IN THE SUPREME COURT OF THE STATE OF ALASKA

UNITED AIRLINES, INC.,	)	
	)	
Appellant,	)	
	)	
vs.	)	
	)	Supreme Court No. S-7917
GOOD TASTE, INC, d/b/a SAUCY SISTERS CATERING,	)	
	)	Superior Court No. 3AN-91-4157 Civil
Appellee.	)	
________________________________	)	

APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT
BRIAN C. SHORTELL, JUDGE

BRIEF OF APPELLANT

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CLERK OF THE APPELLATE COURTS

By:____________________________

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A.S. 09.30.070(a) provides:

Sec. 09.30.070. Interest on judgments; prejudgment interest. (a) the rate of interest on judgments and decrees for the payment of money is 10.5 percent a year, except that a judgment or decree founded on a contract in writing, providing for the payment of interest until paid at a specified rate not exceeding the legal rate of interest for that type of contract, bears interest at the rate specified in the contract if the interest rate is set out in the judgment or decree.

Alaska R. Civ. P. 82(a) provides:

(a) **Allowance to prevailing party**. Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

Restatement (Second) of Conflicts of Laws §187 (1971) provides:

§ 187. Law of the State Chosen by the Parties

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

Comment:

a. Scope of section. The rule of this Section is applicable only in situations where it is established to the satisfaction of the forum that the parties have chosen the state of the applicable law. When the parties have made such a choice, they will usually refer expressly to the state of the chosen law in their contract, and this is the best way of insuring that their desires will be given effect.

. . .

3. In state X, A buys from the B company a ticket on one of B's steamships for transportation from X to state Y. The ticket recites that it shall be governed by Y law and also contains a provision stating that B shall not be liable for injuries resulting from the negligence of its servants. The latter provision is valid under Y local law, but invalid under that of X. In the course of the voyage, A is injured through the negligence of B's servants. A brings suit to recover for his injuries against B in state Z. In determining whether or not to give effect to the choice-of-law provision, the Z court will give consideration to the fact that the contract was drafted unilaterally by B, the dominant party, and then presented to A on a "take-it-or-leave-it" basis.

. . .

Illustrations:

4. In State X, A establishes a trust and provides that B, the trustee, shall be paid commissions at the highest rate permissible under the local law of state Y. A and B are both domiciled in X, and the trust has no relation to any state but X. In X, the highest permissible rate of commissions for trustees is 5 per cent. In Y, the highest permissible rate is 4 per cent. The choice-of-law provision will be given effect, and B will be held entitled to commissions at the rate of 4 per cent.

5. Same facts as in Illustration 4 except that the highest permissible rate of commissions in X is 4 per cent and in Y is 5 per cent. Effect will not be given to the choice-of-law provision since under X local law the parties lacked power to provide for a rate of commissions in excess of 4 per cent and Y, the state of the chosen law, has no relation to the parties or the trust.

STATEMENT OF JURISDICTION

This is an appeal from the Judgment Upon Jury Verdict, dated September 3, 1996, of the Superior Court, Third Judicial District at Anchorage, entered by the Honorable Brian C. Shortell, on the issues of defendant's liability and damages. Exc. 0101. Defendant filed a timely notice of appeal dated December 12, 1996. This Court has jurisdiction of this appeal pursuant to AS 22.05.010(b) and Alaska R. App. P. 202(a).

LIST OF ALL PARTIES

The parties to this case are United Airlines, Inc. (hereinafter "United"), appellant; and Good Taste, Inc., d/b/a Saucy Sisters Catering (hereinafter "Saucy Sisters"), appellee.

STATEMENT OF ISSUES PRESENTED ON APPEAL

The issues presented for review are:

1. Whether the trial court erred in submitting to the jury Saucy Sisters' claim that United arbitrarily terminated its catering contract, where the contract explicitly and unambiguously entitled either party to terminate the agreement, without cause, on ninety days' notice, and where Illinois law (which concededly governs this dispute) uniformly enforces such no-cause termination clauses.

2. Whether Saucy Sisters was entitled to consequential damages in excess of $1,500,000 for the loss of the value of its business, notwithstanding the well-settled rule under Illinois law that a party to a contract with a termination clause cannot recover consequential damages for a period longer than the notice period (here, 90 days) prescribed by the termination clause.

3. Whether the trial court erred in awarding Saucy Sisters attorneys fees and prejudgment interest, notwithstanding the fact that Illinois law does not allow such an award in these circumstances.

STANDARDS OF REVIEW

This Court's review of the trial court's orders relating to summary judgment is, as to legal issues, *de novo*. Great American Ins. Co. v. Bar Club, Inc., 921 P.2d 626, 627 (Alaska 1996). This Court exercises its independent judgment and is not required to give deference to the trial court's determinations on issues of law, such as the choice and proper application of Illinois law involving (1) whether the covenant of good faith and fair dealing can vitiate an unambiguous "no cause" termination clause; (2) the award of consequential damages for a period longer than the notice period prescribed by the termination clause; and (3) awards of attorney fees and prejudgment interest. R.E. v. State, 878 P.2d 1341, 1345 (Alaska 1994).

STATEMENT OF THE CASE

When United Airlines decided in 1988 to solicit competitive bids for catering service of its flights into and out of Anchorage, Alaska, Saucy Sisters accepted the challenge, submitted a bid, and was ultimately selected for the job. The parties signed a standard contract -- which Saucy Sisters' president, Connie Bennett, reviewed with her lawyer in detail -- outlining the parties' responsibilities. The contract provided, in pertinent part, that *either* party could terminate the agreement on ninety days' notice. That provision, as Bennett recognized, gave both parties the freedom to walk away from

the agreement at any time, for any reason, as long as they gave the required notice. Unfortunately, Saucy Sisters proved unable to discharge its duties under the contract satisfactorily, and United -- exercising its rights under the termination clause -- gave plaintiff the requisite 90 days notice and replaced Saucy Sisters as its caterer.

Saucy Sisters thereafter sued United, alleging misrepresentation, breach of contract, and breach of the duty of good faith. The trial court agreed that the contract unambiguously entitled United to terminate the agreement on ninety days' notice. Nevertheless, the court permitted the jury to decide whether United had exercised its termination rights in "good faith." The jury awarded the plaintiff more than $1.5 million, finding that United had acted unreasonably in exercising its rights under the no-cause termination clause. The trial court then added attorneys fees and prejudgment interest, bringing the total award to $3,579,981.

As we show below, the trial court's ruling is flawed at every turn. Under Illinois law -- which the court recognized governs here -- a party to a contract with a no-cause termination clause may exercise that termination right for virtually any reason. The covenant of good faith simply cannot dilute the rights provided by a no-cause termination clause. Moreover, even if Saucy Sisters <u>could</u> state a claim for breach of good faith, its damages would be limited to the losses (if any) that it sustained during the 90-day period following its termination. On this record only nominal damages would be available. Finally, in no event may attorneys fees and prejudgment interest be awarded. Because the trial court misapprehended these fundamental principles, the judgment should be vacated and the case dismissed.

A. Factual Background

1. United Airlines engaged Saucy Sisters to provide catering services pursuant to an agreement with a "no-cause termination" clause.

United Airlines ("United") entered the Alaska aviation market in 1983. Tr. 875: 13-15. Over the next few years, Northwest Airlines and Marriott In-Flight Services provided catering services for United flights arriving in or departing from Alaska. Tr. 875:109-876:20. Early in 1988, however, United decided to solicit competitive bids for its catering contract. Tr. 215:24-217:9. United identified several potential bidders, including Marriott, Japan Air Lines, Korean Air Lines, and the plaintiff Good Taste, Inc., d/b/a Saucy Sisters Catering ("Saucy Sisters") (Tr. 876-77). To facilitate the bidding, United sent each of the prospective bidders a package containing United's standard catering contract, meal boarding schedules, meal volume forecasts, and other data. Tr. 220:22-222:14; Exc. 0002-0005.

