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05-2080

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

MARK MUMMA AND MUMMAGRAPHICS, INC.,

Appellants/Defendants,

v.

OMEGA WORLD TRAVEL, INC., CRUISE.COM, INC.,  
AND GLORIA BOHAN,

Appellees/Plaintiffs.

BRIEF OF APPELLANTS

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FILED  
JAN 16 2006  
U.S. Court of Appeals  
Fourth Circuit

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2006 JAN 17 A 11:17  
U.S. COURT OF APPEALS  
FOURTH CIRCUIT

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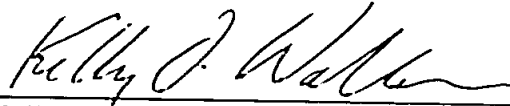
**CERTIFICATE OF INTERESTED PERSONS**  
**AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to rules 26.1 and 28(b) of the Rules of the United States Court of Appeals for the Fourth Circuit, the undersigned Counsel for Mark Mumma and MummaGraphics, Inc. certify that the following is a complete list of the trial judge, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to a party

1. Gloria Bohan – Appellee/Plaintiff
2. Honorable Leonie M. Brinkema – United States District Judge
3. Cruise.com, Inc. – Appellee/Plaintiff
4. James Hodges – Counsel for Appellees/Plaintiffs
5. The Hodges Law Firm, P.C. – Counsel for Appellees/Plaintiffs
6. John J. Lawless – Counsel for Appellees/Plaintiffs
7. Metropolitan Legal Services, LLC – Counsel for Appellants/Defendants
8. Mark Mumma – Appellant/Defendant and President and Sole Shareholder of MummaGraphics, Inc.
9. James Menzer – Counsel for Appellants/Defendants
10. Menzer Law Offices, P.C. – Counsel for Appellants/Defendants
11. MummaGraphics, Inc. – Appellant/Defendant
12. Omega World Travel, Inc. – Appellee/Plaintiff
13. Thomas J. Powell – Counsel for Appellees/Plaintiffs
14. Richard S. Toikka – Counsel for Appellants/Defendants
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Respectfully submitted this 16<sup>th</sup> day of January, 2006



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**STATEMENT REGARDING ORAL ARGUMENT**

Appellants suggest oral argument would materially aid the Court's deliberations, and they request the opportunity to address the Court.

## JURISDICTIONAL STATEMENT

In its Order of August 12, 2005, the District Court granted the Plaintiff's Motion for Summary Judgment and dismissed each of the Defendant's counterclaims. The District Court's jurisdiction was based on the existence of a federal question, 28 U.S.C. § 1331, and diversity of citizenship, 28 U.S.C. § 1332. This Court's jurisdiction is based on 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- 1 Whether the trial court erred in holding that the preemption clause of the CAN-SPAM Act, 15 U.S.C. § 7707(b)(1), preempts Oklahoma's state statutes regulating falsity and deception in the transmission information of commercial e-mail messages
2. Whether the trial court erred in granting summary judgment in favor of Plaintiffs and holding that the transmission information in the Plaintiffs' commercial e-mail messages was not "materially false or misleading" under the CAN-SPAM Act
- 3 Whether the trial court erred in granting summary judgment in favor of Plaintiffs and holding that Defendant MummaGraphics, Inc. did not "opt out" from future receipt of Plaintiffs' commercial e-mail messages within the provisions of the CAN-SPAM Act
- 4 Whether the trial court erred in granting summary judgment in favor of Plaintiffs and holding that Defendant MummaGraphics, Inc.'s counterclaim for trespass to chattels failed as a matter of law.

## STATEMENT OF THE CASE

Mark Mumma operates MummaGraphics, Inc. ("MGI"), an Oklahoma-based company that provides web site design and hosting, and is also an Internet Service Provider (ISP). After receiving commercial e-mails from the Plaintiffs at his business, Mr. Mumma demanded first via telephone and then in writing that the Plaintiffs stop sending him e-mail solicitations, but they continued to do so despite his requests to be removed from their e-mail lists. Mr. Mumma and his company were sued by the plaintiffs – who are Virginia-based travel agencies – for defamation in relation to Mumma's statements published on one of his web sites that the Plaintiffs sent him and his company illegal spam e-mails and that, as a result, the Plaintiffs were spammers. Mumma counterclaimed against the Plaintiffs for violations of the Federal CAN-SPAM Act, violations of two Oklahoma statutes prohibiting false and deceptive e-mails, and common law trespass. Mumma now appeals from the District Court's grant of summary judgment in favor the Plaintiffs on his counterclaims. The District Court's grant of summary judgment for the Plaintiffs was erroneous, and this Court should reverse.

