

**IN THE SUPREME COURT
STATE OF MISSOURI**

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

APPELLANT’S SUBSTITUTE BRIEF

**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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JURISDICTIONAL STATEMENT

On January 24, 2013, the Circuit Court of St. Louis County entered judgment against Plaintiff Issiah Andra granting Defendant Left Gate Property Holding Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction and/or Subject Matter Jurisdiction. Though not delineated with or without prejudice, the dismissal would have had the practical effect of terminating the litigation in Appellant's chosen forum of Missouri. *See Chromalloy American Corp. v. Elyria Foundry Co.*, 955 S.W.2d 1, 3 (Mo. banc 1997). Appellant timely appealed to the Eastern District of the Missouri Court of Appeals.

On November 26, 2013, the Eastern District of the Missouri Court of Appeals issued its opinion affirming the trial court's judgment granting Defendant's Motion to Dismiss. Appellant filed a Motion for Rehearing and an Application for Transfer to the Missouri Supreme Court, both of which the Eastern District of the Missouri Court of Appeals denied.

Appellant filed a timely Application for Transfer to this Court pursuant to Missouri Supreme Court Rule 83.04. On April 29, 2014, this Court sustained Appellant's application and ordered transfer of this appeal. Accordingly, this Court has appellate jurisdiction over this appeal under Article V, Section 10 of the Missouri Constitution and Supreme Court Rules 83.04 and 83.09.

STATEMENT OF FACTS

Appellant Issiah Andra (“Appellant” or “Mr. Andra”) is an adult individual citizen residing in Humansville, Missouri. *LF* p. 89 (*First Amended Petition, paragraph 1*); *Id.* at 163 (*Affidavit of Plaintiff*). Respondent Left Gate Property Holding Inc. (“Respondent” or “Left Gate”) is a foreign corporation doing business as Texas Direct Auto, the self-proclaimed largest eBay vehicle dealership in the world. *Id.* at 89 (*First Amended Petition, paragraph 3*); *Id.* at 167 (*Affidavit of Ed Williams* 6:3-6); *Id.* at 169 (16:6-8).

On or about July 15, 2011, Appellant purchased a 2007 GMC Yukon XL Denali offered for sale by Respondent on the eBay website, which contained information about the vehicle’s price, history, options, equipment, and warranty. *LF* p. 89 (*First Amended Petition, paragraphs 4-6*). All information was reviewed in Humansville, Missouri, and Mr. Andra clicked the “Buy it now” option in Humansville, Missouri. *Id.* at 163 (*Affidavit of Plaintiff*). Appellant has alleged that the eBay listing for the vehicle contained numerous misrepresentations. *Id.* at 94-96 (*First Amended Petition, paragraphs 57, 64*).

On the same day as he agreed to purchase the vehicle by choosing the “Buy it now” option, rather than enter a bid on the eBay page, Appellant spoke with an employee of Respondent via telephone, who made representations about the vehicle’s condition. *Id.* at 90 (*First Amended Petition, paragraph 10*). On or about July 18, 2011, Appellant completed additional paperwork in Missouri, including the Motor Vehicle Retail Installment Sales Contract. *Id.* at 163 (*Affidavit of Plaintiff*). Ed Williams, the operations director for Left Gate, explained at his deposition that a consumer generally contacts Respondent’s shipping department to discuss the type and price of transportation of the

vehicle, and then it is Left Gate's responsibility to find an actual transporter. *Id.* at 172 (*Deposition of Ed Williams, 27:13-22*). On or about July 21, 2011, Respondent contacted Appellant to inform him that the vehicle was ready to be shipped to Missouri. *Id.* at 90 (*First Amended Petition, paragraph 12*).

