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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION
---x
WILLIAM ROGER CLEMENS,

Plaintiff,

4:08-cv-000471
Judge Keith P. Ellison

-against-

BRIAN McNAMEE,

Defendant.
---x

DEFENDANT'S MOTION TO DISMISS THE COMPLAINT IN ITS ENTIRETY

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NATURE AND STAGE OF THE PROCEEDINGS

This is a case of alleged defamation. Roger Clemens filed his Complaint against Brian McNamee in the 129th Judicial District Court of Harris County Texas on January 6, 2008. On February 11, 2008, Mr. McNamee timely and properly removed to this Court on the basis of diversity of citizenship. In lieu of an answer, and pursuant to the deadline set by this Court, Defendant submits this memorandum of law and the Declaration of Debra L. Greenberger dated March 4, 2008 ("Greenberger Decl."), in support of Defendant's motion to dismiss the Complaint in its entirety per Federal Rules of Civil Procedure 12(b)(2), 12(b)(3), and 12(b)(6).

This action stems from Mr. McNamee's truthful admissions, elicited by federal investigators, that he injected Mr. Clemens, a former Major League Baseball pitcher whom Mr. McNamee trained, with steroids and Human Growth Hormone (HGH). The Complaint asserts that Mr. McNamee's repetition of these admissions to Senator Mitchell at the insistence of the federal authorities constitutes defamation. Rather than acknowledging the truth of Mr. McNamee's allegations, Mr. Clemens has chosen to wage a public relations battle against Mr. McNamee in the media and the halls of Congress, in which this lawsuit is but one portion.

The Complaint at issue was filed on a Sunday evening in Harris County District Court, the night before, and plainly in conjunction with, Mr. Clemens's nationally-televised press conference on Monday, January 7, 2008. The sole purpose of that press conference was to label Mr. McNamee a liar. Consistent with the timing and purpose of the Complaint, it reads more like a press release than a pleading, focusing primarily on the accomplishments of the Plaintiff and the alleged coercion of Mr. McNamee by federal authorities, rather than the alleged tortious conduct of the Defendant. Not surprisingly, given its obvious actual purpose, the Complaint suffers from a number of legal defects

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ISSUES, STANDARD AND SUMMARY OF ARGUMENT

Plaintiff moves to dismiss on the following grounds: (1) per Fed. R. Civ. P. 12(b)(2), this court lacks personal jurisdiction over Mr. McNamee; (2) pursuant to Fed. R. Civ. P. 12(b)(3), this Court is not the proper venue for the action; and (3) pursuant to Fed. R. Civ. P. 12(b)(6), the Complaint fails to state a claim for affirmative or declaratory relief.

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

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

(2) Is this Court a proper venue for Mr. Clemens's action? **NO.**

> Civil diversity cases, such as this one, may only be brought: "in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought." 28 U.S.C. § 1391. The Southern District of Texas is not the appropriate venue as defendant does not reside here nor has a substantial part of the events giving rise to the claim occurred here.

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

> A claim must be dismissed pursuant to Rule 12(b)(6) "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Bell Atl. Corp. v. Twombly*, __ U.S. __, 127 S.Ct. 1955, 1966 (2007). This complaint fails to state a claim as (a) the statements at issue are absolutely immune as they were made as part of a federal criminal investigation; (b) the allegations do not afford the defendant sufficient notice of the communications complained of to enable him to defend himself; (c) the allegations preclude intentionality, a necessary element; and (d) a declaratory judgment cannot issue in the circumstance here.

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BACKGROUND

According to the Complaint, Brian McNamee, an athletic trainer who resides in New York, trained Roger Clemens, a former Major League Baseball pitcher. Compl. ¶ 3, 7, 9; Declaration of Brian McNamee, dated March 3, 2008, ¶ 2, *attached as* Exhibit 1 to the Greenberger Declaration ("Ex. 1").[1] Their relationship began in 1998 when Mr. McNamee was a trainer with the Toronto Blue Jays, and continued while Mr. Clemens pitched for the New York Yankees. Compl. ¶ 15-17. Mr. McNamee has also served as Mr. Clemens's personal trainer, training him around the country. Compl. ¶ 21. He has also has sporadically trained Mr. Clemens at or near Mr. Clemens's Texas home. *Id.*

In June 2007, as part of an investigation into controlled substances, federal prosecutors and investigators approached Mr. McNamee. Compl. ¶ 26. After being threatened with prosecution for steroid distribution and conspiracy, Mr. McNamee agreed to cooperate with the federal authorities and admitted that in 1998, 2000 and 2001, he had injected Mr. Clemens with steroids and HGH. Compl. ¶ 26-27. Under penalty of prosecution for false statements, Mr. McNamee informed the federal investigators that, beginning in the summer of 1998, Mr. Clemens approached Mr. McNamee and asked Mr. McNamee to inject him with a steroid called Winstrol. Compl. at 1 "Overview." These initial injections occurred in Toronto. Compl. ¶ 15, Overview. In 2000 and 2001, Mr. McNamee injected Mr. Clemens at Mr. Clemens's Manhattan apartment with steroids and HGH. Compl. at 2 "Overview." Mr. McNamee never injected Mr. Clemens in Texas. *Id.*; Ex. 1 ¶ 2.

