

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

WHITE BUFFALO VENTURES, LLC.,

*Plaintiff,*

v.

THE UNIVERSITY OF TEXAS

at AUSTIN,

*Defendant.*

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CIVIL ACTION NO. A:03-CA-296 JN

**DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

NOW COMES Defendant, The University of Texas at Austin (“UT”), and respectfully submits this Motion for Summary Judgment. UT moves for judgment as a matter of law on all claims against it in this litigation. Plaintiff’s tortious interference with contract claim is barred by state sovereign immunity. Plaintiff’s First Amendment claim fails because UT’s email system is not a public forum and because UT’s restrictions on unsolicited email communications are reasonable and not content oriented. Finally, Plaintiff’s equal protection claim fails because UT’s actions taken to curb Plaintiff’s unsolicited email messages were reasonable and were consistent with the same actions taken against over a thousand other spam email senders, regardless of the content of the email message or the nature of the business of the sender.

**I.**

**SUMMARY JUDGMENT EVIDENCE**

\_\_\_\_\_UT relies of the following summary evidence:

Exhibit A: Declaration of Daniel A. Updegrove;

Exhibit B: Excerpts from the Deposition of White Buffalo Ventures, LLP; and

The sworn testimony of witnesses at the hearing on Plaintiff's motion for a preliminary injunction held in this matter before Hon. James Nowlin, United States District Judge, on May 21, 2003, which is incorporated herein by reference.

## **II.** **INTRODUCTION**

UT operates a computer system under which all faculty, staff, and students are offered an email account ending in "utexas.edu". Messages that are sent to these email addresses are stored on computer servers that are owned and operated by UT. UT has a policy of blocking incoming unsolicited commercial email – commonly referred to as "spam". UT blocks incoming spam that it becomes aware of. LonghornSingles.com is an online dating service operated by White Buffalo Ventures LLC. When UT became aware it had received about 55,000 unsolicited commercial email messages from LonghornSingles.com, sent to faculty, staff and students, it blocked all email coming from this sender. White Buffalo Ventures then sued UT for (1) tortious interference with contract and (2) violations of the First Amendment of the U.S. Constitution and (3) violations of the Equal Protection Clause of the Fourteenth Amendment. UT now moves for summary judgment with respect all of Plaintiff's claims.

## **III.** **STATEMENT OF FACTS**

### **A. A Brief Statement About "Spam".**

Unsolicited commercial email or "spam" represents a significant portion of all email traffic, consuming massive amounts of bandwidth, memory, storage space, and other resources. Internet users and system administrators spend a great deal of time reading, deleting, filtering, and blocking spam. Spam and anti-spam measures frequently interfere with other email traffic and other legitimate email uses. See David E. Sorkin, *Technical and Legal Approaches to Unsolicited*

*Electronic Mail*, 35 U.S.F. L. Rev. 325, 336 - 337 (2001), a copy of which is attached hereto as Appendix I.

Much of the concern over spam revolves around the possibility that its use could rise exponentially in the near future. Spam email increased an incredible 450% between the summer of 2001 and the summer 2002. See Sam Vakin, *The Economics of Spam*, United Press Int'l (July 23, 2002) (available at <http://www.upi.com/view.cfm?storyid=20020723-121152-3651r>), a copy of which is attached hereto as Appendix II. The cost increases that would result from a massive increase in the volume of spam could even lead many sites and service providers to discontinue supporting standard email altogether. Sorkin, at 338-339. Some commentators have even posited that within a few years, email may no longer be the near-universal method for communicating with people via the Internet that it is today. *Id.*

#### **B. UT's Spam Policy**

While UT utilizes various commercially available spam filters, it is not always possible to distinguish unsolicited commercial email ("UCE" or "spam") from legitimate email messages. Indeed, even the best filters do not work perfectly and invariably screen out legitimate emails along with UCE. Of course, due to privacy concerns and the sheer volume of traffic, UT cannot manually monitor and/or investigate all incoming email traffic. Therefore, it is UT's standard practice, when it becomes aware that UCE is being sent to its email system, to request that the sender stop sending spam messages. If the sender does not respond or refuses to comply, UT blocks all email from the sender's IP address. (See Exhibit A, Declaration of Daniel A. Updegrave.)

