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,
Respondents.

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

BRIEF FOR THE PETITIONER

MGIC Number: 38

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT A MAJOR LEAGUE BASEBALL PLAYER'S CLAIM UNDER MINNESOTA'S DRUG AND ALCOHOL TESTING IN THE WORKPLACE ACT CHALLENGING A SUSPENSION UNDER A COLLECTIVELY BARGAINED FOR DRUG POLICY IS NOT PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT, WHEN THE CLAIM IS INEXTRICABLY INTERTWINED WITH INTERPRETATION OF THE COLLECTIVE BARGAINING AGREEMENT.

II. WHETHER THE COURT OF APPEALS ERRED 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 THE AWARD VIOLATED PUBLIC POLICY WHEN THE AWARD DID NOT DIRECTLY CONTRADICT ANY EXPLICT, WELL-DEFINED PUBLIC POLICY.

STANDARD OF REVIEW

This court will review all matters *de novo*.

STATEMENT OF THE CASE

This is an appeal from a judgment in favor of Respondents Kevin Wilson and the Major League Baseball Players Association, where the Court of Appeals for the Fourteenth Circuit reversed the District Court for the Southern District of Tulania's grant of Petitioner Major League Baseball's motion for summary judgment. The Court of Appeals concluded that Wilson's DATWA claim is not preempted by Section 301 of the Labor Management Relations Act, and the arbitrator's award of a fifteen-game suspension should be vacated because it violates public policy. Petitioner MLB appeals the findings on both counts.

Kevin Wilson is an employee of the Minnesota Twins, L.L.C. and a member of the Major League Baseball Players Association ("MLBPA"). (R. at 1). In 2007, the MLBPA and Major League Baseball ("MLB") entered into a collective bargaining agreement incorporating the MLB policy on anabolic steroids and related substances (the "Policy"). (R. at 1). The Policy prohibits MLB players from using, among other prohibited substances, performance-enhancing drugs including clomiphene, which blocks the effects of estrogen and restores the body's natural production of testosterone. (R. 1, 3 at fn. 1). In addition, the Policy holds players strictly liable for what is in their bodies. (R. 1). Therefore, "a positive test result will not be excused because a player was unaware he was taking a Prohibited Substance" nor "because it does not result from an intentional use of Prohibited Substance." (R. 1).

Dr. John Larson is a licensed physician and in charge of implementing the terms of the Policy. (R. 2). One of Dr. Larson's duties as the independent administrator of the Policy is to

educate the players regarding the Policy's implementation, including providing information regarding the specific prohibited substances. (R. 2). Dr. Ray Finkle assists Dr. Larson in the Policy's implementation as the consulting toxicologist. (R. 2).

The first time a player tests positive for a banned substance, the Policy requires discipline in the form of a fifteen to twenty-five game suspension. (R. 2). A player may appeal the suspension 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" and through an arbitration process outlined in the Policy. (R. 2).

In addition to the assistance of Dr. Larson, the Policy created the "MLB Supplement Hotline" to provide players "confidential and accurate information about these [prohibited substances], including their ingredients, effects, and adverse reactions." (R. 2). The memorandum announcing the Policy specifically cautioned players that "[u]sing the Hotline will not excuse a positive test result." (R. 2).

SpeedShot is an energy-boosting supplement claiming to provide five hours worth of energy. (R. 3). In 2007, Dr. Larson learned that some bottles of SpeedShot contained clomiphene, a prohibited substance in the Policy, but failed to disclose it in the label. (R. 3). David Klein, Director of the Sports Medicine Research Testing Laboratory, analyzed SpeedShot and informed Dr. Larson, Dr. Finkle, and Andrew Birch, Vice President of Law and Labor Policy for the MLB, that SpeedShot did contain clomiphene. (R. 3).

Upon this finding, players were notified that "Mega Energy Products, which distributes SpeedShot" was "added to the list of prohibited energy-boosting supplement companies," meaning players could no longer endorse any of their products. (R. 3). Dr. Larson further sent a memorandum to the players reiterating the dangers of energy-boosting supplements and urged

the players not to consume such supplements. (R. 3). The memoranda reminded the players of the Policy's strict liability rule and that a positive test for a banned substance does not require intent in order to receive disciplinary action. (R. 3-4).

