

**DID THE MLBPA STRIKE OUT? AN ANALYSIS OF
UNION LIABILITY IN MAJOR LEAGUE
BASEBALL'S ANONYMOUS 2003 STEROID
TESTING ♦**

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INTRODUCTION

It is difficult to feel compassionate for a group of professional

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baseball players who cheated on their way to making millions of dollars a year playing a beloved national pastime. They might be the prototypical example of a “victim” for whom the public should cry crocodile tears. This, however, is the predicament that we face when looking at the players who tested positive in the Major League Baseball (“MLB”) 2003 anonymous survey steroid testing program. Even some Major League players have expressed a lack of pity or sympathy (and maybe even a hint of *schadenfreude*) for those players whose anonymous test results have subsequently been leaked to the public.¹ However, the privacy issues at stake transcend the rights of the professional athletes involved in this case. The importance of anonymity in certain activities pervades our lives- from voting in elections, to taking anonymous surveys that address institutional and organizational problems. Additionally, when a person agrees to undergo a drug test, take a workplace survey, or even vote in a political election on the condition of confidentiality and anonymity, a violation of that anonymity would certainly disturb our sensibilities. Should it really matter whether the person whose privacy was violated is a wealthy athlete or a blue-collar worker?

This Note, explores the legal rights and recourse available to the Major League players, whose confidential 2003 testing records have been revealed to the public (and whose testing records are likely to continue to be revealed in future leaks). The focus of this Note will be on whether the Major League Baseball Players Association (“MLBPA”), as the labor union representing all Major League players in collective bargaining, violated any of their duties to the players in negotiating, establishing, and enforcing the survey steroid testing program for the 2003 season. Ultimately, this Note concludes that despite the MLBPA’s apparent shortcomings in negotiating and enforcing the drug-testing program, it does not appear that their actions rise to the level of civil liability. In coming to this conclusion, this Note analyzes the extent of the MLBPA’s duty, in light of their actions, from the negotiation of the 2003 Collective Bargaining Agreement (“CBA”), which included the 2003 drug tests, through the sample testing and subsequent confiscation of the results by federal authorities.

¹ After a report surfaced that current New York Yankees third baseman Alex Rodriguez had tested positive for steroids when he was a member of the Texas Rangers (and after he subsequently admitted such use), Lance Berkman, a veteran player (who was subsequently traded to the New York Yankees in July 2010) commented that “I don’t feel the least bit sorry for him If you do something like that, you’re going to pay the piper eventually.” Tom Singer, *Opinions Vary on A-Rod Conference*, MLB.COM, Feb. 17, 2009, http://mlb.mlb.com/news/article.jsp?ymd=20090217&content_id=3840128&vkey=news_mlb&fext=.jsp&c_id=mlb.

Part I will describe how the criminal investigation of a suspected steroid distributor with no official ties to MLB or the MLBPA likely led to the exposure of the confidential and supposedly anonymous 2003 survey steroid test results.

Part II will discuss the actions taken by the MLBPA throughout the negotiation and administration of the survey drug testing. Part II will suggest various ways that the MLBPA could have avoided the current situation whereby MLB players' reputations lay at the whim of a criminal who may or may not still have the ability or desire to continue violating a court order by leaking names of players who tested positive.

Part III will discuss the general legal duties owed by unions to their membership. Federal statutes and the duties they impose on unions and union officials and will be explored, along with the threshold for federal legal liability of unions.

Part IV will move from the measures that could have been taken by the MLBPA discussed in Part II and the legal groundwork laid out in Part III, and will assess whether the MLBPA actually violated any legal duty due to its player-members in its negotiation, administration, or enforcement of the 2003 survey steroid testing. This section will compare and contrast the MLBPA's actions with relevant caselaw. Based on these comparisons, the possibility of any liability will be discussed on the part of the MLBPA for the eventual damage caused by private and supposedly anonymous information becoming compromised.

Part V will discuss other contributors who may have facilitated the publicizing of this private and confidential information, and the proof and procedural problems that would be involved with attributing liability to these parties. This section will also focus on the practical limitations of seeking viable legal recourse for many current and former MLB Players whose privacy may have been violated by the publicizing of these tests. A projection of how this situation may unfold over the next few months and years will be given, concluding with the discussion regarding the importance of what happened in this case and exploring the way in which this whole story could affect the future of anonymous drug testing in other areas.

I. MLB DRUG TESTS AND THE BALCO INVESTIGATION

In 2002, the MLBPA agreed, on behalf of their member players, to conduct survey steroid testing under a collective bargaining agreement with MLB. This testing was to be done under the condition "that the testing would be anonymous and confidential, and that the samples and individual data would be

destroyed upon tabulation of the results.”² Before 2003, there had never been any mandatory steroid testing in the history of MLB.³ While there were certainly players who favored a strong steroid testing policy, many players resisted any drug testing and the MLBPA opposed testing on the grounds that it infringed their player-members’ privacy rights.⁴ There was a clear rift among players as to where steroid testing fit into the game.⁵ In a way, anonymity in the 2003 tests was a compromise that was able to bring all of the parties to the table. Importantly, it brought together the contingent of players who opposed drug testing or those who thought the steroid problem in baseball was not pervasive enough to warrant mandatory testing, with those who wanted to be above reproach and rid the game of any hint of impropriety. According to Rich Levin, a spokesman at the time for MLB, “[w]e would have liked more drug testing, but we were negotiating with the union.”⁶ The MLBPA was resistant to the steroid testing and “[u]nion representatives [said] their policy represents the wishes of the majority of the membership.”⁷ Prior to 2003, “the union had declined to collectively bargain [steroid testing], citing privacy issues, while stipulating that drug testing was an abuse of human rights.”⁸ In resisting mandatory drug testing with penalties in the past, and finally agreeing to anonymous testing without any penalties, the MLBPA was claiming to take a position supported by a majority of their members.⁹

² U.S. v. Comprehensive Drug Testing, Inc. (*Comprehensive I*), 513 F.3d 1085, 1118 (9th Cir. 2008) (Thomas, J., dissenting), *rev’d en banc*, 579 F.3d 989 (9th Cir. 2009), *modified en banc*, 621 F.3d 1162 (9th Cir. 2010). This note will refer to the Ninth Circuit’s majority and dissenting opinions in U.S. v. Comprehensive Drug Testing, Inc., from 2008 and 2009, for the factual background of this case as those earlier opinions go into more details of the relevant facts for this note than does the more recent opinion in U.S. v. Comprehensive Drug Testing, Inc., 621 F.3d 1162 (9th Cir. 2010) (*en banc*). Additionally, the 2010 *en banc* decision “refer[s] the interested reader” to the previous Ninth Circuit opinions for the “complex” factual background of the case. See *Comprehensive Drug Testing, Inc.*, 621 F.3d 1162.

³ There was limited mandatory testing for controlled substances such as cocaine in “circumstances of probable cause, like when a player is arrested for drug possession.” See Michael Freeman & Buster Olney, *New Drug Tests in Baseball Stir Debate Among Players*, N.Y. TIMES, April 22, 2003, <http://www.nytimes.com/2003/04/22/sports/baseball-new-drug-tests-in-baseball-stir-debate-among-players.html?pagewanted=1>.

⁴ *Id.*

⁵ The rift among players became public in the Spring of 2003, by the actions of “a dozen Chicago White Sox players [who] threatened to boycott the new steroid testing procedure because they did not believe it was aggressive enough to weed out drug users.” Freeman & Olney, *supra* note 3.

⁶ See Freeman & Olney, *supra* note 3.

⁷ *Id.*

⁸ Barry M. Bloom, *Mandatory Steroid Testing To Begin*, MLB.COM, Nov. 13, 2003, http://mlb.mlb.com/news/article.jsp?ymd=20031113&content_id=603458&vkey=news_mlb&fext=.jsp&c_id=mlb.

⁹ It is important to note that drug testing in general became an issue that could only be negotiated in collective bargaining between the MLBPA and MLB after a decision in 1986 by an arbitrator “ruled against the major league baseball owners . . . for including clauses in the contracts of several hundred players that allowed random drug testing without

Comprehensive Drug Testing, Inc. (“CDT”), located in California, administered the drug tests by collecting urine specimens from the players.¹⁰ Quest Diagnostics Inc., located in Nevada, was the laboratory responsible for performing the actual steroid tests and for storing those test samples.¹¹

Under the agreement between the MLBPA and MLB, “stricter testing, with penalties, would begin in 2004 only if more than five percent of the 2003 tests turned up positive.”¹² The testing would cover “all anabolic steroids deemed illegal by the U.S. Food and Drug Administration.”¹³ The purpose of this testing was not intended to punish those players that tested positive for steroids in the 2003 testing. Instead, the purpose was to determine the “approximate magnitude of apparent steroid use with the goal of fashioning appropriate policies to address it.”¹⁴ Under these conditions, the players had voluntarily agreed to the survey tests. MLB’s Vice President of Labor Relations and Human Resources, Rob Manfred, stated in 2003 that the league “had heard things about crazy steroid use. . . . But frankly, we didn’t know what to expect” in terms of the number of MLB players taking steroids.¹⁵ Ultimately, “5 percent to 7 percent of the 1,438 tests of Major League Baseball players in 2003 were found to be positive.”¹⁶ The MLBPA received the results of the tests on November 11, 2003 and the results were finalized by November 13, 2003.¹⁷

In 2002, the same year that MLB and the MLBPA decided to begin their survey drug testing program, the U.S. Attorney’s Office commenced an investigation of the Bay Area Laboratory Cooperative (“Balco”), a California based company, “which it suspected of providing steroids to professional baseball players.”¹⁸

negotiating through the union.” Prior to this decision, MLB teams had been trying to institute mandatory clauses in individual player contracts, specifically those contracts that were for more than one year, that would have required such players to submit to drug testing at the team’s discretion. See *Ballplayers Win Drug-Test Grievance*, N.Y. TIMES, July 31, 1986, at B9.

¹⁰ U.S. v. Comprehensive Drug Testing, Inc. (*Comprehensive II*), 579 F.3d 989, 993 (9th Cir. 2009) (en banc).

¹¹ *Id.*

¹² Michael S. Schmidt, *Bonds’s Urine Retested, and Result Is a Positive*, N.Y. TIMES, Feb. 3, 2009, http://www.nytimes.com/2009/02/04/sports/baseball/04bonds.html?_r=1.

