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

OPEN SOURCE SECURITY INC. and	)	Case No.: 3:17-cv-04002-LB
BRADLEY SPENGLER)	
Plaintiffs,)	
v.	)	PLAINTIFFS' NOTICE OF MOTION
	)	AND MOTION FOR PARTIAL
BRUCE PERENS, and Does 1-50,	)	SUMMARY JUDGMENT (DEFAMATION
	)	PER SE);
Defendants.	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES
)	
	)	Hearing Date: November 16, 2017
	)	Time: 9:30 a.m.
	)	Location: Courtroom C, 15th Floor
	)	Judge: Hon. Laurel Beeler
)	
)	

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 16, 2017 at 9:30 a.m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Laurel Beeler, Magistrate Judge of the United States District Court for the Northern District of California (Courtroom C, 15th Floor), located at 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiff Open Source Security, Inc. ("OSS") will and hereby does move the Court for an Order granting partial summary judgment in favor of OSS for Count I of the First Amended Complaint (Defamation *per se*), based on the evidence submitted in the

3:17-CV-04002-LB

1 First Amended Complaint filed on October 2, 2017 (ECF No. 18 and 18-1) and evidence submitted by
2 Perens in his motion to dismiss and special motion to strike, filed on September 18, 2017 (ECF No. 11-
3 1 and 11-2).

4 This motion is being made pursuant to Rule 56 of the Federal Rules of Civil Procedure. Using
5 admissible evidence already gathered by Plaintiffs and further provided by Defendant Perens, this
6 motion is based on the grounds that there is no genuine issue as to any material fact and that plaintiff is
7 entitled to judgment as a matter of law.

8 This motion is based upon this Notice of Motion, the Memorandum of Points and Authorities in
9 support thereof, the files and documents in this action, and all other matters properly presented to the
10 Court prior to its ruling.

11 Pursuant to Civ. L.R. 56-2 and Section V of Hon. Laurel Beeler's Standing Order, no separate
12 or joint statement of facts are being submitted herewith.

13
14
15 Dated this 11th October, 2017.

16 Respectfully Submitted,

17 CHHABRA LAW FIRM, PC

18 /s/Rohit Chhabra

19 Rohit Chhabra

20 Attorney for Plaintiffs

21 Open Source Security Inc. & Bradley Spengler
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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT FOR PARTIAL
SUMMARY JUDGMENT ON COUNT I (DEFAMATION PER SE)**

I. INTRODUCTION

Open source software is computer software that is made available with source code that can be modified, used, or shared under certain defined terms and conditions. One such license is the GNU General Public License version 2 (“GPL”) which defines redistribution rights to any software released under the license. The Linux kernel code is released under the GPL. As stated in the preamble of the GPL, software released under the license is considered “free software,” that is, freedom to distribute (or to not distribute), and developers are free to charge for such distribution as a service, if they wish to do so.

Plaintiff Open Source Security Inc. (“OSS” or “Plaintiff”) is a small private company located in Pennsylvania and develops software code that fixes security vulnerabilities in the Linux kernel code (a concept commonly referred to as *patching* or providing *patches*). OSS releases the *patches*, in source code form, under the GPL, to approximately 45 of its customers (at the time the blog posts were published) via a Stable Patch Access Agreement (“Access Agreement”). In the Access Agreement, OSS’s 45 customers are unequivocally informed that they have all the rights under the GPL for the current *patches* being released. However, OSS further offers an, optional, *incentive* to not redistribute the patches outside the boundaries defined in the Access Agreement if they wish to utilize its server resources and receive continued access to future versions of the *patches*. Plaintiff’s customers can choose to decline this incentive and if they wish to – they are free to redistribute the patches in their possession. Plaintiff can choose not to distribute future releases to any customer since the GPL does not grant an inherent right to future releases (since each version is technically new software and thus needs to be released under its own license). Furthermore, no court of law can ever rule contrary to Plaintiff’s right to terminate access to its server and Internet resources and cancel the Access Agreement of any party (and thus refuse to do business with that party) at its discretion.

