

No. 09-214

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In the

**SUPREME COURT OF THE  
UNITED STATES OF AMERICA**

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MAJOR LEAGUE BASEBALL,  
Petitioner,

v.

KEVIN WILSON;  
MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION  
Respondent.

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

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**COMPETITION PROBLEM PACKED FOR  
THE TULANE MARDI GRAS SPORTS LAW  
COMPETITION, 2010**

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**Brief for Respondent**

**Team #35**

## **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.

## **STANDARD OF REVIEW**

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

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## STATEMENT OF THE CASE

### Statement of Facts

*\*as taken directly from the District Court Opinion*

The Plaintiff, Kevin Wilson, is an employee of the Minnesota Twins, L.L.C., which is not a party here, and a member of the Major League Baseball Players Association (the “MLBPA”), the other plaintiff in this suit. In 2007, the MLBPA and Major League Baseball (the “MLB” or the “League”) 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 a variety of performance enhancing drugs and “Other Anti-estrogens, including Clomiphene, Cyclophenil, and Fulvestrant.” The Policy provides that “players are responsible for what is in their bodies,” and further explains that “this Policy adopts an approach of strict liability, meaning that a positive test result will not be excused because a player was unaware he was taking a Prohibited Substance.” The Policy further states, “a positive test result will not be excused because it does not result from an intentional use of a Prohibited Substance.”

Players with confirmed positive test results will be subject to discipline by the Commissioner as outlined in the Policy. The first time a player violates the Policy by testing positive for a banned substance the Policy states he will face at least a 15-game suspension, but not more than a 25-game suspension. Additionally, the Policy provides that “Players subject to disciplinary action may appeal to an arbitrator, who is either the Commissioner or his designee, whose decision constitutes a full, final, and complete disposition of the appeal that is binding on all parties.” The Policy also establishes an arbitration process for the review of any action taken in accordance with the Policy, and provides that the decision will be made by a neutral arbitrator

whose decision will be “the full, final, and complete disposition of the appeal and will be binding on all parties.”

The Policy is directed by Dr. John Larson, a licensed physician, as its Independent Administrator. Dr. Larson is in charge of implementing the terms of the Policy, including overseeing the drug-testing procedures under the policy, reporting any positive test results to the Commissioner for discipline, and providing education to the players regarding the Policy’s implementation. Dr. Ray Finkle is the “Consulting Toxicologist” to aid in the implementation of the Policy. Larson and Finkle have no affiliation with either the Commissioner’s office or any Major League Baseball club.

The Policy also created the “MLB Supplement Hotline,” (the “Hotline”) a confidential hotline provided to players in order to obtain “confidential and accurate information about these products, including their ingredients, effects, and adverse reactions.” The purpose of the Hotline was to provide MLB players, coaches, and trainers with an opportunity to inquire and obtain information about certain supplements and their relation to the Policy. The memorandum announcing the Policy, however, goes on to caution players “You and you alone are still responsible for what goes into your body. Using the Hotline will not excuse a positive test result.”

In 2007, the MLB learned that some bottles of SpeedShot, an energy-boosting supplement that claims to provide five hours worth of energy, contained Clomiphene,<sup>1</sup> a prohibited substance named in the Policy. The SpeedShot label does not disclose Clomiphene as

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<sup>1</sup> Clomiphene is commonly used by male anabolic steroid users to bind the estrogen receptors in their bodies, thereby blocking the effects of estrogen. It also restores the body's natural production of testosterone. It is commonly used as a "recovery drug" by steroid users and is taken toward the end of a steroid cycle. At the end of a steroid cycle, steroid users often experience a post-steroid "crash," which can quickly eat up much of the steroid user's newly acquired muscle. Clomiphene can help prevent this crash and thus help the steroid user maintain the muscle growth caused by the steroid.

an ingredient. When Dr. Larson was alerted to a possible connection between the positive results for Clomiphene and SpeedShot he informed Dr. Finkle. Dr. Finkle asked David Klein, Director of the Sports Medicine Research Testing Laboratory, to analyze SpeedShot. On November 14, 2007, Klein emailed Finkle and Larson, informing them that SpeedShot did in fact contain Clomiphene. Andrew Birch, Vice President of Law and Labor Policy for the MLB, was then made aware of this finding. Despite the lab director's request that the MLB report the information about SpeedShot to the Food & Drug Administration, Birch and Larson refused to do so.

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 and asked the MLBPA to pass that information on to players. The Union 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 "urging players not to take products or supplements that claim to provide or boost energy." The memoranda also reiterated the strict liability rule of the Policy that "if you test positive for a banned substance this constitutes a positive test, regardless of intent to do so." All of these communications, however, failed to specifically mention that SpeedShot in fact contained a banned substance.

