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10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF MARIN

13 MAGICJACK, LP,

14 Plaintiff,

15 v.

16 HAPPY MUTANTS LLC,

17 Defendant.

CASE NO. CIV 091108

**NOTICE OF MOTION AND SPECIAL
MOTION OF DEFENDANT HAPPY
MUTANTS LLC TO STRIKE
COMPLAINT OF PLAINTIFF
MAGICJACK, LP PURSUANT TO
CALIFORNIA'S ANTI-SLAPP STATUTE,
CAL. CODE CIV. P. § 425.16;
MEMORANDUM OF POINTS AND
AUTHORITIES**

DECLARATIONS OF CORY DOCTOROW,
MARC E. MAYER, AND JILL P. RUBIN
FILED CONCURRENTLY HERewith

Date: May 27, 2009
Time: 9:00 a.m.
Location: Dept. J
Judge: Honorable Verna Adams

File Date: March 11, 2009
Trial Date: TBD

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Special Motion to Strike

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1 Introduction

2 This is precisely the type of bad-faith, strategic lawsuit that the California legislature
3 sought to prevent when it enacted the anti-SLAPP statute, Cal. Code Civ. P. § 425.16. MagicJack,
4 LP (“MagicJack”), the distributor of an Internet telephone device and subscription service, has
5 brought this meritless lawsuit against Happy Mutants LLC, owner of the highly respected and
6 influential website known as “Boing Boing” (“Boing Boing”), for one reason only: to put a stop to
7 public debate and criticism concerning MagicJack’s unusual and invasive end-user license
8 agreement (“EULA”). By its own terms, MagicJack’s EULA – which is automatically imposed
9 on MagicJack’s customers when they install the MagicJack device and cannot be opted-out of or
10 amended - forces every MagicJack user to permit MagicJack to “analyze” their phone calls. Boing
11 Boing’s pointed discussion of the resultant privacy and due process issues surrounding
12 MagicJack’s EULA is protected by the First Amendment. MagicJack’s attempt to silence that
13 debate through costly legal proceedings perfectly illustrates the need for early dismissal under the
14 anti-SLAPP statute. If permitted to proceed, MagicJack’s lawsuit threatens to have a chilling
15 effect not just on Boing Boing, but more generally on public criticism and debate concerning
16 corporate practices and consumer privacy rights.

17 Notwithstanding the rhetoric contained in MagicJack’s Complaint, all that is at issue in this
18 lawsuit is an approximately 200-word “blog”¹ post on the Boing Boing website, by technology
19 commentator and Boing Boing Gadgets editor Rob Beschizza (the “Beschizza Post”). The
20 Beschizza Post, written in the humorous and biting style that is the hallmark of “Boing Boing,”
21 first extensively quoted the MagicJack EULA, verbatim. It then criticized certain provisions of
22 MagicJack’s EULA, specifically those that require users to receive advertisements, permit
23 MagicJack to “analyze” a user’s telephone calls (and calling patterns), and require all users
24 (irrespective of their residence) to submit any claims against MagicJack to binding arbitration in
25 Florida. The Beschizza Post also took issue with a “ticker” on MagicJack’s website that *purports*

26
27 ¹ A “blog” (a contraction of the term “weblog”) “is a type of website, usually maintained by an
28 individual with regular entries of commentary, descriptions of events, or other material such as
graphics or video.” See <http://en.wikipedia.org/wiki/Blog>.

1 to track the number of people who “came for our Free Trial Offer today,” but in truth
2 automatically counts upwards based on a pre-determined algorithm reflecting the previous day’s
3 visits to the website (irrespective of whether those visits were of “unique” users or whether any of
4 those users actually “came for” a “free trial”). MagicJack never contacted Boing Boing about the
5 Beschizza Post. Nor did it post a public response to the Beschizza Post (as all Boing Boing
6 readers are invited to do). Instead, MagicJack simply filed this lawsuit. Apparently concerned
7 about public disclosure of the terms of its EULA, and unwilling to publicly discuss those terms
8 (either with the public or with its consumers), MagicJack’s Complaint seeks to compel Boing
9 Boing to remove the Beschizza Post and to post a retraction on its homepage “that expressly
10 denounces” the Beschizza Post. MagicJack also seeks general, compensatory, special, and
11 punitive damages against Boing Boing.

12 MagicJack’s Complaint should be stricken under California’s anti-SLAPP statute, because
13 all of its claims arise from protected activity “in furtherance of [Boing Boing’s] right of petition or
14 free speech under the United States or California Constitution in connection with a public issue.”
15 Cal. Code Civ. P. 426.16 (b)(1). As such, MagicJack cannot proceed with its claims unless it
16 meets its burden of proving, through competent admissible evidence, that there is a *probability*
17 that it will prevail on this claim. It cannot do so, including because each of the four statements at
18 issue is either demonstrably true and/or constitutes “rhetorical hyperbole” or opinion that is
19 protected under the First Amendment. Three of the statements merely concern and fairly criticize
20 (as “snooping,” “spying,” and “privacy invasion”) the EULA’s requirement that MagicJack users
21 consent to allow MagicJack to “analyze” their telephone calls. The fourth correctly and truthfully
22 debunks the MagicJack “ticker,” which MagicJack *admits* does not actually measure what it
23 purports to. Thus, as a matter of law and undisputed fact, none of the four statements can give rise
24 to a claim for defamation or unfair competition.

