

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT H. BRAVER, an individual,

Plaintiff,

vs.

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,

Case No. CIV-04-1013-W

ORAL ARGUMENT REQUESTED

Honorable Lee. R. West

v.

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.

**DEFENDANT AMERIQUEST MORTGAGE COMPANY'S MOTION TO DISMISS
PLAINTIFF ROBERT H. BRAVER'S THIRD AMENDED COMPLAINT**

Defendant Ameriquest Mortgage Company ("Ameriquest"), by and through its counsel of record, hereby moves to dismiss Counts III and IV in Plaintiff Robert H. Braver's ("Plaintiff" or "Braver") Third Amended Complaint for violations of Oklahoma's Fraudulent Use of Electronic Mail Statutes (15 O.S. §§ 776.1-776.4) and Unsolicited Electronic Mail Statutes (15 O.S. §§ 776.5-776.7):

I. INTRODUCTION.

Plaintiff cannot recover against Ameriquest under either of Oklahoma's anti-spam statutes for the simple reason that Ameriquest did not send any of the e-mails at issue in this case. Although the Federal Can-Spam Act, 15 U.S.C. § 7701 *et seq.*, makes it unlawful to "procure" an email that violates the Act, Oklahoma's anti-spam statutes do not. Unlike the Federal Act, the Oklahoma states unequivocally state that the sender of the e-mail is the only person who may be liable for violations of those Acts. Ameriquest cannot be liable under an agency theory either because the unidentified senders of the e-mails are not agents of Ameriquest. Since Plaintiff admits in the Third Amended Complaint ("Amended Complaint") that Ameriquest did not send the subject e-mails to him and there is no agency relationship between the senders of the e-mail and Ameriquest, he is barred from recovering against

Ameriquest under either of the Oklahoma Acts. Accordingly, Ameriquest respectfully requests an order dismissing Counts III and IV in the Amended Complaint as to Ameriquest.

II. FACTUAL BACKGROUND.

A. Ameriquest Does Not Send E-Mail Solicitations.

Ameriquest is a retail mortgage lender headquartered in Orange, California. [Amended Complaint, ¶ 69]. Ameriquest does not send e-mails to solicit mortgage business, nor does it instruct third parties to send e-mails on its behalf. As a small part of its marketing efforts, Ameriquest from time to time purchases customer leads from third party lead vendors who accumulate these leads through a variety of ways, one of which is e-mail solicitation. Ameriquest purchases these leads pursuant to lead purchase agreements entered into between Ameriquest and the third party lead vendors. The older versions of the lead purchase agreements expressly required the lead generator to comply with all applicable state and federal laws and regulations, including federal and state laws regulating commercial e-mail solicitations. With the advent of the Federal CAN-Spam Act, 15 U.S.C. § 7701 *et seq.* (“CAN-Spam Act”), and state anti-spam legislation, the more recent lead purchase agreements were revised to set forth the specific requirements of the CAN-Spam Act and explicitly prohibit lead generators from violating it or any other applicable anti-spam legislation. In both the older and more recent lead purchase agreements, the lead vendor is required to indemnify Ameriquest for any violations of such laws.

Ameriquest does not instruct or direct lead vendors to send e-mails, it simply contracts with these companies to purchase leads. The lead vendors are not agents or employees of Ameriquest and do not send out e-mails or advertise on Ameriquest’s behalf. Rather, these companies place advertisements and/or have their own third party vendors send out generic e-

mails inquiring whether recipients are interested in obtaining a mortgage loan. If the lead vendor or its third party vendor receives a response from the recipient, the lead vendor independently determines which of its clients may be an appropriate user of the lead.

B. Braver's Efforts to Spawn This Litigation.

Plaintiff Robert Braver claims to be an internet service provider operating out of Oklahoma. [Amended Complaint, ¶ 2]. He is a professional litigant who has brought numerous lawsuits claiming violation of Oklahoma and Federal laws prohibiting unlawful spam.

To generate this particular litigation, Braver responded to generic e-mail solicitations regarding mortgage loans (none of which even mention Ameriquest) which he claims were sent through his server in Oklahoma. To further his cause, Braver provided fake names and telephone numbers in response to the e-mails, pretending to be individuals interested in a mortgage loan. [Amended Complaint, ¶ 79-119]. At some later point in time, some of the fake names provided by Braver were sold to Ameriquest in the form of customer leads (not e-mails). Believing these individuals were actually interested in a mortgage loan, Ameriquest contacted them to follow up on their inquiries for a loan. [Amended Complaint, ¶¶ 79-119]. Although *he admits throughout the Amended Complaint that none of these emails were sent by Ameriquest,* based upon these telephone contacts, Braver is now seeking to make Ameriquest liable for e-mails it never sent. [Amended Complaint, ¶¶ 79-119].

III. PLAINTIFF CANNOT RECOVER AGAINST AMERIQUEST FOR VIOLATIONS OF THE OKLAHOMA STATUTES.

Knowing full well that Ameriquest does not send e-mail solicitations itself, Plaintiff has cobbled together a legal theory that Ameriquest is liable for having "procured" fake customer leads in response to email solicitations sent by unidentified parties. Although the Federal Can-

Spam Act recognizes that a party may be liable for procuring emails that violate that Act, no such “procurement” liability exists under either of Oklahoma’s anti-spam Acts.

