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IN THE SUPREME COURT OF MISSISSIPPI
NO. 2018-SA-01259

JIM HOOD, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, *ex rel*. THE STATE OF MISSISSIPPI, COMMISSIONER OF REVENUE HERB FRIERSON, MISSISSIPPI DEPARTMENT OF REVENUE **APPELLANTS**

v.

WINE EXPRESS, INC., BOTTLE DEALS, INC., GOLD MEDAL WINE CLUB **APPELLEES**

APPEAL FROM THE CHANCERY COURT OF
RANKIN COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANTS JIM HOOD, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI, *ex rel*. THE STATE OF MISSISSIPPI, COMMISSIONER OF REVENUE HERB FRIERSON, MISSISSIPPI DEPARTMENT OF REVENUE

ORAL ARGUMENT REQUESTED

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SUMMARY OF THE REPLY ARGUMENT

Recognizing that their argument reflects a vision of personal jurisdiction at odds with case law on both the federal and state level, Appellees change tactics on appeal and inject a new argument into their brief. *See* App. Br. at 1, 18-19. Now, the argument is that the State is barred from enforcing its beverage control laws not only in *its* courts, but in *all* courts—because those laws purportedly violate the Dormant Commerce Clause.

They do not. But this Court need not reach the Dormant Commerce Clause issue in this appeal. That federal constitutional challenge to this State's laws was not raised, briefed, or addressed by the lower court. The argument thus should be dispensed with quickly because this Court shouldn't consider it at all. But, to be certain, Mississippi's law quite easily passes constitutional muster. This is so because the law treats in-state and out-of-state businesses *the same*. In other words, *all* direct-to-consumer shipments of alcoholic beverages are prohibited.

Nevertheless, as soon as this case is remanded back to the Chancery Court of Rankin County, Appellees then may raise a Dormant Commerce Clause argument if they want. In fact, they may do so for an obvious reason: because the repeated and knowing violations of the State's laws subject Appellees to specific personal jurisdiction in the courts of Mississippi.

Try as they might (or, more accurately, try as they barely do) to get this Court to say otherwise, Appellees fail to provide any analysis consistent with any version of any jurisdictional test set forth by any court. For example, despite that the seminal decision of *International Shoe v. Washington*, 326 U.S. 310 (1945) itself rejected the argument that an "FOB" term in a sales contract defeats personal jurisdiction, Appellees don't grapple with that case at all. Or even cite to it.

Yet that case and a myriad of lower court cases make clear that the jurisdictional inquiry does not turn on FOB terms or other technicalities in sales contracts. Nor do such contractual terms allow

Appellees to knowingly violate state law with impunity. In fact, the upshot of Appellees' argument would be a radical one: Purposefully ship anything you want into Mississippi as often as you want—just make sure you place the words "FOB Shipping Point" somewhere in fine print before you do.

Not surprisingly, such a holding would indeed put this Court at odds with federal and state courts around the country, including the U.S. Supreme Court. In fact, it is axiomatic that States have the power to control their borders when products—*e.g.*, alcohol, defective products, marijuana, untaxed cigarettes, opioids—are destined for delivery into the State.[1] This is especially so when the Twenty-First Amendment is added to the analytical mix, as it is here.

Here, each Appellee purposefully availed itself of Mississippi business opportunities by selling alcohol to Mississippi consumers via interactive websites through which Mississippi consumers could select alcohol, calculate shipping costs, and submit payments. Further, there were a multitude of transactions with Mississippi consumers. *See* State's Br. at 15-16. Worse still, Appellees profited thousands of dollars from their knowing violations of state law. And none of the sales and shipments of alcoholic beverages into Mississippi were performed unilaterally by the consumers.

Instead, each Appellee directed the shipment of alcohol to consumers located in Mississippi by (i) acting on the "buyer's behalf" to ship the alcohol; (ii) selecting/engaging a common carrier to transport the alcohol; and (iii) "arranging" for the transportation of the alcohol to residential addresses in Mississippi. *See* ROA.81 (Gold Medal Terms and Conditions) ("By placing an order,

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[1] The two amici briefs filed in support of Appellees contend that it doesn't matter if the State is powerless to stop shipments of marijuana because marijuana is still illegal under federal law. While true, the State regulates marijuana as well. MISS. CODE ANN. §§ 41-29-113, 41-29-136. For example, in 2014, the State passed HB 1231. Known as "Harper Grace's Law," the bill provides legal protection to patients diagnosed with a "debilitating epileptic condition or related illness" *in certain circumstances*. MISS. CODE ANN. § 41-29-136.

Further, as it relates to alcohol regulation (and thus unlike marijuana), the Twenty-First Amendment gives States the authority to address alcohol-related public health and safety issues. *See infra* pp. 24-25; *see also* State's Br. at 6-10, 47-49.

buyer authorizes ***seller to act*** *on buyer's behalf* ***in arranging for transportation of the wine*** at the buyer's direction."); ROA.99 (Wine Express) (""By placing an order, you authorize ***us to act on your behalf*** *to engage a common carrier to deliver* your order to you."); ROA.125 (Bottle Deals) ("***We will then arrange*** a common carrier for shipment….") (Emphasis supplied).

These activities constitute purposeful availment in Mississippi and satisfy the "minimum contacts" inquiry. The chancery court's unreasoned decision to the contrary must be reversed.

REPLY ARGUMENT

I. SPECIFIC PERSONAL JURISDICTION IS PROPER IN MISSISSIPPI.

As sophisticated companies running commercial websites, Appellees had fair warning that Mississippi (like all states) has laws governing the distribution of alcohol, and that they could be haled into a Mississippi court for repeatedly violating those laws. To be sure, Appellees' brief is divorced from a proper jurisdictional analysis, and they do not (because they cannot) dispute any of the following:

* Appellees operate interactive and commercial websites and entered contracts with Mississippi residents.
* Appellees created accounts via their websites for Mississippi consumers, and sent emails.
* Appellees sold alcohol to Mississippi residents located in Mississippi via their interactive websites.
* Appellees directed alcohol to be shipped and delivered to Mississippi addresses, including to minors and to consumers in "dry" counties.
* Appellees expressly acted on the buyer's behalf to ship alcohol, engage a common carrier, and arrange for transportation of the alcohol into the State.
* Appellees knowingly directed the shipments of alcohol to Mississippi residents, and allowed Mississippi customers to calculate shipping charges by using Mississippi zip codes.
* Appellees chose to conduct business in a highly regulated area of law, and knew Mississippi prohibits direct-to-consumer shipments of alcohol.
* Appellees collectively profited more than $200,000 in a short period of time *by violating State law*, and they each owe thousands of dollars in unpaid taxes.

See State's Br. at 15-16, 43.[2]

[2] Instead of confronting the relevant facts and the law, Appellees retort is to contend that the text on page 14 of the State's brief must be stricken. First, record cites are provided on page 14 of the State's brief. State

By ignoring these undisputed facts and personal jurisdiction implications, the chancery court seriously erred in a serious way. When companies choose to purposefully conduct business and derive benefit from interactions with consumers that they know to be Mississippi citizens, in violation of Mississippi law, it does not offend traditional notions of fair play and substantial justice to allow the State to maintain suit against such companies in Mississippi.

