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7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF SAN FRANCISCO

10  
11 PEOPLEBROWSR, INC., AND  
PEOPLEBROWSR PTY., LTD.,

12 Plaintiff,

13 v.

14 TWITTER, INC.,

15 Defendant.  
16

Case No.

**PLAINTIFFS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF APPLICATION FOR  
TEMPORARY RETRAINING ORDER  
AND ORDER TO SHOW CAUSE RE:  
PRELIMINARY INJUNCTION**

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**CASES**

## I. INTRODUCTION

1 PeopleBrowsr seeks a temporary restraining order (TRO) to protect its business, its  
2 employees' jobs, and its customer relationships.

3 A TRO will preserve PeopleBrowsr's existing access to the Twitter "Firehose," which  
4 provides every tweet posted on Twitter, preventing devastating injury to PeopleBrowsr's business  
5 pending a preliminary injunction hearing. PeopleBrowsr needs the Firehose to provide best-in-  
6 industry analytics to Fortune 500 companies, the Department of Defense, and individual web  
7 users. PeopleBrowsr has invested millions of dollars and thousands of hours building a business  
8 on the Firehose, creating services that cannot be replicated using a mere sample of Twitter's data.  
9 Now Twitter threatens to illegally shut off PeopleBrowsr's Firehose access.

10 PeopleBrowsr built its business on the Firehose because Twitter promised to maintain an  
11 "open ecosystem" for its data, where PeopleBrowsr and other developers could compete without  
12 Twitter using its control over data access to pick who could survive. Such an open platform is a  
13 common technology business model that encourages third party developers to risk their time and  
14 money building innovations that increase the value of the platform, much as developers for  
15 Apple's App Store do. Whether a platform is "open" or "closed" (i.e., controlled by the platform  
16 organizer) is a key factor influencing the decision to build a business on that platform.

17 Now that Twitter has decided that it wants to participate in PeopleBrowsr's market,  
18 however, it threatens to take away PeopleBrowsr's Firehose access in order to eliminate it as a  
19 competitor and take control of its market. Twitter has refused to provide any substantive  
20 explanation for its decision. Twitter receives more than \$1 million per year for PeopleBrowsr's  
21 Firehose access, and would only benefit by continuing to pass along this vital resource.

22 Twitter asserts that it has an absolute right to terminate under the parties' agreement,  
23 which states in part, "Either party may terminate this Agreement without cause with thirty (30)  
24 days prior written notice." This is wrong for two reasons. First, Twitter contracted to provide an  
25 open ecosystem, and Twitter cannot terminate for reasons inconsistent with this obligation.  
26 Second, the termination clause does not allow Twitter to terminate for an illegal purpose: to  
27 interfere with PeopleBrowsr's business relationships and restrain competition.  
28

1 The Court should issue a TRO to preserve the viability of PeopleBrowsr’s business  
2 pending the preliminary injunction hearing based on (a) the relative harm the parties face; and (b)  
3 PeopleBrowsr’s likelihood of prevailing on the merits. *Butt v. State of California*, 4 Cal. 4th 668,  
4 678 (1992). “[T]he greater the plaintiff’s showing on one [factor], the less must be shown on the  
5 other to support an injunction.” *Id.*

6 **The balance of hardships heavily favors PeopleBrowsr.** Shutting off the Firehose will  
7 devastate PeopleBrowsr’s business. PeopleBrowsr’s customers expect highly sophisticated  
8 analytics based on the Firehose. If PeopleBrowsr cannot provide these analytics, its business  
9 relationships will be irreparably harmed. At the same time, continuing Firehose access will  
10 *benefit* Twitter, which receives more than \$1 million per year for that access.

11 **PeopleBrowsr is likely to prevail on the merits.** Twitter’s threatened action would (a)  
12 intentionally interfere with PeopleBrowsr’s business relationships by preventing PeopleBrowsr  
13 from providing its services; (b) breach Twitter’s promises to maintain an open ecosystem; and (c)  
14 restrain competition in violation of the Unfair Competition Law. Twitter seeks to dominate  
15 PeopleBrowsr’s sophisticated Twitter data analytics market by restricting competitors’ data  
16 access while reserving full Firehose access for itself and select partners. Terminating  
17 PeopleBrowsr’s Firehose access will disrupt its ability to provide the sophisticated services its  
18 clients expect and eliminate PeopleBrowsr as a key competitor.

