United States District Court
Northern District of Illinois
Eastern Division

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

-against-

STEVEN DWORKIN;
KRISTEN HENRY;
ROXANNE HAYES;
KAREN MILLS;
WILD SYSTEMS, PTY. LTD.,
AN AUSTRALIAN CORPORATION
Defendants

Case Number
04 C 3317

Judge:
The Honorable Joan B. Gottschall

PLAINTIFF'S MEMORANDUM OF LAW OPPOSING DEFENDANTS' 12(b)(2) AND 12(b)(6) MOTION TO DISMISS

Now Comes before this honorable court your Plaintiff, John F. Tamburo, d/b/a Man's Best Friend Software ("John"). This instrument is his memorandum of law opposing defendants' motion to dismiss.

In this memorandum, John refers to the defendants as Henry (Kristen Henry), Mills (Karen Mills), Hayes (Roxanne Hayes), Dworkin (Steven Dworkin), Wild (Wild Systems Pty. Ltd.), DeJong (Ronald DeJong, Wild's director and owner), the Individual Defendants (Hayes, Mills, Henry and Dworkin).

TBS.NET refers to John's TBS.NET program, and Breedmate refers to Wild's program by that name.

Table of Contents

Table of Authorities

CASES

STATUTES

OTHER AUTHORITIES

RULES

TREATISES

I. Introduction

Defendants are wasting this honorable court's time on a frivolous Rule 12(b) motion that plainly flouts Fed. R. Civ. P. 11. In this memorandum, John, after wading through a swamp of diversionary inapposite argument, intentional citation to antiquated and wrong authority, and plain lies, shows that this court may properly exercise jurisdiction over all defendants, and that every single count of this case states a valid claim. John could say much more, but this motion wastes enough of this court's time as it is.

II. The Facts

John respectfully informs this honorable court that exhibits 1 through 39 are attached to the Third Amended Complaint. Exhibits 40 and forward are attached hereto.

1. On January 9, 2004, John released TBS.NET, a full featured computer program for dog breeders hosted on an Internet web server. See attached Affidavit of John Tamburo ("John Aff.") ¶ 2.
2. In April of 2004, John wrote and used a web browser program that browsed the web pages presented to the public by defendants' web sites, and copied the bare facts into his TBS.NET database. John Aff. ¶ 3.
3. None of the data was removed from any defendants' databases; it was copied. John Aff. ¶ 4.
4. The only facts copied were facts about dogs, including, where provided, the name, competition date of birth, sire name, dam name, registration number(s),

color, gender and some medical certification number(s). 3d. Am. Cplt., ¶¶ 21-23, John Aff. 5.

5. The defendants did not have any of the normally-accepted Internet standard indicators on their web sites to prohibit robot access to their sites. John Aff. 6-7.

6. Defendant Hayes had on her site a tag stating ROBOTS="ALL", a plain invitation to copy the entire site. Exhibit 4. Hayes knew that fact and said so to the Breedmate list, while at the same time exhorting the others to "band together and cause [John] a lot of grief." Exhibit 11. John relied upon that invitation when he copied the data from Hayes' site. John Aff. ¶ 8-10. Hayes later stated in multiple public for a (often using proxies to post for her) that John "purposefully and willfully stole" facts that she claims to own. Exhibits 4, 11, 14, 46.

7. On or about May 5, 2004, the defendants, in concert, published false allegations that the data in their databases were "stolen." 3d. Am. Cplt. ¶¶ 199, Exhibits 4-19, John Aff. 11-13.

8. At all times since its inception, John was the sole shareholder of Versity Corporation. John Aff. 14.

9. On May 10, 2004, John transmitted to the Secretary of State of Illinois an instrument voluntarily dissolving Versity Corporation, and became the successor to all claims by and against Versity and all assets and liabilities of that company, pursuant to an instrument executed that day. Exhibits 41-42, John Aff. 15-16.

10. The Third Amended Complaint ("3d. Am. Cplt.") was presented for leave to file on June 14, 2004, and this honorable court granted such leave on June 17, 2004.

11. John proceeds *pro se* because he lacks the financial means to hire attorneys to represent him. See John Aff. ¶ 17.

12. John lacks the financial means to prosecute this case in any judicial forum other than the Northern District of Illinois. See John Aff. ¶ 18.

13. The "Alfirin Database" email address to which the defendants refer in footnote 11 on page 11 is a group destination created by defendant Dworkin and includes all persons using the Alfirin program to maintain their web sites. See Exhibit 12, John Aff. ¶ 19.

III. Argument

A. This court properly exercises jurisdiction over all of the Defendants.

1. Defendant Wild is subject to general jurisdiction in Illinois.

Defendant Wild is an Australian corporation. 3d. Am. Cplt., ¶ 6. Defendant Wild regularly transacts business with United States citizens, including but not limited to the individual defendants. 3d. Am. Cplt., ¶ 14. Defendant Wild's web site, by which it transacts substantially all of its business, is serviced, at least in part, in the United States. Exhibit 1. Nothing in Mr. DeJong's affidavit denies these facts. They must be taken as true for the purposes of this motion. *Turnock v. Cope*, 816 F.2d 332, 333 (7th Cir. 1987). This complaint sets forth federal counts specifically naming Wild. In a federal question case, the constitutional requirements for jurisdiction may be satisfied by minimum contacts with the nation as a whole, rather than with any particular state or geographic area. *United States v. De Ortiz*, 910 F.2d 376, 382 (7th Cir. 1990).

