IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS, LAW DIVISION

JOHN F. TAMBURO, D/B/A MAN'S BEST FRIEND SOFTWARE,	)	
Plaintiff	)	CASE NUMBER: ***06 L 51***
	)	
v.	)	
	)	
JAMES ANDREWS,	)	
D/B/A K9PED	)	
Defendants	)	

FILED
06 APR -6 AM 8:39
WILL CO. CIRCUIT CLERK
WILL COUNTY, ILLINOIS

NOTICE OF FILING

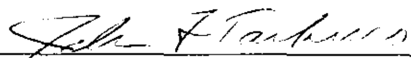
To: Charles Lee Mudd, Jr., Esq.
Law Offices of Charles Lee Mudd, Jr.
3344 N. Albany St
Chicago, IL 60618

BE NOTIFIED that, on April 6, 2006, in Open Court, I shall present the attached opposition and memorandum to the Honorable Herman Haase in open court, and shall file the same with the honorable Clerk.

John F. Tamburo

PROOF OF SERVICE

I, JOHN F. TAMBURO, plaintiff, do hereby on the penalty of perjury under the law of the state of Illinois, do hereby swear that I delivered a copy of this notice and all attachments to defendant's counsel in open court on April 6, 2006.



John F. Tamburo
Plaintiff Pro Se
655 N. LaGrange Rd Suite 209
Frankfort, IL 60423-2913
815-806-2130

IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS, LAW DIVISION

JOHN F. TAMBURO, D/B/A MAN'S BEST FRIEND SOFTWARE, *Plaintiff*	)	CASE NUMBER: ***06 L 51***
v.	)	
JAMES ANDREWS, D/B/A K9PED *Defendants*	)	

PLAINTIFF'S OPPOSITION TO THE DEFENDANT'S MOTION TO DISMISS

NOW COMES John F. Tamburo, d/b/a Man's Best Friend Software ("John"), and does hereby state the following to oppose the defendant's motion to dismiss:

1. Defendant's counsel has, in citing the wrong statute and presenting a commingled motion, violated clear statutes and, in so doing, has waived his client's objections to this court's jurisdiction. *735 ILCS 5/2-301, 735 ILCS 5/2-619.1, In re Schmitt*, 321 Ill. App. 3d 360, 366 (2nd Dist. 2001).

2. Even if the defendant had not waived his objections, Andrews' contacts with Illinois amply establish that this court's exercise of jurisdiction comports with both Illinois law and Federal Due Process. *Bombliss v. Cornelsen*, 355 Ill. App. 3d 1107, 1114 (3rd Dist. 2005), *Burger King v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985).

3. The First Amended Complaint was properly served within the rules. *Ill. Sup. Ct. R. 11, Ill. Sup. Ct. R. 12, Ill. Sup. Ct. R. 104.* The summons and complaint were properly served. *735 ILCS 5/2-201.*

4. Nothing in this case has to do with the terms of service of John's www.mbfs.com web site. Counsel admits that Andrews does not agree to binding arbitration. Therefore, this case has

John F. Tamburo
Plaintiff
655 N. LaGrange Rd, Suite 209
Frankfort, Will County, Illinois 60423
815-806-2130

IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS, LAW DIVISION

JOHN F. TAMBURO, D/B/A MAN'S BEST FRIEND SOFTWARE, *Plaintiff*	)	CASE NUMBER: ***06 L 51***
v.	)	
JAMES ANDREWS, D/B/A K9PED *Defendants*	)	

FILED 06 APR -6 AM 8:39 CIRCUIT CLERK WILL COUNTY ILLINOIS

PLAINTIFF'S MEMORANDUM OF LAW
OPPOSING THE DEFENDANT'S MOTION TO DISMISS

John F. Tamburo, Plaintiff *Pro Se*
655 North LaGrange Rd., Suite 209
Frankfort, Will County, Illinois 60477
815-806-2130

Table Of Contents

Table Of Authorities iii
1. Introduction 1
2. The Facts 1
3. Argument 2
   3.1. Defendant has, by citing the wrong statute and then engaging in a massive attack against the merits, waived all objections to personal jurisdiction. 2
   3.2. Even if jurisdictional arguments were not waived, this court properly exercises personal jurisdiction over the defendants. 4
      3.2.1. Andrews runs www.k9ped.com as a fully interactive web site that completes sales online. 5
      3.2.2. Andrews admits sales into Illinois. Even the one sale to which he admits is enough to bind him to Illinois' personal jurisdiction. 6
      3.2.3. Andrews legally traveled to Illinois when he obtained documents from courts in Illinois to use them to damage the Plaintiff. 6
      3.2.4. Andrews intended to affect an Illinois interest and thus submitted to Illinois' jurisdiction. 7
      3.2.5. The totality of Andrews' contacts with Illinois satisfies Federal Due Process concerns. 7
   3.3. The gravamen of this case does not involve the website www.mbfs.com, and its terms and conditions arbitration clause is not invoked. 8
   3.4. Defendant was properly served with the original and amended complaints in this matter, according to the rules. 9
   3.5. The Amended Complaint relates back to the original by well-settled law; defendant's counsel admitted this in correspondence. 10
   3.6. John states claims for Tortious Interference with Prospective Economic Advantage. 11
      3.6.1. John properly pleads a class of customers with whom he had an expectancy to do business. 12
      3.6.2. John pleads facts underlying all of the other elements of Tortious Interference with Prospective economic advantage. 13
      3.6.3. Defendant's tortuous interferences did not convey truthful information. 14
   3.7. John states proper claims for defamation. 15
      3.7.1. Standard of Review 15
      3.7.2. John alleges all defamations with particularity. 16
      3.7.3. John meets the libel *per se* standard. 16
      3.7.4. John meets the libel *per quod* standard. 17
      3.7.5. The defendant fails to meet his burden to gain dismissal on the ground of "substantial truth." 18
   3.8. John states claims for unfair competition and UDTPA violations. 21
      3.8.1. John properly pleads unfair competiton at the common law and the UDTPA, and asks leave to amend to explicitly plead UDTPA violations. 21
4. Conclusion 23

Table Of Authorities

Cases

Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6 (7th Cir.1992) ____ 22

Boatmen's National Bank of Belleville v. Direct Lines, Inc., 167 Ill. 2d 88, 102 (1995) ____ 11

Bombliss v. Cornelsen, 355 Ill. App. 3d 1107, 1114 (3rd Dist. 2005) ____ 5, 6, 7

Bryson v. News Am. Publs., 174 Ill. 2d 77, 110 (1996) ____ 15, 16, 17

Burger King v. Rudzewicz, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985) ____ 5, 6

Clarage v. Kuzma, 342 Ill. App. 3d 573, 581 (3rd Dist. 2003) ____ 18, 20

Club Assistance Program, Inc. v. Zukerman, 594 F. Supp. 341, 346-47 & nn. 9-11 (N.D. Ill. 1984) ____ 7

Crinkley v. Dow Jones & Co, 67 Ill. App. 3d 869, 385 N.E.2d 714 (1st Dist., 1978) ____ 12

Gaidar v. Tippecanoe Distribution Service, Inc., 299 Ill. App. 3d 1034, 1041 (1st Dist. 1998) ____ 4

Harshman v. DePhillips, 2006 Ill. LEXIS 316 at *45-46 (Ill. Sup. Ct. 2006) ____ 4

Hubbert v. Dell Corp., 359 Ill. App. 3d 976, 983 (5th Dist. 2005) ____ 9

In re Schmitt, 321 Ill. App. 3d 360, 366 (2nd Dist. 2001) ____ 3, 4

Krueger v. Lewis, 342 Ill. App. 3d 467, 471 (1st Dist. 2003) ____ 15

Kutner v. DeMassa, 96 Ill. App. 3d 243, 248 (1st Dist. 1981) ____ 4

Myers v. Levy, 348 Ill. App. 3d 906, 920 (2nd Dist. 2004) ____ 18, 19

Myers v. The Telegraph, 332 Ill. App. 3d 917, 924 (5th Dist. 2002) ____ 20

O'Brien v. State Street Bank & Trust Co., 82 Ill. App. 3d 83, 85 (4th Dist., 1980) ____ 12

People ex rel. Department of Professional Regulation v. Manos, 202 Ill. 2d 563, 568 (2002) ____ 4

Peoples Gas, Light & Coke Co. v. Austin, 147 Ill. App. 3d 26, 100 Ill. Dec. 612, 497 N.E.2d 790 (1st Dist. 1986) ____ 10

Royal Extrusions Limited v. Cont'l Window & Glass Corp., 349 Ill. App. 3d 642 (3rd Dist. 2004) ____ 6

Schuler v. Abbott Lab., 265 Ill. App. 3d 991, 994 (1st Dist., 1993) ____ 12, 13, 15

Soderlund Bros. v. Carrier Corp., 278 Ill. App. 3d 606, 620 (1st Dist. 1995) ____ 14, 15

Urbaitis v. Commonwealth Edison, 143 Ill. 2d 458, 475, 159 Ill. Dec. 50, 575 N.E.2d 548 (1991) ____ 12

Zazove v. Pelikan, Inc., 326 Ill. App. 3d 798, 802 (1st Dist. 2001) ____ 4, 7

Statutes

720 ILCS 295/1a ____ 16, 20

725 ILCS 5/2-209 ____ 6

735 ILCS 5/2-201 ____ 10

735 ILCS 5/2-301 ____ 2, 3

735 ILCS 5/2-615 ____ 14

735 ILCS 5/2-616 ____ 22

735 ILCS 5/2-619 ____ 2

735 ILCS 5/2-619.1 ____ 2, 3

810 ILCS 510/1 ____ 21

Other Authorities

Restatement (3d) of Unfair Competition, § 2 ____ 21

Restatement (3d) of Unfair Competition, § 3 ____ 21

Rules

Ill. Sup Ct. R. 104 ____ 9

Ill. Sup Ct. R. 105 ____ 9, 10

Ill. Sup Ct. R. 11 ____ 10

Ill. Sup Ct. R. 12 ____ 10

1. Introduction

Your Plaintiff, John F. Tamburo ("John") does business as Man's Best Friend Software. Defendant James Andrews, d/b/a K9Ped ("Andrews"), attempts to compete with John in the business of animal-related software. There is a long history of acrimony between the parties, little of which is relevant to the instant motion. What is relevant: Andrews' conduct egregiously violates established norms of decent business competition. Andrews knowingly and falsely accused John of criminal acts, with the evil goal of usurping John's customer base. Furthermore, he manufactured other statements, pure lies that have deceived the buying public. Long settled law holds that these acts are illegal. John, in good faith and after careful research of the law and facts, seeks justice from this court.

Andrews' counsel, in a memorandum so laced with invective and impertinent matter that it flouts the dignity of this court, sets forth numerous red herrings as he attempts to demonize John, the *victim* of a relentless attack by an unsuccessful, jealous, bitter competitor. Notably, counsel has, by long-settled law, waived his client's (meager) objections to personal jurisdiction.

The amended complaint states claims and cannot be dismissed. Andrews has no right to compete in the gutter and then arrogantly demand that this court bless his amoral conduct. Therefore, John prays that this court deny the motion at bar, and order Andrews to answer forthwith.

2. The Facts

Defendant's statement of "facts" is loaded with impertinent matter, and some outright falsehoods, designed to prejudice this court against John. To the extent that the First Amended Sworn Complaint conflicts with the "facts" averred by the defendant, John disputes those facts.

John further relies upon all of the fact allegations in the First Amended Complaint, and cites to them herein, as appropriate.

3. Argument

3.1. Defendant has, by citing the wrong statute and then engaging in a massive attack against the merits, waived all objections to personal jurisdiction.

Counsel's gigantic, bloated Memorandum of law[1] supporting defendant's motion to dismiss ("Memo"), p. 3, attempts to state that *735 ILCS 5/2-619* permits motions that object to "personal jurisdiction." This is incorrect. The statute that permits objection to personal jurisdiction is *735 ILCS 5/2-301*, as this court certainly knows, and defendant's counsel *should* know. It is black letter law that arguments directed to the merits waive objections to personal jurisdiction. See *735 ILCS 5/2-301(a), (a-5).*

Section 2-301 as amended in 2000, does address the use of the *735 ILCS 5/2-619.1* standard of labeling motions to dismiss brought under multiple statutes. However, counsel fails to label the motion and therefore waives all jurisdictional objections. Please read the statutes:

735 ILCS 5/2-301(a) (2000), in pertinent part:

> (a) Prior to the filing of any other pleading or motion other than a motion for an extension of time to answer or otherwise appear, a party may object to the court's jurisdiction over the party's person, either on the ground that the party is not amenable to process of a court of this State or on the ground of insufficiency of process or insufficiency of service of process, by filing a motion to dismiss the entire proceeding or any cause of action involved in the proceeding or by filing a motion to quash service of process. Such a motion may be made singly or included with others in a combined motion, *but the parts of a combined motion must be identified in the manner described in Section 2-619.1 [735 ILCS 5/2-619.1]*. [emphasis supplied]

[1] The custom in Illinois is to file a memorandum of law no longer than fifteen (15) pages, using double-spaced type, of a size of 12 points. In fact, this is the rule in many jurisdictions, including the U.S. Northern District of Illinois and Cook County. Defendants' Memorandum is spaced at 1½ lines, and contains 25 pages of argument, plus 5 pages of contents, for a total of 30 pages. At least counsel could have avoided 1½-line spacing in order to jam another 50% more words into his memorandum. However, since John could not locate an explicit 12th circuit rule limiting the length and format of memoranda of law, John limits his objection to this footnote.

735 ILCS 5/2-301(a-5) (2000), in pertinent part:

> (a-5) If the objecting party files a responsive pleading or a *motion* ... prior to the filing of a motion *in compliance with subsection (a)*, that party waives all objections to the court's jurisdiction over the party's person. [emphasis supplied]

735 ILCS 5/2-619.1, in the whole:

> Combined motions. Motions with respect to pleadings under Section 2-615 [735 ILCS 5/2-615], motions for involuntary dismissal or other relief under Section 2-619 [735 ILCS 5/2-619], and motions for summary judgment under Section 2-1005 [735 ILCS 5/2-1005] may be filed together as a single motion in any combination. A combined motion, however, shall be in parts. Each part shall be limited to and shall specify that it is made under one of Sections 2-615 [735 ILCS 5/2-615], 2-619 [735 ILCS 5/2-619], or 2-1005 [735 ILCS 5/2-1005]. Each part shall also clearly show the points or grounds relied upon under the Section upon which it is based.

Moreover, the courts have ruled upon the 2000 amendment to section 2-301. It does *not* permit the inclusion of 2-615 and 2-619 arguments in the 2-301 motion. The only reported case on this subject is clear. See *In re Schmitt*, 321 Ill. App. 3d 360, 366 (2nd Dist. 2001):

> "[W]e interpret the legislature's changes [effective 2000] to section 2--301 to evince its intent to permit a party to file a motion or other responsive pleading *after the party objects to the court's jurisdiction over the party's person.* Moreover, as long as the party files the motion or other responsive pleading *after* he or she objects to the court's jurisdiction over the party's person, the party does not waive its objections to the court's jurisdiction over the party's person."

In re Schmitt, 321 Ill. App. 3d at 366 [emphasis supplied]. In the instant case, counsel did not wait until after he filed the motion objecting to this court's jurisdiction over Andrews. He has commingled his arguments in one motion, not separating them at all. The 619.1 statute, set forth *supra*, is unequivocal and clear. "A combined motion, however, shall be in parts. Each part shall be limited to and shall specify that it is made under one of" the sections listed therein, or section 2-301. Counsel has further mislabeled the 2-301 arguments as 2-619 arguments. The

memo *attempts* to obey 2-619.1, but *the memo is not the motion*. Also, the memo mislabels the arguments and breaches the statute. Counsel breaches the clear, unambiguous language of sections (a) and (a-5) of the statute. The most fundamental rule of statutory construction is that where the language of a statute is clear and unambiguous, the court must enforce it as written. It may not annex new provisions or substitute different ones, or read into the statute exceptions, limitations, or conditions which the legislature did not express. *People ex rel. Department of Professional Regulation v. Manos*, 202 Ill. 2d 563, 568 (2002); *Harshman v. DePhillips*, 2006 Ill. LEXIS 316 at *45-46 (Ill. Sup. Ct. 2006). Counsel wrote the motion as a two page blob, and included 2-615 arguments in the same paragraph as the mislabeled 2-619 arguments. The motion was not "in parts," and that is required by sections 2-301 and 2-619.1 See use of the word "shall" in both citations. This court must give effect to the statute as written. Pursuant to black-letter law and *Schmitt*, Andrews has waived all objections to personal jurisdiction. The defendant's motion to dismiss for want of personal jurisdiction must be denied.

3.2. Even if jurisdictional arguments were not waived, this court properly exercises personal jurisdiction over the defendants.

Standard of Review: Statements in plaintiff's pleadings which defendant does not controvert by affidavit are taken as true. *Kutner v. DeMassa*, 96 Ill. App. 3d 243, 248 (1st Dist. 1981). A plaintiff's prima facie case may only be overcome by a defendant's uncontradicted evidence that defeats jurisdiction. *Gaidar v. Tippecanoe Distribution Service, Inc.*, 299 Ill. App. 3d 1034, 1041 (1st Dist. 1998). However, conflicts between the parties' affidavits will be resolved in favor of the plaintiff for purposes of determining whether a prima facie case for *in personam* jurisdiction has been made. *Zazove v. Pelikan*, Inc., 326 Ill. App. 3d 798, 802 (1st Dist. 2001).

3.2.1. Andrews runs www.k9ped.com as a fully interactive web site that completes sales online.

John respectfully refers this court to exhibits R-2 and R-3. John swears to the authenticity of these exhibits in his affidavit, exhibit M-1 (hereinafter "John Aff."), ¶ 2. These exhibits are from Andrews' website, www.k9ped.com, and show that one may easily use that web site from anywhere, *including Illinois*, to transact and complete business with Andrews. The memo, at p.5, admits that Andrews "operates a website from which individuals may purchase his products and obtain other useful information."[2]

The www.k9ped.com website establishes personal jurisdiction over Andrews. See *Bombliss v. Cornelsen*, 355 Ill. App. 3d 1107, 1114 (3rd Dist. 2005). (Jurisdiction established "if the defendant transacts business in foreign jurisdictions via an interactive website where contracts are completed online and the defendant derives profits directly from web-related activity.") Moreover, this web site is the same one that has been used to misrepresent John's financial status (1st Am. Cplt, ¶¶ 41-66), to improperly associate John with puppy mills (1st Am. Cplt, ¶¶ 67-76), to assert that John violates his customers' putative "consumer protection" rights (1st Am. Cplt, ¶¶ 67-76), to accuse John of trickery in his pricing (1st Am. Cplt, ¶¶ 77-83) and to falsely accuse John of committing a crime by selling a product he had no intention to complete (1st Am. Cplt, ¶¶ 41-60). This satisfies the need to have the jurisdictional contact "arise out of or relate to" the gravamen of the instant case. *Burger King v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985). Although at p.11, counsel tries to label the website as "hybrid" under the *Bombliss* test, the exhibits belie the argument. The www.k9ped.com website is fully interactive and makes it easy to complete sales contracts online. www.k9ped.com is, in fact,

[2] This "useful information" includes the disparagements cited in the Amended Complaint.

Andrews' *sole* source of revenue from the defendant business. John Aff., ¶ 3. These facts, under the *Bombliss* test, in and of themselves attorn the defendant to this court's jurisdiction.

3.2.2. Andrews admits sales into Illinois. Even the one sale to which he admits is enough to bind him to Illinois' personal jurisdiction.

The memo, at p.7, and Andrews own affidavit at ¶ 11, admit to at least one sale into Illinois. John believes that Andrews is lying and that there are more Illinois sales, but the proof thereof lies in Andrews' sole control at this time. See John Aff., ¶ 4. Let's assume *arguendo* that there was just the one Illinois sale. A single transaction can form the basis for personal jurisdiction if the defendant intentionally transacts business within Illinois. *Royal Extrusions Limited v. Cont'l Window & Glass Corp.*, 349 Ill. App. 3d 642 (3rd Dist. 2004). Andrews does not state in his affidavit when he acquired his putative single Illinois customer. If it were after the publication of one of Andrews' disparagements, or because of one of them,[3] this would be in and of itself fatally dispositive of his objection to personal jurisdiction. *Id.*

3.2.3. Andrews legally traveled to Illinois when he obtained documents from courts in Illinois to use them to damage the Plaintiff.

Counsel admits that Andrews intentionally accessed the web site of the United States District Court, Northern District of Illinois, to dig up damaging dirt on John. This is a contact with Illinois, and it is closely related to the gravamen of the case. *Burger King v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985). Counsel attempts to argue that it does not "count" as a tortious act under *725 ILCS 5/2-209(a)(2)*, but it does. This act was a visit into Illinois in order to obtain information on an Illinois citizen, with the plan to use it deceptively to damage

[3] As this case progresses, John will discover, from each and every of Andrews' customers, the reasons why they chose to do business with him.

that citizen. The contact arises out and relates to the gravamen of the instant case, making this contact with Illinois, as are the others, dispositive of defendant's jurisdictional objections.

3.2.4. Andrews intended to affect an Illinois interest and thus submitted to Illinois' jurisdiction.

Andrews knew that John resided in Illinois. He entered into the U.S. District Court website in Illinois, maintained in Illinois in order to dig up dirt on an Illinois citizen and use it to attempt to drive him out of business. 1st Am. Cplt., ¶ 37. John accuses Andrews of intentional tortious acts, including libel and tortuous interference with prospective economic advantage. Torts occur where the last event to render the tortfeasor liable happens – that event is the injury. *Zazove v. Pelikan, Inc.*, 326 Ill. App. 3d 798, 808. When the injury is economic, due process is satisfied if the Plaintiff alleges that Defendant intended to affect an Illinois interest. *Zazove*, 326 Ill. App. 3d at 806; *Club Assistance Program, Inc. v. Zukerman*, 594 F. Supp. 341, 346-47 & nn. 9-11 (N.D. Ill. 1984) (collecting Illinois cases).

3.2.5. The totality of Andrews' contacts with Illinois satisfies Federal Due Process concerns.

It is the *totality* of a defendant's contacts with Illinois that disposes of the Federal Due Process issue. *Bombliss v. Cornielsen,* 355 Ill. App. 3d at 1115. In the instant case, (1) Andrews *admits* sales of K9Ped to at least one Illinois customer; (2) Andrews *admits accessing the Illinois web site* of the United States District Court for the Northern District of Illinois in order to dig up dirt on John; (3) Andrews *intentionally* published the disparagements in the complaint, while *knowing that John resided in Illinois*, therefore demonstrating an intent to affect an Illinois interest; and (4) Andrews operates a fully interactive website, www.k9ped.com, that enables the

completion of sales contracts, complete with payment, online. That disposes of Federal Due Process. It also fatally disposes of all of defendant's objections to personal jurisdiction.

3.3. The gravamen of this case does not involve the website www.mbfs.com, and its terms and conditions arbitration clause is not invoked.

Counsel attempts to argue in the memo at p.15 that the terms of service of www.mbfs.com, John's web site, somehow require that this case be dismissed in favor of mandatory arbitration before the National Arbitration Association. Andrews desperately seeks any way he can to avoid culpability for his outrageous acts. Andrews does not cite to any part of the www.mbfs.com website that binds him to the arbitration agreement with respect to the gravamen of the instant case. Instead, he attempts to argue that he has taken umbrage at its terms and wishes to object to them by counterclaim. But, *no part of the instant case rests upon any usage of www.mbfs.com!* Andrews published his disparaging, interfering, and deceptive remarks on www.k9ped.com, not www.mbfs.com. Andrews does not link to www.mbfs.com on his pages. At no time have the terms of service of www.k9ped.com required binding arbitration. See Exhibit R-4. John does not plead a breach of the www.mbfs.com site terms and conditions. In fact, Andrews argues that he is not subject to the terms of use he tries to invoke! See Memo, p.15: "Importantly, in this action, the Defendant disputes 'the enforceability of [plaintiff's] arbitration agreement.' " [bracketed phrase retained]. It would be more "important" had John pled anything remotely connected to the www.mbfs.com site terms and conditions.

Defendant's exhibit B, on its face, sets forth a contract, containing only, by its own words, terms of use for www.mbfs.com. It has no relation to this case. John Aff. ¶ 5. Without such relation, the arbitrator has no personal jurisdiction over either party. A party cannot be compelled to arbitrate unless he has agreed to do so. *Hubbert v. Dell Corp.*, 359 Ill. App. 3d 976,

983 (5th Dist. 2005). Nothing in Defendant's Exhibit B states that the www.mbfs.com terms of use covers Andrews' actions on www.k9ped.com. And if it did, the agreement would be unenforceable. Therefore, the www.mbfs.com terms of use do not apply to this action.

3.4. Defendant was properly served with the original and amended complaints in this matter, according to the rules.

Counsel tries to convince this court to make new law and hold that personal service of an amended complaint is required if defendant has not filed an appearance, *even if the defendant was properly served with summons and complaint.* No authority in the entire history of Illinois has ever held what counsel urges of this court. Unsurprisingly, defendant offers no cogent authority to support his premise.

In the instant case, defendant was served by the sheriff of Washington County, Oregon, on February 6, 2006.[4] The day after service, February 7, 2006, Andrews amended www.k9ped.com to *increase* the vitriol of his attacks, in retaliation for the filing of the instant case. 1st Am. Cplt., ¶ 30. John duly amended his complaint, and moved the court for leave to file it. John Aff. ¶ 6. This court granted leave on February 16, 2006. On February 24, 2006, John filed the amended complaint with the clerk and served the same upon Andrews by Priority mail with tracking, which he received. John Aff., ¶ 7. **John did not increase the *ad damnum* from the original to the amended complaint.**

Defendants' counsel *admits* in Memo, p.16, that Rule 104 is silent on Amended Complaints. He admits that Rule 105 applies to parties in Default; this makes his citation to *public Taxi Service, Inc. v. Ayrton*, 15 Ill. App. 3d 706 (1st Dist., 1973), wholly inapposite. Andrews is not now and has never been found in default. Plaintiff fully complied with Rules

[4] The Memo repeatedly, but incorrectly, lists the date of service of summons and complaint as January 2006. Andrews also swears to this inaccuracy in his affidavit at ¶ 20.

11(b)(2) (method of service "other than process and complaint") 12(b)(3) (Certificate of service). The Amended Complaint was certainly not the "process and complaint" that is required to be served to gain jurisdiction over the defendant per *735 ILCS 5/2-201.* Even counsel's Rule 105 cases for defaulted parties make it clear that amendments must be served if they pray *"additional relief."* The *ad damnum* remained *identical* between the original and first amended complaints.

It is also ludicrous to argue that Andrews was not notified of the amendment. Andrews was well notified of the cause of action and the amendment; the post office vouches for that. See Exhibit R-5. John violated no rule, and exceeded the standards of compliance set forth in rules 11 and 12.[5] Therefore, the defendants' motion to dismiss based on improper service must be denied.

3.5. The Amended Complaint relates back to the original by well-settled law; defendant's counsel admitted this in correspondence.

