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

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**CASE NO. 09-214**

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**MAJOR LEAGUE BASEBALL,**
**Petitioner-Defendant**

**V.**

**KEVIN WILSON;**
**MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,**
**Respondent-Plaintiff.**

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# BRIEF FOR THE RESPONDENTS

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Team 20

Attorneys for the Respondents

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## QUESTIONS PRESENTED

I. A Major League Baseball player tested positive for a substance banned by the league's Collective Bargaining Agreement and incorporated steroid policy and was suspended for 15 games. The player subsequently alleges violations of the specific, discrete state law rights guaranteed him by Minnesota's Drug and Alcohol Testing in the Workplace Act; he does not challenge the validity of, nor allege any violation of, the CBA or Policy. Are the player's state law claims preempted by Section 301 of the Labor Management Relations Act?

II. Major League Baseball conducted laboratory tests on a legal, popular, commercially available energy supplement and found that it contained a banned substance, but failed to notify players of the test results. Did this failure to warn constitute a violation of public policy that justifies overturning an arbitrator's award?

## STATEMENT OF THE CASE

In 2007, Major League Baseball ("MLB") and the MLB Players Association ("MLBPA") entered into a Collective Bargaining Agreement ("CBA") that incorporates the MLB Policy on Anabolic Steroids and Related Substances ("Policy"). The Policy prohibits MLB players from using a number of "Prohibited Substances," including various performance-enhancing drugs and substances. It explicitly adopts a "strict liability" standard for any positive tests: "players are responsible for what is in their bodies … a positive test result will not be excused because it does not result from an intentional use of a Prohibited Substance." The Policy also provides that the Commissioner shall punish violations, within a range of sanctions, and creates an arbitration process for the review of any action taken in accordance with the policy.

The Policy is directed by an Independent Administrator, physician Dr. John Larson. Under the Policy, "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." Pursuant to this duty, Larson wrote in a memorandum sent to all players that he would "continue to provide MLB Players with information on the subject throughout the year." Larson is assisted by Ray Finkle, the "Consulting Toxicologist." Larson and Finkle have no affiliation with MLB or its teams.

The Policy also created the "MLB Supplement Hotline" ("Hotline"), which provides players an opportunity to confidentially inquire and obtain accurate information about products that may be prohibited by the Policy, "including their ingredients, effects, and adverse reactions."

In 2007, the Larson was alerted to a possible connection between positive results for Clomiphene, a prohibited substance named in the policy, and SpeedShot, an energy-boosting

supplement that does not disclose Clomiphene as an ingredient. Larson and Finkle engaged an outside lab to test SpeedShot, which confirmed it does in fact contain Clomiphene, and then alerted Andrew Birch, Vice President of Law and Labor Policy for the MLB, of the finding.

At no time did Larson, Finkle, Birch, or any other MLB employee report this finding the MLBPA or players directly. Moreover, Birch and Larson explicitly refused to report the information to the FDA, despite the outside lab directors request that they do so. Instead, the MLB merely notified the MLBPA that the distributor of SpeedShort was now a "banned company" and asked the MLBPA to pass that information on to players. The MLBPA then notified players' agents that the company that "distributes SpeedShot has been added to the list of prohibited energy-boosting supplement companies" and, as a result, "players are prohibited from endorsing any of their products." The notification did not explicitly or otherwise inform players that SpeedShot itself contained prohibited substances.

The decision not to directly warn players of the dangers of SpeedShot was made despite the fact that Finkle informed Larson that "there should be some concern about the potential adverse effects on the health of players who maybe taking this drug without proper medical supervision," according to Finkle's testimony. Larson testified that he decided not to disclose the presence of this dangerous chemical to MLB players "because 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."

In the Spring of 2008, the Respondent-Plaintiff, Kevin Wilson of the Minnesota Twins ("Wilson"), was one of five MLB players to test positive for Clomiphene. He was subsequently suspended for 15 games. Wilson does not dispute the presence of Clomiphene: he admittedly took SpeedShot, which he had no idea contained a prohibited substance.

Wilson, the four additional players, and the MLBPA appealed the suspensions to an independent and neutral arbitrator pursuant to the terms of the Policy. Citing the Policy's strict liability rule, the arbitrator upheld the suspensions.

