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IN THE SUPREME COURT
STATE OF MISSOURI

ISSIAH ANDRA,	)	
	)	
Plaintiff/Appellant,	)	
	)	
v.	)	**Appeal No. SC93984**
	)	
LEFT GATE PROPERTY HOLDING, INC.,	)	
	)	
	)	
Defendant/Respondent.	)	

SUBSTITUTE BRIEF OF RESPONDENT LEFT GATE PROPERTY HOLDINGS, INC.

On appeal from the Circuit Court of St. Louis County
State of Missouri
The Honorable Barbara W. Wallace
Circuit Court Case No. 11SL-CC04312

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INTRODUCTION

This case concerns an issue of first impression in Missouri: whether a nonresident party is subject to personal jurisdiction in Missouri arising out of the sale of a product to a Missouri resident via eBay, a third-party internet auction site. After intentionally and unilaterally electing to purchase a vehicle from a foreign corporation over the internet, Appellant now seeks to maintain a cause of action against Left Gate Property Holding, Inc. ("Texas Direct"), a Texas corporation, in the State of Missouri. Yet, because Texas Direct lacks sufficient minimum contacts with Missouri with respect to either this sale or generally, it is not subject to personal jurisdiction within the state under long-standing principles of law.

Texas Direct is a Texas corporation that has made absolutely no effort to solicit business from Missouri customers. Without Texas Direct promulgating any advertisements in the State of Missouri, having an office or any employees in the State of Missouri, or taking any action to engage in business with residents of the State of Missouri, Appellant consciously reached out to Texas Direct to purchase a vehicle. Appellant now seeks to hold Texas Direct subject to personal jurisdiction in Missouri despite the fact that Texas Direct conducts less than one percent of its total business in the State of Missouri.

To hold Texas Direct subject to personal jurisdiction in Missouri based on this extremely limited and attenuated contact would essentially eradicate all concepts of personal jurisdiction. In today's modern economy, a tremendous amount of business is

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conducted over the internet by businesses and individuals. The selling of products on eBay is commonplace for businesses and individuals alike.

If a party offering a product for sale on the internet is found subject to personal jurisdiction in whichever jurisdiction the purchaser happens to live – despite no showing of any intent to reach the particular forum at issue – all traditional protections previously afforded under principles of personal jurisdiction would essentially be abolished. Moreover, the impact this decision would have on Missouri residents and businesses would be detrimental since it would subject Missouri sellers to the same exposure in other jurisdictions.

While the realities of our modern technology and economy make it easier for parties to conduct business across state lines, the United States Supreme Court has cautioned not to dismiss traditional personal jurisdiction analyses based on such technological advances. *Boschetto v. Hansing*, 539 F.3d 1011, 1019 (9th Cir. 2008) (citing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 293 (1980)). A finding that parties are subject to personal jurisdiction in any forum merely because that entity or individual placed a product for sale online offers no protection to encourage such transactions. Such a finding would subject all parties engaged in business on the internet to jurisdiction in whichever forum the ultimate purchaser happens to reside.

For these reasons, and the reasons set forth in detail below, this Court should affirm the decision of the trial court, holding Texas Direct is not subject to personal jurisdiction in Missouri for this case.

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STATEMENT OF FACTS

Texas Direct operates out of a vehicle dealership facility in Stafford, Texas and sells vehicles on site, through its website and through the online auction site eBay (http://www.ebay.com). (L.F. 167, p. 6:3-21).[1] Issiah Andra ("Appellant"), a Missouri resident, alleges that on or about July 15, 2011, he used the "Buy It Now" option on eBay to enter into an agreement with Texas Direct to purchase a vehicle. (L.F. 89, ¶¶ 4-6).

A. The Purchase

On or about July 15, 2011, Appellant purchased a 2007 GMC Yukon XL Denali from Texas Direct through the online auction site eBay. (L.F. 89, ¶¶ 4-6). Appellant purchased the vehicle by selecting the "Buy It Now" option on the eBay website. (L.F. 89, ¶¶ 4-6). Before the purchase, Appellant had no contact with Texas Direct. (L.F. 89). Appellant discovered the vehicle on eBay and purchased it without being contacted by Texas Direct or having any conversations with Texas Direct. (L.F. 89). Appellant first spoke with a representative of Texas Direct only after he had already clicked the "Buy It Now" option, purchasing the vehicle. (L.F. 90).

The terms of the sale were set out in a Purchase Order agreement signed by Appellant on or about July 18, 2011. (L.F. 45). The Purchase Order provides, in pertinent part:

> In the event of any dispute resulting in litigation regarding the sale of the vehicle herein, including interpretation of the contract, warranty or any

[1] All references to the Legal File are denoted as "L.F."

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> other litigation regarding the transaction, **the parties agree that any suit shall be pursued in Ft. Bend County, Texas**.

(L.F. 45) (emphasis added).

Appellant alleges that after purchasing the vehicle, he began having various problems with the vehicle. (L.F. 90). Without any direction from Texas Direct, Appellant took the vehicle to be repaired on multiple occasions within the State of Missouri. (L.F. 90).

B. The Lawsuit

On or about October 26, 2011, Appellant filed suit against Texas Direct in the Circuit Court of St. Louis County, Missouri, alleging damages arising out of the purchase of the vehicle. (L.F. 6-16). On December 5, 2011, Respondent filed its motion to dismiss for lack of personal jurisdiction and/or subject matter jurisdiction ("Motion to Dismiss"). (L.F. 22-45). The trial court subsequently granted Appellant leave to amend his petition and engage in limited jurisdictional discovery, which consisted of taking the deposition of Ed Williams, Texas Direct's Operations Director. (L.F. 89-100; L.F. 165-175).

