

2.	Alvis’s Allegations of “Actual Confusion” Fail to Show a Likelihood of Confusion as a Matter of Law, and the Law Permits Such Confusion Anyway.	20
III.	ALVIS’S DEFAMATION CLAIMS ARE EACH INADEQUATELY PLED OR BARRED BY THE COMMUNICATIONS DECENCY ACT, OR BOTH.	23
IV.	ALVIS’S TORTIOUS INTERFERENCE CLAIMS FAIL BECAUSE THEY DUPLICATE ALVIS’S DEFAMATION CLAIMS AND BECAUSE THEY ARE PLED INSUFFICIENTLY.	25
	CONCLUSION	27
	CERTIFICATE OF SERVICE	28

INTRODUCTION

This litigation is a Strategic Lawsuit Against Public Participation, or “SLAPP suit”—an attempt, through harassing litigation that the plaintiff knows it cannot win, to halt the exercise of First Amendment rights. Several states have enacted laws that provide for fees for defendants in SLAPP suits. Georgia is one such state, suggesting one reason why Alvis has sued the Townsends in North Carolina instead.

Alvis’s claims are breathtaking in their frivolousness and aggressiveness. First, the Fourth Circuit’s clear, recent, and controlling precedent holds that this Court lacks jurisdiction. Second, Alvis ignores repeating rulings of the United States Patent and Trademark Office rejecting any trademark in the term “spray on siding,” and it alleges that the Townsends have engaged in speech that is completely immune from, and tangential to, trademark law. The Lanham Act is designed to prevent business competitors from profiting by confusing consumers as to the origin of goods and services. It has no application to consumer commentary, particularly when the consumers make clear who they are and use the trademarks to identify the object of their criticism rather than to create confusion. The Townsends’ commentary is noncommercial and is fair use, meaning that it is protected by the First Amendment and is expressly carved out of trademark law. Moreover, even if Alvis could allege some likelihood of confusion, trademark law permits some amount of confusion as a necessary byproduct of fair use.

Third, Alvis sues for defamation but fails to identify, as required by law, a single allegedly defamatory statement by the Townsends. It alleges only statements by third parties for which the Communications Decency Act expressly bars holding the Townsends liable. Although defendants have made clear that Alvis’s defamation claims all fail for these reasons, *see* Defendant’s Memorandum in Support of Motion to Dismiss (“Def. Mem.”) 24-25, Alvis has declined to drop its

defamation claims, to amend its complaint to plead them adequately, *or even to respond to defendants' arguments*. Instead, Alvis forces the Townsends to continue defending claims that the company cannot even attempt to justify.

Fourth, in its response to defendants' motion to dismiss, Alvis adds numerous factual allegations that it failed to include in its complaint. In particular, Alvis includes the speculation and hearsay of Robert A. Turner in an attempt to save the company's tortious interference claims. As shown below, Turner's "evidence" is highly misleading and cannot support a claim of tortious interference.

In sum, this Court lacks jurisdiction, and Alvis fails to state any claim upon which relief can be granted. Controlling cases directly contradict several of Alvis's claims, and all of the claims are barred by the First Amendment. Alvis is understandably unhappy that the Townsends have exposed what they believe are Alvis's flawed products and bad business practices. Unfortunately for Alvis, the law protects such speech and provides the company no legal means of halting it. Simply put, Alvis is abusing this Court to try to silence lawful criticism. Merely requiring the Townsends to defend this harassing and expensive litigation would only further Alvis's goals and chill free speech on the Internet. This Court should dismiss for lack of personal jurisdiction and failure to state a claim.

I. THIS COURT LACKS PERSONAL JURISDICTION OVER THE TOWNSENDS.

Alvis has failed to allege sufficient contacts between the Townsends and North Carolina to support this Court's jurisdiction over them. In fact, the Fourth Circuit rejected Alvis's jurisdictional argument in *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002).

Like the plaintiff in *Young*, Alvis cites *Calder v. Jones*, 465 U.S. 783 (1984), to argue that a website gives rise to jurisdiction wherever it predictably causes harm. To this argument, the Fourth Circuit unequivocally responded, "*Calder* does not sweep that broadly[.]" *Young*, 315 F.3d

at 262. *Young* held that even when a publication interests people in a particular state and predictably harms someone in that state, the state's courts lack jurisdiction over the publisher unless the publisher *targeted* the state. In *Calder*, for example, the forum state provided the defendant's largest subscription base, 465 U.S. 785, and, more importantly, was "both the focal point of the story and of the harm suffered." *Id.* at 789; *see also Young*, 315 F.3d at 263-64.

There is no question that the Townsends' website does not target North Carolina and that North Carolina is neither the focal point of the Townsends' story nor of any alleged harm. If there is any focal point to the Townsends' website, it is Georgia, where the couple's own experiences occurred. However, the website also features testimonials from customers in Illinois and discussion forums open to comments from anyone in the world. In this sense, it is difficult to say that the website has *any* focal point.¹ Moreover, because the site targets a national audience, North Carolina courts would lack jurisdiction even if North Carolina were the focal point of alleged harm from the site. *See Falwell v. Cohn*, 2003 WL 751130 (W.D. Va. Mar. 4, 2003) (rejecting jurisdiction where website was aimed at a national audience rather than the forum state in particular, even where forum state was focal point of harm). But North Carolina is not even the focal point of the site's alleged harm. Again, the Townsends primarily report their experiences with a Georgia contractor, and the Illinois families report experiences with Illinois contractors. Alleged harm is therefore felt primarily in Georgia and Illinois, if at all. Moreover, Alvis avers that it operates in a total of 29 states. *See* Plaintiffs' Response in Opposition to Motion to Dismiss of Defendants ("Opposition Memorandum" or "Opp. Mem.") 19; *see also* Opp. Mem. 12 ("Application of the products of Alvis is performed

¹The natural jurisdiction for this litigation is, of course, Georgia. The Georgia courts have general jurisdiction over the Townsends and special jurisdiction over alleged harm from their website. Georgia is also a more appropriate location for this litigation because most of the evidence regarding the Townsends' statements is at their home in Georgia or in the possession of Spray on Siding of North Georgia.

by independent dealerships *around the country*, including in North Carolina) (emphasis added). Therefore, in addition to Georgia, Illinois, and North Carolina, alleged harm is spread across the 26 other states in which Alvis dealers operate.

