

PHONEDOG, LLC, a Delaware corporation, Plaintiff, v....., 2012 WL 554034 (2012)

2012 WL 554034 (N.D.Cal.) (Trial Pleading)
United States District Court, N.D. California.

PHONEDOG, LLC, a Delaware corporation, Plaintiff,
v.
Noah KRAVITZ, an individual, Defendant.

No. 3:11-cv-03474 (MEJ).
February 14, 2012.

**Noah Kravitz's Counterclaims and Answer to Plaintiff's First Amended Complaint for
Misappropriation of Trade Secrets, Interference With Prospective Economic Advantage and Conversion**

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NOAH KRAVITZ'S COUNTERCLAIMS AND ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant Noah Kravitz ("Kravitz") answers the First Amended Complaint (the "Amended Complaint") filed on November 29, 2011 by plaintiff PhoneDog, LLC ("Plaintiff" or "PhoneDog") as follows:

Jurisdiction

1. Kravitz lacks sufficient information to admit or deny the allegation that PhoneDog is a Delaware Corporation and, on that basis, denies the allegation. Kravitz admits, on information and belief, that two similar sounding limited liability companies are registered with the State of Delaware: PhoneDog Communications LLC and PhoneDog Media LLC. Kravitz admits, on information and belief, that PhoneDog's principal place of business is Mount Pleasant, South Carolina.
2. Kravitz admits that he is a California resident and resides in Alameda County, California.
3. Kravitz denies the allegations of paragraph 3. Kravitz specifically denies that PhoneDog's causes of action against him state claims for relief in excess of \$75,000 and, therefore, Kravitz denies that this Court has original jurisdiction over this matter under [28 U.S.C. § 1332\(a\)](#).

Venue

4. Kravitz admits that if this court had original jurisdiction of this matter under [28 U.S.C. § 1332\(a\)](#) then venue in the United States District Court for the Northern District of California would be proper under [28 U.S.C. § 1391\(a\)](#) because Kravitz resides in this judicial district and is subject to personal jurisdiction here.

THE PARTIES

5. Kravitz lacks sufficient information to admit or deny the allegation that PhoneDog is a corporation organized and existing under the laws of the State of Delaware and, on that basis, denies the allegation. Kravitz admits, on information and belief, that two similar sounding limited liability companies are registered with the State of Delaware: PhoneDog Communications LLC and PhoneDog Media LLC. Kravitz admits, on information and belief, that PhoneDog's principal place of business is Mount Pleasant, South Carolina.

6. Kravitz admits that he is a California resident and resides in Alameda County, CA.

FACTUAL ALLEGATIONS

7. Kravitz lacks sufficient information to admit or deny the allegations of paragraph 7, and, on that basis, denies them.

8. Kravitz admits that PhoneDog has in the past and presently continues to operate different websites that contain reviews of mobile products such as phones, tablet computers and the like. Kravitz admits that PhoneDog's websites permit users to research these mobile products and compare prices for these products. Except as expressly admitted, Kravitz denies any remaining allegations in paragraph 8.

9. Kravitz lacks sufficient information to admit or deny the allegations of paragraph 9, and, on that basis, denies them.

10. Kravitz lacks sufficient information to admit or deny the allegations of paragraph 10, and, on that basis, denies them.

11. Kravitz admits that PhoneDog's agents and employees use social media such as Twitter, Facebook and YouTube. Except as expressly admitted, Kravitz denies any remaining allegations in paragraph 11.

12. Kravitz admits that some of PhoneDog's agents and employees maintain Twitter accounts. Kravitz admits that some of PhoneDog's agents and employees use Twitter accounts within the scope of the services they perform for PhoneDog and use these accounts to direct their followers to PhoneDog's website. Except as expressly admitted, Kravitz denies any remaining allegations in paragraph 12.

13. Kravitz lacks sufficient information to admit or deny the allegations of paragraph 13, and, on that basis, denies them.

14. Kravitz lacks sufficient information to admit or deny the allegations of paragraph 14, and, on that basis, denies them.

15. Kravitz denies the allegations of paragraph 15.

16. Kravitz denies the allegations of paragraph 16.

17. Kravitz admits that PhoneDog initially hired him as a part-time product reviewer and video blogger on or around April 13, 2006. Kravitz admits that he submitted written and video content to PhoneDog, which PhoneDog then reviewed, approved and submitted to its users via PhoneDog's websites. Kravitz admits that beginning in approximately January 2009 he began using his Twitter account (the "Account") which, at the time, had the handle @PhoneDog_Noah, to tweet content related to PhoneDog. Except as expressly admitted, Kravitz denies any remaining allegations in paragraph 17.

18. Kravitz admits that, on occasion, he used the Account to promote PhoneDog's services but denies that more than half of the tweets from the Account related to PhoneDog. Kravitz denies that he accessed the Account using any confidential information or other trade secrets belonging to PhoneDog; to the contrary, neither the identity of the Account's followers nor the password used to access the Account are trade secrets that belong to PhoneDog. In fact, after Kravitz began using the Account in January 2009, he changed the password to the Account and, thereafter, PhoneDog did not have access to or otherwise know the password.

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Kravitz lacks sufficient information to admit or deny any remaining allegations in paragraph 18 and, on that basis, denies those allegations.