As to direct contacts with Illinois, John alleges without refutation that **Wild has sold Breedmate to Illinois citizens.** See 3d. Am. Cplt., ¶ 14e. Were the allegation not true, then DeJong would surely have sworn to that effect, since he went to the trouble of executing a swearing for the court's benefit. Therefore, the general jurisdiction of this court is properly invoked. As to the relatedness test of *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), John respectfully notes that Wild is his competitor (3d. Am. Cplt. ¶ 30), and the exhibits show that Wild was acting against John (Exhibit 10 p. 5) to bar him access to dog facts that his own web site states are for free sharing (Exhibit 28), and personally approving all of the posts to his list. That list is where Hayes and others, with other assistance from DeJong, the proof of which lies solely in defendants' control, organized the campaign against John. 3d. Am. Cplt., ¶¶ 14, 134. This conduct is a *prima facie* showing that the actions against Wild "arise out of or relate to" Wild's general jurisdictional contacts with Illinois, and meet the test set forth in *Burger King*.

2. Defendants have committed tortious acts causing injury in Illinois.

John has pled that the defendants have committed tortious acts, with the intent and result of injuring an Illinois citizen. See 3d. Am. Cplt., ¶ 14, John Aff. ¶¶ 11-12.

The Illinois long-arm statute, 735 ILCS 5/2-209(a), states, in pertinent part:

> "Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts: ... (2) The commission of a tortious act within this State."

The determination of whether the act is "within this state" for the purpose of section 2-

209(a)(2) is *the site of the injury*. See *Mergenthaler Linotype Co. v. Leonard Storch Enterprises*, Inc. (1978), 66 Ill. App. 3d 789, 795, 383 N.E.2d 1379. In *Mergenthaler*, the court stated that a single tortious act occurring in Illinois would establish jurisdiction there even without other Illinois contact or presence and that the site of the tort for the purposes of the long-arm statute was where the injury occurred. The last event is the injury to John, which happened in Illinois. See John Aff. ¶ 1, 11-12.

Committing a tortious act that injures an Illinois citizen has long been held to be sufficient grounds for Illinois courts to exercise personal jurisdiction over a party. To quote the late honorable Judge Alesia in *Interlease Aviation Investors II (ALOHA) L.L.C. v. Iowa Corp.*, 262 F. Supp. 2d 898, 910 (N.D. Ill., 2003):

> With regard to minimum contacts, courts have recognized that " 'one who commits tortious acts against an Illinois business should reasonably anticipate being haled into court there.' " *Digital Merch. Sys., Inc. v. Oglesby*, 1999 U.S. Dist. LEXIS 18824 at *3 (N.D. Ill. Nov. 30, 1999) (quoting *Telular Corp. v. Vitech* Am., Inc., 1996 U.S. Dist. LEXIS 15574, at *2 (N.D. Ill. Oct. 21, 1996). "Therefore, **'allegations of tortious conduct directed at an Illinois business ... establish the minimum contacts necessary under the federal due process clause.'** " *Id.* (quoting *Telular Corp.*, 1996 U.S. Dist. LEXIS 15574 at *2). Further, "the state in which the injury (and therefore the tort) occurs may require the wrongdoer to answer for its deeds even if events were put in train outside its borders." *Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997). Thus, **even where all other conduct takes place elsewhere, jurisdiction is proper if the injury transpires in Illinois**. *Celozzi v. Boot*, 2000 U.S. Dist. LEXIS 11768 at *3 (N.D. Ill. 2000) (citing *Stein v. Rio Parismina Lodge*, 296 Ill. App. 3d 520, 695 N.E.2d 518, 523 (Ill. App. Ct. 1998)). But, where the injury is economic, the plaintiff must additionally demonstrate an intent to affect an Illinois interest. *Id.* (citing *Arthur Young & Co. v. Bremer*, 197 Ill. App. 3d 30, 554 N.E.2d 671, 676 (Ill. App. Ct. 1990)). [bold emphases added, citations retained]

In the instant case, John has not pled any emotional distress or physical injury; his injuries are economic. John makes a *prima facie* showing of an intent to affect an Illinois in-

terest. John has shown via the complaint and attached exhibits that the defendants planned to "band together" (Exhibit 12, pp. 2-4; Exhibit 14), to cause John, *inter alia*, "a lot of grief." Defendants then organized and carried out a concerted attack on John, calling him a "thief," saying that he "willfully and purposefully stole" public domain facts from the free-to-all websites they operated, and said that John was "trying to SELL [his customers] stolen goods!!!" [emphasis and punctuation retained]. (Exhibits 4-5, 11-19, John Aff. 11-13). John has pled and sworn to injury suffered in Illinois (3d. Am. Cplt, ¶¶ 14, 114, 120, 131, 138, 145, 156, 164, 171, 190, 197, 206; John Aff. ¶¶ 1, 20). Exhibits 4-5 show Defendants Henry and Hayes encouraging people to complain[1] to John by telephone and mail **in Illinois**, demonstrating obvious intent to affect an Illinois interest. Exhibit 45 shows this request posted (by a proxy) on a non-dog-related web site! In *Calder v. Jones*, 465 U.S. 783, 789 (1984) the United States Supreme Court was asked to decide if the *National Enquirer*, a periodical headquartered in Florida, and its reporters, could be haled into California for defaming actress Shirley Jones and her husband. The court noted:

> The allegedly libelous story concerned the California activities of a California resident. ... The article was drawn from California sources, and the brunt of the harm ... was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California. [citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-298 (1980); *Restatement (Second) of Conflict of Laws* § 37 (1971)].

[1] Considering the context of the exhibits, "harass" would probably be a better term.

In the instant case, the focal point of the defendants' action was Illinois, where John is a citizen, transacts all of his business, and also feels the intended injuries. Defendants' assertion that the focal point of their libels was the Internet mailing lists to which they posted is preposterous. The **subject** of each of these mailings, which were sent with "permission to cross post" in order to increase their damaging effects[2], was John. The action was not intended to affect a mailing list, it was *intended to damage John and his business*. Defendants also make a hilarious attempt to argue that Illinois residents needed to read these posts in order to damage John in Illinois. Thankfully, the law is crystal clear. John meets all of the tests set forth in *Interlease, supra,* and defendants have established ample minimum contacts with Illinois through their tortious conduct.

3. Defendants have acted in concert, invoking conspiracy jurisdiction.

"To plead successfully facts supporting application of the conspiracy theory of jurisdiction a plaintiff must allege both an actionable conspiracy and a substantial act in furtherance of the conspiracy performed in the forum state." *Textor v. Board of Regents*, 711 F.2d 1387, 1393 (7th Cir. 1983).

Count Nineteen of the Third Amended Complaint properly alleges a civil conspiracy. The exhibits show writings authored by the defendants where they plan to "band together" and, *inter alia*, "cause [John] a lot of grief." See Exhibits 12, 14, John Aff. 11-13. The exhibits show frequent and substantial cross communications between the parties

[2] In Internet parlance, to "cross post" is to copy the entirety of one message posted to one Internet destination and post it to another public destination. When one places words to the effect of "permission to cross post granted" into a posting, it exhorts all to spread the message to the largest possible number of persons.

as they simultaneously post false and defamatory accusations of theft against John on their web sites and also on numerous Internet mailing lists, exhorting all to spread the word far and wide. See Exhibits 4-19. The exhibits also show a uniformity of false allegation - "theft" and the subsequent sale of "stolen" facts - that strongly suggests co-ordination between the defendants in the content of their attacks. Please compare Exhibits 4, 5 and p.3 of 24 to see the co-ordination. See use of "we"/"us" in Exhibits 13, 31, 37. Recruited Proxies were helping defendants quest to "end the business" - drive John out of business. Exhibit 48. These facts exceed the *prima facie* jurisdictional quantum of proof. Under *Textor v. Board of Regents, supra* these acts subject all defendants to Illinois' personal jurisdiction. They injure an Illinois citizen to further the conspiracy. Therefore, this honorable court properly exercises jurisdiction over all defendants under the conspiracy theory of jurisdiction.

4. This court's exercise of jurisdiction comports with fair play and substantial justice.

One concern therefore remains: "[J]urisdictional rules may not be employed in such a way as to make litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage' in comparison to his opponent." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (U.S., 1985). There lies the final test to ensure that jurisdiction over these defendants "does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). As held *supra* in *Interlease Aviation Investors*, 262 F. Supp. 2d at 910, the tortious acts of the defendants, properly alleged, establish minimum contacts under the Due Process clause.

Would this honorable court exercising personal jurisdiction over the defendants place them at a "severe disadvantage" relative to John? Hardly. Throughout this litigation, defendants have been represented by local counsel, in fact a professor at the John Marshall School of Law.[3] John, however, lacks the means to prosecute this case anywhere but here and any way but *pro se* (John Aff. ¶¶ 17-18). Had defendants not wished to be haled into Illinois, they ought not to have decided to "band together" (Exhibits 12 and 14) to libel John and try to wipe out his 13-year-old business. The only "severe disadvantage" would be upon John, if this honorable court declines jurisdiction, since such an act would deny him day in court. Based on the facts, fair play and substantial justice dictate that this case remain in this honorable court.

