

**IN THE SUPREME COURT  
STATE OF MISSOURI**

Issiah Andra,	)	
	)	
Appellant / Plaintiff,	)	
	)	
vs.	)	<b>Case No. SC93984</b>
	)	
Left Gate Property Holding Inc.,	)	
	)	
Respondent / Defendant.	)	
	)	

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**APPELLANT’S SUBSTITUTE REPLY BRIEF**

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**On Appeal from the  
Circuit Court of St. Louis County,  
the Honorable Barbara W. Wallace,  
circuit court case no. 11SL-CC004312**

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## POINT I

**Respondent is subject to the jurisdiction of Missouri Courts, in that respondent's tortious conduct brings it under the ambit of section 506.500 R.S.Mo., and the long-arm statute is in harmony with the requirements of due process.**

Respondent has conceded that its conduct satisfies Missouri's long-arm statute, and, in turn, Missouri's long-arm statute expands the court's jurisdictional reach to the maximum extent permitted by the Due Process Clause of the Constitution. *Substitute Brief of Respondent*, p. 9; *JCW ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. 2009). The issue in this case is whether the invocation of Missouri's long-arm statute is within the bounds of due process. See *Helicopteros Nacionales de Colombia, SA v. Hall*, 466 U.S. 408 (1984); *Burger King v. MacShara*, 724 F.2d 1505 (11<sup>th</sup> Cir. 1984). This is why Missouri employs a second analytical step after finding that a defendant is within the ambit of section 506.500 R.S.Mo., which states "Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby *submits...to the jurisdiction of the courts of this state.*" *Section 506.500 R.S.Mo.* (emphasis added). The tension between this language and the Due Process Clause is also why the Missouri Supreme Court has explained that the second step of the analysis is to be evaluated on a case-by-case basis: to ensure that the application of the long-arm statute is appropriate under the specific circumstances. *Chromalloy American Corp. v. Elyria Foundry Co.*, 955 S.W.2d 1, 5 (Mo. banc 1997). Therefore, once the court confirms that the use of the long-arm statute in this

case is in harmony with the requirements of due process, then Respondent is subject to the jurisdiction of Missouri courts.

A number of decisions of the Supreme Court of the United States have elucidated the concept of due process in the context of jurisdiction. *See, e.g., International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros Nacionales de Colombia, SA v. Hall*, 466 U.S. 408 (1984); *World-Wide Volkswagen Corp v. Woodson*, 444 U.S. 286 (1980). The Supreme Court began by explaining that due process is satisfied when there are “certain minimum contacts ... such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *International Shoe Co.*, 326 U.S. at 316. Unfortunately, while there is a vast body of subsequent case law about “minimum contacts,” discussion is sparse in the context of the internet or eBay in particular. Even the Supreme Court recently noted that “whether and how a defendant's virtual ‘presence’ and conduct translate into ‘contacts’ with a particular State” have been left “for another day.” *Walden v. Fiore*, 571 U.S. \_\_\_, 134 S. Ct. 1115, 1125 [n9] (2014).

In its Substitute Brief, Appellant presented no less than eight separate points of contact (discussed *infra*) between Plaintiff Issiah Andra and Defendant Left Gate Property Holding Inc., beginning with and not limited to, as Respondent suggested, placing the vehicle for sale on eBay. Even without more, that act alone is sufficient “minimum contact” with Missouri to confer jurisdiction. First, Respondent admitted its understanding that consumers in Missouri can view the vehicles it lists on eBay. *LF p.*

