No: 18-8515 ORIGINAL

In The Supreme Court of the United States

E. DRAKE,

Petitioner

v.

MURPHY, AUSTIN, ADAMS, SCHOENFELD; NIELLO PERFORMANCE MOTORS, INCORPORATED; RICHARD SEEBORG; GARLAND E. BURRELL, JR.; EDWARD J. GARCIA; LAWRENCE K. KARLTON; JOHN A. MENDEZ; KIMBERLY J. MUELLER; TROY L. NUNLEY; WILLIAM B. SHUBB; LAWRENCE J. O'NEILL; EDMUND F. BRENNAN; ALLISON CLAIRE; CRAIG M. KELLISON; MICHAEL J. SENG; JENNIFER L. THURSTON,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 17, 2019

QUESTIONS PRESENTED

Petitioner is a consumer, who was seeking reliable transportation. Even though the Petitioner have pled that he first noticed the subject vehicle, a 2003 Mercedes Benz on Respondents website, the Fifth Circuit, the district court as well as Respondent's legal counsel have consistently stated the falsity that the vehicle was advertised on another website. This case is presented to this Court over a dispute of jurisdiction regarding the Internet, Cyberspace, and Websites. Respondent Niello committed fraud upon the Petitioner through its Internet sales staff, and their legal counsel Murphy, Austin, Adams, et al assisted in the fraudulent act.

Respondents Niello and Murphy, Austin et al law firm communicated heavily with the Petitioner in Texas to purchase the subject vehicle. There were sufficient contacts.

Appellant purchased a Mercedes Benz 2003 model with 35,188 miles on the odometer from Niello. Appellant contacted Respondent Niello, and Candy Beck who was and still is an Internet salesperson at Niello contacted Petitioner on or about September 25, 2013, and began negotiating a price to purchase the Mercedes Benz. However, Drake had to file a lawsuit in the Southern District of Texas in 2014 to prompt Niello to sell the vehicle. The case was voluntarily dismissed prior to Drake discovering fraud that Niello had committed. *See* App. J, 36-38.

Petitioner refiled in the Southern District of Texas in 2017. Fraud carries a 4-year statutes of limitations. The district court did not have jurisdiction over Respondents Niello and Murphy, Austin, et al law firm and the Fifth Circuit affirmed. Respondent Niello communicated with Petitioner heavily, advertised the subject vehicle referenced herein on their own Internet website (Niello Porsche), and their Internet sales person contacted the Petitioner regarding the sale of the subject vehicle. Moreover, Respondent Niello have a credit card that they also advertise on their website, and consumers are able to apply for the credit card through Niello's website. Further, Respondent Niello also sells vehicles nationwide, and it was Respondent Niello who delivered the subject vehicle to the Petitioner in Texas at their cost. Niello conspired with Respondent Murphy, Austin, et al to commit fraud against in a settlement agreement in Texas. Petitioner was unaware of the fraud before the subject vehicle was delivered to him in Texas. Petitioner signed a settlement agreement in Texas but Niello's legal counsel demanded that the Petitioner sign yet another copy of the settlement agreement while he was in California.

Respondent Niello through Respondent Murphy, Austin et al law firm claims that the settlement agreement that the Petitioner signed with Niello which was an act of fraud, trigger-

ed *res judicata*, the Petitioner sharply disagrees. There has been heavy communication between the Petitioner and Respondents Niello and Murphy, Austin, et al law firm, thus it is the Petitioner's legal analyses that according to *Zippo*, the district court did in fact have jurisdiction to hear the Petitioner's case in Texas. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997. The district court relied on and cited *International Shoe* for its reasons of dismissing Petitioner's case, however the playing field regarding jurisdiction—especially regarding companies that utilize the Internet and or their websites to sell products that are interactive through commerce have changed substantially.

Respondent Murphy, Austin et al law firm who also committed unethical acts, which includes conspiracy to commit fraud, and assisted Niello in covering up the fraud committed by their employees and staff because both the law firm and undoubtedly Niello had made sufficient contacts with the state of Texas to avail themselves to the jurisdiction of a court in Texas. Thus, there were enough contacts that the district court had jurisdiction to hear the Appellant's case.

Indeed, the Fifth Circuit's decision to agree with the district court is contrary to several other Circuits that have held that when a company has an interactive website that is more in the line of *Maritz*, the outdated concept of *International Shoe* theory of jurisdiction, is in fact, an analog way of thinking in a digital world.

In *Calder v. Jones*, 465 U.S. 783, 789 (1984), this Court held that the Due Process Clause permitted a State to exercise personal jurisdiction over nonresident defendants in a case involving an alleged intentional tort because the defendants' actions were "expressly aimed at" the forum State. In finding that standard satisfied, the Court observed that the defendants knew that the plaintiff resided in the forum State and that the publication containing the allegedly libelous statements had "its largest circulation" in that State. ***Id***. at 790.

The conflict rule of "lex loci contractus," or the law of the state where the contract is entered into, governs the rights of the parties in the case sub judice. This is the applicable rule when the issue is solely a matter of interpretation of the contract; however, when a contract is made in one state and is to be performed in another state, the law of the latter state will govern as to the validity, nature, obligation, and construction of the contract.

Some courts hold that the defendant's knowledge that the plaintiff resides in the Forum State is sufficient to satisfy due process, while other courts hold that the plaintiff must adduce other facts. The questions presented are:

The questions presented are:

1. Whether a business that controls and operates an Internet website that is interactive, where they employ Internet salespersons to market and sale their products through commerce and cyberspace targeting a nationwide audience, while communicating with prospective clients extensively should be subject to jurisdiction in the forum state; the state of the buyer.

2. Whether Niello advertising their products on their website and Internet and the offering of Niello's credit card on their Internet websites would establish sufficient minimum contacts regarding personal jurisdiction.

3. Whether the signing a contract where the buyer of a product resides, and the company, through its Internet sales department delivers their products to the buyers forum state at the company's sole cost, should subject the company to the jurisdiction of the forum state, where the buyer resides.

4. Since Murphy, Austin, et al law firm conspired with Respondent Niello to defraud the Petitioner, whether this conduct would trigger conspiracy theory jurisdiction.

