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7 **UNITED STATES DISTRICT COURT**
8
9 **NORTHERN DISTRICT OF CALIFORNIA**

10 PHONEDOG, LLC, a Delaware) CASE NO. C11-03474
11)
Plaintiff,) **DEFENDANT’S REPLY TO**
12) **PLAINTIFF’S OPPOSITION TO**
v.) **MOTION TO DISMISS**
13) **PLAINTIFF PHONEDOG, LLC’S**
NOAH KRAVITZ, an individual,) **COMPLAINT FOR LACK OF**
14) **SUBJECT MATTER**
Defendants.) **JURISDICTION UNDER FED. R.**
15) **CIV. PROC. RULE 12(b)(1)AND**
16) **FOR FAILURE TO STATE A**
17) **CLAIM UNDER FED. R. CIV.**
18) **PROC. RULE 12(b)(6)**
19) **Date: September 15, 2011**
20) **Time: 10:00 a.m.**
21) **Dept.: Courtroom B – 15th Floor**
22) **Judge: Maria-Elena James**
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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES ii

I. INTRODUCTION..... 1

II. DEFENDANT KRAVITZ DISPUTES THE “ADDITIONAL FACTS” PRESENTED BY PLAINTIFF IN ITS OPPOSITION..... 2

III. PHONEDOG’S COMPLAINT SHOULD BE DISMISSED UNDER FRCP 12(b)(1) BECAUSE PHONEDOG FAILED TO MEET ITS BURDEN TO ESTABLISH SUBJECT MATTER JURISDICTION 3

 A. PhoneDog Incorrectly Places the Burden of Proof on Kravitz 3

 B. Kravitz’s 12(b)(1) Motion is Clearly a “Factual Attack” Which Challenges Subject Matter Jurisdiction as a Matter of Fact..... 4

 C. PhoneDog Fails to Provide Competent Proof to Establish Subject Matter Jurisdiction 6

IV. PLAINTIFF PHONEDOG’S COMPLAINT SHOULD BE DISMISSED UNDER FRCP 12(b)(6) BECAUSE THE FACTUAL ALLEGATIONS IN PHONEDOG’S COMPLAINT FAILS TO STATE A CLAIM..... 8

 A. PhoneDog’s Factual Allegations Must Show a “Plausible” Claim and the Court Must Disregard Conclusory Allegations in the Complaint 8

 B. PhoneDog’s Factual Allegations are Not Sufficient to Show a Plausible Claim For Misappropriation of Trade Secrets 9

 C. PhoneDog’s Factual Allegations are Not Sufficient to Show a Plausible Claim For Intentional Interference with Prospective Economic Advantage 10

 D. PhoneDog’s Factual Allegations are Not Sufficient to Show a Plausible Claim For Negligent Interference with Prospective Economic Advantage 11

 E. PhoneDog’s Factual Allegations are Not Sufficient to Show a Plausible Claim For Conversion..... 11

V. CONCLUSION 12

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FEDERAL CASES

<i>Arpin v. Santa Clara Valley Transp. Agency</i> 261 F.3d 912 (9th Cir. 2001).....	2
<i>Ashcroft v. Iqbal</i> 129 S. Ct. 1937 (2009).....	1, 8, 11
<i>Bell Atlantic Corp. v. Twombly</i> 550 U.S. 544 (2007).....	1, 8
<i>Bellock v. Orkin Exterminating Co., Inc.</i> 754 F.Supp.122 (N.D. Ill. 1990).....	4, 5
<i>Bissessur v. Indiana Univ. Bd. Trustees</i> 581 F.3d 599 (7th Cir. 2009).....	8
<i>Butler v. Los Angeles County</i> 617 F.Supp.2d 994 (C.D. CA 2008).....	2
<i>Diefenthal v. C.A.B.</i> 681 F.2d 1039 (5th Cir. 1982).....	4, 5
<i>Farmilant v. Singapore Airlines, Ltd.</i> 561 F.Supp.1148 (N.D. Ill. 1983).....	5, 6
<i>Gibbs v. Buck</i> 307 U.S. 66 (1939).....	4
<i>In re American Cont'l Crop/Lincoln Sav. & Loan Sec. Litig.</i> 102 F.3d 1524 (9th Cir. 1996).....	11, 12
<i>Janda v. Madera Community Hosp.</i> 16 F.Supp.2d 1181 (E.D. Cal 1998).....	10, 11
<i>Kokkonen v. Guardian Life Ins. Co. of America</i> 511 U.S. 375 (1994).....	4
<i>Musson Theatrical, Inc. v. Federal Express Corp.</i> 89 F.3d 1244 (6th Cir. 1996).....	5
<i>NLFC, Inc. v. Devcom Mid-America, Inc.</i> 45 F.3d 231 (7th Cir. 1995).....	6
<i>Rexford Rand. Corp. v. Ancel</i> 58 F.3d 1215 (7th Cir. 1995).....	4
<i>Roberts v. Corrothers</i> 812 F.2d 1173 (9th Cir. 1987).....	4
<i>Sanchez v. Monumental Acceptance Corp.</i> 102 F. 3d 298 (9th Cir. 1995).....	4

