MAJOR LEAGUE
BASEBALL PLAYERS ASSOCIATION

DONALD M. FEHR
EXECUTIVE DIRECTOR

12 EAST 49th STREET
NEW YORK, NY 10017
TEL. (212) 826-0808
FAX: (212) 752-3649

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Via E-mail (Original by mail)

Hon. Henry A. Waxman, Chairman
Hon. Tom Davis, Ranking Member
Congress of the United States
House of Representatives
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Waxman and Ranking Member Davis:

I write in response to your letter of June 12.

Before responding to the questions posed in your letter, however, I would like to assure you that I was confident my 2005 testimony was entirely accurate at the time I provided it. Sparked by your latest inquiry, I asked counsel to review the record, and as a result of that review, I remain confident. As I said then, use of illegal steroids declined significantly in 2004, the data suggests convincingly that the 2004 program did work, and no player knew when he was going to be tested.

In addition, however, I also want to provide you with an overview of the extraordinary situation that we faced in 2004. Much of this information was sealed by court orders at the time of the March 2005 hearing, but has since been made public in a decision issued by the 9th Circuit Court of Appeals in December, 2006 (later withdrawn), and in a revised decision issued by the same panel in January 2008. Accordingly, there are things I can say today that I could not have said at the hearing in 2005, and doing this may help to dispel any concerns you may have.

In Major League Baseball, as you are well aware, suspicionless drug testing was a controversial subject for many years. But, as part of a new collective bargaining agreement reached in 2002, the parties agreed there would be random testing for steroids. The agreement we reached was one that attempted to strike a balance between the interest

in conducting such tests and the privacy interests that Congress and the federal government have sought to protect when establishing testing programs for federal employees.

By way of background, the Supreme Court has long recognized the special privacy interests implicated by urine testing of employees. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989). The Court has also recognized that unauthorized dissemination of drug testing results is a serious intrusion on privacy. *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001). Congress has also been quite sensitive to the need to guard the confidentiality of voluntarily-taken drug tests. See 42 U.S.C. 290dd-2. And the federal government has been very careful in determining which federal employees are subject to random testing under the Drug-Free Workplace Act, 41 U.S.C. Sec 701 et seq..[1]

The first testing performed under our 2002 Joint Drug Agreement (JDA) with Major League Baseball was "survey testing" done in 2003. Under the terms of the JDA (voted on and ratified by the players) these tests were to be both confidential and anonymous; no one was ever supposed to know who tested positive. Instead, the results were to be tabulated and if the number of positives exceeded a specific threshold (5%), identified "program testing," with disciplinary consequences, was to begin the next year. As you know, the 2003 tests yielded a number of positives slightly above the 5% threshold, and as a direct consequence of that result program testing commenced in 2004. The results of the 2004 program testing were as previously reported to you.

It is important to remember that under the agreement in place for 2004, each player was to be tested one time -- and only one time -- on an unannounced basis. Obviously, this meant that once a player was tested in 2004, he knew that he would not be tested again that year. Since then, as you are aware, we have amended the JDA three times, and now a player is always subject to additional testing, no matter how many times he has already been tested in a given year.

In 2004, the testing program was run by the Health Policy Advisory Committee (HPAC), a joint labor-management committee.[2] Under HPAC's direction, testing in 2004 did not begin until July, for a number of reasons. Because the testing had disciplinary consequences (in 2003 it did not) the manner in which the testing was to be conducted had to have the highest degree of quality control. HPAC had to consider a myriad of issues, from the quality of testing kits to the location and supervision of testing venues, but principal among these were the perceived need for a WADA-certified laboratory to conduct the analysis, along with the adoption of a testing protocol. The

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[1] See Memorandum from the Interagency Coordinating Group Executive Committee to Federal Agencies, Guidance for selection of Testing Designated Positions III(D)(1) (August 2, 1999) *available at* http://dwp.samhsa.gov/FedPgms/Files/TDPs.aspx.

