



4-1-2016

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## Recommended Citation

Andrew Zoeller, *Singh v. PGA Tour: A David v. Goliath Battle*, 23 Jeffrey S. Moorad Sports L.J. 337 (2016).

Available at: <http://digitalcommons.law.villanova.edu/mslj/vol23/iss1/8>

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*SINGH V. PGA TOUR: A DAVID V. GOLIATH BATTLE*

*“If Vijay Singh’s lawsuit against the PGA Tour were a golfer, it would be officially on the clock.”<sup>1</sup>*

I. INTRODUCTION

Vijay Singh (“Vijay”) is known as one of the hardest working golfers on the Professional Golfers Association Tour (“the Tour”).<sup>2</sup> His tireless work ethic resulted in three major titles including the 2000 Masters, and two PGA Championships in 1998 and 2004.<sup>3</sup> Furthermore, Vijay holds the record for most wins after the age of forty and, in 2004, was ranked the number one golfer in the world, which he remained for a total of thirty-two weeks.<sup>4</sup> Vijay’s diligence on the practice range has translated into consistency throughout his career and ranked him third all-time on the list of career money winners.<sup>5</sup>

However, a January 2013 Sports Illustrated article caused Vijay’s hard-working reputation to encounter skepticism for the first time.<sup>6</sup> In the article, Vijay admitted using a product called deer antler spray, but said he did not know it contained a banned

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1. Pete Madden, *Vijay Singh’s Lawsuit Against PGA Tour Over Deer Antler Spray Moves Slowly*, GOLF MAGAZINE (June 3, 2014, updated Dec. 1, 2014), <http://www.golf.com/tour-and-news/vijay-singh’s-lawsuit-against-pga-tour-over-deer-antler-spray-moves-slowly> (describing slow pace of Vijay’s lawsuit).

2. See Derek Lawrenson, *Golf Legend Vijay Fortified by Hard Work Not Lure of Cash— Even at 45*, DAILY MAIL (Jan. 7, 2009, 18:37 EST), <http://www.dailymail.co.uk/sport/golf/article-1100475/Vijay-Singh-fortified-hard-work-lure-cash—age-45.html> (noting Vijay’s famous work ethic).

3. See *Bio*, THE OFFICIAL WEBSITE OF VIJAY SINGH, <http://www.vijaysinghgolf.com/biography> (last visited Mar. 8, 2016) (detailing Vijay’s career major victories).

4. See *id.* (describing Vijay’s record number of wins after age forty).

5. See *Stats – Career Money Leaders*, PGA TOUR, <http://www.pgatour.com/stats/stat.110.html> (last visited Oct. 10, 2015) (listing career money leaders on Tour).

6. See David Epstein, *Snake Oil For Sale and the Athletes Who, Science Be Damned, Think it Might Work*, SPORTS ILLUSTRATED, Feb. 4, 2013, available at <http://www.si.com/vault/2013/02/04/106280221/snake-oil-for-sale-and-the-athletes-who-science-be-damned-think-it-might-work>; see also Douglas Han, *What Do Vijay Singh and Barry Bonds Have in Common?*, THE TEE SHEET (Feb. 4, 2013), <http://www.theteesheet.com/teeing-off/singh-bonds-full/> (drawing similarities between Vijay and Barry Bonds, casting doubt on Vijay’s hardworking reputation). The article was initially posted to the Sports Illustrated website on January 29, 2013 under a different title. See *The Zany Story of Two Self Ordained Sports Science Entrepreneurs*, Sports Illustrated (Jan. 28, 2013), <http://www.si.com/nfl/2013/01/28/strange-lab-lured-numerous-athletes>.

performance enhancer.<sup>7</sup> As a result, the Tour began an investigation that spanned three months.<sup>8</sup> Finally, on April 30, 2013, the Tour Commissioner, Tim Finchem, announced that Vijay would not face punishment.<sup>9</sup> Ironically, just one week later on the eve of the 2013 Players Championship, the Tour's flagship tournament, Vijay filed a lawsuit against the Tour for its management of the investigation.<sup>10</sup>

This comment analyzes the Tour's duty of good faith and fair dealing with players, the Tour's alleged conversion of Vijay's prize money, and the Tour's Anti-Doping Program by focusing on *Singh v. PGA Tour*. First, Section II (A) highlights the history of the Anti-Doping Program on the Tour.<sup>11</sup> Next, Section II (B)(C) discusses Vijay's particular situation by reviewing the events preceding his lawsuit.<sup>12</sup> Section II (D) discusses the progression of Vijay's lawsuit.<sup>13</sup> Section III (A)(C) reviews the implied covenant of good faith and fair dealing for contracts as well as conversion under New York law.<sup>14</sup> Section III (D)(E) predicts the possible outcomes of both claims in court and the potential arguments by both sides.<sup>15</sup> Section IV concludes with a note on the possibly monumental implications of Vijay's lawsuit.<sup>16</sup>

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7. See Steve DiMeglio, *Vijay Singh Files Suit Against PGA Tour*, USA TODAY (May 8, 2013, 9:00 PM), <http://www.usatoday.com/story/sports/golf/2013/05/08/vijay-singh-pga-tour-deer-antler-spray/2143849/> (reporting Vijay's lawsuit against Tour).

8. See Doug Ferguson, *Tour Drops Its Doping Case Against Vijay Singh*, YAHOO! NEWS (APR. 30, 2013, 5:56 PM), <http://news.yahoo.com/tour-drops-doping-case-against-vijay-singh-203335757.html> (detailing events leading up to lawsuit).

9. See Adam Fonseca, *PGA Tour Commissioner Tim Finchem Says 'No Sanctions for Vijay Singh'*, SB NATION (Apr. 30, 2013, 3:59 PM), <http://www.sbnation.com/golf/2013/4/30/4287004/vijay-singh-deer-antler-spray-peds-pga-tour-ruling> (reporting Finchem's announcement that Vijay would not be punished).

10. See DiMeglio, *supra* note 7 (reporting Vijay's lawsuit).

11. See *infra* notes 17–60 and accompanying text (summarizing brief history of Tour's Anti-Doping Program).

12. See *infra* notes 61–88 and accompanying text (detailing circumstances prior to lawsuit).

13. See *infra* notes 89–135 and accompanying text (describing progression of lawsuit).

14. See *infra* notes 136–66 and accompanying text (analyzing covenant of good faith and fair dealing and conversion including possible damages).

15. See *infra* notes 167–212 and accompanying text (predicting possible outcome of both claims).

16. See *infra* notes 213–24 and accompanying text (concluding by noting possible far-reaching implications of trial).

## II. BACKGROUND

### A. History of the Tour's Anti-Doping Program

The Professional Golfers Association of America (“PGA”) officially began in 1916.<sup>17</sup> Its humble beginnings included mostly club professionals who taught lessons and managed country clubs.<sup>18</sup> However, by the 1960’s the organization included many touring professionals whose livelihood was playing tournament golf for money.<sup>19</sup> As a result, in 1968 the touring professionals split from the PGA of America to form the PGA Tour.<sup>20</sup>

As many other professional sporting leagues continued to grow in popularity, most adopted drug-testing policies in response to recent scandals.<sup>21</sup> However, the Tour did not adopt a drug-testing policy because of its unique position among the professional sports.<sup>22</sup> Golf is physically distinct because it does not involve any contact, and it is ethically distinguishable from other sports because players call their own penalties.<sup>23</sup>

Nevertheless, in 2008 the “Tour reluctantly joined the modern era of sports” by implementing the Anti-Doping Program.<sup>24</sup> The random drug testing policy affects all tournaments conducted by the Tour and includes around five hundred tests per season.<sup>25</sup> This important change for the Tour created expectations of enhanced

17. See *PGA of America History – 1916-1919*, PGA, <http://www.pga.com/pga-america/pga-feature/pga-america-history-1916-1919> (last visited Mar. 8, 2016) (chronicling early history of PGA).

18. See *PGA of America History – 1960-1969*, PGA, <http://www.pga.com/pga-america/pga-feature/pga-america-history-1960-1969> (summarizing history of PGA of America from 1960-1969); see generally Stan Awtrey, *Professionals’ Split was a Good Thing for the Game*, PGATOUR.com (Feb. 11, 2009), [http://www.pgatour.com/news/2009/02/11/awtrey\\_column.print.html](http://www.pgatour.com/news/2009/02/11/awtrey_column.print.html) (providing additional details on split between PGA and Tour).

19. See *id.* (chronicling evolution of PGA); see also Awtrey, *supra* note 18.

20. See *id.* (noting split between PGA of America and Tour); see also Awtrey, *supra* note 18.

21. See Doug Ferguson, *PGA Tour Begins New Era with Drug Testing*, USA TODAY (July 2, 2008, 5:21 PM), [http://usatoday30.usatoday.com/sports/golf/2008-07-02-630332920\\_x.htm](http://usatoday30.usatoday.com/sports/golf/2008-07-02-630332920_x.htm) (concluding golf has finally entered modern age with Anti-Doping Program and testing).

22. See *id.* (revealing drastically different opinions of policy on Tour).

23. See *id.* (noting difference between professional golf and other sports).

24. *Id.* (noting reluctance of Tour to implement Anti-Doping Program).