PARTIES TO THE PROCEEDING

Petitioner, Eric Drake, is an individual person, a consumer of goods, products, and services.

Respondent, Niello Performance Motors Inc., is a car dealership located in Sacramento, California that sells its new and used products (automobiles, parts, and automotive accessories) nationwide through its interactive Internet websites and Internet salespersons. Respondent Murphy, Austin, et al law firm is a law firm located in Sacramento, California that practices law in the state of California and Texas.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Eric Drake is an individual person, who is acting in this writ *pro se*.

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INTRODUCTION

This case arises from the actions of Respondent Niello Performance Motors, its employees, and its legal representatives, Respondent Murphy, Austin, et al in California who communicated heavily with the Petitioner in Texas to purchase a motor vehicle from Niello. Respondent Niello committed fraud, violated federal laws, and violated state and federal deceptive trade practices laws. Niello's legal representatives, Murphy, Austin, et al law firm assisted Niello in their fraudulent conduct and wrongful acts against the Petitioner. And even though Niello and the Petitioner had a verbal settlement agreement to resolve Drake's disputes in the 2017 lawsuit, Niello's legal counsel entered into the contract for delay purposes, just to file a dispositive motion.

Candy Beck, an Internet salesperson at Niello made contact with the Petitioner on or about September 25, 2013, and began negotiating a price to purchase the Mercedes Benz. However, apparently Niello did not believe that the Petitioner had the funds to buy the vehicle, thus Drake had to filed a lawsuit to prompt Niello to sell him the vehicle.

Petitioner signed a settlement agreement in Texas, but Niello requested that Drake sign the same document with minor changes in the

State of California. However, upon the Petitioner receiving all of the paper work from the state of Texas concerning the odometer reading, it was evident that Respondent Niello had not been truthful with the Petitioner in the agreement that he signed and willfully committed fraud. Later, Niello explanation for the increase in mileage was that it was a clerical error.

On or about February 2, 2017, Niello and the Petitioner made a verbal agreement to settle the Petitioners claims against Niello through their attorney of record, Dennis Murphy. But rather than keeping the verbal agreement and reducing it to writing, Dennis Murphy of Murphy, Austin, et al law firm violated the agreement and sought to underhandedly dismiss the Petitioner's case by filing a dispositive motion.

Though the Petitioner has the greatest respect for the Honorable Keith Ellison, it is Drake's legal opinion that the district court in Texas, did in fact have personal jurisdiction over both Niello and their law firm; Murphy, Austin *et al* who conspired to commit fraudulent acts against Petitioner, and assisted Respondent Niello in covering up their fraud committed against Petitioner because both the law firm. Undoubtedly Niello had made sufficient contacts with the state of Texas to avail themselves to the jurisdiction of the Southern District of Texas. Thus, the dismissal of Drake's

case and the Fifth Circuit's affirming that dismissal was error and abuse of discretion.

This Court should grant review because this is an issue resulting from the progression of the Internet and cyberspace world. The use of electronic devices from everything from checking in to fly on a commercial airliner to the purchasing of goods and products online or even in some stores without ever leaving one's residence is brunt of the issues presented herein: the sale and marketing of businesses products through the Internet and their interactive websites through commerce.

As the questions set forth states: why should this Court allow companies to make millions of dollars in profits from consumers through commerce: the Internet, websites, and cyberspace, but not allow those same companies to answer for their fraud in the forum state where they made their profits. This case is a straight forward case for the Court to clarify whether a business that sales and market its products online, and have dedicated sales staff that utilize the Internet for its sales should be subject to jurisdiction in the state in which it's targeting through sales, marketing, and promoting their goods.

DECISIONS BELOW

The panel opinion of the court of appeals is reported at 740 Fed. Appx. 91 (5th Cir. 2018), and reproduced at App. 1a. The district court's opinion is not reported, but is available at No. 4:17-CV-1826, 2018 WL 5239829, at *1 (E.D. Wis. Oct. 18, 2018).

STATEMENT OF JURISDICTION

The Fifth Circuit issued an opinion and judgment on October 18, 2018. App. 1a. The Fifth Circuit denied Petitioner motion to stay even though he was involved in a collision with a semi-truck and sustained brain damage. App. 30a. The order of the Fifth Circuit denying rehearing and rehearing en banc on December 4, 2018, is unreported but appears at App. K, 39a–40a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Factual Background

Petitioner is a consumer and sought to purchase reliable used transportation. A salesperson from Niello contacted the Petitioner regarding a 2003 Mercedes Benz. Even the manager of the new car sales department commented that the Petitioner and employees of Niello have made substantial communications regarding the 2003 Mercedes Benz through emails and telephone conversations. Dennis Murphy, Niello's legal counsel expressed to the Petitioner that the subject vehicle was clean and a nice vehicle to own. Petitioner and Niello's law firm made substantial communi-

cations through emails and telephone calls. Niello have an interactive website where consumers are able to purchase vehicles, even out of state, without ever going into the dealership. The interactive website also allows a consumer to seek credit—through Niello's credit card that allows consumers to charge automotive parts, services, and other items. In today's market place of Internet websites and conducting business with consumers through commerce in cyberspace without actually meeting the consumer in person is the norm. Therefore, this case represents just another issue of progression that this Court needs to address regarding Cyberspace, Internet website jurisdiction. If a business can profit from marketing and selling its goods nationwide through its Internet websites and Internet sales staff, the company should not be shocked to discover that they have to defend disputes in jurisdictions other than where the business is headquartered.

There is a clear, deep, and persistent conflict among the district courts regarding the due process standard governing the exercise of personal jurisdiction over a nonresident defendant alleged to have committed an intentional tort using the Internet. The issue arises often in both state and federal courts, and Americans' increasing use of the Internet to purchase

products, and services will be required to confront the question even more frequently. A business that makes profit from consumers that they are fully aware is located in a distant state should be required to answer in the state were dispute is located (the forum state).

