

No. 09-214

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In the

SUPREME COURT OF THE  
UNITED STATES OF AMERICA

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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 OF RESPONDENT

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January 11, 2009

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## **QUESTIONS PRESENTED**

- I. Under the Labor Management Relations Act, does Section 301 preempt the nonnegotiable rights granted under the state-law when an employee seeks enforcement of a state-law tort claim that does not require the interpretation of a Collective Bargaining Agreement and the Collective Bargaining Agreement seeks to displace a nonnegotiable right?
  
- II. Under Federal law, should a court intervene when an arbitrator's award does not take into account the fact that a party to a contractual agreement, against public policy, deliberately breached its fiduciary duty to disclose material information?

## STATEMENT OF THE CASE

### A. The “Policy”

In 2007 the Major League Baseball Players Association (“MLBPA”) and Major League Baseball (“MLB”) entered into a Collective Bargaining Agreement (“CBA”). (District Court Opinion p.1). This incorporated the MLB policy on Anabolic Steroids and Related Substances (“Policy”). (*Id.*) The “Policy” prohibited players from using a number of substances, including Clomiphene. The “Policy” provided that players are responsible for what is in their bodies, and a positive test result of any of the prohibited substances would not be excused simply because a player was unaware that he was taking a prohibited substance. (*Id.*) If a player did violate the “Policy,” he would face certain disciplinary actions (suspension, etc.), subject to appeal to arbitration. (*Id.* at 2). Dr. Larson was to implement and direct the “Policy,” which specifically included making reports to the Commissioner and providing education to the players regarding the “Policy.” (*Id.*) Additionally, a “Hotline” was created to provide players with accurate information regarding the “Policy.” (Appellate Court Opinion p.14).

That same year, the MLB learned that SpeedShot – an energy-booster – contained Clomiphene, although Clomiphene was not a listed ingredient. (DCO p.3). The MLB’s consulting toxicologist alerted Dr. Larson to this fact, who failed to report this finding to the Commissioner. (*Id.*) Further, Andrew Birch, a high ranking MLB official, was alerted to this fact as well. Despite the lab director’s request that the MLB report this information, Birch also failed to disclose the fact that Speedshot contained Clomiphene. (*Id.*) Eventually, the MLB notified only the MLBPA (not the players, coaches, etc.) that “Mega Energy Products” (the distributor of Speedshot) was now a company banned from business, but not personal use. (*Id.*) Further, it failed to ever give a sufficient, particularized warning that Speedshot itself contained

Clomiphene and was therefore banned, despite knowing to a factual certainty that Speedshot did indeed contain Clomiphene. Kevin Wilson was tested pursuant to the “Policy,” and his results came back positive for Clomiphene. (*Id.* at 4). For this he was suspended for fifteen games. (*Id.*) Additionally, four other players tested positive for Clomiphene and received the same suspension. (*Id.*) These five players and the MLBPA appealed the suspensions to an arbitrator pursuant to the terms of the “Policy,” arguing that the positive results should be excused because the MLB and Dr. Larson knew, as of September 2007, that Speedshot contained Clomiphene and failed to disclose this fact. This, they argued, constituted a breach of a fiduciary duty by the MLB. (*Id.*) The arbitrator upheld the suspensions, stating for reasons that the “Policy” held players strictly liable for positive test results. (*Id.* at 5).

## B. Procedural History

In response to the arbitrator’s award, Wilson filed suit against the MLB, Dr. Larson, the consulting toxicologist (Dr. Finkle) and Andrew Birch. (*Id.*) His complaint alleged that the “Policy” (1) violated Minnesota’s Drug and Alcohol Testing in the Workplace Act (DATWA), seeking both damages and an injunction against enforcement of the arbitration award. (*Id.*) A temporary injunction was issued for Wilson under Minnesota law. (*Id.*) The MLB then removed the case to federal court, where it was consolidated with an action brought by the MLBPA seeking to vacate the arbitration awards under the Labor Management Relations Act (the “LMRA”). (*Id.*) The MLB filed a motion for summary judgment, which the United States District Court for the Southern District of Tulania granted. (*Id.* at 20). Wilson and the MLBPA appealed to the United States Court of Appeals for the Fourteenth Circuit (“Circuit Court”), where the judgment of the District Court was reversed. (*Id.*) The Circuit Court concluded that 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. (ACO p.14).

## SUMMARY OF THE ARGUMENT

I. The Circuit Court correctly ruled that Wilson's claim that Major League Baseball violated DATWA is not preempted by Section 301 of the LMRA. This holding should be affirmed because, first, Wilson's DATWA claims are not substantially dependent upon an analysis of the Collective Bargaining Agreement, are not inextricably intertwined with the CBA, and are based on duties arising from a state statute and not established by the CBA. Second, sound jurisprudence supports a lack of preemption. The Circuit Court also correctly noted that the MLB was seeking to enforce a CBA that bargained for what was illegal under state law. The Supreme Court has settled this issue and does not permit a CBA to displace any state-law they find inconvenient. Any fear of inconsistent applications of collective bargaining agreements in this case is unfounded, because this controversy does not require analysis of the CBA. The Court also correctly noted that enforcing the nonnegotiable rights of employees in Minnesota outweigh the concerns for any possible competitive advantages.

