No. 18-15189

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPEN SOURCE SECURITY, INC. AND BRADLEY SPENGLER

Plaintiffs-Appellants,

v.

BRUCE PERENS

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 3:17-cv-04002-LB
Hon. Laurel Beeler

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellant-Plaintiff Open Source Security, Inc. states that it does not have a parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

Date: June 14, 2018

Respectfully Submitted,

CHHABRA LAW FIRM, PC

/s/ Rohit Chhabra
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Attorney for Appellants Open Source Security, Inc. and Bradley Spengler

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I. INTRODUCTION

This is a defamation matter involving abuse of authority by a highly respected subject matter expert who authored a publication intending to cause harm to a small business.

Appellants Open Source Security, Inc. ("OSS") and its CEO, Bradley Spengler, create computer security software for the Linux computer operating system. The Linux computer operating system and OSS's software are both open source software, meaning that, when released under a license, the copyright holder of the software provides the licensee a right to freely copy, modify, and distribute the software. Free, in this regard, means freedom to share, not 'free' at no-cost. The license used by OSS states in part, that OSS "...may not impose any further restrictions on the [software] recipients' exercise of the rights granted herein."

However, the license does not prevent OSS from refusing access to *future* works from its servers. That is – there is no explicit or implicit restriction on OSS's right to do *future* business with whom it pleases. Thus, OSS's customers understand that they have all the rights granted by the license and they can exercise those rights at their volition. However, they acknowledge that by exercising such rights, OSS will also exercise its right of not doing future business with that customer. Similar practices have been used by multi-billion dollar open source companies for approximately two decades.

Defendant-Appellee Bruce Perens is a well-recognized programmer and subject matter expert in the field of open source software. He is a reputed open source licensing compliance professional who not only advises engineers but also educates and advises attorneys. Defendant Perens was not pleased by OSS's agreement with its customers as it relates to future works, and considered it a violation of the license.

This lawsuit arose from statements authored and published by Defendant Perens that were specifically directed towards OSS's customers in which he unequivocally asserted that OSS was operating illegally in violation of the license. He falsely asserted OSS's customers had a right to receive *future* works under the license. He further created an unreasonable fear among OSS's customers warning them that they were subjecting themselves to legal liability by doing business with OSS. Defendant Perens's statements were highly publicized causing harm and tarnishing OSS's business reputation.

OSS filed this lawsuit and Defendant filed a motion to strike pursuant to California's anti-SLAPP statute. The district court determined that (i) Defendant's assertion was about an unsettled legal dispute related to the GPL, (ii) there was no need to distinguish between statements by a layperson and a subject matter expert, and (iii) Defendant was a non-lawyer programmer who expressed a mere opinion.

As set forth below, the district court erred by misapplying applicable and established legal principles.

II. JURISDICTIONAL STATEMENT

The district court had diversity jurisdiction over the underlying suit pursuant to 28 U.S.C. § 1332 inasmuch as Appellants-Plaintiffs are citizens of the State of Pennsylvania, and Defendant-Appellee Bruce Perens is a citizen of California, and the amount in controversy exceeds $75,000. ER 23-24. This is an appeal pursuant to 28 U.S.C. § 1291, from the district court's order granting Defendant's Fed. R. Civ. P. 12 (b)(6) motion pursuant to his special motion to strike under Cal. Civ. Proc. Code § 425.16(a), California's anti-SLAPP statute. ER 3. A notice of appeal was filed on February 5, 2018 (ER 319) from the final judgment entered on January 24, 2018, in which the district court adopted the findings of its Order dated December 21, 2017 and dismissed the case with prejudice. ER 1. The appeal was timely filed as required by Fed. R. App. P. 4 (a)(1)(A).

III. ISSUES PRESENTED

1. Did the district court err in holding that statements alleging OSS was in violation of the GPL did not convey a false factual implication and thus was not defamatory?

2. Did the district court err by failing to apply a 'totality of the circumstances' test as it relates to Defendant, his status and reputation within the

open source community, the substance of his publication, and his desire to harm OSS's business activities?

3. With respect to each claim, did the district court err by holding that the first amended complaint was not legally sufficient to sustain a favorable judgment, under California's anti-SLAPP statute?

IV. STATEMENT OF THE CASE

A. Factual Background.

Plaintiff-Appellants: The plaintiff-appellants — Open Source Security ("OSS") a small private business, and its sole-shareholder and CEO Bradley Spengler — make security software (called "patches," or "software patches" or "grsecurity") to fix security vulnerabilities in an open-source computer operating system called Linux. ER 25 ¶ 12. Open-source software is software that, under certain conditions, users can copy, modify, and distribute freely. ER 26 ¶ 19. At the time of initiation of this lawsuit, OSS only had approximately 45 customers who received the software patches. ER 25 ¶ 12.

The Open Source License: The patches are released under an open source license, the GNU Public License, version 2 ("GPL"). The main software of Linux, called its kernel, is also released under the GPL. OSS modifies portions of the Linux kernel to create its software patches. ER 25 ¶¶ 13-14. While the GPL allows charging a fee as a service, it is prevented from imposing additional restrictions on

recipients, including the recipients' right to redistribute the software. In this regard, the GPL, in part states, "[w]hen we speak of free software, we are referring to freedom, not price." ER 26 ¶19. Further, section 6 of the GPL, in part, states "... no one may impose any further restrictions on the recipients' exercise of the rights granted herein." ER 25 ¶ 14. However, for granting such rights the GPL requires a notice be placed in any software released under the license. The GPL requires the notice to state:

> This License applies to any program or other work which contains a notice placed by the copyright holder saying it may be distributed under the terms of this General Public License.

ER 52; *see also* ER 242.

The Stable Patch Access Agreement ("Access Agreement"): As permitted by the GPL, OSS charges its customers a fee for <u>access</u> to OSS's server resources to directly download the latest software patches, via a subscription service through the Access Agreement. ER 26 ¶ 17. The Access Agreement, in part, states:

> The User has all rights and obligations granted by grsecurity's software license, version 2 of the GNU GPL.
> ...
>
> Notwithstanding these rights and obligations, the User acknowledges that redistribution of the provided stable patches or changelogs outside of the explicit obligations under the GPL to User's customers will result in *termination of access* to **future** updates of grsecurity stable patches and changelogs.

Id. ¶ 18 (emphasis in original; italics added).

Defendant Bruce Perens: Defendant Perens is a well-known personality in the open source community. Defendant maintains a blog website located at www.perens.com ("website"). ER 23; *see also* ER 231 ¶ 5. At his website, Defendant states that he is known for being "one of the founders of the Open Source movement in software, and was the person to announce 'Open Source' to the world". He created the Open Source Definition, the set of legal requirements for Open Source licensing which still stands today." Defendant has represented himself as an expert for the appellant in prominent open source cases like *Jacobsen v. Katzer* 535 F. 3d 1373 (2008). He has also worked as a case strategy consultant for Google's outside counsel in the district court case of *Oracle v. Google*. Defendant Perens instructs engineers in how to comply with open source legal requirements. Further, although not an attorney, Defendant has taught Continuing Legal Education (CLE) classes to "attorneys in many states and was a keynote speaker at a Silicon Valley event attracting over 250 attorneys." Defendant Perens has also published more than 24 books on the subject matter of open source. ER 29 ¶¶ 34-38; *see also* ER 79 - 81.