A. Technicalities in sales contracts specifying when title passes do not control the jurisdictional analysis—especially in a State civil enforcement action.

Appellees continue to invoke contractual shipping terms as an end-run around a proper personal jurisdiction analysis. Indeed, on nearly every page of their brief, they repeat some version of the tired mantra that this case is "governed by the UCC" and that FOB terms defeat personal jurisdiction. *See* App. Br. at 1. For good reason, though, courts uniformly have rejected such arguments—even in commercial transaction disputes that *are* substantively governed by the UCC.

Yet this is not a commercial transactions case, and the UCC doesn't even control the substantive law. This is a civil enforcement action brought by the State under Mississippi's Local Option Alcoholic Beverage Control Law, Miss. Code § 67-1-1 *et. seq.* Thus, the substantive provisions of the State's Local Option Law are the ones that govern—for it is that law that has been violated.

As the Fifth Circuit has put it, "the primary purpose of a F.O.B. term is to allocate the risk of damage to goods between buyer and seller." *Luv N' Care, Ltd. v. Insta-Mix, Inc.,* 438 F.3d 465, 471 (5th Cir. 2006). But, here, the substantive issue has nothing to do with damaged goods—in fact, whether the shipment of alcohol was damaged in transit matters none to the State's enforcement action. Stated

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Br. at 14 (citing ROA.171-172, 182-183, 197-198). Second, to the extent Appellees meant only to refer to note 16, they're still wrong. That footnote was for illustrative purposes because it is something in the public domain. Nonetheless, the record itself provides the same information. *See* ROA.171-172, 182-183, 197-198 (explaining that, through its investigation, the State discovered that most Internet wine retailers place on their website(s) filters that refuse orders that request shipments of alcohol into Mississippi. But not so with the Appellees).

differently, importing and knowingly directing shipments of alcohol to consumers in Mississippi violated Mississippi law—irrespective of whether the bottles of alcohol were damaged or not.

Yet this isn't to say that the UCC doesn't play a vital part of Mississippi law generally. It does. Indeed, the UCC, which is written in terms of current commercial practices, serves to meet the contemporary needs of a fast-moving commercial society. *See St. Paul Mercury Ins. Co. v. Merchants & Marine Bank*, 882 So. 2d 766, 770 (Miss. 2004). So, if this case involved a contractual dispute over the sale of goods between two parties to the contract, then Appellees (and their amicus) might be right. In that instance, the matter would be a UCC case—*at least for purposes of substantive law*.

Yet this case isn't that. And the provisions of the UCC are altogether inapposite to the State's civil enforcement action pursuant to its beverage controls laws. Moreover, even in disputes between parties to business transactions substantively governed by the UCC, courts at every level still *reject* the argument that provisions of the UCC control the jurisdictional inquiry. These cases include:

THE U.S. SUPREME COURT	*International Shoe v. Washington*, 326 U.S. 310 (1945) (rejecting the argument that an FOB term in a contract controls the "minimum contacts" analysis).

STATE HIGHER COURTS	*H. Heller & Co. v. Louisiana-Pac. Corp.*, 209 S.W.3d 844, 853 (Tex. App. 2006); *Book v. Doublestar Dongfeng Tyre Co.*, 860 N.W.2d 576, 597 (Iowa 2015); *Ex parte Lagrone*, 839 So. 2d 620, 627 (Ala. 2002) ("The mere fact that Fisher Products delivered its products 'F.O.B. Hartwell, Georgia,' is not dispositive[.]"); *Starbrite Distributing, Inc. v. Excelda Mfg. Co.*, 562 N.W.2d 640, 642 (Mich. 1997) (agreeing that "the U.C.C. had other concerns in mind, certainly not jurisdictional ones").

FEDERAL CIRCUIT COURTS	*Luv N' Care, Ltd. v. Insta-Mix, Inc.,* 438 F.3d 465, 470–72 (5th Cir. 2006) ("F.O.B. term does not prevent. . .personal jurisdiction[.]"); *Ruston Gas Turbines, Inc. v. Donaldson Co., Inc*., 9 F.3d 415, 417 (5th Cir. 1993) (personal jurisdiction proper even though the defendant shipped items FOB from Minnesota and claimed that "all of its actions related to its contract [ ] occurred in Minnesota"); *Owsalt v. Scripto*, Inc. 616 F.2d 191, 197 n.8 (5th Cir. 1980) ("jurisdiction does not depend on the technicalities of when title passes"). *Illinois v. Hemi Grp.*, 622 F.3d 754, 757–59 (7th Cir. 2010) ("Even if the sales technically occurred in New Mexico under commercial law…Hemi allegedly violated Illinois law…the legal location of the sales contract is not dispositive of [ ] jurisdiction[.]");

	Renner v. Lanard Toys Ltd., 33 F.3d 277, 282 (3d Cir. 1994) (Nothing "suggests that the fact that a foreign manufacturer or seller rids itself of title by a sale F.O.B. a foreign port is enough to insulate that manufacturer or seller from jurisdiction. . . ."); *North American Philips Corp. v. American Vending Sales, Inc.*, 35 F.3d 1576, 1579-80 (Fed. Cir. 1994) ("Appellees have pointed to no policy that would be furthered by according controlling significance to the passage of legal title here. This case has nothing to do…with the proper allocation of the risk of loss between parties to the underlying sales contracts").

FEDERAL DISTRICT COURTS	*Rudolph v. Topsider Bldg. Sys., Inc.*, 2007 WL 2156089, at *4 (D. Haw. July 24, 2007); *Cummins-Allison Corp. v. SBM Co.*, 2013 WL 12198835, at *7 (D. Haw. Jan. 28, 2013); *Reed v. Biomet Orthopedics, Inc.,* 2008 WL 1735162, at *9 (W.D. La. Mar. 6, 2008); *Aurora Corp. of Am. v. Michlin Prosperity Co.*, 2015 WL 5768340, at *6 (C.D. Cal. Sept. 29, 2015); *Jacobs Trading, LLC v. Ningbo Hicon Int'l Indus. Co.*, 872 F. Supp. 2d 838, 844 (D. Minn. 2012); *Excel Plas, Inc. v. Sigmax Co.,* 2007 WL 2853932, at *8 n.11 (S.D. Cal. Sept. 27, 2007); *Capsugel Belgium NV v. Bright Pharma Caps, Inc.,* 2015 WL 7185463, at *5 n.6 (D. Or. Nov. 13, 2015); *Robinson v. Bartlow*, 2012 WL 4718656, at *4 (W.D. Va. 2012); *Wilden Pump & Engineering Co. v. Versa-Matic Tool Inc*., 1991 WL 280844, at *3 (C.D. Cal. July 29, 1991); *People of Ill. ex rel. Madigan v. Hemi Grp.*, LLC, 2008 WL 4545349, at *4 (C.D. Ill. Oct. 10, 2008); *Outdoor Venture Corp. v. Ronald Mark Assocs., Inc.*, 2013 WL 2147854, at *8 (E.D. Ky. May 15, 2013) ("It is also disingenuous for RMA to suggest that it did not purposefully avail itself of the privilege of operating in Kentucky simply because it delivered the fabric F.O.B. Hillside, New Jersey…."); *ATEN Int'l Co. v. Emine Tech. Co.,* 261 F.R.D. 112, 119–20 (E.D. Tex. 2009) ("The contractual shipping arrangement that Emine has with its customers is irrelevant…"); *Strong Pharm. Labs., LLC v. Trademark Cosmetics, Inc.,* 2006 WL 2033138, at *7 (D. Md. July 17, 2006) ("Defendant's emphasis on the fact that the goods it manufactured for Plaintiff were shipped Free On Board ("FOB") is misplaced. . .").

