

Docket No. 09-214

In the
SUPREME COURT OF THE
UNITED STATES OF AMERICA

MAJOR LEAGUE BASEBALL,
Petitioner,

v.

KEVIN WILSON;
MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,
Respondent.

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

BRIEF FOR RESPONDENT

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Date Submitted: January 11, 2010

QUESTIONS PRESENTED

- I. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT A MAJOR LEAGUE BASEBALL PLAYER'S CLAIMS UNDER MINNESOTA'S DRUG AND ALCOHOL TESTING IN THE WORKPLACE ACT CHALLENGING A SUSPENSION UNDER A COLLECTIVELY BARGAINED FOR DRUG POLICY ARE NOT PREEMPTED BY SECTION 301 OF THE LABOR-MANAGEMENT RELATIONS ACT.

- II. WHETHER THE COURT OF APPEALS WAS CORRECT IN SETTING ASIDE AN ARBITRATOR'S AWARD SANCTIONING MAJOR LEAGUE BASEBALL'S REFUSAL TO ISSUE WARNINGS REGARDING THE PRESENCE OF A BANNED SUBSTANCE IN SPECIFIC PRODUCTS BECAUSE SUCH AN AWARD WAS IN VIOLATION OF PUBLIC POLICY.

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit is reported at *Wilson et al. v. Major League Baseball*, No. 09-2108, slip op. at 1-14 (14th Cir.) (“*Wilson II*”). The opinion of the United States District Court for the Southern District of Tullahoma is reported at *Wilson et al. v. Major League Baseball*, No. 09-AC-0213, slip op. at 1-20 (S.D. Tullahoma) (“*Wilson I*”).

STATUTORY PROVISIONS

The relevant portions of the following statutory provisions appear in the appendices following this brief: 29 U.S.C. § 185 (2006) and Minn. Stat. §§ 152.01, 181.950, 181.952, 181.953, 181.955 (2009).

JURISDICTION

This Court has jurisdiction to review the decision of the Fourteenth Circuit upon granting a petition for a writ of certiorari. 28 U.S.C. § 1254(1) (2006).

STANDARD OF REVIEW

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

STATEMENT OF THE CASE

I. Statement of Facts

Kevin Wilson, the Respondent, is a Major League Baseball player and a member of the Major League Baseball Players Association (the “MLBPA”), the other respondent in this case. *Wilson I*, No. 09-2108, slip op. at 1. Mr. Wilson is an employee in the state of Minnesota and of the Minnesota Twins, L.L.C., which is not a party to this case. *Id.* In 2007, the MLBPA and the Petitioner in this case, Major League Baseball (the “League” or the “MLB”), entered into a Collective Bargaining Agreement (the “CBA”). *Id.* The CBA incorporates the MLB Policy on Anabolic Steroids and Related Substances (the “Policy”). *Id.*

A. The Policy

The Policy penalizes players for using certain “Prohibited Substances.” *Id.* Clomiphene, a recovery drug commonly used by anabolic steroid users, is a “Prohibited Substance” under the Policy. *Id.* The Policy states that a player with a first-time confirmed positive test of Clomiphene (or any other “Prohibited Substance”) is subject to at least a fifteen-game suspension (but no more than a twenty-five games). *Id.* at 1-2. Positive tests that are the result of unintentional use of a “Prohibited Substance” are not excused under the Policy’s terms.

Wilson I, No. 09-2108, slip op. at 1. The Policy also creates an appeal process for players and provides that a neutral arbitrator will review any suspensions under the policy. *Id.* at 2.

While one purpose of the Policy is to preserve “the fairness an integrity of athletic competition,” the Policy is also designed to inform MLB players about health and safety issues. *Id.* at 8. Dr. John Larson, a licensed physician, directs the Policy and serves as the League-appointed Independent Administrator. *Id.* at 2. Dr. Larson, with help from the Consulting Toxicologist Dr. Ray Finkle, is tasked with providing education to the players regarding the Policy. *Id.* In addition, the Policy created a confidential MLB Supplement Hotline (the “Hotline”) that allows MLB players to obtain “confidential and accurate information about these products, including, effects, and adverse reactions.” *Id.*

Given the health risks associated with certain substances, the Policy specifically states that particular “questions or concerns about the ingredients in supplements” should be directed to the authoritative source – Dr. Larson. *Wilson II*, No. 09-2108, slip op. at 12. Additionally, and at the direction of the League as the Policy’s Independent Administrator, Dr. Larson promised to “continue to provide MLB Players with information on the [the subject of prohibited substances] throughout the year.” *Id.*

B. SpeedShot

In 2007, the League learned that some bottles of SpeedShot, an energy-boosting supplement, contained Clomiphene. *Wilson I*, No. 09-AC-0213, slip op. at 3. The SpeedShot label, however, does not disclose Clomiphene as one of the product’s ingredients. *Id.* Dr. Larson and Dr. Finkle, upon learning of a possible connection between SpeedShot and Clomiphene, used a sports medicine testing laboratory to confirm that SpeedShot did in fact contain Clomiphene. *Id.* The League, through its Vice President of Law and Labor Policy

Andrew Birch, was informed about the presence of Clomiphene in SpeedShot. *Wilson I*, No. 09-AC-0213, slip op. at 3. Despite the lab director's request that the League report the information about SpeedShot's contents to the FDA, Dr. Larson and the League refused to do so. *Id.*

The League, aware of the Clomiphene presence in SpeedShot, only notified the MLBPA that Mega Energy Products, the distributor of SpeedShot, had become a banned company. *Id.* While the League warned its players that they could not do business with Mega Energy Products, it never specifically identified SpeedShot as containing the banned substance Clomiphene. *Id.* at 3-4.

