

Docket Number 3-06-0347  
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: **Will County**  
Circuit Number: **12<sup>th</sup>**  
Trial Judge: **Hon. Herman S. Haase**  
Docket Number: **06 L 51**  
Date of Judgment: **May 3, 2006**  
Date of Notice of Appeal: **May 10, 2006**

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**APPELLANT'S BRIEF ON APPEAL**

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**ORAL ARGUMENT RESPECTFULLY REQUESTED**

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NOW COMES your Plaintiff and Appellant, JOHN F. TAMBURO, D/B/A MAN'S BEST FRIEND SOFTWARE ("John"), respectfully submitting this instrument, his brief on Appeal.

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## **INTRODUCTION**

This action was brought to recover damages John suffered from numerous alleged tortious acts by Defendant James Andrews (“Andrews”), to wit: His intentional publication of false and deceptive statements accusing John, his competitor, of criminal conduct, and other acts of unfair competition.

Defendant filed a motion that attempted to object to personal jurisdiction and service of process. The same motion also sought dismissal under Section 2-615. After hearing, see A6-10, the trial court granted the defendant’s motion, and dismissed the case for want of personal jurisdiction. R. C386-387. Plaintiff appeals from this order.

No questions are raised on the pleadings.

## **ISSUES PRESENTED FOR REVIEW**

Whether the trial court erred in refusing to consider, and failing to find, that defendant’s failure to follow the requirements of 735 ILCS 5/2-301(a) and (a-5) waived his objections to the court’s jurisdiction over his person.

Whether the trial court erred by holding that Andrews lacked the minimum contacts with Illinois necessary to exercise its personal jurisdiction over him.

Whether judicial efficiency warrants an instruction to the trial court to deny those portions of defendant’s motion made under 735 ILCS 5/2-615.

## **JURISDICTION**

The trial court entered a final and appealable order dismissing the entire cause of

action for want of personal jurisdiction on May 3, 2006. See R. C386-387. On May 10, 2006, John commenced this appeal by filing a Notice of Appeal with the honorable Clerk of the 12<sup>th</sup> Judicial Circuit. See R. C388.

This honorable appellate court has jurisdiction over this appeal because it lies as a matter of right. Under *Supreme Court Rule 301*, 145 Ill. 2d. R. 301, any final order dismissing a case may be appealed as a matter of right.

### THE FACTS

1. John is a citizen of Illinois, and has done business in Will County for over six years. See R. C53 ¶ 1-2.
2. Defendant James Andrews d/b/a K9Ped (“Andrews”) presently resides in Oregon, R. C53 ¶ 3, but has previously at times relevant to the instant case resided in Arizona. R. C53 ¶ 4.
3. As a part of his business, Andrews owns, runs and operates a web site named [www.k9ped.com](http://www.k9ped.com), hereinafter the “web site.” R. C54 ¶ 8.
4. Andrews directly competes with John, R. C54 ¶ 7, does business with the entire nation, and has done business with Illinois customers, using the web site to do so, R. C60 ¶ 40, as he admits. R. C198 ¶ 10.
5. The web site enables one to make and complete sales contracts interactively, online, including payment. R. C59 ¶ 39, R. C255-259. Andrews admits this. R. C198 ¶ 6.
6. Andrews derives revenues from his business directly from the web site, R. C198 ¶ 5-6. C255-259, which is his sole source of revenue from K9-Ped. R. C252 ¶ 3.

7. Andrews published a single, obsolete document, obtained from the Illinois Court Site on the web site, R. C54-55 ¶ 10-16. He used it to justify a false allegation that John was selling an incomplete computer program, CompuPed Millennium, that he had no intention to complete, a crime in violation of 720 ILCS 295/1a. R. C36 ¶ 57. Andrews knew his allegations to be false when he made them. R. C55 ¶ 13; C59 ¶ 32-33. He repeated this allegation on a separate Internet site, [www.gripe2ed.com](http://www.gripe2ed.com). R. C57 ¶ 28.
8. Andrews continued to publish the aforementioned disparagements after he knew that CompuPed Millennium was completed. R. C55 ¶ 15-16.
9. Andrews told numerous prospective customers by phone, knowing that what he was saying was false, R. C66 ¶ 95-96, that John was about to be liquidated, and technical support for his products would be difficult or impossible to obtain, R. C56 ¶ 26, and that technical support services or the lack thereof were the primary factor customers considered in purchasing animal-related software from a vendor. R. C252 ¶ 1.
10. Andrews published statements that associated John with puppy mills, which Andrews knew were detested by their mutual base, R. C62 ¶ 68-69, and which statements were false, R. C63 ¶ 72, with the intent to divert John's prospective customers to himself. R. C56 ¶ 22.
11. Andrews intended to cause John injury in Illinois. R. C59 ¶ 35-36.
12. Andrews damaged John with his actions. R. C59 ¶ 34.
13. John brought a lawsuit in the 12<sup>th</sup> Judicial Circuit alleging, based on the above facts, that Andrews had committed the torts of libel, tortious interference with prospective

- with economic advantage and unfair competition, filing the case in Joliet on January 24, 2006. R. C2-19.
14. On February 6, 2006, the honorable Sheriff served Andrews personally at his home in Oregon. R. C21-22.
  15. Subsequently, Andrews amended his disparagements on the web site. John moved for. and received, leave to amend. R. C23-26, C50. John duly filed and served the amended complaint upon Andrews by mail. R. C51-74
  16. On March 20, 2006, Mr. Charles L Mudd, Jr. Esq. appeared on the record as Andrews' attorney, asking for extended time to file his responsive pleading. R. C75-78, C79. Neither Mr. Mudd nor any other attorney from his office appeared, and the motion was stricken.
  17. Later that same day, John received an incomplete FAX purporting to contain an emergency motion asking for the same relief. R. C106-110. John opposed the "emergency motion," and brought a cross-motion for default. On March 21, 2006, the court granted Defendants' motion and denied John's cross-motion. R. C117.
  18. On March 31, 2006, counsel filed a motion to dismiss, attempting to state a personal jurisdiction objection under 735 ILCS 5/2-619, and seeking dismissal for failure to plead a claim under 735 ILCS 5/2-615. R. C120-122. A 35-page memorandum was filed along with the motion. R. C118-123. The motion included an affidavit from Andrews, in support of both the jurisdictional objections and the 2-615 grounds that the defendant asserted. R. C157.
  19. On April 6, 2006, John appeared in court, and filed both his opposition memorandum

- and a motion for leave to file his second amended complaint. R. C234-279, C280-305. The trial court continued the motion for leave to amend the complaint. R. C341.
20. Defendant also filed a motion for leave to amend his memorandum supporting his motion to dismiss. R. C342-377. The trial court granted this motion over John's objection, which was lodged because John had already filed his memorandum opposing the motion. R. C340.
21. On May 2, 2006, the court heard argument on the motion to dismiss. After argument, the court granted the motion on the ground that the defendant lacked sufficient contacts with Illinois. See Bystander's Bill, A6-10. An order was entered on May 2, see R. C378, and an amended order was entered by agreement on May 3, see R. C386-387.
22. John filed timely appeal from the dismissal order on May 10, 2006.

