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15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 TWITTER, INC., a Delaware corporation,
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20 Plaintiff,

21 v.

22 SKOOTLE CORP., a Tennessee corporation;
and JAMES KESTER, an individual,

23 Defendants.
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Case No. 3:12-cv-1721 SI

**JOINT CASE MANAGEMENT
STATEMENT & [PROPOSED] ORDER**

Date: August 31, 2012
Time: 3:00 p.m.
Place: Courtroom 10
Judge: Hon. Susan Illston

1 The parties to the above-entitled action jointly submit this JOINT CASE
2 MANAGEMENT STATEMENT & PROPOSED ORDER pursuant to the Standing Order for All
3 Judges of the Northern District of California dated July 1, 2011 and Civil Local Rule 16-9.

4 **1. Jurisdiction & Service**

5 The parties stipulate that venue is proper in this District, and that the Court has subject
6 matter jurisdiction over the action pursuant to 28 U.S.C. § 1391(b)(2), and that the Court has
7 personal jurisdiction over defendant Skootle Corp. James Kester does not consent that personal
8 jurisdiction over him in this Court is proper. However, Mr. Kester has opted not to challenge
9 such assertions. All parties have been served and there are no additional parties to be joined at
10 this time.

11 **2. Facts**

12 Plaintiff's Statement

13 Plaintiff Twitter, Inc. ("Twitter") runs an online real-time communications platform
14 through which users share and receive information via short messages called "Tweets." Use of
15 the Twitter service requires a user's agreement to be bound by and comply with the Twitter
16 Terms of Service ("Terms"), the Twitter Rules, and Twitter's Privacy Policy (collectively the
17 "TOS"); noncompliance may result in account suspension. In order to provide a high quality
18 user experience, Twitter prohibits a number of fraudulent and deceptive practices on the Twitter
19 platform, collectively called "spam." Twitter expressly forbids spamming in its TOS, and also
20 invests significant human, technical, and monetary resources to detect and counteract spam on
21 the Twitter service. The TOS specify a number of non-exhaustive criteria that Twitter forbids as
22 "spamming," along with prohibiting, among other activities, serial account creation for
23 disruptive, abusive, or overlapping purposes. Further, the TOS require any third-party software
24 applications to communicate with the Twitter service through Twitter's Software Programming
25 Interface ("API"), and forbid accessing Twitter's service through other, unofficial means.

26 Defendant James Kester is the president and founder of Defendant Skootle Corp.
27 ("Skootle"). Skootle makes a desktop software tool called TweetAdder, which Defendants
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1 license to users for use on the Twitter service. Twitter alleges that the TweetAdder tool features
2 a number of functionalities that violate the Twitter TOS, particularly the TOS's anti-spamming
3 provisions, yet Defendants market TweetAdder using representations that deceive TweetAdder's
4 users into thinking that using TweetAdder will not violate the Twitter TOS or result in account
5 suspension. In addition, Defendants openly advertise that TweetAdder does not use the Twitter
6 API to access Twitter's website and services. Defendants thus both violate the TOS themselves
7 through the TweetAdder tool's prohibited features and functions, and induce further TOS
8 violations by TweetAdder users. Twitter has received numerous complaints from Twitter users
9 about receiving spam from accounts that use the TweetAdder software. Twitter has expended
10 significant resources combating the spamming activities of TweetAdder users on the Twitter
11 service, and has lost substantial goodwill with its users due to those activities.

12 Plaintiff anticipates the following factual issues will need to be resolved:

- 13 1. Does the TweetAdder software access the Twitter website or services
14 through means other than Twitter's API?
- 15 2. Does the TweetAdder software access the Twitter website or services
16 without employing Twitter's OAuth authentication protocol?
- 17 3. Does the TweetAdder software offer features and functionalities that
18 violate the Twitter TOS?
- 19 4. Did the Defendants breach their respective agreements with Plaintiff? If
20 so, was Plaintiff damaged as a result?
- 21 5. Did the Defendants induce third parties to breach their agreements with
22 Twitter? If so, was Plaintiff damaged as a result?
- 23 6. Did the Defendants knowingly make false representations to Plaintiff with
24 the intent to defraud Plaintiff and induce Plaintiff's reliance on their
25 representations?
- 26 7. Did Plaintiff justifiably rely on Defendants' knowingly false
27 representations? If so, was Plaintiff damaged as a result?

