08CV6254
RHK/JJG

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION,	:	
Plaintiff/Petitioner,	:	
vs.	:	No.
NATIONAL FOOTBALL LEAGUE and NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL,	:	
Defendants/Respondents.	:	

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF/PETITIONER'S MOTION FOR A PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

This is the rare case in which a federal court must take action to vacate two labor arbitration awards because they: (i) violate public policy; (ii) defy the essence of the collectively bargained agreement from which they arise; and (iii) stem from fundamentally unfair proceedings in which the arbitrator, the chief legal officer of the National Football League ("NFL"), was so closely tied to the wrongful conduct at issue in the arbitrations by NFL officials who worked closely with him, that he could not render an unbiased decision. In order to protect NFL players from suffering severe and irreparable harm while the Court considers these important issues, preliminary injunctive relief is required.

Specifically, through this Motion, Plaintiff/Petitioner National Football League Players Association ("NFLPA" or "Plaintiff"), on behalf of itself and NFLPA union members Kevin Williams, Pat Williams, Charles Grant, Deuce McCallister, and Will Smith (the "Players"), seeks to preliminarily enjoin the NFL and the NFL Management Council ("NFLMC") (collectively, "Defendants") from enforcing two Arbitration Awards that suspend the Players for the four remaining weeks of the current NFL season. There will be no way to undo the irreparable harm to the Players (and their teams and their fans) if they are wrongfully forced to miss these games – beginning this Sunday – as a result of Arbitration Awards which must be set aside.

The Arbitration Awards at issue arise out of the Players' purported violations of the NFL Policy on Anabolic Steroids and Related Substances (the "Policy"). See Declaration of Mark A. Jacobson ("Jacobson Decl."), Ex. A (filed concurrently herewith). As the Arbitration Awards acknowledge, none of the Players tested positive for any anabolic steroids or ever knowingly ingested any substance banned by the Policy. See Arbitration Award Re: Appeals of Messrs. Kevin and Pat Williams at ¶ 2 ("Williams Arbitration Award") (Jacobson Decl., Ex. B); Arbitration Award Re: Appeals of Messrs. Grant, McCallister and Smith at ¶ 1 ("Grant Arbitration Award") (Jacobson Decl., Ex. C) (collectively, "Arbitration Awards"). Instead, the Players were suspended for unknowingly ingesting a banned diuretic (bumetanide) by taking an over-the-counter supplement called "StarCaps" which did not identify the diuretic in its disclosed list of ingredients. Grant Arbitration Award at ¶ 3. If these were the only facts, the NFLPA

would not be seeking to set aside the Arbitration Awards, as the Policy provides that lack of knowledge is not a defense.

The suspensions at issue here, however, are fatally tainted by the breach of fiduciary duty and wrongful conduct of the very officials who were charged with administering the Policy. Specifically, Dr. John Lombardo, the Independent Administrator of the Policy appointed by the NFL and charged with overseeing all aspects of the Policy, including communications with players, expressly knew and willfully withheld the critical information that StarCaps secretly contained the banned diuretic substance. If this were not bad enough, Adolpho Birch, the NFL's Vice President of Law and Labor Policy who is charged with overseeing the Policy on behalf of the NFL and NFLMC, also expressly knew and withheld from players and the NFLPA the critical information that StarCaps contained a prohibited substance that could jeopardize the health and career of any player who used the product. This failure to disclose and willful concealment was an unconscionable breach of public policy and fiduciary duty which also violated the essence of the collectively bargained Policy. The two Arbitration Awards, which vindicated this wrongful behavior by NFL officials, and punished the Players who innocently used StarCaps because they were deprived of information known to the NFL, shock the conscience and must be set aside.

Further, the Arbitrator in these proceedings, Jeffrey Pash, the NFL's Executive Vice President and chief legal officer, was fatally biased and unqualified as an Arbitrator by the direct involvement of his officer and subordinate, Mr. Birch, in the wrongful failure to disclose what was at issue in the Arbitrations. While the NFLPA

agreed to have the NFL Commissioner or his designee (in this case, Mr. Pash), serve as the Arbitrator under the Policy, that consent did not extend to the wholly unanticipated situation in which Mr. Pash's office was associated with improper conduct under the Policy and in which Mr. Pash was called upon to rule on the propriety of the actions of his own employees and agents. The case law is clear that such an arbitration proceeding, presided over by an evidently partial arbitrator, cannot stand.

The issue on this Motion, however, is not whether the NFLPA will ultimately prevail on its petition to vacate the Arbitration Awards. Because this is a request for preliminary relief to preserve the status quo, the two major points for the Court to consider are the existence of irreparable injury and balance of the hardships. See Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1981) (holding that the movant need not show a "likelihood" of success on the merits where the balance of hardships tilt strongly in the movant's favor). As shown below, the irreparable injury to the Players here – where the suspensions could very well prevent their teams from making the NFL playoffs – could not be clearer. In fact, not only these Players, but their teammates and fans will suffer irreparable harm if the wrongful suspensions are not enjoined.

By contrast, Defendants and the Policy will suffer no injury at all if the suspensions are delayed while the Court considers the merits of the petition to vacate the Arbitration Awards. Indeed, the original failed drug tests took place in July and August and it has already been many months during which those proceedings had been pending and the Players have been able to fully perform with their teams. Maintaining this status

quo a little longer will do no harm to the Defendants, which have no legitimate interest in having the Players wrongfully suspended in a situation in which any purported violation of the Policy was a result of Defendants' own wrongful behavior. The balance of hardships thus weighs heavily in favor of granting the Players the requested relief.

