

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA**

ROBERT H. BRAVER, an individual,)
Plaintiff,)

vs.)

Case No. CIV-04-1013-W

AMERIQUEST MORTGAGE COMPANY, a)
Delaware corporation, INNOVATIVE MARKETING,)
INC., d/b/a LEAD EXTREME, a Washington corporation,)
THE LOAN PAGE, INC., a Delaware corporation,)
STECROFT HOLDINGS, INC., as successor in interest to)
GO APPLY, INC., d/b/a ELEADZ, a Nevada corporation,)
JOHN DOES 1-50, MI SOLUTIONS, INC., a California)
corporation, LEAD ASSOCIATION CORP, a California)
corporation, THE LEAD SOURCE, INC., a California)
corporation, COMMISSION JUNCTION, INC., a)
Delaware corporation, AVALON TRADING COMPANY,)
LLC, a California corporation, IMPACT WEB)
ENTERPRISES, INC., a California corporation,)
LEAD2.NET, INC., a Florida corporation, SUNBURN)
MARKETING GROUP, LLC, a California limited liability)
company, MONEYNEST HOLDINGS, INC., a California)
Corporation, INTERNATIONAL WEBWORKS.COM,)
LLC, a Colorado limited liability company, NICK)
HETCHER, an individual, LIBERTY LEAD SOURCE,)
INC, a Nevada corporation, TIM FAUST, an individual,)
DOTCOM MARKETING GROUP, INC., a Florida)
corporation, INETMEDIA, a California corporation,)
LEADCORP, a California corporation, LEAD)
TRANSFER, LLC, a Nevada limited liability company,)
ABACUS ENTERPRISES, INC., a California corporation,)
TANDAX, INC., a Washington corporation)
Defendants.)

AMERIQUEST MORTGAGE)
COMPANY, a Delaware corporation,)
Cross-Complainant,)

vs.)

INNOVATIVE MARKETING, INC. d/b/a)
LEAD EXTREME, a Washington Corporation;)
VISIUM SOLUTIONS CORPORATION, a)
Florida corporation; and PROFESSIONAL)
EQUITY MARKETING, a California)
Corporation, and ROES I-50, inclusive,)
Cross-Defendant.)

SECOND AMENDED COMPLAINT

COMES NOW the Plaintiff, Robert H. Braver, by and through his counsel, Humphreys Wallace Humphreys, P.C., and for his cause of action against the Defendants Ameriquest Mortgage Company, Innovative Marketing, Inc., d/b/a Lead Extreme, Stecroft Holdings, Inc., as successor in interest to Go Apply, Inc., d/b/a eLeadZ, The Loan Page, Inc., John Does 1 – 50, MI Solutions, Inc., Lead Association Corporation, The Lead Source, Inc., Commission Junction, Inc., Avalon Trading Company, LLC, Impact Web Enterprises, Inc., Lead2.Net, Inc., Sunburn Marketing Group, LLC, MoneyNest Holdings, Inc., International Webworks.com, LLC, Nick Hetcher, Liberty Lead Source, Tim Faust, DotCom Marketing Group, Inc, Inetmedia, Leadcorp, Lead Transfer, LLC, Abacus Enterprises, Inc., and Tandax, Inc. alleges and states as follows:

I. INTRODUCTION

1. This claim for relief is brought under the federal CAN-SPAM Act of 2003, 15 U.S.C. § 7701 et seq (“CAN-SPAM Act”), Title 15, Oklahoma Statutes, §§ 776.1 – 776.4, Fraudulent Use of Electronic Mail, and Title 15, Oklahoma Statutes, §§ 776.5 – 776.7, Unsolicited Commercial Electronic Mail, wherein defendants have sent, caused to be sent, or were responsible for sending tens of thousands of illegal e-mail messages through or to Plaintiff’s e-mail servers and customers.

2. Plaintiff is a provider of “Internet Access Service” as defined by 15 U.S.C. § 7702(11) and an “Electronic Mail Service Provider” as defined under Title 15, Oklahoma Statutes, §§ 776.4 and 776.5.

3. Plaintiff’s e-mail servers are “protected computers” as defined by the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030(e)(2).

I. JURISDICTION AND VENUE

4. Plaintiff restates the above and foregoing as though fully restated herein.

5. The acts complained of herein constitute acts occurring within the State of Oklahoma as a matter of law for the purposes of Plaintiff's state law claims, as set forth at 15 O.S. § 776.3.