19. Kravitz admits that as of October 2010, the Account had approximately 17,000 Twitter followers. Except as expressly admitted, Kravitz denies any remaining allegations in paragraph 19 and specifically denies both that there is any industry standard for the value of a Twitter follower and that as of October 2010 the Account had a value of approximately \$42,500 per month.

20. Kravitz admits that he resigned from PhoneDog in October 2010. Kravitz admits that immediately after his resignation, he changed the Twitter handle for the Account to @noahkravitz. Kravitz admits that he presently uses the Account under the handle @noahkravitz. Except as expressly admitted, Kravitz denies any remaining allegations in paragraph 20. Kravitz specifically denies that PhoneDog requested that he relinquish use of the Account following his resignation. To the contrary, PhoneDog consented to Kravitz's continued use of his Account after his resignation under the handle @noahkravitz. In fact, on October 18, 2010, PhoneDog used its website to market Kravitz's continued use of the Account under the new handle @noahkravitz, and after that date repeatedly asked him to send out tweets under the @noahkravitz handle on PhoneDog's behalf. Moreover, at no point in time did PhoneDog ever informally request that Kravitz cease using the Account after his resignation. Rather, the first oral or written statement from PhoneDog to Kravitz containing any assertion that the Account belongs to PhoneDog and that Kravitz is obligated to cease using the Account came on July 17, 2011 when Kravitz was served with PhoneDog's lawsuit-nine months after Kravitz changed the handle of the Account and began tweeting as @noahkravitz.

21. Kravitz admits that between October and December 2010 he provided freelance services to a variety of media outlets and that on December 6, 2010 he accepted a full-time position with TechnoBuffalo which operates the website www.technobuffalo.com. Kravitz admits that TechnoBuffalo offers some services that are competitive with services offered by PhoneDog. Except as expressly admitted, Kravitz denies any remaining allegations in paragraph 21.

22. Kravitz admits that he continues to use the Account under the handle @noahkravitz. Except as expressly admitted, Kravitz denies any remaining allegations in paragraph 22. Kravitz specifically denies that he used any confidential information belonging to PhoneDog to access the Account. Kravitz further denies his use of the Account constitutes communication with "PhoneDog's Followers." Kravitz also denies that he needs permission from PhoneDog to communicate with his followers on Twitter.

23. Kravitz denies the allegations in paragraph 23.

24. Kravitz admits that while he was employed at PhoneDog he became a contributor to "Street Signs" on CNBC and "Fox Business Live." Kravitz admits that he continues to contribute to these programs. Except as expressly admitted, Kravitz denies any remaining allegations in paragraph 24.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF (Alleged Misappropriation of Trade Secrets)

25. Paragraph 25 is a legal conclusion to which no response is required.

26. Kravitz denies the allegations in paragraph 26.

27. Kravitz denies the allegations in paragraph 27.

28. Kravitz denies the allegations in paragraph 28.

29. Kravitz denies the allegations in paragraph 29. Kravitz specifically denies that PhoneDog has suffered damages due to his use of the Account. Kravitz further denies that he has been unjustly enriched due to his continued use of the Account.

30. Kravitz denies the allegations in paragraph 30.

31. Kravitz denies the allegations in paragraph 31. Kravitz specifically denies that his use of the Account is illegal or otherwise exploits PhoneDog's trade secrets. Kravitz further denies that PhoneDog has no adequate remedy at law for the alleged misappropriation or that PhoneDog would be required to maintain a multiplicity of judicial proceedings in order to protect its interests here.

SECOND CLAIM FOR RELIEF (Alleged Intentional Interference With Prospective Economic Advantage)

32. Paragraph 32 is a legal conclusion to which no response is required.

33. Kravitz denies the allegations in paragraph 33.

34. Kravitz admits that his appearances on "Street Signs" and "Fox News Live" were, in part, designed to drive traffic to PhoneDog's website and that Kravitz was aware of PhoneDog's desire to drive traffic to the website when he made said appearances. Except as expressly admitted, Kravitz denies any remaining allegations in paragraph 34.

35. Kravitz denies the allegations in paragraph 35. Kravitz specifically denies each of the following allegations: that PhoneDog requested he relinquish the Account prior to filing its complaint in this matter; that Kravitz attempted to discredit PhoneDog through his use of the Account; that Kravitz wrongly disparaged PhoneDog through his use of the Account; and that Kravitz wrongly used PhoneDog's economic relationships to promote either himself or TechnoBuffalo.

36. Kravitz denies the allegations in paragraph 36.

37. Kravitz denies the allegations in paragraph 37 and specifically denies that any of his conduct constitutes interference with PhoneDog's prospective economic advantage.

38. Kravitz denies the allegations in paragraph 38.

39. Kravitz denies the allegations in paragraph 39.

40. Kravitz denies the allegations in paragraph 40. Kravitz specifically denies that he has interfered with PhoneDog's prospective economic advantage or damaged its reputation or goodwill. Kravitz further denies that PhoneDog has no adequate remedy at law for the injuries PhoneDog alleges he has caused them or that PhoneDog would be required to maintain a multiplicity of judicial proceedings in order to protect its interests here.

