# CIVIL PROCEDURE

## PRELIMINARY ISSUES

**TRO – Rule 65(b)**

- To preserve the status quo of [. . .], I will first seek a TRO under **Rule 65(b)**.

**PRELIMINARY INJUNCTION – Rule 65(a)**

- Then I will seek a preliminary injunction under **Rule 65(a)**. This motion for a preliminary injunction will be justified because probable success on the merits/irreparable harm to [client]/balance of hardships (at least two) are in [client]'s favor. [. . .].
- Then I will seek a preliminary injunction under **Rule 65(a)**. However, [the opposing party] may argue that probable success on the merits/irreparable harm to [client]/balance of hardships (at least two) are in [the opposing party]'s favor. [. . .]. Thus, the motion for a preliminary injunction may be denied.
- *Chalk* factor test: (1) Probable success on the merits (required), (2) irreparable harm to the movant (required), (3) balance of hardships (required), and (4) public interest (relevant).

**JUDICIAL DISQUALIFICATION/RECUSAL**

- I will seek to disqualify the judge under **§455**, because the judge's impartiality is reasonably questioned.
- Under the federal system – **§455**
- Under the state system – **The 14th Amend., state statutes, and state codes of judicial conduct**
- To decide whether one's campaign contribution has a significant and disproportionate influence on the electoral outcome of a judge, the court considers (1) whether the case is pending or imminent, (2) the contribution size, (3) the contribution in relation to total amount contributed to the judge's campaign and total amount contributed to the election, and (4) the apparent effect of campaign contribution.

## P'S COMPLAINT

**COMPLAINT**

- Rule 8(a): (1) A short, plain statement of the grounds for the court's jux, unless the court already has jurisdiction and the claim needs no new jurisdictional support, (2) a short, plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for the relief sought, which may include relief in the alternative or different types.
- ***Twiqbal* plausibility standard**: (1) The plaintiff must plead facts supporting a plausible claim—a claim that is more likely than possible, but no necessarily probable; (2) the court ignores legal conclusions and only looks at factual allegations; and (3) in determining plausibility, the court relies on its judicial experience and common sense (the key to find a claim implausible is whether there is an obvious, alternative, innocent explanation).
- Rule 8(d)(2) – alternative statements: A party may plead as many alternative and even conflicting claims or defenses, so long as the facts are the same; if the claims are different facts, it is evidence of fraud (Rule 11 sanctions).
- Rule 10(b) – numbered paragraphs: Each claim has to be separated into a single paragraph.
- Rule 9(b) – fraud or mistake (a heightened pleading standard): In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake; malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

**AMENDMENT – RULE 15**

- If the pleading to be amended does not require a responsive pleading: Under **Rule 15(a)(1)(A)**, [client] may amend the complaint/answer once as a matter of course no later than 21 days after serving it.
- If the pleading to be amended requires a responsive pleading: Under **Rule 15(a)(1)(B)**, [client] may amend the complaint/answer once as a matter of course no later than 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b)/(e)/(f), whichever is earlier.
- Relation back to the date of the original pleading – Rule 15(c):
  - The law that provides the applicable statute of limitations allows relation back.
  - The amendment asserts a claim/defense that arises out of the conduct, transaction, or occurrence set out in the original pleading.
  - The amendment changes the party or the naming of the party against whom a claim is asserted: (1) The amendment asserts a claim/defense that arises out of the conduct, transaction, or occurrence set out in the original pleading, (2) the party is on

notice that it will not be prejudiced, and (3) the party knows or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

- *Krupski*: Relation back of the amendments under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or its timeliness in seeking to amend the pleading.

**RELIEF FOR DEFECTIVE COMPLAINT**

- When before trial: If the judgment is not entered, I will consider amending the complaint under **Rule 15(a)**. I will also consider voluntary dismissal under **Rule 41**. If the judgment is entered, I will try to seek relief from judgment under **Rule 60**.
  - When during and after trial: Rule 15(b)

**JOINDER OF CLAIMS – RULE 18**

- The plaintiff may join all unrelated claims against the defendant under **Rule 18**, but each claim should have independent jurisdictional basis. Here, [. . .] lacks jurisdictional basis. I can also raise a **Rule 12(b)(1)** motion as to [. . .].

