

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 MOTION AND MEMORANDUM TO DISMISS OF TIM
FOUST AND TANDAX, INC.**

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COMES NOW the Plaintiff, Robert H. Braver, and in response to the Motion and Memorandum to Dismiss of Tim Foust and Tandax, Inc. (“Foust” and “Tandax”) states as follows:

I. FACTUAL BACKGROUND

Plaintiff, Robert H. Braver, is a provider of Internet Access Service and electronic mail (Third Amended Complaint “TAC” ¶ 2 and Exhibit “1” Affidavit of Robert Braver “Braver Affidavit” ¶ 2). Plaintiff’s servers have been inundated with unlawful mortgage spam procured or sent by the Defendants in this action. (TAC ¶ 78, Braver Affidavit ¶ 3). The person or entity sending the unlawful mortgage spam uses forged, missing, or obfuscated routing and originating information (Braver Affidavit ¶ 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. (Braver Affidavit, ¶ 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 “Clayton Fountain”, “Ron Bartles,” “Frederick Fremont,” “Jake Sparks,” and “Leroy Crocket”) (Braver Affidavit ¶ 6, TAC ¶ 78). From July 2003 through the date of this Response, Plaintiff’s servers have received thousands of unlawful mortgage spam. (Braver Affidavit, ¶ 3).

After the decoys were submitted, Braver received a phone call from Ameriquest’s employees seeking to sell a mortgage to each decoy name. (Braver Affidavit, ¶ 6, TAC ¶ 78). When Braver confronted Ameriquest’s employees, he was told repeatedly that Ameriquest knew that the mortgage leads purchased were generated by spam. (Braver Affidavit, ¶ 9). Rick Davies, in Ameriquest’s legal department, admitted that he was aware that Ameriquest affiliates, which include Tandax and Foust, send large email marketing campaigns but claimed that

Ameriquest was not liable for the emails sent by “third parties”. (Braver Affidavit, ¶¶ 8,9).

In January 2004, Braver received an unlawful spam, purportedly from a “Glenna Manley.” (Braver Affidavit, ¶10 and Exhibit “1” thereto). This email was directed to Braver’s servers in Oklahoma (Braver Affidavit, ¶10). Braver responded to this spam by clicking on the textual link embedded in the spam email, which took him to the www.quick-lender-search.biz website. (Braver Affidavit, ¶11). Braver filled in the webpage form using the “decoy” information of Clayton Fountain. (Braver Affidavit, ¶11). Braver received a return call from Ameriquest. (Braver Affidavit, ¶12).

In January 2004, Braver’s servers received another mortgage spam, purportedly from “lo4xl7rh comet” at coxxkdzjam_24546@juno.com.” (Braver Affidavit, ¶13 and Exhibit “2” thereto). Braver responded to this email by clicking on the textual link, which took him to the www.onlinegrantshere.com website. Plaintiff filled in the web page form using the “decoy” information of Ron Bartles. (Braver Affidavit, ¶14).

In June 2004, Braver’s servers received another mortgage spam, purportedly from “tgflzgumesoo@hotmail.com.” (Braver Affidavit, ¶15 and Exhibit “3” thereto). Braver responded to this email by clicking on the textual link, which took him to the worldtrustrefi.com website. Plaintiff filled in the web page form using the “decoy” information of Frederick Freemont. (Braver Affidavit, ¶ 16). The first telephone call received in response to the “Freemont” decoy was on June 21, 2004.

In July 2004, Braver’s servers received another mortgage spam, purportedly from “Jake Sparks.” (Braver Affidavit, ¶17 and Exhibit “4” thereto). Braver responded to this email by clicking on the textual link, which took him to the finance-home.biz website. Plaintiff filled in the web page form using the same name as the purported sender “Jake Sparks” as the decoy.

(Braver Affidavit, ¶ 18). The first telephone call received in response to the “Sparks” decoy was on July 6, 2004.

