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9 Happy Mutants LLC

FILED

NOV 20 2009

KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT

By: S. Hendryx, 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

REPLY MEMORANDUM IN SUPPORT
OF MOTION OF DEFENDANT HAPPY
MUTANTS LLC FOR ATTORNEYS' FEES
AND COSTS PURSUANT TO CODE OF
CIVIL PROCEDURE SECTION 425.16;

REPLY DECLARATION OF MARC E.
MAYER IN SUPPORT

18 Date: December 1, 2009
19 Time: 9:00 a.m.
20 Location: Dept. J
21 Judge: Honorable Verna Adams

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1 Introduction

2 MagicJack, LLP's ("MagicJack's") memorandum in Opposition to Happy Mutants LLC's
3 ("Bong Boing's") Motion for Attorneys' Fees and Costs ("Opp.") does not dispute Boing Boing's
4 entitlement to attorneys' fees and costs pursuant to the anti-SLAPP statute. Nor does MagicJack
5 offer any tangible objection to the amount of time spent by Boing Boing's counsel on the anti-
6 SLAPP motion and this motion for fees (which MagicJack also agrees is compensable). Thus,
7 MagicJack's *only* apparent objection is to approximately \$17,000 of the attorneys' fees sought
8 (and \$2,000 in costs). Thus, MagicJack apparently concedes that Boing Boing should be awarded
9 *at least* \$52,937.85 in attorneys' fees and costs, not including the attorneys' fees associated with
10 this reply memorandum and any hearing.

11 The foregoing aside, MagicJack's attempt to discount the amount of fees sought by Boing
12 Boing (a total of \$65,126 in fees and \$7,010 in costs, plus the cost of this reply memorandum
13 [approximately \$2,500] and any hearing) is unjustified, applies an overly narrow reading of the
14 anti-SLAPP statute, and ignores thousands of dollars in fees that MagicJack unnecessarily forced
15 Boing Boing to incur. Most notably, MagicJack ignores that the anti-SLAPP motion constituted
16 the *entirety* of this litigation. Thus, unlike the cases cited by MagicJack, Boing Boing does not
17 seek compensation for claims that were not disposed of in connection with the SLAPP proceeding
18 or were totally unrelated to the anti-SLAPP motion. To the contrary, *all* (or virtually all) of the
19 time spent by Boing Boing in connection with this action was either directly related to the anti-
20 SLAPP motion (including its analysis of the Complaint and internal discussions concerning case
21 strategy), inextricably intertwined with the anti-SLAPP motion (for example, work on the
22 demurrer, which was identical to the anti-SLAPP motion and informed that motion), or recovering
23 fees to which Boing Boing was entitled under the anti-SLAPP statute.

24 Finally, most of the fees that MagicJack complains about in its Opposition might never
25 have been incurred if MagicJack had, for example, not wasted Boing Boing's time with a
26 settlement agreement that it apparently never intended to sign, asserted claims for damages that it
27 knew it could not recover, or forced Boing Boing to file its motion for fees (and then to revise that
28

1 motion after MagicJack reneged on the settlement agreement).¹ In sum, Boing Boing should be
2 awarded all of the attorneys' fees and costs it seeks.

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4 **I. MAGICJACK IS NOT ENTITLED TO THE REDUCTION IT SEEKS.**

5 Virtually the entirety of MagicJack's Opposition is dedicated to its claim that of the total
6 amount of attorneys' fees sought by Boing Boing (\$65,126.00), approximately \$17,000 of that
7 amount is "unassociated" with the anti-SLAPP motion. MagicJack is wrong. A review of each of
8 the contested attorneys' fees reveals that each is related to the anti-SLAPP motion and/or the
9 recovery of fees as the prevailing party on the anti-SLAPP motion.

10
11 **A. Time Spent Reviewing The Complaint, Preparing The Demurrer, And**
12 **Engaging In Other Necessary Litigation Activities Are Compensable.**

13 As a threshold matter, MagicJack applies an overly narrow reading of the anti-SLAPP
14 statute. This is not a case in which the parties litigated unrelated matters or claims not covered by
15 the anti-SLAPP statute, and Boing Boing is not seeking fees for its defense of unrelated claims.
16 To the contrary, the entirety of this litigation centered on the anti-SLAPP motion, and that motion
17 disposed of *the entire case*. As MagicJack recognizes, the anti-SLAPP statute was amended in
18 1997 to mandate that it be given a "broad construction." Thus, in Metabolife v. Wornick, 213 F.
19 Supp. 2d 1220, 1223-24 (S.D. Cal. 2002), the District Court (applying California law) noted that
20 where, as here, "the entire lawsuit is subject to the anti-SLAPP motion," in effect, "all of [the
21 defendant's] attorney fees and expenses were incurred 'in connection with' the anti-SLAPP
22 motion." See also Kearney v. Foley & Lardner, 553 F. Supp. 2d 1178, 1183 (S.D. Cal. 2008)
23 (prevailing SLAPP defendant could recover attorneys' fees incurred on matters besides
24 defendants' anti-SLAPP motion); Wilkerson v. Sullivan, 99 Cal. App. 4th 443, 446 (2002)

25
26 ¹ Ironically, the amount that MagicJack concedes that Boing Boing should be awarded is the more
27 than the amount that Boing Boing was prepared to accept in settlement (\$50,000) in order to avoid
28 the expense of briefing this motion. Had MagicJack not forced Boing Boing to (1) spend nearly a
dozen hours drafting and negotiating the parties' settlement agreement, only to have MagicJack
renege on the agreement at the eleventh hour, or (2) file this motion, more than \$20,000 in
additional attorneys' fees could have been avoided.