Not surprisingly, Alvis's jurisdiction argument is light on law and devoid of relevant facts. Alvis spends four pages reciting boilerplate law and citing *Calder* in precisely the manner that the Fourth Circuit rejected in *Young* without mentioning, much less attempting to distinguish, *Young* or *Falwell*. Opp. Mem. 2-5. Then, Alvis embarks on a ten-page factual campaign in an attempt to convince the Court to ignore controlling law. Opp. Mem. 5-11. Unfortunately for Alvis, all of the facts it alleges are either irrelevant (those at Opp. Mem. 5-9) or are squarely insufficient to support jurisdiction under *Young* (those at Opp. Mem. 9-14).

The Court should dismiss out of hand Alvis's assertions regarding the Townsends' warranty and the Townsends' comments about the Better Business Bureau and potential litigation. Opp. Mem. 5-9. Those allegations cannot give rise to jurisdiction in this case because they have nothing to do with Alvis's claims. Specific personal jurisdiction obtains only over activities that form the basis of the plaintiffs' cause of action. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). Alvis does not, and cannot, allege any harm or any violations of law from the Townsends' discussion of their warranty with an Alvis employee or from the Townsends' informing people of their rights to file Better Business Bureau complaints and to talk to lawyers. Therefore, those allegations cannot form the basis of jurisdiction. *Id.*

Alvis's remaining factual allegations amount to an attempt to establish that the Townsends' website primarily targets North Carolina and causes harm in North Carolina. Opp. Mem. 9-14. Those allegations—that North Carolinians (like people in dozens of states) view the Townsends' website and engage in discussion on it, that the Townsends advertised on Google, and that the website caused Alvis to lose one North Carolina dealership—are plainly insufficient to establish

jurisdiction under *Young*.

Long-arm statutes were enacted to provide state residents a remedy against out-of-state manufacturers who do business in the state. In fact, the plain text of the North Carolina jurisdictional statute provides personal jurisdiction over out-of-state actors for in-state harms only if they do *business* within the state of North Carolina. *See* N.C. Gen. Stat. § 1-75.4(4). The attempt in this case by a national company to hale Georgia consumers into the company's own courts is a perversion of the law of personal jurisdiction. There is simply no reason for the Townsends to imagine they would be haled into the courts of another state over a controversy that began with harm to them at their own doorstep. This Court should dismiss for lack of personal jurisdiction.

II. THIS COURT SHOULD DISMISS ALVIS'S TRADEMARK CLAIMS.

Alvis's trademark claims fail for nearly every reason possible. First, Alvis has no common-law trademark on the generic industry term "spray on siding," and that term is not the dominant portion of Alvis's registered trademark. Second, the Townsends' speech and activity is noncommercial fair use, protected by the First Amendment and tangential to trademark law. Third, Alvis has failed to allege facts showing any likelihood of confusion. Finally, even if Alvis had alleged such facts, the law permits some confusion incident to fair use.

Trademark law has several purposes, but the purpose relevant to this case is the protection of mark holders against those who would take advantage of the owners' good will for their own benefit. *See, e.g., Coca-Cola Co. v. Purdy*, 382 F.3d 774, 777 (8th Cir. 2004). The Townsends use Alvis's marks not to confuse anyone or to benefit from Alvis's goodwill, but for precisely opposite reasons—to identify Alvis as the subject of their commentary, as expressly approved in *CPC International, Inc. v. Skippy Inc.*, 214 F.3d 456, 462 (4th Cir. 2000), and to criticize the company, also as approved in *CPC. Id.* One look at the Townsends' website demonstrates that there is zero possibility that it will create confusion as to the origin of goods and services. Finally, the

Townsend's are not using Alvis's marks in business and are not profiting from their use—they are simply engaging in fair use of the marks to engage in protected speech. In sum, the present controversy has nothing to do with trademark law. Alvis is simply abusing the courts in an attempt to silence its critics.

A. Alvis Cannot Claim a Common-Law Trademark in the Term “Spray on Siding,” and that Term Is Not the Dominant Portion of Alvis’s Registered Trademark.

Much of Alvis's trademark claim fails because the company has failed to allege facts giving rise to a common-law trademark in the term “spray on siding” or facts giving rise to a finding that the term “spray on siding” is the “dominant portion” or “salient feature” of Alvis's registered trademark.

The term “spray on siding” is entitled to no trademark protection because it is generic or, at best, merely descriptive: “[N]o matter how much money and effort the user of a generic term has poured into promoting the sale of its merchandise and what success it has achieved in securing public identification, it cannot deprive competing manufacturers of the product of the right to call an article by its name.” *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976); *see also Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984) (explaining that “descriptive” terms, which fare marginally better than generic terms in the trademark hierarchy, are entitled to virtually no protection). Even a term which was once fanciful, and therefore entitled to the utmost trademark protection, may become generic over time and lose its protected status. *Id.* at 9 (citing *Haughton Elevator Co. v. Seeberger*, 85 U.S.P.Q. 80 (1950), in which the coined word “Escalator,” originally fanciful, or at the very least suggestive, was held to have become generic).

Because it merely describes a product, the term “spray on siding” has never been fanciful. Rather, it is a textbook example of a *generic* term because it merely describes the “genus” of a product (spray on siding) instead of its actual “species” (*Alvis's* spray on siding). *See Abercrombie*,

537 F.2d at 9 (“A generic term is one that refers, or has come to be understood as referring, to the genus of which the particular product is a species.”). Press accounts commonly use “spray on siding” as a generic term. *See* Exhibit F. And dealers of spray on siding distinct from Alvis employ the term “spray on siding” to describe themselves and their products. *See* Exhibit G (website of Spray on Siding of Virginia, an independent dealer of TEXCOTE, a spray on siding product manufactured by Textured Coatings of America). In fact, the United States Patent and Trademark Office (“PTO”) has repeatedly rejected the use of “spray on siding” as a trademark. Thus, for example, when Alvis first sought to register the mark “Alvis Spray on Siding” as a trademark for “coatings for interior or exterior applications,” Levy Affidavit, Exhibit A, the PTO changed the class of goods to which the mark would apply to “coatings in the nature of a spray on siding for interior and exterior applications,” Levy Affidavit, Exhibit B, and required Alvis to expressly disclaim any exclusive right to use “SPRAY ON SIDING” apart from the mark as shown. *Id.* Having expressly accepted that ruling, Levy Affidavit, Exhibit C, Alvis is now estopped from arguing to the contrary. Similarly, when Alvis submitted a new application seeking to register the mark “spray on siding,” Levy Affidavit, Exhibit D, the PTO rejected that trademark as merely descriptive. Levy Affidavit, Exhibit E (“The examining attorney refuses registration on the Principal Register because the proposed mark merely describes the goods.”). Although Alvis has submitted further material in an attempt to rescue its application, unless and until the PTO authorizes such a trademark, the preclusive impact of the previous PTO ruling and of Alvis’s acceptance of that ruling should continue to control this case.

