

No. 09-214

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In the

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

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MAJOR LEAGUE BASEBALL,  
Petitioner,

v.

KEVIN WILSON;  
MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION  
Respondent.

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

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**BRIEF FOR THE RESPONDENT**

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**Team Number: 46**

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## QUESTIONS PRESENTED

- I. Despite the preemptive powers of Section 301 of the Labor Management Relations Act, does Plaintiff-Appellee Kevin Wilson have a state law claim against Major League Baseball pursuant to Minnesota's Drug and Alcohol Testing in the Workplace Act, which is an exercise of the state's police power to establish minimum standards for labor conditions by requiring employers to follow certain procedures when implementing a drug testing policy?
  
- II. Under the public policy exception requiring reversal of arbitration awards, was the Fourteenth Circuit correct in overturning the arbitrator's decision to uphold Plaintiff-Appellee Kevin Wilson's suspension when as interpreted by the arbitrator, the MLB policy on anabolic steroids and related substances violates well defined and dominant public policy by sanctioning Defendants' Dr. Larson and MLB's breach of fiduciary duty and their endangerment of players' safety and health?

## STATEMENT OF THE CASE

Plaintiff-Appellees Kevin Wilson ("Wilson") and the Major League Baseball Players Association (the "MLBPA") respectfully request that this Court affirm a decision of the United States Court of Appeals for the Fourteenth Circuit wherein the court held (1) that section 301 ("Section 301") of the Labor Management Relations Act (the "LMRA") does not preempt Minnesota's Drug and Alcohol Testing in the Workplace Act ("DATWA") and (2) that an independent arbitrator's award upholding Major League Baseball ("MLB") players' suspensions must be vacated because it violates public policy.

In September 2007, MLB and the MLBPA entered into a Collective Bargaining Agreement (the "CBA") that incorporated the MLB Policy on Anabolic Steroids and Related Substances (the "Policy"). *Wilson v. Major League Baseball*, No. 09-AC-0213 at 3 (S.D. Tul.). The Policy prohibits MLB players from using a range of foreign substances, including various performance enhancing drugs and other anti-estrogens, like Clomiphene, Cyclophenil, and Fulvestrant. *Id.* at 1. The first time a player tests positive for a banned substance he faces a mandatory suspension ranging from fifteen to twenty-five games. *Id.* at 2. In the event of a

wrongful suspension players must rely upon the arbitration process established by the Policy. *Id.* While the Policy is intended to both promote public confidence in MLB games and the character and integrity of the players, *Id.* at 8, its purpose is also to protect the players' health. *Wilson v. Major League Baseball*, No. 09-2108 at 12 (14th Cir.).

In furtherance of the Policy's health and safety goals, Dr. John Larson, the Policy's Independent Administrator, and Dr. Ray Finkle, a Consulting Toxicologist, are the experts responsible for implementing the Policy. *Wilson*, No. 09-AC-0213 at 2. While the Policy holds players strictly liable for what they put in their bodies, Dr. Larson is responsible for continually educating players on energy-boosting supplements and has an express duty to educate players about prohibited substances. *Wilson*, No. 09-2108 at 12. The Policy specifically states that "[Dr. Larson] will make himself available for consultation with players and [c]lub physicians; oversee violated protocols; oversee the development of education materials; participate in research on steroids." *Id.* In addition, Dr. Larson sent a memorandum to all players in which he promised that he would "continue to provide MLB Players with information on the subject throughout the year." *Id.*

In 2007, MLB learned that a particular energy-boosting supplement, SpeedShot, contained a banned substance known as Clomiphene in some of its bottles, but failed to disclose this substance on its ingredient label. *Wilson*, No. 09-AC-0213 at 3. This knowledge was obtained after Dr. Larson and Dr. Finkle had David Klein, Director of the Sports Medicine Research Testing Laboratory, analyze SpeedShot, whereupon they confirmed that the supplement contained Clomiphene. *Id.* Not only were Dr. Larson and Dr. Finkle made aware of this finding, Andrew Birch, the Vice President of Law and Policy for MLB, was also informed that SpeedShot contained a banned substance that was not disclosed. *Id.*

Rather than expressly notify players of MLB's discovery that SpeedShot contained a banned substance, Dr. Larson only issued a memorandum with a generalized warning about energy boosting supplements. *Id.* While MLB notified the MLBPA that Players were prohibited from doing business with Mega Energy Products, the distributor of SpeedShot, MLB took no steps to directly notify the players about SpeedShot's labeling error. *Id.*

Having only received a generalized warning regarding energy-boosting supplements, Wilson, a player for the Minnesota Twins, L.L.C., took SpeedShot during 2008 spring training, unaware that it contained a banned substance. *Id.* at 4. Upon being drug tested, Wilson tested positive for Clomiphene and was subsequently penalized with a fifteen game suspension. *Id.* Four additional players were also penalized due to testing positive for Clomiphene after taking SpeedShot, one of whom only used SpeedShot after being wrongly advised that SpeedShot was not on the banned substances list by the MLB Hotline, which is supervised by Dr. Larson. *Wilson*, No. 09-2108 at 14.

