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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE - CENTRAL JUSTICE CENTER

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

Plaintiff,

v.

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

Defendant.

Case No. 30-2021-01226723-CU-BC-CJC

PLAINTIFF SOFTWARE FREEDOM CONSERVANCY, INC.'S NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT; DECLARATIONS OF BRADLEY M. KUHN AND NAOMI JANE GRAY

[REQUEST FOR JUDICIAL NOTICE AND COMPENDIUM OF EXHIBITS FILED CONCURRENTLY]

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

Dept. C33

Action Filed: October 19, 2021

Hearing Date: February 15, 2024, 10:00 a.m.

Hearing Reservation ID: 74084781

Trial Date: March 25, 2024

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on February 15, 2024 at 10:00 a.m., in Department C33 of the Central Justice Center at 700 Civic Center Drive, Santa Ana, CA 92701, Plaintiff Software Freedom Conservancy, Inc. ("SFC") will and hereby does move this Court for summary adjudication on an issue of duty and an affirmative defense, specifically:

1. that Defendant VIZIO, Inc. ("VIZIO") has a duty under the GNU General Public License version 2 ("GPLv2") and GNU Lesser General Public License version 2.1 ("LGPLv2.1") (together, the "GPLs") to produce to SFC:

   a. the complete source code (as defined in Section 3 of GPLv2 and in Section 0 of LGPLv2.1) for any GPL-licensed software on VIZIO Smart TV Model Nos. V435-J01, D32h-J09, or M50Q7-J01; and

   b. the complete source code or object code for any software that links to an LGPLv2.1-licensed library on VIZIO Smart TV Model Nos. V435-J01, D32h-J09, or M50Q7-J01 (or otherwise comply with LGPLv2.1 § 6); and

2. that VIZIO's Fifth Affirmative Defense--—which asserts that Plaintiff's claims are barred, in whole or in part, because they are preempted by the United States Copyright Act—has no merit.

SFC makes this motion on the grounds that: (1) VIZIO distributes Smart TV Model Nos. V435-J01, D32h-J09, or M50Q7-J01 that include GPL-licensed software; (2) VIZIO has a duty to share the complete corresponding source code (or, where applicable, object code) under the GPLs; (3) SFC has a right to that source code (or, where applicable, object code) as an intended third-party beneficiary of the GPLs and a purchaser of VIZIO Smart TV Model Nos. V435-J01, D32h-J09, or M50Q7-J01; and (4) SFC's aforementioned right to source code (or, where applicable, object code) does not equate to any right in the Copyright Act. This motion is based on the attached memorandum of points and authorities, Declarations of Bradley M. Kuhn and Naomi Jane Gray, compendium of exhibits, request for

judicial notice, all other briefing and argument in connection with this motion, and all other matters properly subject to judicial notice.

DATED: December 1, 2023

SHADES OF GRAY LAW GROUP, P.C.

By /s/ *Naomi Jane Gray*
Naomi Jane Gray

Attorneys for Plaintiff
SOFTWARE FREEDOM CONSERVANCY, INC.

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PRELIMINARY STATEMENT

VIZIO has a duty to share source code with SFC under "free and open source software" license agreements known as the GPLs. Pursuant to these agreements, VIZIO incorporated software developed by others into its TVs in exchange for a promise to share the source code with anyone that acquired the TVs—including SFC. SFC may enforce its undisputed right to the source code as a third-party beneficiary of the GPLs. After all, a right that cannot be enforced is no right at all.

VIZIO cannot avoid its duty to share source code by arguing that SFC's claims are preempted. In this case, a federal district court has already decided that SFC's claims are not preempted—and rightly so. Two federal district courts have reached the same conclusion in factually analogous cases, *Artifex Software v. Hancom, Inc.,* and *Versata Software, Inc. v. Ameriprise Fin., Inc.* Here, VIZIO's obligation to produce source code under the GPLs is purely contractual and is not equivalent to any of the exclusive rights enumerated in Section 106 of the Copyright Act.

STATEMENT OF FACTS

The GPLs, FOSS, and the Duty to Share Source Code

GPLv2, dated June 1991, and the LGPLv2.1, dated February 1999, are two of the most widely used and successful open-source software license agreements. (Declaration of Bradley Kuhn in Support of SFC's Motion for Summary Adjudication ("Kuhn. Decl.") ¶ 3.) GPL-licensed software helps operate such consumer devices as wireless home routers and—pertinent to this action—television sets. (Kuhn. Decl. ¶ 14.)

The GPLs play a central role in the development of "free and open source software" ("FOSS"). (Kuhn. Decl. ¶¶ 3, 14.) FOSS is a software development model that encourages and relies on collaboration and the free exchange of knowledge. (Kuhn. Decl. ¶¶ 2, 7, 9.) In this context, "free" refers to "freedom," and is not a synonym for "gratis." (Kuhn. Decl. ¶ 2.) FOSS projects "invite computer programmers from around the world to view software code and make changes and improvements to it." *Jacobsen v. Katzer*, 535 F.3d 1373, 1378-79 (Fed. Cir. 2008). FOSS projects are successful because many software developers work on them, adding new

features, tweaking old features, and fixing bugs, and these new versions are available to other developers to learn from, tweak and improve. (Kuhn. Decl. ¶¶ 7, 9.) Many popular programs are "free and open source software" licensed under the GPLs, such as the kernel of Linux, a computer operating system at issue in this case. (Kuhn. Decl. ¶ 14; *see, e.g.*, *Wallace v. Int'l Bus. Machines Corp.*, 467 F.3d 1104, 1106 (7th Cir. 2006).)

Software exists in two general forms: (1) object or executable code (also known as a "binary") that computers can understand and implement; and (2) human-readable source code that can be understood and edited by those familiar with the relevant programming language. (Kuhn. Decl. ¶¶ 10-11; *see* Compendium Exhibits G-I.) As the California Supreme Court has explained, "Computer software programs are written in specialized languages called source code. The source code, which humans can read, is then translated into language that computers can read. The computer readable form, which operates on a binary system, is called object code." *Cadence Design Sys., Inc. v. Avant! Corp*., 29 Cal. 4th 215, 218 n.3 (2002). The gap between the human-readable source code and the computer-readable object or executable code is bridged by a process known as compilation. (Kuhn. Decl. ¶¶ 12-13; *Krause v. Titleserv, Inc.,* 402 F.3d 119, 120 (2d Cir. 2005) ("Code written in such a programming language is called source code. Source code becomes executable only when it is run through a compiler which converts it into the binary 1s and 0s of object, or executable, code."); *accord Universal City Studios v. Corley*, 273 F.3d 429, 438-39 (2d Cir. 2001)).