¹³ Bloom, *supra* note 8.

¹⁴ U.S. v. Comprehensive Drug Testing, Inc. (*Comprehensive I*), 513 F.3d 1085, 1118 (9th Cir. 2008).

¹⁵ See Bloom, *supra* note 8.

¹⁶ Schmidt, *supra* note 12.

¹⁷ Press Release, Major League Players Association, MLBPA Statement on 2003 Results (Feb. 9, 2009), http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20090209&content_id=3812730&vkey=mlbpapr&fext=.jsp&c_id=mlb [hereinafter MLBPA Press Release].

¹⁸ U.S. v. Comprehensive Drug Testing, Inc. (*Comprehensive II*), 579 F.3d 989, 993 (9th Cir. 2009) (en banc).

During the course of its investigation, the government produced evidence that eleven MLB players had procured steroids from Balco.¹⁹ As a result of this finding, on November 19, 2003, the government issued a grand-jury subpoena to MLB requesting the results of the anonymous steroid tests for the eleven players with Balco connections.²⁰ When MLB responded that they did not possess the drug test results, the government went straight to the testing agencies and “secured a grand jury subpoena in the Northern District of California seeking *all* ‘drug testing records and specimens’ pertaining to Major League Baseball in CDT’s possession.”²¹

CDT and the MLBPA informed the government that they intended to file a motion to quash the subpoena.²² Consequently, on April 7, 2004, the day that the motion to quash was filed by CDT and the MLBPA, the government obtained a warrant in the Central District of California and in the District of Nevada authorizing a search of the CDT facilities in Long Beach and the Quest facilities in Nevada.²³ However, the warrant issued by the court was not as broad as the subpoena and was “limited to the records of the ten players as to whom the government had probable cause.”²⁴ Using the warrant to gain entry into CDT in California and Quest in Nevada, the government, led by Special Agent Jeff Novitzky of the Internal Revenue Service,²⁵ seized and reviewed the drug testing records for hundreds of players in Major League Baseball, seemingly in violation of their warrant.²⁶ CDT had already segregated the files relating to the ten Balco athletes so that the government agents could remove the exact files they needed without endangering the privacy of other clients in the company’s database or the hundreds of other MLB players with no alleged connection to Balco.²⁷ However, the government agents executing the warrant refused to accept the segregated data

¹⁹ *Comprehensive I*, 513 F.3d at 1090.

²⁰ *Id.*; see also MLBPA Press Release, *supra* note 17.

²¹ *Comprehensive II*, 579 F.3d at 993 (emphasis in original).

²² *Comprehensive I*, 513 F.3d at 1090-1091.

²³ *Comprehensive II*, 579 F.3d at 993.

²⁴ *Id.* The government decided not to seek drug testing evidence related to one of the eleven players, and future references in *U.S. v. Comprehensive Drug Testing* refer solely to ten Balco related players. For purposes of being consistent with the Ninth Circuit’s opinion, this note will refer to the ten Balco players. See *Comprehensive I*, 513 F.3d at 1090.

²⁵ Special Agent Novitzky has been at the forefront of many of the investigations into steroid distribution and use among professional athletes recently, including the cases brought against baseball player Barry Bonds and Olympic sprinter Marion Jones. See Michael S. Schmidt, *Jeff Novitzky*, N.Y. TIMES, Dec. 30, 2007, http://www.nytimes.com/2007/12/30/sports/baseball/30novitzky.html?_r=1.

²⁶ *Comprehensive II*, 579 F.3d at 993.

²⁷ *U.S. v. Comprehensive Drug Testing, Inc.* (*Comprehensive I*), 513 F.3d 1085, 1120 (9th Cir. 2008) (Thomas, J., dissenting).

concerning the ten players offered by CDT.²⁸ Instead, the agents seized the master list of *all* MLB players, the entire “Tracey” Directory,²⁹ and eleven diskettes containing drug-test results of hundreds of MLB players as well as many other athletes.³⁰ Interestingly, it has been reported that the day before the government executed their search warrants at CDT and Quest, they almost reached a deal with the MLBPA, whereby the data for the ten Balco-connected players would be handed over to the government.³¹ However, after further consideration, the MLBPA refused to give over the any information relating to the ten Balco players, and instead filed a motion to quash the subpoenas on behalf of those players.³² Once the U.S. Attorney saw that the MLBPA intended to fight them over these ten names, they executed their search warrant and gained access to the entire Tracey Directory and all of the urine samples for every major league player.³³ So, in its effort to protect the ten players swept up in the Balco investigation, the union exposed the identities of all 104 players who had tested positive in the 2003 survey.³⁴

A few weeks later, the government filed further subpoenas and warrants in the Northern District of California and the District of Nevada to search through the electronic records seized from CDT for any players, not just those involved with Balco, who tested positive for steroids.³⁵ Basically, the government was requesting a warrant to look through electronic data that was already under their control through their seizure of the Tracey Directory from the CDT facility.³⁶ This was a significant departure from the previous warrants, which merely sought information related to players connected to Balco. After already seizing control of all MLB drug testing information, Special Agent Novitzky, through this new warrant, sought all data pertaining to illegal drug use by any member of major league baseball.³⁷ The government now had data on hundreds of MLB players within arms reach –located in

²⁸ *Id.*

²⁹ The Tracey Directory was a database “that contained information and medical test results for hundreds of other baseball players and athletes engaged in professional sports. . . . [T]he directory contained 2,911 files that had nothing to do with Major League Baseball drug testing, but rather contained test results for numerous other sports entities and business organizations. However, instead of copying only the subdirectories that pertained to Major League Baseball, the agents copied the entire directory.” *Id.*

³⁰ *Id.*

³¹ Mark Fainaru-Wada, *Events That Put A-Rod Under Scrutiny*, ESPN.COM, Feb. 7, 2009, <http://sports.espn.go.com/mlb/news/story?id=3891444>.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ U.S. v. Comprehensive Drug Testing, Inc. (*Comprehensive I*), 513 F.3d 1085, 1121 (9th Cir. 2008) (Thomas, J., dissenting).

³⁶ *Id.*

³⁷ *Id.* at 1122.

the computers that they seized from the testing agencies- and they were determined to expand their investigation from what was initially limited to ten baseball players, to the entire MLB.

Subsequently, CDT and the MLBPA filed motions for return of property seized by the government in execution of the warrants at CDT and Quest, respectively, pursuant to Federal Rule of Criminal Procedure 41(g),³⁸ in the Central District of California and in the District of Nevada.³⁹ They also filed a 41(g) motion in the Northern District of California to quash the latest subpoena by the government to review the files already seized and in government custody (the files that concerned players without alleged associations with Balco).⁴⁰ All three motions in the three separate district courts were decided in favor of the MLBPA.⁴¹ However, the Ninth Circuit, deciding the appeal of the three cases together, reversed the district courts and found that the government had a right to the material seized in the raid.⁴² The court based this finding on the fact that the data on the Balco connected players was “intermingled” with the testing records of the rest of the players, and would have been very difficult to segregate on-site.⁴³ Meeting en banc on to review the panel decision of Judge O’ Scannlain, the Ninth Circuit, on August 26, 2009, reinstated the decision of the district court, requiring the government to return the seized materials.⁴⁴ The en banc panel found that the three district courts’ original decisions quashing

³⁸ FED. R. CRIM. P. 41(g) provides:

A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

³⁹ U.S. v. Comprehensive Drug Testing, Inc. (*Comprehensive II*), 579 F.3d 989, 994 (9th Cir. 2009).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Comprehensive I*, 513 F.3d 1085. For further analysis of the parameters of the Fourth Amendment search and seizure laws as it relates to the Ninth Circuit’s 2008 panel decision specifically and intermingled computer data in general, see Elizabeth Rocco, Note, “*Inequality in the Game vs. Inequality in the Legal System*”: *The Constitutionality of Searches and Seizures in United States v. Comprehensive Drug Testing*, 15 VILL. SPORTS & ENT. L.J. 33 (2008); see also Derek Regensberger, *Bytes, Balco, and Barry Bonds: An Exploration of the Law Concerning the Search and Seizure of Computer Files and an Analysis of the Ninth Circuit’s Decision in United States v. Comprehensive Drug Testing, Inc.*, 97 J. CRIM. L. & CRIMINOLOGY 1151 (2007).

⁴³ *Comprehensive I*, 513 F.3d, at 1110.

⁴⁴ *Comprehensive II*, 579 F.3d at 989. Since the Ninth Circuit’s en banc decision in August 2009, the U.S. Attorney’s Office has requested an unprecedented rehearing by all 27 judges on the Ninth Circuit Court of Appeals. See *Feds Seek Rehearing of Baseball Drug List Ruling*, USA TODAY, Nov. 24, 2009, http://www.usatoday.com/sports/baseball/2009-11-24-drug-list-rehearing_N.htm. Additionally, the Solicitor General has joined in the request for a rehearing and experts believe that the rehearing has a good chance of being granted. *Id.*

the government subpoenas were not an abuse of discretion and should have been upheld.⁴⁵ The court also set out new standards for the search and seizure of electronic data, where files that may be relevant to an investigation are mixed with unrelated files.⁴⁶ In yet another en banc rehearing of the case by the Ninth Circuit, this time in front of eleven members of the court,⁴⁷ the court again affirmed that the district courts had proper discretion to quash the government subpoenas.⁴⁸

The Ninth Circuit's latest en banc decision was certainly a victory for the MLBPA in their battle to protect the privacy of their constituent players,⁴⁹ but this does not change the fact that the government had control of the steroid testing results for over five years.⁵⁰ Over the course of that time, specifically in 2009, names of several prominent players who tested positive in the 2003 anonymous survey were leaked in various news reports.⁵¹ Despite

⁴⁵ U.S. v. Comprehensive Drug Testing, Inc. (*Comprehensive II*), 579 F.3d 989, 1003 (9th Cir. 2009).

⁴⁶ *Id.* at 1006.

⁴⁷ Coincidentally, none of the judges on the en banc panel from the 2009 decision were chosen for the most recent en banc panel. See U.S. v. Comprehensive Drug Testing, Inc. (*Comprehensive III*), 621 F.3d 1162 (9th Cir. 2010).