In his deposition, Mr. Williams testified that, among other things, Texas Direct does not advertise in the State of Missouri, send employees to inspect vehicles in Missouri, have contracts with repair facilities in Missouri, maintain offices or facilities in the Missouri, or hire employees to work in the State of Missouri. (L.F. 171, p. 24:2-8; L.F. 172, p. 30:3-6; L.F. 174, p. 34:4-6; 35:5-11). Mr. Williams also testified that over the last five years, only 0.86% of Texas Direct's total sales, through websites or otherwise, were made to residents in the State of Missouri. (L.F. 169, p. 14:15-19).

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After further briefing and oral argument, on November 1, 2012, the Honorable Judge Barbara Wallace granted Texas Direct's Motion to Dismiss for lack of personal jurisdiction. (L.F. 202). The court's Order, which was subsequently amended to a judgment, noted that "[t]he Court lacks personal jurisdiction over Defendant. An on-line auction process such as eBay does not rise to the level of purposeful conduct necessary to assert specific personal jurisdiction. See, Sayeedi v. Walser, 835 N.Y.S.2d 840, 844-46 (N.Y. 2007) and cases cited therein." (L.F. 202). Upon entry of judgment in favor of Texas Direct, this appeal ensued. (L.F. 204-209).

Upholding the decision of the trial court, the Eastern District of the Missouri Court of Appeals found that Texas Direct lacked sufficient minimum contacts to support a finding of personal jurisdiction *Andra v. Left Gate Property Holding, Inc.*, ED99334, at *3-4. This appeal followed.

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POINTS RELIED ON

1. **The trial court did not err in granting Texas Direct's motion to dismiss because Texas Direct, a Texas corporation, lacks sufficient minimum contacts to be subject to specific personal jurisdiction in Missouri in accordance with the due process clause of the United States Constitution in that Texas Direct did not purposefully avail itself to Missouri.**

   [Response to Point I of Appellant's Substitute Brief]

   Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985)

   Sayeedi v. Walser, 835 N.Y.S.2d 840 (N.Y. 2007)

   Shrader v. Biddinger, 633 F.3d 1235 (10th Cir. 2011)

II. **The trial court did not err in dismissing Appellant's claims against Texas Direct because Texas Direct is not subject to specific personal jurisdiction in Missouri in that the sliding scale test articulated in *Zippo* is inapplicable to cases involving eBay.**

   [Response to Point II of Appellant's Substitute Brief]

   Action Tapes, Inc. v. Weaver, No. 3:05-cv-1693-H, 2005 WL 3199706 (N.D. Tex. Nov. 23, 2003)

   Boschetto v. Hansing, 539 F.3d 1011 (9th Cir. 2008)

   Sayeedi v. Walser, 835 N.Y.S.2d 840 (N.Y. 2007)

   Zippo Manufacturing Company v. Zippo Dot Com, 952 F.Supp. 1119 (W.D.Pa. 1997).

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III. The trial court did not err in dismissing Appellant's cause of action against Texas Direct based on a lack of personal jurisdiction because Texas Direct is not subject to general personal jurisdiction in the State of Missouri because it has no direct contacts with Missouri, much less the substantial, continuous and systematic contacts required for general jurisdiction.

[Response to Point III of Appellant's Substitute Brief]

Bryant v. Smith Interior Design Group, Inc., 310 S.W.3d 227 (Mo. banc 2010)

Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072 (9th Cir. 2003)

Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984))

Shrader v. Biddinger, 633 F.3d 1235 (10th Cir. 2011)

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STANDARD OF REVIEW APPLICABLE TO ALL POINTS

This Court applies a *de novo* standard of review when reviewing a trial court's order granting a motion to dismiss for lack of personal jurisdiction, as this is a question of law. *Bryant v. Smith Interior Design Group, Inc.*, 310 S.W.3d 227, 231 (Mo. banc 2010). The plaintiff must shoulder the burden of establishing that jurisdiction is proper when jurisdiction is contested. *Id.* The plaintiff bears the burden of establishing that the moving party's contacts with the forum state are sufficient to subject that party to jurisdiction in the forum state. *Id.* Absent such a showing, personal jurisdiction is not established.

The Court will defer to the trial court's determination of credibility and resolution of conflicting facts. *Consolidated Elec. & Mechanicals, Inc. v. Schuerman*, 185 S.W.3d 773, 776 (Mo. Ct. App. 2006). The sufficiency of the evidence, however, is a question of law reviewed independently on appeal. *Id.*

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ARGUMENT

I. The trial court did not err in granting Texas Direct's motion to dismiss because Texas Direct, a Texas corporation, lacks sufficient minimum contacts to be subject to specific personal jurisdiction in Missouri in accordance with the due process clause of the United States Constitution in that Texas Direct did not purposefully avail itself to Missouri.

[Response to Point I of Appellant's Substitute Brief]

Contrary to Appellant's contention, the trial court properly dismissed his claims against Texas Direct because Texas Direct is not subject to specific personal jurisdiction in the State of Missouri. As evidenced by the circumstances of the transaction at issue, Texas Direct lacks the requisite minimum contacts with Missouri to be subject to specific personal jurisdiction within the state. To hold otherwise would violate the due process clause of the Fourteenth Amendment of the United States Constitution, as well as abolish all traditional protections afforded through personal jurisdiction concerns.