## **ARGUMENT**

### ***A. The Trial Court Erred when it granted Defendant's Motion to Dismiss for want of Personal Jurisdiction.***

#### **1. Standard of Review**

Dismissals for want of personal jurisdiction are reviewed *de novo*, and solely on the basis of the pleadings and documents, since the trial court held no evidentiary hearing. *Bombliss v. Cornelsen*, 355 Ill. App. 3d 1107, 1112 (3<sup>rd</sup> Dist. 2005); *Viktron Ltd. Partnership v. Program Data Inc.*, 326 Ill.App.3d 111, 116 (2<sup>nd</sup> Dist. 2001).

**2. Defendant waived his objection to personal jurisdiction by filing a motion that does not comply with 735 ILCS 5/2-301(a) or (a-5).**

Please refer to R. C120-122. This is the defendant's motion to dismiss for want of personal jurisdiction. The motion is a multi-page mass of text, not separated into the "parts" required by 735 ILCS 5/2-301(a) and (a-5).

*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]

*735 ILCS 5/2-301(a-5) (2000)*, in the whole:

(a-5) If the objecting party files a responsive pleading or a *motion* (other than a motion for an extension of time to answer or otherwise appear) *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.

[emphases 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.

By the clear and unequivocal language of the statutes, defendant's motion does not comply with section 2-301(a). For the reasons shown below, the trial court regrettably erred in refusing to consider, and failing to hold, that the defendant waived his objections to personal jurisdiction under 735 ILCS 5/2-301(a-5).

a. Motions To Dismiss for want of Personal Jurisdiction are proper only under 735 ILCS 5/2-301.

Defendant improperly attempted to lodge his personal jurisdiction objections under 735 ILCS 5/2-619. Unlike Section 2-301, no part of Section 2-619 mentions an objection to jurisdiction over the person. The only subsections ones that appear applicable are (a)(1), dismissal for want of *subject matter* jurisdiction, and (a)(9), facts

that *defeat the claim*, but neither actually fit the bill.

John finds no reported authority that holds that 735 ILCS 5/2-619(a)(1) may be invoked to dismiss a complaint for want of *personal* jurisdiction. Those who rely upon this provision of the statute are confusing *subject matter* and *personal* jurisdiction, when in fact they are not interchangeable. Subject matter jurisdiction is lacking, for example, when a Plaintiff commences a case in circuit court that properly lies before the Court of Claims. *Williams v. Davet*, 345 Ill. App. 3d 595, 598 (1<sup>st</sup> Dist. 2003).

In the instant case, the circuit court clearly exercised subject matter jurisdiction, absent the State of Illinois, or a state agency listed in the Court of Claims Act, being a defendant in the case. Therefore, 735 ILCS 5/2-619(a)(1) cannot be used to sustain a party's objection to *personal* jurisdiction.

The inappropriateness of 735 ILCS 5/2-619(a)(9) is apparent from the plain language of the statute itself. One does not present an "affirmative matter avoiding the legal effect of or defeating the claim" by objecting to the court's jurisdiction over the defendant's person.

“ ‘Affirmative matter,’ for purposes of avoiding the effect or of defeating the claim, is something in the nature of a defense that negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint. [Citation.] It must, however, be something more than evidence offered to refute a well-pleaded fact in the complaint, for, as in the case of a motion under section 2-615

[citation], such well-pleaded facts must be taken as true for the purposes of a motion to dismiss under section 2-619(a)(9) [citation].”

*Heller Equity Capital Corp. v. Clem Environmental Corp.*, 232 Ill.App.3d 173, 178 (1992).

Section 2-619(a)(9) is clearly inappropriate for an objection to personal jurisdiction. A court’s finding a lack of personal jurisdiction does not negate a cause of action – it holds that the defendant is “not legally there at all.” *Supreme Hive Ladies of the Maccabees v. Harrington*, 227 Ill. 511, 524-25 (1907), citing *Crull v. Keener*, 18 Ill. 65, 66 (1856). A court cannot reach the merits of a case when it lacks jurisdiction over the defendant’s person. *Id.* Therefore, 735 ILCS 5/2-619(a)(9) is also inappropriate.

By lodging his objections to personal jurisdiction under the wrong statute, defendant waived his objection. This is the clear and unambiguous language of the statute. As discussed below, this result is just and proper. Nothing in any part of sections 2-301 or 2-619 is vague. The first axiom 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*, 218 Ill.2d 482, 491 (2006).

Defendant has yet to file a motion that complies with 735 ILCS 5/2-301(a). And, since he filed a motion that neither complies with subsection (a), nor asks for an extension of time to answer or otherwise appear, the result is that which is laid out in the

statute: *the defendant waived all of his objections to jurisdiction*. The trial court's holding rendered the express provisions of section 2-301(a-5) meaningless, which is not permitted. See *People v. Singleton*, 103 Ill.2d 339, 345 (1984) (statutes to be construed so as to avoid constructions that render language meaningless or superfluous).

Some courts have discussed personal jurisdiction under Section 2-619, but none have made an express holding that such a use of the section is proper. To hold that section 2-619 permits objections to personal jurisdiction renders part of section 2-301(a), and the entirety of section 2-301(a-5), meaningless. This is not permitted. See *People v. Singleton*, 103 Ill. 2d 339 at 345. Such a holding would reduce section 2-301 solely to control objections to service of process, voiding its entire personal jurisdiction clause, "the ground that the party is not amenable to process of a court of this State." The black letter of section 2-301 specifically controls objections to "the court's jurisdiction over the party's person;" Section 2-619 is silent on that subject.

Using section 2-619 to object to personal jurisdiction, something for which it was not designed, creates another major problem: the standard used to evaluate the motion and attached evidentiary material. If a defendant objects to personal jurisdiction under 2-619, then the motion ***admits all facts pleaded in the complaint***. "[A] motion pursuant to either section 2-615 or section 2-619 concedes the truth of all well-pled allegations in the complaint." *Provenzale v. Forister*, 318 Ill. App. 3d 869, 879 (2<sup>nd</sup> Dist. 2001). This would include all allegations that support personal jurisdiction, making most objections *impossible* to sustain. "[E]videntiary material in support of a section 2-619 motion may not be submitted for the purpose of contradicting well-pleaded facts in the complaint."

*Provenzale v. Forister*, 318 Ill App. 3d at 879.

*Provenzale* is far from alone in these holdings. See *City of Chicago v. Beretta U.S.A. Corp.*, 337 Ill. App. 3d 1, 23 (1<sup>st</sup> Dist. 2002) (“Evidentiary material in support of a section 2-619 motion may not be submitted for the purpose of contradicting well-pleaded facts in the complaint.”). *LaRochelle v. Allamian*, 361 Ill. App. 3d 217, 218 (2<sup>nd</sup> Dist. 2005), citing *Northwest Millwork Co. v. Komperda*, 338 Ill.App.3d 997, 1000 (2<sup>nd</sup> Dist. 2003): “A motion brought pursuant to section 2-619 admits the legal sufficiency of the complaint, along with all well-pleaded facts and the inferences therefrom, but asserts an affirmative matter that avoids or defeats the claim.”

Therefore, if this court holds that one may properly object to personal jurisdiction under section 2-619, it must take all of John’s allegations, including the jurisdictional allegations, as true, disregarding the defendant’s affidavit. *Provenzale*, 318 Ill. App 3d at 879. In the trial court, that did not happen. See A9, 3<sup>rd</sup> ¶ (assuming one sale into Illinois), A9, 6<sup>th</sup> ¶ (assuming that [www.k9ped.com](http://www.k9ped.com) was not fully interactive and applying “third category” standard from *Bombliss*). Under Section 2-619, defendant’s objections should have been summarily denied.

