

For Opinion See [2006 WL 3333738](#) [Briefs and Other Related Documents](#)

United States Court of Appeals, Fourth Circuit.

Omega World TRAVEL, Incorporated Cruise.com, Incorporated; Gloria Bohan; Daniel Bohan, Plaintiffs - Appellees,

v.

MUMMAGRAPHICS, INCORPORATED, d/b/a Webguy Internet Solutions, d/b/a Webguy.net, d/b/a SueaSpammer.com, Defendant - Appellant,

Mark W. Mumma, in his individual capacity, Defendant.

No. 05-2080.

February 21, 2006.

On Appeal from the United States District Court for the Eastern District of Virginia at Alexandria

Brief of Appellees

[James P. Hodges](#), The Hodges Law Firm, P.C., 803 Sycolin Road, Suite #300, Leesburg, Virginia 20175, (703) 779-5700, Counsel for Appellees. [Thomas J. Powell](#), The Law Offices of [Thomas J. Powell](#), 10565 Lee Highway, Suite 102, Fairfax, Virginia 22030, (703) 293-9050, Counsel for Appellees.

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*1 COME NOW, Appellee, Omega World Travel, Inc. (“Omega”), Appellee, Gloria Bohan (“Mrs. Bohan”) and Appellee, Cruise.com, Inc. (“Cruise.com”) (hereinafter collectively referred to herein as “Appellees”), by counsel, and in accordance with [Rules 25, 26, 28](#), and [30-32 of the Federal Rules of Appellate Procedure](#) and the Local Rules of the Court of Appeals for the Fourth Circuit, submit their brief in response to the appeal brief of Appellant Mummagraphics, Inc. (“Mummagraphics”) which was submitted to this Court on January 16, 2006.

STATEMENT OF JURISDICTION

Appellees do not challenge the Statement of Jurisdiction portion of Appellant Mummagraphics' Brief.

STATEMENT OF ISSUES PRESENTED

1. Whether and to what extent the CAN-SPAM Act preempts Oklahoma's Anti-Spam Statute.
2. Whether the Oklahoma's Anti-Spam Statute violates the dormant Commerce Clause as excessively burdensome on Interstate Commerce.
3. Whether Mummagraphics stated cognizable claims under the CAN-SPAM Act for failure to allege the elements of a violation under the Act.
4. Whether Mummagraphics stated cognizable claims for fraud under the Oklahoma Anti-Spam Statute.
5. Whether Oklahoma recognizes Mummagraphics' Trespass to Chattels Claim for receipt of unwanted e-mail.

STATEMENT OF THE CASE

Nature of The Case

Appellee Omega is a full-service provider of travel-related services. J.A. 1. The two shareholders of Omega are Appellee Mrs. Bohan and her husband, Daniel Bohan. (“Mr. Bohan”) (collectively the “Bohans”). J.A. 1. Appellee Cruise.com is a wholly-owned subsidiary of Omega that specializes in internet-based booking of travel on cruise lines. J.A. 1. Travtech, Inc. is a wholly owned subsidiary of Omega (“Travtech”) and operates and manages e-mail and other computer systems for Omega and its subsidiaries. J.A. 224, J.A. 246, J.A. 382.

Mark Mumma (“Mr. Mumma”) is the sole shareholder of the Appellant, Mummagraphics. J.A. 2, J.A. 134-J.A. 137. Mummagraphics operates a variety of websites related to Mr. Mumma's self-described crusade against those he decides are “spammers,” i.e., senders of illegal e-mail. J.A. 2, J.A. 134-137, *see also, e.g.*, J.A. 150, at ¶ 21. Mummagraphics also owns [www.webguy.net](#) and Mr. Mumma uses [inbox@webguy.net](#) exclusively for Mummagraphics. J.A. 134-135, 166. Among the websites operated by Mr. Mumma and Mummagraphics are “[sueaspammer.com](#)” and “[suedbyspammers.com](#).” J.A. 136- 137, 147. Mummagraphics also claims to provide website development and e-

mail hosting services, and it claims to receive approximately 300,000 unsolicited e-mails per month. J.A. 134-137, 397, 419.

On December 29, 2004, Cruise.com sent its first e-mail to inbox@webguy.net. J.A. 37- 38, 137 at ¶ 10. Sometime in January of 2005, Mr. Mumma noticed that he had received e-mail from Cruise.com announcing travel vacation promotions. J.A. 416 at ¶¶ 2-11. Each e-mail (1) provided travel vacation promotions to the recipients, (2) identified that the offer was from Cruise.com, (3) indicated that the recipient had requested to receive the e-mail, (4) provided telephone and mailing address contact information for Cruise.com, and (5) contained a conspicuous provision that allowed a recipient to opt out of future e-mails. J.A. 47-61.

Mr. Mumma refused to use the opt-out mechanism contained in each e-mail. J.A. 156 at 11. 24-27, 157 at 11. 1-2. Instead, on January 19, 2005, Mr. Mumma called Cruise.com's parent company, Omega, to complain about his receipt of the e-mails. J.A. 155-159. Mr. Mumma spoke with Omega's general counsel, John Lawless. *Id.* During their conversation, the transcript of which is part of the Joint Appendix at J.A. 155-159, Mr. Mumma acknowledged his refusal to use the opt-out mechanism in the Cruise.com e-mails and stated “only idiots do that!” J.A. 156 at 11.24-27- 157 at 11.1-2. Mr. Mumma even refused to provide Mr. Lawless with Mr. Mumma's e-mail address so that Mr. Lawless himself could exercise the opt-out mechanism on Mr. Mumma's behalf. J.A. 157 at 11. 1-6, 25-26, 188, 330. Instead, Mr. Mumma stated that the way he opted-out was to sue Omega under the Oklahoma statutes if Omega refused to pay Mr. Mumma a substantial sum of money to settle the matter. J.A. 157 at 11. 11-24.

On January 25, 2005, Mr. Mumma sent a demand for payment in the amount of \$6,250 along with a draft complaint for his receipt of six e-mails from Cruise.com. J.A. 9-15. Remarkably, Mr. Mumma continued to refuse to exercise his right to opt-out of receiving Cruise.com e-mails. J.A. 10. Similarly, Mr. Mumma continued to refuse to provide Omega with his e-mail address to enable Omega to remove that e-mail address from Cruise.com's subscriber list. J.A. 9-10; 188; 330.

When Omega failed to pay the money demanded, Mr. Mumma and Mummagraphics published on their websites (1) numerous statements to the effect that Omega, Cruise.com and the Bohans are “spammers” and had committed violations of both civil and criminal laws related to commercial e-mail, (2) claims that Omega and Cruise.com are companies “built on spam,” and even (3) pictures of the Bohans identifying them as “Cruise.com spammers.” J.A. 23-30.

When Omega, Cruise.com, and the Bohans learned of the public statements of Mr. Mumma and Mummagraphics, Omega, Cruise.com and the Bohans filed an action in federal court against Mr. Mumma and Mummagraphics for defamation, among other claims, to defend their respective reputations and rights. J.A. 1-8. In response, Mummagraphics filed a counterclaim for violations of (1) the federal Controlling the Assault of Non-solicited Pornography and Marketing Act of 2003, [15 U.S.C. § 7701](#) *et seq.* (“the CAN-SPAM Act” or “the Act”), (2) the Oklahoma Fraudulent Electronic Mail Statute, [15 Okl. St. Ann. 776.1](#) *et seq.* (“the Oklahoma Anti-Spam Statute” or “the Oklahoma Statute”), and (3) the Oklahoma Consumer Protection Act, [15 Okl. St. Ann. § 761.1](#) *et seq.* (“the OPCA”), among and other claims. J.A. 36-45. Mummagraphics' claims allege that the 11 e-mails received over a two-month period violated the federal and state statutes because they were fraudulent, and/or misleading. J.A. 36-45.

Mummagraphics admitted that the total *actual* damages it incurred as a result of receiving of eleven e-mails from Cruise.com were “nominal”, speculative, and, perhaps, no more than \$20.00. J.A. 172 at 11. 12-25, 176 at 11. 16-22, 183-184, 11at 11. 2-6, 412 at 11. 14-24. In fact, Mummagraphics admitted, through its corporate designee Mr. Mumma, that the “main” injury it suffered was “wondering” how Cruise.com “figured out” that Inbox@webguy.net “was an address that worked.” J.A. 176 at 11. 16-19. Nevertheless, Mummagraphics seeks an award under its various claims of no less than \$1,095,100.00 plus attorneys' fees and other relief for the 11 e-mails sent by Appellees. J.A. 45, 172, 183-184.

Course of Proceedings

Mummagraphics states four claims in its Counterclaim concerning allegedly improper e-mail. J.A. 36-45. At its core, the Counterclaim alleges that Cruise.com's e-mail contained fraudulent message headers falsely indicating the transmission path of the e-mail messages and/or included false or misleading information that purposely or negligently injured Mummagraphics. J.A. 40. Only two specific allegations of false information are found in the Counterclaim. J.A. 38. First, the Counterclaim alleges that “each of the 11 [e-mails] falsely stated that ‘[y]ou are receiving this e-mail because you have opted-in to our subscriber list.’ ” J.A. 38 at ¶ 5. Second, the Counterclaim alleges that “[e]ach of the 11 [e-mails] included in the header the hostname FL-Broadcast.net, which is a false and misleading identifier.” J.A. 38 at ¶ 6.

Mummagraphics also claims that it “opted out” of Cruise.com's subscriber list. J.A. 38 at ¶ 7 and ¶ 10. However, rather than state simply that Mr. Mumma requested the removal of the e-mail address at which he was receiving e-mail, the Counterclaim alleges that Mr. Mumma “requested that all of the *domain names* listed on Mummagraphics' [sic] website OptOutByDomain.com be opted-out from” Cruise.com's list. J.A. 38 at ¶ 7 (emphasis added).

Count I alleges “General Violations of the CAN-SPAM Act.” J.A. 39. Count III, alleges “Fraudulent Use of Electronic Mail” asserted under the Oklahoma Anti-Spam Statute. J.A. 40. Count IV is a claim under the OCPA that is based entirely on alleged violations of §§ 776.1(D) and 776.7(D) of the Oklahoma Anti-Spam Statute. J.A. 43-44. Count V asserts a claim for trespass to chattels arising out of the receipt of eleven e-mails. J.A. 44-45.

