

## **QUESTIONS PRESENTED FOR REVIEW**

- 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*.

## STATEMENT OF THE CASE

### **A. Factual Background**

Mr. Kevin Wilson is an employee of the Minnesota Twins, L.L.C., which is not a party in this case, and a member of the Major League Baseball Players Association (“MLBPA”). In 2007, Major League Baseball (“MLB” or “Petitioner”) and Kevin Wilson, through his representative union, the MLBPA (collectively, “Respondents”), entered into a Collective Bargaining Agreement (the “CBA”) which incorporated the MLB Policy on Anabolic Steroids and Related Substances (the “Policy”). The Policy prohibits MLB players from using numerous “Prohibited Substances,” including performance enhancing drugs and “Other Anti-estrogens, including Clomiphene, Cyclophenil, and Fulvestrant.” The Policy makes clear that “players are responsible for what is in their bodies,” and “a positive test result will not be excused because it does not result from an intentional use of a Prohibited Substance.”

The Policy, which charges the Commissioner with enforcement, outlines disciplinary action for players with confirmed positive test results. The Policy subjects first-time offenders to a minimum 15-game suspension, but not more than a 25-game suspension. Further, the Policy provides that players may appeal their disciplinary action “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 outlines an arbitration process for review of any action taken under the Policy; a neutral arbitrator makes the decision which constitutes “the full, final, and complete disposition of the appeal and will be binding on all parties.”

Dr. John Larson, a licensed physician, serves as the Independent Administrator of the Policy. Dr. Larson implements the terms of the Policy, along with Dr. Ray Finkle, the “Consulting Toxicologist.” Neither Larson nor Finkle have an affiliation with the

Commissioner's office or any MLB club. More specifically, Dr. Larson's duties include overseeing the drug-testing procedures under the Policy, reporting any positive test results to the Commissioner for discipline, and providing education for players regarding the Policy's implementation.

Players may contact the "MLB Supplement Hotline" (the "Hotline") which offers "confidential and accurate information about these products." The Hotline provides MLB coaches, players, and trainers with a chance to inquire and obtain information about the relation of supplements to the Policy. However, the memorandum announcing the Policy cautions players "[y]ou 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, contained a prohibited substance contained in the Policy, Clomiphene. SpeedShot did not list Clomiphene as an ingredient. Dr. Larson informed Dr. Finkle of the possible connection between positive results for Clomiphene and SpeedShot, who turned to David Klein, Director of the Sports Medicine Research Testing Laboratory, to analyze the composition of SpeedShot. Mr. Klein discovered that SpeedShot did in fact contain Clomiphene, and he emailed the results of his examination to Larson and Finkle, who subsequently notified Andrew Birch, Vice President of Law and Labor Policy for the MLB, of this finding. Although the lab director suggested that the MLB report the information about SpeedShot to the Food and Drug Administration, Birch and Larson opted to handle the matter in-house instead.

The MLB notified the MLBPA of a new ban which prohibited teams and players from doing business with "Mega Energy Products, which distributes SpeedShot." Pursuant to the MLB's request, the MLBPA informed all players, through their agents, that the company that

“distributes SpeedShot has been added to the list of prohibited energy-boosting supplement companies,” and, consequently, “players are prohibited from endorsing any of their products.” To reiterate the importance of the message, 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 energy.” Once again, Dr. Larson stressed the strict liability rule associated with consuming a banned substance. Dr. Larson opted for a blanket warning about the potential ingredients in all energy supplements as opposed to a specific mention that SpeedShot contained a banned substance.

Despite multiple warnings from the MLB to refrain from taking energy-boosting supplements, Kevin Wilson took SpeedShot on the morning of a scheduled preseason training camp scrimmage. Pursuant to the procedures outlined in the Policy, the MLB tested Wilson. Wilson tested positive for Clomiphene, and as required under the Policy, the MLB suspended him for the minimum period of fifteen games for consuming a prohibited substance. Four other players also tested positive for Clomiphene and received the same suspension. Wilson, the four additional players, and the MLBPA appealed the suspensions to an independent arbitrator.

