

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE Central Justice Center 700 W. Civic Center Drive Santa Ana, CA 92702	
SHORT TITLE: Software Freedom Conservancy, Inc. vs. Vizio, Inc.	
CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE	CASE NUMBER: 30-2021-01226723-CU-BC-CJC

I certify that I am not a party to this cause. I certify that that the following document(s), Minute Order dated 03/26/24, was transmitted electronically by an Orange County Superior Court email server on March 27, 2024, at 8:11:11 AM PDT. The business mailing address is Orange County Superior Court, 700 Civic Center Dr. W, Santa Ana, California 92701. Pursuant to Code of Civil Procedure section 1013b, I electronically served the document(s) on the persons identified at the email addresses listed below:

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CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER**

MINUTE ORDER

DATE: 03/26/2024

TIME: 03:40:00 PM

DEPT: C33

JUDICIAL OFFICER PRESIDING: Sandy Leal

CLERK: V. Do

REPORTER/ERM:

BAILIFF/COURT ATTENDANT: J. Kempf

CASE NO: **30-2021-01226723-CU-BC-CJC** CASE INIT.DATE: 10/19/2021

CASE TITLE: **Software Freedom Conservancy, Inc. vs. Vizio, Inc.**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

EVENT ID/DOCUMENT ID: 74257468

EVENT TYPE: Under Submission Ruling

APPEARANCES

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 02/15/2024 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Plaintiff Software Freedom Conservancy Inc.'s Motion for Summary Adjudication is DENIED as to Issue No. 1 and GRANTED as to Issue No. 2.

Plaintiff's Request for Judicial Notice is GRANTED as to Exhibits 3, 5-7 and DENIED as to 1, 2, 8 and 9. As to Exhibits 4 and 10, the Court declines to rule as the documents are immaterial to the determination of this motion.

Vizio's Objections to Plaintiff's Exhibits & Declaration of Bradley Kuhn: Objections Nos. 1-7: Defendant does not dispute the facts which the exhibits are cited to as evidence. Therefore, the court declines to rule on these evidentiary objections. All objections not ruled upon are preserved for appeal. (Code Civ. Proc. § 437c(q).)

Plaintiff's Objections to Vizio's Evidence: Overruled

Vizio argues this motion is moot and/or barred by judicial estoppel because the court found a triable issue of material fact exists as to whether Plaintiff is a third party beneficiary under the GPL license. The Court found that "the language of the GPLs is not so certain so as to preclude other interpretations." Plaintiff has not presented any additional evidence to resolve that issue in its favor.

"Judicial estoppel applies where a party takes inconsistent positions that effect the orderly administration of justice. Requirements for application of the rule include a party's taking two positions in judicial or administrative proceedings, success in the assertion of the first position, inconsistency between the two positions, and a lack of ignorance, fraud, or mistake in asserting the first position. The doctrine requires that the positions be clearly inconsistent 'so that one necessarily excludes the other.'" (*Kitty-Anne Music*

Co. v. Swan (2003) 112 Cal.App.4th 30, 35 [cleaned up].)

In *Kitty-Anne*, the Court of Appeal rejected a similar argument as that put forth by Vizio.

A party successfully opposes a summary judgment motion. He then moves for summary judgment based upon the same evidence used in the summary judgment motion he resisted. The rule of judicial estoppel does not apply against the party because he has not taken inconsistent positions, nor has he disrupted the orderly administration of justice.

(Id. at 32.)

The Court finds *Kitty-Anne* controlling here. In opposing Vizio's motion for summary judgment, Plaintiff presented sufficient evidence to raise a triable issue of fact. It then decided to move for summary adjudication of the issue of duty, and now bears the burden of proving that it is entitled to an adjudication of this issue as a matter of law. Plaintiff is not taking any inconsistent positions nor is it attempting to take an unfair advantage. Accordingly, the rule of judicial estoppel does not apply here.

Plaintiff moves for summary adjudication on two issues – duty and as to the fifth affirmative defense.

A motion for summary adjudication may be granted if “it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.” (Code Civ. Proc., § 437c(f)(1).) As used in this section, a “cause of action” means the invasion of a primary right, i.e., an injury, rather than a theory of liability. (*Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854.)