Missouri employs a two-step analysis to determine whether personal jurisdiction is proper. *Bryant*, 310 S.W.3d at 231. First, the court must determine whether Texas Direct's conduct satisfies Missouri's long-arm statute, Missouri Revised Statute § 506.500. *Id.* Only if that requirement is met will the court consider whether Texas Direct has sufficient minimum contacts with Missouri to satisfy due process concerns in exercising jurisdiction over Texas Direct. *Id.*

Given the broad scope of Missouri's long-arm statute, Texas Direct does not dispute that the first prong to personal jurisdiction has been satisfied. However, because

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Texas Direct has virtually no contacts with Missouri – much less the minimum contacts required by the due process clause of the United States Constitution – this second requirement to personal jurisdiction has not been met. Therefore, Missouri lacks specific personal jurisdiction over Texas Direct with respect to this claim.

To determine whether sufficient minimum contacts exist, certain relevant factors include: "(1) the nature, quality, and quantity of the contacts with Missouri; (2) the relationship of the cause of action to those contacts; (3) the interest of Missouri in providing a forum for its residents; and (4) the convenience and inconvenience to the parties." *State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828, 835 (Mo. banc 2000). Minimum contacts are evaluated on a case-by-case basis. *Id.* at 834.

A. A nonresident must have sufficient minimum contacts with the State of Missouri by purposefully availing itself to Missouri with the expectation that it may be required to litigate in Missouri in order to be subject to specific personal jurisdiction.

Specific personal jurisdiction over a nonresident exists when the parties' contacts with the forum state with respect to the particular conduct at issue in the lawsuit at hand are sufficient to constitute minimum contacts with the forum state. *Bryant*, 310 S.W.3d at 232-33 (quoting *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 n. 8 (1984)); *see also Lakin v. Prudential Securities, Inc.*, 348 F.3d 704 (8th Cir. 2003). Specific jurisdiction requires that the nonresident defendant purposefully directed its activities at Missouri residents *and* that the claim at issue arose out of or relate to those

activities. *Lakin*, 348 F.3d at 707 (citing *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 473 (1985)).

Traditional, long-standing principles of law hold that nonresidents must have sufficient contacts with the forum state in conformance with the due process clause of the Fourteenth Amendment in order to be subject to personal jurisdiction. *Id.; see also Burger,* 471 U.S. at 471-72 (*citing Int'l Shoe Co. v. Washington,* 326 U.S.310, 319 (1945)) ("The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'").

Due process requires that nonresidents be given fair warning that engaging in a particular activity within a specific forum may subject them to jurisdiction in a foreign jurisdiction. *Id.* (internal citations omitted). A nonresident has fair warning only it if "delivers its products into the stream of commerce with the *expectation* that they will be purchased by consumers in the forum State …" *Id.* at 473 (emphasis added). If not, exercising jurisdiction over nonresidents offends "traditional notions of fair play and substantial justice." *Bryant,* 310 S.W.3d at 232 (citing *Int'l Shoe,* 326 U.S. at 316).

To determine whether a nonresident has sufficient minimum contacts with the forum state, courts focus on whether the nonresident party "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* (quoting *Hanson v. Denckla,* 357 U.S. 235, 253 (1958)). Purposeful availment is necessary to ensure a nonresident is not haled into a jurisdiction as the result of a random, fortuitous or attenuated contact. *Burger King,* 471 U.S. at 475.

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If a nonresident has not purposefully availed itself of conducting activities in the forum state, this requirement to personal jurisdiction is not satisfied, and the nonresident is not subject to personal jurisdiction in the forum state.

In cases involving the internet, a basic problem that arises when "relating such activities directly to the general principles developed pre-internet is that, in a sense, the internet operates in every state regardless of where the user is physically located, potentially rendering the territorial limits of personal jurisdiction meaningless. *Shrader v. Biddinger*, 633 F.3d 1235, 1240 (10th Cir. 2011) (discussing personal jurisdiction for action involving alleged defamatory statements in an email defendant sent to various individuals and posted on a website forum) . If utilizing the internet alone subjects a person to personal jurisdiction in every state in which that information may be accessed, "then the defense of personal jurisdiction, in the sense that a State has geographically limited judicial power, would no longer exist." *Id.* (quoting *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002)). To avoid this result, courts must adapt the personal jurisdiction analysis by emphasizing that the internet user must *intentionally direct* its activities at the forum site. *Id.*

B. Under the facts of this case, Texas Direct did not purposefully direct any activities to the State of Missouri in order to give rise to specific personal jurisdiction.

To be subject to specific personal jurisdiction in Missouri, Texas Direct must have "purposefully directed" its activities at Missouri residents *and* the litigation must be

related to those specific activities. *Burger King*, 471 U.S. at 473. This intent, or *purposeful* availment, is not present under the facts of this case.

Texas Direct simply placed a vehicle for sale on eBay. Texas Direct had no control over eBay's marketing of the auction or the commercial nature of the exchange of information eBay conducted with potential bidders. (L.F. 44, ¶¶ 5-7; L.F. 170, p. 21:10-25; L.F. 171, p. 22:1-25). eBay conducted the auction for a fee and provided information about Texas Direct vehicles to potential customers on a website that it owned and operated. (L.F. 44, ¶¶ 5-7). Texas Direct has *never* directed eBay to actively pursue Missouri residents. (L.F. 170, p. 21:10-25; L.F. 171, p. 22:1-25). Texas Direct does not direct eBay to market its products to Missouri or actively solicit business in Missouri. (L.F. 170, p. 21:10-25; L.F. 171, p. 22:1-25).

