Case 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
THE HONORABLE LAUREL BEELER, UNITED STATES MAGISTRATE JUDGE, PRESIDING

ANSWERING BRIEF OF DEFENDANT-APPELLEE

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INTRODUCTION

This case is a paradigmatic example of why California's anti-SLAPP law exists. A company and its CEO sued an individual, Bruce Perens, for $3 million in damages merely because they disagreed with opinions he expressed online about a matter of public concern—namely, whether restrictions the company placed on its customers' ability to redistribute software violated Open Source license obligations that require software to be freely distributed. Mr. Perens's opinions concern one of the most important and valuable pieces of software in the world, the Linux kernel, and one of the most common Open Source licenses, which governs use of that software. Linux is essential to technology that the general public uses every day, including websites such as Google, banking systems, and government services such as www.healthcare.gov. The freedom to publicly discuss and debate issues such as the Open Source license governing Linux—and what it allows or does not allow—is exactly what the California anti-SLAPP law was designed to protect and encourage.

All of Open Source Security ("OSS") and its CEO Bradley Spengler's (collectively, "Plaintiffs") four claims—defamation per se, defamation per quod, false light, and intentional interference with prospective business advantage—are predicated on the same fatally flawed theory: that opinions about unsettled legal issues, based on fully disclosed facts, can constitute defamation. They cannot.

The district court, relying on precedent from this Court and California state courts, properly held that Mr. Perens's statements were protected opinions about an unsettled issue of law—which are not provably true or false—and thus "not plausibly defamation" under California law. I Excerpts of Record ("ER") 15:1. It also held that Mr. Perens's statements were not actionable because he disclosed all relevant facts that led to his opinion, and none of these facts were alleged to be false or demeaning. The district court held that each of Plaintiffs' defamation claims must therefore be dismissed for failure to state a claim. I ER 4:2–15. The court further concluded that Plaintiffs' claims in the Amended Complaint—which targeted statements Mr. Perens made in a public forum concerning a matter of public interest—could not survive Mr. Perens's motion to strike brought pursuant to the California anti-SLAPP statute. I ER 20:5–13. Plaintiffs chose not to further amend their complaint and conceded that Mr. Perens was entitled to his fees under the anti-SLAPP law. III ER 313–318; I Supplemental Excerpts of Record ("SER") 48:15–17.

On appeal, Plaintiffs do not identify any relevant facts that Mr. Perens failed to disclose, nor do they demonstrate that the subject matter of Mr. Perens's opinions has been previously decided by a court or otherwise might be provably false. Instead, Plaintiffs argue that this Court should reverse the district court by relying on two legally and factually wrong premises: (1) that this Court or the

district court may decide—as a matter of first impression—the unsettled legal issue on which Mr. Perens opined, by holding that OSS's practices *do not* violate the GPL, and then *retroactively* apply such a legal holding to find that Mr. Perens's *past* statements of opinions were false even if not provably false at the time of publication; and (2) that Mr. Perens's opinions—even if not provably false at the time and despite his disclosure of their factual basis—may be rendered actionable because he is very knowledgeable and respected by the Open Source community. Neither is supported by law or fact.

Plaintiffs otherwise rely on mischaracterizing Mr. Perens's statements and proffering other irrelevant and legally unsupported arguments, such as suggesting that Mr. Perens had some obligation to inform OSS of his concerns before expressing his opinions or that he should have avoided expressing his opinions publicly in an effort to effect change. But public participation on matters of public concern is exactly what California law protects. While OSS and Spengler were free to disagree with Mr. Perens's opinions, they were not free to sue him to stifle public debate.

This Court should not allow Plaintiffs to use this strategic lawsuit as a vehicle to "win" the public debate about whether the restrictions it places on distribution of its Linux-based software violate one of the most common Open Source Software licenses. While it is essential that Mr. Perens and others continue

to be allowed to debate the interpretation of this Open Source license and its application to business practices like OSS's, this Court need not and should not interpret the Open Source license or OSS's business practices to decide this case. These issues are irrelevant to the outcome here, and to engage with them would only embolden others to adopt OSS's litigation tactics to chill debate about Linux and Open Source software. The Court should affirm the dismissal of Plaintiffs' claims and uphold the finding that Plaintiffs' claims cannot elude California's anti-SLAPP statute.

STATEMENT OF JURISDICTION

The district court had diversity jurisdiction over Plaintiffs' claims under 28 U.S.C. § 1332(a)(1). The district court granted Mr. Perens's motion to dismiss Plaintiffs' first amended complaint on December 21, 2017, *see* I ER 3–21, and on January 24, 2018, at Plaintiffs' request, entered judgment in favor of Mr. Perens and dismissed the case with prejudice. I ER 1–2; III ER 313–314. On February 5, 2018, Plaintiffs timely filed their notice of appeal. III ER 319–320. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

COUNTER-STATEMENT OF THE ISSUES PRESENTED

Under Ninth Circuit and other precedent, statements of opinion that neither state nor imply assertions of fact that were provably false at the time of publication are not actionable under either defamation law or business torts premised on defamation. The district court dismissed Plaintiffs' claims on that basis, and thus the questions presented by this appeal are:

1. Whether the district court properly dismissed OSS's defamation claims because Mr. Perens's statements were inactionable opinions about unsettled legal issues that were not provably false at the time they were made and rested on the facts he disclosed, and were thus not plausibly defamation.

2. Whether the district court properly dismissed Mr. Spengler's false light claim because it was duplicative of OSS's defamation claims and thus failed for the same reasons.

3. Whether the district court properly dismissed Plaintiffs' intentional interference with prospective economic advantage claim because it was duplicative of OSS's defamation claims and because Plaintiffs' failed to plead any independently wrongful act by Mr. Perens.

4. Whether the district court correctly found that Mr. Perens's statements qualify for protection under California's anti-SLAPP statute because they were made on an online blog, a quintissenial public forum, on an issue of public concern, and that Plaintiffs could not show a probability of prevailing on their claims, for the reasons stated by the court in granting Mr. Perens's motion to dismiss.

PERTINENT STATUTES AND LEGISLATIVE ACTIVITY

A copy of California's anti-SLAPP statute, Cal. Code Civ. P. § 425.16, is included in an attached Statutory and Legislative Addendum, which begins on page 63.

STANDARD OF REVIEW

District court orders granting a motion to dismiss under Rule 12(b)(6) are reviewed de novo. *Stearns v. Ticketmaster Corp*., 655 F.3d 1013, 1018 (9th Cir. 2011). To avoid dismissal, a plaintiff must allege facts showing that the "right to relief [rises] above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A plaintiff must show "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While the Court must accept material factual allegations as true, pleadings that are "no more than conclusions[] are not entitled to the assumption of truth." *Id*. at 679; *see also Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) ("conclusory allegations . . . and unwarranted inferences" are insufficient). The Court also need not accept the truth of any allegations that are contradicted by matters properly subject to judicial notice or by exhibits attached to the complaint. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010). The Court "can affirm a 12(b)(6) dismissal on any ground supported by the record, even if the district court did not rely on the ground." *United States v. Corinthian Colls*., 655 F.3d 984, 992 (9th Cir. 2011) (internal quotation marks omitted).

District court orders granting a motion to strike under California's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, are also reviewed de novo. *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003); *Flatley v. Mauro*, 39

Cal. 4th 299, 326 (2006). Adjudicating an anti-SLAPP motion is a two-step process. First, a court must determine whether a defendant has shown that the claims arise from activity protected by the anti-SLAPP statute, which includes "written . . . statement[s]" made in "a public forum in connection with an issue of public interest." *See* Cal. Civ. Proc. Code § 425.16(a), (e)(3); *Navellier v. Sletten*, 29 Cal. 4th 82, 88 (2002). After the party moving to strike the complaint makes that threshold showing, "the burden shifts to the responding plaintiff to establish a probability of prevailing at trial." *Rogers v. Home Shopping Network, Inc*., 57 F. Supp. 2d 973, 976 (C.D. Cal. 1999) (quoting *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 47 Cal. App. 4th 777, 784 (1996)). In a federal court sitting in diversity, a plaintiff's burden at this second stage depends on the nature of the defendant's challenge. If the challenge is based on legal defects on the face of the complaint—as here—courts must treat the motion to strike "in the same manner as a motion under Rule 12(b)(6)," except that the attorneys' fees provision of the anti-SLAPP statute also applies. *Id.* at 983.

STATEMENT OF THE CASE

Plaintiffs seek to hold Mr. Perens liable for expressing his opinion about a business practice that he believes violates the rights of a worldwide technical community and poses risks to OSS's customers. *See* II ER 30–35 (¶¶ 41–63); II ER 93–228. Mr. Perens's opinion involves an unsettled issue of law of significant interest to the public and particularly to the Open Source community: whether OSS's restrictions on the distribution of its Linux-based security patch software violate the world's most common Open Source license. II ER 45–46, 48–49; *see also* II ER 33. This issue would, if ripe for adjudication, be one of first impression worldwide.

