

IN THE
*SUPREME COURT of the
UNITED STATES OF AMERICA*

No. 09-214

MAJOR LEAGUE BASEBALL,
PETITIONER.

v.

KEVIN WILSON;
MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION
RESPONDENT

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

BRIEF OF RESPONDENT

TEAM #15
ATTORNEYS FOR RESPONDENT

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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 COLLECTIVE 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 AWARD WAS IN VIOLATION OF PUBLIC POLICY.

STANDARD OF REVIEW

The Supreme Court of the United States shall review all matters of this case *de novo*.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition Below

Following a suspension for a positive drug test, Respondents appealed the league's suspension to an independent arbitrator. The arbitrator upheld the suspensions pursuant to a strict liability rule found in the Collective Bargaining Agreement, established in 2007. The respondents then filed suit in Minnesota state court against the Major League Baseball, Dr. Larson, Dr. Ray Finkle, and Andrew Birch; collectively known here as Respondents. A temporary restraining order was issued by the state court barring suspensions; finding the CBA violated Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA).

Respondents then removed the case to federal court, where it was consolidated with an action brought by the Major League Baseball Player's Association seeking to vacate the arbitration awards under the Labor Management Relations Act ("LMRA"). The District Court granted Major League Baseball's motion for summary judgment on both issues presented.

Respondents then appealed the District Court's decision to the court of appeals, which overturned the District Court's decision. Major League Baseball then petitioned this court on writ of certiorari.

Team #15 represents the respondents in filing this brief in opposition to MLB's motion.

II. Statement of the Facts

Kevin Wilson is a professional baseball player for the Major League Baseball's (MLB) Minnesota Twins at the time of the events underlying this case. As an employee of MLB, Wilson is also a member of the Major League Baseball Player's Association ("MLBPA"). The MLB and the MLBPA have entered into a collective bargaining agreement (CBA) effective in 2007, which includes the MLB Policy on Anabolic Steroids and Related Substances ("Policy"). The policy attempts to lay all responsibility on the players for what they put into their bodies. The policy prohibits any use of "prohibited substances" including performance enhancing drugs and "other anti-estrogens...including Clomiphene," which is the substance at issue in this case. The Policy states, "a positive test result will not be excused because it does not result from an intentional use of a Prohibited Substance."

The Policy states consequences for positive test results by a player. The first time a player is positive for a banned substance it results in at least a 15 game suspension, but not more than 25 games. Any player that wishes to appeal the suspension following a positive test result may do so to an arbitrator, which the Policy states, is either the Commissioner or his designee. The decision of the arbitrator constitutes final and complete disposition and binding on all parties.

Dr. John Larson, a licensed physician, is director of the Policy. His duties as director include implementing the terms of the Policy, overseeing the drug testing procedures under the policy, reporting any positive test results to the Commissioner for disciplinary action, and providing education to the players regarding the Policy's implementation. Dr. Ray Finkle is an assistant to Dr. Larson, and is described as the "Consulting Toxicologist" who aids in the implementation of the Policy's terms. Both of these doctors have no affiliation with either the Commissioner's office or any MLB club.

The policy mandates that a "MLB Supplement Hotline" is to be implemented and maintained by MLB. This hotline is created to provide "confidential and accurate information about supplemental products, including their ingredients, effects, and adverse reactions." The hotline was created to provide payers, coaches, and trainers with an opportunity to obtain information on certain supplements and their relation to the Policy.

Sometime in 2007, the MLB learned that a legal, over-the-counter energy booster, called SpeedShot, contained Clomiphene, a substance which is on the banned substances list. The MLB also knew the label on SpeedShot did not disclose the fact that it contained the substance. When Dr. Larson and Dr. Finkle learned of the connection between player's positive test results and the use of SpeedShot, they asked an outside laboratory to analyze the supplement for its

contents. On November 14, 2007, Dr. Finkle and Dr. Larson received word from the laboratory that SpeedShot did include Clomiphene, although it was not listed on the label. The doctors then relayed the information to Andrew Birch, Vice President of Law and Labor Policy for MLB. The lab which found SpeedShot to contain Clomiphene requested MLB to notify the Food and Drug Administration of the findings but the MLB refused to do so.

