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

Proceeding no.	92066968
Party	Defendant Software Freedom Conservancy
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Date	09/19/2023
Attachments	92066968 Reply to Opposition to Motion for Protective Order.pdf(774113 bytes)

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

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

Respondent Software Freedom Conservancy ("Conservancy"), by its counsel, hereby replies to Petitioner's Opposition (124 TTABVUE) to the pending (construed) motion for a protective order excluding Mr. Eben Moglen from attending and from taking the depositions of Bradley Kuhn and Karen Sandler.

Petitioner's Bogus Arguments

Rather than address Conservancy's arguments, Petitioner seeks to distract the Board with a number of spurious arguments and irrelevant facts, including those in Mr. Moglen's self-aggrandizing declaration.

Petitioner asserts that the purpose of Conservancy's motion for a protective order is to delay this proceeding, but it ignores the fact that this proceeding is already suspended. Thus, consideration of this motion will not cause any additional delay. (*See* 114 TTABVUE).[1] Indeed,

[1] Conservancy has addressed the issue of delay multiple times, pointing out Petitioner's major role in any delay that has occurred, including Petitioner's groundless motion to add a fraud claim to its petition for cancellation. The Board denied that motion in 2018 (13 TTABVUE), and yet Mr. Moglen again groundlessly accuses Conservancy of

Conservancy suggested that the Board expedite consideration of this protective order motion (118 TTABVUE, page 5), and the Board has done so. The purpose of this motion is to prevent further harassment of the two witnesses by Mr. Moglen, and to ensure that their depositions proceed in an orderly fashion.

Petitioner also falsely asserts that Conservancy has "done everything in its power . . . to prevent these depositions from taking place." (124 TTABVUE, page 3). Conservancy has never sought to prevent the depositions from going forward, but only to exclude Mr. Moglen's attendance, both because of his ugly past with the deponents and because of the logistical difficulties in protecting Respondent's highly confidential information. (*see* footnote 2, *infra.*). What prevents the depositions from moving forward is Mr. Moglen's stubborn insistence that he attend the depositions.

Mr. Moglen also breezily asserts, "There was never been any doubt I would personally conduct these depositions." (Moglen Decl. ¶ 21, 124 TTABVUE 25-26.) If he so intended, he kept this surprising information a closely guarded secret. Mr. Moglen has made no appearance and signed no pleading in this proceeding, and has no discernable litigation experience. Conservancy did not learn of his plan to take the depositions until a telephone discussion between counsel on July 31, 2023. (*See* the email of July 31, 2023 from Sean McMahon to John L. Welch, 122 TTABVUE 10: "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.").

Petitioner complains repeatedly about the admissibility of the evidence relied on by Conservancy, arguing for what it views as strict compliance with the Federal Rules of Civil

fraud. (124 TTABVUE 24). In the same vein, Mr. Moglen dredges up a meritless copyright infringement accusation made in 2014 that was never pursued, all in an effort to distract the Board's attention from his own behavior.

Procedure. But a court may certainly consider reliable but otherwise inadmissible evidence, such as hearsay, in deciding a motion for protective order or other collateral matters. *See, e.g., Johnson v. U.S. Bancorp*, 2012 U.S. Dist. LEXIS 182435, at *1 n.2 (W.D. Wash. Dec. 26, 2012) (overruling a hearsay objection and explaining, "The court is not deciding a motion for summary judgment. The court may consider hearsay on a motion for protective order."); *Becker v. Precor, Inc*., 2009 U.S. Dist. LEXIS 91722, at *7 n.1 (W.D. Wash. Sep. 16, 2009) (overruling hearsay objection, and explaining, "[N]othing prevents the court from considering hearsay evidence in a collateral matter."); *see also, e.g.,* Kos Pharm., Inc. v. Andrx Corp., 369 F.3d 700, 718-19 (3d Cir. 2004) (comparing motions for summary judgment with motions for preliminary injunction and noting that only Fed. R, Civ. P. 56 requires admissible evidence, and that the evidentiary standard elsewhere is relaxed). The decision to consider hearsay materials rests within the tribunal's sound discretion. *See Kos Pharm.,* 369 F.3d at 719. In light of the interlocutory nature of the subject motion and the expedited briefing, together with Petitioner's utter failure to cast doubt on the evidence (*see infra*), it is appropriate for the Board to consider all the evidence Conservancy has submitted in connection with this motion.

Conservancy's Motion Complies with the Applicable "Good Cause" Standard.

