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8 Attorneys for Plaintiff

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF MARIN

11 MAGICJACK, LP,

12 Plaintiff,

13 v.

14 HAPPY MUTANTS LLC,

15 Defendant.

Case No.: CIV-091108

**DECLARATION OF DANIEL  
BORISLOW IN OPPOSITION TO  
DEFENDANT'S SPECIAL MOTION TO  
STRIKE COMPLAINT PURSUANT TO  
CALIFORNIA'S ANTI-SLAPP STATUTE**

16 Date: May 27, 2009

17 Time: 9:00 a.m.

18 Dept: J

19 Judge: Hon. Verna Adams  
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**DECLARATION OF DANIEL BORISLOW**

I, DANIEL BORISLOW, declare as follows:

1. I am the founder, President and Chief Executive Officer of magicJack LP. Unless otherwise stated, I have personal knowledge of the contents of this declaration and, if called as a witness, could and would testify competently to them.

2. MagicJack LP is a limited partnership with its principal place of business in West Palm Beach, Florida. MagicJack's principal business is to sell computer hardware and license accompanying software that permits users to make free local and long distance telephone calls without any monthly or per-call fee.

3. MagicJack LP is a small, privately held company that is not in the public eye. MagicJack LP was founded in April, 2007. MagicJack LP has no more than thirty (30) employees.

4. MagicJack LP markets and sells a highly popular Voice over Internet Protocol ("VoIP") device under the magicJack® trademark (the "magicJack® Device"). The magicJack® Device provides customers with several features, among them a phone number and an ability to make and receive free local and long distance calls over the Internet.

5. The magicJack® Device is approximately the size of a matchbox and plugs into the USB port of a user's computer. Once registered, when a user plugs her standard telephone into the magicJack® Device, it runs automatically, allowing the telephone to directly make and receive calls over the Internet.

6. The magicJack® Device has won numerous accolades and awards for its ease of use and ingenuity, including the PC Magazine's Editors' Choice® award and favorable reviews by the Washington Post, cnet News, Laptop magazine and The Michigan Observer. Attached as Exhibit A are true and exact copies of a sample of positive articles regarding the magicJack® Device.

7. To acquire and activate the magicJack® Device, customers must agree to be bound by the Terms of Service and Software Agreement ("Terms of Service"). MagicJack conspicuously posts its Terms of Service on the magicJack website at <http://www.magicjack.com/tos/>. Attached as Exhibit B is a true and correct copy of magicJack's current Terms of Service.

1           8.     MagicJack ensures that its users are aware of, and accept, its policies by requiring  
2 each user to agree to the Terms of Service by means of a click-through end user license agreement  
3 (“EULA”). After customers receive the magicJack<sup>®</sup> Device, to install it, they plug the device into  
4 their computer through a USB port. Before they can activate the device, they must click through  
5 and accept the terms and conditions of the Terms of Service that appear on the user’s computer  
6 screen. Without affirmatively accepting the Terms of Service, the magicJack<sup>®</sup> Device registration  
7 will not complete. Attached as Exhibit C is a true and correct copy of the screen image of the click-  
8 through EULA presented to customers during registration of the magicJack<sup>®</sup> Device.

9           9.     The magicJack website is designed to refer customers to the Terms of Service  
10 whenever a customer poses a question that can be answered effectively by a review of its Terms of  
11 Service. For example, if a customer clicks on the Frequently Asked Question “Are there restrictions  
12 on long distance usage?” they are directed to a page that answers their question -- “magicJack  
13 provides free local and long distance calls to the United States, Canada, Puerto Rico and the U.S.  
14 Virgin Islands”-- and provides the customer a link to the Terms of Service to ensure they have  
15 current information in response to their inquiry. Attached as Exhibit D is a true and correct copy of  
16 a printout showing how customers who ask Frequently Asked Questions are directed to the Terms  
17 of Service.

18           10.    I first learned about the Beschizza Post when I saw it in February 2009 on  
19 www.mywebblogs.com printed under the anonymous handle EXPOSE the HYPOCRITES. I later  
20 came to understand that the blog was originally posted on the Boing Boing website in 2008 and was  
21 authored by Rob Beschizza.

22           11.    The Beschizza Post contained several false and defamatory statements about  
23 magicJack. First, its title states: “MagicJack’s EULA says it will spy on you and force you into  
24 arbitration.” In the entry, it says magicJack will “snoop on your calls to target ads” and refers to  
25 magic Jack’s actions as “systematic privacy invasion.” These statements are absolutely false.

