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

Proceeding no.	92066968
Party	Plaintiff Software Freedom Law Center
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

SOFTWARE FREEDOM LAW CENTER, Petitioner, v. SOFTWARE FREEDOM CONSERVANCY, Respondent.	Cancellation No. 92066968

PETITIONER'S OPPOSITION TO
RESPONDENT'S CONSTRUED MOTION FOR PROTECTIVE ORDER

Petitioner, Software Freedom Law Center, by its counsel, hereby submits its opposition to Respondent's construed Motion for a Protective Order (120 TTABVUE) and the Supplemental Memorandum in Support of Motion for Protective Order ("Respondent's Motion") (122 TTABVUE) seeking the exclusion of Prof. Eben Moglen ("Prof. Moglen") from attending and taking the depositions of Karen Sandler ("Sandler") and Bradley Kuhn ("Kuhn").

Submitted herewith as Exhibit 1 is the Declaration of Eben Moglen and accompanying exhibits..

PROCEDURAL HISTORY & INTRODUCTORY REMARKS

Petitioner assumes the Board's familiarity with the lengthy procedural history of this proceeding, particularly with respect to the numerous motions filed in connection with the depositions of Sandler and Kuhn.

The discovery depositions of Sandler and Kuhn were noticed on October 14, 2019 and February 24, 2021 respectively. Respondent claims that it has never challenged Petitioner's right to take the depositions of Sandler and Kuhn. Yet, Respondent has done everything in its power to delay and prevent those depositions from taking place, even in the face of several admonitions from the Board. For example, in the Board's November 12, 2021 Order granting Petitioner's Motion to Compel the Sandler and Kuhn depositions, the Board wrote "**Any attempted gamesmanship in scheduling or attending the depositions will not be tolerated**." 78 TTABVUE at 10 n.21 (emphasis in original). More recently, in its order of March 6, 2023, the Board wrote that it "highly discourages this type of piecemeal litigation" when addressing "**another"** motion proposed by Respondent. 107 TTABVUE at 9 (emphasis in original). Then, in its most recent order of July 21, 2023, the Board wrote,

> The Board notes that, regardless of whether Respondent's decisions not to file a motion or cross-motion for a protective order were well-intentioned or its previous positions pretextual (which the Board need not determine here), Respondent made several tactical decisions to foreshadow the motion in an effort to color its other filings while keeping it's powder dry for another chance at preclusion. Respondent's piecemeal approach has resulted in unnecessary delay and taxed the Board's scarce resources. Respondent should not, therefore, interpret the Board's exercise of discretion to consider a motion in this instance as condoning of Respondent's strategy.

120 TTABVUE at 6, n.20.

Thus, on multiple occasions the Board has criticized the strategy of Respondent and its conduct in this proceeding. But, as shall be demonstrated herein nothing has changed with respect to Respondent's strategy. Respondent continues to invoke the now tired strategy of delay and procrastination with respect to the discovery depositions of Sandler and Kuhn. The sole purpose of the construed Motion for a Protective Order is for one purpose only - delay. It is now

time for the Board to let Petitioner take its depositions without any further delay and move this proceeding along. This proceeding was filed on September 22, 20217 and, to date, not a single discovery deposition has been taken.

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LEGAL DISCUSSION

Inter partes proceedings before the Board are governed by the Federal Rules of Civil Procedure, except as otherwise provided in the Trademark Rules of Practice, and "wherever applicable and appropriate." T.B.M.P. § 101.02; *see also* 37 C.F.R. § 2.116(a). Thus, the provisions of Fed. R. Civ. P. 26(c)(1) are applicable to the Sandler and Kuhn depositions. But, while it may be within the Board's inherent authority to issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, which includes the designation of person who may be present while discovery is conducted, the law does not support the issuance of a protective order here to prevent Prof. Moglen from attending or taking the depositions of Sandler and Kuhn.

Respondent asks the Board to believe that the good cause standard set out in Fed. .R. Civ. P. 26(c)(1) is quite low and easily met. However, contrary to what Respondent asks the Board to believe, the bar is actually quite high and requires a showing of particular and specific facts pointing to the need for a protective order. Furthermore, Fed. R. Civ. P. 26(c)(1) is also not an appropriate vehicle to disqualify an attorney from acting for a company that he created and is currently an officer. Disqualification of counsel conflicts with the general policy favoring a party's right to representation by counsel of choice.

Respondent relies upon seemingly convenient quotations from various authorities to support its contention that Mr. Moglen should be excluded from the Sandler and Kuhn depositions in any manner. But, they are unavailing and, in fact, distinguishable when the specific circumstances of those cases are considered.

In *DeLuca v. Gateways Inn, Inc.*, 166 F.R.D. 266 (D. Mass. 1996), Plaintiff indicated in its papers that it did not intend to call the deponent in question at trial. Thus, to rely upon the fact that the court saw no reason his attendance at the deposition "would in any way be necessary to [his] right to make out his defense" is misleading in the context of this matter.

Similarly, the facts of *Laul v. Los Alamos Nat'l* Labs, 2017 WL 5129002 (D. N.M. 2017), a case concerning employment discrimination and unlawful termination, demonstrates no pertinent association to the facts of this case. In *Laul* the deponent in question was the wife of a company director employed in an non-management capacity and the record reflected that the Plaintiff had confrontations with the deponent about his employment with the Defendant. The record reflected that the Plaintiff had visited Zumba classes at which the deponent attended where he asked questions about the deponent, suggesting that Plaintiff was stalking the deponent. No such facts exist in this case and Respondent's reliance upon *Laul* serves no purpose whatsoever other than to distract the Board.