Notwithstanding all the warnings against consuming energy-boosting supplements, such as SpeedShot, Wilson and four other MLB players took SpeedShot and tested positive for clomiphene. (R. 4). Pursuant to the Policy, all five players were suspended for fifteen games and, along with the MLBPA, then appealed the suspensions to an independent and neutral arbitrator. (R. 4). During arbitration, the players did not dispute the positive tests for clomiphene and conceded to knowing of and understanding the dangers of energy-boosting supplements, the MLB Supplement Hotline, and the Policy's strict liability rule. (R. 4). The players' primary argument against the suspensions was that the Policy created a fiduciary duty requiring the MLB to give a specific warning that SpeedShot contained clomiphene. (R. 4).

The arbitrator upheld the suspensions for several reasons. (R. 5). First, the Policy expressly stated, which the players understood, a strict liability rule for testing positive for a prohibited substance. (R. 5). Second, there was "no genuine dispute regarding the positive test of each player's urine sample." (R. 5). Finally, "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," which addresses the players' core argument. (R. 5).

Following the arbitration proceeding, Wilson filed suit against the MLB, Dr. Larson, Dr. Finkle, and Andrew Birch in Minnesota state court alleging that the Policy violated Minnesota's Drug and Alcohol Testing in the Workplace Act ("DATWA"). (R. 5). The state court granted Wilson a temporary order barring the suspension, which only applied to Wilson since the other

four players were not employed in Minnesota and the DATWA is a Minnesota state law. (R. 5). The case was removed to federal court and consolidated with an action brought by the MLBPA seeking to vacate the arbitration award under the Labor Management Relations Act ("LMRA"). (R. 5).

The United States District Court for the Southern District of Tulania granted the MLB's motion for summary judgment holding that Wilson's DATWA claims are preempted by Section 301 of the LMRA and the arbitrator's award should be upheld. The United States Court of Appeals for the Fourteenth Circuit reversed, and the MLB now appeals.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Fourteenth Circuit incorrectly held that Wilson's DATWA claim challenging his suspension from the MLB is not preempted by Section 301 of the LMRA. Section 301 of the LMRA gives federal courts jurisdiction to hear claims that violate collective bargaining agreements. Only when the court finds that the claim is independent of the collective bargaining agreement, it will survive preemption.

Preemption of Wilson's claim is necessary because it cannot be resolved without interpreting the collective bargaining agreement, which inextricably intertwines the claim with the interpretation. Wilson's claim hinges on his contention that the MLB Policy violated Minnesota's DATWA. However, Wilson failed to identify which provisions of the state statute were violated. The DATWA requires that collective bargaining agreements meet or exceeds requirements outlined in the statute. The only way to show that the Policy violated the DATWA is to examine the collective bargaining agreement to determine if it meets or exceeds the DATWA requirements. The court cannot fairly make this determination solely by examining the

facts surrounding the collective bargaining agreement, since it is the sole source of Wilson's claim.

The MLB strives to achieve fairness and integrity throughout the league. Failure to preempt Wilson's DATWA claim would be directly adverse to this ultimate goal. Congress intended Section 301 to correct state-law inconsistency and maintain uniformity. Courts have specifically recognized the importance of uniformity in professional sports leagues, such as the MLB. An obvious example of the adverse effect created if this claim is not preempted exists in the present facts. Wilson was only one of five MLB players who tested positive for clomiphene and received fifteen-game suspensions. However, since the other four players are not employees in the state of Minnesota, they cannot reap the benefits owed to Wilson if his claim is decided in state court. Applying state law to an organization that exists across the country creates a great disadvantage to those players who are employed in states that have not enacted laws similar to the DATWA.

In addition, the United States Court of Appeals for the Fourteenth Circuit improperly vacated Wilson's fifteen-game suspension even though it was not shown that the arbitrator's award violated public policy. A reviewing court must afford an arbitrator a high level of deference. The exception to this standard is extremely narrow and allowed only when the award, not the act itself, violates public policy. The public policy must be explicit, well-defined, and dominant as pursuant to New York law, which governs the collective bargaining agreement that spells out the disciplinary procedure. This exception is far too narrow to apply to this case.

