

CIVIL PROCEDURE

Mr. Martin

December 9, 2013

Exam ID no. \_\_\_\_\_

### FINAL EXAMINATION

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Please write legibly, begin each question on a new page, and leave a margin on the left-hand side of the page.

Use only your examination identification number to identify your blue book or blue books. Your exam ID number is the last six digits of your social security number followed by the numerals "59." Thus, if your social security number is 123-45-6789, your exam ID number will be 45678959. If you use more than one blue book, identify each one ("No. 1 of 2," "No. 2 of 2," etc.), make sure that your exam ID number is on each one, and insert all others into the first blue book when you turn them in.

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**QUESTION ONE**  
**(suggested time: thirty minutes)**

Attorney Cecelia McStinger sued her former partners in the 24-lawyer firm of Sniff, Peck & Grubb. Suit was brought in federal court under Title VII of the federal Civil Rights Act. Cecelia alleged that she was forced out of the partnership because of conduct and attitudes that discriminated against her on the basis of sex.

Because a law firm is a partnership (not a corporation), suit was brought against each of Cecelia's former partners. The defendant partners each filed a timely motion to dismiss for failure to state a claim upon which relief can be granted based on the argument that Title VII does not cover professional legal partnerships. Relying on Hishon v. King and Spaulding, 467 U.S. 69 (1984), the district court denied these motions.

ANSWER EACH OF THE FOLLOWING QUESTIONS "YES" OR "NO" WITH A BRIEF EXPLANATION. YOUR ONE-WORD ANSWER "YES" OR "NO" COUNTS AS FORTY PERCENT (40%) OF EACH QUESTION. YOUR BRIEF EXPLANATION COUNTS AS THE REMAINING SIXTY PERCENT (60%). WHERE APPROPRIATE, INCLUDE IN YOUR BRIEF EXPLANATION A CITATION TO THE RELEVANT FEDERAL RULE SECTION OR SUB-SECTION.

1. Can any of the defendant partners now move to dismiss for lack of subject matter jurisdiction?

2. Can any of the defendant partners include in his or her answer the defense of lack of jurisdiction over the person?

Sylvester Peck was the managing partner of Sniff, Peck & Grubb. Each year he asked every lawyer at the firm to write an evaluation of each of the other lawyers. Peck did not share these evaluations. He used them to fix

compensation levels and to determine which of the associate lawyers should become partners.

Cecelia sought and obtained discovery of the evaluations. She had always thought of Walter J. Grubb, another senior partner, as a friend. Imagine her distress to read that Grubb described her as a “power-hungry butch lesbian,” “openly hostile to males” who should for that reason “be confined to representing other angry females in the domestic relations practice.”

3. May Cecelia amend her Title VII complaint to add a claim for libel [tort claim based on written statement that is injurious to the reputation of another] against Walter J. Grubb?

4. Must Cecelia amend her Title VII complaint to add a claim for libel against Grubb, or else forego this claim which might otherwise be brought later in a state court?

5. Herbert Sniff, the greatly esteemed senior partner of Sniff, Peck & Grubb, was surprised to discover that Cecelia’s evaluation described him as “brain-dead,” “no longer able to practice at the level expected of a partner in SP&G,” and “a malpractice hazard if he does anything but play golf with the older clients.” May Sniff counterclaim for libel in Cecelia’s Title VII suit?

6. Must Sniff counterclaim for libel in Cecelia’s Title VII suit, or else forego this claim which might otherwise be brought later in a state court?

## **QUESTION TWO**

**(suggested time: fifteen minutes)**

Explain the differences between the uses and functions of impleader, interpleader, and intervention. Give an example of each.

**QUESTION THREE**  
**(suggested time: forty-five minutes)**

Veganburger Corp. (“Veganburger”) of Vermont is in the business of franchising fast food restaurants in Vermont that specialize in vegan cuisine such as carrot burgers, soy cheese pizza, vegan chili, salads, and the like.<sup>1</sup> A franchise agreement with Veganburger entitles a restaurant owner (the franchisee) to use, for a fee, the “Veganburger” name and logo, and to purvey food products supplied by Veganburger. Veganburger’s franchise agreements all contain termination clauses which provide that any franchise may be cancelled at will by Veganburger if, in its sole judgment, the franchisee is not operating the restaurant satisfactorily.