The standard contract -- which Saucy Sisters ultimately executed upon its selection as caterer -- contained three provisions that are of crucial significance to this appeal. First and foremost, Section III provided that the term of the Agreement would be three years "provided, however, either party may terminate this Agreement upon ninety (90) days' prior written notice."[1/] Second, Paragraph 24 contained a so-called "merger clause"

[1/] Roger Groth, who has had catering responsibilities for United for more than 33 years (Tr. 874:6-10), explained at trial that this no-cause termination clause is valuable to *both* parties to the contract. Not only United, but caterers as well have exercised their right to terminate the contract without cause when a better opportunity arose -- even though the term of the agreement had not yet expired. In one case, for example, a caterer in Santa Barbara executed its right of no-cause termination because "after they got open the place got real popular and they decided they didn't have room to handle us any more, so they sent us a termination notice." Tr. 884:6-14. And in Groth's experience, no caterer had ever asked to delete the no-cause termination clause: "Caterers are anxious to retain that privilege themselves because

stating that "[t]his Agreement, including any Exhibits hereto, constitutes the entire agreement and understanding of the parties on the subject matter hereof, and, as of the effective date, supersedes all prior agreements, whether written o[r] oral, between the parties concerning the subject matter hereof." Finally, Paragraph 22 stated that "[t]his Agreement and any dispute arising under or in connection with this Agreement, including any action in tort, shall be governed by the laws of the State of Illinois." Exc. 0012-0025.

Connie Bennett was the president and principal shareholder of Saucy Sisters. Bennett started Saucy Sisters in 1986 and, by the time of the United solicitation, the company was enjoying annual gross revenues in excess of $1.6 million. Tr. 209:20-210:24. After receiving the United bid package, Bennett carefully reviewed the contract (Tr. 382:16-383:15) and obtained the advice of her attorney, William Artus, as to its meaning (Tr. 597: 12-25; 598: 1-2). Bennett focused particularly on the 90-day termination provision, which was of special concern to her. Tr. 240:1-2; 383:1-3. She realized that under the termination clause both parties had the option of "walking away from the contract." Tr. 383:21-22. The termination clause, Bennett agreed, was "not a one-way street," but instead gave "the caterer an option and it also g[a]ve United Air-lines an option." Tr. 384:5-6. Bennett also understood the merger clause in the Agreement; as she stated at trial, "lawyers generally put [a merger clause] in all contracts

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circumstances may change and they may wish to leave that particular business and go into something else or for several reasons they would not like to have that clause removed." Tr. 885:11-15.

that says this is the entire agreement." Tr. 374:12-14; 598: 6-7. Indeed, Bennett had herself relied on just such a merger clause in connection with a separate contractual dispute she had had with the Salvation Army. Tr. 374:19-Tr. 376:6; Exc. 0001.

On March 14, 1988, United awarded the catering contract to Saucy Sisters. Tr. 231:13-15; Exc. 0010. Although United invited Connie Bennett to propose any changes she wanted in the standard contract, she declined to do so; instead, she accepted the standard contract, including the 90-day termination clause, as is. Tr. 381:3-12; 885:5-7; Exc. 0012-0025. On April 6, 1988, Bennett signed the contract on behalf of Saucy Sisters. Exc. 0012.

2. Saucy Sisters proved unable to discharge its duties appropriately, and United elected to terminate the contract, pursuant to the termination clause.

From the outset, Saucy Sisters had enormous difficulties in carrying out its responsibilities as a caterer. The company experienced a rapid turnover in employees (Tr. 387:8-19; 348:16-21), in part due to Bennett's explosive temperament as a manager. Exc. 0059-0065. Plaintiff also had constant trouble adjusting to the United billing system (Tr. 301:7-9; 576:6-25; 577: 1-25; Exc. 0095-0100), meeting United's specifications for food service (Tr. 409: 10-23; 410: 13-25; 411: 1-24; 413: 3-25), and satisfying customer needs in a timely and efficient manner (Tr. 401: 13-25; 402: 1-25; 403: 1-8). Flight attendants also reported that Saucy Sisters often neglected to provide sufficient meals, plates, silver and settings. Tr. 551:19-25; 552:1-6; 555:9-25; 556:1-25; 558:1-22; 1075:19-22.

By far the most egregious problem, however, was the actual food that Saucy Sisters served. Allen Kalaiwaa -- a former Saucy Sisters employee who was responsible

for setting up the food and equipment for the flights (Tr. 1158; Exc. 0084-0086) -- was "shocked" to discover that, on orders from Connie Bennett, Saucy Sisters employees routinely reused food that they had retrieved from inbound flights, including "ounce portions of margarine, half pints of milk, individual cups of orange juice, * * * and even some of the entrees." Tr. 1158; Exc. 0086. Saucy Sisters employees were told to place "[a]nything that was salvageable, in other words, not rotten" into refrigerators for subsequent use on another flight. Tr. 1150; Exc. 0071-72. As one former Saucy Sisters employee put it (Tr. 1159; Exc. 0082-0083):

> [W]hen the items came back off the flights, they went into this receiving room that I was speaking of before that was where we received our incoming freight. People were instructed to pull the garbage items out of those carriers and save the items that were unused, and that could be anything from the Andes candies to the cookies, the milks, the first-class used orange juices, the quart-sized orange juices, and a number of other items like that.

To conceal this reuse of food, employees were instructed to remove the date codes on food items, replace them with new codes, and then put the mislabled items in the refrigerator. Tr. 1151; Exc. 0074-0077. What is more, refrigerating these reused food items only made matters worse. As one former employee reported, the refrigerators were poorly maintained: "If something would get spilled not always would it get picked up; it would be sitting in there for a day, two days, sometimes three days, before it would be cleaned. They didn't clean the fridges on a regular basis.... The main concern was get the flights out." Tr. 1150; Exc. 0073.

As a consequence of these actions, Saucy Sisters routinely served fruit with "bruising spots on them" (Exc. 0074-0076), spoiled milk and reused yogurt (Tr. 1075:22;

Exc.0077), and meals that were simply inedible. Tr. 1075:22. The results were obvious to passengers and crew alike. Jean Ford, a United flight attendant for 31 years, put it squarely: plaintiff's food was "either frozen or overcooked. Items were missing. Food such as yogurt would be coming on spoiled." Tr. 1208; Exc. 0066-0068. Indeed, Ford added, "[t]he safety aspect of it concerned me in cases where the food would smell bad and look bad." Exc. 0069. In her entire 31-year history with United caterers, Saucy Sisters -- in Jean Ford's view -- ranked "at the bottom."[2/] Exc. 0070.

United repeatedly warned Saucy Sisters that it was not properly discharging its duties under the Agreement. Tr. 994:5-12; 995:7-25; 996:1-25; 1000:1-20; Exc. 0078-0081; Exc. 0095-0100. But it was not easy to convince Bennett that she was responsible for any of the problems. Bennett was "always very defensive that in most of the cases it wasn't the fault of the Saucy Sisters, it was always somebody else's fault." Tr. 1016:21-1017:1. By mid-1989, the relationship with Saucy Sisters had sufficiently deteriorated that United elected to terminate plaintiff as its caterer, and on May 18, 1989, a notice of termination was sent to Bennett. Exc. 0026-0027. Pursuant to the 90-day provision, the termination was effective August 15, 1989. Exc. 0027, 0031-0032, 0033.

B. Proceedings Below

Saucy Sisters filed this action on May 17, 1991, alleging claims for misrepresenta-

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To be sure, Connie Bennett denied these allegations at trial (Tr. 1311:19-22), blaming most of the complaints on disgruntled employees (Tr. 625: 21-25; 626: 1-2), or laying the responsibility at United's doorstep. Tr. 432: 3-25 - 433: 1-8; 450: 9-25; 451:1-11; 550: 22-25; 551: 1-25; 556: 1-25 - 558: 1-22; Exc. 0028-0030. In the end, however, whether Bennett is right or wrong is beside the point: it was precisely to avoid any such disputes about responsibility that the parties agreed to a no-cause termination clause.

tion, breach of contract, and breach of the duty of good faith. R. 313. Prior to trial, United moved for partial summary judgment. United principally contended that it was entitled to discharge Saucy Sisters, without cause, under the 90-day termination clause of the Agreement, and that accordingly neither the contract claim nor the good faith claim could be sustained. Applying Illinois law (Exc. 0087-0094), the trial court first ruled that the termination clause was "unambiguous on its face" (Exc. 0092). The court explained that the termination clause "has only one reasonable interpretation, which is that the contract period is for three years unless one of the parties decides to take affirmative action to end it early." Exc.0092. The court also found that no "extrinsic" evidence was needed to interpret the provision. Exc. 0092. "No-cause termination clauses like the one considered here are widely used, and this one in particular would not cause anyone to second-guess its clear and unambiguous terms." Exc. 0092. In light of these conclusions, the trial court held that, as a matter of law, "United did not breach the terms of . . . the Catering Agreement when it terminated the contract pursuant to a ninety day written notice." Exc. 0092-0093.