Although software is often distributed in an executable form, as in the "Smart TVs" at issue here, human programmers cannot readily read, modify, or repurpose executable software. (SFC Statement of Undisputed Material Facts ("SUMF") Nos. 10-11; Kuhn Decl. ¶¶ 14, 18.) The GPLs solve this problem and make FOSS possible by requiring those who distribute software in an executable form to include either the complete corresponding source code or a written offer to share it on demand. (SUMF Nos. 3-4; Kuhn Decl. ¶ 14.) As one court has described it, "[T]he GPL allows for free use and redistribution of [the software], including in other software (i.e., the creation of a derivative work), on the condition the original licensor continues the open source trend and makes the source code freely available." *Versata Software, Inc. v. Ameriprise*

Financial, Inc., No. A-14-CA-12-SS, 2014 WL 950065 *1 (W.D. Tex. Mar. 11, 2014); *accord Artifex Software v. Hancom, Inc.,* No. 16-cv-06982-JSC, 2017 WL 1477373 *3 (N.D. Cal. Apr. 25, 2017).

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

> You may copy and distribute [a GPL-licensed] Program (or a work based on it…) in object code or executable form under the terms of Sections 1 and 2 above provided that you also do one of the following:
>
> a) Accompany it with the complete corresponding machine-readable source code…; or,
>
> b) Accompany it with a written offer, valid for at least three years, to give any third party … a complete machine-readable copy of the corresponding source code….

(SUMF Nos. 5, 20.) LGPLv2.1 includes equivalent language, as well as similar language that substitutes "object code" for "source code" in limited circumstances. (SUMF Nos. 6-7, 21-22.)

The GPLs explicitly set forth their objectives in the preamble to each license. The GPLs are "intended to guarantee your freedom to share and change free software—to make sure the software is free for all its users." (SUMF No. 3, 18.) The GPLs are "designed to make sure" that "you have the freedom to distribute copies of free software," that "you receive source code or can get it if you want it," that "you can change the software or use pieces of it in new free programs," and that "you know you can do these things." (SUMF Nos. 3-4, 18-19.) The GPLs create "responsibilities for you if you distribute copies of the software . . . You must give the recipients all the rights that you have. You must make sure that they, too, receive or can get the source code. And you must show them these terms so they know their rights." (SUMF Nos. 3-4, 18-19.) "Everyone is permitted to copy and distribute [the GPLs], but changing [them] is not allowed." (SUMF Nos. 8-9.)

SFC, VIZIO, and the Advent of This Dispute

SFC is a non-profit whose mission includes fostering FOSS-related projects and ensuring that FOSS remains "free." (Kuhn Decl. ¶ 15.) An important part of that mission is ensuring that source code licensed under the GPLs or other FOSS agreements remains accessible and available for further development. (Kuhn Decl. ¶¶ 15-16.) When FOSS-reliant companies shirk their

duties, including by failing to distribute source code as required by the GPLs, SFC encourages them to fulfill their obligations. Occasionally, SFC finds it necessary to file suit to accomplish its mission. (Kuhn Decl. ¶ 16.)

VIZIO manufactures and sells "Smart TVs", *i.e.*, televisions that can stream content, such as Netflix, via a built-in internet connection and user interface. (Kuhn Decl. ¶¶ 17; Compendium Exhibit J.) In July 2021, SFC purchased VIZIO Smart TV Model Nos. V435-J01, D32h-J09, and M50Q7-J01. (SUMF No. 12.) These devices include executable software that is licensed under the GPLs. (SUMF Nos. 13-15.)

PROCEDURAL HISTORY

On October 19, 2021, SFC filed the Complaint against VIZIO. (ROA No. 2.) The Complaint alleges, among other things, that VIZIO has a duty "when distributing an executable computer program covered by [the GPLs, to] accompany the executable software with either (a) the source code corresponding to the executable software, or (b) a written offer to provide such source code on demand." (ROA No. 2 ¶ 94.) The Complaint further alleges that VIZIO has a duty "when distributing an executable computer program that links with a [LGPLv2.1-licensed library, to] accompany the executable program with either (a) the [corresponding] source code or object code . . ., [or] (b) a written offer for such material[s]." (ROA No. 2. ¶ 96.) The Complaint demands that VIZIO produce such source code to SFC as a purchaser of its Smart TVs and an intended beneficiary of the GPLs. (ROA No. 2. ¶¶ 120-21, Prayer For Relief ¶ a.) The Complaint also seeks a judicial declaration that the terms and conditions of the GPL Agreements require that VIZIO provide the source code" of the "executables of the SmartCast Programs at Issue" and "any Library Linking Programs. …" (ROA No. 2 ¶ 130(b); Prayer ¶ h(i).) The Complaint does not seek monetary damages. (ROA No. 2 Prayer for Relief.)

On November 29, 2021, VIZIO removed the case to federal court, arguing that the Complaint was completely preempted by the Copyright Act. (ROA No. 14.) The federal court held otherwise and remanded the case to this Court on May 13, 2022. (ROA No. 21; SUMF 23-24.)

On April 28, 2023, VIZIO moved for summary judgment. (ROA No. 58.) That motion remains pending. This Court heard oral argument on October 5, 2023.

LEGAL STANDARD

"A party may move for summary adjudication as to . . . one or more issues of duty, if the party contends that . . . one or more defendants either owed or did not owe a duty to the plaintiff." CCP 437c(f)(1). The motion "shall be granted" if it "completely disposes . . . of an issue of duty." CCP 437c(f)(1); *see, e.g.*, *Linden Partners v. Wilshire Linden Assocs.*, 62 Cal. App. 4th 508, 518-22 (1998) (defendant owed a contractual duty to deliver certificates to plaintiff). "Duty, being a question of law, is particularly amenable to [summary] resolution." *Regents of Univ. of Cal. v. Super. Ct. (Rosen)*, 4 Cal. 5th 607, 618 (2018) (cleaned up). Similarly, the interpretation of a contract is a judicial function. *Brown v. Goldstein*, 34 Cal. App. 5th 418, 432 (2019).

"A party may move for summary adjudication as to . . . one or more affirmative defenses, if the party contends that . . . there is no merit to an affirmative defense." CCP 437c(f)(1). The motion "shall be granted" if it "completely disposes . . . of an affirmative defense." CCP 437c(f)(1). "When the issues regarding federal preemption involve undisputed facts, it is a question of law whether a federal statute or regulation preempts a state law claim." *Smith v. Wells Fargo Bank, N.A.*, 135 Cal. App. 4th 1463, 1476 (2005), *as modified on denial of reh'g* Jan. 26, 2006.

In each case, the motion "shall proceed in all procedural respects as a motion for summary judgment." CCP 437c(f)(2).

ARGUMENT

I. VIZIO HAS A DUTY TO SHARE SOURCE CODE WITH SFC, AN INTENDED THIRD-PARTY BENEFICIARY UNDER THE PLAIN TEXT OF THE GPLs.

"A third party beneficiary may enforce a contract made for its benefit." *Hess v. Ford Motor Co.*, 27 Cal. 4th 516, 524 (2002) (citing Civ. Code § 1559). The third party must show that: (1) "the third party would in fact benefit from the contract"; (2) "a motivating purpose of the contracting parties was to provide a benefit to the third party"; and (3) "permitting [the]

third party to bring its own breach of contract action against a contracting party is consistent with the objectives of the contract and the reasonable expectations of the contracting parties." *Goonewardene v. ADP, LLC*, 6 Cal. 5th 817, 829-36 (2019).