All in all, then, contractual shipping arrangements do not govern the jurisdictional analysis even in cases substantively governed by the UCC.[3] And they certainly do not govern here—in a case brought by the State and *not* substantively governed by the UCC.[4]

[3] Appellees complain that some of the cases cited to by the State are "unpublished." App. Br. at 2. To be clear on this Court's rules regarding case citations, MRAP 35-B(b) provides that Mississippi state court cases "decided prior to the effective date of this rule which have not been designated for publication shall not be cited[.]" That rule was effective in 1996 and amended in 1998, so it only applies to cases decided before then. Plus, that rule only concerns *this State's* "appellate court[ ]" opinions. *See* Cmt. to Rules 35-A and 35-B.

In part, though, Appellees are right about the litany of cases cited by the State. The State cited to cases that are published and unpublished; cases from state and federal courts; and cases from the U.S. Supreme Court, appellate courts, and trial courts. The point is that *no court* agrees with the unreasoned decision issued by the Rankin County Chancery Court here.

[4] On page 2 of Wine Freedom's amicus brief, they declare: "The Uniform Commercial Code is as alive in Mississippi as it is in New York or California." They are correct. In fact, all current Mississippi law is alive—*when* it is applicable and *when* it governs the substantive dispute. That's just not the case here as to the UCC. And the UCC doesn't control the jurisdictional inquiry in any event. Relatedly, despite the hyperbolic language

i. The cases of *Charia v. Cigarette Racing Team, Inc*. and *Butler v. Beer Across America* do not advance Appellees' position.

Appellees continue to rely almost exclusively on *Charia v. Cigarette Racing Team, Inc.,* 583 F.2d 184 (5th Cir. 1978) and *Butler v. Beer Across America,* 83 F. Supp. 2d 1261 (N.D. Ala. 2000). The State again addresses both of these cases—but neither supports Appellees' position.

The Fifth Circuit's 1978 Decision in *Charia*. To recap the background, the defendant in *Charia* was a brick-and-mortar Florida boatbuilding corporation—not an Internet retailer. The plaintiff wrote to the Florida defendant, visited the Florida boatbuilding plant in Florida, and had face-to face discussions and ordered a boat in Florida. The boat was then shipped "F.O.B. Miami, Florida" to Louisiana. After delivery, the plaintiff experienced problems with the boat and sued. And eventually the case was dismissed on personal jurisdiction grounds.

In contrast to the Appellees' activities, though, the Fifth Circuit in *Charia* reasoned: "Cigarette sold four boats in Louisiana in a 5-year period, sales which we consider, in the circumstances of this case, to be isolated and sporadic." *Id.* at 189. Further, and more importantly, in considering the circumstances of that case, the *Charia* court analyzed only general jurisdiction.

In fact, given that *Charia* was decided in 1978, "specific jurisdiction" was not discussed at all. This is so because *Charia* was decided prior to the development in Supreme Court jurisprudence drawing distinctions between general and specific jurisdiction. *Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 380 n.4 (5th Cir. 2002) (*abrogated on other grounds*); *Thompson v. Chrysler Motors Corp*., 755 F.2d 1162, 1170-1172 (5th Cir. 1985) (distinguishing *Charia* and "more clearly draw[ing] the distinction" between specific and general jurisdiction) (citing *Helicopteros Nacionales*

in Wine Freedom's briefing (*e.g*., "Appellant's attack is on not on wine [sic] but on an essential part of the United States legal system"), *see* Wine Freedom Br. at 7, they curiously don't address the cases, like the ones in the above chart, cited by the State. Nor do they even try to grapple with the fact that *International Shoe* itself rejected the argument they urge.

de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984) (citing von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144–64 (1966)).

As discussed in footnote 39 of the State's opening brief, the distinction between "general" and "specific" jurisdiction is generally attributed to Professors von Mehren and Trautman, writing in 1966. *See Helicopteros Nacionales*, 466 U.S. at 414 n.8. That writing was cited in *Shaffer v. Heitner*, 433 U.S. 186, 205 (1977), but *Shaffer* did not specifically reference the distinction between general and specific jurisdiction. It was not until 1984, in *Helicopteros Nacionales*, that the Court cited to the Professors on the differences between general and specific jurisdiction. 466 U.S. at 414 n.8.

The Supreme Court more recently has discussed the distinction between specific and general jurisdiction. *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014). "Adjudicatory authority. . . in which the suit 'aris[es] out of or relate[s] to the defendant's contacts with the forum'. . . is today called 'specific jurisdiction.'" *Id.* (internal quotation marks and citation omitted). On the other hand, "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Id.* (internal quotations and citations omitted).

In other words, "[s]pecific jurisdiction 'arises out of' or 'relates to' the cause of action ***even if those contacts are 'isolated and sporadic.'*** . . . General jurisdiction arises when a defendant maintains 'continuous and systematic' contacts with the forum state even when the cause of action has no relation to those contacts." *LSI Indus. v. Hubbell Lighting, Inc.*, 232 F.3d 1369, 1375 (Fed. Cir. 2000) (emphasis supplied) (quoting *Burger King* and *Helicopteros Nacionales*); *L.C. Eldridge Sales Co., Ltd. v. Azen Manufacturing Pte., Ltd.*, 2013 WL 7964065, at *1 (E.D. Tex. 2013) ("Isolated and sporadic contacts suffice, so long as those contacts arise out of or relate to the plaintiff's cause of action.").

Thus, the "isolated and sporadic" language in *Charia* was in reference to, and in the context of, a general jurisdiction analysis—not a specific jurisdiction inquiry, which is what is at issue here. *Cf. Daimler AG*, 571 U.S. at 127–28 (noting that "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role") (internal quotations omitted). Further, unlike here, there was no website interactivity in *Charia*, no violations of state law, and overall there were very few sales and contacts with the forum state.

Lastly, as to the FOB argument, it was ***the plaintiff*** in *Charia* relying on an FOB term to support jurisdiction. *Id.* at 188. The plaintiff contended that jurisdiction ***was proper*** because the defendant "indirectly ship[ed] its product into Louisiana[.]" *Id.* Put differently, the plaintiff there invoked an FOB term to try to establish jurisdiction when there was otherwise a lack of forum contacts.

