

Sa'id Vakili, Esq. (SBN: 176322)
vakili@vakili.com
David N. Schultz, Esq. (SBN: 123094)
Schu1984@yahoo.com
Stephen P. Hoffman, Esq. (SBN: 287075)
hoffman@vakili.com
VAKILI & LEUS, LLP
3701 Wilshire Boulevard, Suite 1135
Los Angeles, CA 90010-2822
213/380-6010 | Fax: 213/380-6051

Attorneys for Plaintiff 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 to 10, Inclusive,**

Defendants.

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

[Hon. Sandy N. Leal / Dept. C33]

**PLAINTIFF SOFTWARE FREEDOM
CONSERVANCY, INC.'S NOTICE OF
MOTION AND MOTION FOR SUMMARY
ADJUDICATION OF ISSUES;
MEMORANDUM OF POINTS AND
AUTHORITIES, AND DECLARATIONS OF
BRADLEY KUHN, PAUL VISSCHER, SA'ID
VAKILI, AND ZOE KOOYMAN IN SUPPORT
THEREOF**

*[Separate Statement of Undisputed Material Facts;
Proposed Order; Appendix of Exhibits; and
Request for Judicial Notice submitted concurrently
herewith]*

Date: October 16, 2025

Time: 10:00 a.m.

Dept.: C33

Complaint Filed: 10/19/2021

Trial Date: 09/15/2025

Reservation No.: 74571189

TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY OF ARGUMENT	1
II.	RELEVANT FACTUAL BACKGROUND.....	3
A.	<i>The GPLs, FOSS, and the Source Code Provision at Issue.....</i>	3
B.	<i>SFC’s Dealings With VIZIO and VIZIO’s Offer to Provide Source Code</i>	5
III.	RELEVANT PROCEDURAL BACKGROUND	6
A.	<i>SFC Files its Complaint in this Action</i>	6
B.	<i>Proceedings in Federal District Court and the Remand Order</i>	6
C.	<i>Additional Proceedings Back in State Court.....</i>	6
IV.	LEGAL AUTHORITY APPLICABLE TO SFC’S MOTION.....	7
V.	SFC IS ENTITLED TO SUMMARY ADJUDICATION ON ISSUE NO. 1 BECAUSE IT IS UNDISPUTED THAT VIZIO ENTERED INTO A BINDING CONTRACT WITH SFC TO PROVIDE SFC WITH THE APPLICABLE SOURCE CODE FOR ANY SOFTWARE ON ITS SMART TV MODEL NO. D32H-J09 THAT IS LICENSED UNDER THE GPLS	8
VI.	SFC IS ENTITLED TO SUMMARY ADJUDICATION ON ISSUE NO. 2 AND 3 BECAUSE THE PLAIN LANGUAGE OF THE GPLS COMPELS THE CONCLUSION THAT SFC AND OTHER PURCHASERS OF VIZIO’S SMART TVS ARE INTENDED THIRD-PARTY BENEFICIARIES OF THE GPLS AND THEIR SOURCE CODE PROVISION	10
A.	<i>SFC Would Benefit From the GPLs and Their Source Code Provision.....</i>	10
B.	<i>A Motivating Purpose of the GPLs Was to Provide a Benefit to Third Parties, Such as SFC.....</i>	11
C.	<i>The Language of the GPLs Makes Clear That Allowing Recipients of GPL-Licensed Software, such as SFC, to Enforce Their Rights to Source Code Is Consistent with the “Objectives of the Contract” and the “Reasonable Expectations of the Contracting Parties”</i>	11
1.	<i>Allowing SFC to Enforce Its Right to Source Code as a Third-Party Beneficiary of the GPLs Is Consistent with the Objectives of the Contract.....</i>	12
2.	<i>Allowing SFC to Enforce Its Right to Source Code as a Third-Party Beneficiary of the GPLs Is Consistent With the “Reasonable Expectations of the Contracting Parties.”</i>	14
VII.	CONCLUSION.....	18

TABLE OF AUTHORITIES

Cases

<i>Artifex Software v. Hancorn, Inc.</i> 2017 U.S. Dist. LEXIS 62815, at *4	4
<i>Berlanga v. Univ. of San Francisco</i> (2024) 100 Cal.App.5th 75	8
<i>Blonder v. Gentile</i> (1957) 149 Cal.App.2d 869	8
<i>Brown v. Goldstein</i> (2019) 34 Cal.App.5th 418	8
<i>Flojo Int'l, Inc. v. Lassleben</i> 4 Cal.App.4th 713	9
<i>Goonewardene v. ADP, LLC</i> (2019) 6 Cal.5th 817	<i>passim</i>
<i>Hess v. Ford Motor Co.</i> (2002) 27 Cal.4th 516	10, 15, 17
<i>Hom v. Petrou</i> (2021) 67 Cal.App.5th 459	15
<i>Jacobsen v. Katzer</i> (Fed. Cir. 2008) 535 F.3d 1373	3
<i>La Jolla Beach & Tennis Club, Inc. v. Indus. Indem. Co.</i> (1994) 9 Cal.4th 27	15
<i>Levy v. Only Cremations for Pets, Inc.</i> (2020) 57 Cal.App.5th 203	8
<i>Linden Partners v. Wilshire Linden Assocs.</i> (1998) 62 Cal.App.4th 508	8
<i>Lloyd's Underwriters v. Craig & Rush, Inc.</i> (1994) 26 Cal.App.4th 1194	15, 17
<i>Lucas v. Hamm</i> (1961) 56 Cal.2d 583	12
<i>Regents of Univ. of California v. Superior Court</i> (2018) 4 Cal.5th 607	8

1	<i>Seaver v. Ransom</i>	
2	(N.Y. 1918) 120 N.E. 639.....	13
3	<i>Shaw v. Regents of Univ. of California</i>	
4	(1977) 58 Cal.App.4th 44	17
5	<i>Versata Software, Inc. v. Ameriprise Fin., Inc.</i>	
6	2014 U.S. Dist. LEXIS 30934	4
7	<i>Wexler v. California Fair Plan Ass’n</i>	
8	(2021) 63 Cal.App.5th 55	13
9	<i>Williams v. Apple, Inc.</i>	
10	(N.D. Cal. 2021) 338 F.R.D. 629, 638.....	17
11	<u>Statutes</u>	
12	California Civil Code	
13	§ 1605	8, 9
14	§ 1614	9
15	§ 1636	17
16	California Code of Civil Procedure	
17	§ 437c(f)(1).....	8
18	§ 437c(f)(2).....	8
19	<u>Other Authorities</u>	
20	Melvin Aron Eisenberg, Third-Party Beneficiaries, 92 Colum. L. Rev. 1358	13, 14
21	<u>Treatises</u>	
22	13 Williston on Contracts	
23	§ 37:10 (4th ed.).....	11
24	§ 37:13 (4th ed.).....	14
25	§ 7:21 (4th ed. 2023 update).....	9
26	Restatement (Second) of Contracts	
27	§ 11, comment e.....	17
28	§ 71, comment e (1981).....	9

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on October 16, 2025, at 10:00 a.m., or as soon thereafter as the
3 matter may be heard, in Department C33 of the above-captioned Court, located at 700 Civic Center
4 Drive, Santa Ana, California 92701, the Honorable Sandy N. Leal presiding, Plaintiff Software Freedom
5 Conservancy, Inc. (“SFC”) will and does hereby move this Court, pursuant to Section 437c(f)(1) of the
6 California *Code of Civil Procedure*, for summary adjudication against Defendant VIZIO, Inc. (“VIZIO”)
on the following issues:

7 **ISSUE NO. 1:**

8 VIZIO has a contractual duty to provide SFC with the complete corresponding machine-readable
9 source code (as that term is defined in Section 3 of the GNU General Public License, version 2 (the
10 GPLv2”)) for any software on its Smart TV Model No. D32h-J09 that is licensed under the GPLv2 and
11 the complete corresponding machine-readable source code (as that term is defined in Section 0 of the
12 GNU Lesser General Public License version 2.1 (the “LGPLv2.1”)) for any library that is licensed under
the LGPLv2.1.

13 **ISSUE NO. 2:**

14 Under the GPLv2, VIZIO has a contractual duty to provide to the purchasers of any VIZIO Smart
15 TVs, including SFC:

16 (a) the complete corresponding machine-readable source code (as defined in Section 3 of the
17 GPLv2) for any software on its Smart TVs that is licensed under the GPLv2; or

18 (b) a written offer, valid for at least three years, to give any third party, for a charge no more
19 than the cost of physically performing source distribution, a complete machine-readable copy of the
20 corresponding source code.

21 **ISSUE NO. 3:**

22 Under the GNU Lesser General Public License, version 2.1 (the LGPLv2.1), VIZIO has a
contractual duty to provide to the purchasers of any VIZIO Smart TVs, including SFC:

23 (a) the complete corresponding machine-readable source code (as defined in Section 0 of the
24 LGPLv2.1) for any library (as defined in Section 0 of the LGPLv2.1) on its Smart TVs that is licensed
25 under the LGPLv2.1; or

26 (b) otherwise comply with Section 6 of the LGPLv2.1.

27 SFC requests that the final judgment in this action, in addition to any matters determined at trial,
28 award judgment in favor of SFC and against VIZIO as established by the adjudication of the above

1 issues.

2 This Motion is made upon the grounds that:

3 (1) The undisputed facts establish that VIZIO made an offer to provide the applicable source
4 code subject to the GPLv2 and the LGPLv2.1 in connection with VIZIO's sale of its Smart TV Model
5 No. D32h-J09 to SFC, which offer was accepted by SFC. Therefore, under general principles of contract
6 law, VIZIO has a contractual duty to provide that source code to SFC; and

7 (2) The plain language of the GPLv2 and the LGPLv2.1 compels the conclusion that purchasers
8 of VIZIO Smart TVs such as SFC are third-party beneficiaries of the provision of the GPLv2 that entitles
9 such purchasers to receive the source code for: (a) any software on VIZIO's Smart TVs that is licensed
10 under the GPLv2; and (2) any library on VIZIO's SMART TVs that is licensed under the LGPLv2.1.
11 Therefore, under the GPLv2 and the LGPLv2.1, VIZIO has a contractual duty to provide purchasers of
12 VIZIO Smart TVs with that source code.

13 Accordingly, there is no triable issue of material fact as to the above issues for which summary
14 adjudication is sought, and SFC is entitled to such adjudication as a matter of law. In addition, resolving
15 any or all of these duty-related issues would significantly reduce the scope of this case at trial. The SFC's
16 standing to enforce its right to complete and corresponding source code, whether as a direct contracting
17 party or a third-party beneficiary, is arguably the most crucial issue in this matter.

