IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WILLIAM ROGER CLEMENS	**§**	
	§	
	§	
V.	**§**	**CASE NO.: 4:08-CV-00471**
	§	
	§	
BRIAN McNAMEE	**§**	

PLAINTIFF ROGER CLEMENS'S RESPONSE
TO DEFENDANT BRIAN McNAMEE'S
MOTION TO DISMISS THE COMPLAINT IN ITS ENTIRETY

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Plaintiff Roger Clemens ("Clemens") responds to Defendant Brian McNamee's ("McNamee") Motion to Dismiss the Complaint in its Entirety.

NATURE & STAGE OF PROCEEDINGS

This is a defamation and intentional infliction of emotional distress case. Clemens sued McNamee in a Harris County, Texas district court on January 6, 2008. McNamee removed the case to this Court on February 11, 2008 based on diversity of citizenship. On March 4, 2008, McNamee moved to dismiss Clemens's complaint for lack of personal jurisdiction, lack of proper venue, and failure to state a claim. Simultaneously with the filing of this response, Clemens has filed his First Amended Complaint ("Amended Complaint").

STATEMENT OF ISSUES & STANDARD OF REVIEW

The first issue is whether this Court has specific personal jurisdiction over McNamee, a nonresident defendant who defamed and inflicted severe emotional distress

on Clemens, a Texas resident, with the intent to cause him devastating injuries in Texas where McNamee knew his false accusations would be widely circulated and where Clemens lives, worked, and has significant business interests. A district court's ruling on a motion to dismiss for lack of personal jurisdiction is subject to *de novo* review. *Revell v. Lidov*, 317 F.3d 467, 469 (5th Cir. 2002).

The second issue is whether the Southern District of Texas is necessarily a proper venue for Clemens's lawsuit since McNamee removed the lawsuit to this federal judicial district. A district court's ruling on a motion to dismiss for improper venue is generally reviewed for abuse of discretion. *United States v. Lipscomb* 299 F.3d 303, 338-39 (5th Cir. 2002).

The third issue is whether the Amended Complaint states a claim upon which relief can be granted because, among other reasons, it alleges facts supporting defamation and intentional infliction of emotional distress claims, and its allegations do not conclusively establish that McNamee's false accusations to the Mitchell Commission are absolutely privileged. A district court's ruling on a motion to dismiss under Rule 12(b)(6) is subject to *de novo* review. *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1173 (5th Cir. 2006).

SUMMARY OF THE ARGUMENT

McNamee's motion to dismiss Clemens's complaint lacks merit and should be denied for several reasons.

First, the Due Process Clause permits this Court to exercise specific personal jurisdiction over McNamee because he intentionally defamed and inflicted emotional

distress on Clemens in Texas by: falsely telling Andy Pettitte in Texas that Clemens had used steroids and human growth hormone ("HGH"); and repeating those false accusations to the Mitchell Commission and SI.com, knowing that they would republish and widely circulate them in Texas where Clemens lives, worked, and has significant business interests.

Second, venue is proper in the Southern District of Texas because McNamee's removal of this lawsuit from Harris County district court to the Southern District of Texas automatically fixed proper venue in this Court.

Third, Clemens's Amended Complaint states claims upon which relief can be granted—defamation and intentional infliction of emotional distress—because Clemens has sufficiently pleaded specific facts to support every element of those claims. Moreover, McNamee's false accusations to the Mitchell Commission are not absolutely privileged because the Mitchell investigation was a private investigation by a private law firm for a private client and was independent of the federal investigation.

FACTUAL BACKGROUND

I. Clemens Has Substantial Ties To Texas.

Clemens has lived in Texas since 1977, when he moved here from Ohio with his mother and five siblings. *See* Amended Cmplt. at 4 ¶ 11. He attended Spring Woods High School, San Jacinto Junior College, and The University of Texas, all in Texas. *Id*. at 5 ¶ 12. In 1983, Clemens led the Texas Longhorns to the national championship. *Id*. Thereafter, The University of Texas honored Clemens by retiring his number. *Id*.

After completing his collegiate career, Clemens was drafted by the Boston Red Sox and made his major league debut in 1984. *Id*. at 5 ¶ 13. Clemens played for the Red Sox for thirteen years from 1984-1996. *Id*. Clemens then played with the Toronto Blue Jays from 1997-1998. *Id*. at 6 ¶ 15-16. In 1998 in Toronto, Clemens met McNamee, who was then an assistant trainer with the Blue Jays. *Id*. at 6 ¶ 16. Clemens was traded to the New York Yankees in 1999 and played there from 1999-2003 and in 2007. *Id*. at 6 ¶ 18, 20, 23, 27.

Although Clemens temporarily lived in Boston, Toronto, and New York during the baseball season while playing for the Red Sox, Blue Jays, and Yankees, respectively, he returned to his home in Houston, Texas at the end of each season where he permanently resides with his wife and four children. *Id*. at 9 ¶ 24. Texas is also home to Clemens's extended family. Clemens's mother lived in Texas until her death, and his five siblings and seven of his nephews and nieces still reside in Texas. *Id*.

From 2004-2006, Clemens played for his home-town Houston Astros. *Id*. at 9 ¶¶ 25-27. During his first year with the Astros, Clemens won his seventh Cy Young award, climbed to second on the all-time strike-out list, and was named the starter on the National League All Star Team. *Id*. at 9 ¶ 25. Also during Clemens first year with the Astros, their attendance climbed by more than 25% from the previous year. Ex. A. During his second year with the Astros, Clemens led the major leagues in earned run average and the Astros advanced to the World Series for the first time in history. *See* Amended Cmplt. at 9 ¶ 26. During Clemens's third year with the Astros, their attendance again topped 3,000,000. Ex. A.

Clemens is also engaged in business and charitable ventures in Texas. *See* Amended Cmplt. at 4 ¶ 9. Clemens is a trustee of the Roger Clemens Foundation, a Houston-based charity. *See id.* Clemens also has a long-term personal services contract with the Houston Astros and other Texas-based businesses. *Id*. at 4 ¶ 9.

II. McNamee Has Conducted Significant Business In Texas.

According to McNamee, in 1999 he began traveling to Texas during baseball's off-season to train Clemens at his home in Houston. *Id*. at 2 ¶ 5; Ex. B at 139-40. McNamee would also train Andy Pettitte, another Yankees' pitcher, during his trips to Texas. *See* Amended Cmplt. at 2 ¶ 5. From 1999-2007, McNamee traveled to Texas at least 30-38 times to train Clemens and/or Pettitte.[1] Each of McNamee's trips to Texas lasted approximately five days. *Id*. at 2 ¶ 5; Ex. B at 118, 136. Thus, McNamee spent approximately 150-190 days in Texas training Clemens and/or Pettitte.

McNamee also earned significant income as payment for training Clemens and Pettitte in Texas. *See* Amended Cmplt. at 2 ¶ 5. For example, Pettitte has testified that he paid McNamee $62,000-$64,000 to serve as his full-time personal trainer in 2004. *Id*. at 2 ¶ 5; Ex. C at 9.