The appellate court incorrectly found a fiduciary duty to exist between the MLB and the players requiring the MLB to expressly disclose the fact that some bottles of SpeedShot contained clomiphene. No such duty was created, even with the availability of the MLB

Supplement Hotline. The players were given general warnings about energy-boosting supplements and were continuously reminded of the Policy's strict liability rule, which does not require intent in order to receive disciplinary action for testing positive for a prohibited substance. Neither Dr. Larson, Dr. Finkle, nor Andrew Birch made statements that were false, misleading, or ones which omitted material facts.

Finally, while the MLBPA claims the arbitration award violated public policy, it failed to such policy that was allegedly violated by the suspensions. This court must look at whether the arbitration award, not the act of consuming a product containing clomiphene, threatens the health and safety of the players. When comparing the present facts to those of precedent cases, upholding the arbitrator's award does not threaten the health and safety of players. Therefore, the fifteen-day suspension should be reinstated.

ARGUMENT

I. WILSON'S DATWA CLAIM IS SUBSTANTIALLY DEPENDENT ON THE INTERPRETATION OF THE COLLECTIVE BARGAINING AGREEMENT AND IS THEREFORE PREEMPTED BY SECTION 301 OF THE LMRA.

Under Section 301 of the Labor Management Relations Act, federal district courts have jurisdiction to hear claims that violate collective bargaining agreements. *Teamsters v. Lucas Flour*, 369 U.S. 95, 102 (1962). As a result, federal law will apply to such preempted claims. *Textile Workers Union of America v. Lincoln Mills of Alabama,* 353 U.S. 448, 456 (1957). Section 301 states:

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

29 U.S.C. § 185(a) (2009). A claim may survive preemption only if the court finds that the claim is "independent" of the collective bargaining agreement. On the contrary, if the court finds that the claim is substantially dependent on the collective bargaining agreement then preemption is necessary. *Id.*

This court has established a two-prong test to determine whether a claim is substantially dependent on a collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985). This test requires the movant to show that at least one of the prongs are met in order to preempt the state law claim. *Id.* To succeed on the first prong one must show that the collective bargaining agreement establishes the claim or right that is at issue. *Id.*; s*ee also Lucas Flour Co*., 369 U.S. at 102 (stating "any state law claim founded on rights created by a CBA is preempted under section 301"). Claims arise out of the collective bargaining agreement when that agreement establishes the right at issue. *Allis-Chalmers Corp.*, 471 U.S. at 210. Wilson does not assert that any claims are based on a breach of the collective bargaining agreement itself, thus the court's preemption analysis turns on the second prong. *Textile Workers Union,* 353 U.S. at 456. Succeeding on the second prong requires a showing that the court cannot resolve the claim without analyzing relevant sections in the collective bargaining agreement. *Id.*

Additionally, failure to preempt the state-law claim will frustrate the purpose of uniformity found in Section 301. *Lucas Flour Co*., 369 U.S. at 103; s*ee also Anderson v. Ford Motor Co.*, 803 F.2d 953, 955 (8th Cir. 1986) (stating "uniformity in the interpretation of collective bargaining agreements is considered essential to the federal scheme favoring collective bargaining"). Therefore, it is necessary that this court uphold the trial court's ruling and find that preemption is necessary pursuant to Section 301 of the LMRA.

A. This court must interpret the collective bargaining agreement in order to determine whether it meets or exceeds the requirements outlined in the DATWA, which inextricably intertwines the claim with the interpretation and makes preemption necessary.

Wilson's claim cannot be resolved without interpreting the collective bargaining agreement and therefore preemption is necessary. Under the second prong of the independent claim test, a claim that requires such analysis also requires preemption. *Allis-Chalmers Corp.*, 471 U.S. at 213. In *Allis-Chalmers*, as here, the parties entered into a collective bargaining agreement. *Id.* The employee brought a tort action against the employer claiming bad faith. *Id.* This court held that resolution of the state law claim was dependent on the analysis of the collective bargaining agreement thus preemption was necessary. *Id.* The rule this court applied in *Allis-Chalmers* is equally applicable to the facts present here.

