No. 09-214

In the

SUPREME COURT OF THE
UNITED STATES OF AMERICA

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 FOR THE RESPONDENT

Team #21

Counsels 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 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 award was in violation of public policy.

STATEMENT OF THE CASE

In 2007, the Major League Baseball Players Association (the "MLBPA"), on behalf of its players, entered into a collective-bargaining agreement (the "CBA") with Major League Baseball ("MLB" or the "League"). *Wilson v. Major League Baseball*, No. 09-AC-0213 at 1 (S.D. Tul. 2009). That agreement incorporated the MLB Policy on Anabolic Steroids and Related Substances (the "Policy"), which prohibits MLB players from using a number of prohibited substances, including Clomiphene. *Id*. The Policy is directed by an Independent Administrator, Dr. John Larson, who is charged with overseeing its implementation and with providing education to the players about banned substances. *Id*. at 2. The Policy also created the MLB Supplement Hotline (the "Hotline"), through which the players can presumably obtain confidential and accurate information about banned substances. *Id*.

In 2007, the League learned that some bottles of SpeedShot, an energy-boosting supplement, contained Clomiphene, a banned substance, although it was not listed as an ingredient on the bottle. *Id*. at 3. Although the Independent Administrator, the Consulting Toxicologist (Dr. Ray Finkle), and the Vice President of Law and Labor Policy for the MLB

(Andrew Birch) were all made aware of this finding, no report was made to the Food & Drug Administration. *Id*. Furthermore, the League did not specifically disclose the presence of Clomiphene in SpeedShot to its players; instead, it issued a memorandum to all MLB players reminding them of the dangers of energy-boosting supplements in general. *Id*. In that memorandum, the League failed to specifically mention that SpeedShot contained a banned substance. *Id*. at 4. Furthermore, the League failed to update the information offered on the Hotline, which continued to report only that "players should avoid taking any energy supplement because the label might not list all the ingredients," and not that SpeedShot actually contained a banned substance. *Id*. at 17.

The Plaintiff, Kevin Wilson, is an employee of the Minnesota Twins, L.L.C., and a member of the MLBPA. *Id*. at 1. On the morning of a scheduled preseason training camp scrimmage, Wilson took SpeedShot. *Id*. at 4. Pursuant to the Policy's annual preseason provisions, Wilson was drug-tested, and his results came back positive for Clomiphene. *Id*. Four other players from different teams also tested positive for Clomiphene, and all were suspended for fifteen games. *Id*. Wilson, the other players, and the MLBPA appealed the suspensions to an independent and neutral arbitrator pursuant to the terms of the Policy. *Id*.

The arbitrator upheld the suspensions, and Wilson filed suit against the League, Dr. Larson, Dr. Finkle, and Andrew Birch in Minnesota State Court. *Id*. at 5. Wilson's complaint alleged that the Policy violated Minnesota's Drug and Alcohol Testing in the Workplace Act ("DATWA"), and sought damages and an injunction against enforcement of the arbitration award. *Id*. The state court granted Wilson a temporary restraining order barring his suspension, but this injunction applied only to Wilson as the other four suspended players were not employed in the State of Minnesota. *Id*. The League then removed the case to federal court, where it was

consolidated with an action brought by the MLBPA on behalf of all five players (the "Players"), seeking to vacate the arbitration award under the Labor Management Relations Act (the "LMRA").

At the district court, the League was granted summary judgment on all claims after arguing that Wilson's DATWA claim was preempted by § 301 of the LMRA and that the arbitrator's award should be upheld. *Id*. at 19. Wilson and the MLBPA appealed, and the Court of Appeals reversed the judgment of the district court after determining that Wilson's DATWA claim is not preempted by § 301 of the LMRA, and that the arbitration award violated public policy. *Wilson v. Major League Baseball*, No. 09-2108 at 4, 10 (14th Cir. 2009).

Major League Baseball submitted a petition for writ of certiorari, which was granted by this court.

