IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT

WILL COUNTY, ILLINOIS

LAW DIVISION

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| JOHN F. TAMBURO d/b/a MAN'S BEST FRIEND SOFTWARE, | ) | |
| Plaintiff, | ) | |
| v. | ) | Case No. 06 L 51 |
| JAMES ANDREWS d/b/a K9PED, | ) | |
| Defendant. | ) | |

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**AMENDED MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

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**AMENDED MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

NOW COMES the Defendant, James Andrews d/b/a K9Ped ("Andrews" or "Defendant"), and respectfully submits this Amended Memorandum in Support of Defendant's Motion to Dismiss Plaintiff's First Amended Complaint. The Defendant brings its Motion to Dismiss as a combined motion pursuant to 735 ILCS 5/2-619.1 and requests relief under 735 ILCS 5/2-619 and 5/2-615. See 735 ILCS 5/2-615, 5/2-619 and 5/2-619.1. In support of his Motion, the Defendant states as follows:

**OPENING STATEMENT**

By this action, the Plaintiff has sought to harass and pursue unnecessarily in bad faith meritless claims against the Defendant for true statements the Defendant posted on his website. The Plaintiff and Defendant sell competing software. The Plaintiff's action is aimed to attack the Defendant's business and thwart his efforts to relay truthful information. Plaintiff has filed its First Amended Complaint. This action and the Plaintiff's First Amended Complaint should be dismissed in its entirety.

**BACKGROUND**

This controversy involves software created and sold for use by pure bred dog, cat and horse breeders. See 1st Am. Compl. ¶¶ 5, 7, 9. Plaintiff has created and sold such software, including its trademarked "CompuPed Millenium" and "The Breeder's Standard" software. See 1st Am. Compl. ¶¶ 5, 6, 19. Defendant Andrews has created and sold his trademarked software "K9-Ped". See 1st Am. Compl. ¶ 9.

In September 2001, Defendant Andrews became aware of repeated complaints involving the Plaintiff's products and customer service. See Affidavit of James Andrews ¶ 11 ("Andrews Aff.") (attached as Exhibit A). Specifically, in January 2003, Andrews noticed that the Plaintiff's website advertised the Plaintiff's trademarked software and sold software upgrades. See id. at ¶ 12. He further learned that the "upgrades" to the new versions of the software were, at the time, non-existent, as they had not yet been completed and released. Id. Even so, before the upgrades had been completed, such upgrades were being advertised and sold on Plaintiff's website to the general public. Id.

In addition, in September 2004, Defendant Andrews learned that the Plaintiff had filed

for bankruptcy in the United States Bankruptcy Court for the Northern District of Illinois, not once but six times, and that the Plaintiff was, at the time, involved in bankruptcy proceedings. Andrews Aff. at ¶¶ 13, 14. Thus, as stated in the Bankruptcy Court documents, Plaintiff admitted that he "lacked funds required to complete the [CompuPed Millenium software program]." Id. at ¶ 16; see also 1st Am. Compl. ¶ 10. Bankruptcy Court documents further revealed that Plaintiff owed the IRS $160,000 and included a sworn statement by Plaintiff in which Plaintiff stated that "[t]he Millenium edition of CompuPed is almost done, but I lack the funds to pay to complete the programs." Id.; see also 1st Am. Compl. ¶ 28. Despite this, Plaintiff continued to pre-sell CompuPed Millenium licenses over five months after swearing in Court that he was unable to finish the programs due to lack of funds. Id.; see also 1st Am. Compl. ¶ 28.

Moreover, Plaintiff's website listed the price chart for such software and related (then non-existant) upgrades. Andrews Aff. ¶¶ 16, 17. Such prices were significantly higher than those for similar software and upgrades sold by Plaintiff's competitors. Id. Specifically, the price for three upgrades of Plaintiff's "The Breeder's Standard" software cost more than the original "The Breeder's Standard" program. Id. at 16; see also 1st Am. Compl. ¶ 18. Additionally, all of the CompuPed DOS to Windows version upgrades cost over $50.00, with some costing over $99.00, even with the $15.00 discount for orders received before the first Windows version of CompuPed was released. Id. at 17; see also 1st Am. Compl. ¶ 18.

In January 2006, Andrews learned that Plaintiff had been banned from bankruptcy court and was no longer in bankruptcy. Id. at ¶ 20. In fact, according to the bankruptcy trustee's final report, Plaintiff's bankruptcy proceeding was dismissed on August 22, 2005; Plaintiff had not made payment to his creditors for fifteen (15) months; and Plaintiff was banned from bankruptcy court and refiling a bankruptcy claim for the next six (6) months. Id., See 1st Am. Compl. ¶ 30.

As sworn in his Affidavit, attached, all of the above information is true. The Plaintiff brings this action because Defendant Andrews provided the above information on the Internet. None of the information posted on the Internet was untrue, false or otherwise misleading. This vengeful lawsuit is nothing more than an outlet for Plaintiff to harass and make bad faith accusations against the Defendant. For the reasons stated below, Plaintiff's claims should be dismissed.

## ARGUMENT

The Defendant seeks to dismiss the Plaintiff's First Amended Complaint in its entirety. First, this Court does not have personal jurisdiction over Andrews. Second, Plaintiff failed to properly serve the Defendant with the First Amended Complaint. Third, this Court of law is the improper forum in which to resolve Plaintiff's alleged dispute. For these reasons, Plaintiff's First Amended Complaint should be dismissed pursuant to 735 ILCS 5/2-619. Alternatively, Plaintiff's claims should be dismissed pursuant to 735 ILCS 5/2-615 because Plaintiff has failed to sufficiently state claims as a matter of law.

### I. 735 ILCS 5/2-619 – Defects and Defenses

Section 2-619 provides for involuntary dismissal of an action based upon certain defects or defenses to the action, including lack of personal jurisdiction, affirmative matters which avoid the legal effect of and/or defeat the claim, and untimely filed claims. 735 ILCS 5/2-619. Each of these provide sufficient bases to dismiss Plaintiff's First Amended Complaint.

#### A. Lack of Personal Jurisdiction

This Court lacks personal jurisdiction over Andrews. Defendant Andrews is not a resident of Illinois, but rather is domiciled in North Plains, Oregon. See 1st Am. Compl. ¶ 3. While the Illinois long-arm statute provides a number of bases for conferring general and specific jurisdiction over a nonresident defendant, Defendant Andrews does not have contacts with the State of Illinois sufficient to establish personal jurisdiction over him. Kostal v. Pinkus Dermatopathology Laboratory, P.C., 357 Ill. App. 3d 381, 827 N.E.2d 1031 (Ill App. 2005).

The alleged statements at issue (and from which the Plaintiff has conjured many claims) were all made on Andrews' website. In Illinois, operating and maintaining a website does not by itself provide a sufficient basis for the exercise of personal jurisdiction. LaRochelle v. Allamian, 361 Ill. App. 3d 217, 225, 836 N.E.2d 176 (Ill. App. 2005). Thus, this Court lacks personal jurisdiction over the Defendant, and the First Amended Complaint should be dismissed in its entirety.

##### *1. Standard*

Section 5/2-619 of Chapter 735 of the Illinois Compiled Statutes provides for the dismissal of actions and claims where the Court lacks personal jurisdiction over the defendant. See 735 ILCS 5/2-619. Whether Illinois can exercise jurisdiction over a nonresident Defendant rests on the applicability of Illinois' long-arm statute. Kostal, 357 Ill. App. 3d at 384 (citing 735

ILCS 5/2-209).

Illinois' long-arm statute provides several bases for jurisdiction over a nonresident defendant and provides, in relevant part, as follows:

> (a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:
>
> (1) The transaction of any business within this State;
>
> (2) The commission of a tortious act within this State;
>
> * * *
>
> (b) A court may exercise jurisdiction in any action arising within or without this State against any person who:
>
> * * *
>
> (4) Is a natural person or corporation doing business within this State.
>
> (c) A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.

