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### Kasie W. Lee, SBN No. 229168

I One Sansome Street, ste. 3500

1. San Francisco, California 94I04 Telephone: (415) 371-9786
2. Email: kasie/alkasiewlee.com

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### Attorney for Defendant

1. LAUREN SMITH 6

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SUPERIOR COURT OF CALIFORINIA

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### 8 CITY AND COUNTY OF SAN FRANCISCO

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### 10 PEOPLE OF THE STATE OF 1I CALIFORNIA,

1. Plaintiff,
2. V.

### LAUREN SMITH,

Defendant.

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No

**NOTICEOF MOTION AND MOTION TO QUASH THE SUBPOENA DUCES TECUM ISSUED BY THE PEOPLE TO TWITTER, INC.**

Date:- 1 **/1** *(* ***18***

### Time: I:30 pm

16 l -1-- - - - - - - - - - - - - - -' Dept. 16

### TO THE ABOVE-ENTITLED COURT AND THE DISTRICT ATTORNEY FOR THE CITY

1. AND COUNTY OF SAN FRANCISCO:

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1. PLEASE TAKE NOTICE that on the above date, time, and in the above-noted
2. department of the above-entitledcourt, the defendant LAUREN SMITH, will respectfully move
3. this Court to quash a subpoena duces tecum (hereinafter"the subpoena") issued by the San
4. Francisco Dislrict Attorney's Office to Twitter,Inc., for the records and content of Twitter
5. subscriber@laurenriot oo the grounds that the subpoena fails to comply with 18 U.S.C. §2701-
6. 2711 (the Stored Communications Act).
7. This motion is based on the attached declaration, points and authorities, and any additional evidence and argument that may be presented at the time of the hearing.

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,,.... I. **DECLARATION OF COUNSEL**

* 1. I, Kasie W. Lee, hereby declare:
	2. I. I am the attorney of record for Lauren Smith in the above-entitled case.
	3. 2. On or about November 13, 2012, Assistant District Attorney Laura Caster served a
	4. subpoena decus tecum on Twitter, Inc., for the production of records and content
	5. information for subscriber@laurenriot, including:
	6. a. Subscriber information for @laurenriot;
	7. b. Photos tweeted by @laurenriot for the time period between January I, 2012
	8. through October 31, 2012;
	9. C. Mentions of @laurenriot by any other Twitter user for the time period between

11 January I, 2012 through October 31, 2012;

12 d. Tweets by @laurenriot the time period between January I, 2012 through October 13 31, 2012;

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1. e. The usemarnes of all followers of @laurenriot;
2. f. The usemarnes of all subscribers followed by @lauic nriot.
3. *See Exhibir,A*

Subpoena Duces Tecum.

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The subpoena further asserts that there is good cause for the production for the

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1. following reasons:
2. a. That the t"' ner account for @laurenriot belongs to Ms. Smith;
3. b. That Ms. Smith, along with the 18other defendants are being charged with
4. rioting, routing, and unlawful assembly;
5. C. That Lauren Smith, Robert Donohoe and Daniel Bash are additionally charged
6. with wearing a disguise during the commission of a crime;
7. d. That the account may contain communications indicating that Ms. Smith and/or
8. the other defendants conspired to or agreed to stage a riot, unlawfully assemble
9. or wear a disguise during a commission of a crime.
10. *See id.*
11. 4. No other statements supporting the existence of good cause were provided.

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* 1. On or about November 24, 2012, Ms. Smith received an email from Twitter Legal informing her of the subpoena. No other notice was provided to Ms. Smith.
	2. Upon information and belief, the twitter account for @laurenriot was no longer

active at the time of the service of the subpoena and none of the tweets were viewable by the public.

* 1. There is no information that this Tv.<itter account was used immediately before,

during, or after the alleged incident.

Dated this 29111 da y of Novem ber, 2012.

Respectfully submitted,

Attorney for Defendant

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II. POINTS AND AUTHORITIES

#### T he Subpoena Should Be Quas hed Because It Fails to Complv with the Stored Communica tions Act, 18 U.S.C. § 2701-§2 711

The Stored Communications Act, 18 U.S.C. §2701-2711, governs the privacy of stored

Internet comm unications in the United States. Enacted in 1986, the statute prohibits providers of an electronic communication service, such as Twitter, Inc., from "knowingly divulging the contents of any communication while in electronic storage by that service to any person otber than the addressee or intended recipient." S.Rep. No. 99-541, 97m Cong. 2nd Sess. 37. Clearly, the legislative intent of the Stored Communications Act was to protect users whose communications are in electronic storage with an Internet Service Provider or other electronic communications facility." *Theo/el. v. Farey-Jones,* 341 F.3d 978,982 (9mCir. 2003).

