Answers to Question 1
--->Question -1-

ESSAY QUESTION ONE

To establish proper personal jurisdiction, three criteria must be met: notice, statutory amenability, and constitutional amenability.

Notice Analysis

For the purposes of this analysis, I am going to assume that notice was served and is proper pursuant to Rule 4.

Statutory Analysis

Though the Supreme Court has authorized a constitutional limit to personal jurisdiction, this limit is not self executing. That is, the state legislature must enable the courts to exercise their power over nonresident defendants. Further, the legislature can constric the constitutional limits if it so chooses. State statutes that authorize jurisdiction over nonresidents are called "long arm statutes." For the purpose of this analysis, I am going to assume that the California long arm statute extends the court's reach to the limits of the constitution. Thus, my analysis will center on the constitutionality of personal jurisdiction over IBM.

Constitutional Analysis

Assuming that the statutory basis for personal jurisdiction is met, it must
now be determined whether the exercise of jurisdiction based on the given facts would be constitutional.

Briefly, it should be noted that there are several traditional basis allowing for person jurisdiction. As set out in Pennoyer, these include, inter alia, in-state service, consent, residence in the forum, and voluntary/involuntary appearance. I will assume that none of these basis have been met. Further, if they were to be applicable, the court in Shaffer opened up the possibility that further analysis under International Shoe may still be required when they stated that "all assertions of state-court jurisdiction" must be assessed by International Shoe."

Shoe is used to determine constitutionality of personal jurisdiction in cases involving non residents falling outside of the traditional basis. The Shoe test consists of two primary components. In essence, the defendant must have "such minimum contacts with the forum" that "exercise of jurisdiction will not offend traditional notions of fair play and substantial justice." In other words, we must consider (1) the quantity and quality of contacts that IBMA had with California, and (2) the fairness factors brought up by holding such jurisdiction over IBMA.

(1) Minimum Contacts

Whether IBM had minimum contacts with California can be analyzed by looking at whether the contacts result from IBM's purposeful availment to that forum, and whether they had foreseeability.
Prior to further breaking down purposeful availment and foreseeability, the concept of general and specific jurisdiction should be introduced. On their face, this break down does not mean a whole lot. Simply establishing a general or specific basis for jurisdiction is akin to stating that your ice cream is chocolate when asked if it tastes good. That is, not much is answered.

General Jurisdiction

General personal jurisdiction, according to Shoe, arises when the forum activities of a corporate defendant are sufficiently continuous, systematic, and substantial such that there is fair notice that it may be sued there even on claims unrelated to their primary activity. Factors used to establish this activity include the location of their principle place of business (PPB), advertising directed at the forum, number of products sold in the forum, and foreseeability of litigation in the forum.

Because IMB's PPB was in Canada, and because their advertising was mostly limited to trade show appearances by IBM, it is likely that general jurisdiction analysis does not apply. It would be helpful to know how many machines IBM sold in California, but withstanding that information my analysis is going to continue under a stream of commerce view by way of specific jurisdiction.

Specific Jurisdiction

Specific jurisdiction applies in cases where the cause of action arises out of
or relates to the defendant's contacts withing the forum. According to Bell, there must be a causal link between the party and the claim. In this case, IBM's six-ton machine being located in California may be considered a contact. Whether this contact can be considered "minimum" depends on further analysis construed under purposeful availment and foreseeability.

**Purposeful availment** may be applicable if the defendant only has a few contacts in the state, so long as the contacts relate directly to the cause of action asserted. In this instance, IBM dropped their machine into the stream of commerce (SOC) where upon it found its way into California and burst into flames. Moreover, to meet the **foreseeability** element, mere unilateral or isolated contacts with the forum will not be sufficient. A defendant must have availed herself to some privilege of doing business in the forum such that there could be a reasonable foreseeability of having to defend suit in relation to those contacts.

Expounding on purposeful availment and foreseeability in stream of commerce cases involves a bit of uncertainty. The Asahi court split four-to-four in attempting to define purposeful availment. According to O'Connor, the placement of a product into the SOC is not an act purposefully directed toward the forum state. A more direct intention on the part of the defendant is needed. Simply counting contacts is not sufficient. This can be thought of as "SOC plus." According to Brennan, as long as a party is aware that their product is being marketed in a forum, the possibility of a lawsuit in that forum cannot come as a surprise. Marketing and regular sales is sufficient to form minimum contacts. It should be noted that SOC plus is, at the moment,
the more "accepted" view.

IBM will argue that, akin to the O'Connor view, that their act of fulfilling orders for IBMA, a completely different entity, does not satisfy the SOC plus requirement. They were not purposefully directing their machine to the California forum. That was the job of IBMA, whose sole purpose was to market and sell the products. IBM will also point to their location being in Canada. Under this assertion they will claim that their intent is to manufacture and distribute products within that country. This argument will likely be moot since their company name contains the word "international." Plant, however, will likely argue that IBM had employees attend trade shows and conferences in California. He will also point out that IMBA performed their advertising and sales efforts in accordance with IBM's direction and guidance. Further, IBM and IBMA share an ironically similar name. The aforementioned arguments by Plant make it likely that IBM has done more to avail their products to the forum than they would like the court to think. Because of this, under the broader Brennan view, IBM's contacts are likely sufficient such that it is foreseeable for them to expect a lawsuit in California.

Since the SOC plus view is predominant, it is likely that the court will be hesitant to find the purposeful availment required to establish minimum contacts. The court will likely conclude that pursuant to O'Connor's analysis, while it is likely that an IBM product would reach the California forum, IBM did not perform any act that was purposefully directed toward the state. IBMA was the company responsible for their product getting into the forum.
(2) Fairness

In *Burger King* it was emphasized that without any sufficient contact to the forum, fair play and substantial justice serve no purpose. For the sake of this analysis, I am going to assume that Plant was able to prove that IBM had minimum contacts with California.