169 (*Affidavit of Ed Williams* 16:1-3). As one court described, “Internet forums such as eBay expand the seller's market literally to the world and sellers know that, and avail themselves of the benefits of this greatly expanded marketplace.” *Dedvukaj v. Maloney*, 447 F.Supp2d 813, 820 (E.D.Mich. 2006). Thus, purely by its use of eBay, Respondent “has continuously and deliberately exploited” the Missouri market, such that “it must reasonably anticipate being haled into court there.” *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984). In that case, the defendant’s only connection to the forum state of New Hampshire was circulating magazines. *Id.* at 772. Nevertheless, the Supreme Court found “no unfairness” in calling the defendant to answer there, given that its product was “aimed at a nationwide audience.” *Id.* at 781. In the same way, Respondent has used eBay to develop a \$500 million business that ships to all states and indeed “all over the globe.” *LF p. 169* (16:6-8); (20:24). Just as with the distribution of Hustler magazine through the mail, Respondent’s use of eBay allows it to widely disseminate purchase information.

What Respondent fails to grasp in its Substitute Brief is that targeting all 50 states does not allow it to claim that it hasn’t targeted any *specific* state. It is more accurate to say that Respondent markets to all 50 states *simultaneously* via its eBay listings. If this Court was to adopt Respondent’s argument, the legal effect would be to create a blanket exemption from liability for any out-of-state seller that uses the eBay website and claims it markets to more than one state, not targeting Missouri specifically. This is precisely the concern expressed in the Amicus Brief of the Attorney General. To protect Missouri

consumers, both private litigants and the Attorney General should not be barred from bringing an action in Missouri, lest outside companies be given free reign to commit fraud and deception on eBay without effective recourse. *Amicus Brief of the Attorney General*, p. 11-12.

In light of its knowledge and control of using eBay for broad commercial activity, the cases cited by Respondent about its lack of control over the highest bidder are ultimately irrelevant. The “minimum contact” already occurs at the time when Respondent lists its vehicle on the eBay website. Respondent understands and exploits the large eBay consumer base, and will deliver literally “anywhere” to within the United States. *LF p. 171 (22:21-25); 170 (18:12-14)*. In this sense, Respondent “purposefully directed [its] activities at the residents of the forum.” *Burger King Corp.*, 471 U.S. at 472. In the *Burger King* case, the Supreme Court found the lower court had jurisdiction because the defendant had eschewed the option of operating locally, opting to “reach out beyond” his office and “create continuing relationships and obligations with citizens of another state” *Id.* at 473, 480. Not only has Respondent chosen to operate globally, via the eBay website, but Respondent also issued one or more warranties to Mr. Andra in Missouri. *LF p. 90, 92 (First Amended Petition, paragraphs 16, 38)*. Based on “the foreseeability that is critical to due process analysis,” Respondent’s conduct and connection with Missouri is such that it should reasonably anticipate being haled into court here. *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

Additionally, due process is satisfied because Respondent's use of eBay is "reasonably calculated" to reach Missouri, as well as other states. *Id.* at 295. In that case, the state of Oklahoma had stretched its long-arm statute to include certain goods that merely could possibly be used there since the products were designed to be mobile. *Id.* at 290. But the case at bar does not present a situation where Plaintiff bought a vehicle from Defendant in Texas and then moved it through or to Missouri. There is no doubt that Respondent knew they were selling to a Missouri resident, with a Missouri address, who was going to register the vehicle in Missouri. *LF p. 171 (26:7-15, 27:2-8); 173 (31:2-16)*. Missouri would not be exceeding "its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State" *World-Wide Volkswagen Corp.*, 444 U.S. at 297-298. In this case, the record is clear that Respondent does "regularly sell cars" to Missouri customers or residents and that Respondent "serve or seek to serve" the Missouri market. *Id.* at 297; *LF p. 169 (14:15-19)*. Defendant absolutely could have and should have anticipated being sued in Missouri.

