

1 DAVID H. KRAMER, State Bar No. 168452  
 CHARLES T. GRAVES, State Bar No. 197923  
 2 RIANA S. PFEFFERKORN, State Bar No. 266817  
 WILSON SONSINI GOODRICH & ROSATI  
 3 Professional Corporation  
 650 Page Mill Road  
 4 Palo Alto, CA 94304-1050  
 Telephone: (650) 493-9300  
 5 Facsimile: (650) 565-5100  
 Email: dkramer@wsgr.com  
 6 tgraves@wsgr.com  
 rpfefferkorn@wsgr.com

7 Attorneys for Plaintiff  
 8 TWITTER, INC.

9 DOUGLAS W. COLT, State Bar No. 210915  
 THOMAS E. WALLERSTEIN, State Bar No. 232086  
 10 NICOLE M. NORRIS, State Bar No. 222785  
 COLT/WALLERSTEIN LLP  
 11 Shorebreeze II  
 255 Shoreline Drive, Suite 540  
 12 Redwood Shores, CA 94065  
 Telephone: (650) 453-1980  
 13 Facsimile: (650) 453-2411  
 14 Email: dcolt@coltwallerstein.com  
 twallerstein@coltwallerstein.com  
 15 nnorris@coltwallerstein.com

16 Attorneys for Defendants  
 17 SKOOTLE CORP. and JAMES KESTER

18 UNITED STATES DISTRICT COURT  
 19 NORTHERN DISTRICT OF CALIFORNIA  
 20 SAN FRANCISCO DIVISION

21		
22	TWITTER, INC., a Delaware corporation,	) CASE NO.: 3:12-cv-1721 SI
		)
23	Plaintiff,	) <b>JOINT STATEMENT REGARDING</b>
		) <b>DISCOVERY ISSUES</b>
24	v.	)
		)
25	SKOOTLE CORP., a Tennessee corporation; and	)
	JAMES KESTER, an individual,	)
26	Defendants.	)
		)
27		)
		)
28		)

1           The parties submit this Joint Statement Regarding Discovery Issues pursuant to the Court's  
2 Standing Order dated July 28, 2011. This case centers on Defendants' software tool, TweetAdder,  
3 which Plaintiff alleges breaches Plaintiff's Terms of Service (TOS) and induces Defendants'  
4 customers to do likewise. Defendants assert that they have not breached the TOS and have raised  
5 various defenses against Plaintiff's claims. The parties are seeking discovery in connection with  
6 their respective claims and defenses, and met and conferred in person on October 9, 2012.

7 **1. Plaintiff's Statement**

8 A. Plaintiff's Interrogatories (1, 2) (Exs. 1 & 2)

9           With respect to Interrogatories 1 and 2 – in which Twitter seeks the identification of  
10 Twitter accounts held by Skootle's employees – Defendants assert that information about Skootle  
11 employees' non-work-related Twitter accounts is irrelevant and private, and that Twitter may  
12 independently obtain the same information. The information is discoverable because the opening  
13 of a Twitter account by a Skootle employee – which requires acceptance of the Terms of Service  
14 at issue in this lawsuit – may lead to relevant information that Skootle employees were aware of  
15 and/or bound by those Terms of Service. The bare fact of opening such accounts is not private.  
16 Twitter cannot identify the accounts on its own with any certainty because different people may  
17 use the same name to open a Twitter account.

18 B. Plaintiff's Requests for Production of Documents (Exs. 3 & 4)

19           With respect to Document Requests 14 (Skootle) and 15 (Mr. Kester) – in which Twitter  
20 seeks documents showing Defendants' revenues from the TweetAdder software – Defendants  
21 objected that this information will become relevant only once Twitter proves Defendants' liability.  
22 The revenues are discoverable because, among other things, they help identify Defendants'  
23 customers (and thus the extent of Defendants' liability) by corroborating other sources of  
24 information about the customer base; they show Defendants' knowledge, motive, and  
25 responsibility for offering the software; they show the potential bias of witnesses who are paid out  
26 of those revenues; they are relevant for the constructive trust Twitter seeks over such revenues;  
27 and they demonstrate whether Defendants are able to pay any money judgment assessed against  
28 them.

