

FAIR OR FOUL? MAJOR LEAGUE BASEBALL’S USE OF A TORTIOUS INTERFERENCE LAWSUIT AS A MEANS OF INVESTIGATION•

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INTRODUCTION

Steroids and baseball. For nearly two decades the two words have been synonymous with one another. Throughout that period, Major League Baseball (“MLB” or the “League”) has fought the reputation of being a league where players use steroids and Performance Enhancing Substances (“PES”)¹ without fear of reprisal. In the early to mid-2000s, the BALCO scandal² and the Mitchell Report³ rocked the game of baseball and displayed the full-fledged PES problem that MLB had on its hands. In order to rid the game of PES completely, the League turned to the court system in 2013 for its latest and most innovative effort to combat cheating.

The decision to crack down on the BioGenesis⁴ clinic⁵ and discern whether players should be suspended for violating the league’s drug policy, “is an attempt to solve the longstanding problem that MLB has faced in trying to discipline players who have been linked to doping but have not tested positive for a banned substance.”⁶ The PES policy between the League and the Major League Baseball Players Association (“MLBPA”) has been called “the strongest drug policy in professional sports.”⁷ However, critics are quick to point out the policy’s limitations,

¹ The term Performance Enhancing Drugs (“PEDs”) is a term that became en vogue in the United States following the BALCO scandal and Mitchell Report as a more correct term to use than simply classifying all such illegal substances as “steroids.” However, Major League Baseball’s current Joint Drug Agreement classifies banned substances as Performance Enhancing Substances (“PES”) in an effort to further encompass the definition to include means of breaking the rules that might not necessarily be considered drugs. *See* JDA, *infra* note 70 at 7. This Recent Development will use the term PES to remain consistent with the current Major League Baseball Joint Drug Prevention and Treatment Program.

² *See infra* Part I.A.1.

³ *See infra* Part I.A.2.

⁴ BioGenesis of America, LLC, or BioGenesis for short, is often spelled as “Biogenesis” by various media outlets and reports. This article will refer to the company as “BioGenesis” and “BioGenesis of America, LLC” throughout.

⁵ The BioGenesis clinic was an “anti-aging clinic” located in Miami, Florida that provided human growth hormone and other PES to multiple professional baseball players. *See* Elfrink, *Sports’ Biggest Names*, *infra* note 117.

⁶ Michael Schmidt, *Baseball Said to Be Suing People Linked to Florida Clinic*, N.Y. TIMES (Mar. 21, 2013), [http://www.nytimes.com/2013/03/22/sports/baseball/major-league-baseball-is-said-to-be-suing-people-linked-to-florida-anti-aging-clinic.html?smid=tw-nytsports&seid=auto&_r=2&](http://www.nytimes.com/2013/03/22/sports/baseball/major-league-baseball-is-said-to-be-suing-people-linked-to-florida-anti-aging-clinic.html?smid=tw-nytsports&seid=auto&_r=2&[hereinafter Schmidt, Florida Clinic])

⁷ Jay Jaffe, *MLB All Wrong in Attempting to Fight Biogenesis in Court*, SPORTS ILLUSTRATED (Mar. 22, 2013), *available at* <http://mlb.si.com/2013/03/22/mlb-biogenesis-lawsuit>.

“particularly its lack of teeth beyond the testing regime.”⁸

This Recent Development explores MLB’s latest attempt to rid its sport of PES. Tired of watching suspected cheaters beat the system,⁹ MLB sought ways to find new, “non-analytical evidence,”¹⁰ that is, without a failed drug test, in its war on PES and catch those who are guilty of violating the rules. This bold and exciting new strategy of filing a tortious interference lawsuit against the PES distributor is, “a fundamental shift in dealing with performance-enhancing drug issues . . . an attempt to attack the problem at its source.”¹¹ It has led to early successes, but is it a long-term strategy? This Recent Development will analyze and scrutinize MLB’s lawsuit against BioGenesis and determine whether this new strategy is a game-changing addition to MLB’s investigative arsenal.

Part I will explore the historical background of PES in MLB, including its prevalence and impact over the past twenty years as well as the two most notable steroid-era controversies that engulfed the game of baseball: the BALCO scandal and the Mitchell Report. Additionally, this section will analyze the source of MLB’s, and specifically the Commissioner’s, powers to investigate player misconduct and to punish players who have broken the rules.

Part II will introduce the concepts of Florida’s tortious interference state law,¹² including an outline of the four-factor test that Florida courts utilize to assess the validity of such claims. Part II will also explain the parameters of what does and does not constitute a tortious interference claim in the state of Florida.

Part III will present and analyze the Florida state court case of *Office of Commissioner of Baseball v. BioGenesis of America*,¹³ both in terms of its effectiveness and by searching for pitfalls that MLB may encounter in bringing future similar lawsuits. Florida’s four-factor tortious interference test offered in Part II will be used as a framework for dissecting MLB’s claims against BioGenesis. This part will also discuss and dissect all other relevant claims for dismissal that have been raised by defendants, third parties, and legal analysts. Finally, this

⁸ *Id.*

⁹ See *infra* note 119.

¹⁰ Non-analytical evidence is evidence showing the purchase and/or use of PES that does not include a failed drug test—MLB’s typical method for collective evidence of PES use. See Axisa, Mike, *Facebook, Other Electronic Records Used During Biogenesis Investigation*, CBSSPORTS (Aug. 7, 2013), available at <http://www.cbssports.com/mlb/eye-on-baseball/23054492/facebook-and-other-electronic-records-used-during-biogenesis-investigation>.

¹¹ Schmidt, *Florida Clinic*, *supra* note 6.6

¹² Major League Baseball’s lawsuit against BioGenesis alleges tortious interference with a contract—a state law claim. Thus, it is imperative that this Recent Development utilize relevant Florida statutes and case law when assessing the validity of Major League Baseball’s claim.

¹³ *Comm’r of Baseball v. BioGenesis of Am.*, No. 2013-010479-CA-01, 2013 WL 1173946 (Fla. Cir. Ct. Mar. 22, 2013).

section will analyze whether this type of suit represents a viable and powerful new strategy for MLB to use to investigate cheaters in baseball.

I. HISTORICAL BACKGROUND AND IMPACT OF PERFORMANCE ENHANCING SUBSTANCES IN MAJOR LEAGUE BASEBALL

A. *Rampant Abuse of Performance Enhancing Substances and Early Efforts to Curb the Problem*

The internal desire not only to compete, but to win, drives athletes to test the boundaries of their bodies and skirt the rules. In the 1950s, athletes began using anabolic steroids in Eastern Europe and the Soviet Union as a means to gain strength and get an edge over the competition.¹⁴ By the mid-1960s, football players in the National Football League, as well as American bodybuilders, had begun using steroids.¹⁵ The use of PES by Athletes is not a new phenomenon; rather, the past two decades have simply opened the eyes of Americans to its prevalence. In response, Congress enacted the Anabolic Steroids Control Act of 1990¹⁶ as part of its overarching Crime Control Act of 1990.¹⁷ With these acts, Congress added anabolic steroids to Schedule III of the Controlled Substances Act, making it illegal to possess anabolic steroids without a doctor's prescription.¹⁸

Congress' investigation into steroid abuse in the United States showed the black market for illicit steroid sales to be \$300 to \$400 million annually.¹⁹ Today, while steroid abuse exists in the general American public, it is perhaps more noticeable within the world of professional sports, where despite "only limited scientific research supporting these claims, athletes use [PES] for increasing strength and muscle size, enhancing muscle definition, reducing body fat, shortening recover time after a difficult training session or competition and having more energy to train longer and more intensely."²⁰ In essence, many professional athletes will do almost anything to gain an advantage over

¹⁴ Sarah R. Heisler, *Steroid Regulation in Professional Sports: Sarbanes-Oxley as a Guide*, 27 CARDOZO ARTS & ENT. L.J. 199, 205 (2009).

¹⁵ *Id.*

¹⁶ Anabolic Steroids Control Act of 1990, Pub. L. 101-647, Title XIX, 104 Stat. 4789 (1990) (codified as amended in scattered sections of 21 U.S.C. and 42 U.S.C.).

¹⁷ Crime Control Act of 1990, Pub. L. 101-647, 104 Stat. 4789 (1990) (codified as amended in scattered sections of 10, 12, 18, 20, 21, 26, 28, 31, 42, 45 U.S.C.).

¹⁸ 21 U.S.C. § 812 (2012).

¹⁹ H.R. Rep. No. 101-681(I), at 6499 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6499. According to the CPI Inflation Calculator on the United States Department of Labor, Bureau of Labor Statistics website, \$300 to \$400 million in 1990 currency is roughly equivalent to between \$536 to \$714 million in 2013 dollars. *See CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/data/inflation_calculator.htm (last visited Nov. 26, 2013).

²⁰ Heisler, *supra* note 14, at 205.

their competition, while others take the PES simply to keep up with their fellow competitors.²¹

In the mid-1990s, baseball suffered a downturn in attendance.²² Eventually, baseball experienced a resurgence of fan interest through towering homeruns and increased offensive statistics,²³ notably through Mark McGwire and Sammy Sosa and their subsequent chase to break the at-the-time all-time single-season homerun record in 1998.²⁴ In MLB's first 125 years of existence, only two men hit sixty or more homeruns in a single season;²⁵ yet in a four-year period from 1998–2001, three men²⁶ would break that elusive mark six times.²⁷ This sharp rise in homerun totals also marks the period in which league-wide revenues for MLB increased drastically.²⁸

While PES abuse is said to have been rampant in that era,²⁹ at the time MLB had no steroid policy or testing program. Accordingly, players who were using PES were not breaking any rules.³⁰ PES became a growing concern when a former National League Most Valuable Player, Ken Caminiti, admitted to using banned substances throughout his career and expressed his views that PES use was

²¹ See Tom Verducci, *To Cheat or Not to Cheat*, SPORTS ILLUSTRATED (June 4, 2012), <http://sportsillustrated.cnn.com/2012/magazine/05/29/baseball.steroids>.

²² Affected in part by the 1994 Players Strike, total attendance across all of Major League Baseball decreased from 70,257,938 in 1993 to 50,469,236 in 1995, but rebounded back up to 70,601,147 in 1998. *1990-1999 Attendance*, BALLPARKSOFBASEBALL.COM, <http://www.ballparksofbaseball.com/1990-99attendance.htm>. See also *1994 Strike Was a Low Point for Baseball*, ESPN (Aug. 10, 2004), <http://espn.go.com/espn/print?id=1856626&type=story#>.

²³ In 1992, MLB saw its lowest average home runs per game and runs per game totals in 12 years, with 0.72 home runs and 4.12 runs per game; however, those numbers surged to 1.17 home runs and 5.14 runs per game in 2000. *League Year-By-Year Batting—Averages*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/leagues/MLB/bat.shtml>.

²⁴ Justice, Richard, *The National Pastime is Back in Full Swing*, THE WASHINGTON POST (Sept. 27, 1998), available at <http://www.washingtonpost.com/wp-srv/sports/baseball/longterm/chase/articles/base27.htm>.

²⁵ See *Single-Season Leaders & Records for Home Runs*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/leaders/HR_season.shtml (last visited Nov. 25, 2013).

²⁶ Sammy Sosa, Mark McGwire and Barry Bonds. *Id.*

²⁷ *Baseball's Battered Image*, USA TODAY (July 8, 2002), available at <http://usatoday30.usatoday.com/news/comment/2002/07/09/edtwof2.htm>.

