

**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. )

**PLAINTIFF’S RESPONSE TO MOTION TO DISMISS AND BRIEF IN SUPPORT OF  
LEAD2NET.NET, INC.**

**COMES NOW** the Plaintiff, Robert H. Braver, and in response to the Motion to Dismiss and Brief in Support of Lead2net.net, Inc. (“Lead2”) 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). From July 2003 through the date of this Response, Plaintiff’s servers have received many thousands unlawful mortgage spam (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 “Ron Bartles” (Braver Affidavit ¶ 6, 10, TAC ¶ 78). After the decoys were submitted, Braver received a phone call from Ameriquest’s employees seeking to sell a mortgage to almost all decoy names. (Braver Affidavit, ¶ 6, 9, 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, ¶ 8). Rick Davies, in Ameriquest’s legal department, admitted that he was aware that Ameriquest affiliates, which include send large email marketing campaigns but claimed that Ameriquest was not liable for the emails sent by “third parties”. (Braver Affidavit, ¶ 8).

In January 2004, Braver received an unlawful spam, purportedly from a "lo4x17rhcomet" at [coxkxdzjam\\_24546@juno.com](mailto:coxkxdzjam_24546@juno.com) (Braver Affidavit, ¶11 and Attachment "1" thereto). This email was directed to Braver's servers in Oklahoma (Braver Affidavit, ¶ 11). This email was addressed to an email address, used by Braver's wife, obviously tied to Oklahoma: [secondchance@ohww.norman.ok.us](mailto:secondchance@ohww.norman.ok.us). (Braver Affidavit, ¶ 11). This spam was one of several fraudulent spam emails that Braver received that had similar characteristics and appeared to have been sent by the same person or persons (Braver Affidavit, ¶¶ 12, 14).

Braver responded to this spam by clicking on the textual link embedded in the spam email, which took him to the [www.onlinegrantshere.com](http://www.onlinegrantshere.com) website. (Braver Affidavit, ¶ 12). Braver filled in the webpage form using the "decoy" information of Ron Bartles at an address in St. Louis, Missouri with a telephone number of (314) 754-7458 (Braver Affidavit, ¶ 12). Braver received a return call from Ameriquest. (Braver Affidavit, ¶ 13).

Lead2 has admitted that it purchased the Ron Bartles lead, which it then sold to Ameriquest (Affidavit of Nicholas Passalacqua, ("Passalacqua Affidavit"), Exhibit 2, ¶ 17). Lead2 describes the source of the Ron Bartles lead as "an unrelated, independent lead supplier which is not an agent of or controlled by Lead2." (Passalacqua Affidavit, ¶ 17). However, in its response to Braver's discovery request for the name and contact information of the supplier from which Lead2 purchased the Ron Bartles lead, Lead2 responded: "After a search of its business records, Lead2 does not have any information from which to answer this Interrogatory." (Defendant Lead2net.net, Inc.'s Supplemental/Amended Responses to Plaintiff's Interrogatories, "Supplemental Responses") Exhibit 3, Response to Interrogatory No. 2). Lead2 also stated that it "had no information from which to answer" the Interrogatory requesting the number of leads purchased from the source of the Ron Bartles lead. (Supplemental Responses, Interrogatory No.

8). Finally, in response to the Interrogatory asking whether Lead2 had a written agreement with the source of the Ron Bartles lead, Lead2 responded that it “no longer possesses a ‘written agreement’ responsive to this Interrogatory, nor does it have any other information from which to answer this Interrogatory.” (Supplemental Responses, Interrogatory No. 9).

Although Lead2 characterizes itself as an “intermediary” or “middleman” between vendors (Brief at 2), its activities are more extensive than that. It has generated its own leads and has sold leads directly to mortgage clients (Passalacqua Affidavit, ¶¶ 6, 13).

Lead2’s website [www.lead2net.net](http://www.lead2net.net) markets mortgage leads to mortgage brokers and mortgage companies. (Lead2net.net’s website pages 01 -10, (“Website”), admitted as genuine in Responses to Requests for Admission, Request No. 5, Exhibit 4). Lead2’s website does not state that it excludes Oklahoma leads.

Lead2’s owner Nicholas Passalacqua also owns the website [www.emortgagetree.com](http://www.emortgagetree.com) (Passalacqua Affidavit, ¶ 6; Supplemental Responses, Interrogatory Nos. 7, 10). Lead2 admits that it used [www.emortgagetree.com](http://www.emortgagetree.com) to generate mortgage leads, but claims that it did so only between June 20, 2005 and August 8, 2005 (Passalacqua Affidavit, ¶ 6). However, the Lead2 website currently states that the leads it sells “are generated from Emortgagetree.com” in addition to leads received through various sources including: Google, Yahoo, and Email Marketing (Website, page 08).

