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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

RAMON G. MARTINEZ and MOSES
LOPEZ, on behalf of themselves and all
others similarly situated,

Plaintiff,

v.

MAGICJACK LP a/k/a MAGICJACK,
YMAX HOLDINGS CORPORATION,

Defendants.

Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

1 **CLASS ACTION COMPLAINT, DEMAND FOR JURY TRIAL,**
2 **INJUNCTIVE RELIEF SOUGHT**

3 Plaintiffs Ramon G. Martinez and Moses Lopez (“Plaintiffs”), individually
4 and on behalf of all others similarly situated, allege the following on information and
5 belief, except that Plaintiffs’ allegations as to their own actions are based on personal
6 knowledge.
7

8 **NATURE OF THE ACTION**

9 1. Between January 3, 2018 and June 21, 2018, Defendants Magicjack LP
10 a/k/a Magicjack and/or YMAX Holdings Corporation a/k/a Magicjack Holdings
11 Corporation (collectively “Magicjack” or “Defendants”) called Mr. Martinez’s and
12 Mr. Lopez’s respective cellular telephones using an automatic telephone dialing
13 system without the prior express consent of either Plaintiff.

14 2. Mr. Lopez received at least one call from Defendants, including a call
15 on January 3, 2018 using an automatic telephone dialing system and an artificial and
16 prerecorded voice. The call was placed from the following telephone number: (480)
17 319-7609. When this number is called back, a recording plays stating: “If you would
18 like to make and receive calls anywhere in the United States absolutely free, simply
19 visit MagicJack.com and begin making calls for free.”

20 3. Mr. Martinez also received at least one call from Defendants, including
21 a call on June 21, 2018 using an automatic telephone dialing system and an artificial
22 and prerecorded voice. The call was placed from the following telephone number:
23 (805) 876-3114. When this number is called back, a recording plays stating: “If you
24 would like to make and receive calls anywhere in the United States absolutely free,
25 simply visit MagicJack.com and begin making calls for free.”

26 4. Defendants placed these calls with a predictive dialer with the capacity
27 to store and dial a list of telephone numbers without human intervention.
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1 the proposed class; (b) some members of the proposed class have a different
2 citizenship from Defendants; and (c) the claims of the proposed class members
3 exceed the sum or value of five million dollars (\$5,000,000) in aggregate. *See* 28
4 U.S.C. § 1332(d)(2) and (6).

5 13. This Court also has federal question jurisdiction pursuant to 28 U.S.C. §
6 1331 because this action involves violations of a federal statute, the TCPA.

7 14. Venue is proper in this Court under 28 U.S.C. § 1391 because
8 Defendants have their principle place of business in this District, Defendants transact
9 significant business within this District, and a substantial part of the events giving
10 rise to Plaintiffs' claims took place within this District.

11 **FACTS COMMON TO ALL CAUSES OF ACTION**

12 **A. The Telephone Consumer Protection Act Of 1991**

13 15. In 1991, Congress enacted the TCPA in response to a growing number
14 of consumer complaints regarding certain telemarketing practices.

15 16. The TCPA regulates, among other things, the use of automated
16 telephone equipment, or "autodialers," defined as equipment which "has the capacity
17 . . . (a) to store or produce telephone numbers to be called, using a random or
18 sequential number generator; and (b) to dial such numbers." 47 U.S.C. § 227(a)(1).
19 Specifically, the plain language of section 227(b)(1)(A)(iii) prohibits the use of
20 autodialers to make any call to a wireless number in the absence of an emergency or
21 the prior express consent of the called party. The same section forbids making calls
22 using an "artificial or prerecorded voice." *Id.* The FCC has issued rulings clarifying
23 that in order to obtain an individual's consent, a clear, unambiguous, and
24 conspicuous written disclosure must be provided by the individual. 2012 FCC
25 Order, 27 FCC Rcd. at 1839 ("[R]equiring prior written consent will better protect
26 consumer privacy because such consent requires conspicuous action by the
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1 consumer—providing permission in writing—to authorize autodialed or prerecorded
2 telemarketing calls. . . .”).

