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17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 SAN FRANCISCO DIVISION
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14 TWITTER, INC., a Delaware corporation,

15 Plaintiff,

16 v.

17 SKOOTLE CORP., a Tennessee corporation;
18 JAMES KESTER, an individual; and TROY
19 FALES, an individual,

20 Defendants.
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CASE NO. CV 12-1721 SI

**DEFENDANTS' ANSWER TO FIRST
AMENDED COMPLAINT**

Filing Date: April 5, 2012

Trial Date: None Set

1 Defendants Skootle Corp (“Skootle”), James Kester (“Mr. Kester”) and Troy Fales (“Mr.
2 Fales,” collectively “Defendants”) hereby submit this Answer to the first amended complaint of
3 Twitter, Inc. (“Twitter”) for Breach of Contract; Tortious Interference with Contract; Fraud; and
4 Unfair or Deceptive Business Practices:

5 **PRELIMINARY STATEMENT**

6 James Kester is the founder and President of Defendant Skootle Corporation. Skootle sells
7 the product referred to in the complaint as “TweetAdder.” Twitter claims to have filed this action to
8 fight “spam.” While some individuals, companies or products may abuse Twitter in order to send
9 spam, TweetAdder does not. TweetAdder is a product far different from the other third-party
10 products that use Twitter to spam unsuspecting users. TweetAdder is a lawful, legitimate program
11 that helps businesses and individuals manage their Twitter accounts more efficiently and more
12 effectively.

13 Traditionally, “spam” refers to the use of electronic messaging systems to send unsolicited
14 bulk commercial messages indiscriminately. TweetAdder is not intended to send spam, and in fact, it
15 is impossible to send spam using TweetAdder. To the contrary, in order for any Twitter user to
16 receive a tweet or direct message that originated from TweetAdder, the Twitter user must have either
17 (a) made the decision to follow a TweetAdder user’s twitter profile and therefore elected to read
18 tweets from the user; or (b) posted a tweet @[TweetAdder user].

19 TweetAdder is a standalone desktop application. By automating certain repetitive and
20 mundane tasks, TweetAdder users are able to find Twitter users with similar interests to follow and
21 interact with. TweetAdder also allows users to schedule Tweets to be posted throughout the day to
22 provide their followers with news, updates, and other information without the need to manually post
23 each individual update. This feature is readily available, for example, with TweetDeck (a similar
24 program owned by Twitter). For example, a news station or blogger can post an article on its
25 website, and TweetAdder can automatically post an excerpt of the article with a link referencing the
26 article on twitter.com. This is something the user could have done anyway, but TweetAdder saves
27 them the extra time and extra steps. As another example, most celebrities are not able to sit at their
28 computer all day and post tweets and manually follow back 1,000 or more Twitter users throughout

1 the day. They can hire someone to do it for them, or they can automate the task with TweetAdder.
2 This helps them grow their fan base through Twitter and allows their fans to feel they are more
3 connected to them.

4 Customers of TweetAdder include popular television shows and newspapers, radio stations,
5 PR firms, charities, law firms, musicians, celebrities, politicians and political campaigns, city
6 chambers of commerce, banks, and numerous other businesses from small startups to Fortune 500
7 companies. These customers use TweetAdder to save the time and expense of manually locating and
8 following users so they can spend more time engaging with the Twitter users that want to hear what
9 they have to say and stay connected with them. Many tasks that TweetAdder performs can already
10 be performed manually by the end user. TweetAdder simply makes it easier with added search
11 capabilities.

12 Skootle has created TweetAdder in a way that makes it a useful and legitimate tool. Skootle
13 specifically elected to exclude certain features from TweetAdder that would otherwise allow users to
14 abuse Twitter. Without these features, it would be exceedingly difficult to use TweetAdder for
15 illegitimate and malicious purposes. Those excluded features include:

- 16 a. Account creation. TweetAdder clients have no ability to create multiple profiles
17 automatically. They must create their profiles manually with Twitter.
- 18 b. Bulk profile editing. TweetAdder users must create and edit each profile they enter
19 into the program manually.
- 20 c. Mass importing accounts. TweetAdder users must input each twitter profile
21 manually. They cannot upload a list of multiple profiles into the program.
- 22 d. Duplication of account settings. TweetAdder users must open each profile in
23 TweetAdder one by one and manually set each profile setting for that particular
24 profile. They cannot simply copy over settings to their remaining profiles.
- 25 e. Following the same user on multiple accounts. TweetAdder does not permit a user
26 to follow another user from multiple accounts.
- 27 f. @Replies based on user keywords. TweetAdder allows a user to send an “@reply”
28 only on the condition that another Twitter user mentioned them in an @reply, such

1 as a “thank you for mentioning me.” TweetAdder does not allow its users to
2 indiscriminately send @replies to Twitter users who have not already mentioned
3 them.

4 g. Automatic conversion of keywords to hashtags. TweetAdder does not permit users
5 to automatically convert keywords to hashtags.

6 **ANSWER TO TWITTER’S FIRST AMENDED COMPLAINT**

7 **II. INTRODUCTION**

8 1. Defendants are without knowledge or information sufficient to form a belief as to the
9 truth of the allegations in ¶ 1 and therefore deny them.

10 2. Defendants admit that Twitter brought this action against them. To the extent any
11 further allegations in ¶ 2 relate to Defendants, Defendants deny each and every other allegation
12 and/or implication of wrongdoing.

13 3. Defendants admit that Skootle distributes a software tool called “TweetAdder” but
14 deny all other allegations and/or implications of wrongdoing.

15 **III. THE PARTIES**

16 4. Defendants are without knowledge or information sufficient to form a belief as to the
17 truth of the allegations in ¶ 4 and therefore deny them.

18 5. Defendants admit that Skootle is a corporation incorporated in Tennessee, with its
19 principal place of business in the State of Virginia, doing business in the State of California.

20 6. Defendants admit that Mr. Kester is a resident of the State of Virginia but deny that
21 Mr. Kester individually conducts business in California. Defendants admit that Mr. Kester is the
22 principal officer of Skootle.

23 7. Defendants admit that Mr. Fales is a resident of the State of North Carolina but deny
24 that Mr. Fales individually conducts business in California. Defendants deny each and every other
25 allegation.

26 8. Defendants admit that Twitter refers to Skootle, Mr. Kester, and Mr. Fales collectively
27 as “TweetAdder” in its First Amended Complaint, however Defendants deny that such collective
28 reference is appropriate.

1 **IV. JURISDICTION AND VENUE**

2 9. Defendants do not contest this Court’s diversity jurisdiction.

3 10. Defendants deny that either Mr. Kester or Mr. Fales are subject to personal jurisdiction
4 in this jurisdiction. Otherwise, Defendants do not contest that venue is proper in this District under
5 28 U.S.C. § 1391 (b)(2).

6 **V. INTRADISTRICT ASSIGNMENT**

7 11. Defendants are without knowledge or information sufficient to form a belief as to the
8 truth of the allegations in ¶ 11 and therefore deny them.

9 **VI. GENERAL ALLEGATIONS**

10 **A. Twitter’s Service**

11 12. Defendants admit Twitter is an online communications platform that lets users share
12 and receive information in real-time through short messages called “tweets,” which have a maximum
13 length of 140 characters. Defendants admit the Twitter service is free of charge. As to the remaining
14 allegations in ¶ 12, Defendants are without sufficient knowledge to form a belief and therefore deny
15 them.

16 13. Defendants admit this is an accurate reflection of how Twitter may be used.

17 14. Defendants admit this is an accurate reflection of how Twitter may be used, with the
18 clarification that a direct message may only be received by a user who is a follower.

19 15. Defendants admit this is an accurate reflection of how Twitter may be used.

20 **B. “Spam” on Twitter**

21 16. Defendants admit that certain uses of Twitter are beneficial for businesses and that, as
22 a result, companies of every size now use Twitter to connect with customers, including driving new
23 businesses, offering discounts and deals, and providing customer service. Defendants are without
24 knowledge or information sufficient to form a belief as to the special efforts taken by Twitter, and
25 therefore deny that allegation.