The vehicle was delivered to Appellant in Missouri on or about July 28, 2011, and by the next day, July 29, 2011, Appellant had contacted Respondent about his concerns with the vehicle, including illuminated warning lights and discrepancies between the eBay listing and the vehicle he received. *Id.* at 90 (*First Amended Petition, paragraphs 13-14*). Additional representations were then made to Appellant that Respondent would cover the costs of repairs, which the vehicle underwent between July 30 and August 1, 2011. *Id.* at 90 (*First Amended Petition, paragraphs 15-18*). On August 17, 2011, the vehicle failed the Missouri safety inspection, and underwent additional repairs on August 25, September 1, and September 23, 2011, among other dates. *Id.* at 90-91 (*First Amended Petition, paragraph 19-22*). As the vehicle would not operate properly and Respondent refused to pay for the needed repairs, this lawsuit followed, with counts for misrepresentation, negligence, negligence *per se*, and violations of the Magnuson-Moss Warranty Act and Missouri Merchandising Practices Act. *Id.* at 89-100 (*First Amended Petition*).

Plaintiff initially filed suit on October 26, 2011, and with leave of Court filed his First Amended Petition on July 2, 2012. *Id.* at 3. A hearing on Defendant's Motion to Dismiss Plaintiff's First Amended Petition for Lack of Personal Jurisdiction and Subject Matter Jurisdiction was continued so that discovery could be completed, which consisted

of a Rule 57.03(b)(4) deposition of Ed Williams on September 14, 2012. *Id.* at 143-145. After briefing, the Trial Court heard oral arguments on October 26, 2012. *Id.* at 201. The Court issued its Order, granting Defendant's Motion to Dismiss, on November 1, 2012. *Id.* at 202. Appellant timely filed his Notice of Appeal on November 30, 2012. *Id.* at 204. The Order was subsequently amended *nunc pro tunc* to reflect its proper status as a Judgment on January 24, 2013. *Id.* at 203.

In its Opinion, the Eastern District of the Missouri Court of Appeals accurately stated that "Whether the purchase of a vehicle through an online website such as eBay provides sufficient purposeful contacts with Missouri to subject a defendant to the state's long arm jurisdiction is one of first impression." *Andra v. Left Gate Property Holding, Inc.*, ED99334, p. 4. The Eastern District of the Missouri Court of Appeals concluded, however, that this "single transaction on eBay...without more, does not constitute sufficient purposeful conduct to satisfy minimum contacts in this particular case." *Id.* at p. 6. This appeal follows.

POINTS RELIED ON

POINT I

The Trial Court erred in dismissing Appellant’s claims because 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 Respondent has sufficient minimum contacts with Missouri.

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

Chromalloy Am. Corp. v. Elyria Foundry Co., 955 S.W.2d 1 (Mo. banc 1997).

Guffey v. Ostonakulov, 2014 OK 6, ___ P.3d ___ (Ok. 2014).

Section 506.500 R.S.Mo.

POINT II

The Trial Court erred in dismissing Appellant’s claims because Missouri can exercise specific jurisdiction over Respondent, in that the nature and quality of Respondent’s contacts with Missouri over the Internet support a finding of personal jurisdiction pursuant to the test articulated in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D. Pa. 1997).

Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D. Pa. 1997).

Lakin v. Prudential Securities, Inc., 348 F. 3d 704 (8th Cir. 2003).

Dedvukaj v. Maloney, 447 F. Supp.2d 813 (E.D. Mich. 2006).

Crummey v. Morgan, 965 So.2d 497 (La.Ct.App. 2007).

POINT III

The Trial Court erred in dismissing Appellant’s claims because Missouri can exercise general jurisdiction over Respondent, in that Respondent has been carrying on continuous and systematic business in Missouri via the Internet.

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

Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1080 (9th Cir. 2003).

Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D. Pa. 1997).

