

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF OKLAHOMA

ROBERT H. BRAVER, an individual, )  
Plaintiff, )

vs. )

Case No. CIV-04-1013-W

AMERIQUEST MORTGAGE COMPANY, a )  
Delaware corporation, INNOVATIVE MARKETING, )  
INC., d/b/a LEAD EXTREME, a Washington corporation, )  
THE LOAN PAGE, INC., a Delaware corporation, )  
STECROFT HOLDINGS, INC., as successor in interest to )  
GO APPLY, INC., d/b/a ELEADZ, a Nevada corporation, )  
JOHN DOES 1-50, MI SOLUTIONS, INC., a California )  
corporation, LEAD ASSOCIATION CORP, a California )  
corporation, THE LEAD SOURCE, INC., a California )  
corporation, COMMISSION JUNCTION, INC., a )  
Delaware corporation, AVALON TRADING COMPANY, )  
LLC, a California corporation, IMPACT WEB )  
ENTERPRISES, INC., a California corporation, )  
LEAD2.NET, INC., a Florida corporation, SUNBURN )  
MARKETING GROUP, LLC, a California limited liability )  
company, MONEYNEST HOLDINGS, INC., a California )  
Corporation, INTERNATIONAL WEBWORKS.COM, )  
LLC, a Colorado limited liability company, NICK )  
HETCHER, an individual, LIBERTY LEAD SOURCE, )  
INC, a Nevada corporation, TIM FAUST, an individual, )  
DOTCOM MARKETING GROUP, INC., a Florida )  
corporation, INETMEDIA, a California corporation, )  
LEADCORP, a California corporation, LEAD )  
TRANSFER, LLC, a Nevada limited liability company, )  
ABACUS ENTERPRISES, INC., a California corporation, )  
TANDAX, INC., a Washington corporation )  
Defendants. )

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 I-50, inclusive, )  
Cross-Defendant. )

**FILED**  
OCT 24 2006  
ROBERT D. DENNIS, CLERK  
U.S. DIST. COURT, WESTERN DIST. OF OKLA.  
BY BS DEPUTY

**ORDER**

This matter comes before the Court on the motion to dismiss filed by the specially appearing defendant The Wisdom Companies, LLC F/K/A Sunburn Marketing Group (“Wisdom”) (docket entry no. 175). The matter has been fully briefed and on October 11, 2006, the Court conducted a hearing on the motion and heard the parties’ evidence and oral arguments. Based upon careful consideration of the parties’ submissions and arguments, the Court makes its determination as follows.

On October 24, 2005, Wisdom filed its motion to dismiss the plaintiff’s claims against it on the ground that the Court lacks personal jurisdiction because the company has no contacts with the plaintiff or with the State of Oklahoma and none are alleged in the complaint. Since the filing of the motion to dismiss, the plaintiff, Robert H. Braver has been granted time to conduct discovery into the issue of personal jurisdiction. He has also amended his complaint. Thus, while Wisdom’s motion to dismiss is directed at Mr. Braver’s Second Amended Complaint, its supplemental brief and reply in support of the motion address the Third Amended Complaint filed with leave of Court on January 27, 2006.

It is the plaintiff’s burden to establish that the court has personal jurisdiction over the defendants. Behagen v. Amateur Basketball Ass’n, 744 F.2d 731, 733 (10<sup>th</sup> Cir. 1984). The weight of that burden depends on whether the court, in its discretion, elects to resolve the jurisdiction issue solely on the basis of pleadings, declarations, and discovery materials or after conducting an evidentiary hearing. Id. If the court relies exclusively on papers submitted, the plaintiff need only make a prima facie showing. Id. However, if the court elects to hold a hearing on the matter, the plaintiff must prove by a preponderance of the evidence the facts necessary to establish personal

jurisdiction. *See* Federal Deposit Ins. Corp. v. Oaklawn Apartments, 959 F.2d 170,174 (10<sup>th</sup> Cir. 1992); *see also* Baldrige v. McPike, Inc., 466 F.2d 65 (10<sup>th</sup> Cir. 1972).

**Factual background**

The plaintiff, Robert Braver, represents himself to be an Oklahoma provider of Internet access and electronic mail services whose servers were inundated with allegedly unlawful commercial electronic mail promoting mortgage services (“mortgage spam”). In order to discover who was behind the mortgage spam, Mr. Braver created decoy identities and responded to several of the mortgage spam messages. Each of these decoy “leads” resulted in Mr. Braver’s receiving communications from the defendant Ameriquest Mortgage Company (“Ameriquest”).

