

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

-----x
WILLIAM ROGER CLEMENS,

Plaintiff,

4:08-cv-00471

Judge Keith P. Ellison

-against-

BRIAN McNAMEE,

Defendant.
-----x

**DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT,
OR, IN THE ALTERNATIVE, TO TRANSFER VENUE**

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NATURE AND STAGE OF THE PROCEEDINGS

This is a case of alleged defamation and intentional infliction of emotional distress. Roger Clemens filed his original Complaint against Brian McNamee in the 129th Judicial District Court of Harris County Texas on January 6, 2008. On February 11, 2008, Mr. McNamee timely and properly removed to this Court on the basis of diversity of citizenship. On March 4, 2008, Defendant moved to dismiss in lieu of an answer. On May 27, 2008, Plaintiff concurrently filed a response to Defendant's motion to dismiss the original Complaint and filed an Amended Complaint. On June 3, 2008, pursuant to Defendant's letter to the Court, the Court terminated Defendant's motion to dismiss the original Complaint as moot in light of the Amended Complaint.

Pursuant to the deadline set by this Court, Defendant submits this memorandum of law and the Declaration of Debra L. Greenberger dated July 2, 2008 ("Greenberger Decl."), in support of Defendant's motion to dismiss the Amended Complaint in its entirety per Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6), or, in the alternative, to transfer venue pursuant to 28 U.S.C. § 1404(a).

This action stems from Mr. McNamee's truthful admissions, elicited by federal investigators, that he injected Mr. Clemens, a former Major League Baseball pitcher whom Mr. McNamee trained, with steroids and Human Growth Hormone (HGH). The Complaint asserts that Mr. McNamee's repetition of these admissions to Senator Mitchell at the insistence of the federal authorities constitutes defamation. The Amended Complaint adds an intentional infliction of emotional distress claim and additional defamation allegations based on conversations with Andy Pettitte years ago, and Mr. McNamee's single conversation with Jon Heyman, allegedly repeating his admissions to Mitchell. Rather than acknowledging the truth of

Mr. McNamee's allegations, Mr. Clemens has chosen to wage a public relations battle against Mr. McNamee in the media and the halls of Congress, of which this lawsuit is but one portion.

The original Complaint in this case was filed on a Sunday evening in Harris County District Court, the night before, and plainly in conjunction with, Mr. Clemens's nationally-televised press conference on Monday, January 7, 2008. The sole purpose of that press conference was to attempt to label Mr. McNamee a liar. Consistent with the timing and purpose of the original Complaint, it reads more like a press release than a pleading, focusing primarily on the accomplishments of the Plaintiff and the alleged coercion of Mr. McNamee by federal authorities, rather than the alleged tortious conduct of the Defendant. Not surprisingly, given its obvious actual purpose, the original Complaint suffered from a number of legal defects. While the Amended Complaint attempted to cure certain legal problems raised by Defendant's motion to dismiss, it adds additional defective claims, and must be dismissed in its entirety.

Roger Clemens seeks to blame Brian McNamee for the damage to his reputation that resulted from the release of the Mitchell Report. Notably, Mr. Clemens has so far pitched around Senator Mitchell, choosing not to sue him or Major League Baseball. Mr. McNamee, of course, did not even know that the Mitchell Report would be made public. Therefore, it is notable that it was not Mr. McNamee who released or publicized the Report. Mr. McNamee's participation was only in the way of privileged conversations with Senator Mitchell, conversations that are absolutely immune because they were made as part of a federal government investigation. Given this immunity, and given the widespread publication of the Mitchell Report, it is baseless to claim that any harm resulted from Mr. Clemens's newly-added allegation that Mr. McNamee repeated to a reporter the same accusations he had told Senator Mitchell.

ISSUES, STANDARD AND SUMMARY OF ARGUMENT

Defendant moves to dismiss Plaintiff's Amended Complaint (1) per Fed. R. Civ. P. 12(b)(2), as this court lacks personal jurisdiction over Mr. McNamee and (2) pursuant to Fed. R. Civ. P. 12(b)(6), as the Amended Complaint fails to state a claim. In the alternative, Plaintiff moves this Court to transfer venue to the Southern District of New York, pursuant to 28 U.S.C. § 1404(a).

(1) Can this Court assert personal jurisdiction over defendant, Mr. McNamee? **NO.**

Plaintiff has the burden of proving that jurisdiction exists by demonstrating that defendant has "minimum contacts" with the forum state such that imposing a judgment would not "offend traditional notions of fair play and substantial justice." *Luv n' care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 469, 473 (5th Cir. 2006). This Court does not have personal jurisdiction over Mr. McNamee as the allegedly defamatory statements are not sufficiently connected to Texas and it would be unfair to force him to defend in this forum.

(2) Does the Amended Complaint state a claim upon which relief can be granted? **NO.**

A claim must be dismissed pursuant to Rule 12(b)(6) "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Bell Atl. Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 1966 (2007). Here the Amended Complaint must be dismissed because: (1) an intentional infliction of emotional distress claims only applies where there are no other legal remedies for the alleged wrong, not where Plaintiff's remedy is a defamation claim; (2) the allegedly defamatory statements are not plead with sufficient specificity; (3) the new allegations that Mr. McNamee defamed Plaintiff in conversations with Mr. Pettitte in 1999/2000 and in 2003/2004 are barred by the one year statute of limitations; (4) Mr. McNamee's statements to Senator Mitchell are absolutely immune because they were made as part of a federal government investigation; (5) none of the alleged defamatory statements are defamatory as a matter of law; and (6) the Amended Complaint fails as it does not allege special damages nor fall within any *per se* category.

(3) In the alternative, should this Court transfer this case to the Southern District of New York? **YES.**

Section 1404(a) of Title 28 provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. 1404(a). Here those factors compel this Court to transfer this action to the Southern District of New York.

BACKGROUND

According to the Amended Complaint, Brian McNamee, an athletic trainer who resides in New York, trained Roger Clemens, a former Major League Baseball pitcher. Am. Compl. ¶¶ 2, 5; Declaration of Brian McNamee, dated July 2, 2008, ¶ 2, *attached as* Exhibit 1 to the Greenberger Declaration (“Ex. 1”).¹ Their relationship began in 1998 when Mr. McNamee was a trainer with the Toronto Blue Jays, and continued while Mr. Clemens pitched for the New York Yankees. Am. Compl. ¶¶ 16-18. Mr. McNamee has also occasionally trained Mr. Clemens at or near Mr. Clemens’s Texas home. *Id.* ¶ 22; Ex. 1 ¶ 11.

In June 2007, as part of an investigation into controlled substances, federal prosecutors and investigators approached Mr. McNamee. Am. Compl. ¶ 28. After being threatened with prosecution for steroid distribution, Mr. McNamee agreed to cooperate with the federal authorities and admitted, among other things, that in 1998, 2000 and 2001, he had injected Mr. Clemens with steroids and HGH. *Id.* ¶¶ 28-29. Under penalty of prosecution for false statements, Mr. McNamee informed the federal investigators that, beginning in the summer of 1998, Mr. Clemens approached Mr. McNamee and asked Mr. McNamee to inject him with a steroid called Winstrol. Compl. at 1 “Overview.” These initial injections occurred in Toronto. *Id.* at 1-2; Compl. ¶ 15. In 2000 and 2001, Mr. McNamee injected Mr. Clemens at Mr. Clemens’s Manhattan apartment with steroids and HGH. Compl. at 2 “Overview.” Mr. McNamee never injected Mr. Clemens in Texas. *Id.* at 1-2; Ex. 1 ¶ 2.

The federal authorities insisted that Mr. McNamee cooperate with an investigation conducted by former United States Senator George Mitchell. Am. Compl. ¶¶ 30, 32. Accompanied by the federal investigators—and still under penalty of criminal prosecution

¹ All exhibits referenced in this brief are attachments to the July 2, 2008 Greenberger Declaration.

for false statements—Mr. McNamee repeated to Senator Mitchell that he had injected Mr. Clemens with steroids and HGH on a number of occasions. *Id.* ¶ 33.

By way of background, though not alleged in the Complaint or Amended Complaint, Mr. McNamee also informed the federal investigators and Senator Mitchell that he injected two other Major League Baseball players with HGH, Andy Pettitte and Chuck Knoblauch. Both of these players have admitted that Mr. McNamee’s statements were true.² Pettitte Aff., Ex. 2 ¶ 8; Knoblauch Dep., Ex 3 at 9. Furthermore, Andy Pettitte has corroborated Mr. McNamee’s statements about Mr. Clemens use of performance enhancing drugs: Mr. Pettitte testified that in 1999 or 2000 Mr. Clemens told him that he was using HGH. Ex. 2 ¶¶ 1, 3.