Following the players' suspensions, Wilson, the four additional players, and the MLBPA appealed to an independent arbitrator. *Wilson*, No. 09-AC-0213 at 4. Plaintiffs did not dispute the positive tests, but rather argued that they should not be suspended because Dr. Larson and MLB knowingly withheld critical information regarding the presence of Clomiphene in SpeedShot. *Id.* In addition, the players argued that despite the generalized warnings on energy-boosting supplements and the Policy's strict liability rule, "the Policy created a fiduciary duty that required the MLB to give a more particularized warning about SpeedShot once it was found to contain Clomiphene." *Id.* The arbitrator chose to uphold the suspensions. *Id.* at 5.

Subsequently, Wilson filed suit against MLB, Dr. Larson, Dr. Finkle, and Andrew Birch in Minnesota state court on grounds that the Policy violated the requirements of DATWA. MLB

concedes that its steroid testing procedures are not in compliance with DATWA. *Wilson*, No. 09-2108 at 4. The court granted a temporary restraining order barring Wilson's suspension. *Wilson*, No. 09-AC-0213 at 5. MLB then filed a Notice of Removal with the United States District Court for the Southern District of Tullahoma where the case was consolidated with an action brought by the MLBPA seeking to vacate the arbitrator's decision on the grounds that it violated public policy. *Id.*

Once in federal court, MLB filed a motion for summary judgment on both of Wilson's claims, which the district court then granted. *Id.* The district court held that Section 301 of the LMRA preempted DATWA and that the arbitrator's award did not violate public policy because MLB had no duty to issue specific disclosures to players. *Id.* Wilson and the MLBPA, on behalf of the other four suspended players, then appealed to United States Court of Appeals for the Fourteenth Circuit, which reversed the grant of summary judgment. *Wilson*, No. 09-2108.

#### SUMMARY OF THE ARGUMENT

Unions and employers cannot simply make a labor contract agreeing to dismiss state laws designed to protect employees in the workplace. Accordingly, the circuit court properly held that Section 301 of the LMRA, 29 U.S.C. § 185(a) (2006), does not preempt Plaintiff's DATWA claim. Under Section 301, federal law preempts state-law claims that are inextricably intertwined with the labor contract or that are substantially dependent upon analysis of the terms of a labor contract. However, if the state-law claim is not based on a specific provision of the CBA or if resolution of the state-law claim does not require interpretation of the CBA, the claim is not preempted.

Wilson's DATWA claims are based on such independent, non-negotiable state law rights. His substantive and procedural rights under DATWA were violated when MLB failed to follow the statute's minimum requirements. In fact, MLB concedes that its steroid testing procedures

are not in compliance with DATWA. The DATWA violations include a failure by MLB to use certified laboratories, to implement a confirmatory test prior to taking adverse personnel action, and to give players who violate MLB's drug testing Policy the first time a chance to enroll in and complete a treatment program prior to suspending them. The Court need only look at the conduct and procedures followed by MLB in suspending Wilson. These are purely factual inquiries that do not require any interpretation of the CBA.

Moreover, the plain language of DATWA does not require the Court to interpret and apply the CBA and its drug-testing Policy to resolve the DATWA claim. DATWA's CBA provisions simply establish non-negotiable, minimum requirements that all CBAs must meet. Wilson's DATWA claim for MLB's violation of these minimum requirements is independent of the CBA—he could bring a DATWA claim even if there was no CBA.

In addition, the circuit court properly held that the arbitrator's decision to uphold Wilson's suspension was in violation of well-defined and dominant public policy. In general, courts have a limited role when reviewing the decisions of arbitrators. However, when a contract itself as interpreted by an arbitrator is contrary to an explicit public policy, the court is obligated to set the arbitration award aside. Such public policy must be well defined and dominant and should be ascertained by looking to the law and legal precedents.

The arbitrator's award upholding Wilson's suspension condoned Dr. Larson and MLB's breach of fiduciary duty to provide specific disclosures to players regarding banned substances. The plain terms of the Policy establish Dr. Larson's role as an authority and his duty as administrator to continually educate players about prohibited substances. This makes it reasonable for the players to rely on Dr. Larson superior expertise. Yet upon learning that SpeedShot contained the banned substance Clomiphene and it was not disclosed on the label, Dr.

Larson deliberately chose not to tell players. It was not within his discretion to issue a general warning about energy boosters. As a fiduciary, he had a duty to disclose his superior knowledge not available to the players. This willful omission on the part of Dr. Larson directly led to the players' suspensions and the arbitrator's award wrongfully condoned this breach of fiduciary duty.

Moreover, Dr. Larson and MLB's failure to disclose violated a well defined and dominant public policy of protecting public safety and health in the area of consumer drugs and supplements. The development, production, and sale of drugs is a heavily regulated industry overseen by the Food & Drug Administration (FDA). Dr. Larson and MLB were advised to inform the FDA of the illicit substance contained in SpeedShot but refused to, thus endangering the players' safety and health.

