		deprived of the value that such discovery would have in the designation of expert witnesses on this new cause of action. In addition, the PFACC may result in a demurrer, motion to strike or other pretrial motion practice. The court notes that prior to filing the instant motion, Shady Bird agreed to stipulate to TSB filing the PFACC if TSB agreed to reopen discovery and continue trial. These conditions would alleviate the prejudice identified by Shady Bird. Therefore, given the liberal policy of granting leave to amend to resolve all disputes between the parties, the motion is GRANTED. The trial is continued to . Discovery is reopened as to the new cause of action for trespass only. All deadlines and completion dates for discovery concerning the new cause of action, motions and other procedural matters are continued based on the new trial date according to Code of Civil Procedure.
11	***2021-01226723*** ***Software Freedom Conservancy, Inc. vs. Vizio, Inc.***	**Motion for Summary Judgment and/or Adjudication** Plaintiff Software Freedom Conservancy, Inc.'s Second Motion for Summary Adjudication (ROA 496) is GRANTED as to issue no. 1 and DENIED as to issues no. 2 and 3. Plaintiff's request for judicial notice (ROA 488) is granted as to items 1-7 and 10 and denied as to items 8-9 and 11. Defendant's objections (ROA 563) are sustained as to objection 18 (Wikipedia article) and overruled as to the remaining objections. <u>Legal Standard:</u> Code of Civil Procedure section 437c states in part: "(f)(1) A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty. (2) A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment. A party shall not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court unless that party establishes, to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion."

		"(p) For purposes of motions for summary judgment and summary adjudication: (1) A plaintiff or cross-complainant has met that party's burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The defendant or cross-defendant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto." <u>Issue No. 1: Whether VIZIO has a contractual duty to provide SFC with the complete corresponding machine-readable source code (as that term is defined in Section 3 of the GNU General Public License, version 2 (the GPLv2")) for any software on its Smart TV Model No. D32h-J09 that is licensed under the GPLv2 and the complete corresponding machine-readable source code (as that term is defined in Section 0 of the GNU Lesser General Public License version 2.1 (the "LGPLv2.1")) for any library that is licensed under the LGPLv2.1.</u> Plaintiff argues the subject smart TV included a statement in the "License List" menu that it "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…." (Motion, p. 8.) Plaintiff contends its representative accepted such offer by requesting the applicable source code in a live chat with a Vizio representative. (p. 9; UMFs 8-11.) Defendant contends (1) Plaintiff failed to allege in the complaint that it had a direct contract with Vizio, (2) Plaintiff failed to assert such a claim in its discovery responses, (3) Plaintiff should not be allowed to belatedly amend its complaint to state such an allegation, and (4) the alleged acceptance was by non-party Paul Visscher who was not an clearly acting as an employee or agent of Plaintiff. (Opp. at pp. 4-8.) The pleadings define the issues on a motion for summary judgment. (*Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1519.) Here, Plaintiff's operative FAC alleges claims for breach of contract and declaratory relief. Paragraphs 100-101 of the FAC allege that Defendant "purports to include a written offer for source code via the SmartCast streaming platform…" in the License List, consistent with Plaintiff's allegations of an offer in the motion. Paragraph 107 references the "source code recently provided by" Defendant, which Plaintiff asserts was the result of Ms. Visscher's acceptance of the offer in April 2023. (Reply, p. 2.)