[2] I was not a member of HPAC.

contract with the WADA lab in Montreal was not finalized until May 9, and the protocol worked out and testing kit agreed upon thereafter.[3]

In implementing the testing program, however, HPAC believed that because a player would only be tested one time, any delay in beginning the testing would actually have a beneficial effect. Deterrence would last longer, because once a player was tested, he would know that he was not subject to being tested again in 2004.[4] It perhaps could go without saying, but obviously no player was told that testing would not commence on opening day, and so every player from the start of the season had reason to believe he might be tested on any day of the season. In fact, on March 17, 2004, the Commissioner's Office and the MLBPA sent a joint memo to all players which said that program testing "will begin shortly."

Early in the 2004 season, however, and before testing began, developments forced us to confront a very difficult and unanticipated situation. As we told Senator Mitchell:

> Because of certain actions by the Government in 2004 (which led to litigation, much of which has been under seal), the parties were forced to confront a serious threat to the confidentiality and integrity of our program. To combat that threat, and indeed to save the credibility of our program, the parties undertook certain measures in that year only. (Mitchell Report p. 284)

The events in question commenced on April 8, 2004, when the federal government executed a search warrant and seized materials from the company that administered our program, Comprehensive Drug Testing, Inc. (CDT). Although the warrant named only 10 players and sought only information related to those specific individuals (thought to have some connection to a company known as BALCO), the government seized all of CDT's baseball records, including records related to the testing of every Major League player (more than 1,100) in 2003. The government did not stop there, but also seized thousands of other records of individuals in thirteen other major (non-baseball) sports organizations, three unaffiliated business entities, and three sports competitions. (513 F.3d at 1116-7.)

A few weeks later, the government executed additional search warrants both at CDT and at Quest Diagnostic, Inc., the laboratory where the specimens from our 2003 survey tests had been analyzed and were being kept. The government also issued grand

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[3] One feature of the 2004 testing that proved particularly problematical from a scheduling standpoint was the "paired testing" feature of the 2004 program, under which every player would be tested 5-7 days after he was initially tested in order to provide a urine sample that would inform the question whether an initially positive sample should be attributed to the lawful, and not prohibited, ingestion of a legal nutritional supplement (recall that androstenedione was a legal substance in that year).

[4] The Mitchell Report indicated that the parties agreed on a "moratorium" on testing early in the 2004 season (Mitchell Report at 281). I would not characterize it that way. As noted above, for reasons unrelated to the government's actions, HPAC did not begin testing early in the 2004 season.

jury subpoenas (seeking data which would include 2004 test results), attached to which was a list naming more than 100 players as to whom records and specimens were sought.

Because we believed that these wholesale seizures were illegal, the MLBPA and CDT promptly commenced proceedings in the Northern District of California, the Central District of California, and the District of Nevada seeking, *inter alia*, the return of the materials inappropriately and unlawfully seized. We also acted because we had an obligation to our membership to protect the confidentiality of these records which was an important part of our agreement with MLB. This litigation was conducted under seal by order of the district courts. While there were media reports about the seizures, the MLBPA, CDT, and the Department of Justice were legally precluded from discussing this litigation by the court orders.

On July 8, 2004, despite the ongoing threat to the confidentiality of the program that the government's actions represented, program testing of Major League players began. The date was set by HPAC in consultation with CDT. Based on a review of currently available information, I find no indication that HPAC's deliberations or decisions in regard to when testing began were influenced by the Government's actions or the related litigation. Indeed, the date appears to have been a function of the completion of HPAC's work with regard to the many details of a quality testing program (agreement on and contracting with a WADA-certified lab, development of a randomization process, testing protocols, logistics of paired testing, selection and design of testing kits, appointment of testing coordinators and collectors, etc.) Accordingly, I believe that the crisis created by the seizures had no meaningful impact on when testing began.

It is true that at this time that the MLBPA considered whether it was proper under the circumstances to go forward with the testing program. After all, as a result of the searches and subpoenas, we could not assure the players that the fundamental promise of confidentiality made to them in the JDA would be, or even could be, honored. But the MLBPA decided not to pursue that position at that time, but instead to litigate the cases and then deal with the aftermath in bargaining should that prove necessary.[5] Program testing went forward.

