

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF OKLAHOMA

ROBERT H. BRAVER, an individual,

Plaintiff,

v.

AMERIQUEST MORTGAGE COMPANY, a  
Delaware corporation, et al,

Defendants.

No. CIV-04-1013-W

**MOTION AND MEMORANDUM TO  
DISMISS OF TIM FOUST AND  
TANDAX, INC.**

**ORAL ARGUMENT REQUESTED**

AMERIQUEST MORTGAGE COMPANY, a  
Delaware corporation,

Cross-Complainant,

v.

INNOVATIVE MARKETING, INC. d/b/a  
LEAD EXTREME, a Washington corporation, et  
al,

Cross-Defendants

**I. INTRODUCTION**

Defendants Tim Foust and Tandax, Inc. ("Tandax") respectfully request the Court to Dismiss Plaintiff's claims against Tandax alleged in Plaintiff's Third Amended Complaint (the "Amended Complaint"). The Amended Complaint fails to allege facts sufficient to support the Court's exercise of personal jurisdiction over Tandax or Foust because neither have any contacts with the State of Oklahoma, and none are alleged in the Amended Complaint. In fact, neither Foust nor Tandax are alleged to have any contacts with any other party in this lawsuit or with Plaintiff. The Amended Complaint should also be dismissed for failure to state a claim. The Amended Complaint fails to articulate anything more than conclusory allegations regarding Tandax's allegedly improper conduct, and fails to put Tandax on notice regarding its allegedly

improper conduct. Plaintiff lacks standing to assert causes of action under 15 U.S.C. § 7701 (the “CAN-SPAM Act”). Finally, the Amended Complaint contains no allegations regarding Foust in his individual capacity. Foust should be dismissed from the lawsuit.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### A. ALLEGATIONS IN THE AMENDED COMPLAINT

The Amended Complaint alleges Ameriquest Mortgage Company (“Ameriquest”) “maintains offices in Oklahoma and transacts business within the State of Oklahoma.” (Amended Complaint, ¶ 17.) The Amended Complaint further alleges that “Ameriquest is a subprime lender . . . that purchases spam generated sales leads from the remaining defendants. . . .” (Amended Complaint, ¶ 69.) The Amended Complaint alleges “it was common knowledge that . . . mortgage spam is generally fraudulent [and violates state and federal laws].” (Amended Complaint, ¶ 11.) The Amended Complaint further alleges that “Defendants purposely created a complex network of transactions in an attempt to obscure the link between . . . the spam and the ultimate sale of the spam-generated lead to Ameriquest.” (Amended Complaint, ¶ 23). The Amended Complaint contains these additional allegations:

Virtually all mortgage spam is sent using forged, missing, or obfuscated routing and origin information . . . .

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 . . . .

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 . . . to block traffic from known senders of such unwanted, nuisances messages

Ameriquest is a significant presence in the subprime mortgage lending industry . . . . 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 over other subprime lenders by obtaining below market cost sales leads, such as spam generated leads.

(Amended Complaint, ¶¶ 70-73.)

The Amended Complaint does not allege facts underlying the alleged conspiracy amongst the Defendants or point to any overt acts taken in furtherance of any such conspiracy. Rather, the Amended Complaint merely alleges that “[a]ll Defendants are engaged in a conspiracy . . . to conceal their activities which violate federal and state anti-spam laws.”

(Amended Complaint, ¶ 19.) The Amended Complaint also does not allege that Tandax sent any e-mails in violation of the CAN-SPAM Act; nor does the Amended Complaint contain any allegations whatsoever about Tim Foust. (*See, generally*, Amended Complaint.)

**B. TANDAX LACKS ANY OKLAHOMA CONTACTS**

Tandax is a now-inactive Washington corporation which served as a broker in the data industry. (Declaration of Tim Foust submitted herewith (“Foust Decl.”) ¶ 2.) Tandax bought and sold “data,” or expressions of interest in consumer-related products and services. (Foust Decl. ¶ 2.) This data was generated in a variety of ways, including but not limited to, Internet-based marketing. (Foust Decl. ¶ 3.) Tandax undertook efforts to ensure that any third party it dealt with complied with all laws, including the CAN-SPAM Act, and state laws regulating the transmission of unsolicited commercial email. It was in Tandax’s interest to only sell or distribute data containing valid expressions of consumer interest, as any invalid data jeopardized client relationships and resulted in a loss of repeat customers. Tandax ensured it dealt with valid data in two ways. First, it had no dealings with any one known to regularly violate federal and state laws regulating unsolicited commercial email. Second, Tandax immediately terminated any broker which was the subject of a single complaint. (Foust Decl. ¶ 4.)

Tandax had an office in Washington. (Foust Decl. ¶ 5.) Tandax never conducted any

business whatsoever in Oklahoma. (Foust Decl. ¶ 6.) Tandax never maintained any offices in Oklahoma. (Foust Decl. ¶ 7.) Tandax never employed any Oklahoma-based employees. (Foust Decl. ¶ 8.) Tandax never maintained any telephone or facsimile numbers in Oklahoma. (Foust Decl. ¶ 9.) Tandax never advertised in any Oklahoma newspapers or magazines. (Foust Decl. ¶ 10.) Tandax never had any Oklahoma-based owners. (Foust Decl. ¶ 11.) Tandax never owned or leased any property in the State of Oklahoma. (Foust Decl. ¶ 12.) Tandax was never licensed to conduct business in the State of Oklahoma. (Foust Decl. ¶ 13.) None of Tandax's contractors or employees ever traveled to Oklahoma on behalf of Tandax. (Foust Decl. ¶ 14.) Tandax never generated any revenues from customers in the State of Oklahoma. (Foust Decl. ¶ 15.) Tandax never received a single complaint relating to unsolicited commercial email. (Foust Decl. ¶ 16.)

### **III. ARGUMENT**

#### **A. TANDAX IS NOT SUBJECT TO PERSONAL JURISDICTION IN OKLAHOMA**

##### **1. Personal Jurisdiction — Legal Framework.**

The plaintiff bears the burden of establishing personal jurisdiction over the defendant. Kuenzle v. HTM Sport-Und Freizeitgerate AG, 102 F.3d 453, 456 (10th Cir. 1996) (quoting Behagen v. Amateur Basketball Ass'n of the United States, 744 F.2d 731, 733 (10th Cir. 1984)). In a diversity action, a federal court may exercise personal jurisdiction over a defendant to the extent permitted by the applicable state law. FED. R. CIV. P. 4(e)(1); Soma Med Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1295 (10th Cir. 1999). Jurisdiction is therefore appropriate in this case to the extent allowed under Oklahoma's long arm statute, Okla. Stat. tit. 12, § 2004(F). Because Oklahoma's long arm statute allows jurisdiction to the extent consistent with Due Process, the relevant inquiry is whether exertion of jurisdiction over Tandax comports with Due

Process. Rambo v. Am. S. Ins. Co., 839 F.2d 1415, 1416 (10th Cir. 1988).<sup>1</sup>