		However, Plaintiff alleges the responsive code provided was incomplete and insufficient. Plaintiff also alleges at paragraph 128 that Defendant "did not accompany the Subject TVs with either the source code corresponding to the executable of the SmartCast Works at Issue residing on those devices, or with a valid written offer to provide such source code on demand." Plaintiff alleges Defendant's failure to provide the source code is a breach of the subject agreements. (¶¶ 128-138.) "It is well established that a party may plead in the alternative and may make inconsistent allegations." (*Third Eye Blind, Inc. v. Near North Entertainment Ins. Services, LLC* (2005) 127 Cal.App.4th 1311, 1323 [cleaned up].) Here, Plaintiff alleged both that Defendant failed to make an offer or provide the source code, and in the alternative that Defendant made a purported offer via the License List but failed to adequately comply with Plaintiff's request for code. (FAC, ¶¶ 100, 101, 107, 128-138.) Plaintiff is permitted to plead in the alternative. Here, Plaintiff adequately pled facts in the FAC that could support its claim that a direct contract existed between the parties consistent with its motion. Next, Defendant argues Plaintiff's discovery responses contradict its contract assertions in the motion. Defendant states, "These allegations were consistent with SFC's interrogatory responses in discovery that explained why, in SFC's view, VIZIO's written offers were invalid. (CITE.) [sic]" (Opp. at 5:20-22.) Defendant apparently neglected to insert a citation in support of this argument. Defendant's responses to Plaintiff's undisputed facts also fail to cite their evidence in support of this argument. (See Responses to UMFs 8-11.) However, in reply Plaintiff states its discovery responses merely contended that Defendant's offer was invalid because it was too difficult for ordinary users to find and exercise. Again, Plaintiff is entitled to allege in the alternative that the offer was binding on Defendant, but at the same time that it was too difficult for a typical user to access the offer. Therefore, Plaintiff adequately stated a basis for its contract argument in its FAC and discovery responses. Substantively, Defendant does not contend there is insufficient evidence it made an offer or that Mr. Visscher accepted it. Rather, Defendant contends in a footnote that the alleged acceptance was by a third-party Mr. Visscher who did not disclose he was Plaintiff's agent. (Opp. at p. 6, fn. 2.) Plaintiff cites legal authority holding that an "undisclosed principal" may accept the benefits of a contract made by an agent. (Reply at p. 5.) Here, Visscher declares he has been the Systems Administrator for Plaintiff since February 2023 and that in April 2023, he requested the source code "on behalf of" Plaintiff. This is sufficient to demonstrate that Visscher was Plaintiff's agent, and Defendant does not present evidence or legal authority showing that Visscher was not Plaintiff's agent.

Therefore, the motion is granted as to issue no. 1.

Issue No. 2: Whether, under the GPLv2, VIZIO has a contractual duty to provide to the purchasers of any VIZIO Smart TVs, including SFC: (a) the complete corresponding machine-readable source code (as defined in Section 3 of the GPLv2) for any software on its Smart TVs that is licensed under the GPLv2; or (b) a written offer, valid for at least three years, to give any third party, for a charge no more than the cost of physically performing source distribution, a complete machine-readable copy of the corresponding source code.

Plaintiff alleges the plain language of the GPLs provides that Plaintiff and other purchase of Defendant's smart TVs are intended third-party beneficiaries of the GPLs.

Defendant contends Plaintiff is improperly attempting to relitigate an issue the Court already decided in denying Plaintiff's prior motion for summary adjudication. (3/26/24 Minute Order.) In that order, the Court found Defendant had presented evidence that FSF "did not intend for third parties [including Plaintiff] to enforce the rights under the license agreement," creating a triable issue as to the parties' intent. (pp. 4-5.)

Moreover, the Court found that Plaintiff had improperly narrowed the issue to only assert Defendant failed to provide the source code, without addressing the alternative duty to provide a written offer. Now, Plaintiff has expanded the issue of duty to include either alternative.

Code of Civil Procedure section 437c(a)(4) provides, "A party shall not bring more than one motion for summary judgment against an adverse party to the action or proceeding. This limitation does not apply to motions for summary adjudication." Section 437c(f)(2) states in part, "A party shall not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court unless that party establishes, to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion."

Bagley v. TRW, Inc. (1999) 73 Cal.App.4th 1092, 1096, footnote 3 (*Bagley*), states:

"[T]he prohibition against repeated summary judgment motions was added to make the summary judgment process more efficient and to reduce the opportunities for abuses of the procedure (Sen. Rules Com., Off. of Sen. Floor Analyses, rev. of Sen. Bill No. 2594 (Aug. 23, 1990)) which the addition of subdivision (f)(2) accomplished by overruling the cases that had held that an order denying a motion for summary judgment did not preclude a renewal of the same motion at any time before trial."

