START OF EXAM

-->Question -1-

Question #1

In order for the court to determine the issue at hand, whether the defendant's 12(b)(6) motion for failure to state a claim upon which relief could be granted, the court first must analyze Guirguis's complaint. The complaint must satisfy the requirements set out in Rule 8 of the Federal Rules of Civil Procedure in addition to the standards set out in case law interpreting Rule 8.

First, Congress granted the Supreme Court the right to establish and prescribe rules for the federal court system under 28 USC § 2071-72. Rule 8 governs pleading requirements beginning with 8(a)(1-3) which requires a short and plain statement of the grounds for the court's j/d (jurisdiction), a short and plain statement of the claim that the pleader is entitled to relief, and a demand for the relief sought. I will assume that Guirguis (now abbreviated as P) included the grounds for j/d and relief in his complaint, and that the determinative issue is whether the short and plain statement follows the standards set out in case law, most recently by Twombly and Iqbal. Generally, we know that the default rule is that most pleadings usually survive dismissal unless the pleader pleads themselves out of court, fails to assert a claim based on a recognized cause of action, fails to plead an essential element, pleads allegations deemed conclusory, pleads in a nonconclusory manner but the pleading isn't plausible, or the complaint fails to give fair notice to the other party. The general rule was established by Conley v. Gibson, where the court held that in order for a claim to be dismissed under a 12(b)(6) motion,
the claim must appear beyond doubt that the plaintiff can prove "no set of facts" in support of the claim that would entitle him to relief. The Conley court upheld the policy of the rule makers that the purpose of liberal pleading requirements was to facilitate proper decisions based on the merits of claims, meaning that a short and plain statement is all that is needed. The exceptions to the general rule stem from more recent Supreme Court decisions, Twombly and Igbal. In Twombly, the plaintiff's complaint based on allegations of parallel business practices not to compete in regional markets was deemed conclusory because the statement was a legal conclusion without supporting facts. The court held that specific facts were not required but enough facts were necessary to state a claim that is plausible on its face (pg. 213). In Igbal, the court also held that Igbal's allegations were conclusory and required courts to draw on "traditional judicial experience and common sense" to decide whether claims where plausible. One might conclude that narrow readings of Twombly/Igbal are appropriate because those cases deal with antitrust and qualified immunity situations. Perhaps these situations require special pleading requirements because of the potential high cost of discovery or because of the security and privacy concerns related to qualified immunity. Additionally, Swierckiewicz, a case that also held that a short and plain statement of the facts was all that is need instead of heightened pleading requirements for discrimination, was never over-ruled. However, Igbal extended Twombly to apply to all pleadings, not just anti-trust litigation. Therefore, after determining that Guirquis's pleading follows the 8(a) requirements, the court will also need to apply the Twombly/Igbal two-step: 1) Is the complaint conclusory? 2) Is the complaint plausible?

In application of the T/I two-step, the court will first mark out all of
the legal conclusions in the complaint and then look to see what remains. The line "he was terminated by the defendant in violation of his civil rights" may be interpreted to be a legal conclusion. P will argue that that is not conclusory because it was the reason for his termination. The P will likely want to rely on Swierckiewicz where the court held that S did not have to plead all the elements of prima facie discrimination, whereas that was an evidentiary requirement and not a pleading standard. The P may not know of any other reason why he was terminated other than discrimination, so it may not be possible for him to make a statement that is not conclusory. The P could have made a better argument, following S's lead, had he also listed reasons that he should not have been terminated. For example, that he was never late, performed his job according to standards, co-workers thought he was hard-working, etc. However, at that point we are getting into the realm of requiring evidence rather than pleading facts, so perhaps that wouldn't be necessary. The D will argue, like the D in Twombly, that the statement "he was terminated in violation of his civil rights" is a formulaic recitation and is only a legal conclusion. Additionally, the court may also find the statement in paragraph 9 "he was terminated in violation of his rights due to his national origin" to be a conclusory remark. The P will argue that there is no other way to illustrate the reason for his termination. He was fired for his national origin only, and there is no other non-conclusory way to say it. Likely, the D will again argue that this statement is a legal conclusion, that there are no facts that the company had a motive against the P's national origin, and that there are no statements or actions that would lead one to conclude P's termination was based on national origin. Because the facts are difficult to allege without being conclusory and the P establishes that he is
an Arab, a different national origin than most in the United States, the court will probably follow Swierckiewicz and conclude that the complaint does not have to allege prima facie evidence of discrimination and is not conclusory.

