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No. 12-462

IN THE

Supreme Court of the United States

NORTHWEST, INC., a Minnesota corporation and wholly-owned subsidiary of Delta Air Lines, Inc., and DELTA AIR LINES, INC., a Delaware corporation,

Petitioners,

v.

RABBI S. BINYOMIN GINSBERG, as an individual consumer, and on behalf of all others similarly situated,

Respondent.

On Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR AMICUS CURIAE STEVEN J. BURTON, PROFESSOR OF LAW IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS

Pursuant to Rule 37, Amicus Curiae Steven J. Burton respectfully submits this brief in support of Respondent Rabbi S. Binyomin Ginsberg.[1]

Steven J. Burton is the John F. Murray Professor of Law at the University of Iowa. His work on contractual good faith has been cited by Petitioners and Respondents in their merits briefs, by the United States in its amicus brief, and by numerous courts, including the Minnesota Supreme Court.

Professor Burton has authored or co-authored one book and five law review articles on the subject. His landmark *Breach of Contract and the Common Law Duty to Perform in Good Faith* 94 Harv. L. Rev. 369 (1980) [hereinafter Burton HLR] has played a large role in shaping the law throughout the United States: this article alone has been cited by courts well over one-hundred times. As of 2001, it had been cited almost five times more often than the next most cited contracts article published in a major journal after 1979. *See* Gregory Scott Crespi, *The Influence of Two Decades of Contract Law*

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part, and that no person other than amicus and his counsel made a monetary contribution to its preparation or submission. Petitioners' blanket consent to amicus is reflected on the docket, and Respondent's consent to the filing of this brief is attached.

Scholarship on Judicial Rulings: An Empirical Analysis, 57 SMU L. Rev. 105, 113-15 (2004).

SUMMARY OF THE ARGUMENT

Both Parties agree this case turns in important part on whether Minnesota's implied covenant of good faith and fair dealing ("Implied Covenant") is a state-imposed regulation or a voluntary undertaking. Both Parties, and the United States, cite Amicus Curiae Steven J. Burton's scholarship to support their view on this question. Professor Burton submits that it is well-established (as documented by him in five law review articles and a book) that the Implied Covenant is a voluntary undertaking by parties to a contract. The Implied Covenant ensures that the parties' agreement is interpreted to further their intentions at the time of contracting and to protect their reasonable expectations arising from their agreement.

INTRODUCTION

Because states generally cannot regulate airlines, one potentially dispositive issue in this case is whether the Implied Covenant is part of a voluntary agreement between contracting parties or, instead, subjects their agreement to a state's non-contractual public policy.

Petitioners Northwest, Inc. and Delta, Inc. (together, "Northwest") are mistaken when they argue that the Implied Covenant is based on state policy encompassing "community standards of decency, fairness, or reasonableness." Pet. Br. at 24. (citation omitted). To the contrary, the Implied Covenant is a self-imposed undertaking that

effectuates the intentions of parties and protects their reasonable expectations arising from the agreement. In other words, the Implied Covenant is part of and helps to define the parties' agreement: it does not enlarge or expand it.

ARGUMENT

I. The Implied Covenant is a Self-Imposed Contractual Undertaking.

A. The Implied Covenant Serves in Aid and Furtherance of the Parties' Express Agreement.

The Implied Covenant makes explicit an obligation implicit in the parties' express agreement. *Cf*. Steven J. Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 Iowa L. Rev. 1, 4-5 (1981) (comparing good faith with *pacta sunt servanda*). Its historical roots lie in ordinary implied promises cases starting in the 1870s, such as those involving conditions of satisfaction and requirements or output contracts. Steven J. Burton & Eric G. Andersen, *Contractual Good Faith: Formation, Performance, Breach and Enforcement* 23-27 (1995). The judicial practice of implying contract terms expanded greatly following Judge Cardozo's famous opinion in *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (1917) ("[A] promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed.'"). For some time, courts implied terms ad hoc, but starting in 1933 the practice of implication came to be positioned under the rubric of the Implied Covenant. Burton & Andersen, *supra* at 32-33 (discussing *Kirke La Shelle Co. v. Paul Armstrong*

Co., 188 N.E. 163 (1933) (holding that every contract includes an implied covenant of good faith and fair dealing)).