In August 2004, Braver’s servers received another mortgage spam, purportedly from “Rogelio Mcleod” (Braver Affidavit, ¶19 and Exhibit “5” thereto). Braver responded to this email by clicking on the textual link, which took him to the sterlinglenders.com website. Plaintiff filled in the web page form using the “decoy” information of Leroy Crockett. (Braver Affidavit, ¶ 20). The first telephone call received in response to the “Crockett” decoy was on August 23, 2004.

II. TANDAX AND FOUST ARE SUBJECT TO PERSONAL JURISDICTION IN OKLAHOMA

A. Tandax and Foust are spammers

Tandax and Foust have moved to dismiss Plaintiff’s Third Amended Complaint (“TAC”) claiming the facts as alleged are insufficient to support jurisdiction in large part because the TAC “does not allege Tandax” or Foust “sent any emails” in violation of the law. (Motion to Dismiss “MTD”, P. 3). To the contrary, the TAC repeatedly alleged that Defendants, including Tandax and Foust sent the unlawful, fraudulent emails to Plaintiff’s servers which are the subject of this litigation. (TAC, ¶¶ 1,18,19,27,28,56,126,132,137,141, and 146).

Tandax and Foust tendered to the Court, the Declaration of Tim Foust as their sole evidentiary support for the motion. In the Declaration, Foust does not controvert Plaintiff’s allegations that Tandax and Foust sent the unlawful, fraudulent spams to Plaintiff’s servers. (Document Number 266 “Declaration”). This failure to deny should be fatal to Tandax and Foust’s Motion to Dismiss.

This Court has determined that the pretrial question of personal jurisdiction will be

decided on the basis of affidavits. “When a motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing.” *Federal Deposit Insurance Corporation v. Oaklawn Apartments*, 959 F.2d 170, 174 (10th Cir. 1992) (citing *Behagen v. Amateur Basketball Association*, 744 F.2d 731, 733 (10th Cir. 1984)). In such a situation, “[t]he allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant’s affidavits. *Behagen*, 744 F.2d at 733.

B. Foust’s Declaration Should be Stricken

Foust’s Declaration is filled with numerous inaccuracies and should be stricken or disregarded by the Court. Any new supplementary declaration by Foust and/or Tandax attempting to controvert the allegation that they sent the spam should be viewed with suspicion in light of the following facts:

1. According to Foust, Tandax was only in business between August 2003 and September 2004. (Exhibit “2”, Deposition of Tim Foust (“Foust Deposition”), P. 11, L. 23 – P. 12, L. 4). Foust claims that Tandax is a now inactive Washington corporation. (Declaration ¶ 2). This representation is not accurate¹.

¹ Foust hired the marketing firm, Info Search Media to direct individuals that had an interest in refinancing their home to Tandax’s www.2savemoney.com website. (Foust Deposition, P. 30, L. 15-17; P. 33, Ll. 9-21; P. 34, Ll. 18-19; P. 36, Ll. 12-18). This was the only marketing firm Tandax or Foust ever hired to promote Tandax’s website, www.2savemoney.com. (Foust Deposition, P. 51, Ll. 14-17). Tandax and Foust produced Tandax bate stamped documents 71-77 which relate to the discussions and agreements between Tandax and Info Search Media. (Foust Deposition, P. 30, Ll. 15-21; P. 34, Ll. 15-24; P. 35, Ll. 12-17; P.50, L 15 – P. 51, L. 17). This marketing firm was only hired one time and Tandax bate stamped documents 71-77 were generated as a result of those communications and agreements. (Foust Deposition, P. 35, L. 25 – P. 36, Ll. 1-5; P. 50, L. 19 – P. 51, : 17). Tandax 000071-000077 (attached hereto as Exhibit “3”) reveal Tandax and Foust hired this marketing firm in March 2005, many months after Tandax allegedly became inactive. Tandax continues to maintain the www.2savemoney.com domain. (Foust Deposition, P. 30, L. 22 – P. 31, L 14). Foust claims he owns and registered the www.divorcestopper.com domain which is active today. (Foust Deposition, P. 69, Ll. 3 – 21). The www.divorcestopper.com website, however, is copyrighted by Tandax, Inc. (Exhibit “4”,

