

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.)

**PLAINTIFF'S RESPONSE TO DEFENDANT LEAD TRANSFER, L.L.C.'s MOTION
AND MEMORANDUM TO DISMISS**

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COMES NOW the Plaintiff, Robert H. Braver, and in response to Defendant Lead Transfer, L.L.C.'s Motion and Memorandum to Dismiss states as follows:

I. ALLEGATIONS IN THE COMPLAINT

Plaintiff alleged in his Second Amended Complaint that Ameriquest conspired with known and unknown defendants to violate federal and state law by initiating, procuring and intentionally paying and providing compensation to others to send unlawful spam to Plaintiff's servers in order to generate mortgage leads. (See Complaint, ¶¶ 42, 53-55, 59-62, 64-65 and 68-71.) Plaintiff alleged an act taken in furtherance of that conspiracy when Defendants sent, caused to be sent or were responsible for sending tens of thousands of illegal email messages through or to Plaintiff's email servers and customers. (See Complaint, ¶¶ 1, 42, 47 (¶ 47 inadvertently referred to ¶ 19 in error, should be ¶ 42), 53, 55, 59, 60, 64, 68 and 69.)

Plaintiff also alleged that the Defendants either transmitted or *caused* the transmission of fraudulent electronic mail to Plaintiff's servers, therefore constituting acts occurring within the State of Oklahoma as a matter of law. (See Complaint, ¶ 5.) Plaintiff alleged Defendants' unilateral, unlawful and criminal contacts with Plaintiff's server facility have been systematic and ongoing for a number of years; that Plaintiff's claims arise from these contacts, and that Defendants have been engaged in business activities in and directed to the Western District of Oklahoma and committed tortious acts within the Western District of Oklahoma, therefore, purposely availing themselves of the opportunity to conduct commercial activities in this forum. (See Complaint, ¶¶ 8 and 9.) On December 20, 2005, Plaintiff filed a Third Application to Amend the Complaint to more explicitly set forth the conspiracy claim.

I. FACTUAL BACKGROUND AND LEAD TRANSFER DISCOVERY

Plaintiff, Robert H. Braver, is a provider of internet access service and electronic mail. (See Second Amended Complaint (“Complaint”) ¶ 2 and Exhibit 1, Affidavit of Robert Braver ¶ 2) Plaintiff’s servers have been inundated with unlawful mortgage spam procured or sent by Defendants in this action. (Braver Affidavit ¶ 3) The person or entity sending the unlawful mortgage spam uses forged, missing or obfuscated routing and originating information. (Braver Affidavit ¶ 4) The mortgage spam is void of any information identifying the responsible mortgage and/or marketing companies or a valid physical address required by law all of which is designed to hide the identity of the sender. (Braver Affidavit ¶ 5 and Complaint ¶ 48)

In order to discover who was behind the unlawful mortgage spam, Plaintiff created decoys and responded to multiple unlawful mortgage spam emails. (Braver Affidavit ¶ 6) From July 2003 through the date of this Response, Plaintiff’s servers have received thousands of unlawful mortgage spam. (Braver Affidavit ¶ 3) From July 2003 to April, 2005, Plaintiff submitted the following decoys in response to fraudulent mortgage spam (Braver Affidavit ¶ 11):

"Decoy" Lead Name	Location	Phone #	Appx. Date
-----	-----	-----	-----
Maren Eliason	Norman, OK	unknown	July '03
Gregory Annapolis	St Louis, MO	314-779-0134	July '03
Roger Griffith	Norman, OK	405-253-4058	Oct. '03
Martin Wilkinson	Atlanta, GA	mwilkins@wilburnet.com	Dec. '03
Ron Bartles	St Louis, MO	314-754-7458	Jan. '04
Jerry Pickering	Moore, OK	405-227-9517	Jan. '04
Clayton Fountain	Los Angeles, CA	213-596-9700	Jan. '04
Shiela Rhodes	Oklahoma City, OK	405-227-9517	April '04
Frederick Fremont	Mt. Pleasant, SC	843-972-0294	June '04
Zachariah Winkle	Dallas, TX	214-269-1166	June '04
Jake Sparks	W. Blomfield, MI	248-724-1711	July '04
Randi Tatum	Detroit, MI	313-347-2719	July '04

