

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 RESPONDENT

Team #32

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STATEMENT OF THE ISSUES

- 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 COLLECTILEY 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.

SUMMARY OF THE FACTS

In 2007, the MLBPA and Major League Baseball (the “MLB”) entered into a Collective Bargaining Agreement (the “CBA”) that incorporates the MLB Policy on Anabolic Steroids and Related Substances (the “Policy”). The Policy prohibits MLB players from using a number of “Prohibited Substances,” including the Anti-estrogen Clomiphene. The Policy further provides that “players are responsible for what is in their bodies,” also noting that “...a positive test result will not be excused because a player was unaware he was taking a Prohibited Substance.” However, the Policy made the “MLB Supplement Hotline” (“the Hotline”) accessible to all players in order to provide “...accurate information, including their ingredients, effects, and adverse reactions” regarding commercial supplements.

The Policy further outlines the Commissioner’s disciplinary authority regarding players with confirmed positive test results. In addition, the Policy provides players with an opportunity to appeal to an arbitrator for review of any action taken in accordance with the Policy. An arbitrator’s decision constitutes a complete, final, and binding disposition of the appeal.

When the MLB learned that the energy-boosting supplement SpeedShot possibly contained Clomiphene, despite the fact that SpeedShot’s label does not disclose Clomiphene as an ingredient, the league requested licensed physician Dr. John Larson to analyze the supplement. As the Policy’s Independent Administrator, Dr. Larson is in charge of overseeing the drug-testing procedures as well as educating players in regard to the Policy’s implementation. Dr. Larson is assisted by “Consulting Toxicologist” Dr. Ray Finkle.

On November 14, 2007, after a thorough examination, David Klein, Director of the Sports Medicine Research Testing Laboratory, emailed both Dr. Larson and Dr. Finkle informing them that Speedshot did in fact contain Clomiphene. Andrew Birch, Vice President of

Law and Labor Policy for the MLB, was also made aware of this finding. Despite Klein's request that the MLB report the misleading information about SpeedShot to the players and the Food & Drug Administration ("FDA"), Birch and Larson refused to do so. Instead, the MLB notified the MLBPA that "Mega Energy Products," which distributes SpeedShot, had become a banned company with which teams and players were prohibited from doing business. The MLB requested that the MLBPA pass this information on to the players.

The MLBPA responded by notifying all players (through their agents) that the company that "distributes SpeedShot has been added to the list of prohibited energy-boosting supplement companies" and, as a result, "players are prohibited from endorsing any of their products." In addition, Dr. Larson sent a memorandum to all MLB players reminding them of the dangers posed by Energy-Boosting Supplements and advocated that players not "take products or supplements that claim to provide or boost energy." However, the memoranda failed to specifically mention that SpeedShot in fact contained a banned substance.

Kevin Wilson, a player for the Minnesota Twins, L.L.C., consumed SpeedShot the morning of a scheduled preseason training camp scrimmage. Pursuant to the Policy's annual preseason provisions, Wilson was drug tested, and his results came back positive for Clomiphene. As required by the Policy, the MLB suspended Wilson for fifteen games. Additionally, four other players tested positive for Clomiphene and received the same suspension. Wilson, the four additional players, and the MLBPA appealed the suspensions to an independent and neutral arbitrator pursuant to the terms of the Policy.

During arbitration proceedings, no players disputed their positive tests or the presence of Clomiphene in their systems and all admitted that they were aware of the warnings regarding energy boosters, the Hotline, and the Policy's rule that each player is responsible for what is in

his body. However, the players argued that their positive results should be excused because Dr. Larson and the MLB knew, as of September 2007, that SpeedShot contained Clomiphene and did not specifically advise MLB players of this fact. The players argued that the sanctions should be lifted because the Policy created a fiduciary duty that required the MLB to give a more particularized warning about SpeedShot once it was found to contain an undisclosed banned substance.

After a full hearing, the arbitrator upheld the suspensions pursuant to the Policy's strict liability rule finding "no genuine dispute regarding the positive test of each player's urine sample" and further ruled that the players used SpeedShot at their own risk.

Wilson then filed suit against the MLB, Dr. Larson, Dr. Ray Finkle, and Andrew Birch in Minnesota state court. The complaint alleged that the Policy violated Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA) and sought both damages and an injunction against enforcement of the arbitration award. The state court granted Wilson a temporary restraining order barring his suspension. 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 Section 301 of the Labor Management Relations Act (the "LMRA").

The MLB filed a motion for summary judgment claiming that Section 301 of the LMRA preempted Wilson's DATWA claim and that the League had no duty to disclose that SpeedShot contained Clomiphene. The United States District Court for the Southern District of Tullahoma agreed, concluding that Section 301 preempted the Players' DATWA claims. Additionally, the Court concluded that the MLBPA's argument—that the MLB and Dr. Larson violated public policy by failing to disclose that SpeedShot contained Clomiphene—lacked merit because Dr.

Larson warned players about energy boosting supplements and testified that he would have informed players that SpeedShot contained Clomiphene had they asked about the supplement.