25 MagicJack’s desire to avoid or stifle the inevitable public criticism from requiring its users
26 to sacrifice their privacy rights and allow MagicJack to “analyze” their phone calls is not
27 surprising. But the biting commentary provided by Boing Boing is exactly the type of speech that
28 the First Amendment protects, and California’s anti-SLAPP statute was expressly written to

1 prevent companies from stifling criticism with the threat of a lawsuit. See Gilbert v. Sykes, 147
2 Cal. App. 4th 13, 21-22 (2007) (the anti-SLAPP statute “was enacted in 1992 to dismiss at an
3 early stage nonmeritorious lawsuits litigation meant to chill the valid exercise of the constitutional
4 rights of freedom of speech and petition in connection with a public issue”). The Court should
5 grant Boing Boing’s motion, strike the Complaint, and award Boing Boing its reasonable
6 attorneys’ fees and costs incurred in its defense of this frivolous lawsuit.

7 **I. STATEMENT OF FACTS.**

8 **Boing Boing.** Boing Boing is one of the longest running and most well-respected online
9 journals on technology and culture. Boing Boing originally was founded in 1988 as a print
10 magazine. In 1995, Boing Boing changed formats and became an Internet website. Declaration of
11 Cory Doctorow (“Doctorow Decl.”), ¶ 3. In 2000, it was re-launched as a weblog (or “blog”), and
12 (in its characteristic tongue-and-cheek style) a “Directory of Wonderful Things.” Boing Boing is
13 edited by four well-known journalists and writers on technology issues (Mark Frauenfelder, Cory
14 Doctorow, David Pescovitz, and Xeni Jardin).² Id.,

15 The Boing Boing website features news, editorials, product reviews and insights, and
16 social and political commentary both on its homepage (located at www.boingboing.net), and on
17 related, “sub” pages, including “BBGadgets” (discussing and reviewing consumer technology)
18 and “BBOffworld” (discussing computer and video games). Doctorow Decl., ¶ 5. The editorial
19 focus of Boing Boing has always been the nexus of culture, technology, politics and art. Id. ¶ 6.
20 In a typical day, Boing Boing editors post some 50-60 short items, sourced from reader
21 suggestions or discovered independently through review of hundreds of websites, newsfeeds and
22 other sources. Id. These items typically consist of a short blurb, a quotation from the website
23 under discussion (sometimes including a video clip or still image) and a link to the website. Id.
24 Each item also includes a message-board in which readers, contractor moderators, and the editors

25 ² All four Boing Boing editors are, or have been, contributing writers for *Wired* magazine. In
26 addition, Doctorow is the author of the popular, critically acclaimed, and Hugo-nominated novels
27 “Down and Out In the Magic Kingdom,” and “Little Brother.” Xeni Jardin is a regular technology
28 commentator for National Public Radio. Pescovitz is co-author of the book “Reality Check” and
has contributed to Scientific American, Popular Science, the New York Times, the Washington
Post, New Scientist, and Business 2.0. Doctorow Decl., ¶ 2, 3.

1 discuss the post. Id., ¶ 6. Boing Boing’s verbal style is intentionally hyperbolic, acerbic, or wry.
2 Id., ¶ 8. The approach of Boing Boing is to use humor to influence technological policy, law and
3 norms to the advantage of citizens and consumers. Id.

4 Since its inception, Boing Boing has provided public commentary and discussion on
5 innumerable issues of public interest and concern relating to new technologies, including the
6 intersection of technology, culture, intellectual property, privacy and free speech. Doctorow
7 Decl., ¶ 9. For example, Boing Boing’s coverage of the use of a software “rootkit” (i.e. an
8 invasive software program) to prevent copying of CDs by consumers has been widely cited by
9 scholars and was used before the Federal Trade Commission. Id., ¶ 10. Boing Boing also
10 reported extensively on the struggle for self-determination in Burma, China, and Tibet, as well as
11 on indigenous rights issues in Central America and Africa. Id., ¶ 11. Boing Boing was a sponsor
12 of the British Convention on Modern Liberty, and has spearheaded many lawmaker-outreach
13 campaigns related to European and UK law. Id. Boing Boing’s material on copyright law has
14 been quoted in New Zealand and Canadian parliamentary speeches. Id.

15 Boing Boing has twice won the Bloggies for ‘Weblog of the Year’, in 2004 and 2005.
16 Doctorow Decl., ¶ 9. Boing Boing also was listed by Time Magazine as one of the “25 Best Blogs
17 2009,” noting that:

18 “The self-described “Directory of Wonderful Things” is compiled by
19 four regular bloggers and a revolving corps of guest geeks who
20 present the bleeding edge of technology and fringe culture.
21 BoingBoing is equally adept at uncovering can-you-believe-this
22 photos (“Carved watermelon resembles human mouth!”) as it is
23 rallying readers to demand greater digital freedoms. Boing Boing
24 has been credited for helping put direct public pressure on Google
25 and Yahoo! when they gave in to the demands of China’s Internet
26 censors.” Declaration of Marc E. Mayer (“Mayer Decl.”), Ex. 1.