"It is solely a judicial function to interpret a written contract." *Hess*, 27 Cal. 4th at 527 (cleaned up). The contract is "interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting." *Id.* at 524 (quoting Cal. Civ. Code § 1636). "Such intent is to be inferred, if possible, solely from the written provisions of the contract." *La Jolla Beach & Tennis Club, Inc. v. Indus. Indem. Co.*, 9 Cal. 4th 27, 37 (1994) (cleaned up). "If contractual language is clear and explicit, it governs." *Id.* (citing Cal. Civ. Code § 1638) (cleaned up).

The intent behind a form contract is "somewhat fictional." *Victoria v. Super. Ct. (Kaiser Found. Hosps.)*, 40 Cal. 3d 734, 744 (1985) (cleaned up). Such a contract is construed "wherever reasonable as treating alike all those similarly situated, *without regard to their knowledge or understanding of the standard terms of the writing*." *Williams v. Apple, Inc.*, 338 F.R.D. 629, 638 (N.D. Cal. 2021) (applying California law) (emphasis in original; otherwise cleaned up). The goal is "to effectuate the reasonable expectations of the average member of the public who accepts [the contract]." *Id.* (quoting Restatement (2d) Contracts § 211 cmt. e). "[T]he objective intent, as evidenced by the words of the contract, is controlling." *Lloyd's Underwriters v. Craig & Rush, Inc.*, 26 Cal. App. 4th 1194, 1197 (1994).

A. Having Received GPL-Licensed Software, SFC Would "Benefit" from a Right to Source Code Under the Contracts.

Having received GPL-licensed software when it purchased VIZIO smart TVs, SFC would "benefit" from a right to receive source code (or, where applicable, object code) under the contracts. The contracts require VIZIO to provide the code to consumers like SFC:

> You may copy and distribute [GPL-licensed software] . . . provided that you also . . . a) Accompany it with the complete corresponding machine-readable source code . . . or, b) Accompany it with a written offer . . . to give any third party . . . a complete machine-readable copy of the corresponding source code . . ."

(SUMF No. 5 ; *accord* SUMF Nos. 6-7; *see also* SUMF Nos. 3-4 ("You must make sure that [recipients of GPL-licensed software] receive or can get the source code").) Simply put, distributors of GPL-licensed software, such as VIZIO, have a duty to share the source code; recipients of GPL-licensed software, such as SFC, have a right to the source code—a clear "benefit" under the contracts.

B. There is No Question that a "Motivating Purpose" of the Contracts Was to Benefit Recipients of GPL-Licensed Software, Such as SFC.

There is no question that a "motivating purpose" of the contracts was to benefit recipients of GPL-licensed software, such as SFC. The contracts say so in plain terms:

> ***General Public Licenses are designed to make sure*** that you have the freedom to distribute copies of free software (and charge for this service if you wish), ***that you receive source code or can get it if you want it***, that you can change the software or use pieces of it in new free programs; ***and that you know you can do these things*** . . .
>
> ***[I]f you distribute copies*** of such a program, whether gratis or for a fee, ***you must give the recipients all the rights that you have. You must make sure that they, too, receive or can get the source code. And you must show them these terms so they know their rights.***

(SUMF No. 3 (emphases added); *accord* SUMF No. 4.) The "motivating purpose" could hardly be clearer. *See* 13 Williston on Contracts § 37:10 (4th ed.) ("Williston") ("In the typical case, in which the promisor has undertaken to render performance directly to the beneficiary, the intent to benefit the third party will be clearly manifested.")

C. There Is No Question That Permitting Recipients of GPL-Licensed Software, Such as SFC, to Enforce Their Right to Source Code Is "Consistent" with the "Objectives of the Contract" and the "Reasonable Expectations of the Contracting Parties."

Finally, there is no question that permitting recipients of GPL-licensed software, such as SFC, to enforce their right to source code (or, where applicable, object code) is "consistent" with (1) the "objectives of the contract" and (2) the "reasonable expectations of the contracting parties." *Goonewardene*, 6 Cal. 5th at 829-30. After all, the GPLs are "designed to make sure" that recipients of licensed software "receive or can get the source code"—and "know" it. (SUMF No. 3; *accord* SUMF No. 4.) Further, the ability of downstream users to modify and

improve upon open source to their own needs is critical to fostering further innovation – a clear purpose behind both the GPLv2 and the LGPLv 2.1. It is not only entirely "consistent" with these objectives and expectations, but critical to them, that recipients of licensed software can enforce their right to source code. They will only "know" they can get the source code—and be assured of their right to receive it—if they have standing to enforce that right. That should be clear to all involved, including distributors of GPL-licensed software, such as VIZIO. *See Lucas v. Hamm*, 56 Cal. 2d 583, 590 (1961) ("[A] contract for the drafting of a will unmistakably shows the intent of the testator to benefit the persons to be named in the will, and the attorney must necessarily understand this.").

Importantly, the test "does not focus upon whether the parties specifically intended third party enforcement . . ." *Goonewardene*, 6 Cal. 5th at 830. "[T]he parties to a contract are typically focused on the terms of performance of the contract rather than on the remedies that will be available in the event of a failure of performance . . ." *Id.* Accordingly, SFC is "not required [to show] that the contracting parties actually considered the third party enforcement question as a prerequisite to the applicability of the third party beneficiary doctrine." *Id*.

1. As a Recipient of GPL-Licensed Software, SFC May Enforce Its Right to Source Code "Consistent" with the "Objectives of the Contract."

Allowing SFC to enforce its right to source code is "consistent" with the "objectives of the contract." As explained below, (a) SFC holds the right to source code (or, where applicable, object code) under the plain text of the GPLs; (b) SFC is harmed by denial of that right and motivated to enforce that right, unlike upstream licensors that do not seek the code; (c) SFC can only be assured of that right if given standing to enforce it; and (d) allowing SFC to enforce that right would not impose additional liability on VIZIO, beyond the duty to share the code, which it accepted upon entering the GPLs. As such, SFC's enforcement of its right to source code is "consistent" not only with the "objectives" of the GPLs but also with longstanding precedent, as well as academic commentary that the California Supreme Court endorsed in *Goonewardene*.

"For doctrinal assistance, the *Goonewardene* court turned to the pathbreaking article by the esteemed contract law scholar Professor Melvin Eisenberg." *Wexler v. Cal. Fair Plan Ass'n*, 63 Cal. App. 5th 55, 65 (2021) (citing Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. 1358, 1389-90 (1992)). "The requirement . . . that third party enforcement be consistent with the objectives of the contract is comparable to the inquiry, proposed in Professor Eisenberg's article, regarding whether third party enforcement will effectuate 'the contracting parties' performance objectives, namely those objectives of the *enterprise* embodied in the contract." *Goonewardene*, 6 Cal. 5th at 831 (emphasis in original; otherwise cleaned up). In this case, the "objectives of the enterprise*"* embodied in the GPLs are "to make sure" that "you have the freedom to distribute copies of free software," that "you receive the source code or can get it if you want it," "that you know you can do these things," and that you "give the recipients [of GPL-licensed software] all the rights that you have." (SUMF Nos. 3; *accord* SUMF No. 4.) Recipients of GPL-licensed software, such as SFC, may enforce their right to source code consistent with these objectives. They will only "know" they can get the source code—and be assured of their right to receive it—if they have standing to enforce that right. Moreover, they need the source code "to share and change free software," (SUMF Nos. 3, 10-11; *accord* SUMF No. 4.)—*i.e.*, to modify the source code and distribute new works based on the software (which others can modify in turn).

