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IN THE  
APPELLATE COURT OF ILLINOIS  
FOR THE THIRD DISTRICT

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JOHN F. TAMBURO d/b/a MAN'S BEST  
FRIEND SOFTWARE,

Plaintiff-Appellant,

v.

JAMES ANDREWS d/b/a K9PED,

Defendant-Appellee.

) Appeal from the Circuit Court of the  
) Twelfth Judicial Circuit,  
) Will County, Illinois.

) Case No. 06 L 51

) Honorable Herman S. Haase,  
) Presiding Judge.

) Date of Judgment: May 3, 2006

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**BRIEF AND ARGUMENT FOR  
DEFENDANT/APPELLEE JAMES ANDREWS d/b/a K9PED**

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**ORAL ARGUMENT REQUESTED**

**POINTS AND AUTHORITIES**

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## INTRODUCTION

This controversy involves a dispute between competitors of software created for use by pure bred dog, cat and horse breeders. John F. Tamburo d/b/a Man's Best Friend Software ("Plaintiff") brings this action because James Andrews d/b/a K9Ped ("Defendant") conveyed verifiable information about Plaintiff on the Internet. None of the information posted on the Internet was untrue, false or otherwise misleading. The Plaintiff brings this action in Illinois where personal jurisdiction does not exist over Defendant. In essence, the lawsuit underlying this appeal represents nothing more than an outlet for Plaintiff to harass Defendant. For the reasons stated below, the trial court correctly granted Defendant's Motion to Dismiss ("Defendant's Motion"), and this Court should affirm the trial court's order.

## STATEMENT OF FACTS<sup>1</sup>

1. Defendant is a resident and citizen of Oregon. R. C27 (1st Am. Compl. ¶ 3); R. C157-58 (Andrews' Affidavit ¶¶ 2, 3, 7, 8, 9). He has minimal contacts, if any, with Illinois. Id.
2. In September 2001, Defendant became aware of repeated complaints involving Plaintiff's products and customer service. See R. C31 (1st Am. Compl. ¶¶ 18, 28).
3. In addition, Defendant learned that Plaintiff was involved in bankruptcy proceedings before the United States Bankruptcy Court for the Northern District of Illinois and that Plaintiff had previously filed for bankruptcy five times. See R. C28 (1st Am. Compl. ¶ 10).
4. Based on the information he learned, Defendant posted truthful statements about

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<sup>1</sup> Defendant objects to Plaintiff's Statement of Facts as being argumentative, inaccurate, and undeniably subjective. See Appellant's Brief pp. 11-14. However, as many of the facts stated by Plaintiff are irrelevant to the issues on this appeal, Defendant declines to respond to each objectionable statement of fact within its supplemental Statement of Facts. Rather, the Defendant relies on citations to the record contained within the body of his memorandum below.

Plaintiff on the Internet. See R. C28-33 (1st Am. Compl. ¶¶ 10, 17, 18, 28, 30, 37).

5. In fact, none of the information posted on the Internet was untrue, false or otherwise misleading. See R. C28-33 (1st Am. Compl. ¶¶ 10, 17, 18, 28, 30, 37).

6. Plaintiff disliked the publication of the truthful statements and filed the underlying lawsuit against Defendant. R. C.

### **STANDARD OF REVIEW**

A motion to dismiss under section 2-615 of the Illinois Code of Civil Procedure (the “Code”) tests the legal sufficiency of the plaintiff’s claim. 735 ILCS 5/2-615. A motion to dismiss under section 2-619 of the Code admits the legal sufficiency of the plaintiff’s claim, but asserts certain defects or defenses outside the pleading that defeat the claim. 735 ILCS 5/2-619; see also Wallace v. Smyth, 203 Ill. 2d 441, 447, 786 N.E.2d 980, 984 (Ill. 2002).

When reviewing a lower court’s dismissal of claims pursuant to sections 2-615 or 2-619, this Court applies a *de novo* standard. Ramos v. City of Peru, 333 Ill. App. 3d 75, 77, 775 N.E.2d 184, 186 (3rd Dist. 2002).

### **ARGUMENT**

On May 3, 2006, the trial court granted Defendant’s Motion to Dismiss Plaintiff’s First Amended Complaint concluding that the court lacked personal jurisdiction over Defendant. R. C386-87 (Amended Order). Specifically, the trial court held that 1) Defendant lacked sufficient contacts with the State of Illinois for it to exercise personal jurisdiction over him; 2) Defendant’s Motion to Dismiss Plaintiff’s First Amended Complaint is granted upon this basis; 3) Plaintiff’s First Amended Complaint is dismissed in its entirety; and 4) Plaintiff’s request to file his Second Amended Complaint is denied as moot. Id. By this appeal, the Plaintiff seeks reversal of the trial court’s order. Plaintiff also

argues the merits of his substantive claims, though the trial court did not rule upon them. Defendant responds to both of these arguments below. Despite Plaintiff's efforts, the law remains clear that Defendant lacks sufficient contacts with Illinois to be subject to personal jurisdiction under any statutory and due process analysis. Moreover, despite Plaintiff's unsupported assumptions about and its mischaracterization of tortious interference, defamation, and unfair competition law, Plaintiff's substantive claims completely lack any merit. For these reasons, the trial court's order dismissing the Plaintiff's First Amended Complaint must be affirmed.

**I. THE TRIAL COURT'S ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION MUST BE AFFIRMED.**

In his brief, Plaintiff raises both procedural and substantive arguments challenging the propriety of the trial court's order dismissing the First Amended Complaint for lack of personal jurisdiction over the Defendant.

**A. Plaintiff's § 2-619.1 and § 2-301 Procedural Arguments Lack Merit.**

Plaintiff first contends that Defendant's Motion does not comply with Section 2-619.1 of the Illinois Code of Civil Procedure ("Code"). See Appellant's Brief pp. 16-22. Specifically, Plaintiff contends Defendant did not properly combine his arguments on personal jurisdiction grounds with those relating to the deficiency of the underlying common law claims. This argument lacks merit. In his Motion to Dismiss, Defendant identified his arguments and bases for dismissal in three brief, distinct paragraphs. R. C120-21 (Defendant's Motion). The first such paragraph specifically refers to this Court's lack of personal jurisdiction over the Defendant and the corollary basis for dismissal pursuant to § 2-619. Id. The second paragraph identifies additional arguments relating to improper service by the Plaintiff, improper forum, and the expiration of certain claims under the

statute of limitations. Id. The final paragraph refers specifically to Defendant's argument that Plaintiff failed to state any claim upon which relief can be granted under § 2-615. Id. Moreover, the Defendant's Motion specifically incorporates and references the arguments in the accompanying memorandum filed in support thereof. R. C120-21 (Defendant's Motion). Finally, the memorandum and amended memorandum filed in support of Defendant's Motion both contained distinct sections limited to and made under each of §§ 2-615 and 2-619. Id.; R. C132, 147 (Defendant's Mem. in Supp. Mot. to Dismiss). Each section also clearly showed the "grounds relied upon under the Section upon which it is based." Id. Such a construction completely complies with the requirements pursuant to § 2-619.1 relating to combined motions. 735 ILCS 5/2-619.1. Consequently, Plaintiff's argument to the contrary is erroneous. See id.

Next, Plaintiff reverses his argument and contends that a motion to dismiss for lack of personal jurisdiction must be filed separately under § 2-301 of the Code. Consequently, Plaintiff argues that Defendant has waived his jurisdictional argument by purportedly failing to do so. See Appellant's Brief pp. 15-22. As with his prior argument, Plaintiff misunderstands the law. For, a party no longer needs to file a special appearance under § 2-301 to challenge personal jurisdiction. In re Marriage of Hoover, 314 Ill. App. 3d 707, 710, 732 N.E.2d 145, 147 (4th Dist. 2000); see also KSAC Corp. v. Recycle Free, Inc., 364 Ill. App. 3d 593, 595, 846 N.E.2d 1021, 1023 (2nd Dist. 2006). In essence, the 2000 amendments to § 2-301 eliminated the distinction between general and special appearances. Id. In addition, a "defendant [may now] combine a motion challenging jurisdiction with other motions seeking relief on different grounds." KSAC Corp., 364 Ill. App. 3d at 595, 846 N.E.2d at 1023; see also In re Marriage of Hoover, 314 Ill. App. 3d. at 710, 732 N.E.2d

at 147. Indeed, § 2-619.1 specifically provides for such combined motions. 735 ILCS 5/2-619.1. And, despite Plaintiff's contention that personal jurisdiction cannot be raised under 2-619, Illinois courts have consistently addressed motions to dismiss for lack of personal jurisdiction pursuant to Section 2-619.<sup>2</sup> In re Marriage of Hoover, 314 Ill. App. 3d. at 710, 732 N.E.2d at 147; W. Va. Laborers Pension Trust Fund v. Caspersen, 357 Ill. App. 3d 673, 675, 829 N.E.2d 843, 845 (1st Dist. 2005). Consequently, Defendant properly brought his motion to dismiss for lack of personal jurisdiction pursuant to Section 2-619 in combination with additional bases for dismissal. See KSAC Corp., 364 Ill. App. 3d at 595, 846 N.E.2d at 1023; In re Marriage of Hoover, 314 Ill. App. 3d at 710, 732 N.E.2d at 147; 735 ILCS §§ 5/2-301, 2-619, and 2-619.1. Thus, the trial court did not err in refusing to consider Plaintiff's arguments on this issue below. Id. Therefore, the trial court's ruling should not be reversed on these bases. Id.