## D'S RESPONSE 1

**DEFAULT – RULE 55(a) & DEFAULT JUDGMENT – RULE 55(b)/RULE 60(b)**

- I will oppose [plaintiff]'s motion for default judgment; **Rule 55** is not triggered because [client] answered.
- I will move to set aside default/default judgement under **Rule 60** for good cause. I will show that [plaintiff] will be (not) prejudiced because [. . .]. [Client] has a meritorious defense—[. . .]. Also, [client]'s culpable conduct that leads to the default is [negligent/intentional/reckless], because [. . .].
- Courts may set aside default or default judgment for good cause (*Shepard Claims Service, Inc.* factor test): (1) Whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant leads to the default (an intent to thwart judicial proceedings/a reckless disregard for the effect of the plaintiff's conduct on judicial proceedings).

## D'S RESPONSE 2: PRE-ANSWER

**RULE 12 PRE-ANSWER MOTION**

**Consolidate with Rule 12(g)**

- First, I will test the sufficiency of the complaint with a **Rule 12** pre-answer motion, which will have all the following Rule 12 motions consolidated as is required under **Rule 12(g)**.

**Failure to State a Claim upon which Relief can be Granted – Rule 12(b)(6)**

- In this pre-answer motion, I will have a **Rule 12(b)(6)** motion for failure to state a claim upon which relief can be granted based on Rule 8(a)/9(b). Assuming all the factual allegations of the complaint as true, the complaint is insufficient because it fails to allege every essential element of a [. . .] claim. The complaint fails to plead [specific element]. (In addition, the complaint is insufficient because it has no claim under existing law, since [source of law] is unlawful/unconstitutional. Although the complaint characterizes the [source of law] as "lawful," it is a legal conclusion that the court will not take as true for purposes of a Rule 12(b)(6) motion.)
- A Rule 12(b)(6) defense may be raised in a Rule 12 pre-answer motion, any pleading allowed or ordered under Rule 7(a), a Rule 12(c) motion for judgment on the pleadings, or at trial.
- Rule 12(b)(6) motion can be dismissed after the plaintiff amends the defective complaint.
- ***Twiqbal* plausibility standard**: (1) The plaintiff must plead facts supporting a plausible claim—a claim that is more likely than possible, but no necessarily probable; (2) the court ignores legal conclusions and only looks at factual allegations; and (3) in determining plausibility, the court relies on its judicial experience and common sense (the key to find a claim implausible is whether there is an obvious, alternative, innocent explanation).

**Failure to Join a Party under Rule 19 – Rule 12(b)(7)**

- Also, in this pre-answer motion, I will include a **Rule 12(b)(7)** motion for failure to join a required party under Rule 19.
- Under **Rule 19(a)(1)**, [the absent party] is necessary because [the court cannot grant complete relief among existing parties without the absent party/the absent party claims an interest in the action that would be impaired or impeded if that party is not joined/the party's absence would leave an existing party subject to a substantial risk of multiple liability or inconsistent obligations].
- Under **Rule 19(b)**, [the absent party] is feasible because [. . .]. Thus, under **Rule 21**, [the absent party] should be added.

- Under **Rule 19(b)**, [the absent party] is infeasible because [. . .], and dismissal is the best course of action here. First, the prejudice to [the absent party or the existing] will be [. . .]. Second, the court can/cannot limit the severity of the prejudice by [. . .]. Third, the judgment will/will not be adequate without [the absent party]. Lastly, [plaintiff] will/will not have an adequate remedy if the action is dismissed.

**Motion for a More Definite Statement – Rule 12(e)**

- Additionally, this pre-answer motion will also have a **Rule 12(e)** motion for a more definite statement, as paragraph [. . .] is unintelligible to the degree that [the responding party] cannot possibly respond.

**Motion to Strike – Rule 12(f)**

- This pre-answer motion will also contain a **Rule 12(f)** motion to strike for paragraph [. . .], which is [redundant, immaterial, impertinent, or scandalous].

**Other Rule 12(b) Motions**

## D'S RESPONSE 3

## ANSWER – Rule 8(b)

**Admission/Denial – Rule 8(b)**

- In the answer, I will first admit or deny specific allegations of the complaint, going paragraph by paragraph as required by **Rule 8(b)**. I will admit paragraphs [. . .] and deny paragraphs [. . .]. I will admit the true part and deny the false part of paragraph [. . .]. I will deny the legal conclusion and admit the other part in paragraph [. . .]. I will also admit/deny paragraph [. . .] if not stricken, because it is true/false.
- I may answer in the alternative that [defendant's explanation 1] or [defendant's explanation 2].