Defendant's attorney, Charles Lee Mudd, Jr., on February 28, 2006, emailed John Tamburo and said that he was aware that the complaint related back to the date of filing, and that there were no issues with respect to the statute of limitations. See Exhibit R-6, sworn as authentic, John Aff., ¶ 8. Mr. Mudd got the law right in his email. Here, however, he throws in the "kitchen sink" in the form of a meritless statute-of-limitations argument. Well settled law: An action is commenced when the complaint is filed, not when the defendant is served, and the *filing of a complaint* determines whether an action is instituted during the period prescribed by a statute of limitations. *Peoples Gas, Light & Coke Co. v. Austin*, 147 Ill. App. 3d 26, 100 Ill. Dec. 612, 497 N.E.2d 790 (1st Dist. 1986) [emphasis supplied]. An amendment relates back in Illinois

[5] John obtained delivery confirmation from the United States Postal Service, although not required by any rule.

when the original complaint "furnished to the defendant all the information necessary … to prepare a defense to the claim subsequently asserted in the amended complaint." *Boatmen's National Bank of Belleville v. Direct Lines, Inc.*, 167 Ill. 2d 88, 102 (1995). Except for new causes of action that arose because of Andrews' reaction to being sued in this case, i.e., the Sixth Disparagement, John meets the *Boatmen's* test. The complaint relates back for all previous counts, where the only things changed were typographical error corrections. John Aff., ¶ 10.

Moreover, the First Disparagement was published in June, 2005. 1st Am. Cplt., ¶ 10. The fourth disparagement was uttered no earlier than June, 2005 and continues to be uttered by Andrews to this day. John Aff., ¶ 9. The fifth disparagement was uttered on April 9, 2005. 1st Am. Cplt., ¶ 28. The sixth disparagement was posted *after the filing of the original complaint in this case, on February 7, 2006.* 1st .Am. Cplt., ¶ 30. The entire argument that these disparagements, some of which occurred *after the complaint was filed*, are barred by the statute of limitations is frivolous.[6] Therefore, defendants' motion to dismiss based on the statute of limitations must be denied.

3.6. John states claims for Tortious Interference with Prospective Economic Advantage.

Defendant argues that John fails to state claims for tortuous interference with prospective economic advantage. Counsel avers that John pleads bare legal conclusions, and fails to plead the specific identities of the parties with whom Andrews interfered. Memo, pp.19-20. As counsel well knows, and John shows herein, neither argument has merit.

Standard of Review: In considering a 2-615 motion, all well-pled facts in a complaint are taken as true with all inferences drawn in favor of the non-movant. *Schuler v. Abbott Lab.*, 265

[6] I hesitate use the term *frivolous*. I don't want to be accused of the same ribald, scattershot paroxysms of *ad hominem abusive* attacks that the Memo lays upon me. However, this argument is so baseless that it wastes this court's and my time to address it at all. There is no reasonable way to question its bad faith.

Ill. App. 3d 991, 994 (1st Dist., 1993). The question presented by a motion to dismiss under section 2--615 is whether sufficient facts are contained in the pleadings which, if proved, would entitle the plaintiff to relief. *Urbaitis v. Commonwealth Edison*, 143 Ill. 2d 458, 475, 159 Ill. Dec. 50, 575 N.E.2d 548 (1991). The tort of interference with prospective economic advantage has four elements: (1) plaintiff must have a reasonable expectancy of a valid business relationship; (2) defendant must know about it; (3) defendant must intentionally interfere with the expectancy, and so prevent it from ripening into a valid business relationship; and (4) intentional interference must injure the plaintiff. *Schuler v. Abbott Lab.*, 265 Ill. App. 3d at 994. Plaintiff can properly plead an expectancy to do business with an identifiable class of third parties. *O'Brien v. State Street Bank & Trust Co.*, 82 Ill. App. 3d 83, 85 (4th Dist., 1980); *Crinkley v. Dow Jones & Co*, 67 Ill. App. 3d 869, 385 N.E.2d 714 (1st Dist., 1978).

3.6.1. John properly pleads a class of customers with whom he had an expectancy to do business.

Counsel argues in memo, at p.19, that John must plead the specific identities of those parties with whom Andrews interfered in order to state a claim. This is not the law in Illinois. John properly pleads an expectancy to do business with an "identifiable class" of third parties. See *O'Brien v. State Street Bank & Trust Co.*, 82 Ill. App. 3d 83, 85 (4th Dist., 1980). Plaintiff alleges in the 1st Am. Cplt., ¶¶ 41, 101, 126, that he has the reasonable expectancy to do business with "dog, cat and horse breeders, and the exhibitors thereof." This is not a mere "legal conclusion" as contended by counsel in the Memo, at p.19. It is bolstered by the fact that John makes software products specifically directed to those markets. 1st Am. Cplt., ¶ 5. John can prove ¶ 5, and he can prove that Andrews interfered with his valid expectancy to do business

with the very people at whom his products are aimed. Therefore the tortious interference counts validly allege John's expectancy to do business with an identifiable class of customers.

3.6.2. John pleads facts underlying all of the other elements of Tortious Interference with Prospective economic advantage.

Factor 2 of the *Schuler* test is that Defendant must know of the expectancy. John alleges this in 1st. Am. Cplt., ¶¶ 42, 102, 127. This is also not a legal conclusion. Andrews is John's competitor. 1st Am. Cplt., ¶ 7. John can prove these allegations, thus, they are not legal conclusions.

Factor 3 of the *Schuler* test is intentional interference. John pleads the interference in 1st Am. Cplt., ¶¶ 43, 128, 103-105. These pleas are *not* legal conclusions. Andrews published deceptive statements about the Plaintiff's financial condition, even in the face of John's continuing pre-releases of CompuPed™ Millennium. Andrews chose his words carefully to make it seem as if John was intentionally selling a product he had no intention to complete, a criminal act (of which Andrews is ironically guilty himself). 1st Am. Cplt., ¶¶ 13, 15-16, 47. In the fourth disparagement, Andrews told numerous people that John was about to be liquidated and that his technical support would soon be unavailable. 1st Am. Cplt., ¶¶ 26-27. Andrews knew, from his admitted frequent forays into the Illinois website of the U.S. District Court for the Northern District of Illinois (see Memo, p.10), that John was *not* about to be liquidated when he made those statements. John Aff., ¶ 11. The facts are that Andrews published all of these utterances, with knowledge of their deceptive nature, making them *unjustified.* John meets the requirement of *Schuler* factor number 3.

Factor 4 is damages. John pleads damages in the form of lost sales in 1st Am. Cplt., ¶¶ 52, 108, 133. Lost sales can be proven as a fact and therefore are not a legal conclusion. John

has pled ample facts to support his claims of tortious interference with prospective economic advantage. These counts cannot be dismissed under section 2-615 of the Code of Civil Procedure.

3.6.3. Defendant's tortuous interferences did not convey truthful information.

Counsel attempts to argue that, according to *Soderlund Bros. v. Carrier Corp.*, 278 Ill. App. 3d 606, 620 (1st Dist. 1995), John's claims for tortious interference with prospective economic advantage cannot survive because they merely give "truthful information." However, counsel's averment is plainly wrong. Defendant misrepresented John's statement in the PDF Document. As Andrews knew (1st Am. Cplt., ¶ 12) at the time he published the first disparagement, John filed the document quoted in the first disparagement in an effort to cause the court to grant his pending motion to covert from Chapter 7 to Chapter 13. The import of the document was *not* that John could not afford to complete Compuped Millennium, it was that, *if the conversion were not granted*, John would not be able to afford to complete CompuPed Millennium. John Aff. ¶ 12. The conversion was granted prior to the publication of the first and fifth disparagements. And, as final proof of the falsehood of the gist of the first disparagement, John released Compuped. 1st Am. Cplt., ¶ 15. Nonetheless, Andrews intentionally kept up the deceptive statements for six months after Compuped was released, until he was served with the original complaint in this case. 1st am. Cplt, ¶ 16. Andrews lies in his affidavit where he says that he only learned of CompuPed Millennium's release in January, 2006. He was aware, from a phone conversation with at least one person in October, 2005, that CompuPed was released and available to the general public. John Aff. ¶ 13. The first disparagement was deceptive, alleging that John "actively marketed" Compuped Millennium with no intention to complete it. 1st Am. Cplt., ¶ 45-47. This court must take John's allegations as true, and resolve the conflict in

affidavits in John's favor. *Schuler v. Abbott Lab.*, 265 Ill. App. 3d at 994. Deceitful acts and unfair competition are *never* privileged. *Soderlund Bros. v. Carrier Corp.*, 278 Ill. App. 3d at 619. The first disparagement, as Andrews' knew, was "false in the sense in which it is intended to be understood by the recipient." *Id.* See 1st Am. Cplt., ¶¶ 13-16. Thus, count one cannot be dismissed.

Similarly, the *Soderlund* "defense" fails to kill Count eight. Knowingly stating, while John was not in bankruptcy, that John was about to be imminently liquidated and his technical support halted (1st Am. Cplt., ¶ 25-27) is deceptive, and is never privileged. Count Eleven similarly speaks of the sixth disparagement, which John pleads is false in 1st Am. Cplt., ¶¶ 120-122, 129.

3.7. John states proper claims for defamation.

3.7.1. Standard of Review

A complaint may not be dismissed under section 2-615 unless "it clearly appears that no set of facts could be proved under the pleadings that would entitle plaintiff to relief." *Krueger v. Lewis*, 342 Ill. App. 3d 467, 471 (1st Dist. 2003). A complaint must be liberally construed, to the end that controversies may be quickly and finally determined according to the substantive rights of the parties. *Bryson v. News Am. Publs.,* 174 Ill. 2d 77, 110 (1996). A 2-615 motion does not raise affirmative defenses. *Id.,* at 86. Courts measure the specificity of an allegation by determining whether it states a conclusion or a fact. *Krueger v. Lewis*, 342 Ill. App. 3d at 471. Allegations that the statements made were false, were made with knowledge of their falsity, or were made in reckless disregard as to their truth or falsity have been held by our Supreme Court to be sufficient to withstand a motion to dismiss. *Krueger v. Lewis*, 342 Ill. App. 3d at 472.

3.7.2. John alleges all defamations with particularity.

Defendant's counsel asserts in the Memo, at p.21, that the fourth disparagement is not stated with the requisite specificity to maintain a libel action. The only problem with counsel's argument is that *John does not plead libel on the Fourth Disparagement.*

John pleads libel per se on the First Disparagement (count two), libel per quod on the Second Disparagement (count four), libel per quod in the Third Disparagement (count five), and libel per se in the creditor libel (count ten). These libels are pled in their exact words in 1st Am. Cplt., ¶¶ 10, 17, 18, 30. Therefore, John pleads with ample specificity to state a claim.

3.7.3. John meets the libel *per se* standard.

Words are libelous per se if they are "(1) words that impute the commission of a criminal offense; (2) words that impute infection with a loathsome communicable disease; (3) words that impute an inability to perform or want of integrity in the discharge of duties of office or employment; or (4) words that prejudice a party, or impute lack of ability, in his or her trade, profession or business." *Bryson v. News Am. Publs.*, 174 Ill. 2d 77, 88 (1996).

Counts two and ten properly state a claim for libel per se. Count one alleges that the First Disparagement falsely imputes to John the crime of selling an incomplete software program with no intention to finish it, a crime in violation of *720 ILCS 295/1a*. 1st Am. Cplt., ¶ 55. The statement was false, as the release of Compuped Millennium has proved. 1st Am. Cplt., ¶ 56. These sworn allegations must be taken as true. *Bryson*, 174 Ill. 2d at 86. Andrews lies when he swears that Compuped was unavailable to the public when he posted his defamatory statements. At all times, the pre-release of CompuPed Millennium was available for download and immediate use; Andrews knew this. John Aff. ¶ 14. If one falsely accuses someone of a crime,

then the accuser is guilty of libel per se. That's the start and end of it. Count one states a proper claim.

Now onto Count Ten. Andrews represents that John has paid none of his creditors. That representation is false. 1st Am. Cplt., ¶¶ 120-121. Moreover, as other documents Andrews deceptively ignored in the creditor libel showed, at least two of John's creditors were paid in their entirety by the Trustee. John Aff., ¶ 15. The creditor libel imputes to John an inability to perform his profession. It is false. John states a claim for libel per se.

3.7.4. John meets the libel *per quod* standard.

In order to state a claim for libel *per quod*, Plaintiff "must plead ... that [he] sustained actual damage of a pecuniary nature ('special damages') to recover." *Bryson v. News Am. Publs.*, 174 Ill. 2d 77, 88 (1996). A *per quod* claim is appropriate where the defamatory character of the statement is not apparent on its face, and [Plaintiff must] resort to extrinsic circumstances is necessary to demonstrate its injurious meaning. *Bryson v. News Am. Publs.*, 174 Ill. 2d at 103.

Counts four and five meet the *Bryson* standard. Count four alleges the extrinsic circumstances that make the second disparagement defamatory, see 1st Am. Cplt., ¶¶ 67-72. It alleges lost sales, a pecuniary loss, in ¶ 75. Count five alleges the extrinsic circumstances that make the third disparagement defamatory, see 1st Am. Cplt., ¶¶ 77-79. It also alleges pecuniary loss in the form of lost sales, in ¶ 81. Therefore the libel *per quod* counts state claims and cannot be dismissed.

Count Two as *Per Quod*: If this court disagrees that the First Disparagement is a libel per se, John may still proceed *per quod* on count Two. It is possible for a disparagement to be actionable under both theories of libel. *Clarage v. Kuzma*, 342 Ill. App. 3d 573, 581 (3rd Dist.

2003) (Holding that a defamation was actionable as both per se and per quod libel). In the instant case, John pleads the extrinsic circumstances that make the First Disparagement libelous, see 1st Am. Cplt., ¶¶ 55-58. He furthermore pleads pecuniary special damages in the form of lost sales at ¶¶ 24-25, 34. Therefore count two may be properly pursued *per quod* if not per se. The same logic pertains to count ten and the sixth disparagement. See 1st Am. Cplt., ¶¶ 120-121, 123, 24-25, 34. Therefore, all libel count state claims and cannot be dismissed.

3.7.5. The defendant fails to meet his burden to gain dismissal on the ground of "substantial truth."

The defendant, to defeat a defamation claim using the *affirmative defense* of substantial truth, must establish the truth of the "gist" or "sting" of the allegedly defamatory statement. This is a question for the finder of fact, *unless no reasonable jury could find a lack of substantial truth*. Then, the question is one of law. *Clarage v. Kuzma*, 342 Ill. App. 3d 573, 580 (3rd Dist. 2003). Counsel, in memo, p.22-23, asserts "substantial truth" as a complete defense to the Plaintiff's defamation counts. The *defendant* bears the burden of proving the truth of the gist or sting of his statement:

> A defendant bears the burden of establishing the "substantial truth" of his assertions, which he can demonstrate by showing that the "gist" or "sting" of the defamatory material is true. When determining the "gist" or "sting" of allegedly defamatory material, a trial court must look at the highlight of the article, the pertinent angle of it, and not to items of secondary importance which are inoffensive details, immaterial to the truth of the defamatory statement.
> *Myers v. Levy*, 348 Ill. App. 3d 906, 920 (2nd Dist. 2004).

In light of the above citation, please review the statement of which John complains in the First Disparagement, forming the gravamen of Count Two:

> Please use caution when purchasing any unreleased software products. John Tamburo, d/b/a Mans Best Friend Software, has declared bankruptcy. Although it is actively being marketed on the web sire [sic], in one of his court documents Mr. Tamburo stated that 'I lack the funds required to complete the programs

[CompuPed millennium™] [sic]. For a pdf copy of the court document please see: http://k9ped.com/mbfsbankruptcy.pdf [sic]
1st Am. Cplt., ¶ 10.

Counsel focuses on the minutiae, and not the total statement. That's not allowed; a libel is reviewed for its impact as a whole. *Myers v. Levy*, 348 Ill. App. 3d at 920. The "gist" and "sting," the pertinent angle, of the first disparagement is *not* John's bankruptcy filing. It was, and remains to this day, the notion that John was selling an "unreleased software program" that he had no intention to complete: "Please use caution when purchasing any unreleased software products...Although it is actively being marketed...Tamburo stated that 'I lack the funds required to complete...' CompuPed [M]illennium." Andrews, knowing better, twisted a superseded court document (1st Am. Cplt., ¶ 13) into an accusation that John was actively marketing something he had no ability or desire to finish. Considering Plaintiff's Exhibit 1, Andrews is doing what psychologists call "projecting."

Andrews knew the falsehood of what he wrote as he wrote it. At the time Andrews released this statement, John was continually releasing updates to the pre-release version of the program, and, contrary to the imputation of the Memo at pp.1, 22, John's customers were free to download the pre-release program use it, and suggest improvements. John Aff., ¶ 14. Andrews falsely swears that CompuPed Millennium was unavailable; it was freely available for download at all relevant times hereto. *Id.*

Andrews knew that the statement he quoted was made obsolete in March, 2005, when the court granted his motion to convert from Chapter 7 to 13. Yet Andrews, who has written harassing emails to John's technical support manager and has harassed John in email, calling him, *inter alia,* a "slimeball," (John Aff. ¶ 16), acted with pure hate, looking to destroy John's livelihood by any means possible, decency and the law notwithstanding. So he made up the false

accusation of a criminal act and posted it to his own web site in the First Disparagement, and to an unrelated web site, www.gripe2ed.com, in the Fifth. 1st Am. Cplt., ¶¶ 10, 28.

Defendant's myopic defense of "substantial truth" as a defense falls short by asserting no incremental harm. In *Myers v. The Telegraph*, 332 Ill. App. 3d 917, 924 (5th Dist. 2002), the court noted that the "substantial truth" or "incremental harm" defense has not been explicitly adopted, and it *declined* to do so because the defense "conflicts with the common law principles governing per se actions ... The incremental-harm defense eliminates the presumption of damages and reintroduces a need for the plaintiff to prove special damages." The Third District has not adopted this defense, and John respectfully prays that this court follow *Myers* and refuse to do so now.

Even if the substantial truth / incremental harm defense were the law in this district, it is inapposite here. Substantial truth protects where the gist of the statement "substantially true, even though not technically accurate in every detail." *Clarage v. Kuzma*, 342 Ill. App. 3d at 580. The instant case displays something close to the inverse: Andrews selectively uses facts, misstates them, and intertwines them with lies in order to falsely impute criminal conduct onto John. The incremental harm of the falsehood, in this case the criminal act of selling a product under false pretenses, in violation of the Illinois Deceptive Advertising Act, *720 ILCS 295/1a*,[7] is *far* more damaging than filing a bankruptcy petition, a lawful act. See *Myers v. The Telegraph*, 332 Ill. App. 3d at 922, holding that a statement that a person committed a felony when only a misdemeanor had been committed is libel *per se*. It is clear that Andrews intended to falsely impute criminal conduct to John. It is not necessary that a statement charge a criminal offense

[7] To this day, ironically, Andrews promises "free updates" on his web site, and has not finished his "Version 7.0N" update, in unchanged "beta" status since December, 2002. See Plaintiff's Exhibit 1, attached to the First Amended Complaint. It is *Andrews* and not John, who used a false pretense to con potential customers into buying his product. Nor surprisingly, Andrews resorts to even more falsehood in his desperate grab for market share. In so doing, Andrews has violated *720 ILCS 295/1a*, the very crime he to imputed to John. 1st Am. Cplt., ¶ 57.

with the precision of an indictment to be libelous. *Krueger v. Lewis*, 342 Ill. App. 3d at 471. If that difference can justify a libel per se action, accusing someone of a crime when none was committed is certainly libel *per se*.

3.8. John states claims for unfair competition and UDTPA violations.

In the Memo, pp.24-25, counsel wastes an overstuffed page full of long citations to argue that John's common law unfair competition claims should be dismissed because John fails to cite them as claims under the Uniform deceptive Trade Practices Act (UDTPA), 810 ILCS 510/1 et. Seq. However, his citations plainly hold that there *is* a common law right of action for unfair competition! From this confusion, John will attempt to bring order. John also files his motion, under separate cover, to amend to explicitly allege claims under the UDTPA.

Standard of Review: One who, in connection with the marketing of goods or services, makes a representation relating to the actor's own goods, services, or commercial activities that is likely to deceive or mislead prospective purchasers to the likely commercial detriment of another under the rule stated in § 3 is subject to liability to the other. *Restatement (3d) of Unfair Competition, § 2.* A representation is to the likely commercial detriment of another if: (a) the representation is material, in that it is likely to affect the conduct of prospective purchasers; and (b) there is a reasonable basis for believing that the representation has caused or is likely to cause a diversion of trade from the other or harm to the other's reputation or good will. *Restatement (3d) of Unfair Competition, § 3.*

3.8.1. John properly pleads unfair competiton at the common law and the UDTPA, and asks leave to amend to explicitly plead UDTPA violations.

Andrews, in each and every one of the unfair competition counts, seeks to deceive viewers of www.k9ped.com into buying his product, and / or abandoning John's. Under § 2 of

the Restatement, as quoted *supra*, the statement that is deceptive need not be literally false. It only needs to be "likely to deceive", as in the deception inherent in imputing that John was illegally selling a computer program he had no intention to complete *after he completed it*, ad in the First Disparagement, or in telling telephone callers that John was about to be liquidated in bankruptcy and his technical support services terminated, even though John was not in bankruptcy at the time (Fourth Disparagement), or saying that John was "trick[ing] customers into buying his programs with sale prices and specials," and buying K9Ped would get them free updates. And they "only buy K9-Ped Once," when Andrews had no intention of releasing any of the "free updates" he advertised and has conclusively proven that by refusing to complete the "7.0N" "beta" program for nearly 3½ years as of this writing (the second and third disparagements, free updates promise and free updates repudiation).

In determining if the statement is deceptive, the *perceptions of the audience* control. *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6 (7th Cir.1992). Counsel wastes time trying to whack John's counts down on inapposite technicalities. He does not, and cannot, argue that the statements do deceive, or are not likely to deceive, the "reasonably intelligent" consumer. *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272 (2nd Cir. 1981). Therefore, all of the unfair competition counts must stand.

John also asks, under separate cover, for leave to file his second amended complaint, which explicitly pleads Andrews' UDTPA violations. The unfair competition claims form the bulk of the instant case, inasmuch as Andrews' disparagements and phony promises violate the UDTPA. To do justice under *735 ILCS 5/2-616*, John prays that this court grant leave to amend *instanter*.

4. Conclusion

4.1. Defendant's counsel has, in citing the wrong statute and presenting a commingled motion, violated clear statutes and, in so doing, has waived his client's objections to this court's jurisdiction. *735 ILCS 5/2-301, 735 ILCS 5/2-619.1, In re Schmitt*, 321 Ill. App. 3d 360, 366 (2nd Dist. 2001).

4.2. Even if the defendant had not waived his objections, Andrews' contacts with Illinois amply establish that this court's exercise of jurisdiction comports with both Illinois law and Federal Due Process. *Bombliss v. Cornelsen*, 355 Ill. App. 3d 1107, 1114 (3rd Dist. 2005), *Burger King v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985).

4.3. The First Amended Complaint was properly served within the rules. *Ill. Sup. Ct. R. 11, Ill. Sup. Ct. R. 12, Ill. Sup. Ct. R. 104.* The summons and complaint were properly served. *735 ILCS 5/2-201.*

4.4. Nothing in this case has to do with the terms of service of John's www.mbfs.com web site. Counsel admits that Andrews does not agree to binding arbitration. Therefore, this case has not, by agreement of the parties, been sent to binding arbitration. *Hubbert v. Dell Corp.*, 359 Ill. App. 3d 976, 983 (5th Dist. 2005).

4.5. By well settled Illinois law, the First Amended Complaint relates back to the date the original complaint was filed. *Peoples Gas, Light & Coke Co. v. Austin*, 147 Ill. App. 3d 26, 100 Ill. Dec. 612, 497 N.E.2d 790 (1st Dist. 1986). Before this motion, defendant's counsel admitted this in email to John. Exhibit R-6.

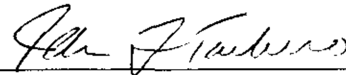
4.6. John states proper claims for Tortious interference with Prospective Economic Advantage. *Schuler v. Abbott Lab.*, 265 Ill. App. 3d 991, 994 (1st Dist., 1993). Deceptive

statements and unfair competition are never privileged. *Soderlund Bros. v. Carrier Corp.*, 278 Ill. App. 3d 606, 620 (1st Dist. 1995).

4.7. John states proper claims for defamation per se and defamation per quod. *Bryson v. News Am. Publs.*, 174 Ill. 2d 77, 88 (1996). The defendant cannot show that the "gist or sting" of Andrews' statements was true. *Myers v. Levy*, 348 Ill. App. 3d 906, 920 (2nd Dist. 2004). The defendant also fails to meet his burden to prove that no reasonable jury could find that his statements were not substantially true. *Clarage v. Kuzma*, 342 Ill. App. 3d 573, 580 (3rd Dist. 2003).

4.8. John states proper claims for Unfair Competition at the common law. *Restatement (3d) of Unfair Competition, § 2-3, Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272 (2nd Cir. 1981).

WHEREFORE, your Plaintiff respectfully prays that this court DENY the defendant's motion and compel him to answer the complaint as amended on the date of the order.



John F. Tamburo
Plaintiff
655 N. LaGrange Rd, Suite 209
Frankfort, Will County, Illinois 60423
815-806-2130

IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS, LAW DIVISION

JOHN F. TAMBURO, D/B/A MAN'S BEST FRIEND SOFTWARE, *Plaintiff*	)	CASE NUMBER: ***06 L 51***
v.	)	***EXHIBIT R-1***
JAMES ANDREWS, D/B/A K9PED *Defendants*	)	

PLAINTIFF'S AFFIDAVIT OPPOSING THE DEFENDANT'S MOTION TO DISMISS

NOW COMES your Plaintiff, John F. Tamburo, and does hereby, on the penalty of perjury under the laws of the State of Illinois, 735 ILCS 5/1-109, swear to the truth of the following statements. If called to testify on the matters contained herein, John F. Tamburo would testify identically. To wit:

1. The availability of product technical support is the main factor that customers in my market use to determine which software to buy. James Andrews knows this, and this is why he told many of my customers, after he knew I was *not* in bankruptcy, that I was about to be imminently liquidated and support for my products would soon cease or become very difficult to obtain.

2. Exhibits R-2 and R-3 are genuine, and were taken by me from the www.k9ped.com web site and printed by me, without alteration on April 5, 2006.

3. www.k9ped.com is the Internet website that contained and still contains, unfairly competitive, deceptive, disparaging remarks directed solely toward me. That web site is James Andrews' *sole* source of income from the K9Ped software.

4. I believe, based on what I have been told by others, that James Andrews has lied to this court in his affidavit, attached to Defendant's memorandum supporting its motion to dismiss as Exhibit B, when he swears that he has only one Illinois customer. The truth of this matter is within Andrews' exclusive control.

5. The terms of use for www.mbfs.com have no bearing on this case. None of the gravamen of this case is related to the usage of www.mbfs.com in any way, directly or indirectly.

6. The summons and complaint were served upon James Andrews by the honorable Sheriff of Washington County, Oregon, on February 6, 2006. After said service, proof of which is duly

filed with this court, Andrews did amend his web site to include the "sixth disparagement," as that term is used in the First Amended Sworn Complaint.

7. After this court granted me leave to file my First Amended Complaint on February 16, 2006, I did file the First Amended Sworn Complaint with the honorable Clerk and serve it upon James Andrews by mailing it to him via Priority Mail, Delivery Confirmation Requested, Postage Prepaid, that day.

8. Exhibit R-6 is genuine. It was printed from my email log unaltered on April 4, 2006.

9. The Fourth Disparagement was first uttered no earlier than June, 2005. Andrews continued to utter it until at least January 2006. I believe that he continues to utter the fourth disparagement to my potential customers to this very day.

10. The only changes made to those parts of the First Amended complaint that related to the incidents complained of in the First Amended Complaint were typographical error corrections.

11. Andrews knew, from his thorough dirt-digging expedition into the Illinois web site for the United States District Court for the Northern District of Illinois, that I was not at risk of liquidation at any time when he uttered the fourth disparagement.

12. Defendant misrepresented my statement in the PDF Document. As Andrews knew at the time he published the first disparagement, I filed the document quoted in the first disparagement in an effort to cause the court to grant my pending motion to covert from Chapter 7 to Chapter 13. The import of the document was *not* that I could not afford to complete Compuped Millennium, it was that, *if the conversion were not granted*, I would not be able to afford to complete CompuPed Millennium.