During the arbitration proceedings, the players acknowledged that they knew of the warning regarding energy boosters, the Hotline, and the Policy’s strict liability rule that each player bears responsibility for what he consumes. However, the players argued that the MLB should excuse the positive results because Dr. Larson and the league knew that at least some SpeedShot boosters contained Clomiphene and failed to specifically disclose this information. They went on to claim that the Policy created a fiduciary duty that required the MLB to give a more particularized warning about SpeedShot since the product contained a substance included on the Policy’s prohibited list. Ultimately, the arbitrator upheld the suspensions because “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.”

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”) and seeking an injunction against the arbitration award. The state court granted Wilson a temporary restraining order barring his suspension but failed to provide the same remedy to the other suspended players who could not obtain protection from Minnesota’s employment laws since they played for teams outside the state. The MLB removed the case to federal court, where it was combined with an action brought by the MLBPA seeking to vacate the arbitration awards under the Labor Management Relations Act (the “LMRA”).

## **B. Procedural History**

Upon determination that Wilson and the MLBPA’s claims must fail on both counts, the United States District Court for the Southern District of Tulania held for the MLB. The United States Court of Appeals for the Fourteenth Circuit reversed the judgment of the district court.

## SUMMARY OF THE ARGUMENT

Section 301 of the LMRA preempts Wilson's DATWA claim because the DATWA claims are inextricably intertwined with an interpretation of the CBA. DATWA mandates that the court interprets and analyzes the CBA before granting relief. Thus, Wilson's DATWA claim is predicated upon the MLB's enforcement of the CBA. Wilson alleged that the MLB violated DATWA by failing to comply with mandatory state-law requirements. However, the MLB acted pursuant to a collectively bargained-for policy, and if the MLB did not enforce the CBA, Wilson could not assert a DATWA claim. The relatedness of the claims mandates § 301 preemption.

In addition to Supreme Court precedent which compels application of § 301 preemption, public policy supports the MLB's position. Although states have the constitutional right to regulate conduct within their borders, Minnesota's statute overreaches by effectively controlling the team's performance in competitions wholly outside of the state. DATWA threatens the necessarily uniform drug-testing policies that the players have already agreed to through their bargaining representatives. If the Court allows the decision by the Fourteenth Circuit to stand, other states will likely follow suit in adopting similar policies in order to restore competitive balance within the game. This type of legislation threatens to fragment the league on the basis of state lines, which Congress intended to protect against in adopting § 301.

The arbitrator's award was not in violation of public policy and should not have been overturned. The MLB's Policy directs Dr. Larson to provide education to the players regarding the Policy's implementation. However, the CBA does not require Dr. Larson to specifically disclose every supplement that contains a banned substance. Dr. Larson fulfilled his duties under the MLB's CBA by warning the players generally about the dangers of energy-boosting supplements, and therefore, the Court should uphold the decision of the neutral arbitrator.

## ARGUMENT

### **I. THE COURT OF APPEALS INCORRECTLY 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 § 301 OF THE LMRA.**

Section 301 of the LMRA expressly requires that “a suit in state court alleging a violation of a provision of a labor contract *must* be brought under § 301 and be resolved by reference to federal law.” *Allis-Chambers v. Lueck*, 471 U.S. 202, 210 (1985). Furthermore, “[where] resolution of a state law claim is substantially dependent upon analysis of the terms of an agreement made between the parties of a labor contract, that claim *must* either be treated as a § 301 claim . . . or dismissed as preempted by federal labor-contract law.” *Id.* at 220. The *Allis-Chambers* decision provides support to establish that § 301’s preemptive power extends to any state law claim that is “inextricably intertwined with consideration of the terms of the labor contract.” *Id.* at 213. Wilson’s DATWA claims are substantially intertwined with an interpretation of the CBA, thus supporting the District Court’s finding of preemption.

In addition to the directive provided under § 301 of the LMRA, DATWA supports preemption by expressly providing that the terms of the Act “shall not be construed to limit the parties to a CBA 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.” Minn. Stat. § 181.955(1). Thus, the plain language of the statute permits the MLB and the MLBPA to collectively bargain for a policy outlining drug and alcohol rules and prohibitions so long as the minimum standards of DATWA are satisfied. As such, in order to resolve Wilson’s DATWA claims, a court must look to the CBA to determine if the agreed-upon policy meets the minimum requirements set forth in the state statute.