### 1. Proceedings and Disposition Below

Plaintiffs filed suit against Mumma on February 8, 2005, alleging defamation and related wrongs. The Plaintiffs moved for summary judgment in relation to MGI's counterclaims, and the District Court entered an Order on August 26, 2005, granting summary judgment in favor of Plaintiffs as to all counterclaims. Mumma and MGI now appeal.

### 2. Statement of Facts

MGI d/b/a WebGuy Internet Solutions is an ISP with its sole office in Oklahoma City, Oklahoma. (P2). Mumma is the president of MGI. Mumma also maintains a web site called "OptOutByDomain.com" at which he maintains a list of Internet domains, including his own

webguy.net domain, which he and the owners of the other listed domains request be opted out of commercial e-mail distribution lists. Plaintiff Gloria Bohan is the president and CEO of Omega World Travel, Inc. ("OWT") (P1). OWT is a full-service travel agency located in Fairfax, Virginia. (P1). Plaintiff Cruise.com, Inc. ("Cruise com") is a wholly-owned subsidiary of OWT and specializes in cruise sales. (P1). Through its web site, located at "www.cruise.com," the company solicits prospective customers to provide their e-mail addresses to receive regular advertisements for cruise travel. These advertisements are known as "E-deals" (P2-P3).

Between December 9, 2004 and February 9, 2005, Defendant Mumma received a total of eleven "E-deals" e-mails from Cruise.com at his "webguy@inbox.net" e-mail address (P287-P289). Each of the eleven E-deal e-mails stated that the recipient had asked to receive them. Each e-mail also stated that the recipient could request, via postal mail or telephone, that Cruise.com stop sending the E-deal e-mails. (P46-P75).

On January 19, 2005, Mumma placed a telephone call to John Lawless ("Lawless"), an officer and general counsel for Plaintiff OWT. (P3) Mumma told Lawless he had not asked to receive the E-deal e-mails and that he did not wish to receive any future e-mails (Id., P155-P159; P305). During that conversation, Mumma asked Lawless to remove all e-mail addresses from the "E-deals" mailing list that had domains which appeared on a list publicly available from Mumma's "OptOutByDomain.com" web site. (Id.) During the call, Lawless stated that he was "gonna take them down right now." (P155-P159). Lawless also stated that he did not need any additional information from Mumma to fulfill the request. (P159). Lawless made these statements to Mumma in order to end the telephone call with Mumma. (P315-P316)

Mumma received another "e-deal" e-mail on January 20, 2005. (P137; P46-P75). Via a letter dated January 25, 2005 and addressed to Daniel Bohan of OWT, Mumma informed OWT

and Cruise.com that he had received a total of six unsolicited "e-deal" e-mails, and advised that he was preparing to pursue legal action in Oklahoma under state and federal laws relating to the transmission of unsolicited commercial e-mail (P3-P4 and P46-75) Plaintiffs received this letter on February 2, 2005. (P3-P4) In his letter, Defendant Mumma offered to settle any claims arising from the Plaintiffs' spam e-mails (P9-P10). The letter also included copies of the six "e-deal" e-mails received by Mumma at the time the letter was sent (P9-P10) The letter also expressed that Mumma did not request the "e-deal" e-mails, and that he did not wish to receive further "e-deal" e-mails. (Id.) On February 3, 2005, Lawless telephoned Mumma and advised him not to pursue a lawsuit against any of the Plaintiffs. (P4).

"FL-Broadcast.net" appeared in the routing information headers of each of the eleven "e-deals" e-mails received by Mumma at his "inbox@webguy.net" e-mail address (P137, P46-P75). "FL-Broadcast.net" is or appears to be a domain name (P252) None of the Plaintiffs is the registrant, owner, or lessor of the domain name "FL-Broadcast net" (P252). Each of the eleven "e-deals" e-mails included the statement "You are receiving this e-mail because you have opted in to our subscriber list." (P252). The owner of the "inbox@webguy.net" e-mail address did not "opt in" that e-mail address to the Cruise.com subscriber list (P137) Each of the eleven "e-deals" e-mails has the subject line "Weekly Cruise E-deals". (Id.)