Furthermore, for a court to set aside an arbitration award, the employee's conduct under review must relate to his employment duties. Dr. Larson actions meet this standard. He was acting in his capacity as the Policy's administrator when he made the decision not to disclose that SpeedShot contained a harmful, banned substance. His decision endangered every MLB player's safety and well-being. It is precisely Dr. Larson's position of employment that made this decision violate public policy. Thus, this Court should conclude that the arbitrator's decision upholding the suspension violates well-defined and dominant public policy and affirm the circuit court's decision. In addition, the circuit court correctly held that Plaintiff's DATWA claims are not preempted by section 301 of the LMRA.

## ARGUMENT

I. THE COURT OF APPEALS' DECISION THAT PLAINTIFF-APPELLEE KEVIN WILSON'S DATWA CLAIM IS NOT PREEMPTED BY SECTION 301 OF THE LMRA MUST BE AFFIRMED BECAUSE DATWA CONFERS A NONNEGOTIABLE STATE RIGHT THAT IS INDEPENDENT OF THE CBA, AND SECTION 301'S POLICY GOALS OF UNIFORMITY ARE SUPERSEDED BY A STATE'S POLICE POWER TO ESTABLISH MINIMUM STANDARDS FOR WORK CONDITIONS.

The State of Minnesota protects its in-state employees by regulating employers' drug testing procedures under Minnesota's Drug and Alcohol Testing in Workplace Act ("DATWA"). Minn. Stat. §§ 181.950–.957 (2006). DATWA requires that an employer's drug policy must, at a minimum, provide the following information:

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

*Id.* § 181.952 subdiv. 1(1)–(6).

Additionally, DATWA establishes several other criteria that an employer's drug testing policy must meet. For instance, DATWA requires that laboratories meet certain requirements in order for an employer to use their services. *Id.* § 181.953 subdiv. 1. DATWA also directs employers to provide employees who have tested positive for drugs or alcohol with "written notice of the right to explain the positive test," an opportunity "to explain that result," and the ability to "request a confirmatory retest of the original sample at the employee's job or applicant's own expense . . . ." *Id.* § 181.953 subdiv. 6(a)–(c). Moreover, DATWA states that employers may not "discharge [or] discipline . . . an employee on the basis of a positive test

result from an initial screening that has not been verified by a confirmatory test.” *Id.* § 181.953 subdiv. 10(a). The statute specifically precludes employers from discharging first-time offenders unless the employee “has first [been given] an opportunity to participate in . . . either a drug or alcohol counseling and rehabilitation program” and the employee refuses to participate in or does not successfully complete the program. *Id.* § 181.953 subdiv. 10(b)(1)–(2).

While a CBA between MLB and the MLBPA governs the terms and condition of all MLB players’ employment, Wilson is an employee of the Minnesota Twins, L.L.C., which makes him an employee within the state of Minnesota who would normally be protected by DATWA. DATWA directly addresses its relation to CBAs and mandates that its regulations of employee drug testing apply to all CBAs. *Wilson*, No. 09-2108 at 6. The statute states that while it does not “limit the parties to a collective bargaining agreement from bargaining and agreeing with respect to a drug and alcohol testing policy,” the policy must be one “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 subdiv. 1. MLB has conceded that its steroid testing procedures are in violation of the DATWA. *Id.* at 4. However, MLB contends that it is not subject to the drug testing regulations of DATWA because DATWA is preempted by Section 301 of the LMRA. 29 U.S.C. § 185(a) (2006).

Section 301 provides federal jurisdiction of cases involving violations of labor contracts between an employer and a labor organization and gives federal courts the authority to create a body of substantive law to resolve other labor-related disputes. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). Accordingly, even suits brought in state court for violation of a labor contract are subject to Section 301 and must be resolved in accordance with federal law. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985); *Teamsters v. Lucas Flour Co.*, 369

U.S. 95, 103 (1962). While there is no express preemption language within the LMRA, Section 301 has preemptive force over state laws where the state law frustrates Section 301's purpose of obtaining uniformity and predictability within labor-contract disputes. *Allis-Chalmers Corp.*, 471 U.S. at 210.

However, Section 301 does not preempt all state laws regulating labor relations. *Id.* at 220. A state law claim is only preempted if it is based upon a specific provision in the CBA or if its resolution would require interpretation of the CBA itself. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406 (1988); *see also Allis-Chalmers Corp.*, 471 U.S. at 213, 220 (stating that Section 301 preemption applies to all state law claims that are "inextricably intertwined with consideration of the terms of the labor contract" or that are "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract"). On the other hand, if the legal character of the claim is independent of the rights under the collective-bargaining agreement, then the state cause of action may go forward. *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994).

