

NO. A10-922

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State of Minnesota  
In Court of Appeals

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KEVIN WILLIAMS ET AL.,

*Appellants,*

v.

THE NATIONAL FOOTBALL LEAGUE, ET AL.,

*Respondents.*


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**APPELLANTS' BRIEF AND ADDENDUM**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

## SUMMARY OF THE CASE

The facts are undisputed. For two years, Respondent National Football League (“NFL”), as well as the Administrator of the NFL Steroid Program and one of the NFL’s chief attorneys responsible for overseeing the Program (A0954-0982), possessed scientific evidence that a seemingly innocuous, over-the-counter product called StarCaps contained an undisclosed, potentially lethal controlled substance called Bumetanide. (Add.012 at 141-142, 145 -146, 150.)<sup>1,2</sup> The NFL also knew that NFL players were using StarCaps yet failed to disclose this risk to players, including the Williamses, and then punished them for using that product. (*Id.*; Add.012 at 151, 153, Add.013 at 154.)

The NFL contends that it was defending its strict liability steroid policy by suspending the Williamses. The trial court found, however, that the NFL had a “secret policy” not to suspend NFL players who tested positive for Bumetanide from as early as 2005 until sometime in 2008. (Add.012 at 141, 147, Add.013 at 152, 154.)

Moreover, the NFL detected usage of StarCaps by invoking a drug testing procedure that indisputably and materially violated Minnesota State law, the Drug and Alcohol Testing in the Workplace Act (“DATWA”), Minn. Stat. § 181.950-957.

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<sup>1</sup> “Add.” cites are to the separately filed Addendum. “A” cites are to the separately filed Appendix.

<sup>2</sup> Bumetanide can cause an increase in high blood pressure and diuresis. Increased heart rate, fainting, cardiac involvement, and negative consequences to the kidneys are also side effects of Bumetanide. Those side effects are unlikely so long as Bumetanide is taken in a medical context with supervision, unlike the undisclosed over-the-counter situation faced by the Williamses. (Tr. 810-811.)

The NFL's conduct violates the clear public policy of Minnesota. The NFL, in effect, seeks to benefit from its breaches while ignoring its duties and obligations to all Minnesota employees.

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## STATEMENT OF THE ISSUES PRESENTED

1. Whether the lower court erred in failing to find that under DATWA, as a public policy statute, the National Football League's behavior, including, *inter alia*, maintenance of a secret drug policy outside of its purported written policy; inconsistent application of that Policy among its employee players; and violation of DATWA's three-day notice requirement, prevents the NFL from benefiting from its violation of DATWA, that is, suspending the Williamses. *See* Minn. Stat. § 181.950-957. The lower court found that the NFL violated DATWA. Despite the NFL's violation of DATWA, the lower court failed to grant a permanent injunction preventing the suspension of the Williamses allowing the NFL to benefit from its violation of DATWA. The lower court found that the Williamses can be suspended by the NFL despite the NFL's unclean hands. *See Belsky v. Worldwide Parts and Accessories Corp.*, No. Civ. 04-4702 2006 WL 695531 at \* 4 (D. Minn. Mar. 17, 2006); *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

2. Whether the lower court abused its discretion by failing to grant "other equitable relief" under DATWA where DATWA was violated, the NFL acted in an arbitrary and capricious manner toward its employees in implementing its drug policy and wantonly disregarded the mandates of DATWA in its drug testing regime. *See* Minn. Stat. § 181.950-957. The lower court did not grant other equitable relief.

3. Whether the lower court erred in failing to consider evidence that supported NFL violations of DATWA and that would have supported the issuance of an injunction.

*See* Minn. Stat. § 181.950-957; *Donnelly Bros. Constr. Co., Inc. v. State Auto Prop. & Cas. Ins. Co.*, 759 N.W.2d 651, 660 (Minn. Ct. App. 2009).

4. Whether as a matter of law an employee is required to make an affirmative showing of specific injury caused by a DATWA violation to that employee's detriment where DATWA requires no such causal showing. *See* Minn. Stat. § 181.950-957. The lower court found that the Williamses were required to make a specific showing of damages to obtain relief under DATWA.

5. Whether the lower court erred in failing to find that the NFL violated the confidentiality provision of DATWA despite finding that a media report named a "highly placed NFL source" and that the NFL failed to engage in any investigation into the leak. *See* Minn. Stat. § 181.950-957. The lower court found that the Williamses did not prove a breach of confidentiality by a preponderance of the evidence.

6. Whether the lower court erred in failing to award monetary damages and attorneys fees to the Williamses, in the absence of or in addition to injunctive relief, where the NFL, an employer, violated DATWA. *See* Minn. Stat. § 181.950-957. The lower court did not grant the Williamses monetary damages or attorneys fees nor did it analyze the granting of such damages. *See Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

## STATEMENT OF FACTS

### 1. The Parties

Kevin Williams is a seven-year NFL veteran who plays for the Minnesota Vikings (“Vikings”). (Add.002 at 4.) Pat Williams is a 13-year NFL veteran who plays for the Vikings. (Add.002 at 13.)

The NFL is an unincorporated association comprised of NFL member clubs. (Add.001 at 1.) The Vikings is one of those member clubs. *Id.* The NFL approves players’ contracts, controls players’ workplace conditions, and unilaterally governs the administration of the NFL Policy on Anabolic Steroids and Related Substances (the “Program” or “Policy”). (Add.003 at 30; Add.017-023.)

John Lombardo, M.D. (“Lombardo”) is the Program’s Administrator. Although jointly selected by the NFL and the National Football League Players Association (“NFLPA”) (Add.006 at 68), and theoretically independent, Lombardo is employed by the NFL and no relationship with the NFLPA is identified in Lombardo’s curriculum vitae. (Tr. 94:22-25, 95:1-4; A0738-0754.) Lombardo reports directly to Adolpho Birch (“Birch”), the NFL’s Vice President of Law and Labor Policy, answers to Birch (Add.007 at 72-74; Tr. 97-100), and directs information about the Program to the NFL while excluding the NFLPA from receipt of such information, even when the information relates to the health and safety of the players and the integrity of the Program. (Add.007 at 72-74.) The NFL pays Lombardo’s salary. (Add.007 at 75; Tr. 101:22-25, 102:1-17.)

Birch reports to Jeff Pash (“Pash”), the NFL General Counsel as well as the hearing officer of the Williamses’ in-house proceeding who rendered the Williamses’ suspensions. (Tr. 657:11-20.)

Bryan Finkle (“Finkle”) is the Program’s Consulting Forensic Toxicologist. (Add.006 at 68, Add.007 at 71.) Like Lombardo, the NFL and NFLPA jointly appoint Finkle but his position depends upon the continuing approval of the NFL. (Add.007 at 75; Tr. 798:18-24.) Finkle oversees the labs used to test for Program violations. (Tr. 808:14-17.) As with Lombardo, the NFL exerts exclusive influence over Finkle. He is employed by the NFL and reports to the NFL. (Tr. 106:19-25, 107:1-16.) The NFL pays Finkle and Finkle seeks NFL approval for raises and other compensation issues. (Tr. 432:24-25, 433:1-2; Tr. 804:18-25, 805:1-14; A0632.) In contrast to Finkle’s relationship with the NFL, the NFLPA is not listed anywhere on Finkle’s curriculum vitae.

## **2. The Program**

The Program purports to advance three primary goals with regard to the use of anabolic/androgenic steroids, stimulants, growth hormones and related substances: (1) assuring the fairness and integrity of athletic competition, (2) combating adverse health effects of using prohibited substances, and (3) educating young people about steroids. (Add.006 at 66; A0956-0957.) Ironically, given the NFL’s actions underlying this litigation, the Program emphasizes the NFL’s purported concern for players’ health and safety related to the use of prohibited substances under the Program. (A0957.)

The Program bans Bumetanide, a controlled substance (Add.007 at 78) found and undisclosed (Add.012 at 147, 151, Add.013 at 154) in StarCaps, an otherwise legal consumable weight-loss aid sold in stores such as GNC and on the internet (Tr. 224:9-11; Tr. 547:13-14.). StarCaps is not a banned product in the Program in the absence of Bumetanide. (Tr. 197:5-14.) On December 8, 2008, Balanced Heath Products recalled StarCaps, recognizing Bumetanide's potential for causing dangerous health effects. (Tr. 833-835; Tr. 198-199; A0632.)

Bumetanide is a prescription diuretic regulated by the Food and Drug Administration ("FDA"). (Tr. 224:6-8, 224:12-18; Tr. 809-810; A09071.) When taken unknowingly, and without a physician's supervision, Bumetanide can cause heat stroke, brain swelling, cardiac arrest and other potentially life threatening conditions. (Add.012 at 142; Tr. 810-811; Tr. 198-199.) For athletes, the consequences are more likely because of their increased activity. (Tr. 810-811.)

