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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 44038*

January 16, 2009

Motion to Dismiss

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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 COLORADO CUSTOM HARDWARE'S RENEWED MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(2)**

**TEXT:** *Electronically Filed*

NOW COMES Plaintiff, MICHAEL WILLYOUNG-by and through his attorneys, Jeffrey A. Pribanic and Dr. Christopher Buck-and files the instant *Plaintiff's Response to Colorado Custom Hardware's Renewed Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2)* (hereafter, "*Defendant's Motion for Summary Judgment*"), and, in support thereof, avers as follows:

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

modified or contradicted by further examination of the pertinent records.

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

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

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

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

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

9. The averments of paragraph 9 of Defendant's *Motion for Summary Judgment* are admitted, in part, and are denied, [\*3] in part.

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

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

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

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

14. The averments of paragraph 14 of Defendant's *Motion for Summary Judgment* are denied for the reasons set forth in the attached *Brief in Support of Plaintiff's Response to Colorado Custom Hardware's Renewed Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2)*, and in addition, the same are denied in that the averments set forth conclusions of law.

15. The averments of paragraph 15 of Defendant's [\*4] *Motion for Summary Judgment* are denied for the reasons set forth in the attached *Brief in Support of Plaintiff's Response to Colorado Custom Hardware's Renewed Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2)*, and in addition, the same are denied in that the averments set forth conclusions of law.

16. The averments of paragraph 16 of Defendant's *Motion for Summary Judgment* are denied for the reasons set forth in the attached *Brief in Support of Plaintiff's Response to Colorado Custom Hardware's Renewed Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2)*, and in addition, the same are denied in that the averments set forth conclusions of law.

17. The averments of paragraph 17 of Defendant's *Motion for Summary Judgment* are denied for the reasons set forth in the attached *Brief in Support of Plaintiff's Response to Colorado Custom Hardware's Renewed Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2)*, and in addition, the same are denied in that the averments set

forth conclusions of law.

18. The averments of the "WHEREFORE" paragraph of Defendant's *Motion for Summary Judgment* are denied [\*5] insofar as the basis of Defendant's prayer for relief is concerned, for the reasons set forth in the attached *Brief in Support of Plaintiff's Response to Colorado Custom Hardware's Renewed Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2)*, and in addition, the same are denied in that the averments set forth conclusions of law.

WHEREFORE, Plaintiff respectfully requests an Order from this Honorable Court to deny Defendant's *Colorado Custom Hardware's Renewed Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2)*, with the same Order stating that, pursuant to the Pennsylvania Long Arm Statute, 42 Pa. Cons. Stat. Ann § 5322 and its due process requirement, this Court exercises specific personal jurisdiction over both Defendants, Colorado Custom Hardware, Inc. and The Bent Gate, Inc., t/d/b/a Bent Gate Mountaineering.

Respectfully submitted,

By: /s/ [Signature]

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#### CERTIFICATE OF SERVICE

On this 16th day of January 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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**Jeffrey A. Pribanic**  
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(Counsel for Plaintiff,  
Michael Willyoung.)

**BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO COLORADO CUSTOM [\*7] HARDWARE'S  
RENEWED MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(2)**

NOW COMES Plaintiff, MICHAEL WILLYOUNG-by and through his attorneys, Jeffrey A. Pribanic and Dr. Christopher Buck-and files the instant *Brief in Support of Plaintiff's Response to Colorado Custom Hardware's Renewed Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2)*, 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 CCH produced 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, CCH, 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) [\*8] 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 CCH's voluntary recall of "Alien" cams-after testing determined that these devices posed a fall hazard-is an admission that its product is dangerously defective.

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 "CCH Aliens Cams" website at

<<http://www.aliencamsbycch.com>>, forum postings by CCH president, David Waggoner, at the the "Forums: Archive: World Climbing News: Alien Recall From CCH" website at

<<http://www.rockclimbing.com/cgi-bin/forum/gforum.cgi?post=1287216>>, and the "CCH Alien Cams" website

at Defendant, Bent Gate Engineering website at <<http://www.bentgate.com/aliencamsbycch.html>>, where a link to the CCH recall notice is posted.