**B. The Trial Court Correctly Held That Plaintiff's Complaint Should Be Dismissed For Lack of Personal Jurisdiction.**

The trial court properly ruled that it did not have personal jurisdiction over Defendant. Defendant lacks sufficient contacts for this Court to exercise either general or specific personal jurisdiction over him. Furthermore, exercising personal jurisdiction over Defendant would not comport with due process under either the federal or Illinois constitutions. For these reasons, this Court should affirm the trial court's order granting Defendant's Motion.

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<sup>2</sup> The same arguments apply to Plaintiff's contention that Defendant has waived improper service of process. See Safeco/American States Ins. Co. v. Hagler, 332 Ill. App. 3d 912, 916, 773 N.E.2d 1255, 1258 (5th Dist. 2002).

1. *Standard for Personal Jurisdiction in Illinois.*

Section 2-619 of the Code provides for the dismissal of actions and claims where the Court lacks personal jurisdiction over the defendant. See 735 ILCS 5/2-619. Whether Illinois can exercise jurisdiction over a nonresident Defendant rests on the applicability of Illinois' long-arm statute. Kostal v. Pinkus Dermatopathology Laboratory, P.C., 357 Ill. App. 3d 381, 384, 827 N.E.2d 1031, 1035 (1st Dist. 2005) (citing 735 ILCS 5/2-209). The Illinois long-arm statute is codified at § 2-609. In 1989, the Illinois legislature amended § 2-609 to include a "catch-all" provision stating that a court "may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States." 735 ILCS 5/2-609(c). Consequently, the long-arm statute has become co-extensive with the due process requirements under the federal and Illinois constitutions. Keller v. Henderson, 359 Ill. App. 3d 605, 611-612, 834 N.E.2d 930, 936 (2nd District 2005) (citing Kostal, 357 Ill. App. 3d at 384, 827 N.E.2d at 1035). Thus, the focus of any personal jurisdiction inquiry must begin with whether the plaintiff has shown that federal and Illinois due process requirements have been met. Keller, 359 Ill. App. 3d at 612, 834 N.E.2d at 935. If these requirements have been met, the inquiry ends. See id.

In reviewing personal jurisdiction, the plaintiff bears the burden of establishing a valid basis for asserting jurisdiction over the defendant. See Kostal, 357 Ill. App. 3d at 383, 827 N.E.2d at 1035 (citing Morecambe Maritime, Inc. v. National Bank of Greece, S.A., 354 Ill. App. 3d 707, 710, 821 N.E.2d 780, 784 (1st Dist. 2004)). Although this Court must resolve conflicts between the Parties' affidavits in favor of Plaintiff, this Court must also accept as true any facts averred by Defendant that have not been contradicted by an affidavit submitted by Plaintiff. Cleary v. Philip Morris, 312 Ill. App. 3d 406, 411, 726 N.E.2d 770,

775 (1st Dist. 2000). “If plaintiff has failed to establish *a prima facie* case, the inquiry is at an end and the defendant's motion should be granted.” Id.

2. *Federal Due Process Precludes Personal Jurisdiction.*

The standard with which personal jurisdiction must comport to satisfy federal due process requirements has been well established. As the Keller court explained, the defendant

must have certain ‘minimum contacts’ with the forum state such that maintaining the suit there does not offend ‘traditional notions of fair play and substantial justice.’ In other words, “once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with ‘fair play and substantial justice.’” The minimum contacts required for personal jurisdiction “must be based on ‘some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.’” The purposeful availment requirement exists so that an ‘alien defendant will not be forced to litigate in a distant or inconvenient forum solely as a result of random, fortuitous, or attenuated contacts or the unilateral act of a consumer or some other third person’.

Keller, 359 Ill. App. 3d at 611-612, 834 N.E.2d at 936. An analysis under the federal due process requirements requires a three-prong inquiry; “whether (1) the nonresident defendant had ‘minimum contacts’ with the forum state such that there was ‘fair warning’ that the nonresident defendant may be haled into court there; (2) the action arose out of or related to

the defendant's contacts with the forum state; and (3) it is reasonable to require the defendant to litigate in the forum state.” Id.

The analysis of these factors further depends upon whether a plaintiff seeks to establish general or specific jurisdiction over the defendant. Id. General jurisdiction is permitted where a defendant has “continuous and systematic general business contacts” with the forum. Where general jurisdiction has been established, a defendant “may be sued in the forum state for suits neither arising out of nor related to the defendant’s contact with the forum state.” Id. Not so with specific jurisdiction. Indeed, the key difference between general and specific jurisdiction is that specific jurisdiction requires that the suit *arise out of* or be *related to* the defendant's contact with the forum. Id. (citing Bombliss v. Cornelsen, 355 Ill. App. 3d 1107, 824 N.E.2d 1175 (3rd Dist. 2005)) (emphasis added).

a. General Jurisdiction is Inapplicable to Defendant Andrews.

The Plaintiff has not established that this Court can exercise general jurisdiction over Defendant. First, Plaintiff does not specifically allege general jurisdiction over Defendant.<sup>3</sup> Defendant does not argue anywhere in his brief that general jurisdiction applies to Defendant. See Appellant’s Brief pp. 22-30. In fact, Plaintiff limits his jurisdiction argument to “specific jurisdiction in Illinois.” Id. p. 22. Thus, Plaintiff has waived any general jurisdiction argument. See RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1277 (7th Cir. 1997).

Assuming, *arguendo*, the Plaintiff has not waived a general jurisdiction argument,

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<sup>3</sup> Plaintiff confuses general jurisdiction and specific jurisdiction, alleging “*general* personal jurisdiction over Defendant pursuant to 735 ILCS 5/2-209(a)(1)”, whereas subsection 209(a)(1) provides for specific, not general, jurisdiction. See R. C34 (1st Am. Compl. ¶ 40) (emphasis added) and Kostal, 357 Ill. App. 3d at 385, 827 N.E.2d at 1035. Thus, it is unclear whether Plaintiff asserts general jurisdiction, specific jurisdiction, or both. Defendant submits that Plaintiff has failed to properly assert general jurisdiction. Thus, Plaintiff has waived any general jurisdiction argument.

the Plaintiff cannot establish general personal jurisdiction over Defendant. In his First Amended Complaint, Plaintiff admits that Defendant resides in North Plains, Oregon and is not an Illinois resident. See R. C27 (1st Am. Compl. ¶ 3). Defendant has not had and does not have systematic, continuous or intense contacts in the State of Illinois. See R. C157 (Andrews Affidavit ¶ 3). To overcome this, Plaintiff alleges that Defendant is subject to Illinois “general personal jurisdiction” because Defendant operates a website which makes Defendant’s software available online. See R. C28, 34 (1st Am. Compl. ¶¶ 8, 40). It is true that Defendant operates a website at [www.k9ped.com](http://www.k9ped.com). See R. C28 (1st Am. Compl. ¶ 8); R. C157 (Andrews’ Affidavit ¶ 5). However, Defendant does not operate the website from Illinois; does not have the website hosted with an Internet server in Illinois; and does not have the website maintained from Illinois. See R. C157 (Andrews’ Affidavit ¶ 8). Apart from counsel retained for this lawsuit, Defendant has not hired Illinois companies to perform services for him, his website or his business. Id. ¶ 9. Also, Defendant does not specifically target his website, including the advertising and marketing thereon, or his software to Illinois citizens. Id. ¶ 7.