Wisdom is a California-based company. It is a marketing company that buys and sells data, including mortgage leads. It maintains no Oklahoma offices, telephone or facsimile numbers. It employs no Oklahoma-based employees, and has no Oklahoma residents as members. It advertises in no Oklahoma newspapers or magazines, and has no licenses to conduct business in Oklahoma. Wisdom has never directly contacted Robert Braver.

On or about October 17, 2003, an alleged mortgage spam message (the “October 17 email”) was transmitted through Robert Braver’s servers. Mr. Braver responded to the October 17 email by connecting to an included link which took him to the [optinmailing.biz](http://optinmailing.biz) website. He input decoy information employing the identity of Roger Griffith of Norman, Oklahoma. It appears that after being commercially traded by a number of individuals and entities, Mr. Braver’s decoy mortgage lead was purchased by Ameriquest. One of the intermediate owners of the decoy mortgage lead was Wisdom. Wisdom purchased the decoy mortgage lead from [adbrokerz.com](http://adbrokerz.com), Inc. (“Adbrokerz”). Adbrokers had purchased the decoy mortgage lead from another defendant named in this action,

Innovative Marketing, Inc. d/b/a Lead Extreme (“Lead Extreme”). Mr. Braver alleges that Lead Extreme, which has not contested the Court’s personal jurisdiction in this matter, is an entity which directly transmitted mortgage spam to his Oklahoma servers in several instances. Mr. Braver has offered evidence indicating that Lead Extreme’s marketing materials revealed lead generation techniques of questionable legality. Wisdom, however, maintains it did not acquire mortgage leads directly from Lead Extreme and insists it goes to “great lengths” to avoid doing business with entities which engage in the transmission of mortgage spam.

Wisdom asserts that none of its actions relating to the Roger Griffith decoy mortgage lead or any other Oklahoma-related mortgage lead it has purchased and sold occurred in Oklahoma. It argues that, therefore, it cannot be subject to this Court’s jurisdiction. Robert Braver proffers no evidence that Wisdom itself “hit the send button” which transmitted mortgage spam to his Oklahoma servers or contacted him as a result of his decoy mortgage leads. Rather, he contends that Wisdom invoked the personal jurisdiction of this Court when it operated its own lead-generating websites, when it responded to third-party generated mortgage inquiries from Oklahomans, and when it, through its agents or co-conspirators, caused mortgage spam to be transmitted to his Oklahoma servers.

### **Analysis**

Wisdom alleges that the Court lacks personal jurisdiction first because Robert Braver cannot demonstrate that Wisdom has any direct Oklahoma contacts, and second because the plaintiff has not established the elements of “conspiracy jurisdiction.” Pursuant to Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure, a federal court may exercise personal jurisdiction over a defendant in the manner provided by state law. Oklahoma’s long-arm statute provides that “[a] court of this

state may exercise jurisdiction on any basis consistent with the Constitution of this state and the Constitution of the United States.” 12 O.S. 2001 § 2004 (F). In other words, Oklahoma’s long-arm statute permits the exercise of personal jurisdiction to the full extent allowed by the Due Process Clause of the Fourteenth Amendment. Because the limits of Oklahoma’s statutory authorization for the exercise of personal jurisdiction are coterminous with the limits of the Due Process Clause, the statutory and constitutional inquiries necessarily merge into a single due process analysis. Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc., 205 F.3d 1244, 1247 (10<sup>th</sup> Cir. 2000). Due process is satisfied if the non-resident defendant has “minimum contacts” with the forum state such that requiring it to defend its interest here would not “offend traditional notions of fair play and substantial justice.” International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). The sufficiency of a defendant’s contacts must be evaluated by examining the defendant’s conduct and connections with the forum state to assess whether the defendant has purposely availed itself of the privilege of conducting activities therein. Williams v. Bowman Livestock Equipment Co., 927 F.2d 1128, 1131 (10<sup>th</sup> Cir. 1991).

Courts recognize two types of personal jurisdiction: general and specific. In order to establish general jurisdiction, it must be shown that the nonresident defendant has maintained continuous and systematic contact with the forum state. See Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 415-416 (1984). The facts required to establish general jurisdiction must be continuous and systematic. Rambo v. American Southern Ins. Co., 839 F.2d 1415, 1418 (10<sup>th</sup> Cir. 1988). Where general jurisdiction is found, all causes of action against a defendant, whether or not related to the defendant’s activities in the state, may be pursued in that state’s courts.

Less extensive contacts with the forum state will suffice to establish specific jurisdiction.

