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

Competitor # 31

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.

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STANDARD OF REVIEW

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

SUMMARY OF THE FACTS

In 2007, the Major League Baseball Players Association ("MLBPA") entered into a Collective Bargaining Agreement ("CBA") with Major League Baseball ("MLB") which incorporated the MLB policy on Anabolic Steroids and Related uses (the "Policy"). (J.A. at 1.) The Policy prohibits MLB players from using a number of prohibited substances, including a variety of performance enhancing drugs. (J.A. at 1.) The Policy adopted a strict liability approach which means a positive test result will not be excused because a player is unaware he was taking a prohibited substance. (J.A. at 1.)

The Policy is directed by Dr. John Larson as its independent administrator. (J.A. at 2.) Dr. Larson's duties included implementing the terms of the policy as well as providing education to the players regarding the Policy's implementation. (J.A. at 2.) The Policy created the "MLB Supplement Hotline," (the "Hotline") to provide players with a confidential and accurate source of information about various products and their ingredients. (J.A. at 2.)

Around the time the MLBPA entered into the CBA with the MLB in 2007, the MLB learned that some bottles of SpeedShot, an energy-boosting supplement, contained a banned substance called Clomiphene. (J.A. at 3.) However, the SpeedShot label did not disclose Clomiphene as an ingredient. (J.A. at 3.) When Dr. Larson was alerted to a possible connection between the positive results for Clomiphene and SpeedShot he investigated and found SpeedShot did in fact contain Clomiphene. (J.A. at 3.) Despite the recommendation that the MLB report this finding about SpeedShot to the Food & Drug Administration, Andrew Birch the Vice

President of Law and Labor Policy for the MLB and Dr. Larson refused to do so. (J.A. at 3.) The MLB notified the MLBPA that the company which distributes SpeedShot had become a banned company therefore teams and players were prohibited from doing business with it. (J.A. at 3.) The MLBPA notified the players, through their agents, that "the company that distributes SpeedShot has been added to the list of prohibited energy-boosting supplement companies." (J.A. at 3.) Additionally, Dr. Larson sent a memorandum reminding players about the "dangers posed by Energy Boosting Supplements" and urged players to not to take such supplements. (J.A. at 3.) "All of these communications, however, failed to specifically mention that SpeedShot in fact contained a banned substance." (J.A. at 4.)

Kevin Wilson of the Minnesota Twins, LLC took SpeedShot the morning of a scheduled preseason training camp scrimmage. (J.A. at 4.) As a part of preseason provisions, he was drug tested and his results indicated he had Clomiphene in his system. (J.A. at 4.) As required by the Policy Mr. Wilson was suspended 15 games for testing positive for a banned substance. Additionally, four other players from teams across the country also tested positive for Clomiphene and received the same suspension. (J.A. at 4.)

"During the arbitration proceedings, all five players, including Wilson, did not dispute their positive test results or the presence of Clomiphene in their system." (J.A. at 4.) However, they argued that their positive results should be excused because Dr. Larson and the MLB knew, as of September 2007, that SpeedShot contained a banned substance and did not specifically advise MLB players. (J.A. at 4.) Furthermore, the Policy created a fiduciary duty that required the MLB to give a particularized warning about SpeedShot once they had knowledge it contained Clomiphene. (J.A. at 4.) After the hearing the arbitrator found that there was "no genuine

dispute regarding the positive test of each player's urine sample." (J.A. at 5.) Also, the arbitrator found "the Policy enforces a rule of strict liability." (J.A. at 5.)

Mr. Wilson then filed suit against the MLB, Dr. Larson, Dr. Ray Finkle, and Andrew Birch in Minnesota state court. (J.A. at 5.) Wilson 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." (J.A. at 5.) The state court granted Wilson a temporary restraining order. (J.A. at 5.) "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"). The MLB moved for summary judgment asserting that Wilson's DATWA claims are preempted by Section 301 of the LMRA. (J.A. at 5,6.)

Mr. Wilson argued "that because he is employed in the state of Minnesota, the MLB must comply with the provisions set forth in the DATWA, Minnesota's state law regulating employer drug-testing procedures of employees." (J.A. at 6.) "Wilson contends that the provisions of the Policy do not comply with the mandates established in DATWA, and thus his suspension cannot be upheld." (J.A. at 6.) The District Court ruled against Mr. Wilson, but the Appellate Court ruled in favor of Mr. Wilson. *Certiorari* was granted.

OPINIONS BELOW

The United States District Court for the Southern District of Tulania granted Petitioner Major League Baseball's motion for summary judgment. Its opinion is currently unreported, but can be found as *Wilson v. Major League Baseball*, No. 09-AC-0213. The United States Court of Appeals for the Fourteenth Circuit reversed. Its opinion is also currently unreported, but can be found as *Wilson v. Major League Baseball*, No. 09-2108.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 29 U.S.C. § 185(a).