By using a general, descriptive term to name its product, Alvis willingly took the risk that it would be unable to register the term and that others would be able to use it freely and even confusingly. *See KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, No 03-409, Slip Op. at 9, 543 U.S. ___, 2004 WL 2804921, at *6 (Dec. 8, 2004) (holding that the Lanham Act does not

deprive even commercial actors of the use of descriptive words and that resulting confusion is “a risk the plaintiff accepted”). Therefore, Alvis cannot prevent the Townsends from using the term.

For similar reasons, “spray on siding” is not, and cannot be, the “dominant portion” or “salient feature” of Alvis’s registered trademark: “[A] descriptive word can never constitute the dominant part of a mark.” *Pizzeria Uno*, 747 F.2d at 1530. Moreover, the PTO required Alvis to disclaim the phrase “spray on siding,” see Levy Affidavit, Exhibit B, and the disclaimed portion of a trademark cannot be considered dominant. *Pizzeria Uno*, 747 F.2d at 1530. Rather, the word “Alvis” is the dominant portion of Alvis’s stylized trademark because it appears in larger and more conspicuous typeface than the phrase “spray on siding.” *Id.* at 1533; see also *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922, 936 (4th Cir. 1995). Finally, courts only inquire whether a portion of a trademark is “dominant” when determining the likelihood of confusion between two or more marks. See *Pizzeria Uno*, 747 F.2d at 1527, 1529-30 (assessing the likelihood of confusion between “Taco Uno” and “Pizzeria Uno”); *Lone Star Steakhouse*, 43 F.3d at 933-37 (assessing the likelihood of confusion between “Lone Star Cafe,” “Lone Star Steakhouse & Saloon,” and “Lone Star Grill”). Here, the Townsends do not claim a trademark. Therefore, there is no occasion to compare the likelihood of confusion between two or more marks, and the dominance inquiry is wholly irrelevant.

Alvis does not, and cannot, allege facts giving rise to a common law trademark in the term “spray on siding” or a finding that the term is the dominant portion of Alvis’s registered trademark. Therefore, it cannot prevent the Townsends from using the terms “spray on siding” or “spray siding.” This Court should reject as facially frivolous the portion of Alvis’s claims that is based on those terms.

B. The Townsends Engage in Non-Commercial Fair Use and Are Therefore Protected by the First Amendment and Immune from Trademark Law.

For over two months, Alvis intimidated and harassed the Townsends with the breathtaking, frivolous demand that this Court order the Townsends never to speak about Alvis again. *See* Complaint at 15-16; Amended Complaint at 19. Now that the Townsends are represented by counsel, Alvis finally concedes that the couple has some First Amendment right to comment on the company, Opp. Mem. 22,² and it apparently abandons its claims insofar as they implicate the Townsends' noncommercial speech. *Id.*³ Unfortunately for Alvis, it has thus conceded all its trademark claims: All of the Townsends' speech is protected consumer commentary, and none of it is commercial. Alvis has failed to plead facts giving rise to a finding that the Townsends made a "use in commerce" of Alvis's marks "in connection with goods and services." Therefore, the trademark law does not apply to the Townsends. *See* Def. Mem. 13-15.⁴

²Alvis's acknowledgment that the First Amendment bars a large portion of the relief sought in its complaints suggests that the company knowingly sought, in a bad-faith attempt to harass and intimidate the Townsends, relief that it knew no court would ever grant.

³Alvis does not dispute defendants' argument that the Lanham Act is expressly limited to avoid chilling protected consumer commentary. Since defendants amply advanced the argument in their initial memorandum, Def. Mem. 13-15, and since Alvis concedes the point, Opp. Mem. 22, defendants do not rehash the arguments here. However, defendants write briefly to address Alvis's curious citation of a 1977 district court case, *Interbank Card Association v. Simms*, 431 F. Supp. 131 (M.D.N.C. 1977), for the proposition that "the First Amendment does not grant carte blanche rights to use another's registered trademark." Opp. Mem. 22. First, the Townsends are not seeking "carte blanche rights" to use Alvis's marks. They assert only their right, recognized by the Lanham Act and the Fourth Circuit, to use Alvis's marks to engage in fair use consumer commentary. *See* 15 U.S.C. § 1115(b)(4); *CPC*, 214 F.3d at 462. Second, if *Interbank* held that the First Amendment cannot provide a defense to a trademark action because no government action is involved, that holding is clearly invalid because an injunction is surely government action. *See, e.g., CPC*, 214 F.3d at 462 ("Contrary to CPC's assertions, there is no reason to deny full First Amendment protection to Skippy.").

⁴Alvis's state-law claims for unfair and deceptive trade practices and unfair competition likewise fail because the Townsends' use is noncommercial fair use, protected by the First Amendment. *See* Def. Mem. 13-20 & n.3.

1. Alvis's Factual Allegations Regarding "Use In Commerce" Have No Relationship to the Law.

Alvis does not dispute that *PETA* is wholly distinct on the "use in commerce" requirement. *See* Opp. Mem. 22-27 (omitting discussion of *PETA*, much less a rebuttal of defendants' argument). In *PETA*, the defendant conceded that he had made a "use in commerce" of *PETA*'s marks, and the Court did not dwell on the issue. Therefore, neither the parties to this proceeding nor this Court know all the characteristics of his website relevant to that inquiry. However, the opinion identifies two major factors: The defendant used *PETA*'s precise mark to draw traffic to a website that provided over 30 direct links to commercial goods and services, and he offered to sell *PETA* a domain name which consisted exclusively of *PETA*'s own mark. Neither of those blatant uses in commerce is present here. Nor is any other legal basis for finding that Alvis's marks were used in commerce.