Petitioner also seeks to hold Conservancy to an impossible standard for issuance of a protective order. Petitioner posits that a protective order may issue to exclude attendance at a deposition only if the deponent can demonstrate that "serious harm *will* occur." (124 TTABVUE 7 (emphasis added).) Petitioner thus essentially proposes a standard of beyond a reasonable doubt. According to Mr. Moglen, fear is never any better than a "boilerplate good cause fact," no matter how well supported or debilitating. (124 TTABVUE 9, 12.)

None of Petitioner's cited authorities supports these extraordinary arguments. In truth, Conservancy need only provide a "particular factual demonstration of potential harm, not conclusory statements." *Anderson v. Cryovac, Inc*., 805 F.2d 1, 7-8 (1st Cir. 1986). Here, far from being "conclusory," Conservancy's motion for protective order is supported by "particular and specific demonstration of fact" that will not be common to most civil litigation. *See In re Terra Int'l*, 134 F.3d 302, 307 (5th Cir. 1998). The deponents' apprehension and fear of Mr. Moglen is far beyond the normal anxiety felt by deponents. It is, for one thing, specific to Mr. Moglen—they have no similar objection to the presence of Mr. McMahon or representatives of Petitioner other than Mr. Moglen. For another, it is debilitating and threatens the orderly taking of evidence.

To alleviate any doubt and to address Petitioner's complaints about unsworn testimony, Mr. Kuhn's therapist, Heather Brooks Rensmith, has provided herewith a declaration (Exhibit E hereto) setting out in greater detail the points made in her August 6, 2023 letter (attached as Exhibit 1 to Mr. Kuhn's Declaration of August 10, 2023 (122 TTABVUE 21)). In her declaration, Ms. Rensmith first describes her extensive qualifications and her treatment of Mr. Kuhn—which does, in fact, include a diagnosis of Mr. Kuhn, and which should put to rest Petitioner's underbaked concerns about her qualifications and practice. (Rensmith Decl. ¶¶ 2-7.) Ms. Rensmith then explains how post-traumatic stress disorder (PTSD) can and does cause a number of symptoms that would interfere with the taking of a deposition and cause great mental distress, and how even the presence of a person associated with the cause of the PTSD can trigger these debilitating responses. (*Id*. ¶¶8-11.) She goes on to explain that, in her professional opinion, Mr. Kuhn suffers from PTSD, that Mr. Moglen is indeed a trigger for debilitating PTSD symptoms, and that Mr. Moglen's presence at Mr. Kuhn's deposition will cause serious mental

harm to Mr. Kuhn and disrupt the deposition.[2] (*Id*. ¶ 12.) These qualifications and this analysis may be usefully contrasted with Mr. Moglen's armchair diagnosis, which seems to start from the assumption that PTSD is nothing more than "feeling afraid." (*See* Moglen Decl. ¶ 22, 124 TTABVUE 26.)

Conservancy's Motion Is Not a Motion to Disqualify Counsel.

Worst of all, Petitioner attempts to re-cast Conservancy's motion for protective order as a motion to disqualify an attorney (Mr. Moglen) who has not even entered an appearance. (124 TTABVUE 3-5, 9, 12.) To be clear, this motion seeks to preclude Mr. Moglen from attending *two specific depositions*, not to prevent him from otherwise representing or counseling his organization. The only attorney of record for Petitioner is Mr. McMahon, who is not the subject of this motion.

That being said, should Mr. Moglen ever enter an appearance on Petitioner's behalf in this proceeding, he would almost certainly be disqualified. New York law prohibits attorneys of record from testifying as fact witnesses on their client's behalf. *See* N.Y.R. of Prof'l Conduct 3.7 (on file in this proceeding as at 122 TTABVUE 30 ["Exhibit D"]); *see also, e.g., Korfmann v. Kemper National Ins. Co*., 685 N.Y.S.2d 282, 258 A.D.2d 508 (N.Y. Sup. C., App. Div., 2nd Dept. 1999) ("Since it is clear that the plaintiffs' attorney is an essential witness in this bad faith action and ought to be called as a witness, it was an improvident exercise of discretion to deny the defendant's motion to disqualify counsel."); *Zaccaro v. Bowers*, 771 N.Y.S.2d 332, 2 Misc.3d 733 (Civil Court, City of New York, New York County 2003) ("it is apparent that the attorneys have specific noncumulative personal knowledge regarding offers of comparable housing which is a significant issue on behalf of their respective clients. *** Under the

[2] Ms. Rensmith also explains why her website currently indicates that she does not provide diagnoses for every patient. She also clarifies that she did, in fact, provide a diagnosis in Mr. Kuhn's case. (*Id*. ¶¶ 13-17.)

circumstances, it would be an improvident exercise of discretion to deny a motion to disqualify counsel."). The fact that Mr. Moglen is a member of the New York bar and/or an officer of a party is not a "get-out-of-jail-free card" that overrides the Federal Rules of Civil Procedure or the New York Rules of Professional Conduct. (122 TTABVUE 30.)