For all of these reasons, as well as those set forth in detail below, the issuance of a preliminary injunction to maintain the status quo while this Court considers the very substantial questions raised by the Complaint and Petition to vacate the Arbitration Awards, is the only just and proper result in this case.[1]

STATEMENT OF FACTS

The NFL Policy on Anabolic Steroids and Related Substances (the "Policy") prohibits the use of steroids, growth hormones and other similar substances. Policy at 1 (Jacobson Decl., Ex. A). However, the Policy also prohibits the use of so-called "blocking" or "masking" agents, including diuretics. Id. at 1, 10. One of the "primary factors" underlying the Policy are the potential adverse health effects associated with prohibited substances. Id. at 1-2.

The Policy provides for procedures for testing for prohibited substances and disciplinary measures against players who have positive test results. Id. at 3-6. The Policy is conducted by the NFL, which selects an "Independent Administrator," Dr. John

[1] There was a report last night that a Minnesota state court action, brought by the two Minnesota Vikings Players, resulted in a TRO being granted against their suspensions. That order, however, does not obviate the need for this Motion, both because it does not provide any relief to the three New Orleans players and because it is uncertain how long that TRO, which was brought solely on state law grounds, will remain in effect. The NFLPA does not yet have a copy of the TRO issued by the state court, but will provide a copy to this Court as soon as it becomes available.

Lombardo, to administer the Policy. Id. at 2-4, Appendix B at 18. Pursuant to the Policy, the NFL also selects a "Consulting Toxicologist," Dr. Bryan Finkle, who consults on testing procedures and other issues referred to him by the Independent Administrator. Id. at 3 n.2, Appendix B at 18. Additionally, Adolpho Birch, a senior NFL lawyer, oversees the operation of the Policy of the NFL and NFLMC. See, e.g., 11/20/08 Transcript of Williamses Hearing at 174-77, 292 (testimony regarding Mr. Birch's involvement with the Policy) ("11/20/08 Hearing Tr.") (Jacobson Decl., Ex. E); Sports Business Journal Resource Guide and Fact Book (Jacobson Decl., Ex. F).

In addition to administering the Policy, the Independent Administrator is directed to, among other things, make himself available for consultation with the players and oversee the development of educational materials. Policy at 3 (Jacobson Decl., Ex. A). The Policy states that NFL players should contact Dr. Lombardo if they have questions or concerns about particular dietary supplements or other products. Id. at 6.

NFL players Kevin Williams and Pat Williams, of the Minnesota Vikings and Charles Grant, Deuce McAllister, and Will Smith, of the New Orleans Saints (collectively, the "Players"), each used an over-the-counter dietary weight-loss supplement called StarCaps. See Williams Arbitration Award at ¶ 4; Grant Arbitration Award at ¶ 3(Jacobson Decl., Exs. B and C). After using StarCaps, urine samples taken from each player in or about July-August 2008 tested positive for the diuretic bumetanide. Williams Arbitration Award at 1; Grant Arbitration Award at 1. Following these positive test results, each player was suspended for four games pursuant to Policy. Id.; see also Policy at 8.

Bumetanide is not a disclosed ingredient in StarCaps. Williams Arbitration Award at ¶ 4; Grant Arbitration Award at ¶ 3. However, on or about November 2006, Dr. Finkle ordered the NFL laboratory to conduct an investigation into StarCaps based on positive test results obtained around that time period for another NFL player. 11/18/08 Transcript of Grant, McAllister and Smith Hearing at 140-42 ("11/18/08 Hearing Tr.") (Jacobson Decl., Ex. D). This analysis confirmed that bumentanide was an undisclosed ingredient in StarCaps. Dr. Finkle discussed these results with Dr. Lombardo, including his concerns that the product could threaten players' health and that the information should be passed on to players. Id. at 138.

However, Dr. Lombardo did not inform NFL players or the NFLPA about the undisclosed diuretic in StarCaps. 11/20/08 Hearing Tr. at 291-93 (Jacobson Decl., Ex. E). Instead, he merely sent additional notices to players providing the same incomplete information about the risks of dietary supplements generally that had been provided in previous notices, without identifying the information he had about the diuretic secretly contained in StarCaps. Id.

Dr. Lombardo did inform Defendants about the undisclosed presence of a diuretic in StarCaps and had the manufacturer of StarCaps, Balanced Health Products, added to the list of companies with which player endorsements are prohibited. 11/18/08 Hearing Tr. at 57. He also informed Mr. Birch at the NFL about the risks of StarCaps and what ingredients it really contained. 11/20/08 Hearing Tr. at 292. However, no one at the NFL or the NFLMC informed any NFL players – whose health and careers are

paramount concerns under the Policy – about the dangerous diuretic contained in StarCaps. Id. at 291-93, 174-75.

Following the positive test results, the Players each appealed the suspensions pursuant to the Policy. Two separate hearings (one for the Vikings players and one for the Saints players) were held on November 18, 2008 and November 20, 2008, respectively, before the NFL Hearing Officer, Jeffrey Pash, the designee of the NFL Commissioner. At their respective hearings, the Players presented evidence that Dr. Lombardo, Mr. Birch and the NFL had withheld information from the players about StarCaps in violation of their fiduciary and other duties. See 11/20/08 Hearing Tr. at 364-68 (Dr. Finkle testifying that Dr. Lombardo did not inform players of the specific health risks of StarCaps because he feared "legal liability" from StarCaps manufacturers, and that neither Dr. Lombardo nor anyone else "from the NFL provide[d] any warning of any sort about the specific products, StarCaps."); Id. at 174-175 (Mr. Birch testifying that he did not "notify teams in writing that StarCaps contained Bumetanide," and that he also did not "notify players . . . [or] the NFLPA in writing that StarCaps contained Bumetanide" despite knowing about it in "the first part of 2007 or somewhere thereafter"); 11/18/08 Hearing Tr. at 57-58 (Dr. Lombardo testifying that he "had specific knowledge as to StarCaps containing Bumetanide" but that nowhere in his "two memoranda [to players] [did] he mention the term StarCaps . . . .") (Jacobson Decl., Exs. E & D).