⁴⁸ *Id.* While affirming the decision of the prior 2009 en banc panel with regard to the discretion of the district courts to quash the subpoenas, the 2010 en banc opinion modified the protocols for how courts and prosecutors should handle intermingled electronic data in the future. The Court warned that the "process of segregating electronic data that is seizable from that which is not must not become a vehicle for the government to gain access to data which it has no probable cause to collect." *Id.* at 1177. While the per curiam opinion did not outline any specific process for segregating electronic information, in his concurrence, Chief Judge Kozinski's adopted a five-step process to follow in similar cases in the future. See *id.* at 1180.

⁴⁹ While the 2010 decision "closed the door" on any further re-hearings of this case by the Circuit Court, the government still has the opportunity to appeal the case by applying for a writ of certiorari to the United States Supreme Court. See Ginny LaRoe, *Steroids in Baseball: 9th Circuit Backtracks on Electronic Search Rules*, LAW.COM, Sept. 14, 2010, <http://www.law.com/jsp/article.jsp?id=1202472007634&rss=newswire>.

⁵⁰ From the date that the federal agents executed the warrants at CDT and Quest on April 7, 2004 through the date of the decision by the en banc panel of the Ninth Circuit on August 26, 2009.

⁵¹ On February 7, 2009, Sports Illustrated magazine reported that three-time league Most Valuable Player ("MVP") Alex Rodriguez had tested positive for two anabolic steroids during the 2003 survey testing. The article cited "two sources familiar with the evidence that the government has gathered in its investigation of steroid use in baseball and two other sources with knowledge of the testing results." They all provided the information under the condition of anonymity. Selena Roberts & David Epstein, *Sources Tell SI Alex Rodriguez Tested Positive for Steroids in 2003*, SPORTS ILLUSTRATED, Feb. 7, 2009, <http://sportsillustrated.cnn.com/2009/baseball/mlb/02/07/alex-rodriguez-steroids/>.

On June 16, 2009, The New York Times reported that former league MVP Sammy Sosa was on the list of players who tested positive for performance enhancing drugs during the 2003 survey testing. The article cited "lawyers with knowledge of the drug-testing results from that year." Michael S. Schmidt, *Sosa Is Said to Have Tested Positive in 2003*, N.Y. TIMES, June 16, 2009, *available at* <http://www.nytimes.com/2009/06/17/sports/baseball/17doping.html>.

On July 30, 2009, The New York Times reported that former all star teammates Manny Ramirez and David Ortiz tested positive for performance enhancing drugs during the 2003 survey testing. According to the report, "[t]he information about Ramirez and Ortiz emerged through interviews with lawyers and others connected to the pending litigation. The lawyers spoke anonymously because the testing information was under seal

the fact that the list has now been returned to the MLBPA, it remains unknown who has been leaking the names to the press and there is no reason to think that the return of the files will put a stop to such leaks. In this advanced age of technology, a person lacking the moral character to keep court-sealed information private, would also presumably have the ability, motivation and wherewithal to copy such a list.⁵² Thus, while the Fed. Rule of Crim. P. 41(g) motion by the MLBPA for return of seized property served its legal purpose in forcing the government to return the files, the list is still potentially “out there,” hanging like an anvil over the heads of other players who may have tested positive, the MLBPA, and the game of baseball itself.

II. NEGOTIATION AND ADMINISTRATION OF THE 2003 SURVEY TESTING

There is no doubt that the MLBPA could have done a better job in protecting the anonymity of their union members who submitted urine samples on the condition of anonymity. However, when considering any situation retrospectively that does not go exactly as planned it is easy to be overly critical, as hindsight vision is 20/20. It is an entirely separate question whether the way in which the MLBPA handled the testing - from the collection and handling of the specimens to the failed destruction of the data and samples- violated a legal duty to union members. Before considering any possible violation of a legal duty, it is important to review the actions taken by the parties involved that could have caused such a claim to arise in the first place. It would also be helpful to show the ways in which such a situation could have been avoided without jeopardizing the goals of the survey steroid testing program.

There are two significant ways in which the MLBPA may have violated a duty to their players. The first possible violation involves the procedures of the testing itself and the way in which the samples were collected and stored, which allowed for the possibility of the player’s anonymity being compromised. The

by a court order.” Michael S. Schmidt, *Ortiz and Ramirez Said to be on '03 Doping List*, N.Y. TIMES, June 16, 2009, <http://www.nytimes.com/2009/07/31/sports/baseball/31doping.html>.

⁵² While there has been no indication that an investigation into who leaked this information has taken place yet, there has been conjecture that the MLBPA may request such an investigation or that a judge could use his or her own discretion to refer these leaks to the Justice Department for investigation. Such action would not be unprecedented even within the Balco investigation as an earlier Balco leak involving information obtained and reported by journalists was investigated by the Justice Department at the direction of one of the district judges involved. See Jonathan Littman, *A-Rod Leak May Have Been A Crime*, YAHOO! SPORTS, Feb. 9, 2009, <http://sports.yahoo.com/mlb/news?slug=li-arodlegal020909>; see also Joe Mozingo, *Journalists Ordered to Testify in Bonds Case*, L.A. TIMES, Aug. 16, 2006, <http://articles.latimes.com/2006/aug/16/local/me-chronicle16>.

second possible violation involved the timing of destruction of the testing samples once the actual testing was completed.

A. Parameters and Procedure of the Survey Testing

1. The Actual Testing Procedure Under the Collective Bargaining Agreement

There is an obvious question that must be asked when discussing the testing procedure: if the point of using anonymous testing was so that there would be no ramifications for players who tested positive, why were there ever names attached to the individual drug tests in the first place? As stated by Judge Thomas in his dissenting opinion to the Ninth Circuit's 2008 panel decision, "[t]he CDT testing was not undertaken to test individual players; but rather to provide a survey for the possible establishment of an individual drug testing protocol."⁵³

According to the Joint Drug Prevention and Treatment Program detailed in Major League Baseball's 2003-2006 Basic Agreement ("2003 MLB Agreement"), the testing procedure, as implemented, stated that "all Players will be subject to two tests (one initial test and one follow-up test conducted not less than five and not more than seven days following the initial test) at unannounced times for the presence of Schedule III steroids."⁵⁴ This meant that each time a urine sample was taken from a player, he could be assured that a second sample would be taken from him five to seven days later. The reason for having a second test of each player, or a "double-test," only five to seven days after the initial test, was to rule out the potential that the first test result was a false positive.⁵⁵ To be considered a single "positive" test under the survey calculations, both tests had to come up positive.⁵⁶ According to then-MLBPA General Counsel Michael Weiner (who has since been named Executive Director and of the MLBPA),⁵⁷ after the first unannounced test, players were advised to "cease

⁵³ U.S. v. Comprehensive Drug Testing, Inc. (*Comprehensive I*), 513 F.3d 1085, 1147 (9th Cir. 2008) (Thomas, J., dissenting).

⁵⁴ Major League Baseball's 2003-2006 Basic Agreement, at 161, available at http://us.i1.yimg.com/us.yimg.com/i/spo/mlbpa/mlbpa_cba.pdf [hereinafter 2003 MLB Agreement].

⁵⁵ Rafael Hermoso, *New Ritual of Spring: Steroid Testing*, N.Y. TIMES, March 7, 2003, <http://www.nytimes.com/2003/03/07/sports/baseball-new-ritual-of-spring-steroid-testing.html>.

⁵⁶ See 2003 MLB Agreement, *supra* note 54, at 162; see also Nick Cafardo, *Ortiz Says He Never Used Steroids, But Acknowledged He Was 'Careless' With Supplements*, BOSTON.COM, Aug. 8, 2009, http://www.boston.com/sports/baseball/redsox/extras/extra_bases/2009/08/ortiz_says_he_n.html.

⁵⁷ Press Release, Major League Baseball Players Ass'n, MLBPA Executive Board Votes Unanimously to Approve Michael Weiner as Executive Director (Dec. 2, 2009), http://mlbplayers.mlb.com/pa/pdf/20091202_board_approves_weiner.pdf.

taking supplements during the interim” so that any legal supplements that could have altered or tainted the results of the first test would not be present in the second test.⁵⁸ In addition to this “double” test of each player on a MLB team, MLB also had the right to test an additional 240 players to be selected at random for a second round of testing.⁵⁹ As such, once a player went through his “double” test, he was finished with his testing for the 2003 season, unless he was one of the 240 players chosen for the random second test.

2. MLBPA’s Responsibility for the Procedure of the Testing and a Suggested Alternate Testing Procedure that Could have Provided True Anonymity

The fact that the names of the players were, albeit indirectly, attached to each individual test, created the possibility for the names of any players who tested positive to be leaked, however small or unforeseeable. There certainly was a way to achieve the goal of testing every player while also ensuring complete confidentiality and anonymity of individual results. For example, they could have required that at least two players be tested separately during each testing session, consecutively, one after the other. Once the player provided a urine sample under the normally supervised drug testing settings,⁶⁰ his sample could be identified by a randomly assigned number, given to him by the Health Policy and Advisory Committee (“HPAC”),⁶¹ solely for the purpose of pairing his first test sample with the subsequent sample provided five to seven days later. The player’s name would still be associated with this identifying number to ensure that when the second test was done, the same player would have to show up and provide another sample. When the testing administrators returned five to seven days later to conduct the follow-up test, the number identifier on each specimen would be used to pair up the two tests, and at that point, the name of the player would be

⁵⁸ See Cafardo, *supra* note 56.

⁵⁹ See 2003 MLB Agreement, *supra* note 54, at 161; see also Jack Curry & Jere Longman, *Results of Steroid Testing Spur Baseball to Set Tougher Rules*, N.Y. TIMES, Nov. 14, 2003, <http://www.nytimes.com/2003/11/14/sports/results-of-steroid-testing-spur-baseball-to-set-tougher-rules.html>.

⁶⁰ The 2003 MLB Agreement provides a thorough description of the collection procedures. See 2003 MLB Agreement, *supra* note 54, at 172-75.

⁶¹ 2003 MLB Agreement, *supra* note 54, at 157.

