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12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO**

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16 OPEN SOURCE SECURITY, INC., and
BRADLEY SPENGLER,

17 Plaintiffs,

18 v.

19 BRUCE PERENS, and Does 1-50,

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

**DEFENDANT BRUCE PERENS'S
ADMINISTRATIVE MOTION
PURSUANT TO CIV. L.R. 7-11 FOR
LEAVE TO FILE A SURREPLY AND
SUPPLEMENTAL DECLARATION**

Hearing Date: December 14, 2017
Time: 9:30 a.m.
Location: Courtroom C, 15th Floor
Judge: Hon. Laurel Beeler

Pursuant to Civil L.R. 7-11, Defendant Bruce Perens seeks leave to file a four-page surreply and supporting declaration in opposition to Plaintiff Open Source Security, Inc.’s (“OSS”) Motion for Partial Summary Judgment (ECF No. 24). Mr. Perens request leave to file the surreply and declaration to address inaccurate characterizations of his statements presented in OSS’s Reply (ECF No. 37) and to provide additional information located in response to OSS’s Reply regarding when Mr. Perens first reviewed the Grsecurity Stable Patch Access Agreement. Mr. Perens’s proposed surreply and supplemental declaration are attached hereto as Exhibits A and B, respectively.

In its Reply, OSS misconstrues statements made by Mr. Perens in a July 9, 2017 comment on the Slashdot website and in his October 31, 2017 Declaration (ECF No. 32-3), speculating that Mr. Perens must have reviewed the Grsecurity Agreement before posting his July 9 Slashdot comment and necessarily was opining that the Agreement did not violate the GPL. *See* Reply at 3–5. OSS argues that this demonstrates that Mr. Perens therefore admits that statements in his July 10, 2017 updated blog post that the Agreement violates the GPL were false. *Id.*

Mr. Perens disputes OSS’s characterizations of his statements and the conclusions that OSS draws from them. In order to put to rest OSS’s insistence that Mr. Perens reviewed the Grsecurity Agreement before posting his July 9 Slashdot comment, Mr. Perens also searched his files and located emails demonstrating that he did not see a copy of the Grsecurity Agreement until the next day, July 10, 2017. Mr. Perens provided these emails to OSS on November 18, 2017 and attaches them to his proposed supplemental declaration. *See* accompanying Declaration of Melody Drummond Hansen ¶ 2; Ex. B at Exs. 1–3.

Because OSS’s Reply both introduces disputed assertions for the first time and mischaracterizes several of Mr. Perens’s statements, Mr. Perens requests leave to file a short surreply and supporting declaration that address these issues. This Court has previously granted leave to file a surreply to “ensure a clean record” and to “address new facts.” *Hill v. Kaiser Found. Health Plan, Inc.*, No. 3:10-CV-02833-LB, ECF No. 320 (N.D. Cal. Aug. 5, 2016). Other courts within the Northern District have similarly granted parties leave to file surreplies in order

1 to “correct [opposing] counsel’s mischaracterization of the facts.” *See, e.g., Prather v. AT & T*
2 *Inc.*, 996 F. Supp. 2d 861, 865 (N.D. Cal. 2013), *aff’d*, 847 F.3d 1097 (9th Cir. 2017). Moreover,
3 courts routinely grant leave to file a surreply when a movant misrepresents facts or presents new
4 argument in its reply brief. *See, e.g., Toomey v. Nextel Commc’ns, Inc.*, No. C–03–2887 MMC,
5 2004 WL 5512967, at *1 (N.D. Cal. Sept. 23, 2004). Mr. Perens respectfully asks that he
6 similarly be granted leave.

7 Mr. Perens’s counsel has complied with Civil L.R. 7-11 and sought OSS’s stipulation to
8 file the proposed surreply and declaration. Drummond Hansen Decl. ¶¶ 2–3. The parties were
9 unable to reach an agreed stipulation. *Id.* ¶ 3.

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11 Dated: November 24, 2017

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16 By: /s/ Melody Drummond Hansen
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