

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 REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF  
DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT,  
OR, IN THE ALTERNATIVE, TO TRANSFER VENUE**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... (iii-vi)

PRELIMINARY STATEMENT ..... 1

DISCUSSION ..... 2

I. THIS COURT LACKS PERSONAL JURISDICTION OVER  
McNAMEE ..... 2

A. McNamee does not have minimal contacts with  
Texas for the assertion of specific jurisdiction ..... 4

1. This Court lacks personal jurisdiction over  
McNamee for claims arising from his alleged  
statements to Senator Mitchell and SI.com ..... 4

2. This Court lacks personal jurisdiction over  
McNamee for claims arising from his alleged  
conversations with Pettitte in 1999/2000 and  
2003/2004 as those are outside the statute of  
limitations ..... 8

a. This Court can consider the timeliness  
of Clemens’s claim arising from purported  
contacts with Texas in 1999/2000 and  
2003/2004 in a 12(b)(2) motion ..... 8

b. Clemens cannot seek the benefit of the  
discovery rule to assert jurisdiction over  
defendant for claims arising from contacts  
with Texas in 1999/2000 or 2003/2004 ..... 9

B. Clemens must separately demonstrate jurisdiction over  
the statements to Pettitte and the statements to  
Mitchell/SI.com and cannot use pendent personal  
jurisdiction to consolidate these separate claims ..... 15

C. Asserting jurisdiction over McNamee would offend  
traditional notions of fair play and substantial justice. .... 17

II.	IN THE ALTERNATIVE, THIS COURT SHOULD TRANSFER VENUE TO THE SOUTHERN DISTRICT OF NEW YORK .....	19
III.	PLAINTIFF’S AMENDED COMPLAINT FAILS TO STATE A CLAIM .....	21
A.	Clemens does not dispute that his intentional infliction of emotional distress claim must be dismissed .....	21
B.	The Court can consider public records in resolving a 12(b)(6) motion .....	21
C.	Looking to the Amended Complaint and public records, the claims arising out of the statements to Pettitte are untimely .....	23
D.	McNamee’s statements published by Senator Mitchell are absolutely immune from suit .....	23
E.	The allegedly defamatory statements are not plead with sufficient specificity .....	28
F.	The statements to Pettitte and SI.com are not defamatory .....	30
G.	Clemens has not pleaded defamation <i>per se</i> , nor alleged special damages .....	31
H.	The statements to Pettitte and SI.com, standing alone, do not meet the amount in controversy requirement .....	34
	CONCLUSION .....	35

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Asay v. Hallmark Cards, Inc.</i> , 594 F.2d 692 (8th Cir. 1979) .....	28
<i>Bell Atlantic Corp. v. Twombly</i> , ___ U.S. ___, 127 S.Ct. 1955 (2007) .....	29
<i>Boice v. Unisys Corp.</i> , 50 F.3d 1145 (2d Cir. 1995) .....	27
<i>Burger King Co. v. Rudzewicz</i> , 471 U.S. 462 (1985) .....	6,18
<i>Burnaman v. J. C. Penney Co.</i> , 181 F.Supp. 633 (S.D.Tx. 1960) .....	31
<i>Bushnell Corp. v. ITT Corp.</i> , 973 F. Supp. 1276 (D. Kan. 1997) .....	28
<i>Calder v. Jones</i> , 465 U.S. 783 (1984) .....	4-6
<i>Chuy v. Phila. Eagles Football Club</i> , 595 F.2d 1265 (3d Cir. 1979) .....	33
<i>Coleman v. Dretke</i> , 409 F.3d 665 (5th Cir. 2005) (per curiam) .....	21
<i>Cuvillier v. Taylor</i> , 503 F.3d 397 (5th Cir. 2007) .....	10
<i>DaCosta v. Laird</i> , 471 F.2d 1146, 1155 n.14 (2d Cir. 1973) .....	21
<i>Donnelly v. Klosters Rederi A/S</i> , 515 F.Supp. 5 (E.D. Pa. 1981) .....	20
<i>Fielding v. Hubert Burda Media, Inc.</i> , 415 F.3d 419 (5th Cir. 2005) .....	5

<i>Friedl v. City of New York</i> , 210 F.3d 79 (2d Cir. 2000) .....	22
<i>Global Network Communications, Inc. v. City of New York</i> , 458 F.3d 150 (2d Cir. 2006) .....	22
<i>Gulati v. Zuckerman</i> , 723 F.Supp. 353 (E.D.Pa. 1989) .....	24
<i>Hall v. Virginia</i> , 385 F.3d 421 (4th Cir. 2004) .....	21
<i>Hargrave v. Oki Nursery, Inc.</i> , 646 F.2d 716 (2d Cir.1981) .....	15
<i>Hawk Aircargo, Inc. v. Chao</i> , 418 F.3d 453 (5th Cir.2005) .....	22
<i>Holmes v. Eddy</i> , 341 F.2d 477 (4th Cir. 1965) .....	24
<i>Hugel v. McNell</i> , 886 F.2d 1 (1st Cir. 1989) .....	8
<i>IMO Industries, Inc. v. Kiekert AG</i> , 155 F.3d 254 (3d Cir. 1998) .....	4, 6
<i>Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee</i> , 456 U.S. 694 (1982) .....	17
<i>Johnson &amp; Johnson v. American Nat. Red Cross</i> , 528 F.Supp.2d 462 (S.D.N.Y. 2008) .....	21
<i>Mangold v. Analytic Services, Inc.</i> , 77 F.3d 1442 (4th Cir. 1996) .....	24
<i>Northington v. Jackson</i> , 973 F.2d 1518 (10th Cir. 1992) .....	22
<i>Panda Brandywine Corp. v. Potomac Elec. Power Co.</i> , 253 F.3d 865 (5th Cir. 2001) .....	5, 11

<i>Remick v. Manfredy</i> , 238 F.3d 248 (3d Cir. 2001) .....	5
<i>Revell v. Lidov</i> , 317 F.3d 467 (5th Cir. 2002) .....	3-5, 7
<i>Reynolds v. Int’l Amateur Athletic Fed’n</i> , 23 F.3d 1110 (6th Cir. 1994) .....	5
<i>Shanks v. AlliedSignal, Inc.</i> , 169 F.3d 988 (5th Cir. 1999) .....	23-25
<i>Summer v. Land &amp; Leisure, Inc.</i> , 664 F.2d 965 (5th Cir. 1981) .....	10
<i>Swierkiewicz v. Sorema</i> , 534 U.S. 506 (2002) .....	29
<i>Travelers Indem. Co. v. Calvert Fire Ins. Co.</i> , 798 F.2d 826 (5th Cir. 1986) .....	11
<i>United States v. Massey</i> , 550 F.2d 300 (5th Cir. 1977) .....	27
<i>Wyatt v. Kaplan</i> , 686 F.2d 276 (5th Cir. 1982) .....	9
<i>Young v. New Haven Advocate</i> , 315 F.3d 256 (4th Cir. 2002) .....	5

## STATE CASES

<i>Booker v. Real Homes, Inc.</i> , 103 S.W.3d 487 (Tex.App.-San Antonio 2003) .....	10
<i>Darrah v. Hinds</i> , 720 S.W. 2d 689 (Tex. App. 1986) .....	25
<i>Maier v. Maretti</i> , 448 Pa. Super. 276 (Pa. Super. 1995) .....	31
<i>Moore v. Waldrop</i> ,	

166 S.W.3d 380 (Tex.App.-Waco 2005, no pet.) .....	16, 31
<i>Newsom v. Brod</i> ,	
89 S.W.3d 732 (Tex.App.-Houston 2002) .....	10
<i>Thomas v. Bracey</i> ,	
940 S.W.2d 340 (Tex. App. 1997) .....	25
<i>Williams v. Taylor</i> ,	
129 Cal.App.3d 745 (1982) .....	24
<i>Zarate v. Cortinas</i> ,	
553 S.W.2d 652 (Tex. Civ. App.—Corpus Christi 1977, no writ) .....	25

FEDERAL STATUTES

18 U.S.C. § 1001 .....	27
28 U.S.C. § 1332 .....	34
28 U.S.C. § 1404(a) .....	1

Defendant submits this reply brief in further support of his motion to dismiss Plaintiff's Amended Complaint pursuant to (1) Fed. R. Civ. P. 12(b)(2), as this court lacks personal jurisdiction over Defendant and (2) Fed. R. Civ. P. 12(b)(6), as the Amended Complaint fails to state a claim. In the alternative, Plaintiff asks this Court to transfer venue to the Southern District of New York, pursuant to 28 U.S.C. § 1404(a).

