

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT H. BRAVER, an individual,

Plaintiff,

v.

AMERIQUEST MORTGAGE
COMPANY, INC. dba AMERIQUEST
MORTGAGE CORPORATION, INC. its
AGENTS, EMPLOYEES, and ASSIGNS;
et al.

Defendants.

CASE NO. CIV-04-1013-W

**DEFENDANT AMERIQUEST MORTGAGE COMPANY'S RESPONSE IN
OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DISCOVERY SERVED ON
MAY 3, 2005**

Defendant Amerquest Mortgage Company ("Amerquest") hereby opposes Plaintiff Robert H. Braver's Motion to Compel Discovery as follows:

I. INTRODUCTION.

A. Background On Amerquest's Lead Generation Activities.

Amerquest is a retail mortgage lender with offices nationwide. It does not generate mortgage business by e-mail solicitation nor does it condone, sanction, or authorize the use of unlawful spam.

As part of its marketing efforts, Amerquest purchases customer leads from companies which independently generate these leads through a variety of ways, one of which is e-mail solicitation. Amerquest purchases these leads pursuant to lead purchase agreements entered into between Amerquest and the third party lead generators. The older versions of the lead purchase agreements expressly required the lead generator to comply with all applicable state and federal

laws and regulations, including federal and state laws regulating commercial e-mail solicitations. With the advent of the Federal CAN-Spam Act, 15 U.S.C. § 7701 *et seq.*, and state anti-spam legislation, the more recent lead purchase agreements were revised to set forth the specific requirements of the CAN-Spam Act and explicitly prohibit lead generators from violating it or any other applicable anti-spam legislation. In both the older and more recent lead purchase agreements, the lead generator is required to indemnify Ameriquest for any violations of such laws. [Declaration of Jennifer Egan (“Egan Decl.”), ¶ 3].

Ameriquest does not instruct or direct lead generators to send e-mails, it simply contracts with these companies to purchase leads, which these companies generate regardless and independent of Ameriquest. The lead generators are not agents or employees of Ameriquest and do not send out e-mails or advertise on Ameriquest’s behalf. Rather, these companies place advertisements and/or send out generic e-mails inquiring whether recipients are interested in obtaining a mortgage loan. If the lead generator receives a response from the recipient, the lead generator independently determines which of its lender clients may be an appropriate user of the lead. If Ameriquest is offered a lead from a lead generator, it may or may not purchase the lead, depending on whether it meets certain criteria of Ameriquest. Often, the contractor from whom Ameriquest purchases the leads relies on other companies to generate such leads. In such cases, the contractors are, in actuality, lead accumulators. [Egan Decl., ¶ 4].

B. Braver Litigation.

Braver claims to be an internet service provider operating out of Oklahoma. He is a professional litigant who has brought numerous lawsuits claiming violation of Oklahoma and Federal laws prohibiting unlawful spam. To generate litigation, Braver responds to e-mail solicitations, in this case generic emails regarding mortgage loans, usually identifying himself

with a decoy name and telephone number. In this case alone, Braver has identified at least 20 decoy names and 18 different telephone numbers that he has used. At some point, the lead is sold to a purchaser, in this case Ameriquest. Some time later, the purchaser of the lead (in this case Ameriquest), contacts the alias for the purpose of following up on the lead.

After receiving telephone calls from Ameriquest, Braver lodged complaints with Ameriquest about the e-mails that he linked to its telephone calls. In response to Braver's complaint, Ameriquest placed a block on the purchase of any leads with Braver's name or information but, of course, could not stop third parties from sending e-mails through Braver's server. There is no way for Ameriquest to detect whether it is purchasing leads with other fake names and information supplied by Braver. [Egan Decl., ¶ 5].

II. PLAINTIFF'S "PROCUREMENT" THEORY DOES NOT SUPPORT THE WIDE-RANGING DISCOVERY HE SEEKS.

A. The Definition of "Procure" Under The Federal Act Does Not Justify Discovery Beyond The E-Mails, Leads, and Lead Generators In This Case.

