UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

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| FELIPE "TRES" BARRERA III, individually and on behalf of all those similarly situated, | § | |
| Plaintiffs, | § | |
| VS. | § | CIVIL ACTION NO. 7:20-cv-00198 |
| MAJOR LEAGUE BASEBALL; OFFICE OF THE COMMISSIONER OF BASEBALL d/b/a MAJOR LEAGUE BASEBALL; DR. DANIEL EICHNER; SPORTS MEDICINE RESEARCH AND TESTING LABORATORY; and LABORATOIRE DE CONTROLE DU DOPAGE, | § | |
| Defendants. | § | |

# ORDER

The Court now considers the "Application for an Emergency Temporary Restraining Order and Injunctive Relief"[1] filed by Plaintiff and "Plaintiff's Request for Notice of Setting for Ex-Parte Emergency Temporary Restraining Hearing."[2] After considering the application and request, record, and relevant authorities, the Court **DENIES** Plaintiff's application, declines to issue a temporary restraining order, and **DENIES** the request to set a hearing.

## I. BACKGROUND AND PROCEDURAL HISTORY

This case is a labor relations dispute arising under the Labor Management Relations Act.[3] In summary, Plaintiff Tres Barrera trained in high school and college to be a major league sports

[1] Dkt. No. 1 at 31.
[2] Dkt. No. 17.
[3] Dkt. No. 1 at 5, ¶ 18 (citing 29 U.S.C. § 185(a)).

player.[4] "In June 2016, Plaintiff was chosen as a catcher in the sixth round of the Amateur Draft by the Washington Nationals," which is a Major League Baseball team.[5] While Plaintiff was practicing in the minor leagues and after his major league debut game on September 14, 2019, he was administered various drug tests, which all had negative results until a January 4, 2020, test. The January test detected 10 picograms[6] per milliliter (of Plaintiff's urine) of Dehydrochlormethyltestosterone, often known as DHCMT or oral turinabol.[7] "DHCMT, otherwise known as oral turinabol, is an anabolic androgenic steroid and a Performance Enhancing Substance that is banned under all MLB [Major League Baseball] Drug Programs."[8] Subsequent to Plaintiff's positive January drug test, Defendant MLB suspended Plaintiff for 80 games.[9]

Plaintiff appealed his suspension to the Major League Baseball Arbitration Panel, presumably pursuant to one or both of the "MLB's Joint Drug Prevention and Treatment Program ('JDA') and Collective Bargaining Agreement ('CBA')."[10] In a 28-page decision, the arbitration panel composed of "Ian M. Penny, Esq., Players Association Member; Patrick Houlihan, Esq., Office of the Commissioner ("BOC") Member; and Mark L. Irvings, Esq., Chair"[11] reviewed the JDA and the testimony of Defendant Dr. Daniel Eichner. The arbitration decision appears to rest chiefly on the testimony of Dr. Eichner, as the decision concludes that, although the Players Association representing Plaintiff Barrera showed that it was possible that Plaintiff "was inadvertently exposed to a contaminated substance before June 2016" (when

[4] All allegations are taken from Plaintiffs' complaint. Dkt. No. 1.
[5] Dkt. No. 1 at 7, ¶ 29.
[6] Dkt. No. 2 at 6 n.2 ("A picogram is equal to one-trillionth of a gram.").
[7] Dkt. No. 1 at 8, ¶ 31.
[8] Dkt. No. 2 at 8.
[9] Dkt. No. 1 at 16, ¶ 58.
[10] *Id.* at 2, ¶ 1. *But see* Dkt. No. 2 at 2 ("This case was submitted to arbitration pursuant to the parties' Basic Agreement effective December 1, 2016.").
[11] Dkt. No. 2 at 2.