Alvis therefore argues that the Townsends make a "use in commerce" through five spurious arguments that have no basis in, and often directly contradict, the law. Below, defendants enumerate Alvis's specific assertions and respond to them:⁵

a. Alvis argues the Townsends' website is commercial because a company registered the site's domain name. Opp. Mem. 23-24. That assertion is twice removed from any basis in the law. First, the commercial company that registered the Townsends' domain name does not engage in any speech on the Townsends' website. Alvis fails to explain how mere registration of a domain name by a third party renders the Townsends' speech commercial. (Alvis apparently believes that a newspaper editorial is commercial speech because a commercial company owns the newspaper on

⁵On a motion to dismiss, Alvis is limited to the allegations in its complaint. This Court should not even consider, much less accept as true, the extensive factual allegations Alvis advances for the first time in its Opposition Memorandum. However, as even Alvis's new allegations fall far short of providing any basis for trademark liability, defendants are happy to discuss them.

which it is printed. That is plainly not the law.) Second, even if the company that registered the domain name had produced some content, there is zero precedent for the proposition that speech is commercial merely because a commercial company is the speaker. The law is exactly the opposite: Even commercial companies may engage in noncommercial speech. *See, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65-68 (1983) (determining whether speech is commercial based upon the nature of the speech, not the identity of the speaker). Indeed, in *Taubman v. WebFeats*, 319 F.3d 770 (6th Cir. 2003), all of the domain names at issue were registered to a business, “WebFeats,” which also created both the websites at issue. WebFeats’ status as a business did not render its websites commercial. *Id.* at 774-76.

b. Alvis claims the Townsends’ website is commercial because the Townsend have paid Google to display links to their site prominently. Opp. Mem. 24-25. Again, Alvis contradicts the law. The Townsends’ ads draw visitors, not to engage in any kind of commercial activity, but rather to hear the Townsends’ story. No law suggests that speech is commercial merely because one advertises it. (In fact, the Supreme Court has explicitly held that even paid advertising is not necessarily commercial speech. *See New York Times v. Sullivan*, 376 U.S. 254, 265-66 (1964).) If Alvis were correct, then every charitable organization that engages in advertising or solicitation would become a commercial speaker entitled to lessened First Amendment protections, which is plainly not the law. Additionally, the Fourth Circuit has expressly approved the use of trademarks to identify the object of commentary or criticism. *CPC*, 214 F.3d at 462. That holding would have little value if it did not include the right to identify the object of commentary in advertisements or promotions of the commentary.⁶

⁶Likewise, Alvis’s claims for unfair competition under the Lanham Act fail because the Townsends plainly do not use Alvis’s marks “in commercial advertising or promotion.” 15 U.S.C. § 1125(a). The Townsends do not engage in any commercial advertising or promotion. Their advertising is purely noncommercial.

c. Alvis claims that the Townsends “tolerate and even encourage” Alvis’s competitors to post messages, some of which are “blatant advertising.” Opp. Mem. 25-27. First, Linda Townsend’s affidavit attests that she polices and removes advertising when she finds it. See Aff. of Linda Townsend ¶ 11. Second, Linda Townsend provides, at no profit to herself, a noncommercial forum for speech. Even if other parties attempt to use Alvis’s marks in commerce to sell their own goods or services, the Townsends themselves have never done so. That *others* have attempted to use the forum for commercial purposes does not render the *Townsends’* speech commercial or render them liable under trademark law.⁷ Third, even assuming *arguendo* that the competitors’ speech constitutes commercial advertising, and even assuming further that the speech violates the trademark law (which it emphatically does not because competitors are permitted to advertise their own products and to criticize others’), this Court would be mistaken to hold the Townsends liable for infringement based on third-parties’ comments. Such a holding would drastically chill free speech: No consumer would ever endeavor to host an Internet forum to discuss products for fear that participants might hijack the forum and render the host liable for other people’s violations.

d. Alvis cites links from the Townsends’ website to discussion boards on other websites. Again, Alvis finds no support in the law for a novel assertion—this time that linking to someone else’s noncommercial commentary can render one’s own speech commercial. Alvis’s hook is that the discussions happen to appear in forums hosted by commercial websites and happen to appear next to advertising. Opp. Mem. 27. The first problem with Alvis’s assertion is that the Townsends have actually avoided exposing people to advertisements. Rather than merely linking to comments

⁷Even Alvis’s quote from one of Linda Townsend’s postings proves the opposite of the company’s argument. Alvis accuses Townsend of soliciting advertising, yet quotes her *discouraging* advertising and inviting substantive criticism instead. She writes, “**Don’t** just tell us that you now have a better product, tell us what you found wrong with Alvis Spray On Siding!” Opp. Mem. 26.

on other forums, the Townsends have copied the comments onto their own forum. A link to the original is provided, but it is superfluous. There is no reason to think anyone follows the link other than perhaps to verify quickly that the Townsends rendered the comment faithfully and did not fabricate it. Second, the Townsends link only to *discussions*.⁸ Even if those discussions were commercial, Alvis cannot cite any law for the proposition that referring to a commercial discussion renders one's own discussion commercial. (If that were the case, all consumer discussion of advertising would be commercial—precisely the opposite of the holding in *CPC*, 214 F.3d at 462.)

Of course, the speech to which the Townsends link is not even commercial itself, unless one agrees with Alvis's implicit assertion that speech is rendered commercial by the mere presence of advertising on a web page on which it appears. That suggestion is baseless as a matter of law (Alvis cites none) and absurd as a matter of common sense: Alvis would apparently argue that a newspaper editorial is commercial if advertising also appears on the editorial page, and that conversation on city buses and public benches is commercial whenever the buses and benches have advertising on them. That is plainly not the law.

e. Finally, Alvis cites the fact that the Townsends solicit donations for their legal defense. Opp. Mem. 28. Again, Alvis cites no law, and its position is laughable. The company has resorted to pointing out the fact that people have offered the Townsends' money to defend themselves from Alvis's attack, which is a situation that Alvis itself created. The argument's ingenuity is matched only by its circularity: Alvis has sued the Townsends, alleging that their website is commercial.

⁸Alvis misleads the Court by attaching as exhibits web pages to which the Townsends do not even link. As discussed, the Townsends copied messages from *BobVila.com* and *OldHouse.com* so that Internet users would not have to visit those sites at all, but included links to the messages to show their origin. Even if a user clicks on one of those links, it takes the user only to a page that displays the message that was copied. Rather than providing the Court the pages to which the Townsends actually link, Alvis attaches the *home pages* of *BobVila.com* and *OldHouse.com*. See Opp. Mem. Exhibit J. Alvis has done so in order to mislead the Court into believing that the Townsends linked directly to those commercial home pages when they have not.

Why is it commercial? Because the Townsends have raised money to defend themselves from Alvis's lawsuit. Unfortunately for Alvis, trademark law is not so absurd.

2. Alvis Has Failed to Plead Facts Supporting Its Claim that the Townsends Use Alvis's Marks "In Connection with Goods and Services."

Because Alvis cannot establish that the Townsends use Alvis's marks "in commerce," this Court need not inquire into whether they use the marks "in connection with goods and services." Below, however, defendants respond to Alvis's arguments on the point.

PETA's standard for using marks "in connection with goods and services" on the Internet requires that the defendant either (1) prevented users from obtaining or using the plaintiff's goods and services, or (2) connected his or her own website to others' goods and services. 263 F.3d at 365. Alvis does not claim that the second prong applies to the Townsends' website. *See* Opp. Mem. 28-30 (arguing only that the Townsends' website hinders traffic to Alvis's). Therefore, defendants limit their discussion to the first prong.

