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9 Bradley Spengler

10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 OPEN SOURCE SECURITY INC. and) Case No.: 3:17-cv-04002-LB
14 BRADLEY SPENGLER)
15 Plaintiffs,)
16 v.) **Opposition to Defendant Bruce Perens’**
17 BRUCE PERENS, and Does 1-50,) **Second Motion to Dismiss pursuant to Fed.**
18 Defendants.) **R. Civ. P. 12(b)(6) And Second Special**
19) **Motion to Strike pursuant to CA. Code of**
20) **Civ. P. § 425.16. and Bradley Spengler’s**
21) **Decl. In Support to Opposition to Perens’**
22) **Second Motion to Dismiss and Second**
23) **Special Motion to Strike**
24)
25)
26)
27) Hearing Date: December 14, 2017
28) Time: 9:30 a.m.
) Location: Courtroom C, 15th Floor
) Judge: Hon. Laurel Beeler

3:17-CV-04002-LB

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I. INTRODUCTION

1
2 Open source software is computer software that is made available with source code that can be
3 modified, used, or shared under certain defined terms and conditions. One such license is the GNU
4 General Public License version 2 (“GPL”) which defines redistribution rights to any software released
5 under the license. The Linux kernel code is released under the GPL. Plaintiff Open Source Security
6 Inc. (OSS) is a small private company located in Pennsylvania and develops software code that fixes
7 security vulnerabilities in the Linux kernel code (a concept commonly referred to as *patching* or
8 providing *patches*). OSS releases the *patches*, in source code form (that is, in the form of code written
9 in a programming language), under the GPL, to approximately 45 of its customers via a Stable Patch
10 Access Agreement (“Access Agreement”). In the Access Agreement, OSS’s 45 customers are
11 unequivocally informed that they have all the rights under the GPL for the current *patches* being
12 released. However, OSS further offers an, optional, *incentive* to not redistribute the patches outside the
13 boundaries defined in the Access Agreement if they wish to utilize its server resources and receive
14 continued access to future versions of the *patches*. If Plaintiffs’ customers wish to, they are free to
15 redistribute the patches in their possession – Plaintiffs can choose not to distribute future releases to
16 any customer since the GPL does not grant an inherent right to future releases.
17
18

19 The GPL in its preamble provides the licensee the “freedom to distribute free software (and
20 charge for it as a service if you wish to)... .” As stated in the preamble of the GPL, software released
21 under the license is considered “free software,” that is, freedom to distribute, and developers are free to
22 charge for such distribution as a service, if they wish to.
23

24 Plaintiffs, as licensees of the GPL, incorporate Linux kernel code into their *patches*. Thus, as a
25 licensee of the Linux kernel code, Plaintiffs are also granted the freedom to distribute their
26 modifications or additions to the Linux kernel code, under the GPL. Further, since freedom to
27

1 distribute code equates to distributing (or not distributing) code without any consequences, it would be
2 antithetical to conclude the GPL can exclude Plaintiffs’ “freedom to distribute,” their own software as
3 they may have chosen to do so. Further, since each version or update is technically new software, that
4 is a separate *patch* having new code of unaccounted man-hours of work by Plaintiffs, and is released
5 independently under the GPL¹, Plaintiffs are explicitly granted, under the GPL, the freedom to
6 distribute each version, at their discretion. Defendant Bruce Perens (“Defendant” or “Perens”) is a
7 famous and well-regarded, personality in the open source community. Defendant is also respected as
8 an expert in open source matters and has published 24 books on the subject. Reasonably, the open
9 source community, including Plaintiffs, have no reason to doubt Defendant’s knowledge or expertise
10 in the subject matter.
11

12 This action began due to a blog post that was initially published on June 28, 2017, and further
13 updated on July 10. The underlying *premise* of both publications was that the GPL “explicitly
14 prohibits the addition of terms such as [those provided by the Access Agreement].” Based on such a
15 premise, Defendant stated that Plaintiffs’ redistribution clause of the Access Agreement was, *as a*
16 *matter of fact*, violating the GPL, and thus the *patches* were a product of unlicensed work. Based on
17 such an assertion, Defendant expressed his strong opinion stating that Plaintiff’s customers were
18 subjecting themselves to potential legal liability under copyright and/or contract law from the creators
19 of the Linux kernel. However, Defendant, as an expert in open source matters, being well versed with
20 the law, knew or reasonably should have known that the Access Agreement, in part, only enforces
21 Plaintiff’s freedom to distribute free software as they wish to – a right explicitly granted to Plaintiffs
22
23
24

25 ¹ The GPL cannot and does not force Plaintiffs to provide updated patches and is valid for the software
26 released under it. Each time new code is written or new/ updated features are provided, it becomes new
27 version software, and is released under a new GPL license. Per the GPL, any person can modify the
patches to provide new/updated features and release or sell it as their own.

1 by the GPL (as a licensee of the Linux kernel code). Defendant knew or should have known, that the
2 Access Agreement does not prevent or restrict a user from exercising their right of redistributing the
3 *patches*, but only defines conditions upon which Plaintiffs are willing to offer their customers access to
4 their server and Internet resources, and exercise their freedom to distribute future software – a
5 condition beyond the scope of the GPL of the current version of the patches released to Plaintiffs’
6 customers. Further, based on Perens’ own admission publishing a blog post was “more effective than
7 writing to [Plaintiff],” despite the fact that he had not seen the Access Agreement prior to publishing
8 his statements – demonstrating a lack of interest in the truth.²
9

10 Indeed, Perens admitted that Plaintiffs’ Access Agreement was not violating the GPL. On July
11 9, 2017, at or about 5:09 p.m., prior to updating the blog post, Perens, responding to a commenter on
12 slashdot.org, admitted that “[t]he problem isn't with the text [of the Access Agreement]. It's with what
13 *else they have told their customers. It doesn't even have to be in writing. I have witnesses.*” Despite
14 admitting that the Access Agreement was not in violation of the GPL, on July 10, 2017, at or about
15 8:15 a.m., Perens updated the blog post and explicitly published that the Access Agreement violated
16 the GPL. Perens now contends his statements were mere “opinions” and that no court has ever ruled
17 on his assertions, so there can be no liability under a claim of action under defamation. However, such
18 contentions are erroneous. First, Perens’ own position as a crusader and a subject matter expert
19 regarding legality of open source matters makes it reasonable that a layperson would understand such
20 assertions as being based on a fact, since they were made by someone with specialized knowledge in
21 the industry. Second, clearly Perens wanted Plaintiffs’ customers to rely on his assertions as reflecting
22 the truth. Third, a statement of opinion may be actionable if it implies the allegation of undisclosed
23
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25

26 _____
27 ² Perens has stated under penalty of perjury that he reviewed the Access Agreement on July 9,
2017, 11 days after the original publication of the blog post.