Leroy Crockett	Houston, TX	713-474-1417	Aug. '04
Robbie Phipps	Denver, CO	303-785-1755	Sep. '04
Cleo Benitez	Dallas, TX	214-269-1258	Dec. '04
Maribel Bacon	Newark, NJ	212-400-7514	Dec. '04
Pace O'Dell	Terrell, TX	972-210-0223	Jan '05
Taylor Askew	Dallas, TX	214-699-0104	Jan. '05
Golda Coleman	Kansas City, KS	913-378-0311	Apr. '05
Wendell Slater	Dallas, TX	214-329-1776	Apr. '05

After the decoys were submitted, Braver received communications from Ameriquest's employees on every decoy. (Braver Affidavit ¶ 12) When Braver confronted Ameriquest's employees, he was told repeatedly that Ameriquest knew the mortgage leads purchased were generated by spam. (Braver Affidavit ¶ 12) Rick Davies in Ameriquest's legal department admitted that he was aware that Ameriquest affiliates (Lead Transfer) send large email marketing campaigns but claimed that Ameriquest was not liable for the emails sent by "third parties". (Braver Affidavit ¶ 9)

On or about December 22, 2004, the attached Exhibit 2, an unlawful spam, was transmitted through Plaintiff's servers. (Braver Affidavit ¶ 13) Other mortgage spam exhibiting similar characteristics to those in Exhibit 2 were received by Plaintiff's servers almost daily throughout 2004 and up until April 2005. (Braver Affidavit ¶ 13) These particular mortgage spams were addressed to email addresses obviously tied to Oklahoma, including rbraver@ohww.norman.ok.us and meliason@ohww.norman.ok.us as well as recipients at other domains which are and have always been properly registered with an Oklahoma address, such as cdisolutions.com. (Braver Affidavit ¶ 13) The DNS MX records (listing server responsible for receiving email for a particular domain) at all relevant times for these domains indicated a server within the "oklahoma-isp.net" domain as the receiving mail server, which the senders had to make a connection to in order to

deliver the mail. (Braver Affidavit ¶ 13) Braver responded to the mortgage spam email dated December 22, 2004 by clicking the appropriate link which took him to the www.bettermortgagetoday.com website where he input decoy information using the exact same name that appeared in the “From” line on the mortgage spam received in his server. (See Exhibit 3, Website Landing Page; and Braver Affidavit ¶ 13) This website was one page and contains a drop down menu for “state.” (Braver Affidavit, ¶ 15) Exhibit 3 reveals that Braver selected Texas, but it also had an Oklahoma option. (Braver Affidavit ¶ 15)

Braver served two sets of written discovery requests upon Lead Transfer. Much of its “responses” were filled with nonsensical parsing of language. Even Lead Transfer acknowledges that it does not have time to seek the information requested, which it calls “premature” but does “expect[t] to obtain [the information] during discovery.” (Exhibit 4 Lead Transfer’s “General Objections” No. 7). On the one hand Lead Transfer seeks to be protected by the shield of incompleteness and prematurity of discovery but on the other hand demands the early termination of the litigation because Plaintiff does not have sufficient facts to support that it does business in Oklahoma.

According to Lead Transfer’s discovery responses, this decoy mortgage lead was trafficked by a number of individuals and entities before it ultimately ended up in the hands of Ameriquest. Lead Transfer purchased the subject lead from Mark Beaumont, 248 25th Street, Del Mar, California 92014. (See Exhibit 4, Defendant Lead Transfer, LLC’s Responses to Plaintiff’s Discovery Dated December 22, 2005, Interrogatory No. 1 and 3(hereafter “Exhibit 4 Lead Transfer Response to Interrogatory No. ___”)) Lead

Transfer's Verification to Exhibit 4 is attached as Exhibit 7. Plaintiff has requested, but as of this Response has yet to received Lead Transfer's Verification to Exhibit 5.

Lead Transfer represented to the Court in its moving papers that it takes "best efforts to ensure that any third party it deals with complies with all laws." (See Declaration of Oevermann, ¶ 4 attached to Motion to Dismiss of Lead Transfer.) Contrary to Defendant's representation, Lead Transfer admitted in its discovery responses that it does not request or obtain any information from those persons or entities it buys leads from before it purchases the leads. (See Exhibit 5, Defendant Lead Transfer, LLC's Responses to Plaintiff's Discovery Dated November 8, 2005, Interrogatory No. 7 (hereafter "Exhibit 5, Lead Transfer Response to Interrogatory No. ___")) Compare also Lead Transfer's claims of "best efforts" with its Response to Interrogatory No. 11 of Exhibit 5, wherein it was asked to describe in detail its knowledge of how the person or entity generated the lead at issue which it purchased. Lead Transfer's response was that it "had no first hand knowledge" regarding that matter. (Exhibit 5, Lead Transfer Response, Interrogatory No. 11)