735 ILCS 5/2-209.

Jurisdiction can be general or specific. Illinois' long-arm statute provides the basis for general jurisdiction over a nonresident defendant in subsection (b)(4) under the "doing business" theory; and the statute provides for specific jurisdiction over a nonresident defendant in subsection (a)(1) under the "transaction of business" theory. Kostal, 357 Ill. App. 3d at 385. The key difference between general and specific jurisdiction is that specific jurisdiction requires that the suit *arise out of* or be *related to* the defendant's contact with the forum. Id. (citing Bombliss v. Cornelsen, 355 Ill. App. 3d 1107, 824 N.E.2d 1175 (Ill. App. 2005)) (emphasis added).

The Plaintiff bears the burden of establishing a valid basis for asserting jurisdiction over the Defendant. See Kostal, 357 Ill. App. 3d at 383, 827 N.E.2d 1031 (citing Morecambe Maritime, Inc. v. National Bank of Greece, S.A., 354 Ill. App. 3d 707, 710, 821 N.E.2d 780, 784 (Ill. App. 2004) ("Plaintiff bears the burden of establishing a *prima facie* case for the assertion of personal jurisdiction over defendant; however, uncontradicted evidence may overcome the *prima facie* case and defeat jurisdiction")). Although this Court must resolve conflicts between the parties' affidavits in favor of the Plaintiff, this Court must also accept as true any facts averred by the Defendant that have not been contradicted by an affidavit submitted by Plaintiff. See Cleary

v. Philip Morris, 312 Ill. App. 3d 406, 411, 726 N.E.2d 770 (Ill. App. 2000). "If plaintiff has failed to establish *a prima facie* case, the inquiry is at an end and the defendant's motion should be granted." Id.

*2. General Jurisdiction*

Illinois' long-arm statute provides for general jurisdiction over a nonresident defendant in subsection (b)(4) under the "doing business" theory. Kostal, 357 Ill. App. 3d at 385 (citing 735 ILCS 5/2-209(b)(4)). Under the "doing business" theory, a defendant becomes subject to the state's jurisdiction if it "engages in a continuous and systematic course of business in the State," even if the subject lawsuit has no relationship to that business. Id.

Plaintiff does not specifically allege general jurisdiction over the Defendant under Section 209(b)(4), and it is questionable whether Plaintiff alleges general jurisdiction over the Defendant at all.[1] Thus, Plaintiff has waived any general jurisdiction argument. See RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1277 (7th Cir. 1997). In the event that this Court finds that Plaintiff has properly asserted general jurisdiction and has not waived it, the Defendant submits that Plaintiff cannot establish general personal jurisdiction over the Defendant for the reasons stated below.

In its First Amended Complaint, Plaintiff admits that the Defendant resides in North Plains, Oregon and is not an Illinois resident. See 1st Am. Compl. ¶ 3. Plaintiff then alleges that Andrews is subject to Illinois "general personal jurisdiction" because Andrews operates a website which makes Andrews' software available to Illinois residents.[2] See 1st Am. Compl. ¶¶ 8, 40. However, the Defendant does not specifically target his software to Illinois citizens. See Andrews Aff. ¶ *7*. Rather, Defendant Andrews merely operates a website from which individuals may purchase his products and obtain other useful information. Id. at ¶ 6.

Although the possibility of sales to Illinois citizens exists through Andrews' website, this

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1 Plaintiff confuses general jurisdiction and specific jurisdiction, alleging "*general* personal jurisdiction over Andrews pursuant to 735 ILCS 5/2-*209(a)(1)*", whereas subsection 209(a)(1) provides for specific, not general, jurisdiction. See 1st Am. Compl. ¶ 40 (emphasis added) and Kostal, 357 Ill. App. 3d at 385. Thus, it is unclear whether Plaintiff asserts general jurisdiction, specific jurisdiction, or both. The Defendant submits that Plaintiff has failed to properly assert general jurisdiction. Thus, Planitiff has waived any general jurisdiction argument. Therefore, Plaintiff cannot establish personal jurisdiction over the Defendant under either general or specific jurisdiction, as explained in Defendant's argument above.

2 Plaintiff alleges that the Defendant: "operates a web site... (the "Web Site")" and "...has used the Web Site to solicit customers from and complete sales in Illinois, and has sold copies of his competing software to Illinois residents." See 1st Am. Compl. ¶¶ 8, 40.

alone is insufficient to warrant general jurisdiction. See LaSalle National Bank v. Vitro, Sociedad Anonima, 85 F. Supp. 2D 857, 861 (N.D. Ill. 2000) (quoting Molnlycke Health Care AGB v. Dumex Medical Surgical Products Ltd., 64 F.Supp.2d 448, 451 (E.D. Pa. 1999) ("[t]o hold that the possibility of ordering products from a website establishes general jurisdiction would effectively hold that any corporation with such a website is subject to general jurisdiction in every state. The court is not willing to take such a step.")). Obviously, websites, including Defendant's, can be accessed by Internet users *worldwide*. Consequently, it becomes even more essential for courts to analyze the question of jurisdiction on a case-by-case basis. See LaRochelle, 361 Ill. App. 3d at 222 (citing Haubner v. Abercrombie & Kent International, Inc., 351 Ill. App. 3d 112, 119, 812 N.E.2d 704 (Ill. App. 2004) ("There is no fixed test for determining whether a foreign corporation is 'doing business' in Illinois; a court must perform a case-by-case analysis to determine if a corporation is conducting business of such a character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and the laws of Illinois")).

In LaRochelle, the court found that Defendant's website was interactive, but not interactive enough to find that it did business in Illinois. Id. at 225 ("The only truly interactive aspect of the website is the 'Market Watch' section, which allows the user to find current quotes of specific stocks"). Instead, the court found that the defendant "did business" in Illinois because the defendant's principal place of business was in Illinois; the defendant hired an Illinois company to perform various accounting services; and the defendant further had "continual and intense" business contacts with three Illinois companies. Id. at 225-26. The court explained: "[m]erely entering into a contact with a resident of Illinois is not sufficient by itself to subject a nonresident to in personam jurisdiction in Illinois." LaRochelle, 361 Ill. App. 3d at 226 (citing Hendry v. Ornda Health Corp., 318 Ill. App. 3d 851, 854, 742 N.E.2d 746 (Ill. App. 2000)). "The business conducted by the nonresident must be carried on with a fair measure of permanence and continuity, not occasionally or casually." Id. (citing Hendry, 318 Ill. App. 3d at 853).

Here, there are no such "continual and intense" contacts. Andrews' residence or "principal place of business" is not in Illinois. Furthermore, Andrews did not hire Illinois companies to perform services for him or his business. See Andrews Aff. ¶ 9. Moreover, Andrews does not specifically target his software to Illinois citizens. Id. at ¶ 7. On the contrary,

Andrews operates a website to advertise his products to potential customers, and does so on the Internet, which is available to viewers *worldwide*. To determine that the possibility of ordering products from Andrews' website establishes general jurisdiction would effectively hold that Andrews would be subject to general jurisdiction in every state. See Molnlycke Health Care AGB, 64 F.Supp.2d at 451. Like the Court in Molnlycke Health Care, this Court cannot take such a step. Id.