6. Plaintiff's server facilities are located in Norman, Oklahoma.

7. Defendant Ameriquest maintains offices in Oklahoma and transacts business within the State of Oklahoma.

8. Defendants' unilateral, unlawful, and indeed criminal contacts with Plaintiff's server facilities have been systematic and ongoing for a number of years, and Plaintiff's claims arise from these contacts.

9. Defendants have engaged in business activities in and directed to the Western District of Oklahoma, have committed tortious acts within the Western District of Oklahoma, and have purposefully availed themselves of the opportunity to conduct commercial activities in this forum.

10. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1338(a), and supplemental jurisdiction over Plaintiff's state law claims under 28 U.S.C. § 1367.

11. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because a substantial part of the pertinent events and the resulting damage to Plaintiff occurred within the Western District of Oklahoma.

II. THE PARTIES

12. Plaintiff restates the above and foregoing as though fully restated herein.

13. Plaintiff Robert H. Braver is an individual residing and conducting business in Norman, Oklahoma.

14. Defendant Ameriquest Mortgage Company is a Delaware corporation.

15. Defendant Innovative Marketing, Inc., d/b/a Lead Extreme is a Washington corporation with its principal place of business in Kirkland, Washington.

16. Defendant Stecroft Holdings, Inc., is a Nevada corporation with its principal place of business in Aliso Viejo, California and is a successor in interest to Defendant Go Apply, Inc. d/b/a eLeadZ.

17. Defendant The Loan Page, Inc. is a Delaware corporation with its principal place of business in San Francisco, California.

18. Defendant MI Solutions, Inc. is a California corporation with its principal place of business in Oakland, California.

19. Defendant Lead Association Corporation is a California corporation with its principal place of business in San Diego, California.

20. Defendant The Lead Source, Inc. is a California corporation with its principal place of business in Oceanside, California.

21. Defendant Commission Junction, Inc. is a Delaware corporation with its principal place of business in Santa Barbara, California.

22. Defendant Avalon Trading Company, LLC is a California limited liability company with its principal place of business in Long Beach, California.

23. Defendant Impact Web Enterprises, Inc. is a California corporation with its principal place of business in Costa Mesa, California.

24. Defendant Lead2.Net, Inc. is a Florida corporation with its principal place of business in Boca Raton, Florida.

25. Defendant Sunburn Marketing Group, LLC is a California corporation with its principal place of business in Torrance, California.

26. Defendant MoneyNest Holdings, Inc. is a California corporation with its principal place of business in San Diego, California.

27. Defendant International Webworks.com, LLC is a Colorado limited liability company with its principal place of business in Colorado Springs, Colorado.

28. The identity of MI Solutions, Inc., Lead Association Corporation, The Lead Source, Inc., Commission Junction, Inc., Avalon Trading Company, LLC, Impact Web Enterprises, Inc., Lead2Net, Inc., Sunburn Marketing Group, LLC, MoneyNest Holdings, Inc., and International Webworks.com, LLC were provided by Defendant Ameriquest and represented to be lead generators who provided a lead to Ameriquest as a result of a decoy submitted by Plaintiff.

29. Defendant Nick Hetcher is an individual and a resident of Wisconsin.

30. The identity of Nick Hetcher was provided by Defendant Lead Extreme and represented to be the person who provided a lead to Lead Extreme in response to a decoy submitted by Plaintiff.

31. Defendant Liberty Lead Source is a Nevada corporation with its principal place of business in Carson City, Nevada.

32. Defendant Tim Faust is an individual and a resident of Washington.

33. Defendant DotCom Marketing Group, Inc is a Florida corporation with its principal place of business in Sunrise, Florida.

34. Defendant Inetmedia is a California corporation with its principal place of business in Costa Mesa, California.

35. Defendant LeadCorp is a California corporation with its principal place of business in San Diego, California.

36. Defendant Lead Transfer, LLC is a Nevada corporation with its principal place of business in Charleston, South Carolina.

37. The identity Liberty Lead Source, Tim Faust, DotCom Marketing Group, Inc, Inetmedia, Leadcorp, and Lead Transfer, LLC. were provided by Defendant Stecroft Holdings and represented to be lead generators who provided a lead to Ameriquest as a result of a decoy submitted by Plaintiff.

38. Defendant Abacus Enterprises, Inc. is a California corporation with its principal place of business in El Cerrito, California.

