

MONTEREY COLLEGE OF LAW  
CIVIL PROCEDURE – <sup>KCCL</sup>SECTION 2

Final Examination

Spring 2022

Prof. L. Peake

Instructions:

There are three (3) questions in this examination. You will be given three (3) hours to complete the examination.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and facts upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other. Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles; instead, try to demonstrate your proficiency in using and applying them. If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions and discuss all points thoroughly. Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Civil Procedure Final Exam (MCL-SEC2 & KCL)

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QUESTION ONE:

Warmer Music recording artist Ned Sheartan, at the impetus and urging of fellow Warmer recording artist Dewy Lipgloss, demanded that Warmer not release his songs to digital service providers (including individual track downloads and streams) in State F due to their enactment of a law disallowing discussion of the word "Ginger" in State F public schools, with Sheartan asserting that such release would violate his songs Federal copyright protection and terms of his recording contract with Warmer. When Warmer refused the demand, Sheartan refused to finish recording his contractually obligated ten songs for Warmer, and filed a properly venued Federal class action suit on behalf of himself and all other Warmer recording artists (believed by Sheartan to total over one hundred artists) asserting injunctive relief and damage claims for copyright violation and contract breach against Warmer.

Warmer filed a counterclaim against Sheartan for Sheartan's refusal to complete the recording of the required ten songs, and impleaded Dewy Lipgloss by way of third party complaint, with Warmer's third party complaint claiming tortious interference with contractual relations and indemnification for Warmer's anticipated monetary damages caused by Sheartan's refusal to fulfill his recording contract.

1. Warmer opposed certification of the class action.
2. Sheartan moved to dismiss Warmer's counterclaim.
3. Dewy Lipgloss moved to dismiss the third party complaint in impleader.

How should the Federal court rule on each of the above three issues?

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## QUESTION TWO

Assume and facts from Question One, and also:

After hearing a rumor that Lipgloss was urging Sheartan to file suit against Warmer Music following Warmer's refusal of Sheartan's demand that his recordings not be released in State F, Bree Marquee, manager of Warmer's Legal Department, obtained statements at the request of Warmer's attorney, Jules Pettibone, of Warmer's co-CEOs Tim Carson and Baron Payback regarding why Lipgloss would care whether Sheartan's recordings were released in State F, Lipgloss not identifying as "ginger". Bree recorded the statements on her cell phone and also prepared summaries of the statements for Jules. After Sheartan filed his Federal court suit, Sheartan demanded that Warmer produce the recordings and Bree's summaries. Warmer refused the discovery demand for production of documents, even though Sheartan knew that Carson had been transferred by Warmer to the town of Soundgarden in Tristan da Cunha, ostensibly to manage its emerging music market, and thus would not be available for deposition or trial. After unsuccessful meet and confer efforts to resolve the discovery dispute, Sheartan filed a timely motion to compel production of both the recorded and summarized statements.

How should the court rule on Sheartan's motion?

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### QUESTION THREE

Assume all facts from Questions One and Two, and:

After initially timely requesting a jury trial, Plaintiff Sheartan moved to withdraw such request at the final pretrial conference, asserting that both his complaint and Warmer's third party complaint sought equitable relief for which no right of jury trial existed. Warmer objected. Federal court judge Mariel Stamara denied Sheartan's motion, and ruled that the jury would decide all issues raised in both Sheartan's complaint and Warmer's third party complaint.

Judge Stamara also ruled that the jury would be composed of twelve jurors with a favorable decision of 9-3 being required. Warmer objected to such ruling.

Judge Stamara further ruled that Warmer and Lipgloss, both being on the "defense side" of the action, constituted "one side" such that Warmer and Lipgloss had to share their three peremptory challenges. Both Warmer and Lipgloss objected.

Did the Court (Judge Stamara) rule correctly on each of the above issues?

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**Question #1 Answer: KCCL and MCL**

**Question ONE ANSWER:**

*Issue On: Whether the Federal Court should certify Plaintiff's Class Action*

*Rule: FRCP 23 applies (not Class Action Fairness Act)*

*Analysis*

*-Numerosity is met with over one hundred potential class member*

*-Common questions of law and fact met?*

*Pro: Affects all Warner artists, potentially, who have songs released in State F and contracts with provisions affecting copyright and distribution by Warner*

*; Con: Sheartan facts concern Warner artists who identify as "ginger" and thus class action lacks commonality factually, even if copyright and distribution terms in Warner's artist contracts are "common"*

