No. 11-1150

In the Supreme Court of the United States

DAVID SIMON; JEAN D. HEFLICH;
EVELYN SMITH; GARY BERK,
On their own behalf and on behalf of
all others similarly situtated,
Petitioners,

v.

CONTINENTAL AIRLINES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding below were Petitioners David Simon, Gary Berk, Jean Heflich and Evelyn Smith, four individuals, and Respondent Continental Airlines, Inc.

On October 1, 2010, Continental Airlines, Inc. ("Continental") became a wholly-owned subsidiary of UAL (formerly UAL Corporation) as a result of a merger of JT Merger Sub Inc., a wholly owned subsidiary of UAL Corporation, with and into Continental. In connection with the merger, UAL Corporation changed its name to United Continental Holdings, Inc. to reflect that both United Air Lines, Inc. and Continental are its wholly-owned subsidiaries. United Continental Holdings, Inc. is a Delaware corporation and is publicly traded. The operations of Continental continue under the "United" brand.

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INTRODUCTION

The petition for a writ of certiorari should be denied. There is no federal question, circuit split, or any other compelling reason to warrant this Court's review. This case involves a straightforward claim for breach of contract. The District Court granted summary judgment in favor of respondent Continental Airlines, Inc. because the uncontroverted contract terms and other evidence demonstrated that there was no genuine issue of material fact, and that petitioners could not establish that any breach had occurred. The Court of Appeals affirmed the District Court's holding "for the reasons stated in its well-reasoned opinion." Pet. App. 2.

Against this backdrop, the petition is notable for what it does not include, any of which is fundamental to a breach of contract claim. Namely, the petition:

- does not identify that the only claim at issue is for breach of contract;
- does not identify the operative contract;
- does not identify the terms of the contract that allegedly were breached;
- does not identify the alleged basis for the claim of breach;
- does not reference the allegations in the amended complaint;
- does not reference any facts from the record below that supposedly support the petition;

and,

- does not reference the portions of the opinions below that allegedly were in error.

Moreover, petitioners argue in conclusory fashion about construing contractual ambiguities, but they do not cite to a single contract term that allegedly was ambiguous, nor how it supposedly was wrongly construed. The District Court and Court of Appeals opinions contain no language regarding contractual ambiguities because the contractual terms at issue are clear and unambiguous.

Petitioners also argue in conclusory fashion about unilateral contracts and changes to terms, and baldly contend that there is a conflict with decisions from this Court and the Ninth Circuit Court of Appeals. Pet. 2-4. None of these claims is accurate. There is no conflict with these cases, nor was there any error committed below. There is no issue of federal law to be decided, nor do the decisions of the District Court or the Court of Appeals in this case conflict with those of any other federal or state court.

Petitioners also incredibly argue that they were denied the right to file suit or have the contract interpreted. Pet. 6. That obviously was not the case. Rather, the District Court reviewed the contract terms, considered the uncontroverted evidence, and granted Continental's motion for summary judgment and denied petitioners' cross-motion. Pet. App. 15. The Court of Appeals rightly affirmed. Pet. App. 2. There is no question for this Court to review. The petition should be denied.

STATEMENT OF THE CASE

This case involves a claim of breach of contract regarding Continental's frequent flyer program, known as OnePass. As noted by the Court of Appeals, the OnePass program "works like any other frequent flier program." Pet. App. 1. Members sign up and enroll in the program, and may collect miles by flying on Continental, then can redeem those miles for tickets and other merchandise. Pet. App. 1, 10. The four named petitioners have alleged three separate bases for a supposed "breach": (1) regarding the unavailability of round-trip reward travel for 25,000 frequent flyer miles (also referred to as "Standard Rewards"); (2) that they were charged a $75 "close-in booking fee" because they made their reservations within 21 days of the travel date; and (3) that they were charged a $150 "redeposit fee" because they cancelled a reward reservation and wanted their frequent flyer miles put back into their OnePass account. Pet. App. 5.

In every single instance, Continental's actions were in accordance with the then-applicable OnePass terms and conditions. Pet. App. 15. Thus, the District Court correctly held that there is no basis for petitioners to demonstrate any breach of contract. *Id*.

Petitioners ignore the applicable OnePass terms, either those in effect when they enrolled in the OnePass program, or those in effect at the time of the flights or fees upon which they base their claim for breach. Rather, the one and only document upon which petitioners rely is a brochure, which was procured by their lawyer. Pet. App. 16 n. 2. This brochure is not the operative contract. Pet. App. 16 n.

3. There is no evidence that it was viewed or relied upon by any of the four petitioners. *Id.* The District Court properly held that petitioners "failed to submit the entire agreement at issue" because the brochure "directs customers to continental.com for the complete rules and regulations concerning the frequent flyer program." Pet. App. 10-11.