²⁸ MLB revenue rose 28.6% from 1995 to 1996, 16.7% from 1996 to 1997, 19.0% from 1997 to 1998, 12.0% from 1998 to 1999, and 21.4% from 1999 to 2000. Maury Brown, *MLB Revenues Grown from \$1.4 Billion in 1995 to \$7 Billion in 2010*, THE BIZ OF BASEBALL (Apr. 14, 2011, 1:55 PM), http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=5167:mlb-revenues-grown-from-14-billion-in-1995-to-7-billion-in-2010&Itemid=42.

²⁹ This is evidenced by an increase in players' body sizes and personal homerun totals skyrocketing. See Scott Danaher, *Drug Abuse in Major League Baseball: A Look at Drug Testing in the Past, in the Present, and Steps for the Future*, 14 SETON HALL J. SPORTS & ENT. L. 305 (2004) n.2 ("The average weight of an All-Star increased from 199 pounds in 1991 to 211 points in 2001.") (citation omitted). See also JOSE CANSECO, JUICED: WILD TIMES, RAMPANT 'ROID, SMASH HITS & HOW BASEBALL GOT BIG (Regan Books 2005).

³⁰ Tom Verducci, *Totally Juiced*, SPORTS ILLUSTRATED (June 3, 2002), available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1025902/index.htm>.

widespread throughout MLB.³¹

In 2002, MLB and the MLBPA agreed to testing Major League Baseball players for steroids in order to meet the dual goals of ensuring player safety and protecting the integrity of the game.³² The goal was to take samples from the players confidentially and anonymously and to determine how rampant steroid abuse was throughout the league.³³ The MLBPA protected its players by ensuring that there would be no penalties associated with the testing.³⁴ Under this testing agreement, MLB and the MLBPA agreed that “every player on a major league team’s 40-man roster” was to be tested at least once and that “stricter testing, with penalties, would begin in 2004, only if more than five percent of the 2003 tests turned up positive.”³⁵ Ultimately, five to seven percent of the 2003 tests were positive for steroid use.³⁶

1. The BALCO Scandal

In 2002, the U.S. Attorney’s Office commenced an investigation into the Bay Area Laboratory Cooperative (“BALCO”), a California-based company, “which it suspected of providing steroids to professional baseball players.”³⁷ The government was able to “produce evidence that eleven MLB players had procured steroids from [BALCO].”³⁸ During the investigation, Jeff Novitzky, a special agent for the Internal Revenue Service, helped uncover evidence at BALCO that implicated, among others, San Francisco Giants superstar Barry Bonds and track star Marion Jones for steroid use.³⁹ In February 2004, Attorney General John Ashcroft indicted four men, including Victor Conte, the founder of BALCO, on a 42-count indictment, which included charges of conspiracy to distribute anabolic steroids and possession with intent to distribute anabolic steroids.⁴⁰ In 2005, Victor

³¹ *Id.*

³² *Danaher, supra* note 29 at 310 (“While it is true that the increase in homeruns or other statistics may bring more fans to the game, and may raise more money for owners, surely there is a respect for the players who played drug-free and set the longstanding records.”) (citation omitted).

³³ David Adelsberg, *Did the MLBPA Strike Out? An Analysis of Union Liability in Major League Baseball’s Anonymous 2003 Steroid Testing*, 28 CARDOZO ARTS & ENT. L.J. 695, 698 (2011).

³⁴ *Id.*

³⁵ Michael S. Schmidt, *Bonds’s Urine Retested, and Result is a Positive*, N.Y. TIMES (Feb. 4, 2009), http://www.nytimes.com/2009/02/04/sports/baseball/04bonds.html?_r=2&gwh=9E3313B5C6C6F437958E87C75E38B327.

³⁶ Adelsberg, *supra* note 33, at 699.

³⁷ *Id.* (quoting U.S. v. Comprehensive Drug Testing, Inc. (“Comprehensive II”), 579 F.3d 989, 993 (9th Cir. 2009) (en banc)).

³⁸ *Id.* at 700.

³⁹ Michael S. Schmidt, *Jeff Novitzky*, N.Y. TIMES (Dec. 30, 2007), http://www.nytimes.com/2007/12/30/sports/baseball/30novitzky.html?_r=1.

⁴⁰ Bob Kimball & Beau Dure, *BALCO Investigation Timeline*, USA TODAY (Nov. 27, 2007), <http://usatoday30.usatoday.com/sports/balco-timeline.htm>.

Conte would be sentenced to four months in prison and four months of house arrest as a plea deal for his “role as mastermind behind a scheme to provide professional athletes with undetectable performance-enhancing drugs.”⁴¹

In Grand Jury Testimony, several high-profile MLB stars were called to testify, including Barry Bonds, Jason Giambi and Gary Sheffield.⁴² In the testimony, which was eventually leaked to the press, Jason Giambi admitted to using human growth hormone (“HGH”) and steroids that he obtained from BALCO.⁴³

The BALCO scandal did not lead to any player suspensions, in large part because at that time there was no official PES policy in place.⁴⁴ Barry Bonds was eventually indicted and convicted of obstruction of justice for being “evasive” and “misleading” in his testimony to the Grand Jury about his steroid use.⁴⁵ The BALCO scandal also led to a House Government Reform Committee hearing on steroids in baseball, in which prominent players such as Mark McGwire, Jose Canseco and Sammy Sosa were called upon to testify.⁴⁶

The most crucial aspect of the BALCO scandal is that it is the only time in the MLB “steroid era” where the federal government got involved to the extent that it initiated an investigation. As previously stated, there were no suspensions of any players as a result of the BALCO scandal; it merely illustrated the necessity for MLB and the MLBPA to create a testing and punishment procedure for PES use.

2. The Mitchell Report

After years of MLB’s “refus[ing] to acknowledge that its players had a problem with steroids or other [PES],” MLB and the MLBPA finally agreed to a solution.⁴⁷ As part of his effort to protect baseball, Commissioner Allan “Bud” Selig (“Commissioner”), in March 2006, “appointed former Senator George Mitchell and the law firm, DLA Piper, to investigate the alleged use of steroids in professional baseball.”⁴⁸

The Commissioner gave Mitchell “extensive powers to investigate

⁴¹ *Id.*

⁴² James A.R. Nafziger, *Circumstantial Evidence of Doping: BALCO and Beyond*, 16 MARQ. SPORTS L. REV. 45, 53 (2005).

⁴³ Kimball & Dure, *supra* note 40.

⁴⁴ Verducci, *supra* note 30.

⁴⁵ Gabe Lacques, *Barry Bonds Obstruction Conviction Upheld*, USA TODAY (Sept. 13, 2013), <http://www.usatoday.com/story/sports/mlb/2013/09/13/barry-bonds-obstruction-of-justice-conviction-upheld/2809745>.

⁴⁶ Kimball & Dure, *supra* note 40.

⁴⁷ Heisler, *supra* note 14, at 213. See also Brent D. Showalter, *Steroid Testing Policies in Professional Sports: Regulated by Congress or the Responsibility of the Leagues?*, 17 MARQ. SPORTS L. REV. 651, 659 (2007).

⁴⁸ Heisler, *supra* note 14, at 210–11.

players' use of steroids during the years 2002 to 2006, but not the power to subpoena players."⁴⁹ Despite having no power to subpoena and in the face of "an uncooperative players association," Mitchell and his investigators were still able to uncover key evidence, including two key non-player witnesses.⁵⁰ There were many questions raised questions as to the reliability of those witnesses, Kirk Radomski, a former New York Mets clubhouse employee, and Brian McNamee, a former New York Yankees and Toronto Blue Jays strength coach, since both had their own legal problems and "might have talked to save their own skin."⁵¹ Nonetheless, Mitchell relied significantly on the hearsay testimony of these two witnesses, while also interviewing current and former baseball players, coaches and club officials that would cooperate.⁵²

After a twenty-one month investigation, Mitchell released his report ("Mitchell Report"), which named eighty-six players Mitchell was able to connect to the use and/or purchase of steroids and other PES.⁵³ The Mitchell Report also made recommendations on how to "prevent the illegal use of performance enhancing substances in [MLB]."⁵⁴

Once again, the investigation did not result in suspensions of any current players as "[MLB]'s drug agreement clearly states that a player is penalized after he tests positive for a performance-enhancing substance, is found in possession of it or distributes it," and "for most players in the report . . . Mitchell did not come close to uncovering a positive drug test."⁵⁵ The MLBPA criticized the Mitchell Report alleging it was "quite dated and reveals virtually nothing about drug use under [the] current new agreement."⁵⁶ The Commissioner vowed "his commitment to 'embrace' each recommendation, and acknowledged that additional efforts, beyond those enumerated, will be necessary."⁵⁷

The aftermath of both the BALCO scandal and the Mitchell Report reinforced the need of a PES policy by MLB and the MLBPA that would allow for not only testing for the substances, but for punishments harsh enough to induce players to stay away from the illicit substances.

⁴⁹ *Id.* at 211.

⁵⁰ Don Walker, *Report Relies on Hearsay Evidence; Legal Experts Poke a Few Holes in Findings on Steroids*, MILWAUKEE JOURNAL SENTINEL, (Dec. 14, 2007).

⁵¹ *Id.*

⁵² *Id.*; GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL (Dec. 13, 2007), <http://files.mlb.com/mitchrpt.pdf> [hereinafter MITCHELL REPORT].

⁵³ Heisler, *supra* note 14, at 211.

⁵⁴ MITCHELL REPORT, *supra* note 52, at 285.

⁵⁵ Sean Gregory, *Mitchell Names Names. Now What?*, TIME, (Dec. 13, 2007), <http://content.time.com/time/nation/article/0,8599,1694552,00.html>.

⁵⁶ Heisler, *supra* note 14, at 211 (quoting executive director Donald M. Fehr) (internal quotations omitted).

⁵⁷ *Id.*

B. Major League Baseball and the Major League Baseball Players Association's Joint Drug Agreement and the Commissioner's Powers to Investigate

1. Pre-2006 Joint Drug Agreement

A year and a half prior to the release of the Mitchell Report, MLB and the MLBPA altered their PES testing scheme. At the time, baseball was operating under a 2005 agreement between the MLBPA and MLB, which stipulated:

Under this policy, all players were subject to random testing for forty-five banned steroids and various other precursors at least once during the season. Discipline included a ten-day suspension for the first positive test, a thirty-day suspension for the second, a sixty-day suspension for the third, and a one-year suspension for the fourth violation. During the 2005 season, twelve players were suspended for violating the steroid policy, all of them receiving the ten-day suspension.⁵⁸

Criticisms of this policy focused on, among other things, the lack of “consistent incentives, penalties, and systems in place to more effectively deter the use of PES”⁵⁹ and the lack of off-season testing, which “[gave] the players the ‘green light’ to use steroids for four months before the beginning of the following season.”⁶⁰

During the 2005 season, MLB and the MLBPA worked on creating a new PES testing and suspension policy that would include harsher penalties than the system in place at the time.⁶¹ The League insisted on a scheme that included a 50 game suspension for a first offense, a 100 game suspension for a second offense, and a permanent ban for a third offense, while the MLBPA and union chief Donald Fehr countered with a proposal that started with a 20 game suspension for a first offense.⁶² The MLBPA eventually acquiesced to the League's

⁵⁸ Showalter, *supra* note 47, at 659.

⁵⁹ Heisler, *supra* note 14, at 204.

⁶⁰ Danaher, *supra* note 29, at 324.

