

No. SC93984

**IN THE
SUPREME COURT OF MISSOURI**

**ISSIAH ANDRA,
Plaintiff/Appellant,**

v.

**LEFT GATE PROPERTY HOLDINGS, INC.,
Defendant/Respondent.**

**Appeal from the Missouri Court of Appeals, Eastern District,
The Honorable Robert M. Clayton III, Chief Judge**

AMICUS BRIEF OF THE ATTORNEY GENERAL

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INTEREST OF THE AMICUS

The Attorney General submits this brief as amicus curiae under Rule 84.05(f)(4). At issue in this case is the ability of Missouri courts to exercise personal jurisdiction over defendants engaging in online commerce via transactions conducted through websites owned by third parties. The Missouri Merchandising Practices Act (MMPA), RSMo §§ 407.010–407.1500 (Supp. 2013), charges the Attorney General with the duty to police the marketplace and “to preserve fundamental honesty, fair play and right dealings in public transactions.” *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362, 368 (Mo. App. W.D. 1973). Decisions from this Court regarding personal jurisdiction over foreign residents and entities will directly affect the Attorney General’s ability to use Missouri law and Missouri courts to protect Missouri consumers.

ARGUMENT

Introduction

Left Gate Property Holding, Inc. (Left Gate) is the “largest independent [automobile] dealer in the nation and the largest [eBay] motor dealership in the world.” L.F. at 167. It has between 1,800 and 2,100 automobiles listed on eBay at any given time and has a dedicated shipping department that will ship anywhere within the United States. L.F. at 168-70. Despite Left Gate’s sophistication in the online marketplace and its national presence, Left Gate would have the Court believe that it would offend notions of fair play and substantial justice for Left Gate to answer allegations of unfair or deceptive practices anywhere but Texas. Thus, Left Gate urges the Court to require each of its 1,800 to 2,100 consumers like Issiah Andra to travel to a distant and remote Texas court. Left Gate asks for this as a result of black-letter principal. This Court should not go down this path.

The lower court’s conception of personal jurisdiction ignores the realities of modern commerce and would allow sophisticated merchants to conduct business in a manner that achieves a national presence with only local responsibility. If Left Gate were a merely local retailer inflicting consumer harm on only Texas residents, local responsibility would be fully appropriate. But the lower court’s ruling results in a curious outcome. If a merchant takes specific action to expand its market to one or two foreign

states, the merchant would likely be subject to the jurisdiction of those states' courts.¹ Expansion of that same merchant's business to an even broader, national online marketplace such as eBay, however, may be used as a shield to immunize the merchant against suit in *any* foreign jurisdiction. Left Gate "wants to have its cake and eat it, too: it wants the benefit of a nationwide business model with none of the exposure." *Illinois v. Hemi Group L.L.C.*, 622 F.3d 754, 760 (7th Cir. 2010). This Court should reject the lower court's approach and interpret long-arm jurisdiction to address the realities of the 21st century marketplace and 21st century fraud.

¹ See, e.g., *Sloan-Roberts v. Morse Chevrolet, Inc.*, 44 S.W.3d 402 (Mo. App. W.D. 2001) (pointing to Kansas defendant's use of regular newspaper advertisements targeted primarily at Missouri residents, as well as other contacts with Missouri, in finding personal jurisdiction); *Noble v. Shawnee Gun Shop, Inc.*, 316 S.W.3d 364 (Mo. App. W.D. 2010) (pointing to Kansas defendant's periodical advertisement in Kansas City area-wide newspaper, as well as other contacts with Missouri, in finding personal jurisdiction).

I. To protect Missouri consumers, the Attorney General's principal tool, the Missouri Merchandising Practices Act, must be available for use against those selling over the internet.

A. Internet sales are an increasingly large portion of commerce.

Perhaps no innovation has changed the landscape of commerce more than the internet. Most large companies have some form of internet presence, and smaller firms that do not conduct business through their own websites are able to sell merchandise online through a third party website such as eBay. Unfortunately, this has opened the door to extensive fraud in online transactions. Indeed, the Attorney General has received well over 2,000 consumer complaints since 2000 involving eBay alone. In addition, the Office has received numerous complaints relating to online commerce conducted on websites other than eBay.

The Attorney General has received over 400 consumer complaints since 2000 specifically regarding vehicle sales involving eBay. Many consumers purchasing vehicles online are unable to view the vehicle in person before making the purchase, leaving them completely reliant on representations made by the seller. These complaints echo the allegations raised by Mr.

Andra: vehicles do not arrive in the condition advertised, with many unsafe for Missouri roads.