The next step requires that the court determine whether the complaint is plausible on its face. Plausible must be more than a possibility, and the court will likely conclude that it is not plausible. The court will use their own judicial experience and common sense to make this decision. P will want to argue that it is plausible that Arabs in particular would be discriminated against, especially after 9/11 and heightened security restrictions, for their national origin. However, the P worked for the company from 2000-2006. If the company wanted to fire P based on his national origin because of the growing suspicion of Arabs, perhaps they would have fired him sooner rather than after 6 years of work. Because the P did not allege any specific events, such as emails, heated remarks by supervisors, etc. it is difficult to conclude that this allegation is more than a possibility.

In conclusion, the court should probably grant the movers 12(b)(6) dismissal because the P did not meet the non-conclusory and plausible standards set by Twombly and Iqbal.

Question 1 Word Count = 1137

Character Count = 6865

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START OF EXAM

-->Question -1-

Essay Question #1

The issue for the trial court is whether to dismiss Adel's (A) lawsuit for failure to state a claim upon which relief can be granted. To answer this question, we must look to both Rule 12b6 and the pleading standards in Rule 8.

Rule 12 contains the motions and objections available to the defendant. A 12b6 motion is a pre-answer motion (which can also be filed in the answer or as a 12c motion for judgment on the pleadings as allowed under 12h2) when the defendant fails to state a claim upon which relief can be granted. There are three cases when a 12b6 motion can be brought. First, when no cause of action exists, second when the cause of action exists, but the plaintiff has failed to plead it, and third when the cause of relief exists but the plaintiff has plead themselves out of relief. A 12b6 preanswer motion stops the clock in relation to the defendant's time to answer the complaint (if an answer is required). In deciding whether to grant the 12b6 motion, the judge can only look to the four corners of the complaint. No outside evidence is allowed to be presented, and the question of whether the plaintiff failed to state a claim upon which relief can be granted is a pure legal question. Should decide to grant the 12b6 motion, the court can either dismiss or allow the plaintiff to amend and submit repleadings.

Rule 8 contains the general rules for pleading. Rule 8a encompasses the general pleading requirements and states that the pleading for a claim of
relief must contain 1) a short and plain statement of the grounds for the court's jurisdiction; 2) a short and plain statement of the claim showing that the pleader is entitled to relief; and 3) a demand for the relief sought. Rule 8a was deliberately made to be broad by the rulemakers in 1938, and has been interpreted to allow for a liberal pleading standard. While a heightened pleading standard does exist in Rule 9 (which requires heightened pleading in cases of fraud or mistake), historically, Rule 8 allowed for a liberal pleading standard. In Conley, the Court interpreted the rule's "short and plain" requirement to mean "short and plain." Thus, when the black railroad employees in Conley alleged that their employment rights were violated without any clear evidence or a smoking gun, the Court allowed the case to continue by refusing to grant the defendant's 12b6 motion. The Court explicitly stated that unless there were no set of facts to support the black employees allegations, their suit should be allowed to continue. This meant that, as long as, the plaintiff could meet a low threshold of presenting fair notice of what his complaint was and the legal grounds for relief, he was entitled to survive a 12b6 motion.

The Court reiterated this interpretation of Rule 8 liberal pleading standards in Leatherman and Swierczcz (Sw.), which respectively stated that there was no heightened pleading standard for suits against municipalities or suits in Title VII claims. However, in Twombley and later Iqbal, the Court seems to have struck down the liberal pleading standard of Rule 8, and implemented a two step process which allows the court, when a 12b6 motion is brought, to strike any conclusory statements in the plaintiff's complaint and then examine the nonconclusory statements in the complaint for plausibility.
According to the two step process developed in Twombly and Iqbal, the court must strike any conclusory statements and then look to the remaining nonconclusory statements to see if what remains is plausible. Twombly was the first case to truly address plausibility. Thus, when the suit against the phone companies was brought, alleging misconduct under the Sherman Act, the court found that the allegations of conspiracy were nothing but inferences and the behavior of the phone companies was circumstantial evidence that plausibly lead to a different conclusion. Then in Iqbal, the court seemed to institute a conclusory part to the test. In Iqbal, when plaintiff alleged unfair treatment by high-ranking US officials, the court struck out what it deemed to be a conclusory statement (the legal conclusion that the plaintiff was discriminated against) and then examined whether there was another plausible explanation for his treatment by the federal government.