As a result of their findings, MLB issued notices to the MLBPA that “Mega Energy Products, the manufacturer of SpeedShot” has become a banned company which means the players are prohibited from endorsing their products. However, neither the notice to the teams nor to the players contained any information about banning the products from use. Rather, a general warning was sent to the players about the use of energy boosting supplements. No communication between the MLB and the players contained any information that SpeedShot contained Clomiphene despite the absence of the chemical from the product label.

On the morning of a scheduled preseason training camp scrimmage, Kevin Wilson took SpeedShot and as a result tested positive for Clomiphene. Kevin Wilson, along with four other players, was suspended for 15 games. The suspended players appealed the suspension to the neutral arbitrator pursuant to the Policy. The players based their arguments on the fact that MLB knew SpeedShot contained Clomiphene but failed to disclose that information. The players argued a

fiduciary duty existed between MLB and the players which would require them to disclose this information.

The arbitrator found that because the players did not dispute the positive test results, or the laboratory's analysis of the urine samples, there was no genuine dispute, and therefore strict liability must prevail. The arbitrator upheld the suspensions, finding the players use supplements at their own risks, and are responsible for the consequences of using those supplements. Wilson filed suit in state court seeking a restraining order to prevent the suspension. A restraining order was granted, but the case was removed to federal court by the MLB. District court granted summary judgment in favor of the MLB, and the court of appeals overturned. Wilson comes before this court, with the below argument, asking this court to affirm the court of appeals decisions, finding that Wilson's DATWA claim is not preempted by federal law and the Arbitration award was in violation of public policy.

III. Summary of the Argument

The Arbitrator's award and the District Court's ruling should both remain overturned, and the decision of the Appellate Court affirmed.

While the MLB contends, and the District Court found, that § 301 of the Labor Management Relations Act preempts Respondent's DATWA claim, this misapplication of § 301 should be rectified by the Supreme Court. Section 301

applies to suits for violations of labor agreements, as well as where rights asserted are created by a collective bargaining agreement, or where determination of a violation requires an interpretation or construction of an agreement. In these cases, federal law is used to preempt inconsistent state regulations in order to provide a more uniform, national labor system.

In Respondent's case, however, the right asserted is neither conferred by the collective bargaining agreement, nor dependent upon an analysis or interpretation of the agreement. The DATWA is the sole source of Respondent's rights in this case, and such rights are neither dependent upon nor inextricably intertwined with the collective bargaining agreement.

MLB also contends that preemption is necessary to protect the integrity and fairness of its athletic competitions. While this may be a noble goal, it is not one supported by case law or legislation. Congress did not mean for § 301 to allow private agreements to have the force of federal law, so as to preempt valid State legislation. Preemption is only proper in a limited number of circumstances, none of which are present here.

The arbitrator's award has both condoned and encouraged violations of not one, but two, legitimate and longstanding public policies. If this court were to affirm this award, it would undermine every fiduciary duty in existence and devalue a person's right to freedom of contract.

The parties of this case have negotiated for and obtained an expressed fiduciary duty through a collective bargaining agreement. Within that fiduciary duty is a duty to disclose those facts which are within the scope of the relationship. The fiduciary relationship between the Major League Baseball and the players, at least in this case, revolves around drug and alcohol testing and over the counter supplement nutritional information. Major League Baseball, and its agents, intentionally withheld harmful information from its players which resulted in positive drug test results. Those positive test results have consequences, which is a 15 game suspension to Kevin Wilson, Respondent in this case. This positive test result is directly attributable to the breach of the existing fiduciary relationship when Major League Baseball failed to disclose crucial facts about an over the counter supplement. Despite conformity with the appeals process, an arbitrator upheld the suspension, and therefore condoned and encouraged the breach of the fiduciary relationship.

