IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHNSON & JOHNSON, ETHICON, INC., ALEX GORSKY, ASHLEY MCEVOY, PETER SHEN, and SUSAN MORANO,

Defendants Below, Appellants,

v.

FORTIS ADVISORS LLC, solely in its capacity as representative of former stockholders of AURIS HEALTH, INC.,

Plaintiff Below, Appellee.

No. 490, 2024

On Appeal from the Court of Chancery of the State of Delaware C.A. No. 2020-0881-LWW

BRIEF OF NON-PARTY WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING APPELLANTS AND REVERSAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICUS CURIAE..1

INTRODUCTION 3

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. THE COURT OF CHANCERY MISAPPLIED THIS COURT'S IMPLIED-COVENANT TEST 7

II. COURTS SHOULD ONLY RARELY, IF EVER, USE THE IMPLIED COVENANT TO IMPOSE HYPOTHETICAL CONTRACTS ON SOPHISTICATED PARTIES 10

A. The Implied Covenant Generally Addresses Only Truly Unforeseeable Events 11

B. Courts Are Not Good At Divining Counterfactual Agreements Between Sophisticated Parties (And Most Won't Even Try) 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases:

Ahearn v. Mayo Clinic,
180 So. 3d 165 (Fla. Dist. Ct. App. 2015) 16

Aspen Advisors LLC v. Utd. Artists Theatre Co.,
843 A.2d 697 (Del. Ch. 2004) 13

Bevis v. Terrace View Partners, LP,
33 Cal. App. 5th 230 (Cal. Ct. App. 2019) 16

Blondell v. Littlepage,
991 A.2d 80 (Md. 2010) 16

Cantor Fitgerald LP v. Ainslie,
312 A.3d 674 (Del. 2024) 1

Cincinnati SMSA LP v. Cincinnati Bell Cellular Sys. Co.,
708 A.2d 989 (Del. 1998) 7

Delisle v. Crane Co.,
258 So. 3d 1219 (Fla. 2018) 1

Eustis Mining Co. v. Beer, Sondheimer & Co.,
239 F. 976 (S.D.N.Y. 1917) 6

Frlekin v. Apple,
457 P.3d 526 (Cal. 2020) 1

Glaxo Grp. Ltd. v. DRIT LP,
248 A.3d 911 (Del. 2021) 10

Humantech, Inc. v. Caterpillar, Inc.,
2012 WL 6214371 (E.D. Mich. 2012) 10

James Baird Co. v. Gimbel Bros.
64 F.2d 344 (2d Cir. 1933) 4

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting,
908 F.2d 1351 (7th Cir. 1990) 12, 14

Lonergan v. EPE Holdings, LLC,
5 A.3d 1008 (Del. Ch. 2010)....................3, 7, 9, 14, 17

N. Tr. Co. v. VIII S. Mich. Assocs.,
657 N.E.2d 1095 (Ill. App. Ct. 1995) 3

Nemec v. Shrader,
991 A.2d 1120 (Del. 2010) 3, 5, 7, 12, 13, 17

Nine Twenty, LLC v. Bank of the Ozarks,
786 S.E.2d 555 (Ga. Ct. App. 2016)....................16

Northwest v. Ginsberg,
572 U.S. 273 (2014)....................10

Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition LLC, 202 A.3d 482 (Del. 2019)....................17

Shoney's LLC v. MAC E., LLC,
27 So. 3d 1216 (Ala. 2009)....................16

Taylor Equip., Inc. v. John Deere Co.,
98 F.3d 1028 (8th Cir. 1996) 16

Travelers Ins. Co. v. Budget Rent-A-Car Sys., Inc.,
901 F.2d 765 (9th Cir. 1990) 12

Volvo Const. Equip. N. Am., Inc. v. CLM Equip. Co.
386 F.3d 581 (4th Cir. 2004) 16

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Other Authorities:

Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 St. John's L. Rev. 559 (2006) 10

Alan Greenspan & Adrian Wooldridge, *Capitalism in America: A History* (2018)....................1

Daniel B. Listwa, *Cooperative Covenants: Good Faith for the Alternative Entity*, 24 Stan. J.L. Bus. & Fin. 137 (2019) 4

Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 Wm. & Mary L. Rev. 1223 (1999) 10

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as an amicus curiae in state courts of last resort to promote these values. *See, e.g., Cantor Fitgerald LP v. Ainslie*, 312 A.3d 674 (Del. 2024); *Frlekin v. Apple*, 457 P.3d 526 (Cal. 2020); *Delisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018).