Disposition of Court Below on Summary Judgment

On August 12, 2005, Judge Leonie Brinkema heard opposing Motions for Summary Judgment. At the conclusion of that hearing, Judge Brinkema ruled in favor of Omega and the other Plaintiffs on their Motion seeking summary judgment on Mummagraphics' claims that Cruise.com's e-mail violated federal and state law. J.A. 76-78. This is the decision before this Court on appeal. J.A. 82.

In reaching her decision, Judge Brinkema first addressed the claim under the CAN-SPAM Act. J.A. 87, 90-95. Judge Brinkema focused on the provisions of the CAN-SPAM Act that require a sender of e-mail to provide “opt-out” mechanisms to allow a recipient of e-mail to inform the sender that he or she does not want to receive any more e-mail from that sender. J.A. 92-94. She found that the e-mails contained all of the necessary mechanisms and, therefore, complied with the CAN-SPAM Act. J.A. 92-94. She also observed that Mr. Mumma failed to effectively opt-out until February 2, 2005 at the earliest. J.A. 92-94. Finally, since she found that the last e-mail sent by Cruise.com was sent on February 9, 2005 (within ten business days of effective notice), she ruled that Mummagraphics did not establish a violation of the CAN-SPAM Act. J.A. 94-95.

Judge Brinkema then discussed the question of whether the e-mails in question contained any false information. J.A. 95-98. She found that although there might have been “inaccuracy” in the name of the computer from which the e-mail was sent, “anybody looking at that message knows exactly to whom to go to do what is necessary, which is to opt-out if they want to opt out.” J.A. 9 at 11.4-7, 98 at 11. 2-4. Judge Brinkema also noted that Mr. Mumma had no difficulty in contacting not only Cruise.com, but its corporate parent as well. J.A. 98. Based on that evidence, Judge Brinkema ruled that Mummagraphics' allegation of falseness did not meet the “materiality” standard of the CAN-SPAM Act. J.A. 97-100, 102 at 11. 16-18.

The second issue the Court addressed was whether the CAN-SPAM Act preempts the Oklahoma Statute and, if so, to what extent the state law remains effective. J.A. 102-103. On that issue, Judge Brinkema found that the CAN-SPAM Act was “intended to supercede to a significant degree individual state laws governing this area.” J.A. 102 at 11. 22-23. Judge Brinkema found specifically that CAN-SPAM preempts the Oklahoma Statute “to the extent it ad-

dresses or prescribes proper header information ... because if that were not the case, you could then have 50 different standards or criteria for what must be in a header or not in a header and the whole concern of Congress and the recognition of Congress in its findings is that the nature of Internet commerce is so extensive that individual state laws, if you have 50 different state laws on the subject, you couldn't do commerce nationally.” J.A. 103 at 11. 2-10. Based on those conclusions, Counts III and IV of Mummagraphics' Counterclaim were dismissed on summary judgment. J.A. 103 at 11. 21-25, 106.

The final Count of the Counterclaim was a common law claim for trespass to chattels. As to that Count, Judge Brinkema found that Plaintiffs did not intentionally violate the property rights of Mummagraphics and that Mummagraphics failed to give “clear and fair notice to the sender of the property limits” because it refused to provide the e-mail address at which it was receiving e-mail from Cruise.com until “late in the game” after which only one additional e-mail was received. J.A. 106 at 1. 17-107 at 1. 4.

STATEMENT OF UNDISPUTED FACTS

Appellant is Not an Internet Access Service Provider. Mummagraphics asserts that it is an “Internet Access Service Provider” (“IASP”), which, if true, would enable it to claim standing for a private right of action under the CAN-SPAM Act. J.A. 36-38. In his deposition, however, Mr. Mumma admitted that Mummagraphics does not provide connectivity or access to the internet as required to satisfy the statutory definition applicable to that Act. J.A. 193-195.

***10** Cruise.com's E-mail System. In recognition of the proliferation of unsolicited e-mail as well as the enactment of the CAN-SPAM Act, and out of a desire to preserve its reputation as a responsible business, Omega invested hundreds of thousands of dollars in the development of a new e-mail system, including creating proprietary elements of that system, to ensure that it never sent e-mail to those who did not ask to receive e-mail from Omega or its subsidiary Cruise.com. J.A. 224-229. A primary component of that system was the institution of a list of subscribers that is comprised solely of e-mail addresses of customers or prospective customers that are provided directly to Omega and Cruise.com by individuals for the specific purpose of receiving announcements of vacation specials by e-mail. J.A. 224-225. In other words, to get on Cruise.com's subscriber list, one must opt in. Neither Omega nor Cruise.com obtain e-mail lists from third parties or from any source. J.A. 224-J.A. 225. Cruise.com has never received a complaint for sending unwanted or unsolicited e-mail other than Mr. Mumma's complaint at issue in this case. J.A. 244.

Cruise.com's E-mails Sent to Appellant. Sometime before December 29, 2004, Cruise.com received a request through its website to send e-mail advertisements to the e-mail address “inbox@webguy.net.” J.A. 151. In response, and in the normal course of its business, Cruise.com began sending regular e-mails announcing their vacation promotions to that address. J.A. 47-75.

***11** Between December 29, 2004 and January 19, 2005, Cruise.com sent five e-mails to that e-mail address. J.A. 47-58. Each of those e-mails, as well as the six e-mails sent to Mr. Mumma after that date, included information in the “from” line of the header that accurately identified the sender of those e-mails, i.e., Cruise.com, and no other sender was identified in the “from” line. J.A. 47-75. The “Received” line in the header included information that identified the computer from which the e-mail was sent as “FL-Broadcast.net.” J.A. 46, 48, 50, 52, J.A. 55, 58, 61, 64, 67, 70, 73. That name was given to the computer by Cruise.com or its contractor, except for the “.net” suffix which was automatically generated by the e-mail software program obtained by Cruise.com from a third-party software vendor. J.A. 160, 228, 252. The e-mails also included an internet-based mechanism to permit recipients to opt-out of receiving any more e-mail, as well as the mailing address of Cruise.com and its main telephone number. J.A. 47, 49, 51, 53,56,59,62,65,68,71,74.

Mr. Mumma's Actions in Response to E-mail from Cruise.com. Mr. Mumma saw the first few e-mails but ignored

them. J.A. 178, 190. It was not until January 19, 2005 that he decided to inform Cruise.com that he wanted it to stop sending e-mail. J.A. 155-159, 330. On that date, Mr. Mumma identified the sender of the e-mail as Cruise.com and based on the information provided in the e-mail, he determined that Omega is the parent of Cruise.com, which he contacted at *12 its headquarters by telephone to complain about the e-mail. J.A. 155-159, 330, 401. At no time did Mr. Mumma have any trouble identifying the actual sender of the e-mail and he testified that he was not misled by any information in Cruise.com's e-mail as to the sender of the e-mail. J.A. 155-159, 329, 401-402. In fact, he never attempted to use the internet-based opt-out mechanism provided in the e-mails to request that Cruise.com stop sending him e-mail. J.A. 188-189.

During a telephone call initiated by Mr. Mumma on January 19, 2005, he asked for and was connected with the legal department of Omega and, specifically, its General Counsel, John Lawless. J.A. 155-156. Mr. Mumma informed Mr. Lawless that he received e-mail from Cruise.com and he wanted to stop receiving such e-mail. J.A. 156-159. Mr. Lawless first asked Mr. Mumma if he had attempted to use the opt-out mechanism in the e-mail to which Mr. Mumma responded, "only idiots do that!" J.A. 156-158. Mr. Lawless then asked Mr. Mumma to provide the e-mail address he wanted removed from the subscriber list. J.A. 158-159. Instead of providing that address, however, Mr. Mumma demanded that Omega remove all of the 347 *domain names* listed on a website operated by Mummagraphics. J.A. 158-159.

There is no evidence in the record that Cruise.com sent e-mail to any other e-mail address owned or operated by Mummagraphics. Neither is there any indication that any of the other owners of the domain names on Mummagraphics' *13 list received any e-mail from Cruise.com, or requested that they have e-mail addresses removed from Cruise.com's subscriber list.

Mr. Lawless responded to Mr. Mumma's demand by saying that he would "take them down now." J.A. 159. Mr. Lawless explained that he meant that he would take the list of domain names provided by Mr. Mumma "down" to Travtech, the technical arm of Omega, which is on the lower floor of the Omega headquarters building. J.A. 65-66, 192, 305, 394.

When Mr. Lawless and Travtech realized the actual nature of Mr. Mumma's demand, and the amount of time and effort it would require to comply, they decided against incurring the time and expense of going well beyond the requirements of the CAN-SPAM Act to search Cruise.com's database for all e-mail addresses associated with the domain names and to remove them from its subscriber list. J.A. 160-164, 390. As a result, without any knowledge whatsoever of "inbox@webguy.net" as the address at which Mr. Mumma was receiving e-mail, Cruise.com did not remove that address from its list. J.A. 56-75, 161-164, 258.

After receiving one more e-mail on the day after his call to Omega, Mr. Mumma sent a letter to Daniel Bohan demanding that Cruise.com stop sending him e-mail and to pay Mr. Mumma \$6,250.00 to avoid a lawsuit that he threatened to file. J.A. 9-10. In that letter, which was received by Mr. Lawless on February 2, *14 2005, Mr. Mumma again failed to identify the e-mail address at which he received Cruise.com's e-mail. J.A. 9-10, 22, 191. Mr. Lawless noticed, however, that the e-mail address "inbox@webguy.net" appeared in the attachments to the letter and, based on that clue, directed Travtech to remove that e-mail address from Cruise.com's list. J.A. 191, 257-258, 361, 368-369. Also in response to that letter, Mr. Lawless called Mr. Mumma to refuse his naked demand for money and tried to dissuade him from filing a lawsuit. J.A. 137.

As a result of Omega's refusal to pay Mr. Mumma's demand, Mr. Mumma and Mummagraphics began a campaign of smearing Omega, Cruise.com, and their owners, as "spammers" and posted numerous defamatory statements on Mummagraphics' websites. J.A. 23-45, 195-204. Remarkably, Mr. Mumma and Mummagraphics even took images of Mr. and Mrs. Bohan directly from Omega's website and posted them on Mummagraphics' websites labeling them "Cruise.com spammers." J.A. 23.

