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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

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

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

Dept. C33

Action Filed: October 19, 2021

Hearing Date: February 15, 2024

Hearing Time: 10:00 a.m.

Related To ROA # 156

Trial Date: July 15, 2024

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1 The GPLs were created by the Free Software Foundation (“FSF”)¹ as form licenses by which
2 a copyright holder may authorize licensees to copy, modify, and distribute software pursuant to
3 certain conditions. (VIZIO’s Response To SFC’s Separate Statement of Undisputed Material Facts
4 (“Separate Statement”) at ¶¶ 16-22.) “Everyone is permitted to copy and distribute verbatim copies”
5 of the GPLs, “but changing [them] is not allowed.” (*Id.* at ¶¶ 8-9.) The GPLs’ stated “intent is to
6 exercise the [copyright holder’s] right to control the distribution of derivative or collective works[.]”
7 (*Id.* at ¶¶ 21-22.) Licensees “may not copy, modify, sublicense, or distribute the Program except as
8 expressly provided under this License. Any attempt otherwise to copy, modify, sublicense or
9 distribute the Program is void, and will automatically terminate your rights under this License.” (*Id.*
10 at ¶¶ 19-20.)

11 SFC alleges that VIZIO violated the distribution provision of the GPLs, which allows
12 licensees to copy and distribute software covered by the license on the condition that they provide,
13 or offer in writing to provide, the corresponding source code for the licensed software and any
14 modifications thereto. (ROA # 2 (Complaint at ¶¶ 37-38, 48-77).) Specifically, Section 3 of GPLv2
15 states that a licensee may distribute the software “provided that you . . . [a]ccompany it with the
16 complete corresponding machine-readable source code” or “with a written offer . . . to give any third
17 party . . . a complete machine-readable copy of the corresponding source code[.]” (Separate
18 Statement at ¶ 5.) LGPLv2.1 imposes the same condition for software “libraries,” which are
19 “collection[s] of software functions and/or data prepared so as to be conveniently linked with
20 application programs (which use some of those functions and data) to form executables.” (*Id.* at
21 ¶ 6.) SFC alleges that VIZIO violated these conditions by not sending SFC the source code, or an
22 adequate written offer for the source code, for the versions of Linux and other GPL-licensed
23 programs that VIZIO incorporates into its TVs. (ROA # 2 (Complaint at ¶¶ 37-38, 47-77).)

24
25
26 ¹ The FSF is the “the author, primary interpreter, and ultimate authority on the GPL[s].” (Separate
27 Statement at ¶ 17.) “[F]ounded in 1985, [the FSF] is dedicated to promoting computer users’ right
28 to use, study, copy, modify, and redistribute computer programs. The FSF promotes the
development and use of free (as in freedom) software -- particularly the GNU operating system and
its GNU/Linux variants -- and free documentation for free software. . . . [I]ts Web sites, located at
fsf.org and gnu.org, are an important source of information about GNU/Linux.” (*Id.* at ¶ 18.)

1 **The Reasonable Expectations Of Licensees.** Because the GPLs prominently display the
2 FSF as their author (Separate Statement at ¶¶ 23-26), SFC admits that the FSF is the main authority
3 to which the public would look for guidance about them. (*Id.* at ¶¶ 17-18, 49.) As pertinent here,
4 the FSF’s public-facing materials uniformly indicate that the GPLs are enforceable only by the
5 copyright holder. (*Id.* at ¶¶ 27-44.) On its website, www.fsf.org, the FSF states that it “publishes
6 the GNU General Public License (GNU GPL)” and provides links to its companion site
7 www.gnu.org, where the GPLs are available for download. (*Id.* at ¶¶ 27-28.) The FSF’s Licensing
8 and Compliance page similarly provides numerous links to www.gnu.org and invites users to contact
9 the FSF at various email addresses ending in “@gnu.org.” (*Id.* at ¶¶ 33-36.) One of the provided
10 links to www.gnu.org sends users to the FSF’s “Frequently Asked Questions” pages, which states
11 that “the copyright holders of the software are the ones who have the power to enforce the GPL,”
12 and that “we cannot act on our own where we do not hold copyright.” (*Id.* at ¶¶ 34, 39, 41.) The
13 FSF’s Education page provides a link to those same FAQs. (*Id.* at ¶ 31.) The FSF indicates that the
14 public consults and benefits from those FAQs:

15
16 I must say that the vast majority of my
17 questions have been answered by the
18 thorough FAQs included around the FSF
19 Web site. I needed them, for example,
20 when I helped someone correctly GPL
21 their software in under 10 minutes in
22 time for a competition deadline! Thank
23 you for all the resources you already
24 provide.