Because the MLB failed to cite to a specific provision requiring interpretation, the Court of Appeals held that the CBA did not preempt Wilson's DATWA claims. However, the court failed to recognize that the underlying DATWA claim is predicated upon an interpretation of the provisions of the CBA. Wilson asserted that the Policy incorporated in the CBA violated the requirements imposed on Minnesota employers under DATWA. In order to determine whether a violation of DATWA occurred, the Court must analyze and interpret the provisions of the CBA and the Policy to establish whether a state-law violation actually occurred.

For preemption to apply, the court must determine whether one can enforce the requirements under DATWA without any reference to the CBA. *Trustees of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 330 (8th Cir. 2006). The Court of Appeals incorrectly assumed that the DATWA claims existed independently from the Policy under the CBA. In order for a DATWA claim to arise, the MLB must have sought to enforce the Policy provisions under the CBA. The Policy establishes a list of "prohibited substances" and provides that use of such substances violates the players' contractual duties under the CBA. The Policy also sets forth the procedures for testing, the appeal process, as well as guidelines for the review of a positive test. Wilson filed suit against the MLB alleging its failure to comply with the requirements under DATWA. However, but-for the Policy under the CBA specifically addressing substance abuse, Wilson would not have asserted a DATWA claim. The rights and obligations that the Policy creates are an essential part of the DATWA claim *only* because of the MLB's administration and enforcement of the collectively bargained-for plan.

The Court of Appeals further held that a court would have no reason to consult the Policy in order to resolve Wilson's DATWA claim; rather, a court would merely be required to compare the procedures employed by the MLB to establish whether they were inconsistent with the

requirements set forth under DATWA. However, the Court of Appeals failed to recognize that certain terms within the CBA and Policy need interpreted to ensure DATWA compliance under the CBA; a mere comparison fails to provide the same assurances.

In *Holmes v. National Football League*, 939 F. Supp. 517 (N.D. Tex., 1996), Holmes, a former professional football player for the Dallas Cowboys, sued the NFL alleging several state law claims, including invasion of privacy, fraudulent inducement, intentional infliction of emotional distress, and breach of implied covenant of good faith and fair dealing, all related to the administration, use, and consequences of the drug test and drug program. The court held that Holmes' state law claims were in fact preempted by § 301 of the LMRA. *Id.* at 528. The court based this decision on the fact that Holmes' claims are inextricably intertwined, and dependent upon, the terms of the Drug Program, as outlined in the CBA. *Id.* at 527.

The court went on to state that determination of whether interpretation of the CBA is necessary requires analysis of the elements of the state law claim. For example, Holmes claimed he was defrauded into taking the drug test. *Holmes*, 939 F. Supp. at 527. However, in order to establish that Holmes was in fact defrauded, the court must analyze the CBA to establish whether the NFL fraudulently induced Holmes, or whether the conduct was permissible. *Id.* Therefore, since establishment of the underlying state law claims relied on an analysis of the CBA, § 301 mandated preemption of Holmes' state law claims.

The issue in *Holmes* is similar to the present situation involving Wilson. The District Court provided several instances where the CBA requires interpretation and analysis to determine whether the threshold requirements of DATWA are satisfied. A court is required to assess whether the testing procedures under the Policy constitute a form of discipline. Minn. Stat. § 181.953(10). Furthermore, as mandated under DATWA, the court must analyze the Policy's

procedures in challenging a positive test result to ensure Wilson exhausted his claims. Minn. Stat. § 181.956(1). As a result, a court should examine the entire Policy under the CBA to meaningfully compare the provisions of the Policy with the provisions of DATWA. This careful analysis renders the CBA and DATWA wholly dependent upon one another.

The exception provided for under DATWA, which permits collectively bargained-for policies consistent with its guidelines, further establishes the interconnection between the DATWA claim and the CBA. DATWA makes random drug testing illegal except in cases involving professional athletes, where the random tests are consistent with requirements set forth under the CBA. Minn. Stat. § 181.951(4). Thus, DATWA requires Minnesota state courts to interpret the parties' collectively bargained-for policies and procedures to ensure those obligations are consistent with the requirements established under DATWA.