II. Procedural History

This action originated in 2007 when the League, in accordance with its Policy regarding use of prohibited substances, suspended Mr. Wilson and four other players¹ for fifteen games after testing positive for Clomiphene. *Id.* Mr. Wilson, the four additional players, and the MLBPA appealed the suspensions to an independent and neutral arbitrator pursuant to the terms of the Policy. *Id.*

During the arbitration hearing, Mr. Wilson and the four other players argued that despite their positive tests, their suspensions should be vacated because the Policy created a fiduciary duty that required the MLB to give a particularized warning about SpeedShot once the League and the Policy administrators determined the product contained Clomiphene. *Id.* After a full hearing, however, the arbitrator upheld Mr. Wilson and the four other players' suspensions because of the Policy's strict liability rule. *Id.* at 5.

¹ The additional players that tested positive for Clomiphene are: 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. *Wilson I*, No. 09-2108, slip op. at 4.

Mr. Wilson next filed suit against the League, Dr. Larson, Dr. Ray Finkle, and Andrew Birch in Minnesota state court. *Wilson I*, No. 09-AC-0213, slip op. at 5. Mr. Wilson complained that the Policy violated Minnesota’s Drug and Alcohol Testing in the Workplace Act (“DATWA”) and sought both damages and an injunction against enforcement of the arbitration award. *Id.* The state court granted Mr. Wilson’s temporary restraining order barring his suspension.² *Id.*

The League responded by removing this case to the United States District Court for the Southern District of Tullahoma. The district court also consolidated Mr. Wilson’s action with an action brought by the MLBPA seeking to vacate the arbitrator’s suspensions. *Id.* The district court granted the League’s motion for summary judgment upholding the arbitrator’s suspensions, concluding that 1) the Labor-Management Relations Act (“LMRA”) preempted Mr. Wilson’s DATWA claim and 2) the League, despite knowing SpeedShot contained a banned substance, did not have a duty to disclose this information to its players. *Wilson II*, No. 09-2108, slip op. at 3.

Mr. Wilson and the four other suspended players appealed the district court’s order granting of summary judgment as to whether LMRA § 301 preempts Minnesota’s statutory protections. *Id.* Additionally, Mr. Wilson and the MLBPA appealed the district court’s order granting summary judgment on the issue of whether the League and Dr. Larson breached a fiduciary duty. *Id.* The Fourteenth Circuit reversed the district court’s judgment on both issues. *Id.* at 14. In reversing the district court, the Fourteenth Circuit held that LMRA § 301 did not preempt Mr. Wilson’s DATWA claim under Minnesota law. *Id.* at 4. The Fourteenth Circuit also held that the Arbitrator’s award violated public policy because it sanctioned and encouraged

² The injunction only applied to Mr. Wilson, as the four other players suspended by the League were not employed in the state of Minnesota. *Wilson I*, No. 09-2108, slip op. at 5.

breaches of a fiduciary duty to protect the safety of its players imposed on the League and Dr. Larson . *Wilson II*, No. 09-2108, slip op. at 14.

In 2010, this Court granted certiorari to review of the Fourteenth Circuit's holding 1) that the LMRA did not preempt Mr. Wilson's DATWA claim and 2) that the arbitrator's award, because it violated public policy, must be set aside.

SUMMARY OF THE ARGUMENT

This Honorable Court should **AFFIRM** the decision of the United States Court of Appeals for the Fourteenth Circuit and hold Mr. Wilson's claims under DATWA are not preempted by LMRA § 301. Mr. Wilson's claims under DATWA do not require a court to interpret or analyze the CBA between the League and the MLBPA. Moreover, the preemptive effect of LMRA § 301 is limited and should not be read to subvert the impact of state regulatory law.

Additionally, this Honorable Court should **AFFIRM** the decision of the United States Court of Appeals for the Fourteenth Circuit to set aside the arbitrator's suspensions and hold that the League breached a fiduciary duty to its players and the MLBPA. Here, a fiduciary relationship existed because the players reasonably relied on the League's superior exercise of knowledge. Furthermore, the League breached its fiduciary duty by failing to provide vital information to its players about the prohibited substance contained in SpeedShot. Upholding the arbitrator's suspensions would violate explicit public policy because it encourages the League to breach its fiduciary duty and, in effect, harms the health and safety of its players.

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.