Businesses "crave certainty as much as almost anything: certainty is what allows them to make long-term plans and long-term investments." Alan Greenspan & Adrian Wooldridge, *Capitalism in America: A History* 258 (2018). That need for certainty is at the heart of this case. Companies draft contracts expecting that they will be enforced as written. When courts graft new terms onto those contracts, based on their own assumptions and speculations about what the contracting parties "might" have "really" wanted, businesses lose the certainty they so desperately need, and the larger economy suffers. WLF urges the Court to make clear how rarely (if ever) sophisticated parties should be held to—and thus

[1]Under Supreme Court Rule 28(c), WLF states that no party's counsel authored any part of this brief. No one, apart from WLF or its counsel, contributed money intended to fund this brief's preparation or submission.

penalized when they fail to foresee and obey—post hoc contract terms created in a courtroom.

INTRODUCTION

The implied covenant of good faith and fair dealing sometimes puzzles judges and scholars. What are they to make, for example, of a legal doctrine that in one sentence says that parties negotiating a contract must act "reasonably," and in the very next says that each party will be "entitled to enforce the terms of the contract to the letter"? *N. Tr. Co. v. VIII S. Mich. Assocs.*, 657 N.E.2d 1095, 1104 (Ill. App. Ct. 1995). No one (besides lawyers) benefits from doctrinal confusion.

Fortunately, much of the Delaware courts' discussion of the implied covenant is eminently sound. "Existing contract terms control." *Lonergan v. EPE Holdings, LLC*, 5 A.3d 1008, 1017 (Del. Ch. 2010). Yes indeed. "Absent grounds for reformation," courts "should not rewrite contracts." *Nemec v. Shrader*, 991 A.2d 1120, 1128 n.28 (Del. 2010). Spot on. The implied covenant "only applies to developments that could not be anticipated." *Id*. at 1126. Just so.

But sometimes this State's courts go too far and frame the doctrine too broadly. They occasionally suggest that the implied covenant allows them to create and enforce hypothetical, counterfactual contracts to give the parties what they "likely would have agreed to" had "they thought to negotiate with respect to [a] matter." *Lonergan*, 5 A.3d at 1018. That way madness lies.

The implied covenant is supposed to help parties enforce their bargains. To fulfill that task, the implied covenant must be well defined, narrow, and clear. As

much as it treats the implied covenant as "the enforcement of [a] counterfactual contract," however, "Delaware . . . ha[s] adopted" a standard that is in tension "with the basic principles of contract law" and that "threatens the bargains reached by contract parties." Daniel B. Listwa, *Cooperative Covenants: Good Faith for the Alternative Entity*, 24 Stan. J.L. Bus. & Fin. 137, 156-57 (2019). "[I]n 2017 alone," this Court "issued seven opinions" on the implied covenant. *Id*. at 141. As this explosion of litigation over the implied covenant shows, reaching too often for hypothetical contract terms has serious adverse effects. The implied covenant has become catnip for "plaintiffs' lawyers" hoping "to capture value from the uncertainty that persists in this area." *Id*. Now is a good time to heed the words of Learned Hand: "In commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves." *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344, 346 (2d Cir. 1933).

SUMMARY OF ARGUMENT

I. We agree with the appellants that, viewed from any angle, the Court of Chancery misapplied the implied covenant of good faith and fair dealing. It erred in favoring a hypothetical agreement over the parties' actual agreement, and it erred in standing that hypothetical agreement on its naked assertion that "there is no evidence the parties bargained for 510(k) instead of De Novo." In fact, the contract the parties negotiated and agreed to shows otherwise. It explicitly includes the 510(k) process and never mentions the De Novo process. As this Court rightly recognizes, "[t]he time to demand" an alternative regulatory pathway for the earnout "was during negotiations—not years later through the implied covenant." *Nemec*, 991 A.2d at 1126.

