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11 Attorneys for AOptix Technologies, Inc.

12  
13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15

16 AOPTIX TECHNOLOGIES, INC., a Delaware  
corporation,

17 Plaintiff,

18 v.

19 BLUE SPIKE, LLC, a Texas limited liability  
20 company

21 Defendant.

Case No. 4:13-cv-01105-YGR

**FIRST AMENDED COMPLAINT  
FOR DECLARATORY JUDGMENT  
OF PATENT NONINFRINGEMENT &  
PATENT INVALIDITY**

**JURY TRIAL DEMANDED**

22 Plaintiff AOptix Technologies, Inc. (“AOptix”), for its First Amended Complaint for  
23 Declaratory Judgment against Defendant Blue Spike, LLC (“Blue Spike”), avers the following:

24 **NATURE OF THE ACTION**

25 1. This action is based on the patent laws of the United States, Title 35 of the United  
26 States Code. Blue Spike has asserted rights under U.S. Patent Nos. 7,346,472, 7,660,700,  
27 7,949,494, and 8,214,175 (collectively “the Patents-in-Suit”) based on certain ongoing activity by  
28

1 AOptix. AOptix contends that it has the right to engage in the accused activity without license to  
2 any of the Patents-in-Suit. True and correct copies of the Patents-in-Suit are attached hereto as  
3 Exhibits A, B, C, & D. Plaintiff thus seeks a declaration that it does not infringe the Patents-in-  
4 Suit and that the Patents-in-Suit are invalid.

5 **THE PARTIES**

6 2. AOptix is a Delaware corporation having its principal place of business at 675  
7 Campbell Technology Parkway, Campbell, California 95008.

8 3. On information and belief, Blue Spike is a Texas limited liability company having  
9 a principal place of business at 1820 Shiloh Road, Suite 1201-C, Tyler, Texas 75703.

10 **JURISDICTION AND VENUE**

11 4. This is a civil action regarding allegations of patent infringement and patent  
12 invalidity arising under the patent laws of the United States, Title 35 of the United States Code, in  
13 which AOptix seeks declaratory relief under the Declaratory Judgment Act. Thus, the court has  
14 subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1338, 2201, and 2202.

15 5. An actual controversy exists between AOptix on the one hand and Blue Spike on  
16 the other by virtue of Blue Spike's allegations that AOptix infringes the Patents-in-Suit by  
17 making, using, offering to sell or selling its *InSight Duo*, *InSight ESS*, *InSight VM*, and Dash  
18 Six™ Iris Recognition Enterprise SDK products.

19 6. AOptix contends that it has a right to make and sell biometric software, systems,  
20 and technology, including those incorporated in its products *InSight Duo*, *InSight ESS*, *InSight*  
21 *VM*, and Dash Six™ Iris Recognition Enterprise SDK, without license from Blue Spike.

22 7. The Court has personal jurisdiction over Blue Spike *inter alia* because, on  
23 information and belief, Blue Spike has conducted substantial business in the state of California,  
24 including this District, related to licensing the Patents-in-Suit.

25 8. The Court has both general and specific jurisdiction over Blue Spike. Blue Spike  
26 has conducted extensive enforcement efforts regarding the Patents-in-Suit in this District and  
27 elsewhere in California by and through its litigation counsel and agents, Randall T. Garteiser,  
28 Christopher A. Honea, and Christopher S. Johns, from the law offices of Gartieser Honea, P.C.

1 located at 44 North San Pedro Road, San Rafael, California 94903 (“Litigation Counsel”). From  
2 August 8, 2012 until AOptix filed the Complaint (Dkt. No. 1) in this action, Blue Spike, through  
3 its Litigation Counsel, filed and prosecuted over 90 lawsuits from this District asserting  
4 infringement of the Patents-in-Suit. Although those lawsuits were filed in Texas, on information  
5 and belief, all or substantially all enforcement efforts of Litigation Counsel occurred from  
6 Litigation Counsel’s office in San Rafael, California. On information and belief, Litigation  
7 Counsel have served as lead counsel in all of these lawsuits and have continuously prosecuted  
8 these actions from their offices in this District.