Respondent's reliance on *Galella v. Onassis,* 487 F.2d 986 (2nd Cir. 1973), is also blatantly misleading in the face of the actual facts. Respondent included two quotes in its submission to the Board. First, Respondent stated that Plaintiff's 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" and "[a]nticipation of misconduct during the examination could reasonably have been founded on either." But, Respondent conveniently left out the fact that at the time the protective order was issued, Plaintiff had already been charged with violation of the court's temporary restraining order which was entered to protect the defendant from further harassment. There are no restraining orders in place here and Respondent's reliance upon this authority is disingenuous and misleading. Reliance on *Galella* only serves to distract the Board from seeing Respondent's true objective of delay and avoidance.

Apart from Respondent's distracting review of case law on protective orders, Respondent entirely ignores the fact that courts require specific facts that establish serious, well-founded concern that coercion will, in fact, occur absent restrictions. Rule 26(c)'s requirement of a showing of good cause to support the issuance of a protective order mandates that " [t]he burden is upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." *In re Terra Int'l, Inc.*, 134 F.3d 302, 305 (5th Cir. 1998)*., quoting*, *United States v. Garrett*, 571 F.2d 1323, 1326 n. 3 (5th Cir. 1978); *see also* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER AND RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2035, at 483-86 (2d ed.1994). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Cipollone v. Liggett Group, Inc*., 785 F.2d 1108, 1121 (3d Cir. 1986), *cert. denied*, 484 U.S. 976 (1987); *Tuszkiewicz v. Allen Bradley Co*., 170 F.R.D. 15, 16-17 (E.D. Wisc. 1996) (protective order denied where there were no "distinct facts

that would lead thc court to conclude that the witnesses cannot be trusted to tell the truth or that their attending each other's depositions will otherwise affect their testimony").

As shall be set forth below, the record in this case fails to establish any serious harm will occur with respect to either Sandler or Kuhn that would justify the issuance of a protective order under Fed. R. Civ. P. 26(c)(1). Nor is there any authority that Fed. R. Civ. P. 26(c)(1) can be used as a means to disqualify counsel, especially one who formed the very organization that initiated this proceeding.

PROFESSOR EBEN MOGLEN

Prof. Moglen is a distinguished member of the legal profession with a long, storied and distinguished career. Prof. Moglen serves as professor of law at Columbia Law School in New York, where he has taught since 1987. Declaration of Eben Moglen ("Moglen Declaration"), Paragraph 1. Prof. Moglen was admitted to practice law in the State of New York in 1988. Moglen Declaration, Paragraph 2. Prof. Moglen had the privilege of clerking for Justice Thurgood Marshall of the United States Supreme Court. *Id.* Few lawyers enjoy such a distinction. Prof. Moglen's history and accomplishments are amply detailed in his declaration submitted herewith.

The history of Petitioner and Respondent are also more fully forth in the Moglen Declaration for the benefit of the Board, along with a summation of events leading up to the filing of this proceeding almost six years ago.

THE SANDLER DEPOSITION

As to the Sandler deposition, Respondent relies upon the Declaration of Karen M. Sandler in Support of Respondent's Motion for a Protective Order ("Sandler Declaration") and Supplemental Declaration of Karen M. Sandler in Support of Respondent's Motion for Protective Order ("Supplemental Sandler Declaration").

Initially, Petitioner wishes to call to the attention of the Board that Exhibit 3 of the Sandler Declaration and Exhibit 4 of the Supplemental Sandler Declaration constitutes impermissible hearsay. **Thus, Petitioner objects to Exhibit 3 of the Sandler Declaration and Exhibit 4 of the Supplemental Sandler Declaration**. It would be clear error for the Board to rely upon Exhibit 3 of the Sandler Declaration and Exhibit 4 of the Supplemental Sandler Declaration in any capacity whatsoever. The e-mail communications upon which Sandler relies are classic, textbook, examples of out of court statements offered to prove the truth of the contents. Petitioner has been given no ability to cross examine the senders of those communications so that the Board could evaluate the credibility of the statements made in those communications. Accordingly, Exhibit 3 of the Sandler Declaration and Exhibit 4 of the Supplemental Sandler Declaration must be given no consideration whatsoever.

Sandler does not dispute that she was employed in various roles at Petitioner. 109 TTABVUE 33. Sandler was also Prof. Moglen's student in her first year of law school. Moglen Declaration, 9 n.1. The Board will likely note that the Sandler Declaration and Supplemental Sandler Declaration fail to state any specific examples of aggressive behavior or harassment by Prof. Moglen during her time as a student of Prof. Moglen or during her employment with

Petitioner. Instead, Sandler frivolously uses hearsay, innuendo and mere gossip to support her contentions about Prof. Moglen.

Sandler claims that if Prof. Moglen is present at her deposition she would be "consistently conscious of his presence." 122 TTABVUE 25. Sandler claims that she is "concerned" about her ability to recall information and articulate herself if Prof. Moglen is present at her deposition. *Id.* at 26. But, Sandler concedes that she will "certainly do [her] best in any circumstance." *Id.* Indeed, Sandler did just so---in an unbroken atmosphere of mutual respect---in classroom and law practice, for years.