1 defamatory facts as the basis for the opinion. Fourth, the facts implied by Perens, that Plaintiffs are in
 2 violation of the GPL, as a whole are provably false based on known decades old common law
 3 principles of contract law and copyright law, but in the very least based on Perens' own admission.

4 Therefore, by using false facts and abusing his reputation in the community, Perens published
 5 libelous statements about Plaintiffs.

6 II. FACTS³

7
 8 The GPL is an open source licensing agreement which limits certain rights of the author of the
 9 software. *See, generally*, First Amended Complaint (“FAC”), Ex. 3. The GPL, in part provides: When
 10 we speak of free software, we are referring to freedom, not price. Our General Public Licenses are
 11 designed to **make sure that you have the freedom to distribute copies of free software** (and charge
 12 for this **service** if you wish),” *See* FAC ¶19 (emphasis added). Further, section 6 of the GPL, in
 13 part states, no one may impose any further restrictions on the recipients' exercise of the rights granted
 14 herein. *See* FAC ¶ 14. Specifically, the GPL states “[t]his License applies to any program or other
 15 work which contains a notice placed by the copyright holder saying it may be distributed under the
 16 terms of this General Public License.” *See* FAC Ex. 3, Section 0. The GPL does not, implicitly or
 17 explicitly, extend to future versions that may or may not be created or released by the software
 18 developer. *See* FAC, Ex. 3.

19
 20 Bruce Perens is a well-known personality in the open source community. *See* FAC ¶ 33. He is
 21 known for being “one of the founders of the Open Source movement in software, and was the person
 22 to announce ‘Open Source’ to the world”. *Id.* He created the Open Source Definition, the set of legal
 23 requirements for Open Source licensing which still stands today.” *Id.* Perens has represented himself
 24 as an expert for the plaintiff in prominent open source cases like *Jacobsen v. Katzer* 535 F. 3d 1373
 25

26 _____
 27 ³ Plaintiff request the Court to take Judicial Notice to these facts as it deems appropriate.

1 (2008). *See* FAC ¶ 34. He has also worked as a case strategy consultant for Google’s outside counsel in
2 the district court case of *Oracle v. Google*. *See* FAC ¶ 35. Although not an attorney, Perens has taught
3 Continuing Legal Education classes to attorneys in many states and was a keynote speaker at a Silicon
4 Valley event attracting over 250 attorneys.” *See* FAC ¶¶ 36 -37. Perens has also published more than
5 24 books on open source software, all but one have been profitable and “several still sell well more
6 than a decade after publication.” *See* FAC ¶ 38. Perens is also very well versed with the law. During
7 his discussions with a commenter on slashdot.org, Perens has stated that he has “won against folks who
8 were admitted to the supreme court” *See* FAC ¶ 40.

9
10 Plaintiff Open Source Security (“OSS”) is a small private corporation located in the State of
11 Pennsylvania. *See* FAC ¶ 2. Plaintiff Bradley Spengler (“Spengler”) is the CEO and lone share-holder
12 of OSS. *See* FAC ¶ 3; *See* Declaration of Bradley Spengler (“Spengler Decl.”) ¶1. Plaintiff offers
13 software code, in the form of source code (“Patches”), for the Linux kernel providing security fixes,
14 under the trade name, Grsecurity® to 45 of its customers, at the time the blog posts were published.
15 *See* FAC ¶ 12. Grsecurity® is released under the GPL. *See* FAC ¶ 13. Plaintiff does not advertise its
16 services to anyone other than having Internet presence via its website, <http://www.grsecurity.net>. *See*
17 Spengler Decl. ¶ 3. Spengler has not undertaken any voluntary affirmative action through which he
18 has attempted to seek to influence the resolution of any public issue related to the GPL. *See* Spengler
19 Decl. ¶4.
20

21 At or about September 2015, Plaintiff established an Access Agreement with its customers who
22 are primarily private businesses. *See* Spengler Decl. ¶5. As of June 28, 2017, Plaintiff only had
23 approximately 45 customers receiving its *patches*. *See* Spengler Decl. ¶6. Further, OSS provides its
24 services to a niche segment within the open source community. *See* Spengler Decl. ¶11.
25
26
27

1 The Access Agreement states, in part that the customer has all the rights and obligations granted by
2 GPL, and that OSS reserves the right to terminate access to **future** updates if the software is distributed
3 outside of the explicit obligations under the GPL. *See* FAC, Ex. 4, (emphasis in original).

4 The Access Agreement, by itself only controls access to the servers and resources under the
5 dominion and control of Plaintiffs and distributes the Patches, as a service. *See* FAC ¶21. The Access
6 Agreement does not govern any right granted to Plaintiff's customers under the GPL; customers are
7 free to distribute the Patches if they desire to do so. *See* FAC ¶22. If a customer does not require
8 Plaintiffs' service, they are free to modify, host, copy, redistribute, and even charge for their services
9 using the Patches in their possession, since such a right is granted within the GPL. *See* Spengler Decl.¶
10 7. Plaintiff does not engage in a discriminatory practice under any State or Federal law or regulation.
11 *See* Spengler Decl. 8. The Access Agreement further states, in part, "... we reserve the right to revoke
12 access to the stable patches and changelogs at any time for any reason." *See* FAC Ex. 4.
13

14 On June 28, 2017, Perens published a blog post on his website, www.perens.com, based on his
15 understanding from several sources, OSS was implicitly or explicitly in violation of the GPL, and by
16 continuing to use its Grsecurity product, OSS' customers were subjecting themselves to liability. *See*
17 FAC ¶42. On July 9, 2017, at or about 2:10 p.m., Perens' blog post was partially reproduced, and
18 linked, on slashdot.org, a website well known by programmers and software developers in the Open
19 Source community, having an Internet traffic of approximately 3.2 million unique visitors each month.
20 *See* FAC ¶¶ 43, 66, and 67. On July 9, 2017, at or about 4:58 p.m., an anonymous reader commented
21 on the slashdot.org posting:
22

23
24 I've had a look over their agreement here [link to the subscription
25 agreement on grsecurity.net], and **there is nothing to prevent**
26 **redistribution of a patch under the terms and conditions of the**
27 **GPLv2**. It states that if it a patch is distributed outside of the terms of the
28 GPLv2, then access to further patches in the future (not the patch
provided) will be denied

1 See FAC ¶ 44 (emphasis added).

2 On July 9, 2017, at or about 5:09 pm, Perens responded to the above comment, stating:

3 **The problem isn't with the text there. It's with what else they have**
4 **told their customers.** It doesn't even have to be in writing. *I have*
5 *witnesses.*

6 See FAC ¶ 45 (emphasis and *italics* added).

7 However, on July 10, 2017, at or about 8:11 a.m., Perens updated the blog post, and explicitly
8 asserting that OSS was in violation of the GPL and by continuing to use its Grsecurity product, OSS'
9 customers were subjecting themselves to liability; Perens however removed all references that
10 suggested he had witnesses . See FAC ¶¶ 42 and 47.

