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MAY 19 2009
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Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: K. Main, Deputy

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF MARIN

12 MAGICJACK, LP,
13 Plaintiff,
14 v.
15 HAPPY MUTANTS LLC,
16 Defendant.

CASE NO. CIV 091108

REPLY MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
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

17 Date: May 27, 2009
18 Time: 9:00 a.m.
19 Location: Dept. J
20 Judge: Honorable Verna Adams

21 File Date: March 11, 2009
22 Trial Date: TBD

23 BY FACSIMILE

24 Mitchell
25 Silberberg &
26 Knupp LLP

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28 Reply In Support Of Special Motion to Strike

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

Introduction..... 1

I. THE LAWSUIT EASILY FALLS WITHIN THE ANTI-SLAPP
STATUTE..... 2

II. MAGICJACK CANNOT ESTABLISH A PROBABILITY THAT IT WILL
PREVAIL ON THE MERITS. 5

A. The MagicJack EULA. 6

B. The MagicJack Ticker..... 9

Conclusion 10

TABLE OF AUTHORITIES

Page(s)

1

2

3

4 Ampex Corp. v. Cargle,
128 Cal. App. 4th 1569 (2005) 6

5

6 Barrett v. Rosenthal,
40 Cal. 4th 33 (2006) 2

7

8 Bolger v. Youngs Drug Products Corp.,
463 U.S. 60 (1983)..... 3

9

10 Carr v. Warden,
159 Cal. App. 3d 1166 (1984)..... 8

11

12 Carver v. Bonds,
135 Cal. App. 4th 328 (2005) 4

13

14 Christian Research Institute v. Alnor,
148 Cal. App. 4th 71 (2007) 6

15

16 Church of Scientology v. Wollersheim,
42 Cal. App. 4th 628 (1996) 5

17

18 Commonwealth Energy Corp. v. Investor Data Exchange, Inc.,
110 Cal. App. 4th 26 (2003) 3

19

20 Consumer Justice Center v. Trimedica International, Inc.,
107 Cal. App. 4th 595 (2003) 3

21

22 Damon v. Ocean Hills Journalism Club,
85 Cal. App. 4th 468 (2000) 5

23

24 DuPont Merck Pharm. Co. v. Superior Court
78 Cal. App. 4th 562 (2000) 8, 9

25

26 Ferlauto v. Hamsher,
74 Cal.App.4th 1394 (1999) 8, 9

27

28 Kasky v. Nike, Inc.,
27 Cal. 4th 939 (2002) 2, 3

Lafayette Morehouse, Inc. v. Chronicle Publishing Co.,
37 Cal. App. 4th 855 (1995) 2

Morningstar Inc. v. Superior Court,
23 Cal. App. 4th 676 (1994) 6

TABLE OF AUTHORITIES
(continued)

	<u>Page(s)</u>
<u>Nagel v. Twin Laboratories, Inc.</u> , 109 Cal. App. 4th 39 (2003)	3
<u>Nygaard, Inc. v. Uusi-Kerttula</u> , 159 Cal. App. 4th 1027 (2008)	2, 8
<u>Seeling v. Infinity Broadcasting Corp.</u> , 97 Cal. App. 4th 798 (2002)	7
<u>Sipple v. Foundation For Nat. Progress</u> , 71 Cal.App.4th 226 (1999)	5
<u>Sommer v. Gabor</u> , 40 Cal. App. 4th 1455 (1995)	8
<u>Soukoup v. Law Offices of Herbert Hafif</u> , 39 Cal. 4th 260 (2006)	5
<u>Virginia State Bd of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.</u> , 425 U.S. 748 (1976)	3
<u>World Financial Group, Inc. v. HBW Insurance and Financial Servs.</u> , 172 Cal. App. 4th 1561 (2009)	3

STATE STATUTES

Cal. Code Civ. P.	
§ 425.17	3
§ 425.18	5

OTHER AUTHORITIES

R. Weil & I. Brown, <u>California Practice Guide: Civil Procedure Before Trial</u> § 7:500 (Rutter Group 2008)	2
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1 Introduction

2 MagicJack’s Opposition to Boing Boing’s SLAPP motion is smoke-and-mirrors, resting on
3 piecemeal and out-of-context excerpts from the Beschizza Post, an unsupported and overly narrow
4 interpretation of California’s SLAPP statute, and an incorrect and nonsensical view of the First
5 Amendment and its limitations for speech that is purely “commercial” in nature.