Before Senator Mitchell issued his report, Mr. McNamee contacted an agent for Mr. Clemens and Mr. Pettitte to inform them that they would be named in the report. Rusty Hardin, counsel for Mr. Clemens and Mr. Pettitte, immediately sent two investigators to question, and surreptitiously tape, Mr. McNamee who confirmed and explained all the statements he made to Senator Mitchell. *See* Exs. 4 and 5, *attached to* Greenberger Decl. in support of original Motion to Dismiss, March 3, 2008. After the Mitchell Report was released, Mr. Clemens began a very public campaign claiming that he had never used steroids or HGH. He repeatedly accused Mr. McNamee of deceit. Mr. Clemens was interviewed by 60 Minutes and, the day after the interview was aired, held a press conference. It was at that press

² “In deciding a motion to dismiss the court may consider documents attached to or incorporated in the complaint,” *U.S. ex rel. Willard v. Humana Health Plan of Texas Inc.*, 336 F.3d 375, 379 (5th Cir. 2003) (citing *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017-18 (5th Cir.1996)), and “a court may also take judicial notice of documents in the public record,” *R2 Investments LDC v. Phillips*, 401 F.3d 638, 640 n.2 (5th Cir. 2005).

conference that he informed the world—and, for the first time, Defendant—that the day before, on a Sunday evening, he had filed a defamation suit against Mr. McNamee.³

When faced with a motion to dismiss, Plaintiff amended his complaint, adding an intentional infliction of emotion distress claim, additional allegations of defamation stemming from statements McNamee allegedly made in “1999 or 2000” and “2003 or 2004,” and an additional allegation regarding a single conversation with Jon Heyman, a reporter.⁴ Plaintiff’s Amended Complaint also removes his claim for a declaratory judgment and his allegations that federal prosecutors had “pressured” and “bullied” McNamee. *Id.*

The Amended Complaint (like the original Complaint) has sparse mention of allegedly defamatory statements, and instead is a paean to Mr. Clemens’s sterling career as a Major League Baseball pitcher. Indeed, it reads as a lionized biography of Mr. Clemens with paragraph after paragraph detailing his numerous accomplishments.

Defendant also notes as a matter of public record that, after the original Complaint was filed, the House Committee on Oversight and Government Reform (“Committee”) held a hearing on February 13, 2008, about the Illegal Use of Steroids in Major League Baseball, in order to investigate allegations of Clemens’s steroid use.⁵ On February 27, 2008, the Committee wrote to Attorney General Mukasey to request an investigation into the truthfulness of Mr.

³ See Duff Wilson, *Clemens’s Lawyer Plays Tape of McNamee Call*, N.Y. Times, Jan. 8, 2008, at D1, Ex. 6.

⁴ Notably, the new allegations about McNamee’s conversations with Pettitte buttress the truth of McNamee’s statements about Clemens’s use of HGH and steroid; these conversations, which now Clemens himself asserts occurred, rebut any claim of a recent motive to lie, directly contradicting the original Complaint’s allegation that only when “pressured” and “bullied” by federal prosecutors in 2007, “for the first time in his life, McNamee states that he had injected Clemens with steroids.” Compl. ¶ 27.

⁵ Many of the documents relevant to that investigation, including Congressional depositions of both parties, are available online at <http://oversight.house.gov/story.asp?ID=1743>.

Clemens's testimony at that hearing; the Committee also released an extensive background memorandum detailing the inconsistencies and implausibilities in Mr. Clemens's testimony that prompted the referral.⁶

As a result of Mr. Clemens public campaign to discredit him, Mr. McNamee's financial status has rapidly deteriorated. He has earned little since this lawsuit was filed and has poor prospects for future employment. Ex. 1 ¶ 5.

DISCUSSION

In the end Mr. Clemens cannot prevail because Mr. McNamee has the absolute defense of truth and, by no stretch of the imagination, has Mr. McNamee damaged Clemens; the Mitchell Report did. Most significantly, Mr. McNamee has provided steroid paraphernalia, which will test positive for Clemens's DNA, to the federal government, and once the DNA results are revealed there will be little dispute about who is telling the truth.

But Mr. Clemens's allegations cannot get that far. They fail at the threshold, because this Court lacks jurisdiction over Mr. McNamee's person and Plaintiff's Amended Complaint fails to state a claim.⁷ In the alternative, this Court should transfer venue over this action to the Southern District of New York.

I. THIS COURT LACKS PERSONAL JURISDICTION OVER DEFENDANT.

This Court must dismiss this action under Fed. R. Civ. Proc. 12(b)(2) as Mr. McNamee resides in New York and Plaintiff's claims do not arise out of Mr. McNamee's contacts with Texas. Mr. McNamee published the allegedly defamatory statements to Senator

⁶ The Committee has released these documents on its website. *See* <http://oversight.house.gov/story.asp?ID=1770>.

⁷ Despite significant deficiencies with service of process, Defendant has not brought a motion to dismiss pursuant to 12(b)(5), out of concern for judicial economy.

Mitchell and Jon Heyman in New York, and neither involved Mr. Clemens's activities in Texas. As to McNamee's statements to Pettitte, these claims cannot constitute minimum contacts, because the contacts occurred outside of the one year statute of limitations.

“A federal court sitting in diversity must satisfy two requirements to exercise personal jurisdiction over a nonresident defendant. First, the forum state's long-arm statute must confer personal jurisdiction. Second, the exercise of jurisdiction must not exceed the boundaries of the Due Process Clause of the Fourteenth Amendment.” *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 270 (5th Cir. 2006) (internal citation omitted). As the Texas long-arm statute reaches as far as allowable by the Constitution's Due Process Clause, *see Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 867 (5th Cir. 2001) (per curiam), “the question of personal jurisdiction under the Texas long-arm statute becomes a question of federal constitutional due process,” *Rodriguez v. Am. Eurocopter Corp.*, No. H-06-1069, 2006 WL 2238896, at *2 (S.D. Tex. Aug. 3, 2006).

Once a “defendant challenges personal jurisdiction,” the plaintiff has the “burden of proving that jurisdiction exists.” *Luv n' care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 469 (5th Cir. 2006) (citation omitted). Mr. Clemens can only meet that burden by making “a prima facie showing,” *id.*, that Mr. McNamee “has purposefully availed himself of the benefits and protections of [Texas] by establishing ‘minimum contacts’ with [Texas].” *Revell v. Lidov*, 317 F.3d 467, 470 (5th Cir. 2002). “The prima facie case requirement does not require the court to credit conclusory allegations, even if uncontroverted.” *Panda Brandywine*, 253 F.3d at 868-69.

“The minimum contacts requirement can be met through contacts sufficient to confer either specific or general jurisdiction.” *Ouazzani-Chahdi v. Greensboro News & Record, Inc.*, No.Civ. A. H-05-1898, 2005 WL 2372178, at *1 (S.D. Tex. Sept. 27, 2005) (Ellison, J.)

(citation omitted), *aff'd*, 200 Fed.Appx. 289 (5th Cir. 2006). Specific jurisdiction only exists “in a suit arising out of or related to the defendant’s contacts with the forum.” *Luv n’ care*, 438 F.3d at 469. General jurisdiction can only be exercised when defendant has “substantial, continuous, and systematic” contacts with the forum state. *Ouazzani-Chahdi*, 2005 WL 2372178, at *1. If such a showing of minimum contacts is made, Mr. McNamee can still defeat jurisdiction by proving that the “assertion of jurisdiction is unfair and unreasonable.” *Id.* at *2.

When resolving a 12(b)(2) motion to dismiss for lack of personal jurisdiction this Court “may determine the jurisdictional issue by receiving affidavits, interrogatories, depositions, oral testimony, or any combination of the recognized methods of discovery” and need not accept as true any allegations in plaintiff’s complaint that are controverted by affidavits. *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1165 (5th Cir. 1985).

Furthermore, Fifth Circuit precedent makes clear that a “plaintiff bringing multiple claims that arise out of different forum contacts of the defendant must establish specific jurisdiction *for each claim.*” *Seiferth*, 472 F.3d at 274 (emphasis added). Thus, Clemens must establish minimum contacts separately for each and every allegation of defamation and his intentional infliction of emotion distress claim or face dismissal for each claim for which there is insufficient contacts.

In this case, Mr. Clemens does not make out a prima facie basis for *in personam* specific jurisdiction over Mr. McNamee in Texas, and Plaintiff concedes that this Court lacks general jurisdiction over Mr. McNamee.⁸ Because they raise different issues, Defendant will

⁸ In Plaintiff’s (now moot) response to Defendant’s motion to dismiss, Plaintiff concedes that “[o]nly specific jurisdiction is at issue in this case.” Pl. Resp. at 9. Given this concession, Defendant will not burden this Court with an extended discussion as to why this Court cannot assert general jurisdiction over Mr. McNamee. Without belaboring the point, asserting general jurisdiction would be improper because Mr. McNamee’s attenuated contacts with Texas do not suffice to constitute “doing business” in Texas for purposes of general jurisdiction. *Wilson v. Belin*, 20 F.3d 644, 647 (5th Cir. 1994). Defendant, of course,

first discuss the statements to Senator Mitchell and Mr. Heyman—both of which were allegedly made in New York—and separately the statements to Mr. Pettitte, which were allegedly made in Texas. If this Court finds that Plaintiff fails to make a jurisdictional showing on *any* of these claims, it must dismiss that claim. *Seifert*, 472 F.3d at 274-75.

A. This Court lacks specific jurisdiction over Mr. McNamee’s statements to Senator Mitchell and Mr. Heyman, both of which were made in New York about Clemens’s conduct unrelated to Texas.

This Court lacks specific jurisdiction over Defendant McNamee with regard to claims arising from his statements to Senator Mitchell or Mr. Heyman, as these statements were unrelated to any contact with Texas. Instead, both the defamation claim and the intentional infliction of emotion distress claims purport to arise from statements Mr. McNamee made in New York about Mr. Clemens’s use of performance enhancing substances outside of Texas. *See* Ex. 1 ¶ 2. Any harm to Mr. Clemens in Texas is, by itself, insufficient in a jurisdictional analysis. *Revell*, 317 F.3d at 473; *Panda Brandywine*, 253 F.3d at 870.