OSS created a security patch software for the Linux Operating System using the Linux kernel code, which it calls Grsecurity. II ER 25 (¶ 12). The Linux kernel is an Open Source software product, which means it is made freely available to all users, allowing the public to access and modify the code. III SER 21, 29. The Linux kernel, one of the most commonly used software products in the world, is developed and maintained by thousands of software providers who license the fruit of their labor under terms intended to preserve everyone's freedom to examine and improve software—the GNU General Public License or "GPL." *See Wallace v. Int'l Bus. Machs. Corp.*, 467 F.3d 1104, 1106 (7th Cir. 2006) (recognizing Linux as one of the most prominent examples of free and Open

Source software, "maintained by a large open-source community"); *see also* II ER 25 (¶¶ 12–13). The Linux kernel is widely used, including by federal agencies such as the Department of Defense and the Department of Education. I SER 6–7, 21–26. One of the key benefits of Open Source software is that the "collaborative atmosphere" of Open Source software communities "can make it easier to conduct software peer review and security testing, to reuse existing solutions, and to share technical knowledge." I SER 6.

Use of the Linux kernel is governed by the GPL, which is the most common Open Source license and which allows for free use and redistribution of software on the condition that anyone who uses the software continue the Open Source trend. I SER 32–33, 36. The GPL is designed to guarantee those who receive software the freedom to examine, modify, and redistribute such software, II ER 51, and was created to "promote the open-source development of software products." *Artifex Software, Inc. v. Hancom, Inc*., No. 16-cv-06982-JSC, 2017 WL 1477373, at *1 (N.D. Cal. Apr. 25, 2017); *see also* III ER 231 (¶ 2). The Linux kernel is only available for use under the GPL. OSS was therefore bound to abide by the GPL's conditions if it wished to use or redistribute the Linux kernel. *See, e.g.,* II ER 25–26 (¶¶ 13, 20).

Any recipient of software under the GPL receives a license to the software directly from its authors. Each party who redistributes the software, with or

without modifications, must grant a parallel set of rights. *See Artifex*, 2017 WL 1477373, at *1; *see also* I SER 25 (§ 2(b)(2)(e)). Those rights can never change, because Section 6 of the GPL prohibits those who distribute software subject to the GPL from placing any further restrictions on recipients' rights to copy, redistribute, or modify the software, stating: "You may not impose any further restrictions on the recipients' exercise of the rights granted herein." II ER 53; II ER 25 (¶ 14). Placing any such restriction on the recipient is therefore a violation of the GPL.

OSS does not dispute that its Grsecurity product is subject to the GPL's Open Source licensing requirements or that the GPL contains these terms regarding restrictions on redistribution. *See, e.g.,* II ER 25–26 (¶¶ 13, 12–20). OSS does not believe (based on its interpretation of the GPL) that it violates the GPL when it places or threatens to place restrictions on access to *future* updates if its customers redistribute the Grsecurity software. Specifically, OSS distributes its software subject to a user agreement called the "Stable Patch Access Agreement" (or "Access Agreement"), which includes a clause (the "no-redistribution clause") that purports to terminate a recipient's access to any *future* Grsecurity security updates if the recipient exercises their rights under the GPL to freely redistribute the software. II ER 58–59. The no-redistribution clause provides: "[T]he 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." II ER 58 (emphasis in original); *see also* II ER 26 (¶ 18). In doing so, OSS attempted to use a separate negative covenant to limit its customers from freely exercising their rights under the GPL.

Mr. Perens, a founder of the Open Source movement and frequent commenter on Open Source matters, expressed his opinion that imposing the no-redistribution clause by contract to punish customers who redistributed the software patches violates the GPL. *See* II ER 45–46; *see also* II ER 79–81; III ER 231–232 (¶¶ 5–8). Mr. Perens published his opinions in a post on his publicly available blog, where he posts about issues affecting the Open Source community, and disclosed the facts that informed his opinion. II ER 23 (¶ 1); III ER 231 (¶ 5). In his post about OSS's no-redistribution policies, Mr. Perens stated that he had heard from multiple sources that OSS had warned its customers that it would terminate their access to any future Grsecurity security updates should they redistribute the software. II ER 45. After describing the GPL's prohibition on adding further restrictions on redistribution, he explained that it was his opinion that "this punitive action for performance of what should be a right granted under the GPL" violated the GPL and, by violating the license, infringed the copyright of the authors of the Linux kernel. *Id.* He also explained that in his opinion, by using the Grsecurity product under such a no-redistribution policy, OSS's customers

would be at risk of liability under copyright law. *Id.* Mr. Perens stated that he is not a lawyer and that he was offering these opinions in the public interest, and he encouraged readers to discuss their concerns with a licensed attorney. II ER 45–46. Plaintiffs do not dispute that the Access Agreement contains this language creating consequences for customers who redistribute the software. II ER 26 (¶ 18).

Whether punitive contract terms such as OSS's violate the GPL is a matter of unsettled law and public debate. While the GPL clearly requires that all redistribution of GPL code must be only under the terms of the GPL, *see* II ER 51, 53, there is no case law on whether a covenant in a separate contract that exists parallel to the license would also violate the GPL. Given that redistribution and collaboration are core tenets of Linux development and Open Source Software generally, Plaintiffs' methods of discouraging redistribution of Linux security patches were of great interest to many in the community. Unsurprisingly, Mr. Perens's blog post quickly resulted in a vigorous online dialogue among many members of the Open Source community. Slashdot (www.slashdot.org), a website popular within the Open Source community, republished an excerpt from Mr. Perens's blog post (along with a link to the full post), and within twenty-four hours Slashdot readers had posted 323 comments. *See* II ER 93–228; *see also* II ER 31 (¶ 43); III ER 232 (¶ 9). Within ten days, the post generated a heated discussion

spanning over 470 comments. II ER 93. Plaintiffs agree that Mr. Perens's blog post was seen and read by "at least tens of existing Consumers and potential clients, and at least hundreds, if not thousands of professional colleagues and business partners." II ER 36 (¶ 69). Many commenters agreed with Mr. Perens, but some did not, and some had questions about Mr. Perens's opinions or sought to apply them to hypothetical situations. II ER 92–229.

Mr. Perens took part in the public dialog, answering questions about his opinions and further explaining his reasoning. III ER 232 (¶ 9). In an exchange with one anonymous commenter, before Mr. Perens had seen a copy of the full Access Agreement, Mr. Perens explained that the GPL's prohibition on adding "further restrictions" applied regardless of whether the restriction was formally written into an agreement or communicated in some other way. III ER 232–33 (¶ 10); III ER 270 (¶ 4). Mr. Perens later received an email attaching a copy of the full Access Agreement, which he had not previously seen. III ER 232–33 (¶¶ 10–12); III ER 270–71 (¶¶ 4–8). After reviewing a copy of the Access Agreement, Mr. Perens updated his blog entry to explain that the agreement's written terms *confirmed* what he had heard regarding OSS's no-redistribution policy and his opinion that OSS's policies violated the GPL. II ER 30–34 (¶¶ 41–49); III ER 271 (¶ 8). He also included the exact written terms of the Access Agreement's no-redistribution clause and a link to the full text of the Access Agreement. II ER 48–

49; III ER 271 (¶ 8). Mr. Perens explained how the express terms of the Access Agreement added a covenant that went beyond the terms of the GPL, prohibiting or creating a penalty for distribution. II ER 48–49. He expressed special concern that the no-redistribution covenant applied to patches critical for ensuring the proper functioning of OSS's security software and thus for maintaining the security of OSS's customers' computer systems: "By operating under their policy of terminating customer relations upon distribution of their GPL-licensed software, [OSS] 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 rights under the GPL license." II ER 48; *see also* II ER 25 (¶ 12).

OSS could have joined in the public debate to defend its punitive no-redistribution regime and to argue to the Open Source community that its policy did not violate the GPL. Instead, and without making any prior communication to Mr. Perens, OSS commenced this action, filing a complaint on July 17, 2017, I SER 73–83, followed by an amended complaint on October 2, 2017. II ER 22–43. Both complaints asserted claims of defamation per se, defamation per quod, false light, and intentional interference with prospective economic advantage, all predicated on the allegation that Mr. Perens published a defamatory blog post. I SER 79–82; II ER 38–42. On September 18, 2017 and October 31, 2017, Mr.

Perens moved (1) to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, and (2) to strike all claims in the complaint pursuant to California's anti-SLAPP law, Cal. Civ. Proc. Code § 425.16. III ER 324 (Dkt. 11), 326 (Dkt. 30).

On December 21, 2017, United States Magistrate Judge Laurel Beeler dismissed all of Plaintiffs' claims. I ER 4:12–15. The court dismissed Plaintiffs' defamation claims on the ground that the accused portions of Mr. Perens's blog post were opinions about a disputed legal issue, relying on case law that such opinions—which are not provably true or false—are not actionable as defamation. I ER 16:23–17:6. The court next dismissed Plaintiffs' false light claim as superfluous to the defamation claim, relying on case law that false light claims, when brought alongside defamation claims based on the same statements, are the substantive equivalent of the defamation claims. I ER 19:7–14. Finally, the court dismissed Plaintiffs' intentional interference with prospective business advantage claim, finding that the only unjustified act alleged was Mr. Perens's publication of his non-actionable opinions and relying on case law that tort claims predicated on alleged defamation should be treated as defamation claims. I ER 20:1–4.