SUMMARY OF ARGUMENT

As the Court of Appeals correctly held, § 301 preemption is inappropriate in the instant case. Respondent's claims under the Minnesota Drug and Alcohol Testing in the Workplace Act (DATWA) exist independently from, and are in no way "intertwined" with, the Collective Bargaining Agreement ("CBA"). Because they are based on unambiguous statutory provisions, the simultaneous interpretation of the CBA is unnecessary. And as the cursory consultation of the CBA is, by itself, insufficient to spur preemption, the District Court's grant of judgment was clearly uncalled for.

Additionally, preemption would improperly infringe upon Minnesota's police power. As the states are traditionally responsible for the establishment of labor standards, courts have cautioned against the preemption of state labor law. Absent a clear Congressional statement to the contrary, preemption "should not," according to this Court, "be lightly inferred in this area." Here, the DATWA proscribes conduct and establishes rights independent of the CBA. Because it

then creates nonnegotiable state-law rights, which directly conflict with provisions of the CBA, it cannot be preempted. To hold otherwise, as the District Court did, would undermine Minnesota law, and infringe upon the all-important, and carefully guarded, police power.

The Court of Appeals was also correct in vacating the arbitrator's award. While federal law favors the private settlement of labor disputes, courts should not simply "rubber stamp" arbitration awards. Instead, courts must vacate awards that, as here, violate some clear expression of public policy. The instant award, which ignores the doctors' superior knowledge, and duty, under New York law, to disclose "pertinent information," as well as the "ongoing relationship of trust and confidence" between the players and MLB administrators, sanctions a knowing breach of fiduciary duty. It allows a clear violation of applicable case law to go unpunished. Furthermore, in endorsing MLB's failure to properly and explicitly warn the players about SpeedShot, the award fits into a narrow and unacceptable category. Because MLB employees deliberately exposed the players to an unnecessary health risk, their conduct cannot be condoned. Therefore, this Court should affirm the Court of Appeals' ruling and vacate the instant award.

ARGUMENT

I. THE APPELLATE COURT DECISION WAS CORRECT, BECAUSE THE MINNESOTA STATUTE CAN BE INTERPRETED INDEPENDENTLY OF THE COLLECTIVE BARGAINING AGREEMENT AND PREEMPTION WOULD INFRINGE UPON THE POLICE POWER OF THE STATE OF MINNESOTA.

The Court of Appeal's decision should be upheld because the Drug and Alcohol Testing in the Workplace Act's ("DATWA") provisions do not require interpretation and may be understood without looking to the Collective Bargaining Agreement ("CBA"). The Supreme Court has held that, "as long as a 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). Thus, the independent nature of a claim will defeat any claim of preemption. It is only if a claim is "inextricably intertwined" with the CBA that preemption will be appropriate. *Id.* at 402. The respondent's claims are based on provisions in the DATWA such as "minimum information requirements" and "fairness provisions for confirmatory retests." *Minn. Stat.* § 181.952 subdiv. 1 (1)-(6), *Minn. Stat.* § 181.953. These provisions do not rely on the CBA to establish meaning and are therefore not intertwined. Furthermore, only if specific provisions are sufficiently ambiguous to be susceptible to interpretation would § 301 preempt the state-law claim. *Trustees of the Twin City Bricklayers Fringe Benefits Fund*, 450 F. 3d 324, 332 (8th Cir. 2006). The Court of Appeals noted "the MLB does not point to a specific provision of the CBA or the Policy that must be interpreted." *Wilson v. Major League Baseball*, No. 09-2108, op. at 9 (14th Cir). Therefore, preemption is inappropriate.

Additionally, preemption would infringe upon the police power of the States. Congress has never exercised its authority derived from the Supremacy Clause of Article VI of the U.S. Constitution to occupy the entire field of labor legislation. *Allis-Chalmers Corp. v. Lueck*, 471

U.S. 202, 208 (1985). The determination of preemption depends upon congressional intent, yet Congress has not made the determination as to what extent § 301 preempts state law. *Id.* Section 301 only ensures that federal law will be the basis for interpreting CBA's, but says nothing about the substantive rights a State might provide to workers. *Lingle,* 486 U.S. at 409. This Court has held that "pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State." *Id.* at 412 (citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987)). Extending federal law will infringe upon the police power Congress left to the States.

Therefore, because the DATWA can be interpreted without reliance on the CBA and is not ambiguous § 301 preemption is inappropriate. Additionally, Congress has not determined whether § 301 preemption applies in this case. Thus, there is a genuine issue of material fact as to whether it is inappropriate to apply § 301 preemption. The ruling of the Court of Appeals should be upheld.

A. The DATWA claims are not preempted because the Statute's provisions may be interpreted independently of the Collective Bargaining Agreement.