The analysis of fairness is fairly discretionary. There are five factors that are generally cited by courts in application of this analysis. (1) The burden on the defendant is considered. In *Burger King*, the court established that the forum cannot be "gravely inconvenient" such that the defendant is put at a "severe disadvantage" in defending there. (2) The forum state's interest in adjudicating the dispute is considered. The McGee court emphasized that the forum state has an interest in providing a courtroom for its citizens against nonresidents. (3) The plaintiff's interest in obtaining convenient and effective relief is considered. (4) The interstate judicial system's interest in obtaining the most efficient resolution of controversies is considered. And, (5) the shared interest of the several states in furthering fundamental substantive social policies is considered.

In the case at hand, IBM litigating in California probably is not much of an inconvenience. They regularly send employees to that forum to attend conferences and trade shows. Further, the state of California likely has an interest in resolving a dispute of one of its residents. It should also be
noted that the forum is convenient for the plaintiff. Because there is not likely to be any undue hardship on the part of IBM in litigating in the state of California, the fairness factor of personal jurisdiction will likely be met.

Conclusion

Assuming the court looks to the O'Connor view, they will likely find that jurisdiction is not proper over IBM. Under the SOC plus view it is not likely that IBM directed the product toward the California plaintiff.

If, however, Plant can persuade the court to consider the broader Brennan view of the minimum contacts test, he will have a strong argument for the proper exercise of personal jurisdiction over IBM.

It should be mentioned that the Supreme Court is likely going to shed further light on the stream of commerce debate when they rule on Goodyear and Nicastro. Both cases concern the application of contact analysis based on SOC. If the court rules that personal jurisdiction is present in Nicastro, Plant's claim will become much stronger.

Question 1 Word Count = 1556
Character Count = 9837

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IBM's motion to dismiss Plant's (P) action for lack of personal jurisdiction (PJ) will probably fail. Traditionally a defendant (D) consents to PJ through traditional bases such as presence in the state, voluntarily showing up or involuntary waiver, or by being a resident of the state. Based on the facts of this case, it does not appear that IBM has consented in any of these ways. Pennoyer v. Neff, identified the Due Process (DP) Clause of the 14th Amendment as a constitutional protection for Ds against distant and inconvenient forums. Thus, in order for a court to exercise PJ over a D, there must be notice, statutory amenability and constitutional amenability.

Notice

Under R4, notice must be reasonably calculated to apprise the D of the pending suit. When the suit is filed in state court, there is a state statute that governs notice and it must be followed exactly with respect to who is served and how they are served. Although we do not know what the CA statute says about notice based on these facts, we will assume that notice was proper since IBM filed a motion to dismiss and therefore, had to of known of the suit in order to do so.
Statutory Amenability

Since P brought the suit in state court, CA will need to have a statute enabling its courts to exercise PJ over non-resident Ds. These are known as "long-arm" statutes and were first addressed by the court in Gray v. Am. Radiator. When looking at whether a cause of action falls within a long-arm statute, courts look to the letter of the statute, what the legislature intended, and whether it violates DP. Since we do not have any information about the CA long-arm statute, we will assume that it goes to the full limits of DP.

Constitutional Amenability

The modern rule for determining constitutional amenability of PJ over a non-resident D is illustrated by Int'l Shoe and says that Ds are subject to PJ if you can establish that they have certain minimum contacts such that suit does not offend traditional notions of fair play and substantial justice. This analysis depends on whether the D purposefully availed themselves of the benefits of the forum state so that suit would be foreseeable there. This requires a look at the Ds minimum contacts in the forum. Analysis of PJ also asks whether suit is ultimately reasonable in this jurisdiction based on factors illustrated by Asahi.

Purposeful Availment

When the cause of action involves a tort caused by the D's product, a stream of commerce analysis is used to determine whether the D purposefully
sought to take advantage of the benefits of selling his product in the forum state (see *Shoc*). In the case at hand, it is first important to note that the purchase of IBM's product was made in Nevada (NV), but the tort happened in California (CA). Thus, the contact did not arise from D's direct efforts, but rather from P's employer's unilateral activity (*Hanson*). This is similar to what happened in *World Wide Volks Wagon* (WWV) because the Ps in that case bought the vehicle in NY but then drove it to OK where the incident occurred. Thus, the S.Ct held that the mere fortuitous circumstance that a single automobile sold in NY to NY residents happened to suffer an accident while passing through OK did not constitute "minimum contacts" with OK. Thus, suit was not foreseeable there.

Similarly, IBM can argue that they did not rent the booth at the convention (IBMA did) and they did not personally sell the machine to P's employer. This is evidenced by the fact that the check was made out to IBMA. IBM can further argue that even if the President of their company was at the convention in Ne, they could not have foreseen that the box would be taken to Ca. P can counter argue, however, that since IBM has experience at similar conventions in the US for the past ten years, including attendance in Ca conventions, suit in Ca is in fact foreseeable and IBM has in fact purposefully placed their product in the stream of commerce in Ca. Furthermore, P will want to distinguish his circumstance from that of the plaintiffs (PLs) in WWV because the geographic distance between Ne and Ca is far less than the distance between NY and OK. This is important because the justices in WWV struggled with how foreseeability should be defined - whether it should mean the likelihood that the product would find its way into a state (Brennan view) or whether it should turn on the D's conduct and connection
with the forum state as to anticipate being called to court there (White/majority view). In this case, it looks like IBM's conduct would even fall within the majority's meaning of foreseeability for the above reasons.

In Asahi, the S.Ct. addressed the meaning of stream of commerce. O'Connor's test is a "stream of commerce plus" test that requires that the D made an effort to target the market, while Brennan's view only requires that the D knew that the product would get to the forum state, and Stevens test asks whether the product was sold in high volume in the forum state and is highly valuable or hazardous in character. While we will need to know more about how many boxes IBM sold in Ca and how dangerous they are to use Stevens's view, it appears that P would pass both the Brennan test (most liberal) and the O'Connor test not only because they attended conventions, exhibitions and conferences in Ca (where they presumably sold these boxes - presumably because otherwise what is the incentive to participate in such activities?), but also because we know that IBMA structured its advertising and sales efforts in accordance with IBM's direction and guidance. Since we are not sure that IBMA did such advertising in Ca, P would want to obtain more information about this in order to make an even stronger case.