25. See *id.* (describing logistics of implementing Anti-Doping Program); see also Stephen Hennessey, *John Daly Calls Randomness of PGA Tour’s Drug-Testing Policy “a Joke,”* GOLF DIGEST (Mar. 11, 2015), <http://www.golfdigest.com/blogs/the-loop/2015/03/john-daly-calls-pga-tours-drug.html> (citing John Daly, Tour player, questioning random nature of Tour’s drug-testing).

transparency, which was lacking in the past.<sup>26</sup> However, these expectations of the Tour have remained unfulfilled.<sup>27</sup> Instead, the cloak of secrecy surrounding the Tour, and the controversy that follows, has engulfed the Anti-Doping Program from the outset.<sup>28</sup>

In 2009, tour player Doug Barron tested positive for synthetic testosterone and became the first player suspended under the new Anti-Doping Program.<sup>29</sup> Interestingly, Barron had been taking synthetic testosterone for four years prior to the Anti-Doping Program to treat his low levels of testosterone but was denied an exemption by the Tour, forcing him to quit taking it when the Anti-Doping Program began.<sup>30</sup> Nevertheless, a few weeks before his only tournament on the Tour that year, and after consulting with his doctors, Barron decided to take a shot of synthetic testosterone to return his testosterone to normal levels because he had been feeling very lethargic.<sup>31</sup> Unfortunately, Barron was randomly tested at the tournament and failed the test.<sup>32</sup> He decided not to appeal, filed a lawsuit that was later settled, and served a one-year suspension.<sup>33</sup> Ironically, upon returning from his suspension the Tour granted him a medical exemption to continue taking synthetic testosterone.<sup>34</sup>

Another Anti-Doping Program controversy involved the Tour player Mark Calcavecchia in 2011.<sup>35</sup> During 2011, Calcavecchia had

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26. See Karen Crouse, *An Admission by Singh, an Opportunity for the Tour*, N.Y. TIMES (Jan. 30, 2013), <http://www.nytimes.com/2013/01/31/sports/golf/an-admission-by-singh-an-opportunity-for-the-pga-tour.html> (declaring Vijay's admission an opportunity for Tour to provide full transparency on Anti-Doping Program and implementation).

27. See *id.* (revealing Tour's missed opportunity for greater transparency with investigation of Vijay).

28. See Matthew Rudy, *The PGA Tour's Pretend Drug Policy*, GOLF DIGEST (Aug. 1, 2014), <http://www.golfdigest.com/blogs/the-loop/2014/08/column-the-pga-tours-pretend-d.html> (critiquing Anti-Doping Program for lacking transparency).

29. See Doug Ferguson, *Drug Suspension Lifted, Barron Heads to Q-School to Try to Regain Status*, PGA (Nov. 15, 2010, 6:07 PM), <http://www.pga.com/drug-suspension-lifted-doug-barron-heads-q-school-try-regain-status> (reporting Barron as first person disciplined under new Anti-Doping Program).

30. See *id.* (recounting why Barron was taking synthetic testosterone).

31. See *id.* (detailing events leading up to failed drug test).

32. See *id.* (reporting Barron's failed drug test).

33. See *id.* (noting Barron's reaction to failed test).

34. See *id.* (observing Barron was later granted medical exemption to take synthetic testosterone).

35. See Craig Dolch, *The First Golfer to Use Deer-Antler Spray from S.W.A.T.S? It's Not Who You Think*, YAHOO! SPORTS (May 10, 2013, 8:59 AM), <http://sports.yahoo.com/news/first-golfer-deer-antler-spray-125900248—golf.html> (providing background on other players who used deer antler spray); see also Adam Watson & Eric Adelson, *PGA Tour Cracks Down On Deer Antler Spray*, THE POST GAME (Aug. 11,

been dealing with frequent back and wrist issues, so he began using a spray containing a substance called IGF-1 from the company “Sports With Alternatives to Steroids” (“SWATS”).<sup>36</sup> Although the Tour does not test for IGF-1, once the Tour realized Calcavecchia was using the spray it immediately told him to stop.<sup>37</sup> Later in 2011, the Tour issued a warning to all players about the prohibited ingredients in the spray.<sup>38</sup> Interestingly, Calcavecchia did not receive any punishment for his use of the banned substance.<sup>39</sup>

Yet another intriguing controversy surrounds one of the best young players in the game of golf, Dustin Johnson.<sup>40</sup> Johnson mysteriously missed time in 2012, which he attributed to a back injury from lifting a jet ski, and also returned to action in February 2015 after a six-month hiatus, which he attributed to personal struggles.<sup>41</sup> During Johnson’s recent six-month break, the Tour even issued a statement saying Johnson was not suspended.<sup>42</sup> However, multiple reports speculated that Johnson’s six-month absence from the Tour was due to testing positive for cocaine, supposedly his third failed drug test since turning professional.<sup>43</sup> Within a month of Johnson’s return to the Tour he won the WGC-Cadillac Champi-

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2011), <http://www.thepostgame.com/features/201108/pga-tour-cracks-down-deer-antler-spray> (referencing another similar drug issue on Tour).

36. See Watson & Adelson, *supra* note 35 (describing spray and company). The spray produced by this company was the same that Vijay would later use. See *id.*

37. See *id.* (describing Tour’s action directing Calcavecchia to stop taking spray).

38. See Jason Sobel, *Singh Admits to Using Spray, ‘Shocked’ it Contains Banned Substance*, GOLF CHANNEL (Jan. 30, 2013, 1:50 PM), <http://www.golfchannel.com/news/golftalkcentral/singh-admits-using-spray-shocked-it-contains-banned-substance/> (citing Tour’s press release warning players about use of spray).

39. See Michael McCann, *Vijay Singh v. PGA Tour: Why Singh Sued and How the Tour Will Fight Back*, GOLF MAGAZINE (May 8, 2013), <http://www.golf.com/tour-and-news/vijay-singh-sues-pga-tour-over-alleged-ped-policy-violation> (observing Calcavecchia’s actions did not warrant suspension).

40. See Rudy, *supra* note 28 (listing Johnson’s suspect absences from tour and reports that he failed three drug tests).

41. See Jason Sobel, *DJ’s Past in Spotlight with Reported Suspension*, GOLF CHANNEL (Aug. 1, 2014, 6:45 PM), <http://www.golfchannel.com/news/jason-sobel/djs-troubled-past-spotlight-latest-drug-suspension/> (questioning Johnson’s excuses for missing significant playing time); see also Rudy, *supra* note 28 (reporting Johnson was suspended by Tour for third failed drug test).

42. See Sobel, *supra* note 41 (noting Tour’s insistence Johnson was not suspended during six-month hiatus); see also Rudy, *supra* note 28 (disagreeing with Tour’s insistence Johnson was not suspended).

43. See Sobel, *supra* note 41 (citing various sources confirming Johnson was suspended by Tour); see also Rudy, *supra* note 28 (presenting sources confirming Johnson was suspended after his third failed drug test including two others occurring in 2009 for marijuana and 2012 for cocaine).

onship, and then a few months later he tied for second at the 2015 U.S. Open, only fueling speculation surrounding his absence.<sup>44</sup>

The latest controversy involving the Anti-Doping Program occurred on July 7, 2015 when Scott Stallings, a three-time winner on the Tour, was suspended ninety days for violating the Anti-Doping Program.<sup>45</sup> In late 2014, Stallings began suffering serious fatigue that made finishing a round of golf difficult.<sup>46</sup> After consulting with his doctor, who urged him to check with the Tour for compliance, Stallings began taking dehydroepiandrosterone (“DHEA”) to help with his chronic fatigue issues, not in an attempt to gain a competitive advantage.<sup>47</sup> However, Stallings did not review the Tour’s list of banned substances and took DHEA for about two months without knowing it was banned by the Tour.<sup>48</sup> During the two-month period that Stallings took DHEA he was drug tested by the Tour and passed the drug test.<sup>49</sup> Stallings later attended a seminar by the Tour regarding banned substances, realized the Tour banned DHEA, and immediately self-reported the violation.<sup>50</sup> As a result of the violation, Stallings was suspended for ninety days spanning from July 7 to October 7, 2015, even though he passed a drug test while taking the banned substance, and then self-reported his inadvertent violation.<sup>51</sup>

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44. See Sam Weinman, *Tim Finchem Says Most Golf Fans “Don’t Really Want to Know” About Player Discipline. Do You Agree?*, GOLF DIGEST (Mar. 10, 2015), <http://www.golfdigest.com/blogs/the-loop/2015/03/tim-finchem-says-most-golf-fan.html> (noting speculation likely to follow Johnson incident); see also Sacha Pisani, *Dustin Johnson Rallies to Win WGC-Cadillac Championship*, SPORTING NEWS (Mar. 8, 2015), <http://www.sportingnews.com/sport-news/4637966-dustin-johnson-wgc-cadillac-championship-miami-score-results-final-round-bubba-watson-rory-mcilroy> (reporting Johnson’s win within a month of his return).

45. See Sean Zak, *Scott Stallings Suspended by PGA Tour Under Anti-Doping Policy*, GOLF MAGAZINE (July 7, 2015), <http://www.golf.com/tour-and-news/scott-stallings-suspended-pga-tour-under-anti-doping-policy> (reporting Stallings’ suspension by Tour).

