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10 Attorneys for Defendant  
Bruce Perens

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

OPEN SOURCE SECURITY, INC., and  
BRADLEY SPENGLER,

Plaintiffs,

v.

BRUCE PERENS, and Does 1-50,

Defendants.

Case No. 3:17-cv-04002-LB

**DEFENDANT'S NOTICE OF MOTION  
AND MOTION FOR SANCTIONS  
AGAINST PLAINTIFFS' COUNSEL;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

Judge: Hon. Laurel Beeler

**NOTICE OF MOTION**

**TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE** that Defendant Bruce Perens hereby moves for an award of attorneys' fees and costs under 28 U.S.C. § 1927 and the Court's inherent powers against Plaintiffs' counsel Rohit Chhabra. This motion is proper because Plaintiffs' counsel unnecessarily, vexatiously, and in bad faith multiplied the proceedings in this litigation. Defendant respectfully requests an award in the amount of \$121,758 for attorneys' fees and related nontaxable expenses resulting from the unnecessary and vexatious multiplication of the proceedings, including fees and costs incurred in connection with responding to Plaintiffs' First Amended Complaint (ECF No. 18), which this Court dismissed with prejudice on January 24, 2018 (ECF No. 58); responding to Plaintiffs' Motion for Partial Summary Judgment (ECF No. 24), which this Court denied on December 21, 2017 (ECF No. 53); responding to factual inaccuracies contained in Open Source Security, Inc.'s Reply in Support of Its Motion for Partial Summary Judgment (ECF No. 37); and responding to Plaintiffs' Supplemental Memorandum of Points & Authorities in Opposition to Defendant's Motion to Dismiss and Special Motion to Strike (ECF No. 45-1). Mr. Perens also requests an award of his fees incurred in bringing this Motion pursuant to § 1927 as permitted by law, currently accrued at \$26,149.50. This Motion is made following the conference of counsel pursuant to L.R. 54-5, which took place on February 7, 2018.

This Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities in support thereof and all materials cited within the Memorandum, including the Declaration of Melody Drummond Hansen and exhibits attached thereto, the concurrently filed Notice of Motion and Motion for Fees & Costs Pursuant to California's Anti-SLAPP Statute and accompanying declarations and exhibits attached thereto, the other pleadings and papers on file in this action, and any further evidence or argument the Court might allow.

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Dated: February 7, 2018

MELODY DRUMMOND HANSEN  
HEATHER J. MEEKER  
CARA L. GAGLIANO  
O'MELVENY & MYERS LLP

By: Melody Drummond Hansen  
Melody Drummond Hansen  
Attorneys for Defendant Bruce Perens

**MEMORANDUM AND POINTS OF AUTHORITY**

1  
2 Defendant Bruce Perens brings this motion against Plaintiffs' counsel, Mr. Rohit Chhabra,  
3 because Plaintiffs' counsel bears some responsibility for the amount of fees unnecessarily  
4 incurred in this case. Plaintiff's counsels' reckless and vexatious litigation tactics unnecessarily  
5 multiplied the proceedings, ballooning the ultimate fees incurred in defending this litigation by  
6 several times. As an officer of the court—and considering the risk of fees that would be  
7 chargeable to his clients under anti-SLAPP law—Plaintiffs' counsel should have sought to avoid  
8 unnecessarily complicating the case and increasing the cost of litigation, and all lawyers have a  
9 duty to ensure that all signed filings are submitted for proper purposes.