1 (“Under section 425.16, subdivision (c), a defendant who prevails on an anti-SLAPP motion to
2 strike is entitled to recover his or her attorney fees. The statute is broadly construed so as to
3 effectuate the legislative purpose of reimbursing the prevailing defendant for expenses incurred in
4 extricating herself from a baseless lawsuit.”). This proposition is supported even by the cases
5 cited by MagicJack. See, e.g., Jackson v. Yarbray, -- Cal. Rpt.. 3d ---, 2009 WL 3740807,
6 (November 10, 2009) (“In awarding fees the trial court is not constrained by the amount sought by
7 the successful moving parties, but is obligated to award ‘reasonable attorneys’ fees under section
8 425.16 that adequately compensate them for the expense of responding to a baseless lawsuit.’ ...
9 The fees awarded should include services for *all proceedings...*”(emphasis added) (citations
10 omitted), 47 Cal. App. 4th 777 (1996). Accordingly, MagicJack should be compensated for all
11 expenses incurred in its successful defense of this action, which was *entirely* premised on the
12 claims that were subject to the anti-SLAPP motion (and dismissed as a result of that motion).²

13 The foregoing aside, even narrowly reading the statute to apply only to fees “reasonably
14 related” to the anti-SLAPP motion, it is clear that all or nearly all of the fees that MagicJack
15 complains about are directly related to the anti-SLAPP motion or to activities that were necessary
16 to prepare and file the anti-SLAPP motion.

17 *First*, MagicJack attempts to exclude Boing Boing’s initial review and analysis of the
18 Complaint (approximately \$2,150). That is wholly unjustified. Boing Boing necessarily was
19 required to review and analyze the Complaint in order to (1) determine whether the Complaint was
20 subject to the anti-SLAPP statute, and (2) prepare its anti-SLAPP motion, which was based
21 *entirely* upon the allegations and causes of action set forth in the Complaint. There can be little
22 dispute that time spent reviewing and analyzing the Complaint is “related to” the anti-SLAPP
23 motion, under even the narrowest reading of that term. Indeed, the disputed time entries
24 themselves reflect that review of the Complaint was conducted *alongside* (and thus was

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26 ² The portion of Yarbray quoted by MagicJack referred to the defendant’s attempt to seek
27 attorneys’ fees for *other claims* that were wholly unrelated to the claims that were subject to the
28 anti-SLAPP motion. Likewise, in Christian Research Institute v. Alnor, 165 Cal. App. 4th 1315,
1325 (2008), the defendant sought attorneys fees for obviously unrelated and totally unnecessary
tasks such as “attacking service of process, preparing and revising an answer to the complaint,
summary judgment research, [and] a senior associate’s [w]ork on a press release...”

1 intertwined with) review and analysis of the SLAPP Motion. See e.g. Declaration of Kevin
2 Bovard (“Bovard Decl.”) at 2 (time entry: “Review and analyze Complaint by MagicJack;
3 conferences with R. Rader regarding lawsuit; review and analyze blog posting; **SLAPP**
4 **statute.**”)(emphasis added)³

5 **Second**, MagicJack attempts to discount approximately \$3,592 for work in connection with
6 the Demurrer. But MagicJack also necessarily concedes that where the factual and legal bases of
7 the anti-SLAPP motion overlap with another motion, fees “need not be apportioned” between the
8 two motions. Kearny, 553 F. Supp. 2d at 1184 (permitting recovery of attorneys’ fees on motion
9 to strike and motion to dismiss where the motions were “based entirely on a common factual
10 scenario” and there was “substantive convergence of the legal arguments in the motions to strike
11 and to dismiss.”); Metabolife, 213 F. Supp. 2d at 1223 (fees incurred on motion to dismiss “were
12 inextricably intertwined with the anti-SLAPP motion”); Fabbrini v. City of Dunsmuir, No 2:07-
13 CV-1099-GEB-CMK, 2008 WL 1808502, *1 (E.D. Cal. April 22, 2008).