“Summary adjudication motions are ‘procedurally identical’ to summary judgment motions. Summary judgment ‘shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’ (Code Civ. Proc., § 437c, subd. (c).) To be entitled to judgment, the moving party must show by admissible evidence that the “action has no merit or that there is no defense” thereto. (*Id.*, subd. (a)(1).) A defendant moving for summary adjudication meets this burden by presenting evidence demonstrating that one or more elements of the cause of action cannot be established or that there is a complete defense to the claim. (*Id.*, subds. (o), (p)(2).) Once the defendant makes this showing, the burden shifts to the plaintiff to show that a triable issue of material fact exists as to that cause of action or defense. (Code Civ. Proc., § 437c, subd. (p)(2).) Material facts are those that relate to the issues in the case as framed by the pleadings. There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Zamora v. Security Industry Specialists, Inc.* (2012) 71 Cal.App.5th 1, 28-29 [cleaned-up].)

Courts deciding motions for summary judgment or summary adjudication may not weigh the evidence but must instead view it in the light most favorable to the opposing party and draw all reasonable inferences in favor of that party. (Code Civ. Proc. § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) “[A]ll doubts as to whether a summary judgment should be granted must be resolved in favor of the opposing party. The court focuses on finding issues of fact; it does not resolve them. The court seeks to find contradictions in the evidence or inferences reasonably deducible from the evidence that raise a triable issue of material fact.” (*Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1144-1145 [internal citations omitted].)

Issue No. 1:

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:

. - 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

. - 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

“A third party beneficiary may enforce a contract made for its benefit.” (Hess v. Ford Motor Co. (2002) 27 Cal.4th 516, 524 (citing Civ. Code § 1559).) “Generally, it is a question of fact whether a particular third person is an intended beneficiary of a contract.” (Spinks v. Equity Residential Briarwood Apartments (2009) 171 Cal.App.4th 1004, 1025 [internal citation omitted].) If the issue can be answered by interpreting the contract as a whole and doing so in light of the uncontradicted evidence of the circumstances and negotiations of the parties in making the contract, the issue becomes one of law that the court can resolve independently. (Id.)

To show the contracting parties intended to benefit it, a third party must show that, under the express terms of the contract at issue and any other relevant circumstances under which the contract was made, (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 enforce the contract “is consistent with the objectives of the contract and the reasonable expectations of the contracting parties.” (Goonewardene v. ADP, LLC (2019) 6 Cal.5th 817, 830.)

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, so far as the same is ascertainable and lawful.” (Civ. Code § 1636.) Although “the intention of the parties is to be ascertained from the writing alone, if possible” (Civ. Code § 1639), “[a] contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates” (Civ. Code § 1647). “However broad may be the terms of a contract, it extends only to those things ... which it appears that the parties intended to contract.” (Civ. Code § 1648.)

Vizio does not dispute the first two elements of the *Goonewardene* test. Vizio disputes the third element - that third party standing is inconsistent with the reasonable expectations of the average licensee such as Vizio.

The third element of the *Goonewardene* test “does not focus upon whether the parties specifically intended third party enforcement but rather upon whether, taking into account the language of the contract and all of the relevant circumstances under which the contract was entered into, permitting the third party to bring the proposed breach of contract action would be ‘consistent with the objectives of the contract and the reasonable expectations of the contracting parties.’ [Citation.] In other words, this element calls for a judgment regarding the potential effect that permitting third party enforcement would have on the parties’ contracting goals, rather than a determination whether the parties actually anticipated third party enforcement at the time the contract was entered into.” (Id. at 830-832.)

Plaintiff argues the plain text of the GPLs governs the “reasonable expectations of the contracting party.” (See *Hess v. Ford Motor Co. (2002) 27 Cal. 4th 516, 524* (“Ascertaining . . . intent [to benefit a third party] is a question of ordinary contract interpretation”).) The “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.

It further states:

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 . . .

Vizio asserts that Plaintiff has not presented any evidence on this point and thus fails to meet its initial burden of production. The Court has already rejected Plaintiff's reliance on the GPL's text alone.

By contrast, Vizio has presented evidence that FSF intended the copyright holders of the software as the ones who have the power to enforce the GPL. In response to a FAQ posted by FSF it advises "[i]f you think you see a violation of the GNU GPL [or] LGPL . . . you should send a precise report to the copyright holders of the packages that are being wrongly distributed"; "only the copyright holder or someone having assignment of the copyright can enforce the license."