Courts have routinely recognized that the seller of an item in an online auction has no control over the location of the highest bidder for purposes of establishing purposeful conduct in the forum state. *See, e.g., Action Tapes, Inc. v. Weaver*, No. 3:05-cv-1693-H, 2005 WL 3199706, at *2-3 n.2 (N.D. Tex. Nov. 23, 2003) (decision applying Texas law and finding no personal jurisdiction over Missouri resident selling products over eBay). Texas Direct had no control over the ultimate purchaser of the vehicle, or even to whom the vehicle was marketed. Texas Direct's alleged conduct with respect to the sale of the vehicle does not constitute "purposeful availment" as required for personal jurisdiction because it did not in any way actively pursue or attempt to solicit business from Missouri

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consumers specifically.[2] Texas Direct's only intent in placing the vehicle for sale on eBay was to reach the highest bidder with no control over the location of that bidder.

In his Substitute Brief, Appellant relies primarily on *Guffey v. Ostonakulov*, 321 P.3d 971 (Ok. 2014) to argue that Texas Direct is subject to specific personal jurisdiction in Missouri. (Appellant's Substitute Brief, p. 15-16). *Guffey*, like this case, concerned personal jurisdiction over a defendant that sold a vehicle to the plaintiff on eBay. *Id.* at ¶ 2. After allegedly having problems with the vehicle, the plaintiff, a resident of Oklahoma, brought a lawsuit in Oklahoma against the seller, a resident of Tennessee. *Id.* The seller sought to dismiss the case, claiming Oklahoma lacked personal jurisdiction. *Id.* However, *Guffey* is not a reliable guide for the Court as it is distinguishable on one crucially important fact.

The seller in *Guffey* did not simply place its product for sale on the eBay site with no control over who purchased that product. Rather, after the seller placed the vehicle for sale on eBay and the plaintiff placed an initial bid, **the seller reached out and contacted the plaintiff to request that the plaintiff contact the seller to negotiate a purchase price**. *Id.* at ¶ 4. (Emphasis added). Though the Oklahoma Supreme Court recognized that the defendant was a regular user of eBay and found that the seller had sufficient minimum contacts with the forum state based on this transaction, it focused on the

[2] This was also the conclusion of the Honorable John A. Ross with respect to Texas Direct's conduct in the sale of its vehicles in the case *Wellington M'gmt Corp. v. Left Gate Property Holding Inc.*, No. 11SL-CC00088, decided June 8, 2011. (L.F. 189-190).

totality of the contacts between the parties related to the sale. *Id.* at ¶ 21. The court specifically noted that the seller "reached out to [the plaintiff] prior to the completion of the bidding process in an attempt to negotiate a sale outside of eBay's bidding process." *Id.*

This case also differs significantly from the United States District Court for the Eastern District of Missouri's decision in *Furminator, Inc. v. Wahba*, 2011 WL 3847390 (E.D.Mo. Aug. 29, 2011). *Furminator* involved a trademark infringement claim, in which the court found specific personal jurisdiction over the out-of-state defendants based, in part, on their interactions with Missouri residents via eBay. *Id.* at *4. The plaintiff was a Missouri resident, claiming that the defendants infringed on the Missouri trademark by selling counterfeit products over eBay. *Id.* In finding specific personal jurisdiction over the defendants on the basis that the Missouri trademark was infringed upon, the court specifically distinguished that from cases where an injured party is the purchaser of a product over the internet "who happens to reside in the forum state." *Id.*

Courts in other jurisdictions that have considered similar transactions have held that they lack personal jurisdiction over nonresident parties transacting business with residents of the forum state through eBay. *See, e.g., Boschetto*, 539 F.3d 1011; *Choice Auto Brokers, Inc. v. Dawson*, 274 S.W.3d 172 (Tx. App. 2008); *Metcalf v. Lawson*, 802 A.2d 1221 (N.H. 2002); *Winfield Collection, Ltd. v. McCauley*, 105 F.Supp.2d 746 (E.D. Mich. July 24, 2000); *Sayeedi v. Walser*, 835 N.Y.S.2d 840 (N.Y. 2007); *Foley v. Yacht Management Group, Inc.*, 2009 WL 2020776 (N.D.Ill. July 9, 2009).

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In *Sayeedi*, for instance, the court held that the nonresident defendant was not subject to personal jurisdiction in New York for a claim arising out of an eBay transaction. 15 Misc.3d 621, (N.Y. Civ. Ct. 2007). The plaintiff in *Sayeedi* filed a lawsuit in New York state court against a Missouri resident who sold an automobile engine to the plaintiff via eBay. *Id.* at 622. The Missouri resident moved to dismiss the suit, arguing the New York state court lacked personal jurisdiction. *Id.* at 623. The court agreed and dismissed the case, finding that the Missouri resident was not subject to jurisdiction in New York. *Id.* at 632.

In considering whether the Missouri defendant had sufficient minimum contacts with the state of New York for purposes of jurisdiction, the court noted that "the majority of [courts considering a single online auction through a third-party intermediary] have held that the usual online auction process does not rise to the level of purposeful conduct required to assert specific jurisdiction." *Id.* at 626. The purposeful availment condition is lacking because "the only intent manifested by the eBay seller is to 'sell to the highest bidder, regardless of identity or location'." *Id.* at 627 (internal citations omitted). If the seller has no authority over the audience to which its particular good is advertised, the sale is merely random and attenuated, not rising to the level of purposeful availment required for due process. *Id.*

The same is true here. Texas Direct simply placed a vehicle for sale through eBay, without making any effort to reach Missouri residents specifically or directing eBay to actively pursue Missouri residents. Without any intent to reach Missouri residents specifically, Texas Direct did not purposefully avail itself to Missouri residents. *See*

Shrader, 633 F.3d at 1245 (finding no specific personal jurisdiction in defamation claim concerning statements posted on internet forum because the forum targeted a community with no particular tie to the forum state).

