NO. _____

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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Airline Deregulation Act of 1978 ("ADA") includes a preemption provision providing that States "may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b).

Respondent was a participant in Northwest Airlines' frequent flyer program, which by its terms permitted Northwest to remove participants from the program in Northwest's "sole judgment." After respondent was removed from the frequent flyer program, he filed suit against Northwest alleging, inter alia, that Northwest breached both its contractual obligations and an implied covenant of good faith and fair dealing under Minnesota law when it exercised its discretion to terminate respondent's membership in the program. Although the district court dismissed the contract claim for failure to state a claim and the implied covenant of good faith claim as preempted by the ADA, the Ninth Circuit reversed as to the implied covenant claim, finding such claims categorically unrelated to a price, route or service under a line of Ninth Circuit cases that have been recognized by other Circuits as inconsistent with this Court's precedents, especially *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995).

The question presented is:

Did the court of appeals err by holding, in conflict with the decisions of other Circuits, that respondent's implied covenant of good faith and fair dealing claim

was not preempted under the ADA because such claims are categorically unrelated to a price, route, or service, notwithstanding that respondent's claim arises out of a frequent flyer program (the precise context of *Wolens*) and manifestly enlarged the terms of the parties' voluntary undertakings, which allowed termination in Northwest's sole discretion.

## PARTIES TO THE PROCEEDINGS

Petitioners, who were the defendants-appellees below, are Northwest Airlines, Inc. and Delta Air Lines, Inc. Respondent, who was plaintiff-appellant below, is Rabbi S. Binyomin Ginsberg. Respondent seeks to represent a class composed of all other members of Northwest Airlines, Inc.'s customer loyalty program, WorldPerks, whose program status was allegedly revoked without valid cause during the four years prior to the filing of the Complaint.

## RULE 29.6 STATEMENT

Petitioners, which are private, non-governmental parties, hereby disclose and state that (a) Delta Air Lines, Inc. has no parent corporation and there are no publicly held corporations that own ten percent (10%) or more of Delta Air Lines, Inc.'s stock; and (b) Delta Air Lines, Inc. is the parent corporation of Northwest Airlines, Inc. and owns ten percent or more of Northwest Airlines, Inc.'s stock.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Other Authority**

## OPINIONS BELOW

The initial opinion of the Ninth Circuit reversing dismissal of the complaint and remanding to the district court is reported at 653 F.3d 1033 and reproduced at App. 20-40.

The amended opinion of the Ninth Circuit, reversing dismissal of the complaint and remanding to the district court is reproduced at App. 1-19.

The district court's opinion granting petitioners' motion to dismiss the complaint is unreported and reproduced at App. 56-73.

The district court's opinion denying respondent's motion for reconsideration is unreported and reproduced at App. 41-55.

## JURISDICTION

The Ninth Circuit denied Northwest's petition for rehearing and rehearing en banc on July 13, 2012. This Court has jurisdiction under 28 U.S.C. § 1254.

## STATUTORY PROVISION INVOLVED

The preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C § 41713, is reproduced at App. 74.

## STATEMENT OF THE CASE

### I. The ADA and This Court's ADA Preemption Cases

Congress enacted the Airline Deregulation Act ("ADA") in 1978 with the purpose of furthering "efficiency, innovation, and low prices" in the airline industry through "maximum reliance on competitive

market forces." 49 U.S.C. App. § 1302(a)(4). "To ensure that the States would not undo federal deregulation with regulation of their own," *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992), the ADA includes a preemption provision providing that States "may not enact or enforce a law, regulation or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b).

This Court has addressed the preemptive scope of the ADA and its sister statute on three occasions. In *Morales v. Trans World Airlines*, the Court held that the ADA preempts States from prohibiting deceptive airline fare advertisements through enforcement of their general consumer protection statutes. Explaining that the phase "relating to" indicates the ADA's "broad preemptive purpose," 504 U.S. at 383, the Court concluded that the preemption provision encompasses all state laws "having a connection with or reference to" airline rates, routes, or services, *id*. at 384, even if the state law's effect on rates, routes, or services "is only indirect," *id*. at 386. The Court noted, however, that the ADA may not preempt state laws that affect rates, routes, or services in only a "tenuous, remote, or peripheral . . . manner," such as state laws criminalizing gambling or prostitution, or prohibiting obscenity in advertising. *Id*. at 390.

Three years later, this Court considered *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), a class action suit challenging American Airline's efforts to make changes to its frequent flyer program, in particular the imposition of blackout dates and caps on the number of seats available to passengers using

frequent flyer miles. The Court began by noting that frequent flyer programs obviously relate to both prices and services, and that it "need not dwell on the question" any further. *Id.* at 226. The Court observed, however, that "the ADA's preemption clause contains other words in need of interpretation, specifically the words 'enact or enforce any law.'" *Id.* The Court held that while the plaintiffs' claim under an Illinois consumer fraud statute required the enforcement of state law, their breach of contract claim sought "recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Id.* at 227-28. "A remedy confined to a contract's terms simply holds parties to their agreements," *Wolens* explains, and thus does not amount to the enactment or enforcement of state law. *Id.* at 229. The Court thus dismissed the plaintiffs' fraud claim but allowed their breach of contract claim to proceed.

Finally, in *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008), this Court considered the preemptive effect of a provision in the Federal Aviation Administration Authorization Act ("FAAAA"), 49 U.S.C. § 40120, *et seq.*, prohibiting States from enacting any law "related to" a motor carrier's "price, route, or service," 49 U.S.C. § 14501(c). The plaintiffs argued that this provision preempted a Maine law forbidding any person from knowingly transporting tobacco products to a person in Maine unless either the sender or receiver has a Maine license, and requiring tobacco retailers to use a delivery service verifying that the recipient of a tobacco order may legally purchase tobacco. *Rowe*, 552 U.S. at 368-69. This Court began its analysis by noting that Congress borrowed the language in the

FAAAA's preemption provision from the ADA and intended that the two provisions be interpreted in the same way. *Id.* at 370. The Court then held that under *Morales*, the Maine law related to motor carrier services because, although it did not directly apply to carriers, it prompted tobacco suppliers to seek "tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate." *Id.* at 371-72. The Court also noted that if, as *Wolens* holds, "federal law pre-empts state regulation of the details of an air carrier's frequent flyer program, . . . it must pre-empt state regulation of the essential details of a motor carrier's system for picking up, sorting, and carrying goods." *Id.* at 373.

## II. Ginsberg's Class Action Suit Against Northwest

Respondent Binyomin Ginsberg is a former member of Petitioner Northwest's WorldPerks Platinum Elite frequent flyer program. Northwest revoked Ginsberg's membership on June 27, 2008. App. 3. According to Ginsberg, he was told by a Northwest representative that his status was revoked because he had "abused" the program. App. 4. More specifically, Ginsberg attached to his Complaint a letter he received from Northwest stating that between December 2007 and July 2008, Ginsberg filed 24 complaints with Northwest and "'continually asked for compensation over and above [Northwest's] guidelines.'" App. 57 (quoting Compl. Ex. A).

Alleging that Northwest revoked his WorldPerks status without valid cause, Ginsberg filed this suit as a class action on behalf of himself and other members

of WorldPerks whose membership allegedly was revoked without valid cause during the four years before the filing of the Complaint. Ginsberg seeks damages on behalf of the class in excess of $5 million, as well as injunctive relief requiring Northwest to restore the WorldPerks status of the Class members and prohibiting Northwest from future revocations of the Class members' WorldPerks status without valid cause. Dist. Ct. Doc. No. 1, at ¶ 2.

Ginsberg acknowledges that the General Terms and Conditions of the WorldPerks program ("the Agreement") grant Northwest discretion to remove someone from the program:

> Abuse of the WorldPerks program (including failure to follow program policies and procedures, the sale or barter of awards or tickets and any misrepresentation of fact relating thereto or other improper conduct *as determined by Northwest in its sole judgment*, including, among other things, . . . any untoward or harassing behavior with reference to any Northwest employee or any refusal to honor Northwest Airlines employees' instructtions) may result in cancellation of the member's account and future disqualification from program participation, forfeiture of all mileage accrued and cancellation of previously issued but unused awards.

App. 58 (emphasis added).

Ginsberg speculates that he was dismissed for "untoward or harassing behavior with reference to [a] Northwest employee." Dist. Ct. Doc. No. 1, at ¶ 29. He

argues, however, that the Agreement fails to sufficiently define "improper conduct" and "untoward or harassing behavior." *Id.* at ¶ 30. He also claims that any alleged abusive conduct by him was the result of the frequency with which he travels on Northwest, and that his complaints and conduct were all legitimate. *Id.* at ¶¶ 32, 33, 35, 38. And he alleges that he never received an adequate explanation from Northwest for the revocation decision. *Id.* at ¶ 29.

### III. The District Court Dismisses Ginsberg's Suit as Largely Preempted Under the Airline Deregulation Act

Ginsberg asserted four causes of action under state law: (1) breach of contract; (2) breach of implied covenant of good faith and fair dealing; (3) negligent misrepresentation; and (4) intentional misrepresentation. App. 58-59.

The district court dismissed the complaint, explaining that all but the breach of contract claim are preempted under the ADA and this Court's precedents. The district court observed that this Court made "abundantly clear" in *Wolens*, 514 U.S. at 226, that "a frequent flier program relates to 'prices' and 'services,' and the WorldPerks program at issue here is none other than a frequent flier program." App. 69. The court concluded that "[b]ecause Plaintiff's claims for breach of the covenant of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation require the enforcement of state law and relate to both airline prices and services, all are preempted by the ADA." App. 69.

With regard to Ginsberg's breach of contract claim, the district court explained that under *Wolens*, claims that "an airline breached terms of a contract the airline 'itself stipulated'" are not preempted by the ADA because such claims do not involve the enforcement of state law, but rather the enforcement of the parties' own voluntary undertakings. App. 69-71. The court nonetheless dismissed the claim because Ginsberg's complaint failed to identify any material breach of the WorldPerks Agreement. The Agreement "states unambiguously that abuse of WorldPerks, including 'improper conduct as determined by Northwest *in its sole judgment*' is grounds for membership cancellation." App. 71 (quoting the Agreement). The district court explained that although Ginsberg complained that he was not provided an adequate explanation for Northwest's revocation decision and that "improper conduct" is not well defined in the agreement, "Northwest was not required by the agreement to explain its decisions or define what it considers 'improper conduct.' To hold that Northwest was required to explain itself to Plaintiff's satisfaction would be an 'enlargement or enhancement' of the parties' agreement beyond its express terms, which *Wolens* does not allow." App. 71. Accordingly, the district court dismissed the breach of contract claim for failure to state a claim, but without prejudice so that Ginsberg would have an opportunity to amend his complaint to include allegations of an actual breach of contract. App. 72.

Ginsberg had argued that his "breach of implied covenant of good faith claim and fair dealing claim" (hereinafter "implied covenant of good faith claim") was also a "breach of contract" claim merely seeking to

enforce the terms and conditions of the WorldPerks program, because "every contract imposes upon each party a duty of good faith and fair dealing." Dist. Ct. Doc. No. 11, at 8 (internal quotation omitted). Ginsberg argued that he and the rest of the Class were entitled to recovery under this theory because although the WorldPerks Agreement allows for dismissal based on Northwest's "sole judgment," Minnesota law imposes extra-contractual "good faith" obligations limiting Northwest's exercise of its "sole judgment." *See id.* at 5-13. The district court rejected this argument, however, observing that Ginsberg "misses that this duty does not appear *ex nihilo*, and is not imposed by the contract itself (unless it so stipulates). Rather, it is implied by state law." App. 64-65. The court explained: "That parties must act in good faith and deal fairly with one another is a requirement of state policy, external to the contract itself, that is given 'the force and effect of law.'" App. 65

Ginsberg moved for reconsideration, arguing that the district court erred in failing to recognize that the ADA's preemption clause does not apply to state common law claims. Ginsberg asserted that "[t]o preempt a cause of action under the ADA according to *Wolens*, one need identify an offending state statute, that affects the zone of pre-empted activities, and establish that an action lies without a connection to preserved contract rights." Dist. Ct. Doc. No.17, at 6. He also argued that his implied covenant of good faith claim was not preempted because "[i]n Minnesota, every contract is subject to an implied covenant known as a covenant of good faith and fair dealing,

which is automatically deemed to be part of a contract." *Id*. at 12.

The district court denied the motion, explaining that this Court's decision in *Wolens* makes no distinction between state common law and state statutes, but instead distinguishes "between terms an airline itself stipulates on the one hand, and *any* 'enlargement or enhancement based on state laws or policies external to the agreement.'" App. 45 (quoting *Wolens*, 513 U.S. at 233). The district court observed that "state common laws [a]ffecting contracts are not – as the *Wolens* court demands to avoid preemption – terms of the contract itself. They are expansions beyond the explicit terms of the contract, as demonstrated by the fact that they apply regardless of whether the parties agree to them in the contract itself. They exist independently of the contract." App. 46. With regard specifically to Ginsberg's implied covenant of good faith claim, the district court noted its earlier holding, not challenged in the reconsideration motion, that Ginsberg "failed to allege any actual violation of the WorldPerks agreement." App. 47. Accordingly, the district court explained, Ginsberg's implied covenant of good faith claim must be dismissed either for failure to state a claim or because it is based on the alleged violation of an obligation not found in the terms of the agreement and instead arising out of preempted state law. App. 47-48.

## IV. The Ninth Circuit Reinstates Ginsberg's Claim for Breach of Implied Covenant of Good Faith as Categorically Exempted from ADA Preemption

Ginsberg appealed to the Ninth Circuit only with respect to the dismissal of his implied covenant of good faith claim. The Ninth Circuit reversed, holding that such claims are categorically exempted from ADA preemption. App. 21. The Ninth Circuit cited its decisions in *West v. Northwest Airlines, Inc.*, 995 F.2d 148, 151 (9th Cir. 1993), holding that implied covenant of good faith claims are "too tenuously connected to airline regulation to trigger preemption under the ADA," and in *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998) (en banc), holding that the ADA does not preempt common law remedies so long as they "do not significantly impact federal deregulation." App. 33. The court of appeals held that these cases are consistent with this Court's holding in *Wolens* that claims based on "contract law" are not preempted under the ADA. App. 29-30.

The Ninth Circuit also reasoned that, despite *Wolens* and its frequent flyer program context, implied covenant of good faith claims do not "relate to" prices or services because the legislative history of the ADA indicates that Congress intended the preemption provision "only to apply to state laws directly regulating rates, routes, or services." App. 37 (internal quotation omitted). Citing *Charas* for the proposition that "services" is defined narrowly under the ADA, the court of appeals held that "[a] claim for breach of good faith and fair dealing does not relate to

'services' because it has nothing to do with schedules, origins, destinations, cargo, or mail." App. 38.

Judge Rymer filed a concurring opinion explaining that although she believed the panel's holding to be compelled by the Ninth Circuit's decision in *West*, "*West*'s rule for contract claims seems out of step with the Supreme Court's holding" in *Wolens*. Judge Rymer also observed that the decision "places us in tension with the Seventh Circuit," in particular *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996), which holds that this Court's decision in *Morales* "does not permit us to develop broad rules concerning whether certain types of common-law claims are preempted by the ADA." App. 39. Judge Rymer noted that if *West* "were not in the picture," the court would be faced "with the *Wolens* inquiry of whether Ginsberg's claim alleges a violation of a state-imposed obligation or a self-imposed undertaking." App. 40. Judge Rymer found this to be "a difficult question," not answered by the panel's decision, but "the answer [to which] is important for airlines who otherwise may be required to defend contract actions under a variety of state laws whenever they enact changes in their frequent flyer programs." App. 40.

