

# EXHIBIT A

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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,	)	
v.	)	<b>NOAH KRAVITZ'S FIRST AMENDED</b>
	)	<b>COUNTERCLAIMS AND ANSWER TO</b>
15 NOAH KRAVITZ, an individual,	)	<b>PLAINTIFF'S FIRST AMENDED</b>
	)	<b>COMPLAINT FOR</b>
16 Defendant.	)	<b>MISAPPROPRIATION OF TRADE</b>
	)	<b>SECRETS, INTERFERENCE WITH</b>
17	)	<b>PROSPECTIVE ECONOMIC</b>
18	)	<b>ADVANTAGE AND CONVERSION</b>
19	)	
20	)	

1                    **NOAH KRAVITZ’S FIRST AMENDED COUNTERCLAIMS AND ANSWER TO**  
2                    **PLAINTIFF’S FIRST 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”) as follows:  
5

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  
28

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.

28 15. Kravitz denies the allegations of paragraph 15.

1           16.     Kravitz denies the allegations of paragraph 16.

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

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

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

23           20.     Kravitz admits that he resigned from PhoneDog in October 2010. Kravitz admits that  
24 immediately after his resignation, he changed the Twitter handle for the Account to @noahkravitz.  
25 Kravitz admits that he presently uses the Account under the handle @noahkravitz. Except as  
26 expressly admitted, Kravitz denies any remaining allegations in paragraph 20. Kravitz specifically  
27 denies that PhoneDog requested that he relinquish use of the Account following his resignation. To  
28 the contrary, PhoneDog consented to Kravitz's continued use of his Account after his resignation











1 further denies that he has interfered with PhoneDog’s economic relationships or is liable for  
2 interference with any economic relationships belonging to PhoneDog. Kravitz further denies that  
3 PhoneDog is entitled to any relief whatsoever of any kind against Kravitz as a result of any act of  
4 Kravitz or any person or entity acting on behalf of Kravitz.

5 **DEFENSES**

6 **First Defense – Failure to State a Claim**

7 1. The Amended Complaint fails to state a claim for which relief can be granted.

8 **Second Defense – Unclean Hands**

9 2. PhoneDog’s claims are barred because PhoneDog has come to the Court with unclean  
10 hands due to the express and implied representations it made to Kravitz that Kravitz would  
11 permanently have the exclusive right to use the Account and due to the express and implied consent  
12 it gave to Kravitz to continue using the Account after his resignation in October 2010. PhoneDog  
13 only attempted to disavow these representations and revoke its consent when it filed its initial  
14 complaint in this matter on July 15, 2011.

15 **Third Defense – Laches**

16 3. PhoneDog’s claims are barred because PhoneDog’s nine month delay in asserting, let  
17 alone prosecuting, these claims was unreasonable and has prejudiced Kravitz.

18 **Fourth Defense – Failure to Mitigate Damages**

19 4. PhoneDog’s claims are barred because PhoneDog has failed to mitigate its damages.  
20 The identity of the followers of Twitter handle @noahkravitz was, at all times, in the public domain  
21 and available to PhoneDog, however PhoneDog did not seek to attract these followers to a new  
22 Twitter handle or otherwise attempt to replace the advertising revenue it alleges it lost due to  
23 Kravitz’s use of the Account.

24 **Fifth Defense – Waiver and Estoppel**

25 5. PhoneDog’s claims are barred by the doctrines of waiver and/or estoppel as  
26 PhoneDog did not assert ownership over the Account at any time prior to July 2011—years after  
27 Kravitz began using the Account. Kravitz relied on PhoneDog’s statements that the Account was his  
28 and if the Account is returned to PhoneDog, Kravitz will lose the Twitter following that he spent

1 time and effort building. In addition, if Kravitz is required to pay damages to PhoneDog based on  
2 the size of the Twitter following he built while contributing to PhoneDog, then Kravitz will have  
3 unknowingly increased his liability to PhoneDog by detrimentally relying on PhoneDog's statements  
4 that he was entitled to permanent and exclusive use of the Account.