Under Minnesota law, the Implied Covenant "does not extend to actions beyond the scope of the underlying contract[,]" *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 503 (1995), nor can it override the express terms of an agreement, *see* Burton & Andersen, *supra* at 63-65. Indeed, the Implied Covenant cannot form the basis for an independent cause of action. *Medtronic, Inc. v. ConvaCare, Inc.*, 17 F.3d 252, 256 (8th Cir. 1994) ("Minnesota does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing separate from the underlying breach of contract claim."). Further emphasizing that a claim for breach of the Implied Covenant is an ordinary claim for breach of contract in Minnesota, the remedies for its breach are the same as for any other contract claim. *See Wild v. Rarig*, 234 N.W.2d 775, 790 (Minn. 1975); Burton HLR, *supra* at 374 n.21 (showing that remedies in bad faith performance cases are the same as those awarded for "any garden variety breach of contract").

The Implied Covenant is needed because express agreements are commonly incomplete expressions of the parties' agreement. The parties may not state the obvious, such as that one of them may not prevent the other from performing its obligation. For example, a frequent flyer agreement might provide that the airline will credit miles only if it receives the member's ticket stubs at a certain postal box within 30 days of a trip. If the airline closes the box and leaves no forwarding information,

it would breach the Implied Covenant. *See Zobel & Dahl Constr. v. Crotty*, 356 N.W.2d 42, 45 (Minn. 1984) (holding the good faith covenant was breached when one party unjustifiably hindered the other party's performance); *see also J.J. Brooksbank Co. v. Budget Rent-a-Car Corp.*, 337 N.W.2d 372, 376-77 (Minn. 1983) (holding the Implied Covenant preserved the parties' original bargain in the face of unexpected technological change (citing Burton HLR, *supra* at 380 n.44)); *Nodland v. Chirpich*, 240 N.W.2d 513, 516 (Minn. 1976) (holding that the Implied Covenant was breached when a party attempted to take advantage of the failure of a certain condition precedent, but the party itself was responsible for that failure).

In some cases, the parties' express agreement is incomplete because it leaves one of them discretion to determine its or the other party's contractual obligations. Such discretion must be exercised in good faith. *See* Burton HLR, *supra* at 380-85 (discussing discretion in performance as *the* occasion on which courts invoke the Implied Covenant); *White Stone Partners, LP v. Piper Jaffray Cos.*, 978 F. Supp. 878, 882 (D. Minn. 1997) ("[I]t is this Court's judgment that the Minnesota Supreme Court would require a party to exercise good faith in exercising an *unlimited* discretionary power over a term of the contract if necessary *to effectuate the parties' intent and to save a contract from being held to be illusory*." (emphasis added)). In other words, the Implied Covenant does not create "new" obligations outside the scope of a contract. *See, e.g.*, *Hennepin Cnty.*, 540 N.W.2d at 503; *Cardot v. Synesi Group, Inc.*, A07-1868, 2008 Minn. App. Unpub.

LEXIS 1086, at *22 (Minn. Ct. App. 2008) (citing Burton HLR, *supra* at 371).[2]

In sum, claims for breach of the Implied Covenant are routine breach of contract claims. Like any other implied terms, they aim to implement the parties' intentions or to protect their reasonable expectations *arising from their voluntary undertakings*. The implied covenant does not "enlarge or expand the parties' bargain." It helps to define *what their bargain was*.

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[2] Setting aside insurance contracts, the Implied Covenant is part of contracts throughout the United States. As the California Supreme Court put it:

> Allegation of breach of the implied covenant of good faith and fair dealing is an allegation of a breach of an "ex contractu" obligation, namely, one arising out of the contract itself. The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purposes.

Foley v. Interactive Data Corp., 765 P. 2d 373, 394 (Cal. 1988). Similarly, the New York Court of Appeals has written that the covenant of good faith and fair dealing "serves in aid and furtherance of other terms of the agreement of the parties." *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 91 (N.Y. 1983).