The Amended Complaint alleges that this Court has specific jurisdiction because Mr. McNamee knew that his statements “would be republished and widely-circulated and read in Texas, thereby causing devastating injury to Clemens in Texas, where McNamee knew that Clemens lives, worked, and has significant business interests, which in fact has occurred.” Am. Compl. ¶ 6. However, the Fifth Circuit has made clear that, in an action for defamation and intentional infliction of emotional distress,⁹ “plaintiff’s residence in the forum, and suffering of

will brief this matter further if the Court wishes. To the extent the Complaint continues to allege that McNamee traveled to Texas and did business in Texas, *see Am. Compl.* ¶¶ 5-6, “[a]lthough this evidence may bear on the issue of general jurisdiction, it has little relevance to the issue of specific jurisdiction.” *Staton Holdings, Inc. v. Hilton Apparel Group*, No. 3-07-cv-0383, 2007 WL 1964635, at *5 n.3 (N.D.Tex. July 5, 2007).

⁹ Because courts in the Fifth Circuit consistently apply the same specific jurisdiction analysis to both defamation claims and intentional infliction of emotional distress which arises out of defamation claims,

harm there, will not alone support jurisdiction.”¹⁰ *Revell*, 317 F.3d at 473 (dismissing for lack of personal jurisdiction); *see also Panda Brandywine*, 253 F.3d at 870 (“If we were to accept [plaintiff’s] arguments, a nonresident defendant would be subject to jurisdiction in Texas for an intentional tort simply because the plaintiff’s complaint alleged injury in Texas to Texas residents regardless of the defendant’s contacts, and would have to appear in Texas to defend the suit no matter how groundless or frivolous the suit may be.” (internal quotation marks omitted)). This is so because to assert specific jurisdiction over a defendant for purposes of a defamation claim, plaintiff must show that defendant expressly “aim[ed] a story at the state knowing that the effects of the story will be felt there.” *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419, 425 (5th Cir. 2005) (internal quotation marks omitted). Merely knowing that the plaintiff lives in the state is not enough. *Panda Brandywine*, 253 F.3d at 869.

In *Revell*, the Fifth Circuit affirmed a dismissal for lack of personal jurisdiction in a defamation and intentional infliction of emotion distress case with facts that mirror those in the instant case. 317 F.3d 467. In that case, a Texas resident sued an assistant professor and his university, neither of whom were residents of Texas, for the professor’s allegedly defamatory statements posted on the university’s website. *Id.* at 468-69. As in *Revell*, Mr. McNamee’s allegedly defamatory statement “contains no reference to Texas,” and does not “refer to the Texas activities” of Mr. Clemens. *Id.* at 473. The Amended Complaint points to Mr.

for ease, Defendant will refer only to the defamation claim. The same analysis, however, applies to both. *See Revell*, 317 F.3d 467 (both claims raised and analyzed together); *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005) (same); *Pettus v. Combs*, 2006 WL 1677778, at *3 (W.D.Tex. 2006) (same).

¹⁰ Defendant does not concede that plaintiff suffered the greatest harm in Texas, given that plaintiff is a Major League Baseball player with a nationwide reputation. Indeed, it is clear that Plaintiff’s reputation in Cooperstown, New York, the site of the Baseball Hall of Fame, or with advertisers based in New York or states other than Texas, is of more relevance than his reputation in Texas. However, the Court need not resolve this question as the situs of the harm is tangential to this analysis.

McNamee's statements about Mr. Clemens's use of performance enhancing substances in 1998, 2000, and 2001. Am. Compl. ¶¶ 29, 33. None of these events occurred in Texas; instead, they primarily occurred in New York (and Toronto). Ex. 1 ¶ 2.

Furthermore, Mr. McNamee "did not [himself] publish or circulate the report in [Texas]." *Revell*, 317 F.3d at 474 n.47 (noting factors that support dismissal for lack of jurisdiction). Mr. McNamee published his allegedly defamatory statements in New York: his meeting with Senator Mitchell and his investigators was in New York, *id.*, and Mr. McNamee met with Mr. Heyman at Mr. McNamee's home in New York, Am. Compl. ¶¶ 2, 35. (As applied in Texas, "publication" is a term of art in defamation law, defined as "communication intentionally or by a negligent act to one other than the person defamed," as distinguished from its lay meaning. *Kelley v. Rinkle*, 532 S.W.2d 947, 948 (Tex. 1976).) Mr. McNamee did not direct his statements outside of New York at all. Mr. McNamee directed his statements to Senator Mitchell and Mr. Heyman in New York, having no knowledge of, or control over, their ultimate dissemination of the statements. In fact, with regard to the statements to Senator Mitchell, Mr. McNamee did not know if they would be published at all, and, if they did, where or how such publication would occur. Ex. 1 ¶ 3. Indeed, Mr. Clemens's attorney himself has stated that no one knew whether Senator Mitchell would "name names" until shortly before the report was published. *See Hardin Decl. in support of Pl. Resp. to Def. M. for Disqualification*, Ex. 8 at 2.

Finally, Mr. McNamee's statements were "not directed at Texas readers as distinguished from readers in other states." *Revell*, 317 F.3d at 473. At best—and the evidence does not even go this far (as laid out above)—Mr. Clemens may be able to demonstrate that Mr. McNamee directed his statements "nationally." Even in that case, however, to find specific

jurisdiction in a *particular* state requires more than merely having that state be plaintiff's residence. Where a defamation defendant aims his statement nationally, only a state with a "unique relationship" with plaintiff's industry or business, can assert specific jurisdiction. *Remick v. Manfredy*, 238 F.3d 248, 259 (3rd Cir. 2001) (noting that contrary to the Supreme Court's example in *Calder* of the longstanding relationship between California and the film industry, Remick had "not asserted that Pennsylvania has a unique relationship with the boxing industry."), *cited approvingly in Revell*, 317 F.3d at 474; *see also Bank Express Intern. v. Kang*, 265 F.Supp.2d 497, 506 (E.D. Pa. 2003) (no unique relationship between ATM servicing industry and Pennsylvania). Clemens has not alleged, and cannot allege, that Texas has a unique relationship with baseball industry. Nor is there any allegation that Mr. McNamee's statements found their "largest audience in [the forum state]"; instead, there has been a national media firestorm. *Revell*, 317 F.3d at 473.

Mr. McNamee's knowledge that Mr. Clemens is a Texas resident and may have suffered harm in Texas, as alleged in the Amended Complaint, is plainly insufficient *by itself* to confer personal jurisdiction on this Court. In *Paula Brandywine*, the Fifth Circuit affirmed the dismissal of plaintiff's complaint, despite the allegation that defendant knew plaintiffs "are Texas residents and knew its actions would intentionally cause harm to [plaintiffs] in Texas," explaining that this is "insufficient to establish a prima facie case for jurisdiction." 253 F.3d at 869. Such knowledge, the Fifth Circuit explained, goes only to "the foreseeability of causing injury in Texas, which *is not a sufficient benchmark for specific jurisdiction.*" *Id.* (emphasis added); *see also Revell*, 317 F.3d at 474 n.47 (discussing approvingly *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110 (6th Cir. 1994), a Sixth Circuit case which dismissed a defamation

action for lack of specific jurisdiction in Ohio though the *Reynolds* defendant “clearly knew that the plaintiff was an Ohio resident”).

There is simply no connection between Texas and Mr. McNamee’s statements to Senator Mitchell and Mr. Heyman, save for the “fortuity” that Plaintiff resides in Texas, a fortuity that alone is insufficient for an assertion of jurisdiction. *Panda Brandywine*, 253 F.3d at 869-70; *see also Fielding*, 415 F.3d at 427 (“[T]he plaintiff’s mere residence in the forum state is not sufficient to show that the defendant had knowledge that effects would be felt there; a more direct aim is required.” (internal quotation marks omitted)).

Therefore, Plaintiff’s claims of defamation based on Defendant’s statements to Senator Mitchell and Mr. Heyman must be dismissed on Fed. R. Civ. P. 12(b)(2) Grounds.

B. This Court lacks specific jurisdiction over Mr. McNamee’s conversations with Mr. Pettite in 1999/2000 and 2003/2004 as those are outside the statute of limitations.

To bolster Clemens’s weak claims that this Court has *in personam* jurisdiction over Mr. McNamee, his Amended Complaint adds an additional allegation, in a single paragraph, that “McNamee had previously told Andy Pettite . . . that Clemens had used steroids and HGH.” Am. Compl. ¶ 36.

Because this defamation claim is untimely as a matter of law, this Court should dismiss these claims on personal jurisdiction grounds. “When, as in this case, personal jurisdiction is predicated on the commission of a tort within the state, of course the jurisdictional question involves some of the same issues as the merits of the case, and the plaintiff must make a *prima facie* case on the merits to withstand a motion to dismiss under rule 12(b)(2).” *Wyatt v. Kaplan*, 686 F.2d 276, 280 (5th Cir. 1982). Clemens “bears the burden of establishing

jurisdiction,” and thus “must also make a prima facie showing that the tort occurred within the state.” *Id.*

Clemens cannot establish personal jurisdiction over his claim that Mr. McNamee defamed Mr. Clemens to Mr. Pettitte because this claim is untimely. The statute of limitations for libel or slander actions under Texas law is “one year after the day the cause of action accrues.” Tex. Civ. Prac. & Rem. § 16.002; *see also In Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) (holding that a federal court hearing a diversity action must apply the state’s statutes of limitations). Furthermore, where, as here, the complaint “shows affirmatively that a claim is barred by the affirmative defense,” such as a timeliness defense, the “rule in this Circuit provides that affirmative defenses may be raised by motion to dismiss.” *Parra v. Mountain States Life Ins. Co. of Am.*, No. 94-60028, 1995 WL 241730, at *2 (5th Cir. 1995).

The Amended Complaint, by its very terms, alleges that McNamee “had previously told Andy Pettitte . . . that Clemens had used steroids and HGH,” during two conversations, the first in “1999 or 2000,” the second in “2003 or 2004.” Am. Compl. ¶ 36. The statute of limitations on these claims ran, at the latest, in 2001 and 2005.