46. See Rex Hoggard, *Stallings’ Case Further Highlights Tour’s Anti-Doping Inadequacy*, GOLF CHANNEL (Jul. 8, 2015, 1:30 PM), <http://www.golfchannel.com/news/rex-hoggard/stallings-case-further-highlights-tours-anti-doping-inadequacy/> (describing Stallings’ medical situation prior to doping violation).

47. See Zak, *supra* note 45 (highlighting Stallings’ off course health issues); Hoggard, *supra* note 46 (noting Stallings’ intent); see also DHEA, MEDLINEPLUS (June 9, 2015), <https://www.nlm.nih.gov/medlineplus/druginfo/natural/331.html> (describing DHEA).

48. See Hoggard, *supra* note 46 (reporting that Stallings did not review Tour’s banned substances list prior to using DHEA).

49. See *id.* (reporting that Stallings passed Tour drug test while taking DHEA).

50. See *id.* (reporting that Stallings self-reported violation).

51. See Zak, *supra* note 45 (detailing length of suspension).

Stallings' violation and subsequent suspension resembles Vijay's situation because both admitted to using a banned substance, "both took substances that many argue have no performance enhancing benefit if taken orally[,] and neither failed a drug test."<sup>52</sup> Some players including Phil Mickelson, a star on the Tour, defended Stallings' right to take DHEA because the goal was to improve his overall health and not performance enhancement.<sup>53</sup> Therefore, Mickelson believed the penalty did not fit the crime and was too harsh considering Stallings' intent.<sup>54</sup>

This recent Stallings incident propelled the Tour's Anti-Doping Program back into the spotlight. Some critics of the Anti-Doping Program believe the Tour missed an opportunity to deviate from the guidelines and lessen the penalty by considering Stallings' intent as a mitigating factor.<sup>55</sup> Furthermore, the Tour had previously diverged from the mainstream approach when it did not fully implement the World Anti-Doping Agency's ("WADA") list of banned substances when launching its Anti-Doping Program in 2008.<sup>56</sup> Additionally, worldwide anti-doping regulation is typically characterized by full transparency throughout the process.<sup>57</sup>

Although the Tour's Anti-Doping Program sought to convey transparency, it failed because of its policy to only disclose violations for performance enhancing drugs and not violations for recreational drug use.<sup>58</sup> Furthermore, the Tour's management of Vijay's situation shows that the Anti-Doping Program lacks not just trans-

52. Hoggard, *supra* note 46 (drawing similarities between Stallings and Vijay incidents).

53. *See id.* (listing Tour players defending Stallings). Mickelson observed: "[Stallings] was, in my opinion, trying to help his overall health, doing something that every other citizen in the country has the right to do, and it was taken away from him because he plays golf for a living and I don't necessarily agree with that." *Id.* (quoting June 2015 statement by Mickelson).

54. *See id.* (quoting statements by Tour players who opposed length of Stallings' punishment).

55. *See, e.g., id.* (portraying Stallings' situation as another mistake by Tour regarding Anti-Doping Program).

56. *See id.* ("When the Tour introduced testing in 2008 it didn't fully follow the WADA list of banned substances or the hallmark transparency that defines the global effort to end doping.").

57. *See id.* (explaining irony that Tour's Anti-Doping Program is unique for its lack of transparency).

58. *See Rudy, supra* note 28 (observing Tour's lack of transparency for Anti-Doping Program violations); *see also* Pete Madden, *Tour Considers Changes to Policy on Reporting Conduct Violations*, GOLF MAGAZINE (Mar. 10, 2015, updated Mar. 11, 2015), <http://www.golf.com/tour-and-news/pgs-tour-considers-changes-policy-reporting-conduct-violations> (noting discrepancy by Tour in reporting violations of Anti-Doping Program).



parency but also clarity.<sup>59</sup> As golf's return to the Olympics in Summer 2016 draws closer, the rift between anti-doping testing in golf, compared to other sports, continues to widen.<sup>60</sup>

### B. The Tour's Current Anti-Doping Program Manual

The Tour's Anti-Doping Program Manual ("the Manual") extensively details the rules and regulations of the Anti-Doping Program.<sup>61</sup> The Anti-Doping Program applies to all current members of the Tour as well as participants in any event co-sponsored by the Tour.<sup>62</sup> The banned substances are listed in Section 4 of the Manual and are occasionally amended by the Tour.<sup>63</sup> The Manual also clearly states that all players are strictly liable for ingestion of prohibited substances.<sup>64</sup> As a result, any player found with a prohibited substance in his or her body, regardless of intent, has committed a doping violation.<sup>65</sup> Possible sanctions for violating the Manual include disqualification, forfeiture of prize money, and fines.<sup>66</sup> Importantly, the Manual also makes admitting conduct that violates the Anti-Doping Program a violation.<sup>67</sup>

### C. Vijay's Saga

Vijay's whirlwind journey began when a Sports Illustrated story hit the press on January 28, 2013.<sup>68</sup> In the article, Vijay admitted taking a product called deer antler spray on a frequent basis.<sup>69</sup>

59. See DiMeglio, *supra* note 7 (revealing questions about Tour's implementation of Anti-Doping Program as evidenced in Vijay's lawsuit).

60. See *id.* (observing golf's struggle to maintain acceptable anti-doping practices as it prepares for upcoming Olympics).

61. See PGA TOUR ANTI-DOPING PROGRAM MANUAL (Jan. 2009), available at [http://assets.sbnation.com/assets/208240/PGATOURANTI-DOPINGPROGRAM-MANUAL2009\\_1\\_.pdf](http://assets.sbnation.com/assets/208240/PGATOURANTI-DOPINGPROGRAM-MANUAL2009_1_.pdf) (providing Manual).

62. See *id.* at 3 (discussing who is subject to Anti-Doping Program).

63. See *id.* at 21–25 (listing banned substances).

64. See *id.* at 3 (stating players are strictly liable for using any prohibited substances "regardless of how the prohibited substance" enters the body).

65. See *id.* (explaining consequences of strict liability for players).

66. See *id.* at 15–16 (detailing sanctions for violations).

67. See *id.* at 8–9 (admitting to violation is violation); see also *id.* at 3 ("[I]f the PGA Tour becomes aware you have used a prohibited substance, including if by your own admission, you have committed a doping violation regardless of how the prohibited substance entered your body.").

68. See Bob Harig, *Vijay Could Face Suspension*, ESPN (Jan 30, 2013), [http://espn.go.com/golf/story/\\_/id/8897822/vijay-singh-admits-use-banned-substance-deer-antler-spray](http://espn.go.com/golf/story/_/id/8897822/vijay-singh-admits-use-banned-substance-deer-antler-spray) (detailing Sports Illustrated article where Vijay admitted he used deer antler spray); see also Crouse, *supra* note 26 (discussing Vijay's admission in Sports Illustrated article).

69. See Harig, *supra* note 68 (describing Vijay's frequent use of deer antler spray); see also Dina Spector, *Deer Antler Spray: The Natural Supplement That Seems Too*

Vijay received the product in November 2012 from SWATS and, in a statement coinciding with the article's publication, said he checked the list of ingredients in an attempt to avoid violating the Anti-Doping Program.<sup>70</sup> However, deer-antler spray contained IGF-1, a "natural, anabolic hormone that stimulates muscle growth" which is banned under the Tour's Anti-Doping Program.<sup>71</sup> As a result of Vijay's admission, the Tour immediately began an investigation.<sup>72</sup> Intriguingly, the Tour does not test for IGF-1 because it does not believe the testing is sufficiently reliable.<sup>73</sup> However, the Tour's Anti-Doping Program does not consider intent a defense to a violation.<sup>74</sup> Since Vijay admitted taking a banned substance, although unknowingly, it was still a violation of the Anti-Doping Program.<sup>75</sup>

The Tour's investigation of Vijay spanned nearly three months.<sup>76</sup> First, the Tour tested the deer-antler spray provided by Vijay to determine whether it contained IGF-1.<sup>77</sup> After testing, the

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*Good to Be True*, BUSINESS INSIDER (May 15, 2013, 1:07 PM), <http://www.businessinsider.com/what-is-deer-antler-spray-2013-5> (describing deer antler spray as product many professional athletes "use as a 'steroid alternative' to improve muscle strength or boost energy").

70. See Harig, *supra* note 68 (noting Vijay's review after receiving product). In a statement released by the PGA Tour on January 30, 2013, Singh stated:

While I have used deer-antler spray, at no time was I aware that it may contain a substance that is banned under the PGA Tour Anti-Doping policy. In fact, when I first received the product, I reviewed the list of ingredients and did not see any prohibited substances.

*Id.*

71. *Id.* (reporting deer antler spray contains banned substance IGF-1).

72. See *id.* (reporting Tour's immediate reaction to Vijay's admission).

73. See *id.* (reporting that Ty Votaw, PGA Tour Vice President of Communications and International Affairs, said "the tour does not test for IGF-1 nor human growth hormone because it does not feel comfortable with the reliability of such testing").

74. See PGA TOUR ANTI-DOPING PROGRAM MANUAL, *supra* note 61, sec. 2(D)(1)(a) (providing that "intent, fault, negligence or knowing use" of prohibited substances "is not necessary" to establish anti-doping violation).

