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 11 **IN THE UNITED STATES DISTRICT COURT**  
 12 **NORTHERN DISTRICT OF CALIFORNIA**

13	PHONEDOG, LLC, a Delaware corporation,	)	Case No. 3:11-cv-03474 (MEJ)
14		)	
	Plaintiff,	)	<b>DEFENDANT NOAH KRAVITZ'S</b>
15	v.	)	<b>NOTICE OF MOTION AND MOTION</b>
		)	<b>FOR LEAVE TO FILE FIRST</b>
16	NOAH KRAVITZ, an individual,	)	<b>AMENDED ANSWER AND</b>
		)	<b>COUNTERCLAIMS</b>
17	Defendant.	)	
		)	Date: Thursday, June 7, 2012
18		)	Time: 10:00 a.m.
		)	Courtroom: B, 15 <sup>th</sup> Floor
19		)	Judge: Hon. Maria-Elena James
20		)	

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE THAT on Thursday, June 7, 2012 at 10:00 a.m. or as soon  
4 thereafter as this matter may be heard in Courtroom B – 15<sup>th</sup> Floor of the above-referenced Court,  
5 located at 450 Golden Gate Avenue, San Francisco, California, before the Honorable Maria-Elena  
6 James, Defendant Noah Kravitz (“Kravitz”), by and through undersigned counsel, will, and hereby  
7 does move this Court pursuant to Federal Rule of Civil Procedure 15(a)(2) for leave to file a First  
8 Amended Answer and Counterclaims. This motion is based on the accompanying Memorandum of  
9 Points and Authorities, Kravitz’s First Amended Answer and Counterclaims (Exhibit A), and the  
10 Proposed Order filed herewith. The motion is further based on all of the files and records of this  
11 action and on any additional material that may be elicited at the hearing of this motion.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **INTRODUCTION**

14 Pursuant to the Court’s Case Management Order entered on October 21, 2011, the deadline  
15 for parties to file amended pleadings is April 30, 2012. Kravitz files this Motion and the proposed  
16 amended pleading within that deadline. As set forth in the proposed First Amended Answer and  
17 Counterclaims attached hereto as Exhibit A, Kravitz alleges in the Sixth Counterclaim that Plaintiff’s  
18 attempt to impose and/or enforce a covenant not to compete in violation of California Business &  
19 Professions Code § 16600 *et seq.* constitutes unfair, fraudulent, and unlawful conduct in violation of  
20 California Business & Professions Code § 17200 *et seq.*

21 Specifically, Kravitz alleges that PhoneDog expressly consented to Kravitz’s changing the  
22 Twitter handle on the Twitter Account at issue and to Kravitz’s ongoing use of the Account under  
23 the new handle @noahkravitz. After Kravitz resigned from PhoneDog and began a full-time  
24 position at TechnoBuffalo, a company that offers some services competing with those of PhoneDog,  
25 PhoneDog represented to Kravitz that it did not consent to Kravitz publishing mobile content while  
26 he was receiving compensation from PhoneDog, claiming that such action was barred by non-  
27 compete protocol, though the parties had no such agreement. PhoneDog subsequently cancelled a  
28 check for amounts due to Kravitz under the Commission Agreement and sued Kravitz for ownership

1 of the Twitter handle. As a result of such conduct, Kravitz alleges that PhoneDog has violated  
2 California Business and Professions Code § 17200 *et seq.* and that Kravitz has lost money in the  
3 form of commissions forfeited based on the alleged violation of the aforementioned covenant not to  
4 compete, as well as substantial legal fees expended when he was forced to initial legal action to  
5 recover the funds due to him (which he has not recovered to date) and was forced to defend this  
6 action.

7 **ARGUMENT**

8 Federal Rule of Civil Procedure 15(a) provides that leave to amend a pleading “shall freely  
9 [be] give[n] ... when justice so requires.” Fed. R. Civ. P. 15(a)(2). Leave to amend is “to be applied  
10 with extreme liberality.” *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir.  
11 2001) (citation omitted). None of the factors relied upon by the courts in denying a motion for leave  
12 to amend a pleading, “bad faith, undue delay, prejudice to the opposing party, and/or futility,” are  
13 present here. *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1990).

14 The amended counterclaim asserted are made in good faith and within the time permitted by  
15 the Court. Plaintiff will have the chance to answer the amended counterclaim and thus will not be  
16 prejudiced. Finally, Plaintiff cannot show that the amended counterclaim is certain to result in  
17 summary judgment in Plaintiff’s favor, and therefore cannot make the requisite showing that the  
18 amendment is futile. *See DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

19 Allowing an amendment would be in the interests of justice. Defendant’s counsel from  
20 Dewey & LeBoeuf had very little time to answer Plaintiff’s First Amended Complaint due to the  
21 mediation that was scheduled almost immediately after Dewey & LeBoeuf’s first appearance in this  
22 case. While the parties have engaged and are continuing to engage in extensive settlement  
23 discussions, Defendant files this Motion to preserve his right to assert all viable counterclaims  
24 against Plaintiff.

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1 **CONCLUSION**

2 For the foregoing reasons, Kravitz respectfully requests that the Court grant this Motion for  
3 Leave to Amend and allow for entry of the First Amended Answer and Counterclaims attached  
4 hereto as Exhibit A.

5  
6 DATED: April 30, 2012

By: /s/ Margaret A. Keane

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