To the extent Plaintiff seeks to argue that the claim had not accrued until 2008 by including a conclusory statement that this was “[u]nbeknownst to Clemens until earlier this year,” *id.*, such tolling is inapplicable. Texas law provides that, where a “matter is not public knowledge,” the discovery rule “defers the accrual of a cause of action until a plaintiff discovers or, *through the exercise of reasonable care and diligence, should have discovered* the nature of the injury.” *Roberts v. Davis*, No. 06-07-00024-CV, 2007 WL 3194813, at *1-2 (Tex. App. Nov. 1, 2007) (emphasis added). This “very limited exception,” *id.*, to the statute of limitations does not apply here and this Court need not accept Mr. Clemens’s conclusory allegations to the

contrary, Am. Compl. ¶¶ 44, 52, particularly, where, as here they are contradicted by other evidence, *Panda Brandywine*, 253 F.3d at 869.

There is a series of facts, all from more than a year before the filing of the Amended Complaint, which put Mr. Clemens on notice that Mr. Pettitte and Mr. McNamee has discussed Mr. Clemens use of performance enhancing substances.

- Mr. McNamee has testified that during his initial conversation with Andy Pettitte about HGH, Pettitte was talking to Clemens and then turned to McNamee and angrily asked, “why didn’t you tell me about this stuff?” Clemens was in earshot for the entire conversation, wherein McNamee explained why Pettitte should not use HGH. McNamee Dep., Ex. 5, at 28-31.
- In 2005, Mr. Pettitte and Mr. Clemens had the following conversation, according to Mr. Pettitte’s affidavit before Congress, Ex. 2 ¶¶ 4-6:

4. In 2005, around the time of the Congressional hearings into the use of performance enhancing drugs in baseball, I had a conversation with Roger Clemens in Kissimmee, Florida. I asked him what he would say if asked by reporters if he ever used performance enhancing drugs. When he asked me what I meant, I reminded him that he had told me that he used HGH.

5. Roger responded by telling me that I must have misunderstood him; he claimed that he told me that it was his wife, Debbie, who used HGH.

6. I said, “Oh, okay,” or words to that effect, not because I agreed, but because I wasn’t going to argue with him.^{11, 12}

¹¹ Mr. Pettitte also described the 2005 conversation in his Congressional deposition:

And I got Roger and just asked him, I said, dude, what are you going to say if anyone -- if any of the reporters ask you if you had ever used HGH? And he said, you know, he said well, what are you talking about? And I said, well, you had told me you had used HGH. And he said, I never told you that. And I said, you didn’t? And he said no. I told you that Debbie used HGH. And that’s – that was the end of the conversation right there.

Pettitte Dep., Ex. 4, at 26-27.

¹² Clemens was asked about this 2005 conversation in the Congressional hearing by Representative Elijah E. Cummings and his answer was a model of evasiveness and incoherence:

Mr. Cummings. This conversation [with Andy Pettitte] happened just 3 years ago, and it is the kind of conversation that most people would remember. It is hard for me to imagine that Mr. Pettitte made up this conversation. Did you have a conversation with him to this effect?

- Mr. Clemens reported (and Mr. McNamee confirms) that Mr. McNamee injected Debbie Clemens with HGH in 2002 or 2003. Clemens Dep., Ex. 10, at 175-77.
- In 2003, Mr. McNamee met Jim Murray, Mr. Clemens's agent, in a coffee shop and told Mr. Murray that he was concerned about baseball's drug testing, which Mr. McNamee feared would reveal Mr. Clemens's drug use. McNamee Dep., Ex. 5, at 147-49.
- On October 1, 2006 the Los Angeles Times published an article stating that a redacted affidavit filed in federal court by pitcher Jason Grimsley stated that Roger Clemens used performance-enhancing drugs. After that story was published, McNamee and Clemens had an email exchange that same day (October 1, 2006), in which Clemens said to McNamee: "Pet [Pettitte] and I talk about the BS coming out." McNamee's email in response stated: "Lastly, I am not sure what that last statement means in your email but if it his [*sic*] anything to do with me in regards to being a rat or flipping on you or anyone of my clients I will hop on a plane, find you, and slap you very hard" (The last statement in Clemens's previous email said "The real problem will be in any of the people I represent pull out. Then I will be going after someone with many law suites [*sic*].) Ex. 1 ¶ 14 & Attachment (emphasis added).

These statements put Clemens on clear notice that McNamee and Pettitte believed that Clemens used performance enhancing substances. Once Clemens "in the exercise of reasonable diligence should have discovered the injury . . . limitations commences, even if [Clemens] does not know the exact identity of the wrongdoer." *Childs v. Haussecker*, 974 S.W.2d 31, 40 (Tex. 1998).

Mr. Clemens. I don't believe I had a conversation in 2005 with him in Kissimmee, Florida. We would have been with the Houston Astros at the time. But I don't remember that conversation whatsoever.

Mr. Cummings. Are you saying that you don't remember it, or are you telling us that you didn't have it? Do you know?

Mr. Clemens. I don't remember that. And again, I will address the -- any conversation about my wife Debbie using HGH. . . .

Congressional Transcript, Ex 12, at 42-43. Mr. Clemens admitted having a 2006 conversation with Mr. Pettitte "when this L.A. Times report become public about a Grimsley report, and they said that Andy's and my name were listed in that. And I remember him coming in[. . . and sitting down in front of me, wringing his hands and looking at me like he saw a ghost. And he looked right at me and said, What are you going to tell them? And I told him that I am going out there and I am going to tell them the truth, I did not of this." *Id.* at 39-40.

Due diligence requires a reasonable person in Mr. Clemens's position to inquire further and not sit on his hands and claim that the applicable statute of limitations is tolled. Mr. Clemens knew well before 2007 that his strength and conditioning trainer also trained his close friend, Andy Pettitte, and that Pettitte and McNamee had a close relationship. He knew that Mr. Pettitte thought Mr. Clemens used HGH. He knew that Mr. McNamee injected Debbie Clemens with HGH and stated, in 2005, that he believed that Mr. Pettitte knew that Debbie Clemens had used HGH. His agent was told in 2003 that Mr. McNamee believed Clemens's use of performance enhancing substances could be revealed on a drug test. In late 2006, Mr. McNamee attempted to reassure Clemens that he would not "rat" him out or "flip" on him. Furthermore, according to Mr. McNamee, Clemens actually heard the original conversation seven or eight years ago where Pettitte asked McNamee why McNamee did not tell him about HGH use when others (namely Clemens) that McNamee trained were using it. He knew that McNamee and Pettitte trained, socialized, and corresponded frequently. He obviously knew that McNamee and Pettitte talked about him.

Taken together, reasonable care requires Mr. Clemens to investigate: Why did Mr. McNamee tell his agent that a drug test might come back negative? Why would Mr. Pettitte believe that Mr. Clemens used performance enhancing drugs, if Clemens, as he asserts, never told Pettitte that? Why would Mr. McNamee promise not to rat him out? Having failed to make any reasonable inquiries (taking the Amended Complaint as true), Plaintiff cannot walk into this Court years later and ask it to toll the applicable statute of limitations. *See Ellert v. Lutz*, 930 S.W.2d 152, 157 (Tex. App. 1996) (holding that where plaintiff had access to her personnel file over a year before she filed suit, the discovery rule does not apply and the claim is untimely). All Mr. Clemens would have to do is ask one of his closest friends, Mr. Pettitte, how is it that

Mr. Pettitte thought that Mr. Clemens used HGH, given that the only other source it could likely have come from — and from whom Mr. Pettitte would have credited — was their mutual trainer, Mr. McNamee. Yet he avoided asking the obvious question. A defamation plaintiff cannot benefit from the ostrich’s posture that Clemens pretends to assume.

If this Court disagrees that statements in the public record can resolve the limitations issue, it can and should order narrow and focused jurisdictional discovery on this matter, if only to conserve judicial resources and not require Mr. McNamee and his counsel to expend resources that will be wasted if the case is dismissed on this ground. In considering a 12(b)(2) motion to dismiss for lack of personal jurisdiction, this Court can rely on “affidavits, interrogatories, depositions, oral testimony, or any combination of the recognized methods of discovery,” as well as matters in the public record. *Revell*, 317 F.3d at 469. Furthermore, it can and should hold an “evidentiary hearing,” on the jurisdictional question and hear testimony from Mr. Clemens, Mr. Pettitte and Mr. McNamee, to determine if plaintiff can prove *by a preponderance of evidence* that this Court can assert jurisdiction over Mr. McNamee for statements allegedly made in 1999/2000 and 2003/2004. *See Travelers Indem. Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826, 831 (5th Cir. 1986), *modified on rehearing in unrelated part*, 836 F.2d 850 (5th Cir.1988) (holding that while plaintiff must make a *prima facie case* for jurisdiction on a motion to dismiss, after an evidentiary hearing the standard is a preponderance of the evidence).

C. Asserting jurisdiction over Mr. McNamee would offend traditional notions of fair play and substantial justice.

Even where a plaintiff can make a *prima facie* case of minimum contacts with the forum state, the Due Process Clause forbids the exercise of personal jurisdiction where, as here, it “would offend traditional notions of fair play and substantial justice.” *Kalu v. Romerovski*

Corp., No. H-05-04069, 2006 WL 1291275, at *4 (S.D. Tex. May 8, 2006) (Ellison, J.) (internal quotation marks omitted). Of course, if this Court finds that Mr. McNamee does not have sufficient contacts with Texas, it need not consider questions of fairness and justice.