The trial court nevertheless declined to dismiss the essentially identical claim that United had breached "the covenant of good faith and fair dealing." Exc.0093. The court recognized (Exc. 0093) that there is no "independent cause of action" in Illinois for breaches of good faith and fair dealing. Nevertheless, and without further explanation, the court sent just such an independent claim to the jury. In the court's view, the covenant of good faith "may require both United and Saucy Sisters to exercise the discretion afforded to them by the termination clause in a manner consistent with the

reasonable expectation of both parties." Exc. 0093. Based on that legal premise, the court instructed the jury that if it found that United's termination was "arbitrary or capricious," or that the company had failed to exercise its termination rights "in a permissible manner," it was required to return a verdict for the plaintiff. Tr. 1427-1428. And plaintiff's counsel, invoking the same legal premise, told the jury in summation that under "the law ... you can only terminate, even with a 90-day clause such as we have here, with a proper motive consistent with the reasonable expectations of the parties." Tr. 1357:15-19.

On July 26, 1996, the jury returned its verdict, rejecting plaintiff's misrepresentation claim (Tr. 1448:14-16), but awarding plaintiff $1,541,000 for "improperly terminat[ing] the contract under the 90-day termination provision" (Tr. 1448:19-1449:3). The trial court thereafter rejected United's post-trial motions in which United renewed its contention that it had no duty to exercise its rights under the no-cause termination clause for "permissible" reasons. Exc. 0102-0103.

SUMMARY OF ARGUMENT

I. Under Illinois law, the covenant of good faith and fair dealing is a tool of construction used *only* to determine the meaning of ambiguous contract terms. But where the terms of a contract are unambiguous, those terms control, and the covenant of good faith cannot alter those contractual rights. No-cause termination clauses, as the trial court recognized, are among the most common in the commercial world; such clauses set forth the expectations of the parties in a clear and straightforward manner. In the face of such an explicit term, courts may not thwart the expectations of the parties

(or invite juries to do so) by effectively rewriting the contract through the application of the covenant of good faith. But that is just what the trial court did when it sent the “good faith” claim to the jury. It invited the jury to hold United liable for “unreasonably” exercising a termination right that, by the plain terms of the contract, did not require United to have any cause for termination at all.

II. Even if the jury’s "good faith" finding (and the Court’s decision to allow the jury to make it) is upheld, Saucy Sisters is entitled to no more than nominal damages. Under Illinois law, in the extraordinary case in which a defendant’s actions in terminating

a contract are so egregious that a plaintiff proves a violation of the covenant of good faith, damages are limited to the amount of profits the plaintiff would have earned during the length of the notice period provided in the contract. Hentze v. Unverfehrt, 237 Ill. App. 3d 606, 604 N.E.2d 536 (5th Dist. 1992). Saucy Sisters never even attempted to prove the amount of its lost profits for the ninety-day period following its termination. Under the rule in Hentze -- which is controlling here -- plaintiff was therefore entitled only to nominal damages.

III. Finally, the trial court's decision to apply Alaska law, not Illinois law, to determine the availability of attorneys fees, prejudgment interest and costs violated the choice-of-law clause in the parties' contract. The applicable section of the Restatement (Second) of Conflicts of Laws, which Alaska courts usually follow with regard to choice of law issues, indicates that the contract's choice of law provision should have been given full effect. Applying Illinois law -- as the contract required -- Saucy Sisters is not entitled to either attorneys fees or prejudgment interest.

ARGUMENT

I. THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY PLAINTIFF'S CLAIM THAT UNITED FAILED TO ACT IN GOOD FAITH IN EXERCISING ITS RIGHTS UNDER THE 90-DAY TERMINATION CLAUSE.

Plaintiff's contract with United could hardly have been plainer: "Either party" enjoyed the right to "terminate th[e] Agreement upon ninety days' prior written notice." By its terms, the 90-day termination clause was unqualified: "Either party" -- whether Saucy Sisters or United -- could terminate the contract, and could do so without cause,

provided only that it gave the other party 90 days notice. And just to make sure that no other qualifications could be imposed, the Agreement contained a "merger clause" specifying that "[t]his Agreement, including any Exhibits hereto, constitutes the entire agreement and understanding of the parties on the subject matter hereof, and, as of the effective date, supersedes all prior agreements, whether written or oral, between the parties concerning the subject matter hereof." Exc. 0019.

The trial court expressly held that the termination clause was "unambiguous on its face." Exc. 0092. As the court put it, the clause "has only one reasonable interpretation, which is that the contract period is for three years unless one of the parties decides to take affirmative action to end it early." Exc. 0092. Nor, the court added, was "extrinsic" evidence needed to interpret the provision. Exc. 0092. "No-cause termination clauses like the one considered here are widely used, and this one in particular would not cause anyone to second-guess its clear and unambiguous terms." Exc. 0092. In light of these conclusions, the trial court held that, as a matter of law, "United did not breach the terms of . . . the Catering Agreement when it terminated the contract pursuant to a ninety day written notice." Exc. 0092-0093.

But having rejected plaintiff's contract claim, the trial court inexplicably refused to dismiss the essentially identical claim that United had breached "the covenant of good faith and fair dealing." Exc. 0093. Its reasoning is baffling to say the least: On the one hand, the court recognized (Exc. 0093) that there is no "independent cause of action"

in Illinois for breaches of good faith and fair dealing; in the next breath, however, it sent just such an independent claim to the jury. In the court's view, the covenant of good faith "may require both United and Saucy Sisters to exercise the discretion afforded to them by the termination clause in a manner consistent with the reasonable expectation of both parties." Exc. 0093. Based on that legal premise, the court instructed the jury that if it found that United's termination was "arbitrary or capricious," or that the company had failed to exercise its termination rights "in a permissible manner," it was required to return a verdict for the plaintiff. Tr. 1427-1428.

That was fundamentally and fatally wrong. Under Illinois law -- which the trial court and the parties agree is applicable under the Agreement -- the covenant of good faith cannot alter the explicit, written rights and obligations of the parties. In literally scores of reported cases, Illinois courts have held that unambiguous contractual provisions -- including termination clauses -- must be enforced by their terms and may not be circumvented by invoking the covenant of good faith. Thus, where, as here, the contract unambiguously provides that either party may terminate, without cause, on 90 days notice, a court has no authority to dilute that right by requiring the parties to have "permissible" reasons (whatever those are) for termination.

Because the Agreement explicitly and unambiguously permitted either party to terminate without cause, the trial court should never have sent the "good faith" claim to the jury. Judgment in United's favor is accordingly warranted.

A. Under Illinois Law, The Covenant of Good Faith Cannot, And Does Not, Override An Unambiguous No-Cause Termination Clause.

1. As a general matter, the unambiguous terms of a contract cannot be trumped by the implied obligation of good faith.

The cardinal rule of contract interpretation -- in Illinois, as elsewhere -- is that "[a] contract's meaning must be determined from the words or language used in the document." Harrison v. Sears, Roebuck & Co., 189 Ill.App.3d 980, 546 N.E.2d 248, 253 (4th Dist. 1989).[3/] "Where the terms in an agreement are clear and unambiguous, they will be given their ordinary and natural meaning" -- and under no circumstances may courts adopt "a construction which is contrary to the plain meaning of the words." Ibid. "The intention of the parties must be determined from the language employed in the contract and, where there is no ambiguity, from such language alone." S&F Corp. v. American Express, 60 Ill. App. 3d 824, 377 N.E.2d 73, 77 (1st Dist. 1978). The text, in short, is dispositive: "[T]he intention of the parties . . . should be ascertained from the words used in the document." Harrison, 546 N.E.2d at 253. Accord, Srivastava v. Russell's Barbecue, Inc., 168 Ill.App.3d 726, 523 N.E.2d 30 (1st Dist. 1988).

