Civil Procedure
Midterm Exam, Fall 2016

Professor Stephen E. Sachs
October 21, 2016
8:30 a.m.

This exam is **9 pages** long, including these instructions. It consists of **one essay question**. Brevity is appreciated, but there is **no word limit**.

You have **one hour** to complete the exam. Should anything untoward occur—computer error, sudden illness, Godzilla attack, etc.—please notify the proctor and/or the Registrar.

The exam software will be in the "**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, whether electronic or on paper.) You are not permitted to consult with anyone or to access the Internet during the exam. Your exam must be entirely your own work.

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 the question carefully.* I suggest that you take ten minutes at the beginning to read the whole thing, as well as five minutes at the end for proofreading. Separately,

I'd encourage you to spend up to fifteen minutes sketching out your answer with pencil and paper before starting to write. 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 helps greatly 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 In the words of the now-repealed Rule 84, the model exams available on the course website "illustrate the simplicity and brevity that these [instructions] contemplate."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 pattern 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.

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. *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!

<center>*   *   *</center>

Answers will be graded on your understanding and analysis, as well as on clarity of exposition. Grades on the midterm will be curved and reported to you as if they were final grades calculated in compliance with Duke's grading policies.

Good luck!

<center>

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

</center>

(THIS PAGE IS INTENTIONALLY BLANK.)

Q.1: "The Perils of Dr. Ada Meerschweinchen"

   Simon Montfort of Leicester, NC, took great pride in the appearance of his guinea pig Randolph. Every few weeks, he would go online to order another bottle of *Dr. Ada Meerschweinchen's Fuzzinating Oil*, an innovative fur-care product designed for use by guinea pigs and other members of the family *Caviidae*. Each bottle was manufactured personally by Dr. Meerschweinchen and her fifteen employees in the garage of her house outside the German city of Lübeck. Montfort would use the Internet service PayPal to send money to the personal account of Dr. Meerschweinchen, who in return would mail bottles to his home address. The product worked beautifully, and Randolph's fur had never looked better.

Figure 1. Randolph in happier times.

Unfortunately, Dr. Meerschweinchen was persuaded to hire as her sixteenth employee Gunther Meerschweinchen, her ne'er-do-well nephew. On July 1, 2015—his first morning on the job—the hapless Gunther accidentally filled twenty bottles with a different compound used in another product, *Dr. Ada Meerschweinchen's Defuzzination Shampoo*. Nineteen of those bottles were intercepted prior to distribution, but the last was shipped to Montfort on July 3 before anyone realized the error. Montfort received the bottle on July 9 and applied it after Randolph's bath that evening. Horrified by the results the next morning, he took a photograph of Randolph's condition and popularized it on his Twitter account, along with numerous 140-character screeds about the unreliability of Meerschweinchen's products.

Figure 2. Randolph post-shampoo.

To restore Randolph to his prior condition, Montfort was forced to buy five doses of *Dr. Lefevre's Refuzzination Serum*, at a cost of $450 per bottle. In the meantime, the photograph of Randolph became a social media sensation, leading to a severe decline in orders for Meerschweinchen's products.

The picture also came to the attention of a junior staffer at the National Leafy Greens Council, an unincorporated trade association based in Waterport, N.Y. The Council includes among its members most of the major broccoli growers in California, Ohio, Michigan, and the upper Midwest. Capitalizing on the image's popularity, the Council printed and distributed ten thousand copies to tourists in New York City's Times Square as part of a marketing campaign under the slogan, "RANDOLPH TO CITY: EAT BROCCOLI."

Dr. Meerschweinchen believes that Montfort's Twitter postings unfairly maligned her products. She contacted Twitter's customer support on January 5, 2016, asking them to remove the offending posts. In a January 27 letter from Twitter's San Francisco headquarters, Twitter general counsel Vijaya Gadde stated that Montfort's post did not violate Twitter's terms of service, and that the company's actions were legally protected by Section 230 of the Communications Decency Act, 47 U.S.C. § 230, which bars liability in many cases for services that republish others' speech online.

After a lengthy exchange of letters, Dr. Meerschweinchen filed a state-law defamation lawsuit on October 3. The action, which seeks $30,000 in damages against Montfort and $50,000 in damages against Twitter, Inc., was filed in the civil division of the California Superior Court for the County of San Francisco.

On October 10, without consulting Twitter, Montfort filed a notice of removal to the U.S. District Court for the Northern District of California (which includes San Francisco). He provided appropriate copies to the state court and the other parties.

On October 12, Montfort filed in the federal district court his answer to the complaint—including a counterclaim against Dr. Meerschweinchen for breach of implied warranty of fitness for a particular purpose, seeking reimbursement for $2,250 of refuzzination serum as well as $10,000 in emotional damages. Simultaneously, he filed third-party complaints against her nephew Gunther for negligent infliction of emotional distress (again claiming $10,000 in emotional damages), and against the Leafy Greens Council for infringement of his copyright in the image (claiming statutory damages of $750 to $30,000). These third-party complaints were served on the day they were filed, each with its appropriate summons.

Yesterday three motions were filed with the court: **(i)** Dr. Meerschweinchen moved to remand the case to state court; **(ii)** Montfort moved to dismiss the defamation claim against him for improper venue; and **(iii)** the Leafy Greens Council filed a combined motion to dismiss for lack of personal jurisdiction, for misjoinder, and for failure to join the various third parties who reposted Randolph's photo on social media. (Twitter has yet to answer the complaint or to file any motion.)

Knowing only what you know, **what ruling would be proper on these three motions, and why?** (Analyze each relevant issue, even if the disposition of one motion might ordinarily affect another. And if you're unsure or need more information, just say so.)

— END OF EXAM —