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===== Start of Answer #1 (1797 words) =====

**1. Was Susan properly served with the summons and complaint?**

Service of process is accomplished when the summons and complaint is delivered to the defendant either personally, or is left with an individual at their home of appropriate age, that appears to be residing there. There are time limits for service, if these time limits were not adhered to, there would be improper service. The question however does not give us any times of service or filing, and as such, analysis on this would be inadequate.

The papers were left at S's house in Eugene, Oregon. Personal service of documents to an out of state defendant at their home is allowed if the court has personal jurisdiction over the individual. However, as will be discussed in the next question, there is a lack of personal jurisdiction here. Even so, there is another issue to be discussed. The gardener being served appears to be improper. However, if S shows up in court and files an answer she has consented to jurisdiction. Here, she has not does so. We have no indication she is aware of the papers. If we had more information that showed she was aware and acted on them, or that the process server was reasonably sure that the gardener lived at the house (**Mullane**), there would be a stretched argument for proper service.

The facts given indicate that the service was likely improper. ✓

**2. Does the San Francisco County Superior Court have personal jurisdiction over the defendants?**

Personal jurisdiction refers to a courts power over an individual and its ability to compel judgment from them. ✓

Historically, personal jurisdiction was limited to individuals within the same territorial limits (states) as the court. (**Pennoyer**) However, this system needed adjustment as the

world grew larger, and the Supreme Court of the United States (SCOTUS) created a new test in **International Shoe**, deemed the minimum contacts test, that determined whether an absent defendant was available for personal jurisdiction within the forum or not. This test was developed with the idea of traditional notions of fair play and substantial justice as its underpinnings. ✓

A discussion of minimum contacts requires a distinction between general and specific jurisdiction. General refers to contacts that are through continuous and systematic behavior exhibited towards or within the forum state by the individual. (**Perkins**) General requires more contacts than specific. Specific jurisdiction may be claimed when the contacts themselves lead to the case or controversy involved. Theoretically, only one contact may be sufficient under a theory of specific, however, there is a debate about the correctness of that decision (**McGee**). Specific jurisdiction cannot be gained due to a unilateral decision by a party unless they have purposefully availed themselves to a forum state. (**Hanson**) One of the key cases in this situation is **WorldWide Volkswagen** which stated that unilateral action by a third party without purposeful availment of the defendant, and a belief that they might be hauled into the forum state is not enough to get personal jurisdiction over an absent defendant. This is key in D's case.

A.) Personal Jurisdiction over "Daredevil" Dan (D) ✓

D has purposefully availed himself within the state of California through his advertisements in the newspaper and offering of discounts to individuals in California. This would be considered a specific jurisdiction issue due to the fact that the case at issue arises out of his contacts in the state. Further, the fact that P paid in full via the internet is another factor in determining California's personal jurisdiction over D. California has an interest in protecting its citizens, who having never left their home, were solicited by an outside company, paid for their services, and were later hurt engaged with said company. He has minimum contacts and he should have realized that his extensive advertising and getting payment from California residents would open himself up to litigation in California. He would have reasonably anticipated that he might be held to answer here. ✓

B.) Personal Jurisdiction over Susan (S)

S is a resident of Oregon. There is no indication in the fact pattern that she has any contacts with the State of California. She has no contacts with the state. Thus, California has no personal jurisdiction over her. Personal jurisdiction may be gained through service or consent, however, in this case, the service appears to be inadequate, and we have no indications that she consented. ✓

**3. Is San Francisco Superior Court the proper venue for this case?**

In California, venue is controlled by Civil Procedure section 395. That section lays out proper venue to bring actions. This code section is similar to 28 USC 1391. The relevant portion of 395 states that venue is appropriate if its in regards to a personal injury action, in the county that the defendant lived, where the injury occurred, or where a substantial portion of the transaction occurred. Here, the injury occurred in Oregon. It is unlikely the proper venue for this action based on that component. The defendant lives in Oregon, so, San Francisco is improper on that component. We are left with deciding whether a substantial part of the transaction occurred within San Francisco County. Plaintiff's traditionally are allowed the discretion to file a lawsuit where they wish. Here, the facts state that the only piece of this transaction that took place in the state of California occurred in Santa Rosa, CA. Those pieces, purchasing of the trip, and being solicited of the trip, may constitute a substantial part of the case. However, if they were ruled to have, then the case should have been brought in Sonoma County, not San Francisco County. ✓

Seeing as there are no ties in San Francisco County to either the Plaintiff or the Defendant, it is unlikely that this is the appropriate venue. As such it would be subject to a motion based on CP 396 stating that it was improper venue, and it might be transferred to Sonoma County under CP 397 should the court rule that would be appropriate. The defendant is also likely to remove to federal court, which will be discussed next.