22 (*Id.* at ¶ 36.) Thus, according to the FSF, to whom the public may be expected to turn for guidance,
23 only copyright holders may enforce the GPLs.

24 Until very recently, SFC’s own public-facing materials were aligned with the FSF’s,
25 conveying the same message that only copyright holders can enforce the GPLs. As far back as 2012,
26 SFC’s president, Bradley Kuhn, publicly stated that “the parties who may enforce are copyright
27 holders[.]” (*Id.* at ¶ 45.) As recently as August 28, 2023, the COPYLEFT AND THE GNU GENERAL
28 PUBLIC LICENSE: A COMPREHENSIVE TUTORIAL AND GUIDE, a publicly available guide to the GPLs

1 that *SFC* hosts and sponsors for the purpose of public education, stated that the “copyright holders
2 (or their agents) are ultimately the sole authorities to enforce [the GPL] and protect the rights of
3 users.” (*Id.* at ¶¶ 46-50.) These are the sorts of statements that the average person with questions
4 about GPL enforcement would encounter.

5 **VIZIO’s Motion for Summary Judgment.** On December 29, 2023, the Court denied
6 VIZIO’s motion for summary judgment (ROA # 58 (“VIZIO MSJ”)), in which VIZIO sought
7 dismissal of all SFC’s claims on the basis of copyright preemption and lack of third-party standing.
8 (ROA # 161 (“Order”).) The Court rejected copyright preemption as a matter of law, concluding
9 that SFC’s claim presents an “extra element” different from copyright infringement because
10 “Plaintiff seeks only to compel Defendant Vizio to provide it with source code – a remedy that is
11 not available under the Copyright Act.” (*Id.* at 7.) In separately rejecting VIZIO’s motion as to
12 third-party standing, the Court found “that a triable issue of material fact exists as to whether
13 Plaintiff is a third beneficiary under the GPL license.” (*Id.* at 10.) Thus, the Court concluded that,
14 under *Goonewardene v ADP, LLC*, the ““relevant circumstances”” informing the GPLs and the
15 expectations of the parties must be considered at trial. (*Id.* at 8 (quoting 6 Cal. 5th 817, 830 (2019)).)

16 **Subsequent Procedural History.** On January 10, 2024, SFC filed its First Amended
17 Complaint (“FAC”), adding supplementary factual allegations with no effect on the instant motion.
18 (ROA # 165.) In light of the FAC, the parties filed a joint stipulation to continue the March 25,
19 2024 trial date so as to ensure time for adequate discovery. (ROA # 163.) VIZIO then filed its
20 Answer to the FAC, in which it preserved its defenses of copyright preemption and lack of third-
21 party standing, among others. (ROA # 167.) On January 19, 2024, VIZIO filed a Petition for Writ
22 Review of the Court’s summary-judgment order on the issue of copyright preemption. (Case No.
23 G063614.) That Petition remains pending before the Court of Appeal. (*Id.*) On January 31, 2024,
24 the Court heard the parties’ joint *ex parte* application to continue trial and granted a continuance to
25 July, 15, 2024. (ROA # 174-75.)

1 **ARGUMENT**

2 **I. SFC’S MOTION AS TO THIRD-PARTY STANDING SHOULD BE DENIED FOR**
3 **MULTIPLE REASONS**

4 **A. SFC’s Motion As To Third-Party Standing Is Moot**

5 This Court previously found that SFC’s standing as a third-party beneficiary poses a triable
6 question of fact. (Order at 10.) In examining whether third-party enforcement would be consistent
7 with the parties’ “reasonable expectations” under *Goonewardene*, the Court recognized that
8 “evidence from the FSF,” the GPLs’ author, would be relevant. (*Id.*) VIZIO argued that the GPLs
9 state on their face that they are authored by the FSF; that the FSF is the primary authority on the
10 GPLs; and that the average licensee would be guided by the FSF’s public statements. (VIZIO MSJ
11 at 18-20.) The Court rejected VIZIO’s proffered evidence of FSF’s statements as hearsay and
12 insufficiently authenticated. (Order at 5, 8, 10.) But the Court acknowledged that admissible
13 evidence of the FSF’s statements would be important because the GPLs’ text alone fails to make
14 clear whether third-party enforcement would be consistent with the parties’ reasonable expectations.
15 “[T]he language of the GPLs is not so certain so as to preclude other interpretations.” (*Id.* at 10.)
16 Thus, the Court followed *Spinks*, which held that there was “a triable issue of fact on the question
17 of whether [the] plaintiff was an intended third party beneficiary” because “resort to the contract
18 language alone does not resolve the question of plaintiff’s status.” *Spinks v. Equity Residential*
19 *Briarwood Apartments*, 171 Cal. App. 4th 1004, 1028, 1030 (2009) (cleaned up).