II. The Circuit Court was correct in vacating the arbitrator's award for being in violation of public policy. Through its direct contacts as well as those of its agents, the MLB had a duty to disclose material information regarding the "Policy." By withholding material information from the players, as well as providing them with inaccurate information, the MLB breached this duty. This breach violated clearly established public policy, making invocation of the public policy exception to overturn the arbitrator's award proper.

## ARGUMENT

### I. WILSON'S DATWA CLAIMS ARE NOT PREEMPTED BY SECTION 301 OF LMRA.

The Circuit Court correctly ruled that Wilson's claim that Major League Baseball violated Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA) is not preempted by Section 301 of the Labor Management Relations Act (LMRA). The Circuit Court's holding that DATWA is not preempted by § 301 should be affirmed for the following reasons: First, Wilson's DATWA claims are not substantially dependent upon an analysis of the Collective Bargaining Agreement (CBA), the DATWA claims are not inextricably intertwined with the CBA, and the claims are based on duties arising from a state statute, as opposed to the CBA. Second, sound jurisprudence supports a lack of preemption. Third, parties to a CBA cannot bargain for what is illegal under state law.

#### A. Wilson's DATWA claims are not substantially dependent on the CBA, are not inextricably intertwined with the CBA, and do not arise from rights created by the CBA.

A state-law claim is preempted by federal law when the "state law claim is substantially dependent upon analysis of the terms of an agreement made between parties to a labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). Federal law also preempts a state-law claim where the "evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." *Id.* at 213. "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." *Lingle v. Norge Division of magic Chef, Inc.*, 486 U.S. 399, 410 (1988). Section 301 only preempts "claims founded directly on rights created by collective-bargaining agreements." *Cramer v. Consolidated Freightways Inc.*, 255 F.3d 683, 689 (9th Cir. 2001) *cert. denied*, 534 U.S. 1078 (2002), citing *Caterpillar Inc., v. Williams*, 482 U.S. 386, 394 (1987).

Minnesota's DATWA provides minimum standards on drug and alcohol testing with which employers must comply. Minn. Stat. 181.951 (1) (b) mandates that employers cannot request or require employees to undergo such testing unless done pursuant to a written policy. Minn. Stat. 181.921 (1) requires that the written policy contain the following minimum information: those employees subject to the testing, circumstances under which testing may be requested, the right of one subject to such a policy to refuse and the consequences of a refusal, disciplinary or adverse personnel action based on a positive result, the right of one subject to a policy to explain a positive test result or to request a confirmatory retest, and any available appeals procedures. Further, Minn. Stat. 181.951 (4) states that an employer may require employees to undergo such testing randomly if they are employed as professional athletes subject to a CBA that permits random drug and alcohol testing, but only to the extent consistent with the CBA.

For Wilson's DATWA claims to succeed, Wilson must prove that the MLB did not meet the requirements cited above. An analysis of these requirements does not involve any analysis of the CBA. Wilson must show that the "Policy" did not comply with the minimum standards established by DATWA because, for example, it did not sufficiently provide the circumstances under which one may be tested, or that the player was not given the chance to explain a positive test result. The analysis of Wilson's claims would only involve a comparison of the drug testing policy that was incorporated into Wilson's contract with the Minnesota Twins and the MLB (the "Policy") and the elements of the DATWA claim. Therefore analysis of the state-law claim is independent of the CBA, and §301 does not preempt DATWA.

Supporting the fact that Wilson's DATWA claims are independent of the Collective Bargaining Agreement, the duties allegedly violated by the MLB do not arise from the CBA.

Minnesota's statute establishes these duties for which employers initiating drug testing policies are responsible. Because the duties and consequential breaches are determined based on state-law, and are not derived from the CBA, the DATWA claims are independent of the CBA. Therefore, the Court does not have to interpret the CBA and there is no §301 preemption.

Despite the fact that Wilson may be able to prove, without interpreting the CBA, that the "Policy" did not comply with the elements of DATWA, Petitioner relies on the language of DATWA which establishes the freedom of parties to collectively bargain. This language states that DATWA "shall *not* be construed to limit the parties to a CBA from bargaining and agreeing with respect to a...testing policy that *meets or exceeds* and does not otherwise conflict with the minimum standards and requirements for employee protection provided in those sections." (*emphasis added*) Minn. Stat. 181.955. The statute further states that DATWA shall not interfere with employee protections already provided by any CBA that exceed the minimum requirements. *Id.* Petitioner mistakenly argues that the Court must interpret the CBA in order to determine if it "meets or exceeds" the minimum standards set out by DATWA. The fault in this argument becomes clear, however, when looking to the reason behind the provision. The title, "Freedom to collectively bargain," shows that this statute is intended to provide minimum protection for employees subject to drug and alcohol testing. The statute does *not* contemplate imposing on the liberty of parties to negotiate a CBA. Therefore, the statute does not *require* an interpretation of the Collective Bargaining Agreement to determine if it meets or exceeds DATWA standards. If the Court were to rely on Petitioner's argument, the Court would be forced to interpret every such CBA to ensure compliance. If that were the case, every CBA would preempt Minnesota state-law, which is an absurd conclusion. Such interference with CBAs would undermine the purpose of this statute—to ensure freedom of parties to negotiate terms of a CBA, while also

providing employee protection. Thus, the Court does not need to interpret the CBA to determine if the “Policy” meets or exceeds DATWA standards. The Court must compare only the “Policy” itself and the DATWA requirements, effectively eliminating any possibility of preemption.