Northwest filed a petition for rehearing or rehearing en banc. While the petition was pending, Judge Rymer passed away. When the court of appeals eventually ruled on the petition, Judge Rymer was replaced on the panel by Judge Schroeder. The court denied the petition, but amended its decision to delete Judge Rymer's concurrence, and to delete the final two paragraphs of the main opinion discussing the

court's holding in *Charas* that the term "services" does not include "fringe benefits" having "nothing to do with schedules, origins, destinations, cargo, or mail." *Compare* App. 19 *with* App. 38-39.

## REASONS FOR GRANTING THE PETITION

Over the last 20 years, this Court has addressed the preemptive effect of the ADA and FAAAA on three occasions – *Morales*, *Wolens*, and *Rowe*. Consistent with Congress's intent, these decisions interpret the ADA and FAAAA to provide the airline and transportation industries with substantial protection from state statutory and common law claims that impose extra-contractual duties, while allowing plaintiffs to enforce the terms of voluntary undertakings by bringing contract claims. Although most lower courts have followed this Court's guidance, the Ninth Circuit has charted its own path that veers further and further from this Court's jurisprudence with each decision the Ninth Circuit issues. The decision below – finding a breach of implied covenant claim about a frequent flyer program, the precise context of this Court's *Wolens* decision, not related to prices and services even though the state law claim would directly override the terms of the parties' voluntary undertaking – is the culmination of this trend and conflicts with the decisions of this Court and the other Circuits which follow this Court's precedents.

This case is the most recent in a trifecta of Ninth Circuit ADA decisions that numerous courts have described as profoundly at odds with this Court's precedent and the source of significant Circuit conflict. Rather than acknowledging – as many other courts

have – that the Ninth Circuit's prior decisions in *West* and *Charas* cannot possibly be good law following this Court's holdings in *Wolens* and *Rowe*, the decision below expressly affirms and relies upon *West* and *Charas*, thus entrenching and perpetuating the already existing conflict between the Ninth Circuit's interpretation of the ADA and that of this Court and the other courts of appeals.

The decision below is the *non plus ultra* of the Ninth Circuit's deviation from the teachings of this Court. *Wolens* was clear that whether a particular claim is preempted under the ADA turns not on the plaintiff's labeling of the claim but on the extent to which the plaintiff's arguments invoke laws or policies outside the scope of the parties' agreement to enlarge the parties' voluntary undertakings. Ginsberg's implied covenant of good faith claim is a prototypical preempted claim: Ginsberg seeks to circumvent the terms and conditions of Northwest's frequent flyer program, which gives Northwest sole discretion to determine whether a member's behavior constitutes abuse warranting dismissal from the program, by invoking state law purporting to limit that discretion. It is hard to imagine a claim that more obviously enlarges the parties' bargain than a claim that an airline breached an "implied" duty of good faith and fair dealing notwithstanding the parties' express agreement that the dispute at issue is left to the airline's "sole judgment." Nor can there be any serious dispute that Ginsberg is invoking state law in a manner that relates to prices and services – despite the Ninth Circuit's contrary holding, *Wolens* specifically holds that claims arising out of disputes

over frequent flyer programs *easily* satisfy that requirement.

The Ninth Circuit's ruling provides a model for plaintiffs to eviscerate the preemptive effect of the ADA and FAAAA simply by labeling their state law claims as "breach of implied covenant of good faith" claims. This categorical exemption for implied covenant of good faith claims undermines the ADA's purpose of uniformity and efficiency by exposing airlines and other carriers to a patchwork of state laws that, depending on the state, may impose an inquiry into reasonableness or good-faith motivation every time an airline or carrier acts under the express terms of a specific agreement. The decision below also widens the gulf between the Ninth Circuit and the rest of the federal judiciary, declaring all implied covenant of good faith claims exempt from ADA preemption despite contrary holdings by the vast majority of courts to address this issue, including the First and Seventh Circuits.

The consequences of the conflict between the Ninth Circuit and this Court extend beyond implied covenant of good faith claims. At the center of the Ninth Circuit's flawed decision is its persistent failure to apply the analytical framework articulated in this Court's ADA and FAAAA jurisprudence. *Wolens* specifically explains that the narrow preemption exemption for breach of contract claims arises from the fact that such claims involve only the enforcement of the parties' own self-imposed obligations and do not require the enforcement of any state law. Instead of recognizing that Ginsberg's implied covenant of good faith claim is a paradigmatic effort to expand an

airline's obligations beyond its voluntary undertaking, the Ninth Circuit insisted that *Wolens* somehow supports its holdings in *West* and *Charas* that entire categories of common law contract and tort claims are wholly exempt from ADA preemption, regardless whether the plaintiff's underlying allegations or theory of recovery relate to routes, rates or services or rely on the enactment or enforcement of state law. This Court's intervention is necessary to put an end to a growing body of Ninth Circuit ADA jurisprudence causing significant conflict among the Circuits and robbing the airline and transportation industries of many of the protections Congress intended the ADA and FAAAA to afford.

## I. The Ninth Circuit's Decision Below is Wrong and Irreconcilable with This Court's Precedent

### A. *Wolens* does not remotely support the Ninth Circuit's categorical exemption of implied covenant of good faith claims from ADA preemption

In *Wolens*, this Court recognized a narrow exception to ADA preemption for "routine breach-of-contract claims" that seek only to "give effect to bargains offered by the airlines and accepted by airline customers." 513 U.S. at 228. The plaintiffs in *Wolens* argued that American Airline's changes to its frequent flyer program, imposing blackout dates and caps on available seats, violated the terms and conditions of the membership agreement, thus constituting a breach of contract. The Court explained that although the allegations obviously related to airline rates and services within the meaning of the

ADA, the plaintiffs based their breach of contract claim entirely on "the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Id.* at 232-33. Because such claims are "confined to a contract's terms," seeking "simply [to] hold[] parties to their agreements," they do not rely on the enactment or enforcement of state law and thus do not trigger ADA preemption. *Id.* at 229.

As the district court correctly recognized, Ginsberg's claim for breach of an implied covenant of good faith, as opposed to his contract action that failed to state a breach, does not fall within the *Wolens* exception because the whole point of the claim is to override the contractual terms which granted Northwest "sole judgment" and doomed Ginsberg's contract claim. There is nothing subtle or difficult about this. The very name of the cause of action – an *implied* covenant of good faith – makes clear that state law is supplementing the express terms of the parties' voluntary undertaking. And the very fact that Ginsberg's contract claim fails on the merits underscores that the implied covenant claim adds something to the parties' agreement. As the district court aptly put it: Ginsberg's implied duty of good faith claim "does not appear *ex nihilo*, and is not imposed by the contract itself (unless it so stipulates). Rather, it is implied by state law." App. 64-65. Ginsberg does not contest that the terms of the WorldPerks program give Northwest sole discretion regarding membership termination. Instead, he argues that state law overrides that contractual provision and limits Northwest's exercise of its discretion. It is hard to imagine a more obvious example of using state law to

enhance the terms and conditions of an airline program beyond the airline's self-imposed undertakings.

The Ninth Circuit avoided grappling with the extra-contractual nature of Ginsberg's claim, instead simply declaring all implied covenant of good faith claims part of the arsenal of routine breach of contract claims saved from preemption in *Wolens*. But *Wolens* makes no mention of implied covenant of good faith claims and certainly does not suggest that such claims are categorically exempt from preemption. To the contrary, *Wolens* explicitly limits the contract actions that survive preemption to those that enforce self-imposed undertakings without enlarging the terms of the bargain.

Indeed, *Wolens* specifically observed that some state law principles of contract law would be preempted to the extent that "they seek to effectuate the State's public policies, rather than the intent of the parties." 513 U.S. at 233 n.8 (quoting Brief of the United States as Amicus Curiae at 28). As the First, Seventh, and Eighth Circuits have recognized, *Wolens* at the very least requires an individualized inquiry into the nature of the implied covenant of good faith claim asserted by the plaintiff, and cannot possibly support the categorical exemption adopted by the Ninth Circuit. *See Data Manufacturing, Inc. v. United Parcel Serv.*, 557 F.3d 849, 853-54 (8th Cir. 2009) (holding preempted state law claims based on implied contractual obligations, including an implicit duty not to charge unlawful penalties, because such claims were not part of the agreement between the parties); *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 34-37 (1st Cir.

2007) (finding plaintiffs' implied covenant of good faith claim preempted by the ADA because it imposed state policies on the airline by attempting to create implicit contract terms not found in the agreement); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1432 n.8 (7th Cir. 1996) (remanding to the district court to determine whether "the plaintiffs are relying on principles of contract law that . . . could be open to preemption under *Wolens*").

Ginsberg's claim clearly illustrates why the Ninth Circuit's blanket rule is irreconcilable with *Wolens*. Rule 7 of the WorldPerks Program states unambiguously that abuse of WorldPerks, including "improper conduct as determined by Northwest in its sole judgment," is grounds for "cancellation of the member's account and future disqualifications from program participation. . . ." App. 58. Ginsberg's implied covenant of good faith claim seeks a class-wide injunction prohibiting Northwest from revoking membership in its frequent flyer program on any basis not considered reasonable under state law, despite the fact that the terms and conditions of the program expressly reserve Northwest's right to exercise its "sole judgment" in determining whether someone has abused the program. As the district court explained, "Plaintiff in effect asks that the Court replace Northwest's judgment with his own regarding what counts as 'abuse' of WorldPerks. This, however, would transgress the unambiguous terms of the agreement by inserting into it external norms supplied by the Plaintiff, the Court, or both." App. 71-72. In short, Ginsberg seeks precisely the sort of enforcement of state law that *Wolens* identified as preempted under the ADA.

Moreover, the Ninth Circuit was flatly wrong in likening implied covenant of good faith claims to the breach of contract claims this Court contemplated would pose little risk of non-uniform adjudication across States. App. 16 (citing *Wolens*, 513 U.S. at 233 n.8). Many States reject implied covenant claims where, as here, the alleged good faith obligations are inconsistent with the contract's terms, including those expressly giving one party sole discretion with regard to particular actions. *See, e.g.*, *Shoney's LLC v. MAC East, LLC*, 27 So.3d 1216, 1223 (Ala. 2009); *Third Story Music, Inc. v. Waits*, 41 Cal. App. 4th 798, 808 (Cal. Ct. App. 1995); *Chrysler Credit Corp. v. Dioguardi Jeep Eagle, Inc.*, 596 N.Y.S.2d 230, 232-33 (N.Y. App. Div. 1993). Other States, however, impose good faith and fair dealing obligations that override "sole discretion" clauses. *See, e.g., Kohler v. Leslie Hindman, Inc.*, 80 F.3d 1181, 1187 (7th Cir. 1996); *A.I. Transp. v. Imperial Premium Fin., Inc.*, 862 F. Supp. 345, 348 (D. Utah 1994). To subject airlines to a "patchwork" of varying state laws (as well as inevitable forum shopping) on the implied covenant of good faith promises the uncertainty and inconsistency that the ADA sought to avoid. *Rowe*, 552 U.S. at 373.

### B. This Court's precedent flatly contradicts the Ninth Circuit's conclusion that implied covenant of good faith claims are categorically unrelated to rates, routes and services under the ADA, regardless of the underlying allegations and theory of recovery

At the center of the Ninth Circuit's flawed decision is its persistent failure to apply the analytical

framework articulated in this Court's ADA jurisprudence. *Wolens* specifically explains that the narrow exemption for breach of contract claims arises from the fact that such claims involve only the enforcement of the parties' own self-imposed obligations and do not require the enforcement of any state law.

Instead of recognizing that this reasoning compels the rejection of Ginsberg's theory that a state-law implied covenant of good faith claim overrides the contractual "sole discretion" language, the Ninth Circuit insisted that *Wolens* is consistent with and indeed supports its holdings in *West* and *Charas* that certain categories of common law contract and tort claims are categorically unrelated to rates, routes, and services.

The incoherence of the Ninth Circuit's reasoning is on full display in its conclusion that Ginsberg's implied covenant of good faith claim does not relate to rates, routes, or services under the ADA despite the fact that *Wolens* expressly holds that claims arising out of disputes over frequent flyer benefits easily satisfy that requirement. *Wolens* rejected the plaintiffs' effort to separate "matters 'essential' from matters unessential to airline operations," with only the former preempted. *Wolens*, 513 U.S. at 226. Instead, *Wolens* viewed claims arising from a frequent flyer program to be obviously related to both rates and services: "Plaintiffs' claims relate to 'rates,' i.e., American's charges in the form of mileage credits for free tickets and upgrades, and to 'services,' i.e., access to flights and class of service upgrades unlimited by retrospectively applied capacity controls and blackout

dates." *Id.* And *Rowe* reiterates that under *Wolens*, "federal law pre-empts state regulation of the details of an air carrier's frequent flyer program." 552 U.S. at 373; *see also* App. 49-50 (the district court observing that it is "patently obvious" that Ginsberg's implied covenant of good faith claim relates to airline rates and services within the meaning of the ADA). The breach of contract claim in *Wolens* avoided preemption not because it was somehow unrelated to rates and services, but only because it did not involve the enforcement of state law – an exemption that plainly has no application to Ginsberg's implied covenant of good faith claim. The bottom line is that the decision below simply cannot be reconciled with *Wolens* and the preemptive scope of the ADA.

## II. The Ninth Circuit's Decision in this Case is the Third in a Set of Ninth Circuit Cases Dramatically Departing from this Court's Precedent and Contributing to Significant Conflict Among the Circuits Regarding the Scope of ADA Preemption

The Ninth Circuit has its own trilogy of seminal ADA preemption cases. Unfortunately, the Ninth Circuit's trilogy bears little resemblance to this Court's decisions in *Morales*, *Wolens*, and *Rowe*. Although the first of the Ninth Circuit cases pre-dated *Morales*, the Ninth Circuit has not revisited its precedents in light of the intervening decisions of this Court, but rather has doubled down and insisted that its precedents are undisturbed. As a result, each one of its decisions takes the Ninth Circuit further from this Court's trilogy and deepens the conflict in the Circuits. As numerous other courts have recognized,

the Ninth Circuit's jurisprudence has been the source of significant Circuit conflict, and is profoundly at odds with this Court's holdings regarding the scope of the ADA's preemption clause.

### A. *West v. Northwest Airlines*

Before this Court decided any of its ADA/FAAAA preemption cases, the Ninth Circuit addressed the scope of ADA preemption in *West v. Northwest Airlines*. West brought suit against Northwest seeking compensatory and punitive damages after he was bumped from a flight due to overbooking. Like Ginsberg, West argued that Northwest's actions constituted a breach of the implied covenant of good faith, although West based his claim on Montana rather than Minnesota law. *West v. Northwest Airlines, Inc.*, 995 F.2d 148, 150 (9th Cir. 1993). The Ninth Circuit held that the ADA preempted West's punitive damages claim, but did not preempt his claim for compensatory damages under Montana law. *Id.* While the parties' cross-petitions for certiorari were pending, however, this Court issued its decision in *Morales*. This Court subsequently denied West's petition, but granted Northwest's petition, vacated the decision, and remanded the case for reconsideration of the holding allowing West's compensatory damages claim to proceed. *Id.* Upon receiving a second petition from West arguing that the Supreme Court Rules prohibited granting certiorari on a cross-petition but not the initial petition, this Court vacated its earlier denial of West's petition and remanded the punitive damages holding for reconsideration as well. *Id.*

On remand, the Ninth Circuit reached the same conclusion it had before *Morales*, although this time

the decision was not unanimous. All of the panel members agreed that West's punitive damages claim was preempted because "[o]verbooking and bumping are accepted forms of price competition and reduction in the deregulation period, thus any law or regulation which results in penalizing airlines for these practices is preempted." *Id.* at 152. The panel majority nonetheless allowed West's claim for compensatory damages to proceed, on the theory that it was "too tenuously connected to airline regulation to trigger preemption under the ADA." *Id.*at 151.

