BEFORE THE UNITED STATES

HOUSE OF REPRESENTATIVES

COMMITTEE ON ENERGY AND COMMERCE

SUBCOMMITTEE ON COMMERCE, TRADE,

AND CONSUMER PROTECTION

STATEMENT OF DONALD M. FEHR

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Mr. Chairman and Members of the Committee:

My name is Donald M. Fehr, and I serve as the Executive Director of the Major League Baseball Players Association (MLBPA). I appear today in response to the Chairman's invitation to testify.

Let me begin by once again stating the MLBPA's position. As I said when I appeared before this Committee nearly three years ago, the Major League Baseball Players Association does not condone or support the use by players - or by anyone else - of any unlawful substance, nor do we support or condone the unlawful use of any legal substance. I cannot put it more plainly. The unlawful use of any substance is wrong.

Moreover, the Players are committed to dispelling any suggestion that the route to becoming a Major League athlete somehow includes taking illegal performance enhancing substances, such as steroids. It does not take a physician to recognize that steroids are powerful drugs that no one should fool around with. This is particularly true for children and young adults, as the medical research makes clear that illegal steroid use can be especially harmful to them.

Playing Major League Baseball requires talent, drive, intelligence, determination, and grit. Steroids and other unlawful performance enhancing drugs (PEDs) have no place in the game.

I appeared before this Committee in May 2005. That same year I testified before the Senate Commerce Committee and also the House Government Reform Committee. In 2004 I appeared before the Senate Commerce Committee. And just last month I again testified at a hearing of the House Oversight and Government Reform Committee.

At the hearings held in 2004 and 2005 I believe that I explained the Joint Drug Agreement (JDA) that we had reached in 2002 and which began to operate in 2003, would be effective in ridding the game of unlawful PEDs. But there was strong interest in the Congress for us to do more. Accordingly, the Players took the virtually unprecedented step of twice reopening the collective bargaining agreement in order to strengthen the JDA. We announced a stronger program in January 2005, and, then, in November, 2005, announced the Joint Drug Program that is in place today.

Among other things, the November, 2005 agreement greatly increased penalties, significantly increased the number and frequency of tests, added off-season-testing, and provided that the program would be run by an Independent Program Administrator (IPA). When our November 2005 agreement was announced, it was praised by members of Congress of both Houses, many of whom had taken part in the various hearings. It was said to be the standard against which other leagues' programs should be measured; that it was what Congress was hoping for all along; and, that it was proof that the collective bargaining process had worked.

For his part, at the time that this agreement was announced, the Commissioner of Baseball said it was "the most stringent steroid testing program in sport." In his testimony before Government Reform last month, the Commissioner said much the same thing, calling our program the "strongest in professional sports." The agreement he praised is scheduled to run through December 2011, as do the other provisions of our collective bargaining agreements.

We agree with the Commissioner. Our agreement is the best in American professional sports. Our testing procedures are indeed state-of-the-art. The tests are conducted and the samples are collected by a well-respected independent company based in California, and the samples are analyzed by the world-class WADA-certified Olympic lab in Montreal.

Moreover, our agreement contemplates that we will discuss improvements during its term, and we have done so. For example, over the past two years, the parties have implemented changes - what Senator Mitchell calls "best practices" - including the following:

- We have added language confirming that players may be disciplined for "non analytical positives" i.e., - violations of the Program that are proven through means other than testing. And this has led to a number of publicly announced suspensions;

- We have improved our rules for processing therapeutic use exemptions.

- We have improved our collection procedures by adding player chaperones who are charged with watching players once they've been notified they are going to be tested that day.

- We have shortened the notice period given to Clubs that a collector is coming to the ballpark. Notice is now given the same day and only a few hours before the collector arrives;

And so, the program that in November 2005 was hailed as the standard for other sports has been strengthened over the past two years. As Senator Mitchell noted in his recent report (p. 276), baseball's program has the toughest penalties. We require year-round random testing, test players at the site of competition, test primarily on game days, test for stimulants in addition to steroids, and our program is run by an independent administrator.

Senator Mitchell also pointed out that our JDA is working to uncover the use of detectable performance enhancing substances. With respect to steroids, the numbers are clear: We have conducted more than 3,000 tests in each of the last two years, and the number of steroid positives we have had during that time is five. More precisely, during 2006 and 2007 we conducted 6,252 tests, and there were five steroid positives (two in 2006 and three in 2007).

