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GRADING SHEET—CIVIL PROCEDURE I, SPRING 1999

QUESTION 1 (65%--130)

SUBJECT MATTER JURISDICTION (10)

7

PERSONAL JURISDICTION

Lobster Pot

In Personam (30)

In Rem (15)

Tosca (15)

20
8
10

SERVICE OF PROCESS

Lobster Pot (10)

Tosca. (10)

7
9

CLASS ACTION--ERIE (40)

35
8

QUESTION 2—FNC (5%--10 pts.).....

QUESTION 3 (15%--30pts.)

Salty—service/jurisdiction (15).....

Amend to add Dribble (15)

5
8

QUESTION 4—EXPERT (5%--10 pts.).....

7

QUESTION 5 (10%--20 pts.)

Summary Judgment Standard (5)

Shifting Burdens (5)

Application (10)

3
3
6

EXTRA (10)

TOTAL POINTS.. 138

IMPRESSION..... B+/A-

FINAL GRADE..... A
Top

Question 1:

Subject matter jurisdiction:

Subject matter jurisdiction refers to the court's power to hear a particular case. Here, the plaintiffs as a class wish to file in Federal Court in NM. One manner of obtaining subject matter jurisdiction in federal court is through diversity jurisdiction. Governed by 28 USC §1332, diversity jurisdiction is dependent on two factors: the status of the plaintiff & the amount of damages in question. The parties must be from different states (the case here) & the damages must exceed \$75,000. Complete diversity is required between all plaintiffs & all defendants, although co-citizens on one side are acceptable.

Damages

Although the facts do not specify the exact amount of damages, the attachment of the Lobster Pot's (LP) NM bank account allows the reasonable inference that damages will approach \$100,000, which LP normally keeps as a balance. If that account is used to gain quasi-in-rem jurisdiction in NM, then the damages against LP will not be able to exceed that amount. So accepting that figure as an estimate, the court will find the damage requirement for diversity satisfied.

Diversity of Parties

Diversity is based on the parties' domicile. Domicile is defined as the party's residence where they intend to remain indefinitely. Citizenship of a state is based on the person's domicile. The plaintiffs in this action wish to go forward as a class under FRCP 23. For diversity purposes, only the class representative counts to determine the citizenship of the class. Here, Domenici has been chosen as the class representative. His citizenship is NM. Therefore, for

diversity, the class is of NM. Thus, to achieve complete diversity both Tosca & the LP Corporation cannot be of NM themselves.

Tosca

Tosca is a citizen of Massachusetts. The facts do not indicate that his business is incorporated, & the suit appears directed at Tosca personally. Therefore, for subject matter jurisdiction purposes, his citizenship does not conflict with that of the class (NM). Thus, the court will rule that it has subject matter jurisdiction over the action between Tosca & the class.

LP (LP)

LP is a corporation. Diversity for corporations is determined by the state where they are incorporated as well as where they have their principal place of business. LP is incorporated in Delaware & thus, for diversity, is a citizen of that state. Although it has stores in three different states & a bank account in NM, its principal place of business appears to be Logan Airport, as 3.2 million of its 3.5 million dollars in revenue originate from this store. For diversity purposes, then, LP is a citizen of both Massachusetts & Delaware, neither of which conflicts with NM. Therefore, the court has subject matter jurisdiction over the action between the class & LP.

Lack of personal jurisdiction:

In order to hear a case, the court must have power or authority over the parties to the dispute so that any action it takes will be binding on the parties. This power is personal jurisdiction. The federal courts usually apply the state law of the state in which they sit. Here, that would be NM. NM has a long-arm statute §38-1-16 that delineates in which cases NM will have personal jurisdiction over out-of-state defendants. Not only must the statute be fulfilled, but constitutional Due Process requires that the defendant have such minimum contacts with the state that it would be fair & reasonable to require him/her to come to the state & defend the

lawsuit. The minimum contacts requirement applies as well to personal jurisdiction gotten through an attachment of in-state property, a quasi-in-rem action.

NM Long-Arm §38-1-16

The long arm statute enumerates a list of actions that will cause a defendant to submit to personal jurisdiction within the state. This list includes: transaction of business in the state, entering a contract, committing a tortious act, & operating a motor vehicle. The cause of action must arise from the defendant's act in the state & be directly related to it. The court analyzes the applicability of the long-arm on a case by case basis.