The First Publication: On June 28, 2017, Defendant Perens published a blog post on his website. In the blog post, Defendant stated, in part:

> [Title]
> Warning: Grsecurity: Potential contributory infringement and breach of contract risk for customers

> [Body]
> It's my strong opinion that your company should avoid the Grsecurity product sold at grsecurity.net because it presents a contributory infringement and breach of contract risk.
> ...My understanding from **several reliable sources** is that customers are verbally or otherwise warned that if they redistribute the Grsecurity patch, as would be their right under the GPL, that they will be assessed a penalty: they will no longer be allowed to be customers, and will not be granted access to any further versions of Grsecurity. GPL version 2 section 6 **explicitly** prohibits the addition of terms such as this redistribution prohibition.
>
> It is my opinion that this punitive action for performance of what should be a right granted under the GPL is infringing of the copyright upon the Linux kernel and breaches the contract inherent in the GPL.
>
> As a customer, it's my opinion that you would be subject to contributory infringement by employing this product under the no-redistribution policy currently employed by Grsecurity.
> ...
> ...
> In the public interest, **I am willing to discuss this issue with companies and their legal counsel, under NDA, without charge.**
>
> I am an intellectual property and technology specialist who **advises attorneys**, not an attorney. This is my opinion and is offered as advice to your attorney. Please show this to him or her. Under the law of most states, your attorney who is contracted to you is the only party who can provide you with legal advice.

ER 30 ¶ 42 (emphasis added). Subsequently, Defendant Perens's blog post was partially reproduced, and linked, on slashdot.org ("Slashdot"), a website well known by programmers and software developers in the Open Source community,

having an Internet traffic of approximately 3.2 million unique visitors each month. Defendant is a famous personality; his blog website receives over 16,000 unique visitors each month. ER 31 ¶¶ 43, 66-67.

Defendant never attempted to contact OSS directly to address his concerns. ER 37 ¶ 72, ER 87. He stated that he was bothered by the sort of action Plaintiffs had engaged in, by their future works condition. He further stated that he "felt informing [OSS's] customers was the best way to effect a change. This was a case where *publicity was the most effective means of effecting change*.... ." ER 36 ¶ 68 (italics added).

The Second Publication: Subsequently, twelve days later[1], Defendant Perens updated the blog post, and removed any references related to his *reliable sources*. Instead he now stated that OSS was in violation of the GPL through the Access Agreement. ER 33 ¶ 48. Defendant further explained in detail that OSS's customers should beware of doing business with the company. The updated version of the blog post stated, in part:

> [Title]
> Warning: Grsecurity: Potential contributory infringement and
> breach of contract risk for customers
>
> [Body]
> ...

---

[1] July 10, 2017

...

By operating under their policy of terminating customer relations upon distribution of their GPL-licensed software, Open Source Security Inc., the owner of Grsecurity, creates an expectation that the customer's business will be damaged by losing access to support and later versions of the product, if that customer exercises their re-distribution right under the GPL license. Grsecurity's Stable Patch Access Agreement adds a term to the GPL prohibiting distribution or creating a penalty for distribution. GPL section 6 specifically prohibits any addition of terms. Thus, the GPL license, which allows Grsecurity to create its derivative work of the Linux kernel, terminates, and the copyright of the Linux Kernel is infringed. The GPL does not apply when Grsecurity first ships the work to the customer, and thus the customer has paid for an unlicensed infringing derivative work of the Linux kernel developers with all rights reserved. The contract from the Linux kernel developers to both Grsecurity and the customer which is inherent in the GPL is breached.

As a customer, it's my opinion that you would be subject to both contributory infringement and breach of contract by employing this product in conjunction with the Linux kernel under the no-redistribution policy currently employed by Grsecurity.
...

In the public interest, I am willing to discuss this issue with companies and their legal counsel, under NDA, without charge.

I am an intellectual property and technology specialist who advises attorneys, not an attorney. This is my opinion and is offered as advice to your attorney. Please show this to him or her. Under the law of most states, your attorney who is contracted to you is the only party who can provide you with legal advice.

Id. However, prior to either publication, on June 19, 2017, Defendant was informed by Dr. Richard Stallman, the president of the organization who created the GPL[2], that forming an opinion about the condition in the Access Agreement was a complicated issue and would require a lot of time.[3] ER 87. A few hours later Defendant Perens responded:

> I think I'll be able to write something to inform present and potential customers of the lawsuit risk and their position as contributory infringers. *This is more effective than writing to the company.*

Id. (italics added).

On July 14, 2017, another subject matter expert, Bradley Kuhn, questioned Defendant's tactics to publicize the issue without discussing the matter with OSS in private. ER 84-85. Defendant replied that he had lost his patience and that "[he] only [has] publicity as a tool." ER 84. He separately stated that publicizing the issue as a warning "will have the desired effect." ER 32 ¶45. Additional facts, as relevant to particular claims, are set forth in the arguments below.

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[2] Free Software Foundation

[3] Dr. Richard Stallman also stated that he believed OSS will not listen to him, even if he formulated an opinion. However, there is no evidence Dr. Stallman attempted to contact OSS to discuss the issue.

B. Procedural Background.

On July 17, 2017, this lawsuit was initiated. Dkt. 1. On September 18, 2017, Defendant Perens filed a motion to dismiss the original complaint, pursuant to California's anti-SLAPP statute. Dkt. 11. On October 2, 2017, a first amended complaint was filed along with a motion for joinder to join Appellant Bradley Spengler in the case. Dkts. 18, 19. On October 10, 2017, Defendant withdrew his motion to dismiss the original complaint. Dkt. 21. On October 18, 2017, the district court permitted Appellant Bradley Spengler to join the case. Dkt. 25. On October 11, 2017, Appellants filed a motion for partial summary-judgment for the claim of defamation *per se*. Dkt. 24. On October 31, 2017, Defendant filed a motion to dismiss the first amended complaint pursuant to California's anti-SLAPP motion. Dkt. 31. On December 12, 2017 Appellants filed an unopposed motion for leave to file a supplemental memorandum of points and authorities in which Appellants in support of their opposition to Defendant's anti-SLAPP motion. Dkt. 45, ER 280. The district court granted the motion to consider the supplemental points and authorities on December 13, 2017. Dkt. 46. The hearing for the motions to dismiss and partial summary judgment occurred on December 14, 2017. Dkt. 48. On December 21, 2017, the district court denied the motion for partial summary judgment and granted Defendant's motion to dismiss with leave to amend the complaint. Dkt. 53, ER 3. In its order the district court determined that the

substantive issue whether OSS violated the GPL was an unsettled legal dispute, and thus an opinion, and there was no factual assertion capable of being disproven. ER 16-17. It further held that since Defendant had expressed an opinion and disclosed all the necessary facts to reach his conclusion, Defendant's publications were protected under his right to free speech. The district court also held that there was no need to distinguish between opinions by subject matter experts and laypersons, since the publications, as a matter of fact, were mere opinion. *See generally* ER 17-19. The district court dismissed the complaint. ER 19-21. On January 18, 2018, Appellants filed a notice of intent not to file an amended complaint, in which they expressed their intent to appeal the matter, according to this Court's precedent of *Edwards v. Marin Park, Inc.*, 356 F. 3d 1058, 1064 (9th Cir. 2004). Dkts. 55, 57, ER 313-318. The district court entered final judgment in Defendant's favor and dismissed the complaint with prejudice on January 24. 2018. Dkt. 58, ER 1-2. The notice of appeal was filed timely on February 5, 2018. Dkt. 59, ER 319-322.

On June 9, 2018, the district court awarded Defendant his attorneys' fees, pursuant to California's anti-SLAPP statute, in the amount of $259,900.50 in fees and $2,403.12 in costs. Dkt. 95. A separate notice of appeal related to the fee and cost award was filed on June 11, 2018. Dkt. 96.