The Health Policy Advisory Committee (“HPAC”) is responsible for administering and overseeing the Program. HPAC shall be composed of one medical representative (“Medical Representative”) from each of the Parties (both of whom shall be licensed physicians expert in the diagnosis and treatment of chemical use and abuse problems), and one other representative each from the Office of the Commissioner and the Association (both of whom shall be licensed attorneys).

removed from the samples, leaving only the identifying number. Those who were present during the production of the testing samples and who provided the appropriate supervision of the production of samples by each player would not be the same people who subsequently handled or tested the samples.⁶² Additionally, once both specimens were received by the testing laboratory, the number given to the player by HPAC identifying the player would be removed from both specimens. The testing officials who were not present during the collection of the urine samples would assign a randomly selected new number, solely for the purpose of keeping the two specimens together.⁶³ Because at least two players were tested in each “testing session,” once the samples left the testing room and were given to a separate group of administrators responsible for storage, transport, and testing, there would be no way of tracing each individual specimen back to a specific player. The same process could have worked for the additional 240 random tests. This kind of true anonymity in the testing process would have been appropriate to ensure both the eternal anonymity of the players, while at the same time satisfying the goal of collecting data on each MLB player to determine the extent of steroid use in MLB. This alternate testing procedure would have been relatively easy to conduct. Seemingly, it wouldn’t impose much more of a burden in terms of financial resources than the procedure that was actually implemented, while at the same time providing significant safeguards for player privacy.

3. Allowing Third Party Testing Agencies Access to Sensitive Information

Another possible violation by the MLBPA involving the testing procedure occurred when the drug testing laboratories themselves, specifically CDT, were given the actual names of the players along with their test results. At the time that procedures for the drug testing were created, during the collective bargaining negotiations, there may not have been any reason to suspect that anyone at CDT would leak the results of the drug tests,⁶⁴ or that federal agents would seize this information directly from the

⁶² This resembled the actual procedure, as CDT was responsible for procuring the specimens from each player and Quest was responsible for testing the specimens. See U.S. v. Comprehensive Drug Testing, Inc. (*Comprehensive I*), 513 F.3d 1085, (9th Cir. 2008).

⁶³ This would remove any possibility of impropriety by the testing administrators, since those who collected the samples and were therefore privy to the player’s individual identification numbers would now be removed from the equation. The laboratory administrators would assign entirely new numbers solely for the purpose of identifying and differentiating each player’s dual sample.

⁶⁴ There has been no indication that CDT is responsible for any of the leaks. The issue here is that the universe of people with access to this private information was increased when CDT was given the names of individual players along with their test results.

testing laboratories. However, there was also no reason that CDT ever needed the results for each individual player to be identified by name. All that CDT needed were the results of the samples themselves so that MLB officials could calculate the percentage of players who tested positive.

It appears that there was some care taken to assure that the samples themselves were not attached to player's names as the "Quest specimens were identified only by number."⁶⁵ This precaution of keeping the 'lock' separate from the 'key' in terms of the samples held by Quest was presumably taken to provide some measure of anonymity for the players' samples. However, records associating the players with their identifying numbers were easily found in the files stored by CDT.⁶⁶ On the day that the federal agents exercised their warrants at CDT and Quest, "these records soon were discovered by agents at CDT and faxed to the agents at Quest," easily enabling the federal agents to link each sample to a specific player.⁶⁷ While this shows that some precautions were taken to protect the anonymity of the players by not allowing Quest to have the names associated with each sample, the same precaution was not taken at CDT. Why was CDT allowed to maintain the records in the Tracey Directory that contained no numbering system, but instead identified the test results by name? Taking the precautionary measure of not having the samples at Quest directly linked to players' names while allowing CDT to maintain records that identified individual players' test results seems inconsistent at best and careless or negligent at worst. Furthermore, why didn't the MLBPA take it upon themselves to store the data indicating the results associated with each player as opposed to allowing a third party such as CDT to control this extremely sensitive data? The MLBPA should have directly controlled either the 'lock' or the 'key' instead of entrusting it to an outside source with no inherent duty to the players the MLBPA represented. Allowing a third party to have control over, and access to, this information only expanded the universe of people with access to sensitive test results relating to MLBPA union members that CDT had no need or business in knowing.

B. *Administration, Storage, and Disposal of the Test Results and Samples*

Another area where the MLBPA may have violated a duty to their members was their behavior with regard to the actual test results and samples. As noted above, the testing process was completed by November 13, 2003, and the first government

⁶⁵ *Comprehensive I*, 513 F.3d at 1093.

⁶⁶ *Id.*

⁶⁷ *Id.*

subpoena was not issued to the MLBPA until November 19, 2003, a full six days later.⁶⁸ However, under the guidelines for the 2003 testing, the post-season was not included, so the actual testing of players was completed by the end of the regular season schedule of games.⁶⁹ Therefore, no player was tested after the last day of the season, September 28, 2003, over six weeks prior to the first government subpoena.⁷⁰ The collectively bargained agreement regarding the steroid testing provided that “[a]t the conclusion of any Survey Test, and after the results of all tests have been calculated, all test results, including any identifying characteristics, will be destroyed in a process jointly supervised by the Office of the Commissioner and the Association.”⁷¹ Thus, the question that remains is why the test results and samples were not destroyed immediately upon completion of the testing program and tabulation of the results. Obviously, once there was a subpoena issued demanding that the results be turned over to the government, it would have been improper to destroy or hide any data or samples. However, this window of at least six days between the time of the testing program’s completion and the first government subpoenas would seem to have been an ample amount of time for the MLBPA to ensure destruction of these test results. Indeed, there has been much media scrutiny of the MLBPA for their delay and speculation as to the reason for their delay.⁷² Some MLB officials have even questioned the MLBPA’s lack of action in this regard, with an anonymous MLB source saying that “[t]he fact of the matter is that this would all have been prevented if they had just called and said, ‘[d]estroy the tests.’”⁷³

Additionally, the results conceivably could have been destroyed on a rolling basis after the tests on that specific specimen were completed and the results of each particular test were added to the general tally. Since the program was solely for the sake of surveying the extent of steroid use among MLB players, once the specimen was tested it became a mere data point to be

⁶⁸ See sources cited *supra* notes 14-17.

⁶⁹ See 2003 MLB Agreement, *supra* note 54, at 161; see also *Comprehensive I*, 513 F.3d at 1139 (Thomas, J., dissenting).

⁷⁰ MLB Schedule, ESPN.COM, <http://espn.go.com/mlb/schedule?date=20030928>, (last visited Oct. 23, 2010).

⁷¹ 2003 MLB Agreement, *supra* note 54, at 172.

⁷² See Hal Bodly, *Saga Won't End Until '03 List Is Public*, MLB.COM, July 3, 2009, http://mlb.mlb.com/news/article.jsp?ymd=20090730&content_id=6154138&vkey=perspectives&fext=.jsp&c_id=mlb; Jon Heyman, *A-Rod Tainted by Players Union's Mistake; How Will He Respond?*, SPORTS ILLUSTRATED, http://sportsillustrated.cnn.com/2009/writers/jon_heyman/02/08/rodriguez.union/index.html; Michael O'Keefe & Teri Thompson, *Negative '03 Results May Face Re-testing*, N.Y. DAILY NEWS, Feb. 10, 2009, http://www.nydailynews.com/sports/baseball/2009/02/08/2009-02-08_negative_2003_results_may_face_retesting.html; Schmidt, *supra* note 52.

⁷³ Schmidt, *supra* note 52.

combined with the other 1,400-plus test results. Once a specimen was tested and it was known whether there were traces of steroids, there was no longer any purpose for the sample, and there was certainly no need to know the identity of the sample. Additionally, tabulation of the results themselves took 46 days from the end of the season until the MLBPA was notified of completion.⁷⁴ Although there were over 1,400 samples to test and tabulate, 46 days seems like a long time to compile the numbers.⁷⁵ Perhaps if a rolling basis of tabulation and destruction of samples had been instituted, there would not have been a long delay and the results would have been destroyed in a more expeditious manner, preventing the compromising of confidential information. While the Joint Drug Prevention and Treatment Program within the 2003 MLB Agreement describes, in painstaking detail, the procedures for collection and testing of the samples, very little attention was given to the process of destroying the samples and the player identifiers attached to each sample. All that was included was a statement that at the conclusion of the survey testing the results and “identifying characteristics” should be destroyed.⁷⁶

As stated earlier, these are actions that the MLBPA perhaps should have or could have done to prevent some of the problems present today. The question that will now be analyzed is whether the MLPBA was legally obligated, as the collective bargaining representative of the MLB players, to act in a more circumspect manner at the time of the negotiations.

III. UNION DUTIES TO THEIR MEMBERS

A. *National Labor Relations Act*

There are numerous federal laws that relate to the duties owed by labor unions and union officials to their members. The National Labor Relations Act of 1935, under 29 U.S.C.A. § 159(a), “has been interpreted to impose a ‘duty of fair representation’ on labor unions, which a union breaches ‘when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith.’”⁷⁷ This duty of “fair-representation . . . encompasses challenges leveled not only at a union’s contract administration and enforcement efforts . . . but at its negotiation activities as

⁷⁴ The 46-day delay is counting from September 28, 2003, the day of the last regular season game, through November 13, 2003, the day the MLBPA was notified of the cumulative results of all of the tests.

⁷⁵ This Note is not suggesting that the delay was solely MLB’s responsibility, it could very well be the responsibility of CDT and Quest laboratories.

⁷⁶ See 2003 MLB Agreement, *supra* note 54, at 172.

⁷⁷ 14 Penn Plaza v. Pyett, 129 S. Ct. 1456, 1473 (2009).

well,” and has focused on protecting individual union members or individual groups of union members from certain actions taken by the union towards them as individuals or as a group.⁷⁸ Typically, minority groups have claimed violations of the union’s statutory duty of fair representation when the union’s actions towards them in filing grievances, negotiating new contracts, or establishing union seniority were seen as discriminatory, arbitrary, or in bad faith.⁷⁹ Specifically, among these various types of claims, the focus of the litigation surrounding the duty of fair representation has created an impression of the duty as “a judicially created doctrine that limits a union’s discretion in the grievance process by prohibiting discriminatory, bad faith, or arbitrary conduct in the processing of employee grievances.”⁸⁰ Generally, unions are given substantial latitude in negotiations and actions on behalf of their members. The duty of fair representation is thus somewhat of a “relative” duty, in that it applies with regard to how a union treats some of its members in comparison to how it treats other members.⁸¹ If one union member or a group of union members feel that the union is purposefully not representing their interests as opposed to those of other union members, they could then file a claim for violation of the duty of fair representation.

