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1 ARNOLD & PORTER LLP
Beth H. Parker (SBN 104773)
2 Kevin M. Bovard (SBN 247521)
Rhonda Stewart Goldstein (SBN 250387)
3 275 Battery Street, Suite 2700
San Francisco, California 94111
4 Telephone: 415.356.3000
Facsimile: 415.356.3099
5 E-Mail: Beth.Parker@aporter.com
E-Mail: Kevin.Bovard@aporter.com
6 E-Mail: Rhonda.Goldstein@aporter.com

7 Attorneys for Plaintiff

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF MARIN

10 MAGICJACK, LP,

11 Plaintiff,

12 v.

13 HAPPY MUTANTS LLC,

14 Defendant.

Case No.: CIV-091108

**OPPOSITION TO DEFENDANT'S
SPECIAL MOTION TO STRIKE
COMPLAINT PURSUANT TO
CALIFORNIA'S ANTI-SLAPP STATUTE**

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

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PLAINTIFF MAGICJACK'S OPPOSITION TO MOTION TO STRIKE

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1 **I. INTRODUCTION**

2 Happy Mutants' motion to strike magicJack's Complaint should be denied. The motion
3 itself perpetuates the very defamation magicJack's Complaint seeks to end. Without any factual
4 support, Happy Mutants continues to claim magicJack uses an "unusual and invasive" end-user
5 license which "permit[s] magicJack to 'analyze' [customer] phone calls." Def. Motion to Strike, at
6 2. MagicJack has not, and would not, listen to its customers' calls.

7 The anti-SLAPP statute was not designed to give publishers, on the web or otherwise, carte
8 blanche to destroy a company's reputation by posting defamatory statements. The statements are
9 commercial speech and subject to the same constraints as any other. Because, here, Happy Mutants
10 cannot show its actions fall within the purview of the statute, and its statements are provably false,
11 its motion should be denied.

12 **II. THE FACTS**

13 Plaintiff magicJack LP ("magicJack") is a small, privately held company that markets and
14 sells a popular Voice over Internet Protocol ("VoIP") device under the magicJack® name (the
15 "magicJack® Device"). See Declaration of Dan Borislow ("Borislow Decl.") ¶¶ 3-4. The
16 magicJack® Device allows its users to make and receive local and long distance phone calls over the
17 Internet simply by plugging it into their computer. *Id.* The Device is approximately the size of a
18 matchbox and plugs into the USB port of a user's computer. Borislow Decl. ¶ 5. When a user
19 plugs her standard telephone into the magicJack® Device, after clicking through and accepting
20 magicJack's Terms of Service, the device runs automatically, allowing the telephone to directly
21 make and receive calls over the Internet. *Id.* The Device has won numerous accolades and awards
22 for its ease of use and ingenuity. Borislow Decl. ¶ 6, Ex. A.

23 Defendant Happy Mutants LLC owns and operates the Boing Boing Gadgets blog ("Boing
24 Boing"). On April 14, 2008, it published the following defamatory statements in an "article"
25 written by Boing Boing editor Rob Beschizza:

- 26 • magicJack practices "systematic privacy invasion";
27 • "[magicJack] will also snoop on your calls to target ads more accurately";
28 • "MagicJack's EULA ["End User License Agreement"] says it will spy on you";

- 1 • “the ‘look how many people came for a free trial’ counter on the homepage *is a fake*,
2 a javascript applet that increments itself automatically” (emphasis added).

3 Complaint, Ex A. (the “Defamatory Statements”). This blog post was subsequently reprinted on
4 other websites with increasingly vitriolic language.¹ Each of these statements is provably false.

5 MagicJack has not and would not listen in on any user’s phone conversation. Borislow
6 Decl., ¶¶ 14, 18. It has no interest in doing so. *Id.* It has never analyzed the phone numbers its
7 customers call. Borislow Decl., ¶ 16. Nor has it ever sold its users’ personal information. *Id.*

8 While magicJack’s terms of service state that magicJack “*may* analyze the phone numbers
9 you call in order to improve the relevance of the ads,” magicJack has never actually made use of
10 this provision. *See* Borislow Decl., ¶¶ 16-18 (emphasis added). It has at all times complied with
11 California’s Privacy Law, Bus. & Prof. Code § 22575 *et seq.*, by conspicuously posting its terms of
12 service on its website. Beyond that, its users are fully aware of the terms of service; they must
13 accept them by clicking through a license agreement before they can use the device. Borislow
14 Decl., ¶ 8, Ex. C. Finally, the web ticker posted on magicJack’s website is not “a fake.” To the
15 contrary, it exceeds industry standards to provide as close an approximation of actual visitors as
16 technically possible.

