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: **12th**
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**

# APPELLANT'S REPLY BRIEF

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

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## APPELLANT'S REPLY BRIEF

NOW COMES your Plaintiff and Appellant, JOHN F. TAMBURO, D/B/A MAN'S BEST FRIEND SOFTWARE ("John"), respectfully submitting this instrument, his brief in Reply to Defendant-Appellee's Amended brief.

## ARGUMENT

### 1. Introduction

John takes a short amount of space to refute the new "points" raised in Appellee's Amended brief, and therefore, continues to pray that this honorable Appellate court reverse and remand, with instructions to deny section 2-615/2-619 relief upon remand.

### 2. Defendant's motion still waives his objection to personal jurisdiction.

Defendant proffers arguments wholly unrelated to John's points, and presents argument without authority, while failing to effectively answer John's points in his brief

on appeal. For the reasons shown below, defendant has waived his objections to the court's jurisdiction.

### *2.1. The Memorandum of law is not the motion.*

In the defendant's amended Appellee's brief (the "Brief"), pp. 3-5, defendant first argues, incorrectly, that the motion "specifically incorporates" the memorandum attached to it. The memorandum is *not* the motion, and the statute specifically states that the *motion* shall be in parts. See *735 ILCS5/2-301(a-5).* ***John could not locate any authority that holds that, under section 2-301, 2-615, 2-619 or 2-619.1, a memorandum of law is to be credited as the motion it supports.*** It is therefore unsurprising that defendant cites none to support his argument. In addition, the motion does *not* "specifically incorporate[]" the Memorandum. At R. C121, defendants parenthetically mention the Memorandum of law, with no language that stated or implied that the Memorandum was incorporated into the Motion.

Defendants ask this court, with respect to the unambiguous language of section 2-301, to "annex new provisions or substitute different ones, or read into the statute exceptions, limitations, or conditions which the legislature did not express." This court "may not" do that. *People ex rel. Department of Professional Regulation v. Manos*, 202 Ill. 2d 563, 568 (2002); *Harshman v. DePhillips*, 218 Ill. 2d 482, 491 (2006).

### *2.2. The Memorandum, if it were to be credited, still fails to obey the statute.*

Defendant, in his Appellee's brief, argues that the "parts" in that memorandum are sufficient to comply with the statute. Again, such a position urges this court to ignore

the unambiguous language of the statute: "the parts of a combined *motion* must be identified in the manner described in Section 2-619.1." *735 ILCS 5/2-301(a)* [emphasis added]. Let us assume *arguendo* that the defendants are right and the statute intended to speak of supporting memoranda and not "a combined motion." Let us also assume, *arguendo,* the defendant's apparent position that section 2-301's language "the ground that the party is not amenable to process of a court of this State" is meaningless, and motions to dismiss for want of personal jurisdiction are properly brought under Section 2-619. Assuming both of those notions, defendant has still waived his objection to jurisdiction because he also objected to "Improper Service of Process" under 2-619, see R. C328-330. That objection is only properly made under Section 2-301. Therefore, defendant still flouts the Section 2-301(a) labeling requirement. Defendant has waived his objection under Section 2-301(a-5).

### *2.3. John has <u>never</u> argued for the defunct "special and limited appearance."*

Defendant then argues that John misapprehends the law, and incorrectly alleges that he is arguing that the special and limited appearance, which was done away with in 2000, warrants a finding of waiver. This argument appears to be copied *verbatim* from the defendant's reply memorandum, see R. C345-46. Defendant's argument ignores what John wrote. John's arguments are based on the following points:

- That the defendant improperly argued his objections to personal jurisdiction under section 2-619 instead of 2-301;
- That the defendant also argued improper service of process under section 2-619 when it is only proper under 2-301;

- That the motion was not in the "parts" that the statute requires.

John made no attempt to argue that the special and limited appearance was required, and is dumbfounded by the entire last paragraph of p.4 of defendant's brief. In fact, John specifically noted that the special and limited appearance was eliminated over six years ago. See Appellant's brief, p. 21. John then noted the commentary by the author of the current Section 2-301: "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). That is what defendant failed to do, and that failure is what caused his waiver.