Courts balance five factors in this inquiry: “(1) the burden on the defendant; (2) the interests of the forum state in adjudicating the dispute; (3) the plaintiff’s interest in obtaining convenient and effective relief; (4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies.” *Id.*

Here, exercising jurisdiction over the Defendant would “make litigation so gravely difficult and inconvenient that [Mr. McNamee would be] unfairly at a severe disadvantage in comparison to his opponent.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) (internal quotation marks omitted). This is particularly the case as Mr. McNamee is an individual defendant, not a corporate entity; “it will be a greater inconvenience for a nonresident individual to defend a suit in a distant jurisdiction” as a “corporation often will have personnel and financial resources available that an individual defendant will not.” 4A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* (“Wright & Miller”) § 1069.5 (3d ed. 2007). Mr. McNamee lacks these resources.

Defending a lawsuit would be a significant burden on Mr. McNamee, an individual defendant. Mr. McNamee lives in Queens, New York, over 1,500 miles from Houston, Texas. Ex. 1 ¶ 1. Mr. McNamee also has very limited resources; in the first half of 2008 he has earned just \$3,000. Ex. 1 ¶ 5. He attempts to support four dependents, and owes more than his income and assets allow him to pay. Ex. 1 ¶ 6. To defend himself, he “would have to shoulder the expense of transporting” himself and his records to Texas. *Kalu*, 2006 WL

1291275, at *5. In addition, Mr. McNamee is not able to pay his counsel. Ex. 1 ¶ 7. Thus counsel would have to bear the cost of defending this lawsuit in Texas, with all the attendant travel and litigation expenses.

Furthermore, Defendant's presentation of evidence would be prejudiced if he were forced to defend in Texas, as the events underlying the allegedly defamatory statements occurred in New York and Toronto. Many of the defense witnesses "cannot be subpoenaed to give testimony at a trial in Texas, [so] litigating this suit in Texas would prejudice Defendants' presentation of its case." *Kalu*, 2006 WL 1291275, at *5. A Texas court could not subpoena many of the witnesses least likely to testify voluntarily, a list of whom is included *infra* at 39-40 in the transfer of venue section.

On the other hand, "nothing prevents Plaintiff[] from seeking relief in [New York], where Defendant concedes that personal jurisdiction would be appropriate." *Kalu*, 2006 WL 1291275, at *5. Mr. Clemens is a man of considerable resources, who maintained a New York residence for years, Ex. 1 ¶ 13, Am. Compl. ¶ 24, and could easily bring this suit there.

Indeed, New York has the most interest in this dispute: Mr. McNamee's statements to Senator Mitchell and Mr. Heyman were allegedly made in New York; New York is the only state in this country where the injections of performance enhancing drugs that underlie the defamation claims occurred; and Mr. Clemens's career was substantially as a New York Yankee.

As Mr. McNamee's contacts with Texas do not constitute purposeful availment of this forum and exercising jurisdiction over him would offend traditional notions of fair play and substantive justice, this Court should dismiss Mr. Clemens's Amended Complaint for lack of

personal jurisdiction *in its entirety*. Furthermore, if this Court finds that Plaintiff fails to make a jurisdictional showing on *any* of his claims, it must dismiss that claim.

II. PLAINTIFF’S AMENDED COMPLAINT FAILS TO STATE A CLAIM.

To survive a Rule 12(b)(6) motion to dismiss, a complaint must provide the plaintiff’s grounds for entitlement to relief. “[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, ‘this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.’” *Bell Atl. Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1555, 1566 (2007) (internal quotation marks omitted).

Here, Plaintiff’s Amended Complaint fails to state a claim on numerous grounds: (1) an intentional infliction of emotional distress claims only applies where there are no other legal remedies for the alleged wrong, not where Plaintiff’s remedy is a defamation claim; (2) the allegedly defamatory statements are not plead with sufficient specificity; (3) the new allegations that Mr. McNamee defamed Plaintiff in conversations with Mr. Pettitte in 1999/2000 and in 2003/2004 are barred by the one year statute of limitations; (4) Mr. McNamee’s statements to Senator Mitchell are absolutely immune because they were made as part of a federal government investigation; (5) none of the alleged defamatory statements are defamatory as a matter of law; and (6) the Amended Complaint fails as it does not allege special damages nor specify a *per se* category.

A. The new intentional infliction of emotional distress claim is mere window dressing and must be dismissed because an IIED claim can only lie where there are no other remedies.

Mr. Clemens’s Amended Complaint adds a cause of action for intentional infliction of emotional distress (IIED), which is entirely inappropriate, because an IIED claim can only lie where there are no other remedies, and cannot be used to bolster a weak defamation claim.

Texas law could not be clearer:¹³ “intentional infliction of emotional distress is a ‘gap-filler’ tort *never* intended to supplant or duplicate existing statutory or common-law remedies.” *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 816 (Tex. 2005) (emphasis added). IIED claims exist only for those “rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress.” *Hoffmann-La Roche, Inc.*, 144 S.W.3d at 447 (citing *Standard Fruit & Vegetable Co., Inc.*, 985 S.W.2d at 68). This is not one of those rare instances. Plaintiff has a “recognized theory of redress:” defamation law. *See Moser v. Roberts*, 185 S.W.3d 912, 915-16 (Tex. App. 2006) (dismissing IIED claim where plaintiff’s claims were actually for “slander, libel, and malicious prosecution” such that “there was no gap left to fill with an IIED cause of action”).

Instead, this is the common instance where a flailing plaintiff seeks to bolster weak claims—and, in particular, weak assertions of personal jurisdiction—by adding a frivolous intentional infliction of emotion distress claim. Indeed, in 2005, the Texas Supreme Court noted that “[f]or the tenth time in little more than six years, we must reverse an intentional infliction of emotional distress claim for failing to meet the exacting requirements of that tort.” *Creditwatch*, 157 S.W.3d at 815. Plaintiff’s IIED claim must fail as a matter of law, as it is merely duplicative of his defamation claims.

Furthermore, Clemens IIED claim also fails because McNamee’s alleged actions here are not sufficiently “outrageous” nor would they reasonably cause emotional distress “severe” enough to constitute a claim. There are four elements to an intentional infliction of emotional distress claim under Texas law: (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the actions of the defendant caused the plaintiff

¹³ Given that this Court will only reach a 12(b)(6) analysis after concluding that it had personal jurisdiction over Defendant in Texas, for purposes of this motion only Defendant does not challenge that Texas law applies as to whether Clemens failed to state a claim.

emotional distress; and (4) the emotional distress suffered by the plaintiff was severe. *Standard Fruit & Vegetable Co., Inc. v. Johnson*, 985 S.W.2d 62, 65 (Tex. 1998). As to the second element, “the threshold for what constitutes extreme and outrageous conduct sufficient to give rise to the tort of intentional infliction of emotional distress is a difficult one to meet.” *Haynes & Boone, L.L.P. v. Chason*, 81 S.W.3d 307, 311 (Tex. App. 2001). Defendant’s conduct must “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993). The alleged defamatory statements here fall well below that threshold as a matter of law. As to the fourth element, severe emotional distress “is distress that is so severe that no reasonable person could be expected to endure it.” *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 618 (Tex. 1999). The distress reasonably caused by defendant’s allegedly defamatory statements is not so severe as to meet this high standard as a matter of law.

B. The defamation claims all fail because the allegedly defamatory statements are not plead with sufficient specificity.

As a pleading matter, the Amended Complaint fails as it provides insufficient specifics of the allegedly defamatory statements Mr. McNamee made to Senator Mitchell, Mr. Heyman, or Mr. Pettitte. Federal Courts have repeatedly required “the use of *in haec verba* pleadings on defamation charges . . . because generally knowledge of the exact language used is necessary to form responsive pleadings.” *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 699 (8th Cir. 1979); *see also Holliday v. Great Atlantic & Pacific Tea Co.*, 256 F.2d 297, 302 (8th Cir. 1952); *Foltz v. Moore McCormack Lines, Inc.*, 189 F.2d 537, 539 (2d Cir. 1951). Such requirements ensure the court can evaluate a variety of defenses, such as “the possibility of a privilege.” *Asay*, 594 F.3d at 692; *see also Bell Atlantic*, 127 S.Ct. at 1965 n.3 (“Without some

factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.” (citation omitted)). In assessing whether a defamation claim has been plead with sufficient particularity, courts look to “whether said complaint references the alleged defamatory statement, identifies who made the statement, when it was made, the context in which it was made, whether it was made orally or in writing and whether it was made to a third party.” *Nickerson v. Comm’n Workers of Am. Local 1171*, No. 504CV00875NPM, 2005 WL 1331122, at *7 (N.D.N.Y. May 31, 2005); *see also Bushnell Corp. v. ITT Corp.*, 973 F.Supp. 1276, 1287 (D. Kan.1997) (internal citations omitted) (noting that a “stricter” pleading standard applied to defamation as a “traditionally disfavored” cause of action).

Furthermore, several courts in this Circuit have held that a defamation pleading fails where it does not allege the “time and place that the statement was published.” *Hernandez v. Wal-Mart Assocs, Inc.*, No. EP-06-CA-233-FM, 2006 WL 2883080, at *4 (W.D. Tex. Sept. 16, 2006) (citing *Garrett v. Celanese Corp.*, No. 3:02-cv-1485-k, 2003 WL 22234917, at *4 (N.D. Tex. Aug. 28, 2003) (same); *Jackson v. Dallas Indep. School Dist.*, No. A.398-cv-1079, 1998 WL 386158, at *5 (N.D. Tex. July 2, 1998) (same)).