Although the Program explicitly prohibits the NFL from "influenc[ing] the Independent Administrator's determination whether a potential violation occurred and should be referred for further actions," this case proves that this prohibition is a farce. Most relevant here, the NFL engaged in an until-now secret course of conduct regarding the detection of diuretics found in players - conduct that undermines any claim of a strict liability Policy. (Add.012 at 147 - 151, 153, Add.013 at 154).

Starting in 2005, the NFL detected Bumetanide in several players, almost all linked to ingesting StarCaps. (A0760.) From the start of the "secret" policy until sometime shortly before the NFL suspended the Williamses, as many as 10 to 12 players

were found to have Bumetanide in their system, mostly linked to StarCaps (Add.012 at 144 – 147), and the NFL decided to discipline none of those players (Add.012 at 141, 150, 152 – 153; *see also* Add.012 at 147.)<sup>3</sup> Undisputedly, this “secret” policy was unknown to players.

Birch, at some time apparently in 2008, instructed Lombardo to change the “secret” policy and discipline players who tested positive for diuretics. (Add.013 at 154; Add.032; Tr. 715-716; Tr. 193:8-25, 194:1-19; Tr. 240.)<sup>4</sup> Beginning in 2008, the NFL began suspending players for at least four games under the guise that the NFL was following the Policy’s written “strict liability standard.” (Add.013 at 154; Tr. 240; A0649-0650; A0954-0982.)

### **3. The NFL Consciously Chose Not to Disclose That StarCaps Contained Bumetanide**

It is undisputed that the NFL (a) knew that StarCaps contained the dangerous substance Bumetanide as early as 2006, and (b) did not disclose that fact directly or indirectly to players or to the NFLPA. The NFL stood back knowing that players’ health,

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<sup>3</sup> Upon Lombardo’s request, Finkle had samples of StarCaps tested by Dennis Crouch of Aegis Sciences Corporation. (Tr. 222-223.) The Aegis scientific study (A0641-0644) confirmed, without doubt, the presence of Bumetanide in StarCaps. (Add.0012 at 145; A0641-0644.) Alarmed by the finding, Mr. Crouch stated that he was going to inform the FDA of the finding. (Tr. 227.) Birch ordered Mr. Crouch not to tell the FDA and, instead, assumed the responsibility himself to warn the FDA. (Add.0012 at 148-149.) No one who knew that StarCaps contained a substance regulated by the FDA ever reported this fact to the FDA (Add.0012 at 149; Tr. 236-237) including Birch. (Add.0012 at 148-149, 151.)

<sup>4</sup> The NFLPA did not learn of this secret policy, or the change in the policy, until sometime in 2008 at around the time of the Williamses’ hearings. (Tr. 413-417.)

careers and reputation were on the line when it could have and should have made a simple disclosure to prevent that harm. The NFL instead issued insufficient warnings, permitted the Hotline<sup>5</sup> to distribute inaccurate and incomplete information, and punished the Williamses for the very consequences of the NFL's behavior. (Tr. 193:8-22; Tr. 167-168; Tr. 675; Tr. 339:24-25, 340:1-19; Tr. 689:21-25, 690:1-2.)

Judge Larson's findings about the NFL's handling of the Bumetanide/StarCaps connection are enlightening. As set forth in the Court's Findings 144 – 154 (Add.012-013), Judge Larson found:

-- 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;

-- 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.;

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

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<sup>5</sup> The Program provides for the creation and maintenance of a hotline, theoretically designed to give players information about dietary supplements. (Tr. 160:7-10.) The Hotline, maintained by Drug Free Sport, breached its obligation to give truthful, complete, and accurate information with regard to StarCaps. For example, on at least one occasion the Hotline told a player that StarCaps was not a banned product even though Lombardo and the NFL had already identified a link between StarCaps and Bumetanide. (Tr. 689:21-25; 690:1-2; A0633-0634.) Despite knowing that the false information had been disseminated, NFL officials did nothing to correct the distribution of such blatantly incorrect and misleading information. (A0633-0634.) In fact, Birch testified in discovery that it would be appropriate for the Hotline to tell a player today that StarCaps was not banned so long as it also warned that supplements in general are risky. Judge Larson erroneously prevented this evidence from being entered at trial.

-- That Lombardo advised Birch that Star Caps contained the "secret" banned substance;

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

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

-- That Birch now knew that Star Caps contained Bumetanide and that NFL players were inadvertently ingesting Bumetanide;

-- 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;

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

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

-- 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."

In the interim period between the NFL's discovery of the presence of Bumetanide and StarCaps and Birch's directive to start violating players for the presence of Bumetanide in their system, the NFL did *not* violate approximately a dozen Players whose test results were the same as the Williamses'. All this time, the NFL filed no disclosure that StarCaps contained a banned diuretic.

#### **4. The Williamses are Accused of Violating the Program**

Lombardo in 2008 for the first time referred Bumetanide positives for discipline, based on Birch's change of approach and reconsideration of the "secret" policy regarding diuretics. (Add.013 at 154; Tr. 234-235, 240; Tr. 136; A0639.)

Neither Williams has ever taken anabolic steroids. (Add.002 at 7, 16; Tr. 241:8-19.) Neither Williams has ever masked or otherwise diluted a urine sample in order to disguise the use of any substance. (Add.002 at 7, 16; Tr. 241:20-25, 242:1-2.) It is undisputed that neither Williams has ever violated the Program despite undergoing years of testing. (Add.002 at 7, 16; Tr. 344:24-25, 345:1-14; Tr. 541: 15-20.) A diuretic would not have given the Williamses a competitive advantage. (Tr. 330:10-25, 331:1-2.) The Williamses would not have used StarCaps had the NFL disclosed to players that the StarCaps label and advertising were erroneous, that StarCaps contained a banned substance, or that the banned substance created significant adverse health risks, and each made good faith efforts to abide by the Program. (Add.002 at 12, Add.003 at 21; Tr. 340:2-7, 399:7-9; Tr. 555:15-17.)

On July 26, 2008, both of the Williamses provided samples that tested positive for Bumetanide. (Add.008 at 95; Tr. 128; Tr. 346:4-9; A0637; A0638.) Neither had any trace of an anabolic steroid or showed any sign of diluting his urine sample or masking any substance. (Tr. 241:11-25, 242:1-2.) Despite that conclusion, Lombardo referred the Williamses to Birch for discipline. (A0639-0640; Tr. 129-130.) Two months after submitting their samples, Birch informed Kevin Williams, on September 26, 2008 (Add.010 at 112), and Pat Williams, on October 3, 2008 (Add.011 at 127), that each would be suspended for four games. (A0645-0646; A0649-0650; Tr. 761-763; Tr. 131:20-25, 132: 1-3; Tr. 908:8-25, 909:1-2.)

Following a hearing, the NFL – **four months** after the “positive” tests – suspended each on December 2, 2008, for four games. (A0645-0646; A0649-0650.) By suspending

the Williamses, the NFL compromised the Williamses' reputations, place in the community, opportunity for their team to be successful during the 2008 NFL season, opportunity to be selected to the Pro Bowl or ever to be inducted into the NFL Hall of Fame, and the compensation and potential bonuses the Williamses have spent years building. (Tr. 565-569; Tr. 611-612, 614-615; Tr. 645-647; Tr. 386-387.)

Despite confidentiality requirements in Minnesota statutory law, as well as in the Program, just hours after the NFL proposed the four-game suspension in late September and early October and before the Williamses could even provide notice that they were challenging the proposed sanction (and apparently before the Williamses had even learned of the proposed suspension), news of the NFL's suspension was broadcast throughout the country. (Add.011 at 131-132; Tr. 158:4-17; Tr. 351-353; A0967.)

Although NFL officials had leads about the source of the leaks (Tr. 534-535; Tr. 746-747), the NFL failed to investigate the leaks (Add.011 at 133, 135-136; Add.025-026; Tr. 160:3-6; Tr. 526-537; Tr. 742:14-25). As Judge Larson concluded: "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," (Add.011 at 133) and "Birch's single-handed investigation is highly suspect" (Add.011 at 135).

Moreover, the NFL's own subsequent press release, as well as the hundreds of spin off media reports, identified the Williamses violating the NFL's "anti-doping policy" despite the fact that the Williamses indisputably did not use steroids or otherwise try to ingest banned substances. (Add.002 at 7, 16; Tr. 344:24-25, 345:1-14; Tr. 541: 15-20.)

## **5. Immediate State Court Action**

On December 3, 2008, one day after the arbitration decision, the Williamses filed an action in Hennepin County and sought injunctive relief. (A0077-0078.) Following extensive oral argument, a temporary restraining order against the NFL's suspensions was granted.