To hold that Texas Direct purposefully availed itself to Missouri solely because its product was available for purchase by a Missouri resident would contradict the holding in *Schrader* requiring (1) an intentional act; (2) expressly aimed at the forum state; (3) with knowledge that the injury would be felt in the forum state. *Id.* at 1240 (citing *Calder v. Jones*, 465 U.S. 783 (1984)). In this transaction, there is no intentional act aimed at the forum state. Such a holding would defeat any benefit derived from the ability to conduct business via the internet – for both sellers and purchasers. Neither buyer nor seller would have the benefit of engaging in business with parties in other states, if simply offering a product for sale to consumers in any jurisdiction submits that seller to personal jurisdiction in every possible forum. *Id.* at 1241 ("this emphasis on intentionally directing internet content … at the forum state has its grounding in the 'express aiming' requirement the Supreme Court developed in *Calder* to deal with the somewhat analogous question of specific jurisdiction based on content in nationally distributed print media."); s*ee also ALS Scan Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002).

If Texas Direct contacted the Appellant prior to the Appellant exercising the "Buy It Now Option" or if a Texas Direct representative interrupted the eBay auction process to entice Appellant to purchase the product in question (such as what occurred in *Guffey)*, than there may be an argument for specific person jurisdiction, but that did not happen.

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cf. Mcguire v. Lavoie, 2003 WL 23174753, *3 (N.D. Tex. 2003), (finding person jurisdiction in a contract case because **the eBay seller stopped the auction before its conclusion and entered into a directed relationship with the known buyer).** (emphasis added).

The record is clear. There has been no intentional action taken by Texas Direct expressly aimed at the State of Missouri or the Appellant to sell the Yukon XL Denali. There are numerous automobile dealers in the state of Missouri where Appellant could have purchased a vehicle, but the Appellant initiated the purchase from Texas Direct Auto. Appellant has not established the first two required elements for purposeful availment set forth by the United States Supreme Court in *Calder v. Jones*.

C. Texas Direct had no expectation of being required to litigate in Missouri, as evidenced by the forum-selection clause of the Purchase Order Appellant signed.

Due process requires that a party have "fair warning" that it may be subject to personal jurisdiction in another state. *Burger King*, 471 U.S. at 471-72. Thus, a forum may only exercise personal jurisdiction over a nonresident if that nonresident purposefully avails itself to the forum by purposely directing its activities at residents of the forum. *Id.* This ensures a level of foreseeability, a mandatory element for establishing personal jurisdiction. *Id.* at 474. Foreseeability is a *critical* requirement to due process so that a party may "reasonably anticipate" being haled to court within a particular forum based on that party's own conduct. *Id.*

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As further evidence that Texas Direct did not foresee litigating issues relating to Appellant's purchase of the vehicle in the State of Missouri, the Purchase Order contains an express forum-selection clause. This clause states, "[i]n the event of any dispute resulting in litigation regarding the sale of the vehicle herein, … **the parties agree that any suit shall be pursued in Ft. Bend County, Texas**." (L.F. 45) (emphasis added). Appellant, a sophisticated businessperson and CEO of a company, signed this agreement just below this provision. (L.F. 45, 77). Since Appellant agreed to litigate all potential claims arising out of this transaction in Texas, Texas Direct should not have foreseen being forced to litigate in Missouri if Missouri expects its residents to honor duly executed contracts. *Grossman v. Thoroughbred Ford, Inc.*, 297 S.W3d 918 (Mo.App. W.D. 2009) (holding that individual consumer was bound by arbitration clause in agreement he signed with an automobile dealer). Without this requisite foreseeability, Texas Direct is not subject to personal jurisdiction within this forum. *See Burger King*, 471 U.S. at 474.

D. Appellant's unilateral conduct cannot subject Texas Direct to personal jurisdiction in Missouri.

The foregoing cases demonstrate that placing the vehicle for sale on the eBay website simply does not amount to Texas Direct purposefully availing itself to Missouri. It is undisputed that Appellant, of his own volition, solicited and purchased the vehicle from Texas Direct via eBay. (L.F. 89, ¶¶ 4-5, 7). Appellant reached out to Texas Direct and contracted with Texas Direct, despite the fact that Texas Direct did not solicit business in Missouri. Appellant signed the Purchase Order that specifically informed him

that any litigation arising from the sale would be pursued in Fort Bend County, Texas; yet, he now seeks to hold Texas Direct subject to personal jurisdiction in the State of Missouri. (L.F. 45)

Though the person to initiate the contact is not itself outcome determinative, Appellant's unilateral activity cannot satisfy the minimum contacts required for personal jurisdiction over the out of state defendant. *Burger King*, 471 U.S. at 474-75 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). Appellant's unilateral conduct in attempting to repair the vehicle in Missouri also cannot be used to "create" personal jurisdiction, as Texas Direct did not require Appellant to make the repairs in the State of Missouri. If this were true, Appellant could presumably subject Texas Direct to personal jurisdiction in *any* forum in which he chose to have repairs performed – an outcome that does not comply with due process.

Appellant further relies upon Texas Direct's purported contacts with him in the State of Missouri after the sale. Yet, the fact that Texas Direct necessarily was in contact with him after the sale – the sale that Appellant initiated – does not establish that Texas Direct purposefully availed itself of doing business in Missouri. To the contrary, Appellant purchased the vehicle through his own unilateral conduct. Texas Direct had no need to – and, did not – purposely direct itself to or solicit business in Missouri. Any post-sale contacts Texas Direct had with Appellant in Missouri do not evidence any intent to solicit business in Missouri.

