Casenotes

CAN WE REALLY ASCRIBE A DOLLAR AMOUNT TO INTERPERSONAL COMMUNICATION? HOW *PHONEDOG V. KRAVITZ* MAY DECIDE WHO OWNS A TWITTER ACCOUNT

"*Can we really ascribe a dollar amount to interpersonal communication?*"[1]

—@noahkravitz

1. #Introduction

Twitter is a social media website that has exploded in the past five years, gaining in size, notoriety, and capability.[2] Launched in 2006 by a San Francisco, California dot-com company, Twitter was initially met with criticism.[3] Initially, much of the technology community projected that it would fail.[4] Recent years, however, have seen the public perception of Twitter change drastically.[5] In fact, it was projected that by March of 2012, Twitter would surpass 500 million registered users worldwide.[6] Twitter is now one of the primary

1. Noah Kravitz, Posting of @noahkravitz to Twitter (Dec. 30, 2011, 07:53 AM), *available at* https://twitter.com/noahkravitz/status/152779343901376512.

2. *See* Chelsea Doyle, *The History of Twitter*, Maine Today Digital (Dec. 21, 2011, 4:17 PM), http://www.mainetodaydigital.com/2011/the-history-of-twitter/ (noting that by 2009, Twitter was third most popular online social networking website); *id.* ("It's been five years since Twitter began, and every year it manages to grow bigger and better. It represents the internet's rapid progress and it shows no signs of slowing down anytime soon."); *see also Twitter News*, N.Y. Times (Dec. 19, 2011), http://topics.nytimes.com/top/news/business/companies/twitter/index.html?inline=nyt-org ("With more than 200 million accounts, Twitter is part of an elite group of social Web start-ups that have flourished in recent years by rapidly attracting users.").

3. *See Twitter News*, *supra* note 2 (discussing early ridicule of Twitter, "as it was derided as a high-tech trivia or the latest in time-wasting devices").

4. *See, e.g.*, Michelle Slatalla, *If You Can't Let Go, Twitter*, N.Y. Times (Feb. 14, 2008), http://www.nytimes.com/2008/02/14/fashion/14Cyber.html?pagewanted=1&_r=0moc.semityn.www&adxnnl=1&ref=twitter&adxnnlx=1348074292-sbcaLsuRGp9%20SZhAz9oJnA (discussing early confusion over functionality and purpose of Twitter).

5. *See Twitter News*, *supra* note 2 (noting new perception of, and respect for, Twitter after extensive use of Twitter to "organize protests and disseminate information in the face of a news media crackdown" during Iranian presidential election in June 2009).

6. *See* Lauren Dugan, *Twitter to Surpass 500 Million Registered Users on Wednesday*, AllTwitter, (Feb. 21, 2012, 12:30 PM), http://www.mediabistro.com/alltwitter/500-million-registered-users_b18842 (noting at time of writing, Twitter had 498,862,688 registered users, and was projected to pass 500 million next day); *id.*

and most efficient sources of news media, it affords businesses unique marketing capabilities, and it allows anyone and everyone to have their voice heard.[7] "Twitter is a way for the entire world – all around the world – to talk about what's happening right here and now in the fastest possible way. It's instant. If knowledge is power, Twitter is all knowing."[8]

Twitter's meteoric rise in popularity and social standing did not come without some costs.[9] Twitter quickly became the center of many legal battles, and to this day, there are still a myriad of issues that remain unresolved.[10] *PhoneDog v. Kravitz*, a recently spotlighted lawsuit between a mobile phone review website and a departed worker, has garnered national attention.[11] When this case is decided, it may shed light on who owns a Twitter account – the

("If Twitter keeps growing at this rate, it will reach 1 billion users in about a year and a half – but it might even be sooner than that, as its growth continues to accelerate.").

7. *See* Doyle, *supra* note 2 (noting rise of Twitter due to early use by celebrities, ease with which businesses could market deals and special events, and ability for people to "say anything [they] want[ ]"); *see also* Pedram Tabibi, *Legally Tweeting: 5 Legal Issues for Twitter Users*, LONG ISLAND BUS. NEWS, (Mar. 30, 2012), http://libn.com/youngisland/2012/03/30/legally-tweeting-5-legal-issues-for-twitter-users/ ("Twitter's popularity is growing by the day, and the Tweet is now a daily (and preferred) method of communication for many.").

8. Doyle, *supra* note 2.

9. *See* Tabibi, *supra* note 7 (discussing legal issues that have accompanied Twitter's expansion); *see also, e.g.*, *Editorial: As Twitter Expands, Legal Issues Abound*, STAR TRIBUNE (Minn.) (Feb. 7, 2012, 8:41 PM), http://www.startribune.com/opinion/editorials/138816249.html?refer=y (commenting on legal issues that have confronted Twitter during its rise to popularity).

10. *See* Tabibi, *supra* note 7 (outlining various legal issues, including employee/employer ownership of Twitter accounts, intellectual property, defamation, confidential information, and use of Twitter in trial proceedings); *see also Editorial: As Twitter Expands*, *supra* note 9 (detailing early legal issues confronted by Twitter, specifically pertaining to censorship).

11. *See* PhoneDog v. Kravitz, No. C 11-03474 MEJ, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011) [hereinafter Nov. 8 Opinion] (dealing with ownership and valuation of Twitter accounts); PhoneDog v. Kravitz, No. C 11-03474 MEJ, 2012 WL 273323, (N.D. Cal. Jan. 30, 2012) [hereinafter Jan. 30, 2012 Opinion] (dealing with same); *see also* Nancy Messieh, *PhoneDog v. Noah Kravitz: The Twitter Case Continues*, THE NEXT WEB (Feb. 12, 2012), http://thenextweb.com/socialmedia/2012/02/02/phonedog-vs-noah-kravitz-the-twitter-case-continues/ (discussing national media attention received by PhoneDog case due to potential impact on social media); Michele Sherman, *Do Your Social Media Accounts Belong to Your Business? Why Worry, When There Are Safeguards You Can Take Now*, 17 NO. 1 CYBERSPACE L. 18 (2012) ("The world is closely watching a federal case in the Northern District of California where a mobile news and reviews resource company . . . is suing a former employee (or independent contractor, depending on what news report you read) over who owns a Twitter account . . . ."); Maureen Minehan, *Protect Social Media Assets from Departing Employees*, 29 NO. 6 EMP. ALERT 1 (Mar. 22, 2012) ("Anticipating a surge in similar cases as companies increase their use of social media for marketing and other purposes, employment experts are watching the PhoneDog suit closely.").

employer or the employee.[12] Further, the case will be the first to deal with the valuation of Twitter followers, as the plaintiff in the suit is alleging damages in the amount of $2.50 per follower per month.[13]

The outcome of this case may have a profound impact on the use of social media, as businesses are increasingly using social media websites like Twitter and Facebook to communicate with fans and customers.[14] Because the law typically lags behind social developments and many legal situations of this nature have yet to be encountered, let alone adjudicated, "[t]his [case] will establish precedent in the online world, as it relates to ownership of social media accounts."[15] However, it is not entirely clear yet how influential this precedent will be.[16] The facts alleged in the case may ultimately confine the holdings to a narrow set of circumstances, leaving many questions still unanswered.[17]

This Comment examines *PhoneDog v. Kravitz*, focusing on the ownership and valuation issues central to the case. Part II will detail what Twitter is and how it works, and will outline how businesses are currently using Twitter.[18] Part III will introduce the factual and procedural history of *PhoneDog v. Kravitz*.[19] Part IV of this Comment will analyze PhoneDog's claims against Noah Kravitz and will opine as to the potential outcome of the claims.[20] Finally, Part V

12. *See* Nov. 8, 2011 Opinion, *supra* note 11, at *3-4 (discussing legal arguments of ownership for both sides).

13. *See id.* at *4 (discussing lack of industry standard for valuation of Twitter followers, noting that "there is no evidence that a Twitter account has any monetary value.").

14. *See* John Biggs, *A Dispute Over Who Owns a Twitter Account Goes to Court*, N.Y. TIMES, Dec. 25, 2011, at B1, *available at* http://www.nytimes.com/2011/12/26/technology/lawsuit-may-determine-who-owns-a-twitter-account.html (quoting statement of Henry J. Cittone); *see also Henry J. Cittone*, CITTONE & CHINTA LLP, http://cittonechinta.com/index.php/attorneys/henry-j-cittone/ (last visited Oct. 26, 2012) (detailing Cittone's intellectual property background).

15. *See id.* ("The lawsuit, though, could have broader ramifications than its effect on Mr. Kravitz and the company.").

16. *See* Sherman, *supra* note 11 ("PhoneDog does not enter court with the best of facts in order to decide [the] larger issues of interest to employers and the social media community.").

17. *See id.* (noting that facts alleged may not lead to strong precedent outside specific circumstances therein).

18. For a further discussion of Twitter, see *infra* notes 23-64 and accompanying text.

19. For a further discussion of PhoneDog v. Kravitz, see *infra* notes 65-145 and accompanying text.

20. For analysis of the issues presented in PhoneDog v. Kravitz, see *infra* notes 146-235 and accompanying text. It must be noted that at the time of the writing of this Comment, PhoneDog v. Kravitz is in the pleading stages of the suit. Any and all opinions as to the validity and potential outcomes of the claims are based solely

will provide concluding remarks and suggest some precautionary steps for both employers and employees to take in order to safeguard their use of social media websites.[21]

II. #TWITTER

"Following me will not cost me money. Seriously. Can't believe I'm saying this! Follow if you want, it's FREE! (please RT) #$2.50."[22]

—@noahkravitz

A. THE BASICS

According to Twitter's website, "Twitter is a real-time information network that connects you to the latest stories, ideas, opinions and news about what you find interesting. Simply find the accounts you find most compelling and follow the conversations."[23] To begin with, each Twitter user must create a unique Twitter username, or Twitter handle.[24] Upon signing into Twitter, each user has a personal profile page unique to that user.[25] From this profile page, a user can perform any number of actions, including sending out communications to other users and reading those messages sent out by other users.[26]

Twitter users communicate through short messages called tweets.[27] Each tweet can have a maximum of 140 characters.[28] The text box in which users compose their tweets poses the question:

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on complaints and other pleadings, and on rulings of the United States District Court for the Northern District of California on pretrial motions.

21. For concluding remarks and precautionary steps that employers might implement, see *infra* notes 238-252 and accompanying text.

22. Noah Kravitz, Posting of @noahkravitz to Twitter (Dec. 27, 2011, 1:08 PM), *available at* https://twitter.com/noahkravitz/status/151726156201213952.

23. *About*, TWITTER, https://twitter.com/about (last visited Mar. 14, 2012); *see also* Jennifer Benz, *Say it All in 140 Characters*, 23 EMP. BENEFIT NEWS 12 (2009), *available at* http://www.benzcommunications.com/files/documents/0000/0373/Say_it_all_.pdf (providing background information on Twitter); *What is Twitter*, TWEETERNET, http://tweeternet.com/#explained (last visited Mar. 14, 2012) ("Twitter is a social networking and microblogging service that allows you answer the question, '*What are you doing?*' by sending short text messages 140 characters in length, called 'tweets', to your friends, or 'followers.'").