Mrs. Bohan was deeply offended by the statements made against her, her husband, and her company by Mr. Mumma and Mummagraphics. J.A. 210. In an effort to defend her reputation, and that of her business, she directed Mr. Lawless to file the instant action against Mr. Mumma and Mummagraphics for defamation, among other claims. *See, e.g.*, J.A. 1-20.

*15 As part of their business, Appellant and Mr. Mumma regularly seek to “trap” senders of e-mail into sending them e-mail and then use their receipt of such e-mail as the basis for filing lawsuits under anti-spam laws and advise visitors to their websites to engage in the same actions. J.A. 23, 99-100, 145-146. Mr. Mumma admitted that after publishing the defamatory statements on his websites, he sought to entrap Appellees into sending what he considers to be spam e-mail. J.A. 145-146. To carry out his “trap,” Mr. Mumma submitted fictitious e-mail addresses through Cruise.com’s website to “opt-in” and to request “e-deals” from Cruise.com. J.A. 145-146.

SUMMARY OF THE ARGUMENT

The CAN-SPAM Act Codifies Congress' intent to establish one national standard for regulating e-mail sent in interstate commerce. To accomplish its intent, Congress provided that all state laws that expressly regulate e-mail are preempted except to the extent that they prohibit “falsity or deception.” Congress was clearly referring to “fraud” when it spoke of “falsity or deception” in the Act.

The Oklahoma Anti-Spam Statute is not limited to prohibitions of fraud. Instead, it regulates practically all of the conduct addressed by the CAN-SPAM Act and sets a much lower threshold for violation of its provisions than would be necessary to establish fraud. Mistake, error, omission and negligence are the standards established by that Statute as it applies to the transmission of e-mail. Therefore, the Oklahoma Statute is preempted by the CAN-SPAM Act and, as a result, Mummagraphics' claims thereunder were properly dismissed by the District Court.

Due to the fact that the Oklahoma Statute imposes unreasonably severe burdens on interstate commerce, it is also unconstitutional as a violation of the dormant Commerce Clause of the Constitution. By imposing penalties of \$550,000 for the transmission of eleven e-mails that allegedly caused only “nominal” damages, the Oklahoma Statute runs afoul of the *Pike* test for balancing a state's efforts to protect local interests against the burdens placed on interstate commerce by those efforts and is, therefore, unconstitutional.

The claims stated by Mummagraphics under the CAN-SPAM Act were also properly rejected by the District Court because Mummagraphics is not an IASP. Therefore, it does not have standing to bring a private action under the Act. Even if Mummagraphics can be considered to be an IASP, its allegations do not give rise to claims under the Act. Allegations of inaccurate computer names, without more, do not establish violations of the Act, and allegations of failure to comply with opt-out provisions cannot be asserted by an IASP unless they are accompanied by evidence of a pattern or practice of such violations. Neither allegations nor evidence of a pattern or practice were presented by Mummagraphics in this case. Also, allegations of falsity of an e-mail's content cannot be asserted under the CAN-SPAM Act. Therefore, summary judgment as to Appellant's claims under the CAN-SPAM Act was properly granted to Appellees by the District Court.

If the Oklahoma Statute survives preemption in some measure, it only remains enforceable to the extent it prohibits fraud. But in this case Mummagraphics' claims under the Oklahoma Statute did not allege that Appellees committed fraud. In fact, Mummagraphics only alleged that a computer name included in header information was somehow “misleading,” that a statement in the body of an e-mail was false, and that Appellees did not remove an e-mail address from a subscriber list after an allegedly valid opt-out was communicated. The record shows, however, that Mummagraphics was not misled by, and did not rely to its detriment upon, any of the allegedly improper information. Thus, even if Oklahoma law prohibits fraud and remains valid, Mummagraphics did not allege that fraud was committed by Appellees. Therefore, Mummagraphics' claims under the Oklahoma Anti-Spam Statute were properly

dismissed on summary judgment.

Likewise, the District Court's decision to dismiss Mummagraphics' trespass to chattels claim was properly dismissed. Oklahoma has not recognized a claim related to the transmission of e-mails as a trespass to chattels and there is no indication that Oklahoma would extend its common law to include such a claim.

18ARGUMENT

Standard of Review

Summary judgment is appropriate when there is no genuine issue of material fact, given the parties' burdens of proof at trial. See [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 247-48 (1986). The appellate standard of review of a grant of summary judgment is *de novo*. See [Chisolm v. TranSouth Fin. Corp.](#), 95 F.3d 331, 334 (4th Cir. 1996). The non-moving party has the ultimate burden of demonstrating a genuine issue of material fact for trial. See [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322-23 (1986). Conclusory or speculative allegations do not suffice, nor does a “mere scintilla of evidence” in support of its case. [Thompson v. Potomac Electric Power Co.](#), 312 F.3d 645, 649 (4th Cir. 2002). Summary judgment is proper “if the 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 a judgment as a matter of law.” [Cray Communications, Inc. v. Novatel Computer Systems, Inc.](#), 33 F.3d 390, 393 (4th Cir.1994) (quoting [Celotex](#), 477 U.S. at 322-23).

I. THE CAN-SPAM ACT PREEMPTS THE OKLAHOMA ANTI-SPAM STATUTE.

Appellant's first argument on appeal contests the District Court's conclusion that the CAN-SPAM Act significantly preempts the Oklahoma Anti-Spam Statute. *19 Remarkably, Appellant argues that the federal statute “does not preempt the application of the Oklahoma Statute *in any way*.” Appellant's Brief at p. 7 (emphasis added). In fact, the express terms of the CAN-SPAM Act clearly provide that state laws governing internet e-mail are preempted by the Act with only a narrow exception that permits the States to continue enforcement of prohibitions against fraudulent e-mail transmissions. Congress intended the CAN-SPAM Act to serve as the basis for establishing and enforcing national standards for the content and transmission of e-mail while providing a narrow exception to permit the states to prohibit only fraudulent e-mail. See generally [15 U.S.C. § 7701](#). Congress' clearly expressed purpose in enacting the CAN-SPAM Act supports the District Court's conclusion that the Act preempts the application and enforcement of the Oklahoma Statute in this case, and, therefore, the District Court's decision to grant summary judgment to Appellees on Mummagraphics' claims under Oklahoma law should be affirmed.

A. *The CAN-SPAM Act Is Intended to Establish a National Standard for Regulating Commercial E-mail in Interstate Commerce.*

The CAN-SPAM Act was enacted in response to the growing problem of Unsolicited Commercial E-mail (“UCE”). *Id.* Citing the lack of success under the then-current conditions in which many states attempted to regulate e-mail with different standards and requirements, Congress determined that a national standard *20 for regulating UCE was required. See [15 U.S.C. 7701\(b\)\(1\)](#). In enacting the CAN-SPAM Act, Congress made several findings that are embodied within the first section of the Act. Among the findings most relevant to this Appeal are the following:

(a) FINDINGS- The Congress finds the following:

(1) Electronic mail has become an extremely important and popular means of communication, relied on by millions of Americans on a daily basis for personal and commercial purposes. Its low cost and global reach make it extremely convenient and efficient, and offer unique opportunities for the development and growth of frictionless commerce.

(11) Many States have enacted legislation intended to regulate or reduce unsolicited commercial electronic mail, but these statutes impose different standards and requirements. As a result, they do not appear to have been successful in addressing the problems associated with unsolicited commercial electronic mail, in part because, since an electronic mail address does not specify a geographic location, it can be extremely difficult for law-abiding businesses to know with which of these disparate statutes they are required to comply.

(12) The problems associated with the rapid growth and abuse of unsolicited commercial electronic mail cannot be solved by Federal legislation alone. The development and adoption of technological approaches and the pursuit of cooperative efforts with other countries will be necessary as well.

Congress also stated the public policy underlying its passage of the Act in [§ 7701\(b\)](#) as follows:

***21** (b) CONGRESSIONAL DETERMINATION OF PUBLIC POLICY-On the basis of the findings in subsection (a), the Congress determines that--

(1) there is a substantial government interest in regulation of commercial electronic mail on a nationwide basis.

The purposes of the Act as set forth in the [Senate Report 108-102](#) on the Act are as follows:

(i) prohibit senders of electronic mail (e-mail) for primarily commercial advertisement or promotional purposes from deceiving intended recipients or Internet service providers as to the source or subject matter of their e-mail messages; (ii) require such e-mail senders to give recipients an opportunity to decline to receive future commercial e-mail from them and to honor such requests; (iii) require senders of unsolicited commercial e-mail (UCE) to also include a valid physical address in the e-mail message and a clear notice that the message is an advertisement or solicitation; and (iv) prohibit businesses from knowingly promoting, or permitting the promotion of, their trade or business through e-mail transmitted with false or misleading sender or routing information.

[S. Rep. No. 108-102, at 1 \(2003\)](#), reprinted in 2004 U.S.C.C.A.N. 2348, 2348.

The CAN-SPAM Act covers a variety of issues that require national regulation as determined by Congress. The subjects on which Congress imposed a national regulatory standard include the following:

1. Definitions of: “commercial electronic mail message”, “domain name”, “header information”, “Internet access service”, and “sender”, among others, [15 U.S.C. § 7702](#);
2. Prohibition of false or misleading transmission information, including a standard for what will be considered not misleading, [15 U.S.C. § 7704\(a\)\(1\)](#);
- *22** 3. Prohibition of deceptive subject headings, [15 U.S.C. § 7704\(a\)\(2\)](#);
4. Inclusion of return address or comparable mechanism in commercial electronic mail, [15 U.S.C. 7704\(a\)\(3\)](#);
5. Prohibition of transmission of commercial electronic mail after objection; [15 U.S.C. § 7704\(a\)\(4\)](#);
6. Inclusion of identifier, opt-out, and physical address in commercial electronic mail, [15 U.S.C. § 7704\(a\)\(5\)](#);
7. A standard of “materially” for purposes of determining whether header information violates the Act as “false or misleading”, [15 U.S.C. § 7704\(a\)\(6\)](#);
8. An enforcement scheme by which the Federal Trade Commission has primary responsibility for enforcement of the Act along with other federal agencies and state attorneys general, with a narrow private right of action for providers of internet access service, [15 U.S.C. § 7706](#);
9. Penalties for violation of the Act including criminal sanctions and civil financial penalties, [15 U.S.C. § 7706](#);
10. A limitation on damages of \$1,000,000 for actions brought by an IASP, [15 U.S.C. § 7706\(g\)\(3\)\(B\)](#); and
11. Provisions for reduction of penalties where remedial action is taken by sender or violation occurred despite reasonable efforts to maintain compliance. [15 U.S.C. § 7706\(f\)\(3\)\(D\)](#) and [15 U.S.C. § 7706\(g\)\(3\)\(D\)](#).

