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8 The Linux Foundation

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF ORANGE-CENTRAL JUSTICE CENTER**

11 SOFTWARE FREEDOM CONSERVANCY,
12 INC., a New York Non-Profit Corporation,

13 Plaintiff,

14 v.

15 VIZIO, INC., a California Corporation; and
16 DOES 1 through 50, Inclusive,
17 Defendants.

18 **CASE NO. 30-2021-01226723-CU-BC-CJC**

19 Assigned for All Purposes to Judicial Officer:
20 The Honorable Sandy Nunes Leal
21 Dept. C33

22 **NOTICE OF MOTION AND EX PARTE**
23 **MOTION FOR PROTECTIVE ORDER OR**
24 **MOTION TO QUASH SUBPOENA;**
25 **MEMORANDUM OF POINTS AND**
26 **AUTHORITIES IN SUPPORT THEREOF**

27 **[COMPENDIUM OF EXHIBITS FILED**
28 **CONCURRENTLY HEREWITH]**

Hearing:

Date: May 31, 2024; Time: 9:30 a.m.;
Dept.: C33

Complaint Filed: October 19, 2021
Trial Date: July 15, 2024

29 **TO THE HONORABLE COURT, TO ALL PARTIES AND TO THEIR**
30 **ATTORNEYS OF RECORD:**

31 PLEASE TAKE NOTICE THAT on May 31, ~~2023~~ ²⁰²⁴, at 9:30 a.m., in Department C33 of
32 the Superior Court of California, in and for the County of Orange, located at Central Justice
33 Center, 700 W. Civic Center Drive, Santa Ana, California, 92701, Subpoenaed Third-Party
34 Deponent, the Linux Foundation shall move, and hereby do move, for a protective order directing
35 that the deposition of the Linux Foundation, noticed by plaintiff Software Freedom Conservancy,

1 Inc., not take place, and that this Court issue a Protective Order against, or to quash, the
2 subpoena and attached deposition notice issued by Plaintiff Software Freedom Conservancy, Inc.
3 for the third-party testimony of the Linux Foundation.

4 This motion is made under the Sections 2025.420(b), 1987.1 and 1987.2 of the California
5 Code of Civil Procedure on following grounds:

6 1. Plaintiff has failed to serve the Linux Foundation at least 10 days before the date of the
7 noticed deposition, as required under Section 2025.270(a);

8 2. Plaintiff's list of matters on which examination is requested – to the extent they do not
9 duplicate matters upon which the Linux Foundation has already prepared a witness to be
10 examined pursuant to a properly-served subpoena and deposition notice by Defendant, Vizio,
11 Inc. – are not directed to matters reasonably related to the issues at hand in this Action, cannot
12 reasonably lead to the discovery of admissible evidence relevant to the issues framed by this
13 action, and in fact are only directed to matters that will lead to “unwarranted annoyance,
14 embarrassment, or oppression, or undue burden or expense” to the Linux Foundation. Plaintiff's
15 own objections to the subpoena and deposition notice by Defendant, Vizio, Inc. – that all topics
16 related to the licenses at issue in this litigation and statements made by the Linux Foundation
17 about those licenses or about Plaintiff's action around those licenses are “irrelevant” to this
18 litigation – demonstrate that Plaintiff is not seeking to depose the Linux Foundation to discover
19 evidence reasonably related to this Action; and

20 3. Because of the short notice Plaintiff has given the Linux Foundation between issuing
21 the subpoena for deposition testimony and the date of the deposition, the Linux Foundation has
22 not been given adequate time to identify, prepare, and offer a witness under Section 2025.230 of
23 the California Code of Civil Procedure responsive to Plaintiff's voluminous list of the new
24 matters on which examination is requested.

25 This motion is based upon this notice of motion and motion, the attached memorandum
26 of points and authorities, as well as the Exhibits appended thereto, and on such further evidence,
27 both oral and documentary, as may be offered at the time of the hearing.