Despite multiple warnings against the use of energy-boosting supplements, Kevin Wilson took 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 plaintiff was suspended for fifteen games for testing positive for a prohibited substance. Additionally, four other players, Pat Wilson of the Houston Astros, Manny Rogers of the Boston Red Sox, Al Peterson of the St. Louis Cardinals, and Bradley Melton of the Florida Marlins, also tested positive for Clomiphene and received the same suspension. Plaintiff, the four additional players, and the MLBPA appealed the suspensions to an independent and neutral arbitrator pursuant to the terms of the Policy.

During the arbitration proceedings, all five players, including Wilson, did not dispute their positive tests or the presence of Clomiphene in their system. The players 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. The players argued, however, that their positive results should be excused because Dr. Larson and the MLB knew, as of September 2007, that at least some SpeedShot shots contained Clomiphene—an undisclosed banned substance—and did not specifically advise MLB players of this fact. The players argued that the sanctions should be lifted because, notwithstanding the explicit and repeated warnings about the dangers of energy-boosting supplements and the Policy's strict liability rule, the Policy created a fiduciary duty that required the MLB to give a more particularized warning about SpeedShot once it was found to contain Clomiphene.

After a full hearing, the arbitrator upheld the suspensions pursuant to the Policy's strict liability rule. The arbitrator found that "none of the players challenged the laboratory analysis or any other aspect of the test." Thus, there was "no genuine dispute regarding the positive test of each player's urine sample." "There is no question," the arbitrator further ruled, "that the Policy enforces a rule of strict liability—a rule that players alone are responsible for what is in their bodies; that supplements are used at the player's own risk, and each player clearly understood

that rule and what it means.” Moreover, the arbitrator found, “the Policy does not articulate or impose an obligation to issue specific warnings about specific products, and nothing in the record suggests that the bargaining parties have ever contemplated imposing such a requirement.” Thus, the “players used SpeedShot at their own risk, did so in the face of repeated warnings about the risks inherent in using supplements in general and energy-boosting supplements in particular, and did so knowing that a positive test would result in a suspension that would not be excused based on a claim of unintentional or inadvertent use.”

### Procedural History

*\*as taken directly from the Appellate Opinion*

In response to the arbitrator’s award, Kevin Wilson filed suit against the MLB, Dr. Larson, Dr. Finkle, and Birch in Minnesota District Court, alleging numerous violations of Minnesota common law and breach of contract. That same day, the state court issued a preliminary injunction blocking the suspension of Kevin Wilson because the MLBPA established a likelihood of success on its claim that the Policy is in violation of Minnesota’s Drug and Alcohol Testing in the Workplace Act (DATWA). This injunction, however, only blocked the suspension of Kevin Wilson, as he is the only player employed in the state of Minnesota and subject to that court’s jurisdiction. The MLB then removed the case to federal district court. Thereafter, the MLBPA, on behalf of the five players, initiated a separate suit in federal court against the MLB and the Commissioner seeking to have the arbitration awards upholding the suspensions vacated as a violation of public policy. The MLBPA then amended their complaint in federal court, asserting that Wilson’s suspension was a violation of Minnesota’s Drug and Alcohol Testing in the Workplace Act (DATWA).

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—failed because Dr. Larson warned players about the energy boosting supplements in general and testified that had a player asked him about SpeedShot he would have disclosed that it contained Clomiphene. The court determined that Dr. Larson's decision not to provide an ingredient-specific warning was within his discretion. The court further decided the MLB had no duty to specifically inform players when an energy booster supplement is found to contain a banned substance. Therefore, the court granted the league's motion for summary judgment and upheld the arbitrator's suspensions.

## SUMMARY OF THE ARGUMENT

The Court of Appeals properly overturned the district court and found that Plaintiff Miller's state-law claims founded in Minnesota's Drug and Alcohol Testing in the Workplace were not preempted by § 301 of the Labor Management Relations Act because those claims did not turn on an analysis of the drug testing policy set forth in the collective bargaining agreement between Major League Baseball and its Players Association. Moreover, such state-law claims were properly brought and could be adjudicated on their merits without undermining Congressional intent for uniform federal labor law.

In this case, Wilson's state-law claims are not preempted by § 301 of the LMRA because 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 respect to its drug testing of Wilson with DATWA's requirements in order to determine if Wilson is entitled to prevail. Such a claim, based entirely on fact, is not preempted under Supreme and Circuit Court precedent because it does not require in interpretation of by provision of the collective bargaining agreement between the two disputing parties. Only when a specific provision of a collective bargaining must be analyzed must a court defer to federal labor law, thus preempting any state-law claims.

The Court of Appeals also correctly held that Plaintiff Wilson's claims are not preempted by § 301 of the LMRA so as to further Congressional intent of uniform federal labor law because Congress did not enact the LMRA to allow parties to contract out of otherwise illegal terms under state law when creating collective bargaining agreements. As such, when state laws are enacted to maintain minimum protections or protect other guaranteed rights or obligations, federal labor law may not trump such a threshold. To hold otherwise would deteriorate

important notions of federalism and basic substantive and procedural rights guaranteed by states to their citizenry.

