

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.

Case No. CIV-04-1013-W

Honorable Lee. R. West

AMERIQUEST MORTGAGE COMPANY, a Delaware corporation,

Cross-Complainant,

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 STECROFT HOLDINGS, INC.’S REPLY IN SUPPORT OF ITS MOTION TO  
DISMISS PLAINTIFF’S THIRD AMENDED COMPLAINT**

Defendant Stecroft Holdings, Inc. (“Stecroft”) respectfully submits this reply memorandum in support of its motion to dismiss Plaintiff’s Third Amended Complaint (“TAC”).

## I. ARGUMENT.

Inexplicably, the Opposition claims “Braver has made no claim predicated upon the existence of a false representation...” and that the only reason the TAC alleges fraud is because the Oklahoma anti-spam statute defines the illegal conduct as “fraudulent.” (Opp. at 1-2.) In fact, the TAC does not simply quote or cite a statutory definition, but actually relies on allegations of fraudulent conduct *to support* its claims. (See Motion at 5-6; TAC at ¶¶ 6, 7, 9, 11, 13, 21, 22, 27, 70, 71, 72.)

But even if plaintiff is correct, and the TAC only references fraudulent conduct because Oklahoma’s Fraudulent Electronic Mail statute relies on fraud in its definitions, the Court should require the TAC to be plead with the particularity required by Fed. R. Civ. P. 9(b). Courts in the Tenth Circuit require plaintiffs to plead fraud with particularity when there is no “claim of common law fraud or statutory deceit” (Opp. at 2) but when the specific statute is based in fraud.<sup>1</sup> See *In re Urethane Antitrust Litig.*, 409 F. Supp. 2d 1275, 1284-85 (D. Kan. 2006) (requiring particularity for claim of fraudulent concealment to toll statute of limitations).

Further, plaintiff claims that, although the Oklahoma Fraudulent Electronic Mail statute relies on “fraud” to define a violation, that statute does not require fraudulent conduct to establish a violation. While the Opposition cites no support for this odd result, even if true, “if the plaintiff alleges, as a basis for his statutory claim, that the defendant has engaged in fraudulent conduct, then the circumstances constituting fraud must be stated with particularity.” *In re General Motors Corp.*, 2005 WL 1924333, \*3 (W.D. Okla. Aug. 8, 2005) (noting fraud not essential element of claim under statute but requiring particularity in pleading because of allegations in complaint) (citing *Vess v. CIBA-Geigy Corp., USA*, 317 F.3d 1097, 1103-05 (9th Cir. 2002)). Even if plaintiff could plead a violation of Oklahoma’s Fraudulent Electronic Mail statute without claiming fraud, the allegations in the TAC clearly do allege fraudulent conduct by

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<sup>1</sup> On one hand, plaintiff dismisses the TAC’s fraud allegations as simply parroting Oklahoma’s Fraudulent Electronic Mail statute. On the other, plaintiff contradicts himself, stating, “Braver makes no claim under a statute codifying an action grounded in fraud.” (Opp. at 2.) Plaintiff must concede that, if the activities defined in the Oklahoma statute are “fraudulent,” allegations thereunder must be plead with particularity if brought in a federal court.

Stecroft and must be plead with particularity.<sup>2</sup>

Further, plaintiff's conspiracy allegations are not sufficiently pled. The standard for pleading conspiracy advanced by the Opposition is simply false.<sup>3</sup> "In pleading conspiracy, a plaintiff must allege '*specific facts* showing agreement and concerted action among the alleged co-conspirators.'" *Coulter v. Oklahoma*, 2006 WL 15486, \*2 (W.D. Okla. Jan. 4, 2006) (emphasis added) (quoting *Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir.), *cert. denied*, 513 U.S. 837 (1994)). Despite this heightened standard, plaintiff's conspiracy allegations are not "specific" but are merely conclusory. For example, plaintiff claims that "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...." (TAC ¶ 19; Opp. at 7.) All allegations regarding conspiracy in the TAC are similarly generic. Such allegations are insufficiently plead and should be dismissed.

Because plaintiff has attempted to plead actionable conduct four times, Stecroft respectfully requests the Court dismiss the TAC without leave to amend.

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<sup>2</sup> The Opposition claims to agree with Stecroft regarding the particularity standard for pleading fraud and claims the TAC meets this standard. (Opp. at 2, 3.) Yet, while the TAC may have particularized allegations about the conduct of other "unknown" conspirators who sent the e-mails at issue, there are no similar particularized allegations regarding Stecroft, such as the "who, what, when and where" of Stecroft's alleged involvement. (*See* Motion at 4.)

<sup>3</sup> Apart from the heightened pleading standard required for conspiracy under Oklahoma law, the conspiracy claim must be plead with particularity because the TAC alleges fraud. *Cavitat Med. Tech., Inc. v. Aetna, Inc.*, 2006 WL 218018, \*5-\*6 (D. Colo. Jan. 27, 2006).

Dated: March 24, 2006

Respectfully submitted,

By: s/ Steven J. Adams  
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**CERTIFICATE OF SERVICE**

This is to certify that on the 24th day of March, 2006, the attached document "DEFENDANT STECROFT HOLDINGS, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT," was electronically transmitted to the Clerk of the Court for the Western District of Oklahoma via the ECF System for filing. The Clerk of the Court will electronically transmit a Notice of Electronic Filing to the following ECF registered parties:

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