STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Judge Gary Larson

Court File No. 27-CV-08-29778

Kevin Williams, Pat Williams,

Plaintiffs,

v.

The National Football League,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

The above-entitled matter came on for a court trial before the Honorable Gary Larson, Judge of Hennepin County District Court, on March 8, 2010 through March 12, 2010. Kevin Williams and Pat Williams appeared personally and through their attorneys, Peter Ginsberg, Esq., Steven Rau, Esq., and Christina Burgos, Esq. The National Football League appeared by its attorneys, Joseph Schmitt, Esq., Daniel Nash, Esq., and Marla Axelrod, Esq.

The parties agreed to dismiss John Lombardo, M.D., and Brian Finkle, M.D., as Defendants. At the commencement of trial, Adolpho Birch was also dismissed from the action. Based upon on the files, records, testimony, and proceedings herein, the Court makes the following findings:

FINDINGS OF FACT

1. That the National Football League ("NFL") is an unincorporated nonprofit association comprised of 32 member clubs, including the Minnesota Vikings ("Vikings").

2. That the National Football League Management Council ("NFLMC") is the exclusive multi-employer bargaining representative for the NFL member clubs, including the Vikings.

3. That each member club is separately owned. Upon purchasing an NFL team, each owner agrees to be bound by the NFL Constitution and Bylaws and other agreed upon internal rules.

4. That Kevin Williams ("Kevin") plays football for the Vikings and has been in the NFL for seven years.

5. That Kevin's contract with the Vikings contains a weight bonus clause.

6. That Kevin is a starting player for the Vikings and has been selected to play in the Pro Bowl five times.

7. That Kevin has never taken steroids, performance enhancing drugs, or attempted to mask any banned substance.

8. That in 2006, Kevin had surgery on his left knee for a torn patella. Kevin found that maintaining a lighter weight helped him feel better.

9. That, shortly after his operation, in the start of the 2007 season, Kevin took Star Caps.

10. That a teammate initially told Kevin about and gave him Star Caps. Kevin subsequently purchased Star Caps from GNC stores or over the internet.

11. That Kevin took Star Caps for the perceived health benefits, to meet his contractual weight requirements, and to avoid his coach's reprimands for not meeting the weight requirements prescribed in his contract.

12. That Kevin never saw any notice or warnings about Balanced Health Products or Star Caps. Kevin would not have taken Star Caps if he had known that they contained the banned substance Bumetanide.

13. That Pat Williams ("Pat") plays football for the Vikings and has been in the NFL for thirteen years.

14. That Pat's contract with the Vikings contains a weight bonus clause.

15. That Pat is a starting player for the Vikings and has been selected to play in the Pro Bowl a number of times.

16. That Pat has never taken steroids, performance enhancing drugs, or attempted to mask any banned substance.

17. That Pat suffers from high blood pressure and gout, and takes medications for these conditions.

18. That, due to these health conditions, doctors advised Pat to maintain a specified weight.

19. That Pat first took Star Caps while playing for the Buffalo Bills to help alleviate the retention of extra fluid in his joints.

20. That Pat first heard about Star Caps from another player on the Buffalo Bills. Pat spoke with his trainer about taking Star Caps, and the trainer told him that it would be okay. He purchased Star Caps from GNC stores or over the internet.

21. That Pat never received any notice or warnings about Balanced Health Products or Star Caps. No one ever advised Pat not to take Star Caps. Pat would not have taken Star Caps if he had known that they contained the banned substance Bumetanide.

22. That Pat reviewed the contents of the Star Caps bottle, which states that it is an all natural supplement and did not list any prohibitive substance. He also tried calling the players' hotline, but never received an answer.

23. That Kevin and Pat are both members of the NFL Players Association ("NFLPA"), the exclusive bargaining representative for all NFL players. Kevin and Pat have been NFLPA members since they began playing in the NFL.

24. That in 2006, the NFLPA and the NFLMC negotiated and entered into a comprehensive collective bargaining agreement ("CBA") that governs the terms and conditions of players' employment with members clubs and establishes procedures for discipline and dispute resolution.

25. That the CBA states that players are employed by a member club of the NFL.

26. That member clubs have agreed to resolutions, which govern their relationships with each other. The clubs agreed to share revenue from certain sources, such as television contracts and national marketing agreements.

27. That the national contracts are negotiated by a committee of owners, who must be approved by the member clubs. Revenue from these deals is administered by the NFL, on behalf of the member clubs, and maintained in an agency account.

28. That the revenue sharing provides, among other things, that clubs with higher revenues will share with clubs with lower revenues.

29. That the Vikings have sole authority to hire, fire, negotiate, and sign contracts with players, cut players, and provide special bonuses for players.

30. That the NFL reviews and approves every NFL contract for Vikings players and team personnel.

31. That Kevin and Pat entered into NFL player contracts which set forth the terms of their employment. The NFL standard form contract is collectively bargained and is included as Appendix C to the CBA.

32. That the contracts for Kevin and Pat are on the standard NFL mandated forms and were approved by the NFL.

33. That players may only use agents who are approved by and registered with the NFL to negotiate their contracts.

34. That Kevin and Pat's contracts state that they are employed by the Vikings as a "skilled football player," accept such employment, and agree to give their best efforts and loyalty to the club.

35. That the Vikings Vice President of Football Operations, Rob Brzezinski ("Brzezinski") negotiated specific contract terms with Kevin and his agent, Tom Condon ("Condon").

36. That, as part of the employment contract, the Vikings agreed to pay Kevin a yearly salary for his performance, services, and other promises. The contract also provides for individually negotiated bonuses paid by the Vikings to Kevin, and the payment terms of these bonuses.

37. That these bonus provisions are not part of the standard NFL contract, and must be approved by the NFL and the NFLPA.

38. That Kevin's contract includes a weight provision, negotiated by Brzezinski, under which Kevin could earn up to $400,000 in 2008, if he met certain required weight goals. Under this provision, Kevin specifically agreed not to engage in any last minute weight-reducing tactics such as excessive use of a steam room, use of diuretics, fasting, et cetera.