The argument in *Charia* is thus ***the opposite*** of the argument urged in this case. Here, Appellees wrongly seek to use an FOB term to circumvent specific jurisdiction when there are otherwise more than sufficient contacts with the forum—*and* those contacts relate to the cause of action.

The Alabama District Court's Decision in *Butler*. The other primary case relied on is *Butler v. Beer Across America,* 83 F. Supp. 2d 1261 (N.D. Ala. 2000). There, the parents of a minor brought an action against an Illinois defendant seeking damages for the single sale of beer to their minor son. *Id.* The *Butler* court applied *Zippo* and determined that the website was akin to "an electronic version of a postal reply card." *Id.* at 1268. Here, by contrast, Appellees' commercial websites are as interactive as it gets under *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

What's more, the sales and shipments of alcoholic beverages into Mississippi were not performed unilaterally by the buyers and consumers of the alcohol. *See* ROA.81 (Gold Medal Terms and Conditions); ROA.99 (Wine Express); ROA.125 (Bottle Deals). And, unlike *Butler*, this case is an action brought by the State to enforce the repeated and knowing violations of state law.

Plus, Appellees rely on footnote 6 of the *Butler* decision, which construed applicable provisions of Alabama ***state law*** vis-à-vis FOB terms and that state's version of the UCC. *See Butler*, 83 F. Supp. 2d at 1264 n.6. However, two years ***after*** the *Butler* case was decided, the Alabama Supreme Court held that FOB terms do ***not*** control the jurisdictional inquiry. *Ex parte Lagrone*, 839 So. 2d 620, 627 (Ala. 2002) (finding personal jurisdiction and explaining that "[t]he mere fact that Fisher Products delivered its products 'F.O.B. Hartwell, Georgia,' is not dispositive.").

In short, the attempt to stretch *Charia* and *Butler* to mean something more than they do falls flat. And the quantity and regularity of shipments by Appellees, as well as the purposeful shipment of alcohol to known destination addresses in Mississippi, makes specific jurisdiction proper.

ii. Neither the Chancery Court's decision nor Appellees' argument comports with contemporary personal jurisdiction principles.

According to Appellees, using a third-party carrier to knowingly send shipments of alcohol to Mississippi absolves them of their contacts with the State. Under Appellees' position, then, for personal jurisdiction to be proper, Internet wine retailers need to personally deliver and physically transport alcohol into the geographic bounds of the Mississippi forum. But such a position falls out of step with the contemporary inquiry for personal jurisdiction.

Indeed, Appellees seek to rewind the last 141 years and return to the rigid territorial framework of *Pennoyer v. Neff,* 95 U.S. 714 (1878). In *Pennoyer*, decided shortly after the enactment of the Fourteenth Amendment, the Court held that a tribunal's jurisdiction over persons reaches no farther than the geographic bounds of the forum. *Id.* at 720 ("The authority of every tribunal is necessarily restricted by the territorial limits of the State[.]"); *Shaffer v. Heitner,* 433 U.S. 186, 197 (1977).

In time, however, *Pennoyer*'s strict territorial approach yielded to a less rigid understanding, spurred by "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity." *Burnham v. Superior Court of Cal., County of Marin,* 495 U.S.

604, 617 (1990) (opinion of Scalia, J.). And *International Shoe* reflects one of the first steps in the "momentous departure from *Pennoyer*'s rigidly territorial focus[.]" *Daimler AG*, 571 U.S. at 128.

When "a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). In fact, jurisdictional analysis is not susceptible to mechanical tests, *International Shoe*, 326 U.S. at 319, and due process is not intended to act as a "territorial shield" whereby a defendant can escape jurisdiction through artful structuring of commercial relations, *Burger King,* 471 U.S. at 473-74.

Consequently, an FOB term in a sales contract does not mechanically preclude a court from exercising jurisdiction. And, at the end of the day, if Appellees didn't want to come to court in Mississippi, they shouldn't have knowingly and repeatedly shipped alcohol into this State.

B. Mississippi's long-arm statute is applicable.

As discussed, the three prongs of the long-arm statute are commonly referred to as the doing-business prong, the contract prong, and the tort prong. MISS. CODE ANN. § 13-3-57. All are satisfied here.

Doing Business Prong. One is deemed to be "doing business" if they "perform any character of work or service in this state." *ITL Int'l, Inc. v. Constenla, S.A.*, 669 F.3d 493, 497-98, 2012 WL 266987, at *3 (5th Cir. Jan. 31, 2012); *Estate of Jones v. Phillips*, 992 So. 2d 1131, 1139 (Miss. 2008)); *Retail Coach v. r360, LLC*, 2017 WL 875831, at *3 (N.D. Miss. Mar. 3, 2017). Appellees' acts of "doing business" include the operation of interactive websites and knowing sales to the forum state.

Each Appellee operates a commercial, interactive website through which Mississippi customers can purchase alcohol, calculate shipping charges using Mississippi zip codes, and create customer accounts. When a defendant transacts business through a website by engaging in transactions

with forum residents, and by entering into contracts over the Internet, specific personal jurisdiction is proper. *Mink v. AAAA Dev. LLC,* 190 F.3d 333, 337 (5th Cir. 1999).

The key distinguishing feature of a fully interactive website which yields personal jurisdiction is the ability to allow consumers to order or purchase products and services online. *Mink,* 190 F.3d at 337. In this case, Appellees made repeated and knowing online sales to customers located in Mississippi. *Cf. People of Ill. ex rel. Madigan v. Hemi Grp.*, LLC, 2008 WL 4545349 (C.D. Ill. Oct. 10, 2008); *Illinois v. Hemi Grp. LLC*, 622 F.3d 754, 757–58 (7th Cir. 2010); *State of Wash., Dept. of Rev. v. www.dirtcheapcig.com, Inc*., 260 F. Supp. 2d 1048 (W.D. Wash. 2003) (considering the "transaction of any business" prong of Washington's long arm and holding that website provided grounds for specific jurisdiction); *see also* State Br. at 27-36 and n.29, 30.

As a result, the commercially interactive websites at issue here are at the opposite end of the spectrum as the websites in the cases relied on by Appellees, such as *Lofton v. Turbine Design, Inc*., 100 F. Supp. 2d 404 (N.D. Miss. 2000). *See* App. Br. at 12-13. In *Lofton*, the court first found that the state long-arm statute *was* applicable. *Id.* at 409. But, in *Lofton*, the minimum contacts test wasn't satisfied when the defendant's website was evaluated under *Zippo*.

However, this was because the website "was used solely as an advertising tool. . .not suited for shopping or ordering online." *Id.* at 410 ("The website does not contain a price list for services, contract for engagement of services, or order form. It is not suited for shopping or ordering online. It does not even offer the opportunity to receive a quote as to costs [.]"). By contrast, the websites at issue here are interactive and designed to allow (and did allow) shopping and ordering online.