**4. May the case be removed and where should it be tried?**

Federal rules of removal is encompassed in 1446. The rules state that a defendant may move for removal to any district court in which the action could have been originally brought. In order for an action to be originally brought in Federal Court, the court must have subject matter jurisdiction to hear the case. Federal courts, unlike a state court which has general jurisdiction, is of limited jurisdiction. That limited jurisdiction is stated as subject matter jurisdiction and comes in 4 varieties. The most common three are under a federal question under 1331, under diversity jurisdiction under 1332, or under supplemental jurisdiction under 1367.

Here there is no federal question, as there is no allegation that this case arose out of anything to do with the constitution, treaties, or rules of the United States.

Diversity Jurisdiction is gained over a case when the parties are shown to be domiciliaries of different states and the amount in controversy is over \$75,000. The parties must be in complete diversity (**Strawbridge**). Here, P lives in CA. Both defendants are domiciliaries of Oregon as far as the facts indicate. Under **Hertz**, a corporation's residency is dictated by its headquarters location, and as D is headquartered in Oregon, his business resides there. The other factor regarding diversity jurisdiction has not been shown in the fact. We may postulate however, that due to P and S being airlifted to a hospital with significant injuries, that the amount is over \$75,000. Even if the amount is not shown to be that much in the end, at this point, it appears that in good faith it would be believed to be as such. Federal Courts would have subject matter jurisdiction over this claim under diversity. Thus, the case may be removed to federal court, as D has the burden to show there is subject matter jurisdiction which I believe has been shown. A caveat here would be when he files for removal. He must file for removal within 30 days of being served. There is another issue since all defendants need to consent to removal in order for it to be so. Currently, S appears to have no responsibilities in this lawsuit since she was not properly served and has no personal jurisdiction. However, federal court would have proper personal jurisdiction over her once removed. If she was dropped from the lawsuit due to no personal jurisdiction and improper service, then D would not need her consent to remove. However, if after its removed to federal court, they attempt to bring her back into the action under the theory that now the federal court has personal jurisdiction over

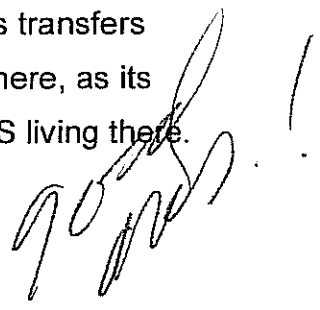
her, I am unsure what would happen.

Forum non Convenience and Transfer come into play with where the case would be removed to. Those separate concepts, they are similar. Forum non Convenience is a common law remedy that stated when the forum was unduly burdensome on the defendant, it was dismissed. However, the defendant had to show a very high level of inconveniences here. The fact that D purposely availed himself to this forum, sent things here, and the fact that Oregon and California are very close means that he would lose in his attempt to argue Forum non Convenience. He would also likely argue that the case should be transferred up to Oregon after its removal. He initially wishes that for it to be transferred to La, where his brother in law practices law. Initially he would be allowed to remove it to this court. However, it would not be allowed to stay there. 1404 states that in the interests of justice, and in regards to economy of the parties and witnesses, district courts may transfer to any district it could be initially filed in.

D is likely to argue that in the interests of justice and the fact that he, s and witnesses are possibly in Oregon dictates that it should be transferred up to Oregon. However, in diversity cases, it cannot be removed to a state where a defendant resides. This is due to a thought that there would be home town advantage. This is not as much of an issue in the current age, however, its still the rule.

P is to argue that LA is vastly inconvenient for her, and as such it should be transferred to District Court in SF. This might be the appropriate location, as transfers are under the discretion of the judge. Most likely the case would be heard here, as its close to the plaintiff, and it cannot be removed to Oregon based on D and S living there.

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===== Start of Answer #2 (1083 words) =====

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**1. Was the court's ruling on the subject matter jurisdiction motion challenge correct?**

Subject matter jurisdiction (SMJ) is the courts power to hear specific types of cases. Federal courts are courts of limited jurisdiction. They can only hear cases arising out of two circumstances. When these circumstances are met the federal court has subject matter jurisdiction. Section 1331 allows federal court's smj when the complaint states a claim arising out of a federal question, that is based on

the constitution or federal statute. Section 1332 allows SMJ when in diversity actions, that is when the parties are citizens of diverse states .

