

**SUMMONS  
(CITACION JUDICIAL)**

**NOTICE TO DEFENDANT:  
(AVISO AL DEMANDADO):**

Happy Mutants LLC

**YOU ARE BEING SUED BY PLAINTIFF:  
(LO ESTÁ DEMANDANDO EL DEMANDANTE):**

magicJack LP

FOR COURT USE ONLY  
(SOLO PARA USO DE LA CORTE)

MAR 11 2009

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

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California ([www.courtinfo.ca.gov/selfhelp/espanol/](http://www.courtinfo.ca.gov/selfhelp/espanol/)), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), en el Centro de Ayuda de las Cortes de California, ([www.courtinfo.ca.gov/selfhelp/espanol/](http://www.courtinfo.ca.gov/selfhelp/espanol/)) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:  
(El nombre y dirección de la corte es):

Marin County Superior Court  
3501 Civic Center Drive  
San Rafael, CA 94903

CASE NUMBER:  
(Número del Caso): CIV 09 1 108

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Beth H. Parker (SBN 104773); Rhonda L. Stewart (SBN 250387)

Phone: (415) 356-3000

Arnold & Porter LLP, 275 Battery Street, Suite 2700

Fax: (415) 356-3099

SAN FRANCISCO, CA 94111

DATE:

MAR 11 2009

**KIM TURNER**

Clerk, by *K. MAIN*  
(Secretario)

Deputy  
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

**NOTICE TO THE PERSON SERVED:** You are served

- 1.  as an individual defendant.
- 2.  as the person sued under the fictitious name of (specify):

3.  on behalf of (specify): Happy Mutants LLC

- |   |   |
|---|---|
| under: <input checked="" type="checkbox"/> CCP 416.10 (corporation) | <input type="checkbox"/> CCP 416.60 (minor)             |
| <input type="checkbox"/> CCP 416.20 (defunct corporation)           | <input type="checkbox"/> CCP 416.70 (conservatee)       |
| <input type="checkbox"/> CCP 416.40 (association or partnership)    | <input type="checkbox"/> CCP 416.90 (authorized person) |
| <input type="checkbox"/> other (specify):                           |   |

4.  by personal delivery on (date):



ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, or number and address) <b>Beth H. Parker (SBN 104773) Rhonda L. Stewart SBN 250387</b> <b>ARNOLD &amp; PORTER LLP</b> <b>275 Battery Street, Suite 2700</b> <b>San Francisco, CA 94111</b> TELEPHONE NO: (415) 356-3000      FAX NO: (415) 356-3099 ATTORNEY FOR (Name) <b>Plaintiff magicJack LP</b>	<b>FOR COURT USE ONLY</b>  <div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 0 auto;"> <b>MAR 11 2009</b>  <b>MARIN COUNTY SUPERIOR COURT</b> </div>
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN</b> STREET ADDRESS <b>3501 Civic Center Drive, Room 116</b> MAILING ADDRESS <b>P.O. Box 4988</b> CITY AND ZIP CODE <b>San Rafael, CA 94903</b> BRANCH NAME	
<b>CASE NAME: magicJack LP v. Happy Mutants LLC</b>	
<b>CIVIL CASE COVER SHEET</b> <input checked="" type="checkbox"/> <b>Unlimited</b> (Amount demanded exceeds \$25,000) <input type="checkbox"/> <b>Limited</b> (Amount demanded is \$25,000 or less)	<b>Complex Case Designation</b> <input type="checkbox"/> <b>Counter</b> <input type="checkbox"/> <b>Joinder</b> Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)
	CASE NUMBER: <b>CIV 091108</b> JUDGE: DEPT:

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

<b>Auto Tort</b> <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) <b>Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort</b> <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/PD/WD (23) <b>Non-PI/PD/WD (Other) Tort</b> <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input checked="" type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-PI/PD/WD tort (35) <b>Employment</b> <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	<b>Contract</b> <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) <b>Real Property</b> <input type="checkbox"/> Eminent domain/Inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) <b>Unlawful Detainer</b> <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) <b>Judicial Review</b> <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	<b>Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403)</b> <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) <b>Enforcement of Judgment</b> <input type="checkbox"/> Enforcement of judgment (20) <b>Miscellaneous Civil Complaint</b> <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42) <b>Miscellaneous Civil Petition</b> <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
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2. This case  is  is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

a. <input type="checkbox"/> Large number of separately represented parties	d. <input type="checkbox"/> Large number of witnesses
b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve	e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
c. <input type="checkbox"/> Substantial amount of documentary evidence	f. <input type="checkbox"/> Substantial postjudgment judicial supervision

3. Remedies sought (check all that apply): a.  monetary    b.  nonmonetary; declaratory or injunctive relief    c.  punitive

4. Number of causes of action (specify): **Two (Defamation and Unfair Competition)**

5. This case  is  is not a class action suit.

6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: **March 11, 2009**  
 Beth H. Parker \_\_\_\_\_  
 (TYPE OR PRINT NAME)      (SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

**NOTICE**

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

1 Delaware, with a principal place of business in the City of Kentfield, the County of Marin, in the  
2 State of California.

