

County, California, and thus venue in the Western District of Oklahoma is improper. Furthermore, the Court lacks personal jurisdiction over Lead Extreme, as Lead Extreme has no minimum contacts with Oklahoma.

I. BACKGROUND.

Plaintiff Robert Braver (“Braver”) brought a claim against Ameriquest under 15 O.S. 776.1 *et. seq.*, for Fraudulent Use of Electronic Mail. In the Petition, Braver claimed that Ameriquest sent or caused to be sent electronic mail messages in violation of the statute. Ameriquest, in turn, apparently is attempting to implead¹ third-party defendant Lead Extreme (referred to in the “Cross-Complaint” as “Cross-Defendant”) and brings a claim for declaratory relief for indemnity based on the Ameriquest Mortgage Company Lead Purchase Agreement (the “Agreement”) that it entered into with Lead Extreme.

Under the Agreement, Lead Extreme agrees to transmit to Ameriquest consumer information about individuals’ mortgage needs that it receives through its QuoteGuru.com website. (Agreement, Ex. 1, ¶ A.) Internet users can visit QuoteGuru.com and type in information such as their name, address, email address, phone number, and what type of loan they are interested in. QuoteGuru, in turn, transmits the information (leads) to Ameriquest according to the Agreement. (Agreement, Ex. 1, ¶ 1.) Ameriquest now alleges that Lead Extreme failed to comply with all applicable federal, state, and local laws in the performance of its obligations under the Agreement, (Cross-Complaint ¶ 9) by sending one or more of the emails at issue in the Petition (Cross-Complaint ¶ 16).

II. ARGUMENTS AND AUTHORITIES

¹ If Ameriquest not attempting to implead Lead Extreme, then the Cross-complaint should be dismissed because Lead Extreme is not a proper cross-defendant.

A. The Agreement Between Ameriquest and Lead Extreme Limits Venue to Orange County, California.

In the Agreement, Lead Extreme agrees to indemnify Ameriquest for any liabilities caused by Lead Extreme's representations in the Agreement or by Lead Extreme's acts or omissions in the conduct of its business. (Agreement, Ex. 1, ¶ 6.2.) However, the Agreement specifically provides the choice of law, jurisdiction, and venue for any action relating to the Agreement. (Agreement, Ex. 1, ¶ 8.2.) Specifically, the Agreement states that “[v]enue shall be the appropriate court of jurisdiction in Orange County, California.” (Agreement, Ex. 1, ¶ 8.2.) (Emphasis added.)

Forum selection clauses are prima facie valid and should be enforced unless they can be shown to be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching. *Furry v. First Nat'l Monetary Corp.*, 602 F. Supp. 6, 8 (W.D. Okla. 1984); *Janko v. Outboard Marine Corp.*, 605 F. Supp. 51, 52 (W.D. Okla. 1985). Because the Agreement designates that the only forum in which venue is proper is Orange County, Lead Extreme requests that the third-party complaint (titled the “Cross-Complaint”) be dismissed.

B. The Court Lacks Personal Jurisdiction over Lead Extreme.

Not only is venue improper under the Agreement, but the Court does not have personal jurisdiction over Lead Extreme. In an impleader action such as this, there must be an independent basis for personal jurisdiction over the third-party defendant. 3 *Moore's Federal Practice*, §§ 14.03[4], 14.40 (Matthew Bender 3d ed.). Moreover, the plaintiff in an action has the burden of proving the existence of personal jurisdiction over the defendant. *See Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995).

A plaintiff in a diversity action must show that jurisdiction is legitimate under the laws of the forum state, and that the exercise of jurisdiction does not offend due process. *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1295 (10th Cir. 1999). Therefore, it is necessary to first examine Oklahoma's long-arm statute. Because Oklahoma's long-arm statute extends personal jurisdiction on any basis consistent with the Oklahoma and United States Constitutions, the analysis collapses into a single inquiry, which is whether the exercise of personal jurisdiction over Lead Extreme comports with due process. *See Rambo v. Am. S. Ins. Co.*, 839 F.2d 1415, 1416 (10th Cir. 1988); 12 O.S. § 2004.

