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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE — CENTRAL JUSTICE CENTER

SOFTWARE FREEDOM CONSERVANCY, INC., a New York Non-Profit Corporation, Plaintiff, v. VIZIO, INC., a California Corporation; and DOES 1 to 50, Inclusive, Defendants.	CASE NO.: 30-2021-01226723-CU-BC-CJC COMPLAINT FOR: (1) BREACH OF CONRACT; and (2) DECLARATORY RELIEF JURY TRIAL DEMANDED Assigned for All Purposes Judge Robert J. Moss

COMPLAINT - 1

COMES NOW THE PLAINTIFF, Software Freedom Conservancy, Inc., and alleges as follows against Vizio, Inc. and DOES 1 to 50 (collectively, "Defendants"):

1. This is an action to enforce two vital and ubiquitous software license agreements, the GNU General Public License version 2, also known as "GPLv2," and its close cousin, the GNU Lesser General Public License version 2.1, also known as "LGPLv2.1," together "the GPL Agreements." At their heart is a simple bargain. Recipients of the licensed software are entitled to use, examine, modify, adapt, and improve the software however they see fit. In exchange, the recipients must allow their licensees to use, examine, modify, adapt, and improve the software as they see fit. In this way, the licensed software is continuously being tinkered with, improved upon, re-purposed, and learned from. For this bargain to work, however, all recipients and licensees of the software must have a right to obtain a copy of the software's "source code"—the form of the software that can be understood and edited by computer programmers—so its workings are laid bare. Further, this right must travel with any improvements, adaptations, or other modifications that might have been made to the software, so those new versions may themselves be used, examined, modified, adapted, and improved upon. In contrast to conventional license agreements, nothing is secret under the GPL Agreements. Instead, users of software licensed under these agreements are free to do with the software what they like, so long as they give their users the same freedom.

2. This case primarily concerns the right to obtain source code under the GPLv2 and LGPLv2.1—and how one recipient of software governed by the GPL Agreements has taken full advantage of the rights granted by these agreements but refuses to let others enjoy the same rights.

3. Since their introduction in 1991, the GPL Agreements have been an unqualified success and have given rise to an entirely new way of managing software projects. Entire communities of software developers can make major or incremental improvements to software, fixing bugs, adding new features, and adapting the software to new uses, confident that their contributions can be used by all and will lead to further improvements and innovations. Today, the GPLv2, and its offshoot, the LGPLv2.1, are the software license agreements governing a major mobile operating system, significant components of the Internet, personal electronic devices, wireless routers, and "smart" home appliances.

4. This action seeks to enforce the GPL Agreements with respect to the operating system used by commercially-available "smart TVs" manufactured by the defendant Vizio. Vizio has taken advantage of the hard work performed by the thousands of developers over nearly three decades to build, improve and maintain key components of Vizio's operating system. Yet, Vizio will not comply with its reciprocal obligation to disclose the source code of its versions of these key software programs.

THE PARTIES

5. The plaintiff, Software Freedom Conservancy, Inc. ("Software Freedom Conservancy" or "Plaintiff") is a not-for-profit corporation, organized under the laws of New York, with its principal place of business located at 137 Montague Street, Suite 380 in Brooklyn, New York 11201.

6. Software Freedom Conservancy is centered around ethical technology. Its primary mission is to ensure the right to repair, improve, and reinstall software. It promotes and defends these rights by fostering free (in the sense of "freedom" not "gratis") and open source software ("FOSS") projects, driving initiatives that make technology more inclusive, and advancing policy strategies that defend FOSS.

7. Further to this mission, Software Freedom Conservancy works with companies to obtain their compliance with the software license agreements, such as the GPL Agreements, that govern FOSS projects and make them possible. This lawsuit to enforce the GPL Agreements governing Defendants' use of certain FOSS programs is thus part of Software Freedom Conservancy's mission to promote FOSS projects.

8. Plaintiff is a purchaser of several of the Defendants' smart TVs and is a third-party beneficiary of the GPL Agreements.

9. The defendant Vizio, Inc. ("Vizio") is a for-profit corporation, organized under the laws of California and registered and qualified to do business in California, with its principal place of business located at 39 Telsa in Irvine, California 92628.

10. Vizio manufactures, among other things, "smart TVs," which are essentially televisions with computers built in to enable streaming and sophisticated user interfaces.

11.   According to the online records of the California Secretary of State, Vizio may be served with process at its registered agent for the service of process, Registered Agent Solutions, Inc., 1220 S Street, Suite 150 in Sacramento, California 95811.

12.   The true names or capacities, whether individual, associate, corporate, or otherwise, of those defendants sued herein as DOES 1 to 50 ("Doe Defendants"), inclusive, are currently unknown to Plaintiff, who therefore sues said Doe Defendants by such fictitious names pursuant to section 474 of the California *Code of Civil Procedure* (hereafter, "Cal. Code Civ. Proc."). Each of the Doe Defendants is in some manner responsible for the actions or events described herein. Plaintiff will seek leave of court to amend this Complaint to reflect the true names and capacities of those defendants designated hereinafter as Does when such identities become known.

JURISDICTION AND VENUE

13.   This Court has subject matter jurisdiction over the claims raised herein, pursuant to the California Constitution art. VI, § 10 and Cal. Code Civ. Proc. § 410.10, as the claims contain causes of action colorable under California law, which are not given by statute to the jurisdiction of any other court.

14.   Venue as to defendant Vizio is proper in this judicial district pursuant to Cal. Code Civ. Proc. § 395, as it has its principal place of business in Orange County and has substantial, continuous, and systematic contacts with Orange County; the subject causes of action arose, in whole or part, in Orange County; the subject occurrences, events, and acts substantially took place, and caused damages in this judicial district; and Vizio caused injuries and damages to Plaintiff in this judicial district.

