For each of the four questions on the final exam, which was jointly written by Professors Levine and Ratner, we provide three things: (1) an issue-spotting list; (2) a sample answer selected by Professor Levine from his small section; and (3) a sample answer selected by Professor Ratner from his small section. The issue-spotting lists are designed to highlight the most important and relevant issues we hoped students would address upon reading the exam questions. Merely spotting an issue is not the same as fully confronting it. The best exams confronted issues with a relatively high degree of sophistication, as evidenced by, among other things the students’ demonstrated ability: to use the legal reasoning tools developed throughout the term (including but not limited to both rule and case analysis); to apply those tools in a logical, precise and orderly way to the specific facts of the exam hypothetical and questions; and to see where procedural doctrine and policy provided more than one possible answer or outcome. The sample student answers are just that – representative answers that, though imperfect, curved well relative to other exams in our respective small sections.

The final exam questions are attached to this memorandum. The exam hypothetical facts were inspired by a number of actual cases litigating personal injury and other claims associated with the use of allegedly violent video games, including: Wilson v. Midway Games, 198 F.Supp.2d 167 (D. Ct. 2002); James v. Meow Media, Inc., 90 F.Supp.2d (W.D. Ky. 2000); Roccaforte v. Nintendo of Am., Inc., 802 So.2d 764 (La. App. 2001). However, these decisions do not necessarily shed light on the specific procedural questions the exam was designed to highlight.

The issue-spotting list and sample answers, below, alternatively refer to the plaintiffs in the exam hypothetical as Plaintiffs, P’s/Ps’, Connor Kennedie and/or Taylor Swifte, CK and/or TS. Defendants are referred to as Defendants, D’s/Ds’, Nebula and/or Galactic Gaming, or N and/or GG. Judge Kowell is sometimes referenced as JK.

I. Question 1:

A. Issue Spotting List

A good answer addressed the following issues, among others:

1. The purposes/functions of “discovery” (e.g., obtaining information, to avoid surprise at trial).

2. The scope of discovery is broadly defined, subject to limitations including proportionality, the application of which depends on the circumstances (allegations, nature of potentially available discovery, etc.) of each case.

3. FRCP 26(b)(1) establishes the scope of discovery, by reference to the term “relevant” (which needs to be defined according to the rule). Relevance in this hypothetical had to be examined by reference to the
following materials responsive to Plaintiffs’ Rule 34 Request for Production, among others:

a. Users other than named plaintiffs

b. Games other than Rampage

4. FRCP 26(b)(2) functions to limit the scope of discovery under particular circumstances.

a. Once relevance is established by the propounding party, the party seeking to limit discovery under 26(b)(2) has the burden to establish the bases for limiting discovery.

b. The mere fact that responding to a discovery request is burdensome does not automatically limit discovery (Sears and McPeek); instead, as to all discovery, Rule 26(b)(2)(C) applies a principle of proportionality, which students should have explained and applied to the facts of this hypothetical.

c. Electronically stored discovery (“ESI”) is subject to specific limits, depending on whether the discovery is accessible or inaccessible. Students should have defined “inaccessible discovery” and applied the rule with that definition in place to the types of ESI potentially responsive to Plaintiffs’ discovery,

i. Using the text of the Rule and even the relevant Advisory Committee Notes, and

ii. Applying relevant case law we studied, acknowledging the extent to which it was or was not binding or merely persuasive authority, and noting the extent to which it was codified via 2006 rule amendments.

5. Cost shifting should have been discussed. Students should have:

a. Specifically emphasized its appropriateness with respect to ESI, given that FRCP 26(b)(2) enables conditions (including, impliedly, cost shifting) to be placed on the production of such discovery under appropriate circumstances;

b. Applied relevant case law (including case law enabling sampling as a precursor to cost shifting), acknowledging the extent to which the case law was binding precedent or merely persuasive authority, and noting the extent to which it was codified via 2006 rule amendments;
c. Acknowledged that cost shifting is not necessarily a binary choice, made only at one time, but, instead, can be addressed after appropriate sampling, and applied in a nuanced way (for example, shifting costs only with respect to one subset of ESI, etc.); and

d. Acknowledged that this area of the law is a particularly fast-moving target that requires not only the application of doctrine but, also, the use of common sense and creativity to properly balance the competing values at stake.

6. Sanctions should have been examined primarily by reference to Rule 37 (as the hypothetical did not really place 26(g) squarely at issue, though it could have been mentioned in passing). As to the issue of sanctions:

   a. The range and different purposes of discovery sanctions should have been noted (with specific application to the facts of the hypothetical, which did not involve complete failure to respond, or refusal to comply with a prior discovery order);

   b. Students should have distinguished between the fee and cost shifting provisions of Rule 37(a)(5), which do not depend on a finding of willfulness or fault, and which are subject to a number of exceptions that should have been applied here, and more stringent sanctions identified in other sub-sections of Rule 37, which do turn on some finding of willfulness (e.g., a refusal to comply with a prior discovery order issued by the court); and

   c. Rule 37(e)’s special treatment of ESI was worth mentioning.

7. Since the defendants did not raise the objections of work product or privilege, it was not necessary to address them. It was useful to include a brief discussion confirming the existence of subject matter jurisdiction via diversity.

B. Levine Small Section - Sample Answer

Question 1

Whether the judge should grant the motion to compel, impose sanctions, and/or shift costs in regards to P's discovery request.

In the case of P's v Nebula, the P's have requested that Nebula "produce all documents in Nebula's possession, including e-mails and other communications regarding alleged behavioral problems associated with the use of Rampage or any of Nebula's other video
games." Nebula has refused to comply with the request because it is "overboard" considering the P's are asking for information, which Nebula argues, is outside the scope of their litigation. Further, Nebula argues that it would be unduly burdensome for them to respond to such a vague request and refuses to search their backup systems.

It first must be determined whether the P's request is within the scope of 26(b)(1), which provides "parties may obtain discovery regarding any non privileged matter that is relevant to any party's claim or defense. Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by 26(b)(2)(C)."

It seems here that Nebula is not asserting any privilege defense in regards to the document request, only that it would be unduly burdensome and that some of the information requested is outside the range of discovery. Granted, the P's request is extremely broad. The P's have asked for any information regarding problems with any of Nebula's games, not just the game Rampage. Given the fact that 26(b)(1) states the discovery must be relevant to a party's claim or defense, it might be determined that requesting the information relating to complaints of other games made by Nebula should not be taken into consideration. On the other hand, if in fact there have been previous complaints about the violent nature of some of Nebula's other games that have led to similar injuries, the request for discovery may not be overly broad.

Nebula objects to the claim under rule 26(b)(2)(B). The rule gives specific limitations on ESI and it provides that a party need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. The party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. And if that showing is made, the court may still order discovery from such sources if the requesting party shows good cause, considering the limitations of 26(b)(2)(C).

**McPeek v Ashcroft**

This situation is similar to that of *McPeek v Ashcroft*. In *McPeek* a P had recently settled a claim regarding sexual harassment and in the settlement agreement it was determined the P would be moved to a different office location and the suit was not to be discussed. However, once the P had arrived at his new place of work it was found out that the settlement had been talked about and this caused the P to suffer great humiliation. As a result, he sued and during discovery requested that the Department of Justice (the defendant in the case) search its backup systems in order to determine whether e-mails that had been sent, but no deleted, contained information that was relevant to the case. The court struggled with the issue of whether to compel the motion of not, and ultimately decided that the D should draw a sample at first instead of complying with the full discovery request. If indeed the sample returned some positive information for the P, the P could then continue to obtain more information.

**Kozlowski v Sears**

Sample Answers 4
Further, the case of *Kozlowksi v Sears* (decided before *McPeek*) was not as lenient towards the D. In *Sears* a child was severely burned wearing a pair of PJ's he had purchased from Sears. The P made a discovery request to Sears in that it provide a record of all complaints and communications concerning the personal injuries caused by the pi's. Sears rejected to comply arguing that it would be far too costly and burdensome for them to comply with such a request. The reason Sears stated was because they filed their complaints by name and not by the product. *Sears* ultimately held that because compliance with an RFP would be costly or time-consuming is not ordinarily a sufficient reason to grant a protective order where the information is relevant and necessary to the discovery of evidence.

In the case at hand, the P's have made a similar request to that of *Sears* and *McPeek*. They are requesting information that relates to "alleged behavioral problems... associated with the use of Rampage or any of Nebula's other video games." Granted, the request is quite broad and may even be difficult to determine whether a document relates to "behavioral problems" or not. However, the information is definitely relevant to P's claims as they are alleging that Nebula knew or should have known that the Rampage game was dangerous. If there were e-mails or communications that stated other people had similar problems to that of the P, it would greatly strengthen the P's argument that Nebula knew the game was dangerous.