Lead Transfer also refused to answer discovery requests concerning its evaluation or due diligence of the propriety or lawfulness of the business practices of the person or entity from whom it purchased the lead related to the decoy submitted by Plaintiff. (Exhibit 5, Lead Transfer Response, Interrogatory Nos. 12, 16, 20, and 21) Any alleged "best efforts" by Lead Transfer should also be compared with its responses to the request for production wherein it claimed that it did not have any contract with the person or entity it purchased the lead from or any documents related to analysis, consideration or criticism of its decision to purchase leads from the same person or entity or any

guidelines, procedures or other documents related to due diligence or investigation of lead generators related to the lead submitted by Plaintiff. (Exhibit 5, Lead Transfer Response, Request for Production Nos. 2, 3, 4 and 5 and Exhibit 4, Lead Transfer Response, Request for Production No. 1) Discovery was also sought as to the amount of revenue Lead Transfer generated by selling leads since January 1, 2002 that related to Oklahoma residents or Oklahoma real property. Lead Transfer engaged in a nonsensical parsing of language and claimed in its responses that it does not generate revenue from leads “related to Oklahoma residents or Oklahoma real property,” yet admitted to “purchasing” 1,746 mortgage leads that “related to Oklahoma residents or Oklahoma real property” during that same time period. (Exhibit 4, Lead Transfer Response, Interrogatory No. 4; Exhibit 5, Lead Transfer Response, Interrogatory No. 19) Discovery was sought concerning Lead Transfer’s knowledge of how Mark Beaumont, the individual who sold the subject lead to Lead Transfer, was generating these leads. Lead Transfer responding that to the best of its knowledge, he resells but does not generate leads, and it did not know *who* or *how* the subject lead was generated. (Exhibit 4, Lead Transfer Response, Interrogatory No. 3 and 5) Lead Transfer admitted it has made repeated purchases of leads from every person or entity it has done business with which would include Mark Beaumont. (Exhibit 5, Lead Transfer Response, Interrogatory No. 19 (sic) page 19).

Lead Transfer claims to take “best efforts” to ensure that the mortgage leads it is purchasing are obtained lawfully yet has no documents to produce other than its self-serving affidavit in support of these claims. Most importantly, Lead Transfer claims not to know who or how the leads, including the Braver lead, were generated.

Defendant Lead Transfer was involved in the trafficking of the decoy lead submitted by Braver which was generated by a fraudulent spam email sent to Plaintiff's servers in Oklahoma. Lead Transfer trafficked 1,746 leads since January 1, 2002 that related to an Oklahoma resident or Oklahoma real property. (Exhibit 5, Lead Transfer Response, Interrogatory No. 19)

Discovery asking Lead Transfer to identify and describe its marketing was met with responses that "to the best of its knowledge it does not have in its possession marketing materials that refer to "nationwide" or "all fifty states" and that it has never sold leads comprised of "Oklahoma residents". (Exhibit 5, Lead Transfer Response, Interrogatory No. 8 and 9; Exhibit 4, Lead Transfer Response, Interrogatory No. 15) Lead Transfer was given an opportunity to deny straight on that it markets its mortgage lead broker services nationwide but instead choose to take a very restrictive hyper technical and qualified response.

Lead Transfer, a Nevada corporation that has an office in South Carolina purchased the decoy mortgage lead submitted by Plaintiff with a Texas address from an individual in California who Lead Transfer openly admits "resells but does not generate [these] leads" yet claims not to be involved in sales and marketing on a nationwide basis. (Exhibit 4, Lead Transfer Responses, Interrogatory No. 1 and 3 and Affidavit of Gerhard Oevermann ¶ 2 and 5) This "broker in the mortgage lead industry" also trafficked 1746 mortgage leads related to Oklahoma.

Document requests seeking Lead Transfer's agreements with Mark Beaumont and Stecroft (the entity who purchased the decoy lead from Lead Transfer) were met with promises to do so only after the Court enters a protective order. (Exhibit 4, Lead Transfer

Response, Request For Production No. 1; Exhibit 6 Response to Plaintiff's Discovery to Defendant Stecroft Holdings, Inc., As Successor In Interest To Go Apply, Inc., d/b/a eLeadz Dated November 4, 2005). Requests for Production of the documents and information Lead Transfer and Stecroft reviewed or referred to in preparing its responses were likewise met with more promises to produce the information after a protective order was entered. (Exhibit 4, Lead Transfer Response, Request For Production No. 3; and Exhibit 6, Stecroft Response to Request For Production No. 4).