Despite Defendant’s lack of contact with Illinois, Plaintiff alleges that Defendant “has used the Web Site to solicit customers from and complete sales in Illinois, and has sold copies of his competing software to Illinois residents.” See R. C28, 34 (1st Am. Compl. ¶¶ 8, 40). In fact, as of March 30, 2006, Defendant had only *one* customer with an Illinois mailing address. See R. C157 (Andrews’ Affidavit ¶ 10). Although Plaintiff calls Defendant “a liar” for saying so without any basis, he does acknowledge that “[t]he truth of this matter is within Andrews’ exclusive control.” R. C252 (Plaintiff’s Affidavit ¶ 4). In any case, merely entering into a contract with a single resident of Illinois is not sufficient by

itself to subject a nonresident to personal jurisdiction in Illinois. Hendry v. Ornda Health Corp., 318 Ill. App. 3d 851, 853, 742 N.E.2d 746, 748 (2nd Dist. 2000). Indeed, the business conducted by the nonresident must be carried on with a fair measure of permanence and continuity, not occasionally or casually. Id. Consequently, such nominal and sporadic contacts do not lend to business that is conducted with “a fair measure of permanence and continuity” sufficient for general jurisdiction. LaRochelle v. Allamian, 361 Ill. App. 3d 217, 226, 836 N.E.2d 176, 185 (2nd Dist. 2005) (citing Hendry v. Ornda Health Corp., 318 Ill. App. 3d 851, 853, 742 N.E.2d 746, 750 (2nd Dist. 2000)). Moreover, the mere possibility of sales to Illinois citizens through Defendant’s website is insufficient to warrant general jurisdiction. See LaSalle National Bank v. Vitro, Sociedad Anonima, 85 F. Supp. 2d 857, 861 (N.D. Ill. 2000) (quoting Molnlycke Health Care AGB v. Dumex Medical Surgical Products Ltd., 64 F. Supp. 2d 448, 451 (E.D. Pa. 1999)).

With respect to Defendant’s website as a whole, it does not warrant exercising general jurisdiction in this instance. Obviously, websites, including Defendant’s, can be accessed by Internet users *worldwide*. Consequently, it becomes even more essential for courts to analyze the question of jurisdiction arising from websites on a case-by-case basis. LaRochelle, 361 Ill. App. 3d at 222, 836 N.E.2d at 184-85 (citing Haubner v. Abercrombie & Kent International, Inc., 351 Ill. App. 3d 112, 119, 812 N.E.2d 704 (1st Dist. 2004)). For this reason, with regard to the Internet and personal jurisdiction, Illinois courts have adopted the “sliding scale” analysis to determine whether Internet activity is sufficient to establish personal jurisdiction. LaRochelle, 361 Ill. App. 3d at 225 (citing Bombliss v. Cornelsen, 355 Ill. App. 3d 1107, 1114, 824 N.E.2d 1175, 1180 (3rd Dist. 2005), for the analysis formulated in Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123-24 (W.D.

Pa. 1997)). At one end, jurisdiction does not attach where the nonresident maintains a passive website that merely provides information about the defendant's products or services. Id. At the other end, jurisdiction attaches where the defendant transacts business via an active website where contracts are completed online and the defendant derives profits directly from web-related activity. Id. Passive websites do not give rise to general jurisdiction. Fully active, commercial websites can give rise to general jurisdiction. Id.

A third type of interactive hybrid website exists between the “passive” and “active” websites. An “interactive” website allows customers to communicate and interact with a defendant regarding a defendant's products and services. See Infosys Inc. v. Billingnetwork.com, Inc., No. 03 C 2047, 2003 U.S. Dist. LEXIS 14808, at \*9 (N.D. Ill. Aug. 27, 2003). The applicability of general jurisdiction to such a website depends on its level of commercial interactivity. However, “commercial” does not necessarily include all features designed to promote a business or product. See id. at \*9-10 (comparing interconnectivity of a commercial nature such as “soliciting software resellers, medical sales representatives, and practice management consultants to join its ‘network of qualified Value Added Resellers (VARs)’” to other “interconnectivity features of a lesser commercial nature” such as “an opportunity to subscribe to [the company’s] periodic newsletter, and, on a separate page for investors, the website invites potential investors to fill out a form for more information ‘about investment opportunities’ in the company”). Even still, courts have disagreed on the level of commercial interactivity sufficient to confer general jurisdiction. Id. n2, n3 (citing disagreeing opinions). An analysis of these cases, however, demonstrates that “cases conferring jurisdiction partly on the basis of Internet activity ‘reflect that personal jurisdiction is typically determined based not only on the defendant's

Internet activities but also on its non-Internet activities.” Id. (citing Watchworks, Inc. v. Total Time, No. 01 C 5711, 2002 U.S. Dist. LEXIS 4491, at \*6 (N.D. Ill. Mar. 19, 2002) (emphasis added)). Indeed, “there is no case where general jurisdiction was conferred on the basis of an interactive website in the absence of non-website factors evidencing intent for a defendant's product or website to reach a particular state.” Id. Therefore, non-Internet activities must exist apart from a hybrid or interactive website for there to be general jurisdiction over Defendant operator of the website. Id.

Here, Defendant’s website is a “hybrid” or “interactive” -- it provides information about Defendant’s software and is designed to sell Defendant’s products. See R. C157 (Andrews’ Affidavit ¶ 6). As indicated above, the Defendant lacks any non-Internet contacts sufficient to confer general jurisdiction. Consequently, there do not exist sufficient bases to warrant exercising general jurisdiction over Defendant. See Watchworks, Inc., 2002 U.S. Dist. LEXIS 4491, at \*6; Infosys, Inc., 2003 U.S. Dist. LEXIS 14808, at \*9.

For the reasons above, Plaintiff fails to allege that Defendant has continual and intense business contacts with Illinois companies or residents; and Defendant does not have such contacts. See R. C157-58 (Andrews Affidavit ¶¶ 1-10). Without such contacts with Illinois, the Defendant’s website does not give rise to general personal jurisdiction. Thus, Defendant cannot be subject to personal jurisdiction based on a general jurisdictional analysis.

b. Specific Jurisdiction is Inapplicable to Defendant Andrews.

Similar to that of general jurisdiction, Plaintiff cannot establish that this Court has specific jurisdiction over Defendant. The main factor in specific jurisdiction analysis is foreseeability -- was it reasonably foreseeable to the defendant that its action could result in

litigation in the state in question. Birnberg v. Milk St. Residential Assocs. Partnership, No. 02 C 0978 and 02 C 3436, 2003 U.S. Dist. LEXIS 806, at \*10 (N.D. Ill. January 17, 2003) (R. C164-178) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-74 (1985)). Contacts that are "random, fortuitous, or attenuated" are not sufficient to establish that a state's exercise of personal jurisdiction over the defendant was foreseeable. Id. (citing Heritage House Rests., Inc. v. Cont'l Funding Group, Inc., 906 F.2d 276, 283 (7th Cir. 1990)). Moreover, in examining the contacts in a specific jurisdiction analysis, the court cannot "simply aggregate all of the defendant's contacts with the state -- no matter how similar in terms of geography, time, or substance." Id. (citing RAR, 107 F.2d at 1277).

Plaintiff alleges specific jurisdiction over Defendant pursuant to 735 ILCS 5/2-209(a)(1) and (a)(2). See R. C33-34 (1st Am. Compl. ¶¶ 38, 40). Sections 209(a)(1) and (a)(2) provide for jurisdiction over a nonresident defendant for a cause of action arising from the "transaction of any business within" Illinois and the "commission of a tortious act within" Illinois, respectively. 735 ILCS 5/2-209(a). Specifically, Plaintiff contends that Defendant transacts business in Illinois, engaged in tortious activity that affected an Illinois citizen, and that his website gives rise to specific personal jurisdiction.

#### **"Transaction of Business" Inapplicable**

For specific jurisdiction to be applicable based upon transaction of business, Plaintiff's causes of action must *arise from* Defendant's "transaction of business" in Illinois. See 735 ILCS 5/2-209(a)(1); Kostal, 357 Ill. App. 3d at 385 (emphasis in original) (citing Kadala v. Cunard Lines, Ltd., 226 Ill. App. 3d 302, 314, 589 N.E.2d 802, 810 (1st Dist. 1992)); see also Bombliss, 355 Ill. App. 3d at 1112, 824 N.E.2d at 1179 ("Specific jurisdiction refers to jurisdiction over a defendant in a suit arising out of or related to the

defendant's contacts with the forum"). Plaintiff alleges that Defendant "transacted business" because Defendant's website "is an active web site, [sic] that facilitates the completion of sales transactions wholly online, including sales to Illinois residents." See R. C33 (1st Am. Compl. ¶ 39). Although Defendant has one customer with an Illinois mailing address, any such sales to this customer are irrelevant to the question of *specific* personal jurisdiction over Defendant. For, Plaintiff's claims of libel, unfair competition and tortious interference with prospective economic advantages have no relation to and did not arise out of any such sales. See generally R. C27-46 (1st Am. Compl). Rather, Plaintiff's allegations arise from Defendant's acts of posting alleged "disparagements" or statements about Plaintiff on his website. See generally R. C27-46 (1st Am. Compl.) As such, the instant circumstances differ significantly from Swissland Packing Co. v. Cox, 255 Ill. App. 3d 942, 944, 627 N.E.2d 686, 688 (3rd Dist. 1994) (holding that the defendant's conduct of negotiating the contract with plaintiff by telephone and mailing the contract to plaintiff in Illinois was sufficient to submit the defendant to specific jurisdiction of the Illinois courts) and Kalata, 312 Ill. App. 3d at 768, 728 N.E.2d at 654 (holding that the defendant's telephone and mail communications to negotiate and execute the joint venture agreement with plaintiff satisfied the long arm-statute). Because Plaintiff's allegations of libel, unfair competition and tortious interference do not *arise from* Defendant's alleged sales to Illinois citizens, there cannot be any specific jurisdiction over Defendant based on such alleged conduct under the "transacting business" theory. See Kostal, 357 Ill. App. 3d at 385, 827 N.E.2d at 1035 (emphasis in original) (citing Kadala v. Cunard Lines, Ltd., 226 Ill. App. 3d 302, 314, 589 N.E.2d 802, 810 (1st Dist. 1992)); see also Bombliss, 355 Ill. App. 3d at 1112, 824 N.E.2d at 1179.