To consider any objection to personal jurisdiction under section 2-619 creates confusion as to the correct standard for deciding the motion. Indeed, *Zazove v. Pelikan, Inc.*, 326 Ill. App. 3d 798, 801 (1<sup>st</sup> Dist. 2001), appears to consider an objection to personal jurisdiction under section 2-619(a)(9). On the other hand, *LaRochelle v. Allamian*, 361 Ill. App. 3d at 218, notes the filing under Section 2-619 and then cites to the correct section, 2-301, for analysis. The black letter language of Section 2-619, and

the law that interprets it, says affidavits cannot be used to contradict the complaint's allegations, only to establish the affirmative fact matter that defeats the claim. See 735 ILCS 5/2-619(c); *Provenzale v. Forister*, 318 Ill. App. 3d at 879. Section 2-301 and its supporting law permit parties to use affidavits to contest jurisdictional facts in the complaint. 735 ILCS 5/2-301(b); *Supreme Court Rule 191(a)*, 145 Ill. 2d. R. 191(a); *Buxton v. Wyland Galleries Hawaii*, 275 Ill. App. 3d 980, 981 (4<sup>th</sup> Dist. 1995).

In PA 91-145, effective Jan. 1, 2000, our legislature modified Section 2-301(a) and added section 2-301(a-5) to the Code of Civil procedure. The amendments eliminate the former "special and limited appearance" and encourage the efficiency of combined motions. Professor Keith Beyler, the author of PA 91-145, writes, "To ensure clarity, the defendant must present any combined motion in the form required by the statute on combined motions (section 2-619.1)." K. Beyler, *The Death of Special Appearances*, 88 Ill. B. J. 30, 32 (2000).

Allowing this defendant to commingle Section 2-615, 2-619 and 2-301 arguments, into a motion that is neither in parts nor properly labeled, flouting the statute, would ignore section 2-301(a-5) and deny John the procedural due process provided by the statute. The legal confusion set forth above prejudiced John, as it would any attorney or party who tried to present a cogent opposition to such an improperly-drafted motion. The statute sets forth strict labeling requirements, and consequences for violation, for good reason. Defendant's counsel only needed to *comply with the statute*. Such compliance required minimal, trivial effort, which was not expended. The only just and proper remedy is a finding of waiver, as the statute commands.

b. Defendant also proffered an objection to service of process, and violated the statute by not specifically labeling the objection as under Section 2-301.

Please refer to R. C328-330. Defendant, in addition to arguing his personal jurisdiction objections under the wrong statute, *also* argues against service of process, in a section entitled “Improper Service of Process.” There is no question that arguments of improper service of process can only be made under section 735 ILCS 5/2-301. Neither the motion nor its Memoranda mention section 2-301 (R. C120-122, C144-146, C328-330). Assuming *arguendo* that one may object to personal jurisdiction under section 2-619, Defendant commingles his objection with unlabeled section 2-301 objections, in another clear violation of the statute, waiving all objections.

Regretfully, the trial court erred in refusing to consider this argument or hold that waiver occurred. 735 ILCS 5/2-301(a), (a-5). Wherefore, John pleads for reversal and remand, with instruction as prayed *infra*.

**3. Defendant is properly subject to personal jurisdiction in Illinois.**

If this honorable appellate court finds that the defendant has not waived his objections to personal jurisdiction, he is still properly haled into Illinois. For the reasons shown below, Andrews is subject to specific personal jurisdiction in Illinois.

a. Defendant transacts business using a fully interactive Internet Web Site, and is therefore subject to Illinois’ personal jurisdiction.

Andrews transacts his entire business via the Internet, specifically the web site, www.k9ped.com. More importantly, while wrongly characterizing the web site as

“hybrid”, see R. C324, defendant’s counsel *admits* that the web site is used to “sell” to customers. Also see R. C198 ¶ 5-6, where the defendant, on his oath, admits this fact himself! Andrews admits one sale to Illinois, R. C198 ¶ 10, but, significantly, is silent about when that sale occurred. John alleges, R. C59-60 ¶ 39-40, swears, R. C252 ¶ 2-3, and attaches exhibits, R. C255-261, all showing that the web site is fully interactive under the test set forth in *Bombliss v. Cornelsen*, 355 Ill. App. 3d 1107, 1114 (3<sup>rd</sup> Dist. 2005). *Bombliss* holds that jurisdiction is 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.*” [emphasis supplied].

Defendant’s counsel, in open court, A9, 2<sup>nd</sup> ¶, again *admitted* that defendant’s web site transacts business and accepts payments online; this admission shows the web site to be “fully interactive” under *Bombliss*. Defendant’s counsel argued before the trial court that the standard was whether the web site was directed at Illinois. See A7, 6<sup>th</sup> ¶. Counsel’s argument is thwarted by *Bombliss*, 355 Ill. App. 3d at 1114. Defendant held himself out to do business with the entire nation, including Illinois, used the web site to consummate business contracts *directly* with Illinois citizens (See R. C198 ¶ 10, C59 ¶ 39), and derive profit *directly* therefrom, and then used that same web site to consummate numerous torts, injuring an Illinois citizen.

John was entitled to have his jurisdictional fact allegations taken as true, except where refuted by affidavit. *Kutner v. DeMassa*, 96 Ill. App. 3d 243, 248 (1<sup>st</sup> Dist. 1981); *Zazove v. Pelikan, Inc.*, 326 Ill. App. 3d 798, 802 (1<sup>st</sup> Dist. 2001). Conflicts in affidavits were to have been resolved in John’s favor. *Community Merchant Services, Inc. v.*

*Jonas*, 354 Ill. App. 3d 1077, 1086 (4<sup>th</sup> Dist. 2004). John was also entitled to have all reasonable inferences from the facts he alleged drawn in his favor. *SRAM Corp. v. Sunrace Roots Enterprise Co., Ltd.*, 390 F. Supp. 2d 781, 783 (N.D. Ill. 2005) citing *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F. 3d 1272, 1275-76 (7<sup>th</sup> Cir. 1997).

John brought before the court, both in written argument (R. C245 ¶ 3.2.2) and in open court (A9) the inference that the Illinois customer that Andrews admits in R. C198 ¶ 10 purchased K9Ped *because* of defendant's tortious statements regarding John. This is a reasonable inference, to which John was entitled at this stage of pleading (See *SRAM Corp. v. Sunrace Roots Enterprise Co., Ltd.*, 390 F. Supp. 2d at 783), yet regretfully did not receive. The admitted Illinois sale is an important jurisdictional contact. 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, 649 (1<sup>st</sup> Dist. 2004). Andrews intentionally transacted business in Illinois. As the direct seller of his wares, he had the option to avoid Illinois' jurisdiction by merely rejecting Illinois orders and refraining from tortiously damaging Illinois citizens. He chose differently, and is therefore accountable in our courts.

The trial court did not take John's unrefuted allegation and Andrews' *admission* that the web site was fully interactive as true, and instead applied *Bombliss* as if the web site were in the "third category" discussed in the case, see 355 Ill. App. 3d at 1114, and not fully interactive. See A9, 6<sup>th</sup> ¶.