26 17. Defendants admit that many legitimate companies have grown their businesses
27 through Twitter. Defendants are without knowledge or information sufficient to form a belief as to
28 the truth of the remaining allegations in ¶ 17 and therefore deny them.

1 18. Defendants are without knowledge or information sufficient to form a belief as to the
2 truth of the allegations in ¶ 18 and therefore deny them.

3 19. Defendants are without knowledge or information sufficient to form a belief as to the
4 truth of the allegations in ¶ 19 and therefore deny them.

5 20. Defendants admit that Twitter attempts to limit the number of Tweets and direct
6 messages an account can send per day and the number of users an account can follow. Otherwise,
7 Defendants are without knowledge or information sufficient to form a belief as to the truth of the
8 remaining allegations in ¶ 20 and therefore deny them.

9 21. Defendants are without knowledge or information sufficient to form a belief as to the
10 truth of the allegations in ¶ 21 and therefore deny them.

11 22. To the extent any allegations in ¶ 22 relate to Defendants, Defendants deny each and
12 every allegation and/or implication of wrongdoing. To the extent the allegations in ¶ 22 relate to
13 software offered by any other person or entity, Defendants are without knowledge or information
14 sufficient to form a belief as to the truth of the allegations and therefore deny them.

15 23. To the extent any allegations in ¶ 23 relate to Defendants, Defendants deny each and
16 every allegation and/or implication of wrongdoing. To the extent the allegations in ¶ 23 relate to
17 other unidentified “spammers” or “makers of spam software,” Defendants are without knowledge or
18 information sufficient to form a belief as to the truth of the allegations and therefore deny them.

19 **C. Twitter’s User Agreement**

20 24. Defendants admit that in order to create a Twitter account, a would-be Twitter user
21 must first agree to be bound by Twitter’s user agreement, which comprises the Twitter Terms of
22 Service (“Terms”), the Twitter Rules, and Twitter’s Privacy Policy (collectively the “TOS”).
23 Defendants deny that a Twitter account is necessary to access Twitter and use many of Twitter’s
24 services. Defendants are without knowledge or information sufficient to form a belief as to the truth
25 of the remaining allegations in ¶ 24 and therefore deny them.

26 25. Defendants deny that by accessing or using Twitter’s websites and services a user
27 agrees to be bound by the TOS. Defendants are without knowledge or information sufficient to form
28 a belief as to the truth of the remaining allegations in ¶ 25 and therefore deny them.

1 26. Defendants admit the terms of Twitter’s TOS and Twitter Rules speak for themselves.
2 Defendants are without knowledge or information sufficient to form a belief as to the truth of the
3 remaining allegations in ¶ 26 and therefore deny them.

4 27. Defendants admit the terms of Twitter’s TOS and Twitter Rules speak for themselves.
5 Defendants are without knowledge or information sufficient to form a belief as to the truth of the
6 remaining allegations in ¶ 27 and therefore deny them.

7 28. Defendants admit the terms of Twitter’s TOS and Twitter Rules speak for themselves.
8 Defendants are without knowledge or information sufficient to form a belief as to the truth of the
9 remaining allegations in ¶ 28 and therefore deny them.

10 29. Defendants admit to opening a Twitter account in 2009 and to agreeing to the TOS in
11 place at that time. Defendants deny all remaining allegations and/or implications of wrongdoing.

12 **D. TweetAdder**

13 30. Defendants admit that Mr. Kester is the founder and President of Skootle, which owns
14 and operates a website available at www.tweetadder.com. Defendants further admit that Skootle sells
15 and services a product called “TweetAdder.” Defendants further admit that Skootle customers may
16 purchase TweetAdder for more than one account. Defendants deny the remaining allegations in ¶ 30.

17 31. To the extent any allegations in ¶ 31 relate to Defendants, Defendants deny all
18 allegations and/or implications of wrongdoing. Defendants are without knowledge or information
19 sufficient to form a belief as to the truth of the remaining allegations in ¶ 31 and therefore deny them.

20 32. The allegations in this paragraph assert legal conclusions to which no response is
21 required and on that basis Defendants deny them.

22 33. Defendants admit that Mr. Fales wrote the source code for the TweetAdder software.
23 Defendants deny all remaining allegations in ¶ 33.