1 With respect to Document Requests 15 (Skootle) and 16 (Mr. Kester) – in which Twitter  
2 seeks Defendants’ financial statements and (redacted) tax records – Defendants claim these  
3 Requests are overbroad, irrelevant, and invasive of their privacy. As with the foregoing, this  
4 information is presently relevant because it shows motive, knowledge, and responsibility. Plaintiff  
5 agrees that Mr. Kester may redact personal information such as Social Security numbers, and any  
6 portions of documents that do not relate to TweetAdder. Likewise, Skootle may withhold  
7 documents that do not relate in any way to TweetAdder. Plaintiff maintains that Skootle must  
8 produce any documents that contain both responsive material and material that does not relate to  
9 TweetAdder. As a corporation, Skootle has no right to privacy. *See Fed. Commc’ns Comm’n v.*  
10 *AT&T Inc.*, 131 S.Ct. 1177, 1183-85, 562 U.S. \_\_, \_\_ (2011).

11 C. Plaintiff’s Document Subpoenas to Third Parties (Exs. 5 & 6)

12 Plaintiff served document subpoenas to third parties Troy Fales and Amanda Kester, who  
13 are both represented by Defendants’ counsel, with a response date of October 12, 2012. When the  
14 parties met on October 9, 2012, they agreed to extend the response date to October 19, 2012. Ms.  
15 Kester produced documents on that date, subject to her objections. However, Mr. Fales missed  
16 this extended deadline, citing “technical snags,” and has not informed Plaintiff when the  
17 documents will be produced except to say that document production is “forthcoming.” Plaintiff is  
18 entitled to timely responses to its document subpoenas, and a vague reference to “technical snags”  
19 does not supply adequate excuse for Mr. Fales’s failure to obey the subpoena under Rule 45(e).

20 Through counsel, Mr. Fales objects that Request No. 3 – which seeks documents showing  
21 the amounts Mr. Fales has been paid for his work on TweetAdder – seeks irrelevant information  
22 and intrudes on his right to privacy. This information is discoverable because it shows that  
23 Defendants knew about and condoned Mr. Fales’s actions, it helps establish Mr. Fales’s status as  
24 an agent of Defendants, and it also shows Mr. Fales’s bias as a witness. Mr. Fales may redact  
25 sensitive personal information, as well as information pertaining to income for work or services  
26 performed wholly in connection with other matters, and not in connection with TweetAdder.

27 Mr. Fales objected to Request Nos. 11, 12, and 14 – which seek documents and  
28 communications relating to Twitter, Skootle, or TweetAdder – as overbroad, on the basis of an

1 apparently mistaken interpretation of the term “relating to” that encompasses any occurrence  
2 whatsoever of the word “Twitter,” “Skootle,” or “TweetAdder.” Twitter stands by these Requests  
3 as worded and maintains that the subpoena’s Definitions section, which defines certain of the  
4 terms used in these Requests, adequately limits the Requests’ breadth and scope.

5 **2. Defendants’ Statement**

6 A. Plaintiff’s Responses to Skootle’s Interrogatories

7 Plaintiff has responded to various of Skootle’s interrogatories by asserting that the  
8 information sought will be disclosed in documents that Plaintiff intends to produce. Because  
9 Plaintiff has thus far produced only a handful of publicly-available documents, Defendants cannot  
10 assess the propriety of Plaintiff’s response. In any event, Defendants have asked Plaintiff to agree  
11 to identify which documents are responsive to which requests, but Plaintiff has thus far declined to  
12 agree. Defendants will further raise this issue with this Court if Plaintiffs decline to agree.

13 B. Plaintiff’s Interrogatories (1, 2)

14 Plaintiff’s interrogatory numbers 1 and 2 seek information related to Defendants’, and their  
15 employees’, Twitter accounts. Defendants have already responded in full to these interrogatory  
16 requests to the extent either Skootle or Mr. Kester created any Twitter account and/or instructed  
17 any employee to do the same on behalf of Skootle. To the extent these interrogatories seek  
18 information related to Defendants’ employees’ personal Twitter accounts, if any, such information  
19 is outside Defendants’ possession, custody, or control in that such information is personal as to  
20 that individual employee. Defendants have no basis on which to demand any employee or former  
21 employee provide such information and Plaintiff cannot point to any authority stating otherwise.

22 Moreover, despite Plaintiff’s contention, the information is irrelevant to establishing that  
23 any actions Defendants took constitute the violations alleged in the Complaint. Whether Skootle  
24 employees were aware of and/or bound by any Twitter Terms of Service as to any *personal*  
25 Twitter account they may or may not have, has no impact on Defendants’ liability.

26 Furthermore, Plaintiff has alternative means of obtaining the requested information.  
27 Defendants have provided to Plaintiff names and contact information for any current and/or  
28 former Skootle employee, three of which Plaintiff has already subpoenaed. Plaintiff should pursue

1 this information directly from the selected witnesses so that they may respond as appropriate.

