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MICHAEL WILLYOUNG v. COLORADO CUSTOM HARDWARE, INC., et al.

Civil Action No. 1:08-cv-17-SJM

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF  
PENNSYLVANIA, ERIE DIVISION

*2008 U.S. Dist. Ct. Motions 480617; 2009 U.S. Dist. Ct. Motions LEXIS 44039*

March 9, 2009

Motion to Dismiss

**VIEW OTHER AVAILABLE CONTENT RELATED TO THIS DOCUMENT: U.S. District Court:** Motion(s); Pleading(s)

**COUNSEL:** [\*1] Jeffrey A. Pribanic, Lead Attorney, Pa. I.D. No.: 56808, Dr. Christopher Buck, Associate Attorney, Pa. I.D. No.: 205265, PRIBANIC & PRIBANIC, L.L.C., White Oak, PA, (Counsel for Plaintiff, Michael Willyoung).

**JUDGES:** Hon. Sean J. McLaughlin

**TITLE: PLAINTIFF'S RESPONSE TO RENEWED MOTION TO DISMISS OF THE BENT GATE, INC. t/d/b/a BENT GATE MOUNTAINEERING**

**TEXT:** *Electronically Filed*

NOW COMES Plaintiff, MICHAEL WILLYOUNG-by and through his attorneys, Jeffrey A. Pribanic and Dr. Christopher Buck, of Pribanic & Pribanic-and files the instant *Plaintiff's Response to Renewed Motion to Dismiss of The Bent Gate, Inc. t/d/b/a Bent Gate Mountaineering ("Renewed Motion to Dismiss")* and, in support thereof, avers as follows:

1. The averments of paragraph 1 of Defendant's *Renewed Motion to Dismiss* are admitted, unless otherwise modified or contradicted by further examination of the pertinent records.
2. The averments of paragraph 2 of Defendant's *Renewed Motion to Dismiss* are admitted, unless otherwise modified or contradicted by further examination of the pertinent records.
3. The averments of paragraph 3 of Defendant's *Renewed Motion to Dismiss* are admitted, unless [\*2] otherwise

modified or contradicted by further examination of the pertinent records.

4. The averments of paragraph 4 of Defendant's *Renewed Motion to Dismiss* are admitted, unless otherwise modified or contradicted by further examination of the pertinent records.

5. The averments of paragraph 5 of Defendant's *Renewed Motion to Dismiss* are admitted, unless otherwise modified or contradicted by further examination of the pertinent records.

6. The averments of paragraph 6 of Defendant's *Renewed Motion to Dismiss* are admitted, unless otherwise modified or contradicted by further examination of the pertinent records.

7. The averments of paragraph 7 of Defendant's *Renewed Motion to Dismiss* are admitted, unless otherwise modified or contradicted by further examination of the pertinent records.

8. The averments of paragraph 8 of Defendant's *Renewed Motion to Dismiss* are admitted, unless otherwise modified or contradicted by further examination of the pertinent records.

9. The averments of paragraph 9 of Defendant's *Renewed Motion to Dismiss* are admitted, unless otherwise modified or contradicted by further examination of the pertinent records. [\*3]

10. The averments of paragraph 10 of Defendant's *Renewed Motion to Dismiss* are admitted, unless otherwise modified or contradicted by further examination of the pertinent records.

11. The averments of paragraph 11 of Defendant's *Renewed Motion to Dismiss* are admitted, unless otherwise modified or contradicted by further examination of the pertinent records.

12. The averments of paragraph 12 of Defendant's *Renewed Motion to Dismiss* are admitted, unless otherwise modified or contradicted by further examination of the pertinent records.

13. The averments of paragraph 13 of Defendant's *Renewed Motion to Dismiss* are admitted, unless otherwise modified or contradicted by further examination of the pertinent records.

14. The averments of paragraph 14 of Defendant's *Renewed Motion to Dismiss* are denied for the reasons set forth in the attached *Brief in Support of Plaintiff's Response to Renewed Motion to Dismiss of The Bent Gate, Inc. t/d/b/a Bent Gate Mountaineering*, and, moreover, the same are denied in that the averments set forth conclusions of law.

15. The averments of paragraph 15 of Defendant's *Renewed Motion to Dismiss* are denied [\*4] for the reasons set forth in the attached *Brief in Support of Plaintiff's Response to Renewed Motion to Dismiss of The Bent Gate, Inc. t/d/b/a Bent Gate Mountaineering*, and, moreover, the same are denied in that the averments set forth conclusions of law.

16. The averments of paragraph 16 of Defendant's *Renewed Motion to Dismiss* are denied for the reasons set forth in the attached *Brief in Support of Plaintiff's Response to Renewed Motion to Dismiss of The Bent Gate, Inc. t/d/b/a Bent Gate Mountaineering*, and, moreover, the same are denied in that the averments set forth conclusions of law.

17. The averments of paragraph 17 of Defendant's *Renewed Motion to Dismiss* are denied for the reasons set forth in the attached *Brief in Support of Plaintiff's Response to Renewed Motion to Dismiss of The Bent Gate, Inc. t/d/b/a Bent Gate Mountaineering*, and, moreover, the same are denied in that the averments set forth conclusions of law.

18. The averments of the WHEREFORE paragraph of Defendant's *Renewed Motion to Dismiss* are denied for the reasons set forth in the attached *Brief in Support of Plaintiff's Response to Renewed Motion to Dismiss of The Bent* [\*5]

*Gate, Inc. t/d/b/a Bent Gate Mountaineering*, and, moreover, the same are denied in that the averments set forth conclusions of law.

Respectfully submitted,

**By:** /s/ [Signature]

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#### **CERTIFICATE OF SERVICE**

On this 11th day of March 2009, I hereby certify that a true and correct copy of the foregoing has been served on the Party listed below, by way of:

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By: /s/ [Signature]  
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 Michael Willyoung.)

**BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO RENEWED MOTION TO DISMISS OF THE BENT GATE, INC. t/d/b/a BENT GATE MOUNTAINEERING**

NOW COMES Plaintiff, MICHAEL WILLYOUNG-by and through his attorneys, Jeffrey A. Pribanic and Dr. Christopher Buck, of Pribanic & Pribanic-and files the instant *Brief in Support of Plaintiff's Response to Renewed Motion to Dismiss of The Bent Gate, Inc. t/d/b/a Bent Gate Mountaineering*, and, in support thereof, avers as follows:

**INTRODUCTION**

In this product liability action, there is no dispute that the subject "Alien" cam n1-manufactured in March 2007 by Colorado Custom Hardware ("CCH"), Inc. and distributed by Defendant, Bent Gate Mountaineering ("Bent Gate")-was defective. Testing has revealed that Colorado Custom Hardware produced [\*7] specific cams after November 2004 that had faulty brazes, causing the brazed cables to snap when pulled in the course of a rock climber's fall, thus rendering this safety device dangerously unsafe. n2 On April 18, 2006, U.S. Consumer Product Safety Commission, in cooperation with Defendant, Bent Gate, issued a voluntary recall of the dangerously defective product that is the subject of this product liability action. The "hazard" (i.e., the danger posed by this defective product) is simply stated: "The cables that support climbers using these devices can fail, causing climbers to fall." n3 Subsequent testing disclosed the nature of this defect: "[T]he recall sample revealed a separation of the filler metal from the socket." n4 And further: "The subject and recall climbing cam joints had been improperly brazed, thus leading to the premature failure of both. The presence of fractured braze material at the internal surface of the subject socket suggests that high thermal stresses (rapid cooling) had initiated the failure." n5 Therefore, Defendant Colorado Custom Hardware's voluntary recall of "Alien" cams-after testing determined that these devices posed a fall hazard-is an admission [\*8] that its product is dangerously defective. As part of the supply chain, Bent Gate marketed this dangerously defective product.

n1 A "cam" is a rock-climbing anchor-a protective device that prevents safeguards against accidental falls.

n2 See admissions by Defendant, Colorado Custom Hardware, at the "Bent Gate Aliens Cams" website at <<http://www.aliencamsbyBentGate.com>>, forum postings by Bent Gate president, David Waggoner, at the the "Forums: Archive: World Climbing News: Alien Recall From Bent Gate" website at <<http://www.rockclimbing.com/cgi-bin/forum/gforum.cgi?post=1287216>>, and the "Bent Gate Alien Cams" website at Defendant, Bent Gate Engineering website at <<http://www.bentgate.com/aliencamsbvBentGate.html>>, where a link to the Bent Gate recall notice is posted.

n3 U.S. Consumer Product Safety Commission, "Bent Gate Inc. Recalls Mountain Climbing Camming Anchor Due to Fall Hazard." Online at <<http://www.cpsc.gov/cpscpub/prerel/prhtml06/06141.html>>. Accessed 18 May 2008.

n4 "Testing Report from Northwest Laboratories-5-5-06." Online at <[http://www.aliencamsbyBentGate.com/recall/nw\\_report.html](http://www.aliencamsbyBentGate.com/recall/nw_report.html)>. Accessed 15 May 2008.

[\*9]

n5 "Testing Report from Northwest Laboratories-5-5-06." Online at <[http://www.aliencamsbyBentGate.com/recall/nw\\_report.html](http://www.aliencamsbyBentGate.com/recall/nw_report.html)>. Accessed 15 May 2008.

However, the merits of this case are not at issue at this stage of the proceedings. Pending before this Court is Defendant's *Renewed Motion to Dismiss of The Bent Gate, Inc. t/d/b/a Bent Gate Mountaineering*. The jurisdictional question, therefore, stands as the threshold issue before this Court. The parties in this case dispute whether Defendant, Bent Gate, should be subjected to personal jurisdiction in this Court on account of the contacts that they have with the Commonwealth of Pennsylvania.

### STATEMENT OF FACTS

Plaintiff is a citizen of the Commonwealth of Pennsylvania. Defendant, Bent Gate Mountaineering is believed to be a Colorado corporation-duly licensed and/or organized to transact business within the Commonwealth of Pennsylvania-with its corporate headquarters and principal place of business located at 1313 Washington Avenue, Golden, Colorado 80401. n6 The matter in controversy exceeds, exclusive of costs and interest, [\*10] the sum of seventy-five thousand dollars (\$ 75,000.00).

n6 Bent Gate, *Renewed Motion to Dismiss of The Bent Gate, Inc. t/d/b/a Bent Gate Mountaineering*, P 14(a). See Exhibit A.

This Court has jurisdiction over this action pursuant to 28 U.S.C. Section 1332 (a)(1) and venue is proper pursuant to 28 U.S.C. Section 1391 (a)(2). At all relevant times, Defendants CCH and Bent Gate were engaged in the business of designing, manufacturing, supplying, selling and/or distributing mountain climbing products, specifically a product commonly known as "Alien" cams (hereinafter referred to as "the product"/"Alien") and had shipped the product into the Commonwealth of Pennsylvania.

On March 2, 2007, Plaintiff purchased the product from the Defendant, Bent Gate Mountaineering and it was shipped to him in Clarion, Clarion County, Pennsylvania. On April 8, 2007 at approximately 12:00 p.m., Plaintiff, Michael Willyoung, was climbing in the Red River Gorge in Slade, Kentucky-when [\*11] he utilized the product, according to the manufacturer's instructions, to secure himself to the rock face while he was approximately 70 feet above ground-when he fell approximately eight feet, at which point pressure was placed on the cam and broke the cam at the weld (between the head of the cam and the stainless steel cable), causing him to fall an additional approximate 15 feet, when a second piece of the cam became loose, causing him to fall again for a total of 70 feet, causing Plaintiff to sustain severe and serious injuries. The foregoing incident and fall was witnessed by Plaintiff's climbing partner, Matthew J. Subel, of Columbus, Ohio. As a result of this fall, Plaintiff suffered serious injuries to his right wrist, right elbow, right ankle, left hip, and teeth/mouth; sustained abrasions; lost earnings and/or earning capacity; experienced great pain of body and mind; and incurred expenses for medical attention as a direct and proximate result of this occurrence. That the accident transpired in Kentucky was a fortuitous event. As such, the issue now is whether this Court has jurisdiction in the Western District of Pennsylvania, where Plaintiff purchased the dangerously defective [\*12] "Alien" cam.

### LEGAL STANDARD

Once a defendant asserts a lack of personal jurisdiction, the plaintiff has the burden to prove otherwise by making a prima facie showing of jurisdiction. n7 To satisfy this burden, a plaintiff must provide evidence "establishing with reasonable particularity sufficient contacts between the defendant and the forum state." n8 Any factual dispute must be construed in favor of the plaintiff. n9 A federal court exercises personal jurisdiction to the extent authorized by the

state's long-arm statute. n10 Constitutional jurisdiction can be established two different ways: specific jurisdiction and general jurisdiction. n11 As Plaintiff has advanced no theory of general jurisdiction, therefore the following analysis will pertain solely to specific jurisdiction.

n7 *Provident Nat. Bank v. California Fed. Sav. & Loan, Inc.*, 819 F.2d 434, 437 (3d Cir. 1987).

n8 *Mellon Bank (East) PSFS v. Farino*, 960 F.2d 1217, 1223 (3d Cir. 1992).

n9 *Toys "R" Us, Inc., v. Step Two, S.A.*, 318 F.3d 446, 457 (3d Cir. 2003).

[\*13]

n10 Fed. R. Civ. P. 4(e).

n11 *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414-16 (1984).