14 Like the SLAPP motion, the Demurrer was based entirely upon Boing Boing’s First
15 Amendment defense, and specifically on the ground that the statements on which MagicJack’s
16 claims were based either were truthful or were statements of opinion that were not “provably
17 false” (e.g. that MagicJack’s EULA is an “invasion of privacy” or that the EULA says that
18 MagicJack will “spy on you.”). In fact, MagicJack’s Demurrer and anti-SLAPP motion were
19 prepared hand-in-hand, with research and drafting on one motion informing and being used in the
20 other. Even a cursory review of the two motions (which contain much of the same language)
21 confirms this to be the case. MagicJack’s claim that Boing Boing’s demurrer is “premised on the
22 distinct argument that MagicJack failed to state a claim per Code Civ. P. 430.10(e)”(Opp. at 4)
23 misses the point. Regardless of the **procedural** basis on which the Demurrer was filed, it was
24 premised on the exact same factual and legal arguments as the anti-SLAPP motion.

25 **Third**, with respect to time spent on the motion to strike punitive damages, MagicJack
26 ignores that Boing Boing had no choice but to file that motion at the same time its initial response

27 _____
28 ³ Related to this initial analysis were Boing Boing’s communications with its insurance carrier, in
which Boing Boing sought approval of its decision to file the anti-SLAPP motion.

1 was due, lest it run the risk of being foreclosed from making the argument in the future.⁴ Cal. Civ.
2 Proc. Section 435(b)(1)) (“Any party, *within the time allowed to respond to a pleading* may serve
3 and file a notice of motion to strike the whole or any part thereof”)(emphasis added). MagicJack’s
4 suggestion that this motion could have been filed after the hearing on the anti-SLAPP motion
5 (Opp. at 4) is wrong.

6 *Finally*, even if there were any merit to MagicJack’s assertions (there is not) it is
7 immediately obvious, including from the chart provided with the Declaration of Kevin Bovard that
8 the amount that MagicJack ascribes to these tasks is grossly overstated. By way of example:

9 • With respect to the entry dated 3/19/09, MagicJack ascribes as “insurance”
10 conferences between counsel and clients concerning “defamation claim,” and ignores that the *only*
11 time spent in connection with “insurance” that day was a single telephone call.

12 • With respect to numerous entries, MagicJack has ignored that the time it seeks to
13 discount pertained either to conferences in which the SLAPP motion was discussed or in which
14 the attorney reviewed the SLAPP motion along with other papers. See, e.g., 3/30/09 (“revise
15 demurrer and SLAPP motion”); 4/7/09 (“conferences with J. Rubin regarding demurrer,
16 scheduling, hearing on SLAPP motion.”); 4/10/09 (“draft and revise demurrer, motion to strike,
17 SLAPP motion”); 4/12/09 (“Review pleadings and make comments”); 4/13/09 (“conferences with
18 M. Mayer, J. Rubin regarding pleadings.”).

19 • In some cases, MagicJack simply has improperly allocated or characterized the
20 time. See, e.g., 4/7/09 (entire entry is falsely characterized as relating to “insurance”); 4/9/09
21 (characterizing “research regarding defamation” as “damages.”); 4/15/09 (incorrectly
22 characterizing as “demurrer” time spent to “finalize and file...declarations,” although all
23 declarations were in support of the SLAPP motion).

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27 ⁴ MagicJack also ignores that it certainly knew that it was not entitled to seek punitive damages,
28 and thus the fees incurred in connection with this motion were entirely the result of overreaching
and overpleading by MagicJack.

1 Thus, even if the Court were inclined to discount any of the fees incurred in connection
2 with these activities, it should provide only a nominal offset (a total of no more than \$3,000-
3 \$5,000).⁵

4
5 **B. Attorneys' Fees Incurred In Connection With Settlement Discussions Are "In**
6 **Connection With" Its Attempt to Recover Its Attorneys' Fees; Moreover,**
7 **MagicJack Is Directly And Wholly Responsible For These Fees.**

8 MagicJack next claims that the fee award should be reduced by \$5,134, representing fees
9 incurred by Boing Boing in connection with the parties' settlement communications in July and
10 August 2009. MagicJack's argument, and its characterization of these fees (as incurred
11 "attempting to settle this case") is disingenuous. The fees incurred in July and August 2009 were
12 not incurred in efforts to settle the "case" (Boing Boing already had prevailed); rather, they were
13 incurred in attempting to settle *only* the issue of Boing Boing's *attorneys' fees*, in lieu of (and in
14 order to avoid) this motion.

15 This distinction is critical, because it is well-established, and MagicJack does not dispute,
16 that Boing Boing is entitled to recover all of its fees and costs incurred in recovering the fees to
17 which it is statutorily entitled under Cal. Civ. Code § 425.16(c). See Dowling v. Zimmerman, 85
18 Cal. App. 4th 1400, 1425 (2001) ("We hold that in order to effectuate the purpose of the anti-
19 SLAPP statute and the Legislature's intent to deter SLAPP suits, a defendant... is entitled to
20 recover an award of reasonable attorney fees under the mandatory provisions of subdivision (c) of
21 that section in order to compensate the retained counsel for the legal services provided in
22 connection with *both* the special motion to strike, *and the recovery of attorney fees and costs*
23 *under that subdivision.*") (emphasis added). The caselaw draws no distinction between time spent
24 attempting to obtain these attorneys' fees by way of settlement, rather than by motion. Both

25 ⁵ The total amount attributable to insurance issues is approximately \$1,800, after MagicJack's
26 attempt to discount the 3/19 and 4/7 entries is disregarded. The total amount attributable to the
27 motion to strike punitive damages is approximately \$1,316, disregarding MagicJack's attempt to
28 discount the 4/9/09 and 4/12/09 entries. It is extremely difficult to separate time spent on the
demurrer from time spent on the anti-SLAPP motion, since the two were prepared hand-in-hand;
however, Boing Boing estimates that no more than \$2,000 in fees were incurred in connection
with portions of the Demurrer that were not lifted directly from the anti-SLAPP motion.

