

## QUESTION 9

Paula Plaintiff, a citizen of Pennsylvania, sued Frank Franchisee, a citizen of Florida, in a federal district court in Pennsylvania. In her suit, Plaintiff alleged that by purchasing hamburger from a supplier other than her, Franchisee breached the franchise agreement between the parties. The franchise agreement stated that it was governed by Florida law. Applying Florida law, the Pennsylvania District Court held that the franchise agreement permitted Franchisee to purchase hamburger from other suppliers, and awarded Plaintiff nothing.

A few months after the Pennsylvania District Court rendered its opinion, Plaintiff sued David Defendant, a citizen of Florida, in Florida District Court for breaching an identical franchise agreement that was the subject of the Pennsylvania suit. She alleged that Defendant had purchased hamburger from a supplier other than her and claimed damages in the amount of \$30,000.

Defendant argued that he was not liable to Plaintiff because of the Pennsylvania District Court's interpretation of the agreement in the earlier case against Franchisee, a party unrelated to Defendant. Defendant also filed a counterclaim alleging that he made a personal loan to Plaintiff in the amount of \$25,000 several years ago, and that she failed to repay him.

The Florida District Court found in favor of Plaintiff, and entered judgment in the amount of \$20,000. The court ruled against Defendant on his counterclaim.

Defendant has come to you for legal advice. He tells you that he does not want to appeal the judgment against him on the personal loan to Plaintiff, but that he wants to know the grounds upon which he can appeal the \$20,000 judgment.

### QUESTION:

What arguments would you make for Defendant before the Court of Appeals?

## DISCUSSION FOR QUESTION 9

The Florida District Court should not have ruled in favor of Plaintiff. First, the Federal District Court did not have subject matter jurisdiction over the action. Under 28 U.S.C. § 1332, the Federal District Courts have jurisdiction over a matter where there is diversity of citizenship of the parties and \$75,000 in controversy. Although the diversity of citizenship requirements are met since Plaintiff is a resident of Pennsylvania and Defendant is a resident of Florida, the amount in controversy requirement is *not* met by the inadequate \$30,000 in dispute.

A counterclaim amount will not be added to Plaintiff's claim to attempt to meet the "amount in controversy" requirement. The counterclaim is permissive as it did not arise out of the same transaction or occurrence as Plaintiff's claim. Fed. Rule Civ. Proc. 13(b). A permissive counterclaim will not be aggregated with plaintiff's claim to meet the jurisdictional amount. See, e.g., St. Paul Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288; Motorists Mutual Ins. Co. v. 404 F.2d 511, 514 (7th Cir. 1968). (In addition, a permissive counterclaim must have independent grounds for federal jurisdiction. State Farm Fire & Cas. Co. v. Geary, 699 F. Supp. 756, 762 (N.D. Cal. 1987)). Furthermore, the court does not have "arising under" jurisdiction under 28 U.S.C. § 1331 because the lawsuit does not involve a federal question.

Lack of subject matter jurisdiction means that the court did not have power over the cause of action. A subject matter jurisdiction objection can be raised at any time. See, e.g., Cannon v. Van Noorden, 6 U.S. 126 (1804). If Defendant raises the objection on appeal, the Court of Appeals should reverse the District Court and dismiss the case. Thus, this is an important argument for Defendant to make.

Defendant may also argue that the Florida District Court should have applied the doctrine of collateral estoppel (issue preclusion). In order to find that collateral estoppel applies, a court must find that the issue asserted in the second action is identical to the issue asserted in the first action. See Bernhard v. Bank of America Nat'l. Trust and Savings Assoc., 122 P.2d 892, 895 (1942); 18 C. Wright, A. Miller & E. Cooper § 4417. The facts of the instant case indicate that the issue Plaintiff litigated against Franchisee was identical to the issue she litigated against Defendant.

In addition, Defendant must show that the issue to be precluded was litigated and decided in the prior court's action, and that it was essential to the court's judgment. Bernhard v. Bank of America Nat'l. Trust and Savings Assoc. 122 P.2d 892, 895 (1942); Restatement (Second) of Judgments § 28 (1982). Again, the facts indicate that the issue of whether the contract permitted a franchisee to purchase burgers from another supplier was litigated by the parties, decided by the Pennsylvania District Court, and was essential to the court's judgment.

The harder issue Defendant must grapple with is whether the court permits nonmutual collateral estoppel. That is, Defendant was not a party to the action between Plaintiff and Franchisee, so he had nothing to lose in that action, but he is seeking to use the Pennsylvania court's decision against Plaintiff. Since Bernhard v. Bank of America Nat'l. Trust and Savings Assoc., 122 P.2d 892 (1942), was decided by Justice Traynor in 1942, the courts' prior tendency to refuse to allow nonmutual collateral estoppel has steadily been eroding. In Bernhard, as in many other cases applying nonmutual collateral estoppel, the party asserting the doctrine is

**DISCUSSION FOR QUESTION 9**  
**PAGE TWO**

using it as a shield, not a sword. Where it is used as a shield against a party who was the plaintiff in the prior action as well, it should be upheld (at least in a civil lawsuit between private parties). See Laboratories v. Univ. of Ill. Foundation, 402 U.S. 313,328 (1971). Here, Defendant is using the doctrine as a shield against Plaintiff's claim for liability. Thus, Defendant may have a good argument that the District Court should have applied collateral estoppel.

Under Fed. Rule Civ. Proc. 8(c), collateral estoppel is an affirmative defense, which must be raised or it will be waived; although the facts do not expressly indicate this, it appears that David timely raised the defense.

Examinee # \_\_\_\_\_

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**SCORESHEET FOR QUESTION 9**

ASSIGN ONE POINT FOR EACH STATEMENT BELOW

1. The Pennsylvania Federal District Court did not have subject matter jurisdiction pursuant to 28 U.S.C. 1332. 1. \_\_\_\_\_
  - 1a. Diversity of citizenship was present 1a. \_\_\_\_\_
  - 1b. Requisite amount in controversy, \$75,000, lacking. 1b. \_\_\_\_\_
2. Neither did the Federal District Court have subject matter jurisdiction under 28 USC 1331, because there was no federal claim. 2. \_\_\_\_\_
3. An objection to subject matter jurisdiction can be raised at any time, even on appeal. 3. \_\_\_\_\_
4. May be collateral estoppel/issue preclusion. 4. \_\_\_\_\_
  - 4a. The issue asserted in the action against David was identical to the issue asserted in Paula's action against Frank. 4a. \_\_\_\_\_
  - 4b. The issue was litigated and decided in the prior action and was essential to the court's judgment in the earlier action. 4b. \_\_\_\_\_
  - 4c. David is seeking to use nonmutual collateral estoppel. 4c. \_\_\_\_\_
  - 4d. Modern courts permit nonmutual collateral estoppel where it is used as a shield and not as a sword. 4d. \_\_\_\_\_
  - 4e. Collateral estoppel is an affirmative defense that must be timely raised. David probably did this. 4e. \_\_\_\_\_

## **QUESTION 6**

Arlo and Bubba have been neighbors for years. Recently, Bubba decided to allow persons to dump unwanted materials on his property for a fee. He has stated he will accept anything from old refrigerators to spent nuclear material. Bubba intends to start construction of the dumping facility in about 30 days.

Arlo fears that Bubba's operation will contaminate adjacent properties, including his own.

### **QUESTION:**

Discuss what action Arlo might be able to take in Federal Court to obtain relief pending the final resolution of a suit against Bubba. Assume that jurisdictional and venue requirements are not a problem.

## DISCUSSION FOR QUESTION 6

These facts raise the issue of potential injunctive relief under Rule 65 of the Federal Rules of Civil Procedure. Since there is no question concerning jurisdictional and venue requirements in the Federal Court, the discussion should proceed directly to the requirements and considerations under Rule 65. The purpose of the Rule, and injunctive relief in general, is to preserve the status quo until the merits of the case can be decided. See, generally, Rule 65(b); and Resolution Trust Corp v. Cruce, 972 F.2d 1195, 1198 (10th Cir.1992). Either the granting or denial of a preliminary injunction is immediately appealable as of right. See 28 U.S.C.A. §1292(a)(1).

A Temporary Restraining Order may also be a remedy in the event that there would irreparable loss or damage prior to being able to have a hearing, and if notice is given or a specific reason or certification is provided for failing to give the notice. See Rule 65(b); and Hospital Resources Personnel, Inc. v. United States, 860 F.Supp. 1554, 1556 (S.D.Ga.1994). Generally, a decision to grant or deny a temporary restraining order is not appealable. See Robinson v. Lehman, 771 F.2d 772, 782 (3d Cir.1985). The facts of this case, however, seem to not demonstrate a need for a temporary restraining order. TRO's are only good for 10 days and the threatened harm does not appear to be likely to occur before a hearing on an injunction can be obtained. See generally Rule 65(b).

The type of notice which must be given an opposing party to obtain a preliminary injunction (as opposed to a temporary restraining order) is not specifically set out in Rule 65. Nonetheless, notice is required. Western Water Management, Inc. v. Brown, 40 F.3d 105, 109 (5th Cir.1994). Usually, the courts will require that at least a copy of the motion for preliminary injunction be served, and notification given of the date of a preliminary hearing. See Parker v. Ryan, 960 F.2d 543, 544 (5th Cir.1992). The court must hold a hearing before granting or denying a preliminary injunction, but the scope and timing of that hearing is up to the discretion of the trial court. Rule 65(a)(2); and see Campbell Soup Co. v. Giles, 47 F.3d 467 (1st Cir.1995); and Gomperts v. Chase, 404 U.S. 1237, 92 S.C. 16, 30 L.Ed.2d 30 (1971). The hearing on preliminary injunction can, in a proper circumstance, be consolidated with the trial on the merits. Rule 65(a)(2).

In order to determine whether a preliminary injunction is proper, courts generally review the following factors or circumstances:

- a. Whether potential harm is irreparable or whether it could be remedied through money damages;
- b. Whether the person against whom an injunction is sought would be harmed excessively.
- c. Whether an injunction would affect third persons or the public interest.
- d. Whether the person seeking an injunction is likely to prevail on the merits or to be successful at the ultimate trial.

See S & R Corp. v. JiffyLube International, Inc., 968 F.2d 371 (3d Cir.1992).

**DISCUSSION FOR QUESTION 6**  
**Page Two**

Additionally, if the preliminary injunction is granted, the party seeking it is required to give adequate security in an amount to be determined by the court. That security is to cover payment of costs or damages which may be incurred by any party who has been wrongfully enjoined. See Rule 65(c).

If an order is entered granting a preliminary injunction, the order must be specific, set forth in detail the acts to be restrained, and the reasons for the issuance of order. The order is binding only upon the parties to the action, persons who act in concert with them, and those who receive actual notice of the order. Rule 65(d).



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1. Arlo will seek injunctive relief under Rule 65, F.R.Civ.P. 1. \_\_\_\_\_
2. Injunctive relief preserves the status quo until the case can be decided. 2. \_\_\_\_\_
3. A Temporary Restraining Order may be sought, where appropriate, pending a hearing on preliminary injunctive relief. 3. \_\_\_\_\_
4. A preliminary injunction decision can be immediately appealed. 4. \_\_\_\_\_
5. Notice, usually including copies of the motion and notification of a hearing, must be provided to Bubba. 5. \_\_\_\_\_
6. A preliminary injunction hearing can be consolidated with trial on the merits. 6. \_\_\_\_\_
7. To obtain a preliminary injunction, Arlo must show:
  - 7a. That he will suffer irreparable harm (no adequate remedy at law). 7a. \_\_\_\_\_
  - 7b. That the injunction would not cause excessive harm to Bubba. 7b. \_\_\_\_\_
  - 7c. Whether third persons, including the public, would be affected. 7c. \_\_\_\_\_
  - 7d. That he is likely to prevail or succeed on the merits. 7d. \_\_\_\_\_
8. A preliminary injunction will not be issued unless Arlo posts proper security. 8. \_\_\_\_\_
9. The injunctive order must be specific and describe the acts to be restrained. 9. \_\_\_\_\_
10. An injunction is only binding on parties to the case and person in concert or participation with the parties who receives notice. 10. \_\_\_\_\_

## QUESTION 9

Paul Plaintiff properly filed a complaint, with a jury demand, against Dan Defendant in the United States District Court in the State of Alpha. The complaint sought damages of \$100,000.

