UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

JOHN F. TAMBURO, D/B/A MAN'S BEST FRIEND SOFTWARE and VERSITY CORPORATION, Plaintiffs, v. STEVEN DWORKIN, KRISTEN HENRY, ROXANNE HAYES, KAREN MILLS, WILD SYSTEMS PTY. LTD., an AUSTRALIAN CORPORATION, Defendants.	)	DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' FIFTH AMENDED COMPLAINT Case No. 04 C 3317 Hon. Joan B. Gottschall

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MEMORANDUM IN SUPPORT OF DEFENDANTS'

MOTION TO DISMISS PLAINTIFFS' FIFTH AMENDED COMPLAINT

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MEMORANDUM IN SUPPORT OF DEFENDANTS'

MOTION TO DISMISS PLAINTIFFS' FIFTH AMENDED COMPLAINT

NOW COME Defendants Steven Dworkin, Kristen Henry, Roxy Hayes, Karen Mills, and Wild Systems Pty. Ltd, an Australian Corporation, (collectively, the "Defendants") pursuant to Rule 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure and respectfully submit this Memorandum in Support of Defendants' Motion to Dismiss Plaintiffs' Fifth Amended Complaint. In support of their motion to dismiss, Defendants state as follows:

OPENING STATEMENT

By this action, the Plaintiffs have sought to harass and pursue unnecessarily in bad faith meritless claims against the Defendants for comments made and/or published through the Defendants in reaction to admitted conduct by John Tamburo and his corporation, Versity Corporation, (collectively "MBFS") in acquiring through devious means the fruits of the Defendants' labor. MBFS antagonized Defendants Steven Dworkin, Kristin Henry, Roxy Hayes, and Karen Mills ("Database Defendants") by surreptitiously acquiring information and raw data from proprietary electronic databases the Database Defendants had created through their time, money and effort.[1] While the Database Defendants kindly permitted individuals to search their databases as a courtesy, this did not include access to the information and raw data within these proprietary databases. MBFS then incorporated the Database Defendants' work into its commercial product and advertised the additional data. In response to this offensive conduct, the Defendants publicly complained of MBFS. Defendant Wild Systems Pty. Ltd ("Defendant WSP") hosted an online message board through which individuals could and did publicly

[1] Interestingly, MBFS prohibits this same conduct on its site and expressly forbids this as noted on its website. See http://www.mbfs.com/copyright.asp ("The following activity on the Site is expressly prohibited: Any non-personal or commercial use of any robot, spider, other automatic device, or manual process to monitor or copy portions of the Site or the content contained herein without prior written permission by MBFS").

communicate their frustration with MBFS. Plaintiff John Tamburo then filed this meritless lawsuit against the Defendants for their failure to enjoy and remain silent over MBFS' perceived unethical and tortious commercial activity. Indeed, Plaintiff John Tamburo alleged broad claims of conspiracy and unfair competition because the Defendants, brought together through MBFS' conduct, share dismay and anger of the conduct of MBFS and its use of their information and raw data. The Plaintiffs have recently filed their Fifth Amended Complaint. This action and the Plaintiffs' Fifth Amended Complaint should be dismissed in their entirety.

BACKGROUND

This controversy involves dogs and dog enthusiasts. All of the parties have some involvement with dog pedigrees. See 5th Am. Compl. ¶¶ 11, 15, 18. The Database Defendants operate websites on which individuals may search for pedigrees of dogs at no charge. They are noncommercial websites. See id. at ¶ 18. Although individuals may conduct individual searches for pedigrees, individuals do not have access to the complete database; that is, the information and raw data contained therein. Defendant WSP operates a commercial website selling its product Breedmate.[2] At the time of the incidents giving rise to this action, Man's Best Friend Software ("MBFS") served as a "Doing Business As" for Versity Corporation, an Illinois corporation with which Plaintiff John Tamburo is associated. MBFS operated a commercial website that sold a commercial database of dog pedigrees, among other products. See 5th Am. Compl. ¶¶ 16, 17.

Early in 2004, MBFS created a computer program that surreptitiously acquires the information and raw data from databases. See 5th Am. Compl. ¶ 21. In this case, MBFS used this computer program, often referred to as robots or spiders,[3] to successfully acquire the

[2] The sale of Breedmate in and of itself and Wild's website are not at issue in this action.

[3] For a discussion of these computer programs, see discussion in the following cases: Register.com, Inc. v. Verio,

information and raw data from the databases owned by the Database Defendants. MBFS then incorporated the raw data into its commercial product and advertised these additional pedigrees. See 5th Am. Compl. ¶¶ 21-24.

MBFS' conduct obviously and understandably upset the Database Defendants. In response to the unauthorized acquisition of the information and raw data from their databases, the Database Defendants complained of MBFS' conduct on some of their websites, on a limited number of mailing lists, and on a Yahoo! Group operated by Defendant WSP during late Spring 2004.

All of this occurred prior to May 11, 2004. On May 11, 2004, Plaintiff John Tamburo filed the first Complaint in this action in response to the Database Defendants' complaints about MBFS' conduct. See Compl., (Doc. #1). On May 25, 2004, Versity Corporation voluntarily dissolved itself. Presumably, on May 25, 2004, Plaintiff John Tamburo personally began using the name MBFS and Man's Best Friend Software. Since then, Plaintiff John Tamburo filed three amended complaints.[4] Previously, Defendants filed a motion to dismiss Plaintiff John Tamburo's Third Amended Complaint. (Doc. ##20-21) The Court granted this motion basing its decision on the fact that John Tamburo did not represent the true party in interest. (Doc. ##113-114) Plaintiff John Tamburo and Versity Corporation thereafter filed a *Fifth* Amended Complaint. (Doc. #122) The Defendants now move to dismiss Plaintiff Tamburo's Fifth Amended Complaint in its entirety.

Inc., 126 F. Supp.2d 238 (S.D.N.Y. 2000) (the court issued an injunction preventing Verio from using spiders to search Register's database ("spidering") for customer names and contact information and sending them advertisements); eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp.2d 1058 (N.D. Cal. 2000) (the court enjoined Bidder's Edge from spidering eBay's site to report pricing information).

[4] Although the Plaintiff has filed three Amended Complaints (four pleadings total), the terms Complaint, Amended Complaint, and Fifth (or 5th) Amended Complaint all refer to the most recent pleading, Plaintiff's Fifth Amended Complaint. Any specific reference made to the Third Amended Complaint is intentional.

ARGUMENT

The Defendants seek to dismiss the Plaintiffs' Fifth Amended Complaint in its entirety. First, this Court does not have personal jurisdiction over any of the Defendants. Consequently, the Fifth Amended Complaint should be dismissed pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. Alternatively, should the Court chose not to dismiss the Fifth Amended Complaint on this basis alone, Plaintiffs' claims should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because Plaintiffs have failed to sufficiently state claims as a matter of law. Finally, the Defendants, particularly Defendant WSP, have immunity against any liability for allowing co-Defendants and/or third parties to post messages on their mailing lists or message boards regarding Plaintiffs.