[\*9]

n3 U.S. Consumer Product Safety Commission, "CCH 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.aliencamsbycch.com/recall/nw\\_report.html](http://www.aliencamsbycch.com/recall/nw_report.html)>. Accessed 15 May 2008.

n5 "Testing Report from Northwest Laboratories-5-5-06." Online at <[http://www.aliencamsbycch.com/recall/nw\\_report.html](http://www.aliencamsbycch.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 *Colorado Custom Hardware's Renewed Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2)*. The jurisdictional question, therefore, stands as the threshold issue before this Court. The parties in this case dispute whether Defendant, CCH, 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 [\*10] of Pennsylvania. Defendant, CCH, is believed to be a Wyoming corporation that is duly licensed and/or organized to transact business within the Commonwealth of Pennsylvania, with its corporate headquarters and principal place of business located at 115 Lyon Street, Laramie, Wyoming 82070. 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. The matter in controversy exceeds, exclusive of costs and interest, the sum of seventy-five thousand dollars (\$ 75,000.00).

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 [\*11] 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 he utilized the product, according to the manufacturer's instructions, to secure himself to the rockface 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 [\*12] 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 "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. n6 To satisfy this burden, a plaintiff must provide evidence "establishing with reasonable particularity sufficient contacts between the defendant and the forum state." n7 Any factual dispute must be construed in favor of the plaintiff. n8 A federal court exercises personal jurisdiction to the extent authorized by the state's long-arm statute. n9 Constitutional jurisdiction can be established two different ways: specific jurisdiction and general jurisdiction. n10 As Plaintiff has advanced no theory of general jurisdiction, therefore the following analysis will pertain solely to specific jurisdiction.

n6 *Provident Nat. Bank v. California Fed. Sav. & Loan, Inc.*, 819 F.2d 434, 437 (3d Cir. 1987).  
[\*13]

n7 *Mellon Bank (East) PSFS v. Farino*, 960 F.2d 1217, 1223 (3d Cir. 1992).  
n8 *Toys "R" Us, Inc., v. Step Two, S.A.*, 318 F.3d 446, 457 (3d Cir. 2003).  
n9 Fed. R. Civ. P. 4(e).  
n10 *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." n11 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?" n12 This second step is discretionary. n13

n11 *Pennzoil Prods. Co. v. Colelli & Assocs, Inc.*, 149 F.3d 197, 201 (3d Cir. 1998) (citations omitted).  
n12 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).  
[\*14]

n13 *Pennzoil*, 149 F.3d at 201.

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. n14 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 [\*15] ... who acts directly or by an agent, as to a cause of action or other matter arising from such person:

(1) Transacting any business 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. n15

n14 Pennsylvania Long Arm Statute, 42 Pa. Cons. Stat. Ann § 5322 (2008)(b) (emphasis added).

n15 Pennsylvania Long Arm Statute, 42 Pa. Cons. Stat. Ann § 5322 (2008)(a)(1)(i-iii).

[\*16]

Other forms of communication may be adduced to show minimal contacts with the forum state: "Mail and telephone communications sent by the defendant into the forum may count toward the minimum contacts that support jurisdiction." n16 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." n17

n16 *Grand Entm't Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 482 (3d Cir. 1993).

n17 *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 [\*17] into the "stream of commerce," which through a chain of distribution finds its way into the forum state. The Supreme Court in *Asahi* announced three separate approaches to the stream of commerce doctrine. n18 The Third Circuit, however, has not yet adopted any of the three stream of commerce tests announced in *Asahi*. n19 Regardless of this uncertainty, the defendant must have engaged in some form of "purposeful availment" of the forum state. n20 Mere foreseeability that the defendant's products may end up in the forum state is not sufficient for "stream of commerce" jurisdiction. n21

n18 *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).

n19 *Pennzoil*, 149 F.3d at 205; *Renner*, 33 F.3d at 281-282.

n20 *Pennzoil*, 149 F.3d at 203; *Renner*, 33 F.3d at 282 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, at 475).

n21 *Pennzoil*, 149 F.3d at 203.

[\*18]

In deciding whether specific personal jurisdiction can be asserted successfully, 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. n22 Purposeful availment, *inter alia*, is the act of commercially targeting the forum state. This requires a fact-sensitive approach. n23

n22 *Pennzoil*, 149 F.3d at 201; see *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).  
n23 *Pennzoil*, 149 F.3d at 203.