In regards to the request for information that does not relate to the Rampage game, but still made my Nebula. The court should most likely not allow the D to search through these documents as well. Given that the complaint alleges that it is the Rampage game that is dangerous and not a list of other games, it would appear all the e-mails and communications related to the other games are outside the scope of discovery and not relevant to the P's claim.

Therefore, while it might be unduly burdensome for Nebula to comply with the request, it appears the information requested (the information specially related to the Rampage game) is relevant to the P's claim and have made a showing of good cause (26(b)(2)(B) that the motion to compel discovery should be granted. The discovery motion should be granted, however, Nebula should not be required to search its backup systems for everything the P has requested. The P has made of showing of good cause in relation to the request for items that would fall under the Rampage game and nothing more.

**Sanctions**

With regard to sanctions, assuming that the P wins the motion to compel, the P may attempt to obtain sanctions under 37(a)(5) - Payment of Expenses. Under the rule, if the P's motion to compel is granted the can require the party whose conduct necessitated the motion to pay the movant's reasonable expenses incurred in making the motion, including attorney fees. However, the court must take into consideration whether the opposing party's nondisclosure, response, or objection was substantially justified (35(a)(5)(ii)). Given from the above discussion, it seems that the P's discovery request was overly broad and therefore Nebula may have been justified in fighting the motion. They thought the request was overly broad and would be extremely costly and time consuming. While this
is partly true, Nebula will still have to search its backups only for information relating to the Rampage game, it may be unfair to impose sanctions on Nebula for their behavior.

Shift Costs

Assuming the motion to compel should be granted, Nebula will want to shift the cost of the discovery on the P given how costly and time-consuming the discovery request is. Cost benefit/shifting is governed by 26(b)(C)(iii). In Mc Peek the DOJ also argued that the P should have to bear the burden of forcing the DOJ to search their backup systems. The court responded by stating: the more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the government agency search at its own expense. The less likely it is, the more unjust it would be to make the agency search at its own expense. The presumption is that the responding party must bear the expense of complying with discovery requests... Thus, cost shifting should be considered only when the electronic discovery imposes an undue burden or expense on the responding party.

Here, the court may very well apply the same method that the Mc Peek court used. The court could compel Nebula to provide a sample of data at first and if e-mails or communications regarding "behavior problems" were found, further discovery would be required. However, it seems the P's request is reasonable in that it may find material that is relevant to the P's claims and therefore the cost should not be shifted toward the P. If the court employs the same method in Mc Peek and requires a sample of evidence to be taken and that sample returns nothing back in favor the P's. The P's could then ask for further discovery and at that point the burden of cost should shift onto them.

Note on Privacy

It should briefly be noted that the D's could be justified in not turning over, or at least redacting the names of the people contained in the e-mails/communications. In Vinson v Superior Court, a P was required to undergo a physiological examination and the P argued this violated her privacy rights. The court stated that it must balance the right of civil litigants to discover relevant facts against the privacy interests of persons subject to discovery. Given that the information being requested (the e-mails/communications) is relevant to the P's case the information needs to be discovered and turned over. However, the individuals’ names on the documents are not relevant. Therefore, it may be appropriate for the D to redact any personal identifiable information as to protect the individuals’ privacy interest.
C. Ratner Small Section – Sample Answer

Here, in order to determine whether Judge Kowell should grant the motion to compel depends on 2 things. First, we must address the issue of whether or not the discovery request by plaintiffs are too broad and outside the scope if discovery; second, if it is found that the discovery request is within the scope, we then must address the second question of whether or not it is unduly burdensome which would determine whether or not Judge kowell should deny or grant the request.

Since N argues that it is outside the scope, the first question to ask and is at issue is what is the scope of discovery? The scope of discovery is established in the pre-trial conference held previously with Judge Kowell (Rule 16) and is shaped by what survived the pleading stage (Rule 8(a)(2)). Here, according to the fact pattern, it states that the plaintiffs pleaded that N knew Rampage was dangerous as a video game and would cause violent outburst, and didn't warn customers, and that Rampage would cause behavioral problems that N failed to warn the plaintiffs about. Since in the hypothetical, it is stated that N answered instead of motioning to dismiss (12)(b)(6) nor motion to strike (12(f)), we will presume that the entire pleading given in the main fact pattern survived the pleading stage and therefore, the entire pleading will shape the scope of discovery (Rule 26). What is determined within the scope can be found in Rule 26(b)(1) which states that parties may obtain discovery that's non privileged and relevant to the party's claim and defense. (Rule 26(b)(1)). This rule is broad because there's a liberal and broad sense of discovery . . . . Given the underlying broad values that drive discovery, "relevancy" is interpreted broadly by courts and Judge Kowell in his Rule 16 conference may have established that plaintiff's request for "e-mails and other communications" regarding "the alleged behavioral problems associated with the Use of Rampage or any of Nebula's other video games" is strictly within the scope of relevancy" since plaintiffs have been alleging that the video game caused them to become violent, and here, they are asking for documents and e-mails that relating to behavioral problems. N may try to argue that "other behavioral problems" is too broad because plaintiffs is merely alleging violent behavior and not "any type" of behavior problems, but as stated before, given the broad liberal values driving discovery, it would be sufficient to say that "behavioral problems" caused by video games is at least relevant to whether or not a video game causes violence. The scope determined by Judge Kowell is up to his own discretion because it's a management tool used by the judge to try to shape the discovery. N may try to argue that by making the scope too broad, it will allow for abuse and instead of having the plaintiffs focus on their own discovery, they are asking for this overly broad and unduly burdensome as a way of abusing discovery and trying to game the same (In Re Convergent Technology); however, this ultimately would be a hard sell because as previously stated behavior, behavioral problems are strongly linked to violent behavior and it seems that Jude Kowell, having using his implicit value judgment, would not accept N's argument that this request is not relevant to the scope itself. Additionally, N may try to argue that there's no documents that could be admissible later on, but that isn't a valid argument either since discovery doesn't apply only to admissible evidence as long as the potential request could lead to admissible evidence (Rule 26(b)(1))

However, N's second objection should be taken into more consideration regarding how
burdensome the request itself is. While the discovery request was not outside the proper scope of discovery, N may argue that the request itself is overly broad by stating the request has not been described with "reasonable particularity" (Rule 34(b)(1)(A)) and therefore it is unduly burdensome in that sense. Here, Plaintiffs have asked for not only e-mails but "other communications" which could mean a number of things, ranging from record phone calls to meeting numbers, to inter office memos. However, that could be easily remedied by having plaintiffs tailor their document request further. The second issue at hand regarding producing documents (both ESI and non-ESI) is whether or not it actually is unduly burdensome. As previously stated, since asking for documents relating to behavioral problems is within the scope of relevance, the first portion of the test is met. Whether or not a document request (for non-ESI) is unduly burdensome is seen under Rule 26(b)(2)(A), which allows the court to alter the limits of the document request if N can show that producing these non-ESI documents would be unduly burdensome (it is the propounding party to states the relevancy, and it is the responding party to show that it will be unduly burdened). Here, N has only stated that it would cost them hundreds of thousands of dollars to identify and locate responsive hard copies of the documents without discussing why they cannot locate it. If the reason happens to be because they have kept unorganized records and it would cost them a lot of money to sift through these hard copy documents because they have decided to store them in an unkempt manner in the warehouse, the court will not likely find this burdensome given the fact that having a poorly organized system is not a valid excuse (Kozlowski v. Sears); the policy reason underlying this is if they allowed bad organization as a valid excuse, then there are no incentives for parties to keep organized files. Even if these hard copies are stored somewhere, like say under a mountain, the argument that it would be unduly burdensome to retrieve relevant hard copy documents would not work in defendants favors because even then, it would seem relatively easy to at least retrieve hard copy documents (as oppose to ESI, which can be extremely more costly to re-assemble if they're in tape forms). Additionally, they can also present the boxes of documents to plaintiffs and tell them to sort through the documents themselves (which is allowed since the defendants would have had to do it themselves). Under Rule 34(b)(2)(E)(i), they have to produce the documents either the way it's kept in the usual course of business (which would work in their favor, if it is merely kept in boxes amongst boxes stored in a warehouse, they can present the boxes to the plaintiff and allow them to sort through it themselves) or the court may require them to label and sort according to how it's been requested. Depending on the jurisdiction they're in, courts may either allow N to respond with the option they prefer, but other courts may require that they produce these hard copy documents by how the plaintiffs would want it organized. In generally though, stating that it would cost them copious amounts of money to retrieve hard copy documents is a harder argument for N since hard copies are generally easy to retrieve, and bad organization of these documents have been show to not be valid.

