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8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 SAN FRANCISCO DIVISION

12 TWITTER, INC., a Delaware corporation,)
)
 13 Plaintiff,)
)
 14 v.)
)
 15 SKOOTLE CORP., a Tennessee corporation; and)
 JAMES KESTER, an individual,)
 16 Defendants.)
 17)
 18)
 19)
 20)

CASE NO.: 3:12-CV-01721 SI
**PLAINTIFF'S NOTICE OF
 MOTION AND MOTION FOR
 LEAVE TO AMEND COMPLAINT**
 Date: Friday, December 14, 2012
 Time: 9:00 AM
 Dept: Courtroom 10, 19th Floor
 Before: Honorable Susan Illston

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1 **NOTICE OF MOTION AND MOTION FOR LEAVE TO AMEND COMPLAINT**

2 **PLEASE TAKE NOTICE** that on Friday, December 14, 2012, at 9:00 AM, or as soon as
3 the Court’s calendar permits, in Courtroom 10, 19th Floor of the United States District
4 Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102, before the Honorable Susan
5 Illston, Plaintiff Twitter, Inc. will and hereby does move this Court, pursuant to Local Rule 7-1
6 and Rule 15(a)(2), for an order granting Plaintiff leave to amend its Complaint.¹

7 Following the dismissal of all other defendants against whom this action was originally
8 filed, Plaintiff seeks leave to remove from its Complaint the allegations pertaining to those
9 defendants. Further, in light of information gathered in the course of discovery, Plaintiff requests
10 leave to add Troy Fales as a defendant.

11 In furtherance of Plaintiff’s motion, Plaintiff submits the Declaration of Charles T. Graves
12 in support of the instant motion (“Graves Decl.”); a copy of the proposed Complaint as amended,
13 attached as Exhibit 1 to the Graves Declaration; and a form of the amended pleading that indicates
14 in what respects the amended pleading differs from the pleading which it amends, attached as
15 Exhibit 2 to the Graves Declaration. Plaintiff has also filed herewith a [Proposed] Order pursuant
16 to Civil L.R. 7-2. Despite Plaintiff’s multiple attempts to meet and confer with Defendants,
17 Plaintiff has been unable to learn whether Defendants consent to or oppose the amendments, and
18 therefore assumes that they oppose the instant motion. Defendants have stated previously that
19 they oppose any amendment to add Troy Fales as a defendant. (*See* Docket No. 64, p. 1).

20 This motion is based upon the Memorandum of Points and Authorities below, the Graves
21 Declaration, and the files and records in this action. Although Plaintiff has noticed the motion
22 for hearing on the above-mentioned date and time, Plaintiff does not believe a hearing is
23 necessary and respectfully requests that the Court enter an order granting the motion without a
24 hearing.

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28 ¹ Plaintiff has noticed the motion for December 14 rather than December 7 due to the
unavailability of Defendants’ counsel on the earlier date.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This is a case where Defendants breach Twitter’s Terms of Service, and induce and
4 deceive other Twitter users to breach the Terms of Service, by offering a software tool called
5 “TweetAdder,” which – as the name suggests – allows users to bombard other Twitter users with
6 annoying spam messages in a manner forbidden by the Terms of Service.

7 Twitter seeks to amend its Complaint for two reasons. First, Twitter originally filed suit
8 against numerous defendants for various spam-related violations. Since then, all of the original
9 defendants except Skootle and Mr. Kester have been dismissed or severed. (Docket Nos. 43, 46,
10 49, 54). As a result, Twitter seeks to streamline the complaint by removing allegations that
11 relate only to the former defendants. The two remaining defendants, Skootle and Mr. Kester, are
12 both responsible for the TweetAdder spamware tool.

13 Second, Twitter seeks to add a third defendant, Troy Fales, who is also associated with
14 TweetAdder. In the limited discovery that has taken place thus far, Twitter has learned that Mr.
15 Fales designed the TweetAdder software, was an employee of Skootle for at least some of the
16 time at issue, holds the only copy (or copies) of the source code for the TweetAdder software,
17 and holds a Twitter account. Because he holds a Twitter account, he is a party to Twitter’s
18 Terms of Service and the Court has jurisdiction over him in San Francisco.

