

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 ASSOCIATION, INC'S MOTION TO
DISMISS FOR LACK OF PERSONAL JURISDICTION (FRCP 12(B) (2) AND BRIEF IN
SUPPORT**

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COMES NOW the Plaintiff, Robert H. Braver, and in response to Defendant Lead Association, Inc.'s ("LAI") Motion to Dismiss for Lack of Personal Jurisdiction (FRCP 12 (B)(2)) and Brief in Support states as follows:

I. ALLEGATIONS IN THE COMPLAINT

Plaintiff alleged in his Third Amended Complaint ("Complaint") that all the Defendants engaged in a conspiracy based upon agreement, either express or implied, to conceal activities violating federal and state anti-spam laws; the fact that the mortgage leads they traffic in are generated by illegal spam; and further to conceal the identity of persons responsible for transmitting the spam. (Complaint ¶¶ 19, 33) The Defendants, including LAI, have each actually transmitted the spam that is the subject of this action; provided consideration or induced their co-conspirators to transmit the spam; trafficked in the lead that was created as a result of this spam; or were identified by a co-defendant as having trafficked in a spam-generated lead that is the subject of this action. (Complaint ¶ 19) 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. (Complaint ¶¶ 20, 21, 64, 74) No Defendant has denied that the emails are the product of spam. The Defendant spammers intentionally targeted Plaintiff's servers for pecuniary gain by advertising mortgage services. The remaining Defendants paid monetary consideration to the spammers to send these emails. (Complaint ¶¶ 24, 74, 75, 76, 77) Further, the Defendants have continued their conspiracy by refusing to disclose the identity of the persons or entities who originally transmitted the spam and the identity of all others engaged in trafficking the spam-generated mortgage leads. (Complaint ¶ 19) In furtherance of the conspiracy and to create plausible deniability, some Defendants entered into contracts containing provisions that purport

to prohibit actions in violation of state and federal anti-spam laws. The agreements are entered into in order that the party may deny responsibility for leads purchased or sold, without ever intending to actually comply with legal requirements. (Complaint ¶ 25)

Plaintiff also alleged that the Defendants sent, caused to be sent, and/or procured the transmission of the fraudulent commercial electronic mail messages that they knew or had reason to know would be destined to recipients and server facilities in Oklahoma. Defendants' unilateral, unlawful, and indeed criminal, contacts with Plaintiff's server facilities have been systematic and ongoing for a number of years, and Plaintiff's claims arise from these contacts. The sending of unsolicited, unlawful emails to Plaintiff's servers in Oklahoma by the spammers and lead generators, and the ratification of these actions by Ameriquest creates a substantial connection to the state of Oklahoma. Defendants have engaged in business activities in and directed to the Western District of Oklahoma, have committed tortious acts within the Western District of Oklahoma, and have purposefully availed themselves of the opportunity to conduct commercial activities in this forum. (Complaint ¶¶ 27, 28, 29, 30)

II. NON CONFIDENTIAL FACTUAL BACKGROUND AND DISCOVERY

Plaintiff, Robert H. Braver, is a provider of internet access service and electronic mail. (Complaint ¶ 2 and Exhibit 1, Braver Aff. ¶ 2) Plaintiff's servers have been inundated with unlawful mortgage spam procured or sent by the Defendants in this action. (Complaint ¶ 78, Braver Affidavit ¶3) The person or entity sending the unlawful mortgage spam uses forged, missing or obfuscated routing and originating information. (*Id.* ¶ 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. (*Id.* ¶ 5)

In order to discover the identity of the spammers, Braver responded to multiple unlawful mortgage spam emails using decoy names and contact information (including “Cleo Benitez,” “Golda Coleman” and “Wendell Slater”) (*Id.* ¶ 6, Exhibit 2, Braver Aff. ¶ 11, Complaint ¶ 78) From July 2003 through the date of this Response, Plaintiff’s servers have received thousands of unlawful mortgage spam. (Exhibit 1, Braver Aff. ¶ 3)