Plaintiff knows that Ameriquest does not send e-mail solicitations itself. Instead, Plaintiff's theory in this case is that Ameriquest "procured" the e-mails that are the subject of this lawsuit, as that term is defined in the Federal CAN-Spam Act, 15 U.S.C. § 7701 *et seq.* ("Act"), and is therefore liable to Plaintiff as if it had sent the emails through Plaintiff's server itself.¹ [See Motion to Compel, pages 3-4]. For the purposes of a civil action brought by an internet service provider, the Act defines "procure" to mean to:

"intentionally to pay or provide other consideration to, or provide other consideration to, or induce, another person to initiate such a message on one's behalf....with actual knowledge, or by consciously avoiding knowing, whether such person is engaging, or will engage, in a pattern or practice that violates this Act."

¹ There is no parallel provision in Oklahoma's anti-spam act.

[15 U.S.C. § 7702(12) and § 7706(g)(2)]. Thus, to establish Ameriquest's liability as a "procurer" under the Act, Plaintiff must establish that the subject e-mails were sent through his server on Ameriquest's behalf *and* Ameriquest purchased the leads that were generated from the subject e-mails with actual knowledge, or by consciously avoiding knowing that, the lead generator from whom it was purchased was engaged in a pattern and practice of violating the Act. In his motion to compel, Plaintiff claims to be seeking documents to prove these facts. Plaintiff's motion should be denied, however, because (1) he cannot dispute that the subject e-mails were not sent on Ameriquest's behalf, and (2) he is seeking irrelevant, overly broad, and confidential documents and information going well beyond the question of whether Ameriquest procured the subject e-mails under the Act.

1. The Undisputed Facts Establish That The Subject E-Mails Were Not Sent On Ameriquest's Behalf.

Each and every e-mail that is the subject of this case was a generic message sent for the purpose of soliciting people who are interested, generally, in mortgage loans. None of the e-mails identify Ameriquest, Ameriquest did not instruct the e-mails to be sent, nor did Ameriquest have any arrangement with a third party lead generator to send any of these e-mails exclusively on its behalf. Indeed, Ameriquest is only one of hundreds, perhaps even thousands, of lenders who could have been the purchaser of the leads generated from the subject e-mails. [Egan Decl., ¶ 6]. Because these e-mails were not sent on Ameriquest's behalf, and there are no documents or information to demonstrate otherwise, this motion should be denied in its entirety.

2. Under the Act, The Legitimate Scope of Discovery Is The E-mails, Leads & Lead Generators In This Litigation.

The motion should be denied for the additional reason that it seeks discovery which is overly broad and completely irrelevant to Plaintiff's burden under the Act. As set forth above, the "knowledge" that Plaintiff must prove is not whether Ameriquest knew generally about an industry problem with unlawful email, but whether Ameriquest knew that the persons from whom the e-mail was purchased, i.e. the defendant lead generators, were engaging or will engage in a pattern of practice that violates the Act. [15 U.S.C. § 7706(g)(2)²]. In fact, despite demanding mountains of overly broad and irrelevant discovery relating to Ameriquest's alleged knowledge of what Plaintiff perceives to be an industry wide problem with spam, Plaintiff concedes in his motion that the actual focus of this discovery dispute is what Ameriquest knew specifically about the "*spam mortgage activities of the 'lead generating' Defendants*". [Motion, page 3]. As set forth below, however, because Ameriquest has already agreed to produce the very same discovery that Plaintiff claims is relevant to his case, his motion for more expansive and irrelevant discovery is unnecessary and should therefore be denied.

B. The Requests Seek Irrelevant, Confidential, and Proprietary Information That, Even If It Did Exist, Would Be Unduly Burdensome For Ameriquest To Collect.

1. Request for Production No. 7-9: Overbroad, Irrelevant, Unduly Burdensome and Confidential Documents Relating to Ameriquest's Generation of Leads.

Requests 7 through 9 seek any documents in Ameriquest's possession, custody, or control relating to: using e-mail to generate leads, using internet marketing to generate leads, and

² Sections 7702(12) and 7706(g)(2) define procure to "intentionally to pay or provide other consideration to, or provide other consideration to, or induce, **another person** to initiate such a message on one's behalf... with actual knowledge, or by consciously avoiding, whether *such person* is engaging, or will engage, in a pattern or practice that violates the Act."