Judge Brunetti dissented with regard to the compensatory damages claim, explaining that *Morales* "made clear that the 'relating to' language [in the ADA] is to have a very broad scope, encompassing within its reach statutes or actions 'having a connection with or reference to airline 'rates, routes, or services.'" *Id.* at 153. Judge Brunetti observed: "[O]ne strains to conceive of an action which could relate to those services more directly than a lawsuit seeking damages for the inevitable result of [an airline's] boarding practices." *Id.*

*West* soon became the subject of Circuit conflict. In 1995, the Fifth Circuit sitting en banc specifically noted its disagreement with *West* in *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 339 (5th Cir. 1995) (en banc). The Fifth Circuit allowed to proceed a state tort claim alleging that the plaintiff was injured by luggage that fell out of an overhead compartment on a commercial airplane, explaining its position that claims for physical injury resulting from the negligent operation of an aircraft are not related to rates, routes, or services under the ADA. *Id.* at 336-37. The

Fifth Circuit emphasized, however, that its holding was narrow and "*does not* extend to" state tort claims that more clearly relate to airline services, pointing in particular to *West* as an example of claims that are "preempted under our interpretation of 'services.'" *Id.* at 339-40 (emphasis in original). The court of appeals explained, "[u]nder either *Morales* or the analysis advanced here, it is difficult to see how a lawsuit for overbooking would not 'relate to' the airline's contract for 'services' with its passenger." *Id.* at 340. The Fifth Circuit was not the only court to call out the Ninth Circuit's reasoning in *West* as obviously contrary to *Morales* – a New Jersey state court described *West* as reflecting the Ninth Circuit's "stunning indifference to *Morales*." *El-Menshawy v. Egypt Air*, 276 N.J. Super. 121, 126, 647 A.2d 491 (N.J. Sup. 1994).

Indeed, *Wolens* subsequently made clear the *West* majority's error in finding "the state contract and tort laws under which West seeks relief" – including an implied covenant of good faith claim – too tenuously related to routes, rates, and services to trigger preemption. In *Wolens*, this Court easily concluded that a breach of contract claim in that case related to rates and services because it arose out of a frequent flyer program. *Wolens*, 513 U.S. at 226. The Court found the breach of contract claim outside the scope of the ADA not because it was "too tenuously connected" to airline regulation under *Morales,* but because the claim did not involve the enactment or enforcement of state law. *Id.* at 227-29. If, as *Wolens* holds, a breach of contract claim arising out of a dispute over frequent flyer benefits relates to rates, routes and services under the ADA, then *West* cannot possibly be correct that an implied covenant of good faith claim arising

out of an overbooking incident does *not* relate to rates, routes, and services. Indeed, Judge Rymer observed in her concurrence, with some understatement, that "*West*'s rule for contract claims seems out of step with the Supreme Court's holding" in *Wolens*. App. 39.

This Court's subsequent decision in *Rowe* also squarely foreclosed the Ninth Circuit's holding that the claim in *West* did not relate to routes or services under the ADA. The tobacco regulations at issue in *Rowe* did not even apply to carriers, but this Court nonetheless found them preempted under the FAAAA because they prompted tobacco suppliers to seek "tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate." *Rowe*, 552 U.S. at 372. If, as *Rowe* holds, state tobacco laws "relate to" rates, routes, and services if they regulate tobacco suppliers in a manner that impacts the delivery services that suppliers require from their carriers, then the *West* majority's reasoning that a claim asserting a breach of an implied duty of good faith not to overbook flights is unrelated to rates, services, and schedules is simply irreconcilable with this Court's precedents.

### B. *Charas v. Trans World Airlines*

In 1998 – after *Morales* and *Wolens* but before *Rowe* – the Ninth Circuit heard en banc a set of consolidated cases asserting state law tort claims for physical injuries occurring during travel on a commercial flight. *See Charas*, 160 F.3d at 1261-62 (describing claims for injuries arising, inter alia, from falling luggage and a service cart collision). The Ninth Circuit once again struggled to read ADA preemption narrowly: "[W]e hold that Congress used the word

'service' . . . in the ADA's preemption clause to refer to the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail . . . [and not] an airline's provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities." *Id.* at 1261, 1264. Reading *Wolens* selectively to focus on the Court's holding that "Congress did not intend to preempt common law contract claims," *id.* at 1264, while ignoring the finding of preemption for the fraud claims, the *Charas* court held that state law tort claims are likewise outside the scope of the ADA, because "[n]othing in the Act itself, or its legislative history, indicates that Congress had a clear and manifest purpose to displace state tort law in actions that do not affect deregulation in more than a peripheral manner." *Id.* at 1265 (internal quotation omitted).

*Charas* is part of a widely recognized and well-established conflict among the Circuits over the meaning of "relating to . . . services" in the ADA, with the vast majority of Circuits on the other side of the split. In 2000, Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas acknowledged the split in dissenting from denial of a petition for a writ of certiorari in *Northwest Airlines, Inc. v. Duncan*, 531 U.S. 1058 (2000). In *Duncan*, the Ninth Circuit concluded that the ADA does not preempt a claim challenging an airline policy allowing smoking on trans-Pacific flights, explaining that the case was directly controlled by the narrow definition of "services" adopted in *Charas*. *Duncan v. Northwest Airlines, Inc.*, 208 F.3d 1112, 1115 (9th Cir. 2000). The Justices dissenting from the denial of certiorari

explained that they would have granted the petition because the courts of appeals "have taken directly conflicting positions on this question of statutory interpretation," and because "[r]esolution of this question would provide needed certainty to airline companies." *Duncan*, 531 U.S. at 1058 (O'Connor, J. dissenting). The dissenting Justices pointed to *Charas* and the Third Circuit's decision in *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3d Cir. 1998) as examples of cases interpreting the term "services" in the ADA narrowly, in contrast to the broader readings of the Fourth, Fifth, and Seventh Circuits, *see Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998); *Hodges*, 44 F.3d at 336; *Travel All Over the World*, 73 F.3d at 1433. Three years later, the Eleventh Circuit also noted the split and specifically rejected the reasoning in *Charas*, explaining that it found "more compelling" the broader reading of the ADA's preemption clause adopted by the Fifth and Seventh Circuits. *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1256-57 (11th Cir. 2003).

*Rowe* decisively rejected the Ninth Circuit's reasoning in *Charas*. As numerous courts have now recognized, *Rowe* makes clear that the Ninth Circuit's analysis in *Charas* reflects a significant misunderstanding of what it means for a law to be related to airline deregulation under *Morales*, as well as this Court's rationale for exempting breach of contract claims in *Wolens*. *See, e.g.*, *DiFiore v. American Airlines, Inc.*, 646 F.3d 81, 88 (1st Cir. 2011) ("[T]his dispute has been super[s]eded by controlling Supreme Court case law – namely, by *Rowe*'s expansive treatment of the term 'service.' The weight of circuit court authority now favors the broader definition.")

(citation omitted); *Air Transport Assoc. of America v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008) ("*Charas*'s approach, we believe, is inconsistent with the Supreme Court's recent decision in *Rowe*."). Indeed, last year, the U.S. Department of Transportation submitted a Statement of Interest in a district court case, stating the Department's position that *Charas* conflicts with *Rowe* and now stands on "unstable ground." *Nat'l Fed'n of the Blind v. United Airlines, Inc.,* No. 10-4816, 2011 WL 1544524, at *5 (N.D. Cal. Apr. 25, 2011).

### C. The Ninth Circuit Doubles (or Triples) Down: *Ginsberg v. Northwest*

In the decision below, the Ninth Circuit dug in its heels, expressly affirming and relying upon *West* and *Charas*, thus entrenching and perpetuating the already existing conflict between the Ninth Circuit's ADA jurisprudence and that of this Court and the vast majority of courts of appeals. Instead of recognizing *West*'s abrogation by *Wolens* and *Rowe*, the decision below declares *West* "still good law" requiring the conclusion that Ginsberg's implied covenant of good faith claim is "too tenuously connected" to airline regulation to trigger preemption. App. 14. Likewise, instead of recognizing *Charas*' abrogation by *Rowe*, the Ninth Circuit (although abbreviating its discussion of *Charas* when it amended its opinion) relied on *Charas* for the proposition that implied covenant of good faith claims are outside the scope of state laws that Congress intended the ADA to preempt. App. 14-17.

The decision below widens the gulf between the Ninth Circuit and the rest of the country by holding

that all implied covenant of good faith claims are exempt from ADA preemption, contrary to decisions by the vast majority of courts to address this issue. Relying on *Charas* and *West*, the decision adopts a blanket rule exempting "state-based common law contract claims, such as the implied covenant of good faith and fair dealing" from ADA preemption. App. 5. The First Circuit, in contrast, has specifically rejected a categorical preemption exemption for implied covenant of good faith claims. The plaintiffs in *Buck v. American Airlines, Inc.*, 476 F.3d 29 (1st Cir. 2007) sued several airlines seeking a refund of fees and taxes paid in the purchase of non-refundable tickets that were subsequently not used. The First Circuit found plaintiffs' implied covenant of good faith claim preempted by the ADA because it imposed state policies on the airline by relying on "implicit" contract terms not found in the agreement. *Id.* at 34-37. Similarly, in *Data Manufacturing, Inc. v. United Parcel Services*, 557 F.3d 849, 853-54 (8th Cir. 2009), the Eighth Circuit held preempted state law claims based on implied contractual obligations, including an implicit duty not to charge unlawful penalties, because such claims were not part of the agreement between the parties.

And the U.S. District Court for the Northern District of Illinois recently recognized "a direct conflict" between the decision below and Seventh Circuit precedent, explaining: "*Ginsberg* was decided in large part . . . on the conclusion that the implied covenant of good faith and fair dealing can never 'relate to' prices, routes or services. That holding appears to be in direct conflict with the Seventh Circuit's decision in *Travel All Over the World*, which

held that any contract claim can relate to price depending on the facts alleged." *Newman v. Spirit Airlines, Inc.*, No.12-2897, 2012 WL 3134422, *3-4 (N.D. Ill. July 27, 2012). *See Travel All Over the World,* 73 F.3d at 1432 n.8 (recognizing that under *Wolens*, "'some state-law principles of contract law . . . might well be preempted to the extent they seek to effectuate the State's public policies, rather than the intent of the parties'"); *see also* Jol A. Silversmith, *Federal Preemption Over Air Carrier Prices, Routes, and Services: Recent Developments*, 3 Air & Space L. 4, 6 (2012) (citing the *Ginsberg* decision for the proposition that "courts are divided as to whether claims based solely on the implied covenant of good faith and fair dealing are preempted" and noting that the Ninth Circuit "has taken an approach, relying on a narrow reading of the terms 'prices' and 'services,' that seemingly conflicts with Supreme Court decisions, as well as with other courts").

Consistent with the approach of the First, Seventh, and Eighth Circuits, numerous district courts have rejected plaintiffs' attempts to assert implied covenant of good faith claims by sheltering behind the *Wolens* preemption exception for breach of contract claims. *See, e.g.*, *ATA Airlines, Inc. v. Fed. Express Corp.*, No. 08-0785, 2010 WL 1754164, *4 (S.D. Ind. April 21, 2010) (claims for breach of fiduciary duty and breach of duty of good faith and fair dealing "are preempted because the claims impose duties that are implied under state law and beyond the scope of the parties' agreements"); *Ray v. Am. Airlines, Inc.*, No. 08-5025, 2008 WL 2323923, *10 (W.D. Ark. June 2, 2008) ("Plaintiff's breach of contract claims which allege a breach of the implied

covenant of good faith and fair dealing based on Defendant's Customer Service Plan and Conditions of Carriage are preempted. The Supreme Court has held that the ADA 'confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.'" (quoting *Wolens*, 513 U.S. at 233)); *McMullen v. Delta Air Lines, Inc.*, No. 08-1523, 2008 WL 4449587, *5 (N.D. Cal. Sept. 30, 2008) (breach of implied covenant of good faith claim must be dismissed because "to the extent a plaintiff seeks to impose limits 'beyond those to which the parties actually agreed, the [implied covenant] claim is invalid. To the extent the implied covenant claim seeks simply to invoke terms to which the parties *did* agree, it is superfluous.'") (quoting *Harm v. Frasher*, 181 Cal. App. 2d 405, 417, 5 Cal. Rptr. 367 (1960)).

Finally, even beyond the more specific splits of authority when it comes to substantive results, the Ninth Circuit's methodological approach to ADA and FAAAA preemption is out of step with precedents from this Court and the other Circuits. Part of the Ninth Circuit's problem is its persistent and erroneous view that the ADA's preemption provision should be interpreted narrowly, despite this Court's repeated statements to the contrary. The decision below describes *Morales* as "cabin[ing] its holding to those laws that actually have a direct effect on rates, routes, or services," and going to "great lengths to make clear that its holding was narrow." *Morales*, however, repeatedly affirmed the breadth of the ADA's preemption language, stating that the clause "express[ed] a broad preemptive purpose," had a "sweeping nature," and was "broadly worded." 504

U.S. at 383-84. *Wolens* reiterated a broad construction of the ADA preemption clause, applying it to claims relating to "unessential," as well as "essential," services. 514 U.S. at 226. And *Rowe* affirms that a claim may have an effect that is "only indirect" on prices, routes, or services, and still be preempted. 552 U.S. at 370. As the First Circuit recently summarized: "All three of the major Supreme Court cases endorsed preemption and read the preemption language broadly and none adopted [the position] that we should presume strongly against preempting in areas historically occupied by state law." *DiFiore*, 646 F.3d at 86 (internal citation omitted).

## III. This Court's Review is Necessary to Bring the Ninth Circuit's ADA Jurisprudence in Alignment with that of this Court and the Other Courts of Appeals and to Put an End to the Ninth Circuit's Frustration of Congress's Deregulation Efforts in the Airline and Transportation Industries

The decision below has widespread commercial ramifications in the aviation and transportation industries, much greater than the frequent flyer program at issue here. Each time a carrier acts pursuant to its express and unequivocal rights under a contract, it may be exposed to a state law claim for breach of an implied covenant of good faith. Airlines and other carriers must be able to rely and act on the standard terms in their self-undertaken contracts. The ADA and *Wolens* guarantee as much. Yet the Ninth Circuit's decision casts significant doubt on whether airlines can continue to rely on their standard contract terms without being subject to

extra-contractual claims and obligations. As Judge Rymer observed, "[t]he answer [to whether implied covenant of good faith claims are preempted] is important for airlines who otherwise may be required to defend contract actions under a variety of state laws whenever they enact changes in their frequent flyer programs." App. 40.

The Ninth Circuit's decision here provides a roadmap for avoiding this Court's ADA precedent by allowing a plaintiff to pursue a claim squarely foreclosed under a contract by labeling it a claim for breach of an implied covenant of good faith. The end run around *Wolens* is dramatically illustrated by Ginsberg's decision to drop his contract claim (which was effectively foreclosed by the contract's "sole judgment" language) and pursue the "implied covenant" theory to obtain what the express terms of the contract plainly did not provide. The decision entrenches and exacerbates an already existing split between the Ninth Circuit and the majority of other courts of appeals, and robs the industry of much of the protection conferred by Congress in the ADA.