9 9. On information and belief, Litigation Counsel have used public utilities, including  
10 telephone and electricity, in California for the purpose of enforcing the Patents-in-Suit against  
11 AOptix and others. On information and belief, Litigation Counsel also are members of the State  
12 Bar of California, and their enforcement activities are performed as California-licensed attorneys,  
13 and thus are subject to the rules of professional conduct and other ethics rules of the State Bar of  
14 California.

15 10. In addition, many of the companies Blue Spike has sought to enforce the Patents-  
16 in-Suit against in the above-mentioned lawsuits maintain their principal places of business in this  
17 District and/or California. These companies include Google Inc. (Mountain View), Yahoo! Inc.  
18 (Sunnyvale), Facebook, Inc. (Menlo Park), Adobe Systems, Inc. (San Jose), Shazam  
19 Entertainment Ltd. (Menlo Park), CBS Interactive, Inc. (San Francisco), SoundHound, Inc. (Santa  
20 Clara), Zeitera, LLC (Sunnyvale), Audible Magic Corp. (Los Gatos), Rovi Corporation (Santa  
21 Clara), DigitalPersona Corp. (Redwood City), Vercury Inc. (Palo Alto), Vobile, Inc. (Santa  
22 Clara), Related Content Database, Inc. (San Francisco), MySpace, LLC (Beverly Hills), Specific  
23 Media, LLC (Irvine), Yap.tv, Inc. (Los Altos), GoMiso, Inc. (San Francisco), Metacafe, Inc. (San  
24 Francisco), YouWeb, LLC (Campbell), SecuGen Corp. (Santa Clara), ImageWare Systems, Inc.  
25 (San Diego), and AOptix (Campbell). Accordingly, on information and belief, litigation  
26 negotiations and settlement activity between Blue Spike, through its Litigation Counsel, and  
27 California-based companies being sued by Blue Spike has physically taken place in California,  
28 including this District. For example, on March 4, 2013, Blue Spike’s Litigation Counsel

1 announced on Twitter “Blue Spike reache[d] a favorable settlement with Yahoo!,” (*see* Exhibit.  
2 E, (<https://twitter.com/gartieserhonea>)) and on information and belief, negotiations and execution  
3 of the settlement agreement between Blue Spike, through its Litigation Counsel, and Yahoo! Inc.  
4 took place solely in this District. On information and belief, Blue Spike, through its Litigation  
5 Counsel, has entered into settlement negotiations with other California defendants as part of its  
6 enforcement of the Patents-in-Suit, and these negotiations also have taken place solely or  
7 substantially within California, including this District.

8 11. Several non-California companies sued by Blue Spike over the Patents-in-Suit  
9 have also retained litigation counsel in California to defend these actions. Accordingly, on  
10 information and belief, Blue Spike, through its Litigation Counsel, has conducted settlement  
11 negotiations with non-California companies represented by California litigation counsel, and  
12 these enforcement-related activities have also taken place entirely within California, including  
13 this District.

14 12. On information and belief, in connection with settlement negotiations related to  
15 the Patents-in-suit, Blue Spike entered into non-disclosure agreements through its agent in  
16 California, Gartieser Honea, P.C., with numerous California companies prior to the filing of the  
17 present lawsuit, including without limitation Yahoo!, Inc., SecuGen Corporation, Rovi  
18 Corporation, and Rovi Guides, Inc. On information and belief, these non-disclosure agreements  
19 were executed on behalf of Blue Spike by its agent, Gartieser Honea, P.C., in California. On  
20 information and belief, those agreements, fully executed by parties all within California, are thus  
21 governed by California law. In addition, on information and belief, Blue Spike entered into  
22 numerous other non-disclosure agreements with non-California companies relating to  
23 enforcement of the Patents-in-suit through its agent Gartieser Honea, P.C. in California. On  
24 information and belief, all or substantially all of the non-disclosure agreements executed on  
25 behalf of Blue Spike by its agent Gartieser Honea, P.C. were transmitted using utilities in  
26 California, including electricity, internet service, and/or telephone services. Accordingly, Blue  
27 Spike has invoked the benefits and protections of California’s laws generally and with respect to  
28 the Patents-in-Suit.