In as such, businesses like Niello is making millions of dollars off consumers through their Internet website and by selling and marketing automobiles and parts nationwide, Niello content that they should not be held liable in the states in which they sells a substantial amount of product. Niello is selling and marketing its goods and services knowing that consumer's that they are selling to reside outside the state of California. As it is, Niello has spent 50 times the amount of money that it agreed to settle with the Petitioner in its constantly filing dispositive motions to try and pay Petitioner no compensation, but only sought to undermine justice by not ever agreeing that it committed fraudulent conduct. There are no due process violations in such cases. Indeed, review by this Court is clearly warranted.

A. Due Process Limits On Personal Jurisdiction

The Due Process Clause normally limits a court's exercise of personal jurisdiction over a nonresident defendant to situations in which the defendant has "minimum contacts" with the forum State. *International Shoe*

Co. v. Washington, 326 U.S. 310, 316 (1945). The minimum contacts requirement "perform[s] two functions. It supposes to protect defendants against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States do not reach out beyond the limits imposed on them by their status as coequal sovereigns." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-292 (1980).

The first interest rests on this Court's longstanding injunction that "the maintenance of [a] suit [must] not offend 'traditional notions of fair play.' "*International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Courts may not "enter judgments affecting nonresident defendants" unless it is "fair" to require those individuals to litigate in the forum. *Kulko v. Superior Court of California*, 436 U.S. 84, 91 (1978).

This fairness inquiry generally focuses on the burden on a defendant of having to litigate away from home, see *International* Shoe, 326 U.S. at 317, and the extent of the defendant's participation in the State's market, see *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-476 (1985). The inquiry also looks to whether the defendant had "fair notice" that he or she would be liable to suit in the forum State. See ***Id***. at 487.

The "minimum contacts" standard also ensures that no State may exercise unlimited power to reach individuals residing beyond its borders. See, e.g., *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982) (observing that "the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-à-vis other States"). Questions regarding the due process limits on personal jurisdiction often arise in the context of intentional tort claims. The court held in *Calder v. Jones*, 465 U.S. 783, 789 (1984), that the minimum contacts requirement was satisfied with respect to a libel claim because the defendants had "expressly aimed" their conduct at the forum State. *Calder* involved a California court's exercise of jurisdiction over a nonresident who had authored a magazine article about a California celebrity. ***Id.*** at 784-786. This Court relied on three facts in upholding jurisdiction: (1) the defendants knew that the article would harm the plaintiff; (2) the defendants knew that "the brunt of that injury would be felt" in California; and (3) the magazine had its largest circulation in California, See ***Id.*** at 789-790.

In subsequent decisions, the Court has emphasized the importance of the third factor—the extent of participation in the State's market. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779, 774 (1984) (defendant "chose to enter the New Hampshire market" by circulating "thousands of magazines" there each month); see also *Burger King*, 471 U.S. at 473 (stating the principle that "a publisher who distributes magazines in a distant State may fairly be held accountable in that forum for damages resulting there from an allegedly defamatory story").

The question in this case is how the "minimum contacts" standard as elucidated in *Calder* and subsequent decisions applies to claims of intentionally tortious conduct involving the Internet. Especially in the case at bar where Niello sales staff uses the Internet to contact consumers all over the nation, and where Niello's website is interactive. *See* App. I, 34a - 35a. And if those intentional contacts are made by salespersons who market and sales products, and minimum contacts were made by Niello's staff via emails and telephone calls, including their legal counsel through commerce, would these contacts satisfy due process. This is a question for the Court to consider and answer.

II. Statutory Background

Courts have created new jurisdictional principles for analyzing contacts mediated through cyberspace and websites that depart from the traditional jurisdictional principles articulated in cases involving contacts made in real space:

Minimum Contacts:

This Court decided in 1945, the case of *International Shoe v. Washington* that for a defendant to be hailed into court in a particular jurisdiction it must have at least a minimum level of contact with that state that it could reasonably expect to be sued in the courts of that state. Following *International Shoe*, courts have generally applied a three-part test in evaluating minimum contacts sufficient for jurisdiction:

> (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections[;] (2) the claim must be one which arises out of or results from the defendant's forum-related activities[; and] (3) exercise of jurisdiction must be reasonable.[6]

The "effects" or "*Calder*" test:

Courts may also apply the "effects" test from *Calder v. Jones*, 465 U.S. 783 (1984), in cases with insufficient interactivity or minimum contacts, but where an action is targeted at a particular forum.[1] In *Calder*, a California resident in the entertainment business sued the *National Enquirer*, located in Florida, for libel based on an allegedly defamatory article published by the magazine. While the article was written and edited in Florida, the Court found that personal jurisdiction was properly established in California because of the effects of the defendants' conduct in that state. As the article concerned a California resident with a career in California and relied on California sources, the Court found the defendants' "intentional, and allegedly tortious, actions were expressly aimed at California."

In the Internet context, the effects test can be used to examine the exact nature of a defendant's Internet activities to determine whether its out of state actions were directed at parties or entities within the forum state. This is referred to in the language of *Calder v. Jones* as "purposeful direc-

[1]Calder v. Jones, 465 U.S. 783 (1984)

tion," which requires (a) an intentional action, that was (b) expressly aimed at the forum state, with (c) knowledge that the brunt of the injury would be felt in the forum state. If a court finds that a defendant's actions meets the standard of purposeful direction, then personal jurisdiction may be asserted based on Internet activities which do not meet the requisite level of interactivity or minimum contacts needed for other tests of personal jurisdiction in Internet cases.

"Sliding scale" or "*Zippo*" test:

In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, a federal court held that "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. This sliding scale is consistent with well developed personal jurisdiction principles."[2] The "sliding scale" or "*Zippo*" test has been generally accepted as the standard in federal courts in deciding personal jurisdiction in Internet cases.[3] Such cases

[2]*Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 Archived September 27, 2007, at the Wayback Machine (W.D. Pa. 1997).