27 One of the most prevalent (and recurring) issues discussed by Boing Boing is that of
28 EULAs and the potential waiver by consumers of privacy or other rights by installing or using
29 software programs subject to EULAs. Doctorow Decl., ¶ 12. In the past several years, Boing
30 Boing has posted dozens, if not hundreds, of articles on issues relating to EULAs and/or consumer

1 privacy rights.³ *Id.* Boing Boing and its writers have criticized numerous companies, including
2 Fuji, Sony, Disney, Microsoft, Home Depot and others, for what it viewed as unreasonable or
3 overbearing EULAs.⁴ *Id.*, Ex. 1.

4 **MagicJack and the EULA.** MagicJack is the manufacturer and distributor of an internet
5 “voice-over IP” (VOIP) device known as the “MagicJack.” Complaint, ¶ 2. MagicJack purports
6 to allow consumers, with the purchase of a MagicJack device (which plugs into the USB port of a
7 user’s computer) and payment of an annual fee, the ability to make “unlimited” local and long
8 distance telephone calls through their computer, using a telephone or headset. *Id.* MagicJack
9 advertises its product primarily via television “infomercials” and via its website
10 www.magicjack.com.⁵

11 MagicJack claims that “once plugged into a computer’s USB port, the MagicJack device
12 runs automatically – no additional software is needed.” Complaint, ¶ 12. In fact, the MagicJack
13 device requires that a user download and install a software program for it to work. *See* Terms of
14 Service [Mayer Decl., Exs. 2, 3] at ¶ 1 (“To enable your use of the magicJack device, you must
15

16 ³ *See, e.g.*, “Fuji makes you sign bizarre EULA to buy a camera” (April 2, 2008),
17 <http://www.boingboing.net/2008/04/02/fuji-makes-you-sign.html>; “Grapes with a EULA” (Sept.
18 16, 2008), www.boingboing.net/2008/09/16/grapes-with-a-eula.html; “Sketch comedy troupe
19 proposes a EULA for friendship” (March 9, 2009), [www.boingboing.net/2009/03/09/sketch-](http://www.boingboing.net/2009/03/09/sketch-comedy-troupe.html)
20 [comedy-troupe.html](http://www.boingboing.net/2009/02/26/a-fair-eula-for-down.html); “A fair EULA for downloaded works” (February 26, 2009),
21 www.boingboing.net/2009/02/26/a-fair-eula-for-down.html; “Thomas Edison’s crappy, price-
22 [fixing EULA,”](http://www.boingboing.net/2009/01/13/thomas-edisons-crapp.html) (January 13, 2009), www.boingboing.net/2009/01/13/thomas-edisons-crapp.html;
23 “Malware gets a EULA” (April 29, 2008), [www.boingboing.net/2008/04/29/malware-gets-a-](http://www.boingboing.net/2008/04/29/malware-gets-a-eula.html)
24 [eula.html](http://www.boingboing.net/2008/10/09/sleeping-beauty-blur.html); “Sleeping Beauty Blu-Ray requires viewers to agree to 57 page EULA” (October 10,
2008), gadgets.boingboing.net/2008/10/09/sleeping-beauty-blur.html; “DHS perfects the abusive
EULA” (October 16, 2008), www.boingboing.net/2008/10/16/dhs-perfects-the-abu.html; “Crazy
EULA makes you agree to a bunch of other EULAs” (October 11, 2007),
www.boingboing.net/2007/10/11/crazy-eula-makes-you.html; “Sony’s EULA is worse than their
rookit” (November 9, 2005), www.boingboing.net/2005/11/09/sonys-eula-is-worse-.html; “CBC
introduces RSS feeds with shitty EULA” (December 10, 2004),
www.boingboing.net/2004/12/10/cbc-introduces-rss-f.html; “Home Depot’s bullshit EULA”
(February 26, 2007), www.boingboing.net/2007/02/26/home-depots-bullshit.html.

25 ⁴ Boing Boing founder Cory Doctorow also is the co-creator of an anti-EULA website called
26 “ReasonableAgreement.org,” which drafted and prepared an “anti-EULA” which it encourages
consumers to attach to e-mails, business cards, credit card slips, and warranty cards. Doctorow
Decl., ¶ 13 & Ex. 2.

27 ⁵ Scores of consumer complaints have been leveled against MagicJack, ranging from the quality
28 of the product itself to the company’s poor customer service. *See e.g.*, “Contact 5 Investigation:
Magic Jack” (July 11, 2008), Mayer Decl., Ex. 4.