THIRD CLAIM FOR RELIEF (Alleged Negligent Interference With Prospective Economic Advantage)

41. Paragraph 41 is a legal conclusion to which no response is required.

42. Kravitz denies the allegations in paragraph 42.

43. Kravitz denies the allegations in paragraph 43.

44. Kravitz denies the allegations in paragraph 44.

45. Kravitz denies the allegations in paragraph 45 and specifically denies that he negligently disrupted any of PhoneDog's economic relationships.

46. Kravitz denies the allegations in paragraph 46 and specifically denies that PhoneDog has suffered any damages due to any of the acts alleged in the Amended Complaint.

FOURTH CLAIM FOR RELIEF (Conversion)

47. Paragraph 47 is a legal conclusion to which no response is required.

48. Kravitz denies the allegations in paragraph 48.

49. Kravitz admits that PhoneDog consented to his use of the Account while he was a contributor to PhoneDog and that PhoneDog consented to Kravitz's use of the Account after he resigned from PhoneDog. Except as expressly admitted, Kravitz denies any remaining allegations in paragraph 49. Kravitz specifically denies that he needed PhoneDog's permission to use the Account and denies that he was required to return the Account to PhoneDog when he ceased working for the company.

50. Kravitz admits that he continues to use the Account with the handle @noahkravitz and admits that he markets his services and TechnoBuffalo's services using the Account. Except as expressly admitted, Kravitz denies any remaining allegations in paragraph 50. Kravitz specifically denies that he converted the Account and further denies that PhoneDog requested that he relinquish the Account to PhoneDog on or about October 15, 2010. In fact, on October 18, 2010, PhoneDog published content to its website indicating that Kravitz would retain the Account under the new handle @noahkravitz. PhoneDog only requested that Defendant relinquish the Account after Kravitz sued PhoneDog for unpaid wages in June 2011. The first communication from PhoneDog to Kravitz requesting that he relinquish the account came on July 17, 2011, when PhoneDog served Kravitz with its complaint in this matter.

51. Kravitz admits that in October 2010, the Account had approximately 17,000 followers. Except as expressly admitted, Kravitz denies any remaining allegations in paragraph 51.

52. Kravitz lacks sufficient information to admit or deny the allegations of paragraph 52, and, on that basis, denies them.

53. Kravitz denies the allegations in paragraph 53.

PRAYER FOR RELIEF

These paragraphs set forth the statement of relief requested by PhoneDog to which no response is required. Kravitz denies that PhoneDog is entitled to any of the requested relief and denies any allegations contained in the Prayer for Relief to which a response is required.

DEMAND FOR A JURY TRIAL

PhoneDog's demand that all issues be determined by a jury trial does not state any allegation and Kravitz is not required to respond. To the extent that any allegations are included in the demand, Kravitz denies these allegations.

Kravitz denies each and every allegation of PhoneDog's Amended Complaint not specifically admitted or otherwise responded to above. Kravitz specifically denies that he has converted PhoneDog's property or is liable to PhoneDog or any other party for conversion. Kravitz further denies that he has interfered with PhoneDog's economic relationships or is liable for interference with any economic relationships belonging to PhoneDog. Kravitz further denies that PhoneDog is entitled to any relief whatsoever of any kind against Kravitz as a result of any act of Kravitz or any person or entity acting on behalf of Kravitz.

DEFENSES

First Defense - Failure to State a Claim

1. The Amended Complaint fails to state a claim for which relief can be granted.

Second Defense - Unclean Hands

2. PhoneDog's claims are barred because PhoneDog has come to the Court with unclean hands due to the express and implied representations it made to Kravitz that Kravitz would permanently have the exclusive right to use the Account and due to the express and implied consent it gave to Kravitz to continue using the Account after his resignation in October 2010. PhoneDog only attempted to disavow these representations and revoke its consent when it filed its initial complaint in this matter on July 15, 2011.

Third Defense - Laches

3. PhoneDog's claims are barred because PhoneDog's nine month delay in asserting, let alone prosecuting, these claims was unreasonable and has prejudiced Kravitz.

Fourth Defense - Failure to Mitigate Damages

4. PhoneDog's claims are barred because PhoneDog has failed to mitigate its damages. The identity of the followers of Twitter handle @noahkravitz was, at all times, in the public domain and available to PhoneDog, however PhoneDog did not seek to attract these followers to a new Twitter handle or otherwise attempt to replace the advertising revenue it alleges it lost due to Kravitz's use of the Account.

Fifth Defense - Waiver and Estoppel

5. PhoneDog's claims are barred by the doctrines of waiver and/or estoppel as PhoneDog did not assert ownership over the Account at any time prior to July 2011-years after Kravitz began using the Account. Kravitz relied on PhoneDog's statements that the Account was his and if the Account is returned to PhoneDog, Kravitz will lose the Twitter following that he spent time and effort building. In addition, if Kravitz is required to pay damages to PhoneDog based on the size of the Twitter following he built while contributing to PhoneDog, then Kravitz will have unknowingly increased his liability to PhoneDog by detrimentally relying on PhoneDog's statements that he was entitled to permanent and exclusive use of the Account.