[3]TiTi Nguyen, A Survey of Personal Jurisdiction based on Internet Activity: A Return to Tradition, 19 Berkeley Tech. L.J. 519 (2004).

are now primarily decided based on a determination of the website's "interactivity." Courts have held that the greater the commercial nature and level of interactivity associated with the website, the more likely it is that the website operator has "purposefully avail[ed] itself" of the forum state's jurisdiction. App. 34a–35a. Interactivity is measured through an examination of the website's features and intended uses. Websites designed to facilitate or conduct business transactions will often be characterized as interactive. In contrast, a passive website that simply makes the information available to the user will be less likely to have a basis for personal jurisdiction.[4] Websites are thus effectively divided into three categories: websites that conduct business over the Internet, websites where users exchange information with the host computers, and websites that do little more than present information. Websites that do business over the Internet will yield a finding of purposeful availment, while websites that simply present information will not. Purposeful availment for the third type is determined by the level of interactivity and its commercial nature.

[4]Christopher Wolf, Standards for Internet Jurisdiction, findlaw.com (1999).

III. Proceedings Below

Petitioner filed suit in the U.S. District Court for the Southern District of Texas in 2017, because this is the state and division, jurisdictional district where the first lawsuit was filed.

Respondent Niello committed fraud in its first settlement agreement with the Petitioner, and its legal counsel assisted in the fraudulent conduct. In a second settlement agreement, Niello's legal counsel, also committed fraudulent inducement, Niello had no real desire to settle Drake's case.

On July 19 2017, Respondent filed a motion to dismiss Petitioner's lawsuit based on alleged lack of personal jurisdiction over Respondent's Niello and Murphy, Austin et al law firm. Pet. Petitioner answered the Respondent dismissal motion. See excerpts of response: Exh. F, App. 19a–29a. On November 13, 2017, the district court dismissed the Petitioner's lawsuit citing that the court did not have personal jurisdiction over Respondent's Niello and Murphy, Austin, et al law firm. Exh. B, App. 5a

The district court made its determination to dismiss the Petitioners claims against Respondents Niello and Murphy, Austin, et al law firm based on *International Shoe v. Washington*. The district court made its decision

On November 13, 2017, prior to any arguments by either the Petitioner or the Respondents counsel.

On November 15, 2017, the Petitioner immediately filed a motion to reconsider the district court's dismissal. However, the district court would not reverse its ruling, even after the Petitioner citing *Zippo* and that Respondents Niello and Murphy, Austin, et al law firm had made sufficient contacts. Exh. C, App. 6a. Also, Drake argued that Niello's Internet website and its sales staff that market and sells its automobiles and parts nationwide would confer jurisdiction because of its contacts and for other reasons.

Petitioners timely appealed the granting of the dismissal on January 1, 2018. Exh. D, App. 7a-9a. The district court granted the Petitioner IFP. The district court dismissed the Petitioner's motion for reconsideration without prejudice on February 2, 2018. *See* Exh. C, App. 6a.

On July 12, 2018, the Petitioner had a collision with a semi-truck where the truck rear-ended the Petitioner and fled the scene. The Petitioner sustained traumatic brain damage, cervical and lumbar injuries. Petitioner filed a motion to stay the appeal to allow him an opportunity to recover. However, On August 14, 2018, the Fifth Circuit denied any relief (motion to stay and continue) for Drake to recover from his injuries. Exh. G, App. 30a.

Although the Petitioner provided the Fifth Circuit with doctor notes stating the seriousness of Petitioner's injuries, just as he did for this Court. The Fifth Circuit conduct amount to an **unconscionable** action. This also demonstrates an unprecedented biased, due process violation, making fair and impartial hearings, rulings, and decisions unfeasible.

A panel of three judges of the Fifth Circuit affirmed district court's granting of the dismissal based on jurisdiction. Exh. A, 1a–4a. Most salient to this petition, the district court and the Fifth Circuit court of appeals used *International Shoe* as its guide and the fact that neither Niello nor Murphy, Austin, et al law firm have any offices in the state of Texas. The Fifth Circuit also continued the false claims that were made in the Respondents brief that the Petitioner viewed the C32 Mercedes Benz on Cars.com, to advert the fact that the Petitioner actually viewed the C32 Mercedes Benz on Niello's own website through its Porsche dealership. Exh. H, App. 31a-33a.

The Fifth Circuit also made another intentional falsity, it stated that the contract at issue was not signed in the forum state of Texas, and did not call for performance in the state. Petitioner have proof that the contract at issue was signed in the state of Texas. The Fifth Circuit merely reciting what the Respondents allege in their brief is not proof, but a display of *partiality*.

REASONS FOR GRANTING THE WRIT

Review should be granted because the Fifth Circuit's holding continues to expand the outdated 1945 decision by this Court in *International Shoe Co. v. Washington,* 326 U.S. 310.

The lower courts have to be brought up to date with the progression into the Internet-based and cyberspace jurisdiction. In this world, new considerations such as a Website's "interactivity" and "target audience" are the essential concepts courts use to determine whether to treat virtual contacts as minimum contacts. Many courts believe that these new concepts, which seem to be more suited to the Internet, have supplanted traditional considerations. Yet, this was the very argument that the Petitioner used in his plea with the district court and the Fifth Circuit, but only to his demise.

Most courts have employed some variation of the sliding-scale framework developed in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, and have incorporated a "targeting" or "express aiming" requirement seemingly inspired by the "effects" test the Supreme Court developed in *Calder v. Jones*.

However, as in the case at bar, Niello can legally sell its products all over the nation and profit millions of dollars through its Internet sales and marketing, but Respondent Niello is able to hide behind jurisdiction when it comes to being held responsible for its fraud, conspiracies, and improper conduct—which is asking a victim of these company to appear in their courts which they control with an iron fist.

Hopefully, this will prompt the Court in updating its ruling on *International Shoe Co. v. Washington*, which places jurisdiction squarely on this Court to settle this important issue in an ever expanding modern world.

This case is one of many that are ripe for reviewing issues set forth herein: the relevant facts are undisputed, and the legal issues were briefed, argued, and squarely ruled on below. Review by this Court is warranted and compelling.

I. The Fifth Circuit's Decision Incorrectly Applies this Court's decision in *International Shoe* and Conflicts with the more recent decisions to Websites and Internet jurisdiction in *Zippo* and or *Calder.*

A. Websites that target consumers nationwide and profit by selling their products online to those consumers in their forum state should be expected to answer complains in that state.