Respondent has not met its burden in seeking to have Prof. Moglen excluded from Sandler's deposition. Respondent has failed to allege or even demonstrate the possibility of any harm, let alone serious harm, could stem from Prof. Moglen's attendance at Sandler's deposition. As Prof. Moglen stated, "[p]ut in simpler but not less accurate words, their testimony is they are afraid." Moglen Declaration, Paragraph 22. But, the standard for excluding a party, or disqualifying an attorney, from a deposition is not measured by how afraid or scared one may be of the person conducting the examination. Being afraid or scared falls into the category of "boilerplate 'good cause' facts which will exist in most civil litigation." *See, e.g., In re Terra Int'l, Inc.*, 134 F.3d 302, 305 (5th Cir. 1998). It is fair to say that being afraid, scared or anxious would apply equally to anyone being deposed in civil litigation. In any event, Sandler herself concedes that Prof. Moglen's attendance at her deposition is inevitable by stating that she would do her best in any circumstance. Thus, Petitioner submits that the Board should allow Sandler to do just that.

THE KUHN DEPOSITION

Respondent relies upon the Declaration of Declaration of Bradley M. Kuhn in Support of Respondent's Motion for a Protective Order ("Kuhn Declaration") and Supplemental Declaration of Bradley M. Kuhn ("Supplemental Kuhn Declaration").

Initially, Petitioner wishes to call to the attention of the Board that Exhibit 1 of the Supplemental Kuhn Declaration constitutes impermissible hearsay and improper expert testimony. **Thus, Petitioner objects to Exhibit 1 of the Supplemental Kuhn Declaration** .It would be clear error for the Board to rely upon Exhibit 1 of the Supplemental Kuhn Declaration in any capacity whatsoever. The communication upon which Kuhn relies is a classic, textbook, example of out of court statements offered to prove the truth of the contents. Furthermore, to the extent that Kuhn purports to introduce the correspondence from Ms. Rensmith as expert testimony, it would be clear error for the Board to rely upon the report without permitting Petitioner to have an independent psychological examination of Kuhn obtained by a licensed practitioner of its choice. Petitioner has not been able to cross examine Ms. Rensmith on the subject matter of her communication. For example, Ms. Rensmith does not state she has rendered a clinical diagnosis of Kuhn and Petitioner has not been able to challenge Ms. Rensmith's credibility or qualifications, especially on account of the fact that Ms. Rensmith's e-mail address on her correspondence is "heather@switchonsextherapy.com." 122 TTABVUE 21. Indeed, Ms. Rensmith's website states "[a]s a sex and relationship therapist, I am not often primarily treating mental health concerns and do not have a diagnosis for our treatment." *See* Exhibit 2 submitted herewith, which consists of a printout from

https://www.switchonsextherapy.com/faq accessed on August 30, 2023. Accordingly, Exhibit 1 of the Supplemental Kuhn Declaration must be given no consideration whatsoever.

Like Sandler, Kuhn frivolously uses hearsay, innuendo and mere gossip to support his contentions about Prof. Moglen. Kuhn claims that he suffers from post traumatic stress disorder (PTSD) and attempts to insinuate, in both the Kuhn Declaration and Supplemental Kuhn Declaration, that his PTSD is somehow connected to Prof. Moglen. But, Kuhn also acknowledges that his mental health issues are rooted elsewhere. 122 TTABVUE 18; *see also* 109 TTABVUE 16.

Kuhn recounts a number of events in his declarations to persuade the Board that Prof. Moglen has been abusive towards him. For example, Kuhn indicated that on March 25, 2017 he attended a conference at which Prof. Moglen was speaking. 109 TTABVUE 16. Then, Kuhn recalled a story told by Prof. Moglen about his [Moglen's] mother. *Id.* at 17. Kuhn claims that he believes that the story told by Prof. Moglen was to "continue his verbal abuse" towards him. *Id.* Kuhn submitted an 8 second clip of Prof. Moglen's remarks to the Board via DVD submission. 122 TTABVUE 19; *see also* 123 TTABVUE. The Board can hear from Prof. Moglen in his own words and can easily see and hear that his remarks were not directed at anyone in particular. Moreover, the crowd responds with laughter. Simply put, for some reason, Kuhn chooses to believe that the remarks were insensitive, directed towards him and constituted verbal abuse. But, the record does not support that contention.

Despite Kuhn's recollection of events in his declarations, some of which occurred over 13 years ago during his employment with Petitioner, Kuhn fails to state any harm that could result from Prof. Moglen's attendance at his deposition. Kuhn wrote that if Prof. Moglen is present during his examination that "I am unlikely to be able to testify." 122 TTABVUE 18. Kuhn claims that if he begins to experience a PTSD flashback that he "will not be able to understand and be responsive to the current questions during deposition." *Id.* Kuhn fails to allege that any ***harm*** would occur if Prof. Moglen is present for his examination. Instead, Kuhn states that it would be difficult for him to concentrate. As Prof. Moglen stated in his declaration, even if you grant Kuhn, *arguendo*, his concentration difficulties, the essence of his testimony is that he is afraid. Moglen Declaration, Paragraph 22. Kuhn has not alleged that Prof. Moglen's presence at his examination would pose any risk to his safety. Kuhn has merely alleged concentration difficulties.

Respondent's Motion claims that there is a chance that the deposition could come to a complete halt. 122 TTABVUE 5. But, that is a mere conclusory statement, unsupported by any fact or evidence. Indeed, Kuhn has not identified a single incident of being unable to respond to a question or form a coherent statement due to an alleged "PTSD flashback." Such broad, conclusory statements are insufficient to form the basis of a protective order.

As noted above, the standard for excluding a party, or disqualifying an attorney, from a deposition is not measured by how afraid or scared one may be of the person conducting the examination. Being afraid or scared falls into the category of "boilerplate 'good cause' facts which will exist in most civil litigation." *See, e.g., In re Terra Int'l, Inc*., 134 F.3d 302, 305 (5th

Cir. 1998). It is fair to say that being afraid, scared or anxious would apply equally to anyone being deposed in civil litigation. Kuhn recounts events in his declarations that he claims demonstrate abuse and harassment. While Prof. Moglen disagrees with the manner in which Kuhn recalls those events, Kuhn nevertheless has failed to state how Moglen's presence at his deposition would cause any harm or pose any risk to him whatsoever.

