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## 1. DAN'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Dan is filing a rule 12(b)(1) pre-answer motion based on lack of subject matter jurisdiction.

Subject matter jurisdiction is the power of the court to hear the case. Federal courts are courts of limited jurisdiction and there are two basis for a case to be in federal court. 28 USC 1332 governs federal questions, in which the case involves a question of federal law that is pled on the face of the complaint (the well-pled complaint rule). The federal question cannot arise in what the Plaintiff thinks the defendant will assert as a defense. 28 USC 1332 governs diversity jurisdiction, when cases can be heard in federal court if the amount in controversy is greater than \$75,000 and there is complete diversity between the parties (the parties must be citizens of the US and domiciliaries of different states, which is their permanent residence where they reside, per *Mas v Perry*.)

Here, Peter sues Dan in US District Court in San Francisco on the basis that Dan would claim a federal law defense. Per the well pled complaint rule, supra, a federal question arising as the defense to the claim does not give rise to 133 federal question jurisdiction. This claim will fail subject matter jurisdiction on the basis of a federal question. However, it can come into federal court under diversity jurisdiction.

Peter's domicile is in California, and Dan's is Eugene, providing complete diversity of the parties. The vase amount is \$80,000 meeting the second requirement of diversity jurisdiction of the amount in controversy being over \$75,000. Dan asserted this claim in his first Rule 12 motion, but he could have brought it at any time, as pursuant to rule 12(h), subject matter jurisdiction is a defense that is not waivable and not lost if not pled in the first Rule 12b motion. Based on diversity jurisdiction, the district court has subject matter jurisdiction, and Dan's pre-answer motion will be denied. ✓

## 2. DAN'S MOTION TO DISMISS THE LIBEL CLAIM

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Dan also included in his rule 12(b)(1) pre-answer motion based on lack of subject matter jurisdiction a claim to dismiss Peter's separate claim for libel.

Pursuant to rule 18, a party is can assert all claims that they have against a party, whether related or not, at one time. This is for the efficiency of the courts. The libel claim is relating to the sale of the vase, This claim arises out of the same transaction or occurrence and can be brought under 1367 supplemental jurisdiction, since it pertains to a common nucleus of operative fact (*United Mine Workers v Gibbs*). The court will still have subject matter jurisdiction, since there is still complete diversity of the parties and the amount in controversy is over \$75,000. It is irrelevant that this is not a "serious" claim. Peter pled it and is allowed to include it in his complaint. Dan asserted this claim in his first Rule 12 motion, but he could have brought it at any time, as pursuant to rule 12(h), subject matter jurisdiction is a defense that is not waivable and not lost if not pled in the first Rule 12b motion.

Dan's pre-answer motion to dismiss the libel claim for lack of subject matter jurisdiction will be denied.

### 3. DAN'S MOTION TO QUASH THE SERVICE OF THE SUMMONS AND COMPLAINT

Dan is filing a Rule 12(b)(2) motion for lack of personal jurisdiction. Based on the facts, it sounds like this defense is being included in the first Rule 12(b) motion, where it is allowed to be asserted. If Dan didn't bring up this defense in his first pre-answer motion, or his answer if no pre-answer motion was filed, he would have waived this defense. However, since it is being brought in the first pre-answer motion, it will be allowed to be pled as a defense.

Here, Dan is moving to quash the summons for lack of personal jurisdiction.

Personal jurisdiction is the power of the court over the person. The court can acquire personal jurisdiction over someone if they are a domiciliary of that states and reside within the state bounds (*Pennoyer v Neff*), if they are present in the forum state (*Burnham v Superior Court*), or if the party consents to jurisdiction, either express or implied (*Carnival Cruise Lines*). In order to obtain personal jurisdiction over a non-resident of the forum state, the non-resident must have sufficient minimum contacts

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such that being brought into court in the forum state does not offend our traditional notions of fair play and substantial justice (International Shoe). The party must purposefully avail themselves to the forum state so that it is foreseeable that they could be hauled into court there (WorldWide Volkswagen). The non-party's contacts with the forum state are based on quality, not quantity.

Here, Dan sells an antique vase to Peter who travels back to California with it. Dan claims that he has never sold antiques to a California resident before and that he thought Peter came to visit him for personal reasons. However, Peter first met Dan when Dan was in Marin County, where he was showing vases. It sounds like Peter traveled to Eugene to buy from Dan based on their interaction in Marin County where Dan was purposefully availing himself of California by showing vases in the state. This is enough of a minimum contact with the state for it to be foreseeable for Dan to be brought into court here. It is irrelevant that Dan has never sold antiques to a California resident before since he was in California attempting to sell them, whether or not anyone bought one. The purpose of Dan's trip is also irrelevant. Based on this, the court does have personal jurisdiction over Dan. ✓

However, Dan should also file a Rule 12(b)(5) motion to quash for insufficient service of process.

Due process requires that parties receive notice of an pending action and the opportunity to be heard. Notice is what is reasonable under the circumstances (Mullane v Central Hanover Bank). After the filing of a complaint, all parties must be served with the summons and complaint to apprise them of the pendency of the action and provide them an opportunity to respond. A summons and complaint must be served on a party within 90 days of being filed. It can be served via personal service, mail, substitute service or waiver and acknowledgment of receipt.

