

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT H. BRAVER, an individual,

Plaintiff,

v.

**AMERIQUEST MORTGAGE
COMPANY, INC. dba AMERIQUEST
MORTGAGE CORPORATION, INC. its
AGENTS, EMPLOYEES, and ASSIGNS;
et al**

Defendants.

CASE NO. CIV-04-1013-W

**AMERIQUEST MORTGAGE
COMPANY, a Delaware corporation,**

Cross-Complainant,

v.

**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.

**DEFENDANT AND CROSS-CLAIMANT AMERIQUEST MORTGAGE COMPANY'S
OPPOSITION TO CROSS-DEFENDANT LEAD EXTREME'S MOTION TO DISMISS
FOR LACK OF JURISDICTION**

Defendant and Cross-Claimant Ameriqurest Mortgage Company ("Ameriqurest") hereby submits its Opposition to Cross-Defendant Lead Extreme's ("Lead Extreme") Motion To Dismiss For Lack of Personal Jurisdiction:

I. FACTUAL BACKGROUND OF AMERIQUEST'S CROSS COMPLAINT FOR INDEMNITY.

As part of its marketing efforts, Ameriquest purchases customer leads from companies which independently generate these leads through internet marketing, including e-mail solicitations. Typically, the email solicitations contain a link by which the recipient may access the lead generator and /or a subvendor's website to provide the relevant information regarding the recipient's address, phone number, email address and other information that pertain to the recipient's mortgage needs. The companies who generate leads do not send out e-mails on Ameriquest's behalf. Rather, they (and/or subvendors working on their behalf) send out generic non-Ameriquest branded e-mails inquiring whether recipients are interested in obtaining a mortgage loan. If the lead generator receives a response (typically on the lead generator's website), the lead generator independently determines which of its lender clients may be an appropriate user of the lead. [See Declaration of Jennifer Egan, ¶ 3].

Ameriquest purchases customer leads generated in the above fashion pursuant to contracts entered into between Ameriquest and lead generators. These contracts require the lead generator to comply with all applicable state and federal laws and regulations, and further requires that the lead generator indemnify Ameriquest for any violation of such laws. [See Declaration of Jennifer Egan, ¶ 4].

In or around January 2002, Ameriquest entered into a Lead Purchase Agreement ("Agreement") with cross-defendant Lead Extreme. In the Agreement, Lead Extreme agreed to perform all of its obligations under the Agreement in compliance with any and all applicable laws (see paragraphs 4 and 5.3 of Lead Purchase Agreement). Lead Extreme further agreed to

indemnify Ameriquest for any losses resulting from a breach of the Agreement by Lead Extreme (see paragraph 6.2 of Lead Purchase Agreement). [See Declaration of Jennifer Egan, ¶ 5].

Ameriquest has determined through its telephone conversations with plaintiff Robert Braver and its own investigation that it had purchased at least two leads from Lead Extreme identifying information associated with Plaintiff, e.g., his phone numbers, mailing address, e-mail address and other information which purported to relate to his mortgage needs. Based upon Ameriquest's investigation, it appears that these two leads were purchased during the general time frame that the e-mails which are the subject of the Complaint were allegedly sent. In conversations with Mr. Braver prior to the commencement of this action, Mr. Braver has advised that he supplied this information in response to unsolicited emails solicitations which he contends violated Oklahoma law. [See Declaration of Jennifer Egan, ¶ 6].

Ameriquest is therefore informed and believes that one or more of the emails which are the subject of this complaint were generated by Lead Extreme and that plaintiff Robert Braver responded to such email(s) and supplied information to Lead Extreme, which lead information was subsequently sold to Ameriquest. Ameriquest is therefore informed that Lead Extreme has a duty to defend and indemnify Ameriquest from the claims of Plaintiff arising from such emails. [See Declaration of Jennifer Egan, ¶ 7].

II. SUMMARY OF OPPOSITION.

Lead Extreme asks this Court to dismiss a portion of this lawsuit and sever related claims that have been appropriately raised in a single forum on the grounds that (1) Ameriquest's cross claim for indemnity against Lead Extreme should have been brought in Orange County, California, and (2) Oklahoma has no personal jurisdiction over Lead Extreme, a Washington corporation. Lead Extreme is wrong on both grounds.

First, the venue selection clause in the Lead Purchase Agreement (“Agreement”) between Lead Extreme and Ameriquest must be set aside under the facts presented here. Federal courts consistently set aside venue selection clauses where enforcement of the clause would sever a related cross claim from the underlying claims asserted in the main action. Moreover, the venue selection clause was clearly designed to benefit Ameriquest – not Lead Extreme – since Ameriquest’s corporate headquarters are located in Orange County.

