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1 **NOTICE OF MOTION AND MOTION**


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

3 PLEASE TAKE NOTICE THAT on September 15, 2011 at 10:00 a.m., or soon
4 thereafter as the motion may be heard, in Courtroom B – 15th Floor of the above-referenced
5 Court, located at 450 Golden Gate Avenue, San Francisco, California, before Honorable
6 Maria-Elena James, Defendant Noah Kravitz (“Kravitz”), by and through undersigned counsel,
7 will move this Court to dismiss Plaintiff PhoneDog, LLC’s (“PhoneDog”) Complaint pursuant
8 to Fed.R.Civ.Proc. (“FRCP”) 12(b)(1) for lack of subject matter jurisdiction and pursuant to
9 FRCP 12(b)(6) for failure to state a claim upon which relief can be granted.

10 By this motion, Defendant seeks an order from this Court dismissing the case with
11 prejudice. This Motion is made and based upon this Notice and Motion to Dismiss, the
12 accompanying Memorandum of Points and Authorities, the Declaration of Noah Kravitz, the
13 Declaration of Cary Kletter and upon all the pleadings, records, and papers on file herein, and
14 upon any further and additional evidence that may be presented to or at the time of the hearing
15 on this Motion.

16 Dated: August 4, 2011

KLETTER LAW FIRM

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

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I. INTRODUCTION**

25 This case should be dismissed for several reasons: 1) There is no diversity because the
26 amount in controversy is less than \$75,000 [FRCP 12(b)(1)]; 2) Plaintiff is improperly forum
27 shopping, since Defendant Kravitz previously filed suit against PhoneDog in the Superior
28 Court of the State of California in Alameda County; and 3) No viable claim has been alleged

1 because a Twitter account's followers are not "secret", a Twitter account and its humans
2 followers are not property, the password to the Twitter account is not a "trade secret" because
3 Kravitz created the password and Kravitz did not take any property of PhoneDog's.

4 Kravitz worked for PhoneDog for more than 5 years creating content for its online
5 website PhoneDog.com, initially being paid for each article written individually, then later a
6 monthly fee for all articles written and video blogs created and later still a percentage of
7 company revenue and profits. A dispute arose between Kravitz and PhoneDog in 2010, and in
8 October 2010 Kravitz left the company. At that time, PhoneDog owed Kravitz substantial
9 unpaid wages and profits and Kravitz attempted to resolve the dispute informally. When those
10 efforts failed, Kravitz filed suit in the California Superior Court in Alameda County (the
11 "Superior Court Action") on June 8, 2011. (See Declaration of Cary Kletter ("Kletter Decl.") ¶
12 5.)

13 **II. PENDING CALIFORNIA ACTION**

14 Prior to the filing of the Superior Court Action, Kravitz and his counsel made multiple
15 attempts to resolve the matter informally with PhoneDog and provided it with a copy the
16 complaint he planned to file. At no time prior to the filing of this lawsuit did PhoneDog raise
17 any of the issues it now alleges in its Complaint filed on July 15, 2011. All of PhoneDog's
18 allegations are based upon Kravitz's use of a Twitter account Kravitz single-handedly created
19 (the "Account"). The Complaint contains four claims for relief, all based upon California law.
20 PhoneDog never expressed any disapproval of Kravitz's use of the Account at issue, and in
21 fact repeatedly asked him to send out tweets on its behalf after he left employment with
22 PhoneDog in October 2010. PhoneDog only now raises the meritless and unsupported issues
23 in this suit for the first time as an attempt to prevent the Superior Court Action from
24 proceeding. PhoneDog's conduct constitutes improper forum shopping.

25 PhoneDog asserts that this Court has subject matter jurisdiction under 28 U.S.C. § 1332
26 on the grounds of diversity jurisdiction. (Complaint ("Compl.") ¶ 3.) However, as outlined
27 below, PhoneDog cannot establish an amount in controversy over \$75,000 through competent
28

1 proof of damages as required by law. PhoneDog's exaggerated and unrealistic claims about
2 the amount in controversy are a patent and disingenuous attempt to create diversity. PhoneDog
3 cannot prove the amount in controversy in this case exceeds \$10,000. Selling a Twitter
4 account is not permitted pursuant to Twitter's Terms of Service, so the Account cannot be sold.
5 PhoneDog cannot demonstrate with competent evidence that there is an industry standard in
6 determining the worth of a Twitter account based solely on the amount of followers. The
7 "value of a Twitter account" is dependent on a number of factors including, but not limited to,
8 the number of tweets, the person tweeting, the content of the tweets and the number of
9 followers. Based on these factors, the potential "value", if any, of the Account is no more than
10 \$8,000 according to multiple online Twitter value calculators. Because the amount at issue is
11 not in excess of \$75,000, this Court lacks subject matter jurisdiction and the Complaint should
12 be dismissed.