### *2.4. Section 2-619 is still the wrong statute under which to object to personal jurisdiction.*

Defendants cite several cases to stand for the notion that objections to personal jurisdiction are properly brought under section 2-619. John stands on his arguments in his brief that such arguments render part of Section 2-301(a) and all of 2-301(a-5) meaningless, which is not allowed. *People v. Singleton*, 103 Ill. 2d 339, 345 (1984). But, in addition, John must note that defendant's cited cases in his Appellee's brief, p. 5, are all inapposite. One case, *In re Marriage of Hoover*, 314 Ill. App. 3d. 707, 710 (4th Dist., 2000), *never mentions Section 2-619!* His other cases are similarly inapposite. *West Virginia Laborers Pension Trust Fund v. Caspersen*, 357 Ill. App. 3d 673, 675 (1st Dist., 2005), mentions the statute once in its opening paragraph. Nowhere does it hold that section 2-619 is a proper statute under which to object to personal jurisdiction. After diligently searching, John cannot locate any reported case that makes such a specific

holding; if one existed, John is sure that defendants would have cited to it, and John would be arguing for this honorable court to depart from it.

Similarly, defendants argue that *Safeco/American States Ins. Co. v. Hagler,* 332 Ill. App. 3d 912, 916 (5th Dist., 2002) holds that objections of improper service of process may also made under section 2-619. But *Safeco* held that, "the trial court's involuntary dismissal, pursuant to section 2-619 of the Code of Civil Procedure, was *improper*" [emphasis supplied]. *Safeco* spoke of a lack of diligence in service, *tardy* service, not improper service, and *made no holding* about the propriety of objecting to service of process under section 2-619.

If Defendant's arguments are credited, then section 2-301 is void and completely useless. If this honorable court holds as defendant's counsel urges, not one iota of this statute, effective January 1, 2000, is effective in 2006 – effectively repealed, with no legislative act. However, that is not what the law holds. Defendant has, with his improperly-labeled motion, flouted sections 2-301(a) and (a-5) of the Code of Civil Procedure, and by its express language, has waived his objections to Illinois' jurisdiction over his person.

**3. Defendant's contacts with Illinois, when evaluated with *Illinois* law, warrant Illinois Jurisdiction.**

Defendants cite Tennessee law, Pennsylvania law and unpublished federal cases (67 pages of them, attached in an appendix) to dispute personal jurisdiction. John employs a breathtaking approach: citing *Illinois* law decided by *Illinois courts*. And, applying the *proper* law, the *controlling* law, Andrews is properly haled into Illinois.

### *3.1. Defendant's Website, Specific Jurisdiction, and Bombliss.*

John stands on his argument in his brief, pp. 22-26. www.k9ped.com is fully interactive under *Bombliss v. Cornelsen*, 355 Ill. App. 3d 1107, 1114 (3rd Dist. 2005). The site contains not only the mechanism where Andrews derives 100% of his profit (R. C198 ¶¶ 5-6; C252 ¶ 3), but also the libels that form the gravamen of the instant case (R. C27-34).

John addresses the notion, raised in Appellee's brief, p. 18, that the specific web page on defendant's admittedly-interactive site upon which the libels appear is "passive." (R. C198 ¶¶ 5-6; Appellant's brief, A9). This argument is unsupported by any authority. It is also incorrect, since one can click on a web page link to download and order the K9-Ped program (see R. C48, link "Program Downloads").