11 Collectively, in both the original blog post, its revision, and comments on slashdot.org,
12 Defendant made the following defamatory statements. See FAC ¶ 49. Perens, being aware that
13 “publicity [is] a tool” available to him, did not bother discussing his disagreement with Plaintiffs about
14 their business practices. See FAC ¶¶68 and 72. Exploiting his position as an expert in open source
15 matters, Perens published statements about Plaintiffs’ business practices and attempted to dissuade
16 Plaintiffs’ customers from doing business with Plaintiffs, while having absolutely no valid proof or
17 case law that supported his contention. See FAC ¶¶ 33 – 40, 53 – 56, and Perens Decl. ¶¶ 5 – 10 (ECF
18 No. 32-3). See also Defendant’s Second Anti-SLAPP Motion & Motion to Dismiss FAC at p. 16, *ll.*
19 13-15, and fn. 8 (ECF No. 30). Clearly, Perens wanted Plaintiffs’ customers to rely on his assertions
20 as reflecting the truth. See also Perens Decl. (ECF No. 32-3). Further, laypersons understood such
21 assertions as being based on a fact, since they were made by someone with specialized knowledge in
22 the industry. *Generally see,* Defendant’s Second Anti-SLAPP Motion & Motion to Dismiss FAC, Ex.
23 A (ECF No. 30-2). Perens was at least negligent and did not attempt to ascertain the truthfulness and
24 veracity of the statements identified above, or knew the statements were false or had serious doubts
25 about the truthfulness of such statements, or was just not interested in the truth. See e.g., FAC ¶¶ 57,
26
27

1 59, 60, 62, 63, 68,72, 81, 82, 99, and 117; *Also see* FAC ¶¶ 44-45, 48 and 49 (Perens admitting his
2 statements were false, and despite that updating the blog post and publishing that the Access
3 Agreement was violating the GPL). Furthermore, Perens published the original blog post without
4 contacting Plaintiffs or even having access to the Access Agreement. See FAC ¶¶ 68, 72, Perens Decl.
5 ¶¶ 10, 12 (ECF No. 32-3). Further, Defendants do not have any “reliable sources” or “witnesses” that
6 can provide any evidence or testimonial facts that can support a showing of a violation of the GPLv2
7 by Plaintiffs. *See* FAC ¶¶ 46, 49, 59, Perens Decl. ¶¶ 6 – 7 (ECF No. 32-3). To the contrary, Plaintiffs
8 have never conveyed any verbal statements regarding its Access Agreement or its redistribution
9 policies to anyone. *See* Spengler Decl. ¶ 9.

11 Spengler is the sole-shareholder of OSS, Spengler’s name is often associated when OSS is
12 discussed in the open source community. *See* FAC, Ex. 9 and 11 (title/ subject stating Spengler along
13 with OSS). Defendant discussed the contents of the Postings with readers of Slashdot, attempting to
14 convince them that the statements in the Postings were an accurate analysis of the law and publicized
15 his postings. *See* Defendant’s Second Anti-SLAPP Motion & Motion to Dismiss FAC, Ex. A (ECF
16 No. 30-2); *Also see* FAC ¶ 68. Plaintiff Spengler, by association, became a subject of discussion in
17 numerous posts on Slashdot. *See* FAC ¶¶ 94-96. The false light created was highly offensive to a
18 reasonable person in Spengler’s position since the blog posts attempted to destroy his reputation and
19 the reputation of his services, and sought to cause Spengler to lose his ability to continue his business.
20 *See* FAC ¶ 97.

22 The statements in the blog posts have caused OSS extraordinary damages, including loss of
23 potential customers and loss of good will. *See* FAC ¶ 73. As a direct or proximate cause of the
24 publications, over 35 potential business customers have not signed the Access Agreement. *See* FAC
25 ¶74. Further, at least four existing Customers have terminated business relations with Plaintiffs. *See*
26

1 FAC ¶75. Further, prior to the publication of the blog posts, OSS was in the process of hiring a full-
2 time software engineer to further enhance the security features in the Grsecurity® product. The
3 employee was expected to start working on the Grsecurity® product in September 2017. However, as
4 a direct or proximate cause of the Postings, OSS had to implement a hiring freeze and divert its
5 resources towards legal fees and unexpected costs of litigation. The hiring freeze has harmed OSS at a
6 time when it was geared towards expanding its business operation. *See* FAC ¶ 76. The publication of
7 the blog posts also caused OSS to incur the extraneous expense to hire an independent contractor to
8 monitor and counteract the negative publicity resulting due to the publications which has further
9 caused an expense of \$6,300. *See* FAC ¶ 77. As a proximate result of the Postings, Plaintiffs have
10 suffered loss of business and professional reputation. *See* FAC ¶¶ 84, 85, 87, 97, 102, 103, 105, and
11 111. Due to the blog posts OSS has suffered general and special damages, including, without
12 limitation, lost revenue and profits as a function of damage to Plaintiff's business reputation;
13 diminution in the pecuniary value of Plaintiff's goodwill, administrative costs in connection with
14 Plaintiff's efforts to monitor and counteract the negative publicity, and other pecuniary harm. *See* FAC
15 ¶¶ 73 – 77 and 85 – 87.

16
17
18 Further, Spengler was also mentally distressed by the blog posts and comments and the
19 negative publicity it generated towards his ability to do business and loss of reputation in the
20 community that he had to seek psychological help for the emotional distress. *See* FAC ¶ 100; *Also see*
21 Spengler Decl. ¶ 10.

22 III. ARGUMENT

23 1. A special motion to strike pursuant to California's anti-SLAPP statute, alleging Plaintiff's lack 24 of demonstrative evidence is inappropriate.