Correspondingly, a claim for breach of the duty of fair representation in this case could only be brought by the select group of players who feel that their interests were not looked after by the MLBPA – those who tested positive and who would be claiming harm by the dissemination of the test results. Even so, it would be improper for those who tested positive for steroids to come forward with a claim that they as a group were discriminated against or treated unfairly by the MLBPA, because the administration, testing, and storage of specimens were all done in a uniform manner and without prior knowledge by the MLBPA of who was using steroids. Therefore, it would have been impossible for the MLBPA to treat such players differently throughout the testing process.

Such a claim would differ greatly from the typical allegations of a violation of the duty of fair representation as the “steroid-using players” would not be claiming that the MLBPA failed to file a grievance on their behalf or failed to negotiate fairly on their behalf. Rather, the only argument these players could make

⁷⁸ *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 743 (1988).

⁷⁹ See *Ford Motor Co. v. Huffman*, 345 U.S. 330, 336-39 (1953); *NLRB v. Local 106, Glass Bottle Blowers Ass’n*, 520 F.2d 693, 696-97 (6th Cir. 1975) (involving claims of union violation of the duty of fair representation for the above mentioned reasons in each case).

⁸⁰ Gary L. Tidwell, *Major Issues in the Duty of Fair Restitutional Cases Since 1977*, 62 U. DET. L. REV. 383, 386 (1985).

⁸¹ *Id.*

would actually be detrimental to their claim in the first place. The players who tested positive could claim that the MLBPA violated the duty of fair representation because the results of their tests becoming public are more damaging than the results of a non-steroid users tests becoming public. However, this differing outcome would in no way be attributable to the MLBPA's actions, but to the players using illegal steroids in the first place.

Additionally, even if the MLBPA acted negligently only with regard to the group testing positive for steroids, that would still not be enough to find a breach of the duty of fair representation.⁸² Unions are normally given very broad discretion when its actions are done "in good faith and with honest purpose."⁸³ While an argument may be made that the MLBPA made numerous missteps in handling the drug testing, it does not seem that their actions were discriminatory, arbitrary, or in bad faith with respect to a specific group of players as to constitute a violation of their duty of fair representation to that group of players. If anything, the MLBPA vigorously represented the interests of players using steroids by avoiding testing for as long as possible and by finally agreeing to testing on a survey basis only. While the MLBPA's actions with regard to the testing procedures and formats may have been clumsy or at most negligent toward steroid-using players, there does not appear to have been any bad faith, arbitrariness, or discrimination in those actions. It is true that the steroid users stood to lose the most by the test results being compromised, but their samples and data results were not handled any differently by the MLBPA than any other players' results. This fact seems to foreclose any claim of the violation of the duty of fair representation.

B. *Labor Management Reporting and Disclosure Act*

Another source of possible MLBPA liability lies within 29 U.S.C. § 501.⁸⁴ The statute is part of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"), which states that officers of labor organizations are in a position of trust vis-à-vis the union members and, therefore, owe a fiduciary duty to the organization itself and to its members.⁸⁵ The pertinent language from 29 U.S.C. §501(a) reads as follows:

(a) Duties of officers; exculpatory provisions and resolutions void

⁸² *Journeyman Pipe Fitters Local 392 v. NLRB*, 712 F.2d 225, 229 (6th Cir. 1983) ("Negligence, poor judgment or ineptitude are insufficient, standing alone, to establish a breach of the duty of fair representation.")

⁸³ *Id.*

⁸⁴ 29 U.S.C § 501(a) (1959).

⁸⁵ *Id.*

The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.⁸⁶

There has been a split among circuits as to how broadly to interpret this statutorily imposed fiduciary duty. At the time, the main purpose for enacting the LMRDA was to prevent union officers from embezzling union funds for their own purposes and to protect union funds from other improper use by union officers.⁸⁷ In this sense, 29 U.S.C. § 501 has been viewed as a way to combat “the misuse of union funds and property by union officials in its every manifestation . . . [and] extends to every area in which subversion of the interests of the union membership may be accomplished by union officials or representatives.”⁸⁸

However, some circuits have found that there is a broader and more all-encompassing purpose for the LMRDA. These circuits hold that this statute is necessary to “redress unreasonable and arbitrary action of Unions” both relating to their use of union funds as well as their actions on behalf of union members in other areas.⁸⁹ Under this understanding of the statute, misuse of funds is not necessary to find a union or union official in violation of their fiduciary duty. Some circuits, including the Ninth Circuit in *Stelling v. International Brotherhood*,⁹⁰ “have taken the ‘broad view’ of § 501 and interpreted it as establishing the fiduciary duties of labor organization officers in all their functions.”⁹¹ This

⁸⁶ *Id.*

⁸⁷ See *Brink v. DaLesio*, 453 F. Supp. 272 (D. Md. 1972); *Richardson v. Tyler*, 309 F. Supp. 1020 (N.D. Ill.1970).

⁸⁸ *Hood v. Journeymen Barbers, Hairdressers, Cosmetologists and Proprietors Int’l Union of Am.*, 454 F.2d 1347, 1354 (7th Cir. 1972).

⁸⁹ *Kleppick v. Penn. Telephone Guild*, 631 F. Supp. 1073, 1081 (W.D. Pa. 1986).

⁹⁰ *Stelling v. Int’l Bhd. of Elec. Workers Local Union No. 1547*, 587 F.2d 1379 (9th Cir. 1978), *cert. denied* 442 U.S. 944 (1979), *reh’g denied*, 444 U.S. 889 (1979).

⁹¹ *Stelling*, 587 F.2d at 1386. While some circuits have not yet definitively stated their stance on a broad or narrow interpretation of §501, the Third and Eighth Circuits have

interpretation of § 501 would mean that “union officials have fiduciary duties even when no monetary interest of the union is involved.”⁹² *Stelling* involved union members who claimed that “union officials had failed properly to exercise their duties as officers of [their union] by failing to submit a collective bargaining agreement to general membership vote in derogation of the union constitution.”⁹³ The Ninth Circuit affirmed the district court ruling that a union can in fact violate their duty to their members even though the claims “do not relate to the financial affairs of the union, [since] they are related to the fiduciary duties of the individual appellants in their official capacities as union officers.”⁹⁴ However, even though many circuits hold that such a fiduciary duty exists for union officers not only when financial matters are at stake, courts are not necessarily given free reign to second-guess every action taken by union officials. Great discretion is to be given and “judicial interference should be undertaken only with great reluctance.”⁹⁵

Adopting the opposite view from the Ninth Circuit, the Second Circuit, in *Gurton v. Arons*,⁹⁶ had a more narrow view and interpretation of § 501. In *Gurton*, the plaintiffs tried to compel union officers to act in accordance with resolutions that were voted on by the union members.⁹⁷ Contrary to the Ninth Circuit’s holding in *Stelling*, the Second Circuit held:

A simple reading of that section shows that it applies to fiduciary responsibility with respect to the money and property of the union and that it is not a catch-all provision under which union officials can be sued on any ground of misconduct with which the plaintiffs choose to charge them.⁹⁸

The Second Circuit based its narrow interpretation of the statute on legislative history and congressional intent that inter-union affairs be left out of the courtroom “except in the very limited instances expressly provided by the Act.”⁹⁹ In using language that specified certain instances when it would be appropriate for judicial intervention in union affairs, i.e. when union funds were involved, Congress was indicating their intent to require unions to settle all other issues internally and that unions

followed the Ninth Circuit’s broad interpretation of a union’s fiduciary duty and have found a breach of fiduciary duty even when the spending of union funds is not specifically at stake. See *Sabolsky v. Budzanoski*, 457 F.2d 1245 (3d Cir. 1972), *cert. denied*, 409 U.S. 853 (1972); *Johnson v. Nelson*, 325 F.2d 646 (8th Cir. 1963).

⁹² *Stelling*, 587 F.2d at 1386.

⁹³ *Id.* at 1387.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Gurton v. Arons*, 339 F.2d 371 (2d Cir. 1964).

⁹⁷ *Id.* at 373.

⁹⁸ *Id.* at 375.

⁹⁹ *Id.*

should be “free from officious intermeddling by the courts.”¹⁰⁰ The Second Circuit’s holding indicated that § 501 was to be used as a mechanism to control only certain forms of internal union activity and purposely limit the liability of union officers. This narrow interpretation meant that any actions taken by union officials that did not directly concern expenditure of union funds, would not fall under the purview of § 501 and, thus, greatly limited the statutorily mandated, and court enforced fiduciary duty owed to union members.

The circuits differing interpretations of § 501(a) greatly affects the availability of recourse for union members depending on their subjected jurisdiction. However, a common theme in all circuits, as stated by the Ninth Circuit in *Stelling*, is to give the labor unions broad discretion in their internal affairs and to involve the courts in these issues only when absolutely necessary.¹⁰¹ Internal union resolutions are seen as preferable to judicial intervention, and courts should only wade into union affairs when absolutely necessary.¹⁰²

The courts’ reluctance to meddle in union affairs is further evidenced by the discretion given to unions with regard to negotiating collective bargaining agreements. Some courts have even gone so far as to find that § 501 has “little or no applicability to a union’s performance of its collective bargaining function.”¹⁰³ Other courts have held that while the fiduciary duty extends to negotiating collective bargaining agreements and “implies certain affirmative as well as negative obligations” on the union, that duty is very limited by the discretion the unions have always had in this arena.¹⁰⁴ The First Circuit, which has not taken a definitive stance on whether § 501 covers non-monetary issues of fiduciary duty by union officials, succinctly discussed the issue of union liability for actions taken during the collective bargaining process in *Carr v. Learner*.¹⁰⁵ Among other claims, the plaintiff in *Carr* alleged that his union violated § 501(a) “by failing to obtain a more favorable pension plan through the collective bargaining process.”¹⁰⁶ The court denied the claim even when analyzing the case under the broader view of §501 endorsed by the Ninth Circuit (where issues of collective bargaining would fall under the fiduciary duty

¹⁰⁰ *Id.* The Seventh Circuit Court of Appeals in *McNamara v. Johnston*, 522 F.2d 1157, 1163 (7th Cir.1975), *cert. denied*, 425 U.S. 911 (1976), also aligned themselves with the narrow view of § 501 held by the Second Circuit in *Gurton*.