Separate and apart from the training services he provided to Clemens and Pettitte in Texas, McNamee has also traveled to Texas twice as a trainer for the Yankees, once in

[1] By his own admission, McNamee traveled to Texas 2-3 times each year in 2000, 2001, 2002, 2003, 2005, 2006, and 2007, and 10 times in 2004, to train Clemens and/or Pettitte. *See* McNamee Mtn., Ex. 1 ¶ 12. Thus, these trips totaled 24-31. However, in the deposition he gave Congress, McNamee testified that his trips to Texas to train Clemens began in 1999. Ex. B at 139. Thus, 2-3 more trips to Texas must be added to McNamee's total. Also, Pettitte testified in his deposition that in 2004 McNamee would travel to Texas during each home stand to train him. Ex. C at 68. The Houston Astros had 14 homestands during 2004. Ex. D. Thus, another 4 trips must be added to McNamee's total. With those additions, McNamee's trips to Texas to train Clemens and/or Pettitte total 30-38.

2000 and another time in 2001. *See* McNamee Mtn., Ex. 1 at 2 ¶ 11. McNamee spent a total of six days in Texas during those trips. *See id.*

III. McNamee Intentionally Defamed And Inflicted Emotional Distress On Clemens In Texas By Falsely Accusing Him Of Using Steroids And HGH.

In 1999 or 2000, while at Clemens's Texas home to train him, McNamee falsely told Pettitte, a Texas resident, that Clemens, a Texas resident, had used human growth hormone ("HGH"). *See* Amended Cmplt. at 13 ¶ 36; McNamee Mtn. at 4 ("Mr. Pettitte testified that in 1999 or 2000 Mr. Clemens told Mr. Pettitte that he, Mr. Clemens, was using HGH and also testified that shortly thereafter Mr. McNamee told him, Mr. Pettitte, that he had injected Mr. Clemens."). Thereafter, in 2003 or 2004, while at Pettitte's Texas home to train him, McNamee falsely told Pettitte that Clemens had used steroids. *See* Amended Cmplt. at 13 ¶ 36; Ex. C at 31-32. McNamee later repeated his false accusations that Clemens had used steroids and HGH to the Mitchell Commission. *See* Amended Cmplt. at 11-12 ¶ 33; Ex. E. And shortly thereafter, McNamee again repeated his false accusation that Clemens had used steroids to SI.com. *See* Amended Cmplt. at 11-12 ¶ 35; Ex. F.

When he intentionally made his false accusations, McNamee knew: (1) Clemens was a Texas resident because McNamee had repeatedly traveled to Texas and stayed at Clemens's home while training him, Ex. B at 132-36, 143; (2) Clemens had worked in Texas as a Houston Astro from 2004-2006; *see* Amended Cmplt. at 2 ¶ 5-6, 3-4 ¶ 9, 9 ¶ 25-27; (3) Clemens had significant baseball and non-baseball related business interests in Texas, *see* Amended Cmplt. at 4 ¶ 9; Ex. B at 197-98; (4) Clemens runs a charitable

foundation in Texas that bears his name, *see* Amended Cmplt. at 3 ¶ 6, 3-4 ¶ 9, 11 ¶ 33, 12-13 ¶ 35; (5) his false accusations would have a devastating impact on Clemens's reputation, mental status, and business interests in Texas; *see id*.; (5) the Mitchell Commission and SI.com would republish and widely circulate his false accusations in Texas, *see id*.; and (6) millions of Texas residents would read his false accusations against Clemens. *See id*.

McNamee's false accusations have in fact been circulated to millions of Texans. Virtually every major Texas newspaper and many smaller ones republished the false accusations McNamee made to the Mitchell Commission regarding Clemens. Ex. G; Ex. H; Ex. I; Ex. J; Ex. K; Ex. L. And a link to the Mitchell Report was immediately placed on dozens of websites, including MLB.com, the official website for Major League Baseball. Ex. M. MLB.com received over 19,000,000 visitors during the month the Mitchell Report was released. Ex. N. Similarly, the SI.com article was circulated to the approximately 16,000,000 Texas residents with Internet access. Ex. O.

It goes without saying that McNamee's false accusations have accomplished their purpose of destroying Clemens's good reputation and making him the subject of scorn and ridicule throughout Texas.

ARGUMENTS & AUTHORITIES

I. This Court Has Specific Personal Jurisdiction Over McNamee.

"When a nonresident defendant presents a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing the district court's jurisdiction over the nonresident." *Stuart v. Spademan,* 772 F.2d 1185, 1192 (5th Cir.1985). The

plaintiff will meet his burden by presenting a *prima facie* case that personal jurisdiction is proper. *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162, 1165 (5th Cir. 1985). "Plaintiffs need only plead a *prima facie* case for personal jurisdiction." *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419, 424 (5th Cir. 2005). "Moreover, on a motion to dismiss for lack of jurisdiction, uncontroverted allegations in the plaintiff's complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in the plaintiff's favor for purposes of determining whether a *prima facie* case for personal jurisdiction exists." *Bullion, v. Gillespie*, 895 F.2d 213, 217 (5th Cir.1990).

In a diversity suit, a federal court has personal jurisdiction over a nonresident defendant to the same extent that a state court in that forum has jurisdiction. *Bullion*, 895 F.2d at 215; FED. R. CIV. P. 4(e). The reach of this jurisdiction is limited by: (1) the state's long-arm statute; and (2) the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Bullion*, 895 F.2d at 215. Because the Texas long-arm statute extends to the limits of federal due process, this Court's two-step inquiry is reduced to an analysis of whether requiring McNamee to defend this lawsuit in Texas would violate due process.

The exercise of personal jurisdiction over a nonresident will not violate due process principles if two requirements are met. First, the nonresident defendant must have purposefully availed himself of the benefits and protections of the forum state by establishing "minimum contacts" with that forum state. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Bullion*, 895 F.2d at 216. Second, the exercise of

jurisdiction over the nonresident defendant must not offend "traditional notions of fair play and substantial justice." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

The "minimum contacts" prong of the due process inquiry may be further subdivided into contacts that give rise to "specific" jurisdiction and those that give rise to "general" jurisdiction. Only specific jurisdiction is at issue in this case. Specific jurisdiction is appropriate when the nonresident defendant's contacts with the forum state arise from, or are directly related to, the cause of action. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n. 8 (1984); *Bullion*, 895 F.2d at 216.

As shown below, the Due Process Clause permits this Court to exercise personal jurisdiction over McNamee because: (A) McNamee established "minimum contacts" with Texas and Clemens's claims arise from, or are directly related to, those contacts; and (B) exercising personal jurisdiction over McNamee in Texas does not offend "traditional notions of fair play and substantial justice."

A. McNamee Has Minimum Contacts With Texas, And Clemens's Claims Arise From, Or Are Directly Related To, Those Contacts.

1. McNamee's Conduct That Was Intended To and Did Harm Clemens In Texas Is Sufficient to Subject Him to Personal Jurisdiction In This Court.

Calder v. Jones, 465 U.S. 783 (1984) is the seminal United States Supreme Court case addressing a forum's specific personal jurisdiction over an individual, nonresident defendant accused of defamation and intentional infliction of emotional distress.