However, N can still claim that they could be unduly burdened to produce the ESI documents, which previous cases have shown that courts do acknowledge the hardship of this since the development of almost all communications in electronic media; and the fact that many of these communications are now copied but kept in formats that could be costly to re-construct. Regarding the burden of ESI, the test used is again whether or not the request is relevant to the scope (which it is), and then they see if it's unduly burdened
under Rule 26(b)(2)(B). Here, N has stated that it would cost them hundreds of thousands of dollars to locate electronic documents because they're only on back up systems. In order to see if it is really an undue burden, they would consider whether or not it would be fair to allow for this discovery, whether the burden and costs outweigh the benefits. Here, N has stated that it would cost hundreds of thousands of dollars, but it hasn't exactly shown if this is necessarily an undue burden on their part. They might need to state more facts including the fact that it may cost $80 a day (for example) to assemble one tape and there are potentially hundreds of tapes that are relevant to Plaintiffs' document request, just merely stating that it will cost hundreds of dollars just to retrieve what was on the back up system may not, in itself, show that the defendant is unduly burdened (Mcpeek v. Ashcroft). Additionally, N may also need to state why or how these were on back-up tapes, as that may be an indicator of whether or not it's unduly burden. If they keep all transcripts on back-up tapes in case they need to refer to them in the future when a customer complains and they need to be able to retrieve it, that may be an indicator that it's not necessary unduly burden for them to retrieve these tapes (as opposed to McPeek, which only had the tapes in case of a nuclear break down and therefore, these back-ups were a last resort sort of thing, which explains why it would be so hard to reconstruct), they must show that reconstructing these tapes are significantly burdensome, but if the company keeps back-up tapes in order to be able to cite to them for their records, it may seem that it's not so hard to retrieve this information even if it's costly in itself. However, if N can prove it's unduly burdensome depending on how hard it would be to reconstruct them (and also weigh in the fact of how much money it is compared to company itself), the court may still require it if plaintiffs can show that it's incredibly important to their case. In order to determine this, the court may allow for sampling a small portion and require that N turn over say, a month's worth of communications as outlined by plaintiffs to see if there may or may not be anything relevant. If there is, then the court may still grant the motion to compel and require that the company turn over the other documents since the benefit outweighs the burden if there is a high relevancy of the documents to the discovery request (26(b) (2)(C)(i)). This burden can also be determined by weighing the elements under the Zubulake test which is codified in the advisory notes. In it, the advisory notes ask whether it would be specific to the discovery request (if p can show through sampling that it is specific, then this is easily met), whether quantity of information available can be easily accessed from other sources (if p can show they can't retrieve it through the hard copy documents, they may have an easier time with this argument since now a days, a lot of information and communication is done electronically, and rarely are things put into hard copy), they ask whether the failure to produce relevant information that seems likely to have existed but no longer available on easily accessed sources (if N is a company that backlogs all its information and washes their hard drives clean for example, and p can show they have no other means of getting to this information when it used to be on their companies, this would suffice), question of whether they could predict importance of information (again, sampling could help the court determine that), the importance of issues at stake here ( p can argue that this may or may not be the determinative factor, since p’s are trying to show behavior problems and that N had known about it, whether or not they can obtain communications which nowadays are stored almost entirely electronically would be almost determinative of their case, and therefore, it seems very essential, and the parties resources).
This test also allows the court to determine whether or not to cost shift. Under the test, it seems that this document request is essential to the plaintiffs and they really need this information. However, the fact that there are asymmetrical resources could prevent N from shifting the costs to the parties, who are two young adults. The court may not allow a huge corporation to shift such huge costs to two young adults and may in fact force the company to turn over documents while not allowing the costs to be shifted.

However, defendants could also possibly argue that there's no good cause and the plaintiffs are merely trying to burden them by gaming the system (In re Convergent) but there's no evidence of that and this isn't a very strong argument. They have validly proven their relevance of these documents and a document request at the outset of discovery is not seen as abuse as would contention interrogatories at the outset (In re Convergent). Also, plaintiffs can argue, even if there is little evidence to cite support, that they don't know what's accessible until they have more discovery (i.e. plaintiffs need to prove their case by accessing the documents and communications that the defendants are not complying to turn over).

Lastly, the defendant may be subject to rule 37 sanctions for not complying if they did not try to comply in good faith. Generally, under Rule 37(e), a party may not be punished for not complying with ESI requests, but only if they had tried to first comply with it and the lost ESI information was simply because of how they operated. However, here, it seems like the information was available and they did not even try, but rather "would not search back up systems" which seems that they did not try to even attempt to retrieve this information and may be subject to sanction. But first, the parties (p) must have tried to confer and work it out with N first before sanctioning them under Rule 37(e). If they didn't, then N wouldn't be sanctioned. Also, if the motion to compel has been granted, then may also need to pay the fees of the p parties, additionally, if they don't comply even after the motion to compel has been granted, they may be subjected to even harsher sanctions as outlined under Rule 37(b)(2)(A)(i-vi) which could be detrimental and could potentially even affect the outcome of their case (Cine 42 Street) so even if they are unhappy with the motion to compel and it would be incredibly harsh to spend hundreds of thousands of dollars, it would be better for them to just comply with it than try to disregard it.
II. Question 2:

A. Issue Spotting List

This question posed three problems for students to analyze. First, students should have recognized and explained the procedural context/posture of this question. It was not a motion for leave to amend under Rule 15(a), as some students incorrectly presumed, but, instead, a motion to dismiss by a newly added defendant after a successful motion for leave to amend (see Krupski). This was most appropriately decided under Rule 12(b)(6) or 12(c), and would turn on whether the addition of a new defendant, GG, “related back” to the time of the filing of the original complaint as permitted under 15(c).

Second, students should have described and applied the relevant doctrine governing relation back. Third, in connection with that line of inquiry, students should have acknowledged that the exam hypothetical as framed arguably involved, not an amendment that corrected a “mistake” by “chang[ing] the party or the naming of the party against whom a claim is asserted” but, instead, the addition of a new party in addition to the originally-named party, Nebula. As to GG, the new party, plaintiffs were trying to add what was arguably a new claim, which was a complication that was potentially problematic for the plaintiff.

1. Procedural Posture:

   See above. Students who analyzed this question as a motion for leave to amend under 15(a) lost points, as the hypothetical expressly indicated that a 15(a) motion had already been granted.

2. Relation Back:

   a. As to GG

   A good exam answer tracked the provisions of Rule 15(c)(1)(C), using Krupski and other cases we studied to the extent such cases shed light on how the rule should be interpreted and applied. Specifically:

   i. The claim against GG must be transactionally related to the claim against N, pursuant to 15(c)(1)(B), which is incorporated by explicit reference into 15(c)(1)(C), and in this issue-spotting memorandum is covered Section II.A.2.b.; and

   ii. Within the period provided by Rule 4(m), GG:

      (A) Received such (actual or constructive) notice of the action that it will not be prejudiced in defending on the merits, an inquiry that provided an opportunity for students to compare the facts of this exam hypothetical to the facts of
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Krupski (e.g., here, while the defendants share the same law firm, it did not say that they had the same lawyer, and the defendants, while they share some professional ties, are not part of interconnected corporate entities); and

(B) Knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party’s identity, a matter that had to be examined by reference to the interpretation of this terminology in Krupski.

b. As to the New Claim Against GG

Relation back as to the new claim against GG for negligent design due to an excessive “flash rate” must also be analyzed under FRCP 15(c)(1)(B), with the key issue being whether the new claim “arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading.” A good answer discussed this standard by reference to the cases we studied, and acknowledged that there is some play in the framing of what constitutes a “conduct, transaction, or occurrence,” depending on context and policy concerns. It did not matter whether students ultimately concluded that the negligent design claim was or was not part of the same underlying conduct, transaction, or occurrence; regardless of the conclusion reached, the strongest exam answers would have confronted the obvious counter-arguments.

3. Addition Versus Substitution of New Parties

A number of students noted that a potentially problematic element of the hypothetical was that GG was being added as a new party, arguably, depending on how the hypothetical was read, in addition to N, rather than in lieu of N (see Worthington).

B. Levine Small Section - Sample Answer

P's have filed an amended complaint (granted permission by the court) and after being served by the complaint the new D's (GG) move to dismiss asserted the SOL has run.

Relation Back in Regards to the Party

The issue is whether the P's amended complaint can relate back to include the D's and causes of action. The issue is not the same, but similar to that of Krupski v Costa Cociere. In Krupski a P had fallen on a cruise ship and sued the cruise line for negligence. The P's brought action against the cruise line, but sued the ticket holding company, not the cruise line itself. Three months after the SOL had expired the ticketing company (which was run by Costa) notified the P they had sued the wrong D. The P then attempted to file an amended complaint changing the D's in the case so they could bring in the correct D. The court allowed the relation back because they had determined the cruise line (1) received the notice of the action and that it would not be prejudiced in defending the merits (a subjective standard) and (2) that Costa knew or should have known that but more a
mistake in the learning the P's identity the suit should have been brought against them (an objective standard). The court ultimately allowed the relation back under 15(c)(C) given the circumstance.