24. *See* John Jantsch, *Using Twitter for Business*, JOHN JANTSCH.COM, 3 (2009) http://johnjantsch.com/TwitterforBusiness.pdf (explaining Twitter handle or username).

25. *See id.* (outlining features of profile page).

26. *See generally id.* (discussing uses of Twitter and utility for businesses).

27. *See About*, TWITTER, *supra* note 23 (noting that "[a]t the heart of Twitter are small bursts of information called tweets.").

28. *See id.* (noting that tweets can contain up to 140 characters); Steven Levy, *Twitter: Is Brevity the Next Big Thing?*, THE DAILY BEAST (Apr. 29, 2007, 8:00 PM), http://www.thedailybeast.com/newsweek/2007/04/29/twitter-is-brevity-the-next-

"What are you doing?"[29] A user may answer this question in a tweet, or transmit just about anything else to millions of other users around the world.[30] Tweets can contain photos, videos, and hyperlinks in addition to text, enabling users "to get the whole story at a glance, and all in one place."[31]

Twitter users may tweet as often as they like.[32] One can tweet by sending a message over the Twitter website directly, by using short message service ("SMS"), or through a third party application.[33] These messages are posted on the user's profile page, on the profile page of the user's "followers," and on the Twitter Public Timeline.[34] There is a search function on Twitter's homepage that allows a user to search for topics and people.[35] Additionally, users may choose to "follow" topics or people.[36] When one user follows another, all of the tweets by the followed user will appear on the following user's homepage.[37] A user's homepage consists of all tweets sent out by the accounts followed, in chronological order.[38] The "following" capability is akin to subscribing to a user's page in that all tweets by the users that you follow will come up on your timeline.[39]

These are some of the defining characteristics of Twitter that set it apart from most other social networking sites.[40] Specifically,

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big-thing.html (explaining 140 maximum and providing example of length of 140 characters for "yardstick" measurement).

29. *See What is Twitter*, *supra* note 23 ("explaining how users transmit tweets"); Rebecca Haas, Comment, *Twitter: New Challenges to Copyright Law in the Internet Age*, 10 J. MARSHALL REV. INTELL. PROP. L. 231, 232 (2010) (noting that tweets "generally answer one question: 'What are you doing?' ").

30. *See* Haas, *supra* note 29, at 236 ("Twitter users' answers vary, as some users' Tweets are akin to stream of consciousness, while others Tweet facts, share stories, or just keep tabs on each other.").

31. About, TWITTER, *supra* note 23.

32. *See* Levy, *supra* note 28 (noting that tweets may be sent as frequently as one desires).

33. *See What is Twitter*, *supra* note 23 (outlining ways in which tweets can be sent).

34. *See id.* (discussing ways in which users can access other users' tweets).

35. *See* Haas, *supra* note 29, at 236 (explaining search capabilities of Twitter).

36. *See id.* (outlining "following" function).

37. *See id.* (noting that once user has chosen to follow another user or topic, the follower receives all tweets sent out by accounts that he or she follows); *see also* Phillip Gragg & Christine L. Sellers, *Twitter*, 102 LAW LIBR. J. 325, 325 (2010) ("Following someone on Twitter means getting their updates in your personal time line. If you follow someone, you're their follower. If they follow you, they are your follower.").

38. *See What is Twitter*, *supra* note 23 (detailing homepage and noting chronological order of tweets).

39. *See id.* (comparing following feature to subscription).

40. *See id.* (discussing unique features of Twitter).

the short nature of tweets supports quick and informal information sharing, accessible to anyone, anywhere in the world.[41] Further, the "follow" function allows users to get messages and information from countless other users that one would not normally communicate with otherwise.[42]

Twitter has a number of other functions and capabilities that make it so attractive to personal users and businesses alike.[43] When creating a tweet, a user can direct that message to another person using the "@handle" function.[44] The person to whom the tweet is directed will see it in his or her own timeline, and while the tweet will still be transmitted to the public, this lets other readers know that the tweet was directed at a specific user.[45] Additionally, Twitter has a Direct Messaging ("DM") function in which a tweet is sent only to one person and cannot be seen by the public.[46]

Further, users may "retweet" messages to the public.[47] When a user retweets a message, the user is forwarding a tweet written by someone else such that it is more easily visible to the followers of the user that transmitted the retweet.[48] "Retweeting is . . . vital because it means if someone retweets your update, everyone on their list will see it too. That doubles or triples your viewership with one click. This is the essence of how the internet can spread like wildfire."[49]

Additionally, "hashtags" allow users to tag tweets with a topic.[50] Hashtags work by including the "#" symbol followed directly by one or more words or characters with no spaces.[51] These hashtags are an easy way for tweeters to link or connect their tweets to any given

41. *See id.* (discussing break from use of email and instant messaging services).

42. *See Twitter News*, *supra* note 2 ("Unlike most text messages, tweets are routed among networks of friends. Strangers, called 'followers,' can also choose to receive the tweets of people they find interesting.").

43. *See* Jantsch, *supra* note 24 (discussing various uses of Twitter enabled by specific functions, including search functions, lists, and retweets).

44. *See* Benz, *supra* note 23 (discussing Twitter lingo and explaining how users can communicate with specific people using this function). For example, someone who wanted to send a message to Noah Kravitz would include his Twitter handle "@NoahKravitz" somewhere in the tweet.

45. *See id.* ("[B]ut remember it is all public.").

46. *See id.* (noting that DM "is a private tweet.").

47. *See id.* (discussing retweet function).

48. *See* Doyle, *supra* note 2 (discussing retweet function and its ability to spread information quickly).

49. *Id.*

50. *See* Benz, *supra* note 23 (discussing hashtags).

51. *See* Jantsch, *supra* note 24 (noting that hashtags are "a way people categorize tweets so that others might use the same tag and effectively create a way for people to view related tweets. . . .").

topic, and users can search for topics, like people, on Twitter's homepage.[52] Also, frequently tweeted topics appear on each user's Twitter profile page, allowing users to easily follow those that are "trending up."[53]

One common criticism of Twitter is that it can become an information overload of sorts.[54] However, it is possible to whittle down the content such that it becomes manageable and easy to understand.[55] Twitter has a function where users can create lists of topics and other users.[56] For instance, a user could make a sports list, a news list, or a list of high school friends. Further, the list function allows each user to monitor other users without having to follow them and further clutter the user's personal homepage.[57]

B. TWITTER FOR BUSINESS

In recent years, Twitter has exploded on the business scene, providing an effective and efficient marketing and communication tool.[58] Without having to spend much time, or money for that matter, businesses are able to communicate with their customers and market their products and services to any one of Twitter's many users.[59] Additionally, once a company has become established in the "Twittersphere," it can target specific groups of followers depending on the message it wants to send.[60]

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52. *See* Benz, *supra* note 23 (noting that hashtags "allow[ ] anyone to easily follow a conversation or specific topic through search applications.").

53. *See id.* (discussing how hashtags are "trending up" when they are frequently used in the Twitter community).

54. *See id.* (noting that "many people describe Twitter as an online cocktail party, and while at first glance, there's just a bunch of noise, if you listen a little more clearly, you'll see that people are exchanging interesting and valuable information and/or just having a good time.").

55. *See* Jantsch, *supra* note 24 (outlining various methods to sort through massive amounts of information on Twitter).

56. *See id.* (explaining list function).

57. *See id.* ("You may actually want to follow people you find on a list, but you may also want to monitor industry niche lists for a week or two while you're pitching a new client in that industry. You can delete a list very easily, deleting hundreds of followers is harder.").

58. *See id.* ("As twitter has grown in popularity the ways that businesses and brands use the service has naturally evolved. While twitter is widely considered a tremendous tool for one to one engagement, relationship building and networking, it is also showing interesting opportunities for broadcast tactics.").

59. *See* Benz, *supra* note 23 (noting ease with which Twitter can be used by businesses).

60. *See* Jantsch, *supra* note 24 (discussing "evidence of organizations successfully using twitter to promote and broadcast content, events, campaigns and launches in ways that followers find valuable.").

Not only does Twitter allow businesses to broadcast information about their products, upcoming deals, and events, but it has become a useful way for businesses to converse with their customers.[61] Twitter can serve as a great market research tool, as businesses can easily follow what people are saying about them.[62] Companies can also reply to the customers, creating a more personal relationship between the business and its customer base.[63] Along these lines, many companies have started using Twitter as a help-desk.[64]

III. #FACTS: THE PHONEDOG CASE

"*Social Media Users: Be very careful when using your company's name in your online handles. Never know how/when your employers might react.*"[65]

—@noahkravitz

Section A of this Part will discuss the factual background of the PhoneDog case.[66] It will detail Kravitz's employment at PhoneDog, his responsibilities, including the use of the Twitter account, and the circumstances that led to the eventual filing of the suit.[67] Section B will provide a brief outline of the procedural history of the case, including information on the claims asserted by PhoneDog and the various counterclaims and motions filed by Kravitz.[68] Section B will then examine the Court's ruling on Kravitz's motion to dismiss for lack of subject matter jurisdiction. The analysis of

61. *See* Doyle, *supra* note 2 (discussing use of Twitter by businesses to broadcast promotional information to customers and followers).

62. *See* Jantsch, *supra* note 24 (recognizing utility of information Twitter can provide to companies).

63. *See* Doyle, *supra* note 2 (noting that businesses can "also converse with their customer. They can reply back and forth if the customer has a question, and it makes them feel heard. Respected.").

64. *See* Jantsch, *supra* note 24 (noting that recently, "something happened to customer support - a great deal of it moved on to twitter."); *see also id.* ("Now that twitter has grown to about 20 gazillion users almost any company can and should be offering customer service and support via this mechanism. The expectation is growing for some users that all companies provide a level of support using this platform.").

65. *See* Noah Kravitz, Posting of @noahkravitz to Twitter (Dec. 27, 2011, 4:18 PM), *available at* http://twitter.com/noahkravitz/status/151773991688867840.

66. For factual and procedural background of PhoneDog v. Kravitz, see *infra* notes 70-145 and accompanying text.

67. For information about Kravitz's employment, responsibilities, and account use, see *infra* notes 70-98 and accompanying text.

68. For discussion of procedural history of PhoneDog v. Kravitz, see *infra* notes 99-145 and accompanying text.

PhoneDog's claims, and opinions as to the potential outcome of each claim, will follow in Part IV of the Comment.[69]

A. Factual Background

PhoneDog Media operates an interactive website that provides news and product reviews for new and forthcoming mobile devices.[70] Established in 2001, the site operates as a privately owned and operated company based in South Carolina.[71] According to the profile of Tom Klein, CEO and Co-Founder of PhoneDog Media, the website has been developed "with a simple philosophy in mind: to provide the consumer with un-biased reviews and interesting content within the wireless industry."[72]

The site provides users with the resources needed to research and compare mobile devices, along with other information "that users rely on to make important decisions about their next mobile purchases."[73] Additionally, PhoneDog.com has an e-commerce wing that allows users to "shop from those providers that fit their needs."[74] Noting that the site attracts "2.5 million unique visitors each month," PhoneDog boasts that "[s]ite editors are highly engaged, frequently replying to comments and forum threads and elevating the conversation to the next level."[75]

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69. For analysis of PhoneDog's claims and their potential dispositions, see *infra* notes 144-219 and accompanying text.

