

1 The Court should dismiss both sets of claims. First, plaintiffs' copyright claims lack
2 well-pled allegations of fact sufficient for the Court to conclude they are "plausible" as *Iqbal*,
3 *Twombly*, and their progeny require. Plaintiffs do not allege their copyrights are valid, and offer
4 no information about the filings with the U.S. Copyright Office on which their claims depend.
5 Nor can they ask the Court to presume they satisfy those requirements, because they did not
6 attach copyright registration certificates to their complaint (or even claim that such certificates
7 exist). Therefore, plaintiffs' copyright infringement claims can't stand.

8 Second, plaintiffs seek to recover \$25,000 in contractual liquidated damages for each
9 time they claim Madison McQueen ran the subject songs in ostensible breach of their contracts:
10 more than 78,086 times for the first song, and more than 12,000 times for the second. According
11 to plaintiffs, this means they are entitled to damages of more than \$2 billion! Yet, Washington
12 courts only enforce liquidated damages clauses if they approximate just compensation for the
13 plaintiff's harm, and such harm cannot be reasonably determined. Plaintiffs do not allege facts
14 to support either required element. Nor do they offer facts to support their claim for liquidated
15 damages beyond \$50,000 – \$25,000 for the alleged infringement of each of their two songs.
16 Since the Ninth Circuit recognizes that continued unauthorized use of a work gives rise to only
17 one set of damages, plaintiffs needed to explain why they are specially entitled to damages each
18 time their song was used. Yet, they do not attach the contract they conclude provides such an
19 extraordinary remedy, or even quote from it. Without factual support, plaintiffs' claim to
20 thousands of times the liquidated amount ostensibly stated in their contracts cannot be
21 "plausible."

22 Third, copyright preemption prevents plaintiffs from seeking substantially broader
23 remedies through their license agreements (including their stratospheric claim for liquidated
24 damages) that they cannot obtain in copyright. Both claims depend on Madison McQueen's
25 alleged interference with the exclusive right to use and distribute their songs as they see fit.
26 Since that right flows from the Copyright Act, plaintiffs are limited to the remedies the

1 Copyright Act provides. Preemption prevents their inconsistent contract claims from standing
2 alone.

3 Finally, the Court should take judicial notice that Ted Cruz is no longer running for
4 president. Thus, the harm plaintiffs claim they sustained as part of his campaign occurred
5 entirely in the past. Neither Cruz for President nor Madison McQueen has any incentive to run
6 more of the subject ads, but plaintiffs seek an injunction restraining them from doing so anyway.
7 The issue is moot. As such, the Court should deny plaintiffs' request for injunctive relief.

8 For all of these reasons, Cruz for President and Madison McQueen respectfully request
9 the Court dismiss plaintiffs' Complaint for Copyright Infringement and Breach of License
10 Agreement (Ct. Dkt. 1) ("Complaint") under Federal Rules of Civil Procedure 12(b)(6), 12(c),
11 and/or 12(f).

12 **FACTS**

13 For purposes of this motion, Cruz for President and Madison McQueen accept the
14 following allegations that plaintiffs pled in their Complaint as being true:

15 **A. Plaintiffs' Allegations that Defendants Used "Lens" without Authorization**

16 "[O]n September 17, 2015, Madison McQueen employee Robert Perkins downloaded an
17 Audiosocket-licensed music track called 'Lens,' which was created by Sarah Schachner
18 ('Schachner'). Schachner has filed a US copyright application for the 'Lens' music composition
19 and sound recording."¹

20 "On December 23, 2015, Defendant Madison McQueen, entered into Audiosocket's
21 standard 'Small Business License Agreement' (the 'Lens License Agreement'). Under the Lens
22 License Agreement, Madison McQueen agreed to use 'Lens' for the limited permitted purposes
23 outlined in Audiosocket's Small Business Licensing Agreement."²

24 _____
25 ¹ Complaint at ¶ 20.

26 ² *Id.* at ¶ 21.

1 “The Lens License Agreement listed expressly permitted uses and restrictions on use of
2 the composition and sound recording.”³

3 “The Lens License Agreement expressly prohibited Madison McQueen from using
4 ‘Lens’

5 1. In any broadcast, cable, web television, video games, mobile applications, or
6 radio;

7 . . .

8 3. For political purposes (including, but not limited to, supporting or opposing
9 any government policy, government official, political action, or candidate for
political office).”⁴

10 “Madison McQueen also agreed to pay liquidated damages of \$25,000 for any breach of
11 the Lens License Agreement.”⁵

12 “Audiosocket has confirmed that, despite its agreement not to use ‘Lens’ for any political
13 purposes, three days after entering into the Lens License Agreement, Defendants Cruz and
14 McQueen began broadcasting ‘Victories,’ an acclaimed political ad promoting and supporting
15 U.S. Presidential candidate Ted Cruz, on YouTube. The political ad uses ‘Lens’ as its
16 soundtrack throughout the entirety of the video.”⁶

17 “Audiosocket has confirmed . . . that ‘Victories’ uses Audiosocket’s unique watermarked
18 version of ‘Lens,’ including that it was licensed by Madison McQueen’s Robert Perkins via the
19 downloaded Lens License Agreement. . . . The ‘Victories’ video has been viewed over 78,000
20 times on YouTube.”⁷

21
22 ³ *Id.* at ¶ 22.