3 **B. Defendants’ Calls to Plaintiffs and Class Members**

4 17. Prior to the calls at issue in this action, Plaintiffs never had any contact
5 with Defendants. Plaintiffs have never consented in writing, or otherwise, to receive
6 autodialed calls from Defendants to their respective cellphones. Plaintiffs never
7 provided Defendants with their telephone numbers.

8 18. In total, Defendants called Plaintiffs at least once each using an
9 autodialer and artificial prerecorded voice without their prior express written
10 consent.

11 19. When Plaintiffs answered Defendants’ calls, they heard a momentary
12 pause before someone (or a prerecorded voice) started speaking to them. This pause
13 indicates that Defendants placed the calls at issue with a predictive dialer: equipment
14 with the capacity to store and dial a list of telephone numbers without human
15 intervention.

16 20. Plaintiffs asked Defendants that they not be called anymore, but
17 Defendants kept calling.

18 **CLASS ALLEGATIONS**

19 21. Plaintiff brings this action pursuant to Rules 23(a), 23(b)(2) and
20 23(b)(3) of the Federal Rules of Civil Procedure, individually, and on behalf of the
21 following class:

22 All persons within the United States who (a) received a non-
23 emergency telephone call; (b) on his or her cellular
24 telephone or residential telephone line; (c) made by or on
25 behalf of Defendant in order to promote its products or
26 services; (d) for whom Defendant had no record of prior
27 express written consent; (e) and such phone call was made
28 with the use of an automatic telephone dialing system as
defined under the TCPA and/or with an artificial or

1 prerecorded voice; (f) at any time in the period that begins
2 four years before the filing of the complaint in this action to
3 the date that class notice is disseminated.

4 22. Plaintiffs represent, and are members of, this proposed class. Excluded
5 from the Class are Defendants and any entities in which Defendants have a
6 controlling interest, Defendants' agents and employees, any Judge and/or Magistrate
7 Judge to whom this action is assigned and any member of such Judges' staffs and
8 immediate families.

9 23. **Numerosity.** Plaintiffs do not know the exact number of members in the
10 proposed Class, but reasonably believe, based on the scale of Defendants' business,
11 that the class is so numerous that individual joinder would be impracticable. The true
12 number of Class members is known by Defendants.

13 24. **Existence and predominance of common questions of law and fact.**
14 Common questions of law and fact exist as to all members of the Class and
15 predominate over any questions affecting only individual Class members. These
16 common legal and factual questions include, but are not limited to, the following:

- 17 a. Whether Defendants made telephone calls to class members using an
18 autodialer without their prior express written consent;
- 19 b. Whether Defendants made telephone calls to class members using an
20 artificial or prerecorded voice without their prior express written
21 consent;
- 22 c. Whether Defendants' conduct was knowing and/or willful;
- 23 d. Whether Defendants are liable for damages, and the amount of such
24 damages, and
- 25 e. Whether Defendants should be enjoined from engaging in such conduct
26 in the future.
- 27
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1 25. There are well defined, nearly identical, questions of law and fact
2 affecting all parties.

3 26. Plaintiffs and all members of the proposed Class have been harmed by
4 the acts of Defendants in the form of multiple involuntary telephone and electrical
5 charges, the aggravation, nuisance, and invasion of privacy that necessarily
6 accompanies the receipt of unsolicited and harassing telephone calls, and violations
7 of their statutory rights.

8 27. The disposition of the claims in a class action will provide substantial
9 benefit to the parties and the Court in avoiding a multiplicity of identical suits. The
10 proposed class can be identified easily through records maintained by Defendants.

11 28. **Typicality.** Plaintiffs assert claims that are typical of each member of
12 the class because they are all persons who received calls on their telephones using an
13 autodialer and/or artificial or prerecorded voice without their prior express written
14 consent. Plaintiffs will fairly and adequately represent and protect the interests of
15 the proposed class, and have no interests which are antagonistic to any member of
16 the proposed class.