After the decoys were submitted, Braver received a phone call from Ameriquest’s employees seeking to sell a mortgage to each decoy name. (Exhibit 2, Braver Aff. ¶ 6, Complaint ¶ 78) When Braver confronted Ameriquest’s employees, he was told repeatedly that Ameriquest knew the mortgage leads purchased were generated by spam. (*Id.*, Complaint ¶ 120) Rick Davies, in Ameriquest’s legal department, admitted that he was aware that Ameriquest affiliates, of which LAI is one, send large email marketing campaigns but claimed that Ameriquest was not liable for the emails sent by “third parties”. (*Id.* ¶¶ 7, 8, 9, Complaint ¶ 121)

In December 2004, Braver received an unlawful spam, purportedly from a “Cleo Benitez.” This was part of a pattern of over 3,500 mortgage spams directed to his servers during the period between February 2004 through April 2005, all of which share common identifying characteristics (Exhibit 1, Braver Aff. ¶ 8, and Attachment “A” thereto) This email was directed to Braver’s servers in Oklahoma. (*Id.*) Braver responded to this spam by clicking on the textual link embedded in the spam email, which took him to the www.xmastimerates.com website. (*Id.*, ¶ 9) Braver filled in the webpage form using the same name as the purported sender, “Cleo Benitez,” as the decoy. The webpage contained a pulldown menu for the state of Oklahoma. (*Id.*)

On December 29, 2004, Braver received his first telephone call in response to the “Cleo Benitez” decoy. Caller I.D. indicated the call originated from 858-488-8664 (*Id.* ¶ 10), the same

area code and prefix as Neighborhood Loan. (Exhibit 3, *betterwhois.com* website with *neighborhoodloan.com* domain registration) Braver's second call in response to the Cleo Benitez decoy was from Ameriquest's Dallas office on December 29, 2004. (*Id.*, ¶ 11)

On or about April 22, 2005, Braver's server received another mortgage spam, purportedly from a "Golda Coleman." (*Id.* ¶ 12, Attachment B thereto) This email was part of a pattern of over 1200 spams received from March and April 2005 that share common identifying characteristics. This e-mail was sent to a valid client address at *smithandpickle.com*, whose domain registration has always indicated an Oklahoma company, and since late March 2005, has been registered with Domain Name Servers at "oklahoma-isp.net," specifically *ns1.oklahoma-isp.net* and *ns2.oklahoma-isp.net*. (*Id.*) Braver responded to this e-mail by clicking on the textual link, which took him to the "XfhfP0BX2ug.perfect-mortgages.net" website and filled in the form using the same name as the purported sender, "Golda Coleman," as the decoy. (*Id.*, ¶ 13) This web page contained a pulldown menu option for the state of Oklahoma. (*Id.*) The first telephone call received in response to the "Coleman" decoy was on April 25, 2005 with Caller I.D. data indicating a number of 858-488-1456 (*Id.*, ¶ 14), the same area code and prefix of Neighborhood Loan. Telephone company records, which have not been subpoenaed, would confirm that Neighborhood Loan initiated these calls. On April 26, 2005, Braver received a phone call from Home Funds Direct in response to the "Golda Coleman" decoy. The Home Funds Direct representative identified Neighborhood Loan as their source for the "Golda Coleman" contact information. (*Id.*, ¶ 15) On April 27, 2005, Braver received a call from Ameriquest in response to the Golda Coleman decoy. (*Id.*, ¶ 16)

On or about April 27, 2005, Braver's server received another fraudulent mortgage spam, purportedly from a "Wendell Slater." (Exhibit 1, Braver Aff. ¶ 17, Attachment C thereto) This