23 ⁴ *Id.* at ¶ 23 (emphasis omitted).

24 ⁵ *Id.* at ¶ 24.

25 ⁶ *Id.* at ¶ 25.

26 ⁷ *Id.* at ¶ 26.

1 “On February 24, 2016, nearly two months after Madison McQueen and Cruz for
 2 President first went live with their unauthorized political use of ‘Lens,’ but before they broadcast
 3 ‘Lens’ on cable television, Madison McQueen admitted it had no right to use ‘Lens’ on cable
 4 television. . . . Although Audiosocket advised Madison McQueen that political use of ‘Lens’
 5 was not approved, Madison McQueen chose to ignore the political purpose and cable television
 6 restrictions and proceeded to cause ‘Lens’ to be broadcast on cable channel Fox Business News
 7 no fewer than 86 times.”⁸

8 **B. Plaintiffs’ Allegations that Defendants Used “Fear of Complacency” without**
 9 **Authorization**

10 “[O]n September 17, 2015, Madison McQueen employee Robert Perkins downloaded an
 11 Audiosocket-licensed song called ‘Fear of Complacency,’ which was created by Brad Couture
 12 (‘Couture’). Couture has filed a U.S. copyright application for the ‘Fear of Complacency’ sound
 13 record and music composition.”⁹

14 “On January 25, 2016, Defendant Madison McQueen, entered into another Small
 15 Business Licensing Agreement (the ‘FoC License Agreement’) with Audiosocket. Under the
 16 FoC Licensing Agreement, Madison McQueen agreed to use ‘Fear of Complacency’ for the
 17 limited permitted purposes outlined in Audiosocket’s Small Business Licensing Agreement.”¹⁰

18 “The FoC License Agreement listed the same permitted uses and restrictions as the Lens
 19 License Agreement Madison McQueen purchased a month earlier. . . . Madison McQueen was
 20 expressly prohibited from publishing or performing ‘Fear of Complacency’ or ‘[f]or political
 21 purposes (including, but not limited to, supporting or opposing any government policy,
 22 government official, political action, or candidate for political office).”¹¹

23 ⁸ *Id.* at ¶ 27.

24 ⁹ *Id.* at ¶ 28.

25 ¹⁰ *Id.* at ¶ 29.

26 ¹¹ *Id.* at ¶ 30.

1 “Madison McQueen also agreed to pay liquidated damages of \$25,000 for any breach of
2 FoC License Agreement.”¹²

3 “Audiosocket has confirmed that . . . on January 24, 2016, . . . Defendants Cruz and
4 McQueen already had begun broadcasting a political commercial for candidate Cruz titled ‘Best
5 to Come,’ which uses ‘Fear of Complacency’ as its soundtrack, on YouTube. . . . Audiosocket
6 has further confirmed . . . that ‘Best to Come’ uses Audiosocket’s unique, watermarked version
7 of ‘Fear of Complacency,’ including that it was licensed by Madison McQueen’s Robert Perkins
8 via the download FoC License Agreement. The ‘Best to Come’ video has been viewed over
9 12,000 times on YouTube. . . .”¹³

10 **C. Plaintiffs’ Claims for Breach of Contract and for Copyright Infringement**

11 Plaintiffs allege these facts give rise to two sets of two claims: for breach of contract and
12 for copyright infringement, relating to the allegedly unauthorized use of “Lens” and “Fear of
13 Complacency.” As shown below, both sets of claims are based on Madison McQueen’s and
14 Cruz for President’s use of the songs (1) for “political purposes”; and/or (2) in ads “broadcast on
15 cable television.”

16 Plaintiffs’ first claim is for “Breach of Lens License Agreement” (between Audiosocket
17 and Madison McQueen). It alleges that “[p]ursuant to its Lens License Agreement with
18 Audiosocket, Madison McQueen agreed it would not use ‘Lens’ for any political purpose and
19 that it would not cause ‘Lens’ to be broadcast on cable television,”¹⁴ promises that Madison
20 McQueen breached.¹⁵

21 Plaintiffs’ second claim is for “Breach of FoC License Agreement” (between
22

23 ¹² *Id.* at ¶ 31.

24 ¹³ *Id.* at ¶ 32.

25 ¹⁴ *Id.* at ¶ 34.

26 ¹⁵ *Id.* at ¶ 35.