The respondents in this case argue that this court should dismiss the arbitrator's award because it violates public policy against breaching fiduciary relationships. To affirm such an award would also undermine a person's right to freedom of contract. The Major League Baseball Player's Association has negotiated for and received a fiduciary relationship in their contract, which the arbitrator ignored when issuing his ruling.

We ask this court to dismiss the arbitrator's award due to the violations of public policy in conformity with the below cited case law.

ARGUMENT

I. THE COURT OF APPEAL’S DECISION TO REINSTATE RESPONDENT’S DATWA CLAIM SHOULD BE UPHELD AS THE CLAIM IS NOT PREEMPTED BY SECTION 301.

A. Preemption by § 301 only applies to violations of labor agreements, and is not applicable in the present case.

Section 301 of the Labor Management Relations Act applies to “suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce” and “may be brought in any district court of the United States having jurisdiction of the parties....” 29 U.S.C. § 185(a). The MLB contends that the Respondent’s DATWA claim is preempted by section 301, as the Supreme Court has held that federal law exclusively governs suits for a breach of a collective bargaining agreement. *United Steelworkers v. Rawson*, 495 U.S. 362, 269 (1990). However, both MLB and the District Court incorrectly applied 301’s preemptive powers. As stated plainly in the text of § 301, the section applies only to suits for violations of *contracts* (emphasis added.) While the Supreme Court has ruled that § 301 expresses a federal policy that the substantive law to apply in § 301 cases is “federal law, which the courts must fashion from the policy of our national labor laws,” this does not mean that federal law must be applied where the cause of action is based on a state law claim, and not stemming from a violation of a contract or collective bargaining agreement. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957).

This distinction can be traced back to the first analysis of the preemptive effect of § 301, by the Supreme Court in *Teamsters vs. Lucas Flour Co.*, 369 U.S. 95 (1962). The Supreme Court has thus, from the beginning of § 301 preemption, held that “the substantive principles of federal labor law must be paramount in the area covered by...” § 301. *Id.*, at 103.

While the Court has long since held that “a suit in state court alleging a violation of a provision of a labor contract must be brought under § 301 and be resolved by reference to federal law,” there is no case law that unequivocally requires a suit alleging a violation of a state-law to be preempted by § 301. *Allis-Chambers Corp. v. Lueck*, 471 U.S. 202, 210 (1985). While Supreme Court noted in *Allis-Chambers* that “questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law,” the court also cautioned that “Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by § 301 or other provisions of the federal labor law.” *Id.*, at 211.

While MLB would like for the Court to allow for it to circumvent Minnesota’s DATWA with its own, less protective drug policy, the Supreme Court in *Allis-Chambers* expressly cautioned against such a result. According to the Court, there is no suggestion “that Congress, in adopting § 301, wished to give the

substantive provisions of private agreements the force of federal law,” and allow it to oust any inconsistent state regulations.” *Id.*, at 212. While Congress’ power to legislate in the area of labor relations is long established, it has “never exercised authority to occupy the entire field in the area of labor legislation. *Id.*, at 208.

While there are unresolved issues regarding the preemption of state laws by federal laws in § 301 suits, there is no question as to where collective bargaining agreements fit in the hierarchy. “Such a rule of law would delegate to unions and unionized employers the power to exempt themselves the power to exempt themselves from whatever state labor standards they disfavored.” *Id.*, at 212.

Furthermore, the Court reiterated that “Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability for what is illegal under state law.”

Id.

Finally, the Supreme Court found that “extending the pre-emptive effect of § 301 beyond suits for breach of contract...”, as the MLB desires, “would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract”, such as those bestowed upon the Respondent by Minnesota’s DATWA.

Id. Therefore, according to the plain text meaning of § 301 and the Supreme Court’s subsequent interpretations, the statute does not apply to the case at bar and preemption should not be applied.

B. Respondent's DATWA Claim is not dependent upon, or inextricably intertwined with the Collective Bargaining Agreement, and thus preemption is not appropriate.