39. That Brzezinski negotiated a standard NFL contract with Pat and his agent, Angelo Wright ("Wright"). As part of this employment contract, the Vikings agreed to pay Pat a yearly salary for his performance, services, and other promises.

40. That Pat's contract includes a weight provision, negotiated by Brzezinski, under which Pat could earn up to $400,000 in 2008, if he met certain required weight goals. Under this provision, Pat specifically agreed not to engage in any last minute weight-reducing tactics such as excessive use of a steam room, use of diuretics, fasting, et cetera.

41. That many of the rules and regulations governing the NFL and the teams are collectively bargained for, including, post-season pay, retirement plans, college draft rules.

42. That, pursuant to the CBA, Kevin and Pat are entitled to receive various retirement benefits, including pensions. The retirement plans under the CBA are established and administered pursuant to the Taft-Hartley Act.

43. That the CBA establishes the amount of a player's pension, which is administered through the auspice of a separate pension fund. The specific amount of retirement benefits payable to Kevin and Pat are controlled by the plan.

44. That the Vikings financial obligations for such benefits are controlled by the CBA. The benefits are the financial responsibility of the Vikings, not the NFL. The Vikings are

required to make contributions to the plan for the benefit of Kevin and Pat during their employment. The Vikings' contributions to the retirement plan are paid out of the Vikings' share of the agency account maintained by the NFL.

45. That Pat and Kevin are paid directly by the Vikings with funds that the Vikings receive from many sources, including league-wide revenue sharing, supplemental revenue sharing, fees which the NFL receives from media and endorsement contracts, and other sources.

46. That the NFL negotiates and enters into all media and endorsement contracts on behalf of the teams. Fees from these contracts are paid into the revenue sharing program.

47. That the NFL maintains and manages an agency account where the shared funds are deposited. The NFL then distributes these from the agency account to the teams pursuant to a formula created by the NFL.

48. That the Vikings sell merchandise through retail outlets, the internet, and other arenas. The Vikings keep part of these proceeds and then turn a certain portion over to the NFL into the revenue sharing account. A portion of ticket sales for all home games are also turned over to the NFL for revenue sharing.

49. That the NFL also manages a separate supplemental revenue sharing program, where money is collected from higher revenue generating teams and distributed to lower revenue generating teams. Teams may not opt out of this process.

50. That the Vikings, like all teams in the NFL, are required to participate in a revenue sharing program. The NFL Commissioner imposes discipline if a team fails to pool funds appropriately.

51. That without revenue sharing, the Vikings could not pay all of its salaries and business expenses.

52. That the NFL is a tax exempt not-for-profit corporation. Accordingly, the NFL loans funds to teams at a lower rate than a for-profit entity could normally borrow funds. Some teams are able to borrow funds for as low as 1%.

53. That the NFL avoids the unrelated business tax due to its tax structure.

54. That the NFL controls many areas of operation for the Vikings through the NFL owner's manual which dictates rules governing who can own and operate NFL teams and where they can operate, the operation of teams, salaries, salary caps, television, public relations, playing rules, publicity, revenue sharing, and discipline.

55. That the NFL commissioner may discipline individual players for violations of NFL rules, including imposing suspensions and/or fines.

56. That the NFL must approve a company before a player may contract with it for endorsement purposes.

57. That players can only wear NFL approved clothing on game days.

58. That the NFL also maintains a credit facility from which teams may borrow money.

59. That the NFL enforces a debt ceiling for all teams of $150 million. The amount each team has borrowed is known only to the NFL.

60. That the NFL determines a player's performance-based pay by looking at the player's salary, draft status, and playing time.

61. That the NFL controls, in immense detail, what players may wear during games including sock and chin strap color, the type of tape that may be used on shoes, how jerseys are tucked in, and even how a player may use a towel.

62. That under the NFL's conduct policy, Vikings players are subject to discipline by the Commissioner if they violate an NFL policy.

63. That the CBA specifically provides the amount that players receive for playing in the Pro Bowl. Kevin and Pat have been selected to the Pro Bowl several times. The Vikings pay its Pro Bowl players with money given to them by the NFL.

64. That the Vikings have qualified for the playoffs during Kevin and Pat's tenure with them. The CBA provides the terms of the players' post-season pay. The NFL gives the Vikings money to pay its players for post-season play.

65. That the CBA establishes a policy on Anabolic Steroids and Related Substances (the "Policy").

66. That the Policy is designed to eliminate the use of performance-enhancing drugs in the NFL. The Policy articulates three goals: (1) protecting the fairness and integrity of professional football; (2) protecting players' health and safety, and; (3) insuring that NFL players do not send the wrong message to young fans, whom may be tempted to use performance-enhancing drugs.

67. That the Policy, although negotiated by the NFLPA and NFLMC, is administered by the NFL through an Independent Administrator and Consulting Toxicologist.

68. That Dr. John Lombardo ("Lombardo") is the appointed Independent Administrator and Dr. Bryan Finkle ("Finkle") is the Consulting Toxicologist.

69. That Adolpho Birch ("Birch") is the NFL's Vice President of Law and Labor Policy and is the person at the NFL with the responsibility over the Policy and the liaison with the NFLPA.

70. That Stacy Robinson ("Robinson") is the NFLPA Director of Player Development, and he is Birch's counterpart for the NFLPA with responsibility over the Policy.

71. That, at all times relevant to this lawsuit, Finkle served as the Policy's Consulting Toxicologist and was appointed jointly by the NFLPA and the NFLMC. Finkle also consults for the U.S. Anti-Doping Agency, the World Anti-Doping Agency, the National Olympic Committee, the British Olympic Committee, the National Basketball Association, and the National Hockey League.

72. That, although Lombardo serves as the Policy's "Independent Administrator," Lombardo reports to and takes directives from Birch.

73. That, although the Policy provides that Lombardo has sole discretion to certify a positive test, which includes determining whether to grant therapeutic use exemptions and verify the chain-of-custody, this is not, in fact, how the Policy works.