Section 301 of the LMRA states: "Suits for violation of contracts between an employer and labor organization representing employees in an industry affecting commerce… may be brought in any district court of the United States having jurisdiction of the parties…" *Allis-Chalmers,* 471 U.S. at 209 (citing 29 U.S.C. §185(a)). Additionally, the Supreme Court has held that state courts have "concurrent jurisdiction over § 301 claims." *Lingle,* 486 U.S. at 403 n.2.

When the resolution of a state-law claim substantially depends upon analysis of the terms of a collective bargaining agreement ("CBA"), that claim must either be treated as a § 301 claim, or dismissed as preempted by federal labor-contract law. *Allis-Chalmers,* 471 U.S. at 220. In short, § 301 covers suits for breaches of CBA's. However, "as long as a state-law claim can be

resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 preemption purposes." *Lingle,* 486 U.S. at 410. The independent nature of a claim will oust any claim of preemption. In *Lingle,* a union representing the petitioner filed a grievance as required by the CBA covering the employee after she was discharged for making an apparent false worker's compensation claim. *Id.* at 401. Both the district court and the appellate court concluded the claim was "inextricably intertwined" with the CBA provisions such that allowing the state action to continue would "undermine the arbitration procedures set forth in the parties' contract, thus the state-law claim was preempted by § 301. *Id.* at 402. The Supreme Court found that the claims were a "purely factual inquiry" that did not turn on the meaning of any provision in the CBA. *Id.* at 407. The state-law remedy was therefore "independent" of the CBA, and the claim was not preempted by § 301. *Id.*

"The proper starting point for determining whether interpretation of a CBA is required in order to resolve a particular state law claim is an examination of the claim itself." *Twin City Bricklayers,* 450 F. 3d at 331. In this case the Respondent claims the CBA is in conflict with the DATWA. Similar to the case of *Lingle,* Minnesota's DATWA can be independently construed and does not rely on the CBA for interpretation and is therefore "independent" within the meaning of § 301. This determination results from the application of a two step approach used by the court to determine the independent nature of a claim. *Bogan v. General Motors Corp.,* 500 F. 3d 828, 832 (8th Cir. 2007). First, state-law is preempted if the CBA provision sets forth the right upon which the claim is based. *Id.* Second, preemption applies where the state-law claim requires interpretation of a provision of the CBA. *Id.* Although Subdivision 1 of the DATWA addresses CBA's, it states that the section: "shall not be construed to limit the parties to a collective bargaining agreement 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 by those sections." *Minn. Stat.* § 181.955 subdiv. 1. This means that an employee subject to the laws of Minnesota is permitted to enter a CBA so long as it meets the minimum requirements set out in the DATWA.

As to the first test, the DATWA sets out the minimum information requirements that must be included in employers' drug policies. *Id.* at § 181.952 subdiv. 1 (1)-(6). Furthermore, there are various reliability and fairness safeguards such as provisions for confirmatory retests. *Id.* at § 181.953. The respondent's claims are based on the provisions in the DATWA, not the CBA which indicates the first prong of the test goes against preemption.

As to the second test, the state-law claim does not require interpretation of a provision of the CBA. As the Appellate Court noted, "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 DATWA's requirements…" *Wilson*, No. 09-2108, op. at 7. Like *Lingle*, the similar provisions present in the DATWA and CBA do not make the state-law analysis dependent upon the contractual analysis. *Lingle*, 486 U.S. at 408. Section 301 "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…" *Id.* at 409. Furthermore, even if a CBA and state law required addressing the same set of facts, "as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 purposes." *Id.* at 401. Only if specific provisions were sufficiently ambiguous to be susceptible to interpretation would § 301 preempt the state-law claim. *Twin City Bricklayers*, 450 F. 3d at 332. MLB has not argued that any provision of the DATWA is ambiguous. Furthermore, the Court of Appeals noted "the MLB does not point

to specific provision of the CBA or the Policy that must be interpreted." *Wilson*, No. 09-2108, op. at 9. If there is no ambiguity and no provision requiring interpretation then the second prong fails and pre-emption is inappropriate.

Additionally, "a claim is not preempted simply because it requires reference to the CBA." *Thompson v. Hibbing Taconite Holding Co.,* No. 08-868, 2008 WL 4737442 (D. Minn. Oct. 24, 2008). Furthermore, "an otherwise independent claim will not be pre-empted if the CBA need only be consulted during its adjudication." *Twin City Bricklayers,* 450 F. 3d. at 330. In *Thompson*, the plaintiff was terminated after allegedly submitting a fake urine sample during a company drug test. *Id.* at 1. Plaintiff's employer removed the case to federal court alleging a number of the claims were preempted by the Labor Management Relations Act ("LMRA"). The court noted that an allegation that the employer violated non-negotiable state law rights does not require an interpretation of the CBA. *Id.* at 4. This is similar to the issue with DATWA's minimum requirement provision. The Statute allows for CBA's so long as they do not "otherwise conflict with, the minimum requirements for employee protection…" *Minn. Stat.* § 181.955 subdiv. 1. The provisions of the DATWA confers minimum rights which are not only in conflict with the CBA, but also do not require the CBA for interpreting those rights.