§2703 sets forth an exception to the general rule of non-disclosure, laying out specific

steps that must be taken before the government can compel disclosure of subscriber information (classified as "records") and substantive electronic communication (classified as "contents").

None of those steps were complied with in this case.

* + - 1. §2703(a) Permits Disclosure of Contents Less Than 180 Davs Old Onlv With a Valid Search Warrant

Pursuant to §2703, a governmental entity " may require the disclosure by a provider of

electronic communication service of the contentS of a \vire or electronic communication, that is in electronic storage in an electronic colilJDunications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction." In this case, the San Francisco District Attorney' s Office seeks to compel disclosure of photos, tweets, mentions, names of followers and names of those followed from January 1, 2012 to October 31, 2012 for the account held by @laurenriot.

However, any of the listed contents (photos, tweets, mentions, followers, those followed) from May 29. 2012 would be Jess than 180 days old. Absent a search warrant, compliance with the

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subpoena would be in direct violation of this section.

2. §2703(b) Permits Disclosureof Contents Over 180 Days Old Only With Either a Valid Search Warrant or Provides Notice to the Subscriber

With respect to the contents sought from January 1, 2012 to May 28, 2012, disclosure of contents over 180 days old is only permitted under §2307(b) is only permitted with a valid search warrant or, absent a warrant, prior notice to the subscriber. The notice requirement may be bypassed with a court order, which may issue only when the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. Here, there is no search warrant, prior notice or court order accompanying the subpoena.

Even if a court order were to be sought in this matter, the People would not be able to

provide specific and articulable facts showing why contents dating as far back as nine to ten months before the incident would be relevant and material to the incident on October 6, 2012.

ill . **CONCLUSION**

Based on the foregoing, Ms. Smith and counsel respectfully request this court to quash the subpoena.

Dated: November 29, 2012

Respectfully submitted,



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I, the undersigned, declare:

##### Proof of Service

1. On November 30, 2012 I electronically served a co py of the attached Notice of Motion and
2. Motion to Quash on the following parties:
3. Honorable Andre Cheng, Acheng@sftc.org: Laura.Claster, Laura.Claster@sfgov.org
4. **Mark** R. Vermeulen, vermeulen@mindspring.com; Christopher Dove, dovelaw@gmail.com;
5. Michael Linscheid, linscheidlaw@hotmail.com;
6. Sam Lasser, samlasser@hotmail.com: Stuart Hanlon, stuart@stuarthanlonlaw.com;
7. Wendy Lowinger, wendy@lowingerlaw.com;

IO Kate Chatfield, katechatfield@gmail.com; Cherly Rich, cheryl rich@crichlaw.com;

1 1 Josh Davis. jdavis@ joshdavislaw.com;

Samantha Schwartz, schwartzbrownlaw@gmail.com;

1. Matt Sullivan, msullivan@mattsullivanlaw.com;
2. Christopher Shea, christopherjshea@comcast.net; Jim Hardwood, jim@baya rea-crimi na llawyer.com;
3. Ryan King, ryan@ryanjking.co m;

J. P. Visaya . john pa ul.visaya@sfgov .o rg :

1. Miche lle De l Rosar io, MDe lRosar io@sftc .org:
2. Ann Mendoza, amendoza@sftc.org;

David Harrison, defense@criminaldefend.com

1. Patrict Swillinger, patrickswillinger@gmail.com
2. I personally served copies of the attached on the following:
3. OFFICE OF THE DISTRICT ATIORNEY City and County of San Francisco
4. 850 Bryant Street, Room 300
5. San Francisco. CA 94I03
6. I declare under penalty of perjury that the foregoing is true and correct.
7. Executed on November 30, 20 I2, at San Franc isco, California. 24

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26 KASCE W.LEE

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EXHIBIT *A*

**SUBPOENA**

|  |  |
| --- | --- |
| GEORGE GASCONDistrict Attorney LAURA CLASTERAssistant District Attorney850 Bryant StreetSan Francisco, CA 94103 (415) 734--3108LAURA.C LASTER@SFGOV.ORGAttorneys for the Peoole of the State of California | FOR COURT USE ONLY |
| SUPERIOR COURT OF THE STATE OF CALIFORNIA CITY AND COUNTY OF SAN FRANCISCO850 Bryant StreetSan Francisco CA 94103 |  |

THE PEOPLE OF THE STATE OF CALIFORNIA vs. CICILY COOPER, ET AL.