### **“Tortious Act” Inapplicable**

Plaintiff next contends that specific jurisdiction arises from Defendant’s alleged tortious acts. As with the “transacting business” specific jurisdiction analysis, the Plaintiff’s claims must relate to or arise from the tortious acts. Keller, 359 Ill. App. 3d at 611-612, 834 N.E.2d at 936; RAR, Inc., 107 F.3d at 1277-78; Spartan Motors v. Lube Power, Inc., 337 Ill. App. 3d 556, 561, 786 N.E.2d 613, 618 (2nd Dist. 2003). For this purpose, Plaintiff alleges two sets of acts he contends give rise to personal jurisdiction: accessing a federal court website and publishing statements about a competitor on one’s own website. Each of these acts fails to give rise to personal jurisdiction in Illinois.

Plaintiff incredulously contends that Defendant entered into Illinois, with no purpose other than to damage Plaintiff, when he accessed a website operated by the federal courts, particularly that of the United States Bankruptcy Court for the Northern District of Illinois. See R. C33 (1st Am. Compl. ¶¶ 37, 38). Although courts have broadly construed the term “tortious act” to include acts beyond those which “create common law liability” such that “any act [constituting] a breach of duty to another imposed by law” committed within the state may give rise to personal jurisdiction, Vlasak v. Rapid Collection Sys., Inc., 962 F. Supp. 1096, 1100 (N.D. Ill. 1997); Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 429 F. Supp. 139, 140 (N.D. Ill. 1977). Not surprisingly, Plaintiff fails to cite any authority supporting his claim that merely accessing a government website to obtain public court documents constitutes a tortious activity. Indeed, Defendant did not breach a duty to Plaintiff or anyone by accessing a federal court website. Additionally, Plaintiff fails to cite any authority supporting his claim that merely accessing a government website to obtain public court documents gives rise to personal jurisdiction. However, even if accessing an Illinois

court website constitutes “entering Illinois” and a tortious activity for purposes of specific jurisdiction, Plaintiff’s claims do not arise from the accessing of the government’s website. Thus, Defendant’s interaction with the court’s website has no application to specific jurisdiction analysis in this case. See RAR, Inc., 107 F.2d at 1272.

Plaintiff next contends that the act of publishing statements on a website about a competitor suffices to exercise jurisdiction over a nonresident defendant. Plaintiff is mistaken. Like the defendant in Bailey v. Turbine Design, Inc., Defendant here did not make statements about Plaintiff as an Illinois businessman or company. Bailey v. Turbine Design, Inc., 86 F. Supp. 2d 790, 796-797 (W.D. Tenn. 2000). Like Bailey, the alleged defamatory comments had nothing to do with the Plaintiff’s state of residence. See id. Consequently, the alleged statements do not constitute actions “expressly aimed” at Illinois. As the court explained in Barrett v. Catacombs Press:

It is certainly foreseeable that some of the harm would be felt in [the forum state] because Plaintiff lives and works there, but such foreseeability is not sufficient for an assertion of jurisdiction. While we agree that [forum] residents are among the recipients or viewers of such defamatory statements, they are but a fraction of other worldwide Internet users who have received or viewed such statements. The mere allegations that the Plaintiff feels the effect of the Defendant's tortious conduct in the forum because the Plaintiff is located there is insufficient to satisfy the effects test of Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482 (1984). Unless [the forum state] is deliberately or knowingly targeted by the tortfeasor, the fact that harm is felt in [the forum state] from conduct occurring outside [it] is never sufficient to satisfy due

process.

44 F. Supp. 2d 717, 731 (E.D. Pa. 1999). Other courts have reached consistent results. Reynolds v. International Amateur Ath. Fed'n, 23 F.3d 1110, 1120 (6th Cir. 1994) (“the fact that the defendant could foresee that the statements would be circulated and have an effect in [the forum state] is not, in itself, enough to create personal jurisdiction.”); see also Neogen Corp. v. VICAM, No. 5:96-CV-138, 1997 U.S. Dist. LEXIS 3331, at \*5-7 (W.D. Mich. Feb. 20, 1997). Thus, jurisdiction over the Defendant should not be exercised merely based on the fact that some of the harm caused by the alleged tortious conduct occurred in Illinois. See Barrett, 44 F. Supp. 2d at 731. Therefore, the statements alone do not give rise to specific personal jurisdiction. See id.

#### **Websites Revisited**

Finally, the Defendant’s website does not warrant exercising specific personal jurisdiction over the Defendant. Although Plaintiff arguably asserts specific jurisdiction as to Defendant’s website, the Defendant’s website was not specifically targeted toward Illinois or Illinois residents. Moreover, the Defendant’s website is wholly passive to the portions of the website at issue in this litigation. Specifically, the statements about Plaintiff constitute purely passive information on the website. As such, the passive nature of this content cannot give rise to specific personal jurisdiction over the Defendant. See LaRochelle, 361 Ill. App. 3d at 225, 836 N.E.2d at 186; Bombliss, 355 Ill. App. 3d at 1114, 824 N.E.2d at 1175; Zippo Mfg. Co., 952 F. Supp. at 1123-24. This Court cannot consider portions of the Defendant’s website unrelated to the Plaintiff’s claims in a specific jurisdiction analysis. See Haemoscope Corporation v. Pentapharm AG, et al, No. 02 C 4261, 2002 U.S. Dist. LEXIS 23387, at \*22 (N.D. Illinois December 6, 2002) (citing RAR,

Inc., 107 F.3d at 1277 (“in minimum contacts analysis for specific jurisdiction, court may consider only defendant's contacts that relate to the suit; it may not aggregate all of defendant's contacts with a forum”). Therefore, with respect to the Defendant’s statements Plaintiff finds troubling, Defendant’s website is “a passive website which cannot satisfy the minimum contacts requirement.” Id.

3. *Illinois Due Process Precludes Personal Jurisdiction.*

Although Illinois due process requirements theoretically could diverge at some point from federal due process requirements, federal courts have held that “because Illinois courts have not elucidated any ‘operative difference between the limits imposed by the Illinois Constitution and the federal limitations on personal jurisdiction,’ the two constitutional analyses collapse into one.” Allied Van Lines, Inc. v. Gulf Shores Moving & Storage, Inc., No. 04-C-6900, 2005 U.S. Dist. LEXIS 6244, slip op. at 5 (N.D. Illinois February 23, 2005) (quoting Hyatt Int’l Corp. v. Coco, 302 F.3d 707, 715 (7th Cir. 2002)). That being said, “[d]ue process under the Illinois Constitution requires that it be ‘fair, just, and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant's acts which occur in Illinois or which affect interests located in Illinois.’” Keller, 359 Ill. App. 3d at 619, 834 N.E.2d at 942 (quoting Rollins v. Ellwood, 141 Ill.2d 244, 275, 565 N.E.2d 1302 (Ill. 1990)); RAR, Inc., 107 F.3d at 1276. As demonstrated above, the subjection of the nonresident Defendant to jurisdiction in Illinois to defend this case would not be “fair, just and reasonable.” See id. Consequently, the Illinois due process requirements cannot tolerate exercising personal jurisdiction against Defendant. See id.

4. *Defendant Is Not Subject to Jurisdiction in Illinois.*

For the foregoing reasons, the Plaintiff has failed to make a prima facie case sufficient to warrant the exercise of personal jurisdiction over Defendant. Even if the Plaintiff did establish a prima facie case, the Defendant has demonstrated that exercising personal jurisdiction over him would not comport with the due process requirements under the federal and Illinois constitutions. Because neither general nor specific jurisdiction is applicable, the trial court correctly ruled that it did not have personal jurisdiction over Defendant. Therefore, this Court should affirm the trial court's ruling and dismiss Plaintiff's claims for lack of jurisdiction.