Amanda Marinara’s Veganburger restaurant was cited by her town’s health inspector for unsanitary conditions. Veganburger thereupon terminated her franchise in accordance with the franchise agreement notwithstanding Amanda’s protest that the violations were trivial and soon corrected. Amanda brought a class action suit in a Vermont state court on behalf of the class of all Veganburger franchisees. The suit sought an injunction against enforcement of the termination clause on the grounds that its unlimited grant of discretion to Veganburger was unconscionable.

Upon filing of the suit, the trial judge held a hearing to determine if the suit should be certified as a class action pursuant to Vermont Rule of Civil Procedure 23, which is identical to Federal Rule 23. At the hearing, several franchisees opposed certification on the ground that they (and others like them) feared that, if the termination clause were invalidated, the entire franchise agreement might fall with it or that Veganburger might use other

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and more punitive measures to get rid of franchisees that it didn't like. The court rejected these arguments against certification, however, and certified the class under Rule 23(b)(2). Following a bench trial, the court ruled that the termination clause was not unconscionable and entered judgment for Veganburger. Amanda, lacking funds, did not appeal.

A few months later Veganburger terminated the franchise of Emily Chutney, another franchisee, for adulterating the soy cheese with mozzarella. Insisting that this charge was false, Emily brought suit against Veganburger in Vermont state court. This suit sought an injunction against enforcement of the termination clause against Emily on the ground that the clause violated a Vermont statute prohibiting the termination of any franchise agreement except for "just cause." Emily had not received personal notice of, and was unaware of, Amanda's earlier lawsuit.

Veganburger now moves to dismiss Emily's suit on the ground that it is precluded by the judgment in Amanda's earlier case. Discuss the issues raised by this motion, and assess the motion's chances of success.

**QUESTION FOUR**  
**(suggested time: forty-five minutes)**

Buster Klaxon, a citizen of Maine, was a businessman who owned the largest retail store in Maine selling hunting and fishing equipment exclusively. He had an idea for a new line of business that he thought might turn a profit. Buster decided that he might make money selling refrigerators during the months of January through March. He observed that his fellow Maine citizens liked to shop for out-of-season bargains such as Christmas decorations in January and winter boots in April. He thought that they would enjoy buying refrigerators in winter too.

Buster had seen an article in a national trade magazine about Polar Co., a manufacturer of small refrigerators in Alabama. The article said that Polar usually had refrigerators left over at the end of a year of production which it could not sell.

Polar was a profitable company that had a good reputation in southern states which it had developed by marketing refrigerators through stores that sold hunting and fishing equipment in Alabama, Georgia, Florida, South Carolina and Mississippi. The customers bought small refrigerators for use in local hunting, fishing and vacation lodges. Polar introduced a "new, improved" model of refrigerator each year in the hopes of stimulating repeat sales. At the end of the year in December, unsold refrigerators of the old model were disposed of for their scrap metal value alone.

Buster's plan was to buy the surplus refrigerators at a heavy discount from their normal wholesale price, ship them to Maine, and offer them to his hunting and fishing customers in Maine at a little below the price of competing models.

When Buster approached Polar (by telephone) the company's officers were intrigued. Buster was careful not to explain the details of his plan to Polar. He insisted that he would buy the refrigerators "F.O.B." which meant that he would take title to them at Polar's warehouse in Alabama and arrange his own shipping, so that Polar could not copy his plan and take over the Maine market. Despite Buster's secretive manner Polar decided that, if Buster would pay, even at a reduced price Polar could make money by selling surplus refrigerators which would otherwise be scrapped.

So the deal was made. Polar checked out Buster's credit references, which were good, and agreed to sell him the refrigerators on credit with payment to be made 60 days after shipment from Polar's warehouse. Polar

was experienced in making deals with retailers who resisted formal written contracts so, except for a few letters that went back and forth, the understanding was oral.

At first the small refrigerators got a good reception in Maine. Customers loved the bargain price. All over Maine and even into New Hampshire word spread that Buster had something special.

Problems, however, soon arose. It turned out that Maine citizens liked to use the refrigerators when they did their cold weather snowmobiling and ice fishing. They wanted a small refrigerator that would keep their beer chilled without freezing it. But the refrigerators were not designed to resist extreme cold. Large numbers of customers returned their refrigerators to Buster's store, demanding refunds and complaining about their frozen beer. Buster complained to Polar that Polar's officers had told him, orally and in writing, that the refrigerators were designed to withstand extremes of temperature. Polar's officers replied that they were talking about hot weather, not cold weather.