One of the reasons Dr. Lombardo decided to conceal the StarCaps information from NFL players was to mollify his concern about legal exposure to a suit from the manufacturer of StarCaps. As Dr. Finkle testified:

> Q. What reason did Dr. Lombardo tell you he decided not to make that specific disclosure?
> A. It was a very general conversation. I will distill it down to two reasons; one was he didn't feel he had adequate evidence that all of StarCaps products contained this drug, and, therefore, was very concerned about making that allegation, if you will. And secondly, he was concerned about legal liability.
> Q. To whom?
> A. For himself. That if he publicly made a statement that this product, by this company contained this particular drug and he considered this dangerous and so on and so forth, that the company might indeed sue him and he might find -- and he said to me that that had happened in his experience to other people and other organizations that had made allegations against supplement companies. And those people had been ruined by these subsequent consequent legal proceedings.

11/20/08 Hearing Tr. at 364-65.

Mr. Pash, the NFL's chief legal officer who supervises Mr. Birch, sustained the four-game suspensions of each player in two separate – but substantively identical – decisions dated December 2, 2008. See Arbitration Awards (Jacobson Decl., Exs. B and C). Mr. Pash concluded that neither Dr. Lombardo, nor the NFL, had any duty to provide the NFL players with the information they had gained about the undisclosed risk StarCaps posed to players' health. Williams Arbitration Award at 6-9; Grant Arbitration Award at 7-9.

ARGUMENT

Fed. R. Civ. P. 65 provides for issuance of a preliminary injunction where necessary to alleviate the probability of immediate and irreparable injury, loss or damage. The factors to be considered are:

1. The threat of irreparable harm to the movant;

2. The state of the balance of this harm and the injury that granting the injunction will inflict on other parties litigant;

3. The probability that movant will succeed on the merits; and

4. The public interest.

Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1981). See also Animal Fair, Inc. v. Amfesco Industries, Inc., 620 F. Supp. 175, 184-185 (D. Minn. 1985), aff'd, 794 F.2d 67 (8th Cir. 1986). However, the equitable nature of a motion for preliminary injunctive relief requires that "the court's approach be flexible enough to encompass the particular circumstances of each case." Dataphase Sys., 640 F.2d at 113. Thus, "where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less." Id.

"At base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." Id.; Basin Elec. Power Co-op v. MPS Generation, Inc., 395 F.Supp.2d 859, 867 (D.N.D. 2005) ("To maintain the status quo at this stage is clearly the wise and prudent approach to take. This factor [balance of hardships] weighs in favor of the issuance of injunctive relief."). This threshold consideration strongly favors granting

the requested injunctive relief to maintain the status quo, i.e., keeping the Players practicing and playing with their teams, pending judicial review of the Arbitration Awards.

As demonstrated below, all of the preliminary injunction factors compel the issuance of such preliminary injunctive relief to prevent the NFL from enforcing the Arbitration Awards until their validity can be fully and finally determined.

I. THE PLAYERS WILL BE IRREPARABLY HARMED IF THEIR SUSPENSIONS ARE NOT IMMEDIATELY ENJOINED

There can be no question that the Players here would suffer severe and irreparable injury if the Arbitration Awards – and their suspensions – are not immediately enjoined. See Declaration of NFLPA Interim Executive Director and General Counsel Richard A. Berthelsen ("Berthelsen Decl.") ¶¶ 3, 9-13 (filed concurrently herewith). The careers of professional athletes, such as Messrs. Williams, Williams, McCallister, Smith, and Grant, are short and precarious so that being denied the opportunity to play in games is an irreparable harm which cannot be compensated with monetary damages.[2] See Silverman v. Major League Baseball Player Relations Committee, Inc., 67 F.3d 1054, 1062 (2d Cir. 1995) ("Given the short careers of professional athletes and the deterioration of physical abilities through aging, the irreparable harm requirement has been met."); Jackson v. Nat'l Football League, 802 F. Supp. 226, 231 (D. Minn. 1992)

[2] Mr. Grant is currently on "injured reserve" and ineligible to play in regular season games. However, he is nevertheless suffering irreparable harm to his reputation each day that his unlawful suspension is in effect. And, regardless of Mr. Grant's status, the Arbitration Award suspending him also applies to Mr. McCallister and Mr. Smith – who are active – and therefore must be enjoined. See Arbitration Award Re: Appeals of Messrs. Grant, McCallister and Smith (Jacobson Decl., Ex. B).

("The existence of irreparable injury is underscored by the undisputed brevity and precariousness of the players' careers in professional sports . . . .") (granting NFL players a TRO against the NFL); Neeld v. Am. Hockey League, 439 F. Supp. 459, 461 (W.D.N.Y. 1977) (finding irreparable harm because a "young athlete's skills diminish and sometimes are irretrievably lost unless he is given an opportunity to practice and refine such skills at a certain level of proficiency"); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1319 (D. Conn. 1977) ("The career of a professional athlete is more limited than that of persons engaged in almost any other occupation.").

In this case, given the fact that the four-game suspensions would prevent Messrs. Williams, Williams, McCallister and Smith from participating in the remainder of the NFL's regular season while their teams fight to make the playoffs, the irreparable harm that they would suffer absent a preliminary injunction extends beyond the shortness of their respective careers. The NFL season is now in its "fourth quarter," and these players are critical to their team's chances of making the playoffs. See, e.g., Albert Breer, "Suspensions Will Ripple Through Playoff Races," The Sporting News, Dec. 2, 2008 (Jacobson Decl., Ex. G) ("Sporting News Article"); Berthelsen Decl. ¶¶ 10-12.