I. Rule 12(b)(2) – Lack of Personal Jurisdiction

This Court lacks personal jurisdiction over the Defendants. The statements and communications at issue (and from which the Plaintiffs have conjured so many claims) all have been made on Internet websites, through a small number of electronic message boards and mailing lists, or private electronic mail.[5] In Illinois and in this federal district, online statements do not by themselves provide sufficient minimal contacts for the exercise of personal jurisdiction. The Defendants, two of which are domiciled in foreign countries, have no other contacts with the State of Illinois. Thus, this Court lacks personal jurisdiction over the Defendants and the Fifth Amended Complaint should be dismissed in its entirety.

A. Standard

Rule 12(b)(2) of the Federal Rules of Civil Procedure provides for the dismissal of actions and claims where the Court lacks personal jurisdiction over the defendants. See Fed. R.

[5] The Plaintiffs' claim that communications by the Defendants have been posted to hundreds of lists is unsupported by his allegations and blatantly false.

Civ. P. 12(b)(2). To survive such a motion, the Plaintiff must make a prima facie case for personal jurisdiction over the defendants. See RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1276 (7th Cir. 1997); see also Nelson ex rel. Carson v. Park Indus., Inc., 717 F.2d 1120, 1123 (7th Cir.1983). Although a court must resolve all factual conflicts in favor of the Plaintiff, the court may consider affidavits from the Defendants in deciding such a motion. See Nelson, 717 F.2d at 1123. A court in diversity must determine whether an Illinois court would have jurisdiction over non-resident defendants. See McIlwee v. ADM Indus., Inc., 17 F.3d 222, 223 (7th Cir. 1999). Personal jurisdiction may be general or specific.

B. General Jurisdiction

General jurisdiction occurs in suits that do not arise out of or are not related to the defendants' contacts with the forum state. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n. 8, 104 S.Ct. 1868, 1872 n. 8 (1984). General jurisdiction can only occur where the defendant is either domiciled in the forum state or has "continuous and systematic general business contacts" with the forum. Id. at 414-416, 104 S.Ct. at 1873. These contacts must be extensive and persuasive. See LaSalle Nat'l Bank v. Vitro, Sociedad Anonima, 85 F. Supp.2d 857, 861 (N.D. Ill. 2000) (quoting Reliance Steel Prods. v. Watson, Ess. Marshall, 675 F.2d 587, 589 (3rd Cir. 1982)).

Here, the Defendants are not domiciled in Illinois. See 5th Am. Compl. ¶¶ 9-13. Plaintiffs have not alleged that the Database Defendants have such systematic contacts with Illinois to make general jurisdiction applicable.[6] Consequently, with respect to the Database Defendants, Plaintiffs have waived any general jurisdiction argument. See RAR, Inc., 107 F.3d at 1277. Although Plaintiffs allege that Defendant WSP "regularly conducts business within

[6] Although the Plaintiffs allege that Steven Dworkin's website was operated by a computer in the United States, this allegation is incorrect. See Declaration of Steven Dworkin ¶ 4 (attached as Exhibit A).

Illinois by marketing Breedmate into Illinois and selling the program to Illinois citizens," Defendant WSP does not specifically target Breedmate to Illinois citizens. See generally Affidavit of Ronald de Jong (attached as Exhibit B). Rather, Defendant WSP merely operates a website from which individuals may purchase its products and obtain other useful information. Although the possibility of sales by Illinois citizens exists through its website, this alone is insufficient to warrant general jurisdiction. See LaSalle National Bank, 85 F. Supp.2d at 862 (citing and quoting Molnlycke Health Care AB v. Dumex Medical Surgical Products Ltd., 64 F. Supp.2d 448, 451 (E.D. Pa. 1999) ("[t]o hold that the possibility of ordering products from a website establishes general jurisdiction would effectively hold that any corporation with such a website is subject to general jurisdiction in every state. The court is not willing to take such a step.") and IDS Life Ins. Co. v. SunAmerica, Inc., 958 F. Supp. 1258, 1268 (N.D. Ill. 1997) ("Plaintiffs ask this court to hold that any defendant who advertises nationally or on the Internet is subject to its jurisdiction. It cannot plausibly be argued that any defendant who advertises nationally could expect to be haled into court in any state, *for a cause of action that does not relate to the advertisements*.") (emphasis in quoted citation, not in original), aff'd in part, vacated in part on other grounds, 136 F.3d 57 (7th Cir. 1998)). Therefore, general jurisdiction is also inapplicable to the determination of whether this Court has personal jurisdiction over Defendant WSP. See Euromarket Designs, Inc. v. Crate & Barrel Ltd., 96 F. Supp.2d 824, 833 (N.D. Ill. 2000); RAR, Inc., 107 F.3d at 1277; LaSalle National Bank, 85 F. Supp.2d at 862; Molnlycke Health Care AB, 64 F. Supp.2d at 451; IDS Life Ins. Co., 958 F. Supp. at 1268.

Because the Defendants do not have the "continuous and systematic general business contacts" necessary for general jurisdiction, see id., the Defendants cannot be subject to personal jurisdiction based on the principle of general jurisdiction. See id.; Helicopteros Nacionales de

Colombia, S.A., 466 U.S. at 414-416, 104 S.Ct. at 1873. Therefore, the inquiry must focus on whether the Court can exercise personal jurisdiction over the Defendants based on the principle of specific jurisdiction. The Defendants contend the Court cannot.

C. Specific Jurisdiction

The Defendants do not have sufficient minimal contacts with the State of Illinois for this Court to exercise specific personal jurisdiction. Even were the Court to find sufficient minimal contacts as to any of the Defendants, the exercise of specific personal jurisdiction would not comport with due process and the notions of substantial justice and fair play.

1. Standard

To demonstrate specific personal jurisdiction, a plaintiff must show that each defendant has sustained sufficient minimum contacts with the forum to fall within the framework of International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154 (1945). See Euromarket Designs, Inc., 96 F. Supp.2d at 833. This inquiry involves two elements. First, the Plaintiff must demonstrate that a defendant is amenable to service of process. Second, the Plaintiff must demonstrate that "bringing the defendant into court is consistent with the Fifth Amendment's due process guarantees." See id. at 833-834. Service becomes sufficient on a defendant under Rule 4(k) of the Federal Rules of Civil Procedure when service is provided for by a United States statute or "when the defendant could be subjected to the jurisdiction of a court in the forum state through that state's long-arm statute."[7] See id. The Illinois long-arm statute "provides that a defendant submits to the jurisdiction of the Illinois courts if it commits a tortious act within the state and 'the cause of action arises from the doing of such act.'" See id. at 834 (quoting Clipp

[7] In his 5th Amended Complaint, Plaintiff Tamburo brings claims for anti-trust and alleges this court has jurisdiction pursuant to 15 U.S.C. § 4. However, Plaintiff Tamburo fails to indicate how personal jurisdiction is proper against the Defendants pursuant to 15 U.S.C. § 4. Moreover, as argued infra, the Plaintiffs have failed to state a claim under this statute.