While § 301 applies, on its face, only to suits for violations of labor contract, the Supreme Court has held that any state law claim founded on rights *created* by a collective bargaining agreement is preempted under § 301. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102 (1962) (emphasis added). However, in this case the cause of action is based on a state law, and not any right created by MLB's collective bargaining agreement.

a. Respondent's rights under DATWA

Respondent Wilson brought this suit seeking protection under the Minnesota DATWA, which provides the minimum standards and requirements for employers' drug testing policies and subsequent employment actions. The DATWA lists minimum information requirements for the contents of drug policies, requirements that the MLB concedes that their drug policy fails to meet.

Under Minnesota's DATWA, 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. Minn. Stat. § 181.952 subdiv. 1(1)-(6). The DATWA also takes into consideration employer/employee relationships governed by a collective bargaining agreement.

By its own terms, the Act “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 provided in those sections. *Id.* 181.955(1). The Act also addresses the unique issues presented by professional athletes, whom as the District Court noted, carry out portions of their employment in as many as 24 other states. According to the DATWA, the Act authorizes random testing for “professional athletes if the professional athlete is subject to a [collective bargaining agreement] permitting random testing but only to the extent consistent with the collective bargaining agreement.” *Id.* § 181.951(4). This rule should be read by the Court to allow MLB to randomly test its players, so long as the policy otherwise meets or exceeds the requirements of the act. The Minnesota legislature was obviously aware of the issues presented by professional athletics, but refused to alter in any way the minimum requirements set by law in regards to their drug policy protections.

The MLB contends, and the District Court mistakenly agreed, that Respondent's DATWA claim fails if the MLB policy meets or exceeds the requirements of the DATWA. This is not the correct application of § 301. As the Appellate Court correctly pointed out, the DATWA does not state that an employer who is a party to such a collective bargaining agreement cannot bring a claim under the DATWA. Union representatives can bargain for more protection regarding drug testing, but the DATWA represents a boundary below which testing policies may not fall. As Respondent's DATWA claim is based upon a right conferred by State law, and not preempted by any Federal law, the DATWA claim cannot be dismissed as being preempted by § 301 or MLB's collective bargaining agreement.

b. DATWA claim independent of Collective Bargaining Agreement

While § 301 applies primarily to suits for violations of collective bargaining agreements, it also preempts state law claims that are “substantially dependent upon analysis” of a collective bargaining agreement. *Allis-Chambers*, at 369. This application is consistent with the desire to resolve labor disputes uniformly, as it allows for a uniform *interpretation* of the collective bargaining agreement. However, § 301 does not preempt state law claims merely because the parties involved are subject to a collective bargaining agreement. *Allis-Chambers* holds that “if the resolution of a state law claim depends upon the meaning of a collective

bargaining agreement, the application of state law is preempted and federal labor-law principles... must be employed to resolve the dispute.” *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399, 405 (1988). The Court further clarified: “§ 301 preemption merely ensures that federal law will be the basis for interpreting collective bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements.” *Id.* at 409.

As the 8th Circuit noted, in applying the § 301 preemption doctrine, courts should begin with the claim itself. *Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing Inc.*, 450 F.3d 324, 331 (2006). In this case, Respondent Wilson’s DATWA claim does not depend upon the meaning of the collective bargaining agreement. The claim must stand as the record establishes that the testing procedures used by MLB, which led to the wrongful suspension of Wilson was in violation of the rights conferred by the DATWA. Nothing else need even be considered. As the MLB’s testing policy failed to even meet the DATWA standards, it is irrelevant in this action whether the collective bargaining agreement’s policy was followed. “As long as the state law claim can be resolved without interpreting the agreement itself, the claim is ‘independent’ of the agreement for § 301 preemption purposes.” *Id.*

Under a two-step approach to determine if a claim is sufficiently “independent,” the claim is preempted only “if it is ‘based on’ a provision of the [collective bargaining agreement], or if it “is dependent upon an analysis of the relevant” agreement. *Bogan v. General Motors Corp.*, 500 F.3d 828, 832 (8th Cir. 2007). Unlike tort suits such as invasion of privacy or wrongful termination, for example, Respondent’s DATWA claim does not depend on an analysis of the agreement to determine if a violation occurred. Respondent is not alleging that any violation of the agreement occurred, merely that the MLB’s policy was in violation of his Minnesota-conferred rights.