By enacting these provision, Congress established a comprehensive regulatory scheme for commercial e-mail to be enforced on a nationwide basis.

***23 B.** *Congress Provided a Narrow Fraud Exception to the Preemption of State Law.*

As Appellant correctly indicates in its brief, “the purpose of Congress is the ultimate touchstone in every preemption case.” See Appellant’s Brief at p. 8 (citing, *Medtronic v. Lohr*, 581 U.S. 470, 485 (1996)). Despite properly identifying the foundation for analyzing issues of preemption, Appellant wholly failed to consider the purposes underlying the passage of the CAN-SPAM Act. In fact, as shown above, Congress’ purpose in enacting the CAN-SPAM Act could not be clearer - to establish a national standard for regulating e-mail transmitted in interstate commerce. See [15 U.S.C. § 7701\(b\)](#).

To carry out its purpose, Congress necessarily provided that the CAN-SPAM Act preempts any state statute that “expressly regulates the use of electronic mail to send commercial messages ...” [15 U.S.C. § 7707\(b\)](#). Congress also provided for an important, but very narrow, exception to the preemption provision that permits states to continue to enforce laws “to the extent that any such [law] prohibits falsity or deception in any portion of a commercial [e-mail] message or information attached thereto.” *Id.* The term “falsity” is not defined in the Act and, therefore, its meaning for purposes of enforcing the Act might be questioned. The legislative history of the CAN-SPAM Act, however, reveals that Congress’ intent concerning the meaning of “falsity” was quite specific and clearly supports the *24 conclusion that the exception is narrowly tailored to recognize an important state interest, i.e., protecting its citizens from fraudulent behavior.

In [Senate Report 108-102](#), under the heading “Effect on other laws,” the exception is described as encompassing “statutes, regulations or rules that target *fraud* or deception in such e-mail.” [S. Rep. No. 108-102](#), *supra* at 21 (2003)(emphasis added). The report goes on to characterize laws that would be preempted and then states, “[b]y contrast, a State law *prohibiting fraudulent* or deceptive headers, subject lines, or content in commercial e-mail would not be preempted.” *Id.* (emphasis added). The reason for limiting the exception to fraudulent behavior is then explained as follows:

Given the inherently interstate nature of e-mail communications, the Committee believes that this bill’s creation of *one national standard* is a proper exercise of the Congress’s power to regulate interstate commerce that is essential to resolving the significant harms from spam faced by American consumers, organizations, and businesses throughout the United States. This is particularly true because, in contrast to telephone numbers, e-mail addresses do not reveal the State where the holder is located. As a result, a sender of e-mail has no easy way to determine with which State law to comply. Statutes that *prohibit fraud and deception* in e-mail do not raise the same concern, because they target behavior that a legitimate business trying to comply with relevant laws would not be engaging in anyway.

Id. at 21-22, 2365 (emphasis added). Thus, Congress left no doubt that it intended to regulate all aspects of e-mail transmission and content except to the extent particular statutes prohibit practices that constitute fraudulent or deceptive behavior. Congress did not intend to permit states to continue to regulate *25 typographical errors, inadvertent or negligent mistakes, or computer errors that lead to “false” transmission information.

Despite the clear language of the Act and the intent of Congress as expressed in the Legislative History of the CAN-SPAM Act, Appellant has taken the unsupportable position that the CAN-SPAM Act “does not preempt the application of the Oklahoma Statutes *in any way*.” See Appellant’s Brief at 7 (emphasis added). Appellees cannot characterize this position as anything other than entirely wrong. As Judge Brinkema stated in her remarks during the summary judgment hearing, “I don’t think there’s any question that the [CAN-SPAM Act] was intended to supercede to a significant degree individual state laws governing [e-mail].” J.A. 102. Judge Brinkema’s conclusion on this point is shared by each of the courts cited by Appellant that have so far considered the preemption language of the CAN-SPAM Act. See, e.g., [White Buffalo Ventures, LLC v. Univ. of Texas](#), 420 F.3d 366, 371-72 (5th Cir. 2005); [Gordon v. Impulse Marketing Group, Inc.](#), 375 F. Supp. 2d 1040, 1045 (E.D. Wash. 2005); [White Buffalo Ventures, LLC v. Univ. of Texas](#), 2004 WL 1854168, at *3 (W.D. Tex. 2004). The question in those cases is the *scope* of the exception to preemption; there is no doubt that state antispam laws are preempted to a significant extent.

The plain meaning of the CAN-SPAM Act's exception to preemption is that all portions of state laws that regulate e-mail are preempted except those provisions *26 of such laws that prohibit fraud. Thus, contrary to the implication of Appellant's argument, a state statute can be preempted in part, and remain enforceable, in part, as long as the statute in question contains provisions that specifically prohibit fraud. All provisions not related to fraud are preempted, such as provisions related to non-fraudulent content or information, definitions, enforcement, private right of action, penalties, opt-out requirements, etc.

C. The Oklahoma Anti-Spam Statute is Preempted by the CAN-SPAM Act.

Most of the provisions of the Oklahoma Statute, which was passed prior to the passage of the CAN-SPAM Act, address the same concerns as the CAN-SPAM Act. As such, they are preempted unless they can be held to prohibit "fraudulent" behavior as that term was understood by Congress when it enacted the CAN-SPAM Act.

Under Oklahoma law, the elements of fraud include the following: 1) a false material misrepresentation, 2) made as a positive assertion which is either known to be false, or made recklessly without knowledge of the truth, 3) with the intention that it be acted upon, and 4) which is relied on by the other party to his/her own detriment. [Rogers v. Meiser, 2003 OK 6, ¶ 17, 68 P.3d 967, 977](#). According to the intent of Congress as expressed in the CAN-SPAM Act, the Oklahoma Anti-Spam Act survives preemption only to the extent it prohibits the behavior described in the elements above.

*27 Mummagraphics asserted claims under [§ 776.1\(A\)](#), [776.6\(A\)](#) and [776.6\(E\)](#) of the Oklahoma Anti-Spam Statute. § 776.1 (A) of the Oklahoma Statute, entitled "Fraudulent electronic mail messages," refers to several kinds of activity that represent violations of the Statute. § 776.1 (C) provides that any e-mail that violates § 776.1 (A) "shall be considered a fraudulent electronic mail message" [Section 776.4](#) sets forth definitions including "Electronic mail messages" and "Fraudulent electronic mail message." With respect to the latter, only violations of section 776.1(A) are defined as "fraudulent."

Despite the description of violations of section 776.1(A) as "fraudulent e-mail," the acts that constitute violations clearly do not rise to the level of "fraud" as described in *Rogers, supra*. The plain language of the Oklahoma Statute provides that a claimant can establish a violation by showing mere inaccuracy of transmission information, unintentional omission of transmission information, and negligently inflicted injury, among others. The recipient does not have to take any action, or even notice the allegedly offending information (as initially occurred in this case), let alone rely to his detriment on the information, to establish a violation. Therefore, section 776.1 of the Oklahoma Statute clearly does not seek to prohibit fraud. As such, section 776.1 does not fall within the exception to the preemption provision of the CAN-SPAM Act and, therefore, it is preempted.

*28 In contrast to section 776.1(A), section 776.6(A) sets forth activity specifically related to "commercial electronic mail messages" that also violate that statute. Unlike section 776.1 (A), however, [section 776.6](#) does not provide that a violation thereof shall be considered "fraudulent e-mail." Rather, [section 776.6\(A\)](#) provides that any e-mail that contains "[false] electronic mail transmission information or other routing information" or "false or misleading information in the subject line" shall be a violation of the statute. Accordingly, [Section 776.6\(A\)](#) prohibits activity that does not meet the standard of "fraud" under Oklahoma law.

Finally, section 776.6(E) of the Oklahoma Statute does not prohibit fraud in any way. Rather, it provides that an opt-out mechanism must appear in each commercial e-mail and that a sender of such e-mail must remove an e-mail address from its list if it receives an opt-out request through that mechanism. As such, that section obviously is preempted under the CAN-SPAM Act and cannot be enforced in this case.

In light of the discussion above, Mummagraphics' Appeal related to its claims asserted under the Oklahoma Statute

must be denied based on the preemption of that statute by the CAN-SPAM Act.

D. Prior Cases That Construe the CAN-SPAM Act Do Not Support Appellant's Argument Regarding Preemption.

As previously stated, Appellant appears to disregard completely the language of both the CAN-SPAM Act and the Oklahoma Statute in arguing that *29 the CAN-SPAM Act does not preempt the Oklahoma law in any way. Similarly, their heavy reliance on the Fifth Circuit's decision in *White Buffalo, supra*, ignores that court's analysis of the CAN-SPAM Act and the grounds for its decision.

In *White Buffalo*, the University of Texas (the "University") blocked e-mail sent by an e-mail marketer ("White Buffalo") to e-mail addresses hosted on the University's computers due to the large volume of such messages being sent by that marketer. [420 F.3d 366, 369-370 \(5th Cir. 2005\)](#). The University made the decision to block such e-mail in accordance with its terms of service and the policies it established as an internet access service provider ("IASP"). *Id.*

White Buffalo filed its action against the University under the CAN-SPAM Act alleging that the University's actions and the policies under which they were taken constituted state regulations concerning e-mail within the meaning of the CAN-SPAM Act and were, therefore, preempted by the Act. *Id.* at 368-369. There was no dispute that 1) White Buffalo complied with all relevant provisions of the CAN-SPAM Act, and 2) the University did not block White Buffalo's e-mail based on any allegation of "falsity or deception" in the transmission information attached to White Buffalo's e-mail. *Id.* at 371.

In fact, the questions before the court related to the issue of preemption did not involve the scope of the exception to the preemption provision. Rather, the issue before the court was whether the preemption provision "prevents [the *30 University] from promulgating regulations to impede the ingress of [White Buffalo's] e-mail to [the University's e-mail] users" or, in other words, whether the Act "preempts the [University's] Rules authorizing the e-mail filters." *Id.* The University argued that it was an IASP and, as such, its rules were authorized by [section 7707\(c\)](#) of the Act, which provides that the Act does not prevent an IASP from adopting, implementing or enforcing "a policy of declining to transmit, route, relay, handle or store certain types of [e-mail] messages." *Id.* The district court in *White Buffalo* decided in favor of the University on summary judgment and ruled that the University's e-mail filtering policies were not preempted by the CAN-SPAM Act on several grounds. See [White Buffalo Ventures, LLC v. Univ. of Texas, 2004 WL 1854168 \(W.D. Tex. 2004\)](#).