Therefore, there is a genuine issue of material fact as to the independent nature of the DATWA and summary judgment is inappropriate.

B. Pre-emption based on the premise of nationwide uniformity is inappropriate because such an application infringes on the police power of the States.

Congress has never exercised its authority derived from the Supremacy Clause of Article VI of the U.S. Constitution to occupy the entire field of labor legislation. *Allis-Chalmers,* U.S. at 208. Therefore, "the question whether a certain state action is pre-empted by federal law is one of congressional intent." *Id.* Yet, Congress was not explicit as to what extent it intended § 301 to preempt state law. *Id.* The solution has often been to favor local regulation unless it conflicts with federal law or would frustrate the federal scheme or it is clear from the circumstances that Congress sought to exclude the States from this area of law. *Id.* Section 301 ensures that federal law will be the basis for interpreting CBA's, but says nothing about the substantive rights a State might provide to workers. *Lingle*, 486 U.S. at 409. "There is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective bargaining agreements." *Id.* at 411. Also, not every dispute concerning employment or tangentially involving a CBA is pre-empted by § 301. *Allis-Chalmers*, 471 U.S. at 211. Section 301 does not say anything about the substance of what private parties may agree to. *Id.* "Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law…" *Id.* at 212. The result of such a rule would allow unions to exempt themselves from whatever state labor standards they disfavored. *Id.* Furthermore, the Court has held that "pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State." *Lingle,* 486 U.S at 412 (citing *Fort Halifax Packing*, 482 U.S. at 21). Naturally, § 301 "does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law." *Allis-Chalmers* 471 U.S. at 212. If the pre-emptive effect of § 301 was extended in this situation it would be inconsistent with congressional intent "to preempt state

rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Id.*

The DATWA proscribes conduct and establishes rights independent of the CBA, thus it is inappropriate to apply § 301 pre-emption. A claim is not preempted if it "confers nonnegotiable state-law rights on employers or employees independent of any right established by contract." *Id*. at 213. Yet, the DATWA in subsection 1(5) provides that an employee has the right to explain a positive test result on a confirmatory test and seek a retest. *Minn. Stat.* § 181.952. The CBA posits a strict liability standard on its employees. This militates against the CBA's strict liability standard. Denying a represented employee basic state protections might encourage collective bargaining over state rights, which would undermine state law and infringe upon the police power of the States. *Livadas v. Bradshaw*, 512 U.S. 107, 130 (1994). Yet, there are provisions of the CBA that are in conflict with non-negotiable rights in the Statute. For these reasons, applying § 301 pre-emption in this case will undercut the rights conferred by DATWA and disrupt the sovereignty and police power of the State of Minnesota.

II. THE APPELLATE COURT CORRECTLY SET ASIDE THE ARBITRATOR'S AWARD, BECAUSE IT SANCTIONED MAJOR LEAGUE BASEBALL'S BREACH OF FIDUCIARY DUTY, VIOLATED PUBLIC POLICY, AND FIT INTO THE NARROW CATEGORY OF AWARDS WHICH ENDANGER THE PUBLIC HEALTH.

For more than sixty years, federal law has favored the "private settlement of labor disputes," upholding arbitration as "the desirable method" of "final adjustment," and "insulating arbitral decisions from judicial review." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987). This policy, founded in the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, and expressed, most clearly, in the LMRA, promotes labor peace; it encourages collective bargaining, affirms individual autonomy, and ensures the "speedy resolution of grievances." *Id.* at 38. In doing so, it reduces the role of the court by restricting the scope of judicial review; deferring, in most instances, to the decision of the arbitrator. *Id.* ("The courts play only a limited role when asked to review the decision of an arbitrator," so as not to "undermine" federal policy); *see also Crawford Group, Inc. v. Holekamp*, 543 F.3d 971, 978 (8th Cir. 2008) ("Judicial review of an arbitration award is extremely narrow"). By "includ[ing] an arbitration clause," parties "choose" the arbitrator's judgment, and a court may not "overrule [a] decision simply because [it] believes its own interpretation … would be the better one." *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 764 (1983). Even in the face of "serious [arbitrator] error," the decision may not be vacated or modified. *Eastern Associated Coal Corp. v. United Mine Workers of Am., District 17*, 531 U.S. 57, 62 (2000). It is, then, only in "rare instances" that courts can "set aside" an arbitrator's award. *Id.*; *see also United Paperworkers*, 484 U.S. at 38 ("as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," the court cannot "overturn his decision"); *see also Iowa Elec. Light & Power Co. v. Local Union 204 of the Int'l Bhd. of Elec. Workers (AFL-CIO)*, 834 F.2d

1424, 1427 (8th Cir. 1987) ("the decision of an arbitrator who has not exceeded his contractual authority is almost always upheld").