CONCLUSION

Respondent has failed to carry its burden in seeking the exclusion of Prof. Moglen in any manner from the depositions of Sandler and Kuhn. Neither Sandler or Kuhn have claimed that they will be harmed in any way by Prof. Moglen's presence at their depositions (either as an attendee or counsel taking the depositions) except to say that they will have concentration difficulties. Neither Sandler or Kuhn have provided any specific details about being unable to speak or the risks to their safety. The standard for excluding a party, no less an officer of the court, or disqualification of counsel from a deposition is much higher than Respondent asks the Board to believe. Respondent has not established any basis for the exclusion of Prof. Moglen in any manner under Fed. R. Civ. P. 26(c)(1). Nor is there any authority for disqualification of Prof. Moglen as counsel for the entity he created and is an officer under Fed. R. Civ. P. 26(c)(1).

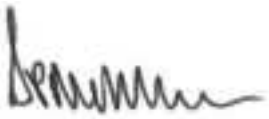
Instead, Respondent's Motion should be seen by the Board for exactly what it is. Respondent's Motion is just another vehicle for delay; a constant and unremitting effort to avoid answering questions under oath. Perhaps the most troubling part of Respondent's Motion is that it asks the Board for an extraordinary remedy fatally founded in hearsay, innuendo, gossip and unsworn expert testimony rendering the motion utterly frivolous. Respondent knew, or ought to

have known, better than to ask for such a remedy founded in frivolity. It is for this very reason that Fed. R. Civ. P. 11 exists.

After years of obstruction, the simplicity of this last frivolous motion is clarifying. Sandler and Kuhn are afraid to sit across the table from Prof. Moglen, who taught and trained them, and answer his questions under oath. Respondent, a New York non-profit, should produce its officers in New York City, on days of Petitioner's choosing, for questioning by counsel of Petitioner's choice, forthwith. Moglen Declaration, Paragraph 27. Petitioner will also require an additional half day with each witness to inquire into statements made in declarations under oath by these witnesses in connection with the present motion. Sandler and Kuhn have delayed for years, dragging behind them the reputation of the charity they control. Now it should end. As noted by Prof. Moglen, it is now time to end this "litany of delay, cost, and obstruction." *Id.*

Dated: August 30, 2023
Mankato, Minnesota

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PETITIONER'S OPPOSITION TO RESPONDENT'S CONSTRUED MOTION FOR PROTECTIVE ORDER** was served upon Respondent this 30th day of August, 2023, by emailing a copy thereof to its counsel at jlwtrademarks@wolfgreenfield.com:

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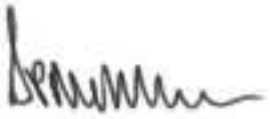


Dated: August 30. 2023

Sean P. McMahon

Exhibit 1

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

SOFTWARE FREEDOM LAW CENTER, Petitioner, v. SOFTWARE FREEDOM CONSERVANCY, Respondent.	Cancellation No. 92066968

DECLARATION OF EBEN MOGLEN

I, Eben Moglen, declare as follows:

1. I am Professor of Law at Columbia Law School, where I have taught since 1987. In 2005, I founded Petitioner Software Freedom Law Center, Inc. (referred to herein as either "Petitioner" or "SFLC"), of which I am President and Executive Director. In 2006, I founded Respondent Software Freedom Conservancy ("SFC"). I make this declaration in opposition to Respondent SFC's construed Motion for a Protective Order to prevent and disqualify me from attending and taking the depositions of Karen M. Sandler ("Sandler") and Bradley Kuhn ("Kuhn") in this cancellation proceeding.
2. I am currently 64 years old. I was educated at Swarthmore College (BA, High Honors, 1980) and Yale University (JD, MPhil, 1985; PhD (History, with distinction), 1993), where I simultaneously took a law degree and a PhD in American History. During law school I worked for the IBM law department and at the law firm of Cravath, Swaine & Moore. After graduating I clerked for Judge Edward Weinfeld of the Southern District of New York and Justice Thurgood Marshall of the United States Supreme Court. I was

admitted to the New York Bar in 1988, and to the United States Supreme Court Bar, on the motion of the late Justice Harry A. Blackmun, in 1991. I was promoted to full professor at Columbia in 1994, and have served as visiting professor at the law faculties of Tel-Aviv University, the University of Virginia, and Harvard University.

3. I began working as a professional computer programmer at the age of 14 in 1973. Skilled work paid for my higher education. From 1979 until I began federal employment in 1985, I was---in addition to my law and graduate school programs---employed as a designer and implementer of advanced computer programming languages at IBM's Santa Teresa Laboratory and Yorktown Research Center. Though my living has since been earned at another trade, I have remained for half a century an architect and maker of software, a tinkerer building and running hardware and networks of my own design, and so on.

4. Though I have published and lectured widely on legal history subjects, the focus of my practice throughout nearly forty years has been on issues of political freedom and digital technology. Since the beginning of my academic career, I have tried to put my unique upbringing and set of knowledges to work---supported by the stability and protection of academic tenure---strengthening, for the very long term, ideas and institutions that would use software to preserve and protect individual human freedom. I saw this as the urgent project of my lifetime, because I foresaw that other forces would use software as an instrument to destroy individual human freedom altogether.