18 This Motion is based upon: (1) the First Amended Complaint filed by SFC in this action; (2) this
19 Notice of Motion and Motion; (3) the Memo of Points and Authorities and Declarations of Bradley M.
20 Kuhn, Paul Visscher, Sa'id Vakili, and Zoe Kooyman in support of the Motion attached hereto; (4) the
21 Separate Statement of Undisputed Material Facts, the Appendix of Exhibits ("Appx."), and the Request
22 for Judicial Notice, all filed separately herewith; (5) the complete files and records in this action; (6) all
23 matters of which judicial notice may be taken; and (7) such other and further matters which may be
24 brought before this Court at or before the time of the hearing on this matter, including in any reply
25 papers.

26 DATED: May 23, 2025

VAKILI & LEUS, LLP

27 By: 

Sa'id Vakili, Esq.

David N. Schultz, Esq.

*Attorneys for Plaintiff Software Freedom
Conservancy, Inc.*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

3 The GNU General Public License version 2 (the “GPLv2”) and the GNU Lesser General Public
4 License version 2.1 (the “LGPLv2.1”) (collectively, “the GPLs”) are two of the most vital, widely
5 utilized, and successful software license agreements. Software licensed under the GPLs helps to operate
6 consumer goods such as wireless routers and televisions, including the Smart TVs manufactured and
sold by Defendant VIZIO, Inc., that are at issue in this case.

7 The GPLs play a central role in the development of what is known as “free and open software”
8 or “FOSS”—a software model that encourages and relies upon collaboration and the free exchange of
9 knowledge to develop high-quality, reliable, robust, and useful software. The arrangement underlying
10 the GPLs is simple: Recipients of software licensed under the GPLs may use, examine, modify, and
11 adapt the software however they see fit, so long as they permit their licensees to do the same. For this
12 arrangement to work, however, distributors and licensors of the software have a duty to provide their
13 recipients and licensees with the software’s source code—the form of the software that can be
14 understood and edited by computer programmers. In this way, software licensed under the GPLs may
continuously be tinkered with, repurposed, and improved upon.¹

15 This Motion addresses two duties arising from the above arrangement owed by VIZIO—a
16 manufacturer and distributor of Smart TVs that include software subject to the GPLs—to SFC, a non-
17 profit charitable corporation dedicated to promoting FOSS, which purchased certain models of VIZIO’s
18 Smart TVs and sought to obtain the applicable source code.

19 First, because the models of VIZIO Smart TVs purchased by SFC contain software subject to
20 the GPLs, the GPLs provide that SFC is entitled to receive either complete copies of the source code for
21 this software or a written offer from VIZIO to obtain the source code. It is undisputed that VIZIO made
22 an offer to provide the applicable source code upon request and that SFC accepted VIZIO’s offer by
23 requesting the applicable software for a VIZIO Smart TV model it had purchased. Accordingly, VIZIO
24 has a duty to comply with this contract and provide SFC with the complete corresponding machine-
25 readable source code for the Smart TV purchased by SFC. For this reason, SFC is entitled to summary
adjudication on Issue No. 1 of this Motion [*see* Section V, below].

26
27
28 ¹ The above discussion of FOSS and the GPLs above is taken from Paragraphs 7-9, and 17-20 of the
Declaration of Bradley M. Kuhn, attached hereto (the “Kuhn Decl.”).

1 Second, and more broadly, VIZIO has a contractual duty to provide the applicable source code
2 to any purchasers of its Smart TVs, including SFC, because such purchasers are intended third-party
3 beneficiaries of the GPLs and their source code provisions under the three-part test set out by the
4 California Supreme Court in *Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817 (“*Goonewardene*”). As
5 discussed fully below, the first element of the *Goonewardene* test is whether the third party would in
6 fact benefit from the contract; the second element of the test is whether a motivating purpose of the
7 contracting parties was to provide a benefit to the third party. Here, as this Court has previously noted,
8 VIZIO does not dispute that SFC satisfies both the first and second elements of the test—SFC would
9 indeed benefit from the GPLs, and a motivating purpose of the contracting parties was to benefit third
10 parties such as SFC. Moreover, the language of the GPLs clearly establishes that SFC satisfies both of
11 these elements. The GPLs specifically provide that recipients of GPL-licensed software, such as SFC,
12 “would benefit” under the contracts by receiving source code, thereby satisfying the first element, and
13 the Preambles to the GPLs provide that a “motivating purpose” of the contracts was to ensure that
14 recipients of GPL-licensed software, such as SFC, could receive source code, and would know it, thereby
15 satisfying the second element.

16 Finally, the third element of the *Goonewardene* test is whether allowing a third party, such as
17 SFC, to file its own breach of contract action against a contracting party is consistent with the contract’s
18 objectives and the contracting parties’ reasonable expectations. Any contention that SFC cannot satisfy
19 this third element as a matter of law ignores the following:

20 1) Because one of the objectives of the GPLs is to allow third parties, such as SFC, to obtain
21 the source code, and because this Court has already ruled, in rejecting VIZIO’s preemption claim, that
22 SFC cannot acquire the source code under copyright law, permitting SFC to bring its own breach of
23 contract claim is necessarily consistent with the objectives of the GPL.

24 2) As this Court has previously held, “[a]llowing third parties such as SFC to enforce their
25 rights to receive source code is not only consistent with the GPLs’ objectives; it is both essential and
26 necessary to achieve these objectives.” (*See* Appx., Exhibit “7” (12/29/2023 Minute Order), at pg. 9.)

27 3) California law is clear that the plain text of the GPLs governs the reasonable expectations
28 of the contracting parties. The GPLs explicitly require that distributors of GPL-licensed software, such
as VIZIO, ensure that recipients of the software, such as SFC, “receive or can get the source code.”

4) VIZIO conceded, in a government filing before SFC commenced this action, that it could
be subject to liability for breach of contract by parties such as SFC “demanding release of, what we

1 believe to be open source software or noncompliance with open source licensing terms” such as those
2 in the GPLs. Thus, VIZIO reasonably expected that it could be sued by SFC for breach of contract; and

3 5) Recent statements by the Free Software Foundation (the “FSF”), made after this Court’s
4 ruling in March 2024, make clear that the FSF, the publisher of the GPLs, never intended to restrict,
5 hinder, or limit any means for users to assert their rights and freedoms under the GPLs through methods
6 other than a straightforward claim under copyright law. Moreover, the FSF believes that third parties
7 requesting complete and corresponding source code under the GPLs are entitled to receive that source
8 code.

9 As explained in greater detail below, this Court should apply the above points, rule that VIZIO
10 has a contractual duty to provide the source code to recipients of GPL-licensed software such as SFC
11 because they are third-party beneficiaries of the Source Code Provision in the GPLs, and grant SFC’s
12 Motion as to Issue Nos. 2 and 3 [*see* Section VI, below].

12 **II. RELEVANT FACTUAL BACKGROUND**

13 **A. *The GPLs, FOSS, and the Source Code Provision at Issue***

14 The GPLs at issue in this action are two of the most vital, widely used, and successful software
15 license agreements. (SFC’s Separate Statement of Undisputed Material Facts, submitted separately
16 herewith, Undisputed Material Fact (“UMF”) Nos. 1, 13.) Software developed under the GPLs helps
17 operate such consumer devices as wireless home routers, and television sets, including the Smart TVs
18 manufactured and sold by VIZIO. (UMF Nos. 14.)

19 The GPLs play a central role in the development of “free and open source software” (“FOSS”).
20 FOSS is a software development model that encourages and relies on collaboration and the free
21 exchange of knowledge. In this context, “free” refers to “freedom,” not “gratis.” (UMF Nos. 15, 16.)
22 As one court has explained, FOSS projects “invite computer programmers from around the world to
23 view software code and make changes and improvements to it.” (*Jacobsen v. Katzer*, 535 F.3d 1373,
24 1378 (Fed. Cir. 2008). FOSS projects are successful because many software developers work on them,
25 adding new features, tweaking old features, and fixing bugs, and these new versions are available to
26 other developers to learn from, tweak and improve. (UMF No. 17.) Many popular software programs
27 are FOSS, including the Linux kernel, a popular computer operating system at issue in this case. (UMF
28 No. 18.)

Software exists in two general forms: (1) object or executable code that computers can
understand and implement; and (2) source code that can be understood and edited by those familiar with

1 the relevant programming language. (UMF Nos. 19, 20.) Although software is often distributed in an
2 executable form, including in VIZIO’s Smart TVs at issue here, programmers cannot review, modify,
3 or re-purpose executable software. (UMF Nos. 19-21.) The GPLs solve this problem and make FOSS
4 possible by requiring those who distribute software in an executable form to accompany that software
5 either with the complete corresponding source code, or with a written offer to give any third party the
6 complete corresponding source code upon request. (UMF No. 22.) As one court has explained, “[T]he
7 GPL allows for free use and redistribution of [the software], including in other software (i.e., the creation
8 of a derivative work), on the condition the original licensor continues the open source trend and makes
9 the source code freely available.” (*Versata Software, Inc. v. Ameriprise Fin., Inc.*, 2014 U.S. Dist.
10 LEXIS 30934, at *4; *see also Artifex Software v. Hancom, Inc.*, 2017 U.S. Dist. LEXIS 62815, at *4
11 (“[T]he GNU GPL required Defendant to distribute its software with the accompanying source code.”).

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

14 You may copy and distribute [a GPL-licensed] Program (or a work based on it...) in
15 object code or executable form under the terms of Sections 1 and 2 above provided that
16 you also do one of the following:

17 a) *Accompany it with the complete corresponding machine-readable source*
18 *code...*; or,

19 b) *Accompany it with a written offer, valid for at least three years, to give any*
20 *third party ... a complete machine-readable copy of the corresponding source code....*

21 (UMF No. 23 (emphasis added).) The LGPLv2.1 has equivalent language. (UMF No. 24.) This
22 provision, referred to as the “Source Code Provision,” thus specifically references mentions third party
23 rights, stating that distributors of GPL-licensed programs must provide the source code for such
24 programs or “a written offer ... to give *any third party* ... a complete machine-readable copy of the
25 corresponding source code.” (UMF No. 22 (emphasis added).)

26 The Preamble to the GPLs sets forth the objectives of these agreements. The GPLs are “intended
27 to guarantee your freedom to share and change free software—to make sure the software is free for all
28 its users.” (UMF No. 28.) 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.*”
(UMF No. 28 (emphasis added).) Finally, the GPLs create “certain responsibilities for you if you
distribute copies of the software, or if you modify it. For example, *if 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*

1 *must make sure that they, too, receive or can get the source code. And you must show them these*
2 *terms so they know their rights.”* (UMF Nos. 30 (emphasis added).)