¹⁰¹ See *Stelling v. Int’l Bhd. of Elec. Workers Local Union No. 1547*, 587 F.2d 1379, 1386 (9th Cir. 1978).

¹⁰² *Id.*

¹⁰³ *Aikens v. Abel*, 373 F. Supp. 425, 433 (W.D. Pa. 1974).

¹⁰⁴ *Carr v. Learner*, 547 F.2d 135, 138 (1st Cir. 1976).

¹⁰⁵ *Id.* at 138.

¹⁰⁶ *Id.*

requirements of the LMRDA).¹⁰⁷ In denying the claim, the court held that “we do not think that the fiduciary duty imposed by [the LMRDA] is violated in a case where nothing more is alleged than poor performance as a collective bargaining agent.”¹⁰⁸ In further elucidating the limits of union liability in these circumstances, the court stated that the LMRDA “does not require that collective bargaining agents necessarily obtain what hindsight reveals to be optimal results.”¹⁰⁹ Thus, the nature of collective bargaining, which involves a give and take atmosphere inherent in arms-length negotiations, provides union officials with a certain degree of freedom from liability under § 501, so long as they don’t act egregiously against their members or in self-interest.¹¹⁰

C. *“Hands Off” Approach to the Enforcement of Collective Bargaining Agreements*

Judicial reluctance to interfere with union officials’ duties of negotiation and enforcement of collective bargaining agreements is further reflected in Supreme Court caselaw. The Supreme Court has held:

Congress did not intend judicial review of a union’s performance to permit the court to substitute its own view of the proper bargain for that reached by the union. Rather, Congress envisioned the relationship between the courts and labor unions as similar to that between the courts and the legislature. Any substantive examination of a union’s performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities.¹¹¹

Therefore, when determining if a union can be liable for their actions in collective bargaining “the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a ‘wide range of reasonableness,’ . . . that it is wholly ‘irrational’ or ‘arbitrary.’”¹¹²

Moving from the negotiation of the collective bargaining agreement to the actual enforcement, unions are still given a great deal of discretion and protection from liability in their decision-making capacities. In *United Steelworkers of Am. v. Rawson*,¹¹³ the survivors of four deceased miners killed in a fire in an Idaho mine brought an action for liability against the United Steelworkers of

¹⁰⁷ See cases cited *supra* notes 89-95.

¹⁰⁸ *Carr*, 547 F.2d at 138.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Air Line Pilots Ass’n, Int’l v. O’Neill*, 499 U.S. 65, 78 (1991).

¹¹² *Id.* (citing *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)).

¹¹³ *United Steelworkers of Am. v. Rawson*, 495 U.S. 362 (1990).

America (the union for the miners), claiming that the union “undertook to act as accident prevention representative and enforcer of an agreement negotiated . . . on behalf of the deceased miners.”¹¹⁴ In claiming that the union was liable, the plaintiffs asserted that the union “had negligently performed inspections of the mine that it had promised to conduct, failing to uncover obvious and discoverable deficiencies.”¹¹⁵ The Court did not allow the plaintiffs to state their claim as a separate tort claim against the union for negligently conducting the inspection. Instead the Court held that “[i]f the Union failed to perform a duty in connection with inspection, it was a duty arising out of the collective-bargaining agreement signed by the Union as the bargaining agent for the miners.”¹¹⁶ Therefore, the federal laws regarding collective bargaining applied, as opposed to state tort law.¹¹⁷ In denying the plaintiff’s claims, the Court endorsed the view that “mere negligence, even in the enforcement of a collective-bargaining agreement, would not state a claim for breach of the duty of fair representation.”¹¹⁸ Therefore, once the union agreed to take on responsibility for safety inspections in the collective bargaining agreement, they removed the possibility of regular tort liability for their actions as safety inspectors. Instead they received the wide discretion allotted to union decisions where they could only be found liable if they acted in a manner that is “arbitrary, discriminatory, or in bad faith.”¹¹⁹ The Court went on to say that “[i]f an employee claims that a union owes him a more far-reaching duty, he must be able to point to language in the collective-bargaining agreement specifically indicating an intent to create obligations enforceable against the union by the individual employees.”¹²⁰ As such language was not present in the collective bargaining agreement, the *Rawson* plaintiffs did not have a viable claim.

While there is a split within the circuits as to whether a union’s fiduciary duty under § 501 extends to matters beyond union funds, the courts have traditionally taken a “hands-off” approach to resolving union disputes, preferring to intervene in

¹¹⁴ *Id.* at 372-73.

¹¹⁵ *Id.* at 365.

¹¹⁶ *Id.* at 371.

¹¹⁷ *Id.* at 368-69.

¹¹⁸ *Id.* at 372-73.

¹¹⁹ *United Steelworkers of Am. v. Rawson*, 495 U.S. 362 (1990). This sentiment was originally stated by the Supreme Court, in *Vaca v. Sipes*, holding that “the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining . . . and in its enforcement of the resulting collective bargaining agreement.” 386 U.S. 171, 177 (1967). This duty “includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.” *Id.*

¹²⁰ *Rawson*, 495 U.S. at 374.

only the most drastic circumstances. This approach taken by courts, combined with the great discretion given to unions in negotiation and enforcement of collective bargaining agreements, makes most judicial challenges of union behavior by a union member, a very difficult and uphill battle.

IV. LEGAL ANALYSIS OF MLBPA ACTION

The MLBPA's actions regarding the 2003 tests should be analyzed from the two different perspectives mentioned in Part II. Part II.A concerned the MLBPA negotiations for the 2003 steroid testing agreement and Part II.B discussed the MLBPA's conduct as it related to administration of the testing itself. The former, for the most part, relates to the MLBPA's behavior as the collective bargaining agent for the players, while the latter primarily concerns their behavior in following the guidelines set forth in the actual agreement and, thus, relates to the MLBPA as enforcers of the collective bargaining agreement (which included the steroid testing agreement).

The MLBPA's actions described in Part II.A involved ways in which the MLBPA could have better achieved the goals of anonymity in negotiating the testing procedures during the collective bargaining process.¹²¹ As stated in the introduction to this Note, it is much easier to criticize previous decisions once all the facts are known. However, caselaw suggests that just because hindsight elucidates how a union could have best achieved the goals of its constituents, incorrect choices made by a union in negotiating collective bargaining agreements do not generally rise to the level of liability. This sentiment was plainly expressed by the First Circuit in *Carr*, where the court dismissed a claim alleging that the union violated a fiduciary duty in not negotiating a better pension plan for its members.¹²² Similarly, the only complaint the MLB players would be able to make with regard to the negotiations would be that the MLBPA was not able to negotiate a more secure and private testing policy to ensure anonymity. There was no apparent bad faith on the part of the MLBPA in negotiating the steroid testing agreement, and the discretion given to unions to negotiate collective bargaining agreements would appear to protect the MLBPA from any liability in this instance.

Additionally, the fact that there was an effort to ensure anonymity by not attaching names to the actual urine samples at Quest laboratory,¹²³ and by stipulating that the tests would be

¹²¹ See *supra* Part II.A.

¹²² See cases cited *supra* notes 104-110.

¹²³ U.S. v. Comprehensive Drug Testing, Inc. (*Comprehensive I*), 513 F.3d 1085, 1093 (9th

destroyed once the results were tabulated indicate the good faith effort on the part of the MLBPA to ensure anonymity. At the time of the 2003 agreement negotiation, it was probably not foreseeable to the MLBPA that the U.S. Attorney would subpoena the results of the anonymous tests, so such stringent and extensive safeguards for player anonymity, beyond what was already provided for, may have appeared unnecessary. Attaching the names of players to the actual test sample may have assisted with the efficiency of the testing process and provided for the possibility that, if samples were lost or contaminated, the testing agencies would know who to retest. Both CDT and Quest laboratories are experienced companies in the industry of drug testing and allowing CDT to maintain the master list, while expanding the universe of people with knowledge of this private information, appears not to be done in bad faith nor unreasonable. While the MLBPA should have instituted the more stringent safeguards in their negotiations as described in Part II.A, their failure to do so does not appear to result in a violation of any fiduciary duty owed to their membership. As the *Carr* Court aptly noted, “[t]he collective bargaining process is, by definition, too complex and too adversarial in nature to subject the participants in it to liability for every failure fully to satisfy their constituency.”¹²⁴

While the MLBPA’s actions, as described in Part II.B, relate mostly to the actual administration of the drug testing process, one major aspect of Part II.B related to the negotiation of the 2003 MLB Agreement: the process of destroying the samples and sample identification. While there should have been a more explicit protocol addressing the destruction of the samples, the MLBPA’s failure to bargain for this would likely fall under the allowable discretion given to unions recognized in *Carr*. There was a provision for destruction of the samples, which by itself shows good faith on the part of the MLBPA. The fact that this provision did not provide any specifics as to the time frame or protocol for destruction would seem to be a careless oversight at worst, or the MLBPA’s recognition of the expertise of those agencies hired to test the samples to dispose of them according to internal institutional protocol. Again, at the time of the negotiations, it may have not been foreseeable that the U.S. Attorney would subpoena these records, so the timeframe for destroying the test results was probably not a major concern. Therefore, the MLBPA’s neglecting to include a timeframe for destruction of the samples or provide for a rolling basis of

Cir. 2008).

¹²⁴ *Carr v. Learner*, 547 F.2d 135, 138 (1st Cir. 1976).

tabulation/destruction,¹²⁵ would be shielded from liability under the same logic used to exonerate their actions in Part I.A.

