

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 STECROFT HOLDING, 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 Stecroft Holdings, Inc.'s Motion to Dismiss Plaintiff's Third Amended Complaint states as follows:

I. INTRODUCTION

Defendant Stecroft takes more than ten pages to make two simple points. One, that Fed. R. Civ. P. 9(b) mandates dismissal for failure to plead fraud with specificity and, two, that Braver failed to plead claims as against Stecroft for violating the federal CAN-SPAM Act or Oklahoma's anti-spam law. Neither proposition merits terminating this action based solely upon the pleadings.

II. ARGUMENT AND AUTHORITIES

A. Braver's claims have been pled sufficiently.

Contrary to Stecroft's assertion, Braver did not allege that Stecroft "generally" engaged in fraudulent activity. Rather, TAC, in paragraph 137, alleges that each defendant, directly or through their known or unknown co-conspirators, engage in the transmission of e-mails that are fraudulent, as that term is defined by statute.¹ Oklahoma's fraudulent use of electronic mail statute specifically identifies the characteristics that constitute "fraudulent" e-mail. The spam e-mails sent directly or indirectly to Braver's servers by the co-conspirators are fraudulent, as defined by statute, because they use techniques designed to misrepresent the source of the e-mail and/or contain false and misleading information in the e-mail.² Braver's TAC alleges that the

¹ See 15 O.S. § 776.1 (D) "For purposes of this section, an electronic mail message which is declared to be unlawful by subsection A of this section shall be considered a fraudulent electronic mail message or a fraudulent bulk electronic mail message." and 776.1 (A)(1)(2) "It shall be unlawful for a person to initiate an electronic mail message that the sender knows, or has reason to know: 1) Misrepresents any information in identifying the point of origin or the transmission path of the electronic mail message; 2) Does not contain information identifying the point of origin or the transmission path of the electronic mail message;"

² TAC, ¶ 137 and see Footnote 4.

purpose of these fraudulent techniques is to disguise the origin of the messages in order to thwart efforts to block unwanted spam.³ Braver has not alleged a claim of common law fraud or statutory deceit. Braver makes no claim under a statute codifying an action grounded in fraud, nor is he alleging generally that any defendant engaged in fraud-based conduct as a basis for recovery, but, rather, is pleading specifically that commercial e-mail messages were transmitted to Braver's servers in violation of the specific statutes identified in Braver's TAC.⁴

Braver agrees that Stecroft correctly states the general rule that to plead fraud with particularity, the pleader must "set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *Koch v. Koch Industries*, 203 F.3d 1202, 1236 (10th Cir. 2000). Here, however, Braver has made no claim predicated upon the existence of a false representation and therefore the usefulness of pleading fraud with particularity is questionable. Stecroft cites this Court to the Western District decision of *U.S. ex rel. Semtner v. Medical Consultants, Inc.*, 170 F.R.D. 490, 497-98 (W.D. Okla. 1997) for the proposition that the federal False Claims Act requires particularized pleading, alleging that that decision stands for the broader proposition that particularized pleading applies to any fraud claim

³ TAC, ¶¶ 70-72

⁴ "Unsolicited commercial e-mail messages are sent using fraudulent techniques." (TAC at ¶ 7.) "CAN-SPAM criminalized and provided civil remedies for the fraudulent practices employed by spammers." (TAC at ¶ 9.) "Mortgage spam is generally fraudulent and violates various state and federal laws and regulations related to the marketing of mortgage loans." (TAC at ¶ 11.) "At all times relevant to this case, Defendants employed and participated in a 'free-for-all' business model designed to encourage and provide compensation for fraudulent mortgage spam. Defendant's business practices were and are wholly inconsistent with those of a legitimate business desiring to discourage fraudulent practices." (TAC at ¶ 13.) "The vast majority of the fraudulent mortgage spam sent to Plaintiff's servers by Defendants were addressed to recipients at domain names registered to Oklahoma companies and individuals, with accurate postal addresses in Oklahoma, and domain name servers at *oklahoma-isp.net*." (TAC at ¶ 22.) "Fraudulent commercial electronic mail messages." (TAC at ¶ 27.) "Mortgage spam is sent with fraudulent techniques to disguise the origin of the messages." (TAC at ¶ 72.) "Fraudulent e-mail messages." (TAC at ¶ 138(a-e).)

under federal statutory law. In actuality, the Court did nothing more than find persuasive authority applying Rule 9(b) applicable in the False Claims Act context. The False Claims Act codifies common law fraud concepts and extension of particularized pleading requirement fits the policy underlying the rule. As noted in *Semtner v. Medical Consultants, Inc.*, the Tenth Circuit has characterized the rule's purpose "to afford defendant fair notice of the plaintiff's claim and the factual ground upon which it is based and to safeguard a defendant's goodwill from improvident charges of wrongdoing." *Semtner v. Med. Consultants, Inc.* at 497 (citing *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982 (10th Cir. 1992)).