The District Court ordered a pretrial conference. At the conference, Plaintiff's attorney declined to eliminate any claims from the complaint and refused to agree to a stipulation offered by Defendant's attorney that Defendant was liable, leaving damages as the only issue to be tried. Plaintiff's attorney then offered to settle the case for \$500,000. After the conference, Defendant's attorney moved to have Plaintiff's attorney pay Defendant's attorney's fees incurred as a result of attending the conference.

Plaintiff's attorney properly served a Notice of Deposition upon Defendant and his attorney. Defendant and his attorney appeared at the designated location, but Plaintiff and his attorney did not appear. Defendant's attorney filed a motion requiring Plaintiff's attorney to pay for Defendant's expenses and attorney's fees.

Plaintiff's attorney also served ten interrogatory questions on Wendy Witness. Witness, who had knowledge of the facts supporting Plaintiff's claim, did not answer the interrogatories. Plaintiff's attorney then filed a Motion to Compel Witness to answer the interrogatories.

Later, Plaintiff's attorney filed a Motion to Withdraw the Jury Demand two weeks before trial. Defendant's attorney filed a written objection to the motion.

### QUESTION:

Discuss all relevant issues raised by the facts, and explain why the motions made by each attorney should be granted or denied.

## DISCUSSION FOR QUESTION 9

The Federal Rules of Civil Procedure govern the issues raised in this case. Therefore, all Rule references in the Discussion are to the Federal Rules of Civil Procedure.

### Pretrial Conference Issues

The purpose of a Pretrial Conference is to narrow the issues and to dispose of other matters. Rule 16(a); Marschand v. Norfolk & W. Ry., 81 F.3d 714 (7<sup>th</sup> Cir. 1996). Among other things, Pretrial Conferences allow the Court to narrow the issues for trial, obtain admissions and stipulations, and foster settlement and quick resolution. Rule 16(a) and (b); Wellmore Coal Corp. v. Stiltner, 81 F.3d 490 (4<sup>th</sup> Cir. 1996). At the Pretrial Conference, the Court may require the parties to identify the claims they intend to present at trial. Rule 16(c)(1); Marschand, 81 F.3d at 716. Attorneys at a Pretrial Conference must make a full and fair disclosure of their views as to what the real issues of the trial will be. Rios v. Bigler, 67 F.3d 1543 (10<sup>th</sup> Cir. 1995). The Court may also discuss the possibility of obtaining stipulations. Rule 16(c)(3).

A District Court may impose sanctions on disobedient or recalcitrant parties, their attorneys, or both. The offending conduct could include failing to obey a pretrial order of the Court, failing to appear at the Pretrial Conference, being substantially unprepared to participate in the Pretrial Conference, or failure to participate in the Pretrial Conference in good faith. Rule 16(f). See, e.g., Lillie v. United States, 40 F.3d 1105, 1110 (10<sup>th</sup> Cir. 1994); Guillory v. Domtar Indus., Inc., 95 F.3d 1320 (5<sup>th</sup> Cir. 1996). There are several different sanctions available to the Court. These include, but are not limited to, dismissal, exclusion of evidence, contempt, or charging a party and/or attorney with expenses and attorney fees caused by noncompliance with the pretrial order. Rule 16(f). The sanction can be requested by a party or imposed by the Court on its own motion. Rule 16(f).

Dan's attorney moved for sanctions because of Paul's attorney's conduct during the Pretrial Conference. Paul's attorney did not act in good faith during the Pretrial Conference. Paul's attorney refused to consider narrowing the issues for trial by eliminating any claims from the complaint, as required by Rule 16(a) and (c). Paul's attorney also failed to act in good faith because he made a settlement offer that was five times greater than what he demanded in the complaint. Finally, Paul's attorney failed to accept a proffered stipulation that would have eliminated liability as a question to be tried, saving time and money at trial. The cumulative effect of Paul's attorney's conduct was that he did not act in good faith during the Pretrial Conference. The District Court should grant Dan's attorney's Motion to pay Dan's attorney's fees incurred as a result of attending the Pretrial Conference.

### Discovery Sanctions

Sanctions for discovery abuse are imposed by the District Court to (1) secure compliance with the discovery rules, (2) deter other litigants from violating the discovery rules, and (3) punish parties who violate the rules of discovery. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976). See also Ohio v. Arthur Anderson & Co., 570 F.2d 1370, 1375 (10<sup>th</sup> Cir. 1977).

### Deposition

As a preliminary matter, any party can take the deposition of another party. Rule 30(a). The party seeking to take the deposition must give notice to all other parties stating the time and place for taking the deposition and the name and address of the person to be examined. Rule 30(b). That rule also provides for sanctions for failure to appear at a deposition. A party who appears may move for sanctions if the party giving notice of the deposition fails to appear at the deposition. Here, Paul's attorney gave notice of the deposition. Paul and his attorney failed to appear at the deposition. Dan and his attorney did appear at the deposition. Therefore, Dan and his attorney fall within the language of Rule 30(g). The rule authorizes the District Court to enter an award against the offending party. The award could include the "reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees." Rule 30(g)(1). Because Paul and his attorney failed to appear, the District Court could award reasonable expenses of both Dan and Dan's attorney, and Dan's reasonable attorney's fees related to the failure of Paul and his attorney to appear. Rule 30(g)(1). Therefore, Dan's attorney's Motion should be granted.

### Interrogatories

Interrogatories are written questions answered under oath. Interrogatories may be served on any party to a lawsuit. Rule 33(a). By rule, interrogatories may not exceed 25 in number, including subparts, without leave of court. Rule 33(a). Interrogatories cannot be served on a non-party witness. Rule 33(a); University of Texas v. Vratil, 96 F.3d 1337 (10<sup>th</sup> Cir. 1996). Paul's attorney served interrogatories on Wendy Witness, who is not a party to the action. Because Wendy is not a party, Paul's attorney improperly served interrogatories on her. Rule 33(a); Vratil, 96 F.3d 1337. Because use of interrogatories was not proper, the District Court cannot grant Paul's attorney's Motion to Compel.

### Jury Demand

The parties have a right to a jury trial under the Seventh Amendment to the United States Constitution. See, also, Rule 38(a). Any party may demand a jury trial by several methods, including endorsement on a pleading, such as the complaint. Rule 38(b). Paul's attorney properly demanded a jury trial by requesting it on the complaint. Once demanded, however, trial by jury cannot be waived as of right. A demand for a jury trial cannot be withdrawn without the consent of all the parties. Rule 38(d); Bennett v. Pippin, 74 F.3d 586 (5<sup>th</sup> Cir. 1996). To withdraw a jury demand, the parties must either file a written stipulation or make an oral stipulation in court on the record. Rule 39(a); Fuller v. City of Oakland, 47 F.3d 1522 (9<sup>th</sup> Cir. 1995). Because there was not a stipulation filed by the parties, the jury demand cannot be withdrawn. Therefore, the Motion to Withdraw the Jury Demand should be denied.



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**Essay 9 GradeSheet**

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- 1. This case is governed by the Federal Rules of Civil Procedure. 1. \_\_\_\_\_
- 2. Sanctions can be imposed by the District Court for an attorney's failure to participate, in good faith, at a Pretrial Conference. 2. \_\_\_\_\_
  - 2a. Discussion of whether Plaintiff's attorney did not participate in good faith because he refused to narrow the issues for trial and he made a settlement offer five times greater than the demand in his complaint. Motion may be granted. 2a. \_\_\_\_\_
- 3. The District Court can order the party giving notice of the taking of a deposition, and who fails to attend, to pay reasonable expenses of the party and his/her attorney, plus reasonable attorney's fees. 3. \_\_\_\_\_
- 4. Interrogatories may only be served on parties to an action. 4. \_\_\_\_\_
  - 4a. The Motion to Compel should be denied. 4a. \_\_\_\_\_
- 5. A jury demand, once made, cannot be withdrawn without the consent of the parties. The Motion to Withdraw the Jury Demand should be denied. 5. \_\_\_\_\_

## QUESTION 1

Your client, Paul Plaintiff, is involved in four different disputes in which he wants to file a lawsuit. All persons and entities involved are Colorado residents.

The first dispute is between Plaintiff and Landscaping Company. Plaintiff hired Landscaping to install a sprinkler system at his home. The contract provided that Landscaping would install a sprinkler system for \$20,000. As required by the contract, Plaintiff paid half the contract price, \$10,000, before installation. Weeks have passed and Landscaping has not installed the sprinkler system. Plaintiff wants his \$10,000 refunded. Landscaping refuses because Landscaping alleges that Plaintiff damaged their truck by backing into it. Landscaping claims that the damage to the truck is approximately \$11,000. Plaintiff wants to sue Landscaping for the \$10,000. If Plaintiff sues, Landscaping intends to counterclaim.

The second dispute is between Plaintiff and ABar Antiques. Plaintiff contracted with ABar to buy a wooden hutch for \$4,000. After the contract was executed, ABar learned that the hutch was a rare piece of furniture valued at \$20,000. ABar refuses to honor the contract price. Plaintiff wants to enforce the contract because he wants the hutch.

The third dispute is between Plaintiff and his wife. They have decided to file for divorce.

The fourth dispute is between Plaintiff and Kim, the nanny Plaintiff hired to care for his children. Plaintiff paid Kim \$1,000, in advance, for the first month she was to serve as his children's nanny. Kim never showed up for work and has not returned Plaintiff's phone calls requesting that she return the money. Plaintiff wants his \$1,000 back.

### QUESTION:

Explain why the courts listed below do/do not have jurisdiction over the four lawsuits.

- (a) The Colorado state district courts
- (b) The Colorado state county courts
- (c) The Colorado state small claims division of the county courts (small claims courts)
- (d) The United States District Court for the District of Colorado (federal court)

Organize your answer into four separate parts, one for each dispute. Do not address the merits of any of the disputes or discuss venue.

## DISCUSSION FOR QUESTION 1

### General

There is no federal jurisdiction in any of the suits as all of the parties are Colorado residents and no questions of federal law are raised by the facts. Therefore, each of the four disputes can only be filed in the Colorado state courts. Colorado district courts are courts of general jurisdiction and have jurisdiction over all of the lawsuits Plaintiff wants to file. See §13-6-104, C.R.S. 2000.

### **A. Plaintiff's dispute with Landscaping**

Plaintiff can file suit for a refund of the \$10,000 down payment in either county court or district court. The county court and the district court have concurrent original jurisdiction in civil actions in which the amount claimed does not exceed \$10,000, exclusive of interest and costs. See §13-6-104(1), C.R.S. 2000; County Court Rule 313(b).

The county court and district court also have concurrent jurisdiction in all actions in which the counterclaim does not exceed \$10,000. Here, Landscaping's counterclaim could be for as much as \$11,000. Therefore, Landscaping will need to make a choice regarding its counterclaim -- how much it decides to demand will determine whether Plaintiff's lawsuit stays in the county court. If Landscaping files a counterclaim, but limits its request to \$10,000 or less, then the entire lawsuit will remain in county court. If Landscaping files a counterclaim in excess of \$10,000, then it will have the right, but not the obligation, to request a transfer of the entire lawsuit -- including Plaintiff's claim -- to the district court. Colorado County Court Rule 313(b)(2). To do so, Landscaping will need to include its request for transfer in its answer and counterclaim, plus it will need to pay the district court filing fee for a complaint. Colorado County Court Rule 313(b)(2). If Landscaping files a counterclaim in excess of \$10,000, but fails to request a transfer properly, then the lawsuit will remain in county court and Landscaping's possible recovery will be limited to \$10,000 (the county court's jurisdictional limit).

### **B. Plaintiff's dispute with Abar Antiques**

Small claims courts are courts of limited civil jurisdiction where the claim amount cannot exceed \$5,000. See §13-6-403, C.R.S. 2000. Even though the claim against Abar is for \$4,000, small claims courts do not have jurisdiction over actions for specific performance (except as required to enforce restrictive covenants on residential property). §13-6-403(2)(e), C.R.S. 2000. Accordingly, the suit must be filed in either county court or district court.

### **C. Plaintiff's divorce**

Neither county court nor small claims court has jurisdiction in dissolution of marriage proceedings. See §13-6-105(1)(c), C.R.S. 2000 (county court); §13-6-403(2)(a), C.R.S. 2000 (small claims court). Accordingly, the petition for dissolution of marriage must be filed in district court.