## **6. Federal Action**

On December 4, 2008, the NFL removed this matter to federal court. (A0092-0096.) The NFL then filed a motion to vacate the Williamses' temporary restraining order (A0097-0098), which, after lengthy hearing, was denied on December 5, 2008 (A0099-0100).

Discovery was conducted until approximately April 29, 2009.

## **7. Remand and Trial**

Following summary judgment motions in federal court, Honorable Paul A. Magnuson, on May 22, 2009, remanded the action to state court for trial on the Williamses' state statutory claims. (App.014 at 163.) Trial was held from March 8 through March 12, 2010. Honorable Gary Larson thereafter entered the May 6 Order, finding that the NFL had wantonly ignored State law, and had violated DATWA's three-day notice provision for notifying players of a positive test, but refused permanently to enjoin the NFL from suspending the Williamses. On May 21, 2010, the Court refused to dissolve the TRO pending appeal, finding that The Williamses, notwithstanding his decision not to grant a permanent injunction, had shown a "likelihood of success" on appeal (A0373), acknowledged that "[v]iolations of public policy and violations of

statutes are inextricably linked because statutes are one way in which states set forth their public policy,” and acknowledged that “[t]his case presents pressing issues of an important state law designed to protect employees for which appellate court [g]uidance ... is needed.” (A0374-0375.)

### STANDARD OF REVIEW

On appeal from an Order or judgment, the appellate court’s scope of review is limited to deciding whether the trial court’s findings of fact are clearly erroneous, and whether it erred in its legal conclusions. Minn. R. Civ. P. 52.01; *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1990), *Gruenhagen v. Larson*, 246 N.W.2d 565, 569 (Minn. 1976); *Citizens State Bank v. Leth*, 450 N.W.2d 923, 925 (Minn.Ct.App. 1990); *Hardwick v. Hansen*, 374 N.W.2d 297, 299 (Minn.Ct.App.1985).

A trial court's findings of fact are clearly erroneous when they are not “reasonably supported by evidence in the record considered as a whole.” *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 441 (Minn.1983). However, reviewing courts need not give deference to a district court's decision on purely legal issues. *Frost-Benco Elc. Ass'n, v. Minnesota Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn.1984). Conclusions of law can be overturned if the trial court erroneously construed and applied the law to the facts. *O'Brian v. Comm'n. of Public Safety*, 552 N.W.2d 760, 761 (Minn.Ct.App. 1996).

While a trial’s court decision to grant or deny an injunction is reviewed for abuse of discretion, it is not entitled to exercise discretion without restraint. *Cherne Industrial, Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 91-92 (Minn. 1979), *Overholt Crop Ins. Svc. Co., Inc. v. Bredeson*, 437 N.W.2d 698, 701 (Minn.Ct.App. 1989).

In cases involving public policy, a trial court's discretion is restricted by legislative intent. See *Owner Operator Ind. Drivers Ass'n, Inc. v. Swift Transp. Co., Inc.*, 367 F.3d 1108, 1111 (9<sup>th</sup> Cir. 2004); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 193-194 (1978); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). "Congress, however, has the power to alter the traditional balancing test. If Congress wishes to do so, it can require the federal courts to automatically enjoin actual or imminent violations of a statute without an individualized balancing of the equities." *Owner Operator Ind. Drivers Ass'n, Inc.*, 367 F.3d at 1111 (citations omitted).

#### SUMMARY OF ARGUMENT

During the course of NFL-administered steroid testing, implemented in a manner that both procedurally and substantively violated DATWA, the Williamses tested positive for Bumetanide, a banned substance under the Program. The NFL will suspend the Williamses for four games and materially compromise Minnesota statutory law and public policy in the absence of injunctive relief. The lower court committed reversible error by refusing to issue a permanent injunction under DATWA. The lower court also erred in refusing to consider all the evidence showing the NFL's violations of DATWA and its unclean hands.

Minnesota public policy, DATWA, and the Williamses' rights all demand issuance of appropriate equitable and other relief.

#### ARGUMENT

- I. **THE LOWER COURT ERRED IN FAILING TO FIND THAT DATWA, A PUBLIC POLICY STATUTE, PRECLUDES THE NFL, WHOSE ACTIONS INCLUDED MAINTAINING A SECRET DRUG POLICY, WANTONLY**

**IGNORING AND VIOLATING STATE LAW, AND VIOLATING PROCEDURAL AND SUBSTANTIVE PROVISIONS OF DATWA, FROM BENEFITING FROM ITS VIOLATIONS, THAT IS, SUSPENDING THE WILLIAMSES**

**A. DATWA is a Public Policy Statute**

DATWA prohibits an employer from requesting or requiring that an employee undergo drug or alcohol testing unless that testing complies with specific statutory mandates. DATWA was established, as explained in *Belsky v. Worldwide Parts and Accessories Corp.*, No. Civ. 04-4702 2006 WL 695531 at \* 4 (D. Minn. Mar. 17, 2006), “with the express intent to provide constitutional protections for workers in the workplace.”<sup>6</sup> DATWA provides Minnesota workers with a host of protections for their right to privacy and right to due process. *See Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724 (1985) (protecting state’s rights to establish mandatory minimum protections for employees). The public policy of DATWA is aimed at protecting employees from, *inter alia*, invasive drug testing and unfair punishment or retaliation. DATWA provides employees with safeguards from employer abuses. Those safeguards are diluted, as is the Legislature’s intent, where an employer is permitted to violate DATWA without consequence and where, as here, an employee will be punished notwithstanding an employer’s violation of DATWA.

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<sup>6</sup> According to Rep. Sandra Pappas, Workplace Drug Testing--House File 42, 14 Wm. Mitchell L.Rev. 239, 239-43 (1988), the author of the legislation, “Our rights against self-incrimination, against unreasonable search and seizure, our right to be presumed innocent, as well as our common sense expectation of privacy are non-existent under an aggressive and invasive employer drug testing program.”

The Legislature drafted DATWA carefully to address an employer's actions at every important step of the drug testing process, *inter alia*: i) the content and location of an employer's written testing policy; ii) the type of laboratory which is authorized to conduct the testing; iii) the internal chain of custody procedures which must be followed by the employer and laboratory; iv) the content, frequency and timing of the various notices to employees who have tested positive; v) the number of tests required to be performed on samples; vi) the manner in which accused employees can defend themselves; vii) permissible and unauthorized consequences for positive tests; and viii) privacy and confidentiality requirements. Minn. Stat. § 181.950-957.

An employee who proves a violation of DATWA is entitled to injunctive relief. Minnesota Statute § 181.956(3) reads: “[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 DATWA. (Emphasis added.) Further, Minn. Stat. § 181.956(4) states that “as part of injunctive relief granted ... a court may, in its discretion, grant any other equitable relief it considers appropriate, including ordering the injured employee” reinstated. *Id.* The express language and intent of DATWA is to provide aggrieved employees with a range of equitable remedies. The lower court's failure to grant injunctive relief and to use its discretion under DATWA to grant other equitable relief was error in light of the NFL's violations of DATWA.

In addition to equitable relief, DATWA explicitly provides for “any damages allowable at law,” Minn. Stat. § 181.956(2), including monetary damages and “reasonable attorney fees for a cause of action if the court finds that the employer

knowingly or recklessly violated” DATWA. Minn. Stat. § 181.956(2). The lower court also committed error in failing to award the Williamses monetary damages under DATWA for the damages sustained and to be sustained by the Williamses related to the NFL’s wanton violation as well as their attorneys fees spent in protecting their rights as Minnesota employees.<sup>7</sup>

**B. THE NFL’S DATWA VIOLATIONS**

Respondents violated DATWA in a multitude of ways. This is unsurprising given that the NFL did not even attempt to learn of or comply with DATWA in implementing its steroid policy. (Tr. 734, 736-737.) Judge Larson erroneously limited his ruling to addressing violations identified in The Williamses’ motion for summary judgment.<sup>8</sup> (*See p.35 at II.*)

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<sup>7</sup> A collectively bargained drug and alcohol testing policy, including those involving professional sports organizations, must “meet[] or exceed[], and does not otherwise conflict with, the minimum standards and requirements for employee protection provided” in DATWA. Minn. Stat. § 181.955(1). Moreover, Minn. Stat. § 181.955(2) mandates that DATWA’s procedural framework applies to all collective bargaining agreements in effect after passage of the law in 1987. The football collective bargaining agreement has been in effect since 2006

<sup>8</sup> Judge Larson specifically limited Appellants’ case to proving that the three-day notice violation caused injury and to proving that the NFL violated DATWA’s confidentiality provision. Thereafter, Judge Larson orally modified his ruling to allow for evidence of inconsistent punishment under the program (Tr. 221), yet failed to analyze the impact of such evidence in his Order.