B. Internet sales are a fertile area for fraud and deception.

The anonymous nature of the internet and the ability to reach consumers hundreds or even thousands of miles from where merchandise is physically located facilitates fraud and deception through online commerce far more so than more traditional, local commerce. Such tactics are too common for big-ticket purchases such as vehicles where substantial sums of money trade hands. With an automobile being one of the most expensive purchases a consumer will make, the harm incurred from the type of conduct alleged by Mr. Andra can be disastrous. Disputes regarding internet vehicle purchases frequently find their way to the courts. *See, e.g., Guffey v.*

Ostonakulov, 321 P.3d 971 (Okla. 2014) (automobile); *Montalvo v. First Interstate Fin. Corp.*, No. Civ. A. CV-04-209, 2005 WL 380727, at *3 (Me. Super. Jan. 3, 2005) (truck); *Keenan v. Aguilar*, 391 S.W.3d 620 (Tex. App. 2012) (motorhome).

With the relative ease of defrauding consumers online and the high dollar amounts involved with vehicle sales, both the temptation and the ability to defraud are magnified, resulting in profound harm to consumers. The Attorney General has received numerous complaints regarding online

vehicle sales where the seller (often grossly) misrepresented the condition of the vehicle—and even many complaints where apparently no vehicle existed at all. Distant consumers are even more at risk of fraud than local consumers who may inspect a prospective purchase in person. As fraud in the online marketplace will only increase, consumers—and law enforcement—must have a mechanism to combat these fraudulent practices impacting Missouri consumers.

As legitimate businesses move toward conducting large amounts of business online, unscrupulous merchants are already following. In the past, one illegal method the unscrupulous have employed is “curbstoning,” where a used car dealer, often unlicensed, places a vehicle “for sale” in a parking lot or other publicly visible area, advertising the vehicle as if it were for sale by a private owner. These vehicles are often salvaged, faulty, or otherwise unsafe, yet are cosmetically touched up to pass a consumer’s visual inspection. Many are hazardous to operate on Missouri’s roads and would not pass a state vehicle inspection. When the curbstoner demands payment in cash, it is often difficult for the consumer to locate the dealer once the consumer learns of the vehicle’s true condition and value.

The unscrupulous have brought curbstoning into the 21st century. Websites such as eBay allow an unscrupulous merchant to “park” an unsafe vehicle for sale online, where consumers cannot even perform a visual

inspection of the physical vehicle. Furthermore, even licensed dealers who know it would be illegal to place a car for sale in a public parking lot believe they can place the same unsafe vehicle for sale on eBay or Craigslist.² The unscrupulous have always adapted to modern methods of commerce, and the law must adapt as well. Consumers must be provided with a realistic venue for actions against these dishonest merchants. If the Eastern District's decision is not reversed, unsafe automobiles will go directly onto the online marketplace for Missouri consumers to purchase. Dangerous cars will continue to be sold to Missouri residents, and the sellers will not have to answer for their wrongdoings in Missouri, a state where they conduct business.

II. Carving out interstate internet sales using third-party sites like eBay would have a significant negative impact on the ability of consumers and the Attorney General to use the MMPA to police commerce.

It is clear that Missouri residents are to have liberal access to Missouri courts, particularly in disputes involving fundamental policies. *See State ex*

² Even legitimate operations may use the online marketplace to dispose of automotive lemons from their inventories in remote markets, so as to avoid hurting their local reputation.

rel. Wichita Falls Gen. Hosp. v. Adolf, 728 S.W.2d 604, 606 (Mo. App. E.D. 1987) (citing *State ex rel. Deere & Co. v. Pinnell*, 454 S.W.2d 889 (Mo. banc 1970)) (“[T]he Missouri long-arm statute is intended to extend jurisdiction to the limits permissible under the due process clause of the Fourteenth Amendment.”); *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493 (Mo. banc 1992) (refusing to enforce a forum selection clause in a case involving a dispute under RSMo, Chapter 407, which is “fundamental policy”); *Missouri Highway and Transp. Comm’n v. Merritt*, 204 S.W.3d 278 (Mo. App. E.D. 2006) (citing *Kilmer v. Mun*, 17 S.W.3d 545, 549 (Mo. banc 2000)) (“The ‘Open Courts’ provision of the Missouri Constitution . . . prohibits any law that unreasonably or arbitrarily bars individuals or classes of individuals from accessing the courts in order to enforce recognized causes of action.”).

Access to Missouri courts should be guaranteed in actions alleging violations of the MMPA. “In light of the strong public policy behind the [M]MPA, the Missouri Supreme Court has found that ‘the Missouri legislature would not want the protections of Chapter 407 to be waived by those deemed in need of protection.’” *Shaffer v. Royal Gate Dodge, Inc.*, 300 S.W.3d 556 (Mo. App. E.D. 2009) (citing *Huch v. Charter Commc’ns, Inc.*, 290 S.W.3d 721, 725, 726 (Mo. banc 2009)).