19 Twitter needs to add Mr. Fales in order to best ensure that it can obtain complete relief
20 with respect to the TweetAdder spamware tool. It is unclear whether Mr. Fales has been an
21 employee of Defendant Skootle at all relevant times. Defendants, including Mr. Fales’s
22 employer, have denied that they have possession of the source code for TweetAdder, pointing
23 instead to Mr. Fales. Defendants originally acted as if they did not possess knowledge of how
24 the software works, but later gave an explanation. The circumstances strongly suggest that Mr.
25 Fales supplied the information to them regarding how the software works. Given these facts,
26 Twitter must add Mr. Fales so that it may best be accorded complete relief in this litigation.

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1 **II. BACKGROUND**

2 Discovery in this case is just getting started. Through interrogatories, Twitter learned
3 that Troy Fales has been an employee of Defendant Skootle for at least some of the time period
4 at issue, though it is unclear whether he was also a contractor for part of the time as well. Graves
5 Decl. at ¶ 8. When Twitter sought through an interrogatory to learn how Defendants’
6 TweetAdder software tool accesses Twitter’s system, Defendants originally refused to answer on
7 the ground that they did not know. *See id.*, ¶¶ 10, 11. Defendants later supplemented their
8 responses to the interrogatory to explain how the TweetAdder software accesses the Twitter
9 system. *Id.*, ¶ 19.

10 Defendants’ discovery responses and a third party subpoena response show that Mr. Fales
11 is principally responsible for developing and maintaining the TweetAdder software, including
12 writing the code, fixing bugs, and providing support services. *Id.*, ¶¶ 12, 23. It also appears that
13 Mr. Fales, and not Defendants, holds the only copy (or copies) of the source code for TweetAdder.
14 *Id.*, ¶¶ 13, 14, 17. These circumstances strongly indicate that Mr. Fales is the one who informed
15 Defendants how the TweetAdder software accesses the Twitter system. *Id.*, ¶ 20. In a meet and
16 confer letter regarding the subpoena to Mr. Fales, counsel for Defendants and Mr. Fales informed
17 Plaintiff’s counsel that Mr. Fales opened a Twitter account in the course and scope of his work for
18 Skootle. *Id.*, ¶ 18.

19 Fact discovery in this case will close on March 1, 2013. (Docket No. 62).

20 **III. ARGUMENT**

21 **A. Legal Standard: Leave to Amend**

22 Federal Rule of Civil Procedure 15(a) allows a party to amend after obtaining leave of
23 court, or by the adverse party’s consent. Fed. R. Civ. P. 15(a). Leave to amend is generally
24 within the court’s sound discretion, but the Rule provides that “leave shall be freely given when
25 justice so requires.” *Id.*; *In re Daisy Sys. Corp.*, 97 F.3d 1171, 1175 (9th Cir. 1996).

26 “Rule 15’s policy of favoring amendments to pleadings should be applied with ‘extreme
27 liberality.’” *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981) (quoting *Rosenberg Bros. &*
28 *Co. v. Arnold*, 283 F.2d 406 (9th Cir. 1960) (per curiam)). Courts consider four factors: (1) undue

1 delay, (2) bad faith in seeking amendment, (3) futility of amendment, and (4) undue prejudice to
2 the opposing party. *Foman v. Davis*, 371 U.S. 178, 182 (1962). “Absent prejudice, or a strong
3 showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in
4 favor of granting leave to amend.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051
5 (9th Cir. 2003) (citing *Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 245 (5th Cir. 1997)).

6 **B. Argument**

7 Twitter is entitled to the presumption favoring leave. First, this case is still in the early
8 stages; there have been no depositions, there have been no substantive rulings, the Court did not
9 impose a deadline to amend the pleadings, and the parties are still beginning document production.
10 Fact discovery does not close until March. Even if there were any delay, that alone is insufficient
11 to justify denial of leave to amend. *Webb*, 655 F.2d at 980. Most important, there can be no
12 undue delay where, as here, discovery has not closed. *James ex rel. James Ambrose Johnson, Jr.,*
13 *1999 Trust v. UMG Recordings, Inc.*, 2012 WL 4859069, at *2 (N.D. Cal. Oct. 11, 2012) (citing
14 *Am. Express Travel Related Servs. Co., Inc. v. D & A Corp.*, 2007 WL 2462080 (E.D. Cal. Aug.
15 28, 2007)).