1 A court in the Northern District of California has stated that, “ ... the Ninth Circuit requires a
2 party opposing an anti-SLAPP motion be afforded the same right of discovery as a party opposing
3 summary judgment under Rules 56(f) and (g), [citing *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832,
4 846 (9th Cir. 2001)] (reversing district court's granting of certain defendants' anti-SLAPP motions and
5 remanding to the district court to, in part, permit discovery where information "in the defendants'
6 exclusive control" may have been "highly probative to [plaintiff's] burden"); [citing *Rogers v. Home*
7 *Shopping Network, Inc.*, 57 F.Supp.2d 973, 982] ("Because the discovery-limiting aspects of §
8 425.16(f) and (g) collide with the discovery allowing aspects of Rule 56, these aspects of subsections
9 (f) and (g) cannot apply in federal court"). *Semiconductor Equipment And Materials International, Inc.*
10 *V. The Peer Group*, No. C 15-cv-00866-YGR, at *14 (N.D. Cal. September 18, 2015).

12 Furthermore, California courts have also stated, “[s]tatutes such as section 425.16, therefore,
13 are construed to require the lower court to consider the challenged plaintiff's affidavits for the purpose
14 of determining whether sufficient evidence has been presented to demonstrate a prima facie case and,
15 “[i]n making this judgment, the trial court's consideration of the defendant's opposing affidavits does
16 not permit a weighing of them against plaintiff's supporting evidence, but only a determination that
17 they do not, as a matter of law, defeat that evidence.” [Citation.] ‘A motion to strike under section
18 425.16 is not a substitute for a motion for a demurrer or summary judgment’ [Citation]. In resisting
19 such a motion, the plaintiff need not produce evidence that he or she can recover on every possible
20 point urged. It is enough that the plaintiff demonstrates that the suit is viable, so that the court should
21 deny the special motion to strike and allow the case to go forward.” *Wilbanks v. Wolk*, 121 Cal. App.
22 4th 883, 905 (2004). However, Perens, in arguments for his special motion to strike pursuant to
23 California’s anti-SLAPP statute, is attempting to hold Plaintiffs to a higher standard and expects
24 Plaintiff to conclusively prove that Perens is liable for the alleged causes of action.
25
26

1 Plaintiffs submit a viable suit can be demonstrated as further discussed herein, including by the
 2 allegations in the First Amended Complaint, and a prima facie case has been further established based
 3 on affidavits. *See* FAC Ex. 12 and the attached Spengler Decl., Ex. 1. Thus, Perens' special motion to
 4 strike should be dismissed.⁴

5 **2. Defendants' defamatory statements are not protected conduct and are thus not subject to a**
 6 **special motion to strike under the California anti-SLAPP statute.**

7
 8 The California anti-SLAPP statute allows certain parties limited immunity from suit for
 9 statements made in pursuit of their First Amendment rights. Neither the immunity nor its application
 10 is absolute and even its fairly liberal reach does not extend to Perens' defamatory and false statements
 11 that the Plaintiffs' Grsecurity product violated the GPL and that Plaintiffs' customers were thus subject
 12 liability. The statute protects only:

- 13 1. any written or oral statement or writing made before a legislative,
 14 executive, or judicial proceeding, or any other official proceeding
 authorized by law;
- 15 2. any written or oral statement or writing made in connection with an
 16 issue under consideration or review by a legislative, executive, or judicial
 body, or any other official proceeding authorized by law;
- 17 3. any written or oral statement or writing made in a place open to the
 public or a public forum in connection with an issue of public interest; or
- 18 4. any other conduct in furtherance of the exercise of the constitutional
 19 right of petition or the constitutional right of free speech in connection
 with a public issue or an issue of public interest.

20 Cal. Code Civ. Proc. § 425.16(e)(1)-(4).

21
 22 Perens holds the burden of proof to show that his defamatory statements were protected. *Bosley*
 23 *Medical Institute, Inc. v. Kremer*, 403 F.3d 672, 682 (9th Cir. 2005). Perens cannot meet his burden
 24

25 _____
 26 ⁴ However, if the Court determines that the Plaintiffs, for any claim, are unable to prove an allegation
 27 due to lack of evidence, as contended by Perens, the Court should deem this anti-SLAPP motion as
 prematurely filed, and sua sponte grant Plaintiff a motion to continue Defendant's motion to dismiss
 and special motion to strike pursuant to California's anti-SLAPP statute, for those respective claims.

1 because his false assertions of facts are not constitutionally protected free speech, as a matter of law.
2 There is no credible evidence that Perens' defamatory statements were made before legislative,
3 executive or judicial bodies. Further, his statements did not involve any issue of public interest, but
4 were limited to Plaintiffs existing customers who were 45 private businesses at the time of the blog
5 post(s) were published. Further Perens' statements were not made in anticipation of litigation.

6 Perens' Defamatory Statements Are Not An Issue Of Public Interest

7 Perens claims that simply because his blog post was linked to slashdot.org, and generated over
8 470 comments, the response by the public is conclusive that the matter was of public interest. It is
9 undeniable that Perens is well-known in the open source community. His opinions are also well
10 respected in the community. Indeed, when someone coins the term open source, creates the open
11 source definition, writes 24 books on the subject matter, represents himself as an expert on the subject
12 matter during appeal, and teaches continuing legal education to 250+ attorneys, such a person will be
13 well respected and his views taken very seriously. Perens' blog post was specifically addressed to
14 Plaintiffs' customers – which numbered 45 at the time of the publication of the defamatory statements.
15
16

17 Not all disputes are a matter of public interest for purposes of a special motion to strike. In
18 order to be of —public interest, an issue must be one that —impacts a broad segment of society and/or
19 that affects a community in a manner similar to that of a governmental entity. *Rivero v. American*
20 *Federation of State, County and Municipal Employees*, 105 Cal.App.4th 913, 920 (2003).

21 Perens cannot turn his personal dissatisfaction with Plaintiffs' business practices or the Access
22 Agreement into a public issue merely by abusing his fame and reputation and communicating it to a
23 large number of people. *Weinberg v. Feisel*, 110 Cal. App 4th 1122, 1132 (2003). “[P]ublic interest is
24 not mere curiosity. Further, the matter should be something of concern to a substantial number of
25 people. Accordingly, a matter of concern to the speaker and a relatively small, specific audience is not
26

1 a matter of public interest” ... Moreover, the focus of the speaker's conduct should be the public
2 interest, not a private controversy. Finally, a defendant charged with defamation cannot, through his or
3 her own conduct, create a defense by making the claimant a public figure. Otherwise private
4 information is not turned into a matter of public interest simply by its communication to a large
5 number of people. *Hailstone v. Martinez*, 169 Cal. App. 4th 728, 736 (citing *Weinberg supra*, at pp.
6 1132-1133).