*Conclusion: Court would appear to more likely find that FRCP 23 commonality is lacking on this subissue.*

*-Typicality would not appear to exist between self identified "ginger" Sheartan with other Warner artists, who may not so self identify, and may not have the music distributed in State F, nor have contractual provisions the same as those of Sheartan as to copyright and distribution terms.*

*-Named representative fairly and adequately representing interests of absent members? Would not appear to be met absent addition of named class representative(s) whose interests cover issues not common with those of Sheartan*

*-Risk of inconsistent result or injunctive/DRA relief or common questions predominate over individual issues? Would not appear to be met; appears that Sheartan's interests are individual, and his request for injunctive relief also appears to address individual interests, not interests common to all Warner contract artists.*

*Conclusion: Most appropriately, Court would not certify suit as a class action.*

*Issue Two: Whether Court should dismiss Warner's counterclaim*

*Rule: A compulsory counterclaim may be filed by any party against an opposing party when its facts arise from the same transaction or occurrence as the underlying claim(s) raised by the opposing party, with the Federal court having supplemental jurisdiction over the compulsory counterclaim even in the absence of an independent basis for Federal SMJ [28 USC 1367(a)]. A permissive counterclaim does not arise from the same transaction or occurrence, and a permissive counterclaim must have independent SMJ in order to avoid being dismissed under FRCP 12(b)(1); FRCP 13.*

*Analysis) Plaintiff Sheartan's claim is for injunctive relief and violation by Defendant Warner of his copyright and contract rights concerning song distribution. Warner's counterclaim is for Sheartan's refusal to complete ten required songs under the same contract. This raises the tricky issue as to whether the counterclaim "arises out of" the same transaction as Plaintiff's claims. Arguments can be made both pro and con on this issue (which is the intention of the fact pattern: to present a challenge to the students on this distinction).*

*Conclusion: More likely than not that Warner's counterclaim is compulsory as arising from the same transaction (recording contract/retaliation by Plaintiff by refusing to finish recording ten songs) and thus denying Sheartan's motion to dismiss.*

*Issue Theme: Whether the Court should dismiss Warner's third party complaint*

*Rule: A defendant may implead a third party who may be liable for all or part of the Plaintiff's claims against the impleading defendant. FRCP 14.*

*Analysis! Warner has sought both indemnification AND damages against Lipgloss (for tortious interference with contractual relations). The tort cause of action can be argued to lack SMJ in Federal court, absent diversity and amount in controversy being present. Argument might be made that the essence/gravamen of the tort claim sounds in indemnity and thus ought not be dismissed. The third party complaint by Warner against Lipgloss for indemnity would appear to be compliant with FRCP 14*

*Conclusion: More likely than not, the Federal court would allow the third party comp*

*Civil Procedure 2022 Final Exam Question #2 Answer: KCCL and MCL*

*QUESTION TWO ANSWER:*

*Whether! the Court should compel production of defendant's statements*

*Rule: A party is entitled to production of documents under FRCP 34 that are nonprivileged, relevant, and proportional to the needs of the case.*

*Analysis!:*

*-The two statements were taken at the direction of Warmer's attorney (Jules) and would potentially constitute attorney work product.*

*-Because the statements are taken to two co-CEOs of Warmer (Carson and Payback), they arguably also constitute attorney client privilege information.*

*-The statements were taken before suit was filed. IF taken in anticipation of litigation, the statements are nonetheless potentially protected material (as work product and/or attorney client material). FRCP 26(b)*

*-The recorded statement of Baron Payback would appear to be protected as both work product and attorney client privilege, but the unavailability of Carson raises the issue of potential for production of the recording of his statement as "work product" under a showing by Plaintiff Sheartan of "substantial need" for the statement. FRCP 26(b).*

*-However, Carson's statement, if attorney client communication, is not subject to production/disclosure.*

*-The summaries by Bree are also arguably work product if considered to result from her mental impressions/conclusions of the information obtained from Payback and Carson. FRCP 26(b)(3)(B).*

*-Warmer was required to timely interpose any and all objections to the production of the statements in its response to Sheartan's FRCP 34 demand: i.e., 30 days, or the objections are waived. FRCP (b)(2).*

*Conclusion: The Court should properly deny the demand for production of the statements as to which timely objection was made as improperly calling for material that constituted both attorney client privilege and work product.*

*Civil Procedure 2022 Final Exam Question #3 Answer: KCCL and MCL*

*QUESTION THREE ANSWER:*

*Issue One: Did the court correctly deny Plaintiffs motion to withdraw jury trial request and rule that jury would decide all issues in the complaint and third party complaint*