While the relationship between IBM's Ca contacts is not exactly related to P's claim since that particular box was bought in Ne, the fact that P can show that the contacts IBM does have with Ca could just as easily have caused the same result distinguishes his case from Helicopteros where the court felt the contacts were not sufficiently related to the claim even for general PJ.

Reasonableness

While we do not know enough to determine whether IBM's contacts in Ca are
continuous, systematic and substantial (Shoe) or even if IBM plans to have a
continuous relationship with the forum state (by attending the above mentioned
events or marketing their product there) as was the case in Burger King, we do
know that IBM has American, Canadian and European patents. Thus, we can infer
that although IBM resides in Canada, they do have some knowledge of American
law and perhaps the American legal process. While this doesn't mean that it
would be reasonable for them to be subject to suit in any American state, it
also means that it would not be unreasonable for them to have to defend
themselves in Ca since they probably will continue to travel there anyway. The
reasonableness factors set out in Asahi include the burden on the D, the
interest of the forum state to promote the health, safety, and welfare of its
citizens and the PL's interest in seeking relief. In addition to probably not
being too burdensome, Ca may have an interest in hearing the case depending on
how many boxes IBM has sold in the state and whether or not they will continue
to do so. It is also not likely that P will be able to bring suit against IBM
in Canada since he is probably still recovering from the injury. Finally, WWV
requires that a court look at whether suit in a particular forum will hinder
efficiency for that judicial system because evidence is located in a different
state. This is probably one of the bigger hurdles that P will have to overcome
(assuming the SOL has not run since the purchase of the box was made 10 years
ago - thus, adding to the potential difficulty of obtaining evidence) because
the box was purchased in NV and manufactured in Canada. However, it is probably
likely that there are adequate records of these activities (receipts for the
sale and design specifications or blueprints for the manufacturing) and
bringing them to a court in Ca should not be too burdensome.
**Conclusion**

Based on all of the above, IBM's motion to dismiss P's action for lack of PJ will likely fail.

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**Question 1 Word Count = 1445**

Character Count = 8306

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**Question 2**

**Introduction**

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 is not plausible, or the complaint fails to give fair notice to the other party.

**Applicable Law**

Rule 8 governs the general rules of pleading and 8(b) requires the D to
IBM is subject to personal jurisdiction in California for the present claim. In applying either of the operative standards that the U.S. Supreme Court has suggested to determine the legitimate reach of personal jurisdiction in "stream of commerce" cases, California's exercise of personal jurisdiction over IBM would comport with fair play and substantial justice as required by the Due Process clause.

The facts of this case address an unresolved question in federal personal jurisdiction law: under what circumstances shall a party be subject to personal jurisdiction when it has placed a product in the open market that later causes injury in a foreign forum? This of course is just one species of personal jurisdiction issues, and the general law applicable here, developed by the U.S. Supreme Court in Shue and its progeny, articulates a two-prong test to determine the constitutionality of a state's exercise of personal jurisdiction over a non-resident defendant: (a) does the defendant have minimum contacts, some activity or relationship with the forum, such that (b) his answering suit there does not violate the Due Process clause's requirement of fair play and substantial justice? Where Defendant has placed a product in the forum via the open market, or stream of commerce, and the product causes injury, it is the latter requirement of this test that is most in question. The last case the U.S. Supreme Court reviewed concerning a stream of commerce question, Asahi, left two viable standards as to when the exercise of personal
jurisdiction fulfills Due Process requirements in stream of commerce cases. We'll turn to those tests, but first there is the ancillary issue of whether IBM has sufficient contacts with California.

**IBM's relationship and activity with California**

IBM's presence in this case relates to an injury in California allegedly caused by a machine they manufactured in Canada, and these facts will very likely be sufficient to show that IBM has contact with California related to the claim, thus allowing the plaintiff to pursue a theory of specific personal jurisdiction.

However, in analyzing the question more broadly, the plaintiff may seek to subject IBM to jurisdiction in California by any traditional base of jurisdiction, a theory of general jurisdiction, or a theory of specific jurisdiction arising out of the relationship between IBM and the injury in the state. The plaintiff has no basis for traditional jurisdiction (IBM has no corporate presence or agents in the state and has not consented to jurisdiction in California). And the plaintiff could only very improbably argue that IBM is subject to general jurisdiction in California, as there is no evidence of the kind of systematic and continuous contacts (e.g., a primary place of business) to subject IBM to defend any claim in California. Here the plaintiff's jurisdiction claim rather turns on the theory that California has limited jurisdiction over IBM specifically related to the plaintiff's claims that arise from IBM's activity and relationship with the state.

On the question, then, of whether IBM has contact with California related to
the controversy, the court is very likely to answer in the affirmative. It is undisputed that IBM manufactured a product that is involved in an injury in California. It is also undisputed that IBM financially gained from GSCM's purchase of the product from IMBA. The plaintiff will also make note of IBM's solicitation of business in California through its presence at trade shows in San Diego and San Francisco. These facts also recall Asahi, a case at one point reviewed by the California Supreme Court, where the foreign defendants, manufacturers of motorcycle parts, were deemed to have contact with California related to an accident in which parts they manufactured were involved. It is very unlikely, therefore, that the court will distinguish IMB's case here.

Due Process Clause's Fair Play and Substantial Justice Requirement

Because contact has been established to sustain a theory of specific personal jurisdiction, we next turn to whether subjecting IBM to suit in California comports with the Due Process clause, specifically whether exercise of jurisdiction is consistent with "fair play and substantial justice" as interpreted by Shoe and its progeny. On this question's relation to a defendant who has contact with the forum via a stream of commerce, the U.S. Supreme Court has not been in agreement, and I'll suggest some reasons why one standard they suggest is likely to ultimately be operative, but for the reasons shown below either standard promoted by the Court suffices to haul IMB into a California court.