7
8 The instant case is most like *Rivero, supra*. In that case, a janitorial supervisor at a public
9 university sued a union for defamation after he was accused of bribery, nepotism, theft and extortion.
10 The Union’s anti-SLAPP motion alleged that the issue was one of public concern because it involved
11 unlawful workplace activities which concerned the public and public policy, especially at a publicly
12 financed institution. The court rejected this argument, finding that the dispute between the supervisor
13 and the union simply did not rise to a matter of public interest. *Rivero*, 105 Cal.App.4th at 924.

14
15 In the instant matter, the title of Perens’ blog post was, “Warning: Grsecurity: Potential
16 contributory infringement and breach of contract risk for customers.” In both the original blog post and
17 its update revision, Perens began by communicating directly to his audience – the 45 customers of
18 Plaintiffs. He stated, “It’s my strong opinion that your company should avoid the Grsecurity product
19 sold at grsecurity.net because it presents a contributory infringement and breach of contract risk.”

20 In both the original blog post and its updated version, Perens continued by explaining
21 Plaintiffs’ business practice and then made conclusory statements that such practices violated the GPL,
22 without any proof. Perens then continued discussing how Plaintiffs’ clients were subjecting themselves
23 to liability. It is also undisputed Perens wanted the target audience (that is, Plaintiff’s customers) to
24 believe his statements were true. Given that Plaintiff is well known in the open source community and
25

1 is known to be a subject matter expert in the industry, his statements were bound to attract public
2 fascination and curiosity.

3 However, Perens attempts to portray his blog posts as a matter of public concern, when they
4 were:

5 (i) not addressed to the open source community at large, but only to a niche segment within the
6 open source community that considers using open source security based products not provided by the
7 Linux kernel code developers;

8 (ii) were specifically addressed to Plaintiffs' approximately 45 customers and how they were
9 subjecting themselves to liability by using the Grsecurity product; and

10 (iii) not related to an analysis of the current practices in the for-profit open source industry,
11 when such practices have been going on for approximately two decades. *See* FAC ¶¶ 23 – 27.

12 Perens now resorts to conjecture and attempts to hold Plaintiffs against their genuine desire to
13 clarify a previously ambiguously written statement that the blog posts were seen and read by hundreds,
14 if not thousands of consumers and prospective clients, professional colleagues and business partners.

15 See Original Complaint ¶ 36 *Cf.* FAC ¶69. However, this should be deemed as a non-issue since as

16 Perens correctly notices amendments pursuant to Fed. R. Civ. P. 15 are to be construed broadly.

17 Further, Plaintiffs early on, in good faith, corrected a previous allegation that had an ambiguous

18 context, and did not attempt to thwart the statutory language by artfully pleading allegations that were

19 fatal to a claim.⁵ Moreover, even if such ambiguous statement, amended in good faith, is held to be

20 inconsistent with the original pleading, there is no rule to prevent such an action by Plaintiff, especially

21 _____
22 ⁵ Plaintiffs note the cases cited by Perens do not apply to the instant matter, since in the instant matter
23 Plaintiffs only clarify a previously submitted ambiguous statement, and not a contradictory statement,
24 as referred to within the case cited by Perens. Specifically, in *Rodriguez v. Sony Comput. Entm't Am.,*
25 *LLC*, 801 F.3d 1045 (2015), Rodriguez had amended the complaint numerous times, later in the
26 proceeding, with allegations that contradicted the previous stated allegation. *Id.* at 1054.

1 since the ambiguity was clarified pursuant to Fed. R. Civ. P. 15(a)(1), and that too, at a very early stage
 2 in the proceeding. *See PAE Gov't Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 858 (9th Cir. 2007)
 3 (determining that even if the allegations in the first amended complaint were unfounded because they
 4 contradicted (in the district court's view) earlier allegations made in the original complaint,
 5 adjudication of claims on the merits was not permitted by Federal Rules of Civil Procedure at such an
 6 early stage in the proceedings).

7
 8 Therefore, since the subject matter of the blog post was to inform Plaintiffs' 45 customers of
 9 their potential liability if they continued to use the Grsecurity® product, Perens abused his fame and
 10 invoked the curiosity of the public, none of them who were directly affected by Plaintiffs' business
 11 practices. Thus, these statements are not protected by sections 425.16(e)(3) and (4).

12 **3. Opposition to Motion to Dismiss under Fed. R. Civ. P. 12(b)(6)/ Special motion under**
 13 **California's anti-SLAPP statute**

14 Even if Perens' statements are considered as a matter of public interest, Plaintiffs respectfully
 15 submit that they can sufficiently demonstrate a probability of prevailing on the merits of the claims.

16 **(i). Defamation per se and Per Quod⁶**

17 **(A) Plaintiff OSS Is Not A Public Figure Or A Limited Purpose Public Figure**

18 Public figures are entities which, —by reason of the notoriety of their achievements or the
 19 vigor and success with which they seek the public's attention, are properly classed as public figures.
 20 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974). Plaintiff OSS is a small private corporation
 21 with one employee and currently three⁷ part-time independent contractors. Spengler Decl. ¶ 2. Prior to
 22 the publication of the blog post(s), OSS has never sought the public attention and did not even
 23

24
 25 ⁶ Plaintiff OSS severally brings the action of defamation per se and defamation per quod. See FAC ¶¶
 78 – 90.

26 ⁷ At the initiation of this action, OSS employed four part-time independent contractors. See Spengler
 27 Decl. ¶ 2, at ECF No. 20-1.

1 advertise their services or their product, except for having Internet presence. Spengler Decl. ¶3.
2 Plaintiffs are not limited purpose public figures either. A limited public figure is one who injects
3 himself into a particular public controversy. *Gertz*, 418 U.S. at 351. In determining if a business is a
4 limited purpose public figure the Fourth District Court of Appeal provided the necessary factors to
5 consider: (1) if the company is publicly traded; (2) the number of investors and (3) whether the
6 company has promoted or injected itself into the controversy by means of numerous press releases.
7 *AMPEX Corp. v. Cargle*, 128 Cal.App.4th 1569, 1576 (2005). In this case, none of the *AMPEX* factors
8 are met. (i) OSS is a small private incorporation. (ii) OSS has no investors, and (iii) OSS has not
9 promoted or injected itself into the controversy, at issue, by means of any press release. In fact, even
10 after Perens' defamatory publication, Spengler did not make any comments to the public about Perens'
11 post, or attempted to defend OSS from Perens' allegations. Thus, OSS is not a limited public figure.