This regretfully was error, for if the court were to have properly held, as it was required based on the record before it, that the web site was fully interactive, the only

proper response was to: (1) hold that John had made out the required *prima facie* case for personal jurisdiction; (2) hold that defendant failed to meet his burden to refute John's *prima facie* case; and (3) deny the defendant's motion to dismiss for want of jurisdiction.

At A9, the trial court noted the dissent in *Bombliss*, written by the honorable Justice Holdridge, in apparent agreement with that dissent. In that dissent, see *Bombliss*, 355 Ill. App. 3d at 1117, the honorable Justice writes that "minimum contacts with Illinois are not enough to invoke long-arm jurisdiction; those contacts must also constitute a basis from which the cause of action arises." Applying the *Bombliss* dissent to the instant case, it is apparent that the motion to dismiss should have been denied.

In the instant case, defendant used one web site to complete sales contracts, including payment (see R. C198 ¶ 5-6,10; C255-261), including at least one from an Illinois citizen, and to publish his unlawful, tortious lies to the world, including documents obtained from another Illinois-based web site. See R. C59 ¶ 37. This satisfies the honorable Justice Holdridge's concerns in his *Bombliss* dissent, and also the standard set by the Supreme Court in *Burger King v. Rudzewicz*, 471 U.S. 462, 476 (1985).

Defendant's conduct is not a situation where Andrews was merely selling to middlemen, with the chance that such a sale "may or will sweep the product into the forum State." Such indirect sales "[do] not convert the mere act of placing the product into the stream [of commerce] into an act purposefully directed toward the forum State." *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92, 104 (1987). However, Andrews admits that he operates [www.k9ped.com](http://www.k9ped.com) himself, R. C198 ¶ 5-6, selling his wares *directly* to customers, *including* the admitted

Illinois citizen. R. C198 ¶ 10. Andrews chose to include the tortious material into the web site, R. C59 ¶ 35-36. He derives all of his revenues from that web site, R. C252 ¶ 3. Defendant's unlawful and tortious conduct, especially his acquisition and publication of carefully selected obsolete court documents (R. C59 ¶ 37), *obtained from Illinois* solely to attack John, constitutes "[a]dditional conduct [which] may indicate an intent or purpose to serve the market in the forum State." *Asahi*, 480 U.S. at 112. Therefore, the trial court regretfully erred in dismissing the case, and John is entitled to reversal and remand, with instructions as prayed *infra*.

b. Defendant is alleged to have committed intentional torts that injure in Illinois, invoking jurisdiction under 735 ILCS 5/2-209(a)(2).

In *Zazove v. Pelikan, Inc.*, 326 Ill. App. 3d 798, 806 (1<sup>st</sup> Dist. 2001), the court held that alleged tortious acts damaging an Illinois citizen constitute sufficient contacts with Illinois to exercise personal jurisdiction over a defendant, provided that in cases where all damages are economic, plaintiff alleges an intent to affect an Illinois interest. In R. C59 ¶ 36, John alleges this intent; this allegation is uncontradicted. And, not only does John allege the intent, but he also alleges facts and shows exhibits that defendant intended to affect an Illinois interest. See, R. C59 ¶ 37, R. C57 ¶ 28, R. C255-261.

The court's tortious act jurisdiction is a point Plaintiff made in his opposition memorandum (See R. C246 ¶ 3.2.4). Regretfully, the trial court refused to hear John's arguments on this point (A9, 7<sup>th</sup> ¶). For the reasons that follow, even if this honorable appellate court finds that the defendant did not waive his objections to jurisdiction, and even if this honorable appellate court finds that the fully-interactive [www.k9ped.com](http://www.k9ped.com)

web site, combined with admitted sales to Illinois citizens, do not constitute sufficient contacts with Illinois to exercise its jurisdiction over the defendant, jurisdiction must be properly exercised on this ground.

“[A]llegedly false communications to Illinois residents with an intent to affect Illinois interests is a sufficient basis for exercising personal jurisdiction over a nonresident defendant.” *Zazove v. Pelikan, Inc.*, 326 Ill. App. 3d at 807. Defendant admits, under oath, at least one sale into Illinois. R. C198 ¶ 10. John is entitled to the reasonable inference that this sale resulted from Andrews’ tortious publications. In addition, defendant, knowing that Plaintiff resided in Illinois, accessed the Illinois Court Site, downloaded selected documents from that site, and published them to lend credibility to a false accusation that John was committing a crime. R. C59 ¶ 37. Defendant undeniably intended to adversely affect an Illinois interest. R. C59 ¶ 34-36.

The web site, the same one that is *fully interactive* under the *Bombliss* test (see *Bombliss v. Cornelsen*, 355 Ill. App. 3d at 1114), is the vehicle that was (and is, to this very day) used to libel John and tortiously interfere with his business. This is the vehicle whereby defendant transacts, directly with his customers, 100% of his business, worldwide, as admitted. R. C198 ¶ 5-6; C252 ¶ 3. Defendant made numerous false public statements, such as: 1) Accusing John of criminal activity, R. C36 ¶ 57; 2) Associating him with puppy mills while knowing that their mutual customer base detests them, R. C62-63 ¶¶ 67-76; 3) Telling numerous prospects who phoned that John’s technical support, the main reason they buy one product over another (R. C252 ¶ 1), was to cease and John was about to be liquidated (R. C56-57 ¶ 25-26). It is hard to imagine a

more blatant case of intent to affect an Illinois interest than this vicious campaign of lies.

- c. Defendant fails to meet his burden to dispute the reasonableness of Illinois as a forum for this case.

In *Bombliss v. Cornelsen*, 355 Ill. App. 3d at 1115, the court holds that, once the plaintiff establishes, *prima facie*, that the defendant “purposefully directed [his] activities at Illinois,” Defendant then has the burden of making a “compelling case” that the presence of some other consideration would render Illinois an unreasonable forum. See also *Burger King*, 471 U.S. at 477.

Any argument that defendant did not purposefully direct his activities at Illinois fails. The instant case is more egregious than *Bombliss*, where the court, see 355 Ill. App. 3d at 1115, held that purposeful postings to an internet chat room (which was unrelated to the defendant’s “third category” web site) that impugned the quality of dogs bred by the Plaintiff were sufficient to show purposeful direction at Illinois. The record shows that John has amply alleged purposeful direction. See generally, 1<sup>st</sup> Amended Complaint, R. C51-74. John exceeded the *prima facie* quantum required to assert personal jurisdiction.

Therefore, defendant had the burden, under *Bombliss* and *Burger King*, to make a “compelling” case that Illinois is an unreasonable forum. Defendant never even attempted to meet this burden. Therefore, the 12<sup>th</sup> Judicial Circuit of Illinois is the most reasonable place to litigate this matter.

d. A Due Process Analysis shows that Illinois' properly exercises jurisdiction over Andrews.

Defendant has been shown to have far more than the minimum contacts with Illinois required to satisfy Federal Due process concerns. As *Bombliss* holds, see 355 Ill. App. 3d at 1114-1115, the *totality* of defendant's Illinois contacts is the measure by which minimum contacts are measured. Defendant (1) operates the fully-interactive www.k9ped.com web site as his sole source of revenue from that business; (2) ventured into, and paid money to, an Illinois-operated, Illinois-maintained Illinois court web site for Illinois documents about an Illinois citizen; (3) Used his fully-interactive web site to commit intentional torts and unlawful acts designed to damage, and damaging, an Illinois citizen; and (4) derived profit directly from Illinois citizens, using the web site containing the tortious postings.