The federal authorities insisted that Mr. McNamee cooperate with an investigation conducted by former United States Senator George Mitchell. Compl. ¶ 29. Accompanied by the federal investigators—and still under penalty of criminal prosecution for

[1] All exhibits referenced in this brief are attachments to the Greenberger Declaration.

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false statements—Mr. McNamee repeated to Senator Mitchell that he had injected Mr. Clemens with steroids and HGH on a number of occasions. Compl. ¶ 30, Overview.

By way of background, though not alleged in the Complaint, Mr. McNamee also informed the federal investigators and Senator Mitchell that he injected two other Major League Baseball players with HGH, Andy Pettitte and Chuck Knoblauch. Both of these players have admitted that Mr. McNamee's statements were true.[2] Ex. 2 ¶ 8; Ex 3 at 9. Furthermore, Andy Pettitte has provided some corroboration for Mr. McNamee's statements with respect to Mr. Clemens: 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. Ex. 2 ¶ 1, 3.

Before Senator Mitchell issued his report, Mr. McNamee contacted an agent for Mr. Clemens and Mr. Pettitte to inform them that they would be named in the report. *See* Transcript of McNamee and Jim Murray, Dec. 5, 2007, at 2, Ex. 4. Rusty Hardin, counsel for Mr. Clemens and Mr. Pettitte, immediately sent two investigators to question, and surreptitiously tape, Mr. McNamee. *See* Transcript of McNamee by Investigators, Dec. 12, 2007, at 8, Ex. 5. A purportedly transcribed excerpt of that conversation is included in the Complaint. Compl. ¶ 27. After the Mitchell Report was released, Mr. Clemens began a very public campaign claiming that he had never used steroids or HGH and accusing Mr. McNamee of deceit. Mr. Clemens was interviewed by 60 Minutes and, the day after the interview was aired, held a press conference. It

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

was at that press conference that he informed the world—and, for the first time, defendant—that the day before, a Sunday evening, he had filed a defamation suit against Mr. McNamee.[3]

The forty-paragraph Complaint has sparse mention of the allegedly defamatory statements, and instead is a paean to Mr. Clemens's sterling career as a Major League Baseball pitcher. Indeed, nearly half of the Complaint reads as a lionized biography of Mr. Clemens. The Complaint also perfunctorily seeks a declaratory judgment

Defendant also notes as a matter of public record that, after the Complaint was filed, the House Committee on Oversight and Government Reform ("Committee") held a hearing on February 13, 2008, about the Illegal Use of Steroids in Major League Baseball, in order to investigate allegations of Clemens's steroid use.[4] On February 27, 2008, the Committee wrote to Attorney General Mukasey to request an investigation into the truthfulness of Mr. Clemens's testimony; the Committee also released an extensive background memorandum detailing the inconsistencies and implausibilities in Mr. Clemens's testimony that prompted the referral.[5]

As a result of Mr. Clemens public campaign to discredit him, Mr. McNamee's financial status has rapidly deteriorated. He has earned little since this Complaint was filed and has poor prospects for future employment. Ex. 1 ¶ 4.

DISCUSSION

In the end Mr. Clemens cannot prevail because Mr. McNamee has the absolute defense of truth. But Mr. Clemens's allegations cannot get that far. They fail at the threshold,

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

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

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

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based on any of three independent infirmities with his pleadings: this court lacks jurisdiction over Mr. McNamee's person, this Court is not the proper venue for this diversity action, and Plaintiff fails to state a claim for affirmative or declaratory relief.[6]

I. THIS COURT LACKS PERSONAL JURISDICTION OVER DEFENDANT.

This Court must dismiss this action under Fed. R. Civ. Proc. 12(b)(2) as Mr. McNamee is from New York and does not have sufficient contacts with Texas to provide this Court with jurisdiction over his person.

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

Once a "defendant challenges personal jurisdiction," the plaintiff has the "burden of proving that jurisdiction exists." *Luv n' care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 469 (5th Cir. 2006) (citation omitted). Mr. Clemens can only meet that burden by making "a prima facie showing," *id.*, that Mr. McNamee "has purposefully availed himself of the benefits and protections of [Texas] by establishing "minimum contacts' with [Texas]." *Revell v. Lidov*, 317

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

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F.3d 467, 470 (5th Cir. 2002). "The minimum contacts requirement can be met through contacts sufficient to confer either specific or general jurisdiction." *Ouazzani-Chahdi v. Greensboro News & Record, Inc.*, No.Civ. A. H-05-1898, 2005 WL 2372178, at *1 (S.D. Tex. Sept. 27, 2005) (Ellison, J.) (citation omitted), *aff'd*, 200 Fed.Appx. 289 (5th Cir. 2006). Specific jurisdiction only exists "in a suit arising out of or related to the defendant's contacts with the forum." *Luv n' care*, 438 F.3d at 469. General jurisdiction, on the other hand, does not require a relationship between the minimum contacts and the suit, but can only be exercised when defendant has "substantial, continuous, and systematic" contacts with the forum state. *Ouazzani-Chahdi,* 2005 WL 2372178, at *1. If such a showing of minimum contacts is made, Mr. McNamee can still defeat jurisdiction by proving that the "assertion of jurisdiction is unfair and unreasonable." *Id.* at *2.

