

Sample Answers

Civil Procedure Midterm

Fall 2009

Professor Davies

NOTE: The answers contained herein are samples and samples only. They are disjointed from reality in that they (or at least some of them) exceed what anyone likely could produce in the amount of time allotted.

Nevertheless, the answers also are not “ideal,” “model,” or “perfect.” Different portions of the questions could be approached in different ways, and the key is not necessarily the conclusion reached but the ***analysis*** undertaken.

Students thus will be well advised not to grasp the sample answers as talismans, but to see them as study tools. The prudent student will first assess the ***questions*** and use them as a way to test her own understanding of the material. Only after this would the student review the sample answers provided here, which can be used to identify potential areas for improvement.

Short Answer

Response to Allegations

1. Defendant admits that “Party in the U.S.A.” is Defendant’s song but otherwise denies the allegations in Paragraph 1 of Plaintiff’s complaint. Defendant lacks sufficient knowledge or information concerning Plaintiff’s past record sales and thus denies all allegations related to such sales.

2. Defendant denies the allegations in Paragraphs 2-11 of Plaintiff’s complaint.

First Affirmative Defense (Failure to State a Claim)

3. Plaintiff’s complaint fails to state a claim upon which relief can be granted.

Second Affirmative Defense (Contributory Negligence)

4. Plaintiff cannot recover on his claims sounding in negligence because he is fully or partially responsible for any harm that has incurred.

Third Affirmative Defense (Comparative Negligence)

5. Plaintiff cannot fully recover on his claims sounding in negligence because he is partially or fully responsible for any harm that he has incurred.

Fourth Affirmative Defense (Improper Venue / Forum Non Conveniens)

6. Venue is improper or unduly inconvenient.

Fifth Affirmative Defense (Lack of Personal Jurisdiction)

7. This Court lacks personal jurisdiction over Defendant.

Sixth Affirmative Defense (Improper Process / Service)

8. The complaint was insufficiently served, or is defective on its face.

Seventh Affirmative Defense (Truth)

9. Plaintiff’s causes of action sounding in defamation fail because the statements in “Party in the U.S.A.” concerning Plaintiff’s songs are true. Jay-Z songs in fact do make Defendant feel better, and they are in fact some of her favorite songs.

Eighth Affirmative Defense (Lack of Writing)

10. Plaintiff's complaint fails to state a claim for libel because "Party in the U.S.A." is not a written or printed communication.

Ninth Affirmative Defense (Statutory Bar of Negligent Interference with Business)

11. Plaintiff's causes of action sounding in negligent interference with business relation is barred by New York Code § 709.

Essay Question

There are three issues before the court: (1) whether Jay-Z should be allowed to amend his complaint to add Billy Ray Cyrus as a defendant; (2) whether Miley Cyrus should be allowed to amend her answer to add counterclaims against Jay-Z (and to add Beyonce as a party); and (3) whether Jay-Z should be compelled to produce information responding to Miley Cyrus' interrogatory no. 23. The short answer is that all three motions should be granted. The court is likely to allow all of the amendments sought, and Jay-Z likely will be compelled to produce the information Miley seeks.

The first two issues can be taken together. The third follows.

Motions to Amend

Parties may amend pleadings in three circumstances: once as a matter of right before filing of a responsive pleading (or within 20 days if a responsive pleading is not allowed and the case is not yet on the trial calendar); with the opposing side's consent thereafter; or if there is not consent, when "justice so requires" and by leave of court, which should be "freely given." FRCP 15(a).

Here, it is clear that Jay-Z cannot amend as a matter of right. Miley Cyrus has already answered his complaint. Likewise, it appears likely that Cyrus cannot amend as a matter of right. Because responsive pleadings are not allowed for answers unless ordered by the court, *see, e.g.,* FRCP 7(a)(7), Cyrus only had twenty days to amend. Although the fact pattern does not specify how much time has elapsed since Cyrus answered Jay-Z's complaint, enough events have transpired that it appears more than twenty days have gone by, foreclosing Ms. Cyrus' ability to amend as a matter of right.

By the same token, neither party can amend based on consent. Both Jay-Z and Ms. Cyrus have vigorously opposed each others' motions.

Thus, the question of whether the amendments should be allowed reduces to whether "justice requires" them. It should be relatively straightforward that under this standard, the amendments should be allowed. A core purpose of the Federal Rules is to promote resolution of disputes on their merits. *See* FRCP 2. Allowing the amendments sought here clearly promotes that goal. For Jay-Z, the amendment would allow him to pursue his claim against not only "Party in the U.S.A.'s" performer, Miley Cyrus, but also its author, Billy Ray Cyrus. If both potentially are liable, clearly the objective of reaching the merits of the case is met. Likewise for Miley, the amendment will allow her to pursue her counterclaims against Billy Ray, in the same suit where questions about the parties' music already are at issue.

Nor should either party be able to claim prejudice, which is the primary way to avoid an amendment. The case remains in discovery, so closeness to trial should not be problematic. Discovery may need to be extended, but the fact that both Jay-Z and Miley seek to amend and add parties should effectively cancel out any claim by the other that there is prejudice from extending discovery to accommodate the amendments. And there is no indication that critical

evidence has been lost, or witnesses have become unavailable, because of the lapse of time between the original filings and the motions to amend.