The next argument, that the cause of action must "arise from" the web site, see Appellee's brief, p.14-15, is a half-truth. The *correct* standard is that the action must "arise out of ***or relate to***" the defendant's contacts. *Bombliss v. Cornelsen*, 355 Ill. App. 3d at 1112; *Burger King v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 2184 (1985). Under that standard, Andrews' inclusion of these disparagements on a site that exists solely to *sell his competing product* properly hales him into Illinois. Andrews' forays into Illinois court web sites to dig up dirt on John (R. C33 ¶ 37) *relate to* this action. His misuse of obsolete documents to impute fraud to John (R. C 29 ¶ 13) *relates* to this action. Andrews' telling callers that John was imminently to be liquidated when he knew this was impossible (R. C32 ¶ 27) *relates* to this action. Andrews' knowingly publishing false statements about the end of John's bankruptcy (R C32 ¶ 30) on a web site that

hawks a product that directly competes with his (R. C28 ¶ 7), and from which he derives 100% of his business revenues (R. C198¶¶ 5-6; C252 ¶ 3), *relates* to this action. The jurisdictional contacts in this matter are overwhelming.

John is entitled to have his allegations taken as true, *Zazove v. Pelikan*, Inc., 326 Ill. App. 3d 798, 802 (1st Dist. 2001). John alleges, R. C60 ¶ 40, and Andrews admits, R. C198 ¶ 5-6, that www.k9ped.com is fully interactive. John also alleges, R. C34 ¶ 40, and Andrews admits, R. C198 ¶ 10, sales to Illinois. John is entitled to the inference that the admitted Illinois sale resulted from Andrews' tortious publications. *SRAM Corp. v. Sunrace Roots Enterprise Co., Ltd.*, 390 F. Supp. 2d 781, 783 (N.D. Ill. 2005). That single sale into Illinois, when viewed in light of Andrews' conduct designed to affect an Illinois interest, constitutes minimum contacts for Due Process. *Royal Extrusions Limited v. Cont'l Window & Glass Corp.*, 349 Ill. App. 3d 642 (3rd Dist. 2004).

### *3.2. Totality of Contacts under Bombliss.*

Defendant cites numerous foreign cases to argue against *Bombliss'* holding. All of these cases, in fact, are decided before *Bombliss*, which is the latest law on personal jurisdiction in this district. *Bombliss v. Cornelsen*, 355 Ill. App. 3d at 1115, holds that the *totality* of a defendants' contacts are considered in determining minimum contacts for Due Process. John has pled that Andrews went to Illinois court sites to dig up dirt on John, and used that to libel him. John also pleads, and Andrews admits, that he has sold product to Illinois customers, and John is entitled to the inference (*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 (7th Cir. 1997)) that said Illinois sale

was completed *because* of Andrews' libels on his fully interactive commercial web site. Under *Bombliss*, see 355 Ill. App. 3d at 1115, the totality of contacts establishes jurisdiction.

### *3.3. Tortious Act Jurisdiction and Intent to Affect an Illinois Interest.*

John stands on his appellant's brief, pp. 26-28. He has alleged tortious act jurisdiction, with intent to affect an Illinois interest. This establishes Illinois' jurisdiction over Andrews. *Arthur Young & Co. v. Bremer,* 197 Ill. App. 3d 30, 35-36 (1st Dist. 1990). John alleges that defendant committed intentional torts against, him, while knowing his Illinois residency, causing injury in Illinois. R. C33 ¶¶ 36-37. This evinces Andrews' intent to affect an Illinois interest, establishing jurisdiction. Appellee's brief, p. 16, asserts that Andrews "did not make statements about Plaintiff as an Illinois businessman or company." Such an argument is ludicrous. Consider Andrews' venture into Illinois court websites, for the *sole purpose* of obtaining documents with he could use to harm John, an Illinois citizen. Illinois has a *strong* interest in providing Plaintiffs with a convenient forum for adjudicating torts that injure within its borders. *Commerce Trust Co. v. Air 1st Aviation Companies, Inc.*, 366 Ill. App. 3d 135, 147 (1st Dist. 2006).

When one commits an intentional tort against an Illinois citizen, which is a purposeful direction at Illinois, one is subject to the jurisdiction of our courts. *Arthur Young & Co. v. Bremer,* 197 Ill. App. 3d at 35-36, *Bombliss v. Cornelsen,* 355 Ill. App. 3d at 1115-16.

