

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA**

ROBERT H. BRAVER, an individual,

Plaintiff,

v.

AMERIQUEST MORTGAGE COMPANY, a
Delaware corporation, et al,

Defendants.

No. CIV-04-1013-W

**REPLY TO PLAINTIFF'S
RESPONSE TO MOTION AND
MEMORANDUM TO DISMISS OF
TIM FOUST AND TANDAX, INC.**

AMERIQUEST MORTGAGE COMPANY, a
Delaware corporation,

Cross-Complainant,

v.

INNOVATIVE MARKETING, INC. d/b/a
LEAD EXTREME, a Washington corporation, et
al,

Cross-Defendants

I. INTRODUCTION

In accordance with this Court's June 13, 2006 order, Defendants Tim Foust and Tandax, Inc. (together, "Tandax") reply to Plaintiff's Response to Motion and Memorandum to Dismiss of Tim Foust and Tandax, Inc. (the "Response"). After two years of discovery, Plaintiff Robert Braver's ("Plaintiff") sole evidence in support of jurisdiction is a co-defendant's self-serving allegations that Tandax¹ provided leads relating to Oklahoma residents. To this day, there is no evidence Tandax ever sent any "spam emails". Moreover, Tandax denies all allegations of spamming in its answer ("Answer") to Plaintiff's Third Amended Complaint ("TAC"). This Court should put an end to Plaintiff's frivolous prosecution of this case with no supporting

¹ Unless specifically provided otherwise, all references to "Tandax" herein also refer to Tim Foust.

evidence by dismissing Tandax without delay.

II. PLAINTIFF'S FACTUAL MISSTATEMENTS

The facts alleged in Plaintiff's Response are replete with misstatements and factual errors. Some of the more egregious examples include the following:

A. PLAINTIFF'S ALLEGED EVIDENCE IS SELF-SERVING AND INCONSISTENT.

The only evidence Plaintiff cites in support of his jurisdictional arguments is the Confidential Brief ("Confidential Brief") referred to in his Response. The Confidential Brief claims Tandax provided a co-defendant, Stecroft Holdings, Inc. ("Stecroft") with five of the "decoy leads" Plaintiff allegedly provided in response to spam emails. (Confidential Brief ¶ 2.) These allegations, however, are of little credibility. The TAC itself makes directly contradictory statements about two of the decoy leads. The TAC alleges the "Clayton Fountain" decoy was purchased from International Webworks, LLC (TAC ¶ 93), and the "Ron Bartles" decoy was purchased from Lead2Net (TAC ¶ 89). Moreover, the 497 leads allegedly sold by Tandax to Stecroft Holdings, Inc. ("Stecroft") are of dubious credibility. William Baskin provides no foundation or authentication for the string of unidentified mortgage leads. (Declaration of William Baskin ("Baskin Decl.") ¶ 4.) Nor is there any indication on the face of the leads that Tandax was the source. (Baskin Decl. ¶ 4, Ex. 9.) Even more curious, the leads provided by Baskin extend to January 24, 2005, four months after Mr. Baskin claimed to have terminated the business relationship with Tandax on September 27, 2004. (Baskin Decl. ¶ 3; Ex. 9.) These purported leads should accordingly be disregarded by the Court.

The allegations in the Confidential Brief are made by a co-defendant with a motive to deflect potential liability. Even if the allegations in the Confidential Brief were true, they would only indicate the sale of marketing leads to a Nevada corporation. (TAC, ¶ 38.) There is no evidence that Tandax ever transmitted spam or caused spam to be transmitted to an Oklahoma

server, and Tandax denies any allegations to the contrary. (*See, e.g.*, Answer, 2: ¶ 13; 3: ¶ 23; 3: ¶ 27; 8: ¶ 74; 15: ¶¶ 126, 128.) Tandax has never done business in the state of Oklahoma. (*See* Dkt. #266, Declaration of Tim Foust in Support of the Motion to Dismiss of Tim Foust and Tandax, Inc. (“Foust Decl.”) ¶¶ 5-16.)

