GALVES/CIVIL PROCEDURE
2010 MID-TERM EXAM ANSWER/ANALYSIS
MEANING OF NUMERICAL GRADES

On your score sheets distributed with your exams, you have received two numerical scores/grades written across the top of your exam. The Box score/grade on the left is your total "RAW" score for the exam (your actual points received). However, that raw score is NOT your final grade. That raw score has been ADJUSTED to a final numerical score (the box/score grade on the right) for the exam for final grading purposes. Your final letter grade for the course will correspond to the ADJUSTED numerical grade (NOT the RAW score). Note that the average Raw score was 56 points, but that was adjusted so the average adjusted score (the real grade) was a "77" which according to the Pacific McGeorge grading scale translates to a low "B" as an "80" translates into a low "B+" and a "76" is a high "B-" (see standard grading scale and distribution of student scores handed out in class).

EXAM NO. (*Your Exam # Here*)

RAW SCORE	ADJUSTED QCORE
56 (average)	*77 (average)*

There are 65 RAW points possible for Part One of the exam, 27 RAW points possible for Part Two, and 18 RAW points for the Short Answer section. Adding those possible scores together, there is a total of 110 possible RAW points for the exam. Notice that there were 8 possible RAW points (5 points for Question One and 3 points for Question Two) given for overall clarity, persuasiveness organization, and creativity, that I took into account in the essay portions of the exam regarding intangible factors.

FINAL RAW SCORE

EXAM SECTIONS	POSSIBLE POINTS	YOUR POINTS
ESCAY QUESTION ONE	65	
ESSAY QUESTION TWO	27	
SHORT ANSWER SECTION	18	
TOTAL SCORE	**110**	

MODEL ANSWER AND EXAM ANALYSIS

The following answer/analysis is much more involved and detailed than I expected for your answers to be, given the more limited time and stressful conditions under which you had to complete the exam. Moreover, there are certain non-issues considered that you were not expected to address. This longer analysis is NOT a model answer and you should not consider it as such. Instead, it is designed to give you important information on what issues were raised on the exam, how they should have been/might have be addressed, and how I generally graded the exam (the raw points you received for each section and possible raw points/weight of each question/subsection). It can also serve as a general study aid for the future.

Also, please review the copy of a student answer. This exam answer is distributed to you so that you can compare how you did with how fellow a student did under actual exam conditions. Please compare this analysis that I have prepared (along with a fellow student's answer) with your own exam answer (and your corresponding score sheet) before you schedule a meeting with me in order to discuss your exam, should you wish to discuss your exam answer. Notice that on your score sheet, there are several sub-issues for which raw points were given that correspond exactly to the subheadings contained in this analysis. The exam questions are also reproduced in their entirety so that you can read the exam question before reading the corresponding analysis and so that you can refer to each question as you read.

AGAIN, THE "RAW SCORE" IS MEANINGLESS TO YOU, DO NOT CONCERN YOURSELF WITH IT. IT WAS JUST MY WAY OF ADDING UP POINTS. PLEASE PAY ATTENTION ONLY TO THE "ADJUSTED SCORE." THAT IS YOUR ACTUAL SCORE FOR THE MID-TERM AND IT ALONE WILL SERVE TO HELP CALUCULATE YOUR FINAL GRADE.

ESSAY QUESTION ONE

Phyllis has a personal "Facebook" account on which she is very active and has, at last count, 2,466 "friends" located in every state in the U.S., as well as in Europe, Asia, and Latin America. She also uses Facebook to sell used cell phones. She has sold thousands of used cell phones throughout the U.S. and Europe. Phyllis is currently living with her aunt in Sacramento, California, while she attends college at Sacramento State University. This coming summer in 2011, she will go to Europe for two years of traveling and working with the Peace Corps. Phyllis grew up and lived with her parents in Oregon before she started living with her aunt last fall in order to attend classes this academic year 2010-2011 at Sac State.

When Phyllis first arrived in Sacramento in August of 2010, she decided to sign up for a dating website called, "Dream Dates." Dream Dates is incorporated in Oregon and has its principle place of business in San Diego, California. Dream Dates has thousands of people located throughout the U.S., and the world, who have submitted dating profiles on the Dream Dates website and pay a monthly fee of $15 to use Dream Dates' matchmaking services. Dream Dates does not research any users of its services and explicitly makes no guarantees as to the fitness of any user, or as to the truth of any user's dating profile claims.

In early September, Phyllis met DuBois online using the Dream Dates online matchmaking service. She began conversing with DuBois and even met with him twice for dates in Las Vegas in October and November of this year. DuBois is a French citizen who has resided in Los Angeles, California, for the last 5 years. DuBois claimed on his Dream Date profile that he was a "Very Successful Hollywood Movie Producer and Director." However, as Phyllis soon found out, DuBois simply makes low budget, homemade, "erotic" videos in the basement of his grandmother's Los Angeles house, where he actually lives. DuBois has never made a movie that has been commercially released, and he is currently unemployed. When Phyllis met DuBois in Las Vegas for their two dates in October and November, unbeknownst to Phyllis, DuBois secretly videotaped her in her hotel room getting dressed and sleeping.

Phyllis recently has learned that DuBois is now using that footage of her in one of his "movies." He sent out a movie trailer (containing the very invasive and embarrassing footage of Phyllis) with an announcement to all of Phyllis' Facebook friends saying, "*Check out my girlfriend, Phyllis, starring in my latest movie.*"

Phyllis has sued DuBois and Dream Dates in Federal Court in the Eastern District of California. Phyllis has sued Dream Dates for negligent supervision of its site because it allowed DuBois on its site, and she has sued DuBois for posting footage of her to all of her Facebook friends which is a violation of the "Federal Privacy Act of 2010" making it a federal crime to violate someone's privacy using the internet. It has cost Phyllis $75,000 to remove all of the copies of DuBois' movie featuring her dressing/sleeping in her hotel room. DuBois has counterclaimed

against Phyllis for selling him a broken cell phone and for defamation because she has posted to all of her friends that DuBois is a "*pathetic loser and a creepy stalker.*"

When Phyllis originally signed up on the Dream Dates matchmaking site, she clicked "I agree" to the statement, "*User agrees that any lawsuit brought against Dream Dates for any purpose must be filed in State Court in California, and User also hereby agrees that Texas substantive state law will apply to all such disputes.*"

DuBois recently agreed to meet Phyllis in San Francisco for one last "date" with her. Although DuBois brought flowers as he was excited that perhaps all was forgiven and Phyllis would start dating him again, Phyllis brought a copy of her complaint against DuBois and Dream Dates and served him. Phyllis also sent a Rule 4(d) Waiver to Dream Dates' in San Diego. A receptionist signed it and sent it back to Phyllis' lawyer 70 days later after receiving it. Phyllis now wants Dream Dates to pay for the cost of service. DuBois also has decided to file both a petition to remove, and a motion to transfer, the case to state court in Arizona.