13. In October 2005, Andrews was made aware of the completion of CompuPed Millennium by at least one person, and after having been made aware, he kept the First Disparagement posted on www.k9ped.com.

14. Andrews lied when he said that Compuped Millennium was unavailable. He was at all times aware of the fact that CompuPed Millennium was available to freely download, in pre-release form, continuously from its first Alpha test to its final edition, much like the K9Ped "7.0N" Beta edition that he refuses to complete for three and one-half years running.

15. Andrews reviewed documents that show that the Trustee paid two of my creditors, in their entirety nearly $4,000.00, that I had previously paid in to the trustee, by leave of court with no objection from me. He knew the falsehood and deceptiveness of the sixth disparagement when he posted it.

16. In 2002, Andrews began barraging me with insulting and harassing emails, in fact so many that I eventually had to install a block on his email address into my Exchange Server rules. In one email he referred to me as a "slimeball." In mid-2004, Andrews began to harass my product support manager, Kathi Charpie, with emails designed to cause her to leave my employ by disparaging me.

FURTHER YOUR AFFIANT SAYETH NAUGHT

DATED APRIL 5, 2006

John F. Tamburo

EXHIBIT R-2

K9-Ped Demo Program Download Page
April 10, 2002 - Version 6.5C Now Available

This release includes the CompuPed(tm), TBS(tm) and BreedMate(tm) import features and should fix all known problems with previous versions. Please contact jim@azdogs.com immediately if you experience any problems.

* * * New Easier Installation Procedure * * *

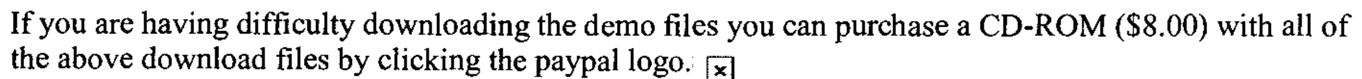
Please read the instructions below then click on one of these links to download the installation file. If you have any problems installing the file please check that your file size matches the values shown to make sure you received the entire download..

Program Downloads

Program with Westie Database	**5,895 KB**	**Program with SCWT Database**	**5,768 KB**
Program with Golden Database	**6,170 KB**	**Program with Chinese Crested Database**	**5,748 KB**
Program with no database	**5,137 KB**	**Additional download for MAC VPC Users**	**1,282 KB**
Self Extracting Program Update	**968 KB**	**Program Update ZIP file**	**805 KB**
Breed Database Downloads		**Breed Pictures for One-Paw-Bandit**	

For other breed databases provided by K9-Ped or to try K9-Ped with your CompuPed, TBS or Breedmate data please download the "Program with no database". To use a a K9-Ped provided database install the program and before running the program download and unzip your breed file. The pedigree data provided is for demonstration use only. Known errors exist in these database files.

Special Instructions for MAC Virtual PC users
Instructions for updating existing installation



If you are having difficulty downloading the demo files you can purchase a CD-ROM ($8.00) with all of the above download files by clicking the paypal logo. [x]

The preferred method of purchase is to download and install the program and use the PayPal button on the about page of the program. This will send a message that includes your System ID so you can receive your User Code quickly. There are no additional downloads required. Your user code will unlock the full features o the program.

You can also purchase a license to run the full program ($99.00) by clicking this logo. [x]

Download Instructions:

Installing the program is now just a two step process, downloading the self extracting / self installing file and running the downloaded file. You may want to print this page for reference use during the installation process.

Downloading the self-extracting / self running file

Click on the above link and use the "Save as" or "Copy file.. option and save the file to your desktop. If

you prefer to save the installation file to a new folder see instructions below on creating a new folder directly from the save as window. During the installation process you will have to go to this folder instead of clicking on a desktop icon.

Downloading the file may take some time depending on your internet connection speed. At 4 Kbytes per second it will take at least 30 minutes.

Installing the program

k9pedbinst.... < Installation Icon

Go to your desktop and double click on the installation icon (pedpinst.exe) to run the combination file extraction & installation program.

When the installation program starts, selecting the defaults (Select "Next" at each screen) will work fine and produce a standard installation.

The installation program installs the program, the Borland Database Engine and places the K9-Ped icon on the desktop. When the installation is complete you can right click on the installation icon and select delete.

If you have downloaded the "empty" demo to use a different breed unzip the breed file into the c:\k9ped\backup folder AFTER the installation and BEFORE you run the program for the first time.

Double-click on the K9-Ped icon to run the program. Until you are a registered user you will see a message indicating that your use is limited to the sample database. Click OK and the program will continue to load.

The first time you run the program you will be prompted to select the demo database you wish to use.

Getting your User Code Number:

K9-Ped is user code protected. Without the proper user code you are restricted to using the sample database with no deletions and limited additions.

Your system ID # can be found by selecting "Help" from the menu at the top of the program window and selecting "About". If you have purchased the program or are a beta test site, send this number to jim@azdogs.com . You will receive your unique user code # by return e-mail. Your code will only work with your system.

Special instructions for updating very old versions

Due to a database structure change for breeding information, the programs downloaded prior to 14 November 2000 cannot be updated by just downloading a new version of the program. If your version of the program is over fifteen months old you will need to Back up your data. Then rename the k9ped folder to k9pedx. Download and re-install the program. Restore your data and delete the k9pedx folder.

Normal Program Update

The latest version of the program includes many new features and improved help files. If you are not comfortable using an un-zip program or do not have an "unzip" program you should use the Self Extracting file. Save the self extracting file to the desktop and double click it for an automatic upgrade. If you use the zip file it should be extracted to the c:\k9ped folder (or the folder containing the k9ped program if you did not do a default install) with "Overwrite all files" selected.

NOTE: You will need to download and run the breedpic.exe file to use the "One Paw Bandit" game. You only need to do this one time.

If you need a copy of an un-zip program for windows you can download a trial version of WinZip by clicking here.

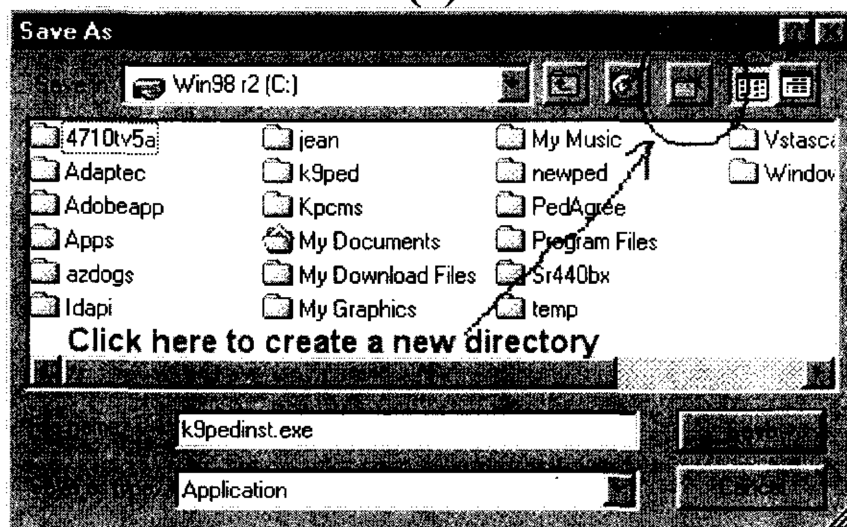
MAC Virtual PC Users

Some versions of MAC Virtual PC may not work properly with the compressed format of the k9ped.exe file. If you are experiencing problems please download and install the uncompressed version here.

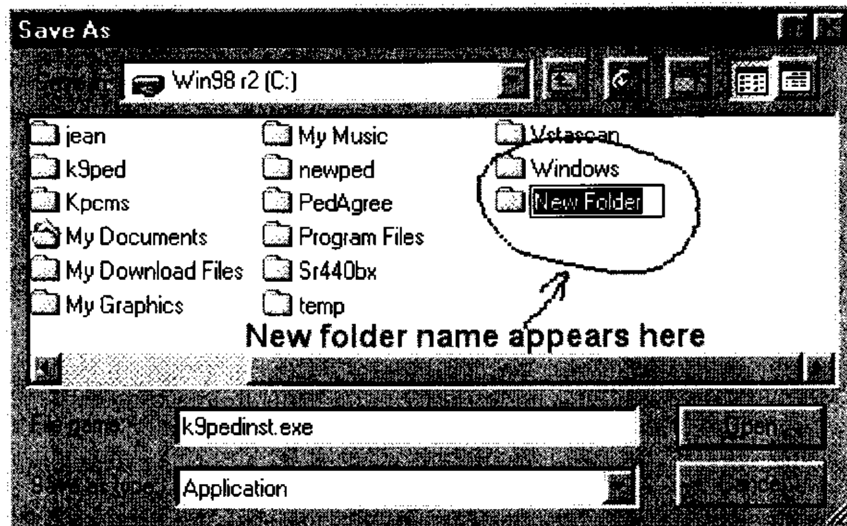
Uncompressed k9ped.exe file (1,287 KB).

How to create a new folder (aka directory) from the "Save As" window

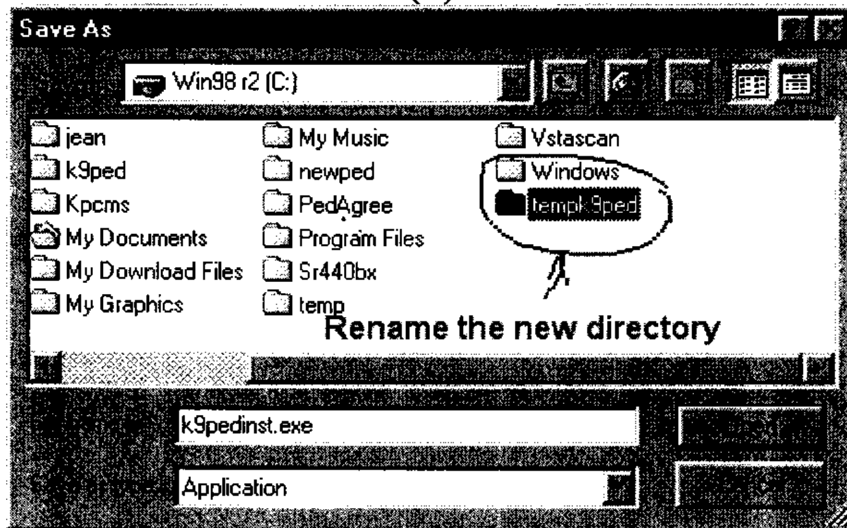
(1)



(2)



(3)



(4)

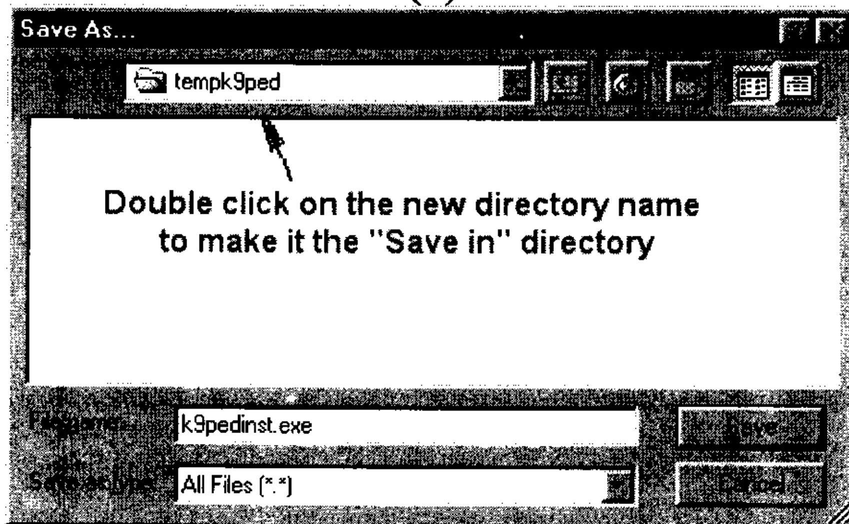


EXHIBIT
K-3

jim@azdogs.com

Checkout

Secur

PayPal is the secure payment processor for **jim@azdogs.com**. To continue, please enter the required information belo
about PayPal.

Pay To: jim@azdogs.com
Payment For: K9-Ped Pedigree Software Single System License
Currency: U.S. Dollars ?
Amount: $99.00 USD
Shipping & Handling: $0.00 USD
Total Amount: $99.00 USD

If you do not currently have a PayPal account, click here

PayPal Login

Already have a PayPal account? Please log in below

Email Address: johntam@mbfs.com Forgot your email?
PayPal Password: Forgot your password?

PayPal protects your privacy and security.
For more information, read our User Agreement and Privacy Policy.

IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS, LAW DIVISION

JOHN F. TAMBURO, D/B/A MAN'S BEST FRIEND SOFTWARE,
Plaintiff

v.

JAMES ANDREWS,
D/B/A K9PED
Defendants

CASE NUMBER: ***06 L 51***

NOTICE OF FILING

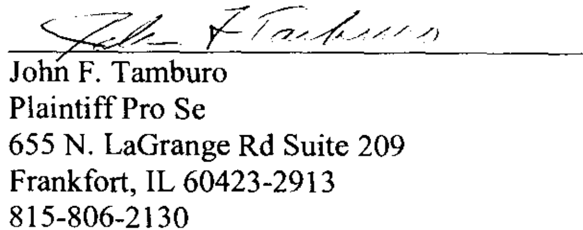
To: Charles Lee Mudd, Jr., Esq.
Law Offices of Charles Lee Mudd, Jr.
3344 N. Albany St
Chicago, IL 60618

BE NOTIFIED that, on April 6, 2006, in Open Court, I shall present the attached opposition and memorandum to the Honorable Herman Haase in open court, and shall file the same with the honorable Clerk.

John F. Tamburo

PROOF OF SERVICE

I, JOHN F. TAMBURO, plaintiff, do hereby on the penalty of perjury under the law of the state of Illinois, do hereby swear that I delivered a copy of this notice and all attachments to defendant's counsel in open court on April 6, 2006.



John F. Tamburo
Plaintiff Pro Se
655 N. LaGrange Rd Suite 209
Frankfort, IL 60423-2913
815-806-2130

IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS, LAW DIVISION

JOHN F. TAMBURO, D/B/A MAN'S BEST FRIEND SOFTWARE, *Plaintiff*	)	CASE NUMBER: ***06 L 51***
v.	)	
JAMES ANDREWS, D/B/A K9PED *Defendants*	)	

PLAINTIFF'S OPPOSITION TO THE DEFENDANT'S MOTION TO DISMISS

NOW COMES John F. Tamburo, d/b/a Man's Best Friend Software ("John"), and does hereby state the following to oppose the defendant's motion to dismiss:

1. Defendant's counsel has, in citing the wrong statute and presenting a commingled motion, violated clear statutes and, in so doing, has waived his client's objections to this court's jurisdiction. *735 ILCS 5/2-301, 735 ILCS 5/2-619.1, In re Schmitt*, 321 Ill. App. 3d 360, 366 (2nd Dist. 2001).

2. Even if the defendant had not waived his objections, Andrews' contacts with Illinois amply establish that this court's exercise of jurisdiction comports with both Illinois law and Federal Due Process. *Bombliss v. Cornelsen*, 355 Ill. App. 3d 1107, 1114 (3rd Dist. 2005), *Burger King v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985).

3. The First Amended Complaint was properly served within the rules. *Ill. Sup. Ct. R. 11, Ill. Sup. Ct. R. 12, Ill. Sup. Ct. R. 104.* The summons and complaint were properly served. *735 ILCS 5/2-201.*

4. Nothing in this case has to do with the terms of service of John's www.mbfs.com web site. Counsel admits that Andrews does not agree to binding arbitration. Therefore, this case has

not, by agreement of the parties, been sent to binding arbitration. *Hubbert v. Dell Corp.*, 359 Ill. App. 3d 976, 983 (5th Dist. 2005).

5. By well settled Illinois law, the First Amended Complaint relates back to the date the original complaint was filed. *Peoples Gas, Light & Coke Co. v. Austin*, 147 Ill. App. 3d 26, 100 Ill. Dec. 612, 497 N.E.2d 790 (1st Dist. 1986). Before this motion, defendant's counsel admitted this in email to John. Exhibit R-6.

6. John states proper claims for Tortious interference with Prospective Economic Advantage. *Schuler v. Abbott Lab.*, 265 Ill. App. 3d 991, 994 (1st Dist., 1993). Deceptive statements and unfair competition are never privileged. *Soderlund Bros. v. Carrier Corp.*, 278 Ill. App. 3d 606, 620 (1st Dist. 1995).

7. John states proper claims for defamation per se and defamation per quod. *Bryson v. News Am. Publs.*, 174 Ill. 2d 77, 88 (1996). The defendant cannot show that the "gist or sting" of Andrews' statements was true. *Myers v. Levy*, 348 Ill. App. 3d 906, 920 (2nd Dist. 2004). The defendant also fails to meet his burden to prove that no reasonable jury could find that his statements were not substantially true. *Clarage v. Kuzma*, 342 Ill. App. 3d 573, 580 (3rd Dist. 2003).

8. John states proper claims for Unfair Competition at the common law. *Restatement (3d) of Unfair Competition, § 2-3, Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272 (2nd Cir. 1981).

John furthermore attaches a memorandum of law and exhibits to oppose this motion, and in such memorandum, fully develops the above points and authorities.

WHEREFORE, your Plaintiff respectfully prays that this court DENY the defendant's motion and compel him to answer the complaint as amended on the date of the order.

John F. Tamburo
Plaintiff
655 N. LaGrange Rd, Suite 209
Frankfort, Will County, Illinois 60423
815-806-2130

IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS, LAW DIVISION

FILED 07 APR -6 AM 8:39 CIRCUIT CLERK WILL COUNTY ILLINOIS

JOHN F. TAMBURO, D/B/A MAN'S BEST FRIEND SOFTWARE, *Plaintiff*	)	CASE NUMBER: ***06 L 51***
v.	)	
JAMES ANDREWS, D/B/A K9PED *Defendants*	)	

PLAINTIFF'S MEMORANDUM OF LAW
OPPOSING THE DEFENDANT'S MOTION TO DISMISS

John F. Tamburo, Plaintiff *Pro Se*
655 North LaGrange Rd., Suite 209
Frankfort, Will County, Illinois 60477
815-806-2130

Table Of Contents

Table Of Authorities ____ iii
1. Introduction ____ 1
2. The Facts ____ 1
3. Argument ____ 2
  3.1. Defendant has, by citing the wrong statute and then engaging in a massive attack against the merits, waived all objections to personal jurisdiction. ____ 2
  3.2. Even if jurisdictional arguments were not waived, this court properly exercises personal jurisdiction over the defendants. ____ 4
    3.2.1. Andrews runs www.k9ped.com as a fully interactive web site that completes sales online. ____ 5
    3.2.2. Andrews admits sales into Illinois. Even the one sale to which he admits is enough to bind him to Illinois' personal jurisdiction. ____ 6
    3.2.3. Andrews legally traveled to Illinois when he obtained documents from courts in Illinois to use them to damage the Plaintiff. ____ 6
    3.2.4. Andrews intended to affect an Illinois interest and thus submitted to Illinois' jurisdiction. ____ 7
    3.2.5. The totality of Andrews' contacts with Illinois satisfies Federal Due Process concerns. ____ 7
  3.3. The gravamen of this case does not involve the website www.mbfs.com, and its terms and conditions arbitration clause is not invoked. ____ 8
  3.4. Defendant was properly served with the original and amended complaints in this matter, according to the rules. ____ 9
  3.5. The Amended Complaint relates back to the original by well-settled law; defendant's counsel admitted this in correspondence. ____ 10
  3.6. John states claims for Tortious Interference with Prospective Economic Advantage. ____ 11
    3.6.1. John properly pleads a class of customers with whom he had an expectancy to do business. ____ 12
    3.6.2. John pleads facts underlying all of the other elements of Tortious Interference with Prospective economic advantage. ____ 13
    3.6.3. Defendant's tortuous interferences did not convey truthful information. ____ 14
  3.7. John states proper claims for defamation. ____ 15
    3.7.1. Standard of Review ____ 15
    3.7.2. John alleges all defamations with particularity. ____ 16
    3.7.3. John meets the libel *per se* standard. ____ 16
    3.7.4. John meets the libel *per quod* standard. ____ 17
    3.7.5. The defendant fails to meet his burden to gain dismissal on the ground of "substantial truth." ____ 18
  3.8. John states claims for unfair competition and UDTPA violations. ____ 21
    3.8.1. John properly pleads unfair competiton at the common law and the UDTPA, and asks leave to amend to explicitly plead UDTPA violations. ____ 21
4. Conclusion ____ 23

Table Of Authorities

Cases

Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6 (7th Cir.1992) ____ 22

Boatmen's National Bank of Belleville v. Direct Lines, Inc., 167 Ill. 2d 88, 102 (1995) ____ 11

Bombliss v. Cornelsen, 355 Ill. App. 3d 1107, 1114 (3rd Dist. 2005) ____ 5, 6, 7

Bryson v. News Am. Publs., 174 Ill. 2d 77, 110 (1996) ____ 15, 16, 17

Burger King v. Rudzewicz, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985) ____ 5, 6

Clarage v. Kuzma, 342 Ill. App. 3d 573, 581 (3rd Dist. 2003) ____ 18, 20

Club Assistance Program, Inc. v. Zukerman, 594 F. Supp. 341, 346-47 & nn. 9-11 (N.D. Ill. 1984) ____ 7

Crinkley v. Dow Jones & Co, 67 Ill. App. 3d 869, 385 N.E.2d 714 (1st Dist., 1978) ____ 12

Gaidar v. Tippecanoe Distribution Service, Inc., 299 Ill. App. 3d 1034, 1041 (1st Dist. 1998) ____ 4

Harshman v. DePhillips, 2006 Ill. LEXIS 316 at *45-46 (Ill. Sup. Ct. 2006) ____ 4

Hubbert v. Dell Corp., 359 Ill. App. 3d 976, 983 (5th Dist. 2005) ____ 9

In re Schmitt, 321 Ill. App. 3d 360, 366 (2nd Dist. 2001) ____ 3, 4

Krueger v. Lewis, 342 Ill. App. 3d 467, 471 (1st Dist. 2003) ____ 15

Kutner v. DeMassa, 96 Ill. App. 3d 243, 248 (1st Dist. 1981) ____ 4

Myers v. Levy, 348 Ill. App. 3d 906, 920 (2nd Dist. 2004) ____ 18, 19

Myers v. The Telegraph, 332 Ill. App. 3d 917, 924 (5th Dist. 2002) ____ 20

O'Brien v. State Street Bank & Trust Co., 82 Ill. App. 3d 83, 85 (4th Dist., 1980) ____ 12

People ex rel. Department of Professional Regulation v. Manos, 202 Ill. 2d 563, 568 (2002) ____ 4

Peoples Gas, Light & Coke Co. v. Austin, 147 Ill. App. 3d 26, 100 Ill. Dec. 612, 497 N.E.2d 790 (1st Dist. 1986) ____ 10

Royal Extrusions Limited v. Cont'l Window & Glass Corp., 349 Ill. App. 3d 642 (3rd Dist. 2004) ____ 6

Schuler v. Abbott Lab., 265 Ill. App. 3d 991, 994 (1st Dist., 1993) ____ 12, 13, 15

Soderlund Bros. v. Carrier Corp., 278 Ill. App. 3d 606, 620 (1st Dist. 1995) ____ 14, 15

Urbaitis v. Commonwealth Edison, 143 Ill. 2d 458, 475, 159 Ill. Dec. 50, 575 N.E.2d 548 (1991) ____ 12

Zazove v. Pelikan, Inc., 326 Ill. App. 3d 798, 802 (1st Dist. 2001) ____ 4, 7

Statutes

720 ILCS 295/1a ______ 16, 20

725 ILCS 5/2-209 ______ 6

735 ILCS 5/2-201 ______ 10

735 ILCS 5/2-301 ______ 2, 3

735 ILCS 5/2-615 ______ 14

735 ILCS 5/2-616 ______ 22

735 ILCS 5/2-619 ______ 2

735 ILCS 5/2-619.1 ______ 2, 3

810 ILCS 510/1 ______ 21

Other Authorities

Restatement (3d) of Unfair Competition, § 2 ______ 21

Restatement (3d) of Unfair Competition, § 3 ______ 21

Rules

Ill. Sup Ct. R. 104 ______ 9

Ill. Sup Ct. R. 105 ______ 9, 10

Ill. Sup Ct. R. 11 ______ 10

Ill. Sup Ct. R. 12 ______ 10

1. Introduction

Your Plaintiff, John F. Tamburo ("John") does business as Man's Best Friend Software. Defendant James Andrews, d/b/a K9Ped ("Andrews"), attempts to compete with John in the business of animal-related software. There is a long history of acrimony between the parties, little of which is relevant to the instant motion. What is relevant: Andrews' conduct egregiously violates established norms of decent business competition. Andrews knowingly and falsely accused John of criminal acts, with the evil goal of usurping John's customer base. Furthermore, he manufactured other statements, pure lies that have deceived the buying public. Long settled law holds that these acts are illegal. John, in good faith and after careful research of the law and facts, seeks justice from this court.

Andrews' counsel, in a memorandum so laced with invective and impertinent matter that it flouts the dignity of this court, sets forth numerous red herrings as he attempts to demonize John, the *victim* of a relentless attack by an unsuccessful, jealous, bitter competitor. Notably, counsel has, by long-settled law, waived his client's (meager) objections to personal jurisdiction.

The amended complaint states claims and cannot be dismissed. Andrews has no right to compete in the gutter and then arrogantly demand that this court bless his amoral conduct. Therefore, John prays that this court deny the motion at bar, and order Andrews to answer forthwith.

2. The Facts

Defendant's statement of "facts" is loaded with impertinent matter, and some outright falsehoods, designed to prejudice this court against John. To the extent that the First Amended Sworn Complaint conflicts with the "facts" averred by the defendant, John disputes those facts.

John further relies upon all of the fact allegations in the First Amended Complaint, and cites to them herein, as appropriate.

3. Argument

3.1. Defendant has, by citing the wrong statute and then engaging in a massive attack against the merits, waived all objections to personal jurisdiction.

Counsel's gigantic, bloated Memorandum of law[1] supporting defendant's motion to dismiss ("Memo"), p. 3, attempts to state that *735 ILCS 5/2-619* permits motions that object to "personal jurisdiction." This is incorrect. The statute that permits objection to personal jurisdiction is *735 ILCS 5/2-301*, as this court certainly knows, and defendant's counsel *should* know. It is black letter law that arguments directed to the merits waive objections to personal jurisdiction. See *735 ILCS 5/2-301(a), (a-5).*

Section 2-301 as amended in 2000, does address the use of the *735 ILCS 5/2-619.1* standard of labeling motions to dismiss brought under multiple statutes. However, counsel fails to label the motion and therefore waives all jurisdictional objections. Please read the statutes:

735 ILCS 5/2-301(a) (2000), in pertinent part:

> (a) Prior to the filing of any other pleading or motion other than a motion for an extension of time to answer or otherwise appear, a party may object to the court's jurisdiction over the party's person, either on the ground that the party is not amenable to process of a court of this State or on the ground of insufficiency of process or insufficiency of service of process, by filing a motion to dismiss the entire proceeding or any cause of action involved in the proceeding or by filing a motion to quash service of process. Such a motion may be made singly or included with others in a combined motion, *but the parts of a combined motion must be identified in the manner described in Section 2-619.1 [735 ILCS 5/2-619.1].* [emphasis supplied]

[1] The custom in Illinois is to file a memorandum of law no longer than fifteen (15) pages, using double-spaced type, of a size of 12 points. In fact, this is the rule in many jurisdictions, including the U.S. Northern District of Illinois and Cook County. Defendants' Memorandum is spaced at 1½ lines, and contains 25 pages of argument, plus 5 pages of contents, for a total of 30 pages. At least counsel could have avoided 1½-line spacing in order to jam another 50% more words into his memorandum. However, since John could not locate an explicit 12th circuit rule limiting the length and format of memoranda of law, John limits his objection to this footnote.