Moreover, even the terms of this brochure do not support any claim for breach. In addition to referring customers to the complete contract, the brochure also states that there are capacity controls and limitations on Standard Reward seats. Pet. App. 12. Petitioners provided no evidence, including the brochure, that supported their claims for breach. Pet. App. 16 n. 4.

A. The OnePass Program

The District Court below based its ruling upon the uncontroverted evidence regarding the OnePass program and the applicable contract terms. Petitioners failed to submit evidence to support their breach of contract claim, and even failed to submit the entire agreement at issue. Pet. App. 10. Continental presented substantial documentation of the terms of the OnePass program and supplied affidavits from several Continental managers. Pet. App. 11-12. In addition, though petitioners failed to offer any evidence concerning when they joined the OnePass program, Continental submitted evidence providing that information and demonstrating that the OnePass program had always been subject to the capacity controls and other terms that defeat petitioners' claims for breach. Pet. App. 12, 15.

The District Court specifically recognized certain terms as a part of Continental's OnePass program. Among them is that Standard Reward tickets are limited by capacity controls. Pet. App. 12. Another is that Continental reserves the right to make modifications or changes to the OnePass program at any time with notice to active members, which Continental provided for the close-in booking fee and redeposit fee at issue in this case. Pet. App. 13-15.

B. Petitioners' Allegations And The Applicable OnePass Terms

Petitioners are four individuals that advanced a single claim for breach of contract. While the petitioners asserted only sparse allegations, the undisputed evidence demonstrated that the four petitioners enrolled in OnePass at different times. Pet. App. 12-14. They complained about OnePass terms related to reward tickets that were booked at different times. *Id.* Their allegations also pertained to different terms and conditions of the OnePass program. *Id.* In each instance, however, the clear and unambiguous OnePass terms demonstrated that Continental did not breach the OnePass terms. Pet. App. 15. Petitioners' "failed as a matter of law to establish their breach of contract claim" in the District Court. Pet. App. 11.

1. Petitioner David Simon

Petitioner David Simon complained about a flight he booked in January 2009. Pet. App. 12. He alleged that he wanted a flight from Los Angeles to Cleveland, but could not obtain a seat for 25,000 frequent flyer miles on the flight that he wanted. *Id.* Instead, he

booked a flight on Northwest Airlines, at the time a Continental partner airline, for 25,000 miles, with a connecting flight. *Id.* Mr. Simon also alleged that he was charged a $75 close-in booking fee because he made his reservation within 21 days of his flight, booking it the day before the flight. Pet. App. 13. Mr. Simon provided no support that the close-in booking fee breached the terms of the OnePass program. *Id.* He did, in fact, receive a reward ticket flight for 25,000 miles. Pet. App. 12. He also did not provide any support for the contention that he was entitled to a non-stop reward flight. Pet. App. 16 n. 4.

The District Court held that Continental did not violate the terms of the OnePass Program related to Mr. Simon's allegations. Pet. App. 13. The OnePass terms at the time the flight was booked provided that the number of all reward seats was limited and there were other capacity controls. Pet. App. 12-13. The OnePass terms also provided that Continental reserved the right to change any aspect of the OnePass program, including the close-in booking fee involved in Mr. Simon's claim, at any time with 60 days' notice to active members. Pet. App. 13. The District Court held that Continental provided the required notice. Pet. App. 14.

2. Petitioner Gary Berk

Gary Berk complained about a reward ticket he booked in June 2009. Pet. App. 14. Mr. Berk provided no details, but Continental records indicated that on June 22, 2009, Mr. Berk booked a flight from Cleveland to Phoenix for travel on July 16, 2009, returning on July 25. *Id.* Mr. Berk alleged that he cancelled his trip and was charged a $150 redeposit

fee. *Id.* The redeposit fee was part of the OnePass program from the date that Mr. Berk enrolled. *Id.* The specifics of the redeposit fee did change over the years, as did other aspects of the OnePass program, in accordance with the terms of the program. *Id.* Continental provided notice to its OnePass members of the changes relating to the redeposit fee, and of other changes, per the terms of the OnePass program. Pet. App. 14-15. The uncontroverted evidence demonstrated that Continental did not violate the terms of the OnePass program by charging Mr. Berk the redeposit fee. Pet. App. 15.

3. Petitioner Jean Heflich

Jean Heflich complained that she was "charged more than 25,000 miles on a Continental OnePass trip." Pet. App. 12. Ms. Heflich provided no details, but Continental records indicated that on December 22, 2005, she booked two reward tickets for travel from Cleveland to Fort Myers, Florida on March 3, 2006, with a return trip on April 1, 2006, and redeemed 50,000 miles for each ticket. *Id.* Continental records also indicated that on February 1, 2000, Ms. Heflich redeemed 40,000 OnePass miles and booked a reward ticket for travel from Cleveland to Fort Myers on March 23, 2000, returning on April 3, 2000. *Id.*

It is not clear upon which reservation Ms. Heflich based her contract claim, but there was no breach by Continental in either instance. Pet. App. 12-13. The OnePass terms and conditions provided for capacity controls in February 2000, and December 2005, the dates Ms. Heflich booked these flights. Pet. App. 12-13. Even the brochure upon which petitioners

exclusively relied provided for these capacity controls. Pet. App. 12.