1 Audiosocket and Madison McQueen). It similarly alleges that “[p]ursuant to its FoC License
2 Agreement with Audiosocket, Madison McQueen agreed it would not use ‘Lens’ for any
3 political purpose,”¹⁶ a promise that Madison McQueen breached.¹⁷

4 Plaintiffs’ third claim is for copyright infringement relating to “Lens” (between Ms.
5 Schachner and both defendants). It alleges that “[a]t no time have Defendants Cruz for President
6 and Madison McQueen been granted a license or other authorization from Ms. Schachner to use
7 either the music composition or the sound recording of ‘Lens’ for political purposes or for
8 broadcast on cable television,” a right that both defendants infringed by using that song in that
9 manner.¹⁸

10 Plaintiffs’ final claim is for copyright infringement relating to “Fear of Complacency”
11 (between Mr. Couture and both defendants). It alleges that “[a]t no time have Defendants Cruz
12 for President and Madison McQueen been granted a license or authorization from Mr. Couture to
13 use either the music composition or the sound recording of “Fear of Complacency’ for political
14 purposes,” a right that both defendants infringed by using that song in that manner.¹⁹

15 **D. Ted Cruz Ends His Campaign**

16 On May 3, 2016, Ted Cruz ended his presidential campaign.²⁰

17 **E. Plaintiffs File Suit**

18 On May 9, 2016, plaintiffs filed the instant lawsuit.²¹

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20 ¹⁶ *Id.* at ¶ 39.

21 ¹⁷ *Id.* at ¶ 40.

22 ¹⁸ *Id.* at ¶ 46.

23 ¹⁹ *Id.* at ¶ 50.

24 ²⁰ *See, e.g.*, M. Flegenheimer, “Trump Nears Nomination as Cruz Drops Out,” *The New York Times* (May 4, 2016 at
25 A1) (“On Tuesday, Mr. Cruz ended his campaign, his loss in Indiana extinguishing any chance of denying Mr.
Trump the nomination.”). As discussed below, Madison McQueen asks the Court to take judicial notice of this
well-known fact.

26 ²¹ *See* Complaint.

ARGUMENT**A. Standard for Motions to Dismiss, for Judgment on the Pleadings, and to Strike**

Under Rule 12(c) of the Federal Rules of Civil Procedure, any party may seek judgment on the pleadings after the pleadings are closed. Fed.R.Civ.P. 12(c). “Analysis under Rule 12(c) is “substantially identical” to analysis under Rule 12(b)(6) because, under both rules, ‘a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy.’” *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (citation omitted).

Under Rule 12(b)(6), the Court must determine whether the plaintiff has alleged sufficient facts to state a claim for relief which is “plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While detailed factual allegations are not necessary, the plaintiff must provide more than “labels and conclusions” or a “formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555. In addition, although the Court must accept as true all well-pled allegations within the complaint, it need not accept “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010). Plaintiffs’ claims fail to meet this pleading standard. Therefore, the Court should dismiss their claims under both Rules 12(b)(6) and/or 12(c).

A court also “may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter.” Fed.R.Civ.P. 12(f). An immaterial matter “has no essential or important relationship to the claim for relief or the defenses being pleaded,” while an “[i]mpertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question.” *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993) (quoting 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1382, at 706-07, 711 (1990)), *rev’d on other grounds*, 510 U.S. 517 (1994). The purpose of a Rule 12(f) motion “is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.” *Sidney-Vinsein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983).

1 As discussed below, plaintiffs assert claims and seek relief that simply cannot be granted
 2 under their pleadings or under the law. The Court should strike all such requests under Rule
 3 12(f) to the extent it does not dismiss them under Rules 12(b)(6) and/or 12(c).

4 **B. Plaintiffs' Claims Are Not Supported by Well-Pled Facts.**

5 **1. Ms. Schachner and Mr. Couture fail to allege sufficient facts to support their**
 6 **copyright infringement claims.**

7 To state a claim for copyright infringement, a plaintiff must allege (1) ownership of a
 8 valid copyright; and (2) copying of the constituent elements of the work that are original. *Feist*
 9 *Publ'n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). The Copyright Act also provides
 10 that “no civil action for infringement of the copyright in any United States work shall be
 11 instituted until preregistration or registration of the copyright claim has been made in accordance
 12 with this title.” 17 U.S.C. § 411(a). In the Ninth Circuit, “receipt by the Copyright Office of a
 13 complete application” satisfies this requirement. *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*,
 14 606 F.3d 612, 621 (9th Cir. 2010). *See also, Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384,
 15 386-87 (5th Cir. 1984) (“In order to bring suit for copyright infringement, it is not necessary to
 16 prove possession of a registration certificate. One need only prove payment of the required fee,
 17 deposit of the work in question, and receipt by the Copyright Office of a registration
 18 application.”). A complaint that fails to plead these basic elements should be dismissed for
 19 failure to state a claim upon which relief can be granted. *Cosmetic Ideas, Inc.*, 606 F.3d at 615.

