QUINN EMANUEL URQUHART & SULLIVAN, LLP
Michael E. Williams (Bar No. 181299)
michaelwilliams@quinnemanuel.com
Daniel C. Posner (Bar No. 232009)
danposner@quinnemanuel.com
John Z. Yin (Bar No. 325589)
johnyin@quinnemanuel.com
Arian J. Koochesfahani (Bar No. 344642)
ariankoochesfahani@quinnemanuel.com
865 South Figueroa Street, 10th Floor
Los Angeles, CA 90017-2543
Telephone: (213) 443-3000
Fax: (213) 443-3100

Attorneys for Defendant
VIZIO, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE-CENTRAL JUSTICE CENTER

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

Plaintiff,

v.

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

Defendant.

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

DEFENDANT VIZIO, INC.'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY ADJUDICATION

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

Dept. C33

Action Filed: October 19, 2021

Hearing Date: July 24, 2025

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PRELIMINARY STATEMENT

SFC devotes most of its brief to steering the Court away from the merits of VIZIO's Motion. Before addressing the merits, SFC asserts several purported procedural arguments that lack foundation and provide no grounds for denying the Motion. There are no procedural defects in the Motion, and even if there were, the appropriate remedy would be to permit VIZIO to correct them. The Court should disregard SFC's efforts to avoid the merits through its procedural arguments.

The reason SFC puts off the merits is because it has no real answer on the merits. SFC fails to establish any genuine dispute of material fact as to whether GPLv2 contains a "reinstallation requirement."[1] Because GPLv2 is a written instrument, its plain language determines its meaning. As VIZIO has explained, and as SFC does not dispute, the plain language of GPLv2 does not include language requiring licensees to allow reinstallation of "open source" software back onto the "same device" on which it was distributed. SFC does not even contend that the language of GPLv2 is ambiguous in this respect, such that the Court could consider extrinsic evidence to decide that issue. Instead, SFC argues that the plain language of GPLv2, which requires "the scripts used to control compilation and installation of the executable," (Comp. Ex. 3 at 27), compels the licensee to provide "files such that a person of ordinary skill can compile the source code into a functional executable and install it onto the same device, such that all features of the original program [*i.e.*, software] are retained, without undue difficulty." (Comp. Ex. 12 at 193.) But GPLv2 is not reasonably susceptible to that interpretation. And because the dispute here is simply a dispute about the meaning of the words in the license, the Court should disregard the self-serving declarations SFC offers to support its interpretation of GPLv2, which in any case are inadmissible legal conclusions.

To the extent the Court considers any extrinsic evidence to determine whether GPLv2 contains a reinstallation requirement, then the dispositive extrinsic evidence here is the undisputed fact that the author of GPLv2, the Free Software Foundation ("FSF"), drafted an entirely new version of the GPL—GPLv3—specifically to add a limited reinstallation requirement. SFC's only response is to argue the Court cannot admit GPLv3 as evidence because it allegedly post-dates

[1] Both parties agree that the relevant language of LGPLv2.1 is substantively identical to GPLv2 and therefore, the Court's determination as to GPLv2 would also apply to LGPLv2.1. (Opp'n at 5.)

VIZIO's first use of GPLv2-licensed software. That argument is meritless: Relevant evidence of course of performance under a contract—which ***necessarily*** post-dates the formation of the contract—is unquestionably admissible to show the intent of the parties at the time of contracting. And here, evidence of the addition of a reinstallation requirement in GPLv3 is compelling evidence that GPLv2 has none.

Accordingly, the Court should grant this Motion and conclude as a matter of law that GPLv2 does not impose a duty on VIZIO to provide information that would allow "a person of ordinary skill" to reinstall the source code from its products back onto the devices from which it came.

ARGUMENT

I. SFC'S ATTEMPTS TO AVOID THE MERITS OF VIZIO'S MOTION ARE DISINGENUOUS AND UNAVAILING

A. SFC Cannot Avoid The Merits Based On Its Interrogatory Response

SFC's first attempt to avoid the merits of VIZIO's Motion is to argue (Opp'n at 8–9) that the Court should not decide whether GPLv2 requires a licensee to allow the reinstallation of "***modified***" software because SFC did not discuss such modification in an interrogatory response. This argument is disingenuous, and it should be soundly rejected.

