

 Phonedog v. Kravitz, No. C 11-03474 MEJ, 2011 BL 290583 (N.D. Cal. Nov. 08, 2011)

United States District Court, N.D. California.

PHONEDOG, Plaintiff, v. NOAH KRAVITZ, Defendant.

No. C 11-03474 MEJ.

November 8, 2011

ORDER ON DEFENDANT'S MOTION TO DISMISS PURSUANT TO FRCP 12(B)(1) AND 12(B)(6)

[Docket No. 4]

MARIA-ELENA JAMES, Chief Magistrate Judge

I. INTRODUCTION

Plaintiff PhoneDog brings this action against one of its former employees, Defendant Noah Kravitz, based on his continued use of a Twitter account that PhoneDog alleges it owns and contains trade secrets, namely the compilation of subscribers and the password used to access the account. Currently pending before the Court is Mr. Kravitz's Motion to Dismiss PhoneDog's Complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1), and for failure to state a claim pursuant to Rule 12(b)(6). Mot., Dkt. No. 4. PhoneDog has filed an Opposition (Dkt. No. 13), and Mr. Kravitz has filed a Reply (Dkt. No. 17). On October 13, 2011, the Court held a hearing on the matter. After carefully considering the parties' arguments and the controlling legal authorities, the Court **DENIES** without prejudice Mr. Kravitz's *12(b)(1)* motion and **GRANTS IN PART** and **DENIES IN PART** his *12(b)(6)* motion as set forth below.

II. BACKGROUND

The relevant allegations, taken from PhoneDog's Complaint, are as follows.

PhoneDog is an "interactive mobile news and reviews web resource," that reviews mobile products and services and provides users with resources needed to research, compare prices, and shop from mobile carriers. Compl. ¶ 8. PhoneDog uses a variety of social media,

including Twitter, Facebook, and YouTube, to market and promote its services to users. *Id.* ¶ 9.

[*2]

Beginning in April 2006, Mr. Kravitz began working for PhoneDog as a product reviewer and video blogger. *Id.* ¶ 14. PhoneDog alleges that "[a]s an employee of PhoneDog, [Mr. Kravitz] was given use of and maintained the Twitter account "@PhoneDog_Noah" (the "Account"). *Id.* ¶ 15. As part of Mr. Kravitz's employment, he submitted written and video content to PhoneDog, which was then transmitted to its users via a variety of mediums, including PhoneDog's website and the Twitter Account. *Id.* ¶ 14. Mr. Kravitz accessed the Twitter Account using a password and used the Account to disseminate information and promote PhoneDog's services on behalf of PhoneDog. *Id.* According to PhoneDog, all @PhoneDog_Name Twitter accounts used by its employees, as well as the passwords to such accounts, constitute proprietary, confidential information. *Id.* ¶ 12. PhoneDog avers that, during the course of Mr. Kravitz's employment at PhoneDog, the @PhoneDog_Noah Account generated approximately 17,000 Twitter followers. *Id.* ¶ 16.

In October 2010, Mr. Kravitz ended his employment with PhoneDog. *Id.* ¶ 17. At that time, PhoneDog requested that he relinquish use of the Twitter Account. *Id.* In response, Mr. Kravitz changed the Account handle to "@noahkravitz," and continues to use the Account. *Id.* As a result, PhoneDog alleges that it has suffered at least \$340,000 in damages. *Id.* at 9.

Based on these allegations, on July 15, 2011, PhoneDog filed this lawsuit against Mr. Kravitz, asserting claims under California law for: (1) misappropriation of trade secrets; (2) intentional interference with prospective economic advantage; (3) negligent interference with prospective economic advantage; and (4) conversion. *Id.* at 3-7.

Mr. Kravitz now moves to dismiss PhoneDog's Complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction and pursuant to Rule 12(b)(6) for failure to state a claim.

