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14  
 15 **IN THE UNITED STATES DISTRICT COURT**  
 16 **NORTHERN DISTRICT OF CALIFORNIA**

17 PHONEDOG, LLC, a Delaware corporation, )  
 )  
 18 Plaintiff, )  
 )  
 19 v. )  
 )  
 20 NOAH KRAVITZ, an individual, )  
 )  
 21 Defendant. )

Case No. 3:11-cv-03474 (MEJ)

22 **NOAH KRAVITZ'S COUNTERCLAIMS**  
**AND ANSWER TO PLAINTIFF'S FIRST**  
**AMENDED COMPLAINT FOR**  
**MISAPPROPRIATION OF TRADE**  
**SECRETS, INTERFERENCE WITH**  
**PROSPECTIVE ECONOMIC**  
**ADVANTAGE AND CONVERSION**

1                    **NOAH KRAVITZ’S COUNTERCLAIMS AND ANSWER TO PLAINTIFF’S FIRST**

2    **AMENDED COMPLAINT**

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

6    **Jurisdiction**

7                    1.            Kravitz lacks sufficient information to admit or deny the allegation that PhoneDog is  
8                    a Delaware Corporation and, on that basis, denies the allegation. Kravitz admits, on information and  
9                    belief, that two similar sounding limited liability companies are registered with the State of  
10                   Delaware: PhoneDog Communications LLC and PhoneDog Media LLC. Kravitz admits, on  
11                   information and belief, that PhoneDog’s principal place of business is Mount Pleasant, South  
12                   Carolina.

13                   2.            Kravitz admits that he is a California resident and resides in Alameda County,  
14                   California.

15                   3.            Kravitz denies the allegations of paragraph 3. Kravitz specifically denies that  
16                   PhoneDog’s causes of action against him state claims for relief in excess of \$75,000 and, therefore,  
17                   Kravitz denies that this Court has original jurisdiction over this matter under 28 U.S.C. § 1332(a).

18    **Venue**

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

23    **THE PARTIES**

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

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

4 **FACTUAL ALLEGATIONS**

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

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

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

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

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

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

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

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

1           15.     Kravitz denies the allegations of paragraph 15.

2           16.     Kravitz denies the allegations of paragraph 16.

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

10          18.     Kravitz admits that, on occasion, he used the Account to promote PhoneDog's  
11 services but denies that more than half of the tweets from the Account related to PhoneDog. Kravitz  
12 denies that he accessed the Account using any confidential information or other trade secrets  
13 belonging to PhoneDog; to the contrary, neither the identity of the Account's followers nor the  
14 password used to access the Account are trade secrets that belong to PhoneDog. In fact, after  
15 Kravitz began using the Account in January 2009, he changed the password to the Account and,  
16 thereafter, PhoneDog did not have access to or otherwise know the password. Kravitz lacks  
17 sufficient information to admit or deny any remaining allegations in paragraph 18 and, on that basis,  
18 denies those allegations.

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

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

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

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

22 23. Kravitz denies the allegations in paragraph 23.

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

1 **CLAIMS FOR RELIEF**

2 **FIRST CLAIM FOR RELIEF**

3 **(Alleged Misappropriation of Trade Secrets)**

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

5 26. Kravitz denies the allegations in paragraph 26.

6 27. Kravitz denies the allegations in paragraph 27.

7 28. Kravitz denies the allegations in paragraph 28.

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

11 30. Kravitz denies the allegations in paragraph 30.

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

17 **SECOND CLAIM FOR RELIEF**

18 **(Alleged Intentional Interference With Prospective Economic Advantage)**

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

20 33. Kravitz denies the allegations in paragraph 33.

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

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

4 36. Kravitz denies the allegations in paragraph 36.

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

7 38. Kravitz denies the allegations in paragraph 38.

8 39. Kravitz denies the allegations in paragraph 39.

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

14 **THIRD CLAIM FOR RELIEF**

15 **(Alleged Negligent Interference With Prospective Economic Advantage)**

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

17 42. Kravitz denies the allegations in paragraph 42.

18 43. Kravitz denies the allegations in paragraph 43.