13
14 In addition, because PhoneDog's Complaint fails to state a claim upon which relief can
15 be granted, this action should be dismissed. PhoneDog's factual allegations are insufficient to
16 raise a right to relief above a speculative level. PhoneDog has not sufficiently alleged that the
17 identity of followers or "password" to the Account fall under the definition of "trade secret" or
18 that Kravitz engaged in any act of misappropriation. Additionally, PhoneDog insufficiently
19 alleges a special economic relationship ever existed between PhoneDog and the followers of
20 the Account maintained exclusively by Kravitz that would "probably" result in an economic
21 benefit to PhoneDog, nor is there any evidence of an actual disruption of that relationship.
22 Moreover, neither the Account nor any of its followers are properties of PhoneDog. The
23 Account itself is the exclusive property of Twitter, not PhoneDog. The Account's followers,
24 on the other hand, are humans and since the passage of the Thirteenth Amendment to the
25 United States Constitution in 1854, humans in the United States are not "property" and cannot
26 be owned.

1 Kravitz therefore brings this Motion to Dismiss Plaintiff PhoneDog's Complaint for
2 Lack of Subject Matter Jurisdiction Under Fed.R.Civ.Proc. Rule 12(b)(1) and for Failure to
3 State a Claim Under Fed.R.Civ.Proc. Rule 12(b)(6).

4 **III. STATEMENT OF ISSUES**

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

- 6 1) whether the amount in controversy does not exceed \$75,000 depriving this Court of
7 subject matter jurisdiction; and
8 2) whether the Complaint failed to state a claim upon which relief can be granted.

9
10 **IV. PHONEDOG'S ALLEGATIONS¹**

11 PhoneDog is a Delaware Corporation with its principal place of business in Mount
12 Pleasant, South Carolina. (Compl. ¶ 1.) PhoneDog engages in the business of providing
13 reviews of the latest mobile products and services and providing users the resources needed to
14 research, compare prices and shop from those providers that fit their needs. (Compl. ¶ 8.)
15 PhoneDog alleges that it employed Kravitz as a product reviewer and video blogger beginning
16 on or around April 13, 2006. (Compl. ¶ 14.) PhoneDog alleges that as part of Kravitz's
17 employment, Kravitz submitted written and video content to PhoneDog, which was then
18 transmitted to its users via a variety of mediums including but not limited to, PhoneDog's
19 website and PhoneDog's @PhoneDog_Noah Twitter account. (Compl. ¶ 14.)

20 PhoneDog alleges that Kravitz maintained the Twitter account "@PhoneDog_Noah"
21 (the "Account"). (Compl. ¶ 15.) PhoneDog does not allege that there was any agreement with
22 Kravitz regarding the Account should the employment relationship cease. PhoneDog alleges
23 Kravitz accessed the Account using PhoneDog's Confidential Information, used the Account to
24 disseminate information and promote PhoneDog's services on behalf of PhoneDog (Compl. ¶
25 15.) and that the Confidential Information includes the passwords to PhoneDog's Twitter

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

1 accounts, including all @PhoneDog_NAME Twitter accounts used by PhoneDog's employees.
2 (Compl. ¶ 12.) Nowhere in PhoneDog's Complaint does it allege that the password to the
3 Account has any independent economic value.

4 PhoneDog alleges that the Account generated approximately 17,000 Twitter followers
5 during the course of Kravitz's employment. (Compl. ¶ 16.) Nowhere in PhoneDog's
6 Complaint does it allege that there was any economic relationship with any of the Account's
7 followers that did or probably would have resulted in an economic benefit to PhoneDog.
8 Further, PhoneDog's Complaint does not allege that there was any actual disruption of any
9 such relationship.

10 PhoneDog alleges that according to industry standards, each Twitter *follower* is
11 currently valued at \$2.50 per month. (Compl. ¶ 16.) However, PhoneDog does not allege that
12 there is any industry standard in determining the value of a Twitter account. Further,
13 PhoneDog does not allege that the Account generates any direct profits, nor does it allege that
14 it was entitled to any profit directly resulting from the Account.

15 PhoneDog alleges that Kravitz suddenly resigned from PhoneDog in October 2010.
16 (Compl. ¶ 17.) PhoneDog alleges that following Kravitz's resignation, PhoneDog requested
17 that Defendant relinquish use of the Account. (Compl. ¶ 17.) PhoneDog also alleges that
18 instead of relinquishing use of the Account, Kravitz changed the Twitter handle to the Account
19 to "@noahkravitz" and continues to use the Account under the handle "@noahkravitz".
20 (Compl. ¶ 17.) PhoneDog does not allege that there was any agreement prohibiting Kravitz
21 from changing the Twitter handle to the Account to "@noahkravitz" without PhoneDog's
22 permission. Also, PhoneDog does not allege that Kravitz was prohibited from communicating
23 with any of the Account's followers, which were widely known and publicly displayed on the
24 Account's homepage.

25 PhoneDog alleges that subsequent to resigning from his employment with PhoneDog,
26 Kravitz used PhoneDog's Confidential Information to access the Account. (Compl. ¶ 19.)
27 Nowhere in PhoneDog's Complaint does it allege that Kravitz acquired the password to the
28

1 Account by theft, bribery, misrepresentation, breach or breach of duty to maintain secrecy, or
2 espionage through electronic or other means. PhoneDog does not allege any facts as to the
3 times, dates, place or benefits received in the alleged use of Confidential Information, other
4 than (presumably) use of the Account.