## 19 II. FACTUAL BACKGROUND<sup>1</sup>

### 20 A. Twitter Is the Only Source for Its Unique Data.

21 Twitter provides a platform for its 140 million users to share information in real time  
22 through short messages called “tweets.” (Decl. of John D. Rich (“Rich Decl.”) ¶ 2.) Tweets are  
23 public and reflect users’ immediate reaction to products (e.g., “I love Starbucks!”), providing  
24 invaluable insight regarding consumer sentiment. Identifying influential Twitter users is also  
25 valuable to companies marketing their products. Users of social media sites like Facebook do not

26 \_\_\_\_\_  
27 <sup>1</sup> Further detail regarding the factual background for this dispute may be found in the  
28 Complaint and the Declarations of John D. Rich and Robert Harris in Support of Plaintiffs’  
Application.

1 post publicly or interact in the same way. While their data is a useful complement to Twitter  
2 data, PeopleBrowsr’s clients do not see it as a substitute for that data. (Rich Decl. ¶¶ 4-5; Decl.  
3 of Robert Harris (“Harris Decl.”) ¶ 11.)

4 Twitter dominates the market for its unique brand of public, real-time media. Twitter’s  
5 initial competitors have left the business. Any new provider would be unlikely to attract the  
6 critical mass of users needed to be a viable alternative. Twitter’s control over its unique data  
7 gives it substantial market power over downstream markets using its data, including  
8 PeopleBrowsr’s sophisticated data analytics market. (Harris Decl. ¶¶ 10-12.)

9 **B. PeopleBrowsr Built a Valuable Business in Reliance on Twitter’s**  
10 **Commitment to Keep Access to Its Data Open.**

11 **1. PeopleBrowsr Provides Valuable Insight Utilizing the Full Firehose.**

12 Analyzing every public tweet, PeopleBrowsr makes Twitter’s massive data stream useful  
13 to individual web users and organizations. PeopleBrowsr highlights relevant data for its users and  
14 enables them to find others with like interests. Its analytics tell companies how consumers feel  
15 about their brands and how effective their marketing efforts are. And it continues to innovate, as  
16 by using Twitter data to identify security threats for the Department of Defense. (Rich Decl. ¶¶  
17 8-13.)

18 PeopleBrowsr built its technology to use the comprehensive data only available through  
19 the Twitter Firehose. It spent millions of dollars and over 30,000 hours building products that  
20 provide unique insight that cannot be replicated with a smaller data set. Twitter’s alternative data  
21 offerings, including those provided by its partners Gnip and DataSift, provide only a small  
22 fraction of the data provided by the Firehose, and are not sufficient to support PeopleBrowsr’s  
23 products. (*Id.* ¶¶ 25-30, 48.)

24 **2. PeopleBrowsr Built Its Business in Reliance on Twitter’s Promises of**  
25 **Open Data Access.**

26 PeopleBrowsr built its business using the Firehose because Twitter committed to maintain  
27 an “open ecosystem” using its data, and not to use its control over data access to pick winners and  
28 losers in the marketplace. Twitter has made repeated public statements affirming its commitment

1 to an open ecosystem, stating, for example, that “Twitter will always be a platform on which a  
2 smart developer with a great idea and some cool technology can build a great company of his or  
3 her own.” Even today, Twitter’s Rules of the Road for Developers state, “Twitter maintains an  
4 open platform that supports the millions of people around the world who are sharing and  
5 discovering what’s happening now. We want to empower our ecosystem partners to build  
6 valuable businesses around the information flowing through Twitter.” (*Id.* ¶¶ 17-18; Harris Decl.  
7 ¶¶ 13-19.)

8 As part of its open approach, Twitter created the Firehose to provide developers access to  
9 the full stream of Twitter data. Twitter promised to offer Firehose access to “everyone in the  
10 system” and “whoever needs this type of content.” (Rich Decl. ¶¶ 19-20.) PeopleBrowsr used  
11 the Firehose to expand Twitter’s usefulness, and was a pioneer in using “big data”<sup>2</sup> techniques to  
12 analyze the massive and previously unmanageable volume of data generated on Twitter. (Rich  
13 Decl. ¶¶ 15, 23-24; Harris Decl. ¶¶ 20-21, 25-27.)

### 14 3. PeopleBrowsr Is a Key Player in Sophisticated Data Analytics Markets 15 Created by Twitter’s Open Approach.

16 Twitter’s open ecosystem created at least two distinct types of downstream markets: (a)  
17 consumer markets for applications that improve the basic Twitter experience (e.g., mobile  
18 applications); and (b) data analytics markets for applications like PeopleBrowsr’s that analyze  
19 Twitter’s data to provide insight to third parties. (Harris Decl. ¶ 20.)