LMRA § 301 applies to “[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce[.]” 29 U.S.C. § 185 (2006). The substantive law for claims under LMRA § 301 “is federal law, which the courts must fashion from the policy of . . . national labor laws.” *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957). Furthermore, LMRA § 301 has a preemptive effect and “substantive principles of federal labor law must be paramount in the area covered by the statute.” *Local 174, Teamsters v. Lucas Flower Co.*, 369 U.S. 95, 103 (1962). The preemptive effect of LMRA § 301 extends “beyond suits alleging contract violations” and to “questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement[.]” *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-11 (1985).

This Court recognizes that although LMRA § 301 preempts state law in certain instances, “not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law.” *Id.* at 211. This Court further emphasizes that “it would be inconsistent with congressional intent under [LMRA § 301] to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.” *Id.* at 212.

A. Claims Under Minnesota’s DATWA Do Not Require a Court to Interpret or Analyze the CBA.

This Court held that LMRA § 301 preempts state law claims that require the interpretation and application of a collective-bargaining agreement. *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 368-69 (1990). A state law claim must necessarily *depend* on a

collective-bargaining agreement in order to be preempted under LMRA § 301. *Lingle v. Norge*, 486 U.S. 399, 407 (1988) (emphasis added). A cause of action may be preempted under LMRA § 301 even if the complaint does not expressly include a federal cause of action if the claim is “substantially dependent” upon analysis of a collective-bargaining agreement. *Allis-Chalmers Corp.*, 471 U.S. at 214. However, if “resolution of the state-law claim does not require construing the collective-bargaining agreement” then it is independent. *Allis-Chalmers Corp.*, 471 U.S. at 220. Where “state rules . . . proscribe conduct or establish rights and obligations independent of a labor contract” it will fall outside the preemptive scope of LMRA § 301. *Anderson v. Ford Motor Co.*, 803 F.2d 953, 956 (8th Cir. 1986).

This Court acknowledged that an employee’s state law claim is not preempted when the employee is covered by a collective-bargaining agreement. *Allis-Chalmers Corp.*, 471 U.S. at 220. In addition, “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[.]” *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994). Thus, a state law claim is preempted only if “[t]he [collective-bargaining agreement] provision at issue . . . sets forth rights” upon which the claim is based or if the state-law claim requires an interpretation of the collective-bargaining agreement. *Bogan v. General Motors Corp.*, 500 F.3d 828, 832 (8th Cir. 2007).

1. Mr. Wilson’s claims arising under DATWA are not substantially dependent upon the CBA.

This Court has recognized that preemption is mandated when resolution of a state law claim is “substantially dependant” upon analysis of the terms of a collective-bargaining agreement. *Allis-Chalmers Corp.*, 471 U.S. at 213. In *Allis-Chalmers Corp.*, the plaintiff attempted to assert a state law cause of action for bad faith in handling his disability insurance claim. *Id.* at 206. This Court found that although the bad-faith allegation was not contained in

the contract, the bad-faith cause of action required a finding of an implied right. *Allis-Chalmers Corp.*, 471 U.S. at 215. The determination of the implied right had to be made under the precepts of federal contract interpretation. *Id.* This Court’s primary concern was that permitting the state to interpret a collective-bargaining agreement could lead to varying interpretations between states and subvert the “congressional goal of a unified body of labor-contract law.” *Id.* at 220. Thus, “[t]he parties would be uncertain as to what they were binding themselves to when they agreed” to a collective-bargaining agreement if states could interpret the agreement differently. *Id.* at 211.

Like the plaintiff in *Allis-Chalmers Corp.*, Mr. Wilson is a party to a collective-bargaining agreement. However, Mr. Wilson’s situation is different because a state court does not have to find an implied right under the CBA to determine if there is a violation of DATWA. Instead, DATWA establishes its own standards and minimum requirements for a drug and alcohol testing policy. *Minn. Stat.* § 181.952 subdiv. 1(1)-(6). DATWA also sets forth standards that testing laboratories must meet and definitions for drugs and controlled substances. *Id.* §§ 152.01, 181.950, 181.953 subdiv.1. Unlike the claims set forth in *Allis-Chalmers Corp.*, a claim under DATWA does not require the court to find an implied right under the CBA. Rather, DATWA creates independent standards that are entirely separate from the CBA. Therefore, the concern that this Court articulated in *Allis-Chalmers Corp.* regarding varying interpretations of a collective-bargaining agreement between states is not present in this case. The standards set forth under DATWA do not involve an implied claim arising under the CBA. Furthermore, a party to the CBA will know precisely how that agreement will be construed even though there are separate requirements under DATWA.

2. Resolution of Mr. Wilson's DATWA claims does not require a court to interpret the CBA.

To have preemptive effect under LMRA § 301, a state law claim must require a court to construe a collective-bargaining agreement. *Allis-Chalmers Corp.*, 471 U.S. at 220. The Eighth Circuit has recognized that, unlike a claim for bad faith, certain state law claims may not require interpretation of a collective-bargaining agreement. *Anderson*, 803 F.2d at 957. In *Anderson*, the plaintiffs, who were part of a collective-bargaining agreement, brought a state law action for fraudulent misrepresentation relating to Ford's contention that it hired plaintiffs as permanent employees. *Id.* at 954-55. The Eighth Circuit held that unlike the claim for bad faith in *Allis-Chalmers Corp.*, the claim for fraud did not "derive from nor depend upon an underlying contract." *Id.* at 957.

