

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

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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. )

**SUR-REPLY TO THE WISDOM COMPANIES COMPANIES, LLC'S MOTION TO  
DISMISS**

**COMES NOW** the Plaintiff, Robert H. Braver, by and through his counsel of record, and submits the following as his sur-reply to the Wisdom Companies, LLC's Motion to Dismiss for Lack of Personal Jurisdiction.

### **I. STATEMENT OF NEWLY DISCOVERED FACTS**

Plaintiff has discovered a relationship between the Wisdom Companies, LLC ("Wisdom") and [www.leadcherrypicker.com](http://www.leadcherrypicker.com), an Oklahoma-based website business, that was not disclosed in Wisdom Companies' Corporate Disclosure Statement (Document 174). With [LeadCherryPicker.com](http://LeadCherryPicker.com), Wisdom is advertising, soliciting, and doing business in Oklahoma. The newly discovered evidence exposes facts which explain the carefully worded Declaration of Mark McKendry (attached as Exhibit 1 to Wisdom Companies' Motion to Dismiss for Lack of Personal Jurisdiction (Document 175). Wisdom Companies relationship with [LeadCherryPicker.com](http://LeadCherryPicker.com) explains why Mark McKendry's Declaration did not deny that Wisdom Companies had continuous and systematic contacts with Oklahoma; that Wisdom's "marketing" business includes advertising and soliciting business for mortgage leads every day in Oklahoma through website and email activity; and that Wisdom is virtually doing business in Oklahoma.

The Wisdom Companies, LLC f/k/a Sunburn Marketing Group, LLC was added as a defendant in this case on August 25, 2005 (Document Number 75). In the year before Wisdom Companies was added as a defendant, it "owned and operated" [LeadCherryPicker.com](http://LeadCherryPicker.com) (Exhibit "1", [www.leadcherrypicker.com/contact](http://www.leadcherrypicker.com/contact); Exhibit "2", [www.leadcherrypicker.com/terms/](http://www.leadcherrypicker.com/terms/)). Today, the website boasts that "LeadCherryPicker: is owned and operated by Sunburn Marketing Group, LLC. The website is registered to and administered by a Britt Cordon from an office at 101 Park Avenue in Oklahoma City, with telephone number (405) 323-1320 (Exhibit "3", [www.whois.com/WhoisLookup.aspx?dnl=leadcherrypicker.com](http://www.whois.com/WhoisLookup.aspx?dnl=leadcherrypicker.com)) The domain name for this

website was created on April 24, 2004 (Exhibit "3"). The website states that its contents were copyrighted in 2004 by Sunburn Marketing Group, LLC (Exhibit "2"). The website (Exhibit "1") provides the physical address for LeadCherryPicker.com as:

c/o Sunburn Marketing Group, LLC  
21143 Hawthorne Blvd. #187  
Torrance, CA 90503

This address is the address for service of process on Sunburn that was registered with the California Secretary of State as of 2004 and the address where Sunburn was served in this litigation (Document Number 80).

Wisdom's claims that it never advertised in Oklahoma newspapers or magazines (Declaration, ¶ 13) may be true, but its silence on email and internet marketing in Oklahoma is a telling fact. The [www.LeadCherryPicker.com](http://www.LeadCherryPicker.com) website boasts that "LeadCherryPicker generates mortgage leads through a vast network of in-house and affiliate websites." (Exhibit "4", <http://www.leadcherrypicker.com/faq/index.php>) and "we receive hundreds and even thousands of leads daily. Our leads only come from verified affiliate websites and our own large network of lead generation websites." (Exhibit "4"). These statements show that Wisdom does not merely operate passive websites but has penetrated and permeated the Oklahoma market through its web presence. Wisdom with its large network of lead generation websites, only one of which is the LeadCherryPicker.com website, has reached out to Oklahoma and is subject to jurisdiction as a result.

The LeadCherryPicker.com website also reveals a relationship with Stormwest Network, an online marketing firm in Oklahoma City (Exhibit "1"; Exhibit "5", [www.stormwest.com/about/](http://www.stormwest.com/about/)). The website states that LeadCherryPicker.com is a "member" of both Stormwest Network and Sunburn Marketing Group, LLC (Exhibit A). The website

provides a telephone number for customer service inquiries for LeadCherryPicker.com – (877) 839-7273, which is answered as “Stormwest Corporation.” (Exhibit “1”). Stormwest Network is an Oklahoma corporation whose registered service agent is Cordon Britt at 101 Park Ave, Oklahoma City, OK, the same person at the same address who administers the LeadCherryPicker.com website (Exhibit “6”, Secretary of State, Business Entity Search).