A Maine court recently mentioned that state's "strong interest" in protecting consumers from fraudulent sales practices when finding personal jurisdiction over a defendant who had placed a truck for sale on eBay.

Montalvo v. First Interstate Fin. Corp., No. Civ. A. CV-04-209, 2005 WL 380727, at *3 (Me. Super. Jan. 3, 2005).

Access to Missouri courts should also be liberally granted when the action involves merchandise that is heavily regulated. In *State ex rel. Nixon v. Beer Nuts, Ltd.*, the Eastern District took note of "the interest of the State . . . in regulating the sale and delivery of alcoholic beverages within its borders." 29 S.W.3d 828, 836 (Mo. App. E.D. 2000) (finding personal jurisdiction over foreign defendant selling alcohol club memberships online). Vehicle sales present just as compelling an interest for the state.

Missouri strictly regulates automobiles. *See, e.g.*, RSMo Chapter 301 (Registration and Licensing of Motor Vehicles); Chapter 302 (Drivers' and Commercial Drivers' Licenses); Chapter 303 (Motor Vehicle Financial Responsibility Law); Chapter 307 (Vehicle Equipment Regulations). Such regulations are generally aimed at promoting safety in an activity that can be very dangerous. *See, e.g., Hudson v. Dir. of Revenue*, 216 S.W.3d 216, 222 (Mo. App. W.D. 2007) (citing *Weathers v. Royal Indem. Co.*, 577 S.W.2d 623, 625 (Mo. banc 1979)) (stating the Missouri Motor Vehicle Safety Responsibility Law should be given liberal interpretation and that "its

remedial purpose [is] to ensure that those injured by motor vehicles upon Missouri's public highways are protected”).

Despite the strong public policy behind the MMPA³ and the state's tremendous interest in the regulation of automobiles on Missouri's roads, the Eastern District's decision in this matter would effectively immunize entities like Left Gate who advertise and sell automobiles and other merchandise on national, third-party websites. Private litigants would be barred from bringing suit in Missouri, and many consumers would find it difficult if not impossible to bring suit in a distant and remote foreign jurisdiction. In addition, these dishonest merchants would effectively be immunized from suit by law enforcement. Not only would the Attorney General be unable to bring an action in Missouri for violations of the MMPA after an unsafe vehicle has been sold to a Missouri resident, but the Attorney General would be effectively prohibited from exercising its powers under the MMPA to prevent the sale from occurring in the first place, should it find an advertisement that involves fraud and deception.

³ “[T]he public policy involved in Chapter 407 is so strong that parties will not be allowed to waive its benefits.” *High Life*, 823 S.W.2d at 498 (citing *Electrical and Magneto Serv. Co., Inc. v. AMBAC Int’l Corp.*, 941 F.2d 660, 663, 664 (8th Cir. 1991)).

Indeed, consumers would be best protected by enjoining the use of deceitful advertisements. The MMPA recognizes this, providing the Attorney General a cause of action for advertisements that involve misrepresentations, fraud, etc., even before any sale is completed. RSMo, Section 407.020. If the Attorney General identifies advertisements that violate the MMPA, the Attorney General may bring suit to enjoin such marketing practices. RSMo, Section 407.100. Missouri courts have personal jurisdiction over foreign entities that display deceitful advertisements to Missouri residents. To hold otherwise effectively “renders the [MMPA] useless and meaningless” because it would not allow the State to protect consumers from deceitful advertisements, and it would eliminate access to a realistic avenue for redress after a fraud-induced sale. *High Life Sales*, 823 S.W.2d at 498 (quoting *Electrical and Magneto Serv. Co.*, 941 F.2d at 663, 664).

Also troubling is the implication flowing from the lower court’s ruling, that companies outside the U.S. would have free reign to violate the MMPA. Under the Eastern District’s reasoning, international eBay sellers could commit unlawful practices through eBay while selling to residents in all 50 states, yet because the merchant did not explicitly target any individual

state, no court could hear the case because no U.S. court would have personal jurisdiction over the merchant.⁴

Missouri courts must be able to hear cases such as this one in order to effectively promote the safety interests and goals of these statutes and regulations pertaining to automobiles, as well as the MMPA's fundamental policy of protecting consumers in the marketplace. If immune from these enforcement mechanisms, dishonest sellers will continue to peddle their most dangerous cars to foreign jurisdictions, frequently placing unsafe vehicles on Missouri's roads.