1 should properly be considered compensable as fees “in connection with....the recovery of
2 attorneys’ fees.” Id.

3 The circumstances here provide an especially compelling case for the award of these
4 attorneys’ fees. As set forth in the Declaration of Marc E. Mayer (“Mayer Decl.”), Boing Boing
5 would have been prepared to file its motion for attorneys’ fees in June 2009. However, in an
6 effort to *avoid* the expenditure of additional fees, Boing Boing reached out to MagicJack’s counsel
7 to inquire as to whether MagicJack would pay those fees without the necessity of a motion.
8 Mayer Decl., ¶ 15. MagicJack agreed to do so, but insisted that Boing Boing prepare a formal
9 settlement agreement. Id., ¶ 19. Once that settlement agreement was prepared (at a substantial
10 expense to Boing Boing), MagicJack first delayed in providing its edits – forcing Boing Boing to
11 incur additional fees seeking multiple extensions from the Court to file its motion. Id. Then, it
12 made substantive revisions to the settlement agreement (at further expense to Boing Boing). Id.
13 Finally, after the settlement agreement was finalized, MagicJack reneged on the settlement deal,
14 imposing a series of unacceptable new conditions. Id., ¶ 20. To make matters worse, when Boing
15 Boing attempted to communicate with MagicJack to discuss these new terms, no response was
16 forthcoming, requiring Boing Boing first to file for yet another extension, and then to revise and
17 file its Motion for Attorneys’ fees (and this reply). See Reply Declaration of Marc E. Mayer
18 (“Mayer Reply Decl.”), ¶ 3.

19 Ultimately, Boing Boing’s attempt to resolve this fee issue by way of settlement caused
20 Boing Boing to incur substantially *more* fees than if it had simply filed its motion. Mayer Reply
21 Decl., ¶ 6. More to the point, all of these fees were the result of *MagicJack*’s own conduct. Had
22 MagicJack disclosed that it was only prepared to compensate Boing Boing if it would agree to its
23 onerous conditions, Boing Boing could have avoided thousands of dollars in attorneys’ fees
24 drafting and negotiating the settlement agreement. Likewise, if MagicJack had not decided at the
25 eleventh hour to forego the parties’ carefully negotiated agreement and demand new terms, then
26 this motion would not have been necessary at all. MagicJack’s posturing, delay, and last-minute
27 about-face resulted in the absolute *worst* situation for Boing Boing. That is, not only did Boing
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1 Boing incur more than \$5,000 in settlement discussions, but then it was *also* required to litigate its
2 entitlement to attorneys' fees.

3 Finally, MagicJack's argument runs contrary to its own claim that "strong public policy
4 favors the settlement of disputes." (Opp. at 4, citing Abbott Ford, Inc. v. Superior Ct., 43 Cal. 3d
5 858, 871-73 (1987)). The failure to compensate Boing Boing for fees incurred in attempting to
6 resolve the fee dispute would *discourage* litigants from attempting to settle fee disputes, for fear
7 that if a settlement is not consummated, the prevailing party will not be compensated for that time
8 and the claimant will ultimately be in a worse position than if the topic of settlement had never
9 been broached. In other words, Boing Boing will have been penalized for its efforts to avoid this
10 motion and, moreover, for acting in the good faith belief that MagicJack would be true to its word
11 and execute the settlement agreement that the parties negotiated. By contrast, having led Boing
12 Boing down the settlement path, and then changing its mind at the eleventh hour, MagicJack
13 should not be entitled to now disavow itself of these fees.

14
15 **II. BOING BOING'S REQUESTED FEES AND COSTS ARE REASONABLE.**

16 Contrary to MagicJack's suggestion, Boing Boing does not seek a "windfall." (Opp. at 3).
17 Rather, *all* of the attorneys' fees and costs sought by Boing Boing were *actually* incurred by
18 Boing Boing in connection with this action. See Mayer Decl., ¶ 23-26, 28. Put simply, Boing
19 Boing merely seeks to be made whole for the substantial attorneys' fees and costs it was forced to
20 incur in defending this baseless lawsuit. An award of any amount less than that requested would
21 leave Boing Boing uncompensated for its defense of this action. It also would have a chilling
22 effect on First Amendment rights by sending a message to other reporters or bloggers that even a
23 meritless defamation claim will result in substantial, potentially uncompensated expense.