20 There are two fundamentally different types of Twitter data analytics markets: (a) a  
21 general data analytics market which uses small samples of Twitter data to address narrow needs;  
22 and (b) a “Twitter Big Data Analytics” market that analyzes very large amounts of Twitter data  
23 for more sophisticated insights. PeopleBrowsr provides Twitter Big Data Analytics. The services  
24 PeopleBrowsr’s users expect cannot be provided by general data analytics companies.

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25 <sup>2</sup> “Big data analytics is the process of examining large amounts of data of a variety of  
26 types to uncover hidden patterns, unknown correlations and other useful information. Such  
27 information can provide competitive advantages over rival organizations and result in business  
28 benefits, such as more effective marketing and increased revenue.”  
<http://searchbusinessanalytics.techtarget.com/definition/big-data-analytics>

1 PeopleBrowsr needs access to the very highest levels of Twitter data to compete in the Twitter  
2 Big Data Analytics market. (Rich Decl. ¶¶ 23-30; Harris Decl. ¶¶ 25-28.)

3 PeopleBrowsr is either the sole provider or one of two providers of three sophisticated  
4 data analytics services: (a) Influence Measurement, where PeopleBrowsr's Kred product provides  
5 a unique visual stream that highlights the interactions of influential Twitter users; (b) Action  
6 Analytics for Government and Enterprise, which tracks all activity related to brands or markets to  
7 identify trends; and (c) Financial Data Services, which uses trends in Twitter data to detect when  
8 market changes are occurring. (Rich Decl. ¶ 24; Harris Decl. ¶ 28.)

9 PeopleBrowsr is a valuable and growing business, with contracts including: (1) a \$3  
10 million contract with Strategic Technology Research to assess security threats; (2) a \$400,000  
11 contract with Cadalys to build a customized Kred application; (3) a \$300,000 contract with  
12 Radian6 to incorporate Kred into its products; (4) a \$400,000 contract with Badgeville to  
13 incorporate Kred into its products; (5) a contract with Mashable to power its mRank product,  
14 which monitors buzz around certain topics; and (6) a \$75,000 contract with DynamicLogic.  
15 PeopleBrowsr also has prospective relationships with Dell Computer, Demand Media, Ogilvy,  
16 Bell-Pottinger, and CBS Interactive, among others. (Rich Decl. ¶ 14.)

17 **4. Twitter Has Offered PeopleBrowsr the Firehose for Over Four Years**  
18 **as Part of Its Open Platform.**

19 In July 2008, Twitter and PeopleBrowsr entered into a Content License Agreement for the  
20 Firehose, which was renewed in June 2010. PeopleBrowsr now pays Twitter more than  
21 \$1 million per year for its Firehose access under the renewed agreement, which charges  
22 PeopleBrowsr the greater of a minimum monthly fee or 25 percent of its gross revenue. (*Id.* ¶¶ 6-  
23 7.) PeopleBrowsr entered into these agreements reasonably expecting to receive the benefits of  
24 Twitter's open approach. It did not expect that four years into the relationship, Twitter would cut  
25 off the Firehose in order to cripple PeopleBrowsr in the marketplace. (*Id.* ¶ 22.)

26 **C. Terminating Firehose Access Will Devastate PeopleBrowsr's Business and**  
27 **Eliminate It as a Competitor.**

28 Despite its promises of openness, Twitter is using data access to control downstream

1 markets. As it has with other developers, Twitter is limiting PeopleBrowsr’s data access in order  
2 to ensure that Twitter or its partners will dominate the Twitter Big Data Analytics market.

3 **1. Twitter Has Already Converted Twitter Consumer Markets from**  
4 **Open Ecosystems to Twitter-Controlled Markets.**

5 As noted above, there are two general types of downstream markets using Twitter data:  
6 (a) consumer markets; and (b) data analytics markets, including the Twitter Big Data Analytics  
7 market in which PeopleBrowsr participates. (Harris Decl. ¶ 20.) Citing an asserted need to  
8 provide a more uniform user experience, Twitter has already taken control of consumer markets,  
9 using a combination of data access limits, restrictions on what third parties could offer, and  
10 terminations based on shifting terms of service to eliminate all but a few competitors. (*Id.* ¶¶ 34-  
11 41.)