70. *About Us*, PHONEDOG MEDIA, http://www.phonedog.com/content/aboutus/ (last visited Jan. 25, 2012) (outlining company profile); *see also* Sheri Qualters, *Who Owns Your Twitter Account? #Itmaynotbeyou*, NAT'L L.J. (Feb. 2, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202541203680 (noting that PhoneDog is online company that reviews mobile products and services).

71. *See About Us*, PHONEDOG MEDIA, *supra* note 70 (discussing origins of PhoneDog Media); *see also* Defendant's Notice of Motion and Motion to Dismiss Plaintiff PhoneDog, LLC's Complaint for Lack of Subject Matter Jurisdiction under Fed. R. Civ. Proc. Rule 12(b)(1) and for Failure to State a Claim under Fed. R. Civ. Proc. Rule 12(b)(6); Memorandum of Points and Authorities in Support Thereof at 2, PhoneDog v. Kravitz, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011) (No. C11-03474), 2011 WL 6955638 [hereinafter Defendant's First Motion to Dismiss] (noting that PhoneDog is incorporated in Delaware with its principal place of business in Mount Pleasant, South Carolina).

72. *TKDog*, PHONEDOG MEDIA, http://www.phonedog.com/authors/tkdog/ (last visited Jan. 25, 2012).

73. *About Us*, *supra* note 70 (describing PhoneDog.com).

74. *Id.* (outlining e-commerce wing).

75. *Id.* (describing PhoneDog.com). *But see* Plaintiff PhoneDog, LLC's Opposition to Defendant Noah Kravitz's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim at 1, PhoneDog v. Kravitz, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011) (No. 3:11-cv-03474-MEJ), 2011 WL 6955629 [hereinafter Plaintiff's First Opposition] (stating that "[e]ach month, PhoneDog's website attracts approximately 1.5 million users each month, and its videos reach an average audience of 3 million viewers per month.").

Noah Kravitz, the defendant in the suit, worked for PhoneDog in various capacities from April of 2006 until October of 2010.[76] During his time at PhoneDog, Kravitz worked as an editor, product reviewer, and video blogger.[77] His primary role was to submit both written and video content to the company that was then made available to PhoneDog's users.[78]

In a message to PhoneDog users addressing the lawsuit, CEO Tom Klein explained that at the time Kravitz joined PhoneDog, the company "was in the very early stages of becoming the personality-driven mobile tech review site it is today."[79] Klein further notes that PhoneDog found Kravitz to be a "very talented and charismatic editor/video blogger and an excellent addition to represent PhoneDog."[80] As such, PhoneDog took a number of steps to increase their public exposure and hired multiple public relations agencies in an effort to expand their reach.[81] To that end, PhoneDog sent Kravitz to trade shows around the world, and he was "frequently featured on CNBC, Fox Business, and other national and local media outlets."[82] Klein explains that through these efforts, the website increased in popularity and Kravitz "became a micro-celebrity of sorts."[83]

At some point during his time at PhoneDog, Kravitz began using a Twitter account with the Twitter handle @PhoneDog_Noah,

76. *See* Defendant's Reply to Plaintiff's Opposition to Motion to Dismiss Plaintiff PhoneDog, LLC's Complaint for Lack of Subject Matter Jurisdiction Under Fed. R. Civ. Proc. Rule 12(b)(1) And for Failure to State A Claim Under Fed. R. Civ. Proc. Rule 12(b)(6) at 2, PhoneDog v. Kravitz, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011) (No. C11-03474), 2011 WL 6955633 [hereinafter Defendant's First Reply] (noting specifically that Kravitz was not employee of PhoneDog, but was instead independent contractor); *see also* Nov. 8, 2011 Opinion, *supra* note 11, at *1 (outlining background of case); Brian Ries, *What Are Your Twitter Followers Worth, and Who Owns Them?*, THE DAILY BEAST, Dec. 28, 2011, *available at* http://www.thedailybeast.com/articles/2011/12/28/what-are-your-twitter-followers-worth-and-who-owns-them.html (reviewing factual history of suit).

77. *See* Plaintiff's First Opposition, *supra* note 75, at 1 (discussing Kravitz's employment and responsibilities).

78. *See id.* (describing Kravitz's role while working for PhoneDog); *see also id.* (noting that Kravitz's work was "transmitted to PhoneDog's users via a variety of mediums such as PhoneDog's website and PhoneDog's Twitter accounts.").

79. Tom Klein, *A Message to Our Fans About the Twitter Lawsuit*, PHONEDOG MEDIA (Jan. 3, 2012, 5:00 PM) http://www.phonedog.com/2012/01/03/a-message-to-our-fans-about-the-twitter-lawsuit/. In addition, Klein addressed the pending lawsuit, the facts leading up to the suit according to PhoneDog, and he thanked the fans for their support and understanding. *Id.*

80. *Id.*

81. *See id.* (discussing growth of PhoneDog).

82. *Id.* (noting PhoneDog's investment in Kravitz).

83. *Id.* (stating that "[w]hat started out as a small part-time freelance opportunity grew into a very well paid career for Noah.").

though it is disputed whether Kravitz created the account himself or if he was given use of the account after PhoneDog created it.[84] In time, the Twitter handle @PhoneDog_Noah would attract some 17,000 followers.[85] However, when Kravitz left the company, he took his account with him, changing the Twitter handle to @NoahKravitz.[86]

In its pleadings, PhoneDog alleges that it "granted [Kravitz] use of a Twitter account . . . to use in connection with his work for PhoneDog."[87] Additionally, PhoneDog alleges that upon his resignation in October of 2010, the company requested that he relinquish use of the account.[88] Kravitz, however, denied that he was ever asked to abandon the account.[89] In fact, Kravitz asserted that, because the parties were on good terms at the time of his departure, PhoneDog "repeatedly asked him to send out tweets on its behalf after he left . . . ."[90]

There is, additionally, an additional twist to the story. Over the five-year period that Kravitz worked for PhoneDog, he was compensated in a number of different ways.[91] Initially, Kravitz was paid for

84. *See* Plaintiff's First Motion to Dismiss, *supra* note 71, at 14 ("It should be noted that PhoneDog did not create the password to the account. Kravitz initially created the Account, including creating the Account's password."). *But see* First Amended Complaint for Damages and Injunctive Relief; Misappropriation of Trade Secrets; Intentional Interference with Prospective Economic Advantage; Negligent Interference with Prospective Economic Advantage; and Conversion ¶ 18, PhoneDog v. Kravitz, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011) (No. 3:11-cv-03474-MEJ), 2011 WL 6955632 [hereinafter First Amended Complaint] ("As an agent of PhoneDog, [Kravitz] was given use of and maintained the Twitter account '@PhoneDog_Noah.'").

85. *See* Ries, *supra* note 76 (indicating that Kravitz's 17,000 followers consisted of "friends, sources, colleagues, and readers, all interested in his particular blend of tech opinion and general insight on life on the West Coast.").

86. *See id.* (discussing change in Kravitz's twitter handle).

87. *See* Plaintiff's First Opposition, *supra* note 75, at 1 (discussing nature of Twitter account).

88. *See* Nov. 8, 2011 Opinion, *supra* note 11, at *1 (discussing allegations made by PhoneDog).

89. *See* Defendant's First Motion to Dismiss, *supra* note 71, at 2 (responding to PhoneDog's allegations).

90. *Id.*; *see also* Biggs, *supra* note 14 ("PhoneDog told him he could keep his Twitter account in exchange for posting occasionally."). Further, Biggs quotes Kravitz as saying that the company asked him to "tweet on their behalf from time to time and I said sure, as we were parting on good terms." *Id. But see* Plaintiff's First Opposition, *supra* note 75, at 5 ("[C]ontrary to the agreement between PhoneDog and Defendant that the Account was to be used for the benefit of PhoneDog, Defendant failed to respond to requests from PhoneDog to tweet and submit content to the Account promoting PhoneDog and instead used the Account to promote himself and TechnoBuffalo, a competitor of PhoneDog.").

91. *See* Defendant's First Motion to Dismiss, *supra* note 71, at 1 (detailing various forms of compensation).

each individual article that he wrote, then he was given a monthly fee for his work, and finally he received a percentage of company revenue and profits in exchange for his work.[92] In 2010, however, a dispute arose between Kravitz and the company, as Kravitz was allegedly owed "substantial unpaid wages and profits."[93] According to Kravitz's initial motion to dismiss in the present case, he attempted to "resolve the dispute informally."[94] However, his efforts were unsuccessful, prompting him to file suit in the California Superior Court in Alameda County on June 8, 2011.[95]

According to Kravitz, the present case brought by PhoneDog surrounding the Twitter account is in retaliation for the suit he commenced.[96] Specifically, Kravitz argues that PhoneDog has asserted four claims based on California law and an amount in controversy in excess of $75,000 in an effort to have his pending suit disrupted and removed to federal court.[97] According to Kravitz, this "constitutes improper forum shopping."[98] While these facts add intrigue and complexity to the story, discussion of Kravitz's pending suit for back pay and retaliatory lawsuits are outside the scope of this article.

B. Procedural History

On July 15, 2011, PhoneDog filed a complaint in the United States District Court for the Northern District of California against Kravitz.[99] Specifically, PhoneDog brought four claims against Kravitz under California law: (1) misappropriation of trade secrets; (2) intentional interference with prospective economic advantage; (3)

92. *See id.* (expanding on forms of compensation).

93. *Id.*; *see also* Biggs, *supra* note 14 (describing Kravitz's "claim to 15 percent of the site's gross advertising revenue because of his position as a vested partner, as well as back pay related to his position as a video reviewer and blogger for the site.").

94. Defendant's First Motion to Dismiss, *supra* note 71, at 1.

95. *See id.* (discussing pending state litigation).

96. *See id.* at 2 (noting timing of PhoneDog's Complaint and its lack of grievances prior to Kravitz's suit). Additionally, Kravitz asserts that PhoneDog raised four claims, all based on California law, in an effort to impede the progress of the litigation in state court and gain subject matter jurisdiction for federal court. *Id.; see also* Biggs, *supra* note 14 (discussing Kravitz's pending litigation in California and his assertion of retaliation).

97. *See* Defendant's First Motion to Dismiss, *supra* note 71, at 1 ("PhoneDog only now raises the meritless and unsupported issues in this suit for the first time as an attempt to prevent the Superior Court action from proceeding.").

98. *Id.* (discussing PhoneDog's claims).