Like the plaintiffs in *Anderson*, Mr. Wilson's claim under state law does not require a court to interpret a collective-bargaining agreement. Unlike the claim in *Anderson*, Mr. Wilson's DATWA claim arises under a state statute. The same reasoning used by the Eighth Circuit is therefore applicable here. Mr. Wilson's claim under DATWA provides an independent cause of action and does not require interpretation of the CBA. DATWA does purport to require drug testing under collective-bargaining agreements to be as protective as DATWA's standards. *Minn. Stat.* § 181.955 subdiv. 1. Although DATWA requires a drug and alcohol testing policy under a collective-bargaining agreement to "meet or exceed, and . . . not otherwise conflict with, the minimum standards and requirements for employee protection[,]" there is no limit upon an employee's right to bring a cause of action separate from a collective-bargaining agreement. *Id.* For instance, a plaintiff will only have a claim under a collective-bargaining agreement when the collective-bargaining agreement provides greater protection than DATWA. Here, Mr. Wilson can bring a claim under DATWA without reference to *Minn. Stat.* § 181.955. If Mr. Wilson had

filed a claim under DATWA for the failure of the CBA to comply with *Minn. Stat.* § 181.955, then, and only then, would a preemption argument exist. However, Mr. Wilson’s claim under DATWA, as noted below, does not require a court to interpret the CBA or examine *Minn. Stat.* § 181.955 in any manner. Mr. Wilson’s cause of action, in its entirety, is based solely upon the League’s failure to comply with the minimum requirements of DATWA. *Minn. Stat.* § 181.952 subdiv. 1(1)-(6).

The United States District Court for the District of Minnesota recently dealt with a case involving a plaintiff that attempted to enforce the terms of a collective-bargaining agreement under DATWA. *Thompson v. Hibbing Taconite Holding Co.*, No. 08-868, 2008 U.S. Dist. LEXIS 87045, 2008 WL 4737442, at *4 (D. Minn. Oct. 24, 2008). In *Thompson*, the plaintiff alleged that the defendant “violated *its own* testing policy.” *Id.* at *12 (emphasis added). The district court held that “[w]hether Hibbing Taconite violated its own testing policies is a separate question from whether it satisfied the requirements set forth in DATWA, and requires interpretation of the CBA.” *Id.*

Unlike the plaintiff in *Thompson*, Mr. Wilson does not allege that the League violated its own testing policy. Rather, Mr. Wilson’s allegation involves the League’s failure to meet the standards set forth under DATWA. Thus the claim by Mr. Wilson under DATWA is separate from whether the League met its own requirements under the Policy and the claim is not preempted.

3. Mere factual inquiry into the League’s conduct does not require interpretation of the CBA.

This Court emphasized that a factual inquiry into the conduct of an employee and conduct of an employer does not require interpretation of a collective-bargaining agreement. *Lingle*, 486 U.S. at 407-10. In *Lingle*, the employee filed a grievance pursuant to a collective-

bargaining agreement for improper discharge *and* filed a state law action for exercising her rights under Illinois workers' compensation laws. *Lingle*, 486 U.S. at 407. This Court held that the state law cause of action was independent and did not require construing the collective-bargaining agreement. *Id.* Furthermore, this Court emphasized:

even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is independent of the agreement for § 301 preemption purposes.

Id. at 409-10 (internal quotations omitted).

Like the employee in *Lingle*, Mr. Wilson has two venues of redress and, accordingly, a state court need only make a factual inquiry to determine whether the League violated DATWA. Mr. Wilson can (1) appeal the suspension to an arbitrator under the terms of the CBA and, (2) bring a cause of action in Minnesota state court because the actions taken pursuant to the Policy do not comply with DATWA. While the arbitrator has already upheld Mr. Wilson's suspension under the CBA, Mr. Wilson can still have a state court determine whether the League violated DATWA. Furthermore, like in *Lingle*, a state court may address the exact same set of facts as the arbitrator without preempting the claim under DATWA. Since the League has already stipulated that the CBA does not comply with the minimum testing standards of DATWA, damages and an injunction against enforcement of the arbitration award are appropriate.

B. LMRA Section 301 Should Not Be Read to Subvert State Regulatory Law Beneath Uniform Interpretation of Collective-Bargaining Agreements.

Although LMRA § 301 has a preemptive effect on an interpretation of a collective-bargaining agreement, the effect is limited. *See Allis Chalmers Corp.*, 471 U.S. at 220. This Court recognized that LMRA § 301 requires “state contract law [to] yield to the developing federal common law, lest common terms in bargaining agreements be given different and

potentially inconsistent interpretations in different jurisdictions.” *Livadas*, 512 U.S. at 122 (citing *Lucas Flour Co.*, 36 U.S. at 103-04). However, this Court emphasized that there is no indication “that Congress, in adopting § 301, wished to give substantial provisions of private agreements the force of federal law, ousting any inconsistent state regulation.” *Allis Chalmers Corp.*, 471 U.S. at 211-12. This Court reasoned that “[s]uch a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. *Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law.*” *Id.* at 212 (emphasis added). Thus, “nonnegotiable rights conferred on individual employees” by state law are not preempted. *Livadas*, 512 U.S. at 123.