1 Defendant Bruce Perens is a famous and well-regarded personality in the open source
2 community. Perens is also respected as an expert in open source matters and has published 24 books on
3 the subject. He has also appeared as an expert witness in court. Perens also thoroughly understands the
4 law. Although not an attorney himself, Perens has taught continued legal education (CLE) to attorneys
5 in many states. Further Perens has also implied that he understands the law better than attorneys
6 admitted to the U.S. Supreme Court. Reasonably, the open source community, including Plaintiffs,
7 have no reason to doubt Perens' knowledge or expertise in the subject matter.

8
9 This action began due to a blog post that was initially published on June 28, 2017, and further
10 updated on July 10, 2017 by Perens, in which he discussed his "strong opinion" on how Plaintiff's
11 customers were subjecting themselves to legal liability by doing business with Plaintiff.

12 The underlying *premise* of both publications was that the GPL "explicitly prohibits the addition
13 of terms such as [those provided by the Access Agreement]." Based on this premise, Perens stated that
14 Plaintiffs' redistribution clause of the Access Agreement was, *as a matter of fact*, violating the GPL,
15 and thus the *patches* were a product of unlicensed work. Based on such a false assertion, Perens
16 expressed his strong opinion stating that Plaintiff's customers were subjecting themselves to potential
17 legal liability under copyright and/or contract law from the creators of the Linux kernel.

18
19 However, Defendant, as an expert in open source matters, knew or reasonably should have
20 known that the Access Agreement, in part, only enforces Plaintiff's freedom to distribute free software
21 as they wish. Defendant knew or should have known, that the Access Agreement does not prevent or
22 restrict a user from exercising their right of redistributing the *patches*, but only defines conditions upon
23 which Plaintiff is willing to offer their customers future access to their server resources and exercise
24 their freedom to distribute future software – a condition beyond the scope of the GPL of the current
25 version of the patches released to Plaintiff's customers.

26
27 Indeed, Perens admitted that Plaintiff was not violating the GPL under the Access Agreement.
28 On July 9, 2017, at or about 5:09 p.m., prior to updating the blog post, Perens, responding to a

commenter on slashdot.org, admitted that “[t]he problem isn’t with the text [of the Access Agreement]. It’s with what else they have told their customers. It doesn’t even have to be in writing. I have witnesses.” However, despite admitting that the Access Agreement was not in violation of the GPL, on July 10, 2017, at or about 8:11 a.m., Perens updated the blog post and explicitly published that the Access Agreement violated the GPL. Reasonably, Perens’ statements in each version of the blog post were published either negligently, maliciously, or a combination thereof, and cannot be considered protected speech.

II. PROCEDURAL HISTORY

The instant matter was initiated on July 17, 2017. On September 18, 2017, Defendant Perens filed a motion to dismiss pursuant to Fed. Civ. P. R. 12 (b)(6) and a special motion to strike pursuant to Cal. Code of Civ. P. §425.16. On Oct. 2, 2017, Plaintiffs filed a first amended complaint and opposition/response to Perens’ motion to dismiss/ special motion to strike. On Oct. 10 2017, Perens filed a motion to withdraw the motion to dismiss and special motion to strike, pursuant to Civ. L.R. 7-7 due to Plaintiffs’ First Amended complaint.

III. ARGUMENT

A. Summary Judgment is Appropriate on Motions Such as This Where Facts Are Not in Dispute and the Only Question Presented is One of Law.

Summary judgment is proper when the moving party can show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is “material” if it “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In this instance, there is no genuine dispute as to any material fact because the issue is one of law. In such instances, summary judgment is not a disfavored procedure. *Tokio Marine & Fire Ins. Co., Ltd. v. United Air Lines, Inc.*, 933 F. Supp. 1527, 1529 (C.D. Cal. 1996). Rather, it is a useful procedural tool in avoiding trial. *Scripps Clinic & Research Foundation v. Genentech, Inc.*, 927 F.2d 1565 (Fed Cir. 1991). It is particularly appropriate

1 where no issues are presented involving the credibility of witnesses, *Earp v. Ornoski*, 431 F.3d 1158,
 2 1170 (9th Cir. 2005), *cert. denied*, 547 U.S. 1159 (2006); motivation or intent, *Douglas v. Anderson*,
 3 656 F.2d 528, 535(9th Cir. 1981); bias, *Alameda Books, Inc. v. City of Los Angeles*, 631 F.3d 1031,
 4 1043 (9th Cir. 2011); or a person's state of mind. *F.T.C. v. Network Services Depot, Inc.*, 617 F.3d
 5 1127, 1139 (9th Cir. 2010). The issues in the present motion involve none of these complications.