Here, the summons was delivered to Dan's 17 year old son. While substitute service is one way to serve someone, it must be left with a person over the age of 18 who resides at the residence. Since Dan's son is 17 and a minor child, he could not accept service on behalf of his dad, regardless of whether he resided there. This is not proper service. While Dan would be apprised of the pendency of the action, he must be properly served before he needs to appear in court. ✓

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#### 4. DAN'S MOTION FOR A PROTECTIVE ORDER

Attorney work product is privileged information that is made in anticipation of litigation and protected during the Rule 26 discovery process.

Here, Peter sends a RFP to Dan's attorney seeking the witness interviews since they can't be found now.

Dan has filed for a protective order to keep this info privileged. Dan's attorney will argue that this material is protected and falls under the attorney work product privilege because it is material that was done in anticipation of litigation and contains the attorney's theories and research.

Peter can file a motion to compel to obtain these docs. In order for Peter to obtain the witness interviews, he will have to show that there is no other way to get this information and it is essential to his case. There is no way, without undue burden, to get copies of these materials. Since the previous owners of the vase can't be found, it will be impossible for Peter to obtain this info elsewhere, meeting the undue burden test. The info he is seeking to obtain is essential to his claim because the vase is the main component of the case, and he could potentially show that it was a fraudulent transaction and what he bought was not what was represented to him. In this case, the court would grant Peter's motion to compel the request for production. However, the Judge can never order mental impressions, legal theories, opinions and conclusions to be produced to the other side (Hickman v Taylor). Derogatory comments do not fall within this exemption.

The Judge would grant the protective order in regards to Dan's attorney's theories and research, but would deny the protective order to the witness interviews and derogatory comments. The materials could be produced with Dan's attorney's theories and research omitted.



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**The three defendant's motions to dismiss for lack of personal jurisdiction.**

I'm not sure how this case is in federal court as it does not appear to be a federal question claim, and there is no complete diversity amongst the parties as Paul the plaintiff lives in CA, and defendants Ears R Us is domiciled in Nevada, and manufactures in CA, David is in Nevada, and Darlene is in CA. However, assuming that the court has subject matter jurisdiction, the parties here are challenging personal jurisdiction.

It appears that the three have all filed the rule 12 motion as a pre-answer or if not, in the answer, which would preserve their ability to challenge personal jurisdiction.

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Personal jurisdiction is the power of a court to engage in binding adjudication over a person or thing. The traditional test for personal jurisdiction was established in *Pennoyer*. There the court held that courts of the forum shall have exclusive jurisdiction over person's and property located within their territorial boundaries. Modernly the basis for personal jurisdiction may be established in other ways. 1) where a defendant is served within the forum state, *Burnham*, 2) if the defendant is domiciled in the forum state (residence with intent to remain) even if served outside of that forum state (*Mas v. Perry*). 3) if a defendant has consented to jurisdiction through contract, *Carnival Cruise Lines*, 4) if a defendant waives personal jurisdiction, making a general appearance waives any defect in personal jurisdiction, *Ceullar*, and finally, if minimum contacts can be established.

The minimum contacts test was established in *International Shoe*. There the court held that in order for an absent non resident defendant to be subject to personal jurisdiction there must be sufficient contacts or ties not to offend the traditional notions of fair play and substantial justice. Later, the international shoe standard was extended to apply to action in rem and quasi in rem following a three part test, that evaluates the relationship between the defendant, the forum and the litigation.

Minimum contacts consists of two categories, General and specific jurisdiction. General jurisdiction exists when the defendants presence in the state is systematic and continuous as to render the defendant at home in the forum state. Specific jurisdiction occurs when the defendants activities in the state are purposefully directed at the forum state (*Burger King*), or the defendant is availed of the benefits and protections of the forum state (*J. McIntyre*).

Here, the CA court has personal jurisdiction over Darlene as she is domiciled in CA. The court also has personal jurisdiction over Ears R Us as they have clearly sufficient minimum contacts. They conduct business with the company's manufacturer located in Los Angeles. The company likely travels to CA on a regular basis to pick up shipments, order new products. They likely regularly receive/send products to and from CA. Further Darlene introduced herself to some CA doctors at the Chicago convention, and the combination of all these events make it likely that there are sufficient minimum contacts for Ears R Us in CA. Finally this brings us to the last defendant David. He lives just over the border in Nevada, and works for the company

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located in Nevada. It is unlikely that he has never been to CA, but from all we can tell from the fact pattern, he may have never been to CA. It does not appear that he works in CA, and he would not be expected to be haled into a CA court for merely working at a Nevada company. There are no other contacts that could get David into a CA court.

The court has personal jurisdiction over Darlene and Ears R Us, but the claim against David should be dismissed.

