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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO

OPEN SOURCE SECURITY, INC., and
BRADLEY SPENGLER,

Plaintiffs,

v.

BRUCE PERENS, and Does 1-50,

Defendants.

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

**DEFENDANT BRUCE PERENS'S
RESPONSE MEMORANDUM TO
PLAINTIFFS' SUPPLEMENTAL
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS AND SPECIAL
MOTION TO STRIKE**

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

1 After multiple rounds of briefing over three months, Plaintiffs now seek to file a
 2 Supplemental Memorandum because on December 11, “Plaintiff[s]” counsel was finally able to
 3 find a relevant case.” Mot. (ECF. No. 45) at 1:10. Contrary to Plaintiffs’ assertions, though,
 4 *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688 (2007)¹ does not address a
 5 “very similar fact pattern” (*Id.* at 1:9, 17) or a “very similar issue” (Supp. Br. (ECF No. 45-1) at
 6 1:2) to this case.

7 The defendant in *Overstock* was Gradient Analytics, a firm that provided analytical
 8 reports on publicly traded companies to large institutional investors who subscribed to the
 9 service, some of whom paid tens of thousands of dollars for the reports. 151 Cal. App. 4th at
 10 693–94. While Gradient advertised its reports as “independent and objective,” *id.* at 710,
 11 Gradient actually allowed certain customers to commission negative reports on companies,
 12 including where those customers planned to “short” the stock of the companies (*i.e.*, sell the stock
 13 with the hope of buying it back at a lower price after the stock price falls). *Id.* at 694–95.
 14 Gradient customer Rocker Partners commissioned such negative reports regarding Overstock
 15 (whose stock Rocker planned to short), *id.* at 696–97, and Gradient wrote several negative reports
 16 about Overstock at Rocker’s request, giving the company a “D” or an “F” rating and listing
 17 Overstock in multiple “greatest concerns” listings. *Id.* at 697, 703. Rocker discussed the reports
 18 with Gradient in advance of publication and suggested changes that would emphasize negative
 19 aspects, add negative facts, or suggest a more negative perspective than in the drafts, and
 20 Gradient obliged those requests without disclosing Rocker’s participation in the reports. *Id.* at
 21 696–97, 710, 714. Gradient published false statements in biased reports in collusion with Rocker
 22 to drive down the price of Overstock’s stock, and succeeded in that goal. *Id.* at 698, 710–11, 718.
 23 In this case, Mr. Perens, a private individual, published his opinions as *opinions* on his blog and
 24 the Slashdot public forum as part of a public debate about whether OSS’s restrictions (and similar
 25
 26

27 ¹ *Overstock* is not new—it is a decade old and cites *Wilbanks v. Wolk*, 121 Cal. App. 4th 883
 28 (2004), precedent first cited in Defendant’s first anti-SLAPP motion and motion to dismiss on
 September 18, 2017. (*See* ECF No. 11 at 9-10.)

provisions) violate Open Source obligations under the GPL—an unsettled question of law. There simply is no similarity between the cases.

Attempting to force this case to match *Overstock*, Plaintiffs wholly ignore the facts and reasoning there. For example, Plaintiffs focus narrowly on Gradient’s statement that Overstock’s policies “violate[d] the intent (if not the form) of GAAP” (Generally Accepted Accounting Principles), arguing that there is similarity between the GPL and GAAP. *See* Supp. Br. at 1, 3. *Overstock*, however, did not turn on Gradient’s statement regarding violations of GAAP alone but instead 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). Other examples included assertions that “Overstock was ‘cooking the books’ and manipulating accounting procedures to boost the price of its stock”; Overstock overstated its sales; Overstock’s change in revenue recognition was implemented in an effort to drive revenues and share price up; Overstock’s CFO resigned because of the revenue recognition model; Overstock was not taking on general inventory risk; the primary causes for returns were causes other than buyer’s remorse; and the company did little more than provide a software interface for the majority of returns. *See id.* at 702–04. Not only were these provably false factual assertions, Overstock presented evidence that they were false. *See id.* 702–04, 706–08. Plaintiffs ignore that the accused statements here, unlike those in *Overstock*, involve interpretations of unsettled matters of law, which at a minimum require a “clear and unambiguous” ruling from a court or regulatory agency to be actionable statements of fact. *See Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999).

Plaintiffs likewise ignore holdings in cases much more analogous to this one, which involved statements—including statements published in blog posts—opining that plaintiffs had engaged in copyright infringement or breaches of contract. *See, e.g., Franklin v. Dynamic Details, Inc.*, 116 Cal. App. 4th 375 (2004); *Amaretto Ranch Breedables, LLC v. Ozimals, Inc.*, No. CV 10-5696 CRB, 2013 WL 3460707 (N.D. Cal. July 9, 2013), *Freecycle Network Inc. v. Oey*, 505 F.3d 898 (9th Cir. 2007). Those cases applied the *Coastal Abstract* rule to hold that

1 such statements are nonactionable opinions, and all three of the above examples were cited in Mr.
2 Perens's motions. *See id.* and Mot. (ECF No. 30) at 15. Plaintiffs have never so much as
3 acknowledged the existence of those cases, let alone respond to them.

4 Plaintiffs also take *Overstock*'s words out of context to argue "Gradient also held itself out
5 to its subscribers as having specialized knowledge" and "its readers relied on its opinions [as]
6 reflecting the truth about Overstock." Supp. Br. at 2. But Plaintiffs ignore the very different
7 nature of the reports provided by Gradient, which were presented as "independent and objective"
8 when in fact they were biased and commissioned by a third party who was shorting Overstock's
9 stock. Indeed, in finding Gradient's statements actionable, the *Overstock* court distinguished
10 commentary from another case where the context forewarned the reader that what followed was
11 "one person's opinion." 151 Cal. App. 4th at 705. No matter how informed Mr. Perens may be,
12 his opinions still are "one person's opinion" and were presented as such.

13 Plaintiffs then suggest a new theory: that Mr. Perens's statements are actionable because
14 he states that Plaintiffs violate the GPL "with the implication that Plaintiffs have engaged in
15 unethical business practices which would risk liability on Plaintiffs customers or have engaged at
16 least in conduct, characteristics, or a condition that was incompatible with the proper exercise of
17 their lawful business, trade, or profession." Supp. Br. at 2. Despite Plaintiffs' convoluted new
18 wording, Plaintiffs do not explain how Mr. Perens's opinions imply any business practice beyond
19 OSS's undisputed policy on redistribution.

20 Plaintiffs also suggest that *Overstock* somehow newly supports that Mr. Perens had
21 "serious doubts" regarding the truth of his publication, but they merely rehash previous theories
22 that Mr. Perens "admitted" the Grsecurity Agreement does not violate the GPL and that there
23 cannot be witnesses regarding OSS's restrictions. Supp. Br. at 4. These theories were debunked
24 by previous briefing. *See, e.g.*, Reply at 10–11; Surreply re MPSJ at 1–3. And while Plaintiffs
25 suggest without explanation that *Overstock* supports their intentional interference claim (Supp.
26 Br. at 4), that claim fails for the same reasons as the defamation claims. *See, e.g.*, Mot. at 22–23.

27 For these reasons, Plaintiffs have not demonstrated that they have a probability of success
28 on the merits of their claims, and their claims should be stricken and dismissed.

1 Dated: December 13, 2017

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