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

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

9 **Seventh Defense – Disclosure & Ratification**

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

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

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

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

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

26 **Tenth Defense – Transfer**

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

1 Account.

2 **Eleventh Defense – Miscalculation of Damages**

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

5 **Twelfth Defense – No Trade Secrets**

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

10 **Thirteenth Defense – Statute of Limitations**

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

18 **Fourteenth Defense – Implied License**

19 14. PhoneDog’s claims are barred by the doctrine of implied license because PhoneDog  
20 provided Kravitz with authorization, implied or explicit, to use the Account permanently.

21 **Fifteenth Defense – Forfeiture or Abandonment**

22 15. PhoneDog’s claims are barred to the extent it has forfeited or abandoned its right to  
23 use the Account.

24 **Sixteenth Defense – Innocent Intent**

25 16. PhoneDog’s claims are barred, in whole or in part, because Kravitz’s conduct was in  
26 good faith and with non-willful intent, at all times.





1 was receiving compensation from PhoneDog and noted that this “would be standard no-compete  
2 protocol for any company.”

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

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

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

### 19 The Twitter Account

20 13. On or about January 8, 2009, Kravitz began using a Twitter account (the “Account”)  
21 with the handle @PhoneDog\_Noah. On information and belief, another PhoneDog employee named  
22 Ryan Rae (“Rae”) created this Account using Twitter’s services and it was transferred to Kravitz by  
23 Rae in January 2009. After Rae provided Kravitz with access to the Account, Kravitz changed the  
24 password to the Account. After Kravitz changed the password to the Account, PhoneDog never  
25 again knew the password to the Account and never had access to the Account. In addition to  
26 maintaining the password to the Account, Kravitz controlled all content on the Account. At the time  
27 the Account was transferred to Kravitz, PhoneDog never expressed to Kravitz he would be required  
28 to return access to the Account to PhoneDog in the event he resigned from the company. Kravitz

1 understood it to be the case that he had permanent and exclusive access to the Account and that he  
2 was entitled to continued access even if he resigned from PhoneDog. Accordingly, after receiving  
3 access to the Account he immediately ceased using another Twitter handle (@kravykrav) that he had  
4 created in May 2008 and under which he had already built a following.

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

13 15. Beginning on the date Kravitz started using the Account and at all times thereafter,  
14 PhoneDog never controlled the Account and PhoneDog never informed Kravitz that it believed the  
15 Account was PhoneDog’s property. Kravitz would not have used the Account if PhoneDog had told  
16 him that he would be required to return it after he left the company. After Kravitz began using the  
17 Account, PhoneDog did not create a single one of the tweets from the Account—Kravitz generated  
18 all of them. At all times, the identity of the Account’s followers was public information accessible  
19 to PhoneDog and anyone else with access to Twitter. All of Kravitz’s tweets were publicly available  
20 as well.

21 16. Pursuant to Twitter’s Terms of Service (“Terms”), a Twitter account is not personal  
22 or intellectual property that belongs to Twitter users. Rather, Twitter agrees to offer users a set of  
23 services which include access to and use of Twitter’s websites (the “Services”). Each user’s right to  
24 use the Services is conditioned on acceptance and compliance with Twitter’s Terms. The Terms  
25 provide that “[a]ll right, title, and interest in and to the Service (excluding Content provided by  
26 users) are and will remain the exclusive property of Twitter and its licensors.” Thus, the Account  
27 does not belong to either Kravitz or PhoneDog. Rather, under the Terms, Kravitz, who for more  
28



1 than three years has been the exclusive user of the Account and rightful holder of the password, is  
2 the individual with the right to use the Services under the Terms.

3 17. Twitter has the exclusive right to “terminate users or reclaim usernames.” All of the  
4 Services belong to Twitter. Under the Twitter Rules, users of the Services are strictly prohibited  
5 from copying, selling, or trading the Services. Under the Terms, a user is responsible for  
6 safeguarding the password that they use to access the Services. In addition, Twitter users are strictly  
7 prohibited from making a profit off their accounts without specific permission from Twitter to do so  
8 and are further prohibited from selling their accounts.

9 **Use of the Account by Kravitz**

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

15 19. In October 2010, Kravitz elected to resign from PhoneDog. Immediately after his  
16 resignation, Kravitz changed the handle of the Account from @PhoneDog\_Noah to @noahkravitz.  
17 On October 14, 2010 Tom Klein expressly represented to Kravitz that he consented to Kravitz  
18 changing the Twitter handle. When a Twitter handle changes, the users that followed the account  
19 under its previous handle automatically continue following the account on its new handle. Kravitz  
20 informed PhoneDog prior to his resignation that he would be changing the Account’s handle.