This case fits in a long line of cases enforcing contracts in favor of "donee beneficiaries." *See, e.g.*, *Martinez v. Socoma Cos., Inc.*, 11 Cal. 3d 394, 400-01 (1974); *Garratt v. Baker*, 5 Cal. 2d 745, 747 (1936); *Gourmet Lane, Inc. v. Keller*, 222 Cal. App. 2d 701, 705-6 (1963). "A person is a donee beneficiary" if the "contractual intent is either to make a gift to him or to confer on him a right against the promisor." *Martinez*, 11 Cal. 3d at 400-01 (citing Restatement (1st) of Contracts § 133(1)(a)). Professor Eisenberg explains:

> *Seaver v. Ransom* is the paradigmatic [donee beneficiary] case. An analysis of the facts . . . shows why a donee beneficiary should be permitted to enforce a contract . . .
>
> Recall that a performance objective of the contracting parties in that case, Judge and Mrs. Beman, as manifested in the contract read in the light of surrounding circumstances, was that a gift be made to Mrs. Beman's niece Marion through the

> instrumentality of a contract that obliged Judge Beman to leave Marion a certain amount in his will. After Mrs. Beman's death, Judge Beman broke the contract.
>
> On these facts, allowing Marion to enforce the contract was an important if not necessary means of effectuating that performance objective. If the contract could not be enforced by Marion, it could be enforced only by Mrs. Beman's estate. Mrs. Beman's estate, however, would have had no economic incentive to enforce the contract, because the estate would bear all the costs of enforcement while Marion would reap all the benefits. . . .

92 Colum. L. Rev. at 1389-90 (citing *Seaver v. Ransom*, 224 N.Y. 233 (1918)). Hence, "*allowing donee beneficiaries to enforce contracts under which they will benefit is a necessary or important means of effectuating the performance objectives of the parties to such a contract.*" *Id.* at 1391 (emphasis added); *see also Goonewardene*, 6 Cal. 5th at 829 n.3 (referring to *Seaver v. Ransom* as "the classic donee-beneficiary case"); *Brewer v. Simpson*, 53 Cal. 2d 567, 588, 592, (1960) (allowing donee beneficiaries to enforce a contract for the making of mutual wills); *Sonnicksen v. Sonnicksen*, 45 Cal. App. 2d 46, 52-58 (1941) (same); *see also* Williston § 37:12 ("All American jurisdictions now allow a donee beneficiary to bring an action at law to enforce a contract made for his or her benefit.").

Although the term "donee beneficiary" may seem old-fashioned, the underlying reasoning is vital and applies to this case. Recipients of GPL-licensed software, such as SFC, have a right to source code (or, where applicable, object code) under the contracts. Allowing such recipients to enforce their right is a necessary or important means of effectuating the performance objectives of the parties to the contracts, as articulated in the preambles thereto. If the recipients of GPL-licensed software cannot enforce their right to source code, that right can only be enforced, if at all, by an upstream licensor who is party to the contract. Like Mrs. Beman's estate in *Seaver*, an upstream licensor would have no economic incentive to enforce the right to source code—even if they could—since they would bear all the costs of enforcement while the recipients of GPL-licensed software would reap all the benefits of the source code, most notably, the ability to modify that source code and distribute new works based on the software.(SUMF Nos. 3, 4, 10-11.) Furthermore, allowing the recipients of licensed software, such as SFC, to enforce their right to source code would not expand the

obligation upon upstream distributors of GPL-licensed software, such as VIZIO, to share the source code—an obligation they assumed upon accepting the contracts in the first place, as Judge Beman recognized in *Seaver v. Ransom*.

While lacking an economic incentive to enforce the GPLs, an upstream licensor may also have practical difficulties with enforcement. For one thing, they could be dead by the time of the breach, like Mrs. Beman in *Seaver*. Even if living, they would not necessarily know about the breach, particularly if a distributor of GPL-licensed software had offered to share source code but then failed to do so on request. It would be incumbent upon the recipient of GPL-licensed software, such as SFC, to somehow identify the relevant licensor (if that were even possible), explain the breach, and plead for enforcement—notwithstanding the licensor's contrary economic incentives. That would make little sense, and the law does not require it.

SFC may enforce its right to source code *even if* an upstream licensor could do the same. An intended beneficiary need not rely on a contracting party for enforcement. In *Zigas v. Superior Court (Sangiacomo)*, government-subsidized housing tenants successfully enforced a rent cap in the contract between their landlord and the federal government, even though the government could sue in place of the tenants. 120 Cal. App. 3d 827 (Ct. App. 1981). According to Professor Eisenberg, that is the right outcome under the present test.

> [In *Zigas*,] [i]t is true that the contracting parties' performance objectives could be effectuated even without allowing the tenants to sue, because the [National Housing] Act empowered the government to obtain damages on the tenants' behalf. However, because the government's litigation resources are very limited, unless the tenants were allowed to bring suit the performance objectives might not have been effectuated, despite the provision allowing the government to bring suit for the tenants' damages, for the adventitious reason that the government was forced to allocate its litigation resources to matters with higher priority. Allowing the tenants to bring suit was therefore an important means of effectuating the contracting parties' performance objectives.

92 Colum. L. Rev. at 1411. Just as the tenants did not have to rely on government enforcement in *Zigas*, the recipients of GPL-licensed software do not have to rely on licensor enforcement in this case. *See also* Williston § 37:13 ("The modern third party beneficiary doctrine . . . embraces, as perhaps its chief virtue, the procedure which led to the need for its creation in the

first place; it gives control of contract enforcement in the hands of the party most likely to be motivated to seek to enforce the contract—the beneficiary.")

In summary, VIZIO has a duty to share source code, and SFC has a right to receive it. SFC is irreparably harmed by denial of that right, since it cannot modify the source code and distribute works based on the software. SFC is motivated to enforce its right and may do so without need to rely on others.

2. SFC May Also Enforce Its Right to Source Code "Consistent" with the "Reasonable Expectations of the Contracting Parties."

As a recipient of licensed software, SFC may also enforce its right to source code (or, where applicable, object code) "consistent" with "the reasonable expectations of the contracting parties." *Goonewardene*, 6 Cal. 5th at 830. The plain text of the contracts governs the "reasonable expectations of the contracting parties." *See Hess v. Ford Motor Co.*, 27 Cal. 4th 516, 524 (2002) ("Ascertaining . . . intent [to benefit a third party] is a question of ordinary contract interpretation"); *Lloyd's Underwriters v. Craig & Rush, Inc.*, 26 Cal. App. 4th 1194, 1197 (1994) ("[T]he objective intent, as evidenced by the words of the contract, is controlling"); *La Jolla Beach & Tennis Club, Inc. v. Indus. Indem. Co.*, 9 Cal. 4th 27, 37 (1994) ("If contractual language is clear and explicit, it governs") (citing Cal. Civ. Code § 1638). In this case, the plain text of the contracts could hardly be clearer: "[I]f you distribute copies of [GPL-licensed software] . . . you must give the recipients all the rights that you have. You must make sure that they, too, receive or can get the source code"—and "know" it. (SUMF Nos. 3; *accord* SUMF 4.)