99. *See* Nov. 8, 2011 Opinion, *supra* note 11, at *1 (discussing commencement of suit). For the factual background of *PhoneDog v. Kravitz*, see *supra* notes 70-98 and accompanying text.

negligent interference with prospective economic advantage; and (4) conversion.[100] In response to this Complaint, Kravitz filed a motion to dismiss the suit pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.[101]

In an Opinion dated November 8, 2011, the United States District Court for the Northern District of California, per Chief Judge Maria Elena James, addressed PhoneDog's claims and Kravitz's motion to dismiss.[102] The court denied Kravitz's motion to dismiss for lack of subject matter jurisdiction.[103] The court opined that because "whether the amount in controversy requirement is satisfied in this case is intertwined with factual and legal issues raised by Phonedog's claims . . . the issue cannot be resolved until summary judgment on a fully developed evidentiary record."[104]

Additionally, in the November 8 opinion, the court granted in part and denied in part Kravitz's motion to dismiss for failure to state a claim.[105] Specifically, the court preserved PhoneDog's claims of misappropriation of trade secrets and conversion.[106] PhoneDog's claims of intentional interference with prospective economic advantage and negligent interference with prospective economic advantage claims, however, were dismissed without prejudice.[107] In doing so, the court said that PhoneDog had not sufficiently alleged economic relationships with third parties.[108]

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100. *See* Nov. 8, 2011 Opinion, *supra* note 11, at *1 (listing claims brought by PhoneDog).

101. *See id.* at *1-2 (noting Defendant's response); Defendant's First Motion to Dismiss, *supra* note 71, at 2 (responding to PhoneDog's allegations).

102. *See* Nov. 8, 2011 Opinion, *supra* note 11, at *1 (denying Kravitz's 12(b)(1) motion and granting in part and denying in part his 12(b)(6) motion).

103. *See id.* at *5 (denying motion to dismiss for lack of subject matter jurisdiction).

104. *Id.* (discussing the court's opinion). For further discussion of the court's denial of Kravitz's motion to dismiss for lack of subject matter jurisdiction, see *infra* notes 115–145 and accompanying text.

105. *See* Nov. 8, 2011 Opinion, *supra* note 11, at *5-10 (granting Kravitz's motion to dismiss PhoneDog's claims for intentional interference with prospective economic advantage and negligent interference with prospective economic advantage while denying his motion to dismiss claims of misappropriation of trade secrets and conversion).

106. *See id.* (ruling on motion).

107. *See id.* (granting motion to dismiss both interference with prospective economic advantage claims with leave to amend).

108. *See id.* at *8 (noting that "it is unclear who the 'users' are,. [sic] i.e., whether they are the 17,000 Account followers, consumers accessing PhoneDog's website, or some other individuals, and what the nature of PhoneDog's purported economic relationship is with these users.").

Further, PhoneDog had not sufficiently alleged "actual disruption of the relationship between [PhoneDog] and its users and economic harm caused by Mr. Kravitz's actions."[109]

PhoneDog was afforded leave to amend these two claims, and subsequently filed its first amended complaint on November 29, 2011.[110] In response, Kravitz filed a motion to dismiss the two claims for interference with prospective economic advantage.[111] In a January 30, 2012 opinion, the court denied Kravitz's motion to dismiss on both counts.[112] In so holding, the court recognized that PhoneDog's first amended complaint cured the deficiencies present in the initial complaint.[113] All four of PhoneDog's claims will be analyzed in Part IV of this Comment.[114]

As noted above, the court denied Kravitz's motion to dismiss for lack of subject matter jurisdiction.[115] "Federal courts are courts of limited jurisdiction," possessing only that power authorized by

109. *See id.* (dismissing PhoneDog's claim because it failed to sufficiently allege which economic relationships were actually disrupted by Kravitz's alleged conduct.").

110. *See generally* First Amended Complaint, *supra* note 84; *see also* Jan. 3, 2012 Opinion, *supra* note 11, at *1 (noting November 8 disposition and PhoneDog's amended complaint).

111. *See generally* Defendant's Notice of Motion and Motion to Dismiss Plaintiff PhoneDog, LLC's Second and Third Claims for Relief in the First Amended Complaint Pursuant to Fed. R. Civ. Proc. Rule 12(b)(6); Memorandum of Points and Authorities in Support Thereof, PhoneDog v. Kravitz, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011) (No. C11-03474), 2011 WL 6955635 [hereinafter Defendant's Second Motion to Dismiss] (moving for dismissal for failure to state a claim).

112. *See* Jan. 30, 2012 Opinion, *supra* note 11, at *2 (denying Kravitz's motion to dismiss on both claims).

113. *See id.* at *1 ("PhoneDog's [first amended complaint] clarified that it had economic relationships with (1) the approximately 17,000 followers of the Twitter account at issue; (2) its current and prospective advertisers; and (3) CNBC and Fox News, and that each of these economic relationships were actually disrupted by Kravitz's conduct."); *see also* First Amended Complaint, *supra* note 84 ¶ 33 (alleging relationship with approximately 17,000 followers of Twitter account and "existing and prospective advertisers who pay for ad inventory on PhoneDog's website per 1000 pageviews"); *id.* ¶ 34 (alleging economic relationships with CNBC and Fox News); *id.* ¶ 36 (stating that Kravitz's "wrongful conduct was designed to disrupt, and has in fact disrupted, as well as adversely affected, PhoneDog's economic relationships with the PhoneDog followers and prospective users of the Account, and PhoneDog's existing and prospective advertisers who buy ad inventory on PhoneDog's website in that, as a result of Defendant's conduct, there is decreased traffic to Defendant's website through the Account, which in turn decreases the number of website pageviews and discourages advertisers from paying for ad inventory on PhoneDog's website. Moreover, as a result of Defendant's wrongful conduct, PhoneDog no longer has contributing spots on [CNBC and Fox News programs].").

114. For analysis of PhoneDog's claims against Kravitz moving forward, see *infra* notes 146–236 and accompanying text.

115. For a discussion of the court's denial of Kravitz's motion, see *supra* notes 103–104.

Article III of the United States Constitution and statutes enacted by Congress thereto.[116] Per 28 U.S.C. § 1331, Congress has conferred upon federal courts jurisdiction to decide federal questions, i.e., cases or controversies arising under the Constitution and laws of the United States.[117] Additionally, federal courts have jurisdiction over cases or controversies between citizens of different states, known as diversity jurisdiction, as granted by Congress in 28 U.S.C. § 1332.[118] The party asserting jurisdiction has the burden of proving that jurisdiction is proper.[119]

Unlike federal question jurisdiction, where the subject matter of the underlying suit determines if jurisdiction is proper, the parties involved in the suit are determinative of diversity of citizenship jurisdiction.[120] Pursuant to 28 U.S.C. § 1332, federal diversity jurisdiction exists only in "civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and cost, and is between – (1) citizens of different States . . . ."[121]

There is no dispute that PhoneDog and Kravitz are citizens of different states.[122] However, Kravitz asserts that PhoneDog has not met the burden of establishing that the amount in controversy is satisfied.[123] PhoneDog asserts that industry standards value each follower at $2.50 per month.[124] Accordingly, 17,000 followers is equal to $42,500 in damages for each of the eight months that Kravitz continued his use of the Twitter account, totaling $340,000 in damages at the time of filing.[125]

Kravitz's challenge of the amount in controversy is based on the contention that "PhoneDog cannot establish that it is entitled to any monetary recovery because it does not have competent proof

116. Craig A. Smith, *Civil Procedure*, LAWSCHOOLHELP.COM, http://www.west.net/~smith/smjuris.htm (last visited Mar. 8, 2012).

117. *See* 28 U.S.C. § 1331 (defining federal question jurisdiction).

118. *See* 28 U.S.C. § 1332 (defining diversity of citizenship jurisdiction)

119. *See* Smith, *supra* note 116 (discussing diversity jurisdiction).

120. *See id.* (discussing diversity jurisdiction).

121. 28 U.S.C. § 1332(a) (2006).

122. *See* Nov. 8, 2011 Opinion, *supra* note 11, at *2 (noting that Kravitz acknowledges diversity of citizenship between parties); *see also About Us*, PHONEDOG MEDIA, *supra* note 70 (noting that PhoneDog is South Carolina company); Defendant's First Motion to Dismiss, *supra* note 84, at 4 (noting that PhoneDog is incorporated in Delaware with its principal place of business in Mount Pleasant, South Carolina).

123. *See* Defendant's First Motion to Dismiss, *supra* note 71, at 2-3 ("PhoneDog cannot establish an amount in controversy over $75,000 through competent proof of damages as required by law.").

124. *See* Nov. 8, 2011 Opinion, *supra* note 11, at *3 (discussing PhoneDog's calculation of damages).

125. *See id.* (outlining calculation of alleged damages).

that it has ownership or right to possession over the Account or the followers."[126] Kravitz offers a number of arguments in support of this claim.[127] First, Kravitz contends that the Twitter account at issue, like "all Twitter accounts are . . . the exclusive property of Twitter and its licensors, not PhoneDog."[128] Next, Kravitz argues that Twitter followers have the discretion to follow or unfollow accounts without the permission of the handle user.[129] Along these lines, Kravitz makes the argument that the value of a Twitter account really "comes from . . . efforts in posting tweets and [an] individual's interest in following . . . not from the account itself."[130] Lastly, Kravitz makes the point that followers are humans and that since the passing of the Thirteenth Amendment to the United States Constitution, "humans in the United States are not 'property' and cannot be owned."[131]

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126. Defendant's First Motion to Dismiss, *supra* note 71, at 9.

127. *See id.* at 9-12 (arguing that all Twitter accounts are exclusive property of Twitter, that Twitter account followers are humans and cannot be property or owned, that there is no evidence that Twitter accounts have any monetary value, and that PhoneDog's valuation methodology is flawed); *see also id.* at 10 ("To date, the industry precedent has been that absent an agreement prohibiting any employee from doing so, after an employee leaves an employer, they are free to charge [sic] their Twitter handle.").

128. *Id.* at 9; *see also Terms of Service*, TWITTER, https://twitter.com/tos (June 25, 2012) ("All right, title, and interest in and to the Services (excluding Content provided by users) are and will remain the exclusive property of Twitter and its licensors.").

129. *See* Defendant's First Motion to Dismiss, *supra* note 71, at 9 (noting discretion each follower possesses). *But see Account Settings*, TWITTER, https://twitter.com/account/settings (authorizing Twitter users to protect their tweets). Twitter privacy settings allow users to set their accounts as private, which enables users to approve followers and keep their Tweets from the public. *Id.* "Protect your Tweets if you don't want them to be public. Approve who can follow you and keep your Tweets out of search results." *Id.* On Twitter's 'Help Center' page, privacy settings are explained:

> When you sign up for Twitter, you have the option of keeping your Tweets public (the default account setting) or protecting your Tweets. Accounts with public Tweets have profile pages that are visible to everyone. Accounts with protected Tweets require manual approval of each and every person who may view that account's Tweets. Only approved followers can view Tweets made on these accounts.

About Public and Protected Tweets, TWITTER, https://support.twitter.com/groups/31-twitter-basics/topics/107-my-profile-account-settings/articles/14016-about-public-and-protected-tweets (last visited Nov. 9, 2012).