## 4. Defendant's arguments against the sufficiency of the Complaint are meritless.

### *4.1. John is prejudiced by defendant's attempt to label his improper arguments as made under section 2-619.*

In Appellee's Amended brief at p. 20, defendants, for the first time, change their entire approach and demand that this court consider Andrews' affidavit and take their motion as being lodged under Section 2-619. They argue that John is "not prejudiced" by such a move. Defendant's argument is ludicrous. To the extent that any of defendant's arguments are proper under section 2-619, considering Andrews' affidavit, without affording John a chance to prepare a truthful competing affidavit, leaves everything Andrews swears to be taken as true. *Provenzale v. Forister,* 318 Ill. App. 3d at 879. This is *inherently prejudicial* to John. Therefore, this honorable court, respectfully, cannot allow defendants to switch statutes just to use the defendant's affidavit.

### *4.2. Motions under 2-619 may not use affidavits to counter the allegations of the complaint.*

More importantly, defendant's affidavit is not properly used to contradict the fact allegations of the complaint. "[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 869, 879 (2nd Dist. 2001); *City of Chicago v. Beretta U.S.A. Corp.*, 337 Ill. App. 3d 1, 23 (1st Dist. 2002). Affidavits can only be used to establish fact matters *outside the face of the complaint. Provenzale v. Forister,* 318 Ill. App. 3d at 879. Defendant's attorney improperly uses Andrews' affidavit to attempt to prove the truth of his libelous statements. John alleges that

Andrews statements were false, see R. C27-46, ¶¶ 13-16, 22-24, 27, 29, 32-33, 56, 59, 71-72, 79-80, 121-122, 127. These allegations, and the fact allegations underlying them, eg., R. C29 ¶ 16, (allegations made after Compuped released); C30-31 ¶¶ 26-27 (allegations of imminent liquidation made while Andrews knew John was not in bankruptcy); C253 ¶ 15 (no payments to creditors while Andrews saw documents of payments made), must be taken as true.

"[W]ell-pleaded facts must be taken as true for the purposes of a motion to dismiss under section 2-619(a)(9)." *Heller Equity Capital Corp. v. Clem Environmental Corp.*, 232 Ill. App. 3d 173, 178 (1st Dist., 1992). "[D]isputed questions of fact are reserved for trial proceedings," *Advocate Health and Hospitals Corp. v. Bank One*, N.A. 348 Ill. App. 3d 755, 758 (1st Dist. 2004). The Appellee's brief makes *heavy use* of Andrews' affidavit to attempt to dispute John's well-pled allegations. 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. "A section 2-619(a)(9) motion may not be employed as a substitute for a motion for summary judgment." *Longust v. Peabody Coal Co.*, 151 Ill.App.3d 754, 757 (5th Dist. 1986). As shown *infra,* defendant continues to shift gears and commingle 2-615 and 2-619 arguments. This showcases the prejudice that defendant's counsel argues does not exist. This honorable court, respectfully, cannot allow defendant to flip-flop and treat his 2-615 arguments, made improperly with affidavits, to be made under section 2-619, even though it does not save their arguments from doom.

### *4.3. Defendant has not shown that John has failed to state a claim.*

#### 4.3.1. Tortious Interference

Defendant's counsel, on pp. 20-21 of his amended brief, asked this court to consider his 2-615 arguments under Section 2-619. Yet he also argues at pp. 33-36 that John failed to plead certain facts – legal insufficiency. Section 2-619 "admits the legal sufficiency of the complaint" and seeks dismissal based on "affirmative matter" that is "outside the complaint." *Provenzale v. Forister*, 318 Ill. App. 3d 869, 879 (2nd Dist. 2001). So, apparently, defendants want to have their 2-615 cake and eat it too. After proffering these 2-615 arguments, defendants switch gears *again* to argue affirmative defenses. See Appellee's Brief, pp. 36-38. Defendant wrongly urges this court to join it in "confus[ing] motions" and "consider[ing] defendant's affidavits," which is error. *Johnson v. Nationwide Business Forms, Inc.*, 41 Ill. App. 3d 128, 131 (1st Dist., 1976).