1 *Stock West, Inc. v. Confederated Tribes of Colville Reservations*
 873 F.2d 1221 (9th Cir. 1989)..... 4

2 *TMX Funding, Inc. v. Impero Technologies, Inc.*
 3 2010 U.S. Dist. LEXIS 60260 (N.D. Cal. June 17, 2010) 9

4 **FEDERAL STATUTES**

5 28 U.S.C. § 1332 12

6 Fed. R. Civ. P. 12(b)(1)..... *passim*

7 Fed. R. Civ. P. 12(b)(6)..... *passim*

8 **STATE CASES**

9 *Diodes, Inc. v. Franzen*
 260 Cal.App.2d 253 (1968)..... 9

10 *Morlife, Inc. v. Perry*
 56 Cal.App.4th 1514 (1997)..... 9

11 **STATE STATUTES**

12 California Uniform Trade Secret Act

13 Cal. Civ. Code §§3426, et seq..... 9

14
 15
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 18
 19
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 21
 22
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1 **I. INTRODUCTION**

2 Defendant Noah Kravitz (“Kravitz”) hereby submits this Reply to Plaintiff PhoneDog,
3 LLC’s (“PhoneDog”) Opposition to his Motion to Dismiss (“PhoneDog’s Opposition”).
4 Because Kravitz challenged PhoneDog’s Complaint as a matter of *fact* under FRCP 12(b)(1)
5 (“factual attack”), PhoneDog was required to furnish competent proof to establish that the
6 amount in controversy exceeds \$75,000. Rather than furnish the necessary evidence to support
7 the claims in its Complaint, however, PhoneDog instead attempts to introduce alleged
8 “additional facts” in its Opposition and materially alters its original theory for recovery of
9 damages. Nonetheless, PhoneDog’s new alleged facts should not be considered in the ruling of
10 this motion as it has no bearing on PhoneDog’s Claims for Relief. PhoneDog also
11 inappropriately places the burden of proof on Kravitz and urges the court to lower the standard
12 of proof because it cannot satisfy its burden of establishing federal jurisdiction. Because
13 PhoneDog cannot establish that the amount in controversy is in excess of \$75,000, the Court
14 must dismiss the Complaint for lack of subject matter jurisdiction.

15 Additionally, PhoneDog’s Opposition misstates the applicable legal standard in ruling
16 on a FRCP 12(b)(6) motion. PhoneDog inappropriately attempts to mislead the Court to lower
17 the legal standard and accept its conclusory allegations as true so that the Court rules in its
18 favor. Nonetheless, PhoneDog’s Complaint must be dismissed under FRCP 12(b)(6) because
19 it does not contain sufficient “factual allegations” to show a plausible claim for any of its
20 Claim for Relief under the *Twombly/Iqbal* standard. *Bell Atlantic Corp. v. Twombly*, 550 U.S.
21 544, 555 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

22 As discussed in Kravitz’s Motion to Dismiss, this suit was brought by PhoneDog in
23 response to Kravitz filing suit in the California Superior Court in Alameda County (Alameda
24 Superior Court, Case No. RG11579535). It is evident that PhoneDog only now raises the
25 meritless and unsupported issues in this suit in an inappropriate attempt to forum shop. Such
26 improper conduct should not be encouraged by this Court and the Court must dismiss
27 PhoneDog’s Complaint.
28

1 **II. DEFENDANT KRAVITZ DISPUTES THE “ADDITIONAL FACTS”**
2 **PRESENTED BY PLAINTIFF PHONEDOG IN ITS OPPOSITION**

3 First, the alleged “additional facts” presented in PhoneDog’s Opposition to Kravitz’s
4 Motion to Dismiss (“PhoneDog’s Opposition”) were not pleaded in its Complaint and therefore
5 cannot be considered whatsoever in ruling on Kravitz’s FRCP 12(b)(6) motion. *See, Arpin v.*
6 *Santa Clara Valley Transp. Agency* 261 F.3d 912, 925 (9th Cir. 2001); *Butler v. Los Angeles*
7 *County* 617 F.Supp.2d 994 (C.D. CA 2008).