6 **B. Summary Judgment Is Particularly Appropriate in Libel Per Se Cases Such as This**
 7 **One Where Only Questions of Law Are Presented.**

8 Under California law, a libel is a written publication made in an unprivileged context that is
 9 false and that causes another to be exposed to hatred, contempt, ridicule or obliquy, or causes him to be
 10 shunned or avoided, or which has a tendency to injure him in his occupation. Calif. Civil Code §45. It
 11 is an invasion of the interest in a person's reputation. *Anthoine v. North. Cent. Counties Consortium*,
 12 571 F.Supp.2d 1173 (E.D. Cal. 2008). California courts have added requirements that such a
 13 publication be intentional in nature and that the publication in question be of a factual nature - i.e.,
 14 susceptible of being proved true or false - rather than an opinion. *Price v. Stoessel*, 620 F.3d 992, 998
 15 (9th Cir. 2010), citing *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 53 Cal Rptr. 3d 752, 764 (2007).

16 However, a defendant cannot hide behind a claim of opinion when the statement in question –
 17 however phrased – states a provable (or disprovable) fact. *Rodriguez v. Panayiotou*, 314 F.3d 979, 985
 18 (9th Cir. 2002); *Milkovich v. Lorain Journal Co.*, 487 U. S. 1, 19 (1990). The dispositive question is
 19 whether a reasonable fact finder could conclude that the relevant statements imply a provably false
 20 factual assertion. *Milkovich*, 497 U.S. at 19. The United States Supreme Court affirmed this rule in
 21 *Milkovich* when it stated, “[e]ven if the speaker states the facts upon which he bases his opinion, if
 22 those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement
 23 may still imply a false statement of fact. *Id.* at 19-20. Thus, a false assertion of fact [can] be libelous
 24 even though couched in terms of opinion. *Moyer v. Amador Valley Joint Union High Sch. Dist.*, 225
 25 Cal.App.3d 720, 723 (1990).
 26
 27
 28

Courts have also held that the publication must be made to one or more persons who understand its defamatory meaning and application to the injured party. *Scott v. Solano County Health and Social Services Department*, 459 F.Supp.2d 959 (E.D. Cal. 2006). A libel that is defamatory without the need to introduce explanatory matter is libel on its face or "per se" libel. *Slaughter v. Friedman*, 185 Cal. Rptr. 244, 32 Cal. 3d 149, 649 P.2d 886. Such a libel is one that has a natural tendency to injure a person's reputation. *Taus v. Loftus*, 54 Cal. Rptr. 3d 775, 804, 40 Cal 4th 683, 151 P.2d 1185 (Cal. 2007). California courts have imposed virtually no restrictions on what kinds of publications may be held libelous per se. The publication, furthermore, does not have to state explicitly the defamation that is intended. *Condit v. National Enquirer, Inc.*, 248 F.Supp.2d 945 (E.D. Cal. 2002) (newspaper article regarding alleged "blowup phone call" between wife of former United States Congressman and intern with whom he allegedly had an affair, which referred to such call as a "heated phone screamfest" and stated that wife was "enraged," was reasonably susceptible of defamatory meaning; such statements attributed to wife a bitter and angry disposition, intemperance, and loss of control, which could subject her to contempt and humiliation). Libels per se are actionable even if they are susceptible to innocent interpretations. *MacLeod v. Tribune Pub. Co.*, 343 P.2d 36, 52 Cal.2d 536 (Cal. 1959). Finally, whether a publication is libelous on its face is a question of law. *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1010 (9th Cir. 2001); (citing *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 695 (9th Cir. 1998)). If a publication is shown to be libelous per se, furthermore, damages are presumed. *Clark v. McClurg*, 215 Cal. 279, 284, 9 P.2d 505 (Cal. 1932). In both instances, no factual inquiry is required. Summary judgment motions, therefore, are particularly appropriate where, as here, a libel per se is alleged.

C. The primary question here is whether Defendants' statements in the updated publication of July 20, 2017, that Plaintiff's Access Agreement is in violation of the GPL and thus, by trade of the Grsecurity product, was subjecting its customers to legal liability are Libelous per se.