3 The notice preceding the Preamble in the GPLs states that “[e]veryone is permitted to copy and
4 distribute verbatim copies of this license document, but changing it is not allowed.” (UMF No. 31.)

5 ***B. SFC’s Dealings With VIZIO and VIZIO’s Offer to Provide Source Code***

6 SFC is a not-for-profit organization whose mission includes fostering FOSS-related projects and
7 ensuring that FOSS remains “free” and that the source code for FOSS is ensuring that source code
8 remains accessible and available for further development. As part of this purpose, SFC engages in
9 enforcement activities regarding the GPL Agreements. (See Declaration of Bradley M. Kuhn, attached
hereto (“Kuhn Decl.”), ¶¶ 2-6, and 19.)

10 Vizio manufactures and sells “Smart TVs”—televisions capable of streaming content, such as
11 Netflix or Hulu, via a built-in internet connection and user interface. (UMF Nos. 2-3, 32-33.) Smart
12 TVs require computer software and processors to stream such content. (UMF Nos. 4, 34.) Many of the
13 computer programs on VIZIO’s Smart TVs, such as the Linux kernel, are subject to the GPLs. (UMF
14 Nos. 5, 35.) The Source Code Provision thus requires VIZIO to provide purchasers of its Smart TVs
with complete copies of the source code or an offer to provide the source code. (UMF Nos. 38, 39.)

15 VIZIO itself concedes that that its devices use software governed by the GPLs and that the GPLs
16 thus may require VIZIO to disclose its source code. (UMF No. 42.) Moreover, VIZIO specifically
17 concedes, in a March 2021 filing with the Securities and Exchange Commission, that it “could be subject
18 to suits and liability for ... breach of contract by parties ... demanding release of, what we believe to be
19 open source software or noncompliance with open source licensing terms,” such as in the GPLs. (UMF
20 No. 43.)

21 In or about July 2021, SFC purchased three models of VIZIO Smart TVs, including model
22 number D32h-J09. (UMF Nos. 6, 36.) These models contained software that was subject to the GPLs.
23 (UMF Nos. 7, 37.) Accordingly, under the Source Code Provision, SFC was entitled to receive complete
24 copies of the source code for these programs or a written offer from VIZIO to obtain the source code.
(UMF No. 38.)

25 At some point, VIZIO made an offer to provide SFC with source code for the Smart TVs that
26 SFC had purchased from VIZIO. (UMF No. 8.) That offer was set forth on the “License List” menu on
27 the user interface of the Smart TV. (UMF No. 9.) In its offer, VIZIO stated that its Smart TVs
28 may contain executable codes and libraries that are subject to the terms of the GNU
General Public License (GPL), GNU Lesser General License (LGPL) ... and other open

1 source licenses. VIZIO offers to provide applicable source code upon request for a
2 processing fee covering the cost of fulfilling the distribution, such as the cost of the
3 medium used and shipping and handling. To make a request, please contact VIZIO at
support.vizio.com. (UMF No. 10.)

4 In response, on or about April 26, 2023, an SFC representative contacted VIZIO and requested, on behalf
5 of SFC, the applicable source code for VIZIO's Smart TV Model No. D32h-J09. (UMF No. 11.)

6 **III. RELEVANT PROCEDURAL BACKGROUND**

7 ***A. SFC Files its Complaint in this Action***

8 On October 19, 2021, SFC filed its Complaint in this action, alleging two state law claims for
9 breach of contract and declaratory relief. (*See* Declaration of Sa'id Vakili, attached hereto ("Vakili
10 Decl., ¶ 2; ROA No. 2.) On November 29, 2021, VIZIO filed a Notice of Removal, removing the case
11 to the United States District Court for the Central District of California (the "Federal Court") on the
ground that SFC's claims were completely preempted by the Copyright Act. (*Id.*; ROA No. 14)

12 ***B. Proceedings in Federal District Court and the Remand Order***

13 In response to VIZIO's Notice of Removal, SFC filed a motion to remand the action to this Court
14 (the "Motion to Remand"). (Vakili Decl., ¶ 2.) The Federal Court granted the Motion to Remand in an
Order dated May 13, 2022, explaining as follows:

15 *There is an extra element to SFC's claims because SFC is asserting, as a third-party*
16 *beneficiary of the GPL Agreements, that it is entitled to receive source code under the*
17 *terms of those agreements. There is no right to receive certain works—or source code*
18 *in particular—under the Copyright Act; indeed, the Act's primary purpose is to limit*
19 *who may reproduce, prepare derivative works, distribute, and display protected works.*
(Vakili Decl., ¶ 4; Appx., Exhibit "6" (italic emphasis in original; bold and italic emphasis added).)

20 ***C. Additional Proceedings Back in State Court***

21 Once this action moved back to this Court, VIZIO moved for summary judgment or, in the
22 alternative for summary adjudication. VIZIO contended, among other things, that SFC's breach of
23 contract claim was preempted by the Copyright Act and that SFC was not an intended third-party
beneficiary of the GPLs and their Source Code Provision. (*See* Appx., Exhibit "7"; ROA No. 58.)

24 In its Minute Order, dated December 29, 2023, this Court denied SFC's motion in its entirety.
25 (*See* Appx., Exhibit "7" (the Minute Order).) The Court explained that VIZIO contended that SFC was
26 not a third-party beneficiary of the GPLs because "third party standing is inconsistent with the
27 reasonable expectations of the contracting parties as well as those of the GPLs' creator, the" Free
28

1 Software Foundation (the “FSF”). (Appx. Exhibit “7”, at p. 8.) In rejecting this contention, the Court
2 stated as follows:

3 Moreover, *the source code provision specifically mentions third party rights*, stating
4 that distributors of GPL-licensed programs must provide the source code for such
5 programs or “a written offer ... to give any third party ... a complete machine-readable
6 copy of the corresponding source code.”

7 *Allowing third parties such as SFC to enforce their rights to receive source code is
8 not only consistent with the GPLs’ objectives; it is both essential and necessary to
9 achieve these objectives. Recipients of GPL-licensed software will be assured of their
10 right to receive source code only if they have standing to enforce that right.*

11 (Appx., Exhibit “7”, at p. 9) (emphasis added).)

12 While VIZIO’s motion was pending, SFC filed its own motion for summary adjudication,
13 contending, among other things, that it was entitled to judgment as a matter of law that VIZIO had a
14 duty under the GPLs to produce to SFC the source code for any GPL-licensed software on the three
15 Smart TVs purchased by SFC from VIZIO. (See ROA No. 156, at p. 1; Appx. Exhibit “8”).

16 In a Minute Order dated March 26, 2024, this Court denied this portion of SFC’s motion for two
17 separate reasons. (Appx., Exhibit “8” (the Minute Order).) First, the Court noted that the issue of duty
18 that SFC sought to be adjudicated ignored the fact that, under the GPLv2, VIZIO could satisfy the Source
19 Code Provision either by providing the source code for the GPL-licensed software or by making a written
20 offer to provide any third party with the source code. (*Id.*, p. 5.) Second, the Court held that statements
21 made by the FSF and Bradley Kuhn of SFC created a triable issue of fact as to whether granting third-
22 party beneficiary status to SFC to sue for breach of contract under the GPLs was consistent with the
23 objectives of the GPLs and the reasonable expectations of the contracting parties. (*Id.*, pp. 2-5.)

24 Since that Minute Order, VIZIO has taken the deposition of FSF’s corporate representative. She
25 testified that FSF never intended to foreclose any legal means to enforce the right to complete and
26 corresponding source code and that FSF has clarified its public-facing materials (such as the Frequently
27 Asked Questions) to emphasize what has always been its intention in this regard. Furthermore, the First
28 Amended Complaint is now the operative complaint. It asserts a legal theory that was not previously
available: that SFC requested complete corresponding source code pursuant to the GPLs. Therefore,
adjudication of VIZIO’s duty to provide such source code is now ripe.

26 IV. LEGAL AUTHORITY APPLICABLE TO SFC’S MOTION

27 Section 437c of the California *Code of Civil Procedure* provides, in pertinent part, that “[a] party
28 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.” (*See Cal. Civ. Proc. Code* § 437c(f)(1).) The motion “shall be granted” if it “completely disposes ... of an issue of duty.” (*Id.*; *see, e.g., Linden Partners v. Wilshire Linden Assocs.* (1998) 62 Cal.App.4th 508, 518-22 (defendant owed a contractual duty to deliver certificates to plaintiff). “Duty, being a question of law, is particularly amenable to resolution by summary judgment” or summary adjudication. (*Regents of Univ. of California v. Superior Court* (2018) 4 Cal.5th 607, 618.) Moreover, the interpretation of a contract is a judicial function. (*See, e.g., Brown v. Goldstein* (2019) 34 Cal.App.5th 418, 432.)

A motion for summary adjudication “shall proceed in all procedural respects as a motion for summary judgment.” (*Cal. Civ. Proc. Code* § 437c(f)(2).) Accordingly, SFC is entitled to summary adjudication as to the issues raised in this Motion if there is no triable issue as to any material fact, and SFC is entitled to judgment as a matter of law on that particular issue. (*See id.*, § 437c(c).)

V. SFC IS ENTITLED TO SUMMARY ADJUDICATION ON ISSUE NO. 1 BECAUSE IT IS UNDISPUTED THAT VIZIO ENTERED INTO A BINDING CONTRACT WITH SFC TO PROVIDE SFC WITH THE APPLICABLE SOURCE CODE FOR ANY SOFTWARE ON ITS SMART TV MODEL NO. D32h-J09 THAT IS LICENSED UNDER THE GPLS

It is hornbook law in California that the three requirements of a contract are offer, acceptance, and consideration. As one court has explained, in order for there to be a valid contract between the parties, there must be “mutual assent (usually accomplished through the medium of an offer and acceptance) and consideration.” (*Berlanga v. Univ. of San Francisco* (2024) 100 Cal.App.5th 75, 82; *accord Levy v. Only Cremations for Pets, Inc.*, (2020) 57 Cal.App.5th 203, 211.)

Section 1605 of the *California Civil Code* (“Section 1605”) defines consideration as “[a]ny benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor.” *Cal. Civ. Code* § 1605; *see also Blonder v. Gentile* (1957) 149 Cal.App.2d 869, 875 (“A consideration is sufficient to support a contract if it is either beneficial to the promisor or detrimental to the promise.”).)