Plaintiff fails to allege that the Defendant has continual and intense business contacts with Illinois companies or residents; and the Defendant does not have such contacts. See Andrews Aff. ¶ 3. Plaintiff alleges that Andrews "has used the Web Site to solicit customers from and complete sales in Illinois, and has sold copies of his competing software to Illinois residents." See 1st Am. Compl. ¶¶ 8, 40. In fact, Andrews has only *one* customer with an Illinois mailing address. See Andrews Aff. ¶ 10. Such nominal and sporadic contacts do not lend to business that is conducted with "a fair measure of permanence and continuity." LaRochelle, 361 Ill. App. 3d at 226 (citing Hendry, 318 Ill. App. 3d at 853). On the contrary, Andrews' contacts with Illinois residents is not "permanent and continuous", but nominal,[3] and the liklihood of additional Illinois customers would, at most, be random and "occasional." See Andrews Aff. ¶ 10.

Because the Defendant does not have the continuous and systematic business contacts necessary for general jurisdiction, Andrews cannot be subject to personal jurisdiction based on a general jurisdiction assertion. Therefore, the inquiry must focus on whether this Court can exercise personal jurisdiction over the Defendant based on the principle of specific jurisdiction. The Defendant contends the Court cannot.

*3. Specific Jurisdiction*

Similar to that of general jurisdiction, Plaintiff cannot establish that this Court has specific jurisdiction over Defendant Andrews. Specific jurisdiction occurs under the "transaction of business" theory. Illinois has jurisdiction "if the [defendant] transacts any business within the State *and* a cause of action arises from that transaction." Kostal, 357 Ill. App. 3d at 385 (emphasis in original) (citing Kadala v. Cunard Lines, Ltd., 226 Ill. App. 3d 302, 314 (Ill. App. 1992)); see also Bombliss, 355 Ill. App. 3d at 1107 ("Specific jurisdiction refers to jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum").

3 Andrews has only *one* customer with an Illinois mailing address. See Andrews Aff. ¶ 10.

The main factor in specific jurisdiction analysis is foreseeability -- was it reasonably forseeable to the defendant that its action could result in litigation in the state in question. Birnberg v. Milk St. Residential Assocs. Partnership, No. 02 C 0978 and 02 C 3436, 2003 U.S. Dist. LEXIS 806 *10 (N.D. Ill. January 17, 2003) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-74 (1985)). Contacts that are "random, fortuitous, or attenuated" are not sufficient to establish that a state's exercise of personal jurisdiction over the defendant was foreseeable. Id. (citing Heritage House Rests., Inc. v. Cont'l Funding Group, Inc., 906 F.2d 276, 283 (7th Cir. 1990)). Moreover, in examining the contacts in a specific jurisdiction analysis, the court cannot "simply aggregate all of the defendant's contacts with the state -- no matter how similar in terms of geography, time, or substance." Id. (citing RAR, 107 F.2d at 1277).

Plaintiff alleges jurisdiction over Andrews pursuant to 735 ILCS 5/2-209(a)(1) and (a)(2). See 1st Am. Compl. ¶¶ 38, 40. Sections 209(a)(1) and (a)(2) provide for jurisdiction over a nonresident defendant for:

> (a)...any cause of action arising from the doing of any of such acts:
>
> (1) The transaction of any business within this State;
> (2) The commission of a tortious act within this State;

735 ILCS 5/2-209. Where jurisdiction is predicated upon subsection (a), only causes of action arising from the enumerated acts may be asserted against a nonresident defendant. Kalata v. Healy, 312 Ill. App. 3d 761, 766, 728 N.E.2d 648 (Ill. App. 2000) (citing 735 ILCS 5/2-209(f)).

*a. No "Transaction of Business" under Section 209(a)(1)*

Plaintiff's causes of action must arise from Defendant Andrews' "transaction of business" in Illinois in order to establish specific jurisdiction under Section 209(a)(1). See 735 ILCS 5/2-209(a)(1). Plaintiff alleges that Andrews "transacted business" because Andrews' website "is an active web site, [sic] that facilitates the completion of sales transactions wholly online, including sales to Illinois residents." See 1st Am. Compl. ¶ 39. Even if Plaintiff's assumption is correct and Andrews has sold his products on the Internet to Illinois citizens, any such sales to Illinois citizens are irrelevant to the question of *specific* personal jurisdiction over Andrews for Plaintiff's claims of libel, unfair competition and tortious interference with prospective economic advantages ("tortious interference")[4] because Plaintiff's claims did not arise out of any such

4 Although Plaintiff's First Amended Complaint contains eleven Counts, they all allege and are entitled: (1) libel; (2) unfair competition; or (3) tortious interference with a prospective economic advantage. See generally 1st Am. Compl.

sales. See Arthur Young & Co. v. Bremer, 197 Ill. App. 3d 30, 554 N.E.2d 671 (Ill. App. 1990)(A plaintiff's claim must be one that lies in the wake of commercial activities by which the defendant submitted to jurisdiction of Illinois courts.)

Importantly, Plaintiff's claims did not arise from any software sales the Defendant may have made to Illinois residents. Compare Elgin Dairy Foods, Inc. v. V., 2005 U.S. Dist. LEXIS 20262 (N.D. Ill. Sept. 14, 2005)(Where the individuals' software was ultimately sold to plaintiffs in Illinois and the individuals traveled to Illinois on multiple occasions to facilitate the installation, programing, training concerning their company's software, in addition to making promises concerning the software to plaintiffs, such contacts with the state of Illinois were sufficient to subject the individuals to specific personal jurisdiction under 735 ILCS 5/2-209). Rather, Plaintiff's allegations arise from the Defendant's alleged acts of posting "disparagements" or contested statements on his website. See generally 1st Am. Compl.

This case is not brought by an Illinois citizen who purchased Andrews' product from Andrews' website. Thus, the fact that Andrews may have sold his products to other Illinois citizens is immaterial for purposes of specific jurisdiction. As such, the instant circumstances differ significantly from Swissland Packing Co. v. Cox, 255 Ill. App. 3d 942, 627 N.E.2d 686 (1994) (holding that the defendant's conduct of negotiating the contract with plaintiff by telephone and mailing the contract to plaintiff in Illinois was sufficient to submit the defendant to specific jurisdiction of the Illinois courts) and Kalata, 312 Ill. App. 3d at 768 (holding that the defendant's telephone and mail communications to negotiate and execute the joint venture agreement with plaintiff satisfied the long arm-statute). Here, Plaintiff alleges libel, unfair competition and tortious interference. Thus, pursuant to Section 209(a)(1), jurisdiction must arise from these claims specifically. Because Plaintiff's allegations of libel, unfair competition and tortious interference do not *arise from* Andrews' alleged sales to Illinois citizens, there cannot be any specific jurisdiction based on such alleged conduct. See Swissland Packing Co., 255 Ill. App. 3d at 944; Kalata, 312 Ill. App. 3d at 768. Indeed, the actions for libel, unfair competition and tortious interference are based on, related to, and *arise from* false statements that the Defendant allegedly made about the Plaintiff, not by virtue of any sales it may have made to third parties. These are separate acts, and the Defendant's "transacting business" with or selling products to Illinois residents is not related to, and does not give rise to, Plaintiff's causes of action against him. Thus, there is no specific jurisdiction over the Defendant under the

"transacting business" theory in Section 209(a)(1).

*b. No "Tortious Act" under Section 2-209(a)(2)*

Plaintiff's causes of action must arise from a tortious act in Illinios in order to establish specific jurisdiction under Section 2-209(a)(2). See 735 ILCS 5/2-209(a)(2). Plaintiff alleges that Andrews entered into Illinois, with no purpose other than to damage [Plaintiff], when he accessed the website for the Northern District of Illinois United States Bankruptcy Court[5] and that such actions subject Andrews to personal jurisdiction under 735 ILCS 5/2-209(a)(2). See 1st Am. Compl. ¶¶ 37, 38. However, even if accessing an Illinois court webite constitutes "entering Illinois" for purposes of specific jurisdiction, Plaintiff's claims do not arise from such act. Plaintiff's claims arise from the statements allegedly made by Andrews on his website.