28 The Linux Foundation also requests that the Court exercise the power granted to it under

1 Section 2023.030(a) of the California Code of Civil Procedure and award the Linux Foundation
2 its costs in preparing, filing, and arguing the Motion, pursuant to the provisions of Section
3 1987.2(a) of the California Code of Civil Procedure, as the subpoena was issued in bad faith and
4 the requirements of the subpoena are oppressive, or under Section 2025.410(d) of the California
5 Code of Civil Procedure, as the subpoena and appended deposition notice employ a discovery
6 method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or
7 oppression, or undue burden and expense to the Linux Foundation.

8 The Linux Foundation has arranged with the Court's clerk that this matter be
9 considered during this Court's regular Ex Parte hearing time, on Friday, May 31, 2024, at 9:30
10 a.m. This Motion is filed according to this Court's standing Order on scheduling and filing
11 deadlines for Ex Parte Motions, found at this location: [https://voypubapps.occourts.org/civil-](https://voypubapps.occourts.org/civil-calendar)
12 [calendar](https://voypubapps.occourts.org/civil-calendar).

13 The Linux Foundation has attempted to meet and confer with Plaintiff Software
14 Freedom Conservancy, Inc., *see* Exhibits 8 & 9, but that attempt has not resulted in a
15 resolution.

16
17 DATED: May 30, 2024

LEX PAN LAW LLC

18
19 By: /s/ P. McCoy Smith
20 P. McCoy Smith
21 Attorneys for Subpoenaed Third-Party
22 Deponent
23 The Linux Foundation
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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF EX PARTE MOTION FOR PROTECTIVE ORDER
OR MOTION TO QUASH SUBPOENA

I. FACTUAL BACKGROUND

Movant the Linux Foundation is not a party to this Action. Nevertheless, pursuant to the procedures of Section 2025.230 of the California Code of Civil Procedure, Defendant Vizio, Inc. served a subpoena on the Linux Foundation for deposition testimony concerning 15 enumerated matters for which it wished to elicit sworn testimony. The subpoena issued by Defendant Vizio, Inc. was served on the Linux Foundation through the Linux Foundation's designated agent in the State of California for Service of Process, CSC – Lawyers Incorporating Service on May 6, 2024. *See* Exhibit 1. Service of that subpoena and deposition notice occurred on May 6, 2024, 16 days before the noticed deposition date of May 23, 2024, and thus in compliance with Section 2025.270(a) of the California Code of Civil Procedure. *See* Exhibit 2. Due to availability issues for the designated corporate representative for the Linux Foundation to testify at that deposition, the date was changed to June 3, 2024. The Linux Foundation representative is currently scheduled to testify as to all matters in Defendant's third-party deposition notice of it on June 3, 2024 in New York City.

Thereafter, Plaintiff Software Freedom Conservancy, Inc. prepared its own subpoena and deposition notice. The deposition notice reproduced identically many, but omitted some, of the same 15 matters noticed in the previous deposition notice by Defendant Vizio, Inc., but added an additional 30 matters, resulting in a deposition notice reciting a total of 42 matters. *See* Exhibit 3. The subpoena noticed the deposition for the exact time and location of the already-scheduled deposition on New York City on June 3, 2024. *Id.* Service of that subpoena was also to be affected on the Linux Foundation's designated agent for service of process in California, CSC – Lawyers Incorporating Service. *Id.* However, service of that subpoena, according to the records of CSC – Lawyers Incorporating Service did not occur on until May 28, 2024 – 6 days before the noticed deposition date, *see* Exhibit 4, and CSC – Lawyers

1 Incorporating Service has confirmed via a follow-up e-mail that they have done a records search
2 of all service of process the Linux Foundation and only have records of Defendant's subpoena
3 service on May 6, 2024 and Plaintiff's subpoena service on May 28, 2024. *See* Exhibit 5.¹ Of
4 those six days, two days – June 1 and 2 – are weekend days, meaning Plaintiff Software
5 Freedom Conservancy expected the Linux Foundation to identify, produce, and prepare a
6 witness on 30 additional deposition matters over the space of four working days, those four
7 days immediately following the Memorial Day holiday weekend.