75. See *id.* at 8–9. As relevant to Vijay's situation, the Manual provides: It is each player's personal duty to ensure that no *Prohibited Substance* enters his body. Players are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their samples. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the player's part be demonstrated in order to establish an anti-doping violation under Section D(1) . . . .

*Id.* at 8 (Section 2 (D)(1)(a)). Prohibited conduct includes: "Admissions by a player of any of the conduct listed in Sections (1)–(7) above." *Id.* at 9 (Section 2 (D)(8)).

76. See *PGA Tour Statement Regarding Vijay Singh*, PGA TOUR (Apr. 30, 2013), <http://www.pgatour.com/news/2013/04/30/pga-tour-statement-regarding-vijay-singh.html> (detailing Tour's statement regarding Vijay).

77. See *id.* (outlining steps of Tour's investigation of Vijay).

Tour confirmed it did contain the banned substance IGF-1.<sup>78</sup> As a result, the Tour privately informed Vijay that he would be suspended for ninety-day but did not reveal this sanction to the public.<sup>79</sup> Vijay then appealed the ninety-day suspension and was permitted to play while the investigation and appeals process moved forward.<sup>80</sup> As a result, the Tour continued its reputation for lacking transparency when the commissioner, discussing the investigation of Vijay's possible violation, stated, "[i]f no action is taken, it won't be reported."<sup>81</sup> Interestingly, the Tour investigated the matter for almost three months before it finally contacted WADA, which administers the Tour's Anti-Doping Program, with specific questions about IGF-1.<sup>82</sup> In response to this inquiry, on April 30, 2013, WADA wrote:

In relation to your pending IGF-1 matter, it is the position of WADA, in applying the Prohibited List, that the use of "deer antler spray" (which is known to contain small amounts of IGF-1) is not considered prohibited.

On the other hand, it should be known that Deer Antler Spray contains small amounts of IGF-1 that may affect anti-doping tests.

Players should be warned that in the case of a positive test for IGF-1 or hGH, it would be considered an Adverse Analytical Finding.<sup>83</sup>

As a result of this instruction, the Tour issued a statement recounting the details of Vijay's admission and the ensuing investigation.<sup>84</sup> The Tour said that it deferred to WADA's role in administering the Anti-Doping Program and decided not to charge Vijay with a violation, dropped the investigation and all related

78. *See id.* (detailing results of Tour's testing of deer antler spray).

79. *See* Mark Sandritter, *Top 25 Golf Stories of 2013, No. 17: Vijay Singh 'Suspended' For PED's, Sues PGA Tour*, SB NATION (Dec. 1, 2013, 8:32 AM), <http://www.sbnation.com/golf/2013/12/1/5159208/vijay-singh-peds-suspension-lawsuit-pga-tour-top-moments-2013> (reporting that Vijay's "lawsuit also revealed the fact the PGA Tour did sanction Singh, previously unknown to the public").

80. *See id.* (including report that Vijay appealed suspension).

81. *Id.* (quoting Tour Commissioner revealing Tour's lack of transparency).

82. *See id.* (revealing intricacy between Tour's policy and WADA); *see also* Rex Hoggard, *Singh's Battle Against the Tour Comes into Focus*, GOLF CHANNEL (Nov. 10, 2015, 2:16 PM) <http://www.golfchannel.com/news/rex-hoggard/singhs-battle-against-tour-comes-focus/> (indicating Tour waited three months to contact WADA for clarification).

83. *PGA Tour Statement Regarding Vijay Singh*, *supra* note 76 (quoting WADA's response to questions from Tour regarding deer antler spray).

84. *See id.* (reporting Tour's statement regarding Vijay investigation).

sanctions.<sup>85</sup> The Tour's statement reaffirmed Vijay's cooperation throughout the investigation.<sup>86</sup> The Tour also used the platform to remind players they will be held responsible if they take a prohibited substance regardless of their intent.<sup>87</sup> In concluding, the statement sternly cautioned players to be proactive in avoiding banned substances, and specifically cited the warning issued by the Tour in August 2011 regarding deer antler spray.<sup>88</sup>

#### D. Singh v. PGA Tour: The Lawsuit

After the Tour dropped its sanctions against Vijay on April 30, 2013, everyone believed the drama was over.<sup>89</sup> However, just one week later on May 8, 2013, Vijay sent a shockwave through the golf world when he filed a lawsuit against the Tour for its mismanagement of the allegations and investigation.<sup>90</sup> Vijay filed the lawsuit in New York Supreme Court alleging seven separate causes of action against the Tour.<sup>91</sup>

##### 1. *The Allegations*

Of the seven separate counts Vijay filed against the Tour, the first three causes of action were negligence based.<sup>92</sup> First, Vijay asserted that the Tour failed to determine whether the spray was a banned substance under the Anti-Doping Program.<sup>93</sup> Second, Vijay claimed the Tour disciplined him in an unprecedented fashion without having first tested the effectiveness of the substance.<sup>94</sup> Third, he alleged that the method of discipline was unjust because the Tour knew Vijay had never tested positive for a banned substance.<sup>95</sup> Fourth, Vijay claimed that the Tour breached its implied covenant of good faith and publicly degraded his reputation because the Tour failed to conduct a fair investigation before disci-

85. *See id.* (acknowledging Tour's conclusion to drop sanctions against Vijay).

86. *See id.* (indicating Vijay was cooperative throughout investigation).

87. *See id.* ("While there is no reason to believe that Mr. Singh knowingly took a prohibited substance, the PGA TOUR Anti-Doping Program clearly states that players are responsible for use of a prohibited substance regardless of intent.")

88. *See id.* (suggesting players are responsible for preventing any violations).

89. *See* DiMeglio, *supra* note 7 (reporting ensuing drama after Vijay was absolved of wrongdoing).

90. *See id.* (reporting Vijay's lawsuit against Tour).

91. *See* Singh v. PGA Tour, Inc., No. 651659/2013, 2014 WL 641311 (N.Y. Sup. Ct. N.Y. Cnty. Feb. 13, 2014). The New York Supreme Court is the state's trial court.

92. *See id.* at \*3-4 (describing three negligence causes of action).

93. *See id.* (discussing first negligence cause of action).

94. *See id.* (discussing second negligence cause of action).

95. *See id.* (discussing third negligence cause of action).

plining him, failed to analyze the substance, failed to follow the Manual, and delayed announcing that he would not be disciplined.<sup>96</sup> Fifth, Vijay alleged that the Tour breached its fiduciary duty to responsibly administer the Anti-Doping Program, and sixth that the Tour committed intentional infliction of emotional distress when handling the investigation.<sup>97</sup> Finally, Vijay alleged conversion by the Tour because it held his winnings in escrow until the investigation concluded.<sup>98</sup>

## 2. *Initial Ruling to Dismiss Allegations*

On June 12, 2013, the Tour moved to dismiss Vijay's lawsuit, and oral arguments occurred on October 24, 2013.<sup>99</sup> On February 13, 2014, Judge Eileen Bransten granted the Tour's motion to dismiss in part and denied it in part.<sup>100</sup> The court dismissed all three causes of action for negligence because they were contractual in nature and, as such, could not support a negligence claim.<sup>101</sup>

Next, the court denied the defendant's motion to dismiss the fourth cause of action for breach of implied covenant of good faith and fair dealing.<sup>102</sup> The court found that Vijay's allegations were sufficient to avoid dismissal because he alleged that the Tour inconsistently disciplined golfers who admitted to using the spray, specifically citing Calcavecchia as an example.<sup>103</sup> Vijay also alleged that

96. *See id.* at \*4–5 (discussing fourth cause of action for breach of implied covenant of good faith and fair dealing).

97. *See id.* at \*5–9 (discussing fifth cause of action for breach of fiduciary duty, and sixth cause of action for intentional infliction of emotional distress).

98. *See id.* at \*9–10 (discussing seventh cause of action for conversion).

99. *See Singh*, 2014 WL 641311 (ruling on PGA Tour's motion to dismiss); Alex Miceli, *Singh's Lawyers Argue Why Lawsuit Can Stand*, GOLF WEEK (Nov. 8, 2013), <http://golfweek.com/news/2013/nov/06/pga-tour-vijay-singh-lawsuit-should-not-be-dismiss/> (reporting on October 24, 2013 oral arguments, and describing Vijay's arguments against dismissal); *see also* Ryan Ballengee, *PGA Tour Has Filed Motion to Dismiss Vijay Singh Lawsuit*, GOLF NEWS NET (June 20, 2013), [http://thegolfnewsnet.com/ryan\\_ballengee/2013/06/20/pga-tour-filed-motion-dismiss-vijay-singh-lawsuit-3324/](http://thegolfnewsnet.com/ryan_ballengee/2013/06/20/pga-tour-filed-motion-dismiss-vijay-singh-lawsuit-3324/) (outlining Tour's motion to dismiss).

100. *See Singh*, 2014 WL 641311 (ruling on Tour's motion to dismiss).

101. *See id.* at \*3–4 (dismissing negligence causes of action because alleged duties were "contractual in nature" and could not establish *prima facie* claims for negligence).

102. *See id.* at \*4–5 (denying Motion to dismiss claim for breach of implied covenant and fair dealing).