Specific jurisdiction is established when the basis of the "plaintiff's claim is related to or arises out of the defendant's contacts with the forum." n12 Most courts applying Pennsylvania law have engaged in a two-part inquiry: (1) Is personal jurisdiction properly exercised under the Pennsylvania Long Arm Statute?; and (2) does the exercise of personal jurisdiction over the defendant comport with due process under the United States Constitution?" n13 This second step is discretionary. n14

n12 *Pennzoil Prods. Co. v. Colelli & Assocs, Inc.*, 149 F.3d 197, 201 (3d Cir. 1998) (citations omitted).

n13 See *Lehigh Coal & Navigation Co. v. Geko-Mayo*, 56 F. Supp. 2d 559, 564 (E.D. Pa. 1999); *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 258-259 (3d Cir. 1998).

n14 *Pennzoil*, 149 F.3d at 201.

[\*14]

The Pennsylvania Long Arm Statute provides, in pertinent part, that "the jurisdiction of the tribunals of this Commonwealth shall extend to all persons ... to the fullest extent allowed under the Constitution of the United States and may be based on *the most minimum contact* with this Commonwealth allowed under the Constitution of the United States. n15 Note here that the term, "most minimal contact," is written *in the singular*, not in the plural. In other words-in theory at least-*one single contact*, if purposeful, can suffice for the exercise of specific personal jurisdiction, so long as the exercise of that jurisdiction comports with the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. The "most minimal contact" can suffice for the exercise of specific jurisdiction so long as that contact is considered a "sufficient contact," examples of which are provided by the Pennsylvania Long Arm Statute as follows:

(a) GENERAL RULE.-A tribunal of this Commonwealth may exercise personal jurisdiction over a person ... who acts directly or by an agent, as to a cause of action or other matter arising from such person:

(1) Transacting any business [\*15] in this Commonwealth. Without excluding other acts which may constitute transacting business in this Commonwealth, any of the following shall constitute transacting business for the purpose of this paragraph:

(i) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.

(ii) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts.

(iii) The shipping of merchandise directly or indirectly into or through this Commonwealth. n16

n15 Pennsylvania Long Arm Statute, 42 Pa. Cons. Stat. Ann § 5322 (2008)(b) (emphasis added).

n16 Pennsylvania Long Arm Statute, 42 Pa. Cons. Stat. Ann § 5322 (2008)(a)(1)(i-iii).

Other forms of communication may be adduced to show minimal contacts with the forum state: "Mail and telephone communications sent by the [\*16] defendant into the forum may count toward the minimum contacts that support jurisdiction." n17 This Court should be "cognizant that section 5322(a) only sets forth 'examples of sufficient contact' (e.g., transacting business within the state, committing a tort within the state, etc.). ... Since section 5322(b) 'further expands the potential bases for jurisdiction' to the limits of the U.S. Constitution ..., the list of examples of sufficient contact in section 5322(a) cannot be considered exhaustive." n18

n17 *Grand Entm't Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 482 (3d Cir. 1993).

n18 *Pennzoil Prods. Co. v. Colelli & Assocs, Inc.*, 149 F.3d 197, 201 n.2 (3d Cir. 1998) (citations omitted).

A defendant may create the sufficient minimum contact necessary for a court to assert specific jurisdiction by placing a product into the "stream of commerce," which through a chain of distribution finds its way into the forum state. The Supreme Court in *Asahi* announced [\*17] three separate approaches to the stream of commerce doctrine. n19 The Third Circuit, however, has not yet adopted any of the three stream of commerce tests announced in *Asahi*. n20 Regardless of this uncertainty, the defendant must have engaged in some form of "purposeful availment" of the forum state. n21 Mere foreseeability that the defendant's products may end up in the forum state is not sufficient for "stream of commerce" jurisdiction. n22

n19 *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 107 (1987); *Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 279 (3d Cir. 1994).

n20 *Pennzoil*, 149 F.3d at 205; *Renner*, 33 F.3d at 281-282.

n21 *Pennzoil*, 149 F.3d at 203; *Renner*, 33 F.3d at 282 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, at 475).

n22 *Pennzoil*, 149 F.3d at 203.

In deciding whether specific personal jurisdiction can be asserted successfully, [\*18] this Court must first determine whether Defendant, through a conscious targeting of the forum state, has established "most minimal contact" so long as that contact is a Constitutionally "sufficient contact." A sufficient contact with the forum state is one whereby the Defendant should reasonably anticipate being haled into court there. n23 Purposeful availment, *inter alia*, is the act of commercially targeting the forum state. This requires a fact-sensitive approach. n24

n23 *Pennzoil*, 149 F.3d at 201; see *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).  
 n24 *Pennzoil*, 149 F.3d at 203.

Pennsylvania's long-arm statute extends jurisdiction to the fullest extent allowable under the Constitution, n25 so the question is whether the exercise of personal jurisdiction over Bent Gate, is constitutional. n26 If such a sufficient minimum contact is established, this Court may consider whether the exercise of jurisdiction whether it meets [\*19] the requirements of the Due Process Clause of the United States Constitution by comporting with "traditional conceptions of fair play and substantial justice." n27

n25 42 Pa.Cons.Stat.Ann. § 5322(b) (1981).  
 n26 *Mellon Bank*, 960 F.2d at 1221.  
 n27 *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

Pennsylvania's long arm statute, at 42 Pa. Cons. Stat. Ann. § 5322(a)(1)(iii), provides that personal jurisdiction over a nonresident may be obtained on the basis of transacting business, defined as "the shipping of merchandise directly or indirectly into or through [Pennsylvania]." "Once the plaintiff has made out a *prima facie* case of minimum contacts, as here, the defendant must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." n28 The following factors control: "the burden on the defendant, the interests of the forum State, ... the plaintiff's interest in obtaining relief[,] ... the [\*20] interstate judicial system's interest in obtaining the most efficient resolution of controversies[,] and the shared interest of the several States in furthering fundamental substantive social policies." n29

n28 *Grand Entm't Group*, 988 F.2d at 483.  
 n29 *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (citation omitted).

Although not tested, this Court should also bear in mind that, at least in theory, the due process analysis is *discretionary*, not mandatory: As the United States Court of Appeals, Third Circuit, has said: "To make a finding of specific jurisdiction, a court generally applies two standards, the first mandatory and the second discretionary." n30

n30 *Pennzoil*, 149 F.3d at 201.

#### **PERSONAL JURISDICTION ANALYSIS OF COLORADO CUSTOM HARDWARE'S [\*21] CONTACTS WITH THE FORUM STATE**

In this case, this Court should confer personal jurisdiction over Bent Gate because of the significance of its actions in commercially targeting Pennsylvania through its internet sales.