Internet service providers and other businesses that use the Internet, including Cruise.com and TravTech, Inc., take extensive steps to block and reduce spam e-mail messages (P262-263, P265-P271). Spam e-mails consume the finite computer resources of the recipient ISP and the ultimate user-recipient. (P253-P257, P271). MGI's finite computer resources were consumed by the receipt of the eleven unsolicited "e-deals" e-mail messages. (P44, P329-330). Mumma's actual damages resulting from the receipt of the eleven "e-deal" e-mail messages was in excess

of one dollar. (Id.: P41-P43).

The computers at which MGI received the "e-deal" e-mail messages are "protected computers" as that term is defined at 18 U S C § 1030 (e)(2)(B) (P39) The "e-deal" e-mail messages are "commercial electronic communications" as defined at 15 U S.C § 7702 Plaintiffs received actual notice that they were not authorized to send "e-deal" e-mail messages to Mark Mumma and "inbox@webguy.net" on January 19, 2005 (P155-P159) Plaintiffs received additional written notice that they were not authorized to send "e-deal" e-mail messages to Mark Mumma and "inbox@webguy.net" on February 2, 2005. (P3-P4) Plaintiffs' sent an additional "e-deal" e-mail to "inbox@webguy.net" on February 9, 2005 (P37-P38, P46-P75)

### SUMMARY OF THE ARGUMENT

The District Court erred in granting summary judgment to the Plaintiffs on MGI's counterclaims under the Oklahoma Fraudulent E-mail Act, 15 Okl St Ann § 776.1 *et seq* , and the Oklahoma Consumer Protection Act, 15 Okl. St. Ann. § 761.1 *et seq* The District Court incorrectly held that the CAN-SPAM Act preempts these statutes to the extent they seek to regulate the transmission of commercial e-mails. The CAN-SPAM Act contains an express preemption clause, 15 U.S.C. § 7707(b), which unambiguously states that the Act does not preempt state laws that "prohibit[] falsity or deception in any portion of a commercial electronic mail message or information attached thereto." The Oklahoma Statutes at issue here are not subject to the preemption provisions of the CAN-SPAM Act because they fall squarely within the ambit of its express carve-out for state statutes prohibiting falsity or deception

The District Court also incorrectly granted summary judgment to the Plaintiffs on MGI's claims under the CAN-SPAM based on its erroneous holding that the header information in the Plaintiffs' e-mails was not materially false or misleading and that MGI failed to opt out from

future receipt of the Plaintiffs' e-mails. There is at least a genuine issue of material fact precluding summary judgment as to these counterclaim issues. The CAN-SPAM Act prohibits materially false or misleading header information, which it defines as including, *inter alia*, the alteration or concealment of header information in a manner that would impair the ability of an Internet access service . . . to identify, locate, or respond to a person who initiated the electronic mail message." 15 U.S.C. § 7706(a)(6). The Act also requires senders of commercial e-mails to honor valid opt-out requests within ten days of receipt. MGI produced evidence that the headers of Plaintiffs' e-mails contained false or misleading information within the meaning of the Act because they misidentified the computer from which the e-mails were sent. MGI also produced evidence that the Plaintiffs continued to send their commercial e-mail messages to it more than ten days after it opted out – which it did first on January 19 by a telephone call from Mumma to Lawless, and second by a letter from Mumma sent to Plaintiffs via certified mail and received by them on February 2, 2005. Despite this, Plaintiffs continued to send their e-mail solicitations to MGI even after their receipt of its written cease and desist demand.

Finally, the District Court erred in granting summary judgment to the Plaintiffs as to MGI's counterclaim for trespass. Trespass to chattels claims are permitted under Oklahoma law for interferences with intangible or fungible property, which includes MGI's computer systems, e-mail servers, and associated electronic storage space. Courts have widely recognized the applicability of such claims in the specific context of unsolicited commercial e-mails. MGI's claim is legally cognizable even though the total amount of its actual damages resulting from the Plaintiffs' e-mails was approximately \$20.00. Courts should not permit senders of commercial e-mail messages to escape liability on the grounds that their intentional interference with a given ISP's computer network (i.e., its personal property) was minimal.

## ARGUMENT

### Standard of Review

This Court reviews the District Court's grant of summary judgment de novo, applying the same legal standards applicable below. Dawkins v. Witt, 318 F 3d 606, 610 (4th Cir 2003).