12 **2. Twitter Now Seeks to Eliminate PeopleBrowsr as a Competitor in the**  
13 **Twitter Big Data Analytics Market.**

14 Now Twitter wants to cut off PeopleBrowsr’s Firehose access in order to restrict  
15 competition in the Twitter Big Data Analytics market. Having developed its own analytics  
16 capabilities, and acquired or partnered with leading analytics companies, Twitter is now clearing  
17 out competition. Twitter is limiting competitors’ data access so that Twitter and its closely  
18 controlled partners, who have full access to that data, can dominate. Twitter’s primary method of  
19 restricting data access is diverting data analytics providers from the Firehose to its resale partners  
20 Gnip and DataSift, whom Twitter prohibits from providing the full Firehose. (*Id.* ¶¶ 42-44.)

21 In keeping with this approach, Twitter intends to force PeopleBrowsr to transition from  
22 the Firehose to Gnip or DataSift, who cannot provide adequate data. Last year, Twitter told  
23 PeopleBrowsr that it intended to restrict Firehose access to an “inner sanctum” of closely  
24 controlled special partnerships. Under the guise of exploring a continuing relationship, Twitter  
25 repeatedly insisted that PeopleBrowsr divulge its confidential business information, including  
26 business plans, innovations, and customer lists. (Rich Decl. ¶¶ 33-41.)

27 After Twitter had extracted this valuable market information, Twitter gave formal notice  
28 of its intention to cut off the Firehose on November 30, 2012. (*Id.* ¶ 44.) Twitter has refused to

1 provide any substantive reason for termination. Though Twitter insists that its resale partners  
2 Gnip and DataSift are suitable alternatives, both companies told PeopleBrowsr that Twitter will  
3 not authorize them to provide the Firehose to PeopleBrowsr. (*Id.* ¶ 48.)

4 **D. Terminating the Firehose Will Cause Irreparable Injury Because**  
5 **PeopleBrowsr Relies on the Firehose to Serve Its Clients.**

6 PeopleBrowsr’s products rely on creating a comprehensive picture of Twitter activity  
7 based on the Firehose. They need full historical and contextual data to provide timely service,  
8 detect often elusive emerging trends, provide meaningful influence rankings, and provide  
9 sophisticated historical analyses. A mere sample of Twitter data, such as that provided by Gnip  
10 and DataSift, is insufficient. Without the Firehose, PeopleBrowsr will not be able to provide its  
11 clients the products they expect. It will suffer irreparable harm to its business relationships and  
12 goodwill and its business will be devastated. (*Id.* ¶¶ 25-32; Harris Decl. ¶¶ 45-58.)

13 **III. LEGAL ANALYSIS**

14 The Court should issue a TRO preserving PeopleBrowsr’s existing Firehose access and  
15 protecting the viability of its business pending a preliminary injunction hearing. The balance of  
16 hardships heavily favors PeopleBrowsr, and PeopleBrowsr is likely to prevail on its claims. *Butt*  
17 *v. State of California*, 4 Cal. 4th 668, 678 (1992). “[T]he greater the plaintiff’s showing on one  
18 [factor], the less must be shown on the other to support an injunction.” *Id.*

19 **A. The Balance of Hardships Heavily Favors Issuing a TRO to Prevent Severe**  
20 **and Irreparable Injury to PeopleBrowsr.**

21 It is an abuse of discretion not to grant a TRO if it “would result in great harm to the  
22 plaintiff, and the defendants would suffer little harm if it were granted.” *Robbins v. Super. Ct.*, 38  
23 C.3d 199, 205 (1985). Here, *Twitter only stands to benefit* from continuing an agreement that  
24 provides it more than \$1 million a year – far exceeding any cost for providing Firehose access.  
25 By contrast, *PeopleBrowsr will suffer irreparable injury to its business* from loss of the Firehose.  
26 Without the Firehose, PeopleBrowsr cannot provide the products its clients, prospective  
27 customers and web users expect. Its business relationships will be devastated. The roadmaps and  
28 projections that it uses to obtain funding will be undermined. Its business that employs 40 people

1 will be in tatters.