4. Petitioner Evelyn Smith

Though Evelyn Smith was a named plaintiff in the amended complaint, she has never booked a OnePass trip or otherwise tried to redeem any rewards. Pet. App. 5. Ms. Smith thus did not allege any breach by Continental.

REASONS FOR DENYING THE WRIT

A. This Case Presents a Straightforward Claim for Breach of Contract That Was Correctly Decided by the District Court Based Upon Uncontroverted Evidence.

The petition for writ of certiorari should be denied because this case does not involve a circuit split nor does it present any question of law to be resolved. Rather, it involves a straightforward claim for breach of contract. Moreover, the District Court below correctly granted Continental's motion for summary judgment, and denied petitioners' cross-motion, because the evidence demonstrated that there was no genuine issue of material fact that Continental did not breach any of the OnePass terms. Pet. App. 15.

This is a rare case in which summary judgment was granted and there is no dispute about any of the facts below, let alone a genuine issue of material fact. Petitioners' sole claim is for breach of contract. Petitioners failed to provide sufficient evidence to support that claim. Pet. App. 10. Continental provided the relevant contract terms. Pet. App. 11.

Petitioners do not dispute any contract term, nor do they dispute any of the record evidence. The evidence below demonstrated that all of Continental's actions about which petitioners complain were consistent with the OnePass program's terms. Pet. App. 15.

The District Court was presented with the applicable terms and conditions of the OnePass program when each of the petitioners enrolled, and also those in effect at the time of the transactions at issue. Pet. App. 11-15. The District Court concluded that "[n]one of the actions cited by Plaintiffs constitute a breach of contract between Defendant and the Plaintiffs. Indeed, as Defendant has demonstrated, all of the actions taken by Continental have been in accordance with the terms and conditions of the OnePass program. Accordingly, Plaintiffs' claim for breach of contract fails." Pet. App. 15. The Court of Appeals reviewed the record and affirmed the District Court's decision. Pet. App. 2.

It is axiomatic that if the unambiguous contract terms demonstrate that a party's actions were permitted by the contract, the other party cannot maintain a claim for breach of contract. *See, e.g., Aerel, SRL v. PCC Airfoils, LLC*, 371 F. Supp. 2d 933, 939 (N.D. Ohio 2005) (granting defendant's motion for summary judgment on breach of contract claim because the unambiguous contract demonstrated that plaintiff was not entitled to commissions after termination of the contract); *Sekerak v. National City Bank*, 342 F. Supp. 2d 701, 707 (N.D. Ohio 2004) (granting defendant's motion for summary judgment because the unambiguous contract demonstrated there had been no breach).

The District Court followed several similar cases in which putative class actions against airlines were rejected because the evidence demonstrated that the frequent flyer program terms were followed, thus negating any claim for breach of contract. *See, e.g., Monzingo v. Alaska Air Group, Inc.*, 112 P.3d 655, 661 (Alaska 2005) (granting summary judgment because the program's terms expressly provided that the airline reserved the right to make changes to its frequent flyer program.); *Grossman v. USAir, Inc.*, No. 0109, 1997 WL 1433744 (Pa. Com. Pl. Apr. 16, 1997) (granting motion for summary judgment and denying plaintiffs' cross-motion related to increase in mileage amounts required for reward travel because airline's frequent flyer program terms "reserve[d] the right to change the Frequent Traveler Program rules, regulations, partners, mileage credits or award levels."); *Benway v. American Airlines, Inc.*, No. 95-01379-L (Tex. Dist. Ct., June 16, 1995) (granting motion for summary judgment based on the reservation of rights language in frequent flyer program); *Spiegel v. Continental Airlines*, No. 2005-645 W C, 2006 WL 1222363, at *1 (N.Y. Sup. App. Term May 1, 2006) (denying plaintiff's cross-motion for summary judgment and finding that the breach of contract claim had no merit because the OnePass terms provided that reward seats were limited and that plaintiff "failed to demonstrate that defendant in any way breached the terms and conditions of its agreement.").

This case was no different. The OnePass terms from the outset provided that reward seats were limited, that redeposit fees were to be charged and that Continental had the right to modify the program terms with appropriate notice to OnePass members.

Pet. App. 12-15. The District Court concluded that in each instance when terms were modified, Continental provided the appropriate notice and did not violate the terms of the OnePass program. *Id.*

Simply put, the District Court and the Court of Appeals fully considered the uncontroverted OnePass terms and determined that there was no breach. The petition should be denied.