As the Appellate Court stated, “Here a court would have no need to consult the Policy in order to resolve Wilson’s DATWA claim. Rather, it would compare the facts and the procedure that the MLB *actually* followed with [...[DATWAs requirements...”. (Appellate Court Opinion, at 7). Whether the MLB’s testing violated Respondent’s rights is a “purely factual question,” and as such do not require a court to interpret any term of a collective bargaining agreement.

Hawaiian Airlines, Inc. vv. Norris, 512 U.S. 246, 261, 266 (1994). In *Hawaiian*, the Supreme Court distinguished between a claim arising under state law or the agreement itself. The Court found that the “only source” of the right asserted was conferred by the state, and wholly apart from the collective bargaining agreement, as is the case here. *Id.*, at 258.

The 10th Circuit addressed a similar issue in *Karnes v. Boeing Co.*, 335 F.3d 1189 (2003). A former employee brought an action under Oklahoma’s Standards for Workplace Drug and Alcohol Testing Act, an Act analogous with Minnesota’s DATWA. *Id.*, 1192. The court found that in order to establish a violation of the Act, the plaintiff had to show that the two relevant portions of the Act were violated. “Neither inquiry require[d] the court to interpret, or even refer to, the terms of the [collective bargaining agreement].” *Id.* The court thus found that the state law claim was “clearly independent” of the agreement and therefore not subject to § 301 preemption.

Following the interpretation of the 10th Circuit then, Respondent’s DATWA claim is clearly independent from the collective bargaining agreement, and thus preemption is improper in this instance.

c. DATWA claim not “inextricably intertwined” with Collective Bargaining Agreement

Besides claims concerning violations of a labor agreement or those dependent on provisions of a collective bargaining agreement, a claim may be preempted by § 301 if it is “inextricably intertwined with consideration of terms of the labor contract.” *Allis- Chambers*, at 213. In a case claiming breach of duty of good faith, the Supreme Court found that “If the state tort law purports to define the meaning of the contract relationship, that law is pre-empted.” *Id.* This is not the case here. As detailed above, the DATWA claim is entirely independent of the

MLB collective bargaining agreement. Whether or not the Policy met or exceeded the requirements of the DATWA is irrelevant as the DATWA was clearly not followed, a fact that MLB concedes.

In *Stringer v. NFL*, an Ohio District Court held that a wrongful death suit arising from the death of a player in hot weather conditions was preempted because the suit intertwined with collective bargaining agreement provisions regarding certification and responsibilities of team trainers and physicians. 474 F.Supp.2d 894, 910 (S.D. Ohio 2007). A suit for wrongful death, wrongful discharge or breach of good faith may certainly be inextricably intertwined with provisions of a labor agreement that deal with employer and employee rights and responsibilities that exist apart from everyday employment in society.

Unlike those causes of action, Respondent's suit arises from a statutory enactment by a state legislature that considered its effect both on collective bargaining agreements and professional athletes. As Respondent's claim does not require interpretation or construction of the collective bargaining agreement to determine whether a DATWA violation occurred, the claim can in no way be considered inextricably intertwined with the collective bargaining agreement, and thus preemption is improper in this matter.

C. MLB's Uniformity Argument

MLB also contends that denying preemption and subjecting their Policy to divergent state regulations would render the uniform enforcement of the MLB's drug testing nearly impossible. First of all, this argument is unsupported by any case law. That state laws may have a differing effect on the vast amount of employees is not grounds for preemption. The only grounds for preemption have been discussed and dismissed as inapplicable above, and the District Court's questions about the fairness and integrity of athletic competition have no role in this legal discussion.