Further, the volume and regular repeated sales to Mississippi residents, in violation of state law, are more than enough to satisfy this prong of the long-arm statute.[5] Indeed, there were a multitude

[5] Appellees also rely on *Lott v. J.W. O'Connor & Co., Inc*., 991 F. Supp. 785, 785 (N.D. Miss. 1998). But the complaint in that case stemmed from an injury sustained by a Mississippi resident after falling in the

of unlawful sales into the State in a short person of time. Specifically, Gold Medal effectuated 2,556 transactions with Mississippi residents located in Mississippi; Wine Express engaged in 189 such transactions; and Bottle Deals engaged in 51 such transactions.[6] *See* State's Br. at 15-16.

Importantly, too, Appellees (and their amicus) ignore that they each acted on the buyer's half and arranged for the transportation of alcohol to consumers they knew were located in Mississippi. For instance, amicus Wine Freedom proclaims that the Appellees' "only contact with Mississippi was the consumer bringing the product into the state." *See* Amicus Wine Freedom Br. at 7.

This isn't even close to accurate. Indeed, it pays only short shrift to the interactivity of the websites, the knowing violations of state law, and that none of the sales and shipments of alcohol into Mississippi were performed unilaterally by the consumers. *See* ROA.81 (Gold Medal Terms and Conditions) ("By placing an order, buyer authorizes ***seller to act*** *on buyer's behalf* ***in arranging for transportation of the wine***…."); ROA.99 (Wine Express) ("“By placing an order, you authorize ***us to act on your behalf*** *to engage a common carrier to deliver* your order to you."); ROA.125 (Bottle Deals) ("***We will then arrange*** a common carrier for shipment….") (Emphasis supplied). In addition, Appellees' terms and conditions provided that "if a shipment is damaged in transit we will replace the product at no additional charge." ROA.82 (Gold Medal); *e.g.,* ROA.125 (Bottle Deals) ("We guarantee our product quality and service. . . .").

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parking lot of the Oak Court Mall in Tennessee. The Mall consisted of bricks and mortar stores located in Tennessee; it did not operate a commercially interactive website; and it did not direct the shipment of products (lawful or unlawful) to Mississippi consumers located in Mississippi.

[6] In fact, a single sale into the forum is sufficient to establish specific jurisdiction. *Autotronic Controls Corp. v. Davis Technologies*, 2005 WL 1683595, at *2 (W.D. Tex., 2005) ("A single sale of a trademarked product in violation of the Lanham Act in the forum is sufficient to establish personal jurisdiction."); *Ruston Gas Turbines, Inc. v. Donaldson Co., Inc*., 9 F.3d 415, 419 (5th Cir. 1993) ("A single act by the defendant directed at the forum state…can be enough…if that act gives rise to the claim being asserted.").

Arranging for and directing the shipment of alcohol into Mississippi violated state law.[7] And there should be no doubt that Appellees "did various acts here for the purpose of realizing a pecuniary benefit or otherwise accomplishing an object." *Retail Coach*, 2017 WL 875831, at *3.

The Contract Prong. A defendant is subject to jurisdiction under the contract prong of the long-arm statute if the defendant entered into a contract with a Mississippi resident that is to be at least partially performed in Mississippi. MISS. CODE ANN. § 13–3–57; *Lta, Inc. v. Breeck*, 2012 WL 12884873, at *1 (S.D. Miss. Apr. 25, 2012). Here, Appellees entered many contracts with many Mississippi consumers, and those contracts were performed, at least in part, in Mississippi.

Indeed, Mississippi consumers sent payment while in Mississippi. *See Sheridan, Inc. v. C. K. Marshall & Co*., 360 So. 2d 1223, 1225 (Miss. 1978). And acceptance of the contracts was made in Mississippi. *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co*., 188 So. 539, 542 (Miss. 1939); *Miller v. Glendale Equip. & Supply, Inc.*, 344 So. 2d 736 (Miss. 1977). Likewise, Appellees acted on the buyer's behalf and specifically directed the alcohol to be shipped to Mississippi residents.

No matter: Appellees predictably contend that the contract prong of the State's long-arm statute still cannot apply because Appellees "sold all goods at issue 'FOB'." App. Br. at 9. As explained, though, FOB contractual terms neither control the substantive law nor the jurisdictional inquiry in this civil enforcement action brought by the State.

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[7] Wine Freedom's example on page 12 of their brief gets the facts and the law wrong. They pose the example of a Mississippi resident *leaving* the State of Mississippi, buying alcohol from a bricks and mortar store *outside* the State, and then *unilaterally* driving it into Mississippi. But having to resort to that example demonstrates only why personal jurisdiction is proper here with respect to the Appellees.

The Internet wine retailers here set up sophisticated commercial ventures online. And, through their commercially interactive websites, they sold alcohol to Mississippi residents *located in Mississippi*, and they received a pecuniary benefit from their business with residents *located in Mississippi*. They further *purposefully directed* shipments of alcohol to residents they *knew were located in Mississippi*. Still more, Appellees expressly acted on the buyer's behalf and arranged for the transportation of the alcohol *to known Mississippi addresses*.

Plus, Appellees' FOB argument does not comport at all with the plain language of this State's long-arm statute. Section 13-3-57 provides that any "foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall *make a contract with a resident* of this state to be *performed in whole or in part* by *any party* in this state … shall by such act or acts be deemed to be doing business in Mississippi[.]" (Emphasis supplied).

If the Mississippi Legislature had intended for who bears the expense of shipping and the risk of loss in the transfer of goods to be dispositive of the contract prong of the long-arm statute, it would have said that. *But it didn't*.

Further, the case of *Cycles, Ltd. v. W.J. Digby Inc*., 889 F.2d 612 (5th Cir. 1989) does not support Appellees' position. *See* App. Br. at 10. That case stemmed from a sale-of-business transaction gone awry between seller Cycles, Limited (Cycles) and buyer W.J. Digby, Inc. (Digby). And that sale-of-business transaction generated a series of litigation (both in Mississippi and Arkansas).[8]

By way of background, Cycles was in the trucking business in West Memphis, Arkansas and purchased refrigerated trailers and financed them through a series of notes through Navistar Financial Corporation. In 1978, Cycles entered into an Authority and Equipment Lease and Purchase Agreement with Digby (a Nevada corporation with its principal place of business in Colorado). Pursuant to this agreement, the trailers financed by the notes were transferred by Cycles to Digby.

In September 1979, the Interstate Commerce Commission ("ICC") approved the transfer of the trailers from Cycles to Digby but required recharacterization of various portions of the agreement—which caused adverse tax consequences for Digby. Digby appealed the ICC decision, but it was affirmed, and Digby thus terminated the agreement with Cycles. *Cycles*, 889 F.2d at 615.

[8] *E.g., Cycles, Ltd. v. W.J. Digby Inc*., 889 F.2d 612 (5th Cir. 1989); *Cycles, Ltd. v. Navistar Financial Corp*., 37 F.3d 1088 (5th Cir. 1994); *Cycles, Ltd. v. Navistar Financial Corp*., 91 F.3d 139 (5th Cir. 1996).