Bizarrely, after facing a motion to dismiss on this ground, Plaintiff amended his complaint to make it less specific. While the initial Complaint had an “Overview” section which detailed the various statements that Plaintiff alleged were defamatory, the Amended Complaint includes only the following, vague allegations:

- “McNamee appeared before the Mitchell Commission and intentionally and maliciously repeated to its members his false accusations that Clemens had used steroids and HGH.” Am. Compl. ¶ 33.
- “Specifically, on January 6, 2008, McNamee invited Heyman, his friend into his home and gave him an exclusive interview. During that interview

McNamee intentional and maliciously repeated his false accusation that Clemens used steroids.” *Id.* ¶ 35

- “Specifically, McNamee falsely told Pettitte during a conversation in Clemens’s home gym in Houston, Texas in 1999 or 2000 that Clemens had used HGH. And McNamee also falsely told Pettitte at Pettitte’s home gym in Deer Park, Texas in 2003 or 2004 that Clemens had used steroids.” *Id.* ¶ 36.

These allegations are insufficient. While the first two statements were published online, the Complaint does not quote *in haec verba* the SI.com story or the Mitchell Report. Nowhere does the Amended Complaint state: (1) what Mr. McNamee said to the Mitchell Commission or Heyman, other than the allegation that he “repeated his false accusations”; (2) the exact statements to Pettitte; (3) any context to any of the three allegations, which is necessary to determine whether a reasonable listener would find the statements defamatory; or (4) the date of the statements to Mitchell and Pettitte (in the latter case, Clemens did not even allege a specific year). Is this mere sloppiness? Or is there a concerted effort to ignore the pleading requirements for defamation claims in order to impede Mr. McNamee’s potential defenses?

This is not a mere procedural concern. Defamation law is quite technical, and it is necessary to know the exact words allegedly to be defamatory to determine which defenses are applicable (e.g., opinion, privilege, etc.). *Asay*, 594 F.3d at 692. Without any specificity about the timing, nature, or context of these allegations, it is virtually impossible to defend against them. Courts routinely dismiss defamation claims where plaintiff “failed to identify with the requisite specificity what statements are defamatory.” *See, e.g., Harris v. City of Seattle*, 315 F.Supp.2d 1112, 1122-24 (W.D. Wash. 2004) (holding that defamation claims failed because the plaintiff alleged only that defendants “fabricated stories” and disseminated reports that

“contained falsities” but did not identify what these alleged “falsities” and “stories” were or when the statements occurred).¹⁴

C. The new allegations that Mr. McNamee defamed Plaintiff in conversations with Mr. Pettitte in 1999/2000 and in 2003/2004 are barred by the one year statute of limitations.

Clemens’s Amended Complaint alleges, in a single paragraph, that “McNamee had previously told Andy Pettitte . . . that Clemens had used steroids and HGH.” Am. Compl. ¶ 36. For the same reasons this claim fails on a 12(b)(2) motion, it fails on a 12(b)(6) motion, namely that the Amended Complaint, on its face, alleges that these conversations occurred outside the one-year statute of limitations.

As detailed *supra* at I.B., this Court need only examine matters in the public record to hold that, as a matter of law, Clemens’s claim fails as the statements are outside the statute of limitations and the discovery rule is inapplicable. Testimony that is a matter of public record is appropriate for consideration on a 12(b)(6) motion to dismiss. *See Cinel v. Connick*, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994); 5B Wright & Miller § 1357 (explaining that in resolving a motion to dismiss a court “is not limited to the four corners of the complaint,” but may consider “items subject to judicial notice” and “matters of public record”); *Nelson v. Cauley*, No. 3:04-CV-0828-G, 2005 WL 221349, at *3-4 (N.D. Tex. Jan. 27, 2005) (looking to trial testimony on a motion to dismiss, as it is a matter of public record).

¹⁴ *See also Ahmed v. Gelfand*, 160 F.Supp.2d 408, 416 (E.D.N.Y. 2001) (holding that allegations were insufficient where plaintiff did not identify which defendant made the allegedly defamatory statements or when or to whom the statements were made); *White v. Hansen*, No. C 05-784, 2005 WL 1806367, at *9 (N.D. Cal. July 28, 2005) (holding that allegation that defendant made belittling statements was insufficient where plaintiff did not identify any specific statements or state to whom the statements were made); *Celli v. Shoell*, 995 F.Supp. 1337, 1345-46 (D. Utah 1998) (same); *Weeks v. Distinctive Appliance Corp.*, No. 84-9716, 1985 WL 3536, at * 4 (N.D. Ill. Oct. 24, 1985) (same); *Leo Winter Assocs., Inc. v. Dep’t of Health & Human Servs.*, 497 F.Supp. 429, 432 (D. D.C. 1980) (same).

D. Mr. McNamee’s statements to Senator Mitchell are absolutely immune because they were made as part of a federal government investigation.

Mr. McNamee’s statements to Senator Mitchell are absolutely immune from suit because they were made as part of a federal government investigation.

It is clear under Texas law that statements to law enforcement officials have absolute immunity from defamation claims as they are “communications to [a] government agenc[y],” so long as the statements are part of an “ongoing . . . investigation” and are not unsolicited. *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 994 (5th Cir. 1999) (citing *Thomas v. Bracey*, 940 S.W.2d 340, 343 (Tex. App. 1997)). Mr. Clemens alleges that Mr. McNamee was contacted as part of a federal criminal investigation into controlled substances; thus there were no “unsolicited” statements. Am. Compl. ¶ 28. The allegedly defamatory statements stemmed from Mr. McNamee’s cooperation with federal officials at a time when he was under threat of prosecution. The only question before this Court is whether the statements to Senator Mitchell were part of that investigation. This is a “question of law to be determined by the court,” and “[a]ll doubt should be resolved in favor of the communication’s relation to the proceeding.” *Thomas*, 940 S.W.2d at 343. Here Mr. McNamee’s statements to Senator Mitchell were plainly part of the federal investigation.

The Amended Complaint selectively quotes the Mitchell Commission Report to support its allegation that the government investigators did not use the Mitchell commission’s investigation to do their work for them.¹⁵ (This Report is a matter of public record and

¹⁵ The Amended Complaint also quotes Mr. Ward, Mr. McNamee’s counsel, out of context to support its implication that Mr. McNamee’s cooperation with the Mitchell Commission was independent of his proffer agreement with the federal government, when nothing could be further from the truth. Am. Compl. ¶¶ 30, 32. The New York Times Article, the likely source of this quote, included this paragraph, which supports the opposite conclusion:

appropriate for consideration on a motion to dismiss. *Cinel*, 15 F.3d at 1343 n.6.) When viewed in its entirety, however, the Report makes clear that, while the Mitchell Commission was a private investigation, it was intimately associated with the federal investigation. The Report states:

As part of his cooperation with the U.S. Attorney's Office, and *at its request*, McNamee agreed to three interviews by me and my staff, one in person and two by telephone. McNamee's personal lawyer participated in the interviews. Also participating were *federal prosecutors and agents* from the F.B.I. and the Internal Revenue Service. *On each occasion, McNamee was advised that he could face criminal charges if he made any false statements during these interviews, which were deemed by the prosecutors to be subject to his written agreement with the U.S. Attorney's Office.*

Mitchell Report, Ex. 11 at 167-68 (emphasis added).

Thus, the Amended Complaint and the Mitchell Report make clear that

McNamee's interviews with Senator Mitchell were part of the federal investigation:

- Federal authorities "wanted McNamee to repeat his story to former United States Senator George Mitchell." Am. Compl. ¶ 30; Ex. 11 at 167-68.
- Mr. McNamee "initially refused to speak with Mitchell," but "he was told by the federal government that he would be moved from 'witness' status back to a 'target' status" if he refused." Am. Compl. ¶ 32. "McNamee has stated that when faced again with the threat of federal prosecution, he agreed to speak with the Mitchell Commission." *Id.*
- "[F]ederal prosecutors and agents from the F.B.I. and the Internal Revenue Service" "participated" in Mr. McNamee's meetings with Senator Mitchell. Ex. 11 at 167-68.
- The federal investigators warned Mr. McNamee that he could face criminal charges for any false statements that he made to Senator Mitchell, just as he would for false statements made to the federal prosecutors. *Id.*

Ward said the proffer agreement required McNamee to cooperate with the government but not Mitchell; that request came later. "Nothing was written, but it was understood he would continue to speak with him, and if he did so, he wouldn't be charged," Ward said.

Duff Wilson and Michael S. Schmidt, *Trainer's Steroid Testimony Followed Deal With Prosecutors*, N.Y. Times, Dec. 18, 2007, at D1, Ex. 9.

- The interviews by Senator Mitchell “were deemed by the prosecutors to be subject to his written agreement with the U.S. Attorney’s Office.” *Id.*

The protection given to statements made to prosecutors must encompass the allegedly defamatory statements made to Senator Mitchell, as these statements were also made to federal prosecutors as part of their investigation. The federal investigators decided that having Mr. McNamee speak to Senator Mitchell was important to their investigation and decided to include the Mitchell investigators in their continuing interrogation of Mr. McNamee. Why else would they warn Mr. McNamee that he would be subject to prosecution if he lied to Senator Mitchell? By direct inference, the Amended Complaint makes clear that the federal investigators used those meetings to develop their investigation. This Court cannot second-guess the prosecutors’ decision on how to proceed with their investigation. Nor can Mr. McNamee be forced to defend against a defamation action because he told the truth when faced with criminal sanctions for lying. And any doubt should be resolved in favor of immunity. *Thomas*, 940 S.W.2d at 343.

