CIVIL PROCEDURE
FALL 2008
PROFESSOR PERRITT

MODEL ANSWER
FINAL EXAMINATION

QUESTION I

A. Since we are in federal court we must follow Fed.R.Civ.P. 4 for service of process. Rule 4(e)(1) authorizes service of process according to the law of the state in which service is made—Florida in this case. The service followed the requirements of the Florida statute, so it is valid under the federal rules. The only conceivable challenge is that the Florida statute is unconstitutional under *Mullane* and *Green v. Lindsey* because it does not provide for notice "reasonably calculated under the circumstances" to result in actual notice. The best form of notice under the *Mullane* standard is personal service as provided for in other parts of Rule 4, in the case of a corporation, "delivering a copy of the summons and of the complaint to an officer, a managing or general agent . . . ." Fed.R.Civ.P. 4(h)(1). But it certainly is not necessary to follow the requirements of Rule 4(h)(1) itself because 4(h)(2) expressly authorizes service under state law, by its reference to Rule 4(e)(1). Rule 4(h) is simply a benchmark for what definitely would be sufficient constitutionally.

   There are, therefore, two potential challenges to what we did: first, that the email was likely not to result in "delivery," and, second, that it would not reach an "officer" or "managing or general agent." The facts that the email message had nothing in the body of the message and a relatively generic subject line make it likely that it would have been screened and discarded by a spam filter in the defendant's email server, or that anyone receiving it would have been afraid to open the attachment, thinking that it was a phishing attack. These factors suggest that it might not have been "delivered." Moreover, it was addressed to a generic address, which might be managed by lower-level marketing or customer service personnel who would have disregarded it or not brought it to the attention of higher-level corporate officials or lawyers. That impairs the likelihood that it would have reached someone empowered to take appropriate actions to defend Ponte Aligatore.

   The defendant will also argue that *Mullane* requires us to exhaust other reasonably available means of service more likely to result in actual notice, such as first-class mail, or at least sending the email with a return receipt requested. Mishap has been to Ponte Aligatore, so she knows the address, or at least how to find it, so first-class mail would not have been at all burdensome.

   We would argue that Ponte Aligatore does business on the Web, which means that it has an interest in handling all emails appropriately. Also, it is headquartered in Florida, where its officers and lawyers would certainly know about the Florida

email-service statute and thus be on the alert to being served with process by email. In this day and age an email sent to a business operating through a Website is probably more likely to result in actual notice than almost anything else I can think of. So we probably can repel the attack on the constitutionality of the Florida statute.

B. Under Fed.R.Civ.P. 4(k) federal courts have personal jurisdiction to the same extent as state courts in the state in which the federal court sits. So our court has personal jurisdiction over Ponte Aligatore if an Illinois state court would. The IL long-arm statute, reproduced in the casebook, at the center of *Gray v. American Radiator*, and discussed and applied in class many times, extends personal jurisdiction over nonresidents or noncitizens, "transact[ing] any business within the State," "commi[ting] a tortious act within this State," and "making or perform[ing] any contract or promise substantially connected with this state," as to any cause of action arising from the transaction of business, commission of a tortious act, or contract. It also asserts jurisdiction on "any other basis . . . permitted . . . by the U.S. Constitution."

   So the Illinois courts—and therefore the federal court--can exercise personal jurisdiction to the extent permitted by the Fourteenth Amendment, as interpreted by the Supreme Court in *International Shoe* and its progeny. That requires us to assess the contacts Ponte Aligatore purposefully directed to Illinois and then to consider whether subsjecting it to personal jurisdiction in Illinois would comport with Fair Play and Substantial Justice.

   Ponte Aligatore intentially caused at least three contacts with Illinois: it ran the radio ad on a Chicago radio station; it operated an interactive website that allowed Illinois users to make a reservation online and commit themselves to pay by giving a credit card number; it accepted the credit charge charge from Mishap, knowing her Illinois address, thus intentionally entering into a contract with an Illinois resident, although not like the contract in *McGhee,* because it was not to be performed in the forum state. Even if Ponte Aligatore claims that it bought a block of radio ads to run all over the country and did not know that this ad would run in Chicago, the decisions of its advertising agency where to place the ads are attributable to it and thus supply Ponte Aligatore's intent to run the ad in Illinois. Now this one-time (as far as we know) ad, and this one contract surely would not be enough for general jurisdiction under *Helicopteros*—we lack the additional facts justifying general jurisdiction in *LLBean,* but we have a good argument that the controversy arose from the contacts—Mishap would not have paid money to Ponte Aligatore (the basis for the wire fraud claim) or taken her dog to Ponte Aligatore but for the ad and the website. Thus specific jurisdiction is enough.