In this case, Mr. Clemens does not make out a prima facie basis for in personam jurisdiction over Mr. McNamee in Texas.

A. This Court lacks specific jurisdiction over Mr. McNamee because the defamation claim purports to arise out of Mr. McNamee's statements in New York about Clemens's conduct outside of Texas.

This Court lacks specific jurisdiction over Defendant Mr. McNamee, as the defamation claim does not arise out of any contact with Texas. Instead, the defamation claim purports to arise from statements Mr. McNamee made in New York about Mr. Clemens's use of performance enhancing substances in Toronto and New York. *See* Compl. Overview; Ex. 1 ¶ 2. Any harm to Mr. Clemens in Texas is, by itself, insufficient in a jurisdictional analysis.

Mr. Clemens's Complaint alleges that this Court has specific jurisdiction over Mr. McNamee because Mr. McNamee knew that the Mitchell Report "would be widely circulated and cause its greatest harm to Clemens in Texas where Clemens lives and works." Compl. ¶ 5.

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However, the Fifth Circuit has made clear that, in a defamation action, "plaintiff's residence in the forum, and suffering of harm there, will not alone support jurisdiction."[7] *Revell*, 317 F.3d at 473 (holding, in a libel action, that the Court lacked jurisdiction); *see also Panda Brandywine*, 253 F.3d at 870 ("If we were to accept [plaintiff's] arguments, a nonresident defendant would be subject to jurisdiction in Texas for an intentional tort simply because the plaintiff's Complaint alleged injury in Texas to Texas residents regardless of the defendant's contacts, and would have to appear in Texas to defend the suit no matter how groundless or frivolous the suit may be." (internal quotation marks omitted)). This is so because to assert specific jurisdiction over a defendant for purposes of a defamation claim, plaintiff must show that defendant expressly "aim[ed] a story at the state knowing that the effects of the story will be felt there." *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419, 425 (5th Cir. 2005) (internal quotation marks omitted).

In *Revell*, the Fifth Circuit affirmed a dismissal for lack of personal jurisdiction in a defamation case with facts that mirror those in the instant case. 317 F.3d 467. In that case, a Texas resident sued an assistant professor and his university, neither of whom were residents of Texas, for the professor's allegedly defamatory statements posted on the university's website. *Id.* at 468-69. As in *Revell,* Mr. McNamee's allegedly defamatory statement "contains no reference to Texas," and does not "refer to the Texas activities" of Mr. Clemens. *Id.* at 473. The Complaint points to Mr. McNamee's statements about Mr. Clemens's use of performance enhancing substances in 1998, 2000, and 2001. Compl. Overview. None of these events occurred in Texas; instead, they primarily occurred in New York and Toronto. Ex. 1 ¶ 2. Furthermore, Mr. McNamee met with Senator Mitchell and his investigators in New York and

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[7] Defendant does not concede that plaintiff suffered the greatest harm in Texas, given that plaintiff is a Major League Baseball player with a nationwide reputation. Indeed, some would argue that plaintiff's reputation in Cooperstown, New York, the site of the Baseball Hall of Fame, is of more relevance than his reputation in Texas. However, the Court need not resolve this question as the situs of the harm is tangential to this analysis.

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published the allegedly defamatory statements in New York.[8] *Id.* (Published is a term of art in defamation law and means merely making a non-privileged communication to a third party, as distinguished from its lay meaning.) Finally, Mr. McNamee's statements were "not directed at Texas readers as distinguished from readers in other states," nor did his statements find their "largest audience in [the forum state]." *Revell,* 317 F.3d at 473. The Mitchell Report has a nationwide audience and has garnered attention from national media. Furthermore, Mr. McNamee directed his statements to Senator Mitchell, having no knowledge of, or control over, Senator Mitchell's ultimate dissemination of the statements. There is simply no connection between Texas and Mr. McNamee's statements to Senator Mitchell, save for the "fortuity" that Plaintiff resides in Texas, a fortuity that alone is insufficient for an assertion of jurisdiction. *Panda Brandywine*, 253 F.3d at 869-70**;** *see also Fielding,* 415 F.3d at 427 ("[T]he plaintiff's mere residence in the forum state is not sufficient to show that the defendant had knowledge that effects would be felt there; a more direct aim is required." (internal quotation marks omitted)).

B. This Court lacks general jurisdiction over Mr. McNamee because his contacts with Texas were not "substantial, continuous, and systematic."

Mr. McNamee lives and works in New York. Ex. 1 ¶¶ 1, 7. The complaint must be dismissed for lack of general jurisdiction as it fails to allege that he has "extensive" contacts with Texas that are "substantial, continuous, and systematic" enough to justify general jurisdiction. *Ouazzani-Chahdi,* 2005 WL 2372178, at *2. Plaintiffs seeking to establish general jurisdiction over non-residents have a "difficult" burden. *Id.* And courts are particularly unwilling to find that an *individual* non-resident defendant, as opposed to a corporation, has the

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

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type of substantial contacts necessary for general jurisdiction. *See* 4A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* ("Wright & Miller") § 1069.5 (3d ed. 2007). It is "a rare case in which the *individual* has carried on the type of continuous and systematic activities within the latter state that have been held to make a foreign corporation amenable to suit on a theory of general jurisdiction for acts done outside the jurisdiction." *Id.* (emphasis added).[9] A series of attenuated contacts does not suffice to constitute "doing business" in Texas for purposes of general jurisdiction. *Wilson v. Belin*, 20 F.3d 644, 647, 650-651 (5th Cir. 1994). "In case after case when an individual conducts business that requires their occasional presence in a state, courts have not found sufficient contact for general jurisdiction." *Span Const. & Engineering, Inc. v. Stephens*, No. CIV-F-06-0286, 2006 WL 1883391, at *6 (E.D.Cal. July 07, 2006) (citing cases).