12
13 **(B) Perens Made False Statements Of Fact Which Were Not Privileged And Which Have A**
14 **Natural Tendency To Cause Damages**

15 Perens' false statements of "opinion" are actionable because they are facts rather than opinions
16 and admissible evidence shows they are demonstrably false.

17 Generally, statements of fact are actionable. *Global Telemedia Intern., Inc. v. Doe 1*, 132
18 F.Supp.2d 1261, 1267-68 (C.D. Cal. 2001). A defendant cannot hide behind a claim of —opinion when
19 the statement in question – however phrased – states a provable (or disprovable) fact. *Rodriguez v.*
20 *Panayiotou*, 314 F.3d 979, 985 (9th Cir. 2002); *Milkovich v. Lorain Journal Co.*, 487 U. S. 1, 19
21 (1990). The dispositive question is whether a reasonable fact finder could conclude that the relevant
22 statements imply a provably false factual assertion. *Milkovich*, 497 U.S. at 19. The United States
23 Supreme Court affirmed this rule in *Milkovich* when it stated, “[e]ven if the speaker states the facts
24 upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment
25 of them is erroneous, the statement may still imply a false statement of fact.” *Id.* at 19-20. Thus, “a
26

1 false assertion of fact [can] be libelous even though couched in terms of opinion.” *Moyer v. Amador*
 2 *Valley Joint Union High Sch. Dist.*, 225 Cal.App.3d 720, 723 (1990).

3 Firstly, Perens has admitted that the Access Agreement did not violate the GPL.⁸ FAC ¶¶ 44-45.
 4 Therefore, his statements are demonstrably, by admission, false. Thus, Perens cannot avoid liability by
 5 simply claiming that his defamatory statements were “opinions” of a layperson. OSS includes all
 6 arguments presented in Plaintiff’s partial motion for summary judgment (ECF Nos. 24 and 37), by
 7 reference. If the Court were to grant Plaintiffs’ motion, no further analysis needs to be performed.

8
 9 **(C) Even if the subject matter of Perens’ blog post were of public interest, Perens’ anti-SLAPP**
 10 **motion cannot be granted.**

11 Perens primarily relies on *Coastal Abstract Serv, Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725
 12 (9th Cir. 1999). Perens contends that since no court has ruled on the compliance of any agreement
 13 similar to the Access Agreement, thus Perens’ statements should be deemed as mere opinions.
 14 However, the facts of *Coastal Abstract*, can be distinguished from the present matter. There, plaintiff
 15 sued defendant, a lay person, for defamation, among others, since defendant had claimed that plaintiff
 16 did not have a business license in California, as required by statute. Plaintiff did not have a business
 17 license and the Ninth circuit noted, that “an opinion that does not convey a false factual implication is
 18 not defamatory under California law.” (citing *Kahn v. Bower*, 232 Cal.App.3d 1599, 1607, 284
 19 Cal.Rptr. 244, 248 (1991)).

20 Based on the above, the Court stated:

21 Thus the statement that Coastal was operating illegally without a California
 22 license might present a triable claim **if in fact Coastal had a California license.**
 23 **There is no dispute, however, that Coastal had no California license** (and
 24 was not affiliated with a California licensee) at the time First American made the
 25 statement. The only claim of falsity concerns the statement or suggestion that
 26 California's statute applied to the activities of Coastal, which was (and apparently
 still is) a matter of opinion. As a matter of law, the statement that Coastal was

27 ⁸ This Court is requested to take Judicial Notice of FAC ¶¶ 44-45.

1 operating without the necessary license in California did not constitute
2 defamation.

3 *Coastal Abstract, supra*, at 733 (emphasis added).

4 Here, Perens has alleged that OSS is in violation of the GPL. This is disputed (unlike *Coastal*
5 where the original premise was based on a truth –Coastal did not have a license in California). Thus,
6 as a matter of law, the statement that OSS is in violation of the GPL, constitutes defamation, since,
7 unlike *Coastal*, there is no undisputed truth that can be used as a valid defense. Perens further
8 misinterprets *Coastal* as if defamation requires a conclusive law to prove or disprove every statement
9 of fact. To the contrary, the *Coastal* court relied on an undisputed statement of fact, and the court
10 decided not to interpret a statutory requirement since “the only claim of falsity concern[ed] the
11 statement or suggestion that California's statute applied to the activities of Coastal.” *Id.*

12 Perens also relies on *Coastal's* analysis of the Lanham Act to attempt to evade liability under
13 defamation. The *Coastal* Court concluded that “[s]tatements of opinion are not generally actionable
14 under the Lanham Act.” *Id.* at 731. There the court relied on “[a]bsent a clear and unambiguous ruling
15 from a court or agency of competent jurisdiction, **statements by laypersons** that purport to interpret
16 the meaning of a statute or regulation are opinion statements, and not statements of fact.” *Id.* at 731;
17 citing *Dial A Car, Inc. v. Transportation, Inc.*, 82 F.3d 484, 488-89 (D.C.Cir. 1996); *Sandoz*
18 *Pharmaceuticals Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 230-32 (3d Cir.1990) (emphasis
19 added.) The subject matter of dispute in both *Dial A Car* and *Sandoz* was related to the Lanham Act,
20 and the Coastal Court cited these courts to address an issue related to the Lanham Act itself, not the
21 defamation aspect of the case. However, even if the *Coastal* court’s analysis, as applied to the Lanham
22 Act, were to be applied in a defamation matter, Perens cannot simply evade liability by now claiming
23 that his statements were that of a layperson. Here, it is undeniable that Perens has represented himself,
24 and is by large known to the open source community, as an expert in disputes over the legality of open
25
26
27

1 source matters, as he did in *Jacobsen v. Katzer, supra*. Further, Perens has written at least 23
2 successful books in open-source matters, taught continuing legal education to over 250 attorneys, and
3 is a professional who instructs engineers and produces clarity for attorneys in how to comply with legal
4 requirements related to computer software. Perens has further implied that his understanding of the law
5 is better than seasoned attorneys admitted to the US Supreme Court. Clearly, Perens cannot be held to
6 the same standard of a layperson and his “opinions” cannot be simply considered as that of a lay
7 person. Therefore, the *Coastal* test cannot apply for this reason as well.