⁶¹ The MLBPA resisted drug testing its members for years on grounds that it violated their right of privacy. Although it had never been challenged in professional sports, the notion that the players could challenge the drug testing constitutionally, specifically the Fourth Amendment right against unlawful search and seizure, would fail since MLB constitutes a private party and the Supreme Court has held that the Fourth Amendment does not apply to a search or seizure by a private party. *Id.* at 311–12 (citations omitted). Even after agreeing to the 2002 drug testing policy, the MLBPA “continued to defend both its record in responding to the issue of performance-enhancing drugs, and to insist on negotiating terms that provided for relatively less punitive sanctions and greater procedural protections for its members.” Paul H. Haagen, *The Players Have Lost That Argument: Doping, Drug Testing, and Collective Bargaining*, 40 NEW ENG. L. REV. 831, 843 (2006).

⁶² Showalter, *supra* note 47, at 659.

demands.⁶³

2. Major League Baseball's Joint Drug Prevention and Treatment Program

Prior to the 2006 MLB season, the League and the MLBPA agreed to a new Collective Bargaining Agreement ("2006–2011 CBA"), as well as a new PES policy,⁶⁴ both of which went into effect for the 2006 season. The new PES policy included the harsher penalties⁶⁵ and random off-season testing⁶⁶ that MLB had previously sought.⁶⁷

This policy stayed in effect throughout the 2006–2011 CBA, with amendments made after the Mitchell Report and its recommendations were released prior to the 2008 MLB season.⁶⁸ One key recommendation adopted from the Mitchell Report was the MLB "Department of Investigators, which is responsible for investigating violations of MLB rules and regulation, including players' alleged use of PEDs, and 'other threats to the integrity of the game.'"⁶⁹ The 2006 policy and its subsequent modifications demonstrated MLBPA's willingness to negotiate on this key issue and marked the end of the association's reluctance to discuss or allow PES testing and penalties on its members.

The current drug agreement is a direct advancement of the 2005 and 2008 versions. As part of the new Collective Bargaining Agreement that governs from 2012–2016 ("2012–2016 CBA"), MLB and the MLBPA agreed upon Major League Baseball's Joint Drug Prevention and Treatment Program (the "Joint Drug Agreement" or "JDA").⁷⁰ The stated purpose of the JDA is to:

- (i) [E]ducate Players on the risks associated with the use of Prohibited Substances . . . (ii) deter and end the use of Prohibited Substances by Players; and (iii) provide for, in keeping with the

⁶³ *Id.*

⁶⁴ Creating a PES policy through a collective bargaining process is much more effective and specific to the needs of the sport than a Congressional one-size-fits-all technique, as well as the CBA-bargained policy being protected from judicial challenge, as opposed to a federally enacted law. *Id.* at 676. Congress has considered enacting multiple forms of legislation based on this topic, specifically the Clean Sports Acts of 2005. See Lindsay J. Taylor, *Congressional Attempts to "Strike Out" Steroids: Constitutional Concerns About the Clean Sports Act*, 49 ARIZ. L. REV. 961 (2007).

⁶⁵ See *supra* Part I.B.1; Showalter, *supra* note 47, at 660. See also Press Release, Major League Baseball, MLB, MLBPA Announce New Drug Agreement (Nov. 15, 2005), <http://mlb.com/pa/releases/releases.jsp?content=111505>.

⁶⁶ Press Release, *supra* note 65.

⁶⁷ See *supra* Part I.B.1.

⁶⁸ Press Release, Major League Baseball, MLB, Players Association Modify Joint Drug Agreement (Apr. 11, 2008), <http://mlb.com/pa/releases/releases.jsp?content=041108a>.

⁶⁹ Heisler, *supra* note 14, at 214.

⁷⁰ Major League Baseball, Major League Baseball's Joint Drug Prevention and Treatment Program (2011), <http://www.mlb.com/pa/pdf/jda.pdf> [hereinafter JDA].

overall purposes of the Program, an orderly, systematic, and cooperative resolution of any disputes that may arise concerning the existence, interpretation, or application of this Program.⁷¹

The policy prohibits all players from “using, possessing, selling, facilitating the sale of, distributing, or facilitating the distribution of any Drug of Abuse, Performance Enhancing Substance and/or Stimulant (collectively referred to as ‘Prohibited Substances’).”⁷²

Importantly, the PES enumerated in Section 2(B) include “any and all anabolic androgenic steroids covered by Schedule III of the Code of Federal Regulations’ Schedule of Controlled Substances,” as well as a non-exhaustive list of seventy other “Prohibited Substances.”⁷³ Section 3 mandates: tests for every player when he arrives at spring training, randomly during the season, an additional 1,400 total tests of players during the off-season, and blood tests for human growth hormone during spring training and the off-season only.⁷⁴ In addition to the discipline procedures outlined above,⁷⁵ a player “may be subjected to disciplinary action for just cause by the Commissioner for any player violation of Section 2 above not referenced in Section 7.A though 7.F above.”⁷⁶ This “just cause” exemption allows the Commissioner to suspend a player without a failed drug test.

The player does have the right to appeal to an Arbitration Panel—stipulated in Section 8(A)—as Alex Rodriguez demonstrated following his 211-game suspension that resulting from the BioGenesis Scandal.⁷⁷ The Arbitration Panel “shall have jurisdiction to review any determination that a Player has violated the Program . . . [and] any dispute regarding the level of discipline within the ranges set forth in Section 7 is also subject to review by the Arbitration Panel.”⁷⁸ The JDA gives MLB the overwhelming majority of its power to suspend players for using or possessing PES; however it is worth noting that, other than the “just cause” exception in Section 7(G)(2), the JDA almost exclusively deals with failed drug tests.⁷⁹

⁷¹ *Id.* at 1.

⁷² *Id.* at 7.

⁷³ *Id.* at 7–9.

⁷⁴ *Id.* See also Press Release, Major League Baseball, In-Season HGH Testing to Begin in 2013 (Jan. 10, 2013), http://mlb.com/pa/news/article.jsp?ymd=20130110&content_id=40919024&vkey=mlbpa_news&fext=.jsp. (Beginning with the 2013 season, HGH blood tests will also take place during the season).

⁷⁵ See JDA, *supra* note 70, at 22.

⁷⁶ *Id.* at 25.

⁷⁷ See generally Michael O’Keeffe, *Report: Alex Rodriguez Hearing on Appeal of 211-Game Suspension Set for Sept. 30*, N.Y. DAILY NEWS (Sept. 6, 2013), available at <http://www.nydailynews.com/sports/baseball/report-a-rod-appeal-ban-scheduled-sept-30-article-1.1448305> [hereinafter O’Keeffe, *Report*].

⁷⁸ JDA, *supra* note 70, at 28.

⁷⁹ *Id.*

3. The “Best Interests of Baseball” Clause and the Power of the Commissioner

The Commissioner has wide investigatory and disciplinary power. The Office of the Commissioner of Baseball was created in 1921 in response to the 1920 “Black Sox Scandal.”⁸⁰ Similar to the Chief Executive Officer of a corporation, the Commissioner is elected by the team owners (like the board of a corporation), maintains public confidence in baseball, and protects owners’ business interests.”⁸¹ Furthermore, the Commissioner has authority to control “whatever and whoever [is involved] with baseball.”⁸² Additionally, under the 2012–2016 CBA, the Commissioner has the ability to discipline a player for “just cause” if that player’s conduct is “materially detrimental or materially prejudicial to the best interests of Baseball.”⁸³ This power to promote the “best interests of Baseball” leaves the Commissioner with almost unlimited power because “the determination of what concerns ‘best interests of baseball’ is vested solely with the Office of the Commissioner.”⁸⁴

Courts have generally allowed “the Commissioner a wide berth in the use of his ‘best interests of baseball’ clause powers,” thus giving the current Commissioner assumed precedential judicial backing for his actions, in furtherance of the “best interests of baseball.”⁸⁵ Additionally, Article XI of the 2012–2016 CBA stipulates that any grievance or complaint from a player is brought before an independent arbitrator, or a three-member arbitration panel.⁸⁶ Therefore, most, if not all, grievances do not end up in state or federal court, since arbitration has been collectively bargained and agreed upon by both sides; thus giving an arbitrator the exclusive authority to hear disputes and grievances.

Although the Commissioner is granted broad powers through the 2012–2016 CBA, his powers over individuals outside of the League are severely limited. For example, the Commissioner has no subpoena

⁸⁰ Matthew Winkel, *The Not-So-Artful Dodger: The McCourt-Selig Battle and the Powers of the Commissioner of Baseball*, 31 CARDOZO ARTS & ENT. L.J. 539, 542 (2013).

⁸¹ Michael J. Willis, *Protecting the “Owners” of Baseball: A Governance Structure to Maintain the Integrity of the Game and Guard the Principals’ Money Investment*, 88 NW. U. L. REV. 1619, 1620 (1994).

⁸² *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 532 (7th Cir. 1978) (summarizing comments made by Judge Kenesaw Mountain Landis, the first Commissioner of Baseball, upon accepting the position).

⁸³ Major League Baseball and Major League Baseball Players Association 2012–2016 Basic Collective Bargaining Agreement, at 48–49 (Dec. 12, 2011), http://www.mlb.com/pa/pdf/cba_english.pdf [hereinafter 2012–2016 Basic Agreement].

⁸⁴ Winkel, *supra* note 80, at 540.

⁸⁵ *Id.* at 547. See generally *Atlanta Nat’l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213 (N.D. Ga. 1977); *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 532 (7th Cir. 1978); *Rose v. Giamatti*, 721 F. Supp. 906 (S.D. Ohio 1989).

⁸⁶ 2012–2016 Basic Agreement, *supra* note 83, at 38–43.

power, nor the ability to compel compliance of potential witnesses that fall outside the bounds of MLB.⁸⁷ In response to this lack of investigation power, the Commissioner's office has turned to the courts in its investigation of the BioGenesis clinic—an entity outside of the control of MLB.

II. BACKGROUND AND COMPONENTS OF TORTIOUS INTERFERENCE LAW

A. *Tortious Interference with Contractual Relations*

*BioGenesis*⁸⁸ presented a new question: Can a party to a collectively bargained agreement collect damages from a third party who allegedly tortiously interfered with this agreement?⁸⁹ Since tortious interference is a state law claim sounding in both contract and tort, this article will analyze the requirements for tortious interference relevant to Florida decisions and statutes, since that is where MLB filed its lawsuit.⁹⁰

Black's Law Dictionary defines tortious interference with a contractual relationship as a "third party's intentional inducement of a contracting party to break a contract, causing damage to the relationship between the contracting parties."⁹¹ Tortious interference can be shown if the third party *intended* to interfere with a contract that it *knew* existed, and finally, that it *harmed* the contracting parties in a sufficiently quantifiable way to allow the court to award damages. Intent is key since a third party cannot be said to have consciously injured another if it was unaware of the contract.

The Restatement (Second) of Torts differentiates between intentional and negligent tortious interference with contracts by concluding liability for contract interference is proper for "one who intentionally and improperly interferes" with a known contract, but not for one who negligently interferes with a contract.⁹² In tort law, an

⁸⁷ Heisler, *supra* note 14, at 211.

⁸⁸ See Complaint, Comm'r of Baseball v. BioGenesis of Am., No. 2013-010479-CA-01, 2013 WL 1173946 (Fla. Cir. Ct. Mar. 22, 2013) [hereinafter Complaint].

⁸⁹ See *Id.* Collective bargaining agreements are protected by federal law and therefore not part of a state's traditional contract laws. See generally National Labor Relations Act, 29 U.S.C. §§ 151–169 (1935).

⁹⁰ See Soowal v. Marden, 452 So. 2d 625 (Fla. 3d Dist. Ct. App. 1984) (*reh'g denied* July 23, 1984); Windsor v. Migliaccio, 399 So. 2d 65 (Fla. 5th Dist. Ct. App. 1981). See also 56 Fla. Jur. 2d *Venue* § 88 ("For venue purposes, a cause of action for tortious interference with a contract or advantageous business relationship accrues in the county where overt acts constituting the interference occurred").