The home page of the website [www.emortgagetree.com](http://www.emortgagetree.com) has a button to click to “Apply” which takes the user directly to an application for a mortgage from Ameriquest. (Affidavit of Laura Emily Frossard, Exhibit 5, and attachments).

Lead2 admits that it has sold mortgage leads “for which a person in Oklahoma provided information.” (Supplemental Responses, Interrogatory No. 12). Lead2 has provided limited

information in response to the Interrogatory requesting the number of leads it sold for which a person in Oklahoma provided information. Lead2's website has been in operation since March 2003 (Passalacqua Affidavit, ¶ 13). Yet, it has provided the number of leads sold for only two specific time periods:

<u>Time Period</u>	<u>Oklahoma leads sold</u>	<u>Total leads sold</u>
September 9, 2005 – April 26, 2006	425	47,845
April 27, 2006 - July 25, 2006	3	826

(Supplemental Responses, Interrogatory No. 12).

Lead2 stated that it did not have any records for the period before September 9, 2005.

(Supplemental Responses, Interrogatory No. 12).

Only in November 2005 did Lead2 begin requiring the vendors from which it bought leads to sign a contract stating that the lead information was lawfully acquired (Passalacqua Affidavit, ¶ 15).

Lead2 has admitted that it advertised its website on Google from June 20 to August 9, 2005, and further admits that this advertising did reach Oklahoma, since it obtained a mortgage lead from Oklahoma as a result of this advertisement (Supplemental Responses, Interrogatory No. 13). Lead2 also admits that it “may have advertised” on Yahoo before the time period in which it advertised on Google, but states that it has no documents relating to the Yahoo advertisements (Supplemental Responses, Interrogatory No. 13).

## II. THIS COURT HAS GENERAL JURISDICTION OVER LEAD2

Lead2 meets the test for general jurisdiction because its 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> Lead2 solicits business in Oklahoma through internet marketing which is readily available in Oklahoma. Rather than sending agents into Oklahoma to solicit this business Lead2 does so through internet marketing which reaches Oklahoma. Lead2 has trafficked in mortgage leads targeting Oklahomans that it purchased from others and has generated leads relating to Oklahoma residents or property and sold them to third parties. (Passalacqua Affidavit, ¶¶ 13, 14). If Lead2 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,

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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).

Lead2 would clearly be said to be doing business in Oklahoma for purposes of general jurisdiction.

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> Lead2, through its internet marketing, 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.

At the other end of the sliding scale is “a passive Web site that does little more than make information available to those who are interested in it” which is not enough for personal jurisdiction. *Soma Med. Int’l*, 196 F.3d at 1296, quoting, *Zippo Mfg. Co.*, 952 F.Supp. at 1123-1124. Lead2’s website is clearly more than “passive”; it engages in the sale of mortgage leads through the [www.lead2net.net](http://www.lead2net.net) website and obtains mortgage leads through the [www.emortgagetree.com](http://www.emortgagetree.com) website.

These two websites are “interactive” websites where a user can exchange information with the host computer. Whether personal jurisdiction is appropriate based on an interactive website depends upon the “level of interactivity and commercial nature of the exchange of

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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.

information that occurs on the Web site.” *Soma Med. Int’l*, 196 F.3d at 1296, quoting, *Zippo Mfg. Co.*, 952 F.Supp. at 1123-1124.

Lead2 argues that it does not conduct business in Oklahoma because of all the contacts that it does not have with Oklahoma: no office, no bank account, no telephone, no stockholders, etc. (Brief at 2-3). However, Lead2 has *not* shown that it has avoided trafficking in mortgage leads relating to Oklahomans or Oklahoma property.

Lead2 admits that it has generated mortgage leads. (Passalacqua Affidavit, ¶ 6). Although Lead2 asserts that it only generated mortgage leads for a short period of time, June 20 to August 8, 2005 through [www.emortgagetree.com](http://www.emortgagetree.com) (Passalacqua Affidavit, ¶ 6), the lead2net.net website states that “Our leads are generated from Emortgagetree.com” and “[i]n addition, we also receive leads through *[inter alia]*...email marketing.” (Website page 08). This website is accessible in Oklahoma.