UT's spam policy is consistent with its standard policies regarding solicitations on or utilizing UT property and facilities. (*Ibid.*)

#### **IV. STANDARD OF REVIEW**

Summary judgment is appropriate if the pleadings, affidavits and discovery on file “show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505 (1986). A fact is material if it might affect the outcome of a case under the governing substantive law. *Anderson*, 477 U.S. at 248.

The party seeking summary judgment carries the burden of demonstrating that there is no actual dispute as to any material fact in the case; however, this burden does not require the moving party to produce evidence showing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Instead, the moving party satisfies its burden by “pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party’s case.” *Id.* It is unnecessary for the movant to negate elements of the non-movant’s case in order to prevail on its motion for summary judgment. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 885-86, 110 S.Ct. 3177 (1990).

Once the moving party has satisfied its burden of pointing out the absence of evidence to support the non-movant’s case, in order to avoid a summary judgment, the non-movant must “set forth specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e). Specifically, the non-moving party must adduce admissible evidence which creates a fact issue concerning the existence of every essential component of that party’s case. *See Celotex*, 477 U.S. at 323. Summary judgment for a defendant is appropriate when the plaintiff “fails to make a showing sufficient to establish the existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial.” *Cleveland v. Policy Management Sys. Corp.*, 526 U.S. 795, 796 (2000); *Celotex*, 477 U.S. at 323. Unsubstantiated assertions of an actual dispute will not suffice. *See Thomas v. Price*, 975 F.2d 231, 235 (5<sup>th</sup> Cir.1992) (citing *Celotex* at 323). Even if the

non-movant brings forth evidence in support of its allegations, summary judgment will be appropriate “unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Anderson*, 425 U.S. at 247. An adverse party’s response, by affidavits or as otherwise provided in FED. R. CIV. P. 56(e), must set forth specific facts showing that there is a genuine issue for trial. *See Celotex*, 477 U.S. at 322-23; *Anderson*, 477 U.S. at 247, 248.

## **VI.** **ARGUMENT AND AUTHORITIES**

### **A. State Sovereign Bars White Buffalo’s Claim for Tortious Interference with Contract.**

Under Texas law, state universities enjoy sovereign immunity from tortious interference with contract claims. *See, e.g., The University of Texas - Pan American v. De Los Santos*, 997 S.W.2d 817 (Tex. App.– Corpus Christi 1999, no pet.), *citing Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 405 (Tex. 1997). There has been no waiver of immunity that would permit this claim to be brought against UT in state or federal court. Therefore, Plaintiff’s tortious interference claim should be dismissed as a matter of law.

### **B. UT’s SPAM Blocking Policy Does Not Violate White Buffalo’s First Amendment Rights**

White Buffalo claims that UT’s spam blocking policy violates its rights under the First Amendment. White Buffalo’s argument is without merit because (1) UT’s computer system and email servers are not a public forum; and (2) even if subject to constitutional review, UT’s policy satisfies the Supreme Court’s *Central Hudson* test regarding restrictions on commercial speech.

#### **1. Unsolicited commercial email from White Buffalo is not protected by the First Amendment because the University of Texas computer system and servers are not a public forum.**

While speech restrictions within a public forum are subject to strict scrutiny, policies restricting speech in a non-public forum need only be reasonable and viewpoint neutral. *Perry*

*Education Assoc. v. Perry Local Educators Assn.*, 460 U.S. 37, 45, 46, 103 S.Ct. 948, 955 (1983). The state, no less than a private owner of property, has the right to preserve the property under its control for the use to which it is lawfully dedicated. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984). A public forum is created only by an affirmative action on the part of the government, and not by inaction. *Cornelius v. NAACP Legal Defense Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 3449 (1985). Mere ownership or control by a governmental entity does not automatically create a public forum, and a court will not infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity. *Cornelius v. NAACP Legal Defense Fund, Inc.*, 473 U.S. 788, 803, 105 S.Ct. 3439, 3449 (1985).