Here, if there were any doubt that Mr. Moglen is a fact witness, he has cleared that up with his declaration. Key issues in this matter include how Conservancy was formed, who formed it, and how it got its name, as well as Petitioner's awareness of Conservancy's continued use of the Mark-at-Issue after the parties severed ties. (*See* Moglen Decl. ¶¶ 10-13, 15-18, 124 TTABVUE 21-25.) These issues go to, among other things, Conservancy's laches, acquiescence, and estoppel defenses, since they show Petitioner's awareness of Conservancy's long use of the Mark-at-Issue and Petitioner's failure to take any substantive action until September 2017, for more than 12 years after Conservancy adopted its mark and more than five years after the application underlying its registration was published for opposition.

There is no doubt that a court or the Board has the power under the Federal Rules of Civil Procedure to issue an order excluding an attorney from attending a deposition in order to prevent harassment of the witness or witnesses. As pointed out in Conservancy's Supplemental Memorandum (122 TTAVUE), FRCP 26(c)(1) specifically authorizes the granting of a protective order "that discovery be conducted with no one present except persons designated by the court." There is no exception for attorneys. It is inconceivable that a court could not exclude an attorney with a history of harassing a witness from attending that witness's deposition, let alone taking the deposition. Likewise, the court and the Board have the power to exclude from the deposition an attorney who is likely to disrupt the proceeding.

Petitioner's assertion that Conservancy is somehow seeking to improperly "limit [Mr. Moglen's] state-granted right to practice law" (124 TTABVUE 26) is obviously meritless. There is no such right. *See* *Merrifield v. Lockyer*, 547 F.3d 978, 982-84 (9th Cir. 2008). Even if there were, Conservancy's motion plainly does not seek to prevent Mr. Moglen from practicing law if he so chooses. Conservancy simply wants Petitioner and Mr. Moglen to play by the rules in this proceeding.

What Petitioner Doesn't Say

Strikingly, for all of Petitioner's objections and attempts to minimize Conservancy's evidence, Mr. Moglen does not deny any of the factual assertions made by Mr. Kuhn and Ms. Sandler, or those made by Matthias Kirschner and John Sullivan, regarding Mr. Moglen's behavior.

He does not deny his campaign of harassment of Bradley Kuhn, including physical and psychological intimidation [109 TTABVUE 8-19; 122 TTABVUE 17-19].

He does not deny Mr. Moglen's verbal harassment of Karen Sandler [109 TTABVUE 33-36; 122 TTABVE 25-26]

Although he tries to denigrate Mr. Kirschner's statements as "innuendo" and "gossip," he does not deny that he told Mr. Kirschner "if you want to shoot someone in the head, you have to do it the right way," explaining to him "how I [Mr. Moglen] am shooting a bullet in Bradley's and Karen's head . . . ," or that he "mentioned private information about Bradley's childhood and called him a psycho. Eben was also saying 'do you think that those two clowns who worked for me [Mr. Kuhn and Ms. Sandler] are a competition for me?'" (109 TTABVUE 51).

Although he similarly tries to denigrate Mr. Sullivan's statements as "innuendo" and "gossip," Mr. Moglen does not deny his disruptive antics during Mr. Sullivan's deposition. In

fact, he admits that that Mr. Sullivan "accurately recalls" what happened and seems to be proud of his behavior. (See 124 TTABVUE 26 at fn. 2). According to Mr. Sullivan:

> 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." (122 TTABVUE 28).