2           Avoiding this irreparable injury strongly supports a TRO. “[T]erminating the delivery of  
3 a unique product to a distributor whose customers expect and rely on the distributor for a  
4 continuous supply of that product almost inevitably creates irreparable damage to the good will of  
5 the distributor.” *Reuters Ltd v. United Press Int’l, Inc.*, 903 F.2d 904, 907-08 (2d Cir. 1990). Just  
6 as cutting off access to a news wire service in *Reuters* threatened irreparable harm to a news  
7 organization, cutting off PeopleBrowsr’s access to the level of data needed to provide its  
8 sophisticated analytics will cause irreparable damage to its goodwill, disrupt its business, and  
9 threaten its viability. *See also Mahroom v. Best Western Int’l.*, 2009 WL 248262, at \*3 (N.D.  
10 Cal. Feb. 2, 2009) (motel’s loss of access to reservation system caused irreparable harm, even if it  
11 did not immediately result in the death of the business: “Major disruption of a business can be as  
12 harmful as its termination and thereby constitute irreparable injury.”).

13           **B. PeopleBrowsr Is Likely to Succeed on the Merits.**

14           For a TRO to issue, it need only be “reasonably probable that the moving party will  
15 prevail on the merits.” *San Francisco Newspaper Printing Co., Inc. v. Super. Ct.*, 170 Cal. App.  
16 3d 438, 442 (1985). Because the balance of hardships here so strongly favors an injunction,  
17 PeopleBrowsr’s only needs to show “*some possibility* that [it] would ultimately prevail on the  
18 merits of the claim.” *Butt*, 4 Cal.4th at 678 (emphasis added).

19           **1. PeopleBrowsr Will Prevail on Its Claims for Intentional Interference**  
20 **with Contract and Prospective Business Relations.**

21           The elements of intentional interference with contract are: (1) a valid contract; (2) the  
22 defendant’s knowledge of that contract; (3) intentional disruption of the contractual relationship;  
23 (4) actual breach or disruption; and (5) damage. *Reeves v. Hanlon*, 33 Cal.4th 1140, 1148 (2004).  
24 Interference with prospective economic advantage is also actionable if the defendant’s conduct is  
25 independently wrongful. *Lowell v. Mother’s Cake & Cookie Co.*, 79 Cal. App. 3d 13, 20 (1978).

26           **Knowledge of valid contracts.** Twitter required PeopleBrowsr to provide regular  
27 updates on its existing contracts and prospects throughout the parties’ relationship. As a result, it  
28 is aware of PeopleBrowsr’s valid contracts with Strategic Technology Research, Cadalys,

1 Radian6, Badgeville, Mashable, and DynamicLogic worth approximately \$4 million, as well as  
2 prospective relationships with Dell Computer, Demand Media, Ogilvy, Bell-Pottinger, and CBS  
3 Interactive. (Rich Decl. ¶ 14.)

4 **Intentional interference.** In order to demonstrate intent, “the plaintiff need not prove  
5 that a defendant acted with the primary purpose of disrupting the contract, but must show the  
6 defendant’s knowledge that the interference was certain or substantially certain to occur as a  
7 result of his or her action.” *Reeves*, 33 Cal.4th at 1148. PeopleBrowsr informed Twitter on at  
8 least seven occasions – and Twitter has acknowledged – that terminating access to the Firehose  
9 would be devastating to the company, because it is an “essential” input the loss of which “would  
10 shut us down.” It also informed Twitter that it required Firehose access to service specific  
11 contracts. (Rich Decl. ¶¶ 32, 37.) Twitter knows that shutting off Firehose access will destroy  
12 PeopleBrowsr’s ability to perform under its contracts.

13 **Disruption of contracts and prospects.** Each of PeopleBrowsr’s contracts depends on  
14 analysis of a comprehensive data mine of tweets, which only the Firehose can provide. (*Id.* ¶¶  
15 25-30.) Terminating an essential service so that a company cannot perform under its contracts  
16 constitutes intentional interference. *H&M Assocs. v. City of El Centro*, 109 Cal. App. 3d 399, 405  
17 (1980). Much as cutting off water service in *H&M Assocs.* eliminated a key input a landlord  
18 needed to keep its tenants, cutting off the Firehose will disrupt PeopleBrowsr’s ability to provide  
19 the services its clients want, interfering with its business relationships.

20 **Independent Wrongfulness.** An act is independently wrongful if “it is proscribed by  
21 some constitutional, statutory, regulatory, common law, or other determinable legal standard.”  
22 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1159 (2003). Cutting off the  
23 Firehose is independently wrongful for two reasons. First, it breaches Twitter’s express promises  
24 to maintain an open ecosystem. Second, as discussed below, it is anticompetitive conduct that  
25 violates the Unfair Competition Law (the “UCL”). *See Stevenson Real Estate Services, Inc. v. CB*  
26 *Richard Ellis Real Estate Services, Inc.*, 138 Cal. App. 4th 1215, 1224 (2006) (violation of UCL  
27 is independently wrongful act).