FACTUAL ALLEGATIONS

A.   The GNU General Public and Lesser General Public Licenses

15.   The GPLv2 was designed as a general-purpose software license. The LGPLv2.1 is a modification of the GPLv2 license, intended for use with a category of software known as "libraries." In computer programming, a "library" is a stable set of resources that can be used by computer programs. Thus, different programs can take advantage of the same set of resources rather than having multiple copies installed within each different computer program.

16.   The GNU Library General Public License version 2.0 was released contemporaneously with the GPLv2 in June 1991. In 1999, minor changes were made to version 2 of the "Library" license, including changing the word "Library" to "Lesser," and the version number was incremented to 2.1.

17.   The GPL Agreements are an integral part of software freedom. In this context, "freedom" is moral, not pecuniary—not that software cost nothing but that it should be freely examined, modified and shared. The GPL Agreements were written to ensure that "free" software remained "free."

18.   Most software is distributed in a manner that cannot, as a practical matter, be examined or modified. It is distributed in a form that can be executed by a computer but not, as a practical matter, in a form understood by a computer programmer.

19.   As the GPL Agreements explain, in their preambles, "The licenses for most software are designed to take away your freedom to share and change it. By contrast, the GNU General Public License[s] are intended to guarantee your freedom to share and change free software—to make sure the software is free for all its users. ... When we speak of free software, we are referring to freedom, not price."

20.   The GPL Agreements' "freedom to share and change free software" reflects a major goal of software freedom: to improve software and developers' skills through community collaboration. If other interested software developers can examine a program's source code, they can, for example, see how the program works, make changes to it, then circulate the modified source code to the community for comments and further development. Such changes might be minor, such as fixing a specific software bug. Others might be significant, such as adding entirely new features to the program.

21.   Thus, to ensure the freedom to change software, the GPL Agreements must ensure that recipients of software receive the software's "source code."

22.   A computer program's "source code" refers to its original "source," i.e., text written by a software programmer in a programming language that other programmers conversant in that language can comprehend. With a computer program's source code, a programmer can learn how the program operates, make changes and improvements to the program, or re-purpose parts of the program for

another computer program. As the GPL Agreements define it, "Source code for a work means the preferred form of the [computer program] for making modifications to it."

23.   Computers cannot execute source code. For that, the source code must be "compiled" into an executable form, sometimes known as an "executable." The reverse, converting the executable software back into source code, is extremely difficult, if not impossible.

24.   Thus, the GPL Agreements emphasize in their preambles that one of their purposes is, as the GPLv2 puts it, "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." The LGPLv2.1's preamble has nearly identical language.

25.   It is not enough to require the public availability of source code for only the initial distribution of the software. Improvement of software is iterative and incremental. Thus, downstream developers must have the benefit of not only the source code of the original program, but also of any modifications to the original program. For this reason, the GPL Agreements contain provisions such that they "travel with" any modifications to software or libraries subject to a GPL Agreement.

26.   The GPL Agreements' preambles elaborate on the importance of passing the agreements' rights and responsibilities to downstream recipients. As the GPLv2 puts it, "To protect your rights, we need to make restrictions that forbid anyone to deny you these rights or to ask you to surrender the rights. These restrictions translate to 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 … 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." The LGPLv2.1 has equivalent language.

27.   Thus, there can be no proprietary version of software that is subject to the GPL Agreements. If a developer obtains the source code to software that was released under a GPL Agreement, and the developer makes modifications to the software, the developer must make the source code of the modified version available to all. This is so, no matter how much effort the developer put into the modifications, or how valuable the modifications are to the developer, financially or otherwise.

28.   To ensure the freedom to share and change free software, the GPL Agreements contain the following provisions:

(a)   The GPL Agreements apply to any computer program originally distributed by its author with a notice saying it is subject to the license (the "GPL Notice"). The GPLv2 provides, in pertinent part, "This License applies to any program or other work which contains a notice placed by the copyright holder saying it may be distributed under the terms of this General Public License." The LGPLv2.1 has equivalent language.

(b)   The GPL Agreements also cover not only the original computer program but also modifications to, or any other works derivative of, that computer program. The GPLv2 provides, in pertinent part, "The 'Program', below, refers to any such program or work, and a 'work based on the Program' means either the Program or any derivative work under copyright law: that is to say, a work containing the Program or a portion of it, either verbatim or with modifications and/or translated into another language." The LGPLv2.1 has equivalent language.

(c)   Recipients of a covered computer program's source code are explicitly permitted to modify it and to distribute the modified program, provided (among other things) the modified version of the program is licensed to others under the GPL Agreement. The GPLv2 provides, in pertinent part, "You may modify your copy or copies of the Program or any portion of it, thus forming a work based on the Program, and copy and distribute such modifications or work under the terms of Section 1 above, provided … you … cause any work you distribute or publish, that in whole in or in part contains or is derived from the Program or any part thereof, to be licensed as a whole at no charge to all third parties under the terms of this License." The LGPLv2.1 has equivalent language.

(d)   Recipients of a covered computer program's source code, whether in the original or a modified form, may copy and distribute copies of that source code however they wish, provided they, among other things, keep intact the GPL Notice and provide a copy of the GPL Agreement along with the computer program when they further distribute the source code. The GPLv2 provides, in pertinent part, "You may copy and distribute verbatim copies of the Program's source code as you receive it, in any medium, provided that you conspicuously and

appropriately publish on each copy an appropriate copyright notice and disclaimer of warranty; keep intact all the notices that refer to this License and to the absence of any warranty; and give any other recipients of the Program a copy of this License along with the Program." The LGPLv2.1 has equivalent language.