Finally, Appellant attempts to rely on the amount of business Texas Direct performs over the course of a year constitute sufficient minimum contacts for purposes of

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personal jurisdiction.[3] Appellant claims that based on the amount of Texas Direct's total annual sales – a fact that is not established by the record – "[i]t is a reasonable conclusion … that [Texas Direct] has sold numerous vehicles to Missouri residents." (Appellant's Substitute Brief, p. 18). The only evidence supported by the record is that *less than one percent* of Texas Direct's total business is with Missouri residents. (L.F. 169, p. 14:15-19). Any other implications by Appellant regarding Texas Direct's business are not before the Court and should not be considered in determining this appeal.

Moreover, assuming that Texas Direct is a large corporation, this fact alone is insufficient to create personal jurisdiction over Texas Direct in Missouri.[4] Texas Direct's size alone does not subject it to jurisdiction in any forum. Rather, it is still required to have purposefully availed itself of the forum in question. Finding personal jurisdiction over Texas Direct based solely on the fact that it is a large corporation that conducts a minute portion of its business with Missouri consumers would render it impossible to determine the criteria by which a nonresident may be subject to personal jurisdiction in any particular forum in future cases. Nonresident entities may fear being subject to personal jurisdiction in Missouri because they are "large" companies, without a means of determining how that status is defined, i.e., the number of total sales, the number of total

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[3] Appellant addresses this as a factor in determining specific jurisdiction, but this issue has more relevance under general jurisdiction.

[4] Appellant addresses this as a factor in determining specific jurisdiction, but this issue has more relevance under general jurisdiction.

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sales via eBay, the number of sales to Missouri residents, the amount of each sale, the number of employees, etc. – facts not contained in the record. Such a holding will turn the purposeful availment requirement into a guessing game for nonresidents, completely eradicating the foreseeability traditionally required.

E. Any interest Missouri may have in providing a forum for its residents is outweighed by the risks of disregarding due process concerns.

Appellant and the Attorney General, in his *amicus* brief, contend that this Court should find that Missouri has personal jurisdiction over Texas Direct because Missouri has a strong interest in regulating this cause of action. Any interest that Missouri may have in subjecting Texas Direct to jurisdiction in Missouri for this case is substantially outweighed by the concerns that will arise if due process considerations for personal jurisdiction are ignored.

Both Appellant and the *amicus curiae* raise concerns about Appellant's claim for violation of the Missouri Merchandising Practices Act ("MMPA"). Both appear to be under the misconception that Appellant will be deprived of this claim if he is not able to pursue it in a Missouri court. They fail to take into account that whether the MMPA applies to the facts of this case is a choice-of-law consideration that is completely unrelated to personal jurisdiction. Nothing would prevent Appellant from pursuing his private cause of action under the MMPA in another forum. Indeed, to hold otherwise suggests that a court in a different jurisdiction is incapable of competently applying Missouri law. Appellant's claim does not disappear if there is no jurisdiction in Missouri. He is simply required to pursue it in a different forum.

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Furthermore, the *amicus* brief raises concerns about the State of Missouri's ability to regulate nonresidents doing business in the State of Missouri. Whether or not these concerns are valid is immaterial, that is not the case before the Court. Whether a party is subject to personal jurisdiction in a particular forum is determined on a case-specific basis. The State's claim may involve different concerns and interests than those presented here: wherein a private citizen is attempting to subject a nonresident to personal jurisdiction even though that citizen consciously sought out and engaged in business with the nonresident.[5] A finding that the court lacks personal jurisdiction over Texas Direct *for this case* does not necessarily imply that the court will *never* have personal jurisdiction

[5] For instance, this Court in *Beer Nuts* considered whether the State of Missouri had personal jurisdiction over a nonresident in a claim brought by the Missouri Attorney General, rather than by a private party. 29 S.W.3d at 835-36. In analyzing personal jurisdiction, this Court considered various factors that were directly relevant to the Missouri Attorney General's claim against the nonresident conducting business within the State of Missouri, such as Missouri's interests in providing a forum for the Attorney General to prosecute a nonresident and in regulating the sale of alcohol. *Id.* While these factors were relevant in providing a forum for the Attorney General's cause of action specifically, that does not mean they would be relevant in a private citizen's claim against that same nonresident. A cause of action brought by the Attorney General differs in significant respect from a cause of action brought by a private party and the interests of the forum necessarily are necessarily different depending on the particular case at issue.

over Texas Direct. As stated, each case must be evaluated based on the specific facts presented.

Finally, to hold Texas Direct subject to personal jurisdiction in Missouri based on the facts presented by this claim will have a detrimental long-term effect on Missouri residents and businesses. If Texas Direct is subject to personal jurisdiction in Missouri merely by placing a product for sale on eBay which is subsequently purchased by a Missouri resident, the same could hold true for Missouri residents placing items for sale on the internet. Courts applying Texas law have reached the opposite conclusion, declining to extend personal jurisdiction over Missouri residents selling products over eBay. *See Action Tapes*, 2005 WL 3199706. That Missouri seller could then be open to jurisdiction in any forum in which a customer purchasing its product resides.

Consider, for instance, a Missouri law firm that has a business website and is also included on certain third-party websites such as Martindale-Hubbell (http://www.martindale.com). Potential clients, including those residing outside the State of Missouri, may utilize these websites to contact the firm and retain the firm's services. Over the course of the representation, the attorney will undoubtedly have communications with that client in the client's state of residency. If a nonresident client reaches out to that Missouri law firm through the contact information provided on Martindale-Hubbell to represent him within the State of Missouri, is that firm then subject to personal jurisdiction in a malpractice suit in the state of the client's residency simply because the client resides there? This is the far-reaching outcome Appellant urges this Court to adopt.