*Rule: The Seventh Amendment and FRCP 38 provide for trial by jury of all legal (not equitable) issues as a matter of right.*

*Analysis: Here, the Plaintiff initially (and timely) requested a jury, then decided to waive jury at the pretrial conference. However, Defendant objected. Over objection the court must allow the jury trial request to stand.*

*The court here has further ordered that the jury is to hear all issues in the complaint and third party complaint. The complaint seeks both injunctive (equitable) and legal (damages for breach of contract) relief. While the court may allow an ADVISORY jury on the equitable issue of injunctive relief, the court itself must decide such issue.*

*In addition, the third party complaint sought legal (tortious interference with contractual relations monetary damages) and equitable (equitable indemnification) relief. The court must allow jury trial on the tort claim for damages, but should decide the equitable indemnification claim.*

*Conclusion: The court correctly denied Plaintiff's request for waiver of jury trial, but erred in ruling that the jury would decide both equitable and legal claims raised by the pleadings.*

*Issue Two: Whether the court correctly ruled on the jury being composed of twelve members with the verdict requiring a 9-3 vote.*

*Rule: Federal juries must be composed of between six and twelve jurors, and verdicts must be unanimous unless otherwise stipulated by all parties. FRCP 48.*

*Analysis: Here the court correctly allowed for the jury to be composed of twelve members, but incorrectly allowed a favorable vote on this suit to be decided by less than a unanimous vote as required by FRCP 48(b).*



*Conclusion: The court has erred in allowing a favorable verdict to consist of a 9-3 vote of jurors.*

*Issue Three: Whether the court correctly ruled that Warmer and Lipgloss, as defendant and third party defendant, constituted "one side" for allocation of peremptory challenges.*

*Rule: The court must allow each "side" three peremptory challenges. FRCP 47; 28 USC 1870.*

*Analysis: The court correctly set the number of peremptory challenges as three, consistent with the requirements of 28 USC section 1870.*

*However, such section also states that the court may consider several defendants (or plaintiffs) to be considered as a single party for making peremptory challenges.*

*Here, the defendant (Warmer) and the third party defendant (Lipgloss) are clearly adverse, with Warmer having both indemnification and tort claims against Lipgloss. To require such adverse parties to share peremptory challenges based upon a conclusion that they constitute "one side" would arguably constitute an abuse of the trial court's discretion in allocating challenges under section 1870.*

*Conclusion: More probably than not, it would appear the court incorrectly limited defendant Warmer and third party defendant Lipgloss to three shared peremptory challenges.*

1)

1. Class Action

**Did the court properly certify the class action?**

An identifiable class is properly certified if it is so numerous as to make joinder of all member impracticable; common questions of law or fact abound; claims and defenses of the named representative are typical of the unnamed class members; and the named representatives ensure fair and adequate representation of the interests of the unnamed members.

**Is the class identifiable?**

The court certified the class as all Warner recording artists.

The class is identifiable.

**Is numerosity met?**

Numerosity is met if joinder of all members is impracticable.

Here, the class totals over 100 members, which makes joining all of them into one lawsuit highly impracticable for all parties involved.

Numerosity is met.

**Are there common questions of law or fact?**

A common question of law or fact means that all the members of the class interest's will be able to be resolved at once.

Sheartan's claim is based on the fact that he does not want his music released in state F because they disallow the word "ginger". It is assumed that Sheartan is ginger or has some sort of relation to someone who is ginger which is why he feels so strongly about this. The unnamed members of the class might agree with Sheartan, but they also might not. Most likely there would be a large number that don't agree with him, which means that all of the interests of the class are not able to be resolved at once, so there is not a common question of law or fact. The copyright violation claim by Sheartan would not be something that all members of the class want adjudicated. The contract

breach is also unclear as to what exactly was breached by Warner, but there are probably a lot of different contract terms for all the artists, so their claims would be different than Sheartan's as well.

There are not common questions of law or fact.

**Are the claims typical of all members of the class?**

Typicality is all interests of the class will be advanced by the claim of the named representative.

With 100 different recording artists, potentially of many different genders, races, beliefs, hair colors, etc. the class's interests will most likely not be advanced by Sheartan's claim. At least some of the unnamed class members would not care if their song is played in State F, and they would lose money on residuals if their music is not played.

Sheartan's claim is not typical of all members of the class.

**Does Sheartan adequately represent the class?**

The named representative must have standing, and ensure fair and adequate representation of the class.