PROPOSITION A: JURISDICTION IS PROPER

1. Oklahoma's Fraudulent Use of Electronic Mail Statute specifically confers jurisdiction over Lead Transfer.

Personal jurisdiction over violators of the Fraudulent Use of Electronic Mail statute is specifically conferred by statute. "Transmitting or *causing* the transmission of fraudulent electronic mail to or through a computer network of an electronic mail service provider located in this state shall constitute an act in this state." 15 O.S. § 776.3 (emphasis added). There is no doubt that the person or entity who sent the unlawful spam *intended* for it to travel through the Plaintiff's servers. (Braver Affidavit ¶¶ 13 and 14) It is also clear, from the use of fraudulent tracking and originating information on the emails themselves, frequent name changes of industry members and their supposed inability to document basic business transactions (such as the source of leads) that the entire industry bears badges of illegal laundering and trafficking in unlawful goods. Lead Transfer admitted it purchased this lead, along with 1,746 other leads since January 1, 2002 that related to Oklahoma residents or Oklahoma real property. Lead Transfer paid good money to its business partners in exchange for mortgage leads it knew or

consciously avoided knowing were generated by unlawful spam. Lead Transfer *caused* the transmission of this unlawful spam to be sent to Plaintiff's servers and is subject to jurisdiction in the State of Oklahoma as a matter of law.

2. Jurisdiction is conferred by Oklahoma's Long-Arm Statute.

Jurisdiction over Defendant Lead Transfer, L.L.C. is appropriate in this case under Oklahoma's long-arm statute, 12 O.S. § 2004 (F). Oklahoma's long arm statute provides that "[a] court of this state may exercise jurisdiction on any basis consistent with the constitution of this state and the Constitution of the United States." 12 O.S. § 2004 (F). The intent of the statute is to extend the jurisdiction of the Oklahoma court over a non-resident to the limits permitted by the due process requirements of the United States Constitution and the Oklahoma Constitution. *Fields v. Volkswagen of America, Inc.*, 1976 OK 106, 555 P.2nd 48.

3. This Court's exercise of jurisdiction does not offend the due process requirements of the Federal Constitution.

The due process clause of the Fourteenth Amendment operates to limit the power of a state to assert *in personam* jurisdiction over a nonresident Defendant. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 414 n.8 (1984) (citing *Pennoyer v. Neff*, 95 U.S. 714 (1878)). Due process requirements are satisfied when *in personam* jurisdiction asserted over a nonresident corporate defendant has certain minimum contacts with the forum such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 414 (citing *Int'l Shoe Company v. Washington*, 326 U.S. 310, 316 (1945) quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). In determining minimum contacts for specific personal jurisdiction, "a court properly focuses on the 'relationship

among the defendant, the forum, and the litigation.” *Calder v. Jones*, 468 U.S. 783, 288 (1984) (citing *Shafer v. Heitner*, 433 U.S. 186, 204 (1977)).

“*In personam* jurisdiction may be general or specific. To establish *in personam* jurisdiction, contacts with the forum state must be decided on the particular facts of each case.” *Kuenzle v. HTM Sport-Und Freizeitgerate AG*, 102 F.3d 453, 456 (citing *Shanks v. Westland Equip. & Parts Co.*, 668 F.2d 1165, 1166). “The plaintiff need only make a prima facie showing.” *Behagen v. Amateur Basketball Ass'n of the United States*, 744 F.2d 731, 733 (10th Cir. 1984). “The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes are resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party.” *Id.* (internal citations omitted). Plaintiff has made a prima facie showing that Lead Transfer has maintained sufficient contacts with Oklahoma to vest personal jurisdiction in this Court.

The claim asserted against the nonresident defendant need not relate to the contact of the nonresident defendant with the state. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 414 The focus for purposes of assessing whether the nonresident corporation is subject to general jurisdiction is whether it has continuous and systematic contact with the forum such that exercise of jurisdiction would not violate traditional notions of fair play. When an action is “arising out of or related to the defendant’s contacts with the forum, the state is exercising ‘specific jurisdiction’ over the defendant.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414

n.8 (1984) (emphasis added). In this case, both general and specific in personam jurisdiction exists.