Due Process requires certain “minimum contacts” between the defendant and the forum state as a prerequisite to jurisdiction. World-Wide Volkswagen Co. v. Woodson, 444 U.S. 286, 291 (1980) (quoting Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). The “minimum contacts” standard may be met in either of two ways. When the defendant has “continuous and systematic general business contacts” with the forum state, courts in that state may exercise general jurisdiction over the defendant. Kuenzle, 102 F.3d at 455; Helicopteros Nacionales de Colombia, S.A., v. Hall, 466 U.S. 408, 414-15 (1984). In contrast, where there are no continuous and systematic general business contacts, a state may only assert jurisdiction over a non-resident defendant that has “‘purposely directed’ his activities at residents of the forum,” with respect to cases that “‘arise out of or relate to’ those activities.” Burger King v. Rudzewicz, 471 U.S. 462, 472-73 (1985) (citations omitted). Finally, even if defendant’s actions created sufficient minimum contacts, the Court must still consider whether the exercise of personal jurisdiction over defendant would offend traditional notions of “fair play and substantial justice.” Intercon, Inc. v. Bell Atl. Internet Solutions, Inc., 205 F.3d 1244, 1247 (10th Cir. 2000).

In the present case, the Amended Complaint contains no allegations that Tandax engaged in “continuous and systematic general business contacts” with the State of Oklahoma or its residents. Tandax does not have an office in Oklahoma and does not engage in any business activities with the State of Oklahoma or its residents. Jurisdiction is therefore only appropriate under the specific jurisdiction analysis.

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<sup>1</sup> Title 15, Section 776.4 purports to confer jurisdiction over those who violate the statute by deeming the transmission of messages in violation of that statute “an act in this state.” However, to the extent the statute purports to encompass defendants who lack minimum contacts with Oklahoma, section 776.4 violates Due Process. Therefore, in this Motion, Tandax focuses only on the Due Process analysis.

**2. Jurisdiction is Not Appropriate Under the Specific Jurisdiction Analysis Because Tandax Has Not Purposefully Directed any Actions to Oklahoma or its Residents.**

To support jurisdiction, there must be “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” Hanson v. Denckla, 357 U.S. 235, 253 (1958) (citation omitted); *see also* Fidelity and Cas. Co. of N. Y. v. Phila. Resins Corp., 766 F.2d 440, 445 (10th Cir. 1985). This “purposeful availment” requirement precludes personal jurisdiction as the result of “random, fortuitous, or attenuated contacts.” Burger King, 471 U.S. at 475 (citations and internal quotation marks omitted); Kuenzle, 102 F.3d at 455.

The Tenth Circuit, consistent with the approach of other courts, requires that the non-resident defendant direct its activities towards the forum state in order to be subject to jurisdiction. *See* Intercon, Inc. v. Bell Atl. Internet Solutions, Inc., 205 F.3d 1244, 1248 (10th Cir. 2000). In Intercon, a closely analogous case, the Tenth Circuit held that a non-resident defendant who was accused of improperly routing traffic through Oklahoma servers was properly subject to jurisdiction in Oklahoma. The court in Intercon focused on the fact that defendant had knowledge that e-mail traffic was being routed to Oklahoma and purposefully directed its activity there:

plaintiff has shown that defendant purposefully directed its conduct toward Oklahoma after the end of October 1996. At that point, defendant had notice that it was routing its customer’s e-mail through the Oklahoma mail server and that the unauthorized traffic was causing problems for the Oklahoma-based company. . . .

Defendant argues that because it never intended to transmit traffic through Oklahoma, its inadvertent contacts with Oklahoma were merely “fortuitous,” and therefore insufficient to establish personal jurisdiction, citing World-Wide Volkswagen, 444 U.S. at 295 . . . . While this may be an accurate description of defendant’s initial contacts with Oklahoma, after the end of October 1996, its continued transmission of e-mail through the Oklahoma mail server was knowing and intentional. . . .

We also hold that defendant's activities and their consequences have a substantial enough connection with Oklahoma to make the exercise of jurisdiction reasonable. . . . After receiving notice of the routing error, defendant knew its conduct over the next four months was causing injury in Oklahoma, and it should reasonably have expected to be sued there.

Id. (emphasis added).

In contrast to the facts in Intercon, the Amended Complaint in this case contains no allegations that Tandax knew it took any action that affected Oklahoma, or its residents, including Plaintiff. The Amended Complaint contains no allegations that Tandax knew the actions taken by the other Defendant would have an effect in Oklahoma. Tandax has not had any dealings with any of the other parties to this lawsuit. Indeed, the Amended Complaint contains no allegations regarding Tandax whatsoever. Tandax lacks any contacts with the State of Oklahoma or its residents. Personal jurisdiction over Tandax is, therefore, not appropriate.

**3. Jurisdiction is Not Proper Under the Conspiracy Theory of Jurisdiction.**

Sustaining jurisdiction over an out-of-state co-conspirator based on the conspiracy theory requires "something more than the presence of a co-conspirator within the forum state, such as substantial acts performed there in furtherance of the conspiracy and of which the out-of-state co-conspirator was or should have been aware." American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, N.V., 710 F.2d 1449 (10th Cir. 1983) (emphasis added). Under the conspiracy theory of jurisdiction, the plaintiff must (1) make a "prima facie showing" of a conspiracy; (2) allege specific facts warranting the inference of membership in the conspiracy; and (3) show that the defendant's co-conspirator committed a tortious act pursuant to the conspiracy in the forum. Clark v. Tabin, 400 F. Supp. 2d 1290, 1297 (D. Okla. 2005); *see also* American Land, 710 F.2d at 1452 (recognizing requirement that defendant conspired to commit an overt act in state in furtherance of the conspiracy). Plaintiff cannot even satisfy one of the

prongs sufficient for conspiracy jurisdiction.

**a. Plaintiff fails to make a prima facie showing of conspiracy**

Despite prosecuting this case for over 18 months, Plaintiff fails to forth any evidence whatsoever of a conspiracy. Instead, in an effort to escape his evidentiary burden, Plaintiff argues Defendants conspired to cover up the conspiracy. Plaintiff also admits that various Defendants are party to agreements which require them to act lawfully. Yet Plaintiff claims, without making any further allegations that these agreements are “sham” agreements. These allegations are not sufficient to satisfy the Plaintiff’s burden of a “prima facie factual showing” of a conspiracy.

**b. Plaintiff fails to put forth any evidence – circumstantial or otherwise – regarding Tandax’s involvement in the alleged conspiracy**

Other than merely alleging Tandax is part of the conspiracy, Plaintiff makes no allegations regarding Tandax’s involvement in the actions underlying the lawsuit. Plaintiff merely argues “All Defendants are engaged in a conspiracy based upon agreement, either express or implied, to conceal their activities which violate federal and state anti-spam laws.” (Amended Complaint, ¶ 19.) Plaintiff’s inclusion of Tandax in a complaint merely alleging a conspiracy is insufficient to satisfy his burden of making a “prima facie factual showing”. Plaintiff does not put forth any correspondence or agreements between Tandax or any other Defendant or present any documents or testimonial evidence that reflects Tandax’s involvement. Plaintiff falls far short of satisfying his burden of making a “prima facie factual showing”.