**Affirmative Defenses – Rule 8(c)**

- Additionally, the answer will raise affirmative defenses under **Rule 8(c)**. [Raise affirmative defenses in Rule 8(c) and possibly challenge the adequacy of the law (challenge it here under Rule 8(c) with other affirmative defenses!), i.e., constitutionality or precedent.]

**Rule 12(b) Defenses**

- Under **Rule 12(h)(2)**, I will include Rule 12(b)[(6)/(7)] defense here if I omit them earlier.

**Compulsory Counterclaim – Rule 13(a)**

- Besides, the answer will contain a **Rule 13(a)** compulsory counterclaim. The counterclaim is for [. . .], and it is compulsory because it arises out of the same transaction/occurrence as the original claim, has a logical connection with the original claim, and will be substantially disposed by the same evidence of the original claim due to the factual overlap.
- However, if the counterclaim for [. . .] arises out of an afterthought and a separate accident, I will contain a **Rule 13(b)** permissive counterclaim instead because it did not arise out of the same transaction/occurrence as the original claim and there is no overlapping evidence.

**Permissive Counterclaim – Rule 13(b)**

- The answer will also contain a **Rule 13(b)** permissive counterclaim. The counterclaim is for [. . .], and it ispermissive because it does not arise out of the same transaction/occurrence as the original claim, and there is no overlapping evidence.

**Crossclaim – Rule 13(g)**

- Moreover, the answer will contain a **Rule 13(g)** crossclaim. The crossclaim is against [. . .] and is for [. . .]. The crossclaim is permitted under Rule 13(g) since [the claim arises out of the transaction or occurrence that is the subject matter of the original action or a counterclaim/the claim relates to any property that is the subject matter of the original action].

**Amendment – Rule 15**

- If the pleading to be amended does not require a responsive pleading: Under **Rule 15(a)(1)(A)**, [client] may amend the complaint/answer once as a matter of course no later than 21 days after serving it.
- If the pleading to be amended requires a responsive pleading: Under **Rule 15(a)(1)(B)**, [client] may amend the complaint/answer once as a matter of course no later than 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b)/(e)/(f), whichever is earlier.
- Relation back to the date of the original pleading – Rule 15(c):

  - The law that provides the applicable statute of limitations allows relation back.
  - The amendment asserts a claim/defense that arises out of the conduct, transaction, or occurrence set out in the original pleading.
  - The amendment changes the party or the naming of the party against whom a claim is asserted: (1) The amendment asserts a claim/defense that arises out of the conduct, transaction, or occurrence set out in the original pleading, (2) the party is on notice that it will not be prejudiced, and (3) the party knows or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.
- *Krupski*: Relation back of the amendments under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or its timeliness in seeking to amend the pleading.

## JOINDER OF PARTIES

### Required Joinder of Parties – Rule 19

- Under **Rule 19(a)(1)**, [the absent party] is necessary because [the court cannot grant complete relief among existing parties without the absent party/the absent party claims an interest in the action that would be impaired or impeded if that party is not joined/the party's absence would leave an existing party subject to a substantial risk of multiple liability or inconsistent obligations].
- Under **Rule 19(b)**, [the absent party] is feasible because [. . .]. Thus, under **Rule 21**, [the absent party] should be added.
- Under **Rule 19(b)**, [the absent party] is infeasible because [. . .], and dismissal is the best course of action here. First, the prejudice to [the absent party or the existing] will be [. . .]. Second, the court can/cannot limit the severity of the prejudice by [. . .]. Third, the judgment will/will not be adequate without [the absent party]. Lastly, [plaintiff] will/will not have an adequate remedy if the action is dismissed.

### Permissive Joinder of Parties – Rule 20

- [The additional party] can be joined under **Rule 20** if it asserts right to relief with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences and has common question of law or fact. However, to oppose [plaintiff]'s (potential) permissive joinder, I will show that there is no basis for the claim that [the additional party] was part of the same transaction/occurrence/series of transactions or occurrences. Also, [plaintiff] and [the absent party] do not have a common question of law or fact. [Different times, places, circumstances, people, or problems]. Thus, no efficiencies will be generated by adding [the additional party] and trying cases with disparate facts. Because [the additional party] should not be joined, I will move to drop/sever [. . .] under **Rule 21**.
- Look for different times, places, circumstances, people, or problems.