21 20. Once Kravitz announced his resignation, PhoneDog, through its founder Tom Klein,  
22 provided Kravitz with oral assurances that he could retain the Account permanently after his  
23 separation from the company. PhoneDog again consented to Kravitz retaining the Account with a  
24 new handle when, on October 18, 2010, PhoneDog announced Kravitz’s resignation on its website.  
25 PhoneDog had complete control over this “Farewell Post” in which Kravitz stated that he did not  
26 know what job he would take next, but “[w]hatever I wind up doing, you can follow it on my little  
27 blog at <http://nk126.com> and on twitter at @noahkravitz.” Moreover, after his resignation  
28 PhoneDog uploaded a video to its YouTube channel that advertised Kravitz’s new handle

1 @noahkravitz. Kravitz relied on PhoneDog's previous assurances that he would continue to have  
2 the exclusive right to use the Account.

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

10 22. Beginning in December 2010 PhoneDog refused to provide Kravitz with the 15%  
11 share of gross revenue due to him under the Commission Agreement. As PhoneDog had refused to  
12 uphold its contractual obligations, Kravitz ceased tweeting on PhoneDog's behalf. Since his  
13 resignation, Kravitz's Twitter following has increased to over 24,000 followers. He has sent almost  
14 27,000 tweets.

### 15 **PhoneDog's Amended Complaint**

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

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

26 25. Kravitz has all the right to use the Services and the Account, subject to the interests  
27 retained by Twitter. Kravitz was not asked to relinquish use of the Account until nine months after  
28 he left PhoneDog. In fact, PhoneDog only asserted ownership over the Account after Kravitz filed

1 the State Court Litigation. Kravitz has not interfered with any of PhoneDog's relationships, nor has  
2 he discredited or disparaged PhoneDog. The allegations against Kravitz of moral turpitude made in  
3 PhoneDog's Amended Complaint and on its website have damaged his reputation and harmed his  
4 economic relationships.

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

8 **COUNT ONE**

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

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

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

15 29. A judicial declaration is necessary and appropriate to resolve this dispute.

16 30. Since Kravitz began using the Account, he has maintained exclusive possession and  
17 control over it. Kravitz only began using the Account because he believed that the Account was his  
18 to use permanently and that he had all rights to and interest in the Services. After he began using the  
19 Account, PhoneDog never expressed to Kravitz that it believed PhoneDog retained any right, title or  
20 interest in the Account or the Services. Following Kravitz's resignation, PhoneDog agreed that  
21 Kravitz had all rights to and interest in the Services subject to the rights retained by Twitter. Months  
22 after his resignation from PhoneDog, the company continued to request that Kravitz tweet on its  
23 behalf using the Account. PhoneDog thereby acquiesced to Kravitz's ownership of the Services and  
24 ratified his decision to retain the Account.

25 31. Industry precedent establishes that—absent a specific agreement to the contrary—an  
26 employer does not own any employee's Twitter account. An employer cannot prevent an employee  
27 from changing the handle of a Twitter account. There is no agreement between Kravitz and  
28 PhoneDog that PhoneDog owns the Account or has the right to use the Account. In fact, PhoneDog

1 previously agreed with Kravitz on a number of occasions that Kravitz would have permanent and  
2 exclusive use of the Account.

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

4 **COUNT TWO**

5 **Promissory Estoppel**

6 32. Kravitz restates and incorporates by reference his allegations in paragraphs 1-26 of  
7 his Counterclaims.

8 33. When Kravitz began using the Account in January 2009, Kravitz believed that he  
9 would be permitted to retain the Account going forward regardless of whether he continued to  
10 contribute to PhoneDog. Between January 2009 and October 2010, PhoneDog never told Kravitz  
11 that it believed the Account belonged to PhoneDog. Klein and PhoneDog benefitted from these  
12 statements because they induced Kravitz to use the Account and thereby drive traffic to PhoneDog's  
13 websites which increased PhoneDog's profits. In October 2010, PhoneDog's CEO, Tom Klein  
14 informed Kravitz that it had no objection to him retaining the Account after Kravitz left the  
15 company. Klein and PhoneDog benefited from this promise because it resulted in Kravitz  
16 continuing to tweet on PhoneDog's behalf. Kravitz reasonably believed these statements and  
17 justifiably relied on them.