Code of Civil Procedure section 437c(f)(2) does not expressly require reasonable diligence in discovering and presenting new facts, although

		relief based on new facts or evidence requires a showing a reasonable diligence in other contexts. (See *Doe v. United Air Lines, Inc.* (2008) 160 Cal.App.4th 1500, 1509 [motion for new trial]; *Jade K. v. Viguri* (1989) 210 Cal.App.3d 1459, 1467 [motion for reconsideration].) Defendant contends Plaintiff's motion is essentially an improper motion for reconsideration which does not comply with the requirements of Code of Civil Procedures section 1008. Defendant argues there are no material new facts or law supporting reconsideration or renewal of the prior motion. Plaintiff responds that the language of section 437c(f)(2) only prohibits a motion for summary judgment based which raises the same issues as a prior motion for summary adjudication. At least one court has agreed with Plaintiff's interpretation of the statute. (*Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 72 ["Blue Shield's motion for summary judgment falls outside the scope of Code of Civil Procedure section 437c, subdivision (f)(2), as the prior motion was one for summary judgment rather than summary adjudication"].) Plaintiff further argues it may make a "subsequent application for the same order upon new or different facts, circumstances, or law" under section 1008 and that the present motion defines the issue of duty differently – the new motion asks the Court to determine Defendant's duty as to all smart TVs (rather than a limited number of models) and includes the question of whether that duty includes an offer of source code. Plaintiff also points to new facts, including the deposition and declaration of FSF Executive Director Zoe Kooyman, in which Kooyman stated third parties should be able to enforce the GPLs even if they are not the copyright holders. The Court has discretion to decide whether to consider a renewed or subsequent motion based on similar issues. (See *Nieto v. Blue Shield of California Life & Health Ins. Co.*, *supra*, 181 Cal.App.4th 60, 72 [we review a trial court's decision to allow a party to file a renewed or subsequent motion for summary judgment for an abuse of discretion].) The Court construes the summary judgment statute to give the Court discretion to decline to consider a subsequent motion under the statute based on the same issues, in order to give effect to the drafter's intent of reducing duplicative or repetitive motions. Here, Plaintiff had the opportunity to litigate issues no. 2 and 3 in its prior motion. Issues no. 2 and 3 effectively ask the Court to reconsider its 3/26/24 ruling based on evidence which could have, with reasonable diligence, been presented before the hearing on the prior motion. Although the issues in the present motion are defined more broadly, Plaintiff's assertion of these issues is an improper attempt to obtain summary adjudication as to issues which the Court's prior order found were disputed.

		Moreover, even if the Court reaches the merits of issues nos. 2 and 3, Plaintiff has not demonstrated that the new evidence disposes of the factual disputes which caused the Court to deny its prior motion. Even if the Court considers the new evidence, including declarations of Ms. Kooyman and Mr. Kuhn, the new evidence does not negate the triable issues created by conflicting prior statements by the FSF which the Court previously found were sufficient to demonstrate a triable issue. Issue No. 3: Whether, under the GNU Lesser General Public License, version 2.1 (the LGPLv.2.1), VIZIO has a contractual duty to provide to the purchasers of any VIZIO Smart TVs, including SFC: (a) the complete corresponding machine-readable source code (as defined in Section 0 of the LGPLv2.1) for any library (as defined in Section 0 of the LGPLv2.1) on its Smart TVs that is licensed under the LGPLv2.1; or (b) otherwise comply with Section 6 of the LGPLv2.1. The motion is denied for the same reasons set out under issue no. 2.
12	***2025-01473353*** ***Trujillo vs. Newrez, LLC***	**Demurrer to Complaint** Defendant Newrez LLC dba Shellpoint Mortgage Servicing's demurrer to plaintiff Jose A. Trujillo is SUSTAINED in part with leave to amend. **Defendant's request for judicial notice** In connection with its demurrer, Defendant requests judicial notice of the following documents: - Exhibit 1 - Grant Deed recorded on February 9, 2009 as Instrument Number 2009000056864 in the Official Records of the County of Orange, State of California - Exhibit 2 - Deed of Trust recorded on May 27, 2014 as Instrument Number 2014000204066 in the Official Records of the County of Orange, State of California - Exhibit 3 - Corporate Assignment of Deed of Trust recorded on July 25, 2023 in the Official Records of the County of Orange, State of California as Instrument 2023000178548 - Exhibit 4 - Notice of Default and Election to Sell Under Deed of Trust recorded on October 25, 2022 as Instrument Number 2022000344760 in the Official Records of the County of Orange, State of California - Exhibit 5 - Notice of Trustee's Sale recorded on September 13, 2024 as Instrument Number 2023000025670 in the Official Records of the County of Orange, State of California - Exhibit 6 – Trustee's Deed Upon Sale recorded on April 23, 2025 as Instrument Number 2025000118485 in the Official Records of the County of Orange, State of California.