Ameriquest's purchase of leads. These requests are overly broad, irrelevant, and do not describe a category of documents with reasonable particularity. Rather than tailoring the requests to the e-mails, leads, and lead generators which are the subject of this litigation, Plaintiff has demanded documents relating to Ameriquest's entire marketing program, every lead Ameriquest has ever purchased (regardless of whether it was generated from an e-mail), every aspect of lead generation and internet marketing by third party lead generators and Ameriquest, including for example, Ameriquest's placement of banners on websites, advertisements on Ameriquest's own webpage, sales leads generated through direct mail and telephone, and possibly the confidential loan files of Ameriquest's borrowers. Plaintiff has provided no legitimate reason for demanding such extremely broad categories of marketing documents that have no relation to the e-mails, leads, and lead generators which are the subject of this case. Nothing in the facts of this case or in the federal or Oklahoma anti-spam laws relates in any way to internet marketing or to the purchase of sales leads generally and the categories of information demanded in these requests is so overly broad that Ameriquest cannot even understand what documents they would even encompass. There is no justification for Plaintiff to obtain such overly broad and irrelevant documents and his attempt to do so is a blatant example of overreaching.

Furthermore, documents relating to Ameriquest's marketing program and its purchase of sales leads contain highly confidential and proprietary information which, if disclosed to third parties, would cause clearly defined and serious injury to Ameriquest. Ameriquest originates mortgage loans to the public in a highly competitive market in which mortgage lenders compete for customers and where the identity of existing and potential borrowers is the essential and primary source of revenue. Ameriquest obtains customers mainly through extensive marketing and lead generation activities and takes every precaution to preserve and maintain the

confidentiality of its marketing strategies in order to protect both the customer's privacy interests and Ameriquest's revenue source. Disclosure of this information would seriously undermine Ameriquest's ability to compete in the marketplace and would jeopardize its ability to generate revenue. Furthermore, certain of these documents, and particularly documents relating to sales leads, contain confidential borrower information that Ameriquest cannot disclose to the public as a matter of law. [Egan Decl., ¶ 8]; See Gramm Leach Bliley Act, 15 U.S.C. § 6801 *et seq.*

Moreover, Section 776.2 of the Oklahoma Fraudulent Use of Electronic Mail Act and Section 776.7 of the Oklahoma Unsolicited Commercial Electronic Mail Act specifically authorize the Court to protect any trade secrets of any party to litigation involving claims under those Acts. Section 776.2(D) and 776.7(E) each state:

“At the request of any party to an action brought pursuant to this section, the court may, in its discretion, conduct all legal proceedings in such a way as to protect any trade secrets of any party.”

[15 Okl. St. § 776.2(D) and 15 Okl. St. § 776.7(E)]. Pursuant to these sections, and because Plaintiff has failed to show any actual need for this information, Ameriquest requests that the Court protect its marketing trade secrets from needless disclosure to Plaintiff and other third parties.

Additionally, the remote chance that any of the requested documents will actually assist Plaintiff in proving his case is clearly outweighed by the enormous burden of searching for and gathering them from Ameriquest's approximately 270 retail offices nationwide. The categories of information requested are so broad that Ameriquest cannot even understand what they encompass or accurately estimate the time, expense, and labor involved in a search for the

records. [Egan Decl., ¶ 9].³ Put simply, Ameriquest should not be required to undertake the gargantuan task of gathering irrelevant and confidential documents when Plaintiff's legal "theory" does not even justify it.

Notwithstanding the foregoing, there are other discovery requests that Plaintiff propounded to Ameriquest that are encompassed by these requests but relate specifically to the e-mails, leads, and lead generators in this case. Ameriquest has agreed to produce that information in response to those pointed requests but the overly broad and vague demands for irrelevant information go much too far.