The parties did not, however, immediately begin testing for the players whose names appeared on the government list. This decision was premised on a belief that the players should not be required to submit to further tests without a fair explanation of their situation. In other words, the parties concluded that it was necessary to inform these players – whom the MLBPA represents - that the government had their names on a list of individuals whose records the government was targeting, and that they should assume the Department of Justice would attempt to secure their 2004 test results. The MLBPA and the Commissioner's Office agreed that those individuals would not be tested until a

[5] And in fact, as part of the new JDA reached in January 2005, language was added in an attempt to address these issues (see Section 7 of the January 2005 JDA). This language was discussed at the hearing on March 17, 2005.

lawyer for the MLBPA explained these circumstances to each individual subject to testing in a privileged attorney-client conversation. I cannot, however, emphasize this enough: no player knew that he was exempt from testing. No player was told that he or any subgroup of players would not be tested until a subsequent event occurred. Once the player was advised of his situation, that player was once again subject to testing. And both before and after the privileged conversation, so far as any individual player knew, he could be tested at any time, although only once, during the 2004 season.

There have been some media reports which have suggested or implied that because of the events related above, our 2004 program was somehow less effective than it otherwise would have been. I respectfully submit that the opposite is true. The longer a player went without being tested, the longer the deterrent effect of the single test to which he was subject before the season ended would last. In 2004, once a player was tested, that deterrent effect was no longer present, because in 2004 – as distinct from our current program – once a player was tested he knew that he would not be tested again.

On August 9, 2004, Judge Illston of the Northern District of California ruled in favor of the MLBPA, holding that the government had violated the players' Fourth Amendment rights, and ordering the government to return the materials seized. Then on August 19, 2004, Judge Mahan of the District of Nevada issued a similar ruling in favor of the MLBPA, also finding that the Fourth Amendment rights of the players had been violated and ordering the Government to return materials seized from Quest. Next, a similar ruling was made on October 1, 2004 by Judge Cooper in the Central District of California regarding materials seized at CDT. Finally, on December 10, 2004, Judge Illston again ruled in favor of the MLBPA, and quashed grand jury subpoenas for baseball testing records. (513 F.3d at 1122-8). At the district court level, our view that the government's seizures were not lawful was upheld.

Essentially, the three district judges found that the government had acted improperly in that it was not entitled to seize the records of the individuals *not* named in the warrant, simply because those individuals had the misfortune to have their data stored on the same computer which contained the data of the players who *were* named in the warrant. One judge said that she found "absolutely staggering" the implications of the government's "plain view" argument; i.e., that the government could seize all the data because the same computer contained data for the 10 players named as well for thousands of other players and other individuals who were not. (513 F.3d at 1124). The three district judges went on to find that the government had acted in callous disregard of the constitutional rights of the affected players. (Id. at 1122-8).

In September 2004 the conversations contemplated by the parties' agreement took place between an MLBPA attorney and each player on the government list who was then on a Major League roster. After those players had been informed of the legal situation (to the extent permitted by the sealing orders), each was tested before the season ended.

Two important points need to be made about these conversations. First, players were not told that they had tested positive in 2003; they were told that they were named on a list of players whose records the government was targeting. They also were told that, as reported in the press, the government had seized testing records in April, that in May the government had issued a grand jury subpoena with a list of player names attached, and that their name was included. The players were not told, however, what their 2003 test results were. Indeed, the MLBPA attorneys who spoke to the players had not seen the 2003 test results.

Second, there is a statement in the Mitchell Report that an unidentified player was told he would be tested within a short time frame (Mitchell Report p. 283). We asked the Mitchell investigators to tell us who the player is so that we could determine what the facts are, but our request was refused. But the following should be noted: every player who had not yet been tested in 2004 knew that he in fact would be tested sometime before the end of the season; the agreement provided that each player would be tested one time. Thus, the players with whom these conversations took place already knew they would be tested soon because there was little time left in the season and they had not yet been tested. For example, if a conversation with a player took place on September 10, and such player had not yet been tested in 2004, that player knew before the conversation took place that he was going to be tested sometime between September 10 and October 3, the end of the season. Nothing that took place in the conversation changed that fact. During these conversations, players were reminded that if they had not yet been tested they would be tested before the season ended. But again, the players already knew that.