2 C. Plaintiff's Requests for Production of Documents

3 Plaintiff's document request numbers 14-15 to Skootle and 15-16 to Mr. Kester seek  
4 documents showing all of Defendants' revenue and income, including all financial statements and  
5 tax records. Plaintiff has since agreed to limit these requests to cover only Defendants' income  
6 from TweetAdder or their work for Skootle.

7 Even as so limited, Plaintiff's requests are overbroad. Plaintiff has claimed to be entitled  
8 to Defendants' "ill-gotten gains" and seeks to recover "disgorgement of profits, as permitted by  
9 law and in such amounts to be proved at trial." (Complaint, ¶¶ 74, B.) Such a remedy is not  
10 available to Plaintiff for the asserted causes of action and thus, the requested documents are not  
11 discoverable.

12 Plaintiff is only entitled to disgorgement of profits if those profits were taken directly from  
13 Twitter. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1140, 1143-1152 (2009)  
14 (disgorgement of profits is not an authorized remedy in an individual action where such profits are  
15 neither taken from a plaintiff nor funds in which a plaintiff has an ownership interest); *see also*,  
16 *Kraus v. Trinity Management Serv's., Inc.*, 23 Cal.4th 116, 126-137 (2000) (plaintiff in a  
17 representative action cannot recover disgorgement in a nonrestitutionary sense). Skootle's profits  
18 from the license of the TweetAdder software constitute neither money taken from Plaintiff nor  
19 funds in which Plaintiff has an ownership interest.

20 Plaintiff now also claims it is entitled to that information because it helps identify  
21 Defendants' customers and is relevant to show potential bias of witnesses. But Plaintiff already  
22 has propounded and obtained discovery that will identify Defendants' customers and Plaintiff fails  
23 to articulate how the information reflect on the bias of any third party witnesses.

24 D. Plaintiff's Document Subpoenas to Third Parties

25 Mr. Fales timely responded in writing to Plaintiff's subpoena. He and his counsel are  
26 collecting and reviewing documents for production and will produce any responsive documents on  
27 a rolling basis.

28 With respect to Request No. 3, Mr. Fales' objections stand for the reasons discussed in

1 section B, above. The requested information relates to income and profits, information to which  
2 Plaintiff is not entitled in light of the asserted causes of action. Mr. Fales is not a party to this  
3 action and his right to privacy is implicated by Plaintiff's request. Moreover, Mr. Fales' income  
4 from Skootle that has no relation to any work relating to TweetAdder is not relevant to any alleged  
5 causes of action or asserted defense in this case.

6 Plaintiff's Request Nos. 11, 12, and 14 seek documents that generally relate to Twitter,  
7 Skootle, and/or TweetAdder. Mr. Fales and Ms. Kester agreed to produce non-privileged,  
8 responsive documents they could locate after a reasonable search that relate to Twitter and  
9 Skootle, or Twitter and TweetAdder, or Skootle and TweetAdder. Mr. Fales and Ms. Kester's  
10 objections go to the over-breadth of the request to the extent they relate to Twitter generally.

11 As worded, Plaintiff's requests would encompass every single email to or from every  
12 single person who included a "Follow me on Twitter" or Twitter username in their email  
13 signature, regardless of the subject matter of the email. In addition, without limitation, these  
14 requests would render every single email, receipt, or sales confirmation for any product from any  
15 merchant who included a Twitter username on their emails, receipts, or sales confirmations  
16 responsive to these requests. Indeed, Mr. Fales and Ms. Kester have identified communications  
17 related to their purchases of pool equipment, aquarium equipment, flowers, and other  
18 miscellaneous items from Amazon.com, that all include some reference to Twitter.

19 Requests calling for this type of information are grossly overbroad and would require the  
20 production of documents that are not in any way relevant to the claims it asserts against  
21 Defendants, nor can it argue that any such documents can reasonably lead to the discovery of  
22 admissible evidence. Accordingly, Mr. Fales' and Ms. Kester's limitations and agreement to  
23 produce documents that are related to both Twitter and TweetAdder or Skootle, are wholly  
24 appropriate.

25 During the meet and confer process, Defendants offered to negotiate different limitations  
26 that would sufficiently narrow the scope of the requests to exclude the clearly irrelevant  
27 documents used in the examples above. Plaintiff has refused to further meet and confer and has  
28 opted to submit this joint statement instead.

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DATED: October 26, 2012

WILSON SONSINI GOODRICH & ROSATI P.C.

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

Attorneys for Plaintiff TWITTER, INC.

DATED: October 26, 2012

COLT / WALLERSTEIN LLP

By: /s Nicole M. Norris

Attorneys for Defendants SKOOTLE CORP.  
and JAMES KESTER

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**CERTIFICATION**

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

DATED: October 26, 2012

WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation

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

Attorneys for Plaintiff Twitter, Inc.