3 9. Venue is proper in this district because the principal place of business of Defendant  
4 Happy Mutants is situated in Marin County and a substantial part of the events on which Plaintiff's  
5 claims are based occurred within this district.

### 6 BACKGROUND

#### 7 A. The magicJack® Device

8 10. The magicJack® Device is a portable product that allows the customer to use a  
9 standard telephone, corded or cordless, or a headset/microphone combination phone to make local  
10 and long distance calls.

11 11. The magicJack® Device is approximately the size of a matchbox and plugs into a  
12 computer's USB port to provide Internet-based telephone service ("VoIP").

13 12. Once plugged into a computer's USB port, the magicJack® Device runs  
14 automatically – no additional software is needed.

15 13. Purchasers of the magicJack® Device pay one annual fee for the service, which  
16 includes local and long distance calls, a telephone number, voicemail, caller ID, directory  
17 assistance, call waiting, conference calling and call forwarding.

18 14. To date, magicJack has made substantial sales of its magicJack® Device throughout  
19 the country.

#### 20 B. magicJack® End User License Agreement ("EULA")

21 15. Purchasers of the magicJack® Device must agree to the company's End User  
22 License Agreement or "EULA."

23 16. In the EULA, customers provide magicJack with permission to analyze the numbers  
24 dialed by a customer to generate targeted advertising.

25 17. The type of advertising envisioned by this provision of the EULA is similar to that  
26 used by many Internet search engines and grocery stores. Namely, a computer search of phone  
27 numbers would assist in the placement of advertisements for customers (*i.e.*, for a customer who  
28 routinely dials California area codes, an ad for airfare discounts to California may be provided.)

1           18. To date, magicJack has not analyzed phone numbers dialed by customers. The only  
2 advertisements that magicJack displays in conjunction with the magicJack® Device are  
3 advertisements for features of the magicJack® Device.

4           **C. The magicJack.com Website Ticker**

5           19. MagicJack utilizes a “counter” on the www.magicjack.com website. This counter is  
6 used in conjunction with the phrase “Look at how many people came for a free trial today.”

7           20. Until approximately May of 2008, the counter was calculated with the following  
8 methodology: The computer application for the ticker calculated the total visits for the 24 hour  
9 period spanning from 12:00 am to 12:00 am Central Time. This number was converted into a rate  
10 (visitors/minute). This rate was utilized on the magicJack website the following day. When a  
11 visitor arrived at magicJack’s website, a script on the webpage simulated the actual user count by  
12 incrementing at a rate equal to the previous day’s rate. In other words, the counter would “tick” at a  
13 prescribed rate based on the previous day’s traffic.

14           21. In May of 2008, an even more conservative “application variable” was developed  
15 and put into place on the www.magicjack.com website. This variable resets every night at midnight  
16 (12:00 a.m.) Central Time, and incrementally increases every time a visitor visits  
17 www.magicjack.com. Due to the use of two servers and a “load balancer,” the ticker presents a  
18 conservative estimate of visitors, approximately 75% of the actual visitors to the site.

19           **D. Defendant Happy Mutants, LLC**

20           22. Upon information and belief, Rob Beschizza is a professional blogger and at all  
21 relevant times for purposes of this Complaint, has been employed by Defendant as an editor for  
22 Boing Boing Gadgets. Boing Boing Gadgets is a technology-based posting of  
23 www.BoingBoing.net or “Boing Boing,” a self described “directory of wonderful things.” Boing  
24 Boing was first published as a magazine before becoming an online group blog.

25           23. Upon information and belief, Boing Boing Gadgets was created as part of Boing  
26 Boing in 2007. Boing Boing Gadgets is accessible via the www.BoingBoing.net homepage and  
27 focuses on electronics.  
28

1           24.     Upon information and belief, Boing Boing was incorporated under the name “Happy  
2 Mutants, LLC” in 2004 and remains incorporated under that name.

3           25.     Upon information and belief, on April 14, 2008, Rob Beschizza wrote a blog entry in  
4 the course of his employment with Happy Mutants. That blog entry was posted on the Boing Boing  
5 website. The entry, entitled “MagicJack’s EULA says it will spy on you and force you into  
6 arbitration,” is attached hereto as Exhibit A.

7           26.     In this blog posting, Beschizza quotes the magicJack® EULA stating that  
8 magicJack’s computers may analyze the numbers dialed by customers to produce targeted  
9 advertisements.

10          27.     Beschizza goes on to state, however, as suggested in the title of the blog, that  
11 magicJack will “snoop on your calls to target ads” and refers to magicJack’s actions as “systematic  
12 privacy invasion.”