### **PRELIMINARY STATEMENT**

From the Sunday evening in early January when Clemens first filed this case until today, his entire focus has been to enervate Brian McNamee, someone he knows to have almost no money, by dragging him into Texas courts where, in Clemens's view, he will have a better shot at preventing Brian from defending himself. This is Clemens's continuing bully tactic to try to "prove" his lies and salvage the career he destroyed by prevaricating in front of the fans who watched him self-destruct on national television. His willingness to spend his vast fortune to crush his reluctant accuser hinges on this legal tactic. The degree to which Clemens is focused on this tactic is betrayed, glaringly, by the lengths to which his Amended Complaint and response to defendant's motion to dismiss stretch in their attempts to assert jurisdiction in Texas. In support of this undertaking, Clemens resorts to arguments which are entirely spurious and which are addressed in this reply brief:

- He concedes that general jurisdiction is not in play in this case; yet, he repeatedly cites McNamee's irrelevant sporadic contacts with Texas;
- He attempts to conflate claims of defamation arising out of the Mitchell Report and SI.com, which report on Clemens's steroid use in New York and Toronto but not in Texas, with stale claims alleging defamatory statements to Andy Pettitte in Texas, in an effort to support this Court's specific jurisdiction;

- He argues, contorting the applicable Fifth Circuit precedent, that there is specific jurisdiction over McNamee in Texas based solely on the alleged injury to a Texas resident;
- He argues, without any support in the Fifth Circuit, that this Court has pendent personal jurisdiction over all the claims, even though he concedes that the claims based on alleged statements to Pettitte are the only claims that concern Texas events; and
- He makes frivolous claims for intentional infliction of emotional distress in order to buttress his jurisdictional arguments.

Clemens’s effort to shanghai Brian to Texas, to subject him to the expense and rigors of discovery and, perhaps, trial, should not be permitted. That is, of course, why Brian removed this case to federal court: to obtain the dispassionate scrutiny needed to neutralize this insistent ploy for home field advantage. Unlike visiting teams and Clemens himself, Brian cannot afford private airplanes, hotel suites and limousines. He must look to this Court to dismiss this case on the grounds initially argued — that no actionable defamation took place and the pleading is deficient, as well as the inadequacy of the jurisdictional basis. In the alternative, he seeks to have this Court exercise its discretion to transfer this case to New York.

## **DISCUSSION**

### **I. This Court lacks personal jurisdiction over McNamee**

Plaintiff aims to obfuscate the personal jurisdiction inquiry by conflating what should be two distinct analyses:

- First, does this Court have personal jurisdiction over McNamee’s alleged statements to Senator Mitchell and SI.com since these statements were *not* about the “Texas activities of a Texas plaintiff,” but were instead about Clemens’s activities in Florida, New York, and Toronto?

- Second, does this Court have personal jurisdiction over McNamee’s alleged statements in “1999 or 2000” and “2003 or 2004” to Pettitte, given that the Texas contacts out of which this claim arises are old and untimely?

Irrelevant to either analysis is McNamee’s business contacts with Texas; such contacts are only relevant to general jurisdiction, and Plaintiff has specifically waived any claim of general jurisdiction. *See* Pl. Br. 9. Clemens’s repeated and extensive allegations about McNamee’s general business contacts with Texas distract from the question at hand: Specific jurisdiction arises when the defendant’s contacts with the forum “arise from, or are directly related to, the cause of action.” *Revell v. Lidov*, 317 F.3d 467, 470 (5th Cir. 2002). As the Fifth Circuit has made clear, for “specific jurisdiction we look *only* to the contact out of which the cause of action arises.” *Id.* at 472 (emphasis added). In *Revell* the defamation claim arose from “the maintenance of the internet bulletin board;” the Court explained that because the claim “does not arise out of the solicitation of subscriptions or applications by Columbia, those portions of the website *need not be considered.*” *Id.* (emphasis added). Thus, Clemens’s continual mention of McNamee’s visits to Texas is calculated to prejudice, but legally irrelevant.

Finally, if this Court were to find — which, respectfully, it should not, *see infra* I.A.1. — that it lacks jurisdiction over McNamee’s statements to Mitchell and SI.com but that there is jurisdiction over McNamee’s statements to Pettitte, a third question arises:

- Does the doctrine of pendent personal jurisdiction allow this Court to exert jurisdiction over McNamee based on claims arising from a separate set of facts?

This last question, of course, need not be considered if this Court holds that it lacks specific personal jurisdiction over McNamee from any of his alleged statements.

**A. McNamee does not have minimal contacts with Texas for the assertion of specific jurisdiction**

**1. This Court lack personal jurisdiction over McNamee for claims arising from his alleged statements to Senator Mitchell and SI.com**

This motion presents a purely legal question for this Court, one that is resolved in Defendant's favor by ample precedent: Can a defamation claim be maintained in Texas against an out-of-state defendant, where the allegedly defamatory statement concerns the non-Texas activities of the Texas plaintiff? The answer is clear: No. As the Fifth Circuit has unequivocally stated, "the sources relied upon and activities described in an allegedly defamatory publication should in some way connect with the forum if *Calder* is to be invoked." *Revell*, 317 F.3d at 474. McNamee's statements to Mitchell and SI.com are indisputably *not* about any activity that is connected to Texas: McNamee's alleged statements were about Clemens's use of HGH/steroids in Florida, New York, and Toronto. This resolves the issue.

Recognizing that *Revell*, a binding Fifth Circuit opinion, clearly resolves the issue, Clemens attempts to discredit *Revell* as somehow contradicting the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783, 789 (1984). But as the Third Circuit has explained:

*Calder* did not change the fact that even in intentional tort cases the jurisdictional inquiry focuses on the relations among the defendant, the forum, and the litigation. Nor did *Calder* carve out a special intentional torts exception to the traditional specific jurisdiction analysis, so that a plaintiff could always sue in his or her home state.

*IMO Industries, Inc. v. Kiekert AG*, 155 F.3d 254, 265 (3d Cir. 1998). *Revell* in no way overlooked *Calder*; instead, *Revell* extensively discussed *Calder* and explained that the allegedly defamatory story in *Calder* "concerned the California activities of a California resident," *Revell*, 317 F.3d at 472, and "was drawn from California sources," *Calder*, 465 U.S. at 789. (Of course McNamee did not "draw" his allegedly defamatory statements from Texas sources.)

Nor is *Revell* a rogue decision. There is ample case law from other Fifth Circuit panels, as well as the Third, Fourth, and Sixth Circuits, demonstrating that *Calder* does not permit a Court to assert jurisdiction over an alleged defamation defendant based solely on the alleged damage in the forum state. Instead, the vast weight of authority requires plaintiffs to demonstrate that the allegedly defamatory statement *concerns* the forum state. See *Reynolds v. Int'l Amateur Athletic Fed'n*, 23 F.3d 1110 (6th Cir. 1994) (rejecting plaintiff's theory that an Ohio court could assert jurisdiction over a defamation claim stemming from statements about plaintiff's use of performance enhancing substances, because the statements concerned plaintiff's activities outside of Ohio and plaintiff "is an international athlete whose professional reputation is not centered in Ohio," though defendant "knew that the worldwide media would carry the [allegedly defamatory] report and that the brunt of the injury would occur in Ohio"); *Young v. New Haven Advocate*, 315 F.3d 256, 261-62 (4th Cir. 2002) (denying Virginia court jurisdiction over defamation defendant, despite defendant's knowledge that plaintiff was a Virginia resident, the fact that the articles were accessible in Virginia via the internet, and that the primary effects of the defamatory statements on plaintiff's reputation were felt in Virginia, because the "focus of the articles" were events that occurred in Connecticut"); *Remick v. Manfredy*, 238 F.3d 248, 257-59 (3d Cir. 2001) (denying jurisdiction where defendant faxed allegedly defamatory letters to Pennsylvania but did not target anyone in Pennsylvania, and Pennsylvania did not have a unique relationship with the boxing industry); *Revell*, 317 F.3d at 473-75 (citing approvingly *Reynolds*, *Young*, and *Remick*); see also *Panda Brandywine*, 253 F.3d 865, 870 (5th Cir. 2001) (holding that *Calder* requires more than injury to a Texas plaintiff); *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419, 425 (5th Cir. 2005) (same).