1 8. Did the Defendants deceive Twitter users into believing that their use of
2 TweetAdder would not violate the TOS or result in account suspension?
3 If so, was Plaintiff damaged as a result?

4 9. What were Defendants' revenues and profits from licensing, selling,
5 distributing, or otherwise disseminating all versions of the TweetAdder
6 software?

7 Defendants' Statement

8 James Kester is the founder and President of Skootle Corporation. Skootle sells a
9 product "TweetAdder" which helps businesses and individuals manage their Twitter accounts
10 more efficiently and effectively.

11 TweetAdder is not "spamware." TweetAdder is a useful tool for legitimate businesses
12 and individuals. Customers of TweetAdder include popular television shows and newspapers,
13 radio stations, PR firms, charities, law firms, musicians, celebrities, politicians and political
14 campaigns, city chambers of commerce, banks, and numerous other businesses from small
15 startups to Fortune 500 companies. These customers use TweetAdder to save the time and
16 expense of manually locating and following users so they can spend more time engaging with the
17 Twitter users that want to hear what they have to say and stay connected with them.

18 Many tasks that TweetAdder performs can already be performed manually by the end
19 user. TweetAdder simply makes it easier with added search capabilities. TweetAdder
20 specifically seeks to exclude certain features from TweetAdder that would otherwise allow users
21 to abuse Twitter in the way now claimed. Specifically, TweetAdder clients cannot:

- 22 1. Automatically create multiple profiles or accounts;
- 23 2. Follow other users from multiple accounts;
- 24 3. Send any "@replies" absent a direct mention by another Twitter user; or
- 25 4. Automatically convert keywords to hashtags.

26 TweetAdder does not "spam" other Twitter users as that term is used in Twitter's Terms
27 of Service attached to its Complaint.

1 **3. Statement of Principal Legal Issues in Dispute**

2 Plaintiff's Statement

3 Plaintiff anticipates the following legal issues may need to be resolved:

- 4 1. The enforceability of Plaintiff's TOS.
- 5 2. The scope of any injunction that may be granted in this case.
- 6 3. Whether damages are appropriate.

7 Defendants' Statement

8 In addition to the issues listed above, Defendants anticipate the following legal issues
9 will need to be resolved:

- 10 1. Whether there is a binding contract between Twitter and either of the Skootle
11 Defendants and, if so, the terms of those contract(s);
- 12 2. Whether any contracts between Twitter and either of the Skootle Defendants are
13 valid and enforceable as interpreted by Twitter;
- 14 3. Whether the Defendants' creation and license of TweetAdder constitutes a breach
15 of any valid and enforceable contracts between Twitter and either of the Skootle Defendants;
16 included in this issue is:
 - 17 a. The determination of the meaning and scope of "spam."
- 18 4. Whether the Defendants' creation and license of TweetAdder induces Twitter
19 users (and TweetAdder licensees) to violate their own agreements with Twitter;
- 20 5. Whether there is a legitimate business purpose for using TweetAdder such as to
21 insulate the Skootle Defendants from any liability for users who may elect to abuse the software;
- 22 6. Whether either of the Skootle Defendants may be held liable for any Twitter users
23 who violate Twitter's TOS.

24 **4. Motions**

25 The following motions have been filed in this case:
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By Twitter:

1. Motion for Entry of Default Against Defendant Garland E. Harris – moot per Harris’ appearance; and
2. Motion to Serve Foreign Defendant by Alternative Means – currently pending.

By Garland E. Harris:

1. Motion to Dismiss for Lack of Personal Jurisdiction – Denied; and
2. Motion for Permission for Electronic Case Filing – Granted.

Each party anticipates filing a motion for summary judgment on their respective positions.

By the Court:

1. Order to Show Cause re: Misjoinder

Plaintiff’s Statement

Plaintiff anticipates that there may be discovery issues moving forward that need to be resolved. Additionally, Plaintiff anticipates there may be a need to file dispositive motions, including motions for summary judgment or summary adjudication.