8 In the deposition notice issued by Defendant Vizio, Inc., to which the Linux Foundation
9 has not objected and for which the Linux Foundation has scheduled a witness to testify as to the
10 noticed matters, 15 matters for testimony were identified. Although not all of the noticed topics
11 are directly relevant to what the Linux Foundation understands to be factual issues in question
12 in this Action, they at least appear to be directed to matters that may lead to information relevant
13 to those factual issues. As a result, Vizio's deposition notice appears to be reasonably
14 circumscribed to the collection of information relevant to the claims in the present Action. The
15 deposition notice issued by Plaintiff Software Freedom Conservancy, Inc., on the other hand,
16 appears to be directed to issues far afield from any reasonably relevant facts at issue in the
17 present Action, for example:

- 18 • Interpretation of clauses in the license agreements not at issue in the present
19 Action, in particular matters 16, 18 and 19 in Plaintiff Software Freedom
20 Conservancy, Inc.'s deposition notice.
- 21 • Internal governance, funding, membership, tax filing, tax records, staffing, web
22 site ownership, trainings, software licensing and distribution activities and
23 internal compliance processes of the Linux Foundation, in particular matters 20-
24 29, 35, 40-42 and 46 in Plaintiff Software Freedom Conservancy, Inc.'s

25 ¹ Counsel for Plaintiff Software Freedom Conservancy provided to counsel for the Linux
26 Foundation a purported affidavit of service on CSC – Lawyers Incorporating Service
27 with a date of service of May 24, 2024 – exactly 10 days prior to the noticed date of the
28 deposition. *See* Exhibit 6. The date of service indicated in this affidavit does not
correspond with CSC – Lawyers Incorporating Service's electronic records of when the
subpoena was served. *See* Exhibits 4 & 5.

1 deposition notice.

- 2 • Any and all communications (public or private, internal or external) having
- 3 anything at all to do with Plaintiff Software Freedom Conservancy and defendant
- 4 Vizio, Inc., in particular matters 30-34, 39, and 43-45 in Plaintiff Software
- 5 Freedom Conservancy, Inc.'s deposition notice.
- 6 • Information concerning the "competing views" of non-Linux Foundation
- 7 personnel, in particular matter 36 in Plaintiff Software Freedom Conservancy,
- 8 Inc.'s deposition notice.
- 9 • Plaintiff Software Freedom Conservancy, Inc.'s own e-mail communications on
- 10 public mailing lists, in particular matters 37 in Plaintiff Software Freedom
- 11 Conservancy, Inc.'s deposition notice.
- 12 • Communications for which no identification information or copy has been made
- 13 available to the Linux Foundation in order to identify an appropriate witness, in
- 14 particular matters 38 and 39 in Plaintiff Software Freedom Conservancy, Inc.'s
- 15 deposition notice.

16 See Exhibit 3. None of these topics have anything to do with Plaintiff Software Freedom
17 Conservancy's claim that Defendant Vizio, Inc. is failing to comply with the licenses for the
18 software packages identified in the complaint in this Action, nor do they relate at all to facts that
19 underly that claim – such as how those licenses are interpreted. Instead, Plaintiff Software
20 Freedom Conservancy wishes to rummage through the private internal policies and practices of
21 the Linux Foundation under the belief that it will somehow demonstrate that the Linux
22 Foundation is biased against it or lacks credibility concerning its positions, policies and practices
23 around one of the very software packages – Linux – that Plaintiff Software Freedom
24 Conservancy, Inc. wishes, through this Action, to act as a license enforcement entity.

25 Finally, on May 29, 2024, Plaintiff Software Freedom Conservancy, Inc. served on
26 Defendant Vizio, Inc. a document entitled "Software Freedom Conservancy, Inc.'s Objections
27 to Deposition Subpoena and Notice of Deposition of Linux Foundation's Person Most
28 Knowledgeable." See Exhibit 7. In that document, Plaintiff Software Freedom Conservancy, Inc.