B. PLAINTIFF MISCITES HIS OWN AFFIDAVIT.

Plaintiff implies the Braver Affidavit (“Braver Affidavit”) filed in support of the Response indicates Ameriquest’s in-house counsel, Rick Davies, “admitted that he was aware that Ameriquest affiliates, which include Tandax and Foust, send large email marketing campaigns” (emphasis added). (Response at 2.) In truth, the affidavit does not attribute any email marketing campaigns specifically to Tandax or Foust. (Braver Affidavit ¶ 9.) There is no evidence that Tandax was ever involved in email marketing.

C. PLAINTIFF CONTRADICTS HIS OWN EXHIBITS.

Plaintiff’s Response provides that, “Foust claims that Tandax is a now inactive Washington corporation... This representation is not accurate.” (Response at 5.) Plaintiff then recites a litany of extraneous allegations about unrelated websites. (*Id.* at 5 fn. 1.) These attempts to tarnish Tandax cannot change the plain fact of Tandax’s inactive status. Plaintiff’s own Exhibit 7, a printout from the Washington Secretary of State’s website, clearly indicates Tandax is an inactive Washington corporation. In any event, none of these allegations relate to jurisdiction.

D. PLAINTIFF INCORRECTLY CLAIMS BLANKET ALLEGATIONS ARE SPECIFIC TO TANDAX.

In his Response, Plaintiff claims the TAC alleges facts sufficient to support a claim that Tandax “sent ... emails” in violation of the law. (Response at 4.) However, as Plaintiff concedes in the Response, the TAC does not make any specific allegations regarding Tandax or Foust. It makes repeated blanket references to “Defendants”, but alleges no specific facts relating to

Tandax's purported unlawful actions. (*Id.*) Indeed, Plaintiff could not make such allegations against Tandax, Inc. or Tim Foust because they were not involved in sending any email, and have no connections to Oklahoma.

E. PLAINTIFF CONSISTENTLY ASSUMES THE CONCLUSION HE IS REQUIRED TO PROVE.

Plaintiff incessantly repeats his allegations as if that were sufficient to make them true. For example, with no support, he alleges "Tandax and/or Foust were directing spam emails into Oklahoma", and claims "Tandax and/or Foust" are responsible for "internet marketing (spam)..." (Response at 11.) Tandax denies these allegations (*see, e.g.*, Answer, 2: ¶ 13; 3: ¶ 23; 3: ¶ 27; 8: ¶ 74; 15: ¶¶ 126, 128), and a careful review of the Response reveals Plaintiff does not cite a single document supporting his baseless allegations. After nearly two years of litigating this case and special jurisdictional discovery of Tandax, Plaintiff has failed to discover even one of the spam emails allegedly sent by Tandax.

III. ARGUMENT

Plaintiff has failed to allege contacts sufficient to establish general jurisdiction over Tandax, despite multiple amendments of his Complaint. Plaintiff also fails to establish Tandax "purposely directed" its activities at Oklahoma residents, which is a prerequisite to specific jurisdiction. Essentially, Plaintiff argues that because Tandax's business is related to the Internet, Tandax can reasonably expect to be haled into court anywhere in the United States. Plaintiff's theory is entirely without support, and has a plainly inequitable result – requiring Tandax to defend against a baseless lawsuit in a jurisdiction where it has never done business.

A. THIS COURT LACKS JURISDICTION OVER TANDAX.

1. Plaintiff Has Not Demonstrated General Jurisdiction Over Tandax.

Plaintiff cites the four factors the Tenth Circuit considers to assess general jurisdiction over a foreign corporation, but cannot cite evidence satisfying a single factor:

1. Whether the corporation solicits business in the state through a local office or agents;
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 bank accounts; and
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). Tandax does not solicit business in Oklahoma through a local office or agent. (Dkt. #266, Foust Decl. ¶¶ 7-8.) Tandax has never sent agents into Oklahoma to solicit business, let alone on a regular basis. (Id. at ¶ 14.) Tandax did not have any telephone or facsimile numbers in Oklahoma, did not advertise in Oklahoma newspapers or magazines, and did not otherwise hold itself out as doing business in Oklahoma. (Id. at ¶¶ 9-10.) Tandax did not conduct any business whatsoever in Oklahoma. (Id. at 6.)