In Asahi the Supreme Court wrestled with the question of what standard to use to constitutionally subject a stream of commerce defendant to suit in a
foreign forum. The Court was evenly divided between two standards (with Justice Stevens not surprisingly taking his own view), and 4 justices, led by Justice Brennan, advocated for what is called the "stream of commerce standard," and the remaining 4 justices, led by Justice O'Connor, advocating the "stream of commerce plus" standard. I'll analyze the viability of IBM's motion under both, but I begin with O'Connor's standard first because, for the reasons set forth, I believe it will eventually be the sole standard on this question.

Brennan's standard or O'Connor's?

First, what are they? Justice Brennan's standard can be stated as follows: where a defendant is aware that its product enters into a forum state, it is aware of the benefit it receives from the forum state's laws and commercial regulation. It is therefore not unconstitutional to subject the defendant to suit there. Justice O'Connor's rejects the conflation between awareness of the product's final placement and fairness in subjecting to jurisdiction. O'Connor argued that the defendant must not only be aware of the product's placement in the forum, it must also take additional action directed at the forum to subject itself to suit there. Additional action may include advertising, designing a product with the forum in mind, or as will become crucial for our our present case, marketing through a distributor directed at the forum.

I think the Supreme Court will likely favor Justice O'Connor's standard to Justice Brennan's because (a) the Court needs to settle on one rule of law for these cases, and (b) O'Connor's view will likely be viewed as most in line
with cases following Shoe where particular emphasis was put on the volitional aspect of a defendant's contacts. Particularly, one sees a similar argument developed in previous personal jurisdiction disputes. In Denckla the question of whether Florida had jurisdiction over a Delaware trust when the deceased women who set up the trust was a Floridian was in the end decided primarily on the fact that the trust's relationship with Florida was unilateral. That is, the trust did not elect to have a relationship with the forum (did not "purposefully avail" itself of the forum), so it did not comport with Due Process requirements to subject it to suit there. Similarly, in Worldwide Volkswagen, the Court held that defendant did not move the product into the forum and could not have anticipated being hauled into the forum to defend a lawsuit. In comparing the two stream of commerce standards in this context, the O'Connor standard seems more in line with the emphasis that only volitional contact is sufficient. Recently, the Supreme Court granted certiorari in a case called NICASTRO that will likely decide this very issue.

O'Connor's Stream of Commerce "Plus":

Under O'Connor's standard, IBM is very likely subject to limited jurisdiction in California. In applying O'Connor's standard one should first note that the defendant is aware of its product presence in the United States, and it aims for an interstate market, with California included. This apparent from its attendance of trade shows in the United States, and its attraction of U.S. customers like Mr. Stamples at these shows. However, the O'Connor standard requires a "plus" factor that ties the defendant's activity to the forum. Here
Conley's "no set of facts" language was eviscerated by Twombly because the Court saw that in the Sherman context that the case was brought the defendant was doomed to an immensely costly discovery process. So the court raised a question that it said had been haunting federal courts since Conley: How does one "show" (Rule 8(a)(2)) the "grounds for relief" (Conley) with no facts that lead to an inference of the defendant's liability? So in Twombly the court decided that Rule 8(a) requires facial plausibility (reasonable inference of defendant's liability) and in the antitrust context this required more facts than the plaintiff alleged. In Iqbal the standard was now deemed to apply anytime the plaintiff's claim could lead to a warrantless round of discovery (arguably, anytime). The Court also rejected that idea that Rule 26 could solve this problem with its discretionary provision to cabin discovery. Basically, if you're not entitled to discovery, you're not entitled to cabin discovery.

How does this fit in to a Rule 8(b)-(c) analysis? Well, on its face, there is a plausible argument that although neither Twombly nor Iqbal mentions affirmative defenses, the cases revisited the pleading standard in general. Namely, if the pleading standard had changed, and an affirmative defense is a pleading, why wouldn't it apply? I doesn't apply, I think, because the context of these opinions' application (excessive discovery costs borne by defendant and subjecting defendants to unreasonable deposition) simply were not stated to apply to affirmative defenses. (Although, it is interesting that Justice
the exclusive American distributor of IBM's products, IBMA, serves as a "plus" factor. The relationship between IBM and IBMA is such that IBM is directed its products at an interstate market, including California, through IBMA. (IBMA structures its advertising and sales in accordance with IBM; IBMA fields all requests from U.S. customers related to IBM products). O'Connor actually listed marketing through an exclusive distributor as one such "plus" factor that would subject a stream of commerce defendant to personal jurisdiction. The court will follow this lead and reason that a foreign company cannot avoid jurisdiction by setting up a "buffer" U.S. company to shield it from product liability in American courts.

Brennan's Stream of Commerce Standard:

Under Brennan's stream of commerce standard, IBM's will almost certainly be subject to jurisdiction in California. Brennan's standard has a lower threshold than O'Connor's and consequently the probability that IBM will be subject to jurisdiction in California is a near certainty applying this standard. IBM only had to be aware that its product was directed to California, and it surely was because it directed the product there itself by advertising it at trade shows in San Diego and San Francisco. It therefore benefited from California's laws and commercial regulation, and it's not unfair to subject it to jurisdiction. It's a rather open and shut case under this standard.

In conclusion, while a key element of the law remains unresolved here, the
result does not. Whatever standard the California court adopts will result in a finding that subjecting IBM to personal jurisdiction does not run afoul of the Due Process Clause.

Question 1 Word Count = 1585
Character Count = 9930
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Answers to
Question No. 2
The issue here is whether the Twombly/Iqbal test applies to the D's answers. Twombly/Iqbal addressed the P's pleading under FRCP 8(a) (short and plain statement) and the P is trying to extend that test to the D's defenses.

Conley interpreted R 8(a) as saying that only when no set of facts exist to support P's claim should the claim be deemed insufficient. This was confirmed by Leatherman & Sweirkiewicz, which both said short and plain means short and plain. Twombly/Iqbal modified this by creating a two step test. First, the court would scratch out any conclusory allegations (court does not credit statement w/o factual support) and then determine if the remaining claims are reasonable (based on judicial knowledge and experience). While Iqbal did state that the Twombly standard applied to all cases, it never addressed whether the standard would apply to defenses filed under FRCP 8(c). Iqbal did state that the Twombly pleading standard applied to all civil proceedings, which a court could reasonably interpret as including the D's affirmative defenses.