III. DISCUSSION

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

In its Complaint, PhoneDog alleges that this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a). Compl. ¶ 3. It alleges that it diversity of citizenship exists between the parties and more than \$75,000 is in controversy. *Id.* There is no dispute as to the diversity of citizenship of the parties. Mr. Kravitz, however, argues that PhoneDog cannot meet its [*3] burden of establishing that the amount in controversy is satisfied in this case. Mot. at 2. Specifically, he challenges PhoneDog's alleged damages premised on the

value of the Twitter Account. *Id. at 3*. In response, PhoneDog asserts that it has sufficiently alleged that the amount in controversy exceeds \$75,000. Opp'n at 3, Dkt. No. 13. It further argues that Mr. Kravitz's extrinsic evidence does not prove to a legal certainty that its damages fall below the jurisdictional minimum. *Id.*

1. Legal Standard

Federal courts are courts of limited jurisdiction, possessing only that power authorized by Article III of the United States Constitution and statutes enacted by Congress pursuant thereto. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Thus, federal courts have no power to consider claims for which they lack subject matter jurisdiction. *Chen-Cheng Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir. 1992). The Court is under a continuing duty to dismiss an action whenever it appears that it lacks jurisdiction. *Id.*; see also *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 687 (9th Cir. 2003). The burden of establishing that a cause lies within this limited jurisdiction rests upon the party asserting jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Thus, in the present action, PhoneDog bears the burden of demonstrating that subject matter jurisdiction exists over its Complaint. *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001).

On a motion to dismiss pursuant to Rule 12(b)(1), the applicable standard turns on the nature of the jurisdictional challenge. A Rule 12(b)(1) jurisdictional attack may be "facial" or "factual." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (citation omitted). In evaluating a facial attack on jurisdiction, the Court must accept the factual allegations in PhoneDog's complaint as true and draw all reasonable inferences in its favor. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009). As part of its ruling on such a motion, the Court may also consider additional facts that "are contained in materials of which the court may take judicial notice." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035[*4], 1039 (9th Cir. 2004). In such a case, "[n]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Thornhill Publ'g v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). "In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Safe Air*, 373 F.3d at 1039 (citation omitted). However, "[a] jurisdictional finding of genuinely disputed facts is inappropriate when the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits of the action." *Id.* "Dismissal is then appropriate `where it appears beyond doubt that the plaintiff

can prove no set of facts in support of his claim which would entitle him to relief." *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). "This standard, often cited in Rule 12(b)(6) motions, . . . is equally applicable in motions challenging subject matter jurisdiction when such jurisdiction may be contingent upon factual matters in dispute." *Id.* (internal quotations and citation omitted). "The Ninth Circuit has held that, where the jurisdictional issue is intertwined with the merits, a court cannot determine the jurisdictional issue until the merits of the case are appropriately resolved." *Chie v. Reed Elsevier, Inc.*, [2011 BL 227917], 2011 WL 3879495, at *3 (N.D. Cal. Sep. 02, 2011) (citing *Roberts*, 812 F.2d at 1177).

2. Discussion

As indicated above, in its Complaint PhoneDog alleges that Mr. Kravitz's unauthorized use of the Twitter Account (and other confidential information associated with the Account), have caused it to incur \$340,000 in damages. Compl. ¶¶ 16, 41. To reach this calculation, PhoneDog alleges that the account generated approximately 17,000 followers, which according to industry standards, are each valued at \$2.50. *Id.* Thus, PhoneDog contends that its damages amount to \$42,500 ($\$2.50 \times 17,000$) for each month that Mr. Kravitz has used the account, which at the time of filing amounted to \$340,000 for eight months. *Id.*