Polar refused to accept any returns from Buster. Buster stopped writing checks to Polar. The exchanges between Buster and Polar became more and more hostile.

Polar sued Buster in a state court in Alabama for \$100,000 unpaid by Buster to Polar. Polar sued in Alabama for two reasons: (1) it wanted the home field advantage—specifically it hoped for a jury of satisfied Alabama hunters and fishermen, not a jury of Maine folks who might know about the frozen beer; and (2) Alabama law recognizes and will enforce most oral contracts. Buster was properly served in Maine with process from the Alabama state court.

Two days after service of process upon Buster, Buster retained a lawyer in Alabama. You are that lawyer. Alabama's long arm statute is identical to that of Illinois which is printed at pp. 778 and 780 of your casebook.

Formulate a strategy for forcing Polar to sue Buster in Maine. Identify the procedural steps that you will take to implement the strategy. Estimate your likelihood of success.

**QUESTION FIVE**  
**(suggested time: forty-five minutes)**

Mr. and Mrs. Malarkey bought a recreational vehicle called a Fat Boy made by the Overwaite Coach Co. ("Overwaite") of Overwaite, West Dakota. The Fat Boy was nothing but trouble. First the air conditioning wouldn't work. Then the pressurized water tank depressurized and the Malarkeys couldn't take their showers. The refrigerator wouldn't keep the ice frozen. The sofa bed jammed in the open position. The handle fell off the dishwasher. Every week, it seemed, the Malarkeys were taking the Fat Boy back to the dealership to have some new glitch fixed. Overwaite denied all responsibility for the defects. In addition, Overwaite's customer service representatives were surly and unresponsive. Finally the Malarkeys could take it no longer. They sued Overwaite in the United States District Court for the District of West Dakota under the federal Magnuson-Moss Warranty Act, 15 U.S.C. 2301 et seq. To their complaint they added West Dakota state law claims of negligence, strict product liability and breach of warranty. The state law claims are within the federal court's pendent (now called "supplemental") jurisdiction. A jury trial was demanded.



The Malarkeys thought that they should teach Overwaite a lesson about the consequences of poor customer relations. In addition to compensatory damages for breach of warranty of their state law and Magnuson-Moss Warranty Act claims, the Malarkeys sought punitive damages on their pendent negligence and strict product liability claims.

Punitive damages in tort are available in all but four or five American states.<sup>2</sup> Abolition or curtailment of punitive damages, especially in product liability actions, is high on the tort reform agenda that has been promoted for the past twenty years by American manufacturing and insurance interests. Economists argue that punitive damages are dysfunctional. The United States Supreme Court has found that there are constitutional Due Process limitations on the states' law authorizing punitive damages, although it hasn't said exactly what those limitations are. Several American jurisdictions have enacted legislation in recent years restricting punitive damages. One of these jurisdictions is West Dakota.

In its 2008 Tort Reform and Insurance Act, West Dakota limited punitive damages to three times actual damages, imposed restrictions on discovery relating to defendants' net worth, and introduced the following special requirement:

No claim for punitive damages shall be accepted in any court of this state until the plaintiff shall have filed in court a statement on oath of facts which, if proven, would entitle the plaintiff to recover punitive damages, and the court shall have found that there is a reasonable basis for the plaintiff's claim.

(Note that the requirement for a statement "on oath" means that a plaintiff can be prosecuted for perjury if he or she files a statement containing unfounded or exaggerated claims).

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(Note that the requirement for a statement “on oath” means that a plaintiff can be prosecuted for perjury if he or she files a statement containing unfounded or exaggerated claims).

Mr. and Mrs. Malarkey have not filed this statement in the federal district court nor, on the facts set out above, can they do so. Overwaite moves to dismiss the Malarkeys’ pendent state claims for want of this statement. The Malarkeys argue that the Court should deny this motion because the West Dakota statute amounts to a special pleading requirement that is contrary to F. R. Civ. P. Rules 8(a) (2), 8(a) (3) and 9(g).