Indeed, Clemens's approach both misconstrues *Calder* and ignores binding Circuit precedent. Clemens argues that jurisdiction would be appropriate though McNamee's alleged statements (1) were made in New York, (2) did not discuss anything Clemens did in Texas, (3) did not rely on any Texas sources, and (4) were not directed to a Texas audience. Purposeful availment, which has been the touchstone of the jurisdictional inquiry since *Burger King Co. v. Rudzewicz* requires more. It requires "actions by the defendant himself that create a 'substantial connection' with the forum State," such that he "should reasonably anticipate being haled into court there." *Burger King Co. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985). By attempting to flip the focus onto the alleged harm to Clemens, instead of McNamee's alleged actions, Plaintiff perverts the due process inquiry. *See IMO Industries*, 155 F.3d at 256 (holding, in the context of a business tort, that *Calder* requires a showing that "defendant expressly aimed his tortious conduct at the forum, such that the forum can be said to be the focal point of the tortious activity," and it is insufficient to merely demonstrate that plaintiff "felt the brunt of the harm in the forum").

Judge Rosenthal recently made this clear in *Arthur v. Stern*, a defamation lawsuit premised on statements made by the late Vickie Lynn Marshall, better known as Anna Nicole Smith, about plaintiff Virgie Arthur. *Arthur v. Stern*, H-07-3742, 2008 WL 2620116 (S.D.Tx. June 26, 2008). Judge Rosenthal only found that the court had jurisdiction because the statements at issue concerned Arthur's Texas activities:

The alleged conspiracy consisted of arranging a national broadcast of defamatory remarks about a *Texas resident's activities* that occurred in Texas. The alleged defamatory remarks concerned Arthur's treatment of Marshall when she was *a child in Texas*. Although Marshall resided in the Bahamas when she gave the interview from there, the statements at issue were about her *experiences in Texas* and were about an individual who then, and still, resided in Texas. Stern knew that Entertainment Tonight was

broadcast nationally, that Arthur had lived in Texas, and that the *events discussed occurred in Texas*.

*Id.* at \*13 (emphasis added). Again and again, the *Arthur* Court focused on the content of the allegedly defamatory statements, and, only by looking to that content was jurisdiction appropriate and *Revell* distinguishable: “Unlike the article in *Revell*, the statements in this case referred to the Texas activities of the Texas plaintiff.” *Id.*

Clemens cites not a single controlling case where a court has asserted jurisdiction over a defamation defendant where the allegedly defamatory statements involved out-of-state activities. This is no oversight; the caselaw supports Defendant. Clemens decries this binding caselaw as unfair, claiming that it “would be a perverse twist of due process to permit McNamee to defeat jurisdiction” because “when McNamee lied he chose not to use Texas as the location for his tall tale.” Pl. Br. 26. (Of course it is Clemens’s lies which have forced McNamee to defend himself in a foreign forum.) The due process jurisdictional inquiry has *always* focused on the defendant and his *purposeful availment* of the forum —what did the defendant do that opened him up to suit in the forum state. Where, as here, McNamee’s statements did not involve the forum state, he could not have expected to be haled into court here.

Clemens’s attempt to distinguish *Revell*, Pl. Br. 22, is unavailing as (1) McNamee’s contacts with Texas which are unrelated to Clemens’s defamation claim are irrelevant, *Revell*, 317 F.3d at 472, and (2) the *Revell* defendant’s ignorance of plaintiff’s home state was not dispositive to *Revell*’s holding, as Judge Rosenthal recognized. *Arthur*, 2008 WL 2620116, at \*12-13. Instead, *Revell* focused on the importance of the *content* of the defamatory statement and, indeed, cited approvingly similar cases where defendant indisputably knew of

plaintiff's residence. *Revell*, 317 F.3d at 473-75 (looking to and approving *Reynolds*, 23 F.3d 1110, *Young*, 315 F.3d 256, and *Remick*, 238 F.3d 248).<sup>1</sup>

**2. This Court lacks personal jurisdiction over McNamee for claims arising from his alleged conversations with Pettitte in 1999/2000 and 2003/2004 as those are outside the statute of limitations**

As Defendant explained in his opening brief, Clemens's claim, asserted in a single paragraph of the Amended Complaint, that "McNamee had previously told Andy Pettitte . . . that Clemens had used steroids and HGH," Am. Compl. ¶ 36, is a newly-minted reach for the gold ring of a jurisdictional basis for this action in Texas. But this claim is based on contacts McNamee had with Texas in 1999/2000 and 2003/2004 which are too old to be used to assert personal jurisdiction over him.

**a. This Court can consider the timeliness of Clemens's claim arising from purported contacts with Texas in 1999/2000 and 2003/2004 in a 12(b)(2) motion**

Clemens seeks to assert jurisdiction over McNamee based on alleged contacts McNamee had with Pettitte in Texas in 1999/2000 and 2003/2004. These contacts cannot be used to assert personal jurisdiction over McNamee, as the claim from which these contacts arise is untimely.

Clemens dismisses this argument as frivolous, which is surprising given that he has produced not a single authority to rebut Defendant's argument. Instead he asserts the uncontroversial position that courts are powerless to adjudicate the merits if they lack jurisdiction over the defendant. Pl. Br. 19. But Clemens does not dispute that, at times, the jurisdictional inquiry and the merits inquiry may overlap. As the Fifth Circuit has held: "When,

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<sup>1</sup> Clemens reliance on *Hugel v. McNell*, 886 F.2d 1 (1st Cir. 1989), is similarly unavailing. Besides being from outside this Circuit, *Hugel* is distinguishable because in that case it was undisputed that the defendant knew that the brunt of the injury would occur in New Hampshire, whereas here — at best — Clemens can claim that McNamee directed his statements "nationally." Def. Br. 12-13.

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); Def. Br. 14-15. Clemens does not distinguish *Wyatt* and it controls.

As Defendant extensively argued in his opening brief, Texas’s statute of limitations for defamation claims is one year, and Clemens’s claims arise from alleged Texas contacts that McNamee had in 1999/2000 and 2003/2004. Clemens argues that this Court cannot consider the timeliness of Clemens’s defamation claim in asserting jurisdiction over Defendant, simply because the Complaint asserts that Clemens did not discover the statements until recently. As detailed *infra*, Clemens cannot claim the protections of the discovery rule because he should have discovered McNamee’s claim years ago.

Under Clemens’s approach, if someone visited Texas in 1975 and made an allegedly defamatory statement, so long as the Complaint alleged ignorance of the statement until recently, this Court could assert personal jurisdiction over that defendant and force him to defend himself in a state he had not visited in decades. That cannot be the law.

Instead, this Court, in analyzing a 12(b)(2) claim for an intentional tort must consider the merits, at least insofar as they go to the timeliness of McNamee’s alleged statements within the forum. *Wyatt*, 686 F.2d at 280.

**b. Clemens cannot seek the benefit of the discovery rule to assert jurisdiction over defendant for claims arising from contacts with Texas in 1999/2000 or 2003/2004**

The claim for defamation as to statements made in “1999 or 2000” and “2003 or 2004” is untimely on its face. Here, Clemens seeks to benefit from the protection of the

discovery rule (whereby the statute of limitations “clock” begins when the defamatory statement was or should have been discovered). But the discovery rule cannot benefit Clemens’s claim here because it does not apply to parties who hide their heads in the sand, ignoring evidence that would prompt a reasonably diligent person to investigate further. *Roberts v. Davis*, No. 06-07-00024-CV, 2007 WL 3194813, at \*1-2 (Tex. App. Nov. 1, 2007); *see also Cruz v. Schell, Beene & Vaughan, L.L.P.*, No. 11-98-00075-CV, 1999 WL 33748017, at \*4-5 (Tex.App.-Eastland Aug. 5, 1999) (not designated for publication) (plaintiff’s cause of action for slander against defendant was untimely and not saved by the discovery rule, as due diligence required plaintiff to investigate the slander earlier; plaintiff knew that an employer was initially excited about his job application, inexplicably plaintiff did not get a job offer, and plaintiff anticipated that employer would speak to defendant, a friend, about his qualifications); *Newsom v. Brod*, 89 S.W.3d 732, 737 (Tex.App.-Houston 2002) (defamation plaintiff “should have used more diligence in pursuing his claims against those parties who may have contributed to his injury”; even if plaintiff “did not discover the detailed substance of [defendant’s] complaints against him until [recently], [plaintiff] became aware of his injury, at the latest, upon his termination”).<sup>2</sup>