### Misjoinder and Non-joinder – Rule 21: Mention if the party should (not) be joined!

- Because [the absent party] should (not) be joined under Rule [. . .], I will move to add/drop/sever [. . .] under **Rule 21**.

## INTERPLEADER – Rule 22/§1335

- To join all claims against [. . .] into a single action, I will use **Rule 22** interpleader or **§1335** statutory interpleader. Here, interpleader will be appropriate, because [. . .] has a limited stake [on the fund/item] that will be subject to multiple conflicting claims [by . . .] if not joined in a single suit.

## INTERVENTION – Rule 24

### Intervention as of Right – Rule 24(a)

- On timely motion, the court must permit an outsider to intervene, if (1) the outsider claims an interest relating to the property/transaction that is the subject of the action, (2) the outsider's ability to protect its interest will be impaired/impeded, and (3) existing parties do not adequately represent the outsider's interest.

### Permissive Intervention – Rule 24(b):

- On timely motion, the court must permit an outsider to intervene, if (1) the outsider has a claim/defense that shares with the main action a common question of law or fact and (2) the intervention will not cause undue delay or prejudice to existing parties.

## CLASS ACTION – Rule 23: Prerequisites + Types → Certification

- Under **Rule 23(a)**, a class action requires all prerequisites—numerosity, common question of law or fact, typicality of claims/defenses by the representative parties, and adequacy of representation. To oppose [plaintiff]'s (potential) class action, I will first show the lack of [numerosity/commonality/typicality/adequacy of representation]. Based on *Walmart*, differences destroy the commonality. Then I will show that [plaintiff] cannot certify for the class because [the potential class members] cannot satisfy the type of class action under Rule 23(b)(2)/(3).
- Types – Rule 23(b):
  - Prejudicial risk of inconsistent/dispositive adjudications – Rule 23(b)(1)

- Injunctive/Declaratory relief – Rule 23(b)(2): The party opposing the class has acted or refused to act on grounds that apply generally to the class so that injunctive or declaratory relief would be appropriate to the class as a whole.
- Predominance and superiority – Rule 23(b)(3) – catch-all provision: Monetary relief usually fits into this category. >> The common question of law or fact predominates and is not polluted by different factors + Class action is superior to other methods, because [able to managed by the judge/desirability to consolidate the litigation/interest level of members within the class to control their own cases]
  - Even if the court may find the commonality, I will show that the commonality is polluted by different factors and thus does not predominate over other questions affecting only individual members. Therefore, class action is not superior to other methods, because [not able to managed by the judge/desirability to consolidate the litigation/interest level of members within the class to control their own cases].

## D'S RESPONSE 3

## THIRD-PARTY COMPLAINT

**IMPLEADER – RULE 14**

- I will serve a summons and complaint against [. . .] under **Rule 14**, because [. . .]. Thus, if [defendant] is liable to [plaintiff], then [. . .] is liable to [defendant] for all or part of [defendant]'s liability to [plaintiff] in the original action (derivative liability).

## D'S RESPONSE 4: POST-ANSWER

## MOTION FOR JUDGMENT ON THE PLEADINGS – RULE 12(c)

- After the pleadings are closed, I will move for judgment on the pleadings under **Rule 12(c)**. Under **Rule 12(h)(2)**, if I omit the Rule 12(b)(6)/(7) defense in the Rule 12 pre-answer motion or the answer, I will include it here.

## RULE 11 MOTION

**RULE 11**: Present at all times outside of discovery.

- In a separate motion, I will serve [the other party] with **Rule 11** motion (under Rule 11(c)(2)), for its violation of **Rule11(b)[(. . .)]**. A reasonable inquiry under the circumstances would have shown that [law/facts], so [the other party's claim lacks legal/evidentiary support].
- Rule 11(b): No bad faith, no bad law, no bad factual contentions, and no bad denials of factual contentions.
- Rule 11(c)(2) – safe-harbor provision for Rule 11 sanctions: Before making a motion, the movant must give the other party 21 days to correct or withdraw the challenged paper or claim.
- Scenarios:
  - When moving for renewed judgment as a matter of law without a reasonable inquiry into whether the jury determination is accurate.

