

**STUDENT ID:**

**FALL EXAM 2017**

<b>IN-HOUSE EXAM INFORMATION</b>		
<b>Instructor: Prof. Stephen E. Sachs</b>		
<b>Course Name: Civil Procedure</b>	<b>Course #: 110_05</b>	
<b>COMMENTS:</b>		
Exam date and time	Date: 12/12/17	Time: 8:30 am
Type of exam	UNBLOCKED	
Number of Essay Questions	3	
Number of multiple choice/true or false		
Exam information/materials allowed (check as many as applicable)	<input type="checkbox"/> None <input type="checkbox"/> Access to Internet <input checked="" type="checkbox"/> Textbook <input checked="" type="checkbox"/> Textbook Supplement <input checked="" type="checkbox"/> Course Syllabus <input checked="" type="checkbox"/> Student's Own Outline and/or Notes <input checked="" type="checkbox"/> Calculator <input checked="" type="checkbox"/> Other Material (see comments)	<b>Permitted:</b> All additional digital and paper materials, the textbook, the coursepack, your notes, other people's notes, commercial outlines, English translation dictionary (hard copy only). <b>Not Permitted:</b> to consult with anyone or to access the Internet.
Number of hours for exam	3 hours	
Qualifying LLM students may receive up to 1/3 extra time	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
International students may refer to a hard copy English translation dictionary (not a legal dictionary). Note: electronic versions may not be used.	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
<b>INSTRUCTOR'S EXAM INFORMATION</b>		

Please continue to the next page for your Professor's instructions.

**Civil Procedure**  
Final Exam, Fall 2017

Professor Stephen E. Sachs  
December 12, 2017  
8:30 a.m.

This exam is **10 pages** long, including these instructions. It consists of **three questions**. To assist in grading, please separate your answers to different questions within the exam software. Each question will be separately graded and each pile of answers separately randomized, so don't make any reference in your later answers to your earlier ones.

You have **three hours** to complete the exam. Brevity is appreciated, but there's **no word limit**. Should anything untoward occur—computer error, sudden illness, monster attack, etc.—please notify the proctor and/or the Registrar.

The exam software will be in “**unblocked**” mode, and **all** additional digital and paper materials are approved for use on the exam. Feel free to use any electronic or print materials you like: the textbook, the coursepack, your notes, other people's notes, commercial outlines, etc. (This includes an English translation dictionary—but electronic translation dictionaries may not be used, per the Registrar's requirements.) Your exam must be entirely your own work, however. You are **not permitted to consult with anyone or to access the Internet** during the exam. As a result, **you must bring paper or electronic copies of the Federal Rules of Civil Procedure and of the statutes included in your coursepack.**

To preserve anonymity, don't include your name or other identifying information on the exam, except for your student ID number. Please don't discuss the exam with me or with your fellow students, including by email, until I've confirmed to all of

you that all students have taken the exam. (Some might be taking it at a different time.)

In general, please review and follow the advice given in John H. Langbein's *Writing Law Examinations*, available on the course website.

A few specific recommendations:

1. *Make sure that you read each question carefully.* I suggest that you take twenty minutes at the beginning to read the whole thing and reserve ten minutes at the end for proofreading. (These periods are not included in the recommended time allocations.) Separately, I'd encourage you to spend up to one-third of your time on each question just sketching out the answer with pencil and paper before starting to type. If you just dive in, you'll get lost halfway.

2. *Organize your answers clearly.* You don't need to follow any particular format with rigor, but it greatly helps to identify an applicable legal standard before applying it. Stating your conclusions clearly will also be helpful to me when grading. Mentioning individual rules or statutes can be useful, but chapter-and-verse citations aren't necessary; it's more important to state the substance correctly. The same goes for relevant cases. In the words of the now-repealed Rule 84, the model exams available on the course website "illustrate the simplicity and brevity that these [instructions] contemplate."

3. *Unless you're given specific details to the contrary, you may assume:* that every party is properly served, that every pleading is properly pleaded, that all filings are timely, that every motion or brief presents the best arguments available, and so on. Don't try to invent new and helpful facts or law not mentioned in the exam. If there are issues that seem inconclusive or that require more information, you should say so; some of them might be intentional. (Likewise, not every issue suggested by the fact pat-

tern is actually relevant to the question asked; discussing irrelevancies will only cost you time.) If a particular legal standard hasn't received any substantial attention either in the book or in my lectures, it's unlikely to be tested. That said, the exam is open-book and could require close parsing of a particular rule or statute that we haven't addressed at length—or, indeed, at all.

4. *Apply the law as it stands today.* As noted on the syllabus, the exam doesn't ask things like "how would this case have been decided in 1872?" It only tests on the law as it stands on the date of the exam, including any recent amendments to the Federal Rules of Civil Procedure.

5. This one is very important: *When listing reasons why a particular result would be legally correct, don't give just one; give as many as are correct, even if just one of them would be enough to win or lose on that issue. Don't assume that I'll know you know the basics; show me that you do!*

\* \* \*

Answers will be graded on your understanding and analysis, as well as on clarity of exposition. Individual questions will be curved, to reward those who do well on harder questions, and then the exam as a whole will be curved. Final grades will be calculated in compliance with Duke's grading policies.

Good luck!

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**STOP! DO NOT TURN THIS PAGE  
UNTIL INSTRUCTED TO DO SO!**

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— START OF EXAM —

**Q.I: “Twitter Dot Com”** (60 pts, 90 min)

In Internet parlance, to “doxx” someone is to reveal personal information about them, particularly their real-world identity. After several notorious doxxing incidents, the California legislature enacted the California Anti-Doxxing Act, or CADA, which provides in relevant part:

**SEC. 1. PRIVACY RIGHT.**

This State recognizes a fundamental right to privacy in online speech, including a right to engage in speech anonymously or under a pseudonym.