V. SUMMARY OF THE ARGUMENT

1. The district court erred in holding that the publications by Defendant did not convey a false factual implication and thus were not defamatory. Specifically, the district court erred by not recognizing the false factual assertions made in Defendant Perens's publications as set forth in section VI.B.1. Further, the district court also erred in holding that there's an unsettled legal dispute by determining inaccurate factual findings. Contrary to the district court's determination, the issue here is not a dispute regarding the applicability of the GPL, Access Agreement, or a lack of a court determination. Instead, the main issue is whether Defendant made an objectively verifiable provably false assertion in his publications. Based on existing legal principles, Defendant's allegation can be proven false, as set forth in section VI.B.2.a.

2. Even if this Court determines that the publications were an opinion, the district court erred by failing to distinguish between statements made by subject matter experts as opposed to laypersons by convoluting different legal principles. Courts have routinely recognized that a statement, considered as an opinion when made by a layperson, may reasonably be understood as based on a fact when made by someone with specialized knowledge in a field. The district court also erred by considering Defendant Perens as a non-lawyer programmer. Defendant is no ordinary programmer, but one who professionally educates and

advises attorneys as well as instructs engineers how to be legally compliant with open source licenses. Thus, to the average reader his statements were reasonably based on facts and not mere layperson opinion about an *unsettled* legal dispute as further set forth in section VI.C.

3. For de novo review, the first amended complaint is legally sufficient to establish a prima facie showing of facts to sustain a favorable judgment for appellants as set forth in section VI.D.

4. Even if this Court determines that there is an unsettled legal dispute, the analysis of the district court also fails on policy grounds, especially in matters involving malice or lack of interest in the truth by one holding authority and power of persuasion, as set forth in section VI.E.

VI. ARGUMENT

A. Standard Of Review.

A district court's ruling that the statements were not defamatory is a question of law review de novo. *See Gardner v. Martino*, 563 F.3d 981, 986 (9th Cir. 2009); *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005); *see also Manzari v. Associated Newspapers Ltd.*, 830 F.3d 881, 886 (9th Cir. 2016). Whether a publication is libelous on its face is a question of law, measured by the effect the publication would have on the mind of the average reader. *See Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 695 (9th Cir. 1998). The district

court's evidentiary rulings are reviewed for abuse of discretion. *See Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). Any element of legal analysis is reviewed de novo. *See California Pro-Life Council v. Randolph*, 507 F.3d 1172, 1185 f.n.18 (9th Cir. 2007) (citing *Siegel v. The Federal Home Loan Mortgage Corp.*, 143 F.3d 525, 528 (9th Cir.1998)).

B. The District Court Erred In Dismissing Appellants' Claims By Its Incorrect Application Of *Coastal Abstract*.

1. The District Court Erred By Not Making A Determination That Defendant's Factual Assertions Are Capable Of Being Disproven.

Indeed, a nonverifiable legal interpretation by a layperson cannot be actionable under the Lanham Act and is an opinion. *See Coastal Abstract Serv., Inc. v. First Am.Title Ins. Co.* 173 F.3d 725, 731 (9th Cir. 1999). However, when factual assertions reaching a conclusion can be proven false, even an opinion can be defamatory. As recognized by the U.S. Supreme Court, "[i]f a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Milkovich v. Lorain Journal Co.* 497 U.S. 1, 18 (1990). ER 36 ¶ 70; *see also* ER 254.

a. Defendant Expressed A False Factual Assertion That OSS Had Implemented An Explicitly Prohibited No-Redistribution Policy.

Defendant's Statement: "GPL version 2 section 6 <u>explicitly</u> prohibits the addition of terms such as this redistribution prohibition." (underline added). ER 34 ¶ 49 (v); *see also* ER 307, l. 1-5.

The district court correctly identified that "California defamation law requires that the offending statement 'expressly or impliedly assert a fact that is susceptible to being proved false,' and must be able reasonably to be 'interpreted as stating actual facts.'" *Coastal Abstract,* 173 F.3d at 730 (citation omitted). ER 15-16. However, the district court erred in determining that there was no factually false assertion in the publications because Defendant unequivocally stated that the GPL made an explicit reference prohibiting adding conditions such as one added by OSS. ER 16-17.

The condition added by OSS was related to denying access to *future* service or works and since Defendant alleged that the GPL explicitly prohibits such a condition, therefore Defendant alleged that that section 6 of the GPL <u>explicitly</u> prevented denying access to *future* works. However, it can be factually proven that there is no such explicit assertion in section 6 of the GPL. The Merriam-Webster defines '**Explicit'** as "fully revealed or expressed without vagueness, implication,

or ambiguity : leaving no question as to meaning or intent."[4] Further, section 6 of the GPL states:

> Each time you redistribute the Program (or any work based on the Program), the recipient automatically receives a license from the original licensor to copy, distribute or modify the Program subject to these terms and conditions. You may not impose any further restrictions on the recipients' exercise of the rights granted herein.

ER 53.

Therefore, as can be objectively verified, there is no <u>clear</u> and <u>unambiguous</u> clause or condition that suggests a licensee's right to future versions, and thus Defendant Perens made a false factual assertion. Thus, the district court erred by not making such a determination.

b. Defendant Expressed A False Factual Assertion That OSS Was Violating The GPL And Thus Operating Illegally.

Defendant's publications asserted that OSS was violating the GPL, and thus its operations were illegal. ER 30, 33. The district court also erred in determining that there was no factually false assertion in Defendant's publications because it can be objectively verified and proven false that Defendant's assessment of the facts is erroneous by performing a factual analysis. The redistribution policy provided in section 6 of the GPL states "[e]ach time you redistribute the Program

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[4] The Merriam-Webster Dictionary, *Explicit*, available at https://www.merriam-webster.com/dictionary/explicit

... the recipient automatically receives a license ... to copy, distribute or modify **the Program**... ." (emphasis added). Thus, in order to determine whether the GPL's rights can be extended to future works by a copyright holder, the determinative question becomes: what is considered as a "Program" under section 6 of the GPL. The GPL provides the answer as a definition in section 0, and states:

> *This License applies to any program or other work which contains a notice placed by the copyright holder saying it may be distributed under the terms of this General Public License*. The "Program", below, refers to any such program or work, and a "work based on the Program" means either the Program or any derivative work under copyright law... .

ER 52, § 0 (italics added). Therefore, since section 0 requires a notice be provided within the Program that the works are being distributed under the GPL, section 6 can only be applicable on a work that actually contains such notice. However, reasonably, OSS, the copyright holder, cannot apply such a notice to future versions of its software, since future versions or updates are software that have not yet been created (or distributed under any license). ER 25 ¶ 16.

Thus, the GPL does not prohibit the conditions within the Access Agreement as asserted by Defendant Perens. As a matter of fact, Defendant made a provably false assertion. Consequently, the district court erred by not making such a determination.

2. This Matter Is Distinguishable From *Coastal Abstract*

The district court also erred because it failed to recognize that the issue here can be distinguished from *Coastal Abstract*. ER 16-17. In *Coastal Abstract*, Coastal, an escrow agent, sued First American Title for defamation under California law and false representation of fact under the Lanham Act based on First American's statement that Coastal had no license (a true fact) to engage in business as an escrow agent in California and was required to have that license under Cal. Bus. & Prof. Code section 17200 in connection with refinancing California property. *Coastal Abstract*, 173 F.3d at 731. The parties disputed whether Coastal's activities fell within § 17200. *Id*. Dismissing the Lanham Act claim, this Court stated that "... the correct application of § 17200 was not knowable to the parties at the time First American made the licensure statement." *Id.* at 732. "Thus, even if a California court ultimately conclude[d] that § 17200 [did] not require that a company in Coastal's position obtain an escrow license, the licensure statement as a matter of law could not give rise to a Lanham Act claim." *Id.* at 732.