1           13. Blue Spike has also publicly threatened businesses located in this District and  
2 sought to damage these companies' reputations and business plans for the purpose of extracting  
3 licensing agreements for the Patents-in-Suit. For example, Blue Spike on its website announced  
4 that "Shazam [Entertainment Ltd.] is continuing down the road to become a public company. The  
5 hopeful startup needs to maintain a rosy reputation in order to achieve that goal. Unfortunately  
6 for Shazam, this rose doesn't have a thorn—it has Blue Spike to deal with." Exhibit F,  
7 <http://bluespike.com/news/shazam-has-hit-a-spike-in-the-road> (last visited October 22, 2013). On  
8 the same web page, Blue Spike also announced that it "is represented by Garteiser Honea – IP  
9 Trial Attorneys." *Id.* Blue Spike's Litigation Counsel's website links to this web page. *See*  
10 Exhibit G, Press Release, Blue Spike Settles with Yahoo! and NEC (Mar. 4, 2013), *available at*  
11 <http://ghiplaw.com/blue-spike-settles-with-yahoo-and-nec> ("Unfortunately, not all companies are  
12 following Yahoo! and NEC's lead. Shazam, for instance, has remained silent about its alleged  
13 infringement of Blue Spike's patents. [Check out a recent article here.](#)").

14           14. On information and belief, Blue Spike, Inc., granted a license to RPX Corporation,  
15 a company based in this District, with the right to sublicense the Patents-in-Suit. On information  
16 and belief, Blue Spike's rights to the Patents-in-Suit are subject to the sublicense rights of RPX  
17 Corporation. On information and belief, RPX regularly conducts licensing activities relating to  
18 the Patents-in-Suit from its offices in this District. On information and belief, Blue Spike, Inc.  
19 and defendant Blue Spike are under common control, common ownership, and their interests are  
20 commonly aligned such that Blue Spike, Inc. is the alter ego of defendant Blue Spike.

21           15. On information and belief, Blue Spike, Inc. also performed tests of technology  
22 allegedly claimed by the Patents-in-Suit in Los Angeles, California through third party SDMI.

23           16. The Court has general jurisdiction over Blue Spike because Blue Spike has  
24 maintained continuous and systematic contacts with California and this District including without  
25 limitation those contacts and activities described above.

26           17. The Court has specific jurisdiction over Blue Spike because Blue Spike has  
27 specifically directed its activities with respect to the Patents-in-Suit generally, and against AOptix  
28 specifically, at California, as set forth above.

1 18. Venue is proper in this court pursuant to 28 U.S.C. § 1391 because Blue Spike is  
2 subject to personal jurisdiction in this District.

3 **INTRADISTRICT ASSIGNMENT**

4 19. This is an Intellectual Property Action subject to district-wide assignment under  
5 Local Rule 3-2(c).

6 **FACTUAL BACKGROUND**

7 20. AOptix delivers highly intuitive and accurate biometric identity verification  
8 solutions for a wide range of mobile and high throughput applications.

9 21. On information and belief, Blue Spike is a non-practicing licensing entity whose  
10 sole purpose is to engage in the enforcement of the Patents-in-Suit, including the collection of  
11 licensing fees.

12 22. On July 3, 2012, the United States Patent Office issued United States Patent No.  
13 8,214,175 B2 (“the ’175 Patent”) entitled “Method and Device for Monitoring and Analyzing  
14 Signals.” The ’175 patent states on its face that it was assigned to Blue Spike, Inc. of Sunny Isles  
15 Beach, Florida. On August 4, 2012, Blue Spike, Inc. purportedly assigned its interests in the ’175  
16 patent to Blue Spike, LLC. A true and correct copy of the ’175 patent is attached to this  
17 Complaint as Exhibit A.