Defendant's attempted swearings against John's jurisdictional allegations *admit* them: Andrews' maintenance of a fully interactive web site, see R. C198 ¶ 5-6, and direct sale to at least one Illinois citizen, see R. C198 ¶ 10. The record is also devoid of the "compelling argument" against jurisdiction that the defendant must present in order to overcome Plaintiff's *prima facie* case. *Bombliss*, 355 Ill. App. 3d at 1115. Therefore, one must answer the federal due process question in favor of Illinois' jurisdiction. The trial court regretfully erred by declining to exercise that jurisdiction.

The final jurisdictional concern is Illinois Due Process. It tests to see if jurisdiction is "fair, just and reasonable." *Bombliss*, 355 Ill. App. 3d at 1115. In *Bombliss*, it was "entirely foreseeable" that the defendants' false statements would "affect

interests in Illinois.” Likewise, in the instant case, it was entirely foreseeable in this case that Defendant’s acts, as alleged and cited above, would affect John’s Illinois business. Therefore, this test also favors jurisdiction.

The trial court regretfully erred in dismissing the instant case for want of personal jurisdiction. The remedy is to reverse and remand, with the instructions prayed *infra*. John respectfully prays that relief.

**B. Defendant’s objections under Section 2-615 are without merit.**

John is now compelled to show that the defendant’s arguments under 735 ILCS 5/2-615 are without merit. For, this honorable appellate court may affirm the trial court for any reason appearing on the record. *LaRochelle v. Allamian*, 361 Ill. App. 3d at 226.

**1. Standard of Review.**

Decisions upon 735 ILCS 5/2-615 motions are reviewed *de novo*. *Provenzale v. Forister*, 318 Ill. App. 3d 869, 873 (2<sup>nd</sup> Dist. 2001). Evidentiary material, such as depositions, affidavits and exhibits, submitted to support a Section 2-615 motion cannot be considered; the review must be limited to the four corners of the complaint and exhibits. *Provenzale v. Forister*, 318 Ill. App. 3d 869 at 879. 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 Laboratories*, 265 Ill. App. 3d 991, 994 (1<sup>st</sup> Dist., 1993). 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 (1<sup>st</sup> 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. Pubs.*, 174 Ill. 2d 77, 110 (1996). A 2-615 motion cannot 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.

**2. John States claims for Tortious Interference.**

John alleges three counts of Interference with Prospective Economic Advantage. See R. C60-61, C67-68, C69-70. Moving to dismiss under section 2-615, Defendant argued that John failed to allege the specific customers interfered with. See R. C332-333. John argued in opposition that he properly alleged a class of customers and potential customers with whom the defendant interfered. See R. C251, C268 ¶ 3.6.1 (the clerk inadvertently interspersed John's exhibits between pages 12 and 13 of John's Memorandum opposing defendant's motion, thus causing the gap, with C252-267 occupied by those exhibits). Defendant argued in reply that John had to allege interference with *existing* customers, although John does allege this very loss at R. C56 ¶ 24-25, in order to state a claim for interference with *prospective* economic advantage (see R. C346-347). Both arguments fail, and John states proper claims.

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 Laboratories*, 265 Ill. App. 3d 991, 994 (1<sup>st</sup> Dist. 1993). A Plaintiff may 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 (4<sup>th</sup> Dist., 1980); *Crinkley v. Dow Jones & Co.*, 67 Ill. App. 3d 869, 385 N.E.2d 714 (1<sup>st</sup> Dist., 1978). The opportunity to obtain customers is an expectancy protected by the tort of interference with business expectancy. *North Broadway Motors, Inc. v. Fiat Motors of North America, Inc.*, 622 F. Supp. 466, 469 (N.D. Ill. 1984); *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 190 Ill. App. 3d 524, 529 (2<sup>nd</sup> Dist. 1989). Plaintiff properly alleges an expectancy if “a class of identifiable third persons, past and future customers, has been alleged.” *Id.*, citing *O'Brien v. State Street Bank & Trust*, 82 Ill. App. 3d at 85.

Factor 1 of the *Schuler* test is a valid expectancy. Plaintiff alleges at R. C60 ¶ 41; C67 ¶ 101; C69 ¶ 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 counsel argues at R. C332. It is bolstered by the fact that John makes software products specifically directed to those markets. R. C54 ¶ 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.

Factor 2 of the *Schuler* test is that Defendant must know of the expectancy. John alleges this in R. C60 ¶ 42; C67 ¶ 102; C69 ¶ 127. This is also not a legal conclusion. Andrews is John’s competitor, R. C54 ¶ 7, and obviously knows of this expectancy; this is an inference to which John is entitled in a section 2-615 motion. *Schuler v. Abbott Laboratories*, 265 Ill. App. 3d at 994. 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 R. C60 ¶ 43; C69 ¶ 128; C67 ¶ 103-105. These pleas are not legal conclusions. Defendant knowingly published deceptive statements about John's intention to complete CompuPed™ Millennium, into the face of John's continuing pre-releases. R. C54 ¶ 10. Defendant chose his words carefully to falsely accuse John of intentionally selling a product he had no intention to complete, a criminal act. R. C55 ¶ 13, 15-16, C60 ¶ 47. In the fourth disparagement, Defendant told numerous people that John was about to be liquidated and that his technical support would soon be unavailable. R. C56-57 ¶¶ 26-27. Andrews knew, from his admitted frequent forays into the Illinois Court Site, see R. C323, that John was *not* about to be liquidated when he made those statements. R. C253 ¶ 11. Andrews repeated those false statements of impending liquidation while knowing it was impossible. R. C56-57 ¶ 25-27. John alleges that Andrews published all of these utterances with knowledge of their deceptiveness, making them *unjustified*. John meets the requirement of *Schuler* factor number 3.

Factor 4 of the *Schuler* test is damages. John pleads damages in the form of lost sales in R. C61 ¶ 52, C67 ¶ 108, C70 ¶ 133. And, John also pleads that he has lost existing customers because of Andrews' actions. See R. C56 ¶ 24-25. Lost sales and customers can be proven; the allegations are not legal conclusions.

Counsel attempts to argue that, according to *Soderlund Bros. v. Carrier Corp.*, 278 Ill. App. 3d 606, 620 (1<sup>st</sup> Dist. 1995), John's claims for tortious interference cannot survive because they merely give "truthful information." This argument is without merit.

John alleges that the defendant's statements were deceptive, and Andrews knew this when he uttered them. R. C60 ¶ 45, C67 ¶ 104, C70 ¶ 129. Since Section 2-615 motions are limited to the complaint and its attached exhibits, *Provenzale v. Forister*, 318 Ill. App. 3d at 879, and all well-pled allegations are assumed to be true, *Schuler v. Abbott Laboratories*, 265 Ill. App. 3d at 994, affirmative defenses are not permitted, *Bryson*, 174 Ill. 2d at 86, and one cannot introduce evidentiary material to dispute allegations in a section 2-615 motion *Provenzale v. Forister*, 318 Ill. App. 3d at 879, this *affirmative defense* was improperly offered. Of course, later on in these proceedings, this same argument is destined to fail again, for defendant's statements were false and misleading.

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. John States claims for defamation.**

Allegations that a defendant made false statements, and that they 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.