One might argue that Miley's amendment should not be allowed because it will too complicate the suit. Her counterclaims do rely on separate facts and law (copyright) than Jay-Z's complaint (negligence and other causes of action). The claims also are about different songs—songs that were not issue before she sought to amend. However, the Federal Rules are unambiguous that when haled into court by another party, a defendant may counterclaim for anything, even if the counterclaims are not related to the original complaint. "A pleading may state as a counterclaim against an opposing party any claim that is not compulsory." FRCP 13(b). Likewise, FRCP 13(f) specifically allows a court to permit an amendment adding a counterclaim "if it was omitted by oversight, inadvertence, or excusable neglect." Given this, and the fact that Miley came to know about Jay-Z and Beyonce's "secret" mash-up song for the first time as a result of discovery in this case, the court may well allow the amendment. There is no solid reason why Miley should be precluded from bringing her action here in response to Jay-Z, when an original suit by her against Jay-Z could include even more disparate claims. *See* FRCP 13(b). To the extent the court believes the issues need to be separated, moreover, it can take steps to minimize any complications, including, perhaps, segmenting the trial. *See* FRCP 13(i). If, however, the court decides to disallow one of the amendments, it likely would be Miley's because it adds new and different claims.

The addition of parties by both amendments also should not be problematic. FRCP 20 is clear that "[p]ersons may be joined in one action as defendants if . . . any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and any question of law or fact common to all defendants will arise in the action." FRCP 20(a)(2). This requirement appears to be satisfied in both cases. Jay-Z's amendment changes nothing about the facts relied on in his complaint; it only seeks to add Billy Ray Cyrus based on exactly the same facts relied upon to sue Miley Cyrus. Similarly for Miley's amendment, it relies on identical facts to sue Beyonce as it does to sue Jay-Z. It simply brings in Beyonce because she also, allegedly, was responsible for the "mashup" that Miley believes infringed on her intellectual property. If the court believes joining Beyonce will be too problematic, it can order the proceedings accordingly. *See* FRCP 20(b).

Motion to Compel

The court also should grant Miley's motion to compel, or at least do so in part. The Federal Rules clearly anticipate that discovery that is too burdensome or invasive may be excluded. One factor that may be assessed in considering burden is expense, although expense alone may not be sufficient reason to foreclose discovery. *See McPeck v. Ashcroft*. Another obvious consideration is time. For at least three reasons, however, any claim of burden by Jay-Z in this case should not militate against the discovery Miley seeks.

First, the information sought by Cyrus should not be that burdensome to gather. Cyrus has not asked Jay-Z to search voluminous archives for a mere shred of evidence. Nor has she asked for an extraordinary amount of data. Rather, her request asks for limited information

related to a finite set of materials—Jay-Z’s eleven albums. This is hardly the kind of expansive discovery that courts have found overly burdensome. Indeed, Jay-Z’s own communications with defendant confirm the non-invasive nature of her request. Jay-Z’s objection concedes that the information is readily available on a database to which he has access. Presumably, a few simple queries on the database would turn up what Cyrus seeks. Nor does the question violate the Federal Rules’ limitation on interrogatories. The sub-parts to Interrogatory No. 23 merely specify the precise information about Jay-Z’s sales defendant seeks; the sub-parts limit, rather than expand, the scope of information sought. Given this, Jay-Z’s claim of burden rings hollow.

Second, even if it were burdensome for Jay-Z to collect the information in question, a more reasonable resolution would be for Cyrus to share the costs with Jay-Z. Precluding the discovery here is a rather extreme remedy, particularly when the information appears so available. The Federal Rules contemplate that in some situations, the party seeking discovery must pay, such as with experts. *See, e.g.*, FRCP 26(b)(4)(C). Here, however, the concerns over Cyrus “hijacking” Jay-Z’s database subscription do not argue for cost-sharing in the way that one party’s use of another’s expert might. Moreover, Jay-Z has not claimed that the information is not within his ownership, custody, or control. Had he done so, his argument might be stronger, but since he has not, it is just as likely (if not more so) that Jay-Z has access to the information from other sources than from the Billboard subscription alone. If that is the case, his objection that Miley is impermissibly piggybacking lacks foundation. Nonetheless, to the extent the court is inclined to limit discovery in this case, cost-sharing would be a more appropriate remedy than foreclosing it completely.

Finally, any amount of burden that Jay-Z may face must be weighed against Cyrus’ need for the information. Here that balance tips heavily in Cyrus’ favor. Given that the crux of Jay-Z’s complaint is that Ms. Cyrus’ song has caused his record sales to decline, he hardly can be heard to limit defendant’s access to the very information she needs to attempt to disprove such harm. Access to past record sales data will allow Cyrus to argue that other factors have caused plaintiff’s sales of his current LP to stall—including, perhaps, that his records long have been subject to declining profits. In short, the discovery sought is highly relevant, not irrelevant as Jay-Z claims.