Under section 2-209(a)(2), "a single tortious act occurring in Illinois will establish jurisdiction in Illinois, even though the defendant has no other contact in Illinois and has never been to Illinois." Birnberg, 2003 U.S. Dist. LEXIS at 806 (citing Mergenthaler Linotype Co. v. Leonard Storch Enter. Inc., 66 Ill. App. 3d 789, 383 N.E.2d 1379, 1384 (Ill. App. 1978)). Courts have broadly construed the term "tortious act" to include acts beyond those which "create common law liability" to include "any act that constitutes a breach of duty to another imposed by law." Id. (citing Vlasak v. Rapid Collection Sys., Inc., 962 F. Supp. 1096, 1100 (N.D. Ill. 1997)). See also Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 429 F. Supp. 139, 140 (N.D. Ill. 1977) ("the word 'tortious' . . . is not restricted to the technical definition of a tort, but also includes any act committed within the state which involves a breach of duty to another and makes the actor liable for damages").

Unlike the cases in which a defendant has made express mailings that have given rise to tortious claims, Cross v. Simons, 729 F. Supp. 588, 592 (N.D. Ill. 1989); McClub Serv., Inc. v. Stovall, 714 F. Supp. 370, 373 (N.D. Ill. 1989); Birnberg, 2003 U.S. Dist. LEXIS 806 (N.D. Ill. 2003), there is no "tortious act" in the case at hand. Certainly, it cannot be said that accessing a website operated by a federal court in Illinois constitutes tortious conduct under 209(a)(2). There is nothing libelous about accessing public records. By allegedly accessing the Illinois Bankruptcy Court's website, the Defendant did not "breach a duty to another, making make him

5 Plaintiff alleges: "Andrews did enter into the Internet web site of the United States Bankruptcy Court for the Northern District of Illinois (http://ecf.ilnb.uscourts.gov), which is located in Cook County, Illinois, to obtain documents from its official electronic files so that he could distribute them, with no purpose other than to damage John. *This is entry into Illinois for the purposes of personal jurisdiction*." See 1st Am. Compl. ¶ 37 (emphasis added).

liable for damages." Thus, Plaintiff's allegation that the Defendant "entered Illinois" by accessing the Illinois court's website is not tortious conduct for purposes of establishing specific jurisdiction over the Defendant.

*c. Websites*

With regard to the Internet, Illinois courts have adopted the "sliding scale" analysis to determine whether Internet activity is sufficient to establish personal jurisdiction. See LaRochelle, 361 Ill. App. 3d at 225 (citing Bombliss v. Cornelsen, 355 Il.. App. 3d 1107, 1114, 824 N.E.2d 1175 (2005), for the analysis formulated in Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123-24 (W.D. Pa. 1997)). At one end, jurisdiction does not attach where the nonresident maintains a passive website that merely provides information about the defendant's products or services ("passive" websites). Id. At the other end, jurisdiction attaches where the defendant transacts business via an interactive website where contracts are completed online and the defendant derives profits directly from web-related activity ("active" websites). Id. In between the "passive" and "active" websites lies a third type of hybrid website which is interactive in that it allows customers in foreign jurisdictions to communicate regarding defendant's products and services, which may or may not be sufficient to assert personal jurisdiction, depending upon the level of interactivity and the commercial nature of the information exchanged. Id. In determining whether a "hybrid" website suffices to confer personal jurisdiction over an individual, courts focus on whether a defendant "purposely directed its activities at the residents of the forum." Infosys Inc. v. Billingnetwork.com, Inc., No. 03 C 2047, 2003 WL 22012687, *2 (N.D. Ill. Aug. 27, 2003); Berthold Types Ltd. v. European Mikrograf Corp., 102 F. Supp 2d 928, 932 (N.D. Ill. 2000); Ty Inc. v. Clark, No. 99 C 5532, 2000 WL 51816, *3 (N.D. Ill. Jan. 14, 2000).

The website in the instant case is a "hybrid" -- it provides information about Andrews' software and further allows customers to purchase the products online. Andrews Aff. ¶ 6. Importantly, Andrews does not target Illinois residents. Id. at ¶ 7. Furthermore, there is nothing on Andrews' website that specifically directs its activities at Illinois residents. Id. at ¶ 6. Andrews does not operate his website from Illinios; does not have the website hosted with an Internet server in Illinois; and does not have the website maintained from Illinois. Id. at ¶ 8. Plaintiff has not alleged anything to the contrary.

Consequently, Andrews' website cannot reach the level of commercial interactivity

required under the standard for personal jurisdiction. See Infoysy, Berthold, and Ty Inc., supra. Therefore, this Court cannot exercise personal jurisdiction over the Defendant based on his website. See id.

*4. Due Process Analysis*

A two-step analysis is applied to determine whether the court acquires personal jurisdiction pursuant to the long-arm statute. Kalata, 312 Ill. App. 3d at 765 (citing R.W. Sawant & Co. v. Allied Programs Corp., 111 Ill. 2d 304, 311, 489 N.E.2d 1360 (Ill. 1986)). The first step is to determine if jurisdiction is proper under the specific language used by section 2-209. Id. If the answer is no, the inquiry ends; but if jurisdiction is found to be proper under the statute, then we reach the second step and determine whether the exercise of jurisdiction comports with due process of law. Id. (citing Int'l. Business Machines Corp. v. Martin Property & Casualty Insurance Agency, Inc., 281 Ill. App. 3d 854, 858, 666 N.E.2d 866 (Ill. App. 1996)).

Under federal due process requirements, a nonresident defendant must have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Kalata, 312 Ill. App. 3d at 768 (citing International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))). Three criteria are considered in determining whether the federal due process standard has been satisfied: (1) whether the nonresident defendant had "minimum contact" with the forum state such that there was "fair warning" that the nonresident defendant may be hailed into a forum court; (2) whether the action arose out of or related to the defendant's contacts with the forum state; and (3) whether it is reasonable to require the defendant to litigate in the forum state. Id. at 768-69 (citing Ores v. Kennedy, 218 Ill. App. 3d 866, 872 (Ill. App. 1991); Autotech Controls Corp. v. K.J. Electric Corp., 256 Ill. App. 3d 721, 725 (Ill. App. 1993) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-77 (Ill. 1985))).

The requirements of "minimum contacts" and "fair warning" are satisfied if defendant has "purposefully directed" his activities at Illinois residents, reached out beyond one state to create continuing relationships with citizens of another state or purposefully derived benefits from his interstate activities. Kalata, 312 Ill. App. 3d at 769 (citing Hoekstra v. Bose, 302 Ill. App. 3d 704, 708, 707 N.E.2d 185 (Ill. App. 1998)); see also Burger King, 471 U.S. at 472 ("By requiring that individuals have fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," the Due Process Clause "gives a degree of predictability to

the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit. Where, as here, a state seeks to assert specific jurisdiction over a nonresident defendant who has not consented to suit there, the 'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the state *and* the suit involves alleged injuries that 'arise out of or relate to' those activities.")(emphasis in original).

In determining whether a defendant has had "fair warning" or should "reasonably anticipate" being haled into an out-of-state court, federal courts have relied upon the following reasoning:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

See, *e.g.*, Id. (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

Assuming, *arguendo*, that the Defendant has the minimum contacts necessary to exercise personal jurisdiction over him, any such exercise of specific personal jurisdiction over the Defendant would not comport with traditional notions of fair play and substantial justice. See International Shoe Co., 326 U.S. at 316. If the Plaintiff succeeds in establishing a prima facie case for the exercise of personal jurisdiction over Andrews (which the Defendant contends Plaintiff has not), the Court must find that Andrews directed his activities at forum residents. See Id. Andrews lives in Oregon and operates a website which is accessible to users around the world. To conclude that the possibility of ordering products from a website establishes jurisdiction over Andrews would effectively hold that Andrews is subject to jurisdiction in every state. See LaSalle National Bank, 85 F. Supp. 2d at 861. The Defendant has found no authority to suggest that a nonresident defendant who operates a website should be subject to jurisdiction everywhere from which the website can be accessed. Such finding would not be foreseeable, but rather over-reaching and unreasonable.