17 In short, magicJack does not conduct “systematic privacy invasion,” it does not “snoop,” it
18 does not “spy,” and its web ticker is certainly not “a fake.”

19 **III. ARGUMENT**

20 **A. Legal Standard for anti-SLAPP Motions to Strike.**

21 A special motion to strike under Cal. Code Civ. P. § 425.16 -- the so-called anti-SLAPP
22 statute -- allows a defendant to seek early dismissal of a lawsuit that qualifies as a Strategic Lawsuit
23 Against Public Participation (“SLAPP”). These are lawsuits “without merit filed to dissuade or
24 punish the exercise of First Amendment rights of defendants.” *Lafayette Morehouse v. Chronicle*
25 *Publishing Co.*, 37 Cal. App. 4th 855, 858 (1995) (SLAPP plaintiffs file “solely for delay and
26 distractions and to punish activists by imposing litigation costs on them”); *see also* *Hull v. Rossi*,

27 _____
28 ¹ Communication Decency Act § 230 provides near blanket immunity for website providers who
merely republish another’s statements. Only the original poster can be held liable.

1 13 Cal. App. 4th 1763, 1769 (1993) (defining a SLAPP suit as “one brought to intimidate and for
2 purely political purposes”).

3 The anti-SLAPP statute was not intended to bar all litigation affecting First Amendment
4 rights. Instead, it was enacted to encourage participation in matters of public significance and
5 ensure that such participation would not be chilled through abuse of the judicial process. Cal. Code
6 Civ. P. § 425.16(a). As a result, the statute contemplates the early dismissal of non-meritorious
7 actions filed with the sole intent to prevent or punish a party for exercising First Amendment rights.
8 *Lafayette Morehouse*, 37 Cal. App. 4th at 865, *citing Dixon v. Super. Ct. of Orange County*, 30 Cal.
9 App. 4th 733, 741 (1994) (citations omitted).

10 To rule on an anti-SLAPP motion to strike, the Court must engage in a two-step process.
11 First, the Court must decide whether the defendant has made a threshold showing that the
12 challenged cause of action is one arising from protected activity. *Navellier v. Sletten*, 29 Cal. 4th
13 82, 88 (2002). Defendant must show that the acts about which plaintiff complains were taken “in
14 furtherance of the [defendant]’s right of petition or free speech under the United States or
15 California Constitution in connection with a public issue,” as defined by Cal. Code Civ. P. § 425.16.
16 If the first prong is met, the burden then shifts to plaintiff to demonstrate a probability of prevailing
17 on the claim. *Vargas v. City of Salinas*, 46 Cal. 4th 1, 14, 19 (2009); *Taus v. Loftus*, 40 Cal. 4th
18 683, 703 (2007); *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (2002).
19 Only a case that satisfies *both* prongs of the anti-SLAPP statute -- that arises from protected speech
20 *and* lacks even minimal merit -- is a SLAPP, subject to being stricken under the statute. *Navellier*,
21 29 Cal. 4th at 88-89. Here, neither prong can be met.

22 **B. Defendant Cannot Show that the Suit Falls Within the**
23 **Anti-SLAPP Statute.**

24 Happy Mutants bears the initial burden of showing that the alleged SLAPP suit falls within
25 the class of suits subject to a motion to strike under section 425.16. It, therefore, must demonstrate
26 that the acts underlying magicJack’s claims were taken “in furtherance of the Happy Mutants’ right
27 of petition or free speech under the United States or California Constitution in connection with a
28 public issue,” as set forth in one of the four categories of conduct described in section 425.16(e).

1 *Nygård, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1036 (2008). Here, Happy Mutants claims
2 the acts fall within subdivision (e)(3), i.e. they are “written or oral statements or writings made in a
3 place open to the public or a public forum in connection with an issue of public interest.” Cal. Code
4 Civ. P. § 425.16(e)(3). Because the challenged statements are purely commercial speech
5 implicating no broad issue of public interest, Happy Mutants cannot satisfy the first prong of the
6 anti-SLAPP suit test. On that basis alone, its motion should be denied.