1 first download the magicJack Software.”) Use of that software (and the MagicJack USB device) is
2 conditioned upon assent to the terms of an “End User License Agreement” (“EULA”), which is
3 accomplished by clicking an “I Accept” button upon completion of the MagicJack “registration”
4 process. *Id.* MagicJack will not function until the user registers his or her device. However, the
5 MagicJack EULA is not disclosed on MagicJack’s website homepage, or on any of the links on
6 that homepage. In fact, it cannot even be obtained on the website’s “FAQ” (“Frequently Asked
7 Questions”) page, and a search within the MagicJack FAQ page for “EULA” or “Terms of
8 Service” does not retrieve any results. Mayer Decl., Ex. 7.⁶ MagicJack’s website (including its
9 FAQ page) also does not make any mention of either advertising or privacy rights. *Id.* Thus, for
10 most consumers, the first time they have had the opportunity to read the (very dense) EULA is
11 during the MagicJack install and registration process. (Certainly, many of those consumers, when
12 presented with the EULA during the install process, do not read it closely and would be surprised
13 to learn that MagicJack may track and analyze their telephone calls).

14 MagicJack did not attach its EULA to its Complaint, but instead purports to briefly
15 characterize its contents. Review of the actual EULA [Mayer Decl., Exs. 2 & 3] reveals that it is
16 lengthy and contains a number of potentially onerous or unusual terms. Most notable of these is a
17 provision concerning “advertising,” in which users must agree to permit MagicJack to “analyze” a
18 user’s telephone calls as part of its “directed” advertising program. At the time the Boing Boing
19 article at issue was written, this provision stated:

20 “You also understand and agree that use of the magicJack device
21 and Software *will* include advertisements and that these
22 advertisements are *necessary* for the magicJack device to work....
23 Our computers *may analyze the phone numbers you call* in order to
24 improve the relevance of the ads”⁷ Mayer Decl., Ex. 3.

25
26 ⁶ The Court may take judicial notice of the content of publicly available websites, including the
27 MagicJack and Boing Boing websites. *See* Request for Judicial Notice.

28 ⁷ After the Beschizza Post was published, MagicJack modified its EULA to remove the statement
“these advertisements are necessary for the magicJack device to work.” *Compare* Mayer Decl.,
Ex. 2 with Mayer Decl., Ex. 3.

1 The EULA also contains a binding choice of law, venue, and arbitration clause, stating that “[a]ny
2 claims, legal proceeding or litigation arising in connection with the magicJack device or Software
3 will be resolved by binding arbitration...in Palm Beach, Florida.” *Id.*, ¶ 24.

4 **The False and Misleading Website “Ticker.”** Although the MagicJack EULA cannot be
5 navigated to from the MagicJack homepage, prominently displayed on the homepage of the
6 MagicJack website is a “ticker” that purports to inform visitors of “how many people came for our
7 Free Trial Offer today.” Mayer Decl., Ex. 7. In fact, MagicJack admits that the “ticker” has
8 nothing to do with its “Free Trial Offer” and does not calculate (far less accurately calculate) the
9 number of overall visitors to its website that day (irrespective of whether they “came” for the Free
10 Trial Offer). Rather, during the relevant time period:

11 “the computer application for the ticker calculated the total visits for
12 the 24 hour period spanning from 12:00 a.m. to 12:00 a.m. Central
13 Time. This number was converted into a rate (visitors/minute).
14 This rate was utilized on the magicJack website the following day.
15 When a visitor arrived at magicJack’s website, a script on the
16 website *simulated the actual user count by incrementing at a rate
17 equal to the previous day’s rate.* In other words, the counter would
18 ‘tick’ at a prescribed rate based on the *previous days’* traffic.”
19 Complaint, ¶ 20 (emphasis added).

20 **The Beschizza Post.** Rob Beschizza is the editor of Boing Boing Gadgets, as well as a
21 full-time writer and blogger for *Wired* magazine. Beschizza frequently posts articles to Boing
22 Boing Gadgets with reviews, critiques, and updates about consumer electronics products.

23 On April 14, 2008, in an effort to inform Boing Boing readers about what he viewed as
24 unreasonable terms of service for MagicJack, Beschizza posted an approximately 200-word article
25 entitled “MagicJack’s EULA says it will spy on you and force you into arbitration.” (the
26 “Beschizza Post”). Complaint, Ex. A; *see also* Doctorow Decl., Ex. 3. The Beschizza Post first
27 quoted, *verbatim*, the “Advertising” and “Choice of Law” clauses of the EULA. It then provided
28 the following analysis and commentary:

29 “In short, the [EULA] not only has one agree to ads with its paid-for
30 system, but claims that the ads are necessary for it to work. It will
31 also snoop on your calls to target ads more accurately, and has you
32 sign away your legal right to take it to court if it defrauds of
33 otherwise harms you. Delightful.

34 “Neither the EULA itself, nor any other privacy or legal
35 information, can be easily found at its homepage. It’s not even

1 provided at the point of sale, where one enters credit card info,
2 email, and street addresses as such, so as to gain access to the
3 service and have your MagicJack dongle delivered. I found the
4 EULA's URL through Google.