II. We urge the Court not to allow the implied covenant to drift too far from the contract's text. Especially where, as here, the agreement at issue is one between sophisticated companies, a court's core assumption should be that parties can, and should be expected to, negotiate for what they want and then write it down. This assumption is a key part of this Court's implied-covenant jurisprudence, and it is at the heart of many other state courts' understanding of the implied covenant. When a contract is not adhesive, *at most* the implied covenant should serve merely to block a party from manipulating for advantage in the wake of a *truly* random and unforeseeable event, but no further. Holding parties closely to their written

agreements keeps the courts out of the business of trying to "fix" sophisticated commercial contracts, something they cannot do well. It also discourages implied-covenant litigation. Above all, it benefits the contracting parties, by encouraging them to get their contracts right the first time. In the end, after all, only they can draft clear, thorough, and workable contracts. "If parties wish more certainty," Hand insisted, "they must use more certain words." *Eustis Mining Co. v. Beer, Sondheimer & Co.*, 239 F. 976, 986 (S.D.N.Y. 1917). Right again.

ARGUMENT

I. THE COURT OF CHANCERY MISAPPLIED THIS COURT'S IMPLIED-COVENANT TEST.

In the next section we will discuss the dangers of using counterfactuals about what contracting parties "would have" agreed to. But first a word on how the Court of Chancery misapplied even the most expansive possible version of this State's implied covenant.

Using the implied covenant to rewrite a contract is a "cautious enterprise." *Cincinnati SMSA LP v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998). It is "a limited and extraordinary legal remedy." *Nemec*, 991 A.2d at 1128. Yet the implied covenant is sometimes described in Delaware as enabling a factfinder to declare the violation of a hypothetical contract term the parties "likely would have agreed to" had "they thought to negotiate with respect to that matter." *Lonergan*, 5 A.3d at 1018. The much better view—also found in this State's jurisprudence—is that "the implied covenant only applies to developments that could not be anticipated, not developments that the parties simply failed to consider." *Nemec*, 991 A.2d at 1126. Put differently, the implied covenant is "not an equitable remedy for rebalancing economic interests that could have been anticipated." *Id*.

That is this case. The contracting parties here *did* "th[ink] to negotiate" about the earnout milestones in question. They signed a contract that explicitly

requires "510(k) premarket notification" as a prerequisite for triggering the earnout payments. This requirement is plain and unmistakable, so there is no contractual "gap" to fill.

What's more, as the appellants point out, the parties were all too aware of the murky regulatory uncertainty confronting the medical device industry at the time they entered the agreement. Indeed, the parties insisted on this specific earnout requirement even though FDA had expressly notified Fortis, in October 2018, that the 510(k) pathway might *not* be appropriate. Given the distinct possibility that FDA might conclude that 510(k) clearance was unavailable, Fortis *could have* gone a step further and placed conditions on when another FDA pathway could be substituted as an earnout trigger. That Fortis chose neither to advise J&J of FDA's caution nor to insist upon such an alternative pathway in the agreement, despite being *aware of the very possibility* of 510(k) unavailability, should have been all the Court of Chancery needed to jettison the implied-covenant claim.

Instead, the Court of Chancery simply rewrote the contract's milestone terms by excising certain terms unfavorable to Fortis while adding new terms imposing far more onerous obligations on J&J than those the parties had bargained for. The court stood this drastic rewrite on its curious assertion that "[t]here is no evidence that the parties bargained for 510(k) instead of De Novo." But under the objective

theory of contracts, the agreed upon contract is the best evidence of the parties' negotiations. *Cox Commc'ns, Inc. v. T-Mobile US, Inc.*, 273 A.3d 752, 760 (Del. 2022). Here that evidence points to 510(k) FDA approval and no other. The Court of Chancery cites no record evidence that the parties ever bargained for *any other* pathway of FDA approval, nor that the DeNovo pathway played *any part* in the parties' negotiations.