130. Lauren Dugan, *How Much Is A Twitter Follower Worth? $2.50 Per Month According To One Company's Lawsuit*, ALLTWITTER (Nov. 14, 2011, 12:35 PM), http://www.mediabistro.com/alltwitter/twitter-follower-worth_b15763.

131. Defendant's First Motion to Dismiss, *supra* note 71, at 3; *see also* U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

PhoneDog will face an uphill battle trying to prove that the amount in controversy exceeds the required $75,000.[132] PhoneDog alleges that, per industry standards, each follower is worth $2.50 per month.[133] However, as Kravitz vehemently contests, "PhoneDog neither states that there is an actual recognized method to measure the value of a Twitter 'account', nor does it allege that its method of calculating the value of the Account is in accordance with 'industry standard.'"[134]

Kravitz is not the only one questioning how PhoneDog calculated their damages, with specific reference to the valuation of followers at $2.50 per month.[135] Some have argued that there are many factors that should be considered when valuing a Twitter account, including more than just the number of followers.[136] In fact, there are reports circulating the web indicating that a Twitter follower may be worth less than a penny.[137] Additionally, it is possible

132. *See* Biggs, *supra* note 14 (quoting Sree Sreenivasan, professor at Columbia Journalism School: "The value of the individual users is very hard to quantify. It's dangerous to overestimate the value of an account to an organization and underestimate what it means for an individual."); *see also Sree Sreenivasan*, COLUM. JOURNALISM SCH., http://www.journalism.columbia.edu/profile/65-sree-sreenivasan/10 (providing profession and biographical information).

133. *See generally* Nov. 8, 2011 Opinion, *supra* note 11 (noting PhoneDog's request for damages).

134. *See* Defendant's First Motion to Dismiss, *supra* note 71, at *10 (noting additionally that "PhoneDog also does not state how ProneDog [sic] profits off the Account or how an account can have any real value, especially when users are strictly prohibited from selling it or using for business purposes not specifically authorized by Twitter."); *see also* Lauren Campbell, *How Much is a Twitter Account Worth? (And Is It Enough to Keep You in Federal Court?)*, CITIZEN MEDIA LAW PROJECT, (Feb. 16, 2012) http://www.citmedialaw.org/blog/2012/how-much-twitter-account-worth-and-it-enough-keep-you-federal-court ("PhoneDog did not, however, define the 'industry standards' used to arrive at this amount, and it provided no further support for the $2.50-per-follower-per-month figure.").

135. *See* Jeff Roberts, *Can a Twitter Account be a Company Trade Secret?*, PAIDCONTENT.ORG, http://paidcontent.org/article/419-can-a-twitter-account-be-a-company-trade-secret/ (noting that PhoneDog's "'industry standard' metric may . . . be a touch optimistic").

136. *See* Campbell, *supra* note 134 ("It is going to be very hard for PhoneDog to establish accurate damages. In order to answer the question 'How much is the Twitter account worth?', a multitude of factors must be considered, not just the number of followers. If I were suggesting an accurate measurement, I might look at number of followers combined with the average tweets, click-thrus, retweets, mentions, etc., per day. And then create a complicated algorithm to put it in dollar terms. This starts, at least, to give a more accurate picture of how and how often people actually interact with your Twitter account, which is indicative of its value.").

137. *See* Jordan McCollum, *What Are Twitter Followers Worth? <1¢*, MARKETING PILGRIM (Feb. 1, 2010), http://www.marketingpilgrim.com/2010/02/twitter-followers-worth-1-cent.html ("[I]t turns out those followers are way overpriced—the going rate on eBay is less than 1¢ per follower.").

to purchase Twitter followers on eBay for "less than a penny each."[138]

There are a number of websites that claim to value Twitter accounts.[139] There is very little information about how these websites actually calculate the value of a Twitter account, and each website may value an individual account differently.[140] Under PhoneDog's valuation, Kravitz's Twitter account with approximately 17,000 followers would be worth $42,500 per month. But, if you apply PhoneDog's value-per-follower calculation to other Twitter accounts, the estimated values would be astronomical.[141] For example, Lady Gaga's Twitter account, with more than twelve million followers, would be valued at $30 million per month or $3.6 billion per year.[142] "This would make @ladygaga as profitable as the entire online dating industry."[143]

In the end, it is not clear how the Court will rule. At this stage, PhoneDog has alleged enough for the suit to go forward, but there is still much to be uncovered during discovery.[144] However, many of the facts that Kravitz alleges—specifically that he was an independent contractor as opposed to an employee and that he personally created the account—if true, could render this case less telling than initially anticipated.[145]

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138. Erick Schonfeld, *On eBay, Twitter Followers are Worth Less Than a Penny Each*, TECH CRUNCH (Jan. 31, 2010), http://techcrunch.com/2010/01/31/twitter-followers-ebay-penny/. *But see id.* ("You are not actually buying followers outright (Twitter doesn't allow people to transfer their followers), but rather services which 'guarantee' getting your account up to the promised number of followers through 'proven and safe methods.' Some even only count reciprocal followers (followers who follow back).").

139. *See* HOW MUCH IS YOUR TWITTER ACCOUNT WORTH?, http://whatsmytwitteraccountworth.com/ (last visited Mar. 21, 2012) (displaying worth of Twitter accounts entered into inquiry field); TWEET VALUE, http://tweetvalue.com/ (last visited Mar. 21, 2012) (displaying same); TWALUE, http://www.twalue.com/ (last visited Mar. 21, 2012) (displaying same).

140. *See* TWEET VALUE, *supra* note 139 ("This service was created by the Swedish entrepreneur and developer Jonas Lejon. The value is calculated with a Ph.D algoritm [sic] that is based on the public information available on your Twitter profile. uuhm. not really :-).").

141. *See* Campbell, *supra* note 134 (applying PhoneDog's equation to Lady Gaga's Twitter account).

142. *See id.*

143. *Id.*

144. *See* Nov. 8, 2011 Opinion, *supra* note 11, at *5 (noting that "the issue cannot be resolved until summary judgment on a fully developed evidentiary record.").

145. *See* Qualters, *supra* note 70 (quoting Eric Goldman, associate professor at Santa Clara University School of Law: "At most, it's going to answer questions about how the law applies to contractors."). Professor Goldman is also the director of the school's High Tech Law Institute. See *Eric Goldman*, SANTA CLARA LAW,

IV. #ANALYSIS

"*zpower: noahkravitz is it true that following you is a misdemeanor in the state of california?*"[146]

—@noahkravitz

A. Misappropriation of Trade Secrets

In California, a claim for misappropriation of trade secrets is governed by California's Uniform Trade Secrets Act, Cal. Civ. Code Section 3426 et seq., ("CUTSA").[147] To properly state a cause of action for misappropriation of trade secrets, a plaintiff must plead two primary elements: (1) the existence of a trade secret, and (2) misappropriation of the trade secret.[148]

1. *Trade Secrets*

Section 3526.1(d) of CUTSA defines a "trade secret" as

> information . . . that . . . derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and . . . is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[149]

In their initial complaint, PhoneDog alleged that their confidential information includes the passwords to Twitter accounts used by PhoneDog employees using the @PhoneDog_NAME handle.[150] Bolstering this argument, PhoneDog stated that it uses social media, including Twitter, Facebook, and YouTube, in an effort to pro-

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http://law.scu.edu/faculty/profile/goldman-eric.cfm (displaying faculty profile and biography of Professor Goldman); *Biography*, ERIC GOLDMAN, http://www.ericgoldman.org/biography.html (displaying biography of Professor Goldman).

146. Noah Kravitz, Posting of @noahkravitz to Twitter (retweeting @zpower) (Dec. 27, 2011, 1:13 PM) *available at* https://twitter.com/noahkravitz/status/151727294845681664/.

147. *See* CAL. CIV. CODE § 3426.1 (West) (providing definitions for misappropriation of trade secrets claim); *see also id.* § 3426 ("This title may be cited as the Uniform Trade Secrets Act.").

148. *See id.* (noting elements of misappropriation of trade secrets claim).

149. *Id.* § 3426.1(b) (defining "trade secret").

150. *See* Nov. 8, 2011 Opinion, *supra* note 11, at *1 ("According to PhoneDog, all @PhoneDog_Name Twitter accounts used by its employees, as well as the passwords to such accounts, constitute proprietary, confidential information."); First Amended Complaint, *supra* note 84 ¶ 15 (alleging that "confidential information includes, but is not limited to . . . the passwords to PhoneDog's Twitter accounts, including all @PhoneDog_NAME Twitter accounts used by PhoneDog's agents.").

mote the website and generate pageviews.[151] Specifically, PhoneDog alleges that the password to Kravitz's account derives actual and potential independent economic value for Kravitz.[152] PhoneDog essentially frames Twitter followers as a customer list, alleging that Kravitz used the account after his departure "with the intent and desire to further his career, to use and profit from such information, [and] to call on and solicit the very same users of PhoneDog's services. . . ."[153]

In response, Kravitz argued that the password to his Twitter account does not fall within the definition of a trade secret under the CUTSA.[154] First, Kravitz argues that the information that PhoneDog alleges is a trade secret does not fit the definition of a trade secret under the CUTSA because Twitter follower information is public.[155] Second, Kravitz alleges that PhoneDog "did not treat the information as a trade secret or take adequate steps to protect it."[156]

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151. *See* First Amended Complaint, *supra* note 84 ¶¶ 10-11 (discussing use of social media sites and explaining that pageviews generate income for PhoneDog through advertisements).

152. *See id.* ¶ 22 ("[Kravitz's] use of the Account and communication with PhoneDog's Followers is and was done in an attempt to market and advertise his services and the services of his [new] employer."); *see also* Qualters, *supra* note 70 (noting same PhoneDog claim).

153. First Amended Complaint, *supra* note 84 ¶ 27; *see also* Jane Genova, *Phonedog v. Noah Kravitz: Protecting IP*, THE MOTLEY FOOL (Feb. 3, 2012), http://beta.fool.com/janegenova/2012/02/03/phonedog-v-noah-kravitz-protecting-ip/1617/ (suggesting that PhoneDog is "framing the entity as a type of 'customer list.'").

154. *See* Defendant's First Motion to Dismiss, *supra* note 71, at 15 ("[P]asswords to Twitter accounts do not derive any actual or potential independent economic value under the UTSA"); Nov. 8, 2011 Opinion, *supra* note 11, at *6 (acknowledging Kravitz's argument that "the identity of the Account followers and the 'password' to the Account which PhoneDog alleges were misappropriated by Kravitz are not a 'trade secret' within the meaning of the [CUSTA].").

155. *See* Defendant's First Motion to Dismiss, *supra* note 71, at 14 ("The followers of the Account are not secret because they are and have been publicly available for all to see at all times."); *see also PhoneDog v. Kravitz*, TRADE SECRETS INST., http://tsi.brooklaw.edu/cases/phonedog-v-kravitz (noting Kravitz's argument in motion to dismiss for failure to state claim that public information such as followers of Twitter account cannot be trade secrets).