email was sent to a valid client address at purcellhospital.com, whose domain registration information has always identified Oklahoma and, since approximately October 2004, has been registered with the Domain Name Servers at “oklahoma-isp.net,” specifically “ns1.oklahoma-isp.net” and “ns2.oklahoma-isp.net.” (*Id.*, ¶ 17) On April 27, 2005, Braver responded to this spam by clicking on the link, which took him to “accepted.approved-loans.net” website, where he filled in the form using the same name as the purported name of the sender, “Wendell Slater,” as the decoy. (*Id.*, ¶ 18) Again, this webpage contained a pulldown menu that included the state of Oklahoma. (*Id.*) On April 28, 2005, Braver received a response to the “Wendell Slater” decoy with Caller I.D. data indicating a call number 858-488-8709 (*Id.*, ¶ 19), the same area code and prefix as Neighborhood Loan. The phone records from Neighborhood Loan and Lead Association’s 199 other websites should confirm that Lead Association calls Oklahoma consumers on a daily basis. On April 28, 2005, Braver received a call from Ameriquest in response to the “Wendell Slater” decoy. (*Id.*, ¶ 20) On April 26, 2005, Braver contacted Neighborhood Loan at the 858-488-7525 number listed on neighborhoodloan.com and left a message as “Golda Coleman” with questions as to how “my information was obtained.” (*Id.*, ¶ 21) Shortly following Braver’s call, he received a response from Greg with Neighborhood Loan with Caller I.D. data indicating call number 858-488-8709. (*Id.*, ¶ 22) This call number is the exact same number from which Braver received his first telephone call related to the “Wendell Slater” decoy that occurred on April 28, 2005. (*Id.*, ¶ 19 and 22) Braver repeatedly told Greg from Neighborhood Loan that the spam Braver had responded to was unlawful, involved forged headers, exploited proxies, and, indeed, involved the commission of a felony, to which Greg’s unconcerned response was to repeatedly tell Braver that Neighborhood Loan had no way to track where they obtained the contact information. (*Id.*, ¶ 22) Greg asked Braver for the email address

that “Golda Coleman” had provided. Greg also asked if Braver had responded with the same “Tracy Soto,” which he had used as a decoy and had provided the same memorable domain name, “*lefthandedwidget.com*” in the decoy’s email address. Braver responded affirmatively. (*Id.* ¶ 23) The “Tracy Soto” decoy occurred on or about April 20, 2005 and generated another response on April 21, 2005 from 858-488-8928. (*Id.* at ¶ 23)

In August 2005, while researching Neighborhood Loan, Braver located a fictitious business name filing in San Diego (CA County) indicating Lead Association Corp. as the owner, with an effective date of March 18, 2003, a copy of which was printed to a pdf page. (Braver Aff. ¶ 23, Attachment D thereto) The same website also indicated that Madrock Corporation was the owner of the Neighborhood Loan name as of July 9, 2003, and that Lead Association Corp. abandoned the Neighborhood Loan name as of July 10, 2003. Braver copied the pertinent index page from the San Diego County Clerk’s website. (*Id.*, ¶ 24, Attachment E thereto) Braver then searched the California Secretary of State’s Business Portal website and retrieved the listings for Lead Association Corp. and Madrock Corporation and observed that both companies listed the same San Diego address and Michael V. Nittoli as agent for service of process. (*Id.*, ¶ 25, Attachments F and G thereto)

The “facts” LAI, through President Michael Nittoli, have presented to this Court by way of affidavit have changed dramatically since the filing of its Motion to Dismiss. Originally, Nittoli admitted that LAI generated its own mortgage leads and that it required consumer users to take an affirmative step to request further information before receiving an e-mail from LAI. (Exhibit 4, November 3, 2005, Nittoli Affidavit, ¶ 4, 5) LAI’s supplement to its Motion to Dismiss (Document No. 271) now claims those facts in Nittoli’s Affidavit were not true, but, in fact, a mistake because it “**did not and does not**” engage in mortgage lead generation, whether

through e-mail or otherwise. (Emphasis in original) These newly-revised “facts” and claims are false. www.leadassociation.com is owned by LAI. A simple search at www.betterwhois.com reveals that LAI’s affiant, Mike Nittoli, through TDI Design, has reserved the domain leadassociation.com with its administrative contact and technical contact in the name of Lead Association Corp. (Exhibit 5, leadassociation.com domain registry) LAI has never disclosed in this litigation the existence of the leadassociation.com website, apparently for good reason. The home page for leadassociation.com boasts that it owns “nearly 200 consumer websites” for its lead generation business (Exhibit 6, leadassociation.com home page.) “LAI’s web page contains the following sales pitch:

“If you are a mortgage broker or lender looking for mortgage leads, internet leads, lead generation, we can help you. We provide mortgage leads for brokers across the country through **marketing** and **search engine optimization**.

Our mortgage leads are *generated* from **strategically** placed pages on the internet...