Internet business has taken over the traditional way of shopping. And this reality is evermore so a fact during the holidays, "black Friday," and Christmas. However, should companies that utilize interactive websites, who target consumers nationwide, making millions of dollars in profit, not be expected to answer their underhanded fraud in the consumers forum state? And should a defendant who allegedly commits an intentional tort be subject to personal jurisdiction in the forum where the aggrieved plaintiff lives and works? Although this Court adopted the effects test in the 1984 case *Calder v. Jones*, it has not revisited the issue. Unfortunately, many lower courts have adopted a very narrow construction of the effects test that precludes jurisdiction without evidence of other forum-state contacts.[6]

[6]The petition for certiorari in *Kauffman Racing* phrased the question as "[w]hether the Due Process Clause permits a State to exercise personal jurisdiction over a nonresident defendant based solely on a claim that the defendant committed an intentional tort on the Internet knowing that the plaintiff resided in the forum State." Petition for a Writ of Certiorari,

Roberts v. Kauffman Racing Equip., L.L.C., 131 S. Ct. 3089, 3090 (2011) (No. 10-617), 2010 WL 4494141, at *i. The cert petition in Clemens asked, "Does the Due Process Clause require that a defamatory statement refer to a state and be drawn from sources in the state to permit the state to exercise specific personal jurisdiction over a nonresident defamation defendant?" Petition for a Writ of Certiorari, *Clemens v. McNamee,* 131 S. Ct. 3091 (2011) (No. 10-966), 2011 WL 291140, at *ii.

The idea that a "defendant" should not be forced to litigate a cause of action in a jurisdiction that is inconvenient and would create a burden for the cost thereof, is completely dispelled by Respondents Niello who through their corrupt legal counsel actually made a verbal settlement with Petitioner. But instead used that verbal settlement as a vehicle to file a dispositive motion to try and dispose the Petitioner's case without paying him any compensation for his damages. What about the fact that it is also inconvenient for a consumer to prosecute a case hundreds miles away.

[7] *See* Larry Dougherty, *Does a Cartel Aim Expressly*? Trusting Calder Personal Jurisdiction When Antitrust Goes Global, 60 FLA. L. REV. 915, 927 & n.2 (2008). Because effects-test jurisdiction requires that the defendant intentionally target a particular forum, there can typically only be effects-test jurisdiction in one forum — even though there may be personal jurisdiction in multiple fora. See, e.g., *Remick v. Manfredy*, 238 F.3d 248, 258 (3d Cir. 2001) ("[W]e held that the Calder 'effects test' requires the plaintiff to show that: (1) The defendant committed an intentional tort; (2) The plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort; (3) The defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity.") (emphasis removed).

Although this Court denied both petitions, the contours of effects-test jurisdiction remain far from settled—and the courts in the two underlying cases came to different conclusions.[7] But while this Court left the issue unresolved, the plurality's emphasis in *J. McIntyre Machinery, Ltd. v. Nicastro* on the need for specific forum-state targeting may lend some support to the courts that have adopted a more narrow reading of *Calder*, and it may suggest that the Court will be willing to reconsider effects-test jurisdiction in the near future.[8]

The number of effects-test cases has more than tripled in the last decade, surpassing the number of "stream of commerce" jurisdictional cases. The growth of effects-test cases has more than tripled in the last decade, surpassing the number of "stream of commerce" jurisdictional cases.[9] The growth of effects-test cases corresponds to the rise of modern communications technology. Increasingly, we are seeing disputes that cross state or national boundaries, even when the individuals involved remain at home and or in the forum state.

[8]See *Clemens*, 615 F.3d at 376 (denying jurisdiction); *Kauffman Racing*, 126 Ohio St. 3d 81, 2010-Ohio-2551, 930 N.E.2d 784, at ¶ 1 (upholding jurisdiction).

The time is therefore ripe to revisit [9] the question of effects-test jurisdiction and, in particular, to explore the reasons why many courts have been so eager to limit its application in the decades since it was first adopted. In effects-test cases, the merits are inextricably intertwined with jurisdictional issues and therefore influence—often unconsciously the courts' decisions on personal jurisdiction. Essentially, when a court accepts the plaintiff's allegations of wrongfulness and harm as true, the court will find jurisdiction.

[9] See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788-90 (2011) (plurality opinion) (stating that personal jurisdiction in a commerce case is appropriate "only where the defendant can be said to have targeted the forum" and concluding that "[r]espondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey").

According to a Westlaw search of cases, there were approximately 94 stream-of-commerce cases between 1997 and 2000, as compared to 77 effects-test cases. A decade later, between 2007 and 2010, the number of stream-of-commerce cases had grown to 167 — but the number of effects-test cases had grown to 294. For both time periods, I searched ("stream of commerce" w/p "personal jurisdiction") and (Calder w/p "personal jurisdiction") in the allcases database. Some amount of the increase was likely due to improved case coverage in Westlaw, but the relative growth of effect-test cases in comparison to stream-of-commerce cases demonstrates the doctrine's increasing relevance.

1. Respondent Niello's Interactive Website and Internet Sales staff created jurisdiction in Petitioner's forum state of Texas.

Respondent Niello advertised the subject vehicle on the Internet trying to depose of the vehicle because of the serious mechanical problems that the subject vehicle possessed. (Presently, the amount of repairs needed to repair the vehicle is more than what the vehicle sold for). Niello retracted from admitting that the vehicle was likewise advertised on its own website under the Porsche dealership. By doing so, Niello reached the state of Texas, because it was targeting every state to make money and revenue. Petitioner found the subject vehicle advertised on Niello's (porsche.niello.com) website of having 35,188 miles on the odometer, which was false and deceptive. Exh. H, App. 31a-33a. Respondent Niello also purposefully availed itself of the privilege of acting in Texas through its website because it is interactive to a degree that reveals specifically intended interaction with residents of the state." *Neogen*, 282 F.3d at 890; *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997.