SUMMARY OF THE ARGUMENT

The Court of Appeals was correct in holding that Wilson's DATWA claim was not preempted by § 301 of the LMRA, and that the arbitration award against the Players should be vacated because it violates public policy. Wilson's DATWA claim should not be preempted because resolution of the claim does not require an analysis or interpretation of the terms of the CBA or the Policy. To determine whether the League's actual conduct in administering its drug-testing program was in compliance with the minimum standards required by DATWA requires nothing more than a factual inquiry into actual events. No part of this claim would require the court to analyze or even view the terms of the CBA or the Policy. If anything, Wilson's claim is only tangentially related to a provision of the Policy. Furthermore, the intent of Congress in adopting § 301 was to create a unified federal body of labor-contract law, not to allow the substantive provisions of private agreements to trump inconvenient state regulation. To allow

parties to a collective-bargaining agreement to contract around state laws would lead to inequality in the application of the minimum labor standards imposed by a state legislature.

Additionally, the arbitration award should be vacated because it violates public policy. The conditions of the Policy obligated the League to inform its players of potentially harmful substances, and the Players relied on the League's superior expertise and knowledge to protect their health and safety. By purposely failing to disclose the known presence of a harmful substance, the League violated a fiduciary duty owed to its players. The failure was a direct violation of public policy, because it jeopardized the health and safety of those who were owed the fiduciary obligation. To allow the arbitrator's award to stand would be to condone this violation of public policy.

STANDARD OF REVIEW

The applicable standard of review is *de novo*.

ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT IN HOLDING 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.

Section 301 of the LMRA states: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States." 29 U.S.C. § 185(a) (2000). In *Textile Workers Union v. Lincoln Mills*, this Court held that § 301 not only provides federal-court jurisdiction over controversies involving collective-bargaining agreements, but also "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." 353 U.S. 448, 451 (1957). The preemptive effect of § 301 was first analyzed in

Local 174, Teamsters v. Lucas Flour Co., where this Court recognized that while § 301 does not preclude state courts from taking jurisdiction over cases involving the interpretation of collective-bargaining agreements, that state law must yield to federal common law, so that common terms in bargaining agreements are not given different and potentially inconsistent interpretations in different jurisdictions. 369 U.S. 95, 103-04 (1962). To determine whether preemption of a state-law claim is warranted, this Court has prescribed that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). With that holding, this Court did not intend to imply that *all* state-law claims rooted in a dispute over a collective-bargaining agreement were subject to preemption. In fact, this Court made clear that the opposite was true: "Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law." *Id*. at 211.

At the district court, the League asserted, and the court agreed, that Wilson's DATWA claim was preempted by § 301 of the LMRA because: 1) resolution of the claim required an "analysis" of the Policy in order to determine whether it met or exceeded DATWA's requirements; and 2) that a uniform interpretation of the CBA and Policy across state lines was necessarily to preserve the integrity of the MLB's business as a competitive sport league. Unfortunately, both the League and the district court have misinterpreted the nature of the claim. As the Court of Appeals recognized, resolution of Wilson's DATWA claim does not require so much as a glance at the CBA or the Policy; it is dependent upon nothing more than an inquiry into the conduct of the League and the implementation of its drug-testing policy and a

comparison with DATWA's minimum standards. Furthermore, this Court has never interpreted that the intent of Congress in adopting § 301 included granting parties to a collective-bargaining agreement the license to contract around potentially inconvenient state laws.