(The argument for Overwaite’s motion to dismiss is a precursor to other arguments that lie down the road in this or other federal court cases in West Dakota, specifically that restrictions on discovery of defendants’ net worth contravene F. R. Civ. P. Rule 26(b)(1), and that restrictions on awards of punitive damages abridge the right to trial by jury as guaranteed by the Seventh Amendment).

How should this judge rule on Overwaite’s motion to dismiss the Malarkeys’ pendent state law claims? Why?

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(The argument for Overwaite’s motion to dismiss is a precursor to other arguments that lie down the road in this or other federal court cases in West Dakota, specifically that restrictions on discovery of defendants’ net worth contravene F. R. Civ. P. Rule 26(b)(1), and that restrictions on awards of punitive damages abridge the right to trial by jury as guaranteed by the Seventh Amendment).

How should this judge rule on Overwaite’s motion to dismiss the Malarkeys’ pendent state law claims? Why?

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**QUESTION ONE**  
**(suggested time: forty-five minutes)**

Stanley Simmerwell lent his 2012 Ford Devastator sport-utility vehicle to his nephew Herb Highball, who had a reputation for wild and crazy off-roading. Highball decided that he wanted to drive the Devastator up the Mt. Washington Auto Road to the summit of Mt. Washington in New Hampshire.

While ascending the mountain at an excessively high speed, Highball was in a head-on collision with a descending car owned and driven by Tammy Tumblehome. Tumblehome did not see the Devastator coming because she was talking on her cell phone while adjusting her makeup and trying to find heavy metal music on the radio. Tumblehome's car was knocked off the auto road. The car overturned and rolled down the mountainside before coming to a stop several hundred feet from the site of the collision. Tumblehome suffered serious injuries.

The Devastator remained on the road but suffered substantial property damage.

Tumblehome sued Simmerwell and Highball as co-defendants in the United States District Court for the District of Massachusetts claiming damages of \$500,000.

In addition to filing an appropriate defensive response to the complaint, Simmerwell wants to assert offensive claims (1) to recover for the damage to the Devastator, and (2), if Highball should be found at fault in the accident, to receive indemnification from Highball for any money paid by Simmerwell to satisfy the judgment in favor of Tumblehome. Note that

the first of these two claims can be asserted against both Highball and Tumblehome.

REVIEW RULES 13(a), 13(b), 13(g), 18(a) AND 20(a). THEN ANSWER EACH OF THE FOLLOWING SUB-QUESTIONS BRIEFLY.

1. Tumblehome is a resident of New Hampshire. Simmerwell and Highball are residents of Massachusetts and have been properly served under Rule 4. Are subject matter jurisdiction, personal jurisdiction and venue correct? Explain.
2. Why is the joinder of Simmerwell and Highball as co-defendants proper? Cite the relevant federal rule or rules.
3. What pleading may Simmerwell file against Tumblehome? What, if anything, will happen to Simmerwell's claim against Tumblehome if he fails to file it in this action? Cite the relevant federal rule or rules.
4. What pleading may Simmerwell file against Highball? What, if anything, will happen to Simmerwell's claim against Highball if Simmerwell fails to file it in this action? Cite the relevant federal rule or rules.
5. Suppose that Simmerwell asserts a claim against Highball, in the original action, for indemnity but not for damage to the Devastator. The entire case, including this claim against Highball, goes to trial. The court concludes that Highball was solely responsible for the accident. Now Simmerwell files a separate action against Highball to recover for damage to the Devastator. Why will this second case be dismissed? (Hint: the answer is not found in Rule 13[a] or Rule 13[g]).
6. Suppose that Simmerwell asserts against Highball both his claim for indemnification and his claim for property damage to the Devastator in the original proceeding. If Simmerwell has a completely unrelated claim

against Highball for trespassing on Simmerwell's farm, can Simmerwell join this trespass claim to his indemnification and property damage claims against Highball? Cite the relevant federal rule or rules.

7. Suppose that Simmerwell has no claim against Highball either for indemnification or for property damage, but does have against Highball the unrelated trespass claim mentioned in sub-question 6. Why can Simmerwell not assert the trespass claim alone in the original action? Cite the relevant federal rule or rules.

8. Suppose that Simmerwell asserts against Highball both his claim for indemnification and his claim for property damage to the Devastator in the original proceeding. Now suppose that Highball wants to assert a claim against Simmerwell, alleging that the Devastator had defective brakes when Simmerwell lent it to Highball. May Highball assert this claim against Simmerwell in the original proceeding? Cite the relevant federal rule or rules.