The P bears the burdens of pleading, production, and persuasion. The interpretations of R 8(a) from Conely to Iqbal have been based on providing the D w/sufficient information so that he knows why he his being brought into court. Pleading was meant to give fair notice to the other party of the claims being made. The same considerations would not exist for a P responding to affirmative defenses. The P knows why they are in court and does not need fair
notice of the claims (P made them), but it is arguable that the P does need fair notice of affirmative defenses so that he can properly prepare to refute them (as opposed to the D simply saying I did not do it and the P having to meet the three burdens).

In addition, the courts have not applied the same standard for affirmative defenses as they have for notice pleading. While R 8(a) says that a short and plain statement of the claim showing the P is entitled to relief is required, there is no such requirement under R 8(c) for the D's affirmative defenses. It is unlikely that 8(a) would be read to apply to 8(c) as the rule makers made the point of distinguishing b/w claims for relief and defenses under 8(b).

However, 8(b) does require the D to state in short and plain terms its defenses, which seems similar to the 8(a) short and plain statement standard. B/c of the similarity b/w the wording of 8(a) and 8(b) and Iqbal stating Twombly applied to all civil proceedings, a court could reasonably conclude that the standard from those two cases also applied to the D's affirmative defenses.

**Twombly/Iqbal**

Assuming that the court did determine the Twombly/Iqbal standard applied to the D's affirmative defenses as well as the P's pleading, they would need to decide whether the defenses asserted were conclusory and then whether or not they were plausible.

For the first defense (statute of limitations, SoL), a court would likely find
this is not conclusory. The statute of limitations is in the law providing for
certain causes of action. If it has passed, then the P's are barred from
bringing that claim unless they can get it in as an amended complaint to an
existing cause of action, although that does not seem to be the case here. In
Twombly, the conclusory allegation was that the D's from different regions
were all doing the same thing so they must have had an agreement to do so. The
court determined that allegation conclusory b/c the complaint was a vague &
formulaic recitation of the elements of the claim. Just stating there was a
conspiracy was seen as boilerplate terminology lacking in detail.

However, the situation w/the SoL defense is different. While the D is using
boiler plate in their response, there is not the same the same lack of factual
evidence to support throwing out the affirmative defense b/f hearing it on its
merits. Twombly only had suspicious behavior to back up the allegation, where
as if the SoL defense would apply, there would be hard evidence (can prove
time b/w injury and case being brought) to support the defense. In addition,
Twombly said that while there needs to be a complaint w/ enough factual matter
(taken as true) to support the claim, it also said that the sample forms
provided by the FRCP could b sufficient in certain circumstances (like form
11). A court could determine that a similar form for affirmative defenses
could be appropriate in certain circumstances. Thus it is likely that a court
would allow the SoL defense because it is not a conclusory allegation and
would be plausible (judicial experience & common sense say that SoL would
apply as long as the time has run) and not strike it down as insufficient
under R 12(f).
As for the 8th affirmative defense (doctrine of laches), a court might determine that was a conclusory defense. Under Twombly this could be seen as a vague and formulaic recitation of the elements of the defense. In addition, under Iqbal, the court doesn’t have to credit statements w/o factual support. As previously stated in Twombly, the P claimed that the D's colluded and that he was harmed by this. In Iqbal, the P claimed that the attorney general and others adopted an unconstitutional policy of detaining people based on race & religion and subjected them to harsh conditions in confinement. Iqbal's complaint did not relate to the actual harm he suffered, just that high level officials were involved in the decisions. The court said that these complaints were merely conclusions unsupported by fact b/c it asserted discrimination b/c of various acts, and as such was not entitled to be assumed true.

Here, D asserts that the P's claims are barred in whole or in part by the doctrine of laches. It does not say why the doctrine of laches would bar the P's complaint nor does it have factual allegations sufficient to make the defense plausible. Like Twombly, all it states is the cause of action/defense. The affirmative defense #8 simply restates the boilerplate from the law, and does so in even less specificity than Twombly. Twombly at least alleged that the D's colluded w/one another b/c of their parralell conduct. Here, the D just says that the claim is barred by the doctrine of laches w/o even stating why. Twombly/Iqbal require that enough facts are pleaded to suggest the allegation was plausible, and because the D here failed to do. It is likely
that a court would strike down this affirmative defense under 12(f) as being insufficient.

Conclusion

Assuming the court determines that the *Twombly/Iqbal* standard applies to the D's answers as well as the P's cause of action, they should allow some of the 24 affirmative defenses and strike down as insufficient others. Those, like the Sol defense, which are based on concrete standards (eg. Sol has a time limit, statute of frauds is clear on what's required for a writing & signature) the court should find as sufficient under 12(f). While *Twombly/Iqbal* do require sufficient facts to support the allegation, they also said that in certain situations using the standard forms form the FRCP could be appropriate, and a similar form for affirmative defenses would probably be appropriate in this situation, and the court should deny the P's R 12(f) motion.

For the affirmative defenses such as #8 that simply restate the defense and are based more on a judgment of the facts (fraud, duress, etc.), the court should grant the 12(f) motion for stating insufficient defenses. *Twombly/Iqbal* would require more than a mere recitation that the D acted under duress or the P was fraudulent in his actions. The D would need to provide sufficient facts to make the allegations non-conclusory and plausible, which it does not seem he did by simply restating the boilerplate defenses. Thus, the court would likely determine the defenses conclusory if it were using the *Twombly/Iqbal*
standard, and they would be stricken per the P's R 12(f) motion.

Question 2 Word Count = 1352
Character Count = 7921

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--->Question -2-

Question 2

This situation presents a strange question: what effect, if any, do the Twobley and Iqbal rulings have on a defendant's answer? Twobley and Iqbal both concerned the complaint of the plaintiff, not the defendant's answer. The court will first have to decide if these two cases are even applicable to a defendant's answer. Then, assuming they rule it does apply, they will go through the DF's affirmative defenses and use the Twobley/Iqbal two step test. This requires that the court 1) stike all concursory allegations, and then
ask: 2) is what left plausible?