However, regarding the defamation claim, this Court held that "[a]n opinion that <u>does not convey a false factual implication</u> is not defamatory under California law." *Id.* (underline added). And since there was no factual dispute at issue (Coastal did not have a license), but an unsettled legal dispute was at issue (whether §17200 applied to Coastal's activities), there was no false factual

implication to the statement that §17200 applied to Coastal's activities. *Id.* This Court explained:

> ... [T]he statement that Coastal was operating illegally without a California license might present a triable claim *if in fact Coastal had a California license*. ... The only claim of falsity concerns the *statement or suggestion that 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 operating without the necessary license in California did not constitute defamation.

Id. (italics added).

In *Coastal Abstract*, the dispute between the parties was whether California's statute applied to Coastal's Activities. Here, the district court erred by not appreciating that there is no dispute whether GPL applies on OSS's activities. The GPL is a license and it is applicable on OSS's activities. Here, the dispute is related to the falsity in the assertion that OSS had violated its license, and thus was operating illegally.

Applying the rationale used by this Court in *Coastal Abstract*, the statement that OSS was operating illegally without a license might present a triable claim *if in fact OSS had a valid license*. Here, it is pleaded that OSS does have a valid license and is operating within the bounds of that license. Further, even considering the rationale adopted by the district court, the same conclusion can be

reached. Even if we presume the GPL is analogous[5] to the California statute in *Coastal Abstract*, here, there is no dispute whether the GPL applies on OSS's activities and the Access Agreement. Here, in order to justify that OSS's customers would be subjecting themselves to liability, Defendant stated:

> Thus, the GPL license**,** *which allows Grsecurity to create its derivative work of the Linux kernel, terminates, and the copyright of the Linux Kernel is infringed*. The GPL does not apply when Grsecurity first ships the work to the customer, and thus the customer has paid for an unlicensed infringing *derivative work* of the Linux kernel developers with all rights reserved.

ER 33 ¶ 48 (italics added).

Thus, analogous to this Court's recognition in *Coastal Abstract*, here, the statement that OSS was operating illegally without a license from the Linux kernel developers might present a triable claim *if in fact OSS was not operating illegally and had a valid license* from the Linux kernel developers. ER 256. Thus, the determinative question is whether OSS was operating without a copyright license, the GPL, by adding its future services condition. As set forth below, Defendant's assertions are objectively verifiable and provably false based on existing legal principles pursuant to well settled case law.

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[5] Having the Access Agreement analogous to California's statute, as applied by the district court, reaches an illogical conclusion as if the parties disputed whether OSS's own Access Agreement was applicable on its activities.

a. It Is Objectively Verifiable That OSS Did Not Violate the GPL.

The district court erred by its failure to apply well settled common law principles to determine that it is objectively verifiable that OSS does not violate the GPL. "A trader or manufacturer ...[that] carries on an entirely private business, and can sell to whom he pleases; **... he may cease to do any business whenever his choice lies in that direction**... ." *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 320-21 (1897) (emphasis added). Also, "[a] manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto Co. V. Spray-Rite Service Corp.* 465 U.S. 752, 761 1984). ER 29 ¶ 30-31.

Here, OSS's customers are informed they have all the rights granted by the GPL, and they are informed that if the patches were distributed to a non-client (of the customer), OSS would not do future business with that customer. ER 26 ¶ 18. Thus, the only condition imposed by OSS on a customer is their ability to do *future* business with OSS. A condition within OSS's right as recognized by the US Supreme Court – its right to *cease business whenever its choice lied in that direction.* ER 260. Similarly, customers are free to exercise their GPL rights. There is no restriction that customers have to continue doing future business with OSS. It is also objectively verifiable that OSS did not, and could not, prevent its customers from exercising their GPL granted rights – if any customer ever decided

to do so. *Id.* In fact, customers were explicitly informed they had all the rights of the GPL. ER 26 ¶ 18.

Thus, OSS did not prohibit the exercise of any right that was granted by the GPL as alleged by Defendant but only explicitly stated a right already available to OSS. Therefore, the district court erred by not determining that Defendant Perens made objectively verifiable, provably false, factual assertions based on precedential case law and facts.

C. Even If An Opinion, The District Court Erred By Not Determining That A False Assertion Can Be Implied As Being Based On Facts, When Made By One With Specialized Knowledge.

The district court erred by not recognizing the distinction between opinions of subject matter experts and laypersons. Specifically, the district court erred by holding "the decision in Coastal turned on the conclusion that the correct application of the licensing statute was a matter of opinion and did not rest on a distinction between a layperson and an expert." ER 17. This is not the correct application of the law.

In *Coastal Abstract*, this Court concluded: "[a]bsent a clear and unambiguous ruling from a court or agency of competent jurisdiction, statements **by laypersons** that purport to interpret the meaning of a statute or regulation are opinion statements, and not statements of fact." *Id.* at 731 (citations omitted) (emphasis added). ER 256. As set forth below, extending *Coastal Abstract*'s

holding to one with specialized knowledge in an industry would be erroneous and contrary to case law.

1. Courts Have Repeatedly Applied A ‘Totality Of The Circumstances’ Test In Such Matters.

The district court erred by failing to consider a ‘totality of the circumstances’ test, as applied by numerous California courts in defamation cases. ER 282, 296. Particularly, two California cases have similar fact patterns.

First, in the context of an interpretation of a regulation, even without a court or agency determination, statements made by one with specialized knowledge can be defamatory when they can objectively be proven to be false, as held by *Overstock.com Inc. v. Gradient Analytics, Inc.* 151 Cal. App. 4th 688 (2007). ER 280 – 284.

Second, layperson opinion, but when made by one with specialized knowledge, can reasonably be understood as based on a fact, and can further be defamatory when the author expects the readers to rely on his opinions as the truth, as held by *Wilbanks v. Wolk*, 121 Cal. App. 4th 883 (2004). ER 257-260; *see also* ER 294-298.

a. Statements By One Having Specialized Knowledge Can Be Defamatory Even If Otherwise May Have Qualified As Layperson Opinion.

i. People With Specialized Knowledge Are Held To A Higher Standard.

The district court also erred by holding *Overstock* distinguishable from the instant matter. ER 288, 292. In *Overstock*, Gradient, a specialist, provided analytical reporting services on publicly traded companies. *Overstock*, 151 Cal. App. 4th 688 at 693-94. Gradient generated a report about plaintiff Overstock (NASDAQ Trading Symbol: OSTK), alleging Overstock was violating a set of authoritative accounting standards and procedures for preparing financial statements, called GAAP[6]. *Id.* at 702. Gradient issued an alert to its customers, stating:

> The most important update in this Alert is new evidence indicating that there is literally `no there there' with respect to OSTK's claimed motivation for changing its revenue recognition model. As a consequence, we believe that it is misstating revenues through a substantive violation of [General Accepted Accounting Principles (GAAP)]. ... *we believe that its use of*

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[6] INVESTOPEDIA, *Generally Accepted Accounting Principles – GAAP,* https://www.investopedia.com/terms/g/gaap.asp (last visited, Jun 13, 2018) "Generally accepted accounting principles (GAAP) are a common set of accounting principles, standards and procedures that companies must follow when they compile their financial statements. GAAP is a combination of authoritative standards (set by policy boards) and the commonly accepted ways of recording and reporting accounting information."