Under Pennsylvania's long-arm statute, the "shipping of merchandise directly or indirectly into or through this Commonwealth" qualifies as one form of "[t]ransacting any business in this Commonwealth." n31 "The shipping of goods into Pennsylvania upon receipt of orders is in itself a systematic method of conducting business, in that it follows a system or orderly procedure in distributing goods." n32 Even if not systematic and continuous, transacting business in the Commonwealth of Pennsylvania, by way of shipping products into or through Pennsylvania, qualifies as a



commercial activity that targets the forum state, and is therefore recognized as a form of purposeful availment.

n31 Pennsylvania Long Arm Statute, 42 Pa. Cons. Stat. Ann § 5322 (2008) (a)(1)(iii) and (a)(1).

n32 *White-Evans Mfrs., Inc. v. Elevator Sales & Service*, 543 F. Supp. 398, 401 (E.D. Pa. 1982).

[\*22]

Bent Gate, by its own admission, had engaged in such activity. Over the course of at least three years (2006-2009), Bent Gate sold and shipped its products to its clients in Pennsylvania: (1) "In 2006 and 2007, Bent Gate sold a total of \$ 328.92 worth of CCH products that were shipped into PA." n33; (2) "Bent Gate reports the following for the years 2006 and 2007: ... [2006] PA Sales from 98 orders [=] \$ 18,572.66; ... [2007] PA Sales from 113 orders [=] \$ 22,993.39." n34 Here, over the course of two years, Bent Gate had a total of 211 orders amounting to \$ 41,566.05 in sales. For the purposes of jurisdictional analysis, this fact is dispositive. This fact, this "most minimum contact with this Commonwealth" n35 (which a number of Pennsylvania courts actually misquote as "most minimal contacts with this Commonwealth") n36 is, for constitutional due process purposes, a *sufficient* contact.

n33 Bent Gate, *Defendant The Bent Gate, Inc. t/d/b/a Bent Gate Mountaineering's Answers to Plaintiff's Interrogatories and Requests for Production of Documents for Jurisdictional Discovery, Directed to the Defendant, The Bent Gate, Inc. ("Answers")*, p. 5 (Answer to Question 8). See Exhibit B.

[\*23]

n34 Bent Gate, *Answers*, p. 4-5 (Answer to Question 7). See Exhibit B.

n35 42 Pa. Cons. Stat. Ann. § 5322(a)(1).

n36 See e.g. *Strugill v. Arrow Converting Equipment, Inc.*, 1989 U.S. Dist. LEXIS 9880, at 2 (E.D. Pa. 1989); *Hab Air, Inc. v. Butler Aviation Corp.*, 1992 U.S. Dist. LEXIS 615 at 4-5 (E.D. Pa. 1992).

A due process analysis, moreover, will show that this Court's exercise of personal jurisdiction over Bent Gate is reasonable and therefore passes constitutional muster. The admitted burden on the Defendant is clearly outweighed by the Commonwealth's interest in this case as a social policy concern under Pennsylvania's Guarantor Rule, n37 combined with Plaintiff Michael Willyoung's own interest in obtaining relief for the injury caused by Defendant's being a supplier of an admittedly defectively designed and unreasonably dangerous product. The fact that the subject "Alien cam" was designed and manufactured by an alien corporation and subsequently sold and shipped to or through the Commonwealth of Pennsylvania by one of its suppliers, [\*24] Bent Gate, is clearly a sufficient minimum contact, arising out of commercial activity directed toward this state, thus triggering purposeful availment, thereby establishing a basis for this honorable Court's exercises specific jurisdiction over Bent Gate, as the following analysis will demonstrate.

n37 *Azzarello v. Black Bros.*, 391 A.2d 1020, 1027 n. 12 (Pa. 1978). In an earlier case, the Pennsylvania Supreme Court held: "Today, ... a manufacturer by virtue of section 402A is effectively the guarantor of his products' safety." *Salvador v. Atlantic Steel Boiler Co.*, 319 A.2d 903, 907 (Pa. 1974).

## I. PENNSYLVANIA HAS PERSONAL JURISDICTION OVER DEFENDANT, BENT GATE, PURSUANT TO

## THE PENNSYLVANIA LONG ARM STATUTE.

Plaintiff asserts that Pennsylvania has personal jurisdiction over Defendant, Bent Gate, under the Pennsylvania Long Arm Statute, pursuant to 42 Pa. Cons. Stat. Ann. § 5322(a)(1)(iii), because of the fact that Bent Gate shipped 211 orders-amounting to \$ 41,566.05 [\*25] in sales of its merchandise-directly to Pennsylvania clients. n38

n38 Bent Gate, *Answers*, pp. 4-5 (Answer to Questions 7 and 8). See Exhibit B.

**A. As an internet retailer, Bent Gate supplied its products to Pennsylvania clients over the course of at least three years (2006-2009); therefore, Pennsylvania has personal jurisdiction over the online retailer, Bent Gate, under the Pennsylvania Long Arm Statute, 42 Pa. Cons. Stat. Ann. § 5322(a)(1)(iii), because of the fact that Bent Gate shipped merchandise directly to Pennsylvania clients.**

Defendant Bent Gate basically argues that its internet contacts are insufficient to confer personal jurisdiction in this matter. Bent Gate maintains no physical presence in Pennsylvania. Bent Gate neither owned nor leased property in the state. Bent Gate is not registered to do business in Pennsylvania, has not advertised in Pennsylvania, has no agents in Pennsylvania, etc. n39

n39 Bent Gate, *Renewed Motion to Dismiss of The Bent Gate, Inc. t/d/b/a Bent Gate Mountaineering*, P 15(g). See Exhibit A.

[\*26]

However "nominal" Bent Gate's sales of CCH products may have been, the fact that Bent Gate supplied CCH and other products to Pennsylvania clients clearly shows sufficient contacts between Bent Gate and the forum state of Pennsylvania. The percentage of Bent Gate's total volume of business, for any given year, in terms of its sales to Pennsylvania clients is irrelevant to the issue of purposeful availment, as the following analysis will demonstrate.

**B. By its own admission, Bent Gate shipped its merchandise directly or indirectly into or through this Commonwealth; therefore the "minimum contacts" requirement is met.**

By its own admission, Bent Gate shipped its merchandise directly or indirectly into or through this Commonwealth: (1) "In 2006 and 2007, Bent Gate sold a total of \$ 328.92 worth of CCH products that were shipped into PA." n40; (2) "Bent Gate reports the following for the years 2006 and 2007: ... [2006] PA Sales from 98 orders [=] \$ 18,572.66; ... [2007] PA Sales from 113 orders [=] \$ 22,993.39." n41 Therefore, this Court may exercise personal jurisdiction pursuant to 42 Pa. Cons. Stat. Ann § 5322 (2008)(a)(1)(iii).

n40 Bent Gate, *Defendant The Bent Gate, Inc. t/d/b/a Bent Gate Mountaineering's Answers to Plaintiff's Interrogatories and Requests for Production of Documents for Jurisdictional Discovery, Directed to the Defendant, The Bent Gate, Inc. ("Answers")*, p. 5 (Answer to Question 8). See Exhibit B.

[\*27]

n41 Bent Gate, *Answers*, pp. 4-5 (Answer to Question 7). See Exhibit B.