The Court of Appeals correctly set aside the arbitrator's award sanctioning the MLB's refusal to issue warnings regarding the presence of Clomiphene in the energy supplement SpeedShot. Although a reviewing court is not permitted to review the merits of the issue that was before the arbitrator, and much deference is to be given to the arbitrator as long as the arbitrator was arguably applying the contract and acting within the scope of his authority, a court must vacate an arbitration award if it violates an explicit public policy.

In upholding the MLB's suspension of Wilson, the arbitrator's award sanctioned a breach of fiduciary duty that threatened the health and safety of the individual baseball players, including Wilson. The MLB and Dr. Larson had a duty to inform the players of all information to their knowledge concerning energy supplements and the ingredients within those supplements. The MLB and Dr. Larson not only failed to inform the players, but they did so purposefully. It is well settled that a breach of a fiduciary duty is against public policy, and therefore should not be condoned by this court.

The arbitrator's award also sanctioned the MLB's actions that caused Wilson's health and safety to be put at risk. By confirming the suspension of Wilson, the arbitrator approved of the MLB's actions of withholding pertinent information about SpeedShot that could detrimentally affect the physical well-being of Wilson and other players. Legal precedent shows that actions that place the health and safety of individuals is clearly and definitely against public policy.

For these reasons, this Court should affirm the Fourteenth Circuit Court of Appeals by vacating the arbitrator's award and reinstating Wilson into Major League Baseball.

## ARGUMENT

### I. KEVIN WILSON'S CLAIMS UNDER MINNESOTA'S DRUG AND ALCOHOL TESTING IN THE WORKPLACE ACT ARE NOT PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT BECAUSE THEY MAY BE ASSESSED WITHOUT ANALYZING THE ANTI-DRUG POLICY CONTAINED WITHIN THE COLLECTIVE BARGAINING AGREEMENT BETWEEN MAJOR LEAGUE BASEBALL AND THE MAJOR LEAGUE PLAYERS ASSOCIATION

The Supreme Court recognizes that an application of state law is preempted by [Section] 301 of the Labor Management Relations Act of 1947 only if such application requires the interpretation of a collective-bargaining agreement. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 423 (1988). Generally, § 301 applies to “suits for violation of contracts between an employer and a labor organization.” 29 U.S.C. § 185(a) (2006). Section 301 preempts state-law claims that are “substantially dependent upon analysis” of a CBA. *Allis-Chalmers Corp v. Lueck*, 471 U.S. 202, 220 (1985). This is so because “the application of state law... might lead to inconsistent results since there could be as many state-law principles as there are States...” *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406 (1988). As such, the Supreme Court has recognized that “federal labor-law principles—necessarily uniform throughout the nation—must be employed to resolve the dispute. *Id.* The question whether a certain state action is preempted by federal law, however, is one of congressional intent. When making this determination, the purpose of Congress is the ultimate touchstone. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985).

Where the resolution of a state-law claim depends on an interpretation of the CBA, the claim is preempted. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-406; *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, (1962). It has also observed, however, that "purely factual questions" about an employee's conduct or an employer's conduct and motives do not "require a

court to interpret any term of a collective-bargaining agreement,” and are thus not preempted by § 301 of the LMRA. *Hawaiian Airlines v. Norris*, 512 U.S. 246, 262 (1994). When the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished. *Id.* at 261 n.8 (citing *Lingle*, 486 U.S. at 413 n.12).

Following this rule, at least one circuit court has held that, [a] mere consultation of the CBA's terms . . . will not suffice to preempt a state law claim. *Karnes v. Boeing Co.*, 335 F.3d 1189, 1194 (10th Cir. 2003). The Ninth Circuit has also explained the principles derived from the Supreme Court's rulings in *Allis-Chalmers* and *Lingle* and its progeny in noting that, “if the claim may be litigated without reference to the rights and duties established in a CBA... it is not preempted. The plaintiff's claim is the touchstone for this analysis; [i]f the claim is plainly based on state law, § 301 preemption is not mandated simply because the defendant refers to the CBA in mounting a defense. *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 691 (9th Cir. 2001).

*Lingle*, 486 U.S. 399 (1988), makes plain in so many words that when liability is governed by independent state law, the mere need to "look to" the collective-bargaining agreement for damages computation is no reason to hold the state-law claim defeated by § 301. *Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994). Here, a court would have no need to consult the Policy in order to resolve Wilson's DATWA claim. Rather, it would compare the facts and the procedure that the MLB actually followed with respect to its drug testing of Wilson with DATWA's requirements in order to determine if Wilson is entitled to prevail. Such a claim is not preempted. Opinion at 7, *Wilson v. Major League Baseball*, No. 09-2108 (14th Cir. Jan. 11, 2010).