As the Fifth Circuit noted in its decision affirming the district court's decision, there is an ambiguity in the Act where a state actor is also an IASP. *Id.* at 372. The Fifth Circuit based its decision to deny White Buffalo's argument in favor of preemption on that ambiguity. *Id.* at 371-374. The court held that the "CAN-SPAM does not preempt the [University's] Rules because [§ 7701\(b\)\(1\)](#) is in tension with plain text found elsewhere in the Act and that tension triggers the presumption against preemption." *Id.* at 372. The Fifth Circuit's decision was limited to consideration of the Rules established by the University as an IASP but *31 did not involve a question of whether the University of Texas' Rules prohibited "falsity or deception."

Since the textual tension found by the Fifth Circuit and upon which it based its decision does not involve a question of state regulation of "falsity or deception," that decision has little, if any, relevance to the questions before this Court. Therefore, *White Buffalo* does not represent persuasive authority in this Appeal and Mummagraphics' reliance on that decision is misplaced.

Notwithstanding that conclusion, however, the Fifth Circuit's opinion does contain some guidance to the issues in this Appeal. In reaching its decision, the Fifth Circuit considered the scope of the preemption clause and its exception language and concluded that "[i]n layman's terms, state entities may not regulate the use of [e-mail] to send

commercial spam except where those rules relate to source and content authenticity.” *Id.* at 372 (emphasis added). Although that observation was not a basis for its decision, the Fifth Circuit appears to agree with Appellees in this Appeal that 1) the CAN-SPAM Act preempts all but a narrow set of state laws regulating e-mail, and 2) something more than simple error or mistake in transmission information must be found before a state can enforce its anti-spam laws. *See Id.* The phrase “source and content authenticity” appears to be drawn from Congress' sense that “fraud and deception” can still be prohibited by the *32 states. Compare [White Buffalo, 420 F.3d at 372](#), with [S. Rep. No. 108-102, supra](#), at 21-22 (2003).

It is also interesting to note that in its opinion granting summary judgment to the University, the district court distinguished the facts of that case with an action that might be brought under the Texas anti-spam statute and stated the following: “In contrast, if White Buffalo were prosecuted under the Texas anti-spam statute, White Buffalo would surely be able to raise preemption as a defense and the state would be prevented from imposing penalties on White Buffalo if their spam complied with all provision [sic] of the CAN-SPAM Act.” [White Buffalo, 2004 WL 1854168, at *4](#) (citation and footnote omitted). Thus, if the preemption issue in *White Buffalo* were identical to the preemption issue presented in the instant Appeal, the district court in that case would have rejected Appellant's argument on that issue and ruled that the State statute is preempted by the CAN-SPAM Act.

Mummagraphics also cites in support of its argument, the decision of the District Court for the Eastern District of Washington in *Gordon, supra*. In that case, the district court considered a claim brought under the Washington anti-spam statute which contains language very similar to some of the provisions of the Oklahoma anti-spam statute. 375 F. Supp. at 1045.

In *Gordon*, the defendant filed a motion to dismiss based, in part, on the preemption language of the CAN-SPAM Act. *Id.* at 1044-1045. In its decision *33 denying the motion to dismiss, the court reviewed the CAN-SPAM Act's preemption language and the exception clause thereof, and compared it to the Washington statute's language that prohibits misrepresentation of transmission information and “false and misleading” subject line information. *Id.* at 1045. Without reference to any other authority, the district court summarily concluded that the language of the Washington statute fell within the exception to the preemption provision of the CAN-SPAM Act and, as a result, the Washington statute is not preempted by the CAN-SPAM Act. *Id.* at 1045-1046.

The *Gordon* court's simplistic analysis of the preemption issue appears to have occurred in the vacuum created by the court's failure to consider Congress' purpose in passing the CAN-SPAM Act and, in particular, its preemption provisions. As shown above, Congress clearly intended to except from preemption only those provisions of state law that prohibit fraudulent or deceptive activities of senders of e-mail. *See, e.g., 15 U.S.C. § 7704(a)(2); S. Rep. No. 108-102, supra*, at 21-22 (2003). If the Washington court had considered Congress' purpose, it is reasonable to assume that its decision on the question of preemption would have more closely resembled the *White Buffalo* district court's dicta that the CAN-SPAM Act preempts state laws such as Texas' (and Washington's) anti-spam statutes. *See White Buffalo, 2004 WL 1854168, at *4*. Since that court did not properly analyze the Congressional intent underlying the CAN-SPAM Act, *34 *Gordon* does not represent persuasive authority on the question of the scope of the preemption clause or the exception thereto of the CAN-SPAM Act.

II. THE OKLAHOMA ANTI-SPAM STATUTE VIOLATES THE DORMANT COMMERCE CLAUSE.

A. Commercial E-Mail is Interstate Commerce.

[Article I, Section 8, Clause 3 of the United States Constitution](#), known as the “Commerce Clause,” empowers Congress “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” This clause of the Constitution is generally understood to confer upon Congress the primary authority to regulate interstate commerce. Given its nature and Congressional statements e-mail, there should be no doubt that commercial e-

mail constitutes “interstate commerce.” See [49 U.S.C. 31132\(4\)](#).

In [Senate Report 108-102](#) concerning the CAN-SPAM Act, the very first sentence of that Report states the basic purpose of the Act: “to regulate interstate commerce by imposing limitations and penalties on the transmission of unsolicited commercial electronic mail via the internet....” [S. Rep. No. 108-102](#), *supra*, at 1. The Committee also stated as follows:

Given the inherently interstate nature of e-mail communications, the Committee believes that this bill's creation of one national standard is a proper exercise of the Congress's power to regulate interstate commerce

[S. Rep. No. 108-102](#), *supra*, at 21.

*35 Accordingly, commercial e-mail is properly understood to be communications in interstate commerce. Therefore, since the Oklahoma Anti-Spam Statute is intended to regulate commercial e-mail, its intent must also be construed to regulate interstate commerce.

B. The Oklahoma Anti-Spam Statute Directly Affects Interstate Commerce.

The corollary to the Constitution's affirmative grant of Congressional authority over interstate commerce is the implied prohibition against such regulation by the States. This negative inference of the reservation of lawmaking authority over interstate commerce set forth in the Commerce Clause has become known as the “dormant Commerce Clause.” [PSINet v. Chapman](#), 362 F.3d 227, 239 (4th Cir. 2004) (“The negative implication of the Commerce Clause (the dormant Commerce Clause), [U.S. Const. Art. I, § 8, cl. 3](#), includes a prohibition on state regulation that ‘discriminates against or unduly burdens interstate commerce and thereby impeded free private trade in the national marketplace.’ ”)(citing [General Motors Corp. v. Tracy](#), 519 U.S. 278, 287 (1997)).

Federal courts have declared state statutes to be in violation of the dormant Commerce Clause for a variety of reasons including that enforcement of the statute would adversely affect interstate commerce because it would lead to the imposition of inconsistent regulations across the fifty states and therefore impermissibly affect interstate commerce. See, e.g., *36 [C & A Carbone, Inc. v. Town of Clarkstown, N.Y.](#), 511 U.S. 383, 405-408 (1994)(O'Connor, J. concurring); see also [Southern Pacific Co. v. Arizona](#), 325 U.S. 761, 774 (1945)(noting the “confusion and difficulty” that would attend the “unsatisfied need for uniformity” in setting maximum limits on train lengths). The Supreme Court has also ruled that the Commerce Clause prohibits States from regulating subjects that “are in their nature national, or admit only of one uniform system, or plan of regulation.” [Cooley v. Board of Wardens](#), 53 U.S. 299, 319 (1851). Appellees also note that in her ruling on summary judgment in this case, Judge Brinkema invoked the same rationale for her decision and stated that if each of the 50 states had different laws on the requirement of e-mail, one “couldn't do commerce nationally.” J.A. 103, at 11. 2-10.

In [PSINet](#), *supra*, this Court recently decided a case that involved a Virginia state statute that regulated communications related to sexually explicit materials transmitted over the internet. In that case, the Virginia statute was challenged on the grounds that it violated the dormant Commerce Clause. *Id.* at 239-240. This Court held that the Virginia statute directly interfered with interstate commerce because, due to the nature of internet communications, there is no practical way to limit the statute's effect to just Virginia. *Id.* Therefore, it “restricted commercial materials in all states, not just the state in which it was enacted.” *Id.*

Similarly, in this case, the Oklahoma Anti-Spam Statute, if enforced, would directly affect all e-mail sent over the internet. This conclusion is supported by the *37 Findings of Congress of the CAN-SPAM Act, 15 U.S.C. § 7701, as well as the Act's legislative history. See [15 U.S.C. 7701\(11\)](#) (Congress recognized that “since an electronic mail address does not specify a geographic location, it can be extremely difficult for law-abiding businesses to know with which of these disparate statutes they are required to comply.”).

C. The Oklahoma Statute Imposes Clearly Excessive Burdens on Interstate Commerce.

In *PSINet*, *supra*, this Court also analyzed the Virginia statute in the alternative as an “indirect” regulation of interstate commerce under the test applied by the United States Supreme Court in [Pike v. Bruce Church, Inc.](#), 397 U.S. 137 (1970). As this Court applied the *Pike* test in *PSINet*, a state statute that does not directly discriminate against interstate commerce but nonetheless has an affect thereon, must be reviewed under a two-part “balancing” inquiry. *Id.*; *see also PSINet*, 362 F.3d at 240. The first part of the inquiry determines the legitimacy of the state interest sought to be protected by the statute in question. *Id.*; *see also PSINet*, 362 F.3d at 240. The second part of the inquiry “weighs the burden on interstate commerce in light of the local benefit derived from the statute.” *PSINet*, at 240 (citing [Pike](#), 397 U.S. at 142). In determining whether an appropriate balance is struck by the statute in question, the courts consider whether less burdensome means of protecting the state interest are available. *See Hughes v. Oklahoma*, 441 U.S. 322, 336-337 (1979).