Sheartan does have standing to sue. He most likely could not ensure fair and adequate representation of the class, as all the recording artists most likely already have agents and personal attorney's that they would prefer to use instead of an appointed attorney by the court.

Sheartan does not adequately represent the class.

**Cure**

The court can cure lack of representation by making smaller subclasses.

If the court were to make a smaller subclass, of say all ginger recording artists at Warner, or those that had ginger family members that they felt strongly about, Sheartan might be able to continue his suit.

**Could the class be certified under Class Action Fairness Act (CAFA)?**

A class is properly certified under CAFA, if one class member is diverse from one defendant; the class totals over 100 members; and the amount in controversy is over \$5 million.

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With over 100 members in the class, it is very likely that at least one of the members is diverse in citizenship from Warmer. There are also over 100 members, so this element is met. It is unclear how much the amount in controversy is, but with over 100 class members suing on breach of contract, it is likely that the average contract breach dispute would be at least \$50,000 each, so the total would be over \$5 million.

The class would most likely be able to be certified under CAFA.

Conclusion: The court will most likely grant Warmer's opposition to certification of the class action. If there were more facts implicating CAFA, potentially it could be denied under that.

## 2. Counterclaim by Warmer

### **How should the court rule on Sheartan's motion to dismiss Warmer's counterclaim?**

Any party may file a counterclaim against any other party. A counterclaim is compulsory if it arises out of the same events or transaction as the claim in the original suit. A compulsory counterclaim gives the court supplemental jurisdiction over the claim. A counterclaim is permissive if it does not arise out of the same events or transaction as the claim in the original suit, and must show that the court has subject matter jurisdiction over the separate claim.

### **Is Warmer's counterclaim compulsory?**

Rule supra

Sheartan is a party and Warmer is a party, so they both may file counterclaims against the other if they wish to. Sheartan's original suit involves a federal question regarding copyright violation and contract breach; Warmer is counterclaiming that Sheartan is breaching the contract by not recording the songs. Warmer will argue that their counterclaim arises out of the same transaction as Sheartan, since Sheartan is suing over a breach of contract, and they are suing over the same breach.

Sheartan will argue that his original claim had to do with Warmer releasing his music in State F, and his actions after, including not recording the songs, don't have anything to do with his reason for suing. It is close, but most likely the events or transaction that arose in the original suit are not the same that Warmer is suing on.

*do not. AVOID CONTRACTIONS, PLEASE.*

Warmer's counterclaim is not compulsory

### **Is Warmer's counterclaim permissive?**

Rule supra

Since Warner's counterclaim is not compulsory it is permissive. Warner must show that their permissive counterclaim gives the court subject matter jurisdiction over it. Their counterclaim deals with breach of contract, which is a state law issue, so there is no federal question jurisdiction, and the facts do not state whether there is diversity of citizenship between Warner and Sheartan.

Warner's counterclaim is permissive.

Conclusion: Depending on diversity of citizenship, <sup>AND AIC?</sup> the court will most likely grant Sheartan's motion to dismiss Warner's counterclaim.

3. Third party complaint in impleader

**How should the court rule on Dewy's motion to dismiss the third party complaint in impleader?**

After serving an answer, a defendant may file a third party suit in impleader against a nonparty transferring all or part of the liability to them. There are two types of impleader, contribution and indemnity. Contribution is partial transfer of liability, mostly for joint tortfeasors. Indemnity is full transfer of liability to the third party.

Dewy is a Warner recording artist, so ostensibly he would be considered as part of the class that Sheartan is seeking to be certified. As a member of the class he is not a "nonparty". Warner is claiming tortious interference, which is not the original claim that Sheartan is suing on. Warner is also suing Dewy for indemnification, transferring all their liability onto him.

The court should grant Dewy's motion to dismiss the 3rd party complaint in impleader.

BOTH CLAIMS IN THIRD PARTY COMPLAINT?

90

2)

**Can the court compel production of the recordings?**

A party can object to compelled discovery of privileged information. Attorney client communications are absolutely privileged, this includes agents of an attorney who prepare information on direction of the attorney.

PROTECTION - NOT TRULY A "PRIVILEGE"

Attorney work product is a qualified privilege. All thought processes, theories of the case, and impressions of the attorney are absolutely privileged. Work done in anticipation of litigation are also privileged. Work product can be compelled to be produced if a party shows substantial need of the material, and an inability to come by the material by other means without undue hardship.