B. The Implied Covenant is Not Like the Unconscionability Doctrine.

Because the Implied Covenant serves only to effectuate the parties' intentions and to protect their reasonable expectations arising from their agreement, Northwest and the United States are mistaken when they equate the Implied Covenant with the unconscionability doctrine. *See* Pet Br. at 26; U.S. Br. at 17. Unconscionability gives the courts a power to refuse to enforce an agreement when the agreement was not a product of meaningful choice when it was made, and the agreement is so one-sided in its terms as to shock the conscience. *See* Uniform Commercial Code § 2-302, cmt. 1; *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449-450 (D.C. Cir. 1965).

The Implied Covenant, by sharp contrast, ensures that parties to an enforceable agreement get what they intended or reasonably expected when performance time arrives. The Implied Covenant is relevant only to the performance or enforcement of a contract, not to its formation. Restatement (Second) of Contracts § 205 & cmt. c (1981) ("This section, [like the U.C.C.], does not deal with good faith in the formation of a contract"). The Implied Covenant, moreover, has nothing to do with meaningful choice or one-sided terms. *See* Burton & Andersen, *supra* at 50; Burton HLR, *supra* at 383-84 ("Unlike the unconscionability doctrine, . . . weakness and strength in this context do not refer to the substantive fairness of the bargain or to the relative bargaining power of the parties. Good faith performance cases typically involve arm's-length

transactions, often between sophisticated business persons" (footnote omitted)).

C. Northwest Misconstrues Minnesota Law and the Restatement.

Northwest asserts that Minnesota law defines bad faith performance to "exclude a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." Pet. Br. at 24. In support of this proposition, Northwest cites *Hennepin Cnty.*, 540 N.W.2d at 502, which cites Restatement (Second) of Contracts § 205 (1981).

This is misleading for two reasons. First, *Hennepin County* cited to Section 205, which says only that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205 (1981). Northwest is relying instead on a comment to the Restatement, never cited or endorsed by the Minnesota Supreme Court.

Second, Northwest quotes the "community standards" phrase out of context. It is preceded by language with a strikingly different import: "[g]ood faith performance . . . of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Id.*, cmt. a (1981). As a whole, the sentence is best read to emphasize agreed common purposes and justified expectations; "community standards of decency, fairness or reasonableness" are *examples* of what contract parties might reasonably

expect from their counterparties when they make their contracts.

II. "Sole Judgment" in Northwest's Frequent Flyer Agreement Does Not Make Good Faith an Enlargement of the Agreement

Northwest argues that the express term "sole judgment" in its frequent flyer agreement means that Northwest has absolute and unlimited power to terminate Ginsberg's rights. *See, e.g.*, Pet. Br. at 22. Consequently, Northwest suggests, any other interpretation enlarges or enhances the agreement "based on laws or policies external to the agreement." Pet. Br. at 22-23. Northwest is mistaken here, as Minnesota law and Professor Burton's scholarship establish: a contract consists of both express and implied terms, consequently, there is no conflict between "sole judgment" and a good faith constraint on discretion. *See Jack v. Horman*, A06-362, 2007 Minn. App. Unpub. LEXIS 34, at *7-8 (Minn. Ct. App. Jan. 9, 2007) (emphasis added) ("Although the contract gave the [defendants] *sole* discretion, it did not give them unlimited discretion. . . . [Defendants] had an obligation to exercise that discretion in good faith."); *see also White Stone Partners*, 978 F. Supp. at 881 ("[T]he implied covenant may not be applied to limit the exercise of a clear contractual provision . . . .").

Put another way, whether a party used its discretion in "bad faith" does *not* depend on public policy; it depends instead on whether the party acted for reasons it gave up when it entered the contract. Burton & Andersen, *supra* at 45-52; Burton HLR, *supra* at 384-85. This is where the Implied Covenant

is tied to the parties' voluntary undertaking (i.e., their agreement). Some reasons for exercising discretion may be within their intentions and expectations; others may be outside of them. Good faith requires a party to exercise contractual discretion for a reason within them. Burton & Anderson, *supra* at 51-57.

The above constraint does not negate the contractual term "sole judgment;" rather, it allows for a deferential review for abuses of discretion, those uses that undermine contractual intentions and expectations. The contract in this case provided that Northwest could exercise its "sole judgment" to determine whether Ginsberg abused the frequent flier program. But Northwest could not terminate him "for any reason whatsoever, no matter how arbitrary or unreasonable." *Tymshare, Inc. v. Covell,* 727 F.2d 1145, 1154 (D.C. Cir. 1984). In particular, Northwest almost certainly cannot terminate him for reasons related solely to its merger with Delta; that would have nothing to do with an abuse of the program.