*4.3.1.1. John properly alleges a class of third parties with whom Andrews interfered.*

John stands on his Appellant's brief, pp. 31-34. He properly alleges a class of third parties with whom the defendant interfered. John simply responds to address defendant's counsel's arrogant contention that John "has not and cannot" cite to authority that holds that a class of present and future customers is a proper allegation of a class of third parties. Here is that authority to which John "cannot" cite: *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 190 Ill. App. 3d 524, 529 (2nd Dist. 1989): "Plaintiff must plead facts to show interference of a business relationship with specific third parties or an *identifiable prospective class of third persons*. (*Parkway Bank*

*& Trust Co. v. City of Darien* (1976), 43 Ill.App.3d 400, 2 Ill.Dec. 234, 357 N.E.2d 211.) This does not mean, however, that plaintiff must allege the identity of the third party or parties by name. (*Crinkley v. Dow Jones & Co.* (1978), 67 Ill.App.3d 869, 878, 24 Ill.Dec. 573, 385 N.E.2d 714.) In *Crinkley*, the court aptly pointed out that the reason for the rule stated in Parkway was that the plaintiff had failed to allege the existence of any third party. (*Crinkley*, 67 Ill.App.3d at 878-79, 24 Ill.Dec. 573, 385 N.E.2d 714.) Plaintiff's allegation that approximately 80% of the people that bought Saabs from its dealership return for inspection services and that it expected to continue to provide service to its customers is sufficient to allege a reasonable expectancy of a prospective business relationship with an identifiable class of third persons. Here, unlike Parkway, a class of identifiable third persons, past and future customers, has been alleged. (See *O'Brien v. State Street Bank & Trust* (1980) 82 Ill.App.3d 83, 85, 37 Ill.Dec. 263, 401 N.E.2d 1356 (allegation of numerous customers and suppliers sufficiently alleged an identifiable third party).) Furthermore, *this expectancy is reasonable.* As *North Broadway Motors, Inc. v. Fiat Motors of North America, Inc.* (N.D.Ill.1984), 622 F.Supp. 466, 469, held, the opportunity to obtain customers is an expectancy protected by the tort of interference with a business expectancy. See also *Knapp v. McCoy* (N.D.Ill.1982) 548 F.Supp. 1115, 1117, citing *Prosser, Torts § 130*, at 950 (4th ed. 1971)."

John alleges actual lost customers at R. C35 ¶ 52. He alleges the reasonable expectancy to do business with the breeders and exhibitors of show dogs, cats and horses, the very people at whom his products are aimed. R. C28 ¶ 5; C34 ¶ 41; C42 ¶ 101; C44 ¶ 126. John's expectancy is well-alleged.

*4.3.1.2. Knowledge of Expectancy*

John stands on his brief, pp. 31-34. John alleges Andrews to be his competitor. R. C28 ¶ 7. John alleges his expectancy. *Sect. 4.3.1.1., supra.* John alleges Andrews' knowledge of the expectancy. R. C34 ¶ 42; C42 ¶ 102; C44 ¶ 127. His allegations are to be taken as true, in either a 2-615 or 2-619 motion. *Provenzale v. Forister,* 318 Ill. App. 3d at 879. Andrews' affidavit is improperly used to dispute well-pleaded facts under either statute. *Id.* Knowledge of the expectancy is well-pled.

*4.3.1.3. Privilege*

Truth cannot be asserted as a privilege entitling the defendant to dismissal under sections 2-615 or 2-619. Plaintiff's allegations are taken as true; Andrews' affidavit cannot be considered under either statute to dispute those allegations. *Provenzale v. Forister,* 318 Ill. App. 3d at 879.

The *defendant must prove the privilege.* "In a section 2-619 proceeding, the defendant bears the burden of proving any affirmative defense it relies upon." *Advocate Health and Hospitals Corp. v. Bank One*, N.A. 348 Ill. App. 3d 755, 758 (1st Dist. 2004). A self-serving affidavit from Andrews is insufficient for such proof; the record is devoid of any real evidence to substantiate this affirmative defense, which is usually seen at summary judgment. "A section 2-619(a)(9) motion may not be employed as a substitute for a motion for summary judgment." *Longust v. Peabody Coal Co.*, 151 Ill. App. 3d at 757.