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<sup>2</sup> The cases cited by Clemens are not to the contrary. *See* Pl. Br. 58. Both cases involve fraudulent concealment and “[f]raudulent concealment estops a defendant from using limitations as an affirmative defense.” *Booker v. Real Homes, Inc.*, 103 S.W.3d 487, 493 (Tex.App.-San Antonio 2003). Here, there is no allegation that there was fraudulent concealment of the alleged conversations between McNamee and Pettitte. In *Summer v. Land & Leisure, Inc.*, 664 F.2d 965, 968 (5th Cir. 1981), a defrauded investor sued alleging violations of federal securities laws. The court held that the discovery rule applied only because the defendants had fraudulently concealed from plaintiff the material facts, including promising “on numerous occasions that reports of financial condition would be forthcoming, that all was well with the defendant Land and Leisure, and that annual meetings would be forthcoming. In addition, Summer alleged that he was denied access to records, and that there were attempts to prevent him from learning the true financial condition by hiding records, removing records, making false entries in records, and misrepresenting that records were also lost or destroyed.” *Id.* The plaintiff in *Cuvillier v. Taylor*, 503 F.3d 397, 402 (5th Cir. 2007), similarly alleged fraudulent concealment. Furthermore, the Court did not hold that the fraudulent concealment tolled the statute of limitations; instead it only “assume[d] *arguendo* that [plaintiff] brought her suit before the limitations period expired,” and upheld the dismissal on other grounds. *Id.* at 402, 408.

First, Clemens does not dispute the legal framework this Court should use evaluating a 12(b)(2) motion, as detailed in Defendant’s opening brief at 19: (1) The Court need not accept Clemens’s conclusory allegations where they are contradicted by other evidence, *Panda Brandywine*, 253 F.3d at 869. (2) 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. (3) The Court can hold an “evidentiary hearing,” on the jurisdictional question and hear testimony from Clemens, Pettitte and McNamee, to determine if Clemens can prove *by a preponderance of evidence* that this Court can assert jurisdiction over 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).

Furthermore, even looking only to evidence in the public record makes clear that claims as to the statements to Pettitte are untimely. Because evidence in the public record is appropriate for consideration on a 12(b)(6) motion to dismiss, *see infra* III.B., this Court can equally dismiss the claim under 12(b)(2) or 12(b)(6). *See infra* III.C. If, however, the Court believes that the additional evidence only appropriate for consideration under 12(b)(2) is dispositive (or if the Court believes that an evidentiary hearing is necessary to resolve the issue), it must resolve the motion based on 12(b)(2). For this reason (and to avoid duplicating his arguments in two portions of the brief), in laying out the facts below, Defendant identifies the source of the evidence.

In his opposition brief, Plaintiff painstakingly explains why each piece of evidence is, by itself, insufficient to prompt a reasonably diligent person to have discovered the

allegedly defamatory statement. But the question is not whether any individual statement put Clemens on notice, the question is whether, based on the amalgam of information Clemens indisputably had before him, can he argue that claims whose statutes of limitations had — on their face — expired up to 6 years previously were nonetheless still timely, by virtue of the discovery rule.

Clemens, who now claims that he had no idea prior to December 2007 about McNamee’s alleged defamatory statements to Pettitte, had an amalgam of information before him during the statutory period, as detailed in Defendant’s opening brief at 14-19. And Clemens is fighting strawmen in contending that this information, by itself, did not conclusively establish that McNamee had allegedly defamed him in conversations with Pettitte. Pl. Br. 60-62. The question is only whether this information reasonably prompted a duty of inquiry. Would a reasonable person in Clemens shoes, given the surrounding context, have inquired further? *See Roberts*, 2007 WL 3194813; *Newsom*, 89 S.W.3d 732; *Cruz*, No. 11-98-00075-CV, 1999 WL 33748017.

Even limiting the inquiry to Clemens’s admission in the public record, Clemens failed to exercise reasonable due diligence. Clemens testified to Congress about a 2006 conversation he had with Pettitte after the Los Angeles Times published an article stating that a redacted affidavit filed in federal court by pitcher Jason Grimsley said that Clemens used performance-enhancing drugs. In that conversation, as Clemens described it, Pettitte was “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 none of this.” Congressional Transcript, Feb. 13, 2008, at 39-40, *attached*

as Exhibit 12 to the Greenberger Declaration (“Ex. 12”).<sup>3</sup> What would a reasonable person in Clemens’s shoes have done? Taking the facts in Clemens’s favor, here was a professional baseball player who had never used steroids or HGH and who had a famed career as a pitcher. Revelations of the kind reported by the L.A. Times had the potential to destroy his career. And yet his “close friend,” Pettitte, *id.* at 39, 42, somehow believed that the allegations in the Grimsley affidavit were true, and was concerned enough to be asking Clemens how he planned to respond. In this context, a reasonable pitcher, recognizing the enormity and potential consequences of this allegation, would be outraged and intent on getting to the bottom of it. He would not be satisfied by telling his friend and teammate that “he did none of this.” He would diligently inquire as to why a teammate might believe that he had used performance enhancing drugs. Given what was at stake, reasonable diligence required Clemens to ask Pettitte why he might think that Clemens used performance enhancing substances. Instead Clemens—by his own account—made his plea of innocence and simply let it drop.

By itself this 2006 conversation is enough to start the statute of limitations clock (which, of course, would have expired in 2007). But, as detailed in Defendant’s opening brief at 16-18, the public record indicates that Clemens had significant additional information which would have prompted a reasonably diligent person to inquire about an allegation that goes to the heart of his pitching prowess and his “Hall of Fame” reputation: Pettitte recounts a 2005 conversation in Kissimmee, Florida, where Pettitte reminded Clemens that “he had told me that he used HGH.” Ex. 2 ¶¶ 4-6; Def. Br. 16 (detailing conversation). Imagine the confusion, the outrage, the fear, of an innocent pitcher, who had never used HGH, learning that somehow his close friend and teammate thought he used HGH. He would dig deep and try to get at the root of

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<sup>3</sup> All exhibits referenced in this brief are attachments to the Greenberger Declaration, July 2, 2008, submitted with defendant’s opening brief.

Pettitte's claims. But that Clemens did not do. Instead, he simply told Pettitte "that I must have misunderstood him," and, when Pettitte said "Oh, okay," Clemens simply let the matter drop. *Id.*

And if this Court looks to McNamee's testimony (which is appropriate for consideration on a 12(b)(2) motion, or at a evidentiary hearing for the 12(b)(2) challenge), there is even more information: McNamee testified that Clemens was within earshot for his initial conversation with Pettitte where Pettitte angrily asked, "why didn't you tell me about this stuff?" McNamee Dep., Ex. 5, at 28-31.<sup>4</sup> In 2003, McNamee told Clemens's agent that he feared that baseball's drug testing would reveal Clemens's use of performance-enhancing drugs. McNamee Dep., Ex. 5, at 147-49. Finally, McNamee's affidavit attached an email exchange from October 1, 2006 between McNamee and Clemens in response to the L.A. Times's story regarding the Grimsley affidavit, reassuring Clemens that he should not be concerned about McNamee "being a rat or flipping on you." *See* Ex. 1 ¶ 14 & Attachment (emphasis added); Def. Br. 17 (detailing this email exchange).

Taking all the evidence together: Clemens heard Pettitte ask McNamee about HGH in 1999 or 2000; in 2003 Clemens's agent was told by McNamee that drug testing could reveal performance-enhancing drugs; and in 2005 his close friend Pettitte reminded Clemens that Clemens had revealed to him that he had used HGH. Then, after the L.A. Times's story about the Grimsley affidavit broke in late 2006, Clemens had two interactions in short order that should have triggered further inquiry: Pettitte nervously asked Clemens how he would respond to Grimsley's revelation that Clemens had used steroids (a concern Clemens brushed off) and McNamee reassured him that he would not "rat" him out. Understanding what was at stake for

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<sup>4</sup> Plaintiff's contention that, even if Clemens heard this conversation, it was "Pettitte [who] told McNamee about Clemens's alleged HGH use, not vice versa" and thus "Clemens had no reason to believe that McNamee had accused him of using HGH," Pl. Br. 61, again ignores the requirement of reasonable diligence. If Clemens heard that Pettitte was wrongly stating that he used HGH, then reasonable diligence required asking Pettitte how he reached that erroneous conclusion.