20 Here, Ms. Schachner and Mr. Couture conspicuously fail to offer well-pled facts that
 21 would enable the Court to conclude they have standing to bring their copyright infringement
 22 claims. While their claims require them to prove “ownership of a valid copyright,” they
 23 conspicuously never allege they can do so.²² Nor can they ask the Court to presume they satisfy
 24 this element, because they did not attach copyright registration certificates to their complaint – or

25 _____
 26 ²² *See id.* The complaint is simply silent on this element.

1 even allege that such certificates exist.²³ *Dream Games of Arizona, Inc. v. PC Onsite*, 561 F.3d
2 983, 987 n.2 (9th Cir. 2009), citing *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1110 (9th
3 Cir.1998), and *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1075-76 (9th Cir. 2000). Since
4 plaintiffs cannot fiat this essential element into existence, they cannot establish their claims for
5 copyright infringement.

6 The Court also need not – and should not – accept the bare conclusion that plaintiffs have
7 satisfied their Section 411(a) prerequisite to filing suit. Tellingly, Ms. Schachner and Mr.
8 Couture only allege they each have “filed a US copyright application.”²⁴ They offer zero facts to
9 support that conclusion. They did not attach registration certificates; they did not provide
10 registration numbers; they did not attach a copy of their applications for registration; they did not
11 reveal the factual representations they made to the Copyright Office; and they did not provide
12 deposit copies of their works.²⁵ Plaintiffs’ failure to offer any detail whatsoever to support their
13 conclusions falls short of the Ninth Circuit’s requirement that plaintiffs at least plead “receipt by
14 the Copyright Office of a complete application.” *Cosmetic Ideas, Inc.*, 606 F.3d at 621. Since
15 that showing, in turn, requires “payment of the required fee, deposit of the work in question, and
16 receipt by the Copyright Office of a registration application,” the occurrence of these events
17 should not be left to the imagination. *Apple Barrel Prods., Inc.*, 730 F.2d at 386-87.

18 Plaintiffs’ complete silence unfairly requires Madison McQueen to wonder who is listed
19 as the owner of the copyrights; whether the subject works were made for hire; what the claimed
20 works consist of; when the applications were filed; whether the applications were complete; and
21 when (if ever) the Copyright Office issued the subject registrations. This information is entirely
22 within plaintiffs’ knowledge and control, and it should have been disclosed.

23
24 ²³ *See id.*

25 ²⁴ *Id.* at ¶ 44 (Ms. Schachner’s allegation) and ¶ 49 (Mr. Couture’s allegation).

26 ²⁵ *See* Complaint.

1 For these reasons, a proper complaint for copyright infringement typically “identifies a
2 document that is protected by a copyright by ‘listing the copyright registration numbers issued
3 by the United States that correspond to each of its copyrighted [materials], annexing copies of
4 the United States Certificates of Copyright Registrations, and stating that the defendant has
5 infringed upon one of more of these copyrights.’” *Newborn v. Yahoo!, Inc.*, 391 F. Supp.2d 181,
6 188-89 (D.D.C. 2005), quoting *Home & Nature Inc. v. Sherman Specialty Co.*, 322 F. Supp.2d
7 260, 266 (E.D.N.Y. 2004) (“[T]he plaintiff has done none of the above, but rather has provided
8 the defendants with only scant information to which they can evaluate the claims against them.
9 This is simply insufficient, and thus this Court must conclude that the plaintiff has failed to state
10 a claim upon which relief can be granted.”).

11 Ms. Schachner’s and Mr. Couture’s incomplete pleading similarly deprives Madison
12 McQueen of the ability to evaluate their claims. Unless or until plaintiffs provide sufficient
13 information, the Court should not have to entertain those claims, and Madison McQueen should
14 not have to defend them.

15 **2. Audiosocket fails to allege sufficient facts to support its request for more**
16 **than \$2 billion in liquidated damages.**

17 Plaintiff Audiosocket likewise fails to allege facts needed to support its outsize claim for
18 liquidated damages. The Washington Supreme Court applies a two-part test to determine
19 whether a liquidated damages clause is enforceable. “First, the amount fixed must be a
20 reasonable forecast of just compensation for the harm that is caused by the breach. Second, the
21 harm must be such that it is incapable or very difficult of ascertainment.” *Walter Implement,*
22 *Inc. v. Focht*, 107 Wn.2d 553, 559 (1987) (citations omitted). *See also*, Restatement (Second) of
23 Contracts § 356 (1981) (providing a similar test).