In his Motion, Mr. Kravitz contends that PhoneDog cannot establish damages over the [*5] \$75,000 jurisdictional threshold. Mot. at 9. Contrary to PhoneDog's calculation, Mr. Kravitz asserts that "PhoneDog cannot establish that it is entitled to any monetary recovery because it does not have competent proof that it has ownership or right to possession over the Account or the followers." Mot. at 9. According to Mr. Kravitz, pursuant to Twitter's Terms of Service, "the Account, as all Twitter accounts are, is the exclusive property of Twitter and its licensors, not PhoneDog." *Id.* As to the followers, Mr. Kravitz argues that "[f]ollowers' are human beings who have the discretion to subscribe and/or unsubscribe to the Account without the consent of PhoneDog," and are not property and cannot be owned. *Id.* Because PhoneDog cannot own either the Account or its followers, Mr. Kravitz contends that PhoneDog has no basis for its damages calculation and, as a result, cannot show that the amount in controversy requirement is met. *Id.*

Mr. Kravitz also argues that, "[t]o date, the industry precedent has been that absent an agreement prohibiting any employee from doing so, after an employee leaves an employer, they are free to change their Twitter handle." *Id.* at 10.

Further, Mr. Kravitz contends that, irrespective of whether PhoneDog owns the account, it cannot establish more than \$75,000 in damages because there is no evidence that a Twitter account has any monetary value. Mot. at 10. He argues that "PhoneDog neither states that there is an actual recognized method to measure the value of a Twitter `account', not does it

allege that its method of calculating the value of the Account is in accordance with an `industry standard.'" *Id.* He argues that any value attributed to the Account comes from his efforts in posting tweets and the individual's interest in following him, not from the Account itself. Mot. at 11.

Finally, Mr. Kravitz challenges PhoneDog's methodology for assessing the value of a Twitter account. Mot. at 12. He argues that if any value can be determined, it requires more than simply multiplying each user by \$2.50; rather multiple factors must be considered, including: (1) the number of followers; (2) the number of tweets; (3) the content of the tweets; (4) the person publishing the tweets; and (5) the person placing the value of the account. *Id.*

PhoneDog, however, maintains that it has sufficiently alleged that it has incurred more than \$75,000 in damages as a result of Mr. Kravitz's conduct, thereby satisfying Rule 8(a)(1)'s liberal [*6] pleading standard. Opp'n at 8. It asserts that it is not required to provide a detailed calculation of how its Account is valued in its Complaint. *Id.*

PhoneDog also counters that it has an ownership interest in the Account based on the license granted to it by Twitter to use and access the Account, in the Account's list of followers, and in the content submitted to the Account. Opp'n at 6-7. It argues that, even if Mr. Kravitz created the Account, he did so at PhoneDog's request and for its benefit and in the course and scope of his employment with PhoneDog. *Id.* at 6. It argues that the list of followers is akin to a business customer list, in which it has an intangible property interest. *Id.* at 7.

PhoneDog further argues that, notwithstanding any ownership interest or right to possession it has in the Account, it is entitled to damages based upon Mr. Kravitz's interference with its access to and use of the Account. Opp'n at 5. PhoneDog states that it requests that its representatives maintain Twitter accounts to increase traffic to its website, which generates income from advertisers. *Id.* It argues that, "contrary to the agreement between PhoneDog and [Mr. Kravitz] that the Account was to be used for the benefit of PhoneDog, [Mr. Kravitz] failed to respond to requests from PhoneDog to tweet and submit content to the Account promoting PhoneDog and instead used the Account to promote himself and TechnoBuffalo, a competitor of PhoneDog. By failing to use the Account for PhoneDog's benefit, [Mr. Kravitz] interfered with PhoneDog's access to the Followers, which in turn interfered with PhoneDog's economic relations with its advertisers," thereby interfering with its "advantageous relations" and giving rise to a claim for damages *Id.* at 5-6. Thus, it argues that Twitter's prohibition on purchasing or selling a Twitter account is inconsequential because "[t]he value of the Account lies in the Account's list of Followers and the traffic that those Followers generate to the PhoneDog website." *Id.* at 8-9.