In accordance with due process, a court may exercise personal jurisdiction over a nonresident defendant only as long as there are minimum contacts between the defendant and the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). The minimum contacts standard may be met by asserting specific jurisdiction over the defendant “if the defendant has ‘purposefully directed’ his activities at residents of the forum, and the litigation results from alleged injuries that ‘arise out of or relate to’ those activities.” *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091 (10th Cir. 1998)(quoting *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 471 (1985)). Where a court's exercise of jurisdiction does not directly arise from a defendant's forum-related activities, a court may exercise general jurisdiction over a nonresident defendant if the defendant has “continuous and systematic” general business contacts with the forum state. *Id.* at 1091.

In this case, the indemnification claim between the third-party plaintiff, Ameriquest, and the third-party defendant, Lead Extreme, is based on the Agreement between them. Ameriquest has not asserted that Lead Extreme has continuous and systematic contacts with

Oklahoma, and therefore a finding of general jurisdiction is not appropriate. Therefore, we must look for specific jurisdiction over Lead Extreme.

Specific jurisdiction will only exist if Lead Extreme purposefully directed its activities at Oklahoma, and the litigation results from alleged injuries that “arise out of or relate to” those activities. *Burger King*, 471 U.S. at 472. Ameriquest has alleged that Lead Extreme agreed to comply with all applicable laws in the performance of the Agreement (Cross-Complaint ¶ 9; Agreement, Ex. 1, ¶ 5.3), that Lead Extreme is responsible for the damages claimed by Plaintiff under Plaintiff’s claim for Fraudulent Use of Electronic Mail, (Cross-Complaint ¶ 18), and that Lead Extreme must therefore indemnify Ameriquest pursuant to the Agreement (Cross-Claim ¶ 18; Agreement, Ex. 1, ¶ 5.3, 6). Thus, the litigation in this case, the indemnity action, arises out of or relates to the Agreement.

The Agreement that is the subject of the Cross-Claim was not signed in Oklahoma, was not performed in Oklahoma, and is in no way related to Oklahoma. According to the Cross-Claim, Ameriquest is a Delaware corporation with its principal place of business in California. (Cross-Complaint ¶ 1.) Lead Extreme is a Washington corporation with its principal place of business in Washington. Under the Agreement, Lead Extreme simply agreed to provide leads to Ameriquest that Lead Extreme received through its website “QuoteGuru.com.” (Agreement, Exhibit 1, ¶ 1). The Agreement, and Lead Extreme’s obligations under the Agreement, do not relate to Oklahoma. Therefore, Lead Extreme did not purposefully avail itself of the protection of Oklahoma laws, and did not purposefully direct its activities related to the contract at Oklahoma. For this reason, there are no minimum contacts with Oklahoma that arise out of or relate to the Agreement, and specific jurisdiction is not proper.

Furthermore, the Fraudulent Electronic Mail statute in Oklahoma (15 O.S. 776.1 *et. seq.*), under which Braver brought his claim against Ameriquest, does not provide for personal jurisdiction over Lead Extreme. Braver did not bring a claim against Lead Extreme under the Fraudulent Electronic Mail statute, 15 O.S. 776.1 *et. seq.*, which provides for personal jurisdiction in Oklahoma for violators of the statute, 15 O.S. § 776.3. Ameriquest has not, and cannot, bring a claim against Lead Extreme under the Fraudulent Electronic Mail statute because it is not the injured party. *See* 15 O.S. § 776.2. Without the Fraudulent Electronic Mail Statute providing personal jurisdiction, there is no basis in state law for the assertion of personal jurisdiction over Lead Extreme in Oklahoma.

C. CONCLUSION

When Ameriquest signed the Agreement with Lead Extreme, it contracted away its right to sue Lead Extreme over the provisions of the Agreement in any court other than in Orange County, California. Furthermore, the Court lacks personal jurisdiction over Lead Extreme, as Lead Extreme has no minimum contacts with Oklahoma. Therefore, Lead Extreme requests that the Court dismiss the Cross-Claim pursuant to Rules 12(b)(2) and 12(b)(3) of the Federal Rules of Civil Procedure.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2005, I electronically transmitted the attached document to the Clerk of Court using ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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