Here, it is undisputed that VIZIO made an offer, stating on the “License List” menu found on the user interface of its Smart TVs that its Smart TVs “may contain executable codes and libraries that are subject to the terms of the GNU General Public License (GPL), GNU Lesser General License (LGPL) ... and other open source licenses. VIZIO offers to provide applicable source code upon request for a processing fee covering the cost of fulfilling the distribution....” (UMF Nos. 8-10, Appx., Exhibit

1 “3”.) It is also undisputed that SFC accepted this offer by requesting, in a Live Chat with a VIZIO
2 representative, the applicable source code for VIZIO’s Smart TV Model No. D32h-J09. (UMF No. 11;
3 Appx., Exhibit “4” (screenshots of the Live Chat).

4 Consideration exists for the contract entered into between SFC and VIZIO for two separate and
5 independent reasons. First, Section 1614 of the California *Civil Code* provides that “[a] written
6 instrument is presumptive evidence of a consideration.” (Cal. *Civ. Code* § 1614.) Because the contract
7 between SFC and VIZIO was formed through the writings exchanged between the parties, consideration
8 is presumed to exist.

9 Moreover, the main consideration that VIZIO receives by providing the source code requested
10 by SFC is the continued right under the GPLs to copy, modify, and distribute the software licensed under
11 the GPLs that is found in VIZIO’s Smart TVs. If VIZIO copies, modifies, sublicenses, or distributes
12 such software without complying with the GPLs, this right terminates automatically. (*See, e.g.*, GPLv2
13 § 4, found at Appx., Exhibit “1” (“You may not copy, modify, sublicense, or distribute the Program
14 except as expressly provided under this License. Any attempt otherwise to copy, modify, sublicense or
15 distribute the Program is void, and will automatically terminate your rights under this License.”);
16 LGPLv2.1 § 8, found at Appx., Exhibit “2” (“You may not copy, modify, sublicense, or distribute the
17 Library except as expressly provided under this License. Any attempt otherwise to copy, modify,
18 sublicense or distribute the Program is void, and will automatically terminate your rights under this
19 License.”). Accordingly, by complying with its contract with SFC to provide the applicable source code
20 for its Smart TV Model No. D32h-J09, VIZIO continues to receive a benefit that it otherwise would
21 have lost. For this reason, consideration exists for VIZIO’s agreement with SFC.

22 The fact that VIZIO receives this benefit from the licensors of the GPLs, and not from SFC, is
23 completely irrelevant, and does not change the above analysis. First, Section 1605 defines consideration
24 as “[a]ny benefit conferred . . . upon the promisor, **by any other person**”, (Cal. *Civ. Code* § 1605
25 (emphasis added)), and not merely a benefit received by the promisor (here, VIZIO) from the promisee
26 (here, SFC). As one California court has explained, “It matters not from whom the consideration moves
27 or to whom it goes.” (*Flojo Int’l, Inc. v. Lassleben*, 4 Cal.App.4th 713, 719, *quoting* Restatement
28 (Second) of Contracts § 71, comment e (1981); *see also* 3 Williston on Contracts § 7.:21 (4th ed. 2023
update) (“In short, as long as the promisor has received the performance or return promise it bargained
for, within the terms of its offer, there is simply no difference whether that consideration is furnished by
the promisee or by some third person.”).)

1 In short, it cannot be disputed that the transaction by which SFC, in response to VIZIO's offer,
2 requested the applicable source code for the VIZIO Smart TV Model No. D32h-J09 that it had
3 purchased, includes an offer, an acceptance, and consideration. Therefore, it cannot be disputed that
4 VIZIO and SFC entered into a binding contract concerning Smart TV Model No. D32h-J09, under which
5 VIZIO has a contractual duty to provide SFC with the complete corresponding machine-readable source
6 code for any software licensed under the GPLv2 and for any library licensed under the LGPLv2.1. For
7 this reason, this Court should grant SFC's Motion as to Issue No. 1.

8 **VI. SFC IS ENTITLED TO SUMMARY ADJUDICATION ON ISSUE NO. 2 AND 3**
9 **BECAUSE THE PLAIN LANGUAGE OF THE GPLS COMPELS THE CONCLUSION**
10 **THAT SFC AND OTHER PURCHASERS OF VIZIO'S SMART TVS ARE INTENDED**
11 **THIRD-PARTY BENEFICIARIES OF THE GPLS AND THEIR SOURCE CODE**
12 **PROVISION**

13 "A third party beneficiary may enforce a contract made for its benefit." (*Hess v. Ford Motor*
14 *Co.*, 27 Cal. 4th 516, 524 (2002) ("*Hess*"). In *Goonewardene*, *supra*, the California Supreme Court set
15 forth the three-part test to determine whether a third party such as SFC is an intended beneficiary of a
16 particular contract. The *Goonewardene* court explained that courts must

17 carefully examine[] the express provisions of the contract at issue, as well as all of the
18 relevant circumstances under which the contract was agreed to, in order to determine
19 not only (1) whether the third party would in fact benefit from the contract, but also (2)
20 whether a motivating purpose of the contracting parties was to provide a benefit to the
21 third party, and (3) whether permitting a third party to bring its own breach of contract
22 action against a contracting party is consistent with the objectives of the contract and
23 the reasonable expectations of the contracting parties. All three elements must be
24 satisfied to permit the third party action to go forward.

25 (*Goonewardene*, *supra*, 6 Cal.5th at 830.) As explained below, undisputed evidence, including the plain
26 language of the GPLs, establishes that SFC satisfies all three elements of the *Goonewarde* test and
27 therefore is an intended third-party beneficiary of the GPLs and their source code provision. For this
28 reason, SFC is entitled to summary adjudication on Issue Nos. 2 and 3 of the Motion.

29 **A. SFC Would Benefit From the GPLs and their Source Code Provision**

30 The plain language of the GPLs compels the conclusion that third parties who receive products
31 with software licensed under the GPLs unquestionably would benefit from the GPLs and the Source
32 Code Provision. In particular, the Preamble of the GPLs states that the GPLs create "certain
33 responsibilities for you if you distribute copies of the software, or if you modify it." (UMF No. 29;
34 GPLv2, Preamble, ¶ 3, found at Appx., Exhibit "1"; LGPLv2.1, Preamble, ¶ 4, found at Appx., Exhibit
35 "2".) The Preamble then goes on to state as follows:

1 For example, if you distribute copies of such a program, whether gratis or for a fee,
2 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
3 know their rights.

4 (UMF No. 30; GPLv2, Preamble, ¶ 4, found at Appx., Exhibit “1”; LGPLv2.1, Preamble, ¶ 5, found at
5 Appx., Exhibit “2” (emphasis added).) Such language clearly establishes that recipients of GPL-licensed
6 software, such as SFC, unquestionably benefit from the GPLs because they have a right to receive the
7 source code for that software under the above language and the Source Code Provision of the GPLs.
8 Perhaps for this reason, VIZIO did not dispute that SFC satisfied the first prong of the *Goonewarde* test
9 when VIZIO brought its motion for summary judgment or, in the alternative, for summary adjudication.
10 (See Appx., Exhibit “7”, at p. 8 (noting that VIZIO “does not dispute the first two elements of the
Goonewardene test”).)

11 ***B. A Motivating Purpose of the GPLs Was to Provide a Benefit to Third Parties, Such As
SFC***

12 The plain language of the GPLs likewise establishes that a “motivating purpose” of these
13 agreements was to provide a benefit to third-party recipients of software licensed under the GPLs, such
14 as SFC. The language from the Preamble of the GPLs quoted in Section VI.A., above, specifically
15 provides that distributors of programs containing GPL-licensed software “must make sure that
16 [recipients of such programs] receive or can get the source code.” (UMF No. 30; GPLv2, Preamble,
17 ¶ 4, found at Appx., Exhibit “1”; LGPLv2.1, Preamble, ¶ 5, found at Appx., Exhibit “2”). Another
18 paragraph of the Preambles likewise states that ***“General Public Licenses are designed to make sure
... that you receive source code or can get it if you want it ...”*** (GPLv2, Preamble, ¶ 2, found at Appx.,
19 Exhibit “1”; LGPLv2.1, Preamble, ¶ 3, found at Appx., Exhibit “2” (emphasis added).)

20 The above language from the Preambles compels the conclusion that a motivating purpose of
21 the GPLs was to benefit third-party recipients of programs containing GPL-licensed software, such as
22 SFC. As one treatise has explained, “In the typical case, in which the promisor has undertaken to render
23 performance directly to the beneficiary, the intent to benefit the third party will be clearly manifested.”
24 13 Williston on Contracts § 37:10 (4th ed.) Indeed, VIZIO did not dispute that SFC satisfied the second
25 element of the *Goonewarde* test when the issue was previously before this Court. (See Appx., Exhibit
26 “7”, at p. 8 (noting that VIZIO “does not dispute the first two elements of the *Goonewardene* test”).)

27 ***C. The Language of the GPLs Makes Clear That Allowing Recipients of GPL-Licensed
Software, such as SFC, to Enforce Their Rights to Source Code Is Consistent with the
28 “Objectives of the Contract” and the “Reasonable Expectations of the Contracting
Parties”***

1 The third element of the *Goonewardene* test set forth above has two parts: “permitting a third
2 party to bring its own breach of contract action against a contracting party” must be “consistent with the
3 objectives of the contract and the reasonable expectations of the contracting parties.” (*Goonewardene*,
4 *supra*, 6 Cal.5th at 830.) As explained below, SFC satisfies both parts of the third element of the
5 *Goonewardene* test.

6 **1. Allowing SFC to Enforce Its Right to Source Code as a Third-Party Beneficiary of
7 the GPLs Is Consistent with the Objectives of the Contract**

8 A review of the plain text of the GPLs makes clear that allowing recipients of GPL-licensed
9 software such as SFC to enforce their right to source code is consistent with the “objectives of the
10 contract.” (*Goonewardene, supra*, 6 Cal.5th at 830.) As the Preamble to the GPLs states:

11 ***General Public Licenses are designed to make sure that you have the freedom to
12 distribute copies of free software (and charge for this service if you wish), that you
13 receive source code or can get it if you want it, that you can change the software or use
14 pieces of it in new free programs; and that you know you can do these things ...***

15 (GPLv2, Preamble, ¶ 2, found at Appx., Exhibit “1”; LGPLv2.1, Preamble, ¶ 3, found at Appx., Exhibit
16 “2” (emphasis added).) In fact, in its Minute Order denying VIZIO’s motion for summary
17 judgment/summary adjudication, this Court specifically held that permitting third parties such as SFC
18 to enforce their right to receive source code is consistent with the objectives of the GPL:

19 ***Allowing third parties such as SFC to enforce their rights to receive source code is
20 not only consistent with the GPLs’ objectives; it is both essential and necessary to
21 achieve these objectives. Recipients of GPL-licensed software will be assured of their
22 right to receive source code only if they have standing to enforce that right.***

23 (Appx., Exhibit “7” (Minute Order, at p. 9) (emphasis added).) Indeed, the notion that recipients of
24 GPL-licensed software will be assured of their right to receive source code only if they are able to sue
25 to enforce that right, should be clear to all involved, including distributors of GPL-licensed software
26 such as VIZIO. As the California Supreme Court stated in a parallel context, “a contract for the drafting
27 of a will unmistakably shows the intent of the testator to benefit the persons to be named in the will, and
28 the attorney must necessarily understand this.” (*See Lucas v. Hamm* (1961) 56 Cal.2d 583, 590 (1961).

