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25 *Attorneys for Defendants Automattic Inc. and*  
26 *Matthew Charles Mullenweg*

27 **IN THE UNITED STATES DISTRICT COURT**  
28 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

WPENGINE, INC., a Delaware corporation,  
Plaintiff,

vs.

AUTOMATTIC INC., a Delaware  
corporation; and MATTHEW CHARLES  
MULLENWEG, an individual,

Defendants.

Case No. 3:24-cv-06917-AMO

**DEFENDANTS AUTOMATTIC INC. AND  
MATTHEW CHARLES MULLENWEG'S  
ADMINISTRATIVE MOTION FOR  
LEAVE TO FILE SURREPLY IN  
OPPOSITION TO MOTION FOR  
PRELIMINARY INJUNCTION**

Judge: Hon. Araceli Martinez-Olguin  
Courtroom: 3, 3rd Floor, Oakland  
Hearing Date: November 26, 2024  
Hearing Time: 10:30 a.m.

1 Pursuant to Local Rule 7-11, Defendants Automattic Inc. and Matthew Charles Mullenweg  
 2 (collectively, “Defendants”) file this administrative motion to respectfully seek leave of the Court  
 3 to file the attached short five-page Surreply in order to highlight misrepresented evidence and  
 4 caselaw raised for first time by Plaintiff WP Engine Inc. (“WP Engine”) in its reply brief in support  
 5 of its motion for preliminary injunction (“Reply”).

6 This Court may grant leave to file a Surreply and “[a] decision to grant or deny leave to file  
 7 a sur-reply is generally committed to the sound discretion of the court.” *Warren v. City of Chico*,  
 8 No. 2:21-CV-00640-DAD-DMC, 2024 WL 4803960, at \*1 (E.D. Cal. Nov. 15, 2024) (citing  
 9 *Toungset v. Valley-Wide Recreation & Park Dist.*, No. 16-cv-00088-JGB-KK, 2020 WL 8410456 at  
 10 \*2 (C.D. Cal. Feb. 20, 2020) (acknowledging discretion to permit Surreply)); *see also In re*  
 11 *PersonalWeb Technologies, LLC, et al.*, No. 18-md-02834-BLF, 2019 WL 1975432, at \*1 (N.D.  
 12 Cal. Feb. 6, 2019) (granting administrative motion for leave to file Surreply). Courts “should”  
 13 exercise their discretion to allow a surreply “where a valid reason for such additional briefing exists,  
 14 such as where the movant raises new arguments in its reply brief.” *Id.*; *see also Baxter Bailey &*  
 15 *Assocs. v. Ready Pac Foods, Inc.*, No. CV 18-8246 AB (GJSX), 2020 WL 3107889, at \*1 (C.D.  
 16 Cal. Feb. 14, 2020) (indicating that Surreplies can be warranted where the reply brief raises “new  
 17 arguments” or “evidence,” or “cites . . . new law”). Surreplies promote the “interest of fairness” by  
 18 allowing parties “an opportunity to respond” to evidence or arguments “submitted for the first time  
 19 in a reply brief.” *Sherman v. Yahoo! Inc.*, No. 13CV0041-GPC-WVG, 2015 WL 5604400, at \*3  
 20 (S.D. Cal. Sept. 23, 2015).

## 21 I. BACKGROUND

22 On November 4, 2024, WP Engine filed its Reply. ECF No. 44. The next day (November  
 23 5), WP Engine represented that it would be filing an amended complaint (“Amended Complaint”),  
 24 which was ultimately filed on November 14, 2024. ECF No. 48 at 1; ECF No. 51. Defendants  
 25 waited for the Amended Complaint to be filed to determine whether it would moot in part or in  
 26 whole the Motion for Preliminary Injunction. Having now reviewed the 144-page Amended  
 27 Complaint, Defendants do not believe that it moots the outstanding preliminary injunction motion.  
 28 As a result, Defendants believe the Court would benefit from – and Defendants seek a fair

1 opportunity to submit – a response in advance of the November 26, 2024 hearing to new evidence  
2 and arguments WP Engine raised for the first time in its Reply.