24 MagicJack's hyperbole that the fees incurred (\$65,126, plus the expense of this reply
25 memorandum and any oral argument) were "exorbitant" (Opp. at 6) is unsupported and
26 unexplained. MagicJack does not challenge the rate or experience of Boing Boing's attorneys.
27 Nor does MagicJack offer *any* factual or legal basis for its suggestion that the amount of time
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1 spent on the anti-SLAPP motion was excessive or improper.⁶ (Tellingly, MagicJack does not
2 disclose its own fees, which certainly were on par with those incurred by Boing Boing). Rather,
3 Boing Boing made every effort to litigate this case in a cost-effective manner, commensurate with
4 the importance of the issue and the number of arguments put forth by MagicJack. The fee award
5 sought by Boing Boing thus is consistent with (and in fact is far less than) awards granted in other
6 SLAPP cases. See, e.g., Metabolife, 213 F. Supp. 2d at 1228 (\$318,688); Ketchum v. Moses, 24
7 Cal. 4th 1122, 1129 (2001) (two awards of \$140,212 and \$112,160).⁷ Moreover, MagicJack does
8 not contest that it could have avoided many of these fees and costs if, for example, it had
9 submitted on the Court’s tentative ruling, executed the parties’ final settlement agreement, or not
10 required Boing Boing to file multiple stipulations extending the deadline to file this motion.

11 Finally, MagicJack cursorily suggests that Boing Boing’s *costs* (a total of \$7,010) should
12 be offset by 1/3, based purely on “assumptions,” without any explanation or factual basis (Opp. at
13 5). Review of the cost breakdown provided by Boing Boing (Mayer Decl., Ex. B) reflects that
14 virtually every one of the requested costs was incurred in connection with the preparation, filing,
15 and arguing of the anti-SLAPP motion and this motion.

16
17 **Conclusion**

18 For the foregoing reasons, and those set forth in Boing Boing’s Motion, Boing Boing
19 respectfully requests that the Court award it \$65,126 in attorneys’ fees and \$7,010 in costs, plus
20 the fees incurred in connection with this reply memorandum (approximately \$2,500, see Mayer
21

22 ⁶ MagicJack deliberately overstates the staffing on the case, claiming that “four attorneys and one
23 paralegal” worked on the case. A review of the fee statements submitted by Boing Boing
24 confirms that, in fact, virtually *all* of the work on this case was done by Mr. Mayer, with some
limited support from associate Jill Rubin. A paralegal was used solely to assist in preparing the
attorneys’ fees statements that were attached to Boing Boing’s motion for attorneys’ fees.

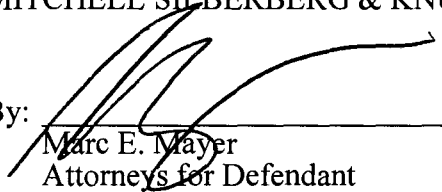
25 ⁷ The two cases cited by MagicJack, Maughan v. Google Tech., Inc., 143 Cal. App. 4th 1242
26 (2007), and Christian Research, 165 Cal. App. 4th at 1315, are inapposite. Both of these cases
27 involved fee requests that were far greater than that sought here, and grossly disproportionate to
28 the amount of work required by the motions (in Google, the defendant sought compensation for
400 hours of work; in Christian Research, *600* hours). Additionally, in Christian Research, the
court expressly found that the hours were deliberately padded and that fee statements were vague
and improper.

1 Reply Decl., ¶ 2) and those incurred in connection with any hearing on this motion.

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DATED: November 19, 2009

MITCHELL SILBERBERG & KNUPP LLP

By: 

Marc E. Mayer
Attorneys for Defendant

1 hearing (or further briefing) on the attorneys' fees motion. A true and correct copy of the August
2 21, 2009, e-mail is attached hereto as Exhibit B. Ms. Parker did not respond to that e-mail.

3
4 5. On August 28, 2009, I received a message from my assistant that MagicJack's
5 President and Chief Executive Officer, Daniel Borislow, had attempted to reach me by telephone.
6 I immediately forwarded this message to Ms. Parker by e-mail, and asked her to contact me. Ms.
7 Parker did not contact me. On August 31, 2009, I sent a follow-up e-mail to Ms. Parker, again
8 asking that she contact me. I did not receive a response to either of these e-mails. A true and
9 correct copy of these e-mails are attached hereto as Exhibit C.

10
11 6. If MagicJack had not represented to me in July 2009 that it was prepared to resolve
12 the fee dispute for the sum of \$50,000, Boing Boing would have immediately filed its motion for
13 attorneys' fees at that time. Instead, I was required (at MagicJack's request) to spend several
14 hours drafting and revising the settlement agreement, and my colleague Jill Rubin was required to
15 spend several hours preparing and filing stipulations to extend the time to file the motion for
16 attorneys' fees. Additionally, because of the amount of time that passed while the parties were
17 negotiating the settlement, Ms. Rubin and I were required to spend several additional hours
18 revising and re-drafting the motion for attorneys' fees to account for additional attorneys' fees
19 incurred and the new circumstances presented by the settlement negotiations. I estimate that
20 MagicJack's decision to engage in settlement negotiations, and then abandon those negotiations,
21 forced Boing Boing to incur approximately \$10,000 that it would not have otherwise incurred if it
22 simply had filed its motion in June or July 2009 and not made any effort to settle the fee dispute.