### **D. Plaintiff's dispute with Kim (the nanny)**

Because the amount at issue in the dispute between Plaintiff and Kim does not exceed \$5,000, his suit against her can be filed in small claims court. See §13-6-403(1). However, if he files suit in small claims court, he cannot be represented by an attorney; small claims courts do not have

jurisdiction over cases in which either party is represented by counsel. If an attorney enters an appearance on behalf of either Plaintiff or Kim, the case must be transferred to county court; however, even after such a transfer, it will continue to operate under small claims court rules.

Plaintiff can also file suit in either district court or county court; both have concurrent jurisdiction with the small claims court in all civil actions in which the damages requested do not exceed \$5,000. See §13-6-403.



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#### Landscaping

- 1. The federal courts do not have jurisdiction. 1. \_\_\_\_\_
  - 1a. To have federal jurisdiction, there must be either a federal question, or diversity of jurisdiction and \$75,000 or more in dispute. 1a. \_\_\_\_\_
- 2. The district court has jurisdiction. 2. \_\_\_\_\_
  - 2a. The district court is a court of general jurisdiction (with no limit on amounts in dispute). 2a. \_\_\_\_\_
- 3. The county court also has jurisdiction. 3. \_\_\_\_\_
  - 3a. The county court has jurisdiction to grant monetary relief up to \$10,000. 3a. \_\_\_\_\_
  - 3b. Landscaping's counteroffer, which is far more than \$10,000, raises an issue regarding the county court's jurisdiction limit. 3b. \_\_\_\_\_
  - 3c. Rules exist regarding Landscaping's ability to remove the entire case, including Plaintiff's claim, to district court. 3c. \_\_\_\_\_
- 4. The small claims court does not have jurisdiction. 4. \_\_\_\_\_
  - 4a. The small claims court has jurisdiction to grant monetary relief up to \$5,000. 4a. \_\_\_\_\_

#### Abar Antiques

- 5. The small claims court does not have jurisdiction over claims for specific performance (injunctive relief). 5. \_\_\_\_\_

#### Divorce

- 6. Only the district court has jurisdiction over divorces. 6. \_\_\_\_\_

#### Nanny

- 7. The claim can be filed in all but the federal court. 7. \_\_\_\_\_

### QUESTION 3

Paul, a citizen of Missouri, and Donna, a citizen of Colorado, collided as a result of negligently operating their motor vehicles on an Interstate highway in Colorado. Paul suffered severe personal injuries in the collision. Donna suffered no personal injuries, but her vehicle, worth \$25,000, was totally destroyed in the collision.

Paul filed a civil action against Donna in the United States District Court for the District of Colorado seeking \$100,000 in damages based on state negligence law. Donna filed a counterclaim, seeking damages for her destroyed vehicle. No other litigation is or had been pending between Paul and Donna.

#### **QUESTIONS:**

Discuss whether:

1. The court has subject matter jurisdiction over Paul's claim against Donna.
2. Donna's counterclaim against Paul is proper and whether the court has jurisdiction to hear Donna's claim.

### DISCUSSION FOR QUESTION 3

The question is designed to elicit analysis from an applicant in three areas: (1) subject-matter jurisdiction; (2) the procedural requirements for a compulsory counterclaim pursuant to F.R.C.P. 13(a); and (3) the federal court's exercise of supplemental jurisdiction.

#### I. Subject-matter jurisdiction

The question calls for the applicant to possess very basic knowledge of subject-matter jurisdiction. The applicant should identify that federal question jurisdiction under 28 U.S.C. § 1331 does not exist in this fact pattern as Paul's claims do not 'arise under' the Constitution, treaties, or laws of the U.S. Rather, Paul's claim is based on "state negligence law." Diversity jurisdiction does exist pursuant to 28 U.S.C. § 1332. Paul and Donna are citizens of different states and the amount in controversy is greater than \$75,000.

#### II. Compulsory Counterclaim

The applicant should recognize that Donna's counterclaim for destruction of her vehicle is compulsory under F.R.C.P. 13(a). That is, unless Donna pleads and prosecutes that claim in Paul's civil action, she loses it. It is compulsory because; (1) it is against an opposing party; (2) it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, (3) it doesn't require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, and (4) it is not the subject of another pending action. F.R.C.P. 13(a) has another requirement that is quite obscure and it is unlikely any applicant will mention it, therefore it is not on the score sheet. This requirement is that the opposing party must not have brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgement.

#### III. Supplemental Jurisdiction

There is no independent basis for jurisdiction over the counterclaim. The counterclaim does not present a federal question under 28 U.S.C. § 1331 and the court does not have diversity of citizenship jurisdiction over the counterclaim because the amount in controversy is only \$25,000 and therefore does not satisfy the jurisdictional amount required by 28 U.S.C. § 1332.

The applicant should recognize that the court has supplemental jurisdiction over Donna's counterclaim under 28 U.S.C. § 1367. First, the court has original jurisdiction over the underlying matter. Second, the counterclaim is "so related to claims in the action within such original jurisdiction" (Paul's original claim) that it "form[s] part of the same case or controversy under Article III of the United States Constitution." Donna's counterclaim forms part of the same case or controversy as Paul's original claim because the two claims share a "common nucleus of operative fact," see *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), as they arise from the same vehicle collision.

The court has personal jurisdiction over Paul, a citizen of Missouri, for purposes of Donna's counterclaim based on consent. By filing the civil action against Donna, Paul has consented to the exercise of jurisdiction over him for purposes of Donna's counterclaim. The leading case of *Adam v. Saenger*, 303 U.S. 59 (1938), so holds. See, e.g., J. Friedenthal, M. Kane, & A. Miller, *Civil Procedure* § 3.5 at 108 (3d. 1999).



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1. No jurisdiction under federal question -- doesn't "arise under" the Constitution, treaties, or laws of the U.S. (or) claim arises under state negligence law. 1. \_\_\_\_\_
2. Diversity jurisdiction exists because: 2. \_\_\_\_\_
  - 2a. Paul is from Missouri, Donna is from Colorado, and 2a. \_\_\_\_\_
  - 2b. Amount in controversy is greater than \$75,000. 2b. \_\_\_\_\_
3. Donna's claim against Paul is a compulsory counterclaim per F.R.C.P. 13(a); she has to file it in this action. 3. \_\_\_\_\_
4. If Donna doesn't bring her claim now, she will lose it. 4. \_\_\_\_\_
5. Donna's claim arises out of the same transaction or occurrence. 5. \_\_\_\_\_
6. The court doesn't have independent jurisdiction over the counterclaim as there is 6. \_\_\_\_\_
  - 6a. no federal question, and 6a. \_\_\_\_\_
  - 6b. no diversity (less than \$75,000). 6b. \_\_\_\_\_
7. The Court has supplemental (ancillary) jurisdiction over the counterclaim under 28 USC 1367. 7. \_\_\_\_\_
8. Court has original jurisdiction over the first claim. 8. \_\_\_\_\_
9. The claims share "common nucleus of operative fact" so they form part of the same case or controversy -- the same car accident forms the basis of both claims. 9. \_\_\_\_\_
10. The court has personal jurisdiction over Paul for purposes of the counterclaim based on his consent by filing the original claim. 10. \_\_\_\_\_

## QUESTION 5

Douglas, who is domiciled in North Carolina, is employed by Deluxe Lawn Service, a business incorporated in Delaware with its principal place of business in New York. Deluxe specializes in spraying lawns with chemicals that kill weeds and insects, and fertilize the grass.

Paterson, a citizen of South Carolina, saw a Deluxe Lawn Service ad in his local South Carolina newspaper. The ad listed a toll free phone number to find the nearest authorized service provider. Paterson called the number and was given Douglas's name and phone number in North Carolina.

Paterson called Douglas, and Douglas came to Paterson's home in South Carolina and sprayed the lawn. Unfortunately, the chemicals that were applied killed all of Paterson's grass and plants, and poisoned two of his neighbors' pets. As a result, Paterson incurred landscaping costs of \$27,000 for soil, sod, bushes, and trees. He also has paid neighbors \$200 for veterinary expenses in connection with the death of their pets.

Paterson has learned that the methods used and chemicals applied to his lawn by Douglas and Deluxe violated state and federal criminal statutes. Paterson also discovered that Douglas and Deluxe caused similar problems in the past and have been ordered by various courts to cease business.

Paterson commenced a civil action against Douglas and Deluxe in federal district court in South Carolina for damage to real property. The complaint asserts that Douglas and Deluxe are jointly and severally liable for damage to Paterson's land. It demands compensatory damages in the amount of \$27,000 and punitive damages in the amount of \$50,000. Paterson served both defendants pursuant to a South Carolina statute that authorizes certified mail service on nonresident defendants who have committed a tort in the state.

The defendants appeared in federal court and moved to dismiss all claims against them for lack of venue, and lack of both personal and subject matter jurisdiction. In addition, Douglas raised a counterclaim against Paterson for \$100, the amount that Douglas claims is due for the lawn service. Paterson moved to dismiss the counterclaim for lack of subject matter jurisdiction.

### QUESTION:

Discuss how the federal court should rule on the motions.

## DISCUSSION FOR QUESTION 5

### Venue

Venue is proper. An action for damage to real property is a local action. Federal courts follow the local action rule, which requires a local action to be brought in the district where the real property is located. Livingston v. Jefferson, 15 Fed. Cas. 660 (C.C. Va. 1811). See generally Jack H. Friedenthal et al., Civil Procedure § 2.16 at 83-84 (2d ed. 1993). The federal venue statute does not apply. 28 U.S.C. § 1391(a)(2) ("A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought. . . [in] a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is subject of the action is situated. . .").

### Personal jurisdiction

The court has personal jurisdiction. Federal courts have territorial jurisdiction coextensive with the "jurisdiction of a court of general jurisdiction in the state in which the district court is located." Fed. R. Civ. P. 4(k)(1). The South Carolina state long-arm statute thus extends the federal court's jurisdiction over nonresident defendants causing a tort in the state.

Nevertheless, due process provides limits to the territorial reach of state courts. U.S. Const. amends. V & XIV; International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Pennoyer v. Neff, 95 U.S. (5 Otto) 714, 733 (1877). See generally Gene Shreve & Peter Raven-Hansen, Understanding Civil Procedure § 12 at 41-47 (2d ed. 1994). The defendant's contacts and relationships with South Carolina may not be so extensive that they may establish the sort of "continuous and systematic general business contacts" that support the exercise of general jurisdiction over defendants, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984). But because the lawsuit concerns their activity in the state that is the basis of the court's jurisdiction, due process for specific jurisdiction requires only certain minimum contacts so that the exercise of personal jurisdiction is not unfair. International Shoe Co., 326 U.S. at 316. Here the defendants' acts of advertising in the state, physical presence in state, providing of services in state, and causing damage to real property in state certainly satisfy such minimum contacts. These were all purposeful acts directed towards the forum state. Hanson v. Denckla, 357 U.S. 235, 258-59 (1958)("[T]here [must] be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."); see generally Shreve & Raven-Hansen, Understanding Civil Procedure, supra, at 47-61.

### Subject matter jurisdiction

The federal court has subject matter jurisdiction over Paterson's claims against defendants. Diversity of citizenship jurisdiction requires that there be diversity of citizenship among the parties and that the amount in controversy exceed \$75,000 (exclusive of setoffs, interest, or costs). 28 U.S.C. § 1332(a).

In this case the parties are diverse, because the plaintiff is a citizen of South Carolina and the defendants' are citizens of states other than South Carolina. Douglas is a citizen of North Carolina because a natural person's citizenship is determined by the state where he or she is domiciled, see generally Friedenthal § 2.6 at 29, and the defendant corporation is a citizen of both Delaware and New York because a corporation is a citizen of the state of incorporation and the state where it has its principal place of business, 28 U.S.C. § 1332(c)(1).

The amount-in-controversy requirement is satisfied by the total damages claimed by the plaintiff. "[T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify a dismissal." St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289 (1938). A plaintiff may join together all kinds of damages (exclusive of interests and costs) and, indeed, even unrelated claims against the same defendant. Fed. R. Civ. P. 18(a) ("A party asserting a claim. . . may join. . . as many claims. . . as the party has against an opposing party.") Moreover, "the value of the claims is added together in determining whether the jurisdictional amount is met." Charles Alan Wright, Law of Federal Courts § 36 at 210 (5th ed. 1994).