All bogus leads are scrubbed out, meaning all leads we provide are guaranteed to be real people. We will return any bogus leads you receive with no additional fee.”

LAI puts all of the leads *it generates* through a “rigorous three-point quality control screening by its quality control team and bogus and duplicate leads are filtered out.”

LAI provides leads for every state the customer requests, including Oklahoma. (Exhibit 7, leadassociation.com Lead Service tab, Exhibit 6, leadassociation.com home page, and Exhibit 8, leadassociation.com Request Leads tab)

Before a customer such as Ameriquest submits their application to purchase leads from Lead Association, it must review the “Lead Generation Program Operating Agreement.” (Exhibit 8, leadassociation.com’s Request Leads tab) LAI has “helped thousands of consumers find loans through our network of nationwide mortgage lenders...The bottom line is that we

enjoy what we do - helping to connect consumers with lenders.” (Exhibit 9, *leadassociation.com* Why Us tab)

The facts uncovered by Braver revealed that www.neighborhoodloan.com is just one of the 200 websites owned by LAI. The fact that LAI controls the operation of *neighborhoodloan.com* is evidenced by President Nittoli’s recently revised affidavit, which contains a fax header on the top of each page identifying the sender as “Neighborhood Loan.” (Document No. 271, Attachment 1 to Lead Association’s Supplement) The website www.betterwhois.com confirms that *neighborhoodloan.com*, according to *Register.com, Inc.* is reserved by Mike Nittoli.

At the *neighborhoodloan.com* website, a simple click on the “Affiliate Programs” tab invites everyone who has a website to “begin earning cash” through its affiliate’s program. (Exhibit 10, *neighborhoodloan.com* home page and Exhibit 11, *neighborhoodloan.com* Affiliates tab) The “FAQ” tab contains convincing evidence that LAI, through its *neighborhoodloan.com* website, employs spammers. While “affiliates” who enroll in the program must have a website, they are encouraged to copy textual links to emails - “The more links you use, the more money you make.” Each text link contains a “AID number embedded” which identifies that particular affiliate for each customer that clicks on a textual link to *neighborhoodloan.com*. (Exhibit 12, *neighborhoodloan.com* FAQ tab) The spam responded to by Braver contained a textual link embedded into the email, a technique employed by Neighborhood Loan. (*Id.*) LAI fails to proffer the identity of any legitimate web page which contained the textual link with LAI’s AID embedded number for the Braver decoys. Braver presents direct evidence that this information was generated by spam, not a legitimate website.

Any doubt as to whether other defendants knew or should have known that LAI was engaged in spamming or the trafficking of known spam leads is put to rest with a simple search at www.google.com. The search "Lead Association spam" generates, at the first hit, an article from <http://news.spamcop.net> exposing Lead Association, their spamming activities and their efforts to shut down those who wish to expose them as spammers to their quality control tactics by only allowing the same number once. (Exhibit 13, Spam Cop Lead Association Spammer article)

President Nittoli's Affidavit asserts that LAI has *never* solicited a consumer within the state of Oklahoma. Attached is the Affidavit of Mark Mumma, directly contradicting this claim. (Exhibit 14, Mark Mumma Affidavit, ¶¶ 2-7) Neighborhood Loan and the other 199 other websites of LAI not only solicit consumers in the state of Oklahoma, but blanket this jurisdiction. LAI cleverly represents in Nittoli's Affidavit that it has "*never advertised* in any Oklahoma newspapers or magazines," yet is silent as to its web presence seeking interaction with Oklahoma consumers. (Emphasis added)

A. Confidential Argument – Restricted Access Pursuant to Court Order (See Confidential Argument and Exhibits - Restricted Access Pursuant to Court Order filed under seal)

As of the filing of this Response, the Court has not yet ruled upon Braver's Motion for Leave to file documents and limited argument related to said documents under seal.