First, the alleged contractual reinstallation duty at issue in this Motion is derived from positions that SFC has asserted from the beginning of this case and has never disavowed, even in response to this Motion. In its First Amended Complaint ("FAC"), SFC asserted that it seeks the source code for VIZIO's Smart TVs so that software developers will have "the opportunity to ***modify them*** to protect user privacy or improve accessibility" and "preserve useful but obsolete features." (FAC ¶¶ 116, 118 (emphasis added).) Since then, SFC's witnesses have repeatedly asserted that GPLv2 requires licensees to allow the reinstallation of "modified" versions of source code back on the same device. (*See* VIZIO's Supplemental Compendium of Exhibits ("Supp. Comp.") Ex. 22 (Gingerich Tr.) at 47 (affirming that "SFC wants the right to be able to ***modify*** GPL-licensed code in any way it sees fit to reinstall back on to a Vizio TV" (emphasis added)); Comp. Ex. 17 (Sandler Tr.) at 399–400 (affirming the requirement "to reinstall ***modified*** software back on the same device" (emphasis added)); Supp. Comp. Ex. 23 (Sandler Tr.) at 54 (same); Supp. Comp. Ex. 24 (Kuhn Tr.)

at 62 (affirming that "you have to provide installation instructions that would allow someone to install ***modified*** software on the same device" (emphasis added)).)

Likewise, SFC publicly states that "GPLv2 assures" the "absolute right to receive the information necessary to install a ***modified version*** of the GPLv2'd works." (SFC's App., Ex. 6 (Denver Gingerich's blog post, dated March 21, 2021, entitled "Understanding Installation Requirements of GPLv2.") (emphasis added).) Regardless of whether its interrogatory response specifically referenced an alleged duty to allow the reinstallation of ***modified*** source code on the same device, SFC's pleadings and representations make clear that SFC contends that GPLv2 imposes such a duty. And, in its opposition to VIZIO's Motion, SFC notably refuses to disavow that it seeks to hold VIZIO to such a requirement.

Second, VIZIO's Motion does not even depend on this "modified" software question; rather, it turns on the more basic question whether GPLv2 imposes ***any*** duty to allow the reinstallation of any version of its source code on the "same device" from which it came, regardless of whether or not the source code is "modified" or "unmodified." SFC's argument is designed to distract the Court from the core issue of VIZIO's Motion, which should be addressed on the merits.

B. SFC Cannot Avoid The Merits Based On VIZIO's Separate Statement

SFC's next ploy to avoid the merits of VIZIO's Motion is its argument (Opp'n at 10) that VIZIO's Separate Statement is "fatally" defective, requiring denial of the Motion.[2] Not so.

First, there is no difference between the alleged contractual duty identified in VIZIO's Notice of Motion and in its Separate Statement. VIZIO seeks summary adjudication on SFC's theory that GPLv2 incorporates a reinstallation requirement, as stated in the Notice. The Separate Statement breaks that issue of contractual duty into subparts because there are alternative grounds on which the Court may grant VIZIO's Motion and the undisputed material facts relevant to each of those grounds vary depending, for example, on whether the Court considers extrinsic evidence.

[2] SFC's criticism of VIZIO's Separate Statement smacks of irony given its own violations of the California Rules of Court with respect to using smaller margins to evade the page limitations for its Opposition brief. The rules require half-inch right-hand margins while SFC used .375 inch margins. *See* Cal. Rules of Court 2.107.

Although VIZIO's Separate Statement does not "repeat[], verbatim," the issue of duty articulated in VIZIO's Notice (Cal. Rules of Court, Rules 3.1350(b), (d)), that does not require the Court to deny the Motion because VIZIO's Separate Statement "notifies the parties which material facts are at issue" and "provides a convenient and expeditious vehicle permitting the trial court to hone in on the truly disputed facts." *Beltran v. Hard Rock Hotel Licensing, Inc.*, 97 Cal. App. 5th 865, 874–76 (2023) (explaining the purposes of the separate statement).

