

MARIN SUPERIOR COURT

DATE: 05/27/09 TIME: 9:00 A.M. DEPT: J CASE NO: CV091108

PRESIDING: HON. VERNA A. ADAMS

REPORTER: SUE FITZSIMMONS

CLERK: JANET MINKIEWICZ

PLAINTIFF: MAGICJACK, LP

vs.

DEFENDANT: HAPPY MUTANTS LLC

NATURE OF PROCEEDINGS: NOTICE OF MOTION – TO STRIKE COMPLAINT
PURSUANT TO ANTI-SLAPP STATUTE, CCP 425.16 [DEFT] HAPPY MUTANTS LLC

RULING

DEFENDANT’S SPECIAL MOTION TO STRIKE COMPLAINT PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16 IS GRANTED.

PLAINTIFF’S CLAIMS ARISE FROM PROTECTED ACTIVITY SINCE THE STATEMENTS INVOLVE CONSUMER INFORMATION AFFECTING A LARGE NUMBER OF PERSONS. (SEE *WILBANKS V. WOLK* (2004) 121 CAL.APP.4TH 883, 898-900; *CARVER V. BONDS* (2005) 135 CAL.APP.4TH 328, 343-344, AND *GILBERT V. SYKES* (2007) 147 CAL.APP.4TH 13, 23-24; SEE ALSO WEIL AND BROWN, CAL. PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL (TRG 2008) § 7:800.) THE POSTING ON DEFENDANT’S WEBSITE PROVIDES INFORMATION ABOUT PLAINTIFF’S PRODUCT NOT ONLY TO THE “SUBSTANTIAL” NUMBER OF PEOPLE WHO HAVE ALREADY PURCHASED THE DEVICE, BUT ALSO TO OTHER CONSUMERS WHO MIGHT BE CONSIDERING PURCHASING SUCH A DEVICE.

PLAINTIFF HAS NOT ESTABLISHED A PROBABILITY OF PREVAILING ON ITS CLAIMS. AS TO THE STATEMENT REGARDING THE HOMEPAGE COUNTER, PLAINTIFF’S OWN EVIDENCE SHOWS THAT THE COUNTER IS NOT COUNTING VISITORS TO THE WEBSITE AS A VISITOR VISITS THE SITE. INSTEAD, THE VISITOR IS SEEING AN ESTIMATE. IT IS NOT PROBABLE THAT THE TRIER OF FACT WOULD THEREFORE FIND UNTRUE THE STATEMENT THAT THE COUNTER IS “A FAKE.” FURTHER, PLAINTIFF MAKES NO CONNECTION BETWEEN “TOTAL DAILY VISITORS” AND “PEOPLE [WHO] CAME FOR A FREE TRIAL.” IN OTHER WORDS, IT OFFERS NO EVIDENCE THAT EACH DAILY

VISITOR, AS COUNTED BY THE METHODS DESCRIBED BY DECLARANT WILLIAMS, "CAME FOR A FREE TRIAL." AS TO THE STATEMENTS BASED ON THE EULA, SUCH STATEMENTS, READ IN CONTEXT, DO NOT IMPLY THAT PLAINTIFF IS EAVESDROPPING ON ITS CUSTOMERS' CALLS. INSTEAD, THE STATEMENTS CLEARLY CONSTITUTE THE OPINION OF THE AUTHOR THAT ANALYZING PHONE NUMBERS FOR PURPOSES OF TARGETED ADVERTISING AMOUNTS TO "SPY[ING]," "SNOOP[ING]," AND "SYSTEMATIC PRIVACY INVASION."