A. <u>To resolve Wilson's DATWA claim, this court need only compare the facts and procedures that the League followed with respect to its drug testing with DATWA's requirements; there is no need to consult or examine the terms of the CBA or the Policy.</u>

An application of state law is preempted by § 301 of the LMRA only if such application requires the interpretation of a collective-bargaining agreement. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988). In *Lingle*, the petitioner notified her employer that she had been injured during the course of employment and requested compensation for her medical expenses pursuant to the Illinois Workers' Compensation Act. She was subsequently fired for allegedly filing a false compensation claim. In response, the petitioner's union filed a grievance pursuant to its collective-bargaining agreement with the employer, which protected employees from discharge except for just cause and provided for the arbitration of grievances. While arbitration was proceeding, the petitioner filed a retaliatory discharge action in Illinois state court, alleging that she had been discharged for exercising her rights under the Illinois worker's compensation laws. After the case was removed to federal court, the district court dismissed the complaint as preempted because the claim was "inextricably intertwined" with the collective-bargaining provision prohibiting discharge without just cause, and the Court of Appeals affirmed. *Id*. at 402. This Court, however, held that the application of the petitioner's state tort remedy was *not* preempted by § 301, because none of the elements of the retaliatory discharge claim required a court to interpret any term of a collective-bargaining agreement. *Id*. at 407.

Under Illinois law governing retaliatory discharge for filing a worker's compensation claim, the employee must show 1) that she was discharged or threatened with discharge and 2)

that the employer's motive was to deter the employee from exercising rights under the Worker's Compensation Act or to interfere with the exercise of those rights. *Id*. (quoting *Horton v. Miller Chemical Co.*, 776 F.2d 1351, 1356 (7th Cir. 1985)). This Court determined that "[n]either of the[se] elements requires a court to interpret any term of a collective-bargaining agreement . . . [t]hus, the state-law remedy in this case is 'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for § 301 pre-emption purposes." *Id*. *See also Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 257 (1994) (holding that a state-law cause of action is not preempted by federal law if it involves rights and obligations existing independent of a collective-bargaining agreement); *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994) (same); *Thompson v. Hibbing Taconite Holding Co.*, No. 08-868, 2008 Dist. LEXIS 87045, 2008 WL 4737442, *1, *4 (D. Minn. Oct 24, 2008) (holding that a terminated employee's multiple DATWA claims alleged "violat[ions] [of] such non-negotiable state law rights [which] d[id] not require an interpretation of the CBA, and would not be preempted under the LMRA.").

Similarly, in this case, resolution of Wilson's DATWA claim does not require the Court to consult or examine the terms of the CBA or the Policy, but instead only to compare the facts and procedures that the League followed with respect to its drug testing with DATWA's requirements. As the court below stated: "Wilson's DATWA claim is predicated on Minnesota law, *not* the CBA or the Policy, and the claim is not dependent upon an interpretation of the CBA or the Policy." *Wilson*, No. 09-2108 at 10 (emphasis added). Just as the resolution of the petitioner's retaliatory discharge claim in *Lingle* was dependent on factual elements distinct from that collective-bargaining agreement, the resolution of Wilson's DATWA claim is dependent on factual elements distinct from the CBA and the Policy. For instance, to resolve Wilson's claim the court could examine: 1) whether the drug-testing laboratory used by the League met the

minimum requirements under MINN. STAT. § 181.953 subdiv. 1; 2) whether the League provided the players who tested positive with sufficient written notice of their right to explain the positive test and opportunity to do so under MINN. STAT. § § 181.953 subdiv. 6(a)-(c); or 3) whether the League complied with DATWA's requirement of a confirmatory test under MINN. STAT. § 181.953 subdiv. 10(a). To determine whether the League was in compliance with these provisions is a factual inquiry that does not require so much as a glance at the terms of the CBA or the Policy. In other words, to resolve Wilson's DATWA claim, a court need only look at the minimum requirements of that law and compare them to what actually occurred during the drug-testing process. As this Court stated in *Lingle*, "[A]s long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes." 486 U.S. at 410. Wilson's state-law DATWA claim is likewise independent.

