

Question 1 (36 points total, 3 points each)

- (a) \_\_\_ True. Based on what we know so far this class action has a decent shot of meeting the prerequisites of R. 23(a) (numerosity, commonality, typicality, and adequacy of representation), even though the Nuts will surely argue that the differences in damages among the prospective class members makes class certification inappropriate. The plaintiffs would need to be certified under R. 23(b)(3), as they are seeking damages, and Eisen has held that the plaintiff must pay all notice costs, per R. 23(c)(2)(B), even though these costs might be quite high.
- (b) \_\_\_ False. It is true that parties are generally free to settle disputes, pre-litigation, under terms of their own choosing. However, it is also true that parties are generally free to settle disputes under terms of their own choosing after a lawsuit has been filed, other than where a party is a minor or the lawsuit is a class action, in which case the court must review and approve any settlement as fair to the minor or the absent class members.
- (c) \_\_\_ True. Although impleader is appropriate under R. 14(a) only when the third party plaintiff is alleging that the third party defendant is responsible in whole or in part for the allegedly improper acts of the third party plaintiff, here, LVPD seems to be denying liability altogether and shifting it to Kopp, which is not proper impleader. For this impleader to be allowed LVPD would need to answer in the alternative, recognizing the possibility of its own liability, and then state either that Kopp's poor implementation of the policy added to the injury or that Kopp's own negligence, albeit unrelated, contributed to the injury in a jurisdiction that allows joint tortfeasor liability.
- (d) \_\_\_ False. Although R. 13(h) allows an additional party to be named if the claim against that party arises out of the same transaction and occurrence as a counterclaim or cross claim, the Rule does not apply to impleaders. Thus, the only way to add the claim against Taser International would be if LVPD could meet the R. 14 impleader standard by arguing that Taser International is responsible in whole or in part for the injuries allegedly caused by the LVPD.
- (e) \_\_\_ True. While plaintiffs can file motions for summary judgment as to an entire cause of action such motions are rare precisely because it is so difficult for plaintiffs to win such motions given that they bear the burden of proof and that the evidence must be viewed in the light most favorable to the non-moving party. However, once plaintiff has met this test per R. 56, in that defendant has failed to show a disputed issue of material fact such that reasonable jury could fail to find for plaintiff on any of the elements of the cause of action, or that a reasonable jury could find for defendant on any of its defenses, then the court must find for plaintiff.

- (f) \_\_\_ False. Courts have held that many mandatory forms of ADR are permissible, and indeed numerous jurisdictions do mandate that disputants participate in such processes as mediation, ENE, or non-binding arbitration that do not eliminate access to the courts. However, were a court or legislature to order disputants to resolve their disputes through binding arbitration many jurisdictions might find a problem under the Due Process Clause or Seventh Amendment right to jury trial, in that mandatory binding arbitration would prevent disputants from receiving a court trial of the matter.
- (g) \_\_\_ False. It is true that Defendant can potentially bring its related claim against Plaintiff as a separate claim in state court, in that the FRCP only apply in federal court and thus state courts will apply their own rules e.g. of res judicata, to determine whether the claim is foreclosed. However, it is not true that Defendant must file and pursue a motion allowing pursuit of simultaneous state litigation as such simultaneous litigation is permitted and occurs all the time, absent such motions, and in any event any federal court ruling on this issue would not be binding on the state court.
- (h) \_\_\_ False. The products of informal discovery are not necessarily protected by the word product doctrine, and indeed would need to be disclosed to the opposition if they are to be relied on in court by the discovering party. On the other hand, it is true that informal discovery is often cheaper than formal discovery and that at least the opposing party would not need to be notified as the informal discovery is being gathered.
- (i). \_\_\_ True. Claim 1 is a defense, and thus properly included in the Answer, but is not a counterclaim as it does not seek additional relief from Plaintiff. Claims 2 & 3 seek relief and are proper at minimum against Durango as permissive counterclaims under R. 13(b), which permits any unrelated claim to be included as a counterclaim.
- (j)\_\_\_ True. The mandatory discovery now required by R. 26(a) is a broadening of the discovery Rules. But, by narrowing the scope of R. 26(b) to only that information “relevant to the claim or defense of any party” (as opposed to relevant to the subject matter) and by limiting the numbers of interrogatories and numbers and length of depositions the drafters have also narrowed discovery rules.
- (k)\_\_\_ True. Although the time for filing a motion to dismiss under R. 12(b)(6) has passed, Doris can use Rule 12(c) to file a partial motion for judgment on the pleadings. If Doris can convince the court that the Complaint, on its face, fails to state a claim for punitive damages, the court should dismiss that claim for relief while permitting discovery to proceed as to the other aspects of the case.
- (l)\_\_\_ False. Rule 15 is used to amend pleadings, and not motions, so the proposed strategy will not work. Instead, given that R. 12(g) only allows one set of pre-answer motions and that the disfavored motion to dismiss for lack of personal jurisdiction was omitted, D’s best (but weak) hope is to argue that the defense of lack of personal jurisdiction was not “then available” at the time the first motion was made, and thus was not waived.