8 Further, the alleged “additional facts” is another improper and desperate attempt by
9 PhoneDog to meet the jurisdictional limit to invoke federal jurisdiction. Nowhere in its
10 Complaint did PhoneDog make any assertion regarding revenues from selling advertisements
11 on its website. In fact, none of the four (4) Claims for Relief in PhoneDog’s Complaint alleged
12 any damages based upon lost advertisement revenues as a result of Kravitz’s conduct. Rather
13 than present the necessary evidence to support its existing allegations for damages in its
14 Complaint, PhoneDog is instead attempting to materially alter its underlying theory for
15 recovery of damages in hopes that it meets the jurisdictional limit. Nonetheless, the
16 “additional facts” regarding the lost advertisement revenues should not be considered in ruling
17 on Kravitz’s Motion to Dismiss because it is immaterial to PhoneDog’s Claims for Relief.

18 Additionally, many, if not all, of PhoneDog’s new factual contentions are wholly
19 inaccurate and misleading. Whether or not PhoneDog requests its “employees” maintain
20 Twitter accounts is irrelevant to Kravitz’s case for several reasons. *See* PhoneDog’s
21 Opposition at pp. 2. First, Kravitz was never an “employee” of PhoneDog, he was an
22 independent contractor. *See*, Supplemental Declaration of Noah Kravitz (“Supp. Kravitz
23 Decl.”) ¶3. Second, PhoneDog never requested Kravitz maintain a Twitter account for the
24 benefit of PhoneDog. *See*, Supp. Kravitz Decl. ¶6. In fact, it was *after* Kravitz created the
25 Twitter account (the “Account”) on his own initiative for personal and work-related purposes
26 did PhoneDog then decided to request its “employees” use their existing Twitter accounts or
27 create such accounts for similar reasons. *See*, Supp. Kravitz Decl. ¶6.

1 Contrary to PhoneDog's assertion, Kravitz never agreed to maintain the Account for the
2 benefit of PhoneDog. *See*, Supp. Kravitz Decl. ¶7. Kravitz created the Account for his own
3 personal use and to promote his freelance work, including freelance projects for PhoneDog.
4 *See*, Supp. Kravitz Decl. ¶5. Despite no agreement with PhoneDog, Kravitz responded to all of
5 PhoneDog's requests "to tweet or publish articles and promotions on the Account." Supp.
6 Kravitz Decl. ¶8.

7 At all times, Kravitz has been the *only* person who has ever used, accessed and
8 maintained the Account. *See*, Supp. Kravitz Decl. ¶10. In fact, Kravitz has been the only
9 person to ever have knowledge of the password to the Account. *See*, Supp. Kravitz Decl. ¶11.
10 PhoneDog's allegation that it "makes every effort to maintain the secrecy of the passwords"
11 (*See*, PhoneDog's Opposition at pp. 2) is completely irrelevant here because PhoneDog never
12 knew the Account's password to be able to make any effort to maintain its secrecy.

13
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15 **III. PHONEDOG'S COMPLAINT SHOULD BE DISMISSED UNDER FRCP**
16 **12(b)(1) BECAUSE PHONEDOG FAILED TO MEET ITS BURDEN TO**
17 **ESTABLISH SUBJECT MATTER JURISDICTION**

18 **A. PhoneDog Incorrectly Places the Burden of Proof on Kravitz**

19 Throughout its Opposition, PhoneDog repeatedly and incorrectly places the burden of
20 proof on Kravitz to establish that the court lacks subject matter jurisdiction. For example,
21 PhoneDog's Subsection I.A. under "ARGUMENT" in its Opposition is titled "Defendant
22 Cannot Establish That PhoneDog Cannot Meet The Amount in Controversy." *See*,
23 PhoneDog's Opposition at pp. 4. Moreover, PhoneDog contends that the Kravitz's 12(b)(1)
24 motion to dismiss should be denied because "the extrinsic evidence offered by Defendant to
25 prove otherwise does not demonstrate with a legal certainty that PhoneDog's damages do not
26 exceed \$75,000". *See*, PhoneDog's Opposition at pp. 3. Similarly, PhoneDog's contention
27 that employers have "ownership rights" over their employees' Twitter accounts because
28 Kravitz did not provide sufficient proof to establish that an employer has no ownership rights
over a Twitter account. *See*, PhoneDog's Opposition at pp. 7.