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper only if

[T]he pleadings, depositions, answers to Interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law

In deciding a motion for summary judgment, the Court is required to view the facts and all reasonable inferences from them in a light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

**I. THIS COURT SHOULD REVERSE THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS BECAUSE THE CAN-SPAM ACT DOES NOT PREEMPT OKLAHOMA'S STATUTES REGULATING FALSITY AND DECEPTION IN THE TRANSMISSION INFORMATION OF COMMERCIAL E-MAIL MESSAGES.**

The trial incorrectly held that the CAN-SPAM Act, 15 U S C § 7701 *et seq.*, preempts the two counterclaims asserted by MGI that are based on Oklahoma statutory law, specifically 15 Okl. St. Ann. § 776.1 *et seq.* ("the Oklahoma Fraudulent E-mail Act") and 15 Okl. St. Ann. § 761.1 *et seq.* ("the Oklahoma Consumer Protection Act") (hereinafter collectively, "the Oklahoma Statutes"). The CAN-SPAM Act's express preemption clause is clear and unambiguous, and it does not preempt the application of the Oklahoma Statutes in any way

**A. The CAN-SPAM Act has an unambiguous express preemption clause.**

There are three theories under which Congress preempts state law: 1) under "express preemption," Congress expressly declares its intent to preempt state law; 2) under "field preemption," Congress impliedly preempts state law when federal law so thoroughly occupies a

legislative field as to make reasonable the inference that Congress left no room for the states to supplement it; and, 3) under "conflict preemption." Congress impliedly preempts state law when it actually conflicts with federal law. See Pinney v. Nokia, Inc., 402 F.3d 430, 453 (4<sup>th</sup> Cir. 2005)

1. **There is a strong presumption against the preemption of state law.**

"[T]he purpose of Congress is the ultimate touchstone in every preemption case." Medtronic, Inc. v. Lohr, 581 U.S. 470, 485 (1996). Any consideration of the issue of preemption under the Supremacy Clause (U.S. Const. Art. 6, cl. 2) must start with the basic assumption that Congress did *not* intend to displace state law. Pinney, 402 F.3d at 453 (citing Maryland v. Louisiana, 451 U.S. 725, 746 (1981)) (emphasis added). The power to supplant state law is "an extraordinary power in a federalist system." Gregory v. Ashcroft, 501 U.S. 425, 460 (1991). see also, Darcangelo v. Verizon Communications, Inc., 292 F.3d 181 (4<sup>th</sup> Cir. 2002). Preemption radically alters the balance of state and federal authority, so the Supreme Court has historically refused to impose that alteration interstitially. Id. The Supreme Court has frequently expressed a presumption *against* the preemption of state law. See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); see also, Bldg. & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218, 224 (1993) ("We are reluctant to infer preemption.") (emphasis added).

2. **The CAN-SPAM Act includes an unambiguous express preemption clause.**

The CAN-SPAM Act contains an unambiguous express preemption clause. 15 U.S.C. § 7707(b). Section § 7707(b)(1) relates specifically to the preemptive effect of the CAN-SPAM Act on state laws regulating electronic mail (such as the Oklahoma Statutes):

This chapter supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of

electronic mail to send commercial messages, *except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.*

(emphasis added). Any preemption analysis based on the CAN-SPAM Act must be limited to the issue of express preemption. The existence of an express preemption provision supports the inference that there is no implied preemption. See Freightliner Corp. v. Myrick, 514 U.S. 280, 289 (1995); Horn v. Thoratec Corp., 376 F.3d 163, 166 (3d Cir.2004). In addition, Courts have been extremely reluctant to infer conflict preemption in the face of an express preemption provision. See, e.g., Horn, 376 F.3d at 166. Moreover, the application of the *expressio unius est exclusio alterius* canon of statutory construction further indicates that when Congress includes an express preemption clause in a statute, it is intentionally excluding any potential for the statute to have any other preemptive effect.

