

In the  
SUPREME COURT OF THE UNITED STATES OF AMERICA

No. 09-214

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MAJOR LEAGUE BASEBALL,  
Petitioner,

v.

KEVIN WILSON;  
MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION  
Respondent.

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ON WRIT OF CERTIORARI FROM THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTEENTH CIRCUIT

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BRIEF FOR THE RESPONDENTS

Team Number 14  
Tulane International Mardi Gras Sports Law  
Competition, 2010

### **QUESTIONS PRESENTED**

- I. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT A MAJOR LEAGUE BASEBALL PLAYER'S CLAIMS UNDER MINNESOTA'S DRUG AND ALCOHOL TESTING IN THE WORKPLACE ACT CHALLENGING A SUSPENSION UNDER A COLLECTIVELY BARGAINED FOR DRUG POLICY ARE NOT PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT.
  
- II. WHETHER THE COURT OF APPEALS WAS CORRECT IN SETTING ASIDE AN ARBITRATOR'S AWARD SANCTIONING MAJOR LEAGUE BASEBALL'S REFUSAL TO ISSUE WARNINGS REGARDING THE PRESENCE OF A BANNED SUBSTANCE IN SPECIFIC PRODUCTS BECAUSE SUCH AN AWARDS WAS IN VIOLATION OF PUBLIC POLICY.

### **STANDARD OF REVIEW**

For the purposes of this hypothetical, the Supreme Court will review all matters de novo.

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## Preliminary Statement

Major League Baseball (“the MLB”) is now appealing a judgment of the United States Court of Appeals for the Fourteenth Circuit (the “Fourteenth Circuit”) that reversed the ruling of the District Court for the Southern District of Tullahoma (the “District Court”) in favor of the Plaintiff, Kevin Wilson, and the Major League Baseball Players Association (“MLBPA”).

Kevin Wilson filed suit against the MLB, Dr. John Larson, Dr. Ray Finkle, and Andrew Birch in Minnesota state court, alleging violations of Minnesota common law and breach of contract. (APR.2<sup>1</sup>). That same day, the Minnesota state court issued a preliminary injunction blocking the suspension of Wilson because the MLBPA established a likelihood of success on its claim that the MLB Policy on Anabolic Steroids and Related Substances (“the Policy”) was in violation of Minnesota’s Drug and Alcohol Testing in the Workplace Act (“DATWA”). *Id.* However, only Wilson’s suspension was blocked, as he was the only player employed in the state of Minnesota and subject to that court’s jurisdiction. *Id.* The MLB removed the case to the District Court. The MLBPA, on behalf of all five players, then initiated a separate suit in the District Court against the MLB and the Commissioner seeking to have the arbitration awards upholding the suspensions vacated as a violation of public policy. *Id.* The MLBPA amended their complaint in the District Court, asserting that Wilson’s suspension was a violation of DATWA. (APR.3).

The MLB filed a motion for summary judgment claiming that Section 301 of the Labor Management Relations Act (“LMRA”) preempted Wilson’s DATWA claim and that the League had no duty to disclose that SpeedShot contained Clomiphene. *Id.* The Honorable Judge Rick Vaughn granted the MLB’s motion for summary judgment holding that: (1) Section 301 of the

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<sup>1</sup> APR. refers to the record for the Fourteenth Circuit.

LMRA preempted Wilson's DATWA claim because it was "inextricably intertwined with an interpretation of the CBA" and (2) the arbitrator's decision "must be upheld because the MLB did not owe the players a fiduciary duty to issue product specific warnings of banned substances" and the "arbitrators decision did not run contrary to explicit public policy." (DCR.19<sup>2</sup>).

As a result of the District Court's ruling, Wilson and the MLBPA appealed to the Fourteenth Circuit. The Honorable Judge Scott reversed the ruling of the District Court holding that Wilson's DATWA claim was not preempted by Section 301 of the LMRA because his claim was "predicated on Minnesota law, not the CBA or Policy, and the claim [was] not dependant upon an interpretation of the CBA or Policy." (APR.10). The Fourteenth Circuit also set aside the arbitration awards holding that it violated "public policy because it sanction[ed] and in fact encourage[d] breaches of fiduciary duty which jeopardized the health of MLB players and upheld suspensions for actions that were the direct result of the League's and Dr. Larson's own misconduct." (APR.10).

It is from this decision that the MLB appeals.

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<sup>2</sup> DCR. refers to the record for the District Court.

### **Statement of Facts**

In 2007, the MLBPA and the MLB entered into a Collective Bargaining Agreement (“CBA”) that incorporated the MLB Policy on Anabolic Steroids and Related Substances, which prohibits MLB players from using a number of “Prohibited Substances,” including various performance enhancing drugs and related substances. (DCR.1). The Policy also regulates testing procedures for prohibited substances and disciplinary actions against players with positive test results. *Id.* A primary factor underlying the Policy is the concern with adverse health effects of using these prohibited substances. (APR.12). Other factors include maintaining the fairness and integrity of MLB competition as well as the integrity and good character of MLB players. (DCR.8).