Thus, the scope of Section 301 preemption must be determined on a case-by-case basis. *Allis-Chalmers Corp.*, 471 U.S. at 220. Based on the facts of the instant case, the court of appeals correctly held that Wilson's DATWA claim is not preempted by the Section 301 of the LMRA because the claim is predicated on Minnesota law and is not dependent upon an interpretation of the CBA. *Wilson*, No. 09-2108 at 10. The determination of Wilson's DATWA claim is based solely on factual inquiries. Furthermore, the need for uniformity does not supersede a Minnesota's police power to establish minimum standards for labor conditions. Therefore, the court of appeals' decision to reverse the district court should be affirmed.

- A. Wilson’s DATWA claim is not preempted by Section 301 of the LMRA because it does not require interpretation of the CBA but rather its determination is solely based upon factual inquiries.

The first step a court takes in determining whether a state law claim is sufficiently independent of the CBA is to examine the claim itself. *Trs. of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 331 (8th Cir. 2006). Because Wilson’s claim is not based upon a specific provision of the CBA the crucial issue for the Court in this case is whether “resolution of [the DATWA] claim depends upon the meaning of a [CBA].” *Lingle*, 486 U.S. at 406. As long as the state-law claim can be resolved without interpreting the agreement itself, “the claim is ‘independent’ of the agreement for [Section] 301 pre-emption purposes.” *Id.* at 410.

Wilson bases his claim upon MLB’s violation of players’ substantive and procedural rights given under DATWA. *Wilson*, No. 09-2108 at 6 n.1. The alleged violations included a failure to use certified laboratories as required in Minn. Stat. § 181.953 subdiv. 1, a failure to implement a confirmatory test prior to taking adverse personnel action, and the suspension of first-time offenders without first giving the employee the chance to receive and complete a treatment program. Determining whether MLB is guilty of these violations does not necessitate interpretation of any provision of the CBA, but rather, only requires purely factual inquiries. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261, 266 (1994); *see also Lingle*, 486 U.S. at 407 (stating that state causes of actions requiring the court to only analyze the conduct of the employee and the conduct and motivation of the employer are not preempted because they only involve “purely factual questions”).

In this case, the Court does not need to look to the words of the Policy but rather to the actual conduct and procedures taken by MLB in suspending Wilson. In fact, it is unlikely that the

Court will even need to familiarize itself with the Policy because MLB has conceded that its drug testing procedures are not in compliance with DATWA. *Wilson*, No. 09-2108 at 4. However, even if the Court must consult the Policy’s terms to see what procedures are followed by MLB, merely referencing the CBA does not constitute an interpretation sufficient for preemption. *Livadas*, 512 U.S. at 124 (stating that when the “meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished”); *Trs. of the Twin City Bricklayers*, 450 F.3d at 330 (“[T]he Supreme Court has distinguished those [cases] which require interpretation or construction of the CBA from those which only require reference to it.”).

The Tenth Circuit recently handled a factually similar case in which it held that Section 301 does not preempt a state statute requiring confirmation of failed drug test. *Karnes v. Boeing Co.*, 335 F.3d 1189 (10th Cir. 2003). In *Karnes*, the plaintiff brought action in state court against Boeing after he was terminated for allegedly smoking marijuana on company premises. *Id.* at 1191. While the terms and conditions of the plaintiff’s employment were governed by a CBA, the plaintiff claimed that Boeing violated the state’s Standards for Workplace Drug and Alcohol Testing Act, a statute similar to DATWA. *Id.* at 1191–92. To succeed under the state cause of action the plaintiff had to show that (1) he was discharged based on his drug test and (2) the employer failed to confirm the result through a second test. *Id.* The court held that the plaintiff’s state-law claim was not preempted because it could be resolved without having to interpret the CBA’s terms. *Id.* at 1193–94.

In the instant case, *Wilson*’s DATWA claim, like the plaintiff’s claims in *Karnes*, do not require this Court to interpret the CBA; rather, this Court need only make a factual analysis of

whether MLB followed DATWA's minimum requirements. Therefore, Wilson's claim is not preempted by Section 301. *Id.* at 1192 ("As long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for S. 301 purposes.") (citing *Lingle*, 486 U.S. at 410).

Furthermore, contrary to Defendants' assertions, DATWA does not explicitly, or even implicitly, predicate relief on interpretation and application of the CBA and its drug-testing Policy. *Wilson*, No. 09-AC-0213 at 11. DATWA's CBA provisions simply establish non-negotiable, minimum requirements that all CBA's must meet. Minn. Stat. § 181.955. As the court of appeals correctly stated, this does not mean that an employee who is a party a CBA that meets these minimum criteria cannot bring a claim under DATWA. *Wilson*, No. 09-2108 at 7. Instead, when a CBA meets the minimum requirements of DATWA, this determines the number of possible claims employees have against their employers. *Id.* For example, when an employer complies with DATWA but not with the CBA, an employee would no longer have a state law claim under DATWA and could only bring a breach of contract claim. *Id.* On the other hand, when an employer does not comply with either DATWA or the CBA, the employee has two claims: a claim for breach of contract and a DATWA claim. *Id.* While parties to a CBA are free to bargain for additional measures that "meet" or "exceed" the minimum standards of DATWA, the minimum standards themselves are non-negotiable. Minn. Stat. § 181.955 subdiv. 1. State law rights and obligations like those established by DATWA that exist independently of private agreements, meaning they cannot be waived or altered by agreement of the private parties, are not preempted by Section 301. *Allis-Chalmers Corp.*, 471 U.S. at 213; *see also Livadas*, 512 U.S. at 123 (cautioning that Section 301 "cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law").