The California Long Arm Statute provides that, among other things: "*California courts will have personal jurisdiction over any business that causes injury within the state, or over any person that harms the business interests of anyone in the state.*"

FOR EACH OF THE FOLLOWING ESSAY QUESTIONS, ANALYZE THE PLAUSIBLE ARGUMENTS THAT WOULD BE PROVIDED BY EACH SIDE AND DISCUSS HOW AND WHY A JUDGE WOULD LIKELY RULE:

ESSAY QUESTION ONE

Discuss all of the plausible reasons: (1) why Phyllis' federal lawsuit can or should be dismissed or resisted by defendants; (2) whether DuBois' counterclaim should be dismissed; (3) whether DuBois' removal petition and motion to transfer the case to State Court in Arizona should be granted; and (4) whether Dream Dates must now pay for Phyllis' Service of Process of Dream Dates.

(1) MOTIONS TO DISMISS/RESIST THE LAWSUIT

I. Rule 12(b)(1) Motion for Lack of Subject Matter Jurisdiction

A. §1331 Federal Question

1. DuBois

Although the "Federal Privacy Act of 2010" statute makes it a federal CRIME to invade someone's privacy on the internet the way DuBois allegedly did to Phyllis, the federal statute is not a "CIVIL" law that can be sued upon by private individuals. There is no evidence or indication of any kind that there would be a right to bring a private *civil* action lawsuit by a private party plaintiff. Remember the need to distinguish *criminal* law from *civil* law in this "Civil Procedure" course (very few students recognized this issue). A criminal violation of this federal statute would allow only a US Attorney prosecutor to bring a criminal action against DuBois for a federal crime. But there would be no §1331 federal question jurisdiction if this is exclusively a federal crime, with no companion private right to bring a civil action. If Phyllis were to recover from DuBois for invasion of her privacy, it would have to be pursuant to STATE tort law for invasion of privacy. That would not satisfy the well-pleaded complaint rule as interpreted by courts when applying §1331. So the only way Phyllis could base her claim against DuBois on §1331 would be if a private civil action were allowed for a violation of this federal criminal statute.

2. DD

The negligent supervision of the website claim against DD is not based and could not be based on the federal privacy statute, even if that criminal statute were to allow private civil actions for damages. Phyllis' claim against DD would be STATE law tort claim for negligence in operating/supervising its web site, so the federal statute would be inapplicable, and as such, there would be no basis for §1331 federal question jurisdiction over Phyllis' claim against DD for the negligent supervision of its website.

B. §1332 Diversity

1. Citizenship

a. Phyllis

There are three domicile possibilities for Phyllis: (1) California, (2) Europe (alien), and (3) Oregon. California is the strongest candidate as Phyllis' domicile because she currently resides there (residency is the first requirement), and she goes to school there, and therefore has an apparent subjective intent to remain there for the indefinite future while she goes to college. It is true that she will be leaving to travel around Europe soon working with the Peace Corps before presumably finishing college back in California, but her European experience appears to be more like an

extended vacation, or learning excursion abroad, than it does any kind of permanent move to Europe. Besides, Europe is a continent, not a country, and citizenship for §1332 domicile purposes of an "alien" usually involves a specific country (not a continent in general) as a domicile ("citizens or subjects of a foreign country"). She does not currently reside in Europe in an country so it cannot be her domicile at this point.

Oregon is another possible domicile for Phyllis because some courts hold that a person's domicile remains their domicile until that domicile is affirmatively changed to another domicile (where BOTH the residence AND the subject intent to remain for the indefinite future are changed from the old to the new domicile). It could be that although Phyllis has changed her residence from Oregon to California, she has not made California her permanent home where she intends to stay for the indefinite future, because she is currently intending to leave for Europe for two years this coming summer. If that is the case, then until her residence also matches her intent to stay there for the indefinite future, her domicile defaults back to where it was originally, in Oregon, where she grew up and lived with her parents until she left for college in California.

However, because DD is definitely domiciled both in Oregon, where it was incorporated, and its principle place of business is definitely in California, in San Diego (where we are told, see below), and because Phyllis is not yet domiciled in Europe (because citizenship for diversity purposes is determined at the time of filing, and she has not yet moved there), diversity of citizenship would not be possible, as long as DD is in the lawsuit on the "opposite side of the v" from Phyllis.

b. <u>DuBois</u>

There are two domicile possibilities for DuBois: (1) France (alien); or (2) California (if a "Permanent Resident Alien" of California). DuBois will argue that he is domiciled in California and therefore that fact defeats any chance for diversity if Phyllis is also domiciled in California. Even if she is domiciled in Oregon, that may help her with DuBois, but not with DD (which is incorporated in Oregon). Phyllis' best hope regarding DuBois would be to argue that he is actually an alien from France, but such is hard to do when DuBois has not even resided in France for the last five years, as he has been residing in California (in his grandma's basement) and his subjective intent seems to be to remain for the indefinite future in California because he seems to think of himself as a Californian by describing himself as a "*Hollywood* director and producer," although he might just be boasting on an dating website and thus not truly revealing his authentic intentions. Still, there is no clear description of DuBois as a "permanent resident alien" in California and so there is at least a possibility that he still might be diverse from Phyllis as an alien from France (or if Phyllis is domiciled in Oregon). If so, Phyllis ought to consider not suing DD in federal court and just sue DuBois if she really wants any chance at all of being able to sue at least DuBois in federal court based on diversity.

c. <u>DD</u>

As mentioned above, there are two domiciles for DD: (1) California; and (2) Oregon, and they are both clearly the domiciles of DD by definition (there really is no room for argumentation here). As a result, DD's domicile would be both: (1) California, because that is where we are told DD's "principle place of business" is located (in San Diego); and (2) it would also be Oregon, because that is where we are told that DD was "incorporated."

d. Diversity of Citizenship Impossible.

Because the only two possible domiciles for Phyllis are either California or Oregon, as she cannot yet possibly be domiciled in Europe, then either way, Phyllis is domiciled in a state where one of the defendant's, DD, is also domiciled (incorporated in Oregon), and California, where DD is definitely domiciled (its "principle place of business"), and where the other defendant, DuBois, might also be domiciled. Even if Phyllis were somehow now considered to be domiciled in Europe (perhaps she already has her apartment set up there and is paying rent), that would not be possible if DuBois were considered a French citizen, then he too would be an alien, and there would be no diversity jurisdiction due to what would be improper alien v. alien jurisdiction at that point. But the bottom line is that there is no way there could be diversity of citizenship for this lawsuit.

2. Amount in Controversy

Even if the diversity of citizenship problem were somehow solved, or were not apparent, there would still be a potential amount in controversy issue that would additionally make the existence of diversity jurisdiction a problem.

a. DuBois

The $75,000.00 cost for Phyllis to remove the offending movie trailer from facebook, and from all of her facebook "friends'" accounts, is not enough by itself, because it would need to be at least a penny more, $75,000.01. However, Phyllis easily could plead additional damages beyond the $75,000 cost for removal of the offending movie trailer. Added to that cost would be her possible "pain and suffering" injuries (embarrassment, invasion of privacy, etc.), along with the harm to her business reputation with potentially new, or continuing, used cell phone purchaser clients on facebook. So all together, those additional claimed damages would easily put her over the $75,000 amount in controversy requirement, at least with respect to her claim against DuBois.

b. DD

It is unclear how much the alleged damage Phyllis would claim against DD, although if the total damage to Phyllis were over $150,000, then she could possibly divide it equally between DuBois and DD. But even if it were not that much, whatever it would be, Phyllis would argue that the amount of damages alleged

against DD should simply be aggregated with the damages to her allegedly caused by DuBois, because DD is responsible for "introducing" Phyllis to DuBois.