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Minnesota's Drug and Alcohol Testing in the Workplace Act ("DATWA") governs drug and alcohol testing in the employment context by creating "minimum standards and requirements for employee protection." Minn. Stat. § 181.955(1). The statute prohibits testing except in the provided instances, id. §181.951(1) and pursuant to numerous conditions, including creation of a written drug policy with minimum information requirements, id. § 181.952, and use of certified testing laboratory, id. § 181.953(1). The DATWA also provides affirmative rights for employees and applicants who test positive for drug use, id. §181.953(6)(b)-(c), and prohibits and employer from "discharg[ing] [or] disciplin[ing] . . . an employee on the basis of a positive result . . . that has not been verified by a confirmatory test," id. § 181.953(1)(a).

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After the arbitrator's ruling, Wilson filed suit in Minnesota state court against Petitioner-Defendants MLB, Larson, Finkle and Birch alleging violation of the DATWA and seeking damages and an injunction against the suspension. At the same time, the MLBPA brought suit in federal court, seeking to vacate the arbitration awards under the Labor Management Relations Act ("LMRA"). Wilson's state claim was removed to federal court, and the cases were consolidated. The United States District Court for the Southern District of Tulania granted summary judgment on both claims for the Defendants. The Court of Appeals for the Fourteenth Circuit then reversed, finding (a) Wilson's DATWA claim is not preempted by § 301 of the LMRA (and should be able to proceed at trial), and (b) the arbitrator's suspension award should

be set aside as a matter of law under the LMRA because it sanctions and encourages breaches of fiduciary duty which jeopardized the health of MLB players. MLB now appeals that ruling.

## SUMMARY OF THE ARGUMENT

LMRA § 301 preempts all state law claims for breach of a collectively-bargained labor contract, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-04 (1962), as well as those state law claims that are "substantially dependent" on or "inextricably linked" with CBAs, Allis-Chalmers v. Lueck, 471 U.S. 202, 213, 220 (1985). It does not, however, preempt those claims that exist independently of, and can be resolved without reference to, a CBA. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 410 (1988).

Minnesota's DATWA creates specific, "non-negotiable state law rights [that] do not require an interpretation of the CBA, and would not be preempted under the LMRA." Thompson v. Hibbing Taconite Holding Co., No. 08-868, 2008 U.S. Dist. LEXIS 87045, *11 (D. Minn. Oct. 24, 2008); see also Allis-Chalmers, 471 U.S. at 213. Wilson's DATWA rights are not shaped by duties or expectations created by MLB's CBA or Policy. Rather, to determine whether MLB violated Wilson's DATWA rights, a court merely need address "purely factual questions" via comparison of MLB's actions with the statute's requirements. See Lingle, 486 U.S. at 406-07. Wilson's DATWA claims are thus "independent" of the CBA, and should not be preempted.

Thus, enforcing Wilson's DATWA claims neither contravenes Congressional intent that CBAs be interpreted uniformly under federal law, see Lucas Flour, 369 U.S. at 103-04, nor threatens the viability of MLB, its CBA, or its Policy. Rather, validating Wilson's state law rights satisfies Congress' intent that § 301 should not be construed to elevate private contractual agreements above independent state law standards. Allis-Chalmers, 471 U.S. at 211-12.

The CBA creates a fiduciary relationship between the Policy Administrator, MLB and the MLBPA because of the trust that players reposed in Dr. Larson to provide full and accurate information about supplements. Lumbermens Mut. Cas. Co. v. Franey Muha Alliant Ins. Servs., 388 F. Supp. 2d 292, 305 (S.D.N.Y. 2005). Fiduciary duties were also created by MLB players' reasonable reliance on the superior knowledge and expertise of Larson and MLB. Callahan v. Callahan, 127 A.D.2d 298 (N.Y. App. Div. 1987). Because the arbitrator's award sanctioned a violation of MLB's fiduciary duties to disclose health hazards to its employees, the award should be set aside on public policy grounds. W.R. Grace & Co. v. Local Union 759, 461 U.S. 757 (1983).

Therefore, this Court should affirm the Court of Appeals' judgment denying Petitioner-Defendant's motion for summary judgment and setting aside the arbitrator's award.