Still, this policy, this general deference, is not "a grant of limitless power." *Stark v. Sandberg, Phoenix & Von Gontard, P.C.*, 381 F.3d 793, 799 (8th Cir. 2004). Courts should not simply "rubber stamp" arbitration awards. *Id*. Instead, they should vacate awards that are "completely irrational" or "evidence a manifest disregard for the law." *Id*.; *see also* 9 U.S.C. §§ 10(a) (outlining four instances in which a district court may vacate an arbitration award); *see also Coca-Cola Bottling Co. of St. Louis v. Teamsters Local Union No. 688*, 959 F.2d 1438, 1440 (8th Cir. 1992) (noting that "there are circumstances … where a court may reverse an arbitration decision"). Furthermore, where the contract, "as interpreted" by the arbitrator, would violate "some explicit [public] policy," the award may also be refused. *United Paperworkers*, 484 U.S. at 43; *see also W.R. Grace*, 461 U.S. at 766 ("as with any contract … a court may not enforce a collective bargaining agreement that is contrary to public policy"); *see also Ace Elec. Contractors, Inc. v. Int'l Bhd. of Elec. Workers*, 414 F.3d 896, 900 (8th Cir. 2005). It is, finally, in the interpretation and application of this last and narrow exception, that the court's judgment is needed. *W.R. Grace*, 461 U.S. at 766 ("the question of public policy is ultimately one for resolution by the courts"). Because the Court of Appeals appropriately applied this exception and found that the arbitrator's decision sanctioned the endangerment of player health, as well as the knowing and intentional breach of MLB's "fiduciary duty" to its players, its decision, to vacate the original award, should be affirmed.

A. By failing to specifically mention that SpeedShot contained a banned substance, Major League Baseball administrators deprived the players of information they were entitled to through an ongoing relationship of trust and confidence, they breached their fiduciary duty, and clearly violated the public policy of New York.

To prove the breach of a fiduciary duty, the moving party must first demonstrate "the existence of a fiduciary relationship." *Lumbermens Mutual Casualty Co. v. Franey Muha Alliant Ins. Serv.*, 388 F. Supp. 2d 292, 304 (S.D.N.Y. 2005). As no singular definition or specific formula exists for such a relationship, a "fact-specific inquiry" will often result. *Id*. at 305 (noting, additionally, that "[i]t is not essential for a fiduciary relationship to be formalized in writing"). Ordinarily, the court will determine, in light of the facts plead, "whether a party reposed confidence in another and reasonably relied on the other's superior expertise or knowledge." *Id*. This question, though less than an "exact limit," provides a guiding principle; where one person "is under a duty to act or give advice for the benefit of [another] upon matters within the scope of [their] relation," a fiduciary relationship will exist. *Id*. It is, ultimately, a relationship "founded upon trust or confidence"; one defined by and based on "integrity and fidelity." *United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc.*, 216 F. Supp. 2d 198, 218 (S.D.N.Y. 2002). Where that trust or fidelity is broken, where some "influence has been acquired and abused, [or some] confidence … reposed and betrayed," a breach may be found. *Lumbermens*, 388 F. Supp. 2d at 305 (quoting *United Feature Syndicate*, 216 F. Supp. 2d at 208).

Therefore, where a professional unfairly deprives another, in a "relationship of trust and confidence," of important information available only to him, a breach of fiduciary duty may occur. *Grandon v. Merrill Lynch & Co., Inc.*, 147 F.3d 184, 192 (2d. Cir. 1998); *see also Lumbermens*, 388 F. Supp. 2d at 306 (denying defendant's motion for summary judgment, and finding that defendant, engaged in an "on-going relationship … of trust and confidence" with the

plaintiff, was "familiar" with a risky bond, "knew" about its potential to incur liability, and may have been under a duty to disclose that fact). In *Grandon*, the court found an "implied duty to disclose [excessive] markups on municipal securities," and held that the defendant broker, in charging "inflated prices and fees," and "failing to disclose … the 'true market price'" of its bonds, breached that duty. *Grandon*, 388 F. Supp. 2d at 193. In so doing, the court noted that "in the case of an omission, the duty to disclose generally 'arises when one party has information that the other [party] is entitled to know because of [an existing] trust and confidence between them.'" *Id*. at 189. It also recognized that, while occasionally "burdensome," the above rule protects customers and prevents unfairness. *Id*. at 193. It is a rule, then, that places responsibility on the least-cost avoider; that forces those with "superior knowledge" to divulge "pertinent information," and obey their fiduciary duty. *Callahan v. Callahan*, 17 A.D.2d 298, 300-301 (N.Y. App. Div. 1987).