Andrews did not have "fair warning" that he would be subject to a lawsuit in Illinois. Plaintiff has not alleged that Andrews specifically targets Illinois residents, and Andrews simply does not target Illinois residents. See Andrews Aff. ¶ 6. At Andrews' website targets animal

breeders, regardless of geographic location. Id. Thus, he has not "purposefully directed" his activities at Illinois residents, as required to satisfy "minimum contacts" and "fair warning". See Burger King Corp., 471 U.S. at 471-77.

It would be unfair and unreasonable to require Andrews to litigate in Illinois. See Kalata, 312 Ill. App. 3d at 769 (It is not unfair to submit defendant to the jurisdiction of an Illinois court where defendant initiated contact with plaintiff about the joint venture and frequently used the telephone and mail system on a "continuing basis" to carry out the completion of the contract between the two parties.). Andrews did not initiate contact with Plaintiff and have contacts with Plaintiff on a "continuing basis" to justify hailing the Defendant into court in Illinois for Plaintiff's lawsuit.

Plainly stated, the Defendant could not have been expected to be hailed into court in Will County, Illinois. To subject Andrews to personal jurisdiction in this Court would not do substantial justice and fair play. As the Illinois Constitution teaches, "jurisdiction is to be asserted only when it is fair, just and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant's acts which occur in Illinois or affect interests located in Illinois." RAR, Inc., 107 F.3d at 1276. Specific personal jurisdiction over the defendant in this action would not be fair, just or reasonable. Consequently, this Court must conclude that specific personal jurisdiction cannot be exercised against the Defendant.

*5. Defendant Not Subject to Jurisdiction*

Plaintiff has failed to allege and/or demonstrate sufficient minimum contacts to warrant the exercise of personal jurisdiction over Defendant Andrews. Because neither general nor specific jurisdiction is applicable, the Court does not have personal jurisdiction over the Defendant. Therefore, the Court should dismiss Plaintiff's First Amended Complaint in its entirety. See Unterschuetz v. City of Chicago, 346 Ill. App. 3d 65, 803 N.E.2d 988 (Ill. App. 2004) (Under either Sections 2-615 or 2-619, dismissal is proper if a plaintiff fails to allege any set of facts to support a cause of action that would entitle him to relief; the plaintiff cannot rely simply on mere conclusions of law or fact unsupported by specific factual allegations, regardless of whether they generally inform the defendant of the nature of the claim against him or her.).

**B. This Court is the Improper Forum and Venue**

The Plaintiff has violated his own Terms and Conditioins by filing a lawsuit to resolve his "disputes" with Defendant Andrews. See Plaintiff's Website, MBFS.com, Terms and Conditions (attached as Exhibit B). Like the Defendant, Plaintiff sells software to breeders of dogs, cats and horses. See 1st Am. Compl. ¶ 5. Also like the Defendant, Plaintiff does so on the Internet. The Terms and Conditions on Plaintiff's Website include an arbitration clause that provides:

> ANY CLAIM OR DISPUTE UNDER THE USER AGREEMENT AND ANY THAT YOU MAY HAVE AGAINST ANY OF THESE PERSONS OR ENTITIES, WHETHER RELATED TO THE DESCRIBED TRANSACTIONS OR OTHERWISE, INCLUDING THE ENFORCEABILITY OF THIS ARBITRATION AGREEMENT, WILL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION under the Code of Procedure of ARBITRATION-FORUM.COM (the "Code") in effect at the time the claim is filed.

See id. Thus, the Plaintiff requires that all disputes against Plaintiff be resolved by arbitration through Arbitration Forums. Id. Importantly, in this action, the Defendant disputes "the enforceability of [Plaintiff's] arbitration agreement". See id. Moreover, should Plaintiff's claims survive this Motion to Dismiss, this action will inevitably involve counterclaims against the Plaintiff. Accordingly, pursuant to Plaintiff's own Terms and Conditions, the dispute at hand must be resolved by arbitration, not in a court of law. Thus, the Court should dismiss this action so that it may be resolved by arbitration, the alternative dispute resolution method previously proscribed and specifically chosen by Plaintiff.

**C. Improper Service of Process**

The First Amended Complaint should be dismissed because it was not properly served. Specifically, the original Complaint was served on Defendant by process server on January 24, 2006. Despite that the Defendant had not yet appeared, Plaintiff thereafter mailed a copy of its First Amended Complaint to Andrews by regular mail. See 1st Am. Compl. Thus, the First Amended Complaint was improperly served on Defendant.

The Illinois Supreme Court Rules do not specifically provide how an amended complaint must be served upon a non-appearing defendant. Thus, the Defendant submits that a non-appearing defendant must be personally served with an amended complaint, as with the original complaint. For example, Illinois Supreme Court Rule 11 applies to the service of papers *other than* process and complaint. See Ill. Sup. Ct. R. 11. This Rule applies to the service of papers

(other than process and complaint) on the parties to a case who are not in default. Id. If a party has appeared and is not represented by counsel, service shall be made upon the party; if an attorney has appeared for him, service shall be made upon the attorney. Public Taxi Service, Inc. v. Ayrton, 15 Ill. App. 3d 706, 304 N.E.2d 733 (Ill. App. 1973).

Illinois Supreme Court Rule 104 states that a summons must be accompanied by a complaint (with no mention of an amended complaint) and addresses filing pleadings subsequent to the complaint (again, with no mention of an amended complaint) on all parties who have appeared and have not been found in default for failure to plead. See Ill. Sup. Ct. R. 104.

The Defendant submits that notice to a non-appearing defendant is necessary only where the relief sought in the complaint is different from the relief sought thereafter. See Eckel v. Bynum, 240 Ill. App. 3d 867, 608 N.E.2d 167 (Ill. App. 1992) ("Ordinarily, a party who has not appeared need not be served with notices of motions, however, if relief is sought from the party other than that requested in the complaint, the party must be notified."). The significance is whether the amended complaint seeks additional relief; if it does not seek additional relief, notice is not necessary. See, *e.g.*, Berkson v. Quality Beauty Supply Co. 36 Ill. App. 3d 877, 344 N.E.2d 629 (1 Dist. 1976) (A default judgment was not void because the complaint had been amended without notice to defendant where the defendant was in default for failure to plead, the amendment did not seek additional relief, but merely changed the date of the occurrence from June 2, 1973 to May 17, 1972, and defendant understood--or should have understood--the facts pleaded in the complaint to be those of the May 17, 1972 incident.).

Rule 104 was designed to protect a defaulting party insofar as the relief granted on default may not differ from that requested in the complaint. In re Ponsart, 118 Ill. App. 3d 664, 455 N.E.2d 271 (Ill. App. 1983), and see Grover v. Franks, 27 Ill. App. 3d 900, 327 N.E.2d 71 (Ill. App. 1975) (Rule 104 was designed to protect a party's right to reasonable notice so as to enable a defense to be made.), Public Taxi, 15 Ill. App. 3d 706 (The purpose of Rule 104 is to make certain that the party who has the judgment is informed that an effort is being made to take it away.).