5. I therefore tried to assist the---initially very small---number of people who shared my concerns. From 1991-95 I helped the path-breaking programmer, Philip R. Zimmerman, whose Pretty Good Privacy (PGP) brought truly strong encryption to every user, stare

down criminal prosecution in the United States. Therefore, real digital encryption available to everyone flourished throughout the Net in the Free World. Beginning in 1993, I turned Richard Stallman's revolutionary GNU General Public License (GPL) and its fundamental concept of ``copyleft" into a globally respected system of "share and share alike" relationships between computer software and copyright law. That practical legal innovation transformed the global software industry, unleashing competition and innovation that ultimately came to be worth trillions of dollars. Following the thought of Elinor Ostrom---one of the 20th century's greatest economists and the first woman economist thought worthy of the Nobel Prize---I showed how the world's largest IT businesses as well as the smallest could benefit from the rich ecology of ``free software" commons, living under the familiar principle ``from each according to inclination and ability, to each according to need."

6. By 2005, the value of the ideas I represented, both metaphorically and professionally, had become evident to the world's most informed and powerful IT businesses. They were willing to make substantial, unrestricted regular donations to an organization led by me that would give ***pro bono*** legal assistance to free software non-profit organizations, engage in the public teaching of these ideas, and train young lawyers who could help commercial entities make use of the immense capital value being created in these commons. I therefore founded SFLC. SFLC is a regulated public charity chartered in New York State for the purposes described, and determined to be a tax-deductible 501(c)(3) charity by the Internal Revenue Service (IRS). Because its mission is educational as well as for the provision of legal services, it is chartered as an educational non-profit with the New York State Department of Education.

7. In my roles at Columbia Law School and at SFLC, I have advised, counseled and assisted dozens of free software communities, some organized as non-profit corporations, most existing as unincorporated associations of creative individuals. I have trained lawyers from around the world in the issues, institutions and techniques I pioneered. I have frequently appeared in the US Supreme Court as and on behalf of ***amici curiae*** in cases involving patent scope and damages, software copyright, and digital civil liberties. I have testified before the European Commission and in both the United States Congress and the European Parliament as an invited witness. I have worked with standards organizations, legislative committees, trade associations, and companies in many countries as they adopted and made free software ideas their own.
8. SFLC has been a full-service practice for free software clients. Because of its nature as a training practice, it has been designed to combine "basic" client services with academic instruction and publication. Over the years I have supervised or performed, personally, all sorts of non-profit transactions, trademark filings, patent re-examinations, subpoena responses, trial court motions, and depositions on clients' behalf.
9. Operating SFLC over nearly two decades, I have had occasion to form, to assist, to support, and to govern in various degrees a number of non-profit organizations, including---as well as Respondent SFC---SFLC.in, the FreedomBox Foundation, the Protocol Freedom Information Foundation (now the Free Software Support Network), and the Public Patent Foundation. All of these entities were created and operated, to the extent I operated them or participated in their operation, in pursuit of a single unifying idea: that the freedom of users to exercise their rights in software is ultimately necessary

to the preservation of all human freedom. That idea is much more widely understood now than it was forty years ago.

10. Once SFLC had formed and begun to establish itself as a law practice, it was apparent to me that we would need an affiliated entity, separate from the law firm for professional responsibility and liability-limitation reasons, to which client assets---including intangible rights and small funds flows---could be entrusted, with the ability to receive tax-deductible contributions. SFLC's legal director, Daniel Ravicher ("Ravicher"), and I designed the structure that became SFC. The work of making the entity was delegated to a recently-hired associate, Sandler. In consultation with Ravicher---with whom I constituted the initial board of directors, which I chaired---I appointed another early hire at SFLC, Kuhn (whom I brought in to run our internal computing and to help interact with our programmer client base, under the title of Chief Technical Officer) to be SFC's President.

11. Like SFLC, SFC was designed to maximize regulatory oversight: built for integrity---as one might describe the matter to a client---not for speed. New York State non-profits are not creatures of general incorporation. Each is a specially-chartered corporation, legally obligated to operate only within its granted rights. Directors of New York non-profits organizations are not empowered with broad discretion to use "business judgment" as to the charity's activities. They are responsible to the New York State Attorney General to hold the entity to activities within the charter. Activities outside the charter, let alone forbidden by the charter, are unlawful. Soliciting funds for unlawful purposes is unlawful solicitation. When we drafted SFC's charter, we explicitly forbade it from offering or engaging in legal services. *See* Exhibit 10 to the Declaration of Bradley M. Kuhn in

support of Respondent's Motion for Summary Judgment at 6 TTABVUE. (SEVENTH: The Corporation will not practice the profession of law.) This provision was necessary for the same reason that SFC itself was necessary: any law practice also holding and managing client assets would impose fiduciary liability on itself and create legal ethics pitfalls for its lawyers.

12. In addition to appointing SFC"s officers and chairing its board, I as SFLC Executive Director located SFC's place of business at SFLC's offices, paid its operating costs out of SFLC's budget, personally signed its application for IRS determination, and made public speeches promoting its goals and soliciting public support. The close cooperation and confidential relationship necessary for the handling of client trust meant that despite the formal legal independence of the two organizations, SFC functioned, as I frequently told my employees in the course of our duties, like a "potted plant."

13. In May 2010, in my role as SFLC's Executive Director, I terminated Kuhn's employment for cause. In January 2011, at a regularly scheduled board meeting of SFC, Kuhn fomented a boardroom coup, narrowly voting me off the board and eliminating all SFLC influence over SFC's governance. In view of this governance change I immediately, before leaving the board meeting, terminated SFLC's retainer to provide ***pro bono*** legal services to SFC. Sandler---then and afterwards serving SFC in the office of Corporate Secretary, and later as Executive Director---left my practice to take non-legal employment in June 2011, and has remained in non-legal employment---at the Gnome Foundation and SFC---since. Thereafter, although I maintained professional contact with Kuhn, Sandler, and SFC's General Counsel, Anthony K. Sebro ("Sebro"), I played no further role in SFC's management or affairs.