2. Foust is the only employee or officer of Tandax. (Foust Deposition, P.84, L. 22 – P. 85, L. 4)

3. The sole purpose of Tandax was to provide mortgage leads to other businesses. (Foust Deposition, P. 7, L. 16 – P. 8, L.10)

4. Tandax and Foust only sold mortgage leads to Stecroft Holdings, Inc. as successor in interest to GoApply, Inc., d/b/a EleadZ (“Stecroft”) and The Loan Page (“Loan Page”). (Foust Deposition, P. 21, L. 23 – P. 22, L. 9)

5. Tandax and Foust claim they purchased the mortgage leads they sold from third parties. (Foust Deposition, P. 8, L. 21 – P. 10, L. 11).

6. Tandax and/or Foust cannot identify a single person or entity from whom they allegedly purchased these mortgage leads. (Foust Deposition, P. 62, L. 2 – P.63, L. 24; P. 13, L. 7-14).

7. Neither Tandax or Foust have any documents related to the mortgage leads they supposedly purchased or documents that identify any third party from whom they allegedly purchased these mortgage leads they, in turn, sold to Stecroft and Loan Page. (Foust Deposition,

<http://www.divorcestopper.com/PrivacyStatement.htm>). Throughout the Privacy Statement, www.divorcestopper.com is referred to as “the Tandax, Inc. website.” (Exhibit “4”, <http://www.divorcestopper.com/PrivacyStatement.htm>). Additionally, the Terms and Conditions for use of www.divorcestopper.com identifies the “owner and operator of this web site: Tandax, Inc., a Washington corporation.” (Exhibit “5”, <http://www.divorcestopper.com/Terms.htm>). The address for the USA Headquarters of DivorceStopper is 28610 NE 20th Ave, Ridgefield, Washington 98642. (Exhibit “6”, http://www.divorcestopper.com/Divorce_FAQ.htm). This is the same address on file with the Washington Secretary of State for the Registered Agent (Tim Foust) for Tandax, Inc. (Exhibit “7”, Tandax 000067). A link on the www.divorcestopper.com website titled “Affiliates” encourages affiliates of DivorceStopper to include a link to www.divorcestopper.com in emails (i.e. encourages the use of spam to promote the www.divorcestopper.com website and generate revenue). (Exhibit “8”, <http://www.divorcestopper.com/affiliate.htm>). This evidence contradicts Foust’s representation that Tandax is inactive and was only in existence between August 2003 and September 2004.

P. 60, L. 3 – P.63, L. 24; P. 67, L. 24 – P.68, L. 6).

8. Foust and Tandax could not produce an executed copy of any agreement with anyone related to the purchase of leads. (Foust Deposition, P. 10, L. 17 – P. 11, L. 22).

9. Neither Foust or Tandax have any memory of entering into a written mortgage lead agreement (Foust Deposition, P. 10, L. 17 – P.11, L. 22).

10. Tandax and Foust admit that all of the third parties they claim to have purchased mortgage leads from were “one hit wonders” and that they never had previous or subsequent dealings with these persons. (Foust Deposition, P. 13, L. 10 - P. 14, L. 10)

11. Tandax and Foust claim that when they purchased mortgage leads from these “one hit wonders” they always received assurances *before* they purchased the leads that their business practices for obtaining mortgage leads complied with all laws including the CAN-SPAM Act. (Foust Deposition, P. 13, L. 7 – P. 16, L. 24).

12. Tandax and Foust also claim that they never had an occasion arise that called into question whether the “one hit wonders” were telling the truth about their business practices. (Foust Deposition, P. 19, Ll. 6-10).