## ARGUMENT

### I. Standard Of Review Is *De Novo*.

Whether the district court properly granted MLB's motion for summary judgment is a question of law that this Court should review *de novo*. McLean v. Gordon, 548 F.3d 513, 516 (8th Cir. 2008). The lower courts' rulings regarding § 301 preemption and upholding the arbitrator's award are also subject to *de novo* review. Bogan v. General Motor Corp., 500 F.3d 828, 832 (8th Cir. 2007).

### II. Wilson's Minnesota DATWA Claims Are Not Preempted By LMRA § 301.

Section 301 of the LMRA preempts state law claims that are "substantially dependent" on or "inextricably linked" with CBAs, Allis-Chalmers, 471 U.S. at 213, 220, but not those which can be resolved without interpretation of a CBA, Lingle, 486 U.S. at 410 (1988).

Wilson's DATWA rights fall into the latter category: they are independent, "nonnegotiable" rights which do not depend on MLB's CBA or Policy for the meaning or scope. To determine whether MLB violated Wilson's DATWA rights, a court merely need address "purely factual questions" via comparison of MLB's actions with the statute's requirements. See Lingle, 486 U.S. at 406-07. Moreover, validating Wilson's state law rights does not threaten the uniform interpretation under federal law of MLB's CBA or Policy, see Lucas Flour, 369 U.S. at 103-04, but instead validates Congressional intent that private contractual agreements not be elevated above independent state law standards, Allis-Chalmers, 471 U.S. at 211-12.

For these reasons, this Court should find Wilson's DATWA claims are not preempted by § 301, and accordingly affirm the Court of Appeals' denial of Petitioner-Defendant's motion for summary judgment.

**A. LMRA § 301 does not necessarily preempt all claims arising under state labor law.**

LMRA § 301 stipulates that "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce…may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a). Claims arising under Section 301 are governed exclusively by federal law. See Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 456 (1957). Therefore, "a suit in state court alleging a violation of a provision of a labor contract must be brought under § 301 and be resolved by reference to federal law . . . or dismissed as pre-empted by federal labor-contract law." Allis-Chalmers, 471 U.S. at 210, 220. Wilson's DATWA claim, it should be noted, is not a contract claim — it does not allege that MLB violated the CBA or incorporated Policy.

This Court also has held repeatedly that "the pre-emptive effect of § 301 must extend beyond suits alleging contract violations . . . [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," regardless of the context in which such questions arise, since doing otherwise would "elevate form over substance." Id. at 210-211; see also Livadas v. Bradshaw, 512 U.S. 107, 123 (1994); United Steelworkers v. Rawson, 495 U.S. 362, 369 (1990). But the Court has been equally clear that the pre-emptive effect of § 301 is not unlimited: "Not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 . . . § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." Allis-Chalmers, 471 U.S. at 211-12.

Therefore, to determine whether § 301 preempts Wilson's DATWA claims, this Court must ask whether the claims are grounded in "nonnegotiable state-law rights on employers or employees independent of any right established by contract," or instead whether the claim is "inextricably intertwined with consideration of" or "substantially dependent upon analysis of" the terms of the labor contract. Allis-Chalmers, 471 U.S. at 213, 220. In other words, claims that can be resolved solely based on factual circumstances and statutory or doctrinal analysis, necessitating no CBA interpretation, are not preempted by § 301. Indeed, it is even irrelevant whether "dispute resolution pursuant to a collective-bargaining agreement . . . and state law . . . would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself." Lingle, 486 U.S. at 410. On the other hand, however, when the substantive contours of a right are shaped by the expectations created by a CBA, interpretation is required, and claims arising from that right are preempted by § 301.

**B. The DATWA gives Wilson nonnegotiable state-law rights that may be resolved by factual and statutory analysis, requiring no interpretation of MLB's CBA or Policy.**

The Court's preemption inquiry should begin with "an examination of the claim itself." Trustees of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc., 450

F.3d 324, 331 (8th Cir. 2006). Wilson's DATWA claim alleges that MLB failed to use certified laboratories, violating Minn. Stat. § 181.953(1), as well as other unspecified violations of his "substantive and procedural rights" under the DATWA. Wilson v. Major League Baseball (*Wilson II)*, No. 09-2108, slip op. at 6, n.1 (14th Cir. 2009). The limited record suggests that these other claims might include, for instance, failure to provide written notice of the positive drug test and Wilson's ensuing rights, violating Minn. Stat. § 181.953(6)(b)-(c), and disciplining Wilson based on a test that was not verified or confirmed, violating Minn. Stat. § 181.953(10)(a). See Wilson v. Major League Baseball (*Wilson I*), No. 09-AC-0213, slip op. at 4 (S.D. Tul. 2009).