In *Perry*, the Supreme Court examined whether or not a public school district's internal mail system constituted a public forum. That system was established to transmit official messages and to facilitate communication between teachers and the school administration. *Perry*, 460 U.S. at 39, 103 S.Ct. at 951-952. Teachers were also allowed the privilege of using the system for personal mail, and principals allowed the delivery of messages from private organizations. *Id.* In holding that the school's mail system was a *nonpublic* forum, the court emphasized that there had been no indication that the mail system was opened to use by the general public. *Id.*, at 47, 103 S.Ct. at 956.

*Perry* should control the outcome in this case. A university's computer system is primarily designed to further the interests of the university and to enhance the ability of university faculty, staff, administrators and students to communicate with one another and to conduct academic and scientific research and other university-related endeavors. It is not a public forum. *See Loving v. Boren*, 956 F. Supp. 953, 955 (W.D. Okla. 1997) (holding University of Oklahoma's computer and Internet services do not constitute a public forum), *aff'd*, 133 F.3d 771 (10<sup>th</sup> Cir. 1998). Like the teachers in *Perry*, those persons who are provided access to the UT email system are allowed to send and receive communications with persons outside of the UT system, for university related purposes

and for non-business purposes under UT's incidental personal use policy. (See Exhibit A, Declaration of Daniel A. Updegrove.) Although email communications on the UT network are not identical to the school district mail system addressed in *Perry*, that in no way changes the basic purpose of the network: to facilitate university business. UT does not offer email accounts to members of the general public and one must have some official connection with the University, either as an employee or as a student, to access the system and use "utexas.edu" email. Therefore, like the communications in *Perry*, UT email communications are either directed to or generated by someone who has the privilege of using the UT system. No generalized public access has been created, and, Defendant respectfully contends, no public forum exists.

Importantly, in the only published case known to defense counsel that addresses whether a university computer system is a public forum, a federal district court found that the University of Oklahoma's computer and Internet service did not constitute a public forum, in part, because it was not open to the public.<sup>1</sup> *See Loving*, 956 F. Supp. at 955.

Since UT's computer network and email system is not a public forum, UT's actions limiting unsolicited email communications must only be reasonable in light of the purpose which the forum serves. *Perry*, 460 U.S. at 48. In this case, UT is not singling out White Buffalo because UT opposes the actual content of the email messages promoting the online dating services available at LonghornSingles.com. UT treats White Buffalo's spam just like the thousands of other spammers it has blocked. In light of the difficulties involved in filtering unsolicited email, blocking all email from an identified spammer is not an unreasonable approach to the problem.

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<sup>1</sup> In a relevant yet unpublished case, the Seventh Circuit cast serious doubt on a plaintiff's argument that the University of Wisconsin--Milwaukee's email system constituted a public forum, noting that the email system was not open for use by the public. *See Pichelman v. Madsen*, 31 Fed.Appx. 322, 2002 WL 442248 (7<sup>th</sup> Cir. 2002) (citing *Perry* and *Loving*).

**2. Even if the UCE from White Buffalo is considered protected speech, there is still no First Amendment violation because UT's policy satisfies the test set forth in *Central Hudson* that governs the regulation of commercial speech.**

The emails sent to "utex.edu" recipients from LonghornSingles.com are commercial advertisements for White Buffalo's dating service. Therefore, they are commercial speech. The restrictions that a government entity may put on commercial speech are generally subject to the four prong test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). The first prong holds that unlawful or misleading speech is not protected speech by the First Amendment. *Id.*, at 566. Second, the test requires a determination of whether the governmental interest is substantial. *Id.* Finally, if the government interest is substantial, then the government action must (1) directly advance that interest and (2) do so in a manner that is limited to what is necessary to assert that interest. *Id.*