This case is readily distinguishable from other cases where this Court has determined that preemption was proper. In *Lueck*, this Court considered whether the Wisconsin tort remedy for bad-faith handling of an insurance claim could be applied to the handling of a claim for disability benefits that were authorized by a collective-bargaining agreement. In that case, a collective-bargaining agreement existed between the petitioner employer and the labor union of which the respondent employee was a member. The agreement incorporated a self-funded disability plan that provided benefits for non-occupational injuries to employees, and established a disability grievance procedure that that culminated in final and binding arbitration. The respondent suffered a non-occupational injury, and became involved in a dispute over how the petitioner and insurer handled his disability claim. Rather than use the grievance procedure, the respondent brought a tort suit in Wisconsin state court, alleging bad faith in the handling of his claim. This

Court examined the agreement, and determined that it provided the basis not only for the benefits, but also for the right to have the payments made in a timely manner. *Lueck*, 471 U.S. at 213-16. A further analysis of the Wisconsin tort remedy revealed that it "exists for breach of a 'duty devolv[ed] upon the insurer by reasonable implication from the express terms of the contract' the scope of which, crucially, is 'ascertained from a consideration of the contract itself.'" *Id*. at 216 (quoting *Hilker v. Western Automobile Ins. Co.*, 235 N.W. 413, 415 (Wis. 1931)). In other words, "[q]uetions of good faith performance [are] related to the application of terms of the contractual agreement." *Lueck*, 471 U.S. at 217, n.11. Since the "parties' agreement as to the manner in which a benefit claim would be handled [would] necessarily [have been] relevant to any allegation that the claim was handled in a dilatory manner" this Court determined that § 301 preempted the application of the Wisconsin tort remedy. *Id*. at 218.

Such is not the case here. Unlike in *Lueck*, there is no need for a court to conduct a threshold inquiry into the terms of the CBA or the Policy to determine whether a cause of action exists. All a court must do to decide Wilson's DATWA claim is to examine the minimum requirements of the Minnesota law and then examine the actions of the League to determine whether it was in compliance. This is a simple, black and white, factual inquiry that has nothing to do with the CBA, the Policy, or the terms of any agreement between the parties. A simple examination of an employer's conduct does not require an interpretation of terms, and therefore does not invoke preemption under § 301.

B. Congress's intent in adopting Section 301 was to create a unified federal body of labor-contract law, not to allow the substantive provisions of private agreements to trump state regulation.

The question of whether a certain state action is preempted by federal law is one of congressional intent. *Lueck*, 471 U.S. at 208. "[C]ongressional purpose [is] the 'ultimate

touchstone' of our enquiry." *Livadas*, 512 U.S. at 120 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)). This Court has repeatedly determined that Congress's goal in adopting § 301 was to create a unified body of labor contract law to prevent inconsistent interpretation of collective-bargaining agreements across jurisdictional lines. *See Lucas Flour*, 369 U.S. at 104 ("[I]n enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules."); *Lueck*, 471 U.S. at 201-02 (same). That being said, this Court has also recognized that it was not the intent of Congress to allow the parties to such an agreement to contract around inconvenient state laws. As the court below noted:

> [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 of law 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. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it 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.

Wilson, No. 09-2108 at 9 (quoting *Lueck*, 471 U.S. at 211-12).

In *Livadas*, the petitioner was a former employee of a supermarket in California. State law in California requires employers to pay all wages due immediately upon an employee's discharge, imposes a penalty for refusal to pay promptly, and places responsibility for enforcement of these provisions on the State Commissioner of Labor. After the petitioner was discharged, her employer refused to pay her all wages owed. The petitioner filed a penalty claim, and the Commissioner replied with a form letter stating that he was barred from enforcing such claims on behalf of individuals, like the petitioner, whose employment terms were governed by a collective-bargaining agreement containing an arbitration clause. The petitioner brought an action alleging that this non-enforcement policy was preempted by federal law because it

abridged her rights under the National Labor Relations Act, because it placed a penalty on the exercise of her statutory right to collectively bargain. The Commissioner countered that his non-enforcement policy expressed a "conscious decision" to keep the state's "hands off" the claims of employees protected by collective-bargaining agreements, in order to encourage the collective-bargaining and arbitral processes favored by federal law. *Livadas*, 512 U.S. at 126. This Court rejected this assertion, on the premise that such "freewheeling bargaining" that contradicts state law is not within the scope of congressional intent under § 301. *Id*. at 128. "[W]e have never suggested that labor law's bias towards bargaining is to be served by forcing employees or employers to bargain for what they would otherwise be entitled to as a matter of law." *Id*. at 130.