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As the United States Supreme Court has cautioned, traditional jurisdictional analyses should not be upended "simply because a case involves technological developments that make it easier for parties to reach across state lines." *Boschetto*, 539 F.3d 1011, 1019 (9th Cir. 2008). Personal jurisdiction protections should not be dismissed because our modern economy makes it easier for parties to do business across state lines.

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II. The trial court did not err in dismissing Appellant's claims against Texas Direct because Texas Direct is not subject to specific personal jurisdiction in Missouri in that the sliding scale test articulated in *Zippo* is inapplicable to cases involving eBay.

[Response to Point II of Appellant's Substitute Brief]

Appellant also seeks to establish personal jurisdiction over Texas Direct by citing to the sliding scale test articulated in *Zippo Manufacturing Company v. Zippo Dot Com*, 952 F.Supp. 1119 (W.D.Pa. 1997). The test, however, does not fit within the parameters of an online business transaction conducted via an internet auction website such as eBay, as is the case here.

A. The *Zippo* test is inapplicable to cases involving a third-party intermediary such as eBay.

The *Zippo* test is a "sliding scale" test for determining the exercise of jurisdiction by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website. 952 F.Supp. 1119, 1124 (W.D.Pa. 1997). With respect to eBay, however, several courts have correctly recognized that "this mode of analysis makes little sense in the eBay context since eBay, and not the user, controls the interactivity and marketing efforts of the website." *Sayeedi*, 835 N.Y.S.2d at 845; *see also Boschetto*, 539 F.3d at 1018 (noting that the *Zippo* analysis is inapplicable where the sale occurs via eBay because the issue is not whether the court has jurisdiction over eBay); *Metcalf*, 802 A.2d at 1226 ("The *Zippo* test is not particularly helpful in this case, however, because the majority of cases using it are based upon a defendant's conduct

over its own website."); *Action Tapes*, 2005 WL 3199706, at * 2 ("The *Zippo* standard has been applied by this Circuit only to defendants who own or exercise control over the sites in question.").

As these courts have correctly held, the *Zippo* scale examining the level of interactivity on the website in question does not fit in cases involving a sale through a third-party intermediary. The seller of the product, such as Texas Direct, has no control over the level of interaction between the ultimate purchaser and the website at hand. "The sellers and buyers who connect through eBay cannot be said to control eBay's degree of commercial interactivity any more than a buyer and seller at Sotheby's can be said to be responsible for the premises or to control the auctioneer." *Action Tapes*, 2005 WL 3199706, at *2. The issue is not whether this Court has personal jurisdiction over eBay, the party owning and operating the website through which this sale occurred. Thus, the interactivity of the website has no jurisdictional significance, and the *Zippo* test is inapplicable. *See, e.g., Boschetto*, 539 F.3d at 1018.

In urging this Court to adopt the *Zippo* test, Appellant cites several cases he contends have adopted this test, as cited by the Eighth Circuit in *Lakin.* (Appellant's Substitute Brief, p. 21). *Lakin* involved certain claims against a bank arising out of the bank's release of certain funds. 348 F.3d at 706. In arguing that the court had general jurisdiction over the bank, the plaintiffs relied, in part, on the bank's website, which offered services to Missouri residents. *Id.* The Eighth Circuit utilized the *Zippo* test in analyzing whether the bank had conducted continuous and systematic business in Missouri giving rise to general jurisdiction. *Id.* at 711.

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Significantly, however, neither *Lakin* nor any of the cases cited by the Eighth Circuit in *Lakin* adopted the *Zippo* test in the context of an eBay transaction. While other jurisdictions have adopted this test in determining personal jurisdiction for cases both involving and not involving eBay other jurisdictions have expressly declined to do so, recognizing the incongruities between the test and the nature of the sale. *Action Tapes*, 2005 WL 3199706, at * 2; *Boschetto*, 539 F.3d at 1018; *Metcalf*, 802 A.2d at 1226; *Sayeedi*, 835 N.Y.S.2d at 845.

B. Even under the *Zippo* test, Texas Direct does not have sufficient minimum contacts with Missouri to be subject to personal jurisdiction.

Even if the *Zippo* test were applicable in cases involving internet sales via eBay, this test does not hold that Texas Direct is subject to personal jurisdiction in Missouri. This is simply another means of analyzing Texas Direct's contacts with the forum state, contacts that, again, must be analyzed on a case-specific basis. *Beer Nuts*, 29 S.W.3d at 834.

Under the *Zippo* test, the court classifies the website at issue into one of three categories on a "spectrum" based on the level of interaction and information sharing available. 952 F.Supp. at 1124. As set forth in Appellant's Substitute Brief, one end of the spectrum concerns parties clearly doing business over the internet, while the other end concerns parties with websites simply for information purposes. *Id.* In the middle of the spectrum, which Appellants contends is applicable here, are interactive websites where a user can exchange information with the host. *Id.* For such cases, "the exercise of

jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site." *Id.*

Even acknowledging that other jurisdictions applying this test have determined that eBay is an interactive site, this alone is not sufficient to constitute purposeful availment. *See Dedvukaj v. Maloney*, 447 F.Supp.2d 813 (2006); *see also Choice Auto Brokers*, 274 S.W.3d 172 (finding no minimum contacts using *Zippo* test for transaction on interactive eBay website); *Winfield Collection*, 105 F.Supp.2d 746 ("the court is not prepared to broadly hold, as Plaintiff implies, that the mere act of maintaining a website that includes interactive features *ipso facto* establishes personal jurisdiction over the sponsor of that website anywhere in the United States.").