However, the United States Court of Appeals for the Fourteenth Circuit (“the Circuit Court”) disagreed, finding that Wilson’s DATWA claim is not preempted by section 301 because it is predicated on Minnesota law and not dependent upon an interpretation of the CBA or the Policy. The Circuit Court further determined that Dr. Larson and the MLB owed the players a duty to disclose all material facts they knew within the scope of their professional relationship. Thus, the Circuit Court reversed the judgment of the District Court, holding that the arbitrator’s award violates public policy because it sanctions breaches of fiduciary duty which jeopardize the health and safety of MLB players. The MLB now appeals the decision of the Fourteenth Circuit.

SUMMARY OF THE ARGUMENT

Wilson’s DATWA claim, since it requires only a factual inquiry to resolve, is outside the scope of Section 301 preemption. Under Section 301, a claim may be preempted only if it requires an interpretation of a labor agreement. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988). The Supreme Court and United States Circuit Courts of Appeals have consistently held that “purely factual inquiries,” since they require no interpretation of a labor agreement, are not preempted by Section 301. *See Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994); *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 265 (1994); *Karnes v. Boeing Co.*, 335 F.3d 1189, 1193 (10th Cir. 2003). Wilson’s claim requires the trier of fact to determine only what actions the MLB took against Wilson after his positive drug test, and compare those facts with the applicable elements of the Minnesota statute. This “purely factual inquiry” does not invoke an interpretation of the Policy. Furthermore, the ultimate consequence of state-created,

nonnegotiable rights such as Minnesota's DATWA is that some players in Major League Baseball – depending on their domicile – will have greater protections than other players. Thus, it is unlikely the League could ever achieve absolute uniformity. Simply, the MLB's desire for *absolute* uniformity is far outweighed by the general police power of individual, sovereign states. Our constitutional federalism trumps a mere business interest in total consistency.

Additionally, the arbitration award upholding Wilson's suspension must be vacated. The arbitration award is entitled to deference, but may be set aside if the Policy, as interpreted by the arbitrator, violates some explicit public policy. *W.R. Grace & Co. v. Local Union 759*, 414 F. 3d 896 (1983). The Policy explicitly requires the MLB and Dr. Larson ("the Petitioners") to both (1) educate and (2) give advice on dietary supplements. These duties establish a fiduciary relation between the parties because Wilson reposed confidence and reasonably relied on the Petitioners expertise of knowledge. *See Lumbermens Mut. Cas. Co. v. Franey Muha Alliant Ins. Servs.*, 388 F.Supp.2d 292, 305 (S.D.N.Y. 2005). Fiduciary relations of trust and confidence, like the one hand, imply a duty to disclose material information within the scope of that relation. *See Grandon v. Merrill Lynch & Co., Inc.*, 147 F.3d 184 (2d. Cir. 1998). The arbitrator refused to reprimand the Petitioners' for their breach of the duty to disclose, despite their conscious choice to withhold potentially harmful information from Wilson. The arbitrator's interpretation of the Policy, void of a duty to disclose, sanctioned behavior that threatened health and safety; therefore, the award violates explicit public policy and must be set aside. *See MidAm. Energy v. Int'l Bod. of Elec. Workers*, 499, 345 F.3d 616, 620 (8th Cir. 2003); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665 (11th Cir. 1988). Accordingly, the judgment of the Circuit Court must be affirmed.

ARGUMENT

I. KEVIN WILSON'S MINNESOTA DATWA CLAIM MUST BE HEARD IN COURT.

Kevin Wilson's DATWA claim, since it requires only a factual inquiry to resolve, is outside the scope of Section 301 preemption. Under Section 301, a claim may be preempted only if it requires an interpretation of a labor agreement. *Lingle*, 486 U.S. at 407. Claims that require interpretation are those (1) that are based on the labor agreement itself, or (2) that require an analysis that is substantially dependent on the labor agreement. *Allis-Chambers Corp., v. Lueck*, 471 U.S. 202, 218 (1985). The Supreme Court and United States Circuit Courts of Appeals have consistently held that "purely factual inquiries," since they require no interpretation of a labor agreement, are not preempted by Section 301. *See Livadas*, 512 U.S. at 124; *Hawaiian*, 512 U.S. at 265; *Karnes*, 335 F.3d at 1193. Wilson's claim requires the trier of fact to determine only what actions the League took against Wilson after his positive drug test, and compare those facts with the applicable elements of the Minnesota statute. This "purely factual inquiry" does not invoke an interpretation of the Policy. Therefore, Wilson's DATWA claim is not preempted by Section 301 of the LMRA; it must be heard in court.

A. A SHORT HISTORY OF SECTION 301 PREEMPTION

Whether a claim is preempted by Section 301 of the LMRA is ultimately a question of Congressional intent. *Hawaiian*, 512 U.S. at 252. This section explores Congress's intent in creating Section 301 preemption and how the Supreme Court has refined the boundaries of Section 301 preemption to further Congress's purpose. In *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451 (1957), the Supreme Court held that the LMRA, 29 U.S.C. § 185 provides federal

courts to “fashion a body of federal law” to interpret and enforce labor agreements. Section 301(a) of the LMRA states:

“Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce...may be brought in any district court of the United States having jurisdiction of the parties.” 29 U.S.C. §185(a).