The requirement "that third party enforcement be consistent . . . with the reasonable expectations of the contracting parties reflects the teaching of prior California decisions that have denied application of the third party beneficiary doctrine." *Goonewardene*, 6 Cal. 5th at 831 (cleaned up). VIZIO has not previously relied on such prior decisions, and none supports its position.

Instead, VIZIO has relied on more recent decisions which are inapposite here, such as *Wexler v. Cal. Fair Plan Ass'n*, 63 Cal. App. 5th 55 (2021), and *City of Oakland v. Oakland*

Raiders, 83 Cal. App. 5th 458 (2022). In *Wexler*, an insured's daughter could not enforce a home insurance policy. It was not a "motivating purpose" of a home insurance policy to cover the insured's daughter, since the policy "expressly disclaimed coverage for unnamed people" like her. *Id.* at 57, 65-66. Moreover, she did not need to sue the insurer, since her parents had already done so, and their uncontested claim covered her property. *Id.* at 66. By contrast, a "motivating purpose" of the GPLs is "to make sure" that recipients of licensed software "receive or can get the source code." (SUMF Nos. 3-4.) No one else is suing to enforce their right.

In *Oakland Raiders*, the City of Oakland could not enforce an NFL team relocation policy that left "unfettered discretion" to NFL team members. 83 Cal. App. 5th at 468, 476. Allowing the city to enforce the policy "in an attempt to restrict the defendants' unfettered discretion . . . would [have been] contrary to the [p]olicy's plain language." *Id.* at 476. By contrast, the distributors of GPL-licensed software have no discretion over whether to share source code. They "must" do so. (SUMF Nos. 3-4.)

In the seminal *Goonewardene* case, an employee sued her employer and its payroll company for unpaid wages but could not enforce the service contract between them. The court observed that "[w]hen an employer hires a payroll company, providing a benefit to employees with regard to the wages they receive is ordinarily not a motivating purpose of the transaction." 6 Cal. 5th at 835. Also, "it would be inconsistent with the objectives of the contract and the reasonable expectations of the contracting parties to permit the employees to sue the payroll company for an alleged breach of its contract with the employer . . ." *Id.* at 836. The employer was available and motivated to enforce the service contract because the employer itself was subject to liability under "the applicable wage orders or labor statutes" if it did not compel the payroll company to fix the problem. *Id.* In turn, its employees could "obtain full recovery for unpaid wages" from the employer and had no need to sue the payroll company. *Id.* By contrast, in this case, a "motivating purpose" of the transaction is providing a benefit to the recipients of GPL-licensed software—*i.e.*, a right to source code. The licensor may not be available or motivated to compel disclosure of the source code. *See supra* at 9-10. Plus, the recipient of

GPL-licensed software could not obtain the source code from an upstream licensor that does not possess downstream modifications.

D. The Plain Text of the GPLs Controls.

The plain text of the GPLs controls. To the extent VIZIO may attempt to rely on after-the-fact, hearsay, or legally conclusory evidence to interpret the GPLs (as it did in support of its pending Motion for Summary Judgment), such evidence should be excluded and disregarded. "A contract must be so interpreted as to give effect to the *mutual intention* of the parties as it existed *at the time of contracting* . . ." *Hess,* 27 Cal. 4th at 524 (quoting Cal. Civ. Code § 1636). "[T]he relevant intent is . . . the objective intent as evidenced by the words of the instrument, not a party's subjective intent." *Shaw v. Regents of Univ. of Cal.*, 58 Cal. App. 4th 44, 54-55 (1997). That is particularly true with form contracts, such as the GPLs. *See Williams v. Apple, Inc.*, 338 F.R.D. 629, 638 (N.D. Cal. 2021). "Everyone is permitted to copy and distribute verbatim copies" of the GPLs "but changing [them] is not allowed." (SUMF Nos. 8-9.)

II. THE COPYRIGHT ACT DOES NOT PREEMPT THE CONSERVANCY'S BREACH OF CONTRACT CLAIM.

A. The Copyright Act Only Preempts Claims That Assert Rights Protected by the Copyright Act.

The Copyright Act secures the exclusive right to reproduce, adapt, distribute, perform, or display a protected work. 17 U.S.C. § 106. Only the copyright owner can engage in or authorize these acts. A copyright claim arises when someone else engages in such acts without permission. 17 U.S.C.A. § 501 (West).

The Copyright Act preempts state law claims that assert rights "equivalent to the exclusive rights contained in Section 106" of the Copyright Act. 17 U.S.C. § 301(a); *Fleet v. CBS Inc.*, 50 Cal. App. 4th 1911, 1919 (1996) (cleaned up). In other words, a state law claim is preempted when it arises from "the mere act of reproducing, performing, distributing, or displaying the work at issue." *Id.* at 1924. By contrast, a state law claim is not preempted if it

requires assertion of an "extra element … instead of or in addition to the acts of reproduction, performance, distribution or display." *McCormick v. Sony Pictures Entm't,* No. CV 07-05697 MMM (PLAx), 2008 WL 11336160, at *9 (C.D. Cal. Nov. 17, 2008) (quoting *Computer Assoc. Int'l v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992)); *see also Kabehie v. Zoland*, 102 Cal. App. 4th 513, 525 (2002) (breach of contract claims not preempted when they seek to enforce rights that are qualitatively different from exclusive rights of copyright).

Importantly, a contract claim is not preempted if it alleges breach of "a contractual . . . right not existing under federal copyright law." *Kabehie*, 102 Cal. App. 4th at 517-518. Thus, a contract claim is not preempted when it enforces a right to payment, a right to royalties, a right to prevent the disclosure of confidential information, and a right to keep bots off an online gaming platform—or, indeed, "any other independent covenant." *Id.* at 521, 527-28 (collecting cases); *Durgrom v. Janowiak*, 74 Cal. App. 4th 178, 186-87 (1999); *MDY Indus. LLC v. Blizzard Entm't Inc.*, 629 F.3d 928, 958 (9th Cir. 2010). The Copyright Act does not confer these rights. Contracts do. Accordingly, the Copyright Act does not preempt the claims. *See also Kabehie*, 102 Cal. App. 4th at 528 (collecting examples of preempted copyright claims that arose from nothing more than reproduction, distribution, or display of a protected work).

When a copyright owner licenses a protected work to a licensee who breaches the agreement, there may be a contract claim, a copyright claim, or both, depending on the nature of the breach and the right enforced. Consider these hypotheticals:

- Hypothetical 1. MC Hammer grants Taylor Swift a license to make 10 copies of his hit single, "U Can't Touch This." Swift makes 11 copies. Hammer can sue Swift for copyright infringement, since she lacked permission for the last copy. *See, e.g., Clifton v. Houghton Mifflin Harcourt Publ'g Co.*, 152 F. Supp. 3d 1221, 1224 (N.D. Cal. 2015) (allegations that publisher exceeded limits in photograph license stated claim for copyright infringement).
- Hypothetical 2. MC Hammer grants Taylor Swift a license to make 10 copies of "U Can't Touch This" on the condition that she pay $100. Swift makes 10

copies but never pays. Hammer can sue Swift for breach of contract. *Kabehie*, 102 Cal. App. 4th 528 (citing cases).