In *Calder*, a California resident sued a Florida reporter and a Florida editor for libel, intentional infliction of emotional distress, and invasion of privacy following the publication of an article about her in the *National Enquirer*, which was widely circulated in California. *Id*. at 784-85. A California superior court quashed the service of process on the reporter and editor for lack of personal jurisdiction. *Id*. at 785. The court of appeals reversed the trial court's decision and announced the following "effects" test for personal jurisdiction:

> **As the trial court observed, [the editor] did not enter California or even make telephone calls into the state in connection with his role in the preparation of the subject article; all of his acts with reference to that article apparently were performed in Florida.** However, **the requisite minimum contacts of a defendant with the forum state need not arise from his physical activity in that state.** Every state has a natural interest in effects occurring within its territory, even if the act causing those effects was committed elsewhere. **If a defendant commits an act or omission outside the forum state *with the intent* to cause a tortious effect within the state, the state may exercise jurisdiction over the defendant as to any cause of action arising from the effects. *The intent to cause tortious injury within the state when the tort actually occurs is generally a sufficient basis, without more, for the exercise of in personam jurisdiction*.** The act may have been done with the intention of causing effects in the state. If so, the state may exercise the same judicial jurisdiction over the actor, or over the one who caused the act to be done, as to causes of action arising from these effects as it could have exercised if these effects had resulted from an act done within its territory. **The complaint herein alleges that defendants, in publishing the defamatory article, acted maliciously and with the intent to injure plaintiffs.** The general rule for defamation is that everyone who takes a responsible part in the publication is liable for the defamation. For the purpose of the determining whether a California court may assume jurisdiction over [the editor] in this lawsuit, it must be presumed that [the editor], in participating in the publication of the article as its editor, intended to cause injury to plaintiffs in California where they reside; such injury in fact occurred. Accordingly, a valid basis exists for California's exercise of personal jurisdiction over [the editor] with respect to the causes of action alleged herein.

Jones v. Calder, 187 Cal. Rptr. 825, 829 (Cal. Ct. App. 1982), *aff'd*, *Calder v. Jones*, 465 U.S. 783 (1984) (citations and quotations omitted) (bolding emphasis added) (italics emphasis in original).

The United States Supreme Court **expressly** approved of the "effects" test employed by the California Court of Appeals. *Id*. at 787 n.6. The court explained that "[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly caused the injury in California." Moreover, the Supreme Court stated that the author and editor were "primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction is proper on that basis." *Id*. at 790. The Supreme Court affirmed the judgment of the California Court of Appeals, "**hold[ing] that jurisdiction over petitioners in California is proper because of their intentional conduct in Florida calculated to cause injury to respondent in California.**" *Id*. at 791 (emphasis added); *accord Kwik-Kopy Corp. v. Byers*, No. 01-20748, 37 Fed. Appx. 90, slip op. at 5 (5th Cir. May 9, 2002) ("[T]he Supreme Court in *Calder* clearly held that if intentional conduct is intended to cause injury in a specific state, that is sufficient to give specific jurisdiction to the courts of that state."); *Guidry v. United States Tobacco Co.*, 188 F.3d 619, 628 (5th Cir. 1999) ("Even an act done outside the state that has consequences or effects within the state will suffice as a basis for jurisdiction in a suit arising from those consequences if the effects are seriously harmful and were intended or highly likely to follow from the nonresident defendant's conduct.").

McNamee's contacts with Texas present a more compelling case for personal jurisdiction than did the editor's contacts in *Calder*. First, in *Calder*, the defendant had fewer direct contacts with the forum state: the editor had been to California only twice (with neither trip related to the defamatory article); the editor approved the initial evaluation of the subject of the article, edited the article in its final form, and refused to print a retraction of the article. *Calder*, 465 U.S. at 786. By way of contrast, McNamee (1) contracted with two Texas residents, Clemens and Pettitte, to perform strength and conditioning trainer services in Texas, (2) traveled to Texas at least 30-38 times between 1999-2007 for 5 days at a time to train Clemens and Pettitte, (3) earned a substantial portion of his income from training Clemens and Pettitte in Texas, and (4) defamed Clemens while in Texas to train Clemens and Pettitte by telling Pettitte that Clemens had used steroids and HGH.

Second, the Supreme Court stated in *Calder* that the editor "expressly aimed" his tortious conduct at California because he edited an article that he knew would have a devastating impact on the plaintiff, and he knew that the brunt of the injury would be felt by the plaintiff in California where she lived, worked, and where the *National Enquirer* had its largest circulation. *Calder*, 465 U.S. at 789-90. Similarly, in this case, McNamee expressly aimed his intentionally tortious conduct at Texas because he made his false accusations to: Pettitte, a Texas resident, about Clemens, a Texas resident, while present in Texas. McNamee also expressly aimed his intentionally tortious conduct at Texas because he made his false accusations to the Mitchell Commission and SI.com, knowing that the false accusations would be widely-circulated and cause devastating injury to

Clemens in Texas where McNamee knew Clemens lives, worked, and has significant business interests. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 150 cmt. e (1971) (recognizing that a plaintiff suffers his greatest injury from a multistate defamatory communication in the state of his domicile).

Third, the Supreme Court noted that the editor was a primary participant in an alleged wrongdoing intentionally directed at a California resident. *Calder*, 465 U.S. at 790. Here, McNamee is obviously the primary actor in the intentional defamation and infliction of emotional distress on Clemens, a Texas resident, because McNamee is the sole source of the false accusations that Clemens used steroids and HGH.[2]

Subsequent to *Calder*, Former Chief Judge John R. Brown of the Fifth Circuit Court of Appeals, sitting by designation and writing for the First Circuit Court of Appeals, applied its principles to a defamation case against a media source in *Hugel v. McNell*, 886 F.2d 1 (1st Cir. 1989). In *Hugel*, the plaintiff, a New Hampshire resident, sued the defendants in New Hampshire for defamation after the defendants served as sources for a *Washington Post* article that suggested the plaintiff had engaged in illegal securities transactions. *Id*. at 2. The story was reported throughout the country after it was picked up by national news services and television and radio networks. *Id*. The media firestorm forced the plaintiff to resign his position as the Deputy Director of Operations of the Central Intelligence Agency. *Id*. Ultimately, a default judgment was

[2] In *Calder*, the plaintiff alleged that the editor acted maliciously and with the intent to injure the plaintiff by publishing the defamatory article. *Jones v. Calder*, 187 Cal. Rptr. 825, 829 (Cal. Ct. App. 1982), *aff'd*, *Calder v. Jones*, 465 U.S. 783 (1984). Clemens has likewise alleged that McNamee acted maliciously and with the intent to injure him by falsely telling Pettitte, the Mitchell Commission, and SI.com that Clemens used steroids and HGH when he knew that his false accusations would be republished.

entered against the defendants. *Id*. at 2-3. On appeal, they asserted that the district court lacked personal jurisdiction. *Id*. at 2-3.

Judge Brown began by noting that in *Calder*, the Supreme Court held that a California court could assert personal jurisdiction over a nonresident author and editor employed by the *National Enquirer* because:

> (i) their intentional actions were aimed at the forum State, (ii) they knew that the article was likely to have a devastating impact on the plaintiff, and (iii) they knew that the brunt of the injury would be felt by the plaintiff in the forum State where she lived, worked and the article would have the largest circulation.