103. *See id.* at \*5. The Court explained:

Plaintiff alleges that Defendant has inconsistently disciplined golfers who admitted using deer antler spray. Specifically, Plaintiff alleges that in 2011, golfer Mark Calcavecchia also admitted that he used deer antler spray and was not disciplined by Defendant. Rather, Calcavecchia was merely told to stop using the spray. In addition, Plaintiff alleges, upon information and belief, that Defendant "is aware of other golfers who

the Tour knew other golfers used the spray but did not discipline them.<sup>104</sup> Further, Vijay asserted that the Tour did not fairly investigate the spray he used before deciding he committed a violation.<sup>105</sup> Vijay claimed that the Tour's approach led to procedural missteps, which included suspending Vijay and placing his earnings in escrow.<sup>106</sup> Finally, Vijay claimed that the Tour delayed reversal of his penalties even though it knew WADA removed the spray from its banned substances list.<sup>107</sup> Due to the circumstances of a motion to dismiss, the court accepted Vijay's allegations as true and found that he had pled facts sufficient for a cause of action for breach of implied covenant of good faith and fair dealing.<sup>108</sup>

The court granted the motion to dismiss for breach of fiduciary duty because it was analogous to the fourth cause of action and Vijay did not meet the particularized pleading requirement.<sup>109</sup> Specifically, Vijay failed to demonstrate the fiduciary relationship between him and the Tour, and failed to show a breach of that alleged fiduciary relationship.<sup>110</sup> The court also dismissed the cause of action for intentional infliction of emotional distress because the conduct did not rise to the level of extreme and dangerous, as required under New York law.<sup>111</sup>

Finally, the court denied the motion to dismiss the last cause of action for conversion.<sup>112</sup> Vijay alleged that the Tour held his prize money in violation of Section 2 (H) (5) of the Manual.<sup>113</sup> The Man-

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have used the Spray but has not attempted to discipline those other golfers.”

*Id.* (internal citations omitted).

104. *See id.* (“In addition, Plaintiff alleges, upon information and belief, that Defendant ‘is aware of other golfers who have used the Spray but has not attempted to discipline those other golfers.’”).

105. *See id.* (alleging that Tour “failed to fairly and thoroughly investigate”).

106. *See id.* (noting Tour's alleged procedural mistakes).

107. *See id.* (alleging that Tour purposely delayed reversal of penalties).

108. *See id.* (reasoning why Vijay's allegations were sufficient to survive dismissal at this stage). On a Motion to dismiss under New York's Civil Practice Law and Rules, the court “accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within *any* cognizable legal theory.” *Id.* (quoting *Leon v. Martinez*, 638 N.E.2d 511, 513 (N.Y. 1994)).

109. *See id.* at \*5–7 (dismissing claim for breach of fiduciary duty).

110. *See id.* at \*7 (describing two prongs for breach of fiduciary duty Vijay failed to satisfy).

111. *See id.* at \*8–9 (dismissing claim for intentional infliction of emotional distress).

112. *See id.* at \*9–10 (denying motion to dismiss conversion claim).

113. *See id.*; *see also* PGA TOUR ANTI-DOPING PROGRAM MANUAL, *supra* note 61, at 12 (stating if administrator believes player may have committed violation, player must be notified of potential violation).

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ual states that the player is given seven days from the time of notification to provide a written explanation of their conduct.<sup>114</sup> Suspected players are permitted to continue playing, but if a “player chooses to continue participating in any tournaments pending the resolution of the case, then any prize money won by the player may be held in escrow pending the outcome of the case.”<sup>115</sup> Vijay claimed that the Tour placed his money in escrow prior to giving him proper notice.<sup>116</sup> Furthermore, Vijay said the Tour notified him by letter dated February 14, 2013 that he violated the Anti-Doping Program.<sup>117</sup> However, he received another letter February 19, 2013 stating that his prize money had been held in escrow since his participation in a tournament that occurred February 7-10.<sup>118</sup> As a result, the court found the allegations sufficient to avoid dismissal at this stage because Vijay pled facts, which would establish that the Tour did not properly notify Vijay prior to holding his earnings in escrow.<sup>119</sup> In the end, Vijay’s two causes of action that survived dismissal on the pleadings were for breach of implied covenant of good faith and fair dealing and conversion.<sup>120</sup>

### 3. *Discovery Process: Searching the Weeds*

On June 12, 2014, the court granted in part and denied in part Vijay’s motion to compel disclosure of specific documents and materials.<sup>121</sup> The first category of information Vijay hoped to discover contained numerous documents related to the Tour’s treatment of other players suspected of using deer antler spray.<sup>122</sup> The court granted this motion to compel, but excluded items deemed

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114. *See id.* at 10 (quoting PGA TOUR ANTI-DOPING PROGRAM MANUAL, *supra* note 61, sec. 2H(5) (citing specific language from Manual regarding notice requirements and funds in escrow).

115. *Id.* at 9 (quoting PGA TOUR ANTI-DOPING PROGRAM MANUAL, *supra* note 61, sec. 2(L)) (citing specific language from Manual regarding requirements for keeping funds in escrow).

116. *See id.* at \*9–10 (describing allegations supporting claim for conversion).

117. *See id.* at \*10 (citing first letter received by Vijay).

118. *See id.* (observing inconsistency between Tour’s notice policy and letters Vijay received).

119. *See id.* (“Because Plaintiff alleges that some of the prize money was held in escrow prior to that notice [on February 14], Plaintiff has sufficiently alleged a cause of action for conversion as to that money only.”).

120. *See id.* at \*14–15 (indicating claims that survived dismissal).

121. *See Singh v. PGA Tour, Inc.*, No. 651659/2013, 2014 WL 2650078 (N.Y. Sup. Ct. N.Y. Cnty. June 12, 2014) (announcing decision regarding discovery motions).

122. *See id.* at \*1–3 (referencing Vijay’s motion to compel records of other players suspected of using spray).

beyond the scope of Vijay's allegations.<sup>123</sup> The second category for discovery focused on the drafting history of the Tour's Manual.<sup>124</sup> The third category related to discovering how involved members of the Tour were in drafting the Tour membership renewal form.<sup>125</sup> The court denied Vijay's motion to compel discovery of all information contained within the second and third categories, granting only the release of information concerning the implementation of the Anti-Doping Program, specifically regarding IGF-1.<sup>126</sup> The court denied the motion to compel discovery for the final category of information, related to a substance containing IGF-1, because it was not on the Tour's list of banned substances.<sup>127</sup> Judge Eileen Bransten then scheduled a status conference on October 7, 2014.<sup>128</sup> The status conference proceeded as scheduled, with document production slated to conclude in October, and another status conference set for February 2015.<sup>129</sup>

The February 2015 status conference revealed the chaos surrounding the discovery process, which was originally scheduled to close by May 30, 2015 but instead continued into the fall of 2015.<sup>130</sup> At the point of the February 2015 status conference Vijay had deposed eleven witnesses, including employees of the Tour, executives from WADA, and Calcavecchia.<sup>131</sup> However, following the February 2015 status conference both parties continued discovery

123. *See id.* at \*3 (allowing some, but not all, discovery Vijay requested).

124. *See id.* at \*3–4 (discussing Vijay's discovery request for documents related to drafting of Anti-Doping Program).

125. *See id.* (discussing Vijay's discovery request aimed at Tour member involvement in renewal form).

126. *See id.* at \*4 (limiting most discovery related to this category).

127. *See id.* at \*4–5 (denying motion to compel discovery related to substance not on banned list).

128. *See id.* at \*6 (announcing next procedural steps for case).

129. *See* Rex Hoggard, *Singh's Lawsuit Still Hung Up in Legal Procedures*, GOLF CHANNEL (Oct. 16, 2014, 12:31 PM), <http://www.golfchannel.com/news/golf-central-blog/singhs-lawsuit-still-hung-languid-legal-procedures/> (reporting status of lawsuit in October 2014 and acknowledging that litigation is moving slowly).

130. *See* Rex Hoggard, *Discovery Process In Singh Lawsuit Turns Hectic*, GOLF CHANNEL (Feb. 23, 2015, 3:38 PM), <http://www.golfchannel.com/news/golf-central-blog/discovery-process-singh-lawsuit-turns-hectic/> (reporting progress of intense discovery process); Pete Madden, *Vijay Singh Deposes Mark Calcavecchia In Suit Against Tour*, GOLF (Feb. 26, 2015), <http://www.golf.com/tour-and-news/vijay-singh-deposes-two-champions-tour-pros-suit-against-tour> (detailing specific jobs of witnesses already deposed including lead drafter of WADA Code, Director General of WADA, and Vice President of Tour Operations at Cleveland Golf); *see also* Docket, *Singh v. PGA Tour, Inc.*, No. 651659/2013 (N.Y. Sup. Ct. N.Y. Cnty. filed May 8, 2013) (providing large number of discovery filings, court filings, and court orders through November 27, 2015).

131. *See* Madden, *Vijay Singh Deposes Mark Calcavecchia in Suit Against Tour*, *supra* note 130 (outlining Vijay's concluded depositions).