2. **Request for Production Nos. 10-12 – Plaintiff Is Not Entitled to Documents Related to Irrelevant Sales Leads.**

Request Nos. 10-12 seek all documents in Ameriquest's possession, custody, or control relating to any analysis, consideration or criticism of the decision to purchase sales leads from the defendant lead generators. These requests are not tailored to the issue of unlawful email that is presented in this case. Ameriquest has agreed to produce responsive documents to the extent they relate to the issue of unlawful e-mail, however, for the same reasons discussed above, it should not be required to produce documents related to irrelevant matters involving the purchase of sales leads generally or leads generated by internet marketing. Matters such as direct mail solicitation and banner advertisements on websites have no bearing on this litigation and will do nothing to assist Plaintiff in proving his case.

³ Plaintiff's insufficient showing of need for these overly broad categories of documents is further decreased by the insignificance of his potential recovery under the Federal Act, \$100 per violation, as compared with his recovery under the Oklahoma Act, \$25,000 per day (Oklahoma law does not have a parallel provision). "It is well established that discovery has limits and that these limits grow more formidable as the showing of need decreases." *United States Air Lines, Inc. v. United States*, 26 F.R.D. 213, 219 n. 9 (D. Del. 1960) (citing *Hickman v. Taylor*, 29 U.S. 495 (1947) and *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958)).

3. **Request for Production Nos. 16, 17, 18, 42 – Overbroad, Irrelevant, And Confidential Documents Relating to Contracts With Lead Generators.**

These requests seek the Lead Purchase Agreements for each lead generator defendant and all suggestions, proposals or directives to modify, or in any way alter Ameriquest's contracts with the defendants. Ameriquest responded that it would comply with the requests by producing all non-privileged responsive documents that are relevant to the subject matter and time period of this case subject to the entry of the Stipulated Protective Order. The Stipulated Protective Order has not been entered with the Court and Plaintiff's motion as to these requests is therefore premature.

As for the remainder of the documents in these requests, Plaintiff has failed to show the relevance of (1) any contracts entered into after he allegedly received the emails in this case, (2) any contracts entered into and superseded with a new contract before he allegedly received the e-mails in this case, or (2) documents relating to each and every provision of Ameriquest's contracts with lead generators, regardless of their content. If Ameriquest and a particular lead generator negotiated over a venue provision of a contract, for example, why would documents relating to those negotiations be relevant to the allegations in the case? No legitimate purpose is furthered in requiring Ameriquest to spend the time and expense gathering documents that clearly have no relevance to this case.⁴

4. **Request for Production No. 19, 20, 21, 22 – Plaintiff's Demand Ameriquest's Financial Statements, Projections, Budgets Is Improper And Harassing.**

Request Nos. 19 -22 seek Ameriquest's confidential and proprietary financial statements for the last seven years, and its budgets, financial projections, financial statements, and other

⁴ Plaintiff is not entitled to any documents that are protected from disclosure by the attorney client privilege or attorney work product doctrine.

highly confidential documents referring to sales leads, whether purchased through internet or e-mail marketing. There is simply no argument that Braver can make that would allow him access to such highly confidential and proprietary financial records, particularly when his claims against Ameriquest have no support in the law or facts to begin with.

Plaintiff insists that he needs Ameriquest's financial statements to compare the profitability of e-mail generated leads to the profitability of leads generated by other forms of marketing. However, *Ameriquest does not even receive information from the lead generators about whether a lead was generated by e-mail and therefore has no financial records relating specifically to leads generated by e-mail solicitations.* [Egan Decl., ¶ 9]. Any financial information that Ameriquest does have about sales leads would necessarily include money paid or earned for leads generated through methods other than e-mails (e.g. telephone, direct mail) and, thus, would be highly misleading and inaccurate if used by Braver in connection with leads generated as a result of e-mail solicitations. Since there are no records which would allow Plaintiff to make the profitability comparison between e-mails and other leads that he is seeking to make, he has failed to show that he needs access to Ameriquest's financial records that have no bearing on his case.