Finally, the Court in Public Taxi considered Illinois Supreme Court Rule 105 with regard to proper notice requirements. Public Taxi, 15 Ill. App. 3d at 711-712. It examined the Rule and explained:

> Subparagraph (b) of Rule 105 states that notice may be served in one of three ways: (1) by the method provided by law for service of summons, (2) by prepaid registered mail and (3) by publication. Notice is indispensible to due process and compliance with the rules is essential to jurisdiction. If the notice is invalid, jurisdiction is lacking and subsequent orders are likewise invalid.
>
> Rule 105, on the other hand, applies to parties who are in default -- those who have not appeared either personally or by counsel. Ordinarily, a party who has not appeared need not be served with notices of motions. If, however, relief is sought from him other than that requested in the complaint, he must be notified. A defendant, for example, might voluntarily default if the *ad damnum* was for a small amount but would appear and contest the complaint if the *ad damnum* were substantially increased. Rule 105 covers this situation; it provides that if new or additional relief is sought from a party in default he must be served with notice by one of the methods set out in the rule.

Id., (citing Andonoplas v. Jaremko, 9 Ill. App. 3d 298, 292 N.E.2d 225 (Ill. App. 1972); Acosta v. Burris, 47 Ill. App. 2d 201, 197 N.E.2d 757 (Ill. App. 1964)).

Thus, the crux of service and notice requirements depends upon whether the relief requested is different. In the instant case, if the Plaintiff's original complaint and amended complaint essentially request the same relief, the defendant is on notice and not entitled to additional notice; notice becomes necessary where the relief sought in the subsequent complaint is different. For instance, Plaintiff's First Amended Complaint adds to the original Complaint Counts Nine (IX), Ten (X) and Eleven (XI)6. Plaintiff's First Amended Complaint also adds the Fourth, Fifth and Sixth Disparagements. See generally Plaintiff's original Complaint; and 1st Am. Compl. ¶¶ 26, 28, 30. Thus, the Defendant was not properly served and/or notified of Counts Nine through Eleven or the Fourth through Sixth Disparagements in the First Amended Complaint. Since the relief request in Plaintiff's First Amended Complaint varies from that in the original Complaint, it was necessary for Plaintiff to properly affect service of process on Defendant, or at the very least comport with the notice requirements in Rule 105, and Plaintiff did not. See Ill. Sup. Ct. R. 105, and Public Taxi, supra. Service was improper, thus the First Amended Complaint must be dismissed.

**D. Claims Untimely Filed**

Plaintiff filed its original Complaint on January 24, 2006. See Plaintiff's original Complaint. On February 24, 2006, Plaintiff filed its First Amended Complaint. See 1st Am.

6 Count Nine (IX) alleges Unfair Competition IV; Count Ten (X) alleges Libel Per Se II; and Count Eleven (XI) alleges Tortious Interference with Prospective Economic Advantage III. See 1st Am. Compl. pp. 17-19.

Compl. A claim for defamation (which encompasses libel and slander) must be filed within one year in Illinois. 735 ILCS 5/13-201. Furthermore, Plaintiff must allege with specificity the statements it claims were defamatory and/or libelous. See Lykowski v. Bergman, 299 Ill. App. 3d 157, 163, 700 N.E.2d 1064, 1069 (Ill. App. 1998) (A plaintiff must set forth the words alleged to be defamatory "clearly and with particularity." It is not enough for the plaintiff to state that a defendant generally accused the plaintiff of committing improper or unethical conduct.). Plaintiff failed to identify certain statements in its original Complaint, including the Fourth, Fifth and Sixth Disparagements. See 1st Am. Compl. ¶¶ 26, 28, 30. Thus, the allegedly defamatory or libel statements set forth in the Fourth, Fifth and Sixth Disparagements were not timely filed when Plaintiff filed its First Amended Complaint after the expiration of the one-year statute of limitation for defamation claims. As such, Plaintiff's claims relative to the Fourth, Fifth and Sixth Disparagements, including Count Ten (X), must be dismissed. See 1st Am. Compl. p. 18.

**II. 735 ILCS 5/2-615 – Failure to State Claims**

Assuming, *arguendo*, this Court has jurisdiction over the Defendant, the Court should dismiss the First Amended Complaint in its entirety pursuant to section 2-615 because the Plaintiff has failed to state claims upon which relief can be granted.

The standard for deciding a motion to dismiss under Section 2-615 is well-settled. Such a motion admits the truth of all well-pleaded factual allegations, and challenges only the legal sufficiency of the complaint. Disc Jockey Referral Network v. Ameritech Publishing, 230 Ill. App. 3d 908, 912 (Ill. App. 1992) (citing Perkins v. Collette, 179 Ill. App. 3d 852 , 534 N.E.2d 1312 (Ill. App. 1989) and Schnidt v. Henehan, 140 Ill. App. 3d 798, 489 N.E.2d 415 (Ill. App. 1986)). The question presented is whether sufficient facts are alleged in the complaint which, if proved, would entitle the plaintiff to relief. Anderson v. Vanden Dorpel, 172 Ill.2d 399, 407 (Ill. 1996). In opposing a motion to dismiss for failure to state a claim, the plaintiff cannot rely on mere conclusions of law or fact that are unsupported by specific factual allegations. Id. at 408. Moreover, Illinois is a fact-pleading jurisdiction, and a plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action being asserted. Id.

The pleader is required to set out ultimate facts that support a cause of action, and legal conclusions unsupported by allegations of specific fact are insufficient. Estate of Johnson by Johnson v. Condell Memorial Hospital, 119 Ill.2d 496, 509-10, 520 N.E.2d 37, 42-3 (Ill. 1988). Although the plaintiff need not set out its evidence, mere allegations of factual or legal

conclusions are not sufficient. Santelli v. City of Chicago, 222 Ill. App. 3d 286, 288, 398 N.E.2d 395, 397 (1st Dist. 1979). For example, a general allegation that an agreement or contract exists, without supporting facts, is a legal conclusion. Martin-Trigona v. Bloomington Federal Savings & Loan Assoc, 101 Ill. App. 3d 943, 946, 428 N.E.2d 1028, 1031 (Ill. App. 1981).

Plaintiff largely asserts unsupported facts and conclusions of law. Importantly, in this fact-pleading jurisdiction, Plaintiff fails to allege facts sufficient to bring his or her claim within the scope of Plaintiff's causes of action being asserted. See Anderson, 172 Ill.2d at 407. Thus, Plaintiff does not sufficiently allege facts in support of its allegations, and the Plaintiff's First Amended Complaint should be dismissed.

A. Tortious Interference with Prospective Economic Advantage

Plaintiff fails to state claims in Counts One (I), Eight (VIII), and Eleven (XI) in which Plaintiff alleges tortious interference with prospective economic advantage.[7] To sufficiently allege such a claim, a plaintiff must allege: (a) a reasonable expectancy of entering into a valid business relationship; (b) the defendant's knowledge of such expectancy; (c) an intentional and unjustifiable interference by defendant with the third-party that induced or caused a breach or termination of the expectancy; (d) damage to the plaintiff resulting from defendant's alleged interference. Anderson, 172 Ill.2d at 406-407. This includes an allegation that the defendant engaged in specific action against the party with whom the plaintiff expected to do business. Schuler v. Abbott Laboratories, 265 Ill. App. 3d 991, 994 (Ill. App. 1993). Moreover, the plaintiff must allege a business expectancy with a specific third party and not merely allege a general expectation of future business. Id. The plaintiff must furthermore plead, and eventually prove, purposeful interference that connotes impropriety. See Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 485 (1998). Indeed, there will be no liability for interference with a prospective contractual relation where the defendant merely conveys truthful information. Cromeens, Holloman, Sibert, Inc. v. AB Volvo, 349 F.3d 376, 399 (7th Cir. 2003) (citing Soderland Bros. v. Carrier Corp. 278 Ill. App. 3d 606, 620 (Ill. App. 1995)).