Clemens—his career, his future earnings and his reputation—it is hard to understand his diffidence. Given Clemens’s penchant for hiring private detectives, *see* Ex. 8, at 2-3 (Hardin Declaration), reasonable diligence for someone with so many resources in a high stakes situation would dictate investigating this matter considerably further than just dropping it.

Clemens avoided all diligence; he avoided asking the obvious question. He cannot now seek the benefit of the discovery rule. This Court should dismiss the defamation claim which arises out of statements to Pettitte. There is ample evidence in the public record and McNamee’s affidavit to resolve the limitations issue. At a bare minimum, the Court should order a hearing on this matter, if only to conserve judicial resources and not require McNamee and his counsel to expend resources that will be wasted if the case is dismissed on this ground.

**B. Clemens must separately demonstrate jurisdiction over the statements to Pettitte and the statements to Mitchell/SI.com and cannot use pendent personal jurisdiction to consolidate these separate claims**

Fifth Circuit precedent confirms 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). Pendent personal jurisdiction constitutes a judicially-created exception to this general rule, and, as Clemens concedes, the Fifth Circuit has never upheld any assertion of jurisdiction pursuant to the doctrine. Pl. Br. 29. Furthermore, pendent personal jurisdiction — “if [it] exists,” 4A FPP § 1069.7 — is a doctrine rooted in federal question subject matter jurisdiction, based on federal nationwide service of process. Wright & Miller explains that this approach may be simply improper in the diversity context: “[A] federal district court may exercise personal jurisdiction over a defendant in the diversity context only if state law permits it.” *Id.* Indeed, while Clemens obfuscates the issue, only one Circuit has upheld pendent personal jurisdiction in the context of a diversity claim. *Hargrave v.*

*Oki Nursery, Inc.*, 646 F.2d 716, 719-20 (2d Cir.1981) (holding that federal courts may exercise pendent personal jurisdiction in diversity cases).

Even where some courts have asserted pendent personal jurisdiction in a diversity context, however, *Wright & Miller* makes clear that there is no pendent personal jurisdiction where, as here “the claim falling outside the reach of the forum state’s long-arm statute arises from a separate set of facts,” explaining:

When no common nucleus of operative fact binds the federal and state claims, serious procedural unfairness to the defendant might result and pendent personal jurisdiction probably should not be permitted. A defendant in this circumstance could not reasonably anticipate being subject to personal jurisdiction in that forum for purposes of defending an unrelated state claim, especially given the fact that the state claim falls beyond the reach of the forum state’s long-arm statute. This raises a significant due process concern. Further, a claim that is not part of the same constitutional case is much more likely to involve different litigational strategies and may require very different resources to defend against. Moreover, a district court’s assertion of personal jurisdiction over the jurisdictionally insufficient state claim might be thought to offend principles of federalism.

4A FPP § 1069.7.

There is no “common nucleus of fact” here as the two claims are based on statements made years apart, to different audiences, in entirely different contexts. Quite simply Clemens is confusing what his claim is. His claim does not arise from his use of performance enhancing drugs. Instead his claim arises from McNamee’s alleged statements about Clemens’s use. Clemens has brought claims for defamation, defined as “a false statement about a person, published to a third party, without legal excuse, which damages the person’s reputation.” *Moore v. Waldrop*, 166 S.W.3d 380, 384 (Tex.App.-Waco 2005, no pet.). Each false statement is a separate claim. Tex. Jur. Libel § 91 (“[E]very separate and distinct publication of a libel is a distinct tort, for which a separate action will lie.”). Thus, any defamation claim arising out of

any statements McNamee made to Pettitte in 1999/2000 or 2003/2004, Am. Compl. ¶ 36, is a different claim arising from different set of facts than any claim arising from McNamee's alleged statements to Senator Mitchell and SI.com. It strains credulity to assert that statements McNamee allegedly made eight years apart are part of the same set of facts sufficient to assert pendent personal jurisdiction.

Clemens would have this Court assert jurisdiction for any claim against McNamee, regardless of its factual predicate, so long as it might be more efficient to litigate the claims together. But the Constitution's due process clause requires more: "The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. . . Thus, the test for personal jurisdiction requires that "the maintenance of the suit . . . not offend traditional notions of fair play and substantial justice." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982).

Pendent personal jurisdiction cannot be used assert jurisdiction over McNamee because statements he made up to eight years apart are not part of the same common nucleus of fact sufficient to overcome his due process rights.

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

Even if this Court finds that Clemens made a prima facie case that McNamee has minimum contacts with Texas out of which any of Clemens's claims arise, it should dismiss because the exercise of personal jurisdiction here "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 McNamee does not have sufficient contacts with Texas, it need not consider questions of fairness and justice.

Courts considering fairness and justice considerations balance the burden on defendant of litigating in a foreign forum with any burden on plaintiff, along with considerations of the forum state's interest and the interest of the interstate judicial system. Def. Br. 20. Here, as explained in Defendant's opening brief, Clemens would not be prejudiced — particularly given his considerable financial resources — if this case were dismissed. He could file suit in a New York court, which would have personal jurisdiction over McNamee. In contrast, McNamee would face considerable disadvantage if he had to litigate in Texas, given his financial status. *See* Def. Br. 20-21 (explaining that in the first half of 2008 McNamee earned just \$3,000 and supports four dependants). The fact that McNamee is not currently paying for his defense does not mean that his counsel can expend unlimited resources to defend a lawsuit in a foreign jurisdiction. If forced to do so, the “difficult[y] and inconvenience” would “unfairly” place McNamee “at a severe disadvantage in comparison with his opponent.” *Burger King*, 471 U.S. at 478. Moreover, Clemens cannot rebut McNamee's sworn statements as to his earnings based on speculative press reports. Pl. Br. 36.

Second, while Clemens is a Texas resident, Texas has a significantly lessened interest in this lawsuit because the *content* of the allegedly defamatory statements do not include Clemens's actions in Texas. *See supra* I.A.1. In contrast, New York has a significant interest in the dispute as the alleged statements to Senator Mitchell and the SI.com reporter were made in New York and the activities underlying the defamation claims (the injections of performance enhancing drugs) occurred primarily in New York. Finally, Clemens's career was substantially as a New York Yankee.

Third, notwithstanding Clemens's assertion that witnesses as to his reputation in the community may be based in Texas, as Clemens himself notes, such witnesses can appear by "videotaped deposition." Def. Br. 39, 37. Moreover, Clemens's damages witnesses are likely to appear voluntarily, without enforcement by subpoena. In contrast, the witnesses most likely to require the compulsion of a subpoena are witnesses outside Texas whom McNamee would call to prove the truthfulness of his allegedly-defamatory statements. See Def. Br. 21; 39-40 (listing witnesses).

As 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 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* claim, it must dismiss that claim.

## **II. IN THE ALTERNATIVE, THIS COURT SHOULD TRANSFER VENUE TO THE SOUTHERN DISTRICT OF NEW YORK**

McNamee has demonstrated that, even if this Court were to find it had personal jurisdiction over McNamee (and it does not), it should transfer this case to the Southern District of New York in the interest of justice. Def. Br. 37-41. 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.

Courts balance private and public factors in this inquiry. Def. Br. 38 (citing cases). Plaintiff's choice of forum is entitled to little weight here because this Court was not Plaintiff's choice; Plaintiff originally filed his claim in state court and McNamee removed to this

Court. *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).

The inconvenience to McNamee to force him to litigate in Texas far outweighs any inconvenience to Clemens, as detailed in Defendant's opening brief and section I.C., *supra*. A number of important witnesses — who are outside the subpoena range of a Texas court, and also unlikely to testify voluntarily — could be compelled to give testimony in New York. Def. Br. 39-40. Furthermore, New York has the most interest in this action.<sup>5</sup> *See supra* I.C.

Finally, conservation of judicial resources compels transfer, and Clemens does not dispute this conclusion. First, this Court could transfer the case and need not resolve the complicated jurisdiction motion, thus conserving substantial judicial resources. *Donnelly v. Klosters Rederi A/S*, 515 F.Supp. 5, 7 (E.D. Pa. 1981) (“A transfer, obviating a jurisdictional difficulty, has been found to serve the interests of justice within the meaning of that language in § 1404(a).”). Similarly, if this Court resolves the 12(b)(2) motion and determines that it can assert personal jurisdiction over McNamee for certain claims and not others that would weigh strongly in favor of transfer in “the interest of justice” “to avoid multiplicity of litigation as a result of a single transaction or event.” 15 Wright & Miller § 3854. The Supreme Court has “suggest[ed] that great weight should be given to this efficiency consideration.” *Id.*

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.