For example, in *Wilson,* the Fifth Circuit denied general jurisdiction where the defendant performed an annual legal project for various Texas firms, gave a legal seminar in Texas; served as a consultant to a Texas-based historical society; carried malpractice insurance with a Texas firm, gave interviews to Texas reporters, published a letter to the editor in a Texas newspaper and wrote a book which was circulated, *inter alia*, in Texas. *Id.* at 650. There, the Court explained that "these various brief contacts with Texas . . . simply were not substantial enough to give rise" to an expectation that defendant could "be sued in Texas on any matter, however remote from these contacts." *Id.* There, as here, the defendant had not "conducted regular business in Texas," or make "all or even a substantial part of [his] business decisions in

[9] Even in corporate cases, where Courts are more willing to assert general jurisdiction, when a defendant has never maintained an office in Texas, occasional visits by corporate employees, even when coupled with other contacts, are insufficient for jurisdiction. *See, e.g., Central Freight Lines v. APA Transport Corp.*, 322 F.3d 376, 281 (5th Cir. 2003).

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Texas, did not keep bank accounts in Texas, did not hold directors' meetings in Texas, and did not maintain [his files] in Texas." *Id.* at 650-51.[10]

In this case, Mr. McNamee's contacts to Texas were limited to an "occasional presence" in the state. The Complaint alleges that Mr. McNamee has "profited by frequently and regularly traveling to Texas for extended periods of time to train professional athletes over the last decades." Compl. ¶ 5. But Mr. McNamee's visits to Texas—his only contact with the forum state—were sporadic and for short, not extended, periods of time. *See* Ex. 1 ¶¶ 10-14. Mr. McNamee made, on average, two to three annual visits to Texas in the years before this lawsuit, with the exception of 2004, when he made ten visits. Ex. 1 ¶ 12. This is the very definition of occasional presence, similar to (though less than) the contacts in *Wilson,* 20 F.3d 644, which the Court found insufficient for jurisdiction. Furthermore, "[m]erely contracting with a resident of [Texas] does not establish minimum contacts." *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 481 F.3d 309, 311 (5th Cir. 2007). Mr. McNamee never resided in Texas, never owned property in Texas, never maintained an office or business records in Texas, and never paid taxes in Texas. Ex. 1 ¶ 8. Instead, Mr. McNamee resides in New York, maintains his office and business records in New York, and pays taxes in New York. Ex. 1 ¶ 7.

Mr. McNamee's contacts with Texas are plainly neither substantial, nor continuous, nor systematic. The implication of Mr. Clemens's assertion of general jurisdiction on these facts is mind boggling. If Mr. Clemens were to prevail on his allegation that Texas courts may assert general jurisdiction over Mr. McNamee, then he could be hailed into court in Texas for <u>any</u> action, no matter if the underlying events occurred in Sweden and the plaintiff

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[10] Other courts in jurisdictions with long-arm statute that reach as far as allowable by the Constitution's Due Process Clause have also held that a series of visits to the forum state cannot constitute the required contacts for assertion of general jurisdiction. *See, e.g., Cornelison v. Chaney*, 16 Cal.3d 143 (1976) (holding that twenty trips a year, for each of seven years, hauling goods to and from the forum state was insufficient for general jurisdiction).

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resided in Thailand. This cannot be the case. This Court cannot assert general jurisdiction over an individual defendant on the facts of this case.

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

Even where a plaintiff can make a prima facie case of minimum contacts with the forum state, the Due Process Clause forbids the exercise of personal jurisdiction where, as here, it "would offend traditional notions of fair play and substantial justice." *Kalu v. Romerovski Corp.*, No. H-05-04069, 2006 WL 1291275, at *4 (S.D. Tex. May 8, 2006) (Ellison, J.) (internal quotation marks omitted). Of course, if this Court finds that Mr. McNamee does not have sufficient contacts with Texas, it need not consider questions of fairness and justice.

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

Here, exercising jurisdiction over the Defendant would "make litigation 'so gravely difficult and inconvenient' that [Mr. McNamee would be] unfairly . . . . at a severe disadvantage in comparison to his opponent." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) (internal quotation marks omitted). This is particularly the case as Mr. McNamee is an individual defendant and, as compared to a "corporation or commercial enterprise," "it will be a greater inconvenience for a nonresident individual to defend a suit in a distant jurisdiction" as a "corporation often will have personnel and financial resources available that an individual defendant will not." 4A Wright & Miller § 1069.5. Mr. McNamee lacks these resources.