Second, contrary to Lead Extreme’s motion, this Court can properly exercise specific personal jurisdiction over Lead Extreme consistent with Oklahoma’s long arm statute and the Oklahoma Fraudulent Electronic Mail Act. Since Lead Extreme does not, and cannot, dispute that it was the sender of at least one or more of the e-mails which are the subject of Plaintiff’s complaint, and since Plaintiff alleges that the subject e-mails were sent to him (through his mail server) in Oklahoma, personal jurisdiction exists over Lead Extreme in this State. Accordingly, the exercise of personal jurisdiction over Lead Extreme in Oklahoma is proper and its motion to dismiss should therefore be denied.

III. THE VENUE SELECTION CLAUSE IS INAPPLICABLE TO THE CROSS CLAIM FOR INDEMNITY AGAINST LEAD EXTREME.

Attempting to find its way out of this lawsuit, Lead Extreme argues that a clause in the Lead Purchase Agreement (“Agreement”) providing for venue in Orange County, California warrants its dismissal from this action. The applicability of a venue selection clause is, however, an issue of fact to be determined by the Court. *FSLIC v. Geldermann, Inc.*, 1989 U.S. Dist. LEXIS 16395 (Aug. 1, 1989, W.D. Okla.). “Such clauses do not impose absolute duties, nor do they endow parties with absolute rights” and may be set aside under appropriate circumstances *Id.*

Where, as here, a court is confronted with multiple parties and the possible severance of related claims, a venue selection clause may be set aside if enforcement of the clause would require the same issues to be litigated in two places. *Id.* In *Geldermann*, the Hon. Ralph G. Thompson of the U.S. District Court for the Western District of Oklahoma was faced with the same issue as the Court here: whether to apply a venue selection clause to sever the claim of one defendant in a case involving multiple parties and multiple related claims. In determining that the venue selection clause must be set aside, the court concluded that “[a] single forum is most suitable for determining possible counter – and cross-claims.” *Id.* at 7. Noting the public interest in facilitating a speedy and less expensive resolution of issues, the court concluded that it would be unreasonable to force the parties to litigate their related claims in two courts. *Id.*

Consistent with *Geldermann*, federal courts generally set aside venue or forum selection clauses where enforcement of the clause would require severance of a cross claim for indemnification. *Mylan Pharms. Inc. v. Am. Safety Razor Co.*, 265 F. Supp.2d 635, 638 (N.D. W.Va. 2002) (setting aside a forum selection clause on the grounds that indemnification is a subordinate claim dependent upon the main issue of liability); *Taylor Inv. Corp. v. Weil*, 169 F. Supp.2d 1046 (D. Minn. 2001) (setting aside a venue selection clause applicable to a cross claim on the grounds that it created the potential for conflicting judgments and amounted to an inefficient use of judicial resources as well as an unnecessary waste of the litigants' resources). In *Mylan Pharms.*, the plaintiff brought suit in U.S. District Court for the Northern District of West Virginia against a defendant who, in turn, brought a cross-claim for indemnification in the same court against its corporate predecessors. One of the cross-defendants moved to dismiss based on a forum selection clause in the parties' purchase agreement which provided that any disputes between arising out of the agreement would be governed by the laws of New York. *Id.*

at 637-638. In denying the motion to dismiss, the court held that severing the claims and forcing the parties to refile in New York would be a gross waste of the parties' and the court's resources:

Dismissing the cross claim and forcing the parties to refile in New York would not only increase their own costs, but also force the Southern District of New York to expend its resources in handling the case, by either letting it remain on its docket until this action is resolved, or, as discussed above, transferring it back to this Court. **Such an exercise would be a gross waste of the parties' and the Court's resources. Enforcement of the forum selection clause is therefore unreasonable.**

Id. (emphasis added).

In support of its ruling, the court observed that forum selection clauses can be unreasonable where there is "a possibility of prejudice to the parties through conflicting judgments by the concurrent litigation in two courts, or when forcing them to refile subordinate claims in a separate court would be a gross waste of the parties' and the court's resources." *Id.*

Similarly, in *Taylor*, the U.S. District Court of Minnesota refused to dismiss cross claims for indemnity based upon a licensing agreement which was the subject of the main action. Because all claims relating to the agreement were joined before the court, the district court reasoned, ultimate resolution of the case would fully and finally resolve all claims among the parties with respect to that agreement. The court therefore determined that enforcement of the forum selection clause applicable to the cross claims would be unreasonable and potentially unjust. *Id.* at 1061.