A. Wilson's State Law Claims Are Sufficiently Independent From The Strictures Of Section 301 Of The Labor Management Relations Act To Withstand Preemption Because They Are Not Based On A Specific Provision Of The Collective Bargaining Agreement Between Major League Baseball And The Major League Baseball Players Association

When undertaking § 301 preemption analysis, courts apply a two-step approach to determine if the claim is sufficiently “independent” to withstand preemption under federal law. *See Bogan v. General Motors Corp.*, 500 F.3d 828 (8th Cir. 2007). First, courts assess whether Plaintiff’s state-law claim is “based on” the relevant provision of the CBA. *Id.* at 832. Next, courts must determine if Plaintiff’s state-law claim is “dependent upon an analysis” of the relevant CBA. If either of these questions is answered affirmatively, Plaintiff’s state-law claims are preempted by § 301 of the LMRA. *Id.*

At issue in this case is the relationship between Minnesota’s Drug and Alcohol Testing in the Workplace (“DATWA”) and the drug testing policy as found in the collective bargaining agreement between Major League Baseball and the Major League Baseball Players Association. Thus, if Wilson’s state-law claims under DATWA are based on or depend upon an analysis of the drug testing policy as bargained for by the Players Association, they are preempted under § 301. In Minnesota, Allegations if an employer defendant violates such non-negotiable state law rights do not require an interpretation of the CBA, such state-law claims, such as DATWA, would not be preempted under the LMRA. *See Thompson v. Hibbing Taconite Holding Co.*, 2008 WL 4737442, at \*4 (D. Minn. Oct. 24, 2008).

DATWA mandates threshold requirements of employers’ drug policies in Minnesota. Specifically, employers must provide 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.

*Minn. Stat.* § 181.952 subdiv. 1(1)-(6). DATWA also provides further protections to employees who are subject to employment-related drug testing. Such requirements include: laboratory conditions of the drug test itself, *see Minn. Stat.* § 181.953 subdiv. 1; the right of an employee to receive written notice of a positive test result and a chance to explain the positive test or request a confirmatory retest, *see Minn. Stat.* § 181.953 subdiv. 6(c); and employers may not discipline employees on the basis of a positive test resulting from an initial screening test that has not yet been verified by a confirmatory test, *see Minn. Stat.* § 181.953 subdiv. 10. Lastly, § 181.955 subdiv.'s (1)-(2) of DATWA reflects its conformance with collective bargaining agreements provided that such agreements “meet or exceed, and does not otherwise conflict with, the minimum standards and requirements for employee protection provided in [DATWA].” *Minn. Stat.* § 181.955 subdiv. (1).

Major League Baseball concedes that its steroid testing procedures do not comply with these provisions of DATWA, i.e. they do not reach the minimum protections afforded to employees subject to drug testing in Minnesota, but argues that their shortcomings are negligible and do not require the Court to invalidate Wilson’s positive test for the banned steroid, Clomiphene. Opinion at 4, *Wilson v. Major League Baseball*, No. 09-2108 (14th Cir. Jan. 11, 2010). Specifically, Wilson has alleged that Major League Baseball violated the requirements of drug-testing laboratories and facilities pursuant to *Minn. Stat.* § 181.953 subdiv. 1. *Id.* at 6 n.1.

Thus, as the Fourteenth Circuit correctly noted, where the employer does not comply with DATWA..., the employee could potentially have two claims, a claim for breach of contract and a DATWA claim. *Id.* at 7. Moreover, in its analysis to determine if DATWA is “inextricably intertwined” with the drug policy in the CBA between Major League Baseball and its Players Association, Major League Baseball does not point to a specific provision of either the CBA or its embedded drug policy that must be interpreted by this Court. *Id.* at 9.

B. Wilson’s State Law Claims Are Not Preempted By Section 301 Of The Labor Relations Management Act Because They Do Not Require An Interpretation Or Analysis Of A Single Provision Of The Collective Bargaining Agreement Between Major League Baseball And The Major League Baseball Players Association

From these facts and concessions, this Court must follow the two-step *Bogan* analysis in determining whether Plaintiff’s state-law claims are preempted by § 301 of the LMRA. Both prongs of this analysis- if the state-law claim is “based on” a provision of the CBA or if the state-law claim “is dependent upon an analysis” of the relevant CBA- must be negatively answered without any interpretation or consultation of the CBA between Major League Baseball and its Players Association and are this not preempted by § 301.

Plaintiff Wilson’s DATWA’s claims must survive § 301 preemption because this Court need only compare the facts and the procedure that Major League Baseball actually followed when it suspended Wilson with the minimum protections mandated by DATWA. Case law developed from Supreme Court precedent has specifically noted that such an investigation is simply a factual inquiry, and neither “based on” or “dependent upon an analysis” of a CBA and therefore not preempted by § 301 of the LMRA. In its cases on § 301 preemption, the Supreme Court has distinguished those which require interpretation or construction of the CBA from those

which only require reference to it. An otherwise independent claim will not be preempted if the CBA need only be consulted during its adjudication. *Trustees of Twin City Bricklayers Fringe Ben. Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324 (8th Cir. 2006).