23
24 7. On November 17, 2009, after I had prepared this reply memorandum, I finally
25 received a telephone call from MagicJack's counsel, Richard Firestone. I subsequently had
26 telephone and e-mail communications with Mr. Firestone and (with Mr. Firestone's express
27 consent), with Mr. Borislow to discuss settlement of this fee dispute. However, MagicJack
28 demanded that as a condition to settlement Boing Boing agree to a broad confidentiality provision.

1 When I told Mr. Borislow that Boing Boing could not agree to a confidentiality agreement with
2 respect to matters in the public record, he stated (in an e-mail) "see you in Court." Accordingly,
3 the parties were unable to resolve this fee dispute.
4

5 I declare under penalty of perjury under the laws of the State of California that the
6 foregoing is true and correct.
7

8 Executed this 19th day of November, 2009, at Los Angeles, California.
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11 _____
12 Marc E. Mayer
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EXHIBIT A

Mayer, Marc

From: Mayer, Marc
Sent: Thursday, August 20, 2009 2:12 PM
To: 'Stewart Goldstein, Rhonda'; Parker, Beth
Cc: Rader, Rob; Rubin, Jill
Subject: RE: MagicJack v. Happy Mutants

Beth and Rhonda:

We filed the stipulation this morning. However, since this is now the third stipulation, we are extremely concerned about the possibility (albeit small) that the Court will decline to sign the stipulation. We have contacted Judge Adams' clerk to advise her that the stipulation is being filed, and we will continue to follow up.

In the meantime, we are even more concerned with the amount of time it has taken just to obtain your client's position on the settlement agreement, and both we and our clients are becoming frustrated, especially since it seems as if we are renegotiating terms that were specifically discussed weeks ago. Thus, we feel that unless we receive word from the Court by noon tomorrow that the stipulation has been signed, we may have no choice but to file our motion for attorneys' fees (which have now grown to over \$70,000 as a result of our being required to prepare and finalize the motion and in the unnecessarily protracted settlement negotiations). Since we no longer have confidence that the settlement agreement will be executed, we simply cannot risk any possibility (even if remote) of waiving our client's right to attorneys' fees.

If you have any ability to finalize the settlement agreement today, please let me know right away. Our clients remain prepared to execute the settlement agreement in the form we negotiated and that circulated last week. Otherwise, you should be aware that if we do not have confirmation that the stipulation has been signed, we may file our motion for attorneys' fees. Please also be advised that our motion will, of necessity, seek fees incurred in connection with the settlement negotiations (which are compensable as fees incurred in attempting to collect attorneys' fees), as well as an explanation as to why the settlement negotiations were unsuccessful.

We are certain that you can understand the difficult position that your client has put us in.

We look forward to hearing from you. I am available all day today if you wish to discuss this matter further.

Marc E. Mayer | Mitchell Silberberg & Knupp LLP | 11377 West Olympic Blvd., Los Angeles, CA 90064 | direct: 310 312-3154 | fax: 310 312-3786 | mem@msk.com | www.msk.com

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From: Stewart Goldstein, Rhonda [mailto:Rhonda.Goldstein@APORTER.COM]
Sent: Wednesday, August 19, 2009 5:30 PM
To: Rubin, Jill; Parker, Beth
Cc: Mayer, Marc
Subject: RE: MagicJack v. Happy Mutants

Hi, Jill,

I went ahead and cleaned up a couple minor, non-substantive edits to the stipulation (see attached redline), and signed

11/17/2009

for Beth (see attached pdf). Please let me know if you have any questions or need anything else from us regarding the stipulation.

Regards,
Rhonda

Rhonda Stewart Goldstein

Arnold & Porter LLP
Suite 2700
275 Battery Street
San Francisco, CA 94111-3823

Telephone: +1 415.356.3021
Fax: +1 415.356.3099
rhonda.goldstein@aporter.com
www.arnoldporter.com

From: Rubin, Jill [mailto:jpr@msk.com]
Sent: Wednesday, August 19, 2009 4:55 PM
To: Parker, Beth
Cc: Stewart Goldstein, Rhonda; Mayer, Marc
Subject: RE: MagicJack v. Happy Mutants

Dear Beth,

Attached is a revised version with the last paragraph deleted. If you have any questions or comments, please let me know. If this revised draft is acceptable, please sign and return to me by PDF as soon as possible and I will arrange for filing first thing tomorrow morning

Best regards,

Jill

Jill P. Rubin | Mitchell Silberberg & Knupp LLP | 11377 West Olympic Blvd., Los Angeles, CA 90064-1683 | direct: 310.312.3202 | fax: 310.231.8422 | jpr@msk.com | www.msk.com

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From: Parker, Beth [mailto:Beth.Parker@aporter.com]
Sent: Wednesday, August 19, 2009 4:27 PM
To: Rubin, Jill
Cc: Stewart Goldstein, Rhonda
Subject: Re: MagicJack v. Happy Mutants

Jill

Rhonda will look at this. I don't believe the last paragraph is right and was not in the last stipulation. Can we just use the last one with the new extension?