7 **1. Commercial Speech is Entitled to Limited, If Any,
8 First Amendment Protection.**

9 As Happy Mutants admits, the challenged statements all specifically criticized magicJack’s
10 Terms of Service for its VoIP device: “The Beschizza Post . . . first extensively quoted the
11 MagicJack EULA, verbatim. It then criticized certain provisions of MagicJack’s EULA The
12 Beschizza Post also took issue with a ‘ticker’ on MagicJack’s website. . .” Def. Motion to Strike,
13 at 2. These statements are quintessential commercial speech. They concern commercial products,
14 are directed to potential magicJack consumers and consist of allegedly factual statements.
15 *Kaskey v. Nike, Inc.*, 27 Cal. 4th 939, 964 (2002). The First Amendment “accords less protection to
16 commercial speech than to other constitutionally safeguarded forms of expression.” *Bolger v.*
17 *Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-65 (1983); *Kaskey*, 27 Cal. 4th at 952. In particular,
18 there is no constitutional value in false statements of fact. *Id.*, citing *Gertz v. Robert Welch, Inc.*,
19 418 U.S. 323, 340 (1974). “Untruthful speech, commercial or otherwise, has never been protected
20 for its own sake.” *Id.*, citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer*
21 *Council, Inc.*, 425 U.S. 748, 771 (1976). As such, the statements here are entitled to limited, if any,
22 First Amendment protection, *id.*, citing *In re R.M.J.*, 455 U.S. 191, 203 (1982), and limited, if any,
23 protection under California’s anti-SLAPP statute. *See Nagel v. Twin Laboratories, Inc.*, 109 Cal.
24 App. 4th 39, 50-51 (2003).

25 **2. The Defamatory Statements do not Concern an Issue of Public
26 Interest.**

27 Even if the statements are accorded some First Amendment protection, they still do not fall
28 within the ambit of the anti-SLAPP statute. Because there is no official proceeding, the public

1 interest limitation of CCP § 425.16(e) applies. Contrary to Happy Mutants' claim that this prong
2 encompasses any issue in which the public is interested, Def. Motion to Strike, at 11, the
3 Legislature intended this requirement to have a limiting effect on the types of conduct that come
4 within the statute. *Weinberg v. Feisel*, 110 Cal. App. 4th 1122, 1132 (2003); *Rivero v. American*
5 *Federation of State, County and Municipal Employees, AFL-CIO*, 105 Cal. App. 4th 913, 926
6 (2003). Thus, unless Happy Mutants' statements concern a matter of public interest within the
7 meaning of the statute, the anti-SLAPP statute does not apply. *Commonwealth Energy Corp. v.*
8 *Investor Data Exchange, Inc.*, 110 Cal. App. 4th 26, 33 (2003); *Consumer Justice Center v.*
9 *Trimedica International, Inc.*, 107 Cal. App. 4th 595, 600-601 (2003).

10 Generally, statements about the quality of a specific commercial product or about a
11 particular business are *not* matters that concern a public issue or a matter of public interest within
12 the meaning of California's anti-SLAPP statute. *Commonwealth Energy*, 110 Cal. App. 4th at 34-
13 35 (denying anti-SLAPP motion to strike in case involving claims made about telemarketing pitch);
14 *Consumer Justice Center*, 107 Cal. App. 4th at 601 (denying motion to strike in case involving ads
15 for breast enlargement herbal supplements); *Nagel*, 109 Cal. App. 4th at 47-48 (denying anti-
16 SLAPP motion in case involving dietary supplements); *Rivero*, 105 Cal. App. 4th at 924 (denying
17 anti-SLAPP motion in libel suit about criticisms of university's workplace activities). Although a
18 statement about the specific properties and efficacy of a particular product may affect consumers,
19 this type of statement is directed primarily at protecting private commercial interests and, thus, does
20 not generally implicate issues that are fundamentally "public" concerns. *See Commonwealth*
21 *Energy*, 110 Cal. App. 4th at 34-35; *Consumer Justice Center*, 107 Cal. App. 4th at 601; *Nagel*,
22 109 Cal. App. 4th at 50-51.