Due Process

To achieve minimum contacts with the forum state, the defendant must purposefully avail himself of the benefits & protections of that state such that he would foresee that the contact would render him subject to the courts. The contact must be of such nature that the maintenance of the suit would not offend traditional notions of fair play & substantial justice. That is, it must be reasonable to subject the defendant to the jurisdiction in terms of convenience, the state's interest in providing a forum, the relatedness of the acts, the plaintiff's interest in obtaining convenient & effective relief, the interstate judicial interest in obtaining efficient resolution, & the shared interest of several states in furthering substantive social policies.

Tosca

The court will probably find no personal jurisdiction over Tosca. Under the NM long-arm, he did not transact any business nor did he enter a contract in the state. However, it is possible to achieve personal jurisdiction over a defendant who commits a tortious act outside the state, which hurts someone inside the state. That is, if some negligent act on part of the defendant causes injury on someone within NM, then there is personal jurisdiction if the

defendant has the requisite minimum contact with the state. Here, however, all Tosca did was sell olive oil. He only imports 300 quarts a year, & all his sales occur in Boston. He is not in the proverbial "stream of commerce." Even if the olive oil were negligently prepared at the family farm in Italy, it is doubtful from the nature of Tosca's sales that he would foresee being hauled into NM court. Nor does he have any purposeful minimum contacts with NM as far as we know from the facts. Drabble brought his olive oil to NM, & her unilateral activity is not contact by Tosca. Therefore, the court will find that no personal jurisdiction exists over Tosca.

LP

The court, however, will probably find personal jurisdiction over LP. Under the NM long-arm, LP may fall in the committing a tortious act in the state through its negligent acts outside the state. That is, if it negligently sold bad lobster. Additionally, LP does do business in NM, buying Hatch chiles. However, this cause of action does not arise from its chile business, so its transaction of business does not qualify for long-arm personal jurisdiction. However, unlike Tosca, LP is a corporation that caters to tourists who fly out of the airports where its stores are located. When it sells lobsters, it knows that they will be probably used/eaten outside Massachusetts. Only 2% of its sales are to residents. Additionally, it offers packaging that will keep its lobsters fresh up to 18 hours after purchase. Eighteen hours travel from any of its New England stores is a sizeable distance. That is, LP purposefully puts its products in the stream of commerce for use elsewhere, and it is reasonably foreseeable that it might incur responsibility for any damage in the courts there. However, foreseeability alone does not create enough contact for due process. LP needs to have purposefully availed itself of the benefits & protection of NM through minimum contacts with the state. Outside of the Hatch business, LP's deliberate contact with NM seems small. However, LP would expect to be able to use the NM courts to get

money if the NM bank decided not to honor Drabble's credit card transaction. As well, by the nature of its tourist business, it is availing itself of out-of-state dollars & profits. Nor would this suit offend traditional notions of fair play & substantial justice. The NM cause of action is directly related to the sales/production acts of LP, & they should be responsible for direct damage from their products. In addition, the courts have a substantial interest in providing forums for victims of torts. A plaintiff's claim should not be barred just because the corporation happens to be in another state. This, however, is not the stronger argument for assessing personal jurisdiction against LP.

The attachment of the Las Cruces bank account could serve as quasi-in-rem jurisdiction. With quasi-in-rem jurisdiction, it is not necessary for the action to arise from the defendant's actions. It is enough that the property be in the state, as the court has jurisdiction over all property within its state's borders. However, when the property is not directly related to the cause of action, jurisdiction is not presumed. Again, the minimum contacts analysis is necessary. Here, though, LP does enough business to establish minimum contacts with NM. It buys \$500,000 worth of chile annually from which it profits. It is, indeed, purposefully availing itself of the benefits & protections of the state & could foresee that its conduct might bring it into court there, through the chile business or selling lobsters to travelers. Additionally, it is not unreasonable to bring LP to court here for the policy reasons stated above.

Therefore, the court would probably find personal jurisdiction over LP either under the long-arm or the quasi-in-rem action.

Improper service of process

The federal courts require that service either follow the state rules in which it sits (*FRCP 4(e)(1)*) or that the defendant be personally served, that server leave copies at the defendant's

usual dwelling house/place of abode with someone of suitable age & discretion, or that delivery be accomplished upon an agent authorized by law. *FRCP 4(e)(2)* Thus, service is valid under either NM rule *NMRA 1-004* or the federal rule.