B. Sound jurisprudence supports the Circuit Court’s ruling that §301 does not preempt DATWA.

The unanimous Supreme Court in *Lingle* held that §301 did not preempt a state-law tort claim. 486 U.S. at 413. In that case, the plaintiff brought a retaliatory discharge claim under Illinois state Worker’s Compensation law. *Id.* at 402. The Court reasoned that the plaintiff’s claim was not preempted because it was not “inextricably intertwined” with the provisions in the CBA prohibiting discharge without just cause. *Id.* at 409. The Court said that the elements of retaliatory discharge, 1) the employee was discharged or threatened with discharge and 2) the employer’s motive was to deter the employee from exercising his right under Worker’s Compensation laws were factual considerations pertaining to the conduct of the parties. *Id.* at 407. Thus the *Lingle* Court found that the state-law claim was independent of the CBA, and was not preempted by §301. *Id.*

Like the plaintiff in *Lingle*, Wilson has brought a state-law claim with specific elements that can be proven based on factual considerations of the conduct of the parties. Like the *Lingle* plaintiff’s state-law claim, Wilson’s DATWA claims are sufficiently independent of the CBA, and therefore the Court does not need to interpret it. Wilson’s state-law claim seeks recovery for the MLB’s violation of DATWA’s minimum requirements for employers’ drug testing policies. (R. 5 D.C.). The Court needs to look only to the conduct of the MLB, MLBPA, and players in negotiating the “Policy,” not the CBA, to determine if the “Policy” satisfied the elements set forth in DATWA. For example, the Court will have to determine if the “Policy” provided that

players were given the opportunity to explain a positive test or to request a confirmatory retest. Accordingly, the Court should follow its reasoning in *Lingle*, uphold the decision of the Circuit Court, and rule that §301 does not preempt Wilson’s DATWA claim. *See also Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 266 (1994) (applying *Lingle* and finding that §301 did not preempt Plaintiff’s state-law claim).

*Karnes v. The Boeing Company*, a Tenth Circuit case, is exactly on point with the instant case. 335 F.3d 1189 (10th Cir. 2003). The *Karnes* Court held that §301 did not preempt Oklahoma’s Drug Testing Act. *Id.* at 1194. To succeed under the state Drug Testing Act claim, the plaintiff had to prove that 1) he was discharged based on his drug test and that 2) his employer failed to confirm the result through a second test. *Id.* at 1193. The Court reasoned that “neither inquiry requires a court to interpret, or even to refer to, the terms of a CBA.” *Id.* Further, the state claim was “clearly independent of the CBA and not subject §301 preemption.” *Id.* at 1194.

In the instant case, Wilson, like the plaintiff in *Karnes*, brought a state-law claim challenging a drug test pursuant to a state drug testing law that applies to employers’ drug testing policies. The elements of Wilson’s claim, set forth in DATWA, are similar to the elements of Oklahoma’s Drug Testing Act in *Karnes*. Accordingly, applying *Karnes*, the Court should find that Wilson’s DATWA claims are independent of the CBA and are therefore not subject to §301 preemption. *See also Bogan v. General Motors Corp.*, 500 F.3d 828, 833 (8th Cir. 2007) (holding that the plaintiff’s claim for intentional infliction of emotional distress, a state-law claim, was not preempted by §301 because the elements of the plaintiff’s claim were not “inextricably intertwined” with the terms of the labor contract.”); *see also Thompson v. Hibbing Taconite Holding Co.*, 2008 LEXIS 87045 (D. Minn. 2008) (holding that DATWA claims were

nonnegotiable state rights and do not require an interpretation of the CBA, and would not be preempted under LMRA.)

Though the Supreme Court and other jurisprudence has found that there is no §301 preemption where elements of a state-law claim, such as DATWA, are independent of and do not require interpretation of the CBA, Petitioner relies on the Court's holding in *United Steel Workers of America, AFL-CIO-CLC v. Rawson*, 495 U.S. 362, 371 (1990). This Court found that §301 preempted a state-law claim in a wrongful death action. *Id.* However, this case should not be applied because it is distinguishable. The tort claim in *Rawson* was that mine inspectors were negligent in inspecting the mine which caused the deaths of the plaintiffs' family members. *Id.* at 364. The *Rawson* Court had to analyze the CBA to determine whether the inspectors' duty was one owed to all citizens (and therefore a nonnegotiable state claim) or a duty specifically owed to miners under the CBA. *Id.* at 371. Unlike *Rawson* where the duties were established by the CBA at issue, in the instant case, employees' rights and employers' duties are established by statute, *not* by the CBA, and are nonnegotiable state claims available to all employees subject to drug testing policies. Therefore, *Rawson* should not apply. An analysis of the MLB's duties and possible breaches thereof do not require an interpretation of the CBA, thus Wilson's DATWA claims are independent of the CBA and are not preempted by §301.