10 From the beginning, Plaintiffs' counsel has contributed to the high cost of this litigation  
11 by treating the litigation as a “game” to be won rather than seeking the most effective and  
12 efficient ways to resolve the parties' disputes. *See* Drummond Hansen Decl. ¶ 2. Plaintiffs'  
13 counsel engaged in a pattern of reckless and bad faith filing of premature and duplicative  
14 motions, engaging in unusual procedural maneuvers, and pursuing frivolous and harassing  
15 arguments, wasting the Court's and the parties' resources. He rebuffed efforts by Mr. Perens's  
16 counsel to manage the case reasonably. As one egregious example, Plaintiffs' counsel filed a  
17 motion for partial summary judgment before Mr. Perens could file his second anti-SLAPP  
18 motion, then refused to Mr. Perens's counsel's request to delay proceeding on that premature  
19 summary judgment motion until after the Court determined whether Plaintiffs' claims could  
20 proceed at all. Plaintiffs' counsel later admitted that he filed the motion for partial summary  
21 judgment for purely tactical reasons—to obtain Mr. Perens's declarations. *See* Dec. 14, 2016  
22 Hr'g Tr. at 6:13–14, 6:21–7:48. Courts in this district routinely impose sanctions for this type of  
23 behavior, regardless of the relative resources or experience of the litigators. Section 1927  
24 sanctions exist not only to hold individual attorneys responsible, but also to deter the kinds of bad  
25 faith behavior that make litigation unnecessarily vexatious, increasing costs for everyone. This  
26 purpose is especially important in an anti-SLAPP case where Plaintiffs' counsel is on notice that  
27 the claims are subject to being stricken under anti-SLAPP, yet proceeds nonetheless to recklessly  
28 increase fees and costs.

1 While Mr. Perens is entitled to recover mandatory attorneys' fees from Plaintiffs under  
 2 California's anti-SLAPP statute (*see generally* Def's Mot. for Mandatory Fees & Costs Under  
 3 California's Anti-SLAPP Law, *concurrently filed*), this motion seeks to also hold Plaintiffs'  
 4 counsel jointly and severally liable for fees attributable to counsel's misconduct and for fees and  
 5 costs incurred in filing this motion under §1927 to the extent permitted by law.<sup>1</sup>

6 **I. THE COURT SHOULD IMPOSE SANCTIONS UNDER § 1927 AND THE**  
 7 **COURT'S INHERENT POWERS.**

8 Plaintiffs' counsel's pattern of bad faith conduct is precisely the type of behavior that  
 9 § 1927 is meant to deter. The purpose of § 1927 is to deter attorneys from "multiplying legal  
 10 proceedings unnecessarily, and to compensate attorneys forced to endure such proceedings."  
 11 *Vedatech, Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 04-1403 VRW, 2005 WL 1513130, at \*16  
 12 (N.D. Cal. June 22, 2005), *aff'd sub nom. St. Paul Fire & Marine Ins. Co. v. Vedatech Int'l, Inc.*,  
 13 245 F. App'x 588 (9th Cir. 2007). To that end, § 1927 authorizes federal courts to require an  
 14 attorney who "multiplies the proceedings in any case unreasonably and vexatiously" to personally  
 15 satisfy the attorneys' fees and costs incurred because of their conduct. 28 U.S.C. § 1927. An  
 16 attorney acts "unreasonably and vexatiously" when he or she acts with intent, recklessness, or bad  
 17 faith. *Optyl Eyewear Fashion Int'l Corp. v. Style Cos.*, 760 F.2d 1045, 1048 (9th Cir. 1985).

18 Federal courts also have the inherent authority to impose sanctions for misconduct, which  
 19 may include an award of attorneys' fees, against attorneys and parties who "acted in bad faith,  
 20 vexatiously, wantonly, or for oppressive reasons." *Liu v. Win Woo Trading, LLC*, No. 14-CV-  
 21 02639-KAW, 2016 WL 3280474, at \*2 (N.D. Cal. June 15, 2016). The Ninth Circuit has  
 22 concluded that sanctions are available under a court's inherent power if "preceded by a finding of  
 23 bad faith, or conduct tantamount to bad faith," such as recklessness "combined with an additional  
 24 factor such as frivolousness, harassment, or an improper purpose." *See Gomez v. Vernon*, 255

25 \_\_\_\_\_  
 26 <sup>1</sup> Because § 1927 sanctions may not be imposed on represented parties, *FTC v. Alaska Land*  
 27 *Leasing, Inc.*, 799 F.2d 507, 510 (9th Cir. 1986), and because Mr. Perens's request for sanction  
 28 under the Court's inherent powers is likewise based on Plaintiffs' counsel's bad faith conduct,  
 Mr. Perens has excluded his fees and costs incurred in connection with this motion from the  
 amount he seeks to recover under the anti-SLAPP statute. (*See* Anti-SLAPP Fees Mot.)