In the First Amended Complaint, R. C53-74, John pleads libel per se on the First Disparagement (count two, R. C54 ¶ 10), libel per quod on the Second Disparagement (count four, R. C55 ¶ 17-18), libel per quod on the Third Disparagement (count five, R. C57 ¶ 28), and libel per se on the creditor libel (count ten, R. C58 ¶ 30). These libels are pled in their exact words.

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. Pubs.*, 174 Ill. 2d 77, 88 (1996).

Counts two and ten properly state a claim for libel per se. Count two 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. R. C35-36 ¶ 55. The statement was false, as the release of CompuPed™ Millennium has proved. R. C36 ¶ 56. Nonetheless, Andrews persisted in the statement for months after he knew that CompuPed was released, changing it only after being served with the original complaint in this matter. R. C58 ¶ 30. These sworn allegations must be taken as true. *Bryson*, 174 Ill. 2d at 86. A court cannot consider a movant’s affidavits when deciding a section 2-615 motion, however, John notes that 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. R. C253 ¶ 14. If one knowingly and falsely accuses someone of a crime, then one is guilty of libel per se. Count two states a proper claim.

Now onto Count Ten. Andrews publishes the false accusation that John has paid none of his creditors (the “Creditor Libel”). That representation is false. C69 ¶¶ 120-121. Andrews saw documents, which show that John paid creditors in their entirety. R.

C253 ¶ 15. The creditor libel imputes to John an inability to perform his profession, and/or a want of integrity. To the extent that the creditor libel imputes a violation of the bankruptcy laws, it falsely imputes a federal crime. John states a claim for libel per se.

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 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 R. C62-63 ¶¶ 67-72. It alleges lost sales, a pecuniary loss, at R. C63 ¶ 75. Count five alleges the extrinsic circumstances that make the third disparagement defamatory, see R. C63-64, ¶¶ 77-79. It also alleges pecuniary loss in the form of lost sales, in R. C64 ¶ 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 (3<sup>rd</sup> 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 C35-36 ¶¶ 55-58. He furthermore pleads pecuniary special damages in the form of lost sales at R. C56 ¶¶ 24-25, C58 ¶ 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. R. C69 ¶¶ 120-121,123, C56 ¶ 24-25, C59 ¶ 34. Therefore, all libel counts state claims and cannot be dismissed.

a. Defendant cannot assert the affirmative defense of Substantial Truth.

Defendant's counsel went to the mat to attempt to argue the affirmative defense of "substantial truth" against the defamation counts, supported by an affidavit from Andrews that attempts to dispute the allegations in the First Amended Sworn Complaint. See C335-336, C347-348 (reply), C198-200 (affidavit). This is improper, as counsel well knows. *Provenzale v. Forister*, 318 Ill. App.3d at 879.

Defendant simply cannot argue affirmative defenses in his section 2-615 motion. *Bryson v. News Am. Pubs.*, 174 Ill. 2d at 86. If the defendant wanted to attempt to dispute the truth of John's allegations, he should have filed a motion for summary judgment under Section 2-1005. *Provenzale v. Forister*, 318 Ill. App. 3d at 879. No Illinois court can, as it must, take all of the allegations of the First Amended Complaint as true and simultaneously dismiss the case because those same allegations are false. John has alleged that the First, Second, and Third disparagements, and the creditor libel, are all false. R. C56 ¶¶ 23-24, C59 ¶ 32, C60 ¶ 47, C35-36 ¶¶ 55-56, 59, C63 ¶ 73, C63-64 ¶¶ 78-79, C66 ¶ 95.

Defendant, at R. C335 cites to *American International Hospital v. Chicago, Tribune Co.*, 136 Ill. App. 3d, 1019, 1022-23 (1<sup>st</sup> Dist. 1985) to attempt to justify his inclusion of this defense in a 2-615 motion. However, *American International* is easily

distinguished. In that case, the court rightly held that the Plaintiff conceded the truth of the defendant's newspaper report in its complaint! *Provenzale v. Forister*, 318 Ill. App. 3d at 879, holds that section 2-615 review is limited to the four corners of the complaint.

In the instant case, the complaint is internally consistent. It does not allege false statements in one place and then admit those statements are true elsewhere. Therefore, *American International* is inapposite to the case at bar. If one alleges that a defamatory statement is false, as John does (R. C36 ¶ 56), and that the defendant knew of its falsehood or acted with reckless disregard as to the falsehood of the statement, as John does in R. C30 ¶ 23, the Plaintiff survives a section 2-615 motion to dismiss. *Krueger v. Lewis*, 342 Ill. App. 3d 467, 472 (1<sup>st</sup> Dist. 2003).

It is error to confuse motions and consider defendant's affidavits, depositions, or exhibits on a section 2-615 motion. *Johnson v. Nationwide Business Forms, Inc.*, 41 Ill. App. 3d 128, 131 (1<sup>st</sup> Dist., 1976). A court "may not consider supporting affidavits 'offered by the movant.'" *The Retreat v. Bell*, 296 Ill. App. 3d 450, 454 (4<sup>th</sup> Dist., 1998). The affirmative defense of "substantial truth" is unsupportable in this case at this or any other time.

#### **4. John States claims for Unfair Competition.**

John has alleged four counts of Unfair Competition. R. C36-37, C39-41, C41 ¶¶ 95-100, C43-44. At R. C337-338, Defendant's counsel attempted to argue that John's common law unfair competition claims should be dismissed because John failed to cite them as claims under the Uniform Deceptive Trade Practices Act (UDTPA), 810 ILCS 510/1 et. seq. However, there plainly *is* a common law right of action for unfair

competition. In *Custom Business Systems, Inc. v. Boise Cascade Corp.*, 68 Ill.App.3d 50, 53 (2<sup>nd</sup> Dist. 1979), the court considered claims pled as common-law unfair competition under the UDTPA. Notwithstanding, John also filed his motion, under separate cover, to amend to explicitly allege claims under the UDTPA.

*Standard of Review:* Illinois courts have held that the UDTPA is a codification of the common law of unfair competition. (*Mars, Inc. v. Curtiss Candy Co.*, 8 Ill. App. 3d 338 (1<sup>st</sup> Dist. 1972); *National Football League Properties, Inc. v. Consumer Enterprises, Inc.*, 26 Ill. App. 3d 814 (1<sup>st</sup> Dist. 1975), 327 N.E.2d 242, *cert. denied*, 423 U.S. 1018). As such, it has generally been held to apply to situations where one competitor is harmed or may be harmed by the unfair trade practices of another. See *Clairol, Inc. v. Andrea Dumon, Inc.*, 14 Ill. App. 3d 641 (1<sup>st</sup> Dist. 1973), *cert. denied*, 419 U.S. 873; see also *Tone and Eovaldi, New Illinois Trade Regulation Laws: The Uniform Deceptive Trade Practices Act (Part Two)*, 54 Ill. B. J. 436 (1966). Unfair competition is a tort. *Board of Trade of City of Chicago v. Dow Jones & Co., Inc.*, 108 Ill. App. 3d 681, 689 (1<sup>st</sup> Dist., 1982). **John cannot locate any reported Illinois case where a complaint was dismissed for failing to allege the specific provision of the UDTPA that the defendant is alleged to have violated.**

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.