6 Initially, MagicJack’s attempt to avoid the SLAPP statute by characterizing the Beschizza
7 Post as “commercial speech” and referring to the EULA as a “private,” arms’-length transaction is
8 specious, at best. The Beschizza Post is not an advertisement or marketing pitch. It is
9 different from any other editorial in any news journal or magazine. By the same token, MagicJack
10 cannot deny that EULAs and Internet privacy are important public issues, appropriately addressed
11 by publications such as Boing Boing. Nor can MagicJack dispute that its own EULA impacts a
12 large (and growing) body of actual and potential consumers. As a result, the Beschizza Post
13 plainly concerns a matter of “public interest” under the extremely broad definition of that phrase
14 in the SLAPP statute.

15 MagicJack’s Opposition also confirms that it cannot meet its heavy burden on the merits.
16 The critical facts underpinning this lawsuit are undisputed, including that MagicJack records
17 telephone numbers, that its EULA requires MagicJack users to consent to allow MagicJack to
18 “analyze” these telephone numbers for advertising purposes, and that MagicJack intends to use
19 and exploit the consents that it acquired in its EULA. Thus, even MagicJack does not seriously
20 contend that the Beschizza Post contains any demonstrably false *factual* statements. Instead,
21 MagicJack’s argument is premised on purported “inferences” and “suggestions” that it claims
22 *might* conceivably be drawn from hyperbolic expressions and turns of phrases used in the Post.
23 But that argument ignores that the Beschizza Post fully discloses the basis for all of the challenged
24 statements set forth therein. Not only is there no basis for any of the “inferences” claimed by
25 MagicJack, but a fair and contextual reading of the Beschizza Post confirms that even the most
26 colorful of the challenged statements indisputably constitutes a fair and/or reasonable (if
27 opinionated) characterization of the undisputed facts. Finally, there now is no dispute that the
28 MagicJack “ticker” does not actually measure what it purports to and thus Boing Boing’s

1 characterization of it as “fake” is not “provably false.”

2 For the reasons set forth herein and in Boing Boing’s Motion, MagicJack’s lawsuit should
3 be stricken.

4 **I. THE LAWSUIT EASILY FALLS WITHIN THE ANTI-SLAPP STATUTE.**

5 MagicJack concedes that the Boing Boing website, and the Beschizza Post in particular, is
6 a “written or oral statement in writing made in a place open to the public or in a public forum,”
7 and thus within Section 426.16(e)(3) of the SLAPP statute. Barrett v. Rosenthal, 40 Cal. 4th 33,
8 41 n.4 (2006). MagicJack also concedes that the definition of “public interest” under the SLAPP
9 statute is extremely broad, encompassing “*any* issue in which the public is interested,” Nygard,
10 Inc. v. Uusi-Kerttula, 159 Cal. App. 4th 1027, 1048 (2008), and that Internet privacy, EULAs and
11 consumer rights are extremely important public issues. Moreover, even the cases cited by
12 MagicJack confirm that defamation claims against newspapers, journals, and websites are
13 paradigmatic SLAPP suits.¹ See, e.g., Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 37
14 Cal. App. 4th 855, 862 (1995) (defamation claims against newspaper). Instead, in a desperate
15 attempt to avoid the anti-SLAPP statute, MagicJack ignores all of these issues (and the cases cited
16 by Boing Boing), attempts to analogize the Beschizza Post to a misleading commercial
17 *advertisement* about a competitor’s product (Opp. at 5), and claims that the EULA is a “private
18 contract” immune from public discussion. Nothing could be further from the truth.