Sixth Defense - Lack of Subject Matter Jurisdiction

6. PhoneDog's claims are barred because, based on the allegations in PhoneDog's Amended Complaint, the amount in controversy here is less than \$75,000 and, therefore, this Court does not have subject matter jurisdiction under [28 U.S.C. § 1332\(a\)](#).

Seventh Defense - Disclosure & Ratification

7. PhoneDog's claims are barred on the ground that material facts concerning the Account were fully disclosed and ratified by PhoneDog which knew that Kravitz had exclusive use and control of the Account while he contributed to PhoneDog and during the many months after he left the company. PhoneDog never asserted ownership over the Account during this period of time.

Eighth Defense - Failure to Join Twitter

8. PhoneDog's claims for provisional remedies are barred because it has failed to join Twitter, the ultimate owner of the account and party with authority to return the Account to PhoneDog. Complete relief in this action cannot be accorded without joining

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Twitter, as PhoneDog claims to be the owner of the Twitter account. Deciding the issue of ownership of the account without the participation of Twitter could deprive Twitter of its claimed interest in the account at issue.

Ninth Defense - Consent, Ratification and Acquiescence

9. PhoneDog's claims are barred by the doctrines of consent, ratification, and/or acquiescence by PhoneDog which knew that Kravitz had exclusive use and control of the Account while he contributed to PhoneDog and during the many months after he left the company but never asserted ownership over the Account.

Tenth Defense - Transfer

10. PhoneDog's claims are barred because, to the extent PhoneDog ever owned any interest in the Account, it irrevocably transferred that interest to Kravitz when he began using the Account.

Eleventh Defense - Miscalculation of Damages

11. PhoneDog has overstated the valuation of the Account and therefore is not entitled to the amount of damages requested in the Amended Complaint.

Twelfth Defense - No Trade Secrets

12. PhoneDog's claims are barred because the Account password is not a trade secret belonging to PhoneDog because PhoneDog did not know let alone make efforts to protect the password to the Account. Similarly, the identity of the Account's Twitter followers was never a trade secret because this information was always available to the public.

Thirteenth Defense - Statute of Limitations

13. PhoneDog's claims are barred because they allege that Kravitz has breached an obligation to return the Account to PhoneDog. This alleged obligation to return the Account to PhoneDog was not in writing. Under [Cal. Code Civ. P. § 339](#), any action founded upon breach of a contract not in writing must be brought within two years of the breach. Here, the cause of action accrued when Kravitz asserted that he had the permanent and exclusive right to use the Account and began tweeting personal matters in February 2009-more than two years before PhoneDog filed this litigation.

Fourteenth Defense - Implied License

14. PhoneDog's claims are barred by the doctrine of implied license because PhoneDog provided Kravitz with authorization, implied or explicit, to use the Account permanently.

Fifteenth Defense - Forfeiture or Abandonment

15. PhoneDog's claims are barred to the extent it has forfeited or abandoned its right to use the Account.

Sixteenth Defense - Innocent Intent

16. PhoneDog's claims are barred, in whole or in part, because Kravitz's conduct was in good faith and with non-willful intent, at all times.

Seventeenth Defense - Unconstitutionally Excessive Damages

17. PhoneDog's claims are barred because the damages sought are unconstitutionally excessive and disproportionate to any actual damages that may have been sustained in violation of the Due Process Clause.

Eighteenth Defense - No Injunctive Relief

18. PhoneDog has not suffered any irreparable injury, PhoneDog has an adequate remedy at law, injunctive relief would be contrary to the public interest, and PhoneDog is not entitled to injunctive relief.

COUNTERCLAIMS

As and for his counterclaims against plaintiff PhoneDog Media, LLC, Kravitz respectfully shows as follow:

The Parties

1. Noah Kravitz (“Kravitz”) is an individual residing in Alameda County, California.
2. PhoneDog, LLC (“PhoneDog”) is the plaintiff in this litigation. However, Kravitz has reviewed the entity search function on the website maintained by the State of Delaware, Department of State: Division of Corporations. (<https://delecorp.delaware.gov/tin/controller>) and there is no record of an entity known as PhoneDog, LLC on this site. Instead, there are records of two other entities with similar names: PhoneDog Media LLC (incorporated on 7/24/2002) and PhoneDog Communications LLC (incorporated on 1/22/2004). It appears to Kravitz that plaintiff PhoneDog, LLC is a d/b/a or affiliate of one of these other PhoneDog entities. If this is the case and PhoneDog, LLC is not an entity with legal existence, then Kravitz will amend his counterclaims to add an entity with a legal existence such as PhoneDog Media LLC or PhoneDog Communications LLC. As his investigation is in its preliminary stages, Kravitz initially raises his counterclaims solely against PhoneDog, LLC, the current plaintiff and counter defendant in this litigation.

Jurisdiction and Venue

3. Subject to Kravitz's defenses and denials, Kravitz alleges that this Court has jurisdiction over the subject matter of these counterclaims under, without limitation, 28 U.S.C. §§ 1332(a), 1367(a), 2201(a), 2202.
4. This Court has personal jurisdiction over PhoneDog.