Hugel, 886 F.2d at 4. Judge Brown then stated that "[t]he knowledge that the major impact of the injury would be felt in the forum State constitutes a purposeful contact or substantial connection whereby the intentional tort-feasor could reasonably expect to be haled into the forum state's courts to defend his actions. *Id*.; *accord Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 213 (5th Cir. 1999) ("When the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment. The defendant is purposefully availing himself of the privilege of causing a consequence 'in Texas.'"). Thus, Judge Brown concluded that the plaintiff's allegations were sufficient to confer personal jurisdiction over the nonresident defendants because the complaint alleged that the defendants: committed an intentional tort; directed their actions toward the forum state by providing information to the reporters about a New Hampshire resident; and the defendants knew that the brunt of the devastating blow caused by the release of the information provided to the reporters would

be felt in New Hampshire where the plaintiff resided and had an established reputation as a businessman and public servant. *Hugel*, 886 F.2d at 4-5.

McNamee's contacts with Texas present virtually the same case for personal jurisdiction as did the defendants' contacts in *Hugel*. As in *Hugel*, Clemens has alleged that McNamee committed intentional torts (defamation and intentional infliction of emotional distress); that McNamee directed his actions toward Texas; and that McNamee knew that the brunt of the injury caused by the publication and republication of his false accusations would be felt in Texas because it is where Clemens resides, and has established professional and business reputations, and where the Mitchell Report and the SI.com article would be widely circulated and read. Consequently, as in *Hugel*, the assertion of personal jurisdiction over McNamee satisfies the dictates of due process. *See Hugel*, 886 F.2d at 5.

Finally, in *Brown v. Flowers Indus., Inc.*, 688 F.2d 328 (5th Cir. 1982), the Fifth Circuit Court of Appeals applied a test similar to that later adopted in *Calder*. In *Brown*, an Indiana resident made a telephone call from Indiana to Mississippi during which he allegedly defamed a Mississippi resident and a Mississippi corporation. *Id*. at 330-31. The district court dismissed the lawsuit for lack of personal jurisdiction, finding that due process would be violated by assuming jurisdiction over the Indiana defendant whose sole contact with Mississippi was the making of a single defamatory telephone call to a person in Mississippi. *Id*. at 330.

The court of appeals disagreed and noted that, "whether an act is intentional or negligent can have a distinct bearing on whether the exercise of jurisdiction thereover is

constitutional for it goes directly to fairness and the degree to which an individual has purposefully availed himself of the privilege of conducting activities within the forum state." *Id*. at 334 n.16. The court of appeals then reversed the district court, holding that subjecting the Indiana defendant to suit in Mississippi did not deprive him of due process because the Indiana defendant initiated the telephone call and allegedly committed an intentional tort, the injurious effect of which foreseeably fell on a Mississippi resident and a Mississippi corporation in Mississippi. *Id*. at 334-35.

Again, McNamee's contacts with Texas present a much more compelling case for personal jurisdiction than did the defendant's contacts in *Brown*. Like the defendant in *Brown*, McNamee committed torts—defamation and intentional infliction of emotional distress—in the forum by telling Pettitte, a Texas resident in Texas, that Clemens, a Texas resident, had used steroids and HGH. However, McNamee's contacts with Texas are more substantial than those of the defendant in *Brown* because, unlike the defendant in *Brown* who defamed the plaintiff on a telephone call from outside the forum into the forum, McNamee was actually present in Texas when he defamed Clemens by telling Pettitte that Clemens had used steroids and HGH. Moreover, for the reasons previously explained, McNamee had additional contacts with Texas when he repeated these allegations to the Mitchell Commission and SI.com because those statements were intentionally calculated to—and did—cause their greatest harm to Clemens in Texas. Consequently, this Court may properly exercise personal jurisdiction over McNamee. *See Brown*, 688 F.2d at 334-35.

The Restatement (Second) of Conflicts of Law lends further support for the proposition that a court can properly exercise personal jurisdiction over a nonresident defendant when the defendant engages in tortious conduct outside of the forum with the intent to cause harm within the forum. Section 37 specifically states:

> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any claim arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 37 (Rev. 1988). Comment e to section 37 notes that, when a defendant's "act was done with the intention of causing the particular effects in the state, the state is likely to have judicial jurisdiction though the defendant had no other contact with the state." RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 37 cmt. e (Rev. 1988). This section has been favorably relied upon by both the United States Supreme Court and the Fifth Circuit Court of Appeals. *See Calder*, 465 U.S. at 789; *Guidry*, 188 F.3d at 629-30.

Clemens has alleged that McNamee defamed him with the intention of causing him severe emotional, reputational, and economic harm in Texas where Clemens has lived, worked, and engaged in numerous business and charitable ventures for many years. Accordingly, based on *Calder*, *Hugel*, *Brown*, and section 37 of the Second Restatement of Conflict of Laws, Clemens has presented a *prima facie* case that McNamee has "minimum contacts" with Texas and that Clemens's claims arise from, or are directly related to, those contacts.

2. McNamee's Arguments And Authorities To The Contrary Are Not Persuasive.

McNamee suggests that Clemens has not established personal jurisdiction over him because he did not "expressly aim" his tortious conduct at Texas. *See* McNamee Mtn. at 8. However, to the contrary, as in *Calder*, McNamee did in fact "expressly aimed" his tortious conduct at Texas because he (1) intentionally and maliciously made false accusations to Pettitte in Texas, and (2) intentionally and maliciously made false statements to the Mitchell Commission and SI.com knowing that the false accusations would be widely-circulated in Texas, and (3) caused devastating injury to Clemens in Texas, where McNamee knew Clemens lives, worked, and has significant business interests. The Court in *Calder* noted that such conduct is precisely the type that is "expressly aimed" at the forum state:

> [The defendants] intentional, and allegedly tortious, actions were **expressly aimed** at California. [The author] wrote and [the editor] edited an article that they knew would have a potentially devastating impact upon [the plaintiff]. And they knew that the brunt of that injury would be felt by [the plaintiff] in the State in which she lives and works and in which the *National Enquirer* has its largest circulation. Under the circumstances, [the defendants] must 'reasonably anticipate being haled into court there' to answer for the truth of the statements made in their article.

Calder, 465 U.S. at 789-90 (emphasis added).

McNamee primarily relies on *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002) to support his argument that this Court lacks personal jurisdiction. However, *Revell* is easily distinguished for several reasons.

First, personal jurisdiction was lacking in *Revell* because the defendant did not know that the plaintiff was a resident of Texas, an essential element of *Calder*'s personal jurisdiction test:

> [O]ne cannot purposefully avail oneself of 'some forum someplace'; rather, as the Supreme Court has stated, due process requires that 'the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.' **[The defendant's] affidavit, uncontroverted by the record, states that he did not even know that [the plaintiff] was a resident of Texas when he posted his article. Knowledge of the particular forum in which a potential plaintiff will bear the brunt of the harm forms an essential part of the *Calder* test.** The defendant must be chargeable with knowledge of the forum at which his conduct is directed in order to reasonably anticipate being haled into court in that forum, as *Calder* itself and numerous cases from other circuits applying *Calder* confirm.