Indeed, Mr. Kevin Williams and Mr. Pat Williams have been the centerpieces of the Minnesota Vikings defensive line. See, e.g., Chip Scoggins, "Suspensions Leave Defensive Line Thin," Star Tribune, Dec. 2, 2008 (discussing how "[t]he 'Williams Wall' gave the Vikings perhaps the top tackle tandem in the NFL and are key cogs in a defense that ranks second in the League in run defense and eighth in total defense") (Jacobson Decl., Ex. H). The Minnesota Vikings are currently in first

place in their division – but only by a single game – and in the heart of the playoff race.[3] As one of the Williamses' Minnesota Vikings teammates described the possibility of their being suspended for the remainder of the regular season: "Those guys are two All-Pro defensive tackles .... It would be a different world without them." Id.

Similarly, Mr. Smith and Mr. McCallister are key components of another team in the thick of a playoff race – the New Orleans Saints.[4] Mr. Smith and Mr. McCallister, like the two Vikings players, are both former Pro Bowlers.[5] Mr. Smith has achieved the second highest number of sacks on the Saints defense this season, and is regarded as one of the team's key defensive players.[6] Mr. McCallister is second on the Saints in rushing attempts, rushing yards, and rushing touchdowns.[7] As one commentator put it: "With so many teams to leapfrog in the NFC wild-card race, the Saints are already a longshot to make the playoffs. The loss of Smith and McAllister ends any hope." Sporting News Article (Jacobson Decl., Ex. G).

Given the importance of each of these four players to their respective teams, and the timing of the suspensions, there is simply no way to compensate for the

[3] See http://www.nfl.com/standings (last visited December 3, 2008).

[4] See http://www.nfl.com/standings (last visited December 3, 2008) (showing that the Saints have a 6-6 won/loss record which is comparable to many other teams in their conference).

[5] See http://www.pro-football-reference.com/years/2006/probowl.htm (identifying Will Smith as a 2006 Pro Bowl player); http://www.pro-football-reference.com/years/2003/probowl.htm (identifying Deuce McCallister as a 2003 Pro Bowl player).

[6] http://www.nfl.com/teams/neworleanssaints/statistics?team=NO (last visited December 3, 2008).

[7] http://www.nfl.com/teams/neworleanssaints/statistics?team=NO (last visited December 3, 2008).

lost opportunities of these Players missing games, or to undo the possible consequences of their inability to participate in those games (e.g., the Vikings and/or Saints missing the playoffs). Such irreparable harm would extend not only to the Players themselves, but to their respective teammates and to the fans of those teams.

An additional type of irreparable harm that would result from not enjoining the Arbitration Awards would be the resulting prohibition on these Players being selected to this season's Pro Bowl team or receiving any other League honor. Under the Policy, a suspended player is "ineligible for selection to the Pro Bowl, or to receive any other honors or awards from the League or NFLPA, for the season in which the violation is upheld and in which the suspension is served." Policy § 6 (Jacobson Decl., Ex. A). Such honors and awards provide substantial economic and non-economic benefits for players (e.g., contractual incentives and the notoriety that attaches to individual honors). See Berthelsen Decl. ¶ 13.

Yet another form of irreparable injury to the Players is the damage to their reputations each day the unlawful suspensions remain in effect. Notwithstanding the undisputed fact that none of these Players testified positive for using any anabolic steroid, the suspensions are being reported as "for violating the league's steroid policy." Sporting News Article (Jacobson Decl., Ex. G). A preliminary injunction would at least mitigate the daily, irreparable harm these Players' reputations are suffering as long as they are wrongfully suspended, and allow time for judicial consideration.

For all of these reasons, it cannot be seriously disputed that a failure to issue a preliminary injunction enjoining the Players' suspensions will cause severe and

irreparable injury to each of the players involved. By contrast, as set forth below, it is equally clear that the balance of hardships at issue on this Motion decisively supports granting the preliminary injunction.

II. THE BALANCE OF HARDSHIPS OVERWHELMINGLY FAVORS THE PLAYERS

On the one hand, absent a preliminary injunction enjoining the Arbitration Awards and the underlying suspensions, the Players will suffer substantial and irreparably injuries. Supra, Point I. On the other hand, even if the Defendants ultimately prevailed in confirming the Arbitration Awards, they would suffer no injury from those Arbitration Awards having been enjoined pending resolution of the underlying merits of this dispute. The reason is that Defendants can impose the suspensions and fines at a later time (e.g., during the next NFL season). Accordingly, the issuance of a preliminary injunction would in no way undermine the Defendants' (and the NFLPA's) interest in having the Policy properly enforced, and there would be no harm to the Defendants or the Policy by granting the requested preliminary injunctive relief. See Berthelsen Decl. ¶ 14.

In fact, the Policy would not have its principal objective served – protecting the health and safety of NFL players – by requiring players to serve unlawful suspensions that should not have been imposed because of Defendants' own failure to disclose critical information. See id. Moreover, many months have already elapsed between the dates of the various Players testing positive as a result of taking StarCaps (between July 25th and August 20th) and the date that the suspensions were supposed to become effective (December 2nd). See Arbitration Awards, (Jacobson Decl., Exs. B and C). Extending

this period a little bit longer for judicial consideration would thus not make any material difference in the Policy's multi-month time period before discipline is imposed.

On balance, the severe and irreparable injury to the Players that would result from denying the preliminary injunction overwhelms the absence of any injury to the Defendants or the Policy if such relief is granted. This is the strongest possible case for entry of a preliminary injunction.