As the Court in *Darrah v. Hinds* explained, the “doctrine of absolute privilege is founded on public policy grounds. Obviously, the proper administration of justice requires full disclosure from witnesses without fear of retaliatory lawsuits for defamation of any sort.” 720 S.W. 2d 689, 691 (Tex. App. 1986) (citation omitted). Similarly, in construing Ohio law which immunizes the reporting of criminal activity to a prosecutor, the court explained that the purpose of this rule, “[a]s a matter of public policy,” is that it “will encourage the reporting of criminal activity by removing any threat of reprisal in the form of civil liability. This, in turn, will aid in the proper investigation of criminal activity and the prosecution of those responsible for the crime.” *M.J. DiCorpo, Inc. v. Sweeney*, 634 N.E.2d 203, 209 (Ohio 1994).

Policy considerations support including all of Mr. McNamee’s statements to Senator Mitchell within the ambit of absolute immunity. In this situation, where prosecutors arrange and attend a meeting with a witness because those prosecutors decide that inclusion of such third parties will serve law enforcement purposes, the “proper investigation of criminal activity,” *id.*, compels protecting that witness’s statements (in the face of criminal repercussions for lying) from a subsequent defamation lawsuit. To hold otherwise would impede criminal investigations by obscuring when, and under what conditions, contact with prosecutors is absolutely privileged from a defamation lawsuit. Furthermore, here there was ample protection against defamatory allegations—the prosecutors could have brought a criminal action if they believed McNamee had made false statements.

As Mr. McNamee’s statements are at the core of prosecutorial activity, they must be immune from suit.

E. The alleged defamatory statements are not defamatory as a matter of law.

The alleged defamatory statements, are not, in fact defamatory as a matter of law as they would not expose Clemens to “public hatred, contempt or ridicule, or financial injury or impeach [his] any person’s honesty, integrity, virtue, or reputation.” Tex. Civ. Prac. & Rem.. § 73.001 (libel definition); *see also Double Diamond, Inc. v. Van Tyne*, 109 S.W.3d 848, 854 (Tex. App. 2003) (“Whether a publication is capable of the defamatory meaning alleged by the plaintiff is a question of law to be determined by the court.”).

1. The alleged defamatory statements are not defamatory because they do not accuse Clemens of deciding to use HGH or steroids in order to improve his baseball performance.

The Amended Complaint does not allege that McNamee said that Mr. Clemens knowingly used performance enhancing drugs. Nor does it allege that McNamee stated that

Clemens purchased performance enhancing substances. Nor does it allege that McNamee stated that Clemens requested that McNamee inject him with performance enhancing substances. It does not even allege that McNamee stated that Mr. Clemens used such substances without a prescription or for non-medical purposes. Nor does it allege that Mr. Clemens used steroids or HGH to be a better baseball player. Nor does it even state that Mr. Clemens used anabolic steroids (other steroids, such as cortisone, are and were available over-the-counter).

It is not *per se* contemptible or dishonest to be injected with steroids or HGH. Clemens is asking this Court to infer that McNamee stated that Mr. Clemens cheated by knowingly using steroids and HGH to improve his pitching performance. Yet the Amended Complaint states no such thing. Defamation is a technical and narrowly-construed tort and requires explicit allegations subject to specific damages inferences. The Amended Complaint fails in this regard.

In fact, in this context, a reasonable person hearing Mr. McNamee's alleged statements would believe that Mr. Clemens *did not know* what he was being injected with. *See Double Diamond*, 109 S.W.3d at 854 ("We construe the alleged defamatory publication as a whole, in light of the surrounding circumstances, based upon how a person of ordinary intelligence would perceive it."). In fact, this is the exact position that Clemens has asserted, namely that McNamee injected him with Lidocaine and B12. Clemens Dep., Ex. 10, at 37-38, 44. As alleged in the Amended Complaint, McNamee was Clemens's strength and condition trainer; McNamee first trained Clemens when McNamee was employed by the Toronto Blue Jays; McNamee continued training Clemens though McNamee's employment with the New York Yankees. Am. Compl. ¶¶ 5, 15-16, 18. Their relationship was one of trainer and trainee. A reasonable reader of the statements alleged in the Amended Complaint would believe that

Clemens would trust his trainer—a trainer who was employed by numerous Major League Baseball teams—and not inquire as to what he was being injected with. The question is not how Plaintiff understood McNamee’s alleged statements, but rather a reasonable person’s understanding of the specific allegations of the Amended Complaint: What do they mean? What do they fail to say?

2. In particular, McNamee’s alleged statements to Pettitte are not defamatory as a matter of law.

Mr. Pettitte’s Congressional testimony demonstrates that these conversations were not defamatory as a matter of law (to the extent Defendant can pinpoint them without the required specificity in pleading, *see supra* II.B). As this testimony is in the public record, the Court may rely on it to dismiss Mr. Clemens’s claim. *Cinel*, 15 F.3d at 1343 n.6.

a. The 1999/2000 conversation consisted of statements from Mr. Pettitte to Mr. McNamee, not *vice versa*.

Mr. Pettitte swore in his affidavit before Congress:

Shortly after my conversation [in 1999 or 2000] with Roger, I spoke with Brian McNamee. Only he and I were parties to the conversation. *I asked Brian about HGH and told him* that Roger said he had used it. Brian McNamee became angry. He told me that Roger should not have told me about his HGH use because it was supposed to be confidential.

Ex. 2 ¶ 3 (emphasis added).

This conversation demonstrates that two elements of the tort of defamation were not met in this 1999/2000 conversation: there is no publication, nor is there any damage to plaintiff’s reputation. *Moore v. Waldrop*, 166 S.W.3d 380, 384 (Tex. App. 2005). Mr. Pettitte states that it was he who “told” Mr. McNamee about Clemens’s HGH use, not vice versa. Mr. McNamee, rather than sharing information, was upset that Mr. Pettitte knew of this information. Furthermore, a statement is only defamatory if it injures plaintiff’s reputation. *Id.* Mr. Pettitte,

according to his testimony, *already knew* that Mr. Clemens used HGH (per Mr. Pettitte's earlier conversation with Mr. Clemens). Thus, Mr. McNamee could not further injure Clemens's reputation in Mr. Pettitte's eyes. Furthermore, the conversation's context shows that Mr. Pettitte was inquiring about HGH in order to use it himself. Clemens cannot claim injury from Pettitte's knowledge of Clemens's alleged use of performance enhancing substances, when Pettitte himself wanted to, and subsequently admits to, use of these substances. Ex. 2 ¶ 8.

b. The 2003/2004 Conversation did not affect Mr. Pettitte's view of Mr. Clemens.

Mr. Pettitte testified to Congress about the 2003/2004 conversation where Mr. McNamee allegedly stated that Mr. Clemens had used steroids, and explained that this statement had no effect on him. He explained his reaction: "But I just kind of – to tell you the truth, I just like, just kind of blew, it off." Ex. 4 at 32-33. He further explains that while it was a surprise to learn that Mr. Clemens used steroids, "I just kind of let it be as a wash, you know, just kind of go in one ear and out the other ear basically." *Id.* at 33.

Pettitte, by his own testimony, was not affected by these statements. Thus, these statements cannot be defamatory as they did not lower Clemens in Mr. Pettitte's estimation of Mr. Pettitte, nor "expose [Clemens] to public hatred, contempt, ridicule, or financial injury." Tex. Civ. Prac. & Rem.Code Ann. § 73. There was no injury because Mr. Pettitte, by his own testimony, paid these statements no mind. Thus, as a matter of law, the 2003/2004 alleged statements are not capable of defamation. Indeed, because Mr. Pettitte already knew that Mr. Clemens used HGH, the additional revelation that he also used steroids would cause no further damage to Mr. Clemens's reputation in Mr. Pettitte's view. Furthermore, by this point Mr. Pettitte had used performance enhancing drugs, *see* Ex. 2 ¶ 8, so there can be no damage to Clemens's reputation in Pettitte's eyes to learn that Clemens also used these substances.

Mr. McNamee alleged statements to Mr. Pettitte in 1999/2000 and 2003/2004 were not defamatory.

3. The statement to Mr. Heyman was not defamation.

Mr. McNamee is alleged to have defamed Plaintiff in a conversation with Mr. Heyman on January 6, 2008. Am. Compl. ¶ 35. By that point the Mitchell Report had been published (it was published on December 13, 2007). *Id.* ¶ 34. Every major media outlet had already covered the story, including SI.com. On its face, it is clear that Mr. McNamee was merely relating the statements he had already told Senator Mitchell. The SI.com story therefore had no effect. Furthermore, Mr. McNamee's truthful report of his conversations with Senator Mitchell should be privileged, tantamount to the "fair reporting" privilege under Texas state law. *Cf.* Texas Civil Practice & Remedies Code § 73.002.

F. The Amended Complaint fails as it does not allege special damages and the allegations do not fall within any *per se* category.

Under Texas law, slander *per se* is limited to a narrow band of statements: "(1) imputation of a crime, (2) imputation of a loathsome disease, (3) injury to a person's office, business, profession, or calling, and (4) imputation of sexual misconduct." *Fiber Sys. Intern., Inc. v. Roehrs*, 470 F.3d 1150, 1161 (5th Cir. 2006). The Amended Complaint is defective because it fails to allege special damages, and though it alleges that Mr. McNamee's comments fit within the *per se* categories for imputation of a crime, and injury to a person's office, business, profession, or calling, Am. Compl. ¶¶ 41, 49, the statements fit into neither category.

First, the Amended Complaint fails to allege special damages, and only alleges general damages. *See Bingham v. Sw. Bell Yellow Pages, Inc.*, No. 2-06-229-CV, 2008 WL 163551, at *3 n.5 (Tex. App. Jan. 17, 2008) ("General damages are damages for injuries to

character or reputation, injuries to feelings, mental anguish, and other like injuries incapable of monetary valuation, while special damages involve some form of pecuniary or economic loss.” (internal citations omitted)).