Moreover, SFC’s ability to enforce its right to source is not only consistent with the objectives
of the GPLs. It is also consistent with the academic commentary endorsed by the California Supreme
Court in *Goonewardene*. As the Court noted, “the requirement in the third element 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.”

1 (*Goonewardene, supra*, 6 Cal.5th at 831, quoting Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92
2 Colum. L. Rev. 1358, 1385 (“*Eisenberg*”) (emphasis in original).) Here, the objectives of the enterprise
3 embodied in the GPLs, as set forth in the language of the Preamble quoted above, are “to make sure”
4 that “you have the freedom to distribute copies of free software,” that “you receive the source code or
5 can get it if you want it,” “that you know you can do these things,” and that you “give the recipients [of
6 GPL-licensed software] all the rights that you have.” Recipients of GPL-licensed software, such as SFC,
7 must be able to enforce their right to source code consistent with these objectives. They will only
8 “know” they can get the source code—and be assured of their right to receive it—if they have standing
9 to enforce that right as third-party beneficiaries of the GPLs and the Source Code Provision.

10 Finally, SFC’s ability to enforce its right to source code is also consistent with Professor
11 Eisenberg’s discussion of “donee beneficiaries” and *Seaver v. Ransom*, 120 N.E. 639 (N.Y. 1918) in the
12 article relied upon by the *Goonewardene* Court in establishing this portion of its test. (See
13 *Goonewardene, supra*, 6 Cal.5th at 831; *Wexler v. California Fair Plan Ass’n*, 63 Cal.App.5th 55, 65
14 (2021) (“For doctrinal assistance, the *Goonewardene* court turned to the pathbreaking article by the
15 esteemed contract law scholar Professor Melvin Eisenberg.”).) As Professor Eisenberg’s article states:

16 A third-party beneficiary is a *donee beneficiary* when a performance objective of the
17 contracting parties . . . is to give effect to a donative intention of the promisee by obliging
18 the promisor to render a performance that will benefit the third party. *Seaver v. Ransom*
19 is the paradigmatic case. An analysis of the facts of that case shows why a donee
20 beneficiary should be permitted to enforce a contract ...

21 Recall that a performance objective of the contracting parties in that case, Judge and Mrs.
22 Beman, as manifested in the contract read in the light of surrounding circumstances, was
23 that a gift be made to Mrs. Beman’s niece Marion through the instrumentality of a
24 contract that obliged Judge Beman to leave Marion a certain amount in his will. After
25 Mrs. Beman’s death, Judge Beman broke the contract.

26 On these facts, allowing Marion to enforce the contract was an important if not necessary
27 means of effectuating that performance objective. If the contract could not be enforced
28 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....

29 (*Eisenberg, supra*, 92 Colum. L. Rev. 1358, 1389-90; see also *Goonewardene, supra*, 6 Cal.5th at 829
30 n.3 (referring to *Seaver v. Ransom* as “the classic donee-beneficiary case”).) As Professor Eisenberg
31 concludes, “**allowing donee beneficiaries to enforce contracts under which they will benefit is a
32 necessary or important means of effectuating the performance objectives of the parties to such a
33 contract.**” (*Eisenberg, supra*, 92 Colum. L. Rev. at 1391 (emphasis added).)

1 The same reasoning applies to this case. If recipients of GPL-licensed software, such as SFC,
2 cannot enforce their right to source code, then that right can only be enforced, if at all, only by an
3 upstream licensor who is a party to the contract or by a copyright holder. Like Mrs. Beman's estate in
4 *Seaver v. Ransom*, however, the upstream licensor and the copyright holder would have no economic
5 incentive to enforce the Source Code Provision in the GPLs because they would bear all the costs of
6 enforcement while the recipients of GPL-licensed software would reap all the benefits of the source
7 code—*i.e.*, the ability to modify that source code and create new works based on the software.
8 Furthermore, allowing the recipients of licensed software, such as SFC, to enforce their right to source
9 code would not expand the obligation of distributors of GPL-licensed software, such as VIZIO, to share
10 the source code—an obligation they assumed upon accepting the contracts in the first place, just like
11 Judge Beman in *Seaver v. Ransom*. (See 13 Williston on Contracts § 37:13 (4th ed.) (“The modern third
12 party beneficiary doctrine ... embraces, as perhaps its chief virtue, the procedure which led to the need
13 for its creation in the first place; it gives control of contract enforcement in the hands of the party most
14 likely to be motivated to seek to enforce the contract—the beneficiary.”).)

15 Accordingly, for all the above reasons, this Court should conclude that allowing SFC to enforce
16 its right to the source code through a breach of contract claim as a third-party beneficiary of the GPLs
17 is consistent with the objectives of the GPLs. SFC thus satisfies the first part of the third element of the
18 *Goonewardene* test.

19 **2. *Allowing SFC to Enforce Its Right to Source Code as a Third-Party Beneficiary of***
20 ***the GPLs Is Consistent With the “Reasonable Expectations of the Contracting***
21 ***Parties.”***

22 The second prong of the third element of the *Goonewardene* Court's test for third party
23 beneficiary standing provides that “third party enforcement be consistent as well with ‘the reasonable
24 expectations of the contracting parties’ ...” (*Goonewardene*, 6 Cal.5th at 830.) In discussing this prong,
25 the Court has explained that “the parties to a contract are typically focused on the terms of performance
26 of the contract rather than on the remedies that will be available in the event of a failure of performance.”
27 (*Id.*, citing *Eisenberg*, *supra*, 92 Colum. L. Rev. at 1388.) Therefore, a third party is “not required [to
28 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.*) “Accordingly, the third
element does not focus upon whether the parties specifically intended third party enforcement.” (*Id.*)

It is well settled under California law that the plain text of the contracts governs the “reasonable
expectations of the contracting parties.” As the California Supreme Court has stated, “Ascertaining . . .

1 intent [to benefit a third party] is a question of ordinary contract interpretation.” (*Hess v. Ford Motor*
2 *Co.* (2002) 27 Cal.4th 516, 524. *See also Lloyd’s Underwriters v. Craig & Rush, Inc.* (1994) 26
3 Cal.App.4th 1194, 1197 (“[T]he objective intent, as evidenced by the words of the contract, is
4 controlling”); *La Jolla Beach & Tennis Club, Inc. v. Indus. Indem. Co.* (1994) 9 Cal. 4th 27, 37 (“If
5 contractual language is clear and explicit, it governs”).)

6 Here, the plain text of the GPLs compels the conclusion that allowing third parties such as SFC
7 to enforce their right to the source code as third-party beneficiaries of the GPL and its Source Code
8 Provision is consistent with the reasonable expectation of the contracting parties. As the Preamble to
9 the GPLs clearly states:

10 [I]f you distribute copies of [software licensed under the GPLs], whether gratis or for a
11 fee, ***you must give the recipients all the rights that you have. You must make sure***
12 ***that they, too, receive or can get the source code. And you must show them these***
13 ***terms so they know their rights.***

14 (UMF No. 30; GPLv2, Preamble, ¶ 4, found at Appx., Exhibit “1”; LGPLv2.1, Preamble, ¶ 5, found at
15 Appx., Exhibit “2” (emphasis added).) Moreover, the Source Code Provision itself references the rights
16 of third parties such as SFC, specifically stating that a distributor of a GPL-licensed Program such as
17 VIZIO may accompany that program with ***a written offer***, valid for at least three years, ***to give any third***
18 ***party ... a complete machine-readable copy of the corresponding source code.***” (UMF No. 23; GPLv2,
19 § 3, found at Appx., Exhibit “1” (emphasis added).) This reference to third parties in the GPL caused
20 this Court to point out, in one of its prior rulings, that “***the source code provision specifically mentions***
21 ***third party rights ...***” (*See* Appx., Exhibit “7”, at p. 9.)

22 The above language from the GPLs clearly establishes that the contracting parties to the GPLs
23 reasonably expected that recipients of GPL-licensed software such as SFC had the right to receive source
24 code—a right such recipients could enforce only through a breach of contract claim as third-party
25 beneficiaries of the GPLs. For this reason, allowing third parties to enforce their right to the source code
26 under the GPLs is consistent with the reasonable expectation of the contracting parties.

27 Such a conclusion is compelled by the Court of Appeal’s ruling in *Hom v. Petrou* (2021) 67
28 Cal.App.5th 459. In *Hom*, two lenders who were non-signatories to a lease contended that they were
third-party beneficiaries of the attorneys’ fees provision in the lease. The Court of Appeal concluded
that “[t]here can be little doubt that Petrou and Utter [the two lenders] qualify as third party beneficiaries
of the lease as a whole.” (*Id.* at 472.) In so ruling, the court relied upon the fact that “two of the lease’s
nine pages specify the rights such lenders would have with respect to the lease.” (*Id.*) As the court

1 concluded, “[p]ermitting Petrou and Utter to obtain benefits under the lease is therefore consistent with
2 the parties’ expectations.” (*Id.*) Here, as well, the fact that the GPLs specify in great detail the rights of
3 third parties to receive source code compels the conclusion that permitting such third parties to enforce
4 their right to source code is consistent with the parties’ expectations.

5 Moreover, VIZIO’s own statements further compel the conclusion that permitting third parties
6 such as SFC to enforce their rights to the source code under the GPLs aligns with the reasonable
7 expectations of the contracting parties. In a filing with the Securities and Exchange Commission in
8 March 2021, ***before SFC filed its Complaint in this action, VIZIO specifically conceded that it “could***
9 ***be subject to suits and liability for ... breach of contract by parties ... demanding release of, what we***
10 ***believe to be open source software or noncompliance with open source licensing terms,”*** such as in
11 the GPLs. (UMF No. 43; Appx., Exhibit “11” (selected pages from VIZIO’s SEC filing) (emphasis
12 added).) VIZIO’s statement compels the conclusion that VIZIO reasonably expected it could be held
13 liable for failing to comply with the Source Code Provision by parties bringing claims as third-party
14 beneficiaries of the GPLs (since only third-party beneficiaries could demand release of source code as a
15 legal remedy). For this reason, SFC also satisfies this portion of the third element of the *Goonewardene*
16 test.