Petitioner further erroneously relies on *Trustees of the Twin City Brick Layers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324 (8th Cir. 2006) and *Gore v. Trans World Airlines*, 210 F.3d 944 (8th Cir. 2000). However, neither of these cases applies to the case at bar, because the state claims in each of those cases required the Court to look to whether and what kind of rights and duties were established by the CBA at issue. Those Courts then had to determine if the defendants had violated any such rights or duties. *Twin City*, 450 F.3d at 330-

331; *Gore*, 210 F.3d at 950. In the instant case, on the other hand, the rights and duties for which employers, including the MLB, are responsible are set forth in DATWA and are *not* established by the CBA. Therefore, the Court should uphold the Circuit Court’s ruling that §301 does not preempt Wilson’s DATWA claims.

C. A collective bargaining agreement cannot bargain for what is illegal under state law.

While collective bargaining agreements have become essential to business that crosses state lines, the Supreme Court has held that these agreements do not have the power to trump state-law tort claims that give rights independent of the Collective Bargaining Agreement.

1. Collective bargaining agreements must respect the laws of the states in which they are present.

The Supreme Court established a clear principle that parties are not permitted to bargain for what is illegal under state law. *Allis-Chalmers Corp.*, 202 U.S. at 212. In *Allis-Chalmers Corp.*, this Court dealt with a state-law tort claim which required an interpretation of a collective bargaining agreement in order to meet the elements of the tort. This Court overruled the Wisconsin Supreme Court, enforcing a state-law tort claim, and in doing so established preemption of state-law tort claims that require an interpretation of a collective bargaining agreement. *Id.* at 221. Writing for the majority, Justice Blackmun qualified the Court’s holding of preemption to prevent its use in particular situations. This Court stated that not every employment dispute is preempted and that Congress had no intention in §301 to give a CBA “the force of federal law”. *Id.* at 212. The Court went on to say that any alternative reasoning would allow a private agreement to “exempt themselves from whatever state labor standards they disfavored...Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law.” *Id.* The Court recognized that the

preemptive power of §301 did not extend to a right that was derived independently of a collective bargaining agreement, and any other conclusion would frustrate the legislative intent. *Id.* DATWA provides employees with certain rights that are independent of a collective bargaining agreement and therefore cannot be preempted.

The Supreme Court also had an opportunity to deal with this issue in a case involving the California Labor Commissioner's ruling on the enforcement of a CBA. *Livadas v. Bradshaw*, 512 U.S. 107 (1994). In this case the plaintiff brought a claim under 42 U.S.C. § 1983 against the Labor Commissioner of California for not enforcing state law when a collective bargaining agreement was in place. The Court cited *Allis-Chalmers Corp.* and restated the position that "§301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law." *Id.* at 123. While the *Livadas* Court did preempt in this case for other reasons, it cautioned the California Commissioner against establishing a *per se* rule of not enforcing state-laws merely because of the presence of a collective bargaining agreement. *Id.* at 121-122. The Court warned that preemption of § 301 does not have the power of a "mighty oak" but instead refers to the preemptive power as an "acorn" when put against a state-law tort claim. *Id.* at 122-123. This firmly rooted metaphor is to remind parties that these private agreements are not allowed to bargain for what is illegal under state law.

DATWA creates nonnegotiable rights for employees and proscribes minimum standards for how employers must act in reference to drug testing. Minn. Stat. 181.921 (*see also* Minn. Stat. 181.951 and Minn. Stat. 181.955). As previously stated, DATWA specifically allows for collective bargaining agreements as long as the agreement protects the minimum rights given to employees in the state of Minnesota. Minn. Stat. 181.955. The Petitioner seeks to give its private agreement the force of federal law and to preempt a series of nonnegotiable rights under state-

law. Using the parameters set out by the Supreme Court in *Allis-Chalmers Corp.* and *Livadas*, the Circuit Court properly rejected the holding of the District Court based on the simple fact that private agreements do not have the power to circumvent state laws that they find inconvenient. As stated in *Livadas*, “Congress is understood to have legislated against a backdrop of generally applicable labor standards” *Livadas*, 512 U.S. at 124 n. 17. Therefore the District Court’s reason for preemption fails in this circumstance and the Circuit Court should be affirmed.

2. Nonnegotiable rights given through state law outweigh the need for uniformity in the application of collective bargaining agreements.

The Petitioner hopes to circumvent the well-settled principles of *Allis-Chalmers Corp.* and *Livadas* by arguing for uniformity in labor regulation. The District Court poorly reasoned that the congressional intent of uniformity in labor law is more powerful than the intent to protect nonnegotiable state-law rights.