Here, Paula (P) brings her action under a federal question (FQ), the federal copyright law. Therefore, the federal court has SMJ over the portion of the action. The question is whether her other claims qualify for federal SMJ as well.

*Seeger*  
*5.* Under section 1367, which codifies Gibbs), claims which otherwise would not meet federal SMJ can be brought along with a federal question if those claims arise from the same nucleus of operative facts, or same circumstances as the original claim. It can be argued that the defamation claim is arising out of the same nucleus of facts or event as the copyright claim. If so, the court will likely find that there is supplemental jurisdiction. However, the breach of contract claim clearly is not related to the same events and operative facts as the original claim, and there will not be supplemental jurisdiction. ✓

Absent, supplemental jurisdiction and federal question, the court may still hear the claim under diversity jurisdiction if it

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finds that the parties are citizens of different states. However, the claims do not reach the \$75,000 threshold, and as such will not qualify for diversity jurisdiction. If the claim amount were sufficient then diversity would exist as P appears to be a Nevada citizen and D appears to be a Cal citizen although there are insufficient facts to make a definite determination.

The court was correct to deny the motion as to the copyright claim (and possibly the defamation claim), but was in error in denying the claim for breach of contract.

## **2. Courts ruling on motion to strike affirmative defenses?**

The court erred in denying Paula's motion to strike affirmative defenses. The motion to dismiss for improper venue is a Rule 12(b)(3) motion. Rule 12 allows that a party may make certain motions based on affirmative defenses before answering to a pleading. However, some of these defenses are waived if they are not included in the consolidated in the original motion. Rule 12(b)(3) is one of



the defenses that is waived. Here, D filed an earlier motion to dismiss based on SMJ and did not include the 12(b)(3) motion. As such it was waived. The court should have granted P's motion to strike.

### **3. Transfer of the case to San Francisco**

Section 1404 allows the defendant to move to transfer a case to a different venue when the original venue is proper and section 1406 allows for dismissal or transfer when the original venue was improper. Section 1397 provides the rules for determining proper venue. This motion would be brought under 1406 because the original venue was improper. (see below) Proper venue may lay in any federal question where a defendant resides, if all of the defendants reside in the same state, or in the any district where a substantial portion of the events giving rise to the action took place. If neither of these are available then the proper venue may be any district where a defendant resides.

Here, the only D is the sole defendant. Proper venue will be the location where he resides. For federal venue

purposes an individual resides in the district that he is domiciled, which here would be the district representing Sacramento, and the court would transfer the case there. However, for corporations, proper venue would be any district that has personal jurisdiction over the corporation. If D is a corporation then it would seem that he has sufficient contacts in San Francisco that the San Francisco district would have personal jurisdiction over him. Therefore, he would be able to transfer the case to SF. This would be reasonable as his business and his witnesses are all in SF.

#### **4. Which law should district court apply?**

In cases in federal court on federal question jurisdiction, the federal court will apply both federal substantive and procedural law. Thus the the court should apply federal law to the copywrite action. In cases arising out of diversity of citizenship, the Supreme Court held in *Erie* that state substantive and federal procedural law should apply. Cases subsequent to Erie helped delineate what laws are substantive and which are procedural. First, *York* provided

the outcome determinative test. That is if applying federal law would lead to a different outcome than applying state law then the law is substantive and the state law should apply. Next, *Byrd*, provided the interest balancing test along with the certainty of outcome test. First, a law is only outcome determinative it will decide the outcome with absolute certainty. More, importantly, the court's should weigh the state and federal interest in having their choice of law applied. Finally, *Hanna* provides two tests. First, if there is a federal directive on point then the federal law should apply. Secondly, the court should consider the twin aims of *Erie*, to 1) prevent forum shopping and 2) the inequitable administration of the law.

Here there are two areas where choice of law is a question. First, federal law prohibits questioning until a judge authorizes. This is a federal directive and under *Hanna* the federal law will control in this matter. Second, we consider the arbitration clause. Applying *York*, the arbitration clause is probably not outcome determinative, as pre-trial mediation will not definitely determine the

case's outcome. Next we use the Byrd balancing test. The state of Nevada has expressed a strong interest by creating a law forcing arbitration, presumably to decrease the burden on their court system and encourage settlement. Under the balancing test, the Nevada law would probably apply. Next, we will apply the twin aims of Erie under the Hanna decision. Applying federal law here may encourage forum shopping as those parties that could avoid arbitration by going to federal court probably would do so. Further it would be inequitable for some plaintiffs to be forced into arbitration while others aren't. Under Hanna and Byrd, I would apply the Nevada law in regard to arbitration.

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End of Answer #2