The purported forum selection clause, which is otherwise not at issue in this case, does in fact evince just such anticipation by Respondent that it was likely to be sued in other states. If Respondent did not believe that such suits were forthcoming, and that they might very well be subject to jurisdiction in other states, then there would be no need to try to include such a provision. The clause is there precisely because Respondent

recognized it could and would be sued elsewhere. Respondent's argument that the forum selection clause indicates its expectation that it would not be sued in Missouri is more accurately formulated as Respondent's unreasonable expectation that a forum selection clause would be *enforced*. In fact, the Missouri Supreme Court has declared it unreasonable to enforce a forum selection clause when the case involves Chapter 407, as this case does, because public policy is "so strong that parties will not be allowed to waive its benefits." *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 498 (Mo. 1992). Respondent's argument is therefore unpersuasive, in that the presence of the clause actually suggests Respondent reasonably anticipated the eventuality of being haled into Court in Missouri by lawsuits such as the one brought by Petitioner.

Over and above the use of eBay, Appellant identified several other points of contact that went effectively unaddressed by Respondent.

- Appellant spoke with employees of Left Gate on the day of purchase.
- Appellant later received additional paperwork in Missouri from Respondent, including the Motor Vehicle Retail Installment Sales Contract, Federal Buyer's Guide, and documents to arrange shipping.
- Appellant signed documents at his home in Humansville, Missouri.
- Appellant received a telephone call from Respondent explaining the shipping process and quoting the price.

- Respondent helped arrange to have the vehicle delivered in Missouri to Appellant.
- After the vehicle was delivered, Appellant spoke with employees at Left Gate at least twice about the ongoing nonconformities and need for repairs under warranty.
- Respondent issued one or more warranties to Appellant at the time of sale.

*Appellant's Substitute Brief*, p. 14-15 (internal citations omitted). The nature, quality, and quantity of these contacts are more than the *de minimis* requirements of the “minimum contacts” analysis. *Bryant v. Smith Interior Design Group, Inc.*, 310 S.W.3d 227, 233 n[4] (Mo. *banc* 2010). Indeed, Respondent’s suggestion that contact with Appellant *prior* to his use of the “Buy It Now” option on eBay would somehow alter the analysis actually supports the proposition that the actual correspondence between the parties was sufficient to satisfy due process. The emphasis of the *Guffey* decision was not the *timing* of seller reaching out to the purchaser, but the “*totality* of contacts between” them. *Guffey v. Ostonakulov*, 2014 OK 6, \_\_\_ P.3d \_\_\_ (Ok. 2014) (Appendix p. A32-A33)(emphasis added). The primary and central holding of that case is that the use of eBay “cannot serve as a shield...when otherwise sufficient minimum contacts exist so that the exercise of jurisdiction is reasonable.” *Id.* (Appendix p. A34).

At least one other court has applied a traditional minimum contacts test to an out-of-state defendant conducting business over eBay and found that personal jurisdiction was appropriate. *Malcolm v. Esposito*, 63 Va. Cir. 440 (Va.Cir.Ct. 2003). In that case, the plaintiff, a Virginia resident, won an auction to purchase a car on eBay from a defendant located in Connecticut. After the auction ended, the parties contacted each other by email and phone and the defendants arranged to ship the car from California to Virginia. *Id.* The plaintiff subsequently sued the defendants in Virginia for fraud and breach of warranty. *Id.* Just as in that case, jurisdiction is proper here because Respondent is a commercial seller of the item and had anticipated and conducted many transactions to many different states through eBay. *Id.* at 446.

Embedded with the very term “minimum contacts” is an acknowledgment that contact need only be “the least possible quantity, amount or degree.” *Frasher v. Spradling*, 743 S.W.2d 109, 110 (Mo.Ct.App. W.D. 1988). The fact is Respondent regularly solicits, via the eBay website, and transacts business in Missouri, and thus Respondent’s focus on the specific percentage of sales to Missouri residents is misplaced. In one case, after a finding that the tortious acts subsection of the Florida long-arm statute applied, the court performed a minimum contacts analysis and ruled that the defendant’s sales to Florida through its website, which amounted to 2.4 of its overall sales and totaled \$2,101.83, was nevertheless sufficient to subject the defendant to jurisdiction there. *Renaissance Health v. Resveratrol Partners*, 982 So. 2d 739, 742 (Fl. 4<sup>th</sup> DCA 2008) Another similar Florida case found that 4.35% of total sales supported a finding that the

