ESSAY QUESTION NO. 1

Answer this question in booklet No. 1

Eastern Greenhouse Supply (Eastern) is incorporated and headquartered in New York and has its single distribution center there. It ships supplies to commercial nurseries. The company does not advertise other than by means of a website. Most of its buyers shop over the Internet and then either place their orders on line or by telephone. Eastern has made sales to buyers in all states, but its sales to Alaska have been limited to two or three isolated orders over the last five years.

Northern Nurseries, Inc. (Northern) operates a commercial greenhouse in Houston, Alaska. During the summer, Northern's old central heating system failed, and the company decided to replace it with individual gas units to hang from the roofs of the greenhouses. Northern needed the units in place by September 15 in order to start a crop of poinsettias for sale in the Christmas season. Northern could reasonably expect a net profit of $200,000 if the poinsettias were ready in time.

Visiting the Eastern website, Northern's purchasing manager, Susan, saw that she could purchase 100 of the units for $1000 each. "Expedited shipping" was offered "to all 50 states," with guaranteed delivery in 15 days. Placing her $100,000 order in late August, Susan chose expedited shipping and paid the appropriate surcharge. Eastern accepted her order.

As September 15 approached, the units had not arrived, and Susan called Eastern to check on them. She learned that all of the units had erroneously been trucked to a greenhouse in Houston, Alabama. By the time the mix-up was sorted out, delivery was greatly delayed and the heating units did not reach Northern until October. Although the units were satisfactory and Northern installed them, there was too little growing time left to grow poinsettias for the profitable season.

Northern sues Eastern in Alaska Superior Court. The complaint has two counts, one founded on breach of contract and one on negligence, each of them predicated on the delayed delivery that resulted from mistakenly shipping the units to Houston, Alabama. Both counts seek damages of $200,000 for the lost poinsettia profits and reimbursement of the "expedited shipping" surcharge. Northern validly serves the summons and complaint on Eastern at its headquarters in New York.

1. Eastern moves to dismiss for lack of personal jurisdiction. How should the court rule? Explain.

2. Assume the motion to dismiss for lack of personal jurisdiction is granted. Each side has incurred $10,000 in attorney's fees. Is Eastern entitled to a fee award under Civil Rule 82? In what amount? Explain.

Assume the motion to dismiss for lack of personal jurisdiction is denied. Eastern then serves the following discovery requests on Northern:

Request for Admission: Please admit that by placing its order Northern accepted the "terms and conditions" on our website, and thus entered into a contract that precluded recovery for incidental and consequential damages.

Interrogatory: In connection with your allegation of breach of contract, please state each and every term of the contract between the parties.

Forty-five days later, Northern serves on Eastern its response:

Request for Admission: Objection, calls for a legal conclusion.

Interrogatory: See enclosed documents.
[Northern enclosed all correspondence relating to the order.]

3. Evaluate the adequacy of Northern's responses under the Alaska Rules of Civil Procedure.

GRADER'S GUIDE

***** QUESTION NO. 1 *****

SUBJECT: CIVIL PROCEDURE

1. Eastern moves to dismiss for lack of personal jurisdiction. How should the court rule? Explain. (50 points)

This question tests basic understanding of the "minimum contacts" needed for personal jurisdiction. The facts present a question that can be argued either way, but the correct answer is that personal jurisdiction is present.

Personal jurisdiction is "'the power to subject a particular defendant to the decisions of the court.'" *Rocky Mountain Claim Staking v. Frandsen*, 884 P.2d 1299, 1301 (Utah App. 1994) (quoting *Stone's Farm Supply, Inc. v. Deacon*, 805 P.2d 1109, 1113 (Colo.1991)). When personal jurisdiction is challenged, the plaintiff has the burden of establishing that it exists. *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 294 (Alaska 1976).

Alaska has a "long-arm" personal jurisdiction statute that is "an assertion of jurisdiction to the maximum extent permitted by due process." *Morrow,* 548 P.2d at 293. Hence the evaluation of personal jurisdiction is always a matter of analyzing the constitutional limits of jurisdiction. It bears noting, however, that Alaska's long-arm statute lists categories of jurisdiction that potentially fit the circumstances of this case, including:

> -- actions claiming injury to property in Alaska arising out of an act or omission by the defendant elsewhere, when related to products processed by the defendant that "were used or consumed" in Alaska "in the ordinary course of trade" (AS 09.05.015(a)(4)(B)); and
>
> -- actions arising out of a promise made anywhere to deliver goods in Alaska (AS 09.05.015(a)(5)(C));

The due process clause of the fourteenth amendment to the United States constitution limits the power of courts in one state to exercise personal jurisdiction over a defendant who is a resident of another state. *E.g., Pennoyer v. Neff,* 95 U.S. 714 (1878). For personal jurisdiction over a nonresident corporate defendant, there must be "certain minimum contacts with [the forum] state such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945) (quoting prior authority).