> *gross method revenue recognition violates the intent (if not the form) of GAAP.*
> ...
> This is the type of accounting policy choice that *we believe the SEC would be very interested in looking at.*

Id. (Italics added).

Overstock sued for libel and intentional interference with prospective economic advantage; Gradient filed its special motion to strike pursuant to California's anti-SLAPP statute. *Id.* at 697-98. Gradient contended that the statements were nonactionable speech because they were "either (1) opinions based on fully disclosed fact; (2) rational interpretations of ambiguous sources; (3) statements embodying complex and debatable technical judgments; or (4) statements too inexact or subjective to be proven true or false." *Id.* at 703. The court determined that a contextual analysis was required to examine the nature and full content of the publications as well as the knowledge and understanding of the target audience and found the statements to be defamatory based on a 'totality of circumstances' test. *Id.* at 701.

There was no dispute that Gradient held itself out to its subscribers as having specialized knowledge in the areas of accounting and its readers relied on the opinions as reflecting the truth about Overstock. *Id.* at 706. The court further noted that the Gradient reports <u>reasonably could be understood as implying Overstock's reporting methods were in violation of the GAAP</u>. *Id.* at 704 (underline added).

As to Gradient's contention that the statements were debatable technical judgments and too subjective to be proven true or false, the court held that "a right or wrong answer to whether ...Gradient made false statements of fact that are objectively verifiable and provably false, for example, that Overstock's accounting violated GAAP, with the implication that Overstock falsified its financials to mislead investors." *Id.*

There are many parallels between the instant matter and Overstock:

First, the main issue in both instances involves the alleged violation of a legally binding document (here the GPL – a license, in *Overstock*, the GAAP – accounting and financial disclosure pursuant to authoritative standards).

Second, the main issue in both instances involves an interpretation by someone who has specialized knowledge.

Third, like *Overstock*'s alleged GAAP violation, here no court or agency has expressed a formal determination on OSS's alleged violation of the GPL.[7]

Fourth, like *Overstock*, here, it is objectively verifiable whether OSS had violated the GPL, with the *implication* that adding a future services condition was prohibited by the GPL, as set forth above at section VI.B.2.a.

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[7] The SEC or any court never made a determination whether Overstock was violating the GAAP.

ii. Defendant Concealed Information From His Audience Depriving Them Of Key Facts.

The district court also erred in determining that Defendant Perens had disclosed all pertinent facts in his publications. ER 18, l. 14-16. It should be noted, Defendant did not write about general practices employed by the for-profit open source industry. He did not disclose that such practice were prevalent since at least 2003. ER 27 ¶ 23. He also did not disclose that other experts in the field had previously disagreed with him (e.g. Bradley Kuhn). ER 27 ¶ 24-27. He also did not disclose that the president of the organization that created the GPL (Dr. Richard Stallman) expressly stated that he was unable to formulate an opinion on OSS's business practices. ER 87.

Instead, Defendant decided to specifically attack OSS's business practices and wanted the reader to presume they were true. Also, Defendant did not disclose to his readers that he was unaware of any court or agency determination holding OSS in violation of the GPL. ER 35 ¶ 53-54. Defendant also failed to inform his readers that multi-billion dollar companies like Red Hat had engaged in similar practices like OSS, for approximately two decades, and yet no subject matter expert found such practices to be a violation of the GPL. ER 27 ¶ 24-27.

Reasonably, had Defendant mentioned these facts in his publication, his readers would have been in a better position to understand that perhaps Defendant personally had a difference of opinion with OSS, and that OSS was not necessarily

violating the GPL. Therefore, Defendant omitted material facts that would have helped an average reader to better understand the issue and formulate an independent opinion.

iii. Under The Totality Of The Circumstances, Malice May Also Be Proven.

The district court also erred by its failure to determine that malice, as alleged, may be proven in the instant matter. The *Overstock* court held that prima facie evidence of malice was established when:

> evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity.' A failure to investigate, anger and hostility toward the plaintiff, reliance upon sources known to be unreliable, or known to be biased against the plaintiff — such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication."

Overstock, 151 Cal. App. 4th 688 at 709-10 (citation omitted).

Defendant Perens initially claimed to have several reliable sources who could verify his assertions about OSS violating the GPL. ER 32 ¶45, ER 31-32 ¶42. However, Defendant later admitted that he had relied on a single email sent to a mailing list by an anonymous disgruntled person. ER 232 ¶ 6; *also see* ER 307. Defendant admitted he had not even seen the Access Agreement until at least July 10, 2017. ER 207 ¶5, ER 279. Yet, he authored and publicized his blog-post on June 28 based on the anonymous source, without ascertaining all the facts. ER 232

¶ 6. Even after seeing the Access Agreement, it is alleged Defendant Perens continued to lie that he had witnesses, and evidence shows that he had serious doubts about his publication. He stated:

> The problem isn't with the text [of the Access Agreement]. It's with what else they have told their customers. It doesn't even have to be in writing.
> I have witnesses. ... I think this warning will have the desired effect.[8]

ER 32, ¶ 45. Reasonably, Defendant's motive was not to educate the masses about an issue related to the GPL, but rather wanted OSS's customers to cease doing business with the company. He made no effort to address his concerns with OSS privately – after all, he had lost his patience and he did not have confidence that anyone could handle more than 1% of such alleged violations. ER 84. He had publicity as a tool, which was faster and cheaper than dealing with each alleged violator independently. *Id.* A fact-finder can reasonably infer that by publicly exploiting his fame and employing fear-mongering techniques, Defendant Perens only had one goal – he wanted to run OSS out of business and wanted his warning to serve as an example to the other companies who had employed similar

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[8] Although there is a dispute whether Defendant agreed that OSS was not in violation of the GPL and had additional witnesses, under California law, for the purposes of the anti-SLAPP motion, Appellants' allegation in the first amended complaint needs to be considered as true. *See Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 905 (2004). ER 248. The district court also erred in this regard. *See* ER 18.

agreements. Indeed, Defendant believes "[e]nforcement of [o]pen [s]ource licenses can also pose logistical difficulties ... ." ER 231 ¶ 4; *see also* ER 84. Further, Defendant is not aware of even a single legal authority holding OSS liable to his allegation in his blog posts. ER 35 ¶ 53-54. Yet, he wanted his readers to rely on his statements as the truth. ER 101-02, 107, 117, 134, 135, 137, 143, 145, 146, 148, 150, and 152. Anyone who attempted to question Defendant's rationale was publicly challenged and belittled. ER 30 ¶ 40.

Thus, based on the totality of the circumstances test, a trier of fact can determine Defendant's (a) failure to investigate, (b) anger and hostility towards OSS, (c) reliance upon sources known to be unreliable, (d) after seeing the Access Agreement, agreeing that perhaps the Access Agreement did not violate the GPL, (e) lying about having witnesses to which OSS had made verbal statements, (f) claiming his publications would have the desired effect, (g) concealing material information favorable to OSS from his publications – are factors based on which one may determine whether Defendant himself had serious doubts regarding the truth of his publication and acted with malice. Nonetheless, such facts at the very least establish a prima facie case of negligence with Defendant's lack of interest in the truth.

Therefore, applying a 'totality of the circumstances' test, the publications implied that Defendant wanted OSS's customers to believe that OSS was operating

illegally, had engaged in unethical business practices, and would risk liability on them.

b. Statements By One With Specialized Knowledge Can Be Understood As Based On Facts.