Marquee was the manager of Warmer's legal department, and at the request of Warmer's attorney Pettibone, she made the recordings, so she is an agent of an attorney. Sheartan can object to this finding since Marquee is only the manager and not an attorney herself, but most likely the court will find that Marquee was an agent of Pettibone who made the recordings on the direction of an attorney. Warmer is a corporation, with co-CEO's, Carson and Payback, who would have information that Pettibone would need for trial. Since Carson and Payback are authorized to speak on behalf of Warmer, any communication they had with Pettibone or an agent of Pettibones, such as Marquee, are protected by attorney client privilege.

CLEARLY FIND

Sheartan can argue that the recordings are attorney work product and are only qualified privilege. Sheartan can argue that since Carson is now living out of the country, it would cause him undue hardship to find a way to get the information from Carson. What Carson told Marquee can be considered very important and a substantial need, as Sheartan can see what the CEO of Warmer is thinking about the lawsuit and specifically why Lipgloss wanted Sheartan to sue.

The court most likely would not compel production of the recordings.

**Can the court compel production of the summaries?**

Rule supra

Sheartan will argue that the summaries of the recordings are not the thought processes of any attorney or agent, they are simply rote copying of something someone else said. If this is true, then Marquee's recording of Carson could be compelled to be produced since Carson does not live in the country anymore, and it would cause undue hardship on Sheartan to get the same information

another way. Warmer will argue that a summary of someone's words is not the same thing as a recording, and it will show exactly how the person summarizing the words is thinking, by showing what they put in and leave out as important. This would be the thought processes of an attorney or their agent, and would be absolutely privileged.

The court will most likely not compel the production of the summaries.

3)

**(1) Did Judge Stamara correctly deny Sheartan's motion to withdraw from a jury trial?**

**Jury Trial**

A party that makes a request for a jury trial cannot withdraw that request unless all of the opposing parties agree to the request. However, if the issues are equitable, there is no jury trial permitted as all equitable issues have to be decided by the trial judge.

Here, the facts state that Sheartan initially requested a jury trial, but moved to withdraw such request at the final pretrial conference. He withdrew because both his complaint and Warmer's third party complaint sought equitable relief. Judge Stamara however denied his request and ruled that the jury would decide all issues raised. Judge Stamara incorrectly denied Sheartan's motion because juries may not decide over equitable issues, only trial judges may.

As such, Judge Stamara incorrectly denied Sheartan's motion for withdrawal of a jury trial.

**(2) Did Judge Stamara correctly rule on the composition of the jury and the decision of 9-3 being required?**

**Jury Composition**

The composition of a jury may range from 6-12 in federal courts. The verdict of the jury does not have to be unanimous if both of the parties stipulate. A judge also cannot order less an a unanimous decision as parties have to agree to it.

Here, the facts show that Judge Stamara ruled that the jury would be composed of twelve jurors with a favorable decision of 9-3 being required. The facts further show that Warmer objected to the ruling. Judge Stamara correctly ruled that the jury be composed of twelve jurors because that is within the permissible range of jurors within a federal court. However, the decision of requiring the jury be 9-3 was incorrectly ruled because that decision is up to the parties. The facts are not clear as to whether Warmer object to both the composition and decision ruling of Judge Stamara, but Warmer still objected to her ruling which shows that Warmer did not agree to the 9-3 decision being required.

As such, Judge Stamara incorrectly ruled on the 9-3 decision, but correctly ruled on the number of jurors.



**(3) Did Judge Stamara correctly rule that Warmer and Lipgloss are both "one side" and therefore had to share their peremptory challenges?**

**Peremptory Challenges**

A lawyer may exclude a prospective juror by exercising three peremptory challenges for any reason other than race or gender. However, if two parties share the same interests, the court may require the two parties to share three peremptory challenges because they are considered the same "side". A side is constituted as parties whose interests are closely aligned and consistent. However, this is a discretionary ruling and is subject to appeal as an abuse of discretion should a party feel that they were incorrectly assigned with another party.

Here, the facts state that Judge Stamara ruled that Warmer and Lipgloss constituted one side because they were both on the defense side. As such, Warmer and Lipgloss had to share their three peremptory challenges. Although Lipgloss is a recording artist of Warmer, they would not be considered the same side as Warmer is counter-suing Sheartan for Sheartan refusing to finish his recordings as stipulated by his contract, and Lipgloss may be a possible class member of Sheartan's class action. Both Warmer and Lipgloss's interests are not consistent or aligned.

As such, Judge Stamara incorrectly ruled that Warmer and Lipgloss were "one side".

\*Thanks Professor Peake! :)

**END OF EXAM**