1. *Congressional intent behind Section 301.*

Congress intended that the LMRA would bring national uniformity and stability to negotiations and administrations of labor agreements. *Local 174 Teamsters v. Lucas Flour Co*, 369 U.S. 95, 103-04 (1962). Without the application of uniform rules in the interpretation of labor contracts, Congress reasoned, “individual contract terms might have different meanings under state and federal law.” *Id.* Consequently, the disparity in applicable legal rules would “inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements,” and national commerce. *Id.* Therefore, it is a well-settled rule that “A state rule *that purports to define the meaning or scope* of a term in a contract suit...is preempted by federal labor law.” *Allis-Chambers*, 471 U.S. at 210 (emphasis added).

To protect the Congressional interests of uniformity and predictability, the preemptive effect of Section 301 also extends beyond contract disputes in some instances. *Allis-Chambers*, 471 U.S. 210-11. As the Court held in *Allis-Chambers*, 471 U.S. at 210-11, “[i]f the policies that animate Section 301 are to be given their proper range...the pre-emptive effect of Section 301 must extend to questions relating to (1) what the parties agreed, and (2) what legal consequences “were intended to flow from breaches of that agreement.” However, since Section 301 preemption exists only to protect the aforesaid Congressional interests, its preemptive breadth is inherently limited. *Allis-Chambers*, 471 U.S. at 211 (“not every dispute concerning

employment, or tangentially involving a provision of a [CBA]...is pre-empted by Section 301”). Rather, sovereign, individual states may regulate labor within their borders. It was not Congress’s intent to give employers *de jure* authority to overrule state-created rights independent of a labor agreement. *Id.* at 212 (Congress did not “wish[] to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation”); *See also Hawaiian*, 512 U.S. at 262 (“[Section 301] merely ensures that federal law will be the basis for interpreting [CBAs], and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements”).

2. *The scope of Section 301 preemption.*

Determining the scope of Section 301 preemption is an imprecise endeavor. Section 301 will preempt a state claim “*only if* such application requires the *interpretation* of a collective-bargaining agreement.” (emphasis added) *Lingle*, 486 U.S. at 407. Claims requiring “interpretation” of a CBA are those that are (1) *based on* a provision of the labor contract, (2) “*substantially dependent*” on an analysis the labor contract, or both. *Allis-Chambers*, 471 U.S. at 218 (holding that plaintiff’s state law claim in tort is preempted “[b]ecause the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, [and] any attempt to assess liability here inevitably will involve contract interpretation”). *See also, United Steelworkers of America v. Rawson*, 492 U.S. 362, 371 (1990) (holding that, in the context of the plaintiff’s state claim in tort, if any “duty” existed to the plaintiff, “it was a duty *arising out of the [CBA]*”).

Allis-Chambers and *Rawson* are illustrative of claims that require interpretation of a labor agreement. In *Allis-Chambers*, 471 U.S. at 203, the plaintiff sued his former employer for the Wisconsin tort of bad-faith handling of an insurance claim. Aside from Wisconsin common law requiring “good faith” in handling insurance claims, the relevant labor agreement *also* required the employer to behave toward its employees in “good faith” generally. *Id.* at 215. The Wisconsin Supreme Court ruled that the two “good faith” standards were separate, and the state tort action could be decided independently of the labor agreement. *Id.* The Court disagreed, holding Wisconsin court had presumed that the labor agreement was inconsequential in determining the “good faith” duty at issue. *Id.* The Wisconsin court’s assumption that the labor agreement created “no implied rights,” – that it merely required the employer to compensate the employee – was unwarranted, since the finding (or lack thereof) of “implied rights” in the agreement is ultimately a question of federal law. *Id.* Thus, the plaintiff’s claim was preempted by Section 301. *Id.* at 216-17. (The tort “intrinsically relates to the...contract...[and]...[t]he duties imposed and rights established through the...tort thus derive from the rights and obligations...[of] the contract”).

Likewise, in *Rawson*, 495 U.S. at 364, survivors of mine workers who died in a fire brought suit against the deceased’s union for the tort of wrongful-death, alleging that the union’s negligent inspection of the mines proximately caused the worker’s deaths. Importantly, the Court pointed to no provision of the labor agreement that required interpretation. Nonetheless, the Court held that “if the Union failed to perform a duty in connection with inspection, it was a duty arising out of the collective-bargaining agreement.” *Id.* at 371. The Court reasoned that in order to determine what duty was owed to the workers, a court must interpret – in light of the relevant labor agreement – the nature of the contractual privity between the employer and

employees. As the Court opined, “[t]his is not a situation where the...[Union is] accused of acting in a way that might violate the duty of reasonable care owed to every person in society.”

Id. Therefore, the claim was preempted by Section 301. *Id.*

3. *Purely factual questions are not preempted by Section 301.*

In the doctrinal fog of Section 301 preemption analyses, however, there is at least one hard rule: Purely factual questions raised by state claims – because they require no interpretation – do not threaten to fracture Congress’s regime of national uniformity, and are not preempted. *Lingle*, 486 U.S. at 407 (holding that “purely factual inquir[ies]” are “independent” from any provision of a CBA, and, therefore, are not preempted by Section 301); *E.g.*, *Livadas*, 512 U.S. at 124 (holding that the plaintiff’s assertion of a state labor right was “entirely independent of any understanding embodied” in the labor contract). Therefore, the proper inquiry in a Section 301 preemption question is whether the state right asserted stands *independent* of the labor agreement. *Id.* at 123-24.