28 Twitter should not be allowed to intentionally and wrongfully disrupt PeopleBrowsr’s

1 contractual and prospective business relations by terminating Firehose access.

2 **2. PeopleBrowsr Is Entitled to Relief Under The Doctrine of Promissory**  
3 **Estoppel.**

4 The elements of a promissory estoppel claim are: “(1) a clear promise, (2) reliance, (3)  
5 substantial detriment, and (4) damages measured by the extent of the obligation assumed and not  
6 performed.” *Toscano v. Greene Music*, 124 Cal.App.4th 685, 692 (2004).

7 **Clear promise.** For years, Twitter has clearly promised an open ecosystem, encouraging  
8 PeopleBrowsr to build a business that depends on Twitter. An “open ecosystem” or “open  
9 platform” is a common and widely-understood concept in technology markets that creates the  
10 expectation that the platform organizer will not use its control over the platform to choose who  
11 succeeds in the marketplace. Twitter offered an “open ecosystem” to encourage PeopleBrowsr  
12 and others to create valuable uses for its platform. (Harris Decl. ¶¶ 13-19; Rich Decl. ¶¶ 17-19.)

13 Among the statements Twitter has made affirming its commitment to an open ecosystem  
14 are the following:

- 15 • Twitter’s Rules of the Road for Developers state, “Twitter maintains an open  
16 platform that supports the millions of people around the world who are sharing and  
17 discovering what’s happening now. We want to empower our ecosystem partners  
18 to build valuable businesses around the information flowing through Twitter.”
- 19 • On March 1, 2010, Twitter’s blog stated that “[e]ven before Twitter was officially  
20 a company, we opened our technology in ways that invited developers to extend  
21 the service. Before long, Twitter became a platform and an ecosystem of  
22 innovation began to grow.”
- 23 • On January 18, 2008, Twitter’s blog stated, “Twitter has . . . an open approach to  
24 technology development. . . . [O]ur open approach is more than just good karma. .  
25 . . . Gaining trust means showing our work. When a technology is shared,  
26 conversations and understanding form around it.”

- On March 11, 2011, Ryan Sarver, Twitter’s Head of Platform, stated that “Twitter will always be a platform on which a smart developer with a great idea and some cool technology can build a great company of his or her own.” (Rich Decl. ¶ 17.)

Twitter described the Firehose as a part of this open ecosystem, stating on multiple occasions that it would “provide . . . the firehose for everyone in the system . . . . [W]hoever needs this type of content we want to be able to provide an open and transparent framework for you to gain access to it.” Its blog proclaimed that with widespread Firehose access, “it is possible to move far beyond the Twitter experiences we know today. In fact, we’re pretty sure that some amazing innovation is possible.” Twitter also committed directly to PeopleBrowsr that “[we are] all fighting to keep access to the Firehose . . . as open as possible.” (*Id.* ¶ 19.)

**Reliance.** PeopleBrowsr relied on Twitter’s promises by investing more than \$5 million and thousands of hours in a business based on the Firehose. In addition, PeopleBrowsr repeatedly divulged to Twitter confidential information regarding its business plans and innovations in the expectation that Twitter would not seek to eliminate PeopleBrowsr as a competitor. In a technology market, this information is invaluable, and Twitter can now use it to take PeopleBrowsr’s business opportunities. (Rich Decl. ¶¶ 22, 33-41; Harris Decl. ¶ 32.)

The Court should enforce Twitter’s promise to maintain an open ecosystem in order to avoid injustice. Twitter promised an open ecosystem to induce PeopleBrowsr and thousands of other developers to improve and create lucrative new markets for its product. PeopleBrowsr invested millions of dollars and thousands of hours in reliance on that promise, which Twitter should not now be allowed to abandon.

### **3. Twitter’s Practices Violate California’s Unfair Competition Law.**

California’s Unfair Competition Law (the “UCL”) prohibits any “unlawful, unfair or fraudulent business act or practice.” Bus. & Prof. Code § 17200. Twitter’s business practices are both unlawful and unfair.