- Hypothetical 3. MC Hammer grants Taylor Swift a license to make 10 copies of "U Can't Touch This" on the condition that she pay $100. Swift makes 11 copies and doesn't pay. Hammer can sue Swift for copyright infringement (for making the last copy) *and* breach of contract (for failure to pay the $100). *Clifton*, 152 F. Supp. 3d at 1224; *Kabehie*, 102 Cal. App. 4th at 528; *Redwood Theatres, Inc. v. Festival Enters., Inc.,* 908 F.2d 477, 479 (9th Cir. (Cal.) 1990) (if plaintiff can bring suit on both federal and state grounds, plaintiff "may ignore the federal question and assert only a state law claim").

Kabehie illustrates how preemption applies to contract claims. There, the plaintiff alleged claims for breach of contract, fraud, and interference with economic relations arising out of contracts to purchase the exclusive rights to music compositions. 102 Cal. App. 4th at 517. The contracts required the defendant to deliver to the plaintiff the master recordings for certain albums. *Id.* at 518. The plaintiff alleged that the defendant breached the agreements by continuing to reproduce and sell the subject musical materials to third parties after transferring those rights to the plaintiff, and also by refusing to deliver to the plaintiff certain of the master recordings. *Id.* The Court of Appeal held that the alleged breaches arising out of the copying and sale of the musical materials simply enforced "the reproduction and distribution rights protected by federal copyright law," adding, "there is no extra element alleged that makes the causes of action qualitatively different from a copyright infringement action." *Id.* at 529 (cleaned up). Those claims were preempted. *Id.* The defendant's alleged failure to deliver the master recordings to the plaintiff, however, constituted "an extra element that is different from a copyright infringement claim." *Id.* Accordingly, the contract claim based on this failure was not preempted. *Id.*

B. The Conservancy's Breach of Contract Claim Does Not Assert Rights Protected by the Copyright Act.

SFC's enforcement of its contractual right to source code (or, where applicable, object code) is analogous to the plaintiff's enforcement of its contractual right to master recordings in *Kabehie*. In each case, the claims are not preempted since they enforce a contractual right "not existing under federal copyright law." *Kabehie*, 102 Cal. App. 4th at 517-18; (SUMF Nos. 18-21.)

Apart from this case, only two known cases have addressed whether a contract claim enforcing the right to source code under the GPLs may be preempted. Both held that the contract claim was not preempted. *Artifex Software v. Hancom, Inc.,* No. 16-cv-06982-JSC, 2017 WL 1477373 (N.D. Cal. Apr. 25, 2017); *Versata Software, Inc. v. Ameriprise Financial, Inc.*, No. A-14-CA-12-SS, 2014 WL 950065 (W.D. Tex. Mar. 11, 2014).

In *Versata*, the plaintiff licensed software that incorporated a GPL-licensed program. 2014 WL 950065, at * 1. When the plaintiff sued its licensee for breach of a broader master license agreement, the licensee counterclaimed for breach of the duty to share source code under the GPL (even though the licensee was not, strictly speaking, a party to that agreement). *Id.* at *2. The plaintiff moved for partial summary judgment, arguing that the counterclaim was preempted because the duty to share source code under the GPL "amounts to nothing more than a promise to not commit copyright infringement." *Id.* at *4. The court rejected this argument, holding that the counterclaim arose from the "breach of an additional obligation: an affirmative promise to make its derivative work open source because it incorporated an open source program into its software." Indeed, the court noted that the duty to share source code under the GPL is not only "separate and distinct from any copyright obligation," but also creates "essentially opposite rights from those created by copyright"—*i.e.*, the right to receive source code. *Id.* at *4-5 (cleaned up); *see also CDK Glob. Ltd. Liab. Co. v. Brnovich,* 16 F.4th 1266, 1275-76 (9th Cir. 2021) (copyright confers "the right to exclude others").

Following *Versata* and applying California law, *Artifex* likewise held that a contract claim enforcing the right to source code under the GPL was not preempted. 2017 WL 1477373

at *3-4. The defendant, Hancom, allegedly licensed software that incorporated a GPL-licensed program. Like the plaintiff in *Versata* and VIZIO here, Hancom allegedly failed "to distribute its software with the accompanying source code." *Id.* at *2. Also like the plaintiff in *Versata* and VIZIO here, Hancom argued that the contract claim was preempted. *Id.* at *3. The Northern District of California held otherwise, concluding that "a failure to disclose the source code of the derivative software" constitutes the required "extra element in addition to reproduction or distribution." *Id.* at *3 (cleaned up).

The Central District of California agreed in the remand order in this case. *Software Freedom Conservancy, Inc. v. Vizio, et al.*, Case No. 8:21-cv-01943-JLS-KES, 2022 WL 1527518 (C.D. Cal. May 13, 2022). Relying in part on *Versata,* the District Court held that SFC's claims were not preempted because VIZIO's contractual promise to provide source code under the GPLs was "'separate and distinct from any rights provided by the copyright laws'" and amounted to "an 'extra element.'" (SUMF No. 23-24.) The court explained:

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

(SUMF No. 24)__ (emphasis in original).)

In its own motion for summary judgment, VIZIO strained to invoke preemption based on an illusory distinction between a contractual covenant and a contractual condition. (*See* ROA 58 pp. 7-13.). VIZIO overlooks that the duty to share source code is both a covenant *and* a condition under applicable law. *See* 1 Witkin, *Summary of Cal. Law*, Contracts § 801 ("the same fact or act may be both a condition and a promise"); Williston § 38:15 ("A provision may be both a condition and a promise if one of the parties, as part of its bargain and in addition to

the other promises it makes, agrees to ensure that the condition will occur") (collecting cases); *see, e.g.*, *Kulawitz v. Pacific Woodenware & Paper Co*. 25 Cal.2d 664, 669-70 (1944); *Guntert v. City of Stockton* 55 Cal.App.3d 131, 139-40 (1976); *Call v. Alcan Pacific Co*., 251 Cal.App.2d 442, 447 (1967); *Budaeff v. Huber* 194 Cal. App. 2d 12, 20 (1961). Simply put, VIZIO cannot escape its promise to share source by claiming the license requires it.

CONCLUSION

For the foregoing reasons, SFC respectfully requests that the Court grant summary adjudication and enter an order declaring that (1) VIZIO has a legal duty to share source code (or, where applicable, object code) with SFC, as provided in the GPLs; and (2) the Copyright Act does not preempt SFC's claims against VIZIO.

DATED: December 1, 2023 SHADES OF GRAY LAW GROUP, P.C.

By /s/ *Naomi Jane Gray*
Naomi Jane Gray

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SOFTWARE FREEDOM CONSERVANCY, 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

DECLARATION OF BRADLEY M. KUHN IN SUPPORT OF PLAINTIFF SOFTWARE FREEDOM CONSERVANCY, INC.'S MOTION FOR SUMMARY ADJUDICATION

[COMPENDIUM OF EXHIBITS FILED CONCURRENTLY]

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

Dept. C33

Action Filed: October 19, 2021

Hearing Date: February 15, 2024, 10:00 a.m.