The district court further erred by holding that *Wilbanks* did not apply based on an erroneous conclusion that Defendant Perens had disclosed all the facts. ER 18 l. 16. As argued about at section VI.C.1.a.ii above, Defendant did not disclose all underlying facts to his audience. Furthermore, "[a]n accusation that, if made by a layperson, might constitute opinion may be understood as being based on fact if made by someone with specialized knowledge of the industry." *Wilbanks* 121 Cal. App. 4th at 904 (citing *Slaughter v. Friedman* 32 Cal.3d 149, 154 (1982) [holding that persons with specialized knowledge carry a ring of authenticity, and thus accusations, that may be considered as a mere opinion of a layperson, when made by one with specialized knowledge can reasonably be understood as being based on fact.]).

In *Wilbanks*, Gloria Wolk was a consumer advocate and expert on viatical settlements, that is, arrangements in which dying persons sell their life insurance policies to investors to help pay for medical care and other expenses. *Id.* at 833. Wolk posted negative comments on her website about Appellant Wilbanks, a broker of such settlements. *Id.* at 833, 889. Wolk had written several books on viaticals and acted as a consumer watchdog and an expert on issues surrounding

viatical settlements. *Id.* at 889. On her website, Wolk published the following related to Wilbanks:

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

Id. at 890, 901. Wilbanks filed a defamation complaint against Wolk and Wolk moved to strike pursuant to California's anti-SLAPP statute; the lower court granted Wolk's anti-SLAPP motion. *Id.* at 890. In reversing the grant of the anti-SLAPP motion, the California appeal court determined that Wolk's publication suggested that Wilbanks had engaged in unethical or incompetent practices. *Id.* at 902. Wolk presented an assertion suggesting that Wilbanks was in fact under investigation. *Id.* at 903. In support to her special motion to strike, Wolk submitted a declaration that she had been informed by a viator who won a judgment in small claims against Wilbanks and that the viator had filed a complaint with the State's department of insurance. *Id.* She further stated that her publication was "merely stating the facts and drawing her own opinion from them." *Id.*

However, the court determined that although a complaint was filed against Wilbanks, he was not under active investigation. *Id.* The court held that such express or implied assertion of incompetent and unethical business practices could

not be viewed as statements of opinion. *Id.* at 902-03. Citing *Milkovich,* 487 U. S. at 19, the court held, "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false statement of fact." *Wilbanks,* 121 Cal. App. 4th at 903. The court further stated:

> **Wolk's own position as a crusader and watchdog to the industry also works against any argument that she was merely stating the facts and drawing her own opinion from them.** An accusation that, if made by a layperson, might constitute opinion may be understood as being based on fact if made by someone with specialized knowledge of the industry. [citation omitted.] Wolk here held herself out to have special knowledge resulting from extensive research into the viatical industry; i.e., she claimed to be a person who could recognize and identify unethical practices that the average person might not recognize. **Wolk clearly expected readers to rely on her opinions as reflecting the truth**.

Id. at 904 (emphasis added). As set forth below, Defendant's own position as a crusader and watchdog to the open source community works against any argument that he was merely stating the facts and drawing his opinion from them. Further, Defendant clearly expected readers to rely on his opinions as reflecting the truth.

i. Defendant Is A Subject Matter Expert Who Holds Himself As One Having Specialized Legal Knowledge In Open Source Matters.

The district court erred in considering Defendant Perens as a non-lawyer programmer. ER 16, l.23-25. According to Defendant's own biography at his blog website, www.perens.com, he states:

> Bruce Perens is one of the founders of the Open Source movement in software, and was the person to announce "Open Source" to the world. He created the Open Source Definition, the set of legal requirements for Open Source licensing which still stands today.
> ...
> ... Bruce Perens is the bridge between lawyers and engineers, helping one to understand the other. He instructs engineers in how to comply with legal requirements and how to deal with intellectual property issues in their own work, and produces clarity for attorneys who are working on issues of computer software.
> ...
> Mr. Perens was expert for the Appellant in the appeal of *Jacobsen v. Katzer*, which established the legality of Open Source licenses. He was a case strategy consultant for Google's outside counsel in the lower court case of *Oracle v. Google*. He has taught Continuing Legal Education classes in many states, although he is not an attorney. Most recently, he was keynote speaker at the Baker and Mackenzie Tech Days 2015, a Silicon Valley event attracting over 250 attorneys.
> ...
> As series editor of the Bruce Perens' Open Source Series with Prentice Hall PTR publishers, Mr. Perens published 24 books on Open Source software under an Open Publications license (predecessor to the Creative Commons licenses). All but one of the books was profitable and several still sell well more than a decade after publication.

ER 79-81 (italics in original).

Just like Wolk, here, Defendant has specialized knowledge related to open source matters; he is one of the founders of the open source movement in software and the creator of legal requirements for open source licensing. He has also published 24 books on the matter, has provided 250+ attorneys with continuing legal education lectures, has represented himself as an expert in court, is an

advocate of the open source community, and instructs engineers on how to be legally compliant with open source and intellectual property matters. ER 29 ¶ 34. Indeed, Defendant stated in his blog posts that he was not an attorney and that, by law, only an attorney can offer legal advice. He also stated that the reader should show his blog post to their attorneys. However, Defendant further stated that he is "an intellectual property and technology specialist <u>who advises attorneys</u> ... ." ER 31, 33 (underline added). Further, Defendant wanted the average reader to believe so. On July 9, 2017, Defendant responded to a commenter who identified himself as an attorney on Slashdot:

> OK, if you're a real lawyer, I have no problem arguing law with you. *I've won against folks who were admitted to the supreme court before*.

ER 30 ¶40 (italics added).

Reasonably, Defendant held himself out, to the average reader, to be a qualified subject matter expert, who was well versed with the law and further had specialized legal knowledge that was superior to that of attorneys – after all, he is one who advises attorneys and is better than attorneys admitted to the Supreme Court.

Furthermore, Defendant Perens's qualifications and accomplishments provided the required credibility. Thus, even if there's an unsettled legal issue or an issue which would otherwise be considered as an opinion made by a layperson,

to the average reader, Defendant's statements, especially that OSS had violated the GPL and operating illegally, were based on a fact from a legal and subject matter expert in open source matters, and *not a mere layperson opinion*. Therefore, Defendant's own position as an expert in open source legal compliance issues, having specialized legal knowledge, works against his argument that he was merely stating facts and drawing his opinion from them.

ii. Defendant Expected Readers to Rely On His Statements as Reflecting the Truth, While He At Least Demonstrated A Lack Of Interest In The Truth.

Further, the district court erred by not determining that Defendant expected his readers to reply on his statements as reflecting the truth, while he demonstrated a lack of interest in the truth. The facts conclusively show that Defendant Perens clearly expected readers to rely on his statements as reflecting the truth. ER 101-02, 107, 117, 134, 135, 137, 143, 145, 146, 148, 150, and 152. Just like Wolks's publication, Defendant presented an assertion that OSS was violating the GPL, and customers should avoid using its product or subject themselves to legal liability. To justify his assertion, among other statements, Defendant created false or incomplete facts and suggested the GPL explicitly prohibited the condition added to the Access Agreement.

The *Wilbanks* court also held that Wolk did not check with plaintiffs before publishing the material and her refusal to discuss the matter with Wilbanks was

viewed as a lack of interest in the truth, thus Wolk acted negligently or possibly with a reckless disregard for the truth. *Wilbanks,* 121 Cal. App. 4th at 906.

Here, as argued in section VI.C.1.a.iii, above, Defendant did not contact OSS privately, and acted with malice or at the very least with lack of interest in the truth.

A trier of fact can determine that Defendant was frustrated with OSS adding a condition that, to him, seemed contrary to his beliefs. He knew that publicity was a tool available to him, and that publicly asserting that OSS was performing illegal activities was more effective than directly addressing his concerns with the company.