1 objected to all but one of the matters (matters 2-15) identified in Defendant Vizio Inc.'s
2 Subpoena and Notice of Deposition of the Linux Foundation as, inter alia, "irrelevant." As such,
3 Plaintiff concedes that the matters in items 2-15 in its own deposition notice of the Linux
4 Foundation (which mirror those in Defendant Vizio, Inc.'s deposition notice) are irrelevant to
5 Plaintiff Software Freedom Conservancy, Inc.'s case, and – by extension, that matters in items
6 16-46 – which are not directly related to factual issues in the present Action, are equally
7 irrelevant to its case.

8 9 **II. ARGUMENT**

10 "Before, during, or after a deposition, any party, any deponent, or any other affected
11 natural person or organization may promptly move for a protective order." (Code Civ. Proc., §
12 2025.420, subd. (a).) For good cause shown, the court "may make any order that justice requires
13 to protect any party, deponent, or other natural person or organization from unwarranted
14 annoyance, embarrassment, or oppression, or undue burden and expense." (Code Civ. Proc., §
15 2025.420, subd. (b).) A protective order may direct "that the deposition not be taken at all."
16 (Code Civ. Proc., § 2025.420, subd. (b)(l).) In addition, "upon the court's own motion after
17 giving counsel notice and an opportunity to be heard, may make an order quashing the subpoena
18 entirely, modifying it, or directing compliance with it upon those terms or conditions as the court
19 shall declare, including protective orders ... [and the Court] may make any other order as may
20 be appropriate to protect the person from unreasonable or oppressive demands...." (Code Civ.
21 Proc., § 1987.1, subd. (a).)

22 The power of the court to issue protective orders rests on the need to protect litigants, or
23 for that matter, third parties not part of a litigation, from discovery abuse: "Because of the
24 liberality of pretrial discovery ... it is necessary for the trial court to have the authority to issue
25 protective orders." (*Coalition Against Police Abuse v. Superior Court* (1985) 170 Cal.App.3d
26 888, 894, quoting *Seattle Times v. Rhinehart* (1984) 467 U.S. 20, 34.) "The prevention of the
27 abuse that can attend the coerced production of information under a state's discovery rule is
28 sufficient justification for the authorization of protective orders." (*Id.*, quoting *Seattle Times*,

1 467 U.S. at pp. 35-36.).

2 It is clear from experience that pretrial discovery by depositions ... has a significant
3 potential for abuse. This abuse is not limited to matters of delay and expense; discovery
4 also may seriously implicate privacy interests of litigants and third parties. [Discovery
5 rules do not] apply only to parties to the litigation, as relevant information in the hands
6 of third parties may be subject to discovery. There is an opportunity, therefore, for
7 litigants to obtain — incidentally or purposefully — information that not only is
8 irrelevant but if publicly released could be damaging to reputation and privacy. The
9 government clearly has a substantial interest in preventing this sort of abuse of its
10 processes.

11 *Id.*, at 901, quoting *Seattle Times*, 467 U.S. at pp. 34.

12 “Courts have broad discretion in controlling the course of discovery.” (*Fuller v. Superior*
13 *Court* (2001) 87 Cal.App.4th 299, 307.) Courts in California may limit discovery as needed to
14 protect against abuse: “The court shall limit the scope of discovery if it determines that the
15 burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the
16 information sought will lead to the discovery of admissible evidence.” (Code Civ. Proc., §
17 2017.020, subd. (a).)