However, DD might have a good argument that the negligence claim against it is not over the $75,000 amount. Also, the negligence claim against DD is really separate and apart from the claim against DuBois because it is for a completely different kind of tort such that it should not be aggregated with the claim against DuBois. Moreover, DD's position in the litigation is actually adversarial to DuBois and therefore DD wants to distance itself as far as possible from DuBois, so the claims against them should not be aggregated as though they are co-defendants against Phyllis as "allies."

A court would likely find that the claims should be aggregated as there are at least somewhat related and the damages allegedly caused by DuBois would never have even been possible if it were not for DD first facilitating Phyllis and DuBois' meeting in the first place. The claims seem to come out of the same set of operative facts.

C. §1367 Supplemental Jurisdiction for the Claim against DD

Provided there is §1331 federal question jurisdiction for Phyllis' claim against D (which may not be possible, because it is a federal CRIMINAL statute), but if a private *civil* action were allowed by the statute, then a lack of diversity claim against DuBois and DD would be irrelevant. However, there would still need to be some basis for subject-matter jurisdiction for Phyllis' negligent supervision claim against DD. Recall that her claim against DD is a state law negligence claim, and there appears to be a lack of diversity, and no federal question basis for it. However, Phyllis would have a good argument to get §1367supplemental jurisdiction over the claim against DD, even though there would not otherwise be diversity or federal question jurisdiction for that claim.

1. §1367(a) – Same Case or Controversy

The claim against DD involves negligence for allowing the likes of DuBois on the site because DD allowed DuBois on the site without checking him out, or his claims on his profile made to potential dates, which allowed him to be on the site, to meet Phyllis, to make his false claims to her, and then eventually to harm Phyllis, so the claim against DD would fit within the same case or controversy as the (federal) claim against DuBois. DD might argue that although Phyllis met DuBois through DD, what DuBois did to Phyllis at that point really had nothing to do with DD allowing DuBois simply to be on the DD website. However, because the claim stems from Phyllis' original meeting and dating of DuBois, a court probably would rule that the claim is close enough to arise out of the same case or controversy.

2. §1367(b) – But No Destruction of Diversity

This provision would be inapplicable because the main claim for which there possibly could be federal subject-matter jurisdiction in the first place would have to be based on federal question – Phyllis' invasion of privacy claim against DuBois – because diversity would not even exist. Thus, it would not matter if there would be no diversity between Phyllis and DD because the main claim by Phyllis against DuBois is not based on diversity to begin with.

3. §1367(c) – Discretion to Dismiss Anyway

There appears to be no discretionary reason to dismiss the supplemental claim against DD, even if there would be supplemental jurisdiction for it. First, the claim against DD is a pretty straight forward negligent supervision and operation of a dating website claim that does not appear to involve overly "novel or complex" state law that would be too difficult for a federal judge to handle or understand. Next, the case is mostly about DuBois' tort injury of Phyllis, whereas the claim against DD is subsidiary to it, so the claim against DD would in no way "predominate" over the claim against DuBois. If anything, it is the claim against DuBois that would predominate in this lawsuit. However, there is a likelihood that the federal invasion of privacy claim against DuBois would be dismissed fairly early on in the case (as there appears to be no diversity or federal question for it), and if so, the judge might dismiss the claim against DD as well as a discretionary matter, but much would depend on how early on in the case Phylllis' invasion of privacy claim against DuBois would be dismissed. Conceivably, if the main claim against DuBois would not get dismissed until right before trial, the federal court might allow the state law claim against DD to continue in federal court, although given all of the problems with the case, that scenario seems unlikely. Finally, there appears to be no other "compelling reason" to dismiss the case.

II. Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction.

This motion would have to be raised in the defendants' first responsive pleading in order not to be waived, certainly before they made other motions or filed counterclaims, etc. However, if timely filed, it is highly unlikely that either defendant would not be subject to personal jurisdiction in California for the reasons set forth below. Of course, there is personal jurisdiction over a plaintiff, so Phyllis would be subject to the court's personal jurisdiction over her based on consent, for deciding to file the lawsuit in the first place.

A. Jurisdictional/Long-Arm Statute – CA

The long-arm statute of California would be applicable because we are in federal court in the Eastern District of California, and under Rule 4(k)(1)(A), the federal court is instructed to apply the long-arm statute of the state in which it sits in order to determine personal jurisdiction in federal court which, which was an outgrowth of the *Erie* concern to remove incentives which would otherwise promote forum shopping. Note that the scope of California's actual long-arm statute is much broader than this and goes to the extent of the due process clause. However, you are to apply the facts as given in the exam.

1. DuBois

DuBois would argue that he does not fall within the clear terms of statute because he is not a "business" as set forth in the statute. Instead, he is simply unemployed, he has never released a movie commercially, and he lives with his grandma in her basement. Plaintiff would argue that just because DuBois is not a "*successful*" business, does not mean that he is still not considered a "business" within the broad meaning of that term. DuBois also may be estopped from claiming otherwise in light of his fraudulent statement to Phyllis and others on the DD website that he was a "*very successful* Hollywood Movie producer and director," which seems to imply a business of some sort, but DuBois would argue that just because he embellished or was mistaken on his dating profile does not mean that he actually now falls within the statute. A judge would probably find that DuBois is not a "business" within the meaning of the statute given that he is unemployed and makes no money and is really more of a delusional character who made exaggerated claims than anything else.

However, even if DuBois is not considered to be a "business" under the statute, Phyllis would have a good argument that he is still a "person" that harmed "the business interests of anyone [here, Phyllis] in the state [in California]." Phyllis could argue that DuBois' actions harmed her reputation among all of her "friends" on facebook. DuBois caused Phyllis harm in the state (using the "effects test" *Calder/Jones* cases cited in *Pavlovich*) as Phyllis lives and works in California and some of her facebook friends are from California and so the effects of the tort were felt where she lives.

DuBois would argue that if he harmed Phyllis, it was only personal to her as an individual person, but not as a "business," as required by the statute. However, Phyllis sells used cell phones on facebook and her 2,466 "friends" probably are not all really personal friends, but many of them are really more future and potential customer and business interests. Much would depend on the actual make up of her "friends" but it is hard to imagine that she has that many close, personal (non-business, customer only) friends and that they are not really potential and/or existing used cell phone customers, but we are not provided with that specific information.

DuBois might argue that there is jurisdiction only over claims that he harmed her business interests for economic business losses purposes, but personal invasion of privacy injuries do not fall within the long-arm statute. The court probably would not separate the claims this way and would instead find that DuBois fits within the statute in general because the legislature probably did not intend for California state courts to be unable to exercise jurisdiction over people alleged to have done what Dubois allegedly did to Phyllis. [Note: Again, although the real CA long-arm statute is very broad and goes to the full extent of the constitutional minimum contacts fairness test, the exam gave you this different instruction and assumption so you were to apply the statute as set forth in the facts of the exam. On the California bar exam sometimes you are given incomplete or incorrect law and are asked to apply that law, not to apply actual or correct law].