In *Zupanich v. U.S. Steel Corp.*, the court held that the claim filed under the Minnesota Fair Labor Standards Act was preempted by § 301 because the plain language of the statute required an interpretation of the CBA, thus rendering such a claim “inextricably intertwined with the CBA.” 2009 U.S. Dist. LEXIS 44504, at \*8-9. Likewise, to uphold Wilson’s DATWA claim, the court shall engage in an analysis of the CBA to ensure the requirements under the CBA meet Minnesota’s state law requirements. Therefore, since the CBA and DATWA are inextricably intertwined in a manner similar to the relationship in *Zupanich*, § 301 of the LMRA should preempt DATWA.

**II. ALLOWING SELECT PLAYERS TO RELY ON MORE FAVORABLE STATE REGULATIONS DIRECTLY CONTRAVENES PUBLIC POLICY WHICH FAVORS THE SANCTITY OF COLLECTIVE BARGAINING AGREEMENTS, PARTICULARLY AS APPLIED TO PROFESSIONAL SPORTS’ LEAGUES.**

Federal labor-law principles dictate that players must adhere to the drug-testing policy mutually agreed upon by their representatives and the MLB. In addition to the Supreme Court

precedent compelling application of § 301 preemption in this case, public policy further supports the “interpretive uniformity and predictability” of collectively bargained-for agreements. *Twin City Bricklayers*, 450 F.3d at 334. While the Constitution promotes “the autonomy of the individual states within their respective spheres,” states cannot, either intentionally or otherwise, create laws in “which the practical effect of the regulation is to control conduct beyond the boundaries of the State.” *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989).

Because Wilson’s “career and professional advancement depends upon the operation of a nationwide league that allows him to play games in approximately twenty-five different states,” DATWA overreaches constitutional protections by effectively supplying Minnesota-based athletes with a distinct and unfair advantage in league competitions occurring *wholly outside of the State’s borders*. *Dist. Ct. Op.* at 12. Minnesota’s statute has the “impermissible territorial effect” of disrupting the competitive balance in other states where the team plays, so public policy mandates enforcement of the MLB’s collectively bargained-for drug policy over inconsistent state laws. *Healy*, 491 U.S. at 334.

Although “the LMRA certainly did not give employers and unions the power to displace any state regulatory laws they found inconvenient,” the collective bargaining agreement does not, and should not, equip certain players in Minnesota with the ability to violate the drug policy without repercussions while holding similarly-situated players strictly liable for any prohibited substances they consume. *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 695 n.9 (9th Cir. 2001)(en banc). Collective bargaining provides the proper forum to develop drug testing policies for professional athletes, and thus “employees” of professional teams should adhere to these mutually agreed-upon policies. The Minnesota legislature recognized the sanctity of the

collective bargaining process for professional sports organizations in carving out an exception for random drug testing, and thus the courts should apply the Policy to drug-testing disputes.

The Court should also consider “what effect would arise if not one, but many or every, State adopted similar legislation.” *Healy, 491 U.S. at 336*. The issue presented in this case is not limited to the sport of professional baseball. If the lower court’s decision stands, athletes in every sport can rely on DATWA and similar state legislation to circumvent the policies, to which they agreed to abide by, instituted within their respective leagues. To maintain competitive balance, teams and athletes in other states will likely begin to pressure their legislatures to adopt laws similar to Minnesota’s DATWA.

Professional sports leagues are unlike other multi-state employers, as “employees” of a team located in one state physically compete with “employees” of league franchises situated in another state. Thus, states will be inclined to pass laws aimed at preserving competitive balance within the league. Eventually, these laws will contribute to “[f]ragmentation of the league structure on the basis of state laws,” the very result that § 301 purports to protect against. *Partee v. San Diego Chargers Football Co.*, 668 P.2d 674, 678 (Cal. 1983).