74. That Birch specifically directed Lombardo how and when to report certain, specific types of positive tests.

75. That the Policy provides that the NFL, and specifically Birch, bear responsibility for imposing discipline in accordance with the Policy. The Policy also provides that the testing costs and compensation for Lombardo and Finkle are paid by the NFL.

76. That Kevin and Pat received a copy of the Policy each year at training camp. Both Kevin and Pat read, understood, and were familiar with the policy and the list of substances prohibited by the Policy.

77. That the Policy forbids players from having prohibited substances in their bodies. The prohibited substances are listed in Appendix A to the Policy. The list is negotiated between the NFL and the NFLPA and includes steroids and potential blocking and masking agents, such as diuretics that hinder the detection of banned substances.

78. That Bumetanide is one of the banned substances on the prohibited list. Bumetanide was included in the Policy's prohibited substances list at all times relevant to this lawsuit.

79. That the Policy provides that the unknowing use of a prohibited substance is not a defense to such use.

80. That the Policy also states that the use of a dietary supplement that contains a prohibited substance is not a viable excuse or a defense to the use thereof.

81. That the NFL has sent several letters to the players warning them not to use any dietary supplements because they often contain prohibited substances that are not listed on the packaging.

82. That the NFL also sent alerts for specific brands of products that should not be used.

83. That the NFL never sent an alert about Star Caps.

84. That the Policy provides that whoever tests positive for a prohibited substance is subject to a first-time minimum four-game suspension without pay, to be administered by the NFL (i.e. Birch).

85. That the Policy provides a detailed procedure for collecting specimens, protecting the chain-of-custody, reviewing test results, and maintaining confidentiality.

86. That the NFL was not aware of and did not take into consideration the laws of the State of Minnesota, and specifically the Drug and Alcohol Testing in the Workplace Act ("DATWA"), which governs drug test collection for Minnesota employees.

87. That the Policy provides that a specimen collector must observe the player furnish a urine sample, and then split the sample into "A" and "B" bottles and forward the samples to the appropriate lab for testing.

88. That the NFL uses two laboratories to conduct player drug tests, the UCLA Olympic Analytical Laboratory ("UCLA Lab") and the Sports Medicine Research and Testing Laboratory in Utah ("Utah Lab").

89. That the UCLA Lab and the Utah Lab are certified and accredited by the World Anti-Doping Agency ("WADA") and the International Organization for Standardization ("IOS").

90. That the UCLA Lab does not conform to the specific requirements of DATWA, but in all respects meets or exceeds the requirements for testing by laboratories as set out in DATWA.

91. That the Policy states that Lombardo may choose which laboratories to use.

92. That Lombardo testified that the UCLA lab is overworked and cannot possibly conduct player drug tests within three days, as required by DATWA.

93. That the NFL has an ownership interest in the Utah Lab and has a financial arrangement with the UCLA lab.

94. That the Policy requires that all NFL players be subject to annual drug tests as part of their pre-season physical examination during training camp.

95. That Kevin and Pat's urine samples were collected at the start of training camp, on July 26, 2008, pursuant to the Policy's annual pre-season testing provision, as noted in the NFL manual.

96. That Kevin and Pat observed the collectors split their specimens into "A" and "B" bottles and signed the chain-of-custody forms.

97. That Kevin and Pat's samples were sent to the UCLA Lab, which received them on July 28, 2008.

98. That the UCLA Lab completed an initial screening test on Kevin's "A" bottle on August 1, 2008. The lab then performed a confirmatory test on Kevin's "A" bottle sample beginning on August 6, 2008, and completing it on August 12, 2008. The results of the confirmatory test were certified on August 12 or 13 2008.

99. That on August 13, 2008, the lab notified Lombardo of Kevin's initial positive screening and positive confirmatory test results.

100. That Lombardo then reviewed the chain-of-custody forms and scheduled a testing date for Kevin's "B" bottle sample.

101. That on August 27, 2008, Lombardo sent Kevin written notification of his positive test result. The letter was sent in an envelope marked "confidential." The letter was addressed to the Vikings and placed in Kevin's open locker.

102. That Lombardo's letter advised Kevin that his "B" bottle test would occur on September 9, 2008, and that he was entitled to have a qualified toxicologist observe the "B" bottle test.

103. That after receiving Lombardo's letter, Kevin told his wife; his agent Condon; and his coach, Brad Childress, about his positive test results.

104. That Condon informed his colleague Tracy Lartigue ("Lartigue") about Kevin's positive sample.

105. That on September 2, 2008, Lartigue sent Birch a letter appealing Kevin's positive test result. Lartigue copied Robinson in his letter.

106. That Kevin arranged for Dennis Crouch ("Crouch"), an independent toxicologist, to observe his "B" bottle test. Both Crouch and Finkle observed the "B" bottle test on September 9, 2008.

107. That the confirmatory "B" bottle test was positive for the presence of Bumetanide.

108. That Finkle reviewed the "B" test. On September 17, 2008, Finkle notified Lombardo, via e-mail, of his certification of Kevin's positive test result.

109. That Lombardo notified Lartigue, by phone, on September 22, 2008, that Kevin's final test was positive for Bumetanide.

110. That on September 22, 2008, Lombardo notified Birch, by mail, of Kevin's positive test result. This was the NFL's first notice of Kevin's positive test result.

111. That Lombardo's September 22, 2008 letter was received by the NFL on September 24, 2008.

112. That, on September 26, 2008, Birch sent a letter by express mail, on behalf of the NFL, to Kevin and the Vikings notifying them that Kevin would be suspended for four games because he tested positive for a banned substance.

113. That, with regard to Kevin's drug test, the NFL did not comply with DATWA's three-day notice requirement.

114. That Kevin testified at trial that he was not harmed because of Lombardo's or the NFL's delay in informing him of his positive test result.

115. That Kevin acknowledged that Bumetanide was in his system and does not challenge that he tested positive for Bumetanide.

116. That the UCLA Lab completed the initial testing screening on Pat's "A" bottle sample on August 1, 2008. The lab performed a confirmatory test on Pat's "A" bottle sample on August 6, 2008, and completed the analysis on August 12, 2008.