Thus MLB has a state-law obligation to make sure the lab that tested the players' samples complies with DATWA's certification requirements, to give the players an opportunity to take a confirmatory test, and to allow them the chance to undergo treatment before being suspended. *See Hawaiian Airlines*, 512 U.S. at 258. Wilson's claim under DATWA for MLB's violation of these minimum requirements is independent of the CBA, and, in fact, Wilson could bring a DATWA claim even if there was no CBA. *See Allis-Chalmers Corp.*, 471 U.S. at 216 (explaining that some claims only exist because of the nature and existence of a labor contract). Whether MLB satisfied the requirements of DATWA is a separate question from whether its actions violated the Policy, which *would* require interpretation of the CBA. *Thompson v. Hibbing Taconite Holding Co.*, No. 08-868, 2008 WL 4737442, \*4 (D. Minn. Oct. 24, 2008). Though analyzing Wilson's claim under DATWA or the CBA would address the same facts, this does not necessitate preemption. *Lingle*, 486 U.S. at 409 ("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.").

Therefore, because Wilson's DATWA claim is not based upon a provision of the CBA, but is an independent right, it is not preempted by Section 301. In addition, resolution of Wilson's DATWA claim does not require interpretation of the CBA but instead is a nonnegotiable state-law right. Thus, the court of appeal's decision should be affirmed.

- B. DATWA is not preempted by Section 301 of the LMRA because the need for uniformity does not supersede a state’s police power to establish minimum standards for labor conditions.

While one of the purposes of Section 301 of the LMRA is “to ensure uniform interpretation of collective-bargaining agreements . . . ,” *Lingle*, 486 U.S. at 404, the need to ensure uniformity does not supersede a state’s police power to protect the health, welfare, and safety of its workers. This Court has cautioned against interfering with state regulation of workplace conditions. *Hawaiian Airlines*, 512 U.S. at 252. This Court has stated that “pre-emption of employment standards ‘within the traditional police power of the State’ ‘should not be lightly inferred.’” *Id.* (citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987)); see also *Lingle*, 486 U.S. at 412.

DATWA was intended by the Minnesota legislature to provide all employees in the state with minimum state-based rights when being subjected by an employer to drug and alcohol testing. This Court has stated that the mere existence of an arbitration scheme under a federal statute like the LMRA does not preempt causes of action to enforce state rights that are independent of the CBA. *Hawaiian Airlines*, 512 U.S. at 256–57 (“It cannot be said that the minimum requirements laid down by state authority are all set aside.”) (citing *Terminal R.R. Ass’n of St. Louis v. Trainmen*, 318 U.S. 1, 6–7 (1943)). In *Hawaiian Airlines*, the Court held that the enactment of Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves because this was an area of industry that state laws had historically regulated. *Id.* at 257. The Court also stated that the same reasoning applies to the LMRA. *Id.* at 260.

Moreover, the LMRA does not give employers and unions “the power to displace any state regulatory laws they find inconvenient.” *Cramer v. Consol. Freightways, Inc.*, 225 F.3d 683, 695 n.9 (9th Cir. 2001). As the Supreme Court stated:

[T]here [is not] any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. . . . it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

*Allis-Chalmers Corp.*, 471 U.S. at 211–12. DATWA establishes independent, nonnegotiable rights for employees, and the MLB cannot displace those rights under a guise of “uniformity.”

Therefore, because Section 301’s goal of uniformity does not supersede a state’s police power to set minimum labor standards, Wilson’s DATWA claim is not preempted by Section 301 of the LMRA. In addition, the court of appeal’s holding that Section 301 does not preempt Plaintiff’s DATWA claim should be affirmed because the claim does not depend on the meaning of the Policy but instead is a nonnegotiable state-law right independent of the CBA, and the Plaintiff’s claims do not ultimately depend on the terms of the CBA. Therefore, the court of appeal’s decision should be affirmed.

II. THE ARBITRATOR’S DECISION AFFIRMING WILSON’S SUSPENSION MUST BE OVERTURNED BECAUSE, AS INTERPRETED BY THE ARBITRATOR, THE DRUG TESTING POLICY ITSELF VIOLATES WELL DEFINED AND DOMINANT PUBLIC POLICY BY SANCTIONING DEFENDANTS DR. LARSON AND MLB’S BREACH OF THEIR FIDUCIARY DUTY TO DISCLOSE AND ENDANGERMENT OF PLAYERS’ HEALTH AND SAFETY.