Specific jurisdiction refers to a court's exercise of jurisdiction where the lawsuit arises out of the nonresident defendant's contacts with the forum state. A finding of specific jurisdiction requires a two-step analysis. First, a court must first determine whether a nonresident defendant has such minimum contacts with the forum state that he should reasonably anticipate being haled into court there. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 287 (1980). If minimum contacts are present, the court must then determine whether its assertion of jurisdiction would comport with the traditional notions of fair play and substantial justice. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 467 (1985). Such a determination requires a court to consider not only the burden imposed upon the out-of-state defendant, but also the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies. World-Wide Volkswagen at 292.

**1. General Jurisdiction**

Mr. Braver alleges that the Court has both general and specific personal jurisdiction over Wisdom. He contends that not only does Wisdom's routine commerce in mortgage information generated by others, but known by it to be intimately related to Oklahoma residents and Oklahoma real property constitute continuous and systematic contact with this state sufficient to invoke this Court's general personal jurisdiction, but also that Wisdom is advertising, soliciting, and doing business in Oklahoma through its interactive commercial websites.

Wisdom makes no effort to controvert the allegation that it routinely engaged in the purchase and sale of Oklahoma-related mortgage leads generated by third parties. It does resist the existence

of general jurisdiction over it by asserting that such commerce does not represent continuous and systematic contact with the state. Nothing in Wisdom's submissions shows that the Oklahoma-related mortgage leads in which it traded were not the result of a continuous and systematic approach to acquiring leads throughout a market which clearly included Oklahoma. The critical question is whether Wisdom's commerce in those leads constitutes contacts with Oklahoma. Wisdom insists it does not.

Wisdom's argument is premised upon its depiction of its business as one which traded nothing more than lists of information which it characterizes as "merchandise." It appears to the Court that the mortgage leads here at issue constituted more than mere merchandise or tangible personal property. They are unfulfilled requests from would-be customers (made in response to third-party solicitations) for mortgage information. The Court is concerned that companies like Wisdom systematically respond to requests from prospective Oklahoma mortgage-services customers by helping to procure the requested service. Nonetheless, the Court finds no authority authorizing it to exercise general personal jurisdiction over such out-of-state defendants. The Court finds that Mr. Braver has failed to make a prima facie showing that Wisdom had continuous and systematic contact with Oklahoma by virtue of its routine trafficking in third-party generated Oklahoma mortgage leads.

Mr. Braver also argues that the Court may exercise general personal jurisdiction over Wisdom based upon Wisdom's own continual and systematic lead-generating activities within this state. He alleges that Wisdom generated Oklahoma mortgage leads through the NetMoneyWizard.com and LeadCherryPicker.com websites. Mr. Braver has offered evidence indicating that Wisdom is the owner and operator of NetMoneyWizard.com website and alleges that

website solicits “affiliates” to generate mortgage leads throughout the United States. Because Mr. Braver has failed to produce any evidence connecting NetMoneyWizard.com with any mortgage-lead generation activities occurring in Oklahoma, however, the Court finds no basis for exercising general jurisdiction over Wisdom on the basis of its operation of the NetMoneyWizard.com website. *See Xactware, Inc. v. Symbility Solution, Inc.*, 402 F.Supp.2d 1359, 1363 (D.Utah 2005)(“courts have looked to find ‘something more’ that creates actual acts directed at the forum state other than the mere existence of an interactive website.”).

To support its contention that Wisdom generated Oklahoma mortgage leads through the LeadCherryPicker.com website, Mr. Braver relies upon printed screen shots of LeadCherryPicker.com’s web page indicating that the cite does in fact generate mortgage leads and further indicating that LeadCherryPicker.com is “a member of” Sunburn Marketing Group. Sunburn Marketing Group is the name under which Wisdom operated until approximately July 28, 2005. In response, Wisdom has produced sealed affidavits establishing that it does not and has never owned LeadCherryPicker.com. Because Wisdom filed its affidavits under seal in accordance with the parties’ agreed protective order, the Court will refrain from discussing them in any detail. In light of the sealed affidavits, the Court finds the plaintiff has failed to meet his burden of establishing by a preponderance of the evidence, that LeadCherryPicker.com was owned or operated by Wisdom. Thus, the Court finds no basis for exercising general personal jurisdiction over Wisdom.

## **2. Specific Jurisdiction**

In addition to claiming the existence of general jurisdiction over Wisdom, Mr. Braver alleges the existence of specific jurisdiction. He maintains that Wisdom not only trafficked in mortgage leads obtained from unlawful mortgage spam sent to his Oklahoma servers, but that it also conspired

with other defendants to this action and with unnamed third persons to initiate and transmit mortgage spam and to obscure the trails between the parties actually transmitting that unlawful email and those encouraging such wrongful conduct for their ultimate financial gain.