This argument has been made and rejected in *Cramer v. Consolidated Freightways Inc.*, 255 F.3d 683 (9th Cir. 2000) *cert. denied*, 534 U.S. 1078 (2002). This case went before the Ninth Circuit Court of Appeals on a rehearing *en banc* and regarded an employer using two-way mirrors in restrooms to catch employees using illegal drugs. *Id.* at 688. The *Cramer* Court overturned the lower Court’s ruling of §301 preemption on the basis that the invasion of privacy claim was independent of the Collective Bargaining Agreement. The Court cited *Allis-Chalmers Corp.* and *Livadas* asserting that the parties to the agreement could not bargain around California’s privacy laws as they granted a nonnegotiable right. Since the plaintiffs in *Cramer* solely based their claims on state privacy law, there was no preemption. *Id.* at 694. While the employer argued that “CBAs affecting employees in multiple states should supersede inconsistent state laws”, the Court made little of this argument stating, “This contention

overreaches, however, because the LMRA certainly did not give employers and unions the power to displace any state regulatory law they found inconvenient.” *Id.* at 696 n. 9. The Court states very logically that the employees “had a right to assume their employer would obey the law.” *Id.* at 695.

The District Court cited several cases to back their theory that uniformity outweighs the need to enforce DATWA. The Court showed a misunderstanding of the substantive law on the subject. The District Court cited *Healy v. Beer Institute* for the proposition that “the critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the state.” 491 U.S. 324, 336 (1989). This quote is taken out of context and not applicable to the controversy at hand. *Healy* is a commerce clause case that refers to price ceilings. In *Healy*, Connecticut attempted to prevent the prices of out-of-state beer from being higher in Connecticut than in their home state. *Id.* at 326. A complete reading of *Healy* shows that the quoted portion referred to the idea that a legislature could not interfere with interstate commerce regardless of its intent. *Id.* at 335-336. DATWA, on the other hand, is Minnesota legislation that creates nonnegotiable rights for Minnesota workers. *Healy* has no bearing on the facts at hand because interstate commerce and nonnegotiable rights of employees are too far attenuated. The Circuit Court was correct not to rely on *Healy*.

The District Court also cited three cases for the proposition that in order to have consistent interpretations of these private agreements there must be uniformity in the agreement’s application. The Court first quotes *Teamsters v. Lucas Flour, Co.*, which discusses the problem national collective bargaining agreements would have if each state could interpret the agreement differently. 369 U.S. 95, 103 (1962). The District Court also cited *Lingle* for the proposition that since different states could have inconsistent results for the same collective

bargaining agreement, use of a uniform federal law would prevent this. 486 U.S. at 405-406 (1988). Lastly the District Court cited *Twin City Bricklayers* to show that state law allows for “interpretive uniformity and predictability.” 450 F.3d at 334. These cases are valid law and correctly note the great need for uniformity in interpreting collective bargaining agreements, but because of the facts at hand, the District Court’s use of these cases is in error. The Circuit Court properly reasoned that Wilson’s claims in this controversy are independent of the Collective Bargaining Agreement. The claim at issue is brought under DATWA and not anything else. As previously stated, this claim does not require any interpretation of Major League Baseball’s Collective Bargaining Agreement. This being the case, there is no possibility of inconsistent interpretations of this Collective Bargaining Agreement. Thus the District Court’s use of *Teamsters*, *Lingle*, and *Twin City Bricklayers* for this proposition is inappropriate and the Circuit Court was proper to not rely on them.

Lastly, the District Court reasoned that uniformity is required to keep the competitive balance in Major League Baseball. The lower Court cited *Partee v. San Diego Chargers Football Company* stating that “fragmentation of the league structure on the basis of state lines” must be avoided. 668 P.2d 674, 678 (1983). Much like the *Healy* case, this quote is also taken out of context and not applicable to the present controversy. A complete reading of *Partee* will show that the Supreme Court of California cautioned its holding to prevent its use in this particular circumstance. Just prior to the above quoted language the Court stated that any extra territorial effect is an impermissible burden on interstate commerce unless there is a “strong state interest.” *Id.* at 678. As stated multiple times, DATWA provides nonnegotiable rights which would fall squarely within the definition of a “strong state interest.” *Partee* dealt with state anti-trust laws and the plaintiff’s claim challenged fundamental aspects to the functioning of the National

Football League like the rookie draft and free agency regulations. *Id.* at 676. In *Partee*, the Court held that those aspects were so fundamental that uniformity outweighed the state interest that the plaintiff was seeking to enforce. Uniformity in those areas is required for fair and balanced competition to be present in any league. DATWA, on the other hand, only provides a testing procedure to discover illegal drug use. The process of this regulation has no effect on the product put on the field. The protections provided to an employee by DATWA do not give Minnesota baseball teams more or less of an advantage on the field of play. In fact, DATWA's allowance of a collective bargaining agreement shows that the two can coexist as long as minimum, nonnegotiable rights are provided for. Clomiphene, the drug for which Wilson tested positive, is still a banned substance in Minnesota because DATWA allows collective bargaining agreements to set that term. DATWA only protects the employee's rights in dealing with how to test for the drug and therefore provides no advantage to Minnesota baseball players. Accordingly, because a collective bargaining agreement cannot bargain for what is illegal under state law the Circuit Court should be affirmed.

II. THE CIRCUIT COURT'S DECISION SHOULD BE AFFIRMED BECAUSE THE MLB'S BREACH OF ITS FIDUCIARY DUTY TO PLAYERS VIOLATED PUBLIC POLICY.