17 Previous statements by the FSF and Bradley Kuhn of SFC, upon which this Court relied in
18 denying SFC’s earlier motion for summary adjudication (*see* Appx., Exhibit “8”, at pp. 2-5) do not
19 change the above conclusion. First, in a declaration submitted in support of SFC’s Motion, the Executive
20 Director of the FSF confirms that: (i) the FSF never intended to restrict, hinder, or limit any means for
21 users to assert their rights and freedoms under the GPLs through methods other than a straightforward
22 claim under copyright law; and (ii) the FSF believes that third parties that request complete and
23 corresponding source code under the GPLs are entitled to receive that source code. (UMF Nos. 44, 45;
24 Declaration of Zoe Kooyman, attached hereto (“Kooyman Decl.”), ¶¶ 17, 20.) Moreover, since this
25 Court’s previous ruling, the FSF has changed the language of its FAQ entry to better reflect the above
26 positions. (Kooyman Decl., ¶¶ 22-26; Appx., Exhibit “12”.) Among other things, the FAQ now
27 “encourage[s] the use of any legal mechanism to users for obtaining complete and corresponding source
28 code, as is their right... After all, we developed the GNU GPL to make software free for all its users.”
(Appx., Exhibit “12”.)

Second, the FSF’s after-the-fact pronouncements have no relevance whatsoever to the reasonable
expectations of the contracting parties, for at least two reasons. First, “[u]nder long-standing contract

1 law, a ‘contract must be so interpreted as to give effect to the *mutual intention* of the parties as it existed
2 *at the time of contracting....*’” (*Hess, supra*, 27 Cal.4th at 524, *quoting* Cal. Civ. Code § 1636 (emphasis
3 added).) “[T]he relevant intent is ... the objective intent as evidenced by the words of the instrument,
4 not a party’s subjective intent.” (*Shaw v. Regents of Univ. of California*, 58 Cal.App.4th 44, 54-55
5 (1997).) That is particularly true with form contracts, such as the GPLs. (*See, e.g., Williams v. Apple,*
6 *Inc.*, 338 F.R.D. 629, 638 (N.D. Cal. 2021) (applying California law); *Lloyd’s Underwriters v. Craig &*
7 *Rush, Inc.* (1994) 26 Cal.App.4th 1194, 1197.) Form contracts are construed “wherever reasonable as
8 treating alike all those similarly situated, with regard to their knowledge or understanding of the standard
9 terms of the writing.” (*Williams*, 338 F.R.D. at 638.) The goal is “to effectuate the reasonable
10 expectations of the average member of the public who accept [it].” (*Id.* (quoting Restatement (Second)
of Contracts § 11 comment e).)

11 Here, however, the pronouncements by the FSF were not made at the time of contracting. Rather,
12 they were issued anywhere from 10 to 32 years after the GPLv2 was drafted in 1991. Second, the FSF
13 is not even a party to the GPLs for many of the works at issue in this case. Therefore, its pronouncements
14 have no bearing whatsoever on the reasonable expectations of the contracting parties to the GPLs.²
15 Furthermore, allowing the FSF’s old pronouncements to influence the interpretation of the GPLs would
16 undermine the purpose of having a single form contract to uniformly and predictably govern a multitude
17 of licensing relationships. Not every party to the GPL will have read FSF’s old pronouncements; indeed,
18 many may not even be aware of them. However, if those old pronouncements are used to interpret the
19 GPLs, there is a significant risk of creating effectively two different versions of the same GPL: one for
20 those who are familiar with the old pronouncements, and one for the many who are not. The Preamble,
21 in contrast, always accompanies the GPLs prominently and is unmistakable to anyone considering
22 whether to accept its terms.

23 ² For these same reasons, any reliance on statements made by SFC representative Bradley Kuhn is
24 misplaced. Kuhn’s statements were made more than ten years ago. Moreover, Kuhn’s after-the-fact
25 opinions have no bearing on the reasonable expectations of the actual contracting parties. Kuhn is not
26 a lawyer, and his lay legal opinions are, at best, a reflection of the conventional wisdom at the time in
27 2012 and 2014. In any event, in his declaration attached hereto, Kuhn explains in great detail why these
28 statements are not relevant to the Motion and how his views about enforcement of the GPLs have
changed over time, noting that he “never intended any of [his] prior statements to restrict, hinder, or
limit any means for users to assert their rights and freedoms under the GPL Agreements through methods
other than a straightforward copyright claim.” (*See* Kuhn Decl., ¶ 36; *id.*, ¶¶ 27-37.)

1 Accordingly, this Court should ignore these irrelevant pronouncements, accept the arguments
2 advanced by SFC, and rule that SFC has satisfied all three elements of the *Goonewardene* test, thereby
3 qualifying as a third-party beneficiary of the GPLs. For this reason, this Court should grant the Motion
4 and enter judgment as a matter of law in favor of SFC on Issue Nos. 2 and 3.

5 **VII. CONCLUSION**

6 For all the foregoing reasons, Plaintiff Software Freedom Conservancy, Inc. respectfully requests
7 that this Court grant its Motion for Summary Adjudication of Issues and rule that SFC is entitled to
8 judgment as a matter of law on Issues 1 through 3, herein.

9 DATED: May 23, 2025

VAKILI & LEUS, LLP

10
11 By: 

Sa'id Vakili, Esq.

David N. Schultz, Esq.

*Attorneys for Plaintiff Software Freedom
Conservancy, Inc.*

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18

6
7
8
9
10
11
12
13
14
15
16
17
18

22
23
24
25
26
27
28

1 6. The FOSS model software development creates high-quality software of interest to both
2 commercial and non-commercial entities. In addition, the diversity of contribution generates more
3 reliable, robust, and useful software than closed and proprietary models of development.

4 7. The GNU General Public License Version 2.0 (the “GPLv2”) and the GNU Lesser
5 General Public License Version 2.1 (the “LGPLv2.1”) (collectively, the “GPL Agreements”), the
6 agreements involved in this action, are two of the most vital, widely used, and successful software
7 license agreements. As discussed further below, the GPL Agreements have played a central role in the
8 development of FOSS.

9 8. I am very familiar with the GPL Agreements as a result of my work and experience
10 described below, including my work as Policy Fellow at SFC and previous roles at SFC. True and
11 correct copies of the GPLv2 and the LGPLV2.1 are attached as **Exhibit “1”** and **Exhibit “2”**,
12 respectively, to the Appendix of Exhibits in support of the Motion, submitted separately herewith (the
“Appendix”).

13 9. Software released under the GPL Agreements helps operate such consumer equipment as
14 wireless home routers and television sets.

15 **EXECUTABLE CODE AND SOURCE CODE**

16 10. Most software is distributed in an obfuscated form, which is sometimes called “binaries”
17 or “object code”. Computers process software in this form easily but humans cannot. For this reason,
18 these forms of software are said to be “executable.” This obfuscation originates primarily because of
19 technical necessity. Computers must be instructed very precisely in “binary”, which encodes
20 information in zeroes and ones. A computer can only execute and run software encoded in binary. (A
21 long sequence of ones and zeroes is said to be “in binary.”) If such code is stored in a computer file, the
file is said to be a “binary file” or just “a binary.”

22 11. Because humans cannot easily understand binary, it is impractical for humans to try to
23 instruct a computer by writing the instructions in binary. Instead, humans use programming languages
24 to instruct computers. These programming languages are usually formally specified and must be written
25 meticulously and precisely. Software written in such languages is also called “source code”. Unlike
26 executable code encoded in binary, this “source code” is designed for human programmers to
27 understand. A program written in a programming language is known as “source code” or sometimes
28 simply as “source”. Also, referring to something colloquially as just “code” without further context
usually means “source code”.

1 12. Anyone who is familiar with the programming language will not only be able to
2 understand the source code but will also be able to make changes to the source code, and by doing so,
3 change the instructions that the computer or other device using the program receives and carries out.

4 13. The source code must be “compiled” into an executable code (encoded in binary) that
5 the computer is able to read, run, and execute.

6 **MY EDUCATIONAL BACKGROUND AND WORK EXPERIENCE**

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

11 15. I worked professionally as a software developer and computer systems administrator
12 from 1991 to 2001 – specializing in FOSS systems such as Linux. In addition, since 1998, I have focused
13 much of my career on the technical aspects of compliance with the GPL Agreements. For 25 years, I
14 have regularly performed and/or supervised analyses of binary files found in products to determine
15 whether software governed by the GPL Agreements is present in those products. I also regularly perform
16 and/or supervise analyses of source code to test whether that source code “corresponds” to the executable
17 and object code found in such products. I have worked on at least hundreds of matters of this type. I
18 continue to carry out work of this nature at least monthly, and often more frequently. I have presented
19 this work regularly at key industry conferences and events. I am well respected and consulted by
20 colleagues throughout the software industry for my knowledge on these issues.

21 16. In addition to the above work, I also contribute regularly to the improvement of the FOSS
22 systems that are used at SFC – not only as a FOSS programmer, but in the other forms of contribution
23 essential to FOSS such as system deployment, DevOps, documentation, and packaging.

24 **THE GPL AGREEMENTS AND SFC**

25 17. The GPL Agreements have been very successful in fostering the development of FOSS.
26 The GPL Agreements have been instrumental in fostering FOSS development because they guarantee
27 third parties’ access to the source code (and related materials) that correspond to any distributed
28 executable encoded in binary. Because humans cannot understand binary, it is extremely difficult, if not
impossible, to study and modify software without obtaining the corresponding source code.

1 18. FOSS developed under the GPL Agreements is commonly found “embedded” in
2 consumer and other off-the-shelf devices, such as wireless routers and smart TVs. The Linux kernel,
3 the basis for a popular computer operating system, and the GNU C Library (glibc), a core library for that
4 operating system, are just two prominent examples of FOSS developed under the GPL Agreements.

5 19. SFC defends the status of FOSS by ensuring that FOSS remains “free” and available to
6 anyone who wants to use, change, distribute, and/or reinstall it. As part of this purpose, SFC engages in
7 enforcement activities regarding the GPL Agreements.

8 20. An important part of SFC’s mission is ensuring that source code remains accessible and
9 available for further development. When companies that incorporate FOSS into their products fail to
10 comply with their obligations, SFC tries to educate them to comply with the GPL Agreements. SFC
11 occasionally finds it necessary to bring lawsuits to enforce the GPL Agreements.