⁹¹ BLACK'S LAW DICTIONARY (9th ed. 2009), tortious interference with contractual relations.

⁹² Compare RESTATEMENT (SECOND) OF TORTS § 766A (1979) ("One who intentionally and improperly interferes with the performance of a contract . . . is subject to liability to the other for the pecuniary loss resulting to him."), with RESTATEMENT (SECOND) OF TORTS § 766C (1979) ("One is not liable to another for pecuniary harm . . . if that harm results from the actor's negligently . . . (b) interfering with the other's performance of his contract.").

actual injury must occur before the party seeking to recover can sue. Going one step further, tortious interference requires there to be actual monetary damages the plaintiff is seeking to recover. Tortious interference lawsuits are not meant for moral victories; rather they are intended for the injured party to become whole at the expense of the disrupting third party.

B. Florida's Four-Factor Test for Tortious Interference of a Contract

Florida has long held that a “party to a contract cannot be sued for tortious interference with that same contract.”⁹³ That court further explained that a “[defendant] cannot be sued for interference with a contract from which she benefits.”⁹⁴ Tortious interference suits are utilized when a third party has precluded one or both parties from fulfilling their contractual duties; therefore, providing a cause of action for the injured party against the harming third party who has no contractual obligations.⁹⁵ This precludes MLB from filing a tortious interference lawsuit against the handful of players who are purported to have used banned substances since those players, by their inclusion in the MLBPA,⁹⁶ are a party to the contract with MLB and not a third party. If MLB asserts claims directly against the players and the MLBPA, it would have to do so under a breach of contract theory, rather than tortious interference.

For this reason, even though the League’s end-game is to suspend its own players who have violated the JDA, MLB had to find a third party against whom it could allege tortious interference with MLB’s Joint Drug Agreement.⁹⁷ Accordingly, the *BioGenesis* lawsuit alleging tortious interference with a contract is an attempt to acquire the requisite evidence needed for the player suspensions.

Four factors are considered in tortious interference cases under Florida state law:

⁹³ *Schramek v. Jones*, 161 F.R.D. 119, 121 (M.D. Fla. 1995) (where plaintiff, a citizen of the United States, could not allege that a fellow citizen had tortuously interfered with a contract between the people of the United States and the President of the United States as the fellow citizen, herself, constituted a party to that alleged social contract as a citizen of the U.S. and thus could not be an interfering third party).

⁹⁴ *Id.*

⁹⁵ RESTATEMENT (SECOND) OF TORTS § 766A (1979).

⁹⁶ 2012–2016 Basic Agreement, *supra* note 83, at 1 (“The intent and purpose of the Clubs and the Association . . . in entering into this Agreement is to set forth their agreement on certain terms and condition of employment of all Major League Baseball Players for the duration of this Agreement. . . the Association [is] the sole and exclusive collective bargaining agent for all Major League Players, and individuals who may become Major League Players during the term of this Agreement”). As shown through Article I: Intent and Purpose and Article II: Recognition, as part of this collective bargaining agreement, it is agreed that all Major League Baseball Players are automatically members of the Major League Baseball Players Association upon entering into a contract with one of the Major League Clubs. *See id.*

⁹⁷ *See JDA*, *supra* note 70.

(1) [T]he existence of a business relationship or an enforceable contract, (2) knowledge of the relationship on the part of the defendant, (3) an intentional and unjustified interference with the relationship by the defendant, and (4) damage to the plaintiff as a result of the breach of the relationship.⁹⁸

Each of these factors is given equal weight when assessing a tortious interference claim.⁹⁹

The first factor, the existence of a business relationship or enforceable contract, can be fulfilled even without a written contract.¹⁰⁰ However, the contract must be in force currently and not a proposed future contract, as the prospect of future harm through loss of potential clients cannot constitute tortious interference due to the lack of an actual contract.¹⁰¹ The Supreme Court of Florida clarified this point by stating, “[plaintiff] may not recover, in a tortious interference with a business relationship tort action, damages where the ‘relationship’ is based on speculation regarding future sales to past customers.”¹⁰²

The second and third factors reflect the distinction between intentional tortious interference and coincidental interference with a contract made in the Restatement (Second) of Torts.¹⁰³ The Restatement lists seven factors determining when an actor’s conduct is intentional and improper:

(a) [T]he nature of the actor’s conduct, (b) the actor’s motive, (c) the interests of the other with which the actor’s conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the

⁹⁸ *TracFone Wireless, Inc. v. SND Cellular, Inc.*, 715 F. Supp. 2d 1246, 1262 (S.D. Fla. 2010). *See also* *Mobile Shelter Systems USA, Inc. v. Grate Pallet Solutions, LLC*, 845 F. Supp. 2d 1241 (M.D. Fla. 2012); *Rodante v. Harmon*, 85 So. 3d 508 (Fla. 2d Dist. Ct. App. 2012). *See generally* *Florida Tel. Corp. v. Essig*, 468 So. 2d 543, 544 (Fla. 5th Dist. Ct. App. 1985); *Sullivan v. Economic Research Properties*, 455 So. 2d 630 (Fla. 5th Dist. Ct. App. 1984); *Heavenner, Ogier Services v. R.W. Fla. Region*, 418 So. 2d 1074 (Fla. 5th Dist. Ct. App. 1982); *McDonald v. McGowan*, 402 So. 2d 1197 (Fla. 5th Dist. Ct. App. 1981), *pet. for rev. disp.*, 411 So. 2d 380 (Fla. 1981); *Insurance Field Services v. White and White Inspection*, 384 So. 2d 303 (Fla. 5th Dist. Ct. App. 1980); *Tamiami Trail Tours, Inc. v. J.C. Cotton*, 463 So. 2d 1126 (Fla. 1985) (*reh’g denied* Mar. 14, 1985) (elements of cause of action for tortious interference with business relationship).

⁹⁹ *See TracFone*, 715 F. Supp. 2d 1246.

¹⁰⁰ *See Schramek v. Jones*, 161 F.R.D. 119, 121 (M.D. Fla. 1995) (where the Court found that an unwritten social contract existed between the people of the United States and the President of the United States; however, ultimately concluding one citizen could not sue another citizen on the grounds of tortious interference with a social contract that the plaintiff was a party to, as well).

¹⁰¹ *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So. 2d 812, 814 (Fla. 1994) (*reh’g denied* Jan. 11, 1995) (where plaintiff’s claim of damages to its relationship with its “customers, past present and future” stemming from defendant’s ad in a newspaper was found not to invoke tortious interference for lack of actual damages with respect to past and potential future customers).

¹⁰² *Id.* at 815.

¹⁰³ *See generally* Restatement (Second) of Torts § 767 (1979).

contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties.¹⁰⁴

These factors guide a court determining whether there has been an "[i]ntentional inducement of a contracting party to break a contract," which is key to recovery in tortious interference.¹⁰⁵ Intentional inducement requires both that the third party know of the other's contract and that the third party intentionally and unjustifiably disrupt the contract.¹⁰⁶ Thus, the Florida courts have repeatedly denied claims for tortious interference where the injury was "only negligently or consequentially effected."¹⁰⁷

The final factor, "damage to the plaintiff,"¹⁰⁸ requires actual harm to the contracting party. In other words, tortious interference claims arise when there is an "agreement which in all probability would have been completed if the defendant had not interfered."¹⁰⁹ The importance of proving *actual* damages, rather than nominal damages, is demonstrated in *Worldwide Primates, Inc. v. McGreal*, where the court explained: "[Plaintiff] argues that even without proof of actual losses, it could have recovered nominal damages. This is an incorrect assessment of Florida law, which . . . requires proof of damages as an essential element of a tortious interference claim."¹¹⁰

In order for MLB to proceed to discovery in their current case against BioGenesis and its named employees, it had to show there was a reasonable chance of success on the merits of the four factors utilized by Florida courts consider in tortious interference cases, so as to not be dismissed.

III. ANALYSIS OF THE LEGAL MERITS BEHIND MAJOR LEAGUE BASEBALL'S TORTIOUS INTERFERENCE LAWSUIT

A. Major League Baseball's Most Innovative Strategy in its Ongoing War Against Performance Enhancing Substances

MLB's inability to compel parties outside of baseball to provide evidence to suspend players, coupled with the pressure of public knowledge that these players likely violated the JDA but were not

¹⁰⁴ *Id.*

¹⁰⁵ BLACK'S LAW DICTIONARY (9th ed. 2009), tortious interference with contractual relations.

¹⁰⁶ *Id.*

¹⁰⁷ *Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1224 (Fla. Dist. Ct. App. 1980) (reh'g denied Sept. 4, 1980) (citing Restatement (Second) of Torts § 766C (1979)).

¹⁰⁸ *TracFone Wireless, Inc. v. SND Cellular, Inc.*, 715 F. Supp. 2d 1246, 1262 (S.D. Fla. 2010).

¹⁰⁹ *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So.2d 812, 815 (Fla. 1994).

¹¹⁰ *Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1089, 1092 (11th Cir. 1994) (involving a tortious interference claim against a wildlife activist who sent letters to one of Plaintiff's clients in an attempt to sabotage a business arrangement that would have included the sale of animals).

suspended because of a paucity of evidence, MLB made an “unusual step” of filing a lawsuit in Florida state court. In that suit, MLB accused six people connected to the BioGenesis Clinic of “damaging the sport by providing various players with prohibited substances.”¹¹¹

MLB has no subpoena power and very little power to induce third parties to share information to further a MLB Investigation.¹¹² As a result, MLB turned to the courts for the power to subpoena records from the BioGenesis clinic and testimony from parties closely associated to the lawsuit.¹¹³ This technique has been viewed as a game-changing strategy¹¹⁴ as well as a gross misuse of the court system.¹¹⁵

The lawsuit against BioGenesis began when a disgruntled former employee took records from the clinic that implicated the sale and distribution of PES to MLB players.¹¹⁶ The *Miami New Times* obtained those records and published an exposé in late January 2013 detailing the clinic’s dealings with prominent professional baseball players as well as how the clinic distributed substances in direct violation with the JDA to those players.¹¹⁷ In response to the negative publicity, MLB wanted to suspend the players who violated the JDA.

The League, however, needed to procure evidence in order to validate the suspensions and it sent two deputies to Florida in February to “try to persuade [the] Miami New Times to share the documents it had obtained. The newspaper declined.”¹¹⁸ The Commissioner’s desire to investigate and discipline increased when formerly investigated

¹¹¹ Steve Eder & Michael S. Schmidt, *Antidoping Lawsuit Cites Six People with Links to Florida Clinic*, N.Y. TIMES (Mar. 22, 2013), <http://www.nytimes.com/2013/03/23/sports/baseball/baseball-suit-against-clinic-cites-six-individuals.html?gwh=BD1D0D2E474DAA570400EA349921C109>.

¹¹² Schmidt, *Florida Clinic*, *supra* note 6.

¹¹³ *Id.*

¹¹⁴ *Id.* (“‘This is a fundamental shift in dealing with performance-enhancing drug issues,’ said Gabe Feldman, the director of the sports law program at Tulane University and a lawyer who has represented athletes in disputes with professional leagues. He added: ‘It’s an attempt to attack the problem at its source’”).

¹¹⁵ Craig Calcaterra, *Major League Baseball’s Lawsuit Against Biogenesis Should be Laughed Out of Court*, NBC SPORTS (Mar. 22, 2013), <http://hardballtalk.nbcsports.com/2013/03/22/major-league-baseball-lawsuit-against-biogenesis-should-be-laughed-out-of-court> (“Major League Baseball’s lawsuit against Biogenesis should be laughed out of court.”) [hereinafter Calcaterra, *Laughed Out of Court*].