8
9 California courts agree with Plaintiffs’ analysis in the context of defamatory statements
10 published by a person having specialized knowledge in an industry. The facts of the instant matter are
11 very similar to that of *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, *supra*. In *Wilbanks*, Gloria Wolk, a
12 consumer advocate and expert on viatical settlements (arrangements in which dying persons sell their
13 life insurance policies to investors to help pay for medical care and other expenses), posted negative
14 comments on her website about Plaintiff Wilbanks, a broker of such settlements. *Id.* at 833, 889. Wolk
15 had written several books on viaticals, and acted as a consumer watchdog and an expert on issues
16 surrounding viatical settlements. *Id.* at 889. On her website, Wolk published the following related to
17 Wilbanks:
18

19 Be very careful when dealing with this broker. Wilbanks and Assoc. is under
20 investigation by the CA dept. of insurance. The complaint originated with a
21 California viator who won a judgment against Wilbanks. How many others have
22 been injured but didn't have the strength to do anything about it?
23 The company is under investigation. Stay tuned for details.
24 Wilbanks and Associates provided incompetent advice.
25 Wilbanks and Associates is unethical.

26 *Id.* at 890, 901.

27 Plaintiff Wilbanks filed a complaint against Wolk for defamation and Wolk moved to strike
28 pursuant to California’s anti-SLAPP statute in which the lower court granted Wolk’s anti-SLAPP
29 motion. *Id.* at 890. In reversing the grant of the anti-SLAPP motion, the Court of Appeal stated that

1 Wolk's publication suggested that Plaintiffs engaged in unethical or incompetent practices. *Id.* at 902.
2 The court held that such express or implied assertion of incompetent and unethical business practices
3 could not be viewed as statements of opinion. *Id.* at 902-03. Citing *Milkovich v. Lorain Journal Co.*,
4 487 U. S. 1, 19, *supra*, the court stated, "[e]ven if the speaker states the facts upon which he bases his
5 opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the
6 statement may still imply a false statement of fact." *Id.* at 903.

7
8 In support to her special motion to strike, Wolk submitted a declaration that she had been
9 informed by a viator who won a judgment in small claims against Wilbanks and that the viator had
10 filed a complaint with the State's department of insurance. *Wilbanks*, *supra*, at 903. However, as the
11 court determined, Wilbanks was in fact not under active investigation (although a complaint had been
12 filed against him by a disgruntled viator), however Wolk had presented an assertion suggesting that
13 Wilbanks was in fact under investigation. *Id.* Wolk presented that her publication was "merely stating
14 the facts and drawing her own opinion from them." *Id.* However, the court stated:

15
16 Wolk's own position as a crusader and watchdog to the industry also works
17 against any argument that she was merely stating the facts and drawing her own
18 opinion from them. An accusation that, if made by a layperson, might constitute
19 opinion may be understood as being based on fact if made by someone with
20 specialized knowledge of the industry. (*Slaughter v. Friedman* (1982) 32 Cal.3d
21 149.) Wolk here held herself out to have special knowledge resulting from
22 extensive research into the viatical industry; i.e., she claimed to be a person who
23 could recognize and identify unethical practices that the average person might not
24 recognize. Wolk clearly expected readers to rely on her opinions as reflecting the
25 truth.

26 *Id.* at 904.

27
28 Here, just like Wolk's publication, it is undisputed Perens published statements explicitly or
implicitly suggesting OSS was violating the GPL, and customers should avoid using its product or
subject itself to legal liability. Further, just like Wolk, it is undisputed that Perens is a subject matter
on open source matters, has written numerous books on the matter, has provided 250+ attorneys with

1 continuing legal education lectures, has represented himself as an expert in court and is an advocate of
2 the open source community. Also, just like Wolk, there is no dispute that Perens has held out to have
3 specialized knowledge in the open source community, and has clearly expected readers to rely on his
4 opinions as reflecting the truth. *Also see* Perens Decl. ¶ 8 (ECF No. 32-3).

5 The court also held that Wolk did not check with plaintiffs before publishing the material and
6 her refusal to discuss the matter with Wilbanks was viewed as a lack of interest in the truth, thus Wolk
7 acted negligently or possibly with a reckless disregard for the truth. *Id.* at 906.

8 Similarly here, Perens did not check with Plaintiffs before publishing with material, Perens
9 stated that publishing his blog posts was “more effective than writing to” Plaintiffs. *See* FAC ¶72. *Also*
10 *see* Perens’ Opposition to OSS’ Motion for Partial Summary Judgment, Ex. 2, p. 10-11 (ECF No. 32-
11 2). Further, Perens agrees that he is not aware of any case law which reasonably suggests that
12 Plaintiffs may be in violation of the GPL. Thus, Perens either acted negligently or with reckless
13 disregard of the truth.

14 The *Wilbanks* court further concluded, that the facts implied that the publication as a whole was
15 provably false. *Id.* at 904. The court reasoned that despite the existence of a judgment against
16 Wilbanks, he was never under active investigation and he could show that his business practices were
17 in fact not unethical. *Id.* Since Perens statements cannot be considered as mere opinions, and being a
18 subject matter expert he expected his readers to rely on his publication as the truth, OSS can
19 demonstrate that the publication as whole is provably false. Specifically, OSS can demonstrate that
20 there has been no initiation of any legal proceeding against them that can even remotely suggest a
21 possibility that they have been in violation of the GPL. Spengler Decl. ¶12. Further, OSS is unaware if
22 any of its customers have been contacted regarding possible contributory infringement or breach of
23 contract by, or threatened of legal action by, anyone from the Linux kernel code developers. Spengler
24
25
26
27

1 Decl. ¶ 13. Furthermore, OSS can demonstrate and convince a fact finder, based on the explicit clauses
2 of the GPL, that it has been in compliance of the laws of contract and copyright and can thus prove that
3 Perens' assertion that OSS has been violating the GPL is unreasonable and not true.