Hearing Reservation ID: 74084781

Trial Date: March 25, 2024

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

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

2. SFC is a 501(c)(3) non-profit charitable corporation founded in New York in 2006. SFC is dedicated to "Free and Open Source Software," sometimes abbreviated "FOSS." FOSS is a term used to refer to software for which the end-user of the software has the permission and means to study, copy, share, modify, redistribute and/or reinstall modified versions of the software. In this context, "free" refers to freedom and doesn't mean "gratis."

3. As a result of my work as the current Policy Fellow and former president of SFC, I am very familiar with the GNU General Public License Version 2.0 and the GNU Lesser General Public License Version 2.1 (together, the "GPL Agreements"). The GPL Agreements are two of the most vital, widely used, and successful software license agreements. The GPL Agreements have played a central role in the development of FOSS. Software developed under the GPL Agreements helps operate such consumer equipment as wireless home routers and television sets. Exhibits A and B, respectively, of SFC's Compendium of Exhibits are true and correct copies of the GNU General Public License Version 2.0 and the GNU Lesser General Public License Version 2.1.

4. I hold a summa cum laude Bachelor's of Science in Computer Science from Loyola University in Maryland, and graduated as the top student in Computer Science in 1995. I hold a Master's Degree in Computer Science from University of Cincinnati. My master's thesis related to compilation of source code into executable code for the FOSS programming language, Perl.

5. I worked professionally as a software developer and computer systems administrator from 1991-2001. I specialized in FOSS systems such as Linux. In addition to

my other work at SFC, since we are a small charity, I contribute regularly to improvement of the FOSS systems we use to work. For example, in recent years, I have done extensive software design and development for our non-profit accounting software.

6. Since 1998, I have focused much of my career on the technical aspects of compliance with the GPL Agreements. For 25 years, I have regularly performed and/or supervised analyses of binary files found in products to determine the presence of software governed by the GPL Agreements in those products. I also regularly perform and/or supervise analyses of source code to test whether that source code "corresponds" to the executable and object code found in such products. I have worked on innumerable matters of this type: I can confidently say there have been hundreds, and there may well have been thousands. I continue to carry out work of this nature at least monthly, and often more frequently. I have presented this work regularly at key industry conferences and events. I am well respected and consulted by colleagues throughout the software industry for my knowledge on these issues.

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

8. The FOSS model of software development succeeds in creating high-quality software of interest to commercial and non-commercial entities alike. The diversity of contribution generates more reliable, robust, and useful software than closed and proprietary models of development.

9. An essential aspect of FOSS is that everyone who receives the software can easily study and modify it, and that the terms permit and encourage this activity. Many programmers fix bugs, implement new features, find new uses for the software, repurpose third-party software under the same license into new programs, and so forth. These new

versions are available to other programmers to learn from, change, and improve. In larger FOSS projects, programmers perform "code review" on each other's work – thus assuring that only the best and most robust contributions appear in the software products. The FOSS model is also conducive for experienced programmers to mentor younger programmers.

10. Most software is distributed to end-users in an obfuscated form that humans cannot understand but computers can process easily. This obfuscation originates primarily as a technical necessity. Computers must be instructed very precisely in "binary," which encodes information in zeroes and ones. A computer can only understand binary code. A long sequence of such ones and zeroes is said to be "in binary." If stored in a computer file, the file is said to be a "binary file" or just "a binary."

11. Because humans cannot easily understand binary code, it is impractical for humans to try to instruct a computer by writing the instructions in binary code. Instead, humans use programming languages, such as C, C++, and Rust (to name just a few of the many programming languages available) to instruct computers. These programming languages are usually formally specified and must be written meticulously and precisely – which is why software written in such languages is also called "code". However, unlike binary code, this code is designed for human programmers to understand. Humans even use the code to communicate with each other. (For example, it is common for programmers working on a problem together to write to each other short programs in this code to express ideas succinctly and clearly.) A program written in a programming language is known as "source code" or sometimes as simply "source."

12. Anyone who is familiar with the programming language will not only be able to understand the source code, but they can also make changes to the source code, and by doing so, they change the instructions that the computer receives and carries out.

13. A computer cannot execute the source code; source code must be "compiled" into a binary that the computer can understand.

14. The GPL Agreements have been very successful in fostering the development of FOSS. The GPL Agreements are instrumental in fostering FOSS development because they

guarantee third parties' access to the source code (and related materials) corresponding to any distributed executable binary code. FOSS developed under the GPL Agreements is commonly found "embedded" in consumer and other off-the-shelf devices, such as wireless routers and smart TVs. The Linux kernel, the basis of a widely popular computer operating system and the GNU C Library (glibc), a core shared library for that operating system, are just two prominent example of FOSS developed under the GPL Agreements. (A shared library is a collection of code put in one place to be included in many different executable, binary code files easily.)

15. SFC defends the status of FOSS by ensuring that FOSS remains "free" (as in freedom) and available to anyone who wants to use, change, or distribute it. As part of this purpose, SFC engages in enforcement activities regarding the GPL Agreements.

16. An important part of SFC's mission is ensuring that source code remains accessible and available for further development. When companies who incorporate FOSS into products fail to comply with their obligations, SFC encourages them to comply with the GPL Agreements. SFC occasionally finds it necessary to bring lawsuits to enforce the GPL Agreements.

17. In July 2021, on behalf of SFC, I purchased certain models of VIZIO "Smart TVs," including model numbers V435-J01, D32h-J09, and M50Q7-J01.

18. That same month, I initiated an investigation to determine if these Smart TVs contained any software subject to the GPL Agreements. With the help of volunteers, I extracted various binary files from the SmartTVs.

19. I found that 'these Smart TVs contained many executables in binary form and shared libraries in binary form that were, in fact, versions of software subject to the GPL Agreements. I recognized these software programs as subject to the GPL Agreements based on my extensive experience in the FOSS industry.

20. Additionally, I used standard, common tools available on any Linux system to examine these binary files. This examination confirmed that the software programs were subject to the GPL Agreements.

21. For example, on the Vizio D32h-J09, inside a file called rootfs_b, there was a file called application/3rd/snaps/rootfs.ext2. Inside that file, I found an executable binary file called bin/busybox. Inside that file, I found the following notice: "BusyBox is copyrighted by many authors between 1998-2015. Licensed under GPLv2. See source distribution for detailed copyright notices. … BusyBox v1.32.0.git (2021-04-30 23:57:35 UTC)".

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 1, 2023, in Portland, Oregon.

DATED: December 1, 2023

Bradley M. Kuhn

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE - CENTRAL JUSTICE CENTER

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

Plaintiff,

v.

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

Defendant.

Case No. 30-2021-01226723-CU-BC-CJC

DECLARATION OF NAOMI JANE GRAY IN SUPPORT OF PLAINTIFF SOFTWARE FREEDOM CONSERVANCY, INC.'S MOTION FOR SUMMARY ADJUDICATION;

[COMPENDIUM OF EXHIBITS FILED CONCURRENTLY]

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

Dept. C33

Action Filed: October 19, 2021

Hearing Date: February 15, 2024, 10:00 a.m.