Furthermore, Ameriquest's financial statements will not in any way show, nor have any tendency to show, whether the defendant lead generators were engaging in a pattern of practice of violating the Act or whether Ameriquest had any knowledge of any of any such pattern of practice. Ameriquest is a nationwide mortgage lender with approximately 270 retail branches nationwide. There are a myriad of reasons why Ameriquest could be profitable (e.g. interest rates, housing supply, demand for mortgages, or overall market stability), none of which relate to this lawsuit or to e-mail solicitations. Plaintiff has no legitimate need to know why or whether

Ameriquest is profitable, particularly when the information he seeks will not even indicate whether that profit was the result of leads originated from third party e-mail solicitations.

Moreover, the profits (or losses) of a privately held business such as Ameriquest, even where remotely relevant, are highly confidential trade secrets protected from disclosure to third parties. *See e.g. Corbett v. Free Press Association, Inc.*, 50 F.R.D. 179 (D. Vt. 1970) (denying motion to compel as to the net profits of defendant employer because the employee failed to make a strong showing of need for the discovery); *Hecht v. Pro-Football, Inc.*, 46 F.R.D. 605 (D.C. Cir. 1969); *Ocean Atlantic Woodland Corp. v. DRH Cambridge Homes, Inc.*, 262 F. Supp.2d 923 (N.D. Ill. 2003) (denying motion to compel broad requests for documents relating to financial activities because plaintiff made no attempt to limit the scope of discovery to the activities related to the subject of the lawsuit). Ameriquest is a privately owned company that maintains its financial records in the strictest of confidence. [Egan Decl., ¶ 9]. The Court is well aware that discovery of confidential financial records from a privately owned company is allowed only under unusual circumstances, i.e. where the financial statements are directly relevant to the issues involved in the litigation. That is not the case here. Plaintiff has failed to articulate one legitimate purpose, much less a showing of necessity, for the production of seven years' of confidential financial information that has absolutely no bearing on this lawsuit and which are highly protected trade secrets belonging to Ameriquest. Discovery of those financial records is unnecessary, highly prejudicial, and harassing and should, accordingly, be denied in its entirety.

Plaintiff's overly broad requests for information relating to the profitability of unrelated leads and the amount Ameriquest spends on unrelated marketing efforts should also be denied as that information likewise has no bearing on whether Ameriquest is liable to Plaintiff for the

alleged violations of the federal or Oklahoma anti-spam acts. Leads generated through direct mail, telephone, or Ameriquest's own website clearly have no relevance to claims arising out of e-mail solicitations from third party lead generators, particularly since Ameriquest does not even receive information from the lead generators about whether a lead was generated by e-mail.

Furthermore, as set forth above, Ameriquest's marketing records contain confidential and proprietary trade secrets which, if disclosed to third parties, would cause it serious financial injury. Ameriquest's confidential marketing information is clearly beyond the legitimate scope of discovery in this case and Plaintiff's requests for such irrelevant information should be denied.

5. Request for Production Nos. 31 - 39 – Confidential And Proprietary Records Regarding Irrelevant Sales Leads.

Request Nos. 31-39 seek all documents in Ameriquest's possession, custody, or control describing the number of sales leads purchased from the lead generator defendants, the total amounts paid to them for the purchase of unrelated leads, and any methods used to track and/or evaluate the quality of unrelated leads purchased from them. Plaintiff believes such documents to be relevant to show a "cozy relationship" between Ameriquest and the defendants. The real inquiry in this case, however, is whether Ameriquest had knowledge that the defendant lead generators were, or would be, engaging in a pattern of practice of violating the Act. The documents Plaintiff seeks in these requests do not include such information. [Egan Decl., ¶ 9].

In addition, documents relating to Ameriquest's methods of tracking and/or evaluating sales leads contain highly confidential and proprietary information concerning Ameriquest's marketing strategies and revenue source. [Egan Decl., 7]. Plaintiff's unsubstantiated need for these documents is easily outweighed by Ameriquest's interest in maintaining their confidentiality.