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and filed exhibits, letters, emails, and other correspondence throughout the summer.<sup>132</sup> As the discovery process wore on both parties attended status conferences in March, June, and September.<sup>133</sup> Furthermore, in November the Tour submitted a motion for summary judgment.<sup>134</sup> Finally, on November 27, 2015, Judge Eileen Bransten denied the Tour's motion for summary judgment and set the trial date for April 5, 2016.<sup>135</sup>

### III. ANALYSIS

#### A. New York's Implied Covenant of Good Faith and Fair Dealing

All contracts in New York “imply a covenant of good faith and fair dealing” between the parties, which encompasses “any promises which a reasonable person in the position of the promisee would be justified in understanding were included.”<sup>136</sup> Additionally, when the implementation of a contract requires discretion, the promisor may not “act arbitrarily or irrationally in exercising that discretion.”<sup>137</sup> As a result, a party breaches the covenant when they act “in a manner that deprives the other party of the right to receive benefits under their agreement.”<sup>138</sup>

At trial Vijay will argue that the Tour was inconsistent in its disciplinary actions against golfers who admitted to using deer antler spray.<sup>139</sup> The court will then review the Manual to determine

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132. See Docket, *supra* note 130.

133. See *id.*

134. See *id.*

135. See *id.* (noting summary judgment motions denied and trial date set).

136. *Singh v. PGA Tour, Inc.*, No. 651659/2013, 2014 WL 641311, at \*4 (N.Y. Sup. Ct. N.Y. Cnty. Feb. 13, 2014) (quoting 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 773 N.E.2d 496, 501 (N.Y. 2002); *Rowe v. Great Atl. & Pac. Tea Co.*, 385 N.E.2d 566, 569 (N.Y. 1978)).

137. *Id.* (quoting *Dalton v. Educ. Testing Serv.*, 663 N.E.2d 289, 291 (N.Y. 1995)); see also *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302, 1305 (N.Y. 1980) (noting “the implied in law condition of good faith [in contracts], i.e., not to act arbitrarily”).

138. David Rich, *What Are the Elements of Breach of Implied Contract of Good Faith and Fair Dealing in New York?*, N.Y. BUS. LITIG. AND EMP'T ATT'YS BLOG (July 11, 2014), <http://www.davidrichlaw.com/what-are-the-elements-of-breach-of-implied-contract-of-good-faith-and-fair-dealing-in-new-york/>; see *Singh*, 2014 WL 641311, at \*4 (“[T]his implied obligation includes ‘a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.’” (quoting *Dalton*, 663 N.E.2d at 291)); see also 22 N.Y. JUR. 2D CONTRACTS § 227 (2016) (summarizing implied covenant of good faith and fair dealing under New York law).

139. See *Singh*, 2014 WL 641311, at \*5 (discussing Vijay's arguments in support of implied covenant of good faith and fair dealing cause of action).

whether the Tour violated its implied covenant of good faith and fair dealing.<sup>140</sup> Specifically, the court will likely look to Section 2(H)(5) that allows discretion on the part of the program administrator to weigh information submitted by the player and decide whether to move forward with the violation process.<sup>141</sup> Vijay will likely argue the program administrator “acted arbitrarily or irrationally in exercising that discretion” afforded to the Tour by the implied covenant of good faith and fair dealing.<sup>142</sup>

During trial the court will also likely review Section 2(K) of the Manual, which lists possible sanctions and grants the Tour Commissioner discretion in the implementation of those sanctions.<sup>143</sup> Vijay will likely argue that the Tour’s discretion under Section 2(K) was arbitrary and violated New York law.<sup>144</sup> Specifically, Vijay will cite a 2011 incident where Calcavecchia admitted to using deer antler spray.<sup>145</sup> However, the Tour elected to merely instruct Calcavecchia to stop using the spray in lieu of any punishment.<sup>146</sup> Further, Vijay will cite other similar instances where the Tour did not discipline players for using the spray.<sup>147</sup> Finally, Vijay will argue that the Tour failed to perform a fair investigation, and thus violated the procedural guidelines of the Tour’s Manual.<sup>148</sup> This accusation relies on the Tour’s implied covenant of good faith because Vijay would have expected the Tour’s investigation to follow the procedural guidelines in the Manual for a fair and thorough investigation.<sup>149</sup> Therefore, Vijay will argue that the Tour violated this implied covenant because it did not analyze the spray before it dis-

140. See PGA TOUR ANTI-DOPING PROGRAM MANUAL, *supra* note 61; see also *Singh*, 2014 WL 641311, at \*5 (analyzing Vijay’s allegations and Manual’s provisions).

141. See *Singh*, 2014 WL 641311, at \*5 (reviewing Section 2(H)(5) as important component of court’s analysis).

142. See *id.* at \*4 (citing *Dalton*, 663 N.E.2d at 291) (stating legal obligations pursuant to implied covenant of good faith and fair dealing).

143. See *id.* at \*5 (reviewing Section 2(K) as another important component of court’s analysis).

144. See *id.* (analyzing Vijay’s allegations and Manual’s provisions).

145. See *id.* (finding that Vijay’s allegations stated claim for breach of implied covenant of good faith and fair dealing based in part on inconsistent discipline of players who admitted using spray).

146. See *id.* (observing allegation that Calcavecchia was not penalized for using spray).

147. See *id.* (implying there have been other similar instances where players were not disciplined for use of spray, although names and allegations are currently unknown).

148. See *id.* (presenting Vijay’s allegations against Tour for unfair investigation).

149. See *id.* at \*4 (stating that under New York law, contracts include “any promises which a reasonable person in the position of the promisee would be just-

ciplined him, it waited three months to contact WADA for clarification on the issue, and it delayed dismissal of the penalties.<sup>150</sup>

### B. Conversion

In the state of New York, “[a] conversion occurs when a party, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person’s right of possession.”<sup>151</sup> The two elements of conversion are “(1) the plaintiff’s possessory right or interest in the property and (2) the defendant’s dominion over the property or interference with it, in derogation of plaintiff’s rights.”<sup>152</sup> Importantly, conversion of money can occur “where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question.”<sup>153</sup>

At trial Vijay will argue that the Tour is liable for conversion because it held \$99,980 of his prize money in escrow, from tournaments he played in while under investigation.<sup>154</sup> However, Section 2(L) of the Manual permits the Tour to hold prize money in escrow.<sup>155</sup> Specifically, it says that “[i]f a player is not Provisionally Suspended after Notice provided in section [2(H)(5)] and the player chooses to continue participating in any tournaments pending the resolution of the case, then any prize money won by the player may be held in escrow pending the outcome of the case.”<sup>156</sup>

Nonetheless, the Manual requires the Tour to provide notice to a player before placing prize money in escrow.<sup>157</sup> The Manual also specifies that notice must be given to the player by hand delivery, registered or certified mail with return receipt requested, or by

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fied in understanding were included” (citations omitted)); *see also id.* at \*5 (indicating Vijay’s implied expectations).

150. *See id.* at \*4–5 (citing Vijay’s allegations against Tour for breach of implied covenant); *see also* Hoggard, *supra* note 82 (highlighting lengthy period until Tour contacted WADA for clarification).

151. *Id.* at \*9 (alteration in original) (quoting *Lynch v. City of New York*, 965 N.Y.S.2d 441, 446 (N.Y. App. Div. 2013)).

152. *Id.* (quoting *Lynch*, 965 N.Y.S.2d at 446).

153. *Id.* (quoting *Thys v. Fortis Sec. LLC*, 903 N.Y.S.2d 368, 369 (N.Y. App. Div. 2010)) (specifying criteria for conversion of money).

154. *See id.* (describing Vijay’s argument for conversion).

155. *See id.* at \*9–10 (citing PGA TOUR ANTI-DOPING PROGRAM MANUAL, *supra* note 61) (indicating Manual allows funds to be held in escrow).

156. *Id.* at \*9 (first alteration in original) (quoting PGA TOUR ANTI-DOPING PROGRAM MANUAL, *supra* note 61, sec. 2(L)).

157. *See id.* at \*9–10 (citing PGA TOUR ANTI-DOPING PROGRAM MANUAL, *supra* note 61, sec. 2(H)(5)).

overnight delivery service.<sup>158</sup> Since the Tour failed to provide Vijay with timely notice, before placing his earnings in escrow, Vijay will cite this as evidence of conversion and seek damages.<sup>159</sup>

### C. Damages for Conversion

At trial Vijay will have the opportunity to recover possible damages from the Tour for conversion related to the \$99,980 of earnings it held in escrow.<sup>160</sup> The court will determine possible damages based on “the value of the property at the time of conversion, together with interest.”<sup>161</sup> Additionally, “‘if [the] plaintiff accepts return of the property,’ damages may include ‘the loss flowing from the conversion.’”<sup>162</sup> By incorporating interest as part of damages, the court will ensure that Vijay can be fully indemnified for his loss.<sup>163</sup> At trial Vijay will seek damages for the lost interest and argue that the Tour improperly held his funds in escrow and refused to release them with interest.<sup>164</sup> Although the earnings were eventually returned to Vijay after disciplinary action was withdrawn, he can still seek damages for interest.<sup>165</sup> If Vijay proves his conversion claim, Judge Eileen Bransten will determine the amount of damages.<sup>166</sup>

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158. See PGA TOUR ANTI-DOPING PROGRAM MANUAL, *supra* note 61, sec. 3, at 17 (defining “notice” as used in reference to “[a]ny notification required by the [Anti-Doping] Program). The Manual notes that delivery to a player’s tournament locker also satisfies the hand delivery requirement. See *id.* (defining “notice”).

