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PHONEDOG, LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PHONEDOG, LLC, a Delaware corporation,

Plaintiff,

v.

NOAH KRAVITZ, an individual,

Defendant.

AND RELATED COUNTERCLAIM.

CASE NO. 3:11-cv-03474-MEJ

ANSWER TO COUNTERCLAIM

[JURY TRIAL DEMANDED]

In answer to the Counterclaim ("Counterclaim") filed by NOAH KRAVITZ ("Kravitz") on February 14, 2012, Plaintiff PHONEDOG, LLC ("PhoneDog"), by and through its attorney, responds as follows:

The Parties

1. Answering the allegations in paragraph 1 of the Counterclaim, PhoneDog lacks sufficient information to admit or deny the allegations contained therein and on that basis denies them.

2. Answering the allegations contained in paragraph 2 of the Counterclaim, PhoneDog admits that it is the plaintiff in this litigation. The remaining allegations of paragraph 2 state legal conclusions and as such do not require PhoneDog to answer. To the extent PhoneDog is required to answer, PhoneDog denies the allegations contained therein.

Jurisdiction And Venue

3. Answering the allegations in paragraph 3 of the Counterclaim, PhoneDog denies the allegations contained therein.

4. Answering the allegations in paragraph 4 of the Counterclaim, PhoneDog admits the allegations contained therein.

Factual Background

5. Answering the allegations in paragraph 5 of the Counterclaim, PhoneDog admits the allegations contained therein.

General Allegations

6. Answering the allegations in paragraph 6 of the Counterclaim, PhoneDog admits that Kravitz continued to contribute to PhoneDog for a number of years after April 2006 and held the following titles at PhoneDog: Cell Phone Editor, Senior Editor and Editor-in-Chief. PhoneDog admits that Kravitz was one of PhoneDog's most prominent and heavily trafficked contributors. PhoneDog admits that it entered into an agreement with Kravitz effective June 1, 2008 ("Commission Agreement"). Except as so admitted, PhoneDog denies the remaining allegations contained in the said paragraph.

7. Answering the allegations in paragraph 7 of the Counterclaim, PhoneDog denies the allegations contained therein.

8. Answering the allegations in paragraph 8 of the Counterclaim, PhoneDog admits that at all times Kravitz was paid on a 1099 basis- not with W-2s. PhoneDog is without sufficient knowledge or information to form a belief as to the truth of the allegation that while Kravitz was contributing to blog posts to PhoneDog and managing the work of other editors, Kravitz and a friend spent a number of months working on a start-up venue and on that basis denies the allegations. Except as so admitted, PhoneDog denies the remaining allegations contained in the said paragraph.

9. Answering the allegations in paragraph 9 of the Counterclaim, PhoneDog is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said paragraph, and on that basis denies them.

10. Answering the allegations in paragraph 10 of the Counterclaim, PhoneDog admits that in December 2010, it issued Kravitz a check in the amount of approximately $8,261.64 and admits that it cancelled the aforementioned check. PhoneDog admits that on June 8, 2011 Kravitz filed suit against PhoneDog in the Superior Court of California, County of Alameda. Except as so admitted, PhoneDog denies the remaining allegations contained in the said paragraph.

11. Answering the allegations in paragraph 11 of the Counterclaim, PhoneDog admits that it filed a lawsuit in this court on July 15, 2011. Except as so admitted, PhoneDog denies the remaining allegations contained in the said paragraph.

12. Answering the allegations in paragraph 12 of the Counterclaim, PhoneDog admits that Federal Court litigation raises four claims against Kravitz. Except as so admitted, PhoneDog denies the remaining allegations contained in the said paragraph.

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The Twitter Account

13. Answering the allegations in paragraph 13 of the Counterclaim, PhoneDog denies the allegations contained therein.

14. Answering the allegations in paragraph 14 of the Counterclaim, PhoneDog admits that Kravitz's tweets had the effect of driving traffic to PhoneDog's website. PhoneDog denies that under the Commission Agreement Kravitz was entitled to 15% of the revenue generated from all sources applicable to Kravitz. As to remaining allegations of paragraph 14, PhoneDog is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said paragraph, and on that basis denies them.