2. DD

DD would argue that it is not a "person" within the meaning of the term within the statute, but is instead a corporation/"business," so as a "business," under the statute, it would have had to have caused injury IN the state (in CA). DD would argue that to the extent it caused any injury at all, it was not IN the state of California, but it was merely in cyber-space on the DD website. However, Phyllis would argue that there was an actual injury in California to Phyllis, because that is where she lives and goes to school, and that is where at least her California-based facebook friends are located. Moreover, DD's negligent supervision of the site took place in San Diego, California, DD's principle place of business, where it presumably would have been supervising the website, not simply in "cyber-space."

B. Constitutional Due Process Fairness Test – Minimum Contacts

1. Traditional Bases

a. Presence – DuBois

i. Brennan v. Scalia (Burnham) Issue

Phyllis would argue that DuBois was physically present within the state when he was served with process and so that satisfies both Scalia's test (physical presence only) and Brennan's test (minimum contacts), because although DuBois was up in San Francisco only for one night, he actually lives in California with his grandma in Los Angeles. So although DuBois may have been "tricked" to go to San Francisco, he was already here in California of his own volition to begin with, and so when he left back for "home," he still remained in California (San Diego). The important point is that DuBois was never "tricked" to come to California, he was already in California. This was really a "red-hearing" issue, DuBois was never tricked or coerced into crossing a state border.

ii. Service Done Incorrectly, So Presence Impossible

DuBois could argue that under Rule 4(e), service has to be executed by a NON-party over the age of 18. The problem is that Phyllis herself, the plaintiff, served DuBois on their last "date" in San Francisco. So even though DuBois was physically in California when that improper service happened, there was no real legal service accomplished because Phyllis' service of DuBois was not executed properly. Another problem was that Phyllis only brought a copy of her complaint, but she failed to bring the summons with her and serve that as well which is necessary. So service was not executed properly for that reason as well. Although there might otherwise be jurisdiction over DuBois based on service had it been executed properly, it would be impossible to have presence personal jurisdiction over DuBois based on Phyllis' *failed* attempt to serve him correctly. In short, he was never, and has never been, legally served.

b. Domicile – DuBois and DD

There would be clear general jurisdiction over DD because we are told that its principle place of business is in San Diego, California. DuBois also appears to be domiciled in California (he has lived in LA with his grandmother for the last five years, and he has held himself out as "Hollywood Producer and Director" on the DD website), even though he is also originally from France, and at least politically, is a French citizen.

c. Consent – DD's Argument

DD will argue that Phyllis, by clicking "I Agree," cannot now sue DD in federal court in Sacramento because the she previously consented to sue DD only in state court in San Diego. However, this is not really a personal jurisdiction issue because there is personal jurisdiction over all of the parties in the State of California (consent and domicile, as well as other minimum contacts in California), so DD's consent argument is at most, a venue issue that Phyllis has sued in the wrong venue/wrong court in California, not an argument that the state of California (i.e., the federal court in California applying the state long-arm statute in which the federal court sits – Rule 4(K)(1)(A)) lacks personal jurisdiction over DD. However, Phyllis certainly can use the agreement against DD to argue that DD is clearly subject to jurisdiction in California because it required Phyllis to "agree" (presumably with DD) that California would be the proper place to sue, as having personal jurisdiction over the parties – Phyllis AND DD.

2. Case-By-Case Analysis

a. General Jurisdiction

i. DuBois

DuBois is unemployed, so he is not really a "successful" Hollywood producer and director and he has never sold a movie or apparently has ever made any money or ever had a job in California, so he really has no business contacts in California that are substantial and pervasive, although he lives there. Still, he lives there, and unless he gets all of his money from his grandma, he is probably getting some kind of assistance from the state, plus he benefits from living in the state and benefits from being able to take advantage of state protections (police, fire, emergency, education, etc.). A judge would likely find that it would be fair to exercise jurisdiction over DuBois on any claim brought against him in a California court, regardless of how related or unrelated that claim may be to DuBois substantial and pervasive contacts with California.

ii. DD

There is probably general jurisdiction over DD in California based on the number of sales and the large amount of business it does in California – DD probably has substantial and pervasive contacts based on many California "Dream Date" members each paying $15 per month, from whom it makes money and is obviously aware of the fact that these customers live in California. There is also general jurisdiction based on its domicile/principle place of business being in California (see above).

b. Specific Jurisdiction over Each of the Claims

i. DuBois – Invasion of Privacy.

Phyllis could argue that the harm that DuBois caused her in California is highly related to this lawsuit and, using the "Effects Test", her reputation and privacy was hurt where she is, here in California. Also, the harm which was felt was done to her in California as it was done to her through her many California facebook friends. DuBois might argue that because many of her friends are outside the State of California and even outside the country, that when they viewed the movie trailer they were not "in" California, but their own states and/or countries, so at least some of the harm and damage did not actually take place in California. This is a tough issue because the claim is for the general harm but does not break it down to the various localities (specific states, and countries) where it might be thought to actually transpire. Because DuBois has so many other contacts with California, and perhaps there is even general jurisdiction over DuBois, this becomes a non-issue; however, it would be a more difficult case if this were the only one contact DuBois had with the State of California.

ii. DD – Negligent Supervision

Similarly, it is difficult to say "where" the harm took place—was it where DuBois harmed Phyllis with the movie trailer (all 50 states), or was it where DD supervised its site (in California)? Still, because DD's principle place of business is located in California, Phyllis has a strong argument that the alleged negligent supervision, if it took place anywhere, took place in San Diego, California. It is possible to use a stream of commerce argument to connect DD, but DD did not sell a product that harmed Phyllis, DD merely provided a place for DuBois and Phyllis to meet (the website).

c. Other Considerations

i. Purposeful Availament

Both DuBois and DD appear to have purposefully availed themselves in California in many ways such as living there and having a principle place of business there, by dealing with Phyllis, who is a resident and probably domiciled in California, by taking advantage of state services. So they both have clearly voluntarily connected with California and their activities, especially regarding Phyllis, a California resident, show it was foreseeable that they could get sued there based on their activity.

ii. Convenience/State's Interest

The state has a strong interest in providing a forum for its residents who are harmed here, even if through the internet, and because the defendants both live or are based in California the convenience test has no application (it would have to be used with respect to a venue or transfer issue only).

iii. Reasonableness

This is a non-issue as the facts of this case are very clearly different than those of *Asahi* where the concept of reasonableness was first used as a basis to deny jurisdiction even if technically minimum contacts were present.

III. Do Nothing and Then Do a Collateral Attack Whenever Phyllis Attempts to Enforce the Default Judgment Against the Defendants

This would be a very bad idea for the defendants. It would be far too risky for the defendants because there definitely would be personal jurisdiction in California over both of them. Once the enforcement court would make that relatively easy determination, that court would then enforce the default judgment against both of the defendants, and the defendants would not be able at that point to defend the case on the merits. It is hard to imagine a more appropriate court than one in California to which the plaintiff would take the default judgment in order to get it enforced.

IV. Rule 12(b)(3) Motion to Dismiss for Lack of Venue

A. DD – Consent

DD could make its consent argument here that Phyllis agreed that although there would be personal jurisdiction in California, she would sue DD only in STATE court (not federal), and only in San Diego (not Sacramento), and so because venue can be waived and agreed to by the parties (through a forum-selection clause, just like when agreeing to personal jurisdiction), the parties agreed that any lawsuit between them would be in state court in San Diego, or nothing, certainly not in federal court in Sacramento (the Eastern District).

