated conditions or restrictions on our ability to provide the open source software subject  
24 to those licenses. Accordingly, we could be subject to suits and liability for copyright  
infringement claims and breach of contract by parties claiming ownership of, or demanding  
release of, what we believe to be open source software or noncompliance with open source  
licensing terms.” (SFC’s Appendix of Exhibits, Exh. # 10 at 55.)

25 <sup>3</sup> SFC accuses VIZIO of mischaracterizing *Kabehie*, claiming that *Kabehie* also says “most breach  
26 of contract causes of action would not be preempted . . .” (Opp. at 7, fn 3.) It is SFC, not VIZIO,  
27 that mischaracterizes *Kabehie*. The actual quote SFC refers to is describing the legislative history  
28 of the Copyright Act and says: “although most breach of contract causes of action would not be  
preempted, Congress removed the blanket exemption for specific causes of action, such as breach  
of contract, in order that any action equivalent to a copyright infringement action would be  
preempted.” *Kabehie*, 102 Cal. App. 4th at 524. In other words, Congress considered a specific  
list of non-preempted causes of action but removed that list in favor of the “equivalency” test.

1           *Second*, SFC’s own characterization of its claim is irrelevant to the preemption analysis.  
2 SFC argues that its contract claim contains an “extra element” because “SFC *does not allege* that  
3 VIZIO copied (or adapted, distributed, displayed, or performed) without authorization the software  
4 covered by the GPLs at issue in the case . . . [*and instead*] *alleges* that, under the Source Code  
5 Provision, VIZIO had an affirmative duty to provide and SFC had the right to receive [] source  
6 code.” (Opp. 8 (emphasis added).) This argument is unavailing. “[O]ne must look to the substance  
7 of the claim, not its characterization, to determine whether an action is preempted.” *Detomaso v.*  
8 *Pan Am. World Airways, Inc.*, 43 Cal. 3d 517, 527 (1987); *see also Civic Partners Stockton, LLC v.*  
9 *Youssefi*, 218 Cal. App. 4th 1005, 1017 (2013) (the plaintiff’s choice of claim is irrelevant because  
10 “it is the nature of the action not the identity of the plaintiff that controls”); *see also Cassady v.*  
11 *Morgan, Lewis & Bockius LLP*, 145 Cal. App. 4th 220, 241 (2006) (“a party cannot rely on its own  
12 pleadings as evidence to support or oppose a summary judgment motion”).<sup>4</sup> SFC’s attempt to rely  
13 on its allegations is misplaced. *Detomaso*, 43 Cal. 3d at 530. In any event, SFC does allege that  
14 VIZIO “breached” the GPLs by distributing its smart TVs containing GPL-covered software without  
15 providing the source code or a written offer to supply it, notwithstanding its attempt to reframe its  
16 allegations to avoid preemption through artful pleading. (ROA #2 (Complaint at ¶¶ 49-51).)

15           *Third*, SFC fails to address the undisputed and dispositive fact that the GPLs—by their  
16 express terms—only involve exclusive rights under the Copyright Act, so any assertion of those  
17 rights is, by definition, an assertion of rights equivalent to copyright. It is undisputed that the  
18 Copyright Act includes the exclusive rights to copy/reproduce, distribute, and modify/adapt the  
19 copyrighted work. 17 U.S.C. § 106. The GPLs state that “[a]ctivities other than copying,  
20 distribution and modification are not covered by this License; they are outside its scope.”  
21 (Compendium at 12 (Exh. 3 (GPLv2 § 0)); *id.* at 20 (Exh. 4 (LGPLv2.1 § 0)) (same).) SFC admits  
22 that contract claims involving “the reproduction and distribution rights protected by federal  
23 copyright law” are preempted. (Opp. at 8 (*quoting Kabehie*, 102 Cal. App. 4th at 529; *see also ML*  
24 *Genius Holdings LLC v. Google LLC*, 2022 WL 710744, \*3 (2d Cir. Mar. 10, 2022) (“For