## DISCLOSURE & DISCOVERY

**RULE 26(f) CONFERENCE**

**DISCLOSURE**

- [The other party] should disclose [. . .] without a Rule 34 request, because [paragraph in the complaint] is plead with specificity and [. . .] is relevant.
- **Initial Disclosures**
- **Testifying Expert Disclosures**
- **Pretrial Disclosures**

**DISCOVERY**

**Discoverable – Rule 26(b)(1)**

- Relevant to any party's claim or defense + Non-privileged + Proportional to the needs of the case

**Discovery Tools**

- **Early deposition to perpetuate testimony – Rule 27**
- **Oral deposition – Rule 30**
- **Written deposition – Rule 31**

- **Interrogatories – Rule 33**
- **Requests for production of documents – Rule 34**
- **Electronic discovery – Rule 34**
- **Requests for physical or mental examination – Rule 35**
- **Requests to admit – Rule 36**

**Work Product Protection – Rule 26(b)(3), Rule 26(b)(5), & *Hickman***

- If work product of attorney's mental impressions, conclusions, opinions, or legal theories: [. . .] is [attorney's mental impressions/conclusions/opinions/legal theories], so it is undiscoverable work product under **Rule 26(b)(3)**.
- If ordinary work product: [. . .] is prepared by [another party or its representative] in anticipation of litigation, so it is work product. Although [. . .] is work product, I will show the court that (1) I have a substantial need for the documents/tangible things/information and (2) I will not be able to obtain it or the substantial equivalent of it without undue hardship. Therefore, [. . .] is not protectible work product under **Rule 26(b)(3)**.
- If work product prepared by an employee expert who is not specially retained but nonetheless does work for the party in anticipation of litigation: [. . .] is prepared by [. . .], an employee expert who is not specially retained but nonetheless does work for the party in anticipation of litigation, so it is work product. Although [. . .] is work product, I will show the court that (1) I have a substantial need for the documents/tangible things/information and (2) I will not be able to obtain it or the substantial equivalent of it without undue hardship. Therefore, [. . .] is not protectible work product under **Rule 26(b)(3)**.
- If previous statement about the action or its subject matter: Always discoverable.
- If oral product: *Hickman*.
- I will seek [. . .], because the work product protection does not apply here, as [. . .] is about to further a crime/fraud.

**Attorney-client Privilege – Rule 26(b)(5) & Common Law**

- I will seek [. . .], because the attorney-client privilege does not apply here, as [. . .] is about to further a crime/fraud.
- I will seek [. . .], because its disclosure to a third party qualifies as a waiver to the attorney-client privilege.
- [. . .] is relevant, non-privileged, and proportional to the needs of the case. Besides, I do not seek for the communications between [the opposing party] and [the opposing party]'s attorney, but the underlying facts.

**Expert – Rule 26(b)(1), Rule 26(b)(3), and Rule 26(b)(4)**

- If an expert who is retained/specially employed in anticipation of litigation and will testify: Under **Rule 26(b)(4)(A)**, [. . .], an expert who is retained/specially employed in anticipation of litigation and will testify, is deposable.
- If an expert who is retained/specially employed in anticipation of litigation but will not testify: Under **Rule 26(b)(4)(D)**, to discover facts from [. . .], an expert who is retained/specially employed by [plaintiff] in anticipation of litigation but will not testify, I will show the court that due to [. . .], there are exceptional circumstances which make it impracticable for me to obtain the facts or opinions by any other means.
- If an employee expert who is not specially retained but nonetheless does work for the party in anticipation of litigation: [. . .] is prepared by [. . .], an employee expert who is not specially retained but nonetheless does work for the party in anticipation of litigation, so it is work product. Although [. . .] is work product, I will show the court that (1) I have a substantial need for the documents/tangible things/information and (2) I will not be able to obtain it or the substantial equivalent of it without undue hardship. Therefore, [. . .] is not protectible work product under **Rule 26(b)(3)**.
- If an expert whose work is relevant but is not prepared in anticipation of litigation: [. . .] is prepared by [. . .], an expert whose work is relevant but is not prepared in anticipation of litigation. Thus, under Rule 26(b)(1), [. . .] is discoverable because it is relevant, non-privileged, and proportional to the needs of the case.
- Expert witness classification:
  - Experts who are specially retained in anticipation of litigation and will testify: Rule 26(b)(4)(A) >> Deposable.
  - Experts who are specially retained in anticipation of litigation but will not testify: 26(b)(4)(D) >> Discoverable only upon a showing of exceptional circumstances under which it is impractical to obtain facts or opinions on the same subject by other means.
  - Employee experts who are not specially retained but nonetheless do work for the party in anticipation of litigation: Rule 26(b)(3) >> Party's work-product discoverable upon a showing of substantial need and inability to obtain equivalent information without undue hardship.
  - Experts whose work are relevant but are not prepared in anticipation of litigation: Rule 26(b)(1) >> Generally discoverable.