19 Initially, MagicJack’s characterization of the Beschizza Post as “quintessential commercial
20 speech,” not entitled to First Amendment protection, is absurd. The cases cited by MagicJack
21 confirm that “commercial speech” generally refers to speech “proposing a *commercial*
22 *transaction*.” Kasky v. Nike, Inc., 27 Cal. 4th 939, 956 (2002) (emphasis added). More broadly,
23 commercial speech “consists of representations of fact about the business operations, products, or
24 services of the speaker, made for the purpose of promoting sales of, or other commercial
25

26 ¹ Contrary to MagicJack’s suggestion (Opp. at 3-4), Boing Boing is not required to prove
27 MagicJack’s bad faith intent in filing this lawsuit. All that is required is that the lawsuit meet the
28 two prongs of the SLAPP statute. R. Weil & I. Brown, California Practice Guide: Civil Procedure
Before Trial § 7:500, at 7(II)-1 (Rutter Group 2008) (“no intent to chill or actual chilling of such
rights is required”).

1 transactions in, the speaker's products or services." *Id.* at 960.² By contrast, Boing Boing is a
2 news and technology journal, in the business of publishing content – not selling products or
3 services. It is no different from any other print or online newspaper or magazine. The Beschizza
4 Post likewise has nothing to do with promoting or soliciting sales of Boing Boing or its content
5 (or, for that matter, any other product or service); it is a *critique* of the terms of a contract imposed
6 by MagicJack on its customers. Not only is the Beschizza Post completely different from the
7 commercial advertisements at issue in the cases cited by MagicJack,³ but MagicJack's attempt to
8 quell speech on a matter of public interest designed to effectuate changes in public policy and
9 corporate practices is a "quintessential" SLAPP suit, inconsistent with the First Amendment.

10 MagicJack's assertion that the Beschizza Post does not concern matters of public interest is
11 equally meritless. Not one of the cases relied upon by MagicJack involved speech whose *content*
12 encompassed issues of public interest or concern, or even speech directed at the *plaintiff's*
13 product. Rather, each involved claims for unfair competition or consumer fraud based on false
14 advertisements, product labels, or telemarketing pitches. See, e.g., Consumer Justice Center v.
15 Trimedica International, Inc., 107 Cal. App. 4th 595, 602 (2003) (false claim that dietary
16 supplement would result in a "fuller, more beautiful bust"); Nagel v. Twin Laboratories, Inc., 109
17 Cal. App. 4th 39, 43 (2003) (misleading statement of ingredients on product label);
18 Commonwealth Energy Corp. v. Investor Data Exchange, Inc., 110 Cal. App. 4th 26, 28 (2003)
19 (improper use of customer list to make telemarketing pitch for defendant's product); World
20 Financial Group, Inc. v. HBW Insurance and Financial Servs., 172 Cal. App. 4th 1561 (2009) (use
21 of confidential information to solicit clients). The conduct at issue in those cases could not be
22 further removed from the news and commentary at issue here.

23
24 ² The cases cited by MagicJack actually confirm that commercial speech *is* entitled to First
25 Amendment protection. See Virginia State Bd of Pharmacy v. Virginia Citizens Consumer
26 Counsel, Inc., 425 U.S. 748, 761 (1976). MagicJack also ignores that commercial speech is
subject to a specific carve-out in the SLAPP statute. Cal. Code Civ. P. § 425.17. MagicJack does
not claim (nor could it claim) that the Beschizza Post falls within that exception.

27 ³ See, e.g., Virginia, 425 U.S. at 748 (prescription drug advertisements); Bolger v. Youngs Drug
28 Products Corp., 463 U.S. 60 (1983)(advertisements for contraceptives); Kasky, 27 Cal. 4th at 958
(Nike advertisements).