Defendant's desire to hurt OSS is further evident since, in the guise of public interest, he was willing to offer his legal consultation services for free to any of OSS's customers and their attorneys so that he could convince them that continuing to do business with OSS would subject them to legal liability.

D. As To Each Claim, The First Amended Complaint Is Legally Sufficient To Withstand A Motion To Strike, Pursuant To California's Anti-SLAPP Statute.

1. Defamation *Per Se* And Defamation *Per Quod*, Review De Novo.

The California anti-SLAPP statute allows certain parties limited immunity from suit for statements made in pursuit of their First Amendment rights. Neither the immunity nor its application is absolute and even its fairly liberal reach does

not extend to Defendant Perens' defamatory and false statements that the Appellants' Grsecurity product violated the GPL and that Appellants' customers were thus subject to liability.

The statute protects only:

> 1. any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
> 2. any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
> 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
> 4. any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

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

Defendant holds the burden of proof to show that his defamatory statements were protected. *Bosley Medical Institute, Inc. v. Kremer*, 403 F.3d 672, 682 (9th Cir. 2005). Defendant Perens cannot meet his burden because his false assertions of facts are not constitutionally protected free speech, as a matter of law. There is no credible evidence that Defendant's defamatory statements were made before legislative, executive, or judicial bodies. Further, his statements did not involve any issue of public interest, but were limited to Appellants' existing customers –

45 private businesses at the time the blog posts were published. Further, Defendant's statements were not made in anticipation of litigation. ER 249-50.

a. Defendant's Defamatory Statements Are Not An Issue Of Public Interest.

Defendant Perens claims that simply because his blog post was linked to Slashdot and generated over 470 comments, the response by the public is conclusive that the matter was of public interest. ER 250. It is undeniable that Defendant is well-known in the open source community. His opinions are also well respected in the community and any publication was bound to be highly publicized. Indeed, Defendant himself knows that publicity is a tool available to him. ER 30 ¶ 39. He wanted to make an example out of OSS and send a message to the 99% alleged violators since he had lost his patience. Nonetheless, it cannot be ignored that Defendant's blog post was specifically addressed to OSS's 45 customers, and not to the open source community at large as set forth below.

i. The Subject Matter And Intended Audience Of Defendant's Publication Was Limited To OSS's Customers.

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

his personal dissatisfaction with OSS's business practices or the Access Agreement into a public issue merely by abusing his fame and reputation and communicating it to a large number of people. *Weinberg v. Feisel*, 110 Cal. App 4th 1122, 1132 (2003). "[P]ublic interest is not mere curiosity. Further, the matter should be something of concern to a substantial number of people. Accordingly, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest" ... **Moreover, the focus of the speaker's conduct should be the public interest, not a private controversy**. Finally, a defendant charged with defamation cannot, through his or her own conduct, create a defense by making the claimant a public figure. Otherwise private information is not turned into a matter of public interest simply by its communication to a large number of people." *Hailstone v. Martinez*, 169 Cal. App. 4th 728, 736 (2008) (citing *Weinberg,* 110 Cal. App 4th at 1132-1133) (emphasis added). ER 251.

Here, while the GPL is a well-known and highly used license agreement, all indicia point to that the blog was addressed specifically to OSS's customers, as set forth below: (i) The title of Defendant's blog post was, "Warning: Grsecurity: Potential contributory infringement and breach of contract risk for customers." (ii) In both the original blog post and its update revision, Defendant began by communicating directly to his audience – OSS's customers. He stated, "It's my strong opinion that **your company** should avoid the Grsecurity product sold at

grsecurity.net because it presents a contributory infringement and breach of contract risk." (emphasis added). (iii) In both the original blog post and its updated version, Defendant continued by falsely asserting that OSS's business practices subjected its customers to liability. (iv) Given that Defendant is well known in the open source community and is known to be a subject matter expert in the industry, his statements were bound to attract public fascination and curiosity. (v) Defendant knew that publicity is a tool available to him. In his mind, he wanted to publicize the issue as he believed this was more "effective than discussing the issue with the company." He asserted that his publicized "warning will have the desired effect." (vi) Defendant's posts were not addressed to the open source community at large, but only to a niche segment within the open source community that considers using open source security-based products not provided by the Linux kernel code developers. (vii) Defendant's posts were not written broadly related to an analysis of the current practices in the for-profit open source industry, even when such practices have been going on for approximately two decades and would have been relevant to the average reader. ER 251-52.

Reasonably, Defendant wrote the blog posts for the sole purpose to create fear in the minds of OSS's customers. He abused his fame and invoked the curiosity of the public, who were not affected by OSS's business practices. Thus, these statements are not protected by sections 425.16(e)(3) and (4).

b. OSS Is Not A Public Figure Or A Limited Purpose Public Figure.

Public figures are entities which, ―by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974). Appellant OSS is a small private corporation with one employee and currently employs three part-time independent contractors. ER 266 ¶ 2. Prior to the publication of the blog post(s), OSS has never sought public attention and did not even advertise their services or their product, except for having Internet presence. ER 256-67. Appellants are not limited purpose public figures either. A limited public figure is one who injects himself into a particular public controversy. *Gertz*, 418 U.S. at 351. In determining if a business is a limited purpose public figure the Fourth District Court of Appeal provided the necessary factors to consider: (1) if the company is publicly traded; (2) the number of investors and (3) whether the company has promoted or injected itself into the controversy by means of numerous press releases. *AMPEX Corp. v. Cargle*, 128 Cal.App.4th 1569, 1576 (2005). In this case, none of the *AMPEX* factors are met. (i) OSS is a small private incorporation. (ii) OSS has no investors, and (iii) OSS has not promoted or injected itself into the controversy, at issue, by means of any press release. In fact, even after Defendant's defamatory publication, OSS's CEO Bradley Spengler did not make any comment to the public about Defendant's publications. Mr. Spengler

also did not attempt to defend OSS from Defendant's allegations to change public opinion. Thus, OSS is not a limited public figure. ER 254.

c. Even If The Matter Is Considered Of Public Interest, Defendant Made False Statements Of Fact That Were Not Privileged And That Have A Natural Tendency To Cause Damages.

Defendant's false statements of "opinion" are actionable because they are facts rather than opinions and admissible evidence shows they are demonstrably false. Generally, statements of fact are actionable. *Global Telemedia Intern., Inc. v. Doe 1*, 132 F.Supp.2d 1261, 1267-68 (C.D. Cal. 2001). A defendant cannot hide behind a claim of —opinion when the statement in question – however phrased – states a provable (or disprovable) fact. *Rodriguez v. Panayiotou*, 314 F.3d 979, 985 (9th Cir. 2002); *Milkovich,* 487 U. S. at 19. The dispositive question is whether a reasonable fact finder could conclude that the relevant statements imply a provably false factual assertion. *Id*. Thus, "a false assertion of fact [can] be libelous even though couched in terms of opinion." *Moyer v. Amador Valley Joint Union High Sch. Dist.*, 225 Cal.App.3d 720, 723 (1990). ER 254-55. As argued above at section VI.B, Defendant Perens made an objectively verifiable false factual implication, causing an average reader to reasonably believe that it was based on facts. Thus, the First Amended Complaint ("FAC") is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment in the claim of defamation *per se* and defamation *per quod*.

2. False Light, Review De Novo.

The Restatement Second of Torts, section 652E provides:

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

ER 262. "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." *Hill v. National Collegiate Athletic Assn.* 7 Cal.4th 1, 24 (1994).