23 Only three categories of cases fit this prong: (1) the subject of the statement was a person or
24 entity in the public eye, (2) the statement involved conduct that could affect large numbers of
25 people beyond the direct participants, and (3) the statement involved a topic of widespread, public
26 interest. *Commonwealth Energy*, 110 Cal. App. 4th at 33; *Rivero*, 105 Cal. App. 4th at 924. The
27 speech here fits none of these categories. MagicJack is a small, privately held company; it is not in
28 the public eye. Borislow Decl., ¶ 3. The statements concerned "the specific properties and efficacy

1 of a particular product.” See *Consumer Justice Center*, 107 Cal. App. 4th at 601 (holding that
2 advertising claims made about herbal supplement promising breast enlargement did not invoke
3 public issue or issue of public interest because claims not about “herbal supplements in general” but
4 specific claims about specific property); *Nagel*, 109 Cal. App. 4th at 50 (same as to claims about
5 widely ingested non-medicinal product used to lose weight). Other than magicJack customers who
6 installed the device, no one would be affected by magicJack’s allegedly problematic practices.

7 Finally, the statements did not concern a topic of widespread public interest. They were
8 solely about MagicJack’s terms of service. Where, as here, the statements solely concern the
9 plaintiff’s product, the defendant’s anti-SLAPP motion is routinely denied. See, e.g.,
10 *Commonwealth Energy*, 110 Cal. App. 4th at 34 (denying motion to strike under first prong where
11 statements about company’s particular services, not about investment scams in general); *Mann v.*
12 *Quality Old Time Service, Inc.*, 120 Cal. App. 4th 90, 111 (2004) (denying anti-SLAPP motion
13 where statements “not about pollution, or potential public health and safety issues in general, but
14 about the [plaintiff’s] specific business practices.”); *World Financial Group, Inc. v. HBW Insurance*
15 *& Financial Services, Inc.*, 172 Cal. App. 4th 1561, 1568-70 (2009) (denying motion under first
16 prong where statements solely about plaintiff’s business capacity). As one California court has
17 explained:

18 The part is not synonymous with the greater whole. Selling an herbal
19 breast enlargement product is not a disquisition on alternative
20 medicine. Lying about the supervisor of eight union workers is not
21 singing one of those old Pete Seeger union songs. . . [H]awking an
investigatory service is not an economics lecture on the importance of
information for efficient markets.

22 *Commonwealth Energy*, 110 Cal. App. 4th at 34. So, too, criticizing magicJack’s Terms of Service
23 is not challenging the telecommunications industry’s treatment of consumer privacy rights. If it
24 were, virtually every claim concerning a consumer product would fall within the anti-SLAPP
25 statute. Most do not. See *Consumer Justice Center*, 107 Cal. App. 4th at 602 (“Construing the
26 statute in this manner would allow every defendant in every false advertising case (or nearly any
27 case that involves any type of speech) to bring a special motion to strike under the anti-SLAPP
28 statute, even though it is obvious that the case was not filed for the purpose of chilling participation

1 in matters of public interest.”); *see also Rivero*, 105 Cal. App. 4th at 926; *World Financial Group,*
2 *Inc.*, 172 Cal. App. 4th 1561, 1570 (2009).

3 Happy Mutants ignores its specific criticisms of magicJack’s EULA and argues that
4 “internet privacy rights and the use and abuse of EULAs” are matters of public interest. Def.
5 Motion to Strike, at 11. It also claims the issues raised in the false statements “broadly implicate
6 consumer rights.” *Id.* This argument has been routinely rejected. “By focusing on society’s
7 general interest in the subject matter of the dispute instead of the specific speech or conduct upon
8 which the complaint is based, defendants resort to the oft-rejected, so-called ‘synecdoche theory of
9 public issue in the anti-SLAPP statute,’ where ‘[t]he part [is considered] synonymous with the
10 greater whole.’” *World Financial Group, Inc.*, 172 Cal. App. 4th 1561, 1570 (2009), *quoting*
11 *Commonwealth Energy Corp.*, 110 Cal. App. 4th at 34. The proper focus is, instead, “the specific
12 nature of the speech rather than the generalities that might be abstracted from it.” *Id.*; *see also*
13 *Mann*, 120 Cal. App. 4th at 111. Here, each of the four challenged statements all exclusively
14 concern magicJack’s EULA and website, which are only of interest to prospective magicJack
15 customers. They, therefore, are outside the purview of California’s anti-SLAPP statute.