III. IT IS LIKELY THAT THE PLAYERS WILL ULIMATELY PREVAIL ON THE MERITS

The Eight Circuit has held that the element of "success on the merits" does not require in every case that the party seeking preliminary relief prove a greater than fifty percent likelihood that it will ultimately prevail on the merits. See Dataphase Sys., 640 F.2d at 113-114. Rather, "the likelihood that plaintiff ultimately will prevail ... must be examined in the context of the relative injuries to the parties and the public." Id. In cases such as this one, "where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits can be less." Id. Indeed, "where the balance of other factors tips decidedly toward plaintiff[,] a preliminary injunction may issue if movant has raised questions so serious and difficult as to call for more deliberate investigation." Id. As set forth below, although the standards for vacating arbitration awards are demanding, it is clear that in this case there are, at a minimum, "questions so serious and difficult as to call for more deliberate investigation."

A. The Arbitration Awards Must Be Vacated Because They Violate Public Policy And Shock The Conscience By Sanctioning Defendants' Breach Of Fiduciary Duty And Willful Failure To Disclose

An arbitration award must be vacated where it runs counter to public policy. See Ace Elec. Contractors, Inc. v. Int'l Bhd. of Elec. Workers, Local Union No. 292, 414 F.3d 896, 903 (8th Cir. 2005). The Arbitration Awards at issue here violate public policy because they sanction Defendants' knowing and intentional breach of fiduciary duty and willful failure to disclose the fact that StarCaps secretly contained a banned diuretic – that was both a violation of the Policy and potentially harmful to the Players' health. Permitting the Arbitration Awards to stand would endorse this wrongful conduct by the Defendants and the officials who the NFL appointed to supervise the Policy. Indeed, courts have frequently ordered arbitration awards to be vacated on public policy grounds where, as here, an award would sanction behavior that threatens health and safety. See Iowa Elec. Light & Power Co. v. Local Union 204 of Int'l Bhd. of Elec. Workers (AFL-CIO), 834 F.2d 1424, 1428 (8th Cir. 1987) (affirming vacation of award ordering reinstatement of nuclear power plant machinist discharged for deliberately violating federally mandated safety regulation); Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l, 861 F.2d 665, 674 (11th Cir. 1988) (affirming vacation of award ordering reinstatement of pilot who had been discharged after flying passenger plane while intoxicated).[8]

[8] See also Russell Mem'l Hosp. Ass'n v. United Steelworkers of Am., 720 F. Supp. 583, 587 (E.D. Mich. 1989) (vacating award ordering reinstatement of nurse discharged for negligence in administering medication); Highlands Hosp. & Health Ctr. v. Am. Fed. of State, County & Mun. Employees, Dist. Council 84, No. CIV. A. 95-170, 1996 WL

1. Dr. Lombardo, Mr. Birch and Defendants Owed a Fiduciary Duty to NFL Players to Disclose Information They Learned on Harmful and Banned Substances in StarCaps

A fiduciary relationship existed in this case because the Players reasonably relied on Dr. Lombardo's, Mr. Birch's, and Defendants' superior expertise and knowledge in administering the Policy – which states that it is motivated by concerns of protecting player health – as the authoritative source of information on potentially harmful ingredients in dietary supplements banned by the Policy.

"Under New York law, a fiduciary relation exists between two persons when one of them is under a duty to act or to give advice for the benefit of the other upon matters within the scope of the relation." Lumbermens Mut. Cas. Co. v. Franey Muha Alliant Ins. Servs., 388 F. Supp. 2d 292, 305 (S.D.N.Y. 2005) (internal quotation omitted). A fiduciary relationship "may be found in any case 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) (internal quotation omitted). "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, 388 F. Supp. 2d at 305 (internal quotation omitted).[9]

One of the "primary factors" underlying the Policy is the "concern[] with the adverse health effects of using Prohibited Substances." Policy at 1-2 (Jacobson Decl.,

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163947, at *6 (W.D. Pa. Feb. 16, 1996) (vacating award ordering reinstatement of health care assistant discharged for abusing patient).

[9] New York law governs this issue because the Policy is part of the NFL Collective Bargaining Agreement, which states that to the extent that federal law does not govern, New York State law will govern the CBA. See CBA, Art. LIX (Jacobson Decl., Ex. I).

Ex. A). Dr. Lombardo, as the Independent Administrator of the Policy, had an express duty to educate players about prohibited substances. See id. at 3 ("In addition, [the Independent Administrator] will make himself available for consultation with players and Club physicians; oversee violated protocols; oversee the development of educational materials; participate in research on steroids ...."). NFL players were expressly directed to Dr. Lombardo to ask for information about dietary supplements. See id. at 6. Furthermore, while disciplinary provisions are important parts of the Policy, Dr. Lombardo acknowledged in a memo to NFL players that the "[m]ore important[]" concern is the "risk of harmful health effects associated with the[] use" of supplements containing banned substances. Lombardo Memo to NFL Players, Policy at Appendix G (emphasis added) (Jacobson Decl., Ex. A). In that memo, he expressly promised to "continue to provide [NFL players] with information on the subject throughout the year." Id. Dr. Lombardo failed to live up to that duty by withholding critical information he learned about StarCaps that was directly relevant to the health of NFL players.

In addition to Dr. Lombardo's promise to continually provide NFL players with relevant information on dietary supplements, the NFL held itself and Dr. Lombardo out to NFL players as the authoritative sources for information about the ingredients of dietary supplements:

> If you have questions or concerns about a particular dietary supplement or other product, you should contact Dr. John Lombardo . . . . As the Independent Administrator, Dr. Lombardo is authorized to respond to players' questions regarding specific supplements. You may also contact the NFL/NFLPA Supplement Hotline . . . . **Having your Club's medical or training staff approve a supplement will not excuse a positive test result.**

Policy at 6 (first two underlines added, bold in original). By declaring itself and Dr. Lombardo the authoritative sources for information about supplements, the NFL undertook the "duty to . . . give advice for the benefit of [NFL players] upon matters within the scope of the relation," and the players reasonably relied on the Defendants' and Dr. Lombardo's superior expertise and knowledge about the safety of dietary supplements. See Lumbermans, 388 F. Supp. 2d at 305. These facts alone give rise to a fiduciary duty under New York law.