(e)   If a recipient of the computer program, or a modified version of the computer program, wishes to distribute the program in an executable form, the distributor must accompany the executable software with either (a) the complete corresponding source code or (b) a written offer to provide the complete corresponding source code on demand. Where a distributor chooses to provide the written offer, the distributor must also make a complete machine-readable copy of the source code available to anyone who asks for it. The GPLv2 provides, in pertinent part: "You may copy and distribute the Program (or a work based on it...) in object code or executable form under the terms [above] provided that you also do one of the following: (a) Accompany it with the complete corresponding machine-readable source code...; or, (b) Accompany it with a written offer ... to give any third party ... a complete machine-readable copy of the corresponding source code...." The LGPLv2.1 has equivalent language.

(f)   The LGPLv2.1 additionally requires that, if the licensed library is used by a "work that uses the Library," the recipient be provided with the object code or source code of the "work that uses the Library" so that the library can be modified and recombined with the "work that uses the Library." The LGPLv2.1 provides, in pertinent part: "You must do one of these things: accompany the work[,] ... if the work is an executable linked with the Library, with the complete machine-readable 'work that uses the Library', as object code and/or source code, so that the user can modify the Library and then relink to produce a modified executable containing the modified Library." The LGPLv2.1 also gives the licensor the option, in pertinent part, of instead accompanying the executable programs with a written offer to provide such materials or verify that users already have copies of such materials. The purpose of this provision is to make sure modifications made to covered libraries continue to work with other programs that rely on such libraries.

(g)   The contractual obligation to provide source code for the licensed software described in Sub-paragraph 27(e), and to also provide an object code or source code version of the "work that uses the Library" (if applicable), as described in Sub-paragraph 27(f), is referred to hereinafter as the "Source Code Provision."

(h)   Code that, if provided, would satisfy the requirements described in Sub-paragraphs 27(e) or 27(f), as applicable, is referred to hereinafter as "Source Code."

(i)   The GPL Agreements' Source Code Provision further provides that the corresponding source code must include all files and instructions necessary to compile it. The GPLv2 provides, in pertinent part, "For an executable work, complete source code means all the source code for all modules it contains, plus any associated interface definition files, plus the scripts used to control compilation and installation of the executable." The LGPLv2.1 has equivalent language.

(j)   Each recipient of the computer program, or modified version of the program, automatically receives a license *from the original licensor* to copy, distribute, and modify the program in accordance with the GPL Agreements.

29.   In short, each recipient of a computer program distributed under a GPL Agreement obtains a license from all of the authors of the program to copy, use, distribute, re-distribute and modify the program, and in return, the recipient agrees to comply with the GPL Agreement's requirements. These requirements include the obligation to provide Source Code under the Source Code Provision.

30.   The GPLv2 is attached hereto as **Exhibit A** and is incorporated by reference. It may also be found at https://www.gnu.org/licenses/old-licenses/gpl-2.0.en.html.

31.   The LGPLv2.1 is attached hereto as **Exhibit B** and is incorporated by reference. It may also be found at http://www.gnu.org/licenses/old-licenses/lgpl-2.1.html.

B.   Vizio's SmartCast Platform

32.   Defendants manufacture and sell smart TVs, among other things.

33.   Smart TVs are essentially televisions with computers built in to enable streaming and sophisticated user interfaces.

34.   Vizio TVs are loaded with numerous computer programs that manage the smart TVs' computers and provide their users with content in an accessible, consumer-friendly way. Defendants refer to these programs variously as an "operating system" and a "platform." Defendants market this operating system or platform as "SmartCast."

35.   Defendants describe SmartCast as "Vizio's operating system for our connected TVs and … our own built in-house solution." SmartCast works with Apple's "HomeKit," which manages a household's "smart devices"; with Chromecast, a Google streaming service; and with Apple's AirPlay, which allows content on Apple devices to be viewed on a television. It also works with "digital assistants" like Amazon's Alexa, Google Assistant and Apple's Siri.

36.   Defendants further describe SmartCast: "But from a content perspective, SmartCast is where we bring together all of the amazing content that consumers are looking for. Whether that's the latest movie, whether that's the latest TV show, whether that's free and ad-supported, or whether that's their favorite subscription, it's all right there in a single place within SmartCast."

37.   Among the computer programs that comprise SmartCast are a number of programs subject to the GPLv2:

(a)   The Linux kernel. A kernel is the heart of an operating system, which all computerized devices, like smart TVs, require in order to function. The Linux kernel is one of the most popular operating system kernels.

(b)   alsa-utils, which is a suite of programs that assist and manage ALSA, Linux's audio subsystem.

(c)   GNU bash, which is a "shell," a program that allows users to interface with the operating system and is required for most operating systems.

(d)   GNU awk, which is a popular scripting language with many uses.

(e)   bluez, which is a suite of programs that assist and manage Bluetooth for Linux-based devices.

(f)   BusyBox, which is a popular "thin footprint" suite of utilities for Linux.

(g)   coreutils, which is a popular suite of utilities for Linux, with a larger "footprint" than BusyBox.

(h)   dmesg, which is a utility for reading system logs on a Linux-based device.

(i)   dnsmasq, which helps manage the infrastructure for small computer networks, such as a home computer network that might include a smart TV.

(j)   findutils, which is a suite of utilities for Linux that complements coreutils.

(k)   dmsetup, which helps manage storage locations such as the hard drive or other devices that a smart TV might use to store content.

(l)   GNU tar, which is a program for storing groups of files as a single file.

(m)   mount, which helps set up disk partitions.

(n)   selinux, which provides additional security features for Linux.

38.   Among the computer programs that comprise SmartCast are a number of programs subject to the LGPLv2.1:

(a)   The GNU C Library, which is a library of resources that allows Linux users to program in the popular C and C++ programming languages. It would be required for any Linux-based operating system that wished to take advantage of these popular programming languages.

(b)   ffmpeg, which is a suite of libraries for handling audio, video, and multimedia.

(c)   glib, which is a library that facilitates programming in C.

(d)   DirectFB, which is a library that allows Linux-based systems to work with video hardware.