The *PETA* defendant's website hindered traffic to *PETA's* in several ways, none of which is present here. There, the defendant's domain name comprised the plaintiff's precise trademark, "PETA"—no more and no less—in an effort to steal people away from *PETA's* website. Furthermore, his site did not contain a prominent disclosure stating that it was not *PETA's* official site; nor did it contain a prominent link to *PETA's* site. Users who typed in *peta.org* with expectation of finding *PETA's* page "mistakenly access[ed]," *PETA*, 263 F.3d at 366, a strange web page that was not *PETA's*, did not explain that it was not *PETA's*, and did not facilitate efforts to find *PETA's*. Therefore, users might have given up on finding *PETA's* site due to "anger, frustration, or the belief that [it] did not exist." *Id.* The Townsends' website is different for several significant reasons:

First, there is no reason to believe that people who seek Alvis's official website will

accidentally land on the Townsends' website. This is because there is no reason to believe someone seeking Alvis's website will guess that Alvis's domain name is the term "spray siding" rather than something closer to Alvis's actual name or marks. Users will more likely guess *alvis.com* or *alvissprayonsiding.com*. See, e.g., *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135 (9th Cir. 2002) (explaining that Internet users searching for a company's Web site often assume that the domain name of a particular company is the company name or trademark followed by ".com.") (citing *Brookfield Communications, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1045, 1055 n.18 (9th Cir.1999)). To illustrate, an Internet user searching for the website of Apple Computer, Inc. will not type *computer.com* into a browser. She will type *apple.com*, *applecomputer.com*, or *applecomputers.com*. In an even easier case, someone looking for PETA's website will naturally type *peta.org* rather than *animalrightsgroup.org*. The same was true in the cases on which *PETA* relied, which concerned the domains *plannedparenthood.com* and *thebuffalonews.com*. See *Planned Parenthood Federation of America, Inc. v. Bucci*, 42 U.S.P.Q.2d 1430, 1997 WL 133313 (S.D.N.Y.1997); *OBH, Inc. v. Spotlight Magazine, Inc.*, 86 F. Supp. 2d 176 (W.D.N.Y. 2000). Here, in contrast, the Townsends' domain name does not contain Alvis's name or its precise marks. Thus, it is very unlikely that users will mistakenly access the Townsends' website when seeking Alvis's. In fact, the Townsends' domain name is substantially different from Alvis's marks when viewed in the context of the Internet, where users are sophisticated enough to know that very small differences in domain names matter. See *Entrepreneur Media*, 279 F.3d at 1146-47 (finding that the domain *entrepreneurpr.com* was not confusingly similar to plaintiff's ENTREPRENEUR mark and noting that, in the Internet context, "consumers are aware that domain names for different Web sites are often quite similar . . . and that very small differences matter").

Second, the Townsends' page includes a prominent link to Alvis's website, which actually *facilitates* traffic there. See Def. Mem. 24 (citing *Taubman*, 319 F.3d at 777). If a user seeking

Alvis were to type *spraysiding.com*, the Townsends' website would immediately tell her where to reach Alvis's site and provide a link. This is more helpful than her landing on a blank page with a cryptic and unhelpful message such as "www.spraysiding.com could not be found." *See id.* In fact, there is zero possibility that a user who accidentally types in the Townsends' domain will "fail to continue to search for [Alvis's] home page" out of "anger, frustration, or a belief that Alvis's home page does not exist." *PETA*, 263 F.3d at 365-66. That is because the search has ended: The user need only click on a prominently displayed link on the Townsends' website. The only reason a visitor to the Townsends' site who originally sought Alvis's might not subsequently visit Alvis's is that the user was persuaded by the Townsends' constitutionally protected consumer commentary. There is no basis in the law for finding that speech is made "in connection with goods and services" for trademark purposes because it is persuasive. *PETA* only provides for such a finding of use "in connection with goods and services" where the defendant's speech inhibits visitors to a trademark holder's website by confusing or frustrating them.⁹

C. Alvis Has Failed to Allege Facts Showing that the Townsends' Website Creates a Likelihood of Confusion and, Even If Some Confusion Were to Exist, the Law Expressly Permits It.

The Court need not reach the issue of likelihood of confusion because, as a matter of law, the Townsends' speech is protected consumer commentary that does not constitute the use of marks "in commerce" and "in connection with goods and services." However, even if the trademark law were to apply to the Townsends' speech, Alvis has failed to meet its burden of alleging facts that

⁹Defendants believe that *PETA* errs in conflating the "in connection with goods and services" and "likelihood of confusion" inquiries. *PETA* deems a domain name a use "in connection with goods and services" primarily because it is confusing, then holds that the same domain name causes a likelihood of confusion. Defendants believe that the use of confusing domain names should be relevant *only* to the likelihood of confusion. However, defendants argue within the framework established by *PETA*. Therefore, defendants' arguments regarding use in connection with goods and services are also relevant to assessing the likelihood of confusion.

meet the legal standard for showing a likelihood of consumer confusion.¹⁰ It is telling that Alvis spends just over a page discussing likelihood of confusion, *see* Opp. Mem. 30-32, when that issue is the heart of the company's claims. Even if all the factual allegations in Alvis's Amended Complaint and the extraneous allegations in its Opposition Memorandum were taken as true, those facts provide no evidence of confusion as a matter of law. Moreover, even if Alvis were able to allege some amount of confusion, the Supreme Court has held that some confusion is permissible as a matter of law.

1. Alvis's Speculation that the Townsends' Website May Confuse Some Internet Users Is Baseless and, in any Event, Some Confusion Is Legally Permissible.

In discussing the likelihood of confusion, Alvis again relies on *PETA*—and again, the relevant facts of this case are very different from those in *PETA*. Foremost, the defendant in *PETA* conceded that his domain name, *peta.org*, created a likelihood of confusion because it comprised PETA's precise mark. 263 F.3d at 366. Here, as discussed above, Alvis has failed to allege such initial confusion because the Townsends' domain name is a general, descriptive term, and because Internet users will be unlikely to guess that Alvis's domain name is something other than the company's precise name or trademark. *See supra* § II.B.2.

After conceding that users would initially be confused, the *PETA* defendant argued only that the content of his website would alleviate the confusion. The court rejected that argument because it determined that confusion regarding the source of the defendant's web page would only dissipate after users read enough of it to realize that it was a parody. *Id.* at 366-67. *See also Fairbanks*

¹⁰The Supreme Court recently clarified that the burden is on the plaintiff to prove confusion, and the defendant need not prove an absence of confusion: “[A]ll the defendant needs to do is leave the factfinder unpersuaded that the plaintiff has carried its own burden on that point.” *KP*, Slip Op. at 7, 543 U.S. ___, 2004 WL 2804921, at *5; *see also id.* (“[A] look at the typical course of litigation in an infringement action points up the incoherence of placing a burden to show nonconfusion on a defendant.”).

