

ESTTA Tracking number: **ESTTA1303029**

Filing date: **08/10/2023**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	92066968
Party	Defendant Software Freedom Conservancy
Correspondence address	JOHN L. WELCH WOLF, GREENFIELD & SACKS, P.C. 600 ATLANTIC AVENUE BOSTON, MA 02210 UNITED STATES Primary email: jlwtrademarks@wolfgreenfield.com 617-646-8000
Submission	Other Motions/Submissions
Filer's name	John L. Welch
Filer's email	jlwtrademarks@wolfgreenfield.com
Signature	/johnlwelch/
Date	08/10/2023
Attachments	92066968 Respondent_s Supplemental Memorandum in Support of Motion fo r Protective Order.pdf(842672 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Software Freedom Law Center,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cancellation No.
	)	92066968
Software Freedom Conservancy,	)	
	)	
Respondent.	)	
	)	

**RESPONDENT’S SUPPLEMENTAL MEMORANDUM  
IN SUPPORT OF MOTION FOR PROTECTIVE ORDER**

Pursuant to the Board’s Order of July 21, 2023 (120 TTABVUE), Respondent Software Freedom Conservancy (“Conservancy”), by its counsel, submits this supplemental memorandum in support of its construed motion for a protective order excluding Mr. Eben Moglen from attending the depositions of Bradley Kuhn and Karen Sandler.

Accompanying this memorandum are supplemental declarations of Mr. Kuhn and Ms. Sandler, together with exhibits.<sup>1</sup>

Compliance with Fed. R. Civ. P. 26(c)(1)

Counsel for the parties conferred by email correspondence and via telephone in a good faith effort to resolve the subject dispute, without success. As will be seen in the email exchange between counsel (Exhibit A hereto), Conservancy proposed that, instead of Mr. Moglen attending the depositions, a different of Petitioner attend. Petitioner did

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<sup>1</sup> Conservancy has filed a physical exhibit to Mr. Kuhn’s declaration (a DVD) via overnight courier.

not accept that proposal. Furthermore, for the first time, Petitioner informed Conservancy that not only does Mr. Moglen plan to attend the depositions, but he also intends to take the depositions. This development only exacerbates the current situation and increases Conservancy's concerns regarding harassment of the witnesses.

#### Introduction

Initially, it is important to recognize that Conservancy has never challenged Petitioner's right to take the depositions of Mr. Kuhn and Ms. Sandler. Conservancy seeks a much more limited remedy: namely, exclusion of a single person from attending those depositions in any manner, based upon that person's past and likely future harassment of Mr. Kuhn and Ms. Sandler. Petitioner, represented by counsel, has never explained why Mr. Moglen must attend the depositions. With its newly revealed intention to have Mr. Moglen take the depositions, Petitioner has exacerbated the situation and has signaled Mr. Moglen's goal of harassment.

When the respective interests of the parties and the two witnesses are weighed, the balance heavily favors issuance of an order protecting the Conservancy and the two witnesses from further harassment by excluding Mr. Moglen completely.

#### Fed. R. Civ. P. 26(c)(1)(E)

Fed. R. Civ. P. 26(c)(1) provides the Board with the authority "for good cause, [to] issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . designating the persons who may be present while the discovery is conducted . . . ." Fed. R. Civ. P. 26(c)(1)(E) more specifically authorizes the granting of a protective order "that discovery be conducted with no one present except persons designated by the court." Specific to this case,

“proven and predictable potential for emotional harm to a deponent can provide a basis to exclude from deposition appearances otherwise entitled to attend.” *Ameduri v. Frankfort*, No. 6:11-CV-0050 (MAD/DEP), 2012 U.S. Dist. LEXIS 202559, at \*6-7 (N.D.N.Y. July 17, 2012). It does not matter whether the deponent’s anxiety or fear is reasonable, only that he or she would genuinely experience anxiety or fear such that it would interfere with his or her ability to provide testimony. *See Tolbert-Smith v. Bodman*, 253 F.R.D. 2, 4-5 (D.D.C. 2008).