15. Answering the allegations in paragraph 15 of the Counterclaim, PhoneDog admits that the identity of the Account's followers was public information accessible to PhoneDog and anyone else with access to Twitter. PhoneDog admits that all of Kravitz's tweets were publicly available. Except as so admitted, PhoneDog denies the remaining allegations contained in the said paragraph.

16. Answering the allegations in paragraph 16 of the Counterclaim, PhoneDog denies that the Account does not belong to either Kravitz or PhoneDog and that Kravitz is the individual with the right to use the Services under the Terms. As to the remaining allegations of paragraph 16, PhoneDog is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said paragraph, and on that basis denies them.

17. Answering the allegations in paragraph 17 of the Counterclaim, PhoneDog is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said paragraph, and on that basis denies them.

Use Of The Account By Kravitz

18. Answering the allegations in paragraph 18 of the Counterclaim, PhoneDog admits that when Kravitz began using the Account, it did not have many followers. As to the remaining allegations of paragraph 18, PhoneDog is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in said paragraph, and on the basis denies them.

19. Answering the allegations in paragraph 19 of the Counterclaim, PhoneDog admits that in October 2010, Kravitz resigned from PhoneDog. PhoneDog admits that Kravitz changed the handle of the Account from @PhoneDog_Noah to @noahkravitz. PhoneDog admits that when a Twitter handle changes, the user that followed the account under its previous handle automatically continues following the account on its new handle. Except as so admitted, PhoneDog denies the remaining allegations contained in the said paragraph.

20. Answering the allegations in paragraph 20 of the Counterclaim, PhoneDog denies the allegations contained therein.

21. Answering the allegations in paragraph 21 of the Counterclaim, denies the allegations contained therein.

22. Answering the allegations in paragraph 22 of the Counterclaim, PhoneDog is without sufficient knowledge or information to form a belief as to the truth of the allegation that Kravitz has sent almost 27,000 tweets, and on that basis denies the allegation. PhoneDog denies the remaining allegations of paragraph 22.

PhoneDog's Amended Complaint

23. Answering the allegations of paragraph 23 of the Counterclaim, PhoneDog admits the allegations contained therein.

24. Answering the allegations of paragraph 24 of the Counterclaim, PhoneDog admits the allegations contained therein.

25. Answering the allegations of paragraph 25 of the Counterclaim, PhoneDog denies the allegations contained therein.

26. Answering the allegations of paragraph 26 of the Counterclaim, paragraph 26 states a legal conclusion and as such does not require PhoneDog to answer. To the extent PhoneDog is required to answer, PhoneDog denies the allegations contained therein.

COUNT ONE

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

27. Answering the allegations of paragraph 27 of the Counterclaim, PhoneDog realleges and reincorporates by reference as if set forth in full herein its answers to paragraphs 1 through 26.

28. Answering the allegations of paragraph 28 of the Counterclaim, paragraph 28 states a legal conclusion and as such does not require PhoneDog to answer. To the extent PhoneDog is required to answer, PhoneDog denies the allegations contained therein.

29. Answering the allegations of paragraph 29 of the Counterclaim, paragraph 29 states a legal conclusion and as such does not require PhoneDog to answer. To the extent PhoneDog is required to answer, PhoneDog denies the allegations contained therein.

30. Answering the allegations of paragraph 30 of the Counterclaim, PhoneDog denies the allegations contained therein.

31. Answering the allegations of paragraph 31 of the Counterclaim, PhoneDog denies the allegations contained therein.

COUNT TWO

Promissory Estoppel

32. Answering the allegations of paragraph 32 of the Counterclaim, PhoneDog realleges and reincorporates by reference as if set forth in full herein its answers to paragraphs 1 through 31.