But the conflict between the Ninth Circuit and this Court is about much more than whether the ADA preempts implied covenant of good faith claims. Over the last 20 years, the Ninth Circuit has repeatedly strayed from this Court's teaching about the ADA. While other courts have recognized that *Wolens* and *Rowe* abrogated the Ninth Circuit's decisions in *West* and *Charas*, the Ninth Circuit has dug in its heels and relied on those cases to reach results like the one here that would be inconceivable in other Circuits. At this point, it is as if the Ninth Circuit is speaking a

different language than the rest of the federal judiciary: While this Court and the other courts of appeals conduct an inquiry into the underlying allegations to determine whether the claim at issue (1) relies on the enactment or enforcement of state statutory or common law in a manner that (2) relates to airline rates, routes, or services, the Ninth Circuit is issuing sweeping declarations that entire categories of common law claims are unrelated to airline deregulation and do not implicate the "narrow" preemptive effect of the ADA. Indeed, in the decision below, the Ninth Circuit quite literally was asking the wrong question. Rather than focus on whether Ginsberg's "implied covenant" claim enlarged the parties' bargain based on state law (a question that could only be answered affirmatively), the Ninth Circuit focused on whether the claim related to rates and services (a question that was already answered affirmatively in *Wolens*). The decision below makes clear that the Ninth Circuit is deeply committed to its flawed approach to ADA preemption and will not align itself this Court and the rest of the courts of appeals without direct intervention by this Court.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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October 11, 2012

# APPENDIX

## TABLE OF APPENDICES

*Appendix A*

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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No. 09-56986

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S. BINYOMIN GINSBERG, Rabbi, an individual and on behalf of all others similarly situated,

*Plaintiff-Appellant,*

v.

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

*Defendants-Appellees.*

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Appeal from the United States District Court for the Southern District of California
D.C. No. 3:09-cv-00028-JLS-NLS
Janis L. Sammartino,
District Judge, Presiding

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Argued and Submitted June 9, 2011
Pasadena, California

Filed July 13, 2012

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Before: Mary M. Schroeder[1], Robert R. Beezer[2], and Stephen S. Trott, Circuit Judges.

Opinion by Judge Beezer

## ORDER

The opinion filed August 5, 2011, slip op. 10231, and appearing at 653 F.3d 1033 (9th Cir. 2011), is hereby withdrawn. A new opinion is filed concurrently with this order.

The panel voted to deny defendants-appellees' petition for rehearing, and recommended denying the petition for rehearing en banc.

The full court has been advised of the new opinion and defendants-appellees' petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Defendants-appellees' petition for panel rehearing and petition for rehearing en banc are denied.

## OPINION

Beezer, Circuit Judge:

Plaintiff brought suit against an airline alleging a common law breach of contract under the implied covenant of good faith and fair dealing. The district court held that Plaintiff's claim was preempted by

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[1] Following the death of Judge Rymer, Judge Schroeder has been drawn to replace her on the panel.

[2] Judge Beezer authored and approved the amended opinion before his death.

the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1), and dismissed the claim pursuant to Fed. R. Civ. P. 12(b)(6). We conclude that the ADA does not preempt this common law contract claim, and reverse the district court.

When Congress passed the ADA, it dismantled a federal regulatory structure that had existed since 1958. By including a preemption clause, Congress intended to ensure that the States would not undo the deregulation with regulation of their own. Congress's "manifest purpose" was to make the airline industry more efficient by unleashing the market forces of competition—it was not to immunize the airline industry from liability for common law contract claims. Congress did not intend to convert airlines into quasi-government agencies, complete with sovereign immunity.

The purpose, history, and language of the ADA, along with Supreme Court and Ninth Circuit precedent, lead us to conclude that the ADA does not preempt a contract claim based on the doctrine of good faith and fair dealing.

**Background**

Plaintiff S. Binyomin Ginsberg was an active member of "WorldPerks," a frequent flier program offered by Defendant Northwest Airlines, Inc. ("Northwest"). Ginsberg began his WorldPerks membership in 1999, and by 2005 he had obtained Platinum Elite Status. Northwest revoked Ginsberg's WorldPerks membership on June 27, 2008. Ginsberg attempted several times to clarify the reasons behind Northwest's decision to revoke his membership.

Ginsberg alleges that Northwest revoked his membership arbitrarily because he complained too frequently about the services. Northwest sent Ginsberg an email on November 20, 2008, detailing the basis for Northwest's decision to revoke Ginsberg's membership. In that email the Northwest representative quotes from Paragraph 7 of the General Terms and Conditions of the World-Perks Program, which provides that Northwest may determine "in its sole judgment" whether a passenger has abused the program, and that abuse "may result in cancellation of the member's account and future disqualification from program participation, forfeiture of all mileage accrued and cancellation of previously issued but unused awards."

Ginsberg initially filed suit on January 8, 2009, asserting four causes of action: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) negligent misrepresentation; and (4) intentional misrepresentation. Northwest moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), arguing that the ADA preempted the claims. The district court dismissed, with prejudice, Ginsberg's claims for breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation, concluding that the ADA preempted them " 'because they relate to airline prices and services.' " The district court also dismissed the general breach of contract claim without prejudice, finding that the claim was not preempted, but that Ginsberg had failed to allege facts sufficient to show a material breach.

Ginsberg only appeals the district court's conclusion that the ADA preempts a claim for breach of the implied covenant of good faith and fair dealing.

**Standard of Review**

"Dismissals under Fed. R. Civ. P. 12(b)(6) for failure to state a claim are reviewed de novo." *Kahle v. Gonzales*, 487 F.3d 697, 699 (9th Cir. 2007).

**Analysis**

Based on our case law, Supreme Court precedent, and the ADA's legislative history and statutory text, we conclude that the ADA does not preempt state-based common law contract claims, such as the implied covenant of good faith and fair dealing. Although Ginsberg's claim may still fail on the merits, the district court erred when it dismissed the claim under the preemption doctrine. Doing so was a misapplication of the law because the ADA was never designed to preempt these types of disputes.

**A. Preemption Doctrine**

The key to understanding the scope of the ADA's preemption clause is to determine what Congress intended to achieve when it enacted the ADA. "Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990) (internal quotation marks omitted). This inquiry "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative

purpose." *Id.* at 57 (internal quotation marks omitted).

In *Medtronic, Inc. v. Lohr*, the Supreme Court advised that preemption provisions ought to be narrowly construed for two reasons:

> First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action . . . Second, our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment . . . that the purpose of Congress is the ultimate touchstone in every pre-emption case.

518 U.S. 470, 485 (1996) (internal quotation marks omitted).

Indeed, preemption analysis "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). When the question of preemption implicates "a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485 (internal citation and quotations omitted).

To determine what Congress's "manifest purpose" was, we must first consider the ADA's unique history. Under the Federal Aviation Act of 1958, the Civil Aeronautics Board ("CAB") had regulatory authority over interstate air

transportation. Pub. L. No. 85-726. But the Board's power in this field was not exclusive, for the statute also contained a "savings clause," clarifying that "[n]othing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506 (1964), amended and renumbered as 49 U.S.C. § 40120(c) by Pub. L. 103-272, 108 Stat. 745, 1118 (1994). Because the 1958 Act did not expressly preempt state law, this clause allowed states to regulate airlines, leading to economic distortions. *See, e.g.*, *California v. CAB*, 581 F.2d 954, 956 (D.C. Cir. 1978) (concluding that states may regulate intrastate airfares, even if such regulations interfere with interstate prices).

By 1978 Congress had concluded that state-by-state regulation was inefficient and that deregulation, along with market forces, could better promote efficiency, variety, and quality in the airline industry. *See* H.R. Rep. No. 95-1779, at 53 (1978) (Conf. Rep). But seeing that states could just as easily "undo federal deregulation with regulation of their own," *Morales v. Trans World Airlines Inc.*, 504 U.S. 374, 378 (1992), Congress included a preemption clause in former section 1305(a)(1), which now reads as follows:[3]

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[3] The clause was initially located in the ADA itself at 49 U.S.C. § 1305(a)(1), but was amended and incorporated into the Federal Aviation Administration Authorization Act of 1994. 49 U.S.C. § 41713(b).

> [A] State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

At the same time, Congress retained the "savings clause," thereby preserving common law and statutory remedies. Since 1978, the scope of this preemption clause has been hotly debated, but never fully resolved.

### B. Supreme Court and Ninth Circuit Precedent

The Supreme Court has encountered the ADA's preemption clause at least three times since 1990. In *Morales*, the Court considered whether the ADA preempted the States "from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes." 504 U.S. at 378. The Court concluded that because advertising has such a direct link to pricing and rates, the ADA preempted restrictions against deceptive advertising. *Id.* at 388-89. The Court therefore reasoned that the advertising restrictions at issue had the "forbidden significant effect" on rates, routes, or services. *Id.* at 388. Because the regulations were inconsistent with the ADA's deregulatory purpose, they were preempted under former § 1305(a)(1). But in the next breath the Court cabined its holding to those laws that actually have a direct effect on rates, routes, or services.

The Court went to great lengths to make clear that its holding was narrow, and that the ADA only preempts laws that have a direct effect on pricing:

> In concluding that the . . . advertising guidelines are pre-empted, we do not . . . set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly "relate to" rates; the connection would obviously be far more tenuous . . . [S]ome state actions may affect airline fares in too tenuous, remote, or peripheral a manner to have a preemptive effect.

504 U.S. at 390 (internal citations omitted).

We echoed this view in *Air Transport Association of America v. City & County of San Francisco*, where we concluded that Congress did not intend for the ADA to preempt state laws forbidding employment discrimination, even if these laws have an economic effect, because employment discrimi- nation laws are not directly related to pricing, routes, or services. 266 F.3d 1064, 1072-73 (9th Cir. 2001).

The Court considered the ADA's preemption clause for a second time in *American Airlines, Inc., v. Wolens*, 513 U.S. 219 (1995). In a fact pattern similar to this case, the plaintiffs in *Wolens* were members of a frequent flyer program and brought suit against an airline. *Id.* at 224-25. The plaintiffs challenged

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The Court in *Wolens* drew a clear distinction between the consumer fraud claim, which was based on a proscriptive law targeting *primary conduct*, and actions that "simply give effect to bargains offered by the airlines and accepted by airline customers." *Wolens*, 513 U.S. at 228. Because this distinction—between state laws that regulate airlines and state enforcement of contract disputes—is crucial, we quote the Court at length:

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*Wolens*, 513 U.S. at 228-30 (internal footnote omitted) (alterations in original) (emphasis added). In sum, the Court concluded that a state does not "enact or enforce any law" when it uses its contract laws to enforce private agreements.[4]

After drawing this distinction, the Court then pointed out institutional limitations that demonstrate the ADA cannot preempt breach of contract claims, including those based on common law principles such as good faith and fair dealing. In particular, the Department of Transportation is not equipped to adjudicate these types of claims. First, the DOT's own regulations "contemplate that . . . contracts ordinarily would be enforceable under 'the contract law of the States.'" *Wolens*, 513 U.S. at 230 (citing 47 Fed. Reg. 52129 (1982)). Second, the DOT is not equipped with either "the authority [or] the apparatus required to superintend a contract dispute resolution regime." *Id.* at 232. Although before 1978 the CAB adjudicated contract disputes, when Congress deregulated the airline industry it dismantled this apparatus and never replaced it.

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Therefore, if common law contract claims were preempted by the ADA, a plaintiff literally would have no recourse because state courts would have no jurisdiction to adjudicate the claim, and the DOT would have no ability to do so. Effectively, the airlines would be immunized from suit—a result that Congress never intended. This also means that "the lawmakers indicated no intention to establish, simultaneously, a new administrative process for DOT adjudication of private contract disputes." *Id.* Consequently, the Court flatly refused to "foist on the DOT work Congress has neither instructed nor funded the Department to do." *Id.* at 234. We agree.

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And finally, we addressed a similar question in *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993). There, the plaintiff brought suit against Northwest for breach of the covenant of good faith and fair dealing under Montana law. *Id.* at 149. The district court granted summary judgment to Northwest, stating that the claim was preempted by the ADA. On appeal we reversed, concluding that a claim for breach of the covenant of good faith and fair dealing was "too tenuously connected to airline regulation to trigger preemption under the ADA." *Id.* at 151. Although this case was pre-*Wolens*, we conclude it is still good law.

Indeed, in *Charas*, a post-*Wolens* decision, we emphasized that Congress's "clear and manifest purpose" in enacting airline deregulation "was to achieve just that—the economic deregulation of the airline industry." *Charas*, 160 F.3d at 1265. The only purpose of the preemption clause is to prevent state interference with the mandate of deregulation. *Id.* at 1261 (noting that when Congress enacted the ADA it "intended to preempt only state laws and lawsuits that would adversely affect the economic deregulation of the airlines and the forces of competition within the airline industry.").

Additionally, that Congress did not intend for § 1305(a)(1) to preempt state common law contract claims is evident from another provision: the savings clause, which preserves common law remedies. Because the ADA's preemption clause does not explicitly preempt common law breach of contract claims, we turn to the rest of the statute's language to " 'ascertain and give effect to the plain meaning of

the language used,' but must be careful not to read the preemption clause's language in such a way as to render another provision superfluous." *Charas*, 160 F.3d at 1264 (quoting *Hughes Air Corp. v. Public Utils. Comm'n*, 644 F.2d 1334, 1337 (9th Cir. 1981)).

In *Charas* we concluded that, taken together, the savings clause and preemption clause "evidence [ ] congressional intent to prohibit states from regulating the airlines while preserving state tort remedies that already existed at common law, providing that such remedies do not significantly impact federal deregulation." *Id.* at 1265. Similar logic would apply to state contract remedies that already existed at common law, such as the implied covenant of good faith and fair dealing. *See Wolens*, 513 U.S. at 232-33 (explaining that the preemption clause, "read together with the . . . savings clause," would permit "state-law-based court adjudication of routine breach of- contract claims").

Moreover, we also may look to "the pervasiveness of the regulations enacted pursuant to the relevant statute to find preemptive intent." *Montalvo v. Spirit Airlines*, 508 F.3d 464, 470 (9th Cir. 2007). As the Supreme Court pointed out in *Wolens*, the DOT is not equipped to handle contract disputes, and its regulations suggest that Congress did not intend to occupy this particular field of law. This stands in contrast, for example, to airline safety, where agency regulations demonstrate "an intent to occupy exclusively the entire field of aviation safety." *Id.* at 471.

A claim for breach of the implied covenant of good faith and fair dealing does not interfere with the

deregulatory mandate. Although Northwest argues that a common law breach of contract claim, like one based on the doctrine of "good faith and fair dealing," would enlarge the contract's terms—savings clause, notwithstanding—the Supreme Court rejected this argument in *Wolens*. There, the Court explicitly allowed "state-law-based" claims to go forward because that was the purpose of retaining the savings clause. *Wolens*, 513 U.S. at 232. The Supreme Court reasoned that state-law-based contract claims would not frustrate the ADA's manifest purpose: "[b]ecause contract law is not at its core 'diverse, nonuniform, and confusing,' we see no large risk of nonuniform adjudication inherent in 'state-court enforcement of the terms of a uniform agreement prepared by an airline and entered into with its passengers nationwide.'" *Id*. at 233 n.8 (internal citation and alteration omitted).

