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8
9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**

11 Davison Design & Development Inc., a
12 Pennsylvania corporation, XL Marketing
13 Corp., a Delaware corporation, Spire Vision
14 Holdings, Inc., a Delaware corporation,
15 ProAdvertisers, LLC, a Delaware Limited
16 Liability Company, Prime Advertisers, LLC,
17 and MediActivate, LLC, Nevada Limited
18 Liability Companies, and
19 ConnectionCentrals, a Delaware Series
20 Limited Liability Company,

21 Plaintiffs,

22 v.

23 Catherine Riley, an individual,
24 Defendant.

No. CV-11-2970-EDL

**SECOND AMENDED
COMPLAINT FOR
DECLARATORY JUDGMENT**

24 Davison Design & Development Inc., XL Marketing Corp., Spire Vision
25 Holdings, Inc., ProAdvertisers, LLC, Prime Advertisers, LLC, MediActivate, LLC, and
26 ConnectionCentrals (collectively, "Plaintiffs") hereby allege for their complaint against
27 Catherine Riley ("Riley" or "Defendant") upon personal information as to Plaintiffs' own
28 activities, and upon information and belief as to the activities of others, as follows:

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I. NATURE OF THE CASE

Davison Design & Development Inc. (“Plaintiff Davison”) offers marketing and product development services to inventors and aspiring inventors. XL Marketing Corp., Spire Vision Holdings, Inc., and the remainder of the Plaintiffs (the “Spire Vision Plaintiffs”) run an internet marketing business. Catherine Riley is an individual who sent a demand letter to Plaintiffs demanding payment of over \$75,000 in damages for alleged violations of California’s Business and Professions Code. The basis of Riley’s claims is that she received and continues to receive emails from Plaintiffs that do not comply with California state and federal spam laws. Plaintiffs contend that they have not sent or advertised in, and do not send or advertise in, email that violates state or federal spam law. Plaintiffs ask this court for a declaratory judgment that there is neither a legal nor factual basis for Riley’s claims.

II. JURISDICTION AND VENUE

1. This Court has original subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1332 (a)(1), and 28 U.S.C. § 2201. The parties are diverse, and more than \$75,000 is in controversy.

III. PARTIES

2. Plaintiff Davison Design & Development is a Pennsylvania corporation that offers marketing and product development services to inventors and aspiring inventors.

3. Plaintiff XL Marketing Corp. is a Delaware corporation engaged in the business of internet marketing. XL Marketing Corp. wholly owns a range of subsidiaries, each focused on a particular area of internet marketing.

4. Plaintiff Spire Vision Holdings, Inc., is a Delaware corporation and a wholly-owned subsidiary of XL Marketing Corp.

5. Plaintiff ProAdvertisers, LLC is a Delaware Limited Liability Company and a wholly-owned subsidiary of Spire Vision Holdings, Inc.

6. Plaintiff MediActivate, LLC is a Nevada Limited Liability Company and a wholly-owned subsidiary of Spire Vision Holdings, Inc.

1 7. Plaintiff Prime Advertisers, LLC is a Nevada Limited Liability Company
2 and a wholly-owned subsidiary of Spire Vision Holdings, Inc.

3 8. Plaintiff ConnectionCentrals, is a Delaware Series Limited Liability
4 Company and a wholly-owned subsidiary of ProAdvertisers, LLC.

5 9. Defendant Riley is an individual and resident of California.

6 IV. FACTS

7 10. Defendant Riley is an individual who owns multiple personal email
8 addresses. Defendant Riley is not an Internet Service Provider (ISP).

9 11. Between August 12, 2005 and April 5, 2011, Defendant Riley visited
10 various websites, including <claimfreerewards.com> and <winyourcruise.com>. On
11 those websites, Defendant entered her email address in order to access the site and/or
12 participate in promotional offers. Each website displayed a message indicating that by
13 entering her email address, Riley agreed to receive advertising emails. Each website
14 provided a means to “opt out” of advertising emails.

15 12. Riley knowingly agreed and provided her direct consent to receive
16 advertising emails.

17 13. Riley never opted out of receiving advertising emails.

18 14. The Spire Vision Plaintiffs create and/or distribute internet advertisements.
19 Some of the Spire Vision Plaintiffs’ internet advertisements are distributed through
20 emails. The Spire Vision Plaintiffs’ advertising emails are permission-based, and the
21 Spire Vision Plaintiffs do not send emails to persons who have not agreed to receive
22 them. The Spire Vision Plaintiffs obtain email addresses from affiliates, and have strict
23 guidelines regarding direct consent.