Appendix F of the Policy also advises players that the Policy's administrators will make a "***special effort to educate and warn*** players about the risks involved in the use of 'nutritional supplements'." Dr. Lombardo testified that this "special effort to educate and warn players" was a continuing obligation that is included within the scope of his duties under the Policy. 11/18/08 Tr. 48-49.

2. The Defendants and Dr. Lombardo Breached their Fiduciary Duty to Disclose Their Knowledge about StarCaps to NFL Players

As their fiduciaries with respect to information about dietary supplements, Dr. Lombardo and Defendants owed NFL players the duty to disclose all material facts they knew within the scope of that relationship, especially facts about banned substances which could endanger players' health. See Grandon v. Merrill Lynch & Co., Inc., 147 F.3d 184, 189 (2d Cir. 1998) ("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.") (internal quotation omitted); Callahan v.

Callahan, 127 A.D.2d 298, 300 (N.Y. App. Div. 1987) (a "duty to disclose may arise where a fiduciary or confidential relationship exists or where a party has superior knowledge not available to the other").

In this case, there is no dispute that Dr. Lombardo and Mr. Birch knew that StarCaps contained a banned diuretic years before the Players were tested. 11/20/08 Hearing Tr. at 174-75, 292-93, 364-68; 11/18/08 Hearing Tr. 57-58. Further, it is indisputable that they both deliberately withheld this vital health information from the Players.

Dr. Finkle, the toxicologist under the Policy, testified that he informed Dr. Lombardo that Bumetanide, "an unusual, potent diuretic drug" had been identified in StarCaps, although it was not included in 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." 11/18/08 Hearing Tr. 138-142. Despite this knowledge, Dr. Lombardo deliberately chose not to inform any NFL player or the NFLPA about these critical facts that threatened the health of NFL players. Compare Williams Arbitration Award at ¶ 11 ("The record establishes that Dr. Lombardo became concerned approximately two years ago that players using StarCaps had tested positive for diuretics.") with id. ¶ 13 ("No specific advisory or other communication regarding the presence of bumetanide in StarCaps was sent to NFL players") (emphases added) (Jacobson Decl., Ex. B).

Shockingly, Dr. Lombardo testified that he decided not to disclose to NFL players the presence of this potentially dangerous chemical secretly contained in

StarCaps because he feared that NFL players might then in the future come to expect that he would notify them about other harmful banned substances in dietary supplements:

> Q. Nowhere in those two memoranda [the July 2007 and July 2008 memoranda] do you mention the term StarCaps, do you?
> A. No, because basically if you -- if I put the word StarCaps in specifically, then all those other supplements, we fear the next thing would be you didn't mention this supplement or that supplement. So I sent it with something to warn them of all the weight reduction products out there. And to my knowledge, StarCaps had been added to the list of banned companies and, therefore, they would know that they can't endorse this because it contains a banned substance.
>
> * * * *
>
> Q. You testified that the reason you didn't include StarCaps is that if you had then you anticipated players would use your failure to include another weight reduction supplement as an excuse if that other weight reduction supplement was a source of a banned substance, is that what your testimony was?
> A. Yes. I felt it was more important to get out a warning about all weight reduction supplements. And also the fact that it is not just diuretics and it is not just about one containing diuretics, it is about all of these containing something that is going to end up with a positive test or be harmful to their health.
> Q. But at that point you had specific knowledge as to StarCaps containing Bumetanide, true?
> A. Yes.

11/18/08 Hearing Tr. 57-58 (emphasis added) (Jacobson Decl., Ex. D).

Even more appalling, Dr. Finkle – the toxicologist – testified that Dr. Lombardo had admitted in conversation with him that the reason he (Dr. Lombardo) did not tell NFL players the truth about StarCaps was because he was afraid of being primarily subjected to legal action by StarCaps' manufacturing company:

> Q. What reason did Dr. Lombardo tell you he decided not to make that specific disclosure?
> A. It was a very general conversation. I will distill it down to two reasons; one was he didn't feel he had adequate evidence that all of StarCaps products contained this drug, and, therefore, was very concerned

about making that allegation, if you will. And secondly, he was concerned about legal liability.

Q. To whom?

A. For himself. That if he publicly made a statement that this product, by this company contained this particular drug and he considered this dangerous and so on and so forth, that the company might indeed sue him and he might find -- and he said to me that that had happened in his experience to other people and other organizations that had made allegations against supplement companies. And those people had been ruined by these subsequent consequent legal proceedings.

11/20/08 Hearing Tr. at 364-65 (Jacobson Decl., Ex. E).

Dr. Lombardo's concern about his personal liability was also inconsistent with a scientific fact about which he was aware. An article entitled, "Detection of Bumetanide in an Over-the-Counter Dietary Supplement," Journal of Analytical Toxicology, Vol. 31, November/December 2007, resulted from the NFL's investigation of StarCaps. The authors, who conducted the toxicology tests on StarCaps on behalf of NFL, concluded: "the consistency between the bumetanide content of the [StarCaps] capsules argues against inadvertent 'contamination' of the StarCaps capsules during manufacture. The fact that the bumetanide content of the capsules was remarkably consistent from capsule-to-capsule, and consistent with a therapeutic dose, suggest addition of the bumetanide prior to encapsulation and, potentially, controlled addition of the drug." Accordingly, Dr. Lombardo knew or should have known that every capsule of StarCaps contained bumetanide and that every NFL player who consumed StarCaps would unknowingly consume bumetanide, a powerful diuretic drug.