For purposes of this motion only, UT is not contending that White Buffalo's unsolicited commercial emails have been misleading. However, with respect to the second prong, it can not reasonably be disputed that UT has a substantial interest in managing and/or blocking the spam that is received into its computer system. Uncontrolled, spam unnecessarily utilizes bandwidth and memory space on UT's servers. It also expends UT's resources in responding to user complaints. Perhaps most importantly, it disrupts the work of UT faculty, staff, employees and students by subjecting them to unsolicited advertising and forcing them to waste valuable time sorting out legitimate emails from spam. Of course, an occasional UCE from White Buffalo to a university employee or student would not likely have an overwhelming effect on productivity or computer resources. However, White Buffalo is not the only entity who tries to reach the fertile university market by sending unsolicited emails to UT system users. The cumulative effect of thousands of spammers asserting a constitutionally protected right to spam state email systems certainly would

have a significant effect on employee productivity and would substantially degrade the effectiveness of this means of communication by universities, and governmental entities in general.

White Buffalo has pointed to First Amendment case law extending protection to bulk mail and telemarketing to support its position. However, UCE presents a situation that it is different from these other forms of mass advertising. UCE shifts most the cost of the advertisement from the sender to the recipient. *See* Sorokin, 35 U.S.F. L. Rev. at 337 - 38. Therefore, there is no incentive for the sender to curb the volume of his UCE. Prevention of this type of burden shifting in advertising has been held to be a substantial government interest. *Destination Ventures, Ltd. v. Federal Communications Commission*, 46 F.2d 54 (9<sup>th</sup> Cir. 1995).

The *Destination Ventures* case is also important with respect to whether the policy in place is a reasonable fit with respect to the interest being advanced. The court in *Destination Ventures* upheld the constitutionality of the Telephone Consumer Protection Act of 1991. This statute, in relevant part, provides the following:

“It shall be unlawful for any person within the United States . . .to use any telephone facsimile machine, computer, or other device o send an unsolicited advertisement to a telephone facsimile machine. . .”

The Telephone Consumer Protection Act of 1991 completely bans the transmission of unsolicited commercial faxes and has been held to be constitutional under the First Amendment. UT’s spam policy operates in a similar manner. When unsolicited commercial emailers are identified, they are blocked from the system. Some UCE does get through to UT system users. However, UT does not single out and block email because it does not like the sender or because it disagrees with the content of the email. The present case is analogous to the unsolicited commercial fax case law and White Buffalo’s reliance on the other mass marketing and advertising cases is misplaced.

UT has a substantial interest in limiting UCE coming into its system. In addition, due to the difficulty involved in filtering spam and vetting spammers, there is a reasonable fit between the UT's policy and the stated goal. *See Destination Ventures*, 46 F.3d at 55-56. Therefore, UT's actions in this case satisfy the test set forth in *Central Hudson* and do not violate the First Amendment.

**C. UT Is Not Violating White Buffalo's Rights Under the Equal Protection Clause Because It Attempts to Block All UCE and Has a Rational Basis for Doing So.**

Plaintiff is alleging UT violated the Equal Protection Clause of the Fourteenth Amendment by blocking email traffic to and from its site while allowing traffic from other senders. UT does not dispute that some UCE gets through to UT system users. However, it is common knowledge that even the most advanced email filtering systems do not block out all spam. UT blocks all UCE that it is aware of. Therefore, White Buffalo is not being singled out, nor is it a member of any protected class. Therefore, there only need be a rational basis for UT's action. *See Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification).

As set forth above, UT clearly has an interest in minimizing UCE and a rational basis for its blocking policy. Therefore, UT has not violated the Equal Protection Clause and White Buffalo's claim is without merit. Based on the foregoing, it is respectfully submitted that summary judgment should be rendered in favor of Defendant on this claim.

**VII.  
CONCLUSION**

The University of Texas at Austin respectfully requests that the Court grant Defendant's Motion for Summary Judgment.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been sent via U.S. certified mail, return receipt requested, on February 20, 2004, to:

Brad L. Armstrong, J.D.  
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