Id. at 475 (footnotes omitted). Unlike *Revell*, McNamee knew Clemens was a Texas resident when he made his defamatory statements to Pettitte, the Mitchell Commission, and SI.com. Second, *Revell* did not involve a claim for intentional infliction of emotional distress. This is important because, given the nature of the injury resulting from intentional infliction of emotional distress—severe mental anguish—the brunt of that injury necessarily occurred where Clemens could be found most often—Texas.

Third, unlike the defendant in *Revell*, who had never been to Texas or conducted business here, McNamee has been to Texas many times and had substantial business

contacts with Texas. McNamee contracted with two Texas residents, Clemens and Pettitte, to train them in Texas; traveled to Texas at least 30-38 times between 1999-2007 for 5 days at a time to perform those services; earned a substantial portion of his income from the performance of those services in Texas; and defamed Clemens, while in Texas to train Clemens and Pettitte, by telling Pettitte that Clemens had used steroids and HGH. Comment c to Restatement (Second) of Conflict of Laws § 37 expains that these types of contacts, while not dispositive, are in fact persuasive:

> Whether a state has judicial jurisdiction over one who by an act done outside the state causes an effect within the state may depend upon a variety of factors. Of significance are the extent of the relationship of the state to the defendant . . . . The closer the defendant's relationship to the state, the greater is the likelihood that the state may exercise judicial jurisdiction over him as to claims arising from the effects of the act in the state. . . . So if the defendant does business in the state, . . . there is a greater likelihood that the state may exercise judicial jurisdiction over him as to claims arising from the effects in the state of an act done by him outside the state than if the defendant did not have this relationship to the state. This is so even though the defendant's relationship to the state is not related in any way to the act or to such of its effects in the state as are involved in the suit.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 cmt c.

McNamee also relies on *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005). However, *Fielding* is also easily distinguished for several reasons.

First, unlike Clemens, the plaintiffs in *Fielding* were not residents of the forum state. *See id*. at 427 ("Here, [the plaintiffs] have not even proven that they did, in fact, ever reside in Texas during any of the time relevant to this suit. Thus, [the defendant's] conduct and connection with the forum was not such that it should have 'reasonably anticipated being hauled into court there.'"). Second, unlike Clemens, the plaintiffs in

Fielding did not suffer the brunt of their reputational and emotional injuries in Texas. *See id*. ("The brunt of the harm, in terms of [the plaintiffs'] injury to their professional reputations and their emotional distress, was suffered in Germany, not Texas."). Third, unlike McNamee, the defendant in *Fielding* did not know that the plaintiffs would suffer substantial injury in Texas. *See id*. ("[W]hile the bulk of the effects need not be suffered in the forum to establish jurisdiction, . . . 'knowledge of the particular forum in which a potential plaintiff will bear the brunt of the harm forms an essential part of the *Calder* test.' . . . Knowledge that sufficient harm would be suffered in Texas is conspicuously lacking."). Fourth, unlike Clemens, the plaintiffs in *Fielding* sued media entities, not the individual sources responsible for the defamation. Fifth, in *Fielding*, the combined circulation in Texas of the defendants' defamatory publications totaled only 130 issues. *See id*. at 422. By way of contrast, McNamee's false accusations in the Mitchell Report and the SI.com article were circulated in virtually every major Texas newspaper, and to every person in Texas with Internet access, approximately 16,000,000 people. Exs. G-L, O.

For these reasons, McNamee's arguments and authorities do not require dismissal of Clemens's defamation claims for lack of personal jurisdiction.

B. Exercising Personal Jurisdiction Over McNamee In Texas Will Not Offend "Traditional Notions Of Fair Play And Substantial Justice."

"Once a plaintiff has established minimum contacts, the burden shifts to the defendant to show the assertion of jurisdiction would be unfair." *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 215 (5th Cir. 1999). "[W]here a defendant who purposefully has

directed his activities at forum residents seeks to defeat jurisdiction, he must present a **compelling case** that the presence of some other considerations would render jurisdiction unreasonable." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (emphasis added). "It is rare to say the assertion is unfair after minimum contacts have been shown." *Wien Air*, 195 F.3d at 215. "The standards to be used are the traditional notions of fair play and substantial justice." *Id*.

The interests to balance are: (1) the burden on the defendant having to litigate in the forum; (2) the forum state's interests in the lawsuit; (3) the plaintiff's interests in convenient and effective relief; (4) the judicial system's interest in efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Id*. "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Burger King*, 471 U.S. at 477. As shown below, McNamee has not made a "compelling case" that it would be unreasonable to exercise jurisdiction over him in Texas.

1. Litigating In Texas Will Not Be Overly Burdensome For McNamee.

In 1957, the Supreme Court noted that "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity." *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957). Of course, since *McGee*, transportation and communication have improved exponentially. As previously noted, from 1999-2007, McNamee traveled to Texas on

business at least 30-38 times for 150-190 days and defamed Clemens in Texas on two of those trips. Traveling to Texas was obviously not too burdensome for McNamee then, nor is it now, especially since it is likely that the only time McNamee will actually need to travel to Texas again is for the trial of this case.

Citing section 1069.5 of *Federal Practice and Procedure*, McNamee asserts that litigating in Texas would be "gravely difficult" for him because he is an individual, not a corporation. *See* McNamee Mtn. at 12. However, that section recognizes that "a federal court may invoke a state long-arm statute to assert jurisdiction over a nonresident individual who has committed a single tortious act within the state as readily as it can in the case of a corporation." 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1069.5 (3d ed. 2002). Moreover, "[e]ven an act done by an individual outside the state that has consequences within the state should suffice as a basis for asserting personal jurisdiction in a suit arising from those consequences if the effect reasonably could have been expected to follow from the defendant's conduct." *Id*.

McNamee also asserts that defending this lawsuit would be a "significant burden" on him because he lives in Queens, New York, over 1,500 miles from Houston, Texas. *See* McNamee Mtn. at 13. However, in *Wien Air Alaska*, the Fifth Circuit Court of Appeals found that requiring a German citizen to defend a lawsuit in Texas did not offend traditional notions of fair play and substantial justice: "Admittedly, litigation in the U.S. would place a burden on the defendant. However, once minimum contacts are established, the interests of the forum and the plaintiff justify even large burdens on the defendant." *Wien Air Alaska*, 195 F.3d at 215; *accord Asahi Metal Indus. Co v. Superior*

Court, 480 U.S. 102, 114 (1987) ("[W]hen minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant."). Besides, David Miller, a Houston lawyer, is also defending McNamee. Miller's local presence will minimize any burden placed on McNamee.