However statutorily accomplished, constitutional due process requires that the notice be reasonably calculated under all the circumstances to apprise the interested parties of the pending action & afford them an opportunity to present their objections. The court assesses sufficiency of service on a case by case basis.

Tosca

The server served Tosca by posting a copy of the complaint & summons on the front door of his grocery store. Under the federal rule 4(e)(2) governing service, this is inadequate. That rule does allow posting as reasonable service. The NM rule under which federal service can occur allows posting, BUT the server must also mail a copy of the summons/complaint as well. The server did not do this. In addition, for posting to be appropriate, the server must have attempted to serve the papers upon either the individual or someone of at least 15 years of age at the defendant's usual place of abode. From the facts, we do not know if the server attempted individual service upon Tosca or someone at his usual place of abode. If the grocery store is not his usual place of abode (he probably does not live there), this service appears inadequate under NM rules as well. While under a due process analysis, the grocery store probably is a reasonable place to post; the failure of the posting under the statutes invalidates it. Therefore, the court will probably quash Tosca's service.

LP

The process server delivered notice to the store manager at Logan Airport. Incorporated in Delaware, LP is a foreign corporation in Massachusetts. We do not know from the facts

whether it is registered or not in Massachusetts. If it is registered, then the law usually appoints an agent to receive process. If LP has a specific agent in MA to receive process, then service upon the store manager may fail under both federal & NM construction of notice. NM also requires the notice be mailed to the defendant corporation, & the server here did not. However, under the law, the Logan airport store manager may be a suitable person to receive service. If so, then the service would be valid under the federal rules of service. If the corporation is not registered but conducts systematic & continuous business within the state, as LP does in MA, then it is present in that state as if it were an individual. Thus, service upon an employee, such as the store manager at its main outlet, would constitute symbolic in-hand, personal service upon the corporation. This conforms to both the NM & federal rules. In this type of situation, NM does not require a mailing. Thus, the court would probably find service sufficient in the case of LP.

Strike class action allegations

To decide this motion, the court must determine which law will govern the composition of the class action group. The two laws in question are FRCP 23 & the NM Tort Reform Act. Generally, in cases of diversity the federal court must apply the laws of the state in which it sits. The first law to apply would be the state's conflicts of law provisions. If they do not solve the problem here, an Brie analysis of the situation is necessary. The first question posed is whether a valid federal rule of civil procedure exists that covers the matter. Here there is an applicable rule, FRCP 23, which governs class actions. The second inquiry is to any conflict that might exist between the federal rule & the state rule. There appears to be some conflict here, though not direct. If it were a direct conflict, the federal rule would govern. In this case, the federal rule describes the composition of the class in general terms & sets out procedure for certification. It

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addresses class characteristics: numerosity, questions of law/fact common to the class, claims typical of class, etc. The state rule, however, specifically addresses class action composition for tort litigation. It requires that each plaintiff in the class have damages equal to at least 50% of the damages of the named plaintiff. The conflict between the two rules is indirect at best.

When an indirect conflict exists, the court inquires into whether the state statute is more substantive or procedural. If it is more substantive, meaning that it directly affects the rights of the parties such that it might induce forum shopping/difference in outcome & discrimination in the courts if it not applied, the state law prevails. If it is more procedural, then the federal rule will govern. If the state law can be followed without violating the federal rule, then the court should follow the state law as well.

Here, the NM law has both procedural & substantive components. While it does set out the procedure for obtaining a class action in tort litigation, it is this procedure that delineates the plaintiff's substantive rights. If each plaintiff of the class does not have damages equal to or greater than 50% of the named plaintiff, then the class action is not available to them. The federal rule has no such limitation. Thus, a class not meeting the NM standard could possibly get certified for federal court, but not in state. This would lead to forum shopping, alternate application of the law, & differing outcomes in the two different forums. This reasoning calls for the application of state law here unless there is some overriding federal interest protected by the rule. The federal class action does not appear to preserve any specific federal interests (i.e. judge/jury function, constitutional right to jury). For these reasons then, the court should find that *Erie* requires that state law applies in the federal court here. Thus, court will probably deny the motion to strike.