The court also concluded that Plaintiffs' claims were unlikely to elude California's anti-SLAPP statute, finding that Mr. Perens's statements were made in a public forum and concern matters of public interest, and that Plaintiffs had not

shown a probability of success on the merits. I ER 20:5–9. The court stated that "[w]ere the pleadings to remain in their current form," it "would likely grant the anti-SLAPP motion." I ER 20:9–12. The court permitted Plaintiffs an opportunity to file an amended complaint and attempt to cure the deficiencies of their claims. I ER 21:1–3. Plaintiffs' declined the opportunity and instead conceded that Mr. Perens was the prevailing party for purposes of awarding attorneys' fees and moved for entry of judgment, requesting that the district court enter judgment in Mr. Perens's favor and dismiss the complaint with prejudice. I ER 1:19–20; III ER 313–318; I SER 48:15–27. Judgment was entered on January 24, 2018. I ER 1:21–22. Plaintiffs then filed this appeal.

SUMMARY OF THE ARGUMENT

The district court properly dismissed Plaintiffs' complaint in its entirety for failure to state a claim. Each claim was predicated on Plaintiffs' erroneous theory that Mr. Perens's blog post could be actionable defamation when it merely expressed his opinions about an unsettled issue of law that no court has yet addressed, explicitly identified his statements as opinion, and disclosed all of the facts on which he based his opinions. The district court, applying well-settled law in this Court and in California, held that opinions about unsettled issues of law—which are by definition not provably true or false—are not actionable as defamation and that Plaintiffs had failed to "plausibly plead" their defamation and defamation-related claims. I ER 16, 19:7–20:13; *see also Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 730–31 (9th Cir. 1999).

Plaintiffs relied at the district court, and rely again here, on the novel argument that Mr. Perens's opinions, simply by virtue of his being a longstanding member of the Open Source community, automatically imply the existence of undisclosed facts. *See* Appellants' Opening Brief ("AOB"), 23–27. This argument disregards established case law from this Court and California state courts holding that opinions about unsettled questions of law are not actionable as defamation unless they "expressly or impliedly assert a fact that is susceptible to being proved false," regardless of who utters them. *Coastal Abstract*, 173 F.3d at 730 (quoting

Weller v. Am. Broad. Cos., 232 Cal. App. 3d 991, 1001 (1991)). Plaintiffs suggest without legal support that this law simply should not apply when an "expert" expresses an opinion—asking the Court to create a new exception to settled law—and falsely contend that others accepted Mr. Perens's opinions as objectively true statements of fact.

The district court correctly dismissed these arguments. There is no such distinction between "experts" and "laypersons" in the case law regarding unsettled legal issues. Indeed, such a rule would be contrary to the public interest; it would deter knowledgeable and respected individuals from entering into public debate and expressing opinions on matters within their area of expertise. That this would stifle public debate is self-evident. Those who, like Mr. Perens, write freely available blogs on legal topics create a forum for public debate open to everyone. The rule advanced by the Plaintiffs would cause such experts to suddenly be held to a legal standard exposing them to significant liability. As the district court observed, Plaintiffs' argument misconstrues the two distinguishable cases on which they purport to rely, *Overstock.com, Inc. v. Gradient Analytics, Inc*., 151 Cal. App. 4th 688 (2007), and *Wilbanks v. Wolk*, 121 Cal. App. 4th 883 (2004), for their theory that opinions of laypersons with "specialized knowledge" can "reasonably be understood as based on facts." *See* AOB, 25–27, 32–38. Neither case supports OSS's position, and neither is applicable here. The district court

correctly held that Mr. Perens's opinions rest only "on facts that he disclosed" and that "[t]here is no suggestion of undisclosed facts that raise a concern about reliance on an expert's opinion." I ER 18:14–16.

Because Mr. Perens's opinions were not actionable defamation as a matter of law, the district court went on to dismiss the remaining false light and intentional interference claims. I ER 19:7–20:4. The district court was right to do; it was simply applying law that holds that claims predicated on alleged defamation (even if not labeled as defamation) should be treated as defamation claims. I ER 20:1–4.

The district court also properly concluded that because Mr. Perens's statements were made on an online blog, a quintessential public forum, about an issue of significant public concern to the Open Source community—the Access Agreement's impact on the GPL and redistribution of Linux—California's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16,[1] applied to the statements at issue. I ER 20:6–10. Further, because Plaintiffs had failed to show a probability of prevailing on the merits of their claims, their claims could not survive a motion to strike under section 425.16. *Id*. Indeed, Plaintiffs conceded below that Mr. Perens is the prevailing party under the anti-SLAPP statute and thus cannot challenge that statute's application here. III ER 317 (¶¶ 15–18); I SER 48:15–17.

[1] Unless otherwise noted, all section references herein are to Cal. Civ. Proc. Code § 425.16.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM.

A. Plaintiffs Failed to State a Claim for Defamation Per Se or Per Quod Because the Accused Opinions Are Not Provably False Assertions of Fact.

Mr. Perens's blog post contains statements of opinion regarding unsettled legal issues that are not actionable as defamation because they neither express nor imply assertions of fact that were provably false at the time of publication. The district court correctly held, pursuant to law from this Court, that such statements are not plausibly defamation and that Plaintiffs had therefore failed to adequately plead either of their defamation claims. *See Dodds v. Am. Broad. Co.*, 145 F.3d 1053, 1065 (9th Cir. 1998).

i. Defamation law requires that an offending statement express or imply a provably false assertion of fact.

The *sine qua non* for recovery for defamation—whether per se or per quod—is "the existence of a falsehood." *Baker v. L.A. Herald Exam'r*, 42 Cal. 3d 254, 259 (1986) (quoting *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974)). To be actionable as defamation, the offending statement must therefore "expressly or impliedly assert a fact that is susceptible to being proved false" and must reasonably be "interpreted as stating

actual facts." *Coastal Abstract*, 173 F.3d at 730 (quoting *Weller v. Am. Broad. Cos.*, 232 Cal. App. 3d 991, 1001 (1991)).

ii. Mr. Perens's statements are inactionable opinions, not statements of fact susceptible to being proved false.

The district court correctly held that Mr. Perens's statements are readily recognizable as opinions. I ER 16:23–25. Mr. Perens stated that his blog post contained his opinions, and he used other qualifying and predictive language. Mr. Perens repeatedly framed his views using language of opinion and possibility:

- "Warning: Grsecurity: *Potential* contributory infringement and breach of contract *risk* for customers."
- "*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*."
- "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."
- "*This is my opinion* and is offered as advice to your attorney."

See II ER 45–46; II ER 48–49 (emphasis added).[2] Although identifying a

[2] Plaintiffs argue that Mr. Perens "expected readers to rely on his opinions as reflecting the truth." *See* AOB, 34. Plaintiffs' argument, however, is not tethered

statement as one's opinion does not automatically render it nonactionable under defamation law, doing so alerts the reader that the author is conveying his own interpretation of the facts. Reasonable readers understand "the import of words like 'I think' or 'I believe'" and "grasp[] that they convey some lack of certainty as to the statement's content." *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S. Ct. 1318, 1328 (2015). In the same vein, statements regarding potential future events—such as how a judge would rule in a hypothetical lawsuit—can indicate to a reader that the author is merely offering an opinion about a likely outcome of a situation. *See Roland Land Inv. Co. v. Velur Invs. II, Inc.*, No. B131086, 2002 WL 59676, *9 (Cal. Ct. App. Jan. 17, 2002), *as modified,* (Feb. 25, 2002) ("[N]o reasonable reader could have interpreted the statement"—a prediction couched in "cautionary language" and "regarding an unpredictable event, the outcome of a [hypothetical] lawsuit"—"as one of fact.").

Here, like in *Roland*, Mr. Perens's statements clearly expressed his views regarding an interpretation of law and potential associated risks—and the district court correctly held that these statements were statements of opinion rather than assertions of fact under defamation law. I ER 16:23–25.

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to reality. As noted, Mr. Perens stated—multiple times—that his opinions were merely opinions, cautioned readers that he is not an attorney, and encouraged them to seek an attorney's input. II ER 45–46, 48–49. *Cf. Partington v. Bugliosi*, 56 F.3d 1147, 1157 (1995) (recognizing that a statement will not imply a false assertion of fact if author makes clear that he lacks "definitive knowledge" about the issue and invites readers to consider other possibilities).

iii. Mr. Perens's stated opinions are inactionable because they concern an unsettled issue of law.

Regardless of the language he used, there can be no question that Mr. Perens—who is not a lawyer—was making statements of opinion when he opined in his blog post about a disputed legal issue of public debate that no court has addressed: whether the punitive no-redistribution clause in OSS's Access Agreement violates the GPL. II ER 16:23–25. This Court has consistently held that, "absent a clear and unambiguous ruling from a court or agency of competent jurisdiction," such interpretations of disputed issues of law are statements of opinion, not fact. *Coastal Abstract*, 173 F.3d at 731 (applying California law).