Designs, Inc. v. Tag Bags, Inc., 996 F. Supp. 766, 768 (N.D. Ill. 1998)). It also provides that jurisdiction may be exercised to the fullest extent permitted by the state and federal constitutions. As such, the analysis under the Illinois long-arm statute collapses into one of a constitutional due process analysis. See Euromarket Designs, Inc., 96 F. Supp.2d at 834. This due process analysis involves the examination of three principles. First, the Court must examine whether sufficient minimal contacts exist with the forum. See id. Second, the Court must ensure that the claims asserted arise from forum related activities. See id. Finally, the Court must ensure that the exercise of jurisdiction would be reasonable. See id.

2. Electronic Mails from Defendant Dworkin to MBFS

Plaintiffs have alleged that Defendant Dworkin, a Canadian citizen, sent emails to Plaintiffs requesting that MBFS cease and desist the use of information and raw data from his database. Email alone, without additional substantial contacts, will not amount to personal availment. See Machulsky v. Hall, et al., 210 F. Supp.2d 531, 539-540 (D. N.J. 2002) (citing Barrett v. Catacombs Press, 44 F. Supp.2d 717, 729 (E.D. Pa. 1999) (holding that an exchange of three emails regarding defendant's web site did not "amount to the level of purposeful targeting required under the minimum contacts analysis")). Indeed, in this case, the electronic mails sent by Defendant Dworkin amounted to the equivalent of "cease and desist" letters. A cease and desist letter sent into a forum is not sufficient to create jurisdiction. See Trost v. Bauer, No. 01 C 2038, 2001 WL 845477, * 7 (N.D. Ill. Jul. 24, 2001); E.J. McGowan & Associates, Inc. v. Biotechnologies, Inc., et al., 736 F. Supp. 808, 812 (N.D. Ill. 1990) (although sending infringement letters constitutes business within district, sending of infringement letters does not in and of itself satisfy due process clause for purposes of exercising personal jurisdiction); Modern Computer Corp. v. Ma, 862 F. Supp. 938, 945 (E.D.N.Y.1994) (sending a cease and

desist letter in his forum alone is insufficient to establish the minimum contacts necessary for personal jurisdiction). Consequently, Defendant Dworkin's electronic mails seeking to make MBFS cease and desist from the use of Defendant Dworkin's proprietary information and raw data do not constitute sufficient contacts with Illinois to meet the minimal contacts necessary to exercise specific general jurisdiction on this basis.[8] See id,

3. Message Boards and Mailing Lists

Most of the remaining claims in Plaintiffs' Fifth Amended Complaint arise from alleged defamatory communications posted to certain mailing lists, such as the Schipperke List, and Yahoo! message boards, such as Defendant WSP's Breedmate board. See generally 5th Am. Compl. These communications do not suffice to meet the minimal contacts necessary to exercise specific personal jurisdiction.

In determining whether jurisdiction exists for alleged intentional torts, the Seventh Circuit has adopted the "effects" test of Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482 (1984).[9] See generally Indianapolis Colts, Inc. v. Metro. Baltimore Football Club Ltd. Partnership, 34 F.3d 410 (1994). The effects test

> is satisfied when the plaintiff alleges that the defendant committed an intentional tort expressly aimed at the forum state; the actions caused harm, the brunt of which was suffered in the forum state; and the defendant knew that the effects of its actions would be suffered primarily in the forum state.

Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F. Supp.2d 1154, 1165, (W.D. Wis.

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[8] This same analysis would apply to any additional email communications alleged to be at issue by Plaintiffs.

[9] Calder v. Jones, 465 U.S. 783 (1984), involved an action that arose from a California state court. Consequently, it did not address an analysis of venue under 28 U.S.C. § 1391. As Plaintiff Tamburo has alleged subject matter jurisdiction exists due to diversity, section (1)(a) of 28 U.S.C. § 1391 must be met for the Northern District of Illinois to be the proper venue. Absent personal jurisdiction over the Defendants, there does not exist sufficient bases for proper venue in the Northern District of Illinois. None of the defendants reside or are domiciled in Illinois. A substantial part of the events giving rise to the claims occurred outside Illinois. MBFS prompted the communications by engaging in questionable conduct *in the Defendants' forums*. The Defendants made the communications from their respective forums. Consequently, the Northern District of Illinois is not the proper venue. See 28 U.S.C. § 1391.

2004); (citing Calder, 465 U.S. at 788-90, 104 S.Ct. 1482; Wallace v. Herron, 778 F.2d 391, 394 (7th Cir.1985)). In Wallace v. Herron, the Seventh Circuit made clear that the effects test does not supplant traditional due process analysis. See Wallace, 778 F.2d at 394. The Wallace Court explained that "[w]e do not believe that the Supreme Court, in Calder, was saying that any plaintiff may hale any defendant into court in the plaintiff's home state, where the defendant has no contacts, merely by asserting that the defendant has committed an intentional tort against the plaintiff." Id. More recently, the Seventh Circuit held that

> [i]n Calder as in all the other cases that have come to our attention in which jurisdiction over a suit involving intellectual property (when broadly defined to include reputation, so that it includes Calder itself) was upheld, *the defendant had done more than brought about an injury to an interest located in a particular state*.

Indianapolis Colts, Inc., 34 F.3d at 412 (emphasis added).

This analysis is particularly applicable to the Internet where a mailing list, bulletin board, Yahoo! message board or other electronic forum can quite literally be accessed by anyone in the world. Any contrary reading would require that anyone communicating anything online might be subject to any jurisdiction. Indeed, recent opinions of the district courts in the Seventh Circuit addressing Internet related issues have adopted the Wallace Court's analysis of Calder.[10] See Hy Cite Corp., 297 F. Supp.2d at 1165. Consequently, there must be something more than the alleged injury in the forum state. See id.; Imo Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265 (3rd Cir.1998).

Here, Plaintiffs have complained of electronic communications made by the Defendants

[10] Jurisdictional analysis must continue to evolve with the evolution of technology. Nearly a half-century ago, the Supreme Court made clear that "[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction has undergone a similar increase." Hanson v. Denckla, 357 U.S. 235, 250-251, 78 S.Ct. 1228, 1237-1238 (1958). This principle remains ever so relevant.

and posted to varying electronic mailing lists and message boards.[11] Although Plaintiffs claim that messages have been posted to "hundreds" of mailing lists, Plaintiff Tamburo only refers to three specific lists: the Schipperke List, the Breedmate Yahoo! Group, and COLPedigrees.[12] As stated earlier, the Defendants are not domiciled in Illinois. The Defendants operate their mailing lists outside of Illinois. Indeed, Defendant WSP operates the Breedmate Group from Australia. See 5th Am. Compl. ¶¶ 6, 45-46, 72. None of the Defendants' lists target Illinois specifically. Plaintiffs have not alleged any different. Indeed, a geographic location is not the nexus of the list members' interest. Rather, the lists are electronic communities where "dog enthusiasts gather." See 5th Am. Compl. ¶ 53. Plaintiffs have not alleged that, apart from his support manager, anyone in Illinois has received the communications. See generally 5th Am. Compl. None of the Defendants specifically markets products in Illinois. In fact, the only commercial defendant is Defendant WSP. Finally, the communications arose from MBFS' successful efforts in acquiring the information and raw data from the Database Defendants' dog pedigree databases without their permission or authorization by using a computer program that extracted the raw data and information *from locations outside Illinois*. Consequently, the Defendants cannot be said to have aimed their communications directly to Illinois or made Illinois the focal point of the dispute. Thus, specific personal jurisdiction cannot be exercised over the Defendants for communications posted on electronic mailing lists or message boards that do not target Illinois where the Defendants have no other contacts with Illinois apart from the Plaintiffs receiving copies of the electronic communications. See Hy Cite Corp., 297 F. Supp.2d at 1165; Imo Indus., Inc., 155

[11] Whether through mailing lists operated by the Defendants through private servers or Yahoo! Message boards operated through Yahoo!'s portal, the analysis remains the same.