The 9th Circuit addressed this argument in *Cramer v. Consolidated Freightways, Inc.*, where an employer "argued that the terms of the [collective bargaining agreements] affecting employees in multiple state should supercede inconsistent state laws." 255 F.3d 683, 695. The court found this contention unsupported, as "the LMRA certainly did not give employers and unions the power to displace any state regulatory laws they found in convenient." *Id.*, at 695 n.9. This is consistent with the Supreme Court's finding in *Allis-Chambers* that Congress did not intend § 301 "to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation." *Allis-Chambers*, at 211. Directly on point was the Court's warning that "Clearly § 301 does not grant the parties to a [collective bargaining agreement] the ability to contract for what is illegal under state law.

While certainly uniformity is important in a national sports league, it is not, for purposes of the law, more important that the minimum requirements and standards established by individual state legislatures. If the MLB desires uniform application of drug testing procedures, all they would have to do is “meet or exceed” the highest state minimum requirements. MLB and its representatives have the ability to bargain around state regulations, but no employer should have the right to enforce below par standards for employee drug testing procedures.

II. THE COURT OF APPEAL’S DECISION TO SET ASIDE THE ARBITRATOR’S AWARDS SHOULD BE AFFIRMED BECAUSE THE ARBITRATOR’S DECISIONS ARE IN CONTRADICTION TO WELL ESTABLISHED PUBLIC POLICY.

When reviewing an arbitral award, courts accord “an extraordinary level of deference” to the underlying award itself...and must confirm the award so long as the arbitrator is even arguably applying the contract and acting within the scope of their authority. *Stark v. Sandburg, Phoenix, & Von Gontard, P.C.*, 381 F.3d 793, 798. (8th Cir. 2004) (quoting *Bureau of Engraving, Inc. v. Graphic Communication Int’l Union, Local 1B*, 284 F.3d 821, 824 (8th Cir. 2002). The deference owed to arbitration awards, however, is not equivalent of a grant of limitless power and courts are neither entitled nor encouraged simply to ‘rubber stamp’ the interpretations and decisions of the arbitrators. *Id.* at 799. (quoting *Leed Architectural Prods., Inc. v. United Steelworkers of Am., Local 6674*, 916 F.2d 63, 65 (2d Cir. 1990) and quoting *Matteson v. Ryder Sys. Inc.*, 99 F.3d 108, 113

(3d Cir. 1996). As with any contract, 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). Nor can a court enforce an arbitrator's award if the arbitrator's interpretation of the CBA violates some explicit public policy. *Id.* (quoting *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948)).

The arbitrator's award, in this case, must be dismissed because it violates public policy on two accounts. First, the arbitrator, through his award, has condoned and encouraged a breach of an existing fiduciary relationship between the players and the MLB. Second, the arbitrator's award fails to take into account an active breach of public policy in the collective bargaining agreement itself, in that the policies and procedures contained in the agreement fail to meet the minimum standards listed in Minnesota Drug and Alcohol Testing in the Workplace Act. Since both of these claims are based on violations of well established public policy, this court may review and overturn the arbitrator's award.

A. The Existence of a fiduciary relationship

“A fiduciary relationship 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.” *Lumbermans Mut. Cas. Co. v. Franey Muha Alliant Ins. Sercs.*, 388 F.Supp.2d 292, 305 (S.D.N.Y. 2005). Although a very fact specific