39. Defendant Tandaz, Inc. is a Washington corporation with its principal place of business in Ridgefield, Washington.

40. The identity Abascus Enterprise, Inc. and Tandax, Inc. were provided by Defendant The Loan Page, Inc. and represented to be lead generators who provided a lead to Ameriquest as a result of a decoy submitted by Plaintiff.

41. Plaintiff is unaware of the true names and capacities of defendants sued herein as JOHN DOES 1-50, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and therefore alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's injuries as herein alleged were proximately caused by such defendants. These fictitiously named defendants, along with the named defendants identified above are herein referred to as "defendants."

42. Upon information and belief, the actions alleged herein were undertaken by or done with the actual or constructive knowledge of Ameriquest, were actions that Ameriquest controlled, directed, or had the ability to authorize, control or direct, and/or were actions Ameriquest assisted, participated in, conspired in, controlled and/or directed or otherwise encouraged, and are actions for which Ameriquest is liable. Ameriquest aided and abetted the actions of the defendants named herein, in that Ameriquest had knowledge of those actions, provided assistance and benefited from those actions, in whole or in part. Ameriquest is the principal of each of the remaining defendants, and in doing the things hereinafter alleged, the remaining defendants were acting within the course and scope of such agency and with the permission and consent of Ameriquest. Ameriquest knew, or consciously avoided knowing, that the other remaining defendants had or would engage in a pattern or practice that violated the CAN-SPAM Act of 2003, and/or the Oklahoma Fraudulent Use of Electronic Mail, or Unsolicited Commercial Electronic Mail statutes. Ameriquest ratified the acts of the remaining defendants by continuing to accept the benefits of its contacts with the remaining defendants with knowledge of the acts described herewith.

III. THE PLAINTIFF'S SERVER FACILITIES AND OPERATIONS

43. Plaintiff restates the above and foregoing as though fully restated herein.

44. Plaintiff operated the first and for some time the only public access electronic Bulletin Board System (BBS) in Oklahoma, entitled The United States Electronic Mail Center (often called "USEMC") beginning in 1981. In 1985, Plaintiff discontinued the USEMC upon commencement of operation of a subscription-based, multi-user bulletin board system which operated through approximately 1995. In 1995, Plaintiff commenced operation of Internet server facilities, including what was for a time one of the top-100 USENET transit servers in the world (wilbur.ohww.norman.ok.us) and also provided web and email hosting services to various

individuals and organizations. In September 1998, Plaintiff began handling inbound Internet e-mail traffic for a prominent Washington D.C. based law firm. At the present time, Plaintiff's clients include a number of law firms, restaurants, radio personalities, and individuals.

45. As with the rest of the world, the issue of spam, a large proportion of which is mortgage spam, has become a major problem for the Plaintiff. End-users of electronic mail service require effective filtering of spam in order to effectively use e-mail as an important communications tool. Plaintiff therefore established and must maintain various spam remediation efforts.

IV. DEFENDANTS' UNLAWFUL CONDUCT

46. Plaintiff restates the above and foregoing as though fully restated herein.

47. Ameriquest is a subprime lender headquartered in Orange, California that purchases spam generated sales leads from the remaining Defendants under the circumstances described in Paragraph 19, above.

48. Virtually all mortgage spam is sent using forged, missing, or obfuscated routing and origin information. This is characteristic of all spam because if such messages were transmitted from the IP (Internet Protocol) address space assigned to Defendants, a) their IP address ranges would very quickly be listed on one or more block lists, resulting in their e-mails being blocked from a large proportion of their intended recipients, and b) their Internet service would be suspended or terminated.

49. Virtually all mortgage spam is devoid of any information identifying the responsible mortgage and/or marketing companies and providing a valid physical address as mandated by the CAN-SPAM Act. This is characteristic of all spam because if such messages were transmitted with the required information, Defendants' Internet service would be suspended or terminated.

50. Virtually all mortgage spam is sent with fraudulent techniques to disguise the origin of the messages to make Defendants' e-mails appear to come from random persons, locations and/or the domain names of innocent third parties in a deliberate and transparent attempt to thwart the efforts of Plaintiff and other electronic mail service providers to block traffic from known senders of such unwanted, nuisance messages.