1 MagicJack's argument that the issues raised in the Beschizza Post do not involve the
2 "public interest" because MagicJack's EULA is a "private contract," of interest only to "customers
3 who installed the device" is wrong. As a threshold matter, MagicJack's contention is completely
4 belied by the public reaction to the Beschizza Post. The Post spawned thousands of reader
5 comments. It also was picked up and quoted by local and national newspapers, including U.S.
6 News and World Report and the Palm Beach Daily News, both of whom warned consumers of the
7 EULA's privacy terms. See Mayer Reply Decl., Exs. 1 & 2. Indeed, MagicJack's attempt to
8 downplay the EULA as "irrelevant" to the public confirms exactly why publications such as Boing
9 Boing are necessary: namely, to inform the public of rights that may be forfeited by using certain
10 products and services. As the Palm Beach Daily News noted: "Boing Boing is one of my go-to
11 sites for many reasons, one of which is that the smart people there actually read EULAs — those
12 end-user license agreements some of us hurriedly 'accept' with a click, never checking to see what
13 we've actually agreed to." Mayer Reply Decl., Ex. 1. Of course, there is a vast difference
14 between a "private contract" between two individuals (or companies) and a EULA that every
15 purchaser of a product is required to automatically consent to as part of a software installation
16 process.

17 In this respect, the Beschizza Post has at least two essential public purposes.

18 *First*, it serves to educate potential MagicJack customers of the risks and tradeoffs of a
19 subscription to the MagicJack service. See Carver v. Bonds, 135 Cal. App. 4th 328, 492-93
20 (2005) (issues pertaining to consumer protection are matters of "public interest"). MagicJack's
21 claim that it is a small company and "outside the public eye" is false, disingenuous, and in any
22 event irrelevant.⁴ MagicJack has advertised, sold, and/or sought to sell, its product to hundreds of
23 thousands or millions of customers. MagicJack's own marketing materials state that "magicJack
24 appears to have become the fastest growing phone service provider ever in the United States with
25 over 2 million sold in its first year of introduction" and that "magicJack is also popular across the
26

27 ⁴ MagicJack is a wholly owned subsidiary of YMax Corporation, which claims to be "a modern
28 phone company with one of the largest newly deployed CLEC networks in the United States."
Mayer Reply Decl., Ex. 3.

1 world and has been used in over 50 countries.” Mayer Reply Decl., Ex. 3. As such, MagicJack
2 indisputably has placed itself and its product (and, by extension, its EULA) in the public eye and
3 made them of enormous interest to the public. See, e.g., DuPont Merck Pharm. Co. v. Superior
4 Court, 78 Cal. App. 4th 562, 567 (2000) (SLAPP statute’s public interest requirement met where
5 1.8 million people purchased advertised product).

6 *Second*, more broadly, the Beschizza Post is part of an overall effort by Boing Boing to
7 educate the public about EULAs and the types of rights that are forfeited by consenting to them.
8 As it has done with numerous other EULAs, Boing Boing mocks not only the overbearing nature
9 of the MagicJack EULA, but also calls attention to the steps taken by MagicJack to limit public
10 access to the EULA (by making it difficult to find on its website) and to thwart attempts to
11 challenge it (by forcing users to consent to arbitration in Palm Beach). That MagicJack’s EULA is
12 just one example of these practices does not detract from the public interest. By discussing
13 MagicJack’s specific corporate practices, Boing Boing is contributing to free and open debate
14 about broader issues of Internet privacy and “click-through” adhesion contracts. See Sipple v.
15 Foundation For Nat. Progress, 71 Cal. App. 4th 226, 238 (1999) (report discussing domestic abuse
16 was in the public interest because “domestic violence is an extremely important public issue in our
17 society”); Damon v. Ocean Hills Journalism Club, 85 Cal. App. 4th 468, 479 (2000) (public
18 interest includes “private conduct that impacts a broad segment of society”).

19 **II. MAGICJACK CANNOT ESTABLISH A PROBABILITY THAT IT WILL**
20 **PREVAIL ON THE MERITS.**

21 As MagicJack recognizes, under the SLAPP statute, its case will be dismissed unless
22 MagicJack meets its heavy burden of providing, by competent admissible evidence, that there is a
23 *probability* that it will prevail on the claim. Church of Scientology v. Wollersheim, 42 Cal. App.
24 4th 628, 654 (1996).⁵ Initially, MagicJack’s claims fail because it has not even attempted to prove

