

**UNIVERSITY OF MARYLAND CAREY SCHOOL OF LAW
INTRODUCTION TO CIVIL PROCEDURE**

Section A

(Two Hours)

Day Division

Wednesday, December 12, 2012

Professor Robert J. Condlin

9:00 A.M. - 11:00 A.M.

No. _____

Signature: _____

Print Name: _____

Submitted Electronically Yes ____ **No** ____

INSTRUCTIONS:

1. **Honor Code.** Conduct during examinations is governed by the Student Honor Code.
2. **Your Name, Examination Number, and Submission.** Sign and print your name in the blanks above. Put the examination number, course title and instructor name on the examination envelope. Indicate whether you are submitting the examination electronically. Submit the examination questions at the conclusion of the examination. Do not put the questions in the examination envelope.
3. **Time.** Submit your examination answers within the announced time for the examination. If you submit your answers late you will be subject to a penalty.
4. **Computer Exams.** You may take the examination by computer. This is an Option 2 – Open Mode – access to Exam4 and student computer-based notes – no Internet Access – “drag and drop” prohibited – examination.

If you use a computer you must use the Exam4 software provided by the Law School. You must provide your own computer and must download a copy of the Fall 2012 version of the Exam4 software to your computer, test the software, and have the computer in working order before the date of this examination.

At the end of the examination, choose the "Submit Electronically" function in the Exam4 software. The software will request your Exam ID (Examination Number). Put the course name on your answers as instructed in the handout, but do not put your name anywhere on your answers. Submit your answers within the time limits for the examination. After submitting your answers electronically, return to the examination

room promptly and turn in (but do not seal) the examination envelope, with a notation on the envelope stating "Submitted Electronically." At the same time, turn in your examination questions to the proctor.

Technological Problems: If you experience a technological problem during the examination, consider the amount of time remaining and decide whether you should continue (or restart) the examination in Blue Books. No additional time will be provided for technological problems. Responsibility for submitting your answers on time electronically lies entirely with you. The Information Technology (IT) Department will assist in retrieving examination files from your computer, and the Office of Registration & Enrollment will accept an IT-certified copy of an examination file retrieved from your computer as a timely submission, as long as there is no evidence of tampering with either your computer or the examination file.

5. Handwritten Exams. If you submit handwritten answers to the examination, put the examination number found above on each of your Blue Book answers to the examination. Both the envelope and your answers should contain your examination number, the course name, and the instructor's name. Do not put your own name anywhere on the envelope, or on the Blue Book answers.

Upon completion of the examination, put your answers in the envelope, fasten the flap, and hand in the envelope to the examination proctor. Be sure to enclose all of your answers in the envelope — you will be graded on only what is inside the envelope. Do not put the examination questions in the envelope. Hand in the questions separately to the examination proctor. You are responsible for ensuring that all of your completed answers and questions are handed in to the examination proctor.

6. Exam Question Clarity. If you believe there is an ambiguity, error, or inconsistency in any of the questions, identify this issue in your answer, specify the assumptions you are making in answering the question, and then answer the question. You should use this approach with caution. The assertion of an ambiguity, error, or inconsistency, if not reasonable, particularly if intended to avoid difficult issues in the examination, will not excuse the failure to address such issues.

7. Special Instructions. The examination consists of three questions and each question counts for a different percentage of the overall grade. The percentage is listed at the beginning of each question. Allocate your time accordingly. **Be sure to explain your answers fully.** The reasons for answers invariably are more important than the conclusions reached. Avoid long descriptive statements about law or facts unencumbered by analysis. The exam is a test of your ability to solve legal problems, not your knowledge of law.

You may bring any materials you like into the examination with you, but you may not use electronic communication devices or software other than the Exam4 software in completing the examination.

Question One
(20 %)

Vance's Foods, Inc.,
Plaintiff,
v.
Special Diets Europe Limited, and Mariel Cotter,
Defendants.

United States District Court for the Eastern District of California

Vance's Foods, Inc. (Vance's), is a corporation organized under the laws of Alaska, with its principal place of business in Sacramento, California. It produces and markets a non-dairy milk substitute called DariFree. Special Diets Limited (SDE), is an Irish corporation with its principal place of business in Dublin. Mariel Cotter (Cotter) is a citizen and resident of Ireland and the founder and owner of SDE.