1. The League’s interest in uniformity throughout a professional sport does not supplant Minnesota’s authority to confer rights upon its citizens.

The Tenth Circuit addressed the conflict between a policy under a collective-bargaining agreement and a substantive state right in *Karnes v. Boeing Co.*, 335 F.3d 1189 (10th Cir. 2003). In *Karnes*, the plaintiff argued that the defendant violated a state law requirement that a company’s anti-drug policy be uniformly applied. *Karnes*, 335 F.3d at 1193. The Tenth Circuit held that “the fact that the CBA incorporated [the defendant’s] anti-drug policy [was] irrelevant because [a party cannot] ‘contract for what is illegal under state law[.]’” *Id.* at 1194 (citing *Allis Chalmers Corp.*, 471 U.S. at 212).

Like the plaintiff in *Karnes*, Mr. Wilson has an established right grounded in Minnesota law under DATWA. Although the League may have an interest in maintaining uniformity in a professional sport, this does not give the League the ability to contractually remove Mr. Wilson’s established rights. Even if the League had a separate drug testing policy under the CBA, that policy cannot supersede the safeguards that have been established by Minnesota under DATWA.

Furthermore, this Court’s language in *Allis Chalmers Corp.* and *Livadas* clarifies that the reach of LMRA § 301 is limited and it does not displace state law protections. Thus, the League’s interests in uniformity do not preempt Minnesota’s right to provide independent substantive protections for state citizens.

2. The CBA cannot sanction illegal conduct under an independent Minnesota state law.

The Ninth Circuit addressed a conflict between a collective-bargaining agreement and California state law. *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 695-97 (9th Cir. 2001). In *Cramer*, the defendants, in violation of California privacy law, videotaped employees via a two-way mirror placed within a bathroom. *Id.* at 688. The Ninth Circuit, relying on this Court’s precedent under *Allis-Chalmers Corp.*, held that even if the purpose of the collective-bargaining agreement was “to facilitate detection of users, such a provision would [still] be illegal under California law.” *Id.* at 695-96. The Ninth Circuit emphasized that determination of guilt under the statute does not require interpretation of the collective-bargaining agreement and any attempt to “reduce or limit [the privacy expectation] would be illegal and unenforceable [because] freedom from illegality is a ‘nonnegotiable state-law right[.]’” *Id.* (citing *Allis-Chalmers Corp.*, 471 U.S. at 213).

DATWA, like the California statute in *Cramer*, makes it clear that specific conduct is illegal. DATWA creates requirements that employers must meet where a drug testing policy is in place. The League cannot preempt Minnesota state law under DATWA by creating lower standards under the CBA and then carrying out those standards through the Policy. Although the League may have an interest in creating testing standards to ensure that players do not use performance-enhancing supplements, the League cannot implement standards that are illegal under independent Minnesota state law.

II. THE FOURTEENTH CIRCUIT CORRECTLY SET ASIDE THE ARBITRATOR'S AWARD BECAUSE THE LEAGUE BREACHED A FIDUCIARY DUTY TO ITS PLAYERS AND THE MLBPA.

A court may not enforce a collective-bargaining agreement that is contrary to public policy. *W.R. Grace & Co. v. Local Union*, 461 U.S. 757, 766 (1983). Such a public policy must be well defined and dominant, and is to be ascertained “by reference to the laws and legal precedents and not from general considerations of supposed public interests.” *Id.* (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)). More specifically, if the policy as interpreted by an arbitrator violates an explicit public policy, a court is obliged to refrain from enforcing it. *Id.* Hence, while a court must afford the arbitrator “an extraordinary level of deference,” an arbitrator’s decision that is directly contrary to well-established public policy must be set aside. *Id.*

The Fourteenth Circuit correctly held that the arbitrator’s awards at issue in this case violated public policy because the award encourages the League’s knowing and intentional breach of a fiduciary duty. *Wilson II*, No. 09-2108, slip op. at 14. In order for liability to exist on a breach of fiduciary duty claim, a plaintiff must demonstrate two things: (1) the existence of a fiduciary relationship, and (2) breach of a fiduciary duty. *Lumberman’s Mut. Cas. Co. v. Franey Muha Alliant Ins. Servs.*, 388 F. Supp. 2d 292, 304 (S.D.N.Y. 2005). Not only did the Policy establish a fiduciary relationship between the League and its players, the League’s failure to give a more particularized warning about SpeedShot constituted a breach of this duty.

A. A Fiduciary Relationship Existed in this Case Because the Players Reasonably Relied on the League’s Superior Expertise of Knowledge.

A fiduciary relationship can be found where a fact-specific inquiry demonstrates that one party reposed confidence in another and reasonably relied on the other’s superior expertise or knowledge. *Id.* at 305. Courts have found fiduciary relationships “in any case in which

influence has been acquired and abused” and “in which confidence has been reposed and betrayed.” *Lumbermens Mut. Cas. Co.*, 388 F.Supp. 2d at 305 As a result, courts have interpreted fiduciary relationships broadly.