Lead2 admits that it advertised its website on Google from June 20 to August 9, 2005, and further admitted that this advertising did reach Oklahoma, since it obtained a mortgage lead form Oklahoma as a result of this advertisement (Supplemental Responses, Interrogatory No. 13). Lead2 also admits that it “may have advertised” on Yahoo before the time period in which it advertised on Google, but states that it has no documents relating to the Yahoo advertisements (Supplemental Responses, Interrogatory No. 13). Taking these admissions in the light most favorable to Braver, it can be assumed for purposes of this motion that Lead2 did advertise its mortgage lead services on Yahoo as well as Google, which, of course, would have been accessible in Oklahoma. Although advertising on well-known search engines like Yahoo and Google cannot be construed as directly targeting Oklahoma, there is no evidence that Lead2 excluded Oklahoma from its Internet advertising. As the court observed in *Ty, Inc. v. Baby Me*,

*Inc.*, No. 00 C 6016, 2001 U.S. Dist. LEXIS 5761 \* 23 (N.D. Ill. Apr. 25, 2001), because “advertising on the Internet targets no one in particular and everyone” the defendant could not “shield itself from suit by claiming that a web site which invites orders from customers in Illinois (as well as elsewhere) was not directed at Illinois residents.”

Lead2 seeks to minimize the business it has done and does in Oklahoma and concerning Oklahomans and their property by highlighting that only 9 of its approximately 2,100 Internet clients have visited the Lead2net.net website from Oklahoma and only one Oklahoma client has purchased a lead from Lead2 (Brief at 8). This statistic is deceptive. Sale of mortgage leads directly to brokers within Oklahoma is only a small part of Lead2’s business. Lead2 also engages in the sale of mortgage leads for Oklahoma to those outside of Oklahoma, such as Defendant Ameriquest.

Despite Plaintiff’s request for this information in discovery, Lead2 has not provided any sales figures for leads sold before September 9, 2005 (Supplemental Responses, Interrogatory No. 12). The total number of mortgage leads relating to Oklahomans sold by Lead2 between September 9, 2005 and July 25, 2006 is not large (.0088 of the total sales), but is not much different than the percentage of the United States’ population living in Oklahoma as of 2005 (.0119) (U.S. Census Bureau, State & County Quick Facts, Exhibit 6). Thus, the percentage of Lead2’s total mortgage lead business attributable to Oklahoma is about the percentage that would be expected based on Oklahoma’s population.

## **II. THIS COURT HAS SPECIFIC JURISDICTION OVER LEAD2**

Lead2’s activities as detailed above confirm it purposefully availed itself of the privilege of conducting activities within Oklahoma. When viewed in the light most favorable to Braver, all of the evidence shows that Lead2 participated in the commerce of mortgage leads, including the

Ron Bartles lead, knowing or having reason to know, or consciously avoiding knowing that these leads had been obtained through illegal spam and that they would be used for mortgage solicitation.

Lead2 states definitively that it did not send the spam email to [secondchance@ohww.norman.ok.us](mailto:secondchance@ohww.norman.ok.us) which generated the Ron Bartles lead, and asserts that the lead was purchased from “an unrelated, independent lead supplier, which is not an agent of or controlled by Lead2.” (Passalacqua Affidavit, ¶¶ 16, 17). Yet, Lead2 claims that it has no business records to identify the name and contact information of this “unrelated, independent lead supplier.” (Supplemental Response, Interrogatory No. 2). If Lead2 has no business records for the purchase of the Ron Bartles lead, how did it know with such certainty that it did purchase the lead from an “unrelated, independent lead supplier?” This unanswered question raises sufficient doubt as to Lead2’s role in the generation of the Ron Bartles lead to make out a *prima facie* case of activity directed at Oklahoma which caused harm to the Plaintiff.

However, even if Lead2 did not itself generate the Ron Bartles lead and did not specifically know that the Ron Bartles lead had been obtained by others through illegal spam into Oklahoma, Lead2 made no effort to limit its trafficking to leads **not** originating from spam sent to Oklahoma. In fact, at the time the Ron Bartles lead was bought and then sold by Lead2 (approximately January 2004), Lead2 admits that it did not have procedure in place to ensure that the leads it purchased were lawfully acquired. (Passalacqua Affidavit, ¶ 15). Lead2 should not be able to hide behind its self-induced ignorance of the origins of the leads it bought and sold while benefiting from the profit generated by those sales. One of the risks Lead2 assumed from trafficking in mortgage leads without either determining if they were generated from unlawful spam or limiting the origin of the lead to exclude Oklahoma is that Lead2 could be haled into

