

UNITED STATES DISTRICT COURT
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., 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.)

Case No. CIV-04-1013-W

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)
1-50, inclusive,)

Cross-Defendant.)

**PLAINTIFF'S RESPONSE TO DEFENDANT AMERIQUEST MORTGAGE COMPANY,
INC.'S MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT AND
BRIEF IN SUPPORT**

COMES NOW the Plaintiff, Robert H. Braver, and in response to Defendant Ameriquest Mortgage Company's Motion to Dismiss Plaintiff's Third Amended Complaint states as follows:

I. Braver's TAC States a Claim Against Ameriquest Under Oklahoma Law.

In seeking dismissal, Ameriquest is asking the Court to ignore the Legislature's expressed intention for construing statutes in harmony with existing common law as the clear intention embodied by the Legislature in the Unlawful Electronic Mail statute itself, and the liberal construction mandate for consumer protection statutes. Ameriquest necessarily ignores all other existing constitutional, statutory and common law of the state of Oklahoma.

The Oklahoma Legislature enacted prohibitions on Unlawful Electronic Mail in 1999. Common law concepts of ratification, conspiracy, agency and the existence of a non-delegable duty had each existed decades prior to that, and in some instances, since statehood. According to the Oklahoma Legislature, "The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma." *Barker v. Allied Supermarket*, 1979 OK 79, ¶ 30, 596 P.2d 870, citing, in part, 12 O.S. § 2.

Ameriquest's argument, made in Footnote 1, that it cannot be liable under Oklahoma law because the legislature did not include what Ameriquest terms "procurement liability" is the opposite of the current status of Oklahoma law. Common law concepts, including ratification, conspiracy, agency and the existence of a non-delegable duty *supplement* the statutes of the state of Oklahoma and "shall remain in force" in their aid. 12 O.S. § 2. In spite of scores of citation to Oklahoma's statutory

prohibition of Unlawful Electronic Mail, Ameriquest neglects to mention 15 O.S. § 776.2(E), the “Recovery of Damages of Fraudulent Electronic Mail” statute, which states, “[t]he provisions of this act shall *not be construed to limit* any right of a person to pursue any additional civil remedy otherwise allowed by law. 15 O.S. § 776.2(E) (emphasis supplied). The legislature expressly recognized Braver’s right to pursue additional civil remedies against Ameriquest, including the common law theories alleged in his TAC.

Ameriquest’s argument that the Legislature was compelled to expressly restate and incorporate Oklahoma’s common law into the Unlawful Electronic Mail prohibition is wrong for another reason. The Legislature chose to enact the Unlawful Electronic Mail statutes in Title 15, under Chapter 20, entitled “Consumer Protection.” Consumer protection laws are remedial in nature and are to be liberally construed to effectuate its underlying purpose. *Patterson v. Beall*, 2000 OK 92, ¶ 28, 19 P.3d 839 (referencing the Oklahoma Consumer Protection Act, part of Chapter 20, “Consumer Protection.”)

If the Legislature intended to preempt the common law of the state of Oklahoma, it could have easily done so. The Legislature did just this in enacting the Residential Property Condition Disclosure Act regulating disclosure of defects in the sale of residential real estate. In that Act, the Legislature expressed its intent to preempt the common law of the state of Oklahoma clearly: “The sole and exclusive civil remedy at common law or otherwise...shall be an action for actual damages,...and shall not include the remedy of exemplary damages.” The Legislature expressed no similar intention to limit common law claims of agency, ratification, conspiracy or non-delegable duty when it enacted the Unlawful Electronic Mail statute within the “Consumer Protection” chapter of Title 15 of the Oklahoma statutes.

Braver has sufficiently pled facts to support his civil conspiracy claim against Ameriquest. The Oklahoma Supreme Court's most recent pronouncement of the elements for civil conspiracy was made in *Brock v. Thompson*, 1997 OK 127, ¶ 39, 948 P.2d 279, 294. There, the Supreme Court stated "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." (*Id.*) Braver has in painstaking detail alleged his conspiracy claim through which Ameriquest is liable for its co-conspirators' violations of the Oklahoma anti-spam statutes. (¶¶ 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 64, 69-77, 120-124, 126, 128, 132, 133, 137, 138, 141, 142, 144 and Count V.)