**B. The Oklahoma Statutes are within the “falsity or deception” exception provided in the CAN-SPAM Act’s express preemption clause.**

The exception provided in section 7707(b)(1) is unambiguous about the state laws that CAN-SPAM does – and does not – preempt. “In layman’s terms, state entities may not regulate the use of electronic mail to send commercial spam except where those rules relate to source and content authenticity.” See White Buffalo Ventures, LLC v. University of Texas at Austin, 420 F.3d 366, 372 (5<sup>th</sup> Cir. 2005), *cert. denied* --- S.Ct. ---, 2006 WL 37101 (Jan. 9, 2006). Because Congress included an express preemption clause in the CAN-SPAM Act, this Court need only consider the scope of the statutory language. See Cipollone, 505 U.S. at 517; Duvall v. Bristol-Myers-Squibb Co., 103 F.3d 324, 328 (4<sup>th</sup> Cir. 1996). The determination regarding the scope of an express preemption provision must be guided by two presumptions. (1) “that Congress does not cavalierly preempt state-law causes of action,” and (2), “that the purpose of Congress is the

ultimate touchstone in every preemption case ” Medtronic, 518 U S at 485

Here, Congress’s statutorily enacted legislative findings clearly support the exclusion of the Oklahoma Statutes from the preemption clause of the CAN-SPAM Act. See 15 U S C § 7701. Congress was clearly aware of the various state statutes relating to the transmission of unsolicited commercial e-mail, including the Oklahoma Statutes (which were enacted in 1999) Id. at § 7701(a)(11). Further, Congress acknowledged that federal legislation and regulation was not the only means by which the plague of unsolicited commercial e-mail should be brought under control. Id. at § 7701(a)(12). The plain language of the exclusion provided for state laws regulating e-mail on the basis of falsity or deception is clearly the product of these Congressional considerations. Further, Congress’s express determinations codified in 15 U S C § 7701(b) strongly set forth a policy for the application of the CAN-SPAM Act, as well as the application of parallel state laws:

[T]he Congress determines that--

- (1) there is a substantial government interest in regulation of commercial electronic mail on a nationwide basis;
- (2) senders of commercial electronic mail should not mislead recipients as to the source or content of such mail; and
- (3) recipients of commercial electronic mail have a right to decline to receive additional commercial electronic mail from the same source

Furthermore, the plain language of the Oklahoma Statutes specifically address practices relating to commercial e-mail involving falsity and deception, bringing them within the ambit of CAN-SPAM’s exception to its preemption clause. The Oklahoma Fraudulent E-mail Act, 15 Okl St. Ann. § 776 I, provides:

It shall be unlawful for a person to initiate an electronic mail message . . . that: 1 *Misrepresents any information in identifying the point of origin or the transmission path of the electronic mail message;* 2 Does not contain information

identifying the point of origin or the transmission path of the electronic mail message, or 3. *Contains false, malicious, or misleading information which purposely or negligently injures a person.*

(Emphasis added). It is clear from an examination of the unambiguous language of the Oklahoma Statutes, that they are not preempted by the CAN-SPAM Act because they seek to regulate falsity and deception in commercial e-mail messages, which 15 U.S.C. § 7707(b)(1) expressly exempts from preemption. In a recent and instructive decision, the United States District Court for the Eastern District of Washington recently reached the same conclusion in its consideration of a nearly-identical preemption issue as it related to Washington State's Commercial Electronic Mail Act and Consumer Protection Act. See Gordon v. Impulse Marketing Group, Inc., 375 F. Supp. 2d 1040, 1044-1046 (E.D. Wash. 2005).<sup>1</sup>

**II. THIS COURT SHOULD REVERSE THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS BECAUSE THE TRIAL COURT INCORRECTLY HELD THAT THE TRANSMISSION INFORMATION IN THE PLAINTIFFS' COMMERCIAL E-MAILS WAS NOT FALSE OR MISLEADING AS A MATTER OF LAW.**

The District Court incorrectly granted summary judgment in favor of Plaintiffs as to MGI's counterclaims for violations of the CAN-SPAM Act's prohibition of materially false or misleading header information because the Court erroneously concluded that the header information in the Plaintiffs' commercial e-mails was not false or misleading as a matter of law

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<sup>1</sup> Compare the language of Washington's Commercial Electronic Mail Statute, RCW § 19.190.929 ("No person ... may initiate the transmission of a commercial electronic mail message ... that: (a) ... misrepresents any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or (b) contains false or misleading information in the subject line.") with the Oklahoma statute, 15 Okl. St. Ann. § 776 I ("It shall be unlawful for a person to initiate an electronic mail message . . . that: 1. Misrepresents any information in identifying the point of origin or the transmission path of the electronic mail message; 2. Does not contain information identifying the point of origin or the transmission path of the electronic mail message; or 3. Contains false, malicious, or misleading information which purposely or negligently injures a person.").