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24           <sup>4</sup> SFC also relies on the remand order (Opp. 6) but, as noted above, that jurisdictional ruling has  
25 no bearing on VIZIO’s preemption defense. Moreover, the remand order also relied on SFC’s  
26 allegations, which is not permitted on summary judgment. (*See* Compendium at 106 (Exh. 13  
27 (Remand Order at 6)) (“There is an extra element to SFC’s claims because SFC is *asserting*, as a  
28 third-party beneficiary of the GPL Agreements, that it is entitled to receive source code under the  
terms of those agreements. . . . [t]he fact that SFC *claims* status as a third-party beneficiary to the  
GPL Agreements and not the actual copyright holder . . . underscores that the contractual right at  
issue is qualitatively different from the rights under the Copyright Act” (emphasis added)).)

1 preemption to apply, ‘the state law claim must involve acts of reproduction, adaptation,  
2 performance, distribution, or display.’”.)

3 Here, there is no question that SFC’s contract claim under the GPLs involves “the  
4 reproduction and distribution rights protected by federal copyright law.” The GPLs could not be  
5 clearer about this: “We protect your rights with two steps: (1) copyright the software, and (2) offer  
6 you this license which gives you legal permission to copy, distribute and/or modify the software.”  
7 (*Id.* at 11 (Exh. 3 (GPLv2 Preamble)); *see also id.* at 19 (Exh. 4 LGPLv2.1 § 0) (equivalent).)  
8 Likewise, the GPLs set forth the “TERMS AND CONDITIONS FOR COPYING, DISTRIBUTION  
9 AND MODIFICATION.” (*Id.* at 12 (Exh. 3 (GPLv2)); *id.* at 19 (Exh. 4 (LGPLv2.1)).) This  
10 provision implements the copyright holder’s exclusive rights “to do and to authorize” the manner in  
11 which copying and distribution occurs. *See* 17 U.S.C. § 106. SFC has no substantive response to  
12 this argument, so instead resorts to baselessly claiming it is irrelevant.<sup>5</sup>

13 *Fourth*, SFC argues that the copyright holder has no right “to control the distribution” of the  
14 work, claiming VIZIO “invented this purported exclusive right to control” the distribution of the  
15 copyrighted work based on a misreading of *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010).  
16 (Opp. at 10.) This argument is absurd and contrary to law. *Vernor* actually held that the distribution  
17 of software in violation of transfer restrictions in the license “infringed Autodesk’s exclusive right  
18 to distribute copies of its work.” *Vernor*, 621 F.3d at 1111-12. SFC also wholly ignores *Jacobsen*  
19 *v. Katzer*, which explicitly states that “[c]opyright holders who engage in *open source licensing*  
20 have the *right to control* the modification and distribution of copyrighted material.” 535 F.3d 1373,  
21 1381 (Fed. Cir. 2008) (emphasis added). Indeed, that is the very purpose of the GPLs, which  
22 implement the “*right to control* the distribution of derivative or collective works based on the  
23 [work].” (Compendium at 12 (Exh. 3 (GPLv2 § 2)) (emphasis added); *id.* at 20 (Exh. 4 (LGPLv2.1  
24 § 2)) (same).) Indeed, every copyright licensing agreement—including the GPLs—is an exercise  
25 of the copyright holder’s exclusive right to control the copying and distribution of copyrighted  
26 material. SFC itself has repeatedly acknowledged that “[t]he GPL itself is a copyright license that .  
27 . . . uses the copyright rules to . . . require people to share software freely (as in freedom) in exchange  
28 for permission to copy, modify and distribute the software.” (Compendium at 93 (Exh. 11)). SFC’s

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<sup>5</sup> In its Amended Response to VIZIO’s Separate Statement of Facts, SFC goes so far as to argue that this language of the GPLs, limiting their scope to exclusive rights under the Copyright Act, is irrelevant to the preemption analysis. (Amended Resp. at 2, 4-7.)