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<sup>5</sup> While Clemens cites statistics about caseload congestion in the Southern District of New York which he claims compares unfavorably with the Southern District of Texas, he cites *not a single case* looking to such statistics in resolving a transfer of venue motion. Indeed, without more information as to the data collection and measurement tools, it is not clear that the statistics are directly comparable.

### **III. PLAINTIFF’S AMENDED COMPLAINT FAILS TO STATE A CLAIM**

#### **A. Clemens does not dispute that his intentional infliction of emotional distress claim must be dismissed**

Plaintiff does not even address Defendant’s argument that under Texas law an intentional infliction of emotional distress claim can lie only where there are no other remedies, and fails where it supplants an existing remedy, such as a defamation claim. Def. Br. 22-24 (citing cases). Clearly Plaintiff inserted this frivolous claim into his pleading to bolster a weak claim of personal jurisdiction. This he cannot do. It is now undisputed that the intentional infliction of emotional distress claim must be dismissed.

#### **B. The Court can consider public records in resolving a 12(b)(6) motion**

While Clemens begins with a didactic review of the rules regarding which types of information are appropriate for consideration on a 12(b)(6) motion to dismiss, he does not rebut Defendant’s main point: Courts can and do look to documents in the public record in resolving a motion to dismiss. This includes Congressional proceedings and documents available on governmental websites.<sup>6</sup> *See DaCosta v. Laird*, 471 F.2d 1146, 1155 n.14 (2d Cir. 1973) (“[T]he record of public hearings and Congressional proceedings from which the Congress had drawn in making specific legislative findings of fact were matters of public record.”); *Johnson & Johnson v. American Nat. Red Cross*, 528 F.Supp.2d 462, 464 n.4 (S.D.N.Y. 2008) (holding, on motion to dismiss, that Congressional hearing testimony “constitutes a public record of which the Court can take judicial notice”); *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004) (court can take judicial notice for purposes of 12(b)(6) motion of document which was “publicly available on the official redistricting website of the Virginia Division of Legislative

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<sup>6</sup> To the extent McNamee cites his affidavit or documents attached thereto in his opening brief, he did so only for purposes of the 12(b)(2) motion or the motion to transfer venue, as the opening brief made clear.

Services”). The Fifth Circuit has specifically held that courts may take judicial notice of governmental websites.<sup>7</sup> See *Hawk Aircargo, Inc. v. Chao.*, 418 F.3d 453, 457 (5th Cir.2005) (taking judicial notice of approval by the National Mediation Board published on the agency’s website); *Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005) (per curiam) (taking judicial notice of Texas agency’s website).

The cases cited by Clemens stand only for the undisputed proposition that a party’s affidavits and testimony which are *not* part of the public record cannot be the basis for a motion to dismiss. None of the cases cited involved public records or documents which the Court could take judicial notice of. See Pl. Br. 41 citing the following cases: *Friedl v. City of New York*, 210 F.3d 79, 84 (2d Cir. 2000) (court cannot consider defendant’s factual contentions contained in a declaration in support of their motion to dismiss); *Maiden v. North American Stainless*, No. 04-5442, 2005 WL 3557175, at \* 2 (6th Cir. 2005) (court did not err in refusing to consider affidavit in opposition to motion to dismiss); *Northington v. Jackson*, 973 F.2d 1518, 1520 (10th Cir. 1992) (holding that in a 12(b)(6) motion the court cannot consider evidence gathered in a special *pro se* hearing, which are treated like a party’s affidavit); *Global Network Communications, Inc. v. City of New York*, 458 F.3d 150, 156 (2d Cir. 2006) (court cannot rely on party’s trial testimony to controvert complaint’s allegation); *Lunn v. Prudential Ins. Co. of America*, No. 07-2679, 2008 WL 2569339, at \* 1 (3d Cir. 2008) (where limited discovery, including depositions, occurred before filing of motion to dismiss, that discovery could not be considered in 12(b)(6) motion).

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<sup>7</sup> Clemens errs in contending that McNamee is required to ask this Court to take judicial notice. See Fed. R. Evid. 201(c). Nonetheless, McNamee is formally so requesting.

**C. Looking to the Amended Complaint and public records, the claim arising out of the statements to Pettitte are untimely**

As laid out above, *see supra* I.A.2.b., Clemens’s claim as to the “1999 or 2000” and “2003 or 2004” statements to Pettitte is untimely. This is equally true, in the alternative, as a ground to dismiss the claim under Fed. R. Civ. Proc. 12(b)(6). Of course, extrinsic evidence — which includes affidavits submitted by Defendant, but does not include evidence that is in the public record — cannot be considered on a 12(b)(6) motion to dismiss. However, even without that evidence, the claim is untimely as the Congressional evidence and Amended Complaint demonstrates that a reasonably diligent potential plaintiff would have discovered McNamee’s alleged statements more than a year ago.

**D. McNamee’s statements published by Senator Mitchell are absolutely immune from suit**

McNamee’s statements which were made as part of the federal criminal investigation and published by Senator Mitchell are absolutely immune from suit. This immunity is “a complete immunity from suit, not a mere defense to liability.” *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 991 (5th Cir. 1999). As the immunity is granted to ensure a defendant can “avoid the burdens of litigation,” *id.*, immunity questions should be resolved at the earliest time, before a defendant has to invest in the litigation costs of defending himself.<sup>8</sup>

As Defendant made clear in his opening brief, Texas law provides for absolute immunity for *solicited* statements made as part of an ongoing criminal *investigation*. Def. Br. 28 (citing *Shanks*, 169 F.3d 988). Clemens concedes that *Shanks* distinguished unsolicited statements from solicited statements, with the latter being covered by an absolute privilege. Yet Clemens seems to argue that this distinction is true only for “ongoing judicial proceedings,” not

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<sup>8</sup> For this reason, the Fifth Circuit held that a denial of a motion to dismiss based on a claim of absolute immunity was immediately appealable. *Shanks*, 169 F.3d at 991.

criminal investigations. *Shanks*, however, made clear that it was not only discussing proceedings, but was instead discussing investigations by law enforcement officials: “we find only two situations in which Texas courts have found that communications to government agencies are not entitled to absolute immunity. The first involves unsolicited communications to law enforcement officials. . . . made in advance of any formal proceeding or investigation.” *Id.* at 994 (emphasis added).

*Smith v. Cattier*, a Texas Court of Appeals case, reaffirmed *Shanks* and makes further clear that absolute immunity extends to solicited statements made as part of a criminal investigation. *Smith* held that an allegedly defamatory statement to the FBI can be covered by the absolute privilege, so long as the defendant “was not involved with referring [plaintiff] to the FBI or instigating the investigation into [plaintiff’s] actions.” No. 05-99-01643-CV, 2000 WL 893243, at \* 4 (Tex.App.-Dallas) (July 6, 2000) (not designated for publication). The question, *Smith* explained, was whether defendant had “initiated, procured, [or] caused the commencement of the criminal investigation.” *Id.* As the defendant in that case initiated the investigation (i.e. the statements were unsolicited), the absolute privilege did not apply. But *Smith* made clear that (1) *Shanks*’s distinction between solicited and unsolicited statements was correct and (2) the absolute privilege can apply to criminal investigations, not only to judicial proceedings, as Clemens contends.<sup>9</sup>

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<sup>9</sup> Texas is not unique in so holding. See *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442, 1447 (4th Cir. 1996) (holding, under federal common law, that private governmental contractors responding to fraud investigations are absolutely immune from suit because to “expose private government contractors who are responding to and cooperating with such investigations to the risk of state tort claims would chill the investigative effort to the same extent that exposing cooperating government employees would”); *Boice v. Unisys Corp.*, 50 F.3d 1145, 1150 (2d Cir. 1995) (holding that while a person who, unsolicited, “called a District Attorney’s office to criticize the qualifications of a potential judicial appointee” was not immune, that rule is inapplicable where defendant was compelled to respond); *Holmes v. Eddy*, 341 F.2d 477, 480-81 (4th Cir. 1965) (granting stockbroker immunity for statements made to the SEC about a suspicion that a company was attempting to “bilk the public via the securities market”); *Gulati v. Zuckerman*, 723

Nor would holding McNamee's statements to Senator Mitchell absolutely privileged constitute a "license to go about in the community and make false and slanderous charges," despite Plaintiff's claims to the contrary. Pl. Br. 66. This is the purpose of the distinction between solicited and unsolicited statements: where a witness is approached by federal investigators, he is not going out and "about in the community," he is responding to government officials. And Texas has reasonably made the policy decision that it would prefer that those approached by criminal investigators not feel inhibited by possible defamation claims. The worse harm, Texas courts have determined, is not that someone would be so brazen as to lie to criminal investigators, but that someone with information that could be useful to a criminal investigation is chilled by the prospect that truthful revelations would prompt a civil lawsuit. *See Darrah v. Hinds*, 720 S.W. 2d 689, 691 (Tex. App. 1986) ("Obviously, the proper administration of justice requires full disclosure from witnesses without fear of retaliatory lawsuits for defamation of any sort." (citation omitted)). It is for this reason that *Zarate v. Cortinas*, 553 S.W.2d 652, 655-56 (Tex. Civ. App.—Corpus Christi 1977, no writ), cited by Clemens, Pl. Br. 64, does not alter the immunity analysis. *Zarate* held only that an unsolicited statement to law enforcement, before there is a criminal investigation, is afforded only a qualified privilege. Indeed, *Shanks* distinguished *Zarate* on this very ground. *Shanks*, 169 F.3d at 994 ("In [*Zarate*], however, the challenged statements were made in advance of any formal proceeding or investigation.").