Applying the above principles to the instant case, it appears obvious that MLB, through Mr. Birch and Doctors Larson and Finkle, breached their fiduciary duty to Mr. Wilson, and the MLBPA. Clearly, theirs was a relationship "founded upon trust and confidence." The players, in agreeing and submitting to random drug testing, "reposed confidence" in the Independent Administrator and his Consulting Toxicologist. They relied on the doctors' "superior knowledge and expertise"; and did so believing that their interests would be served. Ultimately, however, the administrators, like the defendant broker in *Grandon*, unfairly withheld important information. In doing so, and failing to disclose critical test results, available only to them, they breached their fiduciary duty. Because the arbitrator's award sanctions that breach, and improperly places responsibility on the players, it violates public policy, and was correctly vacated.

B. Because the arbitrator's award sanctions the above breach of a fiduciary duty and the endangerment of player health, it violates public policy, and should be vacated.

First recognized in *W.R. Grace*, and repeatedly affirmed by this Court, the "public policy exception" is a contract-based concept, "rooted in the common law" and the "notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act." *United Paperworkers*, 484 U.S. at 42. It allows, essentially, for the abrogation of private agreements, and the rejection of arbitration awards contrary to public policy. *Id*. at 42-43. Because it requires the consideration of "matters not encompassed by the governing agreements" and outside the arbitrator's authority, it demands the attention and analysis of the court. *Iowa Elec.*, 834 F.2d at 1427; *see also W.R. Grace*, 461 U.S. at 766. Still, it is a "narrow" exception, one with a series of stubborn "principles." *Eastern Associated*, 531 U.S. at 63; *see also Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665, 670 (11th Cir. 1988) ("examples of arbitration results that so offend public that they should be set aside by a court are not readily to be found"). To succeed, the cited policy must be "explicit," "well defined and dominant," and "ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *W.R. Grace*, 461 U.S. at 766 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945) (requiring "definite indications in the law … to justify the invalidation of a contract as contrary to that policy")); *see also Delta Air Lines*, 861 F.2d at 673 (noting that "case law also helps define public policy"). Additionally, and according to this Court, the violation of any such policy "must be clearly shown." *United Paperworkers*, 484 U.S. at 43. And yet, the arbitration award need not, in and of itself, "violate[ ] positive law." *Eastern Associated*, 531 U.S. at 63. Eventually, a distinguishable pattern appears; a class of cases in which an exception is appropriate, and Mr. Wilson's claim fits.

For example, where an award sanctions some willful endangerment of the "public health," it will not be enforced. *Iowa Elec.*, 834 F.2d at 1428; *cf MidAm. Energy Co. v. Int'l Bhd. of Elec. Workers Local 499*, 345 F.3d 616, 621 (8th Cir. 2003) (failing to find the "type of explicit safety concerns" that often lead "courts to [vacate] arbitrator's awards"). In *Iowa Elec.*, the court refused to enforce an arbitrator's award that returned a delinquent nuclear power plant employee to his prior position. *Iowa Elec.*, 834 F.2d at 1426. In so doing, it cited a series of federal safety regulations, plant-specific policies and statements by the Supreme Court, and held that any such award would violate the "national policy requiring strict adherence to nuclear safety rules." *Id.* at 1427. In defying a superior's order and intentionally opening an access door, the employee flouted federal regulations and jeopardized secondary containment; he abused the public's trust and "could have caused a disaster"; he did something – deliberately – that society cannot condone. *Id*. at 1429; *see also Delta Air Lines*, 861 F.2d at 671-673 (vacating a similar award, citing the various "FAA regulations" and state "laws prohibiting flying while intoxicated," and holding that Delta "could not permit [a drunken pilot] to continue to [fly] while his offensive conduct continued"). To rule otherwise, and allow reinstatement, would both jeopardize the public health, and violate public policy. *Iowa Elec*., 834 F.2d at 1429.

Clearly, the instant award, which sanctions MLB's continued breach of fiduciary duty and the endangerment of unwitting players, fits in the above, unacceptable category. Like the appellant employee in *Iowa Elec.*, Mr. Birch, together with Doctors Larson and Finkle, deliberately exposed individuals to an unnecessary health risk. In failing to "specifically mention that SpeedShot" contained Clomiphene, they, like the above, delinquent employee, ignored proper protocol; abusing the players' trust, and allowing the ingestion of harmful chemicals. In so doing, they, like the drunken pilot in *Delta Air Lines*, did something society cannot condone.

Because the Court of Appeals correctly dispensed with an arbitration award that, if enforced, would sanction the breach of a fiduciary duty, as defined by New York case law, and the willful endangerment of the "public health," its decision should be affirmed.

CONCLUSION

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

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This document certifies electronic and standard mail delivery of five copies of the foregoing brief on this the Eleventh Day of January, 2010.