Similarly, in this case the bargaining process that occurred between the League and the MLBPA to establish the CBA does not govern which state laws do and do not apply to the players. Just as the State Commissioner in *Livadas* was denied the ability not to enforce California state law based upon the presence of a collective-bargaining agreement, the League should also be denied the opportunity to hide behind the CBA when it is challenged with a valid state-law claim. In both cases, the parties misinterpreted the scope of preemption under § 301. Congress did not intend to create a backdoor pathway to subversion of state law with this provision.

Furthermore, it was certainly not the intent of Congress to provide different sets of rules to different classes of employees based upon their affiliation with a labor union. This Court has previously rejected the proposition that "a distinction between claimants represented by unions and those who are not is 'rational,' the former being less 'in need' that the latter." *Id*. at 128-29. Such a policy would penalize "workers who have chosen to join a union by preventing them

from benefitting from state labor regulations imposing minimum standards on nonunion employers." *Id*. (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)). Basic employment guarantees and protections for individual employees should be applied universally, without excluding members of labor unions. If a court were to find that somehow that Wilson's right to minimum protections as guaranteed by DATWA were trumped by the mere fact that he was subject to a collective-bargaining agreement, he would be subject to the type of "penalty" this court rejected in *Livadas*.

As this Court stated in *Livadas*, "while this sensible 'acorn' of § 301 preemption recognized in *Lucas Flour* has sprouted modestly . . . it has not yet become, nor may it, a sufficiently 'mighty oak' to supply the cover the Commissioner seeks here." 512 U.S. at 122. In this case, the League is seeking shelter under the same mythical "mighty oak," but again the branches do not reach far enough to protect it from inquiries into its adherence to standards adopted by the state legislature.

II. THE ARBITRATION AWARD SHOULD BE VACATED BECAUSE IT VIOLATES PUBLIC POLICY.

This Court's review of the arbitrator's decision is circumscribed by the Federal Arbitration Act, which allows a court to set aside an arbitration award only if that award "was procured by fraud, corruption, or undue means," or when "there was evident partiality in the arbitrators." 9 U.S.C.A. §§ 10(a)(1)-(2) (2002). In the event that a court reviews an arbitration agreement, the court's authority to reverse the arbitration award is "exceptionally narrow." *Coca-Cola Bottling Co. v. Teamsters Local Union No. 688*, 959 F.2d 1438, 1440 (8th Cir. 1992). A court's ability to reverse an arbitration award is narrow because there is "an extraordinary level of deference" given to the arbitrator, and the award must be upheld if the arbitrator "is even

arguably construing or applying the contract and acting within the scope of his authority." *Stark v. Sandburg, Phoenix & Von Gontard, P.C.*, 381 F.3d 793, 798 (8th Cir. 2004).

Although the arbitrator's award is given a high level of deference, an arbitration award must be vacated if the arbitration award runs counter to public policy by affecting public health or safety. *Delta Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665, 674 (11th Cir. 1988). The arbitrator's award must "violate some explicit public policy" that is "well defined and dominate." *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983). If the award does violate an explicit public policy, the court is obligated to refrain from enforcing it. *Id*.

An arbitration award runs counter to public policy when the policy as interpreted by the arbitrator condones the breach of a fiduciary duty. *Wilson*, No. 09-AC-0213 at 16. Therefore, in order for Wilson and the MLBPA to establish that the arbitration award in this case runs counter to public policy they must show: 1) that a fiduciary duty existed between the League and the Players and that duty was breached; 2) that the fiduciary duty conformed to the explicit public policy of protecting public health and safety; and 3) that the arbitrator's award violated that public policy by condoning a breach of the fiduciary duty. *Id*.