But, some ask, what about undetectable PEDs, most notably Human Growth Hormone (HGH)? Have players switched to HGH, for which there is no currently available test, in order to avoid the testing regime? As I said last month, there is what appears to be well-founded concern about players using HGH. We have banned HGH. We have agreed to test for it as soon as a scientifically valid urine test exists. We have developed and agreed to procedures under which players may be suspended for HGH use based on evidence other than a positive test, a so called "non-analytical" finding. In each of the last two years, players were suspended on that basis.

Of course, it is possible that a scientifically valid blood test for HGH will be developed and become commercially available before a valid urine test. However, as Senator Mitchell has indicated, if there is a blood test developed in the near future it may well be of very limited utility; i.e. a player will need to have used HGH a very short time before the test in order for it to show up. That remains to be seen. In addition there may well be very serious issues involved with blood tests for athletes, particularly with respect to tests on competition days, and in baseball we play nearly every day for seven months. As of now, no major professional sport has blood testing for PEDs.

Nevertheless, as I said at the Government Reform hearing last month, if and when a scientifically valid blood test becomes available, the players will consider it in good faith at that time based on the facts then known.

In addition, there clearly is more that we as players can do in the way of education. Telling our nation's kids that drugs will destroy them is only half the battle. The nation's high school athletes - - and their parents - - will still aspire to college scholarships and will still pursue their athletic dreams. Knowing what to do is as important as knowing what not to do. Ballplayers must lead the way in developing nutrition, strength, flexibility and wellness routines. In an era of child obesity, this may turn out to be an even more powerful idea than we can appreciate today.

I suggest, however, that the biggest problem with HGH is very probably its availability to the American public. Anti-aging clinics and others openly advertise in magazines stressing the benefits of HGH. We will continue to take steps against HGH, but this is a societal problem, not one limited to baseball, or even to sports. If we didn't know that before, the investigations into internet pharmacy sales of HGH made public over the last year have made this apparent. The percentage of HGH sales to professional athletes evidently is a small part of the total.

All one needs do in order to appreciate the magnitude of this problem is to go onto Google's website and type in the words, "Where can I buy HGH?" Last month, this search returned 349,000 options in a quarter of a second. Advertisements for HGH, or products touted as HGH, can be found in newspapers and magazines nationwide. For example, in a recent Continental Airlines magazine, on page 99, there appeared an advertisement with the following headline: "Choose life. Grow young with HGH." (I understand that this ad appears in the current issue, too.) Plainly, abuse of HGH and

other illicit (and licit) pharmaceuticals and supplements is not just a baseball problem, but a national one.

I understand that Senator Schumer and Representative Lynch have introduced legislation to reclassify HGH as a Schedule III drug, making its treatment comparable to that of anabolic steroids. This approach may well be worth consideration. But I hope consideration will also be given to addressing the dangers of online sales and marketing of HGH that are false and misleading and to determining why so much product is apparently available to organizations, such as Signature Pharmacy in Florida, which do not appear to be prescribing the pharmaceutical legitimately. And, as I have suggested before, serious consideration should also be given to doing a study to determine whether the Dietary Supplement Health and Education Act (DSHEA) is being adequately enforced and/or whether the law needs to be amended. Certainly a thorough review of DSHEA, and how it is interpreted and enforced, would appear to be warranted.

Let me now turn to the Mitchell Report. Since 2002, the players and owners have worked together effectively in many ways to deal with the problems involving PEDs in baseball. But the Mitchell Report was not such an effort. Senator Mitchell's investigation was a unilateral action undertaken by management. Commissioner Selig hired former Senator George Mitchell and his law firm, DLA Piper, to conduct the investigation on behalf of the owners. We had no role in it whatsoever. In such circumstances a union, including one which represents baseball players, is obligated

under federal law to represent its members – all of its members - in connection with the investigation.

The MLBPA fulfilled it responsibilities. Where we thought we could cooperate with the Mitchell investigation we did. Where the rights of our members needed to be asserted, we did that. We gave appropriate legal advice to the players (and to their individual counsel) with respect to the employment consequences of the investigation, and urged players to retain individual counsel where that was appropriate. In many ways, we thought the conduct of the investigation was unfair. But, for the most part, we have avoided speaking publicly about those issues, and it would serve no purpose to do so here.