“It is unlawful for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message, or a transactional or relationship message, that contains, or is accompanied by, header information that is materially false or materially misleading” 15 U.S.C § 7704(a)(1) Section 7704 articulates three examples of specific elements that help delineate the scope of the term “materially false or misleading”:

- (A) header information that is technically accurate but includes an originating electronic mail address, domain name, or Internet Protocol address the access to which for purposes of initiating the message was obtained by means of false or fraudulent pretenses or representations shall be considered materially misleading;
- (B) a “from” line (the line identifying or purporting to identify a person initiating the message) that accurately identifies any person who initiated the message shall not be considered materially false or materially misleading; and
- (C) header information shall be considered materially misleading if it fails to identify accurately a protected computer used to initiate the message because the person initiating the message knowingly uses another protected computer to relay or retransmit the message for purposes of disguising its origin.

Id. Section 7706(a)(6) provides further clarification to the term “materially” as used in § 7706(a)(1).

*For purposes of paragraph (1), the term “materially”, when used with respect to false or misleading header information, includes the alteration or concealment of header information in a manner that would impair the ability of an Internet access service processing the message on behalf of a recipient, a person alleging a violation of this section, or a law enforcement agency to identify, locate, or respond to a person who initiated the electronic mail message or to investigate the alleged violation, or the ability of a recipient of the message to respond to a person who initiated the electronic message.*

(emphasis added).

A. The header information for Plaintiffs' E-Deal spam messages is materially false and misleading.

Here, it is an uncontested fact that the computer that sent Cruise com's E-Deals announced itself to recipient mail servers as "FL-Broadcast net," and that Plaintiffs knew and intended that the computer announce itself as "FL-Broadcast."<sup>2</sup> However, FL-Broadcast was not the "host-name" of the computer that sent the Cruise com E-Deals. (P46-P75) As the legitimate owner of the "cruise.com" domain, Plaintiffs could assign nearly any conceivable host-name to their mail server (including "FL-Broadcast.net.cruise.com") – but they did not, instead, Plaintiffs chose the character string "fl." This distinction is not insignificant. Based on Cruise com's own e-mail database, dozens of intended recipients' mail servers rejected Cruise com's e-mail message because the announced host name (both "FL-Broadcast" and "FL-Broadcast net") did not match the server's actual host name. (P404-P407). Plaintiffs' use of a false host name falls squarely within the ambit § 7706(a)(1)(A)'s definition of "materially misleading." The only significant difference between that subsection's scope and what Plaintiffs have actually done is that the Plaintiffs did not bother to "obtain" the domain name "FL-Broadcast net" by false pretenses or misrepresentations; rather, they fabricated it in its entirety and represented that it accurately identified their mail server when it did not.

B. The e-mail address that the E-Deal spam is addressed "from" is false and misleading because it is not a valid e-mail address.

Section 7704(a)(1)(B) states that an e-mail message that includes a "from" e-mail address that accurately identifies the person or entity sending the message is not materially misleading. Conversely, logic dictates that an e-mail message with a "from" e-mail address that does not accurately identify the person or entity sending the message is (or at least could be) materially misleading.

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<sup>2</sup> The parties dispute whether Plaintiffs caused or intended their computer to announce itself as "FL-Broadcast.net".

Here, each of the eleven spam E-Deal messages has the address "cruisedeals@cruise.com" in the "from" field. Plaintiffs' own uncontested testimony is that the "cruisedeals@cruise.com" e-mail address is not functional, and that a message (including a reply message, e.g., "Stop sending me spam!") would not be deliverable. (P376-P377) Accordingly, the "from" header of Plaintiffs' spam E-Deals is materially false and misleading

**III. THIS COURT SHOULD REVERSE THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS BECAUSE THE TRIAL COURT INCORRECTLY HELD AS A MATTER OF LAW THAT MGI DID NOT "OPT OUT" FROM FUTURE RECEIPT OF PLAINTIFFS' E-MAILS.**

The District Court incorrectly granted summary judgment to Plaintiffs on Mumma's and MGI's counterclaims for violations of the CAN-SPAM Act's provisions requiring senders of commercial e-mails to honor valid "opt out" requests because it erroneously concluded that, as a matter of law, MGI did not opt out from future receipt of Plaintiffs' e-mails. The CAN-SPAM Act sets the minimum technical standards that the senders of unsolicited commercial e-mail must adhere to in order to conform to the act. 15 U.S.C. § 7704(a)(3)(A). The CAN-SPAM Act specifically contemplates the possibility of greater options and possibilities for opting-out from receiving future commercial e-mail messages from a sender. *Id.* at § 7706(a)(3)(B).