In Twobley, there was a class action suit against SW Bell. The PL had two allegations: 1) alleged DFs conspired to fix prices and limit competition, 2) DFs had parallel conduct. The court struck the first allegation because they had no factual allegations in support and was thus concursory. The second allegation by itself was not illegal.

Iqbal alleged that DFs Ashcroft and Mueller signed off on illegal treatment of prisoners arrested after 9/11. The court struck several concursory allegations and then concluded that what remained was merely conceivable, not plausible. (The factual allegations that Mueller and Ashcroft arrested and detained thousands of Arabs and approved a detention policy did not plausibly suggest that PL was discriminated against due to his race/religion). It is important to note that the court went out of its way to say that its holding applies to all cases, not just discrimination cases.

Barnes will likely argue that not only did Iqbal court mean to apply to all cases, but meant to apply to the entire pleading stage, including the DF's answer. It would not be fair if the DF was able to plead whatever defense he likes, and have it approved even w/o providing any factual support for his defense.

AT&T will argue that the Iqbal court did not intend for the ruling to extend to the answer, because of the effect of what happens when a defense is not raised. Under FRCP 8c1, the text says, in responding to a pleading, a party must affirmatively state any avoidance or affirmative defense. Because they must raise the defense, they should be able to raise whatever they think would
apply at that time, even if they have little or no factual support.

The court will likely factor in the possible goals/reasons behind Twombley/Iqbal. Also, the court will want to consider the policy reasons behind pleading. Traditionally, pleadings were simply meant to give fair notice to the parties of what each others allegations were (Also focused on PL giving fair notice to DF of what they were alleging). It may be argued that the DF did the same thing in return: give fair notice of what they would use as defenses. The liberal standard for pleading was meant to get through the pleading stage quickly and efficiently, and not have claims barred due to technicalities and errors in pleading requirements. Now, it seems those standards have been heightened. We can see evidence of how times are changing through the Gurgulous case example we did at the beginning of the semester (Which was based on a real case): The lawyer for the PL had always done his complaint that certain way, yet it was struck down to Twombley and Iqbal, shocking the lawyer. Heigtened pleading standards are meant to be an early block to litigation, perhaps in order to free up resources of the court and ensure that only claims that have a chance to win get through. (However, this may cut off some legitimate claims, because they haven't had a chance for discovery yet). The court will have to consider that as long as the Barnes' complaint is good, the case will go on anyway, and perhaps this should allow the AT&T to assert any defense they want. If the point of heigtened pleading is to cut off litigation totally, because this is not possible in this situation, the court may not worry about heigtened pleading standard for defenses.

Furthermore, if the affirmative defenses are so obviously redundant, immaterial, impertinent, or scandalous, the court may strike the affirmative
defenses, without having to rely on Twombly/Iqbal and its two step process. This is a tough question to answer on the facts given, however, as we don't know the exact details and factual assertions of the PLs complaint, nor the exact language of all of DFs answer (besides the two examples provided). If we knew more of what the PL alleged and the exact specific defenses, we may be able to answer the question of if the court even needs to rely on the two step process. However, because we don't have this information, we will continue, assuming that the court is willing to use the Twombley/Iqbal two step for DF's answer.

First, the court would strike the conclusory allegations of the DF: this would likely strike the eighth defense, which simply states that the claims are barred due to the doctrine of laches. There are no facts to back up this defense, and may just be a formulaic recitation of the defense, and thus conclusory. As a practical matter, the DF should have alleged facts in support of this defense.

The 6th claim would be slightly harder for the court to strike. SOL is a defense based on dates, and the only factual allegations necessary to prove this are the relevant dates. The court may conclude that a lot of facts could go into the relevant dates, particularly when the SOL starts running (this involves tolling issues and the discovery rule). The DF should have alleged when exactly the SOL started running, and provided factual allegations as to why it started on that specific date. This would make its pleading defense much stronger.

The court would go through this process for the remaining defenses, and then decide if what remains is plausible. Plausible is not specifically defined by
the Iqbal court. It may be thought to be somewhere between conceivable and probable. The defenses do not need to have a probable (51%) chance of succeeding, just a plausible chance. Courts are supposed to use "judicial experience and common sense" in this process. This is a tough thing to predict, but I would imagine that if the defenses were all like 6 and 8, striking the conclusory language would not leave much left. Therefore, if the court does use Twombley/Iqbal for a DF's answer, I would think that many of the DF's affirmative defenses will be stricken by the court under rule 12f.

I would imagine that the court would be hesitant to use the Twombley/Iqbal process, extending it to DF's answers, due to these reasons: The case would continue on regardless (due to the sufficiency of PLs complaint). The court at that point may likely allow any defenses to be raised, so for efficiency reasons, they can all be sorted out at one time. Of course, they may counter this with the theory that the affirmative defenses would have to be raised anyway, due to the must language of 8c1. The court may simply resolve this by allowing the DF to amend his answer and assert more factual allegations. Also, the strategy that DF is using (if he really is just asserting defenses for the sake of asserting defenses), is a risky one. DF may be subject to Rule 11 sanctions if the court determines DF has used this strategy.

Question 2 Word Count = 1237

Character Count = 7189

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Answers to Question #3
Diane (D) v. Ted (T)

Procedural

D's claim that T is liable to her is allowable because rule 18(a). the court seems to have allowed T's 14(a)(2)(D) claim against P which makes since because it arises out of the same car wreck for which P's original negligence claim arises. Does the court have subject matter jurisdiction over the claim?

Ted (T) v. Paul (P)

Subject matter Jurisdiction

Is there original jurisdiction? Article 3 section 2 of the US constitution authorises federal courts to hear cases between citizens of different states. This authority is bestowed upon the courts by statute through 28 USC 1332, which provides that federal courts have jurisdiction to hear cases btw citizens of different states where the amount in controversy is greater than $75,000. 1332 has also been interpreted to require complete
diversity across plaintiffs and defendants (Strawbridge). P's suit against D is sufficient to provide for original jurisdiction because the federal courts have subject matter jurisdiction over this claim since P is a TX citizen and D is a NY citizen and the amount in controversy exceeds $75k. Additionally there is subject matter jurisdiction over the D's impeader claim for the same reasons.