The advent of the Internet has raised a series of new questions pertaining to personal jurisdiction. In *ALS Scan v. Digital Service Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002), the Fourth Circuit

expressly incorporated an ‘intentionality’ requirement when fashioning a test for personal jurisdiction in context of the Internet: a state may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State’s courts.

Toys R US v. Step Two, 318 F.3d 446, 453 (3rd Cir. 2003) (citing *ALS Scan v. Digital Service Consultants, Inc.*, 293 F.3d 707). The Fourth Circuit, in *ALS*, buttressed its decision with authority from the U.S. Supreme Court:

This standard for reconciling contacts through electronic media with standard due process principles is not dissimilar to that applied by the Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984). In *Calder*, the Court held that a California court could constitutionally exercise personal jurisdiction over a Florida citizen whose only material contact with California was to write a libelous story in Florida, directed at a California citizen, for a publication circulated in California, knowing that the “injury would be felt by [the Californian] in the State in which she lives and works”. *Id.* at 789-90. Analogously, under the standard we adopt and apply today, specific jurisdiction in the Internet context may be based only on an out-of-state person’s Internet activity directed at Maryland and causing injury that gives rise to a potential claim cognizable in Maryland.

Id. at 714. Here Braver alleges that the defendants, including Lead Transfer conspired to send or cause to be sent thousands of illegal email messages to or through Bravers’ servers.

The electronic transmission of solicitations subjects the sender to jurisdiction in the forum where injury results from the receipt of those communications. “By sending an

email solicitation to the far reaches of the earth for pecuniary gain, one does so at his own peril, and cannot then claim that it is not reasonably foreseeable that he will be hauled into court in a distant jurisdiction to answer for the ramifications of that solicitation.” *Internet Doorway, Inc. v. Parks*, 138 F.Supp.2d 773, 779 (S.D. Miss. 2001). The unlawful e-mails sent by an unknown spammer were obviously sent for commercial gain. While Plaintiff does not yet have evidence that Lead Transfer actually pushed the “send” button that forced the unlawful spam into Plaintiff’s servers, such proof is unnecessary to establish Plaintiff’s claims. Lead Transfer, through its so far undisclosed financial agreements, caused more than 1700 spam messages to be transmitted into Oklahoma. “E-mails, like letters and phone calls, can constitute minimum contacts, at least if the defendant or his agents send the message for pecuniary gain rather than substantially personal purposes.” *Reliance Nat’l Indem. Co. v. Pinnacle Cas. Assurance Corp.*, 160 F.Supp.2d 1327, 1333 (M.D. Ala. 2001). An advertiser should not be permitted to take advantage of modern technology via electronic means to engage in a tortious act with consequences in Oklahoma and escape traditional notions of jurisdiction because he used electronic means to carry out a long-distance tort. *EDIAS Software Int’l, L.L.C. v. BASIS Int’l Ltd.*, 947 F.Supp.413 (D. Ariz. 1996).

Braver alleges that Defendant Lead Transfer, L.L.C., along with its co-defendants, transmitted or conspired to transmit tens of thousands of illegal e-mail messages through or to Plaintiff’s e-mail servers and customers. Since the injury from the conduct of which Braver complains occurred in Oklahoma, jurisdiction is proper under 12 O.S. § 2004 (F). Broadly interpreted, Braver’s complaint alleges a persistent course of conduct by Ameriquest and its co-conspirators and agents. The Defendants, including Lead Transfer,

L.L.C., knew that the spammers whom they conspired with would transmit their illegal spam and harm Plaintiff and his customers. “[A] spammer sending millions of e-mails over the Internet has reason to know that he could be “ha[u]led into court in a distant jurisdiction to answer for the ramifications of that solicitation.” *State v. Heckel*, 93 P.3d 189, 193 (Wash. App. 2004) (citing *Internet Doorway, Inc. v. Parks*, 138 F.Supp.2d 773, 779-780 (S.D. Miss. 2001); *Verizon Online Servs., Inc. v. Ralsky*, 203 F.Supp.2d 601, 618 (E.D. Va. 2002). The Court in *Heckel*, despite Heckel’s claims that he had no specific knowledge that any particular addresses belonged to residents of the forum state, held that Heckel did indeed subject himself to the jurisdiction of the Court. “[I]f we were to interpret the Act the way Heckel suggests, no spammer sending deceptive e-mail could ever violate the Act so long as he were to use a bulk e-mail program to harvest large numbers of addresses without regard to residence of the owners, because he could always claim that he had no specific knowledge about particular recipients.” *Heckel* at 192-193. In *Verizon Online Services*, defendants sent spam, which on a single day consumed up to 56 gigabytes of memory on Verizon’s servers, seven (7) of which were located in Virginia. *Verizon* at 617. Verizon’s e-mail delivery system was impaired which led to delays and numerous customer complaints. *Id.* The *Verizon* court stated “[i]n the case of injuries to computer systems, various courts have concluded that the ‘use of a computer or network service located in a particular state creat[es] sufficient contacts to establish personal jurisdiction.’” *Id.* at 617-618 (citations omitted). The court further acknowledged that a failure to grant jurisdiction would “allow individuals who purposefully engage in interstate activities for profit to escape having to account in other states for the proximate consequences of their actions.” *Id.* at 620 (citing *Compuserve*