In this case, Adel filed a lawsuit against Movers (M) in federal court alleging discrimination based on Title VII. We will assume that the court has personal jurisdiction and subject matter jurisdiction for this case, and only consider the issue as to whether complaint fails to state a claim upon which relief can be given. A's complaint states specifically that he began working for M in 2000, is foreign born, and that he was fired from his job in 2006 on the basis of his national origin. In Sw., the court allowed for a similar complaint based on Title VII. In that case, a Hungarian employee alleged age and national origin discrimination by his French employer. While the Hungarian listed the facts leading to his termination (Example: he was demoted, given less job duties, a younger Frenchman was brought in as his replacement), he was
unable to show any explicit facts that his employer acted in such a way because he was of Hungarian origin and an older employee. When his former employer filed a 12b6 motion, the court refused to dismiss the complaint because the defendant had fair notice what the plaintiff alleged, i.e., discrimination under Title VII, what the legal grounds of the complaint were, i.e. violation of Title VII, and because the plaintiff provided that the facts and circumstantial evidence that he had actually been discriminated against. The court explicitly stated that this circumstantial evidence was sufficient, and that the evidentiary standard does not apply to the pleading stage.

However, the Twombly/Iqbal test is the current test for whether a claim should survive a 12b6 motion. First, we must see if A's allegations are conclusory. They do appear to be - They state that A is foreign-born and was fired from his job for being foreign-born. As stated by the court, "a formulaic recitation of the elements of a cause of action will not do." Thus, if we strike out the legal conclusion in paragraph 9 which states that A was fired because of his national origins, the only factual statements that we are left with is that he is foreign-born, was hired in 2000, and then terminated in 2006. According to the Twombly/Iqbal standard, we must now test for plausibility. As stated in Iqbal, Rule 8 has a plausibility standard in that the nonconclusory factual content in the pleading must allow the court to draw an inference of wrongdoing, and that the allegations must be more than sheer possibilities. IN this case, it seems that there is another plausible explanation for A's termination from M. He could have had issues regarding his work product, maybe the company needed to downsize, perhaps he repeatedly came
to work late and had other behavior problems. Whatever the case, the trial court will likely find that his termination based on his national origin could be a possible explanation but is not the only plausible explanation. Therefore, the trial court is likely to (and should) grant the dismissal.

(Another option would be for the trial court to allow A to amend his pleadings and for the case to continue)

Even though the similarities to the Sw. case make a compelling argument that the trial court should not dismiss A's case, A's case should not survive the 12b6 motion to dismiss. Just as Sw. provided fair notice of his complaint, circumstantial evidence, and the legal grounds, A has provided his former employer with fair notice of the cause of action for which he seeks relief (discrimination based on national origin), circumstantial evidence (he is foreign born and Arab), and the legal grounds (Title VII). The court could find that A's factual allegations are not sufficient to allow the case to continue. In order to meet the Twombly/Iqbal two step test, then A must amplify his complaint with further facts to meet the nonconclusory and plausibility standard.

Of course, an argument can be made the Twombly and Iqbal only apply to circumstances, such as when discovery could be enormously expensive (Twombly) or when discovery could lead to high ranking officials being dragged through the mud (Iqbal). One could say that if the cases have heightened a pleading standard, that heightened pleading standard only applies to cases where the facts warrant it for the protection of a greater good. If this argument was accepted, then one could say that A's suit against M would not fit into those
categories of cases that require a heightened pleading standard. However, the numbers speak for themselves, and as the evidence shows that, in a post Twombly and Iqbal world, the courts allow for a greater number of 12b6 dismissals. Therefore, even if the court should not grant the 12b6 dismissal, the hard reality, is that it probably will regardless.

While it is true that if the court would dismiss his case, A would not have recourse for relief. Should his allegations be true, then his former employer would be allowed to make illegal firings. (The wheat would thus be burned with the chaff, and a valid complaint would not have its day in court.)

On the other hand, if A's complaint is without any merit, then allowing the case to continue would force M to spend considerable time and resources fighting against an empty claim. In such a way, legal resources would be wasted, and there would be an economic inefficiency for both the legal system and M's business.