The Policy states that “players are responsible for what is in their bodies,” and the Policy “adopts an approach of strict liability, meaning that a positive test result will not be excused because a player was unaware he was taking a Prohibited Substance.” (DCR.1). The Policy also contains an arbitration clause. The Policy provides that “Players subject to disciplinary action may appeal to an arbitrator, who is either the Commissioner or his designee, whose decision constitutes a full, final, and complete disposition of the appeal that is binding on all parties.” (DCR.2). The Policy also establishes an arbitration process for the review of any action taken in accordance with the Policy which is to be heard by a neutral arbitrator whose “decision will be the full, final, and complete disposition of the appeal and will be binding on all parties.” *Id.*

The Policy is directed by its Independent Administrator, Dr. Larson, a licensed physician. (DCR.2). The Policy also provides for a Consulting Toxicologist, Dr. Finkle, to aid Dr. Larson in the implementation of the Policy. *Id.* Neither has any affiliation with the MLB. *Id.* Andrew Birch, the Vice President of Law and Labor Policy for the MLB, oversees the operation of the

Policy on behalf of the MLB. (DCR.3). The Policy advised players that its administrators will make a “special effort to educate and warn players about the risks involved in the use of supplements” and Dr. Larson acknowledged this was a continuing obligation, included within the scope of his Policy duties. (APR.13).

Dr. Larson is in charge of overseeing the Policy’s drug-testing procedures, reporting positive test results to the Commissioner for discipline, overseeing the development of education materials, and participating in research on steroids. (APR.12). In addition, Dr. Larson must make himself available for consultation with players and Club physicians and the Policy directs MLB players to contact Dr. Larson to ask for information about a “particular supplement” or other products. *Id.*

The Policy also created the “MLB Supplement Hotline,” (the “Hotline”) a confidential hotline provided to players in order to obtain “confidential and accurate information about these products, including their ingredients, effects, and adverse reactions.” (DCR.2). The purpose of the Hotline was to provide MLB players, coaches, and trainers with an opportunity to inquire and obtain information about certain supplements and their relation to the Policy. *Id.* In announcing the Hotline to players, the MLB stated that using the Hotline will not excuse a positive test result, but also recognized that “an informed decision is the best one.” (DCR.9).

In 2007, the MLB learned that some bottles of SpeedShot, an energy-boosting supplement, contained Clomiphene: a prohibited substance named in the Policy that blocks the effect of estrogen and is commonly used by steroid users to reduce loss of muscle mass at the end of a steroid cycle. (DCR.3). Clomiphene is not a disclosed ingredient on SpeedShot’s label. *Id.* After laboratory analysis, Dr. Larson and Dr. Finkle learned in November 2007 that SpeedShot contained Clomiphene. *Id.* Dr. Larson informed Birch soon after. *Id.* Despite the

lab's request to report the error to the Food & Drug Administration, both Dr. Larson and Birch refused. *Id.*

Dr. Larson was informed as to "the potential adverse effects on the health of players who may be taking [SpeedShot]." (APR.13). Yet, Dr. Larson chose not to inform any MLB player or the MLBPA because he feared that MLB players might expect future warnings about banned substances. *Id.* Instead, Dr. Larson sent a general memorandum to MLB players reminding them of the dangers of using energy supplements, but did not specifically warn players about the Clomiphene in SpeedShot. (DCR.3). However, Dr. Larson promised that he would "continue to provide MLB Players with information on the subject [of supplements] throughout the year." (APR.12).

The MLB then notified the MLBPA that Mega Energy Products, which distributes SpeedShot, had become a banned company and, as a result, players were prohibited from endorsing any of their products. *Id.* However, no one at the MLB directly informed any MLB players about the potential adverse effects SpeedShot could have on their health. *Id.*

Months later, the plaintiff, Kevin Wilson, who is an employee of the Minnesota Twins, L.L.C. and a member of the MLBPA, the other plaintiff in this suit, used SpeedShot. Accordingly, he tested positive for Clomiphene. (DCR.4). As required by the Policy, Wilson was suspended for fifteen, out of a possible twenty-five, games for testing positive for a prohibited substance. *Id.* Four other MLB players on other teams (collectively with Wilson, the "Players") also tested positive for Clomiphene and received the same suspension. *Id.* Additionally, one of the Players only began using SpeedShot after the Hotline, which was never updated, advised him that SpeedShot was not on the banned substances list. (APR.14). The Players appealed their suspensions to an arbitrator pursuant to the terms of the Policy. (DCR.4).

During the arbitration proceedings, the Players did not dispute their positive tests, the presence of Clomiphene in their system, nor their awareness of previous warnings regarding the Policy's strict liability rule. *Id.* The Players argued that their positive results should be excused and the suspensions should be lifted because Dr. Larson and the MLB knew that SpeedShot contained an undisclosed banned substance, and therefore breached a fiduciary duty created by the Policy that required the MLB to give a more particularized warning about SpeedShot once it was found to contain Clomiphene. *Id.*

After a full hearing, the arbitrator upheld the suspensions pursuant to the Policy's strict liability rule, concluding that neither Dr. Larson, nor the MLB, had any duty to provide MLB players with the information they had about the undisclosed risk SpeedShot posed to players' health. (DCR.5).