True, under Illinois law, "[e]very contract implies a covenant of good faith and fair dealing between the parties to it . . . ." Martindell v. Lake Shore Nat'l Bank, 154 N.E.2d 683, 690 (Ill. 1958). But as the case law makes quite clear, the covenant of good faith

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[3/] The contract between United and Saucy Sisters specifically provided that Illinois law would govern the construction of the contract, Contract § 22, and the trial court rejected plaintiff's contention that Alaska law applied (R.02594).

is a tool of construction that may be used only to interpret ambiguous contract terms or to fill in a contractual "gap" that the parties neglected to consider. "When the contract is silent, principles of good faith . . . fill the gap." Kham & Nate's Shoes No. 2 v. First Bank of Whiting, 908 F.2d 1351, 1357 (7th Cir. 1990). Accord, Baxter Healthcare Corp. v. O.R. Concepts, Inc., 69 F.3d 785, 792 (7th Cir. 1995) ("[t]his is not a situation where the duty of good faith is required to 'fill a gap' in a contract").[4/] Where, on the other hand, there is no "gap" to fill and no ambiguity to resolve, Illinois courts do not rewrite contracts by invoking a covenant of good faith. As the Seventh Circuit has explained, the covenant of good faith may "not block use of terms that actually appear in the contract." Kham & Nate's Shoes No. 2, 908 F.2d at 1357. See P.A Bergner & Co. v. Lloyd's Jewelers, 492 N.E.2d 1288, 1291 (Ill. 1986) (no need to address plaintiff's allegation of breach of good faith because "[w]hen the language of a contract is unambiguous, the express provision governs and there is no need for construction"); Abbott v. Amoco Oil , 619 N.E.2d 789, 797 (Ill. App. Ct 1993) (use of good faith covenant not appropriate where contract terms unambiguous); Anderson v. Burton Assoc., Ltd., 578 N.E.2d 199, 203 (Ill. App. 1991); LaSalle Nat'l Bank v. Metropolitan Life Ins. Co., 18 F.3d 1371, 1375 (7th Cir. 1994) ("implied duty of good faith . . . does not modify contractual provisions which plainly define the parties' duties"); Continental

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Cf. Gerdlund v. Electronic Dispensers Int'l, 235 Cal. Rptr. 279, 286 (Cal. 1165,. App. Ct. 1987) (covenant of good faith "suppl[ies] a requirement of good cause for termination where the contract itself is silent or ambiguous on that subject" (citing cases)).

Bank v. Everett, 964 F.2d 701, 705 (7th Cir.) (good faith has "nothing to do with the enforcement of terms actually negotiated"), cert. denied, 506 U.S. 1034 (1992). Were the law otherwise, courts would be free -- under the guise of applying a good faith covenant -- simply to rewrite the parties' contract. Illinois courts don't do that. See, e.g., Newcastle Properties v. Shalowite, 582 N.E.2d 1165, 1168 (Ill, App. Ct. 1991) (citing cases) ("[a] court cannot remake a contract and give a litigant a better bargain than he himself was satisfied to make "); Continental Mobile Telephone v. Chicago SMSA Ltd. Partnership, 587 N.E.2d 1169, 1173 (Ill. App. Ct. 1992) ("[i]t is well-established that a court may not rewrite a contract to provide a better bargain than plaintiff had already made"); Resolution Trust Corp. v . Holtzman, 618 N.E.2d 418, 424 (Ill. App. Ct. 1993) ("lender and borrower enjoy the freedom of the marketplace to negotiate whatever they wisely or foolishly believe is in their best interests and a court is powerless to alter the clear terms of a mortgage contract"); Industrial Representatives, Inc. v. CP Clare Corp., 74 F.3d 128, 131-132 (7th Cir. 1996) ("[w]hen parties are free to specify price and duration, a court cannot improve matters by intervention after the fact. It can only destabilize the institution of contract, increase risk, and make parties worse off"); Kham & Nate's, 908 F.2d at 1358 ("[r]isk must be judged ex ante by lenders, rather than ex post by judges").

The Seventh Circuit's decision in Industrial Representatives, Inc., applying Illinois law, illustrates these fundamental principles. The plaintiff in that case, a distributor of

the defendant's products, sued the defendant after the defendant terminated the distribution contract. The contract provided that the defendant was free to terminate on 30 days' notice and that, in the event of termination, the plaintiff would be entitled to commissions only for those products that had been ordered before the termination date and delivered within 90 days after termination. Although the distributor acknowledged that the defendant was entitled to terminate, it claimed an entitlement to commissions further into the future than 90 days.

The court of appeals rejected that claim. The court noted, at the outset, that "in Illinois a contract without a fixed term may be ended for any or no reason." 74 F.3d at 129 (citing cases). Thus, the court explained, the defendant was not liable for extra commissions merely because it exercised its right of termination. Nor, the court added, could any such obligation be squared with the express provision limiting future commissions to a 90-day window. "No one, least of all [the plaintiff], could have thought that a contract permitting termination on 30 days' notice, with payment of commissions for deliveries within 90 days thereafter, entitled the representative to the entire future value of the goodwill built up by its work." Id. at 130. As the court explained, "[t]he terms on which the parties would part ways were handled expressly in this contract, and [the plaintiff] got what it bargained for." Ibid. "When the parties are free to specify price and duration, a court cannot improve matters by intervention after the fact." Id. at 131-132. To be sure, the court noted, there may be a duty to act in good faith, but only

"when the contract itself does not cover a particular subject." Id. at 132. Here, the contract quite explicitly prescribed the terms on which the contract could be terminated, and courts were not free to remake the deal (ibid.):

> [T]he subject of this case -- how long [the plaintiff's] stream of commissions would last after termination -- was covered explicitly. [Plaintiff] was the repeat player in this arrangement, [defendant] the newcomer with small initial sales. [The plaintiff] knew, or should have recognized, that the 90-day period created a risk; and it could have responded by demanding a higher commission rate to compensate. For all we know, the commission rate in this contract was higher than it would have been, had the period of post-termination residuals been longer. But whether the commission rate adjusted or not, a deal's a deal.

The Illinois Supreme Court applied the same principles in P.A. Bergner & Co. v. Lloyds Jewelers, Inc., 112 Ill.2d 196, 492 N.E.2d 1288 (1986). The trial court in that case had directed a verdict in plaintiff's favor on defendant's counterclaim alleging a wrongful termination of a lease. According to the counterclaim, plaintiff had violated its covenant of good faith by failing to withhold certain costs under the lease and later assessing all of those unbilled costs as arrearages. The Supreme Court held that, under the terms of the lease, the plaintiff lessor was free to assess the arrearages as it did, and the Court therefore sustained the directed verdict in plaintiff's favor. Rejecting defendant's reliance on "the implied obligation of good faith found in every contract" (492 N.E.2d at 1290), the Court explained that "[w]hen the language of a contract is unambiguous, the express provision governs and there is no need for construction or inquiry as to the intention of the parties." Ibid. Here, the Court concluded, "the

provision of the lease is unambiguous and clearly defines the obligations of the parties." Id. at 1290-1291. The Court therefore agreed with the trial court that the covenant of good faith could not vary the obligations contained in the lease.

To like effect is the decision of the Illinois Appellate Division in Abbott v. Amoco Oil Co., 249 Ill.App.3d 774, 619 N.E.2d 789 (2d Dist. 1993). In that case, a group of Amoco dealers sued the company, alleging that Amoco had breached "the covenant of good faith and fair dealing" when it failed to discount the price it charged the dealers for gasoline. 619 N.E.2d at 795. The court rejected that claim, holding that the contract between Amoco and the dealers expressly permitted the company to set the gasoline prices as it did. Although the court agreed that "[t]here is a duty of good faith and fair dealing included in every contract as a matter of law in Illinois" (ibid.), it explained that the covenant "does not help the dealers, as we have previously found the [contract] to be unambiguous, negating the need for interpretive rules" (id. at 796). As the court pointedly noted: "'[C]ontract terms implied in law cannot supplant express contract.'" Ibid. The court therefore declined to override the express terms of the contract on the basis of the covenant of good faith. "[A]n unambiguous contract must be enforced as it is written," and "'a court may not add provisions to an unambiguous contract even if these make the contract more equitable.'" Id. at 797.