Nonetheless, John alleges that Andrews spoke falsely, and alleged facts to underpin those allegations. R. C55 ¶ 13; C59 ¶¶ 32-33. John is entitled to all reasonable

inferences drawn from the facts he alleged. *LaRochelle v. Allamian,* 361 Ill. App. 3d 217, 218 (2nd Dist. 2005). John has therefore alleged no privilege; defendant has failed to prove a privilege, and the interference counts cannot be dismissed on that ground.

### 4.3.2. Defamation

#### *4.3.2.1. Innocent Construction*

To the extent that any libel is capable of an innocent construction, that rule only bars a claim for libel *per se*; libel *per quod* may still be properly alleged upon those libels. *Clarage v. Kuzma*, 342 Ill. App. 3d 573, 581 (3rd Dist. 2003).

Still none of these disparagements are reasonably capable of an innocent construction. In the First Disparagement, boiling it down to its essence, Andrews states that John was, at that time, actively selling an incomplete CompuPed Millennium, knowing that he was unable to finish it. R. C28 ¶ 10. These allegations continued after Andrews knew that CompuPed Millennium was released. R. C29 ¶¶ 15-16. Andrews implicitly, and arguably explicitly, imputes fraud to John, which is a lack of integrity in his profession – libel per se. *Bryson v. News am. Publs.,* 174 Ill. 2d 77, 86 (1996).

Even if a libel is reasonably capable of an innocent construction, which is determined using the ordinary, plain meaning of the words, in context (*Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 853 N.E.2d 770, 778 (1st Dist. 2006), citing *Bryson v. News am. Publs.,* 174 Ill. 2d at 90), John may still proceed *per quod* since he pleads extrinsic circumstances that render the statements defamatory, and special damages in the form of lost sales and customers. See R. C59 ¶ 34-36; C61 ¶ 52; *Bryson,* 174 Ill. 2d at 86; *Halpern v. News-Sun Broadcasting Co.*, 53 Ill. App. 3d 644, 653 (2nd Dist. 1977)

(allegation that plaintiff lost income and continued to lose income as a result of patients leaving its nursing home sufficient to support special damages).

*4.3.2.2. Opinion*

The *entirety* of the statement, with context, is what a court evaluates to determine if a defamatory statement is a protected expression of opinion. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 853 N.E. 2d 770, 775-76 (1st Dist. 2006). If "the statement contains objectively verifiable assertions," it is *not* an opinion. *Id.* A false assertion of fact can be defamatory even when couched within apparent opinion or rhetorical hyperbole. *Bryson*, 174 Ill. 2d at 99-100.

None of the defendant's statements are protected opinion.

The First Disparagement imputes that Andrews used obsolete documents to impute that John was "actively marketing" a program he had no ability to finish. R. C28 ¶ 10. That is objectively verifiable; it is a *false* accusation, as the completion of CompuPed Millennium demonstrates. R. C33 ¶¶ 32-33. The Second Disparagement alleges that John's software is designed for a "commercial breeding kennel" R. C29 ¶ 17, and that Andrews, purposefully cast John's products as catering to the "puppy mills" that their mutual customer base despises. R. C37 ¶ 69. Whether John's product is aimed at puppy mills is objectively verifiable. John properly alleges libel per quod. The Third disparagement imputes trickery – fraud – upon John, stating that John is price-gouging his customers. R. C29-30 ¶ 18. John alleges Andrews' false statement. R. C39 ¶¶ 80-81. The Third Disparagement refers to John, by reference to his program, The Breeder's Standard™. R. C29-30 ¶ 18. John alleges libel per quod. The Sixth Disparagement

wrongly states that John paid none of his creditors, imputing that John transmitted no money at all. R. C44 ¶¶ 120-121, and Andrews' knowledge of that falsehood through documents he saw while gathering those he posted. R. C253 ¶ 15. This not only defeats "substantial truth," an affirmative defense that is improper under 2-615 or 2-619 unless John pleads the truth of the libel, but also any "fair report" privilege, since the "report" is not "complete." John adequately pleads libel per se on the Sixth Disparagement.