In this case, the facts are slightly different. The P's do not wish to replace the current D, but want to add a D to their complaint. The P's want to add GG to the complaint given that Nebula had contracted out the production of the graphics and GG was the party responsible for the graphics in the game. The court may allow relation back in this situation, however a few factors must be looked it. Under rule 15(c)(1)(C) an amendment will be permitted to relate back if it changes the party or the among of the party against whom a claim is asserted. Given the statute does not state whether a party can be added to the complaint, there may be some grey area for the court to work with and if the court deems it fair and not unjust to allow the relation back, then GG should be added to complaint.

Two factors are considered in whether to allow relation back or not. The first 15(c)(1)(C)(i) determines whether GG had received such notice of the action and if it would be prejudiced in defending on the merits. As stated above, this is a subjective inquiry. Given that GG was started by Nebula, GG leases space in the same building, and GG uses the same law firm as Nebula does, it seems clear that GG was most likely very aware of the suit against Nebula. The second inquiry (an objective one) - 15(c)(1)(C)(ii) - asks whether GG knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity. This second factor may be more difficult for the P's to prove. It is important to note there is a difference between ignorance and mistake and 5(c) allows forgiveness for the latter, not the former. The reason for this is not to cause surprise or hardship on a party that was not expecting to be sued and given the SOL has expired, they should be entitled to move on with their company.

It is not entirely clear whether GG knew they should have been included in the complaint or not. It appears that the P's were not aware of GG's involvement in the case until two months into discovery. Most likely a discovery requested provided information that GG was the party who produced the graphics. If this is something that the P's could not have known beforehand, then the court may be justified in allowing the relation back. However, if the court believes that the P's should have known of GG's existence before or think that the P's are now making a strategic move in adding another D to the complaint, allowing relation back should be denied.

Relation Back in Regards to the Causes of Action For the purposes of this question, assuming that the court permits the relation back, it must then be determined whether the additional causes of action the P's have added into their amended complaint should also relate back. Again, given that the SOL has expired the only way for the P's to add additional causes of action is if the court allows the causes of action to relate back. Rule 15(c)(1)(B) governs this issue. The rule provides that an amendment to a pleading relates back to the date of the original pleading when the amendment asserting a claim or defense that arose out of the conduct, transaction, or occurrence set out in the original pleading. The additional causes of action that the P's have stated are that GG was
negligent in the design of the game for the "flash rate" in Rampage and that GG should have known this high frequency of "flash rate" was unsafe.

It is odd that the P's did not additionally plead these causes of action, granted they were fully aware of them even before discovery took place and even before the P's were aware of this new D, GG. Granted GG was primarily responsible for the "flash rate" and if GG is allowed to be added in as an additional D this is most likely P's best cause of action against GG. Additionally, these causes of action do in fact arise out of the same conduct, transaction, or occurrence. I only write to warn the court that it seems these causes of action could have easily been put in the initial complaint. I would urge the court to not allow these causes of action if it is determined that GG should be not included as an additional defendant given that it would be unfair for Nebula to have new claims to defend themselves against. On the other hand, if the court grants the relation back to the additional D, GG, the causes of action should also relate back as well.

C. Ratner Small Section – Sample Answer

[This is a motion to dismiss by GG, to be decided under 12(b)(6) or 12(c), the resolution to which turns on whether there has been relation back under 15(c)....] An amendment to a pleading relates back to the date of the original pleading when the law that provides the applicable statute of limitations allows relation back. The facts do not specify that there is such a statute in Ps' jx, so for discussion purposes we will assume that there isn't. Ps' additional claims against GG could be added under 15(c)(1)(B) because the claims appear to have arisen out of the conduct, transaction, or occurrence set out in the original pleading. The claims against GG arise out of the malfunctioning video game which caused Ps' problems, therefore they arise out of the same transaction/occurrence.

[Relation back is governed by 15(c), as interpreted by the Supreme Court in Krupski.] The values of the relation back function have a conflict between the interests of the defendant protected by the statute of limitations and a preference for resolving the disputes on their merits. For the reasoning set forth in the paragraph above, it appears that GG's involvement in Ps' claims arises out of the same conduct, transaction or occurrence that was set out in the original complaint. GG will probably try to argue that it design and production of the game was a separate transaction from the marketing, etc. of the game conducted by N. This is not a strong case because they seem to be redundant causes. Ps must also prove that GG had notice of the action within the 120 days after filing of the complaint (R4(m)) against N that it will not be prejudiced in defending on the merits. Notice under this subsection can be actual or constructive and can be evaluated in several ways. The strongest fact militating in favor of finding that GG had notice is that they shared the same [law firm] as N, therefore he/she knew about the action and would not be prejudiced if the [firm informed GG and] had begun to prepare a defense for GG. The court can also find GG had actual or constructive notice through an identity of interest between GG and N which requires the entities to be so closely related in business operation that an action against one is notice to the other. It appears they share a building, but not necessarily operate the same business. The facts do not tell us much about the relationship between N and GG but if Ps can prove a close enough relationship that they
would discuss the details of the lawsuit, they will probably be able to satisfy this prong. Also, it does not appear that GG functions as an official of N (which would militate in favor of notice).

Ps are unlikely to prove that under 15(c)(1)(C)(ii) that GG knew or should have known that the action would have been brought against it but for mistake concerning the proper party's identity. An example of providing this notice was in the Krupski case where defendant 2 should have known from the facts alleged in plaintiff's complaint [seeking relief from the company responsible for the management of the ship] that she would have sued the true owner and operator of the cruise line but for a mistake concerning the identity of the owner. D2 in that case also should have known that it was the proper defendant because of the naming on the cruise ticket. Ps may encounter an issue proving that they made a "mistake" regarding the proper party's identity under 15(c)(1)(C)(ii). Especially because Ps are not substituting one party for the other, like the plaintiff in Krupski who meant to sue the owner of the cruise ship and just got the name wrong, the court will probably not find that they made a mistake as to the identity. Ps could argue that they intended to sue the entity in charge of production separately but made a mistake by thinking the production entity was N. It appears that Ps did not make a mistake regarding identity, but rather a conscious choice to add one party and not the other while understanding the factual and legal differences between the two. In which case, Ps should not be able to amend their complaint to relate back to allow the addition of GG. This is especially proven by the fact that the claimsPs are seeking to bring against GG are significantly different than those set forth in the original complaint against N. The original complaint is regarding failure to warn, etc. and the claims against GG are more to do with the specific function of the video game. Ps can possibly satisfy the mistake requirement, however, by claiming that they did not know of GG's existence. This is different than knowing of D2's existence, but thinking that D1 is the proper party, as we saw in Krupski, but Ps should be able to prevail if they can prove this successfully. GG may counter that argument by saying that GG made a conscious choice not to add GG, not a mistake. It should also be noted that if GG's name was on the video game packaging, or Ps contained some document of the like, that would not necessarily be dispositive of whether or not Ps made a mistake. As we saw in Krupski, not knowing the content of certain documents (cruise ticket, and even disclosures re: proper identity in discovery responses) does not foreclose the possibility that P nonetheless misunderstood crucial facts regarding the two Ds' identities, especially if P's complaint clearly indicates such a misunderstanding. [More importantly, Krupski teaches us that the key language in the last prong of Rule 15(c) focuses primarily on notice to the defendant, rather than on Plaintiff’s knowledge or lack thereof.] If Ps can prove that GG had notice of the suit through their shared atty with N (not necessarily dispositive) or other factors, and that they made a mistake, not a conscious choice in not naming GG in the original complaint, the court should allow their amendment to relate back to the date of the original pleading and before the date of the statute of limitations. Proving the mistake portion seems unlikely so the motion to dismiss should be granted for futility of the amendment.

It should be noted that if relation back is allowed, Ps could add there additional claims to the complaint through the permissive joinder function of 18(a) and could add GG as a defendant under R20(a)(2) because Ps would assert a right to relief jointly/severally, and
as discussed above their involvement arises out of the same transaction or occurrence and there is a question of fact common between GG and N regarding the video game. It also appears that, since GG is a citizen of a diverse state from Ps (CA) that diversity would remain complete if GG were added. It does not matter that GG and N are citizens of the same state because complete diversity is only evaluated across the "v"--plaintiffs must be diverse from defendants. Although, it should be noted that corporations are deemed to be citizens of both the state where it is incorporated and the principal place of business. So, the facts don't specify, but if GG is incorporated in TX, there may be a jurisdictional issue.
III. Question 3:

A. Issue Spotting List

Defendants moved for summary judgment, focusing in their motion on the issue of causation. A good answer worked through the summary judgment analysis step-by-step, as outlined broadly in this issue-spotting list, and acknowledged the range of possible outcomes (e.g., it was possible that the motion could be granted for neither, one or both defendants).