Federal policy encourages the settling of labor disputes by arbitration. *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987). When the parties to a CBA include an arbitration clause in the agreement, they choose to have those disputes concerning constructions of the contract resolved by an arbitrator. *W.R. Grace & Co. v. Local Union 759*,

461 U.S. 757, 764 (1983). Accordingly, courts have a limited role when reviewing the decisions of an arbitrator and cannot review the merits of the contract dispute. *United Paperworkers*, 484 U.S. at 36. A court should confirm an award as long as the arbitrator had arguably construed or applied the contract and acted within his scope of authority. *Stark v. Sandburg, Phoenix & Von Gontard, P.C.*, 381 F.3d 793, 798 (8th Cir. 2004).

However, the deference owed to arbitration awards is not a “grant of limitless power.” *Stark*, 381 F.3d at 799 (stating that courts are not entitled nor encouraged to “rubber stamp” an arbitrator’s decision). This Court has articulated a public policy exception that requires courts to vacate an arbitration award when a contract itself as interpreted by an arbitrator is contrary to public policy. *W.R. Grace*, 461 U.S. at 766. The question of public policy is ultimately to be decided by the courts. *Id.* To qualify under this exception, such a public policy must be “well defined and dominant” and should be ascertained “by reference to the laws and legal precedents and not from general considerations of supposed public interests.” *Id.* (citing *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

In the instant case, Wilson was suspended for fifteen games after he unknowingly took an energy boosting supplement—SpeedShot—which contained the banned substance known as Clomiphene. *Wilson*, No. 09-AC-0213 at 3. However, the Policy’s administrator Dr. Larson and MLB knew that SpeedShot contained Clomiphene but willfully chose not to disclose this to the players, the MLBPA, or the FDA. *Id.* Instead, Dr. Larson simply issued a generalized memo warning of the dangers of energy boosters, and MLB placed Mega Energy Products, the distributor of SpeedShot, on a list of banned companies, meaning players could not endorse its products. *Id.* Pursuant to the Policy, Plaintiffs’ appealed to an independent arbitrator, where their suspensions were upheld on the grounds that the Policy operates under a strict liability standard

and because the policy allegedly does not explicitly require specific disclosures. *Id.* However, Plaintiffs claim Dr. Larson and MLB breached their fiduciary duties to the players and endangered their health and safety by deciding not to disclose information regarding Clomiphene. *Wilson*, No. 09-2108 at 10.

Therefore, this Court must decide whether under New York law the Policy itself as interpreted by the arbitrator violates a “well defined and dominant” public policy. *W.R. Grace*, 461 U.S. at 766. New York law governs this issue because the Collective Bargaining Agreement (CBA) states that to the extent that federal law does not govern, New York law governs the CBA. *Wilson*, No. 09-2108 at 10 n.2. If the construction of the Policy violates public policy, the Court is obligated to refrain from enforcing it. *W.R. Grace*, 461 U.S. at 766. In this case, the court of appeals properly sided with Plaintiff-Appellees and vacated the arbitration award because as interpreted by the arbitrator, the Policy itself violates “well defined and dominant” public policy by condoning a willful breach of fiduciary duty and by endangering the players’ safety and health. *Wilson*, No. 09-2108 at 14.

- A. As interpreted by the arbitrator, the Policy itself violates explicit public policy by allowing Defendants’ to deliberately breach their fiduciary duties when they chose to withhold specific, vital information that MLB players are entitled to know under the Policy’s terms.

A party may have a duty to disclose when a fiduciary or confidential relationship exists. *Callahan v. Callahan*, 127 A.D.2d 298, 300 (N.Y. App. Div. 1987). To determine whether a fiduciary relationship exists, New York courts engage in a fact-specific inquiry to see whether a party’s ongoing conduct reflects that they reposed confidence in another and they reasonably relied on the other party’s superior expertise or knowledge. *Lumbermens Mut. Cas. Co. v. Franey Muha Alliant Ins. Servs.*, 388 F.Supp.2d 292, 305 (S.D.N.Y. 2005). In the instant case, the facts reveal that the terms of the Policy and Dr. Larson’s ongoing conduct made it reasonable

for the players to rely on Dr. Larson superior expertise. The arbitrator's decision to uphold the players' suspensions would condone Dr. Larson's breach of fiduciary duty to disclose.

The Policy has numerous provisions establishing Dr. Larson's duty to provide advice for the benefit of players that is "within the scope of their relationship." *Id.* First, the Policy specifically states that "[Dr. Larson] 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*, No. 09-2108 at 12. In other words, the sole reason for Dr. Larson's employment is to administer the Policy and to educate players about prohibited substances. Pursuant to the Policy, players have been directed to Dr. Larson with questions about energy booster supplements and should reasonably be able to rely on his advice. Second, the Policy advises players, "If you have questions or concerns about a particular supplement or other product, you should contact Dr. Larson. As the Independent Administrator, Dr. Larson is authorized to respond to players' questions regarding specific supplements. *Id.* These facts decidedly establish that the players had reason to "repose confidence" in Dr. Larson and that they "reasonably relied" on his superior expertise or knowledge when deciding to take supplements, thus creating a fiduciary duty. *Lumbermens*, 388 F.Supp.2d at 305.