## Argument

### I. THE FOURTEENTH CIRCUIT CORRECTLY HELD THAT WILSON’S DATWA CLAIM WAS NOT PREEMPTED BY SECTION 301 OF THE LMRA.

Wilson’s DATWA claim was sufficiently independent of the Policy and the CBA to avoid federal preemption. If his claim had been preempted it would have allowed parties to a CBA to displace “nonnegotiable” state-law rights. Section 301 of the LMRA governs “[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce....” *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 689 (9<sup>th</sup> Circ. 2001). The Supreme Court has stated, “the pre-emptive force of [Section] 301 extends beyond state-law contract actions.” *United Steelworkers v. Rawson*, 495 U.S. 362, 369 (1990). Accordingly, the purpose of Section 301 preemption is to “promote the peaceable, consistent resolution of labor-management disputes.” *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 404 (1988). In addition, in *Allis-Chalmers Corp. v. Lueck*, this Court held that state-law claims are preempted if they are “substantially dependent upon the analysis” of a CBA. 471 U.S. 202, 220 (1985). Therefore, when state-law claims are dependent upon the analysis of a CBA, “that claim must either be treated as a § 301 claim...or dismissed as preempted by federal labor-contract law.” *Id.* at 220. Here, the decision of the Fourteenth Circuit should be upheld because Wilson’s DATWA claim arose solely from state law and did not require interpretation of the CBA. Also, if Wilson’s claim had been preempted then parties to a CBA could contract around “non-negotiable” state laws, which was not the Congressional intent with regards to Section 301 preemption.

- A. Wilson's DATWA claim was not preempted by Section 301 of the LMRA because his claim originated from state law and did not require analysis of the Policy or the CBA.

The Fourteenth Circuit correctly held that Wilson's DATWA claim was not preempted by Section 301 of the LMRA. In order to determine whether a state-law claim is preempted, the initial step is to examine the plaintiff's claim. *Cramer*, 255 F.3d at 691. Next, courts use a two-prong test to determine if a state-law claim is sufficiently independent to survive Section 301 preemption. *See, Trustees of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 330 (8th Cir. 2006). First, courts examine whether the claim originated from state law or whether it is based upon a "provision of the CBA." *Bogan v. General Motors Corp.*, 500 F.3d 828, 832 (8th Cir. 2007). Second, even if a claim originated from state-law it can still be preempted if it "is dependent upon an analysis' of the relevant CBA." *Id.* Additionally, analysis of a CBA requires more than merely referencing it. *Cramer*, 255 F.3d at 691. *See, Livadas v. Bradshaw*, 512 U.S. 107, 124-125 (1994) ("holding there was no [S]ection 301 preemption because a wage rate provision of the CBA only had to be referenced to compute the proper damages").

Furthermore, "not every dispute concerning employment or tangentially involving a provision of a CBA is preempted by Section 301." *Lueck*, 471 U.S. at 211. Accordingly, "the crucial inquiry is whether resolution of a state-law claim depends upon the meaning of a" provision in the CBA. *Miner v. Local 373*, 513 F.3d 854, 865 (8th Cir. 2008) (quoting *Lingle*, 486 U.S. at 405-06). Importantly, Section 301 preemption requires the "interpretation of some specific provision of a CBA" and "it is not enough that the events in question took place in the workplace or that a CBA creates rights...similar ...to those on which the state-law claim is based." *Bogan*, 500 F.3d at 833.

In order to determine whether Wilson’s DATWA claim was independent of the CBA it is first necessary to examine DATWA. DATWA is a Minnesota statute that governs drug and alcohol testing by Minnesota employers. DATWA sets out “minimum standards and requirements for employee protection” regarding an employer’s drug and alcohol testing policy. *Minn. Stat.* § 181.955 subdiv. 1. Pursuant to DATWA, the drug policies of Minnesota employers must provide:

- (1) the employees or job applicants subject to testing under the policy;
- (2) the circumstances under which drug or alcohol testing may be requested or required;
- (3) the right of an employee or job applicant to refuse to undergo drug and alcohol testing and the consequences of refusal;
- (4) any disciplinary or other adverse personnel action that may be taken based on a confirmatory test verifying a positive test result on an initial screening test;
- (5) the right of an employee or job applicant to explain a positive test result on a confirmatory test or request and pay for a confirmatory retest; and
- (6) any other appeal procedures available.

*Id.* § 181.952 subdiv. 1 (1)-(6). DATWA also sets forth criteria that a testing laboratory must meet in order for an employer to use its services. *Id.* § 181.953 subdiv. 1.

Additionally, DATWA specifically addresses CBAs. First, DATWA applies to all CBA’s after 1987. *See Id.* § 181.955 subdiv. 2. Second, DATWA “shall not be construed to limit the parties to a collective bargaining agreement from bargaining and agreeing with respect to a drug and alcohol testing policy that meets or exceeds, and does not otherwise conflict with, the minimum standards and requirements for employee protection....” *Id.* § 181.955 subdiv. 1. Moreover, DATWA lists requirements that an employer must follow if an employee tests positive on a drug test. One such requirement is that an employer cannot “discharge or discipline” an employee unless a positive test has been “verified by a confirmatory test.” *Id.* § 181.953 subdiv. 10(a).