As to the Fourth disparagement, although John does not presently plead libel on the Fourth Disparagement, he will amend to include the count upon remand. The Complaint alleges, at R. C30-31 ¶ 26, not only that Andrews falsely told prospective customers by phone that John was to be liquidated and his support terminated, but also that *Andrews knowingly told these lies after he knew that John was not subject to liquidation, including after the end of his bankruptcy case!* R. C31 ¶ 27.

*4.3.2.3. "Substantial Truth"*

John stands on his brief, pp. 37-38. Substantial Truth can only be used as a ground to dismiss at the 2-615 stage if the complaint itself pleads that the libels it cites are true. *American Int'l Hosp. v. Chicago Tribune Co.*, 136 Ill. App. 3d 1019, 1022-23 (1st Dist. 1985). Substantial truth is always a question for the jury to decide, unless *no reasonable jury could conclude* that the statements were false. *Parker v. House O'Lite Corp.*, 324 Ill. App. 3d 1014, 1026 (1st Dist. 2001).

A reasonable jury could conclude that Andrews' allegation that John was defrauding his customers, by "actively marketing" CompuPed Millennium when he could not afford to finish it, was false. A reasonable jury could conclude that Andrews

intentionally and deceptively used obsolete court documents to lend an "official" air to his false allegation of fraud. A reasonable jury could conclude that Andrews falsely cited "commercial breeding kennel" for John's software to link him with universally-despised puppy mills. A reasonable jury could conclude that Andrews knew that John was not subject to liquidation when he told phone callers that John was to be imminently liquidated and technical support for his products would vanish. A reasonable jury could conclude that Andrews intended to falsely accuse John of price-gouging. A reasonable jury could conclude that Andrews intended to falsely accuse John of paying nothing into a bankruptcy plan for 15 months, while knowing that this was not the case.

John pleads consistently, and does not admit the truth of Andrews' lies. R. C27-46, ¶¶ 13-16, 22-24, 27, 29, 32-33, 56, 59, 71-72, 79-80, 121-122, 127. **There is a dispute of fact requiring trial.** *Advocate Health and Hospitals Corp. v. Bank One, N.A.*, 348 Ill. App. 3d at 758. Therefore, defendants' motion to dismiss must fail.

### 4.3.3. Unfair Competition

Again, defendant urges this court to kick John out of court for failing to plead the exact provision(s) of UDTPA that Andrews violated, with specificity. John repeats that, at the time of the dismissal, he had pending a motion for leave to amend, which cures this trivial issue, if even one exists. John stands on his Appellant's Brief, pp. 38-42. Defendant adumbrates the issues raised in that brief. In fact, defendant's chief cited case, *Custom Business Systems v. Boise Cascade Corp.*, 63 Ill. App. 3d 50, 52-53 (2nd Dist. 1979) holds that one does *not* dismiss a common law unfair competition claim for failing to allege specific UDTPA provisions the defendant violated, but *that the court should*

*consider the common law claims under the framework of the UDTPA*! Under Defendant's own case, and those that John cites in his Appellant's brief, all that John needs to allege is that Andrews "disparages the goods, services, or business of another by false or misleading representation of fact." *815 ILCS 510/2(8).* John alleges these facts, see, generally, R. C27-46.

Similarly, Andrews' pleas that his statements are "truthful" are unavailing. John does not need to prove falsehood, but only *likelihood to deceive* the reasonably intelligent consumer. In determining if the statement is deceptive, the *perceptions of the audience* control. *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6 (7th Cir. 1992).

John therefore alleges unfair competition and the counts cannot be dismissed.

## 5. Summary

The trial court erred by dismissing this case for want of personal jurisdiction. John states claims for relief, allowing this court to reverse and remand, with an instruction to deny section 2-615 and 2-619 relief upon remand. John respectfully prays that remedy.

Dated October 12, 2006:

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

## CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the appendix, is eighteen (18) pages.

Dated October 12, 2006:

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