There are two main categories of personal jurisdiction. One, often called "general jurisdiction," arises when a defendant's contacts with the forum state are so pervasive that the defendant may fairly be called to answer in that

state's courts even for matters unrelated to the defendant's contacts with the forum. *E.g., Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414 & n.9 (1984). General jurisdiction comes into play for corporations that have "continuous and systematic" contacts with the forum state. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952). It is not applicable here, where Eastern has made only two or three sales to Alaska in a five-year period.

The second category of personal jurisdiction is sometimes called "specific jurisdiction;" it is jurisdiction whose basis in due process is founded on the specific relationship "among the defendant, the forum, and the litigation." *Shaffer v. Heitner,* 433 U.S. 186, 204 (1977). This is the basis on which Northern must assert jurisdiction.

To evaluate specific jurisdiction, courts analyze (1) whether an out-of-state business has "'purposefully directed' its activities at residents of the forum," and (2) whether the controversy arises out of the business's contacts with the state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

In this case, Eastern did not advertise in Alaska or actively seek sales here. However, it maintained a website, accessible from Alaska, referencing shipment to "all 50 states," and it knowingly took an order from Alaska and promised to arrange shipment to Alaska. Most significantly, this case revolves around an allegation that by erroneously misdirecting the heaters, Eastern caused harm in Alaska.

The last Alaska connection listed above nearly puts this case over the threshold for jurisdiction. The Alaska Supreme Court held in *Jonz v. Garrett/Airesearch Corp.*, 490 P.2d 1197 (Alaska 1971), that the mere occurrence of an injury in Alaska allegedly caused by an act or omission by a defendant in another state is itself a contact with Alaska, but is not sufficient, taken alone, to establish minimum contacts with Alaska. The *Jonz* court went on to declare, however, that "very little by way of additional contacts need be shown to satisfy due process." 490 P.2d at 1199. The defendant in *Jonz* was an Arizona aircraft maker, and in that case evidence that the maker marketed its products through publications with nationwide distribution, could foresee that its planes would leave Arizona, and knew that the airplane in question was being operated in Alaska was sufficient additional contact to establish minimum contacts with Alaska. 490 P.2d at 1199.[1]

[1] There are many similar federal holdings, likewise applying the due process clause of the United States constitution, with which some examinees may be more familiar. A prominent example is *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980): "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State" and those products subsequently injure forum consumers.

Here, like the aircraft manufacturer in *Jonz*, Eastern marketed its products through a forum seen nationwide, in this case the Internet. It noted on its website its willingness to ship to all 50 states. It also specifically accepted this order from an Alaska customer. In this way, it "purposefully directed" its activities at a resident of Alaska (*Burger King,* 471 U.S. at 472), and it could "reasonably anticipate being haled into court there." (*World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). These extra contacts, directed at Alaska, supply the "very little by way of additional contacts" required by *Jonz*. Exercise of personal jurisdiction in Alaska therefore meets the due process threshold.

2. Assume the motion to dismiss for lack of personal jurisdiction is granted. Each side has incurred $10,000 in attorney's fees. Is Eastern entitled to a fee award under Civil Rule 82? In what amount? Explain. (25 points)

This question tests a simple aspect of Alaska's unique attorney's fee rule. Eastern is presumptively entitled to a fee award of $2000, although variation from this amount is possible under certain circumstances.

Alaska Civil Rule 82(a) provides that unless otherwise provided by law or agreed by the parties, "the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule." Having obtained dismissal, Eastern is the prevailing party in the litigation. *Bromley v. Mitchell,* 902 P.2d 797, 804 (Alaska 1995) (party obtaining dismissal is prevailing party even if dismissal not on the merits). The facts of the question reveal no agreement between the parties to override Rule 82, and there is no other law that supersedes Rule 82 in this simple tort and contract action. Accordingly, Eastern is entitled to a fee award under Rule 82.

As to the calculation of the fee award, Rule 82 provides that

> [i]n cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party . . . in a case resolved without trial 20 percent of its actual attorney's fees which were necessarily incurred.

Alaska R. Civ. P. 82(b)(2). Under this formula, the presumptive fee award to Eastern would be $2000. Northern could resist this award on the ground that the fees were not "necessarily incurred," contending that $10,000 is too high a fee in a case resolved by a simple jurisdictional motion. If Northern prevails in this contention, the award under the Rule 82(b)(2) formula would be 20 percent of the portion of the $10,000 fee that was, in fact, necessary to a prudent defense of the case.

