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TWEETS, TWITTER AND TRADE SECRETS: WHO OWNS AN EMPLOYEE'S TWITTER FOLLOWERS?

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As the professional use of social media continues to proliferate, it was only a matter of time before this question reached the courts: who owns an employee's Twitter followers amassed on an account that was created as part of the employee's job function? That is the exact question at issue in *PhoneDog v. Kravitz*, and its holding may have profound implications on the use of social media in the workplace.

The Facts

PhoneDog, LLC hired Noah Kravitz as a product reviewer and video blogger in April 2006. Kravitz's job was to create written and video content for dissemination to PhoneDog users through Twitter and other media formats. Kravitz was given use of a Twitter account with the handle @PhoneDog_Noah to promote PhoneDog's services. Following his resignation in October 2010, despite the company's request that he relinquish use of the account, Kravitz changed the Twitter handle to @noahkravitz and continued using the account, retaining the 17,000 followers he had amassed while working for the company.

According to PhoneDog, in December 2010, Kravitz obtained a full-time job with a PhoneDog competitor and continued to use the Twitter account with the new handle. PhoneDog claimed Kravitz did so in order "to communicate with PhoneDog's followers without PhoneDog's permission" and "market and advertise his services and the services of his employer."

The company filed suit in July 2011, seeking approximately \$340,000 in damages, or \$2.50 for each Twitter follower that Kravitz kept by switching the name of his Twitter account. Arguing that its Twitter account's followers should be treated as a customer list, and therefore PhoneDog's property, the company alleged misappropriation of trade secrets, conversion, interference with prospective economic advantage, and negligent interference with prospective economic advantage. The company also requested that the court issue a temporary restraining order, preliminary injunction, and permanent injunction preventing Kravitz from using its confidential information.

The Law

In response to a motion filed by Kravitz, the court dismissed the company's intentional and negligent

interference with prospective economic advantage claims, finding that PhoneDog failed to assert essential elements of those claims, including the existence of economic relationships and a duty of care. PhoneDog filed an amended complaint in November 2011, alleging that it has an economic relationship with its users and that Kravitz owed a duty of care to PhoneDog as a former agent of the company.

Kravitz again moved to dismiss PhoneDog's amended negligent and intentional interference with prospective economic advantage claims. On January 30, 2012, Chief U.S. Magistrate Judge Maria-Elena James of the Northern District of California denied Kravitz's motion, noting that PhoneDog's amended complaint adequately alleged that Kravitz interfered with its economic relationships with the approximately 17,000 followers of the Twitter account, its current and prospective advertisers, and CNBC and Fox News. The court also held that the amended complaint passed muster because it asserted that Kravitz owed the company a duty of care.

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The Implications

This is the first case involving ownership of Twitter followers. A similar case was filed in the U.S. District Court for the Eastern District of Pennsylvania in June 2011 as to who owns a former employee's LinkedIn contacts. In that case, *Eagle v. Morgan, et al.*, the court held in December 2011 that the employer had sufficiently pled a misappropriation claim when its former employee accessed and took over a LinkedIn account after her termination. Although the *PhoneDog* and *Eagle* cases are not expected to be heard until later this year, they are being closely watched by companies that have employees who use social media as part of their job functions.

As more and more employers utilize social media and empower their employees to do so within the scope of their employment, companies are advised to create and enforce social media policies governing the usage of such technologies. Social media policies typically set forth obligations of confidentiality, privacy, and propriety; guidelines for the

responsible use of social media; the principles of transparency, honesty, and accountability; and repercussions for violations of the policy. In light of the *PhoneDog* and *Eagle* cases, regardless of their ultimate outcomes, employers that are concerned about owning the social media accounts used by employees within the scope of their employment should also make clear in their social media policies that:

- the employer, and not its employees, owns any social media accounts created within the scope of the employees' job;
- all employees must immediately relinquish and not use such accounts after their termination of employment; and
- only the company is permitted to change account names and settings.

Failure to adopt and enforce such policies creates unnecessary uncertainty as to who owns the accounts and the data therein. As such accounts and data become more important, companies should not countenance such risks.

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