5 PhoneDog alleges that Kravitz has and is attempting to discredit PhoneDog and destroy
6 the confidence that PhoneDog's users have in PhoneDog by and through his use of the
7 Account, disparaging PhoneDog. (Compl. ¶ 20.) Nowhere in PhoneDog's Complaint does it
8 allege that Kravitz made any disparaging statements about PhoneDog. There are no allegations
9 of libel or slander.

10 PhoneDog's Complaint includes four (4) claims for relief: (1) Misappropriation of
11 Trade Secrets; (2) Intentional Interference with Prospective Economic Advantage; (3)
12 Negligent Interference with Prospective Economic Advantage; and (4) Conversion. PhoneDog
13 asserts jurisdiction based upon diversity of citizenship and amount in controversy. (Compl. ¶¶
14 21-43.) All of these claims fail as a matter of law.

15
16 **V. ARGUMENT**

17 **A. Plaintiff PhoneDog's Complaint Must Be Dismissed Because PhoneDog**
18 **Cannot Satisfy the Jurisdictional Limit for Diversity of Citizenship**

19 Federal diversity jurisdiction exists only in "civil actions where the matter in
20 controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is
21 between – (1) citizens of different States..." 28 U.S.C. § 1332(a). Diversity jurisdiction must
22 be ascertained at the commencement of the action and therefore diversity jurisdiction exists if
23 the complaint as filed puts more than \$75,000 at issue. *Johnson v. Wattenbarger*, 361 F.3d
24 991, 993 (7th Cir. 2004). Here, the amount in controversy does not meet the jurisdictional
25 threshold and the Complaint must be dismissed.

26 Further, Courts may dismiss an action where the amount in controversy alleged is in
27 "bad faith" because it was falsely asserted solely to invoke federal diversity jurisdiction. *See*
28 *Diefenthal v. C.A.B.*, 681 F.2d 1039, 1052 (5th Cir. 1982). "While a federal court must of

1 course give due credit to the good faith claims of the plaintiff, a court will be remiss in its
2 obligations if it accepted every claim of damages at face value, no matter how trivial the
3 underlying injury. *Id.* Parties invoking federal diversity jurisdiction must show the basis for
4 the amount of damages they claim before allowing the expense and burden of full trial on the
5 merits. *Id.* at 1053. Here, despite no plausible basis that the amount in controversy exceeds
6 \$75,000 (or even \$10,000), PhoneDog makes that assertion solely to invoke federal jurisdiction
7 in an attempt to improperly remove Kravitz's Superior Court Action.

8
9 **1. Legal Standard for Motion to Dismiss For Lack of Subject Matter
Jurisdiction Under FRCP 12(b)(1)**

10 A party may seek dismissal of an action for lack of subject matter jurisdiction by
11 motion. Fed.R.Civ.Proc. Rule 12(b)(1). The complaint must contain sufficient jurisdictional
12 facts to state a claim which is plausible on its face and raises a right of relief above the
13 speculative level. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*,
14 129 S. Ct. 1937 (2009). The party asserting federal jurisdiction must provide evidence that it is
15 "more likely than not" that the amount in controversy exceeds \$75,000. *Sanchez v.*
16 *Monumental Acceptance Corp.*, 102 F. 3d 298, 403-04 (9th Cir. 1995); *see also McNutt v.*
17 *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) ("[J]urisdiction may [not] be
18 maintained by mere averment[.]"); *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1117 (9th Cir.
19 2004); *Gaus v. Miles, Inc.*, 980 F.2d 564 (9th Cir. 1992) (holding that a conclusory allegation
20 does not satisfy the burden of setting forth the underlying facts supporting the assertion that the
21 amount in controversy exceeds \$75,000).

22 When the court's jurisdiction is challenged as a matter of fact ("factual attack"), the
23 court is not bound to accept the allegations of plaintiff's complaint. *See Bellock v. Orkin*
24 *Exterminating Co., Inc.*, 754 F.Supp.122, 123 (N.D. Ill. 1990); *Williamson v. Tucker*, 645 F.2d
25 404 (7th Cir. 1987). "The presumption of correctness that we accord to a complaint's
26 allegations falls away on the jurisdictional issue once a defendant proffers evidence that calls
27 the court's jurisdiction into question." *Commodity Trend Service, Inc. v. Commodity Futures*
28

1 *Trading Comm'n*, 149 F.3d 679, 685 (7th Cir. 1998). Factual attacks are based on *extrinsic*
2 *evidence* quite apart from the pleading. *See Gould Electronics Inc. v. United States*, 220 F.3d
3 169 (3rd Cir. 2000). Since the court's power to hear the case is at stake, the court is not limited
4 to considering the allegations of the complaint. *Roberts v. Corrothers*, 812 F.2d 1173, 1177
5 (9th Cir. 1987). The court may consider extrinsic evidence and ultimately determine the facts
6 for itself. *Id*; *See also Velasco v. Government of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004)
7 (court may consider evidence outside pleadings).