ARGUMENT

Standard of Review

The standard of review of the trial court's granting of Defendant's Motion to Dismiss relating to personal jurisdiction is a question of law to be reviewed *de novo*. *Bryant v. Smith Interior Design Group., Inc.*, 310 S.W.3d 227, 231 (Mo. banc 2010). Appellant was only required to make a *prima facie* case of jurisdiction. *See Johnson Heater Corp. v. Deppe*, 86 S.W.3d 114, 119 (Mo.Ct.App. E.D. 2002). When reviewing the dismissal, therefore, the Court is to assume "that all of plaintiff's allegations are true and liberally grant plaintiff all reasonable inferences therefrom to determine if any ground for relief is stated." *Clement v. St. Charles Nissan, Inc.*, 103 S.W.3d 898, 899 (Mo.Ct.App. E.D. 2003). As well, the Court is to consider the Affidavit of Plaintiff (*LF* p. 163-164) and Oral Deposition of Ed Williams (*LF* p. 165-175) which were filed in connection with this matter. *Chromalloy Am. Corp. v. Elyria Foundry Co.*, 955 S.W.2d 1, 3[n3] (Mo. banc 1997).

POINT I

The Trial Court erred in dismissing Appellant's claims because 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 Respondent has sufficient minimum contacts with Missouri.

In 1958, the Supreme Court of the United States presciently observed that technological advances were eroding the once-clear physical boundaries of jurisdiction.

Hanson v. Denckla. 357 U.S. 235, 250-51 (1958). More recently, Justice Breyer recognized the changing nature of commerce on the internet, rhetorically asking whether personal jurisdiction would exist over a company that “targets the world by selling products from its Web site.” *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780, 2793 (2011)(Breyer, J. concurring). The challenge to define personal jurisdiction in the context of the internet continues to unfold, but the bedrock principle has remained the same for almost seventy years: that the exercise of personal jurisdiction comports with the Due Process Clause of the Fourteenth Amendment. *See Compuserve, Inc. v. Patterson*, 89 F.3d 1257, 1263 (6th Cir. 1996) citing *International Shoe Co. v. Washington*, 326 U.S. 310, 311 (1945). Due process is satisfied when a nonresident corporate defendant has “certain minimum contacts with [the forum] 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.

Missouri courts employ a two-step analysis to evaluate personal jurisdiction: (1) the court first inquires whether the defendant's conduct satisfies section 506.500 R.S.Mo., the long-arm statute, and then (2) evaluates whether the defendant has sufficient minimum contacts with Missouri such that asserting personal jurisdiction over the defendant comports with the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Bryant v. Smith Interior Design Group., Inc.*, 310 S.W.3d at 231 citing *Conway v. Royalite Plastics, Ltd.*, 12 S.W.3d 314, 318 (Mo. banc 2000). Missouri’s long-arm statute expands the court’s jurisdictional reach to the maximum

extent permitted by the Due Process Clause of the Constitution. *JCW ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. 2009).

The Missouri Court of Appeals, Eastern District, ruled that “it is clear Left Gate's conduct falls within the acts enumerated in Section 506.500.1.” *Andra v. Left Gate Property Holding, Inc.*, ED99334, p.3. Respondent’s extraterritorial misrepresentations yielded consequences in Missouri, which are “subsumed under the tortious act section of the long-arm statute. *Longshore v. Norville*, 93 S.W.3d 746, 752 (Mo.Ct.App. E.D. 2002). As well, Petitioner entered a bid on the “Buy it Now” option on Respondent’s eBay page from Missouri, thus making a contract in Missouri that obligated him to purchase the vehicle. *Section 506.500.2 R.S.Mo.*; *LF* p. 89 (*First Amended Petition, paragraph 7*), p. 163 (*Affidavit of Plaintiff*), p. 176 (*eBay.com website*). Finally, Respondent has also transacted business in Missouri. *Section 506.500.1(1) R.S.Mo.*; *State ex rel. Nixon v. Beer Nuts Ltd.*, 29 S.W.3d, 828, 833-834 (Mo.Ct.App. E.D. 2000); *LF* p. 163 (*Affidavit of Plaintiff*), p. 171 (*Deposition of Ed Williams*, 26:7-11, 27:2-8).