The Supreme Court has repeatedly affirmed the existence of a "public policy exception," explaining that arbitration awards in contravention of public policy are unenforceable. *Mid-American Energy Co. v. International Brotherhood of Electrical Workers Local 499*, 345 F.3d 616, 620 (8th Cir. 2003). A specific analysis, such as the three-step approach below, is necessary to prove that the Circuit Court was correct in vacating the arbitrator's award for being in violation of public policy. Therefore, because (1) the MLB had a duty to disclose material information regarding the "Policy," (2) the MLB breached this duty, and (3) this breach violated

clearly established public policy, invocation of the aforementioned public policy exception was not only proper, but mandatory as well.

A. The MLB owed a fiduciary duty to disclose all material facts regarding the “Policy” to the MLBPA and individual players.

This issue is best analyzed by examining two sets of actions, 1) the maintenance of the “Hotline” and actions of Andrew Birch, and 2) the behavior of Dr. Larson. Either or both establish that the MLB had a fiduciary relationship with the players under the “Policy,” and was thus under a fiduciary obligation to disclose all material facts regarding the “Policy” to the players.

1. The MLB’s direct involvement in implementing and enforcing the “Policy” created a fiduciary relationship between itself and the players, obligating itself to disclose all material facts related to the “Policy.”

A “fiduciary relationship” is founded upon trust or confidence reposed by one in the integrity and fidelity of another. *United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*, 216 F.Supp.2d 198, 218 (S.D. NY 2002). Furthermore, a fiduciary relation exists whenever one is under a duty to act or give advice for the benefit of another upon matters within the scope of the relationship. *Id.* Stated in the negative, a fiduciary relationship exists whenever influence has been acquired and abused, where confidence has been reposed and betrayed. *Id.* To determine if said relationship exists, consider whether a party (1) reposed confidence in another, and (2) whether that party reasonably relied on the other’s superior expertise or knowledge. *Lumbermen’s Mutual Casualty Co. v. Franey Muha Alliant Insurance Services*, 388 F.Supp.2d 292, 305 (S.D. NY 2005). Furthermore, whenever such a fiduciary relation exists, there is a duty

to disclose on behalf of the party who has information that another is entitled to know. *Grandon v. Merrill Lynch & Co., Inc.*, 147 F.3d 184, 189 (2nd Cir. 1998).

In the case at hand, there is little doubt that the players reposed trust and confidence in the MLB to implement the “Policy” with “integrity and fidelity.” Because of the harmful effects of performance enhancing drugs to the game of baseball as well as to individual players, the MLB was unequivocally bound to give advice to players regarding facts material to the “Policy.” Through the actions of the MLB and those *directly* affiliated with it (the “Hotline” and Andrew Birch), the MLB deliberately failed to disclose that Speedshot contained Clomiphene. This constitutes a circumstance where “influence has been acquired and abused, confidence reposed and betrayed” – a fiduciary relationship. Stated in the positive, since the players (1) reposed confidence in the league, and (2) were reasonable in so doing because of the MLB’s superior knowledge, a fiduciary relationship between them did indeed exist. Due to this fiduciary relationship, this is an instance where one party (the MLB) had information that another party (the players) was entitled to know. By “hanging out its professional shingle,” the MLB had a duty to disclose information material to the “Policy.” *Grandon*, 147 F.3d at 192. Therefore, the direct involvements of the MLB established a fiduciary relationship between the MLB and the players, obligating the MLB to disclose all material information regarding the “Policy.”

It is not essential for a fiduciary relationship to be formalized in writing for a fiduciary obligation to exist. *Lumbermen’s*, 388 F.Supp.2d at 305. Rather, the ongoing conduct between parties can be sufficient for a fiduciary relationship. *Id.* Further, a fiduciary duty may arise out of a contractual relationship independent of the contract itself. *Id.* For example, a contract that establishes a relationship of trust and confidence between the parties creates a fiduciary duty that arises from the contract, but is independent of the contractual obligation. *Id.* However, because

the MLB had *both* a written duty as well as a duty created from trust and confidence, a fiduciary relationship existed between itself and the players under the “Policy,” *a fortiori*.

2. Because Dr. Larson was an agent of the MLB, the MLB is responsible for his failure to disclose information material to the “Policy.”

The agency relationship between Dr. Larson and the MLB extended the MLB’s duty (and liability) to disclose any information known by Dr. Larson to be material to the “Policy.” The question of whether an “agency relationship” exists is a mixed question of both law and fact. *Lumbermen’s*, 388 F.Supp.2d at 301. “Agency” is the fiduciary relation resulting from a manifestation of consent by one person (the principal) to another (the agent), that the other shall act on his behalf, and subject to the consent and control by the other so to act. *Id.* An essential element to the agency relationship is that the agent acts subject to the principal’s direction and control. *Id.* The elements of agency are (1) a manifestation of consent by the principal that the agent shall act for him, (2) the agent’s acceptance of the undertaking, and (3) the parties’ understanding that the principal is to be in control of the undertaking. *Id.* at 301-302. The significance of such is that, identical to the aforementioned fiduciary relationship, upon establishing the existence of an agency relationship, the agent owes a duty to the principal to “disclose all material facts” regarding the relationship. *Id.* at 301. Even further and especially to the case at hand, the duty of the agent to perform certain tasks is imputed to the principal. *Id.* at 305.