12 **MY ACTIONS ON BEHALF OF SFC IN CONNECTION WITH THIS LITIGATION**

13 21. In July 2021, on behalf of SFC, I purchased certain models of VIZIO “Smart TVs,”
14 including model numbers V435-J01, D32h-J09, and M50Q7-J01.

15 22. That same month, I initiated an investigation to determine if these Smart TVs contained
16 any software that was subject to the GPL Agreements. With the help of volunteers, I extracted various
17 binary files from the Smart TVs.

18 23. I found that these Smart TVs contained many executables encoded in binary and libraries
19 encoded in binary that were versions of software subject to the GPL Agreements. I recognized that these
20 software programs were subject to the GPL Agreements based on my extensive experience in the FOSS
21 industry and by using standard, common tools available on a Linux system to examine these binary files.
22 This examination confirmed that the software programs were subject to the GPL Agreements.

23 24. On or about April 13, 2023, I reviewed the offer to provide source code that VIZIO made
24 in connection with the Smart TVs that I had purchased from VIZIO on behalf of SFC. Specifically, I
25 booted the D32h-J09 (which I had previously purchased on SFC’s behalf in July 2021), followed on-
26 screen instructions to connect the device to the Internet, and then chose the menu options: “Extras ⇒
27 About ⇒ License”.

28 25. I verified that this offer matched the text set forth in a collection of screenshots taken
from a VIZIO Smart TV that were collectively attached as Exhibit 5 to the Declaration of Michael E.
Williams in support of VIZIO’s opposition to SFC’s Motion to Remand, filed on April 22, 2022, while

1 this action was pending in the United States District Court for the Central District of California. A true
2 and correct copy of that collection of screenshots is attached as **Exhibit “3”** to the Appendix.

3 26. On or about April 26, 2023, I instructed Paul Visscher, the Systems Administrator for
4 SFC, to contact VIZIO to request the complete, corresponding source code pursuant to the offer for
5 source code that I had previously reviewed on April 13, 2023.

6 **MY PREVIOUS COMMENTS REGARDING THE GPL AGREEMENTS**

7 27. More than 13 years ago, I wrote an article (dated February 1, 2012) entitled “Some
8 Thoughts on GPL Enforcement.” I am aware that, in its Minute Order concerning SFC’s prior Motion
9 for Summary Adjudication (dated March 26, 2024), this Court quoted from that article, stating that “[a]s
10 far back as 2012, Bradley Kuhn, SFC’s President, stated ‘the parties who may enforce are copyright
11 holders[.]’” I am not qualified to give legal advice nor interpret the law, and I say that often in my public
12 statements. Rather, the purpose of the article, as stated in its opening paragraphs, was to summarize
13 material from a specific set of talks that I had given in years prior to 2012 about enforcement of the GPL
14 Agreements using copyright mechanisms.

15 28. I am also aware that, in its Minute Order, the Court included the following language: “In
16 a tutorial and guide published as a joint project by SFC and FSF, it states that copyright holders are
17 ‘ultimately the sole authorities’ to ‘protect the right of users’ and ‘have historically been the actors in
18 GPL enforcement.’” I was the editor-in-chief of this guide, and the language of the guide quoted by the
19 Court was last edited by me on or about November 10, 2014. Once again, the purpose of the guide was
20 not to provide legal advice or interpret the law. Rather, the purpose of the guide was to provide a basic
21 introduction regarding enforcement of the GPL Agreements.

22 29. While I did serve for many years as the editor-in-chief of the aforementioned guide, due
23 to time constraints from my other duties at SFC, I lacked sufficient time to make a full editorial review
24 of every sentence in the material. Rather, I did the bare minimum to merge freely licensed texts from
25 many sources into the document – including text that I had written years before that.

26 30. The aforementioned guide is stored in a public revision control system, wherein everyone
27 in the public can review all changes made to the document, who made those changes, and the date and
28 time stamp of when the changes were made.

31. On or about May 21, 2025, I reviewed that revision control data and found that the section
quoted in the Minute Order – which I edited on or about November 10, 2014 – was a minimal
“wordsmith rewrite” of text written by others circa 2008.

1 32. I recall that I was working rapidly in November 2014 to integrate third-party texts into
2 that guide due to unrelated deadlines. Such work is error-prone when done quickly.

3 33. When I wrote “Some Thoughts on GPL Enforcement” in 2012, and when I edited the
4 guide on or about November 2014, I uncritically focused on points regarding copyright mechanisms for
5 enforcement of the GPL Agreements.

6 34. Historically, I was laser-focused on the copyright mechanisms for enforcement of the
7 GPL Agreements. I was so-focused for various reasons – including but not limited to the fact that SFC
8 was engaged in copyright litigation regarding its own copyrights in the BusyBox package from (on or
9 about) December 19, 2007 until (on or about) September 20, 2012.

10 35. As I stated in my deposition to VIZIO, taken by Mr. Michael E. Williams on June 6,
11 2023: “[it]’s certainly my view and the view of many that there are lots of mechanisms to enforce the
12 GPL, and the copyright rules are one of them”, and “we [software freedom activists] have certainly
13 talked throughout the history of GPL that whatever method we could use for the enforcement of GPL to
14 assure rights of users should be used.” (Transcript of Deposition of Bradley M. Kuhn, dated June 6,
15 2023, at 206:2-12.) A true and correct copy of the relevant pages from the transcript of my June 6, 2023
16 deposition is attached as **Exhibit “13”** to the Appendix.

17 36. I never intended any of my prior statements to restrict, hinder, or limit any means for
18 users to assert their rights and freedoms under the GPL Agreements through methods other than a
19 straightforward copyright claim.

20 37. In this proceeding, I have learned that courts in cases such as *Versata Software, Inc. v.*
21 *Ameriprise Financial Services* and *Artifex Software, Inc. v. Hancom, Inc.* have ruled that the GPL
22 Agreements could be enforced as contracts. Therefore, persons and entities other than copyright holders
23 have now been “the actors in GPL enforcement”. This has led me to no longer laser-focus on copyright
24 mechanisms for enforcement of the GPL Agreements.

25 I declare under penalty of perjury under the laws of the State of California that the foregoing is
26 true and correct. Executed on May 23, 2025, in Portland, Oregon.

27 

28 _____
Bradley M. Kuhn

DECLARATION OF PAUL VISSCHER

I, PAUL VISSCHER, state and declare as follows:

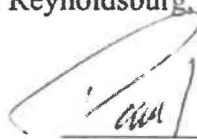
1. I am over the age of 18 and the current Systems Administrator for Software Freedom Conservancy, Inc. ("SFC"), the Plaintiff in this action. I have held the position of Systems Administrator for SFC since February 2023. I am submitting this declaration in support of SFC's Motion for Summary Adjudication of Issues in this action (the "Motion"). 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.

2. In March or April 2023, I learned from Bradley Kuhn of SFC that Defendant VIZIO, Inc. ("VIZIO") was offering to provide applicable source code upon request for its Smart TVs that contained executable codes and libraries that were subject to the terms of the GNU General Public License and the GNU Lesser General Public License. I was asked by Mr. Kuhn to contact VIZIO to request the source code for one of VIZIO's Smart TVs.

3. On or about April 26, 2023, I contacted VIZIO support online and requested, on behalf of SFC, the applicable source code for VIZIO's Smart TV Model No. D32h-J09. True and correct copies of the screenshots of my Live Chat with a VIZIO representative named Jonah, in which I state, among other things, that "I am requesting applicable source code for this TV, as offered in the Extras -> About -> Licenses submenu," is attached as **Exhibit "4"** to the Appendix of Exhibits in support of the Motion, submitted separately herewith.

4. Soon thereafter, around May 6, 2023, I received a package from "VIZIO Service" in Dakota Dunes, South Dakota, which contained a 16 gigabit USB drive. which contained source code. Although I do not believe I examined the contents of the files on the drive, I saw that the drive contained a folder that contained multiple files that, based on their filenames, I assumed were source code.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 23, 2025, at Reynoldsburg, Ohio.



Paul Visscher

DECLARATION OF SA'ID VAKILI

I, SA'ID VAKILI, state and declare as follows:

1. I am a partner with the law firm of Vakili & Leus, LLP, counsel of record for Plaintiff Software Freedom Conservancy, Inc. ("SFC") in this action. I submit this declaration in support of SFC's Motion for Summary Adjudication of Issues in this action (the "Motion"). Through my representation of SFC 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. With respect to the documents identified in this declaration, except where otherwise specifically noted, each and every one of these documents is part of my firm's litigation files with respect to this action, which I maintain and with which I am familiar. In the ordinary course of business, such documents are made a part of the litigation file when received by my offices from other counsel or the Court, or when created by counsel for SFC

2. On October 19, 2021, SFC filed its Complaint in this action, alleging two state law causes of action for breach of contract and declaratory relief. In response, on November 29, 2021, VIZIO filed a Notice of Removal in this action, removing the action to the United States District Court for the Central District of California (the "Federal Court"). In response to the Notice of Removal, SFC filed a motion to remand the action to this Court (the "Motion to Remand").

3. Attached as **Exhibit "5"** to the Appendix of Exhibits in support of the Motion, submitted by SFC separately herewith (the "Appendix of Exhibits"), is a true and correct copy of a Declaration of Michael E. Williams, one of the attorneys for VIZIO, dated April 22, 2022, and submitted by VIZIO in opposition to the Motion to Remand. As may be seen by a review of **Exhibit "5"**, Mr. Williams describes Exhibit 5 to his declaration, as "a true and correct copy of a collection of screenshots taken from a VIZIO television showing step-by-step navigation to the 'License List' menu on the user interface of the television." A true and correct copy of Exhibit 5 to the Williams Declaration is also attached as **Exhibit "3"** to the Appendix of Exhibits.

4. On May 13, 2022, the Federal Court, the Honorable Josephine L. Staton presiding, issued an order granting SFC's Motion to Remand and remanding this action to this Court (the "Remand Order"). A true and correct copy of the Remand Order is attached as **Exhibit "6"** to the Appendix of Exhibits.

1 5. Attached as **Exhibit “7”** to the Appendix of Exhibits is a true and correct copy of this
2 Court’s Minute Order, dated December 29, 2023, denying Defendant VIZIO, Inc.’s Motion for
3 Summary Judgment Or In The Alternative For Summary Adjudication.

4 6. Attached as **Exhibit “8”** to the Appendix of Exhibits is a true and correct copy of this
5 Court’s Minute Order, dated March 26, 2024, denying SFC’s Motion for Summary Adjudication as to
6 Issue No. 1 and granting SFC’s Motion for Summary Adjudication as to Issue No. 2.