9. Same facts as in sub-question 8 above. Must Highball assert this claim against Simmerwell or else forfeit the opportunity to do so in another proceeding? Cite the relevant federal rule or rules.

## **QUESTION TWO**

**(suggested time: forty-five minutes)**

There still is a French Foreign Legion. It still enlists only non-French citizens, and it still guards the identity of its legionnaires by enrolling them in the Legion under false names—noms du Legion. All this Minnie of Methuen found out, to her sorrow, when she divorced her no-good husband Vinnie.



When Vinnie walked out on Minnie in 2006, he told her that he was going to join the French Foreign Legion. It was just about the only truthful statement he ever made to her. This was the last she saw or heard of him. In 2009 she filed for divorce, on the grounds of desertion, in the appropriate Massachusetts state court.

Minnie's first problem was to serve the summons and complaint for divorce upon Vinnie. She sought to make personal service in accordance with French law which, if effected, would have been valid service under Rule 4(f). The French process-server, however, could not locate anybody named Vinnie in the Foreign Legion for the very good reason that nobody by that name was enrolled. Minnie then sent the summons and complaint by international certified mail to Vinnie c/o the Foreign Legion at its headquarters in Corsica. Same result. Finally Minnie applied to the court for an order authorizing her to serve Vinnie by publication. This was allowed. Notice of the pending divorce proceedings, addressed to Vinnie, was published for three weeks in the Boston Herald and in the Paris edition of the English-language International Herald-Tribune. Vinnie, however, was engaged in a tribal civil war in Mali, Africa, fighting with the rest of his Legion battalion, and he never saw the notice.

After Vinnie failed to appear in the divorce proceedings, Minnie's divorce was granted by default. The judgment of divorce contained two provisions of consequence: (1) it recited that a child, Serena, had been born to the couple, and (2) it ordered Vinnie to pay \$100 per week to Minnie for the support of the child retroactive to her date of birth, June 14, 2008.

Abandoned by her husband and caring for a two-year-old, Minnie applied for public assistance. As a condition of assistance she assigned to

the Welfare Department<sup>1</sup> her right to seek and collect child support from Vinnie. No more than Minnie could the Welfare Department find French Foreign Legionnaires under false names, so all that happened was that Vinnie's unpaid child support was recorded on the Welfare Department's computer in ever-increasing amounts.

In September, 2011, Vinnie's enlistment in the Foreign Legion ended. He returned to Massachusetts with \$10,000 in profits from various black-market transactions in Mali. With this money he opened a checking account at the Last National Bank under his real American name and social security number. He then made the serious mistake of writing a check on that bank account to renew his Massachusetts driver's license. The Welfare Department's computer, finding a bank account identified to Vinnie by name and social security number, levied on the account taking the entire \$10,000.

Vinnie was ripped. First he went to the bank for an explanation. The bank sent him to the Welfare Department. There he learned for the first time the meaning of the term "deadbeat dad." Not only was he penniless but, also, he found that he was obliged for the next fifteen years to support a child he knew nothing about.

Vinnie asked when Serena was born. "June 14, 2008," said the Welfare Department worker.

"But," said Vinnie, "I've been out of the United States continuously since 2006."

"Sorry, Mac," said the Welfare Department worker. "You're the father. It's *res judicata*."

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<sup>1</sup> Formally called, in Massachusetts, the Department of Transitional Assistance. The business of collecting delinquent child support is in the hands of another agency, the tax collector at the Department of Revenue. For simplicity, the combined functions of the Department of Transitional Assistance and the Department of Revenue are called the "Welfare Department" in this question.

Part A.

(eighty percent of this question)

Represented by legal services, Vinnie sued the Welfare Department. Vinnie seeks the return of his \$10,000. He also seeks a declaratory judgment that he is not the father of Serena. The Welfare Department answered raising the affirmative defenses of res judicata and collateral estoppel. For the purpose of testing the Welfare Department's arguments of law, Vinnie's lawyer made a motion pursuant to Rule 12(f) to strike these defenses as insufficient. How should the judge decide the motion? Why?

Part B.