McNamee complains that his financial condition is poor. *See* McNamee Mtn. at 13. But frankly, McNamee's financial condition is irrelevant to the fairness prong of the personal jurisdiction analysis in this case because, as his own motion makes clear, McNamee is not bearing any of the costs of his defense. *See id*. Notwithstanding that fact, McNamee has four lawyers and two private investigators defending him. Ex. P. To McNamee's benefit, McNamee's lawyers have voluntarily accepted the financial burden of defending this lawsuit. McNamee cites no authority for the proposition that the imposition of financial burdens on non-parties who have voluntarily assumed them warrants dismissal for lack of personal jurisdiction. Moreover, McNamee's plea of poverty is dubious. SI.com reported that McNamee's personal trainer business is "far from hurting" and that he has a "full training schedule." Ex. F. And, McNamee himself has stated that he has been offered "seven figures" to appear on television and even contacted an agent to investigate how he can capitalize on his notoriety by writing a book. Ex. Q at 7; *see* Ex. B at 205.

Finally, McNamee argues that his ability to present evidence would be prejudiced if forced to defend this case in Texas because defense witnesses are outside the subpoena range of this Court. *See* McNamee Mtn. at 13. The primary flaw in McNamee's

argument is that the only individual he has specifically identified as a defense witness is Andy Pettitte, and he lives in Deer Park, Texas, well within subpoena range. *See id*. n. 11. McNamee's assertion that the testimony of numerous team trainers and doctors for the New York Yankees and Toronto Blue Jays will be essential to combat Clemens's claim that McNamee injected him with vitamin B-12 and Lidocaine is without support. *See* McNamee Mtn. at 13. McNamee has not identified one doctor or trainer who has testified that McNamee did not inject Clemens with B-12 or Lidocaine, despite the fact that most of them gave sworn statements to the Congressional Oversight Committee. And even if such evidence existed, McNamee has offered no explanation for why playing a videotaped deposition of that witness's testimony at trial would not suffice—the critical issue in this case is not whether McNamee injected Clemens with B-12 and Lidocaine, but instead whether McNamee injected Clemens with steroids and HGH. No team doctor or trainer has said that happened.

Moreover, with respect to the Blue Jays' trainers and doctors, McNamee would have no more ability to present their live testimony at trial whether this case continues in Houston or New York because those individuals are outside the subpoena authority and range of the federal courts in both locations. And McNamee's suggestion that "any" witnesses to McNamee's alleged visits to Clemens's Manhattan apartment would "likely" be located in New York is too speculative and unsupported to be a basis for rejecting personal jurisdiction in Texas.

2. Texas Has Substantial Interests In This Lawsuit.

Texas has a substantial interest in the maintenance of this lawsuit in Texas for at least two reasons. First, Clemens has been a Texas resident for more than thirty years, and McNamee's defamatory statements have injured him in Texas. To be sure, Texas has a significant interest in redressing defamation injuries that occur within Texas to Texas residents. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (stating that it is "beyond dispute" that the forum had a significant interest in redressing defamation injuries even to a nonresident that occurred within the forum). Second, Texas has a substantial interest in preventing the publication of false, defamatory statements in Texas because they harm the readers and/or listeners of the falsehood in addition to the subject of the false statements. *See id*.

3. Clemens Has A Substantial Interest In Obtaining Convenient And Effective Relief In Texas, And The Controversy Between McNamee And Clemens Will Be Resolved Most Efficiently In Texas.

Texas is the most convenient and efficient forum for Clemens to litigate his claims against McNamee because most of the witnesses reside in Texas. For example, Ward, McNamee's counsel, has identified Pettitte and Chuck Knoblauch as important witnesses in this case. Ex. R. Pettitte and Knoblauch live in Texas. Ex. S; *see* Amended Cmplt. at 2 ¶ 5. McNamee's counsel has also stated that Clemens's wife and his four sons will all be witnesses in this case. Ex. T. They all live in Texas. McNamee's counsel has also identified Kelly Blair, another trainer, as a potential witness. Ex. U. Blair also lives in Texas. Ex. U.

Moreover, Clemens has lived in Texas for more than thirty years and he has sustained emotional, reputational, and economic injuries in Texas. The witnesses to Clemens's emotional injuries will be his family and friends, the vast majority of whom reside in Texas. *See* Amended Cmplt. at 9 ¶ 24. The witnesses to Clemens's reputational injuries will consist primarily of those who have watched his baseball career from its beginning at Spring Woods High School, to San Jacinto Junior College, to the University of Texas, to the Boston Red Sox, to the Toronto Blue Jays, to the New York Yankees, to the Houston Astros, and back to the Yankees. Those who witnessed Clemens's career from beginning to end will be best positioned to address the rise and fall of Clemens's reputation. The vast majority of those witnesses are in Texas. Finally, Clemens has suffered economic losses because he has lost future endorsement and business opportunities due to McNamee's false accusations. Those losses have also occurred primarily in Texas.

Finally, Clemens's counsel's office is in Houston, Texas, and Clemens does not live, work, or own property in New York. *See* Amended Cmplt. at 9 ¶ 24. Consequently, Texas is a much more convenient and efficient forum for Clemens to pursue this lawsuit.

For these reasons, McNamee has not made a "compelling case" that it is unreasonable for this Court to exercise personal jurisdiction over him in Texas. Consequently, McNamee's motion to dismiss for lack of personal jurisdiction should be denied.

II. Venue Is Proper In This Court Because McNamee Removed This Case To The Southern District Of Texas.

A. The Removal of This Case Automatically Satisfies Federal Venue Requirements.

McNamee's argument that venue is not proper in this case lacks merit. It is hornbook law that "[r]emoval automatically satisfies federal venue requirements." RUTTER GROUP PRACTICE GUIDE, *Federal Civil Procedure Before Trial*, ¶ 2:1048 (5th ed. 2006); *see also* Wright & Miller, FEDERAL PRACTICE & PROCEDURE, § 3726 (2008). The general venue statute (28 U.S.C. § 1391) on which McNamee relies does not apply to removed actions. *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665 (1953) ("[O]n the question of venue, § 1391 has no application to this case because this is a removed action."); Wright & Miller, 14C FEDERAL PRACTICE & PROCEDURE, § 3726 (2008) ("It [] is immaterial that the federal court to which the action is removed would not have been in a district of proper venue if the action had been brought there originally."). Rather, "[t]he venue of removed actions is governed by 28 U.S.C. § 1441(a)." *Polizzi*, 345 U.S. at 663.

Section 1441(a) sets proper venue in "the district court . . . . embracing the place where such action is pending." 28 U.S.C. § 1441(a). Here, the original action was pending in the 129th District Court of Harris County, Texas. McNamee chose to remove this action to the United States District Court for the Southern District of Texas. Upon removal, venue was properly fixed here because the Southern District of Texas embraces Harris County, Texas, where the original action was pending. *See Hollis v. Florida State Univ.*, 259 F.3d 1295, 1299 (11th Cir. 2001) ("[Section] 1441(a), by requiring removal to the district court for the district in which the state action is pending, properly fixes the

federal venue in that district."). Accordingly, McNamee's motion to dismiss for lack of proper venue should be denied.

B. This Case Should Not Be Transferred Under 28 U.S.C. § 1404(a) And McNamee Has Failed To Show Otherwise.

Finally, in a throw-away one sentence statement, McNamee requests a transfer "in the interest of justice," pursuant to 28 U.S.C. § 1404(a). *See* McNamee Mtn. at 16. Such a cursory request is improper and should be denied.