51. Ameriquest is a significant presence in the subprime mortgage lending industry. Upon information and belief, Ameriquest seeks to create and/or maintain an unfair and anti-competitive advantage over other subprime lenders and to maintain and/or increase its profit margins by obtaining below market cost sales leads, such as spam generated sales leads.

COUNT I
CAN CAN-SPAM ACT VIOLATIONS (15 U.S.C. § 7704(A)(1))

52. Plaintiff restates the above and foregoing as though fully restated herein.

53. Defendants initiated the transmission, to protected computers, of commercial e-mail messages that contained, or were accompanied by, header information that is materially false or materially misleading.

54. Defendants' actions were willful and knowing.

55. Defendants intentionally paid for or provided other consideration to, or induced, other persons to initiate a commercial electronic mail messages on its behalf with actual knowledge, or by consciously avoiding knowing, whether such persons are engaging, or will be engaging, in a pattern or practice that violates the CAN-SPAM Act.

56. As a result of defendants' actions, Plaintiff has been damaged in an amount to be proven at trial.

57. Defendants' actions violated 15 U.S.C. § 7704(a)(1), and entitle Plaintiff to injunctive relief, statutory damages and aggravated damages because of defendants' willful and knowing violations of the CAN-SPAM Act.

COUNT II
CAN-SPAM ACT (15 U.S.C. § 7704(A)(2, 3 AND 5))

58. Plaintiff restates the above and foregoing as though fully restated herein.

59. Defendants engaged in a pattern or practice of initiating, to protected computers, commercial e- mail messages that:

- a. contained subject headings that defendants knew, or reasonably should have known, were likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the messages
- b. failed to contain a functioning return e-mail address or other Internet-based mechanism, clearly and conspicuously displayed, that a recipient could use to submit a reply e-mail message or other form of Internet-based communication requesting not to receive future commercial e- mail messages from that sender at the e- mail address where the message was received; and
- c. failed to include a clear and conspicuous identification that the message was an advertisement or solicitation, failed to provide a clear and conspicuous notice of the opportunity to decline to receive further commercial electronic mail messages from the sender; or failed to provide a valid physical postal address of the sender.

60. Defendants intentionally paid for or provided other consideration to, or induced, another person to initiate a commercial electronic mail message on its behalf with actual

knowledge, or by consciously avoiding knowing, whether such person is engaging, or will engage, in a pattern or practice that violates the CAN-SPAM Act.

61. As a result of defendants' actions, Plaintiff has been damaged in an amount to be proven at trial.

62. Defendants' actions violated 15 U.S.C. § 7704(a)(2), (a)(3) and (a)(5), and entitle Plaintiff to injunctive relief, statutory damages and aggravated damages because of defendants' willful and knowing violations of the CAN-SPAM Act.

COUNT III
VIOLATIONS OF THE OKLAHOMA FRAUDULENT USE OF
ELECTRONIC MAIL STATUTES
(15 O.S. §§ 776.1 – 776.4)

63. Plaintiff restates the above and foregoing as though fully restated herein.

64. On numerous occasions during the two years before this suit was commenced and continuing to the present, Defendants, either directly or through their agents, contractors, and/or subcontractors, initiated the transmission of commercial electronic mail messages directed to Plaintiff's server facilities, knowingly or having reason to know were sent,

- a. using techniques designed to misrepresent the point of origin or transmission path of the e-mail messages;
- b. using techniques designed to omit the point of origin or transmission path of the e-mail messages; and/or
- c. containing false or misleading information including the addition of random characters, words, and/or sentences to the e-mail subject lines and/or bodies, and/or obfuscating the nature of the message by misspelling words or substituting various symbols for letters, in a deliberate attempt to thwart Plaintiff's spam filtering mechanisms.

65. Plaintiff is entitled to an award of actual damages based upon the following:

- a. The fraudulent e-mail messages herein listed consumed Plaintiff's finite server and network resources.
- b. Defendants' fraudulent e-mails made it more difficult for Plaintiff and his clients to read and respond to legitimate e-mails by contributing to the clutter of unwanted, unsolicited messages in Plaintiff's and Plaintiff's clients' mailboxes.
- c. Defendants' fraudulent e-mails resulted in complaints by Plaintiff's customers to the Plaintiff, resulting in loss of time and other general damages.
- d. Defendants' fraudulent e-mails consume Plaintiff's and Plaintiff's customers' time to look at and open, resulting in loss of time and other general damages.
- e. Defendants' fraudulent e-mails contribute in large part to what has become a relentless tide of unwanted and unsolicited e-mail messages that burden the electronic mailboxes of the Plaintiff and Plaintiff's customers, up to the point that e-mail service becomes virtually useless.
- f. In an effort to provide some remediation, Plaintiff has been forced to establish e-mail filtering and blocking protocols. Such protocols take time on an ongoing basis to maintain, and consume storage space, additional network traffic, and CPU time.