More importantly, this fiduciary relationship does not need to be explicitly established. “It is not essential for a fiduciary relationship to be formalized in writing for fiduciary obligations to exist; rather, the ongoing conduct between parties may give rise to a fiduciary relationship that will be recognized by the courts.” *Id.* Thus, in determining whether a fiduciary relationship exists, “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.” *Id.*

1. Mr. Wilson and the other suspended players reasonably relied on the League’s superior expertise and knowledge.

First, the substance of the League’s policy on Anabolic Steroids and Related Substances established a fiduciary relationship. The Policy created the “MLB Supplement Hotline” to provide MLB players, coaches, and trainers with an opportunity to inquire and obtain information about certain supplements and their relation to the Policy. *Wilson I*, No. 09-AC-0213, slip op. at 2. The mere existence of this hotline implies that the MLB had superior knowledge in regards to supplements that allowed them to provide information and support. As a result, it was reasonable for the players to rely on this superior knowledge and place their confidence in the MLB’s expertise. The hotline therefore established this fiduciary relationship.

Second, the express language of the Policy established a fiduciary relationship. Dr. Larson, as the Independent Administrator of the Policy, had an express duty to educate players about prohibited substances. The Policy specifically provided, “In addition, the Independent Administrator will make himself available for consultation with players and Club physicians; oversee violated protocols; oversee the development of education materials; participate in

research on steroids.” *Wilson II*, No. 09-2108, slip op. at 12. The Policy indicates that Dr. Larson has superior knowledge that qualifies him to consult with the players. Furthermore, Dr. Larson testified that his “special effort to educate and warn players” is a continuing obligation that is included within the scope of his duties under the Policy. *Id.* at 13. Although Dr. Larson may not have exhaustive knowledge regarding supplements, given the explicit wording of the Policy, the players reasonably relied on his knowledge and expertise.

2. The League is under a duty to act or give advice for the benefit of the players upon matters within the scope of the Policy.

The League made clear that it is the authoritative source for information about the ingredients in supplements and energy boosters. The Policy plainly provides that the Policy’s administrators will make a “special effort to educate and warn players about the risks involved in the use of supplements.” *Id.* Moreover, the League directed Dr. Larson to implement the terms of the Policy, including overseeing the drug-testing procedures under the policy, reporting any positive test results and providing education to the players regarding the Policy’s implementation. *Wilson I*, No. 09-AC-0213, slip op. at 2. Because Dr. Larson maintained superior knowledge, and was obligated to continually enhancing this knowledge, the League gave him the role of “Independent Administrator.” Accordingly, the League directly established itself and its administrators as the authoritative source of information about all supplements – a source players could reasonably rely on.

3. Fiduciary relationships are broadly determined and are found where one party simply places confidence in the other.

A fiduciary relationship “is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another.” *United Feature Syndicate Inc. v. Miller Features Syndicate, Inc.*, 216 F. Supp. 2d 198, 218 (S.D.N.Y. 2002). More specifically, “a fiduciary

relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.” *United Feature Syndicate Inc.*, 216 F. Supp. 2d at 218. Courts have therefore favored a broad definition of how fiduciary relationships are created and simply consider whether a plaintiff has “adequately . . . alleged the existence of a trust relationship.” *Id.* at 216.

Here, the Policy creates a trust relationship between the administrators of the Policy and the players. Dr. Larson, as the Policy’s administrator, is held out as the definitive source regarding supplements and the League directs any questions or concerns players might have about these supplements to him. *Wilson II*, No. 09-2108, slip op. at 12. While this does not mean Dr. Larson must have exhaustive knowledge, the Policy allows the players to reasonably rely on what Dr. Larson does know. Furthermore, the League created a Hotline so that players could seek advice from authorities on the subject matter. Through the substance and the language of the Policy, the League presented itself as the primary authority that the players should rely upon when dealing with its administration. Consequently, a fiduciary relationship existed.

B. The League Breached a Fiduciary Duty with Its Players by Failing to Provide Vital Health Information Regarding SpeedShot.

It is well established that, “in the case of an omission, the duty to disclose generally arises when one party has information that the other party is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.” *Grandon v. Merrill Lynch & Co., Inc.*, 147 F.3d 184, 189 (2d. Cir. 1998). When one party has superior knowledge not available to the other and a fiduciary relationship exists, this duty to disclose arises. *Callahan v. Callahan*, 127 A.D.2d 298, 300 (N.Y. App. Div. 1987). Nondisclosure is “tantamount to an affirmative

misrepresentation where a party to a transaction is duty-bound to disclose certain pertinent information.” *Callahan*, 127 A.D.2d at 300.

1. The League’s failure to explicitly tell the players of the presence of a banned substance in SpeedShot constituted a breach of their duty to disclose.