(twenty percent of this question)

Assume that the judge denied Vinnie's lawyer's motion, in effect ruling that the defenses of res judicata and collateral estoppel will apply to Vinnie's claim, regardless of your actual answer. Does Vinnie, in that event, have any other route to relief? If so, identify it and evaluate Vinnie's likelihood of success.

[NOTE: This Question two is not a Family Law question. You are not expected to know any domestic relations law, of Massachusetts or elsewhere, in order to answer this question. Consider the divorce judgment to be no different from any other judgment for res judicata and collateral estoppel purposes].

**QUESTION THREE**  
**(suggested time: thirty minutes)**

Mary Gentleman was a recent graduate of Millard Fillmore School of Law in upstate New York who succeeded in finding a job at the law firm of Tydings, Comfort & Joy in New York City. In her first year at that firm she gave herself, as a Christmas present, a living room set and a waterbed which she purchased from Nicols & Dime, a furniture retailer incorporated in Delaware with its principal place of business in Illinois. Short of cash, Mary obtained the merchandise by signing an installment payment agreement on a form supplied by the store. Like most customers she signed the form without reading it. However, in a free moment at her office she decided to practice her skills by reading the document to see if it complied with federal and state laws.

Mary's careful review disclosed that Nichols & Dime's form violated a requirement of the federal Truth in Lending Law that the "nominal annual percentage rate" should be shown on the face of the contract. The form also violated the New York Retail Installment Credit Act which required that material portions of the contract be printed in type "not smaller than eight-point." Under the federal law Mary was entitled to bring suit in federal court without regard to the amount in controversy and to recover a \$100 penalty for the violation. The federal statute also provided that, if a class action were brought thereunder, the class's total recovery would be limited to \$100,000 or one percent of the creditor's net worth, whichever was less. The New York statute was more generous. It provided for a statutory penalty "in the amount of the credit service charge" which in Mary's case was \$313.75.

Mary filed a class action in the federal district court for the Southern District of New York on behalf of herself and all other residents of New York who purchased merchandise from Nichols & Dime by entering into installment contracts on the company's form. The number of class members is uncertain but is estimated to be in excess of 3000.

In response to Mary's motion for class certification, Nichols & Dime moved to dismiss the state class claims under the New York Retail Installment Credit Act. Nichols & Dime argued that the class claim was prohibited by the New York Class Action Law, N.Y. C.P.L.R. s. 901(b), which provides:

Unless a statute creating or imposing a penalty or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty or a minimum measure of recovery created or imposed by statute may not be maintained as a class action.

Nichols & Dime also oppose certification of the federal class claims as inappropriate under Federal Rule 23.

You are a clerk for the federal judge who must decide these motions. Please draft a memorandum advising her how she should rule and why.

**QUESTION FOUR**  
**(suggested time: one hour)**

In 2005 Tennyson Lance, an Australian citizen admitted to the United States for permanent residence, who currently lives in San Francisco, California, sold the North American manufacturing and sales rights of his skateboard company to Radical Industries, Inc. ("Rad"), for \$5,000,000. Rad is a Delaware corporation. Its corporate headquarters, manufacturing

facilities, warehouse, and distribution center are all located in Portland, Oregon.

At the time of the sale, Lance's skateboards, called "Lance-A-Lots," were being manufactured at Lance's small factory in Australia. They were not sold by retailers. Instead, customers purchased Lance-A-Lots directly from Lance's company. The company maintained a website on which customers could place their orders. Sales were booming. The capacity of the factory had been reached. To raise capital for expansion Lance decided to sell his North American manufacturing and distribution rights to Rad. As part of the sale transaction, Lance executed a covenant not to compete with Rad in connection with sales in North America.

Rad is a manufacturer of sports and fitness equipment which it sells through the usual retail channels. Rad decided, however, to retain the "special order" feature and the website for Lance-A-Lots manufactured by it, believing that this feature enhanced the cachet and prestige of the Lance-A-Lot. Orders placed via the website, of course, are not being fulfilled in Australia but rather at Rad's headquarters in Portland.