As we pointed out in *Air Transport Association of America v. City and County of San Francisco*, "[w]hat the Airlines are truly complaining about are free market forces and their own competitive decisions." 266 F.3d 1064, 1074 (9th Cir. 2001). In upholding a local law forbidding employment discrimination, the Ninth Circuit reasoned that "[i]n this deregulated environment, airlines can decide whether or not to make large economic investments at the San Francisco airport . . . That economic decision may mean the Airlines will have to agree to abide by the [city's anti-discrimination] Ordinance[ ]." *Id*. Similarly, here, Northwest is free to invest in a frequent flier program; however, that economic decision means that the airline has to abide by its contractual obligations, within this deregulated

context, pursuant to the covenant of good faith and fair dealing. Like the ordinance at issue in *Air Transport Association*, state enforcement of the covenant is not "to force the Airlines to adopt or change their prices, routes or services—the prerequisite for ADA preemption." *Id.*

### C. The Implied Covenant of Good Faith and Fair Dealing Does Not "Relate to" Prices, Routes, or Services

Finally, the district court concluded that the ADA preempts Ginsberg's claim for breach of the covenant of good faith and fair dealing because the claim would "relate to" both "prices" and "services." We disagree.

First, the district court uses an overly broad definition of what relates to "prices." In *Wolens* all the justices—including the dissenters—agreed that the ADA does not preempt common law tort claims such as personal injury and wrongful death, even though airline costs and fares would be affected by how restrictive a particular state's law may be. *Wolens*, 513 U.S. at 234-35. Similarly, here, the link is far too tenuous, and effectively would subsume all breach of contract claims. *See All World Prof'l Travel Servs., Inc. v. Am. Airlines, Inc.*, 282 F. Supp. 2d 1161, 1171 (C.D. Cal. 2001) ("[C]laims must adversely impact economic deregulation of the airlines and the forces of competition within the airline industry in order to be preempted by the ADA . . . Allowing [the claims to proceed] will not have the effect of regulating American's pricing policies, commission structure or reservation practices.").

Second, the district court's broad understanding of the "relating to" language is also inconsistent with the ADA's legislative history. In 1977, the CAB's proposed preemption language stated that "[n]o State . . . shall enact any law . . . relating to rates, routes, or services in air transportation." Hearings on H.R. 8813, Subcomm. on Aviation of the House Comm. on Pub. Works & Transp., 95th Cong., 1st Sess. pt. 1, p. 200 (1977). In its explanatory testimony the CAB's representatives never suggested that the "relating to" language created a broad scope for preemption. Rather, the CAB explained that the preemption clause was "added to make clear that no state or political subdivision may defeat the purposes of the bill by regulating interstate air transportation. This provision represents simply a codification of existing law and leaves unimpaired the states' authority over intrastate matters." *Id.* at 243.

The "relating to" language that Congress eventually enacted came from the House version of the bill. But in its Committee Report, the House also made clear that the preemption provision simply "provid[ed] that when a carrier operates under authority granted pursuant to title IV of the Federal Aviation Act, no State may regulate that carrier's routes, rates, or services." H.R. Rep. No. 95-1211, at 16 (1978). This understanding is more narrow than the district court's conclusion. And, in fact, the Senate's version did not even contain the "relating to" language at all. S. 2493, § 423(a)(1), *reprinted in* S. Rep. No. 95-631, p. 39 (1978). The Senate Report clarified that this section "prohibits States from exercising economic regulatory control over interstate airlines." *Id.* at 98. Finally, the Conference Report

adopted the House bill and its explanation, which it described in narrow terms. H.R. No. 95-1779, at 94-95 (1978) (Conf. Rep.). This history suggests that Congress intended the preemption language only to apply to state laws directly "regulating rates, routes, or services." The district court's broad reading of the statute's language simply finds no support in the legislative history.

**Conclusion**

Nothing in the ADA's language, history, or subsequent regulatory scaffolding suggests that Congress had a "clear and manifest purpose" to displace State common law contract claims that do not affect deregulation in more than a "peripheral . . . manner." *Morales*, 504 U.S. at 390. We conclude that a claim for breach of the implied covenant of good faith and fair dealing is not preempted by the ADA.

Accordingly, we REVERSE and REMAND to the district court to reconsider the merits of plaintiff's claim.

*Appendix B*

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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No. 09-56986

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S. BINYOMIN GINSBERG, Rabbi, an individual and on behalf of all others similarly situated.

*Plaintiff-Appellant,*

v.

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

*Defendant-Appellee,*

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Appeal from the United States District Court for the Southern District of California
D.C. No. 3:09-cv-00028-JLS-NLS
Janis L. Sammartino, District Judge, Presiding

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Argued and Submitted June 9, 2011
Pasadena, California

Filed August 5, 2011

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Before: Robert R. Beezer, Stephen S. Trott, and Ann Rymer, Circuit Judges.

Opinion by Judge Beezer
Concurrence by Judge Rymer

## OPINION

BEEZER, Circuit Judge:

Plaintiff brought suit against an airline alleging a common law breach of contract under the implied covenant of good faith and fair dealing. The district court held that Plaintiff's claim was preempted by the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1), and dismissed the claim pursuant to Fed. R. Civ. P. 12(b)(6). We conclude that the ADA does not preempt this common law contract claim, and reverse the district court.

When Congress passed the ADA, it dismantled a federal regulatory structure that had existed since 1958. By including a preemption clause, Congress intended to ensure that the States would not undo the deregulation with regulation of their own. Congress's "manifest purpose" was to make the airline industry more efficient by unleashing the market forces of competition—it was not to immunize the airline industry from liability for common law contract claims. Congress did not intend to convert airlines into quasi-government agencies, complete with sovereign immunity.

The purpose, history, and language of the ADA, along with Supreme Court and Ninth Circuit precedent, lead us to conclude that the ADA does not preempt a contract claim based on the doctrine of good faith and fair dealing.

## Background

Plaintiff S. Binyomin Ginsberg was an active member of "WorldPerks," a frequent flier program

offered by Defendant Northwest Airlines, Inc. ("Northwest"). Ginsberg began his WorldPerks membership in 1999, and by 2005 he had obtained Platinum Elite Status. Northwest revoked Ginsberg's WorldPerks membership on June 27, 2008. Ginsberg attempted several times to clarify the reasons behind Northwest's decision to revoke his membership. Ginsberg alleges that Northwest revoked his membership arbitrarily because he complained too frequently about the services. Northwest sent Ginsberg an email on November 20, 2008, detailing the basis for Northwest's decision to revoke Ginsberg's membership. In that email the Northwest representative quotes from Paragraph 7 of the General Terms and Conditions of the World- Perks Program, which provides that Northwest may determine "in its sole judgment" whether a passenger has abused the program, and that abuse "may result in cancellation of the member's account and future disqualification from program participation, forfeiture of all mileage accrued and cancellation of previously issued but unused awards."

Ginsberg initially filed suit on January 8, 2009, asserting four causes of action: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) negligent misrepresentation; and (4) intentional misrepresentation. Northwest moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), arguing that the ADA preempted the claims. The district court dismissed, with prejudice, Ginsberg's claims for breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation, concluding that the ADA

preempted them " 'because they relate to airline prices and services.' " The district court also dismissed the general breach of contract claim without prejudice, finding that the claim was not preempted, but that Ginsberg had failed to allege facts sufficient to show a material breach.

Ginsberg only appeals the district court's conclusion that the ADA preempts a claim for breach of the implied covenant of good faith and fair dealing.

## Standard of Review

"Dismissals under Fed. R. Civ. P. 12(b)(6) for failure to state a claim are reviewed de novo." *Kahle v. Gonzales*, 487 F.3d 697, 699 (9th Cir. 2007).

## Analysis

Based on our case law, Supreme Court precedent, and the ADA's legislative history and statutory text, we conclude that the ADA does not preempt state-based common law contract claims, such as the implied covenant of good faith and fair dealing. Although Ginsberg's claim may still fail on the merits, the district court erred when it dismissed the claim under the preemption doctrine. Doing so was a misapplication of the law because the ADA was never designed to preempt these types of disputes.

### A. Preemption Doctrine

The key to understanding the scope of the ADA's preemption clause is to determine what Congress intended to achieve when it enacted the ADA. "Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly

contained in its structure and purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990) (internal quotation marks omitted). This inquiry "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Id.* at 57 (internal quotation marks omitted).

In *Medtronic, Inc. v. Lohr*, the Supreme Court advised that preemption provisions ought to be narrowly construed for two reasons:

> First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action . . . Second, our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment . . . that the purpose of Congress is the ultimate touchstone in every pre-emption case.

518 U.S. 470, 485 (1996) (internal quotation marks omitted).

Indeed, preemption analysis "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). When the question of preemption implicates "a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest

purpose of Congress." *Medtronic*, 518 U.S. at 485 (internal citation and quotations omitted).

To determine what Congress's "manifest purpose" was, we must first consider the ADA's unique history. Under the Federal Aviation Act of 1958, the Civil Aeronautics Board ("CAB") had regulatory authority over interstate air transportation. Pub. L. No. 85-726. But the Board's power in this field was not exclusive, for the statute also contained a "savings clause," clarifying that "[n]othing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506 (1964), amended and renumbered as 49 U.S.C. § 40120(c) by Pub. L. 103-272, 108 Stat. 745, 1118 (1994). Because the 1958 Act did not expressly preempt state law, this clause allowed states to regulate airlines, leading to economic distortions. *See, e.g.*, *California v. CAB*, 581 F.2d 954, 956 (D.C. Cir. 1978) (concluding that states may regulate intrastate airfares, even if such regulations interfere with interstate prices).

By 1978 Congress had concluded that state-by-state regulation was inefficient and that deregulation, along with market forces, could better promote efficiency, variety, and quality in the airline industry. *See* H.R. Rep. No. 95-1779, at 53 (1978) (Conf. Rep). But seeing that states could just as easily "undo federal deregulation with regulation of their own," *Morales v. Trans World Airlines Inc.*, 504 U.S. 374, 378 (1992), Congress included a preemption

clause in former section 1305(a)(1), which now reads as follows:[1]

> [A] State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

At the same time, Congress retained the "savings clause," thereby preserving common law and statutory remedies. Since 1978, the scope of this preemption clause has been hotly debated, but never fully resolved.

### B. Supreme Court and Ninth Circuit Precedent

The Supreme Court has encountered the ADA's preemption clause at least three times since 1990. In *Morales*, the Court considered whether the ADA preempted the States "from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes." 504 U.S. at 378. The Court concluded that because advertising has such a direct link to pricing and rates, the ADA preempted restrictions against deceptive advertising. *Id.* at 388-89. The Court

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[1] The clause was initially located in the ADA itself at 49 U.S.C. § 1305(a)(1), but was amended and incorporated into the Federal Aviation Administration Authorization Act of 1994. 49 U.S.C. § 41713(b).

therefore reasoned that the advertising restrictions at issue had the "forbidden significant effect" on rates, routes, or services. *Id.* at 388. Because the regulations were inconsistent with the ADA's deregulatory purpose, they were preempted under former § 1305(a)(1). But in the next breath the Court cabined its holding to those laws that actually have a direct effect on rates, routes, or services.

The Court went to great lengths to make clear that its holding was narrow, and that the ADA only preempts laws that have a direct effect on pricing:

> In concluding that the . . . advertising guidelines are pre-empted, we do not . . . set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly "relate to" rates; the connection would obviously be far more tenuous . . . [S]ome state actions may affect airline fares in too tenuous, remote, or peripheral a manner to have a preemptive effect.

504 U.S. at 390 (internal citations omitted).

We echoed this view in *Air Transport Association of America v. City & County of San Francisco*, where we concluded that Congress did not intend for the ADA to preempt state laws forbidding employment discrimination, even if these laws have an economic effect, because employment discrimination laws are

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Indeed, in *Charas*, a post-*Wolens* decision, we emphasized that Congress's "clear and manifest purpose" in enacting airline deregulation "was to achieve just that—the economic deregulation of the airline industry." *Charas*, 160 F.3d at 1265. The only purpose of the preemption clause is to prevent state interference with the mandate of deregulation. *Id.* at 1261 (noting that when Congress enacted the ADA it "intended to preempt only state laws and lawsuits that would adversely affect the economic

deregulation of the airlines and the forces of competition within the airline industry.").

Additionally, that Congress did not intend for § 1305(a)(1) to preempt state common law contract claims is evident from another provision: the savings clause, which preserves common law remedies. Because the ADA's preemption clause does not explicitly preempt common law breach of contract claims, we turn to the rest of the statute's language to " 'ascertain and give effect to the plain meaning of the language used,' but must be careful not to read the preemption clause's language in such a way as to render another provision superfluous." *Charas*, 160 F.3d at 1264 (quoting *Hughes Air Corp. v. Public Utils. Comm'n*, 644 F.2d 1334, 1337 (9th Cir. 1981)).

In *Charas* we concluded that, taken together, the savings clause and preemption clause "evidence[ ] congressional intent to prohibit states from regulating the airlines while preserving state tort remedies that already existed at common law, providing that such remedies do not significantly impact federal deregulation." *Id.* at 1265. Similar logic would apply to state contract remedies that already existed at common law, such as the implied covenant of good faith and fair dealing. *See Wolens*, 513 U.S. at 232-33 (explaining that the preemption clause, "read together with the . . . savings clause," would permit "state-law-based court adjudication of routine breach-of- contract claims").

Moreover, we also may look to "the pervasiveness of the regulations enacted pursuant to the relevant statute to find preemptive intent." *Montalvo v. Spirit Airlines*, 508 F.3d 464, 470 (9th Cir. 2007). As the

Supreme Court pointed out in *Wolens*, the DOT is not equipped to handle contract disputes, and its regulations suggest that Congress did not intend to occupy this particular field of law. This stands in contrast, for example, to airline safety, where agency regulations demonstrate "an intent to occupy exclusively the entire field of aviation safety." *Id.* at 471.

A claim for breach of the implied covenant of good faith and fair dealing does not interfere with the deregulatory mandate. Although Northwest argues that a common law breach of contract claim, like one based on the doctrine of "good faith and fair dealing," would enlarge the contract's terms—savings clause, notwithstanding—the Supreme Court rejected this argument in *Wolens*. There, the Court explicitly allowed "state-law-based" claims to go forward because that was the purpose of retaining the savings clause. *Wolens*, 513 U.S. at 232. The Supreme Court reasoned that state-law-based contract claims would not frustrate the ADA's manifest purpose: "[b]ecause contract law is not at its core 'diverse, nonuniform, and confusing,' we see no large risk of nonuniform adjudication inherent in 'state-court enforcement of the terms of a uniform agreement prepared by an airline and entered into with its passengers nationwide.'" *Id.* at 233 n.8 (internal citation and alteration omitted).

As we pointed out in *Air Transport Association of America v. City and County of San Francisco*, "[w]hat the Airlines are truly complaining about are free market forces and their own competitive decisions." 266 F.3d 1064, 1074 (9th Cir. 2001). In upholding a

local law forbidding employment discrimination, the Ninth Circuit reasoned that "[i]n this deregulated environment, airlines can decide whether or not to make large economic investments at the San Francisco airport . . . That economic decision may mean the Airlines will have to agree to abide by the [city's anti-discrimination] Ordinance[ ]." *Id.* Similarly, here, Northwest is free to invest in a frequent flier program; however, that economic decision means that the airline has to abide by its contractual obligations, within this deregulated context, pursuant to the covenant of good faith and fair dealing. Like the ordinance at issue in *Air Transport Association*, state enforcement of the covenant is not "to force the Airlines to adopt or change their prices, routes or services—the prerequisite for ADA preemption." *Id.*

### C. The Implied Covenant of Good Faith and Fair Dealing Does Not "Relate to" Prices, Routes, or Services

Finally, the district court concluded that the ADA preempts Ginsberg's claim for breach of the covenant of good faith and fair dealing because the claim would "relate to" both "prices" and "services." We disagree.