PROPOSITION A: JURISDICTION IS PROPER

- 1. Oklahoma's Fraudulent Use of Electronic Mail Statute specifically confers jurisdiction over LAI.**

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 Braver’s servers. (Exhibit 1, Braver Aff. ¶¶ 8, 12 and 17) It is also clear, from the use of fraudulent tracking and originating information on the spam emails themselves, frequent name changes of industry members and 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. LAI admittedly purchased and sold the “Cleo Benitez” and “Golda Coleman” decoy leads submitted by Braver. LAI says nothing about the “Wendell Slater” decoy. LAI did not reveal the identity of the single lead vendor from whom it claims to have purchased these leads. Why would LAI choose not to disclose this information? The facts suggest LAI, through its affiliates and “almost 200” websites, generated these decoys through spam. Braver alleges that LAI paid its business partners in exchange for mortgage leads it knew or consciously avoided knowing were generated by unlawful spam. LAI *caused* the transmission of unlawful spam to be sent to Braver’s servers and is subject to jurisdiction in the State of Oklahoma as a matter of law. But for LAI’s purchase of spam-generated leads—there would be no illegal act taken in violation of the statute. If spammers had no “middlemen” through which to launder spam-generated leads, there would be no plausible deniability and, hence, no spam.

If the statute intended to confer jurisdiction only on spammers there would have been no need to include the language conferring jurisdiction on those who “cause” the transmission of fraudulent email. The statute could have easily been written to read that jurisdiction is conferred

only by those “transmitting” fraudulent email. However, by drafting the statute as written—“transmitting or causing the transmission of”—the drafters clearly intended jurisdiction be conferred on those who induce and cause the illegal activity.

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

Jurisdiction over LAI 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). Braver has made a prima facie showing that LAI 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 LAI, conspired to send or cause to be sent thousands of illegal email messages to or through Braver’s 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 Braver does not yet have evidence that LAI actually pushed the “send” button that forced the unlawful spam into Braver’s servers,

such proof is unnecessary to establish Braver's claims. LAI, through its so far undisclosed financial agreements, caused 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). (Emphasis supplied) 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 LAI, along with its co-conspirators, transmitted or conspired to transmit tens of thousands of illegal e-mail messages through or to Braver'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). Braver's complaint alleges a persistent course of conduct by the Defendants and their co-conspirators, agents, contractors, and/or subcontractors. The Defendants, including LAI, knew that the spammers whom they conspired with would transmit their illegal spam and harm Braver 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.

When “a commercial actor’s” efforts are “purposefully directed” toward residents of a forum state, a lack of physical contact with the forum will not defeat personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). LAI lack of “physical contact” with Oklahoma does not negate this “commercial actor’s” actions which were “purposefully directed” to Oklahomans. These contacts are neither random nor fortuitous; these contacts are continuous and systematic.

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

Braver, in the Third Amended Complaint, alleged the existence of a civil conspiracy between Defendant Ameriquest and all other defendants, including LAI. (Complaint ¶ 19) "The conspiracy theory of jurisdiction permits the assertion of jurisdiction over all co-conspirators, residents and non-residents, based upon their involvement in a conspiracy which occurred within the forum." *Clark v. Tabin*, 400 F. Supp 2d 1290, 1297 (N.D. Okla. 2005). The Plaintiff must make a prima facie factual showing of a conspiracy; allege specific facts warranting the inference that the Defendant was a co-conspirator; and show that a co-conspirator of Defendant committed a tortious act pursuant to the conspiracy within Oklahoma. *Id.* citing *Kohler Co. v. Kohler International, Ltd*, 196 F. Supp. 2d (N.D. Ill 2002) Here, Braver has alleged in his Third Amended Complaint that Ameriquest and its co-conspirators, including LAI, conspired to transmit commercial electronic mail messages to Braver's server facilities knowingly or having reason to know were sent: 1) using techniques designed to misrepresent the point of origin or transmission path of the e-mail messages; 2) using techniques designed to omit the point of origin or transmission path of the e-mail messages; and/or 3) containing false or misleading information including the addition of random characters, words, and/or sentences to the e-mail subject lines and/or bodies, and/or obfuscating the nature of the message by misspelling words or substituting various symbols for letters, in a deliberate attempt to thwart Braver's spam filtering mechanisms.