19 44. Kravitz denies the allegations in paragraph 44.

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

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

24 **FOURTH CLAIM FOR RELIEF**

25 **(Conversion)**

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

27 48. Kravitz denies the allegations in paragraph 48.





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**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

1 and available to PhoneDog, however PhoneDog did not seek to attract these followers to a new  
2 Twitter handle or otherwise attempt to replace the advertising revenue it alleges it lost due to  
3 Kravitz's use of the Account.

4 **Fifth Defense – Waiver and Estoppel**

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

13 **Sixth Defense – Lack of Subject Matter Jurisdiction**

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

17 **Seventh Defense – Disclosure & Ratification**

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

22 **Eighth Defense – Failure to Join Twitter**

23 8. PhoneDog's claims for provisional remedies are barred because it has failed to join  
24 Twitter, the ultimate owner of the account and party with authority to return the Account to  
25 PhoneDog. Complete relief in this action cannot be accorded without joining Twitter, as PhoneDog  
26 claims to be the owner of the Twitter account. Deciding the issue of ownership of the account  
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1 without the participation of Twitter could deprive Twitter of its claimed interest in the account at  
2 issue.

3 **Ninth Defense – Consent, Ratification and Acquiescence**

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

8 **Tenth Defense – Transfer**

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

12 **Eleventh Defense – Miscalculation of Damages**

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

15 **Twelfth Defense – No Trade Secrets**

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

20 **Thirteenth Defense – Statute of Limitations**

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

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**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

1 PhoneDog Communications LLC (incorporated on 1/22/2004). It appears to Kravitz that plaintiff  
2 PhoneDog, LLC is a d/b/a or affiliate of one of these other PhoneDog entities. If this is the case and  
3 PhoneDog, LLC is not an entity with legal existence, then Kravitz will amend his counterclaims to  
4 add an entity with a legal existence such as PhoneDog Media LLC or PhoneDog Communications  
5 LLC. As his investigation is in its preliminary stages, Kravitz initially raises his counterclaims  
6 solely against PhoneDog, LLC, the current plaintiff and counter defendant in this litigation.

7 **Jurisdiction and Venue**

8 3. Subject to Kravitz's defenses and denials, Kravitz alleges that this Court has  
9 jurisdiction over the subject matter of these counterclaims under, without limitation, 28 U.S.C. §§  
10 1332(a), 1367(a), 2201(a), 2202.

11 4. This Court has personal jurisdiction over PhoneDog.

12 **Factual Background**

13 5. In approximately April 2006, PhoneDog hired Kravitz as a part-time, freelance  
14 reviewer of cellular phones. Kravitz was initially paid by PhoneDog on a per-post basis related to  
15 the amount of content he contributed. Over time, Kravitz's role grew to include writing reviews and  
16 blog posts, producing videos, covering various aspects of the wireless industry including hardware,  
17 software and service reviews, news, and rumors, as well as opinion pieces. These reviews and blog  
18 posts were posted to PhoneDog's website: [www.phonedog.com](http://www.phonedog.com).

19 6. Kravitz continued to contribute to PhoneDog for a number of years after April 2006  
20 and held progressively more senior titles at PhoneDog: Cell Phone Editor, Senior Editor and later  
21 Editor-in-Chief. Over time, Kravitz became one of Phone Dog's most prominent and heavily  
22 trafficked contributors. In an effort to retain Kravitz's services, PhoneDog agreed to enter into an  
23 agreement with Kravitz on June 1, 2008. Pursuant to this agreement ("Commission Agreement"),  
24 PhoneDog agreed to pay Kravitz commission wages equal to 15% of all of PhoneDog's gross  
25 advertising revenue received from "applicable sources to Noah Kravitz".  
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1           7.       In addition to gross advertising revenue under the Commission Agreement, Kravitz  
2 also began receiving monthly payments from PhoneDog in November 2008 in consideration of the  
3 five to ten hours a week he spent managing a number of PhoneDog’s other editors.

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

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

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

18          11.       PhoneDog responded to Kravitz’s State Court Litigation by filing a separate lawsuit  
19 in this Court on July 15, 2011 (the “Federal Court Litigation”).