Second, even if VIZIO's Separate Statement were technically deficient, the proper remedy would be to permit VIZIO to amend it—not to deny the Motion. *See, e.g., Parkview Villas Ass'n., Inc. v. State Farm Fire & Cas. Co.*, 133 Cal. App. 4th 1197, 1211 (2005) (reversing trial court's summary-judgment ruling, which was predicated on the trial court's refusal to permit amendment of the separate statement, because "the proper response in most instances" is to provide "an opportunity to file a proper separate statement."). Clearly, the alleged deficiencies in VIZIO's Separate Statement "did not prevent [SFC] from responding." *Id.* at 1211. "To the contrary," SFC's opposition confirms that SFC knows "exactly what [VIZIO's] position was" and "what evidence it relied upon to support its position." *Id.*; *accord Truong v. Glasser*, 181 Cal. App. 4th 102, 118 (2009) ("Plaintiffs have not explained how any alleged deficiency [. . .] impaired Plaintiffs' ability" to respond).

SFC's contrary authorities arose in circumstances so egregious that they only underscore how inapt SFC's position is here. *See Beltran*, 97 Cal. App. 5th at 874–76 (warning parties not to file "600 paragraphs" of background facts and "attempt[] to game the system by […] claiming facts are [']disputed['] when the uncontroverted evidence clearly shows otherwise"); *N. Coast Bus. Park v. Nielsen Constr. Co.*, 17 Cal. App. 4th 22, 31 (1993) (appellant waived issue where separate statement wholly omitted key factual predicates); *United Cmty. Church v. Garcin*, 231 Cal. App. 3d 327, 337 (1991) (facts in separate statement utterly failed to support movant's legal position).[3] In

[3] SFC's cited trial-court rulings fare no better. In *MB v. Defendant DOE School District*, the separate statement "fail[ed] to delineate each cause of action it is challenging and further fail[ed] to specify which asserted facts apply to each specific issue." 2024 Cal. Super. LEXIS 59874, *11. As a result, the court had to "read Defense counsel's mind" to understand the issues. *Id.* at *12. Similarly, in *Oday v. 118 Wadsworth Avenue Homeowners Ass'n*, the separate statement "listed 62

contrast, here, VIZIO's Notice and the Separate Statement address the same contractual duty, with the Separate Statement specifying the alternative grounds on which the Court can rule and the undisputed material facts supporting each of those alternative grounds. Because VIZIO's Notice and Separate Statement are sufficiently clear and have not hindered SFC's ability to respond, the Court should reject this argument and proceed to the merits.[4]

II. SFC'S OPPOSITION CONFIRMS THAT THE PLAIN LANGUAGE OF GPLV2 ENTITLES VIZIO TO SUMMARY ADJUDICATION

Because GPLv2 is a written document, "the intention of the parties is to be ascertained from the writing alone, if possible." Cal. Civ. Code § 1639; *see DVD Copy Control Ass'n., Inc. v. Kaleidescape, Inc.*, 176 Cal. App. 4th 697, 712 (2009) (court determines meaning of a contract "from the language of the contract alone, if the language is clear and explicit, and does not involve an absurdity" (internal quotation omitted)). "In construing a contract, the court's function is to ascertain and declare what, in terms and substance, is contained in that contract, and not to insert what has been omitted." *Levi Strauss & Co. v. Aetna Cas. & Sur. Co.*, 184 Cal. App. 3d 1479, 1486 (1986), *dismissed, remanded and ordered published*, 737 P.2d 358 (Cal. 1987); Cal. Civ. Proc. Code § 1858. Thus, despite SFC's attempt to confuse the issues, the question here is straightforward: Does the plain language of GPLv2 support SFC's contention that a licensee must provide information allowing users to reinstall the GPLv2-software "***on the same device on which the computer program was originally distributed***"? (Comp. Ex. 12 at 193.) On this issue, SFC has failed to raise a genuine dispute of fact.

GPLv2 says nothing about reinstalling the software on the ***same device*** on which the software was originally distributed—and SFC does not assert otherwise. Nor does it dispute that GPLv2 makes no mention of SFC's self-created requirement that, "[a]t a minimum, [VIZIO] should deliver files such that a person of ordinary skill can compile the source code into a functional

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purportedly material facts, without distinction as to any of the seven issues." 2025 Cal. Super. LEXIS 15187, *4.