14. In December 2014, while I was on SFLC business in the People's Republic of China, I received a call from an SFLC associate informing me that Kuhn and Sandler had plagiarized my writing---and that of SFLC's legal director Mishi Choudhary---on a website advertising SFC called copyleft.org. When I returned from China I verified the claim and consulted SFLC's Board. On December 20, 2014, Ms. Choudhary and I had one abbreviated telephone conversation with Sandler. She refused our request to meet in person, failed to commit to investigating and resolving any plagiarism, and expressed offense at our indignation. Sandler and Kuhn then committed themselves to the mature and well-considered strategy of never speaking to us again, which they have followed now for nearly nine years.

15. Our investigation then unearthed the trademark registration for SOFTWARE FREEDOM CONSERVANCY that is the subject of the present cancellation proceeding, which surprised us. Kuhn, the President; Sandler, the Corporate Secretary---by the time of our discovery, the Executive Director; and Sebro, the General Counsel, who filed the application on SFC's behalf, all had actual knowledge of Petitioner’s SOFTWARE FREEDOM LAW CENTER mark. The SFLC lawyer who submitted and managed the application for SFLC's mark was Sandler. Our mark was the only mark on the register containing the term SOFTWARE FREEDOM. Disclosure of their actual knowledge of our mark, as required under pain of felony violation of 18 U.S.C. § 1001, would have resulted in notice to us. The inevitable confusion caused by the proposed mark would have been called to the Office's attention and the application would have been eventually denied.

16. The solution SFC's officers had adopted was falsehood. SFC's application falsely failed to disclose our mark, of which they indisputably had actual knowledge. ***See*** Declaration of Bradley M. Kuhn submitted in support of Respondent's Motion for Summary Judgment at 6 TTABVUE. Kuhn has testified that " I asked Sebro to register trademarks for any key brands and names that we and our projects were already ***using***." ***See*** Paragraph 20 of the Declaration of Bradley M. Kuhn submitted in support of Respondent's Motion for Summary Judgment at 6 TTABVUE. After the filing of this cancellation petition, Sebro was invited---through Sandler and Kuhn's initiative and action---to join SFC's board of directors, where he presently remains.

17. Having acquired additional evidence of this second serious claim---adding to plagiarism of an SFLC publication the fraudulent registration of a trademark designed to create confusion and misappropriate SFLC's goodwill---I attempted to speak to Kuhn and Sandler personally when we all attended weeks later, in mid-January 2015, a conference in Auckland, New Zealand, where I gave a keynote address. But they refused all contact. My legal director, Ms. Choudhary, and I made repeated attempts over more than a year, personally and through intermediaries, to bring about a meeting to discuss and settle our claims. After eighteen months of their continued refusal to engage, we abandoned the effort and filed the instant cancellation proceeding.

18. The Board is fully familiar with the long procedural record in this matter, and its myriad sources of delay. I will, therefore, add to this account of the background only one more fact outside the formal record. In December 2017, we, SFLC, published our offer of settlement. We offered to exchange full mutual releases of all claims in return only for a strong mutual covenant of non-disparagement. We further offered to license use of the

name “Software Freedom Conservancy"” for all purposes other than the provision of legal services (which was already prohibited by their charter), conditioned on non-violation of the anti-disparagement provision. *See* *https://softwarefreedom.org/blog/2017/dec/22/conservancy/*, a copy of which is attached hereto as Exhibit A. This offer was immediately and publicly rejected by Kuhn, on the ground that it would “not advance software freedom nor our mission” of the charity I created and whose charter I drafted, to enter into a non-disparagement agreement with SFLC. *See* https://sfconservancy.org/blog/2017/dec/22/sflc-escalation/, a copy of which is attached hereto as Exhibit B. At our first procedural opportunity thereafter to make discovery requests, we noticed the depositions of Sandler and Kuhn, still pending.

19. Against this background, one can perhaps surmise why these witnesses have made avoiding their duty to provide truthful testimony such a priority in this proceeding. Now, with their resources of delay almost exhausted. they have consumed an additional year in a frivolous effort to exercise a veto over the selection of the lawyer who will examine them.

20. Respondent's memorandum offers no legal authority whatsoever for the proposition that a protective order may be used to deny the discovering party its choice of counsel. Having no law on its side, Respondent chooses to pretend the issue away altogether.

21. There has never been any doubt I would personally conduct these depositions. I have known both these witnesses for decades; they each worked under my daily personal supervision for years. In addition to being familiar with the witnesses, I have a good knowledge of the background and the record. Being on salary, I am inexpensive. Respondent's counsel was reminded during the course of his preparation of its

supplement to the construed Motion for a Protective Order that I would be representing SFLC at the depositions of Kuhn and Sandler. The pretense of treating counsel, a fellow officer of the court, as bystander is as discourteous as it is legally ineffective.

22. The facts recited in the reluctant witness's declarations may look slightly different after cross-examination, as much will. But let us grant them, *arguendo*, their PTSD and their concentration difficulties. Put in simpler but not less accurate words, their testimony is they are afraid. Let them call their frailties and troubles what they like, they are no basis for interfering with our, SFLC's, right to be represented by the counsel of our choice.