Two years ago, Cotter called Vance Abersold (Abersold), Vance's founder, at his home in Sacramento, to ask if he would be willing to license SDE to distribute DariFree in Europe. After a series of negotiations over a period of six months, the parties entered into a written five-year franchise arrangement (the Agreement), in which Vance's appointed SDE as the exclusive European distributor for DariFree. As part of the Agreement, Vance's promised to provide SDE with the DariFree formula, disclose its manufacturing process, and provide a list of approved ingredient suppliers. In return, SDE promised to treat the formula and manufacturing information as a trade secret and use it only for the purpose of performing its (SDE's) obligations under the Agreement. The Agreement provided that all disputes arising under it would be governed by California law and would be mediated in California before being litigated. It did not contain a forum selection clause.

Six months ago Vance's filed the present action in the United States District Court for the Eastern District of California, claiming that SDE had misappropriated Vance's trade secrets and breached the terms of the Agreement. In its Complaint, Vance's alleges that SDE's participation in the Agreement was pretextual from the start, that the Company never intended to distribute the DariFree product in Europe. Instead, it always had planned to use Vance's secret formula to manufacture and market a milk substitute product of its own, and that it has been doing so for over a year throughout the European Union. Vance's asks for compensatory damages for lost European sales of DariFree, and an injunction preventing SDE from continuing to market its own product based on the DariFree formula. The Defendants have moved to dismiss the action for lack of personal jurisdiction, and that motion is presently before the Court for decision.

SDE does not have offices, employees, agents, bank accounts, or real property of any kind in the United States. It is not licensed to do business in any state and does not conduct any business related activity (including advertising) in the U.S. The Company exists only in Ireland and, according to its articles of incorporation, was formed for the

purpose of importing and distributing DariFree in Europe. The terms of the Agreement were formulated during two-dozen Skype calls, and an equal number of emails, and faxes, between Cotter in Ireland and Abersold in California. The two met face to face just once during this process, in New York City, when each was there for non-business related reasons. They discussed the Agreement at that time, but did not finalize any of its terms. The Agreement was signed by Cotter in Ireland and Abersold in California (Abersold signed last). Cotter has visited California only once in her lifetime, on vacation (to hike Half Dome in Yosemite National Park, and visit Sharon Kulko Horn, the mother of a close friend, in San Francisco), and she did not conduct any SDE related business during that visit.

California's long-arm statute provides for personal jurisdiction to the limits of the Due Process Clause of the United States constitution.

How should the District Court rule on the Defendants' Motion to Dismiss for Lack of Personal Jurisdiction?

**Question Two
(40 %)**

*Dexter Jones,
Plaintiff,*

v.

*Alfred Lobo, Ronald Thomas, and Most Worshipful Grand Lodge of Free and Accepted Masons of Connecticut,
Defendants.*

United States District Court for the District of Connecticut

Plaintiff Dexter Jones is a United States citizen and a resident of Wilbraham, Massachusetts. For the past fifteen years he has been a member of The Widow's Son Lodge of the Fraternal Order of Freemasons (WSL), an unincorporated association located in New Haven, Connecticut. Defendant Most Worshipful Grand Lodge of Free and Accepted Masons of Connecticut (MWGL), located in Hartford, is the headquarters Lodge for the Fraternal Order of Freemasons in the State of Connecticut. It must approve all disciplinary action by local lodges before it is final and binding. Defendant Alfred Lobo is a United States Citizen, a resident of Woonsocket, Rhode Island, and the Worshipful Master of WSL. Defendant Ronald Thomas is a United States citizen, a resident of Poughkeepsie, New York, and the Worshipful Grand Master of MWGL. (A Worshipful Master is the President of a Masonic lodge and the only person authorized to speak and act on behalf of the lodge.) Jones, Lobo and Thomas all lived in Connecticut until a little over a year ago, when each relocated out of state for work. Connecticut residency is an initial but not continuing requirement for membership in Connecticut Freemasonry.

