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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PHONEDOG, LLC, a Delaware corporation,

Plaintiff,

v.

NOAH KRAVITZ, an individual,

Defendants.

) CASE NO. C11-03474

)
) **DEFENDANT'S NOTICE OF**
) **MOTION AND MOTION TO**
) **DISMISS PLAINTIFF**

) **PHONEDOG, LLC'S SECOND**
) **AND THIRD CLAIMS FOR**
) **RELIEF IN THE FIRST**
) **AMENDED COMPLAINT**
) **PURSUANT TO**
) **FED. R. CIV. PROC. RULE**
) **12(b)(6); MEMORANDUM OF**
) **POINTS AND AUTHORITIES IN**
) **SUPPORT THEREOF**

) **Date:** January 26, 2012

) **Time:** 10:00 a.m.

) **Dept.:** Courtroom B – 15th Floor

) **Judge:** Maria-Elena James

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3 **NOTICE OF MOTION AND MOTION**

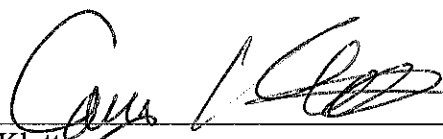
4 TO PLAINTIFF PHONEDOG, LLC AND ITS ATTORNEYS OF RECORD:

5 PLEASE TAKE NOTICE THAT on January 26, 2012 at 10:00 a.m., or soon thereafter
6 as the motion may be heard, in Courtroom B – 15th Floor of the above-referenced Court,
7 located at 450 Golden Gate Avenue, San Francisco, California, before Honorable Maria-Elena
8 James, Defendant Noah Kravitz (“Kravitz”), by and through undersigned counsel, will move
9 this Court to dismiss Plaintiff PhoneDog, LLC’s (“PhoneDog”) Second and Third Claims for
10 Relief in the First Amended Complaint pursuant to FRCP 12(b)(6) for failure to state a claim
11 upon which relief can be granted.

12 By this motion, Defendant seeks an order from this Court dismissing Plaintiff’s second
13 and third claims for relief with prejudice. This Motion is made and based upon this Notice and
14 Motion to Dismiss, the accompanying Memorandum of Points and Authorities and upon all the
15 pleadings, records, and papers on file herein, and upon any further and additional evidence that
16 may be presented to or at the time of the hearing on this Motion.

17 Dated: December 16, 2011

KLETTER LAW FIRM

18 By: 
19 Cary Kletter
20 Attorney for Defendant
21 NOAH KRAVITZ

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I. INTRODUCTION**

24 On November 8, 2011, this Court granted Kravitz’s Motion to Dismiss PhoneDog’s
25 claims for intentional interference with prospective economic advantage and negligent
26 interference with prospective economic advantage with leave to amend. PhoneDog filed its
27 First Amended Complaint (“FAC”) against Kravitz on November 29, 2011.

1 Despite the Court's guidance in the Order on Defendant's Motion to Dismiss Pursuant
2 to FRCP 12(B)(1) and 12(B)(6) (the "Order"), PhoneDog's FAC continues to fail to allege
3 sufficient facts to state a claim upon which relief can be granted. PhoneDog's FAC continues
4 to make allegations that are conclusory and fails to meet the plausibility standard for its
5 intentional interference with prospective economic advantage and negligent interference with
6 prospective economic advantage. PhoneDog has failed to follow the guidance of this Court in
7 its November 8, 2011 Order.

8 PhoneDog's second and third claims for relief should be dismissed for several reasons:
9 1) PhoneDog has not alleged the existence a protected economic relationship between it and
10 the followers and prospective users of the Twitter account at issue (the "Account") that was
11 actually disrupted by a wrongful act of Kravitz and resulted in an economic harm to
12 PhoneDog; 2) PhoneDog has not alleged the existence of a protected economic relationship
13 between it and existing and prospective advertisers that was actually disrupted by a wrongful
14 act of Kravitz which resulted in an economic harm to PhoneDog; 3) PhoneDog has not alleged
15 the existence a protected economic relationship between it and CNBC and Fox News that was
16 actually disrupted by a wrongful act of Kravitz which then resulted in economic harm to
17 PhoneDog; and 4) The allegations in PhoneDog's FAC do not make a plausible showing that
18 Kravitz owed a duty of care to PhoneDog.