Phyllis could argue that even if she broke the contract clause between them by suing in federal court in Sacramento, instead of state court in San Diego, the bottom line is that the federal court in Sacramento is still a valid venue. If it wanted to, DD could pursue the matter as a separate breach of contract, but the federal court in Sacramento is under no duty to be controlled by the parties' private contractual provisions. However, courts are reluctant to do this because that would then defeat the whole purpose for having such forum-selection clauses in the first place, to reduce litigation uncertainty and to avoid costly litigation over these venue/personal jurisdiction issues when those resources would be better spent on the merits of the case.

B. §1391(a)/(b)(1) & §1391(c)

Residence would otherwise be available because both defendants reside in California. But, as a corporation, and therefore applying 1391(c) for DD – DD's residence would be in the judicial district where the corporation be subject to personal jurisdiction/have the most minimum contacts. Given that provision, DD would be considered to reside in the Southern District of California (San Diego), where we are told it has its principle place of business. On the other hand, DuBois, we are told, resides in the Central District of California (with his grandma in Los Angeles). So Phyllis could have either sued in the Southern or Central Disticts, but neither of the defendants resides in the Eastern District (Sacramento), so this residence provision of defendants for venue would not work as a basis for venue. Some students did not discuss how Los Angeles, San Diego, San Francisco, and Sacramento are each in one of the different four US judicial districts in California.

C. §1391(a)/(b)(2)

This provision – venue being proper where a substantial portion of the events or omissions giving rise to the lawsuit took place – is probably the best bet, because Phyllis suffered the most where she resides (in Sacramento), and her reputation was damaged with, or at least she was embarrassed in front of, many facebook friends who presumably reside in Sacramento, and in and around the Eastern District (Placerville, Auburn, South Lake Tahoe, etc.). The place where the tort injury was felt is often a legitimate venue based on this provision because that is considered by courts to be a significant portion of the tort case. The defendants would argue that it would be Nevada, where the improper footage was secretly obtained and the privacy invaded. That might be a proper venue under subsection (2) as well. It is not a contest – there can be more than one venue based on (1)(b)(2), so perhaps Sacramento AND Nevada would be proper venues based on subsection (2).

D. §1391(a)/(b)(3)

These provisions are not applicable because: (1) §1391(a)(b)(1) residence is available in the Central and/or Southern Districts; and (2) §1391(a)(b)(2) is available in the Eastern District and Nevada.

E. § 1391(d)

"Any district," which would include the Eastern District (Sacramento), would be available against DuBois, but only if he were considered to be an "alien" from France. That would work only with regard to DuBois, so if Phyllis sues them together, it would still have to be where venue would be possible against DD.

V. Rule 12(b)(4) & (5) Motions to Dismiss for Lack of Process & Lack of Service of Process (Notice)

Although there are strong arguments for a lack of process and lack of service of process under the federal rules, it might be possible if this form of service were allowed under California state service law (using state service law is allowed under federal Rule 4), but we have no indication of the applicable state service law.

A. DuBois – Improper Personal Service

DuBois has a very strong argument that he has never been correctly served in this lawsuit and a court would very likely agree and dismiss the case without prejudice in order to give Phyllis the opportunity to serve him correctly, as long as this motion was raised in his first responsive pleading. Thus, both DuBois' Rule 12(b)(4) & (5) motions to dismiss definitely would be granted.

1. No Summons [see above] – 12(b)(4)

Phyllis did not include a summons with a copy of the complaint when she served DuBois, which is a clear violation of Rule 4 and would support the court's granting, without prejudice, of a Rule 12(b)(4) motion to dismiss for lack of process.

2. Service by a Party [see above] – 12(b)(5)

Phyllis served DuBois *herself*, which is also a clear violation of Rule 4, requiring an individual to be served by a NON-party and so this improper action by Phyllis would support the court's granting, without prejudice, of a Rule 12(b)(5) motion to dismiss for lack of service of process.

B. DD – Improper Rule 4(d) Service by Waiver on DD

1. No Summons or Complaint.

Although Phyllis sent the Rule 4(d) waiver form by mail for DD to sign, she failed to include both the summons and a copy of the complaint in that mailing in clear violation of Rule 4(d), because DD only was given a waiver form and nothing else.

2. Receptionist Signed It (Not Authorized)

Also, the wrong person signed the waiver form in any event, because according to Rule 4(d), when a waiver form is sent to a corporation, a proper person (or attorney) must sign the waiver, not a receptionist. Also, the receptionist's signing the waiver 70 days after it was sent would have been a problem because it would have meant that the answer or pre-answer motion would have been due 10 days earlier, which would have been impossible unless DD had a time machine, because the answer/response is due 60 days after it is sent (if in the US, and it was). So neither defendant was properly served, but Phyllis easily could have later them served properly.

VI. Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim upon which Relief Can Be Granted

A. DuBois

A court would find that Phyllis clearly has stated a claim upon which relief can be granted against DD for the tort of invasion of privacy and harming her business reputation. This motion would fail with respect to the claim against DuBois.

B. DD

DD would argue that Phyllis has failed to state a claim upon which relief can be granted against DD because DD explicitly warned and informed Phyllis, as it does to all of the DD website users, that DD specifically does not check the claims made by any users on the site, such as those of DuBois, nor does DD in any way guarantee the overall fitness of anyone using the site, such as DuBois. Therefore, DD could argue that Phyllis completely "assumed the risk" by dating DuBois and by agreeing to meet him for dates in Las Vegas. As such, DD is not, and cannot be, liable to Phyllis for the unilateral and independent actions later taken by DuBois, as a matter of law. DD would argue that it had nothing to do with DuBois' illegal action and so that just like a telephone company would not be responsible for a date made over that telephone company's cell phone service with a person who ends up harming the plaintiff, neither can DD be held legally liable to Phyllis, even if Phyllis' allegations in her complaint are considered to be true.

However, Phyllis' claim against DD may, or may not, be a claim which DD can disclaim a general duty that DD might still owe to its users, regardless of any warnings or assumptions of the risk. For example, a lawnmower manufacturer may not be able to escape liability for producing lawnmowers that have no protective shielding over the spinning blades by simply put a warning label on the lawnmowers advising users not to get too close to the spinning blades. Accordingly, it might be the same thing for running a dating website, you can't simply slap a warning label on the site and always escape any and all resulting injuries. Of course, that would be more of a substantive tort law issue and as such the applicable substantive tort law may or may not cover it, but it is at least a possible procedural 12(b)(6) argument that should be considered and mentioned as a possible basis for a motion to dismiss the claim as against DD.

VI. 12(b)(7) – Failure to Join a Required Party.

Dubois and DD might argue that Phyllis failed to add facebook as a required party in this lawsuit because facebook negligently allowed DuBois to post such improper and tortuous material as the offending movie trailer on its site, and distribute it to all of Phyllis' facebook friends, through facebook. Moreover, instead of immediately removing the movie trailer to mitigate her damages, facebook charged Phyllis $75,000 to remove the trailer, which was excessive and unfair for such a relatively easy deletion, and as a result, prolonged Phyllis' invasion of privacy injury. However, Phyllis might argue that just because she *could* sue facebook as another joint tortfeasor, does not necessarily mean that she *must* sue them now, in this particular lawsuit, in order to be able to obtain sufficient recovery. Under Rule19(a), facebook does not qualify as a "required party"

because complete relief is not denied without facebook being in the lawsuit and it would not cause any multiple or inconsistent litigation. At most, facebook merely would be a permissive party under Rule 20.