Jones filed the present lawsuit in response to a written notice he received from the Defendants on March 27, 2012, stating that he had been "suspended from Masonic membership, pending formal charges and trial, for posting a joke about Donald Trump on his (i.e., Jones') personal Facebook page. In his Complaint, Jones states three claims: 1) that the suspension violates 42 U.S.C. § 1983¹ because it deprives him of his right to free speech under the United States Constitution; 2) that it violates a Connecticut statute prohibiting the use of social media data to deprive Connecticut citizens of their federal or state constitutional rights; and 3) that it violates a Connecticut statute prohibiting tortious interference with business relations.

In an affidavit accompanying his Complaint, Jones asserts that the suspension has caused him to miss "the companionship and *joie de vivre* of Masonic life, embodied in the countless dinners, parties, and other gatherings made possible by membership." He describes the suspension as "the Masonic equivalent of capital punishment," since it prohibits all other Masons from having any contact with him. Before the suspension, he alleges, he received weekly requests from members of Masonic lodges throughout New York and New England to cater parties, weddings, and other such events, but since the suspension those requests have stopped altogether, and his overall catering business has declined by seventy percent. (His adjusted gross income from the business has averaged one hundred thousand dollars a year for the past five years.) He asks the Court to order the defendants to restore his membership in WSL, to compensate him for the lost revenue to his catering business, and to award him punitive damages. The Defendants have moved to dismiss the action for lack of subject matter jurisdiction.

¹ 42 U.S.C. § 1983 provides, in relevant part, "Every person who, under color of any statute . . . of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured in an action at law . . ." [A "person" under the statute includes an organization.]

How should the District Court rule on the defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction?

**Question Three
(40 %)**

*Alice Denholm Burke,
Appellant*

v.

*Air Serv International, Inc., and U.S. Protections and Investigations, Inc.,
Appellees.*

United States Court of Appeals for the District of Columbia Circuit

Plaintiff Alice Burke, a former British soldier, was severely wounded in an ambush while riding in a helicopter in Afghanistan. Burke filed the present diversity action in the United States District Court for the District of Columbia against the American

transportation and construction companies that furnished the helicopter and contracted for her security services, alleging that the two companies negligently failed to provide the safety equipment and armor needed for her assignment. (Assume no subject matter or personal jurisdiction problems in the case.)

To prevail on a negligence claim under D.C. law, a Plaintiff must prove the applicable standard of care, a deviation from that standard by the Defendant, and a causal relationship between that deviation and the Plaintiff's injury. Additionally, if the behavior alleged to be negligent is "so distinctly related to some occupation as to be beyond the ken of the average layperson," D.C. case law requires a Plaintiff to prove the standard of care with expert testimony. Failure to provide such testimony is grounds for the entry of a judgment as a matter of law against the Plaintiff. All parties agree that the safety precautions needed in war zone is a subject "beyond the ken of the average layperson."

Burke failed to provide expert testimony to establish the standard of care during her trial and, as a result, the District Court, applying the D.C. expert testimony rule, entered a judgment as a matter of law against her. On appeal, she argues that the D.C. rule does not apply in federal court, both because it conflicts with Federal Rule of Evidence 702 and because it is not a substantive "rule of decision" under the *Erie/Hanna* doctrine. She asks this Court to reverse the District Court's decision and enter a judgment on the merits of her claim in her favor. (Assume that Burke proved the latter two elements of her negligence claim.)

Federal Rule of Evidence 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion if:

- (a) the expert's specialized knowledge will help the trier of fact to understand the evidence;*
- (b) the testimony is based on sufficient facts or data;*
- (c) the testimony is the product of reliable principles and methods; and*
- (d) the expert has reliably applied the principles and methods to the facts of the case.*

Rule 702 was enacted under the authority of the Rules Enabling Act and has the same status as a Federal Rule of Civil Procedure for *Erie/Hanna* purposes. It is the only Federal Rule of Evidence regulating the use of expert testimony in federal court. There also is no federal statute or common law rule governing the issue.

How Should the Court of Appeals rule on Burke's appeal?