For example, in *DeLuca v. Gateways Inn, Inc.*, 166 F.R.D. 266 (D. Mass. 1996), the court confirmed the issuance of a protective order that precluded Defendant Vito Perulli from attending the deposition of the plaintiff’s psychotherapist because that “creates, at a minimum, the potential needlessly to invade this sensitive relationship and, whether deliberate or not, to embarrass and intimidate the plaintiff.” *Id.* at 267. Moreover, the court saw no reason his attendance at the deposition “would in any way be necessary to [his] right to make out his defense.” *Id.*

In *Laul v. Los Alamos Nat’l Labs.*, 2017 WL 5129002 (D. N.M. 2017), the district court issued a protective order preventing the plaintiff from attending the deposition of a witness because he had aggressively encountered her in her office on two occasions and had aggressively and repeatedly asked her to give documents to her husband, the Director of Los Alamos Laboratories. The court found “no need” for plaintiff to attend the deposition.

In *Gallella v. Onassis*, 487 F.2d 986 (2<sup>nd</sup> Cir. 1973), the appellate court upheld an order excluding paparazzi Ron Gallella from attending the deposition of Jacqueline Onassis because, his past conduct “could be deemed to both an irrepressible intent to

continue to [his] harassment of [Mrs. Onassis] and his complete disregard for judicial process.” The court continued, “[a]nticipation of misconduct during the examination could reasonably have been founded on either.” *Id.* at 997.

Courts do not hesitate to exclude persons from depositions when appropriate. In addition to the authorities set forth above, courts have on numerous occasions excluded persons from depositions under circumstances similar to those present here. *See Wesselmann v. Tyson Foods, Inc.*, No. 15-CV-4247-LTS, 2016 U.S. Dist. LEXIS 163495, at \*6-9 (N.D. Iowa Nov. 28, 2016); *Tolbert-Smith*, 253 F.R.D. at 4-5; *Ameduri*, 2012 U.S. Dist. LEXIS 202559, at \*6-7; *Barjo v. Cherian*, No. RWT 18-cv-1587, 2019 U.S. Dist. LEXIS 238417, at \*1-2 (D. Md. Feb. 14, 2019); *Monroe v. Sisters of Saint Francis Health Servs.*, No. 2:09 cv 411, 2010 U.S. Dist. LEXIS 124488, at \*8 (N.D. Ind. Nov. 23, 2010).

#### Good Cause for the Exclusion of Mr. Moglen

Conservancy has summarized the history of Mr. Moglen’s harassment of Mr. Kuhn and Ms. Sandler by way of the declarations of Mr. Kuhn (109 TTABVUE 8-32) and Ms. Sandler (109 TTABVUE 33-51), The email message from Matthias Kirschner (109 TTABVUE 51) further supports that summary.

With this memorandum, Conservancy submits a supplemental declaration of Mr. Kuhn (Exhibit B hereto), including as an exhibit a letter from his therapist, Heather Brooks Rensmith, explaining why Mr. Kuhn should not be required to submit to further harassment by Mr. Moglen. She concludes:

Due to Bradley[ Kuhn]’s history of PTSD [post-traumatic stress disorder], I would not recommend he be in the presence of Moglen... My concern involves the re-traumatization of Bradley and worsening of his mental

health... I believe Moglen[’s] presence would allow for the clear patterns of abuse my client has suffered by this person to continue.

Further, as described in Mr. Kuhn’s supplemental declaration, Mr. Moglen’s presence at either deposition raises the very real risk of impeding, hindering, or even completely derailing the deposition. As explained in Mr. Kuhn’s supplemental declaration, Mr. Moglen’s presence could well trigger a PTSD episode in which Mr. Kuhn re-lives a past traumatic event involving Mr. Moglen. This would have the obvious potential of bringing the deposition to a complete halt. And, as set forth in Ms. Sandler’s supplemental declaration (also submitted herewith as Exhibit C), her past interactions with Mr. Moglen makes it difficult for her to concentrate in his presence.