1 suggestion that VIZIO invented the exclusive “right to control” the distribution of copyrighted  
2 material is disingenuous, bordering on frivolous.<sup>6</sup>

3 *Fifth*, SFC fails to address the fact that a violation of the GPLs’ source code provision gives  
4 rise to a claim for copyright infringement, as SFC itself has repeatedly acknowledged. The GPLs  
5 authorize the distribution of software covered by the license “provided that” the person distributing  
6 the software accompanies it with the source code or a written offer to provide the source code upon  
7 request. (Compendium at 12 (Exh. 3 (GPLv2 § 3)); *id.* at 20 (Exh. 4 (LGPLv2.1 § 3)) (same).) The  
8 GPLs further provide that the licensee “may not copy, modify, sublicense, or distribute” covered  
9 software “except as expressly provided under the [GPLs],” and any attempt otherwise “is void, and  
10 will automatically terminate your rights under th[e GPLs].” *Id.* (Exh. 3 (GPLv2 § 4)); *id.* at 20 (Exh.  
11 4 (LGPLv2.1 § 4)) (same). “A licensee infringes the owner’s copyright if its use exceeds the scope  
12 of its license.” *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989). Thus, distributing  
13 the software without the source code (or an offer to provide it) would be an unauthorized distribution  
14 of a copyrighted work and no different from the example SFC cites as a “paradigmatic” example of  
15 a preempted contract claim: “violation of a contractual limitation allowing a one-time use of a photo  
16 on a magazine cover.” (Opp. at 8; *Kabehie*, 102 Cal. App. 4th at 528 (citing *Wolff v. Institute of*  
17 *Elec. & Electronics Eng., Inc.*, 768 F. Supp. 66 (S.D.N.Y. 1991)).) Just as a violation of the  
18 copyright holder’s restriction on distribution of a photo constitutes infringement, so does a violation  
19 of the GPLs’ restrictions on the distribution of software covered by it.

20 There is no “extra element” to SFC’s contract claim that makes it qualitatively different from  
21 copyright infringement: SFC alleges VIZIO breached the GPLs by distributing the software without  
22 providing the source code; that same alleged failure constitutes copyright infringement, leaving no  
23 doubt that SFC is seeking to assert equivalent rights to those under the Copyright Act. This is not  
24 news to SFC. Prior to filing this lawsuit, SFC wrote VIZIO stating that VIZIO was engaged in  
25 *copyright infringement* by distributing software covered by the GPLs without providing the source  
26 code or a written offer. (Compendium at 26 (Exh. 5 (SFC August 7, 2018 Letter at 1)).) In fact,  
27 SFC has repeatedly endorsed the view that the violation of the source code provision terminates the  
28 rights under the GPLs and constitutes copyright infringement; it has even filed copyright

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26 <sup>6</sup> SFC’s reliance (Opp. 6, 9) on a copyright owner’s “right to exclude” is misplaced. Of course, a  
27 copyright owner has that right, but he/she also has the right to distribute the work to the public  
28 under specific conditions, violations of which constitute copyright infringement. (Mot. at 11-13.)  
Nothing in the case that SFC cites about the “right to exclude” is to the contrary. (Opp. 6, 9  
(citing *CDK Glob. Ltd. Liab. Co. v. Brnovich*, 16 F.4th 1266, 1275-76 (9th Cir. 2021).

1 infringement actions based on this theory. (Compendium at 93, (Exh. 11 (“Some Thoughts on  
2 Conservancy’s GPL Enforcement”)) (“A GPL violation occurs when someone fails to meet the  
3 license requirements and thereby infringes copyright. The copyright rules themselves then are the  
4 only remedy to enforce the license . . . .”); Request for Judicial Notice (Exh. 1 at 5,7 (BusyBox  
5 Complaint at ¶¶ 14, 18)) (“If a distributor fails to [comply with the source-code provision], they are  
6 not fulfilling the terms of the license” and “lose[] all rights granted under the License,” resulting in  
7 “Copyright Infringement”).) SFC cannot explain its inconsistent positions, so it claims they are  
8 hearsay, which they are not; they are party admissions. (Cal. Evid. Code § 1220.) These prior  
9 admissions confirm that SFC is asserting rights that are equivalent to exclusive rights under the  
10 Copyright Act because the same alleged violation of the GPLs constitutes copyright infringement.