1 F.3d 1118, 1134 (9th Cir. 2001).<sup>2</sup>

2 Sanctions are merited here because Plaintiffs' counsel has engaged in a pattern of reckless  
3 and bad faith filing of premature and duplicative motions, engaging in unusual procedural  
4 maneuvers, and pursuing frivolous and harassing arguments, wasting the Court's and the parties'  
5 resources.

6 **A. Plaintiffs' Counsel's Reckless and Vexatious Litigation Tactics Unnecessarily**  
7 **Multiplied the Proceedings.**

8 While Plaintiffs' counsel should have been aware that Plaintiffs' claims were subject to  
9 anti-SLAPP before he filed this lawsuit, counsel certainly was on notice after Mr. Perens filed his  
10 initial anti-SLAPP motion on September 18, 2017. Rather than allowing the Court to efficiently  
11 address the parties' core dispute regarding whether Plaintiffs' claims were actionable, Plaintiffs'  
12 counsel instead chose course of conduct that unreasonably and vexatiously multiplied the  
13 proceedings. While § 1927 sanctions may not be applied to initial pleadings, courts imposed  
14 sanctions where counsel files even one unreasonable or vexatious motion, or advances  
15 unreasonable or vexatious arguments regarding a previously scheduled motion. *See, e.g. De Dios*  
16 *v. Int'l Realty & Invs.*, 641 F.3d 1071, 1077 (9th Cir. 2011) (affirming sanctions under § 1927 for  
17 against an attorney for filing a single motion to disqualify); *Vedatech*, 2005 WL 1513130, at \*17  
18 (imposing sanctions on pro se plaintiffs for advancing frivolous arguments in a motion to  
19 dismiss).

20 This dispute could have been resolved following briefing on Mr. Perens's original motion  
21 to dismiss and strike, filed on September 18, 2017 and noticed for hearing on October 26, 2017.  
22 Indeed, the Court ultimately dismissed Plaintiffs' amended complaint for the same reasons Mr.  
23 Perens's offered that the original complaint should be dismissed (*compare* ECF No. 11 at 13-18,  
24 19-22 *with* ECF No. 53 13-18.) Plaintiffs' Amended Complaint added more facts and new  
25 theories and a new party (to avoid a clearly legally deficient false light claim), but it did nothing

26 \_\_\_\_\_  
27 <sup>2</sup> Mr. Perens recognizes that he is not entitled to the costs of bringing this motion under the  
28 court's inherent powers. As such, he seeks an award of costs for bringing this Motion under  
§ 1927 alone. *See Blixseth v. Yellowstone Mountain Club, LLC*, 854 F.3d 626, 632 (9th Cir.  
2017).

1 to remedy the original complaint's core legal defects and instead pursued equally inactionable  
2 claims. (ECF No. 18.) Plaintiffs' counsel then continued to unnecessarily complicate the case.

3 One egregious example of Plaintiffs' counsel unnecessarily multiplying the proceedings  
4 was filing of a Motion for Partial Summary Judgment (ECF No. 24) before Mr. Perens could even  
5 respond to Plaintiffs' Amended Complaint, and noticed the summary judgment motion for a date  
6 before Mr. Perens's renewed anti-SLAPP motion could be heard. (ECF No. 24, "MPSJ.")

7 Plaintiffs' counsel then refused Mr. Perens's counsel's request that the parties defer briefing on  
8 Plaintiffs' partial summary judgment motion until after the resolution of Mr. Perens's motion to  
9 dismiss and anti-SLAPP motion, given that Mr. Perens's motions could dispose of all four claims  
10 in the case (as indeed they did), a motion for partial summary judgment by definition could not  
11 resolve the case, and Plaintiffs' motion was premature. *See* Drummond Hansen Decl. ¶ 4.