The DATWA's guarantee that employers use certified laboratories — along with its other potentially-implicated guarantees — clearly constitutes what the Court in Allis-Chalmers called "nonnegotiable state-law rights." 471 U.S. at 213. DATWA creates discrete, specific obligations that apply to all employer-employee relationships, regardless of any other contractually-added or contractually-removed duties or rights. Indeed, a federal district court in Minnesota recently held broadly that the DATWA creates "non-negotiable state law rights [that] do not require an interpretation of the CBA, and would not be preempted under the LMRA." Thompson, 2008 U.S. Dist. LEXIS at *11. The Thompson court ultimately held the plaintiff's claims preempted only because he included in the same count the allegation that his employer violated its own collectively-bargained-for policies, thereby requiring interpretation of the agreement. Id. at *12. The record does not suggest that Wilson's complaint contains any similar allegations that MLB violated the CBA or Policy.

Indeed, in the present case, the district court merely needed to compare MLB's actual procedures in administering and acting upon Wilson's drug test with the DATWA's requirements to determine whether MLB violated § 181.953(1) or any other DATWA provisions.

These are just the sort of "purely factual questions" the Lingle Court faced in evaluating the elements of a retaliatory discharge claim — and held not to require court interpretation of a CBA. 486 U.S. at 406-07; see also Bogan, 500 F.3d at 832-33 (holding elements of intentional infliction of emotional distress claim could be adjudicated without reference to CBA); Karnes v. Boeing Co., 335 F.3d 1189, 1192-94 (10th Cir. 2003) (holding elements of Oklahoma's Standards for Workplace Drug and Alcohol Testing Act could be met without reference to a CBA). Petitioner simply does not point to a specific provision of either the CBA or the Policy that must be interpreted to establish the elements of a DATWA claim; the issues upon which Wilson's claim turn require only factual or statutory analysis. Suspension for fifteen games plainly constitutes discipline pursuant to § 181.953(10). Evaluating whether Wilson had an opportunity to "explain the positive test," as required by § 181.953(6), requires analysis of actual events. Determining whether tests for steroids and steroid-recovery drugs like Clomiphene are even covered by the DATWA is a question of law, requiring analysis only of the statutory text and history. Finally, whether MLB or individual team is Wilson's employer (and thus subject to DATWA) requires analysis of Wilson's actual contract and, at most, reference to the CBA.[1] Simply put, in this case, "the meaning of contract terms is not the subject of the dispute," and thus the claim should not be preempted. Livadas, 512 U.S. at 124.

In contrast, this Court has found state-law claims to be "inextricably intertwined with consideration of" or "substantially dependent upon analysis of" the terms of a CBA only in instances in which analyzing the substance or scope of the underlying right required interpretation of a CBA. These cases have generally featured claims arising from ambiguous,

[1] "The Supreme Court has distinguished those [claims] which require interpretation or construction of the CBA from those which only require reference to it," holding that the later class is not preempted. See Trustees, 450 F.3d at 330 (citing Livadas, 512 U.S. at 124-25).

malleable, generally-applicable common law rights — rights, in other words, that are animated and shaped by the expectations set by a CBA. In Allis-Chalmers, for instance, the Court found that a claim of bad faith necessarily depends on the scope of duty and obligation, which in turns necessarily depends upon the agreement established by CBA. 471 U.S. at 216-17. Likewise, the Court found a claim of breach of duty of care necessarily requires a "threshold inquiry" into a CBA to determine the nature and scope of care the parties had agreed to require. Lingle, 486 U.S. at 406 n.4; see also Rawson, 495 U.S. at 371 (finding an allegedly breach duty of care "was a duty arising out of" a CBA); Stringer v. National Football League, 474 F.Supp.2d 894, 909-11 (S.D. Ohio 2007) (finding interpretation of CBA was required to determine scope of duty of care owed by NFL team physicians). And circuit courts have similarly held that resolving state law claim elements such as "justifiable reliance" and "reasonably misled" necessarily depended on analyzing the expectations created by CBA language. See Trustees, 450 F.3d at 332; Holmes v. National Football League, 939 F.Supp. 517, 527-28 (N.D. Tex. 1996). In stark contrast, the rights the DATWA bestows upon Wilson are not shaped by duties or expectations created by MLB's CBA or Policy. The discrete, specific rights created by the DATWA exist independently, requiring no CBA interpretation to determine their scope or substantive meaning.