If A's claim really is dismissed for failure to state a claim upon which relief can be granted even though it has merit, then he will not be utterly without recourse. He can always refile his case so long as he amplifies it with more facts so long as the statute of limitations has not run its course. Of course, M could argue in a preclusion defense that A already filed such a complaint and that it was dismissed. This defense will only work if A does not provide any new and sufficient evidence why his repleaded claim is different.

If A did not have any factual evidence to support his claim and knew that he
was unlikely to have any facts to support his claim, then M could request
sanctions under Rule 11. If it does, however, M must keep in mind that
sanctions cannot be imposed after a case has been dismissed. Because Rule 11a
requires that the attorney or the party itself if unrepresented sign every
pleading, written motion, and other paper, A or his attorney will not be able
to claim that he did not know the details of the pleading. Additionally, 11b
requires that the party make a reasonable inquiry before forming its
position, have evidence or will likely find evidence, and not file the case
for an improper purpose. Thus, if A did not make any reasonable inquiry and
filed his complaint in the heat of his anger from being fired in a malicious
attempt to get revenge, the court could award M sanctions. Because 11c allows
for the nonmoving party a Safe Harbor of 21 days to amend its pleadings when
the moving party gives it notice of its plan to file sanctions, filing
sanction through Rule 11 may not be worth it to M. It would only delay the
case for another 21 days, the case would have to stay in the pipeline so that
the judge could allow for sanctions, and because sanctions are more for
deterrence than punishment, M would not likely get its attorneys' fees paid or
recoup any other costs from A directly.

Question 1 Word Count = 1976

Character Count = 11584

-->End of Question 1
START OF EXAM

---Question -1-
Adel Guirguis will probably have his suit dismissed if Movers bring a 12b6 Motion to dismiss for failure to state a claim. A claim is insufficient in 12b6 terms if 1) no cause of action exists to compensate for the tort/wrong 2) a cause of action exists but the P has not asserted it (or an element of it) or 3) a c/a exists but the P has plead himself out of it. There is a federal claim based on the Title VII civil rights act, but P has probably failed to assert the c/a in his well pleaded complaint. Today's notice pleading standards are much higher than they were previous to Twombly/Iqbal. The rule is still based on FRCP 8 which states, P must give a "short and plain statement" of the claim showing that he/she is entitled to relief. The fate of P's case turns on how the court interprets "short and plain". During the days of Conley v. Gibson, courts contended a complaint was "sufficient unless it appear[ed] beyond a reasonable doubt that the P can prove no set of facts in support of his claim which would entitle him to relief." P could probably bring in facts support the accusation, but now the pleading standard requires more than just a possible allegation - it requires the allegation to be plausible. After Twombly/Iqbal in 2009, courts now require a modern "heightened" pleading standard. Though it is based on the same rule (8), the courts have a 2-step process from Twombly/Iqbal which requires 1) all conclusory allegations to be scratched out and 2) everything that is not conclusory to be held to a plausibility standard.

1) Scratch out all conclusory remarks (Iqbal)

Conclusory means any vague/formulaic recitation of the elements of the claim.
The Twombly two-step tries to eliminate anything that is nothing more than an "unadorned, the D-unlawfully-harmed-me accusation". Paragraphs 7 and 9 will probably be found to have conclusory statements. After scratching out the conclusory statements, Paragraph 7 will probably only contain "P began working for the D in 2000 in the accounting dept. P was employed by the D from that day until February 14, 2006, when he was terminated by the D ________." 'In violation of his civil rights' does not tell the court how/in what way they were violated, rather it simply states that the Ds violated his rights. It is a conclusion D is trying to prove, not a facts that support his contention. Paragraph 8 contains only facts of P's origin which are relevant to the case and so they will remain. Paragraph 9 includes the conclusory allegation "P was terminated by the D in violation of his rights due to his national origin having been born in Egypt". Thus, paragraph 9 would read, "On February 14, 2006, ____." Here, P did not even assert rote recitations of the elements of a claim, and only included completely conclusory outcomes/statements.

2) Everything that is left over is held to a plausibility standard.