Inc. v. Patterson, 89 F.3d 1257, 1265 (6th Cir, 1996). The court further noted that if personal jurisdiction could not be asserted spammers would be able to avoid being hauled into court by alleging they were not aware of the location of the ISP's e-mail servers, while they were fully aware of the harm their conduct was causing to the ISP's business. *Id.* at 620.

Defendant Lead Transfer, L.L.C. relies upon *Intercon, Inc. v. Bell Atl. Internet Solutions, Inc.*, 205 F.3d 1244 (10th Cir. 2000), in support of its argument that personal jurisdiction is not appropriate in this case. In *Intercon*, an Internet Service Provider improperly routed e-mails through the plaintiff's Oklahoma web server for four months after being notified of the problem. *Intercon* at 1247-1248. Lead Transfer attempts to distinguish its conduct from the conduct complained of in *Intercon* by arguing that there are no allegations that Lead Transfer took any actions that affected Oklahoma or knew the actions taken by the other Defendants would affect Oklahoma. This is simply not true. Lead Transfer claims it used "best efforts", yet admits it knows nothing about the business practices of the persons or entities from whom it has chosen 1,746 times to purchase mortgage leads that relate to Oklahoma. Lead Transfer alleges that the Complaint contains no allegations that Lead Transfer knew the actions taken by the other defendants would have an effect in Oklahoma. In his Second Amended Complaint, Plaintiff alleges that the Defendants, including Lead Transfer, "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." (Complaint ¶¶ 64, 68 and 69) The Second Amended Complaint's use of "Defendants"

as opposed to specifically naming each defendant every time Plaintiff refers to defendants is no ground for dismissal.

In a self serving affidavit, Lead Transfer, L.L.C. argues that it does not conduct any business in Oklahoma; maintain any offices in Oklahoma; employ any Oklahoma employees; maintain telephone or facsimile numbers in Oklahoma; advertise in Oklahoma; own property in Oklahoma; have Oklahoma based members; or send employees to Oklahoma on official business. However, Lead Transfer, L.L.C., has not shown that it has avoided trafficking in leads of Oklahomans or Oklahoma property. In fact, Lead Transfer has admitted that it trafficked in what amounts to over one lead per day for a period of three years. These contacts are neither random nor fortuitous; these contacts are continuous and systematic. Lead Transfer accepted the benefit and ratified the conduct by trafficking in spam generated mortgage leads. Lead Transfer claims in its self-serving affidavit that it “takes best efforts to ensure that any third party it deals with complies with all laws, including the CAN-SPAM Act.” (*See* Affidavit of Gerhard Oevermann ¶ 4) However, when asked to describe all information requested or obtained prior to purchasing a lead, Lead Transfer responded “it does not purchase a single lead; rather it purchases leads in aggregate and does not request or obtain information prior to purchasing an aggregate pool of leads.” (Exhibit A, Lead Transfer Response) Lead Transfer represented that it purchased the lead at issue in this litigation, i.e. Taylor Askew, from an individual named Mark Beaumont. In response to an inquiry as to its knowledge of how the leads it purchased were generated, Lead Transfer stated that “to the best of its knowledge, Mark Beaumont resells but does not generate leads.” Lead Transfer further admitted that it does not have any contract with Mark Beaumont.

(Exhibit B, Lead Transfer Response) As such, it is clear that Lead Transfer's best efforts to ensure all laws are complied with are merely an illusion, designed to further its defense of plausible deniability.

4. Lead Transfer's conspiracy to evade federal and state anti-spam laws subjects it to jurisdiction in this Court.

Lead Transfer claims that the Complaint does not allege the existence of a conspiracy. This assertion is incorrect; in the Second Amended Complaint, Plaintiff alleged the existence of a civil conspiracy between Defendant Ameriquest and all other defendants, including Lead Transfer, L.L.C. "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..." (See Second Amended Complaint ¶ 42).