**II. DEFENDANT, BENT GATE, HAS SUFFICIENT "MINIMUM CONTACTS" WITH THE COMMONWEALTH OF PENNSYLVANIA, WHICH IS THE FORUM STATE; THEREFORE, THE FIRST PRONG OF THE "DUE PROCESS" ANALYSIS IS MET.**

Plaintiff now turns to the question of whether or not the exercise of jurisdiction pursuant to the Pennsylvania long-arm statute satisfies due process. By its own admission, Bent Gate shipped its merchandise directly or indirectly into or through this Commonwealth: (1) "In 2006 and 2007, Bent Gate sold a total of \$ 328.92 worth of CCH products that were shipped into PA." n42; (2) "Bent Gate reports the following for the years 2006 and 2007: ... [2006] PA Sales from 98 orders [=] \$ 18,572.66; ... [2007] PA Sales from 113 orders [=] \$ 22,993.39." n43 By virtue of the undisputed fact that Bent Gate is an online retailer which marketed CCH and other products to Pennsylvania residents, the minimum contacts necessary to exercise specific jurisdiction are more than met.

n42 Bent Gate, *Answers*, p. 5 (Answer to Question 8). See Exhibit B.  
[\*28]

n43 Bent Gate, *Answers*, pp. 4-5 (Answer to Question 7). See Exhibit B.

**III. DEFENDANT'S "MINIMAL CONTACTS" WITH THE COMMONWEALTH OF PENNSYLVANIA MEET THE "DUE PROCESS" THRESHOLD REQUIREMENT OF "PURPOSEFUL AVAILMENT" UNDER WHICH PERSONAL SPECIFIC JURISDICTION MAY BE CONSTITUTIONALLY EXERCISED.**

Plaintiff now turns to the question of whether or not the exercise of jurisdiction pursuant to the Pennsylvania long-arm statute satisfies due process. It is not the *quantity* of minimum contacts, but the *quality* of those contacts that is dispositive. Contacts with the forum state that are "random, fortuitous" or "attenuated" are not sufficient for the assertion of personal jurisdiction. n44 The determination of whether sufficient minimum contacts exist for the assertion of personal jurisdiction is based on a finding that "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." n45 Critical to this analysis is the determination that Defendant purposefully directed its activities at residents of the forum, [\*29] and purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of that state's laws. n46

n44 *Burger King*, 471 U.S. at 475.

n45 *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

n46 *Burger King*, 471 U.S. at 472-473.

In the instant case, this question is easily resolved on the basis of precedents in Pennsylvania case law. The Court of Appeals for the Third Circuit, applying Pennsylvania law, held "*the presence of direct shipments will show the defendant's purposeful availment.*" n47 In *Kim Ly Chea v. Wilhelm Fette GmbH*, the court applied this saying that line

of reasoning to a wholesaler shipping and billing its products to a Pennsylvania retailer:

From these facts, the court finds that plaintiff has provided prima facie evidence that Fette GmbH not only was directly involved [\*30] in the approval of the shipment and sale of its product into this forum, but also the terms of payment for the purchase of the product by a citizen of the forum. Thus, the court finds that Fette GmbH purposefully directed its activities into this forum. *Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 282 (3d Cir. 1994) ("The presence of direct shipments will show the defendant's purposeful availment ....").

This is not the case where a defendant corporation simply placed its product into the "stream of commerce" and had it swept into the forum through the independent actions of a distributor as was the case in *Asahi Metal Indus. Co., Ltd. v. Super Ct. of California*, 480 U.S. 102, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987). Nor was the contact with the forum state "random, fortuitous," or "attenuated." *a*, 471 U.S. at 475. Rather, defendant's contact with Pennsylvania was not only known and foreseeable, but to no small extent directly controlled by the defendant, as evidenced from the invoice. As stated by Justice O'Connor in *Asahi*, a "defendant may indicate an intent or purpose to serve the market in the forum State ... [by] marketing [\*31] the product through a distributor who has agreed to serve as the sales agent in the forum state." 480 U.S. at 112. Clearly, at least for the P-3000 model tablet press which is referred to in the invoice, Raymond Automation has "agreed to serve as the sales agent in the forum state." For these reasons, the court concludes that Fette GmbH has sufficient minimal contacts with this forum. n48

n47 *Renner v. Lanard Toys*, 33 F.3d 277, 282 (3d Cir. 1994) (emphasis added).

n48 *Kim Ly Chea v. Wilhelm Fette GmbH*, 2004 U.S. Dist. LEXIS 1157 at 10-11 (E.D. Pa. 2004).

Instantly, because of the fact that Bent Gate shipped 211 orders-amounting to \$ 41,566.05 in sales of its merchandise-directly to Pennsylvania clients, n49 this Court should find that, as in the case of *Burger King*, "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." n50 Such purposeful availment of Pennsylvania [\*32] business opportunities establish the minimum contacts necessary for an assertion of specific jurisdiction.

n49 Bent Gate, *Answers*, pp. 4-5 (Answer to Questions 7 and 8). See Exhibit B.

n50 *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

#### **IV. TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE ARE MET ON THE BASIS OF PRECEDENTS ESTABLISHED UNDER PENNSYLVANIA CASE LAW.**

Defendant Bent Gate has not met its burden to show that the exercise of personal specific jurisdiction by this Court would violate traditional notions of fair play of substantial justice. Indeed, Defendant never raises this issue in its Motion.

*Arguendo*, Bent Gate would likely argue (which it did not) that this Court's exercise of jurisdiction would be inconsistent with the traditional notions of fair play and substantial justice, because it would place too onerous a burden

on it, as Bent Gate would have to travel a substantial [\*33] distance to defend itself. A burden undoubtedly would be imposed on Bent Gate if it is forced to defend a suit in Pennsylvania. As noted in *Asahi*, however, "when minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." n51

n51 *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. at 114.

In the case at bar, the interest of Plaintiff and this forum in the exercise of jurisdiction clearly outweigh any burden on the nonresident Defendant, Bent Gate. Because the injured Plaintiff, Mr. Willyoung, is a citizen of Pennsylvania—even though the injury admittedly took place in Kentucky—this forum clearly has a very strong interest in the case: "A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." n52 This forum has an even greater interest due to social policy concerns, [\*34] under the *Azzarello* "Guarantor Rule." n53

n52 *Burger King*, 471 U.S. at 473 (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

n53 *Azzarello v. Black Bros.*, 391 A.2d 1020, 1027 n. 12 (Pa. 1978).