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Defending a lawsuit would be a significant burden on Mr. McNamee, an individual defendant. Mr. McNamee lives in Queens, New York, over 1,500 miles from Houston, Texas. Ex. 1 ¶ 1. Mr. McNamee also has very limited resources; in the first two months of 2008 he has earned just $1,500. Ex. 1 ¶ 4. He attempts to support four dependents, and owes more than his income and assets allow him to pay. Ex. 1 ¶ 5. To defend himself, he "would have to shoulder the expense of transporting" himself and his records to Texas. *Kalu*, 2006 WL 1291275, at *5. In addition, Mr. McNamee is not paying his counsel. Ex. 1 ¶ 6. Thus counsel would have to bear the cost of defending this lawsuit in Texas, with all the attendant travel and litigation expenses.

Furthermore, Defendant's presentation of evidence would be prejudiced if he were forced to defend in Texas, as the events underlying the allegedly defamatory statements occurred in New York and Toronto. Many of the defense witnesses "cannot be subpoenaed to give testimony at a trial in Texas, [so] litigating this suit in Texas would prejudice Defendants' presentation of its case." *Id.* A Texas court could not subpoena many of the witnesses least likely to testify voluntarily. For example, the testimony of numerous team trainers and doctors who work for the New York Yankees and the Toronto Blue Jays will be essential to combat Mr. Clemens's claim (as he testified to Congress) that Mr. McNamee injected him with Lidocaine and B-12. Similarly outside the subpoena range would be many of Mr. Clemens's Yankee teammates who may have additional information about the truth of Mr. McNamee's allegations. As a third example, any witnesses to Mr. McNamee's frequent short visits to Mr. Clemens's Manhattan home in 2000 and 2001 (the timing of which would support the truth of Mr. McNamee's statements) would likely be located in New York.[11]

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

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Finally, “nothing prevents Plaintiff[] from seeking relief in [New York], where Defendant concedes that personal jurisdiction would be appropriate.” *Kalu*, 2006 WL 1291275, at *5. Mr. Clemens is a man of considerable resources, who maintained a New York residence for years (and may still), Ex. 1 ¶ 16, and could easily bring this suit there. Indeed, New York has the most interest in this dispute: Mr. McNamee’s statements were made to Senator Mitchell in New York; New York is the only state in this country where the injections that underlie the defamation Complaint occurred; and Mr. Clemens career was substantially as a New York Yankee.

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

II. THIS ACTION SHOULD BE DISMISSED AS THIS COURT IS NOT THE PROPER VENUE FOR MR. CLEMENS’S ACTION.

Even if this Court were to find it had personal jurisdiction over Mr. McNamee, it must dismiss because this Court is not the proper venue. Defendant does not reside in Texas, the events giving rise to the claim did not occur here, and the action would be proper in a New York federal court. Civil diversity cases, such as this one, may only be brought: “in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if

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there is no district in which the action may otherwise be brought." 28 U.S.C. § 1391.[12] This Court is not the appropriate venue under any of these provisions. Under § 1391(a)(1), venue would be appropriate in New York, but not Texas, as Defendant resides in New York. Neither is venue appropriate under 1391(a)(3) as that provision only applies "if there is no district in which the action may otherwise be brought," and this action may be brought in New York. Nor is this District the appropriate venue under 1391(a)(2) as a "substantial part" of the events giving rise to the claim did not occur here.

As detailed above in the discussion of specific jurisdiction, the allegedly defamatory statements were made in New York about conduct that occurred in New York and Toronto. Ex. 1 ¶ 2. The only connection to Texas is that the Plaintiff alleges that he was injured here. But that is not enough for proper venue under 1391(a)(2).[13] *See Epstein v. Gray Television, Inc.*, No. 06-CV-431-WRF, 2007 WL 295632, *4 (W.D. Tex. Jan. 5, 2007) (holding, in a defamation claim, that transfer to South Carolina was appropriate as "a substantial part of the events giving rise to the action occurred in South Carolina: the broadcast was prepared there, the activities discussed in the broadcast occurred there, interviewees resided there, and the report was actually aired there," though Plaintiff resided in Texas and alleged that the harm occurred there); *Davis v. Costa-Gavras,* 580 F.Supp. 1082, 1088-90 (S.D.N.Y. 1984) (holding, in a libel case, that venue was not proper in the state where plaintiff's reputation was injured and

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[12] Many courts in the Fifth Circuit have held that the plaintiff has the burden to establish that the district he chose is a proper venue after a Fed. R. Civ. Proc. 12(b)(3) motion has been made. *See, e.g., McCaskey v. Continental Airlines, Inc.*, 133 F.Supp.2d 514, 523 (S.D. Tex 2001) (citing cases holding that the plaintiff has the burden). *But see Lamex Foods, Inc. v. Blakeman Transp., Inc.*, No. H-06-3733, 2007 WL 1456010, at *1 (S.D. Tex. May 15, 2007) (Ellison, J.) (noting that courts are divided over which party bears the burden and citing cases).

[13] While some courts have considered where a defamatory statement was published in a venue analysis, here the publication was the statement to Senator Mitchell, and that statement was made in New York. The Complaint does not allege that Mr. McNamee published the allegedly defamatory statements in Texas.