24 Audiosocket fails to allege facts sufficient to establish either element. First, it notably
25 never claims that the \$25,000 in liquidated damages it seeks amounts to a “reasonable forecast of
26

1 just compensation” for the alleged harm caused by the breach.²⁶ Indeed, it appears to seek
2 \$25,000 for each time their songs were played beyond the scope of its licenses.²⁷ It gets worse.
3 Audiosocket states that Madison McQueen caused “Lens” to be played on YouTube “over
4 78,000 times” and on Fox Business News “no fewer than 86 times”; and “Fear of Complacency”
5 to be played on YouTube “over 12,000 times.”²⁸ According to Audiosocket, therefore, Madison
6 McQueen owes it liquidated damages of more than \$2,252,150,000 (\$25,000 x 90,086). Such a
7 claim is facially ridiculous and, in no event can plausibly approximate just compensation for
8 Audiosocket’s alleged harm.

9 Nor does Audiosocket allege facts needed to support the second required element – that
10 the harm it allegedly suffered is “incapable or very difficult of ascertainment.” Such a claim is
11 likewise incredible. Audiosocket is in the business of licensing music.²⁹ As such, it should know
12 the commercial value of licenses covering songs used for “political purposes” and for “broadcast
13 on cable television.” Thus, Audiosocket lacks facts needed to support both elements of its
14 liquidated damages claim.

15 Indeed, even if its liquidated damages clauses were enforceable, Audiosocket still offers
16 nothing more than its own humble opinion that the thousands of individual breaches it alleges
17 occurred give rise to the astronomical sum it seeks. It notably does not attach the subject
18 contracts or even quote the subject language.³⁰ Without such supporting facts – completely
19 absent here – the Court is not required to accept Audiosocket’s self-serving conclusions about
20

21 ²⁶ *See id.*

22 ²⁷ *Id.* at ¶ 36 (“Madison McQueen agreed to pay \$25,000 for each of its breaches. . . .”) (emphasis added), ¶ 41
23 (same).

24 ²⁸ *Id.* at ¶¶ 27, 32, 35.

25 ²⁹ *Id.* ¶ 8 (“Audiosocket is a music licensing and technology company. . . .”).

26 ³⁰ *See* Complaint.

1 how those contracts should be interpreted. *Twombly*, 550 U.S. at 555. Audiosocket’s lack of
2 well-pled facts prevent its bloated claims for billions of dollars in liquidated damages from being
3 even remotely “plausible on its face.” *Iqbal*, 556 U.S. 662 at 663, quoting *Twombly*, 550 U.S. at
4 570. Therefore, those claims should be dismissed.

5 **C. Audiosocket Can’t Establish More than \$50,000 in Liquidated Damages Given the**
6 **Continuing Infringement It Alleges.**

7 Audiosocket can’t support its astronomical claim for liquidated damages for another
8 reason: no legal basis exists for multiplying each allegedly unauthorized use by \$25,000. To the
9 contrary, at most it can hope to obtain is \$50,000 – one set of liquidated damages for the
10 continuous use of its two songs. It is hornbook law that to remedy unauthorized use of a
11 copyrighted work, damages are calculated by multiplying damages by each work infringed, not
12 by the number of infringements. *See, e.g.*, 17 U.S.C. 504(c)(1) (authorizing statutory damages
13 “for all infringements involved in the action, with respect to any one work”) (emphasis added).
14 Here, Audiosocket alleges that Madison McQueen infringed two works. Therefore, it is limited
15 to damages associated with those two works, regardless of the number of times it claims those
16 works were used without permission.

17 The Ninth Circuit addressed an analogous issue in *Derek Andrew, Inc. v. Poof Apparel*
18 *Corp.*, 528 F.3d 696, 701 (9th Cir. 2008). In that case, the plaintiff alleged the defendant’s
19 unauthorized use of its designs on hang-tags – both before and after plaintiff’s designs were
20 registered – constituted different instances of actionable infringement. The Ninth Circuit
21 rejected that argument, instead finding “the first act of infringement in a series of ongoing
22 infringements of the same kind marks the commencement of one continuing infringement. . . .”
23 *Id.* (emphasis added). Applied to the infringing hang-tags, the court concluded:

1 [T]here is no legally significant difference between Poof’s pre and
2 post-registration infringement. Poof first distributed garments
3 bearing the infringing hang-tag on May 9, 2005, if not earlier, and
4 continued to do so—albeit with the hang-tag attached to different
5 garments—after the June 15, 2005, copyright registration. Thus,
Poof began its infringing activity before the effective registration
date, and it repeated the same act after that date each time it used
the same copyrighted material.