(e)   libasound, which is a library that helps third-party programs interact with ALSA, Linux's audio subsystem.

(f)   libelf, which is a library for reading and modifying binary files.

(g)   libgcrypt, which is a C programming library of encryption functions and utilities.

(h)   libmount, which is a library that helps third-party programs interact with Linux file systems.

(i)   libnl, which is a suite of libraries related to using netlink, a popular network communication protocol.

(j)   selinux libraries, which help third-party programs interact with selinux.

(k)   systemd, which is a large system that manages, organizes and handles shutdown and restarting of system services on a Linux-based system.

39.   The programs listed in Paragraphs 37 and 38 above are collectively referred to herein as the "SmartCast Programs at Issue." The programs listed in Paragraph 38 above are collectively referred to herein as the "SmartCast Libraries at Issue," which is a subset of the SmartCast Programs at Issue.

40.   Each of the SmartCast Programs at Issue was developed over the course of many years—in some cases, over decades—as a free and open source software (FOSS) project.

41.   The Linux kernel is perhaps the most successful FOSS project ever, for example. It was made subject to the GPLv2 in 1992. In 1994, it consisted of about 175,000 lines of code, developed by a small but vigorous community of programmers. By 2020, the Linux kernel consisted of millions of lines of code and had an estimated 20,000 or more total different contributors. Where the Linux kernel was once limited to personal computers, it now forms a crucial component of the Internet, where it helps run major network servers. It is commonly embedded in hardware devices, such as routers and smart TVs. A modified Linux kernel is used by the highly popular Android platform for mobile devices.

42.   Commercial uses of the Linux kernel often use a version specially adapted for the purpose. Such adaptation is made possible by the Source Code Provision. These adapted versions of the Linux kernel are themselves subject to the GPLv2.

43.   Linux would not have become the robust, flexible operating system kernel it is today unless it had attracted a huge community of software developers willing to work on the project. This community of software developers arose as a result of the Source Code Provision.

44.   Purchasers of one of these devices have the right to the Linux kernel's source code, not only to examine it and see how it works, but also to make their own improvements or to write software tools that will be compatible with the modified Linux kernel on the device.

45.   The other SmartCast Programs at Issue were also successfully developed according to the FOSS model. Developers were able to access the source code of programs, make improvements to them or adapt them to other environments, and those improvements or adaptations were then made available for others to examine, improve upon, or adapt. With respect to the SmartCast Libraries at

Issue, developers would also be able to access at least the object code of programs that linked with the libraries to ensure that their modifications to the libraries did not "break" programs that relied on the libraries.

46. Some manufacturers might prefer to keep their modifications to the Linux kernel and other SmartCast Programs at Issue proprietary, despite their obligations under the GPL Agreements.

47. But the price of a robust, reliable Linux kernel and other SmartCast Programs at Issue that can be modified to suit one's needs is making one's own source code publicly available in accordance with the GPL Agreements. That's the deal.

C. Defendants' Breaches of the GPLv2 and LGPLv2.1

48. Defendants' smart TVs are manufactured and distributed with the SmartCast Programs at Issue resident on them.

49. In distributing and selling their smart TVs, Defendants distribute to purchasers the SmartCast Programs at Issue in an executable form, on a chip located inside the smart TV.

50. Defendants do not accompany their smart TVs with any source code corresponding to any of the SmartCast Programs at Issue contained therein.

51. Defendants do not accompany their smart TVs with a written offer to supply, upon demand, the source code corresponding to the SmartCast Programs at Issue.

52. The smart TVs contain several "works that use the Library" that link to a SmartCast Program at Issue subject to the LGPLv2.1. Yet, the Defendants do not accompany the smart TVs with the object code or source code corresponding to that program so that users can modify the library and relink it to produce a modified executable, or a written offer for such materials.

53. At least some of Vizio smart TVs contain executable computer programs that link to each of the SmartCast Libraries at Issue. Any executable program contained on any Vizio smart TV that links to any of the SmartCast Libraries at Issue is hereinafter referred to as a "Library Linking Program."

54. Several years ago, Software Freedom Conservancy started to receive reports that Vizio smart TVs use the Linux kernel, or a modified version thereof, without providing either the corresponding source code or a written offer for such source code on demand.

55. On or about March 8, 2018, a Software Freedom Conservancy employee, on its behalf, purchased a Vizio smart TV from a major retailer. After unboxing and carefully examining the contents and the smart TV itself, another employee found no source code or written offer for any source code. Upon examination, Software Freedom Conservancy concluded that the Vizio smart TV included a version of the Linux kernel, which was resident on the device in an executable form.

56. In August 2018, Software Freedom Conservancy sent a letter to Vizio's Chief Technology Officer and its General Counsel about Vizio's failure to accompany the Vizio smart TV with the source code corresponding to the Linux kernel used by the device or to include with the device a written offer to provide such source code.

57. In response, Vizio promised it would provide the corresponding source code by the end of 2018.

58. On or about January 25, 2019, Vizio provided to Software Freedom Conservancy what it represented as the complete source code corresponding to the Linux kernel used by the Vizio smart TV. However, it did not include all files and scripts that would permit the code to be compiled into an executable form.

59. In Software Freedom Conservancy's experience, it is not unusual for the first or second proffered source code to be incomplete or to have other problems. In these cases, Software Freedom Conservancy provides a detailed report to the providing party showing what was provided and what it believes, after its analysis, to be missing. Software Freedom Conservancy provided such a report to Vizio on or about February 13, 2019.

60. On or about May 10, 2019, Vizio sent another supposedly complete version of the source code to Software Freedom Conservancy. Again, it would not fully compile, and again, Software Freedom Conservancy sent Vizio another report.

61. This process continued throughout 2019. In all, Vizio provided six purportedly complete versions of the source code, and Software Freedom Conservancy provided Vizio with six detailed reports. None of Vizio's proffered versions of the source code would fully compile.