Plaintiff was first subject to contractual restrictions not to take DHCMT), Plaintiff failed to carry his burden under the JDA to show "with objective evidence, that the test of his January 5, 2020[12] specimen did not accurately and reliably establish that he violated the JDA while subject to its terms."[13] Plaintiff takes exception to Dr. Eichner's testimony,[14] but "did not have the ability, to independently, or otherwise, select or present an expert, under the JDA and CBA" at the arbitration hearing.[15]

On July 24, 2020, the arbitration panel issued its decision denying Plaintiff's grievance and declining to reverse his suspension.[16] On July 27th, Plaintiff filed the instant complaint and application for an "emergency temporary restrainig [sic] order against MLB because Plaintiff faces an immediate minimum 80-game suspension."[17]

## II. DISCUSSION

The Court **DENIES** Plaintiff's application for a temporary restraining order for three reasons: (1) the complaint is not verified, (2) Plaintiff has failed to show a likelihood of success, and (3) Plaintiff has failed to show irreparable harm.

### (1) The Complaint is not verified

Federal Rule of Civil Procedure 65(b)(1)(A) requires a verified complaint or affidavit as prerequisites to the granting of a temporary injunction. Plaintiff included a "Verification" by his attorney which asserts "that all factual statements contained in said document [the complaint] are true and correct within my personal knowledge."[18] However, attorneys are already required to

[12] The Court assumes this refers to the January 4, 2020, test that Plaintiff refers to in the complaint. *See* Dkt. No. 1 at 8, ¶ 31.
[13] Dkt. No. 2 at 27.
[14] *See* Dkt. No. 1 at 11–15, ¶¶ 44–57 (alleging that Dr. Eichner's testimony on DHCMT is unreliable).
[15] *Id.* at 15, ¶ 56.
[16] Dkt. No. 2.
[17] Dkt. No. 1 at 31, ¶ A (cleaned up).
[18] Dkt. No. 1 at 38.

sign pleadings and indicate by their signature that factual contentions have evidentiary support,[19] and an attorney's verification of the facts is generally inappropriate because lawyers are not to be witnesses to material facts in their client's case.[20] Facts and verifications are to be attested by parties and witnesses themselves, not their lawyers. The Court finds the verification in Plaintiff's complaint is improper. Because a temporary restraining order may issue "*only if* specific facts in an affidavit or a verified complaint clearly show" the requisite elements,[21] the lack of proper verification or affidavit is an independent reason to deny the application for a temporary restraining order.

**(2) Plaintiff has failed to show a likelihood of success**

> There are four prerequisites for the extraordinary relief of a temporary restraining order or preliminary injunction. To prevail, Plaintiff must demonstrate: (i) a substantial likelihood of success on the merits; (ii) a substantial threat of immediate and irreparable harm, for which he has no adequate remedy at law; (iii) that greater injury will result from denying the temporary restraining order than from its being granted; and (iv) that a temporary restraining order will not disserve the public interest.[22]

Plaintiff cannot satisfy these elements. He alleges that Defendants failed to provide him with "accurate and reliable testing of the prohibited substance DHCMT, which was promised to him in the CBA and JDA," and further argues that the "objective evidence that the test results were not reliable or accurate, yet the evidence was not rationally evaluated by the Arbitration Panel" which instead relied on Dr. Eichner's testimony.[23] But "[j]udicial review of a labor-arbitration decision pursuant to such an agreement is very limited. Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or

[19] *See* FED. R. CIV. P. 11(b)
[20] *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08 ("A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client . . . .").
[21] FED. R. CIV. P. 65(b)(1)(A).
[22] *Dearmore v. City of Garland*, 400 F. Supp. 2d 894, 898 (N.D. Tex. 2005) (citing *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987) & *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974)).
[23] Dkt. No. 1 at 33, ¶¶ 120–21.

misinterprets the parties' agreement."[24] The Court is not empowered to vacate an arbitration decision even if it finds the judgment irrational or inequitable because the Court would thereby usurp the grievance resolution procedure the parties agreed upon.[25] "It is only when the arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice that his decision may be unenforceable."[26] In other words, the Court scrutinizes the "jurisdictional prerequisites of the collective bargaining agreement" to ensure the arbitrator acted within its authority and vacates the award if the arbitrator exceeds its power.[27]