Finally, PhoneDog argues that Mr. Kravitz cannot establish that there is a legal certainty that its damages do not exceed \$75,000. *Id.* at 9. It contends that "the method of valuing a Twitter

account is afforded many different interpretations," and Mr. Kravitz's method which leads to a different valuation is insufficient to defeat subject matter jurisdiction. *Id.*

As the foregoing summary illustrates, the question whether the amount in controversy [*7] requirement is satisfied in this case is intertwined with factual and legal issues raised by PhoneDog's claims. Whether PhoneDog has any property interest in the Twitter account cannot be resolved on the record at this stage of the case. Likewise, should PhoneDog be able to establish that it has some property interest in the Twitter account or the password and follower list, the question becomes what is the proper valuation of such items. Again, the parties have proffered competing methodologies for valuing the account, and on this limited record, the Court is unable to resolve this dispute at this juncture.

At the same time, PhoneDog has expressly alleged \$340,000 in damages stemming from its misappropriation and interference with economic advantage claims. The Court cannot say that PhoneDog's allegation as to the amount in controversy is in bad faith or that it appears beyond a legal certainty that the claim is really for less than the jurisdictional amount.

Taken together, the Court finds that a determination of whether the Court has subject matter jurisdiction over this action based on diversity jurisdiction cannot be resolved at this stage of the proceeding. Rather, because the issue is tied up with PhoneDog's claims, the issue cannot be resolved until summary judgment on a fully developed evidentiary record. The Court therefore **DENIES** Mr. Kravitz's motion to dismiss for lack of subject matter jurisdiction **WITHOUT PREJUDICE** to Mr. Kravitz re-asserting his challenge on summary judgment.

B. Motion to Dismiss for Failure to State a Claim

Mr. Kravitz also moves to dismiss each of PhoneDog's claims pursuant to Rule 12(b)(6). The Court will address each challenge in turn.

1. Legal Standard

A court may dismiss a complaint under Rule 12(b)(6) when it does not contain enough facts to state a claim to relief that is plausible on its face. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* [*8] (quoting *Twombly*, 550 U.S. at 557.) "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a

cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (internal citations and parentheticals omitted).

In considering a motion to dismiss, a court must accept all of the plaintiff's allegations as true and construe them in the light most favorable to the plaintiff. *Id.* at 550; *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007); *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007).

If the court dismisses the complaint, it should grant leave to amend even if no request to amend is made "unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990)).

2. Discussion

a. Misappropriation of Trade Secrets Claim

Mr. Kravitz challenges PhoneDog's misappropriation of trade secrets claim.

Mr. Kravitz first argues that the claim is subject to dismissal because "the identity of the Account followers and the `password' to the Account which PhoneDog alleges were misappropriated by Kravitz are not a `trade secret' within the meaning of the California Uniform Trade Secrets Act ("UTSA")."[fn1] Mot. at 14. Specifically, he argues that "[t]he followers of the Account are not secret because they are and have been publicly available for all to see at all times." *Id.* With respect to the password to the Account, Mr. Kravitz contends that passwords to Twitter accounts do not derive any [*9] actual or potential independent economic value under the UTSA because they do not provide any substantial business advantage. Mot. at 15. Rather, he argues that the passwords merely allow the individual logging on to view information already widely known. *Id.* Mr. Kravitz also argues that he — not PhoneDog — initially created the password and that PhoneDog did not make any reasonable efforts to maintain the secrecy of the password. *Id.*

Additionally, Mr. Kravitz contends that PhoneDog has failed to allege any act by him that falls within the definition of misappropriation.[fn2] Mot. at 16. Rather, he argues that "PhoneDog only makes the conclusory allegation that Kravitz used `improper means, as such are defined in Civil Code § 3426.1(a), [fn3] to obtain and misappropriate the Confidential Information' without providing any factual support of the actual alleged improper act committed by Kravitz." *Id.* (quoting Compl. ¶ 23).