62. On or about December 18, 2019, representatives of Software Freedom Conservancy, Vizio, and Vizio's chip supplier held a conference call to discuss the problems with Vizio's source

code versions and what could be done to resolve them. Vizio assured Software Freedom Conservancy it would be providing the complete, compilable source code.

63. On January 28, 2020, Vizio's representative sent Software Freedom Conservancy an email expressing hope that Vizio's chip supplier "will have more substantial updates for you in the next few weeks, and we will continue to press them to move this project along as their staff returns to the office." This was the last communication Software Freedom Conservancy received from Vizio.

64. Software Freedom Conservancy followed up with Vizio six times during the following five months after this email. Software Freedom Conservancy never received a response to any of its communications.

65. Since this time, Software Freedom Conservancy has purchased a number of different models of Vizio smart TVs. Upon unboxing and examining the smart TVs, no source code or written offer for source code was found on or accompanying the smart TVs. In each case, the Vizio smart TV was found to include a version of the Linux kernel resident on the smart TV in an executable form.

66. On or about July 16, 2021, an employee of Software Freedom Conservancy, on its behalf, purchased a Vizio V435-J01 online from Best Buy, which shipped it to the employee in the United States. Best Buy operates a well-known chain of "big-box" retail stores in the United States and Canada and is a retail seller of electronics such as Vizio Smart TVs.

67. After unboxing and carefully examining the contents and the smart TV itself, the Software Freedom Conservancy employee found no source code or written offer for any source code.

68. The Software Freedom Conservancy employee examined the Vizio V435-J01 smart TV and determined it contained each of the SmartCast Programs at Issue resident on the device in an executable form.

69. On or about July 13, 2021, an employee of Software Freedom Conservancy, on its behalf, purchased a Vizio D32h-J09 smart TV from a Target location in the United States. Target operates a well-known chain of "big-box" retail stores in the United States and Canada and is a retail seller of electronics such as Vizio smart TVs.

70. After unboxing and carefully examining the Vizio D32h-J09 smart TV, the Software Freedom Conservancy employee found no source code or written offer for any source code.

71. The Software Freedom Conservancy employee examined the Vizio D32h-J09 Smart TV and determined it contained each of the SmartCast Programs at Issue resident on the device in an executable form.

72. On or about July 21, 2021, an employee of Software Freedom Conservancy, purchased a Vizio M50Q7-J01 smart TV from a Best Buy location in the United States.

73. After unboxing and carefully examining the Vizio M50Q7-J01, the Software Freedom Conservancy employee found no source code or written offer for any source code.

74. The Software Freedom Conservancy employee examined the Vizio M50Q7-J01 Smart TV and determined it contained each of the SmartCast Programs at Issue resident on the device in an executable form.

75. The Software Freedom Conservancy employee who unboxed and examined the Vizio V435-J01, D32h-J09, and M50Q7-J01 models found that each of these devices was also loaded with programs in executable form that linked with the SmartCast Libraries at Issue. The employee did not find any object code accompanying those devices, or any written offer for any object code. No one contacted the employee (or anyone else with Software Freedom Conservancy) to verify that they already had any source or object code for any such executable programs.

76. Upon information and belief, all Vizio smart TVs introduced to the U.S. market in at least the last four years run a version of one or more of the SmartCast Programs at Issue.

77. Upon information and belief, purchases of Vizio smart TVs are neither accompanied by the Source Code for the SmartCast Programs at Issue or for the Library Linking Programs resident thereon nor accompanied by a written offer to provide such Source Code upon demand. On information and belief, Defendants do not verify that their customers and other users of such smart TVs already have any source or object code for any such Library Linking Programs.

D. Why it Matters

78. With the source code for the SmartCast Programs at Issue as used on Vizio Smart TVs, developers could continue to develop and improve an operating system for smart televisions, which would benefit the public and further the goals of software freedom. Software Freedom Conservancy already manages similar FOSS projects, such as BusyBox (a popular suite of utilities for Linux).

79. There is, for example, a need to include features in such operating systems that protect the user's privacy and personal data. Smart TVs often collect information about their users and their viewing habits, sometimes without first obtaining the viewers' knowledge or consent.

80. On or about February 14, 2017, Vizio and an affiliate settled a case with the U.S. Federal Trade Commission and the Attorney General of New Jersey for collecting such consumer data, without obtaining consent, from more than 11 million Vizio smart TVs and then selling that data to advertisers and others. The case is captioned as *Federal Trade Commission et al. v. Vizio, Inc. et al.*, and identified as Case No. 2:17-cv-00758, filed on or about February 6, 2017 in the U.S. District Court for the District of New Jersey.

81. There is, to take another example, a need to improve accessibility to accommodate those who are deaf, hard of hearing, blind or disabled. SmartCast has a number of features along these lines, but they could stand to be improved.

82. Had Vizio produced the Source Code for the Linux kernel, for the other SmartCast Programs at Issue, and for the Library Linking Programs, as used on Vizio Smart TVs, a community of software developers would have had the opportunity to modify them to protect user privacy or improve accessibility. This remains true today, and this need for consumer privacy and accessibility will be even more important in the future as consumers become more integrated and dependent on computers and other interconnected "smart" devices for their daily lives.

83. Vizio is unlikely to unilaterally implement features that prevent the collection of such user data, as such user data is valuable to Vizio.

84. Access to the Source Code of the Linux kernel, the other SmartCast Programs at Issue, and for the Library Linking Programs, as used on Vizio smart TVs, would enable software developers to preserve useful but obsolete features. It would also allow software developers to maintain and update the operating system should Vizio or its successor ever decide to abandon it or go out of business. In these ways, purchasers of Vizio smart TVs can be confident that their devices would not suffer from software-induced obsolescence, planned or otherwise.