Plaintiff alleges that Tandax has subjected itself to general jurisdiction by engaging in “internet marketing which is readily available in Oklahoma”. (Response at 10.) Plaintiff provides no evidence to support this conjecture, and in fact relies upon irreconcilable evidence. Plaintiff’s Response cites Tandax’s sole source of leads as purchases from third parties (Response, 6: ¶¶ 4-5), not internet marketing. Plaintiff’s discovery and deposition of Tandax has not produced a scintilla of evidence to the contrary. Even assuming all such evidence is accurate – which Tandax denies – there is still no basis for general jurisdiction. Plaintiff alleges Tandax sold marketing leads to a Nevada corporation with principal offices in California. (Response at 6 ¶ 4; TAC 9 ¶ 38.) Pursuant to Trierweiler, supra, this is plainly insufficient.

The legal authority Plaintiff cites is similarly inapposite. The “seminal” case upon which Plaintiff relies (Response at 10) involved a corporation with an office in the forum state from which it transmitted business correspondence, sent money for business purchases, held directors’ meetings, paid salaries and supervised the business. Perkins v. Benguet Mining Co., 342 U.S. 437, 445 (1952). None of those circumstances exist here. The Soma opinion Plaintiff cites

(Response at 11) requires an active website through which the defendant enters into contracts with residents of the forum state and engages in the “knowing and repeated transmission of computer files over the Internet.” Soma Med. Int’l v. Standard Chartered Bank, 196 F.3d 1292, 1296 (10th Cir. 1999). Tandax did not have an active website soliciting contracts with Oklahoma residents, and did not knowingly transmit files to any Oklahoma resident. (Foust Decl. ¶ 6.) Nor does Plaintiff cite any authority for the proposition that selling leads, which purportedly relate to Oklahoma residents, constitutes “doing business in Oklahoma”. Plaintiff’s own authority, in fact, suggests otherwise. Tandax did not direct activities toward Oklahoma residents, and denies Plaintiff’s baseless allegations “that they sent the unlawful emails to Plaintiff’s servers and that this was their business model.” (Response at 12; Answer, 2: ¶ 13.) Once again, Plaintiff’s sole supporting evidence is that Tandax sold leads to a Nevada corporation – a proposition which has been denied and is wholly inadequate to support general jurisdiction. (Response at 6 ¶ 4.)

2. There Is No Specific Jurisdiction.

Plaintiff relies upon the same groundless claim that “Foust and Tandax sent unlawful emails into Oklahoma throughout the relevant time period” to support specific jurisdiction. (Response at 12.) Tandax denies all such allegations (*see, e.g.*, Answer, 2: ¶ 13; 3: ¶ 23; 3: ¶ 27; 8: ¶ 74; 15: ¶¶ 126, 128), and Plaintiff presents no evidence to the contrary. The Tenth Circuit simply does not support a finding of jurisdiction upon such circumstances. In the Internet context, the Tenth Circuit has found specific jurisdiction where a party purposefully directed mass email through a server in Oklahoma, with actual knowledge of the server’s location. Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc., 205 F.3d 1244, 1248 (10th Cir. 2000). Actions that fall short of that conduct have been found not to support specific jurisdiction, and Plaintiff does not provide any contrary authority.

The Utah Supreme Court recently examined this issue and held that a person who

transmits a single email without knowledge of the residence of the recipient is not subject to specific jurisdiction. Fenn v. Mleads Enterprises, Inc., 2006 UT 8, *1 (Utah 2006). Plaintiff attempts to distinguish the Fenn case (Response at 13 n. 5), but cannot produce even one alleged spam email from Tandax despite two years of litigation and liberal jurisdictional discovery. Plaintiff assumes, with no evidence, that if Tandax sold Oklahoma leads, those leads could only have been generated through “spam emails”, and not through any lawful means. To the contrary, leads may be generated through good faith purchase from other parties, which was always Tandax’s business practice. (Foust Decl. ¶ 4.) Tandax did not generate leads through spam, nor did it knowingly purchase leads generated by spam. (Id.; (see, e.g., Answer, 2: ¶ 13; 3: ¶ 23; 3: ¶ 27; 8: ¶ 74; 15: ¶¶ 126, 128.) Plaintiff’s wishful assumptions are insufficient to establish jurisdiction.