Factual Background

5. In approximately April 2006, PhoneDog hired Kravitz as a part-time, freelance reviewer of cellular phones. Kravitz was initially paid by PhoneDog on a per-post basis related to the amount of content he contributed. Over time, Kravitz's role grew to include writing reviews and blog posts, producing videos, covering various aspects of the wireless industry including hardware, software and service reviews, news, and rumors, as well as opinion pieces. These reviews and blog posts were posted to PhoneDog's website: www.phonedog.com.
6. Kravitz continued to contribute to PhoneDog for a number of years after April 2006 and held progressively more senior titles at PhoneDog: Cell Phone Editor, Senior Editor and later Editor-in-Chief. Over time, Kravitz became one of Phone Dog's most prominent and heavily trafficked contributors. In an effort to retain Kravitz's services, PhoneDog agreed to enter into an agreement with Kravitz on June 1, 2008. Pursuant to this agreement (“Commission Agreement”), PhoneDog agreed to pay Kravitz commission wages equal to 15% of all of PhoneDog's gross advertising revenue received from “applicable sources to Noah Kravitz”.
7. In addition to gross advertising revenue under the Commission Agreement, Kravitz also began receiving monthly payments from PhoneDog in November 2008 in consideration of the five to ten hours a week he spent managing a number of PhoneDog's other editors.

8. On July 1, 2009, Tom Klein, PhoneDog's founder, reaffirmed the validity of the Commission Agreement to Kravitz. At all times, however, Kravitz was paid on a 1099 basis-not with W-2s. In addition, there was never anything in Kravitz's agreements with PhoneDog that prevented him from taking other work with another company. In fact, while he was contributing blog posts to PhoneDog and managing the work of other editors, Kravitz and a friend spent a number of months working on a start-up venture.

9. In October 2010, Kravitz resigned from PhoneDog for personal reasons.

10. Following Kravitz's resignation, PhoneDog refused to pay Kravitz amounts due to him under the Commission Agreement. In December 2010, PhoneDog issued Kravitz a check in the amount of approximately \$8,261.64 (constituting one monthly payment of Kravitz's 15% share of the gross advertising revenue). Shortly thereafter, PhoneDog cancelled the aforementioned check before Kravitz received it. After numerous unsuccessful attempts to resolve the dispute without litigation, on June 8, 2011, Kravitz filed suit against PhoneDog in the Superior Court of California, County of Alameda (the "State Court Litigation").

11. PhoneDog responded to Kravitz's State Court Litigation by filing a separate lawsuit in this Court on July 15, 2011 (the "Federal Court Litigation").

12. The Federal Court Litigation-which revolves around a Twitter account-raises four claims against Kravitz. The claims in the Federal Court Litigation pertain to conduct by Kravitz that PhoneDog never once mentioned it objected to prior to the date the Federal Court Litigation was filed. In fact, PhoneDog expressly ratified the conduct by Kravitz that underlies the claims for relief alleged in the Federal Court Litigation. The Federal Court Litigation represents PhoneDog's attempt to retaliate against Kravitz for filing the State Court Litigation and to employ its deep pockets in an effort to cow Kravitz into dropping the State Court Litigation.

The Twitter Account

13. On or about January 8, 2009, Kravitz began using a Twitter account (the "Account") with the handle @PhoneDogNoah. On information and belief, another PhoneDog employee named Ryan Rae ("Rae") created this Account using Twitter's services and it was transferred to Kravitz by Rae in January 2009. After Rae provided Kravitz with access to the Account, Kravitz changed the password to the Account. After Kravitz changed the password to the Account, PhoneDog never again knew the password to the Account and never had access to the Account. In addition to maintaining the password to the Account, Kravitz controlled all content on the Account. At the time the Account was transferred to Kravitz, PhoneDog never expressed to Kravitz he would be required to return access to the Account to PhoneDog in the event he resigned from the company. Kravitz understood it to be the case that he had permanent and exclusive access to the Account and that he was entitled to continued access even if he resigned from PhoneDog. Accordingly, after receiving access to the Account he immediately ceased using another Twitter handle (@kravkrav) that he had created in May 2008 and under which he had already built a following.

14. Kravitz used the Account to share information concerning his life, opinions, work and a variety of other subjects-for example, his favorite TV shows, sports teams and music. Kravitz estimates that more than 50% of the tweets from the Account were personal in nature and completely unrelated to PhoneDog. Kravitz tweeted about all manner of subjects at all hours of the day and night. Kravitz, however, also tweeted to followers of the Account a variety of information concerning PhoneDog. Kravitz's tweets had the effect of driving traffic to PhoneDog's websites. Under the Commission Agreement, Kravitz was entitled to 15% of the revenue generated all sources applicable to Kravitz.

15. Beginning on the date Kravitz started using the Account and at all times thereafter, PhoneDog never controlled the Account and PhoneDog never informed Kravitz that it believed the Account was PhoneDog's property. Kravitz would not have used the Account if PhoneDog had told him that he would be required to return it after he left the company. After Kravitz began using the Account, PhoneDog did not create a single one of the tweets from the Account-Kravitz generated all of them. At all times,

the identity of the Account's followers was public information accessible to PhoneDog and anyone else with access to Twitter. All of Kravitz's tweets were publicly available as well.