¹¹⁶ Tim Elfrink, *MLB Steroid Scandal: How Porter Fischer Exposed the Coral Gables Clinic*, MIAMI NEW TIMES (June 20, 2013), <http://www.miaminewtimes.com/2013-06-20/news/mlb-steroids-alex-rodriguez>.

¹¹⁷ Tim Elfrink, *A Miami Clinic Supplies Drugs to Sports’ Biggest Names*, MIAMI NEW TIMES (Jan. 31, 2013), <http://www.miaminewtimes.com/2013-01-31/news/a-rod-and-doping-a-miami-clinic-supplies-drugs-to-sports-biggest-names/> [hereinafter Elfrink, *Sports’ Biggest Names*].

¹¹⁸ Michael S. Schmidt & Steve Eder, *Baseball Pays for Clinic Documents Tied to Doping Case*, N.Y. TIMES (Apr. 11, 2013), http://www.nytimes.com/2013/04/12/sports/baseball/documents-at-anti-aging-clinic-up-for-sale-in-doping-case.html?pagewanted=2&pagewanted=all&_r=0 [hereinafter Schmidt & Eder, *Baseball Pays for Documents*].

players, Alex Rodriguez and Ryan Braun,¹¹⁹ were rumored to be involved.¹²⁰ Amid reports that Alex Rodriguez and other players were paying for the documents from BioGenesis, MLB's investigation team started buying documents it hoped could help build cases to suspend as many as 20 players.¹²¹ Once MLB had resorted to buying documents, the Commissioner's Office decided to file the tortious interference lawsuit against BioGenesis of America, LLC, and six named individuals¹²² who allegedly played a role in the sale and distribution of PES to Major League players.¹²³

In *BioGenesis*, MLB described the purpose of the JDA was to "eliminate the use of PES . . . to preserve and enhance the integrity of the game and the image of baseball, and to protect the health and well-being of Major League Players."¹²⁴ The Complaint further describes the JDA as a means to inform players of the health risks associated with PES,¹²⁵ as well as define prohibited substances.¹²⁶ The Complaint alleges that the documents cited and discussed in the *Miami New Times*' reports are "authentic business records, and come from personal notebooks and records maintained by Bosch while he was affiliated with Biokem and/or BioGenesis."¹²⁷

The Complaint alleges that Bosch, the founder of the BioGenesis clinic, and all Defendants, were "on notice that the use or possession of PES by [players] violated MLB's Joint Drug Prevention and Treatment Program;" due to Bosch's involvement in selling the prohibited PES to

¹¹⁹ MLB wanted to catch Braun who did not argue the result of his failed drug test in 2011, but rather appealed, and won, on the grounds of a procedural mistake with respect to the chain of custody of his sample. Tim Brown, *Alex Rodriguez, 12 Other Players Suspended by MLB for Biogenesis Ties*, YAHOO! SPORTS (Aug. 5, 2013), <http://sports.yahoo.com/news/alex-rodriguez--12-other-players-suspended-by-mlb-for-biogenesis-ties-190349300.html> [hereinafter Brown, *Rodriguez, 12 Other Players*].

¹²⁰ Teri Thompson, et al., *MLB Files Lawsuit Against Anthony Bosch Accusing the Owner of Biogenesis Clinic of 'Intentional Interference'*, N.Y. DAILY NEWS (Mar. 23, 2013), available at <http://www.nydailynews.com/sports/baseball/mlb-files-suit-bosch-interference-article-1.1296024> [hereinafter Thompson].

¹²¹ Michael S. Schmidt, *Yankees' Rodriguez Tied to Clinic Records Purchase*, N.Y. TIMES (Apr. 12, 2013), <http://www.nytimes.com/2013/04/13/sports/baseball/baseball-believes-alex-rodriguez-bought-clinic-documents.html>; Michael S. Schmidt & Steve Eder, *Baseball Pays for Clinic Documents Tied to Doping Case*, N.Y. TIMES (Apr. 11, 2013), <http://www.nytimes.com/2013/04/12/sports/baseball/documents-at-anti-aging-clinic-up-for-sale-in-doping-case.html?ref=sports>.

¹²² The Defendants include the clinic, BioGenesis of America; a predecessor company called Biokem; Anthony ("Tony") Bosch, the founder of the clinic; Carlos Acevedo and Ricardo Martinez, both executives of the clinic who worked with Bosch; Juan Nunez, an employee of ACES sports agency; Marcelo Albir, a former University of Miami baseball player; and Paulo Da Silveira, a chemist. Complaint, *supra* note 88.

¹²³ *Id.* ¶ 1.

¹²⁴ *Id.* ¶ 14.

¹²⁵ *Id.* ¶ 20.

¹²⁶ *Id.* ¶ 22 ("MLB and the Players Association have agreed, *inter alia*, that Major League Players are not permitted to use or possess PES.").

¹²⁷ *Id.* ¶ 33.

Manny Ramirez for which he was subsequently suspended fifty games by the League in 2009.¹²⁸ Despite such constructive notice, Defendants “solicited [players] to purchase or obtain PES, and sold, supplied and/or otherwise made available PES to certain Major League Players.”¹²⁹ Furthermore, MLB alleged Defendants had knowledge their actions were in violation of the JDA because they attempted to conceal identities of players to whom they sold, supplied or otherwise made available PES.¹³⁰

Overall, MLB alleged that it suffered “injury caused . . . by Defendants’ intentional and unjustified tortious interference with contracts between MLB and the [MLBPA].”¹³¹ The Complaint further states that Defendants “knowingly and intentionally caused and/or induced . . . Players to breach their contractual obligations under MLB’s Joint Drug Prevention and Treatment Program.”¹³² MLB alleged it suffered damages, “including the costs of investigation, loss of goodwill, loss of revenue and profits and injury to its reputation, image, strategic advantage and fan relationships.”¹³³ MLB seeks “monetary damages and other relief resulting from Defendants’ tortious interference with MLB’s contractual relationships.”¹³⁴

B. Legal Analysis using the Florida Four-Factor Test for Tortious Interference of a Contract

In Florida, a claim for tortious interference can only succeed where the plaintiff establishes:

- (1) [T]he existence of a business relationship or an enforceable contract,
- (2) knowledge of the relationship on the part of the defendant,
- (3) an intentional and unjustified interference with the relationship by the defendant, and
- (4) damage to the plaintiff as a result of the breach of the relationship.¹³⁵

At the early stages of litigation, the court looks to these factors to determine whether the parties can proceed to pre-trial discovery, or whether the claims should be dismissed. In the *BioGenesis* Complaint,¹³⁶ MLB specifically alleged each of these four factors.

¹²⁸ *Id.* ¶ 34.

¹²⁹ *Id.* ¶ 35.

¹³⁰ *Id.* ¶ 38 (noting that BioGenesis did not use real or full names on packaging containing the PES intended for such players and in documents referring to such players).

¹³¹ *Id.* ¶ 1.

¹³² *Id.* ¶ 39.

¹³³ *Id.* ¶ 42.

¹³⁴ *Id.* ¶ 43. Actual damages are a pre-requisite for any tortious interference claim. *Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1089, 1092 (11th Cir. 1994) (“Florida law . . . requires proof of damages as an essential element of a tortious interference claim”).

¹³⁵ *TracFone Wireless, Inc. v. SND Cellular, Inc.*, 715 F. Supp. 2d 1246, 1262 (S.D. Fla. 2010).

¹³⁶ Complaint, *supra* note 88, ¶¶ 1, 39, 40, 42, 43.

1. Existence of an Enforceable Contract

In this case there is no unwritten contract or business relationship, but rather the issue of whether the JDA, agreed to by the League and the MLBPA, constitutes an enforceable contract upon which MLB could base a claim for tortious interference.¹³⁷ Some have questioned whether the JDA constitutes a legitimate business contract since the League derives no financial benefit from the contract and it is merely an agreement that bars the use of PES.¹³⁸ However, the court in *Dorman v. Publix-Saenger-Sparks Theatres* foreclosed an argument based on this rationale, holding that a contract *not* to perform some action is as valid and enforceable as that of a contract *to* perform some action.¹³⁹ Here, the JDA is a written agreement between the League and the MLBPA, on behalf of all the players, that explicitly contracts the players *not* to use, possess, sell, facilitate the sale of, distribute, or facilitate the distribution of any PES or other banned substances.¹⁴⁰ Under *Dorman*, the JDA is a valid and enforceable contract. Moreover, even without expressed financial interests in the contract, MLB has such interests since the League thought that drugs in baseball were hurting profits and have the potential to hurt future profits.¹⁴¹ Thus, the JDA constitutes a valid and enforceable contract upon which a tortious interference of contract claim can be brought by one of the contracting parties. Accordingly, *BioGenesis*¹⁴² should satisfy the first prong of Florida's test for tortious interference of a contract.

2. Knowledge of the Contract by the Defendant

MLB's assumption that defendants knew or should have known about the JDA is a logical conclusion given that: (a) Tony Bosch and his father were investigated following the Manny Ramirez PES suspension¹⁴³ and (b) MLB's public crack-down on steroids and PES

¹³⁷ Joseph Ax, *ANALYSIS—In Suing Clinic Over Drugs, U.S. Baseball may be Targeting Players*, CHICAGO TRIBUNE (Mar. 24, 2013), http://articles.chicagotribune.com/2013-03-24/news/sns-rt-usa-baseballlawsuit-analysis12n0cg09z-20130324_1_biogenesis-florida-clinic-anthony-bosch

¹³⁸ *Id.*; Craig Calcaterra, *MLB Sues Biogenesis, Anthony Bosch, Claims Interference with Contract*, NBC SPORTS (Mar. 22, 2013), <http://hardballtalk.nbcsports.com/2013/03/22/breaking-mlb-sues-biogeneis-anthony-bosch-claims-interference-with-contract> [hereinafter Calcaterra, *MLB Sues Biogenesis*].

¹³⁹ *Dorman v. Publix-Saenger-Sparks Theatres*, 135 Fla. 284, 290 (1938). The court stated: "The consideration required to support a simple contract need not be money or anything having monetary value, but may consist of either a benefit to the promisor or a detriment to the promisee."

¹⁴⁰ JDA, *supra* note 70, at 7.

¹⁴¹ David Ziff, *Baseball Sues Biogenesis for Tortious Interference with Contract*, ZIFF BLOG (Mar. 22, 2013), <http://ziffblog.wordpress.com/2013/03/22/baseball-sues-biogenesis-for-tortious-interference-with-contract> (stating that MLB believed it was better off financially without PES, "Otherwise, why sign the JDA?").

¹⁴² See Complaint, *supra* note 88.

¹⁴³ *Id.* ¶ 34. See also *supra* Part III.A.

over the past decade.¹⁴⁴

Given the circumstantial evidence of Tony Bosch's connection to Manny Ramirez's suspension, coupled with the clinic's attempts to conceal names of players, a Florida court could reasonably find that the defendants were well-aware of the JDA and its stipulation that Players shall not use, possess, sell, facilitate the sale of, distribute, or facilitate the distribution of any PES. Therefore, this suit should pass the second prong of Florida's tortious interference of a contract test.