1 Contrary to PhoneDog's contention, the law clearly establishes that as the party
2 invoking the Court's jurisdiction, PhoneDog bears the burden of establishing federal subject
3 matter jurisdiction. *See*, Kravitz's Motion to Dismiss at pp. 6-7; *see also*, *Diefenthal v. C.A.B.*,
4 681 F.2d 1039, 1053 (5th Cir. 1982) (parties invoking federal diversity jurisdiction must show
5 the basis for the amount of damages they claim before allowing the expense and burden of full
6 trial on the merits); *Gibbs v. Buck*, 307 U.S. 66, 72 (1939) (plaintiff has the burden of showing
7 that "it does not appear to a legal certainty that his claim is for less than the jurisdictional
8 limit"); *see also* *Bellock v. Orkin Exterminating Co., Inc.*, 754 F.Supp.122 (N.D. Ill. 1990);
9 *Rexford Rand. Corp. v. Ancel*, 58 F.3d 1215, 1218 (7th Cir. 1995).

10 In effect, the courts presume lack of jurisdiction until the party invoking jurisdiction
11 proves otherwise. *See e.g. Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 376-
12 378 (1994); *Stock West, Inc. v. Confederated Tribes of Colville Reservation*, 873 F.2d 1221,
13 1225 (9th Cir. 1989). In meeting its burden, PhoneDog must provide plausible evidence that it
14 is "more likely than not" that the amount in controversy exceeds \$75,000. *See, e.g., Sanchez v.*
15 *Monumental Acceptance Corp.*, 298 U.S. 178, 189 (1936). Because PhoneDog failed to meet
16 its burden of proof, the Court must dismiss the Complaint.

17
18 **B. Kravitz's 12(b)(1) Motion is Clearly a "Factual Attack" Which Challenges**
19 **Subject Matter Jurisdiction as a Matter of Fact**

20 Kravitz's 12(b)(1) motion challenging the Court's jurisdiction is clearly a "factual
21 attack", based upon extrinsic evidence quite apart from PhoneDog's Complaint. As stated in
22 Kravitz's Motion to Dismiss, the Court is not required to accept the allegations in the
23 Complaint as true when a factual attack is made. *See*, Kravitz's Motion to Dismiss at pp. 7-8.
24 Rather, the Court considers the evidence presented before it and determines the facts for itself.
25 *Id.* at pp. 8. "[T]he existence of disputed material facts will not preclude the trial court from
26 evaluating itself the merits of jurisdictional claims." *Roberts v. Corrothers*, 812 F.2d 1773,
27 1177.

1 Here, Kravitz introduced substantial admissible *extrinsic evidence* for the Court to
2 consider in ruling on the motion. However, PhoneDog improperly urges the Court to consider
3 Kravitz's motion to be a "facial attack" so that the Court accepts all its allegations as true (*see*,
4 PhoneDog's Opposition at pp. 8) because it cannot meet its burden of furnishing the necessary
5 evidence to establish that the amount in controversy exceeds \$75,000. *See, Ancel, 58 F.3d at*
6 *1218* (the plaintiff bears the burden to support its assertion with competent proof); *Bellock, 754*
7 *F.Supp. at 12*. The Court must reject PhoneDog's assertion and not limit itself to considering
8 only the allegations of the Complaint because of the important matters at stake (i.e., the Court's
9 power to hear the merits of the case). PhoneDog must furnish evidence to show the basis for
10 the amount of damages they claim before the Court can allow the expense and burden of full
11 trial on the merits. *See, Diefenthal, 681 F.2d at 1053*.