[12] Plaintiffs claim that Defendant Dworkin sent a message to all persons who had a free online database of dog pedigrees on the Internet. See 5th Am. Compl. 50. In support of this same allegation in his Third Amended Complaint, Plaintiff Tamburo referred to an exhibit reflecting a single recipient, "Aflirin Database." 3rd Am. Compl. ¶ 44. Alfirin refers to the underlying software used by some to operate their databases. It does not infer what Plaintiffs allege. Plaintiffs do not name any additional databases in paragraphs 53-55 of the 5th Amended

F.3d at 265; Wallace, 778 F.2d at 394.

4. Websites

Finally, the noncommercial websites operated by Defendants Hayes, Mills and Henry do not provide the minimal contacts necessary for specific personal jurisdiction.[13] In his Fifth Amended Complaint, Plaintiff Tamburo refers to communications posted to the noncommercial websites owned by Hayes, Mills and Henry.[14] See 5th Am. Compl. ¶¶ 51, 57, 60, 80-81. In the Seventh Circuit, courts have adopted the "sliding scale" approach formulated in Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123-24 (W.D. Pa. 1997) to determine whether a website subjects its operator to personal jurisdiction. See Infosys Inc. v. Billingnetwork.com, Inc., No. 03 C 2047, 2003 WL 22012687, *2 (N.D. Ill. Aug. 27, 2003); Berthold Types Ltd. v. European Mikrograf Corp., 102 F. Supp.2d 928, 932 (N.D. Ill. 2000); Ty Inc. v. Clark, No. 99 C 5532, 2000 WL 51816, *3 (N.D. Ill. Jan 14, 2000). This "sliding scale" approach divides websites into three categories. "Active" websites include those through which commercial business is conducted through the website in an interactive manner. These websites would subject their operators to personal jurisdiction. See Berthold Types Ltd, 102 F. Supp.2d at 932. "Passive" websites include those where information has been posted to the Internet but does not provide for further online interaction. These websites would not subject their operators to personal jurisdiction. Indeed, courts may not exercise jurisdiction over defendants who operate such websites "that merely provide information or advertisements without more." Id. at 933. The third category involves "hybrid" websites that involve some interactivity. In determining

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Complaint.

[13] Although Defendant WSP operates a commercial website, Plaintiffs do not allege that defamatory communications appeared on Wild's website. Consequently, as the claims do not arise from Defendant WSP's website, the website cannot be used to give rise to specific personal jurisdiction.

[14] It should be noted that Plaintiffs do not specifically explain how some of the "text" or communications found on the websites can be considered defamatory considering the explanatory text surrounding the statements. See 5th Am. Complaint, ¶¶ 57, 60, and 72.

whether a "hybrid" website suffices to confer personal jurisdiction over an individual, courts focus on whether a defendant "purposely directed its activities at the residents of the forum." Infosys Inc., 2003 WL 22012687 at *4.

Here, the websites of the Defendants Hayes, Mills and Henry are noncommercial and predominantly passive. The websites provide links and information related to their various dog breeds and dogs in general. While the websites permit individuals to search dog pedigree databases, sign guestbooks, and communicate with the website operators, the websites are noncommercial, and nothing on the websites specifically targets Illinois residents. Moreover, the Defendants do not operate the websites from Illinois; do not have the websites hosted with an Internet server in Illinois; and, do not have the websites maintained from Illinois. Plaintiffs have not alleged anything to the contrary. Consequently, the websites cannot reach the level of commercial interactivity required under the standard for personal jurisdiction adopted in this district. See Infosys Inc., 2003 WL 22012687 at *4; Berthold Types Limited, 102 F. Supp.2d at 932-934; see also generally Ty Inc., 2000 WL 51816; School Stuff, Inc. v. School Stuff, Inc., No. 00 C 5593, 2001 WL 558060, *3 (N.D. Ill. May 21, 2001). Therefore, this Court cannot exercise specific personal jurisdiction over the Defendants based on their websites.[15] See id.

5. Due Process Analysis

Assuming, *arguendo*, that the Defendants have the minimal contacts necessary to exercise specific personal jurisdiction over them, any such exercise of specific personal jurisdiction over the Defendants would not comport with traditional notions of fair play and substantial justice. See International Shoe Co., 326 U.S. at 316; Euromarket Designs, Inc., 96 F. Supp.2d at 833. If the Plaintiffs have succeeded in establishing a prima facie case for the

[15] Even considering the alleged conduct collectively as to each individual defendant, the posting of communications online and operation of a website not targeted to Illinois cannot provide sufficient minimal contacts

exercise of personal jurisdiction over the Defendants (which the Defendants contend they have not), the Court must have found that the Defendants directed their activities at forum residents. See id. To overcome the exercise of jurisdiction at this juncture, the Defendants "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." Burger King v. Rudzewicz, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184 (1985). The Defendants can successfully satisfy this requirement.

It must be remembered that the communications made and/or published by the Defendants arose from MBFS sending a nefarious computer program to surreptitiously obtain information from the noncommercial databases owned and operated by the Database Defendants in *their* jurisdictions.[16] Consequently, MBFS initiated the contact by engaging in conduct in *foreign* jurisdictions. This tortious conduct caused the Defendants substantial concern that MBFS exacerbated by incorporating the raw data from the work product into its commercial product. The Defendants had invested substantial amount of time, money, and expense in creating and maintaining these databases. The acquisition of this work product by MBFS amounted to theft. Theft is defined as "[t]he taking of property without the owner's consent." BLACK'S LAW DICTIONARY 1324 (5th ed. 1979) (citing People v. Sims, 29 Ill.App.3d 815, 331 N.E.2d 178, 179) (Ill. App. 1975)). MBFS took the Defendants' property without their consent.[17] In response, the Database Defendants complained of the conduct online within their dog pedigree communities. MBFS and Plaintiff Tamburo disagreed with the Database Defendants' characterization of the conduct at issue and, as a penalty, filed suit in Illinois against

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to exercise specific personal jurisdiction.

[16] MBFS also attempted to surreptitiously obtain information from the database held by Defendant Wild Systems. These attempts were unsuccessful.

[17] There may be some disagreement as to the nature of the "property" taken without authorization. There remains no question that MBFS took the work product and efforts of the Database Defendants without their authorization and employed it for its own commercial gain.

three noncommercial, nonresident individuals; one noncommercial, nonresident, Canadian individual; and, one Australian commercial company.