A Missouri resident would face significant hardship in litigating out of state. It is not inconsistent with fair play and substantial justice for

⁴ At least one court has found personal jurisdiction over an international defendant on the basis of a "national contacts analysis," "[s]ubstituting the United States as the relevant forum" instead of looking at contacts with any particular state. *Graduate Mgmt. Admission Council v. Raju*, 241 F. Supp. 2d 589, 597 (E.D. Va. 2003). The court found that the defendant did intend "to attract or serve a [U.S.] audience." *Id.* at 598 (citation omitted). But following this reasoning, personal jurisdiction in Missouri courts over Left Gate should be proper as Left Gate intended to attract or serve Missouri consumers.

wrongdoers to answer for their transgressions where they intend to, and indeed do in fact, conduct business. Despite this, the Eastern District's holding provides a ready path for the unethical to rid their inventories of dangerous automobiles and place those hazardous vehicles on Missouri roads.

- III. When a merchant chooses to do business nationwide, using methods, such as eBay, that are expressly designed to have a nationwide reach, it subjects itself to the jurisdiction of all states seeking to protect their resident consumers from deception and fraudulent trade practices.**
- A. Missouri can assert personal jurisdiction over those who “purposely avail” themselves of the privilege of selling into the State.**

Left Gate's contacts with Missouri are such that asserting personal jurisdiction over Left Gate would not offend traditional notions of fair play and substantial justice. This Court recently summarized Missouri law regarding the minimum contacts required for the assertion of personal jurisdiction over a defendant to comport with due process:

When evaluating minimum contacts, the focus is on whether “there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its

laws.” . . . This inquiry “cannot be simply mechanical or quantitative.”

. . .

[A] court acquires “specific jurisdiction” over an out-of-state defendant when the court “exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant’s contacts with the forum.” . . . In some cases, single or isolated acts by a defendant in a state, because of their nature and quality and the circumstances of their commission, provide sufficient minimum contacts to support jurisdiction for liability arising from those acts.

Bryant v. Smith Interior Design Grp., Inc., 310 S.W.3d 227, 232-33 (Mo. banc 2010) (footnote omitted) (citations omitted).

This Court emphasized that “the ultimate issue [is] whether the defendant has purposely availed itself of the privilege of doing business in this state *such that it reasonably could anticipate being haled into court here.*” *Id.* at 233 n. 4 (emphasis added). “The basic governing principles are no different in internet cases[]; ‘traditional statutory and constitutional principles remain the touchstone of the inquiry,’ and the analysis that has been developed simply ‘applies traditional principles to new situations.’” *Mrs. U.S. Nat’l Pageant, Inc. v. Miss U.S. Org.*,

L.L.C., 875 F. Supp. 2d 211, 220 (W.D.N.Y. 2012) (quoting *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 252 (2d Cir. 2007)).

**B. Sellers who choose to sell nationwide have
“purposely availed” themselves of the privilege of
selling in Missouri.**

A business actively seeking a nationwide business model naturally lends itself to a finding of personal jurisdiction:

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. 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.

Dedvukaj v. Maloney, 447 F. Supp. 2d 813, 820 (E.D. Mich. 2006). This passage illustrates how modern commerce has advanced. The law

should, as the court in *Dedvukaj* recognized, adapt to these advancements. This Court quoted with approval the following passage from a 1972 federal appeals decision, where that court wrestled with a novel personal jurisdiction issue that arose from the emerging prevalence of the U.S. Postal Service as a method of conducting business:

We would be closing our eyes to the realities of modern business practices were we to hold that a corporation subjects itself to the jurisdiction of another state by sending a personal messenger into that state bearing a fraudulent misrepresentation but not when it follows the more ordinary course of employing the United States Postal Service as its messenger. . . . Where a defendant knowingly sends into a state a false statement, intending that it should there be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state.”

Bryant, 310 S.W.3d at 234 (quoting *Murphy v. Erwin-Wasey, Inc.*, 460 F.2d 661, 664 (1st Cir. 1972)).

The Court should now acknowledge, just as it did with postal mail, that business practices with Missouri consumers have become even more sophisticated, frequently involving online contacts. Prior to modern online commerce, businesses had to aim harpoons directly at

where they wished to conduct business in order to gain customers in other markets. A national market required many harpoons. Today, businesses can discard those harpoons and easily cast a large net to achieve the same result.⁵ But the fact that throwing a single net is far easier than shooting 50 harpoons does not diminish the intent of the merchant to solicit business in all 50 states or the fact that these merchants engage in affirmative conduct aimed at each state. As the court in *Hemi* noted:

[A]lthough listing all . . . states⁶ by name [in defendant's advertisement] would have made a stronger case for jurisdiction in this case, inasmuch as it would have expressly stated that Hemi wanted to do business with Illinois residents, the *net* result is the same—Hemi stood ready and willing to do business with Illinois residents.

⁵ The harpoon and net analogy may be revised to one involving a rifle and a shotgun, if the Court so desires.

⁶ The original text reads “all forty-nine states” because the defendant had expressly excluded New York residents from purchasing its products online. Such fact should not alter the point made by the court in the passage quoted.