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dismissing action); *see also Lomanno v. Black*, 285 F.Supp.2d 637, 643 (E.D.Pa. 2003) (holding, in a defamation claim, that "the fact that [Plaintiff] suffered injury within [the judicial district] is not enough to establish venue pursuant to Section 1391(a)(2)"); *Schultz v. Ary*, 175 F.Supp.2d 959 (W.D. Mich. 2001) (same).

Thus, per 28 U.S.C. § 1406(a), this court must dismiss the action for improper venue under Fed. R. Civ. Proc. R. 12(b)(3). In the alternative, this Court should transfer venue to the Southern District of New York in "the interest of justice," per 28 U.S.C. § 1404(a).

III. THE COMPLAINT FAILS TO STATE A CLAIM

To survive a Rule 12(b)(6) motion to dismiss, a complaint must provide the plaintiff's grounds for entitlement to relief. "[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Bell Atl. Corp. v. Twombly*, __ U.S. __, 127 S.Ct. 1955, 1966 (2007) (internal quotation marks omitted).

This complaint fails to state a claim because (a) Mr. McNamee's statements are absolutely immune as they were made as part of a federal criminal investigation; (b) the defamation allegations do not afford the Defendant sufficient notice of the communications complained of to enable him to defend himself; (c) the allegations in the complaint preclude intentionality, a necessary element; and (d) a declaratory judgment cannot issue in the circumstances here.

A. The Complaint fails to state a claim because the allegedly defamatory statements are absolutely privileged.

Mr. McNamee has absolute immunity for his statements to Senator Mitchell as they were made as part of a federal government investigation.

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It is clear under Texas law[14] that statements to law enforcement officials have absolute immunity from defamation claims as they are a "communications to [a] government agenc[y]," so long as the statements are part of an "ongoing . . . investigation" and are not unsolicited. *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 994 (5th Cir. 1999) (citing *Thomas v. Bracey*, 940 S.W.2d 340, 343 (Tex.App. 1997)). Mr. Clemens alleges that Mr. McNamee was contacted as part of a federal criminal investigation into controlled substances; thus there were no "unsolicited" statements. Compl. ¶ 26. The allegedly defamatory statements stemmed from Mr. McNamee's cooperation with federal officials at a time when he was under threat of prosecution. The only question before this Court is whether the statements to Senator Mitchell were part of that investigation. This is a "question of law to be determined by the court," and "[a]ll doubt should be resolved in favor of the communication's relation to the proceeding." *Thomas*, 940 S.W.2d at 343. Here Mr. McNamee's statements to Senator Mitchell were plainly part of the federal investigation.

First, the Complaint alleges that federal authorities "wanted McNamee to repeat his story to the Mitchell Commission." Compl. ¶ 29. Second, while he "initially refused to do so," according to the Complaint, "he was told by the federal government that he would be moved from 'witness' status back to a 'target' status" if he refused. *Id.* "McNamee has stated that when faced again with the threat of federal prosecution, he agreed to speak with the Mitchell Commission." *Id.* Third, Mr. McNamee "appeared before the Mitchell Commission with federal authorities at his side." Compl. ¶ 30.

Therefore, 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

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

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to federal prosecutors as part of their investigation. The federal investigators decided that having Mr. McNamee speak to Senator Mitchell was important to their investigation and decided to include the Mitchell investigators in their continuing interrogation of Mr. McNamee. By direct inference, the Complaint makes clear that the federal investigators used those meetings to develop their investigation. This Court cannot second-guess the prosecutors' decision on how to proceed with their investigation. Nor can Mr. McNamee be forced to defend against a defamation action because he told the truth when faced with criminal sanctions for lying.

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

Policy considerations support including all of Mr. McNamee's statements within the ambit of absolute immunity. In this situation, where prosecutors arrange and attend a meeting with a witness because those prosecutors decide that inclusion of such third parties will serve law enforcement purposes, the "proper investigation of criminal activity" compels protecting that witness's statements (in the face of criminal repercussions for lying) from a subsequent defamation lawsuit. To hold otherwise would impede criminal investigations by

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obscuring when, and under what conditions, contact with prosecutors is absolutely privileged from a defamation lawsuit.

As Mr. McNamee's statements are at the core of prosecutorial activity, they must be immune from suit, and this case must be dismissed.[15]

B. The Complaint fails to state a claim because it does not provide Defendant sufficient notice of the allegedly defamatory statements, nor does it allege special damages.

1. The allegedly defamatory statements are not pleaded with specificity.

Defamation allegations must afford the defendant sufficient notice of the communications complained of to enable him to defend himself. *McGeorge v. Continental Airlines, Inc.*, 871 F.2d 952, 956 (10th Cir. 1989) (citing *Liguori v. Alexander*, 495 F.Supp. 641, 647 (S.D.N.Y. 1980)); *see also Bushnell Corp. v. ITT Corp.*, 973 F.Supp. 1276, 1287 (D. Kan.1997) (internal citations omitted) (noting that a "stricter" pleading standard applied to defamation as a "traditionally disfavored" cause of action).

As an initial matter, the Complaint includes the conclusory statement that "McNamee, through his counsel, has repeatedly republished his false statements about Clemens." Compl. ¶¶ 31, 34. This statement, with <u>no</u> additional information, such as what statement or statements were published, when they were published, and where they were published, is insufficient to survive a motion to dismiss. This statement provides no notice to Defendant, making it impossible to defend against.[16] *See Bell Atlantic*, 127 S.Ct. at 1965 n.3

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[15] Contrary to the allegations in the Complaint, Compl. ¶ 35, Senator Mitchell's republication of Mr. McNamee's immunized statements cannot expose Mr. McNamee to liability as he had no control over Senator Mitchell.