Here, the Plaintiff has failed to allege any specific third parties with whom it expected to

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7 Counts One (I), Eight (VIII), and Eleven (XI) are entitled Tortious Interference with Prospective Economic Advantage, Tortious Interference with Prospective Economic Advantage II, and Tortious Interference with Prospective Economic Advantage III, respectively. See 1st Am. Compl. pp. 8, 16, and 18. Plaintiff separates each of these claims for tortious interference with prospective economic advantage to make separate Counts for the first, fourth and sixth "disparagements". See generally 1st Am. Compl. This being their only difference, the Defendant will address all three Counts (I, VIII and XI) as Plaintiff's claim for "Tortious Interference with Prospective Economic Advantage."

enter a valid business relationship. See generally 1st Am. Compl. Plaintiff has further failed to allege Andrews' knowledge of any such expectancies. Id. Rather, the Plaintiff merely states that Plaintiff "has a reasonable expectancy to do business with dog, cat and horse breeders and exhibitors." 1st Am. Compl. ¶ 41. This is insufficient. See Schuler, 265 Ill. App. 3d at 994; Anderson, 172 Ill.2d at 407-408. In addition, Plaintiff has failed to allege that the Defendant intentionally and unjustifiably interfered with any third party that induced or caused a breach or termination of an expectant business relationship. Because of this, the Plaintiff cannot sufficiently allege that conduct caused damage arising from a specific failed expectancy. Thus, nearly every element (if not all) of this claim has been insufficiently plead. See id. Therefore, Plaintiff's claims for Tortious Interference with Prospective Economic Advantage in Counts One, Eight and Eleven should be dismissed. See id.

B. Libel

Plaintiff fails to state claims in Counts Two (II), Four (IV), Five (V) and Ten (X) in which Plaintiff alleges libel per se and libel per quod.[8] The Plaintiff claims that Andrews is liable for libel because he posted statements about Plaintiff on his website. See generally 1st Am. Compl. These claims should be dismissed based on the defenses of substantial truth and opinion.

*1. Standard*

In order to state a defamation claim, a plaintiff must allege facts tending to demonstrate that the defendant made a false statement of fact about the plaintiff, that there was an unprivileged publication of the false statement to a third party by the defendant, and that the publication damaged the plaintiff. Popko v. Continental Casualty Co., 2005 Ill. App. LEXIS 28 (Ill. App. 2005). In Illinois, a "statement is defamatory if it impeaches a person's reputation and thereby lowers that person in the estimation of the community or deters third parties from associating with that person." Schivarelli v. CBS, Inc., et al., 333 Ill.App.3d 755, 759, 776 N.E.2d 693, 696 (Ill. App. 2002). Defamatory statements may be classified as either defamatory *per se* or defamatory *per quod*. See id. To constitute a statement that is defamatory *per se*, a

8 Counts Two (II), Four (IV), Five (V) and Ten (X)are entitled Libel Per Se, Libel Per Quod, Libel Per Quod II, and Libel Per Se II, respectively. See 1st Am. Compl. pp. 9, 11, 12, and 18. Plaintiff alleges Libel Per Se in Count Two (II) relative to the first and fifth disparagements; Libel Per Quod in Count Four (IV) relative to the second disparagement; Libel Per Quod II in Count Five (V) relative to the third disparagement; and Libel Per Se II in Count Ten (X) relative to the sixth disparagement. See generally 1st Am. Compl. To defray confusion, Defendant will address all four Counts (II, IV, V and X) as Plaintiff's "Libel Claims".

statement must fit into one of five categories that Illinois recognizes as being "so obviously and naturally harmful to the person to whom it refers that injury to his reputation may be presumed." Id. These five categories include those statements (1) imputing the commission of a criminal offense; (2) imputing infection with a loathsome communicable disease; (3) imputing an inability to perform or want of integrity in the discharge of duties of office or employment; (4) imputing a lack of ability or prejudicing a party in one's trade, profession, or business; and (5) imputing adultery or fornication. See id. In such cases, a plaintiff need not allege or prove special damages. Van Home v. Muller, 185 Ill.2d 299, 307 (Ill. 1998). Where the plaintiff is a corporation, the alleged defamation must assail the corporation's financial position, business methods, or accuse it of fraud or mismanagement. Harris Trust and Sav. Bank v. Phillips, 154 Ill.App.3d 574 (Ill. App. 1987).

Should statements not fall into one of the *per se* categories, the statements could still be defamatory *per quod*. To succeed on a defamation *per quod* claim, a plaintiff must demonstrate that a defendant "made a false statement concerning [the] plaintiff, that there was an unprivileged publication of the defamatory statement to a third party by [the] defendant, and that [the] plaintiff was damaged" from the publication. Cianci v. Pettibone Corp., 298 Ill.App.3d 419, 424, 698 N.E.2d 674 (Ill. App. 1998). Extrinsic facts must be alleged showing the defamatory nature of the language. Anderson, 172 Ill.2d at 416-417. Moreover, one must allege specific special damages. Indeed, failure to plead specific damages is a fatal deficiency to any defamation *per quod* claim. See Schivarelli, 333 Ill.App.3d at 759. General allegations that the alleged defamatory statements caused a plaintiff emotional distress, embarrassment or economic loss are insufficient. See Anderson, 172 Ill.2d at 416-417.

Finally, Plaintiff must allege with specificity the statements it claims were defamatory and/or libelous. See Lykowski, 299 Ill. App. 3d at 163 (A plaintiff must set forth the words alleged to be defamatory "clearly and with particularity." It is not enough for the plaintiff to state that a defendant generally accused the plaintiff of committing improper or unethical conduct.).

Preliminarily, Plaintiff fails to allege with specificity any statements in the Fourth Disparagement, thus any claims based upon the Fourth Disparagement must be dismissed. See 1st Am. Compl. ¶ 26. Plaintiff alleges "statements" in Disparagements 1 – 3, 5 and 6, which should also be dismissed for the reasons stated below.

*2. Substantial Truth*

Truth is a defense to a defamation action that may be raised by a motion to dismiss. See Emery v. Kimball Hill, Inc.,112 Ill.App.3d 109, 112, 445 N.E.2d 59, 61 (Ill. App. 1983); American Int'l Hosp. v. Chicago Tribune Co., 136 Ill.App.3d 1019, 1022-23, 483 N.E.2d 965, 968 (Ill. App. 1985). While ordinarily the determination of whether substantial truth exists remains a question for a jury to decide, the question becomes one of law where no reasonable jury could find that substantial truth had not been established. See Parker v. House O'Lite Corp., 324 Ill.App.3d 1014, 1026, 756 N.E.2d 286, 296 (Ill. App. 2001). In raising truth as a defense, a defendant need only demonstrate the "substantial truth" of the allegedly defamatory material. See Lemons v. Chronicle Publishing Co., 253 Ill.App.3d 888, 890, 625 N.E.2d 789, 791 (Ill. App. 1993); Farnsworth v. Tribune Co., 43 Ill.2d 286, 293-94, 253 N.E.2d 408, 412 (Ill. 1969). "Substantial truth" requires only that a defendant demonstrate the truth of the "gist" or "sting" of the defamatory material. See Kilbane v. Sabonjian, 38 Ill.App.3d 172, 175, 347 N.E.2d 757, 761 (Ill. App. 1976); American Int'l Hosp.,136 Ill.App.3d at 1022. Further, allegedly defamatory statements need not be technically accurate in every detail to avoid being actionable. See Parker, 324 Ill.App.3d at 1026.