   The "Fair Play Five" also favor the constitutionality of personal jurisdiction here. The burden on Ponte Aligatore to travel to Chicago to litigate is not particularly great. There are lots of flights from Florida into O'Hare Field, with many discount fares available, and many underemployed lawyers and law graduates in Chicago who would be delighted to represent Ponte Aligatore in federal court for a

reasonable fee. So factor one of the Fair Play Five does not particularly favor Ponte Aligatore's challenge. Under factor two, Illinois certainly has an interest in protecting its citizens from fraud and from emotional distress. Under factor three, Mishap's interest in effective relief might seem questionable because she will have to execute any IL judgment in FL against assets located there. But she should be able to define her own interests and she has done do by insisting on suing in federal court in Illinois so she herself has acted on her conviction that this factor cuts in her favor. Factor four arguably might point away from Illinois as to the negligent infliction of emotional distress ("NIED") claim because the alligator was in Florida instead of Illinois and witnesses to the incident (other than Mishap) are presumably not in Illinois. But there should not be any great difficulty in marshalling evidence to be presented in Illinois; the website, an audio recording of the radio ad, and the testimony of Mishap and her health care providers all are in Illinois anyway.

We also must show that constitutionally adequate notice of the lawsuit was given according to methods prescribed by federal law. We have done that, as discussed in the answer to Question I(A).

So we have a very strong position on personal jurisdiction.

C. Even though we surely can amend the complaint under Rule 15, either because the defendant has not filed an answer yet, or because the court will liberally grant leave to amend, joining the CEO is a very bad idea because it might negate subject matter jurisdiction over the NIED claim. Unless she joins the CEO, Mishap has a strong position that subject matter jurisdiction exists over both claims. The wire fraud claim is based on a federal statute that expressly grants a private right of action, so federal question jurisdiction exists under 28 U.S.C. § 1331. Ponte Aligatore is a citizen of Florida under 28 U.S.C. § 1332(c) because that's where it is incorporated and that's where it has its principal place of business. Mishap is a citizen of IL. So there is diverse citizenship. She should not have too much difficulty claiming damages in excess of $75,000. So diversity jurisdiction exists over the NIED claim under § 1332 unless Ponte Aligator can show a legal certainty that she cannot recover $75,000, unlikely since both fraud and NIED allow emotional distress and punitive damages.

If she joins the CEO, however, which she can do under Fed.R.Civ.P. 20 because the claim against him certainly arises from the same series of occurances that give rise to the claim against Ponte Aligatore itself, she destroys complete diversity and would be out of luck in litigating her NIED claim in federal court unless she can establish supplemental jurisdiction under 28 U.S.C. § 1367.

Establishing supplemental jurisdiction may be problematic. Although there is a solid anchor claim—the federal question presented by her wire-fraud claim—she may have difficulty showing that the NIED claim and the wire-fraud claim arise from a common nucleus of operative fact. The fraud occurred through the statements of fact made on the website and in the radio ad. The emotional distress

arose later, when her dog was eaten by the alligator. The elements of the two legal theories are completely different. So Ponte Aligatore will argue that the transactional similarity required for supplemental jurisdiction does not exist. On the other hand, the fraud presumably was the consumption of the dog contrary to the statement that guests, and impliedly their pets, would be safe and secure, and the emotional distress occurred only because she was misled into taking her dog to Cedar Key. So she has a reasonably persuasive argument that the two claims are unified by some common factual elements. 1367(b) does not come into play because this is not a case founded solely on diversity jurisdiction.

Still, why risk putting everything on this argument? Leave the CEO out of it and be safe with subject matter jurisdiction.

D. While the quoted language from her complaint probably satisfied the notice-pleading standard of Fed.R.Civ.P. 8 (we don't have enough of the complaint to know if she numbered the paragraphs pursuand to Rule 10 or pleaded jurisdiction and claimed relief pursuant to Rule 8), Fed.R.Civ.P. 9 requires that fraud be pleaded with particularity. It essentially imposes a fact pleading requirement on her claim for violation of the wire fraud statute. She should plead, in separate numbered paragraphs the specific facts corresponding to each element of her wire fraud claim:

   1. The defendant made statements on the website and in the radio ad that guests and their pets would be safe if they came to the resort

   2. They knew these statements were false when they made them because they knew an alligator lived in or near the fish pond and that it found small dogs appetizing

   3. They made the statements for the purpose of inducing potential guests such as the plaintiff to pay to come to their resort

   4. The plaintiff relied on the statements when she selected the resort, paid her money, and went there with her dog

   5. She suffered detriment when her dog was killed in front of her eyes, "the pain and terror she always feels."

   A Rule 12(e) motion by the defendant for a more definite statement is possible, but such motions are disfavored and would not gain the defendant much. Far more likely is a Rule 12(b)(6)/12(c) motion to dismiss the fraud claim as not stating a claim upon which relief can be granted under the pleading rules. That would be a big problem if it is granted, as it likely would be.

E. Venue is good in the Northern District of Illinois under 28 U.S.C. § 1391. This is not a claim founded solely on diversity, so the relevant provisions are 1391(b) and 1391(c). Under 1391(b), a substantial part of the events or omissions giving rise to the fraud claim occurred in the Northern District, when she heard the radio ad,

and entered into the contract on the website. Arguably a substantial part of the NIED claim occurred in the Northern District as well because that is where she suffers the emotional distress. Even if Ponte Aligatore argues successfully that the real center of gravity for the NIED claim is in Florida because that's where the alligator made his meal of the dog, it does not matter because 1391(c) makes Ponte Aligatore a resident of Illinois for venue purposes because personal jurisdiction exists over it here (see answer to Question I(A)), and 1391(b) authorizes venue where all of the defendants "reside."