Capital Corp. v. Kenney, 303 F. Supp. 2d 583, 589-90 (D. Md. 2003) (finding “by clear and convincing evidence” that it was “highly likely” that people visiting the defendant’s website would be confused regarding its origin “for several moments”). The Townsends’ website is different. Even if the site’s domain name were to create a possibility of initial confusion—even if, for example, it were named *alvissprayonsiding.com*—the content of the website would immediately dispel the confusion. Upon loading the page, users immediately read the title, “Sprayed-On Review - Look Before You Buy!” and phrases such as, “Sprayed-On Review,” “This site is not affiliated with Alvis, Inc. or Alvis Coatings, Inc. or any of their dealers,” and “The official site for Alvis Spray On Siding is located at *sprayonsiding.com*.”¹¹ Thus, even if a user were to type the Townsends’ domain name when seeking Alvis’s website, that user would immediately know that she had not reached Alvis’s website, and she would be provided a helpful link.

Finally, even if the Townsends’ domain name were to cause initial confusion, and even if the website did not dispel it immediately, the Supreme Court has held that some amount of confusion is permissible as a byproduct of fair use. *See KP*, Slip Op. at 9, 543 U.S. ___, 2004 WL 2804921, at *6 (“[S]ome possibility of consumer confusion must be compatible with fair use[.]”). Because the Townsends’ use of Alvis’s marks is fair use (they use Alvis’s marks to identify the company as the object of commentary, as expressly approved in *CPC*), they would not violate trademark law even if they were to engender some confusion. This is particularly true in the case of a *descriptive* term such as “spray siding” or “spray on siding”: “If any confusion results, that is a risk the plaintiff accepted when it decided to identify its product with a mark that uses a well

¹¹The Townsends’ website has always made clear that it is not Alvis’s official website. Alvis misleads the court when it states that the Townsends’ site previously claimed it was Alvis’s official site because it stated, at the bottom of the page, “The Official Site of Alvis Spray on Siding.” Opp. Mem. 21-22. As is common on the Internet, that phrase was a *link* to Alvis’s official page. Therefore, it appeared in a different color from other text and, by its mere existence, it announced that the Townsends’ page was not Alvis’s official website.

known descriptive phrase.” *Id.*¹²

Regarding a likelihood of confusion, Alvis only limply argues, “It is reasonable to conclude that some Internet users who believed that www.spraysiding.com was Alvis’ official website never reached the actual website[.]” Opp. Mem. 31-32. Such casual and opportunistic speculation flatly contradicts the facts: The website’s domain name, title, prominent disclaimer, prominent link, and critical content make it wholly *unreasonable* to conclude that a user seeking Alvis’s site would accidentally land on the Townsends’; that a user would think, even for a moment, that the Townsends’ website was Alvis’s official website; or that a user would fail to reach Alvis’s site from the Townsends’. In any event, even if Alvis’s speculation were correct, it is meaningless as a matter of law: Fair use may permissibly result in some confusion.¹³

2. Alvis’s Allegations of “Actual Confusion” Fail to Show a Likelihood of Confusion as a Matter of Law, and the Law Permits Such Confusion Anyway.

In addition to its speculation discussed immediately above, Alvis cites two facts as

¹²This case is different from *PETA* on the question of fair use because the Townsends used Alvis’s marks to identify the subject of their commentary, as expressly approved in *CPC*. *CPC* did not protect the *PETA* defendant because his website was not about PETA; instead, he stole PETA’s Internet traffic and promoted a fictitious organization called People Eating Tasty Animals. However, to the extent that his website was truly parody (and thus, fair use), *KP* signals that *PETA* was wrongly decided. *PETA* found a likelihood of confusion based on the short-lived confusion that inheres in parody. But *KP* makes clear that because parody is permissible fair use, then some amount of resulting confusion must be tolerated. See *KP*, Slip Op. at 9-10, 543 U.S. ___, 2004 WL 2804921, at *6-8. Likewise, *Fairbanks* was wrongly decided because it held the defendant’s fair use to be infringing based on a likelihood of confusion lasting only “several moments.” See 303 F. Supp. 2d at 589-90.

¹³In its Amended Complaint, Alvis alleges that consumers will be confused by the Townsends’ use of Alvis’s marks in their Google advertisement. Amended Complaint ¶ 24. The Townsends rebutted that allegation in their initial memorandum, Def. Mem. 22 n.6, but Alvis did not respond. See Opp. Mem. 30-32 (no mention of the Google advertisement when discussing the likelihood of confusion). Alvis argues only that the use of the marks in Google renders the Townsends’ use a “use in commerce,” see Opp. Mem. 24-25, and has apparently abandoned the argument that it causes confusion.

supposedly showing *actual confusion*: That a man named Rex Jones allegedly decided not to contract with Alvis after reading the Townsends' website, Opp. Mem. 13-14, 30-31,¹⁴ and that one Utah Alvis dealer accidentally listed the Townsends' website in an Internet advertisement. Amended Complaint ¶ 23. These allegations do not help Alvis establish a likelihood of confusion. They do the opposite.

In alleging actual confusion, Alvis cites just one of seven factors used in assessing the likelihood of confusion. *See Pizzeria Uno*, 747 F.2d at 1527 (considering “a) the strength or distinctiveness of the mark; b) the similarity of the two marks; c) the similarity of the goods/services the marks identify; d) the similarity of the facilities the two parties use in their businesses; e) the similarity of the advertising used by the two parties; f) the defendant’s intent; [and] g) actual confusion.”). The factors emphatically show that the Townsends’ use does not cause a likelihood of confusion. First, because the Townsends do not claim any trademarks, do not use such marks to identify goods or services similar to Alvis’s, are not in business, and do not engage in commercial advertising, there is no possibility of “similarity of the two marks,” “similarity of the goods/services the marks identify,” “similarity of the facilities the two parties use in their businesses,” or similarity in advertising. Second, the Townsends’ intent also weighs in their favor: Rather than attempting to confuse anyone as to the source of goods and services, they use Alvis’s marks to *identify* the sources of certain goods and services to engage in fair use commentary.¹⁵ Finally, Alvis’s allegation of just two instances of actual confusion militates against the likelihood of confusion. *See Petro*

¹⁴Again, because this allegation does not appear in the Amended Complaint, the Court need not consider it. However, defendants discuss it because it helps to illustrate the frivolousness of Alvis’s claims.