VII. Motion for Forum Non Conveniens

Pursuant to DD's consent form where Phyllis agreed to sue only in State Court in San Diego, the defendants may seek to have the lawsuit dismissed in federal court Sacramento, and refiled in state court, in San Diego, pursuant to a Forum Non Conveniens motion. However, there does not appear to be any kind of necessity to dismiss the case based on convenience, or any of the "public or private factors" a court would ordinarily take into account, as much as this motion would be more of a basic contract enforcement in order to enforce the will of the parties regarding a procedural matter – in which type of court, and in which location of the court should this lawsuit be heard. DD might use the contract as a "private factor" argument to the court to grant the Forum non conveniens motion.

(2) DUBOIS' TWO COUNTERCLAIMS

I. Personal Jurisdiction over Phyllis Regarding the Counterclaims

DuBois would argue that there is personal jurisdiction over Phyllis based on consent because she brought this lawsuit in the first place, and the counterclaims against her are compulsory counterclaims under Rule 13(a) because they arises out of the same transaction or occurrence as Phyllis' claim against DuBois. That is certainly true for the slander claim, but it is a much more difficult argument to make for the sale of a broken used cell phone counterclaim. Still, even though that used cell phone counterclaim is probably only a permissive counterclaim, not arising out of the same transaction or occurrence, there would still be personal jurisdiction over Phyllis in California based on her residence, and maybe even domicile being in California, and general jurisdiction and certainly her specific jurisdiction minimum contacts for selling of the used (broken) cell phone over the internet in California to a fellow California resident. Also, remember that DuBois would have consented to jurisdiction himself if he did not first file a Rule 12(b)(2) motion to dismiss the claim against him for lack of personal jurisdiction.

II. Subject-Matter Jurisdiction of the Counterclaims

There would be no diversity jurisdiction over the counterclaims for the same reasons there already would be no diversity over Phyllis' main claim against DuBois. However, if the main claim is based on federal question, then DuBois would argue that there would be supplemental jurisdiction over his counterclaims against Phyllis, clearly over the slander claim, which arises out of the same case or controversy if it arises out of the same transaction or occurrence (and it is negative enough to assume a claim has been stated for which relief can be granted). However, the broken used cell phone counterclaim, since it is permissive and does not arise out of the same transaction or occurrence as Phyllis' main claim against DuBois, it probably also would not arise out of the same case controversy. DuBois would argue that the used cell phone counterclaim arises out of Phyllis and DuBois basic dating relationship that started on the DD website

and continued through facebook where she sells used cell phones. Although it is not clear, a court probably would not find the used broken cell phone counterclaim to be part of the same case or controversy as the invasion of privacy claim and therefore would grant a motion to dismiss it. Of course, Phyllis would always have truth as a defense in a defamation case as DuBois does seem to be a "pathetic loser and a creepy stalker" to the extent that description of a person can even be defined and proved.

(3) VENUE: TRANSFER & REMOVAL MOTIONS TO STATE COURT IN AZ

Both motions are clearly improper and would be denied by a court. First, a transfer motion is inapplicable because going from federal court to state court is not a transfer WITHIN the same sovereign (for example, a federal court to federal court transfer, or from a state court to another state court within that same state transfer). Because we have different court systems involved (federal to state) a transfer would be impossible.

Similarly, a petition for removal is improper because it is a "One-Way Street" only from state court to federal court within that same state (and within that venue). If the subject-matter jurisdiction were based on diversity then it would not be possible because one or both of the defendants are from California and so the home state prohibition would not allow it. Also, the defendants would both have to agree to remove. But because this is not state to federal, but is federal to state, removal would be impossible.

The only available proper motion to accomplish the objective would be a forum non conveniens motion, which was not filed. Even if it were filed, it would not likely be granted, because state court in Arizona would actually be more INnconvenient for all of the three California resident parties. The private and public factors actually would favor California and not Arizona as there was hardly any connection to Arizona at all.

(4) DD TO PAY FOR SERVICE

The Rule 4(d) Waiver of Service procedure used here by Phyllis to serve DD was improper (see above, no inclusion of the summons or copy of the complaint, just the waiver form was sent, and when that form was signed, it was 70 days after it was sent, and signed by a receptionist), and therefore it is as though nothing happened with respect to service of DD. That is, no service of DD has taken place yet. This means that DD still has to be served (the improper waiver form signed by the receptionist notwithstanding).

Although the waiver form was signed well after the 30 days a defendant is entitled to decide if they are going to sign it, Phyllis never had DD served and therefore Phyllis has never had to pay for any formal service of DD, and thus there would be no costs of service for her to collect. If Phyllis would have had to pay for DD to be actually served because they refused to sign the waiver form, THEN Phyllis could collect the cost of service, but this never happened. A party can NEVER collect the costs of merely sending the waiver form in the mail; besides, how minor would those mailing costs even be? At this point; Phyllis would have to start over and serve DD correctly.

QUESTION TWO

ESSAY QUESTION TWO

A. In addition to the above, assume the following: California conflicts of law principles provide that one must apply the substantive law of the "place of the wrong." However, all other states' conflicts of law principles provide that one must apply the substantive law of the state that has the "most significant relationship" with the parties and with the dispute. As a result, which substantive law should be applied to which claims in this lawsuit?

A. California Conflicts of Law – "The Place of The Wrong," Which Substantive Law Applies to which Claim(s)?

We know that according to basic *Erie* Doctrine, the procedural law that will apply in the case will exclusively be federal procedural law, because we are in federal court. The substantive law that applies will be based on the type of the substantive claim and counterclaims involved. However, the agreement to apply Texas substantive law may trump the conflicts of law principles due to the parties' consent. However, a court might decide that the choice of law clause is merely a personal contract and decide not to uphold it (DD could always try to sue for breach of contract). However, this argument would apply only to Phyllis' claim against DD, but it would have nothing to do with Phyllis' claim against DuBois because Phyllis signed no such contract with DuBois. If the contract is upheld, Texas substantive tort law would apply, but not Texas' conflict of law principles because that would not be the intent of the contract.

1. Phyllis v. DuBois – It Would Be Federal Substantive Law If the Invasion of Privacy Claim Against DuBois Is a §1331 Federal Question Claim

If the invasion of privacy tort claim at issue is a §1331 federal question claim, then we would apply federal substantive law to that claim – the Federal Privacy Act of 2010. The federal court would not even look to state substantive tort law on the federal question claim by Phyllis against DuBois. There would be no issue trying to figure out if California or Nevada or other state substantive law would apply because this would be a federal substantive federal question claim. State substantive law never applies in a federal question case. The only time state law could ever apply in a federal question case would be state procedural law if the lawsuit were in state court on a federal question case. Although the applicable substantive law would be federal, the state procedural law would apply, but state substantive law would be inapplicable.