CRIMINAL SUBPOENA DUCES TECUM CASE NUMBER 12025923 THE PEOPLE OF THE STATE OF CALIFORNIA, TO: **CUSTODIAN** OF **RECORDS**

**Twitter,** Inc.

c/o **Trust** & **Safety**

##### 1355 Market Street, Suite 900 San Francisco, CA 94103

1. YOU ARE ORDERED TO APPEAR AS A WITNESS in this action as follows UNLESS you make a special

a reement with the erson named in item 3:

- Date: 12-07-2012 n me: 1:30 PM Dept 16

o. Address: 850 B ant Street, San Francisco, CA 94103

PLEASE CALL THE ASSISTANT DISTRICT ATTORNEY TO CONFIRM APPEARANCE (415) 734-3108

1. And you are:
	1. 0 ordered to appear in person
	2. ■ not required to appear in person if *you* produce the records described in the accompany affidavit in

compliance with Evidence Code sections 1560, 1562, and 1271. (1) Place a *copy* of the records in an envelope (or other wrapper). Enclose your original declaration with the records. Seal them. (2) Attach a *copy* of this subpoena to the envelope or write on the envelope the case name and date, time, and place from ti em 1 (th e above ). ( 3) Place this first envelope in an outer envelope, seal it, and mail it to the clerk of the court at the address in item 1. (4) Mail a *copy* if your declaration to the attorneyor *party* shown at top of this form; (5) Please also emaila courtesy*copy* to **Laura.Claster@sfgov.org**

* 1. D ordered to appear in person and to produce the records described in the accompanied affidavit,. The personal attendance of the custodian or other qualified witness and the production of the original recodrs a er

r equ ired by this subpoena. The procedure authorized pursuant to subdivision (b) of section 1560, and sections 1561and 1562, of the Evidence Code will not be deemed sufficient compliance with this subpoena.

.d D ordered to make the original business records described in the accompanying affidavit available for inspection at *your* business address by the attorney's representative and to permit copying at your busine ss address under reasonable conditions during nomi al business hours.

1. IF YOU HAVE ANY QUESTIONS ABOUT THE TIME OR DATE FOR YOU TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE JS REQU IRED , CON T ACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR. PLEASE CALL BEFORE YOU COME TO COURT:

LAURA CLASTER, Assistant District Attorney Telephone number. (415) 734-3108

Witness Fees: You may be entitled witness fees, mileage, or both, in the discretionof the court. Contact the person named in item 3 after our a arance.

DISOBEDIENCE OF THIS SUBPOENAMAY BE PUNISHEDBY A FINE, IMPRISONMENT, OR BOTH. **A WARRANT**

AY ISSUE FOR YOUR ARREST IF YOU FAIL TO APPEAR. DATE: 11/13/2012

URA CLASTER, Assistant District Attorney

##### DECLARATION FOR SUBPOENA DUCES TECUM

I, Laura Claster, an Assistant District Attorney for the City and County of San Francisco, declare, upc info rmation and belief, that the witness whose name and address are described in the foregoing subpoena m. have the following articles or records in his possession or control:

* 1. Subscriber information for **ID@laurenriot**
1. Photos tweeted by ID @la urenriot (between January I, 2012 - October 31, 2012)
2. Mentions of lD @la urenri ot (between January I, 2012- October 3 I, 2012)
3. Tweeis by (D @ la urenr iot (between January I, 2012 - October 31, 2012)
4. Followers ofI D @la uren ri ot
5. Twitter accountS followed by ID @laurenr iot,

and, that there is good cause for producing the records or articles before the Court The records or articl< described are relevant and material to the trial of this case for the following reasons:

THIS TWITTER ACCOUNT (@laurenriot) IS THE ACCOUNT OF LAUREN **SMITH.** CHARGES 0 RIOTING (Cal. Pen. Code, § 404(a)), ROUTING (§ 406 ), AND UNLAWFUL ASSEMBLY (§ 407), AR PENDING AGAINST LAUREN SMITH AS WELL AS AGAINST HER 18 CO-DEFENDANTS, CICI.L COOPER, GABRIELLE SILVERMAN, JAMI WILLIAMS, EDWARD MEDINA, DANTE CANO, MAY YOUNC: BENJ AM I N MABIE , ROBERT DONOHOE, ANDREA **ABI-KARAM,** LAURA ZELKO, ARIEL GOLA!' DANIEL BASH, ROHT UPAOHYA, **CAMMI** MORGAN, **MARIA** LEWIS, PAUL MURUFAS, MICHAE

THURMAN, BRYAN MITCHELL. LAUREN SMITH, **CAMMI** MORGAN, ROBERT DONOHOE, AND DANIEi BASH ARE ALSO CHARGED WITH WEARING A DISGUISE DURING THE COMMISSION OF A CRIME (•

185).