Beth
Beth H. Parker

11/17/2009

EXHIBIT B

Mayer, Marc

From: Mayer, Marc
Sent: Friday, August 21, 2009 3:26 PM
To: 'Stewart Goldstein, Rhonda'; 'Parker, Beth'
Cc: Rader, Rob; Rubin, Jill
Subject: RE: MagicJack v. Happy Mutants

Beth and Rhonda:

As Beth and I discussed yesterday, I wanted to give you the courtesy of a heads' up on the attorneys' fees issue. We spoke with Judge Adams' clerk late this morning. We were advised that Judge Adams is out both today and Monday. Thus, the stipulation could not be signed until Tuesday, at the earliest. The clerk, of course, could not give us any assurance that the stipulation would be signed by the Court.

In light of that fact, as well as the fact that because of the initial delay in providing us with the \$50,000 settlement proposal we were forced to prepare much of our attorneys' fees motion (at substantial expense), we felt that we had no choice but to file the motion. It was filed a few minutes ago and is being served on your office by mail. The hearing date is December 1, 2009, which was the earliest date available.

In the meantime, since we have filed our motion, I can no longer represent that our clients are prepared to execute the settlement agreement (which, as you know, your client rejected), and I am no longer authorized to accept that agreement. We, of course, are prepared to further discuss settlement with you at your convenience and remain hopeful that we can resolve this matter without further expenditure of attorneys' fees on either side.

Marc E. Mayer | Mitchell Silberberg & Knupp LLP | 11377 West Olympic Blvd., Los Angeles, CA 90064 | direct: 310 312-3154 | fax: 310 312-3786 | mem@msk.com | www.msk.com

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From: Mayer, Marc
Sent: Thursday, August 20, 2009 2:12 PM
To: 'Stewart Goldstein, Rhonda'; Parker, Beth
Cc: Rader, Rob; Rubin, Jill
Subject: RE: MagicJack v. Happy Mutants

Beth and Rhonda:

We filed the stipulation this morning. However, since this is now the third stipulation, we are extremely concerned about the possibility (albeit small) that the Court will decline to sign the stipulation. We have contacted Judge Adams' clerk to advise her that the stipulation is being filed, and we will continue to follow up.

In the meantime, we are even more concerned with the amount of time it has taken just to obtain your client's position on the settlement agreement, and both we and our clients are becoming frustrated, especially since it seems as if we are renegotiating terms that were specifically discussed weeks ago. Thus, we feel that unless we receive word from the Court by noon tomorrow that the stipulation has been signed, we may have no choice but to file our motion for attorneys' fees (which have now grown to over \$70,000 as a result of our being required to prepare and finalize the motion and in the

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unnecessarily protracted settlement negotiations). Since we no longer have confidence that the settlement agreement will be executed, we simply cannot risk any possibility (even if remote) of waiving our client's right to attorneys' fees.

If you have any ability to finalize the settlement agreement today, please let me know right away. Our clients remain prepared to execute the settlement agreement in the form we negotiated and that circulated last week. Otherwise, you should be aware that if we do not have confirmation that the stipulation has been signed, we may file our motion for attorneys' fees. Please also be advised that our motion will, of necessity, seek fees incurred in connection with the settlement negotiations (which are compensable as fees incurred in attempting to collect attorneys' fees), as well as an explanation as to why the settlement negotiations were unsuccessful.

We are certain that you can understand the difficult position that your client has put us in.

We look forward to hearing from you. I am available all day today if you wish to discuss this matter further.

Marc E. Mayer | Mitchell Silberberg & Knupp LLP | 11377 West Olympic Blvd., Los Angeles, CA 90064 | direct: 310 312-3154 | fax: 310 312-3786 | mem@msk.com | www.msk.com

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From: Stewart Goldstein, Rhonda [mailto:Rhonda.Goldstein@APORTER.COM]
Sent: Wednesday, August 19, 2009 5:30 PM
To: Rubin, Jill; Parker, Beth
Cc: Mayer, Marc
Subject: RE: MagicJack v. Happy Mutants

Hi, Jill,

I went ahead and cleaned up a couple minor, non-substantive edits to the stipulation (see attached redline), and signed for Beth (see attached pdf). Please let me know if you have any questions or need anything else from us regarding the stipulation.