Mr. Moglen already has a history of disrupting depositions. Ms. Sandler’s supplemental declaration includes an email message from Mr. W. John Sullivan describing Mr. Moglen’s conduct during a deposition in another litigation. Mr. Moglen would periodically interrupt the deposition to berate the lawyers, then retreat to another room. Mr. Moglen told one of the attending lawyers that he “would be going home in a body bag.” Mr. Sullivan explains:

I’m sharing this specific incident now because to me it showed that either Moglen sees physical and verbal intimidation, including explicit threats, as legitimate tactics in legal proceedings to achieve his goals, or that he is simply unable to control his anger. Either way, this incident stayed with me, and whenever I hear someone say that they feel too unsafe to be in a room with him, I understand fully why.

So far, Petitioner has failed to adequately explain why Mr. Moglen’s presence is so necessary to building its case. Obviously, Mr. Moglen is familiar with the deponents, but he can provide any intelligence about them to Petitioner’s counsel in advance of the deposition. Petitioner has yet to point to any facts that Mr. Moglen knows that he could

use to assist Petitioner's counsel in examining the deponents—or why this assistance must be in real time or why a phone call during a break would not suffice. Further, if Mr. Moglen's recollection of events differs from the deponents', he will be able to testify to that effect.

It seems plain, unfortunately, that Mr. Moglen's goal is not to build Petitioner's case, but to harass and hurt the deponents. Nothing else explains the surprise announcement that Mr. Moglen, not Petitioner's counsel, will take the depositions. Mr. Moglen is, in fact, a lawyer, licensed in New York. But it appears that he has been counsel of record in only a single federal case, which dates to 1994-97. Nothing in Mr. Moglen's public biography remotely suggests that he has experience as a trial lawyer or has ever taken a deposition. He has yet even to make an appearance in this proceeding. He also will be a witness in this case, and under New York ethical rules, he cannot represent Petitioner and testify as a fact witness on its behalf. *See* N.Y.R. of Prof'l Conduct 3.7. (Exhibit D).<sup>2</sup>

The declarations of Mr. Kuhn and Ms. Sandler, together with the statements of Matthias Kirschner, Heather Brooks Rensmith, and W. John Sullivan provide specific facts that establish good cause for the issuance of a protective order under Fed. R. Civ. P. 26(c)(1)(E).

WHEREFORE, Respondent Conservancy prays that the Board issue a protective order excluding Mr. Moglen's presence at the depositions of either Mr. Kuhn or Ms. Sandler (including during breaks), and from taking any action that would interfere with

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<sup>2</sup> On top of all of this, it would seem impossible for Mr. Moglen to both take a deposition and also excuse himself from the room when the deponent's answer involves highly confidential information that would be designated Attorneys' Eyes Only under the Standard Protective Order.

Mr. Kuhn's and Ms. Sandler's ability to provide complete, accurate testimony at their depositions.

SOFTWARE FREEDOM  
CONSERVANCY



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John L. Welch  
Wolf, Greenfield & Sacks, PC  
600 Atlantic Avenue  
Boston, MA 02210  
617/646-8000  
[jlwtrademarks@wolfgreenfield.com](mailto:jlwtrademarks@wolfgreenfield.com)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon Petitioner this 10<sup>th</sup> day of August, 2023, by emailing a copy thereof to its counsel at [sean@mcmahonpllc.com](mailto:sean@mcmahonpllc.com):

SEAN P MCMAHON, ESQ.  
SEAN P. MCMAHON, PLLC  
100 WARREN STREET, SUITE 343  
MANKATO, MN 56001



---

John L. Welch



# EXHIBIT A

## Welch, John L.

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**From:** Sean P. McMahon <sean@mcmahonpllc.com>  
**Sent:** Monday, July 31, 2023 4:50 PM  
**To:** Welch, John L.  
**Subject:** Re: SFLC v. Conservancy

John:

As discussed earlier today, SFLC does not intend on filing a Request for Reconsideration of the Board's July 21, 2023 order. With respect to the proposal set forth in your message below, SFLC is not interested in the arrangement that you proposed because Mr. Moglen has the most knowledge about this matter as it relates to Mr. Kuhn and Ms. Sandler.