622 F.3d at 754 (emphasis added). Left Gate wants to have its cake and eat it, too, by profiting from a nationwide business model while avoiding the natural consequences derived from such a model. When you intend to do business with Missouri consumers and your business practices cause harm to those consumers, you can expect to answer for those harms in a Missouri Court. As the Honorable Daniel E. Scott of the Court of Appeals, Southern District, put it, “if you pick a fight in Missouri, you can reasonably expect to settle it here.” *Baldwin v. Fischer-Smith*, 315 S.W.3d 389, 398 (Mo. App. S.D. 2010).

Other courts agree that the implementation of a nationwide business model subjects a seller to the personal jurisdiction of foreign courts where the seller conducts business. For example, the Seventh Circuit found Illinois courts had jurisdiction over a New Mexico cigarette company conducting online cigarette sales on a nationwide basis. *Hemi*, 622 F.3d 754. The court noted, “[The defendant] held itself out to conduct business nationwide and was apparently successful in reaching customers across the country. . . . [The defendant] wants to have its cake and eat it, too: *it wants the benefit of a nationwide*

*business model with none of the exposure.”*⁷ *Id.* at 760 (emphasis added); see also *Innovative Garage Door Co. v. High Ranking Domains, L.L.C.*, 981 N.E.2d 488, 502 (Ill. App. Ct. 2012) (citation omitted) (finding personal jurisdiction over an internet lead-generation business, stating “having sought the benefit of a nationwide business model, it is fair that [the defendant] also expect the legal exposure that comes with it”).

In *Crummey v. Morgan*, a Louisiana state appeals court held that a Texas business purposely availed itself of the privileges of the state of Louisiana by selling an RV on eBay to a Louisiana resident. 965 So.2d 497, 503-05 (La. Ct. App. 2007). The court noted the defendant’s contact with the plaintiff through eBay: “defendants entered into a contract to sell a vehicle . . . to a Louisiana resident utilizing the website, eBay, which greatly expanded their market”. *Id.* at 504.

⁷ The court in *Hemi* noted the fact that the defendant had used language on its website to exclude sales to New York residents due to prior issues the defendant experienced conducting business in New York. The court, nevertheless, characterized the defendant’s business model as a nationwide model. 622 F.3d at 755-56, 760.

Likewise, the Oklahoma Supreme Court recently held that placing an item for sale on the national eBay marketplace constitutes purposeful availment. In *Guffey v. Ostonakulov*, the defendants were an eBay “power seller” who sold an automobile on eBay to the plaintiff, stating that “[d]efendants are involved in the commercial sale of vehicles to numerous states, and eBay is a primary means through which they conduct these sales.” 321 P.3d 971, 979-80 (Okla. 2014). The courts in both *Guffey* and *Crummey* quoted with approval the passage from *Dedvukaj*, recited at length above, in finding that a nationwide business model constitutes purposeful availment. *Guffey*, 321 P.3d at 979; *Crummey*, 965 So.2d at 504; *see also Innovative Garage Door Co.*, 981 N.E.2d at 502 (stating “having sought the benefit of a nationwide business model, it is fair that [the defendant] also expect the legal exposure that comes with it”).

Each of those courts has recognized that the ability to conduct online sales allows merchants to expand their markets exponentially, from a merely local market to a truly national market. And this is what Left Gate, as an extensive seller on eBay, has done. Having taken that step, Left Gate could reasonably anticipate being haled into a Missouri court. After all, a full *two-thirds* of Left Gate’s automobile sales are done online. L.F. at 168. A full 30% to 35% of Left Gate’s

sales are through eBay, and approximately 35% to 40% of all Left Gate's vehicle sales are to residents of foreign states. L.F. at 187-88. Left Gate acknowledges and facilitates its national sales, promising to deliver automobiles "anywhere" within the United States. L.F. at 170.

When a seller places an item for sale on eBay, it is available for purchase by residents of any state in the country. Sellers typically place items for sale on eBay in order to take advantage of this expanded market and know that the ultimate purchaser might be from anywhere in the country. And Left Gate is not just any eBay seller, but a sophisticated eBay seller, conducting approximately one-third of its business through eBay and shipping throughout the country. Left Gate is aware of its national market.

Because eBay sellers intend to conduct business on a national scale, Left Gate's eBay advertisement and sale of the automobile is a significant Missouri contact. "[S]ingle or isolated acts by a defendant in a state, because of their nature and quality and the circumstances of their commission, provide sufficient minimum contacts to support jurisdiction for liability arising from those acts." *Bryant*, 310 S.W.3d at 233 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)). As discussed, the sale of a vehicle is qualitatively significant for both the consumer *and* this state. Mr. Andra's harm resulted directly from Left

Gate's act of placing the misleading advertisement on eBay and completing the sale through that website.