Digby refused to make any further payments to Navistar on one of the notes and refused to return the trailers to Cycles. Further, in 1981, Cycles was declared bankrupt as a result of Arkansas bankruptcy proceedings. Prior to the adjudication of bankruptcy, though, Cycles had initiated a suit against Digby for conversion of numerous trailers and other equipment.

Although the Fifth Circuit found personal jurisdiction lacking, that decision doesn't carry Appellees where they need to go—for a host of reasons. For starters, Digby didn't operate and conduct business via a commercially interactive website; it otherwise had no employees or assets in Mississippi; and "the record contain[ed] no evidence of the frequency with which [Digby] hauled goods through Mississippi." *Id.* at 614. Moreover, while Cycles and Digby communicated via mail and telephone, the communications only "pass[ed] between Colorado and West Memphis, Arkansas." *Id.* Further, "in-person negotiations" occurred in Arkansas and Tennessee. *Id.* Additionally, payment was "made in [ ] Arkansas," and "the location of the leased premises and equipment" was in Arkansas. *Id.* at 618.

Thus, contrary to the instant matter, no part of the contract in *Cycles* was to be performed in whole or in part in Mississippi. The following comparison demonstrates as much:

CYCLES	THIS CASE
No business transactions via an interactive website.	A multitude of business transactions with Mississippi residents located in Mississippi via commercially, interactive websites.
Lease and Purchase Agreement lawful under state law.	Received a pecuniary benefit from unlawful contracts with Mississippi residents to knowingly ship alcohol into Mississippi.
Phone calls were to and from Colorado and Arkansas.	Business transactions over the Internet involved consumers located in Mississippi.
Physical mail transmitted to and from Colorado and Arkansas.	Emails and creation of consumer accounts involved consumers located in Mississippi.
Negotiations in Arkansas and Tennessee.	Acceptance of the contracts in Mississippi.
Payment was made in Arkansas.	Mississippi consumers sent payment while located in Mississippi.
The leased premises and equipment under the contract were in Arkansas.	Internet wine retailers arranged for the shipment and transportation of the alcohol to residential addresses in Mississippi.
The contractual "services were to be rendered outside of Mississippi." *Cycles*, 889 F.2d at 619.	Internet wine retailers acted on the "buyer's behalf" to ship the alcohol and specifically arrange for the transportation of the alcohol into Mississippi.

Accordingly, and unlike in *Cycles*, Appellees made contracts with Mississippi residents to be performed in whole or in part by a party in Mississippi.

Tort Prong. Appellees make two arguments for why this prong of the long-arm statute isn't satisfied. First, they contend that a tort cannot be committed against the government. Second, Appellees (again) claim that an FOB term controls the analysis. They're wrong on both fronts.

To be sure, Appellees contend that "[t]orts are civil" and that torts are a "civil wrong for which a remedy may be obtained." App. Br. at 11. But this case *is* a civil action, and the State has brought it so that a "remedy may be obtained." Indeed, not every violation of law is enforced criminally. Many times, violations are enforced via civil enforcement actions—like this one.

Plus, "[i]t is common ground that States have an interest, as sovereigns, in exercising the power to create and enforce a legal code." *State of Alaska v. U.S. Dep't of Transp*., 868 F.2d 441, 443 (D.C. Cir. 1989) (quotations omitted); *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (explaining that the government suffers a cognizable "injury to its sovereignty arising from violation of its laws"). Appellees repeatedly and knowingly violated this State's laws—and profited from it. Thus, they caused injury to the State of Mississippi in this State.

C. Exercising specific jurisdiction comports with Due Process.

Due process is afforded in the exercise of personal jurisdiction provided the defendant has minimum contacts with the forum state, and provided maintaining the suit in the forum state will not offend traditional notions of fair play and substantial justice. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291-92 (1980). These two aspects of Due Process are discussed in turn.

i. Appellees have minimum contacts with Mississippi.

A non-resident defendant cannot escape personal jurisdiction by arguing it does not have an office or any employees in the forum state because "specific jurisdiction may arise without the

nonresident defendant[] ever stepping foot upon the forum state's soil." *American Cable Corp. v. Trilogy Communications, Inc*., 754 So.2d 545, 551 (Miss. App. 2000). It is "the purposefulness of the decision that is important and not the physical presence of the defendant in the state." *Id.*

Here, it is clear from Appellees' multiple sales to Mississippi residents and from their interactive websites that minimum contacts with Mississippi are maintained. Each Appellee's sales support an inference of an affirmative, purposeful decision to avail itself of the privilege of conducting business in Mississippi. *See Mississippi Interstate Express, Inc. v. Transp., Inc.,* 681 F.2d 1003, 1007 (5th Cir. 1982). In their brief, however, Appellees spend less than two pages discussing the minimum contacts inquiry in the context of interactive websites. App. Br. at 14-15. And what little discussion they do provide is inept.

For instance, on pages 27-36 of the State's opening brief, the State discussed the varying tests courts have utilized to analyze Internet activity. Further, because the minimum contacts test is grounded in federal due process concerns, the State pointed out that the Fifth Circuit has "adopted *Zippo*'s sliding scale[.]" *Retail Coach*, 2017 WL 875831, at *4 n.3.

Nonetheless, Appellees do not provide an analysis of minimum contacts under *Zippo*. Instead, they paternalistically declare that the State "failed to mention that the Fifth Circuit has…recognized that the *Zippo* analysis is not always 'well adapted to the general jurisdictional inquiry[.].'" *See* App. Br. at 15 (citing *Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir. 2002)). Two points about this contention.

First, the State specifically cited to *Revell* and discussed the *Zippo* analysis in the context of that case. *See* State Br. at 30-31 and n.27, 28. Second, and importantly, Appellees miss the point of *Revell*. That case indicated that *Zippo* is not always "well adapted" for a ***general jurisdiction*** inquiry.

But this isn't a general jurisdiction case. And, as *Revell* noted, "*Zippo*'s scale does more work with specific jurisdiction—the context in which it was originally conceived." *Revell*, 317 F.3d at 471.

In a similar vein, Appellees continue to stray far afield with their citation to a portion of *Dunn v. Yager*, 58 So. 3d 1171 (Miss. 2011). *See* App. Br. at 14 (citing *Dunn* for the proposition that contacts must be regular and continuous). In *Dunn*, a patient brought a medical malpractice action against a physician who prescribed a medication that allegedly caused the patient to become blind.

When this Court discussed the defendant's "regular and continuous contacts" with the forum, it was analyzing the "exercise [of] general jurisdiction[.]" *Id.* at 1186 ¶ 34. Although this Court discussed "specific jurisdiction" in paragraph 33, it did not have to analyze it because "general personal jurisdiction [was] dispositive." *Id.* 1186. Accordingly, Appellees' continued effort to conflate general and specific jurisdiction to try and dodge grappling with their forum contacts just doesn't work.