Defendants’ Statement

Defendants anticipate the potential for motions concerning both discovery and case dispositive issues. As an alternative to Defendants’ request that Plaintiff be required to file an amended complaint (discussed in Section 5, below) Defendants may file a motion to strike certain portions of the existing complaint.

5. Amendment of Pleadings

Pursuant to this Court’s July 20, 2012 order severing defendants, the claims as originally filed against Defendant Garland Harris are no longer a part of this case. Defendants request that Plaintiff be required to file an amended complaint in accordance thereof. Plaintiff does not believe an amended complaint is necessary because the former allegations against Mr. Harris are clearly delineated. Plaintiff can meet and confer with Defendants to stipulate as to which paragraphs of the Complaint do not apply to Defendants.

1 **6. Evidence Preservation**

2 The Parties have initiated document preservation policies to preserve relevant evidence.

3 **7. Disclosures**

4 The parties completed their Rule 26(a)(1) initial disclosures on August 21, 2012.

5 **8. Discovery**

6 **A. Discovery Taken to Date**

7 To date, Plaintiff has served its first set of interrogatories, requests for admission, and
8 document requests on Defendants Skootle and Kester.

9 **B. Limitations or Modifications of the Discovery Rules**

10 Plaintiff's Statement

11 Neither party proposed any limitations or modifications to the discovery rules during the
12 Rule 26(f) conference, and Plaintiff does not request any such limitations or modifications. The
13 Parties agreed during the Rule 26(f) conference to serve discovery requests and disclosures by
14 electronic mail by 5:30 P.M. on the day due, and that electronic mail shall be the exclusive
15 method for such service, except in instances of voluminous productions.

16 Defendants' Statement

17 Defendants do not propose any modifications to the discovery rules as expressed in
18 Federal Rules of Civil Procedure Rules 30 (limiting depositions to ten [10] per party, including
19 third party and Fed. R. Civ. Proc. 30(b)(6) depositions), 33 (limiting interrogatories to 25 per
20 party), 34 (unlimited requests for production of documents), 36 (limiting requests for admission
21 to 25 per party), and 45 (no stated limits on subpoenas to third parties).

22 **C. Protective Order**

23 The parties agree that a protective order governing the handling of confidential and
24 proprietary information is necessary in this case. Given the proprietary and highly sensitive
25 nature of the information at issue in this dispute, the parties have agreed to abide by the
26 protections set forth in the Court's model "Stipulated Protective Order for Litigation Involving
27 Patents, Highly Sensitive Confidential Information and/or Trade Secrets," and submitted a
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1 captioned form of that document as a [Proposed] Stipulated Protective Order for the Court's
2 approval on August 24, 2012.

3 **D. Privileged Information**

4 The parties agree that communications and attorney work product involving outside
5 counsel for either side related to the subject matter of this case need not be entered on a privilege
6 log. The parties have further agreed that if privileged or attorney work-product information is
7 inadvertently produced in discovery, the party making the claim of privilege or attorney work-
8 product protection may notify any party that received the information of the claim and the basis
9 for it. After being notified, a party must promptly return, sequester, or destroy the specified
10 information and any copies it has and may not use or disclose the information until the claim is
11 resolved. A receiving party may promptly present the information to the court under seal for a
12 determination of the claim. If the receiving party disclosed the information before being
13 notified, it must take reasonable steps to retrieve it. The producing party must preserve the
14 information until the claim is resolved. The parties further agree that with respect to any
15 inadvertently produced privileged material or attorney work-product information, the producing
16 party shall not be deemed to have waived any applicable privilege.

17 **E. Electronically Stored Information**

18 The parties anticipate that they will agree to a procedure for producing electronically
19 stored information, including the form or forms in which it should be produced.

20 **9. Class Actions**

21 This is not a class action.

22 **10. Related Cases**

23 There are no pending related cases or proceedings before another judge of this Court, or
24 any other court or administrative body.