12 PhoneDog also attempts to mislead the Court to lower the standard of proof in this case
13 since it cannot meet its burden of proof. First, PhoneDog inappropriately relies on *Musson*
14 *Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244 (6th Cir. 1996) to claim that it can
15 survive Kravitz's 12(b)(1) motion by simply showing "any arguable basis in law for claim".
16 *See*, PhoneDog's Opposition at pp. 4. PhoneDog neglected to mention, however, that *Musson*
17 *Theatrical, Inc.* clearly provided that this standard only applies when a "facial attack" is made.
18 *Id.* at 1248 ("[i]n short, when faced with a 12(b)(1) challenge to the face of a complaint, the
19 plaintiff can survive the motion by showing any arguable basis in law for the claim made").
20 Here, Kravitz unambiguously made a "factual attack" on PhoneDog's Complaint. Hence, the
21 standard in *Musson Theatrical, Inc.* does not apply.

22 Similarly, PhoneDog's reliance on *Farmilant v. Singapore Airlines, Ltd.*, 561 F. Supp.
23 1148 (N.D. Ill. 1983) is completely misplaced. *See*, PhoneDog's Opposition at pp. 4.
24 *Farmilant* was entirely regarding a motion for summary judgment and had nothing to do with a
25 motion to dismiss under FRCP 12(b)(1). Rather, the court made one isolated hypothetical
26 statement about what standard it might apply if it had before it a motion to dismiss, which it
27 did not. *Id.* at 1151 ("[w]ere this a threshold motion to dismiss the Complaint for want of
28

1 subject matter jurisdiction...”). As such, *Farmilant* should not have any bearing on the ruling
2 of this Motion to Dismiss.

3 Because Kravitz made a factual attack on the amount in controversy, PhoneDog’s
4 allegations are not presumed true and it must present competent proof establishing jurisdiction.
5

6 **C. PhoneDog Fails to Provide Competent Proof to Establish Subject Matter**
7 **Jurisdiction**

8 As noted in Kravitz’s Motion to Dismiss, the burden is on PhoneDog to support its
9 assertions with competent proof. *See*, Kravitz’s Motion to Dismiss at pp. 8. Competent proof
10 is “proof of a reasonable probability that jurisdiction exists.” *Id.* (citing *NLFC, Inc. v. Devcom*
11 *Mid-America, Inc.*, 45 F.3d 231, 237 (7th Cir. 1995)).

12 In its Opposition, PhoneDog offered no credible evidence whatsoever to show that a
13 Twitter account has any monetary value. Similarly, PhoneDog offered no credible admissible
14 evidence whatsoever to support its valuation of the Account. Instead, PhoneDog admitted that
15 the valuation of the Account, which it claimed to be approximately \$42,500 per month, is
16 based solely on the unsupported opinion of PhoneDog’s President, Tom Klein. *See*,
17 PhoneDog’s Opposition at pp. 9; *see also*, Declaration of Tom Klein at ¶ 10. It provided no
18 evidence whatsoever regarding the “industry standard” measuring the value of a Twitter
19 “follower” alleged in its Complaint. Moreover, whereas PhoneDog previously only claimed
20 that the value of the Account was simply based on the “industry standard” of each follower
21 (i.e. \$2.50 per month), it now modifies its theory for recovery of damages by claiming that “the
22 value of the Account lies in the Account’s list of Followers and the traffic that those Followers
23 generate to the PhoneDog website.” *See*, PhoneDog’s Opposition at pp. 9. Nonetheless,
24 PhoneDog offered no evidence of any traffic that the Account’s followers ever generated to
25 PhoneDog’s website, nor did PhoneDog offer any evidence that Kravitz’s continued use of the
26 Account interfered with such traffic. In short, PhoneDog’s assertion that the Account’s
27 followers generated any traffic to its website (*See*, PhoneDog’s Opposition at pp. 9) and that
28

1 the followers “accessed the Account in order to receive the content” are unsupported, self-
2 serving and mere speculations.

3 In addition, PhoneDog did not provide the necessary proof to establish that it has an
4 ownership interest in the Account. PhoneDog’s only “proof” that it has an ownership interest
5 is based on the following language in the Twitter Terms of Service (“TOS”), which it claims
6 effectively granted it a “license” to the use the Twitter service: “In consideration for Twitter
7 granting you *access to* and *use of* the Services, you agree...” See, Declaration of Cary Kletter
8 in Support of Motion to Dismiss, ¶ 6, Ex. B (emphasis added). Even if, *arguendo*, that
9 language granted users a “license” and ownership interests, PhoneDog would not be the
10 licensee of the Account. At no time did PhoneDog ever have “access to” or “use of” the
11 Account. In fact, PhoneDog never had the Account’s login information to access or use the
12 Account. Kravitz not only created the Account on his own initiative, he has been the only
13 person to ever access and use the Account. Hence, based on PhoneDog’s own theory (*See*,
14 Defendant’s Opposition at pp. 6), Kravitz is the “licensee” of the Account and has the only
15 ownership interest, if any, in the Account.

