

CONFORMING COPY

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KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: K. Main, Deputy

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

**DECLARATION OF MARC E. MAYER IN
SUPPORT OF 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**

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

File Date: March 11, 2009
Trial Date: TBD

1 I, MARC E. MAYER, declare as follows:

2
3 1. I am an attorney at law, duly licensed to practice law in the State of California. I
4 am, through my professional corporation, a partner at the law firm Mitchell Silberberg & Knupp
5 LLP, attorneys of record for defendant Happy Mutants LLC, which is the owner of the website
6 known as "Boing Boing" ("Boing Boing"). I know all of the following of my own personal
7 knowledge and, if called as a witness, could and would competently testify thereto. I make the
8 following declaration in support of Boing Boing's Special Motion to Strike the Complaint of
9 Plaintiff MagicJack, Inc. ("MagicJack").

10
11 2. Attached hereto as Exhibit 1 is a true and correct copy of a printout of a web page
12 entitled, ("25 Best Blogs of 2008") located at
13 http://www.time.com/time/specials/packages/article/0,28804,1879276_1879279_1879293,00.html

14 This printout was printed by me from the Internet on or about April 15, 2009.

15
16 3. Attached hereto as Exhibit 2 is a true and correct copy of a printout of a webpage
17 containing the "magicJack Device and Software Terms of Service and Software License
18 Agreement," EULA, located at <http://www.magicjack.com/tos/>. This document was printed by
19 my office from the Internet on or about April 14, 2009.

20
21 4. Attached hereto as Exhibit 3 is a true and correct copy of a printout from an
22 "archived" MagicJack webpage entitled "magicJack Device and Software Terms of Service and
23 Software License Agreement," located at
24 <http://web.archive.org/web/20080215072044/http://www.magicjack.com/site/tos.html>. This
25 document was printed by me from the Internet on or about April 14, 2009. According to the
26 website archive.org, this was the "Terms of Service" that was in place on the MagicJack website
27 on or about April 14, 2008.

1
2 5. Attached hereto as Exhibit 4 is a true and correct copy of a printout of an article
3 from WPTV.com (the website for a television station in Florida) entitled "Contact 5 Investigation:
4 Magic Jack," located at [http://www.wptv.com/content/investigative/story/Contact-5-Investigation-](http://www.wptv.com/content/investigative/story/Contact-5-Investigation-Magic-Jack/veK8V79B6Uefvc7oedLWTA.csp)
5 [Magic-Jack/veK8V79B6Uefvc7oedLWTA.csp](http://www.wptv.com/content/investigative/story/Contact-5-Investigation-Magic-Jack/veK8V79B6Uefvc7oedLWTA.csp). This document was printed from the Internet by
6 my office on April 15, 2009.

7
8 6. Attached hereto as Exhibit 5 is a true and correct copy of a printout from the New
9 York Times Online Index, located at [http://www.nytimes.com/library/tech/reference/index-](http://www.nytimes.com/library/tech/reference/index-privacy.html)
10 [privacy.html](http://www.nytimes.com/library/tech/reference/index-privacy.html), entitled Privacy In the Digital Age, collecting various New York Times articles
11 pertaining to Internet privacy rights, including with respect to EULAs and spyware.

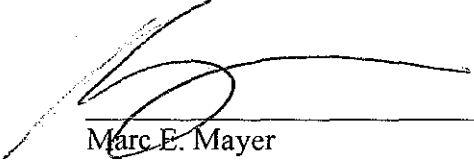
12
13 7. Attached hereto, collectively, as Exhibit 6 are notices of (1) a September 25, 2008,
14 hearing before the Senate Committee on Commerce, Science and Transportation on "Broadband
15 Providers and Consumer Privacy," (2) a July 9, 2008, hearing before the Senate Committee on
16 Commerce, Science and Transportation on "Privacy Implications of Online Advertising," and (3) a
17 July 15, 2008, hearing before the Senate Judiciary Committee on "The Future of Internet
18 Advertising." I located and printed these notices from the Internet on April 15, 2009, at the
19 webpages [http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing](http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&HearingID=778594fe-a171-4906-a585-15f19e2d602a)
20 [ID=778594fe-a171-4906-a585-15f19e2d602a](http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&HearingID=778594fe-a171-4906-a585-15f19e2d602a) (September 25, 2008, hearing on "Broadband
21 Providers and Consumer Privacy"); [http://commerce.senate.gov/public/index.cfm?FuseAction](http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&HearingID=e46b0d9f-562e-41a6-b460-a714bf370171)
22 [=Hearings.Hearing&Hearing ID=e46b0d9f-562e-41a6-b460-a714bf370171](http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&HearingID=e46b0d9f-562e-41a6-b460-a714bf370171) (July 9, 2008,
23 hearing on "Privacy Implications of Online Advertising"); and
24 <http://judiciary.senate.gov/resources/> (July 15, 2008, hearing on "Google-Yahoo! Agreement and
25 the Future of Internet Advertising")

1 8. I have visited the MagicJack website and homepage several times in an effort to
2 locate MagicJack's Terms of Service. However, I have been unable to navigate to the MagicJack
3 Terms of Service from the MagicJack homepage, www.magicjack.com (a true and correct copy of
4 which is attached hereto as Exhibit 7). I also have attempted to locate the Terms of Service using
5 MagicJack's "Frequently Asked Questions" ("FAQ") page, <http://www.magicjack.com/1/faq/>,
6 including by searching for the terms (1) "Terms of Service," (2) EULA, and (3) "end-user license
7 agreement. None of these searches of the FAQ returned any result that directed me to the
8 MagicJack Terms of Service.

9
10 9. Attached hereto, collectively, as Exhibit 8 are printouts from the Merriam-Webster
11 Online Dictionary webpages setting forth the definition of the word "spy", located at
12 [http://www.merriam-webster.com/dictionary/spy\[1\]](http://www.merriam-webster.com/dictionary/spy[1]), the definition of the word "snoop", located at
13 [http://www.merriam-webster.com/dictionary/snoop\[1\]](http://www.merriam-webster.com/dictionary/snoop[1]), and the definition of the word "fake",
14 located at [http://www.merriam-webster.com/dictionary/fake\[4\]](http://www.merriam-webster.com/dictionary/fake[4]). I printed these documents from
15 the Internet on April 15, 2009.

16
17 I declare under penalty of perjury under the laws of the state of California that the
18 foregoing is true and correct.

19
20 Executed this 16th day of April, 2009, at Los Angeles, California.

21
22 
23 _____
24 Marc E. Mayer