6. **Request for Production No. 40 – Plaintiff Is Not Entitled To Confidential, Proprietary, and Irrelevant Records Relating To The Cost or Benefit of Sales Leads.**

Request No. 40 seeks all records, memos, studies, or other documents comparing the cost or benefit of sales leads generated by e-mail or internet marketing, or any other source for obtaining sales leads. Again, this request is not restricted to the e-mails, leads, or lead generators which are the subject of this litigation. Whether Ameriquest knew about a larger industry problem of fraudulent e-mails is not relevant to the inquiry in this case. The question is whether Ameriquest knew that the defendant lead generators had a pattern of practice of violating the Act. These overly broad and irrelevant documents will not tend to answer that question and Plaintiff's request for them should, accordingly, be denied.

7. **Request for Production No. 23; Special Interrogatory Nos. 5, 9, 10, 11- There Is No Legitimate Reason For Braver to Obtain Claims or Complaints About Uninvolved Lead Generators or Unrelated Marketing.**

These discovery requests seek confidential and irrelevant information concerning any claims against Ameriquest relating to fraudulent email or sales leads generated by email or internet marketing irrespective of which e-mail, lead, or lead generator the claim is about. Ameriquest has already agreed to produce redacted responsive documents regarding the identified lead generators, to the extent they exist. Complaints about other third party lead generators or internet marketing are irrelevant and overly broad because whether Ameriquest had knowledge of what Plaintiff perceives to be an "industry wide problem" of unlawful e-mails has

no bearing on his burden of proof in this case.⁵

8. Request for Production No. 44, 13, 41, 43 – Ameriquest Has Agreed To Produce Responsive Records Upon Plaintiff’s Full Cooperation With Ameriquest’s Legal Obligations to Its Customers.

Contrary to the misrepresentations in Plaintiff’s motion, Ameriquest has not refused to produce records relating to the decoy leads which are the subject of this case. Plaintiff’s counsel has been repeatedly advised that Ameriquest has obligations under federal and state laws to maintain the confidentiality of customer information, and cannot disclose that information without an appropriate release, or in some states, the requisite statutory notice. [Gramm Leach Bliley Act, 15 U.S.C. § 6801 *et seq.*]. To satisfy those obligations, Ameriquest made the simple request of Plaintiff to provide an affidavit stating which of the decoy names he provided Ameriquest are fake. For those that are not fake, Ameriquest requested that Plaintiff provide a signed authorization from the individuals allowing Ameriquest to release their private information to Plaintiff.

Plaintiff did provide an affidavit, but falsely stated that all the decoy names were “fake”. Ameriquest knows that some of the decoy names are names of real people, including Plaintiff’s wife, Maren Eliason. Because it cannot release information about a real person without the appropriate authorization, Ameriquest asked Plaintiff for a new affidavit truthfully stating which of the decoy names are fictional and which are those of real people. For whatever reason,

⁵ Furthermore, communications between Ameriquest and regulatory agencies are privileged by law. See, *Bank of America Nevada v. Bourdeau*, 982 P.2d 474 (Nev. 1999) [holding that communications between FDIC and bank are privileged absent a finding of actual malice]; *Boston Auction Co. v. Western Farm Credit Bank*, 925 F.Supp. 1478 (D. Haw. 1996) [holding that communications between bank and Farm Credit Administration were privileged]. Thus, to the extent any responsive communications with regulatory agencies exist, they are privileged matters under the law.

Plaintiff has refused to provide this revised affidavit. Plaintiff's unwillingness to cooperate with this simple request is the only obstacle to production of responsive records.

III. CONCLUSION.

Based on the foregoing, Defendant Ameriquest Mortgage Company respectfully requests that the Court enter an order denying Plaintiff's Motion To Compel Discovery Responses in its entirety, including Plaintiff's request for attorneys fees and costs.

DATED: October 3, 2005

By /s/ Kalley R. Aman

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CERTIFICATE OF SERVICE

This is to certify that on this 3rd day of October, 2005, I electronically transmitted the attached document, **DEFENDANT AMERIQUEST MORTGAGE COMPANY'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DISCOVERY SERVED ON MAY 3, 2005** to the Clerk of Court using the ECF system for filing the transmittal of a Notice of Electronic Filing to the following registrants:

SEE ATTACHED LIST

Dated: October 3, 2005

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