Here, using the two-prong test set out by the Eighth Circuit in *Superior Waterproofing*, it is evident that Wilson’s DATWA claim is not preempted by Section 301 of the LMRA. Turning

to the first prong of the test, Wilson's claim arises from DATWA and not a provision of the CBA. *See, Stringer v. National Football League*, 474 F. Supp. 2d 894, 907 (S.D Ohio 2007) (holding plaintiff's claim did not arise out of a CBA provision, because plaintiff's memorandum "makes it clear that her claims are based...on common law tort principals"). As aforementioned, DATWA explicitly states the requirements that Minnesota employers must follow when drug testing employees. While it should be noted that it is unclear which specific violations of DATWA Wilson is alleging, this fact alone does not extinguish his claim. *See Karnes v. Boeing Co.*, 335 F.3d 1189, 1193 (10th Cir. 2003) (holding that state-law claim was not preempted even though plaintiff's complaint did not specify the section of the Oklahoma Drug Testing Act that his employer violated). Since there is no evidence in the record that the MLB offered Wilson a confirmatory retest or that they used certified laboratories, the Policy violated DATWA, thereby giving Wilson a state-law cause of action. Thus, Wilson's claim arises only from DATWA and not from any provision of the CBA.

Turning to the second prong of the *Superior Waterproofing* test, Wilson's DATWA claim was not substantially dependent on an analysis of the CBA. As aforementioned, "the Supreme Court has distinguished [cases] which require interpretation or construction of the CBA from those which only require reference to it. *Superior Waterproofing*, 450 F.3d at 330; *see also Livadas*, 512 U.S. at 124 (holding that "the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished"). Here, as the Fourteenth Circuit stated, "the MLB does not point to a specific provision of either the CBA or the Policy that must be interpreted." (APR.9). Therefore, Wilson's DATWA claim did not require interpretation the CBA and was sufficiently independent to survive Section 301 preemption.

The District Court erred in holding that DATWA “mandates reference to an analysis of the Policy.” (DCR.10). That Court’s decision hinged on the argument that Wilson’s claim could not succeed “without interpreting certain terms of the collective bargaining agreement, to determine whether the terms of the Policy ‘meet or exceed’ DATWA’s threshold.” *Id.* The District Court gave two main arguments in support of this proposition. First, that Court held that it would require analysis of the Policy’s “operation as compared to DATWA’s provisions...[because] the Policy tests for numerous substances, including...Clomiphene... that are not even subject to DATWA’s provisions.” *Id.* at 11. Secondly, the District Court held that whether Wilson properly “exhausted his claim as mandated by DATWA,” would require analysis of Wilson’s rights in arbitration and the neutral arbitrator’s review “to see if they meet or exceed DATWA’s requirement of an opportunity to explain the positive test.” *Id.* These two arguments will be addressed in turn.

First, although DATWA does not mention Clomiphene by name, DATWA does regulate the use of anabolic steroids in *Minn. Stat.* § 152.02 subdiv. 4(6). DATWA defines anabolic steroids as “any drug or hormonal substance, chemically and pharmacologically related to testosterone.” *Id.* Clomiphene certainly fits into this category. As the District Court explained, “Clomiphene is commonly used by male anabolic steroid users to bind the estrogen receptors in their bodies, thereby blocking the effects of estrogen.” (DCR.3). That Court added that Clomiphene “restores the body’s natural production of testosterone.” *Id.* Thus, although DATWA does not mention Clomiphene by name, it is within the category of anabolic steroids that DATWA does regulate. Therefore, no provision of the CBA needs to be analyzed in order to determine that the Policy did not meet DATWA’s requirements with regards to testing for Clomiphene.

Secondly, the District Court noted that DATWA mandates that “an employee or collective bargaining agent” exhaust all their “grievance procedures and arbitration proceeding requirements” before filing suit. *Minn. Stat.* § 181.956 subdiv. 1. As the *Lueck* Court stated, “a rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness.” *Lueck* 471 U.S. at 220. Here, the Policy states, “Players subject to disciplinary action may appeal to an arbitrator, who is either the Commissioner or his designee, whose decision constitutes a full, final, and complete disposition of the appeal that is binding on all parties.” (DCR.2). The Policy also sets up another arbitration process that states that “any action taken in accordance with the Policy...will be made by a neutral arbitrator whose decision will be the full, final, and complete disposition of the appeal and will be binding on all parties.” *Id.*

Wilson exhausted his claim because the neutral arbitrator heard Wilson’s grievance because he was suspended according to the Policy’s strict liability rule. *Id.* at 5. Contrary to the District Court’s assertion, it was not necessary to analyze whether the drug testing was a form discipline because the independent arbitrator’s ruling was “full, final, and binding” on all matters related to the Policy. Since, the neutral arbitrator ruled against Wilson after a full hearing, he exhausted his claim without sidestepping any remaining grievance procedures. *See Lingle* 486 U.S. at 412 (holding that “notwithstanding the strong policies encouraging arbitration, ‘different considerations apply where the claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.’”) Furthermore, the Fourteenth Circuit correctly held that Wilson’s DATWA claim did not require analysis of the CBA because it was only necessary to compare the procedures that the MLB followed with DATWA’s requirements. (APR.7). Consequently, comparing the MLB’s drug testing procedures with

DATWA's requirements does not mandate any reference to the Policy or CBA. *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 262 (1994) (holding “[p]urely factual questions’ about an...employer’s conduct and motives do not requir[e] a court to interpret any term of a [CBA].”)