While the League learned in 2007 that some bottles of SpeedShot contained Clomiphene, a prohibited substance named in the Policy, the League never explicitly told the players of this finding. Rather, Dr. Larson sent a memorandum to all League 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.” *Wilson I*, No. 09-AC-0213, slip op. at 3. Both Dr. Larson and Dr. Birch’s failures to disclose particularized information regarding SpeedShot constituted a breach of the League’s fiduciary duty.

First, Dr. Larson failed to take proactive steps concerning the existence of Clomiphene in SpeedShot. Dr. Larson plainly testified that he decided not to disclose to MLB players the presence of this potentially dangerous chemical secretly contained in SpeedShot – he feared that MLB players might then in the future come to expect that he would notify them about other harmful banned substances in energy-boosting supplements. *Wilson II*, No. 09-2108, slip op. at 14. Dr. Larson further testified that had a player called him to inquire specifically about SpeedShot, Larson would have told that player that SpeedShot contained Clomiphene. *Wilson I*, No. 09-AC-0213, slip op. at 16. However, when one obviously stands out in a position of superior knowledge, a duty to disclose exists. *Callahan*, 127 A.D. 2d. at 301. Because Dr. Larson was placed in such an authoritative role in regards to the Policy, as someone the players could trust, he was required to disclose the relevant information. The existence of a fiduciary

relationship required Dr. Larson to take proactive steps to inform the players of SpeedShot's ingredients.

Second, Dr. Birch failed to take the necessary steps to ensure that players who consulted with the Hotline would be adequately informed. In fact, Dr. Birch did not tell the Hotline to dispense any more information about SpeedShot other than the fact that while it was not on the banned substance list, players should avoid taking any energy supplement because the label might not list all its ingredients. *Wilson I*, No. 09-AC-0213, slip op. at 17. Consequently, a player could have called the Hotline to inquire specifically about SpeedShot and be told that it was simply not on the banned substance list even though the League knew that taking SpeedShot would trigger a positive test. This failure to provide the players with all relevant information constituted a breach of the League's fiduciary duty. By holding themselves out as the main authority on the matter, the League had a duty to disclose all information it knew regarding the Policy.

2. The League's authoritative position overshadowed the players' assumption of risk despite the strict liability standard set forth in the CBA.

The League's decision to not offer any warning cannot be excused despite the strict liability position contained in the CBA. Even though the CBA does describe the level of warning the League must provide its players, there was also nothing in the CBA explaining that a general warning would suffice in these types of situations. Rather, the CBA provided no explanation on how the League should deal with their knowledge of harmful energy supplements. As a result, the players could reasonably believe that if the League were to find out about specific harmful information, they would, at the very least, inform the players accordingly. Because a fiduciary relationship "may be found in any case in which... confidence has been reposed and betrayed," the players' reasonable confidence that League would disclose overrides

any strict liability standard set forth in the CBA. *United Feature Syndicate Inc.*, 216 F. Supp. 2d at 218.

More importantly, League's behavior was so egregious that any strict liability standard set forth in the CBA must be disregarded. Even the district court below agreed that the League's failure to warn "is baffling." *Wilson I*, No. 09-AC-0213, slip op. at 17. Additionally, the district court's decision explained; "It is no doubt true that none of the players here would have taken SpeedShot if the MLB had issued a specific statement saying that SpeedShot contained Clomiphene." *Id.* at 18. The League spent a considerable amount of resources to make sure that their players were not taking harmful supplements. Yet when the League's administrators found out about one supplement that actually could harm their players, the League did nothing to protect their employees. This failure to inform cannot be excused.

C. The Arbitrator's Award Violates an Explicit Public Policy Because It Encourages an Employer to Breach a Fiduciary Duty.

While the district court relied heavily on the Federal Arbitration Act (the "FAA"), the FAA does not provide the only reasons for vacating arbitration award. The District Court reasoned that the arbitrator's decision is "circumscribed by the Federal Arbitration Act, which allows a court 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 arbitrators.'" *Wilson I*, No. 09-AC-0213, slip op. at 14 (*citing* 9 U.S.C.A. §§ 10(a)(1)-(2)). Further, courts may vacate the decisions of the arbitrator "only for reasons enumerated in the FAA." *Crawford Group, Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008). This Court has held, however, that an arbitrator's decisions are "not distinguishable from the contractual agreement." *Eastern Assoc. Coal Cos. v. United Mine Workers of Am.*, 531 U.S. 57, 62 (2000). Thus, "as with any contract .

.. a court may not enforce a collective-bargaining agreement that is contrary to public policy.”
W.R. Grace & Co., 461 U.S. at 766.

In fact, an arbitration award must be vacated where it runs counter to public policy. *Ace Elec. Contractors, Inc. v. Int’l Bd. of Elec. Workers, Local Union No. 292*, 414 F.3d 896, 903 (8th Cir. 2005). Public policy can be ascertained by reference to the laws and legal precedents. *Id.* However, public policy must be explicitly defined. *MidAm. Energy Co. v. Int’l Bd. of Elect. Workers Local 499*, 345 F.3d 616, 620 (8th Cir. 2003).