5 "It gets sexier. When you access MagicJack's instant web help
6 page, a bizarre series of 'compatibility tests' take place first,
7 reporting lies like 'Your MagicJack is functioning properly,' even if
8 you don't have one installed.

9 "Even the 'look how many people can for a free trial' counter on the
10 homepage is a fake, a javascript applet that increments itself
11 automatically: //the interval (ms) between new visitors var interval
12 = Math/round (86400000/perday)

13 "As if targeted advertising, systematic privacy invasion and the
14 signing away of your legal rights wasn't evil enough!"

15 Complaint, Ex. A. The Beschizza Post also provided a link to the MagicJack EULA, such that
16 clicking the words "EULA itself" would direct the reader to the EULA at
17 www.magicjack.com/tos. *Id.* Boing Boing readers contributed hundreds of comments to the Post,
18 both positive and negative, all of which were posted immediately under the Post.⁸ *Id.*

19 **The Lawsuit.** On March 11, 2009 (nearly one year after the Beschizza Post and without
20 any prior notice), MagicJack filed this lawsuit for defamation and unfair competition. The essence
21 of MagicJack's claim is that four specific statements made in the Beschizza Post are false and
22 "libelous on their face." Complaint, ¶¶ 34-35. The Complaint was served on Boing Boing's agent
23 for service of process on March 17, 2009.

24 II. THE LEGAL STANDARD.

25 California's anti-SLAPP statute provides:

26 "A cause of action against a person arising from any act of that
27 person in furtherance of the person's right of petition or free speech
28 under the United States or 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."

Cal. Code Civ. Proc. § 425.16(b)(1). The legislature has mandated that "this section shall be
construed broadly." Cal. Code Civ. Proc. § 425.16(a). "In making its determination [as to

⁸ MagicJack claims that the Beschizza Post was re-posted on www.mywebblogs.com. See
Complaint, ¶29, Ex. B. Boing Boing has no affiliation with www.mywebblogs.com, or with
anonymous poster "EXPOSETHEHYPOCRITES." Doctorow Decl., ¶ 17.

1 whether CCP § 425.16 applies], the court shall consider the pleadings, and supporting and
2 opposing affidavits stating the facts upon which the liability or defense is based.” Cal. Code Civ.
3 Proc. § 425.16(b)(2). Virtually any cause of action may be subject to an anti-SLAPP motion to
4 strike. Navellier v. Sletten, 29 Cal. 4th 82, 92 (2002) (“[n]othing in the statute itself categorically
5 excludes any particular type of action from its operation”). However, the statute is especially
6 applicable to (and has routinely been applied to) claims for defamation. See, e.g., Gallimore v.
7 State Farm Fire & Casualty Ins. Co., 102 Cal. App. 4th 1388, 1400 (2002) (noting that defamation
8 is one of the “favored” causes of action in SLAPP suits).

9 The analysis under Section 425.16 consists of two steps:

10 **First**, the defendant must make a *prima facie* showing that the claims at issue “arise from”
11 protected activity – namely, “any act of that person in furtherance of the person’s right of petition
12 or free speech under the United States or California Constitution in connection with a public
13 issue.” Cal. Code Civ. Proc. § 425.16(b)(1). See also Equilon Enter. v. Consumer Cause, Inc., 29
14 Cal. 4th 53, 67 (2002); Dowling v. Zimmerman, 85 Cal. App. 4th 1400, 1417 (2001). In the first
15 step of the anti-SLAPP analysis, “a court must generally presume the validity” of the claimed
16 protected right. Chavez v. Mendoza, 94 Cal. App. 4th 1083, 1089 (2001). Moreover, it is
17 sufficient that the challenged cause of action arises *in part* from activities protected under the anti-
18 SLAPP statute. Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal. App. 4th 294, 307-08 (2001)
19 (plaintiffs “cannot frustrate the purpose of the SLAPP statute [by] combining allegations of
20 protected and non-protected activity under the label of one ‘cause of action’”).

21 **Second**, once it is shown that the claims arise from protected activity, the burden then
22 shifts to the plaintiff to show, by “competent admissible evidence,” the *probability* it will prevail
23 on the merits. Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 654 (1996); Equilon,
24 29 Cal. 4th at 67; Cal. Code Civ. Proc. § 425.16(b)(1). Specifically, to defeat a motion under
25 Section 425.16, the plaintiff must show that: (i) each claim is legally viable and supported by
26 competent admissible evidence on all essential elements sufficient to defeat a directed verdict at
27 trial and to support a judgment in plaintiff’s favor; and (ii) the admissible evidence the plaintiff
28 offers negates defenses to the claims. See Tuchscher Dev. Enter., Inc. v. San Diego Unified Port

1 Dist., 106 Cal. App. 4th 1219, 1235-1238 (2003); Seelig v. Infinity Broad. Corp., 97 Cal. App. 4th
2 798, 809 (2002). If the plaintiff cannot make the requisite showing, the action is dismissed and
3 the defendant *must* be awarded its attorneys' fees and costs. Cal. Code Civ. Proc. § 425.16(c).