Question2 (45 points)

\_\_\_\_\_ (3) 3 options: (1) do nothing now, wait and see what happens, if anything, be ready with papers to file right away seeking TRO or preliminary injunction if Mayor acts; (2) try to settle, right away, but without filing anything; (3) immediately file complaint and seek TRO or preliminary injunction;

\_\_\_\_\_ (5) Pros and cons of “wait and see approach”.

Pros: inexpensive; Mayor may not act; keep conflict at lower level and perhaps discourage Mayor from acting; discourage Mayor from failing to renew lease later on; less publicity that could be harmful to reputation of museum; if Mayor follows through with threat, perhaps the publicity sensation that follows will draw more viewers to show and draw more funding to show; if Mayor follows through with threat can still at last minute seek TRO/PI; if Mayor follows through with threat could just let exhibit be closed and then seek contract damages later.

Cons: if Mayor does act, may well not have enough time to fight back before damage is done in terms of museum revenues and publicity; perhaps need to act immediately to defend reputation of museum, since already getting bad publicity from Mayor’s threats; failing to act now will put museum on defensive, if Mayor does call out the police; artists may sue museum for failing to show their work, as promised; delay of show could be very expensive, because publicity has already been done and because other shows are booked for future dates; suing for contract damages may be very difficult, as there will always be proof problems

\_\_\_\_\_ (5) Pros and cons of trying to settle now, without filing anything

Pros: if can reach settlement, with or without mediator, will be quick and inexpensive; if can reach settlement, perhaps can calm mayor down and preserve good relationship with City, which provides substantial funding and lease to museum, there are some creative possibilities for settlement such as displaying a warning sign or putting the contested art in a separate room

Cons: perhaps little settlement leverage if don’t bring some kind of legal action, depends on assessment of Mayor’s personality; if try to settle and fail, and have not filed anything in court, the potential downside losses are great if Mayor follows up on threat to close show; there is probably not enough time in advance of show to hold mediation and still leave time to file for TRO/PI

Overall: This seems worth trying, quickly, e.g. with a phone call or meeting with the Mayor or the City’s attorney, but we should make sure we are ready to file in court if the

negotiations are not successful.

\_\_\_\_\_ (3) Other ADR: Mediation could be helpful, if can be done quickly, as part of settlement efforts above. Is there a mediator both sides trust and think would be helpful? This would not seem to be a good candidate for arbitration, non-binding or binding, as neither side would want to give issue to private dispute resolver or give up rights to appeal, plus time frame is too short.

Pros and cons of filing a lawsuit immediately, and also seeking TRO or preliminary injunction.

\_\_\_\_\_ (3) Logistics on TRO/PI. To seek TRO/PI, must initiate lawsuit with complaint. Will file motion in the alternative, for both TRO & PI, and attempt to provide Mayor with notice. If Mayor does not appear, court could only issue TRO, which can last at most 10 days. Before filing need to consider likelihood of success, potential gains, and potential losses.

\_\_\_\_\_ (3) Standard for determining if can win TRO/PI. Per R. 65, which is relevant because Artis says he wants to be in federal court, courts employ the following test in deciding whether to issue a TRO or preliminary injunction: (1) strong likelihood of success on the merits; (2) plaintiff's showing of irreparable harm, should the TRO/PI be denied; (3) balance of hardships favor the plaintiff; (4) the public interest favors issuance of the injunction. The court would also require the museum to post a "reasonable" bond.