Even if a particularized pleading is required by the Court, Braver's Complaint is sufficient. Braver provided each defendant with a 150-paragraph, 33-page Third Amended Complaint. The Third Amended Complaint ("TAC") specifically identifies the unlawful conduct that is the subject of the action. (TAC at ¶¶ 68-124.) The TAC identifies specific unlawful spam upon which the action is predicated by date and purported address of the sender, as well as Braver's specific response to each identified spam e-mail which generated a telephone solicitation for a mortgage from Ameriquest. (TAC at ¶¶ 79, 82, 84, 86, 88, 90, 92, 94, 96, 98, 100, 102, 104, 106, 108, 110, 112, 116 and 118.) Each defendant is on fair notice of the claims being made by Braver and the policy concerns described by the Tenth Circuit as the basis for Rule 9(b) have been satisfied here.

Braver TAC is sufficiently pled for another reason: "[W]hen plaintiff's allegations involve multiple defendants engaging in the same fraudulent conduct over an extended period of time, and that conduct and the defendant's alleged role in that conduct

is clearly identified in the pleadings, the Court will not dismiss the complaint if the defendants have received fair notice of the claims against them.” *U.S. ex rel Semtner v. Medical Consultants, Inc.* at 497 (citing *U.S. v. Children’s Shelter, Inc.*, 604 F Supp. 865 (W.D. Okla. 1985)). Such is the case here.

B. The TAC states a claim against Stecroft for violating the CAN-SPAM Act.

Stecroft seeks dismissal on the ground that Braver’s TAC fails to allege that Stecroft transmitted unlawful spam e-mail messages. Stecroft overlooks paragraph 2 (“defendants have sent, caused to be sent or were responsible for sending tens of thousands of illegal e-mail messages through or to Plaintiff’s e-mail servers and customers.”); Paragraph 18 (“Each of the Defendants initiated or procured the transmission of unlawful spam in furtherance of the conspiracy described herein...”); Paragraph 19 (“The Defendants named in this suit have each actually transmitted the spam that is the subject of this action...”); Paragraph 22 (“The vast majority of the fraudulent mortgage spam sent to Plaintiff’s servers by Defendants...”); Paragraph 27 (“Defendant sent, caused to be sent and/or procured the transmission of fraudulent commercial electronic mail messages...”); Paragraph 126 (“On numerous occasions, the Defendants and their heretofore unknown co-conspirators initiated the transmission, to protected computers, of commercial e-mail messages...”); Paragraph 132 (“On numerous occasions, the Defendants...engaged in a pattern or practice of initiating, to protected computers, commercial e-mail messages...” of Braver’s TAC. The TAC sufficiently places Stecroft, and its co-defendants, on notice of Braver’s allegation that, indeed, these defendants actually transmitted unlawful, commercial electronic mail.

C. Braver alleges Stecroft procured unlawful e-mail.

Perhaps Stecroft's focus on one sentence in paragraph 10 of Braver's TAC has prevented it from apprehending the remaining allegations contained in the 150-paragraph TAC. Braver alleges that Stecroft engaged in unlawful procurement as contemplated by the CAN-SPAM Act. Braver's TAC contains the following allegations relevant to procurement: In paragraph two ("...caused to be sent..."); Paragraph 18 ("Each of the Defendants...procured the transmission of unlawful spam..."); Paragraph 19 ("The Defendants named in this suit...provided consideration or induced their co-conspirators to transmit the spam..."); Paragraph 27 ("Defendants sent, caused to be sent, and/or procured the transmission of fraudulent commercial electronic mail messages..."); Paragraph 133 ("Defendants intentionally paid for or provided other consideration to, or induced, other persons to initiate commercial electronic e-mail messages on its behalf with actual knowledge, or by consciously avoiding knowing, whether such persons are engaging, or will be engaging, in a pattern or practice that violates the CAN-SPAM Act.");