Ultimately, to ensure the effectiveness of negotiated drug testing programs designed to protect players and the integrity of the game, these policies should apply uniformly to all players, regardless of the home state of the team. Holding otherwise will allow players to circumvent the very standards that they agreed to and manipulate the leagues’ drug-testing policies in order to gain a competitive edge. Neither party will benefit from this result, as inconsistent drug-testing policies can affect the health of the players and the integrity of the game that the CBA aims to preserve through carefully-crafted testing regimes.

**III. THE COURT OF APPEALS WAS INCORRECT 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 NOT IN VIOLATION OF PUBLIC POLICY.**

**A. On review, the arbitrator’s decision requires a high degree of deference.**

The Federal Arbitration Act states that a court is to set aside an arbitration award only if that award “was procured by fraud, corruption, or undue means,” or when “there was evident partiality in the arbitrator(s).” 9 U.S.C.A. §§ 10(a)(1)-(2) (2006). A 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). The court must afford the arbitrator “an extraordinary level of deference” and must confirm the award as long as “the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority.” *Stark v. Sandburg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 798 (8th Cir. 2004).

Therefore, this Court must decide whether the Policy as interpreted by the arbitrator “violates some explicit public policy” that is “well defined and dominant” and can be “ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.” *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983). The question to ask is whether the Policy itself violates public policy. *MidAm Energy Co. v. Int’l Bd. Of Elec. Workers Local 499*, 345 F.3d 616, 620 (8th Cir. 2003).

Given this high degree of deference to the arbitrator’s decision, in order to prevail on this claim, the MLBPA and Wilson must show (1) that a fiduciary duty exists, (2) that duty was breached, (3) that those fiduciary duties are explicit public policy, and (4) that the Policy as interpreted by the arbitrator violated that public policy by condoning a breach of fiduciary duties.

*Dist. Ct. Op.* at 16. The MLBPA did not meet this incredibly high burden of proof, and therefore, this Court should reverse the decision by the Court of Appeals and uphold the arbitrator's decision.

**B. Case law and public policy considerations affirm that the MLB and Dr. Larson fulfilled the fiduciary duty owed to players by issuing repeated warning of the dangers of energy-boosting supplements.**

A fiduciary relationship exists between two persons when one of them is under a duty to act or 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). In order to determine if a fiduciary duty exists, New York law, which governs the issue under the choice-of-law provision in the CBA, directs courts to conduct a fact-specific inquiry of “whether a party reposed confidence in another and reasonably relied on the other’s superior expertise or knowledge.” *Id.* Under this standard, Dr. Larson, who is charged with implementing the Policy and educating members, likely owes a fiduciary duty to the teams and their players.

The MLBPA attempts to argue that the MLB and Dr. Larson breached their fiduciary duty because Dr. Larson did not issue a specific warning regarding SpeedShot’s ingredients, which contained a banned substance. However, according to the CBA, Dr. Larson has the duty to provide education to the players regarding the Policy’s implementation. Dr. Larson did not assume responsibility to specifically warn about every supplement that contains a banned substance – he merely has the duty to provide education to the players. The CBA warns players, who are also informed via several other mediums, including the memorandum written by Dr. Larson himself, that the Policy contains a strict liability rule that “if you test positive for a banned substance this constitutes a positive test, regardless of intent to do so.”

Dr. Larson fulfilled his duty to provide education to the players by warning them that “Mega Energy Products, which distributes SpeedShot” became 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 MLBPA then informed its 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.” Dr. Larson also sent a memorandum to players discussing the dangers of energy-boosting supplements, as well as reiterating the strict liability rule of the Policy.

Despite his lack of a more specific disclosure that SpeedShot contained a banned substance, Dr. Larson fulfilled his fiduciary duty by informing the players of the danger of energy-boosting supplements. Dr. Larson testified that he believed all energy supplements, not just SpeedShot, were dangerous to players, and as a result, he felt a generalized warning about energy supplements was more appropriate than a specific warning only addressing SpeedShot. The Policy does not create a fiduciary duty that requires the MLB to give a more particularized warning about SpeedShot once the booster was found to contain Clomiphene, a banned substance. The players are well aware that the Policy contains a strict liability rule, and if they violate the Policy, there is no recourse because of the strict liability rule.