#### Subject matter jurisdiction over counterclaim

The federal court would not have original subject matter jurisdiction over the counterclaim for one hundred dollars because that claim does not satisfy the \$75,000 amount in controversy requirement. 28 U.S.C. § 1332(a). Nevertheless, Federal Rule 13(a) requires a defendant to raise a counterclaim that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Most federal courts find that a counterclaim arises from the same transaction when it is logically related to the principal claim. The contract claim for debt is logically related to the tort claim for damages stemming from alleged malfeasance in the performance of the contract. E.g., Plant v. Blazer Financial Services, Inc., 598 F.2d 1357 (5th Cir. 1979), see generally Shreve & Raven-Hansen, Understanding Civil Procedure, supra, at 243.

Federal courts have supplemental jurisdiction over compulsory counterclaims. U.S. Const. art. III, 28 U.S.C. § 1367 - ("[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."). The defendant's compulsory counterclaim is within federal supplemental jurisdiction because it satisfies the judicial test for being part of the same constitutional case or controversy: it derives from a common nucleus of operative fact. United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966).



21551

**Essay 5 GradeSheet**

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1. Defendants' motion to dismiss due to improper venue is denied. 1. \_\_\_\_\_
2. Venue is proper as local action must be brought where land is located. 2. \_\_\_\_\_
3. Defendants' motion to dismiss due to lack of personal jurisdiction is denied. 3. \_\_\_\_\_
4. Personal jurisdiction is properly obtained through use of the South Carolina long-arm statute. 4. \_\_\_\_\_
5. Constitutional requirements are met by satisfying:
  - 5a. minimum contacts with South Carolina. 5a. \_\_\_\_\_
  - 5b. availing themselves of the benefits and protections of South Carolina law. 5b. \_\_\_\_\_
6. Defendants' motion to dismiss for lack of subject matter jurisdiction is denied. 6. \_\_\_\_\_
7. Complete diversity of citizenship is necessary for subject matter jurisdiction. 7. \_\_\_\_\_
  - 7a. Patterson and Douglas are citizens of different states. 7a. \_\_\_\_\_
  - 7b. Deluxe, as a corporation, is a citizen both where it is incorporated and where it maintains its principal place of business. 7b. \_\_\_\_\_
8. The amount in controversy must exceed \$75,000 for diversity jurisdiction. 8. \_\_\_\_\_
  - 8a. The amount in controversy includes all damages demanded in good faith. 8a. \_\_\_\_\_
  - 8b. Punitive damages are included in the amount in controversy. 8b. \_\_\_\_\_
9. Plaintiff's motion to dismiss the counterclaim is denied. 9. \_\_\_\_\_
  - 9a. It is a compulsory counterclaim since it arises from same transaction or occurrence. 9a. \_\_\_\_\_
  - 9b. The counterclaim is within federal supplemental or ancillary jurisdiction. 9b. \_\_\_\_\_

## QUESTION 5

Winston Jones is a U.S. citizen who resides in Pueblo, Colorado. Jones is an avid baseball fan who spends many hours on his home computer visiting baseball related websites on the Internet. Jones discovered a website listing for sale a "genuine home run ball autographed by Babe Ruth." The price for the ball was \$25,000. The web offering was posted by Ramona Ortega, a U.S. citizen residing in Los Angeles, California. Her website listed various items for sale, including the baseball, and provided a home address in Los Angeles, an e-mail address, and a telephone number.

Jones communicated with Ortega by e-mail asking if the baseball was real and if the price was firm. Ortega answered by e-mail assuring Jones that the ball was authentic and the price was firm. Ortega then called Jones twice by telephone offering to sell him the ball and warning him that he might lose the chance to buy it if he didn't act quickly. Jones agreed to buy the ball and sent Ortega a check for \$25,000. Ortega cashed the check and then mailed the ball to Jones.

When Jones received the ball, he compared the autograph on it to photographs of Babe Ruth's autograph. He became convinced that the autograph on the ball was fake. He e-mailed and called Ortega attempting to get his money back, but Ortega never responded.

Jones commenced a civil action against Ortega in the Federal District Court for the District of Colorado. His complaint alleges breach of contract and fraud and demands actual damages in the amount of \$25,000 and exemplary or punitive damages in the amount of \$25,000.

Jones arranged for service of process by having his 17 year-old nephew, who resides in Los Angeles, deliver a summons and copy of the complaint to Ortega's home. Ortega was not home at the time of delivery, so the nephew left the summons and complaint with Ortega's next-door neighbor.

Ortega's attorney, pursuant to Federal Rule of Civil Procedure 12(b), filed a Motion to Dismiss all claims for lack of jurisdiction over the subject matter, lack of jurisdiction over the person, improper venue, and insufficient service of process.

### **QUESTION:**

Discuss how the judge should rule on Ortega's Motion to Dismiss.

## DISCUSSION FOR QUESTION 5

### Subject matter jurisdiction

Subject matter jurisdiction must be based on diversity of citizenship because no other ground for federal jurisdiction is present. Diversity of citizenship jurisdiction requires that there be complete diversity of citizenship between the parties and that the amount in controversy exceeds \$75,000 (exclusive of setoffs, interest, or costs). 28 U.S.C. § 1332(a).

In this case, the citizenship of the parties is diverse, because Jones' place of citizenship is Colorado and Ortega's is California. To be a citizen under the statute, a natural person must be both a citizen of the United States and be domiciled in a state. Wolfe v. Hartford Life & Annuity Ins. Co., 148 U.S. 389 (1893)(holding averment of state residence insufficient); see generally Jack H. Friedenthal et al., Civil Procedure 29 (3d ed. 1999). The test for state citizenship under the statute is domicile, and domicile is defined as one's "true, fixed, and permanent home. . . to which he has the intention of returning . . ." Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954).

The amount-in-controversy requirement is normally governed by the total damages claimed by the plaintiff in good faith. "[T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify a dismissal." St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289 (1938).

The amount claimed by Jones does not satisfy the requirement. Though the actual damages demanded do not satisfy the amount in controversy requirement, a plaintiff is permitted to join together all his claims and damages. Fed. R. Civ. P. 18(a)("A party asserting a claim . . . may join . . . as many claims . . . as the party has against an opposing party.") Punitive or exemplary damages are included in the amount in controversy and may be added to satisfy the statutory amount in controversy unless it is not possible under state law for a plaintiff to recover exemplary or punitive damages. Ryan v. State Farm Mut. Auto. Ins. Co., 934 F.2d 276, 277 (11th Cir. 1991); Klepper v. First American Bank, 916 F.2d 337, 341 (6th Cir. 1990). See generally Gene R. Shreve and Peter Raven-Hansen, Understanding Civil Procedure § 5.06 at 126-29 (3d ed. 2002); Charles Alan Wright, Law of Federal Courts § 33 at 195-204 (5th ed. 1994).

In this case, even though Jones may be entitled to reasonable exemplary damages under Colo. Rev. Stat. § 13-21-102(1)(a) (where an injury is attended by circumstances of fraud), the total amount of damages claimed does not exceed \$75,000 exclusive of interest and costs. Therefore, Jones does not satisfy the amount in controversy requirement, thus there is no subject matter jurisdiction.

### Personal jurisdiction

A Federal Court has territorial jurisdiction coextensive with the "jurisdiction of a court

of general jurisdiction in the state in which the district court is located." Fed. R. Civ. P. 4(k)(1). The Colorado state long arm statute extends to the state (and thus federal) court specific jurisdiction over causes of action against any person, resident or nonresident, who transacts any business within the state or who commits a tortious act within the state. Colo. Rev. Stat. § 13-1-124(1)(a)&(b) (jurisdiction of courts). The long arm statute has been construed to go to the constitutional limits. Jenner & Block v. District Court, 590 P.2d 964, 965 (Colo. 1979). Due process, however, limits the territorial reach of federal and state courts. U.S. Const. amends. V & XIV; International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Pennoyer v. Neff, 95 U.S. (5 Otto) 714, 733 (1877). Defendant's contacts with the state of Colorado may not be so extensive that they establish "continuous and systematic general business contacts" that support the exercise of general jurisdiction over a defendant corporation, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984). But such extensive contacts are not required in the present case.

The contract and fraud claims arise directly out of the defendant's contacts (business transactions) in the state; accordingly, due process may support the exercise of specific jurisdiction, because the defendant has purposely engaged in minimum contacts comprising a sale in the forum state from which the defendant derived benefits. In general, the defendant must engage in "some act by which the defendant purposefully avail[ed] [himself] of the privilege of conducting activities within the forum State. . ." Hanson v. Denkla, 357 U.S. 235, 251-54 (1958). See also International Shoe, 326 U.S. 310 (sales agents activity in state supports long arm jurisdiction over principal for taxes related to employment); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) (sale of magazines to distributors in state supports long arm jurisdiction over defendant for defamatory material published in magazines sent into state); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) (negotiation with resident, agreement to send payments into state, and agreement that state law was to cover contract dispute supports exercise of long arm jurisdiction over nonresident who breached contract); Alchemie International, Inc. v. Metal World, Inc., 523 F. Supp. 1039, 1050 (D.N.J. 1981)(holding single commercial sale contract sufficient to establish personal jurisdiction). Defendant's communications and sale to Jones are similar to the contract found to support personal jurisdiction in McGee v. International Life Insurance Co., 355 U.S. 220, 222-24 (1957)(holding exercise of personal jurisdiction constitutional where "suit was based on a contract which had a substantial connection with" forum state). See generally Shreve & Raven-Hansen, Understanding Civil Procedure, pp.46-49.

Defendant's contacts with the forum included a passive web site that invited communications from prospective buyers. Passive web sites present a special problem because they may not evidence a defendant's purposeful connection to any particular forum. Accordingly, the passive web site posted on the Internet and accessible from anywhere in the world is by itself not a minimum contact. See Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir. 1997)(holding "something more" than passive web site required to show defendant purposely directed activities at forum state). But maintaining such a web site

coupled with additional acts directed towards the forum establishes a sufficient basis for constitutional exercise of personal jurisdiction. See CompuServ Inc. v. Patterson, 89 F.3d 1257, 1264 (6th Cir. 1996). See generally, Shreve and Raven-Hansen, Understanding Civil Procedure § 3.12 at 91-92. A single telephone call may establish a minimum contact. Brown v. Flowers Indus., Inc., 688 F.2d 328 (5th Cir. 1982). See also, Bellino v. Simon, No. 99-2208, 1999 U.S. Dist. LEXIS 18081 (E.D. La. Nov. 22, 1999)(finding jurisdiction where passive web site coupled with phone calls).

Here, Defendant's course of conduct in sending e-mails, making calls to Colorado and shipping goods to Colorado likely satisfies the state long arm statute and evidences minimum contacts so that application of the long arm does not violate the due process requirement of the U.S. Constitution.

### Venue

Venue involves the designation of the proper district in which to bring an action. The general federal venue statute provides: "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in . . . a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is subject of the action is situated . . . ." 28 U.S.C. § 1391(a)(2). In this problem, a substantial part of the contract claim--negotiations, offer or acceptance, and delivery and nonperformance--occurred in the district. Likewise, a substantial part of the fraud claim--alleged misrepresentations, reliance, and loss--occurred in the district. Accordingly, venue in the District of Colorado is proper.

### Sufficiency of Service of process

In Federal Court, process may be served pursuant to Federal Rule or pursuant to the methods authorized by the state law either of the place where the Federal Court is sitting or where process is served. Fed. R. Civ. P. 4(e)(1)&(2). See generally, Wright, Federal Courts, supra, § 65 at 453. Federal Rule 4 authorizes any person not a party to the action, who is at least 18 years old, to serve process personally upon the defendant or to leave service at the defendant's usual place of abode with one of suitable age and discretion residing therein, or upon an authorized agent of the defendant. Here, service was not made in accordance with the Federal Rule due to the age of the process server and improper leaving of service with one who neither resides at the defendant's place of abode or is authorized to accept service for her. Further, neither California nor Colorado state rules of civil procedure permit process to be served by an individual under the age of 18 or to be left with a neighbor who does not reside in the defendant's home and is not authorized to accept service for the defendant. Accordingly, service of process was insufficient.