D. Braver's TAC states a claim against Stecroft under Oklahoma's Anti-Spam Law.

In the paragraph identified in Section B above, Braver's TAC alleges that Stecroft transmitted unlawful commercial electronic messages in violation of Oklahoma's Anti-Spam statute, 15 O.S. § 776.1, et seq. Further, paragraph 137 of Braver's TAC states "On numerous occasions during the two years before this suit was commenced and continuing to the present, Defendants and their heretofore unknown co-conspirators, either directly or through their co-conspirators, agents, contractors, and/or subcontractors,

initiated the transmission of commercial electronic mail messages directed to Plaintiff's server facilities, knowingly or having reason to know were sent, a) using techniques designed to misrepresent the point of origin or transmission path of the e-mail messages; b) using techniques designed to omit the point of origin or transmission path of the e-mail messages; and/or c) 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 Plaintiff's spam filtering mechanisms." (TAC at ¶ 137.)

E. Stecroft ignores its liability under recognized principle of agency and conspiracy law in Oklahoma.

Stecroft ignores the express language of Oklahoma's unlawful electronic mail statute. It provides that "The 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) Braver has alleged that Stecroft is liable for its agents' and co-conspirators' violation of the unlawful electronic mail statute. Further, Braver has alleged that Stecroft sent the violative email directly. 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.*) Conspicuously absent from the Supreme Court's pronouncement is any obligation to plead or prove the existence of an express agreement. Nevertheless, even if the Court were to determine that such a requirement exists, of TAC alleges:

19. 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; 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. The Defendants named in this suit have each actually transmitted the spam that is the subject of this action; provided consideration or induced their co-conspirator to transmit the spam; trafficked in the lead that was created as a result of this spam; or were identified by a co-defendant having trafficked in a spam-generated lead that is the subject of this action. 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 lead.
20. The above-described unlawful acts and practices and those set forth herein have been performed to further the unlawful conspiracy to the financial gain of each co-conspirator. The spam e-mails were intentionally transmitted to Braver's servers by one of the Defendants or by an as yet unidentified spammer whose identity is being concealed by their co-conspirators. The co-conspirators identified as Defendants herein and John Does 1 through 50 have trafficked in hundreds of thousands, if not millions, of spam-generated leads and are responsible for the transmission of billions of spam e-mail messages.
21. The illegal spam e-mails were intentionally directed and sent to Plaintiff's servers, the intended recipients of which were Plaintiff's customers. The spam e-mails constitute an overt act carried out in furtherance of the conspiracy. The spammer seeks to avoid detection by engaging in the following unlawful acts, falsifying the sender names; falsifying sender e-mail addresses; using fake company names; hijacking the computers of unwitting third parties; exploiting insecure e-mail relays; and/or brokering the customer data gleaned from the responses ("Leads") through multiple layers of middlemen.
23. The Defendants purposely created a complex network of transactions in an attempt to obscure the link between the transmission of the spam and the ultimate sale of the spam-generated lead to Ameriquest.
25. In furtherance of the conspiracy and to create plausible deniability, some Defendants enter into contracts which contain provisions that purport to prohibit taking 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 and without ever intending to actually comply with legal requirements. Other Defendants have failed to bother with the pretense of compliance with federal and state anti-spam laws.

26. The agreements are themselves a sham. In those instances when a particular defendant did not originate the spam, there is no legitimate, good faith investigation to determine the source of the spam-generated leads. In furtherance of the conspiracy, the co-Defendants consciously avoid knowing the spam-generated source of the lead in which they are trafficking.

Plaintiff sufficiently set forth facts and allegation to support his civil conspiracy claim against Stecroft and The Loan Page and their co-conspirators to violate the Oklahoma spam statutes.

Plaintiff has alleged an agency relationship existed between Stecroft, The Loan Page and their spamming agents. See TAC at ¶¶ 64, 137, 141, 142. An agency relationship generally exists if two parties agree one is to the acts of 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 these Defendants and their agents.

Stecroft's citation to the Tenth Circuit decision of *Salehpoor v. Shahinpoor*, 358 F.3d 782 (10th Cir. 2004) is unhelpful. That decision was made on summary judgment pursuant to Rule 56, and not for failure to state a claim pursuant to Fed. R. Civ. P. 12(b). The claims raised there were based upon law of the state of New Mexico.

The TAC sufficiently states facts to fairly place this Defendant, and others, on notice of the wrongful conduct upon which the action is based.

WHEREFORE, the Plaintiff respectfully request that this Court deny Defendant Stecroft Holdings, Inc.'s Motion to Dismiss.

Respectfully submitted,

S// Luke Wallace

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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:

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