66. In lieu of actual damages for the fraudulent electronic mail messages listed in Paragraph 6, Plaintiff is entitled to and elects to claim statutory damages of \$25,000.00 per each day pursuant to 15 O.S. § 776.2(C).

COUNT IV
VIOLATIONS OF THE OKLAHOMA UNSOLICITED COMMERCIAL
ELECTRONIC MAIL STATUTES
(15 O.S. §§ 776.5 – 776.7)

67. Plaintiff restates the above and foregoing as though fully restated herein.

68. On numerous occasions during following the enactment of the Unsolicited Commercial Electronic Mail statute on November 1, 2003, Defendants, either directly or through their agents, contractors, and/or subcontractor, transmitted electronic mail messages directed to Plaintiff's server facilities, knowingly or having reason to know were sent:

- a. using techniques designed to falsify the transmission or other routing information for the e-mail messages;
- b. containing false or misleading information in the subject line;
- c. using a third party's internet address or domain name without the third party's consent for the purpose of transmitting e-mail in a way that makes it appear that the third party was the sender of such e-mail;

69. On numerous occasions following the enactment of the Unsolicited Commercial Electronic Mail statute on November 1, 2003 through the time of the enactment of the CAN-SPAM Act on January 1, 2004, Defendants, either directly or through their agents, contractors, and/or subcontractors, transmitted electronic mail messages directed to Plaintiff's server facilities, knowingly or having reason to know were sent:

- a. without the exact characters "ADV:" as the first four characters in the subject line;
- b. without a mechanism allowing recipients to easily and at no cost remove themselves from the sender's address list so that they are not included in future mailings; and/or

- c. without a valid return e-mail address.

70. As an alternative to actual damages established at trial for the fraudulent unsolicited commercial electronic mail messages, Plaintiff is entitled to and elects to claim minimum statutory damages of \$25,000.00 per day pursuant to 15 O.S. § 776.7(C).

71. Plaintiff is entitled to an award of actual damages based upon the following:

- a. The fraudulent e-mail messages herein listed consumed Plaintiff's finite server and network resources.
- b. Defendants' fraudulent e-mails made it more difficult for Plaintiff and his clients to read and respond to legitimate e-mails by contributing to the clutter of unwanted, unsolicited messages in Plaintiff's and Plaintiff's clients' mailboxes.
- c. Defendants' fraudulent e-mails resulted in complaints by Plaintiff's customers to the Plaintiff, resulting in loss of time and other general damages.
- d. Defendants' fraudulent e-mails consume Plaintiff's and Plaintiff's customers' time to look at and open, resulting in loss of time and other general damages.
- e. Defendants' fraudulent e-mails contribute in large part to what has become a relentless tide of unwanted and unsolicited e-mail messages that burden the electronic mailboxes of the Plaintiff and Plaintiff's customers, up to the point that e-mail service becomes virtually useless.
- f. In an effort to provide some remediation, Plaintiff has been forced to establish e-mail filtering and blocking protocols. Such protocols take time

on an ongoing basis to maintain, and consume storage space, additional network traffic, and CPU time.

WHEREFORE, Plaintiff respectfully requests that the Court find for Plaintiff and against Defendants, jointly and severally, as follows:

1. Temporary and permanent injunctive relief against defendants, and that defendants, their officers, agents, representatives, servants, employees, contractors, successors and assignees, and all others in active concert or participation with defendants, be enjoined and restrained from continuing to violate the CAN-SPAM Act of 2003 and the Oklahoma Fraudulent Use of Electronic Mail and Unsolicited Commercial Electronic Mail statutes;
2. Actual damages;
3. Liquidated damages;
4. Statutory damages, including aggravated damages;
5. Attorney's fees and costs; and
6. Such other or additional relief as is just and proper.

Respectfully submitted,

s/ Luke J. Wallace

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JURY TRIAL DEMANDED
ATTORNEYS LIEN CLAIMED

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2005, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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 s/ Luke J. Wallace