Nor is that all. For the implied covenant to come into play, Delaware law requires proof that *both* contracting parties, had they thought of an issue, would have executed a different contract term addressing it. *Lonergan*, 5 A.3d at 1018. Yet here the Court of Chancery supplied a new milestone term that only *one* of the contracting parties *might* have wanted. The court did not meaningfully assess whether J&J ever would have agreed to De Novo approval as an alternative milestone. And the court offers no reason to assume—much less record evidence to establish—that J&J would have acceded at the time of contracting to a different, more onerous and time-consuming alternative pathway for FDA approval. After all, the 510(k) milestone was a material term that affected both the Auris robot's expected time to market and the resources required to bring that device to market.

Changing that milestone thus substantially alters the value of the deal the parties struck. That is not the job of a judge or a jury. Even under the broadest possible version of this State's implied covenant, it "should not have been

deployed in this case." *Glaxo Grp. Ltd. v. DRIT LP*, 248 A.3d 911, 920 (Del. 2021). The Court should reverse the judgment below.

II. COURTS SHOULD ONLY RARELY, IF EVER, USE THE IMPLIED COVENANT TO IMPOSE HYPOTHETICAL CONTRACTS ON SOPHISTICATED PARTIES.

"It does not appear that there is any uniform understanding" of the implied covenant's "precise meaning." *Northwest v. Ginsberg*, 572 U.S. 273, 285 (2014). Inconsistency remains despite extensive judicial efforts to give the doctrine shape. "The attention lavished on the implied covenant has not . . . resulted in the emergence of a clear consensus on what it is." Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 St. John's L. Rev. 559, 560 (2006); *see also* Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 Wm. & Mary L. Rev. 1223, 1227 (1999).

The persistent confusion in this area is a sign that the courts are in danger of drifting off course. During "a century of dispute," the "judiciary has pursued conflicting ends, and the result is predictable." *Humantech, Inc. v. Caterpillar, Inc.*, 2012 WL 6214371 *2 (E.D. Mich. 2012). What is needed, at least when it comes to contracts carefully constructed by sophisticated parties, is a renewed appreciation of the value of disciplined contract interpretation. Rather than trying to adjust ever more contracts to account for unforeseen events—something it is not

equipped to do—the judiciary should re-focus on “reduc[ing] unforeseen events by not adjusting contracts.” *Id*.

A. The Implied Covenant Generally Addresses Only Truly Unforeseeable Events.

“Well, everyone knows what we *really* meant.” When a contractual deal goes sour, at least one side will always be tempted to say these words—and then to write something like them in a complaint that kicks off a lawsuit. And if courts are not disciplined about enforcing contracts as written, this temptation to sue will often be rewarded. Put in dry economic terms, unpredictable judicial behavior incentivizes a disgruntled party to generate a deadweight loss to society (litigation) in search of a false positive (a finding of breach where none occurred). Put in plain English, it gives the party good reason to try his luck; to seek a judge or a jury willing to rewrite the contract for him.

“Rewrite” is not too strong a word. Even on the rare occasion when it should apply the implied covenant, a court should be clear-eyed about what it is doing. It is *adding* something of its own to the contract. When as in Delaware it cannot be waived, the implied covenant is “a state-imposed obligation.” *Ginsberg*, 572 U.S. at 286-87. It “*enlarge[s]*” the “contractual agreement.” *Id*. at 289 (emphasis added). But the only thing that shows beyond peradventure what *the parties* agreed to, the only thing that *is* the contract, is what is written in the contract. The

contract's words contain the whole of "the parties' voluntary undertaking." *Id*. at 284.

Courts should therefore stick whenever possible to applying a contract's words, if for no other reason than to respect the parties' freedom of contract. "Contracts generate obligation not through their optimality"—not, that is, based on whether they are structured as *a court* might wish—"but through the fact that they are agreed to by the parties." Listwa, supra, at 155. Inherent in the parties' *right* to structure their own affairs is their *duty* to live with the consequences, good or bad, of their prior, autonomous choices. *Nemec*, 991 A.2d at 1126 ("Parties have a right to enter into good and bad contracts[;] the law enforces both.").

Better still, adherence to contractual text *works*. It is highly efficient. "Contracts enable parties to define their mutual rights and responsibilities," but "only insofar as each side can count on being able to hold the other to the terms of the agreement." *Travelers Ins. Co. v. Budget Rent-A-Car Sys., Inc.*, 901 F.2d 765, 768 (9th Cir. 1990). "Unless pacts are enforced according to their terms, the institution of contract, with all the advantages private negotiation and agreement brings, is jeopardized." *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357 (7th Cir. 1990). Any attempt to "add an overlay" of judicial policymaking to contract enforcement is sure to "reduce commercial certainty and breed costly litigation." *Id*.