B. John is the real party in interest because he is the successor to a voluntarily dissolved corporation.

John is the successor to all of the assets and liabilities of Versity Corporation, by virtue of an instrument dated May 10, 2004. See Exhibit 41. He was the sole shareholder and president of Versity Corporation since it was formed. The statute reads, in pertinent part:

> (a) Dissolution of a corporation terminates its corporate existence and a dissolved corporation shall not thereafter carry on any business except that necessary to wind up and liquidate its business and affairs, including: (4) Distributing its remaining assets among its shareholders according to their interests... *805 ILCS 5/12.30.*

[3] http://www.muddlawoffices.com/common/about.htm

John terminated Versity Corporation's existence on May 10, 2004, when he signed the transfer instrument and the articles of dissolution. At that time John took upon himself all of the debts of the corporation and was assigned all of its assets. Versity Corporation no longer exists; the instrument shown in Exhibit 41 wound up all of its affairs, and distributed the assets to John, its sole shareholder. John is therefore the successor in interest to any action inuring to the benefit of Versity Corporation, in exact compliance with black letter law.

Can Versity assign its right to recover from the defendants to John? Certainly. In *Grunloh v. Effingham Equity, Inc.*, 174 Ill. App. 3d 508, 518 (1998), the court held that a corporation has power "to sell and convey, mortgage, pledge, lease as lessor, and otherwise dispose of all or any part of its property and assets." This power to dispose of property includes the power to assign a cause of action to others. *Grunloh*, 174 Ill. App. 3d at 518. This also holds true for the punitive damages John seeks. "[T]he former shareholders of [plaintiff] may properly seek punitive damages after [plaintiff's] assignment of the...claim to them." *Kleinwort Benson N. Am. v. Quantum Fin. Servs.*, 181 Ill. 2d 214, 227 (1998). Defendants' argument is frivolous. John is **the** real party in interest.

C. All of the counts of the Third Amended Complaint state a claim.

1. Libel and Tortious Interference with Business

As a preamble, John respectfully asks this court to take judicial notice of recent law: *Nautical Solutions Mktg. v. Boats.com*, 2004 U.S. Dist. LEXIS 6304 (D. Fla., 2004). Plaintiff Nautical copied information (yachts for sale listings) from defendant's web site. Defen-

dants publicly accused Plaintiff of theft. At trial, the jury awarded $300,000 (including punitive damages) to the plaintiff on its defamation count. The court then proceeded in the cited opinion to grant declaratory judgment to Plaintiff, holding that its copying was lawful and proper. *Nautical at* *5. The facts in *Nautical* are almost identical to the instant case.

a. A false accusation of Theft is libel per se.

John was falsely accused in many public fora, web sites and internet mailing lists, of the criminal offenses of theft and the sale of stolen goods. See 3d. Am. Cplt. ¶ 109; Exhibits 4 through 15. "Database Theft," "Stolen Data," "purposefully and willfully stole...," "My Schipperke database has been stolen and The Breeder's Standard is the Thief," "Stolen Pedigree Databases."

"Under Illinois common law, four categories of statements are considered defamatory per se... (1) words that impute the commission of a criminal offense..." *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 88, 220 Ill. Dec. 195, 672 N.E.2d 1207 (1996). John alleges that the false claims of theft the defendants made against him are libel per se under *Bryson* above. The word "theft" is used liberally by the defendants, and in the case of some (see Hayes in Exhibits 4 and 11), this accusation was made with particularity and with language reminiscent of a criminal indictment: "On April 21, 2004 MBFS (The Breeders [sic] Standard) purposefully and willfully stole the pedigree databases of many breeds, including this one, using a data mining robot." The defendants clear intent was to accuse John of a crime he did not commit, and, in doing so, cause irreparable

harm to his business. Defendants' libelous writings *exceed* the standards of the law that apply to this situation. "[I]t is not necessary that the words state the commission of a crime in terms of art or with the particularity of an indictment for such words to be libelous." *Gardner v. Senior Living Sys.*, 314 Ill. App. 3d 114, 118 (2000).

b. Theft is not the only libelous accusation made against John.

Defendants ignore the facts of the case in the vain hope that they can pull a fast one on this court. Count 8 of the 3d. Am. Cplt. Exhibits 17 and 18 show that Henry on multiple occasions accused John of hacking into secured portions of her web site and copying database files. She knew better from her web site logs. This is the false accusation of computer tampering, a crime in violation of 720 ILCS 5/16D-3 (2004). Falsely accusing someone of a crime is libel per se. *Bryson v. News Am. Publs.*, 174 Ill. 2d 77, at 88. Henry also commits a trade libel against John as shown in count 13, where she repeatedly alleges that TBS.NET has no value except for the data John "stole." See Exhibit 26. Since Henry had one or more persons subscribe to TBS.NET to spy for her (see Exhibit 43, an email with a screen shot of TBS.NET), she knew this statement to be false when she made it. The *only* possible intent for Henry's conduct is to ruin John and his business, for having the temerity to challenge her monopoly of online Schipperke facts, which she evilly and selfishly refused to share with anyone except on her unreasonable terms (Exhibit 25). She has falsely (but successfully) portrayed John as a criminal. See Exhibit 35.

c. Defendants did not suffer theft; their allegations are completely false.

Facts Cannot be Owned: It is undisputed that John's browser program, disparaged as "devious," "tortious," "nefarious" and "questionable" in defendants' memorandum, in a vain effort to prejudice this court, copied only facts about dogs. 3d. Am. Cplt., ¶¶ 21-23; John Aff. ¶ 5. Defendants arrogantly claim ownership of the facts stored in the databases they maintained, but the simple truth is that **facts cannot be owned**!