¹⁵Alvis claims that the Townsends’ intent is irrelevant to this Court’s analysis. Opp. Mem. 22-23. In fact, the Fourth Circuit holds expressly to the contrary: “The intent of the defendant is sometimes a major factor in infringement cases.” *Pizzeria Uno*, 747 F.2d at 1535. And good faith is an important part of fair use under the Lanham Act. *See* 15 U.S.C. § 1115(b)(4).

Stopping Centers, L.P. v. James River Petroleum, 130 F.3d 88, 95 (4th Cir. 1997) (“[T]he company’s failure to uncover more than a few instances of actual confusion creates a presumption against likelihood of confusion in the future.”).¹⁶

In any event, even the two instances Alvis cites do not show actual confusion. First, neither shows confusion on the part of the “ordinary consumer,” *PETA*, 263 F.3d at 366, because each involves a dealer or potential dealer. Second, neither shows confusion “as to the source or sponsorship of goods,” *id.*, because the Joneses and the Utah dealer knew precisely whose goods they were contemplating. Third, neither shows any confusion *at all*: Rex Jones’s wife Marcia declares that she knew she was reading about Alvis on a critical website and was not confused about the site’s sponsorship. *See* Declaration of Marcia Jones, attached as Exhibit H.¹⁷ (Moreover, Mrs. Jones did not “stumble upon” Alvis’s website while seeking Alvis’s. She specifically sought, and found, information about Alvis produced by other parties. *See id.*) In the case of the Utah dealer, it is plain from viewing the advertisement he posted that it was simply a mistake rather than the result of any confusion. A few lines after providing the URL of the Townsends’ website, the very same advertisement provides, in larger, bold print, the URL of Alvis’s official website. *See* Opp.

¹⁶Some courts also consider the degree of care consumers use in selecting a good or service, with a high degree of care decreasing the likelihood of confusion. *See Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 638 (6th Cir. 2002). Circumstances in which consumers use a high degree of care include expensive or unusual purchases. *Id.*; *see also Heartsprings, Inc. v. Heartspring, Inc.*, 143 F.3d 550, 557 (10th Cir. 1998). Because spray on siding is an expensive and unusual purchase, consumers are likely to exercise a high degree of care when considering it and are unlikely to be confused when making decisions about it.

¹⁷ Alvis again goes beyond the bounds of this case’s 12(b)(6) posture. It relies on allegations that do not appear in its complaint and even attempts to introduce supporting evidence. This Court should not consider those allegations or the purported evidence. Defendants introduce evidence themselves only to dispute Alvis’s misleading, improper evidentiary showing. The Declaration of Robert A. Turner is phrased to insinuate that the Joneses sought Alvis’s page and ended up viewing the Townsends’ through pure accident. Mr. Turner has no personal knowledge regarding how the Joneses found the Townsends’ website, and his insinuation directly contradicts Marcia Jones’s report of her own actions. *See id.*

Mem. Exhibit G. That makes clear that the advertisement’s provision of the Townsends’ website was at best a mistake—probably a typo—and in no way signifies that the Utah dealer believed the Townsends’ website was Alvis’s official site. Nor is it proper to allow Alvis to benefit from a mistake made by one of its own dealers in printing the URL for Alvis’s website. Moreover, if any consumer had visited the Townsends’ site based on the advertisement, she would have *immediately* realized she was visiting the wrong site and could have followed a link to the proper location.

Finally, as discussed above, even if some small confusion resulted from the Townsends’ website, it is precisely this sort of *de minimis* confusion that the Supreme Court approved in *KP*. Any time speakers accurately use trademarks to identity a general class of products or to identify a particular company as the object of commentary, it is conceivable that some confusion might arise. Such confusion does not transform fair use into infringement. *KP*, Slip Op. at 9-10, 543 U.S. ___, 2004 WL 2804921, at *6-8.

III. ALVIS’S DEFAMATION CLAIMS ARE EACH INADEQUATELY PLED OR BARRED BY THE COMMUNICATIONS DECENCY ACT, OR BOTH.

Alvis does not contest the Townsends’ two crucial assertions regarding Alvis’s defamation claims. First, the Communications Decency Act of 1996 (CDA), immunizes the Townsends from liability for the comments of others on their web site. *See* Def. Mem. 24-25 (citing 47 U.S.C. § 230). Instead of responding to this argument, Alvis blusters ahead and continues to call the Townsends “publishers” of those comments, Opp Mem. 34-35, thus employing the precise legal term the CDA bars Alvis from using to hook the Townsends for defamation liability. *See* Def. Mem. 24-25. All that remains, then, is potential liability for the Townsends’ own statements. However, federal and North Carolina law both require Alvis to cite with specificity any allegedly defamatory remarks, *see* Def. Mem. 24 n.8 (citing *Andrews v. Elliot*, 426 S.E.2d 430, 432 (N.C. App. 1993); *Bobal v. RPI*, 916 F.2d 759, 763 (2d Cir. 1990); *Asay v. Hallmark Cards*, 594 F.2d 692, 699 (8th Cir. 1979), and

Alvis has failed to cite a single statement.¹⁸

These two points defeat Alvis's defamation claims completely, and Alvis does not even respond to them. Therefore, this Court should deem Alvis's claims abandoned, conceded, or waived. *See, e.g., Hall v. Tyco Int'l Ltd.*, 223 F.R.D. 219, 255-56 (M.D.N.C. 2004) ("In his Response Brief, Plaintiff does not dispute Tyco Electronics' contentions [that certain claims were without merit and were barred by statute]. Therefore, the Court deems Plaintiff to have abandoned these claims."); *see also Taylor v. City of New York*, 269 F. Supp. 2d 68, 75 (E.D.N.Y. 2003) ("Federal courts may deem a claim abandoned when a party moves for summary judgment on one ground and the party opposing summary judgment fails to address the argument in any way.").