I also pointed out during our call that Mr. Moglen intends to take the depositions of Mr. Kuhn and Ms. Sandler and that you should take this into consideration for purposes of your motion.

Sincerely yours,

**Sean P. McMahon**

**Sean P. McMahon, PLLC** | Attorney at Law\*

100 Warren Street, Suite 343  
Mankato, Minnesota 56001

507.519.2245 [DIRECT](tel:507.519.2245) | 914.844.3796 [MOBILE](tel:914.844.3796)  
[sean@mcmahonpllc.com](mailto:sean@mcmahonpllc.com) | [www.mcmahonpllc.com](http://www.mcmahonpllc.com)

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\*Admitted in New York

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On Thu, Jul 27, 2023 at 6:10 PM John L. Welch <[John.Welch@wolfgreenfield.com](mailto:John.Welch@wolfgreenfield.com)> wrote:

Hello Sean.

Conservancy is willing to reach a compromise on the (construed) motion for a protective order now pending before Judge Elgin. This proposed compromise does not affect the pending Petition to the Commissioner regarding the Attorneys-Eyes-Only designation issue.

Conservancy proposes the following: If SFLC agrees that Eben Moglen will not attend the Kuhn and Sandler depositions in any manner, then Conservancy will not seek a protective order barring SFLC Directors Diane Peters or Daniel Weitzner from attending those depositions. Furthermore, these two depositions will be held in person: Bradley Kuhn in Oregon and Karen Sandler in New York. The scheduling of the depositions would be held in abeyance until a final decision is made on the Attorneys-Eyes-Only issue pending before the Director.

We look forward to discussing this with you on Monday and/or to receiving your comments before then.

Regards,

JLW

**John L. Welch**

**Counsel**

Admitted to Practice: Massachusetts, New York, and  
Washington, DC

[jwelch@WolfGreenfield.com](mailto:jwelch@WolfGreenfield.com)

TEL. 617.646.8285

TTABLOG

**Wolf, Greenfield & Sacks, P.C.**

BOSTON | NEW YORK | WASHINGTON DC

[wolfgreenfield.com](http://wolfgreenfield.com)  

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**From:** Sean P. McMahon <[sean@mcmahonpllc.com](mailto:sean@mcmahonpllc.com)>  
**Sent:** Wednesday, July 26, 2023 2:02 PM  
**To:** Welch, John L. <[John.Welch@WolfGreenfield.com](mailto:John.Welch@WolfGreenfield.com)>  
**Subject:** Re: SFLC v. Conservancy

John:

That's perfect for me. Please call me at 914-844-3796 just in case I decide to work from home or go in late on Monday.

Thanks.

Sean

**Sean P. McMahon**

**Sean P. McMahon, PLLC** | Attorney at Law\*

100 Warren Street, Suite 343

Mankato, Minnesota 56001

507.519.2245 **DIRECT** | 914.844.3796 **MOBILE**

[sean@mcmahonpllc.com](mailto:sean@mcmahonpllc.com) | [www.mcmahonpllc.com](http://www.mcmahonpllc.com)

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\*Admitted in New York

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On Wed, Jul 26, 2023 at 11:11 AM John L. Welch <[John.Welch@wolfgreenfield.com](mailto:John.Welch@wolfgreenfield.com)> wrote:

Thanks, Sean.

Monday is fine.

How about 11 AM Eastern Time.

I'll call you?