Plaintiff Wilson's DATWA claim based on Major League Baseball's failure to comply with *Minn. Stat.* § 181.953 subdiv. 1 as it pertains to laboratory conditions of its drug testing policy must survive preemption because a trier of fact need only determine that (1) he was suspended as a result of his positive drug test and; (2) Major League Baseball violated *Minn. Stat.* § 181.953 subdiv. 1 by not meeting the minimum standards set forth in Minnesota for employer-mandated drug testing of its employees. Such a determination would not require a fact-finder to concern itself with any specific or substantive provision of the drug policy of the CBA between Major League Baseball and its Players Association. *See Bogan*, 500 F.3d at 833. Thus, for there to be complete preemption... the claim must require the interpretation of some specific provision of the CBA; it is not enough that the events took place in the workplace or that a CBA creates rights and duties similar to those on which the state-law claim is based. *Id.*

In *Anderson v. Ford Motor Co.*, the Eighth Circuit considered whether Plaintiffs' fraud claims could withstand § 301 preemption in light of a CBA between the employees and employers. Such a case is instructive because Major League Baseball also committed the tort of fraud in violating DATWA by not executing testing procedures that complied with DATWA. The Anderson court noted that, "[u]nlike the tort claim for bad faith handling of an insurance claim considered in [*Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, (1985)], a claim of fraud does not derive from nor depend upon an underlying contract. Under Minnesota law, proof of fraud does not depend on the existence of any contractual relationship. *Anderson*, 803 F.2d at 957.

Because Wilson's DATWA claims are similarly distinct and independent from the Player's Association with Major League Baseball, they must also survive preemption.

The Ninth Circuit undertook a similar state-law preemption analysis in *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683 (9th Cir. 2001). There, the Court found that employees' state statute-based invasion of privacy action against employer, arising from employer's alleged secret videotaping of employee restrooms to detect drug use, was not preempted by LMRA on theory that the CBA's provisions governing drug testing and governing videotaping did not have to be consulted to determine the employees' privacy expectations. Such expectations based on invasion of privacy are similarly present in Plaintiff Miller's claim that Major League Baseball violated DATWA by conducting a drug test without following minimally proper laboratory testing procedures. As such, this Court must follow *Anderson* by acknowledging that [employees'] claims are based on California's constitutional and statutory rights of privacy guaranteed to all persons, whether or not they may happen to work subject to a CBA. The claims are independent of the CBA and not subject to § 301 preemption. *Id.* at 694.

II. KEVIN WILSON'S CLAIMS UNDER MINNESOTA'S DRUG AND ALCOHOL TESTING IN THE WORKPLACE ACT ARE NOT PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT BECAUSE THEIR DESIRE FOR UNIFORMITY OF FEDERAL LABOR LAW IS OUTWEIGHED BY ITS INTENTION TO DISCOURAGE PARTIES TO CONTRACT FOR OTHERWISE ILLEGAL TERMS UNDER STATE LAW

The Supreme Court acknowledges that [i]t would be inconsistent with congressional intent under [Section 301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406 (1988). Likewise, there is no suggestion that Congress, in adopting 301, wished to give

the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Clearly, 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211-12 (1985). The determination of whether preemption is required must be made on a case-by-case basis. *Id.*

In *Karnes v. Boeing Co.*, 335 F.3d 1189 (10th Cir. 2003), the Tenth Circuit applied § 301 state claim preemption precedent from the Supreme Court in holding that Plaintiffs' state-law remedy is 'independent' of the CBA in the sense of 'independent' that matters for § 301 preemption purposes: resolution of the state-law claim does not require construing the CBA. Further, the fact that the CBA incorporated Boeing's anti-drug policy is irrelevant because "§ 301 does not grant the parties to a [CBA] the ability to contract for what is illegal under state law," quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985), and the Supreme Court has "underscored the point that § 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law." *Livadas v. Bradshaw*, 512 U.S. 107, 123 (1994). Accordingly, the *Karnes* Court concluded that Plaintiffs' claims under the Oklahoma Act were not preempted. *Karnes v. Boeing Co.*, 335 F.3d 1189, 1193-94 (10th Cir. 2003).

Similar reasoning was used to support lack of federal preemption of state invasion of privacy claims in *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683 (9th Cir. 2001). There, the Ninth Circuit held that even if a CBA purported to reduce or limit th[e] expectation [of privacy in the workplace] in some way, that reduction would be illegal and therefore unenforceable. In this way, a court reviewing plaintiffs' claims that their privacy rights were violated need not interpret the CBA to arrive at its conclusion. *Id.* at 695-96, quoting *Allis-Chalmers v. Lueck*, 471

U.S. 202, 213 (1985). Plaintiff Miller's DATWA claims are similarly independent from the CBA between Major League Baseball and its Players Association because its drug testing policy attempted to sidestep threshold requirements set forth by the Minnesota legislature when it enacted DATWA.