**SEC. 2. PROHIBITION.**

It shall be unlawful for a provider of an interactive computer service to disclose to a third party any information identifying or tending to identify an anonymous or pseudonymous author of an electronic communication transmitted through such service, unless the author has consented to such disclosure.

**SEC. 3. JUDICIAL DISCLOSURE.**

No court of this State shall, in any civil action, require a party to make a disclosure that would otherwise be forbidden by this Act; *provided*, that this Act shall not be construed to create any evidentiary privilege, and that a party may admit in evidence any information in its possession that would have been admissible in the absence of this Act.

One Internet service covered by the Act is Twitter, which has invoked CADA in the case of Barbara Johnson of Moose Lake, Minn. As an early Christmas present, Johnson’s grandson set up her new smartphone with a Twitter account, choosing the username “@GrandmaBarb1942” and clicking “ACCEPT” on the Terms of Service. Johnson’s first Twitter experience followed:

 **GrandmaBarb1942**  
@GrandmaBarb1942 Follow

Hello, I am using Twitter for the first time.  
My grandson got me a phone for Christmas.

2:47 PM - 30 Nov 2017

 **GrandmaBarb1942**  
@GrandmaBarb1942 Follow

Here is a picture of my ferret Woogums.




2:48 PM - 30 Nov 2017

 **awesomtweetz71184025**  
@awesomtweetz71184025 Follow

haha you hav leprosy

2:48 PM - 30 Nov 2017

 **GrandmaBarb1942**  
@GrandmaBarb1942 Follow

What are you talking about?

2:49 PM - 30 Nov 2017

 **awesomtweetz71184025**  
@awesomtweetz71184025 Follow

i hacked yr dr's records and your covered,  
w contagious lesions

2:50 PM - 30 Nov 2017

 **GrandmaBarb1942**  
@GrandmaBarb1942 Follow

Stop saying these awful things!

2:51 PM - 30 Nov 2017

 **awesomtweetz71184025**  
@awesomtweetz71184025 Follow

how's ig going Leprous Gradnma

2:52 PM - 30 Nov 2017

This exchange went “viral,” and Johnson endured weeks of online abuse under the hashtag [#leprousgradnma](#). She consulted an attorney, who informed her that falsely imputing to someone “the present existence of an infectious, contagious, or loathsome disease” is *per se* slander under California Civil Code § 46(2). Johnson filed a civil action in the U.S. District Court for the Northern District of California. She alleged one count of § 46(2) slander against the initial harasser “John Doe,” as well as one count of abetting Doe’s tort against Twitter, Inc. Her claim against Doe sought \$80,000 in damages; her claim against Twitter was styled as a putative class action, seeking more than \$5 million in damages on behalf of herself and “all other persons who have been libeled, slandered, libelslandered, or otherwise defamed via Twitter.”

A process server brought the summons and complaint to Twitter’s headquarters in San Francisco, where he delivered it by hand to CEO Jack Dorsey (“@jack”). Unable to identify “John Doe” on her own, Johnson sought and obtained leave of court to serve Doe by tweeting images of the summons and complaint to Doe’s account, [@awesomtweetz71184025](#). Doe retweeted the summons under the comment “🙄 #12(b)(5)”.

Twitter moved to stay proceedings and to compel arbitration under its Terms of Service. These provide that all claims brought by users against Twitter must be heard before a special arbitral panel composed partly of Twitter employees and partly of verified (“blue-check”) users with well-known [#brands](#). Johnson opposed the motion, noting that under Minnesota’s contract law, her 12-year-old grandson could not have acted as her agent in accepting the Terms of Service. The court postponed its resolution of this motion and ordered Twitter to proceed with the case. Twitter answered Johnson’s complaint and moved for an order denying class certification.

Johnson requested that Twitter produce any relevant portions of its server logs from the afternoon of Nov. 30 identifying the Internet address from which Doe's posts were made. Twitter refused on various grounds, CADA among them. Johnson moved to compel production.

An attorney then appeared, claiming to represent Doe. Without revealing Doe's identity, she filed a motion to dismiss for insufficient service of process.

Now pending before the court are four motions:

- (a) to stay proceedings and to compel arbitration;
- (b) to deny class certification;
- (c) to compel production of the server logs; and
- (d) to dismiss for insufficient service of process.

Knowing only what you know, **how should the district court rule on these four motions, and why?** Analyze each relevant issue, addressing each motion independently. (That is, treat each one as if it were the first to be decided, ignoring any potential effect that a ruling on one motion might have on another.) If you're unsure or need more information, just say so.



**Q.2: “Things We Have Not Studied”** (20 pts, 30 min)

Below are listed several provisions that we never discussed at any length in class. Read them again. Then **explain, based on what you’ve already learned, what you think they’re for.** (For instance, what do they do? When might they be used, and by whom? Why do they say what they say, and not something else? What difference do they make to the legal system? Etc.) Remember that you are not permitted to use the Internet.

- (a) 28 U.S.C. § 1332(d)(11)(B)(ii)(II).
- (b) Rule 39(b).
- (c) Restatement (Second) of Judgments § 28(2)(a).

(For ease of reference, the latter provision is reproduced below.)

**§ 28. Exceptions to the General Rule of Issue Preclusion**

**Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:**

(1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or

(2) **The issue is one of law and (a) the two actions involve claims that are substantially unrelated,** or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

**Q.3: “Proper Pleading”** (20 pts, 30 min)

*Twombly* and *Iqbal* have given rise to substantial controversy over pleading standards. **Write an amendment to Rule 8 that would adopt your preferred pleading standard. Defend your proposal.**

— END OF EXAM —