Pennsylvania's long-arm statute extends jurisdiction to the fullest extent allowable under the Constitution, n24 so the question is whether the exercise of personal jurisdiction over Colorado Custom Hardware, Inc., is constitutional. n25 If such a sufficient minimum [\*19] contact is established, this Court may consider whether the exercise of jurisdiction whether it meets the requirements of the Due Process Clause of the United States Constitution by comporting with "traditional conceptions of fair play and substantial justice." n26

n24 42 Pa.Cons.Stat.Ann. § 5322(b) (1981).  
n25 *Mellon Bank*, 960 F.2d at 1221.  
n26 *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." n27 The following factors control: "the burden on the defendant, [\*20] the interests of the forum State, ... the plaintiff's interest in obtaining relief[,] ... the 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." n28

n27 *Grand Entm't Group*, 988 F.2d at 483.  
n28 *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." n29

n29 *Pennzoil*, 149 F.3d at 201.

[\*21]

#### **PERSONAL JURISDICTION ANALYSIS OF COLORADO CUSTOM HARDWARE'S CONTACTS**



## WITH THE FORUM STATE

In this case, this Court should confer personal jurisdiction over Colorado Custom Hardware because of the significance of its actions in commercially targeting Pennsylvania through its retailer, Exkursion, over the course of seven years, from 2000-2007. 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." n30 "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." n31 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.

n30 Pennsylvania Long Arm Statute, 42 Pa. Cons. Stat. Ann § 5322 (2008) (a)(1)(iii) and (a)(1).  
[\*22]

n31 *White-Evans Mfrs., Inc. v. Elevator Sales & Service*, 543 F. Supp. 398, 401 (E.D. Pa. 1982).

Colorado Custom Hardware, by its own admission, had engaged in such activity. Over the course of seven years (i.e. the years 2001-2007), or at least over the course of three years (i.e. the years 2005, 2006, 2007), Colorado Custom Hardware sold and shipped its products to its retailer in Pennsylvania, Exkursion. For the purposes of jurisdictional analysis, this fact is dispositive. This fact, this "most minimum contact with this Commonwealth" n32 (which a number of Pennsylvania courts actually misquote as "most minimal contacts with this Commonwealth") n33 is, for constitutional due process purposes, a *sufficient* contact.

n32 42 Pa. Cons. Stat. Ann. § 5322(a)(1).

n33 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).

[\*23]

A due process analysis, moreover, will show that this Court's exercise of personal jurisdiction over Colorado Custom Hardware is reasonable and therefore passes constitutional muster. The admitted burden on the Defendant (a discussion of which is clearly absent in Defendant's renewed Motion and supporting Brief) is clearly outweighed by the Commonwealth's interest in this case as a social policy concern under Pennsylvania's Guarantor Rule, n34 combined with Plaintiff Michael Willyoung's own interest in obtaining relief for the injury caused by Defendant's 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 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 Colorado Custom Hardware, is the following analysis will demonstrate.

n34 *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).

[\*24]

**I. PENNSYLVANIA HAS PERSONAL JURISDICTION OVER DEFENDANT, COLORADO CUSTOM HARDWARE, PURSUANT TO THE PENNSYLVANIA LONG ARM STATUTE.**

Plaintiff asserts that Pennsylvania has personal jurisdiction over the wholesaler, CCH, under the Pennsylvania Long Arm Statute, 42 Pa. Cons. Stat. Ann. § 5322, because of the fact that CCH shipped merchandise directly to a Pennsylvania retailer, pursuant to 42 Pa. Cons. Stat. Ann. § 5322(a)(1)(iii).

**A. As a wholesaler, Colorado Custom Hardware supplied its products to a Pennsylvania retailer over the course of seven years; therefore, Pennsylvania has personal jurisdiction over the wholesaler, CCH, under the Pennsylvania Long Arm Statute, 42 Pa. Cons. Stat. Ann. § 5322, because of the fact that CCH shipped merchandise directly to a Pennsylvania retailer, pursuant to 42 Pa. Cons. Stat. Ann. § 5322(a)(1)(iii).**

Defendant CCH basically argues that its internet contacts are insufficient to confer personal jurisdiction in this matter. CCH maintains no physical presence in Pennsylvania. CCH neither owned nor leased property in the state. CCH is not registered to do business in Pennsylvania. However, in a due diligence investigation [\*25] of CCH contacts with the forum state, Plaintiff's counsel ascertained that one Pennsylvania retailer does stock "Alien" cams. That retailer is Exkursion, located in 4037 William Penn Highway, Monroeville, Pennsylvania 15146 (412-372-7030), and maintains a web site at <<http://www.exkursion.com/mountain/mountain.html>>. n35 In a phone call made by attorney Dr. Christopher Buck to Exkursion on May 21, 2008, the owner, Fred Gunther, disclosed that Exkursion does (or at that time did) carry "Alien" cams.

n35 Accessed January 4, 2009.