Plainly stated, the Defendants could not have expected to be haled into court in the Northern District of Illinois. To subject them to personal jurisdiction in this Court would not do substantial justice and fair play. As the Illinois Constitution teaches, "jurisdiction is to be asserted only when it is fair, just, and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant's acts which occur in Illinois or which affect interests located in Illinois." RAR, Inc., 107 F.3d at 1276. Specific personal jurisdiction over the Defendants in this action would not be fair, just or reasonable. Consequently, this Court must conclude that specific personal jurisdiction cannot be exercised against the Defendants.[18] See id.

D. Defendants Not Subject to Jurisdiction

Plaintiffs have failed to allege sufficient minimum contacts by each of the Defendants to warrant the exercise of personal jurisdiction. None of the defendants are domiciled in Illinois. None of the defendants have continuous and systematic general business contacts with Illinois. Thus, general personal jurisdiction is inapplicable. Plaintiffs implicitly contend that "cease and desist" emails sent by Defendant Dworkin; communications posted to electronic communication forums by Defendants Dworkin, Henry, Mills and Hayes; and postings to the Defendants' websites constitute sufficient contacts to exercise personal jurisdiction. These activities do not constitute sufficient minimum contacts for this court to exercise specific personal jurisdiction against the Defendants. Moreover, apart from Plaintiffs, who initiated this dispute by stealing Defendants' data, being in Illinois, the claims do not arise from forum related activities. Finally,

[18] If the Court exercises specific personal jurisdiction over these Defendants in this circumstance, such a ruling would encourage any individual or entity to engage in conduct, whether illegal, unethical, or offensive, in a foreign

due process cannot entertain specific personal jurisdiction being exercised over Defendants. As such, specific personal jurisdiction cannot be exercised over the Defendants. See Euromarket Designs, Inc., 96 F. Supp.2d at 834.

Because neither general nor specific personal jurisdiction is applicable, the Court does not have personal jurisdiction over the Defendants. Therefore, the Court should dismiss the Plaintiff's Fifth Amended Complaint in its entirety as to each of the Defendants.

II. Plaintiffs' Fifth Amended Complaint Should Be Dismissed Pursuant to 12(b)(6)

Should the Court conclude that it does have jurisdiction over one or more of the Defendants, the Court should dismiss the Fifth Amended Complaint in its entirety because the Plaintiffs have failed to state claims upon which relief can be granted. In deciding a motion to dismiss brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a Court will accept all well-pleaded facts as true and will draw all reasonable inferences in favor of the plaintiff. See Hernandez v. City of Goshen, 324 F.3d 535, 537 (7th Cir. 2003). However, a Court must dismiss any claim where it appears beyond all doubt that the plaintiff can prove no set of facts that would entitle him to relief. See id.

A. Plaintiff Tamburo Is Not The True Party in Interest

The Defendants move to dismiss Counts Three, Five, Six, Eight, Nine and Ten, as well as Eleven through Thirteen as to Plaintiff John Tamburo, of the Fifth Amended Complaint on the basis that Plaintiff Tamburo again does not represent the true party in interest with respect to the claims asserted. The Defendants previously raised this argument in their motion to dismiss the Third Amended Complaint. See Mot. Dismiss 3rd Am. Compl. and Mem. Supp. Mot. Dismiss 3rd Am. Compl. (Doc. ##20-21). In ruling on Defendants' Motion to Dismiss the Third Amended Complaint, the Court held that Versity Corporation, not Plaintiff Tamburo, represented the true

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jurisdiction, wait for the victims to complain publicly, and then file suit against them in the perpetrators forum.

party in interest. Indeed, the Court stated:

> Defendants argue that Versity, rather than Tamburo as an individual, is the real party in interest in this suit because 'all of the actions alleged in the complaint arise from conduct initiated by Versity' and the context of the allegedly defamatory or otherwise unprivileged statements make clear that the statements referenced MBFS as a business. The court agrees.
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> * * * * *
>
> Tamburo does not dispute defendants' contention that Versity was the real party in interest for the time periods relevant to the complaint . . . .

Order June 24, 2005 (Doc. #114) (attached as Exhibit C). For this reason, the counts brought on behalf of Plaintiff Tamburo, not the true party in interest, should be dismissed. See id.

B. Tortious Interference Claims Insufficient As Matter of Law

The Plaintiffs fail to state claims in Counts Two, Three, Four and Five alleging tortious interference with contractual relationships (Counts Two and Three) and prospective economic advantage (Counts Four and Five). The Plaintiffs have failed to allege any facts that would tend to show that Plaintiffs had a reasonable expectancy of entering into a valid business relationship with any particular person or entity; that the Defendants had any awareness of Plaintiffs' contracts with their customers or their specific expectations of entering into new contracts; or that the Defendants intentionally and unjustifiedly interfered with any contracts or expectations. For these reasons as more fully developed below, Counts Two, Three, Four and Five must be dismissed.

1. Intentional Interference with Contract

The Plaintiffs have failed to state claims for intentional interference with contracts.[19] To

[19] As the alleged conduct occurred while Versity Corporation still existed, Defendants cannot see how Plaintiff Tamburo has standing to bring a claim for tortious interference with contracts between unknown third parties and Versity. Moreover, the Plaintiffs have created allegations that fail to specify any of the parties to the alleged contract (indeed, even which Plaintiff was party to the contract). The Defendants thus have no knowledge of the contract, the unknown third parties, or the Plaintiff who was in privity with respect to the contracts.

state a claim for intentional interference with a contract, a plaintiff must plead (a) the existence of a valid enforceable contract between the plaintiff and a third party; (b) that the defendant had awareness of the contract; (c) that the defendant intentionally and unjustifiedly induced a breach of the contract; (d) that the defendant's alleged wrongful conduct caused a subsequent breach of the contract by a third party; and (e) the plaintiff was damaged as a result. Poulos v. Lutheran Social Services of Illinois, Inc., 312 Ill.App.3d 731, 742 (Ill. App. 2000). The Plaintiffs have failed to allege sufficient facts on most, if not all, of these elements. The Plaintiffs have failed to allege facts that would tend to demonstrate that the Defendants had any awareness of the Plaintiffs' contracts with their customers. The Plaintiffs have failed to allege facts that would tend to demonstrate that the Defendants intentionally and unjustifiably induced a breach with respect to any particular contract. Thus, these claims should be dismissed. See id.

2. Intentional Interference with Prospective Economic Advantage

The Plaintiffs have failed to state claims for intentional interference with prospective economic advantage. To sufficiently allege such a claim, a plaintiff must allege (a) a reasonable expectancy of entering into a valid business relationship; (b) the defendant's knowledge of such expectancy; (c) an intentional and unjustifiable interference by defendant with the third-party that induced or caused a breach or termination of the expectancy; and (d) damage to the plaintiff resulting from defendant's alleged interference. Anderson v. Vanden Dorpel, 172 Ill.2d 399, 406-407 (Ill. 1996). This includes an allegation that the defendant engaged in specific action against the party with whom the plaintiff expected to do business. Schuler v. Abbott Laboratories, 265 Ill.App.3d 991, 994 (Ill. App. 1993). Moreover, the plaintiff must allege a business expectancy with a specific third party and not merely allege a general expectation of future business. Id. The plaintiff must furthermore plead and, eventually, prove purposeful

interference that connotes impropriety. See Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 485 (Ill. 1998). Indeed, there will be no liability for interference with a prospective contractual relation where the defendant merely conveys truthful information. Cromeens, Holloman, Sibert, Inc. v. AB Volvo, 349 F.3d 376, 399 (7th Cir. 2003) (citing Soderlund Bros. v. Carrier Corp., 278 Ill.App.3d 606, 620 (Ill. App. 1995)).