11 *Finally*, SFC’s reliance (Opp. 9-10) on the unpublished rulings in *Versata Software, Inc. v.*  
12 *Ameriprise Fin., Inc.*, 2014 WL 950065 (W.D. Tex. Mar. 11, 2014) and *Artifex Software, Inc. v.*  
13 *Hancom, Inc.*, 2017 WL 1477373, at \*2 (N.D. Cal. Apr. 25, 2017) is not compelling. *Artifex* is  
14 easily distinguishable on two grounds. First, the defendant there, unlike VIZIO, offered *no*  
15 explanation as to “why the GPU GPL’s open source requirement is not the required extra element”  
16 and thus failed to carry “its burden of proving preemption.” 2017 WL 1477373, at \*3-4. Second,  
17 the court found no preemption on a ground inapplicable here, that “the Copyright Act does not  
18 preempt causes of action premised upon possible extraterritorial infringement.” *Id.*

19 *Versata*, an unpublished, out-of-state case, conflicts with California law. *Versata* found no  
20 preemption because “Ameriprise has sued based on *Versata*’s breach of an additional obligation: an  
21 affirmative promise to make its derivative work open source,” and Ameriprise was unable to allege  
22 copyright infringement “because copyrights must be enforced by the copyright holder, not an  
23 interested third party.” 2014 WL 950065, at \*5 & n.4. In other words, *Versata* relied on the  
24 plaintiff’s characterizations in the complaint and the fact that the plaintiff was not the copyright  
25 holder and could not sue for copyright infringement. Both grounds are inconsistent with California  
26 law, as discussed above. *See Detomaso*, 43 Cal. 3d at 527 (plaintiff’s characterization of its claim  
27 is irrelevant to preemption); *Youssefi*, 218 Cal. App. 4th at 1017 (that plaintiff is unable to sue for  
28 copyright infringement is irrelevant to preemption analysis).

29 **B. SFC’s Argument That It Can Elect To Sue For Copyright Or Breach Of  
30 Contract Would Render Preemption Meaningless**

31 Tacitly recognizing that its breach of contract claim contains no “extra element” to survive  
32 preemption, SFC argues that the distinction between “copyright-enforceable conditions” and  
33 “contract-enforceable covenants” is false. (Opp. 11.) SFC asserts “that VIZIO may be liable for

1 copyright infringement for violating a condition of the GPLs [namely, the source code provision]  
2 does not prevent it from also being liable for breach of the Source Code Provision alleged by SFC”).  
3 (Opp. 12.) In fact, internal emails produced by SFC after VIZIO filed its motion confirm that SFC  
4 believes it can simply elect between contract and copyright claims for the same alleged violation of  
5 the GPLs. (Declaration of Daniel Posner (Exh. 1 (fully redacted & filed provisionally under seal)).)  
6 SFC’s position is not, and cannot be, correct, because if accepted, it would render copyright  
preemption a dead letter.

7 As the California Supreme Court recently explained, “the basic operation of federal  
8 preemption [is] as follows: Congress enacts a law that imposes restrictions or confers rights on  
9 private actors; a state law confers rights or imposes restrictions that conflict with the federal law;  
10 and therefore the federal law takes precedence and the state law is preempted. . . . [E]xpress  
11 preemption [as found in the Copyright Act] refers to Congress’s use of express language in a statute  
12 to supersede state law.” *Quishenberry v. UnitedHealthcare, Inc.*, 2023 WL 4511572, at \*3 (Cal.  
13 S271501 July 13, 2023) (cleaned up). In other words, the very essence of preemption is to bar a  
14 plaintiff from being able to elect between a federal and state law claim; only the federal claim may  
15 be brought. *Id.* Consequently, when SFC asserts (Opp. 12) that it can elect one or the other, SFC  
16 is quite literally asking this Court to ignore preemption altogether. SFC’s reliance on non-copyright  
17 cases that allow a plaintiff to elect whether to enforce a clause as a covenant or as a condition when  
preemption is not at issue have no applicability here. (Opp. 11-12.)<sup>7</sup>