19 Kravitz therefore brings this Motion to Dismiss Plaintiff PhoneDog's Second and Third
20 Claims for Relief in the First Amended Complaint for Failure to State a Claim Under
21 Fed.R.Civ.Proc. Rule 12(b)(6).
22

23 **II. STATEMENT OF ISSUES**

24 The issues to be decided in this Motion are as follows:

- 25 1) whether PhoneDog's intentional interference with prospective economic advantage
26 claim should be dismissed for failure to state a claim upon which relief can be
27 granted; and
28

1 2) whether PhoneDog's negligent interference with prospective economic advantage
2 claim should be dismissed for failure to state a claim upon which relief can be
3 granted.
4

5
6 **III. PHONEDOG'S ALLEGATIONS**¹

7 PhoneDog is a Delaware Corporation with its principal place of business in Mount
8 Pleasant, South Carolina. (FAC at ¶ 1.) PhoneDog engages in the business of providing
9 reviews of the latest mobile products and services and providing users the resources needed to
10 research, compare prices and shop from those providers that fit their needs. (FAC at ¶ 8.)
11 One source of PhoneDog's income derives from advertisements being sold on its website.
12 (FAC at ¶ 10.) PhoneDog alleges that advertisers pay for ad inventory on its website for
13 every 1,000 pageviews. (FAC at ¶ 10.) PhoneDog alleges that it requests that its agents and
14 employees maintain Twitter Account to use in the scope of the services they perform for
15 PhoneDog. (FAC at ¶ 12.) These agents and employees tweet links in hopes of directing
16 followers of Twitter accounts to PhoneDog's website, which allegedly in turn generates
17 advertising revenue for PhoneDog. (FAC at ¶ 12.) Nowhere in PhoneDog's FAC does it
18 allege that it any follower of the Account was actually directed to PhoneDog's website.
19 PhoneDog has not alleged that it ever generated any advertising revenue resulting from the
20 Account.

21 PhoneDog alleges that it hired Kravitz as a product reviewer and video blogger
22 beginning on or around April 13, 2006. (FAC at ¶ 17.) PhoneDog alleges that as part of
23 Kravitz's work for PhoneDog, Kravitz submitted written and video content to PhoneDog,
24 which was then transmitted to its users via a variety of mediums including but not limited to,
25 PhoneDog's website and PhoneDog's @PhoneDog_Noah Twitter account. (FAC at ¶ 17.)

26
27 ¹ All factual statement herein are as alleged in PhoneDog's FAC. Kravitz does not admit, concede, or
28 otherwise accept any of the allegations as true, but rather presents these facts as set forth in PhoneDog's FAC. As
 set forth in the Argument section below, the Court is not bound to accept all of the allegations as true since
 Kravitz alleges failure to state a claim.

1 PhoneDog alleges that Kravitz maintained the Twitter account “@PhoneDog_Noah” (the
2 “Account”). (FAC at ¶ 15.) PhoneDog alleges that the Account generated approximately
3 17,000 Twitter followers during the course of Kravitz’s work for PhoneDog. (FAC at ¶ 19.)
4 PhoneDog alleges that according to industry standards, each Twitter follower is currently
5 valued at \$2.50 per month. (FAC at ¶ 19.)

6 PhoneDog alleges that Kravitz suddenly resigned from PhoneDog in October 2010.
7 (FAC at ¶ 17.) Despite the existence of evidence to the contrary, PhoneDog alleges that
8 following Kravitz’s resignation, PhoneDog requested that Defendant relinquish use of the
9 Account. (FAC at ¶ 17.) PhoneDog also alleges that instead of relinquishing use of the
10 Account, Kravitz changed the Twitter handle to the Account to “@noahkravitz” and continues
11 to use the Account under the handle “@noahkravitz”. (FAC at ¶ 20.) PhoneDog does not
12 allege that there was any agreement prohibiting Kravitz from changing the Twitter handle to
13 the Account to “@noahkravitz” without PhoneDog’s permission. Also, PhoneDog does not
14 allege that Kravitz was prohibited from communicating with any of the Account’s followers,
15 which were widely known and publicly displayed on the Account’s homepage.

16 PhoneDog alleges that subsequent to resigning from his employment with PhoneDog,
17 Kravitz used PhoneDog’s Confidential Information to access the Account. (FAC at ¶ 22.)
18 PhoneDog alleges that Kravitz has and is attempting to discredit PhoneDog and destroy the
19 confidence that PhoneDog’s users have in PhoneDog by and through his use of the Account,
20 disparaging PhoneDog. (FAC at ¶ 23.) Nowhere in PhoneDog’s FAC does it allege that
21 Kravitz made any disparaging statements about PhoneDog. There are no allegations of libel or
22 slander.