Here, the Plaintiffs have failed to allege any specific third parties with whom they expected to enter a valid business relationship. See generally 5th Am. Compl. The Plaintiffs have failed to allege Defendants' knowledge of any such expectancies. Id. Rather, the Plaintiffs merely state that Defendants "were aware of Plaintiff's [sic] efforts to market its software and/or services." 5th Am. Compl. ¶ 91. This is insufficient. See Schuler v. Abbott Laboratories, 265 Ill.App.3d at 994; Anderson, 172 Ill.2d at 407-408. Further, the Plaintiffs have failed to allege that Defendants intentionally and unjustifiably interfered with any third party that induced or caused a breach or termination of an expectant business relationship. Because of this, the Plaintiffs cannot sufficiently allege that conduct caused damage arising from a specific failed expectancy. Thus, nearly every element (if not all) of this claim has been insufficiently plead. See id. Therefore, these claims should be dismissed. See id.

3. Conditional Privilege Protects Defendants

Assuming, *arguendo*, the claims have been sufficiently plead, these claims should be dismissed because Defendants' statements remain protected pursuant to a conditional privilege. The protection obtained through a conditional privilege applies to claims alleging tortious interference with business relations. See American Pet Motels, Inc. v. Chicago Veterinary Medical Assn., 106 Ill.App.3d 626, 633-634 (Ill. App. 1982). The Defendants have a conditional privilege in any statements made regarding Plaintiffs' conduct in relation to the Defendants'

databases and information contained therein. Because the Fifth Amended Complaint raises the question of privilege or justification, the Plaintiffs must plead facts from which a trier of fact could conclude that the Defendants abused the privilege. See Roy v. Coyne, 259 Ill.App.3d 269, 284-285 (Ill. App. 1994). Plaintiffs must plead more than malice without factual support to overcome such a privilege. Schuler, 265 Ill.App.3d at 995-996. Thus, the Plaintiffs must allege facts that would demonstrate the Defendants acted with a desire to harm the Plaintiffs *independent of and unrelated to their own interests*. Guice v. Sentinel Technologies, Inc., 294 Ill.App.3d 97, 107 (Ill. App. 1997). As the Fifth Amended Complaint contains no such allegations, the claims for tortious interference in Counts Two, Three, Four, and Five must be dismissed. See id.; Schuler, 265 Ill.App.3d at 995-996; American Pet Motels, Inc., 106 Ill.App.3d at 633-634.

C. Illinois Anti-Trust Claims Insufficient As Matter of Law

Defendants next move to dismiss Count Thirteen because the Plaintiffs have failed to sufficiently set forth a claim for violation of the Illinois Anti-Trust Act. The Plaintiffs claim that the Defendants violated 740 ILCS 10, et seq. Defendants presume the Plaintiffs intended to cite 740 ILCS 10/3(1)(b).[20] Section 3(1) of the Illinois Anti-Trust Act provides that:

> Every person shall be deemed to have committed a violation of this Act who shall:
>
> (1) Make any contract with, or engage in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person:
>
> b. for the purpose or with the effect of fixing, controlling, or maintaining the price or rate charged for any commodity sold or bought by the parties thereto, or the fee charged or paid for any service performed or received by the parties thereto;

[20] Despite being on their Fifth Amended Complaint, the Plaintiffs have again failed to accurately specify the specific statutory they claim to have been violated.

> c. fixing, controlling, maintaining, limiting, or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect stated in paragraph a. of subsection (1); . . . .

740 ILCS 10/3(1). This section requires the persons involved in the alleged contract or conspiracy to be competitors *of one another*. See id. In their Fifth Amended Complaint, Plaintiffs have not alleged that Defendants represent competitors of Plaintiffs.[21] See generally 5th Am. Compl. As has been previously alleged, the Defendants possessed information distinct from one another for distinct breeds of dogs. See 3rd Am. Compl. ¶ 142; see also 5th Am. Compl. ¶ 24. Consequently, the Defendants cannot be competitors. See BLACK'S LAW DICTIONARY 257 (5th ed. 1979) (competitors are "[p]ersons endeavoring to do the same thing and each offering to perform the act, furnish the merchandise, or render the service better or cheaper than his rival"). Thus, the Defendants cannot have violated Section 3(1) of the Illinois Anti-Trust Act. Further, the Plaintiffs' allegations become nonsensical and completely devoid of any allegation that the Defendants fixed, controlled, maintained, limited or discontinued the production, manufacture, mining, sale or supply of any commodity or service for the purpose or effect of "fixing, controlling, or maintaining the price or rate charged" for their respective databases. Therefore, the Plaintiffs' claims for violating the Illinois Anti-Trust Act should be dismissed.[22] See 740 ILCS 10/3(1).

D. Plaintiff's Claims of Libel Insufficient As A Matter of Law

The Plaintiffs fail to state claims for defamation and trade libel in Counts Seven, Eight,

[21] Previously, it has been alleged that the noncommercial Defendants are competitors of the Plaintiffs. In his Third Amended Complaint, Plaintiff Tamburo relied upon an email from Mr. Dworkin in which a statement is made that an attorney believed all parties to be competitors. See 3rd Am. Compl. ¶ 124. Because of this statement, Plaintiff Tamburo concluded that "[t]he defendants therefore compete with John." See id. at ¶ 125. This alone does not suffice to make the Defendants competitors among themselves or with MBFS.

[22] For the same reasons, the Plaintiff's claim under the federal antitrust acts (Count Twelve) should be dismissed. Moreover, the Defendants cannot be considered to be monopolies. Plaintiff Tamburo, or MBFS or Versity, arguably could have searched through the databases by viewing pedigrees online and manually entered the facts into their

Nine and Ten of the Fifth Amended Complaint. The Plaintiffs claim that the Defendants are liable for defamation and trade libel because they made statements accusing MBFS of "stealing" their information and raw data from their proprietary databases. Preliminarily, these claims should be dismissed because the Plaintiffs have failed to identify the statements alleged to be defamatory with specificity. These claims should further be dismissed based on the defense of substantial truth, opinion, and qualified privilege.

1. *Standard*

In Illinois, a "statement is defamatory if it impeaches a person's reputation and thereby lowers that person in the estimation of the community or deters third parties from associating with that person." Schivarelli v. CBS, Inc., et al., 333 Ill.App.3d 755, 759, 776 N.E.2d 693, 696 (Ill. App. 2002). Defamatory statements may be classified as either defamatory *per se* or defamatory *per quod*. See id. To constitute a statement that is defamatory *per se*, a statement must fit into one of five categories that Illinois recognizes as being "so obviously and naturally harmful to the person to whom it refers that injury to his reputation may be presumed." Id. These five categories include those statements (1) imputing the commission of a criminal offense; (2) imputing infection with a loathsome communicable disease; (3) imputing an inability to perform or want of integrity in the discharge of duties of office or employment; (4) imputing a lack of ability or prejudicing a party in one's trade, profession, or business; and (5) imputing adultery or fornication. See id. In such cases, a plaintiff need not allege or prove special damages. Van Home v. Muller, 185 Ill.2d 299, 307 (Ill. 1998). Where the plaintiff is a corporation, the alleged defamation must assail the corporation's financial position, business methods, or accuse it of fraud or mismanagement. Harris Trust and Sav. Bank v. Phillips, 154 Ill.App.3d 574 (Ill. App. 1987).