Indeed, here, the websites at issue are as interactive as it gets under any formulation of *Zippo*—or under any other minimum contacts and specific jurisdiction inquiry.[9] Mississippi consumers located in Mississippi can (and did) view products, view prices, calculate shipping costs using Mississippi zip codes, place orders, enter contracts, have accounts created for them, send and receive emails, have the shipment of alcohol arranged for them, and have the shipment delivered to

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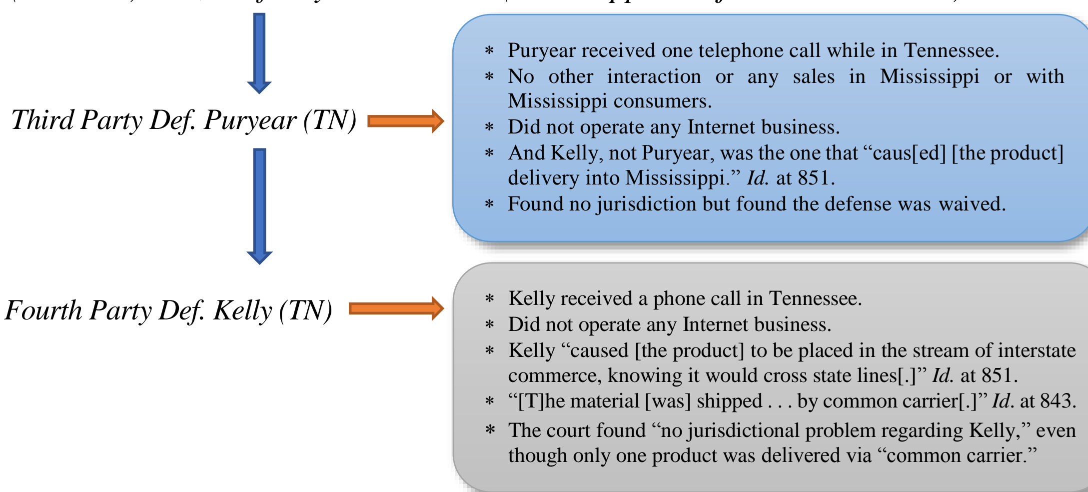
[9] *See, e.g., Rice v. PetEdge, Inc.*, 975 F. Supp. 2d 1364, 1370–72 (N.D. Ga. 2013); *Zing Bros., LLC v. Bevstar, LLC*, No. 2:11–cv–00337 DN, 2011 WL 4901321, at *3 (D. Utah Oct. 14, 2011); *Fusionbrands, Inc. v. Suburban Bowery of Suffern, Inc.*, No. 1:12–cv–0229–JEC, 2013 WL 5423106 (N.D. Ga. Sept. 26, 2013); *Stomp, Inc. v. NeatO, LLC*, 61 F. Supp. 2d 1074, 1078 (C.D. Cal. 1999); *Variant, Inc. v. Flexsol Packaging Corp.*, No. 6:08 CV 478, 2009 WL 3082581, at *2 (E.D. Tex. Sept. 21, 2009); *Robinson v. Bartlow*, No. 3:12-CV-00024, 2012 WL 4718656, at *5 (W.D. Va. Oct. 3, 2012); *Sarvint Techs., Inc. v. Omsignal, Inc.*, 161 F. Supp. 3d 1250, 1261–62 (N.D. Ga. 2015). In contrast to these cases, and the others cited in the State's opening brief, *Shippitsa Limited v. Slack*, 2019 WL 277613, at *5 (N.D. Tex., 2019) is a very recent analysis of Internet activity that is considered "passive" under *Zippo* and its progeny. *Id.*

them in Mississippi. And, all the while, Appellees profited thousands of dollars through their connections with this State.

Next, Appellees turn to the 1977 district court case of *R. Clinton Const. Co. v. Bryant & Reaves, Inc.*, 442 F. Supp. 838 (N.D. Miss. 1977) for support. But that case is also unhelpful. *See* App. Br. at 16-17. In *R. Clinton*, plaintiff Clinton (Missouri resident) requested that defendant Bryant & Reaves, a Mississippi parts supplier, furnish a large quantity of antifreeze. The defendant called Puryear (third party defendant) to supply the antifreeze. Puryear was also in the supply business in Memphis, Tennessee. Puryear then contacted Kelly Chemical Company in Memphis to supply and "arrange for shipment" of the requested antifreeze. Kelly (fourth party defendant) sold the antifreeze, placed it into the stream of commerce, and arranged for the shipment "by common carrier truck line." *Id.* at 843, 851.

The facts and jurisdictional analysis in *R. Clinton* thus looked like this:

Pl. R. Clinton (Missouri) → *Def. Bryant & Reaves (Mississippi – no jurisdictional issue)*



Simply put, neither the facts nor the law in *R. Clinton* support Appellees' position here.

Lastly, the tactic of ignoring the interactivity of their websites and proffering an (incorrect) analysis of the "stream of commerce" theory of personal jurisdiction is equally unavailing. App. Br. at 15-16. Cases involving a standard stream-of-commerce analysis usually involve entities who

cannot necessarily predict or control where downstream their products will land—intervening, unconnected actors may take the products "to unforeseeable markets." *Plixer International, Inc. v. Scrutinizer GmbH*, 905 F.3d 1, 8 (1st Cir. 2018). Here, no intervening and unrelated actor brought Appellees' contraband product somewhere unexpected.

To be certain, this is not a case where the Internet wine retailers placed alcohol adrift in a sea of commerce which randomly swept their products into Mississippi. Quite differently, the Internet wine retailers here entered contracts with, and sold alcohol to, Mississippi residents while located in Mississippi; allowed those residents to calculate shipping costs by entering Mississippi addresses; communicated about Mississippi's beverage control laws with the consumers; and acted on the buyer's behalf to arrange for the transportation of the alcohol into Mississippi.

With this, the Court has an "objectively clearer picture of [Appellees'] intent to serve the forum, the crux of the purposeful availment inquiry." *Plixer International, Inc.*, 905 F.3d at 8; *Ex parte Lagrone*, 839 So. 2d at 627 ("Fisher Products placed its products into the stream of commerce, with not only the "expectation," but with the actual knowledge that the products would be purchased by consumers in this State."); *Tempur-Pedic Intern., Inc. v. Go Satellite Inc.*, 758 F. Supp. 2d 366, 376 (N.D. Tex. 2010) ("Go Satellite is not a victim of unilateral third-party conduct…Go Satellite would have been aware that filling any orders made by persons with Texas addresses would mean shipping the products to Texas in the stream of commerce.") and *id.* at 376 ("[H]ad Go Satellite wanted to exclude certain jurisdictions, it was able to refuse to deal with certain customers or to turn down any orders after checking customer addresses. As *Zippo* itself notes, 'If [the defendant] had not wanted to be amenable to jurisdiction in [the forum state], the solution would have been simple—it could have chosen not to sell its services to [forum-state] residents.' *Zippo,* 952 F. Supp. at 1126–27."); *see also* State's Br. at pp. 33-36 and n.35.

All in all, whether this Court adopts the *Zippo* analysis, or utilizes *Zippo*'s sliding scale as a factor in the overall analysis, or simply analyzes the totality of the circumstances, the minimum contacts test is satisfied here. Indeed, *Zippo* did not create its sliding scale from whole cloth—the test is based on "well developed personal jurisdiction principles." *Zippo*, 952 F. Supp. at 1124. Those well developed principles subject Appellees to personal jurisdiction in Mississippi.

ii. Maintaining suit in Mississippi is consistent with notions of fair play and substantial justice.