33. Answering the allegations of paragraph 33 of the Counterclaim, PhoneDog denies the allegations contained therein.

34. Answering the allegations of paragraph 34 of the Counterclaim, PhoneDog denies the allegations contained therein.

35. Answering the allegations of paragraph 35 of the Counterclaim, PhoneDog denies the allegations contained therein.

36. Answering the allegations of paragraph 36 of the Counterclaim, PhoneDog denies the allegations contained therein.

COUNT THREE

False Promise (Fraud)

37. Answering the allegations of paragraph 37 of the Counterclaim, PhoneDog realleges and reincorporates by reference as if set forth in full herein its answers to paragraphs 1 through 36.

38. Answering the allegations of paragraph 38 of the Counterclaim, PhoneDog denies the allegations contained therein.

39. Answering the allegations of paragraph 39 of the Counterclaim, PhoneDog denies the allegations contained therein.

40. Answering the allegations of paragraph 40 of the Counterclaim, PhoneDog denies the allegations contained therein.

COUNT FOUR

Negligent Misrepresentation

41. Answering the allegations of paragraph 41 of the Counterclaim, PhoneDog realleges and reincorporates by reference as if set forth in full herein its answers to paragraphs 1 through 40.

42. Answering the allegations in paragraph 42 of the Counterclaim, PhoneDog denies the allegations contained therein.

43. Answering the allegations of paragraph 43 of the Counterclaim, PhoneDog denies the allegations contained therein.

44. Answering the allegations of paragraph 44 of the Counterclaim, PhoneDog denies the allegations contained therein.

COUNT FIVE

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

45. Answering the allegations of paragraph 45 of the Counterclaim, PhoneDog realleges and reincorporates by reference as if set forth in full herein its answers to paragraphs 1 through 44.

46. Answering the allegations of paragraph 46 of the Counterclaim, PhoneDog denies the allegations contained therein.

47. Answering the allegations of paragraph 47 of the Counterclaim, PhoneDog denies the allegations contained therein.

48. Answering the allegations of paragraph 48 of the Counterclaim, PhoneDog denies the allegations contained therein.

PRAYER FOR RELIEF

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

AFFIRMATIVE DEFENSES

As and for separate and distinct affirmative defenses to the Counterclaim, PhoneDog alleges as to all of the allegations contained in the Counterclaim:

FIRST AFFIRMATIVE DEFENSE

(Attorneys' Fees Barred)

As and for a separate and distinct defense to Kravitz's Counterclaim, and to each claim for relief contained therein, PhoneDog alleges that Kravitz is precluded from recovering attorneys' fees from PhoneDog under the applicable provisions of law.

SECOND AFFIRMATIVE DEFENSE

(Failure to State a Claim)

All of Kravitz's claims fail to state facts sufficient to constitute a claim for relief for which relief may be granted against PhoneDog.

THIRD AFFIRMATIVE DEFENSE

(Additional Affirmative Defenses)

PhoneDog reserve the right to assert additional affirmative defenses in the event that additional defenses become apparent during the course of this litigation.

FOURTH AFFIRMATIVE DEFENSE

(Unclean Hands)

Kravitz comes to this Court with unclean hands and is therefore barred from recovery.

FIFTH AFFIRMATIVE DEFENSE

(Speculative Damages)

The damages, if any, claimed by Kravitz are wholly speculative and are not susceptible to determination.

SIXTH AFFIRMATIVE DEFENSE

(Breach of Contract)

As and for a separate and distinct defense to Kravitz's Counterclaim, and to each cause of action contained therein, PhoneDog alleges that each of Kravitz's claims are barred because Kravitz substantially and materially breached the contract between the parties prior to the commencement of this action, which conduct extinguishes the right to maintain the instant action.

SEVENTH AFFIRMATIVE DEFENSE

(Business Justification/Privilege)

The conduct complained of in Kravitz's Counterclaim was a just and proper exercise of management discretion undertaken for a fair and honest reason regulated by good faith under the circumstances then existing, and undertaken by PhoneDog in a manner in which it believed in good faith that it was justified and/or privileged to act.