## 1. The NFL Ignored State Law

The NFL admits that it has never done anything to investigate or comply with Minnesota or any other State law (Tr. 734, 736-737), and steadfastly contends it has no obligation to abide by State law (Add.008 at 8).<sup>9</sup>

Birch contends that State law is irrelevant to the NFL's administration of the Steroid Policy. (Add.025-026: "Birch was likewise cavalier about ... potential violation of state law"; Add.008 at 86.) No NFL official has ever reviewed DATWA to determine whether steps had to be taken to assure statutorily-mandated time limits in the testing process. (Tr. 951; Tr. 736-737; Tr. 532:5-17; Tr. 108:21-23, 110:22-25, 111:1-6, 113:3-1, 114:3-8.) Lombardo claims no responsibility for compliance with State laws. (Tr. 110:22-25, 111:1-6.) Lombardo testified that he *never* asked the NFL if it was complying with State law. (Tr. 113:3-11.)

This disregard for Minnesota law ignores important societal interests and the NFL's responsibility to the citizens of Minnesota while conducting business in the State. *Phipps v. Clark Oil & Refining Corp.*, 396 N.W.2d 588, 592 (Minn.Ct.App. 1986); *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 877-78 (Mo.Ct.App. 1985) ("The employer is bound to know the public policies of the state and nation as expressed in their

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<sup>9</sup> The collective bargaining agreement as a matter of law, as recently decided by the 8<sup>th</sup> Circuit United States Court of Appeals prohibits the NFL from contracting for what is illegal under State law or hiding health and safety information from Teams and Players in violation of State law. *Williams v. National Football League*, 582 F.3d 863, 878 (8<sup>th</sup> Cir. 2009)(citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985)). (Tr. 938.)

constitutions, statutes, judicial decisions and administrative regulations, particularly, as here, those bearing directly upon the employer's business”).

## **2. The NFL acted arbitrarily and capriciously**

At its essence, DATWA was designed to assure due process, privacy and fairness in a procedure that is basically intrusive. *See* Minn. Stat. § 181.951(a). The NFL applied its testing procedures and punishment arbitrarily, administered its Program in wanton breach of Minnesota’s laws and in disregard of the procedural safeguards the Minnesota Legislature required for all employees.

The goal of the NFL’s Program theoretically was to provide players with uniform discipline (Tr. 448:21-25, 449:1-4), much like the goal of DATWA. In fact, the policy of the Program in 2005-2007 compared to 2008 was not uniform, but rather was arbitrarily and capriciously administered. Players who tested positive for diuretics were not disciplined while others were disciplined. While some players starting in 2008 were subjected to the “mandatory” four-game suspensions for a violation of the Program, those before that time who tested positive for Bumetanide were not disciplined. (Tr. 711:17-22, 714:20-23.) Not a single NFL representative gave a moment’s thought or concern about abiding by, or even recognizing, the protections mandated by Minnesota to its employees.

As Judge Larson found, the NFL failed to disclose and consciously hid important health and safety information from the NFLPA and NFL players, guided the Program by a “secret” policy (Add.012 at 147) that resulted in an inconsistent administration of its

drug testing and discipline (Add.012 at 152), and “caught” the Williamses by playing a game of “gotcha” (Add.013 at 154).

### 3. DATWA Requires the Issuance of an Injunction in this Case

Public policy mandates the award of an injunction in this case. The lower court’s ruling fails to protect the goals of the Minnesota Legislature in implementing DATWA, assists the NFL in benefiting from its violations of DATWA, and punishes the Williamses despite the fact that their procedural and substantive rights under State law were violated.

The NFL not only wantonly disregarded the existence of DATWA but also implemented a Program that indisputably violates DATWA’s provisions. The NFL regarded such violations as opportunities to build political capital by proving to the world that the NFL is tough on steroid use. Allowing the NFL to exact punishment against the Williamses would constitute judicial approval of purposeful violations of DATWA.

The NFL’s conduct “contravene[s] a clear mandate of public policy.” *See Parten v. Consol. Freightways Corp. of Delaware*, 923 F.2d 580, 584 (8th Cir. 1991) (internal quotations omitted). Violations of public policy and violations of statutes are inextricably linked because statutes are one way in which a state sets forth its public policy. “Public policy, where the legislature has spoken, is what it has declared that policy to be. So far as the question of policy is concerned, [the] statute settles the matter.” *Thompson v. Allstate Ins. Co.*, 412 N.W.2d 386, 388-89 (Minn.Ct.App. 1987).

Minnesota courts routinely refuse to provide aid, relief or enforcement to one who violates or seeks to violate a statute because to do so is against Minnesota’s well-settled

public policy. See *D.W. Hutt Consultants, Inc. v. Const. Maint. Sys., Inc.*, 526 N.W.2d 62 (Minn. Ct. App. 1995) (“[w]here, as a matter of public policy, the legislature has already decided” a party’s responsibilities, one is not free to contract out of that statutory obligation); *Bhd. of Ry. and Steamship Clerks v. Minnesota*, 229 N.W. 2d 3, 12 (Minn. 1975); *Granger v. Adson*, 250 N.W. 722 (Minn. 1933).

Courts have a “duty” to determine whether its involvement in an action would result in furthering a violation of State law. See *Teamsters Local Union 682 v. KCI Const. Co., Inc.*, 384 F.3d 532, 537 (8th Cir. 2004); see, e.g., *Ganley Bros. v. Butler Bros. Bldg. Co.*, 212 N.W. 602, 603 (Minn. 1927) (refusing to enforce, based on public policy, a party’s attempt to escape his own fraud); *Yates v. Hanna Min. Co., Inc.*, 365 N.W.2d 783, 787 (Minn. Ct. App. 1985) (a contract which purported to delegate an employer’s obligation to provide a safe environment for his employees was ineffective to shield the employer from his own negligence); *Board of Comm’rs of St. Louis County v. Sec. Bank of Duluth*, 77 N.W. 815, 818 (Minn. 1899) (conduct where a party was negligently inactive and attempted to avoid the consequences of his own inactivity was “inequitable, as well as against public policy, and we do not think that the authorities support any such position”).

As explained *supra*, Minnesota’s Legislature decided what statutory minimum protections to provide employees and the NFL undermined those protections. The NFL has made no secret that it will suspend the Williamses for four games if the Court does not prevent them from doing so.

DATWA, as a public policy statute, prohibits the arbitrary, capricious, and intrusive or procedurally unfair drug testing of employees in Minnesota. The lower court's holding that causal injury must be proven to grant relief under DATWA ignored both the Williamses' showing of injury and the NFL's violation of the goals and substance of DATWA, and absent reversal of the lower court's failure to grant a permanent injunction, the NFL will benefit from its own bad acts and nothing will prevent it from continuing to ignore Minnesota's law and public policy.

A violation of DATWA is in and of itself sufficient for the issuance of injunctive relief. Minn. Stat. §181.956(3) and (4). Like other public policy statutes, DATWA mandates compliance and serves as a deterrent. The focus is on the offending party's behavior and preventing future violations of the Statute. The Supreme Court has even held that a permanent injunction is an appropriate remedy for the *probable* violation of a public policy statute. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (“*TVA v. Hill*”). In *TVA* the statute at issue was the Endangered Species Act of 1973, a public policy law aimed at protecting the threatened species of flora and fauna throughout the country.

The Court asked two questions: first, would TVA be in violation of the Endangered Species Act if the dam were completed? Second, if so, would an injunction be the appropriate remedy? *Id.* at 172. The facts were clear that the construction and operation of the proposed dam would cause TVA to be in violation of the Act. Moving on to the second part of the analysis, the Court, quoting from *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944), noted that “the balancing of the equities and hardships is

appropriate in almost any case....” *TVA*, 437 U.S. at 193. Whereas the Court in *Hecht* found that an injunction “would have no effect by way of insuring better compliance in the future and would [have been] unjust to [the] petitioner and not in the public interest,” *id.* at 194 (internal quotation marks omitted), with respect to the proposed dam, the TVA Court held that an injunction was the only appropriate remedy, *Id.*

Similarly, here, a permanent injunction is the only way to protect the Williamses’ rights and to safeguard DATWA’s protections and policies. Monetary damages cannot compensate for lost playing time, loss of stature both professionally and in the public eye, loss of professional opportunities such as the Pro Bowl and other performance-based incentives, or compensate for the public and private stigma that comes from being labeled a violator of the steroid program. Of equal importance, money damages would not serve to force the NFL to comply with State law.<sup>10</sup> When damages are an inadequate remedy, injunctive relief is the only appropriate solution. *See Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) (“Environmental injury, by its nature, can

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<sup>10</sup> Just hours after the May 6<sup>th</sup> Order (A0340-0366) was released, the NFL issued the following statement making clear that despite the NFL’s past, and continued, violation of DATWA, it intends on continuing to administer and enforce its violative drug testing program: “Those decisions make clear that the claims of the players and the NFL Players Association were without substance and that the players suffered no harm by being required to comply with the terms of the collectively-bargained policy on steroids and related substances. We intend to continue to administer a strong, effective program on performance-enhancing drugs that applies on a uniform basis to all players in all states.”

seldom be adequately remedied by money damages...the balance of harms will usually favor the issuance of an injunction...”).