735 ILCS 5/2-301(a-5) (2000), in pertinent part:

> (a-5) If the objecting party files a responsive pleading or a *motion* ... prior to the filing of a motion *in compliance with subsection (a)*, that party waives all objections to the court's jurisdiction over the party's person. [emphasis supplied]

735 ILCS 5/2-619.1, in the whole:

> Combined motions. Motions with respect to pleadings under Section 2-615 [735 ILCS 5/2-615], motions for involuntary dismissal or other relief under Section 2-619 [735 ILCS 5/2-619], and motions for summary judgment under Section 2-1005 [735 ILCS 5/2-1005] may be filed together as a single motion in any combination. A combined motion, however, shall be in parts. Each part shall be limited to and shall specify that it is made under one of Sections 2-615 [735 ILCS 5/2-615], 2-619 [735 ILCS 5/2-619], or 2-1005 [735 ILCS 5/2-1005]. Each part shall also clearly show the points or grounds relied upon under the Section upon which it is based.

Moreover, the courts have ruled upon the 2000 amendment to section 2-301. It does *not* permit the inclusion of 2-615 and 2-619 arguments in the 2-301 motion. The only reported case on this subject is clear. See *In re Schmitt*, 321 Ill. App. 3d 360, 366 (2nd Dist. 2001):

> "[W]e interpret the legislature's changes [effective 2000] to section 2--301 to evince its intent to permit a party to file a motion or other responsive pleading *after the party objects to the court's jurisdiction over the party's person.* Moreover, as long as the party files the motion or other responsive pleading *after* he or she objects to the court's jurisdiction over the party's person, the party does not waive its objections to the court's jurisdiction over the party's person."

In re Schmitt, 321 Ill. App. 3d at 366 [emphasis supplied]. In the instant case, counsel did not wait until after he filed the motion objecting to this court's jurisdiction over Andrews. He has commingled his arguments in one motion, not separating them at all. The 619.1 statute, set forth *supra*, is unequivocal and clear. "A combined motion, however, shall be in parts. Each part shall be limited to and shall specify that it is made under one of" the sections listed therein, or section 2-301. Counsel has further mislabeled the 2-301 arguments as 2-619 arguments. The

memo *attempts* to obey 2-619.1, but *the memo is not the motion.* Also, the memo mislabels the arguments and breaches the statute. Counsel breaches the clear, unambiguous language of sections (a) and (a-5) of the statute. The most fundamental rule of statutory construction is that where the language of a statute is clear and unambiguous, the court must enforce it as written. It may not annex new provisions or substitute different ones, or read into the statute exceptions, limitations, or conditions which the legislature did not express. *People ex rel. Department of Professional Regulation v. Manos*, 202 Ill. 2d 563, 568 (2002); *Harshman v. DePhillips*, 2006 Ill. LEXIS 316 at *45-46 (Ill. Sup. Ct. 2006). Counsel wrote the motion as a two page blob, and included 2-615 arguments in the same paragraph as the mislabeled 2-619 arguments. The motion was not "in parts," and that is required by sections 2-301 and 2-619.1 See use of the word "shall" in both citations. This court must give effect to the statute as written. Pursuant to black-letter law and *Schmitt*, Andrews has waived all objections to personal jurisdiction. The defendant's motion to dismiss for want of personal jurisdiction must be denied.

3.2. Even if jurisdictional arguments were not waived, this court properly exercises personal jurisdiction over the defendants.

Standard of Review: Statements in plaintiff's pleadings which defendant does not controvert by affidavit are taken as true. *Kutner v. DeMassa*, 96 Ill. App. 3d 243, 248 (1st Dist. 1981). A plaintiff's prima facie case may only be overcome by a defendant's uncontradicted evidence that defeats jurisdiction. *Gaidar v. Tippecanoe Distribution Service, Inc.*, 299 Ill. App. 3d 1034, 1041 (1st Dist. 1998). However, conflicts between the parties' affidavits will be resolved in favor of the plaintiff for purposes of determining whether a prima facie case for *in personam* jurisdiction has been made. *Zazove v. Pelikan*, Inc., 326 Ill. App. 3d 798, 802 (1st Dist. 2001).

3.2.1. Andrews runs www.k9ped.com as a fully interactive web site that completes sales online.

John respectfully refers this court to exhibits R-2 and R-3. John swears to the authenticity of these exhibits in his affidavit, exhibit M-1 (hereinafter "John Aff."), ¶ 2. These exhibits are from Andrews' website, www.k9ped.com, and show that one may easily use that web site from anywhere, *including Illinois*, to transact and complete business with Andrews. The memo, at p.5, admits that Andrews "operates a website from which individuals may purchase his products and obtain other useful information."[2]

The www.k9ped.com website establishes personal jurisdiction over Andrews. See *Bombliss v. Cornelsen*, 355 Ill. App. 3d 1107, 1114 (3rd Dist. 2005). (Jurisdiction established "if the defendant transacts business in foreign jurisdictions via an interactive website where contracts are completed online and the defendant derives profits directly from web-related activity.") Moreover, this web site is the same one that has been used to misrepresent John's financial status (1st Am. Cplt, ¶¶ 41-66), to improperly associate John with puppy mills (1st Am. Cplt, ¶¶ 67-76), to assert that John violates his customers' putative "consumer protection" rights (1st Am. Cplt, ¶¶ 67-76), to accuse John of trickery in his pricing (1st Am. Cplt, ¶¶ 77-83) and to falsely accuse John of committing a crime by selling a product he had no intention to complete (1st Am. Cplt, ¶¶ 41-60). This satisfies the need to have the jurisdictional contact "arise out of or relate to" the gravamen of the instant case. *Burger King v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985). Although at p.11, counsel tries to label the website as "hybrid" under the *Bombliss* test, the exhibits belie the argument. The www.k9ped.com website is fully interactive and makes it easy to complete sales contracts online. www.k9ped.com is, in fact,

[2] This "useful information" includes the disparagements cited in the Amended Complaint.

Andrews' *sole* source of revenue from the defendant business. John Aff., ¶ 3. These facts, under the *Bombliss* test, in and of themselves attorn the defendant to this court's jurisdiction.

3.2.2. Andrews admits sales into Illinois. Even the one sale to which he admits is enough to bind him to Illinois' personal jurisdiction.

The memo, at p.7, and Andrews own affidavit at ¶ 11, admit to at least one sale into Illinois. John believes that Andrews is lying and that there are more Illinois sales, but the proof thereof lies in Andrews' sole control at this time. See John Aff., ¶ 4. Let's assume *arguendo* that there was just the one Illinois sale. A single transaction can form the basis for personal jurisdiction if the defendant intentionally transacts business within Illinois. *Royal Extrusions Limited v. Cont'l Window & Glass Corp.*, 349 Ill. App. 3d 642 (3rd Dist. 2004). Andrews does not state in his affidavit when he acquired his putative single Illinois customer. If it were after the publication of one of Andrews' disparagements, or because of one of them,[3] this would be in and of itself fatally dispositive of his objection to personal jurisdiction. *Id.*

3.2.3. Andrews legally traveled to Illinois when he obtained documents from courts in Illinois to use them to damage the Plaintiff.

Counsel admits that Andrews intentionally accessed the web site of the United States District Court, Northern District of Illinois, to dig up damaging dirt on John. This is a contact with Illinois, and it is closely related to the gravamen of the case. *Burger King v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985). Counsel attempts to argue that it does not "count" as a tortious act under *725 ILCS 5/2-209(a)(2)*, but it does. This act was a visit into Illinois in order to obtain information on an Illinois citizen, with the plan to use it deceptively to damage

[3] As this case progresses, John will discover, from each and every of Andrews' customers, the reasons why they chose to do business with him.

that citizen. The contact arises out and relates to the gravamen of the instant case, making this contact with Illinois, as are the others, dispositive of defendant's jurisdictional objections.

3.2.4. Andrews intended to affect an Illinois interest and thus submitted to Illinois' jurisdiction.

Andrews knew that John resided in Illinois. He entered into the U.S. District Court website in Illinois, maintained in Illinois in order to dig up dirt on an Illinois citizen and use it to attempt to drive him out of business. 1st Am. Cplt., ¶ 37. John accuses Andrews of intentional tortious acts, including libel and tortuous interference with prospective economic advantage. Torts occur where the last event to render the tortfeasor liable happens – that event is the injury. *Zazove v. Pelikan, Inc.*, 326 Ill. App. 3d 798, 808. When the injury is economic, due process is satisfied if the Plaintiff alleges that Defendant intended to affect an Illinois interest. *Zazove*, 326 Ill. App. 3d at 806; *Club Assistance Program, Inc. v. Zukerman*, 594 F. Supp. 341, 346-47 & nn. 9-11 (N.D. Ill. 1984) (collecting Illinois cases).

3.2.5. The totality of Andrews' contacts with Illinois satisfies Federal Due Process concerns.

It is the *totality* of a defendant's contacts with Illinois that disposes of the Federal Due Process issue. *Bombliss v. Cornielsen,* 355 Ill. App. 3d at 1115. In the instant case, (1) Andrews *admits* sales of K9Ped to at least one Illinois customer; (2) Andrews *admits accessing the Illinois web site* of the United States District Court for the Northern District of Illinois in order to dig up dirt on John; (3) Andrews *intentionally* published the disparagements in the complaint, while *knowing that John resided in Illinois*, therefore demonstrating an intent to affect an Illinois interest; and (4) Andrews operates a fully interactive website, www.k9ped.com, that enables the

completion of sales contracts, complete with payment, online. That disposes of Federal Due Process. It also fatally disposes of all of defendant's objections to personal jurisdiction.

3.3. The gravamen of this case does not involve the website www.mbfs.com, and its terms and conditions arbitration clause is not invoked.

Counsel attempts to argue in the memo at p.15 that the terms of service of www.mbfs.com, John's web site, somehow require that this case be dismissed in favor of mandatory arbitration before the National Arbitration Association. Andrews desperately seeks any way he can to avoid culpability for his outrageous acts. Andrews does not cite to any part of the www.mbfs.com website that binds him to the arbitration agreement with respect to the gravamen of the instant case. Instead, he attempts to argue that he has taken umbrage at its terms and wishes to object to them by counterclaim. But, *no part of the instant case rests upon any usage of www.mbfs.com!* Andrews published his disparaging, interfering, and deceptive remarks on www.k9ped.com, not www.mbfs.com. Andrews does not link to www.mbfs.com on his pages. At no time have the terms of service of www.k9ped.com required binding arbitration. See Exhibit R-4. John does not plead a breach of the www.mbfs.com site terms and conditions. In fact, Andrews argues that he is not subject to the terms of use he tries to invoke! See Memo, p.15: "Importantly, in this action, the Defendant disputes 'the enforceability of [plaintiff's] arbitration agreement.' " [bracketed phrase retained]. It would be more "important" had John pled anything remotely connected to the www.mbfs.com site terms and conditions.

Defendant's exhibit B, on its face, sets forth a contract, containing only, by its own words, terms of use for www.mbfs.com. It has no relation to this case. John Aff. ¶ 5. Without such relation, the arbitrator has no personal jurisdiction over either party. A party cannot be compelled to arbitrate unless he has agreed to do so. *Hubbert v. Dell Corp.*, 359 Ill. App. 3d 976,

983 (5th Dist. 2005). Nothing in Defendant's Exhibit B states that the www.mbfs.com terms of use covers Andrews' actions on www.k9ped.com. And if it did, the agreement would be unenforceable. Therefore, the www.mbfs.com terms of use do not apply to this action.

3.4. Defendant was properly served with the original and amended complaints in this matter, according to the rules.

Counsel tries to convince this court to make new law and hold that personal service of an amended complaint is required if defendant has not filed an appearance, *even if the defendant was properly served with summons and complaint.* No authority in the entire history of Illinois has ever held what counsel urges of this court. Unsurprisingly, defendant offers no cogent authority to support his premise.

In the instant case, defendant was served by the sheriff of Washington County, Oregon, on February 6, 2006.[4] The day after service, February 7, 2006, Andrews amended www.k9ped.com to *increase* the vitriol of his attacks, in retaliation for the filing of the instant case. 1st Am. Cplt., ¶ 30. John duly amended his complaint, and moved the court for leave to file it. John Aff. ¶ 6. This court granted leave on February 16, 2006. On February 24, 2006, John filed the amended complaint with the clerk and served the same upon Andrews by Priority mail with tracking, which he received. John Aff., ¶ 7. **John did not increase the *ad damnum* from the original to the amended complaint.**

Defendants' counsel *admits* in Memo, p.16, that Rule 104 is silent on Amended Complaints. He admits that Rule 105 applies to parties in Default; this makes his citation to *public Taxi Service, Inc. v. Ayrton*, 15 Ill. App. 3d 706 (1st Dist., 1973), wholly inapposite. Andrews is not now and has never been found in default. Plaintiff fully complied with Rules

---

[4] The Memo repeatedly, but incorrectly, lists the date of service of summons and complaint as January 2006. Andrews also swears to this inaccuracy in his affidavit at ¶ 20.

11(b)(2) (method of service "other than process and complaint") 12(b)(3) (Certificate of service). The Amended Complaint was certainly not the "process and complaint" that is required to be served to gain jurisdiction over the defendant per *735 ILCS 5/2-201.* Even counsel's Rule 105 cases for defaulted parties make it clear that amendments must be served if they pray "*additional relief.*" The *ad damnum* remained *identical* between the original and first amended complaints.

It is also ludicrous to argue that Andrews was not notified of the amendment. Andrews was well notified of the cause of action and the amendment; the post office vouches for that. See Exhibit R-5. John violated no rule, and exceeded the standards of compliance set forth in rules 11 and 12.[5] Therefore, the defendants' motion to dismiss based on improper service must be denied.

3.5. The Amended Complaint relates back to the original by well-settled law; defendant's counsel admitted this in correspondence.

Defendant's attorney, Charles Lee Mudd, Jr., on February 28, 2006, emailed John Tamburo and said that he was aware that the complaint related back to the date of filing, and that there were no issues with respect to the statute of limitations. See Exhibit R-6, sworn as authentic, John Aff., ¶ 8. Mr. Mudd got the law right in his email. Here, however, he throws in the "kitchen sink" in the form of a meritless statute-of-limitations argument. Well settled law: An action is commenced when the complaint is filed, not when the defendant is served, and the *filing of a complaint* determines whether an action is instituted during the period prescribed by a statute of limitations. *Peoples Gas, Light & Coke Co. v. Austin*, 147 Ill. App. 3d 26, 100 Ill. Dec. 612, 497 N.E.2d 790 (1st Dist. 1986) [emphasis supplied]. An amendment relates back in Illinois

[5] John obtained delivery confirmation from the United States Postal Service, although not required by any rule.

when the original complaint "furnished to the defendant all the information necessary ... to prepare a defense to the claim subsequently asserted in the amended complaint." *Boatmen's National Bank of Belleville v. Direct Lines, Inc.*, 167 Ill. 2d 88, 102 (1995). Except for new causes of action that arose because of Andrews' reaction to being sued in this case, i.e., the Sixth Disparagement, John meets the *Boatmen's* test. The complaint relates back for all previous counts, where the only things changed were typographical error corrections. John Aff., ¶ 10.

Moreover, the First Disparagement was published in June, 2005. 1st Am. Cplt., ¶ 10. The fourth disparagement was uttered no earlier than June, 2005 and continues to be uttered by Andrews to this day. John Aff., ¶ 9. The fifth disparagement was uttered on April 9, 2005. 1st Am. Cplt., ¶ 28. The sixth disparagement was posted *after the filing of the original complaint in this case, on February 7, 2006.* 1st .Am. Cplt., ¶ 30. The entire argument that these disparagements, some of which occurred *after the complaint was filed*, are barred by the statute of limitations is frivolous.[6] Therefore, defendants' motion to dismiss based on the statute of limitations must be denied.

3.6. John states claims for Tortious Interference with Prospective Economic Advantage.

Defendant argues that John fails to state claims for tortuous interference with prospective economic advantage. Counsel avers that John pleads bare legal conclusions, and fails to plead the specific identities of the parties with whom Andrews interfered. Memo, pp.19-20. As counsel well knows, and John shows herein, neither argument has merit.

Standard of Review: In considering a 2-615 motion, all well-pled facts in a complaint are taken as true with all inferences drawn in favor of the non-movant. *Schuler v. Abbott Lab.*, 265

---

[6] I hesitate use the term *frivolous*. I don't want to be accused of the same ribald, scattershot paroxysms of *ad hominem abusive* attacks that the Memo lays upon me. However, this argument is so baseless that it wastes this court's and my time to address it at all. There is no reasonable way to question its bad faith.

Ill. App. 3d 991, 994 (1st Dist., 1993). The question presented by a motion to dismiss under section 2--615 is whether sufficient facts are contained in the pleadings which, if proved, would entitle the plaintiff to relief. *Urbaitis v. Commonwealth Edison*, 143 Ill. 2d 458, 475, 159 Ill. Dec. 50, 575 N.E.2d 548 (1991). The tort of interference with prospective economic advantage has four elements: (1) plaintiff must have a reasonable expectancy of a valid business relationship; (2) defendant must know about it; (3) defendant must intentionally interfere with the expectancy, and so prevent it from ripening into a valid business relationship; and (4) intentional interference must injure the plaintiff. *Schuler v. Abbott Lab.*, 265 Ill. App. 3d at 994. Plaintiff can properly plead an expectancy to do business with an identifiable class of third parties. *O'Brien v. State Street Bank & Trust Co.*, 82 Ill. App. 3d 83, 85 (4th Dist., 1980); *Crinkley v. Dow Jones & Co*, 67 Ill. App. 3d 869, 385 N.E.2d 714 (1st Dist., 1978).

3.6.1. John properly pleads a class of customers with whom he had an expectancy to do business.

Counsel argues in memo, at p.19, that John must plead the specific identities of those parties with whom Andrews interfered in order to state a claim. This is not the law in Illinois. John properly pleads an expectancy to do business with an "identifiable class" of third parties. See *O'Brien v. State Street Bank & Trust Co.*, 82 Ill. App. 3d 83, 85 (4th Dist., 1980). Plaintiff alleges in the 1st Am. Cplt., ¶¶ 41, 101, 126, that he has the reasonable expectancy to do business with "dog, cat and horse breeders, and the exhibitors thereof." This is not a mere "legal conclusion" as contended by counsel in the Memo, at p.19. It is bolstered by the fact that John makes software products specifically directed to those markets. 1st Am. Cplt., ¶ 5. John can prove ¶ 5, and he can prove that Andrews interfered with his valid expectancy to do business

with the very people at whom his products are aimed. Therefore the tortious interference counts validly allege John's expectancy to do business with an identifiable class of customers.

3.6.2. John pleads facts underlying all of the other elements of Tortious Interference with Prospective economic advantage.

Factor 2 of the *Schuler* test is that Defendant must know of the expectancy. John alleges this in 1st. Am. Cplt., ¶¶ 42, 102, 127. This is also not a legal conclusion. Andrews is John's competitor. 1st Am. Cplt., ¶ 7. John can prove these allegations, thus, they are not legal conclusions.

Factor 3 of the *Schuler* test is intentional interference. John pleads the interference in 1st Am. Cplt., ¶¶ 43, 128, 103-105. These pleas are *not* legal conclusions. Andrews published deceptive statements about the Plaintiff's financial condition, even in the face of John's continuing pre-releases of CompuPed™ Millennium. Andrews chose his words carefully to make it seem as if John was intentionally selling a product he had no intention to complete, a criminal act (of which Andrews is ironically guilty himself). 1st Am. Cplt., ¶¶ 13, 15-16, 47. In the fourth disparagement, Andrews told numerous people that John was about to be liquidated and that his technical support would soon be unavailable. 1st Am. Cplt., ¶¶ 26-27. Andrews knew, from his admitted frequent forays into the Illinois website of the U.S. District Court for the Northern District of Illinois (see Memo, p.10), that John was *not* about to be liquidated when he made those statements. John Aff., ¶ 11. The facts are that Andrews published all of these utterances, with knowledge of their deceptive nature, making them *unjustified*. John meets the requirement of *Schuler* factor number 3.

Factor 4 is damages. John pleads damages in the form of lost sales in 1st Am. Cplt., ¶¶ 52, 108, 133. Lost sales can be proven as a fact and therefore are not a legal conclusion. John

has pled ample facts to support his claims of tortious interference with prospective economic advantage. These counts cannot be dismissed under section 2-615 of the Code of Civil Procedure.

3.6.3. Defendant's tortuous interferences did not convey truthful information.

Counsel attempts to argue that, according to *Soderlund Bros. v. Carrier Corp.*, 278 Ill. App. 3d 606, 620 (1st Dist. 1995), John's claims for tortious interference with prospective economic advantage cannot survive because they merely give "truthful information." However, counsel's averment is plainly wrong. Defendant misrepresented John's statement in the PDF Document. As Andrews knew (1st Am. Cplt., ¶ 12) at the time he published the first disparagement, John filed the document quoted in the first disparagement in an effort to cause the court to grant his pending motion to covert from Chapter 7 to Chapter 13. The import of the document was *not* that John could not afford to complete Compuped Millennium, it was that, *if the conversion were not granted*, John would not be able to afford to complete CompuPed Millennium. John Aff. ¶ 12. The conversion was granted prior to the publication of the first and fifth disparagements. And, as final proof of the falsehood of the gist of the first disparagement, John released Compuped. 1st Am. Cplt., ¶ 15. Nonetheless, Andrews intentionally kept up the deceptive statements for six months after Compuped was released, until he was served with the original complaint in this case. 1st am. Cplt, ¶ 16. Andrews lies in his affidavit where he says that he only learned of CompuPed Millennium's release in January, 2006. He was aware, from a phone conversation with at least one person in October, 2005, that CompuPed was released and available to the general public. John Aff. ¶ 13. The first disparagement was deceptive, alleging that John "actively marketed" Compuped Millennium with no intention to complete it. 1st Am. Cplt., ¶ 45-47. This court must take John's allegations as true, and resolve the conflict in

affidavits in John's favor. *Schuler v. Abbott Lab.*, 265 Ill. App. 3d at 994. Deceitful acts and unfair competition are *never* privileged. *Soderlund Bros. v. Carrier Corp.*, 278 Ill. App. 3d at 619. The first disparagement, as Andrews' knew, was "false in the sense in which it is intended to be understood by the recipient." *Id.* See 1st Am. Cplt., ¶¶ 13-16. Thus, count one cannot be dismissed.

Similarly, the *Soderlund* "defense" fails to kill Count eight. Knowingly stating, while John was not in bankruptcy, that John was about to be imminently liquidated and his technical support halted (1st Am. Cplt., ¶ 25-27) is deceptive, and is never privileged. Count Eleven similarly speaks of the sixth disparagement, which John pleads is false in 1st Am. Cplt., ¶¶ 120-122, 129.

3.7. John states proper claims for defamation.

3.7.1. Standard of Review

A complaint may not be dismissed under section 2-615 unless "it clearly appears that no set of facts could be proved under the pleadings that would entitle plaintiff to relief." *Krueger v. Lewis*, 342 Ill. App. 3d 467, 471 (1st Dist. 2003). A complaint must be liberally construed, to the end that controversies may be quickly and finally determined according to the substantive rights of the parties. *Bryson v. News Am. Publs.*, 174 Ill. 2d 77, 110 (1996). A 2-615 motion does not raise affirmative defenses. *Id.*, at 86. Courts measure the specificity of an allegation by determining whether it states a conclusion or a fact. *Krueger v. Lewis*, 342 Ill. App. 3d at 471. Allegations that the statements made were false, were made with knowledge of their falsity, or were made in reckless disregard as to their truth or falsity have been held by our Supreme Court to be sufficient to withstand a motion to dismiss. *Krueger v. Lewis*, 342 Ill. App. 3d at 472.

3.7.2. John alleges all defamations with particularity.

Defendant's counsel asserts in the Memo, at p.21, that the fourth disparagement is not stated with the requisite specificity to maintain a libel action. The only problem with counsel's argument is that *John does not plead libel on the Fourth Disparagement.*

John pleads libel per se on the First Disparagement (count two), libel per quod on the Second Disparagement (count four), libel per quod in the Third Disparagement (count five), and libel per se in the creditor libel (count ten). These libels are pled in their exact words in 1st Am. Cplt., ¶¶ 10, 17, 18, 30. Therefore, John pleads with ample specificity to state a claim.

3.7.3. John meets the libel *per se* standard.

Words are libelous per se if they are "(1) words that impute the commission of a criminal offense; (2) words that impute infection with a loathsome communicable disease; (3) words that impute an inability to perform or want of integrity in the discharge of duties of office or employment; or (4) words that prejudice a party, or impute lack of ability, in his or her trade, profession or business." *Bryson v. News Am. Publs.*, 174 Ill. 2d 77, 88 (1996).

Counts two and ten properly state a claim for libel per se. Count one alleges that the First Disparagement falsely imputes to John the crime of selling an incomplete software program with no intention to finish it, a crime in violation of *720 ILCS 295/1a*. 1st Am. Cplt., ¶ 55. The statement was false, as the release of Compuped Millennium has proved. 1st Am. Cplt., ¶ 56. These sworn allegations must be taken as true. *Bryson*, 174 Ill. 2d at 86. Andrews lies when he swears that Compuped was unavailable to the public when he posted his defamatory statements. At all times, the pre-release of CompuPed Millennium was available for download and immediate use; Andrews knew this. John Aff. ¶ 14. If one falsely accuses someone of a crime,

then the accuser is guilty of libel per se. That's the start and end of it. Count one states a proper claim.

Now onto Count Ten. Andrews represents that John has paid none of his creditors. That representation is false. 1st Am. Cplt., ¶¶ 120-121. Moreover, as other documents Andrews deceptively ignored in the creditor libel showed, at least two of John's creditors were paid in their entirety by the Trustee. John Aff., ¶ 15. The creditor libel imputes to John an inability to perform his profession. It is false. John states a claim for libel per se.

3.7.4. John meets the libel *per quod* standard.

In order to state a claim for libel *per quod*, Plaintiff "must plead ... that [he] sustained actual damage of a pecuniary nature ('special damages') to recover." *Bryson v. News Am. Publs.*, 174 Ill. 2d 77, 88 (1996). A *per quod* claim is appropriate where the defamatory character of the statement is not apparent on its face, and [Plaintiff must] resort to extrinsic circumstances is necessary to demonstrate its injurious meaning. *Bryson v. News Am. Publs.*, 174 Ill. 2d at 103.

Counts four and five meet the *Bryson* standard. Count four alleges the extrinsic circumstances that make the second disparagement defamatory, see 1st Am. Cplt., ¶¶ 67-72. It alleges lost sales, a pecuniary loss, in ¶ 75. Count five alleges the extrinsic circumstances that make the third disparagement defamatory, see 1st Am. Cplt., ¶¶ 77-79. It also alleges pecuniary loss in the form of lost sales, in ¶ 81. Therefore the libel *per quod* counts state claims and cannot be dismissed.

Count Two as *Per Quod*: If this court disagrees that the First Disparagement is a libel per se, John may still proceed *per quod* on count Two. It is possible for a disparagement to be actionable under both theories of libel. *Clarage v. Kuzma*, 342 Ill. App. 3d 573, 581 (3rd Dist.