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### Essay 5 GradeSheet

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1. Recognition that diversity of parties is the basis for subject matter jurisdiction. 1. \_\_\_\_\_
2. Diversity of citizenship is satisfied because Jones and Ortega are citizens of, and reside in, different states. 2. \_\_\_\_\_
3. Diversity also requires that the amount in controversy exceed \$75,000. 3. \_\_\_\_\_
4. Here, amount in controversy requirement is not satisfied because total damages claimed by Jones do not exceed the required amount. 4. \_\_\_\_\_
5. Colorado federal district court can exercise personal jurisdiction over Ortega statutorily through the state's long-arm statute. 5. \_\_\_\_\_
6. Colorado's long-arm statute extends specific jurisdiction to persons who transact business, or commit a tortious acts, within the state. 6. \_\_\_\_\_
7. Under a constitutional due process analysis, minimum contacts with the state of Colorado are required for the exercise of personal jurisdiction 7. \_\_\_\_\_
8. A passive web-site coupled with other acts such as phone calls and delivery of goods to state may be enough to satisfy minimal contacts requirements and/or transaction of business within state. 8. \_\_\_\_\_
9. A further requirement of an action founded upon diversity is that the action may be brought only in a venue/judicial district in which a substantial part of the events or omissions giving rise to the claim occurred or where a substantial part of the property that is the subject of the action is situated. 9. \_\_\_\_\_
10. Service of process may be made according to federal rule, or the law of the state where the federal court sits or where process is served. 10. \_\_\_\_\_
11. Here, service of process was defective due to the age of the process server or improper service upon an individual who was not authorized to accept process for her. 11. \_\_\_\_\_

## QUESTION 1

Patty Plaintiff was struck and injured by a car driven by Donny Defendant. The accident occurred in Denver, and Defendant is a resident of Colorado. Plaintiff wants to recover damages for her injuries, but does not want to spend too much money on an attorney. Therefore, she went to an office supply store and purchased a complaint form and filled it out as follows:

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Comes now Patty Plaintiff and submits this Complaint against Donny Defendant:

1. Patty Plaintiff and Donny Defendant are both residents of the State of Colorado, and the car accident at-issue occurred here in the State of Colorado.
2. Venue is proper in this court because all of the Parties reside here and the accident occurred in the City and County of Denver.
3. On or about March 1, 2003, Plaintiff was driving her car in the City and County of Denver when defendant negligently drove into her, proximately causing Plaintiff severe damage to both her car and her person.

Wherefore, Plaintiff seeks damages in the amount of her injuries, mental anguish, and property loss she has suffered and is expected to continue to suffer as a proximate result of Defendant's negligence. In addition, Plaintiff seeks her costs and all allowable interest and such other relief as this court deems appropriate.

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Plaintiff has asked you to review the complaint and sign it as her attorney. She has said that she does not want to discuss settlement; she wants her day in court. Assume that the complaint adequately alleges venue, jurisdiction, the elements of a claim for negligence, and Plaintiff's damages. Also assume that the case is to be filed in the Colorado State District Court for the City and County of Denver.

### QUESTIONS:

Discuss, referring to the Colorado Rules of Civil Procedure:

1. What the requirements are regarding pleading specific details of claims (such as the exact sequence of the events of the accident, its location, and time of occurrence), and whether Plaintiff's complaint meets those requirements.
2. Whether Plaintiff's complaint, on its face, is sufficient to warrant a jury trial.
3. Whether Defendant must be served within any specific time period after the complaint is filed with the court.
4. What Plaintiff's obligations are to provide you with all information she has on the case, including identities of witnesses and any exhibits, and your obligations to disclose that information to Defendant.
5. What your obligations are to investigate the case before filing the complaint.
6. Whether Plaintiff can refuse to discuss settlement with Defendant.

## DISCUSSION FOR QUESTION 1

### 1. **Complaint/Specificity.**

Under the Colorado Rules of Civil Procedure, only notice pleading is required. *Rosenthal v. Dean Witter Reynolds*, 908 P.2d 1095, 1099-1100 (Colo. 2002). C.R.C.P. 9 requires pleading with specificity for certain kinds of matters, such as fraud and mistake, however, negligence is not one of those claims. Therefore, Plaintiff does not need to plead her claim with more specificity. In fact, C.R.C.P. 8(e)(1) encourages litigants to keep their pleadings “simple, concise, and direct.”

### 2. **Jury Demand.**

Pursuant to C.R.C.P. 38, a plaintiff who seeks a jury trial must affirmatively demand a jury trial in her complaint. The draft complaint does not demand a jury trial therefore, it is not sufficient to warrant one.

Note: An extra point may be warranted to examinees who recognizes that in addition to an express jury demand, C.R.C.P. 38 requires that a jury fee be paid. The amount of the jury fee is currently \$150.00. That fee is paid on top of the regular civil claim filing fee for the court (currently \$136.00).

### 3. **Deadline for Service.**

While C.R.C.P. 3(a) requires that a complaint be filed within 10 days of service (the “hip pocket” rule), it doesn’t address the reverse; that is, it does not require service within any certain number of days after the filing of the complaint.

Note: An additional point may be awarded to examinees who recognize that many of the Colorado state courts have adopted Delay Reduction Orders, or the like, which impose shorter deadlines for service after filing.

### 4. **Plaintiff’s Obligations**

Plaintiff should be told she is required to provide all information she has on the case to Defendant without waiting for discovery. C.R.C.P. 26. Accordingly, she should provide her attorney with the background information as soon as possible. Indeed, C.R.C.P. 26 provides a firmer deadline. The information must be provided in such time as to allow the attorney to review it and compile it into Plaintiff’s Rule 26 disclosures. Plaintiff should be told that the deadline for Rule 26 disclosures is 30 days after the case becomes “at issue.” According to C.R.C.P. 16(b)(1), a case is deemed “at issue” when “all parties have been served and all pleadings permitted by C.R.C.P. 7 have been filed or defaults or dismissals have been entered....” In this case, unless a counter-claim is filed, that will be when Defendant files his responsive pleading, which may be an answer or a motion to dismiss. If Defendant is served in Colorado, his responsive deadline will be 20 days after service. C.R.C.P. 12(a). Adding the 30 and 20 days, Plaintiff should be advised that her C.R.C.P. 26 disclosures will be due 50 days after service, at the latest.

**5. Attorney's Obligation**

The attorney should review that information as soon as possible to comply with his/her obligation under C.R.C.P. 11 to confirm, before signing the complaint, that "to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation," quoting C.R.C.P. 11.

**6. Settlement Efforts**

While Plaintiff always retains the right to refuse to enter into a settlement, she does not have the right to refuse to discuss settlement, nor can her attorney. C.R.C.P. 16(b)(3) and (16) require all litigants and their counsel to discuss the possibility of settlement.



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### Essay 1 GradeSheet

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#### Complaint/Specificity

- 1. Only notice pleading required. 1. \_\_\_\_\_
- 2. Specificity required only for certain matters (not negligence). 2. \_\_\_\_\_
- 3. Plaintiff's complaint meets the requirements for a pleading. 3. \_\_\_\_\_

#### Jury Demand

- 4. Jury demand must be stated expressly in complaint -- or stated within 10 days thereafter. (C.R.C.P. 38). 4. \_\_\_\_\_
- 5. Plaintiff's complaint (on its face) will not warrant a jury trial. 5. \_\_\_\_\_
- 6. A jury fee is also required (C.R.C.P. 38). 6. \_\_\_\_\_

#### Deadline for Service

- 7. No requirement for specific time in which Defendant must be served. 7. \_\_\_\_\_
- 8. However, a Delay Reduction Order may impose a deadline. 8. \_\_\_\_\_

#### Plaintiff's Obligations to Provide Info to Attorney

- 9. Must do so as soon as possible, so attorney can do investigation (C.R.C.P. 11). 9. \_\_\_\_\_
- 10. No later than in time for attorney to prepare disclosures (C.R.C.P. 26). 10. \_\_\_\_\_
- 11. Disclosures are mandatory and cannot wait for discovery (C.R.C.P. 26). 11. \_\_\_\_\_
- 12. The deadline to disclose is 30 days after the "at issue" date (C.R.C.P. 26). 12. \_\_\_\_\_

#### Attorney's Obligations

- 13. That complaint is based in fact and warranted 13. \_\_\_\_\_

#### Settlement efforts

- 14. Neither Plaintiff nor her attorney can refuse to discuss settlement (C.R.C.P. 16). 14. \_\_\_\_\_

## QUESTION 5

Diana Defendant entered into a contract with Paul Plaintiff whereby she agreed to paint the interior of Plaintiff's Denver home for \$10,000. The contract provided that Plaintiff would pay Defendant \$5,000 when half of the work was done, and the remainder when the work was completed. Defendant resides in Jefferson County. Her business, which has been incorporated, also is located in Jefferson County.

When Defendant finished half of the work, Plaintiff paid her \$5,000. When she finished the other half, Plaintiff refused to pay her the remaining \$5,000. Instead, he told Defendant that he was so dissatisfied with the quality of her work that he hired another contractor to repaint. The second contractor claimed he had to redo the majority of Defendant's work and charged Plaintiff \$10,000.

When Defendant was leaving Plaintiff's house the last day she worked there, she slipped on a patch of ice on his driveway. As a result of the fall, Defendant suffered serious injuries. Her medical bills totaled \$15,000, and because she was not insured, she was required to pay the full amount herself.

Plaintiff sold his house in Denver and moved to Boulder where he filed suit in Boulder County Court against Defendant and her corporation. Plaintiff claimed that Defendant's poor workmanship constituted a breach of contract and sought \$5,000 in damages (the difference between the \$5,000 due to Defendant under the contract and the \$10,000 he paid the second contractor). Plaintiff served both Defendant and her corporation at her residence in Jefferson County.

Defendant seeks to file a counterclaim in tort seeking \$15,000 for her medical expenses and \$5,000 due under the contract.

### QUESTIONS:

1. Which Colorado courts have subject matter jurisdiction over the lawsuit?
2. Can and should Defendant transfer the suit to a different court? If so, what is the procedure for doing so?
3. Discuss whether venue is proper in Boulder.
4. Discuss whether Defendant can change venue. If she can, where would venue be proper, and what is the process for changing it?

Do not address the merits of the dispute.

## DISCUSSION FOR QUESTION 5

The facts indicate that all three parties (Paul, Diana, and Diana's corporation) are Colorado residents. Thus, the examinees do not need to discuss Colorado's long arm statute. And, because there is no diversity of citizenship and the lawsuit does not involve a federal question, it cannot be removed to federal court. The facts also specify that Diana was uninsured and paid her medical expenses herself so examinees should not discuss joining an insurance company and/or subrogation rights.

### Subject matter jurisdiction

County courts and district courts have concurrent original jurisdiction in civil actions in which the amount claimed does not exceed \$15,000, exclusive of interest and costs. County courts and district courts also have concurrent jurisdiction in all actions in which the counterclaim does not exceed \$15,000. District courts have exclusive jurisdiction over civil actions where the amount in controversy exceeds \$15,000. See C.R.S. § 13-6-104(1); County Court Rule 313(b)(1). The amount sought in the original claim and the amount sought in the counterclaim are not added together to determine whether the county court has jurisdiction. Thus, if neither the original claim nor the counterclaim alone exceeded \$15,000, the county court retains jurisdiction. See § 13-6-104(1), County Court Rule 313(b)(1).

Here, Paul's complaint seeks only \$5,000, and was thus properly filed in county court (it could also have been filed in either district court or small claims court, where the jurisdictional limit is \$7,000). However, Diana's counterclaim seeks \$20,000, an amount that exceeds the jurisdictional limit for county courts.

If Diana wants to be able to recover the full amount of her counterclaim, the case must be transferred to district court. If she is willing to cap her recovery (if any) at \$15,000, the case can stay in county court. See CRCP 98(h); County Court Rule 313(b).

If Diana wants to transfer the case to district court, she must request a transfer in her answer. If she does not request a transfer in her answer/counterclaim, and her failure to do so is the result of "oversight, inadvertence, or excusable neglect, or when justice requires," she may amend her counterclaim to add the request. See County Court Rules 313(b) and (d).

### Venue

In contract cases, venue is proper: (1) where any defendant resides at the time the action is commenced, (2) where the plaintiff resides if the defendant can be served there, or (3) where the contract was to be performed. CRCP 98(c); County Court Rule 398(c).

In tort cases, venue is proper: (1) where any defendant resides at the time the action is commenced, (2) where the plaintiff resides if the defendant can be served there, or (3) where the tort was committed. CRCP 98(c); County Court Rule 398(c).