**C. The DATWA's two textual references to CBAs do not mean that analysis of Wilson's claims requires interpretation of MLB's CBA or Policy.**

First, the DATWA provides that random drug testing of professional athlete employees is permissible only if "the professional athlete is subject to a collective bargaining agreement permitting random testing but only to the extent consistent with collective bargaining agreement." Minn. Stat. § 181.951(4). Unquestionably, a claim that a league-employer violated this provision (by violating its CBA) requires CBA interpretation, and thus would be preempted by § 301. But Wilson does not allege a § 181.951(4) violation: he does not claim that MLB's

drug testing actions violated the CBA or Policy. His claims, therefore, may be resolved without reference to this provision or interpretation of MLB's CBA or Policy.

Next, the DATWA stipulates that it "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 for employee protection provided in those sections." Id. § 181.955(1). In practice, this provision means merely that an employer's compliance with a CBA does not serve as a defense to a DATWA claim. Indeed, the provision serves not to link a court's inquiry into whether an employer's actions violated DATWA and/or a collective bargaining agreement, but rather to explicitly disassociate those two inquiries. Thus, any argument by Petitioner that § 181.955(1) necessitates CBA interpretation in adjudicating Wilson's DATWA claim must fail.

In the practical context of testing a professional athletes, three hypothetical claim scenarios may occur under the statutory scheme.[2] First, the test might violate both a CBA and the DATWA; in this instance, the CBA claim is contractual and thus preempted by § 301, while the DATWA claim may proceed independently under state law. Second, in the situation of an "exceedingly" protective CBA, the test might violate the CBA and, in turn, § 181.951(4), despite satisfying all other DATWA provisions; here, both the CBA claim and DATWA claim are contractual and thus preempted. Third, the employer might violate the DATWA despite satisfying the CBA, in which case the DATWA claim should proceed under state law. This third scenario describes the present case: Wilson alleges no violation MLB's CBA or Policy, only that MLB violated the DATWA. The claim is not an as-applied challenge of the CBA or Policy under

[2] A fourth possibility: the employer satisfies its duties under both the CBA and DATWA.

the DATWA; it is simply a DATWA claim, based on MLB's actions. Therefore, reference to MLB's CBA and Policy is entirely unnecessary to resolve the claim.

**D. Enforcing Wilson's DATWA claims under state law does not threaten uniform interpretation of MLB's CBA or Policy, but rather properly validates Wilson's state law rights and declines to give private bargaining the force of federal law.**

Resolving Wilson's DATWA claims under state law does not threaten the uniformity of federal labor law. Respondent does not dispute Petitioner's contention that this Court has long held that Congress enacted § 301 to promote uniformity in federal labor law. See Allis-Chalmers, 471 U.S. at 209-11; Lucas Flour Co., 369 U.S. at 104; Textile Workers Union, 353 U.S. at 454-56. Congress reasonably worried, the Court has explained, that "[t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." Lucas Flour, 369 U.S. at 103. The present case simply does not generate any of the evils the Lucas Flour Court imagined, however. Regardless of the status of Wilson's DATWA claims, the "individual contract terms" of the CBA and Policy have but one meaning — that reached by federal arbitrators — because resolving his claims does not require interpretation of the CBA or Policy. Thus, enforcing Wilson's state law rights neither makes MLB and its players less "certain of the rights which [they] had obtained" through bargaining nor does it "tend to stimulate and prolong disputes as to [the CBA's] interpretation." See id. at 103-04. The "practical effect of the regulation" is assuredly not "to control conduct beyond the boundaries of the state," Healey v. Beer Institute, Inc., 491 U.S. 324, 336 (1989), but rather to ensure that MLB properly affords players in the state of Minnesota a few discrete, specific rights.