18 Although California does allow for parties to a litigation to compel the testimony via a
19 subpoena, the California Code of Civil Procedure provides for strict minimum notices
20 requirements for parties who wish to do so: “[a]n oral deposition shall be scheduled for a date at
21 least 10 days after service of the deposition notice.” (Code Civ. Proc., § 2025.270, subd. (a).).
22 This is undoubtedly true for depositions noticed under California Code of Civil Procedure
23 2025.230 – which allows for a non-natural person deponent to “designate and produce at the
24 deposition those of its officers, directors, managing agents, employees, or agents who are most
25 qualified to testify on its behalf as to those matters to the extent of any information known or
26 reasonably available to the deponent,” (Code Civ. Proc. § 2025.230) for testimony, because
27 identifying, preparing, and producing a witness for testimony requires time, and cannot be
28 accomplished on a moment’s notice.

1 **A. Plaintiff’s Subpoena Should Be Quashed, or a Protective Order Should Be**
2 **Granted Against Plaintiff’s Deposition Notice, in its Entirety for Failing to**
3 **Comply with Code. Civ. Proc. § 2025.270, subd. (a)**

4 Based on records provided by, and confirmed by, the Linux Foundation’s designated
5 agent for service of process in California – CSC – Lawyers Incorporating Service – Plaintiff
6 Software Freedom Conservancy, Inc. failed to properly serve the Linux Foundation within the
7 10-day time limit specified by California Code of Civil Procedure § 2025.270(a). *See* Exhibits 4
8 & 5. Failure to properly comply with the notice deadlines set forth in the California Code of
9 Civil Procedure is sufficient basis to quash Plaintiff’s subpoena of the Linux Foundation, and to
10 issue a protective order against Plaintiff eliciting deposition testimony from the Linux
11 Foundation on any of the matters set forth in their deposition notice.

12
13 **B. Plaintiff’s Subpoena Should Be Quashed, or a Protective Order Should Be**
14 **Granted Against Plaintiff’s Deposition Notice, as Plaintiff has Contended**
15 **that the Linux Foundation’s Testimony is “Irrelevant” to its Case**

16 Plaintiff Software Freedom Conservancy, Inc. has filed a notice of objections to the
17 scheduled deposition to be conducted next Monday, June 3, 2024 of the Linux Foundation by
18 Defendant Vizio, Inc. *See* Exhibit 7. For all but one noticed deposition matter, that is, for matters
19 2-15 which relate to the licenses at issue in this litigation and statements made by certain Linux
20 Foundation employees concerning Plaintiff’s enforcement actions like the present Action,
21 Plaintiff has stated any testimony of the Linux Foundation is “irrelevant.” *Id.* Plaintiff is certainly
22 within its rights to determine for itself, and to argue before this Court, its belief that the matters
23 noticed by Vizio, Inc. for its deposition of the Linux Foundation are irrelevant to the factual
24 matters in this Action, but if that is Plaintiff’s position on factual relevance, matters 16-46 in its
25 own deposition notice, *see* Exhibit 3, are equally – if more so – irrelevant by Plaintiff’s own
26 logic, as they relate to matters outside of the factual issues in this case, and to Plaintiff’s beliefs
27 as to the credibility of testimony by the Linux Foundation on factual issues. *See* Exhibit 9. In
28 view of Plaintiff’s position on the relevance of the matters in Vizio, Inc.’s deposition notice of

1 the Linux Foundation, matters 16-46 in Plaintiff Software Freedom Conservancy, Inc.’s
2 deposition notice are equally – if not more so – irrelevant to its case, and provide a basis for
3 establishing that Plaintiff Software Freedom Conservancy, Inc.’s subpoena of the Linux
4 Foundation has been made only for the purpose of factual discovery to issues relevant to this
5 case but instead to subject the Linux Foundation to “unwarranted annoyance, embarrassment, or
6 oppression, or undue burden and expense,” (Code Civ. Proc., § 2025.420, subd. (b).) or
7 “unreasonable or oppressive demands....” (Code Civ. Proc., § 1987.1, subd. (a).)