A. The League breached a fiduciary duty to the Players.

Due to the conditions of the CBA, the League breached a fiduciary duty to inform its players of any known supplements that contained banned substances. "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 relationship." *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 duty exists, New York Courts examine "whether a party reposed confidence in another and reasonably relied on the other's superior expertise of knowledge." *Id*.

A fiduciary duty is created when parties are involved in an on-going, direct contractual relationship. In *Lumbermens*, the parties were involved in a contract which automatically bound the plaintiff to any bond the defendant issued. The defendant issued a bond against the plaintiff's wishes which caused a substantial loss to the plaintiff. The plaintiff asserted that the parties were involved in an on-going relationship "that may be construed as one of trust and confidence" that the defendant would not issue bonds against the plaintiff's wishes. *Id*. at 306. The Court held that the defendant breached a fiduciary duty not to issue bonds against the plaintiff's requests not to. *Id*. The court reasoned that the parties had an on-going direct contractual relationship that created fiduciary obligations as a result of the parties' relationship. *Id*.

Parties in a fiduciary relationship with superior knowledge have an implied duty to disclose information not available to the other. In *Callahan v. Callahan*, 514 N.Y.2d 819 (N.Y. App. Div. 1987), the parties were involved in a dissolution of marriage. In discussing division of the marital property, the defendant (husband) enticed the plaintiff (wife) that her share of the property was only worth $45,000.00, when the defendant in fact knew that the property was worth $150,000.00. The court held that a duty to disclose may arise where a fiduciary or confidential relationship exists or where a party has superior knowledge not available to the other. *Id*. at 821.

Analogous to the parties in *Lumbermens*, the League and the Players were involved in a contractual relationship of trust and confidence. Under the CBA, the League was obligated to inform any player who called the Hotline of any harmful ingredients in dietary supplements banned by the Policy. The Players reasonably relied on and trusted the League's superior expertise and knowledge in administering the Policy.

The League suggests that it was only under an obligation to inform players of substances on the banned substance list. The League asserts that because SpeedShot itself was not on the banned substance list, it had no duty to inform players that it contained a substance that was harmful to the one's health because all players were responsible for what they put in their bodies. Although the Players were responsible for what they put in their bodies, the League and the Players were involved in a relationship where the Players trusted and relied on the Hotline's guidance in order to be in compliance with the CBA. Under the premise that the Players trusted and relied on the Hotline, the League had a duty to disclose that SpeedShot contained a harmful substance. The League had a duty to disclose the ingredients of SpeedShot because analogous to the defendant in *Callahan*, the League had superior knowledge about SpeedShot's ingredients.

The Players relied on the Hotline's guidance on supplement ingredients so that they could be in compliance with the CBA provision that players cannot consume substances on the banned substance list. The Player's reliance on the League for guidance coupled with the CBA created a fiduciary relationship which required the League to disclose all information it knew about supplements which contained substances on the banned list. The League breached its duty to guide the Players when it knowingly and purposefully failed to disclose through the Hotline that SpeedShot contained a harmful substance that was banned.

B. The fiduciary duty is explicit public policy.

What constitutes public policy is vague and thus, public policy is to be ascertained by reference to laws and legal precedents as opposed to general considerations of public interests. *W.R. Grace & Co.*, 461 U.S. at 766. In referencing laws and legal precedents, courts have recurrently vacated arbitration awards based on public policy grounds where an award would sanction behavior that threatens health and safety. *See Delta Air Lines*, 861 F.2d at 674; *Iowa*

Elec. Light & Power Co. v. Local Union 204 of Int'l Bhd. of Elec. Workers, 834 F.2d 1424, 1428 (8th Cir. 1987).