While Dr. Larson and MLB claim that it was within their discretion whether to specifically disclose that SpeedShot contained Clomiphene versus issuing a generalized warning, "well defined and dominant" public policy based on legal precedent dictates that a duty to disclose arises "where a fiduciary or confidential relationship exists or where a party has superior knowledge not available to the other." *Callahan*, 127 A.D.2d at 300. It is established that Dr. Larson and MLB had superior knowledge regarding pertinent information not available the players. In September 2007, they received test results confirming the presence of Clomiphene in

SpeedShot but willfully chose not to disclose that information despite its material nature to players' health. *Wilson*, No. 09-AC-0213 at 3. Instead, Dr. Larson chose to rely on the Policy's strict liability standard and merely issued a generalized warning about the dangers of energy boosters. *Id.* On its part, MLB simply placed the manufacturer of SpeedShot on its list of banned companies, which only meant that players could not endorse their products—not that they should not use their products. *Id.*

However, such generalized warnings are insufficient under the terms of the Policy and constitute a breach of fiduciary duty. Dr. Larson acknowledged in his testimony that the Policy requires him to make a “special effort to educate and warn players” and that this was a continuing obligation under the Policy. *Wilson*, No. 09-2108 at 13. He also sent a memorandum to players about energy boosting supplements and said that he would “continue to provide MLB Players with information on the subject throughout the year.” *Id.* at 12. It is much more economical and reasonable to expect Dr. Larson, who was already aware of the presence of Clomiphene in SpeedShot, to disseminate that information than to expect each player to contact Dr. Larson about every substance they want to take. In addition, relying on the strict liability standard to make players liable is unconscionable when Dr. Larson himself testified that he chose not to disclose to MLB players the presence of Clomiphene in SpeedShot because he was afraid that players would then expect him to notify them about other harmful banned substances in energy-boosting supplements in the future. *Id.* at 14. Such reasoning allows Dr. Larson to disregard his employment obligations under the Policy, and the strict liability standard should not apply when a party has a fiduciary duty to disclose specific information but chooses not to.

This willful omission on the part of Dr. Larson and MLB lead directly to the players' suspensions. In fact, one of the players only started to use SpeedShot after he was advised by the

MLB Supplement Hotline, which is administered by Dr. Larson, that SpeedShot was not on the banned substances list. *Id.* To uphold the arbitrator's award in favor of Defendants would sanction violation of a "well defined" public policy imposing a duty to disclose when a party in a fiduciary relationship possesses material information that the other party does not. This policy is based on "legal precedent" and not from "general considerations of supposed public interests." *Callahan*, 127 A.D.2d at 300; *see also Grandon v. Merrill Lynch & Co., Inc.*, 147 F.3d 184, 189 (2d. Cir. 1998) (stating that a 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"). Therefore, because Dr. Larson and MLB had a fiduciary relationship with the players and because they possessed superior knowledge regarding material information, the court of appeals' decision vacating the arbitrator's award should be affirmed because it violates a public policy upholding fiduciary duties to disclose.

- B. Defendants' deliberate choice not to disclose the presence of a harmful banned substance in SpeedShot violates a "well defined and dominant" public policy of protecting public safety and health in the area of consumer drugs and supplements.

Courts have consistently applied the public' policy exception to cases where an arbitration award condones endangering public safety and health. *See, e.g., 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*, 834 F.2d 1424, 1428 (8th Cir. 1987). In *Iowa Electric Light & Power*, the plaintiff, a union member, was terminated when he ordered a foreman to open a locked safety door at a nuclear power plant in violation of federal safety standards so he could go to lunch. 834 F.2d at 1426. An arbitrator found that termination was too severe and ordered the plaintiff's reinstatement. *Id.* The court held that the award was contrary to public policy concerning strict compliance with nuclear safety and that this was a well-defined and dominant public policy

evidenced by the “panoply of federal regulations” and the formation of a nuclear safety commission. *Id.* at 1426–28.

Like the employee in *Iowa Electric Light & Power* who endangered public health and safety by opening the safety door at the power plant, Dr. Larson and MLB endangered all MLB players’ safety and health by deliberately choosing not to disclose their knowledge that SpeedShot contained a prohibited substance. There is a “panoply of federal regulations” relating to the development, production, and sale of drugs as administered by the FDA. When Dr. Larson and MLB learned that a readily available, over-the-counter energy-booster contained an illicit substance, they chose to not only withhold this knowledge from players, they also chose not to report this to the FDA, the federal agency charged with regulating the drug industry. *Wilson*, No. 09-AC-0213 at 3. Dr. David Klein, who analyzed SpeedShot and found it contained Clomiphene, requested that Dr. Larson and MLB inform the FDA, but they “refused to do so.” *Id.* This willful decision not to disclose violates explicit public policy of protecting consumer health against harmful drugs.