Left Gate intentionally placed the vehicle Mr. Andra purchased for sale on eBay. Left Gate intended that this eBay listing be viewed by Missouri residents. As the self-declared "largest e-bay motor dealership in the world" and a dealership with a dedicated shipping department that will ship anywhere within the United States, Left Gate intended for its eBay listing to solicit business from any state in the country, including Missouri. L.F. at 167-70. With approximately 1,800 to 2,100 vehicle listings on eBay at any given time and almost 1% of those eBay sales to Missouri residents, Left Gate operates in such a manner as to encourage Missouri sales, and a Missouri resident may purchase any of Left Gate's vehicles listed on eBay. L.F. at 168, 169. Left Gate intends for Missouri residents to purchase a portion of Left Gate's vehicle fleet. *See* L.F. at 168, 169. Left Gate presented no evidence that its eBay listing excluded Missouri residents, and Left Gate made an express decision not to utilize only local sales mechanisms for the automobile in question.

Mr. Andra, a Missouri resident, was induced to purchase as a result of Left Gate's advertisement directed into Missouri and did in fact accede to Left Gate's intentions by purchasing the vehicle in

response to this contact. In addition to Left Gate's eBay listing, Left Gate made additional contacts into Missouri, further supporting personal jurisdiction. Left Gate sent paperwork to Mr. Andra in Missouri to complete the sale. L.F. at 163. Left Gate contacted Mr. Andra in Missouri to inform Mr. Andra that the vehicle was ready to be shipped to Missouri. L.F. at 90. Left Gate issued one or more written warranties to Mr. Andra in Missouri, and following delivery of the vehicle into Missouri, Left Gate further told Mr. Andra that it would cover the costs of necessary repairs to the vehicle, as well as related costs such as towing and car rental fees. L.F. at 90. Based on these representations, Mr. Andra had the vehicle repaired in Missouri. L.F. at 90. Subsequently, Left Gate communicated to Mr. Andra in Missouri that it would not pay for the repairs as promised. L.F. at 90-91.

These facts are strikingly similar to the facts presented in *Guffey*, in which the Oklahoma Supreme Court held that personal jurisdiction over the defendant eBay seller was proper because: (1) "eBay is a primary means through which [defendants] conduct these [automobile] sales"; (2) defendants "negotiated with [plaintiff] directly over the vehicle eventually sold to her in Oklahoma"; (3) defendants "warranted that vehicle while it was to be titled and driven in Oklahoma"; and (4)

defendants “have allegedly engaged in more than one such transaction in this state.” 321 P.3d at 979-80.

Additionally, the quality and nature of Left Gate’s Missouri contacts parallel many factors that were informative to other courts in finding personal jurisdiction.

First, automobiles are heavily regulated. *See Beer Nuts*, 29 S.W.3d at 836 (finding personal jurisdiction over a defendant selling alcohol online, noting the state’s interest in regulating alcohol). The nature and quality of Left Gate’s eBay sale into Missouri carries a heightened significance as it involved an automobile.

Second, Left Gate is a sophisticated business, conducting an extremely high volume of sales on eBay such that it is a power seller or top-rated seller. L.F. at 168; *see Guffey*, 321 P.3d 971 (finding personal jurisdiction over eBay power sellers who sold an automobile on eBay, stating that “[d]efendants’ use of eBay to make multiple sales is systemic and appears to be a core part of their business”); *Dedvukaj*, 447 F. Supp. 2d at 820 (finding personal jurisdiction over eBay power sellers, emphasizing that the defendants “appear to be highly sophisticated sellers with an extensive offering of merchandise and a

volume of business that requires a warehouse”⁸); *Malcolm v. Esposito*, No. 215392, 2003 WL 23272406 (Va. Cir. Ct. Dec. 12, 2003) (finding personal jurisdiction over defendant in dispute regarding eBay sale of automobile, noting “[d]efendants are commercial sellers of automobiles who, at the time the BMW was sold, were represented on eBay as ‘power sellers’ with 213 transactions . . . [and] also represented that they had local, national, and international eBay customers”). Because Left Gate is not an occasional eBay seller and instead conducts an immense volume of business through eBay, the nature and quality of its eBay sale into Missouri carries a heightened significance.

Additionally, Left Gate intentionally directed additional activity in Missouri by offering a warranty and promising to pay for repairs to the vehicle, creating ongoing obligations in Missouri. When the court in *Guffey* found personal jurisdiction over an eBay automobile seller, it noted that defendants offered “a thirty-day limited warranty that created a continuing obligation between [d]efendants and a resident of [Oklahoma],” with such obligation continuing while the vehicle was in Oklahoma. 321 P.3d at 978.

⁸ Left Gate operates out of a 17-acre, 50,000 square foot facility. L.F. at 167.