"A civil conspiracy consists of a combination of two or more persons to do an unlawful act, or to do a lawful act by unlawful means." *Brock v. Thompson*, 1997 OK 127 ¶ 39, 948 P.2d 279 (Okla. 1997). Ameriquest and the other Defendants, including Lead Transfer, L.L.C., conspired to use spam generated leads to send unlawful e-mail communications to consumers, such as those sent to Plaintiff's servers. The actions of the Defendants were knowing and repeated commercial transactions over the internet for the purpose of marketing Ameriquest's mortgage products. *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997). In determining jurisdiction, this court should focus on the "relationship among the defendant[s], the forum, and the litigation." *Calder v. Jones*, 465 U.S. 782, 788 (1984).

Participation in a conspiracy is sufficient to confer personal jurisdiction even where the Defendant's only contact with the forum state is through the actions of the co-

conspirator.¹ *America Online, Inc. v. Ambro Enterprises*, 2005 WL 2218433 at * 3, FN1 (E.D. Va). The conspiracy theory of jurisdiction is based on the notion “that the acts of conspirator in furtherance of a conspiracy may be attributed to the other members of the conspiracy.” *Gemini Enterprises, Inc. v. WFMY Television Corp.*, 470 F.Supp. 559, 564 (M.D.N.C. 1979). “Courts consider conspiracy jurisdiction a form of long-arm jurisdiction in which the defendant’s ‘contact’ with the forum consists of the acts of the defendant’s co-conspirators within the forum.” *Jin v. Ministry of State Security*, 335 F.Supp.2d 72, 78 (D.D.C. 2004) (citing *Second Amendment Found. v. United States Conf. of Mayors*, 274 F.3d 521, 523 (D.C.Cir.2001)). “There does not seem to be any question that if plaintiff’s complaint alleges an actionable conspiracy then the minimum contacts test has been met.” *Textor v. Bd. of Regents of Northern Illinois Univ.*, 711 F.2d 1387, 1392 (7th Cir. 1983). A court may assert personal jurisdiction over a non-resident co-conspirator “where substantial acts in furtherance of the conspiracy were performed in the forum state and the co-conspirator knew or should have known² that acts would be performed in the forum state.” *Gemini Enterprises, Inc.*, 470 F.Supp. at 564.

Here, Plaintiff has sufficiently alleged that the Defendants were engaged in a conspiracy, the product of which resulted in unlawful spam to be forced through Plaintiff’s servers.

¹ Not all courts have approved conspiracy jurisdiction. See *Delgado v. Federal Bureau of Prisons*, 727 F.Supp. 24 (D.D.C. 1989) [no conspiracy jurisdiction where no injury occurred in the District of Columbia]; *Hasenfus v. Corporate Air Servs.*, 700 F.Supp. 58 (D.D.C. 1988) [disallowing conspiracy jurisdiction for unsubstantiated claims].

² Courts are mixed as to what constitutes an adequate showing of knowledge or awareness. *Jin*, 335 F.Supp.2d at 79.

PROPOSITION B: PLAINTIFF'S CLAIMS ARE NOT MERELY CONCLUSORY ALLEGATIONS.

Lead Transfer represents to this Court that Plaintiff has failed to allege any acts by Lead Transfer and failed to allege how Lead Transfer violated any laws. This is false. In paragraph one of the Second Amended Complaint, Plaintiff alleged "...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." Plaintiff further alleged that Lead Transfer, L.L.C. was a lead generator who provided leads to Ameriquest. (Complaint ¶ 37) Further, Plaintiff alleged the existence of a conspiracy between Ameriquest and the other defendants, including Lead Transfer, designed to generate revenue from spam generated leads, which directly harmed Plaintiff's business.

Lead Transfer attempts to persuade this Court that Plaintiff did not allege any specific conduct by Lead Transfer which violated any law or the rights of Plaintiff. Once again, this assertion is incorrect. In the Second Amended Complaint, Plaintiff repeatedly alleged unlawful conduct by all Defendants, including Lead Transfer. (Complaint ¶¶ 53, 55, 59, 60, 64, 68 and 69)

PROPOSITION C: PLAINTIFF HAS STANDING TO PURSUE CAN-SPAM CLAIMS

1. Plaintiff is a provider of Internet access service.

The Second Amended Complaint alleges sufficient, well-pled facts which, when accepted as true and in a light most favorable to Plaintiff, establish that Plaintiff was a provider of Internet access service. The Second Amended Complaint alleges that:

¶ 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).