In *Livadas*, 512 U.S. at 111, a grocery market manager terminated the plaintiff’s employment, and refused to compensate the plaintiff immediately upon discharge as required by California law. After her termination, the plaintiff filed suit against her employer, asserting her right to collect damages for untimely compensation. *Id.* The Court concluded that the only question of law to be determined in that case was state law: whether the plaintiff’s former employer had “willfully fail[ed] to pay” her immediately upon discharge. *Id.* at 125 (*citing* Cal.Lab.Code Ann. § 203 (1989)). Furthermore, the plaintiff’s claim would require, at most, a mere reference to the CBA. *Id.* (The “primary text” for resolving the plaintiff’s suit was not her labor agreement, but a calendar to determine damages).

Likewise, in *Hawaiian*, 512 U.S. at 265, the Court refused to apply Section 301 preemption to a question of pure fact. In *Hawaiian*, 512 U.S. at 250-51, the plaintiff filed suit against his former employer for a discharge in violation of Hawaii's Whistle Blower Protection Act, Haw.Rev.Stat. §§ 378-61 to 378-69 (1988). The plaintiff's claim required a trier of fact to compare only the employer's conduct with the elements of the applicable statute, with no reference to the labor agreement. *Id.* at 266. Furthermore, the Court ruled that factual parallelism is irrelevant in determining if a state claim is independent:

“[E]ven if dispute resolution pursuant to a [CBA], on the one hand, and state law, on the other, would require addressing *precisely the same set of facts*, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is ‘independent.’” *Hawaiian*, 512 U.S. at 262.

The Tenth Circuit has also addressed a controversy virtually indistinguishable from the case at bar. In *Karnes*, 335 F.3d at 1193, an employee tested positive for drugs, and was terminated from employment. The plaintiff filed suit against his former employer under Oklahoma law, the Oklahoma Drug Testing Act, Okla. Stat. tit. 40, §§ 551-565, citing his right to a second, confirmatory drug test before an employer may take punitive action. *Id.* The Tenth Circuit reasoned that a trier of fact would have to determine only if the employer's conduct did not meet the conduct required by law, and this finding of fact required no interpretation or reference to the labor agreement. *Id.* Therefore, the plaintiff's state claim was not preempted by Section 301. *Id.* at 1194.

Cumulatively, *Livadas*, *Hawaiian*, and *Karnes* reflect the proposition that (1) purely factual inquiries (2) arising under a state-created, substantive rights (3) that require, at most, (4) a mere reference to a labor agreement, are outside the scope of Section 301 preemption. This rule reflects the intent of Congress: To assure uniformity in interpretation of labor agreements on a

national level while leaving the states broad police powers to regulate labor within their borders. *See Allis-Chambers*, 471 U.S. at 212.

B. WILSON’S PURELY FACTUAL CLAIMS ARE NOT PREEMPTED BY SECTION 301.

1. *Kevin Wilson’s claims are not based on the Policy.*

The analysis of whether Wilson’s claims are independent of his labor agreement begins with the claim itself. Specifically, whether the claim is (1) based on a provision of the CBA, or (2) is dependent on an analysis of the CBA. *Allis-Chambers*, 471 U.S. at 218. Wilson has asserted his rights under Minnesota’s Drug and Alcohol in the Workplace Act, § 181.952 subdiv.1(4)-(5), which provides an employee the right to explain a positive drug test, to a confirmatory drug test, and to not be disciplined by his employer until after a second, confirmatory test. *See also*, Minn.Stat. § 181.953 subdiv. 6(a)-(c), subdiv. 10(a). That the right Wilson asserts is based exclusively in Minnesota law and, furthermore, that the Policy provides no comparable right conclusively rules out the argument that his claim is based on the CBA in question. *See Bogan v. General Motors Corp.*, 500 F.3d 828, 832 (8th Cir. 2007); *Stringer v. National Football League*, F.Supp.2d 894, 912-13 (S.D. Ohio 2007); *see also Cf. Allis-Chambers*, 471 U.S. at 218 (general discussion).

2. *Kevin Wilson’s purely factual claims do not require interpretation or reference to the Policy.*

The question remains whether Wilson’s claims require an analysis dependent upon the terms of the Policy. *Allis-Chambers*, 471 U.S. at 210-11. A cursory review of the line of cases flowing from *Allis-Chambers* and *Lingle* leads to the conclusion that Wilson’s claims raise a “purely factual question” that has neither basis nor dependence upon any understanding that can be said to be embodied in the CBA. *Lingle*, 486 U.S. at 407; *Livadas*, 512 U.S. at 124. Like the

plaintiffs in *Livadas*, *Hawaiian*, and *Karnes*, Wilson asserts a state right that requires only applying facts to law: Wilson's claims require *only* a comparison of the League's conduct after Wilson's initial positive drug test with the protections of DATWA to determine if the League has violated his right to explain his positive test and a second, confirmatory test. Minn.Stat. § 181.952 subdiv.1(4)-(5). This is a question of the League's conduct alone, outside the realm of Section 301. As the Court stated in *Lingle*, 486 U.S. at 407, "'purely factual questions' about an...employer's conduct...do not 'requir[e] a court to interpret any term of a [CBA].'" Further, it is irrelevant in this analysis that the arbitrator considered "precisely the same set of facts" that a court would consider to resolve Wilson's claims. *Hawaiian*, 512 U.S. at 262. Moreover, it is informative that respondents point to no provision of the Policy or CBA that requires interpretation.