The *current* edition of Black's Law Dictionary defines "theft" as "the felonious taking and removing of another's personal property with the intent of depriving the true owner of it; larceny." *Black's Law Dictionary 1486* (7th Ed. 1999). Defendants cite the definition of theft from a 25 year old version of the book[4] in their memorandum at p. 21, attempting to argue that their false theft allegations were "substantially true."

The definition of theft in Black's 7th Edition closely tracks the definition of theft under Illinois law[5], and every other jurisdiction in the United States. In order to have suffered a theft, *you must (1) be deprived of (2) your personal property.*

The facts John copied are nobody's property! The Supreme Court, looking at census data as an example of facts, stated: "Census data therefore do not trigger copyright because these data are not 'original' in the constitutional sense. The same is true of all facts -- scientific, historical, biographical, and news of the day. 'They may not be copyrighted and are *part of the public domain available to every person.*' " *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347-348 (U.S., 1991) [emphasis added, citation omitted]. It is not

[4] Defendants cite from the 5th edition of Black's, dated 1979.
[5] 720 ILCS 5/16-1 (2004).

possible to steal that which is in the public domain. "[T]he law of property does not protect against the misappropriation or theft of that which is free and available to all." *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368, 378 (2d Cir., 2000). Defendants *copied these public domain facts from other sources, including John's free Compuped databases,* and placed them on the Internet to be free for all persons.[6] This gives them no ownership rights in these facts because "...raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art." *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. at 350. John copied nothing but raw facts into his database, as permitted by law. This is undisputed. See 3d. Am. Cplt., ¶¶ 21-23, John Aff. ¶ 5.

No Deprivation: Not only did the defendants not own that which they claim to be stolen, but they also were not "deprived" of it in any way. John did not *remove* any data from the defendants' databases, he merely *copied* it. Defendants do not dispute John's allegations in 3d. Am. Cplt., ¶¶ 21-23. The defendants' databases had exactly as many dog records in them after the copying as before. Their accusation of theft is wholly false. See *Black's Law Dictionary 1486* (7th Ed. 1999), definition of "theft."[7]

---

[6] Except, of course, for John and his customers. The mind numbing hypocrisy of the defendants' actions cannot go unmentioned. They have accused John of "theft," while Dworkin, Hayes and Mills copied a substantial amount of facts from databases that John originally supplied! See the undisputed allegations of 3d. Am. Cplt. ¶¶ 27-28, 32, 33, 46. If facts can be owned as defendants contend, then they are the original thieves and John their victim.

[7] **Manual Copying v. Automatic Copying**: On p. 20, footnote 21, and on p. 22 of their memorandum, defendants suggest that John, had he manually typed in the data after searching their databases, would not be guilty of the "theft" of which the defendants falsely accuse John. Why? This is a distinction without a difference. In both cases, the data is copied from point A to point B. John merely chose the more efficient and accurate means to do so. As a result, John's customers enjoy the benefits of more accurate genetic calculations and better pedigrees, a benefit that defendants, in concert, are trying to eradicate in order to monopolize the market with their near-worthless software and sites.

Databases not Protectable: As for the statements of Mr. Carson of the copyright office[8], made in a report that holds no authority before this court, advocating a law to reinstate the "sweat of the brow" protection so soundly thrashed in *Feist, supra*, this law has wisely been **killed** all five times it was brought before the Congress.[9] Therefore, "sweat of the brow" work is **not protectable** based on any real law.

Moreover, counsel for defendants *lies* in footnote 23 when he argues that the laws of Canada and Australia protect databases. See *CCH Canadian Ltd. V. Law Society of Upper Canada*, 2004 SCC 013 (Canada 2004), adopting most of *Feist* for Canada. Furthermore, were such a law to be enacted here, John would be arguing (successfully in all likelihood) that this court ought to overturn it as violating both the Copyright Clause and *Berne Convention*, Art. 2, Sec. 8.[10] See Exhibits 44, 47.

No Misappropriation: As for the misappropriation "claim" that defendants threaten on p. 22 of their memorandum, it ought to be noted that the case they cited in footnote 22 states:

> "Adoption of a partial preemption doctrine -- preemption of claims based on misappropriation of broadcasts but no preemption of claims based on misappropriation of underlying facts -- would expand significantly the reach of state law claims and render the preemption intended by Congress unworkable." *NBA v. Motorola, Inc.*, 105 F.3d 841, 849 (2d Cir., 1997).

Any "misappropriation" claim based on John's copying of facts is pre-empted by the copyright law. In *NBA*, the court held that there was no misappropriation for Motorola

[8] Deft. Memorandum, p. 22.

[9] Congressional bills, the HR 3531 (1996), HR 2652, S. 2291, HR 3261 and HR 3872, have all failed to date to be enacted, showing our Congress' wisdom.

[10] "The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information."

to watch copyrighted live sports broadcasts, glean scores of these broadcast games, and retransmit these facts to hand held pagers and AOL screens.