These cases stand for the straightforward proposition that, under Illinois law, the unambiguous terms of a contract cannot be altered by relying on the implied covenant of

good faith. While the good-faith covenant may "fill contractual gaps," it has "nothing to do with the enforcement of terms actually negotiated." Continental Bank, 964 F.2d at 704-705 (applying Illinois law and holding that bank had no good-faith duty to reveal value of collateral to guarantors of loan where the governing agreement did not provide for any such duty). As the Seventh Circuit, applying Illinois law, has flatly put it: "Gap-filling methods such as good faith do not 'block use of terms that actually appear in the contract.'" Id. at 705. "[W]here the disputed issue in a contract is governed by express terms, there is no gap to be filled, and discretion exercised according to the express terms does not breach the implied good faith covenant." Michigan Ave. Nat.l Bank of Chicago v. Rogers, 1994 WL 330275 (N.D.Ill. 1994) (applying Illinois law and holding that where guarantors expressly waived the right to contest bank's modification of collateral, the covenant of good faith could not overcome that express agreement). Accord, LaSalle Nat'l Bank, 18 F.3d at 1375 (applying Illinois law and holding that implied duty of good faith could not overcome text of loan commitment that released defendant's obligation to make loan if certain conditions were not satisfied by the borrowers). See also Ramsey v. Sand Point, 1997 WL 168639 (Alaska 1997) (under Alaska law, "[t]he covenant of good faith cannot be interpreted to prohibit what is expressly permitted by [plaintiff's] contract with the [defendant]").

2. These principles are fully applicable to termination clauses.

The principle that courts strictly enforce the express terms of the contract -- and do not modify those terms by invoking the covenant of good faith -- is fully applicable to termination clauses. In a series of cases, typically (but not invariably) involving employees who were subject to termination at-will, the Illinois courts have uniformly held that the covenant of good faith cannot trump the right to terminate the employee according to the agreement. As these courts have explained, "the covenant of good faith, which is a principle of construction, gives way to the rule that an employment at-will contract is terminable for any reason. Otherwise, the employment at-will principle would be meaningless." Beraha v. Baxter Health Care Corp., 956 F.2d 1436, 1444 (7th Cir. 1992). On that basis, Illinois courts have, time and again, dismissed claims by at-will employees who alleged bad faith terminations. See, e.g., Gordon v. Matthew Bender & Co., 562 F. Supp. 1286, 1290 (N.D.Ill. 1983) (no cause of action for breach of the covenant of good faith in employment at-will setting); LaScola v. US Sprint Communications, 946 F.2d 559, 565 (7th Cir. 1991) (applying Illinois law and holding that implied covenant of good faith cannot modify the right to terminate employment at will).

Harrison v. Sears, Roebuck & Co., 189 Ill.App.3d 980, 546 N.E.2d 248 (4th Dist. 1989), illustrates the point. There, for example, the Appellate Court sustained the grant of summary judgment against an employee who claimed that she was discharged in violation of the implied covenant of good faith. The court agreed that "[i]mplicit in every

express contract in Illinois is the promise that the parties will act in good faith." And it acknowledged, as well, that the covenant of good faith is an appropriate "construction aid" in interpreting the contract between the parties. But the court emphatically held that the covenant of good faith could not modify the express terms of the contract -- including the at-will termination clause. "No obligation should be implied which is inconsistent with the terms of the contract." 546 N.E.2d at 256. That principle was dispositive: "An employment at-will contract gives the employer the right to terminate the employment at any time. Therefore, it is incongruous to imply a covenant which restricts that right." Ibid.

The United States District Court for the Northern District of Illinois, applying Illinois law, took the same view in Zick v. Verson Allsteel Press Co., 623 F. Supp. 927 (1985). There, too, an employee sued his employer alleging that his termination breached the covenant of good faith and fair dealing. Granting defendant's motion to dismiss on the pleadings (and even granting sanctions), the court held (id. at 930, quoting Criscione v. Sears, Roebuck & Co., 66 Ill.App.3d 664, 669-670, 384 N.E.2d 91, 95 (1st Dist. 1978) (emphasis added):

> [R]equiring an employer in an at-will relationship to terminate an employee only for a legitimate business reason absent any other restrictions by contract or statute would place the courts in the untenable position of having to assess an employer's business judgment. There has been no attempt by the legislature to so alter the State's employment policy and such a step is not one for the courts to make. The rule in this state is that an employment at-will relationship can be terminated for "a good reason, a bad reason, or no reason at all.

As the court summarized the matter: "Illinois courts have shown no inclination whatever to back away from the traditional at-will rule." Ibid.

These principles apply not only in the employer-employee setting, but also in other business contexts. In Digital Equip. Corp. v. Uniq Digital Technologies, Inc., 73 F.3d 756 (7th Cir. 1996), for example, the court of appeals, applying Illinois law, rejected a distributor's claim that it had been terminated in violation of the duty of good faith. Like the contract between United and Saucy Sisters, the termination clause in that case provided that either party could terminate the agreement. The Seventh Circuit held that the clause was enforceable and could not be modified by the covenant of good faith. "Illinois enforces written contracts, and [the distributor] agreed, in writing, to a contract that allowed [the defendant] to terminate at the end of any year." Id. at 758. Nor did it matter that the distributor, like Saucy Sisters, had invested significant funds in the expectation that the relationship would continue. Termination at will meant at will (id. at 759):

> [The distributor] could not expect to continue selling . . . indefinitely on the ground that, once the sales began, the "duty of good faith" meant that [the defendant] had to renew on the same terms indefinitely, even though the contract provided for termination at the end of any year. [The distributor] stresses that it invested $1 million in [sunk costs]. Such investments are common; Goodyear invests many millions in designing tires for use on GM's cars, but it cannot complain if at the end of the contract term GM starts buying from Firestone -- or starts making its own tires.

Accord, Nichols Motorcycle Supply Inc. v. Dunlop Tire Corp., 913 F. Supp. 1088, 1143 (N.D.Ill. 1995) (applying Illinois law and holding that covenant of good faith could not modify termination clause between distributor and manufacturer).[5/]

In short: Illinois courts strictly enforce termination clauses, just as they do any other express provision in a contract. Where such terms are unambiguous, and there are no "gaps" to fill, there is simply no basis for declining to enforce the termination right. The covenant of "good faith"does not entitle a court to disregard the plain meaning of the contract.

[5/] Nor are Illinois courts alone in holding that parties that have negotiated no-cause termination clauses cannot reasonably have expectations beyond those set forth in the clauses themselves. Just last month, this Court itself held that, under Alaska law, the covenant of good faith cannot overcome a no-cause termination clause in an employment contract. In Ramsey v. Sand Point, 1997 WL 168639 (Alaska 1997), a police chief sued his employer, alleging that the employer's exercise of a termination clause breached the duty of good faith. This Court upheld the trial court's grant of summary judgment for the defendant, holding that "[t]he covenant of good faith cannot be interpreted to prohibit what is expressly permitted by [the plaintiff's] contract." Id. at *8. Accord, e.g., Devery Implement Co. v. J.I. Case Co., 944 F.2d 724, 728-729 (10th Cir. 1991) (Oklahoma law) (good faith cannot "trump a bargained-for termination-at-will clause"); Phoenix Technologies v. TRW, 840 F.Supp. 1055, 1064 (E.D.Pa. 1994) (Ohio law) (covenant does not require defendant to provide more notice before termination than provided for in contract); Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129, 137 (5th Cir.), cert. denied, 444 U.S. 938 (1979) (Iowa law) ("[w]hen a contract contains a provision expressly sanctioning termination without cause there is no room for implying a term that bars such a termination"); Chrysler Credit v. Dioguardi Jeep Eagle, 596 N.Y.S.2d 230, 231 (N.Y. App. Div. 1993) (New York law) (implied covenant cannot abrogate express financing termination provision); Zapatha v. Dairy Mart, 408 N.E.2d 1370, 1378, 1380 (Mass. 1980) (Massachusetts law) (complying with terms of no-cause termination clause does not violate implied covenant); Willis v. Champlain Cable Corp., 748 P.2d 621, 624 (Wash. 1988) (declining to apply covenant of good faith to employment at-will contracts).