23. After decades spent law professing, I guess there are quite a few people who, imagining me cross-examining them, would feel afraid.[1] Their subjective moods do not constitute a basis for limiting my state-granted right to practice law.[2]

24. Depriving parties of their choice of counsel is an extraordinary intervention, requiring a showing not remotely made here, under circumstances no one has suggested are present. SFC's construed Motion for a Protective Order is frivolous. It is one more piece of delay in an edifice constructed solely ***to*** delay, in order to allow the responsible officials of a regulated public charity to avoid answering questions under oath. But it also embodies a form of personal attack on fellow counsel that I find troubling.

---

[1] Sandler was my student in her first year of law school.

[2] Apparent evidentiary use has been made of an unsworn "email message" from John Sullivan, formerly an employee of my longtime client, the Free Software Foundation. Sullivan refers to an occasion on which I defended a deposition, seconded by Ms. Choudhary, in which the witness deposed was Sullivan. Our client, FSF, had been subpoenaed as a third-party witness in a federal patent infringement action. We expressed on our client"s behalf our willingness to cooperate in the production of documents requested, but plaintiff's counsel demanded the in-person production of a witness. In general---as pro bono practitioners representing small, impecunious non-profits---we take a dim view of commercial parties catching our clients in the expensive cross-fire of their luxurious litigation style. We do what we can to discourage that behavior. On this particular occasion, one of the two sides present left intensely unsettled and dissatisfied, having a bad transcript to take home, along with some very inconvenient testimony provided by Sullivan. Hence the drama Sullivan accurately recalls, minus the context. Time has evidently relieved Sullivan of any gratitude for the efforts quite successfully made in his employer's interest, at no charge, on that occasion.

25. What is said about me in these declarations is not the troubling part. After decades in public life, I have heard various things said about me. Steven Ballmer, then the president of Microsoft, said of my legal work that it was “a cancer.” The New York Times once called me a ``Prophet'' in a headline. One would expect any views expressed by Sandler and Kuhn to fall somewhere in between. Nor have they managed to formulate any derogation, in exaggerating my fearsomeness, that would not also serve the legend of a litigator.

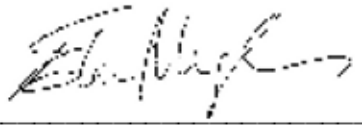
26. But, after nearly four decades in practice, I cannot conceive of circumstances in which I would lend my name to a filing of this kind. I was taught by the great judges for whom I worked starting out, Edward Weinfeld and Thurgood Marshall, that we all, as officers of the court, are charged with a collective and individual duty to protect the dignity and integrity of justice. I have tried to practice, and to teach and train others to practice, always consistent with that duty. Making a frivolous attack on opposing counsel to create delay in discovery seems to me indicative of a failure of that responsibility.

27. SFLC is absolutely entitled to an end to this litany of delay, cost, and obstruction. Respondent, a New York non-profit, should produce its officials in New York City, on days of SFLC’s choosing, for questioning by counsel of SFLC's choice, forthwith. SFLC will need an additional half day with each witness to inquire into statements made in declarations under oath by these witnesses in connection with the present motion.[3]

28. I, being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or submission or any registration

[3] Kuhn has placed his mental health status at issue. This subject now requires additional questions, to which the door has been opened, that SFLC also intends to pursue.

resulting therefrom, declares that all statements made of my own knowledge are true and all statements made on information and belief are believed to be true.



Eben Moglen

Dated: August 30, 2023

Exhibit A

Software Freedom Law Center

Blog

Conservancy: How and Why We Should Settle

By Eben Moglen | December 22, 2017

Yesterday marks three years that I have been trying to negotiate a peaceful settlement with my ex-employees, Karen Sandler and Bradley Kuhn, of various complaints SFLC and I have about the way they treat us. After all this time when they would not even meet with us to discuss our issues, the involvement of the Trademark Trial and Appeals Board in one aspect of the matter has at least created a space for structured discussion. Intermediaries both organizations work with and trust have generously taken the opportunity to communicate our settlement proposals, and we have initiated discussion through counsel. As transparency is, indeed, a valued commitment in the free software world, we think it is now time to publish our offer:

We propose a general peace, releasing all claims that the parties have against one another, in return for an iron-clad agreement for mutual non-disparagement, binding all the organizations and individuals involved, with strong safeguards against breach. SFLC will offer, as part of such an overall agreement, a perpetual, royalty-free trademark license for the Software Freedom Conservancy to keep and use its present name, subject to agreed measures to prevent confusion, and continued observance of the non-disparagement agreement.

We think these are terms that any pair of organizations and their managers could honorably accept for the resolution of claims such as ours. We agree that resources should not be expended on contestation where such a settlement is possible. We do not think that any organization's welfare or any principle would be served by preferring litigation to this settlement, and we don't. But as a lawyer I have the same obligation of zealous representation to the organization I created and led for the last thirteen years that I have to any other client. If we cannot settle swiftly on these evidently fair and respectful terms, litigation must continue.

The Trademark Case as It Stands

When you apply for a trademark in the United States, you must make certain declarations under oath, including that to your knowledge and belief there are no other persons entitled to use the mark or any mark so similar to the mark you are seeking to register that it will or might create "confusion, deception or mistake." You must also acknowledge on the registration application that false certifications are a federal felony under 18 U.S.C. Section 1001.[1]

When Anthony K. Sebro, the Conservancy's in-house counsel, applied for the trademark at issue, in November 2011, the certifications he made were false. This does not mean that a false and fraudulent statement was made in order to acquire a trademark wrongfully. Perhaps Mr Sebro did not know about the organizational history of SFLC and SFC. Perhaps Mr Sebro was not aware of the "Software Freedom Law Center" trademark. His

supervisor, the executive director, Bradley Kuhn, had actual knowledge of these matters. So did the Conservancy's corporate secretary and board member Karen Sandler. Perhaps whatever Mr Sebro did instead of talking to them constituted inquiry reasonable under the circumstances and gave him an evidentiary basis for the false certifications that he made. Also, perhaps not.