There is no dispute that Plaintiff's Stable Patch Access Agreement ("Access Agreement"), states, in part:

1 The User has all rights and obligations granted by grsecurity's software
 2 license, version 2 of the GNU GPL. These rights and obligations are listed
 at <http://www.gnu.org/licenses/old-licenses/gpl-2.0.en.html>.

3 Notwithstanding these rights and obligations, the User acknowledges that
 4 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.

5 *See* First Amended Complaint ("FAC") ¶18, emphasis in original.

6 There is no dispute that section 6 of the GPL states, in part:

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

See FAC ¶ 14.

11 There is no dispute that Plaintiff releases its patches under the trade name of Grsecurity and
 12 releases the software under the GPL. *See* FAC ¶¶ 12, 13, and 15. There is no dispute that Perens, on
 13 July 10, 2017, at or about 8:11 a.m. (pacific time), updated his blog post. *See* FAC ¶33; Also see FAC
 14 Exhibit 10. There is also no dispute that in the updated blog post, Perens published the following
 15 statements:
 16

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

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

28 *See* FAC Exhibit 2; *Also see* FAC ¶48.

1 There is no dispute that these statements were widely disseminated and read by the open source
2 community, at large. *See* FAC ¶¶ 65 – 67. There is also no dispute that the Posting was reasonably
3 understood by the reader to mean that Plaintiff was in violation of the GPL and that thus by its trade of
4 Grsecurity was subjecting its customers to legal liability; therefore, its customers should avoid doing
5 business with Plaintiff. *See generally* Defendant’s Exhibit A, Perens’ motion to dismiss and special
6 motion to strike (ECF No. 11-2).

7
8 There is no dispute that Perens is an expert in open source matters and has a thorough
9 understanding of the law as it relates to open source matters. *See* FAC ¶¶ 33 – 40. There is also no
10 dispute that Perens has admitted that Plaintiff’s Access Agreement does not violate the GPL. *See* FAC
11 ¶¶ 44 – 45. Further, there are no evidentiary issues of Perens’ statements above being admitted into
12 evidence, since Perens, via his attorney, has admitted that the cited statements were made by him. *See*
13 Decl. Drummond- Hansen, ¶ 2, (ECF No. 11-1).

14
15 There is also no dispute that Perens failed to use reasonable care to determine the truth or
16 falsity of the above presented statements of the updated July 10, 2017 blog post. This is clear since:

17 (a) Perens initially published the blog post on June 28, 2017, without even seeing the
18 subscription agreement, claiming that he had “several reliable sources ...” that Plaintiff had introduced
19 terms in the Access Agreement that resulted in the Grsecurity product violating the GPL. *See* FAC ¶
20 42; *Also see* FAC, Ex. 1.

21 (b) On July 9, at or about 4:58 p.m. Perens was provided a web-link to the Access Agreement
22 via a slashdot.org user. *See* FAC ¶ 44. *Also see* Defendant’s Ex. A, page 11 (ECF No. 11-2).

23 (c) On July 9, 2017, at or about 5:09 p.m., Perens acknowledged that the Access Agreement
24 was not in violation of the GPL, stating “[t]he problem isn't with the text [of the Access Agreement].
25 It's with what else they have told their customers. It doesn't even have to be in writing. I have
26 witnesses.” *See* FAC ¶ 45.
27
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(d) On July 10, at or about 8:11 a.m., Perens deleted all statements from his blog post relating to “reliable sources” (or witnesses) that could confirm Plaintiff was adding terms that violated the GPL, but instead explicitly stated, “Grsecurity’s Stable Patch Access Agreement adds a term to the GPL prohibiting distribution or creating a penalty for distribution. GPL section 6 specifically prohibits any addition of terms.” *See* FAC, Ex. 2; FAC ¶48.

(e) Further, Perens is an expert in open source matters and cannot be held to the standard of an ordinary prudent person of the open source community, but has to be held to a standard of an expert in open source matters as it relates to the law.

Notwithstanding the above, this Court should take judicial notice to the following:

(i) Customers are not restricted in their ability to redistribute the Grsecurity product and exercise their rights under the GPL, if they opt to do so.