16. Pursuant to Twitter's Terms of Service ("Terms"), a Twitter account is not personal or intellectual property that belongs to Twitter users. Rather, Twitter agrees to offer users a set of services which include access to and use of Twitter's websites (the "Services"). Each user's right to use the Services is conditioned on acceptance and compliance with Twitter's Terms. The Terms provide that "[a]ll right, title, and interest in and to the Service (excluding Content provided by users) are and will remain the exclusive property of Twitter and its licensors." Thus, the Account does not belong to either Kravitz or PhoneDog. Rather, under the Terms, Kravitz, who for more than three years has been the exclusive user of the Account and rightful holder of the password, is the individual with the right to use the Services under the Terms.

17. Twitter has the exclusive right to "terminate users or reclaim usernames." All of the Services belong to Twitter. Under the Twitter Rules, users of the Services are strictly prohibited from copying, selling, or trading the Services. Under the Terms, a user is responsible for safeguarding the password that they use to access the Services. In addition, Twitter users are strictly prohibited from making a profit off their accounts without specific permission from Twitter to do so and are further prohibited from selling their accounts.

Use of the Account by Kravitz

18. Many people found Kravitz's tweets to be useful and interesting. Kravitz's tweets concerning his personal opinions and views were particularly popular. When Kravitz began using the Account, it did not have many followers. However, by October 2010, due to Kravitz's efforts at creating interesting tweets, the number of followers of the Account had increased substantially to approximately 17,000.

19. In October 2010, Kravitz elected to resign from PhoneDog. Immediately after his resignation, Kravitz changed the handle of the Account from @PhoneDog_Noah to @noahkravitz. When a Twitter handle changes, the users that followed the account under its previous handle automatically continue following the account on its new handle. Kravitz informed PhoneDog prior to his resignation that he would be changing the Account's handle.

20. Once Kravitz announced his resignation, PhoneDog, through its founder Tom Klein, provided Kravitz with oral assurances that he could retain the Account permanently after his separation from the company. PhoneDog again consented to Kravitz retaining the Account with a new handle when, on October 18, 2010, PhoneDog announced Kravitz's resignation on its website. PhoneDog had complete control over this "Farewell Post" in which Kravitz stated that he did not know what job he would take next, but "[w]hatever I wind up doing, you can follow it on my little blog at <http://nk126.com> and on twitter at @noahkravitz." Moreover, after his resignation PhoneDog uploaded a video to its YouTube channel that advertised Kravitz's new handle @noahkravitz. Kravitz relied on PhoneDog's previous assurances that he would continue to have the exclusive right to use the Account.

21. Following his resignation, PhoneDog continued to request that Kravitz use his Account to send out tweets promoting PhoneDog. Kravitz did so for approximately two months. For example, on December 10, 2010, PhoneDog sent Kravitz an email asking him to tweet about a promotional contest on PhoneDog's website. On December 15, 2010, PhoneDog asked Kravitz to tweet about another contest PhoneDog was operating. During this time, the identity of the Account's followers was known to PhoneDog. PhoneDog gave its consent to the change in handle and Kravitz's ongoing use of the Account under the new handle @noahkravitz.

22. Beginning in December 2010 PhoneDog refused to provide Kravitz with the 15% share of gross revenue due to him under the Commission Agreement. As PhoneDog had refused to uphold its contractual obligations, Kravitz ceased tweeting on PhoneDog's behalf. Since his resignation, Kravitz's Twitter following has increased to over 24,000 followers. He has sent almost 27,000 tweets.

PhoneDog's Amended Complaint

23. In its Amended Complaint, PhoneDog asserts that it requested that Kravitz maintain the Account for use in the scope of the services he performed for PhoneDog and that the password to the Account is a trade secret that belongs to PhoneDog. Amended Complaint ¶ 12. PhoneDog claims that it gave Kravitz use of the Account and that he accessed the Account using PhoneDog's trade secrets. Amended Complaint ¶ 18.

24. PhoneDog further states that following Kravitz's resignation he was asked to relinquish actual use of the Account but he refused. Amended Complaint ¶ 20. PhoneDog asserts that through his ongoing use of the Account, Kravitz has discredited and disparaged PhoneDog and has interfered with PhoneDog's economic relationships. Amended Complaint ¶¶ 23-24. PhoneDog also claims that it is the true owner of the Account. Amended Complaint ¶ 48.

25. Kravitz has all the right to use the Services and the Account, subject to the interests retained by Twitter. Kravitz was not asked to relinquish use of the Account until nine months after he left PhoneDog. In fact, PhoneDog only asserted ownership over the Account after Kravitz filed the State Court Litigation. Kravitz has not interfered with any of PhoneDog's relationships, nor has he discredited or disparaged PhoneDog. The allegations against Kravitz of moral turpitude made in PhoneDog's Amended Complaint and on its website have damaged his reputation and harmed his economic relationships.

26. Consequently, there is an actual case and controversy between the parties over the Account and related matters, including any damages attendant to Kravitz's ongoing use of the Account.