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APPENDIX

STATUTORY PROVISIONS

9 U.S.C. §§ 10(a)(1)-(2):

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;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

29 U.S.C. § 185(a):

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. § 181.951

Subdivision 1. Limitations on testing. (a) An employer may not request or require an employee or job applicant to undergo drug and alcohol testing except as authorized in this section. (b) An employer may not request or require an employee or job applicant to undergo drug or alcohol testing unless the testing is done pursuant to a written drug and alcohol testing policy that contains the minimum information required in section 181.952; and, is conducted by a testing laboratory which participates in one of the programs listed in section 181.953, subdivision 1. (c) An employer may not request or require an employee or job applicant to undergo drug and alcohol testing on an arbitrary and capricious basis.

Subd. 2. Job applicant testing. An employer may request or require a job applicant to undergo drug and alcohol testing provided a job offer has been made to the applicant and the same test is requested or required of all job applicants conditionally offered employment for that position. If the job offer is withdrawn, as provided in section 181.953, subdivision 11, the employer shall inform the job applicant of the reason for its action.

Subd. 3. Routine physical examination testing. An employer may request or require an employee to undergo drug and alcohol testing as part of a routine physical examination provided the drug or alcohol test is requested or required no more than once annually and the employee has been given at least two weeks' written notice that a drug or alcohol test may be requested or required as part of the physical examination.

Subd. 4. Random testing. An employer may request or require employees to undergo drug and alcohol testing on a random selection basis only if (1) they are employed in safety-sensitive positions, or (2) they are employed as 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.

Subd. 5. Reasonable suspicion testing. An employer may request or require an employee to undergo drug and alcohol testing if the employer has a reasonable suspicion that the employee:

(1) is under the influence of drugs or alcohol;

(2) has violated the employer's written work rules prohibiting the use, possession, sale, or transfer of drugs or alcohol while the employee is working or while the employee is on the employer's premises or operating the employer's vehicle, machinery, or equipment, provided the work rules are in writing and contained in the employer's written drug and alcohol testing policy;

(3) has sustained a personal injury, as that term is defined in section 176.011, subdivision 16, or has caused another employee to sustain a personal injury; or

(4) has caused a work-related accident or was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident.

Subd. 6. Treatment program testing. An employer may request or require an employee to undergo drug and alcohol testing if the employee has been referred by the employer for chemical dependency treatment or evaluation or is participating in a chemical dependency treatment program under an employee benefit plan, in which case the employee may be requested or required to undergo drug or alcohol testing without prior notice during the evaluation or treatment period and for a period of up to two years following completion of any prescribed chemical dependency treatment program.

Subd. 7. No legal duty to test. Employers do not have a legal duty to request or require an employee or job applicant to undergo drug or alcohol testing as authorized in this section.

Minn. Stat. § 181.952

Subdivision 1. Contents of the policy. An employer's drug and alcohol testing policy must, at a minimum, set forth the following information:

(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.

Subd. 2. Notice. An employer shall provide written notice of its drug and alcohol testing policy to all affected employees upon adoption of the policy, to a previously nonaffected employee upon transfer to an affected position under the policy, and to a job applicant upon hire and before any testing of the applicant if the job offer is made contingent on the applicant passing drug and alcohol testing. An employer shall also post notice in an appropriate and conspicuous location on the employer's premises that the employer has adopted a drug and alcohol testing policy and that copies of the policy are available for inspection during regular business hours by its employees or job applicants in the employer's personnel office or other suitable locations.

Minn. Stat. § 181.953

Subdivision 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 published at 53 Federal Register 11970 to 11989, April 11, 1988;

(2) is accredited by the College of American Pathologists, 325 Waukegan Road, Northfield, Illinois, 60093-2750, under the forensic urine drug testing laboratory program; or

(3) is licensed to test for drugs by the state of New York, Department of Health, under Public Health Law, article 5, title V, and rules adopted under that law.

(b) For alcohol testing, the laboratory must either be:

(1) licensed to test for drugs and alcohol by the state of New York, Department of Health, under Public Health Law, article 5, title V, and the rules adopted under that law; or

(2) accredited by the College of American Pathologists, 325 Waukegan Road, Northfield, Illinois, 60093-2750, in the laboratory accreditation program.

Subd. 2. Repealed by Laws 1991, c. 60, § 12, eff. May 7, 1991.

Subd. 3. Laboratory testing, reporting, and sample retention requirements. A testing laboratory that is not certified by the National Institute on Drug Abuse according to subdivision 1 shall follow the chain-of-custody procedures prescribed for employers in subdivision 5. A testing laboratory shall conduct a confirmatory test on all samples that produced a positive test result on an initial screening test. A laboratory shall disclose to the employer a written test result report for each sample tested within three working days after a negative test result on an initial screening test or, when the initial screening test produced a positive test result, within three working days after a confirmatory test. A test report must indicate the drugs, alcohol, or drug or alcohol metabolites tested for and whether the test produced negative or positive test results. A laboratory shall retain and properly store for at least six months all samples that produced a positive test result.