Perens knew or should have known that Plaintiff is not restricting the redistribution rights of any party, as its customers can opt to not receive future versions of the software and exercise their redistribution rights under the GPL.

(ii) Each version of Grsecurity is released under its own license.

Perens knew or should have known that each GPL license pertains to only software released using such license; each update or version is technically a new software which needs to be released under a license of its own. Perens knew or should have known that there is no term or condition within the GPL that even remotely suggests to the contrary.

(iii) Plaintiff is also a licensee of the Linux kernel code under the GPL and has the freedom to distribute each version of its software at its discretion.

The GPL, in part states:

When we speak of free software, we are referring to freedom, not price. Our General Public Licenses are designed to make sure that **you have the freedom to distribute copies of free software (and charge for this service if you wish)**, that you receive source code or can get it if you want it, that you can change the software or use pieces of it in new free

1 programs; and that you know you can do these things.
2 See FAC ¶19, (emphasis added).

3 Also, it is undisputed that “a trader or manufacturer ...[that] carries on an entirely private
4 business, and can sell to whom he pleases; ... he may cease to do any business whenever his choice lies
5 in that direction... .” *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 320-21
6 (1897). Further, “[a] manufacturer of course generally has a right to deal, or refuse to deal, with
7 whomever it likes, as long as it does so independently.” *Monsanto Co. V. Spray-Rite Service Corp.* 465
8 U.S. 752, 761 (1984).

9 Since Plaintiff is a licensee of the Linux kernel code under the GPL and modifies the kernel
10 code via *patches* (in the form of Grsecurity), the GPL provides Plaintiff “**the freedom to distribute**
11 **copies of free software (and charge for this service if you wish).**” Since each version of Grsecurity
12 is distributed under an explicit GPL license, Plaintiff has the freedom to distribute copies of the kernel
13 code software, at its discretion. Thus, the GPL provides Plaintiff the freedom to distribute each version
14 of its Grsecurity product at its discretion and choose its redistribution without violating the GPL.

15 Needless to say, such an interpretation has to be deemed reasonable since Plaintiff is only
16 restricting itself from choosing with whom it will do future business, and “has a right to deal, or refuse
17 to deal, with whomever it likes, as long as it does so independently.” Plaintiff’s customers also have a
18 right to deal or refuse to deal with whomever they like, and customers can opt to not receive future
19 versions of Grsecurity from Plaintiff and are thus free to exercise their rights (redistribute, modify,
20 share, etc.) the Grsecurity product, as provided in the GPL. Therefore, based on existing case law,
21 Plaintiff cannot legally be deemed in violation of the GPL.

22 (iv) Statement(s) that the Access Agreement of the Grsecurity product is in violation of the
23 GPL, in the updated blog post, is defamatory on its face.

24
25 However, as Perens stated in his (now withdrawn) motion to dismiss and special motion to
26 strike, this Court does not need to rule on whether Plaintiff’s Access Agreement is in violation of the
27 GPL. The issue of defamation per se for this motion of partial summary judgment is limited to the
28 updated blog post in which Perens imputed that the Access Agreement violates the GPL. However, by

1 his own admission, Perens had admitted that the Access Agreement did not violate the GPL. Therefore,
2 the publication of the statement(s) in the updated blog post should be deemed defamatory on its face.

3 **IV. CONCLUSION**

4 For the reasons set forth above, Perens' statements in the updated blog post are false and
5 defamatory imputing that Plaintiff's Grsecurity product is in violation of the GPL, or was subjecting
6 Plaintiff's customers to legal liability. Such statements have a natural tendency to injure the reputations
7 of all those associated with the Grsecurity product. It is thus libelous per se, and this Court should enter
8 judgment accordingly. A hearing on damages arising from such injury should be held in the damages
9 phase of this proceeding upon the resolution of the remaining counts. At that time, Plaintiffs will
10 reiterate their claim for punitive damages since Defendants' libel was done intentionally and with
11 callous disregard for the injury that it inflicted.
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15 Dated this 11th October, 2017.

16 Respectfully Submitted,

17 CHHABRA LAW FIRM, PC

18 /s/Rohit Chhabra

19 Rohit Chhabra

20 Attorney for Plaintiffs

21 Open Source Security, Inc. & Bradley Spengler
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