As argued in the Fifth Circuit, Respondent Niello's Porsche dealership website (where the subject vehicle was purchased) allows a person to look

through the dealerships inventory, a consumer can schedule an appointment for sales or service through its interactive website, order parts through its website and pay for the parts online, fill out applications to purchase or lease a vehicle, in fact, a consumer can even select a new or used vehicle online, and pay the vehicle without appearing in person at Niello's dealerships. The website further invites visitors to contact a member of Respondent's Niello's staff about the purchase of a vehicle. Respondent Niello has a separate division of sales people that are called Internet Sales staff.

Additionally, Respondent's Niello has its own Niello Advantage Card, which enables a consumer to buy parts, pay for service on vehicles and pay for accessories for consumer's vehicles. See Exh. I App, 34a-35a. Consumers can apply for Niello's credit card online through its interactive website. Between Niello's Internet sales, its website which is interactive website, and its online credit card, this would qualify for sufficient minimum contacts.

Considering all the evidence together, it is Petitioners' opinion that he had established a *prima facie* case of purposeful availment regarding Niello. But the Fifth Circuit did not agree and affirmed the dismissal of Drake's case. Respondent's Niello website solicits customers from around the coun-

try, including Texas, to buy its products (automobiles) as well as automotive parts, and accessories for automobiles of a variety of makes and models, including used automobiles. Respondent's Niello through its interactive web site allows consumers to have those products, including automobiles shipped into the customer's state, as it did Petitioner. For specific jurisdiction, a court looks only to the contact out of which the cause of action arises. The Texas long-arm statute states that a nonresident is considered to be doing business in the state—and therefore is subject to personal jurisdiction—if it commits a tort in whole or in part in Texas. Tex. Civ. Prac. & Rem. Code Ann. § 17.042. Petitioner's request for limited discovery to clarify the extent of Niello's sales. However, the district court and the Fifth Circuit ruled against the Petitioner on that request.

There were substantial contacts during the purchase of the subject vehicle by emails, telephonic conversations, and by U.S. mail, between Petitioner and Respondent Niello employees, (including owners of Niello) as well as Murphy, Austin, et al law firm, in particularly Dennis Murphy. Once the Respondents received payment in full for the vehicle, the Petitioner technically owned the vehicle.

It is constitutionally permissible to exercise personal jurisdiction over one who conducts activity over the Internet in a commercial nature and quality. *Jackson v. Hoffman*, 312 S.W.3d 146, 154 (Tex. App.—Houston [14th Dist.] 2010, no pet.). Internet use falls within three categories on a sliding scale for purposes of establishing personal jurisdiction. *Reiff v. Roy*, 115 S.W.3d 700, 705 (Tex. App.—Dallas 2003, pet. denied); *Choice Auto Brokers, Inc. v. Dawson*, 274 S.W.3d 172, 177-78 (Tex. App.—Houston [1st Dist.] 2008, no pet.). At one end of the sliding scale are websites that are "clearly used for transacting business over the Internet," such as entering into contracts, sales of goods and products, and the knowing and repeated transmission of files of information as *Niello* has conducted. *Reiff*, 115 S.W.3d at 705; *Dawson*, 274 S.W.3d at 177. These websites are sufficient to establish minimum contacts with a state. *Reiff*, 115 S.W.3d at 705. In *Mink v. AAAA Development LLC*, the Fifth Circuit recognized that a company may actively do business over its Internet website by entering into contracts with residents of other states, which is applicable in Respondent Niello case. *See* 190 F.3d at 336. In such cases, personal jurisdiction over that nonresident Respondent Niello is appropriate. See ***Id.*** The evidence provided to the district court of Respondent Niello's Internet activities, should have satisfied

this test. Additionally, the Petitioner's *requested limited discovery* to the district court would've support the actual numbers of contacts/profits. See Exh. E, 10a-18a, and Exh F, App. 19a-29a. Case law verifies that a single contact with the forum state is sufficient to support personal jurisdiction over a nonresident defendant. Yet, when considering all of the aforementioned regarding Respondent's Niello's Internet/Website, simply the Fifth Circuit erred in affirming the district courts dismissal.

Purposeful availment of the privileges of conducting business in a forum is indicative that a defendant has contacts with a state. See *Nuovo Pignone v. Storman Asia M/V*, 310 F.3d 374, 378 (5th Cir. 2002).

Even less pervasive contacts, allows courts to exercise "specific jurisdiction" in "a suit arising out of or related to the defendant's contact with the forum." ***Id.*** at 414 n.8. Although a party can, through its actions, avoid being haled into a foreign jurisdiction, the simple fact that a sales transaction is consummated outside that jurisdiction does not prevent the sale from forming the basis of ("jurisdiction does not depend on the technicalities of when title passes"). Nor is jurisdiction always successfully evaded merely because the defendant has avoided physical contact with the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 2184, 85 L. Ed. 2d 528 (1985).

Unlike in the suit *Jeansonne v Joe Myers Ford et al*, Niello's website [10] is interactive, but more importantly, the district court nor the Fifth Circuit knows how many cars Niello sales in Texas.

This is the reason why the Court should remand with an order to allow reasonable limited discovery concerning the issue of jurisdiction.

More importantly:

a). The Plaintiff purchased the subject vehicle from Niello through their Internet sales and through Niello's website;

b). The subject vehicle was advertised on Niello's website and it targeted consumers in Texas;

c). Niello has a dedicated Internet sales staff that communicates with consumers through the Internet and Niello's website;

d). Niello's employees had heavy and continual contacts with the Plaintiff by its website, emails, and telephone;

[10]It is well-settled that mere maintenance of a website, which is akin to a national advertisement, will not alone support jurisdiction. See Id. at *10-11. However, use of a website to make sales in a distant state or to exchange information with distant users can give rise to personal jurisdiction. See Mattel, Inc. v. Adventure Apparel, 2001 U.S. Dist. LEXIS 3179, No. 00 Civ. 4085, 2001 WL 286728, at *3 (S.D.N.Y. Mar. 22, 2001); NFL v. Miller, 2000 U.S. Dist. LEXIS 3929, No. 99 Civ. 11846, 2000 WL 335566, at *2 (S.D.N.Y. Mar. 30, 2000). Assertion of jurisdiction on the basis of a website is subject to an examination of the "nature and quality of commercial activity that [the defendant] conducts over the internet." Citigroup Inc., 97 F. Supp. 2d at 565 (internal quotation marks omitted).

e). Niello's website was without question connected with the transaction of the Plaintiff purchasing the subject vehicle;

When a controversy is related to or "arises out of" a defendant's contacts with the forum, case law has indicated that a "relationship among the defendant, the forum, and the litigation" is the essential foundation of in *personam* jurisdiction. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). In fact, when the 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 by a State's subjecting the corporation to its in *personam* jurisdiction when there are sufficient contacts [11] between the State and the foreign corporation. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952); see *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-780 (1984).