Instead of responding to the Townsends' primary assertions, Alvis argues only whether it must plead actual malice. Alvis's arguments are moot for the above reasons, but defendants answer them. First, Alvis argues that it need not allege actual malice because it alleges libel *per se*, and malice is presumed in libel *per se*. Opp. Mem. 35-36. This argument fails because an allegation of libel *per se* creates a presumption of *common-law malice* rather than *actual malice*. Common-law malice means spite or ill-will. *See Fuisz v. Selective Ins. Co. of America*, 61 F.3d 238, 243-44 (4th Cir. 1995). Actual malice is publication with a "high degree of awareness of [the publication's] probable falsity," *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), or while "the defendant in fact entertained serious doubts as to the truth of [the] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). "The critical difference between common-law malice and constitutional malice, then, is that the former focuses on the defendant's attitude toward the plaintiff, the latter on the

¹⁸Alvis identifies paragraphs 29-32 of its Amended Complaint as alleging defamatory remarks. Opp. Mem. 35. Those paragraphs only contain one statement by Linda Townsend, *see* ¶ 32, and none by Alan Townsend. The statement by Linda Townsend is an imperative (*e.g.* "Do X," or "Don't do Y"). It is therefore devoid of any truth or falsity and therefore cannot form the basis of a defamation claim. *See Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 897 (2002) (allegedly defamatory statement must be false).

defendant's attitude toward the truth." *Konikoff v. Prudential Ins. Co. of America*, 234 F.3d 92, 98-99 (2d Cir. 2000). Alvis is therefore mistaken in thinking that pleading libel *per se* excuses the constitutional requirement of pleading actual malice.

Next, Alvis argues that it is not a public figure and that its business practices are not a matter of public concern. Opp. Mem. 36-39. Alvis is again mistaken. First, the public obviously has an interest in the products and practices of a major corporation that operates in 29 states. *See Amway Corp. v. Procter & Gamble Co.*, 346 F.3d 180, 184-85 (6th Cir. 2003) (affirming district court's holding that Amway Corporation is a public figure); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1116 (8th Cir. 1999) (noting that Minnesota law considers every corporation a "public figure"). Second, Alvis made itself a public figure by thrusting itself into the public eye with aggressive promotional efforts in over half of the United States. *See Nat'l Found. for Cancer Research, Inc. v. Council of Better Bus. Bureaus, Inc.*, 705 F.2d 98, 101 (4th Cir.) (organization that "thrust[s] itself into the public eye" through "massive solicitation efforts" is a public figure), *cert. denied*, 464 U.S. 830 (1983); *New Life Center, Inc. v. Fessio*, 229 F.3d 1143, 2000 WL 1157800, at *7 (4th Cir. 2000) (unpublished) (citing with approval *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 272-74 (3d Cir. 1980) (finding that plaintiff who launched an extensive campaign advertising its product was a limited-purpose public figure)).

Finally, Alvis argues that it has alleged actual malice. It has not. Alvis alleges only "reckless disregard of the truth," *see* Amended Complaint ¶ 47, whereas actual malice requires the reckless disregard of *probable falsehood*. That is, the plaintiff must allege that the defendant published statements with knowledge that they were probably false, or at least serious doubt as to their truth. *Garrison*, 379 U.S. at 74; *St. Amant*, 390 U.S. at 731. Alvis makes no such allegation. It alleges, at most, that the Townsends recklessly failed to investigate other people's comments before posting them. As discussed in defendants' initial brief, posting comments without

investigating their truth is a far cry from posting comments with actual knowledge or a high degree of awareness that they are probably false. *See* Def. Mem. 26-27 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974); *Carr v. Forbes, Inc.*, 259 F.3d 273, 282 (4th Cir. 2001)).

IV. ALVIS’S TORTIOUS INTERFERENCE CLAIMS FAIL BECAUSE THEY DUPLICATE ALVIS’S DEFAMATION CLAIMS AND BECAUSE THEY ARE PLED INSUFFICIENTLY.

Alvis’s tortious interference claims duplicate its defamation claims and therefore fail for the same reasons. Holding otherwise would allow plaintiffs to avoid, through artful pleading, the constraints placed on defamation liability. *See, e.g., Amway Corp. v. Procter & Gamble Co.*, 346 F.3d 180, 185 n.7 (6th Cir. 2003); *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 196 (8th Cir. 1994).

Defendants write only to address Alvis’s new, specific tortious interference allegations. Again, Alvis introduces new facts that do not appear in its Amended Complaint and need not be considered by the Court: That the Townsends’ website prevented Alvis from contracting with a man named Rex Jones. Opp. Mem. 34. Alvis raises its potential relationship with Rex Jones in an attempt to rescue the tortious interference claim from the company’s failure to plead it properly in the Amended Complaint. The company failed to allege that (1) the Townsends unjustifiably induced a third party to refrain from entering into a contract with Alvis; and that (2) the contract would have ensued but for the interference. *Cameron v. New Hanover Mem’l Hosp., Inc.*, 58 N.C. App. 414, 440, 293 S.E.2d 901, 917 (1982). In fact, Alvis neglected to cite any contract at all in the complaint, *see* Amended Complaint ¶¶ 56-60, and this Court should therefore dismiss for failure to state a claim.

However, defendants are happy to discuss Alvis’s potential contract with Rex Jones. Setting aside the assumption that consumer free speech can *ever* constitute “unjustifiable” “interference” with business relations, Alvis cannot show that the Townsends interfered with Alvis’s and the

Joneses' relationship, much less that Alvis's contract with the Joneses would have ensued "but for" the Townsends' alleged interference. Declarations submitted by Marcia and Rex Jones show that the couple were not close to having a deal with Alvis, and that they would never have contracted with Alvis without first researching the company and viewing previous work done with its products. *See* Declaration of Marcia Jones, attached as Exhibit H; Declaration of Rex Jones, attached as Exhibit I. Rather than the Townsends' interfering with the Joneses, Marcia Jones actively sought out information on the Internet such as that offered by the Townsends. *See* Exhibit H. Moreover, the Joneses based their decision not to contract with Alvis not only on the Townsends' website, but also on several other factors, including (1) reports about Alvis on WRAL-TV in Raleigh; (2) the evasive responses they received from an Alvis dealer; (3) concerns about the constraints of being an Alvis dealer; and, perhaps most important, (4) dissatisfaction with a house to which Alvis Spray on Siding had been applied, which persuaded them that Alvis's product was probably not worth the price. *See* Exhibits H & I.

This Court should dismiss Alvis's claim for tortious interference.

CONCLUSION

For the foregoing reasons, this Court should dismiss for lack of personal jurisdiction and failure to state a claim.

Respectfully submitted,

Edward G. Connette, Jr. (NC Bar No. 9172)
1001 Elizabeth Ave., Suite 1-D
Charlotte, NC 28204-2234
Phone: (704) 372-5700
Fax: (704) 377-2008

David Arkush (IN Bar No. 2470349)
Paul Alan Levy (DC Bar No. 946400)
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
Phone: (202) 588-1000

Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 13th day of December, 2004, he caused to be served by United States Mail, first class postage prepaid, the foregoing *Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss* and *Affidavit of Paul Alan Levy* on the following:

Jason M. Sneed
S. Benjamin Pleune
Alston & Bird, LLP
Bank of America Plaza
101 South Tryon Street, Suite 4000
Charlotte, NC 28280-4000

David Arkush

December 13, 2004