Subd. 4. Prohibitions on employers. An employer may not conduct drug or alcohol testing of its own employees and job applicants using a testing laboratory owned and operated by the employer; except that, one agency of the state may test the employees of another agency of the state. Except as provided in subdivision 9, an employer may not request or require an employee or job applicant to contribute to, or pay the cost of, drug or alcohol testing under sections 181.950 to 181.954.

Subd. 5. Employer chain-of-custody procedures. An employer shall establish its own reliable chain-of-custody procedures to ensure proper record keeping, handling, labeling, and identification of the samples to be tested. The procedures must require the following:

(1) possession of a sample must be traceable to the employee from whom the sample is collected, from the time the sample is collected through the time the sample is delivered to the laboratory;

(2) the sample must always be in the possession of, must always be in view of, or must be placed in a secured area by a person authorized to handle the sample;

(3) a sample must be accompanied by a written chain-of-custody record; and

(4) individuals relinquishing or accepting possession of the sample must record the time the possession of the sample was transferred and must sign and date the chain-of-custody record at the time of transfer.

Subd. 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.

Subd. 7. Notice of test results. Within three working days after receipt of a test result report from the testing laboratory, an employer shall inform in writing an employee or job applicant who has undergone drug or alcohol testing of (1) a negative test result on an initial screening test or of a negative or positive test result on a confirmatory test and (2) the right provided in subdivision 8. In the case of a positive test result on a confirmatory test, the employer shall also, at the time of this notice, inform the employee or job applicant in writing of the rights provided in subdivisions 6, paragraph (b), 9, and either subdivision 10 or 11, whichever applies.

Subd. 8. Right to test result report. An employee or job applicant has the right to request and receive from the employer a copy of the test result report on any drug or alcohol test.

Subd. 9. Confirmatory retests. An employee or job applicant may request a confirmatory retest of the original sample at the employee's or job applicant's own expense after notice of a positive test result on a confirmatory test. Within five working days after notice of the confirmatory test result, the employee or job applicant shall notify the employer in writing of the employee's or job applicant's intention to obtain a confirmatory retest. Within three working days after receipt of the notice, the employer shall notify the original testing laboratory that the employee or job applicant has requested the laboratory to conduct the confirmatory retest or transfer the sample to another laboratory licensed under subdivision 1 to conduct the confirmatory retest. The original testing laboratory shall ensure that the chain-of-custody procedures in subdivision 3 are followed during transfer of the sample to the other laboratory. The confirmatory retest must use the same drug or alcohol threshold detection levels as used in the original confirmatory test. If the confirmatory retest does not confirm the original positive test result, no adverse personnel action based on the original confirmatory test may be taken against the employee or job applicant.

Subd. 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. (b) In addition to the limitation under paragraph (a), an employer may not discharge an employee for whom a positive test result on a confirmatory test was the first such result for the employee on a drug or alcohol test requested by the employer unless the following conditions have been met:

> (1) the employer has first given the employee an opportunity to participate in, at the employee's own expense or pursuant to coverage under an employee benefit plan, either a drug or alcohol counseling or rehabilitation program, whichever is more appropriate, as

determined by the employer after consultation with a certified chemical use counselor or a physician trained in the diagnosis and treatment of chemical dependency; and

(2) the employee has either refused to participate in the counseling or rehabilitation program or has failed to successfully complete the program, as evidenced by withdrawal from the program before its completion or by a positive test result on a confirmatory test after completion of the program.

(c) Notwithstanding paragraph (a), an employer may temporarily suspend the tested employee or transfer that employee to another position at the same rate of pay pending the outcome of the confirmatory test and, if requested, the confirmatory retest, provided the employer believes that it is reasonably necessary to protect the health or safety of the employee, coemployees, or the public. An employee who has been suspended without pay must be reinstated with back pay if the outcome of the confirmatory test or requested confirmatory retest is negative. (d) An employer may not discharge, discipline, discriminate against, or request or require rehabilitation of an employee on the basis of medical history information revealed to the employer pursuant to subdivision 6 unless the employee was under an affirmative duty to provide the information before, upon, or after hire. (e) An employee must be given access to information in the employee's personnel file relating to positive test result reports and other information acquired in the drug and alcohol testing process and conclusions drawn from and actions taken based on the reports or other acquired information.

Subd. 11. Limitation on withdrawal of job offer. If a job applicant has received a job offer made contingent on the applicant passing drug and alcohol testing, the employer may not withdraw the offer based on a positive test result from an initial screening test that has not been verified by a confirmatory test.

Minn. Stat. § 181.955

Subdivision 1. Freedom to collectively bargain. Sections 181.950 to 181.954 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.

Subd. 2. Employee protections under existing collective bargaining agreements. Sections 181.950 to 181.954 shall not be construed to interfere with or diminish any employee protections relating to drug and alcohol testing already provided under collective bargaining agreements in effect on the effective date of those sections that exceed the minimum standards and requirements for employee protection provided in those sections.