Andrews, in each and every one of the unfair competition counts, seeks to deceive viewers of [www.k9ped.com](http://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*, as in the First Disparagement (R. C55 ¶¶ 13-16), or in telling telephone callers that John was about to be liquidated in bankruptcy and his technical support services terminated, even though Andrews knew that John was not in bankruptcy (Fourth Disparagement, R. C56-57 ¶¶ 25-27, 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, adding that they "only buy K9-Ped Once," when Andrews had no intention of releasing any of the "free updates" he advertised. He has conclusively proven that fact by refusing to complete the "7.0N" "beta" program for nearly four years as of this writing. See Exhibit 1 at R. C72.

In determining if the statement is deceptive, the *perceptions of the audience* control. *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6 (7<sup>th</sup> Cir. 1992). Defendant's counsel did not, and cannot, argue that the statements don't deceive, or are not likely to deceive, the "reasonably intelligent" consumer. *Vidal Sassoon, Inc. v.*

*Bristol-Myers Co.*, 661 F.2d 272 (2<sup>nd</sup> Cir. 1981). Therefore, all of the unfair competition counts must stand.

Alleging that a defendant falsely told a company's customers that the company was in bankruptcy sufficed to state a claim for Unfair Competition. *M&R Printing Equip., Inc. v. Anatol Equip. Mfg. Co.*, 321 F. Supp. 2d 949 (N.D. Ill. 2004). John alleges this of the First and Fourth disparagements. The First, alleges that Defendant, knowingly and continually, knowing that John was not in Bankruptcy, broadcasted to the Internet that John was in bankruptcy, and that he was “actively market[ing]” a product he had no intention to finish. R. C59-60 ¶¶ 32-33, 45. Similarly, in the fourth disparagement, Andrews, persisted, long after he knew it to be false, in telling those who telephoned him that John was about to be liquidated in bankruptcy, and if they bought John's products, they would soon have no technical support. R C57, 66 ¶¶ 27, 95-96.

John has pled that Andrews “disparages the goods, services, or business of another by false or misleading representation of fact.” 815 ILCS 510/2(8). John need plead no more. As to the *Restatement*, John pleads that Andrews offered the free updates promise and the free updates repudiation, and made deceptive statements of his own products in order to gain customers from John, when he had no intention, from the outset, to honor his free updates promises. See R. C64-66.

At the time of dismissal, John's motion for leave to file his second amended complaint, which explicitly alleges UDTPA violations, was pending. The unfair competition claims form an important part of the instant case. Andrews' disparagements and phony promises clearly violate the UDTPA. To do justice under 735 ILCS 5/2-616,

John moved the trial court for leave to file his second amended complaint, which motion was denied as moot after the trial court declined to exercise jurisdiction and dismissed the case. As shown *supra*, that dismissal was regretfully erroneous. Wherefore, John prays that the order denying leave to amend, see R. C386, be reversed. Upon remand, John prays an instruction ordering the trial court to deny Section 2-615 relief.

**5. John is entitled to an instruction to the trial court to deny 2-615 relief upon remand.**

In *Land of Lincoln Sav. and Loan v. Michigan Ave. Nat. Bank of Chicago*, 103 Ill. App. 3d 1095, 1103-04 (3<sup>rd</sup> Dist. 1982), the appellate court, on the ground of judicial economy, reviewed issues that would not be obviated by its reversal and remand, and used that review to craft instructions to the trial court. The instant case is suitable for such a review.

Since John has shown that the defendant's section 2-615 arguments are completely meritless, as he needed to do to show that no ground existed to affirm the trial court based on the record, this honorable appellate court has already been presented with an opportunity to rule upon them. Reversing and remanding this matter without an instruction would give the defendants an unwarranted "second bite at the apple," see *People v. Armstrong*, 317 Ill. App. 3d 877 (2<sup>nd</sup> Dist. 2000), in the form of an opportunity to file a dilatory second motion for undeserved section 2-615 relief.

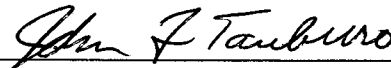
Such a result would be wasteful, and unfairly prejudice John, and may present a sticky law of the case issue, which would result in justice delayed. Judicial economy is best served by this honorable appellate court remanding the instant case, with an

instruction to deny all relief prayed under 735 ILCS 5/2-615.

### CONCLUSION

WHEREFORE, for the reasons stated above, John respectfully prays that this honorable Appellate court reverse the trial court's orders of May 2-3, 2006, and remand this matter back to the Circuit Court of the 12<sup>th</sup> Judicial Circuit. John further respectfully prays that this cause be remanded with an instruction to the trial court to deny all section 2-615 relief requested by the defendant in his motion. John finally prays all other relief that this honorable Appellate court deems to be just and reasonable.

Dated August 14, 2006:



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John F. Tamburo  
Plaintiff-Appellant *Pro Se*  
D/B/A Man's Best Friend Software  
655 N. LaGrange Rd, Suite 209  
Frankfort, IL 60423  
815-806-2130

Docket Number 3-06-0347  
IN THE APPELLATE COURT OF ILLINOIS FOR THE THIRD DISTRICT

JOHN F. TAMBURO, D/B/A  
MAN'S BEST FRIEND SOFTWARE  
*PLAINTIFF-APPELLANT*

*v.*  
JAMES ANDREWS, D/B/A K9PED  
*DEFENDANT-APPELLEE*

Appeal From: **Will County**  
Circuit Number: **12<sup>th</sup>**  
Trial Judge: **Hon. Herman S. Haase**  
Docket Number: **06 L 51**  
Date of Judgment: **May 3, 2006**  
Date of Notice of Appeal: **May 10, 2006**

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**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT  
WILL COUNTY, ILLINOIS**

JOHN F. TAMBURO d/b/a MAN'S BEST )  
FRIEND SOFTWARE, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
JAMES ANDREWS d/b/a K9Ped, )  
 )  
Defendant. )

Case No. 06 L 51

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**AMENDED ORDER**

THIS MATTER COMING TO BE HEARD on Defendant James Andrews d/b/a K9Ped's ("Defendant Andrews") Motion to Dismiss Plaintiff John Tamburo d/b/a Man's Best Friend Software's ("Plaintiff Tamburo") First Amended Complaint and Plaintiff Tamburo's Request for Leave to File His Second Amended Complaint, counsel for Defendant Andrews present, Plaintiff Tamburo present, the Court hearing arguments from both parties, and the Court being advised in the premises, IT IS HEREBY ORDERED:

- (1) Defendant Andrews lacks sufficient contacts with the State of Illinois for this Court to exercise personal jurisdiction over him;
- (2) Defendant Andrews' Motion to Dismiss Plaintiff Tamburo's First Amended Complaint is granted upon the basis that this Court lacks personal jurisdiction over Defendant Andrews;
- (3) Plaintiff Tamburo's First Amended Complaint is dismissed in its entirety;
- (4) Plaintiff Tamburo's Request for Leave to File His Second Amended Complaint is denied as moot;

(5) This Order is final and appealable as of right pursuant to Illinois Supreme Court Rule 301.

ENTER:

  
\_\_\_\_\_  
JUDGE

Dated 5/3/2006

**APPROVED FOR ENTRY:**

DEFENDANT,  
JAMES ANDREWS d/b/a K9Ped

PLAINTIFF,  
JOHN TAMBURO



By: His Attorney  
Charles Lee Mudd Jr.  
Law Offices of Charles Lee Mudd Jr.  
3344 North Albany Avenue  
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(773) 588-5410  
ARDC #: 6257957



By: Himself  
John Tamburo

ORIGINAL

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APPEAL TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT  
FROM THE CIRCUIT COURT OF THE 12<sup>TH</sup> JUDICIAL CIRCUIT  
WILL COUNTY, ILLINOIS

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L  
CIRCUIT COURT OF ILLINOIS

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

VS.