Further evidence that the CBA did not need to be analyzed in the case at bar is supported by the decision in *Karnes*, which established that it was a factual inquiry, not requiring interpretation of the CBA, as to whether an Oklahoma drug testing policy violated state-law. *Karnes*, 335 F.3d at 1192. In *Karnes*, the plaintiff had to show that he was discharged based on a positive drug test and the positive test was not confirmed. *Id.* The *Karnes*’ Court held that neither inquiry required a reference to the CBA. *Id.* In addition, that Court held that there was no Section 301 preemption even though the plaintiff’s employment “was governed by the CBA,” the drug policy was “incorporated into the CBA, and the CBA provide[d] a grievance procedure for his claims.” *Id.* The *Karnes*’ Court added that “every case brought by a union employee against his employer will involve these factors,” and if the plaintiff’s claim was preempted “we cannot imagine a scenario where § 301 would not preempt” a plaintiff’s claims. Here, Wilson only needed to show that he was suspended for a positive drug test and there was no confirmatory test. Since neither inquiry depended on an analysis of the MLB Policy or CBA, Wilson’s DATWA claim was sufficiently independent of the CBA and outside the scope of Section 301 preemption.

The District Court relied on two cases, *Stringer v. National Football League* and *Holmes v. National Football League*, to illustrate that Wilson’s DATWA claim was substantially dependant on an analysis of the CBA. However, our case is immediately distinguishable from both *Stringer* and *Holmes*. First, the *Stringer* case involved a wrongful death suit arising from the death of an NFL player due to hot weather conditions. *Stringer*, 474 F. Supp. 2d at 910. The

*Stringer* Court held that the plaintiff's state-law claim was preempted by Section 301 because it required analysis of a CBA provision that required NFL trainers to be certified by the National Athletic Trainers Association. *Id.* Since it was necessary to ascertain what instructions the trainer's received on "how to prevent, recognize, and treat heat-related illnesses," the plaintiff's claim was substantially dependent upon an analysis of the CBA. *Id.* Here, unlike in *Stringer*, it was not necessary to interpret the Policy or CBA to make a factual determination as to whether the MLB violated DATWA's requirements by failing to use certified laboratories or offer a confirmatory drug test.

Secondly, our case is distinguishable from *Holmes*. In *Holmes*, the court held that a claim for invasion of privacy regarding a mandatory drug test was preempted because it required interpretation of the CBA. *Holmes*, 939 F. Supp 517, 527 (N.D. Tex. 1996). In *Holmes*, however, the plaintiff claimed that he was fraudulently induced to take a drug test. *Id.* The *Holmes* Court held that in order to determine whether the drug test was fraudulently administered it must first be "resolved whether the Drug Program allowed the Lions to solicit and conduct...the test." *Id.* at 528. Additionally, in the plaintiff's complaint he argued that the test was not conducted in accordance with the CBA. *Id.* Here, Wilson argued that his drug test violated state-law because it did not meet DATWA's minimum requirements, not because it was not conducted in accordance with the CBA. Unlike *Holmes* it was not necessary to interpret the CBA because Wilson can show that the MLB violated DATWA simply by looking at how the test was conducted and comparing it to DATWA's standards.

In conclusion, Wilson's claim arose solely from DATWA's and not on any provision of the CBA. In addition, Wilson's DATWA claim did not require analysis of the CBA because it

was a factual question, ascertainable by looking at DATWA's provisions, as to whether the Policy met DATWA's requirements.

B. Preempting Wilson's DATWA claim would allow parties to CBA's to contract around non-negotiable state-law rights, which was not the congressional intent with regards to Section 301 preemption.

The Fourteenth Circuit correctly held that if Wilson's DATWA claim had been preempted it would have allowed parties to CBA's to contract around state laws that they found "inconvenient." As the Supreme Court stated, "whether federal law pre-empts state law...is a question of congressional intent." *Norris*, 512 U.S. at 252. The *Norris* Court added that "pre-emption of employment standards 'within the traditional police power of the State' should not be lightly inferred." *Id.* In addition, the Ninth Circuit has observed, "the LMRA certainly did not give employers and unions the power to displace any state regulatory laws they found inconvenient. *Cramer*, 255 F.3d 695. Here, the MLB's Policy displaced non-negotiable state-law rights when it failed to meet DATWA's requirements.

The District Court erred in holding that if Wilson's DATWA claim was not preempted it would allow players and teams to gain an unfair advantage by using state employment laws to avoid the repercussions of a positive drug test. (APR.12). That Court stated that "such disparate enforcement of the Policy threatens the 'fairness and integrity' of the athletic competition on the playing field, threatens to distort the results of games and League standings, and is obviously unfair to those players who do not wish to use these substances." *Id.* However, that argument presupposes that maintaining the "fairness and integrity" of sporting events trumps the ability of states to regulate the conduct of employers. But Section 301 of the LMRA does not grant parties to CBAs the right to contract around state employment laws. As the Supreme Court has stated:

“[T]here [is not] any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly § 301 does not grant the parties to a [CBA] the ability to contract for what is illegal under state law.”

*Allis-Chalmers*, 471 U.S. at 211-12; see also *Livadas*, 512 U.S. at 123 (Section 301 “cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law.”)