To succeed on a civil conspiracy claim under Oklahoma law, a plaintiff must show that two or more persons acted in concert to accomplish an unlawful objective. Dill v. City of Edmond, Oklahoma, 155 F.3d 1193, 1208 (10<sup>th</sup> Cir. 1998). When a conspiracy is shown to have existed, each of the conspirators is responsible for the acts of his co-conspirators done in furtherance of such conspiracy. Blasdel v. Gower, 1918 OK 322, 173 P. 644. Thus, an out-of-state defendant may be subject to personal jurisdiction in a state where his co-conspirators have engaged in acts undertaken on behalf of the conspiracy.

To establish personal jurisdiction under the “conspiracy theory” of jurisdiction, the plaintiff must do more than simply allege an actionable claim for civil conspiracy against the out-of-state defendant. He must present evidence showing that a conspiracy existed and that the out-of-state defendant was a member of the conspiracy. In addition, he must show that the out-of-state defendant’s co-conspirator committed an act in the forum state in furtherance of the conspiracy. *See Clark v. Tabin*, 400 F.Supp.2d 1290, 1297 (N.D.Okla. 2005). Having been granted an opportunity to conduct discovery into jurisdictional matters, and having been further granted a hearing on such matters, Mr. Braver is required to prove his factual case by a preponderance of the evidence.

Here, Mr. Braver has pointed to evidence which establishes that mortgage spam was intentionally transmitted to Oklahoma through his servers for the purpose of generating commercially marketable Oklahoma mortgage leads. When Mr. Braver replied to the mortgage spam messages, he received mortgage solicitation communications from the defendant Ameriquest.

Wisdom, Ameriquest, and other mortgage brokers who traded in leads generated from alleged mortgage spam sent to Mr. Braver's servers had reason to know that the messages were sent: 1) using techniques designed to omit or misrepresent the point of origin or transmission path of the email messages; and 2) "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. At least in the instance of the Roger Griffith decoy mortgage lead, Wisdom acted as a purchaser and reseller of a mortgage lead which was ultimately acquired by Ameriquest.

The Court is mindful that ordinarily the law permits "great latitude" in the admission of circumstantial evidence tending to establish a conspiracy and the defendant's connection therewith. *See* 15A Corpus Juris Secundum, *Conspiracy* § 33, p. 372-73 (2002); *see also* Felt v. Westlake, 1918 OK 360, 174 P. 1041 (Okla. 1918). Here, however, any inference that Wisdom participated in a conspiracy must rest on its trade of a single Oklahoma mortgage lead. That is simply too slender a reed to support this Court's jurisdiction over the defendant. The Court concludes that any inference that Wisdom conspired to transmit mortgage spam to Oklahoma is too tenuous to survive the important due process considerations at stake in a personal jurisdiction analysis. Due process demands that a court investigate "the extent to which the defendant has purposefully availed itself of the benefits of the forum's laws." Far West Capital, Inc. v. Towne, 46 F.3d 1071, 1079 (10<sup>th</sup> Cir. 1995). Thus the plaintiff must provide "record proof" that the nonresident party had sufficient contacts with the state to assure that traditional notions of fair play and substantial justice not be

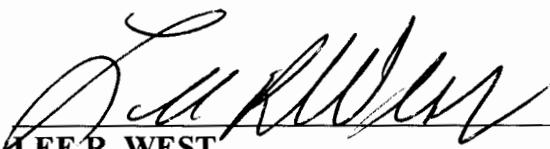
offended should the court exercise personal jurisdiction. Conoco, Inc. v. Agrico Chemical Co., 2004 OK 83, 115 P.3d 829, 835.

Wisdom has proffered affidavits showing that it had no meaningful contacts with the State of Oklahoma. The record as developed following jurisdictional discovery and a hearing on the matter discloses no evidence that Wisdom purposely availed itself of the benefits of Oklahoma law. The Court, therefore, concludes that to exercise specific personal jurisdiction over Wisdom pursuant to a conspiracy theory of jurisdiction would offend traditional notions of fair play and substantial justice.

**Conclusion**

For the reasons set forth above, the Court GRANTS the Specially Appearing Defendant The Wisdom Companies, LLC F/K/A Sunburn Marketing Group, LLC's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2) for a Lack of Personal Jurisdiction. Accordingly, said defendant is DISMISSED from this action.

ENTERED this 24th day of October, 2006.

  
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**LEE R. WEST**  
**UNITED STATES DISTRICT JUDGE**