25 ⁵ MagicJack cites Soukoup v. Law Offices of Herbert Hafif, 39 Cal. 4th 260, 291 (2006), for the
26 proposition that its lawsuit need only have “minimal merit.” MagicJack ignores that Soukoup was
27 a case arising under the “*SLAPPback*” statute (Cal. Code Civ. P. § 425.18), governing motions to
28 dismiss malicious prosecution (SLAPPback) cases arising from claims previously dismissed under
the anti-SLAPP statute. Section 428.18 notes that different standards apply to SLAPPback claims
because “a SLAPPback is distinguishable in character and origin from the ordinary malicious
prosecution action,” and is “consistent with the Legislature’s intent to protect the valid exercise of
(...continued)

1 – far less by “clear and convincing evidence” -- that any of the statements in the Beschizza Post
2 were made with *actual malice*. See Ampex Corp. v. Cargle, 128 Cal. App. 4th 1569, 1578-79
3 (2005) (defamation claims against website dismissed for failure to prove that statements were
4 made with actual malice); Christian Research Institute v. Alnor, 148 Cal. App. 4th 71, 84 (2007)
5 (same). MagicJack specifically fails to offer *any* evidence to refute the unambiguous testimony of
6 Boing Boing’s representative that none of the statements were made with malicious intent – or, for
7 that matter, any intent other than to educate the public about the MagicJack EULA. See Doctrow
8 Decl., ¶¶ 12, 15. That alone is dispositive, because it is MagicJack’s burden to prove *all* of the
9 elements of its causes of action, including malice. Christian Research, 148 Cal. App. 4th at 84.

10 In any event, MagicJack’s argument on the merits is premised on irrelevant or incorrect
11 assertions or upon a deliberate misreading and inappropriate dissection of the Beschizza Post.
12 When *properly* read and considered in light of its “natural and probable effect upon the mind of
13 the average reader,” Morningstar, Inc. v. Superior Court, 23 Cal. App. 4th 676, 668 (1994), it is
14 clear that the Beschizza Post – including the two sets of statements at issue (i.e. those concerning
15 the “ticker” and those concerning the potential ramifications of the EULA) – is not “provably
16 false” as a matter of law, let alone “libelous on its face” (Opp. at 9).

17 **A. The MagicJack EULA.**

18 Most of MagicJack’s defamation and unfair competition claims concern the Beschizza
19 Post’s characterization of the MagicJack EULA and, specifically, its attack on the MagicJack
20 privacy and advertising policy. MagicJack’s claims must fail because it concedes that its device
21 does, in fact, automatically record dialed telephone numbers (Opp. at 11) and that the EULA
22 (which all users must assent to in order to use the MagicJack device) expressly permits
23 MagicJack, at its discretion, to “analyze” those telephone numbers and use them as part of its
24 advertising program. Boing Boing was entitled to report on (including to criticize) the
25 consequences of using the MagicJack device and assenting to its EULA. Rather than engage in

26 _____
27 (...continued)
28 the constitutional rights of free speech.” The other cases cited by MagicJack hold only that in
deciding a SLAPP motion, courts do not make credibility determinations or weigh competing
declarations. Here, MagicJack does not dispute any of Boing Boing’s factual assertions.

1 any serious discussion of the Beschizza Post, MagicJack's entire discussion is a piecemeal attack
2 on the *semantics* of Boing Boing's characterization of the EULA and advertising policies, using
3 isolated, out-of-context statements to draw unsupported conclusions or "inferences."

4 MagicJack's argument completely ignores the overall context and full content of the Post.
5 See Seeling v. Infinity Broadcasting Corp., 97 Cal. App. 4th 798, 809-810 (2002) ("To ascertain
6 whether the statements in question are provably false factual assertions, courts consider the totality
7 of the circumstances," including the "context in which the statement was made" and the "nature
8 and full content of the communication"). When considered in proper context and as a whole, it is
9 absolutely clear, including to the average Boing Boing reader, that the Beschizza Post (and all of
10 the disputed statements) concern the undisputed terms of the *EULA*, and specifically its
11 reservation of rights to "analyze" telephone numbers for advertising purposes:

12 • The headline and title of the Beschizza Post is "MagicJack's *EULA* says it will spy
13 on you and force you into arbitration." That headline placed readers on notice that the Post will be
14 a discussion (and critique) of the MagicJack EULA terms (and more specifically, will fall within
15 the category of Boing Boing blog posts that discuss and critique EULAs).