Wilson's claim fails to specify what provisions the MLB violated pursuant to the DATWA concerning his suspension. As a result, this Court must conduct an overall analysis of the collective bargaining agreement to determine whether a violation occurred. *Compare Holmes v. National Football League*, 939 F. Supp. 517, 528 (N.D. Tex. 1996) (resolving the players' state law claims, first determining whether the team's league drug program, adopted in the collective bargaining agreement, violated state law and further analyzing the collective bargaining agreement, holding preemption necessary because the claims were "inextricably intertwined and substantially dependent upon, the terms of the drug program.")

The instant case presents an even stronger argument for Section 301 preemption than did *Holmes*. In the present case, there are two areas in particular in which the court must interpret to determine whether the collective bargaining agreement is in violation of DATWA: (1) whether the collective bargaining agreement meets or exceeds the requirements of DATWA; and (2) whether the MLB qualifies as an employer governed by DATWA.

Under DATWA, an employer is allowed to create terms of a collective bargaining agreement so long as those terms "meet or exceed" the requirements of the DATWA. The Minnesota Drug and Alcohol Testing in the Workplace Act states:

> Section 181.950 to 181.954 shall not be construed to limit the parties to a collective bargaining agreement from bargaining and agreeing with respect to a drug and alcohol testing policy that meets or exceeds, and does not otherwise conflict with, the minimum standards and requirements for employee protection provided in those sections.

Minn. Stat. § 181.955.

The DATWA requires that an employer provide minimum information in its drug-testing policy that provides employees with notice of testing, the manner in which each test will be conducted, and the rights and disciplinary action that may result from positive test. Minn. Stat. § 181.952. As demonstrated above, the statute allows employers to create their own policies that may be stricter than those asserted by the DATWA. Minn. Stat. § 181.955. The MLB has created such a policy. Its policy not only meets the requirements of the DATWA, but also exceeds them. To make this finding, this court must construe the terms of the collective bargaining agreement to determine whether the collective bargaining agreement violates the DATWA. *See Allis-Chalmers Corp.*, 471 U.S. at 207 (determining that the duty to handle the insurance claim in good faith was "tightly bound" with the interpretation of the contract, finding preemption necessary because the state law claim was "inextricably intertwined" with the collective bargaining agreement). This involves interpreting the collective bargaining agreement and not merely referencing it. *Trustees of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 331 (8th Cir. 2006).

Wilson improperly contends that the court can look solely at the facts without consulting the collective bargaining agreement to resolve the issue. Similarly, there are two reasons why

the Court of Appeals for the Fourteenth Circuit's adoption of this conclusion is improper. First, the claims brought by Wilson are not claims in which the court may look solely at the factual questions that pertain to the claim. *Contra Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 419 (1988) (holding that the elements of retaliatory discharge asserted by the plaintiff did not require an interpretation of any of the terms of the collective bargaining agreement). In the present case, the collective bargaining agreement is the defining source of Wilson's claim. Similar to *Gore v. Trans World Airlines*, Wilson's claim that the MLB violated DATWA requires the court to look at the policy to determine whether the policy meets or exceeds the requirements expressed in DATWA and whether the MLB constitutes an employer under DATWA. 210 F.3d 944 (8th Cir. 2000).

The Minnesota statute, by nature, allows the employer to create policies that are in compliance with, but not necessarily identical to, the DATWA. It does not establish a bright line rule that can be determined purely on a factual basis. For instance, Wilson does not claim that his suspension was unjust because of an improper violation of state law, such as retaliatory discharge, where the court can resolve the matter by purely considering the facts of the case to determine whether the elements are satisfied. Instead, he argues that the collective bargaining agreement itself is a violation of the DATWA. In *Gore*, the court determined that in order to resolve whether a violation of state law occurred it would have to look at the collective bargaining agreement to establish whether the defendant's actions were contrary to the duties that arose from the collective bargaining agreement. *Gore*, 210 F.3d at 950. Likewise, Wilson's claim that the MLB violated the requirements of the DATWA cannot be determined without interpreting the terms of the collective bargaining agreement to establish whether the actions of the MLB were contrary to any duty that may arise from the collective bargaining agreement.