4 **III. MAGICJACK'S CLAIMS ARISE FROM PROTECTED ACTIVITY, NAMELY**
5 **SPEECH AND COMMENT ON AN IMPORTANT PUBLIC ISSUE.**

6 An "act in furtherance of a person's right of petition or free speech under the United States
7 or California Constitution" includes "any written or oral statement in writing made in a place open
8 to the public or in a public forum in connection with an issue of public interest." Cal. Code Civ.
9 Proc. § 426.16(e)(3). It is well-established that "Web sites accessible to the public...are 'public
10 forums' for purposes of the anti-SLAPP statute." Barrett v. Rosenthal, 40 Cal. 4th 33, 41 n.4
11 (2006). See also ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 1006 (2001) (statements
12 posted on an internet website message board or "chat room" constitute statements in public
13 forums); cf. Annette F. v. Sharon S., 119 Cal. App. 4th 1146, 1161 (2004) ("This court has
14 concluded that a news publication is a 'public forum' within the meaning of the anti-SLAPP
15 statute if it is a vehicle for discussion of public issues and it is distributed to a large and interested
16 community."). The Boing Boing website is especially "public" in nature, because it is open and
17 free to the public, and Boing Boing invites its users to post written comments about Boing Boing
18 posts (indeed, the Beschizza Post contains hundreds of such comments). See ComputerXpress, 93
19 Cal. App. 4th at 1007 (website that was accessible to the public free of charge and permitted any
20 member of the public to post their own opinions was a "public forum.")

21 The Beschizza Post also plainly concerns a matter of public interest. See Cal. Code Civ.
22 Proc. §§ 425.16(b)(1), (e)(3), (e)(4). "The public interest requirement of section 426.16...must be
23 'construed broadly' so as to encourage participation by all segments of our society in vigorous
24 public debate related to issues of public interest." Gilbert, 147 Cal. App. 4th at 23, quoting Seelig
25 v. Infinity Broad. Corp., 97 Cal. App. 4th 798, 808 (2002). See also Damon v. Ocean Hills
26 Journalism Club, 85 Cal. App. 4th 468, 479 (2000) ("The definition of 'public interest' within the
27 meaning of the anti-SLAPP statute has been broadly construed.") Accordingly, the "public

1 interest” prong has been held to encompass “any issue in which the public is interested.” Nygaard,
2 Inc. v. Uusi-Kerttula 159 Cal. App. 4th 1027, 1048 (2008).

3 Internet privacy rights and the use and abuse of EULAs to collect private or personal data
4 for advertising purposes certainly are matters of “public interest” under even the narrowest reading
5 of the term. These issues have received extensive discussion in the media. See, e.g., The New
6 York Times Online Index, Privacy In the Digital Age (collecting articles pertaining to Internet
7 privacy rights, including with respect to EULAs and spyware). [Mayer Decl., Ex. 5] The United
8 States Senate Commerce Committee and the Judiciary Committee have held multiple hearings on
9 these issues. See, e.g., Mayer Decl., Ex 6. Courts also have grappled with the procedural or
10 substantive unconscionability of standard EULA terms. See, e.g., Bragg v. Linden Research, Inc.,
11 487 F. Supp. 2d 593, 605-608 (E.D. Pa. 2007) (terms of service of interactive computer program
12 that required users to submit to binding arbitration was a contract of adhesion and
13 unconscionable); Comb v. PayPal, Inc., 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002) (considering
14 unconscionability of arbitration clause in PayPal terms of service).

15 In addition to the foregoing, issues raised in the Beschizza Post broadly implicate
16 consumer rights and constitute information “provided to aid consumers” in choosing among
17 products. Carver v. Bonds, 135 Cal. App. 4th 328, 492-93 (2005) (issues pertaining to consumer
18 protection are matters of “public interest”). By MagicJack’s own admission, it has made
19 “substantial sales” of its MagicJack device “throughout the country.” Accordingly, information
20 concerning the MagicJack EULA certainly is of interest to a large number of potential consumers
21 and members of the public. See, e.g., DuPont Merck Pharm. Co. v. Superior Court, 78 Cal. App.
22 4th 562, 567 (2000) (SLAPP statute’s public issue/interest requirement met where complaint
23 alleged challenged advertising implicated 1.8 million purchasers of advertised product); Macias v.
24 Hartwell, 55 Cal. App. 4th 669, 673-74 (1997) (challenged speech pertained to public
25 issues/interest because it affected 10,000 union members).⁹

26 _____
27 ⁹ Although the Court need not reach the issue, in addition to being covered within Cal. Code Civ.
28 P. § 425(e)(3), the Beschizza Post constitutes “other conduct in furtherance of the exercise of free
speech in connection with a public issue.” Cal. Code Civ. P. § 425.16 (e)(4); see Finke v. Walt
Disney Co., 2 Cal. Rptr. 3d 436 (2003) (articles about litigation over merchandising rights);

(...continued)

1 **IV. MAGICJACK CANNOT ESTABLISH A PROBABILITY THAT IT WILL**
2 **PREVAIL ON THE MERITS.**

3 Because MagicJack's claims clearly fall within the anti-SLAPP statute, the burden shifts to
4 MagicJack to prove, "with competent admissible evidence" a probability that it will prevail in this
5 lawsuit. It cannot do so.