Vizio contends that these statements are not hearsay because they are not offered for the truth of what they assert. They are offered to prove what the average party to the GPLs would think about third party enforcement. Further, "the author's testimony is not required to authenticate a document; instead, its authenticity may be established by the contents of the writing or by other means. As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility." (*People v. Valdez* (2011) 201 Cal.App.4th 1429, 1435 [cleaned up].) Thus, *Valdez* held that statements on a social media page were authenticated because there were various signs that "the page belonged to Valdez rather than someone else by the same name, who happened to look just like him." (*Ibid.*) The situation is the same here, where numerous signs point to control by the FSF. These include the fact that www.fsf.org interlinks repeatedly with www.gnu.org; the fact that both websites display copyright notices from the FSF; and the fact that both websites display the FSF's logos.

Additionally, Plaintiff's statements confirm that third-party enforcement would disrupt the reasonable expectations of the parties. As far back as 2012, Bradley Kuhn, SFC's President, stated "the parties who may enforce are copyright holders[.]" In a tutorial and guide published as a joint project by SFC and FSF, it states that copyright holders are "ultimately the sole authorities" to "protect the right of users" and "have historically been the actors in GPL enforcement."

Plaintiff counters on reply that even if the online commentary by FSF and SFC were admissible, which it is not, the language is not found in the agreements. A standardized agreement is "interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing." (Restatement Second of Contracts § 211(2).) Vizio implies that licensees who read online commentary will have a different understanding of the GPLs licensees than those that do not. But this does not treat all the parties alike. Moreover, it cannot be presumed that all parties have read and relied on the commentary especially since they were published long after the GPLs.

Even if a contract benefits a third party, however, it may still be inconsistent with the objectives of the contract and reasonable expectations of the contracting parties to permit the third party to sue one of the contracting parties. (See *Goonewardene*, 6 Cal.5th at 837 [finding that an employee did not have third-party standing to sue the payroll company for an alleged breach of its contract with the employer].) In this case, Vizio has presented evidence that FSF did not intend for third parties to enforce the rights

under the license agreement. This is sufficient to create a triable issue of fact as to whether allowing third parties, such as Plaintiff, to enforce the GPLs is consistent with the objectives of the contract or the intent of the parties. If FSF has published or caused to be published statements which call into question this issue, then it is possible that it never intended to create such a right at the time the licensing agreement was created. The language of the GPLs is not so certain as to preclude other interpretations. Accordingly, a triable issue of fact exists as to whether Plaintiff is a third party beneficiary.

Furthermore, the Court cannot fully adjudicate the issue of duty as framed by Plaintiff. “[O]n a motion for summary adjudication, the court may rule whether a defendant owes or does not owe a duty to plaintiff without regard for the dispositive effect of such ruling on other issues in the litigation, except that **the ruling must completely dispose of the issue of duty.**” (*Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508, 522 [emphasis added].)

Plaintiff has narrowed the issue of duty to only include Vizio’s alleged duty to provide the source code to third parties. But the language of the GPLs provides as follows:

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 . . .

(UMF 5, 6; FAC 28.)

Therefore, under the license agreement, Vizio can either accompany the product which utilizes the GPL technology with the source code **or** give a written offer on how to obtain the source code.

Plaintiff presented evidence the Vizio Smart TV contained executables in binary form and shared libraries in binary form (as opposed to the source code) that were versions of software subject to the GPL license. (UMF 13.) But there is no evidence Vizio did not accompany the product with a written offer to give any third party a complete machine-readable copy of the source code. The only fact included in Plaintiff’s Separate Statement that could be construed as relating to the issue is the following: “The executable binary file called bin/busybox on the TV provided 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).” (UMF 15.) This fact, however, does not indicate that a written offer was not included. There are no undisputed material facts that, 1) Vizio failed to provide a written offer on how third parties could obtain the source code or 2) that Vizio provided such an offer, and Plaintiff accepted, but was denied the source code by Vizio when requested. Without such facts established, the Court cannot fully adjudicate the issue of duty, even assuming Plaintiff had established it was a third party beneficiary under the licensing agreement.

For the foregoing reasons, summary adjudication is DENIED as to Issue No. 1.

Issue No. 2

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.

This Court previously ruled on Vizio’s Motion for Summary Judgment and found that Plaintiff’s breach of contract claim was not preempted by the Copyright Act. In light of the Court’s prior ruling, the motion for summary adjudication is GRANTED as to Issue No. 2.

Moving party to give notice of the ruling.