P's pleading now looks like this:

7. P began working for the D in 2000 in the acct dept. P was employed by the D from that day until Feb 14, 2006.

8. P is foreign born, is an Arab, having been born in Egypt on June 20, 1947.

9. On Feb 14, 2006, P was terminated by the D.

Aside from the grammatical errors arising from the removal of the bulk of P's sentences, P's pleading now also suffers from a possible lack of "factual content that allows the court to draw the reasonable inference that the D is
liable for the misconduct alleged" (Iqbal). P did not give any indication that
D fired him based on a discriminatory basis. Rather, he leaves the assumption
to the reader to infer his national origin dictated his dismissal from work.
Had he also asserted he was well qualified or that there was no other reason
for his dismissal the inference would be easier to make. As it stands now, the
court would have to assume that anyone who is arab and fired was fired due to
their national origins to permit P's claim to go on. However, it may be
inferred from the length of time he worked for D, 6 years, that he was at
least qualified for the position. It is also a little cruel to fire someone on
valentines, but that's really irrelevant. The burden to defeat a 12b6 motion
is light. P is only required to allege enough facts for the court to infer
that he is alleging the elements of a proper claim. I assume that the elements
of racial discrimination would require more than a wrong and a foreign victim
-it would probably also require the nationality of the victim to be the cause
of the wrong. P needs to assert that element. P could also argue that the
court in Iqbal decided "legal conclusion can provide the framework of a
complaint, but they must be supported by factual allegations (to determine
whether they plausibly give rise to an entitlement to relief)." It is
plausible to think someone could be fired on basis of their race/origin, hence
the passage of the civil rights act and the particular discrimination clause
in question. P's legal conclusion that he was fired based on his race is
supported by the fact that he worked for the D for many years, was fired, and
is Egyptian. Discrimination is a reasonable inference to draw, but the court
will likely not make that leap and deem his pleading inadequate. His case
would be much stronger if he had given other evidence such as ridiculing him
prior to the dismissal or telling him he was not wanted with the company any
longer due to his origins.

It is unfortunate, but P's case will probably not survive a 12b6 motion. Historically, the courts had a very liberal pleading standard that relied on other stages to help separate legitimate from illegitimate. Currently as it stands (though the legislature may eventually overturn it), the heightened pleading standards act as a front end strict gate keeper. It's a tool to separate the wheat from the chaff early on in the system, but like all systems, it is not fool proof. Sometimes trial worthy cases, such as Adel's, are not allowed in court due to an error in pleading, not a lack of a case. Fortunately, unless the statute of limitations has tolled, P will have the opportunity to refile his case if it is dismissed based on the 12b6 motion. P's may also have the opportunity to amend his pleading, but if it is dismissed, he will have nothing to amend.

Question 1 Word Count = 1115
Character Count = 6262
--->End of Question 1
--->Question -2-
When confronted with a PJ claim, a court will asked three questions. 1) is there a traditional base of PJ? 2) Does the long arm statute apply? and 3) Is the application of the long arm constitutional?

1) Traditional basis of PJ
The traditional basis for PJ for corporations is based on where their corporate presence is felt, agents exist, waiver or consent. Tag j/d is generally inapplicable on corporations (corp employees served not availing the
company, only themselves, to the j/d of the forum). P is foreign with no agents in TX and did not argue the merits of the case thereby waiving their PJ arguments. Thus, there is no traditional basis of j/d.

2) Long arm applies?
Long arm j/d is based on statutory amenability. Under R4k1a "federal courts are limited in exercising j/d over the person of a D who could be subjected to the general j/d in the state in which the district court is located." In modern PJ this has been interpreted to mean, if the D is subject to general j/d, then his can be haled into federal court (constitutional basis of long arm statutes). Long arms supplement the authority of R4k1a to reach non-residents who, falling outside the traditional categorites, engage in activities in the state that gave rise to the P's claim. Because TX's long arm statute has been interpreted to go to the fullest extent of the constitutional due process limits, if the next element is met (#3), then #2 is met (although the state can choose to decline the case).