18 SFC claims that the holdings in *Jacobsen I* and *MDY Industries* do not support VIZIO’s  
19 position (Opp. 12), but SFC fails to address the relevant holdings in both cases. First, as explained  
20 in the motion (Mot. 12), *Jacobsen I* addressed the covenant/condition distinction under California  
21 law in the context of an open source copyright license very similar to the GPLs. The Federal Circuit  
22 held that if a provision is only a covenant, it is enforceable by contract; however, if a provision is  
23 both a condition to the license and a covenant, the condition limits the scope of the license and the  
24 violation of that condition is only enforceable under copyright law. *See Jacobsen*, 535 F.3d at 1380  
(explaining that if the terms of the license are “both covenants and conditions, they may serve to

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25  
26 <sup>7</sup> As VIZIO explained (Mot. 15 n.5), nothing prevents a plaintiff from asserting a claim for  
27 copyright infringement based on the violation of a condition while also asserting breach of  
28 contract based on the violation of an independent covenant in the same license. But that is not the  
case here. A violation of the same term cannot give rise to both copyright and contract claims  
without violating the express preemption clause of 17 U.S.C. § 301.

1 limit the scope of the license and are *governed by copyright law*” (emphasis added)). *Jacobsen I*  
2 further held that under California law, the use of the term “provided that”—as the GPLs use in  
3 connection with the source code provision—indicates a condition, enforceable under copyright law.

4 Contrary to SFC’s incorrect assertion, *MDY Industries* did apply this framework to the  
5 question of copyright preemption. *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F.3d  
6 928, 957 (9th Cir. 2010). The court addressed whether the plaintiff’s claim for tortious interference  
7 with contract was preempted by the Copyright Act, and it expressly held that because the license  
8 provisions at issue were *not* “copyright-enforceable conditions,” the plaintiff “seeks to enforce  
9 contractual rights that are not equivalent to any of its exclusive rights of copyright,” and “the  
10 Copyright Act does not preempt its tortious interference claim.” *Id.* In other words, *MDY Industries*  
11 confirms that the “conditions-covenants” framework is relevant to the preemption analysis and that,  
12 if a license term constitutes a condition, it is enforceable only under copyright law.<sup>8</sup>

## 11 **II. SFC FAILS TO RAISE ANY ISSUE OF FACT SUGGESTING THAT IT IS AN** 12 **INTENDED THIRD-PARTY BENEFICIARY**

13 SFC argues (Opp. 13) that there are disputed factual issues as to whether it is an intended  
14 third party beneficiary of the GPLs, but rather than submit evidence to dispute VIZIO’s showing, it  
15 offers speculation and implausible hypotheticals, which are insufficient to defeat summary  
16 judgment. The issue for this motion is whether third-party enforcement of the GPLs is consistent  
17 with “the objectives of the contract and the reasonable expectations of the contracting parties.”  
18 *Goonewardene v. ADP, LLC*, 6 Cal. 5th 817, 836 (2019). SFC has failed to present evidence it is.

19 With respect to the objectives of the GPLs, SFC argues that third-party enforcement is not  
20 only consistent but “essential and necessary.” (Opp. 14.) SFC speculates that copyright holders are  
21 not capable of enforcing the source code provision of the GPLs because the copyright holder: 1) has  
22 no economic incentive to enforce the GPLs and would bear all the costs; 2) might be dead; 3) might  
23 not be aware of the violation; and 4) could not get specific performance. (Opp. 14-16.) These  
24 hypotheticals are not only factually unsupported, they are implausible and irrelevant.

25 First, the copyright holders are the only ones who have an economic incentive to enforce the  
26 GPLs, because they would be entitled to statutory damages and potentially attorneys’ fees under the

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26 <sup>8</sup> SFC now suggests that the source code provision is “purely contractual” (Opp. 2), which ignores  
27 the express language of the GPLs, including the FAQs confirming the drafter’s intent, and SFC’s  
28 prior public statements, pleadings, and even internal emails asserting that the GPLs are copyright  
licenses subject to enforcement under copyright law. There is simply no way to reconcile SFC’s  
current “made-for-litigation” position with the most basic principle of preemption.