Is there independent basis for jurisdiction? T and P do not have diverse citizenship and therefore it will have to be determined whether supplemental jurisdiction provides for federal jurisdiction under these circumstances.

Supplemental jurisdiction

Article 3 Section 2 of the constitution bestows the power to a hear related claim if there is a proper claim within the jurisdiction of the federal court and the related claim arises from the same nucleus of operative facts, (Gibbs). T's 14(a)(2) claim alleging P's negligent driving led to her injuries arises from the same three car accident of which P's claim against D arose from. This is a clear case of arising from the same nucleus of operative facts because the car crash in which the parties were all involved is the source of the parties' claims. It is in the interest of efficiency that these claims be tried together because of their concurrency and relatedness (crashes
occurred at the same time, with each other). Therefore the constitutional requirement is satisfied.

The statutory grant of this constitutional power is provided by 28 USC 1367. 1367 (a) provides that in any civil action of which the district court have original jurisdiction they shall have supplemental jurisdiction over all related claims that are part of the same "case or controversy". The statutory grant of supplemental jurisdiction extends to the outer reach of constitutional authority therefore because there was constitutional authority under the Gibbs standard, 1367(a) is satisfied.

Next, it must be determined whether the claims fall under any of the exceptions provided for by 28 USC 1367(b) which preclude supplemental jurisdiction for claims made by plaintiffs against persons made parties by rules 14, 19, 20, or 14. T was added by D by rule 14 however any claims asserted by T will not be barred because T is not a plaintiff. The purpose of 1367(b) is to preserve the limits on ancillary jurisdiction suggested by the court in Kroger. In its holding the Kroger court forbid extending ancillary jurisdiction to plaintiffs against impleaded parties holding that it would be inconsistent with the long standing interpretation of 1332 requiring complete diversity between the parties. It is interesting to note that complete diversity is not required by the constitution, it is only required by 28 USC
1367 through the interpretation of the courts (Strawbridge).

The court then has the power to use its discretion to allow supplemental jurisdiction over the case 28 USC 1367(c). The court may deny supplemental jurisdiction if the claim raises a novel or complex issue of State law, substantially predominates over the claim or claims over which the court has original jurisdiction, the court has dismissed the claims with original jurisdiction, or in exceptional circumstance other compelling reasons for declining. The court would likely have to utilize the exceptional circumstance avenue denying supplemental jurisdiction here, since the others do not seem to apply. It is unlikely the court will do this however because it is in the interest of efficiency to hear T's negligence claim since all of the same facts are likely to be argued and same witnesses and evidence presented. The court should allow the claim by T against P.

T v. P

Is P's counter claim a rule 13(a) compulsory counter claim? If the defendant's counterclaim arises from the same transaction or occurrence as the claim against him it is compulsory. In this case P's counter claim involves the punch thrown by T preceding the fight and it could be argued that it does not arise from the same transaction or occurrence. The court will likely view
this claim as not arising out of the same transaction or occurrence on the reasoning that the standard for relation should be heightened since allowing such a claim would be contrary to 1367(b) and the requirement for complete diversity. This will be an easy way for the court to dispose of the controversy and it is likely they will make use of it.

However if they rule that the claim is compulsory then the court will have to grapple with whether such a claim is forbidden by 1367(b).

Supplemental Jurisdiction

As indicated above there is a valid original source of jurisdiction. There is no independent source for jurisdiction over P's counter claim therefore we will have to see if supplemental applies. Since the court, hypothetically, arose out of the same nucleus of operative facts in the rule 13(a) analysis it is likely that they will find that the battery counter claim arises out of the same nucleus of operative facts as required by the Constitution, Gibbs. 28 USC 1367(a) standard is met, see above, however 1367 (b) expressly forbids federal jurisdiction over this claim. P is asserting a claim against a non diverse party, T, who was added via rule 14. A strict
interpretation of the rule would force the court to either, as stated above, forbid the counter claim, or determine that it lacks subject matter jurisdiction over the case. This seems drastic and unwarranted however the courts are unsettled on how to handle cases under these circumstances. The Kroger court allowed impleader and crossclaims by defendants even though they abridged the complete diversity requirement, based on the reasoning they were hauled into court and should not be barred from raising their related claims because of lack of diversity. Although that reasoning certainly wouldn't justify allowing P's claim here, it may be argued that since in the past the courts have eroded the diversity requirements in the interest of practicality this is another circumstance that warrants such a holding. The court in Allapadah allowed that as long as one plaintiff meets the amount in controversy in a diversity suit against one defendant, all of the diverse plaintiff's claims should be allowed under supplemental jurisdiction. The amount in controversy is another statutory restraint on the constitutional power of federal courts to hear diversity cases. Once against the courts bent the rules in the interest of efficiency.

If the court rules against the strict interpretation of the statute it is unlikely they will use the discretionary provision, 1367(c) to deny jurisdiction, see above.
The courts should allow the counter claim, however likely will not with strict interpretation of 1367(b).

Question 3 Word Count = 1223

Character Count = 7554

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Total Word Count = 3790

Total Character Count = 23218
Question 3

When determining whether the federal court has permission and power to hear the Paul's battery claim against Ted, we must first consider the court's subject matter jurisdiction over the entire matter before moving on to the issues of supplemental jurisdiction.

Does Paul have a federally triable "anchor" claim?

In this instance, it appears that Paul has a viable federal claim against Diane for his injuries. 28 U.S.C. §1332 provides that where there is diversity between the parties and more than $75,000 in controversy, federal courts have the power to hear claims. Strawbridge continues to act as a limiting factor for this test, demanding that there be complete diversity between the parties.

It appears that Paul's suit against Diane meets the amount in controversy requirement and because they are citizens of different states, it meets the complete diversity requirement. It is important to note that since §1332 is the statute that allows this claim, certain limitations are placed on the types of supplemental claims that can be brought to federal court.