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own databases.

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

2. *Substantial Truth*

Truth is a defense to a defamation action that may be raised by a motion to dismiss. See Emery v. Kimball Hill, Inc.,112 Ill.App.3d 109, 112, 445 N.E.2d 59, 61 (Ill. App. 1983); American Int'l Hosp. v. Chicago Tribune Co., 136 Ill.App.3d 1019, 1022-23, 483 N.E.2d 965, 968 (Ill. App. 1985). While ordinarily the determination of whether substantial truth exists remains a question for a jury to decide, the question becomes one of law where no reasonable jury could find that substantial truth had not been established. See Parker v. House O'Lite Corp., 324 Ill.App.3d 1014, 1026, 756 N.E.2d 286, 296 (Ill. App. 2001). In raising truth as a defense, a defendant need only demonstrate the "substantial truth" of the allegedly defamatory material. See Lemons v. Chronicle Publishing Co., 253 Ill.App.3d 888, 890, 625 N.E.2d 789, 791 (Ill. App. 1993); Farnsworth v. Tribune Co., 43 Ill.2d 286, 293-94, 253 N.E.2d 408, 412 (Ill. 1969). "Substantial truth" requires only that a defendant demonstrate the truth of the "gist" or "sting" of

the defamatory material. See Kilbane v. Sabonjian, 38 Ill.App.3d 172, 175, 347 N.E.2d 757, 761 (Ill. App. 1976); American Int'l Hosp.,136 Ill.App.3d at 1022. Further, allegedly defamatory statements need not be technically accurate in every detail to avoid being actionable. See Parker, 324 Ill.App.3d at 1026.

Here, MBFS used a computer program to surreptitiously obtain the raw data and information from the Defendants' noncommercial databases without their authorization and incorporated this raw data and information into its commercial product. See 5th Am. Compl. ¶¶ 25-30. The Defendants viewed this conduct as theft. Theft is defined as "[t]he taking of property without the owner's consent." BLACK'S LAW DICTIONARY 1324 (5th ed. 1979). The word "steal" or its derivative "stolen" denote "theft." See id. MBFS took their property without their authorization. Plaintiff Tamburo admits as much in his Fifth Amended Complaint. See 5th Am. Compl. ¶¶ 25-30. Consequently, the Defendants should be protected from any claims of defamation because their statements are substantially true. See Emery, 112 Ill.App.3d at 112, 445 N.E.2d 59; American Int'l Hosp., 136 Ill.App.3d at 1022-23, 483 N.E.2d at 968.

Providing Plaintiffs with arguably more breadth than is deserved, Plaintiffs have argued that databases are not subject to intellectual property protection and have focused on the fact that "raw data may be copied at will."[23] See 3rd Am. Compl. ¶ 82 (citing Feist Publications v. Rural Telephone Service, Co., 499 U.S. 340 (1991)). The Plaintiffs continue to maintain this by seeking a declaratory judgment on these issues in their Fifth Amended Complaint. See 5th Am. Compl. ¶ 96. Of course, the Plaintiffs suggest then that MBFS did not, in fact, take the Defendants' property and, by inference, that the Defendants would then be incorrect in their opinion and perspective and liable for defamation. Plaintiff Tamburo adumbrates the issue of

[23] Plaintiffs copied much more than mere data. Indeed, the surreptitious program used by the Plaintiffs copied the databases themselves, including the html code.

database protection. While arguably raw data may be copied at will (the Defendants do not here suggest that MBFS or Plaintiff Tamburo would be precluded from manually searching their databases and manually inserting the data obtained as intended into his database), the work product or "sweat of the brow" invested in creating and maintaining a database *is protectable*. In fact, the General Counsel for the United States Copyright Office has stated that the Copyright Office believes that "legislation should be enacted that would provide appropriate levels of protection for producers of databases . . . ." See "Statement of David O.Carson, General Counsel, United States Copyright Office," September 23, 2003 (attached as Exhibit D). In the absence of this protection, claims have been brought under the theory of misappropriation.[24] And, while this motion is not the location to argue the Defendants' potential claims against MBFS, it certainly supports the premise that MBFS wronged the Defendants by "stealing" or misappropriating their data.[25] It conveys the "gist" of the material alleged to be defamatory. See Kilbane, 38 Ill.App.3d at 175; American Int'l Hosp., 136 Ill.App.3d at 1022. Thus, the Defendants have a substantial truth defense to Plaintiff Tamburo's claims of libel. See id. Therefore, Plaintiff's claims of libel should be dismissed, as should his claim for trade libel.[26] Lemons, 253 Ill.App.3d at 890, 625 N.E.2d 789; Farnsworth. 43 Ill.2d at 293-94, 253 N.E.2d 408; Parker, 324 Ill.App.3d at 1026, 756 N.E.2d 286; Emery, 112 Ill.App.3d at 112, 445 N.E.2d 59.

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[24] As David O. Carson explains, the Second Circuit established standards for analyzing such claims in National Basketball Ass'n v. Motorola, Inc., 105 F.3d 841 (2nd Cir. 1997).

[25] Moreover, Plaintiff Tamburo overlooks the fact that two of the Defendants reside in foreign jurisdictions where databases receive more copyright protection than in the United States. See Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited [2002] FCAFC 11 (Australia).

[26] To succeed on a claim for trade libel, a plaintiff must demonstrate that the statements were false. See Krasinski v. United Parcel Service, Inc., 124 Ill.2d 483, 490, 530 N.E.2d 468, 471 (Ill. 1988). In fact, the requirements for trade libel require the Plaintiff to demonstrate actual malice which, in this context, would involve a showing that the defendants published the defamatory statements with knowledge of their falsity or with where the Defendants published the statements while entertaining serious doubts as to their veracity. See Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53, 65, 86 S.Ct. 657, 664 (1966); Pease v. International Union of

3. Expressions of Opinion

Some of the statements alleged to be defamatory by the Plaintiffs could be statements of opinion, not fact. To determine whether a statement is one of fact, a court must examine whether the statement, in context, could be reasonably understood as describing actual facts about the plaintiff. Bryson v. News America Publs., Inc., 174 Ill.2d 77 (Ill. 1996). The more generalized and vague the opinion, the more likely the opinion will be inactionable as a matter of law. Hopewell v. Vitullo, 299 Ill.App.3d 513 (Ill. App. 1998). Here, Plaintiffs complain of many statements that could be considered opinion. Although difficult to determine as the Plaintiffs have not always alleged specific statements, general opinions that the Plaintiffs' conduct was wrong or improper constitute opinion. Therefore, these statements cannot be actionable.