**II. PLAINTIFF FAILS TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED.**

Although the trial court dismissed Plaintiff's First Amended Complaint on personal jurisdictional grounds only, Plaintiff has also introduced arguments in his Appellate brief on the underlying claims of his First Amended Complaint.<sup>4</sup> See Appellant's Brief p. 30. Plaintiff both raises a procedural issue and argues that he has sufficiently stated claims upon which relief can be granted. Consequently, on the possibility that this Court may consider Plaintiff's arguments with respect to his claims, Defendant now responds to them. For the reasons below, Plaintiff has failed to state claims for Tortious Interference, Defamation, and Unfair Competition.

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<sup>4</sup> Although the record does not contain any ruling by the trial court on the underlying claims in Plaintiff's First Amended Complaint or any substantial discussion of same at the hearing on Defendant's Motion to Dismiss, the Plaintiff views the presence of arguments related thereto as providing a possible additional basis upon which this Court might affirm the trial court's order dismissing the First Amended Complaint.

**A. Plaintiff Was Not Prejudiced by Defendant's Affirmative Defenses and Introduction of Evidentiary Material.**

Plaintiff contends that affirmative defenses and evidentiary material cannot be introduced in a § 2-615 motion. See Appellant's Brief p 34. Specifically, Plaintiff asserts that Defendant submitted evidentiary material to support his arguments seeking dismissal of Plaintiff's Tortious Interference with Prospective Economic Advantage and Defamation claims. This is proper and permissible under a section 2-619 motion. Barrett v. Fonorow, 343 Ill. App. 3d 1184, 1189, 799 N.E.2d 916, 920 (2nd Dist. 2003) ("A motion to dismiss made under § 2-619 admits the legal sufficiency of a plaintiff's complaint but raises defects, defenses, or other affirmative matters that appear on the face of the complaint or that are established by external submissions acting to defeat the allegations of the complaint."). As to these claims, Defendant's arguments perhaps should have been more appropriately labeled as arising under § 2-619 rather than § 2-615. However, this does not provide Plaintiff with a basis for reversal.

As the First District has held, the mislabeling of motion as arising under § 2-615 rather than § 2-619 does not require a reversal where there is no indication of prejudice arising therefrom. Advocate Health & Hospitals Corp. v. Bank One, N.A., 348 Ill. App. 3d 755, 758, 810 N.E.2d 500, 504 (1st Dist. 2004). Here, like in Advocate Health, Plaintiff has not shown any portion of the record that exhibits such prejudice. In fact, there has been no prejudice to Plaintiff. For one, the trial court did not even rule upon the Defendant's arguments with respect to tortious interference and defamation. R. C386-87 (Amended Order). Additionally, like in Advocate Health, the Plaintiff recognized and argued this issue in the trial court. Advocate Health, 348 Ill. App. 3d at 758, 810 N.E.2d at 504. Consequently, the Plaintiff has not been prejudiced by Defendant's use of affirmative

defenses or evidentiary evidence. See id. Thus, this Court should not decline to address the arguments related to Plaintiff's underlying claims on this basis alone. See id. Likewise, should this Court exercise its discretion to consider and rule upon the underlying claims, the Defendant contends this Court should consider his arguments as to Plaintiff's claims for tortious interference with prospective economic advantage and defamation as brought pursuant to § 2-619.<sup>5</sup>

**B. Plaintiff's Defamation Claims Have No Merit.**

Plaintiff fails to state claims for defamation *per se* in Counts Two and Ten and defamation *per quod* in Counts Four and Five.<sup>6</sup> These claims should be dismissed based on the affirmative defenses of substantial truth and opinion.

*1. The Illinois Defamation Standard.*

To state a defamation claim, a plaintiff must allege facts tending to demonstrate that the defendant made a false statement of fact about the plaintiff, that there was an unprivileged publication of the false statement to a third party by the defendant, and that the publication damaged the plaintiff. Popko v. Continental Casualty Co., 355 Ill. App. 3d 257, 261, 823 N.E.2d 184, 188 (1st Dist. 2005). In Illinois, a "statement is defamatory if it impeaches a person's reputation and thereby lowers that person in the estimation of the community or deters third parties from associating with that person." Schivarelli v. CBS, Inc., et al., 333 Ill. App. 3d 755, 759, 776 N.E.2d 693, 696 (1st Dist. 2002). Defamatory

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<sup>5</sup> If this Court reverses on jurisdictional grounds, Defendant requests leave to replead these arguments as arising under section 2-619.

<sup>6</sup> Plaintiff titles Counts Two, Four, Five and Ten "Libel Per Se", "Libel Per Quod", "Libel Per Quod II", and "Libel Per Se II", respectively. See R. C35, 37, 38, 44 (1st Am. Compl.) Plaintiff alleges "Libel Per Se" in Count Two relative to the first and fifth disparagements; "Libel Per Quod" in Count Four relative to the second disparagement; "Libel Per Quod II" in Count Five relative to the third disparagement; and "Libel Per Se II" in Count Ten relative to the sixth disparagement. See generally R. C27-46 (1st Am. Compl.) To defray confusion, Defendant will address all four Counts (II, IV, V and X) collectively as Plaintiff's "Libel Claims".

statements may be classified as either defamatory *per se* or defamatory *per quod*. Id. To constitute a statement that is defamatory *per se*, a statement must fit into one of five categories that Illinois recognizes as being “so obviously and naturally harmful to the person to whom it refers that injury to his reputation may be presumed.” Id. These five categories include those statements (1) imputing the commission of a criminal offense; (2) imputing infection with a loathsome communicable disease; (3) imputing an inability to perform or want of integrity in the discharge of duties of office or employment; (4) imputing a lack of ability or prejudicing a party in one’s trade, profession, or business; and (5) imputing adultery or fornication. Id. In such cases, a plaintiff need not allege or prove special damages. Van Home v. Muller, 185 Ill.2d 299, 307, 705 N.E.2d 898, 903 (Ill. 1998).

Should statements not fall into one of the *per se* categories, the statements could still be defamatory *per quod*. To succeed on a defamation *per quod* claim, a plaintiff must demonstrate that a defendant “made a false statement concerning [the] plaintiff, that there was an unprivileged publication of the defamatory statement to a third party by [the] defendant, and that [the] plaintiff was damaged” from the publication. Cianci v. Pettibone Corp., 298 Ill. App. 3d 419, 424, 698 N.E.2d 674, 678 (1st Dist. 1998). Extrinsic facts must be alleged showing the defamatory nature of the language. Anderson v. Vanden Dorpel, 172 Ill.2d 399, 406, 416-417, 667 N.E.2d 1296, 1303-04 (Ill. 1996). Moreover, one must allege specific special damages. Indeed, failure to plead specific damages is a fatal deficiency to any defamation *per quod* claim. Schivarelli, 333 Ill. App. 3d at 759, 776 N.E.2d at 696. General allegations that the alleged defamatory statements caused a plaintiff emotional distress, embarrassment or economic loss are insufficient. Anderson, 172 Ill.2d at 416-417, 667 N.E.2d at 1303-04. Finally, Plaintiff must allege with specificity the

statements it claims were defamatory. Lykowski v. Bergman, 299 Ill. App. 3d 157, 163, 700 N.E.2d 1064, 1069 (1st Dist. 1998) (holding that a plaintiff must set forth the words alleged to be defamatory “clearly and with particularity” and that it is not enough for the plaintiff to merely state that a defendant generally accused the plaintiff of committing improper or unethical conduct).

2. *The “Substantial Truth” Defense Is Alive, Well, and Applicable.*

The Plaintiff’s claims for defamation fail because the Defendant made truthful statements. Truth is a defense to a defamation action that may be raised by a motion to dismiss. Emery v. Kimball Hill, Inc., 112 Ill. App. 3d 109, 112, 445 N.E.2d 59, 61 (2nd Dist. 1983); American Int’l Hosp. v. Chicago Tribune Co., 136 Ill. App. 3d 1019, 1022-23, 483 N.E.2d 965, 968 (1st Dist. 1985). While ordinarily the determination of whether substantial truth exists remains a question for a jury to decide, the question becomes one of law where no reasonable jury could find that substantial truth had not been established. Parker v. House O’Lite Corp., 324 Ill. App. 3d 1014, 1026, 756 N.E.2d 286, 296 (1st Dist. 2001). In raising truth as a defense, a defendant need only demonstrate the “substantial truth” of the allegedly defamatory material. Lemons v. Chronicle Publishing Co., 253 Ill. App. 3d 888, 890, 625 N.E.2d 789, 791 (4th Dist. 1993); Farnsworth v. Tribune Co., 43 Ill.2d 286, 293-94, 253 N.E.2d 408, 412 (Ill. 1969). “Substantial truth” requires only that a defendant demonstrate the truth of the “gist” or “sting” of the defamatory material. Kilbane v. Sabonjian, 38 Ill. App. 3d 172, 175, 347 N.E.2d 757, 761 (2nd Dist. 1976); American Int’l Hosp., 136 Ill. App. 3d at 1022, 483 N.E.2d at 968. Further, allegedly defamatory statements need not be technically accurate in every detail to avoid being actionable. See

Parker, 324 Ill. App. 3d at 1026, 756 N.E.2d at 296.<sup>7</sup> Here, Defendant posted truthful information on his website about Plaintiff. See R. C157-58 (Andrews' Affidavit).

a. Count Two and the "First Disparagement".