16 They fall within another limitation as well. “[T]hose charged with defamation cannot, by
17 their own conduct, create their own defense by making the claimant a public figure.” *Weinberg*,
18 110 Cal. App. 4th at 1133, *citing Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). Nor can a
19 person turn otherwise private information into a matter of public interest simply by communicating
20 it to a large number of people. *Id.*, *citing Rivero*, 105 Cal. App. 4th at 926. That is precisely the
21 situation here. MagicJack is a small company (fewer than 30 employees), and it is outside of the
22 public eye. Borislow Decl. ¶ 3. The *only* reason the terms of magicJack’s EULA is remotely of
23 public interest is because Happy Mutants has quoted its terms on its website. Otherwise, the EULA
24 is a private contract between magicJack and customers who purchase and install the magicJack®
25 Device. Its terms are irrelevant to everyone else.

26 As the courts did in *Commonwealth Energy*, *Consumer Justice*, *Nagel*, *Rivero*, *Mann* and
27 *World Financial Group*, the Court here should deny Happy Mutants’ motion to strike for not
28 meeting the first prong of the anti-SLAPP statute test.

1 **C. MagicJack Can Substantiate a Legally Sufficient Claim Because**
2 **Defendant's Defamatory Statements are False.**

3 Even if Happy Mutants could show that this lawsuit arises out of protected activity, its
4 Motion to Strike would still fail because it is probable that magicJack can prevail on its claims.
5 Under the anti-SLAPP statute, even where a lawsuit arises out of protected activity, a motion to
6 strike still may not be granted if "the plaintiff has established that there is a probability that [it] will
7 prevail on the claim." Cal. Code Civ. P. § 425.16(b)(1). The question is whether the plaintiff can
8 put forth evidence "that, if believed by the trier of fact, [is] sufficient to support a judgment in
9 plaintiffs' favor." *Zamos v. Stroud*, 32 Cal. 4th 958, 970 (2004) (affirming denial of motion to
10 strike where plaintiff put forth evidence that, if believed by a fact-finder, would be sufficient to
11 render judgment in their favor).

12 Here, magicJack alleges defamation under Cal. Civ. Code § 43 and unfair competition under
13 Cal. Bus. & Prof. Code § 17200, *et seq.* (the "Unfair Competition Law" or "UCL").² It is
14 uncontested that Happy Mutants published the statements at issue. *See, e.g.*, Def. Motion to Strike,
15 at 7-8. The Defamatory Statements are libelous on their face and, by their very nature, injurious to
16 magicJack in that they are likely to diminish magicJack's sales; accordingly, they are unlawful,
17 unfair, and fraudulent within the meaning of the UCL. As explained in section III.A., above, the
18 statements are unprivileged in that "there is no constitutional value in false statements of fact." *See*
19 *Kaskey*, 27 Cal. 4th at 953, *citing Gertz*, 418 U.S. at 340.

20 To be actionable, a defamatory statement must be one of fact. *Baker v. Los Angeles Herald*
21 *Examiner*, 42 Cal. 3d 254, 260 (1986). As the California Supreme Court has noted, the question is
22 "whether the average reader . . . could have reasonably understood the alleged defamatory statement
23 to be one of fact." *Id.* at 261. Where a speaker makes direct statements and "asserts as fact"
24 something about plaintiffs, the defamatory statements are actionable. *Selleck v. Globe Int'l, Inc.*,
25 166 Cal. App. 3d 1123, 1132-3 (1985) (holding a newspaper's statements were actionable where
26 article directly implied -- falsely -- that Tom Selleck's father had said certain things). A plain

27 _____
28 ² Cal. Civ. Code §§ 45-45a are also implicated in that this case deals with libel as the form of
defamation.

1 reading of Happy Mutants' Defamatory Statements shows that each is a statement of fact, not of
2 opinion. The statements directly accuse magicJack of doing certain things -- practicing "systematic
3 privacy invasion," "spy[ing] on you," "snoop[ing] on your calls," and publishing a web ticker that
4 "is a fake." Accordingly, the statements are not mere opinions and actionable in this regard.