13. Foust *claims* that neither he nor Tandax have a memory of anyone *ever* telling them that they were selling mortgage leads which were generated by spam or in violation of federal or state law. In Tandax’s Declaration, Foust represents to this Court that “Tandax has never received a single complaint relating to unsolicited commercial email.” (Declaration, ¶ 16). When questioned if he would recall if someone had ever accused Foust or Tandax of selling mortgage leads that were obtained in violation of federal or state law, Foust responded “Yes, I believe it would have stuck out in my mind.” (Foust Deposition, P. 42, Ll. 16-17). They have never been aware of and nobody has suggested that they were selling mortgage leads acquired

through email. (Foust Deposition, P. 88, Ll. 7-12). Being accused of selling mortgage leads acquired through spam is something that they “absolutely” would remember. (Foust Deposition, P. 90, Ll. 6-16). Foust and Tandax have no memory of anyone ever saying that Tandax and/or Foust’s business practices were in violation of the law. (Foust Deposition, P. 42, L. 18 – P. 43, L. 3). Foust and Tandax claim the decision to quit selling mortgage leads to Stecroft was their decision and not anyone else’s. (Foust Deposition, P. 27, Ll. 12-14). They allegedly decided to get out of the mortgage leads business because they couldn’t make enough money. (Foust Deposition, P. 27, Ll. 15-21) These Defendants claim to have no knowledge, whatsoever, of any claim, allegations, or communications the substance of which relate to violations of the CAN-SPAM Act. (Foust Deposition, P. 41, L. 21 – P. 43, L. 3). Compare these claims of Tandax and Foust with Confidential Brief, ¶ 1².

14. Foust and Tandax claim they undertook efforts to ensure that any third party they dealt with complied with all laws, including the CAN-SPAM Act, and state laws regulating the transmission of unsolicited commercial email. (Declaration, ¶ 4). In deposition testimony, Defendants admitted their efforts consisted of telephone conversations with a person they had never before done business with and as Foust described were always “one hit wonders.” (Foust Deposition, P. 13, L. 10 – P. 14, L. 23; P. 18, L. 19 – P.20, L. 5). Compare Defendants’ statements with Confidential Brief, ¶ 1.

15. In his declaration, under the penalty of perjury, Foust states that Foust and Tandax “immediately terminated any broker which was the subject of a single complaint.” (Declaration, ¶ 4). The truth, however, is that neither Tandax or Foust *ever* terminated a broker or even communicated with a broker following the purchase of the mortgage leads concerning the CAN-

² Plaintiff has filed a request to file a portion of Plaintiff’s response by conventional filing but as of the filing of this Response, the Court has not yet ruled on this motion.

SPAM Act. (Foust Deposition, P. 19, Ll. 1-10; Exhibit “9”, Defendant Tim Foust’s Responses to Plaintiff’s Discovery Dated March 29, 2006, Interrogatory No. 18; Exhibit “10”, Defendant Tandax, Inc’s Responses to Plaintiff’s Discovery Dated March 29, 2006, Interrogatory No. 17).

16. “Tandax never conducted any business whatsoever in Oklahoma.” (Declaration, ¶ 6). Compare this statement with Confidential Brief, ¶ 2

17. “Tandax never generated any revenues from customers in the State of Oklahoma.” (Declaration, ¶ 15). Tandax sold leads to only Stecroft and Loan Page. (Foust Deposition, P. 21, L. 19 – P. 22, L. 9). Tandax was unable to produce evidence of the third parties from which it purchased data or provide the name of a single third party from whom it acquired information. Compare this statement with Confidential Brief, ¶ 2.

Foust’s Declaration has been controverted by Foust himself and the Confidential Brief.