On the application, a potential trademark registrant must also make a full and complete disclosure of the goods and services it offers under the proposed mark. Though the Conservancy was at the time advertising on its website that it offered "legal services", Mr Sebro omitted "legal services" (and only "legal services") from the list of services on the application, perhaps in order to make it more difficult for the PTO examiner to find the likelihood of confusion with our pre-existing mark.

Now, in his affidavit accompanying the Conservancy motion for summary judgment on its affirmative defenses, Mr Kuhn declares that he instructed Mr Sebro to file the trademark application.

In paragraph 32 of their answer to our petition, however, the Conservancy through its counsel declares that any false statement made on the trademark application was solely the act of Mr Sebro, not of the Conservancy.

In view of this evidence and the sworn pleading submitted by the Conservancy, we have now moved to amend our petition, to state as a second ground for the cancellation that the trademark was obtained by fraud.

Conclusion

One need not have spent more than three decades teaching law in Ivy League law schools to know that the real purpose of Conservancy's summary judgment motion was to delay our taking discovery. The Conservancy has also applied for new trademark registrations, declaring that they have a bona fide intention to use "The Software Conservancy," both as a word mark and as a design mark with their tree symbol. (Despite his stated commitment to transparency, Mr Kuhn in his rather extensive blog post omitted to mention that.)

Settlement is the only outcome that makes sense here. Continuance of litigation cannot possibly benefit my former employees, let alone the organization they manage, or its board. We have put a fair offer for comprehensive peace on the table. We hope it will be swiftly accepted.

---

1. The full text of the certification required was:

   > The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true."

   ↩

Please email any comments on this entry to press@softwarefreedom.org.

Other SFLC blog entries...

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Exhibit B

SFLC: Escalation Disguised as Settlement Offer

by Bradley M. Kuhn and Karen M. Sandler on December 22, 2017

Conservancy stands by our motion for summary judgment to dismiss Software Freedom Law Center (SFLC)'s petition to cancel our trademark. This remains the most resource-efficient way to dispense with SFLC's unwarranted attacks. We have received their latest escalation, disguised as a "peaceful settlement" offer. Instead of deescalating today, SFLC added inflammatory accusations against Conservancy and its employees. Obviously, we did not commit fraud; our legal counsel, Pam Chestek, has advised us that SFLC's fraud allegation is "unequivocally unfounded". We will not let them further waste our time.

We cannot accept any settlement offer that includes a trademark license we don't need. Furthermore, any trademark license necessarily gives SFLC perpetual control over how we pursue our charitable mission. SFLC, our former law firm, helped us form and name our independent entity. Changing this arrangement now does not advance software freedom nor our mission. Our community remains best served by SFLC and Conservancy as independent entities.

Links to our previous blog posts on this matter: 1, 2

[permalink]

Tags: conservancy

Please email any comments on this entry to info@sfconservancy.org.

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Our privacy policy was last updated **22 December 2020**.

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Exhibit 2

switch on
sex therapy

Are you accepting new clients?

Yes, though I have limited availab

Please schedule a free 20 minute initial consultation so we can meet to see if we would like to work together or if I can pass

What does my Investment look like?

Therapy is a financial commitment and investment in yourself and your relationships. By the time you have reached out, you've have likely been thinking about

along referrals to other fab clinicians. Either way it is a win/win.

Chemistry, safety, and comfort are ingredients to making the kinds of relationships I am most interested in, and this extends to my therapeutic relationships. We can chat about what is motivating you to seek therapy at this time, I can hear about your prior counseling experiences and what has worked (or not!), and answer any questions you may have.

If we decide we would like to do the work together, I will send along my practice documents for your review and signatures for informed consent and we will pick a time that works to meet regularly.

Are you offering Telehealth (video) visits?

At this time, I am working via Telehealth or in-person. You will have access to my secure client portal where our visits will take place. It has been wonderful to work with my clients from the comfort of their homes and to see all the life that occurs.

I've enjoyed welcoming folx back to my cozy office in the historic Ford Building in SE Portland and am seeing clients without masks. If you are unwell, please re-schedule or request appointment shift to Telehealth..

If you'd rather continue via Telehealth as you are out of the Portland area, traveling, or a Washington resident, I am happy to continue our work in the way it works best for you.

taking these next steps for some time. I'm so excited that you are reaching out to get down to the business of you.

Therapy is an opportunity for growth and healing that can change your life and provide healing.

We decide length of treatment, and often the investment of your work provides long term gains.

Out of Pocket Investment:

Standard (50 minute) individual session: $250

Standard (50 minute) couple/relationship session: $250

Cancellation Policy

Cancellations must be made at least 24 hours in advance to avoid incurring a full session fee ($250). Please cancel Monday appointments by the previous Friday. If I am able to reschedule appointment within the same week (M-F), the cancellation fee will be waived.

Please know that the cancellation policy is enforced without exception. That way it is fair for everyone, and it is not at all personal when the fee is charged.

Insurance

I do not participate with any insurance panels and am considered an out-of-network provider.

Insurance companies dictate clinical decisions such as length of treatment, frequency or length of sessions and require a mental health diagnosis for reimbursement.

As a sex and relationship therapist, I am not often primarily treating mental health concerns and do not have a diagnosis for our treatment.

By bypassing insurance, I can provide the most flexibility and privacy for you! You are welcome to submit on your own behalf for reimbursement for a portion of counseling fees. Please let me know if that is your intention.

Schedule Your 20 Minute Consultation Today

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