1 Copyright Act for each violation. 17 U.S.C. §§ 504(c), 505.<sup>9</sup> Second, the speculation that the  
2 copyright holder might be dead would not prevent the estate from pursuing an infringement action.  
3 Third, the speculation that the copyright holder might not be aware of the violation is addressed by  
4 the FSF’s pronouncement that violations of the GPLs should be reported to the copyright holder  
5 because they are the only ones who have authority to enforce the GPLs. (Compendium at 82 (Exh.  
6 9 (GNU Violations)).) Finally, copyright holders can seek injunctive relief under the Copyright  
7 Act. 17 U.S.C. § 502. In short, SFC’s hypotheticals and speculation provide no basis to deny  
8 summary judgment. *See Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 850-51 (2001). As the  
9 Supreme Court explained in *Goonewardene*, third-party enforcement is not necessary to effectuate  
10 the objectives of the contract when the contracting party is available and fully capable of pursuing  
11 its own claim, as is the case here. *Id.* at 836. Contrary to SFC’s opposition, this is not an illogical  
12 “rule invented by VIZIO” (Opp. at 16) but a holding by the Supreme Court.

13 SFC also misplaces reliance on a 1918 case from New York and an article from Professor  
14 Eisenberg on “donee beneficiaries” to argue that this theory supports the conclusion that SFC should  
15 be permitted to enforce the GPLs as a donee-beneficiary. The Supreme Court made clear, however,  
16 that its cases do not rely on creditor-beneficiary and donee-beneficiary labels; instead, it carefully  
17 considers the express provisions of the contract and the relevant circumstances under which the  
18 contract was agreed. *Goonewardene*, 6 Cal. 5th at 829-30.

19 Similarly, SFC offers no evidence to dispute the reasonable expectations of the parties to the  
20 contract. Instead, it asks this Court to ignore (Opp. 19) the un rebutted evidence of the FSF’s intent  
21 that only copyright holders can enforce the GPLs, as well as SFC’s own prior admissions of the  
22 FSF’s role as the ultimate interpreter of the GPLs.<sup>10</sup> SFC claims (Opp. 19) that the evidence of the  
23 FSF’s intent and public statements are irrelevant because it postdates the publication of the GPLs.  
24 But SFC cites to no authority to support this position.<sup>11</sup> To the contrary, *SFC’s own case* proves  
25 VIZIO’s point: “courts in construing and applying a standardized contract seek to effectuate the

26 <sup>9</sup> SFC’s “fund[ing] litigation by other copyright holders” also proves that copyright holders need  
27 not bear the costs of enforcement. (Compendium at 164 (Exh. 26 (Lawsuit FAQ)).)

28 <sup>10</sup> SFC’s hearsay objections are meritless. Its own statements are not hearsay because they are  
party admissions, and the statements by the FSF are offered to show evidence of intent and the  
parties’ reasonable expectations, which are not hearsay. *See* VIZIO’s Responses to SFC’s  
Evidentiary Objections; *see also, e.g.*, Cal. Evid. Code §§ 1220-21 (party admissions and adoptive  
admissions are not hearsay); *Brown v. Goldstein*, 34 Cal. App. 5th 418, 432-33 (2019) (extrinsic  
evidence of intent is admissible to interpret a contract).

<sup>11</sup> Nor does SFC present evidence that the FSF’s position has ever changed on this point.

1 reasonable expectations of the average member of the public who accepts it.” *Williams v. Apple,*  
2 *Inc.*, 338 F.R.D. 629, 638 (N.D. Cal. 2021). The reasonable expectations of the average party to the  
3 GPLs will be informed by the FSF’s public statements about how the GPLs are intended to work.  
4 SFC’s attempts (Opp. 20) to downplay the significance of the FSF’s purpose behind the GPLs, by  
5 suggesting that the parties would not be guided by such statements, is belied by SFC’s numerous  
6 public statements that the FSF is the “GPL’s author and primary interpreter since 1989” and the  
7 “ultimate authority on the GPL.” (Compendium at 26 (Exh. 5 (SFC August 7, 2017 Letter at 1));  
*id.* at 34 (Exh. 7 (SFC Announcement of GPL Guide)).)