The LeadCherryPicker.com website sells mortgage leads for mortgage brokers and lenders in 49 states, including Oklahoma (Exhibit “7”, [www.stormwest.com/news/?display=2&id=14](http://www.stormwest.com/news/?display=2&id=14); Exhibit “8”, [www.leadcherrypicker.com](http://www.leadcherrypicker.com)). The website requires registration by users who are then given a password for using the site (Exhibit “2”). A customer picks the state or states (including Oklahoma) in which the customer seeks leads for potential mortgage loan purchasers. The customer views the leads available for purchase and then purchases the leads through the website (Exhibit “9”, [www.leadcherrypicker.com/search/?OK=1](http://www.leadcherrypicker.com/search/?OK=1); Exhibit “10”, <http://www.leadcherrypicker.com/search/?OK=1>). On May 5, 2006, sixteen leads pertaining to Oklahoma were available for purchase with dates ranging from April 5 to May 4. On June 9, 2006, the number of leads pertaining to Oklahoma had grown to forty-seven leads, with dates ranging from May 15 to June 7. (Exhibit “10”; Exhibit “12”, Affidavit of Adrienne N. Cash “Cash Affidavit”, ¶ 11, 12). By clicking on the “Lead ID” detailed information about the lead, including name, contact information, mortgage amount, and amount sought, can be obtained (Exhibit “11”, [http://www.leadcherrypicker.com/search/view\\_lead.php?lead\\_id=277732&row\\_id=1](http://www.leadcherrypicker.com/search/view_lead.php?lead_id=277732&row_id=1); Cash Affidavit, ¶ 14).

## II. ARGUMENT

### A. THIS COURT HAS GENERAL JURISDICTION OVER WISDOM COMPANIES

This activity by Wisdom Companies in Oklahoma clearly meets the test for general jurisdiction because Wisdom Companies' 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 (10<sup>th</sup> 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.<sup>1</sup> Wisdom Companies solicits business in Oklahoma through its LeadCherryPicker.com website, the office for which is located in Oklahoma. Rather than sending agents into Oklahoma to solicit this business Wisdom Companies does so through its LeadCherryPicker.com website, which is located in Oklahoma. Wisdom Companies holds itself out as doing business in Oklahoma through its LeadCherryPicker.com website. Although Plaintiff does not now have evidence at this point of

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<sup>1</sup> 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).

the volume of business done by Wisdom Companies through the LeadCherryPicker.com website, that information can be obtained in discovery.

If Wisdom Companies 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, Wisdom Companies 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 presence in the forum from which it conducted “continuous and systematic” supervision of the company’s foreign activities. *Id.* at 448. In fact, Wisdom Companies 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 Wisdom Companies is generating income within Oklahoma rather than merely managing business operations located elsewhere.

Wisdom Companies is engaging in business in Oklahoma, has an office in Oklahoma, maintains a telephone number in Oklahoma (with (405) area code), and solicits business in Oklahoma. The fact that this business is done over a website rather than in a brick-and-mortar office building is not relevant for general jurisdiction purposes *when the website is operated from the forum state*. The presence of the computer or network service within the forum state has been determinative in finding jurisdiction over even an out-of-state defendant who stored files

and otherwise utilized the forum state computer system. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6<sup>th</sup> Cir. 1996). Even an inadvertent use of a forum state computer network service subjected a defendant to the forum's jurisdiction when the defendant routed its customer's email messages through the forum state's mail server. *Intercon, Inc. v. Bell Atlantic Int. Sol.*, 205 F.3d 1244 (10<sup>th</sup> Cir. 2000). Thus, the physical presence of the computer server over which the contact with the forum takes place is jurisdictionally significant. In this case, the physical presence of the website LeadCherryPicker.com is Oklahoma.

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 (10<sup>th</sup> 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).<sup>2</sup> Wisdom Companies, through its website LeadCherryPicker.com 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

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<sup>2</sup> 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.

general jurisdiction. *Gorman v. Ameritrade Holding Corp.*, 293 F.3d at 512. Defendant out-of-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 (9<sup>th</sup> Cir. 2003), *rehearing en banc granted*, 366 F.3d 789 (9<sup>th</sup> Cir. 2004), *appeal dismissed as moot*, 396 F.3d 1125 (9<sup>th</sup> Cir. 2005 (*en banc*)). However, in the instant case there is no need to determine whether Wisdom Companies' out-of-state activities have sufficient effect inside Oklahoma because Wisdom Companies does business within Oklahoma using a website operated from Oklahoma.