**c. Plaintiff fails to allege any over act in or relating to the forum state**

The third element requires Plaintiff to allege “substantial acts performed there in furtherance of the conspiracy and of which the out-of-state co-conspirator was or should have been aware.” American Land, 710 F.2d at 1449. The overt act must not be just alleged, but

must be shown by affidavit that it likely took place. Clark v. Tabin, 400 F. Supp. 2d 1290, 1297 (D. Okla. 2005). The Amended Complaint contains no allegations that any of the Defendants took any illegal action. As stated in Tim Foust's Declaration supporting this Motion, Tandax does not target its activities to the State of Oklahoma or its residents. Nor does it conduct any business in or relating to the State of Oklahoma. In order to assert personal jurisdiction, Plaintiff must rebut these averments by a specific factual showing. Phillips USA, Inc. v. Allflex USA, Inc., 857 F. Supp. 789, 792-93 (D. Kan. 1994) (plaintiffs may not rely on conclusory allegations in their complaint in the face of a detailed declaration challenging jurisdiction).

**4. Jurisdiction Cannot be Based on Fortuitous Contacts.**

A recent decision (*i.e.*, issued February 10, 2006) by the Utah Supreme Court on nearly identical facts illustrates that the current state of the law does not support the assertion of jurisdiction. *See* Fenn v. Mlead Enterprises, Inc., 2006 UT 8 (Utah 2006) (attached hereto as **Exhibit A** for the Court's convenience). In Fenn the Utah Supreme Court held – based on the Due Process Clause of the United States Constitution – a non-resident defendant cannot be held liable without “something more” than an email which happens to reach the forum state, because a non-resident defendant “is generally unaware of the geographic location to which it sends an email.” Fenn, 2006 UT 8, at ¶ 13. In this case, similarly, there is no allegation Tandax was or should have been aware of any activity in the forum state. Jurisdiction is therefore not proper.

**B. PLAINTIFF'S CLAIMS ARE ONLY SUPPORTED BY CONCLUSORY ALLEGATIONS, AND FAIL RULE 9 STANDARDS**

“Unsupported conclusory allegations” are insufficient to state a claim. *See* Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). “Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant [statutory] language to state a claim for relief.” TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d

1022, 1024 (10th Cir. 1992). “[C]onclusory allegations that the defendant violated those laws is insufficient,” a plaintiff must allege sufficient facts to support a cause of action under the laws. *Id.*; *see also* Smith v. Plati, 258 F.3d 1167 (10th Cir. 2001) (affirming dismissal of § 1983 claims for failure to “allege sufficient facts” to show a violation). Additionally, claim which “sounds in fraud” must satisfy Rule 9’s particularity requirement. Brooks v. Bank of Boulder, 891 F. Supp. 1469, 1480 (D. Colo. 1995). Rule 9(b)’s particularity requirement is not limited to claims which expressly allege fraud or use the word “fraud.” *See* Saine v. A.I.A., Inc., 582 F. Supp. 1299, 1303 (D. Colo. 1984) (RICO claim sounds in fraud and triggers Rule 9’s particularity requirement). Rule 9 provides that “in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” FED. R. CIV. P. RULE 9. Courts have interpreted Rule 9 as requiring a plaintiff to allege the “who,” “what,” “when,” and “where” of the fraud. *See, e.g.*, Farlow v. Peat, Marwick, Mitchell & Co., 956 F.2d 982, 991 (10th Cir. 1992).

Here, the Amended Complaint alleges Defendants, including Tandax were part of a conspiracy to (i) send Plaintiff misleading, “fraudulent,” and improperly routed unsolicited commercial email, and (ii) conceal and assist others in concealing each other’s role in the conspiracy. Because Plaintiff’s claims sound in fraud, they must meet Rule 9(b)’s particularity requirement. Significantly, Plaintiff has not alleged any specific conduct taken by Tandax that violates any laws or Plaintiff’s rights. Plaintiff alleges only that “[v]irtually all mortgage spam is sent using forged, missing, or obfuscated routing and origin information,” that “[v]irtually all mortgage spam is devoid of any information identifying the responsible mortgage and/or marketing companies and providing a physical address,” and that “[v]irtually all mortgage spam is sent with fraudulent techniques to disguise the origin of the messages.” (*See* Amended

Complaint, ¶¶ 70-72.) “Virtually all” does not refer to Tandax. The Amended Complaint does not contain any allegations specific to Tandax. Plaintiff fails to refer to any particular e-mail messages, identify when those messages were sent or received, identify the e-mail accounts to which those e-mail messages are sent or through which those messages were sent. Apart from parroting the elements of the statute, Plaintiff does not specifically allege how any e-mails which it received or transmitted violate the CAN-SPAM Act. Plaintiff also fails to refer to any agreement, whether express or implied between Tandax and Ameriquest or any other facts which would demonstrate Tandax’s awareness of the alleged improprieties. Tandax thus has “no notice of what [it is] to defend [itself] against, and the court [has] no way to evaluate the viability of [Plaintiff’s] claims.” See Coopersmith v. Supreme Court for the State of Colo., 465 F.2d 993, 994 (10th Cir. 1972) (holding that merely conclusory allegations were insufficient to sustain a complaint).

### **C. PLAINTIFF LACKS STANDING TO PURSUE HIS CAN-SPAM CLAIMS**

Plaintiff seeks relief under the CAN-SPAM Act. Plaintiff lacks standing to pursue this cause of action because he is an individual—and not an Internet Service Provider and because he seeks to hold Defendants under a section which is reserved for enforcement by the Federal Trade Commission (“FTC”).

#### **1. The CAN-SPAM Act Precludes Individual Enforcement.**

The CAN-SPAM Act prohibits fraudulent, abusive and deceptive commercial email, and provides for enforcement by “federal agencies, states, and Internet service providers (“ISPs”)” referred to as “providers of Internet access services.” White Buffalo Ventures, LLC v. Univ. of Texas, 2005 U.S. App. LEXIS 15885 (5th Cir. 2005). While the CAN-SPAM Act does not itself use the term “provider of Internet access service,” it imports that definition from the Internet Tax

Freedom Act, 47 U.S.C. § 151. *Id.* That statute defines a provider of Internet access service as “[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 a part of a package of services offered to consumers.” 47 U.S.C. § 151.