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F.Supp. 353, 358 (E.D.Pa. 1989) (granting absolute immunity to a defense contractor and its employees for allegedly defamatory statements about the company's former president in his dealings with the Department of Defense); *Williams v. Taylor*, 129 Cal.App.3d 745 (1982) (holding that employer's report to police of employee's criminal activity were absolutely immune, in order to protect the "open channel of communication" between citizens and police needed for effective investigation of crimes).

Clemens's claim that McNamee's allegedly defamatory statements "were not made to a government agency" is similarly without merit. Pl. Br. 65. In analyzing this argument, "[a]ll doubt should be resolved in favor of the communication's relation to the proceeding." *Thomas v. Bracey*, 940 S.W.2d 340, 343 (Tex. App. 1997). First, as a matter of basic fact, they were "made to" a government agent, as the FBI agents were in the room and McNamee was talking to them (along with Senator Mitchell). Def. Br. 29 (citing evidence from Amended Complaint and public record). Clemens seeks to paint this as a question of whether private citizens can be "deputized" to conduct investigations. Pl. Br. 66. There is no contention that private individuals were being deputized. The federal agents were present for, and participated in, McNamee's interviews with Senator Mitchell. *See* Def. Br. 29.

The more nuanced question is whether McNamee's statements were "solicited" by a government agent. But here too, the Amended Complaint and evidence in the public record makes clear that the FBI agents solicited these statements. The Amended Complaint itself alleges that federal authorities "wanted McNamee to report his story to former United States Senator George Mitchell," and McNamee was told he would be "moved from 'witness' status back to 'target' status if he refused." Am. Comp. ¶ 30, 32. Mitchell's statement that his goal was not to assist the federal investigation is beside the point. The question is not one of Mitchell's goals, but of the federal investigator's actions — did they ask McNamee to speak to Mitchell and participate in those conversations? As the fact that they did is undisputed, there remains only a question of law, not of fact. When a federal investigator asks a witness to speak to a private party, participates in those conversations, and warns that any false statements would

be a federal felony, are the witness's statements in that context considered statements solicited as part of a criminal investigation? The answer is yes.<sup>10</sup>

Here, there is even less concern about where to place the line between encouraging truthful and open speech to law enforcement and protecting potential defamation plaintiffs: McNamee faced federal criminal charges for any false statements he made to Senator Mitchell just as he would for any false statements made to federal prosecutors. Ex. 11 at 167-68. This is a sizable deterrent against falsehoods. Clemens is simply incorrect in disputing McNamee's risk of being prosecuted if he lied. Pl. Br. 66 n.20. The federal false statement statute provides that "whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined under this title, imprisoned not more than 5 years." 18 U.S.C. § 1001(a). The crime applies equally to sworn and unsworn statements, oral and written statements. *See United States v. Massey*, 550 F.2d 300, 305 (5th Cir. 1977) (holding that statute applies to an oral statement to an FBI agent which was not made under oath). Thus, it does not matter that McNamee was not under oath (if he had been the appropriate charge for falsehood would be perjury, not 18 U.S.C. § 1001). Furthermore, federal investigators told McNamee that if he lied to Senator Mitchell he could face prosecution under that act, Def. Br. 29, and Clemens contention that he could not be prosecuted is puzzling. Again it bears reiterating, the statements McNamee made to Senator Mitchell were at the same time made to the federal investigators, who were also in the room.

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<sup>10</sup> Whether that witness voluntarily complies is not an element of this inquiry, the question is merely who "initiates" the conversation. *Cf.* Pl. Br. 69. Clemens's allegation that McNamee either "perjured himself to Congress . . . or is misleading this Court," regarding his cooperating with the federal government is grossly unfair. Pl. Br. 70. There is, of course, a distinction between cooperating with federal officials when under threat of prosecution (which McNamee did) and having a "deal" with federal prosecutors (which McNamee did not). The difference is that you cooperate in hopes that one day you can get a "deal," but it is not guaranteed. McNamee cooperated but did not get a deal.

As the federal investigators solicited the statements McNamee made to Senator Mitchell and chose to have McNamee speak to Senator Mitchell as part of their investigation (which was not initiated by McNamee), McNamee's statements to Mitchell are absolutely privileged.

**E. The allegedly defamatory statements are not plead with sufficient specificity**

The Amended Complaint fails to provide sufficient specifics of the allegedly defamatory statements McNamee made to Senator Mitchell, SI.com or Pettitte. It does not provide McNamee with sufficient notice of the statements at issue. There is no allegation as to what, specifically, McNamee allegedly said, when or where he made his alleged statements, or the context in which he made the statements.

As to Plaintiff's argument that McNamee is applying a heightened pleading standard to Clemens's defamation claim, Pl. Br. 42, it is important to make clear what is at stake here. It is not that McNamee is contending that he does not know *generally* what Clemens contends are the defamatory statements at issue. McNamee and his attorneys certainly attended the Congressional hearings involving this matter and have read the statements Clemens and his attorneys have made to the press. But defamation claims, and, particularly, defamation defenses, are legally technical. The specifics matter: The exact words go to whether the statement can constitute defamation *per se* or not (in which case special damages must be alleged). When a statement was said affects statute of limitations defenses. The context of the statement indicates whether there is plausible harm to reputation. The exact words of the statement may give rise to a number of defenses including whether the words on their face constitute opinion or other non-defamatory speech. *See Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 600 (8th Cir. 1979) (requiring *in haec verba* defamation allegation to allow defendant to form responsive pleadings

and assert any possible claim of privilege). It is for this reason that courts have required complaints asserting claims in defamation — often deemed a “disfavored” cause of action, *e.g.*, *Bushnell Corp. v. ITT Corp.*, 973 F. Supp. 1276, 1287 (D. Kan. 1997) — to plead specific allegations. Without such information, Defendant’s hands are tied in moving to dismiss. Moreover, it is simply Plaintiff’s burden to comply, as a matter of law.

Clemens’s claim that “Fifth Circuit courts have consistently refused to require plaintiff to set forth defamatory statements *in haec verba*,” Pl. Br. 45, is erroneous; Defendant’s opening brief cited cases from several district courts in the Fifth Circuit dismissing defamation claims which do not allege the time and place the statement was published, Def. Br. 25 (citing cases). Indeed, to the extent Clemens contends that the Supreme Court’s decision in *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002),<sup>11</sup> changed the analysis, several of the cases cited by Defendant (from within and without the Circuit) post-date this decision. *See* Def. Br. 25, 27 n.14.

Furthermore, the Supreme Court’s latest pronouncement regarding notice pleading is not *Swierkiewicz*, but *Bell Atlantic Corp. v. Twombly*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1955, 1966 (2007), which is fundamentally ignored in Plaintiff’s brief. *Twombly* makes clear that specific factual allegations are necessary to satisfy the requirement of providing “not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.” 127 S.Ct. at 1965 n.3. Furthermore, “when 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.” *Id.* at 1966 (internal quotation marks omitted).

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<sup>11</sup> *Swierkiewicz* was analyzing an employment discrimination claim, not a defamation claim.