5 As Happy Mutants' Motion suggests, the real question in this case is whether the
6 Defamatory Statements are provably false. Def. Motion to Strike at 12 ("The sine qua non of
7 recovery for defamation . . . is the existence of a falsehood.") (quoting *Old Dominion Branch No.*
8 *496, Nat'l Assoc. of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 283 (1974)); see also *Seelig*
9 *v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 809 (2002). Here, each of the Defamatory
10 Statements is provably false. Accordingly, it is probable that a trier of fact would decide this case
11 in magicJack's favor. In making that determination, the Court should consider the factual
12 declarations submitted, but must not weigh the credibility or probative strength of competing
13 evidence. *Soukup v. Law Offices of Herbert Hafif*, 39 Cal. 4th 260, 291 (2006). It is "the court's
14 responsibility to accept as true the evidence favorable to the plaintiff." *Id.*, quoting *HMS Capital,*
15 *Inc. v. Lawyers Title Co.*, 118 Cal. App. 4th 204, 212 (2004). Likewise, to avoid being stricken,
16 plaintiff need only establish that his or her claim has "minimal merit." *Id.*, quoting *Nevellier v.*
17 *Sletten*, 29 Cal. 4th 82, 89 (2002). Because, here, magicJack's claims have more than "minimal
18 merit," the Court must deny Happy Mutants' motion. *Id.*

19 **1. MagicJack does not Practice "systematic privacy invasion."**

20 Happy Mutants' statement that magicJack practices "systematic privacy invasion" is
21 provably false. MagicJack has never invaded any user's privacy, much less in a "systematic" way.
22 Magic Jack has never analyzed the phone numbers its users call. Borislow Decl., ¶¶ 17, 19. It has
23 never listened in on any user's phone conversation. Borislow Decl., ¶¶ 16, 18. It has never sold
24 its users' personal information. Borislow Decl., ¶ 16. MagicJack has at all times complied with
25 California's Privacy Law, Bus. & Prof. Code § 22575 *et seq.*, by conspicuously posting its terms of
26 service on its website. Borislow Decl., ¶ 7. Finally, magicJack ensures that its users are aware of
27 its policies by requiring each user to agree to the terms of service by means of a click-through
28 EULA. Borislow Decl., ¶ 8, Ex C.

1 Happy Mutants' attempt to justify its Defamatory Statement is insufficient. In its Motion to
2 Strike, Happy Mutants argues that the Defamatory Statement is based on magicJack's EULA. Def.
3 Motion to Strike at 13. But all the EULA says is that "You also understand and agree that . . . [o]ur
4 computers *may* analyze the phone numbers you call in order to improve the relevance of the
5 ads. . . ." Borislow Decl., Ex. B (emphasis added). The purpose of this clause is for magicJack to
6 reserve the right to, at some point in the future, target its ads to individual customers based on the
7 geographic areas they call. Borislow Decl., ¶¶ 15-16. This practice would be no different than the
8 way Google targets its ads based on users' keyword searches or the way Amazon.com targets ads
9 based on its customers' past purchases and searches. Importantly, however, magicJack has *never*
10 even made use of this clause in the EULA. Although the license permits magicJack to record and
11 analyze its users' phone numbers for purposes of targeting advertisements, magicJack has never
12 done so. Borislow Decl., ¶¶ 16, 18. To be clear, magicJack *does not* -- and has *never* -- analyzed its
13 users' phone numbers. *Id.*

14 Second, even if magicJack had made use of this clause in the EULA, it still would not be a
15 "systematic invasion of privacy." In the first place, "systematic invasion of privacy" implies
16 potentially criminal wrongdoing, and suggests that magicJack regularly eavesdrops on its users'
17 calls. MagicJack does not, and would not, do this. Borislow Decl. ¶¶ 14, 18. If it did, it would run
18 afoul of federal and state laws. *See* Cal. Penal Code § 630 *et seq.* (making it a misdemeanor under
19 California law to listen to a phone call without consent); 18 U.S.C. § 2510 *et seq.*³ Recording the
20 phone numbers is certainly not a privacy invasion. Every telephone company from time memorial
21 has done this to charge customers for their calls. Ad-targeting is also a common practice that is
22 useful for both sellers and consumers. A trier of fact would likely find that there is nothing
23 nefarious about such a policy. More significantly, though, the policy cannot be a "systematic
24 invasion of privacy" because the users agree to the practice. Borislow Dec. ¶¶ 8, 18. MagicJack

25
26 ³ The Federal Communications Assistance for Law Enforcement Act (CALEA) mandates that all
27 telephone companies, including providers of Voice over Internet Protocol (VoIP) services, establish
28 a mechanism to allow certain law enforcement and national security authorities to (1) access
customer calling records, and (2) put wiretaps in place. 47 U.S.C. § 1001 *et seq.* MagicJack has
never listened in on customers' telephone calls, but of course complies with law enforcement
obligations and court orders pursuant CALEA. *See* Borislow Decl., ¶ 14.