The absence of a permanent injunction would permanently cripple Minnesota Legislature’s intent. It would be virtually impossible to satisfy the lower court’s requirement that causal injury be linked to a violation of an employer’s failure to provide results of a negative test result or to a violation of the notice provision for a positive test; violation of the goal of protecting employees from undue delay or violation of the requirement that a lab prepare a thorough chain of custody cannot easily be quantified or linked to a specific injury. But the Legislature nonetheless deemed those procedural and substantive protections to be mandatory. The lower court decision threatens to strip the Statute of any consequence. Moreover, DATWA does not set forth a requirement that causal injury be proved before an injunction will issue.

*TVA* was premised on the notion that legislative intent should control, and that courts should not function as experts. *TVA*, 437 U.S. at 194. There the Court held that the Endangered Species Act struck the balance “in favor of affording endangered species the highest of priorities....” *Id.* This is equally applicable to DATWA. DATWA is unambiguous in protecting employee rights against being subjected to “arbitrary and capricious” drug testing. *See* Minn. Stat. §181.951(1)(c). DATWA requires employers to notify employees of the specific contours of its drug testing policy, *see* Minn. Stat. §181.952, as well as mandates the manner in which tests are performed, including chain-of-custody procedures, *see* Minn. Stat. §181.953, and provides for explicit protections of employees’ privacy, *see* Minn. Stat. §181.954. With respect to remedies, DATWA

clearly prescribes injunctive relief as an actual and prospective remedy. *See* Minn. Stat. §181.956(3). The legislative intent of DATWA must be preserved here by the issuance of an injunction just as in *TVA*.

The Supreme Court also considered injunctions with respect to a public policy statute in *Romero-Barcelo*, 456 U.S at 314. There the Supreme Court was asked to rule on the availability of injunctive relief under the Federal Water Pollution Control Act. The district court had found that, although the Navy was in violation of the FWPCA, the violation was not due to the occurrence of actual pollution, but rather the Navy's administrative failure to apply for a National Pollutant Discharge Elimination System (NPDES) permit. *Romero-Barcelo*, 456 U.S. at 309-10. The district court "explained that the Navy's 'technical violations' were not causing any 'appreciable harm' to the environment." *Id.* (citation omitted). After a lengthy analysis, the Supreme Court agreed with the district court's finding. *Id.* at 320. *Romero-Barcelo* turned on what was ultimately a procedural defect. That is not at issue here. The *TVA* Court dealt with a substantive violation and the probability of a *future* violation of the Endangered Species Act – like the *Williamses'* case. The NFL's violations are substantive and, as the NFL made clear in its press release, will continue absent a reversal by this Court.

There is no dispute that the NFL violated DATWA's three-day notice requirement. (Add.015 at 2.) Moreover, the NFL violated other provisions of DATWA although such violations were not considered by the lower court. *See infra*. The NFL's entire administration of the Program wantonly ignores State law and is administered arbitrarily and capriciously. These violations stand to go unpunished because the trial court found

that the Williamses were not causally harmed by those violations. This case highlights the danger to the entire DATWA legislative scheme created by the lower court ruling.

The lower court's denial of a permanent injunction against the NFL was error and the Order should be reversed.

**4. The NFL's Violation of State Law is Incontrovertible**

**a. The NFL failed to provide timely notice of the Williamses' test results**

The timeline for informing the Williamses of their test results was rife with DATWA violations.

*Timeline for Kevin Williams (Add.008-010 at 95 – 112)*

On July 26, 2008, Kevin Williams was tested pursuant to an annual exam. (Tr. 346:4-9; A0648.) On July 31, 2008, the UCLA Lab appears to have completed an "A" "Sample Screening." (A0666.) On August 8, 2008, the UCLA Lab appears to have finished an "A" Sample Confirmation. (A0672.) On August 13, 2008, the UCLA Lab advised Lombardo of an "A" positive report. (A0655.) On August 27, 2008, Kevin Williams was advised of the positive test report of his "A" Sample Screening. (Tr. 128; Tr. 346:10-25; A0638.) On September 9, 2008, the "B" Sample Confirmation was completed. (A0686.) On, September 10, 2008, Lombardo was advised of the "B" confirmation positive. (A0683.) Kevin Williams was not advised of his right to have another test of his specimen performed by an independent lab (Tr. 347:10-13), as DATWA required, Minn. Stat. § 181.953(9). On September 22, 2008, Birch was advised by Lombardo that Kevin Williams tested positive for Bumetanide and referred him for

discipline and reasonable cause testing. (A0639.) And finally, on September 26, 2008, Birch, on NFL Management Council letterhead, advised Kevin Williams of a four-game suspension. (A0649-0650.)

*Timeline for Pat Williams (Add.008-011 at 95, 116 – 127)*

On July 26, 2008, Pat Williams was tested pursuant to an annual exam. (A0647.) On July 3, 2008, the UCLA Lab appears to have completed an "A" "Sample Screening." (A0710.) On August 8, 2008, the UCLA Lab appears to have finished an "A" Sample Confirmation. (A0716.) On August 13, 2008, the UCLA Lab advised Lombardo of the "A" positive report. (A0698.) On August 27, 2008, Pat Williams was advised of the positive test report of the "A" Sample. (Tr. 134; A0637.) On September 10, 2008, the "B" Sample Confirmation was completed. (A0726.) On September 11, 2008, Lombardo was advised of the "B" confirmation positive. (A0700.) Like Kevin Williams, Pat Williams was not advised of his right to have another test of his specimen performed by an independent lab. (Tr. 562:8-13.) On September 23, 2008, Birch was advised by Lombardo that Pat Williams had tested positive for Bumetanide and referred him for discipline and reasonable cause testing. (A0640.) And finally, on October 3, 2008, Birch, on NFL Management Council letterhead, advised Pat Williams of a four-game suspension. (A0645-0646.)

One of the primary tenets of DATWA is the importance of time limitations, designed to assure fundamental fairness, confidentiality and decency to those being tested in Minnesota. The DATWA requirement assures answerability, responsibility for expediting processing and adjudicating results, and confidentiality. Judge Larson

correctly found that the NFL violated DATWA's time requirements. (Add.010 at 113, Add.011 at 128; Add.024; Minn. Stat. §181.953(7).) That is not surprising given that the NFL does not mandate time limitations for any of its testing or notice procedures. Indeed, there are *no time requirements* under the Program, including any time limitation for testing a specimen once a specimen is taken (Tr. 114:17-24; Tr. 325:1-4; Tr. 809:11-15; *see also* Add.024), reporting results to Lombardo<sup>11</sup> (Tr. 325:5-8; Tr. 663:10-13; Tr. 736), communicating test results to players, or any other procedural aspect of the Program<sup>12</sup> (Tr. 116:13-22, 117-118; Tr. 325:9-13).

Although the NFL contended at trial that it cannot abide by DATWA's time restrictions (Add.008 at 92; Tr. 736-737), the NFL never took any steps to work with the Labs to determine if the DATWA time restrictions could be met. (Tr. 114-115; Tr. 736-737.) The NFL never even reviewed the State law time requirements. (Tr. 951; Tr. 532:5-17; Tr. 110:22-25, 111:1-6; Tr. 113-114; Tr. 120:2-8.) The World Anti-Doping Agency ("WADA") has such provisions for turnaround time (Tr. 756), undermining any argument that DATWA mandates unworkable requirements. The NFL failed to call anyone at the trial from either of the two NFL-controlled labs to support that contention.

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<sup>11</sup> DATWA specifies that the laboratories can only release test results to an employer. Lombardo receives test results from the Labs. (Tr. 114:14-16, 124, 254; Minn. Stat. § 181.954(1).)

<sup>12</sup> Peculiarly, and without explanation or rationale, the only timeframe is that the "B" Sample test must be done within seven days of the letter advising the Player of the positive "A" Sample test result. (Tr. 115-116; A0973.) There are no time limitations for testing the 'A' sample, providing results, reporting the 'B' reports or adjudicating discipline.

*The Williamses Were Not Advised of Their Positive Test Results in a Timely Manner*

DATWA requires that an employee be informed of a positive test result within three days of the employer receiving the result. (Minn. Stat. § 181.953(7).) Lombardo was informed of the “A” Sample positive on August 13, 2008. (A0652-0737.) The Williamses did not learn of any positive result until August 27, 2008. (A0637-0638.)