117. That the lab certified Pat's result as positive for the presence of Bumetanide. On August 13, 2008, the lab notified Lombardo of Pat's positive test result.

118. That Lombardo requested the chain-of-custody documents for Pat's test. Lombardo conducted an initial review of all documents, and scheduled a date to conduct testing on Pat's "B" bottle sample.

119. That, on August 27, 2008, Lombardo sent Pat written notification of his positive results. The letter was in an envelope marked "confidential" and was sent to the Vikings and placed in Pat's open locker.

120. That Lombardo scheduled Pat's "B" bottle test for September 9, 2008.

121. That shortly after receiving Lombardo's letter, Pat told his wife; his agent Wright; and his coach, Brad Childress, about his positive test result.

122. That Pat chose not to have an independent toxicologist observe his "B" sample test.

123. That Pat's "B" bottle sample was certified as positive on September 10, 2008. On September 11, 2008, Lombardo was notified that Pat's "B" bottle showed the presence of Bumetanide.

124. That Finkle reviewed the documents and certified them to Lombardo on September 23,

2008.

125. That Lombardo reviewed the documents and certified the positive results to Birch on September 29, 2008. This was the first notice that the NFL received of Pat's positive test results.

126. That Lombardo's notice was received by the NFL on October 1, 2008.

127. That on October 3, 2008, Birch sent the letter to Pat and to the Vikings notifying them that Pat would be suspended for four games because he tested positive for a banned substance.

128. That, with regard to Pat's drug test, the NFL did not comply with DATWA's three-day notice requirement.

129. That Pat testified that he was not harmed by either Lombardo's or the NFL's delay in informing him of his positive test results.

130. That Pat acknowledged that Bumetanide was in his system. Pat does not challenge the results showing that he tested positive for Bumetanide.

131. That on October 24, 2008, journalist Josina Anderson reported that a "highly-placed NFL source" released information that several NFL players tested positive for Bumetanide.

132. That on October 24 or 25, 2008, Jay Glazer, a news reporter, reported that Kevin and Pat tested positive for Bumetanide.

133. That Commissioner Roger Goodell was apparently not interested in discovering the source of the leak and did not request an investigation, on behalf of the NFL, to determine if anyone at the NFL was responsible for the leak.

134. That Birch testified that, in his opinion, reference by reporters to the NFL or League includes the NFL Football League, the NFLPA, players, agents, coaches, trainers, and team doctors. Birch defines the NFL as including all of these groups and individuals.

135. That Birch conducted a very brief investigation on his own concerning the leak. Birch concluded that no one from the NFL was involved in the leak, contrary to the newspaper reporter's assertion.

136. That Birch's single-handed investigation is highly suspect.

137. That Birch reached a totally unsupportable and unfounded conclusion, alleging that a certain individual outside of the NFL was the actual source of the leak.

138. That it is impossible for the Court to conclude by a preponderance of the evidence that any particular individual was the source of the leak regarding Plaintiffs' positive test

results.

139. That the Court finds that Kevin and Pat's attorney was not the source of the leak.

140. That Birch's contradictory testimony in this regard is not credible.

141. That in 2005 and 2006, Lombardo and Finkle became aware that a cluster of players' urine samples were testing positive for Bumetanide.

142. That Bumetanide is a very potent and dangerous drug and can cause serious side effects, including death, if inadvertently taken and not under the supervisions of a physician.

143. That Finkle became concerned because he had neither seen this drug nor its level of potency in previous tests.

144. That Finkle and Lombardo discussed their concerns regarding Bumetanide. After interviewing players who had taken Star Caps and subsequently tested positive, it became clear to them that Star Caps was creating the positive test results.

145. That because of the clear correlation between Bumetanide and Star Caps, Finkle and Lombardo requested that the Utah Lab performed a study on Star Caps. The study confirmed that Star Caps contained Bumetanide.

146. That it was obvious to Finkle that if a player took Star Caps, he would test positive for Bumetanide.

147. That Lombardo advised Birch that Star Caps contained the "secret" banned substance.

148. That Birch indicated that he would inform the FDA or another appropriate agency of this finding.

149. That Birch made a conscious decision not to inform the FDA or any other regulatory agency that Star Caps contained Bumetanide.

150. That Birch now knew that Star Caps contained Bumetanide and that NFL players were inadvertently ingesting Bumetanide.

151. That Birch made an affirmative decision to not disclose to the teams, the NFLPA, or the players, that Star Caps contained the banned substance Bumetanide and should not be used.

152. That prior to 2007, a number of players tested positive for Bumetanide and were not referred for discipline.

153. That Birch knew full well that players would continue taking Star Caps and testing positive for Bumetanide.

154. That Birch, thereafter, directed Lombardo to report any future players for discipline who tested positive for Bumetanide, even though their use thereof was inadvertent. Birch was playing a game of "gotcha."

155. That the NFL recently filed pleadings in *American Needle v. Nat'l Football League*, No. 08-661, 2009 WL 3865438 (2009), and argued before the United States Supreme Court that, contrary to its assertion in this case, the NFL should be treated as a single entity with the various member teams for anti-trust purposes.

156. That on December 3, 2008, Kevin and Pat filed suit against the NFL; the Policy's Independent Administrator, Lombardo; the Consulting Toxicologist, Finkle; and the NFL's Vice President of Law and Labor Policy, Birch. The complaint alleged a variety of common law torts based on Defendants' purported breach of their fiduciary duty to warn players that Star Caps contained Bumetanide. Defendants removed the action to federal court on December 4, 2008.

157. That after this suit was removed to federal court, the suit was consolidated with a matter captioned *Nat'l Football League Players Ass'n v. Nat'l Football League and Nat'l Football League Management Council*, No. 08-CV-6254, 2009 WL 1457007 (D. Minn. May 22, 2009) (the "NFLPA Suit").