1 alerts its users to the potential of ad-targeting through its click-through EULA, and its users agree to
2 these terms. Borislow Decl. ¶ 8, Ex. C. Moreover, the terms of service are available online for
3 customers to review at any time. Borislow Decl., ¶¶ 7, 9, Ex. B, D. Thus even if magicJack *had*
4 analyzed the phone numbers its users call, it would not be a “systematic invasion of privacy” in that
5 the users agreed to the practice.

6 All of this shows that Happy Mutants’ statement is provably false. Accepting this evidence
7 in the light most favorable to magicJack, Happy Mutants’ motion must fail. MagicJack has
8 exceeded the “minimal merit” threshold for denying a motion to strike. *Soukup*, 39 Cal. 4th at 291.

9 **2. Statement that “[MagicJack] will also snoop on your calls to**
10 **target ads more accurately” is False.**

11 Similarly, Happy Mutants’ assertion that “[magicJack] will also snoop on your calls to target
12 ads more accurately” is provably false. A plain reading of the dictionary supports magicJack’s
13 position. To “snoop” means to “look or pry especially in a sneaking or meddlesome manner.” *See*
14 *Merriam-Webster Dictionary*, 11th ed. But magicJack has never implemented a system to analyze
15 calls for better-targeted ads. *See supra*, at Section III.B.1. It has never monitored the phone
16 numbers its users call, and it certainly has not monitored their conversations. *Id.* Therefore, Happy
17 Mutants’ blog post telling potential magicJack customers that the device “*will*” snoop on them is a
18 completely false statement. Even if magicJack had implemented a practice of analyzing phone calls
19 for ad-targeting purposes, a fact finder could reasonably determine that there is objectively nothing
20 sneaky or meddlesome about magicJack’s stated policy. This is especially true given that
21 magicJack users are told of the policy and agree to the terms of service.

22 Happy Mutants’ argument that its speech is hyperbole, and therefore protected, also fails.
23 Contrary to Happy Mutants’ position, “[t]he use of rhetorical hyperbole does not render
24 inactionable other statements capable of being proven true or false.” *Nygård, Inc.*, 159 Cal. App.
25 4th, at 1052, n.8 (citing *Edwards v. Hall*, 234 Cal. App. 3d 886, 903 (1991) (finding accusations
26 that plaintiff was an extortionist actionable even though “arguably hyperbolic”); *Sommer v. Gabor*,
27 40 Cal. App. 4th 1455, 1476 (1995) (finding statements that plaintiff “hangs out in sleazy bars” and
28 “is broke, had to sell her house in Hollywood, now lives in the worst section” were actionable

1 because they were provably false); *Gallagher v. Connell*, 123 Cal. App. 4th 1260, 1270-71 (2004)
2 (finding statements that plaintiff was “not there to help decedent but he was there to help himself”
3 was arguably defamatory because it was capable of being proven false.). Therefore, even where
4 statements are hyperbolic, they are still actionable for defamation where the statement is provably
5 false.

6 Here, because Happy Mutants’ defamatory statement is provably false, even if it were
7 “hyperbolic,” Defendant’s motion to strike still fails and should be denied.