III. THIS COURT HAS GENERAL JURISDICTION OVER TANDAX AND FOUST

The TAC alleged Tandax and Foust have had continuous and systematic contacts with Oklahoma. (TAC ¶ 8)

The activity by Tandax and/or Foust in Oklahoma, as set forth above and in the Confidential Brief, clearly meets the test for general jurisdiction because Tandax and/or Foust’s contacts with Oklahoma are “continuous and systematic.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-416 (1984).

The Tenth Circuit has described four factors used to assess a foreign corporation’s contacts with the forum state for purposes of general jurisdiction:

1. whether the corporation solicits business in the state through a local office or agent;
2. whether the corporation sends agents into the state on a regular basis to solicit business;

3. the extent to which the corporation holds itself out as doing business in the forum state, through advertisements, listings or back accounts;
4. the volume of business conducted in the state by the corporation.

Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1533 (10th Cir. 1996).

These factors were intended to assess the extent of physical presence and activity in the forum state, yet they apply with only slight modification to the Internet era.³ Tandax and/or Foust solicit business in Oklahoma through internet marketing which is readily available in Oklahoma. Rather than sending agents into Oklahoma to solicit this business Tandax and/or Foust do so through internet marketing which is readily available in Oklahoma. Tandax and/or Foust generate leads relating to Oklahoma residents or property and sold them to third parties, Stecroft and Loan Page. See also Confidential Brief, ¶ 2.

If Tandax and/or Foust had opened an office in Oklahoma, with a telephone, a sign on the door, and one or more employees from which it sold mortgage leads to customers who either walked in or telephoned, Tandax and/or Foust would clearly be said to be doing business in Oklahoma for purposes of general jurisdiction. The seminal case on general jurisdiction, *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 72 S.Ct. 413 (1952), held that the forum state could exercise general jurisdiction over a foreign mining corporation, headquartered in the Philippines. The foreign corporation had an office in the forum state from which it carried on business correspondence, sent money for business purchases, and otherwise carried on the supervision of the business. The fact that the corporation did not engage in actual mining in the forum state did not prevent the state from exercising general jurisdiction because the corporation had a physical

³ As the D.C. Circuit has noted, “Cyberspace ... is not some mystical incantation capable of warding off the jurisdiction of courts.... Just as our traditional notions of personal jurisdiction have proven adaptable to other changes in the national economy, so too are they adaptable to the transformations wrought by the Internet.” *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510-511 (D.C. Cir. 2002).

presence in the forum from which it conducted “continuous and systematic” supervision of the company’s foreign activities. *Id.* at 448. In fact, Tandax and/or Foust could be considered to be carrying on business in Oklahoma to an even greater degree than the foreign company in *Perkins* was carrying on its business in that forum state because Tandax and/or Foust were directing spam emails into Oklahoma for pecuniary gain rather than merely managing business operations located elsewhere.

The Tenth Circuit has adopted the “sliding scale” framework for evaluating general jurisdiction based on a defendant’s website. *Soma Med. Int’l v. Standard Chartered Bank*, 196 F.3d 1292, 1296 (10th Cir. 1999). Under this test personal jurisdiction is established when “a defendant clearly does business over the Internet,” such as entering into contracts which require the “knowing and repeated transmission of computer files over the Internet.” *Id.*, quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1123-1124 (W.D. Pa. 1997).⁴ Tandax and/or Foust, through their internet marketing (spam) clearly does business by selling information which is chosen, paid for, and received all over the Internet. This is the kind of “continuous and systematic general business contacts” required for general jurisdiction. *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 415-416.