8
9 When a factual attack is made on the amount of controversy, the plaintiff bears the
10 burden to support its assertion with competent proof. *See Rexford Rand. Corp. v. Ancel*, 58
11 F.3d 1215, 1218 (7th Cir. 1995); *Bellock*, 754 F. Supp. at 12; *Gibbs v. Buck*, 307 U.S. 66, 72
12 (1939) (plaintiff has the burden of showing that "it does not appear to a legal certainty that his
13 claim is for less than the jurisdictional limit"); *St. Paul Mercury Indemnity Co. v. Red Cab Co.*,
14 303 U.S. 283, 287 no. 10 (1938) (the party invoking the court's jurisdiction bears the burden of
15 supporting the allegation if challenged; *Rapoport v. Rapoport*, 416 F.2d 41, 44 (9th Cir. 1969)
16 (plaintiff's burden to prove jurisdiction upon challenge); *Matheson v. Progressive Specialty*
17 *Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003) (the party asserting federal jurisdiction must
18 "prove, by a preponderance of the evidence the amount in controversy meets the jurisdictional
19 threshold). Competent proof means "proof of a reasonable probability that jurisdiction exists."
20 *Ancel*, 58 F.3d at 1218 (citing *NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 237 (7th
21 Cir. 1995)).

22 **2. The Court Lacks Jurisdiction Over This Action Because PhoneDog**
23 **Cannot Establish \$75,000 in Damages by Competent Proof**

24 The burden is on PhoneDog to establish jurisdiction in this Court. *See Ancel*, 58 F.3d at
25 1218; *Bellock*, 754 F.Supp. at 123. PhoneDog therefore must come forward with competent
26 proof that it suffered damages in excess of \$75,000 as result of Kravitz's continued use of the
27 Account. If PhoneDog cannot produce any such proof or if the proof demonstrates that its
28

1 purported damages are far less than \$75,000, as alleged by Kravitz, the Court must dismiss the
2 Complaint because subject matter jurisdiction does not exist.

3 a. **PhoneDog Is Not Entitled to Any Damages Because It Does**
4 **Not Own or Have a Right to Possess the Account**

5 PhoneDog cannot establish damages exceeding \$75,000 by competent proof. The
6 alleged damages upon which PhoneDog relies to meet the jurisdictional threshold purportedly
7 result from Kravitz's continued use of the Account, which it claims are \$340,000 (i.e. based on
8 17,000 twitter followers, each worth \$2.50 per month, for 8 months). (Compl. ¶ 41).
9 However, PhoneDog cannot establish that it is entitled to any monetary recovery because it
10 does not have competent proof that it has ownership or right to possession over the Account or
11 the followers. In fact, the Account, as all Twitter accounts are, is the exclusive property of
12 Twitter and its licensors, not PhoneDog. Pursuant to Twitter's Terms of Service ("TOS"),
13 "[a]ll right, title, and interest in and to the Service (excluding Content provided by users) are
14 and will remain the exclusive property of Twitter and its licensors." (Kletter Decl. ¶ 5.)
15 Twitter also has the exclusive right to "terminate users or reclaim usernames." (Kletter Decl. ¶
16 5.) Moreover, Twitter users are strictly prohibited from making a monetary profit off their
17 accounts without the specific permission from Twitter to do so. (Kletter Decl. ¶¶ 5-6.)
18 PhoneDog has not alleged that it has permission from Twitter to do so. Similarly, PhoneDog
19 does not own any of the followers. "Followers" are human beings who have the discretion to
20 subscribe and/or unsubscribe to the Account without the consent of PhoneDog. It is also well-
21 established in the U.S. that human beings are not property and cannot be owned. As such,
22 PhoneDog's assertion that it is entitled to a substantial amount of damages because it is the
23 owner of the Account and the "owner" of the "followers" is wholly misplaced. It is impossible
24 for Kravitz to have converted PhoneDog's property where these human beings implicitly
25 cannot be owned by PhoneDog.

26 It should also be noted that even if Twitter users can "own" their accounts, there is no
27 authority that PhoneDog can present to show that it owns or has the right to possess the
28 account. The question of whether an employer or employee "owns" a Twitter account is a new

1 and emerging area. There is currently no case law on the issue. However, industry precedent
2 establishes that absent specific agreement to the contrary, an employer does not own any
3 employees' Twitter account. For example, when Laura Kuenssberg separated from her
4 employment with British Broadcasting Corporation's ("BBC") as the Chief Political
5 Correspondent recently, she retain her Twitter account with over 60,000 followers despite
6 commencing work for a rival media outlet ITV. BBC could not prevent Ms. Kuenssberg from
7 changing the handle of the Twitter account from "@BBCLauraK" to "@ITVLauraK".
8 Similarly, after Rick Sanchez was terminated from his employment with CNN, he also retained
9 and continued to use his Twitter account (formerly "@ricksanchezcnn") with over 146,000
10 followers. To date, the industry precedent has been that absent an agreement prohibiting any
11 employee from doing so, after an employee leaves an employer, they are free to change their
12 Twitter handle.