## DISCUSSION FOR QUESTION 5

Page Two

Individuals reside in the place where they are domiciled (i.e., where they are physically present and have the intent to remain indefinitely). Corporations reside where their principal place of business is located. Paul is a resident of Boulder (he moved there from Denver and is thus no longer a Denver resident). Diana and her corporation are both residents of Jefferson County.

This case involves both contract and tort claims. Venue is not proper in Boulder (where Paul filed the suit) because neither defendant was served there. Venue is thus proper where the defendants live (in Jefferson County), or where the contract was performed and the tort was committed (Denver County).

Diana can change venue to either Denver County or Jefferson County, and, because Boulder County is not a proper venue, does not need Paul's agreement to do so. Compare County Court Rules 398(d) and 398(e). Diana must request a change of venue in her answer. Proper venue is not a jurisdictional prerequisite, so if Diana does not request a change of venue in her answer, she will waive the objection that venue is not proper, and the case will proceed in Boulder. See County Court Rule 398(d)(1); Halliburton v. County Court ex rel. City and County of Denver, 672 P.2d 1006 (Colo. 1983).

**ESSAY Q5**

SEAT

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ISSUE

	YES	NO
1. County courts have jurisdiction in civil actions in which the amount claimed does not exceed \$15,000.	1. <input type="radio"/>	<input type="radio"/>
2. District courts have exclusive jurisdiction over civil actions where the amount in controversy exceeds \$15,000.	2. <input type="radio"/>	<input type="radio"/>
3. County and district courts have concurrent jurisdiction for matters under \$15,000.	3. <input type="radio"/>	<input type="radio"/>
4. The amount sought in the original claim and the amount sought in the counterclaim are not added together to determine whether a court has jurisdiction.	4. <input type="radio"/>	<input type="radio"/>
5. Here, Plaintiff's complaint seeks only \$5,000, and was thus properly filed in county court.	5. <input type="radio"/>	<input type="radio"/>
6. Defendant's counterclaim seeks \$20,000, an amount that exceeds the jurisdictional limit for county courts and must be transferred to district court for full recovery.	6. <input type="radio"/>	<input type="radio"/>
7. If Defendant is willing to cap her recovery at \$15,000, the case can stay in county court.	7. <input type="radio"/>	<input type="radio"/>
8. If Defendant wants to transfer the case to district court, she must request a transfer in her answer or amend her counterclaim	8. <input type="radio"/>	<input type="radio"/>
9. In contract cases, venue is proper: (1) where any defendant resides at the time the action is commenced, (2) where the plaintiff resides if the defendant can be served there, or (3) where the contract was to be performed.	9. <input type="radio"/>	<input type="radio"/>
10. In tort cases, venue is proper: (1) where any defendant resides at the time the action is commenced, (2) where the plaintiff resides if the defendant can be served there, or 3) where the tort was committed.	10. <input type="radio"/>	<input type="radio"/>
11. Venue is not proper in Boulder where Plaintiff filed the suit because neither defendant was served there.	11. <input type="radio"/>	<input type="radio"/>
12. a. Venue is proper where the defendant live in Jefferson County; or	12a. <input type="radio"/>	<input type="radio"/>
b. where the contract was performed and the tort was committed (Denver County).	12b. <input type="radio"/>	<input type="radio"/>
13. Defendant must request a change of venue in her answer or the objection will be waived.	13. <input type="radio"/>	<input type="radio"/>

## QUESTION 6

Paul, who is disabled, planned to fly on UFlyIt Airlines from Denver International Airport to his home in Boston. UFlyIt has a contract with LoadEm Airline Services Company, pursuant to which LoadEm is responsible for assisting disabled passengers onto UFlyIt's planes. Two employees of LoadEm were lifting Paul off of his wheelchair (which was too wide for the aisle on the plane) onto another chair when they dropped him.

Paul sued UFlyIt and LoadEm in Federal District Court in Colorado under both the Americans with Disabilities Act (ADA), 42 U.S.C.A. § 12101, et seq., and applicable state laws. Paul's state claims against UFlyIt were based on contract and respondeat superior theories, and his state claim against LoadEm was based in negligence. Paul sought damages in the amount of \$200,000 from each defendant for the ADA claim, and \$50,000 and \$40,000 from UFlyIt and LoadEm, respectively, for the state law claims.

UFlyIt is incorporated in Delaware and its headquarters are in Dallas. LoadEm is also incorporated in Delaware, and its home office is in Chicago.

The court ultimately granted defendants' motion for summary judgment with respect to the ADA claim and entered an order dismissing it. Paul filed a notice of appeal of that ruling, and defendants filed a motion to dismiss the appeal.

### QUESTIONS:

Discuss:

1. whether the federal court had jurisdiction over the original complaint;
2. what effect, if any, the dismissal of the ADA claim has on the court's jurisdiction;
- and
3. how the court should rule on defendants' motion to dismiss the appeal.

## DISCUSSION FOR QUESTION 6

### I. Whether the Federal District Court has jurisdiction over the original complaint

This question is about subject matter jurisdiction, not personal jurisdiction, so the examinees should not discuss the latter.

Short answer: The court has both federal question and diversity jurisdiction over the ADA claim. The court does not have either federal question or diversity jurisdiction over the state law claims, but may exercise supplemental jurisdiction over those claims.

#### A. Federal Question Jurisdiction

Federal District Courts have original jurisdiction over all civil actions arising under the Constitution, laws or treaties of the United States. As pertinent here, to find federal question jurisdiction, two conditions must be satisfied: (1) a question of federal law must appear on the face of plaintiff's well-pleaded complaint, and (2) plaintiff's cause of action must be based on a federal law. See Nicodemus v. Union Pacific Corp., 318 F.3d 1281 (10<sup>th</sup> Cir. 2003); 28 U.S.C.A. § 1331. (There is no amount in controversy requirement for federal question cases.)

The facts indicate that Paul filed a claim pursuant to the ADA, which the examinees should recognize as a federal statute. Accordingly, the court has federal question jurisdiction over the ADA claim. See Trainor v. Apollo Metal Specialties, Inc., 318 F.3d 976 (10<sup>th</sup> Cir. 2002).

#### B. Diversity Jurisdiction

The federal district court has original jurisdiction over all civil actions where the citizenship of the plaintiff and defendants is diverse and the amount in controversy exceeds \$75,000. 28 U.S.C.A. § 1332.

##### 1. Citizenship

A corporation is a citizen of any state by which it has been incorporated and of the state where it has its principal place of business. 28 U.S.C. § 1332(c). An individual is a citizen of the state in which he has his permanent home (where he is domiciled). Crowley v. Glaze, 710 F.2d 676 (10<sup>th</sup> Cir. 1983); Walden v. Broce Const. Co., 357 F.2d 242 (10<sup>th</sup> Cir. 1966). Every plaintiff must be of diverse citizenship from every defendant, but the rule of complete diversity does not require that every party be of diverse citizenship from every other party. Specifically, although the plaintiff must be diverse from every defendant, the defendants need not be diverse from each other.

Here, Paul is a citizen of Massachusetts, UFlyIt is a citizen of Delaware and Texas, and LoadEm is a citizen of Delaware and Illinois. Because Paul does not share citizenship with either defendant, there is diversity, even though the defendants are not diverse from each other.

## **2. Amount in Controversy**

The amount of damages Paul sought in his ADA claim against each defendant was \$200,000. Accordingly, the amount in controversy requirement is satisfied as to the ADA claim.

A plaintiff can aggregate claims against multiple defendants if the claim asserted against them is a joint claim. However, a plaintiff cannot aggregate claims against multiple defendants if the claims are based on separate liabilities. See Bajowski v. Sysco Corp., 115 F.Supp.2d 133 (D.Mass. 2000); Chase Manhattan Bank, N.A. v. Aldridge, 906 F.Supp. 870 (S.D.N.Y.1995) (where liability is several, the amount-in-controversy requirement must be satisfied as to each defendant individually rather than on an aggregate basis).

Here, the facts specify that Paul filed different state law claims (not joint claims) against the two defendants. Thus, although the aggregate amount of damages he sought in his state law claims is \$90,000, he cannot aggregate the claims. Because Paul did not claim at least \$75,000 in damages from each defendant, he has not satisfied the \$75,000 minimum, and the federal court does not have diversity jurisdiction over the state law claims.

### **C. Supplemental Jurisdiction over State Claims**

The federal supplemental jurisdiction statute combines the doctrines of pendent and ancillary jurisdiction under a common heading. 28 U.S.C. § 1367. Under the doctrine of supplemental jurisdiction, a federal court may in its discretion exercise supplemental jurisdiction over state claims as to which it lacks original jurisdiction if the claims arise from the same transaction or occurrence as the claim over which the court has original jurisdiction. See 28 U.S.C.A. §§ 1367(a); City of Chicago v. International College of Surgeons, 522 U.S. 156, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997). The federal and state claims must “derive from a common nucleus of operative fact” and be such that a plaintiff “would ordinarily be expected to try them all in one judicial proceeding.” United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

That test is satisfied here, and the federal court may exercise supplemental jurisdiction over Paul’s state law claims.

## **II. The effect of the dismissal of the ADA claim on the court’s jurisdiction**

Federal courts may exercise supplemental jurisdiction over state law claims even after the plaintiff’s federal claim is dismissed on the merits. However, courts generally refuse supplemental jurisdiction and dismiss state claims if no claims over which it has either federal question or diversity jurisdiction remain. Ashley Creek Phosphate Co. v. Chevron USA, Inc., 315 F.3d 1245 (10<sup>th</sup> Cir.2003).

**III. How should the court rule on defendants' motion to dismiss the appeal?**

Where multiple claims or multiple parties are involved in an action, the court may enter a final judgment as to fewer than all of the claims or parties only upon (1) an express determination that there is no just reason for delay, and (2) an express direction for the entry of judgment. Fed.R.Civ.Pro. 54(b).

Here, the court's dismissal of the ADA claim is an entry of judgment against Paul on that claim, but there is no indication in the facts that the court made an express determination that there is no just reason for delay. Consequently, if the district court retains supplemental jurisdiction over the state law claims (which is unlikely), the dismissal of the ADA claim will not have resolved all of the claims against all of the parties and is thus not appealable unless Paul voluntarily dismisses his state law claims or obtains a Rule 54(b) order from the district court certifying that there is no just reason for delay. However, if the district court refuses to exercise continuing supplemental jurisdiction over the state law claims and dismisses them, no Rule 54(b) certification is necessary, and the appeal of the order granting summary judgment and dismissing the ADA claim can proceed. See Fed.R.Civ.Pro. 54(b); see also Ashley Creek Phosphate Co. v. Chevron USA, Inc., supra; Ruiz v. McDonnell, 299 F.3d 1173 (10<sup>th</sup> Cir. 2002).

ESSAY Q6

SEAT

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ISSUE

		YES	NO
1.	Federal district courts have original jurisdiction over all civil actions arising under the <u>Constitution, law, or treaties of the United States.</u>	1. <input type="radio"/>	<input type="radio"/>
2.	Federal question jurisdiction requires a question of federal law.	2. <input type="radio"/>	<input type="radio"/>
3.	The ADA claim is a federal statute and therefore, the court has jurisdiction over the ADA claim.	3. <input type="radio"/>	<input type="radio"/>
4.	Under diversity jurisdiction, federal district courts have original jurisdiction over all civil actions where citizenship of the plaintiff and defendants is diverse and the amount in controversy exceeds \$75,000.	4. <input type="radio"/>	<input type="radio"/>
5.	Because Paul does not share citizenship with either defendant, there is diversity, even though the defendants are not diverse from each other.	5. <input type="radio"/>	<input type="radio"/>
6.	Plaintiffs can't aggregate different state law claims against two defendants if based on separate liabilities.	6. <input type="radio"/>	<input type="radio"/>
7.	Because Paul did not claim at least \$75,000 in damages from each defendant, he has not satisfied the \$75,000 minimum for diversity purposes.	7. <input type="radio"/>	<input type="radio"/>
8.	Supplemental jurisdiction applies where the state federal claims "derive from a common nucleus of operative fact;"	8. <input type="radio"/>	<input type="radio"/>
8a.	and are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding."	8a. <input type="radio"/>	<input type="radio"/>
9.	That test is satisfied here, and the federal court may exercise supplemental jurisdiction over Paul's state law claims. (same transaction or occurrence)	9. <input type="radio"/>	<input type="radio"/>
10.	Federal courts may exercise supplemental jurisdiction over state law claims even after the plaintiff's federal claim is dismissed on the merits.	10. <input type="radio"/>	<input type="radio"/>
11.	Where multiple claims or multiple parties are involved in an action, the court may enter a final judgment as to fewer than all of the claims or parties only upon (1) an express determination that there is no just reason for delay, and (2) an express direction for the entry of judgment.	11. <input type="radio"/>	<input type="radio"/>
12.	Dismissal of the ADA claim will not have resolved all of the claims against all of the parties and is thus not appealable unless Paul voluntarily dismisses his state law claims or obtains a Rule 54(b) order from the district court certifying that there is no just reason for delay.	12. <input type="radio"/>	<input type="radio"/>

## **QUESTION 1**

Paula Plaintiff filed a civil lawsuit against Don Defendant in the United States District Court for the District of Colorado. In that action, Plaintiff timely and properly served on Defendant a set of ten interrogatories. Defendant, based on his belief that all ten interrogatories call for disclosure of privileged information, knowingly failed to respond in any way to the interrogatories.