Plaintiff first complains of the "First Disparagement" by Defendant in Count Two. Although the Plaintiff fails to incorporate any prior allegations into his Count Two, the First Disparagement reads:

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 site [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://www.k9ped.com/mbfsbankruptcy.pdf> [sic].

R. C28 (1st Am. Compl. ¶ 10). This statement contains no defamatory material. Plaintiff does not dispute he was in bankruptcy. Id. Moreover, the Plaintiff does not dispute making the statement that he lacked funds to complete his software programs. Rather, Plaintiff claims his statement made to the United States Bankruptcy Court has been "misinterpreted." See R. C269 (Pl.'s Opp. Memo. p. 14). Plaintiff admits that he made this statement "in an effort to cause the court to grant [Plaintiff's] pending motion to convert [sic] from Chapter 7 to Chapter 13." Id. Here, in a different venue and for a different purpose, Plaintiff attempts to qualify the statement by suggesting that he did not entirely mean what he said. Indeed, he now contends that he then meant only that "if the conversion were not granted, [Plaintiff] would not be able to afford to complete [the program]." See R. C269 (Pl.'s Opp. Memo. p.

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<sup>7</sup> Plaintiff also contends Defendant imputed that Plaintiff violated specific criminal statutes. See Appellant's Brief p. 35. Plaintiff has chosen to construe his conduct as criminal. Defendant did not impute such violations. Consequently, Defendant clearly should not be liable for Plaintiff's construction.

14). In any case, nothing in the “first disparagement” is untrue. Consequently, the first disparagement cannot give rise to a claim for defamation based on its substantial truth. Emery, 112 Ill. App. 3d at 112, 445 N.E.2d at 61; American Int’l Hosp., 136 Ill. App. 3d at 1022-23, 483 N.E.2d at 968.

Additionally, the statement warning readers of purchasing unreleased software products constitutes an opinion. In Illinois, a “statement of fact is not shielded from an action for defamation by being prefaced with the words ‘in my opinion’, but if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.” Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993); see also Sullivan v. Conway, 157 F.3d 1092, 1097 (7th Cir. 1998) (Illinois law); Bryson v. News America Publications, 174 Ill. 2d 77, 100, 672 N.E.2d 1207, 1220 (Ill. 1996). Indeed, “[w]hen a statement in the form of an opinion discloses the defamatory facts (or refers to facts in the public record), it is not actionable apart from those facts.” Stevens v. Tillman, 855 F.2d 394, 400 (7th Cir. 1988) (citing Horowitz v. Baker, 168 Ill. App. 3d 603, 608, 523 N.E.2d 179, 182 (3d Dist. 1988); Stewart v. Chicago Title Insurance Co., 151 Ill. App. 3d 888, 892, 503 N.E.2d 580, 582 (4th Dist. 1987)). In other words, an opinion cannot provide a basis for liability by itself where an individual discloses the truthful facts upon which the opinion is based. Id. Here, the Defendant’s warning constituted an opinion supported by factual and truthful statements to which the Plaintiff admits. Moreover, it constitutes an opinion as to future events that cannot be actionable as “a prediction as to future events can neither be true nor false.” Uline, Inc. v. JIT Packaging, Inc., 437 F. Supp. 2d 793, 803 (N.D. Ill. 2006). Consequently, the warning or opinion cannot give rise by

itself to liability for defamation. Id.; Haynes, 8 F.3d at 1227; see also Sullivan, 157 F.3d at 1092; Bryson, 174 Ill. 2d at 100, 672 N.E.2d at 1220; Stevens, 855 F.2d at 400; Horowitz, 168 Ill. App. 3d at 608, 523 N.E.2d at 182; Stewart, 151 Ill. App. 3d at 892, 503 N.E.2d at 582.

Finally, even if the statement is not a protectable opinion, the statement is subject to an innocent construction. Under Illinois law, a statement is not defamatory if it is “reasonably capable of an innocent construction.” Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717, 726 (7th Cir. 2004) (citing Kolegas v. Heftel Broad. Corp., 154 Ill. 2d 1, 8, 607 N.E.2d 201, 206 (Ill. 1992)). Whether a statement is subject to an innocent construction is for a court to decide. Kolegas, 154 Ill.2d at 8, 607 N.E.2d at 207. Arguably, the statement inferred that Plaintiff may have difficulty completing its software product. See R. C28 (1st Am. Compl. ¶ 10). However, this statement occurred in the context of documents filed with the United States Bankruptcy Court and statements made by Plaintiff in such documents. Id. Consequently, the statement of which Plaintiff complains is subject to an innocent construction that a party in bankruptcy that states it does not have funds to complete a software product may not be able to complete the software product in the future. Consequently, it cannot give rise to liability. See Uline, Inc., 437 F. Supp. 2d at 803.

b. Count Four and the “Second Disparagement”.

Plaintiff next complains of the “Second Disparagement” in Count Four. Although the Plaintiff fails to incorporate any prior allegations into his Count Four, the Second Disparagement reads

K9-Ped is pedigree research software. It is intended for personal use. It does not contain the features required for the management of a breeding kennel. If

you are a commercial breeding kennel and looking for software to manage your kennel please purchase software designed for this purpose. Caution, when purchasing any ‘commercial use only’ software, like all of the products from Man’s Best Friend Software™, you may forfeit all your consumer protection rights.

See R. C29 (1st Am. Compl. ¶ 17). This statement contains no defamatory material. K9-Ped is Defendant’s product. Id. at ¶ 17. Consequently, the claims as to it cannot be considered defamatory of Plaintiff. As to the reference to Plaintiff’s software as “commercial use only,” Plaintiff does not deny this characterization. See R. C37 (1st Am. Compl. ¶ 70). In fact, he explicitly states that “[t]here is no ‘personal use’ for animal pedigree research software.” Id. And, “neither K9-Ped nor any of John’s products have any valid personal use – they are business software products.” See R. C37 (1st Am. Compl. ¶ 71). Despite Plaintiff’s interpretation to the contrary, the statement does not state that Plaintiff’s products would be compatible with a commercial breeding kennel. Rather, it states that Plaintiff’s products are for commercial use only – a fact Plaintiff admits. See R. C29, 37, 38 (1st Am. Compl. ¶¶ 17, 71, 73). Finally, as to “consumer protection rights,” Plaintiff does not contend Defendant falsely represents that one will lose such rights when purchasing Plaintiff’s products. Rather, he disagrees with Defendant that anyone has consumer protection rights to begin with. See R. C38 (1st Am. Compl. ¶ 72) (Defendant “lies in the second disparagement by stating that purchasers of John’s software have ‘consumer rights’ to forfeit.”). If anything, this merely represents a disagreement among lay individuals on legal issues. Again, there exists nothing on the face of the “Second Disparagement” that is untruthful. Consequently, the “Second Disparagement” cannot give

rise to a claim for defamation. Emery v. Kimball Hill, Inc., 112 Ill. App. 3d 109, 112, 445 N.E.2d 59, 61 (2nd Dist. 1983); American Int'l Hosp., 136 Ill. App. 3d at 1022-23, 483 N.E.2d at 968.

c. Count Five and the “Third Disparagement”.

Plaintiff next complains of the Fifth Disparagement in Count Five. Although the Plaintiff fails to incorporate any prior allegations into his Count Five, the Third Disparagement reads:

Don't get tricked by sale prices and specials. Don't lock yourself into a lifetime of high priced upgrades. Many other programs charge outrageous amounts to upgrade to new versions. Changing to K9-Ped now rather than upgrading other programs most likely will be cheaper in the long run. For example, three upgrades of The Breeder's Standard™ costs [sic] more than the program. Even with the \$15.00 discount for orders received before the first Windows version of CompuPed™ is released, all of the CompuPed™ DOS to Windows version upgrades are over \$50.00 and some are over \$99.00.

See R. C29 (1st Am. Compl. ¶ 18). This statement contains no defamatory material.