18 23. On May 24, 2011, the United States Patent Office issued United States Patent No.  
19 7,949,494 B2 (“the ’494 Patent”) entitled “Method and Device for Monitoring and Analyzing  
20 Signals.” The ’494 patent states on its face that it was assigned to Blue Spike, Inc. of Sunny Isles  
21 Beach, Florida. On August 4, 2012, Blue Spike, Inc. purportedly assigned its interests in the ’494  
22 patent to Blue Spike, LLC. A true and correct copy of the ’494 patent is attached to this  
23 Complaint as Exhibit B.

24 24. On February 9, 2010, the United States Patent Office issued United States Patent  
25 No. 7,660,700 B2 (“the ’700 Patent”) entitled “Method and Device for Monitoring and Analyzing  
26 Signals.” The ’700 patent states on its face that it was assigned to Blue Spike, Inc. of Sunny Isles  
27 Beach, Florida. On August 4, 2012, Blue Spike, Inc. purportedly assigned its interests in the ’700  
28 patent to Blue Spike, LLC. A true and correct copy of the ’700 patent is attached to this

1 Complaint as Exhibit C.

2 25. On March 18, 2008, the United States Patent Office issued United States Patent  
3 No. 7,346,472 B1 (“the ’472 Patent”) entitled “Method and Device for Monitoring and Analyzing  
4 Signals.” The ’472 patent states on its face that it was assigned to Blue Spike, Inc. of Sunny Isles  
5 Beach, Florida. On August 4, 2012, Blue Spike, Inc. purportedly assigned its interests in the ’472  
6 patent to Blue Spike, LLC. A true and correct copy of the ’472 patent is attached to this

7 Complaint as Exhibit D.

8 26. Blue Spike asserts that they have right, title, and interest in the Patents-in-Suit.

9 27. On or about January 8, 2013, Blue Spike filed suit in the Eastern District of Texas  
10 against AOptix, asserting that the Patents-in-Suit are being directly and indirectly infringed by  
11 AOptix. That case is pending as *Blue Spike, LLC v. AOptix Technologies, Inc.*, Eastern District of  
12 Texas, Tyler Division, Civil Action No. 6:13-CV-40. The complaint filed in that suit is  
13 fundamentally flawed at least because AOptix is not subject to personal jurisdiction in the Eastern  
14 District of Texas.

15 28. AOptix does not infringe the Patents-in-Suit. Additionally, the Patents-in-Suit are  
16 invalid. Accordingly, an actual controversy exists between AOptix and Blue Spike as to whether  
17 AOptix infringes any valid claim of the Patents-in-Suit. Absent a declaration of non-infringement  
18 and/or invalidity, Blue Spike will continue to wrongly assert the Patents-in-Suit against AOptix,  
19 and thereby cause AOptix irreparable harm.

20 **FIRST CAUSE OF ACTION**

21 **(Declaratory Judgment of Non-Infringement of the ’175 Patent)**

22 29. Paragraphs 1-28 are incorporated by reference as if fully restated herein.

23 30. Blue Spike contends that AOptix has or is infringing one or more claims of the  
24 ’175 patent.

25 31. AOptix has not and is not infringing any claims of the ’175 patent and is not liable  
26 for any infringement of the ’175 patent.

27 32. An actual controversy thus exists between AOptix on the one hand, and Blue  
28 Spike on the other, as to whether AOptix infringes the ’175 patent.

1 33. Accordingly, AOptix seeks a judgment declaring that it does not infringe and has  
2 not infringed, directly or indirectly, contributorily or by inducement, any claim of the '175 patent.

3 **SECOND CAUSE OF ACTION**

4 **(Declaratory Judgment of Invalidity of the '175 Patent)**

5 34. Paragraphs 1-28 are incorporated by reference as if fully restated herein.