24 34. Defendants admit that the TweetAdder website states that licensees can “get more
25 followers, instantly;” “use our program on an unlimited number of Twitter profiles with TweetAdder
26 Platinum;” and “works your Twitter profile or profiles like a human being.” Defendants deny the
27 remaining allegations in ¶ 34.

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1 47. Defendants admit they are aware Twitter has a TOS. Defendants deny all allegations
2 and/or implications of wrongdoing in ¶ 47.

3 48. Denied.

4 49. Denied.

5 50. Denied.

6 51. Denied.

7 **THIRD CLAIM FOR RELIEF**

8 **Fraud**

9 52. Defendants incorporate by reference each and every response contained in paragraphs
10 1 through 51.

11 53. Defendants admit to having opened a Twitter account in 2009 and to agreeing to the
12 TOS in place at that time. Defendants deny all remaining allegations and/or implications of
13 wrongdoing in ¶ 53.

14 54. Denied.

15 55. Denied.

16 56. Denied.

17 **FOURTH CLAIM FOR RELIEF**

18 **Unlawful, Unfair, and Fraudulent Business Practices Under California Business & Professions**
19 **Code § 17200, et seq.**

20 57. Defendants incorporate by reference each and every response contained in paragraphs
21 1 through 56.

22 58. Denied.

23 59. To the extent any allegations in ¶ 59 relate to Defendants, Defendants deny all
24 allegations and/or implications of wrongdoing. To the extent the allegations in ¶ 59 relate to Twitter,
25 Defendants are without knowledge or information sufficient to form a belief as to the truth of the
26 allegations and therefore deny them.

27 60. Denied.

28 61. Denied.

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AFFIRMATIVE DEFENSE 6

68. SUBSTANTIAL COMPLIANCE – Defendants assert that Twitter’s claims against Defendants are barred by the doctrine of substantial compliance.

AFFIRMATIVE DEFENSE 7

69. ECONOMIC LOSS RULE – Defendants assert that Twitter’s claims are barred by the economic loss rule.

AFFIRMATIVE DEFENSE 8

70. JUST CAUSE – Defendants assert that the actions taken of which Twitter complains were taken with just cause and were not in violation of any federal or state statute.

AFFIRMATIVE DEFENSE 9

71. LACHES – Defendants assert that Twitter’s claims are barred by the doctrine of laches.

AFFIRMATIVE DEFENSE 10

72. ESTOPPEL – Defendants assert that Twitter’s claims are barred by the doctrine of estoppel.

AFFIRMATIVE DEFENSE 11

73. FAILURE TO DO EQUITY – Defendants assert that no relief may be obtained under the complaint by reason of Twitter’s failure to do equity in the matters alleged in the complaint.

AFFIRMATIVE DEFENSE 12

74. FAILURE TO MITIGATE – Defendants assert that Twitter’s claims are barred for failure to mitigate damages.

AFFIRMATIVE DEFENSE 13

75. MERITLESS CLAIM(S) – Defendants assert that Twitter’s complaint and the cause(s) of action alleged therein is frivolous and brought and maintained in bad faith and without reasonable cause, is totally and completely without merit, and was brought for the sole purpose of harassing Defendants and that Defendants are entitled to recover reasonable expenses, including attorneys’ fees, from Twitter and its counsel.

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AFFIRMATIVE DEFENSE 14

76. RATIFICATION – Defendants assert that they did not ratify or approve any wrongful conduct.

AFFIRMATIVE DEFENSE 15

77. WAIVER – Defendants assert that Twitter’s claims are barred by the doctrine of waiver.

AFFIRMATIVE DEFENSE 16

78. UNCLEAN HANDS - Defendants assert that Twitter’s claims are barred by the doctrine of unclean hands.

AFFIRMATIVE DEFENSE 17

79. FIRST AMENDMENT – Defendants assert that the actions taken by Kester, Skootle or Skootle’s customers are protected by the First Amendment.

JURY TRIAL DEMANDED

Defendants hereby demand a trial by jury as to all issues so triable in this action.

Date: December 17, 2012

COLT / WALLERSTEIN LLP



By: _____

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