8 SFC also ignores *City of Oakland v. Oakland Raiders*, 83 Cal. App. 5th 458 (2022). In that  
9 case, the court rejected third-party standing to enforce the NFL’s relocation policy even though it  
10 was intended to benefit the host city and might be the only way to achieve the contract’s objective  
11 because “the defendants would not reasonably expect a host city to be able to sue them over those  
12 decisions.” *Id.* at 475-76. As VIZIO explained (Mot. 19) and SFC fails to rebut with any evidence,  
13 the FSF intended the GPLs to be enforced solely by copyright holders and the parties do not expect  
14 to be sued by any third party. SFC also ignores *Goonewardene*’s application of the “reasonable  
15 expectations” standard, which explained that permitting third-party enforcement would be  
16 inconsistent with the parties’ reasonable expectations when it would involve an unexpected and  
17 unwanted increase in litigation costs. 6 Cal. 5th at 836. That applies with even greater force here.  
18 SFC asserts that *any* recipient of GPL-licensed software should be able to sue to enforce the GPLs,  
19 which literally opens up the potential for *tens of millions* of lawsuits.<sup>12</sup> (Compendium at 164 (Exh.  
20 26 (Lawsuit FAQ)).) This result is inconsistent with the reasonable expectations of the parties.

### 21 CONCLUSION

22 VIZIO respectfully requests the Court grant its Motion for Summary Judgment.

23 DATED: August 18, 2023

24 QUINN EMANUEL URQUHART &  
25 SULLIVAN, LLP

26 By           /s/ Michael E. Williams          

27 Michael E. Williams  
28 Attorneys for Defendant VIZIO, Inc.

<sup>12</sup> This is particularly so, given that “[n]on-compliance with the GPL Agreements” is “common.”  
Kuhn Declaration at ¶ 12.

1 **PROOF OF SERVICE**

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

5 On August 18, 2023, I served a true and correct copy of the document described as  
6 **DEFENDANT VIZIO INC.’S MEMORANDUM OF POINTS AND AUTHORITIES IN**  
7 **REPLY TO PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY**  
8 **JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY ADJUDICATION** on the  
9 parties in this action via electronic service to the emails below, pursuant to the parties’ joint  
10 stipulation: “Electronic service will count as personal service on the day of that electronic service,  
11 if the electronic service occurs before midnight Pacific Time. If the electronic service occurs after  
12 midnight Pacific Time, that service will count as personal service for the following business day  
13 that is not a legal holiday.”

14 Richard G. Sanders, Esq.

15 [rick@ricksanderslaw.com](mailto:rick@ricksanderslaw.com)

16 **RICHARD G. SANDERS,**  
17 **PLLC**

18 605 Berry Rd., Ste. A

19 Nashville, TN 37204

20 Tel: (615) 734-1188

21 Fax: (615) 250-9807

Sa’id Vakili, Esq.

[vakili@vakili.com](mailto:vakili@vakili.com)

John A. Schlaff, Esq.

[john.schlaff@gmail.com](mailto:john.schlaff@gmail.com)

David N. Schultz, Esq.

[Schu1984@yahoo.com](mailto:Schu1984@yahoo.com)

Stephen P. Hoffman, Esq.

[hoffman@vakili.com](mailto:hoffman@vakili.com)

**VAKILI & LEUS, LLP**

3701 Wilshire Blvd., Ste. 1135

Los Angeles, CA 90010-2822

Tel: (213) 380-6010

Fax: (213) 380-6051

Naomi Jane Gray

[ngray@shadesofgray.law](mailto:ngray@shadesofgray.law)

Donald A. Thompson

[dthompson@shadesofgray.law](mailto:dthompson@shadesofgray.law)

**w**

**SHADES OF GRAY LAW**  
**GROUP**

100 Shoreline Highway, Suite  
100B

Mill Valley, CA 94941

Tel: (415) 746-9260

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

24 Executed on August 18, 2023.

26 /s/ Arian Koochesfahani

27 Arian Koochesfahani