At the time of the Committee hearing on March 17, 2005, the litigation described above remained completely under seal. We were not permitted to discuss the litigation.

As has now been publicly disclosed, the government appealed the three district courts' rulings that the wholesale seizures of baseball records violated the players' Fourth Amendment rights. The case was argued before the 9th Circuit Court of Appeals in San Francisco on November 15, 2005. On December 27, 2006 a divided panel of the 9th Circuit reversed the three district courts. See, *US v. CDT*, 473 F.3d 915. The government, however, filed a petition for rehearing and rehearing *en banc*, and the MLBPA and CDT did as well. Those petitions were granted and the court issued another opinion on January 24th of this year. *US v. CDT*, 513 F3d 1085. In its second opinion, the same panel ruled in favor of the MLBPA on one of the searches, but in favor of the government on another search and also reversed Judge Illston's ruling quashing the subpoenas. This second opinion, however, specifically invited further petitions for rehearing and rehearing *en banc*. The MLBPA and CDT in March filed another petition for rehearing, and the court ordered the government to file a response. As of today that petition for rehearing is still pending.

Also important for our discussion today, as noted above, the 9th Circuit made the court proceedings somewhat public for the first time. The 9th Circuit conducted oral argument on November 15, 2005 in open court; previously all pleadings and proceedings

had been sealed. A link to an audio recording of the argument was posted on the internet and generated some publicity. In addition, obviously, the two panel opinions were published. The district court orders sealing the litigation are still in effect. Nonetheless, we believe we can now discuss the litigation in a limited context, but only to the extent that it is described by the 9th Circuit opinions - a circumstance that was not true at the time of the Committee hearing on March 17, 2005.

With that background, let me now turn to your questions:

Q1: Was the MLB steroid testing program suspended during the 2004 season? What provisions of the collective bargaining agreement were invoked in order to begin this suspension? If the program was suspended, why did the MLBPA fail to inform Congress of this suspension during the 2005 hearing, or at any time thereafter?

Answer: I would not characterize the program as having been suspended. As explained above, for reasons related to the administration of the program in 2004 program testing did not begin until July 8. At that point, testing of the specific individuals named in government documents was delayed for the reasons set forth above, but ultimately did occur. Section 1D.1.(j) of the Joint Drug Agreement, among others, authorized the action taken. That provision directs HPAC "to take any and all other reasonable actions necessary to ensure the proper administration of the Program." Further, as explained above, players were never told that any testing was delayed; instead, as far as the players knew, they could have been tested on any day throughout the 2004 season. This matter was not raised at the 2005 hearing because: (1) it was not responsive to any question that the Committee asked, nor did it affect the truth or accuracy of any testimony; and (2), volunteering it would necessarily have required explanation of the litigation, which was under seal. Had such a question been asked, my likely response would have been that the question potentially involved discussion of matters under seal, and that we would put our counsel in touch with the Committee's counsel. Since 2005, we have made every effort to fully respond to any question raised by this Committee (and others).

Q2: When did the suspension of the program begin? How many samples were collected before this suspension began, and what percentage of these results were positive?

Answer: As explained above, testing commenced on July 8, 2004. Shortly before July 8, 2004, the MLBPA and the Commissioner's Office agreed to delay the testing of players named on the government list. No samples were collected before that agreement was reached.

Q3: When did the suspension of the testing program end for players who did not test positive in 2003? For these players, how many samples were collected after the end of the program suspension, and how many of these were positive?

Answer: Again, as explained above, testing commenced on July 8, 2004. For players whose names did not appear on the government list, there was no change in the procedures on account of the sealed litigation, and therefore no "end of the program suspension" or anything remotely similar. Overall results for 2004 were 12 positives out of 1,133 tests (1.06%).

