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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MARIN

MAGICJACK, LP,

Plaintiff,

v.

HAPPY MUTANTS LLC,

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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NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE

PLEASE TAKE NOTICE that on May 27, 2009, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Department J of the Marin County Superior Court located at 3501 Civic Center Drive, San Rafael, California 94903, defendant Happy Mutants LLC d/b/a Boing Boing ("Boing Boing") will and hereby does move, pursuant to Code of Civil Procedure § 425.16, for an order striking the Complaint filed by plaintiff MagicJack, LP ("MagicJack") herein.

This motion is and will be made on the grounds that each cause of action alleged in the Complaint arises, in whole or in part, from conduct of Boing Boing in furtherance of the exercise of its constitutional right of free speech in connection with a matter of public interest. MagicJack cannot bear its burden of establishing, through competent and admissible evidence, a probability that it will prevail on those causes of action.

This motion is based upon this Notice of Motion and Special Motion to Strike, the attached Memorandum of Points and Authorities and supporting Declarations of Cory Doctorow, Marc E. Mayer, and Jill P. Rubin, the pleadings and papers on file in this action, and such other evidence and argument as may be presented to the Court prior to or at the hearing on the motion.

Boing Boing has attempted to schedule the hearing date for this motion within 30 days of filing. However, the hearing date of May 27, 2009, is the earliest date available for the Court to hear this motion. See Declaration of Jill P. Rubin. Accordingly, "the docket conditions of the Court require" that the motion be heard on May 27, 2009. Cal. Code Civ. P. § 425.16(f).

DATED: April 17, 2009

MITCHELL SILBERBERG & KNUPP LLP

By: _____
Marc E. Mayer
Attorneys for Defendant
Happy Mutants, LLC

Introduction

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

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

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

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

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

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

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

I. STATEMENT OF FACTS.

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

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

[2] All four Boing Boing editors are, or have been, contributing writers for *Wired* magazine. In addition, Doctorow is the author of the popular, critically acclaimed, and Hugo-nominated novels "Down and Out In the Magic Kingdom," and "Little Brother." Xeni Jardin is a regular technology 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.

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

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

Boing Boing has twice won the Bloggies for 'Weblog of the Year', in 2004 and 2005. Doctorow Decl., ¶ 9. Boing Boing also was listed by Time Magazine as one of the "25 Best Blogs 2009," noting that:

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

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

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

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

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

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[3] See, e.g., "Fuji makes you sign bizarre EULA to buy a camera" (April 2, 2008), http://www.boingboing.net/2008/04/02/fuji-makes-you-sign.html; "Grapes with a EULA" (Sept. 16, 2008), www.boingboing.net/2008/09/16/grapes-with-a-eula.html; "Sketch comedy troupe proposes a EULA for friendship" (March 9, 2009), www.boingboing.net/2009/03/09/sketch-comedy-troupe.html; "A fair EULA for downloaded works" (February 26, 2009), www.boingboing.net/2009/02/26/a-fair-eula-for-down.html; "Thomas Edison's crappy, price-fixing EULA," (January 13, 2009), www.boingboing.net/2009/01/13/thomas-edisons-crapp.html; "Malware gets a EULA" (April 29, 2008), www.boingboing.net/2008/04/29/malware-gets-a-eula.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.

[4] Boing Boing founder Cory Doctorow also is the co-creator of an anti-EULA website called "ReasonableAgreeement.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.

[5] Scores of consumer complaints have been leveled against MagicJack, ranging from the quality 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.

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

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

> "You also understand and agree that use of the magicJack device and Software ***will*** include advertisements and that these advertisements are ***necessary*** for the magicJack device to work.... Our computers ***may analyze the phone numbers you call*** in order to improve the relevance of the ads ...."[7] Mayer Decl., Ex. 3.

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

[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.

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

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

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

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

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

> "In short, the [EULA] not only has one agree to ads with its paid-for system, but claims that the ads are necessary for it to work. It will also snoop on your calls to target ads more accurately, and has you sign away your legal right to take it to court if it defrauds of otherwise harms you. Delightful.
>
> "Neither the EULA itself, nor any other privacy or legal information, can be easily found at its homepage. It's not even

> provided at the point of sale, where one enters credit card info, email, and street addresses as such, so as to gain access to the service and have your MagicJack dongle delivered. I found the EULA's URL through Google.
>
> "It gets sexier. When you access MagicJack's instant web help page, a bizarre series of 'compatibility tests' take place first, reporting lies like 'Your MagicJack is functioning properly,' even if you don't have one installed.
>
> "Even the 'look how many people can for a free trial' counter on the homepage is a fake, a javascript applet that increments itself automatically: //the interval (ms) between new visitors var interval = Math/round (86400000/perday)
>
> "As if targeted advertising, systematic privacy invasion and the signing away of your legal rights wasn't evil enough!"

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

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

II. THE LEGAL STANDARD.

California's anti-SLAPP statute provides:

> "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech 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.

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

The analysis under Section 425.16 consists of two steps:

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

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

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

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

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

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

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

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

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

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[9] Although the Court need not reach the issue, in addition to being covered within Cal. Code Civ. 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)

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

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

A. MagicJack's Defamation Claim Is Meritless.

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

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

(...continued)
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)

[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.

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

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

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

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

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

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

[11] Contrary to MagicJack's suggestion (see Complaint, ¶ 18), the Beschizza Post plainly was intended to criticize (and colorfully characterize) only the MagicJack ***EULA***. Indeed, the EULA 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.

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

B. MagicJack's Unfair Competition Claim Also Fails.

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

V. BOING BOING IS ENTITLED TO RECOVER ITS ATTORNEYS' FEES.

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

Conclusion

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

DATED: April 17, 2009

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[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)