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

¶ 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.”

The CAN-SPAM Act specifically authorizes an action by a “provider of Internet access service,” 15 U.S.C. § 7706 (g). The CAN-SPAM Act does not itself redefine the term “Internet access service,” but does adopt the meaning given that term in the Communications Act of 1934, 47 U.S.C. § 231(e)(4), 15 U.S.C. § 7702 (11). The Communication Act of 1934 provides that the term “Internet access service” means “a service that enables users to access content, information, electronic mail or other services offered over the Internet, and may also include access to proprietary content, information,

and other services as part of a package of services offered to consumers. Such term does not include telecommunication services,” 47 U.S.C. § 231(e)(4).

Plaintiff acknowledges that the CAN-SPAM Act does not expressly authorize an individual adversely affected by violation of the CAN-SPAM Act to bring a civil action. The CAN-SPAM Act contemplates that those individuals who receive unlawful spam in their computer e-mail may seek relief through a civil action initiated by a state Attorney General or an official or agency of the state.

However, the CAN-SPAM Act does not require that a provider of Internet access service be an incorporated entity. Individuals like the Plaintiff who satisfy the definition of “a provider of internet service” are expressly authorized to bring a civil action. The fact that Plaintiff, an individual as opposed to a corporation, offers a service that enables users to access electronic mail over the Internet does not negate his authority as a provider of Internet access service to bring a civil action if adversely affected by specific sections of the CAN-SPAM Act. The Act does not require the act of incorporation. The only requirement is that the provider offer exactly what the Plaintiff has alleged he offers in the Second Amended Complaint. The CAN-SPAM Act does not preclude the Plaintiff’s actions.

2. Plaintiff’s Complaint does not seek relief under Section VI of the CAN-SPAM Act.

Plaintiff’s Complaint does not allege or seek relief under Section VI of the CAN-SPAM Act for the obvious reason that enforcement under Section VI is left solely to the FTC, 15 U.S.C. § 7705(c). Plaintiff’s Complaint seeks relief for Defendants’ violations of 15 U.S.C. § 7704(A)(1)(2)(3) & (5) of the CAN-SPAM Act and for violation of various Oklahoma state electronic mail statutes. Contrary to the statements set forth in

Defendant's motion, Plaintiff did allege that Lead Transfer is a "lead generator" in Paragraph 37 of the Second Amended Complaint. Plaintiff alleged that Ameriquest purchases "spam-generated sales leads from the remaining Defendants," which includes Lead Transfer. Paragraph 50 of the Second Amended Complaint alleges that Defendants' e-mails, including Lead Transfer, constituted mortgage spam sent with fraudulent techniques to disguise the origins of the messages. Plaintiff's Second Amended Complaint alleges that Defendants, again including Lead Transfer, initiated the transmission, to protected computers, which Plaintiff's is, of commercial e-mail messages that contain, or were accompanied by header information that is materially false or materially misleading. Plaintiff alleged that Defendants intentionally paid for, provided other consideration to or induced other persons to initiate the commercial electronic-mail messages on its behalf with actual knowledge or by consciously avoiding knowing whether such persons are engaged in or being engaged in a pattern of practice that violates the CAN-SPAM Act (See *Second Amended Complaint*, ¶55). Paragraph 59 of Plaintiff's Second Amended Complaint alleges that Defendants engaged in a pattern of practice of initiating, to protected computers, commercial e-mail messages that contained numerous violations of the CAN-SPAM Act. Paragraph 64 of the Second Amended Complaint alleges that Defendants, directly or through their agents, contractors and/or subcontractors, initiated the transmission of commercial electronic-mail messages directed to Plaintiff's server facilities in violation of numerous laws. Plaintiff has alleged sufficient facts regarding Lead Transfer's improper conduct and sufficiently put Lead Transfer on notice of its illegal conduct. Should the Court find that Plaintiff has not sufficiently pled facts necessary to put Lead Transfer on notice of Plaintiff's claims,

Plaintiff respectfully requests that the Court grant leave to allow Plaintiff to amend the Complaint to set forth more facts, including some of those provided in Plaintiff's answers and responses to Ameritrust's discovery in this action.

WHEREFORE, the Plaintiff respectfully requests that this Court deny Defendant Lead Transfer, LLC's Motion to Dismiss.

Respectfully submitted,

S// Luke Wallace

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CERTIFICATE OF SERVICE

I hereby certify that on this 16 day of January, 2006 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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