16 Furthermore, PhoneDog attempts to meet the amount in controversy by claiming that it
17 is entitled to damages based on “interference” with “PhoneDog’s access to the Followers,
18 which in turn interfered with PhoneDog’s economic relationships with its advertisers.” See,
19 PhoneDog’s Opposition at pp. 6. PhoneDog asserts that Kravitz’s conduct constitutes “an
20 unfair method of interference with advantageous relations.” See, PhoneDog’s Opposition at
21 pp. 6. PhoneDog’s new interference claim is entirely based on an unsupported hypothetical.
22 Further, this interference claim is wholly unrelated to PhoneDog’s interference claims alleged
23 in its Complaint, which are based on claims of interference with a prospective economic
24 advantage with its website “users”. A claim for “interference with advantageous relations”
25 with “advertisers” is a completely separate Claim for Relief that is not alleged anywhere in
26 PhoneDog’s Complaint. Hence, any damages PhoneDog now claims resulting from such an
27 interference has no bearing on the present Motion to Dismiss. Further, even if damages under
28

1 this interference claim were included in the amount in controversy, PhoneDog fails to offer
2 competent proof to support its assertion.

3 PhoneDog's Complaint must be dismissed under FRCP 12(b)(1) because it failed to
4 furnish competent proof to establish federal subject matter jurisdiction.

5
6 **IV. PLAINTIFF PHONEDOG'S COMPLAINT SHOULD BE DISMISSED UNDER**
7 **FRCP 12(b)(6) BECAUSE THE FACTUAL ALLEGATIONS IN PHONEDOG'S**
8 **COMPLAINT FAILS TO STATE A CLAIM**

9 **A. PhoneDog's Factual Allegations Must Show a "Plausible" Claim and the**
10 **Court Must Disregard Conclusory Allegations in the Complaint**

11 PhoneDog's Opposition conveniently failed to address that while a complaint does not
12 need to contain detailed factual allegations, it must still contain factual allegations sufficient to
13 show a "plausible" claim for relief. *See*, Kravitz's Motion to Dismiss at pp. 13; *see also Bell*
14 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949
15 (2009). This "plausibility" standard serves in effect as a "gatekeeping" function. The
16 *Twombly/Iqbal* standard "teaches that a defendant should not be forced to undergo costly
17 discovery unless the complaint contains enough detail...to indicate that the plaintiff has a
18 substantial case." *Bissessur v. Indiana Univ. Bd. of Trustees*, 581 F.3d 599, 603 (7th Cir.
19 2009). Therefore, to survive a motion to dismiss under FRCP 12(b)(6), Phonedog's factual
20 allegations must sufficiently raise a right to relief above a speculative level. *Bell Atlantic*
21 *Corp.*, 550 U.S. at 555.

22 Similarly, PhoneDog's Opposition conveniently neglected to mention that *before* a
23 court determines if the factual allegations are sufficient to show a plausible claim, it must first
24 identify which statements in the complaint are factual allegations and which are legal
25 conclusions. *See*, Kravitz's Motion to Dismiss at pp. 13-14; *see also, Iqbal*, 129 S. Ct. at 1951.
26 Courts are not bound to accept as true that are legal conclusions. *Id.* "[A] wholly conclusory
27 statement of [a] claim" will not survive a motion to dismiss." *Twombly*, 550 U.S. at 561.

28 PhoneDog's Complaint must be dismissed under FRCP 12(b)(6) because the factual
allegations contained in the Complaint fail to state a claim upon which relief can be granted.

1 **B. PhoneDog's Factual Allegations are Not Sufficient to Show a Plausible**
2 **Claim for Misappropriation of Trade Secrets**

3 PhoneDog's Complaint failed to provide sufficient facts to make a plausible showing of
4 an existence of a trade secret and the existence of misappropriation. *See*, Kravitz's Motion to
5 Dismiss at pp. 14-16. In its Opposition, PhoneDog merely reiterates its conclusory allegations
6 of law and unwarranted inferences to claim that the password to the Account is a trade secret
7 and that Kravitz's conduct constitutes misappropriation under Civil Code §3426.1(a). These
8 legal conclusions should be disregarded.