2. Phyllis v. DuBois – If the Invasion of Privacy Claim Against DuBois Is a Diversity Claim & the Phyllis v. DD Negligent Supervision Claim is a §1367 State Law Claim and/or Diversity Claim (If Possible)

If we are in federal court, but the invasion of privacy claim is based on diversity (assuming diversity were possible), then we would apply California substantive tort law to the state invasion of privacy claim, and California state substantive law to DuBois' slander and broken cell phone counterclaims against Phyllis, and the negligent supervision of the website claim by Phyllis against DD, because all of these claims and counterclaims would be state law tort and contract claims, in federal court, under either §1332 Diversity or §1367 Supplemental Jurisdiction.

Under *Klaxon*, we know that we must apply the substantive law of the state in which the federal court sites – here, that would be California tort and contract law as the lawsuit has been filed in federal court in the eastern district of California. However, before we get to that substantive tort and contract law, the first step is to apply the conflict of laws principles of California. Here, we are told that the conflict of laws principles of California, is to apply the law of "the place of the wrong."

There is a good argument that the place of the wrong might be where DuBois improperly filmed Phyllis in her hotel room in Nevada. And thus, the tort and contract substantive law of Nevada should control in the dispute. However, there is also a good argument that that the "place of the wrong" was where DuBois launched the offending movie trailer, which would have been from California. The tough issue is when and where was Phyliss harmed? Was it where and when she was improperly filmed (Nevada), or was she not really harmed until all of her facebook friends actually saw the footage in the movie trailer posted by DuBois presumably from his residence in California. And for that matter, was the place of the wrong in all of the states and countries where Phyllis' facebook friends live, because that is the time and the place when and where they actually saw the offending footage and it was not until that point that Phyllis' privacy was invaded and she actually suffered damages due to that invasion of privacy.

But just like we had to look to California's conflict principles first before deciding to apply California's substantive tort and contract law, we would have to look at the conflicts principles of either Nevada, or perhaps every state and country where Phyllis' facebook friends live. Fortunately, in terms of complexity, the conflicts of laws principles of every other state and country that might be possible all say to apply the law of the state that has the "most significnt relationship" to the dispute. Because all three parties are residents of California, and much of the harm occurred in California because Phyllis lives there and many facebook friends also live there, a court would most likely choose to apply the substantive tort and contract law of California over any other state, or country.

A court probably would also choose to do so in order to remove any incentives to forum shop for differing substantive law by suing in various states. On balance, there appears to be more arguments pointing in favor of California being BOTH, the possible place of the wrong, and as the place with the most significant relationship to the dispute, so that California substantive law should apply to any state law claims in federal court.

B. Assume for this question only, that Texas substantive law would apply to this dispute. Assume a Texas state statute provides: "(1) All internet and other cyber-crime type of cases must be tried in front of a judge only, in a bench trial, and not in front of a jury, because judges understand technology and the internet better than juries do; and (2) these kinds of internet cases must be tried only in the city where the defendant's server is located." (Assume both of the defendants' servers are located in Phoenix, AZ). Would this Texas state statute apply in this lawsuit, and if so, how?

B. Erie Doctrine – Texas Substantive Law or Federal Law (Bench v. Jury Trial)

1. Application of Texas Substantive Law.

First, this would be a non-issue if the basis for federal subject-matter jurisdiction is federal question, because Texas substantive law, and any state substantive law for that matter, would be completely inapplicable, because federal substantive law would be applicable. However, DD has an argument that because Phyllis agreed to apply Texas state substantive law, then it should be applied, but there would be a strong argument that although parties may always agree to establish personal jurisdiction over themselves, they cannot agree to consent to manufacture subject-matter jurisdiction in federal court if none exists.

Of course, if the case is based on diversity and supplemental jurisdiction over state law claims in federal court, then according to the agreement, Texas state substantive law should apply. However, Phyllis could argue that the agreement to apply Texas substantive law would apply only to the claim against DD (for negligent supervision of the site), but not to the invasion of privacy tort law claim against DuBois, and DuBois state law counterclaims against Phyllis, as there was no agreement between Phyllis and DuBois to apply any specific Texas state substantive law.

However, we are then told to assume that Texas substantive law applied. According to the *Erie* Doctrine, we would apply federal procedural law and state substantive law, which would be Texas substantive law in the case. The issue is whether the Texas state substantive law would apply as substantive law, or whether in would be inapplicable procedural law, because federal procedural law would apply because that is the procedural law of the forum.

2. Application of Part (1) of The Texas State Statute – Allowing Only a Bench and Not a Jury Trial in these Types of Cases

a. The Federal-State Law Conflict Cannot Be Harmonized

In federal court, this action would have a jury to decide the case, whereas in state court, only a judge would decide the case. There is no way to harmonize this conflict as they are directly in conflict.

b. Check the Source of the Federal Law/Apply Appropriate Test

(i) Federal Constitutional Law

If the source of the federal law at issue is a Federal Constitutional provision, then under the Supremacy Clause of the US Constitution, it would control and that would be the end of the inquiry. There is a strong argument that applying the state statute in federal court would violate the 7th Amendment to the US Constitution. In federal court, there is a constitutional right to a jury trial. The application of the state statute would violate that right and it is likely a federal court would rule that Part (1) of the Texas state statute would be inapplicable in a federal court diversity action.

(ii) Federal Statute

There is no applicable federal statute in the US Code that would be directly applicable, but there are statutes regarding the process for selecting a jury. This may not be in conflict, however, because the statute does not state when a jury trial is guaranteed, only that if one is to be used there are certain procedures that must be followed.

(iii) Federal Rule of Civil Procedure

If the source of the federal law at issue is a Federal Rule of Civil Procedure, then it would apply by definition. Rule 38 provides that litigants are entitled to a jury trial in federal civil actions upon demand so it would control as the Rule does not violate the Rules Enabling Act because it does not abridge, modify, or deny state substantive right (at most only a state procedural right to a bench trial only).

(iv) Federal Practice/Local Rule of Practice

If the source of the federal law at issue is Federal Practice of a Local Rule of Practice, then we would do a Modified Outcome Determinative, *Erie*, *York*, *Byrd*, balancing test. However, having a jury trial is not merely a federal practice matter (unlike it was in *Byrd* where one of the preliminary issues in the case [employee v. independent contractor] was decided by a judge or jury, but not the entire trial). But if it were, it does appear there is a very strong bound up relationship between the state rule (judge decides) and the underlying state law tort policy (internet cases need to be decided by knowledgeable judges). Nevertheless, there is also a very strong federal interest in juries deciding factual issues in federal court, so a court would likely rule that the state law does not apply.

3. Application of Part (2) of The Texas State Statute – Allowing the Case to Be Tried Only Where the Defendants' Servers Are Located (Phoenix, AZ)

a. The Federal-State Law Conflict Cannot Be Harmonized

In federal court, this action would be decided by §1391 venue determinations. In state court, for this kind of case, it would be decided by where the servers are located. It is easy to see the dispute, but it could be that one could harmonize them by saying that where the servers are located might well fit within §1391(a)(b)(2) – where a substantial portion of the events or omissions giving rise to the lawsuit are located, which in an internet cyber violation would be or at least could be where the

defendants' servers are located. However, there is still a conflict because that is not necessarily the exclusive place that would always be where a substantial portion of the events or omissions giving rise to the law suit would be located. Moreover, in federal court, residence and other places can be the basis for venue. As a result, a court would likely conclude that this inconsistency is not resolvable and so there is no way to harmonize the conflict.

b. Check the Source of the Federal Law/Apply Appropriate Test

(i) Federal Constitutional Law

There is no apparent constitutional provision that would control venue determinations in federal court except for a possible due process fairness issue that such a statute violates fundamental fairness but this would likely be too much of a stretch.