Arbitration awards will be vacated if they involve parties whose acts deliberately jeopardize public health and safety. In *Iowa Elec. Light & Power Co.*, an employee of a nuclear power plant deliberately defeated an interlock system, thereby committing a knowing violation of a federal rule in place to protect public safety. As a result of the employee's willful act to violate a safety rule, he was discharged from his position. The court held with a line of cases that vacated arbitrators' awards that reinstated employees whose deliberate acts jeopardized public health or safety. *Id*. at 1428. The court reasoned that the employee's violation of the safety rule "did not result in actual injury to public health or safety is of no consequence," because "his willful actions could have caused a disaster." *Id*. at 1429.

Courts have frequently vacated arbitration awards on public policy grounds when the award sanctions behavior that threatens health and safety. The League had a duty to inform its players of the harmful ingredients in dietary supplements banned by the Policy. The Hotline's entire purpose was to help protect the health of players so they could maintain compliance with the CBA. When the players called the Hotline, they relied on the League to protect their health by sharing all knowledge it had about dietary supplements. Based on the League's fiduciary duty to its players, it is reasonable to infer that the League's failure to protect the health of its players constitutes a breach of public policy. As the League has a duty to protect player health and courts have held that behavior that threatens health and safety is contrary to public policy, the League's failure to protect its players from the harmful substance in SpeedShot results in a breach of public policy.

The League asserts that its failure to inform the Players of the potentially harmful substance in SpeedShot was not a breach of public policy because the failure to disclose did not threaten the Player's safety. The League contends that the Players were warned not to take any form of energy booster and thus, the League did not have to specifically tell the Players not to take SpeedShot. Contrary to the League's position that it issued the Players a warning about the potential harm of energy boosters, Dr. Larson expressly promised in a memorandum sent to all players that he would "continue to provide MLB Players with information on the subject throughout the year." *Wilson*, No. 09-2108 at 12. Dr. Larson and the League became aware that SpeedShot contained a banned substance months before the Players began calling the Hotline with inquiries about SpeedShot's ingredients. The Players relied on Dr. Larson and the League's superior knowledge. As Dr. Larson and the League expressly promised that they would give all players further information throughout the year, the League breached its duty to keep the Players safe by failing to disclose known information about SpeedShot's ingredients.

C. <u>The arbitrator's award violated public policy by condoning the breach of a fiduciary duty.</u>

The League's policy of not informing its players of the known harmful substance in SpeedShot as interpreted by the arbitrator violated public policy. The League's policy violated public policy because it condoned the League's breach of its fiduciary duty to disclose information about harmful substances in order to protect player health and safety. In order to determine whether the policy as interpreted by the arbitrator violated public policy, 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 Bhd. of Elec. Workers Local 499*, 345 F.3d 616, 620 (8th Cir. 2003).

An arbitrator's disregard of a fiduciary duty when making a decision violates public policy. In *Coca-Cola*, an employee was discharged for violating three rules of a collective-bargaining agreement. The employee's dismissal went to arbitration where the arbitrator failed to consider language within a last chance agreement made between the employee and employer. The court held that the arbitrator's disregard of the language of the last chance agreement constituted a reversal of the arbitrator's award. 959 F.2d at 1442. The Court reasoned that the arbitrator's failure to discuss the last chance agreement went outside his authority because the arbitrator was obligated to abide by the parties' bargained-for result. *Id*.

In this case, the arbitrator's award violated public policy because it held the Players strictly liable for inadvertently consuming a banned substance without taking into consideration the breach of fiduciary relationship the League committed. The League breached a fiduciary duty to the Players when it failed to disclose the harmful ingredients within SpeedShot. The Players relied on the League for information about dietary supplements so that they could adhere to the strict liability standard within the CBA. The League and Dr. Larson were aware that SpeedShot contained a banned substance years before the Players were tested. *See Wilson*, No. 09-2108 at 13. Furthermore, the MLB and Dr. Larson deliberately withheld this vital information from the Players. *See Id*.