In *Tymshare*, then-Judge Scalia expressed concern that some courts may interpret "good faith" as representing "considerations of morality and public policy." 727 F.2d at 1152-53. Professor Burton's scholarship establishes that any such court would be in error, and that few courts make such a mistake. Burton HLR, *supra* at 371.[3] Most

[3] The Brief for Petitioners cites Professor Burton's work for "observing that the "*Restatement*-Summers formulation … implies a ground for judicial decision that lies outside of and may take precedence over the

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importantly for present purposes, the courts of Minnesota take Professor Burton's view and do not consider the Implied Covenant to be based on public policy. *See, e.g.*, *J.J. Brooksbank Co.*, 337 N.W.2d at 76-77 (citing Burton HLR, *supra* at 380 n.44); *Allen v. Thom*, 2008 Minn. App. Unpub. LEXIS 844, at *10-11 (Minn. Ct. App. 2008) (unpublished) (citing Burton HLR, *supra* at 371); *Cardot,* 2008 Minn. App. Unpub. LEXIS 1086, at *22-23 (unpublished) (citing Burton HLR, *supra* at 371); *accord, e.g.*, *Centronics Corp. v. Genicom Corp.*, 562 A.2d 187, 193 (NH 1989) (Souter, J.) ("[T]he parties' intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion.").

III. The District Court's Dismissal of Respondent's Claim for Breach of Contract Does Not Foreclose His Claim for Breach of Implied Covenant.

Ginsberg's Complaint asserted separate claims for "breach of written contract" and for "breach of the duty of good faith and fair dealing." (Compl. at 14-17.) The District Court dismissed both. Respondent appealed only the dismissal of the claim for breach of the Implied Covenant. As Amicus Curiae, the United States supports reversing the Court of Appeals because the District Court's

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agreement of the parties." Pet. Br. at 26 (citing Steven J. Burton, *More on Good Faith Performance of a Contract: a Reply to Professor Summers*, 69 Iowa L. Rev. 497, 499 (1984)). Petitioners did not reveal that Professor Burton was *disputing* that view.

decision on the breach of contract claim, though it "may" be erroneous, forecloses the good faith covenant claim. U.S. Br. at 18-20; *see also* Pet. Br. at 23, 27. The United States, however, is mistaken.

The District Court dismissed the express breach of contract claim because the claim alleged that "the defendants have failed to perform in accordance with the Program contract, revoking the Program status of plaintiff and Class members *without valid cause*." (Compl. at ¶ 49 (emphasis added).) The District Court thought Ginsberg was asking the court to "replace Northwest's judgment with [the district court's] own regarding what counts as 'abuse' of WorldPerks." (App-72.) Plainly, a district court could never properly act in such a fashion.

A claim for breach of the Implied Covenant, however, does not ask a district court to replace one party's judgment with the court's. The Implied Covenant allows no one to substitute their judgment for that of a contract party with discretion, as though a contract party's exercise of discretion were subject to de novo review. Rather, review is deferential. A court may find a party in breach of the Implied Covenant only for using its discretion for reasons that are impermissible *due to the agreement*. The trier of fact might, for example, find that Northwest terminated Ginsberg's WorldPerks status for business reasons related to its merger with Delta. This would be a finding that Northwest did not make a judgment about abuse of the WorldPerks program *at all*. That would be a breach of contract.

So understood, the District Court's decision on Ginsberg's claim for breach of the written contract

does not foreclose his claim for breach of the Implied Covenant. The District Court's decision held only (and properly) that it could not conduct a "de novo" review of Northwest's judgment. This does not affect whether Northwest acted for reasons barred by the Implied Covenant; i.e., reasons that are barred by the parties' voluntary undertakings.

CONCLUSION

For the aforementioned reasons, Amicus Curiae Steven J. Burton respectfully submits that the implied covenant of good faith and fair dealing serves to effectuate the self-imposed contractual undertakings of the parties.

RESPECTFULLY SUBMITTED,

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SEPTEMBER 19, 2013