defendant has sufficient minimum contacts with Florida to satisfy the due process requirement of specific personal jurisdiction. *Caiazza v. American Royal Arts Corp.*, 73 So.3d 245, 258 (F. 4<sup>th</sup> DCA 2011). Respondent may only admit to 0.86 percent of its total transactions as involving vehicles being sold to Missouri residents, but with \$500 million in annual sales, that equates to over four million dollars in revenue derived from Missouri yearly. Given Respondent's business model and total annual income derived from internet sales, and Missouri in particular, traditional notions of fair play and justice are not offended by confirming jurisdiction here.

## **POINT II**

**Missouri can and should exercise specific jurisdiction over Respondent, in that the nature and quality of Respondent's Internet contacts with Missouri support a finding of minimum contacts pursuant to the Zippo test.**

Appellant acknowledges that not every internet business should necessarily be subject to jurisdiction in Missouri, but adamantly advocates that the law does not exempt internet businesses from Missouri jurisdiction. Solving the dilemma of just what e-commerce contacts subject a business to jurisdiction and what internet conduct does not subject a business to jurisdiction is where the *Zippo* test can play an important role. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D. Pa. 1997). Under the *Zippo* guidelines, maintaining a "passive" website will not subject a business to jurisdiction in other states. *Id.* On the other hand, the use of an "active" website, that expands the marketplace for a business by allowing it to enter into contracts with entities in other

states, will be subject to jurisdiction there. *Id.* This test provides needed clarity and guidance for creating business models and maintaining the all-important web presence. As pointed out in Appellant’s Substitute Brief, the test was not narrowly designed to analyze a website but rather illuminates the extent of contacts a business creates with a forum state by engaging in e-commerce.

There is little doubt that eBay is sufficiently interactive on the “sliding scale” such that personal jurisdiction can be constitutionally exercised. Courts applying the *Zippo* test to auctions conducted over online intermediaries have established that such transactions meet the purposeful availment prong of the traditional minimum contacts test.” *See Dedvukaj v. Maloney*, 447 F. Supp. 2d at 819; *Hinners v. Robey*, 336 S.W.3d 891, 898 (Ky. 2011); *Crummey v. Morgan*, 965 So.2d 497, 501–02 (La.Ct.App. 2007). As Appellant has explained, *supra*, the control exercised by Respondent is the use of eBay itself, knowing the scope of its audience is in all 50 states, and the fact that it doesn’t have control of which one of those states any given customer is located does not alter the analysis. Appellant anticipated Respondent’s objection about its lack of control over the location of its consumers, and noted that this argument was considered and rejected in the *Zippo* decision. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. at 1126. “This argument misconstrues the concept of fortuitous contacts embodied in *World-Wide Volkswagen...* [Defendant] repeatedly and consciously chose to process Pennsylvania residents’ applications and to assign them passwords. [Defendant] knew that the result of

these contracts would be the transmission of electronic messages into Pennsylvania. The transmission of these files was entirely within its control.” *Id.*

Respondent seeks to avoid the result compelled by the *Zippo* test, as it would then be subject to jurisdiction in Missouri, but Respondent fails to offer an alternative. Evaluating “minimum contacts” in the Internet Age is challenging, and the fact that there is no other test that has been so widely discussed and adopted in the case law is a testament to its resiliency. To provide a context, hundreds of reported cases have cited the *Zippo* decision, including at least 28 reported cases in 2014 alone. Respondent’s inability to point to another relevant test speaks to the difficulty of crafting such a test. Not every court has adopted the *Zippo* test, as Respondent points out, but the *Zippo* test is useful and consistent with existing minimum contacts analysis.