Under the “Policy,” Dr. Larson was to direct and oversee the drug-testing procedures, as well as educate the players regarding said “Policy.” (DCO p.2). Through the “Policy,” the MLB manifested its consent that Dr. Larson act on its behalf, subject to its control. Therefore the essential element to any agency relationship existed between Dr. Larson and the MLB—he was

legally bound to report positive test results to the Commissioner, the head of the MLB. Thus, because (1) the MLB manifested consent that Dr. Larson act on its behalf, (2) Dr. Larson's acceptance of said proposal, and (3) the understanding that Dr. Larson was indeed acting under the authority of the MLB, an agency relationship between the MLB and Dr. Larson existed. Under such a relationship, Dr. Larson owed a duty to the MLB to disclose all material facts regarding their relationship. Because a principal is responsible for the actions of its agents, the duty to disclose was imputed to the MLB. Therefore, the agency relationship not only obligated Dr. Larson to disclose material information to the MLB, it also *transferred* that same duty to the MLB, obligating it to disclose to the players all information material to the "Policy."

Simply because Dr. Larson was not explicitly labeled as an "agent" of the Commissioner, nor any MLB team, does not disprove the existence of an agency relationship between he and the MLB. *Lumbermen's* 388 F.Supp.2d at 302. The acts of a person, not the label attached, are determinative as to whether an agency relationship exists. *Id.* Thus, any argument based on a job label or title (i.e. "Independent Administrator") is mere semantics, not legal substance. *Id.* Therefore, because a true fiduciary relationship is not even necessary for a duty to disclose to exist, a duty to disclose exists here where there is a true fiduciary relationship, *a fortiori*. *Callahan v. Callahan*, 127 A.D.2d 298, 300 (A.D. NY 1987).

B. The MLB breached its fiduciary duty when it failed to disclose to the players the fact that Speedshot contained Clomiphene.

In order for liability to exist on a breach of fiduciary duty claim, a plaintiff must demonstrate: (1) the existence of a fiduciary relationship; and (2) a breach of a fiduciary duty. *Lumbermen's*, 388 F.Supp.2d at 304. Considering the relationship element has been previously established, the issue of whether the duty established by this relationship was breached is now ripe.

An action for breach of a fiduciary duty is a prophylactic rule intended to remove all incentive to breach. *Lumbermen's*, F.Supp.2d at 304. Unlike a breach of contract claim, “a claim for breach of a fiduciary duty need not meet the standard requirements of causation and damages.” *Id.* Liability for a breach of fiduciary duty results from the *relation*, not necessarily an agreement or contract. *Id.* at 305. If the relationship entailed a reposition of confidence by one party in another, and reasonable reliance on the other’s superior expertise or knowledge, a breach from said relationship is actionable, for a legal duty without recourse from a breach thereof is cacophonous. *United Feature Syndicate, Inc.*, 216 F.Supp.2d at 218. For example, in *United Feature Syndicate, Inc.*, the plaintiff’s claims that defendants obtained possession of funds that they knew to be held in trust for the benefit of plaintiff, and proceeded to use those funds for their own purposes were sufficient for a claim of a breach of a fiduciary duty. *Id.* at 219.

In the case at hand, the MLB breached its duty to disclose material information regarding the “Policy” to the players. The MLB’s direct failures to disclose as well the failures of its agent, all constituted breaches of the duty it owed to the players, because their relationship via the “Policy” entailed a reposition of confidence by one party in another, where it was reasonable to rely on the other’s superior expertise/knowledge. (DCO p.3). Similar to the breach in *United Feature Syndicate, Inc.*, the MLB possessed something to which they knew the players were entitled – information material to the “Policy.” But instead of fulfilling its duty and disclosing such information, the MLB deliberately and unjustifiably withheld the information, constituting an actionable breach of its duty owed to the players.

It should be noted here that courts have no problem in finding a breach of duty whenever *deliberate* acts have jeopardized public health and safety. *Iowa Electric Light and Power Co. v. Local Union 204 of the International Brotherhood of Electrical Workers*, 834 F.2d 1424, 1428

(8th Cir. 1996). The MLB's violation here was not an "unknowing" one, but "deliberate." *Id.* at 1429. Deliberately failing to disclose that Speedshot contained Clomiphene constitutes not only an actionable breach of a fiduciary duty, but also an actionable violation of "obvious ethical and moral standards." *Muschany v. U.S.*, 324 U.S. 49, 66 (1945).

C. The Circuit Court was correct in overturning the arbitrator's award because to ignore and allow the MLB's breach of its fiduciary duty would violate public policy.