(ii) Federal Statute

The federal venue statute, §1391, conflicts with the Texas state statute because §1391 is not limited to where a defendant's servers might be located. Because the federal venue statute is "arguably procedural" – determining the best and most convenient US judicial district within which to sue will control over any conflicting state law statute. The federal venue statute is procedural *by definition* because Congress has created this procedural venue statute for federal courts. This is a form of a "guided" Erie analysis because the federal legislature has defined this as procedural. There is no violation of the REA as enlarging, abridging, or modifying a state substantive right.

(iii) Federal Rule of Civil Procedure

There is no apparent Federal Rule of Civil Procedure that controls as the federal venue statute addresses venue in federal court.

(iv) Federal Practice/Local Rule of Practice

Venue determinations are not a simple matter of general federal practice of local rules of practice, the issue is controlled by 1391.

SHORT ANSWER SECTION – FIVE (5) QUESTIONS

1. What are the advantages and disadvantages of Phyllis' lawyer taking her case on a "contingency fee" basis rather than on an "hourly billing" basis?

Contingency Fee:

– Advantages – Phyllis does not have to pay any fees up front, or during the litigation, she only has to pay if and when she wins any damages at the end of the case, so it minimizes her litigation financial risk and puts it on the attorney, as well as makes it possible for Phyllis to bring the lawsuit if she does not have the money to pay for initially. It also gives the attorney a good financial incentive to obtain as large an award as possible for Phyllis.

– Disadvantages – Even if Phyllis is awarded all of her requested damages (which is not a guarantee merely for bringing the lawsuit), she will lose a large chunk of that recovery (1/3 or more) which is a very high effective "interest rate" for essentially "borrowing" the attorneys' fess during the litigation and putting the financial risk on her attorney. As a result, she will not really be made whole, unless her attorneys' fees can also be recovered in the lawsuit. Also, the lawyer at least has an initial economic incentive to settle for a lower amount of money if it can be done very quickly with very little work.

Hourly Fee:

– Advantages – Phyllis pays only for what her lawyer actually does, so there is no possibility of a large economic windfall recovery for the attorney because the attorney's economic incentive is to get paid for work actually done on behalf of Phyllis, not just part of the "winnings."

– Disadvantages – Phyllis' lawyer cannot always predict the time that will be necessary to react to various litigation case demands, which could result in higher fees, plus there is an economic incentive for the lawyer to simply drag out work done on the case in order to get more money for the time spent on the case, without necessarily obtaining a favorable result for Phyllis in terms of her ultimate damage recovery.

2. Briefly explain how an "injunction" is different that a "declaratory judgment."

Injunction:

This is the type of judgment or judicial order that is issued as a result of a lawsuit where the plaintiff's requested relief is to obtain a legal order requiring the defendant either to *cease doing some kind of activity or conduct*, or to *begin doing some kind of activity or conduct*. The goal or objective of the lawsuit is not to obtain money damages, but it is instead to obtain the defendant's legal compliance by either stopping, or starting, to engage in a particular kind of action or conduct.

Declaratory Judgment: This is the type of judgment that is issued as a result of a lawsuit where the plaintiff is simply requesting that the court *clarify and explain* what the parties' existing legal rights and responsibilities in a potential legal dispute. Without such a judgment, the legal dispute might have potentially large damages or consequences due to certain legal ambiguities that are not definitively cleared up by the court. The judgment provides legal clarity for the parties so that they can adjust their legal positions accordingly and thereby avoid any possible future problems caused by any existing legal ambiguities.

3. Explain whether the *Erie* case eliminated "federal common law" when it recognized that the 50 common law systems of each state should be the basis for substantive law in diversity cases, instead of a general "brooding omnipresence" of law.

Erie did not eliminate "federal common law." Federal courts constitutionally are still allowed to "create" new *federal* law, or "find" existing *federal* law, in areas regulated by federal law. However, a federal court cannot create, or find, general common law in *state* substantive law areas. To do so would be overstepping a federal court's constitutional power. The power for federal courts to create or find general common law in state substantive law areas was what was eliminated by Erie. Now federal courts must recognize that each of the 50 states has the exclusive power to create, or find, their own common law in STATE substantive law areas. So in a diversity case, a federal court will apply federal procedural law, but will apply only state substantive law, which now includes state common law (not just state statutes or state constitutions).

4. If Dream Dates had filed a Rule 14 "Impleader," 3rd-Party Practice, claim against DuBois for lying about himself on his dating profile, would §1367 be available to supply federal subject-matter jurisdiction for that claim, assuming Dream Dates and DuBois are both domiciled in Arizona?

Yes, §1367 would provide federal subject-matter jurisdiction for DD's claim against DuBois even though DD and DuBois would both be domiciled in AZ and therefore would not be diverse from one another. First, DD's claim (a Rule 14 impleader claim if DuBois was not in the suit to begin with, but would be a Rule 13(g) cross-claim/Rule 14 impleader claim if he was there at the inception of the lawsuit), would arise under the same case or controversy as the main claim that Phyllis has against DD (and DuBois). The claims all involve the exact same actions, so §1367(a) would be satisfied. Second, if the main claim by Phyllis were federal question, then of course, §1367(b) would not even be applicable, but now that we are assuming both DD and DuBois are domiciled in Arizona, diversity over Phyliss' main claims would be possible. But a claim between DD and DuBois would not destroy the diversity between Phyllis and the two defendants, and even if it somehow did, §1367(b)

would not apply because it would not be a "claim" by a plaintiff (it is a claim by DD, who is a defendant). Although there would be no diversity between DuBois and DD, they are on the same side of the "v." and their claim is not by a plaintiff so §1367 would still be available. Finally, §1367(c) would not come into play because the claim is not novel or complex and would not predominate over the main claims by Phyllis, the main claim would not be dismissed because there clearly would be diversity now that the defendants are from Arizona and there is no other "compelling reason" to deny jurisdiction in the judge's discretion.

5. If Phyllis had sued DuBois for a federal sexual harassment Title VII claim in federal court in Arizona, could Dubois have removed that claim to federal court in California?

No, a §1441 removal action is taking the state court action from state court to federal court in the federal venue where the state court is located, so it is possible to remove from state court in Arizona to federal court in Arizona if the case could have originally been filed in federal court (which would have been possible as a federal question case, and no home state prohibition, even though defendants are located in Arizona because subject-matter jurisdiction in federal court would not be based on diversity). The requested action here would simply be a transfer (from a court in a sovereign to a court in the same sovereign), which would be the case as this would be a federal court to federal court transfer. Even if it was correctly requested as a transfer, it would depend if the public and private factors could be satisfied. California would seem to satisfy many of those factors as both defendants and Phyllis all live in CA, and most of the evidence would be in CA, and Arizona would seem to have no connection to the lawsuit whatsoever (the defendants being domiciled in Arizona was an assumption to be made only for question #4, above).