Not only did Dr. Lombardo's fear cause him to conceal his knowledge about the ingredients in StarCaps from NFL players, he also concealed it from the NFLPA. As he testified at the hearing:

Q. Who at the NFLPA did you share this information about the presence of a dangerous drug in StarCaps in 2006?

A. No one.

Id. at 292-293.

Equally outrageous, Mr. Birch, the Vice President of Law and Labor Policy at the NFL, also knew about the banned substance in StarCaps – because Dr. Lombardo told him about it – but he too did nothing to inform NFL players or the NFLPA:

Q. Mr. Birch, when did you first become aware that Bumetanide had been found in StarCaps?
A. I would suspect it was probably the first part of 2007 or somewhere thereafter.
Q. To the best of your knowledge has the NFL ever provided in writing to teams, trainers or players the finding that Bumetanide was found in StarCaps?
A. We have provided to players, clubs, and well, the Players Association, several parties, the results of the findings because we have provided to them information that Balanced Health Products, the makers of StarCaps, were added to the list of prohibited companies because they manufactured a product that contained a banned substance.
Q. Did you notify teams in writing that StarCaps contained Bumetanide, yes or no?
A. No.
Q. Did you notify players that StarCaps contained Bumetanide?
A. Nope.
Q. Did you notify the NFLPA in writing that StarCaps contained Bumetanide?
A. Again, with the caveat that we don't know if StarCaps as a plural contains Bumetanide. We know that StarCaps has been found in some cases to contain Bumetanide. So with that caveat, no such writing was given to the Union on that specific point.

Id. 174-175.[10]

Had the Players been informed that StarCaps contained a banned substance by either Dr. Lombardo or any NFL official, they would not have taken it, would not have risked their health, and would not have been suspended. Indeed, one of the Players, Deuce McAllister, only commenced using StarCaps after the NFL Supplement Hotline advised him that StarCaps did not contain any prohibited substances. 11/18/08 Hearing

[10] Dr. Lombardo and the Defendants apparently first became aware that StarCaps contained bumetanide from a positive urine test on an unidentified NFL player in or about November 2006. See Declaration of Stacy Robinson (filed concurrently herewith) and hearing transcript excerpts quoted therein. The NFLPA, however, has no records of any player being suspended for bumetanide use during that period, which indicates that Dr. Lombardo and the NFL may have decided, without informing the NFLPA, not to apply the penalties under the Policy to that player. Such inconsistent treatment compared to the suspended Players – who equally had no knowledge that StarCaps contained bumetanide – further underscores the arbitrary and unfair result in this case.

Tr. at 200-02. Two of the other Players, Will Smith and Charles Grant, only began using StarCaps after Mr. McAllister informed them of the advice he received from the Hotline. Id.

Rather than denounce the willful failure to disclose by Dr. Lombardo and Mr. Birch, the Arbitrator expressly condoned and encouraged this behavior:

> [The Players] contend that where specific evidence is available about a particular product, a specific warning is required, and that the failure to extend such a warning should excuse any violation of the Policy associated with the product....
>
> The Policy does not articulate or impose an obligation to issue specific warnings about specific products, and nothing in the record suggests that the bargaining parties have ever contemplated imposing such a requirement on Dr. Lombardo.

Williams Arbitration Award at 7-8 (Jacobson Decl., Ex. B).

In short, the Arbitration Awards violate public policy because they sanction and in fact encourage breaches of fiduciary duty which jeopardized the health of NFL players and upheld suspensions for actions that were the direct result of Defendants' and Dr. Lombardo's own misconduct. Such awards are contrary to public policy and must therefore be set aside. At the very least, there are clearly "questions so serious and difficult as to call for more deliberate investigation" so that preliminary injunctive relief to preserve the status quo is warranted." Dataphase Sys., 640 F.2d at 113.

B. The Arbitration Awards Should Also Be Vacated Because They Defy The Essence of the Collectively Bargained Policy – Safeguarding The Health Of NFL Players

It is equally well-settled that "[a] reviewing court . . . may vacate an arbitration award when the award does not derive its essence from the collective

bargaining agreement, or when the arbitrator ignores the plain language of the contract." Keebler Co. v. Milk Drivers & Dairy Employees Union, Local No. 471, 80 F.3d 284, 287 (8th Cir. 1996). Where an arbitrator dispenses his own brand of industrial justice and issues an award that does not draw its essence from the collective bargaining agreement, "courts have no choice but to refuse enforcement of the award." Ballwin-Washington, Inc. v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 9, 615 F. Supp. 865, 867 (E.D. Mo. 1985).

Here, one of the "primary factors" underlying the collectively-bargained Policy is protecting the health of NFL players. See Policy at 1-2 (Jacobson Decl., Ex. A). As set forth above, however, the Arbitration Awards defy – rather than advance – this stated objective. Indeed, the Arbitration Awards undeniably put the health of NFL players at serious risk by depriving them of critical information about the ingredients in StarCaps – the exact opposite of the Policy's stated goal. By condoning the decision not to disclose, the Arbitration Awards encourage Dr. Lombardo to expose NFL players to additional health risks through further non-disclosure in the future. The Arbitration Awards should thus be set aside for this additional reason as well.

C. The Arbitration Awards Should Be Vacated For The Further Reason That The Office Of The Arbitrator, Jeffrey Pash, Was Directly Involved In The Wrongful Conduct At Issue In The Arbitrations

As discussed above, Mr. Birch, an in-house lawyer for the NFL who reported to Jeffrey Pash, the NFL's chief legal officer, was directly involved in the wrongful failure of Mr. Lombardo and the Defendants to disclose the information which they had learned about a banned diuretic being contained in StarCaps and posing a health

risk to players. Despite this fact, Mr. Pash did not disqualify himself, and went on to issue a ruling that the failure to disclose by Dr. Lombardo and his office was entirely proper. See generally Arbitration Awards (Jacobson Decl., Exs. B and C). Federal arbitration law does not permit such arbitration awards to stand, where the appearance of evident partiality is clear since the office of the Arbitrator himself was implicated in the behavior that he was required to rule upon.