1. The arbitrator’s award violates an explicit public policy.

Multiple 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); *Iowa Elec. Light & Power Co. v. Local Union 204 of Int’l Bd. of Elec. Workers (AFL-CIO)*, 834 F.2d 1424, 1428 (8th Cir. 1987). As the Fourteenth Circuit explained below, “one of the primary factors underlying the Policy is the concern with the adverse health effects of using prohibited substances.” *Wilson II*, No. 09-2108, slip op. at 12. As a result, the health and safety of the players is explicitly protected through the implementation of the Policy.

Courts have pointed out the importance of protecting the health and safety of society. In vacating an award ordering reinstatement of a pilot who had been discharged for flying a passenger plane while intoxicated, the Eleventh Circuit looked at the need for laws against drunk flying. *Delta Air Lines*, 861 F.2d at 672. The *Delta* decision relied on a Fifth Circuit decision that held “reinstatement of an employee who drives drunk to a position of public service would do violence to the public welfare and to the purposes of the National Labor Relations Act.” *Nat’l Labor Relations Bd. v. Dixie Motor Coach Corp*, 128 F.2d 201, 203 (5th Cir. 1942). Similarly,

condoning a decision that promotes a reckless disregard for the truth regarding the risks of an energy supplement would do violence to the welfare of all Major League players and the very purpose of the Policy. The explicit public policy at stake in the instant case is therefore protecting the essence of the Policy and the health and safety of all players.

2. Upholding the arbitration award would sanction reckless behavior that threatens health and safety.

Similar to the decision in *Dixie Motor*, the arbitration award in the instant case promotes the League's knowing subrogation of the health and welfare of their player employees. In addition to not explicitly informing the players about the hazardous effects of SpeedShot, Dr. Birch and Dr. Larson overlooked the lab director's request that the League report the information about SpeedShot to the Food and Drug Administration. *Wilson I*, No. 09-AC-0213, slip op. at 3. Dr. Birch and Dr. Larson's intentional failure to provide the necessary safeguards to the very people the Policy is supposed to protect cannot be overlooked.

The reality of professional sports is that players do take supplements on a daily basis. The Policy has been put into place to make sure that players take the correct supplements and is specifically designed to inform MLB players about health and safety issues. Failing to inform players about positive risks concerning a popular product indicates malicious intent on the part of the administrators the League put at the head of their Policy. The arbitrator's award therefore violates public policy because it creates an opportunity for the League to operate in a duty free zone. As such, the award encourages omissions that jeopardize the health of MLB players. Respondent's are not asking that the League have exhaustive knowledge of all supplements. Rather, the League's role as an authoritative source simply requires that they inform the very players they are seeking to protect of specific knowledge the League has acquired. As such, the Fourteenth Circuit decision setting aside the arbitration award must be upheld.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Honorable Court **AFFIRM** the decision of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully Submitted,
Team 41
Counsel for Respondent

Dated: January 11, 2010

APPENDIX A

Labor-Management Relations Act § 301, 29 U.S.C. § 185 (2006).

(a) Venue, amount, and citizenship

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

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an “agent” of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

APPENDIX B

Minn. Stat. § 152.01 (2009).

Subdivision 2. Drug.

The term "drug" includes all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either humans or other animals.

Subdivision 4. Controlled substance.

"Controlled substance" means a drug, substance, or immediate precursor in Schedules I through V of section 152.02. The term shall not include distilled spirits, wine, malt beverages, intoxicating liquors or tobacco.

APPENDIX C

Minn. Stat. § 181.950 (2009).

Subdivision 4. Drug.

"Drug" means a controlled substance as defined in section 152.01, subdivision 4.

Subdivision 5. Drug and alcohol testing.

"Drug and alcohol testing," "drug or alcohol testing," and "drug or alcohol test" mean analysis of a body component sample according to the standards established under one of the programs listed in section 181.953, subdivision 1, for the purpose of measuring the presence or absence of drugs, alcohol, or their metabolites in the sample tested.

APPENDIX D

Minn. Stat. § 181.952 (2009).

Subdivision 1. Contents of the policy.

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

- (1) the employees or job applicants subject to testing under the policy;
- (2) the circumstances under which drug or alcohol testing may be requested or required;
- (3) the right of an employee or job applicant to refuse to undergo drug and alcohol testing and the consequences of refusal;
- (4) any disciplinary or other adverse personnel action that may be taken based on a confirmatory test verifying a positive test result on an initial screening test;
- (5) the right of an employee or job applicant to explain a positive test result on a confirmatory test or request and pay for a confirmatory retest; and
- (6) any other appeal procedures available.

APPENDIX E

Minn. Stat. § 181.953 (2009).

Subdivision 1. Use of licensed, accredited, or certified laboratory required.

(a) An employer who requests or requires an employee or job applicant to undergo drug or alcohol testing shall use the services of a testing laboratory that meets one of the following criteria for drug testing:

(1) is certified by the National Institute on Drug Abuse as meeting the mandatory guidelines published at 53 Federal Register 11970 to 11989, April 11, 1988;

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

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

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

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

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

APPENDIX F

Minn. Stat. § 181.955 (2009).

Subdivision 1. Freedom to collectively bargain.

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