JLW

**John L. Welch**

**Counsel**



Admitted to Practice: Massachusetts, New York, and Washington, DC

[jwelch@WolfGreenfield.com](mailto:jwelch@WolfGreenfield.com)

TEL. 617.646.8285

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**Wolf, Greenfield & Sacks, P.C.**

BOSTON | NEW YORK | WASHINGTON DC

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**From:** Sean McMahon <[sean@mcmahonpllc.com](mailto:sean@mcmahonpllc.com)>  
**Sent:** Tuesday, July 25, 2023 8:42 PM  
**To:** Welch, John L. <[John.Welch@WolfGreenfield.com](mailto:John.Welch@WolfGreenfield.com)>  
**Subject:** Re: SFLC v. Conservancy

Hi John:

Could we speak on Monday, July 31? My schedule that day is open so whatever time works for you. Please let me know.

Regards,

Sean

On Jul 21, 2023, at 15:21, John L. Welch <[John.Welch@wolfgreenfield.com](mailto:John.Welch@wolfgreenfield.com)> wrote:

Hello, Sean.

I hope your summer is going well. I suspect it's been a smokey one.

As you have seen in footnote 21 of the Board's Order issued today, the Conservancy is required to include a "good faith effort" statement in its next filing.

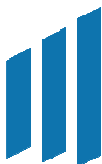
Are you available at some time next week for a telephone discussion? My schedule is open except for 12-2 pm on Wednesday and Thursday (Eastern time).

Regards,

JLW

**John L. Welch**

**Counsel**



Admitted to Practice: Massachusetts, New York, and Washington, DC

[jwelch@WolfGreenfield.com](mailto:jwelch@WolfGreenfield.com)

TEL. 617.646.8285

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**Wolf, Greenfield & Sacks, P.C.**

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# EXHIBIT B



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Software Freedom Law Center,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cancellation No.
	)	92066968
Software Freedom Conservancy,	)	
	)	
Respondent.	)	

**SUPPLEMENTAL DECLARATION OF BRADLEY M. KUHN**

I, Bradley M. Kuhn, declare as follows:

64. I make this declaration to supplement my declaration dated March 28, 2023, which was previously filed in this proceeding in connection with the Conservancy’s motion for a protective order.

65. Attached to this declaration as Exhibit 1 is a letter from my current therapist, Heather Brooks Rensmith, setting forth her opinion regarding the potential harm that would be caused by Eben Moglen’s attendance at my deposition.

66. As a patient who suffers from PTSD, I have educated myself about the disorder and have worked with my therapists (past and current) to identify, notice, and avoid triggers that are likely to cause a “PTSD flashback”.

67. My understanding, as a well-informed patient, is that certain triggers – which can be something as simple as a sound, a photograph, or even thinking about specific memories – can

cause someone who suffers from PTSD to have a “flashback” where they relive past trauma as if that trauma is happening again at that moment.

68. As indicated in my earlier declaration, while Mr. Moglen's continued verbal abuse and occasional physical intimidation is not the sole cause of my PTSD, I do suffer from PTSD in part because of Mr. Moglen's actions, and the symptoms became substantially worse during the years I worked in the same office and was supervised by and reported to Mr. Moglen.

69. I have identified, with the help of my therapists, that, due to the verbal abuse I suffered from him, Mr. Moglen's voice, and even third parties quoting him, or using his favorite turns of phrase and mannerisms, can trigger a PTSD flashback for me.

70. Because of my PTSD, I believe that if Mr. Moglen is in any way involved, is on-site for, is virtually connected (in real time) to, or otherwise directly influencing the real-time questioning during my deposition, I am unlikely to be able to testify.

71. Specifically, if I begin experiencing a PTSD flashback – which Mr. Moglen's involvement in the manners specified in the preceding paragraph will likely trigger – I am likely to become so focused on those past traumatic experiences with Mr. Moglen that I will not be able to understand and be responsive to the current questions during deposition.

72. The recommended acute treatment that I have been taught when experiencing PTSD flashbacks is to, first and foremost, remove any ongoing presence of the trigger.

73. Without a complete protective order that leaves me assured that Mr. Moglen will not be on the premises and has no real time ability to pose the wording or manner of questions, I would be unable during the deposition to engage in the PTSD management skills that my therapists have taught me to use. This is the primary reason why I have asked our legal counsel to seek a broad protective order on this issue.