Finally, Left Gate sought the benefit of a nationwide business model. *See Hemi*, 622 F.3d at 760 (stating defendant “held itself out to conduct business nationwide and was apparently successful in reaching customers across the country”). Left Gate did not accidentally stumble upon a Missouri consumer when it sold the automobile to Mr. Andra. Because Andra was a part of the nationwide market Left Gate actively sought, the nature and quality of Left Gate’s sale into Missouri to Andra carries a heightened significance.

The presence of these factors, combined with the entirety of Left Gate’s Missouri contacts—which involved misrepresentations—are sufficient to support a finding of personal jurisdiction. This is precisely the type of conduct the MMPA is designed to both prevent and remedy. If personal jurisdiction is lacking in these cases, merchants would be able to use online sites such as eBay as a shield to do business across the country without fear of being brought to court in any foreign jurisdiction.⁹

⁹ Although Missouri courts do not apply the sliding scale established in *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*, many jurisdictions have referred to it to assist in resolving issues of personal jurisdiction. 952 F. Supp. 1119 (W.D. Pa. 1997). In regards to eBay transactions, it has been argued that *Zippo* is inapplicable

C. That a seller uses a third-party such as eBay does not immunize the seller from MMPA liability.

Merchants may argue that personal jurisdiction is lacking either because eBay sales involve the unilateral activity of the consumer, or because the merchant's eBay sales do not target any specific state and so the location of the purchaser makes the sale a merely random or fortuitous contact. For example, the defendants in *Guffey* argued that "their use of eBay as the

because the defendant seller does not operate the eBay website. But this distinction is irrelevant to the concepts underlying *Zippo*, particularly whether the defendant could reasonably expect to be haled into the forum state's courts. *See id.* at 1123. As this Court stated in *Bryant*, although rigid tests should not be strictly applied, they may prove to be useful tools. 310 S.W.3d at 233 n. 4. The *Zippo* test can provide additional perspective to a modern context that simply did not exist when the fundamental concepts outlined in *International Shoe* were developed. As an example—"[T]he defendants did business with [plaintiff] over the Internet. Thus, the use of the eBay website . . . is, on the *Zippo* sliding scale, more akin to those situations for which a finding of personal jurisdiction is proper." *Crummey*, 965 So.2d at 503 (finding personal jurisdiction).

medium for the transactions prevents the establishment of minimum contacts with any state where a purchaser resides, simply because Defendants do not choose the buyer or the state where the buyer is located.” 321 P.3d at 977-78. The court rejected this argument. Similarly, the court in *Dedvukaj* rejected the argument that “so long as an auction is not expressly targeted at a particular forum state, jurisdiction will only be proper in the seller’s home state.” 447 F. Supp. 2d at 820.

The court in *Hemi* also rejected this argument, recognizing the true nature of these business transactions:

Characterizing the sales as unilateral is misleading, however, because it ignores several of [the defendant’s] own actions that led up to and followed the sales. [The defendant] created several commercial, interactive websites through which customers could purchase cigarettes from [the defendant]. . . . It is [the defendant] reaching out to residents of Illinois, and not the residents reaching back, that creates the sufficient minimum contacts.

Hemi, 622 F.3d at 758. Even if the initial sale could accurately be characterized as the unilateral activity of the buyer, “the fact that someone [other than the seller] initiated the first contact does not mean that the entire course of conduct is considered unilateral.” *Bryant*, 310 S.W.3d at 235.

The use of eBay does not provide immunity from MMPA liability: “The use of a third-party auction site such as eBay as a vehicle for sales cannot serve as a shield and absolute bar to the exercise of *in personam* jurisdiction by this state, merely because the seller does not choose the buyer or the buyer’s state.” *Guffey*, 321 P.3d at 979. The law should not incentivize dishonest merchants to shift their businesses entirely to third-party marketplaces such as eBay in order to avoid the consequences of their unfair business practices. A recent case helps to illustrate this point. In *Quality Bicycle Products, Inc. v. BikeBaron, L.L.C.*, a bicycle company sued a competitor for trademark and copyright infringement, alleging the competitor’s website used infringing materials. Civ. No. 12-2397 (RHK/TNL), 2013 WL 3465279, at *1 (D. Minn. July 10, 2013). The competitor conducted business both through its own website and on eBay. *Id.* The court found that personal jurisdiction was appropriate, citing the repeated business done with Minnesota consumers through the defendant’s own website. *Id.* at *3-4.

Under the Eastern District’s rationale below, personal jurisdiction would be lacking if the defendant in *Quality Bicycle Products* had sold merchandise only on eBay instead of its own website. This is a curious result—whether a business sells merchandise

nationwide on its own website or nationwide through eBay should be irrelevant to the inquiry. In both cases, the merchant is intentionally placing items for sale nationwide, soliciting business from residents of every state. Merchants should not be able to shift their entire business to eBay and avoid jurisdiction in foreign courts while still enjoying the benefits of a nationwide business model.