*38 In this case, it is clear that the Oklahoma Statute regulates interstate commerce. As such, it is subject to review under the *Pike* test as to whether it violates the prohibition inherent in the dormant Commerce Clause. Under the second part of the *Pike* test, the burden imposed on interstate commerce by the Oklahoma Statute is codified in that law at [section 776.2\(C\)](#) and [776.7\(C\)](#). Both of those sections permit an “electronic mail service provider” to elect “to recover the greater of ten dollars (\$10.00) for each and every unsolicited [e-mail] transmitted in violation of this act, or *Twenty Five Thousand Dollars (\$25, 000. 00) per day.*” [15 Ok. St. Ann. 776.2\(C\), 776.7\(C\)](#) (emphasis added). Thus, a single e-mail sent in violation of the Oklahoma Statute can lead to a penalty of \$25,000 if the claimant chooses to recover that amount of statutory damages.

The truly pernicious effect and burden on interstate commerce of the penalty provisions of the Oklahoma Statute is demonstrated in this case. Here, Appellant seeks statutory damages under both of the penalty sections cited above for each e-mails of which it complains. Thus, based on its receipt of eleven e-mails on eleven separate days over two months, Mummagraphics seeks \$550,000 in statutory damages. Those damages are imposed by the statute to protect the presumably legitimate state interest of protecting citizens against unwanted e-mail. The astounding aspect of those damages, however, is that it appears that the value of the interest to be protected amounts to a total of no more than \$20.00 for the eleven *39 e-mails. That is, the state of Oklahoma is using a \$550,000 club to protect against an alleged loss by one of its citizens of no more than \$20.00. J.A. 172 at 11. 12-25, 176 at 11. 16-22, 183-184, 411 at 11. 2-6-412 at 11. 14-24. The term “undue burden” is almost painfully inadequate to describe the unbalanced nature of the burden as compared to the interest to be protected.

To extend this analysis, reference is made to Mr. Mumma's claim on behalf of Mummagraphics that it receives 300,000 “spam” e-mails per month. J.A. 183, 419. If the Oklahoma Statute is held to be enforceable, and Mummagraphics can establish that it actually receives that number of e-mails in violation of the Statute, then Mummagraphics can conceivably *recover fifteen billion dollars* in statutory damages per month and One Hundred Eighty Billion Dollars per year. If only 15 e-mail service providers in Oklahoma receive the same volume of “spam” e-mails per month, they could use the Oklahoma Statute to obtain, collectively, judgments totalling 2.7 trillion dollars in statutory damages; the equivalent of the entire proposed budget of the United States Government for fiscal year 2007. As such, the effect of the Oklahoma Statute on interstate commerce must be seen as unreasonably burdensome, especially when the cost of the harm to be prevented is, to use the words of Mr. Mumma, “nominal.”

In light of the severity of the burden imposed by the Oklahoma Statute under the *Pike* test, this Court should consider whether other, less burdensome means *40 exist to protect the local interest at issue. It has been recognized the CAN-SPAM Act provides such means in the form of a right of action of State Attorneys General to bring an action under the Act to protect the rights of citizens of their respective states. *See 15 U.S.C. 7706(f)*. As the District Court in *White Buffalo* stated when discussing the preemptive effect of the CAN-SPAM Act: “The State of Texas,

however, is empowered to bring a civil action on behalf of the residents of a state against spammers that violate the provisions of the CAN-SPAM Act.” [White Buffalo Ventures, LLC v. Univ. of Texas, 2004 WL 1854168, at 4, n.4 \(W.D.Tex. 2004\)](#).

III. MUMMAGRAPHICS' CLAIMS UNDER THE CAN-SPAM ACT WAS PROPERLY REJECTED.

The threshold issue that must be addressed with regard to Mummagraphics' claims under the CAN-SPAM Act is whether Mummagraphics can establish that it has standing to bring claims under that Act and, if it does, whether the claims it stated are authorized by the Act. Under the applicable definition, Mummagraphics is not an IASP as contemplated by the Act and, therefore, it does not have standing to bring an action. Even if Mummagraphics can be found to be an IASP, the claims it stated under the CAN-SPAM Act either do not satisfy the requirements of the Act or they are not authorized by the provisions CAN-SPAM Act. Accordingly, all of the claims that are asserted by Mummagraphics under the CAN-SPAM Act were properly rejected by the District Court.

*41 A. *Mummagraphics is Not An IASP and Thus Does Not Have Standing Under the CAN-SPAM Act.*

Congress provided that the Federal Trade Commission, certain other Federal regulatory agencies, and state Attorneys General are primarily responsible for enforcing the CAN-SPAM Act. See [15 U.S.C. § 7706](#). The only exception to governmental enforcement of the Act is set forth at [15 U.S.C. § 7706\(g\)](#), which permits providers of internet access service (“IASPs”) to bring a civil action for a very narrow set of violations of the CAN-SPAM Act. Specifically, IASPs are authorized to file claims if they “are adversely affected by a violation of [section 7704\(a\)\(1\), \(b\), or \(d\)](#) of [the Act], or a pattern or practice that violates [paragraph \(2\), \(3\), \(4\) or \(5\) of section 7704\(a\)](#) of [the Act].” [15 U.S.C. 7706\(g\)](#).

The Act adopts the meaning given the term “internet access service” in [47 U.S.C. § 231\(e\)\(4\)](#), which states: “The term ‘Internet access service’ means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers.” Under this definition, the critical aspect of the service described is enabling users to access information over the internet; in other words, providing users the ability to connect to the internet is the *sine qua non* of obtaining the status of “IASP” under the Act.

*42 Despite Mummagraphics' allegations in their Counterclaim that it is an “Internet Service Provider,” Mr. Mumma admitted in his deposition that Mummagraphics does not provide any connectivity services to its customers and that its customers must use a third-party internet service provider to obtain access to Mummagraphics' services that are accessible over the internet. J.A. 193-195. Thus, under the plain meaning of the definition applicable to IASPs, Mummagraphics is not a “provider of internet access service” as that term is used in the Act. Accordingly, Mummagraphics does not have standing to bring a civil action under the CAN-SPAM Act. Therefore, this Court should deny Appellant's appeal concerning the claims it filed under the CAN-SPAM Act.

B. *Cruise.com's E-mail Did Not Violate the CAN-SPAM Act.*

If, despite the analysis above, this Court concludes that Mummagraphics does have standing to bring an action under the CAN-SPAM Act, the set of violations for which an IASP can bring an action under that Act is very narrow and, in most cases, is limited to actions for violations under [15 U.S.C. 7704\(a\)\(1\)](#). As discussed below, an IASP also can bring an action based on violations of other provisions of [section 7704\(a\)](#) but only if they can establish a pattern or practice of violation. See [15 U.S.C. § 7706\(g\)\(1\)](#).

*43 C. *Mummagraphics Failed to Allege Elements Necessary to Sustain a Claim Under The CAN-SPAM Act.*

1. Mummagraphics Did Not State a Claim Regarding Materially False or Misleading Transmission Information.

Mummagraphics' claims under the CAN-SPAM Act are based on only two allegedly false or misleading representations included in Cruise.com's e-mails. *See* Counterclaim, ¶5-6, J.A. 38. The first allegedly false item involves the statement contained in the body of the e-mails received by Mr. Mumma that "you are receiving this e-mail because you have opted-in to our subscriber list." The second allegation of false or misleading information is the name of the computer from which the e-mail was sent, i.e., "FL-Broadcast.net," which is identified in the "Received" line included in header information attached to the e-mail. *Id.* Neither of those allegations of false information are adequate to sustain claims under the CAN-SPAM Act because, even if entirely true, they do not amount to violations of the plain language of the Act.

a. *FL-Broadcast.net is Not Materially False or Misleading.*

Mummagraphics claims that the name "FL-Broadcast.net" is false and misleading. *Id.* It also insists that the inclusion of that name in the "Received" line "purposely or negligently injured Mummagraphics" each of the eleven times it received an e-mail from Cruise.com. *Id.* at ¶4, J.A. 37-38. It is not clear from the *44 Counterclaim whether that claim is brought under [section 7704\(a\)\(1\)\(A\)](#) or (C) of the Act.

If Mummagraphics intended to bring its claim related to the computer name "FL-Broadcast.net" under subsection (a)(1)(A) of [§ 7704](#) of the Act, then it was required to allege and prove that e-mail sent by Cruise.com satisfied the following elements: 1) they contained header information that was *technically accurate*, 2) they included an originating e-mail address, domain name, or IP address, the access to which was obtained by false or fraudulent pretenses or representations, and 3) such access was obtained for purposes of initiating the message. [15 U.S.C. § 7704\(a\)\(1\)\(A\)](#). In short, to establish a violation, this section of the Act requires that a sender obtained the technically accurate, but somehow false or misleading, name from a third party through false pretenses. *Id.*

There is nothing in the Counterclaim or any other paper filed in the District Court that suggests Mummagraphics intended to make or prove such an allegation, i.e., that Cruise.com obtained an e-mail address or domain name from a third party through false pretenses, and there is no evidence in the record that Cruise.com tried to hide the source of its e-mails. Moreover, Mummagraphics did not allege that the header information attached to the subject e-mails included a technically accurate originating electronic mail address, domain name, or Internet Protocol address as required by [15 U.S.C. 7704\(a\)\(1\)\(A\)](#). Indeed, Mummagraphics asserts *45 that the computer name "FL-Broadcast.net" is not accurate. Appellant's Brief at p. 13, J.A. 38, ¶6. Therefore, Mummagraphics' claim related to the computer name "FL-Broadcast.net" under the CAN-SPAM Act cannot be considered to be based on the provisions of subsection (A) of 7704(a)(1).

The record also is clear that recipients of Cruise.com's e-mails, including Mr. Mumma, had no trouble determining that the e-mail came from Cruise.com. In fact, subsection (B) of 7704(a)(1) provides that a "from" line that accurately identifies the sender of the e-mail shall not be considered materially false or misleading. In this case, the "from" line of the e-mails sent to Mummagraphics accurately identifies "Cruise.com" as the sender of the e-mail. J.A. 16-21, 47-75. Therefore, under the plain language of the Act, Cruise.com complied with the terms of the CAN-SPAM Act because it accurately identified itself in the "from" line of the header. Accordingly, Cruise.com's e-mail cannot be considered to be materially false or materially misleading under the Act.

