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Open Source Security Inc. &
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8 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
9 **SAN FRANCISCO DIVISION**

10 OPEN SOURCE SECURITY INC. and) Case No.: 3:17-cv-04002-LB
11 BRADLEY SPENGLER)
12 Plaintiff,) **REQUEST TO CONSIDER REBUTTAL**
13 v.) **ARGUMENT TO DEEM MOTION FOR**
14 BRUCE PERENS, and Does 1-50,) **SANCTIONS AS IMPORPER PURSUANT**
15 Defendants.) **TO LOCAL RULE 7-8 (c) and (d)**
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Location: Courtroom C, 15th Floor
Judge: Hon. Laurel Beeler

REBUTTAL ARGUMENT IN FAVOR OF DEEMING MOTION FOR SANCTIONS**IMPROPER AS A MATTER OF PROCEDURE**

L.R. 7-8(c) states, “[t]he motion must comply with any applicable Fed. R. Civ. P. and **must** be made as soon as practicable after the filing party learns of the circumstances that it alleges make the motion appropriate;” (emphasis added to highlight lack of permissive verbiage). Defendant first argues that his 21 minute delay, pursuant to L.R. 7-8(d), to file the motion for sanctions should be forgiven. *Arguendo*, even if the Court were to consider such a position, Defendant’s motion for sanctions incurable as to a procedural defect without him showing good cause for the delay.

Indeed, Defendant correctly states that the Court has discretion to deem a motion improper pursuant to L.R. 7-8(c). *See PersonalWeb Techs., LLC v. Google Inc.*, No. 5:13-CV-01317 EJD, 2014 WL 5422933, at *2 (N.D. Cal. Oct. 24, 2014). However, Defendant has failed to provide justifiable cause as to why it why allegations of misconduct that were allegedly committed prior to, or on, December 14, 2017, not practicable to be raised, or at least brought to the Court’s attention, until February 8, 2017.

To justify the delay, Defendant essentially claims that the motion for sanctions against the undersigned was convenient to be filed with a motion for attorneys’ fees against Plaintiffs. However, Defendant fails provide case law that considers his contention as a justifiable excuse under L.R 7-8(c). It is unfortunate that Defendant again resorts to factual misrepresentations to advance his frivolous motion despite this ex parte application being limited to procedural grounds.

The cases listed by Defendant are not pertinent and can easily be distinguished from the instant matter. For example, in *Beaver Cty. Emps.’ Ret. Fund v. Tile Shop Holdings, Inc.*, No. 16-MC-80076-JSC, 2016 WL 7212308 (N.D. Cal. Dec. 13, 2016) since no final judgment was entered, the court held L.R. 7-8(d) did not apply. *Beaver* at *4. Furthermore, L.R. 7-8(c) was not an issue, and Defendant correctly recognizes that the *Beaver* court found good cause for the delay as the motion of sanctions was a direct result out of a failed motion to compel and the party seeking sanctions had provided conclusive evidence for the delay, including letting any possible time to appeal the order of motion to compel expire, attempt to meet and confer, etc. before seeking sanctions. See *Id.* **4-5.

1 Defendant then attempts to mislead the court by attempting to equate his meet and confer with
2 the Plaintiffs' as a meet and confer, *personally* with the undersigned (as if his meet and confer related
3 to section 1927 motions). At no time did Defendant attempt to meet and confer with the undersigned
4 for the purposes of section 1927 sanctions, and neither can Defendant provide such a showing.

5 Defendant also argues that he delayed his motion based on totality of the circumstances,
6 however, yet again Defendant has not provided any reasonable or justifiable cause why he waited until
7 February 8, 2018 for any alleged misconduct that occurred prior to, or on, December 14, 2017. In his
8 defense Defendant claims he was waiting to see if Plaintiffs would have filed a second amended
9 complaint and based on it, his delay is a justifiable excuse. However, such an excuse is problematic
10 since section 1927 sanctions are meant to compensate and deter. See *Haynes v. City & Cnty. of San*
11 *Francisco*, 688 F.3d 984, 987-88 (9th Cir. 2012) (identifying purpose of § 1927 sanctions as both to
12 compensate and deter).

13 Reasonably, if the undersigned was recklessly or in bad faith filing vexatious and frivolous
14 filings – and Defendant was aware of such filings – an intentional delay in seeking sanctions to
15 prevent unnecessary burden to both the Court and to himself only provides a subjective showing of bad
16 faith in an attempt to personally enrich himself by silently waiting until the end of the proceeding, and
17 not for the purposes of compensate and deter, pursuant to section 1927.

18 Defendant then argues that timekeeping and fee calculations are time consuming, however,
19 Defendant had no requirement to provide records of costs and fees at the time of filing a section 1927
20 sanctions motion. E.g., see *Beaver* at *1 (ordering supplemental briefing to address the amount of fees
21 and costs after granting the motion for sanctions).

22 The other cases cited by Defendant are also not pertinent to the issue at hand, specifically a
23 procedural defect pursuant to L.R. 7-8(c) that includes providing a justifiable excuse for the delay. For
24 example, in *both Advantacare Health Partners v. Access IV*, No. C 03-04496 JF, 2004 WL 1837997, at
25 *3 (N.D. Cal. Aug. 17, 2004) and *Tessera, Inc. v. Sony Corp.*, No. C 11-043 99 EJD (HRL), 2013 WL
26 5692109, at *2 (N.D. Cal. Oct. 18, 2013) the courts found justifiable excuse to grant the motion for
27 sanctions.

1 **Conclusion**

2 Here, Defendant has only provided a showing of convenience and delayed filing the section
3 1927 motion since he did not want to prepare timekeeping or billing records – however there is no such
4 requirement to provide such records at the time of filing a motion for sanctions.

5 Furthermore, Defendant’s intentional delay of not filing a section 1927 sanctions motion and
6 waiting until the proceedings were over (or waiting until Plaintiffs would file an amended complaint)
7 is problematic as it provides a showing of subjective bad faith only to increase his potential
8 compensation, while disregarding any burden the alleged misconduct was causing the Court or its
9 resources – contrary to the purpose of section 1927 to provide deterrence. Thus, Defendant has failed
10 to show any good cause for his delay.

11 Therefore, in the interest of judicial economy, the Court is requested to deem the motion for
12 sanctions as improper pursuant to L.R. 7-8 (c) or (d) and remove it from calendar.

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14 Date: February 14, 2018

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16 Respectfully Submitted,
17 CHHABRA LAW FIRM, PC
18 s/Rohit Chhabra
19 Rohit Chhabra
20 Attorney for Plaintiffs
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