Analyzing whether a defendant has minimum contacts with Missouri is “not susceptible of a mechanical application; rather, the facts of each case must be weighed to determine whether the requisite ‘affiliating circumstances’ are present.” *Chromalloy American Corp. v. Elyria Foundry Co.*, 955 S.W.2d at 5. The Missouri Supreme Court has commented, though, that the five-factor test used by the Eighth Circuit can be a useful tool in analyzing minimum contacts. *Bryant v. Smith Interior Design Group, Inc.*, 310 S.W.3d at 233 n[4]. The five factors include: “(1) the nature and quality of the contact; (2) the quantity of those contacts; (3) the relationship of the cause of action to

those contacts; (4) the interest of Missouri in providing a forum for its residents; and (5) the convenience or inconvenience to the parties.” *Id.* The “nature and quality” of contacts with Missouri are to be analyzed in the context of all the business Respondent conducts in Missouri, not just the particular transaction with Appellant. *See State ex rel. Caine v. Richardson*, 600 S.W.2d 82, 84 (Mo.Ct.App. E.D. 1980).

In this case, Respondent made a number of contacts with Missouri in the process of selling a vehicle to Appellan. (1) Respondent offered the vehicle for sale on eBay with a “buy it now” option, which allowed Mr. Andra to immediately purchase the vehicle from Missouri at a set price without waiting for the listing to end. *LF* p. 89 (*First Amended Petition, paragraphs 4,6*), p. 163 (*Affidavit of Plaintiff, paragraphs 2-3*). (2) Appellant spoke with employees of Left Gate on the day of purchase, and (3) 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, which (4) Mr. Andra signed at his home in Humansville, Missouri. *LF* p. 89 (*First Amended Petition, paragraph 10*), p. 163 (*Affidavit of Plaintiff, paragraphs 5-6*); *Id.* at 171 (*Deposition of Ed Williams, 26:7-15*). Respondent also received (5) a telephone call from Respondent explaining the shipping process and quoting the price. *Id.* (27:2-8). Respondent helped arrange (6) to have the vehicle delivered in Missouri. *Id.* at 163 (*Affidavit of Plaintiff, paragraphs 5-6*). Then, (7) 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. *Id.* at 90 (*First Amended Petition,*

paragraphs 14-17). (8) Respondent also issued one or more warranties to Mr. Andra at the time of sale. *Id.* at 90, 92 (*First Amended Petition, paragraphs 16, 38*).

These facts are strikingly similar to those in a recent decision by the Oklahoma Supreme Court. *Guffey v. Ostonakulov*, 2014 OK 6, ___ P.3d ___ (Ok. 2014). In that case, an Oklahoma plaintiff bought a car on eBay from a defendant in Tennessee, with whom she spoke via telephone about final details on the matter and payment instructions. *Id.* at paragraph 4. That plaintiff, like Appellant, signed a purchase agreement that had been sent to her from another state. *Id.* That defendant, like Respondent, helped to arrange shipping of the vehicle to the plaintiff's state, where delivery was taken. *Id.*

The Oklahoma Supreme Court emphasized that, beyond those contacts, the sale to the plaintiff was not an isolated transaction for the defendant, who was an active "power seller" on eBay. *Id.* at paragraph 5. Similarly, in this case, Respondent was first an eBay "power seller" and then a "top seller," because of the large number of vehicles that Left Gate lists, the total amount of money made through the eBay website, and for maintaining a positive feedback rating. *LF* p. 168 (*Affidavit of Ed Williams, 11:19 – 12:3*). The Oklahoma Supreme Court found that "Defendants' use of eBay to make multiple sales is systemic and appears to be a core part of their business." *Guffey*, 2014 OK at paragraph 21. Similarly, Respondent has been selling vehicles using the eBay website since 2002. *LF* p. 167 (*Affidavit of Ed Williams, 8:5-10*). Respondent has four employees who are dedicated to uploading data on the vehicles to the eBay site. *Id.* at 170 (19:15-25). This is a business model that allowed Respondent to become "the largest e-

bay motor dealership in the world” with a “17-acre 50,000 square foot facility.” *Id.* at 167 (7:3-10).