9 Contrary to PhoneDog's claim, the issue here is not whether PhoneDog has a
10 protectable trade secret, but whether the Complaint contained enough facts to make a plausible
11 showing that a trade secret exists. Here, PhoneDog failed to describe with sufficient
12 particularity where the secret lies. *See*, Kravitz's Motion to Dismiss at pp. 14; *see also*,
13 *Diodes, Inc. v. Franzen*, 260 Cal.App.2d 253 (1968). PhoneDog also failed to provide allege
14 sufficient facts to make a plausible showing that the secrecy of the password provide any
15 "substantial business advantage." *See*, Kravitz's Motion to Dismiss; *see also*, *Morlife, Inc. v.*
16 *Perry*, 56 Cal.App.4th 1514, 1522 (1997). PhoneDog also failed to allege sufficient facts to
17 make a plausible showing that it made reasonable efforts to maintain the secrecy of the
18 password to the Account (even though it never even had knowledge of the password). *See*,
19 Kravitz's Motion to Dismiss at pp. 15.

20 PhoneDog also inappropriately relies on *TMX Funding, Inc. v. Impero Technologies,*
21 *Inc.*, No. C 10-00202 JF, 2010 U.S. Dist. LEXIS 60260 (N.D. Cal. June 17, 2010) to conclude
22 that all login and password information are trade secrets. *See*, PhoneDog's Opposition at pp.
23 12. The facts in *TMX Funding, Inc.* establishing passwords as trade secrets are not present in
24 this case. In *TMX Funding, Inc.*, the passwords were used to access the "servers and
25 computers networks" the plaintiff-company purchased and physically possessed. *Id.* at pp. 10.
26 It is indisputable that a company's servers and computer networks contain at least some secret
27 and confidential information to constitute a trade secret. Here, however, the password to the
28 Account does not give anyone access to any confidential information and PhoneDog has not

1 alleged any facts as to what confidential information can be retrieved by accessing the
2 Account. *See*, Kravitz's Motion to Dismiss at pp. 15.

3
4 **C. PhoneDog's Factual Allegations are Not Sufficient to Show a Plausible
5 Claim for Intentional Interference with Prospective Economic Advantage.**

6 PhoneDog's Complaint failed to provide sufficient facts to make a plausible showing of
7 an existence of 1) economic relationship that would have probably resulted in an economic
8 benefit, and 2) an intentional act by Kravitz that actually disrupted that relationship.
9 PhoneDog's Opposition merely reiterates its conclusory allegations that some potential
10 unknown economic relationship with some unknown third party user was probably disrupted.
11 There are no factual allegations contained in the Complaint to make a plausible showing that
12 there was an actual disruption of an existing or future economic relationship. Moreover, there
13 are no factual allegations in the Complaint that PhoneDog ever had an economic relationship
14 with any of the Account's followers.

15 PhoneDog incorrectly relies on *Janda v. Madera Community Hosp.*, 16 F.Supp.2d
16 1181, 1189 (E.D. Cal 1998) to claim that PhoneDog's Complaint survives a motion to dismiss
17 without having to provide the identities of the alleged parties. *See*, PhoneDog's Opposition at
18 pp. 15. However, *Janda* involved a plaintiff-doctor who asserted an interference with
19 economic relations claim against the defendant-hospital based upon the doctor's economic
20 relationship with his existing and potential medical patients. *Janda*, 16 F.Supp.2d at 1189.
21 Contrary to PhoneDog's assertion, *Janda* actually found that "[a]s to 'future' patients, the
22 pleading [was] speculative and insufficient... 'Plaintiff must establish an actual economic
23 relationship or protected expectancy with a third person, not merely a hope of future
24 transactions.'" *Id.* at 1189-90 (citations omitted). *Janda* required the plaintiff to "specifically
25 identify" the "future" lost patients. *Id.* The complaint only survived a motion to dismiss as to
26 the "existing" patients. *Id.* Unlike our case, however, the existing patients in *Janda* were
27 readily and easily identifiable. Here, the allegation that there are existing users whose
28 economic relationship with PhoneDog has been disrupted by Kravitz's continued use of the

1 Account is entirely speculative and insufficiently supported by the pleadings. PhoneDog
2 cannot readily identify any such existing users. Moreover, the *Janda* case, cited by PhoneDog
3 actually supports Kravitz's position because PhoneDog did not allege that any specific
4 Account follower was a past customer of PhoneDog, or that PhoneDog had a protected
5 economic relationship with any Account follower. Thus, *Janda's* statements about that
6 situation (i.e., that the relationship is insufficient to deny a motion to dismiss) applies here.