13
14 **b. The Account In Itself Has No Monetary Value**

15 Regardless of whether PhoneDog owns the Account, it cannot establish at least \$75,000
16 in damages. In fact, there is no evidence that a Twitter account in itself has any monetary
17 value at all. PhoneDog neither states that there is an actual recognized method to measure the
18 value of a Twitter "account", nor does it allege that its method of calculating the value of the
19 Account is in accordance with an "industry standard." PhoneDog also does not state how
20 PhoneDog profits off the Account or how an account can have any real value, especially when
21 users are strictly prohibited from selling it or using for business purposes not specifically
22 authorized by Twitter.
23

24 Additionally, any value objectively assigned to a Twitter account has no relevancy
25 because the value of a Twitter account can only realistically be based on what someone would
26 actually pay, and as discussed above, selling or purchasing a Twitter account is strictly
27 prohibited by the TOS. Moreover, a Twitter account has "followers" because of the *person*
28

1 behind the account. That is why the Twitter accounts with the most followers are those used
2 and maintained by celebrities. If the account is sold or transferred to another person, the
3 account itself would not retain the value. For example, back in 2007, a Twitter user started a
4 Twitter account named @cnbrk in which the user published breaking CNN world news. That
5 account user had no association with CNN and eventually gained over 900,000 followers.
6 Ultimately, CNN hired the Twitter user of @cnbrk as a consultant; CNN did not and could
7 not buy the account itself. Thus, it was the Twitter user is time and employment that was
8 worth monetary value, not the actual Twitter account, itself.
9

10 Here, Kravitz was the sole *person* who utilized and maintained the Account and built
11 up the fan-base. (Kravitz Decl. ¶ 4.) The 17,000 followers of the Account, as alleged in
12 PhoneDog's Complaint, were following Kravitz. These followers also had the discretion to
13 unsubscribe to the Account when Kravitz left the employ of PhoneDog and changed the name
14 of the handle of the Account to @noahkravitz to make it clear to the followers that he was no
15 longer associated with PhoneDog. (Kravitz Decl. ¶ 9.) As such, those who continued to
16 follow the Account are in essence following Kravitz (i.e. the *person* behind the Account), not
17 the Account in itself. Forcing Kravitz to surrender his Twitter Account would be analogous to
18 forcing him to surrender all of his contacts on his mobile phone.
19

21 c. **Even If, *Arguendo*, Twitter Accounts Have Monetary Values,**
22 **Any Monetary Value for the Account Would Not Exceed**
23 **\$75,000**

24 PhoneDog alleges that each Twitter "follower" is currently valued at \$2.50 per month
25 according to "industry standard." (Compl. ¶ 16.) Based on this vague and unsupported
26 allegation, PhoneDog concludes that the Account is worth \$42,500 per month. (Compl. ¶16.)
27 However, PhoneDog cannot present any valid evidence of such an "industry standard"
28 measuring the value of a Twitter "follower". Even if such an industry standard exists,

1 PhoneDog does not state and cannot prove that the value of a “follower” alone directly
2 correlates with the value of a Twitter “account”. At the very least, any actual accurate measure
3 of a Twitter account’s value would require metric and analytics provided by Twitter and social
4 media software. There is no single determinative factor in measuring the value of a social
5 media account. Rather, the value is most likely based on multiple factors, including but not
6 limited to: (1) the number of followers; (2) the number of tweets; (3) the content of the tweets;
7 (4) the person publishing the tweets; and (5) the person placing the value of the account.

8
9 Adopting PhoneDog’s calculation to determine the value of a Twitter account would
10 only lead to absurd and unrealistic values. For example, musician/artist Lady Gaga’s Twitter
11 account has the highest number of followers (i.e. over 12,000,000 followers). Applying
12 PhoneDog’s calculation would mean that Lady Gaga’s Twitter account is “worth” \$30 million
13 per month (i.e. 12 million followers, each worth \$2.50/month) and therefore \$3.6 billion per
14 year. Similarly, any ordinary person’s Twitter account could potentially be worth over \$1
15 million given enough time, despite the identity of the person tweeting or the content of the
16 materials published on the Twitter account.

17 Additionally, this value regarding Lady Gaga’s account contradicts what many
18 specialized and recognized online Twitter account value calculations² have concluded as the
19 worth of Lady Gaga’s Twitter account. For example, according to “Tweetvalue.com”, the
20 value of Lady Gaga’s account with over 12 million followers is only \$118,747 while the value
21 of Kravitz with currently 20,519 followers is only \$4,380. Moreover, according to
22 “whatsmytwitteraccountworth.com”, Lady Gaga’s Twitter account is valued at \$6,078,041
23 while the value of Kravitz’s account is only \$7,705. These figures do not come anywhere
24 close to PhoneDog’s asserted valuation pursuant to its calculation method. PhoneDog has
25 clearly chosen this valuation method solely to reach the jurisdictional threshold.