As in the foregoing cases, forcing Ameriquest to refile its claim against Lead Extreme in Orange County, California would be a gross waste of the parties' and the Court's resources, especially since Lead Extreme is not even located in California. Clearly, California is no more convenient a forum for Lead Extreme than Oklahoma and its reliance on the forum selection clause is an obvious attempt to find its way out of this lawsuit in which they belong.

Significantly, Lead Extreme has presented no evidence to this Court which would show that it is more convenient for them to defend this lawsuit in Orange, California than in Oklahoma. Moreover, dismissal is inappropriate here given Lead Extreme's express contractual obligation to defend Ameriquest in this lawsuit pursuant to the indemnity clause in the Agreement. Accordingly, the venue selection clause should be set aside and the jurisdiction retained over Lead Extreme by this Court.

IV. LEAD EXTREME IS SUBJECT TO PERSONAL JURISDICTION IN THIS COURT UNDER OKLAHOMA'S LONG ARM STATUTE AND FRAUDULENT ELECTRONIC MAIL ACT.

As set forth in Lead Extreme's motion, the Oklahoma long arm statute provides for personal jurisdiction co-extensive with the limits of federal due process. [Lead Extreme's Motion, pg. 4; *Rambo v. Am. S. Ins. Co.*, 839 F.2d 1415, 1416 (10th Cir. 1988).] Under federal due process standards, a state may assert specific personal jurisdiction when defendant has a lesser degree of contacts than "continuous and systemic". Specific personal jurisdiction exists when (1) the nonresident defendant purposefully directed its activities to the forum state, and (2) the litigation results from alleged injuries arising out or relating to those activities. *Burger King Corp. Rudzewicz*, 471 U.S. 462, 472 (1985); *Keeton v. Hustler Magazine, Inc.* 465 U.S. 770, 774 (1984).

On a motion to dismiss, the allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. *Intercon, Inc. v. Bell Atl. Internet Solutions, Inc.*, 205 F.3d 1244 (10th Cir. 2000). Although plaintiff bears the burden of establishing personal jurisdiction over defendant, in the preliminary stages of litigation this burden is "light." *Id.* (citing *Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995):

Where, as in the present case, there has been no evidentiary hearing, and the motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written material, the plaintiff need only make a prima facie showing that jurisdiction exists. The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. If the parties present conflicting affidavits, all factual disputes must be resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party.

Id.

Here, Ameriquest readily satisfies its light burden of making a prima facie showing that specific personal jurisdiction exists over Lead Extreme.

A. Lead Extreme Has Purposefully Directed Its Activities To Oklahoma And Plaintiff's Alleged Injuries Arise Out of Those Activities.

Lead Extreme argues that specific personal jurisdiction does not exist over the company because the Lead Purchase Agreement with Ameriquest was not signed in, and has no connection to, Oklahoma. As Lead Extreme well knows, however, Ameriquest's cross claim for contractual indemnity is based upon the *e-mails* which are the subject of Plaintiff's complaint. If in fact these e-mails were sent to Plaintiff (through his email server), they were sent not by Ameriquest but by Cross-Defendants, including Lead Extreme. These e-mails alone are sufficient to confer personal jurisdiction over Lead Extreme in Oklahoma.

The United States Supreme Court has long held that *one* purposeful act with effects in the forum state is sufficient contact to support specific personal jurisdiction. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (holding that single act could create specific jurisdiction so long as it creates a "substantial connection" to the state); *One World Botanicals v. Gulf Coast Nutritionals*, 987 F.Supp. 317, 324 (D.N.J. 1997) (defendants' single contact with forum consisting of shipment of requested goods to mail order distributor in forum sufficient to

establish specific jurisdiction). Based upon this well-settled rule, even one e-mail sent to the forum for the purpose of soliciting web-site business is sufficient contacts giving rise to the exercise of specific personal jurisdiction. *See e.g. Internet Doorway, Inc. v. Parks*, 138 F. Supp.2d 773 (S.D. Miss. 2001) (mail solicitation of pornographic web-site business, with falsified identification of sender, constituted doing business and committing tort in recipients' forum state, and thus personal jurisdiction in forum was proper).

Based on conversations with Plaintiff prior to the inception of this lawsuit and on Ameriquest's investigation, it would appear that Lead Extreme sent one or more of the e-mails which are the subject of this action. Lead Extreme does not, and cannot, deny this fact. Rather, Lead Extreme disingenuously implies that it obtain leads by customers unilaterally accessing their website without solicitation. Lead Extreme is only telling half the story. Lead Extreme is not telling the Court that is it sends e-mail solicitations to the public for the purpose of obtaining responses directed to their website. Thus, this case is not about a website alone.