Nor, more broadly, does validating Wilson's DATWA rights threaten MLB's integrity, competitive balance, or ability to thrive financially. The rights created by DATWA do not stop

MLB from prohibiting and testing for steroid usage by Twins players, nor do they prevent the discipline of players such as Wilson who fail tests. Allowing Wilson's DATWA claims to proceed should not be conflated with allowing a facial challenge to the CBA or Policy as impermissible under DATWA, which certainly would not be permissible. Indeed, even if MLB in the future tests and disciplines another Twins player by procedures identical to those in this case, that player would still be required to file a new DATWA claim. Suffice it to say, players would still be better off simply abiding by MLB's Policy in the first place; enforcing DATWA by no means incentivizes players to disregard the Policy nor exculpates violations. Enforcing Wilson's DATWA does not result in the "fragmentation of the league structure on the basis of state lines" that would have resulted had MLB been subjected to state antitrust laws in the context of the reserve clause. See Partee v. San Diego Chargers Football Co., 668 P.2d 674, 678-79 (Cal. 1983). Rather, enforcing Wilson's DATWA right merely means that when enforcing its CBA and Policy, MLB must afford Twins' players a few specific — and predominantly procedural — protections. The viability of MLB and its Policy are in no way threatened.

Moreover, this Court has been clear that the federal interest in uniformity of labor law by no means entirely displaces state regulatory interests. To wit, the Court held that "it would be inconsistent with congressional intent under [§ 301] to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." Allis-Chalmers, 471 U.S. at 212; see also Livadas, 512 U.S. at 123 ("§ 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law"). Preempting Wilson's claim inappropriately disregards the Minnesota legislature's decision to confer specific procedural and substantive rights on its employed citizens. Moreover, preempting Wilson's claim also inappropriately elevates a private contractual agreement above state law. This Court has

emphasized that in enacting § 301, Congress did not intend "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." Allis-Chalmers, 471 U.S. at 211-12; see also Cramer v. Consolidated Freightways, Inc., 255 F.3d 683, 695 n.9 (2001) ("[T]he LMRA certainly did not give employers and unions the power to displace any state regulatory law they found inconvenient."). MLB and the MLBPA are not above state law, not should their CBA be allowed to dismantle independent state regulatory schemes.

Finally, if MLB truly believes the viability of its CBA and Policy are threatened by enforcement of Wilson's rights under the DATWA, there are two alternative pathways by which MLB may seek to avoid DATWA liability which require far less doctrinal distortion than does preempting Wilson's independent state law claim. First, MLB is free to seek a Congressional exception from any state laws that in any way hinder or create conditions upon its ability to prohibit, test for, and discipline steroid usage by players, based on the pressing importance of those goals. Second, MLB is free to argue that it already should be so exempted from the requirements created by DATWA. As this Court has noted on multiple occasions, the standard for preemption under § 301 is distinct from those factors the Court considers in determining whether a state law is preempted by § 7 or 8 of the NLRA because it "upset[s] the balance of power between labor and management expressed in our national labor policy." Allis-Chalmers, 471 U.S. 202, 212 n.6; see also Lingle, 486 U.S. at 409 n.8. That MLB has made no such claim here does not justify this Court stretching § 301 in order to inappropriately preempt Wilson's DATWA claim.

**III. The Arbitrator's Decision is Contrary to Public Policy because it Sanctions the Violation of Fiduciary Duties**

The MLBPA recognizes a strong presumption of arbitrability exists in the context of labor disputes, and that the Court must treat an arbitrator's award as if it represents the collective bargaining agreement itself. Eastern Assoc. Coal Corp. v. United Mine Workers, Dist. 17, 531 U.S. 57 (2000). The deference owed to arbitration awards, however, is not the equivalent of a grant of limitless power, and courts are neither entitled nor encouraged simply to 'rubber stamp' the interpretations and decisions of arbitrators. Stark v. Sandburg, Phoenix & von Gontard, P.C., 381 F.3d 793, 799 (8th Cir. 2004). Like any contract, the Court has an obligation to refrain from enforcing those collective bargaining agreements that violate public policy. W.R. Grace & Co. v. Local Union 759, 461 U.S. 757 (1983); Ace Elec. Contractors, Inc. v. Int'l Bd. of Elec. Workers, Local Union No. 292, 414 F.3d 896 (8th Cir. 2005).