Second, the use of steroids or HGH, in itself, is not a crime. Both are perfectly legal if used with a prescription. Nowhere does the Amended Complaint allege that Mr. McNamee made any mention of whether or not Mr. Clemens used these drugs with or without a prescription (of course without any specifics in the Amended Complaint as to the allegedly defamatory statements, this argument requires some conjecture). To the extent Plaintiff contends that Mr. McNamee implied by innuendo that Mr. Clemens used these drugs without a prescription, he must allege special damages, because “innuendo should never be considered when interpreting slander *per se*. The very definition of ‘*per se*,’ ‘in and of itself,’ precludes the use of innuendo.” *Moore*, 166 S.W.3d at 386.

Finally, Mr. Clemens’s contention that Mr. McNamee’s alleged statements caused *per se* injury to Mr. Clemens’s business fails because a *per se* claim is inapplicable where the conduct relates only to plaintiff’s *former* career. *Cf. Chuy v. Phila. Eagles Football Club*, 595 F.2d 1265, 1281-82 (3d Cir. 1979) (holding that doctor’s statements that football player had potentially fatal disease did not fall within *per se* category as plaintiff’s “career as a football player was over . . . and the article . . . was not published until [after that point]” (citing Restatement (Second) of Torts, § 573, cmt. c (2002) (stating that it is not within *per se* category to impute misconduct “of a public officer whose term has expired”))). Furthermore, in 1998, 2000, and 2001 (when Mr. McNamee states that he injected Mr. Clemens), it was not a violation of the Major League Baseball rules in effect at that point, per the terms of the collective

bargaining agreement, for a player to take steroids or HGH.¹⁶ To claim that Defendant's statements caused injury to Plaintiff's business once again requires innuendo and inferences which, as explained above, cannot be considered when interpreting slander *per se*.

To the extent Mr. McNamee's statements do not fall within a *per se* category, the Amended Complaint fails because it does not plead special damages, as is required for slander *per quod*. See *Moore*, 166 S.W.3d at 384.

III. IN THE ALTERNATIVE THIS ACTION SHOULD BE TRANSFERRED TO THE SOUTHERN DISTRICT OF NEW YORK

Even if this Court were to find it had personal jurisdiction over Mr. McNamee (and it does not), it should transfer this case to the Southern District of New York, which is the more appropriate venue: Defendant does not reside in Texas, much of the events giving rise to the claim occurred in New York, they did not occur in Texas, many of the witnesses are in New York, and the action would be proper in a New York federal court.

Section 1404(a) of Title 28 governs transfer of venue and provides, in its entirety: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. 1404(a). Here, defendant seeks transfer to the Southern District of New York, the district where Mr. McNamee spoke to Senator Mitchell and where Mr. McNamee alleges that he injected Mr. Clemens and the district where the New York Yankees are located. The action "might have been brought" in the SDNY pursuant to 28 U.S.C. § 1391(a)(2) as "a substantial part of the events or omissions giving rise to the claim occurred," there.¹⁷

¹⁶ See Special Report: Drug Policy in Baseball, Event Timeline, at http://mlb.mlb.com/mlb/news/drug_policy.jsp?content=timeline.

¹⁷ Defendant would not oppose transfer to the Eastern District of New York, the district where he resides, and therefore a district where the action might have been brought pursuant to 28 U.S.C. § 1391(a)(1).

In analyzing a motion to transfer venue, courts consider private and public factors. *Piper Aircraft Co. v. Reynolds*, 454 U.S. 235, 241 n.6 (1981). The private concerns include 1) the relative ease of access to sources of proof; 2) the availability of compulsory process to secure the attendance of witnesses; 3) the cost of attendance for willing witnesses; and 4) all other practical problems that make trial of a case easy, expeditious and inexpensive. The public concerns include: 1) the administrative difficulties flowing from court congestion; 2) the local interest in having localized interests decided at home; 3) the familiarity of the forum with the law that will govern the case; and 4) the avoidance of unnecessary problems of conflict of laws of the application of foreign law. *Id.*

Both the public and private factors compel transferring this case. Furthermore, while Clemens's choice of forum "is a factor," the Fifth Circuit has held that this "factor is not controlling." *Garner v. Wolfenbarger*, 433 F.2d 117, 119 (5th Cir. 1970); *see also Radio Santa Fe, Inc. v. Sena*, 687 F.Supp. 284, 287 (E.D. Tex. 1988) ("Because a § 1404 transfer is a less drastic procedural measure than dismissal under the doctrine of *forum non conveniens*, the plaintiff's choice of venue may be disregarded for less impelling reasons when considering a defendant's motion to transfer. Accordingly, such a motion more freely may be granted." (internal quotations omitted)). Plaintiff's choice of forum is entitled to particularly "less weight" here, as this Court was not plaintiff's choice; plaintiff originally filed his claim in the 129th Judicial District Court of Harris County Texas, and the case is only in this forum because defendant removed it. *Silver Knight Sales & Mktg. Ltd. v. Globex Int'l, Inc.*, No. 2:06-cv-123, 2006 WL 3230770, at *4 (D.C. Ohio Nov. 6, 2006).

Furthermore, the inconvenience to Mr. McNamee to force him to litigate in Texas far outweighs any inconvenience to Mr. Clemens. Mr. Clemens is a person of national

prominence, with extensive financial resources, who travels extensively in private jets as part of his normal routine, and who formerly lived in New York. Am. Compl. ¶ 24. Mr. McNamee, in contrast, is faced with mounting obligations to care for four dependants, financial obligations that outpace his earnings, and has not visited Texas in over a year (and never lived in Texas). Ex. 1 ¶¶ 5, 6, 10. Courts often consider the relative financial position of the parties and here such an analysis demonstrates that “plaintiff [is] in a better position to bear the cost of litigating in [New York], the transferee district.” *Volkswagen Aktiengesellschaft v. Dee Eng’g, Inc.*, 1:02-cv-1669-CJM, 2003 WL 1089515, at *3 (S.D. Ind. Mar. 4, 2003). Furthermore, the costs of the litigating in Texas would impose enormous litigation expenses, in the way of travel and hotel fees for counsel, another relevant factor. *See Mobil Oil Corp. v. W.R. Grace & Co.*, 334 F.Supp. 117, 127 (S.D. Tex. 1971).

Most importantly, the convenience of the witnesses supports transfer. *See LeBouef v. Gulf Operators, Inc.*, 20 F.Supp.2d 1057, 1060 (S.D. Tex. 1998). Here, there are numerous witnesses for whom New York will be a more convenient forum and who are outside the subpoena range of this Court:¹⁸

- Senator George Mitchell and Charles Scheeler. Senator Mitchell has his office in New York, and Charles Scheeler, who worked with him on the Report and appeared before Congress to discuss the report, works nearby, in Baltimore.
- Kirk Radomski, who can testify that he sent performance enhancing substances to Clemens’s home.
- Brian’s wife (divorce pending) whose testimony will be offered regarding the chain of custody of the DNA materials.
- Jon Heyman, the Sports Illustrated reporter to whom defendant allegedly made defamatory statements.

¹⁸ Even Andy Pettitte, an important witness who has his residence near Houston, Texas, is currently employed with the New York Yankees and also resides in Westchester, New York.

- Carlos Doe (last name unknown), Mr. Clemens’s doorman during the time he lived in New York, who could testify as to McNamee’s pattern of 15-minute visits to Mr. Clemens’s home (which support McNamee’s allegation that he was visiting Clemens to inject him).
- New York Yankees players, such as Derek Jeter, Mariano Rivera, and Jason Giambi, who were teammates of Roger Clemens.
- Numerous team trainers and doctors who work for the New York Yankees will be essential to combat Mr. Clemens’s claim (as he testified to Congress) that Mr. McNamee injected him with Lidocaine and B-12.
- Angela Moyer, a bartender whom the press has reported had a relationship with Roger Clemens.

New York has the most interest in this action. New York is where Mr. McNamee published his allegedly defamatory statements to Senator Mitchell and Mr. Heyman.

Furthermore, this case will ultimately be about the truth of Mr. McNamee’s statements that he injected Mr. Clemens with HGH and steroids. The only state in which those injections occurred is New York (other injections occurred in Toronto, which is not a proper forum). Mr. McNamee has never stated — nor does the Amended Complaint allege — that he injected Mr. Clemens with performance enhancing drugs in Texas.

Finally, conservation of judicial resources compels transfer. If this Court were to find that it has personal jurisdiction over Mr. McNamee for certain claims and not others that would weigh strongly in favor of transfer “to avoid multiplicity of litigation as a result of a single transaction or event.” 15 Wright & Miller § 3854. Additionally, given the pending personal jurisdiction issue presented to this Court, and given that there is no dispute that a New York court would have jurisdiction over Mr. McNamee, transfer would conserve the judicial resources attendant to resolving a complicated jurisdictional motion: “Substantial time, money and effort will be required to determine this preliminary jurisdictional issue which are rendered unnecessary if the action is transferred to the [a New York district court], which has *in personam*

jurisdiction over the defendant and is a forum where the action might have been brought. A transfer, obviating a jurisdictional difficulty, has been found to serve the interests of justice within the meaning of that language in § 1404(a).” *Donnelly v. Klosters Rederi A/S*, 515 F.Supp. 5, 7 (E.D. Pa. 1981).

If this Court does not dismiss Clemens’s Amended Complaint in its entirety, it should transfer this case to the Southern District of New York.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Mr. McNamee’s motion to dismiss the Amended Complaint should be granted, or, in the alternative, this Court should transfer this case to the Southern District of New York.

Date: July 2, 2008
New York, NY

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of July 2008, a true and correct copy of the foregoing instrument was served upon all counsel of record in accordance with the Federal Rules of Civil Procedure, *to-wit*:

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