1. Summary Judgment Analysis

   a. Defendants’ Initial Burden of Production

   The exam hypothetical lent itself to the possibility that defendants attempted to meet their initial burden of production under both the Adickes/FRCP 56(c)(1)(A) and Celotex/56(c)(1)(B) standards. Applying Adickes, it is unlikely that either defendant met its initial burden of production to disprove plaintiffs’ claims, because their reference to pre-Rampage conduct by the plaintiffs did not necessarily foreclose the possibility of plaintiffs’ claims. However, if defendants properly referenced the “record,” a term which should have been defined by students, they probably did meet their initial burden of production under Celotex. A strong exam might have explained Celotex in part by reference to evolving attitudes toward the function of summary judgment.

   b. Plaintiffs’ Burden of Production

   Plaintiffs cited to specific materials in the record on the disputed issue of causation, at least meeting their burden of production (cabining the issue of whether it was enough to survive the motion for summary judgment).

   c. Defendants’ Burden of Persuasion on the Motion for Summary Judgment

   Once plaintiffs met their burden of production, the question was whether defendants, or either of them, met their burden of persuasion to demonstrate that, pursuant to FRCP 56(a), there was no genuine dispute as to the material fact of causation, and that the movant is thus entitled to judgment as a matter of law. The best exams would have defined this standard, cross-referencing to FRCP 50 and applying the cases we studied that interpreted this Rule, looking specifically at the plaintiffs’ showing in opposition to the motion for summary judgment, and asking if a reasonable jury could have found for plaintiffs on that record, making reasonable inferences in favor of the plaintiffs as the non-moving party. The expert testimony of Dr. Spiers merely established that causation was “possible,” which could logically mean that there was a very small or remote chance that Rampage caused plaintiffs’ injuries, arguably below what would be necessary to support a jury’s finding under plaintiffs’ likely “preponderance of the
evidence” burden of persuasion at trial (see Anderson). Could a reasonable jury have found for the non-moving parties based only on the affidavits of family and friends described in the exam hypothetical, or on the combination of Dr. Spiers’ testimony and those affidavits? That was a question the strongest exams at least asked, grappling with the evidence in the hypothetical and considering it in light of the cases we studied on Rule 56.

2. Possible Outcomes

The testimony of Dr. Spiers highlighted the possibility that only one of the two defendants might possibly prevail on the FRCP 56 motion. A strong exam would have explained why.

B. Levine Small Section - Sample Answer

Whether the D's motion for summary judgment should be granted

Both Nebula and GG have jointly moved for summary judgment arguing that there was no evidence in the record that any feature of Rampage caused behavioral problems. Summary judgment is covered by rule 56. The procedural device of summary judgment provides an opportunity for either party to win a case prior to trial by demonstrating, in the words of 56(c), "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action (Rule 1).

In regards to a motion for summary judgment it must first be determined who bears the burden of persuasion at trial. Here, it is the P's who bear this burden to prove that Rampage is a dangerous game and will cause behavioral issues. The D's have now moved for summary judgment and they will bear the burden of production. If this burden of production is met, the burden shifts to the P's who will then have to support their claim to meet the burden of production and the burden will continually flip flop until one side has proven there is no genuine issue as to a material fact and the motion for summary judgment will be granted, or that neither side has won and there is a material issue of fact for the jury to decide on.

On the D's initial motion for summary judgment the have argued there is no evidence in the record that any feature of Rampage causes behavior problems. In support of this motion they point to the records of the P which show the one of the P's had been suspended for fighting with another student before he started playing Rampage. The D's also point out facts in the record that the other P had written a story about breaking windows before she started playing Rampage.

There are two possible paths a party can take when making their motion for summary judgment. The moving party (the D's) can either (1) show affirmative evidence negating an essential element of the nonmoving party's claim (Adickes) or (2) show the nonmoving
party's is absent or insufficient to establish an essential element of the nonmoving party's claim (Celotex). These options are governed by rule 56(c).

Celotex v Catress

It appears that the D here has taken the second route, they are not pointing to any affirmative evidence, but simply using what is already in the record and pointing out to the court that the P's cannot show that Rampage causes behavior problems based on the P's pleadings. This is the same route Coletex took in Celotex Corp v Catrett. In Celotex, a P had accused 13 manufactures of asbestos of causing overexposure to her husband and ultimately killing him. Celotex moved for summary judgment on the grounds that the P did not have enough evidence to prove it was their specific product which led to his death. The court ruled the motion for summary judgment should be granted after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial. Where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depos, answers to rogs, and admissions on file."

This is essentially what the D's are attempting to do here. The two documents that they cite to in the record seem minimal at best. The D's site to one incident for each P that attempts to show they previously had behavioral issues and that Rampage is not the cause of it. The court would need much more evidence than just one incident (a fight with another student or a story written in English class) to prove that the P's already had behavioral issues. It would be difficult to find one person that does not have at least one behavior issue in their record, let alone a story about breaking windows. Given the above, I would argue the D's MSJ's have not met their initial burden of production and therefore the P's are not required to come forward with opposing material.

Adickes v Kress

The other route the D's could have gone is by supplementing the record and showing affirmative evidence negating an essential element of the P's claim. This was the route taken in Adickes v Kress. In Adickes, the P's claimed that a restaurant and a police officer had conspired together to arrest a white school teacher who had taken her class of African Americans to lunch. In Adickes, as the moving the party, they have the burden of showing the absence of a genuine issue as to any material fact. "Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. In Adickes, the D's (the moving party) failed to assert any evidence that a police officer was NOT inside the restaurant. The evidence that the D's submitted simply stated that the officers were there. In Adickes, because the moving party did not meet its initial burden of establishing the absence of a policeman in the store, the P was not required to come forward with suitable affidavits.

Therefore, before discussing the P's opposition to summary judgment it still does not
seem clear that a trial is unnecessary. There is still the genuine issue as to whether or not Rampage causes behavior problems. The D's have pointed to evidence in the record that attempts to prove both of the P's were violent or had behavioral problems before they started playing Rampage. One of the P's had written a story about breaking a car window. It is unknown whether this "story" is one of fact or fiction. If it is simply a story, then clearly this evidence does not establish the P exhibited any behavior problems before playing Rampage. Even if it is true, this again is simply one incident, just as there was only one incident describing the other P who got into a fight in middle school. Kids are kids, and all kids will exhibit some sort of behavioral issues. However, by the D simply pointing to one incident in the record is not enough to show they previously had exhibited behavioral issues before playing Rampage. Further, the D's appear to miss the point of the complaint. The complaint alleges that Rampage causes behavioral issues. By the D's pointing to these single incidents does not show there is no longer a dispute about whether Rampage could cause behavioral issues. Given that the jury could still decide on the issue of whether Rampage causes behavioral issues or not, it appears the D have failed to meet their initial burden of production.

However, assuming that the D's have met their initial burden of production, the P's must then attempt to oppose the MSJ by meeting their burden of production.

A party can oppose a MSJ under 56(c) by arguing that the D did not meet their initial burden of production and therefore have no obligation to respond. The party opposing can point to sufficient evidence to make out their claim (i.e. here is our contrary support to show there is a dispute). And lastly, the party opposing may file an affidavit requesting more time under 56(d).

In this case the P's appear to have taken the second route, the P's are opposing the motion by showing sufficient evidence to make out there claim and show that there still is a genuine issue of material fact that the jury can decide. Although noted above, it would seem the D's never met their initial burden of production - this situation that was very similar in the Adickes v Kress case. Nevertheless, the P's came forward with evidence to oppose the MSJ. In opposing the MSJ the P's placed in the record the excerpt from their expert, Dr. Spiers. In the report Dr. Spiers states, in her opinion, the "flash rate in Rampage was more likely than the violent content to be responsible for the P's behavioral and legal problems." This expert testimony would most likely be a great piece of evidence for the P's. It is clearly allowing the jury to decide on the issue of whether the Rampage game could have been responsible for the P's behavioral problems, specifically the flash rate. The P's also bring forward affidavits from family members and friends which all provided statements to the extent that it was not until after the P's become regular Rampage players that they become "sullen and hostile."