Furthermore, this Court has held that vacating an arbitration award under the public policy exception is only appropriate when an employee’s conduct in question is related to his employment duties. *United Paperworkers*, 484 U.S. at 29. In *United Paperworkers*, police found a Misco employee smoking marijuana in someone else’s car in Misco’s parking lot, and he was subsequently terminated for violating the company’s drug policy. *Id.* at 33. The arbitrator ordered the employee’s reinstatement on grounds that just finding the employee in the same car with the marijuana was insufficient proof that he had used or possessed the drug on Misco’s property. *Id.* at 34. Misco appealed to the district court where the court vacated the award on public policy grounds because of general safety concerns about operating dangerous machinery

while under the influence of drugs. *Id.* at 35. The Court essentially held that the reversal of the arbitration award was inappropriate because the employee's conduct in question was not sufficiently connected to his employment duties. *Id.* at 44. While perhaps there was a public policy regarding safety concerns when operating dangerous machinery under the influence of drugs, the Court said there was no direct link to the employee actually using drugs and also operating the equipment. *Id.*

Plaintiff Wilson and the MLBPA's case is distinguishable from *United Paperworkers*, where the alleged violation of public policy did not relate to the performance of employment duties, and is much more analogous to *Delta Air Lines, Inc.*, where an employee's wrongful actions were intertwined with his employment. 861 F.2d at 665. In *Delta Air Lines*, a Delta pilot was found to have flown a passenger plane with a blood-alcohol level of approximately .13 grams and was subsequently discharged for violating both Delta rules and FAA regulations. *Id.* at 667. An arbitration panel found for the pilot and ordered his reinstatement. *Id.* at 668. On appeal, the district court vacated the award on the grounds that it violated a public policy against allowing pilots to operate aircraft while intoxicated. *Id.* at 669. In affirming the district court's decision to vacate, the court of appeals determined that *United Paperworkers* addressed public policy regarding conduct which is "integral to the performance of employment duties." *Id.* at 671. The court found that in deciding to commit the wrong, the wrongdoer must be making an employment action in order for it to violate public policy. *Id.* To overturn an arbitration award, the wrongdoing and the employment are not merely parallel but intertwined; it must be the "employee *qua* employee" who is the wrongdoer. *Id.*

Unlike the employee in *United Paperworkers*, who was not engaged in any capacity as an employee when he was found with drugs, Dr. Larson was an "employee *qua* employee" who is

the wrongdoer in this case. *Id.* Like the intoxicated pilot who operated an airplane with reckless disregard, Dr. Larson, in his capacity as the independent administrator of the Policy, made an imprudent decision that endangered every MLB player's safety and well-being by choosing not to disclose that SpeedShot contained a harmful, banned substance. Even Dr. Ray Finkle, the Policy's toxicologist, testified that he informed Dr. Larson that Clomiphene had been found in SpeedShot, but it was not on the list of ingredients, and that "there should be some concern about the potential adverse effects on the health of players who may be taking this drug without proper medical supervision." *Wilson*, No. 09-2108 at 13. It is precisely Dr. Larson's position of employment that made his decision not to disclose the dangerous substance in SpeedShot violate public policy. *See Delta Air Lines, Inc.*, 861 F.2d at 671 (stating that the question is not "Is there a public policy against the employee's conduct?" but "Does an established public policy condemn the performance of employment activities in the manner engaged in by the employee?"). Dr. Larson's failure to disclose violates a "well defined and dominant policy" protecting consumer safety and health, as evidenced by pervasive federal regulation of the drug industry. *Iowa Elec. Light & Power Co.*, 834 F.2d at 1428 (citing a line of cases that vacate arbitrators' awards when a person's deliberate acts have jeopardized public safety and health and relying on the existence of federal agencies and regulations to support finding such a public policy).

Therefore, because he was acting in his capacity as the Policy's administrator and his decision endangered the players' health, Dr. Larson's non-disclosure violates a public policy protecting public health and safety. Furthermore, because Defendants' Dr. Larson and MLB breached their fiduciary duty to disclose, the Policy itself as interpreted by the arbitrator violates a well-defined and dominant public policy requiring fiduciaries to disclose when in possession of

superior knowledge. Thus, the court of appeals' decision overturning the arbitrator's award should be affirmed.

### CONCLUSION

For the reasons stated herein, Plaintiff-Appellees Kevin Wilson and the Major League Baseball Players Association respectfully request that the Order and Judgment reversing the district court's grant of summary judgment for Defendant-Appellant Major League Baseball be affirmed.

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CERTIFICATE OF SERVICE

We certify that on January 11, 2010, we delivered one unbound copy of this brief, four bound copies, and one electronic copy to the Tulane Moot Court Board for service on opposing counsel in the Mardi Gras Invitational National Sports Law Competition.

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