QUESTION II

A. I am not entitled to "suspend discovery." Doing so violates the scheduling order under Fed.R.Civ.P. 16 and potentially subjects our side to sanctions under Rules 16 and 37. The "judge would be uptight, really uptight," if I pursue this course of action. Moreover, we are the plaintiff, and for our lawsuit do succeed discovery has to proceed. A far better course of action is to discuss with opposing counsel the basis for his objection—do it on the record in the deposition, pointing out that Rule 30 permits him to put an objection as to relevancy on the record, but not to instruct his client not to answer. I would tell him that if he persists in telling his client not to answer (if he has done so; it is not clear from the question) or if his client continues to refuse to answer, I will move for an order to compel under Rule 37. If I am forced to seek an order to compel, the deposition transcript will then show that I have satisfied my obligation under Rule 37 to seek resolution of the dispute before going to the court. I am confident of my entitlement to a Rule 37 order and that the court will impose the costs of seeking it, including attorneys fees, on the other side.

B. In my motion for summary judgment, I would try to have the blank response to the interrogatory to be taken as an admission that no factors other than the audition were allowable in casting the role. This would leave me in a strong position that there is no disputed issue of fact on the terms of the contract. Then if I could show no issue of disputed fact exists that my client performed the best audition, I would be entitled to judgment. The problem, however, is that a blank interrogatory response probably is not an admission. Rule 36 clearly says that failure to respond to a Request for Admission is an admission, and contrasts with Rule 33 relating to interrogatories, in that respect. Rule 33 also contracts with Rule 8 regarding failure to respond to allegations in a responsive pleading. So I probably need to do more to set up my summary judgment motion. The best course of action is immediately to send a Request for Admission with essentially the same content as the interrogatory. Then, if the defendant does not answer it, I can use it as an admission in the summary judgment proceeding.

   An alternative course of action is to move for a Rule 37 order to compel an answer—after seeking resolution informally with the other side, as we are required to do before seeking Rule 37 relief. Then if the other side persists in not answering the interrogatory, sanctions in the form of taking the question as admitted are available under Rule 37.

If I don't do either of these things, I can still argue that the defendant has the burden of showing disputed issues of material fact to avoid summary judgement. I gave him the opportunity to do so in this interrogatory, and he failed to use the opportunity. But that gives me no ammunition is he submits an affidavit or deposition testimony showing other elements for the casting decision—such as Schoenberg's distinguished name.

C. I have to disclose the name of Flystein, if requested, but his opinion and what he said to me are work product protected by Rule 26(b) (4). I consulted him in anticipation of litigation. I certainly do not intend to use him as a witness, given his negative opinion of my client's ability. Rule 26(b)(4)(B) expressly excludes from discovery through interrogatories or depositions the "opinions" of an expert retained in anticipation of litigation or to prepare for trial, unless the requester makes a showing of extraordinary need. Given the large number of people in Chicagoland who could give an opinion about Pitt's singing ability, no such need can be established.

D. I'm probably not going to be able to get a Rule 35 order compelling an examination of Schoenberg. She is not a party and merely because she was cast in the Bennaza role hardly puts her "under the control" of the defendant. Moreover, it is not clear that anyone I would retain to evaluate her singing would be a licensed or certified examiner within the scope of Rule 35 because I am unaware of any licensing or accrediting procedure for music critics. But I probably can force her to do a singing deposition. I would notice her deposition under Rule 30 and compel her to attend with a Rule 45 subpoena.

Then, anticipating a likely objection to a singing deposition, I would sneak up on the singing with the following series of questions:

Q. Did you audition for the role of Bennaza?

[anticipated A]. Yes

Q. Did you sing and perform well in that audition?

[anticipated A]. Yes

Q. Are you confident that you could replicate that good performance?

[anticipated A]. Yes

Q. I have the sheet music here. Would you please sing the song?

If she answers any of the first three questions in the negative, I have useful evidence to establish breach of contract. If she refused to sing, I would ask for the basis of her refusal. If she says that she is embarrassed. I would ask her how she could sing on stage in front of an audience. If she says she can't sing the song

without preparation, I would ask her if she did not prepare for the performance, and so on.

Alternatively, we would file a Rule 34 Request for Production of any audio or video recordings of the audition of Schoenberg or of her performance, hoping that these would show that she does not sing or perform well. Or, we could just go to a performance and record it.

The only objection I am worried about is that the defendant would say that we are trying to evade the limitations in Rule 35 with the singing deposition. It would be like, they would argue, subpoenaing a non-party to a deposition at which a physician is present and then asking them to strip and undergo an physical examination. But I think the course of questioning I outline above would immunize us from that challenge. The threat to privacy from asking a performer to sing is far less than the threat to privacy from a physical or mental examination.