Braver's TAC alleges that Ameriquest ratified the conduct of the spammer and trafficking defendants. "In order to constitute...a wrongdoer by ratification, the original act must have been done in his interest or been intended to further some purpose of his own." *Frick-Reid Supply Co. v. Hunter*, 1915 OK 175, ¶ 9, 148 P 83. Paragraph 64 of Braver's TAC alleges that the unlawful actions described were done with actual knowledge of Ameriquest and were either directed or controlled by Ameriquest or Ameriquest had the ability to authorize, control and direct those actions. Paragraph 64 of the TAC further alleges that Ameriquest participated in, conspired, controlled and/or directed or otherwise encouraged the described unlawful conduct. Further, Braver's TAC alleges that the spam was intentionally targeted to Braver's servers for pecuniary gain to advertise mortgage services and that the remaining defendants paid monetary consideration to send the unlawful e-mails (TAC at ¶¶ 76, 77).

"The ratification of the wrongful acts should be with full knowledge of the facts... ." *Frick-Reid Supply Co. v. Hunter* at ¶ 12. Braver's TAC alleges that the

unlawful actions described were done with actual or constructive knowledge of Ameriquest. (TAC at ¶ 64.) Braver further alleged that Ameriquest ratified the unlawful actions of its co-defendants. Ratification constitutes a question of fact. *Kincaid & Associates v. Black Angus Motel, Inc.*, 1999 OK 54, ¶ 11, 983 P.2d 1016.

Ratification has been found in cases where a party accepted the benefits of the contract with the full knowledge of the facts at a time when accepting parties were fully competent and capable of contracting for himself. (*Id.*) Braver specifically alleged that Ameriquest's employees ratified the acts of the spammers and spam traffickers. When Braver "confronted Ameriquest employees regarding the unlawful spam and the decoys, [he] was told repeatedly that Ameriquest knew it purchased mortgage leads generated by spam." (TAC at ¶ 120.) "Rick Davies, in Ameriquest's Legal Department, admitted that he was aware that Ameriquest affiliates, such as Lead Transfer, sent large e-mail marketing campaigns, but claimed that Ameriquest was not liable for e-mails sent by "third parties." (TAC at ¶ 121.)

Oklahoma common law also supports a claim against Ameriquest for the acts of the spammers with whom Ameriquest entered into "lead generation agreements" based upon the concept of non-delegable duty. Although the general rule is that an independent contractor is not liable for damages to a third person caused by the contractor, there is an exception where the work of the contractor is unlawful. *Hudgens v. Cook Industries, Inc.*, 1973 OK 145, ¶ 11, 521 P.2d 813. "The rule in Oklahoma is that a person who performs work for an independent contractor is not liable for damages to third persons caused by the negligence of the contractor *except where the work is inherently dangerous or unlawful... .*" *Copeland v. The Lodge Enterprises, Inc.*, 2000 OK 36, Fn. 25, 4 P.3d

695 (emphasis by Court) citing *Williamson v. Fowler Toyota, Inc.*, 1998 OK 14, ¶ 7, 956 P.2d 858. Braver's TAC sufficiently alleges that the acts of the spammers and spam traffickers were unlawful so as to constitute an exception to the general rule of nonliability for the acts of independent contractors.

Braver has alleged an agency relationship existed between Ameriquest and its spamming agents. See TAC at ¶¶ 64, 137, 141, 142. An agency relationship generally exists if two parties agree that one is to act for the other. *McGee v. Alexander*, 2001 OK 78, ¶ 29, 37 P.3d 800. An essential element of an agency relationship is that the principal has some degree of control over the conduct and activities of the agent. (*Id.*) The TAC has sufficiently alleged the facts that an agency relationship existed between Ameriquest and its spammers and spam trafficker co-defendants.

WHEREFORE, the Plaintiff respectfully request that this Court deny Defendant Ameriquest Mortgage Company's Motion to Dismiss.

Respectfully submitted,

S// Luke Wallace

Luke J. Wallace, OBA #16070

David Humphreys, OBA #12346

Attorneys for Plaintiff

Humphreys Wallace Humphreys, PC

1724 East Fifteenth Street

Tulsa, Oklahoma 74104

Telephone: (918) 747-5300

Fax: (918) 747-5311

luke@hwh-law.com

david@hwh-law.com

- AND -

Michael R. McKee, OBA #6018
Attorney for Plaintiff
McKee Law Firm
Post Office Box 1351
Norman, Oklahoma 73070
Telephone: (405) 360-2322
Fax: (405) 366-6416
mike@mckeelawfirm.com

CERTIFICATE OF SERVICE

I hereby certify that on this 14th 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:

<p>Terry D. Kordeliski, Esq. Robert A. Nance, Esq. Riggs Abney Neal Turpen Orbison Lewis 5801 North Broadway Ave., Suite 101 Oklahoma City, OK 73118 TKordeliski@RiggsAbney.com rnance@riggsabney.com <i>Attorneys for Defendant Ameriquest Mortgage Company</i></p>	<p>Phillip L. Free, Jr., Esq. Crowe & Dunlevy, P.C. 20 North Broadway, Suite 1800 Oklahoma City, OK 73102 freephil@crowedunlevy.com johnstom@crowedunlevy.com <i>Attorneys for Cross-Defendant Innovative Marketing, Inc. d/b/a Lead Extreme</i></p>
<p>Kalley R. Aman, Esq. Michael J. Cereseto, Esq. Buchalter Nemer 1000 Wilshire Blvd., Suite 1500 Los Angeles, CA 90017 Kaman@buchalter.com mcereseto@buchalter.com <i>Attorneys for Defendant Ameriquest Mortgage Company</i></p>	<p>Steven J. Adams, Esq. John D. Russell, Esq. Fellers, Snider, Blankenship, Bailey & Tippens, P.C. 321 South Boston Avenue, Suite 800 Tulsa, Oklahoma 74103-3318 sadams@fellerssnider.com <i>Attorneys for Defendant Go Apply, Inc. d/b/a Eleadz</i></p>
<p>Patrick Gunn, Esq Courtney Nguyen, Esq. Cooley Godward, LLP One Maritime Plaza, 20th Floor San Francisco, California, 94111-3580 <i>Attorneys for the Defendants The Loan Page, Inc. and Stecroft Holdings, Inc.</i></p>	<p>Joseph Leventhal, Esq James Patterson, Esq. Cooley Godward, LLP 4401 Eastgate Mall San Diego, California, 92121 <i>Attorneys for the Defendants The Loan Page, Inc. and Stecroft Holdings, Inc.</i></p>
<p>Arthur F. Hoge III Brinda K. White Christopher W. Cotner Mee, Mee & Hoge, PLLP 50 Penn Place 1900 NW Expressway, Suite 1400 Oklahoma City, OK 73118 <i>Attorneys for Defendant Lead Association, Inc.</i></p>	<p>Darren R. Cook Helms & Underwood 2500 First National Center 120 North Robinson Avenue Oklahoma City, OK 73102 <i>Attorneys for Defendant Lead Transfer, LLC</i></p>
<p>Deborah K. Patterson Webb, Patterson and Tapella 906 G Street, Suite 630 Sacramento, California 95814-1813 <i>Attorneys for Defendant LeadCorp</i></p>	<p>Ryan D. Lapidus Daniel C. Lapidus Lapidus & Lapidus 211 South Beverly Drive, Suite 211 Beverly Hills, CA 90212 <i>Attorneys for Defendant The Wisdom Companies, LLC</i></p>

<p>Derek A. Newman Venkat Balasubramani 505 Fifth Avenue South, Suite 610 Seattle, Washington 98104 Derek@newmanlaw.com venkat@newmanlaw.com <i>Attorneys for Defendants Lead Transfer, Inc., Timothy Wayne Foust and Tandax, Inc.</i></p>	<p>Charles L. McLawhorn, III McAfee & Taft Two Leadership Square, 10th Floor 211 North Robinson Oklahoma City, OK 73102 <i>Attorneys for Defendant The Wisdom Company, LLC</i></p>
<p>Richard L. Rose Miller Dollarhide 100 Park Avenue, Second Floor Oklahoma City, OK 73102-8099 <i>Attorneys for Defendant Impact Web Enterprises, Inc.</i></p>	<p>Leanne N. Webster Gregory M. Saylin Fabian & Clendenin, P.C. 215 South State Street, Suite 1200 Salt Lake City, UT 84111 <i>Attorneys for Defendant MoneyNest Holdings, Inc.</i></p>
<p>Lance Schneiter Tomlinson & O'Connell, P.C. Two Leadership Square, Suite 450 211 North Robinson Oklahoma City, OK 73102 <i>Attorneys for Defendant MoneyNest Holdings, Inc.</i></p>	<p>Marie S. Johnston Crowe & Dunlevy 20 North Broadway, Suite 1800 Oklahoma City, OK 73102 <i>Attorneys for Defendant International Webworks.com, Inc.</i></p>

 /s/ Luke Wallace

I hereby certify that on this 14th day of March, 2006, I served the attached document by U.S. Mail, postage pre-paid, to the following:

Nick Hetcher
 N830 Pond Rd.
 Marinette, WI 54143

 /s/ Luke Wallace