158. That the NFLPA Suit alleged claims on behalf of five NFL players, including Kevin and Pat, and sought to overturn the suspensions of those players on the grounds that their suspensions were the product of arbitrator bias, a public policy violation, and were inconsistent with the CBA. In support of the public policy claim, the NFLPA argued that the NFL failed to warn the players that Star Caps contained Bumetanide, in violation of state law fiduciary obligations. In support of its claim that the awards were inconsistent with the CBA, the NFLPA argued that the NFL had imposed harsher discipline on players who tested positive for diuretics in 2008 than it had imposed on players who tested positive for diuretics in 2006.

159. That Kevin and Pat filed a first amended complaint in federal court on January 2, 2009, which added counts under DATWA, Minn. Stat. § 181.950 *et seq*., and the Lawful Consumable Products Act ("LCPA"), Minn. Stat. § 181.938.

160. That, on April 14, 2009, the parties in this case stipulated to dismiss Finkle as a party. On March 8, 2010, Plaintiffs dismissed, with prejudice, individual Defendants Birch and Lombardo.

161. That between January and April 2009, the parties engaged in expedited discovery followed by an accelerated summary judgment briefing schedule.

162. That following discovery, Defendants, Plaintiffs, and the NFLPA filed cross-motions for summary judgment in federal court.

163. That on May 22, 2009, the federal court denied Kevin and Pat's Motion for Summary Judgment and granted Defendants' summary judgment motion in part, holding that Plaintiffs' common law claims were preempted by section 301 of the Labor and Management Relations Act. *Nat'l Football League Players Ass'n v. Nat'l Football League*, 654, F. Supp. 2d 960, 967 (D. Minn. 2009). The Court held, however, that Plaintiffs' claims under DATWA and the LCPA were not preempted, and remanded those claims to this Court.

164. That the United States District Court rejected all of the common law claims asserted by Kevin and Pat, holding that those claims were preempted by Section 301 of the Labor Management Relations Act. *Nat'l Football League Players Ass'n*, 654, F. Supp. 2d at 967.

165. That the Court granted in full Defendants' Motion for Summary Judgment filed in the NFLPA Suit.

166. That in addressing the NFLPA's claims under Section 301 of the LMRA on their merits, the Court first reviewed the NFLPA's claim that the arbitration award upholding Plaintiffs' suspensions did not "draw its essence from the CBA." The Court rejected the NFLPA's claim that the suspensions were inconsistent with the CBA because several players in 2006 and 2007 had not been suspended for a positive diuretic test. *Nat'l Football League Players Ass'n*, 654 F. Supp. 2d at 968.

167. That the Court addressed and dismissed the NFLPA's claim that the award violated public policy because it condoned a "breach of fiduciary duty." The Court rejected the argument about Lombardo's alleged failure to warn, concluding that "Lombardo's decision not to publish specific warnings about Star Caps does not violate his duties to players. Lombardo testified that he decided to send a general warning about weight-loss supplements rather than about Star Caps in particular because 'the problem is the whole area of weigh[t] reduction products.'" *Nat'l Football League Players Ass'n*, 654 F. Supp. 2d at 970. The Court therefore concluded that "Lombardo exercised his discretion under the Policy to educate players, and did so in a general way because he believed that all weigh[t]-reduction products, not just Star Caps, carried risks." *Id.* The Court, therefore, all claims related to Plaintiffs' failure to warn claim.

168. That the parties filed cross-appeals with the United States Court of Appeals for the Eighth Circuit, which affirmed the district court's decision in its entirety. *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009). The Eighth Circuit held that Plaintiffs' statutory claims were not preempted because it could not identify "a specific provision of either the CBA or the Policy which must be interpreted." *Id.* at 877.

169. That on June 5, 2009, Plaintiffs attempted to file a second amended complaint in this case identifying the bases for their statutory claims, adding a new "retaliation" claim, and specifically alleging breaches of the collectively-bargained Policy.

170. That this Court held that Plaintiffs were not permitted to file the second amended complaint without leave of Court, pursuant to a filed motion. Plaintiffs never submitted a Motion for Leave to File the Second Amended Complaint.

171. That the Court's summary judgment decision left only two of Plaintiffs' claims for resolution: (1) Plaintiffs' claim under the three-day notice provision of DATWA; and (2) Plaintiffs' claim under DATWA's confidentiality requirements and the collectively-bargained Policy on Anabolic Steroids and Related Substances.

ORDER

1. That Defendant NFL is Plaintiffs Kevin Williams and Pat Williams's employer for purposes of DATWA.

2. That Defendant NFL violated DATWA's three-day notice requirement.

3. That Plaintiffs Kevin Williams and Pat Williams were not harmed by Defendant NFL's DATWA violation.

4. That Plaintiffs Kevin Williams and Pat Williams failed to prove by a preponderance of the evidence that Defendant NFL's violated DATWA's confidentiality provision.

5. That Plaintiffs Kevin Williams and Pat Williams's request for a permanent injunction is denied.

6. That this Court's previous temporary injunction is dissolved.

7. That the attached memorandum is incorporated herein.

Let judgment be entered accordingly.

BY THE COURT

Dated:

_____
Gary Larson
Judge of District Court

JUDGMENT

I hereby certify that the judgment contained in this Order herein above constitutes the Judgment of the Court.

Dated:

Court Administrator

_____
By: Deputy Clerk

MEMORANDUM

I. LEGAL ANALYSIS

A. The NFL is Plaintiffs' employer for purposes of DATWA.

For purposes of DATWA, the NFL is Plaintiffs employer. DATWA governs only "employer drug testing of employees." *Kise v. Product Design & Eng'g*, 453 N.W.2d 561, 563 (Minn. Ct. App. 1990). DATWA defines an employer as "a person or entity located or doing business in this state and having one or more employees, and includes the state and all political or other governmental subdivisions of the state." Minn. Stat. § 181.950, subd. 7. An employee is "a person, independent contractor, or person working for an independent contractor who performs services for compensation, in whatever form, from an employer." *Id.*, subd. 6. Plaintiffs are indisputably employees of the NFL as well as the Vikings, for DATWA purposes.