In *Coastal Abstract*, an escrow agent sued a title company for defamation based on its statements that the escrow agent did not have a license to engage in business as an escrow agent in California and that the escrow agent was required under California's licensing regulations to have one—a statement which implied that the escrow agent had violated state regulations. *Id.* Whether the California regulation at issue actually required the escrow agent to have a license in connection with its activities refinancing California property, however, was a question of law that had not been ruled on by any court or agency of competent jurisdiction. *Id.* This Court held that absent such a ruling on whether the regulation applied to the escrow agent's conduct, the title company's statement about the need for a license constituted an opinion regarding interpretation of the

law, not a statement of fact, and was thus not actionable as defamation. *Id*. at 731–32.

The Court explained that "the statement that [the escrow agent] was operating illegally without a California license might present a triable claim if in fact [the escrow agent] had a California license"—but it was undisputed that the agent did not. *Id.* at 732. The only claim of falsity "concern[ed] the statement or suggestion that California's statute applied to the activities of [the escrow agent]," which was "a matter of opinion" and thus insufficient to support a state-law defamation claim. *Id.*; *see also Freecycle Network, Inc. v. Oey*, 505 F.3d 898, 904–05 (9th Cir. 2007) (holding that statements based on legal interpretation cannot be "false" if there has been no definitive legal determination of the issue); *Rodriguez v. Panayiotou*, 314 F.3d 979, 986 (9th Cir. 2002) (same); *cf. Theme Promotions, Inc. v. News Am. FSI*, 35 F. App'x 463, 469 (9th Cir. 2002) ("[o]pinions about and interpretations of" contractual provisions do not assert "facts" as required for a claim of false advertising).

California courts routinely apply this Court's *Coastal Abstract* decision to hold that legal interpretations are statements of opinion, not statements of fact. In one widely cited opinion, *Franklin v. Dynamic Details, Inc*., 116 Cal. App. 4th 375 (2004), a California state court concluded that emails accusing the plaintiffs of infringing third-party copyrights and breaching a nondisclosure agreement

"expressed [the defendant's] opinions because they purported to apply copyright and contract law to facts." *Id.* at 378–81. More recently, in *Amaretto Ranch Breedables, LLC v. Ozimals, Inc*., No. CV 10-5696 CRB, 2013 WL 3460707 (N.D. Cal. July 9, 2013), the Northern District of California, citing *Franklin*, held that a defendant's blog post—which asserted that the defendant's works were "protected by copyright" and that the plaintiff had "infringed on [its] intellectual property"—expressed the defendant's opinions, "purport[ing] to apply [the defendant's] understanding of copyright law as applied to the facts." *Id*. at *4 (quotation omitted).

As in *Coastal Abstract* and *Franklin*, Plaintiffs' defamation claims target Mr. Perens's interpretation of the law (*e.g*., copyright law and contract law) as applied to a set of facts (the GPL and the Access Agreement's no-redistribution clause). I ER 15:12–24. The proper analysis then—and the analysis the district court applied—is to ask whether any court has clearly and unambiguously rejected Mr. Perens's position. *See, e.g.*, *Franklin*, 116 Cal. App. 4th at 388 (noting that under *Coastal Abstract* analysis, a court does not "determin[e] the truth or reasonableness of [a defendant's] opinions"). As the district court found, no court has. I ER 16:23–25. Consistent with *Coastal Abstract* and *Franklin*, the district court thus held that Mr. Perens's opinion about an unresolved question of law was

incapable of being proven false and not actionable as defamation. I ER 16:3–6, 23–26.

Plaintiffs do not allege the existence of any legal authority contradicting Mr. Perens's opinion—much less the type of "clear and unambiguous ruling" that might enable Plaintiffs to argue that Mr. Perens's statements are akin to statements of fact under *Coastal Abstract*.[3] *See* 173 F.3d at 731. Rather, they turn *Coastal Abstract* on its head, arguing that Mr. Perens's opinions are actionable because he did not expressly inform readers "that he was unaware of any court or agency determination holding OSS in violation of the GPL." AOB, 28. The defendants in *Coastal Abstract*, *Franklin*, and *Amaretto* made no such disclosures, and those opinions offer no basis for concluding that one was required.

Plaintiffs also argue that *Coastal Abstract* applies only to statements made by laypersons, not to statements made by experts. While *Coastal Abstract* referred to "laypersons," its reasoning turned on the conclusion that the correct legal application of a licensing statute "was not knowable" absent an authoritative ruling—not on a distinction between laypersons and experts. *See id*. at 731–32. The correct legal interpretation of the GPL as applied to the Access Agreement

[3] Even if Plaintiffs could prevail on their theory and convince the Court to adopt its legal interpretation, that would not retroactively make Mr. Perens's statements defamatory. *Coastal Abstract*, 173 F.3d at 732 (explaining that a statement would remain non-actionable even if there was a subsequent legal decision, because the proper application of the law was "not knowable" when the statement was made).

was likewise unknowable at the time of Mr. Perens's statements. While Mr. Perens's expertise may have helped him reach an informed opinion about whether the Access Agreement would be found to violate the GPL, it still is only an opinion, especially absent a clear court ruling issued before he offered it.

Plaintiffs next try to make their lawsuit look like the hypothetical case that *Coastal Abstract* stated in dicta *might* support a claim. Plaintiffs argue that the disputed issue in both cases is whether the escrow agent or OSS was operating *illegally*. Plaintiffs argue that unlike the escrow agent (which did not have a California escrow agent license), here OSS was licensed under the GPL to distribute its Grsecurity software—and that pursuant to *Coastal Abstract*, Mr. Perens's opinions therefore presented a triable claim.[4] *See* AOB, 20. But that argument ignores the facts of this case, obscures *Coastal Abstract*'s holding, and is logically flawed.

In *Coastal Abstract,* the disputed issue of law was whether the escrow agent's unlicensed status meant it was operating unlawfully. 173 F.3d at 731–32. When this Court said in dicta that the title company's statement that the escrow agent was operating illegally without a California license "might present a triable claim if in fact Coastal had a California license[,]" it was illustrating via a

[4] Plaintiffs argue that, "[a]pplying 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." *See* AOB, 20 (emphasis omitted).

hypothetical the distinction between factual predicates and legal conclusions. As the Court explained, if the escrow agent had a California license, the *factual predicate* attached to the title company's interpretation of the law (that the escrow agent *did not* have a California license) would be provably false, thus making that factual predicate (but not the interpretation of the law) actionable. *Id.* at 732. In the hypothetical, the claim of falsity concerned the facts on which the opinion was based. *Id.*

Plaintiffs' claim of falsity, by contrast, concerns Mr. Perens's opinion about an unresolved question of law: whether the Access Agreement's no-redistribution clause violates the GPL, resulting in breach of the license and termination of OSS's license to redistribute the Linux kernel source code. *See id.* Plaintiffs' argument that the no-redistribution clause does not violate the GPL, and that OSS's Open Source license therefore remained valid, is their interpretation of the undecided legal issue—not a fact. Importantly, the factual predicates of Mr. Perens's opinions—the wording of the terms of the GPL and the terms of OSS's no-redistribution clause in the Stable Patch Access Agreement—are not disputed.

Plaintiffs' arguments that Mr. Perens's blog post contained provably false assertions of fact repeatedly boil down to an insistence that the Court should endorse their legal arguments about the interpretation of the GPL. *See, e.g.*, AOB, 1–2, 13, 16–18, 20–23, 27. But the strength of their convictions does not turn their

opinion about this unsettled legal issue into fact. The Court should therefore affirm the district court's determination that OSS did not state a claim for defamation.

iv. Mr. Perens's stated opinions are also inactionable because they are based on disclosed facts that are neither false nor demeaning.

The district court dismissed OSS's defamation claims for another reason as well: Mr. Perens disclosed all relevant facts that formed the basis for his opinion, and none of those statements were false or demeaning. Mr. Perens's opinions based on those facts were thus nonactionable defamation. I ER 18:14–16.

As this Court has held, a "statement of opinion based on fully disclosed facts can be punished only if the stated facts are themselves false and demeaning." *Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995). According to the Court, readers would understand such stated opinions to be "the author's interpretation of the facts presented," rather than inferring "the existence of additional, undisclosed facts" supporting the author's opinion. *Id*. Furthermore, when the factual basis for an opinion is disclosed, readers are "free to accept or reject" such opinions "based on their own independent evaluation of the facts." *Id*.; *see also Partington,* at 56 F.3d at 1156–57. This is particularly relevant here because the discussion of Mr.

Perens's blog post took place among a specialized community that was well aware of the contours of the debate.

In *Franklin*, the court concluded that the defendant's statements of opinion about the plaintiffs' liability for copyright infringement and breach of contract were nonactionable in part because accused emails containing the statements "fully disclosed provably true facts on which the opinions were based." 116 Cal. App. 4th at 378. The accused emails provided a copy of an email sent by the plaintiff, directed the reader to a website containing the allegedly infringing material, and explained why the author believed the material was infringing. *Id*. at 388.