The fact remains that Texas Direct's contacts with the State of Missouri do not constitute minimum contacts, as set forth in detail above. Texas Direct had no contact with Appellant before the sale and did not in any way market or purposefully avail itself to Missouri.

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III. The trial court did not err in dismissing Appellant's cause of action against Texas Direct based on a lack of personal jurisdiction because Texas Direct is not subject to general personal jurisdiction in the State of Missouri because it has no direct contacts with Missouri, much less the substantial, continuous and systematic contacts required for general jurisdiction.

[Response to Point III of Appellant's Substitute Brief]

As properly set forth in Appellant's Substitute Brief, personal jurisdiction may be based on general jurisdiction, in addition to specific jurisdiction. (Appellant's Substitute Brief, p. 22). If the forum state does not have personal jurisdiction based on the transaction or activities directly at issue in the present case, the forum state may nevertheless establish personal jurisdiction over a nonresident provided that nonresident has "continuous and systematic general business contacts" with the forum state. *Helicopteros,* 466 U.S. at 415-16; *see also Choice Auto,* 274 S.W.3d at 178; *Bryant,* 310 S.W.3d at 232.

General jurisdiction over a nonresident party exists if that party's "connections with the state are systematic, continuous and substantial enough to furnish personal jurisdiction over the [party] based on any cause of action – even one that is unrelated to the defendant's contacts with the forum. *Bryant,* 310 S.W.3d at 232 (citing *Helicopteros,* 466 U.S. at 414 n. 9).

Appellant again argues that Texas Direct purposefully availed itself of the privilege of doing business in Missouri in an attempt to establish general jurisdiction. (Appellant's Substitute Brief, p. 22-26). Appellant discusses the purported nature of

Texas Direct's business and use of the internet in an attempt to argue that Texas Direct engaged in continuous and systematic business in Missouri. *Id.*

The standard for establishing general jurisdiction over a nonresident is "fairly high." *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1076 (9th Cir. 2003) (internal citations omitted); *Shrader*, 633 F.3d at 1243 ("[t]he case law sets the bar quire high, however, denying general jurisdiction absent substantial sales.") (*citing Campbell Pet Co. v. Miale*, 542 F.3d 879, 884 (Fed. Cir. 2008) (holding twelve intent sales for $14,000 over eight years insufficient for general jurisdiction); *Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir. 2002) (holding sales of thirty-five subscriptions in two years insufficient for general jurisdiction); *Bird v. Parson*, 289 F.3d 865, 873-74 (6th Cir. 2002) (holding 4,666 internet domain-name registrations insufficient for general jurisdiction)). While physical presence in the forum state is not necessary, the contacts with the forum state must be sufficient to "approximate physical presence." *Gator*, 341 F.3d at 1076. Relevant factors to be considered are "whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated there." *Id.* at 1076-77.

In determining whether a party has substantial or continuous and systematic contacts with the forum state, courts consider whether the party has a deliberate presence in the forum state and whether the party engaged in active solicitation toward the state's markets. *Id.* at 1077. This is also true in the context of internet transactions. *Id.* (examining whether California has general personal jurisdiction over nonresident defendant in case concerning internet-based commerce).

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The court in *Gator.com* ultimately concluded that the defendant was subject to general personal jurisdiction. *Id.* at 1078. Yet, the court expressly noted that whether the defendant was subject to general personal jurisdiction was a "close question," despite the fact that it engaged in extensive marketing and sales in the forum state, had extensive contacts with vendors in the forum state, and its website was designed to operate as a sophisticated virtual store in the forum state. *Id.*

Unlike the defendant in *Gator.com*, Texas Direct has no such contacts with the State of Missouri. While Texas Direct has made prior sales to Missouri residents, these sales comprise of only 0.86% of its total business – less than *one percent* of Texas Direct's total business. Texas Direct does not market or solicit business in Missouri and has no contacts with Missouri vendors of record – contrary to the "extensive" marketing and contact connections cited by the court in *Gator.com.* Texas Direct does not advertise in the State of Missouri, send employees to inspect vehicles in Missouri, have contracts with repair facilities in Missouri, maintain offices or facilities in Missouri, or hire employees to work in the State of Missouri. (L.F. 171, p. 24:2-8; L.F. 172, p. 30:3-6; L.F. 174, p. 34:4-6; 35:5-11).

Given the minimal contacts Texas Direct has with Missouri as evidenced by the record, Texas Direct does not have the continuous or systematic contacts with Missouri required for general personal jurisdiction. The record makes clear that Texas Direct had no direct contacts with Missouri – its only connection with Missouri being less than one percent of its business via third-party intermediary eBay. Such contacts simply are not sufficient to support a finding of general personal jurisdiction.

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CONCLUSION

Based on the foregoing, Texas Direct respectfully requests that this Court deny Points I, II and III of Appellant Issiah Andra's Substitute Brief and affirm the trial court's decision dismissing this case for lack of personal jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. The Substitute Respondent's Brief includes information required by Rule 55.03;

2. The Substitute Respondent's Brief complies with the limitations contained in of Rule 84.06;

3. The Substitute Respondent's Brief, excluding coverage page, signature blocks, certificate of compliance, and certificate of service, contains 8,461 words, as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Substitute Respondent's Brief was prepared;

4. This electronic copy of the Substitute Respondent's Brief has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the forgoing was filed through the CM/ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), this 14th day of July, 2014.

/s/ Bharat Varadachari
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