26
27
28 ² It should be noted that the online Twitter account value calculations are only applications evaluating
virtual values without provided any real value. In reality, these calculations have no worth unless someone
actually wants to purchase a Twitter account for the amount calculated by these applications.

1 **B. Plaintiff PhoneDog’s Complaint Must Be Dismissed For Failure to State a**
2 **Claim**

3 A party may move for an order dismissing a complaint for failure to state a cause of
4 action for which relief can be granted. FRCP 12(b)(6); *see also Hallinan v. Fraternal Order of*
5 *Police of Chicago Lodge No. 7*, 570 F.3d 811 (7th Cir. 2009) (“A motion under Rule 12(b)(6)

6 challenges the sufficiency of the complaint to state a claim upon which relief may be granted”).

7 While a complaint need not contain detailed factual allegations, its “factual allegations must be

8 enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*,

9 550 U.S. 544, 555 (2007). A complaint must allege “enough facts to state a claim to relief that

10 is plausible on its fact.” *Id.* at 556-57. In other words, a “complaint must contain sufficient

11 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft*

12 *v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570).

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

15 When resolving a Rule 12(b)(6) motion, a court must: (1) construe the complaint in

16 light most favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and

17 (3) determine whether the plaintiff can prove any set of facts to support a claim that would

18 merit relief. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). A dismissal

19 under Rule 12(b)(6) is proper where there is either a “lack of cognizable legal theory” or “the

20 absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica*

21 *Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). Moreover, a motion to dismiss may be

22 construed as a motion for summary judgment whenever matters outside the pleadings are

23 presented to and accepted by the court. *Jacobson v. AEG Capital Corp.*, 50 F.3d 1493, 1496

24 (9th Cir. 1995) (citations omitted).

25 Before the court decides whether the factual allegations, if assumed true, allege a

26 “plausible” claim, it must first identify which statements in the complaint are factual

27 allegations and which are legal conclusions. *Iqbal*, 129 S. Ct. at 1951. Conclusory allegations

28 may be disregarded by the courts. The court is not bound to accept as true allegations that are

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

10
11 **2. PhoneDog’s First Claim For Relief – Misappropriation of Trade
12 Secrets**

13 PhoneDog’s claim of misappropriation of trade secrets must be dismissed because the
14 identity of the Account followers and the “password” to the Account which PhoneDog alleges
15 were misappropriated by Kravitz are not a “trade secret” within the meaning of the California
16 Uniform Trade Secrets Act (“UTSA”). The UTSA defines a “trade secret” as “information,
17 including a formula, pattern, compilation, program, device, technique, or process that: (1)
18 derives independent economic value, actual or potential, from not being generally known to the
19 public or to other persons who can obtain economic value from its disclosure or use; and (2) is
20 the subject of efforts that are reasonable under the circumstances to maintain secrecy.” Civ.
21 Code §3426 (emphasis added). A complaint for the misappropriation of trade secrets “should
22 describe the subject matter of the trade secret with sufficient particularity to separate it from
23 matters of general knowledge in the trade or special knowledge of those persons who are
24 skilled in the trade, and to permit the defendant to ascertain at least where the secret lies.”
25 *Diodes, Inc. v. Franzen*, 260 Cal.App.2d 253 (1968).

26 The followers of the Account are not secret because they are and have been publically
27 available for all to see at all times. All Twitter followers are all visible on each Twitter site.
28 PhoneDog also alleges that the “trade secret” information at issue is “the passwords to

1 PhoneDog's Twitter accounts, including all @PhoneDog_NAME Twitter accounts used by
2 PhoneDog's employees (collectively, the "Confidential Information")." (Compl. ¶ 12.)
3 However, passwords to Twitter accounts do not derive any actual or potential independent
4 economic value under the UTSA. For confidential information to have "independent economic
5 value" to qualify as a "trade secret", the secrecy of the information must provide a "substantial
6 business advantage". *Morlife, Inc. v. Perry*, 56 Cal.App.4th 1514, 1522 (1997) (a confidential
7 list of customers has such value because its disclosure would allow a competitor to solicit more
8 effectively and selectively); *see also Whyte v. Schlage Lock Co.*, 101 Cal.App.4th 1443, 1456
9 (2002) (information related to cost and pricing, marketing strategy and manufacturing
10 technology can be trade secrets). Here, the secrecy of the password to the Account does not
11 provide any substantial business advantage. There is no confidential information an individual
12 can obtain that may lead to some economic value by using the password to access the Account.
13 Unlike a password to a company's computer network or server, logging into a Twitter account
14 allows one to view only information already widely known (e.g. list of followers that is already
15 displayed on the account's homepage and thereby easily assessable to competitors and the
16 tweets which are available to everyone at times). Disclosure or use of the Twitter passwords
17 would not result in any economic gain, especially since it does not provide an individual with
18 access to any valuable, special, secret or confidential trade information.

19
20 It should be noted that PhoneDog did not create the password to the Account. Kravitz
21 initially created the Account, including creating the Account's password. (Kravitz Decl. ¶ 4.)
22 Contrary to PhoneDog's assertion, the password to the Account therefore does not reflect any
23 secret information of PhoneDog, and Kravitz did not use any PhoneDog's "confidential
24 information" to access the account. (Compl. ¶ 15.)