24 15. The Spire Vision Plaintiffs accept email advertisements from advertising
25 clients, and tailor email marketing campaigns to suit advertisers’ products or services.

26 16. Each email sent by the Spire Vision Plaintiffs includes an “opt out”
27 provision.

28 17. Plaintiff Davison is an advertising client of the Spire Vision Plaintiffs.

1 18. The Spire Vision Plaintiffs distributed a series of emails for Plaintiff
2 Davison and other clients (the “Allegedly Offending Emails”) by sending the emails to a
3 list of email owners who had directly consented to receive promotional emails and had
4 not revoked that consent.

5 19. The Allegedly Offending Emails each contain a subject line that accurately
6 describes the contents of the email message.

7 20. The Allegedly Offending Emails each contain an “opt out” provision,
8 through which a recipient can choose to receive no further promotional emails.

9 21. The Allegedly Offending Emails each contain accurate email header
10 information.

11 22. The Allegedly Offending Emails each clearly indicate that the email is a
12 marketing email.

13 23. The Allegedly Offending Emails each contain the postal address of the
14 advertiser.

15 24. Defendant did not opt out of receiving the Allegedly Offending Emails or
16 otherwise revoke her consent to receive advertising emails.

17 25. Defendant has not been adversely affected by receiving the Allegedly
18 Offending Emails.

19 26. All of the Allegedly Offending Emails comply with California state and
20 federal spam laws. The Spire Vision Plaintiffs have a rigorous series of spam compliance
21 policies, and ensure that advertising emails they send do not violate the law.

22 27. In March-May, 2011, Defendant sent Plaintiffs a series of letters
23 demanding money because she received the Allegedly Offending Emails. Defendant’s
24 letters claim that she is entitled to at least \$118,000 in statutory damages, and threaten
25 litigation if she is not paid.

26 **FIRST CAUSE OF ACTION**
27 **DECLARATORY JUDGMENT – Cal. Bus. & Prof. Code § 17529.5**

28 28. Plaintiffs incorporate all prior allegations as if fully set forth herein.

1 29. The Allegedly Offending Emails do not contain and are not accompanied
2 by a third-party's domain name without the permission of the third party.

3 30. The Allegedly Offending Emails do not contain and are not accompanied
4 by falsified, misrepresented, or forged header information.

5 31. The Allegedly Offending Emails do not have subject lines that would be
6 likely to mislead a recipient, acting reasonably under the circumstances, about a material
7 fact regarding the contents or subject matter of the message.

8 32. The Allegedly Offending Emails do not violate Cal. Bus. & Prof. Code §
9 17529.5.

10 33. Defendant has not suffered any damages as a result of Plaintiffs' actions.

11 34. Defendant's claims are pre-empted by federal law because they are not
12 based on traditional common law theories of falsity or deceit.

13 35. Defendant is not entitled to relief pursuant to Cal. Bus. & Prof. Code §
14 17529.5.

15 **V. RELIEF REQUESTED**

16 WHEREFORE, Plaintiffs request that the Court enter judgment against Defendant
17 Riley as follows:

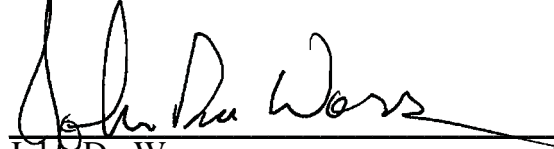
18 1. That the Court enter a Declaratory Judgment that Plaintiffs have not
19 violated California's Business and Professions Code § 17529.5.

20 2. That the Court award Plaintiffs their costs and attorneys' fees.

21 3. That the Court grant such other, further, and different relief as the Court
22 deems proper under the circumstances.

23 RESPECTFULLY SUBMITTED this 25th day of January, 2012.

24 **NEWMAN DU WORS LLP**

25 

26 John Du Wors
27 California State Bar No. 233913
28 Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2012, I electronically filed the foregoing

- **SECOND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT**

with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Daniel Balsam
Law Ofcs Daniel Balsam
3145 Geary Blvd #225
San Francisco, CA 94118
Email: legal@danbalsam.com

Timothy James Walton
Law Offices of Timothy Walton
9515 Soquel Drive, Suite 207
Aptos, CA 95003
Email: ecf.cand@netatty.com

I certify under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct and that this certificate was executed on January 25, 2012, at Selma, Texas.



Arlyne Sorrells