Lance's company had a reputation for producing skateboards of the highest quality. Its tradename, "Lance-A-Lot," was known to skateboarders from the Charles River to the Great Wall of China. At the time of the sale, accountants estimated that the tradename alone was worth \$500,000 in North American sales per year. Lance himself was a champion skateboarder who pioneered the skateboard maneuver called "Lance's Dances." He was well aware of his own reputation and that of the Lance-A-Lot brand. Lance was afraid that Rad would try to profit from the Lance-A-Lot reputation while reducing the quality of the product. To guard against this, the contract of sale provided that all skateboards sold by Rad under the Lance-A-Lot name

must meet the standards of the Federal Skateboard Safety act. If Rad violated this provision of the contract, its rights to the Lance-A-Lot would automatically revert to Lance who would then be free to use or sell the Lance-A-Lot rights as he saw fit.

The Federal Skateboard Safety Act (“FESSA”) was enacted in 2000 after a tide of serious skateboard injuries came to the attention of Congress. Section 3-1 of FESSA provides a private right of action for anyone injured by a violation of FESSA standards. Lance testified before Congress in favor of FESSA and was one of the industry’s most visible supporters of the law. (It didn’t hurt that Lance-A-Lots already met FESSA standards whereas most of Lance’s competitors had to retool and redesign their products).

The August 2012 issue of Boarding Housenews magazine revealed that Lance-A-Lot skateboards made by Rad were defective. The skateboards delaminated when wet and the wheels came off when stressed. Soon after, Lance was contacted by the Half Pipe Skateboard Co. (“Half Pipe”). Half Pipe inquired if it could acquire the North American manufacturing and sales rights to Lance-A-Lot, for which it was willing to pay \$10,000,000. Lance liked the deal but told Half Pipe that he first had to make certain that the rights to the Lance-A-Lot name had reverted to him.

Lance wrote to Rad, quoting the Boarding Housenews article. Lance told Rad that it was manufacturing and selling Lance-A-Lot skateboards which were defective under FESSA standards. Accordingly, Lance’s letter concluded, all rights to the Lance-A-Lot tradename had now reverted to him.

Lance received an angry reply by FAX denying the allegations in Boarding Housenews and insisting that Rad retained its exclusive rights.

Lance sued Rad in California Superior Court seeking a declaratory judgment that the Lance-A-Lot skateboards manufactured by Rad failed to

meet FESSA standards, and that all rights under the sale contract had therefore reverted to him. He also sought an injunction against Rad's further use of the tradename "Lance-A-Lot." Lance was concerned that, even if he were to be awarded this relief, Rad might still seek to enforce the covenant not to compete against him. Therefore he sought to litigate in California because California law treats covenants not to compete as void and unenforceable, as a matter of public policy.

Service of the California summons and complaint was made upon Rad by certified mail to its headquarters in Portland. California law allows service by certified mail; Oregon law does not. Ten days after receiving service of process, Rad removed the action to the appropriate federal district court. As grounds for removal, Rad alleged federal question jurisdiction under 28 U.S.C. s. 1331 and diversity of citizenship under 28 U.S.C. s. 1332. Rad then filed the following motions:

1. A motion to dismiss under F.R.Civ.P.Rule 12(b)(s), lack of jurisdiction over Rad's person, or in the alternative to transfer the action to federal court in Oregon pursuant to 28 U.S.C. s. 1404.
2. A motion to dismiss under F.R.Civ.P.Rule 12(b)(3), improper venue, or in the alternative to transfer the action to federal court in Oregon pursuant to 28 U.S.C. s. 1404.
3. A motion to dismiss under F.R.Civ.P. Rule 12(b)(5), insufficient service of process, on the grounds that service upon a corporation by certified mail is not authorized by F.R.Civ.P.Rule 4(h).

Rad's evident purpose is to force Lance to litigate in Oregon, where covenants not to compete are enforced.

Seeking to prevent Rad from achieving this purpose, Lance filed a motion to remand the action to California Superior Court. Note that, to



prevail on this motion, Lance will have to show that the action is not removable under either (4) diversity or (5) federal question grounds.

How should the judge decide these motions? Why? Please address each motion separately. Conspicuously number the separate sections of your answer, (1), (2), (3), (4), and (5), in accordance with the numbers assigned to each motion or issue in the foregoing paragraphs.

END OF EXAMINATION  
REMEMBER, ALL BLUE BOOKS MUST BE TURNED IN.

THIS INCLUDES BLUE BOOKS THAT ARE ENTIRELY  
UNUSED, AND ALSO BLUE BOOKS USED AS SCRAP.  
LABEL ANY SCRAP BLUE BOOK WITH THE WORD, "SCRAP."