#### **a. Twitter’s Business Practice of Intentionally Interfering with Contracts and Business Prospects Is Unlawful.**

The UCL “borrows violations of other laws and treats them as unlawful practices that the

1 unfair competition law makes independently actionable.” *Cel-Tech Communications, Inc. v. Los*  
2 *Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 180 (1999). Twitter’s intentional interference  
3 with PeopleBrowsr’s current and future contracts is a “tortious violation of duties imposed by  
4 law” that is unlawful under the UCL. *CRST Van Expedited, Inc. v. Werner Enters., Inc.*, 479 F.3d  
5 1099, 1107 (9th Cir. 2007).

6 **b. Restraining Competition in the Twitter Big Data Analytics**  
7 **Market Is an Unfair Business Practice.**

8 A direct competitor’s business practice is unfair if it “threatens an incipient violation of an  
9 antitrust law, or violates the policy or spirit of one of those laws because its effects are  
10 comparable to or the same as a violation of the law, or otherwise significantly threatens or harms  
11 competition.” *Cel-Tech*, 20 Cal.4th at 187. “[P]ractices that have the effect of harming  
12 competition may be unfair” even if they do not violate the antitrust laws. *Id.* at 189.

13 Cutting off PeopleBrowsr’s Firehose access threatens competition. PeopleBrowsr is one  
14 of a few providers of “Twitter Big Data Analytics,” who use sophisticated “big data” techniques  
15 to derive deep insights from very high volumes of Twitter data. (Harris Decl. ¶¶ 25-29.) Twitter  
16 wants to participate in this market and seeks to eliminate competition by restricting competitors’  
17 access to data while reserving full data access for itself and select, closely controlled partners.  
18 This is a highly effective means of restraining competition in a Twitter Big Data Analytics market  
19 that, by its nature, depends on analyzing high levels of data to provide insights others cannot. (*Id.*  
20 ¶¶ 42-44.)

21 Twitter has previously used a variety of means, including limiting competitors’ access to  
22 its data and available features, to convert markets for Twitter consumer applications (e.g., Twitter  
23 mobile applications) from open ecosystems into controlled market in which few competitors  
24 remain. Its stated rationale for this effort was to ensure that its users have a “uniform Twitter  
25 experience.” (*Id.* ¶¶ 34-41.)

26 This pattern is recurring in PeopleBrowsr’s Twitter Big Data Analytics market. Twitter  
27 has developed its own analytics capability, and acquired or formed partnerships with leading data  
28 analytics companies, signaling its intent to enter the market. To ensure that Twitter and its

1 partners will dominate, Twitter has restricted data access for competing services. Though the  
2 Firehose was once intended for wide consumption, after deciding to provide data analytics,  
3 Twitter has required competitors to instead obtain data access through its resale partners Gnip and  
4 DataSift, who provide only a fraction of the Firehose. Because Twitter and its close partners  
5 retain unrestricted access to the Firehose, Twitter’s competitors will not be able to provide the  
6 same level of service, and will not be able to compete. (*Id.* ¶¶ 42-44.)

7 By eliminating PeopleBrowsr’s Firehose access, Twitter will devastate PeopleBrowsr’s  
8 business and ensure it cannot compete with Twitter and its partners, significantly restraining  
9 competition in the Twitter Big Data Analytics market. PeopleBrowsr is a key provider of three  
10 Twitter Big Data Analytics services: (a) Influence Measurement (which identifies people able to  
11 influence others within particular communities and generally); (b) Action Analytics for  
12 Government and Enterprise (which spots trends in sentiment regarding a brand); and (c) Financial  
13 Data Services (which detects early signs of changes in financial markets). PeopleBrowsr is one  
14 of two viable providers of Influence Measurement, the sole provider of Action Analytics for  
15 Government and Enterprise, and, along with Twitter’s partners Dataminr and DataSift, the only  
16 provider of Financial Data Services. (*Id.* ¶¶ 28, 50; Rich Decl. ¶ 24.) Eliminating PeopleBrowsr  
17 will significantly limit consumer choice and allow Twitter to dominate the Twitter Big Data  
18 Analytics market, raising prices and limiting options.<sup>3</sup> (Harris Decl. ¶ 50.)