3. Maintenance of This Lawsuit Against Tandax Offends Due Process.

“The defendant's contacts with the forum State must be such that maintenance of the suit ‘does not offend ‘traditional notions of fair play and substantial justice’”. Rambo v. American Southern Ins. Co., 839 F.2d 1415, 1417 (10th Cir. 1988) (*emphasis added*) (*citations omitted*). Plaintiff urges the Court to exercise jurisdiction over a party that has never done business in Oklahoma, has never sent email to Oklahoma, and has not in any other way availed itself of the forum state. (Foust Decl. ¶¶ 6-15) Exercising jurisdiction over a party who merely sold mortgage leads to a company in Nevada would be to rely upon precisely the “random, fortuitous [and] attenuated” contacts that offend due process. Pro Axess, Inc. v. Orlux Distribution, Inc., 428 F.3d 1270, 1279 (10th Cir. 2005). Tandax requests this Court preserve its due process rights against such an arbitrary and unfair exercise, and dismiss it from this case.

B. PLAINTIFF HAS NO SUPPORT FOR HIS CONSPIRACY THEORY OF JURISDICTION.

Plaintiff bears the burden of establishing personal jurisdiction over the defendant.

Kuenzle v. HTM Sport-Und Freizeitgerate AG, 102 F.3d 453, 456 (10th Cir. 1996) (*quoting* Behagen v. Amateur Basket Ass'n of the United States, 744 F.2d 731, 733 (10th Cir. 1984); *see also* Bell Helicopter Textron, Inc. v. Heliquest Int'l, Ltd., 385 F.3d 1291, 1295 (10th Cir. 2004) (“The burden of establishing personal jurisdiction over the defendant is on the plaintiff”). To demonstrate a conspiracy theory of jurisdiction, Plaintiff must demonstrate (1) a “prima facie showing” of a conspiracy; (2) allege specific facts warranting the inference of membership in the conspiracy; and (3) show that the defendant’s co-conspirator committed a tortious act pursuant to the conspiracy in the forum. Clark v. Tabin, 400 F.Supp.2d 1290, 1297 (D. Okla. 2005). The “mere allegation of conspiracy, without some sort of prima facie factual showing of a conspiracy, cannot be the basis of personal jurisdiction of co-conspirators outside the territorial limits of the court.” Baldrige v. McPike, Inc., 466 F.2d 65, 68 (10th Cir. 1972).

Plaintiff confuses a “prima facie showing” with mere allegations (Response at 14). Plaintiff’s allegations provide that “all available evidence suggests that Tandax and/or Foust were the spammers” and participated in the conspiracy by sending spam email to Oklahoma. (Response at 16.) Plaintiff cites to no evidence, and Oklahoma courts have specifically rejected such allegations standing alone as the basis for conspiracy jurisdiction. Rather than providing any evidence of Tandax’s alleged spamming, Plaintiff’s evidence shows at most that Tandax sold mortgage leads. This is simply insufficient to provide the “prima facie factual showing” necessary to demonstrate Tandax’s involvement in the transmission of spam, or collusion with other parties to transmit it.²

² Contrary to Plaintiff’s allegations, the email Plaintiff relies upon (Baskin Decl., Ex. 1) to support jurisdiction contravenes any theory of concerted action to send spam email. Mr. Baskin’s email terminates his business relationship with Tandax based on the mortgage leads allegedly provided by Tandax – an action that controverts Plaintiff’s speculation regarding a conspiracy to effect a common purpose.