CCH, however, disclaims any such business relationship in 2008: "Colorado Custom Hardware, Inc. does not have any active retailers in Pennsylvania as of 2008. From 2000-2007, a retailer called Excursion [sic] with one store in Monroeville, PA sold a nominal amount of Colorado Custom Hardware's products." n36 In its answer to Interrogatory #9, CCH further stated:

Colorado Custom Hardware only sells its products on a wholesale basis. From 200[0]-2007, Colorado Custom [\*26] Hardware sold its products to only one retailer, a company called Excursion [sic, read: Exkursion] with one store in Monroeville, PA. Between the years 2000-2007, Colorado Custom Hardware, Inc. sold a total of 47 cams to Excursion [Exkursion]. These sales comprise 22 units in 2005, 17 units in 2006, and eight units in 2007. CCH did not sell any units to Excursion [Exkursion] in 2008.

n37

n36 CCH, *Defendant Colorado Custom Hardware, Inc.'s Responses to the Plaintiff's First Set of Interrogatories and Request for Production of Documents for Jurisdictional Discovery ("Responses")*, 4. See Exhibit A.

n37 CCH, *Responses*, 5. See Exhibit A.

However "nominal" Exkursion's sales of CCH products may have been, the fact that CCH supplied its products to

this Pennsylvania retailer clearly shows sufficient contacts between Defendant and the forum state of Pennsylvania. The percentage of CCH's total volume of business, for any given year, in terms of its sales to Exkursion is irrelevant to [\*27] the issue of purposeful availment, as the following analysis will demonstrate.

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

By its own admission, Colorado Custom Hardware shipped its merchandise directly or indirectly into or through this Commonwealth: "CCH sells and supplies its products to various distributors and retailers throughout the country. Although some of these retailers have business locations within the Commonwealth of Pennsylvania, CCH does not know whether those retailers specifically sell CCH products in the facilities that are located within the Commonwealth of Pennsylvania." n38 There, CCH admits to selling and shipping its products, directly or indirectly, to or through its retailers in the Commonwealth of Pennsylvania. Plaintiff directs the court's attention to the fact that CCH refers to its "retailers," in the Commonwealth of Pennsylvania, in the plural, notwithstanding the fact that CCH later states that its "sold its products to only one retailer in Pennsylvania." n39 Therefore, this Court may exercise personal [\*28] jurisdiction pursuant to 42 Pa. Cons. Stat. Ann § 5322 (2008)(a)(1)(iii).

n38 CCH, *Brief*, 5. See Exhibit B.

n39 CCH, *Brief*, 6. See Exhibit B.

**II. DEFENDANT, CCH, 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. Further in its *Brief*, CCH states: "Between 2000 and 2007, CCH sold 47 cams two Exkursion [sic, read: Exkursion]. These sales are broken down as 22 cams sold in 2007, 17 cams sold in 2006, and 8 cams sold in 2007." n40 By virtue of the undisputed fact that CCH is also a wholesale supplier to the other Defendant in this cause of action, Bent Gate Mountaineering ("Bent Gate"), which marketed CCH products to Pennsylvania residents, the minimum contacts necessary to exercise specific jurisdiction are more than [\*29] met. During 2006-2007, Bent Gate reports having sold and shipped two Alien cams to Pennsylvania. n41 Bent Gate, moreover, sold a total of \$ 328.92 worth of CCH products to Pennsylvania during the same period. n42

n40 CCH, *Brief*, 6. See Exhibit B.

n41 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. 2 (Answer to Question 1). See Exhibit C.

n42 Bent Gate, *Answers*, p. 5 (Answer to Question 8). See Exhibit C.

**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 [\*30] 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. n43 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." n44 Critical to this analysis is the determination that Defendant purposefully directed its activities at residents of the forum, 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. n45

n43 *Burger King*, 471 U.S. at 475.

n44 *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

n45 *Burger King*, 471 U.S. at 472-473.