The district court, applying this established precedent, correctly held that Mr. Perens's opinion likewise rested only on facts he disclosed. I ER 18:14–16. In the initial version of his blog post, Mr. Perens stated that he had heard from multiple sources that OSS had warned its customers that it would terminate their access to any future Grsecurity security updates should they redistribute the software. II ER 45. He later updated the post after reading the express terms of the Access Agreement, which confirmed that, as he had learned from his sources, OSS had a punitive no-redistribution policy.[5] III ER 233 (¶ 12); II ER 48–49.

[5] Plaintiffs allege that Mr. Perens admitted in a declaration filed at the district court that his opinions "relied on a single email sent to a mailing list by an anonymous disgruntled person" and that Mr. Perens failed to disclose as much. AOB, 29. Plaintiffs misrepresent Mr. Perens's declaration, which explained that he first learned about OSS's policies via an Open Source mailing list and that the policy

None of the disclosed facts Mr. Perens relied upon to express his opinions were themselves false or demeaning. He identified the Grsecurity product's use of the Linux kernel source code (which is subject to the GPL), the relevant provisions of the GPL, and certain terms under which OSS provides access to the Grsecurity patches as the basis for his opinions. II ER 45–46, 48–49. The statements merely summarize or quote directly from the Access Agreement and the GPL. Mr. Perens further stated that Grsecurity uses the Linux kernel source. OSS itself admits that none of the disclosed facts are false or demeaning. *See, e.g.,* II ER 25–26 (¶¶ 13, 12–20).

And as the district court found, Mr. Perens's post at all times clearly stated that his opinions were based on the requirement of Section 6 of the GPL prohibiting the imposition of any further restrictions on redistribution. I ER 16:3–6, 18:14–16; II ER 45. The court also correctly held that Mr. Perens did not imply

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was subsequently confirmed to him by other reliable sources. III ER 232 (¶ 6). Plaintiffs also allege that Mr. Perens failed to disclose in his initial blog post that he had not read the Access Agreement. AOB, 29. But Mr. Perens clearly explained in his initial blog post that he was relying on sources who had informed him of OSS's punitive no-redistribution policy, not the written agreement. Plaintiffs further assert that Mr. Perens expressed doubt about the terms of the Access Agreement on Slashdot and failed to disclose those doubts. AOB, 30. Here again, Plaintiffs misconstrue the facts, attempting to transform a comment Mr. Perens made before ever reading the text of the Access Agreement, based on an obvious misunderstanding in an exchange with another Slashdot reader, into an undisclosed fact. *See* III ER 269–270 (¶¶ 2–5). Mr. Perens, after reading the Access Agreement, concluded that that the agreement *confirmed* his understanding of OSS's policies and updated his post to reflect this additional basis for his opinion. II ER 48–49; III ER 233 (¶ 12).

any undisclosed false and defamatory statements of fact that would render his opinions actionable. I ER 18:14–16.

Plaintiffs raise several arguments in an attempt to transform Mr. Perens's opinions based on disclosed facts into actionable defamation. None of them succeed.

First, Plaintiffs argue that Mr. Perens's statement that the GPL "explicitly prohibits the addition of terms such as this redistribution prohibition," expresses a false factual assertion. AOB, 16–17 (quotation omitted) (emphasis omitted). But the argument mischaracterizes Mr. Perens's reference to the underlying terms of the GPL and the Access Agreement in service of his opinion. The statement is thus indistinguishable from those in *Franklin* that were not actionable. 116 Cal. App. 4th at 378.

Second, Plaintiffs argue that Mr. Perens's opinions were actionable because he did not include contrasting views from others who disagreed with his interpretation of the GPL and the Access Agreement. AOB, 28. Plaintiffs identify no law, and Mr. Perens is unaware of any, that requires a person expressing an opinion to include contrary opinions about the conclusions derived from the same set of disclosed facts.

Third, Plaintiffs argue that because Mr. Perens is an "expert" in the Open Source community, embedded in his opinions are undisclosed defamatory facts.

See AOB, 23. As the district court correctly held, there is no such rule. This Court's holding in *Coastal Abstract*—that statements of opinion about disputed issues of law are not actionable as defamation unless the plaintiff can demonstrate that they imply false and defamatory facts—did not rest on a distinction between a layperson and an expert. 173 F.3d at 731–32.

No case law supports Plaintiffs' theory that inactionable opinions about unsettled legal issues become actionable merely because they have been uttered by a person with knowledge of the subject matter. On the contrary, the case law supports that expertise does not create an exception to the *Coastal Abstract* rule. In *Amaretto*, for example, the Northern District of California held that even though the defendants' blog post linked to a letter from their lawyer, taking the position that the plaintiff had infringed the defendants' copyrights, the blog entry consisted of "constitutionally protected opinions" and thus was not defamatory. 2013 WL 3460707, at *3. In *Freecycle*, this Court held that the defendant's statement that the plaintiff lacked trademark rights in the term "freecycle" because it was a generic term was a legally protected, non-defamatory opinion—despite being made by an individual who had advised the plaintiff itself on the trademark issue. 505 F.3d at 901, 904–05. Similarly, *Franklin* involved statements made by an experienced product designer, yet the court held that the designer's statements that expressed "opinions and fully disclosed provably true facts on which the opinions

were based" were not actionable. 116 Cal. App. 4th at 378. And in *Coastal Abstract* itself, the speaker was a title insurance company, opining on matters relevant to their business. 173 F.3d at 731.

Plaintiffs rely on *Overstock* and *Wilbanks* for their theory that Mr. Perens's "specialized knowledge" of Open Source issues means he cannot offer his opinions on unsettled legal questions without them carrying the weight of fact. *See* AOB, 25–27, 32–37. Neither case supports OSS's position, and neither is applicable here. Those cases hinged on explicit factual statements that were false or misleading, specific false factual implications, and misleading omissions of material facts—not a distinction between subject-matter experts and laypeople. The district court properly concluded that they do not support that Plaintiffs' claims are actionable. *See* I ER 17:15–18:16; III ER 296:3–9.

As the district court recognized, the facts and issues in *Overstock* have little to nothing in common with this case. The defendant in *Overstock*, Gradient Analytics, was a firm that provided analytical reports on publicly traded companies to large institutional investors who subscribed to the service, some of whom paid tens of thousands of dollars for the reports. 151 Cal. App. 4th at 693–94. Gradient advertised its reports as "independent and objective," *id*. at 710, but the firm actually allowed certain customers to commission negative reports on companies, including where those customers planned to "short" the stock of the companies

(*i.e.*, sell the stock with the hope of buying it back at a lower price after the stock price falls), *id*. at 694–95. Gradient customer and co-defendant Rocker Partners commissioned several such negative reports regarding Overstock. *Id*. at 696–97. Overstock's defamation claims were based on express and implied false assertions published in those reports—reports that Gradient and Rocker had colluded to produce in a successful attempt to drive down the price of Overstock's stock. *Id*. at 697–98, 710–11, 718. The gravamen of Overstock's complaint was that Gradient's reports "repeatedly" stated or implied that Overstock "intentionally falsified its accounting reports in order to defraud investors"—an objectively verifiable factual assertion. *Id.* at 701.

In their attempt to convince the Court of *Overstock*'s relevance, Plaintiffs seize upon two details in its complicated fact pattern: Gradient's accusation that Overstock violated Generally Accepted Accounting Principles ("GAAP") and Gradient's position of authority. AOB, 25–27.

First, Plaintiffs analogize Gradient's assertion that Overstock's accounting methods violated GAAP to Mr. Perens's opinion that OSS's no-redistribution clause violates the GPL, reasoning that if one is actionable, the other must be, too. *Id. Overstock,* however, did not turn on Gradient's statement regarding violations of GAAP alone but instead turned on the many express and implied statements of fact the court found "objectively verifiable and provably false," including that

"Overstock's accounting violated GAAP, *with the implication that Overstock falsified its financials to mislead investors*." 151 Cal. App. 4th at 706 (emphasis added). Regardless of whether there was a settled interpretation of the GAAP as applied to the accounting method used by Overstock (a question not clearly answered in the opinion), Gradient's statement was actionable because it conveyed an objectively verifiable factual implication that Overstock had engaged in specific conduct (falsification of its financials), the truth of which Overstock denied. *See id.* The court also concluded that Gradient could not benefit from the protections afforded to opinions based on fully disclosed facts because Overstock "refuted the truth of certain disclosed factual bases concerning the impropriety of Overstock's financials." *Id.* at 704–05. Here, by contrast, Mr. Perens did not state or imply that Plaintiffs had engaged in any conduct apart from implementing a policy that Mr. Perens accurately described.