19 Twitter has no legitimate business purpose for its planned termination of PeopleBrowsr.  
20 The rationale offered for Twitter’s takeover of consumer markets – the need to ensure a  
21 “consistent Twitter experience” – does not apply to PeopleBrowsr, who does not allow Twitter  
22 users to post tweets or otherwise provide consumers the core Twitter experience. Any business  
23

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24 <sup>3</sup> Eliminating a single competitor in a small market is sufficient to constitute an illegal  
25 restraint of trade. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603 (1985).  
26 In *Aspen Skiing*, the owner of three out of four ski resorts in the Aspen, Colorado area excluded  
27 the fourth resort from a ticket that allowed skiers to ski at all area resorts. As a result, the plaintiff  
28 could not compete. Consumers’ lack of access to the fourth resort through the all-access ticket  
sufficiently hurt competition to support a Sherman Act claim. *Id.* at 606-07. Similarly,  
eliminating PeopleBrowsr by cutting off essential data access will substantially limit consumer  
choice by eliminating the sole provider or one of only two providers of PeopleBrowsr’s services.

1 justification Twitter offers for denying Firehose access to other data analytics providers rings  
2 hollow with regard to PeopleBrowsr, who has been a successful Firehose partner for over four  
3 years. Though Twitter has complained of the cost of providing PeopleBrowsr's access, it is more  
4 than covered by the \$1 million per year that PeopleBrowsr pays for its access. That Twitter has  
5 provided no valid business justification for termination suggests that it seeks to benefit from  
6 restraining competition. (Harris Decl. ¶¶ 51-54.)

#### 7 **4. The Termination Provision Does Not Excuse Twitter's Conduct.**

8 Twitter has asserted that it has an absolute right to terminate under the parties' agreement,  
9 which states in part, "Either party may terminate this Agreement without cause with thirty (30)  
10 days prior written notice." (Rich Decl. Ex. B, ¶ 5.2.) This is not true.

11 First, interpreting this provision to allow Twitter to terminate for the purpose of  
12 eliminating PeopleBrowsr as a competitor and taking control of PeopleBrowsr's market would be  
13 inconsistent with Twitter's obligation to provide an open ecosystem. *See* Cal. Civ. Code §§ 1641  
14 ("The whole of a contract is to be taken together . . . each clause helping to interpret the other.");  
15 1650 ("Particular clauses of a contract are subordinate to its general intent."). The service that  
16 Twitter repeatedly and publicly offered, and which PeopleBrowsr contracted for, is an open  
17 ecosystem. A key component of such an open ecosystem is a commitment not to terminate data  
18 access in order to control Twitter markets and interfere with competition. (Harris Decl. ¶¶ 13-14;  
19 Rich Decl. ¶ 21.) Allowing Twitter to terminate in order to convert PeopleBrowsr's market to a  
20 closed system is inconsistent with this commitment.

21 Second, even if Twitter can terminate without cause, it cannot terminate for an illegal  
22 purpose. Termination for the purpose of interfering with business relationships can be wrongful  
23 even if authorized by contract. "The unjustifiability or wrongfulness of the act may consist of the  
24 *methods* used *and/or* the *purpose* or motive of the actor." *Lowell*, 79 Cal. App. 3d at 18. "[E]ven  
25 if the means used by the defendant are entirely lawful, intentional interference with prospective  
26 economic advantage constitutes actionable wrong if it results in damages to the plaintiff, and the  
27 defendant's conduct is not excused by a legally recognized privilege or justification." *Id.* at 20.

28 Similarly, "[a] refusal to deal based upon a contract provision (permitting termination or

1 nonrenewal) is, in respect to the antitrust laws, no different from the right of traders generally to  
2 select their customers. In either case, the right is limited to situations where the seller has not put  
3 together an arrangement in restraint of trade.” *Phillips v. Crown Central Petroleum Corp.*, 602  
4 F.2d 616, 629 (4th Cir. 1979) (quotation omitted).

5 Finally, promissory estoppel can prevent a party from inducing action based on the  
6 prospect of a business relationship and then terminating that relationship. *See Sheppard v.*  
7 *Morgan Keegan Co.*, 218 Cal. App. 3d 61, 67 (1990); *Gilberd v. Dean Witter Reynolds, Inc.*,  
8 1992 WL 880089 (N.D. Ca. Aug. 11, 1992).

9 Twitter is engaged in an unfair and anticompetitive scheme that will devastate  
10 PeopleBrowsr’s business. The termination clause does not excuse this conduct.

#### 11 IV. CONCLUSION

12 For all the foregoing reasons, the Court should grant PeopleBrowsr’s application, enter the  
13 proposed temporary restraining order, and issue an order to show cause as to why a preliminary  
14 injunction should not issue.

15 Dated: November \_\_\_\_\_, 2012

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