A. Wilson's State Law Claims Are Not Preempted By Section 301 Of The Labor Management Relations And Their Adjudication Would Not Undermine The Uniformity Of The Enforcement Of Major League Baseball's Anti-Drug Policy

The Supreme Court has been careful to note, even in a case where state-law claims were found to be preempted under § 301 of the LMRA, that in extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract. *Allis-Chambers v. Lueck*, 471 U.S. 202, 212 (1985). Thus, not all state-law claims will undermine congressional intent of uniform labor law, especially those which establish rights and obligations that are present absent a CBA, such as employer drug testing requirements set forth in Minnesota by DATWA. As such, Plaintiff's claims are not preempted by § 301. The Tenth Circuit recently considered a case with very similar facts to the dispute at bar in *Karnes v. Boeing Co.*, 335 F.3d 1189 (10th Cir. 2003). Similar to Wilson's DATWA state claims as related to other similarly tested major league baseball players, plaintiff in *Karnes* argued that Boeing violated § 555(A) of the Oklahoma [Drug Testing in the Workplace] Act, which requires a company's anti-drug policy to be "uniformly applied," by failing to take disciplinary action against other employees who were allegedly videotaped using drugs. The Court held that whether Boeing has "uniformly applied" its anti-drug policy is a purely factual inquiry and is not "inextricably intertwined" with the terms of the CBA. Thus,

Karnes' Drug Testing Act claims are clearly independent of the CBA and are not subject to § 301 preemption. *Id.* at 1193-94. Plaintiff Miller's strikingly similar drug testing claims as under DATWA must be similarly allowed to proceed in light of § 301.

### III. THE COURT OF APPEALS WAS CORRECT IN SETTING ASIDE THE ARBITRATOR'S AWARD BECAUSE THE AWARD WAS IN VIOLATION OF PUBLIC POLICY

The arbitrator's award that resulted in the suspension of Wilson was in violation of public policy, and therefore the Court of Appeals was correct when it set aside this award and reinstated Wilson to his position as a player in the MLB. Although an arbitration award is to be given much deference by a reviewing court, the award may be set aside if it meets the public policy exception formulated by the Supreme Court in W.R. Grace v. Local Union 759, 461 U.S. 757 (1983). The arbitrator's suspension of Wilson violates public policy because it sanctions the actions of the MLB, which were a breach of fiduciary duties and directly threatened the health and safety of Wilson.

#### A. An Arbitration Award That Violates Public Policy Shall Be Set Aside By A Reviewing Court

Public policy considerations supersede a court's normative approach to reviewing an arbitrator's award, which is to play only a limited role and to not "reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *United Paperworker's Int'l v. Misco*, 484 U.S. 29, 36 (1987). This is due to the federal interest in having labor disputes settled by private arbitrators. *Id.*

When parties to a collective bargaining agreement have agreed to abide to an arbitrator's decision over contract interpretation, reviewing courts may not set aside that decision as long as the arbitrator's award "draws its essence from the collective bargaining agreement," and is not merely "his own brand of industrial justice." *Id.* (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

Petitioner points out that a court's function "in reviewing an arbitration award is very limited." *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665, 670 (11th Cir. 1988). Furthermore, Petitioner argues that the Court may not set aside the arbitrator's award "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," even if the Court is convinced the arbitrator was in error. *Misco*, 484 U.S. at 38. However, when an arbitrator's award contravenes an explicit public policy, the reviewing court is obliged to refrain from enforcing it. *W.R. Grace*, 461 U.S. at 766. By looking at the effect of the arbitrator's award on public policy, the reviewing court is not delving into the merits of the dispute, and therefore is not impinging on the contractual agreement of the parties to have their dispute settled by a private arbitrator.

The ability of a reviewing court to set aside an arbitrator's award that contravenes public policy is rooted in the common law doctrine that a court may refuse to enforce a contract that violates law or public policy. *Misco*, 484 U.S. at 42. The reasoning behind this ability of the court stems from the basic notion that no court will support a decision condoning immoral or illegal acts. *Id.* Furthermore, the public policy exception allows the courts to represent the public's interests in confining the scope of this type of private agreement. *Id.* Collective-bargaining agreements do not formulate public policy, and arbitrators are only authorized to consider matters within the actual agreement. *Iowa Elec. Light & Power Co. v. Local Union 204*

*of the Int'l Bd. Of Elec. Workers (AFL-CIO)*, 834 F.2d 1424, 1427 (8<sup>th</sup> Cir. 1987). Therefore, “the question of public policy is ultimately one for resolution by the courts.” *W.R. Grace*, 461 U.S. at 766. The arbitrator in the case at hand interpreted the collective bargaining agreement based on the actual terms in the Policy, and properly avoided balancing the public policy considerations of his decision.

The public policy exception to judicial deference to arbitration awards, as stated in W.R. Grace, “requires a showing (1) that there is a well defined public policy, (2) that the policy is explicit, (3) that it is dominant and (4) that it can be ascertained by reference to laws and legal precedents, as opposed to general considerations of supposed interest.” *Ace Elec. Contractors, Inc. v. Int'l Bd. of Elec. Workers, Local Union No. 292*, 414 F.3d 896, 905 (8th Cir. 2005). After a review of these requirements, the *W.R. Grace* court held that no public policy was violated by the arbitrator’s award, but the Court laid out the very specific guidelines which reviewing courts now follow when an arbitrator’s award is brought before a reviewing court.