3 Although WP Engine’s Amended Complaint influenced the timing of this motion,  
4 Defendants do not understand the Amended Complaint to be at issue at the November 26 hearing.  
5 That hearing is scheduled to address issues raised in WP Engine’s preliminary injunction motion,  
6 which was based on its original Complaint. As WP Engine itself admits, the Amended Complaint  
7 – which has not yet been responded to – has no impact on the Motion for Preliminary Injunction  
8 currently pending. *See* ECF No. 48 at 3 (“[W]here (as here) the amendments to the complaint will  
9 not alter the core issues raised in the preliminary injunction motion, the filing of an amended  
10 complaint has no impact on the preliminary injunction proceedings.”).

## 11 II. ARGUMENT

12 WP Engine’s Reply in Support of Its Motion for Preliminary Injunction (“Reply”) contains  
13 new evidence and arguments that Defendants seek leave of the Court to address.

14 First, with respect to new evidence, WP Engine repeatedly relies on a quote it attributes to  
15 Defendant Matt Mullenweg (“Matt”) – a quote that Matt never said. WP Engine’s concocted  
16 quotation is in fact an amalgamation of phrases taken out of context over a nearly twenty-one minute  
17 span of time. *See* Reply, ECF No. 44, at 1. Defendants request the opportunity to file a Surreply  
18 in order to present the full context of statements made during Matt’s interview, which do not support  
19 WP Engine’s assertions that Defendants “admit they have harmed” WP Engine and have “made  
20 multiple threats of future harm.” *Id.*

21 Second, in support of its attempted extortion claim, WP Engine launches new arguments that  
22 misconstrue case law cited for the first time in its Reply. For example, relying on *Tran v. Nguyen*,  
23 97 Cal. App. 5th 523 (2023), WP Engine argues that a common law civil cause of action for  
24 attempted extortion exists independently of the criminal law. Reply, ECF No. 44, at 9. But the  
25 common law claim referenced in *Tran* was the cause of action to recover money based on duress—  
26 a claim that, at a minimum, requires proving Defendants knowingly made a false statement of fact  
27 that caused WP Engine to pay money *as a result of* the alleged threats. *Id.* at 531-32; *see also Raiser*  
28 *v. Ventura Coll. of L.*, No. CV-09-00254 RGK (AGR<sub>x</sub>), 2009 WL 10692058, at \*2 (C.D. Cal. Sept.

1 1, 2009); *Intermarketing Media, LLC v. Barlow*, No. 8:20-CV-00889-JLS (DFMx), 2021 WL  
2 5990190, at \*12-13 & n.11 (C.D. Cal. May 4, 2021). To the extent WP Engine now seeks to raise  
3 such a claim, it has not offered evidence to prove those elements in its Motion for Preliminary  
4 Injunction. WP Engine further argues that *Monex Deposit Co. v. Gilliam*, 666 F. Supp. 2d 1135  
5 (C.D. Cal. 2009), and *Cohen v. Brown*, 173 Cal. App. 4th 302 (2009), support its claim for attempted  
6 extortion. Reply, ECF No. 44, at 9-10. Yet neither of those cases involved an *attempted* civil  
7 extortion claim.

8 **III. POSITION OF WP ENGINE ON THE MOTION**

9 Defendants contacted WP Engine to obtain its position on Defendants' Motion. It is  
10 Defendants' understanding that WP Engine opposes the Motion.

11 **IV. CONCLUSION**

12 For the reasons above, Defendants respectfully request that this Court issue an order granting  
13 this Motion and accepting the attached Surreply for filing.

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15 Dated: November 21, 2024

Respectfully submitted,

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By: /s/Michael M. Maddigan

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