***COUNT ONE Declaratory Judgment that-Subject to the Rights Retained
by Twitter-Kravitz has all Rights to and Interest in the Services***

27. Kravitz restates and incorporates by reference his allegations in paragraphs 1-26 of his Counterclaims.

28. An actual case or controversy exists between Kravitz and PhoneDog as to who owns the Account.

29. A judicial declaration is necessary and appropriate to resolve this dispute.

30. Since Kravitz began using the Account, he has maintained exclusive possession and control over it. Kravitz only began using the Account because he believed that the Account was his to use permanently and that he had all rights to and interest in the Services. After he began using the Account, PhoneDog never expressed to Kravitz that it believed PhoneDog retained any right, title or interest in the Account or the Services. Following Kravitz's resignation, PhoneDog agreed that Kravitz had all rights to and interest in the Services subject to the rights retained by Twitter. Months after his resignation from PhoneDog, the company continued to request that Kravitz tweet on its behalf using the Account. PhoneDog thereby acquiesced to Kravitz's ownership of the Services and ratified his decision to retain the Account.

31. Industry precedent establishes that-absent a specific agreement to the contrary-an employer does not own any employee's Twitter account. An employer cannot prevent an employee from changing the handle of a Twitter account. There is no agreement between Kravitz and PhoneDog that PhoneDog owns the Account or has the right to use the Account. In fact, PhoneDog previously agreed with Kravitz on a number of occasions that Kravitz would have permanent and exclusive use of the Account.

WHEREFORE, Kravitz prays for judgment as set forth below.

COUNT TWO Promissory Estoppel

32. Kravitz restates and incorporates by reference his allegations in paragraphs 1-26 of his Counterclaims.

33. When Kravitz began using the Account in January 2009, Kravitz believed that he would be permitted to retain the Account going forward regardless of whether he continued to contribute to PhoneDog. Between January 2009 and October 2010, PhoneDog never told Kravitz that it believed the Account belonged to PhoneDog. Klein and PhoneDog benefitted from these statements because they induced Kravitz to use the Account and thereby drive traffic to PhoneDog's websites which increased PhoneDog's profits. In October 2010, PhoneDog's CEO, Tom Klein informed Kravitz that it had no objection to him retaining the Account after Kravitz left the company. Klein and PhoneDog benefitted from this promise because it resulted in Kravitz continuing to tweet on PhoneDog's behalf. Kravitz reasonably believed these statements and justifiably relied on them.

34. PhoneDog and Klein have since reneged on the promises they made to Kravitz.

35. Kravitz relied on these statements to his detriment. Before January 2009, Kravitz maintained a Twitter account under the handle @kravkrav. Kravitz ceased using this handle and began using the Account based on the understanding that he would have the permanent and exclusive right to use the Account. Between January 2009 and October 2010, under the belief that the Account was his to use permanently, Kravitz spent substantial time and effort increasing the Account's following and prominence. Since his resignation, Kravitz has sent thousands of tweets and has increased his Twitter following by more than 7,000, or 40%. If the Account is returned to PhoneDog, Kravitz will lose the following that he spent time and effort building. This loss can only be avoided if PhoneDog's promise to Kravitz that he could retain the Account is enforced.

36. Kravitz has suffered harm to his reputation, his economic relationships in the technology industry as well as with various media outlets due to his detrimental reliance.

WHEREFORE, Kravitz prays for judgment as set forth below.

COUNT THREE False Promise (Fraud)

37. Kravitz restates and incorporates by reference his allegations in paragraphs 1-26 of his Counterclaims.

38. To the extent PhoneDog alleges the Account belongs to it and that it should recover the Account and access to the Services, Phone Dog made a false and fraudulent promise to Kravitz.

39. PhoneDog promised Kravitz that the Account was his to keep permanently. It made this promise on a number of occasions. First, at all times while he was a contributor to its websites, PhoneDog led Kravitz to believe that it asserted no ownership over the Account or the Services and that Kravitz had the permanent and exclusive right to use the Account and the Services. Second, after he resigned from the company, PhoneDog uploaded Kravitz's Farewell Post advertising the new Twitter handle for the Account @noahkravitz pursuant to which Kravitz would continue tweeting. Third, PhoneDog asked Kravitz to tweet on its behalf in December 2010 using the Account which PhoneDog was aware had a new Twitter handle. Fourth, after Kravitz announced his resignation, Tom Klein specifically informed Kravitz that he could permanently retain the Account and use of the Services.

40. PhoneDog knew that these promises were false at the time it made them and intended the promises to induce reliance by Kravitz who PhoneDog hoped would continue to tweet on its behalf and drive traffic to its website. Kravitz reasonably believed these promises to be true. The promises did induce reliance because Kravitz abandoned his former Twitter account-@kravkrav-and began using the Account. Moreover, Kravitz expended significant effort and time in creating tweets between October 2010 (when he resigned from PhoneDog) and the present. Kravitz engaged in similar efforts while he was a contributor to PhoneDog. Through these efforts, Kravitz has maintained and expanded his Twitter following-increasing the number of individuals following him by almost 40%. Kravitz will lose this following if the Account is returned to PhoneDog. At a minimum, PhoneDog's false promises will interfere with Kravitz's efforts to communicate with thousands of Twitter followers

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that began following his Account after he resigned from PhoneDog and thereby have no connection to PhoneDog or the Account when its handle was @PhoneDogNoah.

WHEREFORE, Kravitz prays for judgment as set forth below.