6 *Id.* (emphasis added). In other words, “[t]he mere fact that the hang-tag was attached to new
7 garments made and distributed after June 15 does not transform those distributions into many
8 separate and distinct infringements.” *Id.*

9 Audiosocket makes the same flawed assertion here. It alleges that Madison McQueen
10 breached its license agreements each and every time one of plaintiffs’ songs was played for a
11 “political purpose” and/or was “broadcast on cable television” without their permission. Like
12 the *Poof* plaintiff’s claim for multiple sets of statutory damages, Audiosocket asserts it is entitled
13 to parallel sets of liquidated damages for “each” of the thousands of times it claims this
14 occurred.³¹ But even accepting its claims as true, Madison McQueen only infringed two works,
15 and each infringement constituted a series of ongoing infringements. Audiosocket does not
16 allege any legally significant difference exists in the 78,086+ times Madison McQueen caused
17 “Lens” to be played, or the 12,000+ times it caused “Fear of Complacency” to be played.³² It
18 simply claims Madison McQueen caused those two songs to be played over and over.³³ Thus,
19 the most Audiosocket can obtain under the ostensible liquidated damages clauses is \$50,000 –
20 one set of liquidated damages for each of the two songs that Audiosocket claims that Madison
21 McQueen continuously infringed. Audiosocket simply does not allege facts that would plausibly
22 provide the extraordinary multiplier of damages it appears to seek.

23 _____
24 ³¹ *Id.* at ¶¶ 36, 41.

25 ³² *See* Complaint.

26 ³³ *Id.*

1 **D. The Copyright Act Preempts Audiosocket’s Contract Claims.**

2 Audiosocket’s claims for breach of contract rely on identical facts as Ms. Schachner’s
 3 and Mr. Couture’s claims for copyright infringement: that Madison McQueen wrongly used the
 4 subject songs for a “political purpose,” and caused one of them to be “broadcast on cable
 5 television.” Both claims also allege invasion of the identical right: the exclusive right to control
 6 how the songs are used and distributed. The Copyright Act is the source of both rights: Ms.
 7 Schachner and Mr. Couture state as much in support of their claims for copyright infringement;³⁴
 8 and Audiosocket claims its right to license the songs to third parties comes from Ms. Schachner
 9 and Mr. Couture.³⁵ In other words, Audiosocket’s claimed right to control contractually how the
 10 songs are used depends on rights the Copyright Act grants the songwriters, and the songwriters’
 11 passing such rights through to Audiosocket. Without the Copyright Act, therefore, neither the
 12 songwriters nor Audiosocket would have any rights to assert. Because the Copyright Act
 13 preempts inconsistent state law claims that do not require an “extra” element of proof, it
 14 preempts Audiosocket’s inconsistent contract claims here. As such, plaintiffs collectively should
 15 be limited to the remedies the Copyright Act provides, rather than the significantly broader
 16 remedies that Audiosocket additionally seeks under the parties’ ostensible contracts.

17 The Copyright Act preempts the assertion of “all legal or equitable rights that are
 18 equivalent to any of the exclusive rights within the general scope of copyright. . . .” 17 U.S.C. §
 19 301(a). The scope of copyright is broad. It gives the “author” (creator) of a work exclusive
 20 rights to reproduce, distribute, and display the copyrighted material, as well as the right to
 21

22 ³⁴ *Id.* at ¶¶ 45-47 (alleging that defendants’ unauthorized use of “Lens” infringes Ms. Schachner’s copyrighted
 23 works); ¶¶ 50-52 (alleging that defendants’ unauthorized use of “Fear of Complacency” infringes Mr. Couture’s
 24 copyrighted works).

25 ³⁵ *Id.* at ¶ 9 (“Audiosocket is a music publisher whose primary purpose is to find licensing opportunities for the
 26 artists that it represents.”), ¶ 11 (“Under its Artist agreement, artists give Audiosocket permission to promote their
 music to potential licensees for commercial purposes. . . .”), ¶ 15 (“Pursuant to the terms of its agreements with its
 artists, Audiosocket has a duty to assure that licenses are being used within the terms of each license agreement it
 enters.”).

1 prepare derivative works. *See* 17 U.S.C. § 106. To determine whether the Copyright Act
2 preempts a state law cause of action, courts within the Ninth Circuit apply a two-part test: they
3 first determine whether the work at issue is copyrightable subject matter, and then they
4 determine whether the state law right at issue is equivalent to any of the exclusive rights within
5 the general scope of copyright. *Del Madera Props. v. Rhodes & Gardner, Inc.*, 820 F.2d 973,
6 976 (9th Cir. 1987). A state law right is not equivalent to a right under the Copyright Act if it
7 requires at least one “extra element” not necessary for a copyright infringement. *Id.* at 977
8 (dismissing claims for unfair competition and unjust enrichment because the rights on which
9 those claims depended flowed from the Copyright Act).

10 Here, Audiosocket’s contract claims meet the first part of the test because the songs at
11 issue consist of copyrightable subject matter. Indeed, plaintiffs themselves claim as much.³⁶
12 Audiosocket’s contract claims likewise meet the second element because the contractual right
13 they claim Madison McQueen violated – the exclusive right to control the use and distribution of
14 their songs – is the same right the Copyright Act provides.³⁷ *See* 17 U.S.C. § 106 (giving
15 copyright holders the exclusive right to reproduce, distribute, and display copyrighted material).
16 Because Audiosocket’s contract claims meet both elements of this test, they are preempted.