6 35. Blue Spike asserts in this action that AOptix has or is infringing one or more  
7 claims of the '175 patent.

8 36. One or more claims of the '175 patent are invalid for failure to meet one or more  
9 of the conditions for patentability specified in Title 35, U.S.C., or the rules, regulations, and law  
10 related thereto, including, without limitation, in 35 U.S.C. §§ 101, 102, 103, 112, and/or the  
11 judicial doctrine of double patenting.

12 37. An actual controversy thus exists between AOptix on the one hand, and Blue  
13 Spike on the other, as to whether the '175 patent is valid.

14 38. Accordingly, AOptix seeks a judgment declaring that one or more claims of the  
15 '175 patent are invalid for failure to comply with 35 U.S.C. §§ 101, 102, 103, 112, and/or the  
16 judicial doctrine of double patenting.

17 **THIRD CAUSE OF ACTION**

18 **(Declaratory Judgment of Non-Infringement of the '494 Patent)**

19 39. Paragraphs 1-28 are incorporated by reference as if fully restated herein.

20 40. Blue Spike contends that AOptix has or is infringing one or more claims of the  
21 '494 patent.

22 41. AOptix has not and is not infringing any claims of the '494 patent and is not liable  
23 for any infringement of the '494 patent.

24 42. An actual controversy thus exists between AOptix on the one hand, and Blue  
25 Spike on the other, as to whether AOptix infringes the '494 patent.

26 43. Accordingly, AOptix seeks a judgment declaring that it does not infringe and has  
27 not infringed, directly or indirectly, contributorily or by inducement, any claim of the '494 patent.  
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**FOURTH CAUSE OF ACTION**

**(Declaratory Judgment of Invalidity of the '494 Patent)**

44. Paragraphs 1-28 are incorporated by reference as if fully restated herein.

45. Blue Spike asserts in this action that AOptix has or is infringing one or more claims of the '494 patent.

46. One or more claims of the '494 patent are invalid for failure to meet one or more of the conditions for patentability specified in Title 35, U.S.C., or the rules, regulations, and law related thereto, including, without limitation, in 35 U.S.C. §§ 101, 102, 103, 112, and/or the judicial doctrine of double patenting.

47. An actual controversy thus exists between AOptix on the one hand, and Blue Spike on the other, as to whether the '494 patent is valid.

48. Accordingly, AOptix seeks a judgment declaring that one or more claims of the '494 patent are invalid for failure to comply with 35 U.S.C. §§ 101, 102, 103, 112, and/or the judicial doctrine of double patenting.

**FIFTH CAUSE OF ACTION**

**(Declaratory Judgment of Non-Infringement of the '700 Patent)**

49. Paragraphs 1-28 are incorporated by reference as if fully restated herein.

50. Blue Spike contends that AOptix has or is infringing one or more claims of the '700 patent.

51. AOptix has not and is not infringing any claims of the '700 patent and is not liable for any infringement of the '700 patent.

52. An actual controversy thus exists between AOptix on the one hand, and Blue Spike on the other, as to whether AOptix infringes the '700 patent.

53. Accordingly, AOptix seeks a judgment declaring that it does not infringe and has not infringed, directly or indirectly, contributorily or by inducement, any claim of the '700 patent.

**SIXTH CAUSE OF ACTION**

**(Declaratory Judgment of Invalidity of the '700 Patent)**

54. Paragraphs 1-28 are incorporated by reference as if fully restated herein.

1 55. Blue Spike asserts in this action that AOptix has or is infringing one or more  
2 claims of the '700 patent.

3 56. One or more claims of the '700 patent are invalid for failure to meet one or more  
4 of the conditions for patentability specified in Title 35, U.S.C., or the rules, regulations, and law  
5 related thereto, including, without limitation, in 35 U.S.C. §§ 101, 102, 103, 112, and/or the  
6 judicial doctrine of double patenting.