First, the district court uses an overly broad definition of what relates to "prices." In *Wolens* all the justices—including the dissenters—agreed that the ADA does not preempt common law tort claims such as personal injury and wrongful death, even though airline costs and fares would be affected by how restrictive a particular state's law may be. *Wolens*, 513 U.S. at 234-35. Similarly, here, the link

is far too tenuous, and effectively would subsume all breach of contract claims. *See All World Prof'l Travel Servs., Inc. v. Am. Airlines, Inc.*, 282 F. Supp. 2d 1161, 1171 (C.D. Cal. 2001) ("[C]laims must adversely impact economic deregulation of the airlines and the forces of competition within the airline industry in order to be preempted by the ADA . . . Allowing [the claims to proceed] will not have the effect of regulating American's pricing policies, commission structure or reservation practices.").

Second, the district court's broad understanding of the "relating to" language is also inconsistent with the ADA's legislative history. In 1977, the CAB's proposed preemption language stated that "[n]o State . . . shall enact any law . . . relating to rates, routes, or services in air transportation." Hearings on H.R. 8813, Subcomm. on Aviation of the House Comm. on Pub. Works & Transp., 95th Cong., 1st Sess. pt. 1, p. 200 (1977). In its explanatory testimony the CAB's representatives never suggested that the "relating to" language created a broad scope for preemption. Rather, the CAB explained that the preemption clause was "added to make clear that no state or political subdivision may defeat the purposes of the bill by regulating interstate air transportation. This provision represents simply a codification of existing law and leaves unimpaired the states' authority over intrastate matters." *Id.* at 243.

The "relating to" language that Congress eventually enacted came from the House version of the bill. But in its Committee Report, the House also made clear that the preemption provision simply "provid[ed] that when a carrier operates under

authority granted pursuant to title IV of the Federal Aviation Act, no State may regulate that carrier's routes, rates, or services." H.R. Rep. No. 95-1211, at 16 (1978). This understanding is more narrow than the district court's conclusion. And, in fact, the Senate's version did not even contain the "relating to" language at all. S. 2493, § 423(a)(1), *reprinted in* S. Rep. No. 95-631, p. 39 (1978). The Senate Report clarified that this section "prohibits States from exercising economic regulatory control over interstate airlines." *Id*. at 98. Finally, the Conference Report adopted the House bill and its explanation, which it described in narrow terms. H.R. No. 95-1779, at 94-95 (1978) (Conf. Rep.). This history suggests that Congress intended the preemption language only to apply to state laws directly "regulating rates, routes, or services." The district court's broad reading of the statute's language simply finds no support in the legislative history.

Third, the district court's understanding of "services" is inconsistent with the our decision in *Charas*. In *Charas*, the en banc court considered the meaning of "services" in the wake of *Wolens*, and defined the term within the context of "rates" and "routes," to refer

> to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided (as in, "This airline provides service from Tucson to New York twice a day.")
>
> . . .

> Congress used "service" in § 1305(a)(1) in the public utility sense—i.e., the provision of air transportation to and from various markets at various times.

*Charas*, 160 F.3d at 1265-66. In *Charas* we also rejected the airlines' argument that "services" included fringe benefits such as the dispensing of food and drinks, or flight attendant assistance and explicitly warned against an expansive understanding. "To interpret 'service' more broadly is to ignore the context of its use; and, it effectively would result in the preemption of virtually everything an airline does. It seems clear to us that that is not what Congress intended." *Id*. at 1266. The district court's understanding of "services" departs from this court's understanding of that term. A claim for breach of good faith and fair dealing does not relate to "services" because it has nothing to do with schedules, origins, destinations, cargo, or mail.

## Conclusion

Nothing in the ADA's language, history, or subsequent regulatory scaffolding suggests that Congress had a "clear and manifest purpose" to displace State common law contract claims that do not affect deregulation in more than a "peripheral . . . manner." *Morales*, 504 U.S. at 390. We conclude that a claim for breach of the implied covenant of good faith and fair dealing is not preempted by the ADA.

Accordingly, we REVERSE and REMAND to the district court to reconsider the merits of plaintiff's claim.

RYMER, Circuit Judge, concurring in the judgment:

I join the court's holding because it is compelled by *West v. Northwest Airlines Inc.*, 995 F.2d 148 (9th Cir. 1993). There we determined that the plaintiff 's claim for breach of the covenant of good faith and fair dealing was not preempted because state contract law was "too tenuously connected" to airline prices and services. *See id.* at 151. Ginsberg similarly alleges a breach of the implied covenant of good faith and fair dealing. Thus, his claim survives preemption under *West*.

Whether *West* is "clearly irreconcilable" with *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), is a very close call. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). The Court, in *Wolens*, held that a breach of contract claim may relate to prices and services, depending on the facts alleged. *See* 513 U.S. at 226. The breach claim in that case related to prices and services because the alleged facts referenced ticket-pricing and access to flights. *Id. West*'s rule for contract claims seems out of step with the Supreme Court's holding. This rule also places us in tension with the Seventh Circuit. *See Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996) ("*Morales* does not permit us to develop broad rules concerning whether certain types of common-law claims are preempted by the ADA. Instead, we must examine the underlying facts of each case to determine whether the particular claims at issue 'relate to' airline rates, routes or services.").

That being said, the "clearly irreconcilable" requirement presents a high threshold, one I can't

say with certainty has been met here. *West*'s application of the "relates to" requirement was based on the interpretation provided in *Morales v Trans World Airlines, Inc.*, 504 U.S. 374 (1992). *See West*, 995 F.2d at 151. *Wolens* affirmed *Morales*'s interpretation of that clause. *See Wolens*, 513 U.S. at 226. As a three-judge panel, we are not free to disagree with *West*'s understanding of *Morales*, even if the later decision in *Wolens* suggests that *Morales*'s interpretation of "relates to" was broader than the *West* panel believed.

If *West* were not in the picture, we would be faced with the *Wolens* inquiry of whether Ginsberg's claim alleges a violation of a state-imposed obligation or a self-imposed undertaking. *See Wolens*, 513 U.S. at 228. This is a difficult question because, in some sense, an implied covenant of good faith represents both types of obligations. It is a covenant between the parties, suggesting a self-imposed undertaking, but is implied into the contract by the state, indicating a state-imposed obligation. The answer is important for airlines who otherwise may be required to defend contract actions under a variety of state laws whenever they enact changes in their frequent flyer programs. We need not resolve this difficulty today because of *West*'s insulation, at least for the time being, of state contract claims from ADA preemption.

*Appendix C*

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

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No. 09-cv-28 JLS (NLS)

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RABBI S. BINYOMIN GINSBERG,

*Plaintiff,*

v.

NORTHWEST, INC.; and DELTA AIR LINES, INC.,

*Defendants.*

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Filed October 13, 2009

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**ORDER: DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION**

Presently before the Court is Plaintiff's motion for reconsideration of the Court's Order of July 8, 2009. (Doc. No. 16.) For the reasons set forth below, Plaintiff's motion is DENIED.

**BACKGROUND**

On January 8, 2009, Plaintiff Rabbi S. Binyonmin Ginsberg filed a complaint against Defendants Northwest Airlines, Inc. ("Northwest") and Delta Air Lines, Inc. (Doc. No. 1.) Plaintiff alleged negligent and intentional misrepresentation, breach of good faith and fair dealing, and breach of contract against Defendants for actions Defendants

took in relation to Plaintiff's membership in Northwest's frequent flyer program, known as the WorldPerks Program ("WorldPerks"). On July 8, 2009, the Court granted Defendants' motion to dismiss Plaintiff's complaint. (Doc. No. 15 ("Order").)

On July 21, 2009, Plaintiff filed a motion for reconsideration of the Order. (Doc. No. 16.) On August 6, 2009 Defendants filed their opposition, (Doc. No. 23) and on August 13, 2009 Plaintiff filed

**LEGAL STANDARD**

"[A] postjudgment motion will be considered a [Federal Rule of Civil Procedure ("FRCP")] 59(e) motion where it involves reconsideration of matters properly encompassed in a decision on the merits." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174 (1989) (citation and quotation omitted). "[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (citation omitted). "A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (citation omitted).

**ANALYSIS**

Defendants correctly assert that Plaintiff's motion does not meet any requirements of Rule 59(e). (Opp. at 2-5.) Plaintiff brings forth no newly discovered evidence or changes in controlling law.

Rather than cite any clear errors by the Court, Plaintiff attempts to raise points of law he argued earlier. In the process he misstates the holding of the main case at issue, *America Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), and he brings no new arguments that could not reasonably have been brought in the initial litigation.

Nevertheless, the Court addresses Plaintiff's objections on the merits in the hope of resolving any confusion regarding its findings of law. Plaintiff objects that the Court (1) ignored the Airline Deregulation Act ("ADA") savings clause, (2) misconstrued the holding of the Supreme Court in *Wolens*, (3) improperly cited the regulatory authority of the Department of Transportation ("DOT"), (4) did not apply a "substantial effect" standard in finding Defendants' frequent flyer program related to airline rates, (5) erred in asserting that the covenant of good faith and fair dealing is a product of state policy, and (6) violated Plaintiff's constitutional rights to due process of law and equal protection.

## I. Plaintiff's First Objection

Plaintiff asserts the Order "overextended the preemption doctrine in the ADA in contravention of the plain meaning of the ADA's savings clause." (Memo. ISO Motion, at 5.) The Supreme Court in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), explained why the ADA's preemption provision takes precedence over the savings clause:

> [I]t is a commonplace of statutory construction that the specific governs the general, a canon particularly pertinent here,

> where the "saving" clause is a relic of the pre-ADA/no pre-emption regime . . . As in *International Paper Co. v. Ouellette*, . . . "we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause."

*Id.* at 384-85 (citations and quotations omitted). Regarding agreements with customers, *Wolens* interpreted the savings clause to hold airlines to only "term[s] the airline itself stipulated." *Wolens*, 513 U.S. at 232-33. The preemption clause keeps the savings clause from creating any "enlargement or enhancement based on state laws or policies external to [an] agreement." *Id.* at 233. The Court's interpretation of the scope of the savings clause is consistent with the plain meaning of the more recent and specific ADA preemption provision and the plain meaning of two Supreme Court decisions. Under this clearly mandated view, the savings clause does not affect this Court's conclusion.

## II. Plaintiff's Second and Fifth Objections

Plaintiff next objects that the Court has not in fact followed the plain meaning of the Supreme Court's decision in *Wolens*. He asserts that *Wolens* explicitly held common laws affecting contracts to not be preempted by the ADA. (Memo. ISO Motion, at 5-8.) This vision of *Wolens*, however, is at odds with the Supreme Court's decision which make no distinction between state common law and state statutes. Plaintiff further fails to understand that a common law doctrine exists independently of a contract itself and is a product of state policy. Both flaws are on display when Plaintiff claims that *Wolens* held

> claims [regarding a frequent flyer program] against an airline which were existing at common law before the ADA was passed, if dependent upon a contract and not based on a state statute, are preserved.

(Memo. ISO Motion, at 6.)

First, as stated above, *Wolens* makes no distinction between state statutes and state common law. Rather, the Supreme Court distinguished between terms an airline itself stipulates on the one hand, and *any* "enlargement or enhancement based on state laws or polices external to the agreement" on the other. *Wolens*, 513 U.S. at 233. In other words, it distinguishes between "state-imposed obligations" and "self-imposed undertakings" that are "confined to a contract's terms." *Id*. at 228-29. Nowhere in this discussion is there any suggestion that state common laws are somehow not "state-imposed obligations."

The second error in the above quotation is Plaintiff's implicit claim that there was no need for *Wolens* to state that the common law is not a "state-imposed obligation" because common law obligations automatically come into existence when parties agree to a contract.[1] In other words, Plaintiff tries to shoe-

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[1] Plaintiff's statement that "Justice Ginsberg allowed the common law claims in *Wolens* to proceed" is simply false. (Memo. ISO Motion, at 12.) All that remained after the Supreme Court's decision was a question of contractual interpretation: "Did American, by contract, reserve the right to change the value of already accumulated mileage credits, or only to change the rules governing credits earned from and after the date of the change?" *Wolens*, 513 U.S. at 233-35. This question of pure self-

horn his three common law claims into the exception provided by the *Wolens* Court—that airlines are bound to the terms of the contracts they enter—by claiming that the principles behind those claims are inherent in the terms of contracts. (*See* Memo. ISO Motion, at 12.) Plaintiff appears to believe that because state common laws are not written down in statutes, they must come to exist, even if not written down, when a contract is created. (*Id.*) But state common laws effecting contracts are not—as the *Wolens* court demands to avoid preemption—terms of the contract itself.[2] They are expansions beyond the explicit terms of the contract, as demonstrated by the fact that they apply regardless of whether the parties agree to them in the contract itself. They exist independently of the contract.

That is not to say that the common law exists as some "transcendental body of law." *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 534 (1928) (Holmes, J., dissenting). According to Plaintiff, the common law doctrine of good faith and fair dealing is a "normative term" in a contract that is "universally applied" and that is "just there." (Memo. ISO Motion, at 1 & 11 n. 8.) However, this doctrine "does not exist without some definite authority behind it. The common law so far as it is enforced in a State . . . is not common law generally

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imposed contractual obligation had nothing to do with issues of good faith.

[2] Other than, of course, breach of contract, which is- and is alone- the *Wolens* exception. *Wolens*, 513 U.S. at 228-29.

but the law of that State existing by the authority of that State." *Black & White*, 276 U.S. at 533 (Holmes, J., dissenting). Thus, when applying this doctrine, the Court applies a state "law, regulation, or other provision having the force and effect of law," which is preempted by the ADA if it relates to an airline's prices, routes, or services. *See United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 610 (7th Cir. 2000) (common law claims relating to airline prices, routes, or services preempted by ADA); *All World Prof'l Travel Servs., Inc. v. Am. Airlines, Inc.*, 282 F. Supp. 2d 1161, 1169 (C.D. Cal. 2003) (same).

Neither can Plaintiff find refuge in his claim that the covenant of good faith and fair dealing is a self-imposed obligation of every contract. This position effectively reduces breach of contract and good faith into the same cause of action. Yet to the extent Plaintiff wishes simply to assert that Defendants breached an explicit term of WorldPerks, his good faith and fair dealing claim is not only preempted but fails on the ground—unchallenged by Plaintiff in his motion to reconsider—that Plaintiff has failed to allege any actual violation of the WorldPerks agreement. (*See* Order, at 9-11.)

If Plaintiff's good faith and fair dealing claim is in fact *not* based on Defendants' violation on a term of WorldPerks, it still fails. Under California law, the covenant of good faith and fair dealing "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 779 (9th Cir. 2003) (citing *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th

317 (2000)). Minnesota is similarly reticent about allowing the good faith doctrine to expand contracts beyond their explicit requirements. *See Larson v. Vermillion State Bank*, 567 N.W.2d 721, 723 (Minn. App. 1997); *cf. Leonard v. Northwest Airlines, Inc.*, 605 N.W.2d 425, 431 (Minn. App. 2000) (state public policies such as common law contract rule against penalties preempted by ADA because expands agreement of the parties). Thus, to the extent that Plaintiff seeks to get around the *Wolens* rule and expand the obligations of Defendants through the covenant of good faith and fair dealing, his claim is both preempted and invalid on its merits.

Given these substantial flaws in Plaintiff's reading of *Wolens* and his understanding of his common law claims, there is no reason to grant Plaintiff's motion based on these objections.