Further, Wilson's claims require *no* reference to his CBA. *Circuit Court Opinion*, page 7. That Wilson's claims require no reference to his CBA forecloses any colorable argument that it should be subject to Section 301 preemption under the authority of *Allis-Chambers* or *Rawson*. Wilson's claims involve no duty as in *Allis-Chambers* or *Rawson* or any possibility that the Policy gives rise to a duty that somehow relates to his DATWA claims. Additionally, even if the court were required to merely reference or look to the applicable CBA, mere reference does not invoke Section 301 preemption. *Livadas*, 512 U.S. at 125.

C. STATES' RIGHTS TO REGULATE TRUMP THE MLB'S INTEREST IN UNIFORMITY.

The Circuit Court was also correct in finding that the District Court's belief in the need for national "uniformity" in Major League Baseball simply reaches too far. *Circuit Court Opinion*, page 9 (citing *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 695 (9th Cir.

2001)(en banc) (FN 9, holding that the argument that CBA terms affecting employees in multiple states should supersede divergent state law “overreaches”). As the court aptly noted, to confer such authority upon private actors “would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored,” which was clearly not the intent of Congress in passing Section 301. *Id.* (citing *Allis-Chambers*, 471 U.S. at 211-12; *Livadas*, 512 U.S. at 123, Section 301 cannot “be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law”).

Additionally, it may be argued under the authority of *Lingle* and *Lavaidas* that even if Wilson’s claims are not preempted, he has, nonetheless, waived his DATWA rights. *See Lingle*, 486 U.S. at 410, (Court mentions in passing, in a footnote, that it *may* be possible that independent state-created rights could be waived by bargaining parties); *Livadas*, 512 U.S. at 125, (Court suggesting that it *may* have been possible for the plaintiff to waive her the right to immediate payment). However, this argument fails because Wilson asserts a nonnegotiable right. At least two federal courts have held that the rights provided by DATWA are *nonnegotiable*. *E.g.*, *Circuit Court opinion, page 9* (quoting *Livadas*, 512 U.S. at 123, Section 301 “cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law”); *Thompson v. Hibbing Taconite Holding Co.*, 2008 WL 4737442 at *3 (holding that Minnesota’s Drug and Alcohol Testing in the Workplace Act (“DATWA”), Minn.Stat. §§ 181.950-181.957, is a “nonnegotiable state law” right). Furthermore, the Tenth Circuit has held that virtually the same right in an Oklahoma statute is, likewise, *nonnegotiable*. *E.g.*, *Karnes*, 335 F.3d at 1194 (quoting *Allis-Chambers*, 471 U.S. at 212 “§ 301 does not...[allow]...parties...to contract for what is illegal under state law”). Thus, Congress’s intent

in passing Section 301 – to leave states free to regulate – and precedent compels the conclusion that a DATWA claim cannot be waived.

To conclude, the ultimate consequence of extra state-created rights is that some players in Major League Baseball – depending on their domicile – will have greater protections than other players. Without doubt, different substantive rights will ultimately affect the League’s attempt to ensure uniform treatment of all players in some instances. However, the League’s desire for *absolute* uniformity is far outweighed by the general police power of individual, sovereign states. Our constitutional federalism trumps a mere business interest in total consistency. Kevin Wilson has asserted a nonnegotiable state-created right that raises only a question of his employer’s conduct. Therefore, Wilson’s DATWA claims must be heard in court.

II. THE ARBITRATION AWARD MUST BE SET ASIDE BECAUSE THE POLICY, AS INTERPRETED BY THE ARBITRATOR VIOLATES AN EXPLICIT PUBLIC POLICY.

The Court is obliged to set aside the arbitration award confirming Wilson’s suspension if the award interprets the Policy to violate some explicit public policy. *W.R. Grace*, 461 U.S. 757; *Ace Elec. Contractors, Inc. v. Int’l Bd. of Elec. Workers, Local Union No. 292*, 414 F.3d 896 (8th Cir. 2005). The second section of this brief will show the existence of the Petitioners’ duties to educate, advise, and disclose to Wilson, all known matters relating to dietary supplements. Additionally, this section explains how Petitioners’ duty to disclose facilitates the explicit public policy that discourages behavior threatening health and safety. By interpreting the Policy to not include the Petitioners’ breached duty to disclose the award violates explicit public policy and must therefore be set aside.

A. ARBITRATION AWARDS ARE ENTITLED TO GREAT DEFERENCE, BUT COURTS ARE OBLIGED TO SET ASIDE AWARDS THAT RUN CONTRARY TO PUBLIC POLICY.