17 Plaintiffs’ pleading bears this out. It is no accident they use almost identical language to
18 support both causes of action. They are the same cause of action: two claims overtly pled under
19 the Copyright Act, and two claims asserting breach of the same rights, but dressed up as claims
20 for breach of contract:

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25 ³⁶ *See id.* at ¶¶ 32-52 (plaintiffs’ claims for copyright infringement).

26 ³⁷ *See id.* at ¶¶ 34-35, 39-40 (the contractual rights to control the distribution of their works that plaintiffs allege Madison McQueen breached).

Contract Claims

- 1 • “Pursuant to its Lens License Agreement with Audiosocket, Madison McQueen
2 agreed it would not use ‘Lens’ for any political purpose and that it would not
3 cause ‘Lens’ to be broadcast on cable television.”³⁸
- 4 • “Madison McQueen breached its contractual obligation to not use ‘Lens’ for a
5 political purpose thousands of times. Madison McQueen breached its contractual
6 obligation to not broadcast “Lens” on cable television at least 86 times.”³⁹
- 7 • “Pursuant to its FoC License Agreement with Audiosocket, Madison McQueen
8 agreed it would not use [‘Fear of Complacency’] for any political purpose.”⁴⁰
- 9 • “Madison McQueen breached its contractual obligation to not use [‘Fear of
10 Complacency’] for a political purpose thousands of times.”⁴¹

Copyright Claims

- 10 • At no time have Defendants Cruz for President and Madison McQueen been
11 granted a license or other authorization from Ms. Schachner to use either the
12 music composition or the sound recording of “Lens” for political purposes or for
13 broadcast on cable television. Accordingly, Defendants’ unauthorized use and
14 broadcast of the music composition and sound recordings of “Lens” in the
15 “Victories” political ad infringes Ms. Schachner’s copyrighted works.⁴²
- 16 • At no time have Defendants Cruz for President and Madison McQueen been
17 granted a license or other authorization from Mr. Couture to use either the music
18 composition or the sound recording of “Fear of Complacency” for political
19 purposes. Accordingly, Defendants’ unauthorized use and broadcast of the music
20 composition and sound recordings of “Fear of Complacency” in the “Best to
21 Come” political ad infringes Mr. Couture’s copyrighted works.⁴³

22 ³⁸ *Id.* at ¶ 34 (emphasis added).

23 ³⁹ *Id.* at ¶ 35 (emphasis added).

24 ⁴⁰ *Id.* at ¶ 39 (emphasis added). Here, the Complaint refers to “Lens” rather than “Fear of Complacency,” but given
25 the context, Madison McQueen assumes that is a mistake.

26 ⁴¹ *Id.* at ¶ 40 (emphasis added). Again, the Complaint refers to “Lens,” but Madison McQueen assumes that
plaintiffs instead meant to refer to “Fear of Complacency.”

⁴² *Id.* at ¶ 45 (emphasis added).

⁴³ *Id.* at ¶ 50 (emphasis added).

1 Because both causes of action depend on the right to control the distribution and use of the
2 subject works – rights the Copyright Act expressly provides – Audiosocket’s duplicative
3 contract claims cannot separately stand.

4 The case of *Canal+ Image UK Ltd. v. Lutvak*, 773 F. Supp.2d 419, 444 (S.D.N.Y. 2011),
5 illustrates this point. There, the plaintiff alleged a claim for copyright infringement, along with a
6 claim that defendants had breached their promise not to adapt the subject work after the term of
7 their license expired. *Id.* at 446. The court noted that – like here – the plaintiff’s right to control
8 its work ultimately “flowed from the Copyright Act, not from the Agreement.” *Id.* In other
9 words, “the claim that Defendants usurped the exclusive right of Canal+ to adapt the Film is
10 nothing more than a claim that Defendants have violated a right of Canal+ under the Copyright
11 Act.” *Id.* Because the contract claim alleged that defendants had committed an act that “would,
12 by itself, infringe one of the exclusive rights provided by federal copyright law,” the court
13 properly concluded the Copyright Act preempted it, and granted the defendants’ motion to
14 dismiss. *Id.* (citation omitted).

15 The same analysis applies here. Audiosocket’s contract claims allege that Madison
16 McQueen violated the exclusive right to control how the subject songs are used and distributed.
17 Since such rights flow from the Copyright Act, plaintiffs’ copyright infringement claims are the
18 only ones that can stand. As Professor Nimmer has observed, when a breach of contract cause of
19 action serves as “a subterfuge to control nothing other than the reproduction, adaptation, public
20 distribution, etc. of works within the subject matter of copyright,” those claims are preempted.
21 *Id.*, quoting 1 Nimmer on Copyright § 1.01[B][1][a] [iii]. That’s what Audiosocket’s contract
22 claims amount to: subterfuge to control the subject songs. As such, they are preempted.