Finally, Mr. Kravitz argues that PhoneDog has failed to plead misappropriation with

particularity, as required by Rule 9(b) for any claim sounding in fraud. Mot. at 16. Again, Mr. [*10] Kravitz asserts that PhoneDog has not alleged any facts regarding his conduct, but has merely alleged that he used "improper means" to obtain and misappropriate the Twitter password. Mot. at 16-17.

In its Opposition, PhoneDog contends that it has sufficiently stated its misappropriation of trade secrets claim, arguing that it has alleged the existence of a trade secret in paragraphs 12 and 22 of the Complaint. Opp'n at 10. It also contends that it has alleged that when it requested that Mr. Kravitz relinquish use of the Account, he "merely changed the Twitter handle on the Account," continued to use the Account, and "used improper means, as such are defined in Civil Code section 3426.1(a), to obtain and misappropriate the Confidential Information." Opp'n at 11 (citing Compl. ¶¶ 17, 23).

PhoneDog also disputes that Rule 9(b)'s heightened pleading standard applies to the misappropriation of trade secrets claim because the claim does not sound in fraud or mistake. *Id.*

Finally, PhoneDog argues that Mr. Kravitz's challenges to whether PhoneDog has a protectable trade secret are beyond the scope of a 12(b)(6) motion and should be addressed on summary judgment. Opp'n at 12.

The Court has carefully considered the parties' arguments and finds that Mr. Kravitz has not shown any basis for dismissal of the misappropriation of trade secrets claim under Rule 12(b)(6). With respect to the applicable pleading standard, although courts have applied conflicting standards, the Court finds that PhoneDog's misappropriation claim does not sound in fraud or mistake and thus Rule 9(b) does not control. *See TMX Funding, Inc. v. Impero Tech., Inc.*, 2010 WL 2509979, at *2 (N.D. Cal. June 17, 2010). PhoneDog has sufficiently described the subject matter of the trade secret with sufficient particularity and has alleged that, despite its demand that Mr. Kravitz relinquish use of the password and Account, he has refused to do so. At this stage, these allegations are sufficient to state a claim. Further, to the extent that Mr. Kravitz has challenged whether the password and Account followers are trade secrets and whether Mr. Kravitz's conduct constitutes misappropriation requires consideration of evidence beyond the scope of the pleading. Thus, such challenges should be raised at summary judgment on a fully-developed evidentiary record. The Court therefore **DENIES** Mr. Kravitz's request to dismiss PhoneDog's misappropriation of trade secrets claim. [*11]

b. Intentional Interference with Prospective Economic Advantage

Mr. Kravitz next urges the Court to dismiss PhoneDog's claim for intentional interference with prospective economic advantage, arguing that PhoneDog has failed to allege: (1) the existence of an actual economic relationship between it and the Account followers; (2) an

economic benefit would have probably resulted had Mr. Kravitz not disrupted that relationship; and (3) any intentional acts of Mr. Kravitz that actually disrupted the economic relationship. Mot. at 18.

Under California law, to prevail on a claim for intentional interference with prospective economic advantage, a plaintiff must establish: (1) an economic relationship between the plaintiff and some third party with the probability of future economic benefit to the plaintiffs; (2) the defendant's knowledge of the relationship; (3) intentional acts, apart from the interference itself, by defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of defendant. *CRST Van Expedited v. Werner Enter., Inc.*, 479 F.3d 1099, 1108 (9th Cir. 2007). "Interference with prospective economic advantage requires a plaintiff to allege an act that is wrongful independent of the interference itself." *Bekele v. Ford*, [2011 BL 237074], 2011 WL 4368566, at 11 (N.D. Cal. Sept. 17, 2011) (citing *Della Penna v. Toyota Motor Sales*, 11 Cal. 4th 376, 392-93 (2007)). Notably, "[t]he tort of interference with prospective economic advantage does not, however, protect mere 'potential' relationships that are 'at most a hope for an economic relationship and a desire for a future benefit.'" *Id.* (quoting *Westside Ctr. Assoc. v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 527 (1996)).