"[A] misappropriation claim can only arise from the taking of an idea that is original or novel in absolute terms, because the law of property does not protect against the misappropriation or theft of that which is free and available to all." *Nadel v. Play-By-Play Toys & Novelties, Inc.*, 208 F.3d 368, 378 (2d Cir., 2000). There is no originality in facts. *Feist*, 499 U.S. at 345. Defendants' so-called "misappropriation" counterclaim, will, if filed, violate Rule 11 as frivolous. Therefore, there is no "truth," "substantial truth" or "gist and sting" defense to the defendants' libels.

d. The defendants' libels are not any sort of a "perspective" or "opinion."

Defendants also attempt – frivolously – to portray their libels as "opinion and perspective." See Deft. Memorandum, p. 22. What a crock. "[A] statement is constitutionally protected under the first amendment only if it cannot be 'reasonably interpreted as stating actual facts.' " *Bryson v. News Am. Publs.*, 174 Ill. 2d 77 at 100, quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990).

There is no reasonable way to interpret statements like "My Schipperke database has been stolen and The Breeder's Standard is the Thief" (Exhibit 12) or "On April 21, 2004 MBFS (The Breeders [sic] Standard) purposefully and willfully stole the pedigree databases of many breeds, including this one, using a data mining robot." (Exhibit 4) as an opinion. These and all of the other libels are *specific fact accusations!* Moreover, John cannot locate even a single reported case in any jurisdiction where "theft" or "stealing"

accusations were treated as protected opinions. There is no opinion defense applicable to the case at bar.

e. Defendants knew that they were making false accusations when they made them. Let's start with Defendant Hayes in Exhibits 4 and 11. In that exhibit she quotes John's explanatory posting from the MBFS web site (Exhibit 9), and then admits that she had her web site post a ROBOTS="ALL" tag, **unambiguously inviting John to copy data from that site.** Then, after John accepted her **explicit** invitation, she defamed John with the "purposefully and willfully stole" libel in Exhibits 4 and 11 while urging others to "band together to cause [John] a lot of grief." Exhibit 14.

Defendant Dworkin in Exhibit 7 threatened John with the very organized defamation he suffered, unless John removed the Keeshonden he copied from the TBS.NET database. If John would capitulate, Dworkin pledged to "vanish into the backround [sic]." Exhibit 8. When John refused to succumb to this terrorism, Dworkin published the letter in Exhibit 12 to every person who used Alfirin software to publish databases to the web. John Aff. 19. The organized public attack followed. Exhibits 4-19. John informed Dworkin of the law and the public domain nature of these facts, and that there was no theft. Exhibit 24, pp.2-3. Dworkin also informed the other defendants of this same law in Exhibit 12. Nonetheless, Dworkin organized the smear campaign and worked with Henry and the other defendants to maximize its effect, *knowing the whole time that John had done nothing wrong!* Exhibits 4-19. Dworkin, clearly speaking for the Defendants in Exhibit 34, gloats over the damage wrought on John, and renews a variant of the extor-

tion threat, saying they will tell others that John runs a "legitimate" company should he remove the copied facts from TBS.NET.

Defendant Mills continues to publish ridiculous false allegations of theft and violations of antitrust laws and the "Privacy Act" to this very day, purporting to quote an unnamed aide to United States Senator Olympia Snowe of Maine (defendant Mills resides in Ohio) as her legal expert. Exhibit 29. She combines this with an exhortation to all to "boycott MBF/TBS." *Id.*

Defendants contend that there must be actual malice in order for them to be held accountable for their terrorism. Actual malice is defined as publishing a false statement with "...knowledge that statements are false or in reckless disregard of the truth..." *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Moreover, the actual malice standard is applicable only to public figures, and Plaintiff disputes that he is a public figure. John Aff. 21. Nonetheless, defendants' documented conduct exceeds the actual malice standard.

f. John states claims for Tortious Interference with business.

> "To state a cause of action for intentional interference with prospective economic advantage, a plaintiff must allege (1) a reasonable expectancy of entering into a valid business relationship, (2) the defendant's knowledge of the expectancy, (3) an intentional and unjustified interference by the defendant that induced or caused a breach or termination of the expectancy, and (4) damage to the plaintiff resulting from the defendant's interference." *Voyles v. Sandia Mortg. Corp.*, 196 Ill. 2d 288, 300-301 (2001).

The defendants "band[ed] together" to damage John and cause others to refuse to do business with him, with unjustified claims of theft of that which they knew to be in the

public domain. Counts 4, 14 and 18 easily state claims. John notes that truth, or "substantial truth" is not a defense to this tort. Defendants, under the notice pleading standard in the Federal Rules,[11] have also been informed of tortious interference liability on the theory of eliminating TBS.NET as a competitor to their web sites being the intentional and unjustified part of their interference. John will most likely ask for leave to amend to explicitly plead this theory.