Here, Cruise.com permits recipients to opt out by sending such a request via postal mail and by telephone. (P46-P75). On January 19, 2005, Mumma called OWT – Cruise.com and TravTech's parent company – and, as the representative of the owners of the domains listed on "OptOutByDomain.com" demanded the removal of all e-mail addresses associated with those specific domains. OWT officer and general counsel John Lawless agreed to this demand. Further, he took the request to Thomas MacDonald of TravTech, at which point the Plaintiffs decided that it was too burdensome to comply with the demand. Based on testimony from

MacDonald, the request has never been fully honored (P360-P361) By providing the option to stop future Cruise.com spam via mechanisms other than the Internet-based mechanism contained in each E-Deal, the Plaintiffs effectively waived their ability to insist on that particular method of opting out an e-mail address. Further, by his express agreement as an officer of OWT to honor the opt out request,<sup>3</sup> Plaintiffs waived any objection to the form or manner of the request. The CAN-SPAM Act requires compliance (barring unexpected and temporary technical problems) with a request within ten days of receipt. See 15 U.S.C. § 7706(a)(4)(A)(i), see also 15 U.S.C. § 7706(a)(3)(C). Here, Plaintiffs took no action whatsoever until February 3, 2005 – fifteen days after Lawless agreed to honor the request, and even then, the only step taken was to specifically remove “inbox@webguy.net”. Accordingly, there is at least a question of fact for a jury as to whether Plaintiffs’ spam E-Deal messages sent to Mumma and MGI on February 1, 2, and 9, 2005, violate § 7706(a)(4)(A)(i) of the CAN-SPAM Act.

**IV. THIS COURT SHOULD REVERSE THE TRIAL COURT’S GRANT OF SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS BECAUSE THE TRIAL COURT INCORRECTLY HELD THAT MUMMA’S AND MGI’S TRESPASS CLAIMS FAILED AS A MATTER OF LAW.**

The District Court incorrectly granted summary judgment to the Plaintiffs on MGI’s common law trespass claims because it erroneously held that MGI sustained no damage to its computer systems (i.e., their personal property) or that any damage they did sustain was de minimis. The law respecting claims for trespass to chattels, in Oklahoma and in Virginia, and as interpreted and applied by this Court is clear. The E-Deals’ unauthorized consumption of MGI’s Internet and computer resources is actionable as an unjust interference with MGI’s personal property.

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<sup>3</sup> Plaintiffs contest this (plain language) interpretation of Lawless’ statement (“I’m gonna take them down right now”), but even if Mummagraphics were to accept Plaintiffs’ interpretation, Lawless did not cause any e-mail address to be removed from the database until February 3, 2005.

A. **Mummagraphics' trespass to chattels claim is supported by both Virginia and Oklahoma law.**

Under Oklahoma law, conversion<sup>4</sup> is any "act of dominion wrongfully asserted over another's personal property in denial of or inconsistent with [the individual's] rights therein" Steenbergen v. First Fed. Sav. & Loan, 753 P.2d 1330, 1332 (Okla. 1987). Oklahoma applies this law to both tangible and intangible personal property (see generally, Id. (as applied to funds in a bank account)) and both discrete and fungible personalty (see generally, Anderson v. Dvco Petroleum Corp., 782 P.2d 1367 (Okla. 1989); Teel v. Public Service Company of Oklahoma, 767 P.2d 391 (Okla. 1985) (applied to exploited and reserves of natural gas)). The district courts of the Eastern District of Virginia, applying Virginia law, have repeatedly recognized the trespass to chattels claim in the context of Internet or computer trespass. See Verizon Online Services, Inc. v. Ralsky, 203 F. Supp. 2d 601, 606 (E.D. Va. 2002); see also, U-Haul Intern., Inc. v. WhenU.com, Inc., 279 F.Supp.2d 723, 725 (E.D. Va. 2003); America Online, Inc. v. CN Productions, Inc., 272 B.R. 879, 880 (E.D. Va. 2002); America Online, Inc. v. LCGM, Inc., 46 F.Supp.2d 444, 446 (E.D. Va. 1998); America Online, Inc. v. IMS, 24 F.Supp.2d 548, 549 (E.D. Va. 1998). Accordingly, the District Court's refusal to recognize a cognizable claim for trespass in relation to the Plaintiffs' intentional sending of unsolicited commercial e-mail messages to MGI is contrary to the weight of authority permitting such claims.