Finally, the Court of Appeals improperly relied on *Cramer v. Consol. Freightways Inc.* to base its determination in the present case. 255 F.3d 683 (9th Cir. 2001). While *Cramer* remains valid law, the facts of that case are distinguishable from the case at hand. In *Cramer*, the plaintiff claimed that the company violated his right to privacy by installing video surveillance cameras. *Id.* at 693. As a result, the court did not need to interpret the collective bargaining agreement to determine whether the installation was a violation of state law stating, "[u]nder settled Supreme Court precedent Section 301 does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law." *Id.* at 695. The same result would occur in the present case had Wilson challenged the legality of performing the drug test or some other established state law that would allow the court to look solely at the violative law and not at the collective bargaining agreement itself. Wilson, however, failed to assert this. Instead, Wilson contends that the overall provisions of the policy do not comply with the DATWA. This broad contention requires the court to determine the MLB's non-compliance by interpreting the terms of the collective bargaining agreement. In the alternative, Wilson does not allege a claim that can be established by looking purely to the elements of that claim. Instead, Wilson's claim is one of interpretation.

As set forth above, it is necessary to preempt Wilson's state law claims under Section 301 of the LMRA. Certainly, it is not the MLB's position that all claims resulting from the collective bargaining agreement are displaced. *See Cramer,* 255 F.3d at 695 (stating that the LMRA does not provide employers with the authority and ability to shift any state law that is they deem "inconvenient"). The DATWA expressly states that an employer may meet or exceed the requirements of DATWA in implementing its drug testing policy, thus a court must interpret the policy in order to determine whether the minimum requirements are meet in this particular case.

B. Failure to preempt Wilson's state law claim would allow inconsistent interpretation of the collective bargaining agreement, which would frustrate the heart of Section 301 of the LMRA and adversely affect the fairness and integrity the MLB strives to achieve.

The need for uniformity in collective bargaining agreements permeates claims under Section 301 of the LMRA. Ignoring this need only frustrates the federal system and creates inconsistent laws and outcomes throughout nation. In *Lucas Flour Co.* this Court explained, the "subject matter of section 301 (a) is peculiarly one that calls for uniform law . . . The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Lucas Flour Co*., 369 U.S. at 103.

This court further explained that Congress intended Section 301 to prevail when state laws may reveal inconsistency. *Id*. at 104 (stating "in enacting Section 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules"). As a result, uniformity is an important tool in the success of collective bargaining agreements. Failure to establish a uniform system hinders parties' ability to negotiate the terms because the terms may have different meanings under multiple systems. Therefore, claims that threaten this purpose must be brought under federal law. *Id.* (holding "once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation… [and] might substantially impede the parties willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes," and thus preemption was necessary).

Courts have recognized the importance of uniformity in the area of professional athletic teams. In *Partee v. San Diego Chargers Football Co.*, the court explained that it is important to uniformly interpret and enforce claims and issues that arise out of collective bargaining

agreements when dealing with organizations such as the MLB and the NFL. 34 Cal. 3d 378, 382 (Cal. 1983) (stating "[t]he burden on interstate commerce will ordinarily be found unreasonable where the state regulation substantially impedes the free flow of commerce from state to state or governs 'those phases of national commerce which, because of the need of national uniformity demand, their regulation, if any, be prescribed by a single authority.'").

Leagues such as the MLB have a nationwide league structure. Just as in *Partee*, maintaining uniformity in the present case is important for the strength, integrity, and fairness of Major League Baseball. A uniform set of rules is beneficial to teams, players, and competition. *Id*. at 383. Additionally, not applying a uniform interpretation allows players to be subject to different laws, differential treatment, and unfair advantages. *Lucas Flour Co.*, 369 U.S. at 103. Moreover, states may not use its laws to affect commerce and competition in other states. *See Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (stating "[t]he Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State"). The present case exposes this inconsistency. Wilson originally asserted his claims along with four other suspended players. However, because Wilson is the only player employed in the state of Minnesota, the other players do not have access to these rights. This result frustrates the heart of Section 301. By allowing Section 301 preemption, the court will avoid such a result and allow a uniform result to be reached. Thus, Section 301 preemption is necessary.