B. The Trial Court Ignored These Principles In Deciding To Send Saucy Sisters' Good Faith Claim To The Jury

The trial court expressly held that the termination clause in plaintiff's contract with United was "unambiguous on its face." Exc. 0092. As the court put it, the clause "has only one reasonable interpretation, which is that the contract period is for three years unless one of the parties decides to take affirmative action to end it early." Exc. 0092. At that point, the trial court's work was at an end: Having "found the [contract] to be unambiguous," the court "negat[ed] the need for interpretive rules." Abbott, at 795. The court should simply have enforced the 90-day termination clause by its terms and granted judgment to United. It had no authority -- under the guise of "good faith" -- to invite the jury to rewrite the contract.

The trial court believed, however, that the implied covenant of good faith required it to interpret the termination clause "in a manner consistent with the reasonable expectation of the parties." Exc. 0093. The court therefore sent the issue to the jury with an instruction that invited the jury to decide whether United's termination of the plaintiff was consistent with the parties' "reasonable expectations." Tr. 1427. But under Illinois law, where a contract unambiguously provides how the parties may exercise their discretion, the contract itself is the measure of the reasonable expectation of the parties. Continental Mobile Telephone, 587 N.E.2d at 1174, illustrates the point. There, a wholesale purchaser of cellular telephone transmission services alleged that the defendant had impermissibly raised its rates. The trial court dismissed the claim, and the Illinois

Appellate Court affirmed. The court explained that the agreement between the parties "is clear and unambiguous, and allow[ed] defendant to revise its wholesale rates at its sole discretion." Id. at 1172. And the court refused to modify that "unambiguous" language by invoking the duty of good faith (id. at 1173 (emphasis added)):

> In view of the fact that the contract terminology allowed the defendant to raise its rates at its sole discretion and at any time, we do not believe that plaintiff has stated a cause of action under the implied duty of good faith and fair dealing. Good faith between contracting parties requires that a party vested with contractual discretion must exercise that discretion reasonably, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties. . . In this case, both parties were aware that defendant was able to raise its wholesale rates at any time, thereby negating any inference that defendant's actions were outside the contemplation of the parties and could be characterized as a breach of good faith.

The district court in Zick v. Verson Allsteel Press Co., 623 F. Supp. 927 (N.D.Ill. 1985), applying Illinois law, made the same point, when it declined to impose a good-faith restriction on an employer's right to invoke an at-will termination clause. "If an employee has an at-will contract, the only reasonable expectation created by that contract is that he or she can be terminated for 'a good reason, a bad reason, or no reason at all.'" Id. at 931. Accord, Nichols Motorcycle Supply Inc., 913 F. Supp. at 1143 (in light of no-cause termination clause, distributor "could not have had a reasonable expectation that [the defendant] could only terminate it for cause"); Michigan Ave. Nat'l Bank, 1994 WL 330275 at *4 (N.D.Ill. 1994) (good faith "limits discretion only insofar as the exercise of that discretion would be out of step with the reasonable expectations of the parties" and

"where the disputed issue in a contract is governed by express terms . . . discretion exercised according to the express term does not breach the implied good faith covenant"). Cf. Ramsey v. Sand Point, 1997 WL 168639 (Alaska 1997) (under Alaska law, "[t]he covenant of good faith and fair dealing is implied in every contract in order to effectuate the reasonable expectations of the parties to the agreement, not to alter those expectations"); Steven J. Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 Harv. Law Rev. 369, 372 n.14 (1980) ("[a]lthough the parties are not free to disclaim the obligation to perform in good faith as such, they are free to determine by agreement what good faith will permit or require of them" (citations omitted)).[6]

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[6] In reaching its decision, the trial court misapplied (Exc. 0093) Beraha v. Baxter Health Care Corp., 956 F.2d 1436 (7th Cir. 1991). There, the court considered a license agreement between an inventor and a manufacturer that provided that the manufacturer's obligation to pay royalties did not arise unless and until it developed and sold Beraha's invention. Id. at 1444. The agreement did not outline when or how the manufacturer would develop the invention. Under these circumstances, the Seventh Circuit held that the covenant of good faith and fair dealing required the manufacturer "to exercise the discretion afforded to it by the license agreement in a manner consistent with the reasonable expectations of the parties," which should be determined by the trier of fact. Id. at 1445. The court distinguished an employment at-will situation, noting that "an employee at-will has no reasonable expectation that he will be terminated only for cause, and the implied covenant of good faith and fair dealing cannot require the parties to exceed that reasonable expectation." Id. at 1444-1445. Thus, the covenant has effect only where the terms of employment are uncertain. See also Martindell, 154 N.E.2d at 688 ("[t]he agreement is not without ambiguity and inconsistency, nor can it be said that the intent of the parties is crystal clear from its terms"); Foster Enters v. Germania Fed. Sav. and Loan Ass'n, 421 N.E.2d 1375, 1381 (Ill. App. Ct. 1981) (contract requiring appraisal acceptable to both parties implied approval would not be unreasonably withheld). Here, by contrast, the trial court found the termination clause to be clear and unambiguous and that United had complied with it. Having so found, the court had no basis for submitting the good-faith issue to the jury.

The trial court's decision to send Saucy Sisters' good-faith claim to the jury was a clear error of law for second, independent reason. The court rejected (Exc. 0092-0093) plaintiff's breach of contract claim -- as it plainly had to, once it concluded (correctly) that the termination clause unambiguously authorized United to discharge the plaintiff. The court also recognized (Exc. 0093) that the covenant of good faith and fair dealing *does not create an independent cause of action* -- again, a conclusion that cannot be disputed. See, e.g., Beraha, 956 F.2d at 1444. But there's the rub: once the court rejected the breach of contract claim, *there was no claim left to send to the jury*. And yet, the court inexplicably sent a good-faith claim to the jury. In effect, the trial court did just what it (correctly) said Illinois law forbids -- it treated Saucy Sisters' good faith claim as an independent cause of action.

Having found the termination clause to be "unambiguous on its face" (Exc. 0092), the trial court should have dismissed the good-faith claim, then and there. That is invariably what Illinois courts do in like circumstances. See, e.g., Continental Mobile Telephone, 587 N.E.2d at 1174 (affirming dismissal); Baxter Healthcare, 69 F.3d at 792 (affirming dismissal); Continental Bank, 964 F.2d at 705 (affirming grant of summary judgment). Instead, the court "invited the jury to apply an implied covenant of fair dealing to override an express provision of the contract." Gerdlund, 235 Cal. Rptr. at 286 (construing analogous California doctrine of good faith). That was plainly and

indefensibly wrong: The case should never have been sent to the jury. Under the overwhelming weight of Illinois law, judgment should be entered for United.

II. THE AWARD OF CONSEQUENTIAL DAMAGES IN THIS CASE CANNOT BE SQUARED WITH ILLINOIS LAW.

A. Under Illinois Law, A Party Whose Contract Is Subject To Termination On 90 Days' Notice May Receive Consequential Damages Only For The 90-day Period Following Termination.

The measure of damages in this case -- like every other issue arising from this contractual dispute -- is governed by Illinois (not Alaska) law. Exc. 0088-0089. The trial court was therefore required to apply Illinois law in deciding whether consequential damages were available in this case and, if so, how much. In assessing the appropriate amount of consequential damages, the leading Illinois decision is Hentze v. Unverfehrt, 237 Ill.App.3d 606, 604 N.E.2d 536 (5th Dist. 1992).

The facts in Hentze were unusually egregious. The plaintiff, Paul Hentze, operated a dealership that sold defendant DECO's dairy equipment. As his business prospered, Hentze began to attract customers from outside his region, thereby cutting into the business of defendant Unverfehrt, another DECO dealer. Unhappy with the loss of business, Unverfehrt convinced DECO to terminate Hentze's dealership contract. Because 67% of Hentze's sales were derived from DECO products, his company went out of business. He then sued the defendants for breach of contract and sought lost profits for the five-year period following the termination. 604 N.E.2d at 538-540.