159. See *Singh*, 2014 WL 641311, at \*10 (concluding that Vijay’s allegations established he was not given proper notice under Manual).

160. See *id.* (finding Vijay’s conversion claim sufficient to avoid dismissal).

161. *Id.* at \*9 (quoting *Will of Rothko*, 392 N.Y.S.2d 870, 874 (N.Y. App. Div. 1977)).

162. *Id.* (quoting *Chow v. Kshel Realty Corp.*, No. 115033/02, slip op. at 65, 2011 WL 1748557 (N.Y. Sup. Ct., N.Y. Cnty. Apr. 27, 2011)).

163. See 23 N.Y. JUR. 2D CONVERSION, ETC. § 62 (2016) (“The purpose of damages in an action for conversion, as in any other action, is to give the injured party full indemnity and no more. . . . The allowance of interest is based on the theory that it is as necessary a part of a complete indemnity to the owner of the property as the value itself.”).

164. See *Singh*, 2014 WL 641311, at \*9 (noting Vijay’s allegations concerning Tour’s conversion of earnings).

165. See *id.* (acknowledging that return of earnings does not prevent Vijay from suing for damages).

166. See *Lager Assoc. v. City of New York*, 759 N.Y.S.2d 116, 120 (N.Y. App. Div. 2003) (“It is peculiarly within the discretion of the trier of fact to assess the evidence and the persuasiveness of testimony as to estimates and evaluations of damage.” (citations omitted)).

#### D. Vijay's Likelihood of Success on Implied Covenant of Good Faith and Fair Dealing Claim

As Vijay's case heads to trial, tensions are likely running high because the Tour, and all its power, will face a worthy opponent.<sup>167</sup> Vijay's first claim before the court is for breach of the implied covenant of good faith and fair dealing.<sup>168</sup> Within that broad claim, Vijay will likely argue four different theories on how the Tour breached its covenant and all four will be individually analyzed by the Court.<sup>169</sup> First, Vijay will argue the Tour inconsistently punished golfers who used deer antler spray.<sup>170</sup> Second, that the Tour failed to conduct a fair investigation of the spray before disciplining Vijay.<sup>171</sup> Third, that the Tour disciplined Vijay without following protocol of the Manual.<sup>172</sup> Fourth, that the Tour delayed dismissal of his punishment.<sup>173</sup>

Vijay's argument regarding the Tour's inconsistent punishment of players using deer antler spray will focus primarily on Calcavecchia, as well as other players.<sup>174</sup> In 2011, the Tour instructed Calcavecchia to stop using deer antler spray, but never issued any punishment.<sup>175</sup> In conjunction, Vijay will argue that the Anti-Doping Program administrator acted arbitrarily, thus violating the implied covenant of good faith and fair dealing.<sup>176</sup>

While Vijay's allegations were sufficient to overcome dismissal, the key to winning this argument at trial will likely hinge on the evidence collected during discovery.<sup>177</sup> The witnesses deposed by Vijay's counsel include representatives of the Tour, executives from

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167. See *Why the PGA Tour Should Fear Vijay Singh*, GOLF.COM (Mar. 5, 2014), <http://www.golf.com/video/legal-analyst-michael-mccann-discusses-vijay-singh-lawsuit> (interviewing Sports Illustrated legal analyst Michael McCann, who recognized that Vijay has significant money to fight lawsuit and little motivation to settle).

168. See *Singh*, 2014 WL 641311, at \*5 (reviewing claim for breach of implied covenant of good faith and fair dealing).

169. See *id.* (indicating Vijay's four theories of liability).

170. See *id.* at \*4–5 (noting Vijay's first theory against tour).

171. See *id.* at \*5 (noting Vijay's second theory against tour).

172. See *id.* (noting Vijay's third theory against tour).

173. See *id.* (noting Vijay's fourth theory against tour).

174. See *Madden*, *supra* note 130 (noting Vijay's deposition of Calcavecchia to bolster "disparate treatment" argument).

175. See *supra* notes 35–39 and accompanying text (referencing Calcavecchia as example of inconsistent punishment by Tour).

176. See *supra* notes 138–39 and accompanying text (indicating possible abuse of discretion by Tour).

177. See *supra* notes 121–27 and accompanying text (noting extensive discovery process curtailed by Judge).

WADA, and Calcavecchia.<sup>178</sup> These depositions, as well as the many others conducted, will play a large role in this case.<sup>179</sup> Further evidence of players using the spray without facing disciplinary action will also significantly bolster Vijay's chances of prevailing at trial.<sup>180</sup> However, if the depositions show no additional players who used the spray and avoided penalties, the Tour will be able to argue the Calcavecchia incident was isolated and the Tour simply used that situation to warn players before it began disciplining for using this new substance.<sup>181</sup>

Vijay's argument that the Tour failed to fairly investigate the spray before disciplining him will focus on his immediate suspension by the Tour based solely on his admission of use.<sup>182</sup> It will also focus on the fact that the suspension occurred before the Tour tested the spray.<sup>183</sup> However, this argument is a long way from taking Vijay to the winner's circle because, according to the Manual Section 2(D)(8), admitting the use of a banned substance is itself a violation of the Anti-Doping Program.<sup>184</sup> As a result, Vijay will likely lose this argument at trial since the Tour had the right to suspend him pending the investigation because he admitted violating the Anti-Doping Program.<sup>185</sup>

At trial Vijay will argue that the Tour disciplined him without following the Manual's protocol by specifically citing when the Tour placed his earnings in escrow prior to giving him proper notice.<sup>186</sup> This argument favors Vijay because the offered evidence reveals the Tour did not provide adequate notice as required under Section 2 (H)(5).<sup>187</sup> The Tour will have to both disprove Vijay's contentions that a letter he received did not qualify as notice, and demonstrate that it gave him adequate notice prior to placing his earnings in escrow.<sup>188</sup> However, the Tour seems unlikely to suc-

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178. See Hoggard, *supra* note 130 (listing people already deposed).

179. See *id.* (reporting Vijay's plans to depose additional people).

180. See *id.* (noting Tour's opposition to additional depositions).

181. See *id.* (discussing Vijay's plans for depositions).

182. See DiMeglio, *supra* note 7 (reporting Vijay's lawsuit and its reasoning).

183. See *id.* (discussing critical elements of Vijay's lawsuit).

184. See PGA TOUR ANTI-DOPING PROGRAM MANUAL, *supra* note 61, sec. 2(D)(8) (declaring that "[a]dmissions by a player of any . . . conduct" which constitutes anti-doping rule violation is itself violation).

185. See *id.* sec. 2(D) (detailing prohibited conduct which "constitute[s] anti-doping rule violations under the Program").

186. See Singh v. PGA Tour, Inc., No. 651659/2013, 2014 WL 641311, at \*4-5, 9-10 (N.Y. Sup. Ct. N.Y. Cnty. Feb. 13, 2014) (highlighting gist of Vijay's argument).

187. See *id.* at \*10 (observing Manual's notice requirement).

188. See *id.* at \*9 (noting Tour's possible defenses to allegations by Vijay).

ceed on this point because it wrote the letters Vijay produced as evidence.<sup>189</sup> Therefore, Vijay has a strong position since the Tour disciplined him without following the Manual's protocol.<sup>190</sup>

Vijay's argument that the Tour delayed dismissal of his discipline is based on WADA's removal of deer antler spray from its banned substance list while, at the same time, the Tour had not yet dropped its disciplinary actions against Vijay.<sup>191</sup> Although it is unclear exactly when WADA dropped deer antler spray from its list it is clear that the Tour did not contact WADA for clarification until three months into its investigation of Vijay.<sup>192</sup> When the Tour finally contacted WADA it was at that point that the Tour received written confirmation from WADA that deer antler spray had been removed from the banned substances list.<sup>193</sup> Even though the Tour immediately dropped its investigation of Vijay after receiving the information from WADA it seems unusual for the Tour to investigate for three months without contacting WADA for clarification.<sup>194</sup> This evidence is critical to the outcome of the trial because the three-month span between the investigation and communication with WADA weighs in favor of Vijay and against the Tour because it reveals that the Tour delayed ending its investigation by not immediately contacting WADA for clarification.<sup>195</sup>

#### E. Vijay's Likelihood of Success on Conversion Claim

The court will review the Tour's action of holding Vijay's earnings, his property, in escrow without providing proper notice.<sup>196</sup>

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189. See Hoggard, *supra* note 130 (implying evidence contrary to Vijay's will be difficult to find).

190. See *id.* (arguing Vijay has strong case based on initial evidence).

191. See *Singh*, 2014 WL 641311, at \*5 (referencing Vijay's main argument for Tour's delay).

192. See *id.* (inferring from evidence in case that exact date is unknown); see also Hoggard, *supra* note 82 (highlighting Tour's delayed correspondence with WADA for clarification).

193. See PGA Tour Press Conference, Transcript of Commissioner Tim Finchem's Statement Regarding Vijay Singh (Apr. 30, 2013) [hereinafter Finchem Press Conference], available at <http://www.pgatour.com/what-they-said/2013/04/29/transcript—tim-finchem.html> (disputing Vijay's claim that Tour delayed dismissal).