Moreover, by using the “sliding scale” framework, the full panoply of internet-based contacts of a business can be analyzed equally and in the same manner. *Id.* at 1124. One aspect of due process is that “persons similarly situated in relation to a statute be treated the same.” *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. 1992). A case-by-case approach to the Missouri long-arm statute may be necessary, and helpful, but the same test should be used for each analysis. The *Zippo* decision offers a test accompanied by an increasing body of case law that can produce predictable and consistent results for both litigants and the courts.

### POINT III

**Missouri can and should exercise general jurisdiction over Respondent, in that Respondent's use of eBay is a broad vehicle for commercial activity in Missouri.**

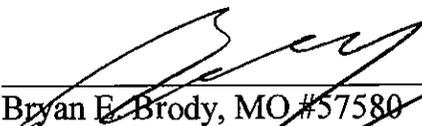
In reviewing the case law about *specific* jurisdiction in the context of e-commerce, Appellant noted that many decisions looked at whether the businesses were using the internet as a “broad vehicle for commercial activity,” a question also suited to an analysis of the existence of *general* jurisdiction. *See, e.g., Furminator, Inc. v. Wahba*, Case No. 4:10CV01941 AGF, 2011 WL 3847390 (E.D.Mo. 2011). Most decisions focus on specific jurisdiction, as guidance on general jurisdiction from the Supreme Court of the United States has been sparse. Recently, the Supreme Court held that general jurisdiction can be appropriate in places outside of its place of incorporation or principal place of business. *Daimler AG v. Bauman*, 134 S.Ct. 746, 761 n[19] (2014). This Court has not discussed the standard for establishing general jurisdiction over a nonresident, which is why Respondent cites only to cases from the 9<sup>th</sup> and 10<sup>th</sup> circuits. Nevertheless, Respondent has ongoing, continuous corporate operations with Missouri residents, via the eBay website. The same arguments, presented *supra*, about why placing a vehicle for sale on eBay is sufficient to find “minimum contacts” should also be sufficient to find “general jurisdiction.” In this case, the record shows that the percentage of cars sold to Missouri is approximately equal to the percentage that would be expected of all of Respondent's sales were equally distributed among the fifty states. *LF p. 169* (14:15-19). Respondent has been making these sales for at least the past five years. *Id.* (14:15).

Respondent's continuous corporate operations within Missouri are "so substantial and of such a nature as to justify" the exercise of jurisdiction over Left Gate Property Holding Inc. in Missouri.

**CONCLUSION**

Appellant, Issiah Andra, respectfully requests that this Court reverse the decision of the Trial Court and Court Appeals, hold that Respondent, Left Gate Property Holding Inc., is subject to the jurisdiction of Missouri courts, and remand the case for further proceedings in accordance with the Missouri Rules of Civil Procedure.

Respectfully submitted,



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**IN THE SUPREME COURT  
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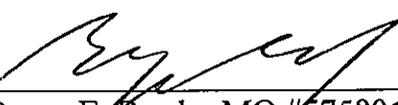
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	)	
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	)	
Respondent.	)	

**CERTIFICATE OF COMPLIANCE**

The undersigned certifies that this Appellant’s Substitute Reply Brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b).

Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 4238.

Respectfully submitted,

  
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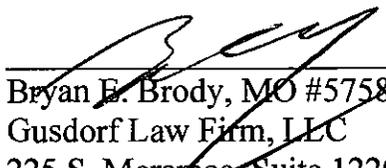
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Respondent.	)	

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that, on this 24<sup>th</sup> day of July, 2014, a true and correct copy of the foregoing Appellant’s Substitute Reply Brief was electronically served upon the attorney for Respondent, Bharat Varadachari, via case.net at the date and time filed, and also emailed to [Bharat.Varadachari@heplerbroom.com](mailto:Bharat.Varadachari@heplerbroom.com), and upon the attorneys for Amicus Curiae via case.net at the date and time filed.

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