Question 2: Forum Non-Conveniens (FNC)

LP & Tosca move for NM state court to dismiss Domenici's individual claim on grounds of FNC. Common law FNC requires that the moving party establish that trial in the chosen forum would be oppressive/vexing to the defendant out of proportion to the plaintiff's convenience or that the chosen forum is inappropriate because of considerations affecting the court's own administrative problems. This common law doctrine has been codified by the federal rules under 28 USC §1404. Venue in NM is governed by statute 38-3-1.

In NM, interstate FNC is governed by the common law factors. However, deference is always given to the plaintiff's choice of forum. When original venue is proper, the defendants need to establish undue hardship/oppressiveness by showing lack of access to proof, costs involved, questions about the enforceability of the judgements, & anything else that adds expense to trial. Alternatively, they should show that the NM court is overly burdened & congested, that the jury will be burdened by hearing a dispute that does not hold local interest, or some law applicability problems.

In this case, the defendant's motion for dismissal will probably fail. While the travel component from Massachusetts to NM is somewhat burdensome, the majority of the proof (stew, poison control reports, witnesses, hospital records) is already here. Nor do we have evidence that this case will excessively burden the NM courts. Additionally, this case holds local interest enough to warrant burdening the community for jury duty: Domenici is from NM. Thus, the defendant's inconvenience does not outweigh the plaintiff's initially proper choice of forum. Thus, court should deny the defendant's FNC motion.

Question 3

Drabble as Defendant

Amendments to the pleadings are permitted once as a matter of right before the answer is returned. Otherwise, the leave of the court (which is freely given) is necessary or written consent of the other party. The amendment must relate back to the date of the original pleading. When changing the names of the parties against whom the claim is asserted, the amendment must arise out of the same conduct/transaction/occurrence from the original pleadings & the party must have received such notice as to alleviate any prejudice by the amendment & should have known that the action would have been brought against them.

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In NM, the plaintiff can add a new party if that party had notice at the commencement of the action, that is, when the complaint was filed. However, the new party may be served after this time & after expiration of the statute of limitations if the claim asserted arose out of the same conduct/transaction, etc. from the original pleading. Here, to amend Drabble, the plaintiff would need to show that the claim arises out of the same transaction/occurrence as the claim against LP/Tosca. Arguably, they do not. LP/Tosca's conduct was in MA; Drabble's, in ABQ. LP/Tosca allegedly sold bad food; Drabble negligently prepared it. These distinctions, however, are fine. In terms of notice, Drabble was probably aware of the suits/poisonings before she was joined, & at this stage of the proceedings, has not been prejudiced. In addition, it is in the court's interest to consolidate this tort action for the sake of efficiency. For this reason, the court will allow the amendment of Drabble.

"Moral identity" issue!

Salty-Default Judgement

The standard to set aside a default judgement (DJ) is dependent on the manner in which it was entered. When the defendant does not answer the plaintiff's complaint, the plaintiff may get

a default judgement 30 days from the date of service. The judgement may be entered by the clerk if it for a sum certain shown by affidavit. If the amount is in dispute, the default will be entered by the court, which may or may not have a hearing on damages. In NM, a hearing is necessary for compensatory or punitive damages.

To set aside a DJ entered by the clerk, the defendant must show good cause. If it is a court entered DJ, then the court can set aside under Rule 60(b)-the NM equivalent. The judgement can be set aside for good cause or the existence of a meritorious defense, among other things listed in the statute. The court construes these standards liberally as DJ is generally disfavored. DJ precludes hearing cases on their merits, & everyone should have their day in court. Although the exact reason Salty is asserting is unknown, the court will probably set aside Salty's DJ given that he has now shown up, the manner of attempted service, & for policy reasons.

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Question 4

Exner is an expert "specially employed/retained" but not a testifying witness. Discovery rules generally preclude depositions of this type of expert, unless the moving party shows exceptional circumstances under which they cannot get the information by other means, a heavy burden for the moving party. To resist this motion, initially I might assert that I did not retain Exner. This argument, however, is futile since I "hired" him. Thus, I would argue that other means do exist to obtain this information: defendant LP can get more olive oil from Italy. However, this will be a hard motion to resist. Tosca only imports 300 bottles annually. I took the last two, and no oil remains from testing. I have cornered the market on this evidence. Additionally, the oil to test would need to be from the same shipment as the oil Drabble bought. No guarantees exist that a new bottle from Italy would be of the same stock. Also, Tosca's