2003) (Holding that a defamation was actionable as both per se and per quod libel). In the instant case, John pleads the extrinsic circumstances that make the First Disparagement libelous, see 1st Am. Cplt., ¶¶ 55-58. He furthermore pleads pecuniary special damages in the form of lost sales at ¶¶ 24-25, 34. Therefore count two may be properly pursued *per quod* if not per se. The same logic pertains to count ten and the sixth disparagement. See 1st Am. Cplt., ¶¶ 120-121, 123, 24-25, 34. Therefore, all libel count state claims and cannot be dismissed.

3.7.5. The defendant fails to meet his burden to gain dismissal on the ground of "substantial truth."

The defendant, to defeat a defamation claim using the *affirmative defense* of substantial truth, must establish the truth of the "gist" or "sting" of the allegedly defamatory statement. This is a question for the finder of fact, *unless no reasonable jury could find a lack of substantial truth*. Then, the question is one of law. *Clarage v. Kuzma*, 342 Ill. App. 3d 573, 580 (3rd Dist. 2003). Counsel, in memo, p.22-23, asserts "substantial truth" as a complete defense to the Plaintiff's defamation counts. The *defendant* bears the burden of proving the truth of the gist or sting of his statement:

> A defendant bears the burden of establishing the "substantial truth" of his assertions, which he can demonstrate by showing that the "gist" or "sting" of the defamatory material is true. When determining the "gist" or "sting" of allegedly defamatory material, a trial court must look at the highlight of the article, the pertinent angle of it, and not to items of secondary importance which are inoffensive details, immaterial to the truth of the defamatory statement.
> *Myers v. Levy*, 348 Ill. App. 3d 906, 920 (2nd Dist. 2004).

In light of the above citation, please review the statement of which John complains in the First Disparagement, forming the gravamen of Count Two:

> Please use caution when purchasing any unreleased software products. John Tamburo, d/b/a Mans Best Friend Software, has declared bankruptcy. Although it is actively being marketed on the web sire [sic], in one of his court documents Mr. Tamburo stated that 'I lack the funds required to complete the programs

[CompuPed millennium™] [sic]. For a pdf copy of the court document please see: http://k9ped.com/mbfsbankruptcy.pdf [sic]
1st Am. Cplt., ¶ 10.

Counsel focuses on the minutiae, and not the total statement. That's not allowed; a libel is reviewed for its impact as a whole. *Myers v. Levy*, 348 Ill. App. 3d at 920. The "gist" and "sting," the pertinent angle, of the first disparagement is *not* John's bankruptcy filing. It was, and remains to this day, the notion that John was selling an "unreleased software program" that he had no intention to complete: "Please use caution when purchasing any unreleased software products...Although it is actively being marketed...Tamburo stated that 'I lack the funds required to complete...' CompuPed [M]illennium." Andrews, knowing better, twisted a superseded court document (1st Am. Cplt., ¶ 13) into an accusation that John was actively marketing something he had no ability or desire to finish. Considering Plaintiff's Exhibit 1, Andrews is doing what psychologists call "projecting."

Andrews knew the falsehood of what he wrote as he wrote it. At the time Andrews released this statement, John was continually releasing updates to the pre-release version of the program, and, contrary to the imputation of the Memo at pp.1, 22, John's customers were free to download the pre-release program use it, and suggest improvements. John Aff., ¶ 14. Andrews falsely swears that CompuPed Millennium was unavailable; it was freely available for download at all relevant times hereto. *Id.*

Andrews knew that the statement he quoted was made obsolete in March, 2005, when the court granted his motion to convert from Chapter 7 to 13. Yet Andrews, who has written harassing emails to John's technical support manager and has harassed John in email, calling him, *inter alia*, a "slimeball," (John Aff. ¶ 16), acted with pure hate, looking to destroy John's livelihood by any means possible, decency and the law notwithstanding. So he made up the false

accusation of a criminal act and posted it to his own web site in the First Disparagement, and to an unrelated web site, www.gripe2ed.com, in the Fifth. 1st Am. Cplt., ¶¶ 10, 28.

Defendant's myopic defense of "substantial truth" as a defense falls short by asserting no incremental harm. In *Myers v. The Telegraph*, 332 Ill. App. 3d 917, 924 (5th Dist. 2002), the court noted that the "substantial truth" or "incremental harm" defense has not been explicitly adopted, and it *declined* to do so because the defense "conflicts with the common law principles governing per se actions ... The incremental-harm defense eliminates the presumption of damages and reintroduces a need for the plaintiff to prove special damages." The Third District has not adopted this defense, and John respectfully prays that this court follow *Myers* and refuse to do so now.

Even if the substantial truth / incremental harm defense were the law in this district, it is inapposite here. Substantial truth protects where the gist of the statement "substantially true, even though not technically accurate in every detail." *Clarage v. Kuzma*, 342 Ill. App. 3d at 580. The instant case displays something close to the inverse: Andrews selectively uses facts, misstates them, and intertwines them with lies in order to falsely impute criminal conduct onto John. The incremental harm of the falsehood, in this case the criminal act of selling a product under false pretenses, in violation of the Illinois Deceptive Advertising Act, *720 ILCS 295/1a*,[7] is *far* more damaging than filing a bankruptcy petition, a lawful act. See *Myers v. The Telegraph*, 332 Ill. App. 3d at 922, holding that a statement that a person committed a felony when only a misdemeanor had been committed is libel *per se*. It is clear that Andrews intended to falsely impute criminal conduct to John. It is not necessary that a statement charge a criminal offense

[7] To this day, ironically, Andrews promises "free updates" on his web site, and has not finished his "Version 7.0N" update, in unchanged "beta" status since December, 2002. See Plaintiff's Exhibit 1, attached to the First Amended Complaint. It is *Andrews* and not John, who used a false pretense to con potential customers into buying his product. Nor surprisingly, Andrews resorts to even more falsehood in his desperate grab for market share. In so doing, Andrews has violated *720 ILCS 295/1a*, the very crime he to imputed to John. 1st Am. Cplt., ¶ 57.

with the precision of an indictment to be libelous. *Krueger v. Lewis*, 342 Ill. App. 3d at 471. If that difference can justify a libel per se action, accusing someone of a crime when none was committed is certainly libel *per se*.

3.8. John states claims for unfair competition and UDTPA violations.

In the Memo, pp.24-25, counsel wastes an overstuffed page full of long citations to argue that John's common law unfair competition claims should be dismissed because John fails to cite them as claims under the Uniform deceptive Trade Practices Act (UDTPA), 810 ILCS 510/1 et. Seq. However, his citations plainly hold that there *is* a common law right of action for unfair competition! From this confusion, John will attempt to bring order. John also files his motion, under separate cover, to amend to explicitly allege claims under the UDTPA.

Standard of Review: One who, in connection with the marketing of goods or services, makes a representation relating to the actor's own goods, services, or commercial activities that is likely to deceive or mislead prospective purchasers to the likely commercial detriment of another under the rule stated in § 3 is subject to liability to the other. *Restatement (3d) of Unfair Competition, § 2.* A representation is to the likely commercial detriment of another if: (a) the representation is material, in that it is likely to affect the conduct of prospective purchasers; and (b) there is a reasonable basis for believing that the representation has caused or is likely to cause a diversion of trade from the other or harm to the other's reputation or good will. *Restatement (3d) of Unfair Competition, § 3.*

3.8.1. John properly pleads unfair competiton at the common law and the UDTPA, and asks leave to amend to explicitly plead UDTPA violations.

Andrews, in each and every one of the unfair competition counts, seeks to deceive viewers of www.k9ped.com into buying his product, and / or abandoning John's. Under § 2 of

the Restatement, as quoted *supra*, the statement that is deceptive need not be literally false. It only needs to be "likely to deceive", as in the deception inherent in imputing that John was illegally selling a computer program he had no intention to complete *after he completed it*, ad in the First Disparagement, or in telling telephone callers that John was about to be liquidated in bankruptcy and his technical support services terminated, even though John was not in bankruptcy at the time (Fourth Disparagement), or saying that John was "trick[ing] customers into buying his programs with sale prices and specials," and buying K9Ped would get them free updates. And they "only buy K9-Ped Once," when Andrews had no intention of releasing any of the "free updates" he advertised and has conclusively proven that by refusing to complete the "7.0N" "beta" program for nearly 3½ years as of this writing (the second and third disparagements, free updates promise and free updates repudiation).

In determining if the statement is deceptive, the *perceptions of the audience* control. *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6 (7th Cir.1992). Counsel wastes time trying to whack John's counts down on inapposite technicalities. He does not, and cannot, argue that the statements do deceive, or are not likely to deceive, the "reasonably intelligent" consumer. *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272 (2nd Cir. 1981). Therefore, all of the unfair competition counts must stand.

John also asks, under separate cover, for leave to file his second amended complaint, which explicitly pleads Andrews' UDTPA violations. The unfair competition claims form the bulk of the instant case, inasmuch as Andrews' disparagements and phony promises violate the UDTPA. To do justice under *735 ILCS 5/2-616*, John prays that this court grant leave to amend *instanter*.

4. Conclusion

4.1. Defendant's counsel has, in citing the wrong statute and presenting a commingled motion, violated clear statutes and, in so doing, has waived his client's objections to this court's jurisdiction. *735 ILCS 5/2-301, 735 ILCS 5/2-619.1, In re Schmitt*, 321 Ill. App. 3d 360, 366 (2nd Dist. 2001).

4.2. Even if the defendant had not waived his objections, Andrews' contacts with Illinois amply establish that this court's exercise of jurisdiction comports with both Illinois law and Federal Due Process. *Bombliss v. Cornelsen*, 355 Ill. App. 3d 1107, 1114 (3rd Dist. 2005), *Burger King v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985).

4.3. The First Amended Complaint was properly served within the rules. *Ill. Sup. Ct. R. 11, Ill. Sup. Ct. R. 12, Ill. Sup. Ct. R. 104.* The summons and complaint were properly served. *735 ILCS 5/2-201.*

4.4. Nothing in this case has to do with the terms of service of John's www.mbfs.com web site. Counsel admits that Andrews does not agree to binding arbitration. Therefore, this case has not, by agreement of the parties, been sent to binding arbitration. *Hubbert v. Dell Corp.*, 359 Ill. App. 3d 976, 983 (5th Dist. 2005).

4.5. By well settled Illinois law, the First Amended Complaint relates back to the date the original complaint was filed. *Peoples Gas, Light & Coke Co. v. Austin*, 147 Ill. App. 3d 26, 100 Ill. Dec. 612, 497 N.E.2d 790 (1st Dist. 1986). Before this motion, defendant's counsel admitted this in email to John. Exhibit R-6.

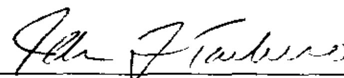
4.6. John states proper claims for Tortious interference with Prospective Economic Advantage. *Schuler v. Abbott Lab.*, 265 Ill. App. 3d 991, 994 (1st Dist., 1993). Deceptive

statements and unfair competition are never privileged. *Soderlund Bros. v. Carrier Corp.*, 278 Ill. App. 3d 606, 620 (1st Dist. 1995).

4.7. John states proper claims for defamation per se and defamation per quod. *Bryson v. News Am. Publs.*, 174 Ill. 2d 77, 88 (1996). The defendant cannot show that the "gist or sting" of Andrews' statements was true. *Myers v. Levy*, 348 Ill. App. 3d 906, 920 (2nd Dist. 2004). The defendant also fails to meet his burden to prove that no reasonable jury could find that his statements were not substantially true. *Clarage v. Kuzma*, 342 Ill. App. 3d 573, 580 (3rd Dist. 2003).

4.8. John states proper claims for Unfair Competition at the common law. *Restatement (3d) of Unfair Competition, § 2-3, Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272 (2nd Cir. 1981).

WHEREFORE, your Plaintiff respectfully prays that this court DENY the defendant's motion and compel him to answer the complaint as amended on the date of the order.



John F. Tamburo
Plaintiff
655 N. LaGrange Rd, Suite 209
Frankfort, Will County, Illinois 60423
815-806-2130

IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS, LAW DIVISION

JOHN F. TAMBURO, D/B/A MAN'S BEST FRIEND SOFTWARE, *Plaintiff*	)	CASE NUMBER: ***06 L 51***
v.	)	***EXHIBIT R-1***
JAMES ANDREWS, D/B/A K9PED *Defendants*	)	

PLAINTIFF'S AFFIDAVIT OPPOSING THE DEFENDANT'S MOTION TO DISMISS

NOW COMES your Plaintiff, John F. Tamburo, and does hereby, on the penalty of perjury under the laws of the State of Illinois, 735 ILCS 5/1-109, swear to the truth of the following statements. If called to testify on the matters contained herein, John F. Tamburo would testify identically. To wit:

1. The availability of product technical support is the main factor that customers in my market use to determine which software to buy. James Andrews knows this, and this is why he told many of my customers, after he knew I was *not* in bankruptcy, that I was about to be imminently liquidated and support for my products would soon cease or become very difficult to obtain.

2. Exhibits R-2 and R-3 are genuine, and were taken by me from the www.k9ped.com web site and printed by me, without alteration on April 5, 2006.

3. www.k9ped.com is the Internet website that contained and still contains, unfairly competitive, deceptive, disparaging remarks directed solely toward me. That web site is James Andrews' *sole* source of income from the K9Ped software.

4. I believe, based on what I have been told by others, that James Andrews has lied to this court in his affidavit, attached to Defendant's memorandum supporting its motion to dismiss as Exhibit B, when he swears that he has only one Illinois customer. The truth of this matter is within Andrews' exclusive control.

5. The terms of use for www.mbfs.com have no bearing on this case. None of the gravamen of this case is related to the usage of www.mbfs.com in any way, directly or indirectly.

6. The summons and complaint were served upon James Andrews by the honorable Sheriff of Washington County, Oregon, on February 6, 2006. After said service, proof of which is duly

filed with this court, Andrews did amend his web site to include the "sixth disparagement," as that term is used in the First Amended Sworn Complaint.

7. After this court granted me leave to file my First Amended Complaint on February 16, 2006, I did file the First Amended Sworn Complaint with the honorable Clerk and serve it upon James Andrews by mailing it to him via Priority Mail, Delivery Confirmation Requested, Postage Prepaid, that day.

8. Exhibit R-6 is genuine. It was printed from my email log unaltered on April 4, 2006.

9. The Fourth Disparagement was first uttered no earlier than June, 2005. Andrews continued to utter it until at least January 2006. I believe that he continues to utter the fourth disparagement to my potential customers to this very day.

10. The only changes made to those parts of the First Amended complaint that related to the incidents complained of in the First Amended Complaint were typographical error corrections.

11. Andrews knew, from his thorough dirt-digging expedition into the Illinois web site for the United States District Court for the Northern District of Illinois, that I was not at risk of liquidation at any time when he uttered the fourth disparagement.

12. Defendant misrepresented my statement in the PDF Document. As Andrews knew at the time he published the first disparagement, I filed the document quoted in the first disparagement in an effort to cause the court to grant my pending motion to covert from Chapter 7 to Chapter 13. The import of the document was *not* that I could not afford to complete Compuped Millennium, it was that, *if the conversion were not granted*, I would not be able to afford to complete CompuPed Millennium.

13. In October 2005, Andrews was made aware of the completion of CompuPed Millennium by at least one person, and after having been made aware, he kept the First Disparagement posted on www.k9ped.com.

14. Andrews lied when he said that Compuped Millennium was unavailable. He was at all times aware of the fact that CompuPed Millennium was available to freely download, in pre-release form, continuously from its first Alpha test to its final edition, much like the K9Ped "7.0N" Beta edition that he refuses to complete for three and one-half years running.

15. Andrews reviewed documents that show that the Trustee paid two of my creditors, in their entirety nearly $4,000.00, that I had previously paid in to the trustee, by leave of court with no objection from me. He knew the falsehood and deceptiveness of the sixth disparagement when he posted it.

16. In 2002, Andrews began barraging me with insulting and harassing emails, in fact so many that I eventually had to install a block on his email address into my Exchange Server rules. In one email he referred to me as a "slimeball." In mid-2004, Andrews began to harass my product support manager, Kathi Charpie, with emails designed to cause her to leave my employ by disparaging me.

FURTHER YOUR AFFIANT SAYETH NAUGHT

DATED APRIL 5, 2006

John F. Tamburo

K9-Ped Demo Program Download Page

April 10, 2002 - Version 6.5C Now Available

This release includes the CompuPed(tm), TBS(tm) and BreedMate(tm) import features and should fix all known problems with previous versions. Please contact jim@azdogs.com immediately if you experience any problems.

* * * New Easier Installation Procedure * * *

Please read the instructions below then click on one of these links to download the installation file. If you have any problems installing the file please check that your file size matches the values shown to make sure you received the entire download..

Program Downloads

Program with Westie Database	**5,895 KB**	**Program with SCWT Database**	**5,768 KB**
Program with Golden Database	**6,170 KB**	**Program with Chinese Crested Database**	**5,748 KB**
Program with no database	**5,137 KB**	**Additional download for MAC VPC Users**	**1,282 KB**
Self Extracting Program Update	**968 KB**	**Program Update ZIP file**	**805 KB**
Breed Database Downloads		**Breed Pictures for One-Paw-Bandit**	

For other breed databases provided by K9-Ped or to try K9-Ped with your CompuPed, TBS or Breedmate data please download the "Program with no database". To use a a K9-Ped provided database install the program and before running the program download and unzip your breed file. The pedigree data provided is for demonstration use only. Known errors exist in these database files.

Special Instructions for MAC Virtual PC users
Instructions for updating existing installation

If you are having difficulty downloading the demo files you can purchase a CD-ROM ($8.00) with all of the above download files by clicking the paypal logo.

The preferred method of purchase is to download and install the program and use the PayPal button on the about page of the program. This will send a message that includes your System ID so you can receive your User Code quickly. There are no additional downloads required. Your user code will unlock the full features o the program.

You can also purchase a license to run the full program ($99.00) by clicking this logo.

Download Instructions:

Installing the program is now just a two step process, downloading the self extracting / self installing file and running the downloaded file. You may want to print this page for reference use during the installation process.

Downloading the self-extracting / self running file

Click on the above link and use the "Save as" or "Copy file.. option and save the file to your desktop. If

you prefer to save the installation file to a new folder see instructions below on creating a new folder directly from the save as window. During the installation process you will have to go to this folder instead of clicking on a desktop icon.

Downloading the file may take some time depending on your internet connection speed. At 4 Kbytes per second it will take at least 30 minutes.

Installing the program

k9pedbinst.... < Installation Icon

Go to your desktop and double click on the installation icon (pedpinst.exe) to run the combination file extraction & installation program.

When the installation program starts, selecting the defaults (Select "Next" at each screen) will work fine and produce a standard installation.

The installation program installs the program, the Borland Database Engine and places the K9-Ped icon on the desktop. When the installation is complete you can right click on the installation icon and select delete.

If you have downloaded the "empty" demo to use a different breed unzip the breed file into the c:\k9ped\backup folder AFTER the installation and BEFORE you run the program for the first time.

Double-click on the K9-Ped icon to run the program. Until you are a registered user you will see a message indicating that your use is limited to the sample database. Click OK and the program will continue to load.

The first time you run the program you will be prompted to select the demo database you wish to use.

Getting your User Code Number:

K9-Ped is user code protected. Without the proper user code you are restricted to using the sample database with no deletions and limited additions.

Your system ID # can be found by selecting "Help" from the menu at the top of the program window and selecting "About". If you have purchased the program or are a beta test site, send this number to jim@azdogs.com . You will receive your unique user code # by return e-mail. Your code will only work with your system.

Special instructions for updating very old versions

Due to a database structure change for breeding information, the programs downloaded prior to 14 November 2000 cannot be updated by just downloading a new version of the program. If your version of the program is over fifteen months old you will need to Back up your data. Then rename the k9ped folder to k9pedx. Download and re-install the program. Restore your data and delete the k9pedx folder.

Normal Program Update

The latest version of the program includes many new features and improved help files. If you are not comfortable using an un-zip program or do not have an "unzip" program you should use the Self Extracting file. Save the self extracting file to the desktop and double click it for an automatic upgrade. If you use the zip file it should be extracted to the c:\k9ped folder (or the folder containing the k9ped program if you did not do a default install) with "Overwrite all files" selected.

NOTE: You will need to download and run the breedpic.exe file to use the "One Paw Bandit" game. You only need to do this one time.

If you need a copy of an un-zip program for windows you can download a trial version of WinZip by clicking here.

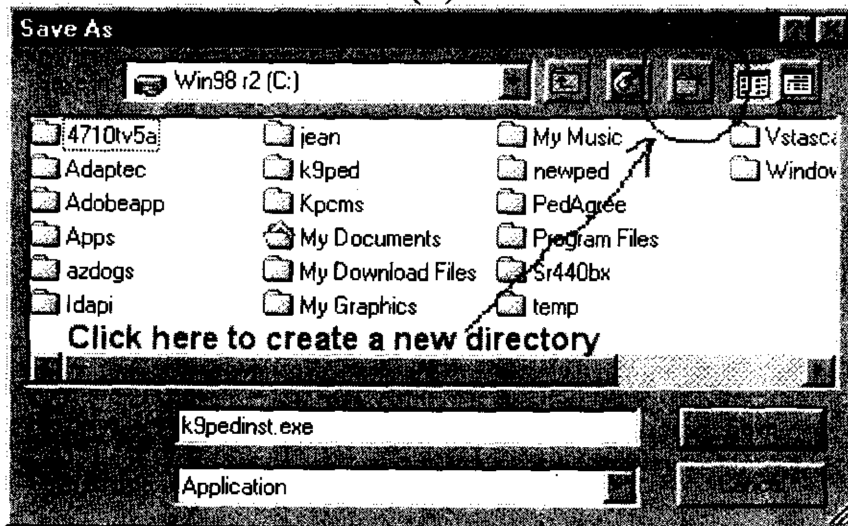
MAC Virtual PC Users

Some versions of MAC Virtual PC may not work properly with the compressed format of the k9ped.exe file. If you are experiencing problems please download and install the uncompressed version here.

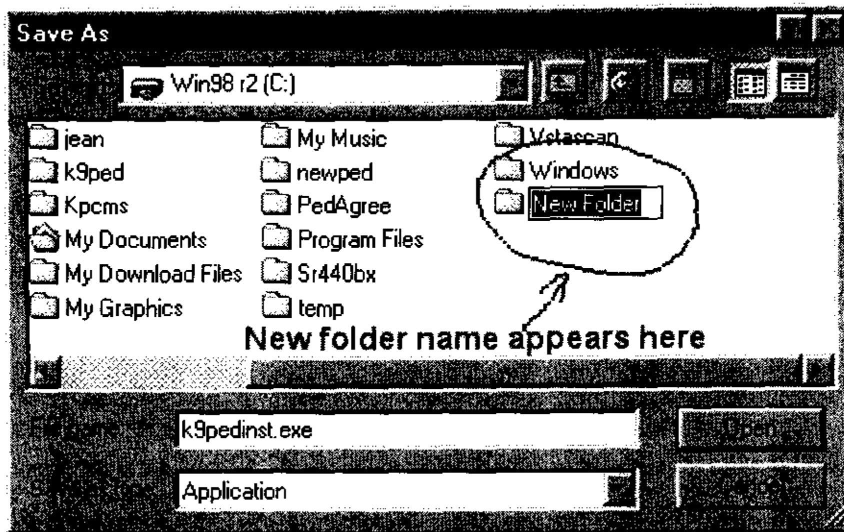
Uncompressed k9ped.exe file (1,287 KB).

How to create a new folder (aka directory) from the "Save As" window

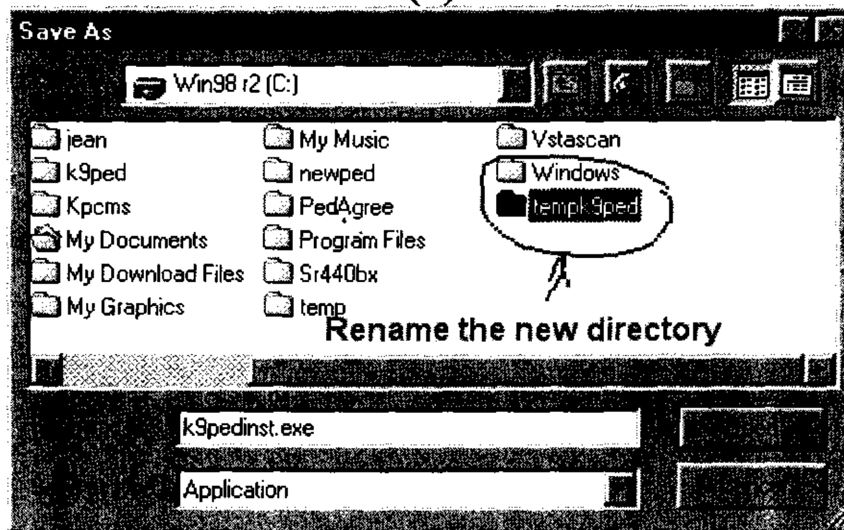
(1)



(2)



(3)



(4)

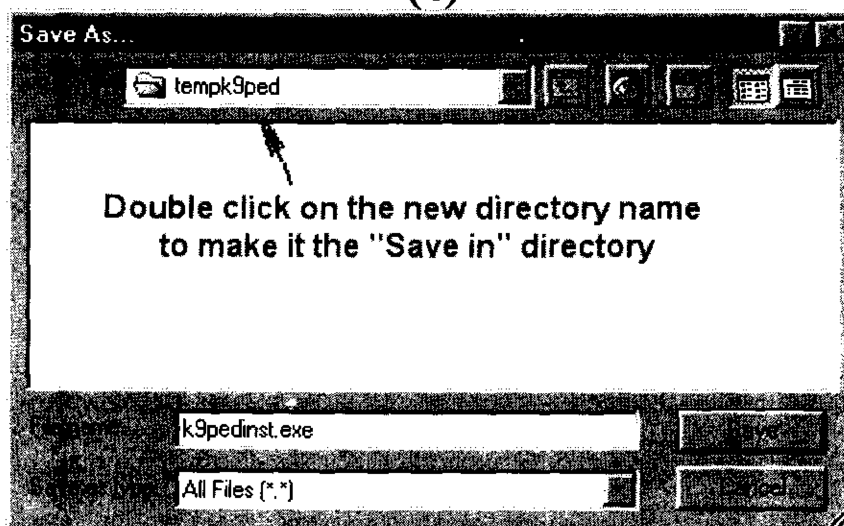


EXHIBIT K-3

jim@azdogs.com

Checkout

Secur

PayPal is the secure payment processor for **jim@azdogs.com**. To continue, please enter the required information belo about PayPal.

Pay To: jim@azdogs.com
Payment For: K9-Ped Pedigree Software Single System License
Currency: U.S. Dollars
Amount: $99.00 USD
Shipping & Handling: $0.00 USD
Total Amount: $99.00 USD

If you do not currently have a PayPal account, click here

PayPal Login

Already have a PayPal account? Please log in below

Email Address: johntam@mbfs.com Forgot your email?
PayPal Password: Forgot your password?

PayPal protects your privacy and security.
For more information, read our User Agreement and Privacy Policy.

EXHIBIT
K-4

k9ped.com web site use terms and conditions

First the standard legal stuff:

K9-Ped makes every effort to ensure, but cannot and does not guarantee, and makes no warranties as to, the accuracy of any information on the site. K9-Ped assumes no liability or responsibility for any errors or omissions in the content of this site and further disclaims any liability of any nature for any loss howsoever caused in connection with using this website.

Now about accessing and linking to the site:

There are no restrictions on linking to the home page or any other page on the site. K9-Ped encourages links to any page.

You have the right to express your opinion. You have the right to include any comment, positive or negative, about the site, the company or the K9-Ped program in combination with a link to the site. If you do provide a link with a negative comment please demonstrate common courtesy and contact jim@azdogs.com to determine if there is any reasonable way to change your opinion and have the negative comment removed.