[16] In any event, no liability can attach under Texas law for statements made by an attorney in the course of a pending litigation. When a privileged statement is made by a counsel it "cannot constitute the basis for a defamation claim against [the defamation defendant] or its counsel." *West v. Maint. Tool* (cont'd . . .)

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("Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." (citation omitted)). Moreover, even the statements in the Complaint's "Overview" section, alleged to have been made by Mr. McNamee to Senator Mitchell, fail the standard elucidated by several courts in this Circuit as there is no allegation as to the "time and place that the statement was published." *Hernandez v. Wal-Mart Assocs, Inc.*, No. EP-06-CA-233-FM, 2006 WL 2883080, at *4 (W.D. Tex. Sept. 16, 2006) (citing *Garrett v. Celanese Corp.*, No. 3:02-cv-1485-k, 2003 WL 22234917, at *4 (N.D. Tex. Aug. 28, 2003) (same); *Jackson v. Dallas Indep. School Dist.,* No. A.398-cv-1079, 1998 WL 386158, at *5 (N.D. Tex. July 2, 1998) (same)).

Indeed, many courts have dismissed defamation claims where plaintiff "failed to identify with the requisite specificity what statements are defamatory." *See, e.g.*, *Harris v. City of Seattle*, 315 F.Supp.2d 1112, 1123-24 (W.D. Wash. 2004) (holding that defamation claims failed because the plaintiff alleged only that defendants "fabricated stories" and disseminated reports that "contained falsities" but did not identify what these alleged "falsities" and "stories" were or when the statements occurred).[17]

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and Supply Co., Inc., 89 S.W.3d 96, 108 (Tex.App. 2002); *see also* Edward K. Esping & Susan L. Thomas, 50 *Tex. Jur.* 3d Libel § 68 (2008).

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

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2. The Complaint does not allege special damages nor specify a *per se* category.

Under Texas law, slander *per* se is limited to a narrow band of statements: (1) imputation of a crime, (2) imputation of a loathsome disease, (3) injury to a person's office, business, profession, or calling, and (4) imputation of sexual misconduct." *Fiber Systems Intern., Inc. v. Roehrs*, 470 F.3d 1150, 1161 (5th Cir. 2006). The complaint is defective because it does not alleges which *per se* category the allegedly defamatory statements fall within.

And, to the extent Mr. Clemens seeks to allege that Mr. McNamee's alleged statements caused injury to Mr. Clemens's business, a *per se* claim is inapplicable as the conduct related only to his *former* career. *Cf. Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1281-82 (3d Cir. 1979) (holding that doctor's statements that football player had potentially fatal disease did not fall within *per se* category as plaintiff's "career as a football player was over . . . and the article . . . was not published until [after that point]" (citing Restatement (Second) of Torts, § 573, cmt. c (2002) (stating that it is not within *per se* category to impute misconduct "of a public officer whose term has expired"))). In fact, in 1998, 2000, and 2001 (when Mr. McNamee states that he injected Mr. Clemens), it was not even a violation of the Major League Baseball rules at the point, under the terms of the collective bargaining agreement, for a player to take steroids or HGH.[18]

To the extent Mr. McNamee's statements do not fall within a *per se* category, the Complaint fails because it does not plead special damages, as is required for slander *per quod*. *See Moore v. Waldrop*, 166 S.W.3d 380, 384 (Tex.App. 2005).

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

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C. The Complaint fails to state a claim because it asserts that McNamee was coerced to defame Clemens; this precludes the element of intentionality.

Defamation is an intentional tort. A "voluntary act" is necessary "to establish tort liability," and there is no such liability when a statement is made under duress. *Stanley v. C. I. R.*, 45 T.C. 555, 561 n.8 (Tax Court 1966) (citing Prosser, Torts, secs. 7, 8, 18 (3d ed. 1964)). Plaintiff alleges that Mr. McNamee statements were made under coercion and duress, due to pressure from federal investigators. On the face of the Complaint, then, Plaintiff does not make out a claim for defamation.

The following allegations in the Complaint allege duress and coercion:

- Alleging that Mr. McNamee's statements to the federal investigators were made "after being threatened with criminal prosecution if he did not implicated Clemens." Compl. ¶ 8. He "later affirmed his allegations to the Mitchell Commission, again only after being expressly threatened with criminal prosecution." *Id.*

- Alleging that, "[t]hroughout a lengthy interrogation the first day, McNamee told others he repeatedly denied that Clemens has used steroids or HGH." Compl. ¶ 26.

- Describing the second day of interrogations, which allegedly included federal investigators going on "a big tirade," throwing paper at Mr. McNamee, and threatening him with imprisonment if he did not provide information about Clemens, which led Mr. McNamee "for the first time in his life," according to the Complaint, to state that he had injected Mr. Clemens with steroids. Compl. ¶ 27.

- Describing the interview with Senator Mitchell as being "conducted like a cold war interrogation, in which a federal agent merely read to the Mitchell investigators McNamee's previously-obtained statement and then asked McNamee to confirm what he previously said." Compl. ¶ 30.