20 SFC provides no reason to revisit that ruling because it fails to introduce **any** evidence to
21 resolve that issue of fact in its favor. Instead, SFC relies on the GPLs text alone (Mot. at 14), which
22 the Court has already rejected as a sufficient basis to find third-party standing. (Order at 10.)
23 Consequently, SFC’s motion as to third-party standing is moot. *See, e.g., Daviscount v. Columbia*
24 *State Bank*, 2008 WL 113899, at *3 (D. Colo. Jan. 9, 2008) (“any arguments raised in the instant
25 motion that were previously ruled on . . . are denied as moot”).

26 **B. Judicial Estoppel Prevents SFC From Asserting There Are No Triable Issues**
27 **Of Fact On Third-Party Standing**

28 Separately, SFC is estopped from arguing that the GPLs’ text alone establishes third-party
standing. “Judicial estoppel generally prevents a party from prevailing in one phase of a case on an

1 argument and then relying on a contradictory argument to prevail in another phase.” *Int’l Billing*
2 *Servs., Inc. v. Emigh*, 84 Cal. App. 4th 1175, 1191 (2000) (cleaned up). In opposing VIZIO’s motion
3 for summary judgment, SFC argued that it “may defeat [VIZIO’s] Motion by showing that a triable
4 issue of material fact exists as to whether it is an intended third-party beneficiary of the GPLs. SFC
5 makes just such a showing here.” (ROA # 85 (“SFC Opp.”) at 13.) The Court adopted that
6 argument, concluding that “a triable issue of material fact exists as to whether Plaintiff is a third
7 beneficiary under the GPL license.” (Order at 10.) Despite prevailing on that argument, SFC now
8 argues the exact opposite: that on the basis of even less evidence—in other words, by relying even
9 more so on the GPLs’ text alone—there is no triable issue of fact after all. (Mot. at 14.) SFC’s
10 about-face satisfies the classic elements of judicial estoppel. *See Jackson v. Cnty. of Los Angeles*,
11 60 Cal. App. 4th 171, 183 (1997) (judicial estoppel applies where “(1) the same party has taken two
12 positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3)
13 the party was successful in asserting the first position (i.e., the tribunal adopted the position or
14 accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not
15 taken as a result of ignorance, fraud, or mistake.”). Accordingly, the Court should disregard SFC’s
16 reversed position here.

17 **C. Third-Party Standing Still Presents A Triable Issue Of Fact**

18 Should the Court reconsider the merits, the motion should be denied because SFC fails to
19 meet its evidentiary burden. As the Court previously stated, “[g]enerally, it is a question of fact
20 whether a particular third person is an intended beneficiary of a contract.” (Order at 8 (quoting
21 *Spinks*, 171 Cal. App. 4th at 1025 (cleaned up)).) Indeed, *Goonewardene* makes clear that the
22 “relevant circumstances” surrounding the contract must be considered. 6 Cal. 5th 817, 830 (2019).
23 Here, there is no dispute that the meaning of unchangeable form agreements like the GPLs depends
24 on the “reasonable expectations of the average member of the public who accepts it.” *Williams v.*
25 *Apple, Inc.*, 338 F.R.D. 629, 638 (N.D. Cal. 2021) (quoting Restatement (Second) of Contracts
26 § 211(2) cmt. e). The dispute primarily concerns whether, under the third prong of *Goonewardene*’s
27 test, enforcement actions brought by any third party would comport with the “reasonable
28 expectations” of the average licensee.

1 SFC introduces no evidence on this point and thereby fails to meet its “initial burden of
2 production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]”
3 (Order at 3 (quoting *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 850 (2001)).) The Court has
4 already rejected SFC’s reliance (Mot. at 14) on the GPLs’ text alone. (Order at 10.)