The court of appeals first upheld the finding of contractual liability against DECO. The court recognized that Hentze's contract allowed either party to terminate at will by providing 60 days' notice. 604 N.E.2d at 539. And it acknowledged the well-settled principle -- which we discuss in Point I above -- that under Illinois law a party to an at-will contract may be terminated for any reason, whether good or bad. Ordinarily, the court stated, that rule would foreclose liability; indeed, "[h]ad DECO merely agreed to Unverfehrt's requests and sent Hentze a termination letter immediately, we would be hard-pressed to find any absence of good faith. DECO had the right to terminate the contract for no reason at all." Ibid. Here, however, DECO had done more than simply exercise its termination rights. Rather, the company had decided "to run Hentze out of business" -- by "telling farmers in the area not to deal with the Hentze dealership anymore as it was incompetent"; "threaten[ing] to terminate the Hentze dealership if its bid prices were not raised to match Unverfehrt's"; misleading Hentze as to DECO's intentions; and cutting off communication with Hentze. Id. at 539-540. In light of these extraordinary acts of bad faith -- which included business libel, antitrust violations, and other commercial torts -- the court upheld contractual liability against DECO.[7]

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[7] In all of these critical respects, the Hentze case is sharply distinguishable from the present case. Saucy Sisters did not, and could not, allege that United took any measure even remotely as destructive as the acts committed by the defendants in Hentze. Thus, as we contend in Point I, the present case is controlled by the traditional rule in Illinois -- acknowledged with approval by the court in Hentze -- that an at-will contract is terminable for any reason, whether good or bad.

The court then turned to the measure of damages. Hentze contended that he lost his entire business and, to quantify that loss, he offered evidence of five years of lost profits. 604 N.E.2d at 540. The court of appeals rejected this damages theory and awarded only nominal damages. Although the court agreed that "[r]ecovery of lost profits [is] allowable if the loss is proved with a reasonable degree of certainty," it emphasized that such consequential damages may not be awarded unless they "were within the reasonable contemplation of the parties at the time the contract was entered." Ibid. In this case, the court noted, "five years of lost profits were not within the contemplation of the parties at the time of entering into the contract." Ibid. To the contrary, the court explained (ibid.), "[t]he contract could be terminated by either party with 60 days' written notice," and "[b]ecause of this provision, damages for lost profits exceeding these 60 days could not have been contemplated." Accordingly, the court held (ibid.), "Hentze's damages for lost profits are limited to no more than he would have sustained within a 60-day period."

Unfortunately for Hentze, however, he had "presented no evidence of damages limited to 60 days, but rather he calculated his damages for a five-year period." 604 N.E.2d at 540. Moreover, the court observed, the five-year projections that Hentze did offer in evidence "cannot reasonably be broken down to establish 60 days of lost profits without engaging in pure speculation or conjecture." The court of appeals therefore concluded (ibid.) that "[h]aving failed to establish a proper basis from which his damages could be computed, Hentze is entitled only to nominal damages."

Hentze stands for a fundamental legal proposition: Even in truly egregious cases (and the present case involves no conduct even remotely as sanctionable as the behavior in Hentze), a party whose contract is subject to termination within a prescribed period of time may not recover consequential damages for a period beyond the time frame prescribed by the contract. As we next show, that proposition requires that no more than nominal damages be awarded to Saucy Sisters.

B. Under These Principles, The Award Of Consequential Damages Should Be Set Aside And Only Nominal Damages (At Most) May Be Awarded.

As in Hentze, the contract with Saucy Sisters was terminable within a prescribed period of time (90 days in this case; 60 days in Hentze). Thus, under the rule in Hentze, Saucy Sisters was entitled to consequential damages for at most a period of 90 days. Moreover, to secure such relief, Saucy Sisters was obligated to prove the damages it would have sustained within the 90-day period following termination of the contract.

But Saucy Sisters offered no such evidence in this case. Instead, as in Hentze, the plaintiff asked the jury to award it the value of its loss of the entire business. The evidence had two distinct components -- but neither component was limited to a 90-day period. Through the testimony of an economist (Paul Taylor), Saucy Sisters first offered evidence of the fair market value of its business. Taylor calculated this figure by selecting a (supposedly) representative year of plaintiff's business, calculating the net income for that year, projecting that year indefinitely into the future, and then applying a discount rate to obtain the present value of the future income stream. Tr. 787:7-810:17. For this component of damages, the jury awarded Saucy Sisters $1,000,000,

which according to the verdict sheet represented the "loss in the fair market value of [plaintiff's] business" (Tr. 1449:2-3).

To that sum, Taylor added a second component, reflecting the out-of-pocket losses sustained by Saucy Sisters supposedly as a result of losing the United contract. As Taylor explained it at trial, Connie Bennet had "entered into a three-year contract" and had made some "very serious financial commitments in order to be able to fulfill and to perform under that contract" -- including "[t]hings like the lease and the loan payments" (Tr. 831:23-814:11). Taylor projected those expenses over the three-year period following the termination (Tr. 835:7-836:9) and calculated the total losses. For this component of damages, the jury awarded an additional $541,000, which according to the verdict sheet represented the "direct losses to [plaintiff's] business as a result of losing the United contract" (Tr. 1448:22-1449:1). The total jury award (before attorneys fees and prejudgment interest) was thus $1,541,000.

Significantly, however, both of these components of consequential damages -- the loss of the business itself and the out-of-pocket losses -- were calculated by projecting income and expenses into the future. Neither was limited to the 90-day period following the termination of the contract. Under Hentze such evidence is simply impermissible. Saucy Sisters was obligated to prove only the losses (if any) that it sustained during the 90 days following termination. It offered no such proof -- and, as in Hentze, any effort to extrapolate the 90-day figure at this juncture would amount to "pure speculation or conjecture." 604 N.E.2d at 540. Under the rule in Hentze, Saucy Sisters is accordingly entitled (at most) to nominal damages.

III. IN NO EVENT SHOULD SAUCY SISTERS RECEIVE ATTORNEYS FEES OR INTEREST.

A. Under Section 22 Of The Agreement Between The Parties, Illinois Law Governs The Question Whether Attorneys Fees Or Interest Is Available.

Section 22 of the Agreement between the parties provided that "any dispute arising under or in connection with this agreement, including any action in tort, shall be governed by the laws of the State of Illinois." "Any dispute" means just what it says -- *any* dispute, whether about the elements of a tort, about the measure of damages, or about whether prejudgment interest or attorneys fees may be awarded. Under the plain, broad language of Section 22, the availability of fees and interest is a "dispute" that arises "in connection" with the contract, and as such was governed by Illinois law.

The trial court nevertheless elected to apply Alaska law to the issues of attorneys fees and prejudgment interest (R. 3247)(after having initially denied plaintiff's request that it do so (R. 3272)). But it offered no reason for treating these "disputes" differently. R. 3162 And in fact, there is no basis for such different treatment. The choice of law provision in the parties' agreement applies as fully to the question of fees and interest as it does to any other issue. As the Fifth Circuit explained in Exxon Corp. v. Burglin, 4 F.3d 1294, 1302 (1993), "[t]he award of attorneys fees is governed by the law of the state whose substantive law is applied to the underlying claims. . . . [I]n litigation construing a contract that contains a valid choice of law clause, the parties' choice of law governs both the interpretation of the contract and the award of attorneys fees." See also

Sparling v. Hoffman Constr. Co., 864 F.2d 635, 641 (9th Cir. 1988) (applying Alaska law to attorneys fee issue under Washington State choice-of-law doctrine).

Applying the choice-of-law provision in this setting is also dictated by the Restatement (Second) of Conflicts of Laws. See Ehredt v. DeHavilland Aircraft Co. of Canada, 705 P.2d 446, 453 (Alaska 1985) (Alaska courts generally follow the Restatement in determining choice of law questions). Section 187(1) of the Restatement provides that "[t]he law of the state chosen by the parties . . . will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." *Restatement (Second) of Conflicts Of Laws* §187 (1971). As the Restatement explains, unless the law of the state in which the contract was drafted prohibits parties from agreeing to the substantive rule that would be dictated by the law chosen in the contract, the choice-of-law provision should be applied to the issue in question.[8/]

Under this principle, the parties' choice of Illinois law should be respected, because Alaska law permits parties to stipulate by contract that fees and interest will not be awarded in the event of a breach of contract (which is the rule in Illinois). Alaska R. Civ. P.

8/

The following illustration from the Restatement depicts a situation in which the parties could not, based on the law of the state where the contract was drafted, have specifically provided in their contract for the rule that would apply if the choice of law provision were given effect.

> In State X, A establishes a trust and provides that B, the trustee, shall be paid commissions at the highest rate permissible under the local law of state Y. . . . [T]he highest permissible rate of commissions in X is 4 per cent and in Y is 5 per cent. . . . under X local law the parties lacked power to provide for a rate of commissions in excess of 4 per cent . . . .