The affidavits that the P supplements the record with appear to show that a jury could find that Rampage was the cause of their behavioral problems. Granted, the expert testimony does not per se state that Rampage caused the behavioral problems. Dr. Spiers simply states that if anything, the flash rate was more likely than the violent content to be responsible for P's behavioral problems. The statement is somewhat ambiguous. Is the expert stating that the flash rate in Rampage is responsible for the P's behavioral
problems, or is the Dr. simply stated that the flash rate would be more likely to cause behavioral problems than the violent content. This would be an issue that needs to be addressed. Further, the affidavits that were supplemented by the P may fall under information that should have been initially disclosed under rule 26(a)(e). If it is determined that these materials should have been initially disclosed the court is fully permitted to not allow the P to bring forward the affidavits under Rule 37(c)(1). The rule provides that if a party fails to provide information as required by rule 26(a) or (e) the party is not allowed to use that information or witness to supply evidence on a motion.

Assuming that the documents can be used, it would appear the P's could successfully oppose the motion for summary judgment (assuming that the D's initially met their burden of production) as there would be a genuine issue for the jury to decide upon -- whether Rampage was responsible for the P's behavioral issues. Also, considering that the D's jointly filed a MSJ and not separately, one party can not be granted the motion and one denied. Taking the experts testimony into consideration, Nebula may have been able to survive their MSJ if they had separately filed given that the expert argues it is the flash rate and not violent content that is responsible for the P's behavioral issues.

C. Ratner Small Section – Sample Answer

The requirements for prevailing on a motion for summary judgment (MSJ) are set forth in R56(a). The purpose of the MSJ is to provide a procedure to identify and terminate factually unsupported claims and defenses -- this is to avoid unnecessary delay and expense (values set forth in R1). The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact. The "no genuine dispute" standard is whether or not a reasonable jury could find for the non-movant. When evaluating/deciding an MSJ, the court must view the evidence and inferences in the light most favorable to the non-movant. Also a material fact is a fact that could affect the outcome of the lawsuit. A genuine issue of material facts requires a jury or judge to resolve the parties' differing versions of the truth at trial. Motions for summary judgments are different from pleading motions (pleading mtns look only at the face of the pleading to test legal sufficiency, whereas the MSJ looks at evidentiary material) and judgment as a matter of law (JML usually made at the close of evidence presented at trial, whereas MSJ is based on pretrial written discovery and can be made at any time after 20 days of the complaint being filed up to 30 days before the close of discovery).

Ds' supported their MSJ by proving their assertions through the avenue set forth in the Celotex case under R56(c)(1)(B). If Ds had the burden of persuasion at trial they would not be allowed to satisfy their burden of production at MSJ through this route and would have had to use 56(c)(1)(A) the Adickes route. This standard does not require the movant to foreclose the possibility of Ps' claim (Adickes), but they must show that P has no evidence to prove an essential element of its case. This requirement includes canvassing the entire record and addressing the fact that Ps have not established a claim, therefore there is a lack of genuine dispute as to a material fact. Ds do not appear to have fully satisfied their obligation here. When the burden of production shifted back to Ps after Ds showing, Ps were able to show the presence of a material factual dispute through an
excerpt of a Dr's report that was in the record. Ds had access to this information and, under *Celotex*, were required to address that factual issue instead of just ignoring it.

Because Ps were able to show the presence of several factual and credibility issues, MSJ is not appropriate. As we saw in *Arnstein v. Porter*, issues of credibility constitute sufficient issues of fact to proceed to the jury. Further, whenever there are factual disputes such as the case here, MSJ is inappropriate. Under 56(c)(4), the affidavits submitted by Ps must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. The affidavits of family members should not be considered if they will not be admitted at trial because they are hearsay or are otherwise defective. This is reminiscent of the *Galloway* case where the witness testimony did not satisfy his burden on a R50 mtn (same standard, different timing) because there were admissibility issues with all of his witnesses and witness testimony was his only supporting evidence. Ps may be able to have the family affidavits support their showing in the MSJ even if they are inadmissible, so long as they can be reduced to admissible evidence at trial. In *Dyer* we saw that where there is a lack of possibility of admissible evidence, the MSJ was granted - the credibility evidence alone was not enough to satisfy the burden. [Even if the affidavits are problematic or insufficient,] Ps will be saved here by the expert witness report which will most likely be admitted at trial (I don't know enough about evidence yet to testify with great authority but we know she has satisfied her requirements under R26 by providing a report). [However, the expert witness report may have its own defects, in terms of supporting a reasonable verdict, given that the expert found it merely “possible” that Rampage caused plaintiffs’ injuries, and did not opine that it was more likely than not that the video game was the cause of the plaintiffs’ injuries, raising questions about what a reasonable jury could infer based on that testimony.] …

Because the courts no longer use the "slightest doubt" test (overruled in *Matsushita*), Ps must show that there is more than a metaphysical doubt as to the material facts set forth in their complaint. It appears that P has satisfied that as to its claims against GG. Also, the only purpose of judicial weighing of the evidence is to see if a reasonable jury could find for the nonmoving party, judge must not go any further (*Scott v. Harris*). Here the judge should weigh the credibility evidence only to see if it is so clearly undisputed so that a jury could not find for Ps. Also, it does not appear that Ps have piled inferences upon inferences as was [disallowed] in *Martin v. Insurance*. A P may have two separate inferences of material fact but cannot infer one material fact that is necessary for the other inference. This would be the case if Ps wanted the fact finder to first infer that their behavior had changed and then to infer that the change was caused by the video game. It seems that Ps have facts to support the finding for the change in behavior, the only inference being that the behavior was caused by the game.

[The Court has more options than merely granting or denying the motion.] If the court feels that either party has failed to properly support an assertion of fact or the other party's assertion of fact, the court may give that party an opportunity to properly support or address the fact. If the court feels that the expert testimony alone is not enough to satisfy the burden of production, then it can request further evidence. Upon that showing, or even without granting such an opportunity, the court may grant summary judgment for
the movant (Ds). If the court feels that Ps have done such a tremendous job showing their evidence, then the court under 56(f)(1) can grant summary judgment for the nonmovant. This rarely happens. The court is also free to grant SJ under grounds not raised by either party or to consider SJ on its own (not an issue here because Ds raised the motion-- not sua sponte).

It appears from the facts that the judge should grant partial summary judgment in favor of N because the only admissible evidence provided by Ps failed to show a genuine dispute as to material fact regarding its claims against N-- only that the flash rate caused the problems NOT the violent content. So, unless Ps can proved that the affidavits of the family members can be reduced to admissible evidence at trial and that they show a genuine dispute of material fact as to its claims against N, partial summary judgment should be granted, dismissing claims against N but upholding the claims against GG. [Note: this is only one reading of the exam hypothetical evidence. Additional readings were possible and could have been profitably explored.]
IV. Question 4:

A. Issue Spotting List

A good answer focused on: the functions and effects of FRCP 50 and 59 (as mechanisms for controlling the jury); the relationship between them (e.g., that a party may move for judgment as a matter of law, and, in the alternative, for a new trial); the extent to which a court may “weigh” evidence or consider credibility under either Rule; and the specific facts presented by the exam hypothetical. Students should have also wove in 7th Amendment issues concerning the re-examination clause.

1. Rule 50

   a. A successful motion under FRCP 50 results in a judgment for the moving party on the ground that, pursuant to Rule 50(a)(1), “a reasonable jury would not have a legally sufficient evidentiary basis to find for the party.”

   b. Some students mentioned the proper sequencing of the motion under Rule 50(a) and its renewal under Rule 50(b).

   c. The key issue on a Rule 50 motion is what a “legally sufficient evidentiary basis” is, which requires the court to determine what a reasonable jury could find, and prompted some students to explain why it is that a court may have denied a motion for summary judgment under Rule 56, but may still be inclined, after a party has been fully heard during trial, to grant a Rule 50 motion.

   d. There is a weighing of evidence in this task, to a limited extent: the judge must weigh the evidence, making reasonable inferences in favor of the non-moving party (see Guenther or Boeing), to assess whether a reasonably jury could find for the non-moving party. If so, the motion should be denied, even if the judge was personally not convinced.

   e. One way to measure what a reasonable jury could find is to assess whether the non-moving party’s proof contains such substantial and material gaps that a jury in its favor could only be premised on improper speculation (see Galloway).

   f. Given all this, the key question under Rule 50 is what Judge Kowell meant when he said that he found the testimony of Dr. Spiers “was not credible” and that the testimony of plaintiffs’ family and friends was “entirely unconvincing.” If the judge meant that no reasonable jury could have found for the plaintiffs under
the relevant standards, then the judge may have had a legitimate basis for granting a Rule 50 motion, albeit one that could be hotly debated on this record. If the judge meant that he believed the witnesses were not telling the truth, the whole truth, and nothing but the truth based on merely an assessment of their credibility, then he should not, on a Rule 50 motion, substitute his opinion for the jury’s assessment of credibility.