6 **A. MagicJack's Defamation Claim Is Meritless.**

7 MagicJack's defamation claim is premised on four discrete statements contained in the
8 Beschizza Post – one of which concerns the website "ticker" and the remaining three concern the
9 EULA's advertising provision. See Complaint, ¶ 34. Initially, MagicJack's claim fails, as a
10 matter of law, because each of these statements either is demonstrably true (or, at a minimum is
11 not "provably false") and/or constitutes rhetorical hyperbole and statements of opinion. Old
12 Dominion Branch No. 496, Nat'l Assoc. of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 283
13 (1974) ("The sine qua non of recovery for defamation ... is the existence of a falsehood."); Seelig,
14 97 Cal. App. 4th at 809 (to state a defamation claim under California law, plaintiff must present
15 evidence of a statement of fact that is "provably false.")

16 *First*, Beschizza's assertion that the webpage "ticker" is a "fake, a javascript applet that
17 increments itself automatically," is admitted by MagicJack. See Complaint, ¶ 20 (alleging that the
18 ticker "*simulates*" the actual user count by automatically "incrementing at a rate equal to the
19 *previous day's* rate," and thus does not measure the "number of people who came for a free trial
20 *today*") (emphasis added).¹⁰ MagicJack also admits that the ticker has nothing to do with the
21 number of people who "came for a free trial." Thus, in all respects, the ticker is "fake." See
22 Merriam-Webster Online Dictionary [Mayer Decl., Ex. 8] (defining "fake" as "one that is not what
23 it purports to be"); Ringler Assoc. Inc. v. Maryland Cas. Co., 80 Cal. App. 4th 1165, 1180 (1990)

24
25 _____
26 (...continued)
27 Tuchscher Dev. Enter. v. San Diego Unified Port District, 106 Cal. App. 4th 1219, 1234 (2003)
(communication to city officials and employees about a proposed development)

28 ¹⁰ Even in its "more conservative" form (updated *after* the Beschizza Post), see Complaint, ¶ 21,
the ticker only provided an "*estimate*" of visitors to the website.

1 (“In all cases of alleged defamation...the truth of the offensive statements or communication is a
2 complete defense to civil liability, regardless of bad faith or malicious purpose.”)

3 **Second**, the remaining statements (that “MagicJack’s EULA says it will spy on you” and
4 “snoop on your calls,” and that the EULA authorizes “systematic privacy invasion”) are fair
5 characterizations of (or reasonable inferences from) the EULA’s provision (quoted verbatim in the
6 Beschizza Post) that “our computers may analyze the phone numbers you call in order to improve
7 the relevance of the ads.” See also Complaint, ¶ 3 (“In the EULA, customers provide magicJack
8 with permission to analyze the numbers dialed by a customer to generate targeted advertising.”)
9 Recording, monitoring, and analyzing telephone numbers called by a user can fairly be
10 characterized as “spying” or “snooping.” See Merriam-Webster Online Dictionary (defining
11 “spy” as “to watch secretly” or “to observe or search for something; defining “snoop” as “to look
12 or pry especially in a sneaking or meddlesome manner.”); Gilbert, 147 Cal. App. 4th at 29-30 (no
13 defamation where the “gist” and “sting” of the alleged statements were “substantially accurate” or
14 “substantially true”). And, to contextualize the statements, the Beschizza Post **provided a link to**
15 **the MagicJack EULA**, so that readers can view the EULA and draw their own conclusions.

16 At most, the statements at issue are precisely the type of “rhetorical hyperbole,” “vigorous
17 epithet[s],” “lusty and imaginative expression[s] of ... contempt,” and language used “in a loose,
18 figurative sense” that have been accorded constitutional protection. Nygaard, 159 Cal. App. 4th at
19 1048; see also Ferlauto v. Hamsher, 74 Cal. App. 4th 1394, 1401 (1999). Language far more
20 venomous (and much further from the truth) routinely has been held not actionable under
21 California law. See, e.g., Krinsky v. Doe 6 159 Cal. App. 4th 1154, 1176-1178 (2008)
22 (description of plaintiff and fellow company managers as “boobs, losers and crooks” constituted
23 “crude, satirical hyperbole,” not defamation); Nygaard, 159 Cal. App. 4th at 1048 (statements that
24 plaintiff “wanted [defendant] to work round the clock” and “hasn’t heard about working hours” “
25 represented “colorful way[s] of expressing [defendant’s] opinion that [plaintiff] was an overly
26 demanding boss”); James v. San Jose Mercury News, Inc., 17 Cal. App. 4th 1, 12 (1993) (plaintiff
27 characterized as “a member of the class of lawyers that engages in, and his conduct in this instance

1 is an example of, sleazy, illegal, and unethical practice”); Beilenson v. Superior Court, 44 Cal.
2 App. 4th 944, 947, 951 (state official “ripped off” taxpayers or acted “unethically”).