85. Vizio is unlikely to go to the trouble and expense of giving its customers the option of keeping features that Vizio has decided are obsolete, despite the usefulness of maintaining and

improving on such features for the benefit of users, the general public, and the software-developing community.

86.   Encouraging these types of uses is the core purpose of the GPL Agreements, a purpose that Defendants have entirely subverted by failing to comply with the Source Code Provision.

FIRST CAUSE OF ACTION
BREACH OF CONTRACT
(By Plaintiff against All Defendants)

87.   Plaintiff re-alleges and incorporates by reference each of the foregoing paragraphs of this Complaint as though fully set forth herein.

88.   The programs set forth in Paragraph 37 above are subject to the GPLv2.

89.   The libraries set forth in Paragraph 38 above are subject to the LGPLv2.1.

90.   From the first-hand analyses conducted by Plaintiff, at least the following models of Vizio smart TVs have versions of the SmartCast Programs at Issue resident on chips located within the devices: V435-J01, D32h-J09, and M50Q7-J01.

91.   Upon information and belief, all models of Vizio smart TVs introduced to the U.S. market in at least the last four years have versions of at least one SmartCast Program at Issue resident on chips located within the devices.

92.   By installing versions of the any of the programs set forth in Paragraph 37 above on its smart TVs (including model numbers V435-J01, D32h-J09, and M50Q7-J01), and by distributing such smart TVs to the public, Vizio became a party to the GPLv2. If Vizio were not a party to the GPLv2, it would have no rights to use or distribute any of these programs, or any modified versions thereof, at all.

93.   By installing versions of any the libraries set forth in Paragraph 38 above on its smart TVs (including model numbers V435-J01, D32h-J09, and M50Q7-J01), and by distributing such smart TVs to the public, Vizio became a party to the LGPLv2.1. If Vizio were not a party to the LGPLv2.1, it would have no rights to use or distribute any of these programs, or any modified versions thereof, at all.

94.   Pursuant to both the GPLv2 and LGPLv2.1, when distributing an executable computer program covered by the license, the licensee must accompany the executable software with either (a) the source code corresponding to the executable software, or (b) a written offer to provide such source code on demand.

95.   Vizio does not accompany its smart TV model numbers V435-J01, D32h-J09, and M50Q7-J01 with either the source code corresponding to the executable of the SmartCast Programs at Issue residing on those devices, or with a written offer to provide such source code on demand.

96.   Pursuant to the LGPLv2.1 license, when distributing an executable computer program that links with a library subject to the LGPLv2.1, the licensee must accompany the executable program with either (a) the source code or object code corresponding to the executable program so that users can modify the library and then relink to produce a modified executable, (b) a written offer for such material, or (c) verify that the user has already received a copy of such materials.

97.   On information and belief, Vizio smart TV model numbers V435-J01, D32h-J09, and M50Q7-J01 contain executable programs that link with each of the SmartCast Libraries at Issue, which are subject to the LGPv2.1.

98.   Defendants do not accompany their smart TV model numbers V435-J01, D32h-J09, and M50Q7-J01 with the source code or object code corresponding to the executable program that links with the SmartCast Libraries at Issue or a written offer for such materials, and Defendants do not verify that their users already have such materials.

99.   Upon information and belief, none of the smart TVs that Vizio has introduced to the U.S. market during at least the past four years was accompanied by the Source Code corresponding to the executables of the SmartCast Programs at Issue and to the Library Linking Programs resident on those devices, or by a written offer to provide such Source Code on demand. Upon information and belief, during this same time period, Defendants failed to contact their customers and other users of such smart TVs to confirm they had copies of the source or object code for the Library Linking Programs.

100.   Due to their complete failure to provide such source code or a written offer to provide same, Defendants are in material breach of the GPLv2 and the LGPLv2.1.

101.   Defendants commit further breaches of the GPLv2 and the LGPLv2.1 every time they distribute a smart TV without such source code or such written offer.

102.   Upon information and belief, none of the smart TVs that Vizio has introduced to the U.S. market during at least the past four years was accompanied by the source code or object code

corresponding to executable computer programs resident on such devices that link to a library subject to the LGPLv2.1, or written offer for such materials. Upon information and belief, Defendants have not verified that the buyers of such devices already possess such materials.

103.   Defendants commit further breaches of the LGPLv2.1 every time they distribute a smart TV without such source or object code or written offer for such source or object code, or fail to verify their customers already possess such source or object code.

104.   Purchasers of Vizio smart TVs (including model numbers V435-J01, D32h-J09, and M50Q7-J01) would have benefited from the GPLv2 and LGPLv2.1 had Defendants complied with the terms thereof, such that said purchasers could have received the source code corresponding to the SmartCast Programs at Issue residing on such Smart TV, either with the smart TV itself or after having made a request to Vizio for it.

105.   Because Vizio does not provide either the corresponding source code or a written offer to provide such source code on demand, purchasers are unaware of their rights to the source code under the GPLv2 and LGPLv2.1.

106.   Purchasers of Vizio smart TVs (including model numbers V435-J01, D32h-J09, and M50Q7-J01) would have further benefited from the LGPLv2.1 had Defendants provided the source or object code for executable programs resident on such devices that link to libraries subject to the LGPLv2.1, or a written offer for such materials. It is highly unlikely that purchasers of Vizio smart TVs would already possess such materials.

107.   The purpose of the GPLv2 and LGPLv2.1 is, among other things, to enable collaboration in developing software, which, in turn, tends to lead to improvements or innovations in the software and the software industry at large.

108.   Such collaboration inures to the benefit of the general public as well as the persons and entities who use and adhere to the GPLv2 and LGPLv2.1. For example, an entity such as Vizio can lower its research and development and software development costs by providing outside software developers with the source code, who could then create and improve features and interfaces which Vizio could use in its products. Indeed, the SmartCast Programs at Issue are examples of the power of this sort of open and free collaboration.