**III. Plaintiff's Third Objection**

Plaintiff objects that in the Order the Court improperly relied on the assumption that Plaintiff had a remedy with the DOT in reaching its conclusion. (Memo. ISO Motion, at 9.) He asserts that the DOT does not regulate frequent flyer matters. (*Id.*) However, the Court's mention of the DOT in a footnote had nothing to do with Plaintiff's remedies or lack thereof. (Order, at 7 n.4.) The point, rather, was that airlines are not immune from liability for improper actions. As *Wolens* stated:

> the DOT retains authority to investigate unfair and deceptive practices and unfair methods of competition by airlines, and may order an airline to cease and desist from

> such practices or methods of competition. See FAA § 411, 49 U.S.C. App. § 1381(a); *Morales*, 504 U.S. at 379.

*Wolens*, 513 U.S. at 228 n.4. Plaintiff cites no authority stating that the role of the DOT has changed since *Wolens* was decided. Further, if the Supreme Court was concerned that the DOT would not be sufficiently vigilant in supervising deceptive practices regarding frequent flyer programs, it could easily have said so, as a frequent flyer program was at issue in *Wolens*. *Id*. at 222. Given that it had no bearing on the resolution of Defendant's motion, Plaintiff's objections regarding the Court's tangential mention of the DOT in the Order are without merit.

**IV. Plaintiff's Fourth Objection**

Plaintiff objects that the Order wrongly concluded that his claims regarding WorldPerks related to airline rates. He concludes that *Wolens* held claims regarding frequent flyer agreements to be too tenuously related to prices to garner preemption. (Memo. ISO Motion, at 9 ("In the case of frequent flyer agreements, which *Wolens* held are so tenuous as not to have a connection to prices . . .").) Plaintiff further asserts that the Court needed to show not only that the claims "relate" to rates, but that the claims had a "substantial effect" on rates. (*Id*., at 10.)

The holding in *Wolens* is the opposite of what Plaintiff claims. The Supreme Court found it patently obvious that tinkering with an airline's frequent flyer program through the enforcement of state laws would effect the prices charged by the airline. *Wolens*, 513

U.S. at 226. This result is not surprising, as the maintenance of a frequent flyer program obviously relates to the prices charged by an airline both to members of the program, who receive various forms of discounted service, and to non-members, whose purchases almost certainly support those discounts to some extent. See generally *Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 741-42 (7th Cir. 1987) (Posner, J., concurring) (explaining that landlords will respond to a government ordinance that raises their costs by raising the rents they charge). Theoretical musings about the effect on price aside, the Supreme Court has spoken on this issue and this Court will follow that judgment.

Plaintiff's objection is also based on a misguided reading of *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007). He claims that to be preempted his claims must not only relate to prices, but have a "substantial effect" on them. (Memo. ISO Motion, at 10.) *Montalvo* created no such heightened requirement. The only use of a phrase even close to "substantial effect" in *Montalvo* is the statement that "Plaintiffs have not conceded that any seating reconfiguration [on a plane] would result in a significant effect on airline ticket prices." *Montalvo*, 508 F.3d at 475. The *Montalvo* court immediately moves on from this statement to apply the proper standard, asking "whether a seat reconfiguration would materially impact federal deregulation." *Id.* For a state law to "materially impact" deregulation (i.e. prices) does not require that the law have a "significant effect;" it requires merely that the law at issue affect rates "in more than a 'peripheral manner.'" *Charas v. Transworld Airlines, Inc.*, 160

F.3d 1259, 1265 (9th Cir. 1998) (citing *Morales*, 504 U.S. at 390). The claims in this case relate to rates in more than a "peripheral manner," as the Supreme Court made abundantly clear when it stated of a frequent flyer program in *Wolens*: "Plaintiff's claims relate to 'rates,' *i.e.*, [Defendant airline's] charges in the form of mileage credits for free tickets and upgrades." *Wolens*, 513 U.S. at 226.

**V. Plaintiff's Sixth Objection**

Plaintiff asserts that his right to equal protection under the 14th Amendment and right to due process under the 5th Amendment have been violated by the Court's Order. (Memo. ISO Motion, at 18.) He claims that the Order was "over inclusive" and deprived him of his "contract rights and property rights." (*Id.*)

In support of this claim, Plaintiff cites *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 62-64 (2002), a case in which the Supreme Court ruled that the preemption provision of the Federal Boat Safety Act of 1971 does not preempt state common law tort claims. Although *Spreitsma* involved questions of preemption, it is of limited utility because entirely different law was under consideration which involved different preemption language. *Compare id.* at 63 (referring to "'a [state or local] law or regulation'") *with Wolens*, 513 U.S. at 222-23 ("'[N]o State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier . . . '") The controlling decision in this case is *Wolens*, which found preemption under the ADA even in light of the savings clause.

Plaintiff next asserts his 14th Amendment right to equal protection was violated because this Court "deprive[d] him of exactly what the *Wolens* plaintiffs received." (Memo. ISO Motion, at 18.) The Court is not entirely sure of the precise thrust of Plaintiff's argument. If he means that in *Wolens* not all of the plaintiff's claims were dismissed, whereas in the instant case all have been, this difference is attributable to the fact that in *Wolens* the plaintiffs successfully stated a claim for breach of contract. *Wolens*, 513 U.S. at 234. In contrast, Plaintiff in this case has yet to allege a term of WorldPerks that Defendants plausibly could have breached.

Finally, in his reply Plaintiff asserts that his fundamental rights were adversely affected while "the fundamental rights of other parties contracting with Defendants are not affected." (Reply, at 7.) Although Plaintiff's argument is meritless on its face, the Court need not address it because it was raised for the first time in Plaintiff's reply. *See, e.g., Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (a district court does not abuse its discretion by not considering an argument raised for the first time in a reply brief). None of Plaintiff's constitutional objections have merit to warrant reconsideration of this Court's prior order.

**VI. Plaintiff's "Fifty Cases"**

Towards the end of the motion for reconsideration, Plaintiff claims "[t]here are more than fifty reported decisions where Federal Courts have not pre-empted state contract claims that were less uniformly grounded than on an iron rule of law." (Memo. ISO Motion, at 14 (quotation marks

omitted).) Plaintiff does not explain what he means by "uniformly grounded," but appears to infer that the listed cases must all support not preempting the claim under the implied covenant of good faith. (Id.)

None of these cases meaningfully advances Plaintiff's position. Some of the cases, including *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996), which Plaintiff claims to be the "most enlightening" case on the list, are examples of a claim not being preempted because it alleged breach of a contract term voluntarily agreed to by an airline, *i.e.* an example of the *Wolens* exception. *See, e.g., id*. at 1432 (claim that airline breached the explicit terms of "its agreement . . . to honor the confirmed reservations of [the plaintiff's] clients"); *In re Jetblue Airways Corp. Privacy Litigation*, 379 F. Supp. 2d 299, 316-17 (E.D.N.Y. 2005) (breach of contract claims not preempted by ADA). Others are cases in which state common law claims were not preempted because they did not relate to airline prices, routes, or services. *See e.g. West v. Northwest Airlines, Inc.*, 995 F.2d 148, 151-52 (9th Cir. 1993); *see also* Order at 7 (addressing fallacy of citing *West* to support Plaintiff's claims).[3] Several

[3] This explanation why *West* does not support Plaintiff also explains why the amended order analyzed by Plaintiff in his reply, *Aloha Airlines, Inc. v. Mesa Air Group, Inc.*, CV 07-00007 DAE (D. Haw. Apr. 2, 2007) is unsupportive. (Reply at 4-5). *Aloha*, like *West*, based its holdings on the finding that the claims at issue did not relate to prices, routes, or services. Here, Plaintiff's preempted claims relate to prices. Further, any complaint about this Court's failure to cite to the amended order

of the cases listed in fact cut directly against Plaintiff. *See e.g. Delta Air Lines, Inc. v. Black*, 116 S.W.3d 745, 756-57 (Tex. 2003) ("A state's common law [claims for misrepresentation and fraud] cannot operate against an airline . . . when it would constitute state enforcement of a law relating to airline services.") Finally, Plaintiff's "iron rule of law" assertion is a non sequitur that lends him no support.[4] The relevant issue is not how widespread or "iron" a law is, it is whether a claim under that law is a state imposed enlargement or enhancement of the contract that relates to airline prices, routes or services.

The Court reiterates that Plaintiff's breach of contract claim is not preempted. To the extent that Plaintiff wishes to enforce the "self-imposed undertakings" contained in the contract's terms, he is entirely free to do so. *Wolens*, 513 U.S. at 228. However, to the extent that Plaintiff seeks redress for breach of the implied covenant of good faith and fair dealing, its preemption, as an "enlargement or enhancement based on state laws or policies external to the agreement," is clear. *Id.* at 233.

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in *Aloha* is de minimis. The amendments did not alter the opinion's substance.

[4] Plaintiff goes on at length about the "iron rule" nature of the covenant of good faith and fair dealing. (Memo. ISO Motion, at 11-14). Plaintiff emphasizes that certain common law "iron rules" apply to all parties when creating contracts. Yet no explanation is given why a common law doctrine having widespread effect over citizens means Congress cannot write a law preempting such a doctrine in limited circumstances.

## CONCLUSION

For the reasons stated, Plaintiff's motion for reconsideration is DENIED. Plaintiff MAY FILE an amended complaint within fourteen days of the date this order is electronically docketed.

IT IS SO ORDERED.

DATED: October 13, 2009.

Honorable Janis L. Sammartino
United States District Judge

*Appendix D*

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

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No. 09-cv-28 JLS (NLS)

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RABBI S. BINYOMIN GINSBERG,

*Plaintiff,*

v.

NORTHWEST, INC.; and DELTA AIR LINES, INC.,

*Defendants.*

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Filed July 8, 2009

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Presently before the Court is Defendant's motion to dismiss the complaint. (Doc. No. 7.) The Court also has before it Plaintiff's opposition (Doc. No. 11) and Defendant's reply. (Doc. No. 14.) For the reasons set forth below, Defendant's motion is GRANTED and this action is DISMISSED WITH PREJUDICE IN PART and WITHOUT PREJUDICE IN PART.

**BACKGROUND**

Plaintiff Rabbi S. Binyomin Ginsberg is a resident of Minnesota and was a member of the frequent flier program offered by Defendant Northwest Airlines, Inc., the WorldPerks Program

(WorldPerks), between 1999 and 2008. (Compl. ¶¶ 1, 12.)[1] In June 2008 Plaintiff was informed by Defendant Northwest that his "Platinum Elite" status under WorldPerks was being revoked. (*Id*. ¶ 14.) Plaintiff received a letter from a Northwest representative dated July 18, 2008 which stated in part:

> It has been brought to my attention that you have contacted our office 24 times since December 3, 2007 regarding travel problems, including 9 incidents of your bag arriving late at the luggage carousel . . .
>
> Since December 3, 2007, you have continually asked for compensation over and above our guidelines. We have awarded you $1,925.00 in travel credit vouchers, 78,500 WorldPerks bonus miles, a voucher extension to your son, and $491.00 in cash reimbursements. . .
>
> Due to our past generosity, we must respectfully advise that we will no longer be awarding you compensation each time you contact us.

(Compl. Ex. A.) After several attempts by Plaintiff to get a more clear explanation for Defendant Northwest's revocation, Plaintiff received an email from the same Northwest representative on

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[1] For purposes of this motion, all of the facts alleged in the complaint are taken as true. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2011).

November 20, 2008. (*Id.* ¶ 28.) This email directed Plaintiff to Rule 7 of the terms and conditions of WorldPerks, which states in part:

> Abuse of the WorldPerks program (including failure to follow program policies and procedures, the sale or barter of awards or tickets and any misrepresentation of fact relating thereto or other improper conduct as determined by Northwest in its sole judgment, including, among other things, violation of the tariffs of Northwest. . . any untoward or harassing behavior with reference to any Northwest employee or any refusal to honor Northwest Airlines employees' instructions) may result in cancellation of the member's account and future disqualification from program participation, forfeiture of mileage accrued and cancellation of previously issued but unused awards.

(*Id.*, Compl. Ex. B, C.)

Plaintiff filed this suit against Northwest and Delta on January 8, 2009 on behalf of himself and all other similarly situated WorldPerks members. (Compl.) Plaintiff prays for relief based on four causes of action: [1] breach of contract due to the revocation of Plaintiff's "Platinum Elite" status without valid cause (*Id.* ¶ 49); [2] breach of the duty of good faith and fair dealing due to Defendants' actions in contravention of the reasonable expectations of Plaintiff (*Id.* ¶ 56); [3] negligent misrepresentation based on the claims made by Northwest in its press release and web

announcement prior to termination of Plaintiff's "Platinum Elite" status (*Id.* ¶ 63); and [4] intentional misrepresentation, also based on the press release and web announcement made prior to termination of Plaintiff's "Platinum Elite" status (*Id.* ¶ 70-71.)

**LEGAL STANDARD**

Federal Rule of Civil Procedure 12(b)(6) permits courts to dismiss a complaint for two reasons: (1) lack of a cognizable legal theory or (2) pleading of insufficient facts under an adequate theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984). In reviewing the Rule 12(b)(6) motion to dismiss, the Court must assume the truth of all factual allegations and construe inferences in the light most favorable to the nonmoving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). While the complaint need not contain detailed factual allegations, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). That is, "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Associated Gen. Contractors of Am. v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998) (quoting *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998)). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the

complaint are true (even if doubtful in fact)." *Bell Atl.*, 550 U.S. at 555 (citations omitted).

Where a motion to dismiss is granted, "leave to amend should be granted 'unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, the Court may deny leave to amend where amendment would be futile. *See id.*; *Schreiber Distrib.*, 806 F.2d at 1401.

**ANALYSIS**

Plaintiff argues that the language of Rule 7 of WorldPerks is vague, leaving a reasonable WorldPerks member unable to tell what is required to comply with it. (Compl. ¶¶ 29, 30.) Plaintiff further asserts that his complaints were all legitimate, and that the revocation of his "Platinum Elite" status was "nothing more than a pretext for cost-cutting" due to a merger between Defendant Northwest and Delta Air Lines, Inc. (Delta), which is also named as a Defendant in the complaint. (*Id.* ¶¶ 32, 39.) Because Northwest in a press release and on its website claimed that the merger between Northwest and Delta would not cause any changes to WorldPerks, Plaintiff asserts that termination of his "Platinum Elite" status for purposes of cost-cutting due to the merger means that the press release and web announcement amount to misrepresentation. (*Id.* ¶¶ 10-11, 63.)

Plaintiff's claims for breach of the duty of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation are preempted under the Airline Deregulation Act because they relate to airline prices and services. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 226 (1995). Therefore these claims must be dismissed. Further, although Plaintiff's claim for breach of contract is not preempted, Plaintiff fails to identify a material breach of the agreement between he and the Defendants. Thus, it is also subject to dismissal.

## I. Preemption of State Law Claims Under the ADA

The Airline Deregulation Act (ADA) was passed by Congress in 1978 "to encourage, develop, and attain an air transportation system which relies on competitive market forces." See 92 Stat. 1705. In order to prevent States from "undo[ing] federal deregulation with regulation of their own," a preemption clause was included in the ADA that bars States from enforcing any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier . . ." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992); 49 U.S.C. § 41713(b)(1).[2]

To be preempted under the preemption clause of the ADA, a claim (1) must require the enforcement of

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[2] Until 1994, when it was amended and incorporated into the Federal Aviation Administration Authorization Act of 1994, § 41713(b)(1) was codified as 49 U.S.C. app. § 1305(a)(1).

state law, and (2) it must relate to airline prices, routes, or services "either by expressly referring to them or by having a significant economic effect upon them." *All World Professional Travel Services, Inc. v. American Airlines, Inc.*, 282 F.Supp.2d 1161, 1168 (C.D. Cal. 2003) (quoting *Chrissafis v. Cont'l Airlines, Inc.*, 940 F.Supp. 1292, 1297 (N.D.Ill.1996)); *see also Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1432 (7th Cir.1996).