17 29. **Adequacy of Representation.** Plaintiff will fairly and adequately
18 protect the interests of the Class. Plaintiffs have retained counsel that is highly
19 experienced in handling class action claims involving violations of federal and state
20 consumer protection statutes.

21 30. **Superiority.** A class action is the superior method for the fair and
22 efficient adjudication of this controversy. Class wide relief is essential to compel
23 Defendants to comply with the TCPA. The interest of the members of the proposed
24 class in individually controlling the prosecution of separate claims against
25 Defendants is negligible because the statutory damages in an individual action for
26 violation of the TCPA are relatively small. Management of these claims is likely to
27 present significantly fewer difficulties than are presented in many class claims
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1 because the calls at issue are all automated and the members of the class, by
2 definition, did not provide the prior express consent required under the statute to
3 authorize calls to their telephones.

4 31. Defendants have acted on grounds generally applicable to the proposed
5 class, thereby making final injunctive relief and corresponding declaratory relief with
6 respect to the proposed class as a whole appropriate. Moreover, on information and
7 belief, Plaintiffs allege that the TCPA violations complained of herein are
8 substantially likely to continue in the future if an injunction is not entered.

9 **CAUSES OF ACTION**

10 **COUNT I**

11 **(KNOWING AND/OR WILLFUL VIOLATIONS OF THE TELEPHONE
12 CONSUMER PROTECTION ACT, 47 U.S.C. § 227, *et seq.*)**

13 32. Plaintiffs incorporate by reference the foregoing paragraphs of this
14 Complaint as if fully stated herein.

15 33. The foregoing acts and omissions of Defendants constitute numerous
16 and multiple knowing and/or willful violations of the TCPA, including but not
17 limited to each of the above-cited provisions of 47 U.S.C. § 227 *et seq.*

18 34. As a result of Defendants' knowing and/or willful violations of 47
19 U.S.C. § 227 *et seq.*, Plaintiffs and members of the proposed class are entitled to
20 treble damages of up to \$1,500.00 for each and every call in violation of the statute,
21 pursuant to 47 U.S.C. § 227(b)(3)(C).

22 35. Plaintiffs and members of the proposed class are also entitled to and do
23 seek injunctive relief prohibiting such conduct violating the TCPA by Defendants in
24 the future.

25 36. Plaintiffs and members of the proposed class are also entitled to an
26 award of attorneys' fees and costs.
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1 **COUNT II**
2 **(VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT, 47**
3 **U.S.C. § 227, et seq.)**

4 37. Plaintiffs incorporate by reference the foregoing paragraphs of this
5 Complaint as if fully stated herein.

6 38. The foregoing acts and omissions of Defendants constitute numerous
7 and multiple violations of the TCPA, including but not limited to each of the above-
8 cited provisions of 47 U.S.C. § 227 et seq.

9 39. As a result of Defendants' violations of 47 U.S.C. § 227 et seq.,
10 Plaintiffs and members of the proposed class are entitled to an award of \$500.00 in
11 statutory damages for each and every call in violation of the statute, pursuant to 47
12 U.S.C. § 227(b)(3)(B).

13 40. Plaintiffs and members of the proposed class are also entitled to and do
14 seek injunctive relief prohibiting such conduct violating the TCPA by Defendants in
15 the future.

16 41. Plaintiffs and members of the proposed class are also entitled to an
17 award of attorneys' fees and costs.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiffs respectfully requests that the Court grant Plaintiffs
20 and all members of the proposed class the following relief against Defendants:

- 21 a. Injunctive relief prohibiting such violations of the TCPA by Defendants
22 in the future;
- 23 b. As a result of Defendants' willful and/or knowing violations of the
24 TCPA, Plaintiffs seek for themselves and each member of the proposed
25 Class treble damages, as provided by statute, of up to \$1,500.00 for each
26 and every call that violated the TCPA;
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- 1 c. As a result of Defendants' violations of the TCPA, Plaintiffs seek for
2 themselves and each member of the proposed Class \$500.00 in statutory
3 damages for each and every call that violated the TCPA;
4 d. An award of attorneys' fees and costs to counsel for Plaintiffs and the
5 proposed class;
6 e. An order certifying this action to be a proper class action pursuant to
7 Federal Rule of Civil Procedure 23, establishing appropriate class,
8 finding that Plaintiffs are proper representatives of the class, and
9 appointing the lawyers and law firm representing Plaintiffs as counsel
10 for the class;
11 f. Such other relief as the Court deems just and proper.