7 Additionally, PhoneDog improperly makes reference to an unknown potential
8 economic relationship with its "advertisers" that was disrupted, which was nowhere alleged in
9 its Complaint. As acknowledged in PhoneDog's Opposition, however, "a court cannot
10 consider material outside the complaint." *See*, PhoneDog's Opposition at pp. 9-10 (*citing In re*
11 *American Cont'l Crop./Lincoln Sav. & Loan Sec. Litig.*, 102 F.3d 1524, 1537 (9th Cir. 1996)).
12 Therefore, the Court cannot consider this new allegation, nor any of the "additional facts"
13 contained in PhoneDog's Opposition, in making its ruling on Kravitz's FRCP 12(b)(6) motion.
14

15 **D. PhoneDog's Factual Allegations are Not Sufficient to Show a Plausible**
16 **Claim for Negligent Interference with Prospective Economic Advantage.**

17 As discussed in Kravitz's Motion to Dismiss, PhoneDog's factual allegations
18 insufficiently show a plausible claim for negligent interference with prospective economic
19 advantage. *See*, Kravitz's Motion to Dismiss at pp. 19. Moreover, this tort arises only when a
20 defendant owes a plaintiff a "duty of care." *Id.* PhoneDog's complaint did not allege such a
21 duty, nor did it allege sufficient facts to make a plausible showing that such a duty exists. As
22 such, the Court must dismiss this claim.

23 **E. PhoneDog's Factual Allegations are Not Sufficient to Show a Plausible**
24 **Claim for Conversion.**

25 PhoneDog's Complaint failed to provide sufficient facts to make a plausible showing
26 that it has ownership over the Account to maintain a conversion claim. PhoneDog correctly
27 asserts that "a court must accept as true all 'well-pleaded factual allegations.'" *See*,
28 PhoneDog's Opposition at pp. 18 (*citing Iqbal*, 129 S. Ct. 1937, 1950 (1990)). However,

1 PhoneDog’s statement that it is the “owner” of the Account and all of the Account’s followers
 2 is a legal conclusion that the court should disregard. Moreover, nowhere in its Complaint did
 3 PhoneDog allege that the list of Followers were “akin to a customer list” as it now alleges.
 4 *See*, PhoneDog’s Opposition at pp. 17. This additional statement is clearly outside of the
 5 complaint and cannot be considered in deciding Kravitz’s 12(b)(6) motions. *See, In re*
 6 *American Cont’l Crop./Lincoln Sav. & Loan Sec. Litig.*, 102 F.3d at 1537. Moreover,
 7 PhoneDog’s assertion the Account’s followers are its “customers” are speculative, conclusory
 8 and unwarranted inferences that should be disregarded by the Court. It should be reiterated
 9 that all Twitter followers, including the followers of the Account, are all visible on each
 10 Twitter site. Therefore, anyone can obtain the Account’s list of followers. Further, at all
 11 times, Kravitz accessed and used the Account for personal and work-related purposes.
 12 PhoneDog has not sufficiently alleged that any of the Account’s followers are actual customers
 13 of PhoneDog to show a plausible claim for conversion.

14 PhoneDog’s claim for conversion must be dismissed because the factual allegations
 15 contained in its Complaint are not sufficient to show a plausible claim for which relief can be
 16 granted.

17
 18 **V. CONCLUSION**

19 Plaintiff PhoneDog’s Complaint should be dismissed for lack of subject matter
 20 jurisdiction pursuant to FRCP 12(b)(1) and 28 U.S.C. § 1332 because PhoneDog cannot satisfy
 21 its burden of establishing an amount in controversy in excess of \$75,000. Further, PhoneDog’s

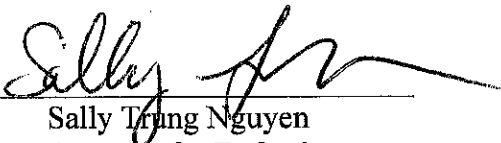
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Complaint should be dismissed for failure to state a claim upon which relief can be granted pursuant to FRCP 12(b)(6) because it has not asserted sufficient factual allegations to show a plausible claim for any of its Claims for Relief.

Dated: August 25, 2011

KLETTER LAW FIRM

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