109.   However, such collaboration on a particular program is possible only if developers have access to the Source Code. Therefore, the GPLv2 and LGPLv2.1 requires, as a condition of their licenses, that developers make their source code (or, in special cases, object code) available to the public.

110.   Therefore, a motivating purpose—indeed, the *sine qua non*—of the GPLv2 and LGPLv2.1 is to provide the Source Code to downstream recipients of computer programs covered by those license agreements.

111.   At the same time, a contracting party to the GPLv2 or LGPLv2.1 might not be aware of the breach of, or have the motivation or means to enforce, this provision of the license agreements. Despite being subject to the GPLv2 or LGPLv2.1, a licensee such as Vizio might prefer to keep its own version of the SmartCast Programs at Issue, or the Library Linking Programs, secret or proprietary.

112.   It is consistent with the objectives and express language of the GPLv2 and LGPLv2.1 to permit recipients of executable software covered by those license agreements, such as purchasers of Vizio smart TVs, to seek court assistance to enforce their right to the corresponding Source Code.

113.   It is reasonable to expect downstream recipients of executables of the SmartCast Programs at Issue or Library Linking Programs, such as purchasers of Vizio smart TVs, to seek court assistance to enforce their right to the corresponding Source Code.

114.   Plaintiff is a purchaser of Vizio smart TVs, specifically model numbers V435-J01, D32h-J09, and M50Q7-J01. Therefore, Plaintiff is a recipient of the executables of the SmartCast Programs at Issue and Library Linking Programs thereon.

115.   Plaintiff has a right under the GPLv2 and LGPLv2.1 to the Source Code corresponding to the executables of the SmartCast Programs at Issue and Library Linking Programs that reside on the Vizio smart TVs purchased by it.

116.   Plaintiff is not a contracting party to the GPLv2 or the LGPLv2.1 as that agreement relates to the Vizio smart TVs, in that it is not asserting that it is the licensor of the software used in Vizio smart TVs or any works based on the software or derivative thereof.

117.   Plaintiff is a member of a class of persons for whose benefit the GPLv2 and LGPLv2.1 were created and intended.

118.   A motivating purpose of Vizio and the developers of the SmartCast Programs at Issue, in accepting the terms of the GPLv2 or LGPLv2.1 (as appropriate), was for said class of persons to benefit from that license agreement.

119.   Permitting Plaintiff to bring this cause of action is consistent with the objectives of the GPLv2 and LGPLv2.1 and the reasonable expectations of Vizio and the developers of the SmartCast Programs at Issue.

120.   Therefore, Plaintiff is an intended third-party beneficiary of the GPLv2 and LGPLv2.1 between Vizio and the developers of the SmartCast Programs at Issue and, because of this, may seek to enforce the Source Code Provision against Vizio.

121.   As a third-party beneficiary under the GPLv2 and LGPLv2.1, Plaintiff has a right to the Source Code corresponding to the executables of the SmartCast Programs at Issue and Linking Library Programs that reside on the Vizio smart TVs purchased by it.

122.   Some or all of the source code that corresponds to the executables of the SmartCast Programs at Issue residing on Vizio smart TVs, including model numbers V435-J01, D32h-J09, and M50Q7-J01, is different in material ways from other versions of the SmartCast Programs at Issue that are publicly available. This source code is unique and cannot be readily found elsewhere.

123.   Some or all of the source or object code that corresponds to the executables of the Library Linking Programs residing on Vizio smart TVs, including model numbers V435-J01, D32h-J09, and M50Q7-J01, is not publicly available and thus cannot be used to relink with the SmartCast Libraries at Issue after modifying such library. Such source or object code is unique and cannot be readily found elsewhere.

124.   Upon information and belief, all purchasers of Vizio smart TVs, including model numbers V435-J01, D32h-J09, and M50Q7-J01, are third-party beneficiaries of the GPLv2 and the LGPLv2.1.

125.   If purchasers of Vizio smart TVs cannot enforce the GPLv2 and LGPLv2.1 as third-party beneficiaries, the Source Code Provision is effectively unenforceable. No one other than the purchaser has both the information and motive to enforce the Source Code Provision. Purchasers will

both know whether the Source Code Provision has been honored and have a desire to examine and further develop the corresponding source code.

126.   Due to Defendants' failure to comply with the duties, responsibilities, and covenants they assumed pursuant to the GPLv2 and LGPLv2.1—namely, their failure to provide the Source Code to purchasers of their smart TVs pursuant to the Source Code Provision—Plaintiff and other members of the class of persons intended to benefit from the GPLv2 and LGPLv2.1 have been damaged in an amount that cannot be readily determined.

SECOND CAUSE OF ACTION
DECLARATORY RELIEF
(Cal. Code Civ. Proc. § 1060)
(By Plaintiff against All Defendants)

127.   Plaintiff re-alleges and incorporates by reference each of the foregoing paragraphs of this Complaint as though fully set forth herein.

128.   Upon information and belief, Defendants' business plan is to continue to manufacture smart TVs and/or other devices based upon the Linux kernel and some or all of the other SmartCast Programs at Issue, but without compliance with GPLv2 and LGPLv2.1 (as appropriate).

129.   An actual controversy has arisen and now presently exists between Plaintiff and Defendants concerning their respective legal rights and duties under the GPLv2 and LGPLv2.1 in connection with Defendants' modification and distribution of the Linux kernel and some or all of the other SmartCast Programs at Issue on their smart TVs.