2. Conspiracy

The defendants agreed to "band together" and falsely accuse John of theft to punish him for copying the public domain facts in their databases. Exhibits 12, 14. Their purpose was to drive John out of business and/or to force him to remove from TBS.NET the public domain facts they claimed to own. 3d. Am. Cplt., ¶¶ 201-204. "In order to state a claim for civil conspiracy, a plaintiff must allege an agreement and a tortious act committed in furtherance of that agreement. The agreement is 'a necessary and important' element of this cause of action. The civil conspiracy theory has the effect of extending liability for a tortious act beyond the active tortfeasor to individuals who have not acted but have only planned, assisted, or encouraged the act." *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 133 (1999) [citations omitted]. John has properly stated a claim for civil conspiracy.

[11] See *McCullah v. Gadert*, 344 F.3d 655, 659 (7th Cir., 2003); *Fed. R. Civ. P. 8.*

3. Extortion

a. John states a claim for common law extortion / blackmail.

"Extortion" and "blackmail" are synonymous terms. *People v. Mahumed*, 381 Ill. 81, 84, 44 N.E.2d 911 (1942). "Blackmail" is an "unlawful demand of money or property under threat to do bodily harm, to injure property, to accuse of crime, or to expose to disgraceful defects." *Black's Law Dictionary 170* (6th Ed. 1990). The threat may consist of a menace of destruction or of injury to person, character, or property. *31A Am Jur 2d Extortion, Blackmail, And Threats § 25*. Under the common law and most statutory codes, a central characteristic of extortion or blackmail by a private person is that the threat is used as a means to obtain money or other things of value from the victim for the purpose of gain to the one making the threat. *31A Am Jur 2d Extortion, Blackmail, And Threats § 33*. Defendants erroneously argue that only politicians that accept a bribe commit extortion at the common law. They also cite to an *antiquated* version of American Jurisprudence[12] to state that extortion "is a crime alone and not a tort." " 'Extortion' is the use of threats to obtain leverage in a situation in which the victim of the threat has no feasible legal remedy." *31A Am Jur 2d Extortion, Blackmail, And Threats § 1* (2004). Nothing there about "crime alone and not a tort." And n.1 in that section cites *Sufrin v. Hosier*, 128 F.3d 594 (7th Cir. 1997) to stand for the section quoted above. As an aside, Dworkin had no feasible legal recourse to obtain leverage over John, and he did not

[12] *31A Am. Jur. 2d Extortion, Blackmail and Threats* § 1 n. 1 (2001) referred to one case, *Myers v. Cohen*, 787 P.2d 6,16 (Haw. Ct. App. 1984), a Hawaiian case, to stand for the proposition that no private right to an extortion action exists. This is nothing less than an intentional citation to outdated authority, a fraud upon this honorable court, in violation of Fed R. Civ. P. 11. Should this honorable court, as John anticipates, deny the instant motion, a Rule 11 motion will immediately ensue.

threaten that. Dworkin threatened John in Exhibits 7-8 with public ridicule unless he removed the copied Keeshonden from TBS.NET. This benefits Dworkin by restoring his monopoly in online Keeshond data. See 3d. Am. Cplt, ¶ 142. Undeniably a black-mail. In *Becker v. Zellner*, 292 Ill. App. 3d 116, 130 (Ill. App. Ct., 1997) appeal denied *Becker v. Zellner*, 176 Ill. 2d 570 (1998), the appellate court held that a threat to take legal action is not actionable as extortion, but did so only because "Nothing in the record convinces us that defendants made this threat in bad faith." In attacking this count, defendants cite cases from many foreign jurisdictions. The only Illinois case cited relates to the Hobbs Act[13] and is wholly inapposite to the case at bar. John alleges without refutation Dworkin made threats without lawful authority -- in bad faith. 3d. Am. Cplt., ¶¶ 101-108. *Becker v. Zellner* shows that Illinois recognizes a private cause of action for extortion and blackmail; no authority in the 7th Circuit holds a contrary position.

b. Illinois recognizes a Private Right of Action under the statute.

Again John cites to *Becker v. Zellner*, a case used as precedent for a court dismissing counts on any basis apparent from the record, as implicitly recognizing the private right to an extortion action under the statute See *Becker v. Zellner*, 292 Ill. App 3d at 129: "The purpose of the intimidation statute is to prohibit the making of specific threats that are intended to compel others to act against their will..." [Citations omitted] Exhibits 7-8 meet this standard. The *Becker* court held only that the threat of legal action "does not

[13] *Scheidler v. NOW, Inc.*, 537 U.S. 393, 401 (U.S., 2003), Deft. Memorandum, p. 18.

rise to the level of" blackmail. The court could have reduced their multi-page analysis to a single citation and a one sentence statement that there is no private right. However, they did not do so. Therefore, Illinois recognizes a private right of action under both the common law of blackmail and the Illinois intimidation statute.

4. Antitrust

Defendants make no real attempt to argue against the Federal Antitrust counts (see 3d. Am Cplt, counts 6-7). Instead they frivolously argue that they are not John's competitors under Illinois law because they supposedly do not compete with *each other*. See Deft. Memorandum, Pp. 19-20. This argument is without merit.

a. Defendants Compete with John.