25 Additionally, PhoneDog did not make any reasonable efforts to maintain the secrecy of
26 the password to the Account which it now claims to be a trade secret. Specifically, there is no
27 written agreement with respect to the proprietary or confidentiality of the Twitter passwords.
28 For example, PhoneDog did not require its employees to sign any non-disclosure or

1 confidential agreement with respect to the Twitter accounts and passwords to maintain secrecy.
2 As such, the identity of the followers and the passwords to the Account do not fall under the
3 definition of “trade secrets”.

4 Furthermore, PhoneDog did not allege any act of Kravitz that falls within the definition
5 of “misappropriation”. Here, misappropriation under the UTSA would require the
6 “[d]isclosure or use of a trade secret of another without express or implied consent by a person
7 who...[u]sed improper means to acquire knowledge of the trade secret...” Civ. Code §
8 3426.1(b). Pursuant to California Civil Code §3426.1(a), acquisition of a trade secret by
9 “[i]mproper means includes theft, bribery, misrepresentation, breach or inducement of a breach
10 of a duty to maintain secrecy, or espionage through electronic or other means.” However,
11 PhoneDog only makes the conclusory allegation that Kravitz used “improper means, as such
12 are defined in Civil Code § 3426.1(a), to obtain and misappropriate the Confidential
13 Information” without providing any factual support of the actual alleged improper act
14 committed by Kravitz. (Compl. ¶ 23.) PhoneDog has not alleged any supporting facts because
15 it cannot, no supporting facts exist.

16 When a plaintiff alleges fraud (i.e. an intentional tort which would include trade secret
17 misappropriation), a heightened pleading standard is applied and the plaintiff “must aver with
18 particularity the circumstances constituting the fraud.” FRCP 9(b). The heightened standard is
19 designed to provide defendants with notice of the “particular misconduct which is alleged to
20 constitute the fraud so they can defend against the charge and not just deny that they have
21 done anything wrong.” *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993). To provide
22 defendants with the requisite “notice”, “the complaint must specify such facts as the times,
23 dates, place, and benefits received, and other details of the fraudulent activity.” *Id.* at 672.

24 Here, PhoneDog failed to plead misappropriation with the requisite particularity.
25 PhoneDog does not allege any facts to establish that Kravitz engaged in any improper acts to
26 obtain the alleged secrets. The Complaint does not make any factual allegations regarding
27 Kravitz engaging in theft, bribery, misrepresentation, breach or inducement of a breach of a
28

1 duty to maintain secrecy, or espionage. Rather, PhoneDog makes the conclusory statement
2 that Kravitz used “improper means” to obtain and misappropriate the Twitter password.
3 Kravitz therefore has no notice of the particular conduct in which PhoneDog claims to
4 constitute misappropriation. As such, PhoneDog’s First Claim for Relief does not survive a
5 Rule 12(b)(6) motion to dismiss.

6
7 **3. PhoneDog’s Second Claim For Relief – Intentional Interference
With Prospective Economic Advantage**

8 PhoneDog’s claim of intentional interference with prospective economic advantage
9 must be dismissed. “The tort of intentional or negligent interference with prospective
10 economic advantage imposes liability for improper methods of disrupting or diverting the
11 business relationship of another which fall outside the boundaries of fair competition.” *Settimo*
12 *Associates v. Environ Systems, Inc.*, 14 Cal.App.4th 942, 845 (1993) (internal citations
13 omitted). The elements of intentional interference with a prospective economic advantage are:
14 “(1) an economic relationship between the plaintiff and some third party, with the probability
15 of future economic benefit to the plaintiff; (2) the defendant’s knowledge of the relationship;
16 (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual
17 disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the
18 acts of the defendant.” *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1153
19 (2003).

20 An essential element is an existing economic relationship. *Roth v. Rhodes*, 25
21 Cal.App.4th 530, 546 (1994). Further, “it must be reasonably probable that the prospective
22 economic advantage would have been realized but for defendant’s interference.” *Youst v.*
23 *Longo*, 43 Cal.3d 64, 71 (1987). A plaintiff must establish an existing economic relationship
24 or a protected expectancy with a third person, not merely a hope of future transactions. *See*
25 *e.g. Blank v. Kirwan*, 39 Cal.3d 311, 330-31 (1985); *Janda v. Madera Cmty. Hosp.*, 16 F.
26 Supp.2d 1181 (E.D. Cal. 1998). A plaintiff must also prove that the defendant’s conduct was
27

1 “wrongful by some legal measure other than the fact of interference itself.” *Della Penna v.*
2 *Toyota Motor Sales, U.S.A., Inc.*, 11 Cal.4th 376, 393 (1995).