If the claim related to "FL-Broadcast.net" is considered under the provisions of subsection (C) instead of subsection (A) of 7704(a)(1), then it is similarly deficient for a failure to allege necessary elements under the Act. As set forth above, in order to state a claim under subsection (C) of 7704(a)(1), Mummagraphics was required to allege that the e-mail: 1) fails to identify accurately a protected computer used to initiate the message, 2) because the sender *46 knowingly uses another protected computer, and 3) for purposes of disguising the origin of the message. *See* [15 U.S.C. § 7704\(a\)\(1\)\(C\)](#). In this case, Mummagraphics alleges an inaccurate identification of Cruise.com's computer. Counterclaim at ¶6, J.A. 38. It does not, however, allege the use of another protected computer to send the message

or an intent on Cruise.com's part to disguise the origin of the e-mails. Alleging no more than an inaccurate computer name is not enough to establish a violation of section 7704 of the CAN-SPAM Act. Therefore, Mummagraphics failed to state a valid claim under the Act.

Appellees emphasize that the record is absolutely clear that Cruise.com prominently identified itself in each of its e-mails and in the header information that accompanied each e-mail. J.A. 16-21, 47-75. Indeed, the whole point of the e-mail was to encourage recipients to order cruise vacations from *Cruise.com*; to conceal the identity of the sender would have guaranteed the futility of the e-mail. In light of Cruise.com's prominent self-identification in the e-mails, Mummagraphics' claim related to the computer name "FL-Broadcast.net" could not survive a motion for summary judgment because it did not falsely identify Cruise.com's computer, Appellant did not allege that Cruise.com used a different computer to send the e-mail, and Appellant did not allege that Cruise.com's purpose was to disguise the origin of the e-mail.

**47 b. Statements in the Body of an E-Mail Are Not Actionable Under the Act.*

Mummagraphics' second allegation of false or misleading information upon which its claim is based, i.e., the statement that the recipient of Cruise.com's e-mail opted-in to Cruise.com's subscriber list, also fails to satisfy the elements necessary for an IASP to sustain a claim under the Act. The allegedly false statement appears in the body of the message, not the header and, thus, has nothing to do with "header information" which is the sole concern of [subsection \(a\)\(1\) of section 7704](#). Under [section 7706\(g\)](#) granting IASPs a private right of action, IASPs are permitted to bring actions for information that appears in e-mail headers, but not for allegedly false information in the body of an e-mail. See [Internet Access Service Providers LLC v. Real Networks, Inc., 2005 WL 1244961 \(D. Idaho 2005\)](#) (allegation of false statement made in body of e-mail, even if true, is not a violation of § 7704(a)(1)).

2. Mummagraphics Failed to Allege a Pattern or Practice Required to Sustain Certain Claims Under The CAN-SPAM Act.

The only other issue identified in the Counterclaim and preserved on appeal that concerns allegedly false or misleading information that violated the CAN-SPAM Act, is found in paragraph 10 of that pleading. Mummagraphics alleges that Appellees "violated § 7704(a)(4) by initiating commercial e-mails to inbox @WebGuy.net more than 10 business days after receipt of an internet based *48 communication from WebGuy that it wished to be removed from Cruise.com's subscriber list." Counterclaim, ¶10. As noted above, however, IASPs are not authorized by Congress, and therefore do not have standing, to raise violations of section 7704(a)(4) of Title 15 unless they can allege and prove a "pattern or practice" that violates that section. Mummagraphics failed to make such an allegation. Accordingly, this Court should affirm the District Court's decision with regard to Mummagraphics' claim under section 7704(a)(4) of Title 15.

3. Other Issues Raised by Appellant

In its Brief, Appellant refers to the e-mail address "cruisedeals@cruise.com" that appears in the "from" line of the subject e-mails as information that allegedly violates the Act because, Appellant alleges, it is not a working e-mail address. Appellant also refers to the inclusion of the character string "fl" in the "Received" line of the header information as evidence that "FL-Broadcast.net" is somehow "false." Since neither of these allegations appear in the Counterclaim and Mr. Mumma failed to identify either fact as a basis for the Counterclaim when he was asked during his depositions to identify all information that Appellant considered to be false, [cite] they cannot be considered appropriate bases for deciding this Appeal. Moreover, there is an obvious difference between a person who sends e-mail and an "e-mail address."

*49 The e-mail address "cruisedeals@cruise.com" accurately identified "Cruise.com" as the "person" who sent the

e-mail. The question of the functionality of that e-mail address is beside the point and not a concern of section 7704(a)(1)(B). For these reasons, those issues are improperly raised on appeal and to the extent Appellant's arguments and claims are based thereon, they should be rejected.

IV. CRUISE.COM DID NOT VIOLATE THE OKLAHOMA ANTI-SPAM STATUTE.

A. Mummagraphics Did Not Establish That Cruise.com E-mail Was Fraudulent.

To prevail on its claims under the Oklahoma Statute (to the extent it remains enforceable), Mummagraphics must establish that Cruise.com's e-mails were fraudulent or deceptive and not simply that they contained an error or mistaken information. Yet, Mummagraphics' claims merely allege the existence of 1) erroneous information concerning the name of one of Cruise.com's computers, and 2) a mistake of fact in the body of Cruise.com's e-mail that Mr. Mumma claims is untrue. Neither piece of information misled, deceived, or caused Mummagraphics to rely to its detriment on that information, nor did it cause Mummagraphics to suffer any pecuniary damages of any kind. J.A. 172, 176 at 11.16-19, 183-184, 411-412. As such, the information that Mummagraphics alleges to be erroneous cannot be considered to be fraudulent or deceptive. Based on the preemptive effect *50 of the CAN-SPAM Act, therefore, Mummagraphics cannot invoke the provisions of the Oklahoma Statute to seek relief for its receipt of e-mail from Cruise.com. If, however, the Court determines that the Oklahoma Statute is not entirely preempted, then Mummagraphics' claims must still be considered in light of the extent to which they allege claims for fraud and can be upheld as such under that statute.

B. Claims Under Oklahoma Anti-Spam Statute Must Sound in Fraud or They Are Not Actionable.

1. Claims under Sections 776.1 and 776.6 of the Oklahoma Anti-Spam Statute

Mummagraphics alleged that the computer name "FL-Broadcast.net" represents a violation of section 776.1(A) and 776.6(A) of the Oklahoma Statute. Since the Oklahoma Statute is preempted by the CAN-SPAM Act, sections 776.1(A) and 776.6(A) can only be enforced to the extent they prohibit fraud. If Mummagraphics seeks relief for anything but fraudulent activity, it is not available under the Oklahoma Statute due to preemption.

In this case, other than bare recitations of statutory language to the effect that Cruise.com's e-mails are "fraudulent e-mail messages," Mummagraphics offers nothing by way of allegation or record evidence to establish that Cruise.com's e-mails are, in fact, fraudulent. Indeed, Appellees are not aware of any circumstances in which a name, standing alone as an allegedly inaccurate piece *51 of information, can be considered fraudulent. The name "FL-Broadcast.net" did not cause Mummagraphics to change its position in any way, it was not relied upon by Mummagraphics for any purpose, and that name did not, and could not, "purposely or negligently injure [Mummagraphics]." Thus, Mummagraphics cannot establish a right to relief based on the allegedly inaccurate name attached to Cruise.com's computer: "FL-Broadcast.net." Accordingly, Mummagraphics' Appeal concerning its claims with respect to such allegedly misleading information, which did not actually mislead Mummagraphics, must be rejected.

2. Claim Under Section 776.6(E) of the Oklahoma Anti-Spam Statute

Mummagraphics also asserted a claim under section 776.6(E) based on Appellees' alleged failure to remove "inbox@webguy.net" from its subscriber list after Mummagraphics allegedly opted-out. That section of the Oklahoma Statute contains two provisions relevant to the claim before the Court. First, a sender of an e-mail message must provide an opt-out mechanism. There is no dispute in this case that Cruise.com complied with that section of the law. Section 776.6(E) also provides that a sender of an e-mail message "shall remove the recipient from their [e-mail] list if the sender receives an [e-mail] from the recipient to the sender-operated return [e-mail] address that

indicates anywhere in the subject line or text that the recipient wants their name removed from the list of the sender.” Unlike *52 the CAN-SPAM Act, the Oklahoma Statute does not provide time parameters for removing a recipient from a sender's list.

In this case, there is no dispute that Mummagraphics refused to send an opt-out request in conformity with the requirements of that Statute. There is also no dispute that “inbox@webguy.net” was removed from Cruise.com's e-mail list after receiving information sufficient to identify that address as the one at which Mr. Mumma was receiving Cruise.com's e-mail. Therefore, based on the clear language of the Oklahoma Statute, Cruise.com complied with all of the relevant provisions of that Statute related to opt-out requests. Thus, to the extent the Appeal is considered to encompass claims under section 776.6(E), it must be denied.

V. OKLAHOMA DOES NOT SPECIFICALLY RECOGNIZE THE TORT OF TRESPASS TO CHATTELS FOR THE RECEIPT OF EMAILS AND THIS COURT SHOULD NOT EXTEND OKLAHOMA LAW TO DO SO.

A. *Oklahoma Law Does Not Recognize Unwanted E-Mail as a Trespass to Chattels.*

Mummagraphics asserted a claim for Trespass to Chattels based on its allegation that Appellees “intentionally used [Mummagraphics'] e-mail systems and computer resources for their own commercial benefit” and that such use “deprived [Mummagraphics] of the legitimate use of” its computer system and which caused Mummagraphics to suffer pecuniary damages. Counterclaim, ¶28. *53 The District Court granted summary judgment to Appellees on Appellant's Trespass to Chattels claim without considering whether Oklahoma recognizes such a tort, let alone whether it would apply it to the receipt of a total of eleven e-mails over a period of two months.

In fact, it appears that Oklahoma does not specifically recognize the tort of trespass to chattels for a claim related to the receipt of e-mail and there is no indication that it would do so. Neither the Oklahoma legislature, nor the courts of Oklahoma, has provided an appropriate signal upon which this Court can base a decision to extend Oklahoma tort law to include a claim that eleven unwanted e-mails constitute a trespass to chattels. Under such circumstances, Appellant's appeal of the District Court's decision on Count V of its Counterclaim should be denied.