A party’s argument that an arbitrator’s award violated some general public policy will not be upheld, as occurred in *Misco*. *Misco* “teaches that [a court] must find such public policy from a more clear expression than our own notions of what it might, or should, be.” *Delta Air Lines*, 861 F.2d at 670. In *Misco*, the Supreme Court found that the Court of Appeals for the Fifth Circuit improperly set aside an arbitrator’s reinstatement of an employee based on the general notion that operation of dangerous machinery while under the influence of drugs is against public policy. Although this reasoning would make sense to any citizen of the land, the *W.R. Grace* court held specifically that a reviewing court must look to “existing laws and legal precedents” in order to find a “well-defined and dominant” public policy that has been violated. *W.R. Grace*, 461 U.S. at 766.

The *Misco* court went on to state that even if an explicit public policy is found, there must be a clear showing of that policy being violated, and it must be more than speculation or assumption. *Misco*, 484 U.S. at 44. In that case, there was no evidence that the employee had actually been under the influence of drugs while operating machinery; the Court of Appeals assumed that the employee was under the influence based only on the fact that drugs had been found in his car. Since the Court of Appeals based their holding on the assumption that the employee was under the influence while operating the machinery, the Supreme Court reversed and allowed the employee to be reinstated.

In comparison, the *Delta Air Lines* court looked to laws of every state of the Union and found that every state has adopted laws prohibiting flying while intoxicated. Moreover, the court found precedential support in two cases where courts vacated arbitrator's award due to their violation of public policy. Since the *Delta Air Lines* court found both "laws and legal precedent" establishing a clear public policy against flying while intoxicated, and found that the arbitrator's reinstatement of the pilot would directly violate that public policy, it vacated the arbitrator's award.

**B. The Arbitrator's Award Violated Public Policy Because It Sanctioned The MLB's Knowing And Intentional Breach Of The MLB's Fiduciary Duties To The Individual Players of the MLB.**

In upholding the MLB's suspension of Wilson, the arbitrator's award violates public policy because it sanctions breaches of a fiduciary duty that jeopardized the health of MLB players and upholds suspensions for actions that were not the fault of the individual players. The public policy exception to deference to the arbitrator's award is met in this instance because there is clear public policy that a fiduciary must abide by its duties to ensure the health and safety

of its beneficiaries. Since this public policy was violated by the arbitrator's affirmation of the MLB's suspension of Wilson, the arbitrator's award must be set aside. It bears no significance in the discussion whether or not Wilson's taking of the energy supplement violates any public policy on its own. The only concern stated by the *W.R. Grace* court is whether the arbitrator's award, as a whole, violates some clear and definite public policy.

Under New York law, which was chosen by the parties to govern the Policy in the collective-bargaining agreement, “ [a] fiduciary relationship 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 Mut. Cas. Co. v. Franey Muha Alliant Ins. Servs.*, 388 F.Supp.2d 292, 305 (S.D.N.Y. 2005) (quoting *Bank of Am. Corp. v. Lemgruber*, 385 F.Supp.2d 200, 224 (S.D.N.Y. 2005) (quoting *Mandelblatt v. Devon Stores, Inc.*, 132 A.D.2d 162, 168 (1<sup>st</sup> Dep’t 1987) (quoting Restatement [Second] of Torts § 874, comment a)) (emphasis added). Thus, in order to find if a fiduciary relationship exists, “New York courts conduct a fact-specific inquiry into whether a party reposed confidence in another and reasonably relied on the other’s superior expertise or knowledge.” *Lumbermens*, 388 F.Supp.2d at 305.

Here, the MLB, through Dr. Larson, was required to educate Wilson regarding the implementation of the Policy, Opinion of District Court at 2, *Wilson v. Major League Baseball*, No. 09-AC-0213 (D.Tulania, January 11, 2010), which includes informing all players of those supplements that contain banned substances. The Policy also created the “MLB Supplement Hotline,” which enabled players to obtain confidential and accurate information about supplements, including each ingredient of those supplements. The Policy went on to state, “If you have any questions or concerns about a particular supplement or other product, you should contact Dr. Larson. As the Independent Administrator, Dr. Larson is authorized to respond to

players' questions regarding specific supplements.” Through these statements in the Policy, the MLB declared itself and Dr. Larson as the authoritative sources of information about all supplements, which created a duty “to give advice for the benefit of [MLB players] upon matters within the scope of the relation.” Opinion of Court of Appeals at 12, *Wilson v. Major League Baseball*, No. 09-2108 (14th Cir., January 11, 2010). Through these terms in the Policy, Wilson “reposed confidence and reasonably relied” on the MLB and Dr. Larson to inform him of any energy supplement that may contain a banned substance. These facts alone create a fiduciary duty under New York law.