13          28.     Beschizza also asserts that the ticker utilized on the www.magicjack.com website “is  
14 a *fake*, a javascript applet that increments itself automatically.” (Emphasis added.) In addition to  
15 the clear statement that the ticker itself is “a fake,” this statement asserts that the application making  
16 the ticker increase numerically is automatic and not related in any way to the number of users  
17 visiting magicJack’s website.

18          29.     On February 20, 2009, Beschizza’s blog entry was reprinted on  
19 www.mywebblogs.com under the anonymous handle “EXPOSEtheHYPOCRITES.” A copy of this  
20 blog posting on www.mywebblogs.com is attached hereto as Exhibit B.

21          30.     Statements published in Beschizza’s blog entry, as described above, are false and ,  
22 upon information and belief, have misled current and potential consumers interested in purchasing a  
23 magicJack® Device.

24          31.     Upon information and belief, as a result of Beschizza’s blog entry, Plaintiff has lost  
25 customers and potential customers and the company’s reputation has been irreparably harmed.  
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**COUNT ONE – DEFAMATION  
UNDER CAL. CIV. CODE § 43**

32. Plaintiff hereby incorporates by reference and realleges each and every allegation contained in each of the foregoing paragraphs.

33. Upon information and belief, at all times mentioned in this complaint Beschizza was acting as an agent and employee of Happy Mutants and, in doing the things alleged in this complaint, was acting within the course and scope of such agency and employment.

34. On or about April 14, 2008, Defendant published the following false and unprivileged statements (collectively referred to hereafter as the “False Statements”) about Plaintiff in a blog entry authored by Rob Beschizza:

- “MagicJack’s EULA says it will spy on you”;
- “[MagicJack] will also *snoop on your calls* to target ads more accurately” (emphasis added);
- MagicJack practices “systematic privacy invasion”; and
- “[t]he ‘look how many people came for a free trial’ counter on the homepage *is a fake*, a javascript applet that increments itself automatically” (emphasis added).

These statements are false as they pertain to Plaintiff.

35. The False Statements are libelous on their face. They clearly expose Plaintiff to hate, ridicule and obloquy and have the tendency to injure Plaintiff in its occupation because they claim that magicJack seeks to spy on its consumers and is lying to website visitors with the use of a fake ticker.

36. The False Statements were made by and published by Defendant about Plaintiff and were published on the Boing Boing website, reaching many if not all readers of www.boingboing.net on April 14, 2008 and dates thereafter.

37. The False Statements were also made and published on www.mywebblogs.com on February 20, 2009.

38. The False Statements were not privileged.



1 (iii) Defendant acted with malice, knowing that the statements made on the blog  
2 were false or acted with reckless disregard for the truth or falsity of those  
3 statements; and

4 (iv) Defendant actions violate Cal. Bus. & Prof. Code §17200, et seq.

5 (B) That an order be issued directing Defendant:

6 (i) to remove the asserted defamatory blog on www.BoingBoing.net as well as  
7 in any other online or written publication of which they are aware that is  
8 currently posting or distributing language from Rob Beschizza's blog entry of  
9 April 14, 2008, including but not limited to www.mywebblogs.com, and

10 (ii) to create and post a retraction on its homepage that expressly denounces the  
11 false statements and issues an apology for the defamatory language used in  
12 Rob Beschizza's blog entry of April 14, 2008.

13 (C) That an order be issued directing any other such relief as the Court may deem  
14 appropriate to negate the effects of the defamatory language published by Defendant.

15 (D) For general and compensatory damages according to proof, including but not limited  
16 to:

17 (i) general damages as allowed under California law for Defendant's defamation  
18 of magicJack;

19 (ii) special damages as allowed under California law for Defendant's defamation  
20 of magicJack, including magicJack's loss of business and monies expended  
21 as a result of the False Statements.

22 (E) For punitive damages for Defendant's willful and malicious publication of the False  
23 Statements.

24 (F) For interest as allowed by law, costs of suit and for such other and further relief as  
25 the Court shall deem appropriate.  
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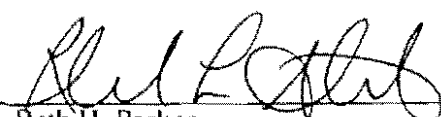


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Respectfully submitted.

Dated: March , 2009

ARNOLD & PORTER LLP

By 

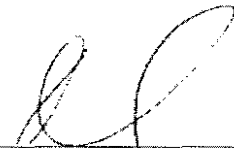
Beth H. Parker  
Rhonda L. Stewart

Attorneys for Plaintiff

**VERIFICATION**

I am CEO of magicjack LP, a party to this action, and am authorized to make this verification on its behalf. I have read the foregoing Complaint and know its contents. I am informed and believe and on that ground allege that the matters stated in the Complaint are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on March , 2009 in West Palm Beach, Florida.



Daniel Borislow (BY FAX)