Where an arbitration award is claimed to be inconsistent with public policy, in order to overturn an award, it must be in direct conflict with other "laws and legal precedents," rather than simply in tension with an assessment of "general considerations of supposed public interests." W.R. Grace & Co., 461 U.S. at 766. This is not to say that an arbitration decision can only be overturned if the arbitrator requires conduct that a party on its own could not lawfully engage in – the Court has deliberately left that question open. See United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987); Eastern Assoc. Coal Corp., 531 U.S. 57 (2000); Iowa Elec. Light & Power Co. v. Local Union 204 of Int'l Bd. of Elec. Workers (AFL-CIO), 834 F.2d 1424, 1427 (8th Cir. 1987). The Court thus acknowledges that there is room in the doctrine for arbitration awards to be overturned due to legal conduct that violates public policy, even if it does not rise to the level of illegality. Definite indications of the law of the sovereignty are sufficient – definite laws are not required. Iowa Elec. Light, 834 F.2d at 1427. The court of

appeal's decision to overturn the arbitrator's award on public policy grounds should be affirmed, because the award sanctioned the violation of fiduciary duties and behavior that threatens employee health and safety.

### A. The terms of the CBA establish a fiduciary relationship between the Policy Administrator and MLB players

In determining whether a fiduciary relationship exists, New York courts "conduct a fact-specific inquiry into whether a party reposed confidence in another and reasonably relied on the other's superior expertise or knowledge." Lumbermens Mut. Cas. Co. v. Franey Muha Alliant Ins. Servs., 388 F. Supp. 2d 292, 305 (S.D.N.Y. 2005). Additionally, New York law recognizes that it is unnecessary for a fiduciary duty to be formalized in writing for fiduciary obligations to exist. Id. Instead, courts analyze the ongoing behavior between the parties to determine whether a fiduciary duty has arisen. Id. And, if a contract establishes a relationship of trust and confidence between the parties, then a fiduciary duty arises from the contract that is independent of the contractual obligation. Id., citing GLM Corp. v. Klein, 665 F. Supp. 283, 286 (S.D.N.Y. 1987). Petitioner's focus on the fact that the CBA does not articulate a specific obligation to issue warnings about specific products is thus misguided. The fiduciary duty to share this information arose out of the relationship arranged for in the contract, and never had to be specifically articulated in order to qualify as a legal imperative.

But the Policy does establish a fiduciary relationship between players and the Policy administrator. Because there is no one-size-fits-all definition of a fiduciary, the Court must analyze whether the relationship between the members MLBPA and Dr. Larson (as an agent of MLB) meets the definition of a fiduciary. A fiduciary relationship may be found in a case "in which influence has been acquired and abused, in which confidence has been reposed and

betrayed." United Feature Syndicate Inc. v. Miller Features Syndicate, Inc., 216 F. Supp. 2d 198, 218 (S.D.N.Y. 2002).

It is clear that in the course of bargaining, both sides contemplated that Dr. Larson and the Hotline would serve as the primary points of contact for players concerned with staying in compliance with the policy. The Policy provides that, "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. More importantly, the Policy directs players to utilize Dr. Larson as the definitive authority on compliance, stating, "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. Thus, by contractual arrangement, the players and the MLBPA reposed a large amount of trust in Dr. Larson and MLB to disclose pertinent information about the policy. The relationship was such that the players were to trust Dr. Larson as the final say on the Policy and the substances that ran afoul of the Policy. By failing to disclose that SpeedShot contained a banned substance, Dr. Larson, as Administrator, and Mr. Birch, as a representative of MLB, betrayed the confidence invested in them by the players.

**B. A fiduciary duty exists where a party reasonably relies on another's superior expertise or knowledge**

The petitioner had an affirmative duty to disclose to MLB players that SpeedShot contained Clomiphene. Because it contained Clomiphene, SpeedShot posed two distinct threats to the players that consumed it: 1) health risks associated with consumption of synthetic hormone blockers, and 2) suspension due to violation of the league substance abuse policy. Dr. Larson and Mr. Birch specifically withheld the knowledge that consumption of SpeedShot would result

in violation of the substance policy, despite the fact that they fielded inquiries about the drug via the Hotline, and despite their knowledge of heavy interest in energy boosting supplements.