156. *See PhoneDog v. Kravitz*, TRADE SECRETS INST., *supra* note 155; *see also* Defendant's First Motion to Dismiss, *supra* note 71, at 15-16 (noting that PhoneDog did not create account's password and "did not make any reasonable effort to maintain the secrecy of the password to the Account which it now claims to be a trade secret."). Kravitz states that there was no written agreement "with respect to the proprietary or confidentiality of the Twitter passwords." *Id.* Further, employees were not required to "sign any non-disclosure or confidential agreement with respect to the Twitter accounts and passwords to maintain secrecy." *Id. But see* First Amended Complaint, *supra* note 84 ¶ 14 ("PhoneDog has taken and continues to take reasonable efforts to maintain the secrecy of this proprietary informa-

In *Morlife, Inc. v. Perry*, the California Court of Appeals for the First District discussed the issue of confidential customer lists constituting trade secrets.[157] In this case, the defendant resigned from his position after working for the plaintiff for six years.[158] Upon his departure, he took with him the business cards of customers he had acquired during his employment.[159] After leaving the plaintiff's company, the defendant opened his own business in the same field.[160] Further, the defendant contacted many of the customers that he had done work for while employed by the plaintiff.[161] The plaintiff filed suit after the defendants ignored a cease and desist letter.[162]

The appellate court held that the customer list constituted a trade secret as defined by the CUTSA.[163] In so holding, the court discussed the debate surrounding free competition in business and the protection of work product.[164] The court noted that when the California Legislature enacted the CUTSA, it was added to the list of states "which have determined that the right of free competition does not include the right to use confidential work product of others."[165]

The court held that in order for confidential information to have independent economic value such that it qualifies as a trade secret, "the secrecy of this information [must] provide[ ] a business with a 'substantial business advantage.'"[166] Additionally, the Court noted that traditionally, courts are not likely to protect customer lists "to the extent they embody information which is 'readily ascer-

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tion, including restricting access to, and distribution of, this confidential information only to agents of PhoneDog who need this information to perform services for PhoneDog.").

157. *See* Morlife, Inc. v. Perry, 66 Cal. Rptr. 2d 731, 736 (Ct. App. 1997) (discussing whether confidential customer lists are trade secrets).

158. *See id.* at 733 (outlining facts).

159. *See id.* (discussing facts).

160. *See id.* (explaining that defendant started his own company doing same work as plaintiff's company).

161. *See id.* (noting that business cards defendant took constituted approximately seventy-five to eighty percent of plaintiff's customer base).

162. *See id.* (discussing factual background of case).

163. *See id.* at 734 (outlining court's findings).

164. *See id.* at 734-736 (outlining enactment of CUTSA and discussing debate).

165. *See id.* at 735 (noting that CUTSA meant that California does not allow individuals to use others' confidential work products).

166. *See id.* at 736 (citing Klamath-Orleans Lumber, Inc. v. Miller, 151 Cal. Rptr. 118, 121 (Ct. App. 1978)).

tainable' through public sources, such as business directories."[167] Explaining that the business models at issue in the case were very unique, the court held that the customer list had a value to the defendants because it allowed them to solicit more effectively and efficiently to the specific and unique customers that the plaintiff had acquired over time.[168]

Kravitz claims that, unlike the customer list in *Morlife*, the followers of his Twitter account "are and have been publicly available for all to see at all times."[169] But this contention does not cover all of the bases. In order to access and take advantage of this customer list, or the followers of his account, Kravitz must use the password to access the account.[170] Each time Kravitz has accessed the Twitter account since his resignation from PhoneDog, he has used what PhoneDog believes to be its trade secret in order to derive the actual or potential economic value from the account.[171]

Possibly fatal to PhoneDog's claim is that Kravitz created the account and the password to the account himself.[172] Kravitz claims that he created the account on his own initiative to promote his freelance work, including the freelance work that he was doing for PhoneDog.[173] Additionally, Kravitz states that it was only after he created his account and used it to promote PhoneDog's website that PhoneDog requested that its other employees do the same.[174]

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167. *See id.* at 1521 (citing Am. Paper & Packaging Products, Inc. v. Kirgan, 228 Cal. Rptr. 713, 717 (Ct. App. 1986)).

168. *See id.* ("[Plaintiff] provides a relatively unusual roofing service, namely, commercial roof repair and maintenance, as distinguished from replacement roofing." Its customer list was "a compilation, developed over a period of years, of names, addresses, and contact persons, containing pricing information and knowledge about particular roofs and roofing needs of customers using its services: as such, it has independent economic value.").

169. *See* Defendant's First Motion to Dismiss, *supra* note 71, at 14; *see also* Sherman, *supra* note 11 (noting that with rapid growth of internet, "the universe of trade secret information is becoming smaller. This would seem especially true in the case of Twitter followers who are on a public list that can be viewed by anyone with a Twitter account.").

170. For information on how Twitter works, see *supra* notes 23-64 and accompanying text.

171. For an explanation of PhoneDog's allegations of the potential and actual economic value that Kravitz derives from use of the Twitter account, see *supra* note 153.

172. *See* Defendant's First Motion to Dismiss, *supra* note 71, at 15 ("It should be noted that PhoneDog did not create the password to the Account. Kravitz initially created the Account, including creating the Account's password.").

173. *See* Defendant's First Reply, *supra* note 76, at 3 ("Kravitz created the Account for his own personal use and to promote his freelance work, including freelance projects for PhoneDog.").

174. *See id.* at 2 ("[I]t was *after* Kravitz created the Twitter account . . . on his own initiative for personal and work-related purposes did PhoneDog then decided

With these facts in mind, it is hard to imagine that PhoneDog is entitled to the allegedly confidential password information.[175] PhoneDog's claim of a trade secret, therefore, seems tenuous at best.[176]

2. *Misappropriation*

The entire misappropriation claim will rest on whether PhoneDog can prove that the password to the account in fact constitutes a trade secret.[177] Assuming, *arguendo*, that PhoneDog is able to establish a trade secret, there are additional hurdles to overcome in order to prevail on the misappropriation of trade secrets claim.[178] Under the CUTSA, misappropriation means the following:

> (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
> (2) Disclosure or use of a trade secret of another without express or implied consent by a person who:
> (A) Used improper means to acquire knowledge of the trade secret; or
> (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:
> (i) Derived from or through a person who had utilized improper means to acquire it;
> (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
> (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

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[sic] request its 'employees' use their existing Twitter accounts or create such accounts for similar reasons.").

175. *See* Messieh, *supra* note 11 ("The problem with the PhoneDog vs. Noah Kravitz case is that, while the Twitter account bore the PhoneDog name, and Kravitz's position as editor-in-chief no doubt earned him more exposure, the account was maintained entirely by Kravitz personally.").

176. For a further discussion of PhoneDog's claim of trade secret, see *supra* notes 149-175 and accompanying text.

177. For discussion of the elements of misappropriation of trade secrets claim, see *supra* notes 147-148 and accompanying text.

178. For the definition of "misappropriation" under CUTSA, see *infra* note 179 and accompanying text.

> (C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.[179]

Working through the elements of misappropriation, it does not appear from the pleadings that any of Kravitz's actions constitute misappropriation.[180]

According to the pleadings, Kravitz's actions did not violate section 3426.1(b)(1).[181] Specifically, Kravitz created the account and the password himself, so he did not acquire it by improper means.[182] Section 3426.1(a) states, "improper means includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means."[183] Kravitz allegedly created the account and password himself, which renders the use of the account after his resignation outside the scope of this provision.[184]

The CUTSA also provides that misappropriation can include "use of a trade secret of another without express or implied consent."[185] PhoneDog is unclear as to whether it requested that Kravitz stop using the account upon his departure from the company.[186] Kravitz, however, claims that that PhoneDog made no request for him to stop using the account and that, in fact, PhoneDog requested that he continue to use the account to promote their website.[187] Further, none of Kravitz's alleged actions fall

179. *See* CAL. CIV. CODE § 3426.1(b) (2012).

180. For discussion of the facts, see *supra* notes 70-98 and accompanying text.

181. For allegations that Kravitz created the account and password, see *supra* note 84 and accompanying text.

182. *See id.*

183. § 3426.1(a).

184. For a discussion of the account creation, see *supra* notes 69-96 and accompanying text.

185. § 3426.1(b)(2).

186. *Compare* Nov. 8, 2011 Opinion, *supra* note 11, at *1 (explaining that at time Kravitz left company, "PhoneDog requested that he relinquish use of the Twitter account"), *with* Plaintiff's First Opposition, *supra* note 75, at 5 ("[C]ontrary to the agreement between PhoneDog and Defendant that the Account was to be used for the benefit of PhoneDog, Defendant failed to respond to requests from PhoneDog to tweet and submit content to the Account promoting PhoneDog and instead used the Account to promote himself and TechnoBuffalo, a competitor of PhoneDog.").

187. *See* Defendant's First Motion to Dismiss, *supra* note 71, at 2 ("PhoneDog never expressed any disapproval of Kravitz's use of the Account at issue, and in fact repeatedly asked him to send out tweets on its behalf after he left employment with PhoneDog in October 2010.").

within the remaining elements of Section 3426.1(b)(2).[188] Since there was no formal agreement between the parties about Kravitz's use of the account after his departure, with the exception of a possible request by PhoneDog that he continue to promote their website, it is unlikely that PhoneDog will prevail under the consent provision.[189]

B. Intentional Interference with Prospective Economic Advantage

PhoneDog's second claim for relief is for intentional interference with prospective economic advantage.[190] As noted by Kravitz in his August 4, 2011 motion for summary judgment, "the tort of intentional or negligent interference with prospective economic advantage imposes liability for improper methods of disrupting or diverting the business relationship of another which fall outside the boundaries of fair competition."[191]

In *Korea Supply Co. v. Lockheed Martin Corp.*, the Supreme Court of California compiled and summarized the elements of the tort as:

> (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual

188. *See* § 3426.1(b)(2)(A)-(C) ("(2) Disclosure or use of a trade secret of another without express or implied consent by a person who: (A) Used improper means to acquire knowledge of the trade secret; or (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was: (i) Derived from or through a person who had utilized improper means to acquire it; (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or (C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.").

189. For a discussion of the consent provision, see *supra* notes 185-188 and accompanying text.

190. *See generally* Nov. 8, 2011 Opinion, *supra* note 11 (acknowledging and ruling on PhoneDog's claim of intentional interference with prospective economic advantage).

191. Defendant's First Motion to Dismiss, *supra* note 71, at 17 (quoting Settimo Assocs. v. Environ Sys., Inc., 17 Cal. Rptr. 2d 757, 758 (Ct. App. 1993)). The *Settimo* court stated that the tort of intentional or negligent interference with prospective economic advantage "is premised upon the principle [that] '[e]veryone has the right to establish and conduct a lawful business and is entitled to the protection of organized society, through its courts, whenever that right is unlawfully invaded.'" *Settimo*, 17 Cal. Rptr. 2d at 758 (internal citations omitted) (quoting Inst. of Veterinary Pathology, Inc. v. Cal. Health Labs., Inc., 172 Cal. Rptr. 74, 81-82 (Ct. App. 1981)).

> disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.[192]

PhoneDog claims to have economic relationships with three different third parties: (1) the followers of the Twitter account; (2) current and prospective advertisers; and (3) CNBC and Fox News.[193] Kravitz's initial motion to dismiss for failure to state a claim on this count rested primarily on his contention that PhoneDog had not sufficiently alleged the existence of any economic relationship between PhoneDog and the followers of the disputed Twitter account.[194] While PhoneDog asserted that it "has had and continues to enjoy relationships with existing and prospective users of its mobile news and review services," the Court was unsatisfied and granted Kravitz's motion to dismiss the claim.[195] On this point, the Court stated that PhoneDog's allegations were unclear as to "who the 'users' are,. [sic] *i.e.*, whether they are the 17,000 Account followers, consumers accessing PhoneDog's website, or some other individuals, and what the nature of PhoneDog's purported economic relationship is with these users."[196]

To overcome the motion for summary judgment, PhoneDog cured the above deficiencies in its first amended complaint.[197] In particular, PhoneDog alleged that it had actual economic relationships with the 17,000 followers of the Twitter account, with current and prospective advertisers, and with CNBC and Fox News.[198] Kra-

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192. Korea Supply Co. v. Lockheed Martin Corp., 131 Cal. Rptr. 2d 29, 45 (Ct. App. 2003) (quoting Westside Ctr. Assocs. v. Safeway Stores 23, Inc. 49 Cal. Rptr. 2d 793, 802 (Ct. App. 1996)); *see also* Nov. 8, 2011 Opinion, *supra* note 11, at *7 (citing CRST Van Expedited v. Werner Enter., Inc., 479 F.3d 1099, 1108 (9th Cir. 2007)) (stating what plaintiff must establish under claim for intentional interference with prospective economic advantage).

193. First Amended Complaint, *supra* note 84 ¶¶ 19, 33, 34 (listing economic relationships).

194. Defendant's First Motion to Dismiss, *supra* note 71, at 18 ("PhoneDog did not allege that there was an *actual* economic relationship with any Twitter followers.").

195. *See* Plaintiff's First Opposition, *supra* note 75, at 13; *see also* Nov. 8, 2011 Opinion, *supra* note 11, at *8 (noting lack of clarity and conclusory nature of PhoneDog's pleading and granting motion to dismiss claim).

196. Nov. 8, 2011 Opinion, *supra* note 11, at *8.

197. *See* First Amended Complaint, *supra* note 84 ¶¶ 19, 33, 34 (stating economic relationships existed with 17,000 followers of Twitter account, current and prospective advertisers, and CNBC and Fox News).

198. *See id.* (outlining economic relationships).

vitz still argued that PhoneDog's pleadings were insufficient to demonstrate proper economic relationships.[199]

The Court held that, while Kravitz contested all three alleged economic relationships asserted by PhoneDog, only one of these relationships had to actually meet the elements of the tort for the claim to move forward.[200] The Court stated that the relationship between PhoneDog and its current and prospective advertisers did in fact meet each element of the claim.[201]

This ruling rested on the allegations made by PhoneDog that "[a] significant source of PhoneDog's income derives from advertisements being sold on its website. PhoneDog's advertisers pay for ad inventory on PhoneDog's website for every 1000 pageviews generated from users visiting PhoneDog's website."[202] In so holding, the Court seems to be approving of a broad theory of economic interference.[203] Specifically, it seems that this theory "would sweep up a lot of otherwise innocent conduct."[204]

Of the three economic relationships asserted by PhoneDog, the relationship with prospective advertisers seems like the relationship most likely to succeed under this claim.[205] Based on PhoneDog's factual allegations pertaining to the income it derives

199. *See* Defendant's Second Motion to Dismiss, *supra* note 111, at 7 ("PhoneDog's second claim for relief must be dismissed because the [First Amended Complaint] still fails to allege sufficient facts to state a claim upon which relief can be granted.").

200. *See* Jan. 30, 2012 Opinion, supra note 11, at *1 ("For PhoneDog to have properly alleged its second claim, only one of the [stated] economic relationships has to meet the elements of the tort.").

201. *See id.* (discussing explicit allegations in PhoneDog's First Amended Complaint regarding decreased traffic to PhoneDog website that discourages advertisers from buying ad space on website). *But see id.* n.2 ("Kravitz's concerns that the nature of PhoneDog's relationships with both the Twitter followers as well as CNBC and Fox News are not 'economical' are more properly addressed by a motion for partial summary judgment rather than a motion to dismiss, particularly where there is another economic relationship being pled by PhoneDog (i.e., the current advertisers).").

202. First Amended Complaint, *supra* note 84 ¶ 10. *But see* Nichole Kelly, *2011 Trending Topic: Social Media ROI*, SOCIAL MEDIA EXPLORER (Apr. 21, 2011), http://www.socialmediaexplorer.com/social-media-measurement/social-media-roi/ (submitting that most companies experience negative economic returns on investment into social media marketing).

203. *See* Venkat Balasubramani, *Court Denies Kravitz's Motion to Dismiss PhoneDog's Amended Claims—PhoneDog v. Kravitz*, TECH. & MKTG. LAW BLOG (Jan. 31, 2012), http://blog.ericgoldman.org/archives/2012/01/court_denies_kr.htm (noting court's statement that this is sufficient at pleading stage).

204. *Id.*

205. *See* Jan. 30, 2012 Opinion, *supra* note 11, at *1 (stating that alleged relationship between PhoneDog and current and prospective advertisers suffices for claim).

from advertisements and how traffic on the website plays a direct role in the amount of advertisements that PhoneDog sells, it seems straightforward enough to view this as an economic relationship to satisfy the first element of the claim.[206] Further, the fact that Kravitz previously used the Twitter account in a manner that encouraged and directed traffic to the site, and no longer does, is an important factor regarding the harm suffered by PhoneDog.[207]

In reference to PhoneDog's alleged economic relationship with the followers and prospective users of the Twitter account, Kravitz argues that it is unclear what exactly the purported economic relationship is.[208] While PhoneDog's economic relationships with its current and future advertisers seem clear enough, its purported economic relationships with the followers of the Twitter account and with CNBC and Fox News are more tenuous.[209] PhoneDog has alleged no facts that support the claim that there was an economic relationship between it and the Twitter followers or between it and CNBC and Fox News.[210]

PhoneDog would be better off asserting that these two relationships, though not economical in a way that meets the elements of the claim, factor into the overall calculus of lost revenue in the form of lost advertisement sales.[211] PhoneDog would have a strong argument here, and potentially in other claims, if it asserts that Kravitz's actions in diverting followers from PhoneDog's website resulted in lost advertisement sales – not that PhoneDog had any relationship with those followers.[212] The same idea applies to

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206. *See id.* (noting that, while claims seem weak, this alleged economic relationship is strongest).

207. *See* First Amended Complaint, *supra* note 84 ¶ 36 ("[A]s a result of [Kravitz's] conduct, there is decreased traffic to [PhoneDog's] website through the Account, which in turn decreases the number of website pageviews and discourages advertisers from paying for ad inventory on PhoneDog's website.").

208. *See* Jan. 30, 2012 Opinion, *supra* note 11, at *1 (noting Kravitz's opposition to purported economic relationship).

209. *See* Venkat Balasubramani, *An Update on PhoneDog v. Kravitz, the Employee Twitter Account Case*, TECH. & MKTG. LAW BLOG (Jan. 11, 2012), http://blog.ericgoldman.org/archives/2012/01/an_update_on_th.htm (noting that PhoneDog's interference with economic advantage claims "look tenuous—especially the one about the disruption of economic relationship between PhoneDog and the followers of Kravitz's Twitter account.").

210. *See* Defendant's Second Motion to Dismiss, *supra* note 111, at 7 (responding to plaintiff's allegations).

211. *See* Jan 30, 2012 Opinion, *supra* note 11, at *1 (outlining court's approach to evaluating economic interference).

212. For PhoneDog's claims of loss of advertisement revenue, see *supra* note 197 and accompanying text.

PhoneDog's association with CNBC and Fox News.[213] Since Kravitz had formerly promoted PhoneDog's website when he appeared on programs on those networks, and he no longer does, the result is decreased traffic to the website.[214] Claiming that there are in fact economic relationships with the followers and with the television networks is probably not PhoneDog's strongest strategy – the focus should be on the harm suffered.

In fact, the court hints that the economic relationships that PhoneDog alleges it had with the Twitter followers and with CNBC and Fox News is weak at best.[215] In a footnote of the January 30 opinion, the court says that Kravitz's attempt to remove the Twitter followers and the television networks would be better suited in a motion for summary judgment as opposed to a motion to dismiss.[216] The reoccurring question throughout this litigation is whether PhoneDog will be able to prevail on its claim for intentional interference with prospective economic advantage.

C. Negligent Interference with Prospective Economic Advantage

The court initially dismissed PhoneDog's claim for negligent interference with prospective economic advantage for the same reasons as the intentional interference claim.[217] Citing deficiencies in PhoneDog's pleadings as to the existence of economic relationships, the court gave this claim little analysis in either of its opinions.[218] While similar to the intentional interference claim, there are different elements.[219] Specifically, the elements of negligent interference with prospective economic advantage are:

> (1) an economic relationship existed between the plaintiff and a third party which contained a reasonably probable

213. For PhoneDog's relationship claims, see *supra* note 193 and accompanying text.

214. For PhoneDog's relationship claims, see *supra* note 195 and accompanying text.

215. *See* Jan. 30, 2012 Opinion, *supra* note 11, at *1 n.2 (suggesting that Kravitz's concerns might be more appropriately addressed with motion for partial summary judgment).

216. *See id.* ("Kravitz's concerns that the nature of PhoneDog's relationships with both the Twitter followers as well as CNBC and Fox News are not 'economical' are more properly addressed by a motion for partial summary judgment rather than a motion to dismiss, particularly where there is another economic relationship being pled by PhoneDog (i.e., the current advertisers).").

217. *See* Nov. 8, 2011 Opinion, *supra* note 11, at *10 (summarizing part of court's holding).

218. *See id.* at *8-9 (setting forth deficiencies in pleadings).

219. For a discussion of the elements of the claim, see *infra* note 220 and accompanying text.

> future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship.[220]

As noted above, the economic relationships that PhoneDog alleges are suspect, though there is a reasonable argument for the validity of the relationship with current and prospective advertisers.[221] The second prong of the claim deals with the defendant's knowledge of the relationships and knowledge of the implications that his or her actions might have.[222] Having worked with—or for—PhoneDog for nearly five years (depending on which set of pleadings are found to be more accurate), it is not hard to imagine that Kravitz knew that the majority of the website's revenues stemmed from advertisement sales.[223] In taking his account with him, and subsequently directing his 17,000 plus followers to a competing website, Kravitz at the very least should have known that he would be affecting PhoneDog's ability to sell advertisements.[224]

However, as is always the case in any negligence claim, the plaintiff must show that the defendant owed a duty of care.[225] "The tort of negligent interference with economic relationship arises only when the defendant owes the plaintiff a duty of care."[226] As

220. North American Chemical Co. v. Sup. Court, 69 Cal. Rptr. 2d 466, 479 (Ct. App. 1997).

221. *See* Jan. 30, 2012 Opinion, *supra* note 11, at *1 ("[T]he alleged relationship between PhoneDog and its current and prospective advertisers suffices.").