Even if the trigger date for DATWA’s three-day notice ran from the confirmatory “B” test, as the NFL seemed to contend at trial, Lombardo was advised of the positive test on September 10, 2008 (Kevin Williams) and September 11, 2008 (Pat Williams), yet the Williams were not informed until they received letters from Birch on September 22, 2008 (Kevin Williams) and September 29, 2008 (Pat Williams). The Court found that the NFL violated this three-day DATWA provision. (Add.015, 023 – 024, 027.)

**b. The Williamses were denied their right to a third test**

DATWA mandates that a third test, following the test and confirmatory test, be offered to an employee. Minn. Stat. § 181.955(9). Judge Larson failed to consider this breach by the NFL despite the issue having been raised throughout discovery.<sup>13</sup> Simply because the Williamses chose to address that violation at trial rather than in the summary judgment motions is not relevant. The NFL was on notice, the pleadings and discovery provided ample notice, and the Williamses’ proof that the NFL violated this important DATWA provision should have been considered in rendering a decision in this matter.

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<sup>13</sup> This issue is discussed at length at p.35, II, *infra*.

An “A” initial screening test is not a specific test; it is not capable of detecting certain information since it is not sufficiently sensitive or exact. For example, the “A” initial screening does not give any specific amounts for a substance. (Tr. 324:19-25; Tr. 837-838.) It is not a “stand alone test.” *Id.* The “A” confirmation test, which only occurs when the “A” initial screening gives a presumptive positive indicating the need for the confirmatory “A” test, is more specific. (Tr. 788-789; Tr. 837-838; A0961.) The confirmatory test targets a drug specifically and accurately, unlike an initial screening test. (Tr. 837-838.)

Thus, the second test occurs when the NFL lab conducts a confirmatory test on the “B” sample. No additional test was offered, in violation of DATWA. The NFL acknowledges that it did not provide the Williamses with a third test. (Tr. 839-840; Tr. 951-952; Tr. 952:1-4: “‘Question: Does the NFL or Dr. Lombardo provide for a third test following the ‘B’ test?’ ‘No. The policy does not provide for a third test.’”) Kevin Williams specifically requested that his specimen be tested a third time, using a more finely-tuned test. (Tr. 839-840; Tr. 951-952; A0796-0798.) Birch rejected that request without consulting with the NFLPA. (Tr. 528-529; A0759.) Had Pat Williams known of his right to a third test, he would have exercised that right. (Tr. 562:14-16.)

**c. The Williamses were denied the right to have their samples tested at a different laboratory**

DATWA requires an employer subject to the Statute to provide an employee who tests positive with notice that the employee not only has the right to a third test, § 181.953(7), but that the confirmatory retest can be performed by “another laboratory”

other than the laboratory selected by the employer, § 181.953(9). The trial court did not consider the NFL's failure to provide notice of the right to have a neutral laboratory perform the confirmatory retest despite the fact that the issue had been raised consistently throughout discovery. *See Infra* at p35, II.

Without dispute, Kevin Williams and Pat Williams were not given the right to have their samples retested at a neutral or different laboratory even though DATWA requires that option. (Tr. 118:6-11.) The right to send samples to a neutral or third party lab is an important aspect of DATWA, clearly designed to assure accuracy and fairness in the drug testing process. Providing that right to all NFL players also may well have resulted in the information that StarCaps contained Bumetanide being reported to the proper regulatory authorities, to the players and to the NFLPA.

**d. DATWA mandates that test results are confidential and private – the NFL breached that mandate**

Certainly up until the time an NFL player has exercised his right administratively to challenge a positive test result and the NFL Commissioner announces a punishment, DATWA's mandate that test results are to remain confidential applies. Minn. Stat. § 191.954(2). That provision of DATWA clearly was breached. Along with the names of players from New Orleans and Atlanta, the Williamses were identified in the media as violators of the Program before they had the opportunity to exercise their appellate rights and before they had told their families, as well as friends and teammates of the positive tests. On October 24, 2010, Josina Anderson of Denver Fox ("Anderson") reported that NFL players had tested positive under the steroid program, citing a "highly placed NFL

source.” (Add.011 at 131; Tr. 607-608.) Shortly thereafter, on either October 24 or 25, Jay Glazer confirmed that Kevin Williams and Pat Williams had failed a steroid test. (Add.011 at 132.)

The NFL, and specifically the Commissioner, is responsible for policing the confidentiality of matters involving the Steroid Program. (Tr. 327:8-15; A0957, A0967¶ 13; Tr. 740:2-8.)

As Judge Larson found:

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.

Order at 25.

The Commissioner failed to conduct a proper investigation to identify the source of the leak. Judge Larson pointedly described Birch’s actions and testimony as “highly suspect.” (Add.011 at 136.) Lombardo, who was told by Birch that Birch would investigate leaks of confidentiality (Tr. 159:6-11), refused to accept responsibility for breaches of confidentiality despite being the Administrator of the Program (Tr. 153-157). Pash did not interview anyone at the NFL or take any other steps to investigate the media leak. (Tr. 536-537.)

*Basic Steps to Ensure Confidentiality were Ignored*

Lombardo always sends notice of positive test results to Players’ Team addresses, using Federal Express with a “Confidential” stamp on it and with the same (fictitious)

initials on the envelope for the sender. (Add.009 at 101, Add.010 at 119; Tr. 283-284.) The test results are sent to Team addresses despite the fact that the NFL knows the Players' home addresses. (Tr. 393-394; Tr. 560:2-9; A0645-0646.) The positive test result letters are left in the Players' open lockers. (Tr. 560:18-25, 561:1.) Everyone knows a letter marked confidential with such packaging is "not good news." (Tr. 561.)

*The Williamses' test results were leaked to the Media before the Williamses could tell families or teammates*

Kevin Williams did not want the news of his positive test result disseminated until he was able to go through the appeal process so that he could find out why Bumetanide was in his system. He was hoping the test result was a mistake. (Tr. 391-392.) Kevin Williams' family learned of his positive test result on the news after a leak to the media while Kevin Williams was in an airport on his way back to Minnesota from a bye week when he first heard of the Glazer report around October 26, 2008. (Tr. 351-352.)

Pat Williams had only told his wife, his agent, head coach, and Kevin Williams up until late October 2008, and never told the media, of his positive test results. (Tr. 584-585.) He first heard of the Glazer report on his way back to Minnesota. (Tr. 563:15-25, 564:1-3.) The news was broadcasted before his right to an appeal had played itself out, depriving him of the right to control how and when people close to him would be told of the positive test result.

Only the NFL and perhaps Stacy Robinson of the NFLPA ("Robinson") knew the names of all players, Vikings, Saints, and Falcons, who appeared in the press. (Tr. 609.) Robinson was not the source of the media leak disseminating news of the Williamses'

positive test results. (Tr. 418-419.) Kevin Williams never told anyone in the media of his positive test result. (Tr. 352:14-16.) Pat Williams never told anyone in the media of his positive test results. (Tr. 563:8-10.) Neither of the Williamses' agents, Tom Condon ("Condon") nor Angelo Wright ("Wright"), discussed the test results with the media. (Tr. 607:8-10; Tr. 621-622; Tr. 642:22-24.) No one at Condon's office spoke to the media. (Wright Testimony 3/11/10; Tr. 642-643.) Brad Childress ("Childress"), the Vikings' Head Coach, was not the source of the media leak. Kevin Williams told Childress of his positive test result as part of a "culture of honesty" for such matters. (Tr. 883:23-25, 884:1-20.) Childress never discussed the positive test results with the media. Childress told Rob Brzezinski ("Brzezinski") of Kevin Williams' test result but Brzezinski did not convey that information to anyone else including members of the media. (Tr. 884:22-25, 885:1-7; Tr. 907:16-24.) The Williamses' attorney was not the source of the leak. (Add.012 at 139.)

Wright investigated the leak by discussing it with Glazer, Robinson, and Anderson. (Tr. 608:2-10.) Anderson ruled out certain people as the source of the leak in her discussions with Wright and then, based on the information Anderson provided, Wright advised Pat Williams to file suit against the NFL.<sup>14</sup> Wright believes that he

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<sup>14</sup> Judge Larson precluded Wright from testifying about the substance of his conversations with Ms. Anderson. (Tr. 609:20-25; 610:1-15.) The conclusions from those discussions resulted in Wright advising Pat Williams to sue the NFL for the breach of confidentiality. (Tr. 610:19-22.)

provided good and accurate advice to Pat Williams about the allegations of breach of confidentiality. (Tr. 608-610.)

Nonetheless, Judge Larson failed to conclude that the NFL was the source of the leak. (Add.011 at 130; Add.025.) Judge Larson erroneously ruled that the Williamses had not proved by a preponderance of evidence that the NFL was responsible for the breach. As the evidence shows, there was no other possible source of the breach and the Court's findings in this regard should be reversed.