As discussed in the State's opening brief, under the fair play and substantial justice inquiry, the court focuses on (1) the burden on the defendant, (2) the interest of the forum state in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the efficient resolution of controversies between the states, and (5) the shared interests of the states in furthering fundamental, substantive social policies. Appellees do not provide any examination of these factors. Because of this, the State's original analysis on these points is unrebutted. *See* State Br. at 44-49.

To recap the analysis, though, the Internet wine retailers here set up sophisticated commercial ventures online. They transacted business and gained a profit from Mississippi consumers by violating state law. There can thus be no argument that they will be seriously burdened by defending a lawsuit in Mississippi. *Hemi*, 622 F.3d at 760 ("Hemi wants to have its cake and eat it, too: it wants the benefit of a nationwide business model with none of the exposure."); *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2095 (U.S. 2018) ("This Court should not maintain a rule that ignores these substantial virtual connections to the State.").

What is more is that this is a suit brought by the State to enforce state law. Mississippi courts certainly have a strong interest in providing a forum to resolve disputes involving the State itself. Additionally, the States' shared interests in furthering substantive social policies and the enforcement

of the States' Twenty-First Amendment rights are advanced by Mississippi's efforts to enforce alcohol control laws.

II. THE DORMANT COMMERCE CLAUSE ARGUMENT CANNOT BE CONSIDERED FOR THE FIRST TIME ON APPEAL, AND THE ARGUMENT IS OTHERWISE MERITLESS.

The record on appeal in this matter is hundreds of pages. But if the Court searches for a reference to the "Dormant Commerce Clause," it will not find it. This is so because it wasn't raised—until now.

For good reason, this Court should not consider a federal constitutional defense raised for the first time on appeal in a civil enforcement action brought by the State—especially where, as here, the State's action was wrongly dismissed at the jurisdictional stage. *See, e.g., Mississippi State Fed. of Colored Women's Club Housing v. L.R.*, 62 So. 3d 351, 363 (Miss. 2010) ("This Court declines to consider the constitutional argument, as it comes too late and is not properly before the Court."); *Williams v. Skelton*, 6 So. 3d 428, 430 (Miss. 2009); *Powers v. Tiebauer*, 939 So. 2d 749, 754–55 (Miss. 2005) (holding constitutional challenge raised for the first time on appeal, was barred).

Yet even if the Court were to address the Dormant Commerce Clause, Appellees reach only a dead end with this new argument. The Commerce Clause operates both positively and negatively. Positively and explicitly, it confers on Congress the power "[t]o regulate commerce…among the several States[.]" U.S. CONST. art. I, § 8, cl. 3. Negatively and by implication, it restricts the power of the states to regulate interstate commerce. This "dormant" aspect "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 273 (1988).

Generally speaking, Dormant Commerce Clause analysis involves a two-step inquiry: the first question is "whether a challenged law discriminates against interstate commerce." *Department*

of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008); *United Haulers Ass'n., Inc. v. Oneida–Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) ("[W]e first ask whether [the law] discriminates on its face against interstate commerce"); *U.S. Technology Corporation v. MDEQ*, 2016 WL 4098609, at *6 (S.D. Miss. July 28, 2016). Even if the law "discriminates on its face," the inquiry doesn't end though. *See Tennessee Wine and Spirits Retailers Association v. Thomas*, 139 S. Ct. 2449 (U.S. 2019).

Indeed, in light of the Twenty-First Amendment, courts "engage in a different inquiry." *Id.* at 2474. "Recognizing that § 2 was adopted to give each State the authority to address alcohol-related public health and safety issues…we ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground. Section 2 gives the States regulatory authority that they would not otherwise enjoy[.]" *Id.* Here, Appellees fail at the first step (and every other step) of the Dormant Commerce Clause inquiry.

To begin with, the only issue in *Tennessee Wine* was a "2-year durational-residency requirement for license applicants." *Id.* at 2476. Mississippi does not have a durational-residency requirement. Moreover, under Mississippi law, *all* direct-to-consumer shipments of alcohol are prohibited—from in-state and out-of-state businesses. *See, e.g.*, MISS. CODE ANN. § 67-1-83(1) (unlawful "to sell any alcoholic beverages except by delivery in person to the purchaser at the place of business of the permittee"). The Dormant Commerce Clause argument thus fails from the start.

So, too, does the argument urged by the National Association of Wine Retailers. *See* Amicus NAWR Br. at 9 (comparing Mississippi law to the law in *Granholm v. Heald*, 544 U.S. 460, 478 (2005)); *see also* App. Br. at 19. In *Granholm*, the Court considered regulations of two States that permitted in-state wineries to ship their products directly to in-state consumers. 544 U.S. at 468–70. The regulations at issue in *Granholm* worked to exempt in-state wineries—but not their out-of-

state competitors—from distributing their wines through wholesalers. *Id.* The Court determined that "[t]he differential treatment between in-state and out-of-state wineries constitutes explicit discrimination against interstate commerce." *Id.* at 467.

Here, in-state and out-of-state businesses are treated *the same*: all direct-to-consumer shipments of alcohol are prohibited. Thus, what Appellees actually seek is to confer *favored status* on *out-of-state businesses*. But this would turn the Dormant Commerce Clause on its head.

In fact, both the Wilson Act and the Webb-Kenyon Act were enacted "to solve the problem" of "confer[ing] favored status on out-of-state alcohol." *Tennessee Wine*, 139 S. Ct. at 2465-66; *id*. at 2466 (Webb-Kenyon Act was enacted to "'eliminate the regulatory advantage...afforded imported liquor'") (quoting *Granholm*, *supra*, at 482). Similarly, "the text of § 2 [of the Twenty-First Amendment] 'closely follow[ed]' the operative language of the Webb-Kenyon Act, and this naturally suggests that § 2 was meant to have a similar meaning." *Id.* at 2467 (citations omitted).

Here, as discussed in the State's opening brief, Mississippi's law is precisely the type contemplated by the Twenty-First Amendment. *See* State's Br. at 6-10, 47-49. And while this Court should not reach the Dormant Commerce Clause issue in this appeal, the argument is a non-starter in any event.

CONCLUSION

For all of the reasons articulated here and in the opening brief, the Chancery Court of Rankin County's dismissal on personal jurisdiction grounds was reached in error. It thus should be reversed, and the case should be remanded for further proceedings.

DATED this the 22nd day of July, 2019.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Krissy C. Nobile, do hereby certify that I have electronically filed the foregoing document with the Clerk of the Court using the MEC system, which sent notification to all counsel of record, and mailed, via U.S. Mail, postage pre-paid to the following:

Honorable John Grant
Rankin County Chancery Court
203 Town Sq.
Brandon, MS 39042

THIS, the 22nd day of July, 2019.

/s/ *Krissy C. Nobile*____________________
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