130.   Upon information and belief, Defendants take each of the following positions in direct contravention of Plaintiff's position and the GPLv2 and LGPLv2.1:

(a)   Defendants contend, and Plaintiff disputes, that Defendants are not obligated to provide purchasers of their smart TVs with the Source Code or a written offer for same as required by the Source Code Provision of the GPLv2 and LGPLv2.1;

(b)   Defendants contend, and Plaintiff disputes, that Defendants are not obligated under GPLv2 and LGPLv2.1 to maintain, on hand, for immediate distribution on request, compilable versions of their Source Code for all existing Vizio smart TVs;

(c)   Defendants contend, and Plaintiff disputes, that Defendants are not obligated under GPLv2 and LGPLv2.1 to do the same for all smart TVs that Defendants may build, manufacture, or distribute in the future based upon the Linux kernel and some or all of the other SmartCast Programs at Issue, or any modified variant of any of them.

(d)   Plaintiff contends, and Defendants dispute, that Defendants' failure to comply with the Source Code Provision constitutes a material breach of the GPLv2 and LGPLv2.1.

134.   Plaintiff has advised Defendants that, by their failure to provide the Source Code or a written offer for same with their smart TVs, they are in breach of the duties, responsibilities, and covenants that they agreed to and assumed pursuant to the Source Code Provision of the GPLv2 and LGPLv2.1.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays judgment against Defendants as follows:

AS TO THE FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT:

a. An order directing Defendants to produce to Plaintiff the complete source code corresponding to whatever versions of the SmartCast Programs at Issue, and any other program subject to the GPLv2 or LGPLv2.1 that are resident on Vizio smart TVs having model numbers V435-J01, D32h-J09, and M50Q7-J01, including the Linux kernel used with Vizio's SmartCast operating system, in a format that may be compiled without undue difficulty. For purposes of this prayer for relief, "complete source code" means all source code for all modules contained in such version or versions of the SmartCast Programs at Issue, plus any associated interface definition files, plus the scripts used to control compilation and installation of the executable.

b. An order directing Defendants to produce to Plaintiff the complete source code or object code for any program resident on Vizio smart TVs having model numbers V435-J01, D32h-J09, or M50Q7-J01 that links with any of the SmartCast Libraries at Issue, or any other library subject to the LGPLv2.1, so that the Plaintiff can modify the library and then relink to produce a modified executable;

c. An order directing Defendants to produce to Plaintiff the complete source code corresponding to whatever versions of any executable program subject to either the GPLv2 or LGPLv2.1 that is resident on any Vizio television sold in the last four years, in the same manner as set forth in part (a) above.

d. An order directing Defendants to produce to Plaintiff the complete source or object code corresponding to any executable program resident on any Vizio television sold in the last four years that links to a library subject to the LGPLv2.1, in the same manner as set forth in part (b) above.

e. For costs of suit incurred herein;

f. For attorney's fees to the extent authorized by law; and

g. For such other and further relief as the Court deems just and proper.

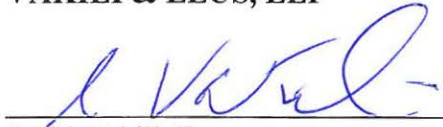**AS TO THE SECOND CAUSE OF ACTION FOR DECLARATORY RELIEF:**

h. For a judicial determination of Plaintiff's and Defendants' rights and duties and a declaration that:

(i)   The terms and conditions of the GPLv2 and LGPLv2.1 agreements require that Defendants provide the source code for the executables of the SmartCast Programs at Issue, and the source or object code for any Library Linking Programs, or a written offer for same inside the boxes of their smart TVs;

(ii) The terms and conditions of the GPLv2 and LGPLv2.1 agreements require that Vizio maintain, on hand, for immediate distribution on request compliable versions of the source code for the executables of all SmartCast Programs at Issue, and the source or object code for any Library Linking Programs, resident on any existing Vizio smart TVs;

(iii) The terms and conditions of the GPLv2 and LGPLv2.1 agreements require that Defendants do the same for all smart TVs that Defendants may build, manufacture, or distribute in the future based upon the Linux kernel, or any modified variant of it, and any other SmartCast Programs at Issue; and

(iv) Defendants' failure to do so is a material breach of the GPLv2 and LGPLv2.1.

i. For costs of suit incurred herein;

j. For attorney's fees to the extent authorized by law; and

k. For such other and further relief as the Court deems just and proper.

DATED: October 19, 2021

AARON & SANDERS, PLLC
VAKILI & LEUS, LLP

By: _____

Sa'id Vakili, Esq.
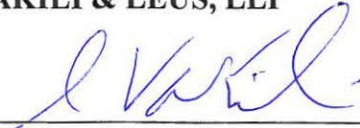Richard Sanders, Esq.
Attorneys for Plaintiff Software Freedom
Conservancy, Inc.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury to the extent authorized by law.

DATED: October 19, 2021

AARON & SANDERS, PLLC
VAKILI & LEUS, LLP

By: _____

Sa'id Vakili, Esq.
Richard Sanders, Esq.
Attorneys for Plaintiff Software Freedom
Conservancy, Inc.

Exhibit: "A"

GNU General Public License, version 2

- The latest version of the GPL, version 3
- What to do if you see a possible GPL violation
- Translations of GPLv2
- GPLv2 Frequently Asked Questions
- The GNU General Public License version 2 (GPLv2) in other formats: plain text, Texinfo, LaTeX, standalone HTML, Docbook, Markdown, ODF, RTF

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Version 2, June 1991

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> **c)** Accompany it with the information you received as to the offer to distribute corresponding source code. (This alternative is allowed only for noncommercial distribution and only if you received the program in object code or executable form with such an offer, in accord with Subsection b above.)

The source code for a work means the preferred form of the work for making modifications to it. For an executable work, complete source code means all the source code for all modules it contains, plus any associated interface definition files, plus the scripts used to control compilation and installation of the executable. However, as a special exception, the source code distributed need not include anything that is normally distributed (in either source or binary form) with the major components (compiler, kernel, and so on) of the operating system on which the executable runs, unless that component itself accompanies the executable.

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Version 2.1, February 1999

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