Plaintiffs also focus on *Overstock*'s finding that Gradient "[held] itself out to its subscribers as having specialized knowledge in the areas of financial accounting and issues of earnings quality," *id.* at 706; AOB, 26–27, but they pay no mind to how that finding factored into the opinion. The court there did not treat Gradient's expertise as the basis for an exception to established legal rules or as transforming a statement of opinion into one of fact. On the contrary, the court pointed to Gradient's reputation only as a reason why the "[c]ontext and [t]enor" of the

reports did not "[n]egate the [i]mpression" that the allegedly defamatory statements were factual assertions, *after* already concluding that the reports "reasonably could be understood as implying provably false assertions of fact," including that Overstock was "'cooking the books' and manipulating accounting procedures to boost the price of its stock." *Overstock*, 151 Cal. App. 4th at 704–06.

Plaintiffs' reliance on *Wilbanks* is no more persuasive. As the district court found, *Wilbanks* likewise hinged on circumstances not present here—not the mere fact of the defendant's expertise. *See* I ER 17:15–18:16. There, the defendant, Wolk, published the following statements about the plaintiffs, a brokerage firm and its president:

- "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."

Wilbanks, 121 Cal. App. 4th at 890 (emphasis omitted). The reviewing court acknowledged that Wolk's statements about "incompetent" and "unethical" business practices could be construed as opinions, but it determined that, under the totality of the circumstances, they might reasonably be read as implying "undisclosed defamatory facts." *Id.* at 902–03.

The court explained that such implications would arise because the only facts Wolk disclosed in the publication—that the plaintiffs had come under investigation by the California Department of Insurance after the entry of a judgment against them—were misleading and materially incomplete. *Id.* By revealing the existence of the judgment and investigation in conjunction with her warnings about the plaintiffs' business practices, Wolk implied that she was aware of specific wrongful conduct underlying those actions against the plaintiffs "and had concluded that they demonstrated incompetence and a lack of ethics." *Id.* at 902. But Wolk did not provide her readers with any underlying facts or explain why she believed that the plaintiffs had acted incompetently and unethically, instead leaving them "to assume the worst." *Id.* at 903. Particularly troubling to the court was Wolk's failure to mention that the judgment against the plaintiffs was in small claims court and that the California Department of Insurance investigates *every* complaint it receives (and in fact ultimately did not pursue the investigation against the plaintiffs). *See id.* By omitting these facts, Wolk created the

impression that a trial court had entered judgment on a fully contested matter and that the Department of Insurance had evaluated the complaint against the plaintiffs and deemed it worthy of investigation—objectively verifiable facts that would support Wolk's allegations of wrongdoing if true. *Id.*

The district court here correctly found that Mr. Perens's blog post raises none of the concerns that made the statements in *Wilbanks* actionable. Unlike Wolk, Mr. Perens fully disclosed the facts he considered in forming his opinions and explained his reasoning. I ER 18:14–16. He gave readers no reason to believe that his statements were supported by additional, undisclosed facts, nor did he omit key details about the facts he did cite.[6] *Id.*

Plaintiffs fixate on a brief passage in *Wilbanks* about the significance of Wolk's status as an industry watchdog, *see* AOB, 32–38, but that discussion did not provide a basis for finding Wolk's statements actionable independent of the reasoning just discussed. The court in *Wilbanks* treated Wolk's specialized knowledge and watchdog status as relevant only to assessing how readers would interpret her failure to provide factual support for her assertions. *See* 121 Cal.

[6] Plaintiffs allege that Mr. Perens failed to inform his audience of the opinions of others who disagreed with Mr. Perens. AOB, 28–29. But these opinions are not underlying *facts*, and Mr. Perens did not imply the existence of any false, defamatory *facts* by not including them. Furthermore, and in contrast to Wolk's misleading references to the judgment against Wilbanks and the Department of Insurance investigation, Mr. Perens's blog post did not include any half-truths suggesting authoritative support for his opinions. Mr. Perens had no duty to disclose in his blog post the opinions of everyone who disagrees with him.

App. 4th at 904. When presented with an opinion without explanation of how it was formed, a reader may draw one of two opposing conclusions: that the opinion has no factual basis (*i.e.*, it is pure opinion) or that the opinion has an undisclosed factual basis (*i.e.*, it is an opinion "based on fact"). Because Wolk presented herself as someone with specialized knowledge and signaled that readers should rely on her opinions, the court reasoned, readers may have been more likely to make the latter assumption and infer the existence of false and defamatory facts. *Id.* That reasoning has no application to Mr. Perens's blog post, which provided a complete explanation of his opinions and therefore did not put readers in such a position.

v. Plaintiffs did not plausibly plead that Mr. Perens acted either negligently or with actual malice.

Finally, this Court should reject Plaintiffs' arguments that Mr. Perens published his opinions with actual malice as to their truth or falsity, which rest on suspicions of ill will and a concocted "admission" theory that the district court rightly dismantled. *See* AOB, 28–32; I ER 18:17–19:6. Indeed, Plaintiffs' failure to plausibly allege that Mr. Perens was negligent in publishing his opinions, much less that he acted with actual malice, provides an independent basis for affirming the district court's dismissal of Plaintiffs' complaint. *See Carney v. Santa Cruz Women Against Rape*, 221 Cal. App. 3d 1009, 1015–17 (1990) (plaintiff alleging defamation must establish that defendant was at least negligent as to the truth or

falsity of the statements at issue); *Corinthian Colls*., 655 F.3d at 992 (Rule 12(b)(6) dismissal can be affirmed on grounds not relied on by the district court). The facts alleged in the complaint show that Mr. Perens accurately described OSS's no-redistribution policy even before obtaining a copy of the Access Agreement. *Compare* II ER 58–59 *with* II ER 45–46 *and* II ER 48–49. The record also shows that after reviewing a copy of the Access Agreement, Mr. Perens updated his post to include the exact written terms. II ER 30–34 (¶¶ 41–49). The complaint fails to show how Mr. Perens's confirmation of the terms of the Agreement and his subsequent update to his blog post demonstrate that he acted with any degree of fault—quite the opposite; it demonstrates his attempts to be accurate.[7]

Plaintiffs' attempts to demonstrate fault also underscore the futility of their claims. Plaintiffs argue that Mr. Perens "fail[ed] to investigate" and evinced a "lack of interest in the truth." AOB, 31. But the only "truth" Plaintiffs accuse Mr. Perens of failing to ascertain is their purported compliance with the GPL—a matter of legal opinion, not ascertainable fact. With no existing judicial determination on point, *there was no factual reference* Mr. Perens could have looked to that would have established that Plaintiffs' no-redistribution clause complies with the GPL.

[7] Plaintiffs' arguments regarding their status as private figures, that the blog post did not concerns matters of public interest, and that Mr. Perens's post made non-privileged false statements of fact are also unsupported by the record and also fail. AOB, 40–44.

To the contrary, Plaintiffs want this Court to decide that issue as a matter of first impression. As the foregoing demonstrates, even if the Court were to now decide that question in Plaintiffs' favor (which it need not and should not do), Mr. Perens was not and could not have been negligent in reaching the conclusions he stated on his website and on Slashdot. The district court therefore correctly dismissed Plaintiffs' defamation claims.

B. Plaintiffs Failed to State a Claim for False Light Invasion of Privacy.

As the district court noted, courts applying California law recognize that when a false light claim is brought alongside a defamation claim based on the same statements, the false light claim is "essentially superfluous" and "stands or falls on whether it meets the same requirements as the defamation cause of action." I ER 19:7–14 (quoting *Eisenberg v. Alameda Newspapers, Inc*., 74 Cal. App. 4th 1359, 1385 n. 13 (1999)); *see also Harkonen v. Fleming*, 880 F. Supp. 2d 1071, 1082 (N.D. Cal. 2012). Here, Mr. Spengler's false light claim "is in substance equivalent to . . . [OSS's] libel claim." *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 543 (1971), *overruled on other grounds by Gates v. Discovery Commc'ns, Inc.*, 34 Cal. 4th 679 (2004) (quotation omitted). The district court therefore correctly held that Mr. Spengler's false light claim fails for the same reasons that OSS's defamation claims do.

C. Plaintiffs Failed to State a Claim for Intentional Interference with Prospective Economic Advantage.

The district also correctly held that, as a result of Plaintiffs' failure to plausibly plead a claim for defamation, Plaintiffs' claim for intentional interference with prospective economic advantage also fails. To state a claim for intentional interference with prospective economic advantage, Plaintiffs had to plausibly allege that Mr. Perens committed intentional and unjustified acts designed to disrupt Plaintiffs' economic relationship with a third party containing the probability of a future economic benefit. *See Sole Energy Co. v. Petrominerals Corp*, 128 Cal. App. 4th 212, 241 (2005) (citing *Korea Supply Co. v. Lockheed Martin Corp*., 29 Cal. 23 4th 1134, 1153–54 (2003)). Furthermore, Plaintiffs needed to allege that Mr. Perens performed an act that was "wrongful 'by some measure beyond the fact of the interference itself.'" *See CRST Van Expedited, Inc. v. Werner Enters. Inc*., 479 F.3d 1099, 1105 (9th Cir. 2007) (quotation omitted).