Indeed, federal courts regularly set aside arbitration awards where the proceedings were fundamentally biased or where there was evident partiality in the arbitrators. See Int'l Union, United Mine Workers of Am. v. Marrowbone, 232 F.3d 383, 389-90 (4th Cir. 2000) (vacating arbitration award pursuant to the LMRA on the ground that parties were denied a fair hearing); 9 U.S.C. § 10(a) (evident partiality in the arbitrator is a ground for vacatur of arbitration awards); Superior Grains, Inc. v. Palouse Empire Marketing, Inc., No. 4:07-MC-11, 2008 WL 151253, at *3 (D.N.D. Jan. 11, 2008) (partiality of arbitrator is a "serious concern" under the FAA).[11] Evident impartiality in the arbitrator requires vacation of an arbitration award where the arbitrator has "even the appearance of bias" or fails to "disclose to the parties any dealings that might create an impression of bias." Montez v. Prudential Securities, Inc., 260 F.3d 980, 982 (8th Cir. 2001).

The fact of evident partiality presented by the Arbitration Awards here is

[11] See also MidAmerican Energy Co. v. Int'l Bhd. of Elec. Workers Local, 345 F.3d 616, 622 (8th Cir. 2003) ("Although the Federal Arbitration Act does not govern labor cases, it does inform our search for the federal common law that governs judicial review of arbitration awards in labor cases.").

analogous to that presented in other cases in which the Commissioner of a sports league was held to be disqualified from serving as an arbitrator because of his personal involvement in some of the issues that were the subject of the arbitration. In Morris v. New York Football Giants, Inc, 150 Misc.2d 271 (N.Y. Sup. 1991), for example, the NFL Player contract at the time provided that disputes between the players and an NFL club would be submitted to arbitration before the NFL Commissioner. The court, however, held that despite the parties' agreement, the Commissioner lacked the "necessary neutrality" to arbitrate the dispute. Id. at 277-28. The reason for this disqualification was not because the NFL Commissioner was hired by the owners, but because, as former counsel to the NFL, he had participated in formulating the very policy that the players were now challenging in the arbitration. Accordingly, to find for the players, the Commissioner would have to "reverse certain positions he previously strongly advocated." Id. The court held that this past involvement with the legal dispute at issue made it impossible for the Commissioner to arbitrate a full and fair hearing.

Similarly, in Erving v. Virginia Squires Basketball Club, 349 F.Supp. 716 (D.C.N.Y. 1972), the court removed the Commissioner of the American Basketball Association as arbitrator because he, too, lacked the requisite neutrality. There, the Commissioner was "listed as a partner of the law firm representing the defendant and the complaint allege[d] that plaintiff's agent in the contract negotiations [at issue in the arbitration] 'acted on behalf and in the interest of the defendant and the American Basketball Association." Id. at 719. Because the Commissioner was involved with the underlying dispute at issue, the court held that he was disqualified from arbitrating it.

See also Superior Grains, 2008 WL 151253, at *4 (arbitrator whose conflict was "directly related to the transactions in question" lacked necessary neutrality; a "connection to the dispute [at issue] creates such a strong impression of bias that any articulation of 'evident partiality' is met.").

While the NFLPA agreed that the NFL Commissioner or his designee, such as Mr. Pash, would arbitrate disputes under the Policy, it was never agreed that he could do so in a situation in which a direct subordinate of Mr. Pash was a critical actor in what the Players and NFLPA contend was wrongful conduct by the NFL and its employees under the Policy. For Mr. Pash to have agreed with the NFLPA and the Players that there was an obligation to disclose, he would have had to condemn the behavior of his own office and subordinate personnel. Such a direct involvement by the Arbitrator in the underlying events being challenged by one side in the arbitration at the very least provides another substantial question going to the merits of the Petition to vacate the Arbitration Awards, which more than warrants the granting of a preliminary injunction to preserve the status quo in this case.[12]

IV. THE PUBLIC INTEREST FACTOR ALSO SUPPORTS ISSUING PRELIMINARY INJUNCTIVE RELIEF

The final consideration in determining whether to grant preliminary injunctive relief is whether the public interest would be harmed if the requested preliminary injunction is not granted. See Dataphase Sys., 640 F.2d at 113. Here, the

[12] Cf. Cristina Blouse Corp. v. Int'l Ladies Garment Workers' Union, Local 162, 492 F.Supp. 508, 515 (D.C.N.Y. 1980) (former counsel to a party "may not be considered . . . as impartial and must be disqualified to serve as an arbitrator . . .")

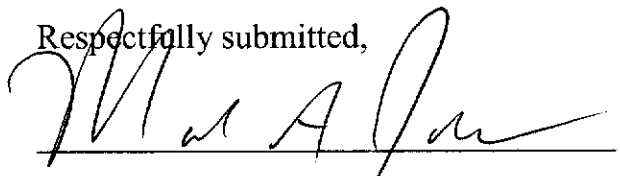
public interest would be harmed if a preliminary injunction is denied, since the Arbitration Awards sanction and encourage the concealment of vital health information from NFL players. Moreover, if the fans of the Minnesota Vikings and the New Orleans Saints have the competitive results for the remainder of the NFL season altered by the Defendants' enforcement of two unlawful Arbitration Awards, the public's interest in fair sports competition will also be damaged. Such lost competitive opportunities cannot be recaptured once any games are missed due to wrongful suspension.

CONCLUSION

For all of the foregoing reasons, a preliminary injunction should be issued, and the status quo should be preserved until the Court can resolve the merits of the Complaint and Petition to vacate the Arbitration Awards in this case.

Dated: December 4, 2008

Respectfully submitted,



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