Braver has more than satisfied his requirement to make a prima facie factual showing of a conspiracy. Ameriquest, LAI and the other co-conspirators, many of who are unnamed because they are unknown to Braver, either initiated (i.e., sent) the spam emails, many of which are identified in the Complaint or in Braver's Affidavit or they procured the transmission of those

unlawful spams with actual knowledge or by consciously avoiding knowing that their affiliates and agents were engaging or would engage in pattern and practice violations of the CAN-SPAM Act. Braver has specifically identified numerous spam e-mails which he received. Braver has alleged the unlawful/fraudulent effects of these emails with particularity. Each such email constitutes an overt act in furtherance of the conspiracy. LAI, either directly or through its agents, transmitted the mortgage spam or procured the mortgage spam. As of this briefing, LAI continues to conceal the identity of the person or entity from whom it purchased the Benitez, Coleman and Slater decoys. Braver's efforts to discover the identity of the spammer have been frustrated by LAI's concealment and the fact that these textual link web pages similar to the 200 in number identified by LAI are online and offline within a very short period of time due to their fraudulent nature.

Braver has specifically alleged the existence of a civil conspiracy in Count V. 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. The spam emails to which Braver responded, which were either sent or procured by LAI, is evidence showing the existence of the conspiracy. All four decoys, including the "Tracy Soto" decoy, are LAI's leads via *neighborhoodloan.com*. The only due diligence taken by LAI consists of statements in its affidavits that it requires vendors to sign contracts warranting that the vendor will not violate the law. No substantive information, other than the contract language itself, is proffered by LAI. The *leadassociation.com* website acknowledges the existence of bogus leads (i.e., spam-generated decoys or spoofs) and their efforts to counter by conducting quality control and refund amounts paid for these leads. Each of the leads submitted by Braver was a bogus decoy lead. LAI has created the Quality Control Department in order to snuff out consumer

advocates like Braver and continue to conceal their trail of spam-generated mortgage lead laundering.

Braver has also alleged specific facts warranting the inference that LAI was a member of the conspiracy and have detailed those facts in this response and in Braver's confidential response.

"Substantial acts performed [in the forum state] in furtherance of the conspiracy and of which the out-of state co-conspirator was or should have been aware" is enough to sustain jurisdiction over the out-of-state co-conspirator. *Am. Land Program, Inc. v. Bonaventura Uitgevers Maatschappij*, 710 F.2d 1449 (10th Cir. 1983) citing *Glaros v. Perse*, 628 F.2d 679, 682 (1st Cir. 1980). In this case, Ameriquest and its co-conspirators, including LAI, were aware or consciously avoided knowing that substantial acts were performed in or directed at Oklahoma in furtherance of the conspiracy; therefore, jurisdiction over LAI is established.

PROPOSITION B: BRAVER HAS STANDING TO PURSUE CAN-SPAM CLAIMS

1. Braver is a provider of Internet access service.

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

¶ 2. Braver 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. Braver's e-mail servers are "protected computers" as defined by the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030(e) (2).

¶ 16. Braver's server facilities are located in Norman, Oklahoma.

¶ 66. Braver 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, Braver discontinued the USEMC upon commencement of operation of a subscription-based, multi-user bulletin board system which operated through approximately 1995. In 1995, Braver 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, Braver began handling inbound Internet e-mail traffic for a prominent Washington D.C. based law firm. At the present time, Braver's clients include a number of law firms, restaurants, radio personalities, and individuals.

¶ 67. 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 Braver. End-users of electronic mail service require effective filtering of spam in order to effectively use e-mail as an important communications tool. Braver 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 (as amended), 47 U.S.C. § 231(e)(4), 15 U.S.C. § 7702 (11). The Communication Act of 1934 (as amended) 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).

Braver acknowledges that the CAN-SPAM Act does not expressly authorize an individual internet user, as opposed to a service provider, 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 or an entity. Individuals like the Braver who satisfy the definition of “a provider of internet service” are expressly authorized to bring a civil action. The fact that Braver offers a service that enables users to access electronic mail over the Internet as an individual rather than in corporate form, offers LAI no relief, and 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 Braver has alleged he offers in the Third Amended Complaint. The CAN-SPAM Act does not preclude the Braver’s actions.

WHEREFORE, Braver respectfully requests that this Court deny Defendant LAI’s Motion to Dismiss.

Respectfully submitted,

S// Luke Wallace

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 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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I hereby certify that on this 13th day of March, 2006, I served the attached document by U.S. Mail, postage pre-paid, to the following:

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 s/Luke Wallace