The evidence adduced at trial shows that the NFL, along with the Minnesota Vikings, is a joint employer of Plaintiffs. The doctrine of joint employer status recognizes that a worker may have more than one employer. *See Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 66 (2d Cir. 2003) ("The regulations promulgated under the FLSA expressly recognize that a worker may be employed by more than one entity at the same time") (citing 29 C.F.R. § 791.2 (2003)); *Gargano v. Diocese of Rockville Ctr.*, 888 F.Supp. 1274, 1278 n.2 (E.D.N.Y. 1995) ("The concept of 'joint employer' most frequently arises in the context of claims asserted under the [NLRA], whether by individuals or the National Labor Relations Board"), *aff'd*, 402 80 F.3d 87 (2d Cir. 1996). Whether a person "'possesse[s] sufficient control over the work'" of employees to qualify as a joint employer "is essentially a factual issue." *International House v. NLRB*, 676 F.2d 906, 912 (2d Cir. 1982) (quoting *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964)).

The NFL, not the Vikings, controls everything about the drug testing process for Minnesota employees including when the testing occurs, where it occurs, how often it occurs, who conducts the specimen collection, and which lab tests the sample. Moreover, the NFL's reach extends beyond drug testing to virtually every aspect of a player's employment, down to the uniforms the players are obligated to wear.

The NFL has significant control over the players' employment. *See Boire*, 376 U.S. 473 (determining joint employment under the National Labor Relations Act based on the "indicia of control" exercised by an employer); *Auto. Trade Ass'n of Maryland v. Harold Folk Enters., Inc.*, 484 A.2d 612 (1984) (finding joint employer status may be found where two or more businesses exercise some control over the work or working conditions of an employee). The Minnesota Supreme Court articulated a five-part test to determine whether an employment relationship exists: (1) the right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of material or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge. *Guhlke v. Roberts Truck Lines*, 128 N.W.2d 324 (Minn. 1964). The NFL is an employer under each part of this test.

1. The NFL controls Plaintiffs' means and manner of performance and the location of team play.

The NFL directly and indirectly controls many aspects of a player's life both on and off the field. This control emanates from a series of formal rules and regulations existing both separate from and in conjunction with the CBA.

In *Boire v. Greyhound Corp.*, the Supreme Court indicated that a determination of joint employment, under the National Labor Relations Act, is based on the "indicia of control" exercised by an employer. 376 U.S. 473 (1964). There, the Court found that maintenance workers hired by an independent contractor to clean a bus terminal were jointly employed by

Greyhound, the bus company which owned the terminal. *Id.* The Supreme Court remanded the case for a factual evaluation of the control Greyhound exercised over the work of the maintenance employees. *Id.*

Subsequently, the Fifth Circuit Court of Appeals found that Greyhound was an employer of the maintenance workers because it exerted control over many aspects of the workers' employment. *N.L.R.B. v. Greyhound Corp.*, 368 F.2d 778 (5th Cir. 1966). The court looked to the following facts: (1) the employees constituted a homogeneous, readily identifiable and stable unit; (2) the service agreements gave Greyhound the right to establish work schedules, assign employees to perform work, specify the exact manner and means of accomplishing work, and to control regular and overtime wages; (3) employees used Greyhound's equipment and supplies in their work, and; (4) in the course of their duties, porters were given detailed supervision by other Greyhound personnel. *Id.* at 781.

Similarly, the NFL exerts control over many aspects of the players' employment. The NFL exerts some of its control over the means and manner of a player's performance by exercising control over the teams. The NFL directly regulates teams and team owners. For example, anyone buying into the NFL as a team owner must adhere to the rules and guidelines set forth in Policy Manual for Member Clubs, 2009 edition ("NFL Owner's Manual"). Any owner failing to abide by the NFL Owner's Manual faces punishment issued by the NFL. Like all prospective owners, the NFL required the Wilfs, the Vikings owners, to undergo an extensive background check by the NFL before they were permitted to purchase the Vikings.

The NFL Owner's Manual also governs the manner in which the Vikings operate. It dictates rules governing team operations, salaries, mechanism of salary caps, television contracts, public relations, playing rules, publicity, revenue sharing, and discipline. The NFL

Commissioner has sole authority over such issues. The NFL maintains a strict hold over the contract process – refusing, for example, to approve contracts that do not use an NFL-mandated form or are not negotiated by registered agents. Before a player can sign on with a team, the NFL must review and approve his contract.

The NFL also controls where teams can operate. If the Vikings relocated, the Wilfs would be required to pay the NFL an excise tax. If an expansion team joined the NFL, it too would have to pay the NFL an excise tax. The NFL's control also extends to team playing schedules and locations. The NFL decides which teams will play against each other each week, when, where, and at what time the games will be played.

The NFL's level of control over the location, manner, and means of players' performance makes it appropriate to adjudicate it as an employer for DATWA purposes.

2. The NFL controls the mode of payment to Plaintiffs.

The NFL argues that it should not be considered players' "employer" under DATWA because it does not issue a weekly paycheck to players. Nothing in DATWA requires such a restrictive reading. In fact, language defining "employee" suggests the contrary – DATWA specifically contemplates looking beyond the technicalities of how an employee is paid and instead focuses on "compensation, in whatever form." Minn. Stat. § 181.950(6).

The NFL negotiates for, collects, and apportions funds from which Plaintiffs and all other NFL players are paid. As stated earlier, the NFL's level of control over NFL teams is akin to that of a franchisor over a franchisee. The NFL is aware of the specific financial conditions of teams requiring credit while individual teams do not know about other teams' finances. NFL teams must operate within the confines of rules and regulations imposed by the NFL. The NFL even identified the League as a franchise, and the teams as franchisees, in its 2000 IRS filing.

An additional sign of the degree of the NFL's control over teams is the NFL's avoidance of the unrelated business tax. Companies, such as Target and McDonalds, would be required to pay the unrelated business tax if one were to borrow from the other. Here, member teams are neither independent entities nor "unrelated" to the NFL in a corporate sense. Hence, member teams avoid the unrelated business tax when revenue filters to them from NFL bond transactions.