\_\_\_\_\_ (4) Ability to show strong likelihood of success. Under the First Amendment it would appear that the museum has a strong likelihood of success, because the Mayor is threatening to prevent the museum and the artists from freely expressing their artistic viewpoint. However, I would need to do legal research on this. Particularly, I would want to look into whether the disgusting/obscene art is entitled to protection under the First Amendment. I would also want to look into whether the Mayor's claim that the exhibit is unhealthy or a nuisance would give her a legitimate excuse to close the show, despite the First Amendment. The fact that the Mayor has not yet closed the show is probably not a major impediment, because the Mayor clearly threatened to close the show, and because one of the purposes of TROs/PIs is to prevent a party from taking certain actions. I would ask for a negative injunction, simply preventing the Mayor from closing the show, rather than a positive injunction, ordering the Mayor to do anything, because courts are more likely to grant negative injunctions.

\_\_\_\_\_ (4) Irreparable harm. To try to show irreparable harm the museum could argue that once the Mayor closes the show, substantial damage will be done. The threatened police barricade would not only close the Artful Animals show, but would also block persons who want to attend any of the museums other shows and events. The damage would include immediate loss of revenues from admissions and gift shop sales; potential loss of contributions and grants, from persons who might believe the Mayor's actions were justified; the waste of publicity that has already been paid for; and a lawsuit by the

artists. As well, if the museum had to close for a substantial time it would have to lay off its workers. The Mayor would argue that none of these potential losses are irreparable, and that the museum could recover its losses if it eventually won the suit. However, if the museum had to wait until the end of a lengthy lawsuit to establish that the Mayor's actions were wrong, it would have already lost the opportunity to put on the show at the promised time. The damages to the museum's credibility and reputation might not be recouped.

\_\_\_\_\_ (3) Balance of hardships. The museum would cite the same factors, above, to show that it would be a real hardship to the museum, its public, the artists, and the museum employees if the Mayor were permitted to block the show. The Mayor would likely argue that the barricade is necessary to prevent the public mind from being "poisoned" by the disgusting show, and also to prevent possible health problems. While I would have to research the validity of the Mayor's health claims, my instinct is that the museum has a stronger showing on balance of hardships.

\_\_\_\_\_ (3) Public interest. Usually this factor is the one that matters least, when courts decide whether or not to issue preliminary injunctions. In this case, however, both sides would probably contend that they were protecting the public. The museum would emphasize that the public benefits from the expression of free ideas, under the First Amendment. The Mayor would argue that she is protecting the public from disgusting supposed art. Unless the facts show that there is really a significant health risk, the museum has a stronger argument.

\_\_\_\_\_ (1) All in all, I think the museum has a pretty high likelihood of success on winning a TRO or PI.

\_\_\_\_\_ (3) Potential gains: If museum can win TRO or preliminary injunction it will prevent the Mayor from closing the show, thereby saving revenue from admissions and shop; if museum can win, it will score big public relations victory, at least temporarily, which will possibly increase private donations or even grant funding; early victory may discourage Mayor, cause her to back down from future efforts to close museum; early victory will sap the Mayor's political support, help constituents to see that there may be a Constitutional problem with what the Mayor is doing; Mayor may be afraid to try to pull the lease, later on; Bob Artis may feel that he has gained a personal victory if he can defeat Mayor with a TRO

\_\_\_\_\_ (3) Potential losses: If the museum seeks a TRO or preliminary injunction and fails to get it, it does face some significant losses that need to be considered. First, the museum would have wasted the \$ it paid me to try to win the injunction. Second, and more significant, the museum would have lost an important public relations battle. Even though the court's denial of the injunction would not mean that the museum would eventually lose, in the final judgment, the public would likely take the denial of the

injunction as an indication that the Mayor was right and the museum was wrong. This would likely hurt the museum in terms of private contributions and public grants. Thus if, after my legal and factual research, I did not think there was a very strong likelihood of winning the TRO/preliminary injunction, I would not recommend that the museum seek such an injunction. There is also some risk seeking TRO/PI will anger Mayor, and cause Mayor to cut off future funding or lease. But, if this were done out of retaliation I might be able to defeat it under First Amendment.