Pennsylvania strict products liability law is distinctive as to policy and procedure. The policy is clear enough: "Pennsylvania's public policy is such that manufacturers of products are encouraged to make them *as safe as possible, as soon as possible*." n54 To ensure this policy, liability attaches to dangerously defective products under this theory: "The [supplier] of a product is the *guarantor of its safety*." n55 The Guarantor Rule extends to suppliers of the product as well as the manufacturer. In this case, CCH is the manufacturer of the defective Alien cams and Bent Gate is a supplier in the supply chain.

n54 *Habecker v. Clark Equip. Co.*, 36 F. 3d 278, 285 (3d Cir. 1994), cert. denied, 514 U.S. 1003 (1995) ("*Habecker III*") (emphasis added).

[\*35]

n55 *Azzarello v. Black Bros.*, 391 A.2d 1020, 1027 n. 12 (Pa. 1978). In an earlier case, the Pennsylvania Supreme Court held: "Today, ... a manufacturer by virtue of section 402A is effectively the guarantor of his products' safety." *Salvador v. Atlantic Steel Boiler Co.*, 319 A.2d 903, 907 (Pa. 1974).

As for the interest of Plaintiff in obtaining convenient and effective relief, this factor also favors the exercise of jurisdiction over Defendant because Plaintiff has retained counsel from this forum, Plaintiff is a citizen of this forum, and this forum, through the common law doctrines of negligence and strict product liability, can provide effective relief to Plaintiff. With respect to the remaining Due Process factors—the interstate judicial system's interest in obtaining the most efficient resolution of the controversies and the shared interest of the several states in furthering fundamental substantive social policies—Defendant has not provided this Court with sufficient reasons as to why these factors are implicated in the present case. For these reasons, [\*36] this honorable Court should find that the traditional notions of fair play and substantial justice do not weigh against this Court exercising specific jurisdiction over Defendant, Bent Gate.

**V. ALTERNATIVELY, SINCE THE DUE PROCESS ANALYSIS IS DISCRETIONARY, THIS COURT MAY CHOOSE TO EXERCISE PERSONAL SPECIFIC JURISDICTION OVER DEFENDANT, THE BENT GATE, INC., BY VIRTUE OF THE EXERCISE OF PENNSYLVANIA'S LONG ARM STATUTE AS THE SOLE CRITERION BY WHICH JURISDICTION IS PROPER UNDER THE PENNSYLVANIA ONE ARM STATUTE.**

As the United States Court of Appeals, Third Circuit, has said: "To make a finding of specific jurisdiction, a court generally applies two standards, the first mandatory and the second discretionary." n56 Although this standard may be applied at a court's discretion, the Third Circuit generally encourages its use. n57 Plaintiff makes the point that this Court is not required to apply the second standard.

n56 *Pennzoil*, 149 F.3d at 201.

n57 *Pennzoil*, 149 F.3d at 201.

[\*37]

**VI. DEFENDANT'S MINIMUM CONTACT ANALYSIS IS LARGELY MISPLACED BECAUSE IT FOCUSES ON THE QUANTITY OF SUCH CONTACTS, RATHER THAN THE QUALITY OF THOSE CONTACTS.**

Defendant Bent Gate's minimum contact analysis is largely misplaced because it focuses on the percentage of sales of its products to Pennsylvania from the standpoint of an aggregated national analysis, in that PA Orders amounted to only "2.42% of web orders" in 2006, and only 2.57% of web orders" in 2007." n58

n58 Bent Gate, *Defendant The Bent Gate, Inc. t/d/b/a Bent Gate Mountaineering's Answers to Plaintiff's Interrogatories and Requests for Production of Documents for Jurisdictional Discovery, Directed to the Defendant, The Bent Gate, Inc. ("Answers")*, pp. 4-5 (Answer to Question 7). See Exhibit B.

Defendant's aggregated national analysis is essentially a "red herring" for the simple reason that one single contact, depending on the quality of that contact, is all that is needed under Pennsylvania's long arm statute: "*A single contact* [\*38] may be sufficient to subject a party to personal jurisdiction, particularly if the 'contacts evaluated are those that give rise to the litigation'." n59 Bent Gate's 211 contacts over a two-year period far exceeds the "single contact" legal threshold for this Commonwealth's exercise of specific jurisdiction.

n59 *Waimberg v. Medical Transp. of Am., Inc.*, 52 F. Supp. 2d 511, 515 (E.D. Pa.1999) (quoting *Grand Entm't Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 483 (3d Cir. 1993) (emphasis added).

**VII. DEFENDANT, BENT GATE MOUNTAINEERING, SHOULD ALSO BE SUBJECT TO THE EXERCISE OF THIS COURT'S SPECIFIC JURISDICTION, UNDER A ZIPPO ANALYSIS.**

Under Pennsylvania's strict products liability law, in addition to manufacturers, "all suppliers of a defective product

in the chain of distribution, whether retailers, partmakers, assemblers, owners, sellers, lessors, or any other relevant category, are potentially liable to the ultimate user injured by the defect." n60 [\*39] Since Defendant, Bent Gate Engineering, acted as a distributor, via the internet, of Colorado Custom Hardware's products, this Court should exercise specific jurisdiction over Bent Gate as well as CCH.

n60 *Burch v. Sears, Roebuck & Co.*, 467 A.2d 615, 621 (Pa. Super. 1983).

Bent Gate has sufficient minimum contact with the Commonwealth of Pennsylvania to fall within the ambit and reach of Pennsylvania's long arm statute. The sufficiency of the minimal contact is established by the fact that Bent Gate sold and shipped Bent Gate products to this Commonwealth. For the reasons set forth in the preceding analysis, the act of selling and shipping products into or through the Commonwealth of Pennsylvania, by an alien Corporation, is a recognized form of "transacting business" in Pennsylvania under its long arm statute. Any commercial activity that targets the Commonwealth of Pennsylvania qualifies as purposeful availment. As the Third Circuit has found, commercial internet activity that targets the [\*40] forum state subjects the defendant operator of that site to specific jurisdiction: "If a defendant web site operator intentionally targets the site to the forum state, and/or knowingly conducts business with forum state residents via the site, then the 'purposeful availment' requirement is satisfied." n61

n61 *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2002).

The leading internet jurisdiction case is *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). In *Zippo*, the Western District of Pennsylvania announced a new personal jurisdiction framework-a "sliding-scale test"-for evaluating internet contacts, a framework that a majority of federal courts have since adopted. n62 Accordingly, this Court should evaluate personal jurisdiction based on internet contacts through the prism of *Zippo* and its progeny. n63 The Third Circuit has adopted the analytical framework of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), [\*41] for determining whether specific personal jurisdiction is proper based on Internet website contacts. n64 The proper exercise of personal jurisdiction depends on where-on a sliding scale of commercial interactivity-the web site falls:

Nevertheless, our review of the available cases and materials reveals 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. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. ... At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the [\*42] exercise personal jurisdiction. ... The middle ground is occupied by *interactive* Web sites where a user can exchange information with the host computer. *In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.* n65

n62 See *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003) ("The opinion in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) has become a seminal authority regarding personal jurisdiction based upon the operation of an Internet web site.").

n63 See *Hershey Co. v. Pagosa Candy Co.*, 2008 U.S. Dist. LEXIS 29410 (M.D. Pa. 2008).

n64 *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003) (emphasis added).

n65 *Zippo*, 952 F. Supp. at 1124.