At the heart of the NFL's control is commercial control. The NFL even determines the companies with whom players can contract for endorsements. None of these enumerated control points, or others proved at trial, are dictated or addressed in the CBA. With a few exceptions involving pre-season play, the NFL negotiates and enters into all media contracts on behalf of the teams. The NFL has contracts with CBS, ESPN, Fox, and others. The NFL controls national sponsorships with companies such as Coca-Cola and Verizon. The NFL runs the NFL Network, the NFL website, NFL Film, and historical programming without any input from the teams or players. The NFL is the conduit from which revenue from those deals is distributed in order to fund teams and pay players.

The NFL also controls team finances as part of Revenue Sharing and Supplemental Revenue Sharing programs. All teams receive revenue sharing from the NFL. The revenue sharing comes from fees received by the NFL for, *inter alia*, media and endorsement contracts. The NFL maintains and manages an agency account where shared funds are deposited. The NFL then distributes these funds from the agency account to teams pursuant to a formula created by the NFL. The teams are removed from the process and revenue pooling occurs automatically. To solidify the NFL's control over the process, the NFL Commissioner exercises discipline if a team fails to pool funds appropriately. Moreover, teams are not permitted to opt out of this process.

While NFL teams technically remit checks to players as compensation, some of these funds come from the NFL League Office. Part of players' salaries are paid for with funds from the NFL through the revenue sharing program. Player benefit plans, including pensions, tuition reimbursement, severance pay, and termination pay, are funded by NFL contracts and the NFL revenue stream. With regard to Plaintiffs, revenue sharing is particularly important. The Vikings could not pay its players' salaries and business expenses without the additional income it receives from revenue sharing.

The NFL controls the mode of payment to Plaintiffs because it controls and supplies many of the funds to the teams that the teams then pay Plaintiffs for the performance and services. The NFL meets the payment control prong of the *Guhlke* test.

3. The NFL controls the materials and tools used by Plaintiffs.

The NFL controls many of the materials and tools used by Plaintiffs in the course of their employment. The NFL acts as a franchisor of NFL teams controlling the rules that players must follow in order to play professional football. The NFL controls just about every aspect of Plaintiffs' workplace performance including what they wear, how they are permitted to act, and what football and non-football rules they must follow.

Moreover, the NFL furnishes and regulates the tools and materials with which players perform on the field. The NFL dictates step-by-step exactly what an NFL uniform must look like to pass as suitable attire. The NFL controls even minute details, such as the color of a player's chinstrap. The NFL's power over players' tools and materials may even override medical advice and/or treatment. For example, the NFL League Office has final approval, even if contrary to medical advice, on whether a player will be permitted to use tinted eye shields during a game. If a player chooses not to follow the rules imposed by the NFL, he faces fines or

possible discharge. The NFL also meets the material and tools control prong of the *Guhlke* test for determining the identity of a worker's employer.

4. The NFL controls the right to discipline and discharge Plaintiffs.

The NFL's power to control is most evident in its ability to discipline and discharge players. The NFL's conduct policy applies to all NFL players and club employees. The NFL Commissioner is empowered to impose fines and subject NFL players and personnel, including coaches, referees and owners to non-monetary discipline as well. The NFL determines game-related misconduct including on-field infractions. NFL employee Merton Hanks enforces the uniform policy and the NFL collects fines for violations. The NFL also polices and punishes player conduct off of the field.[1] The NFL also maintains the right to discharge players. For example, the NFL discharged Vikings player Bryan McKinnie from the 2009-2010 Pro Bowl Team. The NFL withheld McKinnie's Pro Bowl pay and required him to re-pay his Pro Bowl related expenses.

Finally, the NFL has the sole right to discipline players under the steroid Program. Although the Independent Administrator, in theory, has discretion whether to refer a player for discipline, Birch usurped Lombardo's authority in deciding who to refer for discipline. The NFL has ultimate authority to impose discipline under the program. Neither the Vikings nor any other team, is empowered to issue, prevent, or alter any discipline under the Program.

The NFL meets almost all of the criteria under *Guhlke*. The NFL has the right to control the means and manner of performance, the mode of payment, the furnishing of material or tools; exerts some control of the premises where the work is done, and has the right to discharge and

[1] For example, Commissioner Goodell recently suspended Pittsburg Steelers Ben Roethlisberger for six games for violating the league's personal conduct policy, even though he was not charged with any crime. It is interesting to note that a highly respected newspaper characterizes Roethlisberger's position as "an employee of the NFL." William C. Rhoden, Commissioner sends a message to rookie class, GLOBAL EDITION OF THE N.Y. TIMES, April 24-25, 2010, at Sports 13.

discipline players. *Id.* Based on the *Guhlke* test established by the Minnesota Supreme Court, the NFL is a joint employer of Plaintiffs for DATWA purposes.

B. DATWA applies to the NFL's drug testing in this case.

DATWA applies to employers who conduct drug or alcohol testing. Minn. Stat. § 181.951. As established above, drug or alcohol testing is defined as an "analysis of a body component sample . . . for the purpose of measuring the presence or absence of drugs, alcohol, or their metabolites in the sample tested." Minn. Stat. § 181.950(5). DATWA defines "drug" as a controlled substance as defined by Minn. Stat. § 152.01(4). Minnesota's controlled substance statute specifically includes "anabolic steroids," a substance for which the NFL tested players.

Minn. Stat. § 152.01(4)(6). Minnesota law also states that a controlled substance includes drugs, which are defined as "all medicines and preparations recognized in the United State Pharmacopoeia or National Formulary and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either humans or other animals." Minn. Stat. § 152.01, subd. 2. Bumetanide is included in this definition. Drug testing for Bumetanide falls under the auspices of DATWA and applies to the NFL in this case.

DATWA covers the substances under the NFL's drug testing Policy. DATWA applies to the NFL and the drug testing at issue in this case.