It is well-settled that the movant bears the burden of showing that a transfer of venue under § 1404(a) is warranted. *See Peetet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir.1989). Generally, a plaintiff is entitled to choose the forum. *Id.*; *see also Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966) ("Plaintiff's privilege to choose, or not to be ousted from, his chosen forum is highly esteemed.") (citations omitted). Thus, if a defendant seeks to override this choice, there are detailed public and private factors that a court must consider in deciding whether to grant the transfer under § 1404(a). *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). And, "in weighing alternate venues, the plaintiff's choice of venue normally should not be disturbed, unless clearly outweighed by [the] factors." *Lamex Foods, Inc. v. Blakeman Transp., Inc.*, No. Civ. A H-06-3733, 2007 WL 1456010, at *3 (S.D. Tex. May 15, 2007); *see also Houston Trial Reports, Inc. v. LRP Publications, Inc.*, 85 F. Supp.2d 663, 670 (S.D. Tex. 1999) (**"**The plaintiff's choice of forum is normally given deference, especially when the forum is the plaintiff's 'home.' This choice is rarely disturbed unless the other factors weigh strongly in favor of transferring the case.").

McNamee, however, has failed to meet this burden. In fact, McNamee provides no support for his requested transfer: no evidence, no case citations, no recitation of facts, and no argument.[3] Not only are the required factors not discussed in the motion to dismiss, they are not even mentioned. Accordingly, McNamee's request to transfer venue under 28 U.S.C. §1404(a) should be denied.[4]

III. Clemens Has Properly Pleaded Valid Claims Against McNamee And McNamee's False Accusations To The Mitchell Commission Are Not Privileged.

A. Clemens Has Pleaded His Claims Against McNamee With Sufficient Specificity.

McNamee alleges that Clemens's pleading provides "no notice to McNamee, making it impossible to defend against."[5] *See* McNamee Mtn. at 19. McNamee is wrong. Clemens's Amended Complaint gives him "fair notice" of the nature of Clemens's claims and the grounds for them. *See* Amended Cmplt. at 11 ¶ 33, 12-13 ¶ 35, 13 ¶ 36, 14 ¶¶ 38-45, 15-16 ¶¶ 46-53, 16 ¶¶ 54-58. It not only details the specific nature of the defamatory and false statements, but also sets forth facts establishing the

[3] As a threshold issue, the defendant must also show that the alternative forum is proper. But, as discussed, McNamee has failed to provide any evidence or analysis supporting a transfer under 28 U.S.C. 1404(a).

[4] Clemens asserts that even if the court were to review the factors, such a transfer should be denied because the factors do not clearly outweigh his choice of venue. However, because McNamee has failed to even raise the issue, much less attempt to meet his burden of proof, Clemens will not burden the Court with a lengthy discussion of the point.

[5] McNamee's own motion to dismiss belies this contention. Statements in the motion make it clear that McNamee is aware of the false and defamatory statements that form the basis of Clemens's claims. Specifically, McNamee discusses the statements in detail and asserts that he made them when he "met with Senator Mitchell and his investigators in New York and published the alleged defamatory statements in New York." *See* McNamee Mtn. at 8-9.

time frame and location when McNamee made the defamatory statements. *See id*. Thus, Clemens has pleaded facts sufficient for McNamee to easily deduce when and where the alleged statements were made. Accordingly, Clemens's pleading is more than sufficient.[6]

B. Clemens Has Pleaded Special Damages, But Is Not Required To Do So To Maintain His Defamation *Per Se* Claims.

Clemens pleads for the recovery of special damages in his Amended Complaint. *See* Amended Cmplt. at 14-15 ¶ 45, 16 ¶ 53. Importantly though, he is not required to do so because Clemens has stated a claim for defamation *per se.* "The effect of pleading libel per se is to eliminate the requirement for pleading or proving special damages." *Swate v. Schiffers*, 975 S.W.2d 70, 74 (Tex.App.—San Antonio 1998, pet. denied).[7] To the extent that McNamee is claiming that this case does not involve defamation *per se*, he again misses the mark.

Defamation *per se* involves communications that are so obviously hurtful to the person aggrieved that they require no proof of their injurious character to make them actionable. *See, e.g., Morrill v. Cisek,* 226 S.W.3d 545, 549-50 (Tex.App.—Houston [1st Dist.] 2006, no pet.). Courts have held that, as a matter of law, statements are "defamatory *per se* if they impute the commission of a crime or cause injury to a person's office, business, profession, or calling." *Bingham*, 2008 WL 163551, at *3. Whether a statement is defamatory *per se* is a question of law for the court. *Musser v. Smith*

[6] In the alternative, Clemens's requests that he be granted leave to amend his Complaint.

[7] In defamation *per se* cases, the defamation itself gives rise to a presumption of general damages. *See Bingham v. Southwestern Bell Yellow Pages, Inc.*, No. 2-06-229-CV, 2008 WL 163551 at *3 (Tex. App.-Fort Worth 2008, n. pet. h.). Consequently, "no independent proof of damages to reputation or of mental anguish is required." *Leyendecker & Assocs., Inc. v. Wechter,* 683 S.W.2d 369, 374 (Tex. 1984).

Protective Services, Inc., 723 S.W.2d 653, 655 (Tex. 1987). "The court construes the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement." *Id*. Here, it is clear that McNamee's defamatory statements accused Clemens of committing crimes, and injured his business, profession, and calling.

"If a statement unambiguously and falsely imputes criminal conduct to plaintiff, it is defamatory *per se.*" *Mitre v. Brooks Fashion Stores, Inc.*, 840 S.W.2d 612, 619 (Tex.App.-Corpus Christi 1992, writ denied). "[T]he charge of violating a criminal statute need not be made in a technical manner. It is sufficient to constitute slander *per se* if, in hearing the statement, an ordinary person would draw a reasonable conclusion that the complaining party was charged with a violation of some criminal law." *Gray v. HEB Food Store No. 4,* 941 S.W.2d 327, 329 (Tex. App.—Corpus Christi 1997, pet. denied). In this case, McNamee falsely accused Clemens of using steroids. The use of steroids without a prescription is a crime. *See* Anabolic Steroids Control Act of 1990, Pub. L. No. 101-647, 101 Stat. 4789 (1990) (codified as amended in scattered sections of 21 U.S.C.). Thus, McNamee accused Clemens of committing a crime. No innuendo or inference needs to be made to reach this conclusion. Accordingly, McNamee's false statements that Clemens used steroids are defamatory *per se*.

In addition, as stated above, a statement is *per se* defamatory if it injures a person in his office, business, profession, or occupation. *See Morrill,* 226 S.W.3d at 545. If ever there was a classic case of a false statement injuring another's profession and business by exposing the person to public hatred, contempt, ridicule, or financial injury,

this is it. McNamee's false accusations that Clemens used performance enhancing drugs went to the heart of Clemens's work ethic, his accomplishments, and how he played the game of baseball. This, of course, has had a direct and harmful impact on Clemens as a professional baseball player.