12 Despite failing to identify any prejudice that Plaintiffs would suffer, Plaintiffs' counsel rejected  
13 Mr. Perens's proposal, stating that he "sincerely believe[d] that the motion for partial summary  
14 judgment would make [Mr. Perens's] anti-SLAPP motions moot/ frivolous" (10/23/17  
15 email). But at the December 14 hearing, Plaintiffs' counsel made no attempt to defend the  
16 motion's merits and instead admitted that he "honestly just wanted Mr. Perens's Declarations."  
17 *See* Dec. 14, 2016 Hr'g Tr. at 6:13–14, 6:21–7:4. As a result of the unnecessary filing, defense  
18 counsel spent unnecessary hours responding to a premature and procedurally unusual motion that  
19 did not require the court's consideration. *See* Drummond Hansen Decl. ¶ 4; Dec. 14, 2017 Hr'g  
20 Tr. at 6:13–4, 7:10–14. That burden was compounded by Mr. Perens's simultaneous preparation  
21 for hearing on his motions challenging the First Amended Complaint, requiring defense counsel  
22 to staff additional associates on the matter. Drummond Hansen Decl. ¶¶ 4-5.

23 Plaintiffs' numerous filings and positions resulted in eleven filings by the parties in  
24 October, and an additional five filings in November, and forced Mr. Perens's counsel and the  
25 Court to review two complaints, two motions for joinder, two motions to dismiss, a motion for  
26 summary judgment, a motion to file a Surreply, among other briefing. Plaintiffs' last motion (for  
27 supplemental briefing) was filed nearly two months after Mr. Perens's original anti-SLAPP  
28 motion and motion to dismiss was noticed.

1 Plaintiffs' counsel engaged in other conduct that unnecessarily multiplied proceedings.  
2 For example, Plaintiffs' counsel engaged in a campaign of unreasonable theories and inaccurate  
3 factual statements across multiple briefs, forcing Mr. Perens to correct the record. (ECF Nos. 37,  
4 38.) Plaintiffs' counsel insisted that Plaintiffs needed discovery before the anti-SLAPP hearing,  
5 but would not identify the allegedly needed discovery and did not comply with the procedural  
6 requirements of Federal Rule of Civil Procedure 56(d). (ECF No. 38.) Two days before the  
7 hearing on Mr. Perens's motion to dismiss, Plaintiffs filed yet another unnecessary filing--a  
8 motion for supplemental briefing on a decade-old case based on completely different facts. (ECF  
9 No. 45.) This forced Mr. Perens's counsel to divert attention away from hearing preparation to  
10 respond to a meritless motion.

11 Plaintiffs' counsel's actions had the cumulative effect of delaying proceedings by nearly  
12 two months and increasing fees by multiple times the fees incurred in preparation for Mr.  
13 Perens's original motion to dismiss and to anti-SLAPP. His actions have clearly vexatiously  
14 multiplied the proceedings as contemplated by § 1927.

15 **B. Plaintiffs' Counsel Acted Recklessly and in Bad Faith.**

16 Plaintiffs' counsel engaged in a pattern of reckless and bad faith filing of premature and  
17 duplicative motions, engaging in unusual procedural maneuvers, and pursuing frivolous and  
18 harassing arguments. A movant can establish that an attorney acted "unreasonably and  
19 vexatiously" when the attorney acts with intent, bad faith, or recklessness. *Optyl Eyewear*, 760  
20 F.2d at 1048. Knowing or reckless conduct meets this standard." *MGIC Indem. Corp. v. Moore*,  
21 952 F.2d 1120, 1121–22 (9th Cir. 1991). Bad faith may also be inferred from an attorney's  
22 pattern of behavior and course of conduct as a whole. *See Moser v. Bret Harte Union High Sch.*  
23 *Dist.*, 366 F. Supp. 2d 944 (E.D. Cal. 2005).