74. As Exhibit 2 to this declaration, the Conservancy has submitted for filing a DVD disk containing the pertinent video clip of Mr. Moglen's presentation at Freedom Software Foundation's "LibrePlanet" symposium in March 2017, referred to at paragraphs 48-50 of my prior declaration. As previously indicated, the full presentation may be found here:

<https://454850.fs1.hubspotusercontent-na1.net/hubfs/454850/Libre%20Planet.mp4>

I declare that all statements made herein of my own knowledge are true and that these statements were made with the knowledge that willful false statements and the like are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.



---

Bradley M. Kuhn

Date: 10 August 2023

# EXHIBIT 1



August 6, 2023

To Whom It May Concern,

I am writing on behalf of my client, Bradley M Kuhn, in the matter of supporting the request for a protective order covering depositions in this matter. Bradley has been under my care since 7/26/21 as an individual psychotherapy client for the treatment of various concerns, including anxiety and PTSD.

I am a licensed clinical social worker in Oregon and Washington who has worked in a variety of practice settings including with survivors of interpersonal violence, family violence, medical social work, women's health, and emergency psychiatric services and work through trauma informed lenses.

I am familiar with Bradley's experiences including those set out in the declaration prepared by him. I have spoken with Bradley several times, where he detailed his experiences with Eben Moglen. and the request for a protective order, as not be deposed in the presence of Moglen, in any manner (virtual or otherwise). An in person deposition would certainly be detrimental for my patient. Furthermore, even if Bradley had to attend a virtual deposition where Moglen was present, Moglen would have the ability to communicate with his representation and potentially influence questioning or harass Bradley. Finally, if Moglen himself is allowed to question Bradely (either directly or through a real time proxy), the potential harm would be magnified.

Due to Bradley's history of PTSD, and his history with Moglen, I would not recommend he be required to be in the presence of Moglen, and subjected to the potential of further harm by this person. My concern involves the re-traumatization of Bradley and worsening of his mental health that compels me to write for your consideration to avoid unnecessary added suffering. I believe Moglen presence would allow for the clear patterns of abuse my client has suffered by this person to continue.

Respectfully,

Heather Brooks Rensmith, LCSW, CST

# EXHIBIT 2

August 9, 2023

Via FedEx

Commissioner for Trademarks  
Trademark Trial and Appeal Board  
United States Patent and Trademark Office  
Madison East, Concourse Level C-55  
600 Dulany Street  
Alexandria, VA 22314

Re: Submission of Respondent's Evidence via DVD  
Software Freedom Law Center v. Software Freedom Conservancy  
Cancellation No. 92066968

Dear Commissioner:

Enclosed please find a DVD containing an .mp4 file submitted in evidence as an exhibit to the Supplemental Declaration of Bradley M. Kuhn in the above-referenced cancellation proceeding in support of Respondent's Motion for a protective order.

Sincerely,

WOLF, GREENFIELD & SACKS, P.C.



John L. Welch

Encl. One DVD disk

# EXHIBIT C



**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Software Freedom Law Center,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cancellation No. 92066968
	)	
Software Freedom Conservancy,	)	
	)	
Respondent.	)	
	)	

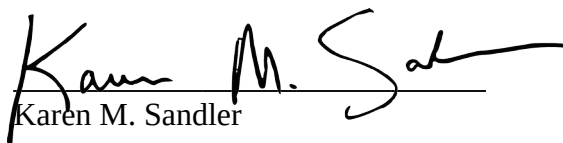
**SUPPLEMENTAL DECLARATION OF KAREN M. SANDLER  
IN SUPPORT OF RESPONDENT’S MOTION FOR PROTECTIVE ORDER**

I, Karen M. Sandler, declare as follows:

14. I make this declaration to supplement my declaration dated March 29, 2023, which was previously filed in this proceeding in connection with Conservancy’s motion for a protective order.
15. In addition to the incidents set forth in Exhibit 3 of my previous declaration, I have personally witnessed, and have heard from many others about, Eben Moglen’s intimidating and threatening behavior on numerous occasions during the years I’ve known him.
16. As another example of such behavior, I am attaching as Exhibit 4 hereto, an email I have received from W. John Sullivan, detailing Moglen’s disruptive behavior at John’s deposition. John was Executive Director of the Free Software Foundation from 2010 through 2022 and had been with the Free Software Foundation since 2003. He has a long working relationship with Moglen.
17. During the panel discussion that I described in paragraph 11 of my previous declaration, and even before Moglen rose to publicly interrupt and berate me, I found it difficult to concentrate in his presence, even though he was merely in the audience (albeit in the front row where I could not miss him). I was distracted by the way he glowered at me. Because of my unpleasant encounters with him in the past, his unpredictability, and his facility with cutting remarks, I was also distracted, wondering what he might say—even though he was merely in the audience.
18. My anxiety was justified when he did, in fact interrupt me while I was speaking and proceeded to berate me about topics unrelated to the panel discussion.
19. Were Moglen present at my deposition, I would be consistently conscious of his presence, his disapproving facial expressions, and the constant anxiety that he would interrupt my testimony or dress me down—on or off the record.

20. As a result, I am concerned about my ability to recall information and articulate my testimony if Moglen were present at my deposition, though I will certainly do my best in any circumstance.

I declare that all statements made herein of my own knowledge are true and that these statements were made with the knowledge that making willfully false statements and the like are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

  
Karen M. Sandler

Date: August 10, 2023

# EXHIBIT 4

Subject **Eben Moglen deposition incident**  
From John Sullivan <[john@wjsullivan.net](mailto:john@wjsullivan.net)>  
To <[karen@sfconservancy.org](mailto:karen@sfconservancy.org)>  
Date 2023-08-10 10:54

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Here is the description of the deposition incident with Eben Moglen:

In August 2013, I was deposed as part of a subpoena for information from the Free Software Foundation's records deemed relevant to patent litigation between two other parties. Eben Moglen at the Software Freedom Law Center had argued on FSF's behalf that the purpose of the deposition could be fulfilled via written affidavit instead of an in-person process, but the parties insisted on the in-person deposition, and this infuriated Moglen.

The deposition took place in the conference room of the SFLC's office in New York City. I attended as FSF's executive director. The conference room adjoined Moglen's office. While another SFLC lawyer was handling the deposition with me, Moglen would periodically enter the room and interrupt the otherwise low-stakes and even-keeled proceedings to aggressively berate the lawyers from the other two parties for their incompetence and inexperience, then leave again. Most memorably, while standing in a threatening posture (with all others seated), he screamed at one of the young lawyers that he "would be going home in a body bag."

I was shocked. It was very early in my executive career at the time, and this was my first deposition in any context. I did not know what was normal, or how to handle the situation. I wanted to assume that Moglen knew what he was doing, and I was afraid of upsetting him, so I just let it go. I wish I hadn't. I'm sharing this specific incident now because to me it showed that either Moglen sees physical and verbal intimidation, including explicit threats, as legitimate tactics in legal proceedings to achieve his goals, or that he is simply unable to control his anger. Either way, this incident stayed with me, and whenever I hear someone say that they feel too unsafe to be in a room with him, I understand fully why.

# EXHIBIT D

**RULE 3.7**

**LAWYER AS WITNESS**

**(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:**

**(1) the testimony relates solely to an uncontested issue;**

**(2) the testimony relates solely to the nature and value of legal services rendered in the matter;**

**(3) disqualification of the lawyer would work substantial hardship on the client;**

**(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or**

**(5) the testimony is authorized by the tribunal.**

**(b) A lawyer may not act as advocate before a tribunal in a matter if:**

**(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or**

**(2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.**

**Comment**

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and also can create a conflict of interest between the lawyer and client.