2. Rule 59

a. Rule 59 motions for new trial present a lower hurdle, and vest the court with more, but still bounded, discretion. The judge may grant a new trial on all or some of the issues for any reason for which a new trial has been granted, including if the judge finds that the evidence is against the weight of the evidence or clearly erroneous or a miscarriage of justice (see Raedle and/or Ahern).

b. On a new trial motion, the judge may weigh the evidence in the light most favorable to the verdict winner. However, the judge should do so with caution and restraint, and may not freely substitute his or her assessment of the credibility of witnesses for that of the jury simply because the judge disagrees. The verdict must be against the clear (or great) weight of the evidence in order to justify a new trial on this basis. Thus, even though the trial court judge’s discretion to weigh evidence is bounded, under Rule 59, if the verdict is an outlier, the court may order a new trial even if judgment as a matter of law under Rule 50 would not be appropriate.

c. The effect of an order granting a motion for new trial is, not a judgment in favor of either party, but, instead, a new trial.

B. Levine Small Section - Sample Answer

After denying the D's MSJ's a jury trial was held and returned verdict for the P's awarding them $100k each - is it acceptable for Judge Kowell to grant the motions for new trial or JML.

It should briefly be noted about the Judges decision to deny the initial pre-JML by the D's. Generally it is in the best interest of a Judge to deny the pre-JML motions as a matter of efficiency. Granted, there will be situations where it is so clear that no reasonable jury could find for the non-moving party and grant the pre-JML, however, Judges are reluctant to do so. This is because if the case eventually gets appealed the appeals court will be able to sit with the entire record of the case (both sides evidence) to determine if the lower court had made a mistake or not. If the Judge grants a pre-JML and an appeal takes place, the appellate court will most likely have to remand the case for further information taking even more time away from other matters. Also, the D complied with the rule, but in order to file a post-JML, the D must have also filed a pre-JML.
Here, after the trial, the jury came back with a verdict of 100k for each plaintiff. During the D's evidence they presented an expert witness who testified that the P's behavior could not be attributed to playing Rampage. Further, after the trial the Judge has informed me that Dr. Spiers is not a credible witness nor were the P's family and friends.

Can he grant the D's motion for JML?

JML is a form of judicial control provided by 50(a). the practice "enables the court to determine whether there is any question of fact to be submitted to the jury and whether any finding other than the one requested would be erroneous as a matter of law. The motion can be made by either party at the close of her opponent's evidence. For the motion to be granted the court must find that there is insufficient evidence to go to the jury or that the evidence is so compelling that only one result could follow. It acts as a delayed MSJ.

The standard on motions for JML provides that the court should consider all of the evidence - not just that evidence which supports the non-movers case - but, in light an with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party the the court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper. A more modern trends ("substantial evidence test") states that JML is proper when the records contains no proof beyond speculation to support the verdict.

In Lavender v Kern, there was a dispute about a death of a railroad worker. The two competing theories were (1) that he was killed by a mail hook attached to a train that hit him while the train was moving or (2) that a vagrant was passing through the railroad station and killed him. The court stated that if there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. Applying this reasoning to the facts here, while our judge may not believe the P's expert, family, and friends testimony, it is up to the jury to decide what they will believe or not believe. The Judge cannot override a jury's decision when the facts point to two competing theories that could both be possible. In Lavender it was physically impossible for the mail hook to have killed the P, however, the jury still found in favor the P. It is up to the jury to believe or discredit witnesses, for that is the role they play in our court system. They are the trier of fact, not the Judge.

The D's motion for JML should only be granted if no reasonable jury could have found for the P's. However, the jury did find for the P's. The judge was not the trier of fact, the jury was and it is their role to decide who they believed the most. Additionally, there still existed a question of fact to be decided by the jury (i.e. whether Rampage could have caused behavioral problems). Comparing this case to that of Galloway, it is clear the Judge should not grant the post-JML motion. In Galloway, a P had to prove he was insane from a certain date, however he had no evidence to support his claim. Because he had zero evidence to support his claim that he was insane before a certain date, the Judge was justified in granted the JML. Comparing that to the case at hand, the court had evidence to support a finding that Rampage caused the behavioral problems in the P's and
it was therefore up to the jury to decide this issue.

The Judge could very well have granted the post-JML to the D's, however JML is only proper when the record contains no proof beyond speculation to support the verdict. Taking the role of the activist judge, while sometimes may be valiant, will most likely only make the court above you peeved at your decision. I would advise the judge to not grant the motion.

Can he grant the D's motion for new trial?

A motion for a new trial is governed by *Ahern v Scholz*. In that case the P was suing the D for failure to pay music royalties. The jury returned a verdict for the P and the D moved for a new trial. The court provided that a verdict may be set aside and new trial ordered "when the verdict is against the clear weight of the evidence OR is based upon evidence which is false, OR will result in a clear miscarriage of justice. A judge CANNOT displace a jury's verdict merely because he disagrees with it or would have found otherwise in a bench trial. The mere fact that a contrary verdict may have been equally - or more easily - supportable furnishes no cognizable ground for granting a new trial. (Rule 59)

The standard for granting a new trial is if the ruling was against the clear weight of the evidence. However, it if there is evidence on both sides it is not up to the Judge to determine which evidence to believe or discredit - that is up to jury. Because both sides arguing in support of their claims: the P's expert stating the flash rate in Rampage was more likely than the violent content to be responsible for the P's behavioral problems and the P's family and friends who all stated that it was not until they started playing Rampage that they became "sullen and hostile." And on the other side, the D's expert who testified the P's behaviors "could not be attributed to playing Rampage." Given the conflicting evidence, a Jury could have decided either way. While the Judge, individually, did not believe the P's testimony, the Jury did. And while the Judge believed the D's testimony, the jury did not. This does not show that the ruling was against clear weight of the evidence, in fact it shows just the opposite, it shows that the ruling could have gone either way given the evidence presented.

Again, it is not up to the Judge to determine the outcome of a case when a jury is involved. As stated above, it is the jury's role to determine which side they believe and which side they do not. Simply because the judge thinks they jury chose the wrong party cannot permit him to rule otherwise. This would be a clear violation of justice.

Possible Other Solutions

The D's should file a motion to alter or amend the judgment under Rule 59(e). If the Judge thinks that the jury gave too much in damages to the P's he can lower the verdict [remittitur]. Another possible solution is for the D's to use rule 60(b) - Grounds for relief from a final judgment. The argument is a stretch, but on motion and just terms, the court may relieve a party from a final judgment for the following reasons: (3) misrepresentation, or misconduct by the opposing party, or (6) any other reason that
justifies relief. Granted, this argument is a stretch, but the D's may attempt to file the motion. The D can also appeal the case, however, comparing this case to that of Anderson v City of Bessmer it appears it would not benefit the D. In Anderson, a female alleged sexual discrimination against the City after she failed to be selected for the job. P won and on appeal the court wrestled with the idea of whether or not is should reverse. The court of appeals stated it should only reverse if the result was "clearly erroneous." Given that the appeals court will have both sides of the evidence and the fact that a jury decided for the P, they would most likely argue that judgment should stand given that it was not "clearly erroneous" to find for the P.

Therefore, the Judge is not permitted to grant the JML or motion for new trial. For better or for worse, this is our justice system. Jury's are selected from a pool of our community and we believe that they should be the finders of fact in cases at trial. They are the reasonable person. If this is a good idea or not, it most likely beats the alternative of having one man/woman decide your fate.

C. Ratner Small Section – Sample Answer

Neither motion should be granted based on judge's disagreement with the jury's credibility determination.

Motions for judgment as a matter of law are governed by R50. They are brought after a party has been fully heard on an issue during a jury trial (as Ds did in the first instance) and can be renewed under 50(b) after the trial with a mtn for new trial also brought in the alternative. A 50(a) motion may be postponed to avoid any question arising under the Seventh Amend.-- b/c a jury verdict for the moving party moots the issue and a pre-verdict ruling gambles that a reversal may result in a new trial that might have been avoided. The standard for deciding the JML motion is whether or not a reasonable jury would not have a legally sufficient evidentiary basis to find for the party. The key issue with the standard as it applies to this case is the determination of legal sufficiency. This does not allow for a judge to substitute his/her credibility determinations for those of the jury's as he seeks to do here. As we saw in Guenther v. Armstrong, even conflicting witness testimony does not mean that a reasonable jury could not find for the plaintiff. There the court of appeal ruled that the judge was improper when he evaluated the sufficiency of the witness testimony. The court of appeal in this jx would similarly overturn Kowell's decision if he grants the motion for judgment as a matter of law based on his own credibility determinations.