\_\_\_\_\_ (2) Conclusion: Overall, based on the information provided, I would recommend filing a lawsuit immediately seeking a TRO/PI. It seems, based on my preliminary understanding of the facts and law, that the likelihood of success is high. This option, if successful, would be highly advantageous to the museum. If the Mayor later tries to cancel our lease, I am hopeful we can use public opinion or the courts to defeat her retaliatory attempt.

\_\_\_\_\_ Other

### Question 3 (19 points)

\_\_\_\_\_ (3) Intro. In this lawsuit plaintiff Barb Root, on behalf of a class of similarly situated 10-12 year old girls, seeks injunctive relief against Defendant City of Denver for refusing to allow girls to play baseball. This is a motion for sanctions, pursuant to R. 37(b). Despite an express order of this court Defendant has refused to provide discovery that is relevant to this litigation and not covered by any privilege. For the reasons set out below plaintiff asks that this court sanction Denver by (1) striking its Answer and (2) awarding plaintiff all attorney fees and costs she has occurred as a result of Defendant's defiant behavior.

\_\_\_\_\_ (2) Rule. According to Rule 37(b)(2) a court may issue appropriate sanctions if a party fails to provide discovery the court has ordered. The Rule explicitly provides that such sanction may include "an order striking out pleadings or parts thereof", and also provides that "in lieu of . . . or in addition" to other sanctions the court "shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that that other circumstances make an award of expenses unjust."

\_\_\_\_\_ (1) The sanction of striking an answer is admittedly very impacting, in that it would mean that plaintiff prevails on the merits.

\_\_\_\_\_ (3) Such sanction is nonetheless appropriate where, as in this case, a party has without excuse simply refused to comply with the court's order. Such a dramatic sanction is particularly appropriate where the refusal is part of a pattern of non-cooperation with discovery. Plaintiffs initially sent the disputed interrogatories to Defendant on August 11. Defendants neither responded nor filed a motion for protective order. When contacted,

were uncooperative and instead said “take a hike.” Upon reviewing Defendant’s objections to the discover the court found them largely unjustified, instead ordering Defendant to respond in full, for the years 2003 through the present. Note also that Defendant only responded to Plaintiffs’ prior statistical discovery requests upon being ordered to do so, by the court.

\_\_\_\_\_ (3) The sanction of striking the answer is appropriate because without the requested discovery plaintiff cannot adequately prepare her case, especially in the short time remaining. Plaintiffs seek names and contact information of female softball players, male baseball players, and coaches for the Denver teams since 2003. Such information is crucial to allow plaintiffs to search out witnesses who can help her prove that Denver’s discriminatory behavior was unjustified and detrimental to the girls. The court has already recognized the importance and relevance of this information in granting plaintiff’s motion to compel, and made clear that the requested information is not covered by any privilege or work product doctrine.

\_\_\_\_\_ (3) Precedent. The U.S. Supreme Court, in Bauxite, held that where a defendant had refused to comply with a trial court’s order to produce discovery requested in connection with a personal jurisdiction dispute the court acted within its discretion by ordering that personal jurisdiction simply would be established. Similarly, in a case involving Morgan Stanley the trial court ordered a jury to find that liability had been established against MS because MS had engaged in obstructionist behavior in discovery. Here, because Denver has similarly and repeatedly engaged in obstructionist behavior, it is appropriate to strike its answer.

\_\_\_\_\_ (2) Policy. This is precisely the sort of situation for which the remedy of striking pleadings was designed. If courts do not take dramatic actions in such cases they encourage parties to flout their orders.

\_\_\_\_\_ (2) Attorney fees and costs. Plaintiffs have incurred significant costs in filing the prior motion to compel, appearing in court, and now drafting this motion. Under the rule plaintiffs are entitled to their reasonable fees and costs unless defendant can show its behavior to be justified, which it has not. R. 37(b).

\_\_\_\_\_ Other