Please observe applicable copyright law with respect to the material provided on the site.

The demo version of the K9-Ped program , any other programs provided on the k9ped.com site and any breed data files available on the site may be freely copied and distributed to others using any available technology. K9-Ped encourages users to provide their friends and associates with direct copies or linked access to the K9-Ped program as provided on the site. K9-Ped encourages the free exchange of pedigree data files.

It is, however, a violation of contract law to attempt to defeat the "demo mode" restrictions contained in the K9-Ped Program. The use of the K9-Ped program without the "demo mode" restrictions requires payment of the license fee.

The breed files on the site are provided free as "starter files". There is no guarantee to the accuracy of these files. Please do not base your purchase decision on the availability of these files without downloading the demo program and loading the breed file to determine the usefulness of the data.

If you send any breed information to K9-Ped it will only be posted on the web site if you provide expressed permission to do so.

Once breed information is posted on the web site there is no copyright protection or other restriction on the distribution. If you want to restrict the distribution of your own data it is recommended that the data files only be sent to others who you trust not to provide your data to anyone else.

EXHIBIT R-5

Instructions

1. Please use a laser or laser-quality printer.
2. Adhere shipping label to package with tape or glue- DO NOT TAPE OVER BARCODE. Be sure all edges are secure. Self-adhesive label is recommended.
3. Place label so it does not wrap around the edge of the package.
4. Each shipping label number is unique and can be used only once – DO NOT PHOTOCOPY.
5. Please use this shipping label on the "ship date".
6. If a mailing receipt is required, present the article and online label record at a post office for postmark.

Customer Online Label Record

Delivery Confirmation® Service Number:

9101 8052 1390 7002 8193 23

Priority Mail, Flat Rate with electronic Delivery Confirmation Service*
Electronic Option Delivery Confirmation Service Fee: $ 0.00
Total Postage & Fees: $ 4.05
Weight: 1 lb
Printed: 02/24/2006 Ship Date: 02/24/2006
PO ZIP Code: 60423

FROM: John Tamburo
Man's Best Friend Software
655 N Lagrange Rd Ste 209
Frankfort, IL 60423-2913

TO: James Andrews, d/b/a K9Ped
17811 NW Collins Rd
North Plains, OR 97133-8309

USPS
Postmark
Here

*Postmark required if fee refund requested. Delivery information is not available by phone for the electronic option. A copy of the recipient's signature will be faxed or mailed upon request by visiting the track & confirm page at www.usps.com or calling 1-800-222-1811.

This item was printed using Endicia Internet Postage (www.endicia.com) for account 502757 (Device ID is 071V00502757)

Account Piece number: 6394

U.S. Postal Service Status:
Your item was delivered at 9:56 am on February 27, 2006 in NORTH PLAINS, OR 97133.

Notice of Delivery
1st Am. Cplt.

Reply Reply to all Forward Close

From: Charles Lee Mudd Jr.
Sent: Tue 2/28/2006 12:55 AM
To: John F. Tamburo
Cc:
Subject: Re: Service on Jim Andrews
Attachments:

EXHIBIT R-6

View As Web Page

John:

See below:

On Feb 27, 2006, at 10:35 PM, John F. Tamburo wrote:

> Dear Charles,
>
> First, please be aware of the history. On Feb 6, 2006, Andrews was personally served with summons and complaint. On Feb 16, 2006, the court granted me leave to file my first amended complaint. On the 24th, I filed that complaint with the court. Upon filing, I fully complied with Rule 104(b): "Filing of Papers and Proof of Service. Pleadings subsequent to the complaint, written motions, and other papers required to be filed shall be filed with the clerk with a certificate of counsel or other proof that copies have been served on all parties who have appeared and have not theretofore been found by the court to be in default for failure to plead."

Mr. Andrews has not appeared and thus Rule 104(b) does not apply.

> At the time you started discussing the First Amended complaint, I wondered about the situation and did research. Rule 104(b) applies. I have complied with the service requirements of Rule 11(b)(3), which has been held to amplify Rule 104 when dealing with any pleading other than the original complaint attached to summons.

I do not see this changing the fact that Mr. Andrews is a party that has not yet appeared.

interesting issue to research.

Charles Mudd

Have a great day.

Thanks
John Tamburo

-----Original Message-----
From: Charles Lee Mudd Jr.
Sent: Mon 2/27/2006 9:02 PM
To: John F. Tamburo
Cc:
Subject: Service on Jim Andrews

John:

Have you had the amended complaint personally served with a process served (as required) on Jim Andrews?

Please advise.

Charles Mudd

Charles Lee Mudd Jr.

Law Offices of Charles Lee Mudd Jr.

3344 North Albany Avenue

Chicago, Illinois 60618

773.588.5410

773.588.5440 (facsimile)

www.muddlawoffices.com

cmudd@muddlawoffices.com <mailto:cmudd@muddlawoffices.com>

Member

Former Member, Board of Directors

Northcenter Chamber of Commerce

Chicago, Illinois

www.northcenterchamber.org

Adjunct Faculty

John Marshall Law School

Former Member, Section Council

Intellectual Property Section

Illinois State Bar Association

This email has been scanned by the MessageLabs Email Security System.
For more information please visit http://www.messagelabs.com/email

IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS, LAW DIVISION

JOHN F. TAMBURO, D/B/A MAN'S BEST FRIEND SOFTWARE,
Plaintiff

v.

JAMES ANDREWS,
D/B/A K9PED
Defendants

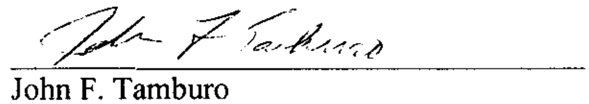
CASE NUMBER: ***06 L 51***

FILED 06 APR -6 AM 8:39 CIRCUIT CLERK WILL CO. ILLINOIS

NOTICE OF FILING

To: Charles Lee Mudd, Jr., Esq.
Law Offices of Charles Lee Mudd, Jr.
3344 N. Albany St
Chicago, IL 60618

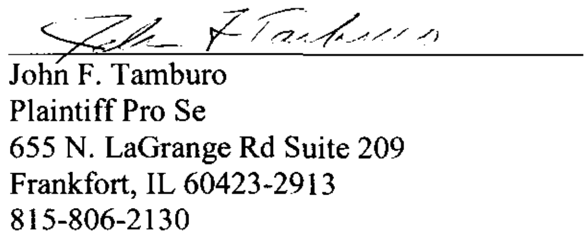
BE NOTIFIED that, on April 6, 2006, in Open Court, I shall present the attached opposition and memorandum to the Honorable Herman Haase in open court, and shall file the same with the honorable Clerk.



John F. Tamburo

PROOF OF SERVICE

I, JOHN F. TAMBURO, plaintiff, do hereby on the penalty of perjury under the law of the state of Illinois, do hereby swear that I delivered a copy of this notice and all attachments to defendant's counsel in open court on April 6, 2006.



John F. Tamburo
Plaintiff Pro Se
655 N. LaGrange Rd Suite 209
Frankfort, IL 60423-2913
815-806-2130

IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS, LAW DIVISION

JOHN F. TAMBURO, D/B/A MAN'S BEST FRIEND SOFTWARE, *Plaintiff*	)	CASE NUMBER: ***06 L 51***
v.	)	
JAMES ANDREWS, D/B/A K9PED *Defendants*	)	

WILL CO. CIRCUIT CLERK WILL CO. ILLINOIS

PLAINTIFF'S OPPOSITION TO THE DEFENDANT'S MOTION TO DISMISS

NOW COMES John F. Tamburo, d/b/a Man's Best Friend Software ("John"), and does hereby state the following to oppose the defendant's motion to dismiss:

1. Defendant's counsel has, in citing the wrong statute and presenting a commingled motion, violated clear statutes and, in so doing, has waived his client's objections to this court's jurisdiction. *735 ILCS 5/2-301, 735 ILCS 5/2-619.1, In re Schmitt*, 321 Ill. App. 3d 360, 366 (2nd Dist. 2001).

2. Even if the defendant had not waived his objections, Andrews' contacts with Illinois amply establish that this court's exercise of jurisdiction comports with both Illinois law and Federal Due Process. *Bombliss v. Cornelsen*, 355 Ill. App. 3d 1107, 1114 (3rd Dist. 2005), *Burger King v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985).

3. The First Amended Complaint was properly served within the rules. *Ill. Sup. Ct. R. 11, Ill. Sup. Ct. R. 12, Ill. Sup. Ct. R. 104.* The summons and complaint were properly served. *735 ILCS 5/2-201.*

4. Nothing in this case has to do with the terms of service of John's www.mbfs.com web site. Counsel admits that Andrews does not agree to binding arbitration. Therefore, this case has

not, by agreement of the parties, been sent to binding arbitration. *Hubbert v. Dell Corp.*, 359 Ill. App. 3d 976, 983 (5th Dist. 2005).

5. By well settled Illinois law, the First Amended Complaint relates back to the date the original complaint was filed. *Peoples Gas, Light & Coke Co. v. Austin*, 147 Ill. App. 3d 26, 100 Ill. Dec. 612, 497 N.E.2d 790 (1st Dist. 1986). Before this motion, defendant's counsel admitted this in email to John. Exhibit R-6.

6. John states proper claims for Tortious interference with Prospective Economic Advantage. *Schuler v. Abbott Lab.*, 265 Ill. App. 3d 991, 994 (1st Dist., 1993). Deceptive statements and unfair competition are never privileged. *Soderlund Bros. v. Carrier Corp.*, 278 Ill. App. 3d 606, 620 (1st Dist. 1995).

7. John states proper claims for defamation per se and defamation per quod. *Bryson v. News Am. Publs.*, 174 Ill. 2d 77, 88 (1996). The defendant cannot show that the "gist or sting" of Andrews' statements was true. *Myers v. Levy*, 348 Ill. App. 3d 906, 920 (2nd Dist. 2004). The defendant also fails to meet his burden to prove that no reasonable jury could find that his statements were not substantially true. *Clarage v. Kuzma*, 342 Ill. App. 3d 573, 580 (3rd Dist. 2003).

8. John states proper claims for Unfair Competition at the common law. *Restatement (3d) of Unfair Competition, § 2-3, Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272 (2nd Cir. 1981).

John furthermore attaches a memorandum of law and exhibits to oppose this motion, and in such memorandum, fully develops the above points and authorities.

WHEREFORE, your Plaintiff respectfully prays that this court DENY the defendant's motion and compel him to answer the complaint as amended on the date of the order.

John F. Tamburo
Plaintiff
655 N. LaGrange Rd, Suite 209
Frankfort, Will County, Illinois 60423
815-806-2130

IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS, LAW DIVISION

JOHN F. TAMBURO, D/B/A MAN'S BEST FRIEND SOFTWARE, *Plaintiff*	)	CASE NUMBER: ***06 L 51***
v.	)	
JAMES ANDREWS, D/B/A K9PED *Defendants*	)	

FILED 06 APR -6 AM 8:39 WILL COUNTY CIRCUIT CLERK WILL COUNTY, ILLINOIS

PLAINTIFF'S MEMORANDUM OF LAW
OPPOSING THE DEFENDANT'S MOTION TO DISMISS

John F. Tamburo, Plaintiff *Pro Se*
655 North LaGrange Rd., Suite 209
Frankfort, Will County, Illinois 60477
815-806-2130

Table Of Contents

Table Of Authorities ____ iii
1. Introduction ____ 1
2. The Facts ____ 1
3. Argument ____ 2
  3.1. Defendant has, by citing the wrong statute and then engaging in a massive attack against the merits, waived all objections to personal jurisdiction. ____ 2
  3.2. Even if jurisdictional arguments were not waived, this court properly exercises personal jurisdiction over the defendants. ____ 4
    3.2.1. Andrews runs www.k9ped.com as a fully interactive web site that completes sales online. ____ 5
    3.2.2. Andrews admits sales into Illinois. Even the one sale to which he admits is enough to bind him to Illinois' personal jurisdiction. ____ 6
    3.2.3. Andrews legally traveled to Illinois when he obtained documents from courts in Illinois to use them to damage the Plaintiff. ____ 6
    3.2.4. Andrews intended to affect an Illinois interest and thus submitted to Illinois' jurisdiction. ____ 7
    3.2.5. The totality of Andrews' contacts with Illinois satisfies Federal Due Process concerns. ____ 7
  3.3. The gravamen of this case does not involve the website www.mbfs.com, and its terms and conditions arbitration clause is not invoked. ____ 8
  3.4. Defendant was properly served with the original and amended complaints in this matter, according to the rules. ____ 9
  3.5. The Amended Complaint relates back to the original by well-settled law; defendant's counsel admitted this in correspondence. ____ 10
  3.6. John states claims for Tortious Interference with Prospective Economic Advantage. ____ 11
    3.6.1. John properly pleads a class of customers with whom he had an expectancy to do business. ____ 12
    3.6.2. John pleads facts underlying all of the other elements of Tortious Interference with Prospective economic advantage. ____ 13
    3.6.3. Defendant's tortuous interferences did not convey truthful information. ____ 14
  3.7. John states proper claims for defamation. ____ 15
    3.7.1. Standard of Review ____ 15
    3.7.2. John alleges all defamations with particularity. ____ 16
    3.7.3. John meets the libel *per se* standard. ____ 16
    3.7.4. John meets the libel *per quod* standard. ____ 17
    3.7.5. The defendant fails to meet his burden to gain dismissal on the ground of "substantial truth." ____ 18
  3.8. John states claims for unfair competition and UDTPA violations. ____ 21
    3.8.1. John properly pleads unfair competiton at the common law and the UDTPA, and asks leave to amend to explicitly plead UDTPA violations. ____ 21
4. Conclusion ____ 23

Table Of Authorities

Cases

Abbott Laboratories v. Mead Johnson & Co., 971 F.2d 6 (7th Cir.1992) ____ 22

Boatmen's National Bank of Belleville v. Direct Lines, Inc., 167 Ill. 2d 88, 102 (1995) ____ 11

Bombliss v. Cornelsen, 355 Ill. App. 3d 1107, 1114 (3rd Dist. 2005) ____ 5, 6, 7

Bryson v. News Am. Publs., 174 Ill. 2d 77, 110 (1996) ____ 15, 16, 17

Burger King v. Rudzewicz, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985) ____ 5, 6

Clarage v. Kuzma, 342 Ill. App. 3d 573, 581 (3rd Dist. 2003) ____ 18, 20

Club Assistance Program, Inc. v. Zukerman, 594 F. Supp. 341, 346-47 & nn. 9-11 (N.D. Ill. 1984) ____ 7

Crinkley v. Dow Jones & Co, 67 Ill. App. 3d 869, 385 N.E.2d 714 (1st Dist., 1978) ____ 12

Gaidar v. Tippecanoe Distribution Service, Inc., 299 Ill. App. 3d 1034, 1041 (1st Dist. 1998) ____ 4

Harshman v. DePhillips, 2006 Ill. LEXIS 316 at *45-46 (Ill. Sup. Ct. 2006) ____ 4

Hubbert v. Dell Corp., 359 Ill. App. 3d 976, 983 (5th Dist. 2005) ____ 9

In re Schmitt, 321 Ill. App. 3d 360, 366 (2nd Dist. 2001) ____ 3, 4

Krueger v. Lewis, 342 Ill. App. 3d 467, 471 (1st Dist. 2003) ____ 15

Kutner v. DeMassa, 96 Ill. App. 3d 243, 248 (1st Dist. 1981) ____ 4

Myers v. Levy, 348 Ill. App. 3d 906, 920 (2nd Dist. 2004) ____ 18, 19

Myers v. The Telegraph, 332 Ill. App. 3d 917, 924 (5th Dist. 2002) ____ 20

O'Brien v. State Street Bank & Trust Co., 82 Ill. App. 3d 83, 85 (4th Dist., 1980) ____ 12

People ex rel. Department of Professional Regulation v. Manos, 202 Ill. 2d 563, 568 (2002) ____ 4

Peoples Gas, Light & Coke Co. v. Austin, 147 Ill. App. 3d 26, 100 Ill. Dec. 612, 497 N.E.2d 790 (1st Dist. 1986) _ 10

Royal Extrusions Limited v. Cont'l Window & Glass Corp., 349 Ill. App. 3d 642 (3rd Dist. 2004) ____ 6

Schuler v. Abbott Lab., 265 Ill. App. 3d 991, 994 (1st Dist., 1993) ____ 12, 13, 15

Soderlund Bros. v. Carrier Corp., 278 Ill. App. 3d 606, 620 (1st Dist. 1995) ____ 14, 15

Urbaitis v. Commonwealth Edison, 143 Ill. 2d 458, 475, 159 Ill. Dec. 50, 575 N.E.2d 548 (1991) ____ 12

Zazove v. Pelikan, Inc., 326 Ill. App. 3d 798, 802 (1st Dist. 2001) ____ 4, 7

Statutes

720 ILCS 295/1a ____ 16, 20

725 ILCS 5/2-209 ____ 6

735 ILCS 5/2-201 ____ 10

735 ILCS 5/2-301 ____ 2, 3

735 ILCS 5/2-615 ____ 14

735 ILCS 5/2-616 ____ 22

735 ILCS 5/2-619 ____ 2

735 ILCS 5/2-619.1 ____ 2, 3

810 ILCS 510/1 ____ 21

Other Authorities

Restatement (3d) of Unfair Competition, § 2 ____ 21

Restatement (3d) of Unfair Competition, § 3 ____ 21

Rules

Ill. Sup Ct. R. 104 ____ 9

Ill. Sup Ct. R. 105 ____ 9, 10

Ill. Sup Ct. R. 11 ____ 10

Ill. Sup Ct. R. 12 ____ 10

1. Introduction

Your Plaintiff, John F. Tamburo ("John") does business as Man's Best Friend Software. Defendant James Andrews, d/b/a K9Ped ("Andrews"), attempts to compete with John in the business of animal-related software. There is a long history of acrimony between the parties, little of which is relevant to the instant motion. What is relevant: Andrews' conduct egregiously violates established norms of decent business competition. Andrews knowingly and falsely accused John of criminal acts, with the evil goal of usurping John's customer base. Furthermore, he manufactured other statements, pure lies that have deceived the buying public. Long settled law holds that these acts are illegal. John, in good faith and after careful research of the law and facts, seeks justice from this court.

Andrews' counsel, in a memorandum so laced with invective and impertinent matter that it flouts the dignity of this court, sets forth numerous red herrings as he attempts to demonize John, the *victim* of a relentless attack by an unsuccessful, jealous, bitter competitor. Notably, counsel has, by long-settled law, waived his client's (meager) objections to personal jurisdiction.

The amended complaint states claims and cannot be dismissed. Andrews has no right to compete in the gutter and then arrogantly demand that this court bless his amoral conduct. Therefore, John prays that this court deny the motion at bar, and order Andrews to answer forthwith.

2. The Facts

Defendant's statement of "facts" is loaded with impertinent matter, and some outright falsehoods, designed to prejudice this court against John. To the extent that the First Amended Sworn Complaint conflicts with the "facts" averred by the defendant, John disputes those facts.

John further relies upon all of the fact allegations in the First Amended Complaint, and cites to them herein, as appropriate.

3. Argument

3.1. Defendant has, by citing the wrong statute and then engaging in a massive attack against the merits, waived all objections to personal jurisdiction.

Counsel's gigantic, bloated Memorandum of law[1] supporting defendant's motion to dismiss ("Memo"), p. 3, attempts to state that *735 ILCS 5/2-619* permits motions that object to "personal jurisdiction." This is incorrect. The statute that permits objection to personal jurisdiction is *735 ILCS 5/2-301*, as this court certainly knows, and defendant's counsel *should* know. It is black letter law that arguments directed to the merits waive objections to personal jurisdiction. See *735 ILCS 5/2-301(a), (a-5).*

Section 2-301 as amended in 2000, does address the use of the *735 ILCS 5/2-619.1* standard of labeling motions to dismiss brought under multiple statutes. However, counsel fails to label the motion and therefore waives all jurisdictional objections. Please read the statutes:

735 ILCS 5/2-301(a) (2000), in pertinent part:

> (a) Prior to the filing of any other pleading or motion other than a motion for an extension of time to answer or otherwise appear, a party may object to the court's jurisdiction over the party's person, either on the ground that the party is not amenable to process of a court of this State or on the ground of insufficiency of process or insufficiency of service of process, by filing a motion to dismiss the entire proceeding or any cause of action involved in the proceeding or by filing a motion to quash service of process. Such a motion may be made singly or included with others in a combined motion, *but the parts of a combined motion must be identified in the manner described in Section 2-619.1 [735 ILCS 5/2-619.1]*. [emphasis supplied]

[1] The custom in Illinois is to file a memorandum of law no longer than fifteen (15) pages, using double-spaced type, of a size of 12 points. In fact, this is the rule in many jurisdictions, including the U.S. Northern District of Illinois and Cook County. Defendants' Memorandum is spaced at 1½ lines, and contains 25 pages of argument, plus 5 pages of contents, for a total of 30 pages. At least counsel could have avoided 1½-line spacing in order to jam another 50% more words into his memorandum. However, since John could not locate an explicit 12th circuit rule limiting the length and format of memoranda of law, John limits his objection to this footnote.

735 ILCS 5/2-301(a-5) (2000), in pertinent part:

> (a-5) If the objecting party files a responsive pleading or a *motion* ... prior to the filing of a motion *in compliance with subsection (a)*, that party waives all objections to the court's jurisdiction over the party's person. [emphasis supplied]

735 ILCS 5/2-619.1, in the whole:

> Combined motions. Motions with respect to pleadings under Section 2-615 [735 ILCS 5/2-615], motions for involuntary dismissal or other relief under Section 2-619 [735 ILCS 5/2-619], and motions for summary judgment under Section 2-1005 [735 ILCS 5/2-1005] may be filed together as a single motion in any combination. A combined motion, however, shall be in parts. Each part shall be limited to and shall specify that it is made under one of Sections 2-615 [735 ILCS 5/2-615], 2-619 [735 ILCS 5/2-619], or 2-1005 [735 ILCS 5/2-1005]. Each part shall also clearly show the points or grounds relied upon under the Section upon which it is based.

Moreover, the courts have ruled upon the 2000 amendment to section 2-301. It does *not* permit the inclusion of 2-615 and 2-619 arguments in the 2-301 motion. The only reported case on this subject is clear. See *In re Schmitt*, 321 Ill. App. 3d 360, 366 (2nd Dist. 2001):

> "[W]e interpret the legislature's changes [effective 2000] to section 2--301 to evince its intent to permit a party to file a motion or other responsive pleading *after the party objects to the court's jurisdiction over the party's person.* Moreover, as long as the party files the motion or other responsive pleading *after* he or she objects to the court's jurisdiction over the party's person, the party does not waive its objections to the court's jurisdiction over the party's person."

In re Schmitt, 321 Ill. App. 3d at 366 [emphasis supplied]. In the instant case, counsel did not wait until after he filed the motion objecting to this court's jurisdiction over Andrews. He has commingled his arguments in one motion, not separating them at all. The 619.1 statute, set forth *supra*, is unequivocal and clear. "A combined motion, however, shall be in parts. Each part shall be limited to and shall specify that it is made under one of" the sections listed therein, or section 2-301. Counsel has further mislabeled the 2-301 arguments as 2-619 arguments. The

memo *attempts* to obey 2-619.1, but *the memo is not the motion.* Also, the memo mislabels the arguments and breaches the statute. Counsel breaches the clear, unambiguous language of sections (a) and (a-5) of the statute. The most fundamental rule of statutory construction is that where the language of a statute is clear and unambiguous, the court must enforce it as written. It may not annex new provisions or substitute different ones, or read into the statute exceptions, limitations, or conditions which the legislature did not express. *People ex rel. Department of Professional Regulation v. Manos*, 202 Ill. 2d 563, 568 (2002); *Harshman v. DePhillips*, 2006 Ill. LEXIS 316 at *45-46 (Ill. Sup. Ct. 2006). Counsel wrote the motion as a two page blob, and included 2-615 arguments in the same paragraph as the mislabeled 2-619 arguments. The motion was not "in parts," and that is required by sections 2-301 and 2-619.1 See use of the word "shall" in both citations. This court must give effect to the statute as written. Pursuant to black-letter law and *Schmitt*, Andrews has waived all objections to personal jurisdiction. The defendant's motion to dismiss for want of personal jurisdiction must be denied.

3.2. Even if jurisdictional arguments were not waived, this court properly exercises personal jurisdiction over the defendants.

Standard of Review: Statements in plaintiff's pleadings which defendant does not controvert by affidavit are taken as true. *Kutner v. DeMassa*, 96 Ill. App. 3d 243, 248 (1st Dist. 1981). A plaintiff's prima facie case may only be overcome by a defendant's uncontradicted evidence that defeats jurisdiction. *Gaidar v. Tippecanoe Distribution Service, Inc.*, 299 Ill. App. 3d 1034, 1041 (1st Dist. 1998). However, conflicts between the parties' affidavits will be resolved in favor of the plaintiff for purposes of determining whether a prima facie case for *in personam* jurisdiction has been made. *Zazove v. Pelikan*, Inc., 326 Ill. App. 3d 798, 802 (1st Dist. 2001).

3.2.1. Andrews runs www.k9ped.com as a fully interactive web site that completes sales online.

John respectfully refers this court to exhibits R-2 and R-3. John swears to the authenticity of these exhibits in his affidavit, exhibit M-1 (hereinafter "John Aff."), ¶ 2. These exhibits are from Andrews' website, www.k9ped.com, and show that one may easily use that web site from anywhere, *including Illinois*, to transact and complete business with Andrews. The memo, at p.5, admits that Andrews "operates a website from which individuals may purchase his products and obtain other useful information."[2]

The www.k9ped.com website establishes personal jurisdiction over Andrews. See *Bombliss v. Cornelsen*, 355 Ill. App. 3d 1107, 1114 (3rd Dist. 2005). (Jurisdiction established "if the defendant transacts business in foreign jurisdictions via an interactive website where contracts are completed online and the defendant derives profits directly from web-related activity.") Moreover, this web site is the same one that has been used to misrepresent John's financial status (1st Am. Cplt, ¶¶ 41-66), to improperly associate John with puppy mills (1st Am. Cplt, ¶¶ 67-76), to assert that John violates his customers' putative "consumer protection" rights (1st Am. Cplt, ¶¶ 67-76), to accuse John of trickery in his pricing (1st Am. Cplt, ¶¶ 77-83) and to falsely accuse John of committing a crime by selling a product he had no intention to complete (1st Am. Cplt, ¶¶ 41-60). This satisfies the need to have the jurisdictional contact "arise out of or relate to" the gravamen of the instant case. *Burger King v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985). Although at p.11, counsel tries to label the website as "hybrid" under the *Bombliss* test, the exhibits belie the argument. The www.k9ped.com website is fully interactive and makes it easy to complete sales contracts online. www.k9ped.com is, in fact,

[2] This "useful information" includes the disparagements cited in the Amended Complaint.

Andrews' *sole* source of revenue from the defendant business. John Aff., ¶ 3. These facts, under the *Bombliss* test, in and of themselves attorn the defendant to this court's jurisdiction.

3.2.2. Andrews admits sales into Illinois. Even the one sale to which he admits is enough to bind him to Illinois' personal jurisdiction.

The memo, at p.7, and Andrews own affidavit at ¶ 11, admit to at least one sale into Illinois. John believes that Andrews is lying and that there are more Illinois sales, but the proof thereof lies in Andrews' sole control at this time. See John Aff., ¶ 4. Let's assume *arguendo* that there was just the one Illinois sale. A single transaction can form the basis for personal jurisdiction if the defendant intentionally transacts business within Illinois. *Royal Extrusions Limited v. Cont'l Window & Glass Corp.*, 349 Ill. App. 3d 642 (3rd Dist. 2004). Andrews does not state in his affidavit when he acquired his putative single Illinois customer. If it were after the publication of one of Andrews' disparagements, or because of one of them,[3] this would be in and of itself fatally dispositive of his objection to personal jurisdiction. *Id.*

3.2.3. Andrews legally traveled to Illinois when he obtained documents from courts in Illinois to use them to damage the Plaintiff.