[4] To the extent the Court finds VIZIO's Separate Statement deficient, VIZIO seeks leave to file the [Proposed] Amended Separate Statement attached to the Notice of Lodging filed concurrently herewith which repeats verbatim the language in the Notice above the sub-issues in the Separate Statement identifying the alternative grounds. As demonstrated therein, the changes are minor.

executable and install it onto the same device, such that all features of the original program [*i.e.*, software] are retained, without undue difficulty." (Comp. Ex. 12 at 193.) Instead, SFC repeats its made-up language about installing the software back onto the "same device," continuing to pretend it is part of GPLv2's text. (*See, e.g.*, Opp'n at 5 (arguing that GPLv2 requires "the scripts used to control compilation and installation of the executable ***on the same device on which the computer program was originally distributed***—the VIZIO Smart TV purchased by SFC" (emphasis added)).) Note that the key (bolded and italicized) language underlying SFC's novel construction of the license is found nowhere in the license. (*See* Opp'n at 5, 13.) SFC's request for the Court to write in this additional language runs afoul of fundamental principles of contract interpretation and should be rejected. "The court does not have the power to create for the parties a contract which they did not make, and it cannot insert in the contract language which one of the parties now wishes were there." *Levi Strauss*, 184 Cal. App. 3d at 1486. Because the plain language of GPLv2 does not support SFC's proffered interpretation of it, the Court should grant summary adjudication on the absence of a contractual reinstallation requirement.

III. TO THE EXTENT EXTRINSIC EVIDENCE IS RELEVANT, IT SUPPORTS SUMMARY ADJUDICATION IN VIZIO'S FAVOR

VIZIO explained that the Court need not consider extrinsic evidence to grant its Motion. (Mot. at 9:14–10:19.) VIZIO presented extrinsic evidence solely in the alternative to the extent SFC argued that the language of GPLv2 is ambiguous. Because SFC does not argue there is any ambiguity in GPLv2, the Court should grant the Motion without considering the extrinsic evidence submitted by either party. To the extent the Court finds otherwise, the admissible extrinsic evidence supports granting VIZIO's Motion.

A. Extrinsic Evidence Is Irrelevant Because SFC Does Not Raise An Ambiguity

The Court should only consider extrinsic evidence if the language of GPLv2 is ambiguous and reasonably susceptible to SFC's interpretation. *See Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 391 (2006) (courts may consider extrinsic evidence only if it "is relevant to prove a meaning to which the language of the instrument is reasonably susceptible"). "An ambiguity arises when language is reasonably susceptible of more than one application to material facts." *Id.* "Courts will

not adopt a strained or absurd interpretation in order to create an ambiguity where none exists." *Alameda Cnty. Flood Control & Water Conservation Dist. v. Dep't of Water Res*., 213 Cal. App. 4th 1163, 1180 (2013) (internal citation and quotation omitted). "Whether the contract is reasonably susceptible to a party's interpretation can be determined from the language of the contract itself." *Curry v. Moody*, 40 Cal. App. 4th 1547, 1554 (1995).

Here, SFC does not argue that the language in GPLv2 on which it relies—"the scripts used to control compilation and installation of the executable" (Comp. Ex. 3 at 27)—is ambiguous, so there is no basis to consider extrinsic evidence to interpret GPLv2. *See Curry*, 40 Cal. App. 4th at 1554 ("[E]vidence of the meaning the parties gave to the contract language is only relevant if the contract language itself is reasonably susceptible to that meaning."). GPLv2 is not reasonably susceptible to SFC's proffered interpretation that this language requires a licensee to provide information that would permit a "person of ordinary skill" to reinstall the source code back onto the same device from which it came while retaining the functionality of all features of the original software. Thus, there is no basis for the Court to consider SFC's extrinsic evidence, including witness declarations, that attempts to show otherwise.