3. Intentional and Unjustified Interference with the Contract by the Defendant

The third factor required to show a *prima facie* claim for tortious interference is that the defendant must have intentionally and unjustifiably interfered with the contract in question.¹⁴⁵ Although defendants can claim their actions were justifiable business decisions in trying to make a profit—profiting by knowingly interfering with a valid and enforceable contract between two other parties cannot be justified.¹⁴⁶

Utilizing the seven factors from The Restatement (Second) of Torts to determine if an actor's conduct is intentional and improper,¹⁴⁷ it is evident that Bosch intentionally and unjustifiably interfered with the JDA. Factor (a) pertains to the nature of the actor's conduct and the JDA prohibits players from using PES; however, it was because of Defendants' conduct that players obtained PES. Therefore, Defendants facilitated player's breach of the JDA.¹⁴⁸ In considering factor (b), the actor's motive, it should be noted that Defendants' motives were to make a profit, but profit seeking does not automatically justify one's actions, especially since the evidence in this case insinuates that the Defendants had knowledge that they should not be engaging in such conduct. Factor (c) concerns the League's interests, in this case those interests are to keep the game free of steroids; by providing PES to players, Defendants were harming the interests that the League sought

¹⁴⁴ Christine Brennan, *Crackdown Shows Tide Has Turned on MLB Dopers*, USA TODAY (July 31, 2013), <http://www.usatoday.com/story/sports/christinebrennan/2013/07/31/christine-brennan-baseball-biogenesis/2606359/>. See also Wendy Thurm, *MLB Sued Biogenesis, Now What?*, FANGRAPHS (Apr. 2, 2013), <http://www.fangraphs.com/blogs/mlb-sued-biogenesis-now-what>.

¹⁴⁵ *TracFone Wireless, Inc. v. SND Cellular, Inc.*, 715 F. Supp. 2d 1246, 1262 (S.D. Fla. 2010). See also *Mobile Shelter Systems USA, Inc. v. Grate Pallet Solutions, LLC*, 845 F. Supp. 2d 1241 (M.D. Fla. 2012); *Rodante v. Harmon*, 85 So. 3d 508 (Fla. 2d Dist. Ct. App. 2012).

¹⁴⁶ See *Se. Integrated Med., P.L. v. N. Fla. Women's Physicians, P.A.*, 50 So. 3d 21, 23 (Fla. Dist. Ct. App. 2010) (where Defendant's knowledge of a non-compete clause in the contract of the doctor it was soliciting to leave the Plaintiff's business constituted intentional and unjustified interference with said contract).

¹⁴⁷ See Restatement, *supra* note 103.

¹⁴⁸ Under the JDA, players are not only prohibited from using PES, but also from obtaining them. See JDA, *supra* note 70, at 7.

to protect through the JDA. With regards to factor (d), Defendants sought financial gain, but did so in direct contravention of the JDA. Factor (e) weighs the social interests in preserving the contract versus the freedom of the third party to act as it wishes. Under (e), the League's interests in protecting the integrity of the game of baseball and its wide societal impacts across the country outweigh Defendants' interest of financial gain, especially considering the potential illegality of the Defendants' activities. Factor (f) considers the proximity of the third party's action to the contractual interference; here, Defendants' actions were the proximate cause of the breach of the JDA as they provided the PES to Players that constituted said breach. Finally, with regards to factor (g), there were no relations between the two parties outside of this suit. Because it is evident that Defendants intentionally and unjustifiably interfered with the JDA, this lawsuit should satisfy the third prong of Florida's tortious interference of a contract test.

4. Damage to the Plaintiff as a Result of the Breach of Contract

The final element of a tortious interference claim is actual damages. This final element is the most contentious because it is the most difficult to prove. In the Complaint, MLB alleges it suffered damages, "including the costs of investigation, loss of goodwill, loss of revenue and profits and injury to its reputation, image, strategic advantage and fan relationships."¹⁴⁹ In the aftermath of MLB's filing, a slew of articles argued that the League could not actually demonstrate that it was harmed,¹⁵⁰ in part because loss of goodwill is impossible to quantify,¹⁵¹ but also because the League's revenues have increased 257% since 1995.¹⁵² It is also quite difficult to discern how exactly the presence of PES in baseball would harm the League, "[w]hile drugs in baseball may create a general sort of harm to MLB, that harm is difficult if not impossible to quantify."¹⁵³ The question remains whether MLB has the ability to show damages at all, and if so, how easily quantifiable are those damages as "injury to its reputation, image, strategic advantage and fan relationships"¹⁵⁴ would require creative guesswork, at best, as to their monetary value.¹⁵⁵ In fact, some analysts

¹⁴⁹ Complaint, *supra* note 88, ¶ 42.

¹⁵⁰ Calcaterra, *Laughed Out of Court*, *supra* note 115 ("It's total nonsense to suggest financial damage here.").

¹⁵¹ Calcaterra *MLB Sues Biogenesis*, *supra* note 138.

¹⁵² Jaffe, *supra* note 8.

¹⁵³ Ziff, *supra* note 141.

¹⁵⁴ Complaint, *supra* note 88, ¶ 42.

¹⁵⁵ Ziff, *supra* note 141:

[I]t would not surprise me at all if MLB had some sort of internal numbers or some sort of consultant study showing how steroid use depressed fan interest and cost the league some revenue. The key, as I see it, is that once the fact of damages is certain, then the amount of damages may be proven with some guesswork.

were shocked by the claim of damages as it could potentially “open the league’s closely-guarded finances to examination.”¹⁵⁶

MLB has not produced any public documentation to show damages. In spite of the paucity of documentation, the lawsuit has continued,¹⁵⁷ perhaps because no defendant has raised the issue of lack of actual damages. Tony Bosch agreed to cooperate with League officials in exchange for MLB dropping the lawsuit, indemnifying Bosch for “any liability arising from his cooperation,” and assurances that MLB would “help mitigate any criminal exposure.”¹⁵⁸ With the cooperation of Bosch and several other named defendants, it appears as though there is no defendant whose interests include a motion to dismiss rather than working with MLB officials. Some have reacted negatively and argue that this “is an essentially fake, non-contested lawsuit in which the primary defendants are now on the same side as the plaintiff’s so *of course* they’re not going to challenge it.”¹⁵⁹

Without any physical evidence produced by MLB, it is impossible to say that the League has met its burden of showing actual damages, the fourth requirement for tortious interference. Despite contentions that lack of such evidence would cause a roadblock to MLB’s investigation of BioGenesis, this lawsuit continued for nearly a year. Perhaps the court regards a fact-intensive legal claim of tortious interference as requiring a plaintiff to allege just enough to meet the bare minimum legal standards to proceed with discovery.¹⁶⁰ Despite their success, MLB should be prepared to proffer evidence of damages suffered from PES-use if it is to file a future tortious interference suit.

C. The Issue of Standing

Despite MLB’s continued pursuit of its case against Biogenesis, several third parties argued that the lawsuit should have been dismissed, or alternatively removed from Florida state court due to a lack of subject matter jurisdiction.¹⁶¹

¹⁵⁶ Thurm, *supra* note 144.

¹⁵⁷ MLB suspended its lawsuit against BioGenesis in February 2014 after Alex Rodriguez’s appeal was complete and he dropped his lawsuit against the League. *MLB Drops Suit Against Biogenesis*, ESPN (Feb. 19, 2014), http://espn.go.com/mlb/story/_/id/10482465/mlb-drops-lawsuit-biogenesis-anthony-bosch.

¹⁵⁸ T.J. Quinn, et al., *MLB Seeks to Suspend A-Rod, Braun*, ESPN (June 5, 2013), http://espn.go.com/espn/otl/story/_/id/9301536/major-league-baseball-suspend-20-players-including-alex-rodriguez-ryan-braun-part-miami-investigation. See also Mike Fish & T.J. Quinn, *Baseball Accused of ‘Bullying’*, ESPN (June 8, 2013), http://espn.go.com/espn/otl/story/_/id/9354195/mlb-secures-cooperative-agreement-biogenesis-founder-tony-bosch (“Officials promised to do what they could although they have no power to stop a federal criminal investigation.”).

¹⁵⁹ Craig Calcaterra, *MLB is Still Using its Bogus Civil Lawsuit Against Anthony Bosch to Collect Evidence*, NBC SPORTS (June 27, 2013), <http://hardballtalk.nbcsports.com/2013/06/27/mlb-is-still-using-its-bogus-civil-suit-against-anthony-bosch-to-collect-evidence>.

¹⁶⁰ Thurm, *supra* note 144.

¹⁶¹ Julie K. Brown, *Now Up to Bat in Steroids Scandal: A-Rod’s Cousin*, MIAMI HERALD (June

Alex Rodriguez's cousin, Yuri Sucart,¹⁶² his lawyer, and another man, Gustavo Gomez, resisted deposition because the Florida State Court lacked subject matter jurisdiction in this case.¹⁶³ Their claims were twofold: first, the 2012–2016 CBA and the JDA both stipulate a grievance procedure that includes an arbitrator, not a court;¹⁶⁴ and second, Florida State Courts lack subject matter jurisdiction in this case as federal labor law requires a federal court to interpret the collective bargaining agreement.¹⁶⁵

The Commissioner can assert that this case does not directly deal with either the 2012–2016 CBA or the JDA as the opposing party is neither a player nor the MLBPA. The Defendants in this case are all third parties, as is necessary in a tortious interference suit, and therefore, have not invoked either of the collective bargaining agreements. While the third parties would like to argue that this suit is in violation of the collectively bargained agreements, there does not exist any provisions of either the 2012–2016 CBA or the JDA that they can point to as the basis for their claims.

The JDA's "Appeals" section, found in Section 8 of the agreement between MLB and the MLBPA, stipulates: "[t]he Arbitration Panel shall have jurisdiction to review any determination that a Player has violated the Program [and] any dispute regarding the level of discipline."¹⁶⁶ Furthermore, Section 8.D details the appeal procedure when a player is disciplined pursuant to Section 7.G.2, the "just cause" section.¹⁶⁷ This "just cause" section is the basis for the Commissioner's BioGenesis suspensions. The JDA does not provide any procedure for grievance or appeals on behalf of the Commissioner's Office; rather it specifies only that the Arbitration Panel Review shall be the vehicle for a *player* appeal. There is no requirement that the Commissioner go to

27, 2013), <http://www.miamiherald.com/2013/06/27/3472495/now-up-to-bat-in-steroids-scandal.html> [hereinafter Brown, *Now Up to Bat*].

¹⁶² Sucart acted as Rodriguez's personal assistant and chauffeur, and is alleged to have secured PES on Rodriguez's behalf—and to have injected Rodriguez with those PES—from 2001–03. In 2009, reports of his PES-related activities surfaced, and the New York Yankees banned Sucart from team facilities. Mark Feinsand & Bill Madden, *Yankees Ban Alex Rodriguez's Cousin Yuri Sucart from Team Facilities*, N.Y. DAILY NEWS (Feb. 27, 2009), <http://www.nydailynews.com/sports/baseball/yankees/yankees-ban-alex-rodriguez-cousin-yuri-sucart-team-facilities-article-1.391775>.

¹⁶³ *Sucart v. Office of Comm'r*, 129 So. 3d 1112, 1113 (Fla. Dist. Ct. App. 2013).

¹⁶⁴ Michael O'Keeffe, *Lawyers for Alex Rodriguez's Cousin Yuri Sucart Challenge Subpoena in Biogenesis Case*, N.Y. DAILY NEWS (July 9, 2013), <http://www.nydailynews.com/sports/baseball/yankees/judge-pitch-a-rod-cousin-article-1.1394404> [hereinafter O'Keeffe, *Lawyers Challenge Subpoenas*]. See also JDA, *supra* note 70, at 28–32; 2012–2016 Basic Agreement, *supra* note 83, at 38–39.

¹⁶⁵ Brown, *Now Up to Bat*, *supra* note 161.

¹⁶⁶ JDA, *supra* note 70, at 28.