[11] See, e.g., *ALS Scan, Inc. v. Digital Serv. Consultants, Inc*, 293 F.3d 707, 714 (4th Cir. 2002) ("Until the due process concepts of personal jurisdiction are reconceived and rearticulated by the Supreme Court in light of advances in technology, we must develop, under existing principles, the more limited circumstances when it can be deemed that an out-of-state citizen, through electronic contacts, has conceptually 'entered' the State via the Internet for jurisdictional purposes.").

II. Respondent's Niello and Murphy, Austin, et al law firm should be subject to Texas courts where the suit was originally filed.

Respondents Niello and Murphy, Austin, et al law firm argued that the Petitioner could not bring another suit against Niello because of *res judicata*. The first lawsuit was filed in Texas was settled between the parties, not the district court. See Exh. J, App. 36a-38a. A review of the Southern District of Texas clerk's record (the first lawsuit) reveal that there is not a reasonable argument that *res judicata* applies in the Petitioner's case.

However, claim preclusion cannot be used as a bar "when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-81, 102 S. Ct. 1883, 72 L. Ed. 2d 262 & n.22 (1982); *Shaw v. State of Cal. Dept. of Alcoholic Beverage Control*, 788 F.2d 600, 606 (9th Cir. 1986) (citing *Kremer*, 456 U.S. at 482-83 & n. 22) ("This Court has held that neither claim nor issue preclusion can be applied by a federal court if there was not a full and fair opportunity to litigate the case."). [This decision is applicable to Petitioner's first lawsuit against Respondent Niello, which was filed in the Southern District of Texas].

Petitioner filed a voluntary dismissal based on untrue statements that

Respondent Niello's legal counsels made to him during negations in the settlement agreement in 2014. A voluntary dismissal based on fraud, misleading statements, or untrue statements made to induce the Petitioner to purchase the subject vehicle was not a full and fair opportunity to litigate the issues in the earlier case in Texas as the Respondents have attempted to illustrate. *Blonder-Tongue Labs., Inc.*, 402 U.S. at 333; *Lewis v. Parker*, 67 F. Supp. 3d 189, 201 (D.D.C. 2014).

Petitioner filed a lawsuit in Texas because of Respondents Niello and Murphy, Austin, et al law firm fraudulent conduct. Respondents never submitted to the Texas courts jurisdiction, thus *res judicata* cannot apply because the first Texas suit did not equate to an adjudication on the merits. Where one ground is a lack of jurisdiction, *res judicata* does not apply. *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002). *Thomas P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1255 (9th Cir. 1980).

("It is well-established that a judgment entered without ***personal jurisdiction over the parties is void***."). As such *res judicata* does not apply to a judgment that rests on both a lack of jurisdiction and a merits determination. See *Remus Joint Venture v. McAnally*, 116 F.3d 180, 184 n.5 (6th Cir. 1997).

The "fairness prong" requires the court to consider, "among other things, the interest of the state in providing a forum for the suit, the relative conveniences and inconveniences to the parties, and the basic equities." *Southwest Offset, 622 F.2d at 152; Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 498 (5th Cir.1974); Hydrokinetics, 700 F.2d at 1028; *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1268 n. 15 (5th Cir.1981); *Growden v. Ed Bowlin and Associates, Inc.*, 733 F.2d 1149, 1150 n. 1 (5th Cir.1984). "The fairness prong cannot compensate for, or overcome the requirement of some minimum contacts with the forum state." *Growden*, 733 F.2d at 1150-51.

The subject vehicle was purchased in Texas, not in California. The settlement agreement was signed by the Petitioner in Texas, not in California, and even though the Niello's attorneys demanded that the Petitioner sign another copy of the settlement agreement in California with minor changes, this does not negate Texas having authority over the vehicle, and additionally the subject vehicle was also delivered to the Petitioner in Texas by the Respondents own delivery service. Petitioner did not take possession of the vehicle until it was delivered to him in Texas.

Under Federal Rule of Civil Procedure 4(e), a federal court may exercise personal jurisdiction over a non-resident defendant to the extent provided by the law of the state in which the federal court sits. FED. R. CIV.

P. 4(e); see also *Blue Ribbon Commodity Traders, Inc. v. Supermercados Mr. Special, Inc.*, Civ. A. No. 07-4036, 2008 U.S. Dist. LEXIS 47337, 2008 WL 2468381, at *2 (E.D. Pa. Jun. 18, 2008); *Accuweather, Inc. v. Total Weather, Inc.*, 223 F. Supp. 2d 612, 613 (M.D. Pa. 2002).

In the case at bar, the forum state is Texas, thus necessitating as previous noted, the application of Texas's long-arm statute. Under this statute, personal jurisdiction of Texas courts over nonresident defendants is permitted "to the fullest extent allowed under the Constitution of the United States and may be based on the most *minimum contact* allowed under the Constitution of the United States." 42 PA. CONS. STAT. § 5322; see *Mellon Bank*, 960 F.2d at 1221 ("The Texas statute permits the courts of that state to exercise personal jurisdiction over nonresident defendants to the constitutional limits of the due process clause of the fourteenth amendment."). Therefore, a court's inquiry is solely whether the exercise of personal jurisdiction over the defendant would be constitutional under the Due Process Clause. *Mellon Bank*, 960 F.2d at 1221.