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

1 **The Twitter Account**

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

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

23 15. Beginning on the date Kravitz started using the Account and at all times thereafter,  
24 PhoneDog never controlled the Account and PhoneDog never informed Kravitz that it believed the  
25 Account was PhoneDog’s property. Kravitz would not have used the Account if PhoneDog had told  
26 him that he would be required to return it after he left the company. After Kravitz began using the  
27 Account, PhoneDog did not create a single one of the tweets from the Account—Kravitz generated  
28

1 all of them. At all times, the identity of the Account's followers was public information accessible  
2 to PhoneDog and anyone else with access to Twitter. All of Kravitz's tweets were publicly available  
3 as well.

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

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

19 **Use of the Account by Kravitz**

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

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

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

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

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

### 25 **PhoneDog's Amended Complaint**

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

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

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

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

### 19 COUNT ONE

#### 20 **Declaratory Judgment that—Subject to the Rights Retained by Twitter—Kravitz has all** 21 **Rights to and Interest in the Services**

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

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

26 29. A judicial declaration is necessary and appropriate to resolve this dispute.  
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1 company. Klein and PhoneDog benefited from this promise because it resulted in Kravitz  
2 continuing to tweet on PhoneDog's behalf. Kravitz reasonably believed these statements and  
3 justifiably relied on them.

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

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

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

16 WHEREFORE, Kravitz prays for judgment as set forth below.

17 **COUNT THREE**

18 **False Promise (Fraud)**

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

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

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

6 40. PhoneDog knew that these promises were false at the time it made them and intended  
7 the promises to induce reliance by Kravitz who PhoneDog hoped would continue to tweet on its  
8 behalf and drive traffic to its website. Kravitz reasonably believed these promises to be true. The  
9 promises did induce reliance because Kravitz abandoned his former Twitter account—  
10 @kravykrav—and began using the Account. Moreover, Kravitz expended significant effort and  
11 time in creating tweets between October 2010 (when he resigned from PhoneDog) and the present.  
12 Kravitz engaged in similar efforts while he was a contributor to PhoneDog. Through these efforts,  
13 Kravitz has maintained and expanded his Twitter following—increasing the number of individuals  
14 following him by almost 40%. Kravitz will lose this following if the Account is returned to  
15 PhoneDog. At a minimum, PhoneDog’s false promises will interfere with Kravitz’s efforts to  
16 communicate with thousands of Twitter followers that began following his Account after he resigned  
17 from PhoneDog and thereby have no connection to PhoneDog or the Account when its handle was  
18 @PhoneDog\_Noah.

19 WHEREFORE, Kravitz prays for judgment as set forth below.

20 **COUNT FOUR**

21 **Negligent Misrepresentation**

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

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

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

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

15 WHEREFORE, Kravitz prays for judgment as set forth below.

16 **COUNT FIVE**

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

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

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

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

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

10 WHEREFORE, Kravitz prays for judgment as set forth below.

11 **PRAYER FOR RELIEF**

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

14 a. A judgment dismissing PhoneDog's Amended Complaint against Kravitz with  
15 prejudice;

16 b. A judgment in favor of Kravitz on his Counterclaims, specifically:

17 1. For the First Counterclaim for a Declaratory Judgment, Kravitz prays  
18 for a declaration that the right to use the Account and the Services belongs to Kravitz  
19 subject to whatever rights to the Account and the Services that Twitter has reserved to  
20 itself. In the event that PhoneDog is judged to be the owner of the Account, then  
21 Kravitz requests *quantum meruit* damages in an amount to be proved to compensate  
22 him for his time and effort he spent building a Twitter following under the false  
23 pretense that Kravitz had the permanent and exclusive right to use the Account;

24 2. For the Second Counterclaim for Promissory Estoppel, Kravitz prays  
25 for enforcement of PhoneDog's promise that the Account and the Services are his to  
26 keep permanently, Kravitz further requests damages in an amount to be proved;

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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.



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DATED: February 14, 2012

By: /s/ Sebastian L. Miller

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