The legislative history to the CAN-SPAM Act makes evident that Congress did not intend for individuals to enforce the CAN-SPAM Act’s provisions. The Committee report on the CAN-SPAM Act notes that the CAN-SPAM Act “would enable State attorneys general and ISPs to bring actions against violators.” REPORT OF COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION ON THE CAN-SPAM ACT OF 2003 (July 16, 2003), 108 S. Rep. 102 (emphasis added). The report continues that section 7(f) allows a “provider of Internet access service” to bring a civil action where it “carried unlawful spam over its facilities,” or who operated a web site from which e-mail addresses were harvested. *Id.* (emphasis added). Secondary authority addressing this issue similarly reads Congressional intent to preclude individual enforcement. *See, e.g., Identity Theft in Cyberspace: Crime Control Methods and Their Effectiveness in Combating Phishing Attacks*, 20 Berkeley Tech. L.J. 259, 276 (2005) (“CAN-SPAM . . . prohibits individuals from filing suit directly”); *Comment: Preemption of State Spam Laws by the Federal CAN-SPAM Act*, 72 U. CHI. L. REV. 355, 358 (2005) (CAN-SPAM “doesn’t provide for a private individual right of action against senders, leaving enforcement of the statute to government officials and ISPs”).

Plaintiff’s allegations in this case preclude a cause of action under the CAN-SPAM Act. Plaintiff is suing as “an individual,” and in his individual capacity. Plaintiff alleges that he “began handling inbound Internet e-mail traffic for a prominent Washington D.C. based law firm.” Plaintiff further alleges, “[at present,] Plaintiff’s clients include a number of law firms,

restaurants, radio personalities, and individuals.” (See Amended Complaint, ¶ 66.) Thus, under Plaintiff’s own allegations, he performs services (presumably as an employee or an independent contractor) for various businesses and individuals. Congress did not intend for claims to be brought by these types of individuals. Statements in legislative history and secondary authority indicate that Congress did not intend for individual enforcement. To give any meaning to Congressional preclusion of an individual right of action under the CAN-SPAM Act, courts must require more than conclusory allegations of performing services as an independent contractor by a plaintiff who sues in his or her individual capacity. Plaintiff’s CAN-SPAM Act claims must be dismissed. Plaintiff’s CAN-SPAM Act claims also fail because his claims properly are characterized by Section 6 of CAN-SPAM, which leaves enforcement to the FTC.

**2. Where the Identity of the Person who Initiated the E-mails are Unknown, the CAN-SPAM Act Provides Only for FTC Enforcement.**

The CAN-SPAM Act contains a section addressing a “businesses knowingly promoted by electronic mail with false or misleading transmission information.” See CAN-SPAM Act, § 6. That section makes it “unlawful for a person to promote, or allow the promotion of, that person’s trade or business . . . in a commercial electronic mail message the transmission of which is in violation of section 5(a)(1) if that person . . . knows, or should have known . . . that the goods . . . were being promoted in such a message or received or expected to receive an economic benefit from such promotion; and took no reasonable action” to prevent the transmission. *Id.* This section prohibits the promotion of a business through unlawful commercial e-mail. That section leaves enforcement solely in the hands of the FTC. See CAN-SPAM Act, § 6(c) (“Exclusive Enforcement by FTC”).

As is clear from the Amended Complaint, Plaintiff seeks to hold Defendants liable because Ameriquest Mortgage Company (“Ameriquest”) and other Defendants allegedly

trafficked in and profited from leads generated by “spam” sent by unknown non-parties. (*See, e.g.*, Amended Complaint, ¶¶ 10, 73, 120.) The gravamen of Plaintiff’s Complaint is that non-parties (or unknown parties) engaged in the transmission of email and Ameriquest, and the other Defendants sold and purchased the leads generated via these emails. In some instances, with respect to some Defendants, Plaintiff alleges that they are “lead generators.” (*See, e.g.*, Amended Complaint, ¶ 40.) With respect to Tandax, Plaintiff does not even allege as much. Indeed, Plaintiff does not allege that any e-mails sent by the Defendants damaged his property or servers. The gravamen of the Amended Complaint is that Ameriquest allowed itself to be promoted via e-mail marketing which violated the CAN-SPAM Act. Individual enforcement is inappropriate in these circumstances.

**D. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM AGAINST FOUST INDIVIDUALLY**

The Amended Complaint contains no allegations whatsoever regarding Foust. The Amended Complaint also contains no allegations regarding misuse of the corporate form by Foust – *i.e.*, justifying piercing the corporate veil. Plaintiff cannot hold Foust liable unless CAN-SPAM imposes director or officer liability.

Courts apply unusually strict liability rules only where specified by Congress. *See, e.g., United States v. Dotterweich*, 320 U.S. 277, 280-281 (1943) (Congress intended that a corporate officer or employee “standing in responsible relation” could be held liable in that capacity for a corporation’s violations of the Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, 21 U.S.C. §§ 301-392); *United States v. Park*, 421 U.S. 658, 673 (1975) (discussing, with respect to the Federal Food, Drug, and Cosmetic Act, congressional intent to impose a duty on “responsible corporate agents”). Some statutes explicitly provide for director, officer or employee liability. For example, antitrust laws provide “[w]henver a corporation shall violate any of the . . .

antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation”. 15 U.S.C. § 24. Similarly, laws governing vehicle identification system provide “[i]f a person, not an individual, is involved in a violation [relating to a vessel identification system], the president or chief executive of the person also is subject to any penalty provided under this section”. *See* 46 U.S.C. § 12507(d).

CAN-SPAM does not provide for any such liability. Because the Amended Complaint fails to allege any personal involvement by Foust, or any facts justifying piercing of the corporate veil, Foust should be dismissed from this lawsuit.

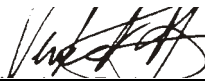
#### **IV. CONCLUSION**

Tandax respectfully requests the Court to Dismiss it from this lawsuit. The Court lacks personal jurisdiction over Tandax because Tandax has no contacts with the State of Oklahoma, and none are alleged in the Amended Complaint. Jurisdiction is also not proper under the conspiracy theory of jurisdiction. The Amended Complaint should also be dismissed for failure to state a claim. The Amended Complaint fails to articulate anything more than conclusory allegations regarding Tandax’s allegedly improper conduct, and fails to put Tandax on notice regarding its allegedly improper conduct. Plaintiff lacks standing to assert causes of action under the CAN-SPAM Act. Finally, the Amended Complaint fails to allege any actions by Foust or otherwise allege why Foust should be held liable. Because CAN SPAM does not provide for such liability Foust should be dismissed from this action.

DATED this 13<sup>th</sup> day of February, 2006.

Respectfully Submitted,

**NEWMAN & NEWMAN,  
ATTORNEYS AT LAW, LLP**

By:  \_\_\_\_\_

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**EXHIBIT A**

Fenn v. Mleads Enterprises, Inc., 2006 UT 8 (Utah February 10, 2006)

*This opinion is subject to revision before final publication in the Pacific Reporter.*

IN THE SUPREME COURT OF THE STATE OF UTAH

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Brittney Fenn, on behalf of  
herself and all others similarly  
situated,  
Plaintiff and Respondent,

No. 20041072

v.

Mleads Enterprises, Inc.; and  
John Does one through ten whose  
true names are unknown,  
Defendants and Petitioner.