General jurisdiction over an out-of-state defendant may exist as a result of doing business through a website located outside the forum state. The out-of-state defendant’s online brokerage website through which customers in the forum state engaged in electronic transactions with the defendant firm was held to be “doing business” within the forum state for purposes of exercising general jurisdiction. *Gorman v. Ameritrade Holding Corp.*, 293 F.3d at 512. Defendant out-of-

⁴ Although the “sliding scale” framework established in *Zippo Mfg., Inc.* was used by the *Zippo* court to analyze specific jurisdiction, it has since been adopted by other courts, including the Tenth Circuit for general jurisdiction as well.

state mail-order business with an interactive website as well as a toll-free number for ordering merchandise which resulted in significant sales in the forum was held to be subject to general jurisdiction. *Gator.com Corp. v. L.L. Bean*, 341 F.3d 1072, 1079-1080 (9th Cir. 2003), *rehearing en banc granted*, 366 F.3d 789 (9th Cir. 2004), *appeal dismissed as moot*, 396 F.3d 1125 (9th Cir. 2005 (*en banc*)). However, in the instant case there is no need to determine whether Tandax and/or Foust's out-of-state activities have sufficient effect inside Oklahoma because Tandax and/or Foust does business within Oklahoma via internet marketing and sold numerous leads relating to Oklahoma residents and/or property as well as several of the decoy leads sent to Plaintiff's servers. Neither Tandax or Foust deny Plaintiff's allegations that they sent the unlawful emails to Plaintiff's servers and that this was their business model.

IV. THIS COURT HAS SPECIFIC JURISDICTION OVER TANDAX AND FOUST

Tandax and Foust contend that they did not purposefully avail themselves of the privilege of conducting business in Oklahoma. Tandax and Foust's activities as detailed above and in the Confidential Brief confirm they purposefully availed themselves of the privilege of conducting activities within Oklahoma. When viewed in the light most favorable to Braver, all of the evidence indicates that Foust and Tandax sent unlawful emails into Oklahoma throughout the relevant time period.

The proper focus for analyzing the contacts between Tandax and Foust and Oklahoma is "whether they represent an effort by the defendant[s] to purposefully avail [themselves] of the privilege of conducting activities within [Oklahoma]." *Rambo v. American Southern Ins. Co.*, 839 F.2d 1415, 1419 (10th Cir. 1988) (*citing Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). "[I]t is essential that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and

protections of its laws.” *Id.*

The acts of Tandax and/or Foust are not “random,” “fortuitous,” or “attenuated” contacts. *Id.*⁵ Tandax and Foust did not deny sending emails to Oklahoma and admit that they direct their advertising to Oklahoma through email and internet marketing. The actions by Tandax and/or Foust create a “substantial connection” with Oklahoma. *Id.* “Purposeful avilment analysis turns upon whether the defendant’s contacts are attributable to his own actions or solely to the actions of the plaintiff... [and generally] requires ... affirmative conduct by the defendant which allows or promotes the transaction of business within the forum state.” *Id.* at 1420. The contacts by Tandax and/or Foust with Braver’s servers are attributable to emails sent to Braver’s servers to which Braver submitted a decoy which was sold, for profit, by Tandax and/or Foust. It is the actions of Tandax and Foust alone that create a substantial connection to Oklahoma. Here, Plaintiff has alleged and the only credible evidence shows Tandax and Foust directed their spam email activities towards Oklahoma and Braver’s servers. Defendants’ actions were intentional – they intended to spam the State of Oklahoma. The exercise of jurisdiction over Foust and Tandax does not offend the “traditional notions of fair play and substantial justice.” *International Shoe v. Washington*, 326 U.S. 310, 316 (1946). It is reasonable to exercise jurisdiction over Foust and Tandax based on their contacts with Oklahoma. Plaintiff has made a prima facie case of jurisdiction over these Defendants.

A. TANDAX AND FOUST PARTICIPATED IN THE CONSPIRACY TO

⁵ Tandax cites the Court to the recent Utah Supreme Court decision of *Fenn v. Mlead Enterprises, Inc.*, 2006 UT 8 (Utah 2006) in support of its argument that jurisdiction is improper. This case is distinguishable from *Fenn*, as in *Fenn*, the Court held that “an exercise of jurisdiction based on one email would be unfair and unreasonable.” 2006 UT 8, ¶ 9. The Court found that the single email at issue in *Fenn* created “an insubstantial contact.” *Id.* at ¶ 11. See Confidential Brief, ¶ 2. Here Plaintiff alleges Defendants contacts with Oklahoma have been continuous and systematic. Unlike *Fenn*, this is not about one email.