3) Long arm constitutional?
States must decide whether j/d is permissible under the due process clause of the 14th amendement. This is done in a (2) part test: 1. Purposeful availment/a minimum contacts analysis and 2. reasonability/fairness anaylsis. This analysis protects Ds from the burden of litigating in a distant or inconvenient forum and ensuring that states don't reach beyond their limits as co-equal sovereigns (Worldwide).
1. Minimum contacts

The minimum contacts test decided in Shoe tests if the D purposely availed itself to the laws of the forum state such that it could reasonably foresee being haled into court there. D's degree of activity is assessed by either an adequate number standard or a sufficient quality of the contacts standard. Basically, the D can satisfy either general or specific j/d elements. Sufficient minimum contacts may be demonstrated by evidence that the D purposely directed their activites at the forum, TX, which is a refinement of the Shoe rule first enunciated by Hanson and adopted by other courts in cases such as Burger King and Asahi. D did not have a large number of contacts and those few contacts that D did have probably would not avail himself to the j/d of TX. However for the sake of argument:

Specific j/d speaks to the quality of the contacts. If the claim arises out of the minimum contacts (the tort occurred in the forum), then the specific j/d analysis could apply. Specific j/d has few contacts, but a high level of relatedness to the claim. D, a French company, did not directly advertise in TX nor did it deal with this client in TX. For individuals, the presence in a forum enabling them to commit a tort against another is enough in itself to avail themselves to the forum (Hess), but corporations are given a little more leeway with their products, especially if they had no idea the product would end up in the forum. CMMC dealt through a liason (KLR) who advertised to potential clients in America. KLR did not have much business in
TX and was not based in TX so it is unreasonable to assume D would know of KLR's sale there. Had KLR told CMMC to fix the product themselves when the warranty claim was made, perhaps the court could make a reasonable inference D at least knew of the product in TX. This probably wouldn't matter much though because D did not attempt to sell the products to TX, rather D would know the product just happened to go there. D also never reviewed KLR's advertising in TX. Much like the Asahi case and the Jeep crash case we discussed in class, if D had advertised in the forum or known of their products reaching the forum, it might be reasonable to think they were availing themselves to the laws of the state. However, the only direct knowledge of a product possible reaching TX was through the wiring request made by KLR to make the product to US specifications. If they had wired the press to TX specifications, then they may have more specific contacts with the forum (Gray Radiator). D had very little awareness of their product ending up in the forum so the courts will be more concerned with the Ds capability to defend in TX (Asahi). The P could argue the D previously sold a press directly to TX, but that argument would probably fail because D was not trying to sell their product to P in TX. D did not know where in the US this particular product would go and probably did not assume this sale would avail themselves to a distant TX court. Specific j/d is based on the claim, not the general availment of the company. Therefore, the court probably would not find specific j/d.

General j/d is found where a company has continuously and systematically availed themselves to the forum. Those contacts must be sufficient/substantial
enough that the D has fair notice of being haled into the forum, whether a claim arises out of the forum or not. Thus, when the activities of a corp D in a forum are sufficiently continuous, systematic, and substantial, the corp D may be sued there even on claims unrelated to those activities (International Shoe). Neither KLR nor CMMC would really qualify under the general j/d method of PJ. As previously mentioned, CMMC had sold one wine press directly to a TX company, but that is neither continuous nor systematic. That is a singular sale that would not put the D on alert that he could possibly be availing himself to TX court through the sheer amount of business he enjoys there. This is a lot like Helicopteros in that there is very little business conducted in the forum state. Helicopteros held that the contacts were not sufficiently systematic and continuous as to avail D to the state. It set a high bar for general j/d that the D did not meet. D is not incorporated in TX and does not have his principle place of business in TX. In fact, D doesn't even have agents in TX. D's retailer the winepress was purchased through (who is not closely tied in business to D) also does not have an agent in TX. Because D has never had a place of business, distributor, representative in TX, or any other contact than the one singular direct sale, D will not be found to have availed himself to the general j/d of TX. Thus, general and specific j/d do not apply to this case and D should not have to litigate there.

2. Reasonableness/fairness

Though D will probably be found not to have minimum contacts with the
forum, if the court does find sufficient min contacts, the court must ensure they are reasonable/fair. In other words, would bringing in the defendant comport with the notions of fair play and substantial justice? The court would probably find that D's case would not meet the reasonableness factor. It would be difficult to convince a court the D should have to litigate in a foreign forum when they were not on notice of the possibility. It would be more fair to litigate in a federal forum because D knew some products were advertised and sold to the US, and they built the product to US specifications.

Conclusion

D will probably not have to litigate in TX state court. Because the TX long arm goes to the full extent of due process and the constitutional due process limit was not met, it would be both unconstitutional and non-statutorially amenable to force D to litigate in TX state court. The appellate court should sustain the 12b2 dismissal.