#### **B. THE COURT SHOULD CONSIDER THE EXHIBITS ATTACHED HERETO**

In its Objection to Plaintiff's Motion to File Sur-reply, Wisdom seeks to persuade the Court that the exhibits attached hereto are unauthenticated evidence and are inadmissible. The exhibits to which Defendant objects are documents which were obtained from the Internet in support of various assertions in this Sur-reply. The exhibits are supported by an affidavit from Adrienne N. Cash in the office of Plaintiff's Counsel stating that she retrieved the attached documents and that the web addresses stamped at the bottom of each exhibit were the addresses she retrieved the exhibits from. (Cash Affidavit, ¶¶ 2, 3, 4, 5, 6, 7, 8) See *Hood v. Dryvit Systems, Inc.*, 2005 WL 3005612, \*2 (N.D. Ill.) (a copy of *Hood* is attached hereto as Exhibit "13" for the Court's convenience). The Cash Affidavit complies with Federal Rule of Civil Procedure 56(e), which requires that affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that affiant is competent to testify to the matters states therein." *Fed.R.Civ.P. 56 (e)*. The Cash Affidavit is sufficient to authenticate the exhibits. In ruling on the Motion to Dismiss, this Court may consider any material that would be admissible or usable at trial. *Hood* \* 2 (*citing Smith v. City*

of *Chicago*, 242 F.3d 737, 741 (7th Cir. 2001). “Authentication, a prerequisite for admissibility, ‘is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.’” *Hood* \* 2 (citing *Fed.R.Evid. 901(a)*). Had Wisdom been forthcoming in its declaration, Plaintiff would have sought discovery about LeadCherryPicker and its “large network of lead generation websites,” which would have provided authentication through Wisdom.

Following the filing of the Motion to File Sur-reply, Wisdom has altered the LeadCherryPicker.com website to remove references to Sunburn Marketing Group, LLC. (See Exhibits “1” and “14”; Cash Affidavit, ¶ 9). However, while on the face of the website, all references to Sunburn Marketing Group, LLC’s affiliation with LeadCherryPicker.com have been removed, the “Terms and Conditions” page of [www.leadcherrypicker.com](http://www.leadcherrypicker.com) states “the LeadCherryPicker (the ‘Site’) owned and operated by Sunburn Marketing Group, LLC.” and “All contents of this Web site are: Copyright © 2004 Sunburn Marketing Group, LLC 21143 Hawthorne Blvd, # 187 Torrance, CA 90503, U.S.A.” (Exhibit “15”, [www.leadcherrypicker.com/terms](http://www.leadcherrypicker.com/terms); Cash Affidavit, ¶ 10).

The documents attached hereto as Exhibits “1”, “2”, “3”, “4”, “5”, “6”, “7”, “8”, “9”, “10”, “11”, “14”, and “15” are admissions against Wisdom’s interest within the Federal Rules of Evidence. *Fed. R. Evid. 804(b)(3)*. As such, this Court may take judicial notice of the documents under Rule 201 of the Federal Rules of Evidence. “Pursuant to Fed. R. Evid. 201(b) and (d), the court, upon request by one of the parties, must take judicial notice of facts ‘capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’ If the requesting party supplies the court with the necessary information.” *Emery v. Northeast Illinois Regional Commuter Rd. Corp*, Case No. 02C9309, fn 2 (N.D. Ill. 2004) (a

copy is attached hereto as Exhibit "16" for the Court's convenience). See also *Twentieth Century Fox Film Corp. v. Marvel Enterprises, Inc.*, 220 F. Supp.2d 289, 296 n.9 (S.D.N.Y. 2002) ("The Court takes judicial notice of the content of the web sites.... In an effort to take into account all facts that could support Marvel's claims, the Court considers the content of the web sites at the time the instant motion was filed, as well as on the date of this Order." (internal citations omitted)); *Grimes v. Naivgant Consulting, Inc.* 185 F. Supp.2d 906, 913, n.7 ("[T]he Seventh Circuit has approved taking judicial notice of reliable information published on the internet." (internal citations omitted)). Wisdom has not presented any evidence to controvert the accuracy of the [www.leadcherrypicker.com](http://www.leadcherrypicker.com) website nor the [www.stormwest.com](http://www.stormwest.com) website. As such, Plaintiff requests the Court take judicial notice of Exhibits "1", "2", "3", "4", "5", "6", "7", "8", "9", "10", "11", "14", and "15." If the Court has serious concerns about the authentication of the Exhibits attached hereto, Plaintiff requests the opportunity to conduct additional discovery in the form of subpoenas and deposition testimony.

Respectfully submitted,

s// Luke J. Wallace

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>th</sup> 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:

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/s/ Luke Wallace

This is to certify that on the 12<sup>th</sup> 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