23 PhoneDog alleges that it had economic relationships with CNBC and Fox News during
24 the time Kravitz performed work for PhoneDog that enabled Kravitz to become a contributor
25 on “Street Signs” and “Fox Business Live” (which PhoneDog later refers to as “Fox News
26 Live” in its FAC). (FAC at ¶¶24, 34.) PhoneDog alleges that after Kravitz’s resignation from
27 PhoneDog, Kravitz continued to contribute to “Street Signs” and “Fox Business Live” to
28

1 market and advertise. Nowhere in PhoneDog's FAC does it allege that Kravitz was prohibited
2 from contributing to "Street Signs" and "Fox Business Live" after his resignation from
3 PhoneDog. PhoneDog has not alleged that Kravitz's continued contributions to "Street Signs"
4 and "Fox Business Live" constituted a wrongful act.

5 PhoneDog's FAC includes four (4) claims for relief: (1) Misappropriation of Trade
6 Secrets; (2) Intentional Interference with Prospective Economic Advantage; (3) Negligent
7 Interference with Prospective Economic Advantage; and (4) Conversion. PhoneDog asserts
8 jurisdiction based upon diversity of citizenship and amount in controversy. (FAC ¶¶ 25-53.)
9 All of these claims fail as a matter of law.

10 11 **IV. ARGUMENT**

12 **A. Legal Standard for Motion to Dismiss For Failure to State Claim Under** 13 **FRCP 12(b)(6)**

14 A party may move for an order dismissing a complaint for failure to state a cause of
15 action for which relief that is plausible on its face. FRCP 12(b)(6); *see also Bell Atl. Corp. v.*
16 *Twombly*, 550 U.S. 544, 570 (2007). Here, Kravitz moves to dismiss PhoneDog's second and
17 third claims for relief pursuant to FRCP 12(b)(6).

18 When resolving a Rule 12(b)(6) motion, a court must: (1) construe the complaint in
19 light most favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and
20 (3) determine whether the plaintiff can prove any set of facts to support a claim that would
21 merit relief. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). "While a
22 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
23 allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief'
24 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause
25 of action will not do. Factual allegations must be enough to raise a right to relief above the
26 speculative level." *Id.* at 555. A complaint must allege "enough facts to state a claim to relief
27 that is plausible on its face." *Id.* at 556-57. "A claim has facial plausibility when the plaintiff
28

1 pleads factual content that allows the court to draw reasonable inference that the defendant is
2 liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)

3 Before the court decides whether the factual allegations, if assumed true, allege a
4 “plausible” claim, it must first identify which statements in the complaint are factual
5 allegations and which are legal conclusions. *Iqbal*, 129 S. Ct. at 1951. Conclusory allegations
6 may be disregarded by the courts. The court is not bound to accept as true allegations that are
7 legal conclusions, even if cast in form of factual allegations. *Pareto v. F.D.I.C.*, 139 F.3d 696,
8 699 (9th Cir. 1998). Conclusory allegations of law and unwarranted inferences are insufficient
9 to defeat a motion to dismiss. *Id.* The court need not accept as true allegations that are
10 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v.*
11 *Golden Gate Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *see also Twombly*, 550 U.S. at 561
12 (“a wholly conclusory statement of [a] claim” will not survive a motion to dismiss).
13 Additionally, a court need not permit an attempt to amend a complaint if “it determines that the
14 pleading could not possibly be cured by the allegations of other facts. *Cook, Perkiss and*
15 *Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990).
16

17
18 **B. PhoneDog’s Second Claim For Relief – Intentional Interference With**
19 **Prospective Economic Advantage – Must be Dismissed**

20 PhoneDog’s FAC is plainly deficient. This Court specifically noted on page 11 of its
21 November 8, 2011 Order that a plaintiff must show the following to establish a claim for
22 intentional interference with prospective economic advantage: “(1) an economic relationship
23 between the plaintiff and some third party with the probability of future economic benefit to
24 the plaintiffs; (2) the defendant’s knowledge of the relationship; (3) intentional acts, apart from
25 the interference itself, by defendant designed to disrupt the relationship; (4) actual disruption of
26 the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of
27 defendant. *CRST Van Expedited v. Werner Enter., Inc.* 479 F.3d 1099, 1108 (9th Cir. 2007).”
28 (emphasis added.) Further, “[t]he tort of interference with prospective economic advantage

1 does not, however, protect mere ‘potential’ relationships that are ‘at most a hope for an
2 economic relationship and a desire for a future benefit.’” *CRST Van Expedited v. Werner*
3 *Enter., Inc.*, 479 F.3d 1099, 1108 (9th Cir. 2007) (quoting *Westside Ctr. Assoc. v. Safeway*
4 *Stores 23, Inc.*, 42 Cal.App.4th 507, 527 (1996)).