Moreover, as a general rule, an interactive website supports a finding of personal jurisdiction over the defendant. *Obabueki v. IBM*, 2001 U.S. Dist. LEXIS 11810 (Aug. 14 2001 S.D.N.Y.); *Zippo Mfg. Co. v. Zippo DOT Com*, 952 F.Supp. 1119 (W.D. Pa. 1997); *Hsin Ten Enter. USA, Inc. v. Clark Enters.*, 138 F.Supp.2d 449, 456 (S.D.N.Y. 2000); *Citigroup Inc. v. City Holding Co.*, 97 F.Supp.2d 549, 564 (S.D.N.Y. 2000); *Maritz, Inc. v. Cybergold, Inc.*, 947 F.Supp. 1328 (E.D. Mo. 1996) (website that functioned as advertisement for defendant's service and which was accessed by Missouri residents gave rise to personal jurisdiction in Missouri); *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F.Supp. 161 164-165 (D. Conn. 1996) (because website was essentially a continuous advertisement directed via internet to all states including Connecticut, defendant could reasonably anticipate being haled into court in Connecticut).

In *Citigroup*, the court found that the foreign defendant had purposefully directed its activities in New York when its website allowed New York customers to apply for loans on the Internet or print out an application, and e-mail questions to the defendant and receive a rapid response. *Citigroup, supra*, 97 F. Supp. 2d at 565. Jurisdiction was found there, as it may be here, even where no purchase or sale was consummated on the Internet. *Id.* at 565.

Here, as in *Citigroup*, Lead Extreme admittedly operates an interactive website where consumers can input inquires about loans. [Lead Extreme Motion, pg. 2]. Lead Extreme does not dispute that it sends e-mails to consumers to generate inquiries, or that it sent one or more e-mails to Plaintiff here (purposefully through Plaintiff's email server). Thus, Lead Extreme's interactive website, coupled with the subject e-mails, serve to confer personal jurisdiction over the company in Oklahoma.

Furthermore, in *Intercon, Inc. v. Bell Atl. Internet Solutions, Inc.*, 205 F.3d 1244 (10th Cir. 2000), an appeal from the U.S. District Court for the Western District of Oklahoma, the Tenth Circuit Court of Appeals held that the ongoing wrongful use of plaintiff's mail server, and the consequences thereof, were substantial enough connection with Oklahoma to warrant exercising personal jurisdiction over defendant in Oklahoma. Similar to *Intercon*, Plaintiff here alleges that the subject e-mails interfered with his server. Under *Intercon*, these undisputed allegations are sufficient to confer personal jurisdiction over Lead Extreme.

The bottom line is that Ameriquest did not send the subject e-mails and Lead Extreme does not dispute that it sent at least one or more of the e-mails. Based upon these undisputed allegations, specific personal jurisdiction exists over Lead Extreme in Oklahoma.

B. Lead Extreme Fails To Meet Its Burden of Showing That The Exercise Of Personal Jurisdiction Would Be Unfair Or Unreasonable.

Once it is shown that the defendant has purposefully established contacts with the forum state giving rise to personal jurisdiction, the burden falls on the defendant to show that jurisdiction would not be proper. *Burger King, supra*, 471 U.S. at 477. “Where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.” *Id.*

Here, Lead Extreme has not even addressed, much less satisfied, its burden of showing that the exercise of personal jurisdiction by this Court would be unfair and unreasonable. As discussed above, Lead Extreme cannot satisfy this burden because fairness dictates having all of these related claims resolved in a single forum.

C. Lead Extreme Is Subject To The Court’s Jurisdiction Under The Oklahoma Fraudulent Electronic Mail Act.

Contrary to its motion, Lead Extreme is subject to this Court’s jurisdiction under the Oklahoma Fraudulent Electronic Act as well. The jurisdictional provision of that statute, codified at O.S. § 776.3, states:

Transmitting or causing the transmission of fraudulent electronic mail to or through a computer network of an electronic mail service provider located in this state shall constitute an act in this state. When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against that person. Nothing contained in this act shall limit, restrict, or otherwise affect the jurisdiction of any court of this state over foreign corporations which are subject to service of process pursuant to the provision of any other law. (emphasis added).

Lead Extreme does not dispute that Section 776.3 confers jurisdiction over non-resident defendants. Nor does Lead Extreme dispute that Plaintiff’s server is located in Oklahoma. Lead

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