23 **D. The Cruz Campaign Is Over. Therefore, Plaintiffs’ Injunction Request Is Moot.**

24 Finally, the Court should deny Ms. Schachner’s and Mr. Couture’s request for injunctive
25 relief. To do so, the Court should take judicial notice that Ted Cruz’s campaign for president is
26 over. Because plaintiffs allege that Cruz for President’s and Madison McQueen’s allegedly

1 wrongful use of the subject songs was part of the now-terminated campaign,⁴⁴ their request for
2 injunctive relief is moot.⁴⁵

3 “Federal courts have long recognized procedures for considering documents outside the
4 pleadings when ruling on motions to dismiss.” *Milo & Gabby, LLC v. Amazon.com, Inc.*, 12 F.
5 Supp.3d 1341, 1351 (W.D. Wash. 2014). Indeed, Federal Rule of Evidence 201(b) expressly
6 provides that a court “may judicially notice a fact that is not subject to reasonable dispute
7 because it (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be
8 accurately and readily determined from sources whose accuracy cannot reasonably be
9 questioned.”

10 Here, the Court should take judicial notice that Ted Cruz’s presidential campaign has
11 ended. This fact is not subject to reasonable dispute because it is both generally known and can
12 readily be determined from sources whose accuracy cannot reasonably be questioned. *See, e.g.*,
13 M. Flegenheimer, “Trump Nears Nomination as Cruz Drops Out,” *The New York Times* (May 4,
14 2016 at A1) (“On Tuesday, Mr. Cruz ended his campaign, his loss in Indiana extinguishing any
15 chance of denying Mr. Trump the nomination.”). For these reasons, the Court should take
16 judicial notice of this fact.

17 The termination of Sen. Cruz’s campaign is significant because it renders plaintiffs’
18 request for injunctive relief moot. *See C.F. v. Capistrano Unified Sch. Dist.*, 647 F. Supp.2d
19 1187, 1194 (C.D. Cal. 2009) (“[n]o injunction may issue . . . if such relief is moot”), *aff’d sub*
20 *nom. C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975 (9th Cir. 2011). “A
21 federal court’s Article III power to hear disputes extends only to live cases or controversies. A
22 request for injunctive relief remains live only so long as there is some present harm left to
23 enjoin.” *Id.*, quoting *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1502 (D.C. Cir. 1995)

24
25 ⁴⁴ *See, e.g., id.* at ¶¶ 21, 25, 27, 32.

26 ⁴⁵ *Id.* at ¶¶ 47, 52; 11:3.

1 (citing *Renne v. Geary*, 501 U.S. 312, 320-21 (1991) (“Past exposure to illegal conduct does not
 2 in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by
 3 any continuing, present adverse effects.”)). To avoid being moot (among other required
 4 showings), “there must be a ‘reasonable expectation’ that the same complaining party will be
 5 subject to the same injury again.” *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1509 (9th
 6 Cir. 1994), citing *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); *Barilla*, 886 F.2d at 1519
 7 (additional citation omitted).

8 No “reasonable expectation” of repetition exists here. With the Cruz campaign
 9 terminated, neither Cruz for President nor Madison McQueen has any political, financial, or any
 10 other interest in running the subject commercials. Ms. Schachner and Mr. Couture, who filed
 11 suit a week after Sen. Cruz ended his campaign, seem to recognize this logic: their complaint
 12 conspicuously omits any allegation that Cruz for President and Madison McQueen are still doing
 13 anything to cause the subject ads to be run.⁴⁶ Thus, the harm plaintiffs complain about occurred
 14 strictly in the past (assuming it occurred at all). There are no future acts that an injunction needs
 15 to restrain. Because plaintiffs nonetheless seek injunctive relief, the Court should deny their
 16 request as a matter of law.

CONCLUSION

17
 18 For the reasons stated above, the Court should dismiss plaintiffs’ claims and deny the
 19 relief they seek under Rules 12(b)(6), 12(c), and 12(f). As pleaded, plaintiffs’ complaint is not
 20 “plausible on its face” and seeks relief that is not available under the law.

21
 22
 23
 24 ⁴⁶ See Complaint. While plaintiffs offer the conclusory allegation that defendants’ alleged copyright infringement
 25 “has caused and will cause” them “irreparable harm,” they do not explain why that legal conclusion can be true,
 26 other than because the past harm they allegedly suffered “cannot be fully compensated by money.” *Id.* at ¶¶ 47, 52.
 Nowhere do plaintiffs allege that Cruz for President or Madison McQueen continue to affirmatively do anything to
 cause the subject ads be to run, or that defendants are likely to do so at any time in the future. See Complaint.

1 DATED this 8th day of June, 2016.

2 By /s/ Michael G. Atkins

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and I hereby certify that I served a true and correct copy of the document as follows:

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Dated: June 8, 2016

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