As demonstrated above, Section 301 is necessary in the present case for two reasons. First, the court cannot resolve Wilson's claim that the MLB's collective bargaining agreement is in violation of the DATWA without determining whether the MLB is an employer under the DATWA and whether the agreement meets or exceeds the DATWA. As a result, resolution of

this claim is inextricably intertwined with the interpretation of the collective bargaining agreement. Moreover, failure to find preemption in this case frustrates the uniformity that is the purpose of Section 301. This failure will produce inconsistency and attack the integrity and fairness of the league. As a result, preemption is necessary in this case.

II. THE ARBITRATION AWARD SHOULD BE UPHELD BECAUSE IT DOES NOT VIOLATE PUBLIC POLICY.

When reviewing an arbitration decision this Court must afford the arbitrator "an extraordinary level of deference" and must uphold the award as long as "the arbitrator was even arguably construing or applying the contract and acting within the scope of his authority." *Stark v. Sandberg, Phoenix & von Gontard, P.C.,* 381 F.3d 793, 798 (8th Cir. 2004). The Federal Arbitration Act ("FAA") controls since the collective bargaining agreement calls for arbitration to govern disciplinary disputes under the Policy. 9 U.S.C. § 10. Under the FAA courts can vacate an arbitration award only if that award "was procured by fraud, corruption, or undue means." *Id.* Further, a court may vacate the decisions "only for the reasons enumerated in the FAA." *Crawford Group, Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008).

When reviewing the arbitrator's decision, courts need not question whether the drug policy violates public policy but rather whether the suspension of Wilson violates an explicit, well-defined, and dominant public policy. It has long been the prerogative of this Court to uphold arbitrators' decisions as they, not the courts, are entrusted by the parties to resolve disputes pursuant to the agreement. A court examining an arbitration award cannot give deference to an award that does not "draw its essence from the collective bargaining agreement." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987). This Court's authority to reverse an arbitration award for failure to comply with the Policy is "exceptionally narrow." *Coca-Cola Bottling Co. of St. Louis v. Teamsters Local Union No. 688*, 959 F.2d 1438, 1440 (8th

Cir. 1992). "[A]s long as the arbitrator is even arguably construing or applying the [Policy] and acting within the scope of his authority," the Court's determination that the arbitrator "committed serious error does not suffice to overturn his decision." *Misco, Inc.*, 484 U.S. at 38. The MLBPA has conceded that the award does draw its essence from the collective bargaining agreement.

A. The exception allowing a court to vacate an arbitration award is far too narrow to apply here.

The public policy exception is narrow and implicated only "when enforcement of the award compels one of the parties to take action which *directly* conflicts with public policy." *Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17,* 531 U.S. 57, 63 (2000). To qualify for the exception, the arbitrator's award "must violate 'an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests.'" *Id.* at 62-63. This Court has been firm in its requirements for an explicit, well-defined, and dominant public policy requirement. This Court still upheld an arbitration award calling for the reinstatement of the worker found to be operating heavy machinery while using drugs. *Misco, Inc.*, 484 U.S. at 44. "Although certainly such a judgment is firmly rooted in common sense, we explicitly held in *W. R. Grace* [*& Co. v. Local Union 759*, 461 U.S. 757 (1983)] that a formulation of public policy based only on 'general considerations of supposed public interests' is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective-bargaining agreement." *Id.*

B. The MLB created no fiduciary duty to disclose through the collective bargaining agreement, the availability of the MLB Supplement Hotline, or any other avenue.

Notwithstanding the MLBPA's argument that the MLB breached its fiduciary duty to the players for failure to disclose since the MLB Supplement Hotline did not issue specific warnings about the potential for SpeedShot to cause positive test results for clomiphene, the MLB in fact had no such duty.

The Court of Appeals for the Fourteenth Circuit's reasoning regarding fiduciary duties from a failure to disclose is mere speculation and not strong enough pass muster under the narrow standard for vacating awards of an arbitrator for reasons of public policy. The case law MLBPA presents to attempt and fashion an explicit, well-defined, and dominate public policy which the awards violate are loose and not extensive enough to pass for the public policy of New York. Even if MLBPA could articulate a public policy for breach of fiduciary duty from non-disclosure under New York Law, their claims for non-disclosure are because players were given a general warning about an entire class of supplements as opposed to a specific warning about a specific product in that class. This is well short of establishing that upholding the awards will require a party "to take action which *directly* conflicts with public policy." *Eastern Associated Coal Corp.,* 531 U.S. at 63. Here the general warnings were not false or misleading, nor did the warnings omit a material element as in the cases the MLBPA cites for establishing this public policy.