8
9 **3. Statement that “MagicJack’s EULA says it will spy on you” is False.**

10 Happy Mutants’ statement that “MagicJack’s EULA says it will spy on you” is also
11 provably false. What the EULA says, and what magicJack users agree to, is that “[o]ur computers
12 may analyze the phone numbers you call in order to improve the relevance of the ads. . . .”
13 Borislow Decl., ¶ 17 (emphasis added); *see also* Borislow Decl., ¶ 13, Ex. B. According to the
14 Merriam-Webster Dictionary, to “spy” means “to watch secretly usually for hostile purposes.”
15 Merriam-Webster Dictionary, 11th ed. As explained above, magicJack fully informs its users of its
16 policy, and its users agree to those terms. There is nothing “secret” about magicJack’s policy. All
17 traditional telephone companies, like AT&T or Verizon, keep track of their customers’ calls; the
18 phone numbers are usually listed in monthly bills. Moreover, the policy is not for “hostile
19 purposes.” To the contrary, the EULA expressly states the policy’s purpose: “to improve the
20 relevance of ads.” Borislow Decl., ¶¶ 13, 17, Ex. B. This stated purpose is not nefarious; it is for
21 the benefit of both advertisers and customers, and a fact finder could agree with this assessment.
22 Accordingly, it is provably false that the magicJack EULA “says it will spy on you.”

23 **4. Statement that “[T]he ‘look how many people came for a free**
24 **trial’ counter on the homepage is a fake, a javascript applet that**
increments itself automatically” is False.

25 Happy Mutants’ blog states that “[T]he ‘look how many people came for a free trial’ counter
26 on the homepage is a fake, a javascript applet that increments itself automatically.” Complaint, Ex.
27 A. This statement is demonstrably false, as the counter is not “a fake.”
28

1 The magicJack website includes a counter that shows approximately how many people have
2 visited the site on any given day. Over time, magicJack has implemented two different types of
3 counters, both of which exceed industry standards. Declaration of Clay Williams (“Williams
4 Decl.”), ¶¶ 4-5, 8, 11-12. MagicJack’s first web counter, used until May 2008, calculated the total
5 number of unique web visits in a 24-hour period from 12:00 to 12:00 a.m. the previous day.
6 Williams Decl., ¶ 4. This was accomplished by assigning each visitor a cookie and tabulating a
7 “hit” whenever a new visitor loaded the magicjack.com domain. *Id.* This number was converted to
8 a visit-rate (visitors/minute), and the counter would simulate the actual user count by incrementing
9 at a rate equal to the previous day’s visitation rate. *Id.* In other words, the counter would “tick” at a
10 prescribed rate based on the previous day’s traffic. *Id.* This type of cookie-based tracking was, and
11 is, an extremely common technique for tracking visitor activity on websites. *Id.*

12 Beginning in May 2008, magicJack developed and implemented a counter that was even
13 more of a live representation of its web-visitors. Williams Decl., ¶ 5-6. Whenever a user visits
14 magicjack.com, he or she is directed to one of two servers where the website is hosted. Williams
15 Decl., ¶ 5. (Two servers are required because of the volume of web traffic visiting
16 magicjack.com.) *Id.* A “load balancer” alternates every other visitor to the second server. *Id.*
17 Because each server hosting the website only receives half of the total magicjack.com volume of
18 users, the servers’ web counters “tick” upward at a rate of 1.5 per page-load to approximate the total
19 number of visits to the website. Williams Decl., ¶ 6. This means that the magicJack counter
20 conservatively underreports its total number of visitors by approximately 25 percent. *Id.*
21 MagicJack has adopted this conservative approach so as to avoid overstating the number of web
22 visitors, and it not only meets, but exceeds industry standards. Williams Decl., ¶ 9, 11. Because it
23 is difficult for companies to measure real time Internet traffic, many websites actually count page
24 views, and not unique visitors. Williams Decl., ¶ 9. However, that methodology overstates the
25 number of visitors insofar as each visitor will typically account for multiple page hits as he or she
26 navigates through the website. *Id.*

1 Because the magicJack web counter exceeds industry standards and represents as close an
2 approximation as technically possible, Happy Mutants' statement that the counter is "a fake" is false
3 and defamatory. Consequently, its motion to strike fails.

4 **IV. CONCLUSION**

5 Happy Mutants' Motion to Strike is unfounded. Happy Mutants has not met its burden of
6 showing how the Defamatory Statements fall within the anti-SLAPP statute. Moreover, even if it
7 had met that burden, magicJack has shown a probability of prevailing on its claims because the
8 Defamatory Statements are provably false. Accordingly, the Court should deny Happy Mutants'
9 Motion to Strike.

10
11
12 Dated: May 13, 2009

Respectfully submitted,
ARNOLD & PORTER LLP

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15 By: 

Beth H. Parker
Attorneys for Plaintiff