Kowell could grant the mtn for judgment as a matter of law if he thought that Ps' evidence contained only speculative inferences as we saw in the Galloway case. There the court ruled that only reasonable inferences will satisfy the required showing to survive a R50 mtn. What is a reasonable inference depends on whether the gap sought to be bridged is too wide and deep a reasonable leap to truth or whether the plaintiff deliberately chose to leave out evidence readily available to it. This would be the case if there were spans of time in either CK or TS's lives where there was an absence of evidence. Ps will not be able to move beyond a speculative inference that the video game
caused their issues if they cannot provide evidence that they were somewhat normal before and were normal on a consistent basis and that it all changed once they started playing this video game.

Kowell should also refuse to grant the motion for new trial. R59 states that the court may grant a new trial on all or some of the issues after the jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court. Although this is a very soft rule that is open for interpretation, courts have generally ruled that a mtn for a new trial should not be granted based on a judge's disturbing a jury's evaluation of a witness's credibility. *Raedle v. CAI* court found that a new trial should be granted if the verdict is against the weight of the evidence or clearly erroneous or a miscarriage of justice. Also, the court required that the miscarriage of justice must be egregious or serious and that there should be no substituting the jury's credibility determinations. It does not appear from the facts that there was such error or miscarriage. It was reasonable for the jury to find in plaintiffs' favor because they had equally weighted evidence and expert testimony-- both had psychologists. Also, they damages award shows the reasonableness of the jury's determinations, plaintiffs were wronged but not grossly wronged. In support of their motion and/or in response to these arguments, Ds will likely argue that granting a new trial is not substituting a jury's credibility determination, it is allowing another shot at jury's determination. This brings up the issue of the tension between the New Trial and the Seventh Amend. right to a jury trial. This tension is most acute where the result may turn in large part on the credibility of a single witness-- in this case the expert testimony. The way this tension is resolved is through the general rule that jury's credibility determinations should not be disturbed. Therefore, Kowell should not disturb this jury's cred. determinations and should not grant to mtn for new trial…

Kowell should deny both motions-- granting them based on his substitution of witness credibility would be improper.
V. Exam Questions

HYPOTHETICAL


The complaint alleged: Nebula sells a video game, Bunny Zombie Rampage (“Rampage”), in which players battle an army of flesh-eating zombie bunnies. Since its introduction in 2008, Rampage has been a top-selling video game. Nebula markets Rampage to persons 14 years and older because of the game’s violent content. Plaintiffs played Rampage daily from 2008 through 2011. Mr. Kennedie began experiencing behavioral changes in early 2010, including violent outbursts. In 2011, he dropped out of high school and was convicted of assault. In 2011, Ms. Swifte, who previously had no criminal record or behavioral problems in school, was convicted of vandalizing several cars in her neighborhood. Ms. Swifte alleges that these convictions will cause her to lose valuable career opportunities. Plaintiffs claim their legal and behavioral problems resulted from their use of Rampage.

Plaintiffs each alleged a cause of action against Nebula for negligent failure to warn. Plaintiffs alleged the elements of a claim for failure to warn, including that: (1) Nebula knew or should have known that Rampage was dangerous when used in a reasonably foreseeable manner because it could cause violent outbursts; (2) Nebula knew or should have known that users would not realize this danger; (3) Nebula thus had a duty to warn purchasers about the dangers associated with regular use of Rampage; (4) Nebula did not warn Plaintiffs; (5) A reasonable manufacturer would have warned of the dangers associated with use of a game like Rampage; (6) Nebula’s failure to warn caused Plaintiffs to experience behavioral problems that caused them harm, including their legal troubles. As a result of these behavioral problems, Plaintiffs alleged that they each suffered at least $100,000 in damages.

For each question below, assume you serve as a law clerk for United States District Judge Simon Kowell, who was assigned to hear the case.

QUESTION 1
(45 minutes)

After Nebula answered the complaint, the parties commenced discovery. Plaintiffs served the following discovery request on Nebula: “Produce all documents in Nebula’s possession, including emails and other communications, regarding alleged behavioral problems associated with the use of Rampage or any of Nebula’s other video games.” In its response to the document request, Nebula asserted two objections. First, Nebula
objected that the request was “overbroad” because it sought materials outside the proper scope of discovery. Second, Nebula asserted the request was “unreasonably burdensome” because it would cost Nebula hundreds of thousands of dollars to identify and locate responsive hardcopy and electronic documents, including electronic documents available only on back up systems. Based on these objections, Nebula stated in its written response to the document request that it would produce only documents, emails and other communications pertaining to the two plaintiffs involved in the lawsuit, and would not search back up systems.

Plaintiffs moved to compel production of the requested materials, and for sanctions. Nebula responded to the motion to compel by arguing that the motion should be denied. Nebula also contended that if the Court were inclined to grant the motion, sanctions were inappropriate. Finally, Nebula asked that the cost of responding to the document request be shifted to the Plaintiffs. Judge Kowell has asked you for a memorandum regarding whether he should grant the motion to compel, impose sanctions, and/or shift costs. Please respond.

**QUESTION 2**
*(45 minutes)*

During discovery, two months after the statute of limitations on their causes of action ran out, Plaintiffs learned that Nebula had contracted out the production of the graphics for Rampage to a separate company, Galactic Gaming, Inc. (“GG”). GG was started by former employees of Nebula. GG leases space in the same building in San Francisco where Nebula’s offices are located. GG uses the same law firm as does Nebula, Baker & Baker, LLP (“Baker”).

Plaintiffs moved for leave to amend their complaint to add GG as a new defendant. Plaintiffs’ proposed complaint added a cause of action against GG for negligent design of the video game graphics. Specifically, Plaintiffs’ proposed amended complaint alleged that: (1) the frequency of image and color changes (“flash rate”) in Rampage could sometimes trigger a reaction in game users that could be partly or wholly responsible for behavioral changes; (2) GG knew or should have known it needed to reduce the flash rate to ensure user safety but did not do so; (3) the flash rate is partly or wholly responsible for Plaintiffs’ behavioral changes and associated injuries; and (4) GG is thus partly or wholly liable for such injuries.

The Court granted Plaintiffs’ motion for leave to amend. After being served with the amended complaint, GG moved to dismiss on the ground that the statute of limitations had run. Judge Kowell has asked you for an analysis of GG’s motion to dismiss, and for a recommendation regarding whether he should grant it. Please respond.

**QUESTION 3**
*(45 minutes)*

Assume that GG’s motion to dismiss was denied. Nebula and GG (“Defendants”) jointly moved for summary judgment. Defendants argued that there was no evidence in
the record that any feature of Rampage caused behavioral problems in either Plaintiff. In support of the motion for summary judgment, Defendants pointed to the school records of the Plaintiffs. These records showed that Mr. Kennedie had been suspended for fighting with another student in middle school, well before he began playing Rampage. The records also showed that Ms. Swifte had written a story in English class about someone breaking car windows. She wrote this story before Nebula began marketing Rampage in 2008.

In opposition to the motion for summary judgment, Plaintiffs placed in the record an excerpt of the report of the Plaintiffs’ expert, Dr. Britney Spiers, a psychologist. In her report, Dr. Spiers stated that it was possible that the Plaintiffs’ behavioral problems were caused by prolonged use of Rampage. Dr. Spiers concluded that, in her opinion, the flash rate in Rampage was more likely than the violent content to be responsible for Plaintiffs’ behavioral and legal problems. Plaintiffs also submitted affidavits from family members and from close family friends. The affidavits described behavioral changes that commenced shortly after Plaintiffs became regular Rampage players, including that Plaintiffs, who had both previously been well-behaved, became “sullen and hostile.” Judge Kowell has asked you for a memorandum discussing whether the motion for summary judgment should be granted for either of the defendants.

**QUESTION 4**

(45 minutes)

Assume that the motion for summary judgment was denied. A jury trial on Plaintiffs’ claims commenced. The evidence described in Question 3 was presented to the jury. In addition, Nebula and GG presented the testimony of an expert in psychology and neurobiology who testified that Plaintiffs’ behaviors could not be attributed to playing Rampage. At the close of evidence and before the case was submitted to the jury, Nebula and GG each moved for judgment as a matter of law. Judge Kowell denied these motions.

The case was then submitted to the jury. The jury returned a verdict for Plaintiffs, awarding them $100,000 each in compensatory damages. Defendants renewed their motions for judgment as a matter of law, and in the alternative they moved for a new trial. Judge Kowell has informed you that, after seeing her testify in court, he thought Dr. Spiers was not credible at all; further, Judge Kowell found the testimony of Plaintiffs’ family and family friends to be entirely unconvincing. Judge Kowell has asked you for a memorandum explaining whether he can grant defendants’ motions for judgment as a matter of law, and/or for a new trial.