The League asserts that because the CBA contained a strict liability clause that stated that the Players were responsible to know what they were putting in their bodies at all times, it did not breach public policy because it had no duty to the Players. Contrary to this assertion, the League knew the Players relied on the Hotline for information about the ingredients and health risks of supplements. The League was in a position of superior knowledge to the Players because it knew prior to the Player's inquiries that SpeedShot contained a banned substance that

was harmful to their health. Due to the fiduciary duty that the League owed to the Players to disclose this information, the Players cannot be held strictly liable for inadvertently consuming a banned substance. The Players cannot be held strictly liable because the League intentionally kept information from them about the contents of SpeedShot regardless of the Player's countless inquiries through the hotline.

Analogous to the arbitrator in *Coca-Cola*, the arbitrator in this case failed to take a vital piece of evidence into consideration when he made his decision. The arbitrator's failure to take the League's deliberate breach of fiduciary duty to the Players into account when making his decision condoned the practice of placing the Player's health and safety at risk. When this case was brought before the arbitrator, the arbitrator did not address the fact that the League was aware that SpeedShot contained a banned substance that was harmful to the Player's health.

The arbitrator's failure to consider the League's breach of fiduciary duty to the Players which placed their health at risk violated public policy by condoning the breach of a fiduciary duty. By not considering the League's breach of fiduciary duty when making the award, the arbitrator was in essence suggesting that it is proper public policy to deliberately violate a relationship of reliance and trust by failing to disclose vital health and safety information. Furthermore, by suspending the Players, the arbitrator is further violating public policy by holding the Players strictly liable for following the advice of the League. The Players should not be held strictly liable where the League induced the Player's reliance and trust and then deliberately violated that trust. The Player's consumption of SpeedShot was within compliance with the Hotline's guidelines. The Players should not be held strictly liable when the League deliberately chose to withhold harmful information about the contents of SpeedShot. Thus, as the arbitrator failed to consider the League's deliberate breach of duty to the Players, the

arbitrator's award violated public policy by condoning that it is acceptable to breach a fiduciary duty. In accordance to the precedent established in *Coca-Cola*, as the arbitrator failed to consider vital information, the award should be overturned. The arbitration award should be vacated because the policy as implicated by the award meets the requisite elements that the arbitration award runs counter to public policy.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fourteenth Circuit should be affirmed.

Respectfully Submitted,

Team #21

Counsels for the Respondent

January 8, 2010

APPENDIX

Federal Arbitration Act, 9 U.S.C.A. §§ 10(a)(1)-(2) (2002):

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them

Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C. § 185(a) (2000):

> (a) Venue, amount, and citizenship: Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

MINN. STAT. § 181.953 (2006):

> Subdiv. 1. Use of licensed, accredited, or certified laboratory required. (a) An employer who requests or requires an employee or job applicant to undergo drug or alcohol testing shall use the services of a testing laboratory that meets one of the following criteria for drug testing: (1) is certified by the National Institute on Drug Abuse as meeting the mandatory guidelines. . . ; (2) is accredited by the College of American Pathologists. . . ; or (3) is licensed to test for drugs by the state of New York, Department of Health. . .
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> …
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> Subdiv. 6. Rights of employees and job applicants. (a) Before requesting an employee or job applicant to undergo drug or alcohol testing, an employer shall provide the employee

or job applicant with a form, developed by the employer, on which to acknowledge that the employee or job applicant has seen the employer's drug and alcohol testing policy. (b) If an employee or job applicant tests positive for drug use, the employee must be given written notice of the right to explain the positive test and the employer may request that the employee or job applicant indicate any over-the-counter or prescription medication that the individual is currently taking or has recently taken and any other information relevant to the reliability of, or explanation for, a positive test result. (c) Within three working days after notice of a positive test result on a confirmatory test, the employee or job applicant may submit information to the employer, in addition to any information already submitted under paragraph (b), to explain that result, or may request a confirmatory retest of the original sample at the employee's or job applicant's own expense as provided under subdivision 9.

…

Subdiv. 10. Limitations on employee discharge, discipline, or discrimination. (a) An employer may not discharge, discipline, discriminate against, or request or require rehabilitation of an employee on the basis of a positive test result from an initial screening test that has not been verified by a confirmatory test.