[\*31]

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.*" n46 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 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 [\*32] 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 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. n47

n46 *Renner v. Lanard Toys*, 33 F.3d 277, 282 (3d Cir. 1994) (emphasis added).

n47 *Kim Ly Chea v. Wilhelm Fette GmbH*, 2004 U.S. Dist. LEXIS 1157 at 10-11 (E.D. Pa. 2004).

[\*33]

Instantly, Defendant CCH's provision two of its shipping invoices to its Pennsylvania retailer, Exkursion,

documents the kind of contact with Pennsylvania that is known, foreseeable, and controlled by Defendant, to wit: (1) Invoice #8752, dated 7/18/2005; and (2) Invoice #8804, dated 8/25/2005. Therefore, with respect to Defendant, CCH, 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." n48 Such purposeful availment of Pennsylvania business opportunities establish the minimum contacts necessary for an assertion of specific jurisdiction.

n48 *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 CCH has not met its burden to [\*34] 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. Defendant merely mentions this Due Process concern on the last page of its Brief, to wit:

Based upon the facts of the instant case, there is neither general nor specific jurisdiction over Colorado Custom Hardware because there were no continuous and systematic contacts in Pennsylvania for general jurisdiction, a lack of minimum contacts for specific jurisdiction and because the traditional concepts of fair play and substantial justice would not be accomplished by the exercise of personal jurisdiction over Colorado Custom Hardware. n49

n49 CCH, *Brief*, 10. See Exhibit B.

To assert is not to prove. Your defendant offers no rationale to substantiate assertion facts traditional notions of fair play and substantial justice would be violated by the exercise of this Court's jurisdiction. According to [\*35] Aristotle, as is well known, a claim that is not accompanied by a supporting reason is merely a naked assertion. At the very minimum, Defendant is required to produce at least one reason to support its assertion in order to put forth the minimum requirement, according to Aristotle, to construct the most basic form of argument, an enthymeme. In other words, Defendant has not met its burden for the simple reason that it has not argued the point. Therefore, by default-that it has, by the absence of an argument-Defendant has not met its for burden to show any unconstitutionality in the exercise of this Court's jurisdiction on the grounds of violation of due process.

*Arguendo*, CCH 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 CCH would have to travel a substantial distance to defend itself. A burden undoubtedly would be imposed on CCH 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 [\*36] in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." n50

n50 *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, CCH. 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." n51 This forum has an even greater interest due to social policy concerns, under the *Azzarello* "Guarantor Rule." n52

n51 *Burger King*, 471 U.S. at 473 (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).  
[\*37]

n52 *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*." n53 To ensure this policy, liability attaches to dangerously defective products under this theory: "The [supplier] of a product is the *guarantor of its safety*." n54

n53 *Habecker v. Clark Equip. Co.*, 36 F. 3d 278, 285 (3d Cir. 1994), cert. denied, 514 U.S. 1003 (1995) ("*Habecker III*") (emphasis added).

n54 *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).

[\*38]

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, 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, CCH.

**V. ALTERNATIVELY, SINCE THE DUE PROCESS ANALYSIS IS DISCRETIONARY, THIS COURT MAY CHOOSE TO EXERCISE PERSONAL SPECIFIC JURISDICTION OVER DEFENDANT, COLORADO CUSTOM HARDWARE, INC., BY VIRTUE OF THE EXERCISE OF PENNSYLVANIA'S LONG ARM [\*39] 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." n55 Although this standard may be applied at a court's discretion, the Third Circuit generally encourages its use. n56 Plaintiff makes the point that this

Court is not required to apply the second standard.

n55 *Pennzoil*, 149 F.3d at 201.

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

**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.**

Defendants Colorado Custom Hardware'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, to wit:

Based [\*40] upon the foregoing, the percentage of the total sales of Colorado Custom Hardware's products to Excursion [Exkursion] between the years 2000 to 2007 was approximately 0.4% (four one-hundredths of one percent) and 0.5% (five onehundredths of one percent) of the total amount produced and sold by Colorado Custom Hardware, Inc.

Evaluated another way, Colorado Custom Hardware's sales to Excursion [Exkursion] in 2005 (22 cams) represent between 0.1% (one one-hundredths [sic; read "one-hundredth"] of one percent) - 0.2% (two one-hundredths of one percent); 2006 (17 cams) represent approximately 0.1[%] (one one-hundredths [sic; read "one-hundredth"] of one percent) its total sales for that year; and 2007 (8 cams) represents approximately .005% (one-half of one one-hundredths [hundredth] of one percent) of its total sales for that year. n57

n57 Colorado Custom Hardware, *Colorado Custom Hardware's Renewed Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2)*, pp. 7-8 (P 14, §§ o-p). See Exhibit D.