analysis is needed, “a fiduciary relationship may be found in any case ‘in which influence has been acquired and abused, in which confidence has been reposed and betrayed.’” *Id.* (quoting *United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*, 216 F.Supp.2d 198, 218 (S.D.N.Y. 2002). Courts often look at whether a party reposed confidence in another and reasonably relied on the other’s *superior expertise or knowledge* when evaluating the existence of a fiduciary relationship. *Id.* (quoting *Facella v. Fed’n of Jewish Philanthropies of New York, Inc.*, No. 98 Civ. 3146, 2004 WL 1700616, at *6 (S.D.N.Y. July 30, 2004)(citing *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991)(emphasis added). Courts have also recognized that a fiduciary duty does not have to be exclusively established through a contract, rather, “the ongoing conduct between the parties may give rise to a fiduciary relationship that will be recognized.” *Id.* (quoting *Sergeants Benevolent Ass’n Annuity Fund v. Renck*, 19 A.D.3d 107, 796 N.Y.S.2d 77, 79 (1st Dep’t 2005). But a fiduciary relationship may arise from the contract itself, as in the case at hand. “If a contract establishes a relationship of trust and confidence between the two parties,...then a fiduciary duty arises from the contract which is independent of the contractual obligations.” *Id.* (quoting *GLM Corp. v. Klein*, 665 F.Supp. 283, 286 (S.D.N.Y. 1987).

Most obvious is the fiduciary relationship that is created through the expressed terms of the collective bargaining agreement. In the agreement itself,

MLB takes on the obligation of maintaining a hotline which players may call to obtain information about over-the-counter supplements and their relationship to the banned substances list. MLB is also charged with the responsibility of issuing warnings about potentially hazardous supplements along with updating the banned substances list as new supplements hit the market. A fiduciary duty is also created by the actions of the MLB as it pertains to the information that is gathered.

Presumably, on more than one occasion, memos have been produced which detail supplements and their affects on the health and safety of the athletes of the league. Even though a specific action, as it pertains to research of supplements, may not be expressly contained in the bargaining agreement, the MLB's continued actions of research and reporting the findings is sufficient to create a fiduciary relationship. It is those relationships, both expressed and created, which are at issue here and which were breached giving rise to this case.

B. The breach of the fiduciary relationship

The existence of a fiduciary duty between the players and Doctors for the MLB, created through the CBA, imposes a duty to disclose all material facts they knew within the scope of that relationship. The scope of the relationship between the parties encompasses, inter alia, the testing of players for banned substances, researching potentially harmful substances, creating a list of substances which are banned from usage, and maintaining a hotline which provides information to

players about substances which may or may not be banned. The failure to disclose information related to the scope of this relationship results in a breach of the fiduciary relationship between the parties. *See Grandon v. Merrill Lynch & Co., Inc.*, 147 F.3d 184, 189 (2d. Cir. 1998)(“duty to disclose 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.”); *Callahan v. Callahan*, 127 A.D.2d 298, 300 (N.Y. App. Div. 1987)(“duty to disclose may arise where a fiduciary or confidential relationship exists or where a party has *superior knowledge not available to the other.*”)(emphasis added). Dr. Larson testified it was within the scope of his duties, proscribed in the CBA policy, that he must make “special effort to educate and warn players about the risks involved in the use of supplements.” It is easy to find the parties in this case, Dr. Larson and MLB, were in possession of superior knowledge that was not immediately available to the players. Dr. Larson readily admits he was knowledgeable to the fact that SpeedShot contained a chemical (Clomiphene) currently on the banned list and also that SpeedShot did not list that chemical on the manufacturer’s label. Dr. Larson also made the conscious decision to withhold specific information from the players, despite his duty to disclose. It is this breach of a fiduciary duty which is against public policy. The arbitrator, by upholding the suspensions, endorsed and encouraged a deliberate withholding of information in violation of the duty to

disclose created by the fiduciary duty. Public policy forbids such endorsement and therefore this court should reverse that decision. But, it is not sufficient for the respondents in this case to simply state that a public policy against breaching fiduciary duties exists and the arbitrator's award violates this policy. The public policy must be well seated in law.