Taking these allegations as true, as the Court must on a motion to dismiss, Mr. McNamee cannot be held liable for statements that he was forced to make.

D. This Court must dismiss the declaratory judgment claim as (1) a declaratory judgment is not appropriate in tort suits; (2) this case is not yet ripe; and (3) the Complaint provides Defendant insufficient notice of the underlying claim.

At paragraph 37 of his Complaint, Mr. Clemens seeks a declaratory judgment absolving him of liability for defaming Mr. McNamee. This allegation is barebones and fails to

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identify any statements or events which even arguably would give rise to such a claim. This Court should dismiss Mr. Clemens's claim for a declaratory judgment because the Declaratory Judgment Act, 28 U.S.C. § 2201, does not apply to tort actions. Furthermore, any claim is not yet ripe. Finally, this claim, laid out in a summary paragraph, does not provide defendant with sufficient specific notice.

First, the Declaratory Judgment Act, which applies in federal diversity actions, *see Standard Fire Ins. Co. v. Sassin*, 894 F.Supp. 1023, 1025-26 (N.D.Tex. 1995), is not meant to circumvent "the right of a personal-injury plaintiff to choose the forum and the time, if at all, to assert his claim," 10B Wright & Miller § 2765. Courts routinely dismiss declaratory judgment actions brought by potential tortfeasors seeking to usurp a tort victim's rights. *See, e.g.*, *Inland Dredging v. Sanchez*, 468 F.3d 864, 866 (5th Cir. 2006) ("[W]e would not allow a tortfeasor to seek a declaratory judgment of non-liability and thereby 'procedurally fence' the injured party in the tortfeasor's chosen forum.").[19]

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[19] *See also Cunningham Bros., Inc. v. Bail,* 407 F.2d 1165, 1167-68 (7th Cir. 1969) (affirming district court's dismissal of declaratory judgment claim and holding that "to compel potential personal injury plaintiffs to litigate their claims at a time and in a forum chosen by the alleged tort-feasor would be a perversion of the Declaratory Judgment Act," notwithstanding plaintiff's claim that a declaratory judgment would "avoid multiplicity of action"), *cited approvingly in Torch, Inc. v. LeBlanc*, 947 F.2d 193, 196 n.2 (5th Cir. 1991); *Great-West Life & Annuity Co. v. Petro Stopping Cts., L.P.*, No. 01-1847, 2001 WL 1636413, *5 (N.D. Tex. Dec. 18, 2001) ("[I]t is not the purpose of the federal Declaratory Judgment Act to enable prospective defendants in tort actions to obtain a declaration of non-liability.); *Morrison v. Parker,* 90 F.Supp.2d 876, 880-81 (W.D.Mich. 2000) (stating that "[f]ollowing *Cunningham*, the uniform approach of the federal courts is that declaratory relief is generally inappropriate when a putative tortfeasor sues the injured party for a declaration of nonliability" and citing cases). *Cf. Certain Underwriters at Lloyd's London v. A & D Interests, Inc.,* 197 F.Supp.2d 741, 750 (S.D. Tex. 2002) (noting that the *Cunningham* line of cases holds that "a prospective tort defendant, *not* a prospective tort plaintiff, may not obtain a declaration of nonliability" (emphasis in original)).

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Second, this claim is not yet ripe.[20] Mr. Clemens cannot bring a declaratory judgment while factual development is still ongoing—including a pending criminal investigation—and before the extent of Mr. McNamee's damages from Mr. Clemens's allegedly defamatory statements has been ascertainable. *See New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 587 (5th Cir.1987) ("A case is generally ripe if the remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required." (citation omitted)); *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 896 (5th Cir. 2000) (holding that a declaratory judgment action is ripe only where "a substantial controversy of sufficient immediacy and reality [exists] between parties having adverse legal interests" (alteration in original)) Moreover, Mr. Clemens has made new and expanded statements about Mr. McNamee long after the filing of the Complaint. *See, e.g.*, Alyson Footer, *Clemens Makes Case to Media,* MLB.com, Jan. 1, 2008, Ex. 7.

Finally, while the Complaint "seeks a declaration that [Clemens's] statements have not defamed McNamee," nowhere does it indicate which statements it seeks to have branded as not defamatory. As laid out above, *see supra* III.B.1*,* without knowing the "specific defamatory statements made by the defendants or when, where, or to whom any defamatory statements were made" that Mr. Clemens wishes to have resolved in this declaratory judgment, defendant cannot respond to the merits of Mr. Clemens's claim for declaratory relief. *Celli v. Shoell*, 995 F.Supp. 1337, 1346 (D. Utah 1998).

Thus, the claim for a declaratory judgment must be dismissed.

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[20] This Court can characterize this argument as seeking a dismissal for failure to state a claim under 12(b)(6) or as seeking dismissal under 12(b)(1) for failure to satisfy Article III's "case or controversy" requirement, which includes the "justiciability doctrines." *See Certain Underwriters at Lloyd's,* 197 F.Supp.2d at 748.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that Mr. McNamee's motion to dismiss the Complaint should be granted.

Date: March 4, 2008
New York, NY

Respectfully Submitted,

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