The award is entitled to deference from the Court because both sides agree it draws “its essence from the collective bargaining agreement.” (In this case the Policy). *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987). The Court’s authority to set aside an arbitration award is “exceptionally narrow,” and the Court may approve vacatur based only on the reasons enumerated in the Federal Arbitration Act (FAA). *Coca-Cola Bottling Co of St. Louis v. Teamsters Local Union No. 688*, 959 F.2d 1438, 1440 (8th Cir. 1992); *Crawford Group, Inc. v. Holekamp*, 543 F.3d 971 (8th Cir. 2008).

In addition to the reasons enumerated in the FAA, the Court is obliged to set aside the award if the contract (the Policy), as interpreted by the arbitrator, violates some explicit public policy. *W.R. Grace*, 461 U.S. 757; *Ace Elec. Contractors*, 414 F.3d 896. The question is not whether any general behavior by the parties violates public policy, but whether the Policy itself violates public policy. *MidAm. Energy*, 345 F.3d at 620. Accordingly, before examining the existence and violation of the explicit public policy, it is necessary to show how the arbitrator’s interpretation of the Policy possibly could violate any explicit public policy at all. This analysis will show the Policy’s direct tie to a potential explicit public policy violation by proving: (1) the Policy implied Petitioners’ duty to disclose specific information; and (2) the arbitrator’s refusal to recognize that duty jeopardizes the functionality of the soon to be established explicit public policy.

B. THE POLICY REQUIRES DR. LARSON AND THE MLB TO EDUCATE, ADVISE, AND DISCLOSE, TO KEVIN WILSON, ALL KNOWN MATTERS RELATING TO DIETARY SUPPLEMENTS.

As explicitly stated with the Policy, the MLB and Dr. Larson both owe the fiduciary duties to educate and advise Wilson on the potential risks involved in the use of dietary supplements. The parties' fiduciary relation instills trust and confidence and, as such, implies a duty to disclose all known material facts within the scope of the parties' relations. Dr. Larson and the MLB both failed to disclose pertinent information and as a result breached their duties to educate and advise MLB players on all material information as it relates to dietary supplements.

1. The Policy explicitly requires Dr. Larson to educate and advise Wilson on the risks of dietary supplements.

Dr. Larson, as the Independent Administrator of the Policy, is not directly affiliated the MLB. Thus, Dr. Larson's fiduciary duties as a physician toward Wilson must be analyzed separately from the duties owed from the MLB to their employee, Wilson. The same legal precedent applies to both parties, however. New York law, the governing law of MLB's CBA, provides: "A fiduciary relation exists between two persons when one of them is under a duty to act or to give advice for the benefit of the other upon matters within the scope of the relation." *Lumbermens*, 388 F.Supp.2d at 305. Such a duty arises between two parties when one party "repose[s] confidence in another and reasonably relie[s] on the other's superior expertise of knowledge." *Id.* Wilson reposed confidence and reasonably relied on Dr. Larson's expertise so as to establish the duty to act or give advice required to find a fiduciary relation.

First, the Policy entrusts Dr. Larson with the duty to educate Wilson with respect to all prohibited substances. The Policy, expressly directed MLB players with questions relating to prohibited substances to Dr. Larson by proclaiming "the Independent Administrator will make

himself available for consultation with players...oversee violated protocols; oversee the development of education materials; [and] participate in research on steroids.” More importantly, Dr. Larson himself promised in a memorandum sent to all players to “continue to provide MLB Players with information on the subject throughout the year.” This promise clearly expressed Dr. Larson’s recognition of a duty to act within the scope of the Policy for the benefit of all MLB players, including Wilson.

Secondly, the Policy, as dictated by the MLB, distinguished Dr. Larson as the authoritative source for information about the ingredients in supplements, and specifically energy boosters. The Policy provides, “[i]f [players] have questions...about a particular supplement...you should contact Dr. Larson [who is] authorized to respond to players’ questions regarding specific supplements.” The Policy plainly declares Dr. Larson as the authoritative source of information about all supplements and bestows upon him the duty “to give advice for the benefit of [Wilson] upon matters within the scope of the relation.” *Lumbermens*, 388 F.Supp.2d at 305.

2. The Policy explicitly bestows upon the MLB the duties to educate and advise Wilson on the risks of dietary supplements.

In addition to Dr. Larson, the MLB also owes Wilson the duties to educate and advise Wilson on dietary supplements. The MLB, as Wilson’s employer and one primary negotiator for the Policy, owes Wilson the duty to educate him on dietary supplements. Further, the MLB specifically promised to provide Wilson, through the creation of the MLB Hotline, information on supplement ingredients. The MLB’s role as the Policy regulator, coupled with the creation of the MLB Hotline gives rise to the duties to (1) educate and (2) advise Wilson on all risks involved with dietary supplements.

The MLB's duty to educate players on supplements arose generally upon the creation of the MLB Policy on Anabolic Steroids and Related Substances. The MLB inherits the duty to educate players on dietary supplements simply by regulating the substances that players may ingest. If the MLB can apply suspensions for the ingestion of certain substances, they must first educate players to a degree of specificity that keeps players well informed as to avoid the MLB's penalties. Although the MLB designated Dr. Larson as the Independent Administrator to implement the terms of the Policy, the MLB cannot delegate away responsibility for breached fiduciary duties owed to their employees. The MLB serves as the ultimate overseer of the Policy, and must ensure that the players are well informed on the subject.