F I L E D

February 10, 2006

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Third District, Sandy  
The Honorable Denise P. Lindberg  
No. 030400108

Attorneys: Denver C. Snuffer, Jr., Sandy, Jesse L. Riddle,  
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Jill L. Dunyon, Salt Lake City, Derek A. Newman,  
Roger M. Townsend, Venkat Balasubramani, Seattle,  
WA, for defendants

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On Certiorari to the Utah Court of Appeals

WILKINS, Associate Chief Justice:

¶1 In this case, we are asked to consider whether due process permits a Utah court to exert personal jurisdiction over a defendant who sends an email without knowledge of the residence of the recipient or the location at which the recipient will retrieve the message. The court of appeals concluded that Utah may exert jurisdiction under the given circumstances in this case. We disagree and reverse.

**FACTUAL AND PROCEDURAL BACKGROUND**

**A. FACTUAL BACKGROUND**

¶2 When determining whether the trial court correctly granted a motion to dismiss, we "accept the factual allegations

in the complaint as true and consider them, and all reasonable inferences to be drawn from them, in the light most favorable to the nonmoving party.'"<sup>1</sup> Mleads is an eight-employee closely-held corporation located in Arizona. It contracts with third-party marketing companies who advertise Mleads's services to customers through email solicitations. Recipients of those emails may complete an application requesting more information from Mleads regarding particular loans. Mleads subsequently provides the applicant with an appropriate institution for further financial assistance with home loans and mortgages. Mleads maintains an office solely in Arizona and conducts most of its business in Arizona, although business activity within Utah produces approximately 1% of its revenue. Mleads is not licensed to conduct business in Utah nor does it employ any Utah-based employees or agents. Mleads does not recruit employees or agents in Utah and does not advertise in any Utah newspapers, magazines, or other forms of Utah-based media. Its advertisement to Utahns has been strictly through unsolicited email over the Internet. Mleads has no bank accounts in Utah and is not subject to taxation in Utah.

¶3 Brittney Fenn, a Utah resident, received an unsolicited email advertisement from Mleads that she opened while living in Utah. On January 3, 2004, Fenn filed a two-page complaint, alleging that Mleads had violated the Unsolicited Commercial and Sexually Explicit Email Act (the Act), which required the characters "ADV" in the subject line of unsolicited commercial email.<sup>2</sup> The Utah Act permitted recipients of non-complying emails to recover the lesser of \$10 per email or \$25,000 per day and reasonable attorney fees and costs.<sup>3</sup> Fenn's complaint presented only facts regarding this particular email sent to Fenn and failed to discuss the details of Mleads's general business contacts with Utah.

¶4 One month after Fenn filed her complaint, the Utah Legislature passed a bill to repeal the Act because the federal government had passed "Controlling the Assault of Non-solicited

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<sup>1</sup> MFS Series Trust III v. Grainger, 2004 UT 61, ¶ 6, 96 P.3d 927 (quoting Krouse v. Bower, 2001 UT 28, ¶ 2, 20 P.3d 895).

<sup>2</sup> Utah Code Ann. § 13-36-103 (2002) (repealed 2004).

<sup>3</sup> Id. § 13-36-105(2) (2002) (repealed 2004).

Pornography and Marketing" (CAN-SPAM), which preempted the Utah Act.<sup>4</sup>

#### B. PROCEDURAL BACKGROUND

¶5 The district court dismissed the case for lack of specific personal jurisdiction, finding "that there [were] insufficient minimum contacts between Defendant and this forum to warrant exercise of personal jurisdiction over Defendant." The district court further explained that the "complaint's sole allegation with respect to jurisdiction is that 'Defendant sent, or caused to be sent, to plaintiff an unsolicited commercial e-mail,' which, according to Plaintiff establishes this Court's jurisdiction under Utah Code Ann. § 13-36-101 (Supp. 2002)." The court observed that although Fenn argued for personal jurisdiction over Mleads, Fenn failed to claim and provide evidence that the court could exercise general personal jurisdiction over Mleads. Rather, Fenn alleged that "the Act itself, as well as Utah's long-arm statute, provide a basis for specific personal jurisdiction over Defendant."

¶6 The court of appeals also correctly understood Fenn's arguments to be based on specific jurisdiction, noting that "[t]he plaintiff bears the burden of establishing personal jurisdiction over the defendant. Fenn does not allege that Utah could exercise general personal jurisdiction over Mleads. Thus, we consider only whether Fenn established that the court could exercise specific personal jurisdiction."<sup>5</sup> Applying the specific jurisdiction analysis, the court of appeals held that sending one email to a resident of Utah satisfies both the Utah long-arm statute and the minimum contacts required by due process. Accordingly, the court of appeals vacated the dismissal and remanded to the district court.

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<sup>4</sup> 15 U.S.C. § 7701 (2005). CAN-SPAM addresses the problems associated with the rapid growth and abuse of unsolicited commercial email and accordingly recognizes the substantial government interest in regulating commercial email on a nationwide basis. CAN-SPAM prohibits commercial email from misleading recipients as to the source or content and protects recipients' rights to decline reception of commercial emails. Ultimately, CAN-SPAM permits states to press criminal charges and recipients to file civil suits when the sender violates the CAN-SPAM provisions. See 15 U.S.C. §§ 7701, 7706.

<sup>5</sup> Fenn v. Mleads, 2004 UT App 412, ¶ 13, 103 P.3d 156.

### ANALYSIS

¶7 The question before this court is whether the court of appeals erred in reversing the district court's dismissal for lack of personal jurisdiction. An appeal from a pretrial jurisdictional decision made only on documentary evidence presents legal questions which we review for correctness.<sup>6</sup>

¶8 Once a defendant raises lack of personal jurisdiction as a defense, the plaintiff must establish personal jurisdiction with adequate evidence.<sup>7</sup> To meet this burden, the plaintiff must demonstrate either specific or general jurisdiction.<sup>8</sup> Here,

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<sup>6</sup> See MFS Series Trust III v. Grainger, 2004 UT 61, ¶ 7, 96 P.3d 927.

<sup>7</sup> See Provident Living Nat'l Bank v. Cal. Fed. Savs. & Loan Ass'n, 819 F.2d 434, 437 (3d Cir. 1987); Neways, Inc. v. McCausland, 950 P.2d 420, 423 (Utah 1997); see also NW. Healthcare Alliance, Inc. v. Healthgrades.com, Inc., 2002 U.S. App. LEXIS 21131 (9th Cir. October 7, 2002); Padcom Inc. v. Netmotion Wireless, Inc., 2004 U.S. Dist. LEXIS 9658 (D. Del. May 24, 2004).