C. Legitimate Public Policy against the breach of a fiduciary relationship

In order for a court to dismiss an arbitrator's award it must be "by reference to the laws and legal precedents and not from general considerations of public interests.'" *W.R. Grace* at 766. (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)). It is undisputed that no court will condone a willful breach of a fiduciary duty, with plentiful case law in existence to support such a statement. But there is also a broader public policy at issue in this case. The fiduciary duty in existence between the players and the MLB is one which has been contracted for. To affirm an arbitrator's award, which is based on a breach of a fiduciary duty, would also undermine the parties' freedom to contract, a secondary public policy at issue. The players have bargained for, and obtained, a service provided by MLB. This service was to provide to the players information about substances which may be harmful to their health. Since they are professional athletes, their health is their livelihood, and therefore the essence of the bargain. Ignoring a parties' right to

freedom of contract, and allowing a party to breach their fiduciary duty, are both contrary to public policy and therefore the arbitrator's award must be overturned in this case.

Courts are more likely to overturn an arbitrator's award which is contra to public policy when the health and safety is threatened. *See Delta Air Lines, Inc. v. Air line Pilots Ass'n, Int'l*, 861 F.2d 665, 674 (11th Cir. 1988)(affirming vacation of an arbitrator's award reinstating a pilot which had flown a commercial airline while intoxicated); *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 operator who violated federally mandated safety regulation). MLB may argue it is not the health and safety of the general public at issue in this case, differing from the cases supra. They may argue the withholding of the hidden ingredient information only affects the players of the league and no one in the public. However, SpeedShot is a product which is available to the general public. David Klein, director of the testing lab which tested SpeedShot for MLB, made a specific request that MLB disclose the findings to the Food & Drug Administration so all of the general public may be aware of the dangerous chemical contained in the product, but not listed on the label. The MLBPA is not suggesting there is any duty owed to the general public by MLB, merely that there is more at issue in this case than the

health and safety of the few hundred baseball players in the league, rather the health and safety of all members of the public who may purchase SpeedShot. Because the MLB failed to disclose this information to the players, and therefore breached their duty, the arbitrator's award should be vacated.

D. Arbitrator's award is based on a contract which fails to meet the minimum standards of state law, and therefore is in violation of public policy, requiring a court to overturn the award.

As stated before, just like any other contract, a court may not enforce a collective bargaining agreement that is contrary to public policy. *W.R. Grace*, 461 U.S. at 766. One blatantly obvious violation of public policy would be to enforce an illegal contract. The collective bargaining agreement between the MLB and the MLBPA falls below the minimum standard set forth in Minnesota's DATWA and is therefore illegal. The arbitrator based his decision on an illegal contract, and therefore his award should be vacated by this court.

The Minnesota DATWA governs drug and alcohol testing in the workplace by setting out the "minimum standards and requirements for employee protection" with regard to an employer's drug and alcohol testing policy. *Minn. Stat.* § 181.955 subdiv. 1. The terms set forth in an employer's drug and alcohol testing policy must meet or exceed the standards set forth in the statute. Failure to do so would result in the policy being deemed illegal. The minimum standards the MLB has failed to take into consideration in forming their policy are:

...(3) the right of an employee or job applicant to refuse to undergo drug and alcohol testing and the consequences of refusal;...(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....

Id. § 181.952 subdiv. 1(3, 5). The MLB does not address, or provide standards in the above areas, in the collective bargaining agreement. The DATWA does state, however, that in a CBA, “parties may negotiate for terms that meet or exceed, but that do not otherwise conflict with these minimum standards.” *Id.* § 181.955 subdiv. 1. But standards that fall below those listed will be deemed illegal. The mere fact that the players, and in particular Wilson, is a party of a CBA, does not exclude him from the rights protected by DATWA. The CBA must meet the minimum standards, which in this case it does not. The arbitrator may not base his decision on an illegal contract; doing so is a breach of public policy and another reason the arbitrator’s award must be dismissed.

CONCLUSION

Pursuant to the Labor Relations Management Act, Minnesota’s Drug and Alcohol Testing in the Workplace Act, Public Policy, cited case law, and all of the arguments state above, the Supreme Court should affirm the decision of the United States Court of Appeals for the Fourteenth Circuit.