In addition, the informational devise titled the "MLB Supplement Hotline" explicitly sets out the MLB's duty to educate all players. Players used the Hotline, created and operated by the MLB, to obtain "confidential and accurate information" about dietary supplements. "Confidential and accurate" information must include a level of specificity so as to aid the players in making an educated decision to avoid penalties. Without this degree of specificity, the term "accurate" within the Policy has little meaning. The MLB inherited a duty to educate players by leading players to believe the Hotline would provide reliable information regarding the legitimacy of all dietary substances.

The MLB also owed Wilson the specific duty to advise, based again, upon the wording of the MLB Hotline. The MLB hotline additionally provides that players can obtain specific, accurate information about products' "ingredients, effects, and adverse reactions." By providing that their own Hotline would provide accurate information regarding product ingredients, effects, and adverse reactions, the MLB posed as an authoritative source on the subject of all dietary

supplements. The MLB's status as an authoritative source on the subject caused Wilson to instill confidence in the MLB and reasonably rely on the information from the Hotline to make informed decisions on dietary supplements. Such confidence and reasonable reliance created a duty to advise Wilson.

Petitioners allege their general warnings satisfy their fiduciary duties toward Wilson, but a closer examination of the fiduciary relation reveals an implied duty to disclose all information material to protecting players' health and safety. The breach of the implied duty to disclose reveals the true breach of the parties' fiduciary relationship, which gives rise to the public policy violation argument.

3. The Petitioners' fiduciary relation with Wilson implies a duty to disclose all material information regarding the known illegality of dietary supplements.

Many fiduciary relations, including the one at hand, imply a duty to disclose. Such a duty to disclose occurs when one party has information the other party is entitled to know because of a fiduciary relation of trust and confidence or where one party has superior information not available to the other. *Grandon*, 147 F.3d 184; *Callahan v. Callahan*, 127 A.D.2d 298 (N.Y. App. Div. 1987). The proof of Petitioners' Policy-driven duties to educate and advise Wilson on the matter of dietary supplements establishes the existence of a fiduciary relation. This particular fiduciary relation is one of trust and confidence; therefore, the duty to disclose is warranted. Additionally, the Petitioners' had superior information, not available to Wilson, which gave Dr. Larson the MLB an unfair advantage in implementing and governing the Policy.

In *Grandon*, the plaintiff-client claimed the broker-defendant committed securities fraud by failing to disclose significant market-price mark-ups made on three separate bond transactions. The district court granted defendant's motion of dismissal for failure to state a claim largely because, in the court's eyes, the broker did not owe plaintiff a duty to disclose the mark-ups made on the transactions. The appeals court, however, reversed the decision, holding the parties' fiduciary relation of trust and confidence implied a duty to disclose mark-ups if those mark-ups were deemed to be excessive.

Just as in *Grandon*, the Petitioners owed the duty to disclose more specific information to their fiduciary, Wilson. The *Grandon* court opined that the duty to disclose mark-ups arises under the "shingle theory," meaning that when broker and client agree to a contract, a fiduciary relation of trust and confidence that the broker will act in the customer's best interest automatically exists. The existence of this duty implies the duty to disclose. Just as the broker's promise to provide a fair and accurate price for bonds created a fiduciary relation that implied the duty to disclose, so too did the Petitioners' promise to educate and advise on matters relating to dietary supplements. The petitioners inherit an implied duty to disclose because Wilson entrusted them to give accurate supplement information within the context of the Policy. The Petitioners inherited the duty to disclose simply by "putting up a shingle" and declaring themselves to all MLB players as the authoritative sources on dietary supplements.

The *Grandon* court did not, however, find that all non-disclosed mark-ups violate a broker's fiduciary duty to disclose; only *excessive* mark-ups warrant a breach of the duty. The same can be said for Petitioners' duty to disclose, as only non-disclosure of specific *material* information that threatens the health and safety of the players breach the Petitioners' duty to

disclose. If for instance, the lab technician found vitamin C as a non-labeled ingredient in SpeedShot, the Petitioners would not breach their duty to disclose by withholding the information from MLB players because the information is not be material nor within the scope of their fiduciary relationship. Conversely, the Petitioners must disclose information that would be harmful to players' health especially when the hidden ingredient is as dangerous and illegal as Chlomiphene.

Additionally, both the MLB and the MBLPA bargained for the Policy and each side receives benefits from its implementation. The MLB guarantees both honesty and integrity in the game of baseball while the players rely on the Policy and the Petitioners' findings to make informed decisions on what supplements to take to achieve safe legal results. The Petitioners non-disclosure creates an imbalance of rights by giving them access to superior information relevant to their fiduciary relation, which is not available to Wilson. This imbalance gives the Petitioners an unfair advantage in administering the Policy. If the Policy is to run smoothly, both sides must have access to all information relevant to the health and safety of MLB players.

4. The Petitioners' breached their duties to disclose all material information that could threaten players' health and safety.