THIS ACCOUNT MAY CONTAIN COMMUNICATIONS BETWEEN LAUREN SMITH ANO THE ABOVE **NAMED CO-DEFENDANTS THAT WOULD TENO** TO **SHOW THAT** THERE **WAS A CONSPIRACY** OF **AGREEMENT** TO **STAGE A RIOT,** TO **UNLAWFULLY ASSEMBLE, ANO** TO **WEAR A DISGU ISE WHILI PARTAKING IN CRIMINAL ACTIVITIES;** THUS, THE **RECORDS OR LACK** THEREOF **ARE MATERIAL** TC THE **CRIMES CHARGED.**

-*u*-

Executed on 11/13/2012, at San Francisco, California. I declare under penalty of perjury that the foregoing ii

truean d correct.

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 URA CLAST E R

P ROOF OF SERVICE OF SUBPOENA DUCES TECUM

I served this subp oena duces tecum and supporting declaration by delivering a copy personally *to* U person served as follows:

1. Person served (name):
2. Address where served:
3. Date of service:
4. Time of service:

Executed on \_ \_ \_ \_ \_ \_ at San Francisco, California. I decl are under penalty of perjury that tr

foregoing is true and correct.

Signature

Title

# GEORGE GASCON DISTRICT ATTORNEY

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**CITY AND COUNTY OF SAN FRANCISCO**

# INSTRUCTIONS TO CUSTODIAN OF RECORDS

Dear: Custodian of Records

In order to avoid personal appearance to comply with the Subpoena Duces Tecum you have received in this matte California Evidence Code section 1560 must be strictly followed.

In order to comply **with** the Section 1560, the following steps must be followed within five days after the receipt of this Subpoena.

1. Make a true and correct copy of all records described in the Subpoena Duces Tecum. **A** photocopy is sufficient.
2. Complete and sign the enclosed Declaration. The enclosed Declaration should be completely filled ou1, with checkmark for either 3a or 3b. Sign and date the declaration and enclose it with the sealed records. It would b helpful to enciose a brief explanation of the records.
3. Put the Declaration and all copies of the records in a sealed envelope.
4. Write the following information on the outside of the sealed envelope:
	1. Title of Action:
	2. Court Number:
	3. Date of Subpoena:
	4. The name of the person signing the Declaration,
5. Enclose the sealed envelope in an outer envelope and seal the outer envelope.
6. Mai Vdeliver the package to: Clerk of the Superior Court

Hall of Justice 850Bryant Street

San Francisco, CA 94103

1. To comply with Section 1560 of the Cali fornia Evidence Cod, e you musl mail or deliver the above package withir

FIVE DAYS or receipt of the subpoena. If you do not comply with this requiremen,t *you* must appear in court or

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thedate and time indicatedon the subpoena and bring the records with you.

If there is an Waiver by the Patient, please send a copy to the

District Attorney's Office, Hall of Justice, 850 Bryant Street, #322, SF, CA 94103.

Your cooperation is appreciated. If you have *any* questions., please call the undersigned Assistant District Attorney immediately.

Sincerely, GEORGE GASCON

DISTRICT ATTORNEY

Assistant District Attorney (415) 734-3108

**DECLARATION OF CUSTODIAN OF RECORDS**

Title of Action:

Number of Action:

Date of Subpoena:

Name of party obtaining subpoena:

Name of Business

I, the undersigned, say:

.1 I am the duly authorized custodian of the records of the above-menitoned business.

1. I have the authority to certify copies of those records.
2. Check either a orb.

D a. the copies transmitted herewith are true and correct copies of all the original record!

described in the above named subpoena, insofar as the above named business hassue t record s.

D b. Nocop ies are transmitted herewith because the above named business has none of the records described in the above named subpoena.

1. The records referred to above **were** prepared by the personnel of the above namedbus ines,s in

Executed on: --, ­

(date)

the ordinary course of business, at or near the time of the act, condition, or event.

at

(city and state)

I hereby declare under penalty of perjury that the above is true andco rer ct.

Signature of Declarant Custodian of Records