Regards,
Rhonda

Rhonda Stewart Goldstein

Arnold & Porter LLP
Suite 2700
275 Battery Street
San Francisco, CA 94111-3823

Telephone: +1 415.356.3021
Fax: +1 415.356.3099
rhonda.goldstein@aporter.com
www.arnoldporter.com

From: Rubin, Jill [mailto:jpr@msk.com]
Sent: Wednesday, August 19, 2009 4:55 PM
To: Parker, Beth
Cc: Stewart Goldstein, Rhonda; Mayer, Marc
Subject: RE: MagicJack v. Happy Mutants

11/17/2009

Dear Beth,

Attached is a revised version with the last paragraph deleted. If you have any questions or comments, please let me know. If this revised draft is acceptable, please sign and return to me by PDF as soon as possible and I will arrange for filing first thing tomorrow morning

Best regards,

Jill

Jill P. Rubin | Mitchell Silberberg & Knupp LLP | 11377 West Olympic Blvd., Los Angeles, CA 90064-1683 | direct: 310.312.3202 | fax: 310.231.8422 | jpr@msk.com | www.msk.com

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From: Parker, Beth [<mailto:Beth.Parker@aporter.com>]
Sent: Wednesday, August 19, 2009 4:27 PM
To: Rubin, Jill
Cc: Stewart Goldstein, Rhonda
Subject: Re: MagicJack v. Happy Mutants

Jill

Rhonda will look at this. I don't believe the last paragraph is right and was not in the last stipulation. Can we just use the last one with the new extension?

Beth
Beth H. Parker

From: Rubin, Jill <jpr@msk.com>
To: Parker, Beth
Cc: Mayer, Marc <MEM@msk.com>
Sent: Wed Aug 19 14:08:13 2009
Subject: RE: MagicJack v. Happy Mutants

Dear Beth,

As I understand that you will be out of the office today, I have included the text of the proposed stipulation below for your convenience. We would very much like to get this on file today so if the stipulation is acceptable to you, please let us know as soon as possible. If you have any questions or comments, please let me know.

Best regards,

Jill

11/17/2009

From: Rubin, Jill
Sent: Wednesday, August 19, 2009 11:38 AM
To: 'Parker, Beth'
Cc: Mayer, Marc
Subject: MagicJack v. Happy Mutants

Dear Beth,

Attached is a draft stipulation to extend the time for Defendant to file a motion for fees. If you have any questions or comments, please let me know. If this proposed draft is acceptable, please sign and return to me by PDF and I will arrange for filing.

Best regards,

Jill
<< File: Stipulation to Extend for Fees Motion (Third) (2341440).DOC >>

Jill P. Rubin | Mitchell Silberberg & Knupp LLP | 11377 West Olympic Blvd., Los Angeles, CA 90064-1683 | direct: 310.312.3202 | fax: 310.231.8422 | jpr@msk.com | www.msk.com

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11/17/2009

EXHIBIT C

Mayer, Marc

From: Mayer, Marc
Sent: Monday, August 31, 2009 5:52 PM
To: 'Parker, Beth'
Cc: Rubin, Jill; Rader, Rob
Subject: RE: Magic Jack

Beth:

I am just following up on my e-mail of last Friday. Please let me know whether there is something that your client wishes to communicate to us.

Marc E. Mayer | Mitchell Silberberg & Knupp LLP | 11377 West Olympic Blvd., Los Angeles, CA 90064 | direct: 310 312-3154 | fax: 310 312-3786 | mem@msk.com | www.msk.com

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From: Mayer, Marc
Sent: Friday, August 28, 2009 9:50 AM
To: 'Parker, Beth'
Cc: Rubin, Jill; Rader, Rob
Subject: FW: Magic Jack

Beth: I just received the following message from my assistant. I, of course, have not returned Mr. Borislow's phone call. Please contact me at your earliest convenience.

Marc E. Mayer | Mitchell Silberberg & Knupp LLP | 11377 West Olympic Blvd., Los Angeles, CA 90064 | direct: 310 312-3154 | fax: 310 312-3786 | mem@msk.com | www.msk.com

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From: Lee, Lindsey
Sent: Friday, August 28, 2009 9:16 AM
To: Mayer, Marc
Subject: Magic Jack

Dan Borislow (sp?) called - Urgent - 561-722-0868

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Mitchell Silberberg & Knupp LLP, 11377 West Olympic Boulevard, Los Angeles, California 90064-1683.

On November 20, 2009, I served a copy of the foregoing document(s) described as **REPLY MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANT HAPPY MUTANTS LLC FOR ATTORNEYS' FEES AND COSTS PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 425.16** on the interested parties in this action at their last known address as set forth below by taking the action described below:

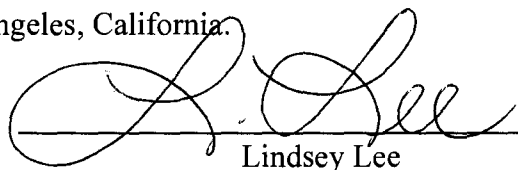
Attorneys for Plaintiff

Beth H. Parker
Rhonda L. Stewart
Arnold & Porter LLP
275 Battery Street, Suite 2700
San Francisco, CA 94111

BY PLACING FOR COLLECTION AND MAILING: I placed the above-mentioned document(s) in sealed envelope(s) addressed as set forth above, and placed the envelope(s) for collection and mailing following ordinary business practices. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at 11377 West Olympic Boulevard, Los Angeles, California 90064-1683 in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 20, 2009, at Los Angeles, California.



Lindsey Lee