3 *Finally*, whether the conduct that the EULA authorizes constitutes “privacy invasion” is a
4 pure statement of opinion, which is protected “no matter how outrageous or pernicious.” Carr v.
5 Warden, 159 Cal. App. 3d 1166, 1170 (1984) (statement that author suspected the plaintiff was
6 “being bought” was a statement of opinion and “therefore not defamatory as a matter of law.”);
7 see also Vogel v. Felice, 127 Cal. App. 4th 1006, 1019-1020 (2005) (accusation that plaintiffs are
8 “top-ranking ‘Dumb Asses’” was not a “provably false factual assertion.”). That is necessarily the
9 case, because the statement is based *only* upon the EULA, which is expressly disclosed (indeed, it
10 is linked to) in the Beschizza Post, and the author does not profess to base his opinion on
11 knowledge of any other facts. McGarry v. Univ. of San Diego, 154 Cal. App. 4th 97,112 (2007)
12 (statements not actionable unless they “imply ‘a knowledge of facts which lead to the
13 [defamatory] conclusion.’”)¹¹

14 Protection for the type of sharp and humorous language used by Boing Boing (and which
15 is the hallmark of Boing Boing’s reporting style) is critical to “provide[] assurance that public
16 debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ which has
17 traditionally added much to the discourse of our Nation.” Nygaard, 159 Cal. App. 4th at 1049.
18 Like many of the most influential reporters and commentators (e.g. Jon Stewart, Bill Maher, Al
19 Franken), Boing Boing uses sarcasm and satire to communicate about serious issues. Moreover,
20 readers of Boing Boing (accustomed to its style and language) certainly understood what was
21 being communicated by the Beschizza Post and put those statements in their proper context. See
22 Morningstar, Inc. v. Superior Court, 23 Cal. App. 4th 676 (1994) (alleged defamatory publication
23 “is to be measured not so much by its effect when subjected to the critical analysis of a mind
24 trained in the law, but by the natural and probable effect upon the mind of the average reader.”)
25 Boing Boing, of course, does not purport to be unbiased, but is akin to a newspaper’s editorial or

26 ¹¹ Contrary to MagicJack’s suggestion (see Complaint, ¶ 18), the Beschizza Post plainly was
27 intended to criticize (and colorfully characterize) only the MagicJack *EULA*. Indeed, the EULA
28 provision itself comprises more than a third of the Beschizza Post, and consistently is referenced
as the basis for the author’s statements and opinions.

1 commentary pages. Id. at 692-93 (“Columns or articles which appear in the opinion-editorial
2 pages of newspapers are the well-recognized home of opinion and comment.”).

3 **B. MagicJack’s Unfair Competition Claim Also Fails.**

4 “The constitutional privilege applies not merely to defamation but to ‘all claims whose
5 gravamen is the alleged injurious falsehood of a statement.’” Gilbert, 147 Cal. App. 4th at 34,
6 quoting Blatty v. New York Times Co., 42 Cal. 3d 1033, 1042 (1986). MagicJack’s claim for
7 unfair competition (Cal. Bus. & Prof. Code § 17200) is based on the exact same statements that
8 purport to give rise to its defamation claims. See Complaint, ¶ 45 (“Defendant’s actions in
9 publishing the False Statements constitute an unlawful, unfair, or fraudulent business practice and
10 amount to unfair competition under the UCL”). Thus, the unfair competition claim fails for the
11 very same reason that the defamation claim fails. See Fellows v. National Enquirer, Inc., 42 Cal.
12 3d 234, 245 (1986) (“To allow an independent cause of action...based on the same acts which
13 would not support a defamation action, would allow plaintiffs to do indirectly what they could not
14 do directly. It would also render meaningless any defense of truth or privilege.”)

15 **V. BOING BOING IS ENTITLED TO RECOVER ITS ATTORNEYS’ FEES.**

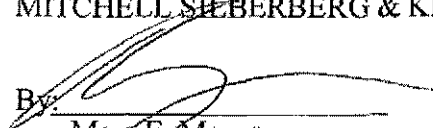
16 “[A] prevailing defendant on a special motion to strike *shall* be entitled to recover his or
17 her attorney’s fees and costs.” Cal. Code Civ. P. § 425.16(c) (emphasis added). Boing Boing
18 shall file a separate request for attorneys’ fees and costs, outlining the amount and nature of its
19 attorneys’ fees and costs incurred by Boing Boing to date.¹²

20 **Conclusion**

21 For the foregoing reasons, Boing Boing requests that the Court grant this Motion, strike
22 MagicJack’s Complaint, and award Boing Boing its reasonable attorneys’ fees and costs.

23 DATED: April 17, 2009

MITCHELL SILBERBERG & KNUPP LLP

24
25 By: 
26 Marc E. Mayer
Attorneys for Defendant

27
28 ¹² A “party filing [a special motion to strike] may...bring a separate, subsequently filed motion for
fees or costs.” Carpenter v. Jack In The Box Corp., 151 Cal. App. 4th 454, 468 (2007)