JAMES ANDREWS,  
D/B/A K9PED  
*Defendant-Appellee*

No. 06 L 51

**NOTICE OF APPEAL**

COMES NOW your Plaintiff-Appellant, JOHN F. TAMBURO, D/B/A MAN'S BEST FRIEND SOFTWARE (hereinafter "Appellant"), appearing *pro se* and appealing to the Appellate Court of Illinois, Third District, from the findings and dismissal order of May 3, 2006, by the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois, The Honorable Judge Herman Haase, presiding. This is an appeal as of right pursuant to Supreme Court Rule 301.

- Appellant respectfully prays of the honorable Appellate Court the following relief:
- a- A finding, holding that Illinois properly exercises personal jurisdiction over the defendant;
  - b- An order reversing the dismissal order of May 3, 2006 and remanding the case back to the Circuit Court for further proceedings consistent with that finding and order;
  - c- Pursuant to Supreme Court Rule 374, all reasonable and qualifying costs incurred by the Appellant;
  - d- Any other relief which the honorable Appellate Court deems to be fair, just and proper.

MOST RESPECTFULLY SUBMITTED on this 5<sup>th</sup> day of May, 2006:

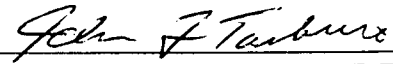
  
\_\_\_\_\_  
JOHN F. TAMBURO  
PLAINTIFF-APPELLANT  
D/B/A MAN'S BEST FRIEND SOFTWARE  
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FRANKFORT, IL 60423-2913  
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APPEAL TO THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT  
FROM THE CIRCUIT COURT OF THE 12<sup>TH</sup> JUDICIAL CIRCUIT  
WILL COUNTY, ILLINOIS

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

vs.

JAMES ANDREWS,  
D/B/A K9PED  
*Defendant-Appellee*

No. 06 L 51

FILED  
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CLERK, CIRCUIT COURT  
WILL COUNTY, ILLINOIS

**RULE 323(C) BYSTANDERS' REPORT**

Now come the Parties and hereby stipulate to the following events that transpired in open court before the Honorable Herman Haase on May 2, 2006, in Courtroom 2, in the River Valley Justice Center, Joliet, Illinois, during the hearing on Defendant James Andrews d/b/a K9Ped's ("Defendant") motion to dismiss.

The court called the case. John Tamburo answered *pro se* and Attorney Scott Lundhagen answered on behalf of the Defendant. The court passed the case for hearing in order to clear other matters from its docket.

The court recalled the case and colloquy commenced. Mr. Lundhagen made an initial objection to Mr. Tamburo's Sur-Reply, stating that he had received it on the evening of April 28, 2006, and that Mr. Tamburo had not moved for leave to file that Sur-Reply. The court did not respond to the objection.

Mr. Lundhagen argued that there was no personal jurisdiction, and also that Plaintiff failed under section 735 ILCS 5/2-615 to state any claims. The court asked Mr. Lundhagen for his arguments against personal jurisdiction, and asked if the arguments were made under 735 ILCS 5/2-619, to which Mr. Lundhagen answered in the affirmative.

Mr. Lundhagen presented his arguments that neither general nor specific jurisdiction was present in this case. As to general jurisdiction, Mr. Lundhagen stated that Mr. Andrews is not an Illinois resident and instead resides in Oregon. Mr. Lundhagen argued that Mr. Andrews does not engage in continuous and systematic course of business in Illinois and there exists no continual and intense contacts with the State of Illinois. Further, Mr. Lundhagen contended that the Defendant's website is the sole basis for the alleged jurisdiction. Mr. Lundhagen argued that the Defendant's website was not targeted specifically to Illinois customers and after a thorough search of the Defendant's records, Defendant affirmed that only one individual with an Illinois address had ordered from Mr. Andrews' website. Mr. Lundhagen argued that this is not sufficient for general personal jurisdiction and cited to *LaRochelle v. Allamian*, 316 Ill.App.3d 217.

The court asked Mr. Tamburo how one transaction with an Illinois resident made Mr. Andrews subject to personal jurisdiction in Illinois and why did he not sue Mr. Andrews in Oregon. Mr. Tamburo first argued that the defendant waived his arguments against personal jurisdiction under 735 ILCS 5/2-301(a-5), but the court stopped that argument, stated that it would not entertain an argument of waiver, and asked Mr. Tamburo to address personal jurisdiction.

Mr. Tamburo argued that both the *LaRochelle v. Allamian* case cited by the Defendant, as well as *Bombliss v. Cornielsen*, 355 Ill. App. 3d 1107, 1114 (3rd Dist. 2005), held that an interactive web site where a customer could complete contracts online was, in and of itself, sufficient contact to meet the "Zippo test" of jurisdiction based on an interactive web site. Mr. Tamburo also noted that the web site with this interactive sales capability was also the same web site where the alleged tortious publications was made, thus meeting the relatedness requirement of *Burger King v. Rudzewicz*.

Mr. Tamburo also argued that the Defendant was subject to tortious act jurisdiction pursuant to section 735 ILCS 5/2-209(a)(2) by committing alleged tortious acts injuring an Illinois citizen, with an intent to affect an Illinois interest.

Mr. Lundhagen interjected that it was important to note that Plaintiff's claims did not arise from any software sales the Defendants made to Illinois residents. Mr. Lundhagen contended that the website and the statements made on the website of Mr. Andrews were the sole basis for the alleged jurisdiction. Mr. Lundhagen then quoted *Molnlycke Health Care AGB v. Dumex Medical Surgical Products Ltd.*, 64 F.Supp.2d 448, 451 (E.D. Pa. 1999), stating that to "hold that the possibility of ordering products from a website establishes general jurisdiction would effectively hold that any corporation with such a website is subject to general jurisdiction in every state. The court is not willing to take such a step."

Mr. Tamburo then responded that *Molnlycke* was not applicable here because it was a federal case from Pennsylvania. The Court replied that the reasoning from *Molnlycke* was applicable here.

Mr. Lundhagen further argued that statements on a website alone were not enough for jurisdiction where, as here, they were not directed to Illinois and cited to *Griffis v. Luban*, 646 N.W.2d 527 (Minn. 2002) and *Barrett v. Catacombs* 44 F. Supp.2d 717, 729 (E.D. Pa. 1999). Mr. Lundhagen also contended that Mr. Andrews has a hybrid website and, under the *Zippo* sliding scale analysis, the question for hybrid website is whether the website owner purposefully directed his activities to Illinois. Mr. Lundhagen argued that apart from the fact that customers may order from Mr. Andrews' website, with one in Illinois doing so, Illinois has no relation to this website and thus this court lacks specific jurisdiction as well.

The court paused at this time and reviewed the case file. The court asked Mr. Lundhagen if Mr. Andrews had filed an affidavit. Mr. Lundhagen responded in the affirmative. Mr. Lundhagen assisted the court in locating a copy of the affidavit attached to Defendant's memorandum in support of Defendant's Motion to Dismiss Plaintiff's First Amended Complaint. The court read the affidavit, noted that most of its allegations were not against jurisdiction, and then recited those allegations of the affidavit that were directed at jurisdiction.