John alleges in 3d. Am Cplt, ¶¶ 133, 142-3, and swears in John Aff. 22-23. that the individual defendants compete with him. Defendants do not deny this. In a 12(b)6 motion, all unrefuted fact allegations are taken as true. In fact, in Exhibit 24, Dworkin *admits* that the individual defendants are John's competitors. These allegations are unrefuted and must be taken as true. *Turnock v. Cope, supra.*

"The starting point for any inquiry into the effect of an agreement on a line of commerce is delineation of the relevant market, the area within which the impact of the defendant's conduct on competition is to be assessed." *Hendricks Music Co. v. Steinway, Inc.*, 689 F. Supp. 1501, 1534 (N.D. Ill., 1988; Gottschall, J.). Continuing this assessment this court in *Hendricks* stated: "...products that are not wholly fungible may be real competitors, and the market must be defined broadly enough so that they are in-

cluded." TBS.NET and the defendants' web sites are fungible within the breed of each web site, since one may use TBS.NET or the defendant's web site to search for an animal's facts. Therefore, every defendant competes with John. If they collude to rid themselves of a common competitor, even though not complete competitors with each other, it's a violation of the statute.

b. Defendants have co-operated in unlawful conduct to harm their competitor.

Every defendant has been shown by the exhibits and by unrefuted sworn allegations to be co-operating in an effort to defame John and thus drive him out of business. They have concerted - agreeing to "band together" (Exhibits 12, 14) -- to conduct an organized smear campaign to "cause [John] a lot of grief" (Exhibit 14), with lies knowingly posted on the face of web sites (Exhibits 4, 5, 6). They further continue to promote Breedmate as they disparage John. *Id.* Libel is unlawful. Defendants admit with their own words that they are out to "stop" John[14] as they exhort others to "band together" with them. This is an unlawful act designed to harm a competitor.

Defendants' counsel also tries to deceive this honorable court by quoting only part of the Illinois antitrust statute. Here's more:

> (2) By contract, combination, or conspiracy with one or more other persons unreasonably restrain trade or commerce; or
> (3) Establish, maintain, use, or attempt to acquire monopoly power over any substantial part of trade or commerce of this State for the purpose of excluding competition or of controlling, fixing, or maintaining prices in such trade or commerce; *740 ILCS 10/3, in pertinent part.*

[14] This can, based on their subsequent conduct, only be interpreted as driving John out of business.

Defendants have violated 740 ILCS 10/3(1)(b), 740 ILCS 10/3(2) and 740 ILCS 10/3(3). The complaint contains a typographical error, for which John apologizes. There is no 740 ILCS 10/3(a)(1)(b). As to whether the defendants compete with each other, John relies upon this honorable court's holding in *Hendricks Music Co, supra.* Defendants are trying to impose too strict a standard of competition to evade answering for their evil deeds.

5. Communications Decency Act

a. Defendant Wild is not accused of defamation for postings on the Breedmate list.

Counts thirteen and seventeen of 3d. Am. Cplt. allege that Wild and Dworkin planned with Henry and assisted her in the publication of libels. Nothing in these counts refers to a posting to the Breedmate List. Therefore the CDA (47 USC § 230) is inapplicable.

b. The CDA does not provide a blanket antitrust or unfair competition immunity.

This flies in the face of logic. One only need set up a members-only Internet mailing list and conspire with others to violate the law, and they are immune from punishment. 47 USC § 230(c) only states that information content providers are not the publishers of information posted by others. In the instant case, Wild's president posted to his own list (Exhibit 10, p.5) his intent to act anti-competitively. Is that immune?

There is no immunity provided by CDA for what one posts himself. *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 417 (S.D.N.Y., 2001). There is also no reported authority that holds that 230(c) provides immunity to an ISP for using his or her forum for antitrust purposes.

IV. Conclusion

1. The unrefuted sworn complaint alleges that Wild is subject to Illinois' General jurisdiction by transacting business with Illinois citizens. It must be taken as true. *Turnock v. Cope*, 816 F.2d 332, 333 (7th Cir. 1987)
2. Defendants have injured an Illinois citizen with an intent to affect his interests. This subjects them to jurisdiction under 735 ILCS 5/2-209(a)(2); *Interlease Aviation Investors II (ALOHA) L.L.C. v. Iowa Corp.*, 262 F. Supp. 2d 898, 910 (N.D. Ill., 2003).
3. Defendants are subject to Illinois' jurisdiction under the conspiracy theory of jurisdiction. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 133 (1999).
4. John states claims for libel and tortious interference. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77 (1996); *Black's Law Dictionary 1486* (7th Ed. 1999); *Voyles v. Sandia Mortg. Corp.*, 196 Ill. 2d 288 (2001).
5. John states a claim for extortion. *Becker v. Zellner*, 292 Ill. App. 3d 116 (Ill. App. Ct., 1997); *720 ILCS 5/12-6.*
6. John states claims for antitrust violations. *Hendricks Music Co. v. Steinway, Inc.*, 689 F. Supp. 1501 (N.D. Ill., 1988);

WHEREFORE, premises considered, John respectfully prays that the instant motion be denied in its entirety.

JOHN F. TAMBURO
Plaintiff
655 N. LaGrange Rd, Suite 100
Frankfort, IL 60423
815-806-2130