Nowhere in the First Amended Complaint does Plaintiff dispute that (a) “three upgrades of The Breeder's Standard™ costs more than the program” and (b) “all of the CompuPed™ DOS to Windows version upgrades are over \$50.00 and some are over \$99.00 even with the \$15.00 discount for orders received before the first Windows version of CompuPed™ is released.” See generally R. C27-46 (1st Am. Compl.) Rather, Plaintiff complains of the Defendant's characterization of “outrageous amounts to upgrade to new versions” and the

warning to avoid being “tricked by sale prices and specials.” See R. C38-39 (1st Am. Compl. ¶¶ 77-79).

The statements of which Plaintiff complains do not themselves refer to the Plaintiff. See R. C29 (1st Am. Compl. ¶ 18). Assuming, *arguendo*, the statements can be construed as referring to Plaintiff, they still remain unactionable as protectable opinion. In Illinois, a “statement of fact is not shielded from an action for defamation by being prefaced with the words ‘in my opinion’, but if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.” Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993); see also Sullivan, 157 F.3d at 1097 (Illinois law); Bryson, 174 Ill. 2d at 100, 672 N.E.2d at 1220. Indeed, “[w]hen a statement in the form of an opinion discloses the defamatory facts (or refers to facts in the public record), it is not actionable apart from those facts.” Stevens, 855 F.2d at 400 (citing Horowitz v. Baker, 168 Ill. App. 3d 603, 608, 523 N.E.2d 179, 182 (3d Dist. 1988); Stewart v. Chicago Title Insurance Co., 151 Ill. App. 3d 888, 892, 503 N.E.2d 580, 582 (4th Dist. 1987)). In other words, an opinion cannot provide a basis for liability by itself where an individual discloses the truthful facts upon which the opinion is based. Id.

Here, Defendant explained the basis for his opinions as to “outrageous amounts” and being “tricked by sales prices and specials” using the Plaintiff as an example with specific dollar amounts. See R. C29 (1st Am. Compl. ¶ 18). Plaintiff does not dispute the facts, but rather disagrees with the opinions of Defendant arising therefrom. This cannot give rise to any liability. Stevens, 855 F.2d at 400; Horowitz, 168 Ill. App. 3d at 608, 523 N.E.2d at 182; Stewart, 151 Ill.App. 3d at 892, 503 N.E.2d at 582. Indeed, “[a]lthough a reader might

arch an eyebrow at [Plaintiff's outrageous prices], an allegation of greed is not defamatory; sedulous pursuit of self-interest is the engine that propels a market economy." Wilkow v. Forbes, Inc., 231 F.3d 552, 557 (7th Cir. 2001). Consequently, the "Third Disparagement" cannot give rise to a claim for defamation. Id.; Stevens, 855 F.2d at 400; Horowitz, 168 Ill. App. 3d at 608, 523 N.E.2d at 182; Stewart, 151 Ill.App. 3d at 892, 503 N.E.2d at 582.

d. Count Ten and the "Sixth Disparagement".

Plaintiff next complains of the Sixth Disparagement in Count Ten. Although the Plaintiff fails to incorporate any prior allegations into his Count Ten, the Sixth Disparagement reads:

Previously I have warned potential purchasers to use caution when purchasing any unreleased software products. This remains good advice. John Tamburo, d/b/a Man's Best Friend Software (MBFS), has informed me that the long awaited CompuPed Millennium™ has recently been released. I was also informed that MBFS is no longer in bankruptcy. The trustee's final report and account indicates that the bankruptcy was in fact dismissed, without confirmation and a 180 day ban on refileing, on 8/22/2005 after 15 months without any payment to creditors. <http://k9ped.com/mbfsfinal.pdf>. K9-Ped is pedigree research software. It is intended for personal or 'hobby' use. It does not contain the features required for the business of managing a kennel or the business of breeding animals. If you need these features and do not mind purchasing business only software that specifically excludes your use of any consumer protection laws you may want to consider CompuPed™ or The Breeder's Standard™.

See R. C.32 (1st Am. Compl. ¶ 30). Plaintiff limits his objection to the statement that his bankruptcy had been dismissed after 15 months without any payment to creditors.<sup>8</sup> See R. C44 (1st Am. Compl. ¶ 120). In his First Amended Sworn Complaint, he characterizes that statement as the “creditor libel” and states that the “creditor libel” is false. See R. C44 (1st Am. Compl. ¶ 121). In doing so, the Plaintiff seeks to hide behind “absolute truth.” However, as stated above, a defendant need only demonstrate the “substantial truth” or “gist” or “sting” of the allegedly defamatory material to raise truth as a defense. Lemons, 253 Ill. App. 3d at 890, 625 N.E.2d at 791; Farnsworth, 43 Ill.2d at 293-94, 253 N.E.2d at 412. Kilbane, 38 Ill. App. 3d at 175, 347 N.E.2d at 761; American Int’l Hosp., 136 Ill. App. 3d at 1022, 483 N.E.2d at 968.

In his affidavit, Defendant has stated that he verified with the bankruptcy court through the trustee’s final report that the Plaintiff had not made a payment to his creditors for 15 months. See R. C157-58 (Andrews’ Affidavit ¶ 20). In the First Amended Sworn Complaint, the Plaintiff includes reference in the Sixth Disparagement to the Defendant’s website from which one can still access the trustee’s final report that demonstrates the substantial truth to Defendant’s statement (in essence, from a list of all known creditors over the course of ten pages, the absence of any payments to anyone but the Office of the US Trustee, the Plaintiff’s attorney, the Trustee, and the refund to Plaintiff). Consequently, this statement cannot under any circumstance give rise to liability for defamation because the

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<sup>8</sup> Although the Plaintiff limits his objection to a single statement in the Sixth Disparagement for purposes of Count Ten, he later references the Sixth Disparagement generally in other Counts (e.g. Count Eleven). The Sixth Disparagement contains no false statements. As to the first paragraph, Defendant merely updates the website with accurate information obtained from the Plaintiff and the trustee’s report filed in Plaintiff’s most recent bankruptcy proceeding. As to the second paragraph, the statements characterize the Defendant’s own software as being appropriate for “hobby” or “personal” use; recommend Plaintiff’s software for business use (a characterization of which Plaintiff admits); and, articulate Defendant’s opinion as to the absence of consumer protection laws for business software (a characterization of which Plaintiff admits). Each of these has been previously addressed. See supra, II.B.2.b.

statement is substantially true, if not absolutely true. See Lemons, 253 Ill. App. 3d at 890, 625 N.E.2d at 791; Farnsworth, 43 Ill.2d at 293-94, 253 N.E.2d at 412. Kilbane, 38 Ill. App. 3d at 175, 347 N.E.2d at 761; American Int'l Hosp., 136 Ill. App. 3d at 1022, 483 N.E.2d at 968.

3. *Conclusion as to Defamation*

For the foregoing reasons, the Plaintiff's claims for defamation in Counts Two, Four, Five, and Ten fail to state a claim.

**C. Plaintiff Fails To State a Claim for Tortious Interference with Prospective Economic Advantage.**

Plaintiff fails to state a claim for tortious interference with prospective economic advantage in Counts One, Eight, and Eleven.<sup>9</sup>

1. *Plaintiff Fails to Properly Allege the Elements.*

In Counts One, Eight, and Eleven, the Plaintiff fails to properly allege the elements necessary to successfully plead a claim for tortious interference with prospective economic advantage. To sufficiently allege such a claim, a plaintiff must allege: (a) a reasonable expectancy of entering into a valid business relationship; (b) the defendant's knowledge of such expectancy; (c) an intentional and unjustifiable interference by defendant with the third-party that induced or caused a breach or termination of the expectancy; and, (d) damage to the plaintiff resulting from defendant's alleged interference. Anderson, 172 Ill.2d at 416-417, 667 N.E.2d at 1303. Further, a Plaintiff must allege that the defendant engaged in a specific action against the party with whom the plaintiff expected to do business.

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<sup>9</sup> Plaintiff titles Counts One, Eight, and Eleven "Tortious Interference with Prospective Economic Advantage," "Tortious Interference with Prospective Economic Advantage II," and "Tortious Interference with Prospective Economic Advantage III," respectively. See R. C34, 42, 44 (1<sup>st</sup> Am. Compl.). For each of the first, fourth and sixth "disparagements" in his First Amended Complaint, he creates separate counts. See generally R. C27-46 (1<sup>st</sup> Am. Compl.) This being the only difference and because the same deficiency applies to all three counts, the Defendant will address these counts collectively.