<sup>8</sup> See Provident Living, 819 F.2d at 437; Neways, 950 P.2d at 423. We recognize that the legal analysis for personal jurisdiction cases differs depending on whether the plaintiff asserts specific or general jurisdiction. Courts exercise specific jurisdiction "only with respect to the claims arising out of the particular activities . . . in the forum state." Phone Directories Co. v. Henderson, 2000 UT 64, ¶ 11, 8 P.3d 256. General personal jurisdiction, on the other hand, permits a court to assert "power over a defendant without regard to the subject of the claim asserted." Id. Such jurisdiction only exists when the defendant conducts "substantial and continuous local activity in the forum state." Id. Of course, our conclusion in this case does not impact the possibility of a Utah court properly asserting personal jurisdiction over a foreign resident based on a single email when that foreign resident otherwise has "continuous and systematic" contacts with Utah sufficient to establish general jurisdiction. See Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945). However, since neither Fenn nor Mleads presented a general jurisdiction argument, based on the 1% revenue Mleads earns in Utah, to either the district court or the court of appeals, our analysis focuses only on

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where Plaintiff Fenn relies on specific jurisdiction, personal jurisdiction is only proper if we determine that (1) the Utah long-arm statute extends to defendant's acts or contacts, (2) plaintiff's claim arises out of those acts or contacts, and (3) the exercise of jurisdiction satisfies the defendant's right to due process under the United States Constitution.<sup>9</sup>

¶9 Both parties agree that the Utah long-arm statute<sup>10</sup> extends to Mleads's actions in this case and that the Plaintiff's claim arises out of those acts or contacts. Hence, we granted certiorari only to review the due process analysis of the court of appeals in regards to the email sent to Fenn. Mleads contends that due process prohibits the exercise of personal jurisdiction for two reasons: (1) Mleads lacks minimum contacts with Utah and (2) an exercise of jurisdiction based on one email would be unfair and unreasonable. We agree and reverse.

I. THE ASSERTION OF JURISDICTION VIOLATES THE DUE PROCESS  
REQUIRED BY THE CONSTITUTION

¶10 The Due Process Clause of the Fourteenth Amendment declares that no state shall "deprive any person of life, liberty, or property, without due process of law."<sup>11</sup> In determining whether a state's exercise of jurisdiction over a non-resident defendant comports with due process, so as not to

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<sup>8</sup>(...continued)  
whether Utah may exert specific personal jurisdiction over Mleads.

<sup>9</sup> See Phone Directories, 2000 UT 64, ¶ 12.

<sup>10</sup> Although the court of appeals addressed Utah's long-arm statute, we deem that analysis unnecessary in this opinion for two reasons: (1) Plaintiff Mleads did not raise the long-arm statute on appeal and (2) the validity of this particular exercise of jurisdiction under Utah's long-arm statute hinges on whether due process permits the exercise of jurisdiction: "The provision of the act, to ensure maximum protection to citizens of this state, should be applied so as to assert jurisdiction over non-resident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution." Utah Code Ann. § 78-27-22 (2005). Thus, our analysis focuses on the due process clause.

<sup>11</sup> U.S. Const. amend. XIV, § 1.

deprive the party of life, liberty, or property, the United States Supreme Court has determined that

due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend the "traditional notions of fair play and substantial justice."<sup>12</sup>

Thus, a Utah state court may assert specific personal jurisdiction over a foreign defendant only if (1) the defendant has minimum contacts with Utah and (2) the assertion of jurisdiction would not offend the traditional notions of fair play and substantial justice.<sup>13</sup>

A. Mleads Lacks Sufficient Minimum Contacts Arising Out of This Claim

¶11 We first review whether Mleads's act of sending this one email to Fenn established minimum contacts between Mleads and Utah. Mleads argues that it did not, and we agree. The activity that gave rise to this claim, namely the sending of an unsolicited email advertisement, created an insubstantial contact with Utah under the federal due process analysis.

¶12 A Utah court may not exert jurisdiction unless the defendant's contacts create a "'substantial connection' with the

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<sup>12</sup> Int'l Shoe, 326 U.S. at 316; see also MFS Series Trust III v. Grainger, 2004 UT 61, ¶ 10, 96 P.3d 927; Starways, Inc. v. Curry, 1999 UT 50, ¶ 8, 980 P.2d 204 (concluding that sufficient evidence of minimum contacts and reasonableness permitted exertion of specific personal jurisdiction over California residents who conducted marketing services for a Nevada corporation with its principle place of business in Utah); Neways, 950 P.2d at 423 (considering minimum contacts, purposeful availment and reasonableness to uphold specific personal jurisdiction over non-resident defendant).

<sup>13</sup> See MFS Series Trust, 2004 UT 61, ¶ 10; see also Phone Directories, 2000 UT 64, ¶ 12.

forum state.”<sup>14</sup> The fact that the contact with Utah occurred via the Internet does not change the analysis. “Traditionally, when an entity intentionally reaches beyond its boundaries to conduct business with foreign residences, the exercise of specific jurisdiction is proper,”<sup>15</sup> and “[d]ifferent results should not be reached simply because business is conducted over the Internet.”<sup>16</sup> Nevertheless, “[t]he ‘minimum contacts’ standard is not susceptible of mechanical application, and instead, involves an ad hoc analysis of the facts,”<sup>17</sup> particularly when dealing with the Internet because emails and websites present unique and complicated problems for jurisdictional analysis. The main complication is that a defendant, like Mleads, is generally unaware of the geographic location to which it sends an email because that information is not necessarily provided with the email address. With this in mind, courts have applied a variety of tests in Internet jurisdiction cases. Thus, a defendant may establish a substantial connection with Utah in a number of ways.

¶13 First, a defendant may purposefully avail itself of the benefits of conducting business in Utah.<sup>18</sup> Generally, a party purposefully avails itself of the benefits of conducting business in a state by deliberately engaging in significant activities

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<sup>14</sup> MFS Series Trust, 2004 UT 61, ¶ 10 (quoting Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 109 (1987)).

<sup>15</sup> Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Penn. 1997) (referring to Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)). Zippo remains one of the most influential cases involving personal jurisdiction and the Internet.

<sup>16</sup> Zippo, 952 F. Supp. at 1124; see also Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 509-13 (D.C. Cir. 2002); 16 James Wm. Moore et al., Moore’s Federal Practice § 108.44 (3d ed. 2005).

<sup>17</sup> Rocky Mountain Chain Staking v. Frandsen, 884 P.2d 1299, 1301 (Utah Ct. App. 1997); see also LAK, Inc. v. Deer Creek Enters., 885 F.2d 1293, 1301 (6th Cir. 1989) (quoting Stuart v. Spademan, 772 F.2d 1185, 1194 (5th Cir. 1985)).

<sup>18</sup> See Rocky Mountain, 884 P.2d at 1301.

within the state<sup>19</sup> or by creating "'continuing obligations' between himself and residents of the forum."<sup>20</sup> Courts often determine purposeful availment by considering whether the defendant "deliberately" created "some relationship with the forum state that would serve to make that state's potential exercise of jurisdiction foreseeable."<sup>21</sup> Nevertheless, the question of purposeful availment is irrelevant when the nature and quality of the contact creates an insubstantial connection with the forum.<sup>22</sup> Furthermore, even if a defendant has purposefully availed itself of the benefits of conducting business in a forum so that the exercise of jurisdiction is foreseeable, a court may still be restrained from the assertion if doing so violates the traditional notions of fair play and substantial justice.<sup>23</sup>

¶14 Second, some courts have also upheld jurisdiction in Internet cases under the Calder v. Jones "effects test."<sup>24</sup> In applying the Calder test, the court examines the degree to which defendants knew or should have known that their actions may affect a given plaintiff in the forum.<sup>25</sup> The defendants in Calder were not intending to avail themselves specifically of the benefits of conducting business in California. But the court concluded that because they had knowledge that their defamatory

<sup>19</sup> See Burger King, 471 U.S. at 475-76.