4. Qualified Privilege

The Defendants' statements also obtain protection pursuant to a conditional or qualified privilege. A qualified exists where a communication that might otherwise be actionable is protected due to the circumstances under which it was made. Kuwik v. Starmark Star Marketing and Admin., Inc., 156 Ill.2d 16, 24 (Ill. 1993). Privileged circumstances include situations where the defendant had some interest in the statements being made. Id. The determination of whether a qualified privilege exists is a matter of law. Id. at 25. Here, the Database Defendants clearly had an interest in the statements being made about the Plaintiffs' conduct in surreptitiously obtaining data from their online databases and incorporating it into the Plaintiffs' commercial product - conduct that the Plaintiffs admit. See 5th Am. Compl. ¶¶ 27-29. Clearly, the Defendants statements are protected by qualified privilege. See Kuwik, 156 Ill.2d at 24.

For the foregoing reasons, Counts Seven, Eight, Nine and Ten must be dismissed.

Operating Engineers Local 150, 208 Ill.App.3d 863, 872, 567 N.E.2d 614, 620 (Ill. App. 1991).

E. Negligent Interference with Contract

The Plaintiffs fail to state a claim in Count Six of the Fifth Amended Complaint. In this count, Plaintiffs allege negligence interference with contract. Illinois does not recognize such a claim. See Great Cent. Ins. Co. v. Ins. Servs. Office, 74 F.3d 778, 785 (7th Cir. 1996); Kurtz v. Illinois Nat'l Bank, 179 Ill. App. 3d 719, 729, 534 N.E.2d 1007, 1013 (Ill. App. Ct. 1989). Moreover, to the extent Plaintiffs seek to create or expand an existing tort, they have chosen the wrong forum. See Great Cent. Ins. Co., 74 F.3d at 785-786. Therefore Count Six must be dismissed. See id.

F. Civil Conspiracy

The Plaintiffs fail to state a claim of civil conspiracy in Count Eleven of the Fifth Amended Complaint. To state a claim for civil conspiracy, a plaintiff must allege that two or more persons conspired to accomplish by concerted action either a lawful purpose by unlawful means or an unlawful purpose by lawful means. Adcock v. Brakegate, 164 Ill.2d 54, 62-63 (Ill. 1994); Smith v. Eli Lilly & Co., 37 Ill.2d 222, 235 (Ill. 1990). One must allege that one of the conspirators committed an overt act in furtherance of the conspiracy and that such act was tortious or unlawful. Id. at 62-64. Where the underlying act is not tortious or unlawful, there cannot be a tort claim for civil conspiracy. See Galinksi v. Kessler, 134 Ill.App.3d 602, 606 (Ill. App. 1985); Ill. Traffic Court Driver Imp. Educ. Found. v. Peoria Journal Star, Inc., 144 Ill.App.3d 555 (Ill. App. 1996). More importantly here, a claim alleging civil conspiracy in Illinois that alleges a tort as the underlying wrongful act will be actionable only where it includes additional defendants or new facts not already pled in connection with the underlying tort. Thermodyne Food Serv. Products, Inc. v. McDonald's Corp,, 940 F. Supp. 1300, 1310 (N.D. Ill. 1996). Indeed, "a conspiracy claim alleging a tort as the underlying wrongful act is duplicative

where the underlying tort has been plead." Id. (citing Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 453 (7th Cir. 1982); Belkow v. Celotex Corp., 722 F. Supp. 1546, 1550 (N.D. Ill. 1989)). Here, the Plaintiffs have not added any new facts or defendants to its conspiracy claim. See 5th Am. Compl. ¶¶ 94, 124-126. Thus, the Plaintiffs have not sufficiently plead a claim for civil conspiracy. See id. Therefore, Count Eleven must be dismissed. See id.

G. Conclusion on 12(b)(6)

Based on the foregoing, this Court should dismiss the Plaintiffs' claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Thus, the Fifth Amended Complaint should be dismissed in its entirety.

III. **Immunity For Publication of Content By Third-Parties**

Plaintiffs suggest that the Defendants, particularly Defendant WSP, should be held liable for the comments posted to their mailing lists and message boards by co-Defendants and other third-parties. However, section 230 of the Communications Decency Act, codified as 47 U.S.C. § 230, "creates a federal immunity to any cause of action that would make service providers liable for information originating from a third-party user of the service." Section 230 states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(l). Section 230 further defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server . . . ." 47 U.S.C. § 230(f)(2). This statute has consistently been held to preclude liability for interactive computer services that make available or publish third-party content. "Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider

liable for its exercise of a publisher's traditional editorial functions--such as deciding whether to publish, withdraw, postpone or alter content—are barred." Zeran v. America Online, Inc., 129 F.3d 327, 328 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

Since Zeran, courts have consistently adopted and applied this approach to Section 230's immunity provision. See e.g. Doe v. GTE Corp., 347 F.3d 655, 656 (7th Cir. 2003) (voyeur videos of college athletes available on website hosted by ISP server); Green v. America Online, Inc., 318 F.3d 465, 469 (3rd Cir. 2003) (allegations of sexual orientation and delivery of "punter" program); Batzel v. Smith, 333 F.3d 1018, 1030 (9th Cir. 2003); Ben Ezra. Weinstein and Co.. Inc. v. America Online, Inc., 206 F.3d 980, 983 (10th Cir. 2000), cert. denied, 531 U.S. 824 (2000) (stock information made available on AOL's "Quotes & Portfolios" service); Morrison v. America Online. Inc., 153 F. Supp. 2d 930, 933-34 (N.D. Ind. 2001) (threats directed at physician, distributed by e-mail); PatentWizard. Inc. v. Kinko's, Inc., 163 F. Supp. 2d 1069, 1071-72 (D.S.D. 2001) (statements about patent service made in chat room by user of defendant's computers);; Blumenthal v. Drudge, 992 F. Supp. 44, 46 (D.D.C. 1998) (allegation of wife-beating in on-line magazine); Doe v. America Online. Inc., 783 So.2d 1010, 1017 (Fla.), cert, denied. 122 S. Ct. 208 (2001) (use of chat rooms to market obscene photos); Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 832, 121 Cal. Rptr. 2d 703 (Cal. App. 2002) (offers to sell counterfeit sports memorabilia on Internet auction site); Schneider v. Amazon.com. Inc., 31 P.3d 37, 41-42 (Wash. Ct. App. 2001) (allegation in reader book review that author was a felon). Consequently, Plaintiffs cannot succeed in alleging liability against the Defendants, particularly Defendant WSP, for comments posted on their message boards and mailing lists by third parties. See id. Further, the Defendants, particularly Defendant WSP, cannot be held liable for refusing to remove communications by third parties from their mailing lists and message boards. See id.

CONCLUSION

For the foregoing reasons, Defendants respectfully move this Court to dismiss Plaintiffs' Fifth Amended Complaint in its entirety as to each of the Defendants.

Dated: Chicago, Illinois
November 30, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIFTH AMENDED COMPLAINT has been sent by electronic mail and First Class Mail, postage prepaid, this 30th day of November 2005, to counsel for Plaintiffs, to wit:

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