**Pauls' request for a consumer jury instruction.**

In Erie, the court held that state substantive law and federal procedural law should be applied. The twin aims of Erie was the discouragement of forum shopping and avoidance of inequitable administration of the laws. The Erie doctrine evolved in York and the Outcome Determinative Test was created, which provides that if a law substantially effects the outcome of a case, then it shall be considered substantive and the state law applied. Later in Byrd, the court held that district courts should weigh the interests of the state and federal government to determine the law to be applied. Finally in Hanna, when state and federal laws conflict, per the Supremacy clause, the federal law should be applied.

Here, there is a state law for a jury instruction, that the benefit of any doubt should be given to the consumers injured by defective products. Hanna does not apply here, because there is no federal law on point. Per the outcome determinative test, it does not appear that this law would substantially affect the outcome of the case. As when it comes down to it, the law is only used when the jury is 50/50 and cannot make a decision. A slight one percent advantage does not sound sufficient enough to make this a substantially affect the outcome of the case. The federal government has an interest in this matter because multiple states are involved and Nevada residents could be affected by CA courts. The government here has an interest in protecting all of its citizens fairly. There would most likely not be a huge incentive to forum shop based on this law as it only helps a plaintiff one percent. Per Erie, federal procedural law should be applied. Because of the analysis of Byrd and Erie, I am leaning towards the federal law being the law here, and since there is none, the CA law is rejected. However, Erie only applies to diversity actions. I am still not sure how this

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case is getting into district court. Diversity is destroyed by all of these parties litigating in this action, and there is no federal question. If this case is in diversity then the state law is out per my analysis.

**Darlenes's objection to the prospective jurors.**

A party gets three peremptory challenges to dismiss a juror without reason. They get unlimited challenges for cause. Paul had a valid challenge to all three of these jurors because as small business owners they may be prejudiced against him, that is a valid claim. The 14th Amendment, prohibits the systematic exclusions and arbitrary discriminations of jury selection. Based on race, gender, etc. Under Batson, the burden is on Darlene to claim that Paul is discriminating (race, gender, etc.) against a juror and removing them for that reason. The burden then shifts to Paul to explain that, no, he has a valid discriminatory neutral reason for dismissing the jurors (that they are small business owners and they may be prejudiced against him), and finally the judge makes ruling. The judge here, will clearly be ok with the dismissal of these jurors as they were for good cause. He shouldn't have wasted his three peremptory challenges.

**Patties' motion for summary judgment.**

Summary judgment is granted when all the pleadings, discovery, evidence, etc., show that there are no genuine issues as to any material fact, and that the movant is entitled to judgment as a matter of law.

Res Judicata - a final judgment on the merits precludes the parties from successive litigation if: 1) there was a valid final judgment on the merits, 2) by a court of competent jurisdiction, 3) the parties (or those in privity with them) are identical in the two suits, and 4) the same cause of action applies in both suits. The same cause of action is present, hearing aids injuring clients, and there was a valid final judgment. However, the parties are not the same, and further, I'm still not sure this was a court of competent jurisdiction since there is no subject matter jurisdiction in the case. Either way Res Judicata is not applicable here.

A partial summary judgment is when the court does not order a Summary Judgment on the entire case and the court should determine, if practicable, whether there is no

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genuine issue as to a specific fact. Here Pattie is moving for summary judgment on the issue of liability. Pattie will be using offensive, non-mutual, collateral estoppel. Collateral estoppel precludes the parties from re-litigating an issue that has already been determined as part of an earlier claim. Collateral estoppel elements are 1) the issue in the second case is identical to the issue in the first, 2) the case was actually litigated, 3) the case was actually decided and 4) it was necessary to the judgment. The issue here is liability from Ears to a plaintiff for their defective earpiece further injuring the plaintiffs. The case was actually litigated and decided as it went to trial and there was a verdict for the plaintiff. The issue was necessary to the judgment in the first and second because it was the basis of the entire case, namely was Ears responsible? Collateral estoppel may be used here.

Pattie is seeking to use Offensive Non-mutual collateral estoppel, in order to not have to litigate all over again. The court should consider, whether the estopped party had a strong incentive to litigate in the first action, 2) whether the procedural opportunities to litigate were as broad in the second as they were in the first, and 3) any other evidence to suggest that the plaintiff could have joined in the earlier proceeding. The party being estopped is Ears, they are being prevented from saying, no we are not liable. In collateral estoppel, unlike res judicata, there need not be a mutuality of the party's only that the estopped party was a litigant in the first proceeding. Ears was as likely to fight as strong against the first claim as it did in the second. If the first lawsuit was for \$100, and this lawsuit is for \$1 million, then there would not be as strong as an incentive for Ears to litigate and it would be unfair to hold them to that court's ruling. However the facts are silent as to the amount in controversy and i can only assume that they are equally strong. There is no evidence to suggest that Pattie just sat around and waited until she heard of a verdict in her favor before initiating her lawsuit. If there was evidence that she did do that, then she may not be allowed to use collateral estoppel this way. From the facts it appears that she was injured by the the hearing aid and filed suit because of her injuries. It appears that she lucked out by having an earlier verdict in her favor. She may use collateral estoppel offensively here.

The court should rule in Patties favor for the summary judgment on the issue of liability.

*Excellent!*

**END OF EXAM**