As the district court correctly held, the only "alleged unjustified acts" were Mr. Perens's publications of his "non-actionable opinions." I ER 20:1. Plaintiffs' intentional interference claim thus fails for the same reasons OSS's defamation claims fail. *See Piping Rock Partners, Inc. v. David Lerner Assocs., Inc*., 946 F. Supp. 2d 957, 977 (N.D. Cal. 2013), *aff'd*, 609 F. App'x 497 (9th Cir. 2014) (allegations predicated on defamation, despite not actually being labeled as defamation, should nonetheless be treated as defamation claims).

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT PLAINTIFFS' CLAIMS COULD NOT SURVIVE A MOTION TO STRIKE UNDER CALIFORNIA'S ANTI-SLAPP STATUTE.

The district court, following the two-step process necessary for adjudicating a motion to strike under California's anti-SLAPP law, also correctly concluded that Plaintiffs' claims could not elude the statute. I ER 20:5–13. First, the district court determined that Mr. Perens had shown that Plaintiffs' claims arose from activity protected by the anti-SLAPP statute—specifically, written statements that are made in "a public forum in connection with an issue of public interest." Cal. Civ. Proc. Code § 425.16(a), (e)(3); *see Navellier*, 29 Cal. 4th at 88; I ER 20:5-13. Second, the district court concluded that Plaintiffs had failed to demonstrate a probability of prevailing on the merits of their claims.[8] *See Navellier*, 29 Cal. 4th at 88; I ER 20:5–13.

The district court's holding is correct because, as explained below, Mr. Perens's opinions concerned an issue of intense public interest to Linux developers, OSS customers, and those who contribute to or otherwise support Open Source software: the impact of the Access Agreement on the ability to redistribute Linux-based software under the GPL. Mr. Perens's statements were

[8] The court granted Plaintiffs leave to amend the complaint, I ER 21:1–3, but stated that "[w]ere the pleadings to remain in their current form" it "would likely grant the anti-SLAPP motion." I ER 20:9–12. Plaintiffs declined to amend their complaint and instead requested that the court enter judgment in Mr. Perens's favor. III ER 313–318; *see also* I SER 48:15–17.

also made on his blog, a classic example of a digital public forum. Thus the court was correct to apply the anti-SLAPP statute to Mr. Perens's statements and analyze whether, in light of the statute's application, Plaintiffs had demonstrated a probability of prevailing. It correctly concluded they did not in light of its previous dismissal of their claims.

Moreover, the court's holding is consistent with section 425.16's statutory requirement that courts, including federal courts sitting in diversity, apply and construe the anti-SLAPP statute broadly to protect the rights of defendants sued as a result of their expressive activities. Cal. Civ. Proc. Code § 425.16(a); *see also Dowling v. Zimmerman,* 85 Cal. App. 4th 1400, 1425 (2001) (noting the statute is meant to provide "a swift and effective remedy to SLAPP suit defendants"); *U.S. ex rel Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999) (applying anti-SLAPP statute in diversity case because of its "important [and] substantive" legal protections); *Averill v. Superior Court*, 42 Cal. App. 4th 1170, 1175–76 (1996) (giving section 425.16(e) broad application in light of its purposes).

Indeed, the statute was passed to encourage "continued participation in matters of public significance" and to combat lawsuits that "chill the valid exercise of the constitutional right[] of freedom of speech" through "abuse of the judicial process." Cal. Civ. Proc. Code § 425.16(a). As described above, allowing

Plaintiffs to continue their claims against Mr. Perens would necessarily stifle public debate on the meaning and reach of the GPL. Accordingly, claims arising from "any act" done "in furtherance of" a defendant's free speech rights under the United States Constitution or the California Constitution "in connection with a public issue" may be stricken under the anti-SLAPP statute, unless the court determines that there is a probability that the plaintiff will prevail on the claim. *Id.* § 425.16(b)(1).

Plaintiffs challenge the district court's determination that their claims cannot withstand a motion to strike under the anti-SLAPP law. As a preliminary matter, however, this Court need not consider Plaintiffs' arguments; they waived them below by conceding not merely that Mr. Perens's speech is protected by the anti-SLAPP law, but also "that [Mr. Perens] is the prevailing party for the anti-SLAPP motion and statutorily is entitled a reasonable attorneys' fee award." I SER 48:15–17. Plaintiffs conceded this point—multiple times—including in their opposition to the amount of attorneys' fees and costs requested by Mr. Perens, *see id.*, and their motion for judgment, filed in lieu of a second amended complaint. There, Plaintiffs said they "agree that [Mr. Perens] should be deemed the prevailing party for the purposes of awarding attorneys' fees and costs pursuant to California's anti-

SLAPP statute, pursuant to the Court's December 21, 2017 Order." III ER 317:15–18.[9]

In conceding that Mr. Perens was the prevailing party under the law for purposes of the anti-SLAPP fees motion pursuant to the district court's December order, Plaintiffs waived any challenge to the district court's rulings as to both elements of the anti-SLAPP law. *Cf. Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 75 F.3d 1401, 1413 (9th Cir. 1996) (holding party was precluded from pursuing issue on appeal that parties stipulated to dismiss with prejudice); *see also Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994) (precluding plaintiff from challenging evidentiary procedure on appeal after he stated he had no objection to the procedure).

In any event, the district court's application of California's anti-SLAPP statute was proper and supported by decisions from this Court and California courts. Plaintiffs' legal claims are little more than an attempt to punish Mr. Perens for exercising his First Amendment rights by expressing a non-actionable opinion on a matter of public interest—precisely the type of lawsuit the anti-SLAPP statute was designed to deter.

[9] Plaintiffs also asked, in their proposed order accompanying the motion, that the district court "deem[] Defendant the prevailing party for the purposes of awarding mandatory . . . fees and costs permitted under California's anti-SLAPP statute." III ER 318:6–9.

A. Mr. Perens's Stated Opinions Qualify for Protection Under California's Anti-SLAPP Law.

As the district court identified, one type of protected activity under the anti-SLAPP statute is "written . . . statement[s]" that are made in "a public forum in connection with an issue of public interest." Cal. Civ. Proc. Code § 425.16(e)(3). The court correctly held that Mr. Perens's blog posts concerned an issue of public importance and were made in a public forum, and thus qualify for anti-SLAPP protection. I ER 20:6–9.

i. The blog post concerns an issue of public interest.

Courts broadly construe "issue of public interest" for purposes of section 425.16 to include "*any issue in which the public is interested*." *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (2008) (emphasis in original) (collecting cases). In *Tamkin v. CBS Broad., Inc.*, 193 Cal. App. 4th 133 (2011), for example, the court concluded that the creation and broadcast of an episode of the TV show CSI was a matter of "public interest" because "the public was demonstrably interested," as evidenced by "the posting of the casting synopses on various Web sites and the ratings for the episode." *Id*. at 143.

Mr. Perens's blog post concerned topics of great interest to a broad segment of the public: Linux and the GPL's interaction with the Access Agreement, which impacts software developers and potentially all users of the software. The blog post also included a warning to OSS customers about the risks he believed they

might face if they purchased a certain product—here, Plaintiffs' Grsecurity software. II ER 48–49. This Court and others have regularly held that "consumer protection information" constitutes protected speech in connection with an issue of public interest. *See, e.g., Makaeff v. Trump Univ.*, LLC, 715 F.3d 254, 262 (9th Cir. 2013) (internet postings accusing plaintiff of fraudulent and deceptive business practices were protected); *Wilbanks*, 121 Cal. App. 4th at 890, 898–901 (website cautioning consumers about doing business with plaintiff and alleging that plaintiff was "unethical" and "provided incompetent advice" was protected); *Piping Rock Partners, Inc.*, 946 F. Supp. 2d at 967–69 (posting on website "Ripoff Reports" warning of negative customer experiences qualified for protection under first anti-SLAPP prong despite being wholly fabricated), *aff'd*, 609 F. App'x 497 (9th Cir. 2015). Consistent with precedent, the district court correctly concluded that Mr. Perens's blog post concerned a matter of public interest.

Additionally Mr. Perens's blog post was, by Plaintiffs' own admission, the subject of considerable demonstrated public interest precisely because the issue impacts a broad community of Linux developers. An editor of Slashdot, a website popular in the Open Source community, noticed Mr. Perens's post and republished it to the Slashdot site. Twenty-four hours later, Slashdot readers had already posted 323 comments in the comments section below the post. *See* II ER 93–228. The post continued to draw attention, and within ten days it generated a heated

discussion spanning at least 470 comments. I ER 8–9; II ER 92–229. In the Slashdot discussion forum, many commenters agreed with Mr. Perens, while others voiced their disagreement. II ER 92–229. Commenters asked questions about Mr. Perens's conclusions, tested his legal theories by applying them to hypothetical situations, and engaged with Mr. Perens—and with one another—about their respective positions. *Id*. Plaintiffs themselves allege that Mr. Perens's blog post was seen and read by "at least tens of existing Consumers and potential clients, and at least hundreds, if not thousands of professional colleagues and business partners." II ER 36 (¶ 69).