24 Plaintiffs' counsel's pattern of behavior supports a finding of recklessness and bad faith.  
25 For example, minutes after Mr. Perens submitted his original Motion to Dismiss and Strike,  
26 Plaintiffs' counsel wrote to Mr. Perens, stating "This will be a fun game to play...Game on."  
27 Drummond Hansen Decl. Ex. 1. Over the course of the litigation, Plaintiffs' counsel apparently  
28 did treat the litigation as a game to be won. For example, after agreeing to a briefing schedule on

1 Mr. Perens's second anti-SLAPP motion and motion to dismiss, hours later, Plaintiffs' counsel  
2 filed a motion for partial summary judgment, then refused to continue briefing, telling Mr.  
3 Perens's counsel that he believed it would render the Motion to Dismiss and Strike moot.  
4 Drummond Hansen Decl. ¶ 3. But counsel later admitted that the summary judgement motion  
5 was filed just to obtain Mr. Perens's declarations. Dec. 14, 2016 Hr'g Tr. at 6:13–14, 6:25–7:48.  
6 Filing such a baseless motion could alone merit the award of sanctions. *See Optyl Eyewear*, 760  
7 F.2d at 1051. In *Optyl Eyewear*, for example, the Ninth Circuit affirmed an award against an  
8 attorney who filed a motion for disqualification, knowing there was no basis for the motion. *Id.*  
9 The Ninth Circuit further found that bad faith is evident when motions are improperly filed as  
10 "tactical maneuvers." *Id.* Similarly here, Plaintiffs' counsel submitted a filing not because he  
11 expected the motion to be meritorious but instead knowing there was no basis for the motion  
12 other than gaining a tactical advantage of obtaining Mr. Perens's declarations.

13 Additionally, Plaintiffs' counsel insisted on pursuing baseless theories meant to harass Mr.  
14 Perens. For example, Plaintiffs' summary judgment reply brief fundamentally misconstrued  
15 statements in Mr. Perens's declaration, and accused him of intentionally omitting certain details.  
16 (ECF No. 37.) Defense counsel sent an email to Plaintiffs' counsel, explaining how Plaintiffs had  
17 misconstrued Mr. Perens's statements and providing supporting documentation located by Mr.  
18 Perens. Drummond Hansen Decl. ¶ 6. Plaintiffs nonetheless insisted on opposing Mr. Perens's  
19 request to correct the information with the Court. *Id.*; *see also* ECF No. 42. Plaintiffs' counsel  
20 also accused Mr. Perens of committing "perjury" for merely requesting to correct his October 31  
21 statement to reflect that he had confirmed from his email records that he reviewed the Grsecurity  
22 agreement the morning of July 10, rather than in the evening of July 9, as he previously recalled—a  
23 trivial misstatement that had no bearing on the litigation. Decl. of Melody Drummond Hansen  
24 ¶ 6. Despite the proffered proof, moreover, Plaintiffs' counsel continued to press the same  
25 incoherent theory in his opposition to Mr. Perens's anti-SLAPP motion. *See Opp. to Second Mot.*  
26 *to Dismiss* at 3, 8, 17, 22-23 (ECF No. 38.)

27 Plaintiff also filed a frivolous motion for supplemental briefing. (ECF No. 45.) While  
28 many litigants might wish they could supplement their briefing after finding additional case

1 support, there are established rules regarding when such filings are appropriate.<sup>3</sup> Also, as the  
 2 Court pointed out in the hearing, the case was readily distinguishable. Dec. 14, 2017 Hr'g Tr. at  
 3 2:58–3:40, 8:45–9:08. Courts have recognized this type of submission as sanctionable, regardless  
 4 of the attorney's experience or lack of resources. For example, in *Vedatech*, the court awarded  
 5 sanctions against a pro se plaintiff based on his on his "fundamental ignorance (either intentional  
 6 or reckless) of the ability to read case law." 2005 WL 1513130, at \*17. And in *Moser*, the court  
 7 imposed sanctions on a seventh-year associate, holding she had enough experience to know not to  
 8 make a "significant and unproductive departure from the Federal Rules of Civil Procedure." 366  
 9 F. Supp. 2d at 973-74. While she claimed her mistakes were due to "mistake, misunderstanding,  
 10 or carelessness," the court disagreed, finding that "as an attorney licensed to practice law in the  
 11 State of California," she had an "ethical obligation to ask for help and get instructions from her  
 12 superiors if she truly could not deal with the 'complexities' of the case." *Id.* at 973-74, 977.