Where the defendant clearly transacts business through its web [\*43] site in the forum state, and where the claim relates to or arises out of use of the web site, the *Zippo* court found that personal jurisdiction exists. n66 In its sliding-scale framework of analysis, the *Zippo* court established three basic categories: (1) *passive*; (2) *interactive*; and (3) commercially integral.

n66 *Zippo*, 952 F. Supp. at 1124.

A web site is considered to be *interactive* if it allows users to purchase merchandise online. n67 In addition to evaluating a defendant's web site on the *Zippo* sliding scale, the Third Circuit has held that a court may also consider a defendant's non-internet activities: "In deciding whether to exercise jurisdiction over a cause of action arising from a defendant's operation of a web site, a court may consider the defendant's related non-Internet activities as part of the 'purposeful availment' calculus." n68 Plaintiff now offers the following *Zippo* analysis under the relevant jurisdictional facts.

n67 *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446 (3d Cir. 2003).

[\*44]

n68 *Toys "R" Us*, 318 F.3d at 453.

### 1. The Purposeful Availment Prong

Defendant's contacts with the forum state are the activities giving rise to the litigation. Bent Gate Mountaineering maintains its website at <<http://www.bentgate.com>>. The following links appear under the banner of the flash page of the Bent Gate website: (1) "Request Catalog"; (2) "Email"; (3) "Help"; (4) "Info"; and (5) "Show Cart." The interactive features of this site include, *inter alia*, the following, to wit:

1. **"Request Catalog":** This link invites a single interaction with the Bent Gate website by the viewer. When the "Request Catalog" link is clicked, an information box pops up. Once the requested information is provided, the viewer then submits this information directly to Bent Gate through its website. n69

n69 See the "Request Catalog" form at

<<http://order.store.yahoo.com/cgi-bin/wg-request-catalog?bentgatemountaineering>>.>ENDFN>

2. **"Email":** Clicking on this link [\*45] instantly invokes a blank message addressed to Bent Gate, via its direct e-mail address, which is <[bentgate@bentgate.com](mailto:bentgate@bentgate.com)>. Also, directly below the company telephone contact number at the



bottom of each Bent Gate web page, prospective and actual consumers may contact Bent Gate directly by e-mail. While many websites allow for messages to be entered and then sent to the site's webmaster, Bent Gate provides the direct e-mail access.

3. **"Help"**: This feature is interactive to the extent that it takes the viewer to a "Yahoo! Small Business Help" page at <http://help.yahoo.com/l/us/yahoo/smallbusiness/store/store-02.html>.

4. **"Info"**: Clicking on this link summons a general information page, providing contact information for Bent Gate.

5. **"Show Cart"**: As with other interactive, commercial websites, the Bent Gate site features products that may be purchased online via a "shopping cart" visual metaphor, and that may be paid for-again online-by means of credit card purchase, verified through the proprietary "PayPal" verification system.

6. **"Subscribe to Our Newsletter" Option**: Viewers may select the "Subscribe to Our Newsletter" link. Clicking on this link [\*46] brings up a simple "Subscription Form," the last question of which is: "How would you like to receive your emails?"

7. **Bent Gate Mountaineering Blogspot**: Selecting <http://www.bentgate.blogspot.com> brings up the "Bent Gate Mountaineering Blog."

8. **Bent Gate Mountaineering Facebook**: The Bent Gate Mountaineering Facebook is located at <http://www.facebook.com/pages/Golden-CO/Bent-Gate-Mountaineering/10236119167>. Conspicuous on this site is the open invitation, "Everyone Can Join" and "Sign Up." "Everyone" reaches out to and includes Pennsylvania citizens.

9. **Search Option**: Bent Gate's search engine may be accessed at <http://www.bentgate.com/nsearch.html>. This page states: "Find the gear you're looking for ...", followed by a "Gear Search" box in which the user can enter a search term. The text immediately following the search field states: "Find my gear!" Entering the word "alien" brings up the following;

Alien Cams by Bent Gate	\$58.50
Alien Cams by Bent Gate: Alien 5pc	
Set: Small Sizes by Bent Gate	
\$257.40	
Bent Gate Alien Hybrids	\$55.50

Clicking on "Alien Cams by Bent Gate" invokes <http://www.bentgate.com/aliencamsbyBent> [\*47] Gate.html. Significantly, the following message is displayed: "All of our Aliens are post recall, or units not covered by the recall. For information about the recall please visit Colorado Custom Hardware's website at <http://www.aliencamsbyBentGate.com/recall/>". n70 After each item is an "Add to Cart" link. This invitation to pay, via "PayPal," was invoked even though the status of each of these products was "Temporarily Unavailable."

n70 Accessed 17 May 2008.

As demonstrated above, there are, at least, nine interactive features with the Bent Gate website. While there is no mention of "Pennsylvania" to be found, this interactive website is still "targeted" to Pennsylvania consumers under the rationale that commercially interactive websites, despite their seemingly ubiquitous nature, necessarily include Pennsylvania. In its online operations virtually twenty-four hours a day, Bent Gate has effectively projected itself into Pennsylvania cyberspace. Indeed, a far greater number of Pennsylvanians are [\*48] potentially "targeted" more cheaply

and effectively through the internet than by a full-page advertisement in a major Pennsylvania newspaper. The question inevitably arises: How many of Defendant's contacts with the forum state are sufficient to meet the threshold of "minimum contacts"? To this inquiry, the *Zippo* court has provided the following rationale:

We are being asked to determine whether Dot Com's conducting of electronic commerce with Pennsylvania residents constitutes the purposeful availment of doing business in Pennsylvania. We conclude that it does. ... Dot Com argues that its forum-related activities are not numerous or significant enough to create a "substantial connection" with Pennsylvania. Defendant points to the fact that only two percent of its subscribers are Pennsylvania residents. However, the Supreme Court has made clear that even a single contact can be sufficient. *McGee*, 355 U.S. at 223. The test has always focused on the "nature and quality" of the contacts with the forum and not the quantity of those contacts. *International Shoe*, 326 U.S. at 320. The Sixth Circuit also rejected a similar argument in *Compuserve* [\*49] when it wrote that the contacts were "deliberate and repeated even if they yielded little revenue." *Compuserve*, 89 F.3d at 1265. n71

n71 *Zippo*, 952 F. Supp. at 1125-1126.