12 **DEMAND FOR JURY TRIAL**

13 Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs demand a trial by
14 jury of any and all issues in this action so triable of right.

15 Dated: July 10, 2018

16 Respectfully submitted,

17 By: /s/ Scott A. Bursor
18 Scott A. Bursor

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AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Florida

Ramon G. Martinez, Moses Lopez, on behalf of themselves and all others similarly situated.

Plaintiff(s)

v.

Magicjack LP a/k/a Magicjack, YMAX Holdings Corporation.

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Magicjack LP a/k/a Magicjack, YMAX Holdings Corporation 560 Village Boulevard, Suite 120 West Palm Beach, Florida 33409

C T Corporation System 1200 South Pine Island Road Plantation, Florida 33324

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Scott Bursor Bursor & Fisher, P.A. 888 Seventh Avenue, New York, NY 10019

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

AO 440 (Rev. 06/12) Summons in a Civil Action (Page 2)

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____ .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.) NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.

I. (a) PLAINTIFFS RAMON G. MARTINEZ and MOSES LOPEZ, DEFENDANTS MAGICJACK LP a/k/a MAGICJACK, YMAX HOLDINGS CORPORATION, on behalf of themselves and all others similarly

(b) County of Residence of First Listed Plaintiff Oxnard, California County of Residence of First Listed Defendant (EXCEPT IN U.S. PLAINTIFF CASES) (IN U.S. PLAINTIFF CASES ONLY)

(c) Attorneys (Firm Name, Address, and Telephone Number) Bursor & Fisher 888 Seventh Avenue, New York, NY 10019, 646-837-7150 Attorneys (If Known)

(d) Check County Where Action Arose: MIAMI-DADE MONROE BROWARD PALM BEACH MARTIN ST. LUCIE INDIAN RIVER OKEECHOBEE HIGHLANDS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only) III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Form with checkboxes for Basis of Jurisdiction (Federal Question, Diversity) and Citizenship of Principal Parties (Citizen of This State, Citizen of Another State, Foreign Nation).

IV. NATURE OF SUIT (Place an "X" in One Box Only) Click here for: Nature of Suit Code Descriptions

Large grid of checkboxes for Nature of Suit categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, PERSONAL INJURY, TORTS, LABOR, IMMIGRATION, FORFEITURE/PENALTY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only) 1 Original Proceeding 2 Removed from State Court 3 Re-filed (See VI below) 4 Reinstated or Reopened 5 Transferred from another district (specify) 6 Multidistrict Litigation Transfer 7 Appeal to District Judge from Magistrate Judgment 8 Multidistrict Litigation - Direct File 9 Remanded from Appellate Court

VI. RELATED/ RE-FILED CASE(S) (See instructions): a) Re-filed Case YES NO b) Related Cases YES NO JUDGE: DOCKET NUMBER:

VII. CAUSE OF ACTION Telephone Consumer Protection Act (TCPA), 47 U.S.C. Section 227. Defendants have placed autodialed and LENGTH OF TRIAL via days estimated (for both sides to try entire case)

VIII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE DATE July 10, 2018 SIGNATURE OF ATTORNEY OF RECORD /s Scott A. Bursor

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked. Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Nature of Suit. Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Refiled (3) Attach copy of Order for Dismissal of Previous case. Also complete VI.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

Remanded from Appellate Court. (8) Check this box if remanded from Appellate Court.

VI. Related/Refiled Cases. This section of the JS 44 is used to reference related pending cases or re-filed cases. Insert the docket numbers and the corresponding judges name for such cases.

VII. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553

Brief Description: Unauthorized reception of cable service

VIII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

Date and Attorney Signature. Date and sign the civil cover sheet.

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [MagicJack Hit with Consumers' Robocall Class Action in FL](#)