Ultimately, the Oklahoma Supreme Court ruled that “the totality of contacts makes an exercise of jurisdiction proper.” *Guffey*, 2014 OK at paragraph 19. Because the defendant was using eBay as a platform for broader commercial activity, defendant's claim that it did not choose the buyer was an ineffective shield to being haled into court in the forum state. *Id.* at paragraph 25. Several other jurisdictions, including the United States District Court for the Eastern District of Missouri, have similarly held that the nature and quality of the contacts of a business that regularly uses eBay as a platform for commercial activity are sufficient to find personal jurisdiction upon a sale to the forum state. See *Furminator, Inc. v. Wahba*, Case No. 4:10CV01941 AGF, 2011 WL 3847390 (E.D.Mo. 2011); *Dedvukaj v. Maloney*, 447 F.Supp.2d 813, 822-23 (E.D.Mich.2006) (“[I]t is clear from the record that Defendants' use of eBay is regular and systemic.”); *Malcolm v. Esposito*, 63 Va. Cir. 440, 446, 2003 WL 23272406 at *4 (Va.Cir.Ct. 2003) (“Defendants are commercial sellers of automobiles who, at the time the BMW was sold, were represented on eBay as ‘power sellers’ with 213 transactions.”).

In this case, Appellant did not merely click a button, because Respondent has created procedures and communication protocols to handle the inherent complexity of purchasing a vehicle over the Internet. Respondent has been selling vehicles to Missouri residents for at least the past five years. *LF* p. 169 (*Deposition of Ed Williams*, 14:15). Respondents’ corporate representative admitted that 0.86 percent of its total transactions involved vehicles being sold to Missouri residents. *Id.* (14:15-19). Respondent did not

clarify how many total transactions it has per year, but its website notes it does over 500 million dollars in annual sales. *Id.* (16:6-8). It is a reasonable conclusion to draw from this evidence that Left Gate has sold numerous vehicles to Missouri residents. *Id.* (16:1-4). Moreover, Respondent then engages these Missouri consumers, as they did with Mr. Andra, in further communication and additional transactions to arrange financing and shipping. When a consumer purchases a listed vehicle using the “Buy It Now” option, as Mr. Andra did, an employee of Left Gate tries to call them on the phone, leave a message, or send them an email. *Id.* at 171 (24:16-24). The typical follow-up involves a combination of emails and phone calls and occasionally a fax. *Id.* (26:4-6). These additional communications include working out details of the purchase, signing the Federal Buyer’s Guide and the purchase order, requesting and receiving a copy of the driver’s license and insurance, explaining the shipping process and quoting the price. *Id.* (24:21-22, 26:4-12, 27:2-8). Respondent also takes a \$500.00 deposit from the consumer and directs consumers in need of financing to Respondent’s own webpage. *Id.* (25:12-23). Defendant even has a shipping department that works with the consumers to get the vehicle to the proper state. *Id.* at 172 (27:2-8). The nature, quality, and quantity of these contacts, in the context of Respondent’s broad commercial activity in Missouri, are consistent with the exercise of personal jurisdiction.

The last two factors of the *Bryant* five-factor test also come out in favor of Respondent having sufficient contacts with Missouri. First, as to the convenience of the parties, Plaintiff is a Missouri resident who bought a vehicle that is registered in Missouri, is driven in Missouri, has been repaired exclusively in Missouri, and is located

in Missouri. *LF p. 163-164 (Affidavit of Plaintiff)*. Second, there is a strong state interest in regulating the conduct at issue. *High Life Sales Co. v. Brown-Forman Corp*, 823 S.W.2d 493, 499-500 (Mo.1992). Missouri has an interest in applying the Missouri Merchandising Practices Act in its own court system, because Chapter 407 is paternalistic in nature and carries “heightened public policy considerations.” *Huch v. Charter Communications, Inc.*, 290 SW 3d 721, 725 (Mo. 2009). Respondent, and others, should not be allowed “to insulate themselves from the consumer protection laws of this State.” *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 314 (Mo. App.2005). To hold otherwise would create an incentive to only sell to Missouri from out-of-state, so as to hide behind otherwise purposeful and profitable use of the eBay website, when in fact Respondent is subject to the jurisdiction of Missouri courts.