B. SFC's Witness Declarations And Deposition Testimony Are Inadmissible Because They Present Only Legal Conclusions

Even if extrinsic evidence could be considered on this Motion, the Court still should not consider the opinions of Messrs. Kuhn, Gingerich, Garbee, and Waid and Ms. Kooyman purporting to interpret GPLv2 in favor of the reinstallation requirement because those opinions are inadmissible. Messrs. Kuhn and Gingerich purport to respond to VIZIO's argument about the plain language of GPLv2 by offering their opinion that "under the GPLv2, VIZIO must provide SFC with all the source code, together with the interface definition files and scripts that will allow the source code for the software on the Smart TVs purchased by SFC that is licensed under the GPLv2 to be installed and compiled into an executable code that can run on these Smart TVs." (Kuhn Decl. at ¶ 27; Gingerich Decl. at ¶ 5.) Messrs. Waid and Garbee and Ms. Kooyman similarly offer their personal beliefs about GPLv2's requirements in support of the argument that it includes a

reinstallation requirement. (Waid Decl. at ¶ 5; Garbee Decl. at ¶¶ 13, 15; Supp. Comp. Ex. 25 (Kooyman Tr.) at 69-73.)

These opinions are inadmissible legal conclusions. Even if these witnesses qualified as experts on GPLv2 (which VIZIO disputes), "[t]he meaning of the [contract] is a question of law about which expert opinion testimony is inappropriate." *Cooper Cos. v. Transcon. Ins. Co.*, 31 Cal. App. 4th 1094, 1100 (1995); *see Summers v. A.L. Gilbert Co*., 69 Cal. App. 4th 1155, 1180 (1999) ("Expert opinion on the legal interpretation of contracts has also been found to be inadmissible."). A federal court applying this rule recently excluded Mr. Kuhn's testimony purporting to interpret provisions in GPLv3. (*See* Supp. Comp. Ex. 20 (Order Granting Plaintiffs' Daubert Motion, *Neo4j, Inc. v. PureThink, LLC*, No. 5:18-cv-07182-EJD (N.D. Cal. Oct. 25, 2023), ECF No. 216 at 12–14) at 12–15.) Nor is this testimony admissible as "lay" opinion. Such testimony "contrary to a contract's express terms […] does not give meaning to the contract: rather it seeks to substitute a different meaning" and "must be excluded." *Gerdlund v. Elec. Dispensers Int'l*, 190 Cal. App. 3d 263, 273 (1987) (excluding the lay testimony offered by both sides). The Court can properly disregard, for purposes of this Motion, the testimony of SFC's proffered witnesses.

C. SFC's Declarations Fail To Show Any Triable Issue Because They Elide The Key Issue Of Reinstalling On The "Same Device"

Even if the Court considers SFC's declarations, those declarations do not create a triable issue of fact because none identifies language in GPLv2 that is reasonably susceptible to SFC's proposed interpretation. GPLv2 undisputedly requires the "scripts used to control compilation and installation of the executable." (Comp. Ex. 3 at 27.) But, as Mr. Kuhn himself states, "[t]he source code must be compiled into an executable code (encoded in binary) that ***the computer*** is able to read, run, and execute." (Kuhn Decl. at ¶ 21 (emphasis added).) Critically, neither Mr. Kuhn nor the other witnesses state that the ***only*** computer able to read, run, and execute the compiled source code is the specific device in which the software was distributed. Nor do SFC's witnesses deny that an executable file can be installed and run on countless computers and devices so long as they can read the relevant programming language.

SFC does not contend that its interpretation is reasonably susceptible because this is a situation where the ***only*** device on which the executable file could be compiled and installed is the "same device," *i.e.*, the VIZIO TVs. To the contrary, SFC admits it was able to successfully compile and install the GPL-software it received from VIZIO even though it could not reinstall that software back onto the same TVs from which it came. (Supp. Comp. Ex. 21 at 40.) Instead, SFC's witnesses simply declare, *ipse dixit*, that the language referring to "scripts used to control compilation and installation of the executable" in GPLv2 should include "on the same device on which it was originally installed," despite the absence of any language in GPLv2 supporting that interpretation. These declarations fail to create a genuine issue of material fact sufficient to deny VIZIO's Motion.