EVADE STATE AND FEDERAL LAWS

Plaintiff alleges in the TAC that the Defendants, including Foust and Tandax, conspired to send or cause to be sent thousands of illegal email messages to or through Braver's servers. "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 tortuous 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 TAC that Ameriquest and its co-conspirators, including Tandax and Foust, 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, Tandax, Foust, 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 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 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 were either sent or procured by Tandax and/or Foust and are evidence showing the existence of the conspiracy.

Tandax and/or Foust claim to have performed due diligence in investigating persons and entities from whom leads were purchased but yet never obtained information on the businesses nor had them sign any type of agreement. Foust claims that he and Tandax always received assurances from the persons and/or entities from whom they purchased leads that they person and/or entity was complying with all laws, including the CAN-SPAM Act, but admits that he never had even a single occasion arise where prudence required he revisit the truthfulness of lawful compliance claims after purchasing the leads. Foust admits that each one of these outfits from whom he purchased leads were “one hit wonders.” (Foust Deposition, P. 13, Ll. 10-22). Foust admits that of these third parties he never had previous or subsequent dealings with these fly-by-night persons or entities. Foust claims that he and/or Tandax never received a single complaint for spam. (Foust Deposition, P. 41, L. 21 – P. 43, L. 3) Compare with Confidential Brief, ¶ 1. The reality is that Tandax and Foust were their “one hit spam wonders.”

“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)). Here, all available evidence suggests that Tandax and/or Foust were the spammers and thereby performed substantial acts in furtherance of the conspiracy by sending unlawful emails into Oklahoma; therefore, jurisdiction over Tandax and Foust is established.

V. PLAINTIFF HAS STANDING TO PURSUE CAN-SPAM CLAIMS

A. Braver is a provider of Internet Access Service

The TAC 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 TAC 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 email servers are “protected computers” as defined by the federal Computer Fraud and Abuse Act, 18 U.S.C. § 103(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 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 redefined 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 Communications 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 incorporated or an entity. Individuals like 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 Tandax and Foust 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 Braver has alleged he offers in the TAC. The CAN-SPAM Act does not preclude Braver’s actions.

VI. FOUST IS A PROPER DEFENDANT

Foust alleges that he is not a proper defendant and should be dismissed from the action based on the contention that the TAC does not make any allegations against Foust. The TAC repeatedly alleged that Defendants, including Tandax *and* Foust sent the unlawful, fraudulent emails to Plaintiff's servers which are the subject of this litigation. (TAC, ¶¶ 1,18,19,27,28,56,126,132,137,141, and 146). It is unclear at this juncture if Foust was acting individually when selling data or as Tandax. See Confidential Brief, ¶ 4. There is a question of fact as to whether Foust was acting individually in his dealings or as an officer of Tandax.

WHEREFORE, the Plaintiff, Robert H. Braver, respectfully requests that this Court deny Defendants Tandax, Inc.'s and Tim Foust'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 FAX
mike@mckeelawfirm.com

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June 2006, a true and correct copy of the foregoing instrument was **mailed by depositing same in the U.S. Mail**, proper postage thereon fully prepaid, and addressed to:

<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 the Defendant</i> <i>Ameriquist Mortgage Company</i></p>	<p>Darren R. Cook Helms & Underwood 2500 First National Center 120 N. Robinson Ave. Oklahoma City, OK 73102 Darren@helmsunderwood.com <i>Attorney for Defendants Tandax, Inc.,</i> <i>Tim Foust and Lead Transfer, LLCt</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 the Defendant</i> <i>Ameriquist 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 jrussell@fellerssnider.com <i>Attorneys for Defendant</i> <i>Go Apply, Inc. d/b/a Eleadz</i></p>
<p>Patrick Gunn, Esq Courtney Nguyen, Esq. Cooley Godward, LLP 101 California Street, 5th Floor San Francisco, California, 94111 pgunn@cooley.com <i>Attorney for the Defendants The Loan Page,</i> <i>Inc., Go Apply, Inc. and Stecroft Holdings, Inc.</i></p>	<p>Joseph Leventhal, Esq James Patterson, Esq. Cooley Godward, LLP 4401 Eastgate Mall San Diego, California, 92121 jleventhal@cooley.com <i>Attorney for the Defendants The Loan Page,</i> <i>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 afhoge@meehoge.com bkw@meehoge.com cwc@meehoge.com <i>Attorneys for Defendant Lead Association, Inc.</i></p>	<p>Marie Johnston Phillip L. Free, Jr. Crowe & Dunlevy, P.C. 20 North Broadway, Suite 1800 Oklahoma City, OK 73102 Johnstom@crowedunlevy.com freephil@crowedunlevy.com <i>Attorney for International Webworks.com,</i> <i>L.L.C. and Innovative Marketing, Inc.</i></p>

Deborah K. Patterson Webb, Patterson and Tapella 906 G Street, Suite 630 Sacramento, California 95814-1813 dpatterson@probateattorneys.com <i>Attorney for LeadCorp</i>	Ryan D. Lapidus Daniel C. Lapidus Lapidus & Lapidus 211 South Beverly Drive, Suite 211 Beverly Hills, CA 90212 ryan@lapiduslaw.com dan@lapiduslaw.com <i>Attorney for The Wisdom Companies, LLC</i>
John E. Dowdell Norman Wohlgemuth Chandler & Dowdell 2900 Mid-Continent Tower Tulsa, OK 74103 <i>Attorneys for Lead2Net.Net, Inc.</i>	Charles L. McLawhorn, III McAfee & Taft Two Leadership Square, 10 th Floor 211 North Robinson Oklahoma City, OK 73102 Chad.mclawhorn@mcfeetaft.com <i>Attorney for The Wisdom Company, LLC</i>
Richard L. Rose Miller Dollarhide 100 Park Avenue, Second Floor Oklahoma City, OK 73102-8099 rrose@millerdollarhide.com <i>Attorney for Impact Web Enterprises, Inc.</i>	Leeanne N. Webster Gregory M. Saylin Fabian & Clendenin, P.C. 215 South State Street, Suite 1200 Salt Lake City, UT 84111 lwebster@fabianlaw.com <i>Attorneys for MoneyNest</i>
Lance Schneider Tomlinson & O'Connell, P.C. Two Leadership Square, Suite 450 211 North Robinson Oklahoma City, OK 73102 lances@tomlinsonconnell.com <i>Attorney for MoneyNest Holdings, Inc.</i>	Venkat Balasubramani Balasubramani Law 8426 40 th Ave. SW Seattle, Washington 98136 venkat@balasubramani.com <i>Attorney for Lead Transfer, LLC</i>
Tara L. Borelli Newman & Newman, Attorneys at Law, LLP 505 Fifth Avenue South, Suite 610 Seattle, Washington 98104 tara@newmanlaw.com <i>Attorney for Tandax, Inc. and Tim Foust</i>	John E Dowdell Norman Wohlgemuth Chandler & Dowell 401 S Boston Ave Suite 2900 Tulsa, OK 74103 <i>Attorney for Lead2.Net Inc.</i>

/s/ Luke Wallace

This is to certify that on the 8th day of June, 2006 a true and correct copy of the above and foregoing instrument was mailed by placing a copy of same in the United States mail, proper postage pre-paid thereon, and addressed to:

Nick Hetcher
N830 Pond Road
Marinette, WI 54143

/s/ Luke Wallace