<sup>20</sup> Id. at 476 (quoting Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648 (1950)).

<sup>21</sup> First Mortgage Corp. v. State St. Bank & Trust Co., 173 F. Supp. 2d 1167, 1173-74 (D. Utah 2001) (citing Burger King, 471 U.S. at 475-76); see also Intercon, Inc. v. Bell Atl. Internet Solutions, Inc., 205 F.3d 1244, 1247-48 (10th Cir. 2000) (concluding that defendant had purposefully directed its contact after it received notice that it was routing customer's emails, albeit inadvertently, through plaintiff's email server).

<sup>22</sup> See First Mortgage, 173 F. Supp. 2d at 1174 (referring to Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 108-09 (1987)).

<sup>23</sup> MFS Series Trust, 2004 UT 61, ¶ 10.

<sup>24</sup> 465 U.S. 783, 785-87 (1984).

<sup>25</sup> Id. at 786-90.

acts could injure a particular California-based company, California courts could properly exercise jurisdiction. Likewise, in applying the "effects test" to Internet activity, the Ninth Circuit, in Panavision International v. Toeppen, concluded that California may exercise personal jurisdiction over an Illinois defendant who registered other companies' trademarks as Internet domain names with the intention of later selling those domain names to the trademark owners.<sup>26</sup> Because Panavision was headquartered in California, the court determined that the defendant must have known his actions would have the effect of injuring the plaintiff in California.<sup>27</sup>

¶15 Third and more generally, one could establish sufficient minimum contacts, even without purposeful availment or knowledge of a potential effect, when the nature and quality of the activity is generally of such a degree to support the exercise of jurisdiction.<sup>28</sup> Such an analysis is particularly relevant in Internet cases because "[c]ourts determining personal jurisdiction primarily on the basis of Internet activity generally focus on the nature and quality of activity that a defendant conducts over the Internet."<sup>29</sup> We have similarly stated that "[d]ue process is only satisfied based on the 'quality and nature of the activity' for each individual defendant."<sup>30</sup>

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<sup>26</sup> 141 F.3d 1316, 1322 (9th Cir. 1998).

<sup>27</sup> Id.

<sup>28</sup> See In re W.A., 2002 UT 127, 63 P.3d 607 (holding that parental status provides the state a strong enough interest in the matter to make minimum contacts irrelevant); see, e.g., Verizon Online Servs., Inc. v. Ralsky, 203 F. Supp. 2d 601, 616 (E.D. Va. 2002) (asserting jurisdiction based on the nature and quality of the conduct); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Penn. 1997) (disregarding purposeful availment and looking rather to the level of activity involved with the contact).

<sup>29</sup> Verizon Online, 203 F. Supp. 2d at 616.

<sup>30</sup> MFS Series Trust III v. Grainger, 2004 UT 61, ¶ 11, 96 P.3d 927; see also Shaffer v. Heitner, 433 U.S. 186 (1977); Int'l Shoe, Co. v. Washington, 326 U.S. 310, 318 (1945) ("[A]lthough the commission of some single or occasional acts . . . has not  
(continued...)

¶16 One approach to the nature and quality inquiry has been to apply a "sliding scale" in extending the jurisdictional analysis to Internet situations.<sup>31</sup> The sliding scale approach, introduced in Zippo Manufacturing Company v. Zippo Dot Com, Inc.,<sup>32</sup> advocates exercising jurisdiction over corporations that clearly do business over the Internet.<sup>33</sup> To make this determination in the context of websites, Zippo and its progeny look to whether the defendant corporation actually engages in "knowing and repeated transmission of computer files over the Internet."<sup>34</sup> If so, the Internet activity is "active" under the due process analysis and satisfies minimum contacts.<sup>35</sup> For instance, repeatedly sending contracts via email satisfies the minimum contacts required by due process because the defendant corporation is clearly doing business in the forum-state.<sup>36</sup> However, at the opposite end of the sliding scale are websites where a defendant has merely posted information accessible to users in foreign jurisdictions. Courts term these websites as "passive" and generally determine jurisdiction to be improper. "The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."<sup>37</sup> Thus, when the level of activity falls in the middle ground and is

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<sup>30</sup>(...continued)

been thought to confer upon the state authority to enforce it[;] other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit.").

<sup>31</sup> See Moore et al., supra note 16, § 108.44 (3d ed. 2005) (citing 3d, 4th, 5th, 6th, 8th, 9th, and 10th Circuit cases which apply a "sliding scale" analysis to Internet contacts).

<sup>32</sup> 952 F. Supp. 1119, 1124-25 (W.D. Penn. 1997).

<sup>33</sup> See id. at 1124.

<sup>34</sup> Id.

<sup>35</sup> See id.

<sup>36</sup> See id.

<sup>37</sup> Id.

"interactive," we focus specifically on the nature and quality of the activity, meaning the type of activity and the level of exchange that occurs over the Internet. And implicit in this analysis is the sender's purpose in sending the email and its effect on the recipient.

¶17 Furthermore, we recognize that certain types of emails, merely through their nature and quality, may rise to a level that creates a substantial connection between the defendant and Utah. It is conceivable, for example, that sending mass emails into Utah, or even a threatening or otherwise tortious individual email, may result in a substantial connection between the defendant and Utah if the nature and quality is such as to have a meaningful impact on Utah and its citizens.

¶18 In applying the nature and quality test for determining minimum contacts, some courts have asserted specific personal jurisdiction over defendants based solely on nationwide Internet advertisements.<sup>38</sup> These courts have relied on the law regarding personal jurisdiction over corporations that advertise in magazines. For example, in Haelan Products, Inc. v. Beso Biological, the United States District Court for the Eastern District of Louisiana held that the forum court could properly exercise jurisdiction over a corporation for trademark infringement on the Internet.<sup>39</sup> The court relied on a four-factor test which the Fifth Circuit had applied to determine whether advertisements in a nationally-circulated trade magazine were sufficient minimum contacts under the due process analysis:

- (1) Whether the publications defendant advertised in circulated in the forum state;
- (2) Whether the defendant advertised in these publications frequently, regularly, or occasionally;
- (3) What amount of business was obtained from the advertisements; and

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<sup>38</sup> See, e.g., Axxess Techs., Inc. v. Keycards Int'l Inc., 1998 U.S. Dist. LEXIS 23223 (D. Ariz. March 27, 1998); Haelan Prods. Inc. v. Beso Biological, 1997 U.S. Dist. LEXIS 10565 (D. La. July 11, 1997).

<sup>39</sup> 1997 U.S. Dist. LEXIS 10565 (D. La. July 11, 1997).