222. *See* Defendant's Second Motion to Dismiss, *supra* note 111, at 7 ("(2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship. . . . ").

223. For discussion of the alleged facts, see *supra* notes 70-98 and accompanying text.

224. *See id.* (summarizing what Kravitz should have reasonably known).

225. *See generally* Defendant's Second Motion to Dismiss, *supra* note 111, at 10 (noting duty of care requirement for negligence tort claims).

226. LiMandri v. Judkins, 60 Cal. Rptr. 2d 539, 551 (Ct. App. 1997) (citing Stolz v. Wong Communications Ltd. P'ship, 31 Cal.Rptr.2d 229, 238 (Ct. App. 1994)).

noted in the court's November 8 opinion, "[a]mong the criteria for establishing a duty of care is the blameworthiness of the defendant's conduct. For negligent interference, a defendant's conduct is blameworthy only if it was independently wrongful apart from the interference itself."[227]

PhoneDog failed to allege that Kravitz owed them a duty of care in their initial pleadings, and the court therefore granted Kravitz's motion to dismiss this claim.[228] However, in the first amended complaint, PhoneDog did allege that Kravitz owed a duty of care, resulting in denial of Kravitz's second motion to dismiss the claim.[229] Addressing the blameworthiness of Kravitz's actions aside from the interference itself, PhoneDog states that his conduct was "intended to affect PhoneDog" and that Kravitz "took advantage of PhoneDog's economic relationships with CNBC and Fox News in order to usurp PhoneDog's contributing spots on [television programs], such that PhoneDog is no longer able to promote and market its services and website on those programs."[230] Further, PhoneDog cites the misappropriation of trade secrets and conversion claims against Kravitz as evidence of his wrongful conduct.[231]

It is unclear whether this claim will succeed. The success of the claim hinges on PhoneDog's ability to prove its other claims.

D. Conversion

PhoneDog's final claim asserts that Kravitz wrongfully converted the Twitter account upon his departure from the company.[232] The elements of a conversion claim under California law are: "(1) ownership of a right to possession of property; (2) wrong-

227. *See* Nov. 8, 2011 Opinion, *supra* note 11, at *9 (internal quotation marks omitted).

228. *See id.* ("With respect to PhoneDog's allegation that Mr. Kravitz interfered with the economic relationship between it and its users, the court agrees with Mr. Kravitz that PhoneDog has failed to allege that Mr. Kravitz owed it a duty of care.").

229. *See* Jan. 30, 2012 Opinion, *supra* note 11, at *2 (quoting First Amended Complaint, *supra* note 84 ¶ 42) ("PhoneDog's FAC now asserts that '[Kravitz] owed a duty of care to PhoneDog as an agent of PhoneDog.'").

230. Plaintiff PhoneDog, LLC's Opposition to Defendant Noah Kravitz's Motion to Dismiss Plaintiff PhoneDog LLC's Second and Third Claims for Relief in the First Amended Complaint Pursuant to Fed. R. Civ. Proc. Rule 12(b)(6) at 10-11, PhoneDog v. Kravitz, No. 3:11-cv-03474-MEJ, 2012 WL 28098 (N.D. Cal. Jan. 5, 2012).

231. *See id.* (noting that other claims, if proven, would evidence wrongful conduct independent from interference itself).

232. *See* Plaintiff's First Opposition, *supra* note 75, at 16 (noting that PhoneDog requested that Kravitz relinquish account, that he did not, and that it has suffered harm as result).

ful disposition of the property right of another; and (3) damages."[233] Obviously, this claim is at the heart of the case. The facts are contested such that it is difficult to determine at this point whether PhoneDog will be able to prove that it in fact owns or has the right to immediately possess the account.[234] While Kravitz contends that PhoneDog has failed to allege facts that support the conversion claim, the court simply noted that, "the nature of [the] claim is at the core of this lawsuit and cannot be determined on the present record."[235] Many facts still need to be determined, for this claim and for others; so further analysis of the conversion claim at this time is not warranted.[236]

V. #CONCLUSION

"Your 'brand', personal or corporate [sic], is very important in the Social Media Age. Embrace contracts, don't fear them. Get it in writing!"[237]

—@noahkravitz

It is difficult to predict how this case will be resolved.[238] Some commentators believe that this should have been settled in the early stages of litigation, and that it still might be settled before trial.[239] In the event this case does get litigated, however, it may not

233. *See* Nov. 8, 2011 Opinion, *supra* note 11, at *9 (citing G.S. Rasmussen & Assoc. v. Kalitta Flying Serv., 958 F.2d 896, 906 (9th Cir. 1992)).

234. *See* Scott Palamondon, *Is Your Twitter Account a Trade Secret?*, THE IP LAW BLOG (Nov. 22, 2011), http://www.theiplawblog.com/archives/-trade-secrets-is-your-twitter-account-a-trade-secret.html (stating "[u]ltimately, because the PhoneDog ruling was not based on the substance of PhoneDog's claims, the court has provided no significant guidance . . ." as to suit's possible outcome).

235. *See* Nov. 8, 2011 Opinion, *supra* note 11, at *9 (discussing findings of court).

236. *See id.* (interpreting court's stance that present record is insufficient to rule on specific issue).

237. Noah Kravitz, Posting of @noahkravitz to Twitter (Dec. 27, 2011, 2:14 PM), *available at* https://twitter.com/noahkravitz/status/151742692823547905.

238. *See* Minehan, *supra* note 11 (quoting John Barry, partner at Proskauer Rose: "We are right at the tipping point where we're going to see lots of these cases. . . . Are Twitter followers or other social media followers property of the company or are they personal followers? There's no clear answer yet."); *see also John P. Barry*, PROSKAUER ROSE LLP, http://www.proskauer.com/professionals/john-barry/ (last visited Sept. 18, 2012) (displaying biographical and professional information about John Barry).

239. *See* Balasubramani, *supra* note 203 (discussing court's denial of Kravitz's motion to dismiss PhoneDog's amended claims, stating: "I thought PhoneDog's claims were weak at best, and the court could have whittled down the litigation and guided the parties to their ultimate destination – settlement – by culling some of the claims, but no such luck."); Venkat Balasubramani, *Courts Says Employer's Lawsuit Against Ex-Employee Over Retention and Use of Twitter Account can Proceed—PhoneDog v. Kravitz*, TECH. & MKTG. LAW BLOG (Nov. 10, 2011) ("This case has mediation written all over it.").

have the profound implications that many thought it might.[240] At this stage, the initial pleadings are the only source of facts, and many material issues are disputed among the parties.[241] Whether Kravitz was an employee of PhoneDog could be dispositive of the case.[242] He claims to have only been a freelance writer, contracted with PhoneDog to supply them with reviews and other content.[243] If this is the situation, "the case is unlikely to resolve questions about how the law applies to employees in Twitter ownership disputes with companies."[244]

Importantly, even though there has yet to be a final disposition of the suit, there are measures that can be taken by employers to avoid contentious situations like the one present in *PhoneDog v. Kravitz*.[245] Citing Benjamin Franklin, one commentator notes that in regard to social media use in the business world, "[a]n ounce of prevention is worth a pound of cure."[246] To begin with, everything

240. *See* Sherman, *supra* note 11 ("PhoneDog does not enter court with the best of facts in order to decide [the] larger issues of interest to employers and the social media community.").

241. For discussion of the alleged facts, see *supra* notes 70-98 and accompanying text.

242. *See supra* notes 243-244 (discussing impact ofKravitz's employment status on potential outcomes).

243. For information on Kravitz's contentions that he was not an employee of PhoneDog, but an independent contractor, see *supra* note 70 and accompanying text.

244. *See* Qualters, *supra* note 70 (citing Eric Goldman). For more information about Eric Goldman, see *supra* note 145.

245. *See* Maxine Neuhauser & Susan Gross Sholinsky, *Ownership of Work-Related Social Media: Could My Employer Really Own My Twitter and LinkedIn Accounts?*, THOMSON REUTERS (Feb. 24, 2012), http://newsandinsight.thomsonreuters.com/Legal/Insight/2012/02_-_February/Ownership_of_work-related_social_media__Could_my_employer_really_own_my_Twitter_and_LinkedIn_accounts_/ ("Companies, their lawyers, and the courts must keep up with the changes in the workplaces that social media and technology bring nearly daily."). Further, Neuhauser & Gross Sholinsky state that "[t]he following advice is not new, but never the less remain fresh: The best way to protect a company's intellectual property is through written agreements, oversight, and enforcement." *Id.*; *see also* Minehan, *supra* note 11 (outlining problems faced by employers and steps employers should take to protect social media assets). "While cases like PhoneDog's begin to wend their way through the courts, establishing precedent, employers should be taking steps on their own to protect themselves." *Id. See also* Sherman, *supra* note 11 (providing various issues faced by employers and employees pertaining to social media accounts in business or commercial settings and recommending precautionary measures); Genova, *supra* note 152 (examining *PhoneDog* case and suggesting methods to avoid such issues).

246. Shawne Tuma, *Your Business Needs a Social Media Policy and This is Why*, BRITTON TUMA (Dec. 30, 2011), http://shawnetuma.com/2011/12/30/your-business-needs-a-social-media-policy-and-this-is-why/ (providing Franklin quotation as maxim for employers to consider, stating "[t]hat old saying could not be more true than when it comes to having a social media policy for your business."). For another source providing this quotation of Benjamin Franklin, see *The Electric Ben*

should be in writing.[247] Contracts and policies should reflect that all social media accounts are being developed for the employer, and that the employer intends to retain all ownership rights to the account and content of the account.[248] Further, employers should update non-solicitation agreements to preclude employees from contacting former customers through social media.[249]

It is also important for employers to take an active role in the use of social media as an advertising tool for their brand.[250] This includes requiring that multiple employees use social media in an effort to "[e]stablish a connection between followers and the brand, not followers and the individual doing the posting."[251] Further, by having various employees administering a single account, employers are better able to "assert[ ] control over the account . . . [and] demonstrate 'ownership' of the account."[252]

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Franklin: The Quotable Franklin, USHISTORY.ORG, http://www.ushistory.org/franklin/quotable/singlehtml.htm (last visited Mar. 21, 2012).

247. *See* Minehan, *supra* note 11 (suggesting employers should address social media ownership in policies and contracts); *see also id.* ("The best course of action is to consult with legal counsel to craft policies that clearly assert the rights of employers to social media accounts used on their behalf and to the material created within them.").

248. *See id.* (suggesting that companies specify social media ownership in contracts and policies).

249. *See id.* (noting importance of removing geographical restrictions in non-solicitation agreements because they are no longer useful in social media age).

250. *See* Sherman, *supra* note 11 (suggesting measures for employers to take to control use of social media).

251. *See* Minehan, *supra* note 11 (quoting business uses for social media).

252. *See* Sherman, *supra* note 11 (describing safeguards for businesses' ownership of social media accounts).

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