**Motion to Compel – Rule 37(a)**: Can be needed before summary judgment.

- [. . .] is relevant, non-privileged, and proportional to the needs of the case. To obtain the needed disclosure/discovery from [. . .], I will first attempt to convince the opposing counsel to give me access. If the opposing counsel refused, I will move for an order

under **Rule 37** to compel disclosure/discovery. I will certify that [client] has in good faith conferred or attempted to confer with [. . .] to obtain the information/material without court action.

**PROTECTIVE ORDER – RULE 26(c)**

- I will move for a **Rule 26(c)** protective order against [the other party]'s discovery from [client or other person from whom discovery is sought/information/document]. I will certify that [client] has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. I will also show good cause that the protective order is necessary to protect [client or other person from whom discovery is sought] from [annoyance/embarrassment/oppression/undue burden or expense]

**RULE 26(g) SANCTIONS**

**RULE 37 SANCTIONS**

- I will file for a **Rule 37(e)** sanction for failure to preserve electronically stored information ("ESI") against [the other party], because [the other party] failed to take reasonable steps to preserve the ESI which should have been preserved in anticipation of litigation, and the ESI cannot be restored or replaced through additional discovery. Although [the other party]'s failure was not intentional, it causes prejudice to [client].
- I will file for a **Rule 37(e)** sanction for failure to preserve electronically stored information against [the other party], because [the other party] intentionally deprived [client] of the information's use by failing to take reasonable steps to preserve the ESI which should have been preserved in anticipation of litigation, and the ESI cannot be restored or replaced through additional discovery.

## SUMMARY JUDGMENT – PRE-TRIAL (EVEN CAN BE PRE-ANSWER)

**SUMMARY JUDGMENT – RULE 56**

- I will move for summary judgment under **Rule 56**, as there can be no genuine dispute of material fact regarding [. . .], and [client] entitled to judgment as a matter of law. Here, [. . . disproves an essential element of [plaintiff]'s claim of . . . as in *Adickes*/shows an absence of evidence in the record sufficient for [plaintiff] to establish an essential element of its claim of. . . as in *Celotex Corp.*]. [Try to bring in evidence that challenges the factual sufficiency of the claim, which is taken as true in Rule 12(b)(6) motion.]
- If the discovery shows that [facts], I will move for summary judgment, as there can be no genuine dispute of material fact regarding [. . .], and [client] entitled to judgment as a matter of law.
- When facts are unavailable to the non-movant: Under **Rule 56(d)**, I will show by affidavit or declaration that, for specified reasons, [client] cannot present facts essential to justify its opposition, to let the court defer considering [the opposing party]'s motion for summary judgment or deny it, allow time to obtain affidavits or declarations or to take discovery, or issue any other appropriate order.
- Possible alternatives for the defendant to meet its burden under Rule 56(a): (1) the defendant must disprove an essential element of the plaintiff's claim, (2) the defendant must show an absence of evidence in the record sufficient for the plaintiff to establish an essential element of its claim, or (3) the defendant must simply move for summary judgment. >> In *Adickes*, there was information to the non-movant's favor and the movant had to disprove it (the first approach); in *Celotex Corp.*, the movant demonstrated an absence of such favorable information that put the burden on the non-movant to produce something (the second approach).
- A Rule 12(b) motion or Rule 12(c) motion is converted into a Rule 56 motion for summary judgment if matters outside the pleadings are presented to and not excluded by the court.

## TRIAL

**RULE 12(b) DEFENSES**

- To end the litigation early, under **Rule 12(h)(2)**, I will first have a Rule 12(b)(6)/(7) defense here if I omit it in previous stages.