5 In its FAC, PhoneDog has practically changed its theory for recovery and now alleges
6 that it had “economic relationships” with (1) “followers and prospective users of the Account”,
7 (2) “existing and prospective advertisers who buy ad inventory on PhoneDog’s website” and
8 (3) “CNBC and Fox News”. (FAC at ¶36.) Nonetheless, PhoneDog’s second claim for relief
9 must be dismissed because the FAC still fails to allege sufficient facts to state a claim upon
10 which relief can be granted.

11 12 **1. Followers and Prospective Users of the Account**

13 With respect to the alleged economic relationship with “followers and prospective users
14 of the Account”, PhoneDog’s FAC contains similar deficiencies as its initial complaint. It is
15 unclear who the “prospective users” are and what the nature of the purported economic
16 relationship is with the Account’s “users” or “followers”. PhoneDog has also utterly failed to
17 allege facts to make a plausible claim that an economic relationship existed and that the
18 relationship would have *probably* resulted in future economic benefit to PhoneDog. Nowhere
19 in the FAC does PhoneDog allege facts to establish that there was some future economic
20 benefit that would have probably resulted from a relationship with the Account’s “followers”
21 or “prospective users”. Moreover, the FAC again fails to sufficiently allege an actual
22 disruption of the alleged economic relationship between it and “followers and prospective
23 users of the Account” and an economic harm caused by Kravitz’s act. In other words, the
24 alleged relationship between PhoneDog and “followers and prospective users of the Account”
25 is not one protected by the tort of interference with prospective economic advantage. *See*
26 *CRST Van Expedited*, 479 F.3d at 1108 (9th Cir. 2007)

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28 //

1 **2. Existing and Prospective Advertisers**

2 Similarly, PhoneDog's FAC fails to sufficiently allege facts to establish a claim with
3 respect to its alleged relationship with "existing and prospective advertisers who buy ad
4 inventory on PhoneDog's website". In fact, this claim is completely speculative and based
5 entirely upon an insufficiently supported hypothetical – i.e. that an act of Kravitz somehow
6 *might or might not have* led to a decrease in the number of PhoneDog's website page views,
7 which *might or might not have* "discourage[d]" existing and prospective advertisers from
8 paying for ad inventory on PhoneDog's website. (FAC at ¶36.) There is insufficient factual
9 allegation in the FAC to make a plausible showing that there was an actual disruption of an
10 existing or probably future economic relationship with an existing or prospective advertisers.
11 PhoneDog's claim is wholly based on a mere desire of a future transaction with a potential
12 unidentifiable advertiser.

13 PhoneDog has also failed to allege an actual economic harm caused by Kravitz in
14 connection with this alleged economic relationship. PhoneDog only speculates that advertisers
15 might have been "discourage[d]" from paying ad inventory on its website and then unwarrantly
16 concludes, without more, that this discouragement resulted in "lost advertising revenue".
17 (FAC at ¶¶36 and 38.) However, PhoneDog has not, and cannot, assert an actual economic
18 harm caused by Kravitz. Moreover, this alleged "lost advertising revenue" is simply not the
19 type of relationship protected by the tort of interference with prospective economic advantage
20 because it is at most a mere hope of future benefits. See *CRST Van Expedited*, 479 F.3d at
21 1108 (9th Cir. 2007). Under California law, a plaintiff must establish an existing economic
22 relationship or a protected expectancy with a third person, not merely a hope of future
23 transactions. See e.g. *Blank v. Kirwan*, 39 Cal.3d 311, 330-31 (1985); *Janda v. Madera Cmty.*
24 *Hosp.*, 16 F. Supp.2d 1181 (E.D. Cal. 1998). PhoneDog has not, and cannot, establish the
25 existence of a *protected* economic relationship or *protected* expectancy.