Indeed, the response the blog post received on Slashdot demonstrates that by publishing his opinions, Mr. Perens furthered one of the California legislature's express goals in enacting the anti-SLAPP law: promoting and encouraging participation in public debate. *See* Cal. Civ. Proc. Code § 425.16(a) ("[I]t is in the public interest to encourage continued participation in matters of public significance[.]"); *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 808 (2002) (the anti-SLAPP law was intended to "encourage participation . . . in vigorous public debate"). The anti-SLAPP law's goal of promoting public debate furthers the principles that underlie the First Amendment, including "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see*

also Abrams v. United States, 250 U.S. 616, 630 (1919) (J. Holmes, dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market[.]").

The public was keenly interested in Mr. Perens's statements because they concerned both the Linux kernel, one of the most commonly used software products in the world, and the GPL, the most common Open Source license in the world. *See* I SER 33; *see also XimpleWare, Inc. v. Versata Software, Inc*., No. 5:13-cv-05161-PSG, 2014 WL 2080850, at *1 (N.D. Cal. May 16, 2014) (referencing the "the millions of lines of source code licensed in this country and around the world" under the GPL). The interpretation of the GPL—and what restrictions it does and does not allow—directly impacts the large Open Source community and the "collaborative atmosphere" in which they currently conduct software peer review and security testing, reuse existing solutions, and share technical knowledge. *See Wallace*, 467 F.3d at 1106; *see also* I SER 6. Plaintiffs' methods of discouraging redistribution (and thus also examination) of Linux security patches were therefore naturally of interest to many.

The district court properly applied the law in holding that Mr. Perens's statements "concern issues of public interest." ER 20:8. Plaintiffs' efforts to characterize Mr. Perens's statements as not concerning a matter of public interest

are unpersuasive. AOB, 40–44. Plaintiffs argue that because OSS had just 45 customers, Mr. Perens's statements concerned only a narrow issue involving a private business. AOB, 40–42. They are incorrect.

First, criticisms of a party's business practices are a matter of public interest if a large number of people potentially will be affected by the plaintiff's conduct. *See Wilbanks*, 121 Cal. App. 4th at 898. As discussed above, hundreds of commenters and others discussed Mr. Perens's statements, indicating there was general public interest in the concerns he raised in his blog post. Moreover, the statements affected not only OSS's customers but also the rights of thousands of developers who have contributed to the Linux kernel.[10]

Second, even if OSS and Mr. Spengler were correct that Mr. Perens's statements were intended only for a specific, limited audience of OSS's clients—

[10] Plaintiffs' argument that Mr. Perens's blog post was "addressed specifically to OSS's customers" is illogical. AOB, 41–42. Mr. Perens's blog is directed at the general public, as was his post regarding Grsecurity that was republished at Slashdot.org. I ER 8:2–10:10. The fact that the title and subject matter of the post concerned OSS's products and referenced its customers does not transform an post expressing larger concerns about the grsecurity product and Open Source software into a communication concerning purely private interests. The argument conflicts with the plain text of the statute, as it protects "any written or oral statement" made in a public forum on an issue of public interest. Cal. Civ. Proc. Code § 425.16(e)(3). Moreover, the factors courts consider in determining whether the statements qualify for protection under the anti-SLAPP statute include, among others, whether the statements concern a substantial number of people, the nexus between the statement and the public interest, and whether the focus of the speech is in the public interest. *See Piping Rock Partners*, 946 F. Supp. 2d at 968. Those factors are all met here.

which they were not—the anti-SLAPP statute would still apply. Communications involving private parties that impact segments of the general public qualify as matters of public interest under section 425.16(e)(3). *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468 (2000), held that content published in a newsletter by homeowners was a matter of public interest for purposes of section 425.16(e)(3) when it concerned the conduct of the homeowners association's general manager. *Id* at 471–72. In affirming the trial court's finding that the statements concerned a matter of public interest, the appellate court held that "[a]lthough the allegedly defamatory statements were made in connection with the management of a private homeowners association, they concerned issues of critical importance to a large segment of our local population." *Id*. at 479. Similarly, Mr. Perens's statements raised larger issues concerning the GPL and copyright that impacted the broader Open Source community.

Plaintiffs' reliance on *Weinberg v. Feisel*, 110 Cal. App. 4th 1122, 1132 (2003), and *Hailstone v. Martinez*, 169 Cal. App. 4th 728, 736 (2008), does not support their argument that Mr. Perens's statements do not concern a matter of public interest. AOB, 41.

Weinberg is easily distinguishable. The defamatory statements in that case stemmed from the defendant's belief that the plaintiff had stolen a valuable coin from him—a purely private dispute. *Weinberg*, 110 Cal. App. 4th at 1127–29.

The court therefore held that the public interest requirement in section 425.16 was not met. *Id*. at 1134. Here, by contrast, Mr. Perens's statements were pertinent to the broader implications of OSS's business practices in light of unsettled law. Indeed, many of the commentators on Slashdot commented on the general question of GPL compliance, and not necessarily only on Plaintiffs' practices. *See, e.g.,* II ER 97–98, 103–104.

Hailstone, on the other hand, supports Mr. Perens. The appellate court there reversed a trial court finding that the anti-SLAPP law did not apply to allegations made against a union official accused of misusing funds. *Hailstone*, 169 Cal. App. 4th at 733–34. The court held that although the statements at issue were not a matter of widespread interest, they still qualified for protection under section 425.16 because they were of great interest to a narrow but definable segment of the population: members of the union. *Id*. at 736–39. Even assuming Mr. Perens's statements were targeting a narrow audience, they still were of great interest to a particular community: those who use and develop software based on Linux and the GPL.

ii. The blog post was made in a public forum.

The district court also correctly concluded—and Plaintiffs have not contested—that Mr. Perens's statements were made in a public forum. Mr. Perens published his written blog post on his website and posted additional opinions in the

comments section on Slashdot.org, both of which are websites accessible to the public at large. *See* I ER 8:2–10:10; II ER 92–229. This Court has held that statements appearing on websites accessible to the public at large, such as Mr. Perens's, are considered made in a public forum for purposes of the anti-SLAPP statute. *See, e.g.*, *Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1010 n.3 (9th Cir. 2017) (quotation marks omitted); *see also Wong v. Tai Jing*, 189 Cal. App. 4th 1354, 1366 (2010) (collecting cases). Moreover, as the Supreme Court recently recognized, websites are part of the "vast democratic forums of the Internet," and the Internet is one of the "most important places . . . for the exchange of views." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). The district court thus correctly concluded that Mr. Perens's statements were protected by the anti-SLAPP statute as statements made in a public forum on an issue of public interest. Cal. Civ. Proc. Code § 425.16(e)(3).

B. Plaintiffs Failed to Show a Probability of Prevailing on Their Claims.

The district court next assessed whether Plaintiffs had shown a probability of prevailing on their claims by applying the same standard it used in ruling on Mr. Perens's motion to dismiss. I ER 20: 8–11; *see Rogers*, 57 F. Supp. 2d at 982 (recognizing that the court's analysis in adjudicating an anti-SLAPP motion based on legal defects on the face of the pleadings is analogous to that on a Rule 12(b)(6) motion to dismiss.). The court correctly determined that they had not.

As described above, *supra* Section I, the district court correctly held that Plaintiffs failed to state any claim for relief in their complaint because as a matter of law, Mr. Perens's statements were non-actionable opinions based on disclosed facts. I ER 14:2–20:13.

Under this Court's precedent, the fact that the district court correctly granted Mr. Perens's motion to dismiss each of Plaintiffs' claims pursuant to Federal Rule Civil Procedure 12(b)(6) demonstrates that Plaintiffs cannot show a probability of prevailing on those claims under section 425.16. *Vess*, 317 F.3d at 1110; *see also Robinson v. Alameda Cty.*, 875 F. Supp. 2d 1029, 1050 (N.D. Cal. 2012) ("Although a Rule 12(b)(6) Motion does not moot an anti-SLAPP motion to strike, it demonstrates that the Plaintiff cannot show probability of success on the merits of her claim.").

Plaintiffs' arguments regarding the probability of success of their claims for purposes of Mr. Perens's anti-SLAPP motion thus fail for the same reasons the court held in dismissing their claims. Plaintiffs' claims thus could not elude the anti-SLAPP statute.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Dated: August 15, 2018

Respectfully submitted,

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-15189

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

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Signature of Attorney or Unrepresented Litigant [/s/ Jamie Williams] Date [Aug 15, 2018]

("s/" plus typed name is acceptable for electronically-filed documents)

STATEMENT OF RELATED CASES

Open Source Security, Inc. and Bradley Spengler v. Bruce Perens, No. 18-16082, appeals the attorneys' fees awarded to Mr. Perens pursuant to the anti-SLAPP law, Cal. Civ. Proc. Code § 425.16.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that 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 on August 15, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 15, 2018

/s/ *Jamie Williams*
Jamie Williams

Attorney for Appellee Bruce Perens

STATUTORY AND CONSTITUTIONAL ADDENDUM

Cal. Code Civ. P. § 425.16.

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c) (1) Except as provided in paragraph **(2)**, in any action subject to subdivision **(b)**, a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

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(2) A defendant who prevails on a special motion to strike in an action subject to paragraph **(1)** shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision **(d)** of Section 6259, 11130.5, or 54690.5.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: **(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.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j) (1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.