### **QUESTION:**

Under the Federal Rules of Civil Procedure, discuss what courses of action are available to Plaintiff in light of Defendant's failure to respond to the set of ten interrogatories.

## DISCUSSION FOR QUESTION 1

Plaintiff has two primary options under FRCP 37. The first option is a **motion to compel answers** to the interrogatories under FRCP 37(a), which provides that “[i]f . . . a party fails to answer an interrogatory submitted under Rule 33 . . . , the discovering party may move for an order compelling an answer.” FRCP 37(a)(2)(B). *See, e.g., Toma v. City of Weatherford*, 846 F.2d 58, 60 (10<sup>th</sup> Cir. 1988); *Pham v. Hartford Fire Ins. Co.*, 193 F.R.D. 659, 661 n.2 (Dist. Colo. 2000); *Ecrix Corp. v. Exabyte Corp.*, 191 F.R.D. 611, 616 (D. Colo. 2000); *In re M & L Bus. Mach. Co., Inc. v. Bank of Boulder*, 167 B.R. 631, 633 (D. Colo. 1994).

The second option is a **motion for sanctions** under FRCP 37(d), which provides that “[i]f a party . . . fails . . . (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just . . . .” FRCP 37(d) (sentence one). *See, e.g., Toma v. City of Weatherford*, 846 F.2d 58, 60 (10<sup>th</sup> Cir. 1988).

The former motion is designed primarily to obtain the information sought by the interrogatories; the latter motion is designed primarily to impose one or more sanctions on the noncomplying party. The latter motion is available even though Defendant has not violated a court order.

Motion to compel. A Rule 37(a) motion to compel must “include a certification that the movant has in good faith conferred or attempted to confer with the . . . party failing to make the discovery in an effort to secure the information or material without court action.” FRCP 37(a)(4)(2)(B); *see also* Rule 7.1.A., Local Rules, U.S. Dist. Ct. Dist. Colo. (“The court will not consider any motion, other than a motion under Fed. R. Civ. P. 12 or 56, unless counsel for the moving party or a *pro se* party, before filing the motion, has conferred or made reasonable, good-faith efforts to confer with opposing counsel or a *pro se* party to resolve the disputed matter. The moving party shall state in the motion, or in a certificate attached to the motion, the specific efforts to comply with this rule.”); *Exum v. United States Olympic Comm.*, 209 F.R.D. 201, 208 (Dist. Colo. 2002); *Echostar Communications Corp. v. News Corp. Ltd.*, 180 F.R.D. 391, 393-94 (Dist. Colo. 1998).

In addition to obtaining an order compelling Defendant to respond to the interrogatories, Plaintiff may also be able to obtain an award of reasonable expenses incurred in making the motion, including attorney fees. FRCP 37(a)(4)(A); *cf. Exum v. United States Olympic Comm.*, 209 F.R.D. 201, 208 (Dist. Colo. 2002) (awarding reasonable expenses incurred in opposing motion to compel). Expenses are not to be awarded if (1) the movant fails to make a good faith effort to obtain the discovery without court action, (2) the nondisclosure is “substantially justified,” or (3) “other circumstances make an award of expenses unjust.” *Id.*

Motion for sanction (s). A Rule 37(d) motion for sanctions must “include a certification that the movant has in good faith conferred or attempted to confer with the part failing to answer or respond in an effort to obtain such answer or response without court action.” FRCP 37(d) (sentence two); *see also* Rule 7.1.A., Local Rules, U.S. Dist. Ct. Dist. Colo. (“The court will not

consider any motion, other than a motion under Fed. R. Civ. P. 12 or 56, unless counsel for the moving party or a *pro se* party, before filing the motion, has conferred or made reasonable, good-faith efforts to confer with opposing counsel or a *pro se* party to resolve the disputed matter. The moving party shall state in the motion, or in a certificate attached to the motion, the specific efforts to comply with this rule.”); *Exum v. United States Olympic Comm.*, 209 F.R.D. 201, 208 (Dist. Colo. 2002); *Echostar Communications Corp. v. News Corp. Ltd.*, 180 F.R.D. 391, 393-94 (Dist. Colo. 1998).

Defendant’s total failure to respond to the set of interrogatories exposes Defendant to “such orders . . . as are just.” FRCP 37(d) (sentence one). Such orders may be as drastic as the striking of defenses and even the entry of final judgment, *id.* (incorporating by reference FRCP 37(b)(2)(C)); *Resolution Trust Corp. v. Rossmiller*, 140 B.R. 1000, 1003 (D. Colo. 1992). This is so if the failure to respond is intentional (as is Defendant’s failure) and not involuntary. *See, e.g., M.E.N. Co. v. Control Fluidics, Inc.*, 834 F.2d 869, 872 (10<sup>th</sup> Cir. 1987).

In lieu of or in addition to a sanction such as judgment by default, Plaintiff may also be able to obtain an award of reasonable expenses caused by Defendant’s failure, including attorney’s fees. FRCP 37(d) (sentence three). Expenses are not to be awarded if a party’s failure “was substantially justified” or if “other circumstances make an award of expenses unjust.” *Id.*

Privilege. Although Defendant may be correct that Plaintiff’s discovery requests were inappropriate because they sought privileged information, Plaintiff can argue Defendant has waived that objection. All objections must be raised on or before the deadline for responses, or they are deemed waived. FRCP 33(b)(4). Objections as to privilege must be raised in a privilege log, which specifically describes the information being withheld. FRCP 26(b)(5). Thus, Defendant’s failure to respond “may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).” FRCP 37(d) (sentence four). Nonetheless, the resolution of a discovery motion is left to the sound discretion of the trial court to enter such orders as it deems “just.” FRCP 37(d). Defendant may throw himself upon the trial court’s mercy and try to argue he should be allowed to resurrect the privilege-objections.

ESSAY Q1

SEAT 

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<u>ISSUE</u>	POINTS AWARDED
1. First option is motion to compel answers.	1. ○
2. Second option is to move for sanctions.	2. ○
3. Sanctions may include the striking of defenses.	3. ○
4. Sanctions may include the entry of judgment.	4. ○
5. Plaintiff may be able to obtain reasonable expenses (including attorney fees) incurred in filing either motion.	5. ○
6. Each motion must be accompanied by a certificate that they met and conferred.	6. ○
7. On either kind of motion, reasonable expenses are unavailable if Defendant's failure was substantially justified or if other circumstances make such an award unjust.	7. ○
8. Defendant was obligated to make timely objections.	8. ○
9. Defendant was obligated to provide a privilege log.	9. ○
10. Defendant may file for a protective order.	10. ○
11. Defendant's failure to meet any or all of the above three (nos. 8-10) may trigger a waiver of those rights.	11. ○
12. Still the court is vested with the sound discretion to rule as it deems just.	12. ○

### QUESTION 3

In June 2005, Pat and Dan were involved in an automobile accident at an intersection in Colorado. As a result of the accident, Pat incurred \$5,000 in property damages to her car and \$4,000 in medical expenses from an emergency room visit. Pat had to miss several days of work due to continuing headaches, and she claims that disturbing memories of the accident have reduced the quality of her life and disrupted her sleep.

At the time of the accident both Pat and Dan were United States citizens domiciled in Colorado. In January 2006, Dan moved to Montana where he immediately bought a house, registered to vote, and accepted permanent employment.

In March 2006, Pat commenced a civil action against Dan in federal district court for the district of Colorado seeking recovery for ongoing personal injuries and property damage. Her complaint alleged that the court had subject matter jurisdiction over the action and sought damages in the amount of \$76,000.

Prior to trial, Dan timely filed the following motions:

1. A motion to dismiss for lack of subject matter jurisdiction.
2. A motion to transfer venue to the federal district court in Montana pursuant to 28 U.S.C. § 1404(a).
3. A motion for summary judgment. This motion included affidavits from five eyewitnesses to the accident each of whom stated that the light was green in Dan's direction when he entered the intersection. Pat filed a response to the summary judgment motion that included an affidavit from her mother, who was in the car with her when the accident occurred, who stated that Pat entered the intersection while the light was "still green."

#### **QUESTION:**

Discuss how the district court should rule on Dan's motions.

## DISCUSSION FOR QUESTION 3

### 1. Motion based on lack of subject matter jurisdiction

The district court should deny this motion because it has subject matter jurisdiction over the action based upon diversity of citizenship.

Diversity of citizenship jurisdiction requires that there be (a) complete diversity of citizenship among the parties and (b) an amount in controversy that exceeds \$75,000 (exclusive of setoffs, interest, or costs). See 28 U.S.C. § 1332(a)(1)(district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between (1) citizens of different States). Both requirements are met here.

- a. Diversity of parties. For purposes of diversity jurisdiction, an individual is a citizen of the state in which he or she is domiciled. See Crowley v. Glaze, 710 F.2d 676 (10th Cir. 1983). Domicile, in turn, is the combination of (i) physical presence in a location and (ii) an intent to remain there indefinitely. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). In this case, the facts reveal that Pat is domiciled in Colorado. Dan has bought a house, registered to vote, and accepted permanent employment in Montana. This conduct is sufficient to establish that he is domiciled in Montana. Thus, the parties are of diverse citizenship.

The examinee should also note that diversity is determined at the time the action is filed or commenced, not when it arose or accrued. See Model Imperial Supply Co. v. Westwind Cosmetics, Inc., 808 F. Supp. 943 (E.D.N.Y. 1992); see also Louisville, N.A. & C.R. Co. v. Louisville Trust Co., 174 U.S. 552, 19 S.Ct. 817, 43 L.Ed. 1081 (1899). Thus, the fact that the accident occurred and/or the claims arose while Dan was still domiciled in Colorado does not destroy diversity.

- b. Amount in controversy. In determining whether the amount in controversy requirement is satisfied, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify a dismissal. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

Here, the complaint seeks damages exceeding the \$75,000 threshold and appears to be made in good faith. And, while the facts indicate initial property damage and medical expenses totaling only \$9000, it is not a legal certainty that Pat cannot recover additional damages for her “ongoing” injuries. Thus, the amount in controversy requirement is satisfied.

### 2. Motion to transfer venue

The district court should also deny Dan’s motion to transfer venue. 28 U.S.C. § 1404(a) provides that for “the convenience of parties and witnesses, in the interest of justice, a district

court may transfer any civil action to any other district or division where it might have been brought.” To obtain a transfer of venue under this provision, the movant must establish two things. First, that the action could have been brought in the district to which the movant seeks transfer. This means the proposed forum must have proper subject matter jurisdiction and personal jurisdiction over defendant, and proper venue. Second, the movant must establish that the transfer is appropriate based on the convenience of the parties, the convenience of witnesses, and the interests of justice. The district court has broad discretion in determining such a motion. See Posven, C.A. v. Liberty Mut. Ins. Co., 303 F. Supp.2d 391 (S.D.N.Y. 2004).

Here, Dan can establish that this action could have been brought in Montana. Subject matter jurisdiction and personal jurisdiction are not problematic and venue is proper in the district court in Montana because actions based solely on diversity of citizenship may be brought in a judicial district where any defendant resides, if all defendants reside in the same state. See 28 U.S.C. § 1391(a)(1).

However, in balancing the convenience of the parties (one of whom is domiciled in Colorado) and the witnesses (most or all of whom probably reside in Colorado) and the interests of justice, it appears that Colorado is the far more convenient forum. Thus, the district court should deny Dan’s motion to transfer venue.