A plaintiff may rely on "specific jurisdiction" where the cause of action is related to or arises out of the defendant's contacts with the forum. *IMO Indus.*, 155 F.3d at 259 (citing *Helicopteros*, 466 U.S. at 414 n.8).

To properly exercise specific jurisdiction under the Due Process

Clause, plaintiff must satisfy a three-part test. *Louis A. Grant, Inc. v. Hurricane Equip., Inc.*, Civ. A. No. 07-438, 2008 U.S. Dist. LEXIS 26768, 2008 WL 892152, at *3 (W.D. Pa. Apr. 2, 2008). "First, the plaintiff must show that the defendant has constitutionally sufficient 'minimum contacts' with the forum." *IMO Indus*, 155 F.3d at 259 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S. Ct. 2174, 2183, 85 L. Ed. 2d 528 Pursuant to these constitutional considerations, physical presence within the forum is not required to establish personal jurisdiction over a nonresident defendant. *IMO Indus, Inc. v. Kiekert AG*, 155 F.3d 254, 259 (3d Cir. 1998).

In *Bibby* the defense contended that dismissal for lack of personal jurisdiction was warranted since it does not conduct any business in the forum or otherwise maintain contacts sufficient to satisfy either specific or general jurisdiction requirements. However, the court in *Bibby* ruled that even if these contacts were not sufficient to support general jurisdiction, it would be reasonable under specific personal jurisdiction requirements. Historically, this Court considers the commission of an intentional tort, the injurious effect which is felt in the forum state, to be a factor supporting jurisdiction in the forum state. This Court reversed the district court's dismissal of *D.J. Investments, Inc v Metzeler.*[19] Similar to Petitioner's circumstance where he settled his case with Niello's attorney by telephone,

so did many of the aspects in the *Metzeler* case regarding contracts were made by telephone. A settlement agreement is a contract. Moreover, the Supreme Court of Texas has broadened this element of jurisdiction.[20] Niello through its legal counsel agreed to settle the Petitioner's case. By not honoring that agreement, Niello's legal counsel, Dennis Murphy, committed fraud,[21] because Mr. Murphy entered into the settlement agreement for delay purposes only to file a dispositive motion thereof, thus because the agreement was conducted by telephone [22] were Petitioner resided in Texas, Niello availed itself to the state of Texas. Murphy contacted Drake and made an offer to settle the Niello case by telephone and email.

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[19]The district court determined that it lacked personal jurisdiction over defendants because Metzeler and Gregg's contacts with the forum state — Texas — were insufficient to satisfy the due process clause of the Constitution. In determining whether "'a foreign corporation should be required to defend itself in a suit in Texas, each case must be decided on its own facts.'" *Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1028 (5th Cir.1983), cert. denied, 466 U.S. 962, 104 S. Ct. 2180, 80 L. Ed. 2d 561 (1984) (quoting *Southwest Offset, Inc. v. Hudco Publishing Co., Inc.*, 622 F.2d 149, 151 (5th Cir.1980)).

[20]The Supreme Court of Texas has given Article 2031b a broader construction; the court has held that Article 2031b's requirement that the cause of action must arise from, or be connected with, the act or transaction which the nonresident consummated in Texas "is unnecessary when the nonresident defendants['] presence in the forum through numerous contacts is of such a nature . . . so as to satisfy the demands of the ultimate test of due process." *Hall v. Helicopteros Nacionales de Colombia, S.A.*, 638 S.W.2d 870, 872 (Tex.1982), rev'd on other grounds, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). We need not reach the issue whether the nonresi-

Niello and Murphy, Austin, et al law firm argument that they own no businesses, bank accounts, nor do they adversities in Texas in is unpersuasive. The Fifth Circuit ignored Petitioner's arguments regarding nonresidents have sufficient contacts with Texas to satisfy "the ultimate test of due process." Furthermore, Petitioner find it unwise to disregard contacts through an openly accessible website given the increased tendency for commerce to take place via the Internet, particularly when the website is used to contact potential consumer in all 50-states. Nothing in this case at

[21]A promise to do something in the future forms the basis of actionable fraud in Texas if it is shown that the promisor, at the time he made the promise, had no intention of performing it); *Pelton v. Witcher*, 319 S.W.2d 400, 403 (Tex.Civ.App. -- Fort Worth 1959, writ ref'd n.r.e.) ("[A] promise to do something in the future, if material, if made without the intention to perform, which induced the execution of the contract, and the failure to perform which resulted in injury to the parties relying upon such promise, may constitute actionable fraud. This seems to be the rule in Texas."). *Foster v. Reed*, 623 S.W.2d 494, 495-96.

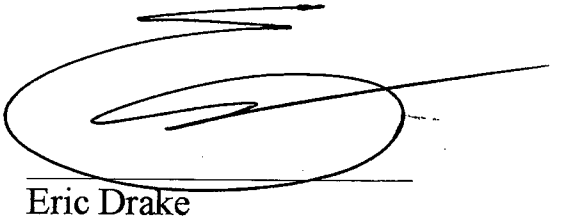
[22]In the *Brown* decision, *supra*, the Petitioner brought suit against three nonresident defendants, none of whom was qualified to do business in Mississippi. 688 F.2d at 330. The district court dismissed the action for want of jurisdiction, and this Court reversed. One of the defendants had initiated a single telephone call into the forum state, during which he allegedly committed the intentional tort of defamation. **The claim of jurisdiction was predicated on this single telephone call.** 688 F.2d at 332. The Fifth Circuit noted that the "injurious effect of the tort, if one was committed, fell in [the forum state], which the defendant could easily have foreseen. The injury was felt entirely by a . . . resident and a . . . corporation [of the forum state]." 688 F.2d at 333-34.

bar would "offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316, 66 S.Ct. at 158 (quotation omitted). The Niello's website contributes to the required minimum contacts as pled herein.

CONCLUSION

For the reason that the Respondents made sufficient enough minimum contacts for the district court to establish personal jurisdiction over them, the district court and the Fifth Circuit erred and abused their discretion by dismissing the Petitioner's cause of action. In addition, because Petitioner has demonstrated that Niello's interactive website and its Internet sales staff created sufficient minimum contacts, the district court had jurisdiction over the Respondents. Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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