With respect to an economic relationship with the probability of future economic benefit, PhoneDog contends that in paragraph 29 of its Complaint, it has sufficiently alleged that "PhoneDog has had and continues to enjoy relationships with existing and prospective users of its mobile news and review services." Opp'n at 13. However, the Court agrees with Mr. Kravitz that this allegation is conclusory and fails to meet the plausibility standard. In particular, it is unclear who the "users" are, *i.e.*, whether they are the 17,000 Account followers, consumers accessing PhoneDog's website, or some other individuals, and what the nature of PhoneDog's purported economic relationship is with these users. [*12]

The Court also agrees with Mr. Kravitz that PhoneDog has failed to sufficiently allege actual disruption of the relationship between it and its users and economic harm caused by Mr. Kravitz's actions. In response to Mr. Kravitz's challenge, PhoneDog cites to paragraph 30 of the Complaint. Opp'n at 14. However, this paragraph does not contain any facts regarding how Mr. Kravitz's conduct disrupted PhoneDog's relationship with its users or resulted in economic harm. In its Opposition, PhoneDog also indicates that Mr. Kravitz's conduct disrupted its economic relationships with its advertisers and cites to testimony from Tom Klein in support. *Id.* (citing Klein Decl. ¶¶ 3, 8). However, to the extent that Mr. Klein's statements contain facts not alleged in PhoneDog's Complaint, it is improper for the Court to consider such facts when assessing the adequacy of PhoneDog's allegations. If PhoneDog contends that an economic relationship existed between it and customers who advertised on its website, PhoneDog must allege such facts in its Complaint. Reviewing the entirety of PhoneDog's Complaint, the Court finds that PhoneDog has failed to allege facts regarding

how Mr. Kravitz's conduct disrupted its relationships and what economic harm it caused. The Court therefore **GRANTS** Mr. Kravitz's request to dismiss the misappropriation of trade secrets claim.

c. Negligent Interference with Prospective Economic Advantage

Mr. Kravitz moves to dismiss PhoneDog's claim for negligent interference with prospective economic advantage on the grounds that it has failed to sufficiently allege: (1) the existence of an economic relationship that would have probably resulted in economic benefit; or (2) a negligent act by Mr. Kravitz that actually disrupted that relationship. Mot. at 19. To state a claim for negligent interference with prospective economic advantage, a plaintiff must allege: (1) an economic relationship existed between the plaintiff and a third party which contained a reasonably probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to plaintiff in that the relationship was actually interfered with or [*13] disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship. *N. Am. Chem. Co. v. Super. Ct.*, 59 Cal. App. 4th 764, 786 (1997).

With respect to the existence of an economic relationship and the causation elements, this claim suffers from the same pleading deficiencies as PhoneDog's intentional interference claim. It is therefore subject to dismissal on this ground.

Additionally, Mr. Kravitz argues that PhoneDog has failed to allege that he owed it a duty of care, which is a necessary element of the claim. *Id.* "The tort of negligent interference with economic relationship arises only when the defendant owes the plaintiff a duty of care. . . . [A]mong the criteria for establishing a duty of care is the blameworthiness of the defendant's conduct. For negligent interference, a defendant's conduct is blameworthy only if it was independently wrongful apart from the interference itself." *Lange v. TIG Ins. Co.*, 68 Cal. App. 4th 1179, 1187 (1998) (quotations omitted). With respect to PhoneDog's allegation that Mr. Kravitz interfered with the economic relationship between it and its users, the Court agrees with Mr. Kravitz that PhoneDog has failed to allege that Mr. Kravitz owed it a duty of care. See *AHO Enter., Inc. v. State Farm Mut. Auto. Ins. Co.*, 2008 WL 4830708, at *4 (N.D. Cal. Nov. 6, 2008) (granting dismissal of negligent interference with economic advantage claim pursuant to 12(b)(6) because the complaint failed to allege that defendant owed a duty of care to the plaintiff). The claim is also subject to dismissal on this basis. The Court therefore **GRANTS** Mr. Kravitz's Motion with respect to PhoneDog's negligent interference with prospective economic advantage claim.