**A. The Claim must Derive from the Enactment or Enforcement of State Law**

Plaintiff's claims for breach of the duty of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation require the enforcement of state laws under the ADA.

The Supreme Court has twice interpreted the breadth of the preemption clause of the ADA. *Morales*, 504 U.S. 374; *Wolens*, 513 U.S. 219. Both decisions strongly suggest that state common law claims are laws, regulations, or "other provision[s] having the force and effect of law" which satisfy the first requirement for ADA preemption.

In *Morales* the Supreme Court held enforcement of state fare advertising guidelines preempted by the ADA. Although the Court did not systematically address what counts as a state law, regulation, or "other provision," it found the case analagous to an earlier Supreme Court decision in which common law causes of action were held preempted under a different provision using similar language. *Morales*, 504 U.S. at 388 (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (holding common law breach of contract and fraud in the inducement claims

preempted by Employee Retirement Income Security Act of 1974 (ERISA)); *See also*, *Wolens*, 513 U.S. at 238 (O'Connor, J., concurring in part and dissenting in part) (reiterating the similar broad language in ADA and ERISA preemption provisions). The Court also noted that preemption of state law does not give airlines the freedom "to lie and deceive customers" through advertisements because the Department of Transportation (DOT) has the authority to prohibit potentially fraudulent or misleading airline ads. *Morales*, 504 U.S. at 390-91. Had the Court believed common law claims to be another tool available to combat fraudulent or misleading airline advertising it surely would have mentioned them.

More recently, *Wolens* held that while state standards relating to airline prices, routes, or services are preempted by the ADA, contract terms which an "airline itself stipulated" can be enforced. *Wolens*, 513 U.S. at 232-33. The Court stated that:

> This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.

*Id.*

Plaintiff asserts that the only distinction between his misrepresentation claims and the claims made in *Wolens* is that the latter were derived from a state fraud statute while the former are derived from state common law; this is precisely why Plaintiff's two misrepresentation claims are preempted by the

ADA. (Opp., at 7-8.) As Judge Easterbrook puts it, "*Wolens* held that [the ADA preemption clause] preempts state anti-fraud statutes as applied to air carriers' rates, routes, and services; just so with common-law rules against fraudulent inducement." *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 610 (7th Cir. 2000) (citation omitted). This is because state common law causes of action are "other provision[s] having the force and effect of law" under the ADA preemption clause. *Id*. at 607. Several District Courts in the Ninth Circuit have adopted Judge Easterbrook's analysis and conclusions. *SVT Corp. v. Federal Exp. Corp.*, No. C-94-3057MHP, 1997 WL 285051, *4-5 (N.D. Cal. May 19, 1997) (finding state common law claims preempted by ADA), *aff'd*, 156 F.3d 1238 (9th Cir.1998); *McMullen v. Delta Air Lines, Inc.*, No. 08-1523 JSW, 2008 WL 4449587, *5 (N.D. Cal. Sept. 30, 2008) (same); *All World Prof'l Travel Services, Inc. v. American Airlines, Inc.*, 282 F.Supp.2d 1161, 1169 (C.D. Cal. 2003) (enforcement of common law claims preempted by ADA because they "would enhance the parties' bargain based on state policy"). The Court finds the reasoning of the Seventh Circuit and the Northern and Central Districts of California persuasive. Since the purpose of the ADA is economic deregulation of air carriers, if a state statute can be preempted for frustrating this purpose it is illogical that a state common law claim which produces an identical result should nevertheless be permitted.

Plaintiff's claim under the implied covenant of good faith and fair dealing fairs no better. His assertion that "[E]very contract imposes upon each party a duty of good faith and fair dealing," (Opp., at

8) (quoting *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.*, 826 P.2d 710, 2 Cal.4th 342, 371-72 (Cal. 1992)) misses that this duty does not appear *ex nihilo*,[3] and is not imposed by the contract itself (unless it so stipulates). Rather, it is implied by state law. *See McMullen v. Delta Air Lines, Inc.*, No. 08-1523 JSW, 2008 WL 4449587, *5 (N.D. Cal. Sept. 30, 2008) (implied covenant of good faith and fair dealing is a product of state law that is preempted by ADA because it "expands agreement of the parties"); *Power Standards Lab, Inc. v. Federal Exp. Corp.*, 127 Cal.App.4th 1039, 1046 (Cal. Ct. App. 2005). As noted above, according to the plain language of the ADA preemption clause, it is immaterial whether what a state commands is written down as a statute. 49 U.S.C. § 41713(b)(1) (state cannot enforce any "law, regulation, or *other provision having the force and effect of law*") (emphasis added). That parties must act in good faith and deal fairly with one another is a requirement of state policy, external to the contract itself, that is given "the force and effect of law." Such provisions can be preempted by the ADA if they relate to an airline's prices, routes, or services.[4]

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[3] Defined by Merriam-Webster Dictionary as "from or out of nothing."

[4] That good faith and fair dealing claims can be preempted does not, as Plaintiff claims, give airlines an ability to "avoid all liability." (Opp., at 5.) *Morales* makes clear that airlines remain subject to DOT supervision, and under *Wolens* they are subject to the explicit terms stated within the four corners of the contracts they enter. *Morales*, 504 U.S. at 390-91; *Wolens*, 513

It is crucial to keep separate the two requirements for ADA preemption: *whether a claim invokes state law* versus *whether a claim relates to an airline's prices, routes, or services*. Plaintiff points out that our Court of Appeals in *West v. Northwest, Inc.*, 995 F.2d 148 (9th Cir. 1993), held a claim based on breach of good faith and fair dealing to not be preempted by the ADA, and then proceeds to argue based on this decision that all good faith and fair dealing claims are not preempted. (Opp., at 8.) But Plaintiff reaches his conclusion by conflating the two requirements for preemption. The Ninth Circuit's reason in *West* for finding no ADA preemption was not that claims for breach of good faith and fair dealing are not state law; it was that claims involving overbooking of flights are too tenuously connected to an airline's prices, routes, or services. *West*, 995 F.2d, at 151-52. Following *West*, several Ninth Circuit district courts have continued to treat good faith and fair dealing claims as state law under the ADA. *See, e.g.*, *Aloha Airlines, Inc. v. Mesa Air Group, Inc.*, F.Supp.2d, 2007 WL 842064, *7-*9 (D. Haw. Mar. 19, 2007); *McMullen v. Delta Air Lines, Inc.*, No. 08-1523 JSW, 2008 WL 4449587, *5 (N.D. Cal. Sept. 30, 2008).

As such, the Court finds that Plaintiff's claims for breach of the duty of good faith and fair dealing, negligent misrepresentation, and intentional

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U.S. at 232-33; *see also*, *McMullen v. Delta Air Lines, Inc.*, No. 08-1523 JSW, 2008 WL 4449587, *5 (N.D. Cal. Sept. 30, 2008).

misrepresentation are applications of state law under the ADA.

### B. The Claim must Relate to Airline Rates, Routes, or Services

Plaintiff's claims also relate to both the "prices" and "services" of an air carrier as those terms are used in the ADA. In order to interpret the second requirement for ADA preemption—that the claim be "related to a price, route, or service of an air carrier"—the Supreme Court's decisions in *Morales* and *Wolens* provide the starting point. In Morales the Court held that advertising guidelines for airlines "quite obviously" relate to prices. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 387 (1992). The Court more generally held that the terms "related to" "express a broad pre-emptive purpose." *Id.* at 385. It held that the ADA preempts more than just statues explicitly regulating airlines, but does not include state actions too "tenuous, remote, or peripheral. . . to have pre-emptive effect." *Id.* at 390 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100, n. 21).

In *Wolens* the Supreme Court ruled that the application of a state fraud statute to an airline's frequent flier program relates to airline "prices" and "services." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 226 (1995). The language of that opinion suggests that preemption regarding the frequent flier program was not a close question. *Id.* ("We need not dwell on the question whether plaintiffs' complaints state claims 'relating to [air carrier] rates, routes, or services.'").

With neither *Morales* or *Wolens* providing a clear test of what is "related to a price, route, or service" under the ADA, the Court looks to the Ninth Circuit, which has defined "service" narrowly.[5] In *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998), the court held that the legislative history of the ADA does not support interpreting "service" to include "the dispensing of food and drinks, flight attendant assistance, or the like." *Id.* at 1265-66. "Service" was instead defined as referring to "the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided." *Id.*; *See also Duncan v. Northwest Airlines, Inc.*, 208 F.3d 1112, 1115 (9th Cir. 2000) (allowing smoking on a flight not a "service"). The Ninth Circuit has also shown reluctance to read "price" broadly. *See Montalvo v.*

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[5] The Courts of Appeals have disagreed over how broadly "related to" should be read, especially regarding airline "service." This Circuit and the Third Circuit have adopted a narrow definition, while the Fourth, Fifth, and Seventh Circuits have all adopted broader definitions. *Compare Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265-66 (9th Cir. 1998), *and Taj Mahal Travel, Inc. v. Delta Airlines Inc.*, 164 F.3d 186, 194 (3rd Cir. 1998) (whether cause of action hinders airline competition trumps consideration of whether airline activity is a "service" for purposes of determining preemption) *with Hodges v. Delta Airliens, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (including "ticketing, boarding procedures, provision of food and drink, and baggage handling" as "services"); *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998) (holding boarding procedures to be a "service"); *and Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996) (following *Hodges* definition of "service").

*Spirit Airlines,* 508 F.3d 464 (9th Cir. 2007) (remanding claim because court unable to determine if seat configuration on plane relates to "price" under ADA).

In the instant case there is no question that Plaintiff's claims relate to both airline "prices" and "services." For the Supreme Court in *Wolens* made abundantly clear that a frequent flier program relates to "prices" and "services," and the WorldPerks program at issue here is none other than a frequent flier program. *Wolens*, 513 U.S. at 226. If the Supreme Court "need not dwell" on this issue, then neither does this Court.

Because Plaintiff's claims for breach of the covenant of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation require the enforcement of state law and relate to both airline prices and services, all are preempted by the ADA.

**II. Breach of Contract**

The *Wolens* decision held that the ADA does not preempt complaints claiming that an airline breached terms of a contract the airline "itself stipulated." 513 U.S. at 232-33. Plaintiff's claim that Defendants breached the express terms of the WorldPerks agreement is therefore not preempted by the ADA. Nonetheless, the Court must consider whether Defendants violated the WorldPerks agreement entered into with Plaintiff, but must do so "with no enlargement or enhancement [of the contract] based on state laws or policies external to the agreement." *Id.*

The inquiry into whether Plaintiff's complaint is adequate must begin with a determination of which state's law applies in this case. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Because Plaintiff filed this complaint in California, California's choice of law rules apply. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). In California: "A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." Cal. Civ. Code § 1646; *see ABF Capital Corp. v. Berglass,* 130 Cal.App.4th 825 (Cal. Ct. App. 2005) (citing *Restatement. 2d, of Conflict of Laws § 188(2)*) (If no choice of law made by the parties, court is to consider "the place at which the parties made the contract . . . the place of the contract's performance, the location of the contract's subject matter and . . . the residence, place of incorporation and place of business of the parties"). Plaintiff, a resident of Minneapolis, appears to fly in and out of Minnesota, and Defendant Northwest's principle place of business is Minnesota. (Compl. ¶¶ 2, 12-13.) Therefore, Minnesota law applies.

In Minnesota the interpretation of a contract is a question of law. *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). The goal of interpretation is to determine the intent of the parties entering into the agreement, and "[w]here there is a written instrument, the intent of the parties is determined from the plain language of the instrument itself." *Id*. The Minnesota Supreme Court "[has] consistently stated that when a contractual provision is clear and unambiguous, courts should

not rewrite, modify, or limit its effect by a strained construction." *Id.* (citing *Telex Corp. v. Data Products Corp.*, 135 N.W.2d 681, 687 (Minn. 1965); *Anderson v. Twin City Rapid Transit Co.*, 84 N.W.2d 593, 601 (Minn. 1957); *Grimes v. Toensing*, 277 N.W. 236, 238 (Minn. 1938)).

Rule 7 of the WorldPerks Program states unambiguously that abuse of WorldPerks, including "improper conduct as determined by Northwest *in its sole judgment*," is grounds for "cancellation of the member's account and future disqualification from program participation . . ." (Compl. Ex. C (emphasis added).) Plaintiff's allegations that he was not provided adequate explanation for Northwest's revocation of his "Platinum Elite" status and that "improper conduct" is not well defined in the agreement are not pertinent here, since Northwest was not required by the agreement to explain its decisions or define what it considers "improper conduct." (*Id.* ¶¶ 29-30.) To hold that Northwest was required to explain itself to Plaintiff's satisfaction would be an "enlargement or enhancement" of the parties' agreement beyond its express terms, which *Wolens* does not allow. 513 U.S. at 233.

More importantly, Plaintiff's bare assertion that Defendants revoked Plaintiff's "Platinum Elite" status "without valid cause" is not supported by the contract itself. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998) (when considering a motion to dismiss, the Court is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint"). For the very issue of what qualifies

as "valid cause" allowing revocation of Plaintiff's "Platinum Elite" status was left to the "sole judgment" of Northwest. Plaintiff in effect asks that the Court replace Northwest's judgment with his own regarding what counts as "abuse" of WorldPerks. This, however, would transgress the unambiguous terms of the agreement by inserting into it external norms supplied by the Plaintiff, the Court, or both. *See*, *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d, at 609-10. Minnesota contract law and the preemption clause of the ADA do not allow the agreement to be altered in this way; consequently the breach of contract claim cannot stand.

That being said, this Court must grant leave to amend unless it "determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *DeSoto*, 957 F.2d at 658. Given that it does not appear certain that Plaintiff could not cure the deficiencies described in this order, the Court dismisses this cause of action without prejudice.

**CONCLUSION**

For the reasons stated, Defendant's motion to dismiss is GRANTED and the hearing set for July 23, 2009 is VACATED. Plaintiff's claims for [1] breach of good faith and fair dealing, [2] negligent misrepresentation, and [3] intentional misrepresentation are DISMISSED WITH PREJUDICE. His claim for breach of contract, however, is DISMISSED WITHOUT PREJUDICE. If Plaintiff elects to amend his complaint, he SHALL FILE the First Amended Complaint within twenty one days of the date order is electronically docketed.

If Plaintiff fails to file within that time the clerk shall close the file.

IT IS SO ORDERED.

DATED: July 8, 2009.

Honorable Janis L. Sammartino
United States District Judge

*Appendix E*

## Relevant Statute

## 49 U.S.C § 41713

### Preemption of authority over prices, routes and service

(a) Definition.— In this section, "State" means a State, the District of Columbia, and a territory or possession of the United States.

(b) Preemption.—

(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

(2) Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely in Alaska unless the transportation is air transportation (except charter air transportation) provided under a certificate issued under section 41102 of this title.

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

(4) Transportation by air carrier or carrier affiliated with a direct air carrier.—

(A) General rule.— Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) Matters not covered.—
Subparagraph (A)—

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 13102 of this title.

(C) Applicability of paragraph (1)—This paragraph shall not limit the applicability of paragraph (1).