13 Taken as a whole, Plaintiffs' counsel's conduct has unnecessarily multiplied the  
 14 proceedings. As such, Mr. Perens respectfully requests that the Court grant sanctions in order to  
 15 hold Plaintiffs' counsel responsible for his role in unreasonably increasing the costs of the  
 16 litigation.

## 17 **II. THE ATTORNEYS' FEES REQUESTED ARE REASONABLE.**

18 The fees requested by Mr. Perens are reasonable given the multitude of unnecessary  
 19 motions Plaintiffs' counsel insisted on filing, and the number of frivolous arguments Plaintiffs'  
 20 attorney persisted in arguing. For the sake of judicial economy, the reasonableness of the fees  
 21 and costs is described in Mr. Perens's concurrently filed Motion for Fees and Costs and the  
 22 Drummond Hansen Declaration filed in support thereof. If the Court prefers, however,  
 23 Defendant's counsel would be happy to file a separate Declaration in support of this motion as  
 24 well. In total, Mr. Perens is seeking \$121,758, which represents 213.9 hours of work in preparing

25 <sup>3</sup> Civil Local Rule 7-3(d) contemplates that no additional memoranda, prepares, or letters should  
 26 be filed after a Reply is submitted. While it does list an exception for supplementing the briefs  
 27 with a relevant judicial opinion, such an exception is designed for cases "published after the date  
 28 the opposition or reply was filed." Moreover, the proper procedure is to submit a citation and  
 copy of the new opinion, without presenting additional arguments. Plaintiffs' four page briefing  
 was not appropriate for a decade-old case.

1 a second anti-SLAPP motion, supplemental briefing and opposition to the partial motion for  
2 summary judgment. (See concurrently filed Mot. for Mandatory Fees Under Anti-SLAPP.) He is  
3 also seeking \$26,149.50 for the fees incurred (for 47.7 hours of work) in filing this motion  
4 pursuant to §1927. As the Ninth Circuit has recognized, fees and costs for bringing a sanctions  
5 motion may be included under Section 1927. See *Blixseth v. Yellowstone Mountain Club, LLC*,  
6 854 F.3d 626, 632 (9th Cir. 2017).

7 **III. CONCLUSION**

8 At every stage of the litigation, Plaintiffs’ counsel’s gamesmanship unnecessarily  
9 complicated the proceedings and forced Mr. Perens and his counsel to spend hundreds of hours  
10 addressing meritless claims and accusations. Plaintiffs’ counsel undertook this course of conduct  
11 in bad faith, or at a minimum, recklessly and frivolously. While Mr. Perens is entitled to  
12 mandatory fees under California’s anti-SLAPP statute, he also believes that Plaintiffs’ counsel  
13 should bear some of the responsibility for the payment of those fees, due to Plaintiffs’ counsel’s  
14 unprofessional and bad faith attitude in litigating this case. For the foregoing reasons, Mr. Perens  
15 respectfully requests that this Court award Defendant \$121,758 for 213.9 hours of work under  
16 § 1927 and the Court’s inherent powers, and \$26,149.50 for the fees incurred (for 47.7 hours of  
17 work) in filing this motion pursuant to § 1927, for which Plaintiffs’ counsel should be liable.

18 Dated: February 7, 2018

19  
20 MELODY DRUMMOND HANSEN  
21 HEATHER J. MEEKER  
22 CARA L. GAGLIANO  
23 O’MELVENY & MYERS LLP

24 By: Melody Drummond Hansen  
25 Melody Drummond Hansen  
26 Attorneys for Defendant Bruce Perens  
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28