1 **11. Relief**

2 Plaintiff's Statement:

3 Twitter is seeking a preliminary and permanent injunction against the Defendants,
4 enjoining and restraining their ongoing violations of the Twitter TOS, from engaging in their
5 unlawful and deceptive practices, and from offering or supporting any version of the
6 TweetAdder software containing any features that violate the TOS. Twitter also seeks to recover
7 compensatory and statutory damages, including restitution and disgorgement of profits. In
8 addition, Twitter is seeking exemplary and punitive damages and attorneys' fees and costs.

9 Defendants' Statement:

10 Defendants seek no affirmative relief other than the declination of the Court to grant
11 Twitter its requested relief. Defendants reserve the right to supplement this response, if and
12 when, they make a damages claim.

13 **12. Settlement and ADR**

14 The parties have filed a Stipulation and [Proposed] Order Selecting ADR Process in
15 which they agreed to participate in mediation. The parties have not yet selected a mediator or
16 mediation date. The parties will inform the Court when a date has been chosen, but anticipate
17 that the mediation will take place within 30 days after the close of discovery. The parties
18 anticipate that they will discuss settlement options following the exchange of discovery.

19 **13. Consent to Magistrate Judge For All Purposes**

20 The parties do consent to the assignment of the case to a magistrate judge for pre-trial
21 discovery purposes. The parties do not consent to have a magistrate judge conduct all further
22 proceedings including trial and entry of judgment.

23 **14. Other References**

24 The parties agree that this case is not suitable for reference to binding arbitration, a
25 special master, or the Judicial Panel on Multidistrict Litigation.

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1 **15. Narrowing of Issues**

2 The parties have not yet identified areas where they may narrow the issues in dispute but
3 will revisit this issue following mediation and as discovery progresses.

4 **16. Expedited Trial Procedure**

5 The parties agree that this case cannot be handled under the Expedited Trial Procedure of
6 General Order 64.

7 **17. Scheduling**

8 The parties agree on the following schedule:

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DEADLINE OR EVENT	Proposed Date
Initial Case Management Conference (CMC) in Courtroom 10, 19 th Floor, SF at 3:00 PM	August 31, 2012 (by Court order)
Close of fact discovery	March 1, 2013
Exchange of initial expert disclosure reports (for party with burden of proof) (FRCP 26(a)(2)(A) and (B))	March 22, 2013
Exchange of Rebuttal Expert Disclosure Reports	April 5, 2013
Close of all expert discovery	April 26, 2013
Last court day by which Dispositive Motions are heard	May 17, 2013
Pre-trial Conference	At Court's discretion in July 2013
Trial	At Court's discretion in August 2013

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21 **18. Trial**

22 The parties agree this case will be tried before a jury and anticipate that the trial of this
23 matter will require seven days of testimony.

24 **19. Disclosure of Non-party Interested Entities or Persons**

25 All parties have filed the "Certification of Interested Entities or Persons" required by
26 Civil Local Rule 3-16. The parties do not intend to identify any other entities or persons that
27 have a financial interest in the subject matter in controversy or in a party to the proceeding

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1 and/or have a non-financial interest in that subject matter or in a party that could be
2 substantially affected by the outcome of this proceeding.

3 **20. Other**

4 The parties do not have any other matters to address with the Court at this time.

5 Dated: August 24, 2012 WILSON SONSINI GOODRICH & ROSATI PC

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By: /s Charles T. Graves
Charles T. Graves
tgraves@wsgr.com

Attorneys for Plaintiff TWITTER, INC.

Dated: August 24, 2012

COLT / WALLERSTEIN LLP

By: /s Nicole M. Norris

Attorneys for Defendants SKOOTLE CORP. and
JAMES KESTER

CERTIFICATION

I, Charles T. Graves, am the ECF User whose identification and password are being used to file the **Joint Case Management Statement and [Proposed] Order**. In compliance with General Order 45.X.B, I hereby attest that Nicole M. Norris has concurred in this filing.

DATED: August 24, 2012

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: s/Charles T. Graves
Charles T. Graves

Attorneys for Plaintiff Twitter, Inc.

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CASE MANAGEMENT ORDER

The Case Management Statement and Proposed Order is hereby adopted by the Court as the Case Management Order for the case and the parties are ordered to comply with this Order.

Dated: _____

The Honorable Susan Illston
UNITED STATES DISTRICT JUDGE