16 Second, there is no bad faith: Twitter has recently learned through the limited discovery
17 thus far that Mr. Fales is a key player with respect to the TweetAdder spamware – according to
18 Defendants, Mr. Fales alone possesses the software and knows how it works. Twitter seeks to add
19 Mr. Fales to ensure that it can obtain complete relief with respect to the TweetAdder software and
20 among all of those who operate it and store it. Naming Mr. Fales as a defendant only upon receipt
21 of such evidence shows good faith. *See DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th
22 Cir. 1987) (“wait[ing] until they had sufficient evidence of conduct upon which they could base
23 claims of wrongful conduct” was “a satisfactory explanation” for plaintiffs’ delay in adding a
24 defendant) (footnote omitted).

25 Third, the proposed amendments are not futile, because the Court has jurisdiction over Mr.
26 Fales in San Francisco (because he holds a Twitter account and is bound by Twitter’s Terms of
27 Service). The amended complaint properly states the elements of the claims alleged, and thus
28 would not be immediately subject to dismissal. *Nordyke v. King*, 644 F.3d 776, 788 n.12 (9th Cir.

1 2011). The proposed claims have a sound legal foundation, and at this point, before the claims
2 have been alleged or discovery completed, the amendments cannot be said to be futile as a matter
3 of law. *James*, 2012 WL 4859069, at *3 (citing *California ex rel. Cal. Dep't of Toxic Substances*
4 *Control v. Neville Chem. Co.*, 358 F.3d 661, 673 (9th Cir. 2004).

5 Most important, there is no prejudice. Prejudice is the “touchstone of the inquiry under
6 rule 15(a)” and “carries the greatest weight” of the four factors considered by the court. *Eminence*
7 *Capital*, 316 F.3d at 1052; *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir.
8 2001). However, the prejudice must be substantial to warrant denial of leave to amend on that
9 ground. *See Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990).
10 “The party opposing amendment bears the burden of showing prejudice.” *DCD Programs*, 833
11 F.2d at 187 (citation omitted). “To decide whether the addition of new parties or new claims will
12 prejudice the defendant, the court looks to whether the plaintiff’s amendment(s) will necessitate
13 additional discovery, research or preparation, delay the proceedings, or increase the cost of
14 litigation.” *Ambat v. City and County of San Francisco*, 2009 WL 3045937, at *2 (N.D. Cal. Sept.
15 18, 2009).

16 Here, Twitter does not seek to add new causes of action; Defendants have long been on
17 notice of the same claims still at issue. No great changes to the defense strategy are warranted.
18 *See Serpa v. SBC Telecommc’ns, Inc.*, 318 F. Supp. 2d 865, 872 (N.D. Cal. 2004). Moreover,
19 Mr. Fales has been on notice of the lawsuit since at least September, because Twitter served
20 interrogatories on Defendants seeking information about Skootle’s employees, and because
21 Twitter then served a third party subpoena on Mr. Fales. In addition, Mr. Fales is represented by
22 Defendants’ same attorneys. Adding Mr. Fales as a named defendant does not result in undue
23 increases in discovery, research, preparation, or cost. In short, leave to amend will not prejudice
24 Defendants.

25 Nor will Mr. Fales be prejudiced if added to the case. As noted above, Mr. Fales has
26 known of the lawsuit since at least September – if not long before. Because discovery is still open
27 and in its early stages, Mr. Fales will not be prejudiced by joining the case at this time. In short,
28 there are no circumstances whatsoever that warrant denial of Plaintiff’s motion for leave to amend.

1 **IV. CONCLUSION**

2 For the reasons described above, Plaintiff hereby respectfully requests that the Court grant
3 Plaintiff's motion for leave to file its Amended Complaint.

4
5 Dated: November 2, 2012

Respectfully submitted,

6
7 /s Charles T. Graves

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