Similar to the MLBPA's claim, a hotline service for banned substances in *Walton-Floyd v. United States Olympic Comm.* was made available for the athletes to use to check the status of banned substances. 965 S.W.2d 35 (Tex. Ct. App. – Houston [1st Dist.] 1998). Walton-Floyd called the hotline to check the status of a particular supplement and received information that it was not on the list of banned substances. *Id.* The hotline gave other assurances about the use of

the supplement. *Id.* Despite all this available information, Walton-Floyd failed a drug test sparking his cause of action. *Id.* The court ruled that simply providing a hotline for the athletes to check the list of banned substances did not by itself create a fiduciary duty to the players to disclose under Texas state law. *Id.*

The MLBPA inappropriately broadens the holding in *Callahan v. Callahan* to apply to the case at bar. 127 A.D.2d 298 (N.Y. App. Div. 1987). In *Callahan*, the court established that a "duty to disclose may arise where a fiduciary relationship or confidential relationship existed or where the party has superior knowledge not available to the other." *Id*. at 300. However the court applied this to a situation where a divorce attorney made false statements to one spouse client about the value of a piece of material property in order to provide benefit to the other spouse client. *Id.* This is distinct from the controversy presently between MLBPA and MLB. Unlike the attorney in *Callahan* Dr. Lawson did not make statements that were false, misleading, or with a material omission. The warnings were true statements, albeit general, that if followed would have successfully protected the player for liability.

C. The MLBPA defines no valid public policy that the arbitration awards allegedly violate.

The MLBPA also improperly claims that the arbitration awards violate public policy by condoning action that threatened the health and safety of the players. This argument, just as the ones before it, holds little muster.

Upholding the suspension does not violate public policy because it does not condone activity that threatens players' health and safety. As stated previously, this public policy exception is extremely narrow and only intended to be satisfied in the most extreme situations and violations of positive law. It was not intended to be satisfied because MLB issued general, rather than specific, warnings about energy boosters. This does not directly conflict with the

health and safety public policy of vacated awards which required employers to put previously-intoxicated pilots back at the controls of a commercial passenger plane. *See Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l,* 861 F.2d 665, 674 (11th Cir. 1988). Neither does it directly conflict with the health and safety public policy that required nuclear workers to be put back on the job after violating federal safety regulations. *See Iowa Elec. Light & Power Co. v. Local Union 204 of Int'l Bhd. of Elec. Workers (AFL-CIO),* 834 F.2d 1424, 1428 (8th Cir. 1987).

This award does not violate public policy for breach of fiduciary duty for failure to disclose or for threatening the health and safety of the players. A player who heeded the general warnings and avoided the entire class of energy boosters would have failed a drug test and would not have been faced with suspension. Wilson willfully chose to not pay attention to those warnings and instead took SpeedShot at his own risk, knowing that he was ultimately responsible for what he put in his body. His representatives in the MLBPA collectively bargained for a drug testing policy which imposes strict liability on the players for this very reason. There is no public policy that is violated by imposing a fifteen-day suspension pursuant to a collectively bargained for agreement which specifically calls for strict liability on the part of the players. The MLB and the MLBPA agreed that an arbitrator shall resolve these disciplinary issues pursuant to the collective bargaining agreement and now the MLBPA is trying to attack the agreement because of the disagreement with the arbitrator's decision. Allowing the MLBPA use the courts to attack an award by attempting to create public policy violations defeats the very purpose of arbitration proceedings. Therefore, the award should be upheld.

CONCLUSION

For these reasons, the decision of the United States Court of Appeals for the Fourteenth Circuit holding that Wilson's DATWA claim is not preempted by Section 301 of the LMRA and vacating the arbitration award because it violates public policy should be reversed, the MLB's motion for summary judgment should be granted, and the fifteen-game suspension should be reinstated.

Respectfully submitted,

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