C. Defendants did not comply with DATWA's three-day notice requirement for test results.

Minnesota Statute § 181.953 subdivisions 3 and 7 provide that the "laboratory shall disclose to the employer a written test result report . . . within three working days after a confirmatory test" and that the employer "[w]ithin three working days after receipt of a test result report from the testing laboratory . . . shall inform in writing an employee . . . of a positive test result on a confirmatory test." The lab did not disclose the confirmatory "B" sample test

results to the NFL within three days and that the NFL did not disclose the results to Plaintiffs three days later.

Kevin and Pat were initially tested on July 26, 2008, but did not receive notice of the positive test results until September 26, 2008 and October 3, 2008, respectively. Dr. Lombardo stated that players generally receive notice of the initial test "anywhere from 14 days to 30 days, 35 days, sometimes longer," but that there is no time period by which he must inform players of a positive test result.

Lombardo reports to the NFL, is paid by the NFL, and takes direction from the NFL. Lombardo is an agent of the NFL and received Plaintiffs' test results, in his capacity as an agent of the NFL. Lombardo received both Kevin and Pat's "A" sample test results on August 13, 2008. Plaintiffs did not receive confirmation of their test results until late September and early October. Regardless of whether the NFL desired to give Plaintiffs' test results an additional level of review, they violated DATWA by not disclosing the confirmatory test results to Plaintiffs within three working days. This lapse in time violates DATWA's three-day notice requirement. The NFL's practice does not meet or exceed DATWA's three-day notice requirement.

Although, Defendants failed to comply with DATWA's three-day notification requirement, Plaintiffs testified that they did not suffer any harm as a result of the delay. When asked how he was harmed by any delay in notification, Kevin responded, "I don't know, I wasn't." Similarly, Pat answered, "I guess I wasn't harmed." Because Plaintiffs did not suffer any damages as a result of the delay in notification, they are not entitled to relief under DATWA.

D. Plaintiffs failed to prove that the NFL breached DATWA's confidentiality requirement.

Plaintiffs claim that the NFL breached the confidentiality requirement of DATWA. DATWA's confidentiality requirement states that "test result reports and other information acquired in the drug or alcohol testing process are . . . private and confidential information, and . . . may not be disclosed by an employer or laboratory to another employer or to a third-party individual, governmental agency, or private organization without the written consent of the employee or job applicant tested." Minn. Stat. § 181.954(2). Plaintiffs did not prove by a preponderance of the evidence that the NFL disclosed Plaintiffs' test results inappropriately.

Plaintiffs' stated, at trial, that they shared the results of their positive drug tests with others. Kevin told his wife, Vikings' Coach Brad Childress, his agent Condon, and his attorney. Coach Childress testified that he told Vikings Vice President of Football Operations Brzezinski. Condon told Lartigue, another agent in Condon's office. Kevin also told David Black and Dennis Crouch, two independent toxicologists. Kevin also stated that he may have told additional people, but "can't remember everybody on the list." Pat told his wife, his agent Wright, Kevin, and Coach Childress. Plaintiffs' coach, agents, and attorney, as well as Brzezinski all testified that they were not the source of the leak. Lartigue and Plaintiffs' wives did not testify. Because so many people outside of the NFL were informed of Plaintiffs' test results prior to the media reports, it is impossible for the Court to conclude by a preponderance of the evidence that the NFL must have violated DATWA's confidentiality provision.

The Court does conclude, however, that the media leak was clearly of no importance to the NFL Commissioner, as he did nothing to determine that the NFL did not violate DATWA's confidentiality provision. The Commissioner did not conduct an investigation or make any inquiries into the matter. Birch was likewise cavalier about the leak of highly-confidential

information or potential violation of state law. Birch claimed to have conducted his own investigation into the leak at the NFL. However, Birch also claimed that the term "highly placed NFL source" that told the media about Plaintiffs' test results could have referred to anyone even tangentially involved in the NFL, including players, agents, or coaches. Given Birch's definition, it is nothing short of miraculous that he could single-handedly launch a thorough investigation.

Plaintiffs' failed to support their allegations that the NFL leaked Plaintiffs' test results to the media with evidence. Plaintiffs failed to prove by a preponderance of the evidence that the NFL breached DATWA's confidentiality requirement.

E. Plaintiffs' request for a permanent injunction is denied.

Plaintiffs seek an injunction, permanently enjoining the NFL from disciplining Plaintiffs as a result of the drug testing and subsequent discipline. DATWA provides that "[a]n employee . . . has standing to bring an action for injunctive relief requesting the district court to enjoin an employer or laboratory that commits or proposes to commit an act in violation of sections 181.950 to 181.954." Minn. Stat. § 181.956 (3).

This Court has discretion to issue an injunction if Plaintiffs have proven their case on the merits. *Bio-Line, Inc. v. Burman*, 404 N.W.2d 318, 320 (Minn. Ct. App. 1987). "In determining whether permanent injunctive relief is warranted, the district court must first determine whether the plaintiff has proven its case." *Thomas & Betts Corp. v. Leger*, No. A04-260, 2004 WL 2711391, at *25 (Minn. Ct. App. Nov. 24, 2004) (citing *Minn. Pub. Interest Research Group v. Butz*, 358 F. Supp 584, 625 (D. Minn. 1973), *aff'd*, 498 F.2d 1314 (8th Cir. 1974)). If the court finds that a plaintiff has succeeded on the merits, it must then balance the likelihood of

irreparable harm to the plaintiff against the possibility of injury to the defendant and other interested parties as well as any public policy considerations. *Id.*

Plaintiffs failed to establish success on the merits. The Court denies Plaintiffs' request for a permanent injunction and dissolves the temporary injunction that was put in place on December 3, 2008.

II. CONCLUSION

Based on Minnesota law and the facts adduced at trial, Defendant is Plaintiffs' employer for purposes of DATWA. Defendant violated DATWA's three-day notice requirement. Defendant's drug testing notice policy did not meet or exceed DATWA. However, Plaintiffs admitted that they did not suffer any harm from the delay in notice. Plaintiffs, therefore, may not recover for Defendant's violation. Plaintiffs failed to prove that Defendant violated DATWA's confidentiality provision. Plaintiffs' request for a permanent injunction is denied and this Court's previous temporary injunction is dissolved.