Q4: Were players who tested positive in 2003 informed at any point that they had tested positive? How many of these players were informed, when were they informed, and what individuals with the MLBPA informed them of the positive results? Were these players also informed of the end of the program suspension?

Answer: Players were not told that they had tested positive. The MLBPA attorneys who spoke in 2004 with players on the government list had not seen test results and did not know who had tested positive. Privileged conversations with these individuals were conducted by MLBPA attorneys Michael Weiner, Gene Orza, and Steven Fehr. Our records indicate these conversations took place with 65 players between September 4 and 16.[6] The players were told (because we believed that as their legal representative we were obligated to tell them) that they were named on a list of individuals whose records the government was targeting. Players were not told that the program had been suspended; nor were they told a suspension had ended. During these conversations, players were told that if they had not yet been tested in 2004, that they would be tested before the season ended, but that was something the players already knew before the conversations took place, because the agreement required that each player be tested once during the year. They were not told (and no one knew) specifically when any test would be conducted.

Q5: When did the suspension of the testing program end for players who tested positive in 2003? For these players, how many samples were

[6] Our plan was to have the privileged conversations only with players on the government list who were still on Major League rosters. It appears now that there was one player with whom such a conversation took place who at that point had been removed from a Major League roster.

collected after the end of the program suspension, and how many of these were positive?

Answer: As discussed above, the program was not suspended and players were not told that they had tested positive. The players were told their name was on a list of individuals whose records the government was targeting. In mid-September, CDT was directed to complete the program testing including the testing of the players on the government list who were then on Major League rosters. Those tests were conducted between September 21 and the end of the regular season on October 3.[7] We believe the number of players on the government list who were tested at that time is sixty-four, and one tested positive (1.56%).

Q6: Following the end of the program suspension, were any of these players informed that they would be tested within a two-week or similar period? Were any other players informed of test results, or of when they would be tested? If players were informed, why did the MLBPA fail to inform Congress of this fact during the 2005 hearing, or at any time thereafter?

Answer: As explained above, the 2004 testing began on July 8. Players whose names were on the government list were not tested until after the privileged conversations which occurred in September. During the September conversations, players were told that if they had not yet been tested in 2004, that they would be tested before the season ended, but, as noted previously, that was something the players already knew before the conversations took place. No player was informed of any 2003 test results, but, as stated above, players whose names were on the government list were informed of that fact. Other than as stated above, no player was told when he or anyone else would be tested. With respect to informing Congress, please see our answer to Question One.

Q7: Which individuals at the MLBPA were aware of the 2004 program suspension at the March 2005 hearing: Were you aware of the program suspension?

Answer: Again, the 2004 testing program was not suspended. I was aware that HPAC did not begin testing until July, and also that individuals named on the government list were not tested until sometime in September (although I did not know who those individuals were). MLBPA attorneys Michael Weiner, Gene Orza, Robert Lenaghan, Jeffery Fannell, and

[7] Two players on the list were tested in August. That was a mistake, and the two players were tested again in September.

Steven Fehr were also aware that this subgroup of players was not tested before September. These attorneys knew of players on the government list, but did not know test results for these players. Other MLBPA employees acted as translators at certain interviews and are not named here, though their names can be provided to the Committee upon request.

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Thank you for letting us set the record straight on these issues. We also appreciate your patience in letting us put the facts in proper context before attempting to respond to your specific questions.

Before concluding I would like to make one final point. In his dissent in the most recent 9th Circuit opinion, Judge Thomas said:

> The majority's holding will also significantly and adversely impact the viability of voluntary workplace drug testing. As the National Chamber of Commerce has pointed out in its amicus brief, today's decision will make it very unlikely that employees or unions will agree to any voluntary employer drug testing in the future, as any promise of confidentiality has now been rendered completely illusory. It will make efforts to curb substance abuse in the workplace harder, not easier.

Whether one agrees or disagrees with these sentiments, this passage recognizes and describes the extraordinarily difficult situation that the MLBPA faced. It was a sensitive, unique and complex legal situation. We have done our best throughout to ensure that we fulfill the obligations we owe to our members, the courts, and this Committee.

Very truly yours,

Donald M. Fehr