Counsel admits that Andrews intentionally accessed the web site of the United States District Court, Northern District of Illinois, to dig up damaging dirt on John. This is a contact with Illinois, and it is closely related to the gravamen of the case. *Burger King v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985). Counsel attempts to argue that it does not "count" as a tortious act under *725 ILCS 5/2-209(a)(2)*, but it does. This act was a visit into Illinois in order to obtain information on an Illinois citizen, with the plan to use it deceptively to damage

[3] As this case progresses, John will discover, from each and every of Andrews' customers, the reasons why they chose to do business with him.

that citizen. The contact arises out and relates to the gravamen of the instant case, making this contact with Illinois, as are the others, dispositive of defendant's jurisdictional objections.

3.2.4. Andrews intended to affect an Illinois interest and thus submitted to Illinois' jurisdiction.

Andrews knew that John resided in Illinois. He entered into the U.S. District Court website in Illinois, maintained in Illinois in order to dig up dirt on an Illinois citizen and use it to attempt to drive him out of business. 1st Am. Cplt., ¶ 37. John accuses Andrews of intentional tortious acts, including libel and tortuous interference with prospective economic advantage. Torts occur where the last event to render the tortfeasor liable happens – that event is the injury. *Zazove v. Pelikan, Inc.*, 326 Ill. App. 3d 798, 808. When the injury is economic, due process is satisfied if the Plaintiff alleges that Defendant intended to affect an Illinois interest. *Zazove*, 326 Ill. App. 3d at 806; *Club Assistance Program, Inc. v. Zukerman*, 594 F. Supp. 341, 346-47 & nn. 9-11 (N.D. Ill. 1984) (collecting Illinois cases).

3.2.5. The totality of Andrews' contacts with Illinois satisfies Federal Due Process concerns.

It is the *totality* of a defendant's contacts with Illinois that disposes of the Federal Due Process issue. *Bombliss v. Cornielsen,* 355 Ill. App. 3d at 1115. In the instant case, (1) Andrews *admits* sales of K9Ped to at least one Illinois customer; (2) Andrews *admits accessing the Illinois web site* of the United States District Court for the Northern District of Illinois in order to dig up dirt on John; (3) Andrews *intentionally* published the disparagements in the complaint, while *knowing that John resided in Illinois*, therefore demonstrating an intent to affect an Illinois interest; and (4) Andrews operates a fully interactive website, www.k9ped.com, that enables the

completion of sales contracts, complete with payment, online. That disposes of Federal Due Process. It also fatally disposes of all of defendant's objections to personal jurisdiction.

3.3. The gravamen of this case does not involve the website www.mbfs.com, and its terms and conditions arbitration clause is not invoked.

Counsel attempts to argue in the memo at p.15 that the terms of service of www.mbfs.com, John's web site, somehow require that this case be dismissed in favor of mandatory arbitration before the National Arbitration Association. Andrews desperately seeks any way he can to avoid culpability for his outrageous acts. Andrews does not cite to any part of the www.mbfs.com website that binds him to the arbitration agreement with respect to the gravamen of the instant case. Instead, he attempts to argue that he has taken umbrage at its terms and wishes to object to them by counterclaim. But, *no part of the instant case rests upon any usage of www.mbfs.com!* Andrews published his disparaging, interfering, and deceptive remarks on www.k9ped.com, not www.mbfs.com. Andrews does not link to www.mbfs.com on his pages. At no time have the terms of service of www.k9ped.com required binding arbitration. See Exhibit R-4. John does not plead a breach of the www.mbfs.com site terms and conditions. In fact, Andrews argues that he is not subject to the terms of use he tries to invoke! See Memo, p.15: "Importantly, in this action, the Defendant disputes 'the enforceability of [plaintiff's] arbitration agreement.' " [bracketed phrase retained]. It would be more "important" had John pled anything remotely connected to the www.mbfs.com site terms and conditions.

Defendant's exhibit B, on its face, sets forth a contract, containing only, by its own words, terms of use for www.mbfs.com. It has no relation to this case. John Aff. ¶ 5. Without such relation, the arbitrator has no personal jurisdiction over either party. A party cannot be compelled to arbitrate unless he has agreed to do so. *Hubbert v. Dell Corp.*, 359 Ill. App. 3d 976,

983 (5th Dist. 2005). Nothing in Defendant's Exhibit B states that the www.mbfs.com terms of use covers Andrews' actions on www.k9ped.com. And if it did, the agreement would be unenforceable. Therefore, the www.mbfs.com terms of use do not apply to this action.

3.4. Defendant was properly served with the original and amended complaints in this matter, according to the rules.

Counsel tries to convince this court to make new law and hold that personal service of an amended complaint is required if defendant has not filed an appearance, *even if the defendant was properly served with summons and complaint.* No authority in the entire history of Illinois has ever held what counsel urges of this court. Unsurprisingly, defendant offers no cogent authority to support his premise.

In the instant case, defendant was served by the sheriff of Washington County, Oregon, on February 6, 2006.[4] The day after service, February 7, 2006, Andrews amended www.k9ped.com to *increase* the vitriol of his attacks, in retaliation for the filing of the instant case. 1st Am. Cplt., ¶ 30. John duly amended his complaint, and moved the court for leave to file it. John Aff. ¶ 6. This court granted leave on February 16, 2006. On February 24, 2006, John filed the amended complaint with the clerk and served the same upon Andrews by Priority mail with tracking, which he received. John Aff., ¶ 7. **John did not increase the *ad damnum* from the original to the amended complaint.**

Defendants' counsel *admits* in Memo, p.16, that Rule 104 is silent on Amended Complaints. He admits that Rule 105 applies to parties in Default; this makes his citation to *public Taxi Service, Inc. v. Ayrton*, 15 Ill. App. 3d 706 (1st Dist., 1973), wholly inapposite. Andrews is not now and has never been found in default. Plaintiff fully complied with Rules

[4] The Memo repeatedly, but incorrectly, lists the date of service of summons and complaint as January 2006. Andrews also swears to this inaccuracy in his affidavit at ¶ 20.

11(b)(2) (method of service "other than process and complaint") 12(b)(3) (Certificate of service). The Amended Complaint was certainly not the "process and complaint" that is required to be served to gain jurisdiction over the defendant per *735 ILCS 5/2-201.* Even counsel's Rule 105 cases for defaulted parties make it clear that amendments must be served if they pray "*additional relief.*" The *ad damnum* remained *identical* between the original and first amended complaints.

It is also ludicrous to argue that Andrews was not notified of the amendment. Andrews was well notified of the cause of action and the amendment; the post office vouches for that. See Exhibit R-5. John violated no rule, and exceeded the standards of compliance set forth in rules 11 and 12.[5] Therefore, the defendants' motion to dismiss based on improper service must be denied.

3.5. The Amended Complaint relates back to the original by well-settled law; defendant's counsel admitted this in correspondence.

Defendant's attorney, Charles Lee Mudd, Jr., on February 28, 2006, emailed John Tamburo and said that he was aware that the complaint related back to the date of filing, and that there were no issues with respect to the statute of limitations. See Exhibit R-6, sworn as authentic, John Aff., ¶ 8. Mr. Mudd got the law right in his email. Here, however, he throws in the "kitchen sink" in the form of a meritless statute-of-limitations argument. Well settled law: An action is commenced when the complaint is filed, not when the defendant is served, and the *filing of a complaint* determines whether an action is instituted during the period prescribed by a statute of limitations. *Peoples Gas, Light & Coke Co. v. Austin*, 147 Ill. App. 3d 26, 100 Ill. Dec. 612, 497 N.E.2d 790 (1st Dist. 1986) [emphasis supplied]. An amendment relates back in Illinois

[5] John obtained delivery confirmation from the United States Postal Service, although not required by any rule.

when the original complaint "furnished to the defendant all the information necessary … to prepare a defense to the claim subsequently asserted in the amended complaint." *Boatmen's National Bank of Belleville v. Direct Lines, Inc.*, 167 Ill. 2d 88, 102 (1995). Except for new causes of action that arose because of Andrews' reaction to being sued in this case, i.e., the Sixth Disparagement, John meets the *Boatmen's* test. The complaint relates back for all previous counts, where the only things changed were typographical error corrections. John Aff., ¶ 10.

Moreover, the First Disparagement was published in June, 2005. 1st Am. Cplt., ¶ 10. The fourth disparagement was uttered no earlier than June, 2005 and continues to be uttered by Andrews to this day. John Aff., ¶ 9. The fifth disparagement was uttered on April 9, 2005. 1st Am. Cplt., ¶ 28. The sixth disparagement was posted *after the filing of the original complaint in this case, on February 7, 2006.* 1st .Am. Cplt., ¶ 30. The entire argument that these disparagements, some of which occurred *after the complaint was filed*, are barred by the statute of limitations is frivolous.[6] Therefore, defendants' motion to dismiss based on the statute of limitations must be denied.

3.6. John states claims for Tortious Interference with Prospective Economic Advantage.

Defendant argues that John fails to state claims for tortuous interference with prospective economic advantage. Counsel avers that John pleads bare legal conclusions, and fails to plead the specific identities of the parties with whom Andrews interfered. Memo, pp.19-20. As counsel well knows, and John shows herein, neither argument has merit.

Standard of Review: In considering a 2-615 motion, all well-pled facts in a complaint are taken as true with all inferences drawn in favor of the non-movant. *Schuler v. Abbott Lab.*, 265

[6] I hesitate use the term *frivolous.* I don't want to be accused of the same ribald, scattershot paroxysms of *ad hominem abusive* attacks that the Memo lays upon me. However, this argument is so baseless that it wastes this court's and my time to address it at all. There is no reasonable way to question its bad faith.

Ill. App. 3d 991, 994 (1st Dist., 1993). The question presented by a motion to dismiss under section 2--615 is whether sufficient facts are contained in the pleadings which, if proved, would entitle the plaintiff to relief. *Urbaitis v. Commonwealth Edison*, 143 Ill. 2d 458, 475, 159 Ill. Dec. 50, 575 N.E.2d 548 (1991). The tort of interference with prospective economic advantage has four elements: (1) plaintiff must have a reasonable expectancy of a valid business relationship; (2) defendant must know about it; (3) defendant must intentionally interfere with the expectancy, and so prevent it from ripening into a valid business relationship; and (4) intentional interference must injure the plaintiff. *Schuler v. Abbott Lab.*, 265 Ill. App. 3d at 994. Plaintiff can properly plead an expectancy to do business with an identifiable class of third parties. *O'Brien v. State Street Bank & Trust Co.*, 82 Ill. App. 3d 83, 85 (4th Dist., 1980); *Crinkley v. Dow Jones & Co*, 67 Ill. App. 3d 869, 385 N.E.2d 714 (1st Dist., 1978).

3.6.1. John properly pleads a class of customers with whom he had an expectancy to do business.

Counsel argues in memo, at p.19, that John must plead the specific identities of those parties with whom Andrews interfered in order to state a claim. This is not the law in Illinois. John properly pleads an expectancy to do business with an "identifiable class" of third parties. See *O'Brien v. State Street Bank & Trust Co.*, 82 Ill. App. 3d 83, 85 (4th Dist., 1980). Plaintiff alleges in the 1st Am. Cplt., ¶¶ 41, 101, 126, that he has the reasonable expectancy to do business with "dog, cat and horse breeders, and the exhibitors thereof." This is not a mere "legal conclusion" as contended by counsel in the Memo, at p.19. It is bolstered by the fact that John makes software products specifically directed to those markets. 1st Am. Cplt., ¶ 5. John can prove ¶ 5, and he can prove that Andrews interfered with his valid expectancy to do business

with the very people at whom his products are aimed. Therefore the tortious interference counts validly allege John's expectancy to do business with an identifiable class of customers.

3.6.2. John pleads facts underlying all of the other elements of Tortious Interference with Prospective economic advantage.

Factor 2 of the *Schuler* test is that Defendant must know of the expectancy. John alleges this in 1st. Am. Cplt., ¶¶ 42, 102, 127. This is also not a legal conclusion. Andrews is John's competitor. 1st Am. Cplt., ¶ 7. John can prove these allegations, thus, they are not legal conclusions.

Factor 3 of the *Schuler* test is intentional interference. John pleads the interference in 1st Am. Cplt., ¶¶ 43, 128, 103-105. These pleas are *not* legal conclusions. Andrews published deceptive statements about the Plaintiff's financial condition, even in the face of John's continuing pre-releases of CompuPed™ Millennium. Andrews chose his words carefully to make it seem as if John was intentionally selling a product he had no intention to complete, a criminal act (of which Andrews is ironically guilty himself). 1st Am. Cplt., ¶¶ 13, 15-16, 47. In the fourth disparagement, Andrews told numerous people that John was about to be liquidated and that his technical support would soon be unavailable. 1st Am. Cplt., ¶¶ 26-27. Andrews knew, from his admitted frequent forays into the Illinois website of the U.S. District Court for the Northern District of Illinois (see Memo, p.10), that John was *not* about to be liquidated when he made those statements. John Aff., ¶ 11. The facts are that Andrews published all of these utterances, with knowledge of their deceptive nature, making them *unjustified*. John meets the requirement of *Schuler* factor number 3.

Factor 4 is damages. John pleads damages in the form of lost sales in 1st Am. Cplt., ¶¶ 52, 108, 133. Lost sales can be proven as a fact and therefore are not a legal conclusion. John

has pled ample facts to support his claims of tortious interference with prospective economic advantage. These counts cannot be dismissed under section 2-615 of the Code of Civil Procedure.

3.6.3. Defendant's tortuous interferences did not convey truthful information.

Counsel attempts to argue that, according to *Soderlund Bros. v. Carrier Corp.*, 278 Ill. App. 3d 606, 620 (1st Dist. 1995), John's claims for tortious interference with prospective economic advantage cannot survive because they merely give "truthful information." However, counsel's averment is plainly wrong. Defendant misrepresented John's statement in the PDF Document. As Andrews knew (1st Am. Cplt., ¶ 12) at the time he published the first disparagement, John filed the document quoted in the first disparagement in an effort to cause the court to grant his pending motion to covert from Chapter 7 to Chapter 13. The import of the document was *not* that John could not afford to complete Compuped Millennium, it was that, *if the conversion were not granted*, John would not be able to afford to complete CompuPed Millennium. John Aff. ¶ 12. The conversion was granted prior to the publication of the first and fifth disparagements. And, as final proof of the falsehood of the gist of the first disparagement, John released Compuped. 1st Am. Cplt., ¶ 15. Nonetheless, Andrews intentionally kept up the deceptive statements for six months after Compuped was released, until he was served with the original complaint in this case. 1st am. Cplt, ¶ 16. Andrews lies in his affidavit where he says that he only learned of CompuPed Millennium's release in January, 2006. He was aware, from a phone conversation with at least one person in October, 2005, that CompuPed was released and available to the general public. John Aff. ¶ 13. The first disparagement was deceptive, alleging that John "actively marketed" Compuped Millennium with no intention to complete it. 1st Am. Cplt., ¶ 45-47. This court must take John's allegations as true, and resolve the conflict in

affidavits in John's favor. *Schuler v. Abbott Lab.*, 265 Ill. App. 3d at 994. Deceitful acts and unfair competition are *never* privileged. *Soderlund Bros. v. Carrier Corp.*, 278 Ill. App. 3d at 619. The first disparagement, as Andrews' knew, was "false in the sense in which it is intended to be understood by the recipient." *Id.* See 1st Am. Cplt., ¶¶ 13-16. Thus, count one cannot be dismissed.

Similarly, the *Soderlund* "defense" fails to kill Count eight. Knowingly stating, while John was not in bankruptcy, that John was about to be imminently liquidated and his technical support halted (1st Am. Cplt., ¶ 25-27) is deceptive, and is never privileged. Count Eleven similarly speaks of the sixth disparagement, which John pleads is false in 1st Am. Cplt., ¶¶ 120-122, 129.

3.7. John states proper claims for defamation.

3.7.1. Standard of Review

A complaint may not be dismissed under section 2-615 unless "it clearly appears that no set of facts could be proved under the pleadings that would entitle plaintiff to relief." *Krueger v. Lewis*, 342 Ill. App. 3d 467, 471 (1st Dist. 2003). A complaint must be liberally construed, to the end that controversies may be quickly and finally determined according to the substantive rights of the parties. *Bryson v. News Am. Publs.*, 174 Ill. 2d 77, 110 (1996). A 2-615 motion does not raise affirmative defenses. *Id.*, at 86. Courts measure the specificity of an allegation by determining whether it states a conclusion or a fact. *Krueger v. Lewis*, 342 Ill. App. 3d at 471. Allegations that the statements made were false, were made with knowledge of their falsity, or were made in reckless disregard as to their truth or falsity have been held by our Supreme Court to be sufficient to withstand a motion to dismiss. *Krueger v. Lewis*, 342 Ill. App. 3d at 472.

3.7.2. John alleges all defamations with particularity.

Defendant's counsel asserts in the Memo, at p.21, that the fourth disparagement is not stated with the requisite specificity to maintain a libel action. The only problem with counsel's argument is that *John does not plead libel on the Fourth Disparagement.*

John pleads libel per se on the First Disparagement (count two), libel per quod on the Second Disparagement (count four), libel per quod in the Third Disparagement (count five), and libel per se in the creditor libel (count ten). These libels are pled in their exact words in 1st Am. Cplt., ¶¶ 10, 17, 18, 30. Therefore, John pleads with ample specificity to state a claim.

3.7.3. John meets the libel *per se* standard.

Words are libelous per se if they are "(1) words that impute the commission of a criminal offense; (2) words that impute infection with a loathsome communicable disease; (3) words that impute an inability to perform or want of integrity in the discharge of duties of office or employment; or (4) words that prejudice a party, or impute lack of ability, in his or her trade, profession or business." *Bryson v. News Am. Publs.*, 174 Ill. 2d 77, 88 (1996).

Counts two and ten properly state a claim for libel per se. Count one alleges that the First Disparagement falsely imputes to John the crime of selling an incomplete software program with no intention to finish it, a crime in violation of *720 ILCS 295/1a*. 1st Am. Cplt., ¶ 55. The statement was false, as the release of Compuped Millennium has proved. 1st Am. Cplt., ¶ 56. These sworn allegations must be taken as true. *Bryson*, 174 Ill. 2d at 86. Andrews lies when he swears that Compuped was unavailable to the public when he posted his defamatory statements. At all times, the pre-release of CompuPed Millennium was available for download and immediate use; Andrews knew this. John Aff. ¶ 14. If one falsely accuses someone of a crime,

then the accuser is guilty of libel per se. That's the start and end of it. Count one states a proper claim.

Now onto Count Ten. Andrews represents that John has paid none of his creditors. That representation is false. 1st Am. Cplt., ¶¶ 120-121. Moreover, as other documents Andrews deceptively ignored in the creditor libel showed, at least two of John's creditors were paid in their entirety by the Trustee. John Aff., ¶ 15. The creditor libel imputes to John an inability to perform his profession. It is false. John states a claim for libel per se.

3.7.4. John meets the libel *per quod* standard.

In order to state a claim for libel *per quod*, Plaintiff "must plead ... that [he] sustained actual damage of a pecuniary nature ('special damages') to recover." *Bryson v. News Am. Publs.*, 174 Ill. 2d 77, 88 (1996). A *per quod* claim is appropriate where the defamatory character of the statement is not apparent on its face, and [Plaintiff must] resort to extrinsic circumstances is necessary to demonstrate its injurious meaning. *Bryson v. News Am. Publs.*, 174 Ill. 2d at 103.

Counts four and five meet the *Bryson* standard. Count four alleges the extrinsic circumstances that make the second disparagement defamatory, see 1st Am. Cplt., ¶¶ 67-72. It alleges lost sales, a pecuniary loss, in ¶ 75. Count five alleges the extrinsic circumstances that make the third disparagement defamatory, see 1st Am. Cplt., ¶¶ 77-79. It also alleges pecuniary loss in the form of lost sales, in ¶ 81. Therefore the libel *per quod* counts state claims and cannot be dismissed.

Count Two as *Per Quod*: If this court disagrees that the First Disparagement is a libel per se, John may still proceed *per quod* on count Two. It is possible for a disparagement to be actionable under both theories of libel. *Clarage v. Kuzma*, 342 Ill. App. 3d 573, 581 (3rd Dist.

2003) (Holding that a defamation was actionable as both per se and per quod libel). In the instant case, John pleads the extrinsic circumstances that make the First Disparagement libelous, see 1st Am. Cplt., ¶¶ 55-58. He furthermore pleads pecuniary special damages in the form of lost sales at ¶¶ 24-25, 34. Therefore count two may be properly pursued *per quod* if not per se. The same logic pertains to count ten and the sixth disparagement. See 1st Am. Cplt., ¶¶ 120-121, 123, 24-25, 34. Therefore, all libel count state claims and cannot be dismissed.

3.7.5. The defendant fails to meet his burden to gain dismissal on the ground of "substantial truth."

The defendant, to defeat a defamation claim using the *affirmative defense* of substantial truth, must establish the truth of the "gist" or "sting" of the allegedly defamatory statement. This is a question for the finder of fact, *unless no reasonable jury could find a lack of substantial truth*. Then, the question is one of law. *Clarage v. Kuzma*, 342 Ill. App. 3d 573, 580 (3rd Dist. 2003). Counsel, in memo, p.22-23, asserts "substantial truth" as a complete defense to the Plaintiff's defamation counts. The *defendant* bears the burden of proving the truth of the gist or sting of his statement:

> A defendant bears the burden of establishing the "substantial truth" of his assertions, which he can demonstrate by showing that the "gist" or "sting" of the defamatory material is true. When determining the "gist" or "sting" of allegedly defamatory material, a trial court must look at the highlight of the article, the pertinent angle of it, and not to items of secondary importance which are inoffensive details, immaterial to the truth of the defamatory statement.
> *Myers v. Levy*, 348 Ill. App. 3d 906, 920 (2nd Dist. 2004).

In light of the above citation, please review the statement of which John complains in the First Disparagement, forming the gravamen of Count Two:

> Please use caution when purchasing any unreleased software products. John Tamburo, d/b/a Mans Best Friend Software, has declared bankruptcy. Although it is actively being marketed on the web sire [sic], in one of his court documents Mr. Tamburo stated that 'I lack the funds required to complete the programs

[CompuPed millennium^{TM}] [sic]. For a pdf copy of the court document please see: http://k9ped.com/mbfsbankruptcy.pdf [sic]
1st Am. Cplt., ¶ 10.

Counsel focuses on the minutiae, and not the total statement. That's not allowed; a libel is reviewed for its impact as a whole. *Myers v. Levy*, 348 Ill. App. 3d at 920. The "gist" and "sting," the pertinent angle, of the first disparagement is *not* John's bankruptcy filing. It was, and remains to this day, the notion that John was selling an "unreleased software program" that he had no intention to complete: "Please use caution when purchasing any unreleased software products...Although it is actively being marketed...Tamburo stated that 'I lack the funds required to complete...' CompuPed [M]illennium." Andrews, knowing better, twisted a superseded court document (1st Am. Cplt., ¶ 13) into an accusation that John was actively marketing something he had no ability or desire to finish. Considering Plaintiff's Exhibit 1, Andrews is doing what psychologists call "projecting."

Andrews knew the falsehood of what he wrote as he wrote it. At the time Andrews released this statement, John was continually releasing updates to the pre-release version of the program, and, contrary to the imputation of the Memo at pp.1, 22, John's customers were free to download the pre-release program use it, and suggest improvements. John Aff., ¶ 14. Andrews falsely swears that CompuPed Millennium was unavailable; it was freely available for download at all relevant times hereto. *Id.*

Andrews knew that the statement he quoted was made obsolete in March, 2005, when the court granted his motion to convert from Chapter 7 to 13. Yet Andrews, who has written harassing emails to John's technical support manager and has harassed John in email, calling him, *inter alia,* a "slimeball," (John Aff. ¶ 16), acted with pure hate, looking to destroy John's livelihood by any means possible, decency and the law notwithstanding. So he made up the false

accusation of a criminal act and posted it to his own web site in the First Disparagement, and to an unrelated web site, www.gripe2ed.com, in the Fifth. 1st Am. Cplt., ¶¶ 10, 28.

Defendant's myopic defense of "substantial truth" as a defense falls short by asserting no incremental harm. In *Myers v. The Telegraph*, 332 Ill. App. 3d 917, 924 (5th Dist. 2002), the court noted that the "substantial truth" or "incremental harm" defense has not been explicitly adopted, and it *declined* to do so because the defense "conflicts with the common law principles governing per se actions ... The incremental-harm defense eliminates the presumption of damages and reintroduces a need for the plaintiff to prove special damages." The Third District has not adopted this defense, and John respectfully prays that this court follow *Myers* and refuse to do so now.

Even if the substantial truth / incremental harm defense were the law in this district, it is inapposite here. Substantial truth protects where the gist of the statement "substantially true, even though not technically accurate in every detail." *Clarage v. Kuzma*, 342 Ill. App. 3d at 580. The instant case displays something close to the inverse: Andrews selectively uses facts, misstates them, and intertwines them with lies in order to falsely impute criminal conduct onto John. The incremental harm of the falsehood, in this case the criminal act of selling a product under false pretenses, in violation of the Illinois Deceptive Advertising Act, *720 ILCS 295/1a*,[7] is *far* more damaging than filing a bankruptcy petition, a lawful act. See *Myers v. The Telegraph*, 332 Ill. App. 3d at 922, holding that a statement that a person committed a felony when only a misdemeanor had been committed is libel *per se*. It is clear that Andrews intended to falsely impute criminal conduct to John. It is not necessary that a statement charge a criminal offense

[7] To this day, ironically, Andrews promises "free updates" on his web site, and has not finished his "Version 7.0N" update, in unchanged "beta" status since December, 2002. See Plaintiff's Exhibit 1, attached to the First Amended Complaint. It is *Andrews* and not John, who used a false pretense to con potential customers into buying his product. Nor surprisingly, Andrews resorts to even more falsehood in his desperate grab for market share. In so doing, Andrews has violated *720 ILCS 295/1a*, the very crime he to imputed to John. 1st Am. Cplt., ¶ 57.

with the precision of an indictment to be libelous. *Krueger v. Lewis*, 342 Ill. App. 3d at 471. If that difference can justify a libel per se action, accusing someone of a crime when none was committed is certainly libel *per se*.

3.8. John states claims for unfair competition and UDTPA violations.

In the Memo, pp.24-25, counsel wastes an overstuffed page full of long citations to argue that John's common law unfair competition claims should be dismissed because John fails to cite them as claims under the Uniform deceptive Trade Practices Act (UDTPA), 810 ILCS 510/1 et. Seq. However, his citations plainly hold that there *is* a common law right of action for unfair competition! From this confusion, John will attempt to bring order. John also files his motion, under separate cover, to amend to explicitly allege claims under the UDTPA.

Standard of Review: One who, in connection with the marketing of goods or services, makes a representation relating to the actor's own goods, services, or commercial activities that is likely to deceive or mislead prospective purchasers to the likely commercial detriment of another under the rule stated in § 3 is subject to liability to the other. *Restatement (3d) of Unfair Competition, § 2.* A representation is to the likely commercial detriment of another if: (a) the representation is material, in that it is likely to affect the conduct of prospective purchasers; and (b) there is a reasonable basis for believing that the representation has caused or is likely to cause a diversion of trade from the other or harm to the other's reputation or good will. *Restatement (3d) of Unfair Competition, § 3.*

3.8.1. John properly pleads unfair competiton at the common law and the UDTPA, and asks leave to amend to explicitly plead UDTPA violations.