Schuler v. Abbott Laboratories, 265 Ill. App. 3d 991, 994, 639 N.E.2d 144, 147 (1st Dist. 1993). Moreover, the plaintiff must allege a business expectancy with a specific third party and not merely allege a general expectation of future business. Id. Finally, the plaintiff must plead, and eventually prove, purposeful interference that connotes impropriety. Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 485, 693 N.E.2d 358, 371 (Ill. 1998). Indeed, there will be no liability for interference with a prospective contractual relation where the defendant merely conveys truthful information. Cromeens, Holloman, Sibert, Inc. v. AB Volvo, 349 F.3d 376, 399 (7th Cir. 2003) (citing Soderland Bros. v. Carrier Corp. 278 Ill. App. 3d 606, 620, 663 N.E.2d 1, 28 (1st Dist. 1995)); see also Kempner Mobile Elecs., Inc. v. Southwestern Bell Mobile Sys., 428 F.3d 706, 716 (7th Cir. 2005).

Here, Plaintiff has failed to allege any specific third parties with whom he expected to enter a valid business relationship. See generally R. C27-46 (1st Am. Compl.). Rather, the Plaintiff merely states that Plaintiff “has a reasonable expectancy to do business with dog, cat and horse breeders, and the exhibitors thereof.” R. C34 (1st Am. Compl. ¶ 41). This is clearly insufficient. See Schuler, 265 Ill. App. 3d at 994, 639 N.E.2d at 147; Anderson, 172 Ill.2d at 407-408; 667 N.E.2d at 1303. To save his claim, Plaintiff, in a cursory fashion, cites to O’Brien v. State Street Bank & Trust for the proposition that a plaintiff properly alleges an expectancy if “a class of identifiable third persons, past and future customers, has been alleged.” O’Brien v. State Street Bank & Trust, 82 Ill. App. 3d 83, 85, 401 N.E.2d 1356, 1358 (4th Dist. 1980). Plaintiff’s reliance on O’Brien is misguided. O’Brien involved an identifiable class of third parties arising from the plaintiff’s *existing business relationships* that included “contracts, accounts and obligations” among his customers and suppliers that he could specifically identify for purposes of constituting

prospective business relations. Id. (emphasis added). Consequently, O'Brien does not support Plaintiff's reliance on an ambiguous, general expectation of future business. Id. With O'Brien having been clarified, Plaintiff has not and cannot cite to any Illinois authority holding that ambiguous allegations of general, hopeful expectations of future business suffice for this claim. See generally R. C27-46 (1st Am. Compl.). In fact, Plaintiff never demonstrates that "a class of identifiable third persons has been alleged." See id. Thus, Plaintiff fails to plead an identifiable class of third parties. See O'Brien, 82 Ill. App. 3d at 85, 401 N.E.2d at 1358.

Having determined that the Plaintiff has failed to allege any third parties or identifiable class of third persons with whom he had a reasonable expectancy of entering into a valid business relationship, Plaintiff also necessarily fails to allege Defendant's knowledge of any such expectancies. See generally R. C27-46 (1st Am. Compl.). Moreover, because Defendant could not and did not know of any such expectancies, Plaintiff has failed to sufficiently allege that Defendant intentionally interfered with any such business expectancy. Id.; see also R. C.157-58 (Andrews' Affidavit). Finally, Plaintiff cannot sufficiently allege damages with respect to third persons, business expectancies, and intentional interference that simply have not been alleged and did not exist. O'Brien, 82 Ill. App. 3d at 85, 401 N.E.2d at 1358; Anderson, 172 Ill.2d at 406-407, 667 N.E.2d at 1303; Schuler, 265 Ill. App. 3d at 994, 639 N.E.2d at 147.

2. *Defendant Conveyed Truthful Information.*

Even if Plaintiff has identified third parties or an identifiable class of third persons, the Plaintiff has failed to allege any impropriety giving rise to a claim for tortious interference with business expectancy. Merely conveying truthful information does not give

rise to liability for interference with a prospective contractual relation. Cromeens, Holloman, Sibert, Inc., 349 F.3d at 399; see also Kempner Mobile Elecs., Inc., 428 F.3d at 716.

a. Count One and the First and Fifth Disparagements.

Plaintiff complains of the First and Fifth Disparagement in Count One. Although the Plaintiff fails to incorporate any prior allegations into his Count One, the Plaintiff contends that the First and Fifth Disparagements constituted tortious interference with prospective economic advantage. See R. C34-35 (1st. Am. Compl. ¶¶ 41-54).

As discussed *supra*, the First Disparagement contains truthful statements to which the Plaintiff admits. See supra II.B.2.a. As such, the First Disparagement does not give rise to liability for tortious interference with prospective economic advantage. Id.; see Cromeens, Holloman, Sibert, Inc., 349 F.3d at 399; Kempner Mobile Elecs., Inc., 428 F.3d at 716. As to the Fifth Disparagement, it reads:

According to recent bankruptcy documents filed by Mr. Tamburo he doesn't pay his taxes nor is he able to finish the CompuPed Millennium product.

His court documents show he owes the IRS over \$160,000.00 and his sworn statemts [sic] include 'The Millennium edition of CompuPed is almost done, but I lack the funds to pay to complete the programs.'

The shocker is he is still pre-selling CompuPed Millennium licenses over five months after telling the court he will not be able to complete the program.

Remember, he is the one who has "All sales are final" to make sure his customers don't cheat him.

R. C31 (1st Am. Compl. ¶ 28). Plaintiff does not dispute the truth of these statements.

Rather, Plaintiff argues that the statements upon which Andrews relied to make the Fifth Disparagement were “months old.” See R. C31 (1st Am. Compl. ¶ 29). Because the statements in the Fifth Disparagement represent truthful statements, the Fifth Disparagement does not give rise to liability for tortious interference with prospective economic advantage. See Cromeens, Holloman, Sibert, Inc., 349 F.3d at 399; Kempner Mobile Elecs., Inc., 428 F.3d at 716. Therefore, Count One must be dismissed.

b. Count Eight and the Fourth Disparagement.

Plaintiff next complains of the Fourth Disparagement in Count Eight. Although the Plaintiff fails to incorporate any prior allegations into his Count Eight, Plaintiff contends that through the Fourth Disparagement Defendant personally told numerous people “that John was to be imminently liquidated, and product support for John’s software would be discontinued or extremely difficult to obtain.” R. C30-31 (1st Am. Compl. ¶ 26). In the context of Plaintiff’s bankruptcy proceedings, this statement again is subject to innocent construction. See Uline, Inc., 437 F. Supp. 2d at 803. Consequently, the Fourth Disparagement is not actionable. See Kolegas, 180 Ill.2d at 313, 607 N.E.2d at 207. Therefore, Count Eight must be dismissed.

c. Count Eleven and the Sixth Disparagement.

In Count Eleven, the Plaintiff complains that the “Sixth Disparagement” gives rise to a claim for tortious interference with prospective economic advantage, despite failing to incorporate any prior allegations. See R. C44-45 (1st Am. Compl. ¶¶ 126-135). As discussed *supra*, the Sixth Disparagement contains statements that, if not entirely true, clearly represent the substantial truth. See supra II.B.2.d. As such, the Sixth Disparagement does not give rise to liability for tortious interference with prospective

economic advantage. Id.; Cromeens, Holloman, Sibert, Inc., 349 F.3d at 399; see also Kempner Mobile Elecs., Inc., 428 F.3d at 716. Consequently, Count Eleven must be dismissed.

3. *Conclusion as to Tortious Interference.*

For the foregoing reasons, Plaintiff has failed to state a claim for Tortious Interference with Prospective Economic Advantage. Therefore, Counts One, Eight, and Eleven must be dismissed.

**D. Plaintiff's Claims Against Defendant for Unfair Competition are Erroneous and Misguided.**

Plaintiff fails to state claims in Counts Three, Six, Seven and Nine in which he alleges unfair competition.<sup>10</sup> Common law unfair competition has been codified as the Illinois Uniform Deceptive Trade Practices Act (“UDTPA”), 815 ILCS § 510/1, *et seq.* MJ & Partners Restaurant Ltd. Pshp. v. Zadikoff, 10 F. Supp.2d 922, 929 (N.D. Ill. 1998). As the Custom Business Systems Court explained:

The plaintiff's brief suggests in its form a distinction between the common law tort of unfair competition and a course of action based on the Uniform Deceptive Trade Practices Act, and we are not inclined to dispute that there may be a cause of action under certain aspects of the common law which are not covered by the Uniform Deceptive Trade Practices Act. However, the plaintiff does not set out in its brief a distinct theory under the common law which would entitle it to judgment separate and apart from issues cognizable under the Uniform Deceptive Trade Practices Act, and as the plaintiff admits

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<sup>10</sup> Plaintiff titles Counts Three, Six, Seven, and Nine “Unfair Competition”, “Unfair Competition II”, “Unfair Competition III”, and “Unfair Competition IV”. See R. C36, 39, 41, 43 (1<sup>st</sup> Am. Compl.). Defendant will address all four counts (III, VI, VII and IX) collectively as Plaintiff's claim for “Unfair Competition.”