7 7. Attached as **Exhibit “9”** to the Appendix of Exhibits is a true and correct copy of a
8 printout from the webpage <https://www.vizio.com/en/tv/overview>, entitled “America’s Smart TV.”

9 8. Attached as **Exhibit “10”** to the Appendix of Exhibits is a true and correct copy of a
10 printout of an article from Wikipedia, entitled “Smart TV,” found at
https://en.wikipedia.org/wiki/Smart_TV.

11 9. Attached as **Exhibit “11”** to the Appendix of Exhibits are true and correct copies of
12 selected pages from a Form S-1 Registration Statement Under The Securities Act of 1933, filed by
13 VIZIO Holding Corp. with the United States Securities and Exchange Commission on March 1, 2021.

14 10. Attached as **Exhibit “12”** to the Appendix of Exhibits is a true and correct copy of the
15 “Frequently Asked Questions about the GNU Licenses,” printed from [https://www.gnu.org/licenses/gpl-](https://www.gnu.org/licenses/gpl-faq.html#WhoHasThePower)
16 [faq.html#WhoHasThePower](https://www.gnu.org/licenses/gpl-faq.html#WhoHasThePower) on May 22, 2025.

17 I declare under penalty of perjury under the laws of the State of California that the foregoing is
18 true and correct. Executed on May 23, 2025, at Los Angeles, California.

19 
20 SA'ID VAKILI, DECLARANT

DECLARATION OF ZOË KOOYMAN

I, ZOË KOOYMAN, state and declare as follows:

1. I am over 18 and currently serve as the Executive Director of the Free Software Foundation (“FSF”). I possess personal and organizational 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 those 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. The FSF is a 501(c)(3) nonprofit charitable organization incorporated in Massachusetts.

3. I have been the full-time Executive Director of the FSF since March 2022. Before that, I worked as the full-time Program Manager at the FSF beginning in 2019.

4. Vizio subpoenaed the Person Most Knowledgeable (“PMK”) for FSF in this case. On May 1, 2024, Vizio deposed me as the PMK for the FSF.

5. The FSF provides the infrastructure for, and is the original and sole sponsor of, the GNU Project—an initiative that was announced in 1983 to create a complete computer operating system, enabling users to run, study, copy, share, modify, distribute, and/or install the system.

6. The GNU system is widely used and redistributed today, often in combination with the kernel called Linux, resulting in a system that is generally referred to as GNU/Linux.

7. Many components in GNU/Linux systems are published under licenses known as “copyleft” licenses. These licenses are designed to protect the rights of third parties to run, study, copy, share, modify, distribute, and/or install the software.

8. The FSF has historically fulfilled three important and distinct roles in the realm of copyleft licensing.

9. First, the FSF functions as the license steward and publisher of a collection of copyleft licenses (“The GNU licenses”), which include the GNU General Public License, version 2

1 (“GPLv2”), and the GNU Lesser General Public License (“LGPLv2.1”)—both of which are at issue
2 in this case.

3 10. Second, based on information and belief, the FSF has developed numerous software
4 packages for the GNU system, both created by staff programmers as well as coordinated through
5 volunteer efforts. The FSF typically publishes these packages under one of the GNU licenses.

6 11. Third, the FSF holds the copyright for many GNU packages. This is either because
7 the packages were created for the GNU system by FSF staff or, more commonly, because volunteers
8 have chosen to assign their own copyrights to the FSF.

9 12. Based on the information available to me, I have learned that when the FSF was
10 founded in 1985, and for many years thereafter, it was the only organization involved in any of these
11 three activities.

12 13. As part of FSF’s activities we publish numerous materials to support our advocacy
13 goals for software freedom across all three of these areas. Many of these documents, such as the
14 Frequently Asked Questions about the GNU licenses (“The FAQ”), address issues that may relate to
15 one, both, or all three of these copyleft-related activities.

16 14. Since the FSF holds many copyrights licensed under the GNU licenses, we have
17 historically focused our efforts on ensuring compliance with these licenses through the methods
18 available to us under copyright.

19 15. I understand, on information and belief, that questions have arisen in this action
20 regarding the FSF’s intentions concerning the enforcement and enforceability of the GNU licenses.

21 16. Regarding its own copyrights, the FSF has historically focused its enforcement
22 activities exclusively on copyright. This effort has included considerable promotion and
23 encouragement, such as persuading volunteers to assign copyrights to the FSF.

24 17. Despite the FSF’s historical focus and choices, it never intended to restrict, hinder, or
25 limit any means for users to assert their rights and freedoms under the GNU licenses through methods
26 **other** than a straightforward copyright claim.
27
28

1 18. In every version of all GNU licenses, the FSF clearly states in the Preamble that we
2 intend for users of the software to receive the rights and freedoms described in that license.

3 19. When the FSF learned about this action, we understood that SFC was pursuing this
4 matter as a third-party beneficiary claim.

5 20. The FSF believes that third-party users who request the complete and corresponding
6 source code under an offer for source under the GNU licenses are entitled to receive that source code.

7 21. The FSF welcomes and celebrates any mechanism that enables users to adjudicate
8 their rights to receive complete, corresponding source code—including mechanisms that can be
9 pursued without assistance from the software's copyright holder.

10 22. Based on information and belief, The FAQ contains numerous answers that the FSF
11 drafted over a span of at least 20 years.

12 23. The FSF does not publish The FAQ as a formal policy position statement; rather, The
13 FAQ serves as an informal educational resource for the public.

14 24. The FSF clearly states at the top of The FAQ: “the[se entries] are not legal advice.
15 The FSF cannot give legal advice. Legal advice is personalized advice from a lawyer who has agreed
16 to work for you. Our answers address general questions and may not apply in your specific legal
17 situation.”

18 25. While the FSF occasionally revisits answers in The FAQ to ensure they are the best
19 possible responses available, it operates as a small charity with limited resources. Consequently, the
20 FSF cannot systematically conduct such reviews. Nevertheless, when new pertinent information
21 becomes available, the FSF recognizes the need to provide updated information and strives to do so
22 as promptly as possible.

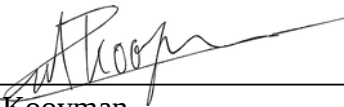
23 26. After the FSF learned of this litigation, it reviewed The FAQ entry captioned "Who
24 has the power to enforce the GPL." Following internal consideration and evaluation, the FSF
25 concluded that the answer needed updating. A true and correct copy of the updated answer is
26 attached as Exhibit “12” to the Appendix of Exhibits in support of the Motion. As may be seen by
27 reviewing the updated answer, The FAQ entry now states as follows:
28

Who has the power to enforce the GPL? (#WhoHasThePower)

Since the GPL is a copyright license, it can be enforced by the copyright holders of the software. If you see a violation of the GPL, you should inform the developers of the GPL-covered software involved. They either are the copyright holders, or are connected with the copyright holders.

In addition, we encourage the use of any legal mechanism available to users for obtaining complete and corresponding source code, as is their right, and enforcing full compliance with the GNU GPL. After all, we developed the GNU GPL to make software free for all its users.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 23, 2025 in Basel, Switzerland.


Zoë Kooyman

1 **PROOF OF SERVICE**

2 *Software Freedom Conservancy, Inc. v. VIZIO, Inc., et al.*
3 *OCSC Case No.: 30-2021-01226723-CU-BC-CJC*

4 I am employed in the County of Los Angeles, State of California. I am over the age of 18 and
5 not a party to the within action. My business address is 3701 Wilshire Boulevard, Suite 1135, Los
6 Angeles, California 90010.

7 On May 23, 2025, I served the foregoing document described as **PLAINTIFF SOFTWARE
8 FREEDOM CONSERVANCY, INC.'S NOTICE OF MOTION AND MOTION FOR
9 SUMMARY ADJUDICATION OF ISSUES; MEMORANDUM OF POINTS AND
10 AUTHORITIES, AND DECLARATIONS OF BRADLEY KUHN, PAUL VISSCHER, SA'ID
11 VAKILI, AND ZOE KOOYMAN IN SUPPORT THEREOF** on all interested parties in this action
12 at the addresses listed below, as follows:

13 **QUINN EMANUEL URQUHART & SULLIVAN, LLP**

14 Michael E. Williams, Esq. (michaelwilliams@quinnemanuel.com)

15 Daniel C. Posner, Esq. (danposner@quinnemanuel.com)

16 John Z. Yin, Esq. (johnyin@quinnemanuel.com)

17 Arian J. Koochesfahani, Esq. (ariankoochesfahani@quinnemanuel.com)

18 865 South Figueroa Street, 10th Floor

19 Los Angeles, California 90017-5003

20 **213/443-3000** | Fax: 213/443-3100

21 *Counsel for Defendant Vizio, Inc.*

22 ☐ OVERNIGHT DELIVERY (DROP-OFF) (CCP §1013(c)). By placing a true copy
23 thereof enclosed in a sealed envelope or package as designated by an overnight mail courier, addressed
24 as above, and depositing said envelope or package, with delivery fees provided for, in a box regularly
25 maintained by the overnight mail courier at 3701 Wilshire Boulevard, Los Angeles, California 90010.

26 ☒ VIA ELECTRONIC TRANSMISSION. I caused to be transmitted a true copy thereof
27 to the designated counsel listed above to his respective e-mail address, pursuant to California *Code of*
28 *Civil Procedure* § 1010.6. I did not receive, within a reasonable time after the transmission, any
electronic message or other indication that the transmission was unsuccessful.

☐ PERSONAL DELIVERY. I caused to be served by messenger for personal delivery that
same day the foregoing documents in a sealed envelope to the above persons at the address(es) listed in
the attached Service List.

I declare under penalty under the laws of the State of California that the above is true and correct.
Executed on May 23, 2025, at Los Angeles, California.

24 Jason C. Ming
25 (Printed Name)


(Signature)

From: donotreply@occourts.org
Subject: Superior Court of California, County of Orange - Motion Reservation Request - CONFIRMATION
Date: May 22, 2025 at 6:22 PM
To: jason@vakili.com

D



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, please place the appropriate Court Reservation number (e.g. 7XXXXXXX) on each Motion being submitted. If multiple motions are submitted on one document, all reservations numbers must be listed on the face page of the pleading.

Please do not reply to this email.

Reservation Number:	74571189
Hearing Date:	October 16, 2025
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:	jason@vakili.com
Requestor Name:	Jason Ming
Requestor Phone:	(213) 380-6010
Filing Party:	Software Freedom Conservancy, Inc.
Date of Request:	May 22, 2025
Time of Request:	6:21 PM
Transaction Number:	1000550918

© 2025 Superior Court of Orange County

This email has been scanned for spam and viruses. Click [here](#) to report this email as spam.