Andrews, in each and every one of the unfair competition counts, seeks to deceive viewers of www.k9ped.com into buying his product, and / or abandoning John's. Under § 2 of

the Restatement, as quoted *supra*, the statement that is deceptive need not be literally false. It only needs to be "likely to deceive", as in the deception inherent in imputing that John was illegally selling a computer program he had no intention to complete *after he completed it*, ad in the First Disparagement, or in telling telephone callers that John was about to be liquidated in bankruptcy and his technical support services terminated, even though John was not in bankruptcy at the time (Fourth Disparagement), or saying that John was "trick[ing] customers into buying his programs with sale prices and specials," and buying K9Ped would get them free updates. And they "only buy K9-Ped Once," when Andrews had no intention of releasing any of the "free updates" he advertised and has conclusively proven that by refusing to complete the "7.0N" "beta" program for nearly 3½ years as of this writing (the second and third disparagements, free updates promise and free updates repudiation).

In determining if the statement is deceptive, the *perceptions of the audience* control. *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6 (7th Cir.1992). Counsel wastes time trying to whack John's counts down on inapposite technicalities. He does not, and cannot, argue that the statements do deceive, or are not likely to deceive, the "reasonably intelligent" consumer. *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272 (2nd Cir. 1981). Therefore, all of the unfair competition counts must stand.

John also asks, under separate cover, for leave to file his second amended complaint, which explicitly pleads Andrews' UDTPA violations. The unfair competition claims form the bulk of the instant case, inasmuch as Andrews' disparagements and phony promises violate the UDTPA. To do justice under *735 ILCS 5/2-616*, John prays that this court grant leave to amend *instanter*.

4. Conclusion

4.1. Defendant's counsel has, in citing the wrong statute and presenting a commingled motion, violated clear statutes and, in so doing, has waived his client's objections to this court's jurisdiction. *735 ILCS 5/2-301, 735 ILCS 5/2-619.1, In re Schmitt*, 321 Ill. App. 3d 360, 366 (2nd Dist. 2001).

4.2. Even if the defendant had not waived his objections, Andrews' contacts with Illinois amply establish that this court's exercise of jurisdiction comports with both Illinois law and Federal Due Process. *Bombliss v. Cornelsen*, 355 Ill. App. 3d 1107, 1114 (3rd Dist. 2005), *Burger King v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985).

4.3. The First Amended Complaint was properly served within the rules. *Ill. Sup. Ct. R. 11, Ill. Sup. Ct. R. 12, Ill. Sup. Ct. R. 104.* The summons and complaint were properly served. *735 ILCS 5/2-201.*

4.4. Nothing in this case has to do with the terms of service of John's www.mbfs.com web site. Counsel admits that Andrews does not agree to binding arbitration. Therefore, this case has not, by agreement of the parties, been sent to binding arbitration. *Hubbert v. Dell Corp.*, 359 Ill. App. 3d 976, 983 (5th Dist. 2005).

4.5. By well settled Illinois law, the First Amended Complaint relates back to the date the original complaint was filed. *Peoples Gas, Light & Coke Co. v. Austin*, 147 Ill. App. 3d 26, 100 Ill. Dec. 612, 497 N.E.2d 790 (1st Dist. 1986). Before this motion, defendant's counsel admitted this in email to John. Exhibit R-6.

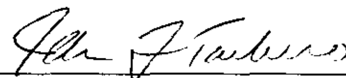
4.6. John states proper claims for Tortious interference with Prospective Economic Advantage. *Schuler v. Abbott Lab.*, 265 Ill. App. 3d 991, 994 (1st Dist., 1993). Deceptive

statements and unfair competition are never privileged. *Soderlund Bros. v. Carrier Corp.*, 278 Ill. App. 3d 606, 620 (1st Dist. 1995).

4.7. John states proper claims for defamation per se and defamation per quod. *Bryson v. News Am. Publs.*, 174 Ill. 2d 77, 88 (1996). The defendant cannot show that the "gist or sting" of Andrews' statements was true. *Myers v. Levy*, 348 Ill. App. 3d 906, 920 (2nd Dist. 2004). The defendant also fails to meet his burden to prove that no reasonable jury could find that his statements were not substantially true. *Clarage v. Kuzma*, 342 Ill. App. 3d 573, 580 (3rd Dist. 2003).

4.8. John states proper claims for Unfair Competition at the common law. *Restatement (3d) of Unfair Competition, § 2-3, Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272 (2nd Cir. 1981).

WHEREFORE, your Plaintiff respectfully prays that this court DENY the defendant's motion and compel him to answer the complaint as amended on the date of the order.



John F. Tamburo
Plaintiff
655 N. LaGrange Rd, Suite 209
Frankfort, Will County, Illinois 60423
815-806-2130

IN THE CIRCUIT COURT OF THE 12TH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS, LAW DIVISION

JOHN F. TAMBURO, D/B/A MAN'S BEST FRIEND SOFTWARE, *Plaintiff*	)	CASE NUMBER: ***06 L 51***
v.	)	***EXHIBIT R-1***
JAMES ANDREWS, D/B/A K9PED *Defendants*	)	

PLAINTIFF'S AFFIDAVIT OPPOSING THE DEFENDANT'S MOTION TO DISMISS

NOW COMES your Plaintiff, John F. Tamburo, and does hereby, on the penalty of perjury under the laws of the State of Illinois, 735 ILCS 5/1-109, swear to the truth of the following statements. If called to testify on the matters contained herein, John F. Tamburo would testify identically. To wit:

1. The availability of product technical support is the main factor that customers in my market use to determine which software to buy. James Andrews knows this, and this is why he told many of my customers, after he knew I was *not* in bankruptcy, that I was about to be imminently liquidated and support for my products would soon cease or become very difficult to obtain.

2. Exhibits R-2 and R-3 are genuine, and were taken by me from the www.k9ped.com web site and printed by me, without alteration on April 5, 2006.

3. www.k9ped.com is the Internet website that contained and still contains, unfairly competitive, deceptive, disparaging remarks directed solely toward me. That web site is James Andrews' *sole* source of income from the K9Ped software.

4. I believe, based on what I have been told by others, that James Andrews has lied to this court in his affidavit, attached to Defendant's memorandum supporting its motion to dismiss as Exhibit B, when he swears that he has only one Illinois customer. The truth of this matter is within Andrews' exclusive control.

5. The terms of use for www.mbfs.com have no bearing on this case. None of the gravamen of this case is related to the usage of www.mbfs.com in any way, directly or indirectly.

6. The summons and complaint were served upon James Andrews by the honorable Sheriff of Washington County, Oregon, on February 6, 2006. After said service, proof of which is duly

filed with this court, Andrews did amend his web site to include the "sixth disparagement," as that term is used in the First Amended Sworn Complaint.

7. After this court granted me leave to file my First Amended Complaint on February 16, 2006, I did file the First Amended Sworn Complaint with the honorable Clerk and serve it upon James Andrews by mailing it to him via Priority Mail, Delivery Confirmation Requested, Postage Prepaid, that day.

8. Exhibit R-6 is genuine. It was printed from my email log unaltered on April 4, 2006.

9. The Fourth Disparagement was first uttered no earlier than June, 2005. Andrews continued to utter it until at least January 2006. I believe that he continues to utter the fourth disparagement to my potential customers to this very day.

10. The only changes made to those parts of the First Amended complaint that related to the incidents complained of in the First Amended Complaint were typographical error corrections.

11. Andrews knew, from his thorough dirt-digging expedition into the Illinois web site for the United States District Court for the Northern District of Illinois, that I was not at risk of liquidation at any time when he uttered the fourth disparagement.

12. Defendant misrepresented my statement in the PDF Document. As Andrews knew at the time he published the first disparagement, I filed the document quoted in the first disparagement in an effort to cause the court to grant my pending motion to covert from Chapter 7 to Chapter 13. The import of the document was *not* that I could not afford to complete Compuped Millennium, it was that, *if the conversion were not granted*, I would not be able to afford to complete CompuPed Millennium.

13. In October 2005, Andrews was made aware of the completion of CompuPed Millennium by at least one person, and after having been made aware, he kept the First Disparagement posted on www.k9ped.com.

14. Andrews lied when he said that Compuped Millennium was unavailable. He was at all times aware of the fact that CompuPed Millennium was available to freely download, in pre-release form, continuously from its first Alpha test to its final edition, much like the K9Ped "7.0N" Beta edition that he refuses to complete for three and one-half years running.

15. Andrews reviewed documents that show that the Trustee paid two of my creditors, in their entirety nearly $4,000.00, that I had previously paid in to the trustee, by leave of court with no objection from me. He knew the falsehood and deceptiveness of the sixth disparagement when he posted it.

16. In 2002, Andrews began barraging me with insulting and harassing emails, in fact so many that I eventually had to install a block on his email address into my Exchange Server rules. In one email he referred to me as a "slimeball." In mid-2004, Andrews began to harass my product support manager, Kathi Charpie, with emails designed to cause her to leave my employ by disparaging me.

FURTHER YOUR AFFIANT SAYETH NAUGHT

DATED APRIL 5, 2006

John F. Tamburo

EXHIBIT R-2

K9-Ped Demo Program Download Page

April 10, 2002 - Version 6.5C Now Available

This release includes the CompuPed(tm), TBS(tm) and BreedMate(tm) import features and should fix all known problems with previous versions. Please contact jim@azdogs.com immediately if you experience any problems.

* * * New Easier Installation Procedure * * *

Please read the instructions below then click on one of these links to download the installation file. If you have any problems installing the file please check that your file size matches the values shown to make sure you received the entire download..

Program Downloads

Program with Westie Database	**5,895 KB**	**Program with SCWT Database**	**5,768 KB**
Program with Golden Database	**6,170 KB**	**Program with Chinese Crested Database**	**5,748 KB**
Program with no database	**5,137 KB**	**Additional download for MAC VPC Users**	**1,282 KB**
Self Extracting Program Update	**968 KB**	**Program Update ZIP file**	**805 KB**
Breed Database Downloads		**Breed Pictures for One-Paw-Bandit**	

For other breed databases provided by K9-Ped or to try K9-Ped with your CompuPed, TBS or Breedmate data please download the "Program with no database". To use a a K9-Ped provided database install the program and before running the program download and unzip your breed file. The pedigree data provided is for demonstration use only. Known errors exist in these database files.

Special Instructions for MAC Virtual PC users

Instructions for updating existing installation

If you are having difficulty downloading the demo files you can purchase a CD-ROM ($8.00) with all of the above download files by clicking the paypal logo.

The preferred method of purchase is to download and install the program and use the PayPal button on the about page of the program. This will send a message that includes your System ID so you can receive your User Code quickly. There are no additional downloads required. Your user code will unlock the full features o the program.

You can also purchase a license to run the full program ($99.00) by clicking this logo.

Download Instructions:

Installing the program is now just a two step process, downloading the self extracting / self installing file and running the downloaded file. You may want to print this page for reference use during the installation process.

Downloading the self-extracting / self running file

Click on the above link and use the "Save as" or "Copy file.. option and save the file to your desktop. If

you prefer to save the installation file to a new folder see instructions below on creating a new folder directly from the save as window. During the installation process you will have to go to this folder instead of clicking on a desktop icon.

Downloading the file may take some time depending on your internet connection speed. At 4 Kbytes per second it will take at least 30 minutes.

Installing the program

k9pedbinst.... < Installation Icon

Go to your desktop and double click on the installation icon (pedpinst.exe) to run the combination file extraction & installation program.

When the installation program starts, selecting the defaults (Select "Next" at each screen) will work fine and produce a standard installation.

The installation program installs the program, the Borland Database Engine and places the K9-Ped icon on the desktop. When the installation is complete you can right click on the installation icon and select delete.

If you have downloaded the "empty" demo to use a different breed unzip the breed file into the c:\k9ped\backup folder AFTER the installation and BEFORE you run the program for the first time.

Double-click on the K9-Ped icon to run the program. Until you are a registered user you will see a message indicating that your use is limited to the sample database. Click OK and the program will continue to load.

The first time you run the program you will be prompted to select the demo database you wish to use.

Getting your User Code Number:

K9-Ped is user code protected. Without the proper user code you are restricted to using the sample database with no deletions and limited additions.

Your system ID # can be found by selecting "Help" from the menu at the top of the program window and selecting "About". If you have purchased the program or are a beta test site, send this number to jim@azdogs.com . You will receive your unique user code # by return e-mail. Your code will only work with your system.

Special instructions for updating very old versions

Due to a database structure change for breeding information, the programs downloaded prior to 14 November 2000 cannot be updated by just downloading a new version of the program. If your version of the program is over fifteen months old you will need to Back up your data. Then rename the k9ped folder to k9pedx. Download and re-install the program. Restore your data and delete the k9pedx folder.

Normal Program Update

The latest version of the program includes many new features and improved help files. If you are not comfortable using an un-zip program or do not have an "unzip" program you should use the Self Extracting file. Save the self extracting file to the desktop and double click it for an automatic upgrade. If you use the zip file it should be extracted to the c:\k9ped folder (or the folder containing the k9ped program if you did not do a default install) with "Overwrite all files" selected.

NOTE: You will need to download and run the breedpic.exe file to use the "One Paw Bandit" game. You only need to do this one time.

If you need a copy of an un-zip program for windows you can download a trial version of WinZip by clicking here.

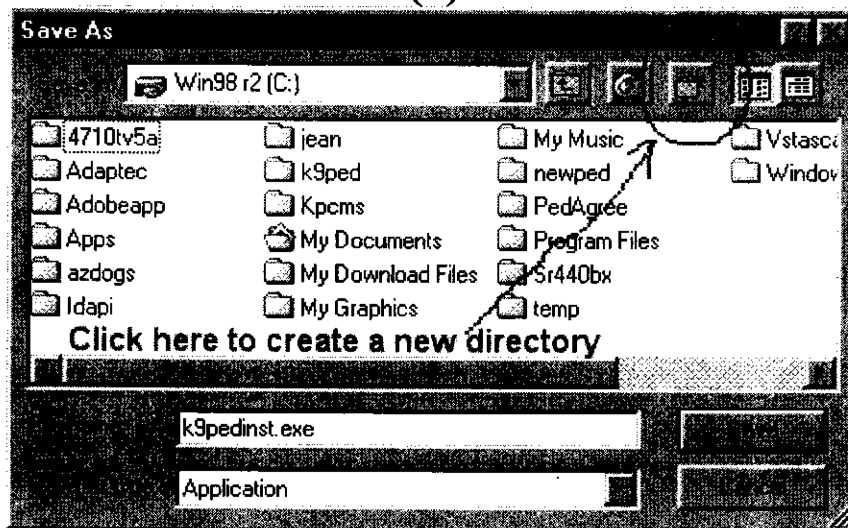
MAC Virtual PC Users

Some versions of MAC Virtual PC may not work properly with the compressed format of the k9ped.exe file. If you are experiencing problems please download and install the uncompressed version here.

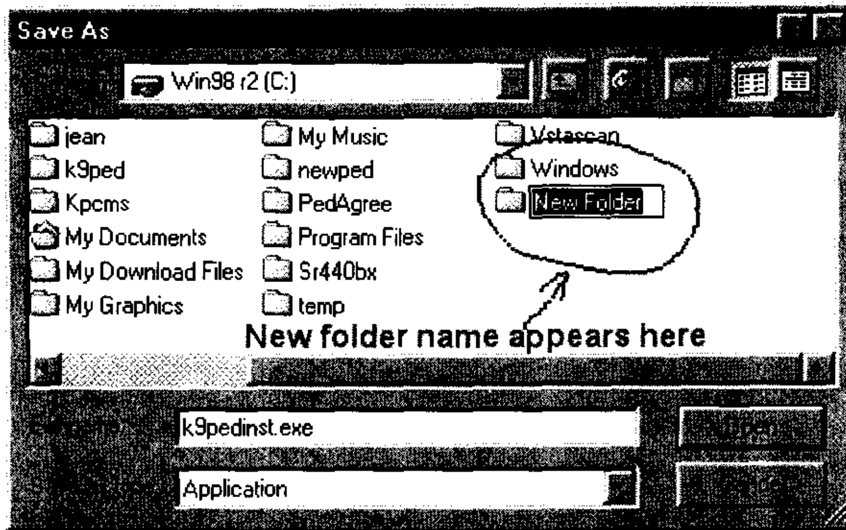
Uncompressed k9ped.exe file (1,287 KB).

How to create a new folder (aka directory) from the "Save As" window

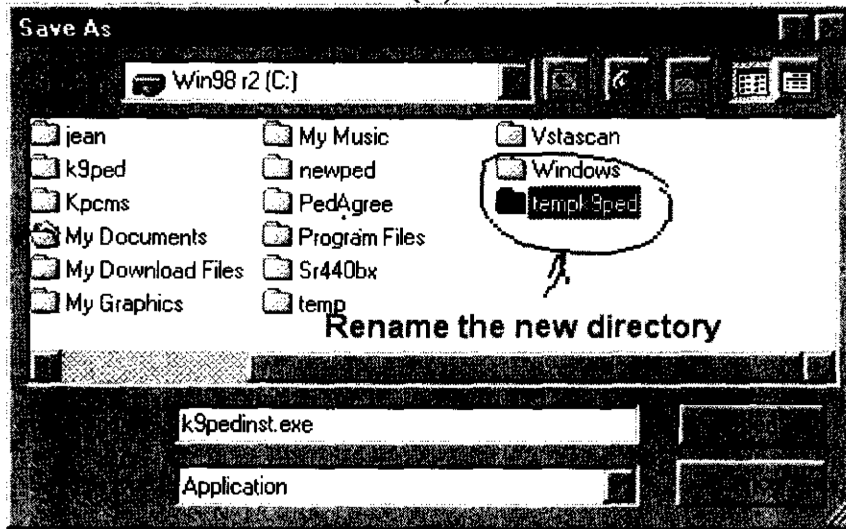
(1)



(2)



(3)



(4)

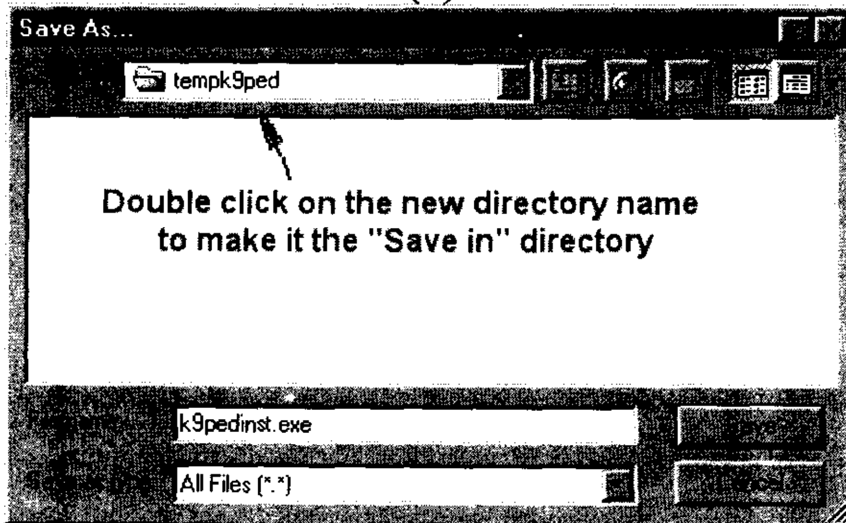


EXHIBIT
R-3

jim@azdogs.com

Checkout

Secur

PayPal is the secure payment processor for **jim@azdogs.com**. To continue, please enter the required information belo
about PayPal.

Pay To: jim@azdogs.com
Payment For: K9-Ped Pedigree Software Single System License
Currency: U.S. Dollars
Amount: $99.00 USD
Shipping & Handling: $0.00 USD
Total Amount: $99.00 USD

If you do not currently have a PayPal account, click here

PayPal Login

Already have a PayPal account? Please log in below

Email Address: johntam@mbfs.com Forgot your email?
PayPal Password: Forgot your password?

PayPal protects your privacy and security.
For more information, read our User Agreement and Privacy Policy.

EXHIBIT K-4

k9ped.com web site use terms and conditions

First the standard legal stuff:

K9-Ped makes every effort to ensure, but cannot and does not guarantee, and makes no warranties as to, the accuracy of any information on the site. K9-Ped assumes no liability or responsibility for any errors or omissions in the content of this site and further disclaims any liability of any nature for any loss howsoever caused in connection with using this website.

Now about accessing and linking to the site:

There are no restrictions on linking to the home page or any other page on the site. K9-Ped encourages links to any page.

You have the right to express your opinion. You have the right to include any comment, positive or negative, about the site, the company or the K9-Ped program in combination with a link to the site. If you do provide a link with a negative comment please demonstrate common courtesy and contact jim@azdogs.com to determine if there is any reasonable way to change your opinion and have the negative comment removed.

Please observe applicable copyright law with respect to the material provided on the site.

The demo version of the K9-Ped program , any other programs provided on the k9ped.com site and any breed data files available on the site may be freely copied and distributed to others using any available technology. K9-Ped encourages users to provide their friends and associates with direct copies or linked access to the K9-Ped program as provided on the site. K9-Ped encourages the free exchange of pedigree data files.

It is, however, a violation of contract law to attempt to defeat the "demo mode" restrictions contained in the K9-Ped Program. The use of the K9-Ped program without the "demo mode" restrictions requires payment of the license fee.

The breed files on the site are provided free as "starter files". There is no guarantee to the accuracy of these files. Please do not base your purchase decision on the availability of these files without downloading the demo program and loading the breed file to determine the usefulness of the data.

If you send any breed information to K9-Ped it will only be posted on the web site if you provide expressed permission to do so.

Once breed information is posted on the web site there is no copyright protection or other restriction on the distribution. If you want to restrict the distribution of your own data it is recommended that the data files only be sent to others who you trust not to provide your data to anyone else.

EXHIBIT R-5

Instructions

1. Please use a laser or laser-quality printer.
2. Adhere shipping label to package with tape or glue- DO NOT TAPE OVER BARCODE. Be sure all edges are secure. Self-adhesive label is recommended.
3. Place label so it does not wrap around the edge of the package.
4. Each shipping label number is unique and can be used only once -- DO NOT PHOTOCOPY.
5. Please use this shipping label on the "ship date".
6. If a mailing receipt is required, present the article and online label record at a post office for postmark.

Customer Online Label Record

Delivery Confirmation® Service Number:

9101 8052 1390 7002 8193 23

Priority Mail, Flat Rate with electronic Delivery Confirmation Service*
Electronic Option Delivery Confirmation Service Fee: $ 0.00
Total Postage & Fees: $ 4.05
Weight: 1 lb
Printed: 02/24/2006 Ship Date: 02/24/2006
PO ZIP Code: 60423

FROM: John Tamburo
Man's Best Friend Software
655 N Lagrange Rd Ste 209
Frankfort, IL 60423-2913

TO: James Andrews, d/b/a K9Ped
17811 NW Collins Rd
North Plains, OR 97133-8309

USPS
Postmark
Here

*Postmark required if fee refund requested. Delivery information is not available by phone for the electronic option. A copy of the recipient's signature will be faxed or mailed upon request by visiting the track & confirm page at www.usps.com or calling 1-800-222-1811.

This item was printed using Endicia Internet Postage (www.endicia.com) for account 502757 (Device ID is 071V00502757)

Account Piece number: 6394

U.S. Postal Service Status:
Your item was delivered at 9:56 am on February 27, 2006 in NORTH PLAINS, OR 97133.

Notice of Delivery
1st Am. Cplt.

Reply Reply to all Forward Close

From: Charles Lee Mudd Jr. Sent: Tue 2/28/2006 12:55 AM
To: John F. Tamburo
Cc:
Subject: Re: Service on Jim Andrews
Attachments:

EXHIBIT R-6

View As Web Page

John:

See below:

On Feb 27, 2006, at 10:35 PM, John F. Tamburo wrote:

> Dear Charles,
>
> First, please be aware of the history. On Feb 6, 2006, Andrews was personally served with summons and complaint. On Feb 16, 2006, the court granted me leave to file my first amended complaint. On the 24th, I filed that complaint with the court. Upon filing, I fully complied with Rule 104(b): "Filing of Papers and Proof of Service. Pleadings subsequent to the complaint, written motions, and other papers required to be filed shall be filed with the clerk with a certificate of counsel or other proof that copies have been served on all parties who have appeared and have not theretofore been found by the court to be in default for failure to plead."

Mr. Andrews has not appeared and thus Rule 104(b) does not apply.

> At the time you started discussing the First Amended complaint, I wondered about the situation and did research. Rule 104(b) applies. I have complied with the service requirements of Rule 11(b)(3), which has been held to amplify Rule 104 when dealing with any pleading other than the original complaint attached to summons.

I do not see this changing the fact that Mr. Andrews is a party that has not yet appeared.

Since you've represented to me that you've not filed any appearance in this matter, I refrain from serving you anything. Rule 11(a) is clear.

I do not believe so.

As to personally serving an alias summons and amended complaint, such a summons could be seen as vitiating the original service, and thus rendering the libel counts for two of the disparagements past the statute of limitations.

John, the statute of limitations would relate back to the Complaint. I understand that you need have filed the complaint prior to statute of limitations expiring, not necessarily having effectuated service.

An amended complaint, by black letter law in sec. 2-616, relates back to the original. I can find no such authority that holds an alias summons relates back. As you know, service of summons was just under the wire on those two defamation counts, a day later and your client would have been in the clear. I do realize that authority conflicts on the statute of limitations, with some holding that the filing date and not the service date controls.

I have diligently searched the statutes and the case law. No case I could find holds that any amended complaint filed after service of summons and original complaint must be personally served to be valid. An amended complaint is a "pleading subsequent to the complaint" under the rules. No case voids service of summons under 2-201, 2-202 or 2-208 if a complaint is amended. In complying with rule 104, I have met my obligation, and will not undertake any action that may jeapordize the perfected service I already have, or the counts asserted therein.

The I fear you will lose as my client has not been properly served.

Thanks for your email. It was a highly interesting capstone to an interesting issue to research.

Charles Mudd

Have a great day.

Thanks
John Tamburo

-----Original Message-----
From: Charles Lee Mudd Jr.
Sent: Mon 2/27/2006 9:02 PM
To: John F. Tamburo
Cc:
Subject: Service on Jim Andrews

John:

Have you had the amended complaint personally served with a process served (as required) on Jim Andrews?

Please advise.

Charles Mudd

Charles Lee Mudd Jr.

Law Offices of Charles Lee Mudd Jr.

3344 North Albany Avenue

Chicago, Illinois 60618

773.588.5410

773.588.5440 (facsimile)

www.muddlawoffices.com

cmudd@muddlawoffices.com <mailto:cmudd@muddlawoffices.com>

Member

Former Member, Board of Directors

Northcenter Chamber of Commerce

Chicago, Illinois

www.northcenterchamber.org

Adjunct Faculty

John Marshall Law School

Former Member, Section Council

Intellectual Property Section

Illinois State Bar Association

This email has been scanned by the MessageLabs Email Security System.
For more information please visit http://www.messagelabs.com/email

Charles Lee Mudd Jr.

Law Offices of Charles Lee Mudd Jr.

3344 North Albany Avenue

Chicago, Illinois 60618

773.588.5410

773.588.5440 (facsimile)

www.muddlawoffices.com

cmudd@muddlawoffices.com

Member

Former Member, Board of Directors

Northcenter Chamber of Commerce

Chicago, Illinois

www.northcenterchamber.org

Adjunct Faculty

John Marshall Law School

Former Member, Section Council

Intellectual Property Section

Illinois State Bar Association

This email has been scanned by the MessageLabs Email Security System.