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

19 35. Kravitz relied on these statements to his detriment. Before January 2009, Kravitz  
20 maintained a Twitter account under the handle @kravykrav. Kravitz ceased using this handle and  
21 began using the Account based on the understanding that he would have the permanent and  
22 exclusive right to use the Account. Between January 2009 and October 2010, under the belief that  
23 the Account was his to use permanently, Kravitz spent substantial time and effort increasing the  
24 Account's following and prominence. Since his resignation, Kravitz has sent thousands of tweets  
25 and has increased his Twitter following by more than 7,000, or 40%. If the Account is returned to  
26 PhoneDog, Kravitz will lose the following that he spent time and effort building. This loss can only  
27 be avoided if PhoneDog's promise to Kravitz that he could retain the Account is enforced.  
28



1 PhoneDog. At a minimum, PhoneDog's false promises will interfere with Kravitz's efforts to  
2 communicate with thousands of Twitter followers that began following his Account after he resigned  
3 from PhoneDog and thereby have no connection to PhoneDog or the Account when its handle was  
4 @PhoneDog\_Noah.

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

6 **COUNT FOUR**

7 **Negligent Misrepresentation**

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

10 42. In January 2009, Kravitz was under the belief that if he began using the Account, the  
11 Account and the Services were his to continue using permanently. PhoneDog never informed him  
12 otherwise. PhoneDog never expressed the belief that it possessed any right or interest in the  
13 Account or the Followers. After he resigned from PhoneDog, the company represented to Kravitz  
14 that he could continue to use the Account and the Services under the handle @noahkravitz. At this  
15 time, PhoneDog again represented that it possessed no right or interest in the Account or the  
16 Followers. At the time that PhoneDog made these representations, it had no reasonable grounds for  
17 believing that they were true.

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

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

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

1 **COUNT FIVE**

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

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

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

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

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

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

23 **COUNT SIX**

24 **Attempt to Impose and/or Enforce an Illegal Contract Term in Violation of Cal. Bus. & Prof.**  
25 **Code § 16600 *et seq.* and Cal. Bus. & Prof. Code § 17200 *et seq.***

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





1 him for his time and effort he spent building a Twitter following under the false  
2 pretense that Kravitz had the permanent and exclusive right to use the Account;

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

6 3. For the Third Counterclaim for False Promise, Kravitz prays for  
7 enforcement of PhoneDog's promise that the Account and the Services are his to keep  
8 permanently, Kravitz further requests damages in an amount to be proved;

9 4. For the Fourth Counterclaim for Negligent Misrepresentation, Kravitz  
10 prays for enforcement of PhoneDog's promise that the Account and the Services are  
11 his to keep permanently, Kravitz further requests damages in an amount to be proved;

12 5. For the Fifth Counterclaim for Unauthorized Use of Likeness in  
13 Violation of Cal. Civ. Code § 3344 and Cal. Bus. & Prof. Code § 17200, Kravitz  
14 prays for a temporary restraining order, a preliminary injunction, and/or permanent  
15 injunction enjoining PhoneDog from using Kravitz's likeness on the PhoneDog  
16 website, and for restitution in an amount to be proved.

17 6. For the Sixth Counterclaim for Attempting to Impose and/or Enforce  
18 an Illegal Contract Term in Violation of Cal. Bus. & Prof. Code § 16600 and Cal.  
19 Bus. & Prof. Code § 17200, Kravitz prays for restitution of his lost commissions and  
20 legal fees expended in the California Superior Court action and this action.

- 21 c. A declaration that PhoneDog's claims are barred by the doctrines of laches, equitable  
22 estoppel, and/or waiver;
- 23 d. An award to Kravitz of his reasonable costs and expenses of litigation, including  
24 expert witness and attorneys' fees;
- 25 e. Such other and further relief as this Court may deem just and proper.
- 26  
27  
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1 DATED: April 30, 2012  
2

3 By: /s/ Margaret A. Keane

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