### **3. Motion for summary judgment**

Finally, the district court should also deny Dan’s motion for summary judgment. Under Federal Rule of Civil Procedure 56(c), summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” See Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Palladium Music, Inc. v. EatSleepMusic, Inc., 398 F.3d 1193 (10<sup>th</sup> Cir. 2005). Thus, if a material factual issue is in dispute, summary judgment is improper.

Here, there is a genuine issue of material fact as to which party had the right of way through the intersection when the accident occurred. Although Dan has a greater number of affidavits than Pat, the court should still conclude that a factual controversy exists which precludes entry of summary judgment. See Hall v. Bellmon, 935 F.2d 1106 (10<sup>th</sup> Cir. 1991)(material factual disputes based on conflicting affidavits generally cannot be resolved at summary judgment stage).

ESSAY Q3

SEAT

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ISSUE

POINTS  
AWARDED

**Subject Matter Jurisdiction**

- |   |    |                       |
|---|----|-----------------------|
| 1. Identification of two basic requirements for diversity of citizenship jurisdiction (diverse citizenship and 75,000 amount in controversy). | 1. | <input type="radio"/> |
| 2. Citizenship/residency equates to "domicile."   | 2. | <input type="radio"/> |
| 3. Test: Physical presence plus intent to remain indefinitely.  | 3. | <input type="radio"/> |
| 4. Dan meets requirement (move/vote/employment in Montana).   | 4. | <input type="radio"/> |
| 5. Diversity is determined when action is commenced.  | 5. | <input type="radio"/> |
| 6. Standard for whether amount in controversy is satisfied (amount claimed in complaint sufficient if made in good faith).                    | 6. | <input type="radio"/> |
| 7. Amount in controversy requirement is satisfied here.   | 7. | <input type="radio"/> |

**Venue**

- |  |     |                       |
|--|-----|-----------------------|
| 8. Proposed forum must be one in which action "might have been brought."                               | 8.  | <input type="radio"/> |
| 9. Venue proper where defendant (any defendant) resides.   | 9.  | <input type="radio"/> |
| 10. Venue proper in Montana based on Dan's residency/domicile.   | 10. | <input type="radio"/> |
| 11. Transfer must be appropriate based on the convenience of parties, witnesses, interests of justice. | 11. | <input type="radio"/> |
| 12. Convenience weighs against transfer.   | 12. | <input type="radio"/> |

**Summary Judgment**

- |   |     |                       |
|---|-----|-----------------------|
| 13. Legal standard for summary judgment (no genuine issue of material fact/no genuine factual controversy). | 13. | <input type="radio"/> |
| 14. Recognition that factual controversy still exists so summary judgment improper.                         | 14. | <input type="radio"/> |

## QUESTION 7

Ted Driver is a Canadian citizen admitted to permanent residence in Denver, Colorado. He is employed by Big Drilling Corporation. Big Drilling is incorporated under the laws of Delaware with its principal place of business in Denver.

Preston Peters is a United States citizen who resides and works in Los Angeles, California. Peters owns a cabin in Colorado where he spends two weeks each year. Peters always returns to Los Angeles at the conclusion of his vacations in Colorado.

Last year, Peters came to Colorado for his usual two weeks. Upon arriving at the cabin, he discovered Driver operating a bulldozer on his property. Driver explained that he was clearing land for a road to access a proposed mine. When Peters told Driver he was trespassing, Driver contacted his employer, Big Drilling, and learned that he was at the wrong location. Driver apologized and left.

Peters' land was badly damaged by the bulldozer and cluttered with construction waste. Peters obtained an estimate for the removal of the construction waste and restoring the land. He learned that it would cost at least \$25,000.

After negotiations between Big Drilling and Peters failed, Peters filed a civil action in United States District Court for the District of Colorado basing jurisdiction on diversity of citizenship. The complaint names Peters as plaintiff and Driver and Big Drilling Corporation as defendants. It states a cause of action for trespass to real property and demands damages jointly and severally from each defendant in the amount of \$75,000. The complaint also seeks an injunction ordering the defendants to remove the construction waste from Peters' property. Both Big Drilling and Driver are represented by Big Drilling's in-house counsel/vice-president. She accepted service of the summons and complaint for both parties at Big Drilling's office in Denver.

### **QUESTIONS:**

Discuss whether:

1. The court has subject matter jurisdiction.
2. The Court has personal jurisdiction.
3. The defendants were properly served.

## DISCUSSION FOR QUESTION 7

### Subject matter jurisdiction

Diversity of citizenship. Diversity of citizenship jurisdiction requires that there be complete diversity of citizenship between the plaintiffs on one side and defendants on the other and that the amount in controversy exceed \$75,000 (exclusive of setoffs, interest, or costs). 28 U.S.C. § 1332(a).

Diversity of citizenship of parties. There is complete diversity of citizenship between Peters, Driver and Big Drilling Co. To be a citizen under the statute, a natural person must be both a citizen of the United States and be domiciled in a state. Wolfe v. Hartford Life & Annuity Ins. Co., 148 U.S. 389 (1893)(holding averment of state residence insufficient); see generally Jack H. Friedenthal et al., Civil Procedure 29 (3d ed. 1999). For purposes of federal diversity jurisdiction, an individual's state citizenship is equivalent to domicile. Crowley v. Glaze, 710 F.2d 676, 678 (10th Cir. 1983). To establish domicile in a particular state, a person must be physically present in the state and intend to remain there. Keys Youth Servs., Inc. v. Olathe, 248 F.3d 1267, 1272 (10th Cir. 2001). Once domicile is established, however, the person may depart without necessarily changing his domicile. "To effect a change in domicile, two things are indispensable: First, residence in a new domicile, and second, the intention to remain there indefinitely." Crowley, 710 F.2d at 678. Smith v. Cummings, 445 F.3d 1254, 1259-1260 (10<sup>th</sup> Cir. 2006).

Peters is a citizen of California because he is a United States citizen domiciled in California where he lives and works. Although he owns property in Colorado, he only spends two weeks per year on the property. He has no intent to remain in Colorado as evidenced by the fact that he returns to California each year after his two week trip.

An alien admitted to permanent residence "is deemed a citizen of the State in which such alien is domiciled." 28 U.S.C. § 1332(a). Accordingly, Driver's place of citizenship is Colorado.

The corporate defendant's place of citizenship is both Delaware and Colorado. The federal statute provides: "For the purposes of this section. . . a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. . . ." 28 U.S.C. § 1332(c)(1).

Because the plaintiff is a citizen of California and defendants are citizens of Colorado and Delaware, complete diversity of citizenship is established.

Amount in controversy. The amount-in-controversy requirement is normally governed by the monetary value of the relief claimed by the plaintiff in good faith. "[T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify a dismissal." St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289 (1938).

**DISCUSSION FOR QUESTION 7**  
**Page Two**

The amount of damages demanded by the plaintiff is not sufficient by itself because the statute requires that the matter in controversy exceed \$75,000. 28 U.S.C. § 1332(1). But the valuation of the matter in controversy also requires a consideration of the monetary value of the injunctive relief. See McCarty v. Amoco Pipeline Co. 595 F.2d 389 (7th Cir. 1979)(discussing ways to evaluate value of injunctive relief). The value of the waste removal (whether measured by the cost to defendants or benefit to plaintiff) and land restoration adds additional monetary value to establish a total amount in controversy in excess of \$75,000.

Personal jurisdiction

The court has personal jurisdiction. A federal court has territorial jurisdiction coextensive with the "jurisdiction of a court of general jurisdiction in the state in which the district court is located." Fed. R. Civ. P. 4(k)(1). The Colorado courts have general personal jurisdiction over natural persons residing in Colorado and over corporations engaged in continuous and systematic business in the state of Colorado.

Due process provides limits to the territorial reach of federal and state courts. U.S. Const. amends. V & XIV; International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Pennoyer v. Neff, 95 U.S. (5 Otto) 714, 733 (1877). The exercise of jurisdiction by a federal court over a state resident does not violate due process limits. Milliken v. Meyer, 311 U.S. 457, 462-64 (1940). Nor does exercise of jurisdiction over a corporate defendant with "continuous and systematic general business contacts." Cf. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984).

Insufficiency of service of process

In federal court, process may be served pursuant to federal rule or pursuant to the methods authorized by the state law either of the place where the federal court is sitting or where process is served. Fed. R. Civ. P. 4(e)&(h). See generally, Charles Alan Wright, Law of Federal Courts § 65 at 446 (5th ed. 1994).

Service of the summons and complaint on Driver appears to be insufficient under both federal and Colorado state rules because those rules require service on the individual party or on a person authorized by the party to receive process. Fed. R. Civ. P. 4(e)(2)(service on an individual requires personal service or service at individual's dwelling upon person of suitable age and discretion residing there or service on individual authorized by appointment or law to receive service); Colo. R. Civ. P. 4(e)(1)(requiring service on defendant personally or upon family member at defendant's home or upon person specifically authorized by appointment or law). An individual must specifically authorize his/her attorney to receive process. E.g., United States v. 51 Pieces of Real Property, 17 F.3d 1306, 1313 (10th Cir. 1994); Ransom v. Brennan, 437 F.2d 513 (5th Cir. 1971); Schultz v. Schultz, 436 F.2d 635 (7th Cir. 1971). See also Bush v.

**DISCUSSION FOR QUESTION 7**  
**Page Three**

Winker, 907 P.2d 79 (Colo. 1995)(holding service on partner's attorney not sufficient service on partnership absent specific authorization to receive service for partnership).

In contrast, service on the corporation is sufficient because the corporation's in-house attorney and vice president is either actually authorized by the corporation to receive service of process or is so authorized by the rules. Fed. R. Civ. P. 4(h)(1)(requiring service on corporation either by method prescribed by state law or by delivery to an "officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. . ."); Colo. R. Civ. P. 4(g)(requiring service on a corporation by delivery of the process in the county in which the action is pending to a corporation's officer, manager, general agent, or registered agent).

The corporation may have authorized its legal counsel to receive process. If it has not, the in-house counsel and vice president still qualifies as a managing or general agent. The test for whether a corporate employee is a managing or general agent who is authorized to receive service under the rules is whether such an employee is "so integrated with the corporation sued as to make it likely that he will realize his responsibilities and know what he should do with any legal papers served on him." Wright, *supra*, at 446. See also, Denman v. Great Western Ry. Co., 811 P.2d 415, 417 (Colo. App. 1990)(observing that general agent qualified to receive service includes employee who performs duties necessary to the corporation's operations and who is responsible for a substantial phase of the corporation's activities). An in-house counsel and vice president meets such a test.

**ESSAY Q7**

SEAT

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<u>ISSUE</u>	POINTS AWARDED
1. Federal Courts are courts of limited jurisdiction--either Federal question or diversity of citizenship.	1. ○
2. Diversity of citizenship: all plaintiffs on one side and defendants on the other must be diverse AND amount in controversy must exceed \$75,000.	2. ○
3. Domiciled defined as, "one's true fixed, and permanent home to which he has the intention of returning."	3. ○
4. Peters is citizen of CA. He lives and works there and is citizen of US. He spends only two weeks per year on the CO property and returns to CA after each trip.	4. ○
5. Alien admitted to permanent resident is a citizen of the state in which he is domiciled. Driver is therefore citizen of Colorado.	5. ○
6. A corporation is a citizen of the state where it is incorporated and state where it has its principal place of business. Big Drilling is citizen of both Delaware and Colorado.	6. ○
7. Complete diversity of citizenship exists in this case since plaintiff is citizen of different state than defendants.	7. ○
8. Within injunctive relief (\$25,000) the amount in controversy exceeds \$75,000 and requirement is met.	8. ○
9. Federal Court has personal jurisdiction as if it were a court of the state in which it is located.	9. ○
10. CO courts have general jurisdiction over persons residing in CO and companies doing business in CO. (minimum contacts)	10. ○
11. Federal Court has personal jurisdiction over Driver and Big Drilling Co.	11. ○
12. Federal & CO rules require personal service for individuals or service at their dwelling upon appropriate person, or service on individual authorized by appointment or law to receive service. (any ok)	12. ○
13. Driver must authorize acceptance of service, if he did service is okay.	13. ○
14. Re: Big Drilling Co., Federal & CO rules say service on officer, managing or general agent or any other agent authorized to accept service. (any)	14. ○
15. As VP and counsel she can likely accept service, therefore service of process on Big Drilling Co. is likely ok.	15. ○