POINT II

The Trial Court erred in dismissing Appellant’s claims because Missouri can exercise specific jurisdiction over Respondent, in that the nature and quality of Respondent’s contacts with Missouri over the Internet support a finding of personal jurisdiction pursuant to the test articulated in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D. Pa. 1997).

In a seminal case, Judge McLaughlin of the United States District Court for the Western District of Pennsylvania fashioned a new analytical framework for evaluating personal jurisdiction based upon the type of business being conducted via computer. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D. Pa. 1997). This framework, which has become known as the *Zippo* test, provides:

At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these 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.*

The court called this test a “sliding scale,” wherein “the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. *Id.* 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.

Like in the case at bar, the defendant in the *Zippo* case did not have any offices, employees, or agents in the forum state, and in fact, all of that defendant’s contacts with the form state happened exclusively through its website. *Id.* at 1121. Nevertheless, the court determined that the defendant’s website fell into the “interactive” category, because

the defendant entered into contracts with residents and companies from the forum state. *Id.* at 1125. The court then concluded that the defendant had purposefully availed itself of doing business in the forum state and found sufficient minimum contacts. *Id.* at 1126-27. Generally, an “interactive” website “tips the scale” and supports a finding of personal jurisdiction over a defendant, because the *Zippo* test emphasizes the making of contracts with citizens of the form state.

Using the *Zippo* test, the nature and quality of Respondent’s contacts with Missouri support a finding of personal jurisdiction. “Internet auctions, by nature, are interactive.” *Dedvukaj v. Maloney*, 447 F. Supp.2d at 821; *accord Boschetto v. Hansing*, 539 F.3d 1011, 1018 (9th Cir. 2008); *Crummey v. Morgan*, 965 So.2d 497, 503 (La.Ct.App. 2007); *Aero Toy Store, LLC v. Grieves*, 631 S.E.2d 734, 736, 740-41 (Ga.Ct.App. 2006); *Furminator, Inc. v. Wahba*, 2011 WL 3847390; *Silpada Designs, Inc. v. O’Malley*, Case No. 04-2302-CM (D.Kan. 2004). In exercising jurisdiction, the United States District Court for the Eastern District of Michigan noted that the “Defendants held themselves out as shipping to the entire United States and most of the world.” *Dedvukaj v. Maloney*, 447 F. Supp.2d. at 822. In this present case, Left Gate indicated understanding that, by using eBay, they are not targeting a particular region or local area. *LF* p. 171 (*Deposition of Ed Williams*, 22:21-24). On each listing of a vehicle on eBay, Respondent states that they help arrange shipping all over the globe. *Id.* (20:24). In Louisiana, the court reasoned that “the defendants did business with [plaintiff] over the Internet. Thus, the use of the eBay website to market and sell the RV to a Louisiana buyer is, on the *Zippo* sliding scale, more akin to those situations for which a finding of

personal jurisdiction is proper.” *Crummey v. Morgan*, 965 So.2d at 503. Respondents’ use of eBay to enter into vehicle purchase agreements with Missouri residents creates “minimum contacts” that satisfy due process.