3 Here, PhoneDog insufficiently alleges the existence of an economic relationship
4 between PhoneDog and the Account followers. PhoneDog did not allege that there was an
5 actual economic relationship with any Twitter followers. PhoneDog did not allege that an
6 economic benefit would have probably resulted had Kravitz not disrupted that relationship.
7 Additionally, PhoneDog did not sufficiently allege any intentional acts of Kravitz that actually
8 disrupted an economic relationship. Instead, PhoneDog merely alleges in a conclusory fashion
9 that Kravitz disrupted “PhoneDog’s economic relationship with its existing and prospective
10 users” by his aforementioned conduct. (Compl. ¶ 29.). PhoneDog’s conclusory allegations
11 need not be accepted as true. *See e.g. Pareto*, 139 F.3d at 699. PhoneDog’s Complaint does
12 not provide sufficient factual allegations to survive a motion to dismiss this claim.

13
14 **4. PhoneDog’s Third Claim For Relief – Negligent Interference With
Prospective Economic Advantage**

15 Similarly, PhoneDog’s claim of negligent interference with prospective economic
16 advantage must be dismissed. The elements of negligent interference with prospective
17 economic advantage are: “(1) an economic relationship existed between the plaintiff and a
18 third party which contained a reasonably probable future economic benefit or advantage to
19 plaintiff; (2) the defendant knew of the existence of the relationship and was aware or should
20 have been aware that if it did not act with due care its actions would interfere with this
21 relationship and cause plaintiff to lose in whole or in part the probable future economic benefit
22 or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence
23 caused damage to plaintiff in that the relationship was actually interfered with or disrupted and
24 plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from
25 the relationship.” *North American Chemical Co. v. Sup. Court*, 59 Cal.App.4th 764, 786
26 (1997).

1 The Complaint herein insufficiently alleges (1) the existence of an economic
2 relationship that would have probably resulted in an economic benefit and (2) a negligent act
3 by Kravitz that actually disrupted that relationship. Moreover, “[t]he tort of negligent
4 interference with economic relationship arises only when the defendant owes the plaintiff a
5 duty of care.” *LiMandri v. Judkins*, 52 Cal.App.4th 326, 348 (1997). PhoneDog, however,
6 does not allege anywhere in the Complaint that Kravitz owes it a “duty of care” to trigger this
7 claim. Accordingly, PhoneDog’s Third Claim for Relief must be dismissed.

8
9 **5. PhoneDog’s Fourth Claim For Relief – Conversion**

10 PhoneDog’s claim of conversion must also be dismissed because PhoneDog did not
11 sufficiently allege that it owns or has the right to immediately possess the Account.
12 “Conversion is the wrongful exercise of dominion over the property of another. The elements
13 conversion are: (1) the plaintiff’s ownership or right to possession of the property; (2) the
14 defendant’s conversion by a wrongful act or disposition of property rights; and (3) damages.”
15 *Burlesci v. Petersen*, 68 Cal.App.4th 1062, 1066 (1998) (internal citations omitted). Here,
16 PhoneDog’s allegation that “was and still is, the owner of the Account and was, and still is,
17 entitled to the possession of the Account” is conclusory and unsupported. (Compl. ¶ 38.)
18 PhoneDog does not assert sufficient facts to support its allegation that the Account and all of
19 the Account’s followers are its property or that it has an immediate right to possession of the
20 Account. In fact, as outlined above, Twitter retains all right, title, and interest in all Twitter
21 accounts, which remain the “exclusive property” of Twitter and its licensor. Further, the
22 Account followers are human beings, not property that can be owned or possessed. A plaintiff
23 cannot maintain an action for conversion if he or she “neither has title to the property alleged to
24 have been converted, nor possession thereof”. *Moore v. Regents of the University of*
25 *California*, 51 Cal.3d 120, 136 (1990) (internal citation omitted).

26 Additionally, the act of conversion “must be knowingly or intentionally done, but a
27 wrongful intent is not necessary.” *Taylor v. Forte Hotels International*, 235 Cal.App.3d 1119
28 (1991). PhoneDog, however, does not allege anywhere in its Complaint that Kravitz’s act of

1 conversion was done “knowingly” or “intentionally”. Moreover, “there can be no conversion
2 where an owner either expressly or impliedly assents to or ratifies the taking, use or disposition
3 of his property.” *Farrington v. A. Teichert & Son, Inc.*, 59 Cal.App.2d 468, 474 (1943). Here,
4 PhoneDog not only informed Kravitz he could continue to use the Account, it informally
5 assented to Kravitz’s continued use of the Account by occasionally sending him requests to
6 tweet on its behalf on the Account months after he had separated from his employment. (See
7 Kravitz Decl. ¶¶ 8, 10-12)


8 For these reasons, PhoneDog’s Fourth Claim for Relief should be dismissed for failure
9 to state a claim.

10 **VI. CONCLUSION**

11 For the foregoing reasons, Defendant Kravitz respectfully requests an order from this
12 Court dismissing Plaintiff PhoneDog’s Complaint for lack of subject matter jurisdiction
13 pursuant to FRCP 12(b)(1) and 28 U.S.C. §1332(a) and for failure to state a claim upon which
14 relief can be granted pursuant to FRCP 12(b)(6).
15

16 Dated: August 4, 2011

KLETTER LAW FIRM

17
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22 NOAH KRAVITZ
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