B. **The E-Deal e-mails were an intentional interference with MGI's personal property and were sufficient to create a cognizable trespass claim.**

Courts have widely recognized that intentional injuries to the use and efficiency of computer systems, as well as the unauthorized consumption of computer and Internet resources, valid bases for computer-related trespass to chattels claims. See Compuserve v. Cyber

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<sup>4</sup> Oklahoma does not differentiate between the separate torts of trespass to chattels, injury to personal property, and conversion of personal property. See Wagoner v. Bennett, 814 P.2d 476, 481-82 and 482-83 (Okla. 1991) (J. Opala, concurring).

Promotions, Inc., 962 F. Supp. 1015, 1022 (S.D. Ohio 1997) (“To the extent that [spammers’] multitudinous electronic mailings demand the disk space and drain the processing power of plaintiffs’ computer equipment, those resources are not available to serve CompuServe subscribers. Therefore, the value of that equipment to CompuServe is diminished even though it is not physically damaged by defendants’ conduct”); AOL, Inc. v. IMS, 24 F. Supp. 2d at 550 (“[Spammer’s] contact with [AOL’s] computer network was unauthorized, and [Spammer’s] contact with [AOL’s] computer network injured [AOL’s] business goodwill and diminished the value of its possessory interest in its computer network.”). see also AOL, Inc. v. LCGM, Inc., 46 F. Supp. 2d at 452 (citing Compuserve, 962 F. Supp. at 1022), Hotmail v. Van\$ Money Pie, Inc., 1998 WL 388389, 47 U.S.P.Q.2d 1020 ¶ 34 (N.D. Cal April 16, 1998)

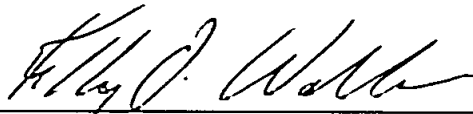
Here, Plaintiffs intentional transmission of 11 unauthorized commercial e-mails to MGI constitute cognizable trespass claims despite the relatively small resulting damages. MGI’s actual damages from Plaintiffs’ e-mails are estimated by Mumma to be an aggregate total of approximately \$20.00 for all 11 e-mails. (P419). Mumma testified that the E-Deal e-mail messages caused MGI to lose the benefit of the bandwidth and capacity associated with the transmission, reception, processing, and storage of the E-Deals, as well as the productive value of the time that MGI was required to direct towards the investigation of the nature of the E-Deal e-mails and take the necessary steps to stop using the compromised “inbox@webguy.net” e-mail address. (P408-P412). Plaintiffs should not be permitted to escape liability on MGI’s trespass to chattels claim merely because the total number of unauthorized e-mails they intentionally sent to MGI after being expressly directed not to do so both verbally and in writing responsible was a relatively small amount of the overall spam problem faced by MGI. Plaintiffs’ unsupported and out-of-hand disregard for MGI’s damages is, in effect, an argument that they are not liable for the

theft of MGI' finite computer and Internet resources because (1) they only "stole a little" from MGI, and (2) many others stole much more. Their position is analogous sneaking into a half-occupied movie theater to watch a film without paying admission, and then seeking to avoid liability or justifying the act because the theater had seats available and that others were engaged in the same illegal behavior. That Plaintiffs' 11 unauthorized E-Deal messages "merely contributed" to the problem of spam generally is not a defense against Plaintiffs' specific liability for those 11 E-Deal spam messages.

### CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's Order granting summary judgment in favor of the Plaintiffs on Mumma and MGI's counterclaims.

Respectfully submitted this 16<sup>th</sup> day of January, 2006.



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Kelly O. Wallace  
Georgia Bar No. 734166 (*Admitted pro hac vice*)

CERTIFICATE OF SERVICE

I hereby certify that on this 16<sup>th</sup> day of January, 2006, I caused a true and accurate copy of the foregoing BRIEF OF APPELLANT to be served by First Class U.S. Mail, postage prepaid, on James Hodges, Esquire, The Hodges Law Firm, P C , 803 Sychin Road, Suite 300, Lessburg, Virginia 20175, and by First Class U.S. Mail, postage prepaid on Thomas J Powell, Esquire, Law Offices of Thomas J. Powell, 10565 Lee Highway, Suite 102, Fairfax, Virginia 22030.



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Kelly O. Wallace