No Missouri court has yet ruled on the applicability of the *Zippo* test, but the Eighth Circuit Court of Appeals has adopted it as the “appropriate approach in cases of specific jurisdiction.” *Lakin v. Prudential Securities, Inc.*, 348 F. 3d 704, 711 (8th Cir. 2003). That decision also noted that the Eastern District of the Missouri Court of Appeals mentioned the level of interactivity of a Web site in an apparent allusion to the *Zippo* test. *Id.* at 710[n9] citing *State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d at 830, 835. The Eighth Circuit decision also cited a number of other circuits that have similarly adopted the *Zippo* test to analyze the nature and quality of contacts: *Bensusan Rest. Corp. v. King*, 126 F.3d 25 (2nd Cir.1997); *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446 (3rd Cir.2003); *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707 (4th Cir.2002); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir.1996); *Cybersell, Inc., v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir.1997). *Id.* at 710. Indeed, the list should also include the Fifth and Tenth Circuits, as well. *See Mink v. AAAA Development LLC*, 190 F. 3d 333, 336 (5th Cir. 1999); *Soma Medical International v. Standard Chartered Bank*, 196 F.3d 1292, 1297 (10th Cir. 1999). As this case is a matter of first impression, it “is proper to look to the law of other jurisdictions that have ruled on the question” of whether the use of the *Zippo* test to analyze minimum contacts in the context of eBay transactions. *See Cruzan By Cruzan v. Harmon*, 760 S.W.2d 408, 436 (Mo. 1988).

While the number of courts that have adopted the *Zippo* test is not necessarily outcome determinative, “it is much more conducive to an orderly administration of justice and predictable results if both jurisdictions, federal and states within the Eighth Circuit, utilize the same criteria and concepts when adjudicating the same question.” *Seales v. State*, 580 S.W.2d 733, 736 (Mo. 1979). Businesses engaging in e-commerce in Missouri would not have to shoulder differing exposures based on if a lawsuit was filed in state or federal court. Another advantage of adopting the *Zippo* test is that it follows closely “well-accepted principles and criteria,” allowing the new test to “take its place in relation to what went before and further [cut] a channel for what it t come.” *Poe v. Ullman*, 367 U.S. 497, 544 (1961). No existing principle of law would need to be overturned, as the *Zippo* test is consistent and compatible with existing minimum contacts analysis. As well, it would provide needed guidance for Missouri consumers who are increasingly turning to the internet to make purchases.

POINT III

The Trial Court erred in dismissing Appellant’s claims because Missouri can exercise general jurisdiction over Respondent, in that Respondent has been carrying on continuous and systematic business in Missouri via the Internet.

“Even when a cause of action does not arise out of or relate to the foreign corporation's activities in the forum state, due process is not offended” when the state can exercise “general jurisdiction.” *Helicopteros Nacionales de Colombia, SA v. Hall*, 466 U.S. 408, 414 (1984). Indeed, the third factor of the *Bryant* five-factor test – the relationship of the cause of action to the contacts– can distinguish specific jurisdiction

from general jurisdiction. *See Jacobs Trading, LLC v. Ningbo Hicon International Industry Co., Ltd.*, 872 F.Supp.2d 838, 843 (D.Minn. 2012). The “minimum contacts” needed to establish general jurisdiction require a foreign corporation to have been carrying on a “continuous and systematic” part of its business in Missouri. *Helicopteros*, 466 U.S. at 415. To the extent Appellant cannot establish specific jurisdiction based on the nature and quality of Respondent’s actions in Missouri, Appellant has also alleged violations of the Magnuson-Moss Warranty Act, which are not necessarily directly related to Respondent’s contacts with Missouri. *LF* p. 93-94 (*First Amended Petition, paragraphs 44-53*). Respondent has sufficient contacts with Missouri *vis-a-vis* its continuous and systematic business conducted through the internet to establish general jurisdiction here.

A review of the existing, albeit scarce, case law reveals that a common theme: determining whether a defendant has purposefully availed itself of doing business in the forum state. The decisions that find personal jurisdiction exists involve a sophisticated seller operating a commercial business through the internet. *See Dedvukaj v. Maloney*, 447 F. Supp.2d 813, 818-23 (E.D. Mich. 2006); *Malcolm v. Esposito*, 63 Va. Cir. at 446. But even the cases where a court declined to find personal jurisdiction still point to the lack of continuous and systematic business conducted through the internet. *See Boschetto v. Hansing*, 539 F.3d at 1018 (finding no jurisdiction because the plaintiff did “not allege that any of the Defendants [were] using eBay to conduct business generally.”); *Sayeedi v. Walser*, 835 N.Y.S.2d 840, 846 (N.Y.Civ.Ct. 2007)(finding no jurisdiction, in part, because “[n]o evidence was provided by Plaintiff as to Defendant's overall eBay

statistics, experience, or of any marketing directed at potential customers.”). In other words, courts seem to be analyzing whether their state has general jurisdiction over these businesses.