¹⁶⁷ *Id.* at 31. Section 7.G.2 specifies: "A Player may be subjected to disciplinary action for just cause by the Commissioner to any Player violation of Section 2 above not referenced in Section 7.A through 7.F above." *Id.* at 25.

an Arbitration Panel Review, nor does it proscribe the Commissioner from utilizing the court system. In fact, the whole appeals process detailed by the JDA comes into effect *after* a player have been disciplined and fails to discuss acceptable means for discovering violations. Based on the language of the JDA, there is no basis for a claim that the Commissioner acted in contravention to it.

Articles XI and XII of the 2012–2016 CBA grant the Commissioner powers related to grievance procedure and discipline, respectively. Article XI defines grievance as a “complaint which involves the existence or interpretation of, or compliance with, any agreement” between the League and the players.¹⁶⁸ Although this description appears to encompass all possible grievances that can arise, the preamble to Article XI stipulates “[f]or the purpose of providing an orderly and expeditious procedure for the handling and resolving of *certain* grievance and complaints, the following shall apply as the exclusive remedy of the Parties.”¹⁶⁹ The wording indicates that while the arbitration process detailed in Article XI is the *exclusive remedy* for both MLB and the MLBPA with respect to many types of grievances, it is not necessarily the only remedy for *all* grievances. The Commissioner’s powers are not severely limited through Article XI and are, in fact, expanded by Article XII—Discipline.

While Article XI specifies procedures for player grievances,¹⁷⁰ grievances initiated or appealed by a club,¹⁷¹ and even grievances initiated or appealed by the MLBPA,¹⁷² there is no procedure for grievances initiated or appealed by the Commissioner. Article XII.B gives the Commissioner the power to discipline a player subject to “just cause” review through the grievance process for “conduct that is materially detrimental or materially prejudicial to the best interests of Baseball.”¹⁷³ The Commissioner could have cited this provision as he was trying to protect the “best interests of Baseball” through the lawsuit against BioGenesis. While the 2012–2016 CBA stipulates that a Player who is disciplined shall have the right to discover all evidence used against him,¹⁷⁴ there are no rules or procedures prescribed for how the League may obtain such evidence.

Though some argue that this case does not belong in state court¹⁷⁵ and should be “addressed according to the grievance procedure outlined

¹⁶⁸ 2012–2016 Basic Agreement, *supra* note 83, at 38–39.

¹⁶⁹ *Id.* at 38 (emphasis added).

¹⁷⁰ *Id.* at 42.

¹⁷¹ *Id.* at 46–47.

¹⁷² *Id.* at 47–48.

¹⁷³ *Id.* at 49.

¹⁷⁴ *Id.* at 49.

¹⁷⁵ O’Keefe, *Lawyers Challenge Subpoenas*, *supra* note 164.

in the collective bargaining agreement;¹⁷⁶ the fact remains that this was not a grievance between the League and its players and, thus, not in violation of either the 2012–2016 CBA or the JDA.¹⁷⁷ It would be inequitable to say that the lack of a grievance or investigation procedure for the League should preclude the League from asserting an injury and seeking a remedy. Absent a defined procedure, the League has followed what it believed to be the best method to remedy their injuries.

The other standing issue, presented by Sucart and Gomez, is that the case should not be in Florida State Court, as it requires interpretation of the 2012–2016 CBA, which is governed by federal law.¹⁷⁸ State courts “are forbidden from interpreting a collective bargaining agreement by operation of the Labor Management Relations Act.”¹⁷⁹ The issue was raised in June 2013 before Judge Ronald Dresnick who agreed that the argument had some legal merit and expressed puzzlement that no defendant had raised a similar challenge; but ultimately ruled that third parties had no legal standing to challenge the lawsuit.¹⁸⁰ While awaiting a decision on the writ of certiorari from the Court of Appeals, Judge Dresnick stayed discovery, specifically the depositions of Sucart and Gomez.¹⁸¹

In an opinion filed December 18, 2013, the three-judge panel (the “Panel”) of the District Court of Appeal of Florida voted unanimously to deny the petitions of Sucart and Gomez.¹⁸² The appellate court acknowledged that the trial court erred in finding that third parties had no standing to raise a lack of subject matter jurisdiction argument.¹⁸³ However, the Panel did not find that Sucart and Gomez met the high

¹⁷⁶ *Id.*

¹⁷⁷ Yuri Sucart’s lawyer, Jeffrey Sonn, has stated that he believes the “suit is a violation of the CBA and violates the due process rights of the MLB players and witnesses who were dragged into this case,” and that the League should “renegotiate” the CBA rather than “run[ning] to the court” and “tramp[ing] on people’s private rights.” John Pacenti, *Justice Watch: MLB Accused of Misusing Courts to Get Dirt on A-Rod, Other Players*, DAILY BUSINESS REVIEW (Aug. 24, 2013), <http://www.dailybusinessreview.com/PubArticleDBR.jsp?id=1202616879282&slreturn=20140002171206>.

¹⁷⁸ Brown, *Now Up to Bat*, *supra* note 161. The NLRA of 1935 provides the foundation of modern labor law and the collective-bargaining procedure. The Act sought to remedy “[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association.” 29 U.S.C. § 151 (2014). The entirety of the Act is codified at 29 U.S.C. §§ 151–69. The Act is still in effect today with several amendments, notably the Labor Management Relations Act of 1947, which delineated exclusive federal court jurisdiction to interpret and enforce collective bargaining agreements. 29 U.S.C. §§ 401–531 (2014).

¹⁷⁹ Craig Calcaterra, *A-Rod’s Cousin, Yuri Sucart, Files an Appeal Challenging Major League Baseball’s Biogenesis Lawsuit*, NBC SPORTS (Aug. 20, 2013), <http://hardballtalk.nbcsports.com/2013/08/20/a-rods-cousin-yuri-sucart-files-an-appeal-challenging-major-league-baseballs-biogenesis-lawsuit/>.

¹⁸⁰ Brown, *Now Up to Bat*, *supra* note 161.

¹⁸¹ *Id.*

¹⁸² Sucart v. Office of Comm’r, 129 So. 3d 1112 (Fla. Dist. Ct. App. 2013).

¹⁸³ *Id.* at 1114.

burden of showing the “required ‘departure from the essential requirements of law’ [which] means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power . . . resulting in a gross miscarriage of justice.”¹⁸⁴

Sucart’s position in this appeal was that the Commissioner’s claims were preempted by Section 301 of the federal Labor Management Relations Act; however, the Panel disagreed. Section 301 preempts state-law claims “when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract.”¹⁸⁵ However, not every state-law lawsuit relating to a collective-bargaining agreement is necessarily preempted by Section 301.¹⁸⁶ Additionally, “[S]ection 301 preemption does not automatically divest state courts of jurisdiction . . . but only displaces state law causes of action that require interpretation of a collective bargaining agreement and mandates that federal law be applied.”¹⁸⁷ The Florida appeals court concluded that the lawsuit is not between parties to the CBA, but rather between a party to the CBA and various third parties over a tort.¹⁸⁸ In fact, the Panel stated that the CBA is, at best, ancillary to plaintiffs’ cause of action.¹⁸⁹ Moreover, Sucart and Gomez were not able to “identify any specific provision of the collective bargaining agreement which [was] in dispute and which . . . need[ed] to be construed as part of th[e] lawsuit.”¹⁹⁰

With “little or no interpretation of the agreement”¹⁹¹ necessary to resolve the claims at hand, Sucart and Gomez had to be deposed. The issues “center not on whether the players violated the contracts, but instead on what role, if any, the defendants played in the players’ already-acknowledged violation of the agreement.”¹⁹² Though MLB had already achieved its ultimate purpose in this particular lawsuit by garnering the requisite evidence to suspend players, they were still able to pursue this lawsuit since it was premised on the third-party injury to the JDA and the suspensions were just ancillary to the lawsuit. The resolution of the claims would have depended on factual questions relating to the conduct and motivations of the defendants, “‘separate and distinct from those involving the construction or interpretation of the agreement.’”¹⁹³

¹⁸⁴ *Id.* at 1115 (quoting *Jones v. State*, 477 So.2d 566, 569 (Fla. 1985)) (Boyd, C.J., concurring specially).

¹⁸⁵ *Allis-Chambers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

¹⁸⁶ *Id.*

¹⁸⁷ *Acevedo v. Caribbean Transp., Inc.*, 673 So. 2d 170, 172 (Fla. 3d Dist. Ct. App. 1996).

¹⁸⁸ *Sucart*, 129 So. 3d 1112 at 1115.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1115.

¹⁹¹ *Id.* at 1116.

¹⁹² *Id.*

¹⁹³ *Id.* (quoting *Kresse v. City of Hialeah*, 539 So. 2d 534, 535 (Fla. 3rd Dist. Ct. App. 1989)).

The upshot of the Florida appeals court decision is twofold: first, Sucart and Gomez could have been deposed;¹⁹⁴ and second, MLB gained another significant victory that may translate into success in future cases. MLB had sought to depose Sucart to create a complete record of the Biogenesis saga, and to “send a message that those who interfere with the joint drug program” will face consequences.¹⁹⁵ The ruling of a Florida appellate court that this lawsuit was separate and apart from interpretation of the 2012–2016 CBA eliminated a potential defense that defendants and third parties may advance in this case and in future tortious interference claims, while also giving MLB more reason to believe it has created a viable future strategy in its fight against PES-use.

D. Game Changing Strategy or One-Time Band-Aid?

When MLB commenced the lawsuit in March, many analysts hailed the move as a “fundamental shift in dealing with performance-enhancing drug issues” and “an attempt to attack the problem at its source . . . that is something different from how the leagues have approached it until now.”¹⁹⁶ Additionally, some noted the innovativeness of filing a lawsuit against those who harmed the game, which gave MLB something it never had before: power and leverage over the distributors.¹⁹⁷ By going after the distributors in court, MLB investigators attempted to solve the problem that MLB has faced disciplining players linked to doping, but have not tested positive for PES.¹⁹⁸ Other experts have called it, “a shot across the bow at those whom the league believe may interfere with [its efforts to eliminate the use of PES],”¹⁹⁹ and an aggressive move to combat doping.²⁰⁰ Furthermore, it could open the door for officials in other sports to file similar suits against those who may have provided players with banned

¹⁹⁴ Michael O’Keeffe, *Alex Rodriguez’s Cousin Yuri Sucart Can be Questioned by MLB Lawyers, Ruling Says*, N.Y. DAILY NEWS (Dec. 19, 2013), <http://www.nydailynews.com/sports/i-team/mlb-lawyers-question-a-rod-cousin-yuri-ruling-article-1.1552351>. Although the Appeals Court ruled that MLB could depose Sucart and Gomez, the docket appears to show that these depositions never took place as a Notice of Taking Deposition was filed on Feb. 5, 2014, but less than a week later there were multiple Cancellation Notices filed and a Voluntary Dismissal signaling the end of the case filed on Feb. 18, 2014. It does not appear that a deposition was ever entered into the record, nor any indication that it affirmatively took.

¹⁹⁵ *Id.*

¹⁹⁶ Schmidt, *Florida Clinic*, *supra* note 6.

¹⁹⁷ *Id.* (“It’s been difficult for the leagues to target the distributors because they have had no power over them.”). See also Michael McCann, *Hernandez Trial, O’Bannon Case, Top 10 Moments for Sports Law in ‘13*, SPORTS ILLUSTRATED (Dec. 31, 2013), <http://sportsillustrated.cnn.com/more/news/2013/12/31/herandez-boston-marathon-obannon-2013/index.html#all>.