With original jurisdiction over the anchor claim settled, we must determine whether Paul's action against Ted has its own original jurisdiction. Though the amount in controversy seems to be met in this case, Ted is a Texas citizen. This would destroy diversity between the parties and would relegate Paul's action (normally) to state court. Unless Paul happens to be a federal
agent or this fight took place in some federal building, there is unlikely to be a question of federal law involved in this case. On the facts given, it would seem reasonable that this battery claim would be governed by state tort law. With diversity options, federal question options, and (presumably) speciality federal court options all extinguished, there is no original jurisdiction for Paul's claim against Ted.

Determining supplemental jurisdiction

The courts will then turn to the question of supplemental jurisdiction. It will go through a three-step process for determining whether the claim should be allowed into federal court. 1) Does a constitutional basis exist for the two claims? 2) Do the claims adhere to the statutory basis of §1367? 3) Should the court decline jurisdiction using its power of preclusion under §1367(c)?

Constitutional Basis (Art.III, §2)

When determining the constitutional basis for supplemental jurisdiction, one must consider whether they are "so related" that should be brought together in federal court. In determining this, the courts employ the Gibbs test, asking whether these issues "arise under the same nucleus of operative fact?"

In our case, arguments can be made for both sides of this coin. On one hand, Paul will likely argue that the incident took place in one place, at one time, and it involved the same parties. He will attempt to frame the wreck and battery as one large injury where he suffered all kinds of damage. Paul will argue that it is completely logical for him to bring all of his claims at the
same time and the same place, and will argue that most courts would want this anyway. His arguments should be based upon judicial efficiency, as the courts have limited resources and it's highly possible that all necessary witnesses would be the same for both actions.

If Ted wanted to stay out of federal court on this claim, he would argue that the incident was a separate one, arising from different facts. He will argue that his (alleged) battery has nothing to do with the original negligence claim that Ted will try to prove. He'll argue, as well, that there is no risk that multiple courts may end up with inconsistent rulings on the matter, since the issues at hand are different. This would counter the arguments on judicial efficiency. His argument will rest on the idea that the "core of operative facts" in one case is a car wreck, and the "core of operative facts" in the other is the exchange of words, a disagreement, and a punch to the face. He may even argue that there are defenses he will bring that will complicate this matter further, and take it further away from the jure of the original action.

Ultimately, the courts do take a broad interpretation of "core of operative facts" and it is reasonable that they might, in the interest of judicial efficiency, want this claim brought along if the constitutional analysis was all we had to look at.

Statutory_Basis_for_Supp_J/D_(§1367)

We must first look to §1367(a), where the courts will be asked to apply the same Gibbs test as listed above. Typically if a claim makes it this far, then
it has already passed the Gibbs test and will pass it here, as well.

Next, we move to an analysis of rule 1367(b). This rule lays out that in diversity cases (like ours), the plaintiff cannot assert a claim against parties added via rule 14, 19, 20, or 24. The facts indicate that this Rule 14 interpleader is permissible, and we must assume that Paul is not contesting its use. Under a strict reading of the rule, it would appear that the court will not allow Paul to assert a claim against Ted, since he is a party added under rule 14. This makes sense, as well, since Ted would ruin diversity in the case and would essentially give Paul the right to do what he isn't allowed to do under federal rules.

The courts do not want plaintiffs to use their federal anchor as a basis for circumventing the diversity requirement. Suing a non-diverse party in federal court is precisely what the court claims you cannot do in §1332, and the courts have held that there is no way congress intended to create a massive loophole in the system. Ted will argue that allowing Paul to sue him in federal court would give a greenlight to all plaintiffs in the future who would just wait for an impleader.

The courts used this approach in Kroger, where they did not allow the plaintiff to assert a claim against a fellow Iowan after it was discovered that completely diversity would be demolished. The court has reasoned that the plaintiff chooses the forum, and he gets many advantages in that sense.
Conversely, he must accept the limitations of his chosen forum.

But isn't this compulsory?

The plaintiff may argue that his counter-claim against Ted is actually a compulsory one. He may argue that if he does not bring his claim against Ted, he will lose his right to bring that claim on the basis of preclusion.

Ted will argue that Paul's claim isn't compulsory at all, and that it should be classified as a permissive counter-claim. Ted will have a strong argument that the battery is not the same "transaction or occurance" as defined by the courts, even if the two happened shortly after one another. He will argue that only using proximity of time and space to things that are of the same T/O will create an opening for a large number of unrelated claims just because they took place on the same day, week, or in the same place. Where do we draw the line, he might argue.

Additionally, this claim will not simply be thrown away. Even though it cannot be brought in federal court, the claim will move to state court where Paul will have the right to pursue it with vigor.

Moving_to_1367(c)

If by some chance the courts decided to let this case through, they would then move to their duties under USC §1367. That section provides the courts with discretionary power. After all, lower federal courts are a congress-creation,
and thus their powers are granted by statute. Congress has given them the power to decline supplemental jurisdiction where they see fit. The courts look to many issues to determine this. In this case, it does not appear that any novel issue of state law exists. Battery tends to be similar across the board and at the very least, this seems to be something that the federal courts would have the ability to work with. They would not, then, be forced to answer a difficult question that should be left to the state to decide.

Additionally, it does not appear that this new claim "predominates" over the anchor claim. All of the claims are for the same amount of money, and the negligence claim seems to be the most pressing. If anything, one might say that these are on "equal" footing. The courts might look at the situation and decide that the negligence claim is going to be easily decided on its merits, and that it would really just be taking on the duty of determining the state law claim. If that were the case, then the court might decide it better to decline jurisdiction and send this case to state court. Otherwise, there does not appear to be any policy reason why this case should not be heard in federal court, other than the obvious policy of keeping laws consistent (rule 14 exclusion).

In short, the court should sever this claim and it should be handled in state court.

Question 3 Word Count = 1497

Character Count = 8751
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Total Word Count = 4701
Total Character Count = 28213