Restatement (Second) of Conflicts Of Laws §187 illus. 4, 5 (1971).

82(a) authorizes parties to "agree" that attorneys fees will not be paid in the event of a breach of contract. Similarly, Alaska Stat. § 09.30.070(a), although prescribing the rate of interest on judgments, permits the parties to agree otherwise by contract -- including to preclude interest altogether. In short, under Alaska law, the parties could have decided "by an explicit provision in their agreement" that fees and interest would be unavailable (as Illinois law provides), thus subsection (1) of section 187 of the Restatement applies and requires that the parties' choice of Illinois law be respected.[9/]

Important public policy goals would be served by applying subsection (1) under these circumstances. As noted by the authors of the Restatement, "[p]rime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract." *Restatement (Second) of Conflicts Of Laws §187 cmt. e* (1971). There is no reason to deprive parties of the right to determine by contract their exposure to fees and interest, just as they can determine by contract what other contractual risks will be. That is especially important in cases like this one, in which a plaintiff maintains that the total fees and interest is enormous -- some $2,038,981.60.[10/] Parties are entitled to make

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9/

In a recent case involving virtually identical issues, the prevailing party apparently did not even dispute that "the parties were free to resolve the issues of prejudgment interest and attorneys fees by explicit contractual provision." Alaska Airlines v. United Airlines, 902 F.2d 1400, 1403 (9th Cir. 1990). In that case, the Ninth Circuit determined that subsection 1 of section 187 of the Restatement was "facially applicable" and certified the question whether this Court would depart from its usual practice of following the Restatement in this area of law. Id. at 1404. The case settled before this Court answered the certified question.

10/

Of course, in citing this unsupportable figure, United does not mean to suggest that it agrees with plaintiff's calculations.

conscious decisions about who should pay for litigation costs of this magnitude. The parties did just that by specifying that Illinois law would govern this important issue.[11/]

As the California Supreme Court recently stated, "the principles set forth in Restatement § 187 . . . reflect a strong policy favoring enforcement of [choice of law] provisions." Nedlloyd Lines B.V. v. Superior Court of San Mateo County, 834 P.2d 1148, 1151 (Cal. 1992) (in bank). This Court should follow the Restatement, enforce the plain language of Section 22, and therefore apply Illinois law in deciding whether attorneys fees and prejudgment interest are available.

11/

Even if subsection 2 and not subsection 1 of Restatement section 187 controls this case, Illinois law would still govern. Under subsection 2, "[t]he law of the state chosen by the parties . . . will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which [would otherwise supply the governing law in the absence of a choice of law provision]." *Restatement (Second) of Conflicts Of Laws §187* (1971). Neither of the subsection's two narrow exceptions to following the law of the state selected by the parties applies here. As an initial matter, since United has its primary place of business in Illinois, the parties' choice was clearly reasonable. *Restatement (Second) of Conflicts Of Laws §187(2)(a)* (1971). Further, applying Illinois law in this case will not "be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue." Id. §187(2)(b). As the Ninth Circuit noted in Alaska Airlines, this Court has never held that Alaska's preference for an award of attorneys fees or prejudgment interest to a prevailing party is so strong as to vitiate an explicit choice-of-law provision selected by the parties. 902 F.2d at 1404.

B. Under Illinois Law, Saucy Sisters May Not Receive Attorneys Fees or Prejudgment Interest

1. Illinois Law Does Not Provide Attorneys Fees To A Prevailing Party.

It is well settled that in Illinois "there is no common law right allowing successful litigants to recover attorney fees as either costs or damages." Scoby v. Civil Serv. Comm'n, 624 N.E.2d 439, 440 (Ill. App. Ct. 1993) (citation omitted). Accord Ash v. Georgia-Pacific, 957 F.2d 432, 438 (7th Cir. 1992) ("Illinois follows the American Rule under which each party normally bears its own legal expenses"). No Illinois statute provides for recovery of attorneys fees by the prevailing party in a breach of contract action. Thus, under Illinois law, Saucy Sisters cannot recover attorneys fees.

2. Illinois Law Does Not Provide Prejudgment Interest Where, As Here, The Underlying Damages Are Not (a) Liquidated Or (b) Subject To Exact Computation.

In Illinois, "[a]bsent an agreement between the parties, prejudgment interest is properly awarded only when specifically provided for by statute, and *only if the damages are liquidated or subject to exact computation*." Ouwenga v. Nu-Way Ag, Inc., 239 Ill.App.3d 518, 526-527, 604 N.E.2d 1085, 1091 (3d Dist. 1992) (emphasis added). Illinois courts award prejudgment interest in contract cases only where the damages due are precisely set forth in the contract or are capable of simple calculation once liability is found. Thus, for example, Illinois courts award prejudgment interest where the plaintiff seeks indemnification for money judgments already rendered against it, National Tea Co. v. Ryan Aviation Corp., 578 F.Supp. 291, 296 (N.D. Ill. 1984); recovery of its share of a loan that has gone bad, Bank of Chicago v. Park Nat'l Bank, 266 Ill.App.3d 890, 900,

640 N.E.2d 1288, 1296 (1st Dist. 1994); payment of a fixed fee due from the defendant, Kansas Quality Constr. v. Chiasson, 112 Ill.App.2d 277, 287, 250 N.E.2d 785, 789 (4th Dist. 1969); or a payment for stock purchases made on defendant's account, Martin v. Orvis Bros. & Co., 25 Ill.App.3d 238, 250, 323 N.E.2d 73, 83 (1st Dist. 1974). In cases of these sorts, the amount of damages is either fully liquidated or is readily calculated.

On the other hand, prejudgment interest is *not* available in Illinois on damages awarded to compensate for lost profits, goodwill, or other damages related to a business's demise. The Seventh Circuit, applying Illinois law, recently refused to permit prejudgment interest where the award compensated plaintiff for the loss of his business. In Ash, 957 F.2d at 435, the plaintiff sought prejudgment interest on a $546,150 award of compensatory damages. Judge Easterbrook observed that "Illinois provides for prejudgment interest on ascertainable damages," id. at 439, and stated flatly that "[t]he award of consequential damages (lost going concern value or goodwill) does not meet this standard." Ibid. "[G]oing concern value," as well as lost profits, Ehret-Krohn Corp. v. Consolidated Bearings Co., 1992 WL 280512 (N.D.Ill. 1992), are types of damages that inherently are not capable of easy quantification. See also Alguire v. Walker, 154 Ill.App. 3d 438, 448, 506 N.E.2d 1334, 1341 (1st. Dist. 1987) (where the size of the damage award is "hotly disputed," prejudgment interest is not available); Ouwenga, 239 Ill.App. 3d at 526-527, 604 N.E.2d at 1091 (reversing award of prejudgment interest where "[d]efendant had no way of knowing the extent of plaintiffs' damages prior to litigation of this case"); Empire Gas v. American Bakeries Co., 840 F.2d 1333, 1342 (7th Cir.

1988) (award of prejudgment interest reversed where "[a]t the time of breach, and indeed right up to the jury's verdict, it was entirely unclear what Empire Gas's loss had been").

Plainly, Illinois law would not authorize prejudgment interest in cases like this. The jury awarded Saucy Sisters $541,000 for "[d]irect losses to its business as a result of losing the United contract" and $1,000,000 for "[l]oss in the fair market value of its business." These losses are exceedingly difficult to ascertain; they are the polar opposite of "liquidated" damages and in no sense were they readily calculated. Indeed, each side presented experts and other competing evidence to support differing valuations of plaintiff's loss -- and there can be no question that the proper damage amount was hotly contested. Even the plaintiff presented different theories of how damages could be computed, a factor weighing against a prejudgment interest award. See Ouwenga 239 Ill.App.3d at 526-527, 604 N.E.2d at 1091; Empire Gas, 840 F.2d at 1342; Ehret-Krohn Corp., 1992 WL 280512 at *1. Saucy Sisters' damage award was incapable of precise calculation and thus cannot be the basis of an assessment of prejudgment interest under Illinois law.

CONCLUSION

For the reasons stated in Point I, the judgment should be vacated in full and the case dismissed. In the event the Court rejects the submission in Point I, it should award, at most, nominal damages for the reasons set forth in Point II. And for the reasons set forth in Point III, in no event should attorneys fees or prejudgment interest be added to any award.

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