To the extent Left Gate characterizes Mr. Andra's purchase of the vehicle as a unilateral action by Mr. Andra outside of Left Gate's control rather than Left Gate soliciting business from Missouri consumers,¹⁰ it must be noted that placing an item for sale on eBay is not the unilateral activity of another party or third person.¹¹ The *seller*

¹⁰ According to Left Gate, "There is no support for [Andra]'s contention that eBay actively solicited business from Missouri residents. In fact, it would have been [Andra] that solicited eBay's website to make a bid." L.F. at 133.

¹¹ "[T]he 'purposeful availment' requirement for the exercise of specific jurisdiction over nonresident defendants ensures that they will not be haled into a jurisdiction solely as a result of a random, fortuitous, or attenuated contact, or by the unilateral activity of another party or a third person." *Crummey*, 965 So.2d at 502 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S.

affirmatively places the item for sale on a national marketplace, intending that a resident from any particular state might purchase the item.

Left Gate actively placed items for sale on eBay—a national marketplace—intending to solicit business from Missouri and other states. Such contact is intentional, not random or fortuitous. Nor is such contact attenuated when a plaintiff's harm results directly from the advertisement and sale. When the seller does not take action to limit the eBay listing to certain potential buyers, the seller is actively choosing to make the product available to the entirety of eBay users residing nationwide, including Missouri residents. To adopt the rationale that eBay sales are merely random and fortuitous contacts would be to ignore the realities of modern business practices.

D. That a seller does not physically enter Missouri to have a purchaser execute a sales agreement under which a specific vehicle, marketed nationwide, is shipped to a Missouri purchaser does not immunize the seller from MMPA liability.

462, 475 (1985)). Left Gate purposely availed itself of an opportunity to sell to Missouri consumers and has done so numerous times.

Missouri courts have long exercised jurisdiction over defendants who have not been physically present in the state. It is axiomatic that one can conduct business in the state, as well as be held responsible in Missouri courts, for violations of the MMPA without being physically present in the state. *Beer Nuts*, 29 S.W.3d 828 (finding personal jurisdiction over North Carolina company that shipped alcohol into Missouri but “ha[d] no physical place of business in Missouri, ha[d] no agent in Missouri and [was] not registered to do business in Missouri”). “Physical presence is not a determinative factor in commercial cases in establishing sufficient minimum contacts between the defendant and the forum.” *Id.* at 834 (citing *Burger King*, 471 U.S. at 476).

Even prior to the proliferation of online commerce, Missouri courts exercised jurisdiction over individuals and businesses who conducted business in Missouri. *See, e.g., State ex rel. Metal Serv. Ctr. of Georgia, Inc. v. Gaertner*, 677 S.W.2d 325 (Mo. banc 1984) (finding personal jurisdiction over Georgia company that shipped materials to and from Missouri).

Other jurisdictions have similarly determined that physical presence is not the determinative factor to the jurisdictional analysis.

It is reasonable for a corporation deriving substantial revenue from interstate commerce, like the defendant, to anticipate that its efforts to serve a market with a particular product may

subject it to suit there on claims, like those in this case, that relate to such efforts, even if those efforts have not resulted in generating substantial revenue in that market.

American Network, Inc. v. Access America/Connect Atlanta, Inc., 975 F. Supp. 494, 500 (S.D.N.Y. 1997). It is reasonably foreseeable to a defendant that publishing on the internet will have consequences in the location where the publication is viewed. *See id.* at 498. Physical presence in the state is simply not essential to establishing sufficient minimum contacts to support jurisdiction. *See Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 738 (W.D. Tex. 1998) (finding jurisdiction in Texas court over California defendant operating an online gambling website). Finally, and especially in this instance when the defendant had multiple additional contacts with the state, a lack of physical presence is simply not determinative to the question of jurisdiction. *See Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 467 (D. Mass. 1997) (finding continuous course of conduct sufficient to establish personal jurisdiction where website was “generally accessible twenty-four hours a day and seven days a week to all Massachusetts residents who can access the [internet]”).

A lack of physical presence does not immunize one from MMPA liability. Missouri courts have jurisdiction over defendants engaging in online commerce with Missouri residents when those defendants purposely

avail themselves of the privilege of selling in Missouri. Use of the internet to conduct business with Missouri and the corresponding ability to avoid physical presence in Missouri may not be used as a shield to avoid liability for violating Missouri's laws.

CONCLUSION

The trial court's dismissal of Andra's action should be reversed.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on June 2, 2014, a true and correct copy of the foregoing was filed electronically via Missouri CaseNet, with copies automatically generated to:

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I further certify that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 6,896 words.

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