B. *Oklahoma Does Not Recognize the Tort of Trespass to Chattels for the Receipt of E-mail.*

Appellant urges this Court to reverse the District Court's rejection of Appellant's claim that Mr. Mumma's receipt of a total of eleven e-mails over a two-month period constitutes a trespass to chattels under Oklahoma law.^[FN1] The threshold issue of whether Oklahoma is cognizant of such a claim, however, must *54 be addressed before there can be any consideration of whether Mummagraphics has established the right to proceed on such a claim.

FN1. Appellees note that Appellant relies quite heavily on Virginia law in support of their argument for reversal but, given that all of Mummagraphics' equipment is located in Oklahoma, it is inconceivable that Virginia law is relevant to Mummagraphics Trespass to Chattels claim.

As a basic principle, federal courts presiding over diversity cases must apply the substantive law of the state whose laws govern the action. *Philadelphia v. Lead Industries Assoc'n, Inc.*, 994 F.2d 112, 122 (3d Cir. 1993)(citing, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). A federal court's role in deciding a question of state law “is to apply the current law of the appropriate jurisdiction, and leave it undisturbed.” *Id.* at 123. Under the principle discussed immediately above, this Court would have to find that the common law of Oklahoma currently recognizes a claim for trespass to chattels based on the theory that the transmission of e-mail to a computer in Oklahoma is somehow a “trespass” to that computer.

Mummagraphics' argues that Oklahoma “does not differentiate between the separate torts of trespass to chattels, injury to personal property and conversion of personal property.” *See* Appellant's Brief at p. 16, n.4. The case cited for

that premise, however, does not support Appellant's characterization of Oklahoma law. See [Wagoner v. Bennett](#), 814 P.2d 476 (Okla. 1991). In the majority decision in *Wagoner*, the Oklahoma Supreme Court observed that the statute in question did not preempt tort claims and specifically stated that the statute in question “does not exclude the possibility of a traditional cause of action for conversion and/or injury *55 to personal property.” *Id.* at 481. Similarly, the minority opinion (*concurring*, in part, and *dissenting*, in part), asserts that the statute as amended does not “manifest[] a legislative intent to abrogate the common law's tort remedies either for conversion of or trespass (injury) to personal property.” *Id.* at 483. The clear implication of the distinction between claims for conversion and for injury to personal property is that such claims have different elements and are intended to provide remedies for different injuries.

If, despite the language of *Wagoner*, Appellant is correct that there is no practical distinction between the three types of claims under Oklahoma law, then it stands to reason that Appellant was required to demonstrate that Oklahoma recognizes the receipt of unwanted e-mail as a claim under that “combined” set of torts, and that Mummagraphics' claim for trespass to chattels satisfied the standard applicable to all three claims, in particular, the standard applicable to claims for “conversion.” This it has not done.

The claim of “conversion” refers to the exercise of dominion over property in defiance or exclusion of the owner's rights. [Brown v. Oklahoma State Bank & Trust Co. of Vinita](#), 860 P.2d 230, 233 (Okla. 1993). Under Oklahoma law, a party seeking to recover based on conversion must show that “(a) he owns or has a right to possess the property in question, (b) that defendant wrongfully interfered with such property right, and (c) the extent of his damages.” *56 [White v. Webber-Workman Co.](#), 591 P.2d 348, 350 (Okla. Ct. App. 1979). In other words, a defendant would have to take possession or otherwise “interfere” with the plaintiffs possession of his property.

Mummagraphics' trespass to chattels claim did not allege that Appellees “wrongfully interfered with” Mummagraphics' possession of its property, but rather, that Appellees “intentionally used” that property. Counterclaim, ¶28, J.A. 44. There is no allegation that Appellant was ever deprived of the possession of its property. Appellant alleges in its Counterclaim that by sending e-mail to inbox@webguy.net, Cruise.com “used Mummagraphics' e-mail systems” and “deprived [Mummagraphics] of the legitimate use of this proprietary and commercially valuable system.” That allegation, standing alone, and without evidentiary support in the record, is not enough to satisfy Appellant's burden of establishing that Cruise.com “interfered with” Mummagraphics' possession of its property.

C. This Court Should Not Extend Oklahoma Law to Recognize Appellant's Claim.

While it is arguable that Oklahoma law recognizes a cause of action for trespass to chattels, it appears beyond doubt that Oklahoma has not extended its common law to recognize a claim for unwanted e-mail. Moreover, there is no authority to suggest that the courts of Oklahoma would sustain such a claim based on the transmission of e-mail into the state. “Absent some authoritative signal *57 from the legislature or the [state courts], we see no basis for even considering the pros and cons of innovative theories we must apply the law of the [appropriate jurisdiction] as we infer it presently to be, not as it might come to be.” *Philadelphia v. Lead Industries Assoc'n*, *supra*, at 123 (quoting [Tidler v. Eli Lilly & Co.](#), 851 F.2d 418, 424 (D.C.Cir. 1988)). Appellant has not identified any Oklahoma cases in which such a claim is stated and Appellees have not located any legislative or judicial “signal” that Oklahoma law would be expanded to include the claim asserted by Mummagraphics. Therefore, no basis exists for this Court to extend Oklahoma law to encompass Appellant's trespass to chattels claim.

In this context, it is instructive to review how the Supreme Court of California decided a petition by Intel Corporation to extend California law to recognize unwanted e-mail as a trespass to chattels. In [Intel Corp. v. Hamidi](#), 30 Cal. 4th 1342, 71 P.3d 296 (2003), that court considered Intel's claim that a former employee's transmission of thousands of e-mails on six occasions over 21 months to Intel's employees should be considered a trespass to its computer equipment. *Id.* That court summarized its decision as follows:

After reviewing the decisions analyzing unauthorized electronic contact with computer systems as potential trespasses to chattels, we conclude that under California law the tort does not encompass, and should not be extended to encompass, an electronic communication that neither damages the recipient computer system nor impairs its functioning. Such an electronic communication does not constitute an *58 actionable trespass to personal property, i.e., the computer system, because it does not interfere with the possessor's use or possession of, or any other legally protected interest in, the personal property itself. The consequential economic damage Intel claims to have suffered, i.e., loss of productivity caused by employees reading and reacting to Hamidi's messages and company efforts to block the messages, is not an injury to the company's interest in its computers--which worked as intended and were unharmed by the communications--any more than the personal distress caused by reading an unpleasant letter would be an injury to the recipient's mailbox, or the loss of privacy caused by an intrusive telephone call would be an injury to the recipient's telephone equipment.

Id. at 1347 (citations omitted).

Since the facts in *Intel* were very similar to those before the Court in this case, the California Supreme Court's conclusions are equally applicable here, if not more so. For instance, the *Intel* court stated, “[t]he interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel.” *Id.* at 1352 (citing, the [Restatement Second of Torts, § 218](#))(emphasis added). It also found that “Intel was not dispossessed of its computers, nor did Hamidi's messages prevent Intel from using its computers for any measurable length of time. The same facts exist in this case. The court in that case also commented on the difference between damage to property which can support a claim for trespass to chattels, and other burdens that are strikingly similar to the “injuries” claimed by Appellant in this case. The court stated:

*59 Nor may Intel appropriately assert a property interest in its employees' time. “The Restatement test clearly speaks in the first instance to the impairment of the chattel.... But employees are not chattels (at least not in the legal sense of the term).” Whatever interest Intel may have in preventing its employees from receiving disruptive communications, it is not an interest in personal property, and trespass to chattels is therefore not an action that will lie to protect it. Nor, finally, can the fact Intel staff spent time attempting to block Hamidi's messages be bootstrapped into an injury to Intel's possessory interest in its computers.

Id. at 1359 (citation omitted). The court concluded that it would not extend California common law “to cover, as a trespass to chattels, an otherwise harmless electronic communication whose contents are objectionable.” *Id.* at 1360.

In this case, Appellant did not establish that its property suffered any damage, and Judge Brinkema made such a finding in her decision on August 12, 2005. J.A. 106-107. In fact, Mr. Mumma admitted that Appellant's damages were “nominal” and had not even been calculated because it was really only seeking statutory damages. As noted above, Mr. Mumma's confused and contradictory rendition of the injuries and damages allegedly suffered by Mummagraphics relate almost entirely to Mr. Mumma's personal response to his receipt of e-mail from Cruise.com. Accordingly, under the analysis presented in *Intel*, Appellant has not stated a claim that can be recognized as a “trespass to chattels.”

Appellees note that the court in *Intel* also reviewed some of the same cases cited by Appellant in support of its argument in this Appeal and found them to be distinguishable and thus, unpersuasive as authority to support extending California *60 law to recognize unwanted e-mail as a trespass to chattels. Specifically, the court cited [America Online, Inc. v. IMS](#), 24 F.Supp.2d 548 (E.D.Va. 1998), and [America Online, Inc. v. LCGM, Inc.](#), 46 F.Supp.2d 444 (E.D.Va. 1998) and noted that those cases, involved more than 60 million e-mails over ten months and 92 million e-mails over seven months, respectively. The court concluded that the several thousand e-mails sent by Hamidi could not be compared to the volume of e-mail received but the ISP plaintiff in those cases.

In the absence of any authority that supports a conclusion that Oklahoma currently recognizes a claim of trespass to chattels for the receipt of e-mail and a similar lack of a "signal" from Oklahoma's legislature or courts that it would endorse the recognition of such a claim, this Court should reject Mummagraphics' appeal concerning trespass to chattels as not currently recognized under Oklahoma's common law, and it should refuse to extend the law of Oklahoma to encompass such a claim.

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment in favor of Appellees should be affirmed.

61REQUEST FOR ORAL ARGUMENT

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

Appendix not available.

Omega World TRAVEL, Incorporated Cruise.com, Incorporated; Gloria Bohan; Daniel Bohan, Plaintiffs - Appellees, v. MUMMAGRAPHICS, INCORPORATED, d/b/a Webguy Internet Solutions, d/b/a Webguy.net, d/b/a SueaSpammer.com, Defendant - Appellant, Mark W. Mumma, in his individual capacity, Defendant.
2006 WL 639196 (C.A.4)

Briefs and Other Related Documents ([Back to top](#))

- [2006 WL 1004285](#) (Appellate Brief) Response of Appellants (Mar. 10, 2006) Original Image of this Document (PDF)
- [2006 WL 297232](#) (Appellate Brief) Brief of Appellants (Jan. 16, 2006) Original Image of this Document (PDF)
- [05-2080](#) (Docket) (Sep. 28, 2005)

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