Further, Judge Larson also erred by not considering that the NFL's violation of its duties under DATWA to oversee confidentiality and to investigate leaks also served as a basis to grant a permanent injunction against the NFL even if the causal link between the NFL's breach of its duties and the leak had not been established at trial.

**e. The NFL did not release negative results to employees, in violation of §181.953**

Minnesota Law requires that “[a] laboratory shall disclose to the employer a written test result report for each sample tested within three working days after a negative test result on an initial screening test or, when the initial screening test produced a positive test result, within three working days after a confirmatory test.” Minn. Stat. § 181.953(7). The NFL, in violation of DATWA, admits that a player only receives his test result if the test is positive; players do not receive negative test results. (Tr. 841; Tr. 790:22-25, 791:1-7.) Kevin Williams and Pat Williams have never received a negative test result despite having been subjected to testing throughout their NFL careers. (Add.002 at 7, 16; Tr. 344:24-25, 345:1-14; Tr. 541: 15-20.)

Judge Larson failed to consider this DATWA violation. *See Infra at p.35, II.*

**f. The NFL violated DATWA's chain of custody requirements**

DATWA, as an integral aspect of its goals of assuring a "reliable ... procedure," Minn. Stat. § 181.953(5), includes a mandatory requirement that "individuals relinquishing or accepting possession of the sample must record the time the possession of the sample was transferred and [each such person] must sign and date the chain-of-custody record at the time of transfer," Minn. Stat. § 181.953(5)(4).

A DATWA-compliant chain of custody must identify each person who handles or possesses a sample from the moment of collection (Minn. Stat. § 181.953(5)(1)) through the entire handling and testing of the sample (Minn. Stat. § 181.953(5)(4)). The relevant chain of custody documents were entered into evidence at the Williamses' trial. (A0647-0648; A0652-0737.) There can be no argument that, from the time the specimens were relinquished by the specimen collector up through their handling at the UCLA laboratory, there was not an appropriate chain of custody. (Tr. 148-149.) The purported chain evidences a material link during transportation of the samples to the lab and, again there is a material break in the link while the sample was being handled at the lab. It is not possible to discern who was removing the samples from the holding areas.

The NFL and its lab failed to abide by this obligation yet Judge Larson refused to consider the NFL's violation of the § 181.953(5) requirements: ""My ruling as far as the chain of custody still is ...we're not pursuing that ...." (Tr. 221). Judge Larson

consequently failed to consider this violation in rendering the May 6 Order. In fact, there was no surprise regarding this argument and the NFL was on notice. *See Infra* at II.

**II. THE LOWER COURT ERRED IN FAILING TO CONSIDER EVIDENCE OF A MULTITUDE OF OTHER NFL VIOLATIONS OF DATWA THAT WOULD HAVE FURTHER SUUPORTED THE ISSUANCE OF THE INJUNCTION.**

The lower court judge limited the issues he considered in determining whether to grant a permanent injunction to the two issues that survived summary judgment: the NFL's violation of the three-day notice provision and the breach of the Williamses' rights to confidentiality. (A0284-0327.) As detailed above, the NFL violated several additional provisions of DATWA in addition to administering the drug testing program in an arbitrary and capricious manner. Judge Larson's failure to consider those systemic as well as particularized violations of Minnesota law was in error.

The Williamses' pleadings sufficiently provided the groundwork for litigating and having the lower court evaluate the myriad DATWA violations. Minnesota is a "notice-pleading" state. As such, Minnesota "does not require absolute specificity in pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it." *Donnelly Bros. Constr. Co., Inc. v. State Auto Prop. & Cas. Ins. Co.*, 759 N.W.2d 651, 660 (Minn. Ct. App. 2009). No one could accurately claim that any of the DATWA violations proved at trial was a "surprise."

The amended complaint, of course, specifically cited to DATWA and its provisions. Notice was not limited, however, to that pleading. In making its *in limine*

motion, the NFL contended during oral argument that the Williamses had not specified the DATWA violations in response to contention interrogatories served while the action was in federal court. (A0328-0330.) That was a misrepresentation. (A0334-0339.) In fact, the specific violations pursued at trial but that the trial court failed to consider were specifically identified in the Williamses' Responses and Objections to Defendant National Football League First Set of Interrogatories. Interrogatory No. 4 (Add.029) requested the specific manner in which the Williamses contended that the NFL violated DATWA. In pertinent part, the Williamses responded as follows (Add.030-031):

*Based on the information known at this time, and without waiving any privilege, the Williamses respond as follows: The Williamses state Defendants have violated the Minnesota Drug and Alcohol Testing in the Workplace Act ("DATWA"), see Minn. Stat. §§ 18 1.950- 18 1.957, including the following:*

- Failing to consider in good faith the innocent explanation provided by the Williamses for the finding of Bumetanide in their system, as required by Minn. Stat. § 181.953(6).
- Failing to provide the Williamses with two weeks written notice in advance of the drug test taken as part of an annual routine physical examination, as required by Minn. Stat. § 181.951(3) (See Lombardo 204:6-13; NFL 2084, 2570);
- Failing to ensure that the laboratory provided written test results within three days of the confirmatory test, as required by Minn. Stat. § 181.953(3) (See Finkle 232:13-233:18; NFL 513, 514, 397, 2860)
- Failing to provide the Williamses with notice of the result of their drug tests within three days, as required by Minn. Stat. § 181.953(7) (See Lombardo 211:4-22; 214:23-215:2; NFL 513, 397, 2509, 2037);
- Failing to adhere to Minn. Stat. § 181.953(10)(a), which prohibits the imposition of any discipline upon an unconfirmed initial positive test result (See NFL 397, 513, 2506, 2507);
- Failing to notify the Williamses of their right to explain the positive result, as required by Minn. Stat. § 181.953(6) (See NFL 513, 397);
- Failing to notify the Williamses that they were entitled to a third test of their samples at their own expense, as required by Minn. Stat. § 181.953(7) (See Birch 346:19-347:4; Lombardo 216:23-217:7; Finkle 241:21-24; NFL 2828, 4149);

- Failing to allow a third test of the Williamses' sample, as required by Minn. Stat. § 181.953(9) (See Birch 346:19-347:4; Lombardo 216:23-217:7; NFL 2828, 4149);
- Failing to use a properly licensed, accredited or certified laboratory, as required by Minn. Stat. § 181.953(1) (See Finkle 229:23-230:2; 230:23-25, 231:10-12; see also Accredited Laboratory Directory Screen Shot from the College of American Pathologists); and
- Failing to adhere to the confidentiality and non-disclosure requirements set forth in Minn. Stat. § 181.954(2) (See Finkle 243:4-9; 243:25-245:11; Pash 83:15-84:15; 86:3-8; Birch 271:23-272:3; 272:13-17; Lombardo 218:10-228:2; NFL 4180; NFL 5540; NFL 5561).

*And, as reflected in the documents produced in response to the Williamses and NFLPA's Requests for the Production of Documents and the deposition testimony given in this action thus far, Defendants failed to comply with DATWA by failing, inter alia, to offer or provide the Williamses a third test to confirm the positive Bumetanide test result, use a laboratory licensed, accredited, or certified in compliance with DATWA, receive notice from the laboratory of the Williamses' positive test results within the time proscribed by DATWA, give timely notice to the Williamses of within three days of the results of the confirmatory test, and keep the Williamses' test results confidential in violation of DATWA. Defendants' acts and omissions constitute a violation of the Williamses statutory protections under DATWA.*

In addition, Appellants directed their discovery demands on the NFL precisely to address the very violations that the NFL claimed were a surprise and that the trial court refused to consider. For example, in Interrogatories that the NFL responded to on March 16, 2009 (A0519-0539), the Williamses addressed their inquiries to: the arbitrary and capricious administration of the Program (A0532 at 11); the confidentiality issue (A0532 at 12); the "random selection" process (A0533 at 14); the DATWA timelines for every requirement – not just the three-day notice provision (A0534 at 15); and the chain of custody (A0535 at 17). The Williamses' document production demands were equally targeted to the DATWA violations. (A0577-0582.)

And during depositions, each NFL representative was asked about the very DATWA violations that Judge Larson failed to consider. Lombardo was questioned

about the factual bases comprising the Williamses' arbitrary and capricious claim (A0487-0490, A0494-0495); failure to provide notification of a negative result (A0491); disclosure of results to Lombardo, *i.e.*, the "employer" (A0492); three-day notice provision (A0492-0493); delay in the appeal hearing (A0493); and, the right to a third test (A0493). Finkle was questioned about the factual bases compromising Appellants' claims involving confidentiality and disclosure (A0497); three-day notice provision (A0498-0499); chain of custody (A0500); rights to confirmatory tests, including the third test (A0500-0501); delay in the appeal hearing (A0501); and, the arbitrary and capricious claim (A0502-0505). Birch was questioned about the factual bases compromising the Williamses' claims involving the arbitrary and capricious administration of the Program (A0507-0510, A0513-0514); chain of custody (A0509-0510); three-day notice provision (A0510-0511); right to a third test (A0510-0511); timing for notification of test results (A0510); right to learn of a negative test result (A0511); and, delay in the appeal hearing (A0512). Pash was questioned about the factual bases compromising the Williamses' claims involving the arbitrary and capricious administration of the Program (A0516-0518.)