Clemens’s claim that his Amended Complaint “goes to great lengths to set forth the specific nature of the [allegedly] defamatory statements,” is belied by his citation to *just five paragraphs* in the entire Amended Complaint. Pl. Br. 46. Three of these five paragraphs were quoted in full in Defendant’s opening brief to demonstrate their vagueness, Def. Br. 25-26, the other two are even less specific:

- As part of the Amended Complaint’s jurisdictional allegations, it states “while present in Texas to train Clemens and Pettitte, McNamee maliciously and intentionally defamed Clemens, a Texas resident, by falsely telling Pettitte, a Texas resident, that Clemens had used steroids and human growth hormone (“HGH”). Moreover, McNamee maliciously and intentionally defamed and inflicted emotional distress on Clemens in whole or in part in Texas by repeating his false accusations that Clemens had used steroids and HGH to the Mitchell Commission and SI.com . . . .” Am. Compl. ¶ 6.
- “However, McNamee has told others during his second day of interrogation that he recanted and told the federal investigators that he had injected Clemens with steroids in 1998, 2000, and 2001, and HGH in 2000.” Am. Compl. ¶ 29.

Indeed, as noted in Defendant’s opening brief, bizarrely, Clemens amended his complaint to make it less specific. Def. Br. 25.

#### **F. The statements to Pettitte and SI.com are not defamatory**

Defendant’s statements to Pettitte are not capable of defamatory meaning as these statements were made to a single individual, not published to the community at large, and, in this context, incapable of harming Plaintiff’s reputation.

As stated in Defendant’s opening brief, any statement to Pettitte did not damage Clemens’s reputation, an essential element of a defamation claim. To determine whether a speech is defamatory one must look to the statement’s audience. Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 2.4.3 (2008) (“Although it has often been said that a communication is to be considered on the basis of its effect upon the ‘average’ person, it is the nature of the audience for the particular statement in issue that determines whether the

speech is defamatory.”)<sup>12</sup> Publication of the statement to the audience here, Pettitte, could not have harmed Clemens’s reputation. *See* Def. Br. 34. Pettitte heard these statements from his trainer, at a time when MLB rules did not prohibit the use of steroids or HGH, and when he himself used HGH (by the time of the 2003/2004 statement). In that context the statements did not have the tendency to cause harm to Clemens’s reputation. Furthermore, they were published to a single individual only, and could not have effected his reputation in the community. *Maier v. Maretti*, 448 Pa. Super. 276, 284-85 (Pa. Super. 1995) (“Here the statement was a report by appellee to the branch manager and personnel director of Sears. The statement was not intended for a large audience; therefore, there was no harm to appellant’s reputation in the community.”)

Similarly, the SI.com reporter’s view of Clemens would not have been affected by McNamee’s statements, given that the Mitchell Report had already been published. Pl. Br. 56. The alleged statements to the SI.com reporter occurred on January 6, 2008, the Mitchell Report was published weeks earlier, on December 13, 2007. Am. Compl. ¶ 34-35. Every major media outlet had already covered the story, including SI.com. McNamee merely restated statements he had already told Senator Mitchell. The SI.com story therefore had no tendency to cause harm to Clemens as it could not have changed either the reporter’s or the readers’ view of Clemens.

**G. Clemens has not pleaded defamation *per se*, nor alleged special damages**

It is difficult to respond to Clemens claim that “he pleads for recovery of special damages,” as he simply does not. Pl. Br. 48. The two paragraphs in the Amended Complaint that he cites for this proposition simply state generally his alleged damages in vague terms with no pleading of special damages. Am. Compl. ¶¶ 45, 53.

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<sup>12</sup> The Restatement provision cited by Clemens, Pl. Br. 56, is not to the contrary. The question is whether the statement has a “tendency” to cause harm to the particular audience who hears it, not to the community at large, where, as here, it was not published to the community at large.

Nor does Clemens plead *per se* defamation. Texas law is clear that “innuendo should never be considered when interpreting slander per se,” yet Clemens’s contentions that McNamee’s statements were defamatory *per se* relies on innuendo and inference. *Moore v. Waldrop*, 166 S.W.3d 380, 386 (Tex.App.-Waco2005); *Burnaman v. J. C. Penney Co.*, 181 F.Supp. 633, 636-37 (S.D.Tx. 1960) (statements from J.C. Penney employees of ‘What did you do with the merchandise?’ and ‘Where is that red dress?’ did not constitute slander *per se* because to construe these statements as an accusation of theft required innuendo). This inquiry must be rooted in the allegations of the Amended Complaint. Based on the Amended Complaint’s allegations, without further inference, did McNamee’s alleged statements (1) charge Clemens with a crime or (2) injure him in his profession (the two categories of *per se* defamation that Clemens relies upon, Pl. Br. 49)? Such an inquiry reveals that, as a matter of law, McNamee’s alleged statements are not defamatory *per se*.

First, while Clemens contends that the allegedly defamatory statements “clearly charge Clemens with illegally using steroids and HGH,” Pl. Br. 49, it is undisputed that the Amended Complaint does not allege that McNamee stated that (1) Clemens used steroids without a prescription, the only use of steroids/HGH that would be illegal, nor (2) that Clemens knowingly used steroids/HGH. Clemens attempts to sidetrack this issue by pointing to language in the Mitchell Report that he contends indicates that McNamee alleged illegal use of HGH or steroids, Pl. Br. 50; Clemens, however, did not allege this in his Amended Complaint and he cannot expand his allegations in the course of opposing Defendant’s motion to dismiss. Looking to outside sources to understand the meaning of complaint’s allegations is the classic meaning of innuendo. *Moore*, 166 S.W.3d at 386 (“If the statement, taken by itself and as a whole, is slanderous, it will require no extrinsic evidence to clarify its meaning. It will stand alone.”).

Furthermore, outside of this statement, every piece of evidence from the Mitchell Report that Clemens relies upon to create his inferential chain, including the title of the Mitchell Report, was language of the report's author — Senator Mitchell. Senator Mitchell's characterization of McNamee's statements, where that characterization is not alleged in the Amended Complaint, is outside the *per se* categories.

Second, McNamee's allegations could not cause *per se* injury to Clemens's business because a *per se* claim is inapplicable where the conduct relates only to plaintiff's former career. A pitcher may be *per se* injured by allegations that he uses steroids or HGH because such allegations would indicate that he was unfit for his job task — namely, throwing a baseball over the plate at high speeds to strike out batters. But Clemens is no longer a pitcher and concedes that he has retired. Pl. Br. 52. While Clemens is still “involved in baseball” through a “long term professional services contract,” Pl. Br. 52, he is no longer *playing* baseball. Fitness for his current involvement in baseball (and thus, his current profession) does not require the ability to throw baseballs at high speeds. The allegedly defamatory statements do not indicate that Clemens is unfit for his current profession. Just as it is not *per se* defamatory to impute misconduct to “a public officer whose term has expired,” Def. Br. 36 (citing Restatement (Second) of Torts, § 573, cmt. c (2002)) — though such claims of misconduct may affect his business dealings, and, indeed, his likelihood of reelection — once Clemens is no longer pitching, there is no *per se* damage to his livelihood. *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]”).

These are technical rules which, through common law, have developed to shift burdens among parties as public policy and freedom of speech demand. It is essential that they be respected to protect from the overreaching which is common in defamation cases such as this one. McNamee's allegedly defamatory statements can only have caused defamation *per quod*, not defamation *per se*, and Clemens bears the burden of pleading and proving special damages, which he has not done.

**H. The statements to Pettitte and SI.com, standing alone, do not meet the amount in controversy requirement**

If this Court dismisses the claims arising from McNamee's alleged statements to Mitchell (based on either lack of personal jurisdiction or absolute immunity), it must also dismiss the statements as to Pettitte and SI.com for lack of subject matter jurisdiction. The claims arising from alleged statements to Pettitte and SI.com do not meet the \$75,000 amount in controversy requirement required for federal subject matter jurisdiction in a diversity action. 28 U.S.C. § 1332.

When Defendant removed this case there were only claims arising from McNamee's statements to Senator Mitchell and there is no dispute that, as to those claims, the amount in controversy requirement is met. However, there are *no conceivable damages* resulting from any statement McNamee made to Pettitte or SI.com. Those statements simply did not affect Clemens's reputation at all because Pettitte's view of Clemens was not altered by McNamee's alleged statements. And the Amended Complaint does not, and could not, allege that they did. Similarly, the SI.com interview, coming as it did after the Mitchell Report was issued and widely publicized, could not have affected anyone's view of Clemens.

**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that 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: September 17, 2008  
New York, NY

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of September 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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