In fact, Petitioner and Mr. Moglen do not address at all the potential for disruption that his presence at the deposition entails. In view of his past behavior at the deposition of John Sullivan and his obvious antipathy toward the two witnesses and toward Conservancy, there has always been a strong likelihood that Mr. Moglen will turn the depositions into a vehicle for attacking Mr. Kuhn and Ms. Sandler, just as he has done in the past.[3] In his declaration, Mr. Moglen has made clear his true motive: to harass the witnesses. Mr. Moglen announces that he looks forward to questioning Mr. Kuhn about Mr. Kuhn's mental health, and asserts that he needs an additional half-day to do so. He testifies: "Kuhn has placed his mental health status at issue.[4] This subject now requires additional questions, to which the door has been opened, that SFLC [Petitioner] also intends to pursue." (Moglen Decl. ¶ 27 & n.3, 124 TTABVUE 27.)

[3] A separate and major problem with regard to Mr. Moglen's taking the depositions involves the information and materials designated "Attorneys-Eyes-Only" by Conservancy. Under the Standard Protective Order, such information and materials are available to outside counsel, but not to a party or its "in-house counsel." Thus Mr. Moglen is not allowed access to Conservancy's AEO information and materials, and he cannot even be in the room when testimony regarding same is being elicited. Thus for this practical reason, it will be impossible for Mr. Moglen to take the depositions. As courts have recognized, protecting highly confidential information is a sound basis for excluding in-house attorneys. *See CytoSport, Inc. v. Vital Pharms., Inc.*, 2010 U.S. Dist. LEXIS 24637 at *10-11 (E.D. Cal. Mar. 2, 2010) (refusing to modify a protective order to allow a party's in-house counsel access to highly confidential information, in the name of better trial preparation and cost savings).

[4] To be clear, Mr. Kuhn has not placed his mental health "at issue" merely by raising it in connection with this motion. Once the subject motion is resolved, Mr. Kuhn's mental health would no longer be of any relevance to the substantive issues in this proceeding. If nothing else, no attorney for Petitioner should be permitted to question Mr. Kuhn about his mental health outside the context of this motion, and Mr. Moglen should not be permitted to do so under any circumstances.

Mr. Moglen's newly-expressed desire to take the depositions and his demand for an extra half day to cross-examine each witness leave no doubt that the requested protective order is warranted.

As to the personal harm to the witnesses that would be caused by Mr. Moglen's attendance, the declarations by Mr. Kuhn and Ms. Sandler spell out their concerns. Mr. Kuhn's therapist specifically avers, "[I]n my professional opinion, there will likely be psychological harm for Bradley [Kuhn] if he spends any time in any manner in or near [Mr.] Moglen's presence, either virtually or in-person, including but not limited to [Mr.] Moglen's presence at or nearby Bradley[Kuhn]'s deposition in this matter." (Rensmith Decl. ¶ 12.)

Mr. Moglen's Objective

What becomes glaringly apparent from Petitioner's opposition paper is Mr. Moglen's real objective in insisting on attending, and even taking, the depositions of Mr. Kuhn and Ms. Sandler. He sees an opportunity to continue his campaign of harassment on a face-to-face basis, having been denied that opportunity for years. Mr. Moglen hopes to punish these two witnesses for what he perceives as disloyalty or lack of adoration.

Conclusion

Conservancy is not asking for much: only the exclusion of one specific person from two specific depositions. Courts often analyze motions for protective order under a test that balances the parties' relative interests and hazards. *See, e.g., Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1546-47 (11th Cir. 1985). Here, Mr. Kuhn's and Ms. Sandler's interest in being free from debilitating fear and psychological harm, and the judicial system's interest in eliciting the complete and accurate testimony from these deponents, are to be balanced against Petitioner's need for Mr. Moglen's participation in those depositions. In Conservancy's view, this is not an

especially close call: Petitioner will be able to elicit complete and accurate testimony from these deponents without Mr. Moglen's participation. And Mr. Moglen has not explained how his presence is so necessary, other than that he is a less expensive alternative than Petitioner's actual counsel (*see* Moglen Decl. ¶ 21, 124 TTABVUE 25.) – surely not a sufficient reason. *See CytoSport, Inc. v. Vital Pharms., Inc.*, 2010 U.S. Dist. LEXIS 24637 at *10-11 (E.D. Cal. Mar. 2, 2010) (refusing to modify a protective order to allow in-house counsel access to highly confidential material, in order to save money). Under the circumstances, the requested protective order excluding Mr. Moglen from attending the depositions in any capacity, is both appropriate and necessary.