The MLB's breach of its fiduciary duty to disclose all material information regarding the "Policy" is in violation of public policy, and the arbitrator's award ratifying such behavior is therefore unenforceable. Courts are obligated to deny enforcement of a contract that is in violation of public policy. *W.R. Grace and Co., v. Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, 461 U.S. 757, 766 (1983). If an arbitrator's determination violates some explicit public policy, the Court must refrain from enforcing it as well. *Iowa Electric*, 834 F.2d at 1427. The Court may overrule an arbitrator when the award is inconsistent with a public policy that is well defined, dominant and ascertainable by reference to laws and legal precedents, not general considerations of supposed public interests. *W.R. Grace*, 461 U.S. at 766. Furthermore, if there is no statute, law, ordinance, or court precedent to the effect that an arbitral award is consistent with public policy, the award may be overturned. *Delta Air Lines, Inc. v. Air Line Pilots Association, International*, 861 F.2d 665, 674 (11th Cir. 1988), *cert. denied*, 110 S.Ct. 201 (1989).

The need to protect against deliberate acts which jeopardize public health and safety has consistently been deemed sufficient policy for overturning an arbitral award. *Iowa Electric*, 834 F.2d at 1427. Ironically, the arbitrator's determination of the "Policy" violates public policy because the MLB *deliberately* breached its fiduciary duty to disclose material information

regarding the “Policy.” This inaction undoubtedly jeopardized the health and safety of the players. In theory, the actual goals of the “Policy” were to protect the individual players, as well as the integrity of the game; neither of which were advanced by the MLB’s deliberate failure to disclose information material to the “Policy.” Thus, the arbitrator’s award should remain overturned for it is in violation of a public policy that is (1) dominant, (2) well defined and (3) ascertained by reference to legal precedents. *Ace Electrical Contractors, Inc. v. International Brotherhood of Electrical Workers, Local Union Number 292, A.F.L.-C.I.O.*, 414 F.3d 896, 899 (8th Cir. 2005) (finding that courts are obligated to deny enforcement of illegal contracts).

Furthermore, because there is no statute, law, ordinance, or court precedent to the effect that an arbitral award encouraging the MLB’s failure to disclose is consistent with public policy, the Circuit Court should be affirmed. The MLB voluntarily assumed its obligations under the CBA’s “Policy,” and no public policy is violated by holding it to those obligations. *W.R. Grace*, 461 U.S. at 770. Actually, holding the MLB to its fiduciary duty would encourage conciliation, as well as advance the interests of health, safety and integrity in baseball. *Id.* at 771. Holding players strictly liable for what they do not know, while simultaneously imputing zero liability to the MLB for what they *do* know would not only violate public policy, but notions of good faith dealings and fundamental fairness as well.

Petitioner will undoubtedly cite cases with language regarding the high burden courts face in overturning an arbitrator’s interpretation of a contract. See *Union Paperworkers International Union v. Misco, AFL-CIO*, 484 U.S. 29 (1987); *Coca-Cola Bottling Company of St. Louis v. Teamsters Local Union No. 688*, 959 F.2d 1438 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 635 (1992); *Crawford Group, Inc. v. Holekamp*, 543 F.3d 971 (8th Cir. 2008). However, these cases are irrelevant and thus do not apply, because overturning the arbitrator’s decision here has

nothing to do with his interpretation of the contract. While the arbitrator technically committed no “manifest disregard for the law,” the agreement, as enforced, is in violation of public policy. *Stark v. Sandberg, Phoenix & Von Gontard*, 381 F.3d 793, 802 (8th Cir. 2004), *cert. denied*, 125 S.Ct. 1943 (2005), *cert. denied*, 125 S.Ct. 1973 (2005).

Because collective bargaining agreements do not formulate public policy, and arbitrators cannot consider matters not encompassed by the governing agreements, the question of public policy is ultimately one for resolution by the courts. *Iowa Electric*, 834 F.2d at 1427. Because clearly established public policy states that the MLB was under a duty prevent the “wrongdoing” of which the players were guilty, it could not agree to arbitrate this issue. *Delta Air Lines*, 861 F.2d at 674. Furthermore, considering the Supreme Court has found no public policy prohibiting “reinstatement of employees who have used illegal drugs” intentionally, there is no public policy prohibiting reinstatement of employees who have used illegal drugs *unintentionally, a fortiori*. *Eastern Associated Coal Corporation v. United Mine Workers of America, District 17*, 531 U.S. 57, 61 (U.S. 2000).

Allowing reinstatement is with even greater justification considering that Clomiphene is not even a performance-enhancing drug. Steroid users often use Clomiphene (intentionally) as a “recovery drug” for steroid users (DCO p.3). However, considering that the players did not use steroids, their uses of Clomiphene amount to nothing more than an accident caused by the distributor’s failure to list the ingredients, as well as the MLB’s failure to disclose material information. By ingesting Clomiphene, not only did the players lack intent to gain an unfair playing advantage, they also failed to gain any advantage whatsoever. Clomiphene helps “steroid users,” which the players were not (*Id*). Therefore, the Circuit Court was correct in denying

enforcement of the arbitrator's award because the MLB's breach of its fiduciary duty violated public policy.

## CONCLUSION

For the reasons provided herein, Respondent, Kevin Wilson and the Major League Players Association, respectfully request the Court to affirm the Circuit Court's decision, finding that DATWA is not preempted by LMRA §301 and overturning the arbitrator's award as against public policy.

Respectfully Submitted:

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