EIGHTH AFFIRMATIVE DEFENSE

(Business Necessity)

Kravitz's Counterclaim as a whole, and each and every cause of action alleged therein, is barred in whole or in part because any and all actions taken by PhoneDog were justified by business necessity and were for legitimate non-discriminatory business reasons.

NINTH AFFIRMATIVE DEFENSE

(Consent of Kravitz)

Kravitz acknowledged, ratified, consented to, and acquiesced in the alleged acts or omissions, if any, of PhoneDog thus barring Kravitz from any relief as prayed for herein.

TENTH AFFIRMATIVE DEFENSE

(Estoppel)

Kravitz is, by virtue of his own inequitable conduct, estopped from recovery on all of the Causes of Action of the Counterclaim, and each of them.

ELEVENTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

As and for a separate and distinct defense to Kravitz's Counterclaim, and to each cause of action contained therein, PhoneDog alleges that, on information and belief, Kravitz's alleged injuries, if any there were, were aggravated by Kravitz's failure to use reasonable diligence to mitigate them.

TWELFTH AFFIRMATIVE DEFENSE

(Fraud/Misrepresentation)

As and for a separate and distinct defense to Kravitz's Counterclaim, and to each cause of action contained therein, PhoneDog alleges that each of Kravitz's claims is barred because the incidents, if any, which are the subject of Kravitz's Counterclaim were procured by the fraud and misrepresentations by Kravitz, thereby voiding any obligations allegedly owed by PhoneDog to Plaintiff.

THIRTEENTH AFFIRMATIVE DEFENSE

(Laches)

The claims asserted in Kravitz's Counterclaim, and each of them, are barred by laches.

FOURTEENTH AFFIRMATIVE DEFENSE

(Lack of Justifiable Reliance)

Kravitz's third cause of action for intentional misrepresentation and fourth cause of action for negligent misrepresentation are barred due to a lack of justifiable reliance by Kravitz.

FIFTEENTH AFFIRMATIVE DEFENSE

(No False Promise)

Kravitz's Counterclaim is barred because PhoneDog made no promises to Kravitz with the concurrent intent to defraud Kravitz.

SIXTEENTH AFFIRMATIVE DEFENSE

(Set-Off)

As a proximate result of the wrongful acts of Kravitz, PhoneDog has suffered damage in an amount equal to or in excess of the amounts claimed by Kravitz herein, which damage bars Plaintiff's recovery on the third, fourth and fifth Causes of Action of the Counterclaim, and each of them.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Lack of Subject Matter Jurisdiction)

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

EIGHTEENTH AFFIRMATIVE DEFENSE

(Waiver)

The claims for relief are barred by Kravitz's prior waiver of the claims alleged therein.

NINETEENTH AFFIRMATIVE DEFENSE

(Willful Misconduct)

Kravitz was, at all times and places set forth in each of the claims for relief of the Counterclaim, guilty of willful misconduct in and about the matters alleged therein, which willful misconduct bars Kravitz from recovery on each claim for relief in the Counterclaim.

TWENTIETH AFFIRMATIVE DEFENSE

(Statute of Limitations)

PhoneDog affirmatively alleges that each claim for relief in the Counterclaim is barred by the applicable statute of limitations.

PRAYER FOR RELIEF

WHEREFORE, PhoneDog prays as follows:

1. That Kravitz takes nothing by reason of his Counterclaim and that judgment be rendered in favor of PhoneDog;

2. That PhoneDog be awarded its costs of suit incurred in defense of this action; and

3. For such other relief as the Court deems proper.

Dated: March 6, 2012

DONAHUE GALLAGHER WOODS LLP

By: _____
John C. Kirke
Attorneys for Plaintiff and Counter-Defendant
PHONEDOG, LLC

DEMAND FOR JURY TRIAL

Plaintiff and Counter-Defendant PhoneDog hereby demands trial by jury.

Dated: March 6, 2012

DONAHUE GALLAGHER WOODS LLP

By: _____
John C. Kirke
Attorneys for Plaintiff and Counter-Defendant
PHONEDOG, LLC