16 • The EULA's advertising provision is quoted at length, verbatim, and accounts for
17 more than half of the article. The *entire* EULA (on MagicJack's website) also is linked to, so that
18 readers can read it and draw their own conclusions and evaluate for themselves the attacks leveled
19 by Boing Boing.

20 • Immediately following the EULA is an explanation of its advertising and choice of
21 venue terms, preceded with the phrase "*in short*." Thus, the author makes clear this paragraph is
22 a discussion and interpretation of the undisputed EULA terms as set forth immediately above.

23 • The conclusion of the article ("As if targeted advertising, systematic privacy
24 invasion, and the signing away of your legal rights wasn't evil enough!") is a pure statement of
25 opinion, summarizing the author's overall reaction to the EULA and the facts set forth in the
26 remainder of the Post. It cannot reasonably be read to state any additional or new facts.

27 In light of the foregoing, MagicJack's assertions that the article "implies" or "suggests"
28 that MagicJack "listen[s] in" or "monitor[s]" telephone conversations (Opp. 11) is wrong. The

1 article never once states, suggests, or implies anything of the sort. To the contrary, in context, the
2 only “reasonable reading” of the article (and the disputed statements) is that they are colorful
3 characterizations of the undisputed EULA provisions set forth in the beginning of the article.
4 Nygaard, 159 Cal. App. 4th at 230 (no defamation where publication “discloses all of the
5 statements of fact on which the opinion is based and those statements are true.”) As such, the
6 statements are not “provably false” factual assertions, but are, at most, the types of hyperbolic,
7 opinionated phrases that are entitled to First Amendment protection. Ferlauto v. Hamsher, 74 Cal.
8 App. 4th 1394, 1403 (1999) (“Caricature, imaginative expression, and rhetorical hyperbole, as
9 used here, are often subject to the threat of a defamation action, but generally constitute a
10 legitimate exercise of literary style.”); Carr v. Warden, 159 Cal. App. 3d 1166, 1170 (1984)
11 (statement that plaintiff was “being bought” was a statement of opinion and “therefore not
12 defamatory as a matter of law”).⁶

13 The contested phrases also are wholly reasonable and supportable interpretations of the
14 EULA (and the conduct authorized therein). Recording a user’s telephone numbers, and then
15 using and “analyzing” those telephone numbers for advertising purposes certainly would be
16 considered by many to be (and is fairly characterized as) “snooping,” “spying,” or “privacy
17 invasion.” These are loose, hyperbolic terms that are inextricably intertwined with matters of
18 opinion, especially in the context here. Whether (as MagicJack claims) ad-targeting is a “common
19 practice” or other phone companies record telephone numbers, does not make the characterization
20 any less warranted. But even MagicJack does not claim that it is “common practice” for a
21 company to use phone number information as a basis for an “ad-targeting” program, and there is a
22 big difference between tracking phone calls for billing purposes and for purposes of directing
23 advertisements. Also problematic is MagicJack’s argument that the conduct authorized in the
24 EULA cannot constitute “privacy invasion” because users have consented to them in the very
25 same EULA. The argument is completely circular. It also validates the need for reports like the
26

27 ⁶ The statements at issue here “spying,” “snooping,” and “privacy invasion” are far different from
28 the pointed *factual* statements at issue in the cases cited by MagicJack. See Sommer v. Gabor, 40
Cal. App. 4th 1455, 1476 (1995) (plaintiff “hangs out in sleazy bars” and “is broke”).