Here, Wilson’s right to a confirmatory retest and the use of a certified laboratory for drug testing are non-negotiable rights that were created by DATWA to protect employees from drug testing procedures that do not comport with Minnesota’s standards. As the Fourteenth Circuit noted, the argument made by a trucking company in *Cramer* was very similar to the argument made by the MLB in this case. In *Cramer*, a national trucking company, “argue[d] that the terms of the CBAs affecting employees in multiple states should supersede inconsistent state laws.” *Cramer*, 255 F.3d at 695. The Ninth Circuit rejected this argument even though the defendants’ only aimed to detect drug use on their companies’ premises. Nevertheless, by setting up cameras in bathroom mirrors, the defendants violated non-negotiable state-law rights. Similarly, here, the MLB’s Policy violated Wilson’s non-negotiable state-law rights created by DATWA. By not conforming to the letter of Minnesota law, the MLB essentially contracted, through the use of a CBA, around the minimum drug testing requirements in Minnesota. If Wilson’s DATWA claim was preempted on these grounds, it would allow parties to a CBA to displace any non-negotiable state-law rights that they found inconvenient.

Moreover, the District Court erred in holding that DATWA has the practical effect of controlling conduct beyond the boundaries of Minnesota. That Court relied on *Healy v. Beer Institute, Inc.*, to argue that Minnesota was using its domestic laws to regulate “the physical

condition and terms of competition in each of the two dozen other States” in which the MLB operates. (APR.12). In *Healy*, a Connecticut statute regulating beer prices ran afoul of the Commerce Clause because it directly affected Massachusetts, New York, and Rhode Island beer prices. 491 U.S. 324, 337-38 (1989). However, our case is distinguishable from *Healy* for two reasons. First, DATWA does not directly regulate an economic activity, like the beer prices in *Healy*, but rather sets out minimum standards for employee drug testing in Minnesota. Second, DATWA directly regulates Minnesota employers, not other state’s employers. As the *Healy* Court noted: “When... a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State’s interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.” *Healy*, 491 U.S. at 337. Here, the Minnesota legislature had a legitimate interest in protecting its state’s employees from improper drug testing and excessive punishments for positive results. Further, the fact that some CBAs may be harder to implement on a nationwide scale does not outweigh the benefits of Minnesota protecting its employees by setting minimum drug test requirements for employer’s to follow.

For similar reasons our case is distinguishable from *Partee v. San Diego Chargers Football Co.*, another case which the District Court used to argue for federal preemption of Wilson’s DATWA claim. The *Partee* Court held that an NFL players anti trust suit must fail because “the burden on interstate commerce outweigh[ed] the states’ interests in regulating baseball’s reserve system. *Partee*, 668 P.2d 674, 678 (Cal. 1983). Here, as aforementioned, Minnesota had a vested interest in regulating the drug testing of its employees. This interest outweighed any difficulty in maintaining a uniform interpretation of the MLB’s Policy.

To conclude, Wilson's DATWA claim should not be preempted, because in doing so it would allow parties to CBA's to contract around non-negotiable state-law rights. Since, it was not the Congressional intent to allow parties to CBAs to avoid state employment laws that they found inconvenient, the decision of the Fourteenth Circuit should be upheld.

## II. THE FOURTEENTH CIRCUIT CORRECTLY VACATED THE ARBITRATOR'S AWARD BECAUSE THE AWARD CONTRAVENES PUBLIC POLICY.

The Players recognize the limited nature of judicial review of arbitration awards. However, the Players seek vacatur because the award, under the Federal Arbitration Act, "was procured by fraud, corruption, or undue means;" and therefore violated the well-settled public policy of New York in favor of enforcing fiduciary duties to disclose material information in relationships of trust.<sup>3</sup> 9 U.S.C.A. §§ 10(a)(1). Permitting the arbitration award to stand would sanction the MLB's knowing and intentional breach of a fiduciary duty, which jeopardized the Players' health. (APR.11).

The Supreme Court held that, "a court may not enforce a collective bargaining agreement that is contrary to public policy." *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983). "[T]he question of public policy is ultimately one for resolution by the courts." *Id.* This court must find the public policy to be "well defined and dominant, and...ascertain[able] by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Id.* The question is not whether any behavior by the parties to the Policy violates public policy, but rather whether the Policy itself violates public policy. *MidAm. Energy Co. v. Int'l Bd. Of Elec. Workers Local 499*, 345 F.3d 616, 620 (8th Cir. 2003). Thus, "authority

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<sup>3</sup> New York law governs this issue because the Policy is part of the CBA, which states that to the extent that federal law does not govern, New York State law will govern the CBA.

to invoke the public policy exception is *not* limited solely to instances where the arbitration award itself violates positive law.” *Eastern Assoc. Coal Cos. v. United Mine Workers of Am.*, 531 U.S. 57, 63 (2000) (emphasis added). If the Policy does violate an explicit public policy, the Court is obligated to refrain from enforcing it. *W.R. Grace*, 461 U.S. at 766.

In order to prevail on this claim, the Player must show that a fiduciary duty exists and was breached, that those fiduciary duties are explicit public policy, and that the Policy as interpreted by the arbitrator violated that public policy by condoning a breach of fiduciary duties. (DCR.16).

A. Petitioners owed and breached a fiduciary duty to the Players to disclose information they learned on harmful and banned substances in SpeedShot.