26           12.    As the inventor of the magicJack<sup>®</sup> Device, I take a great amount of pride in the  
27 product and service we provide to our customers. As evidenced by the articles attached in Exhibit  
28 A, the magicJack<sup>®</sup> Device is revered as an inexpensive and practical solution to the needs of our

1 customers. To have the good reputation of the magicJack® Device smeared by these false  
2 statements not only harms the image of magicJack LP but that of the magicJack® Device and  
3 myself.

4 13. The Terms of Service that was in place when the Beschizza Post appeared on  
5 www.webblogs.com in February 2009, and is in place as of today, state the following:

6 You also understand and agree that use of the magicJack device and  
7 Software will include advertisements. Advertisements will be served  
8 through the magicPage™ Software or the magicJack softphone – the  
9 software/softphone attempts to serve local advertisements and  
10 classifieds using a completely automated process that enables us to  
11 effectively target dynamically changing content. *Our computers may*  
12 *analyze the phone numbers and your registration information you*  
13 *call in order to improve the relevance of the ads.* We do not provide  
14 any personal information to our advertisers or third parties. magicJack  
15 has a policy of restricting advertisers that it believes are inappropriate,  
16 but it does not guarantee the accuracy or integrity of any advertisers  
17 and does not endorse any of the advertisements that may appear in  
18 connection with use of the magicJack device. You also understand  
19 and agree that use of the magicJack device and Software may include  
20 certain communications, such as service announcements,  
21 administrative messages and newsletters, and you will not be able to  
22 opt out of receiving them. (*emphasis added*) (See Ex. B)

23 14. The Terms of Service do not state that magicJack will listen to the *content* of any of  
24 its customers' calls. MagicJack does not and has no interest in doing this.

25 15. The only permission the Terms of Service seek is the ability to let a computer  
26 analyze the phone *numbers* called by a customer, along with the registration/location information  
27 the customer provides during the sign-up process. This is no different than the information received  
28 by any other telephone company or provider of telephone services.

1 While the Terms of Service state that our computers *may* analyze the phone numbers  
2 of its customers to improve the relevance of the ads, magicJack does not do this. MagicJack has  
3 never analyzed the phone numbers its users call to improve the relevance of ads. Indeed, magicJack  
4 has not even run any third party ads. It has never sold its users' personal information. The purpose  
5 of this clause is for magicJack to obtain customers' consent, and thereby to reserve the right to in  
6 the future target its ads to individual customers based on the geographic areas they call.

1 17. I understand that the Beschizza Post originally appeared in April of 2008. The  
2 Terms of Service provision on advertisements in magicJack's EULA in use at that time stated:

3 You also understand and agree that use of the magicJack device and  
4 Software will include advertisements and that these advertisements  
5 are necessary for the magicJack device to work and for the service to  
6 be free in the first year of the agreement (and subsequent licenses to  
7 be at minimal cost). Advertisements will be served through the  
8 magicPage<sup>®</sup> Software. magicPage<sup>®</sup> Software attempts to serve local  
9 advertisements and classifieds using a completely automated process  
10 that enables us to effectively target dynamically changing content.  
11 ***Our computers may analyze the phone numbers you call in order to***  
12 ***improve the relevance of the ads.*** We do not provide any personal  
13 information to our advertisers or third parties. magicJack has a policy  
14 of restricting advertisers that it believes are inappropriate, but it does  
15 not guarantee the accuracy or integrity of any advertisers and does not  
16 endorse any of the advertisements that may appear in connection with  
17 use of the magicJack device. You also understand and agree that use  
18 of the magicJack device and Software may include certain  
19 communications, such as service announcements, administrative  
20 messages and newsletters, and you will not be able to opt out of  
21 receiving them. (*emphasis added*).

22 18. While the above paragraph is not identical to the current Terms of Service, it is  
23 consistent with the current Terms of Service in stating that magicJack's computers "may analyze  
24 the phone numbers you call in order to improve the relevance of the ads." Much like the current  
25 Terms of Service, the Terms of Service in April 2008 did not state that magicJack would listen to  
26 the *content* of any of the customers' calls. MagicJack requested, and customers granted permission,  
27 for magicJack to review the numbers dialed only. Additionally, as stated above, MagicJack does  
28 not -- and has never -- analyzed its users' phone numbers to run targeted ads.

I declare under penalty of perjury that the foregoing is true and correct and that this  
declaration was executed on May 13, 2009 in West Palm Beach, Florida.

  
\_\_\_\_\_  
Daniel Borislow

MAY 13, 2009