Of note, Plaintiff alleges that "no other player has challenged the accuracy or reliability of the DHCMT test results."[28] Furthermore, Plaintiff alleges that Defendant Laboratoire de Controle du Dopage is "is the primary lab that handles MLB drug testing" throughout all 50 states and is a "World Anti-Doping Agency accredited laboratory,"[29] and that Defendant "Dr. Eichner is widely recognized as one of the world 'experts' in this field, in particular regarding the behavior and detection of DHCMT."[30] Nevertheless, at arbitration, Plaintiff argued that the DHCMT test was unreliable, which the arbitration panel dealt with at length but rejected.[31]

Plaintiff's central contention before this Court is that the arbitration panel failed to consider "how the unreliability and inaccuracies in Plaintiff's positive test violated the JDA."[32] But contrary to Plaintiff's assertion, the arbitration panel actually found that, under the JDA, Plaintiff "must show, with objective evidence, that the test of his January 5, 2020 specimen did not accurately and reliably establish that he violated the JDA while subject to its terms," but

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[24] *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001).
[25] *Id.* at 509–10.
[26] *Id.* at 509 (alteration in original) (quotation omitted); *accord Rock-Tenn Co. v. Paper, Allied-Indus., Chem. & Energy Workers Int'l Union*, 108 F. App'x 905, 906–07 (5th Cir. 2004).
[27] *Delta Queen Steamboat Co. v. Dist. 2 Marine Engineers Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989).
[28] Dkt. No. 1 at 35, ¶ 130.
[29] *Id.* at 6, ¶ 24.
[30] *Id.* at 12, ¶ 46.
[31] *See* Dkt. No. 2 at 26–28.
[32] Dkt. No. 1 at 28, ¶ 95.

Plaintiff failed to do so.[33] Plaintiff's contention before this Court amounts to disagreement with the arbitration panel's findings. Crucially for present purposes, Plaintiff has not attached any agreement or pointed to any specific contract language that Plaintiff alleges the arbitration panel ignored or exceeded. Without passing final judgment, the Court holds at this stage that Plaintiff has not shown the requisite substantial likelihood of success on the merits for issuance of a temporary restraining order.

**(3) Plaintiff has failed to show irreparable harm**

The possibility of irreparable harm must be more than speculative, incapable of being undone by money damages or especially difficult to calculate by monetary remedy, and unlikely to be susceptible to corrective relief at a later date.[34] Plaintiff's bolded allegation of irreparable injury is that "[h]e may not receive another chance to play at a high-level, while this lawsuit is pending, if injunctive relief is not granted."[35] This allegation is speculative by definition. Plaintiff's other allegations are that his "hard-earned reputation will continue to be tainted absent injunctive relief," and that he will be irreparably harmed by being suspended from the player roster,[36] but Plaintiff makes no argument and offers no authorities that these harms are incapable of later vindication and monetary compensation. In short, the Court is not persuaded that Plaintiff has shown a substantial threat of irreparable injury that necessitates a temporary restraining order.[37]

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[33] Dkt. No. 2 at 27.
[34] *TIGI Linea Corp. v. Prof'l Prod. Grp., LLC*, No. 419CV00840RWSKPJ, 2020 WL 3154857, at *4 (E.D. Tex. May 20, 2020) (collecting cases).
[35] Dkt. No. 1 at 34, ¶ 124.
[36] *Id.* ¶¶ 125–28.
[37] Plaintiff's citation to 1970's Supreme Court cases is wholly out of place. *See* Dkt. No. 1 at 33, ¶ 123. Plaintiff does not explain what "constitutional freedoms" are at stake in this case or what governmental action menaces Plaintiff's constitutional rights.

## III. CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiff's application for an emergency temporary restraining order.[38] Accordingly, there is no need for a hearing and Plaintiff's request for "formal notice of setting regarding Plaintiff's application for Emergency Temporary Restraining Order" is **DENIED**.[39]

IT IS SO ORDERED.

DONE at McAllen, Texas, this 29th day of July 2020.

Micaela Alvarez
United States District Judge

[38] Dkt. No. 1.
[39] Dkt. No. 17.