(4) Whether the defendant attempted to limit the states in which its product was marketed.<sup>40</sup>

The Beso court affirmed the assertion of specific personal jurisdiction for the trademark infringement that occurred over the Internet because the defendant advertised in four nationally-distributed publications which circulated in the state, maintained a nationwide toll-free number that it published in at least one trade magazine, and its Internet address and website were used to advertise and solicit business in the forum state.

¶19 In summary, under a minimum contacts analysis for Internet activity, "[p]roper inquiry must not focus on the mere quantity of contacts, but rather upon the quality and nature of those contacts as they relate to the claims asserted."<sup>41</sup> We do not intend to permit corporations to hide behind the excuse of ignorance in not knowing where they or their agents send email advertisements. However, before asserting jurisdiction arising out of those emails, a plaintiff must demonstrate a substantial connection to Utah created by the one email contact. Specifically, the plaintiff must establish that the corporation purposefully availed itself of the benefits of conducting business in Utah, knew its email may injure persons in Utah, or the nature and quality of the sent email supports the exercise of personal jurisdiction in Utah. One way, but not necessarily the only way, a plaintiff may establish that the nature and quality of the activity supports jurisdiction is to demonstrate that the defendant's conduct created an active or interactive relationship with Utah. However, we do not limit jurisdiction under the general "nature and quality" to the active/passive test.

¶20 In this case, the record is devoid of any evidence illustrating a substantial connection between Mleads and Utah arising out of this one email. Mleads lacked knowledge of the exact location to which its marketing agency would send the email. The record indicates, without any controverted evidence, that Mleads's marketing agency possessed the email address but not the geographic location to which the email would be sent or at which it would be retrieved. Thus, it is difficult in this particular case to rely on purposeful availment to satisfy minimum contacts.

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<sup>40</sup> Loumar v. Smith, 698 F.2d 759, 763 (5th Cir. 1983).

<sup>41</sup> Starways, Inc. v. Curry, 1999 UT 50, ¶ 8, 980 P.2d 204.

¶21 However, even if Mleads, by sending this email through an agent, had purposefully availed itself of the benefits of conducting business in Utah, the contact does not provide the required minimum contacts. First, under the Zippo analysis, while the email Mleads sent was not clearly passive activity, it is also not the type of active contact that warrants automatic assertion of jurisdiction. Because the activity falls in the middle ground known as "interactive," we must focus on the nature and quality of the activity and the level of exchange it established between Mleads and Fenn. The email did not create an actual business transaction between Mleads and Fenn. The email contained, for example, no contract. It merely provided Fenn with information. Furthermore, although Mleads intended to solicit a business relationship with Fenn, the email is not reflective of an actual relationship or exchange between the two parties. And implicit in "interactive" activity is the exchange of information between parties. Fenn never responded to the email nor did she contact Mleads through any other means. Although the possibility existed for an exchange to occur, because it did not, these facts fall under the type of interactive activity for which the exercise of personal jurisdiction is improper.

¶22 Finally, analogizing to our analysis of magazine advertisement cases in Haelan Products, the fact that Mleads earns 1% of its revenue in Utah but does not engage in widespread advertising in the state suggests its contacts are at best insubstantial. In our past personal jurisdiction cases dealing with corporate advertisement, the record generally reflected additional contacts--telephone or fax communications, business transactions, or the like--within the state. For instance, we upheld the assertion of specific personal jurisdiction when a corporation advertised in Utah and its brokers regularly spoke on the phone with representatives and other contacts in Utah.<sup>42</sup> We also viewed advertisement in Utah as a substantial contact when the contact included direct oral communications between the parties.<sup>43</sup> However, we have never held, nor are we prepared to hold now, that a claim arising out of one email advertisement, brought by one party under a specific jurisdiction claim, without direct communications between the parties or proof of offense or

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<sup>42</sup> See Utah State Univ. of Agric. & Applied Sci. v. Sutro & Co., 646 P.2d 715 (Utah 1982).

<sup>43</sup> See Lee v. Frank's Garage & Used Cars, Inc., 2004 UT App 260, 97 P.3d 717.

injury to the recipient, establishes a substantial connection to Utah under the federal due process analysis. Accordingly, we hold that minimum contacts are not satisfied with this one email.

B. The Exercise of Jurisdiction is Unreasonable

¶23 Even if minimum contacts were satisfied, the assertion of jurisdiction over Mleads would still violate the due process clause because it fails to comport with "the traditional notions of fair play and substantial justice."<sup>44</sup> In other words, the exercise of jurisdiction must be fair and reasonable. Generally, under the reasonableness factor, a court weighs and balances a variety of interests, including the inconvenience to the plaintiff and to the defendant, the regulatory concerns of the forum state, and the location of the witnesses and evidence.<sup>45</sup>

¶24 Adopting a blanket "one-email rule" imposes a substantial burden on corporations. Practically speaking, companies would be required to know the laws of each state and to be prepared to litigate in all fifty of them. Precisely because of this complication, the federal government preempted the Act and those similar in other states with CAN-SPAM, which states: "[t]here is a substantial government interest in regulation of commercial electronic mail on a nationwide basis."<sup>46</sup> The federal statute goes on to explain that state legislation regarding spam has been ineffective, "in part because, since an electronic mail address does not specify a geographic location, it can be extremely difficult for law-abiding businesses to know with which of these disparate statutes they are required to comply."<sup>47</sup> In sum, even if Utah maintains a strong interest in regulating spam, the burden on businesses remains substantial.

¶25 We accordingly conclude that the reasonableness inquiry also requires us to reverse the court of appeals's holding. Exercising specific personal jurisdiction under these particular circumstances is unreasonable and violative of the traditional

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<sup>44</sup> MFS Series Trust III v. Grainger, 2004 UT 61, ¶ 10, 96 P.3d 927 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316) (1945).

<sup>45</sup> See generally Moore et al., supra note 16, § 108.42.

<sup>46</sup> 15 U.S.C. § 7701(b)(1) (2005).

<sup>47</sup> Id. § 7701(a)(11).

notions of fair play and substantial justice sustained by the federal due process clause.

**CONCLUSION**

¶26 Asserting jurisdiction over Mleads violates due process. Mleads lacked sufficient minimum contacts with Utah because the nature and quality of this particular email advertisement failed to establish a substantial connection to Utah. Moreover, the exercise of jurisdiction is unreasonable under these circumstances. We reverse.

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¶27 Chief Justice Durham, Justice Durrant, Justice Parrish, and Justice Nehring concur in Associate Chief Justice Wilkins' opinion.

**CERTIFICATE OF SERVICE**

This is to certify that on this 13<sup>th</sup> day of February, 2006, I electronically transmitted the attached documents, **(1) MOTION AND MEMORANDUM TO DISMISS OF TIM FOUST AND TANDAX, INC.; (2) DECLARATION OF TIM FOUST; AND (3) PROPOSED ORDER** to the Clerk of Court using the ECF system for filing. Based on the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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