Several courts have explicitly recognized the parallels between analyzing whether a defendant “clearly does business over the internet,” per the *Zippo* test, and the analysis of whether a defendant is carrying on “continuous and systematic business” with the forum state, per a finding of general jurisdiction. *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1080 (9th Cir. 2003); *Soma Medical International v. Standard Chartered Bank*, 196 F.3d at 1296-97; *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 513 (D.C. Cir. 2002); *Molnlycke Health Care AB v. Dumex Medical Surgical Products Ltd.*, 64 F.Supp.2d 448, 451 (E.D.Pa.1999). The internet has continued to grow and evolve, and now online stores “can operate as the functional equivalent of a physical store.” *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d at 1079. It no longer makes sense for a test of general jurisdiction to require an actual physical presence in a state. *Id.* Rather, the nature of the online “commercial activity must be of a substantial enough nature that it ‘approximate[s] physical presence.’” *Id.* at 1079-1080 citing *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000).

A non-resident defendant who avails himself of the expansive reach of the Internet should not be able to use his non-residency as a shield against defending tortious activity against a plaintiff harmed in a different state. As one recent case summarized:

It should, in the context of these commercial relationships, be no great surprise to sellers—and certainly no unfair burden to them—if, when a

commercial transaction formed over and through the internet does not meet a buyer's expectations, they might be called upon to respond in a legal forum in the buyer's home state. Sellers cannot expect to avail themselves of the benefits of the internet-created world market that they purposefully exploit and profit from without accepting the concomitant legal responsibilities that such an expanded market may bring with it. *Envirocare Technologies, LLC v. Simanovsky*, Case No. 11-CV-3458 (E.D.NY 2012).

Hailing Left Gate into court in Missouri complies with fair place and substantial justice, because when Respondent made a conscious choice to conduct business with the residents of a forum state, "it has clear notice that it is subject to suit there." *World-Wide Volkswagen Corp v. Woodson*, 444 U.S. 286, 297 (1980).

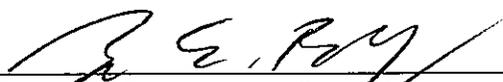
Respondent's objection about its lack of control over the location of its consumers was actually addressed, and rejected, in the *Zippo* decision. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. at 1126. "This argument misconstrues the concept of fortuitous contacts embodied in *World-Wide Volkswagen*... [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.* Like the defendant in the *Zippo* case, Left Gate was under no obligation to sell vehicles to Missouri residents. "It freely chose to do so, presumably in order to profit from those transactions. If a corporation determines that the risk of being subject to personal jurisdiction in a particular forum is too great, it can choose to sever its

connection to the state.” *Id.* If Respondent did not want to be amenable to jurisdiction in Missouri, the solution was to simply not sell its vehicles to Missouri residents. Having done so, Respondent should have reasonably anticipated being haled into Court in Missouri.

CONCLUSION

Appellant, Issiah Andra, respectfully requests that this Court reverse the decision of the Trial Court and Court Appeals 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
STATE OF MISSOURI**

Issiah Andra)	
)	
Appellant,)	
)	
vs.)	Case No. SC93984
)	
Left Gate Property Holding Inc.,)	
)	
Respondent.)	

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Appellant’s Substitute 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 6,298.

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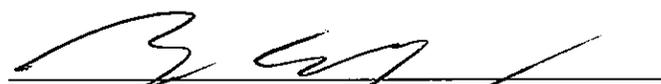
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that, on this 2nd day of June, 2014, a true and correct copy of the foregoing Appellant’s Substitute Brief were 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.

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