D. Evidence Regarding GPLv3 Is Relevant And Supports Summary Adjudication

VIZIO showed in its Motion (Mot. at 10–13) that the addition of a reinstallation requirement in GPLv3 confirms that GPLv2 does not contain such a requirement. Without offering any response on that critical point, SFC argues this Court should disregard GPLv3 because the intent of the parties must be ascertained at the time the contract was formed. (Opp'n at 14–15.) SFC's argument is misplaced. It is well-settled that evidence of post-contract course of performance can inform the meaning of the contract. *See Emps. Reins. Co. v. Superior Ct.*, 161 Cal. App. 4th 906, 920 (2008) ("The use of ['']course of performance['] evidence as extrinsic evidence is acknowledged in case law and was ultimately codified"). Indeed, subsequent events are often "the most potent extrinsic evidence" of the terms of a contract. *Epic Commc'ns, Inc. v. Richwave Tech., Inc.*, 237 Cal. App. 4th 1342, 1355 (2015) ("[T]he course of actual performance by the parties is considered the best indication of what the parties intended the writing to mean." (internal quotation omitted)). This is true "even if the contract was drafted by the parties' predecessors-in-interest or," as is the case here, "was a pre-printed standard form contract." *Emps. Reins. Co.*, 161 Cal. App. 4th at 922.

SFC's authorities are readily distinguishable. In *Roddenberry v. Roddenberry*, 44 Cal. App. 4th 634, 644–46 (1996), the court rejected the argument that "the meaning of ['']profit participation income from Star Trek['']" included "Gene Roddenberry's postdivorce Star Trek efforts" because no one could have predicted that event at the time the contract was entered. In *London Mkt. Insurers v. Superior Ct.*, 146 Cal. App. 4th 648, 666 (2007), the court concluded that the meaning of

"occurrence" could not possibly have been informed by case law postdating the contract. But VIZIO is not arguing here that SFC or others should have foreseen the terms of GPLv3 when GPLv2 was drafted. Rather, VIZIO's point is that GPLv3's express inclusion of a reinstallation requirement confirms that GPLv2 lacks one; otherwise, the subsequent inclusion of a reinstallation requirement in GPLv3 would have been unnecessary.

Critically, SFC still offers no plausible explanation for why GPLv3 would add a limited reinstallation requirement for "User Products" if, as SFC contends, GPLv2 already had, according to SFC, a much broader reinstallation requirement that covered GPLv2 software in ***all products***. Nor does SFC address the absurd results that flow from its interpretation, which VIZIO described in the Motion. (Mot. at 12.) SFC's complete failure to rebut this point only underscores that its novel construction of GPLv2 is irreconcilable with the plain language of GPLv2 and GPLv3 and would lead to absurd results in violation of California's canons of contract interpretation. Cal. Civ. Code § 1638 (language of contract governs interpretation and should not involve an absurdity).

CONCLUSION

VIZIO respectfully requests the Court grant its Motion for Summary Adjudication and conclude as a matter of law that GPLv2 and LGPLv2.1 contain no reinstallation requirement.

DATED: July 11, 2025

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By */s/ Michael E. Williams*
Michael E. Williams
Attorney for Defendant VIZIO, Inc.

PROOF OF SERVICE

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

On July 11, 2025, I served a true and correct copy of the documents described as **DEFENDANT VIZIO, INC.'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY ADJUDICATION, DECLARATION OF MICHAEL E. WILLIAMS, SUPPLEMENTAL COMPENDIUM OF EXHIBITS, CONSOLIDATED SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS, NOTICE OF LODGING [PROPOSED] AMENDED SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS, RESPONSE TO PLAINTIFF'S EVIDENTIARY OBJECTIONS, OBJECTIONS TO PLAINTIFF'S EVIDENCE IN SUPPORT OF OPPOSITION TO MOTION FOR SUMMARY ADJUDICATION, AND CONSOLIDATED [PROPOSED] ORDER ON THE PARTIES' EVIDENTIARY OBJECTIONS** on the parties in this action via electronic service to the emails below, pursuant to the parties' joint stipulation.

Sa'id Vakili, Esq.
vakili@vakili.com
John A. Schlaff, Esq.
john.schlaff@gmail.com
David N. Schultz, Esq.
Schu1984@yahoo.com
Stephen P. Hoffman, Esq.
hoffman@vakili.com
VAKILI & LEUS, LLP
3701 Wilshire Blvd., Ste. 1135
Los Angeles, CA 90010-2822
Tel: (213) 380-6010
Fax: (213) 380-6051

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 11, 2025.

/s/ *Delaney Gold-Diamond*

Delaney Gold-Diamond