McNamee argues that any injury to Clemens's business is inapplicable because the conduct only related to his "former" career. Such a contention flies in the face of reality. To say that Clemens is no longer involved in the business and profession of baseball or that false accusations about steroid and HGH use have no effect on Clemens's present business and profession (and legacy) is yet another falsehood. First, there is no evidence or support for the contention that Clemens is no longer involved in baseball. Indeed, Clemens has a long-term professional services contract with the Houston Astros that becomes effective upon his formal retirement from baseball. *See* Amended Cmplt. at 4 ¶ 9. Second, and perhaps more important, it completely ignores the foreseeable and far reaching impact McNamee's false statements can and will have. McNamee cannot underestimate the value of Clemens's untarnished past accomplishments, deeds, and reputation on his continued involvement in both Major League Baseball and the related business and professional ventures that flow from such involvement. *See* Amended Cmplt. at 4 ¶ 9. As such, McNamee's false and defamatory statements alleging that Clemens used steroids and HGH has injured (and continues to injure) Clemens's business and professional reputation and is defamatory *per se*.

C. McNamee's Reliance On Duress To Avoid The Consequences Of His False Statements Is An Affirmative Defense And Cannot Be Used To Support A Motion To Dismiss.

Contrary to McNamee's assertions, Clemens has pleaded that McNamee intentionally made false and defamatory statements against Clemens. *See* Amended Cmplt. at 14 ¶ 39, 15 ¶ 47. McNamee's attempt to negate this by claiming that somehow Clemens's pleading establishes that McNamee did not act intentionally but rather under duress is specious.

Duress is a classic confession and avoidance tactic, an affirmative defense.[8] *Kalyanaram v. Burck*, 225 S.W.3d 291 (Tex. App.--El Paso 2006, no pet.). As such, McNamee bears the burden to both plead and prove it. *See McMahan v. Greenwood*, 108 S.W.3d 467, 482 (Tex. App.--Houston [14th Dist.] 2003, pet. denied). To prove duress, McNamee must establish the following elements: (1) a threat or action was taken without legal justification; (2) the threat or action was of such a character as to destroy the other party's free agency; (3) the threat or action overcame the opposing party's free will and caused it to do that which it would not otherwise have done and was not legally bound to do; (4) the restraint was imminent; and (5) the opposing party had no present means of protection. *Id.* Here, McNamee has neither pleaded nor attempted to offer any proof of duress. To do so would be inappropriate in a Rule 12(b)(6) motion.[9]

[8] Importantly, Clemens does not concede that duress is a legally cognizable defense to a claim of defamation. Clemens simply assumes so for purposes of this motion alone.

[9] As for McNamee's assertion that Clemens's pleading does this for him, he is incorrect. Even taking Clemens's allegations as true does not result in a finding that McNamee acted under duress. In fact, Clemens has alleged that McNamee acted voluntarily when he made his false and defamatory statements to the Mitchell Commission. *See* Amended Cmplt. at 11 ¶ 32.

Accordingly, Clemens has properly pleaded facts sufficient to support each element of a defamation claim and McNamee's weak attempt at claiming duress as a defense in this case does not negate the pleading. Thus, McNamee cannot seek a dismissal under Rule 12(b)(6) on the basis of an affirmative defense that he has neither pleaded nor proven.

D. McNamee's False Accusations To The Mitchell Commission Are Not Privileged.

McNamee argues that he is entitled to absolute immunity for anything he told the Mitchell Commission, even if he intentionally and maliciously lied. In effect, McNamee is asking the Court to grant him a license to lie. McNamee's position should be rejected. His statements to the Mitchell Commission are not privileged in any way.

McNamee suggests that absolute immunity applies to the statements he made to the Mitchell Commission. "Such immunity, however, attaches only to a limited and select number of situations which involve the administration of the functions of the branches of government, such as statements made during legislative and judicial proceedings." *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 768 (Tex. 1987). Here, nothing supports the application of such immunity.

The Mitchell Commission's investigation was an independent investigation on behalf of a private entity. *See* Amended Cmplt. at 10-11 ¶ 31. It is undisputed that the Mitchell Commission's investigation was an investigation by a private citizen and a private law firm for a private client. *See id*. The Mitchell Commission's report states as much: "This investigation was an independent inquiry on behalf of a private entity." Ex.

V at B-3. Thus, McNamee's false statements to the Mitchell Commission are not immune because they did not "involve the administration of the functions of the branches of government." *See Hurlbut*, 749 S.W.2d at 768.

Moreover, McNamee cannot convert the Mitchell Commission into a government agency. Contrary to McNamee's assertion, federal investigators did not use the Mitchell Commission to develop their investigation. The Mitchell Report itself contains a letter conclusively establishing this. Specifically, in a September 6, 2007, letter from Mitchell to the players of Major League Baseball he stated in no uncertain terms that "**any allegation that the USAO [United States Attorney's Office for the Northern District of California] is using me or my investigation to do their work for them, or to obtain information from me, is simply untrue.**" Ex. V at B-8 (emphasis in original). Mitchell further explains that:

> As has been announced publicly, Kirk Radomski has agreed to cooperate with my investigation at the direction of the United States Attorneys Office for the Northern District of California ("USAO"). Under our agreement with the USAO, neither I nor my staff are required to supply any information to that Office. The USAO has not made any request that we supply them with information nor do we anticipate receiving such request. I previously served as a United States Attorney and can confirm from direct personal experience that the USAO has at its disposal a vast array of investigative tools—subpoena power, search warrants, the use of agents from several federal agencies, to name just a few—which eliminate any need on their part for my assistance.

Id. In light of Mitchell's unequivocal statements, McNamee's admonition that this Court not "second-guess the prosecutors' decision" to use the Mitchell meetings to develop

their investigation is misleading at best.[10] Not only are McNamee's attempts to treat the Mitchell Commission as an extension of the federal BALCO investigation unsubstantiated, they are conclusively disproven by Mitchell's own admissions.[11]

Accordingly, McNamee's statements to the Mitchell Commission are not entitled to any form of protection and he may be held responsible for the consequences of his false and defamatory accusations.

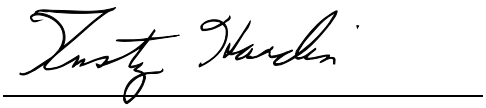
CONCLUSION

For these reasons, Clemens requests that the Court deny McNamee's motion to dismiss Clemens's complaint in its entirety. Clemens also requests all other relief to which he is entitled.

[10] This letter, which McNamee had access to in the Mitchell Report, directly contradicts the bald assertion he made in his motion to dismiss that: "the protection given to statements made to prosecutors must encompass the statements pointed to in the Complaint, as all of these statements were also made to federal prosecutors as part of their investigation. The federal investigators decided that having Mr. McNamee speak to Mitchell was important to their investigation and decided to include the Mitchell investigators in their continuing interrogation of Mr. McNamee. By direct inference, the Complaint makes clear that the federal investigators used those meetings to develop their investigation." McNamee Mtn. at 17-18.

[11] McNamee's attorney and Mitchell himself have stated that McNamee voluntarily spoke with the Mitchell Commission, and that nothing in McNamee's proffer agreement with federal authorities mandated that he do so. *See* Amended Cmplt. at 11 ¶ 32.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May, 2008, a true and correct copy of the foregoing instrument was served upon all counsel of record via certified mail, return receipt requested, in accordance with the Federal Rules of Civil Procedure as follows:

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