The Fourteenth Circuit correctly held that Petitioners had a fiduciary duty to act in the Players’ interests. (APR.11). Since the Policy set out to protect the Players’ health, it placed Petitioners in a relationship of trust with the Players. In addition, the Player’s reasonably relied on Petitioners’ expertise as the authoritative source of information on potentially harmful ingredients in energy boosting supplements banned by the Policy. Petitioners had a duty to warn the Players of the fact that SpeedShot contained a prohibited substance upon acquiring such knowledge within the scope of their positions and breached this duty by deliberately withholding such information.

New York courts have held that “a fiduciary relation[ship] exists between two persons when one of them is under a duty to act or give advice for the benefit of the other upon matters within the scope of the relation.” *Lumbermens Mut. Cas. Co. v. Franey Muha Alliant Ins. Servs.*, 388 F. Supp. 2d 292, 305 (S.D.N.Y. 2005). “In order to determine whether a fiduciary

relationship exists, New York courts conduct a fact-specific inquiry into whether a party reposed confidence in another and reasonably relied on the other's superior expertise or knowledge." *Id.*

However, it is not a requirement that fiduciary relationships be formalized in writing; "rather the ongoing conduct between parties may give rise to a fiduciary relationship," *Id.* Therefore, even when parties have formalized their relationship in the form of an agreement, New York law holds that "if a contract establishes a relationship of trust and confidence between the parties,...then a fiduciary duty arises from the contract which is independent of the contractual obligation." *Id.* Thus, whether Petitioners owed the Players a duty to provide such a warning cannot be determined without examining the parties' legal relationship and expectations as established by the Policy and their conduct.

A plain reading of the Policy indicates that Dr. Larson and MLB officials were required to act in the Players' interest by issuing warnings on specific supplements. The Policy expressly advised MLB players that Policy's administrators will make a "special effort to educate and warn players about the risks involved in the use of supplements." (APR.13). That is unmistakably aligned with a key factor underlying the Policy: "the adverse health effects of using prohibited substance." (APR.12). Use of the phrase "special effort" indicates the parties' intent in drafting the Policy for such efforts to meet a heightened standard.

The Policy also directed the Players to Dr. Larson to address their "questions or concerns about a *particular supplement*" and required Dr. Larson to "oversee the development of education materials." (APR.12-13) (emphasis added). These obligations led the Players to believe that Dr. Larson's oversight of education materials carried with it a duty to educate players on particular supplements. This point highlights the District Court's error in holding that it was within Dr. Larson's discretion to issue a general warning because the court overlooked the

fact that the Policy placed a burden on him to develop educational materials. (DCR.16). Permitting discretionary decisions in disclosing information which directly affects the players' health is not what the Players bargained for, nor is it aligned with their reasonable expectations. Thus, it would run contrary to Dr. Larson's role to act in the Players' interest and inform them of such information.

The District Court's holding misapplied the fiduciary duty law of New York. Rather than requiring parties to expressly describe and prohibit every artifice by which the parties could deprive each other of the fruits of their agreement, New York law implies fiduciary duties into contractual relationships of trust and confidence to enforce parties reasonable expectations. *See Lumbermens*, 388 F. Supp. 2d at 305. The District Court and the arbitrator failed to recognize that regardless of whether the language of the Policy imposed a duty upon Dr. Larson, his fiduciary obligations under New York law did impose such a duty. His duty is supported by his statement that he would "continue to provide MLB Players with information on the subject [of banned substances] throughout the year." (APR.12). Dr. Larson unquestionably represented himself to the Players as an authoritative source of the ingredients in supplements and energy boosters, though as the Fourteenth Circuit noted, by withholding the SpeedShot information, he failed to live up to that duty. *Id.* Therefore, specific warnings were not only "preferable" to the Players as the District Court noted, but *expected* and therefore required. (DCR.17).

The fact that the Policy is one of strict liability does not displace the Policy administrator's duty to inform the Players. The MLB stated itself in a memorandum that "an informed decision is the best one." (DCR.9). If anything, the strict liability of the Policy increases the reasonableness of the Players' reliance because in agreeing to put their employment and public perception on the line, they were under the bargained-for assumption that

administrators would make special efforts to keep them informed of discoveries related to the Policy, especially those of which are discovered under the Policy.

The Hotline was further evidence of the Player's reliance. In fact, one player literally relied on the Hotline for information on SpeedShot, yet was misinformed. (APR.14). Although the players were warned that use of the Hotline would not excuse a positive test, this statement appears to be a bargained-for provision removing MLB's liability for unintentional misinformation provided by the Hotline. But Dr. Larson and Birch were explicitly aware that SpeedShot contained Clomiphene. Therefore, it was reasonable for the Players to expect that the Hotline would be updated with known information discovered under the Policy.

The lack of a duty to update the Hotline as new information became available would render the Hotline useless, and therefore contrary to the Players bargained-for expectations. This point exemplifies why the District Court's reliance on *Walton-Floyd v. United States Olympic Comm.*, 965 S.W.2d 35 (Tex. Ct. App.—Houston [1st Dist.]) was misplaced. Our case is distinguishable because in *Walton-Floyd*, the Hotline was a government creation, rather than the outgrowth of arms length negotiations. *Walton-Floyd*, 965 S.W.2d at 36. In *Walton-Floyd*, the court held that the athlete's breach of duty claim under Texas state-law was preempted by a federal act, which provided private rights of actions against the USOC, though the act's legislative history indicated Congress did not intend for one there. 965 S.W.2d at 40. Here, however, the Players have not brought state tort law claim, but seek to vacate a labor arbitration award that violates an established public policy under the Federal Arbitration Act, which explicitly provides for a private cause of action. *See* 9 U.S.C.A. §§ 10(a)(1).

