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 BRIEF ON APPEAL

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ORAL ARGUMENT RESPECTFULLY REQUESTED

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APPELLANT'S BRIEF ON APPEAL

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 12th 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, 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. 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 12th 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 (3rd Dist. 2005); *Viktron Ltd. Partnership v. Program Data Inc.*, 326 Ill.App.3d 111, 116 (2nd 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. <u>Motions To Dismiss for want of Personal Jurisdiction are proper only under 735 ILCS 5/2-301.</u>

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 (1st 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 (2nd 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 (1st 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 (2nd Dist. 2005), citing *Northwest Millwork Co. v. Komperda*, 338 Ill.App.3d 997, 1000 (2nd 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, 3rd ¶ (assuming one sale into Illinois), A9, 6th ¶ (assuming that 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 (1st 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 (4th 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 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 (3rd 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, 2nd ¶, 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, 6th ¶. 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 (1st Dist. 1981); *Zazove v. Pelikan*, Inc., 326 Ill. App. 3d 798, 802 (1st 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 (4th 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 (7th 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 (1st 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, 6th ¶.

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 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 (1st 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, 7th ¶). 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

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, 1st 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 12th Judicial Circuit of Illinois is the most reasonable place to litigate this matter.