1 Beschizza Post in order to warn consumers that consent to the EULA would *permit* MagicJack to
2 engage in potentially invasive activities.⁷

3 Finally, MagicJack's contention that the Beschizza Post is defamatory because MagicJack
4 has not *yet* analyzed telephone calls for advertising purposes is a red herring. The Beschizza Post
5 does not say anything about MagicJack's past practices. By contrast, MagicJack's own President
6 and CEO readily admits that "[t]he purpose of this ["analysis"] clause is for magicJack to obtain
7 customers' consent, and thereby to reserve the right to *in the future target its ads* to individual
8 customers based on the geographic areas they call." See Borislow Decl., ¶ 16 (emphasis added).
9 In other words, MagicJack plainly *intends* to use this clause to engage in "analysis" of telephone
10 numbers for advertising purposes.⁸ If that were not the case, MagicJack would not have reserved
11 the right to do so or would have limited the scope of its users' consent. All that the Beschizza Post
12 does is to justifiably warn customers of the consequences of the advertising clause, and of the
13 reasonable inferences to be drawn therefrom (i.e. that MagicJack likely will, in fact, at some point,
14 use the consent it obtained rights to use). It is analogous to a situation in which a cable company,
15 as a precondition to service, installed cameras in private homes and then required the homeowner
16 to consent to allow the company to "analyze" the footage. It certainly would be no defense to a
17 charge that the service agreement permits "spying" (or a warning that the company will engage in
18 such activity) that the cameras had not *yet* been turned on.

19 **B. The MagicJack Ticker.**

20 MagicJack's only other argument (that was defamed by the characterization of its "ticker"
21 as "fäke") deserves short shrift. As a threshold matter, MagicJack ignores that the Beschizza Post
22 cannot have been defamatory because the basis for the assertion was fully explained, including by
23 providing the specific Internet html source code by which the ticker functioned. Moreover, when
24

25 ⁷ That MagicJack does not *itself* consider recording phone numbers to be a "privacy invasion"
26 (Opp. at 11) or "spying" is irrelevant. Beschizza and Boing Boing are entitled to their own words,
27 whether or not MagicJack approves. Ferlauto, 74 Cal.App.4th at 1403 ("[A]uthors are not limited
28 to a sterile narrative of facts.").

⁸ While Borislow claims that its intent is only to analyze the "geographic areas" of telephone
numbers, the EULA contains no such limitation (though it certainly could have).

1 the ticker was updated, the Bescizza Post noted this fact in an “update” at the end of the Post.

2 In any event, there is no dispute that MagicJack ticker did not even purport to represent the
3 number of people who came for a “free trial today” -- even though that is what it says it does.
4 That the ticker “exceeds industry standards” or uses the “common technique” of “cookie-based
5 tracking” is irrelevant. “Approximating” or “estimating” (even “conservatively”) the sheer
6 number of people who visited the website the previous day (irrespective of their intent in visiting
7 the website) is not the same as stating the number of people who “came for a free trial today.”
8 MagicJack also now confirms that, as explained by Boing Boing, the MagicJack ticker *did* in fact
9 increase “automatically” (ticking at a “prescribed” rate over time) and thus is wholly deceptive in
10 that individual visits to the MagicJack website do *not* cause the ticker to increase (though that is
11 what is suggested by the ticker). Finally, MagicJack does not even attempt to address the fact that
12 its ticker, by design, had nothing whatsoever to do with the “free trial.”

13 MagicJack easily could have accurately disclosed the nature of its ticker in any number of
14 ways (e.g. “We estimate that ___ people will visit our website today”). Alternatively, MagicJack
15 could simply have reported the number of people who *actually signed up* for its “free trial”
16 (certainly it keeps track of that number) on a given day, which would have been consistent with
17 the ticker. Instead, MagicJack chose to use exaggeration and approximation, and now cannot
18 complain about being held to task for that decision.⁹

19 **Conclusion**

20 For the foregoing reasons, Boing Boing requests that the Court grant this Motion.

21 DATED: May 19, 2009

MITCHELL SILBERBERG & KNUPP LLP

22
23 By 

Marc E. Mayer
Attorneys for Defendant

24
25
26 _____
27 ⁹ MagicJack devotes much of its discussion (and most of the declaration of Clay Williams) to the
28 functioning of the MagicJack ticker *after* May 2008. That is irrelevant, because the Beschizza
Post was written and posted in *April 2008*, one month earlier. Regardless, the updated version of
the ticker is no less misleading than the original.