5 In contrast to SFC’s failure to introduce any evidence, VIZIO submits documents from the
6 FSF, and from SFC itself, to at least create a triable question regarding whether the average party’s
7 reasonable expectations would be upset by the prospect of third-party enforcement. The GPLs
8 prominently display the FSF as their author. (Separate Statement at ¶¶ 23-26.) SFC admits that the
9 FSF is the “ultimate authority” on the GPLs and that its websites, fsf.org and gnu.org, are an
10 “important source of information.” (*Id.* at ¶¶ 17-18.) Accordingly, as this Court previously
11 recognized (Order at 10), the expectations of the average licensee would be informed by the FSF’s
12 public guidance. Thus, the FSF’s main website, www.fsf.org, directs the public to the FAQs on its
13 sister site, www.gnu.org. (Separate Statement at ¶¶ 31, 34.) Notably, those FAQs are copyrighted
14 through the years 2001-2019, 2021, and 2023, and the FSF holds them out as helpful for the public.
15 (*Id.* at ¶¶ 36, 40.) In response to the question “Who has the power to enforce the GPL?”, the FAQs
16 specifically advise that “the copyright holders of the software are the ones who have the power to
17 enforce the GPL.” (*Id.* at ¶ 39.) The FSF further advises that “[i]f you think you see a violation of
18 the GNU GPL [or] LGPL . . . you should send a precise report to the copyright holders of the
19 packages that are being wrongly distributed”; “only the copyright holder or someone having
20 assignment of the copyright can enforce the license.” (*Id.* at ¶¶ 41, 43.) Even on the FSF’s main
21 website, www.fsf.org, the FSF states that it “can only enforce the license on works to which we hold
22 the copyright[.]” (*Id.* at ¶ 35.) In short, the FSF’s message to the public throughout the years has
23 been consistent: only copyright holders can enforce the GPLs, not any third party like SFC.

24 ***These statements from the FSF are not hearsay***, because they are not offered to prove the
25 truth of what they assert. They are offered to prove what the average party to the GPLs would think
26 about third-party enforcement— *i.e.*, to prove their “effect on the listener,” which is not hearsay.
27 *People v. Ramirez*, 13 Cal. 5th 997, 1115 (2022) (“Evidence of an out-of-court statement may be
28 admitted for the nonhearsay purpose of showing its effect on the listener so long as that effect is

1 relevant to an issue in dispute.”). *Likewise, authentication is not an issue* because the average
2 licensee would at least attribute these statements to the FSF in forming their reasonable expectations.
3 Regardless, the statements *are* authenticated. SFC admits that these websites belong to the FSF.
4 (Separate Statement at ¶ 18.) Further, “the author’s testimony is not required to authenticate a
5 document; instead, its authenticity may be established by the contents of the writing or by other
6 means. As long as the evidence would support a finding of authenticity, the writing is admissible.
7 The fact conflicting inferences can be drawn regarding authenticity goes to the document’s weight
8 as evidence, not its admissibility.” *People v. Valdez*, 201 Cal. App. 4th 1429, 1435 (2011) (cleaned
9 up). Thus, *Valdez* held that statements on a social media page were authenticated because there
10 were various signs that “the page belonged to Valdez rather than someone else by the same name,
11 who happened to look just like him.” *Id.* The situation is the same here, where numerous signs
12 point to control by the FSF. These include the fact that www.fsf.org interlinks repeatedly with
13 www.gnu.org; the fact that both websites display copyright notices from the FSF; and the fact that
14 both websites display the FSF’s logos. (Separate Statement at ¶¶ 28-34, 37-38, 40, 42, 44.) For
15 purposes of authentication—distinct from the weight of the evidence—it is not plausible that a
16 different entity is passing itself off as the FSF. *See Valdez*, 201 Cal. App. 4th at 1435.