Dr. Larson and the MLB owed the players the duty to disclose all material facts they knew within the scope of that relationship, especially those facts that could endanger a player's health. Opinion of Court of Appeals at 13, *Wilson v. Major League Baseball*, No. 09-2108 (14th Cir., January 11, 2010). The duty to disclose “arises when one party has information that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.” *Grandon v. Merrill Lynch & Co., Inc.*, 147 F.3d 184, 189 (2nd Circuit 1998) (quoting *Chiarella v. United States*, 445 U.S. 222, 228 (1980) (internal quotation and citation omitted)). A duty may arise to disclose all pertinent information “where a fiduciary or confidential relationship exists or where a party has superior knowledge not available to the other.” *Callahan v. Callahan*, 127 A.D.2d 298, 300 (N.Y. App. Div. 1987). Dr. Larson held the “superior knowledge” about the ingredients and overall safety of energy supplements, and this knowledge would not be available to a player on his own accord. That was the reason the Hotline was set up and Dr. Larson authorized to give advice on supplements – because the players had no other way to know what ingredients the supplements contained, which was especially true here where the banned substance of Clomiphene was not even on the ingredients

list on the SpeedShot product. Wilson and the MLBPA were certainly entitled to know that SpeedShot contained Clomiphene in order to protect the health of the individual players as well as to protect their jobs as players in the MLB. The sole outlet to find accurate information regarding the MLB's policy on certain substances was through the Hotline and Dr. Larson. When these vehicles of information failed to educate the players specifically on SpeedShot, the MLB and Dr. Larson breached their fiduciary duty.

Not only did the MLB and Dr. Larson fail to inform the player's of the banned substance contained within Clomiphene, but they did so *purposefully*. In *Callahan*, the court found that the defendant was personally familiar with the subject matter but failed to disclose pertinent information regarding an estate in a divorce proceeding. Here, Dr. Larson and the MLB knew firsthand that SpeedShot contained Clomiphene and purposefully refrained from passing this information along to the MLBPA, or to the Food & Drug Administration for that matter. Dr. Larson and the MLB knew, through reports from Dr. Finkle, the toxicologist under the Policy, that Clomiphene had been identified in SpeedShot and that there was a concern that this ingredient could have adverse effects on players without proper medical supervision. Opinion of Court of Appeals at 13, *Wilson v. Major League Baseball*, No. 09-2108 (14th Cir., January 11, 2010). Despite knowing this, Dr. Larson purposefully did not inform the MLBPA of this information for he did not want players in the future to rely on him to notify them of other harmful banned substances in the energy-boosting supplements. Opinion of Court of Appeals at 14, *Wilson v. Major League Baseball*, No. 09-2108 (14th Cir., January 11, 2010). This reasoning of Dr. Larson cannot be supported. Dr. Larson was labeled by the Policy as the person to make all inquiries to relating to banned substances, and he had a duty to report all pertinent

information. Since neither he nor the MLB informed the players about the Clomiphene in SpeedShot, a fiduciary duty was breached.

In addition to sanctioning a breach of fiduciary duty, the arbitrator's award sanctions behavior that would threaten the health and safety of the MLB players. Arbitrator's awards have been set aside on public policy based on this fact alone. In *Delta Air Lines*, 861 F.2d 665, the Court vacated an arbitrator's award that reinstated a pilot who had been discharged after flying a passenger plane while intoxicated. The sole reasoning for the court's decision was that it would violate public policy to put the safety and health of passengers at risk by allowing this pilot to continue to fly. The court based its reasoning around specific laws in all 50 states that made it illegal to fly while intoxicated, as well as the Federal Aviation Association's own guidelines on the issue. The court found these two sources of regulations as proof of a clear and definite public policy against flying while intoxicated. In *Iowa Elec. Light & Power Co.*, 834 F.2d 1424, the court similarly vacated an arbitrator's award that reinstated an employee who had been discharged for knowingly violation federally mandated safety regulation. The court looked to federal regulations on nuclear safety regulations, and found a clear and definite public policy in safeguarding the nuclear power industry.

In the case at hand, the MLB and Dr. Larson clearly violated public policy by allowing a substance to be kept off the banned substance list even though they knew Clomiphene could endanger the health of the individual players. It is obvious that the Court should not want to endorse actions that put the health and safety of individuals at risk. The Policy was created to help players refrain from taking substances that may adversely affect their health, and this court should not permit the MLB and Dr. Larson to breach their duty to inform players of all information pertinent to the health and safety of taking supplements.

The Appellate Court below properly followed the *Misco* court's instructions that a reviewing court should not "foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for in the collective-bargaining agreement." *Misco*, 484 U.S. at 41. Instead, a reviewing court should simply vacate the award, just as the Court of Appeals did below.

#### IV. CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fourteenth Circuit should be AFFIRMED.

Respectfully Submitted,

Team #35