Most of the media comment and reaction to what is contained in the report has focused on the individual players who were named by Senator Mitchell, and what they are alleged to have done. That is as unfortunate as it is understandable. But, in that process, an important point may have been lost. The Mitchell Report reveals virtually nothing about drug use under our current new agreement, i.e. 2006 and 2007. There is not a single allegation in the report about any individual who may have used steroids during that time. There is only one incident discussed involving a player and HGH during 2006. But that incident was publicly known at that time, and the player was disciplined. In short, whatever the case was prior to our November 2005 agreement, the Report does not even remotely suggest that our current JDA is failing. To the contrary, it confirms that it is working very well.

We have accomplished much in this area through joint endeavors. But due to the investigation which led to the Report, we were forced to assume our more traditional role of making sure that players being investigated by management were appropriately represented. Hopefully we will now be able to work together with the Clubs in a more collaborative way.

In light of the recommendations made in the Mitchell Report, we have now been asked to reopen our contract for a third time. That is something which neither unions nor employers often do. There are certainly strong policy reasons why an employer and a union should respect the sanctity of a collective bargaining agreement, including its term, and not engage in frequent mid-term renegotiations.

Even so, we have never refused to discuss changes to our JDA at any time during its term, and we will not do so now. We have already held meetings with the Commissioner and his representatives regarding possible changes in the aftermath of the Mitchell Report, and more meetings will be held soon. Indeed, the Commissioner made a proposal to us last week, and we expect to have further discussions, and proposals of our own in the near future. This subject will obviously be one of those discussed in our Spring Training meetings with the players on each of the 30 teams.

The Players will engage in these discussions in good faith. Our record over the last few years demonstrates a willingness to be flexible in this area in order to improve our program consistent with our bargaining responsibilities.

To summarize, clearly baseball has been through much in the last few years regarding performance enhancing drugs. We had a serious problem. Few, if any, appreciated the seriousness of that problem, including the MLBPA, and including me. But since we began attacking this problem we have made significant strides. We have a strong program, and all available evidence indicates that it is working and the use of detectable PEDs has declined dramatically, as Senator Mitchell himself pointed out.

I am aware that some members of Congress, including perhaps some on this Committee, are considering introducing legislation to create federally-mandated drug-testing in professional sports. With due respect, I do not think any such action is necessary, warranted, or appropriate.

When I testified before this Committee in 2005 I said then that we believed that we had negotiated a program that would work. I said then that all the evidence we had then indicated we were on the right track. Later that year we amended our program for the second time; and today we are considering amending it yet again. And now we have even more evidence, all of which indicates that our efforts are succeeding.

Under the National Labor Relations Act, the negotiation of terms and conditions of employment is committed to good faith collective bargaining between employers and the organizations selected by and representing employees. Needless to say, the agreements we have reached are a product of that process. We continue to believe that collective bargaining is the appropriate forum for consideration and resolution of these issues. A fundamental premise of our labor laws is that solutions devised by the parties in the workplace are more likely to be workable and enduring, precisely because they are forged by those parties, rather than by others outside that relationship, no matter how well intentioned they may be.

Accordingly, it should come as no surprise that the Players Association does not believe that any such legislation should be enacted. As Congress has repeatedly noted, collective bargaining is the appropriate forum in which to deal with matters affecting terms and conditions of employment, even matters as controversial and politically volatile as random suspicionless employee drug testing in the absence of significant concerns about public safety. And the recent record in baseball clearly shows that we are dealing with our problems.

Finally, it should be noted that any legislation governing drug testing in private industry surely raises troubling constitutional questions. Suspicionless drug testing, mandated by the federal government, can run afoul of the general Fourth Amendment requirement that searches must be based on individualized suspicion of wrongdoing. The reason asserted to justify deviation from this principle in the context of professional

sports may well fall short under the Supreme Court's reasoning in *Chandler v. Miller*, 520 U.S. 305 (1997). There, the court held that a Georgia statute requiring candidates for state office to submit to drug testing was unconstitutional. Among other things, the Court determined that the stated intention of having candidates set a good example was not sufficient to justify the inherent invasion of privacy. It is likely that a law governing drug testing in professional sports would face a serious challenge as well.

Let me conclude by stating the obvious. The last few years have been difficult for baseball as we have come to grips with this issue. We should have done more, and sooner. But the good news is that since we began to act several years ago, real progress has been made. Today, we have a strong, fair, and effective program in major league baseball, a program the players support and, most importantly, a program that works.

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