8
9 **C. Plaintiff’s Subpoena Should Be Quashed, or a Protective Order Should Be**
10 **Granted Against Plaintiff’s Deposition Notice, at Least with Regard to**
11 **Matters 16-46, as Plaintiff has Given Deponent Insufficient Time to**
12 **Designate a Witness for Testimony**

13 Plaintiff has given the Linux Foundation four business days – Tuesday, May 28 through
14 Friday, May 31 – in which to locate, designate, prepare and present for deposition testimony a
15 witness on the Linux Foundation’s behalf for 30 separate deposition topics. *See* Exhibit 3. Four
16 business days is a wholly inadequate time period for the Linux Foundation to identify, prepare,
17 and produce a witness to testify as the 30 diverse matters identified in Plaintiff’s deposition
18 notice. As such, at least with regard to matters 16-46 in Plaintiff’s deposition notice, Plaintiff’s
19 subpoena of the Linux Foundation should be quashed, and a protective order entered preventing
20 Plaintiff from inquiring into these matters at the deposition to be conducted this Monday, June
21 3, 2024.

22
23 **III. CONCLUSION**

24 For the foregoing reasons, Subpoenaed Third-Party Deponent the Linux Foundation
25 requests this Court quash Plaintiff’s subpoena and notice of deposition of the Linux
26 Foundation in its entirety, or at least quash the subpoena and deposition notice as to matters
27 16-46.

1 If the Court sees fit, Subpoenaed Third-Party Deponent the Linux Foundation requests
2 that sanctions and/or costs be awarded pursuant to the Court's powers under Section
3 2023.030(a) of the California Code of Civil Procedure, as the subpoena was issued in bad faith
4 and the requirements of the subpoena are oppressive under Section 1987.2(a) of the California
5 Code of Civil Procedure, or under Section 2025.410(d) of the California Code of Civil
6 Procedure, as the subpoena and appended deposition notice employ a discovery method in a
7 manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or
8 undue burden and expense to the Linux Foundation.

9
10 Respectfully submitted

11
12 DATED: May 30, 2024

LEX PAN LAW LLC

13
14 By: /s/ P. McCoy Smith
15 P. McCoy Smith
16 Attorneys for Subpoenaed Third-Party
17 Deponent
18 The Linux Foundation
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1 **PROOF OF SERVICE**

2 STATE OF OREGON)

3 COUNTY OF MULTNOMAH)

4 I am employed in the County of Multnomah, State of Oregon. I am over the age of 18, and
5 not a party to the within action. My business address is LEX PAN LAW LLC, 811 SW 6th Avenue,
6 Suite 1000, Portland, OR 97202. On the date below, I served the foregoing document(s) described
7 as:

8 **NOTICE OF MOTION AND MOTION NOTICE OF MOTION AND
9 MOTION FOR PROTECTIVE ORDER OR MOTION TO QUASH SUBPOENA;
10 MEMORANDUM OF POINTS AND AUTHORITIES**

11 By sending a true copy thereof to the addresses listed below:

12 **For Plaintiff:**

13 Donald A. Thompson
14 dthompson@shadesofgray.law
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19 **For Defendants:**

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Los Angeles, CA 90010-2822

- 17 ☐ **By Messenger Service.** I served the documents by providing them to a professional
18 messenger service for personal service.
- 19 ☐ **By Overnight Delivery.** I deposited a sealed envelope containing a true and correct copy
20 of the documents listed above for overnight Express delivery and with the postage fully
21 prepaid.
- 22 ☒ **By E-Mail or Electronic Transmission.** I caused the documents to be sent to the persons
23 at the email address listed above in an Adobe PDF file, and the transmission appeared to
24 be successful.
- 25 ☐ **By United States Mail.** I deposited a sealed envelope containing a true and correct copy
26 of the documents listed above with the United States Postal Service with the postage fully
27 prepaid. I am a resident or employed in the county where the mailing occurred. The
28 envelope or package was placed in the mail at Irvine, California.

I declare under penalty of perjury under the laws of the State of California that the above
is true and correct.

Executed on May 30, 2024, at Portland, Oregon.

/s/ P. McCoy Smith