17 In addition to the FSF’s public messaging, SFC’s admissions confirm that third-party
18 enforcement would disrupt the reasonable expectations of the average licensee. As far back as 2012,
19 SFC’s president, Bradley Kuhn, publicly stated that “the parties who may enforce are copyright
20 holders[.]” (Separate Statement at ¶ 45.) As of January 30, 2024, the COPYLEFT AND THE GNU
21 GENERAL PUBLIC LICENSE: A COMPREHENSIVE TUTORIAL AND GUIDE—announced in 2014 as a joint
22 project by SFC and the FSF to educate the public (*id.* at ¶¶ 47-48)—still states that copyright holders
23 are “ultimately the sole authorities” to “protect the rights of users” and “have historically been the
24 actors in GPL enforcement.” (*Id.* at ¶ 50.) Strikingly, as editor-in-chief of that publication, Bradley
25 Kuhn has made clear that he does not adopt “as the official advice in this tutorial, any text that
26 conflicts with the FSF’s policies[.]” (*Id.* at ¶¶ 46, 49.) Finally, in describing this very lawsuit, SFC
27 states that “[i]n the past, the plaintiffs have always been copyright holders of the specific GPL code.”
28

1 (*Id.* at ¶ 51.) *SFC then boasts that this case is “unique and historic” precisely because it involves*
2 *third-party enforcement.* (*Id.*)

3 In light of these statements by the FSF and SFC—which confirm decades of public
4 messaging and understanding that the GPLs would not be enforceable by third parties—it is
5 extremely probable that third-party enforcement would disrupt the reasonable expectations of the
6 average licensee. Consequently, should the Court reach the merits, it must deny SFC’s motion.

7 **D. CCP § 437c(h) Independently Warrants Denial**

8 Finally, the Court may deny SFC’s motion as to third-party standing because VIZIO is
9 conducting ongoing discovery on this issue. “If it appears from the affidavits submitted in
10 opposition to a motion for summary judgment or summary adjudication, or both, that facts essential
11 to justify opposition may exist but cannot, for reasons stated, be presented, the court *shall* deny the
12 motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any
13 other order as may be just.” Code Civ. Proc. § 437c(h). That statutory command is not
14 discretionary—the Court must not grant the motion. *See Bahl v. Bank of Am.*, 89 Cal. App. 4th 389,
15 395 (2001). Pursuant to the Court’s directive that more evidence is needed, VIZIO has been
16 pursuing more and better evidence of the parties’ reasonable expectations. (Separate Statement at
17 ¶ 52.) Specifically, VIZIO is pursuing an out-of-state deposition of the FSF to authenticate its public
18 pronouncements,² among other topics. (*Id.*) VIZIO also intends to present expert testimony on
19 issues related to third-party beneficiary standing, including the reasonable expectations of parties to
20 the GPLs. (*Id.*) Because this discovery is ongoing, the question of SFC’s standing is best reserved
21 for trial, as the Court previously determined. *See People v. \$4,503 United States Currency*, 49 Cal.
22 App. 4th 1743, 1748 (1996) (“at the time the motion was pending before it, the trial court properly
23 denied the motion for summary judgment at that time in order to allow further discovery to be
24 conducted.”).

25
26
27 ² VIZIO plans to ask, *e.g.*, whether the domain names fsf.org and gnu.org are registered to the
28 FSF, as online searches suggest. *See, e.g.*, <https://www.whois.com/whois/gnu.org> (indicating the
FSF as the registrant of gnu.org).

1 **II. SFC’S MOTION AS TO COPYRIGHT PREEMPTION IS MOOT**

2 SFC asks the Court to rule that “the Copyright Act does not preempt SFC’s claims against
3 VIZIO.” (Mot. at 19.) The Court has already done so as a matter of law (Order at 8), thereby
4 mooted SFC’s motion. *See, e.g., Trinity Christian Ctr. of Santa Ana, Inc. v. Koper*, 2013 WL
5 3200578, at *4 (C.D. Cal. June 21, 2013) (denying motion as moot where the court had previously
6 issued the order sought by the motion).

7 **CONCLUSION**

8 VIZIO respectfully requests that the Court either deny SFC’s motion as moot or issue an
9 order consistent with the Court’s previous ruling.

10
11
12 DATED: February 1, 2024

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

13
14 By /s/ Michael E. Williams

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16 *Attorney for Defendant*
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1 **PROOF OF SERVICE**

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

5 On February 1, 2024, I served a true and correct copy of the document described as
6 **DEFENDANT VIZIO INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN**
7 **OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION** on the
8 parties in this action via electronic service to the emails below, pursuant to the parties' joint
9 stipulation: "Electronic service will count as personal service on the day of that electronic service,
10 if the electronic service occurs before midnight Pacific Time. If the electronic service occurs after
11 midnight Pacific Time, that service will count as personal service for the following business day
12 that is not a legal holiday."

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

Executed on February 1, 2024.

29 /s/ Arian Koochesfahani

30 Arian Koochesfahani