Defendants maintain that the strict liability negotiated for in the CBA absolves them of any blame, because players are responsible for everything that goes into their bodies. However, as a matter of law, petitioner violated its fiduciary duty to MLB players, who reasonably relied on defendant's superior expertise or knowledge. See Callahan v. Callahan, 127 A.D.2d 298 (N.Y. App. Div. 1987). Defendants became aware not only that SpeedShot contained a banned substance, but that the banned substance was not a listed ingredient. Plaintiffs cannot be expected to perform a chemical analysis of every item that passes through their lips. The CBA recognized this reality by providing for a Hotline and an Administrator. In this case, MLB had superior knowledge regarding the ingredients of SpeedShot and knew that MLB players neither possessed this information nor had the likely means to independently obtain this hidden data.

The MLBPA has never argued that MLB has an affirmative duty to test all commercially available supplements, energy drinks, vitamins, etc. for the presence of prohibited substances. Rather, MLB is only obligated as a fiduciary to share the data that it *does* have, especially when said information is unavailable to players by other means. Callahan, 127 A.D.2d at 300 ("duty to disclose may arise… where a party has superior knowledge not available to the other"). The argument that an excessive burden will result from overturning the award simply flies in the face of reason. The burden that respondents *would* place on MLB – disseminating its knowledge of the presence of banned substances in supplements via the Hotline – is far outweighed by the negative health, reputational, and financial consequences to their employees. And not only did MLB fail to disclose their knowledge of SpeedShot's unlabelled ingredient via the Hotline, but they also refused the lab director's request to report the information about SpeedShot to the Food

& Drug Administration. *Wilson I*, No. 09-AC-0213, slip op. at 3. This failure exacerbated the harm to the players by ensuring that the presence of Clomiphene would go undiscovered by the players. MLB's deliberate steps to obfuscate the contents of SpeedShot constitute a violation of their fiduciary duty to their players.

**C. MLB had a duty to disclose known health hazards to players**

MLB had a duty to inform players about the health risks of SpeedShot based on their actual knowledge of the presence of Clomiphene. The appellate court rightfully found that Dr. Larson had a fiduciary duty to disclose that SpeedShot contained Clomiphene. Dr. Larson testified that he would have told a player who specifically inquired about SpeedShot that it contained Clomiphene, but he undertook a stronger duty of care when he expressly promised to "continue to provide MLB Players with information on the subject throughout the year." *Wilson II*, No. 09-2108, slip op. at 12.

Importantly, Clomiphene use has potentially serious negative health consequences. Common side effects from Clomiphene exposure include blurred vision or vision problems (spots or flashes); breast tenderness; dizziness; enlarged breasts; flushing; headache; lightheadedness; mood change; nausea; pelvic pain or bloating; stomach pain; vomiting. Clomiphene Side Effects, http://www.drugs.com/sfx/clomiphene-side-effects.html (last visited January 2, 2010). Additionally, long-term use can result in male sterility. Id. The possibility that players would use another energy supplement if they had been made aware, by Dr. Larson or the Hotline, that SpeedShot contained Clomiphene, in no way mitigates the negative health consequences they could have suffered by ingesting Clomiphene. It's as if MLB is saying they had no duty to alert their employee that he was about to get struck by a train because the track he might have jumped to was also in service.

As the court of appeals pointed out, arbitration awards that have sanctioned behavior that threatens health and safety have been overturned on public policy grounds. See, e.g. Delta Airlines, Inc. v. Airline Pilots Ass'n, Int'l, 861 F.2d 665 (11th Cir. 1988) (affirming vacation of arbitration award ordering the reinstatement of a pilot who had been discharged after flying a commercial plane while inebriated); Iowa Elec. Light, 834 F.2d 1424 (affirming vacation of an award ordering the reinstatement of a nuclear power plant worker discharged for intentionally violating a federally mandated safety regulation). While MLBPA does not contend that the threat to public health in the present case approximates in degree that of the cited cases, it is a matter of degree only – not category. Affirming the lower court's vacation of the arbitration award in the instant case would not represent new law.

In Iowa Elec. Light, the court discussed the line of cases vacating arbitrators' awards that direct the reinstatement of employees whose deliberate acts had jeopardized public health or safety. Included in this line was an alcohol-drinking truck driver. In the present case, the same level of culpability attaches to Dr. Larson and Mr. Birch for willfully exposing the players to harmful substances.

## CONCLUSION

For the reasons set forth above, the Court of Appeals' judgment denying Petitioner-Defendant's motion for summary judgment and setting aside the arbitrator's award should be affirmed.

Respectfully submitted on this 11th day of January, 2010.

Team 20

Counsel for Respondents