Here, the Defendant posted truthful information on his own website. See generally Andrews Aff. For example, Andrews became aware of repeated complaints involving the Plaintiff's products sold on his website and started posting truthful information about the Plaintiff's bad faith business practices on Andrews' own website. Specifically, the statements in the First Disparagement were true, as they stated that the Plaintiff had declared bankruptcy and admitted in a sworn statement that he "lacked the funds required to complete the [software] programs." See 1st Am. Compl.; and see Andrews Aff. The statements in the Second and Third Disparagements are likewise true, as they warned about purchasing software from Plaintiff. See 1st Am. Compl.; and see Andrews Aff. Again, the statements in the Fifth and Sixth Disparagement, which contain specific information about Plaintiff's bankruptcy proceedings, were true. See 1st Am. Compl.; and see Andrews Aff.

Plaintiff argues that the statements upon which Andrews relied to make the Fifth Disparagement was "months old". See 1st Am. Compl. ¶ 29. Thus, Plaintiff argues that since the information was not recent, it was no longer true. See 1st Am. Compl. ¶¶ 27, 29, 30, 31, 32. However, the fact that the Plaintiff was no longer in bankruptcy when the statements may have

been posted is irrelevant. The statements about the Plaintiff's bankruptcy proceeding, including Plaintiff's own sworn statement that he lacked funds to complete his software program when he in fact continued to sell the unfinished product, was true. See 1st Am. Compl.; and see Andrews Aff. Consequently, the Defendant should be protected from any claims of defamation because his statements were substantially true. See Emery, 112 Ill.App.3d at 112; American Int'l Hosp., 136 Ill.App.3d at 1022-23. Thus, the Defendants have a substantial truth defense to Plaintiff's claims of libel. See id. Therefore, Plaintiff's claims of libel should be dismissed. Lemons, 253 Ill.App.3d at 890; Farnsworth. 43 Ill.2d at 293-94; Parker, 324 Ill.App.3d at 1026, 756 N.E.2d 286; Emery, 112 Ill.App.3d at 112.

*3. Expressions of Opinion*

Some of the statements alleged to be defamatory by the Plaintiff could be statements of opinion, not fact. To determine whether a statement is one of fact, a court must examine whether the statement, in context, could be reasonably understood as describing actual facts about the plaintiff. Bryson v. News America Publs., Inc., 174 Ill.2d 77 (Ill. 1996). The more generalized and vague the opinion, the more likely the opinion will be inactionable as a matter of law. Hopewell v. Vitullo, 299 Ill.App.3d 513 (Ill. App. 1998). Here, Plaintiffs complain of many statements that could be considered opinion. For instance, the Second Disparagement includes a warning that when purchasing software from the Plaintiff "you may forfeit all your consumer protection rights." See 1st Am. Compl. ¶ 17. Similarly, the Third Disparagement warns "[d]on't get tricked by sale prices and specials. Don't lock yourself into a lifetime of high priced upgrades. Many other programs charge outrageous amounts to upgrade to new versions..." See 1st Am. Compl. ¶ 18. Finally, the Sixth Disparagement states: "Previously, I have warned potential purchasers to use caution when purchasing any unreleased software products. This remains good advice." See 1st Am. Compl. ¶ 30. These, too, can be construed as merely opinions.

Therefore, these statements cannot be actionable. For the foregoing reasons, Counts Two, Four, Five and Ten must be dismissed.

C. Unfair Competition

Plaintiff fails to state claims in Counts Three (III), Six (VI), Seven (VII) and Nine (IX) in

which he alleges unfair competition.[9] Common law unfair competition has been codified as the Illinois Uniform Deceptive Trade Practices Act ("UDTPA"), 815 ILCS § 510/1 *et seq.,* MJ & Partners Restaurant Ltd. Pshp. v. Zadikoff, 10 F. Supp.2d 922, 929 (N.D. Ill. 1998). While a cause of action for common law unfair competition may exist separate from the UDTPA, the elements necessary to state a cause of action for unfair competition are "not spelled out in well defined terms." Custom Business Systems, Inc. v. Boise Cascade Corp., 68 Ill. App. 3d 50, 52-53 (Ill. App. 1979). As explained by the Court in Custom Business Systems:

> The plaintiff's brief suggests in its form a distinction between the common law tort of unfair competition and a course of action based on the Uniform Deceptive Trade Practices Act, and we are not inclined to dispute that there may be a cause of action under certain aspects of the common law which are not covered by the Uniform Deceptive Trade Practices Act. However, the plaintiff does not set out in its brief a distinct theory under the common law which would entitle it to judgment separate and apart from issues cognizable under the Uniform Deceptive Trade Practices Act, and as the plaintiff admits in its brief, while over the years 'the courts of Illinois and other states have consistently expanded and developed the scope of this tort * * * the case law which has come out of this development has not spelled out in well defined terms the elements necessary to state a cause of action for unfair competition.'
>
> It was no doubt for this reason that the legislature enacted the Uniform Deceptive Trade Practices Act which, as the plaintiff acknowledges in its brief, "was quickly recognized by the courts of Illinois as being a codification of the common law tort of unfair competition." Since the plaintiff's brief does not point out any aspect of this case which constitutes a separate common law tort, in addition to the allegations of violation of the Uniform Deceptive Trade Practices Act, we are not inclined to search out the ramifications of a common law action, which might establish grounds for relief in addition to the elements of unfair competition recognized under the Act. We are inclined, therefore, as did the trial court, to consider the sufficiency of the complaint on the basis of the Uniform Deceptive Trade Practices Act.

Id. Consequently, claims for common law unfair competition need not be addressed separately. McGraw-Edison Co. v. Walt Disney Productions, 787 F.2d 1163, 1173-74 (7th Cir. 1986). Where a claim fails under the UDTPA, it must also fail as common law unfair competition. MJ & Partners, 10 F. Supp.2d at 929; Mars, Inc. v. Curtiss Candy Co., 8 Ill.App.3d 338, 344, 290 N.E.2d 701, 704 (Ill. App. 1972).

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9 Counts Three (III), Six (VI), Seven (VII), and Nine (IX) are entitled Unfair Competition, Unfair Competition II, Unfair Competition III, and Unfair Competition IV. See 1st Am. Compl. pp. 10, 13, 15 and 17. The Defendant will address all four Counts (III, VI, VII and IX) as Plaintiff's claim for "Unfair Competition."

The Plaintiff in this case has failed to sufficiently plead a cause of action for either common law or statutory unfair competition. The elements necessary to state a cause of action for common law unfair competition are unclear, hence the Uniform Deceptive Trade Practices Act. See Custom Business Systems, 68 Ill. App. 3d at 52-53. Plaintiff in the case at hand fails to identify applicable provisions and/or language provided by the UDTPA; thus, Plaintiff fails to sufficiently allege unfair competition under the UDTPA. See 1st Am. Compl. pp. 10-11, 13-15, 17-18. Since Plaintiff's claim fails under the UDTPA, it must also fail as common law competition. See MJ & Partners, 10 F. Supp.2d at 929; Mars, Inc., 8 Ill.App.3d at 344.

Moreover, Plaintiff's unfair competition claims arise from the allegedly false statements on Andrews' website. Such statements are not false. See generally Andrews' Aff. Therefore, there is no basis for Plaintiff's unfair competition claims, and such claims must fail. Thus, Plaintiff's claims for unfair competition in Counts Three (III), Six (VI), Seven (VII), and Nine (IX) of its First Amended Complaint fail to state a cause of action and therefore must be dismissed.

**CONCLUSION**

For the foregoing reasons, Defendant Andrews respectfully moves this Court to dismiss Plaintiff's First Amended Complaint in its entirety.

Dated: Chicago, Illinois
April 6, 2006

Respectfully submitted,
DEFENDANT,
JAMES ANDREWS d/b/a K9PED.

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing MEMORANDUM IN SUPPORT DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT has been sent by electronic mail and First Class Mail, postage prepaid, this 6th day of April 2006, to pro se Plaintiff, to wit:

Mr. JOHN TAMBURO
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Charles Lee Mudd Jr.

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Dated: April 6, 2006
Chicago, Illinois