Having established that Petitioners owed the Players a fiduciary duty to disclose their knowledge about SpeedShot, it is also undisputedly established that this duty was breached. The

Fourteenth Circuit correctly noted that both “Dr. Larson and Mr. Birch knew that SpeedShot contained a banned substance years before the players were tested.” (APR.13). “Further, it is indisputable that they both deliberately withheld this vital health information from the players.” *Id.* Moreover, Dr. Larson knew that “there should be some concern about the potential adverse effects on the health of players who may be taking this drug without proper medical supervision.” *Id.* “Despite this knowledge, Dr. Larson deliberately chose not to inform any MLB player or the MLBPA about these critical facts that threatened the health of MLB players.” *Id.* Dr. Larson’s fear that MLB would expect future notifications about other harmful banned substances in energy-boosting supplements is not a justification for breach, but a blatant disregard for his aforementioned duties to educate the MLB Players. *Id.*

B. A well-defined and dominant public policy exists.

New York courts have a well-settled policy of enforcing fiduciary duties to disclose material information in a relationship of trust. See *Callahan v. Callahan*, 127 A.D.2d 298, 300 (N.Y. App. Div. 1987) (“[D]uty to disclose may arise where a fiduciary or confidential relationship exists or where a party has superior knowledge not available to the other.”); see also *Grandon v. Merrill Lynch & Co., Inc.*, 147 F.3d 184, 189 (2d. Cir. 1998) (“the duty to disclose generally arises when one party has information that the other party is entitled to know because of a fiduciary or other similar relation of trust and confidence between them”).

Although New York courts have said that the “exact limits” of what constitutes a fiduciary relationship are “impossible” to define, that statement bears no relation to the definitiveness of the policy at issue. *United Feature Syndicate Inc. v. Miller Features Syndicate*,

*Inc.*, 216 F. Supp. 2d 198, 218 (S.D.N.Y. 2002). The policy enforces good faith conduct between parties in situations as decided by New York courts on a case by case basis. *See Lumbermens*, 388 F. Supp. 2d at 305 (“...in determining whether a fiduciary relationship exists, New York courts conduct a fact-specific inquiry...”). Arguing the policy is not well-defined because it lacks defined limitations overlooks a distinction between the inequitable conduct which the policy seeks to prevent and the settings in which the policy is applicable. The absence of limitations on the policy’s application does not diminish the specificity of the policy. Conversely, it is evidence of the policy’s domination throughout New York law. Furthermore, it demonstrates the importance New York courts place on implementing the policy by reserving for itself the ability to define its scope.

C. The Policy as interpreted by the arbitrator violated public policy by condoning a breach of fiduciary duties.

The Fourteenth Circuit was correct in holding that, “[t]he arbitrator’s award...violates public policy because it sanctions...breaches of fiduciary duty which jeopardized the health of MLB players and upheld suspensions for actions that were the direct result of the League’s and Dr. Larson’s own misconduct.” (APR.14). There is federal court precedent vacating arbitrators’ awards where they would permit deliberate acts that jeopardize public health and safety which are integral to the performance of employment duties. *See, e.g., Delta Air Lines, Inc. v. Air Line Pilots Ass’n, Int’l*, 861 F.2d 665, 674 (11th Cir. 1988) (affirming vacation of an award ordering reinstatement of pilot who had been discharged after deliberately flying passenger plane while intoxicated); *see also Iowa Elec. Light & Power Co. v. Local Union 204 of Int’l Bd. of Elec. Workers (AFL-CIO)*, 834 F.2d 1424, 1428 (8th Cir. 1987) (affirming vacation of an award

ordering reinstatement of nuclear power plant machinist discharged for deliberately violating a federally mandated safety regulation).

“Had either Dr. Larson or any MLB official informed the Players that SpeedShot contained a banned substance, the players would not have taken it, would not have risked their health, and would not have been suspended.” (APR.14). Furthermore, the breaches, not only affect MLB players, but affect the public as a whole. Due to Birch’s refusal to report the mislabeling of SpeedShot to the Food & Drug Administration, it endangered the health of anyone who took SpeedShot without medical supervision. (APR.13)

In sum, the arbitration award upholds the merits of a deliberate breach of fiduciary duty, which was contrary to public policy, and jeopardized the health of MLB players. If the arbitration award is upheld it would sanction MLB officials withholding material information, not readily discoverable by MLB players, about drugs they may be taking. Furthermore, it would allow MLB officials to impose strict liability for a positive test, without regard for their own wrongful conduct. Therefore, the decision of the Fourteenth Circuit should be upheld and the arbitration award vacated.

### **Conclusion**

For the reasons stated, the decision of the United States Court of Appeals for the Fourteenth Circuit' should be affirmed on both issues. Wilson's DATWA claim should not be preempted by Section 301 and the arbitration awards should be vacated for sanctioning violations of public policy. Therefore, summary judgment for the Respondents should be granted.

Respectfully submitted,

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