The other aspect of Part II.B involved the MLBPA's administration of the Joint Drug Prevention and Treatment Program and their handling of the actual samples and results. As described above, there was a window of at least six days from the time in which all of the samples were tallied and finalized to the time when the first subpoena was issued by the U.S. Attorney requesting the survey tests.¹²⁶ Six days was seemingly enough time for the results to be destroyed as all that would seem to be required was a phone call to CDT and Quest. There was also a 46-day delay from the time the last possible urine sample was taken from a player to the time when the results were finalized.¹²⁷

There has been some conjecture, but little explanation, from the MLB or the MLBPA as to what caused both of these delays in tabulation and destruction. One explanation for the delay has been put forward by respected baseball writer Jon Heyman. Heyman, based on three sources familiar with the testing process, claimed that MLBPA Chief Operating Officer Gene Orza had been trying "to find enough false positives on the list to drive the number of failures so far down that real testing wouldn't be needed in 2004."¹²⁸ As noted above, both the initial and the subsequent urine samples had to test positive for steroids to be tallied as a positive test result in tabulating the five percent threshold that would trigger mandatory testing for 2004 and beyond.¹²⁹ Orza was unsuccessful in finding enough false positives since the five percent threshold was reached in 2004 and mandatory testing with penalties was instituted.¹³⁰ Heyman's explanation helps to account for, if not justify, the 46-days that it took to tabulate and finalize the results, however, this still does not seem to account for the six day delay between finalization and the first subpoena.

However, as caselaw indicates, the discretion given to unions goes beyond their actions in negotiating collective bargaining agreements, and extends to their enforcement of those agreements. A claim by the players here would echo the claims made in *Rawson*,¹³¹ as they address the union's enforcement of the collective bargaining agreement. In *Rawson*, the union took on the responsibility of being part of the committee that inspected

¹²⁵ See *supra* Part II.B.

¹²⁶ See MLBPA Press Release, *supra* note 17.

¹²⁷ See *supra* text accompanying note 74.

¹²⁸ Heyman, *supra* note 72.

¹²⁹ See *supra* notes 54-59 and accompanying text.

¹³⁰ Heyman, *supra* note 72.

¹³¹ See generally *United Steelworkers of Am. v. Rawson*, 495 U.S. 362 (1990).

the mines for safety.¹³² Here, the MLBPA took on the responsibility of enforcing the Joint Drug Prevention and Treatment Program by including in the agreement that an MLBPA member would be represented on HPAC,¹³³ and by the fact that the destruction of the samples was to be “jointly supervised by the Office of the Commissioner and the [Major League Baseball Players] Association.”¹³⁴ Just as in *Rawson*, there appears to be no bad faith on the part of the MLBPA, and the mere negligence in properly enforcing the terms of the collective bargaining agreement is not enough to trigger liability.¹³⁵ The wide discretion afforded to unions in negotiating agreements for their members applies to their enforcement of clauses within those agreements as well.

Additionally, according to Heyman, Orza’s “foolish” actions allowed the samples to exist for weeks longer than they should have, and, thus, Orza was a major cause of the data still existing at the time of the U.S. Attorney’s subpoena in mid-November.¹³⁶ However, Orza’s goal in trying to find false-positives was an effort to prevent the MLBPA’s player member from having to submit to mandatory drug testing in 2004, and, thus, could be seen as done in good faith with the interest of union members at heart. Fortunately for the MLBPA, “foolishness” in enforcing the collective bargaining agreement is not enough to find them liable for breaching a duty to their members. Thus, Orza’s search, an effort to prevent testing in 2004, was a good faith action and provides further exculpation for Orza and MLBPA officials.

Ultimately, there does not seem to be a viable claim under the federal labor laws for MLBPA liability for the players’ names leaking into the public domain. Absent any evidence of bad faith, arbitrary, or discriminatory conduct,¹³⁷ the wide discretion given to unions protects the MLBPA, even if it may shoulder some responsibility for the list’s existence and possible revelation. This result may seem frustrating from the perspective of a union member in general or a MLB player specifically, as it certainly seems that the MLBPA made many egregious mistakes in their handling of the steroid testing process. However, the judiciary is very clear in its mandate to afford wide discretion to labor unions.

¹³² *Id.* at 372-73.

¹³³ See 2003 MLB Agreement, *supra* note 54.

¹³⁴ See *id.* at 172.

¹³⁵ *Rawson*, 495 U.S. at 373.

¹³⁶ See Heyman, *supra* note 72.

¹³⁷ There have not been any allegations or serious conjecture from the press that the source of the leak is from the MLBPA. However, if it was discovered that the leak did originate from the union, that would certainly change the calculus of the MLBPA’s violation of a fiduciary duty, as that would definitely be an action done in bad faith.

V. PRACTICALITY OF RECOURSE AND OTHER CONTRIBUTORS

A. *Government Liability?*

When a person is wronged, it is natural for society to try to point a collective finger at the culprit in order to make certain that those responsible for the wrongdoing are punished. Doing so makes affirm that there is a sense of justice in the world and simplifies the situation through identification. Person A violated Person B's rights, so Person A is to be punished for this action and equilibrium is restored to society. Herbert Morris explained this rationale as the "unjust advantage" retributive theory of punishment when he explained that the wrongdoer "acquired an unjust advantage" and "[j]ustice—that is, punishing such individuals—restores the equilibrium of benefits and burdens by taking from the individual what he owes."¹³⁸ The difficulty arises when there is no clear wrongdoer or when the wrongdoer is unknown, as is the case here. Trying to dole out blame on the MLBPA for mishandling the steroid testing and administration process, or on the U.S. Attorney's Office for seizing sensitive data beyond their search warrant, or even on the journalists for reporting this information, is really just a secondary method of asserting retributive justice, since the real culprit remains unknown. Numerous parties may have negligently or inadvertently contributed to this information becoming public, but it still took an unknown, unscrupulous criminal to decide to break the law and purposely leak this court-sealed information.

Based on the Ninth Circuit's recent en banc decision and Justice Thomas' dissent in the original 2008 panel decision in *U.S. v. Comprehensive Drug Testing, Inc.*, the U.S. Attorney wrongfully obtained the entire Tracey Directory.¹³⁹ The recent en banc decision held that the government came "into possession of evidence by circumventing or willfully disregarding limitations in a search warrant. . . . through intentional wrongdoing- rather than through a technical or good faith mistake."¹⁴⁰ This blatant chastising of the U.S. Attorney by the Ninth Circuit might make it an appealing target for a lawsuit brought by MLB players. However, there is a threshold proof problem to finding governmental liability through the actions of the U.S. Attorney. There is no way to prove that the government was even a proximate cause of the leak. While the leak only occurred after the government seized the data from CDT and Quest, it is still

¹³⁸ Herbert Morris, *Persons and Punishment*, 52 *Monist* 475 (1968).

¹³⁹ See *U.S. v. Comprehensive Drug Testing, Inc. (Comprehensive III)*, 621 F.3d 1162 (9th Cir. 2010).

¹⁴⁰ *Id.* at 1174.

quite possible that the cause or the source of the leak came from a source outside of the court system or the U.S. Attorney's office.

Others had access to the lists and samples before the government executed their search warrants at CDT and Quest on April 7, 2004. These people included the lawyers within the MLBPA, outside counsel for the MLBPA, personnel at CDT who had access to the Tracey Directory, and lab technicians at Quest with access to the urine samples.¹⁴¹ While MLBPA Executive Director Michael Weiner claims that “[I] know exactly what officials on the players’ side have had any access to this information and I am 100% certain that they are not responsible for” causing the leak,¹⁴² as of now it is impossible to dismiss this contingency. As long as the source is unknown, this ‘proof problem’ is a debilitating impediment to placing legal responsibility at the foot of the U.S. Attorney. There is no doubt that the U.S. Attorney is responsible for greatly expanding the universe of people with access to this information, including those within the court system that work for judges on the case and investigators and lawyers within the U.S. Attorneys Office who had access to the files. Additionally, aside from the court order and the principle of protecting confidentiality of court sealed information, the people within the U.S. Attorney’s Office do not have an inherent interest in keeping the list private as opposed to those within the MLBPA and the testing laboratories.¹⁴³ However, the list was “out there,” albeit to a much more limited audience, before the U.S. Attorney was involved and until the actual source of the leak is exposed, there is no way to know if the U.S. Attorney contributed directly to its eventual exposure. Just because the U.S. Attorney expanded the universe of people with access to the list, it is quite possible that the leak came from someone outside that specific universe of people.

B. *Finding the Cause of the Leak and Journalistic Integrity*

Practically, there is not much left to be done to prevent the

¹⁴¹ In an interview on the Mike Francessa radio program on AM 660, WFAN in New York, new MLBPA Executive Director, Michael Weiner claims that as far as the extent of those with knowledge of the 2003 results, “just a couple of lawyers have access to the information . . . and our outside counsel.” Interview by Mike Francessa with Michael Weiner, Executive Director, Major League Baseball Players Association, in New York, N.Y. (Dec. 2, 2009). Additionally, “nobody at the commissioner’s office is [responsible] because they don’t have access to” the test results. *Id.*

¹⁴² *Id.*

¹⁴³ CDT and Quest have an interest in the privacy of the information as their business would certainly suffer if any untoward behavior in handling client data surfaced. The MLBPA also has an obvious inherent interest in protecting the privacy of their players by not allowing this information to be made public, on top of the fact that the leak of information has brought them extremely negative and embarrassing media coverage. See Heyman, *supra* note 72.

names of the remaining players from being publicized; yet, since the Ninth Circuit's original en banc decision in August 2009, there have been no further leaks. MLBPA Executive Director Weiner claims that "we're doing everything we can legally to try to prevent those leaks from taking place,"¹⁴⁴ however, the MLBPA's arsenal to prevent this prospect seems severely limited. After the leak in July revealed that Manny Ramirez and David Ortiz tested positive in the 2003 survey, it was reported that "union officials have asked federal courts to investigate who is leaking the names of the 104 players."¹⁴⁵ It was unclear whether court intervention was ever officially requested by the MLBPA, but Donald Fehr, then-Executive Director of the MLBPA stated that the MLBPA would "take the appropriate legal steps to see that the court orders are enforced."¹⁴⁶

Even if the MLBPA decided not to request court intervention, the judges involved with the case could decide to pursue such an investigation sua sponte. Indeed, after the Alex Rodriguez leak in February 2009, two former federal prosecutors stated that Judge Illston, who was one of the district court judges in this case, was likely to "order contempt hearings."¹⁴⁷ In fact, in 2004 "after repeated grand jury transcript leaks in the Balco case, [Judge Illston] referred the case to the Justice Department."¹⁴⁸ In the 2004 leak, prosecutors, investigators, and reporters were questioned by the FBI to investigate that leak, and, eventually, one of the defense lawyers for Balco mastermind Victor Conte, was found to be the source of the leak and was sentenced to thirty months in prison.¹⁴⁹ If a similar investigation is undertaken here, issues of journalistic integrity and freedom of press would be raised, as they were in the previous Balco leak investigation in 2004. During that investigation, two of the journalists who had reported on the court-sealed transcripts were sentenced to eighteen months in prison for refusing to testify as to the source of the information they reported.¹⁵⁰ They were only spared jail-time when the real cause of the leak was ultimately revealed.