court in Oklahoma. *Gary Scott Intern., Inc. v. Baroudi*, 981 F.Supp. 714, 717 (D. Mass 1997) (by not limiting its business to a certain state or region but choosing to market nationwide, the out of state defendant assumed the risk that it would be haled into a court in a foreign state); *Internet Doorways, Inc. v. Parks*, 138 F.Supp.2d 773, 779 (S.D. Miss. 2001) (“By sending an email solicitation to the far reaches of the earth for pecuniary gain, one does so at one’s own peril” of being subjected to court in a distant jurisdiction). If Lead2 wanted to avoid the exercise by Oklahoma courts of personal jurisdiction over it, Lead2 could have verified that the Ron Bartles lead was not generated by illegal spam. *See ANI v. Access America/Connect*, 975 F.Supp. 494, 499 (S.D.N.Y. 1997) (if Georgia defendant sought to avoid subjecting itself to suit in New York it could have chosen not to sell and ship products to New York).

Lead2 should not avoid liability even if it did not push the “send” button. Even if Lead2 were only a middleman in the trafficking of spam-generated mortgage leads, as it contends, the middlemen like Lead2 make the spam industry possible. If spammers had no middlemen, there would be no spam. The spam in this case is not analogous to the email at issue in *Reliance Nat’l Indem. Co. v. Pinnacle Cas. Assur. Corp.*, 160 F.Supp.2d 1327 (M.D. Ala. 2001). In *Reliance*, the emails received by the plaintiff in his home state on which he sought to base jurisdiction had been sent by the defendant only to its own employees. The evidence showed that the defendant did not know who had forwarded these emails to the plaintiff and that the defendant had in no way authorized that action. *Id.* at 1333. The court held that, because the defendant had not intended the emails to be sent to the plaintiff and had no way to have reasonably foreseen that an unknown third party would do so, the emails could not form the basis for personal jurisdiction in the plaintiff’s state. In the instant case, in contrast, the spam email was sent to the Plaintiff as a purposeful part of the business of generating mortgage leads. Lead2

sold the Ron Bartles lead acquired from the spam sent to the Plaintiff. The spam email was not sent by a third party with no connection to Lead2; Lead2 was an integral part of the mortgage lead trafficking business that depended on spam-generated leads.

It is reasonable to exercise jurisdiction over Lead2 based on its contacts with Oklahoma. Plaintiff has made a prima facie case of jurisdiction over Lead2.

**III. LEAD2'S CONSPIRACY TO EVADE STATE AND FEDERAL LAWS SUBJECTS IT TO THIS COURT'S JURISDICTION**

Braver reasserts the argument regarding conspiracy jurisdiction in Proposition A, Section 4 of Plaintiff's Response to Defendant Lead Transfer, LLC's Motion and memorandum to Dismiss, filed on January 16, 2006 (Docket No. 234, pages 16-17).

**IV. PLAINTIFF HAS STANDING TO PURSUE CAN-SPAM CLAIMS**

Braver reasserts the argument regarding standing to pursue CAN-SPAM claims in Proposition C of Plaintiff's Response to Defendant Lead Transfer, LLC's Motion and memorandum to Dismiss, filed on January 16, 2006 (Docket No. 234, pages 16-17).

**V. PLAINTIFF'S THIRD AMENDED COMPLAINT HAS PLEAD FRAUD WITH SUFFICIENT PARTICULARITY**

The Plaintiff's Third Amended Complaint has alleged sufficiently specific allegations. The Third Amended Complaint alleges that each Defendant, including Defendant Lead2 has "initiated or procured the transmission of unlawful spam" (TAC ¶ 18) in furtherance of a conspiracy "based upon an 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 identify of persons responsible for transmitting the spam." (TAC ¶ 19). The Third Amended Complaint has described the specific

transmission of spam that generated the Ron Bartles lead that was subsequently sold by Defendant Lead2 to Ameriquest (TAC, ¶¶ 88, 89). The Third Amended Complaint alleges sufficient information as to the who, what, when and where of the activities alleged to have violated federal and Oklahoma statutes and to have caused damage to the Plaintiff.

**WHEREFORE**, the Plaintiff, Robert H. Braver, respectfully requests that this Court deny Defendant Lead2's Motion to Dismiss.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 7<sup>th</sup> day of August, 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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/s/ Laura Frossard \_\_\_\_\_

This is to certify that on the 7<sup>th</sup> day of August, 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/ Laura Frossard \_\_\_\_\_