4 A license agreement, by definition, can only apply to a product or service which is agreed upon
5 – in other words, there needs to be an agreement. Since the GPL only governs the current “Program”
6 under which it is released, reasonably, there can be no demand or expectation of a grant of right of a
7 software that has not even been released. Furthermore, the GPL in its preamble provides the licensee
8 the “freedom to distribute free software (and charge for it as a service if you wish to)... .” Since
9 Plaintiffs are incorporating Linux kernel code into their *patches*, as a licensee of the Linux kernel, the
10 freedom to distribute their modifications or additions to the Linux kernel code, is also granted to
11 Plaintiffs under the GPLv2. Since freedom to distribute code means to distribute (or not distribute
12 code) without any consequences, Plaintiffs have the inherent right to not distribute code if they choose
13 to do so. Further, since each version or update is technically new software and is released
14 independently under the GPL, Plaintiffs are explicitly granted, under the GPL, the freedom to
15 distribute each version, at their discretion. Thus, there can be no violation of the GPL. Finally, it is
16 well known that a business can choose with whom it may do business and with it may not. However,
17 Perens wants this Court to follow his absurd rationale and contradict common law principles worth of
18 many decades of wisdom, if not centuries. Based on paragraphs 12 – 32 of the First Amended
19 Complaint, Plaintiffs request this Court to take Judicial Notice that Plaintiffs are not in violation of the
20 GPL.
21
22
23

24 However, for the purposes of this special motion to strike, even if the Court decides not to
25 determine whether Plaintiffs were in compliance of the GPL, Perens' own admission that the Access
26

1 Agreement does not violate the GPL provides proof that at the publications of his blog posts are
2 provably false, as explained further.

3 “The problem isn’t with the text there. It’s with what else they have told their customers. It doesn’t
4 even have to be in writing.”

5 OSS contends the above stated paragraph by Perens, in response to a Slashdot.org commenter,
6 who provided Perens a link of the Access Agreement, demonstrates that Perens has admitted that the
7 Access Agreement did not violate the GPL. OSS contends that by “the text there” Perens meant the
8 text of the Access Agreement, since the Slashdot.org commenter had stated, “I’ve had a look over their
9 agreement here [grsecurity.net] ...” (underline in original indicating a web-link). OSS contends “there”
10 was a reference and reasonable response to “here.” Furthermore, Perens continued “[i]t’s with what
11 else they have told their customers,” clearly suggesting that he agreed that the problem was not with
12 the Access Agreement, but with what OSS had told their customers. Reasonably, the paragraph when
13 considered as a whole suggests a strong finding that Perens agreed that the Access Agreement did not
14 violate the GPL. Yet, on July 10, 2017, Perens explicitly stated that the Access Agreement was in
15 violation of the GPL.
16

17 However, Perens has taken great measures to deny such a reasonable contention and his
18 inference, arguably, crosses the boundaries of logic and rational thinking.⁹ Although, Plaintiffs
19 contend their partial motion for summary judgment should be granted, even if the Court were to deny
20 such a motion, at the very least, a dispute of material fact has been identified, and a trier of fact may
21 very well find in favor of Plaintiffs. Further, it has already been alleged that Perens did not have any
22 reliable witnesses who could confirm that either the Access Agreement was in violation of the GPL or
23 that Plaintiffs had made verbal statements suggesting a violation of the GPL, and a trier of fact may
24 find in favor of Plaintiffs.
25

26 _____
27 ⁹ See Perens’ opposition to Plaintiff’s motion for partial summary judgment (ECF No. 32).

1 **(ii) False Light**

2 The Restatement Second of Torts, section 652E provides:

3 One who gives publicity to a matter concerning another that places the
4 other before the public in a false light is subject to liability to the other for
5 invasion of his privacy, if (a) the false light in which the other was placed
6 would be highly offensive to a reasonable person, and (b) the actor had
7 knowledge of or acted in reckless disregard as to the falsity of the
8 publicized matter and the false light in which the other would be placed.

9 “California common law has generally followed Prosser’s classification of privacy interests as
10 embodied in the Restatement.” *Hill v. National Collegiate Athletic Assn.* 7 Cal.4th 1, 24 (1994). “In
11 order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a
12 reasonable person. Although it is not necessary that the plaintiff be defamed, publicity placing one in a
13 highly offensive false light will in most cases be defamatory as well.” *Fellows v. National Enquirer* 42
14 Cal.3d 234, 238–239 (1986).

15 Here, while Plaintiff OSS alleges defamation per se and defamation per quod, Plaintiff
16 Spengler does not allege he has personally been defamed by the blog posts. However, since Spengler’s
17 name is generally associated with Plaintiff OSS, Spengler claims false light as an implication of the
18 Postings resulting him in harm personally. Thus, the false light claims are not superfluous.

19 **(iii) Intentional Interference with Prospective Economic Advantage**

20 “[S]pecific intent is not a required element of the tort of interference with prospective economic
21 advantage....[A] plaintiff may alternately plead that the defendant knew that the interference was
22 certain or substantially certain to occur as a result of its action.” *Korea Supply Company V. Lockheed*
23 *Martin Corp* 29 Cal.4th 1134, 1154 (Cal. 2003). “Although varying language has been used to express
24 this threshold requirement, the cases generally agree it must be reasonably probable that the
25 prospective economic advantage would have been realized but for defendant’s interference.” *Youst,*
26 *supra*, at p. 71. “[I]n the absence of other evidence, timing alone may be sufficient to prove causation. .

1 . . . Thus, . . . the real issue is whether, in the circumstances of the case, the proximity of the alleged
 2 cause and effect tends to demonstrate some relevant connection. If it does, then the issue is one for the
 3 fact finder to decide.” *Overhill Farms, Inc. v. Lopez* 190 Cal.App.4th 1248, 1267 (2010).

4 Perens, in his original blog post claimed he had “several reliable witnesses.” FAC ¶42.
 5 Moreover, Perens claimed “It’s with what else they have told their customers. It doesn’t even have to be
 6 in writing. I have witnesses. ...” FAC ¶45. Clearly, Perens has asserted he has knowledge about an
 7 economic relationship, either with a present customer or potential customer who has enquired about
 8 the Access Agreement from Plaintiffs. While Plaintiffs allege Perens does not have such knowledge,
 9 based on Perens’ own assertions, he knew about a relationship, that remains unknown to Plaintiffs.
 10 Further Plaintiffs have also alleged that 35 potential customers have not engaged in business with
 11 Plaintiffs since the publication of the defamatory statements. FAC ¶74. Furthermore, four existing
 12 customers ceased business relationships with Plaintiff after the publication of the defamatory
 13 statements. FAC ¶ 75. It is further alleged that it is reasonably probable that the prospective economic
 14 advantage would have been realized but for defendant’s interference. FAC ¶ 111.
 15
 16

17 **IV. CONCLUSION**

18 This Court should thus dismiss Perens Special Motion to Strike and Motion to Dismiss, and
 19 award Plaintiffs its attorney’s fees for having to oppose this frivolous motion.
 20

21 Date: November 21, 2017
 22

23 Respectfully Submitted,

24 CHHABRA LAW FIRM, PC

25 s/Rohit Chhabra

26 Rohit Chhabra

27 Attorney for Plaintiffs

Open Source Security Inc. & Bradley Spengler