7 57. An actual controversy thus exists between AOptix on the one hand, and Blue  
8 Spike on the other, as to whether the '700 patent is valid.

9 58. Accordingly, AOptix seeks a judgment declaring that one or more claims of the  
10 '700 patent are invalid for failure to comply with 35 U.S.C. §§ 101, 102, 103, 112, and/or the  
11 judicial doctrine of double patenting.

12 **SEVENTH CAUSE OF ACTION**

13 **(Declaratory Judgment of Non-Infringement of the '472 Patent)**

14 59. Paragraphs 1-28 are incorporated by reference as if fully restated herein.

15 60. Blue Spike contends that AOptix has or is infringing one or more claims of the  
16 '472 patent.

17 61. AOptix has not and is not infringing any claims of the '472 patent and is not liable  
18 for any infringement of the '472 patent.

19 62. An actual controversy thus exists between AOptix on the one hand, and Blue  
20 Spike on the other, as to whether AOptix infringes the '472 patent.

21 63. Accordingly, AOptix seeks a judgment declaring that it does not infringe and has  
22 not infringed, directly or indirectly, contributorily or by inducement, any claim of the '472 patent.

23 **EIGHTH CAUSE OF ACTION**

24 **(Declaratory Judgment of Invalidity of the '472 Patent)**

25 64. Paragraphs 1-28 are incorporated by reference as if fully restated herein.

26 65. Blue Spike asserts in this action that AOptix has or is infringing one or more  
27 claims of the '472 patent.

1 66. One or more claims of the '472 patent are invalid for failure to meet one or more  
 2 of the conditions for patentability specified in Title 35, U.S.C., or the rules, regulations, and law  
 3 related thereto, including, without limitation, in 35 U.S.C. §§ 101, 102, 103, 112, and/or the  
 4 judicial doctrine of double patenting.

5 67. An actual controversy thus exists between AOptix on the one hand, and Blue  
 6 Spike on the other, as to whether the '472 patent is valid.

7 68. Accordingly, AOptix seeks a judgment declaring that one or more claims of the  
 8 '472 patent are invalid for failure to comply with 35 U.S.C. §§ 101, 102, 103, 112, and/or the  
 9 judicial doctrine of double patenting.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiff prays for a declaratory judgment against Defendant as follows:

12 A. Judgment against Blue Spike declaring the '175 patent not infringed by AOptix;

13 B. Judgment against Blue Spike declaring one or more claims of the '175 patent  
 14 invalid;

15 C. Judgment against Blue Spike declaring the '494 patent not infringed by AOptix;

16 D. Judgment against Blue Spike declaring one or more claims of the '494 patent  
 17 invalid;

18 E. Judgment against Blue Spike declaring the '700 patent not infringed by AOptix;

19 F. Judgment against Blue Spike declaring one or more claims of the '700 patent  
 20 invalid;

21 G. Judgment against Blue Spike declaring the '472 patent not infringed by AOptix;

22 H. Judgment against Blue Spike declaring one or more claims of the '472 patent  
 23 invalid;

24 I. A declaration that AOptix's claims present an exceptional case entitling it to, and  
 25 therefore awarding, its reasonable attorneys' fees under 35 U.S.C. § 285;

26 J. Award of costs to AOptix; and

27 K. Award to AOptix such other relief as the Court deems just and reasonable.  
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Dated: October 25, 2013

FENWICK & WEST LLP

By: /s/ Teresa M. Corbin

Teresa M. Corbin

Attorneys for Plaintiff  
AOptix Technologies, Inc.

**DEMAND FOR JURY TRIAL**

Pursuant to Fed. R. Civ. P. 38, Plaintiff AOptix demands a jury trial as to all matters triable of right by a jury.

Dated: October 25, 2013

FENWICK & WEST LLP

By: /s/ Teresa M. Corbin

Teresa M. Corbin

Attorneys for Plaintiff  
AOptix Technologies, Inc.

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