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1 **3. CNBC and Fox News**

2 PhoneDog's claim for intentional interference with prospective economic advantage
3 with respect to its alleged relationship with "CNBC and Fox News" is plainly deficient.
4 PhoneDog has not alleged any facts to establish the existence of an "economic" relationship
5 between CBNC and Fox News with the probability of future economic benefits to PhoneDog.
6 Rather, PhoneDog has only alleged facts establishing a relationship that is clearly *non-*
7 *economic* in nature — i.e. a relationship that allegedly enabled PhoneDog and Kravitz to
8 contribute to "Street Signs" (CNBC) and "Fox News Live" (FoxNews). (FAC at ¶¶24, 34, 36.)
9

10 PhoneDog has also completely failed to allege the existence of an economic harm
11 resulting from a disruption of this relationship. In fact, PhoneDog admits that only a *non-*
12 *economic* harm resulted from this disruption when stating that "as a result of Defendant's
13 wrongful conduct, PhoneDog no longer has contributing spots on "Street Signs" and "Fox
14 News Live." (FAC at ¶36.) Any attempt by PhoneDog to claim that this somehow resulted in
15 an actual economic harm is completely speculative, insufficiently supported by the factual
16 allegations and nothing more than a mere desire for future benefits.

17 In addition, page 11 of the November 8, 2011 Order specifically noted that
18 "[i]nterference with prospective economic advantage requires a plaintiff to allege an act that is
19 wrongful independent of the interference itself." However, PhoneDog's FAC completely fails
20 to allege a *wrongful* act by Kravitz designed to disrupt this particular relationship. PhoneDog
21 has only alleged that Kravitz continued to contribute to "Street Signs" and "Fox News Live"
22 (FAC at ¶35), but has not alleged facts to establish how Kravitz's act was "wrongful". In
23 addition, PhoneDog states that Kravitz disrupted this relationship by "using PhoneDog's
24 economic relationships with CNBC and Fox News to continue contributing to 'Street Signs'
25 and 'Fox News Live'". (FAC at ¶35) However, this alleged act is the interference itself.
26 PhoneDog has not made any other allegation constituting an independent act by Kravitz
27 designed to disrupt this particular relationship.
28

1 **C. PhoneDog's Third Claim For Relief – Negligent Interference With**
2 **Prospective Economic Advantage – Must be Dismissed**

3 PhoneDog's claim of negligent interference with prospective economic advantage must
4 be dismissed. Pursuant to the Court's Order, a plaintiff must allege the following to state a
5 claim for negligent interference with prospective economic advantage: "(1) an economic
6 relationship existed between the plaintiff and a third party which contained a reasonably
7 probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the
8 existence of the relationship and was aware or should have been aware that if it did not act with
9 due care its actions would interfere with this relationship and cause plaintiff to lose in whole or
10 in part the probable future economic benefit or advantage of the relationship; (3) the defendant
11 was negligent; and (4) such negligence caused damage to plaintiff in that the relationship was
12 actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits
13 or advantage reasonably expected from the relationship." *North American Chemical Co. v.*
14 *Sup. Court*, 59 Cal.App.4th 764, 786 (1997).

15 Similarly to PhoneDog's intentional interference claim, this claim also fails for failure
16 to sufficiently allege (1) the existence of an economic relationship that would have probably
17 resulted in an economic benefit, (2) a negligent act by Kravitz that actually disrupted that
18 relationship, and (3) economic harm caused by Kravitz.

19 Moreover, "[t]he tort of negligent interference with economic relationship arises only
20 when the defendant owes the plaintiff a duty of care." *LiMandri v. Judkins*, 52 Cal.App.4th
21 326, 348 (1997). On page 13 of the Order, this Court stated: "'[A]mong the criteria for
22 establishing a duty of care is the blameworthiness of the defendant's conduct. For negligent
23 interference, a defendant's conduct is blameworthy only if it was independently wrongful apart
24 from the interference itself.' *Lange v. TIG Ins. Co.*, 68 Cal.App.4th 1179, 1187 (1998)".
25 PhoneDog has completely ignored this Court's guidance and instead merely makes the
26 conclusory allegation that Kravitz "owed a duty of care to PhoneDog as an agent of
27 PhoneDog." (FAC at ¶42.) PhoneDog's conclusory allegations need not be accepted as true.

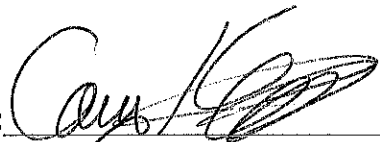
1 *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). Accordingly, PhoneDog's Third Claim
2 for Relief must be dismissed.

3
4 **V. CONCLUSION**

5 For the foregoing reasons, Defendant Kravitz respectfully requests an order from this
6 Court dismissing Plaintiff PhoneDog's second and third claims for relief in the First Amended
7 Complaint for failure to state a claim upon which relief can be granted pursuant to FRCP
8 12(b)(6).

9
10 Dated: December 16, 2011

KLETTER LAW FIRM

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12 By: 
13 Cary Kletter
14 Attorney for Defendant,
15 NOAH KRAVITZ
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