C. PLAINTIFF FAILS TO STATE A CLAIM AGAINST TANDAX OR FOUST.

Plaintiff has failed to present even a shred of evidence that Tandax “initiated the transmission” of spam, an essential element of the CAN-SPAM Act (15 U.S.C. § 7704) and Plaintiff’s related state law claims. Nor has Plaintiff demonstrated any likelihood that Tandax conspired to transmit spam email. Instead Plaintiff merely offers blanket allegations, which are wholly insufficient to state a claim. Full Draw Productions v. Easton Sports, Inc., 182 F.3d 745, 755 (10th Cir. 1999) (“Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant antitrust language to state a claim for relief”) (*citations omitted*); Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) (“Unsupported conclusory allegations” are insufficient to state a claim). Moreover, Plaintiff’s claims, which sound in fraud, are insufficient to meet Rule 9(b)’s particularity requirement. Brooks v. Bank of Boulder, 891 F.Supp. 1469, 1480 (D. Colo. 1995) (A claim sounding “in fraud” must be pled with particularity). Tellingly, Plaintiff’s Response leaves this argument unaddressed. Plaintiff fails to state a claim against Tandax, and those claims must be dismissed as a matter of law.

D. PLAINTIFF HAS NO STANDING TO PURSUE HIS CAN-SPAM CLAIMS.

Plaintiff “acknowledges that the CAN-SPAM Act does not . . . authorize an individual internet user . . . to bring a civil action.” (Response at 17.) Plaintiff agrees with Tandax that enforcement is limited to a “provider of Internet Access Service” (Response at 17), but continues to insist that he should be permitted to circumvent these restrictions. Plaintiff provides no authority supporting his creative interpretation of a “service provider” under the Act. Accepting his arguments would require this Court to make the lone ruling permitting an individual to evade the clear legislative history of the statute. REPORT OF COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION ON THE CAN-SPAM ACT of 2003 (July 16, 2003), 108 S. Rep. 102 (enabling “State attorneys general and [Internet Service Providers] to bring actions against

violators”).

Plaintiff leaves unaddressed the observation that the CAN-SPAM Act provides only for FTC enforcement where the identity of the person who initiated the emails is unknown. In fact, the CAN-SPAM Act leaves enforcement solely in the hands of the FTC where a business is promoted through unlawful commercial email. 5 U.S.C. 7705(c). The crux of Plaintiff’s Complaint is Plaintiff’s allegations that Ameriquest Mortgage Company (“Ameriquest”) and others profited from leads generated by spam sent by unknown parties. (*See, e.g.*, TAC, ¶¶ 10, 73, 120.) These allegations fall squarely the exclusive enforcement province of the FTC. Plaintiff offers no evidence or authority to the contrary, and the CAN-SPAM Act claims should accordingly be dismissed.

E. FOUST IS NOT A PROPER DEFENDANT.

Unlike other legislative schemes, the CAN-SPAM Act does not provide individual liability for directors, officers or agents. (*Cf.* Federal Food, Drug, Cosmetic Act of 1938, 21, U.S.C. §§ 301-392; Antitrust laws, 15 U.S.C. § 24; Vehicle identification system laws, 46 U.S.C. § 12507(d)). As a matter of law, the sole remaining basis for individual liability against Tim Foust is a piercing of the corporate veil. Plaintiff misleadingly obscures the issue by arguing there “is a question of fact” as to whether Foust acted individually. (Response at 18.) Nowhere does Plaintiff allege a misuse of the corporate form justifying piercing the veil, and the issue must accordingly be determined as a matter of law. Because the CAN-SPAM act conspicuously fails to provide for individual liability, Mr. Foust should be dismissed from this suit.

IV. CONCLUSION

Plaintiff’s Confidential Brief invites the Court to “Imagine how many spam emails were sent to generate” the Oklahoma leads allegedly sold by Tandax. (Confidential Brief at 3). That theory is imaginative indeed. Plaintiff supplies not a scrap of evidence to support this whimsy.

Something more than hypothetical conjecture is required to exercise jurisdiction over Tandax. Plaintiff has failed to supply the Court with anything remotely resembling the necessary showing, and Tandax respectfully requests that the Court dismiss it from this suit.

DATED this 19th day of June, 2006.

Respectfully Submitted,

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