There was no surprise about any of the Williamses' claims. The Williamses, in interrogatory responses, in depositions cited with specificity in those interrogatory responses, and in other discovery, identified precisely which violations were going to be pursued in this action. There is no basis upon which the NFL could have claimed surprise or upon which the trial judge should have precluded evidence regarding these enumerated offenses or ignored those violations in considering whether to grant relief.

Judge Larson's ruling limiting the NFL's DATWA violations for purposes of determining whether to grant relief was erroneous. Notwithstanding the ruling, the record at trial substantiates the many DATWA violations. Thus, it is respectfully submitted that this Court either should remand the action to the court below to consider the full panoply of DATWA violations in considering whether to grant a permanent injunction or, since the record conclusively evidences those many violations, this Court should issue a permanent injunction.

**III. THE TRIAL JUDGE ERRONEOUSLY CONCLUDED THAT AN EMPLOYEE IS REQUIRED TO MAKE AN AFFIRMATIVE SHOWING OF SPECIFIC INJURY WHERE AN EMPLOYER HAS VIOLATED DATWA TO THAT EMPLOYEE'S DETRIMENT. SEE MINN. STAT. § 181.950-957**

Even taking the lower court's findings and conclusions alone, without the benefit of appellate review, the NFL conclusively violated at least one substantive provision of DATWA. The language of the Statute mandates the granting of an injunction.

The appropriateness of granting injunctive relief for a violation of DATWA is addressed in terms of the Legislature's granting of standing for seeking such relief. *See* Minn. Stat. §185.956(4)("[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 DATWA). The Williamses indisputably are aggrieved employees.

The provision for injunctive relief is not modified by language suggesting judicial discretion when the Statute has been violated. In contrast, the Legislature modified the

determination of whether a court should grant equitable relief *other* than an injunction. Minn. Stat. § 181.956(4) (“as part of injunctive relief granted ... a court may, in its discretion, grant any **other** equitable relief it considers appropriate, including ordering the injured employee” reinstated. (*Emphasis added.*)) If the Legislature had wanted to make the granting of injunctive relief discretionary when DATWA is violated, it would have used the “may, in its discretion” language when addressing both the “injunctive relief” and the “other equitable relief” remedies.

Not only did the lower court fail to grant a permanent injunction, but the lower court, despite overwhelming evidence showing repeated and wanton violations of DATWA, did not consider whether to grant “other equitable relief” and the scope of such relief.

**IV. HAVING CONCLUDED THAT THE NFL VIOLATED DATWA, THE LOWER COURT ERRED BY FAILING TO AWARD – OR CONSIDER – MONETARY DAMAGES AND ATTORNEYS FEES IN THE ABSENCE OF, OR IN ADDITION TO, INJUNCTIVE RELIEF, PURSUANT TO MINN. STAT.. § 181.950-957**

The NFL never told Kevin Williams or Pat Williams that taking StarCaps would result in discipline under the NFL’s Steroid Policy nor did the NFL ever provide any notice or warning about StarCaps. (Add.002 at 12; Add.003 at 21; Tr. 691-693; Tr. 340-341.) Neither Kevin Williams nor Pat Williams has ever been found to have steroids in his system nor has he ever been suspected of masking anything in his urine. (Add.002 at 7, 16; Tr. 241:11-25, 242:1-2.) The NFL invoked a testing process that was wantonly in disregard of State law safeguards. At least with regard to the three-day notice provision,

the lower court found a substantive violation of DATWA. The evidence is overwhelming that the entire administration of the testing is arbitrary and capricious, both procedurally and substantively violative of an important Minnesota law.

The NFL's hands are unclean as is evident from its failure to disclose that StarCaps contained Bumetanide (*see supra*). The NFL showed no concern for the health and safety of the Players. Fundamental fairness was violated because the NFL did not advise the Williamses that Bumetanide was contained in StarCaps. (Tr. 340:2-4, 399:15-19; Tr. 817:1-9.) The NFL wantonly and cavalierly decided it simply would not learn about or abide by State law.

The failure to administer the Program in a fair and just manner compromised the rights of the Williamses. The failure to abide by timely notice resulted in the Williamses having the positive test results hanging over their heads for four months before they were able to have their appeals heard. (Tr. 397:24-25, 398:1-23.) And now, despite the NFL having ignored and violated DATWA and having arbitrarily and capriciously administered its own steroid testing program, the NFL stands to prevail without intervention of this Court.

**A. Damage Done to the Williamses**

Both Kevin Williams and Pat Williams have suffered significant monetary loss as a result of the NFL's actions and stand to suffer far greater loss if the NFL is allowed to impose a four-game suspension on them. Judge Larson failed to consider or evaluate in any way the monetary damages suffered by Appellants.

Kevin Williams has suffered lost opportunities as a result of this case. Football camp opportunities died away since the news of his positive test result became public. (Tr. 386:2-11, 387:4-8.) Other marketing opportunities have also been lost. Kevin Williams has also suffered mental distress from this situation since it has been weighing on his mind since he tested positive. (Tr. 353-354, 389:2-18.) Kevin Williams has already had \$60,000 of his weight bonus withheld from his contract. (Tr. 401:14-21.)

Condon testified that he believed, based on Kevin Williams' stature and career thus far, including numerous times being voted to the Pro Bowl and the progress of the Minnesota Vikings as a Team, that Kevin Williams deserves to be inducted into the Hall of Fame. (Tr. 644-647.) If Kevin Williams is suspended, he will not be permitted to play in the Pro Bowl which could, along with the suspension, affect his ability ever to be inducted in the Hall of Fame. (Tr. 646:10-25, 647:1-13.) Moreover, Kevin Williams may have broadcasting and book deals available to him after he retires based on his record thus far and potential to advance even more. (Tr. 644:11-25, 645:1-22.) This case would have an effect on Kevin Williams' upward trajectory and post-football career. (Tr. 645:23-25, 646:1-9.)

Pat Williams' teenage children were teased at school because of this incident. (Tr. 615:16-25; 565:3-10.) This case has resulted in Pat Williams suffering distress. (Tr. 565.) He has lost football camp opportunities and curtailed his charitable activities in the States of Minnesota and Louisiana. (Tr. 565-569.) If Pat Williams clears his name, he will move forward and start his charity role again. (Tr. 596:22-24.) Pat Williams has had an endorsement deal with Mike and Johnny's drink tabled until this case is resolved. (Tr.

611-612.) Under the agreement with Mike and Johnny's he would have been the company spokesperson, conducted signings, and made appearances in exchange for approximately \$150,000 a year for three years with incentives. (Tr. 611:4-21.) The deal was tabled about three weeks after leaks of the positive test result occurred. (Tr. 611:22-25, 612:1-18.) If Pat Williams is cleared in this case, Wright is hopeful that this endorsement deal can be resurrected. (Tr. 612:19-22.) Moreover, Pat Williams has an interest in an auto repair company and sponsors backed out of a car show he sponsors. The value of that loss is about \$50,000. (Tr. 612:23-25, 613:1-17.) If Pat Williams is suspended, he will not be permitted to play in the Pro Bowl which could, along with the suspension, affect his ability ever to be inducted in the Hall of Fame. (Tr. 614:8-13, 614:23-25, 615:1-15.)

Judge Larson failed to consider awarding monetary relief to the Williamses despite DATWA's provision for such awards. Minn. Stat. § 181.956(2).

**B. Attorneys Fees**

Finally, having proved that the NFL violated DATWA as a result of its wanton, knowing and reckless behavior, the trial court should have awarded to the Williamses their reasonable attorneys fees, Minn. Stat. § 181.956(2), yet failed to do so.

**CONCLUSION**

The lower court's failure to issue a permanent injunction, grant damages and attorneys fees should be reversed.

Dated: July 13, 2010

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven Rau". The signature is fluid and cursive, with a large initial "S" and "R".

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**CERTIFICATE OF COMPLIANCE WITH  
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I certify that the foregoing Brief of Respondents Pat Williams and Kevin Williams conforms to the Minn. R. Civ. App. P. 132.01, sub. 3, for a brief produced in the following font:

Proportional serif font, 13-point or larger.

The length of the brief is 12,234 words. This brief was prepared using Microsoft Word 2003.

Dated: July 13, 2010

  
Steven E. Rau