d. Conversion Claim

Finally, Mr. Kravitz urges the Court to dismiss PhoneDog's conversion claim. Mot. at 19. Under California law, the elements of conversion are: (1) ownership of a right to possession of property; (2) wrongful disposition of the property right of another; and (3) damages. See *G.S. Rasmussen & Assoc. v. Kalitta Flying Serv.*, 958 F.2d 896, 906 (9th Cir. 1992).

Mr. Kravitz first argues that PhoneDog has failed to sufficiently allege that it owns or has the right to immediately possess the Account. *Id.* PhoneDog, however, maintains that it has adequately alleged that it was and still is the owner of the Account and is entitled to possession of the Account. [*14] Opp'n at 16. It points out that it has alleged that it gave Mr. Kravitz permission to use the Account during his employment, but he has refused to surrender the Account following his departure from PhoneDog. *Id.* at 16-17 (citing Compl. ¶¶ 39-40). At this stage of the proceedings, the Court finds that PhoneDog has adequately alleged that it owns or has the right to possess the Account. As discussed above, the nature of that claim is at the core of this lawsuit and cannot be determined on the present record.

Mr. Kravitz also argues that PhoneDog has failed to allege that Mr. Kravitz's act of conversion was done "knowingly" or "intentionally." Mot. at 19-20. He further contends that the conversion claim fails because PhoneDog informed him that he could continue to use the Account and assented to his continued use after he separated from his employment with PhoneDog. *Id.* at 20. In its Opposition, PhoneDog responds that it has alleged that it expressly requested that Mr. Kravitz relinquish use of the Account, but Mr. Kravitz merely changed the Twitter handle. Opp'n at 17 (citing to Compl. ¶ 17). The Court agrees with PhoneDog that this allegation is sufficient for purposes of alleging that the conversion was knowing or intentional.

The Court therefore **DENIES** Mr. Kravitz's request to dismiss PhoneDog's conversion claim.

IV. CONCLUSION

For the reasons sets forth above, the Court **GRANTS IN PART** and **DENIES IN PART** Mr. Kravitz's Motion to Dismiss (Dkt. No. 4) as follows.

The Court **DENIES WITHOUT PREJUDICE** Mr. Kravitz's Motion to Dismiss for lack of subject matter jurisdiction.

The Court **GRANTS** Mr. Kravitz's Motion to Dismiss PhoneDog's claims for intentional interference with prospective economic advantage and negligent interference with prospective economic advantage with leave to amend.

The Court **DENIES** Mr. Kravitz's Motion in all other respects. [*15]

PhoneDog shall file its First Amended Complaint no later than November 29, 2011.

IT IS SO ORDERED.

[fn1] The UTSA, California Civil Code section 3426.1(d), provides that "'[t]rade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

[fn2] California Civil Code section 3426.1(b) provides:

(b) "Misappropriation" means:

(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(2) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(A) Used improper means to acquire knowledge of the trade secret; or

(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:

(i) Derived from or through a person who had utilized improper means to acquire it;

(ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

[fn3] California Civil Code section 3426.1(a) provides: "'Improper means' includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Reverse engineering or independent derivation alone shall not be considered improper means."

General Information

Result(s)	Motion To Dismiss Granted (In Part), Motion To Dismiss Denied (In Part), Motion To Dismiss For Jurisdiction Denied
Related docket(s)	3:11-cv-03474 (N.D. Cal.)
Topic	Civil Procedure Torts Trade Secrets
Industry	Social Networking