Under the relevant case law on fiduciary duty, as outlined above, a fiduciary relationship likely exists between the MLB and the MLBPA. Pursuant to his duties under the CBA, Dr. Larson, does have the obligation to provide education to the players regarding the Policy’s implementation. However, his explicit duties to educate end there. Public policy considerations support the MLB’s position on this issue.

The District Court dismissed the Respondents' claims partly because they failed to specify the public policy that the MLB violated by not disclosing that SpeedShot contained a banned substance. The Court of Appeals attempted to overcome this hole in the evidence presented by the MLBPA by stating that relevant public policy "is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of public interests.'" *W.R. Grace & Co.*, 461 U.S. at 766 (1983). Courts have ordered arbitration awards to be vacated on public policy grounds where an award would sanction behavior that threatens health and safety. *Delta Air Lines, Inc. v. Air Line Pilots Ass'n Int'l*, 861 F.2d 665, 674 (11th Cir. 1988). However, contrary to what the Court of Appeals held, the arbitrator's decision did not threaten the players' health and safety.

The Court of Appeals incorrectly states that the award violates public policy because it sanctions the MLB's knowing and intentional breach of fiduciary duty and willful failure to disclose the fact that SpeedShot secretly contained a banned substance. The court goes on to state that the failed disclosure could potentially harm the players' health. Dr. Larson warned players of the dangers of energy-boosting supplements through repeated warnings and players were well-informed that SpeedShot was an energy booster. If the players were concerned about their health and safety, they should have heeded Dr. Larson's general warning about energy supplements and not taken SpeedShot in the first place, despite the lack of a specific warning.

The Court of Appeals attempts to further support its argument by pointing to testimony in which Dr. Larson stated that he decided not to disclose to MLB players the presence of the Clomiphene because he feared that MLB players might then come to expect that he would notify them about other harmful banned substances in energy-boosting supplements. This fear supports Dr. Larson's decision to not disclose. Dr. Larson has several duties as the independent

administrator of the Policy, and there are constantly new energy-boosting supplements entering the marketplace; there is no feasible way Dr. Larson could also assume the role of the FDA in testing new products for unlisted ingredients. Holding otherwise would create additional duties that Dr. Larson did not assume under the terms of the CBA.

As the District Court correctly noted, the MLBPA entered into a CBA with the MLB that does not contain the requirement that the MLB inform players specifically when any supplement is found to contain a banned substance. If the MLBPA wanted this requirement, the Union should have collectively bargained for such restrictions; however, because this is not the current requirement, the MLB did not violate public policy by failing to specifically disclose that SpeedShot contained a banned substance.

**C. Although the MLB instituted the Hotline to provide information to teams, the players are ultimately responsible for the substances they consume.**

The duty to disclose does not necessarily translate to the unlimited duty to disclose everything. In *Grandon v. Merrill Lynch & Co., Inc.*, 147 F.3d 184, 189 (2d. Cir. 1998), the court held that the duty to disclose generally 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. The court in *Callahan v. Callahan*, 127 A.D.2d 298, 300 (N.Y. App. Div. 1987), held that the duty to disclose may arise where a fiduciary or confidential relationship exists or where a party has superior knowledge not available to the other. Neither of these cases supports the Respondents' claims that there is a complete disclosure requirement when a fiduciary duty exists. Therefore, the terms of the CBA should determine the extent of disclosure necessary, and in this case, Dr. Larson was only required to educate the players, not police for FDA violations. As the District Court correctly notes, the MLB fulfilled their fiduciary duty by offering repeated, albeit generalized warnings against consuming energy supplements. Simply because Dr. Larson

and the MLB employ a Hotline does not mean that the hotline must disclose every supplement that contains a banned substance.

The players were repeatedly warned about the potential harmful effects of the energy supplements and that they are strictly liable for any positive test. They were given a generalized warning about energy supplements and should have heeded that warning. Just because the MLB took a precaution and implemented the Hotline, the MLB did not assume a duty of full disclosure.

### **CONCLUSION**

For the above-stated reasons, Petitioner respectfully requests that this Court reverse the decision of the Court of Appeals for the Fourteenth Circuit.