194. See *id.* (announcing Tour's immediate dismissal of sanctions upon receiving information from WADA); see also Hoggard, *supra* note 82 (highlighting Tour's delayed correspondence with WADA).

195. See *Singh*, 2014 WL 641311, at \*5 (discussing Vijay's allegations); see also Hoggard, *supra* note 82 (reporting Vijay has asked for \$5 million in damages).

196. See *Singh*, 2014 WL 641311, at \*9–10 (discussing Tour placing Vijay's money in escrow and Manual requirements); see also *supra* notes 156–58 (discussing Tour placing Vijay's money in escrow and Manual requirements).

The court will apply the facts of Vijay's situation to New York's law of conversion, which includes a two-prong test and an additional comment on conversion of money.<sup>197</sup> The first prong considers whether Vijay had a "possessory right or interest in the property."<sup>198</sup> From the perspective of the gallery, Vijay has a hole in one when it comes to his right or interest in his property, which includes the earnings he received playing in a golf tournament.<sup>199</sup>

However, the second prong is less clear when determining whether the Tour's "dominion over the property or interference with it" was "in derogation of plaintiff's rights."<sup>200</sup> Although the Tour had the legal right to control Vijay's property, according to the Manual, they must first provide notice of any potential violation before placing the money in escrow.<sup>201</sup> However, the Tour will have an uphill battle at trial because it did not provide Vijay notice before placing his money in escrow.<sup>202</sup>

Vijay will most likely win this second prong as well because the Tour supposedly provided Vijay notice on February 14, 2013, but began holding his prize money from a tournament he played from February 7–10.<sup>203</sup> At trial, the Tour must present evidence that it provided notice to Vijay before the tournament on February 7th.<sup>204</sup> Vijay will likely win this prong unless the Tour presents alternative evidence disputing the its letters to Vijay, which reveal the Tour began holding his earnings in escrow before they provided notice.<sup>205</sup>

While the chances of Vijay winning the two conversion prongs at trial looks like a routine tap in, the remaining stand-alone criteria regarding conversion may be somewhat more challenging.<sup>206</sup>

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197. *See Singh*, 2014 WL 641311, at \*9 (defining New York law of conversion); *see also supra* notes 152–54 and accompanying text (describing applicable legal standard).

198. *See id.* (quoting *Lynch v. City of New York*, 965 N.Y.S.2d 441, 446 (N.Y. App. Div. 2013)).

199. *See id.* at \*10 (discussing Vijay's tour prize money underlying conversion claim).

200. *See id.* at \*9 (quoting *Lynch*, 965 N.Y.S.2d at 446) (detailing second prong of conversion analysis).

201. *See id.* at \*9–10 (discussing Manual's notice requirements); *see also supra* note 156–57 and accompanying text (same).

202. *See Singh*, 2014 WL 641311, at \*9 (referring to recent evidence submissions).

203. *See id.* at \*10 (detailing notice letters from Tour).

204. *See id.* (suggesting Tour's counter arguments to Vijay's claims).

205. *See id.* (finding that Vijay's allegations established this prong in light of initial evidence).

206. *See id.* at \*9 ("[A]n action for conversion of money may be made out where there is a specific, identifiable fund and an obligation to return or otherwise



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While Vijay can show the identifiable funds were his earnings, he may have a more difficult task convincing the court that the Tour did not “return or otherwise treat in a particular manner the specific fund in question.”<sup>207</sup> This may be difficult because, as the Manual requires, the Tour returned the money when it dropped the investigation.<sup>208</sup> Vijay will argue that the Tour did not treat the funds in the particular manner required by the Manual because it placed them in escrow before providing notice.<sup>209</sup>

Overall, the Tour will likely win on this criterion because lack of notice would not play a role since the Tour treated the funds appropriately and returned them once the investigation concluded.<sup>210</sup> Nonetheless, this criterion seems to be a freestanding element and courts more commonly apply the two-pronged test to conversion claims.<sup>211</sup> As a result, Vijay has a prime opportunity to succeed on his conversion claims at trial because he has strong arguments in his favor for the two-prong test, while the Tour has a better chance of prevailing on the stand-alone criteria.<sup>212</sup>

#### IV. CONCLUSION

A January 2013 Sports Illustrated article began a whirlwind journey pitting Vijay against the Tour.<sup>213</sup> The saga appeared to be over when the Tour dropped its investigation of Vijay.<sup>214</sup> Unbeknownst to golf fans and legal analysts, April 30, 2013 was just the first round.<sup>215</sup> Just over a week later, Vijay filed a lawsuit targeting the Tour’s Anti-Doping Program.<sup>216</sup> However, the court’s initial

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treat in a particular manner the specific fund in question.” (quoting *Thys v. Fortis Sec. LLC*, 903 N.Y.S.2d 368, 369 (N.Y. App. Div. 2010)); *see also supra* note 152 and accompanying text (noting stand alone prong requirements).

207. *See id.* at \*9–10 (comparing Vijay’s facts to stand alone conversion criteria).

208. *See* PGA TOUR ANTI-DOPING PROGRAM MANUAL, *supra* note 61, sec. 2(L) (providing requirements for returning money after investigation concludes).

209. *See supra* note 158 and accompanying text (reasoning Tour did not follow protocol); *see also Singh*, 2014 WL 641311, at \*10 (concluding that Vijay’s allegations established he was not given proper notice under Manual).

210. *See supra* notes 155–56 and accompanying text (indicating Tour may win this argument because it followed protocol after placing money in escrow).

211. *See supra* notes 152–53 and accompanying text (noting different conversion criteria).

212. *See supra* notes 151–59 and accompanying text (presenting conversion criteria to be used by court).

213. *See* DiMeglio, *supra* note 7 (reporting Vijay admitted using deer antler spray).

214. *See id.* (announcing Tour dropped disciplinary action against Vijay).

215. *See id.* (noting date Tour dropped investigation of Vijay).

216. *See id.* (reporting Vijay’s lawsuit against Tour).

ruling dismissed five of Vijay's seven allegations, leaving only claims of breach of covenant of good faith and fair dealing and conversion for trial.<sup>217</sup>

Although Vijay's lawsuit was softened through dismissal and limited by the scope of discovery, it still has the potential to rock the golf world.<sup>218</sup> Vijay's trial could drastically affect how the Tour handles Anti-Doping Program violations by partially pulling back the veil of secrecy that shrouds the policy.<sup>219</sup>

Ironically, over two years after Vijay filed suit against the Tour and its Anti-Doping Program, the Tour has blatantly ignored calls for transparency.<sup>220</sup> Specifically, when Commissioner Tim Finchem was asked about the desire of golf fans to know about player discipline issues he said, "we don't think the fans really want to know about most of the stuff we would be talking about."<sup>221</sup> Contrary to the Commissioner's statement, a recent Golf Digest poll revealed that seventy-five percent of golf fans are interested in whether a player is disciplined by the Tour.<sup>222</sup>

Even though the Tour has adamantly resisted transparency of the Anti-Doping Program, *Singh v. PGA Tour* may force the Tour to change.<sup>223</sup> If successful in his lawsuit Vijay could single-handedly alter the administration of the Anti-Doping Program and, in a twist of fate that seemed far-fetched when Vijay filed suit, alter the public

217. See *supra* notes 99–120 (detailing court's partial dismissal of Vijay's allegations); see also *Singh v. PGA Tour, Inc.*, No. 651659/2013, 2014 WL 641311, at \*14–15 (N.Y. Sup. Ct. N.Y. Cnty. Feb. 13, 2014) (granting Tour's Motion to dismiss as to five claims, and denying it as to remaining claims for conversion and breach of covenant of good faith and fair dealing).

218. See *Why the PGA Tour Should Fear Vijay Singh*, *supra* note 167 (discussing significant potential impact of Vijay's lawsuit).

219. See Jeff Rude, *Singh Hopes to Blow Lid Off PGA Tour's Drug Policy*, GOLF WEEK (Nov. 6, 2013), <http://golfweek.com/news/2013/nov/06/pga-tour-vijay-singh-drug-policy-accusations/> (reporting goal of Vijay's lawsuit is to reveal secrets of Tour's policy).

220. See Weinman, *supra* note 44 (noting Tour's resistance to change even when faced with lawsuit).

221. *Id.* (quoting Commissioner Finchem's denial, in stark contrast to truth, that fans want player discipline publicized).

222. See *As a Golf Fan, Are You Interested in Whether a Player Is Disciplined by the PGA Tour?*, POLL DADDY, <https://polldaddy.com/poll/8714616/?view=results&msg=voted> (last visited Mar. 8, 2016) (citing poll results revealing Commissioner is out of touch with golf fans).

223. See Weinman, *supra* note 44 (affirming Tour's resistance to transparency).

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perception of the Tour by increasing transparency for the controversial Anti-Doping Program.<sup>224</sup>

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<sup>224</sup>. See Michael Bamberger, *Vijay's Lawsuit Against the PGA Tour Could Have Huge Implications for His Fellow Pros*, GOLF.COM (May 11, 2013), <http://www.golf.com/tour-and-news/vijay-singh-lawsuit-against-pga-tour-could-impact-fellow-pros> (announcing lawsuit has monumental potential to alter Tour's Anti-Doping Program).

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