Here, Bent Gate's contacts with this forum are of a commercial nature and quality. Bent Gate targets a niche among Pennsylvania consumers: rock climbers and participants in other outdoor sports. Bent Gate accepts online orders from Pennsylvania consumers and profits by them, with Plaintiff representing one such Pennsylvania contact. Under a *Zippo* analysis, this fact alone is sufficient to establish specific jurisdiction:

When a defendant makes a conscious choice to conduct business with the residents of a forum state, "it has clear notice that it is subject to suit there." *World Wide Volkswagen*, 444 U.S. at 297. Dot Com was under no obligation to sell its services to Pennsylvania residents. It freely chose to do so, presumably in order to profit from those transactions. [\*50] If a corporation determines that the risk of being subject to personal jurisdiction in a particular forum is too great, it can choose to sever its connection to the state. *Id.* If Dot Com had not wanted to be amenable to jurisdiction in Pennsylvania, the solution would have been simple-it could have chosen not to sell its services to Pennsylvania residents. n72

n72 *Zippo*, 952 F. Supp. at 1126-1127.

Since Bent Gate did chose "to sell its services to Pennsylvania residents," therefore, under *Zippo*, specific jurisdiction should attach.

## 2. The Arising Claim Prong

Plaintiff documents the following contacts with Defendant, Bent Gate:

1. On March 2, 2007, Bent Gate Mountaineering shipped, to Plaintiff, Receipt No. 76202, for Order No. 27170, for his online purchase of five "Alien" cams (rock climbing anchors) in five colors: black, blue, green, yellow, and gray. (Exhibit C.) Each unit cost \$ 51.48, for a total of \$ 263.40, which was charged to Plaintiff's MasterCard. Of these [\*51] five units, the yellow anchor was to be shipped at a later date. It was the yellow "Alien" anchor (Item #2797) that proved to be defective, causing injuries to the Plaintiff.

2. On March 2, 2007, Plaintiff received e-mail confirmation sent by Defendant, Bent Gate, updating his order status, and providing the shipper's UPS tracking number, which was 1ZA5R8670398773099. n73

n73 See Exhibit D.

### 3. The Reasonableness Prong:

1. **Burden on the Defendant:** The burden on each Defendant is primarily one of inconvenience and added expenses of being haled into this Pennsylvania district court. However, that burden is greatly outweighed by the remaining four reasonableness factors, not the least of which is this: Since Defendants have inconvenienced Plaintiff in marketing to Plaintiff a dangerously defective product, Plaintiff's interest in obtaining an effective remedy clearly outweighs Defendants' inconvenience in litigating this case in Pennsylvania.

2. **The Forum State's Interest:** Since this [\*52] is a product liability case, Pennsylvania's interest is demonstrably great: "Pennsylvania's public policy is such that manufacturers of products are encouraged to make them as safe as possible, as soon as possible. In *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020, 1024 (Pa. 1978), the Pennsylvania Supreme Court stated that the supplier of a product is the guarantor of its safety." n74 Therefore this Commonwealth arguably has a greater interest in trying a products liability case than in any other state, including Colorado and Wyoming.

n74 *Habecker v. Clark Equipment Co.*, 36 F.3d 278, 286 (3d Cir. 1994).

3. **Plaintiff's Interest in Obtaining Relief:** Plaintiff's interest in obtaining effective relief clearly outweighs the Defendant's interest in having a convenient forum. In this diversity action, any forum is likely to be inconvenient to one or more of the parties. This Court, however, should consider the fact that the Plaintiff is the party that was injured, [\*53] while Defendants are the parties that profited from the sales of their products. In its reasonableness analysis, therefore, preference should be given to the injured Plaintiff over the inconvenienced Defendant who allegedly profited at the Plaintiff's expense.

4. **Interstate Judicial System's Efficiency Interest:** The interstate system's interest in obtaining the most efficient resolution of the case is best served by litigating the claims in Pennsylvania, because: (a) the Plaintiff resides in the Western District of Pennsylvania, where venue is proper, so long as this Court exercises jurisdiction over the non-citizens Defendants; and (b) because the dangerously defective "Alien" cam was sold within the Commonwealth of Pennsylvania, since it both was ordered from Pennsylvania and shipped to Pennsylvania.

5. **Interest in Further Substantive Social Policies:** The shared interest of the several states in furthering fundamental substantive social policies is really an extension of Pennsylvania's products liability policy under the *Azzarello* standard. In the case at bar, there is no other state with a superior interest to Pennsylvania.

Therefore, on the basis of the foregoing [\*54] analysis under the *Zippo* framework, this Court should find that Bent Gate's effort to characterize its conduct as falling short of purposeful availment of doing business in Pennsylvania is unpersuasive.

## VIII. CONCLUSION

In fine, the Court may exercise personal jurisdiction over Defendant, Bent Gate, under the following analysis:

1. Section 5322(b) of Pennsylvania's long-arm statute states that jurisdiction extends "to all persons ... to the fullest extent allowed under the Constitution of the United States and may be based *on the most minimum contact with this Commonwealth* allowed under the Constitution of the United States."

Instantly, Defendant Bent Gate meets this threshold by "the shipping of merchandise directly or indirectly into or through [Pennsylvania]." n75

2. Because "*the presence of direct shipments will show the defendant's purposeful availment*," n76 the first Due Process requirement is met.

3. Because "minimum contacts have been established," here, "the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." n77

n75 42 Pa. Cons. Stat. Ann. § 5322(a)(1)(iii).

[\*55]

n76 *Renner v. Lanard Toys*, 33 F.3d 277, 282 (3d. Cir. 1994) (emphasis added).

n77 *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. at 114.

Since Bent Gate purposefully reached out to (i.e. commercially targeted) the forum state, the forum state may reach back. Pennsylvania's social policy interest in the litigation pursuant to *Azzarello's* "Guarantor Rule", Mr. Willyoung's interest in obtaining substantial relief, and the joint interests of the states in encouraging essential social policies clearly outweigh the burdens on the nonresident Defendant, Bent Gate, of litigating in the Commonwealth of Pennsylvania.

WHEREFORE, Plaintiff respectfully requests an Order from this Honorable Court to deny Defendant's *Renewed Motion to Dismiss of The Bent Gate, Inc. t/d/b/a Bent Gate Mountaineering*, and find that this Court has specific personal jurisdiction over Defendant, Colorado Custom Hardware, Inc., as well as specific personal jurisdiction over Defendant, The Bent Gate, Inc., t/d/b/a Bent Gate Mountaineering.

Respectfully submitted,

By: [\*56] /s/ [Signature]

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## CERTIFICATE OF SERVICE

On this 11th day of March 2009, I hereby certify that a true and correct copy of the foregoing has been served on the Party listed below, by way of:

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**By:** /s/ [Signature]

**Jeffrey A. Pribanic**

**Dr. Christopher Buck**

*(Counsel for Plaintiff,  
Michael Willyoung.)*

[SEE ORDER IN ORIGINAL]

[SEE EXHIBIT A IN ORIGINAL]

[SEE EXHIBIT B IN ORIGINAL]

[SEE EXHIBIT C IN ORIGINAL]

[SEE EXHIBIT D IN ORIGINAL]