The earlier Balco investigation and subsequent sentencing of reporters to jail time for refusal to divulge sources created an

¹⁴⁴ Francessa Interview, *supra* note 141.

¹⁴⁵ Michael O'Keefe & Teri Thompson, *Players' Union in Uproar Over Latest Leak of Names on Steroids "List"*, Jul. 31, 2009, N.Y. DAILY NEWS, http://www.nydailynews.com/sports/baseball/2009/07/30/2009-07-30_players_union_in_uproar.html.

¹⁴⁶ *Id.*

¹⁴⁷ See Littman, *supra* note 52.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Bob Egelko, *Silence Means Prison, Judge Tells Reporters*, S.F. CHRON., Sept. 22, 2006, <http://www.sfgate.com/cgi-bin/article/article?f=/c/a/2006/09/22/MNGMTLANJR1.DTL>.

uproar in 2006, and to repeat such an event would no doubt create even more controversy for the MLB and its players.¹⁵¹ While there are valid arguments to be made for both sides as to the merits of courts ordering journalists to divulge their source for court-sealed materials, the question for the MLBPA is whether such an investigation would ultimately benefit the players. An investigation might lead to the source of the leak, however, there is a significant chance that the journalists who reported the information will once again refuse to divulge their sources, similar to the journalists in the first Balco leak investigation. Such a refusal would once again lead to a standoff between the press and the courts, and it would resurface the steroid issue to the forefront of the sports world once again, especially if the journalists are ultimately sentenced to jail-time. Even at that point, there is no guarantee that the real source of the leak will be revealed. As of now, there have been no new leaks since July 2009.¹⁵² While the story will forever hang over the league and the MLBPA until all of the names are released -which may never happen- the story has receded from the forefront of American sports to some extent. Perhaps the source of the leaks was scared off by the MLBPA's rhetoric.¹⁵³ Perhaps the "leaker" had a morality check and decided to stop breaking the law. Regardless of the reason for this "silence," the MLBPA may not want to re-awaken this story by pushing for an investigation.

C. *Looking Ahead and Problems for the Future*

Even though Part IV of this Note established that the players do not seem to have a viable claim under federal law for a violation of any duty owed by the MLBPA, it may not be in most players' interests to continue to actively pursue any legal recourse. The players' reputations are now tarnished and some players could be denied economic opportunity and personal accolades for any association with steroids, so long as this issue remains in the news.¹⁵⁴ Keeping this story alive through legal maneuvering fixes a

¹⁵¹ For an in depth look at the possibility of a federal media shield law that would protect journalist's from being compelled in court to disclose their sources, in light of *Balco*, see Peter Meyer, Note, *Balco, the Steroids Scandal, and What the Already Fragile Secrecy of Federal Grand Juries Means to the Debate Over a Potential Federal Media Shield Law*, 83 IND. L.J. 1671 (2008).

¹⁵² See *supra* note 51.

¹⁵³ See *supra* note 144 and accompanying text

¹⁵⁴ It is conceivable that players associated with steroids could be denied economic opportunities such as endorsements, a contract with a team that doesn't want the negative news coverage that comes with signing a known steroid user, or eventual entry into the Hall of Fame, which creates other economic opportunities for retired players. See Mel Antonen, *Debate Surrounding McGwire, Hall of Fame Intensifies*, USA TODAY, Dec. 5, 2006, http://www.usatoday.com/sports/baseball/2006-12-04-mcgwire-cover_x.htm (claiming that McGwire was a "shoo-in first-ballot Hall of Famer" until he refused to address his

spotlight on the past and will not allow players trying to resurrect their images to move forward with their lives.

As touched upon in the introduction to this Note, there is a moral dilemma with the way society looks at these players. Should the damage to the positively-tested-players' reputations matter, as they were cheating and violating MLB rules and U.S. law?¹⁵⁵ Should we really feel bad for players who used illegal drugs to boost their game in order to make millions of dollars off of the consuming public? From this perspective, the leak may seem like a form of poetic justice –steroid-abusing players are getting exactly what they deserve by having to “face the music” about their dark past.

However, there are a few reasons why society should be concerned with the release of these names, aside from the legal issues involved. One major problem with the logic of saying that these players cheated, so they don't deserve anonymity, is that just because the tests came back positive for a type of steroids, that does not necessarily mean that they used steroids at all or that they were used to gain an unfair advantage. According to Judge Thomas' dissent in the original Ninth Circuit panel decision in 2008 in *U.S. v. Comprehensive Drug Testing*, “positive tests did not necessarily reflect steroid use; the use of nutritional supplements—which is common in professional sports—could yield a false positive. It is therefore possible that certain players' specimens triggered false-positives. In addition, there are a whole host of legitimate reasons for individuals to be prescribed steroid products.”¹⁵⁶ It is plausible that some players were taking a certain type of steroids for medical conditions that have nothing to do with enhancing their performance on the field. To lump all of the players with positive tests together would be unfair and would no doubt tarnish the names of some innocent players. So, even if those who took steroids deserve all of the negative publicity that they get from their names being exposed, innocent players would also have their reputations harmed for no reason.

Another area where it would be problematic to lump together all of the players who tested positive comes up in the

alleged steroid use in front of a Congressional Committee in 2005.) In four years on the ballot, McGwire has yet to receive support of even 25% of Hall of Fame voters, and 75% approval is required for induction into the Hall. Interestingly, before the 2010 baseball season, McGwire was named the Hitting Coach for the St. Louis Cardinals. Before the season began, McGwire finally publicly admitted using steroids during his baseball career. See Larry Fine, *Record Breaking McGuire Admits Steroid Use*, REUTERS, Jan. 12, 2010, <http://www.reuters.com/article/idUSTRE60A4VK20100112>. Whether this admission will affect his prospects for entry into the Hall of Fame is yet to be determined.

¹⁵⁵ See 2003 MLB Agreement *supra* note 54, at 160.

¹⁵⁶ *U.S. v. Comprehensive Drug Testing, Inc. (Comprehensive I)*, 513 F.3d 1085, 1147 (9th Cir. 2008) (Thomas, J., dissenting).

popular demand that the entire list be revealed in order to “rip the band-aid off,” so to speak, instead of allowing the slow trickle of names to continue. In fact, many players have gone on record saying they wish the whole list would be released to get the story over with and to allow the game to move forward and escape from the shadow of steroids.¹⁵⁷ However, this would pose even more problems of exposing confidential information. Such an action would be an intentional violation of the agreement of anonymity agreed to by the players as a prerequisite to the testing. Releasing this information without the permission of these players would appear to be a blatant bad faith violation of the collective bargaining agreement, and would likely create a viable claim for breach of a fiduciary duty.¹⁵⁸ It is also unlikely that all the players on the list will voluntarily agree to release their test results. Players who tested positive in 2003 and have not been directly linked to steroids yet may be hoping that they can continue to live under the radar, and that the remainder of the names on the list will never surface. For these reasons, even if many players continue to clamor for the MLBPA to release the entire list, such an action is unlikely.

The final reason why it should actually matter and be an issue for concern that names have been leaked is a reflection on the place and purpose of anonymous surveys and testing in general. Anonymous surveys and tests are an essential way of finding out important information from a specific group of people. Anonymity gives those who are providing information for a survey or a specimen for a test, the security of knowing that the information they provide will not be connected back to them, allowing the participants to be more willing to give honest answers and to provide specimens. For example, if a company suspects that depression is rampant among its employees, the company may want to create some type of survey to find out if anything in the office is causing the widespread depression. If the employees provide accurate information in the survey, the company may then be in a position to remedy the situation. However, it is likely that an employee would not be willing to provide honest answers about such a private condition if they knew that their employer would be reading their results knowing who provided each one. The employee would probably be afraid that a revelation to the employer about their depression would reflect poorly on them as

¹⁵⁷ Mark Teixeira, one of the highest paid players in the game said that “[n]ames are going to keep coming out, so just put it all out.” O’Keefe & Thompson, *supra* note 145. Johnny Damon echoed Teixeira’s sentiment, stating that “I think for the sake of the players who are on that list, it might be beneficial (for it to be released) so they don’t have to look over their shoulders.” *Id.*

¹⁵⁸ See explanation of *Rawson* and *Vaca*, *supra* note 119 and accompanying text.

an employee and would jeopardize their future at the company. Anonymity in this situation would be essential for the survey to effectively provide help to the employee and the employer.¹⁵⁹ For such anonymous surveys to completely put an employee's mind at ease, especially when it comes to revealing private information, "real" anonymity would be required and not just placing the 'lock and key' in different locations as was done in the 2003 survey steroid testing. As seen in the *U.S. v. Comprehensive Drug Testing* case, unless there is "real" anonymity, there will always be the possibility that the 'lock and key' could be put together and the supposedly anonymous results could be revealed. Without this guarantee of "real" anonymity there is a possibility of a chilling effect on anonymous tests in all facets of American life where a subject of the survey or test is asked to provide any private information.

CONCLUSION

Ultimately, while they may not be the most sympathetic victims, the current predicament of the MLB players should serve as a cautionary tale for concerned members of the public as well as other organizations who conduct anonymous surveys or tests. While the MLBPA seems to have escaped any legal repercussions for their actions here, the bar for quality of work done by organizations whose goal is the well-being of their members should not be set so low as to only hope to avoid civil liability. To obtain honest and willing responses to important future surveys, elections, and other tabulations requesting private information from people, true anonymity should be a central concern from the outset.

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¹⁵⁹ The employer would benefit by having healthier employees and by the goodwill created with their employees who would see that the employer took an interest in assisting them with their condition.

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