[\*41]

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* may be sufficient to subject a party to personal jurisdiction, particularly if the 'contacts evaluated are those that give rise to the litigation'." n58

n58 *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, NOTWITHSTANDING THE FACT THAT THIS DEFENDANT DID NOT FILE A RENEWED MOTION TO DISMISS.**

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, [\*42] assemblers, owners, sellers, lessors, or any other relevant category, are potentially liable to the ultimate user injured by the defect." n59 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.

n59 *Burch v. Sears, Roebuck & Co.*, 467 A.2d 615, 621 (Pa. Super. 1983).

For reasons quite similar to those offered in the preceding analysis respecting CCH, 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 CCH 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 [\*43] 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 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." n60

n60 *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. n61 Accordingly, this Court [\*44] should evaluate personal jurisdiction based on internet contacts through the prism of *Zippo* and its progeny. n62 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), for determining whether specific personal jurisdiction is proper based on Internet website contacts. n63 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 [\*45] end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise 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.* n64



n61 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.").

n62 See *Hershey Co. v. Pagosa Candy Co.*, 2008 U.S. Dist. LEXIS 29410 (M.D. Pa. 2008).

n63 *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 452 (3d Cir. 2003) (emphasis added).

[\*46]

n64 *Zippo*, 952 F. Supp. at 1124.

Where the defendant clearly transacts business through its web 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. n65 In its sliding-scale framework of analysis, the *Zippo* court established three basic categories: (1) *passive*; (2) *interactive*; and (3) commercially integral.

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

A web site is considered to be *interactive* if it allows users to purchase merchandise online. n66 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 noninternet 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 [\*47] related non-Internet activities as part of the 'purposeful availment' calculus." n67 Plaintiff now offers the following *Zippo* analysis under the relevant jurisdictional facts.

n66 *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446 (3d Cir. 2003).

n67 *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, [\*48] the viewer then submits this information directly to Bent Gate through its website. n68

n68 See the "Request Catalog" form at

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

2. **"Email"**: Clicking on this link instantly invokes a blank message addressed to Bent Gate, via its direct e-mail address, which is <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 [\*49] 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 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 [\*50] following the search field states: "Find my gear!" Entering the word "alien" brings up the following;

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

Clicking on "Alien Cams by CCH" invokes <<http://www.bentgate.com/aliencamsbycch.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.aliencamsbycch.com/recall/>". n69 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."

n69 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 [\*51] 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 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 [\*52] 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* when it wrote that the contacts were "deliberate and repeated even if they yielded little revenue." *Compuserve*, 89 F.3d at 1265. n70

n70 *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 [\*53] 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. 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. n71

n71 *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 [\*54] 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 I.) Each unit cost \$ 51.48, for a total of \$ 263.40, which was charged to Plaintiff's MasterCard. Of these 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. (Exhibit II.)

### 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' [\*55] inconvenience in litigating this case in Pennsylvania.

2. **The Forum State's Interest:** Since this 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." n72 Therefore this Commonwealth arguably has a greater interest in trying a products liability case than in any other state, including Colorado and Wyoming.

n72 *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 [\*56] parties. This Court, however, should consider the fact that the Plaintiff is the party that was injured, 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, [\*57] there is no other state with a superior interest to Pennsylvania.

Therefore, on the basis of the foregoing 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, CCH, 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 CCH meets this threshold by "the shipping of merchandise directly or indirectly into

or though [Pennsylvania]." n73

2. Because "*the presence of direct shipments will show the defendant's purposeful availment*," n74 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 [\*58] even the serious burdens placed on the alien defendant." n75

n73 42 Pa. Cons. Stat. Ann. § 5322(a)(1)(iii).

n74 *Renner v. Lanard Toys*, 33 F.3d 277, 282 (3d. Cir. 1994) (emphasis added).

n75 *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. at 114.

Since CCH 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, CCH, of litigating in the Commonwealth of Pennsylvania.

WHEREFORE, Plaintiff respectfully requests an Order from this Honorable Court to deny Defendant's *Colorado Custom Hardware's Renewed Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(2)*, and find that this Court has specific [\*59] 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: /s/ [Signature]

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#### CERTIFICATE OF SERVICE

On this 16th day of January 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]