Here, Defendant Perens abused his reputation and publicized a private business practice between OSS and its customers. Defendant alleged that OSS was performing its business illegally and was subjecting its clients to liability. The publicity, due to Defendant's reputation in the community, generated a lot of attention to the matter. Further, Defendant also actively responded to comments on Slashdot, which further generated interest in the matter. ER 39-40. Mr. Spengler's name is generally associated with OSS and grsecurity. ER 40 ¶ 95. Thus, by implication, Mr. Spengler became a topic of discussion in numerous comments. *Id.* ¶ 96. Defendant knew that his blog posts would be publicized and that such publicity would have a natural tendency to hurt the CEO of OSS – whom he alleged was operating illegally. The publicity of Defendant's publications did

impact Mr. Spengler personally. Negative comments from the public started to emerge on Slashdot. Mr. Spengler was called a person with unscrupulous ethics ("...simply steal it in the hopes of making a buck") and that he was not a stable person ("Brad has some mental issues. ... "). *Id.* Due to the negative publicity and being accused of employing illegal business practices, Mr. Spengler was emotionally distressed and had to seek psychological help. *Id.* ¶100.

It is not necessary that the plaintiff be defamed in order to be actionable on a claim of false light. *Fellows v. National Enquirer* 42 Cal.3d 234, 238–239 (1986) ("In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person. Although it is not necessary that the plaintiff be defamed, publicly placing one in a highly offensive false light will in most cases be defamatory as well.") ER 262. Reasonably, the false light created by Defendant's blog posts about OSS performing illegal activities and comments made in a public forum about Mr. Spengler are highly offensive. Thus, the FAC is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment in the claim of false light.

3. Intentional Interference With Prospective Economic Advantage, Review De Novo.

"[S]pecific intent is not a required element of the tort of interference with prospective economic advantage....[A] plaintiff may alternately plead that the defendant knew that the interference was certain or substantially certain to occur as

a result of its action." *Korea Supply Company V. Lockheed Martin Corp* 29 Cal.4th 1134, 1154 (2003). "Although varying language has been used to express this threshold requirement, the cases generally agree it must be reasonably probable that the prospective economic advantage would have been realized but for defendant's interference." *Youst v Longo* 43 Cal.3d 64, 71 (1987) "[I]n the absence of other evidence, timing alone may be sufficient to prove causation. . . . Thus, . . . the real issue is whether, in the circumstances of the case, the proximity of the alleged cause and effect tends to demonstrate some relevant connection. If it does, then the issue is one for the fact finder to decide." *Overhill Farms, Inc. v. Lopez* 190 Cal.App.4th 1248, 1267 (2010). Further, the *Overstock* court also held that prima facie showing of intentional interference with prospective economic advantage was established "since a plaintiff's burden includes pleading and proving that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." *Overstock*, 151 Cal. App. 4th at 713, (citations omitted). ER. 262-63.

Defendant Perens, in his original blog post claimed he had "several reliable witnesses." ER 30 ¶42. Even after the first publication, Defendant claimed: "It's with what else they have told their customers. It doesn't even have to be in writing. I have witnesses. ..." ER 32 ¶45. Clearly, Defendant has asserted he has knowledge

about an economic relationship, either with a present customer or potential customer who has enquired about the Access Agreement from Appellants. Based on Defendant Perens's own assertions, he knew about a relationship that, as of now, remains unknown to Appellants. Further, Appellants have also alleged that 35 potential customers have not engaged in business with Appellants since the publication of the defamatory statements. ER 37 ¶74. Also, four existing customers ceased business relationships with Appellant after the publication of the defamatory statements. *Id.* ¶ 75. It is further alleged that it is reasonably probable that the prospective economic advantage would have been realized but for defendant's interference. ER 42 ¶ 111. Thus, the FAC is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment in the claim of intentional interference with prospective economic advantage.

E. The District Court's Analysis Also Fails On Policy Grounds.

As a public policy matter, the district court erred by its failure to consider the distinction between subject matter expert and layperson opinion, even if there is an unsettled legal dispute. ER 294-97. Open source licensing compliance is known to be a complicated subject matter. This can be evident from the fact that Defendant has published 24 books and works as a professional instructing both

engineers and attorneys. Therefore, people like Defendant Perens are revered in the open source community, and their publications resonate the word of authority.

Also, the record indicates that the vast majority of readers believed in Defendant's statements and presumed them to be true. *See, generally,* ER 93-229. Only a handful dared question him, and those who did invited hateful or disparaging comments – either directly from Defendant or his sympathizers and followers. Reasonably, subject matter experts, like Defendant, hold the power of persuasion and their publications are enough for the masses to believe in them. No court determination is needed when people like Defendant have the power to play judge (*Is OSS in violation of the GPL?),* jury (*Yes, it is.*), and executioner (*It is declared customers who do business with OSS are subjecting themselves to liability.*).

Understandably, businesses like OSS's customers are wary to engage with a company that can subject them to liability. Further, it can be appreciated that when a recognized authority in the field publishes a warning, to err in the side of caution, those businesses would terminate their relations with a company like OSS.

Thus, even if this Court determines that the issue involved an unsettled legal dispute, this Court should not extend *Coastal Abstract*'s holding to cases involving malice, or at least lack of interest in the truth, by a subject matter expert who holds the power to persuade the masses. This Court should consider Defendant's desire

to exploit his fame, conceal key facts from the reader that prevented them from independently determining the issue, and attempt to convince readers that his opinions were reflecting the truth – while he had little or no interest in the truth. These substantial factors should be considered to reverse the district court's order granting Defendant's motion to dismiss, pursuant to California's anti-SLAPP motion to strike the FAC.

Finally, this lawsuit did not arise from OSS's desire to settle a public debate in court or to silence Defendant from expressing his opinions.[9] To the contrary, this lawsuit arose since OSS's right to freedom to do business and its right to co-exist were threatened by Defendant's reckless or malicious actions.

VII. CONCLUSION

For the above reasons, the Court should hold that the complaint is legally sufficient to withstand a motion to strike, pursuant to California's Anti-SLAPP statute, reverse the district court's dismissal of Appellants' complaint, and remand the matter for further proceedings. Further, this Court should also reverse the district court's order granting Defendant his attorneys' fees and costs.

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[9] A desire to engage in a public debate requires discussing all facets of the issue and a recognition that the GPL presented a complicated issue, as appreciated by the creator of the GPL, Dr. Richard Stallman. Reasonably, presenting a one sided highly subjective 'warning' targeting a small private business and persuading its customers to stop doing business in a ruse of an 'opinion' cannot be considered as a genuine desire to engage in a public debate.

Date: June 14, 2018

Respectfully Submitted,

CHHABRA LAW FIRM, PC

<u>*s/ Rohit Chhabra*</u>
Rohit Chhabra

Attorney for Appellants Open Source Security, Inc. and Bradley Spengler

STATEMENT OF RELATED CASES

It is certified that a related case, Appeal No. 18-16082, has been filed on June 12, 2018. That matter is an appeal from the district court's order, entered June 9, 2018, in which it partially granted Defendant's motion for attorneys' fees, pursuant to California's anti-SLAPP statute.

Date: June 14, 2018

Respectfully Submitted,

CHHABRA LAW FIRM, PC

s/ Rohit Chhabra
Rohit Chhabra

Attorney for Appellants Open Source Security, Inc. and Bradley Spengler

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,308 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2013, Times New Roman 14-point font.

Date: June 14, 2018

Respectfully Submitted,

CHHABRA LAW FIRM, PC

s/ Rohit Chhabra
Rohit Chhabra

Attorney for Appellants Open Source Security, Inc. and Bradley Spengler

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: June 14, 2018

Respectfully Submitted,

CHHABRA LAW FIRM, PC

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