¹⁹⁸ Schmidt, *Florida Clinic*, *supra* note 6.

¹⁹⁹ Thompson, *supra* note 120 (quoting former federal prosecutor Matthew Rosengart).

²⁰⁰ Eder, *supra* note 111.

substances.²⁰¹

Whether this is a game-changing strategy for MLB, and other professional sports, depends on who you ask. However, the suit served its immediate purpose: to punish players who have ties to BioGenesis and are suspected of PES use, but have not failed a drug test.²⁰² In late July and early August 2013, MLB levied the greatest number of suspensions for off-the-field conduct since eight Chicago White Sox players were banned from baseball for life, following their conspiracy to fix the 1919 World Series.²⁰³ Ryan Braun accepted a 65 game suspension, twelve players accepted 50 game suspensions, and most notably, Alex Rodriguez was suspended for 211 games.²⁰⁴

All of these suspensions were imposed using non-analytical evidence—that is, without a failed drug test, as has been the case with all other previous suspensions under the JDA.²⁰⁵ Braun and Rodriguez's suspensions did not fit the JDA's model of suspensions for 50 games, then 100 games, followed by a lifetime ban for violating the JDA, but rather were a result of the Commissioner utilizing his “just cause” powers.²⁰⁶ All players, except Rodriguez, accepted their punishments, a sign that the evidence MLB received from BioGenesis and other cooperating witnesses had merit.²⁰⁷

This acceptance by the punished players is being viewed as an overwhelming victory for the Commissioner. Certain commentators believe that the Commissioner is attempting to create a legacy that will reflect him as ridding MLB of PES, after nearly two decades of turning his back on the issue.²⁰⁸ In suspending fourteen players by using non-analytical evidence, obtained with the help of a lawsuit in Florida state

²⁰¹ *Id.*

²⁰² David Lengel & Steve Busfield, *Alex Rodriguez and 12 Other Players Suspended in Biogenesis PEDs Scandal*, *GUARDIAN* (Aug. 5, 2013), <http://www.theguardian.com/sport/2013/aug/05/alex-rodriguez-suspended-mlb-peds-drugs>.

²⁰³ *Id.*

²⁰⁴ *Id.* Following his appeal to arbitrator Frederic Horowitz, Rodriguez's suspension was reduced to 162 games, the entirety of the 2014 season. Wallace Matthews, *A-Rod to Miss All of 2014 Season*, *ESPN* (Jan. 12, 2014), http://espn.go.com/new-york/mlb/story/_/id/10278277/alex-rodriguez-suspension-reduced-162-games.

²⁰⁵ Brown, *Rodriguez, 12 Other Players*, *supra* note 119.

²⁰⁶ *Id.*

²⁰⁷ Credibility of evidence was an issue early on when MLB investigators were said to have been buying documents from former BioGenesis employees. Legal analysts noted “you will have a witness's credibility attacked if they take money from the side that calls them to give evidence.” Schmidt & Eder, *Baseball Pays for Documents*, *supra* note 118.

²⁰⁸ See Jeff Passan, *Bud Selig's Overzealous Handling of A-Rod is More About Legacy Preservation Than 'Good of the Game'*, *YAHOO SPORTS* (Aug. 5, 2013), <http://sports.yahoo.com/news/bud-selig-s-overzealous-handling-of-alex-rodriguez-is-more-about-legacy-preservation-than-good-of-the-game---191217055.html>. See also Christine Brennan, *Selig Wants 'Whatever it Takes' to Clean Up Game*, *USA TODAY* (June 5, 2013), <http://www.usatoday.com/story/sports/columnist/brennan/2013/06/05/major-league-baseball-drug-testing-ron-bosch-bud-selig/2394383>.

court, Commissioner Selig can claim a substantial victory for the League in its fight against PES-use.²⁰⁹

Although MLB's strategy proved successful in the BioGenesis case, was that strategy a one-time shot or can it prove useful long-term? Baseball and legal analysts say the *BioGenesis* case was "the most comprehensive investigation of its sort in the history of sports,"²¹⁰ and this lawsuit sent a message to "those supplying drugs to its players [that] those on the field are not the only ones at risk of punishment."²¹¹ Up to this point, MLB had no recourse against the distributors of PES, except the ability to suspend the players who used such banned substances. The *BioGenesis* case is a clear indication that the tide is turning:

[MLB] turned the tables on rules for uncovering players' use of performance-enhancing drugs. . . . MLB's lawsuit against Biogenesis is a new weapon for league investigations into PEDs. It is a weapon that is outside of any collectively-bargained rule and thus can't be stopped by the MLBPA. The strategy is simple: rather than relying solely on a test to catch a player using PEDs, go after the player's supplier in court.²¹²

As MLB continues to crack down on PES use, it will not only sue distributors, but presumably will also hope that the mere threat of a suit serves as a deterrent for future PES distribution and use.²¹³

Today, the League is no longer alone in its war on PES.²¹⁴ "[T]he days where it's 100% scorched-Earth between the league and the [MLBPA] are a long way in the rear-view mirror"²¹⁵ The MLBPA, although still loyal to all players, will no longer blindly support the players against whom there 'is overwhelming evidence[] that a player committed a violation of the program'²¹⁶ This fundamental shift in

²⁰⁹ Bill Madden, *Alex Rodriguez Suspension is a Home Run for Bud Selig and Major League Baseball*, N.Y. DAILY NEWS (Jan. 12, 2014), <http://www.nydailynews.com/sports/baseball/yankees/madden-a-rod-decision-home-run-bud-mlb-article-1.1576754>.

²¹⁰ Tim Brown, *Biogenesis Investigation Brings a Hardened Over-The-Top Stance from Bud Selig and MLB*, YAHOO SPORTS (June 21, 2013), <http://sports.yahoo.com/news/biogenesis-investigation-brings-a-hardened--over-the-top-stance-from-bud-selig-054730416.html>.

²¹¹ David Lengel, *Major League Baseball Targets Biogenesis Anti-Aging Clinic in Lawsuit*, THE GUARDIAN (Mar. 23, 2013), <http://www.theguardian.com/sport/blog/2013/mar/23/major-league-baseball-performance-enhancing-drugs-lawsuit>.

²¹² McCann, *supra* note 197.

²¹³ *Id.*

²¹⁴ Howard Bryant, *MLBPA's Sea Change over Biogenesis*, ESPN (Aug. 6, 2013), http://espn.go.com/mlb/story/_/id/9525457/biogenesis-transformation-mlbpa?src=mobile.

²¹⁵ Craig Calcaterra, *Michael Weiner: The Union Will Try to Persuade Clearly Guilty Biogenesis Players to Take a Plea*, NBC SPORTS (July 18, 2013), <http://hardballtalk.nbcsports.com/2013/07/18/michael-weiner-the-union-will-try-to-persuade-clearly-guilty-biogenesis-players-to-take-a-plea/>.

²¹⁶ Teri Thompson, et al., *Baseball Union Boss Michael Weiner Warns Biogenesis Drug Cheats Could Face Major Road Block*, N. Y. DAILY NEWS (July 17, 2013), available at <http://>

both the minds of the players and the MLBPA's actions should lead to more support of the League in its PES crackdown. Perhaps in 2016 the MLBPA will push for stricter penalties in a new JDA, given their acceptance of MLB's new tactics and willingness to cooperate. This might be more likely if the MLBPA see that strict penalties economically benefit the League and players.

The League can also claim a small victory because its subpoenas had been successful. It was not only the information itself that proved useful to MLB investigators in *BioGenesis*, it was also from whom they received the information; in fact, that may prove even more important in the future.²¹⁷ MLB subpoenaed defendants and individual third parties and also delivered subpoenas to large corporations such as Federal Express, AT&T Mobility, T-Mobile USA, UPS, and MetroPCS.²¹⁸ Although only a few large national corporations complied and turned data over, the League has set itself up for future successes by subpoenaing the same organizations that worked with them in the past.

Overall, MLB came away with what could, indeed, be a game-changing strategy in its battle against PES-use. At this point, MLB must assess each PES distributor on a case-by-case basis to determine if filing a tortious interference lawsuit is the best course of action for them. As Jeffrey Sonn, the lawyer for Sucart, expressed "[b]aseball's lawyers were very clever in creating this lawsuit. My hat's off to them."²¹⁹ Very clever indeed, and perhaps in several years, the *BioGenesis* case will be seen as the turning point in MLB's war on PES.

CONCLUSION

MLB entered 2013 with the same problem that had dogged them for the past decade: how to attack the PES problem when players are constantly finding new and undetectable methods to skirt the rules? Changes to drug-testing procedures, such as the implementation of blood testing for HGH beginning in 2013²²⁰ were a nice start, but are oftentimes a step or two behind the players. The most significant change to the League heading into the 2014 season is not the expansion of instant replay²²¹ or the elimination of home plate collisions;²²² rather,

www.nydailynews.com/sports/i-team/weiner-warns-drug-cheats-face-major-road-block-article-1.1401845 (quoting former executive director of MLBPA Michael Weiner).

²¹⁷ See generally *Electronic Trail Helped MLB with Bans*, ESPN (Aug. 7, 2013), http://espn.go.com/mlb/story/_/id/9546552/mlb-built-biogenesis-case-facebook-texts-report-says.

²¹⁸ *Id.*

²¹⁹ Pacenti, *supra* note 177.

²²⁰ See Press Release, *supra* note 74.

²²¹ *MLB to Expand Instant Replay in 2014*, ESPN (Aug. 15, 2013), http://espn.go.com/mlb/story/_/id/9570618/mlb-expands-instant-replay-2014-include-manager-video-challenges.

²²² *MLB to Ban Home Plate Collisions*, ESPN (Dec. 15, 2013), http://espn.go.com/mlb/hotstove13/story/_/id/10121849/mlb-intends-ban-home-plate-collisions-2015.

it is the League arming itself with the most effective weapon yet in the war on PES: a lawsuit.²²³

MLB's fundamental shift in dealing with performance-enhancing drug issues means PES-distributors are no longer immune from MLB prosecution and the Players are no longer the only ones at risk.²²⁴ MLB sought a game-changing strategy in its efforts to rid PES from the game of baseball, and in the *BioGenesis* suit, it may have found one.

There are no guarantees that this strategy will work again, especially considering the fact-intensive nature of tortious interference claims and the differences between state laws in evaluating such claims. In fact, the threat of a tortious interference lawsuit may prove to be a more effective deterrent than the League actually filing multiple lawsuits, as the League can use this leverage against distributors without risking the possibility of an adverse ruling. The *BioGenesis* lawsuit was a rousing success, not only in the end result, but also because Judge Dresnick allowed MLB "carte blanche" in the discovery phase of this case.²²⁵ Another judge in the same court may have ruled differently. When deliberating whether or not to file a similar lawsuit in the future, MLB must be careful because of the uncertainty still remaining on these issues.

The *BioGenesis* suit represented a calculated gamble by the League—it was an experiment designed to turn the tide in what had been a losing battle for MLB.²²⁶ In securing the suspensions of fourteen players, MLB pulled a straight flush and proved its fight against PES is not as toothless and ineffective as some have suggested. Whether that straight flush turns out to be a royal flush depends on when and where MLB chooses to employ this new strategy next; and most importantly, how effective this shocking new strategy will be the second time around.

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²²³ McCann, *supra* note 197.

²²⁴ Schmidt, *Florida Clinic*, *supra* note 6.

²²⁵ Pacenti, *supra* note 177.

²²⁶ Although MLB suspended numerous players throughout the time the JDA has been in force, Alex Rodriguez's apparent defiance and Ryan Braun's absolution by a procedural technicality shows that something needed to change in order for the JDA to be effective.

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