B. Petitioners Misrepresent the Caselaw in A Failed Attempt to Generate A Circuit Split For This Court to Resolve.

Recognizing the high standard this Court has for granting a petition for writ of certiorari, the petitioners argue that the decisions below are in conflict with two other opinions. Petitioners are wrong.

First, petitioners claim that the Court of Appeals' opinion in this case conflicts with this Court's decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). Pet. 2. *Wolens* involved a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), and stands for the proposition that a breach of contract claim is not preempted by the Airline Deregulation Act. 513 U.S. at 232. That opinion, frankly, has nothing at all to do with the Court of Appeals' opinion in this case. Petitioners appear to have a severe case of amnesia, arguing now that "[f]requent flyers must be allowed to file suit to obtain the benefit of the bargain of the contract that they agreed to." Pet. 6. Petitioners were "allowed to file suit"; their breach of contract claim was not preempted, and it was decided on summary judgment. Pet. App. 15. The courts below ruled that

petitioners did "obtain the benefit of the bargain of the contract that they agreed to." *See* Pet. 6; Pet. App. 15.

Consistent with the portion of *Wolens* quoted in the petition, the courts below looked to "the usual 'rules' of contract interpretation to decide what the contract's language means." Pet. 3 (quoting *Wolens*, 513 U.S. at 248). The courts below determined that the uncontroverted language demonstrated that there was no breach. Pet. App. 2, 15. Petitioners argue without any support that "[t]he district court below construed every possible contractual ambiguity in favor of Continental Airlines" Pet. 3, and yet they identify not a single "ambiguous" term that was supposedly interpreted. There was none. Moreover, even if there had been, that would not render the opinion below in conflict with *Wolens*; rather, it still would render this case one of contract interpretation that the losing side simply claims was in error.

Likewise, petitioners argue incorrectly that the Court of Appeals' decision conflicts with that of the Ninth Circuit Court of Appeals in *Ginsberg v. Northwest Inc.,* 653 F.3d. 1033 (9th Cir. 2011). Pet. 3. *Ginsberg*, like *Wolens*, only addressed whether a claim was preempted by the Airline Deregulation Act. In that case, the court held that a claim for the breach of the duty of good faith and fair dealing is sufficiently related to a contract claim, which is not preempted. 653 F.3d. at 1042.

Petitioners wrongly argue that *Ginsberg* held "that airlines do not have the right to make unilateral changes to the terms and conditions of frequent flyer programs." Pet. 3. The opinion holds no such thing. The claim at issue was that the airline breached the

terms of its program by revoking the plaintiff's membership because he complained too much. 653 F.3d at 1035. The airline cited a program term that it retained "sole judgment" to cancel a member's account. *Id*. The plaintiff sued for breach of contract, breach of the duty of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentations. *Id*. All four claims were dismissed. The contract claim failed because the program terms demonstrated that there was no breach. *Id*. The other three claims were dismissed on preemption grounds. The Ninth Circuit's opinion relates solely to the question of preemption. There is no conflict with the Court of Appeals' opinion in this case.

Petitioners also point to two other irrelevant sources. The citation to an Australian court decision regarding an airline's fuel charges is of no help to them. Pet. 4. They do not present any evidence of the terms at issue, or the basis for demonstrating that there was a breach of contract. In this case, the District Court and Court of Appeals reviewed extensive evidence that the OnePass terms provided for capacity controls and the fees at issue, and further that Continental reserved the right to modify the program terms. Pet. App. 11-14.

Likewise, Petitioners' citation to the Department of Transportation's ruling regarding disclosure of fees is irrelevant. Pet. 5. Putting aside that the Department of Transportation's ruling related to a fine against an airline, not a civil cause of action, petitioners again misrepresent the record in claiming that "Continental did not disclose fees for using frequent flyer miles and *unilaterally* changed these fees." Pet. 5 (emphasis in original). The uncontroverted evidence below

demonstrated that Continental disclosed the fees and other OnePass terms, including the right to modify the terms, when each of the petitioners enrolled in the OnePass program, and it also disclosed changes to the OnePass terms as it was required to do. Pet. App. 11-15.

Likewise petitioners wrongly argue, without any support, in the Questions Presented that OnePass is a unilateral contract that Continental could not modify. Pet. i. Rather, as both courts below held, the contract was bilateral, because petitioners had to enroll and accept the OnePass terms. As the District Court held: "[T]his is a bilateral contract where Plaintiffs 'accepted' the 'offer' by enrolling in the OnePass program." Pet. App. 10. The District Court also held, affirmed by the Court of Appeals, that petitioners' references to "various snippets and random rules regarding unilateral contracts" have no relevance to the breach of contract claim in this case. Pet. App. 10.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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