**MOTION FOR JUDGMENT AS A MATTER OF LAW (DIRECTED VERDICT) – RULE 50(a)**: **Pre-jury** verdict

- To end the litigation early, after [the opposing party] had been fully heard, and before the case was submitted to the jury, I will move for a judgment as a matter of law under **Rule 50(a)**. I will argue that due to [. . .], no reasonable jury would have a legally sufficient evidentiary basis to find for [the opposing party] on the issue/element of […].
- If arguing for JMOL: *Galloway* (the court inclined to get more evidence before the case went to the jury, because it discouraged the jury's speculation).
- If arguing against JMOL: *Lavender* (the court was more willing to let the case go to the jury and allowed the jury to speculate).

**RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW (JUDGMENT NOTWITHSTANDING THE VERDICT) – RULE 50(b)**: **Post-jury** verdict

- If the jury reaches a verdict in favor of [the opposing party], I will move for a renewed judgment as a matter of law under **Rule 50(b)** within 28 days of judgment. I will once again argue that because of [. . .], no reasonable jury could have found for [the opposing party] on the evidence presented at trial on the issue/element of […] as this jury did. Simultaneously, in addition to a Rule 50(b) motion for a renewed judgment as a matter of law, I will also move for a new trial under **Rule 59**.

**MOTION FOR A NEW TRIAL – RULE 59**

- (Rule 50(b). . .) My motion for a new trial will be justified because the jury verdict is against the clear weight of the evidence. [. . .]. I will move for a new trial in addition because the standard needed is easier to satisfy than "no reasonable jury," and it can provide a second and more probable attempt to protect [client] from the jury verdict.

**RELATIONSHIP BETWEEN A POST-VERDICT JMOL AND A NEW TRIAL – RULE 50(c)-(e)**

- Rule 50(c)-(e) regulates the relationship between a post-verdict JMOL and a new trial to facilitate appeal:

| | |
|---|---|
| The court denies a renewed JMOL while granting a new trial: Rule 50 does not address this scenario! | - When a court denies a renewed JMOL and grants a new trial, the next thing that happens is a new trial.<br>- The "final decision" rule: With exceptions, the parties may appeal only from litigation-ending, final decisions of district courts.<br>- A new trial order is not a final decision (and thus is non-appealable).<br>- Here, no final decision, so no appeal until after the new trial. |
| The court grants a renewed JMOL while conditionally granting a new trial: Rule 50(c)-(d) | - Conditional: If the JMOL is upheld on appeal, a new trial is not needed.<br>- Rule 50(c)(2): Plaintiff can appeal the JMOL; it is a final decision and conditionally granting new trial does not affect the finality of JMOL. >> Appeal as of right is provided by Rule 50(c)(2).<br>- Rule 50(c)(2): If the JMOL is reversed on appeal, a new trial follows unless the circuit court orders otherwise.<br>- Rule 50(d): The JMOL loser may move for a new trial within 28 days after the entry of JMOL in the district court. |
| The court grants a renewed JMOL while conditionally denying a new trial: Rule 50(c)-(d) | - Rule 50(d): The JMOL loser may move for a new trial within 28 days after the entry of JMOL in the district court.<br>- Rule 50(c)(2): If the JMOL is reversed on appeal, the JMOL winner (the appellee) may protect itself by asserting that the district court erred in conditionally denying the new trial.<br>- Rule 50(c)(2): If the circuit court reverses the JMOL, the case proceeds as the circuit court orders.<br>- If the JMOL is upheld on appeal, a new trial is not needed. |
| The court denies a renewed JMOL while denying a new trial and enters judgment on the verdict: Rule 50(e) | - The prevailing party (the jury verdict winner) may, as the appellee, assert grounds for a new trial if the circuit court reverses the JMOL.<br>- If the circuit court reverses the judgment, it may order a new trial, direct entry of judgment, or direct the district court to determine if a new trial is warranted.<br>- The jury verdict loser can appeal the denials because given both denials, the judgment against the jury verdict loser is a final judgment. >> D appeal as of right because judgment is final.<br>- If the denials are upheld on appeal, the judgment against the jury verdict loser stands. |

Suppose P is the jury verdict winner, and D moves for a renewed JMOL and a new trial:

| | District court's decisions | | |
|---|---|---|---|
| Jury verdict | JMOL | New trial | Appeal (in circuit court) |
| P wins | √ | √ | P appeals for the JMOL. >> If P wins on appeal (the circuit court reverses the JMOL), then go to a new trial. |
| P wins | × | × | D appeals. |
| P wins | √ | × | P appeals for the JMOL. |
| P wins | × | √ | Not final, no appeal (go to a new trial). |