COUNT FOUR Negligent Misrepresentation

41. Kravitz restates and incorporates by reference his allegations in paragraphs 1-26 of his Counterclaims.

42. In January 2009, Kravitz was under the belief that if he began using the Account, the Account and the Services were his to continue using permanently. PhoneDog never informed him otherwise. PhoneDog never expressed the belief that it possessed any right or interest in the Account or the Followers. After he resigned from PhoneDog, the company represented to Kravitz that he could continue to use the Account and the Services under the handle @noahkravitz. At this time, PhoneDog again represented that it possessed no right or interest in the Account or the Followers. At the time that PhoneDog made these representations, it had no reasonable grounds for believing that they were true.

43. PhoneDog intended that Kravitz rely on these misrepresentations so that Kravitz would use the Account, drive traffic to PhoneDog's website and tweet promotions on its behalf.

44. Kravitz has suffered harm to his reputation as a result of Phone Dog's misrepresentations and material omissions. Kravitz abandoned his former Twitter account-@kravykrav-and started to use the Account only because PhoneDog failed to tell him that it would subsequently assert ownership over the Account. Kravitz also put significant time and effort into building a following for the Account from January 2009 to the present because he believed PhoneDog would not assert ownership over the Account. In addition, Kravitz continued to use the Account between November 2010 and July 2011, in part, because PhoneDog did not ask him to relinquish the Account.

WHEREFORE, Kravitz prays for judgment as set forth below.

**COUNT FIVE Unauthorized Use of Likeness in Violation of
Cal. Civ. Code § 3344 and Cal. Bus. & Prof. Code § 17200 et seq.**

45. Kravitz restates and incorporates by reference his allegations in paragraphs 1-26 of his Counterclaims.

46. Since Kravitz's departure, PhoneDog has continued to employ his likeness to promote its website. PhoneDog's use of Kravitz's likeness is commercial in character because it drives additional traffic to www.phonedog.com. Kravitz has not consented to PhoneDog's use of his likeness which includes images of Kravitz appearing on television programs and goes far beyond blog posts and videos that Kravitz created for PhoneDog. PhoneDog's use of Kravitz's likeness as it appears in these videos is unauthorized because Kravitz did not provide PhoneDog with consent to use his likeness to promote its website in this manner. Moreover, any implied consent that Kravitz may previously have given to PhoneDog to use his likeness is now invalid because PhoneDog breached the Commission Agreement it reached with Kravitz in June 2008.

47. Kravitz has requested that PhoneDog cease using his likeness but PhoneDog has refused. By using Kravitz's likeness, PhoneDog has driven additional traffic to its websites and otherwise benefitted commercially.

48. Kravitz's reputation has been harmed due to this unauthorized use, and Kravitz has lost money in the form of diminished business opportunities. PhoneDog's foregoing conduct is in violation of [Cal. Civ. Code § 3344](#) and also constitutes unlawful, fraudulent, and unfair conduct in violation of [California Business and Professions Code § 17200 et seq.](#)

WHEREFORE, Kravitz prays for judgment as set forth below.

PRAYER FOR RELIEF

WHEREFORE, having fully responded to PhoneDog's Amended Complaint and asserted his Counterclaims against PhoneDog, Kravitz prays for judgment as follows:

- a. A judgment dismissing PhoneDog's Amended Complaint against Kravitz with prejudice;
- b. A judgment in favor of Kravitz on his Counterclaims, specifically:
 1. For the First Counterclaim for a Declaratory Judgment, Kravitz prays for a declaration that the right to use the Account and the Services belongs to Kravitz subject to whatever rights to the Account and the Services that Twitter has reserved to itself. In the event that PhoneDog is judged to be the owner of the Account, then Kravitz requests *quantum meruit* damages in an amount to be proved to compensate him for his time and effort he spent building a Twitter following under the false pretense that Kravitz had the permanent and exclusive right to use the Account;
 2. For the Second Counterclaim for Promissory Estoppel, Kravitz prays for enforcement of PhoneDog's promise that the Account and the Services are his to keep permanently, Kravitz further requests damages in an amount to be proved; ANSWER CASE NO. 3:11-cv-03474 (MEJ)
 3. For the Third Counterclaim for False Promise, Kravitz prays for enforcement of PhoneDog's promise that the Account and the Services are his to keep permanently, Kravitz further requests damages in an amount to be proved;
 4. For the Fourth Counterclaim for Negligent Misrepresentation, Kravitz prays for enforcement of PhoneDog's promise that the Account and the Services are his to keep permanently, Kravitz further requests damages in an amount to be proved;
 5. For the Fifth Counterclaim for Unauthorized Use of Likeness in Violation of [Cal. Civ. Code § 3344](#) and [Cal. Bus. & Prof Code § 17200](#), Kravitz prays for a temporary restraining order, a preliminary injunction, and/or permanent injunction enjoining PhoneDog from using Kravitz's likeness on the PhoneDog website, and for restitution in an amount to be proved.
- c. A declaration that PhoneDog's claims are barred by the doctrines of laches, equitable estoppel, and/or waiver;
- d. An award to Kravitz of his reasonable costs and expenses of litigation, including expert witness and attorneys' fees;
- e. Such other and further relief as this Court may deem just and proper.

DATED: February 14, 2012

By: /s/ Sebastian L. Miller

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