Hearing Reservation ID: 74084781

Trial Date: March 25, 2024

DECLARATION OF NAOMI JANE GRAY

I, Naomi Jane Gray, declare:

1. I am a principal at Shades of Gray Law Group, P.C. and counsel for Plaintiff Software Freedom Conservancy, Inc. ("SFC") in this case. I have personal knowledge of the matters set forth below. If called to testify, I could and would do so truthfully. I submit this declaration in support of SFC's motion for summary adjudication filed concurrently herewith.

2. Attached as **Exhibit C** to SFC's Compendium of Exhibits is a true and correct copy of Defendant VIZIO Inc.'s Responses to Plaintiff's First Set of Requests for Admission dated May 31, 2023, with a proof of service dated June 19, 2023.

3. Attached as **Exhibit D** to SFC's Compendium of Exhibits is a true and correct copy of Defendant VIZIO Inc.'s Responses to Plaintiff's First Set of Form Interrogatories dated May 31, 2023, with a proof of service dated June 19, 2023.

4. Attached as **Exhibit E** to SFC's Compendium of Exhibits is a true and correct copy of an order from the United States District Court for the Central District of California, granting SFC's motion to remand in this case, also available at *Software Freedom Conservancy, Inc. v. Vizio, Inc.*, No. 8:21-CV-01943-JLS-KES, 2022 WL 1527518, at *1 (C.D. Cal. May 13, 2022).

5. Attached as **Exhibit F** to SFC's Compendium of Exhibits is a true and correct copy of selected pages from a Form S-1 that VIZIO Holding Corp. filed with the United States Securities and Exchange Commission on March 16, 2021.

6. Attached as **Exhibit G** to SFC's Compendium of Exhibits is a true and correct copy of an entry in Encyclopedia Britannica entitled "Binary Code," accessed at https://britannica.com/technology/binary-code on November 30, 2023.

7. Attached as **Exhibit H** to SFC's Compendium of Exhibits is a true and correct copy of an entry in Free On-Line Dictionary of Computing entitled "Executable," accessed at https://foldoc.org/executable on November 30, 2023.

8. Attached as **Exhibit I** to SFC's Compendium of Exhibits is a true and correct copy of an entry in Free On-Line Dictionary of Computing entitled "Binary," accessed at https://foldoc.org/binary on November 30, 2023.

9. Attached as **Exhibit J** to SFC's Compendium of Exhibits is a true and correct copy of a printout from VIZIO's website, accessed at www.vizio.com/en/tv/overview and www.vizio.com/en/smartcast respectively on November 30, 2023 and December 1, 2023.

10. Attached as **Exhibit K** to SFC's Compendium of Exhibits is a true and correct copy of the document captioned "index : kernel/git/stable/linux.git Linux kernel stable tree" at https://git.kernel.org/pub/scm/linux/kernel/git/stable/linux.git/tree/COPYING?h=v4.19.300, accessed on December 1, 2023.

11. Attached as **Exhibit L** to SFC's Compendium of Exhibits is a true and correct copy of the document captioned "linux-4.19 / Copying" at https://github.com/jplozi/linux-4.19/blob/loadbalancing/COPYING, accessed on December 1, 2023.

12. Attached as **Exhibit M** to SFC's Compendium of Exhibits is a true and correct copy of the document captioned "Linux Kernel licensing rules" at https://www.kernel.org/doc/html/latest/process/license-rules.html, accessed on December 1, 2023.

13. Attached as **Exhibit N** to SFC's Compendium of Exhibits is a true and correct copy of the document captioned "kernel / pub / scm / linux / kernel / git / stable / linux-stable / linux-4.19.y / . / COPYING" at https://kernel.googlesource.com/pub/scm/linux/kernel/git/stable/linux-stable/+/linux-4.19.y/COPYING, accessed on December 1, 2023.

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

Executed on December 1, 2023 in Mill Valley, California.

DATED: December 1, 2023

/s/ *Naomi Jane Gray*
Naomi Jane Gray

PROOF OF SERVICE

I am employed at the law firm of Shades of Gray Law Group, P.C. in the County of Marin, State of California. I am over 18 years old and not a party to the within action. My business address is 100 Shoreline Highway, Suite 100B, Mill Valley, California 94041.

On December 1, 2023, I served true and correct copies of the documents described as

PLAINTIFF SOFTWARE FREEDOM CONSERVANCY, INC.'S NOTICE OF MOTION AND MOTION FOR SUMMARY ADJUDICATION,

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF,

SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT THEREOF,

DECLARATION OF BRADLEY M. KUHN IN SUPPORT THEREOF,

DECLARATION OF NAOMI JANE GRAY IN SUPPORT THEREOF,

COMPENDIUM OF EXHIBITS IN SUPPORT THEREOF,

REQUEST FOR JUDICIAL NOTICE,

[PROPOSED] ORDER GRANTING MOTION FOR SUMMARY ADJUDICATION,

[PROPOSED] ORDER GRANTING REQUEST FOR JUDICIAL NOTICE

on the parties in this action via electronic service to the emails below, pursuant to the parties' joint stipulation: "Electronic service will count as personal service on the day of that electronic service, if the electronic service occurs before midnight Pacific Time. If the electronic service occurs after midnight Pacific Time, that service will count as personal service for the following business day that is not a legal holiday."

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Los Angeles, CA 90017-2543
Telephone: (213) 443-3000
Fax: (213) 443-3100

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

Executed on December 1, 2023, in Mill Valley, California.

/s/ Natalia Ermakova
Natalia Ermakova

From: donotreply@occourts.org
To: Natalia Ermakova
Subject: Superior Court of Orange County - Motion Reservation Request - CONFIRMATION
Date: Tuesday, August 22, 2023 10:29:36 AM
Attachments: assetsimageslogo.png

THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE

Reserve a Motion Date

Your reservation request has been CONFIRMED by the Superior Court. The hearing date and time below has been reserved. You will be asked to provide your reservation number to the court at a later date.

MOVING PAPERS MUST BE E-FILED WITHIN 24 HOURS AFTER COMPLETING THE ON-LINE RESERVATION. Failure to submit your moving papers within 24 hours will result in the automatic CANCELLATION of the reservation.

NOTE: To EXPEDITE your MOTION filing place the appropriate Court Reservation number (e.g. 7XXXXXXX) on each Motion being submitted.

Please do not reply to this email.

Reservation Number:	74084781
Hearing Date:	February 15, 2024
Hearing Time:	10:00 AM
Department:	C33
Motion Type:	Motion for Summary Judgment and/or Adjudication
Case Number:	30-2021-01226723-CU-BC-CJC
Case Title:	Software Freedom Conservancy, Inc. vs. Vizio, Inc.
Judicial Officer:	Sandy Leal
Email:	nermakova@shadesofgray.law
Requestor Name:	Natalia Ermakova for Naomi Jane Gray, Esq.
Requestor Phone:	4157469260
Filing Party:	Software Freedom Conservancy, Inc.
Date of Request:	August 22, 2023

Time of Request:	10:27 AM
Transaction Number:	1000444887