SOFTWARE FREEDOM CONSERVANCY

_____

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon Petitioner this 19th day of September, 2023, by emailing a copy thereof to its counsel at sean@mcmahonpllc.com:

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

_____

John L. Welch

EXHIBIT E

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

In the Matter of Registration No. 4212971
Mark: SOFTWARE FREEDOM CONSERVANCY
Registration date: September 25, 2012

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

DECLARATION OF HEATHER BROOKS RENSMITH
IN SUPPORT OF RESPONDENT'S MOTION FOR PROTECTIVE ORDER

I, Heather Brooks Rensmith, declare as follows:

1. I am over the age of 18 and otherwise competent to make this declaration. The facts stated herein are made on my personal knowledge.

2. I am a Licensed Clinical Social Worker in private practice as a therapist. I am licensed to practice in the states of Oregon and Washington. My Oregon licensing can be independently confirmed by anyone by visiting https://www.oregon.gov/blsw/ and clicking on "License Verification".

3. My credentials are broad and far-reaching in many mental health therapeutic areas. I hold a BA in Women's Studies from Michigan State University and Master's in Social Work from University of Michigan. In addition to being one of the few AASECT-certified

therapists in Oregon, I am also trained in Gottman Method and Emotionally Focused Therapy. I have 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.

4. I confirm everything in my August 6, 2023 letter, which I understand has been filed in this matter. I understand that the other party has raised some questions about the nature of my practice and my treatment of Bradley M. Kuhn ("Bradley"). I would like to respond clarifying those matters.

5. Bradley has been my patient in Portland, Oregon since May 2019.

6. I have diagnosed Bradley in accordance with the Diagnostic and Statistical Manual, Fifth Edition, Text Revision ("DSM-5-TR"). I confirm that I am indeed treating Bradley for professionally diagnosed mental health concerns — including Post-Traumatic Stress Disorder ("PTSD").

7. In my professional opinion, based on my treatment of Bradley, behavior and actions by Eben Moglen ("Moglen") is one of the causes and/or triggers for Bradley's ongoing PTSD symptoms.

8. Persons with PTSD can experience marked alterations in response and reactivity associated with the traumatic events – evidenced by irritable behavior, angry outbursts, reckless or self-destructive behavior, hypervigilance, exaggerated startle response, problems with concentration, and sleep disturbances.

9. Avoidance of stimuli that triggers these responses is a typical response to those persons with PSTD – in an effort to locate emotional safety and to function in the activities of life. In cases where those triggering stimuli are additionally psychologically damaging to the patient in any event (such as verbal abuse), mental health professionals encourage the patient to continue avoidance of psychologically harmful stimuli when possible.

10. Common responses to PTSD include the "4 F's": flight, fight, freeze or fawn – all characterized by varying responses. When triggered, a range of physiological responses

can occur (including increased respiration, increased or decreased heart rate and blood pressure, nausea, and pain). These responses impact the brain's ability to function as it would in a less triggered state.

11. It is not uncommon for PTSD to be triggered by the mere presence of a person associated with the trauma, or even by the person's voice or the knowledge that the person is close by.

12. As stated in my letter previously provided as an exhibit in this matter, in my professional opinion, there will likely be psychological harm for Bradley if he spends any time in any manner in or near Moglen's presence, either virtually or in-person, including but not limited to Moglen's presence at or nearby Bradley's deposition in this matter. Independent of this issue with the deposition, I had already advised Bradley to avoid Moglen, for the sake of Bradley's mental health.

13. I am aware that out-of-context portions of my current website have been quoted in filings in this matter. My current website is entirely different from the website that I had when Bradley became my patient in May 2019. In the time since Bradley became my patient, I made several changes to my practice's focus with regard to new patients.

14. My current website does include the sentence (in the FAQ section): "I am not often primarily treating mental health concerns and do not have a diagnosis for our treatment". As is seen in the plain text of that statement, the statement is not categorical. While that description does fit many of my clients, it does not fit Bradley.

15. The aforementioned quoted sentence from my website informs my **new** clients that some services and counseling that I provide might not include diagnosable mental health concerns, and as such, unfortunately, might not be covered by their health insurance plans.

16. Health insurance companies have their own rules in this regard, and unfortunately will often not cover important and necessary mental heath services unless the patient has a diagnosable mental health condition. In other words, sadly, **preventative** mental health care is not typically covered by health insurance companies.

17. Contrasting this with Bradley's situation and treatment, I have diagnosed Bradley. In fact, I have, from May 2019 until present date, provided diagnosis documentation to Bradley for filing with his employer-provided health insurance plan.

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.

Heather Brooks Rensmith

Dated: September 18, 2023

Heather Brooks Rensmith, LCSW