Dr. Larson breached his duty to disclose potentially harmful information to Wilson by failing to specifically notify the MLB and the Food & Drug Administration of the existence of Chlomiphene in SpeedShot. Dr. Larson's general warning against doing business with Mega Energy Products may have satisfied the general duties to educate and advise players on dietary supplements, but the general warnings do not satisfy his implied duty to disclose potential information relevant to the scope of the parties Policy agreement. Dr. Larson's explicit duty to make a "special effort to educate and warn players about the risks involved in the use of

supplements” created an implied duty to disclose all material facts he knew within the scope of his relationship, especially the fact that SpeedShot contained the harmful banned substance Chlomiphene.

As the governing body in charge of the Policy, the MLB also breached its duty to disclose when its employee and Vice President of Law & Labor, Dr. Birch, likewise failed to disclose the existence of the banned substance in SpeedShot. Through the theory of *respondeat superior*, the MLB is liable for Dr. Birch’s failure to disclose to the MLB his specific findings of Chlomiphene. Had either Dr. Larson or Dr. Birch, on behalf of the MLB, disclosed this potentially harmful fact to the MLB, then Wilson would have been in a better position to make an informed decision.

C. THE ARBITRATOR’S REFUSAL TO RECOGNIZE THE DUTY TO DISCLOSE AS A PART OF THE POLICY VIOLATES EXPLICIT PUBLIC POLICY.

If an arbitration award interprets a contract (the Policy) to “sanction behavior that threatens health and safety” then it violates explicit public policy. *MidAm. Energy*, 345 F.3d at 620; *Delta Air Lines*, 861 F.2d 665. The arbitrator’s award upholding Wilson’s suspension permits the Petitioners to continue activity that not only infringes upon their fiduciary duties to disclose material information about the illegality of dietary supplements, but also violates the explicit public policy the duty to disclose is designed to protect.

In *Delta*, Day, the pilot in question, navigated a commercial flight from Boston to Bangor, Maine in the early morning of January 10th despite still being intoxicated from the night before. An expert estimated Day’s blood alcohol content to be .13 grams at the time of the flight. Accordingly, Delta Airlines discharged Day for violating both the Federal Aviation

Association Regulations and Delta rules. The Airline Pilots Association then submitted the dispute to arbitration asserting Day's actions were not a sufficient cause for discharge.

The arbitration panel agreed and issued an award reinstating Day on the premise that he was not first offered entrance into the Delta alcohol rehabilitation program before his discharge. Delta moved to vacate the award in a district court. The district court set aside the award because it violated clearly established public policy against allowing pilots of airliners to operate aircraft while under the influence of alcohol. The appeals court affirmed Day's discharge and emphasized the allegedly violated explicit public policy must be made "well defined and dominant" law and legal precedent. *Delta*, 861 F.2d at 670 (*quoting Muschany v. United States*, 324 U.S. 49, 66 (1945)).

The *Delta* case narrowly defines public policy against drunken pilots operating planes, but also stands for the proposition that *any* contract-interpreting award sanctioning behavior that threatens health and safety must be set aside. Just as the courts in *Delta*, our own Fourteenth Circuit correctly refused to uphold an award that violated public policy by sanctioning a the breach of fiduciary duties. *See generally the Circuit Court Opinion*. The arbitrator refused to recognize the Petitioners' implied duty to disclose the known existence of potentially harmful secret ingredients. As a result the award, if upheld, would support the Petitioners' non-disclosure that threatens the health and safety of MLB players; a blatant violation of the explicit public policy "well defined and dominant" in *Delta*. Therefore, it stands that the award must be set aside because it interprets the Policy in a way that is contrary to well-established explicit public policy.

A closer examination of the unrecognized breached duty in the *Delta* award explains why the MLB award must also be set aside. Within the context of his employment contract, Day owed Delta the duty to conduct his work with due diligence. This duty obviously includes a promise to operate planes in a sober condition. The award, however, failed to recognize this duty by permitting Day to return to work, even after navigating a plane while intoxicated. Such a refusal to recognize an implied duty results in the violation of explicit public policy condoning behavior that threatens health and safety of Delta employees and customers. Just as in *Delta*, the award must be set aside because the arbitrator's failure to recognize an implied duty to disclose within the Policy sanctions behavior that threatens the health and safety of all MLB players.

While it is true that Wilson did not specifically plead this public policy concern, there is no reason to dismiss the argument based on procedure alone. A claim not fully articulated to the district court is not subject to forfeit on appeal if a manifest injustice would result. *Ace Electrical Contractors, Inc. v. Int'l Bd. of Elec. Workers* 292, 414 F.3d 896, 903 (quoting *Roberts v. Apfel*, 222 F.3d 466, 470 (8th Cir. 2000)). Despite the fact a court can set aside an arbitration award anytime it runs contrary to explicit public policy, the 'threat to health and safety' argument must be heard because withholding potentially life-threatening information from all employees is manifestly unjust. Holding the players accountable for a positive test resulting from a hidden ingredient, the existence of which the MLB had full knowledge, creates a manifest injustice by tilting the balance of the rights in favor of the MLB and putting the players, who are all subject to random drug tests at a sincere disadvantage.

CONCLUSION

Kevin Wilson asks the Court to affirm the Circuit Court's decision that (1) the DATWA claims are not preempted by Section 301; and (2) the arbitration award must be set aside for violating public policy.

Respectfully submitted,

Attorneys for Respondent.