Beyond the potential reduction to eliminate unnecessary fees from the calculation, a court may further vary a fee award based on consideration of a

set of factors listed in subpart (b)(3) of Rule 82. By the terms of the rule, an adjustment based on these factors is left to the court's discretion, but the court has to explain its reasons for the adjustment. The factors are:

(A) the complexity of the litigation;

(B) the length of trial;

(C) the reasonableness of the attorneys' hourly rates and the number of hours expended;

(D) the reasonableness of the number of attorneys used;

(E) the attorneys' efforts to minimize fees;

(F) the reasonableness of the claims and defenses pursued by each side;

(G) vexatious or bad faith conduct;

(H) the relationship between the amount of work performed and the significance of the matters at stake;

(I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts;

(J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and

(K) other equitable factors deemed relevant.

Alaska Supreme Court Justice Jay Rabinowitz once wryly noted that "[a]ny attorney worth his or her salt will, pursuant to the expansive provisions of (b)(3)(A) through (K), request variations from the attorney's fees awards called for under . . . the provisions of (b)(2) which apply where no money judgment is recovered by the prevailing party." SCO 1118 (Rabinowitz, J, dissenting). The question provides little material from which to develop an argument under these factors, but a superior answer may note their availability to alter a twenty percent calculation made under Rule 82(b)(3). Depending on the course of the litigation prior to dismissal, these factors could be used by Eastern to argue for an enhanced fee award, or by Northern to argue for a reduced award.

3. Assume the motion to dismiss for lack of personal jurisdiction is denied. Eastern then serves the following discovery requests on Northern . . . . Evaluate the adequacy of these responses under the Alaska Rules of Civil Procedure. (25 points)

This question tests the mechanics of two of the basic discovery rules.

A. Request for admission

Alaska Rule of Civil Procedure 36 provides that a request for admission "is admitted unless within 30 days after service of the request, or within such shorter or longer time as the court may allow or the parties may agree in writing . . ., the party to whom the request is directed serves . . . a written answer or objection." Since the question does not suggest that the time for response was expanded, Northern's response appears to be untimely. Under the terms of the rule, an untimely response is technically an admission. A matter that is admitted is "conclusively established" unless the admission is withdrawn or amended. Alaska R. Civ. P. 36(b).[2]

Apart from its untimeliness, the objection served by Northern would act to prevent admission. Rule 36 gives responding party the option to object rather than answer, and requires only that "the reasons [for the objection] shall be stated." Since Northern has given a reason for its objection, the objection is sufficient until adjudicated otherwise.

To obtain a further response in the face of an objection accompanied by a reason, Eastern would have to file a motion to determine the sufficiency of the objection. If the court determined the objection was not justified, it would then, at that time, "order that an answer be served." Alaska R. Civ. P. 36(a).

In this case, the objection that has been offered is not well taken. At one time, both Alaska's Rule 36 and the federal rule on which it is modeled were arguably limited to purely factual admissions, and objections were sometimes sustained against requests for admission seeking the application of law to the facts. 8A Wright, Miller & Marcus, Federal Practice and Procedure 2d § 2255. This changed in the 1970s, and both the state and federal versions of Rule 36 now explicitly provide that requests for admission can encompass "the application of law to fact." The request for admission in this question is such a request, asking Northern to admit alleged legal consequences of actions and events. It is permissible, and Eastern could, by motion, obtain an order requiring Northern respond to it on the merits.

B. Interrogatory

Like the response to the request for admission, the response to the interrogatory is probably untimely, since responses to interrogatories are due in 30 days unless otherwise ordered or agreed. Alaska R. Civ. P. 33(b)(3). In the absence of a motion to compel, the late response does not have any particular consequences in the context of an interrogatory; in contrast to Rule 36, Rule 33 provides no automatic admission or other consequence for a late response.

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[2] If Eastern were to move to withdraw or amend the admission, the court could grant the motion if "presentation of the merits of the action will be subserved thereby" and Northern cannot show prejudice. Alaska R. Civ. P. 36(b). Under this forgiving standard, an early motion to amend the admission would very likely be granted.

The response Northern has provided is probably adequate. Alaska R. Civ. P. 33(d) permits a party to simply direct the other party to records "from which the answer may be derived" and provide access to those records, rather than provide a textual answer. This option may be used if:

-- the answer "may be derived or ascertained from the business records" of the answering party; and

-- the burden of deriving or ascertaining the answer is substantially the same for either party.

Here, Northern has supplied the written correspondence that passed back and forth between the parties, taken from its business records. It is presumably as easy for one party as another to extract the agreed terms from those documents. Note, however, that by answering in this way Northern has limited itself, because it has effectively represented that "each and every term of the contract" is to be found in the "enclosed documents." Any later contention that there were other terms, such as terms agreed through oral discussions, implied terms, or terms from the website, would be inconsistent with its interrogatory response.