A. The Federal Can-Spam Act’s Procurement Provision.

The Federal Can-Spam Act of 2003, 15 U.S.C. § 7701 *et seq.* (“CAN-Spam Act”) makes it unlawful to “procure” an email that violates that Act. For the purposes of a civil action brought by an internet service provider, the Act defines “procure” as:

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

[15 U.S.C. § 7702(12) and § 7706(g)(2)]. Thus, to prove that the defendant “procured” an offending e-mail under the Federal Act, an internet service provider must establish (1) the defendant intentionally paid or induced another person to initiate a message on the defendant’s behalf, ***and*** (2) that the defendant actually knew, or consciously avoided knowing that, the sender was engaged in a pattern and practice of violating the Act. Unable to allege that Ameriquest actually sent the e-mails which are the subject of this lawsuit, Braver instead contends that Ameriquest is liable for having “procured” them, as that term is defined in the Act.

B. There Is No Procurement Liability Under The Oklahoma Acts.

Setting aside, for the purpose of this motion, that Ameriquest did not “procure” the subject e-mails as defined in the CAN-Spam Act, Braver is barred from recovering under Oklahoma law because there is no parallel “procurement” liability under either of the State’s anti-spam Acts. To the contrary, both of the state statutes make clear that the ***sender*** of the e-mail is the only person who may be liable for violations of either of the Acts.

The relevant portions of the Oklahoma Acts provide as follows:

“[i]t shall be unlawful for a person to *initiate* an electronic mail message that the sender knows or has reason to know....” OKLA. STAT. tit. 15 § 776.1(A) (emphasis added)¹

“It shall be a violation of this act for any person to *transmit* a commercial electronic mail message that....” OKLA. STAT. tit. 15 § 776.6(A) states (emphasis added).

“[i]t shall be a violation of this action for any person that *sends* an a commercial electronic mail message.... “ OKLA. STAT. tit. 15 § 776.6(B) (emphasis added)

“[i]t shall be a violation of this act for any person that *sends* an unsolicited commercial electronic mail message....” OKLA. STAT. tit. 15 § 776.6(B)(C)(D)(E) (emphasis added);

Indeed, Braver clearly knows there is no “procurement” liability under these statutes as he does not even allege in the Amended Complaint that Ameriquest “procured” the emails in violation of the Oklahoma Acts. Since he cannot show that Ameriquest sent the e-mails to him, or that it is liable for having “procured” them under the Oklahoma statutes, Braver cannot as a matter of law recover under either of the state Acts.²

C. Ameriquest Cannot Be Liable Under The Oklahoma Acts Under An Agency Theory Either.

To save his state law claims, Plaintiff will likely argue that Ameriquest is liable under the

¹ “Initiate” is defined as “*the action of the original sender* of an electronic mail message....” Okla. Stat. tit. 15, § 776.4(3) (emphasis added).

² In a final effort to save these claims, Plaintiff may invite the Court to read “procurement” liability into the Oklahoma Acts. It is, however, presumed in Oklahoma that the legislature has expressed its intent in a statute and that it intended what it is expressed. *In the Matter of the Estate of Villines*, 2005 OK 63, 122 P.3d 466, 470 (2005) (citing *Nealis v. Baird*, 1999 OK 98, 996 P.2d 1107, 1119 n. 17); *see also Fuller v. Odom*, 1987 OK 64, 741 P.2d 449, 453 (1987) and *Duncan v. Oklahoma Department of Corrections*, 2004 OK 58, 95 P.3d 1076 (2004) (citing *Fulsom, supra*). (“it is not within the realm of this Court’s power, under the guise of statutory interpretation or construction, to do what the Legislature has failed to express in its legislation.”). Only the legislature can change, amend or modify its expressed intent in a statute. *Copeland v. Copeland*, 1992 OK 154, 842 P.2d 754 (1992) (citing *Anschutz Corp. v. Sanders*, 734 P.2d 1290, 1292 (Okla. 1987); *McVicker v. Board of County Comm’rs*, 442 P.2d 297, 302 (Okla. 1968); and *Oklahoma Alcoholic Beverage Control Bd v. Central Liquor Co.*, 421 P.2d 244, 248 (Okla. 1966). Had the Oklahoma legislature intended to establish “procurement” liability under the Acts, it would have simply said so in the Acts themselves. Since it did not, and since Ameriquest cannot otherwise be liable under the acts, those claims should be dismissed from this action as a matter of law.

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CERTIFICATE OF SERVICE

This is to certify that on this 24th day of February, 2006, I electronically transmitted the attached document, **DEFENDANT AMERIQUEST MORTGAGE COMPANY'S MOTION TO DISMISS PLAINTIFF ROBERT H. BRAVER'S THIRD AMENDED COMPLAINT** to the Clerk of Court using the ECF system for filing the transmittal of a Notice of Electronic Filing to the following registrants:

SEE ATTACHED LIST

Dated: February 24, 2006

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