Judges should try to stick to a contract's words *even if* it might be true that the parties "really" wanted something those words fail to convey. *Id*. The search for the "really-wanted" is itself what "reduce[s] commercial certainty and breed[s] costly litigation." *Id*. Declining to engage in that search, meanwhile, spurs parties to ensure that what they "really" want is always reduced to words. To return to economics-speak, "false negatives in determining that a breach has occurred are, on the whole, less damaging to economic efficiency than false positives, because false negatives make litigation less attractive . . . and encourage more specific contract drafting." Listwa, supra, at 166.

Perhaps the most important statement in all this State's implied-covenant jurisprudence is then-Vice Chancellor Strine's insistence that a court should not "grant" to "plaintiffs, by judicial fiat, contractual protections that they failed to secure for themselves at the bargaining table." *Aspen Advisors LLC v. Utd. Artists Theatre Co.*, 843 A.2d 697, 707 (Del. Ch. 2004); *accord Nemec*, 991 A.2d at 1126. If a court wants to help parties enjoy the benefit of their contracts, the best thing it can do is to put the onus on the parties to create predictable contracts at the outset. That is especially so where, as here, the parties are sophisticated businesses uniquely capable of looking out for their own interests. Such firms—firms "that have *negotiated* contracts"—are "entitled to enforce them to the letter, even to the

great discomfort of their trading partners, without being mulcted for lack of 'good faith.'" *Kham & Nate's Shoes*, 908 F.2d at 1357 (emphasis added).

In most cases involving sophisticated entities, the implied covenant simply requires that neither side "take opportunistic advantage in a way that *could not have been contemplated* at the time of drafting." *Id*. (emphasis added). It protects each side from manipulative behavior that it did not nor *could have* foreseen and protected itself against in advance. This is not such a case—not even close.

B. Courts Are Not Good At Divining Counterfactual Agreements Between Sophisticated Parties (And Most Won't Even Try).

Courts will never be good at using the implied covenant to create contract terms the parties "likely" would have wanted had they "thought" of them. *Lonergan*, 5 A.3d at 1018. A big part of the problem is that judges and juries are bound to be bad at assessing *ex post* what contracting businesses *would* have wanted *ex ante*. The problem is not just hindsight bias (though it is that, too). It is that judges and juries must decide what the parties "would have" wanted after receiving only a crash course in how those sophisticated businesses' industry works. And it is that judges and juries are likely to bring to their decisions sensibilities about what counts as "fair" practice very different from those that prevail in the industry at hand. Invited to decide what the parties "would have" wanted, factfinders will be tempted to put the contract's terms to one side, clearing the way for them to satisfy an urge to punish ordinary hard-nosed business

dealings. Moving away from a straightforward enforcement of the contract that *is*, and toward a meditation on the contract that *might have been*, is a recipe for second-guessing followed by error and wrongful condemnation.

Even if judges and lay juries were adept at creating the contract the parties *would* have wanted—and they're *not*—letting parties freely enforce such "contracts" would remain an awful idea. The world is complex, chaotic, and inherently unpredictable. Surprising events are inevitable, and it will quite often be the case that, had they foreseen such events, parties would write a different contract, a superior contract, a contract better suited to the world to come, and so on.

Yet if one wanted to impose a rule that served as a lawsuit-generating machine, an unending source of billable hours for lawyers, one could hardly do better than to declare that parties have recourse to the Delaware courts every time a contract could, with perfect knowledge of the future, have been made better. Put differently, a "counterfactual test" that "identifies a breach of the implied covenant in *every case* in which the hypothetical bargain would differ from the actual contract" will "locate[] breaches in far too many cases." Listwa, supra, at 166.

Given the problems that come with the judicial task of trying to divine counterfactual contracts, it is no surprise that many courts apply a contract's words whenever they can, no matter how circumstances may have unexpectedly changed.

See, e.g., *Volvo Const. Equip. N. Am., Inc. v. CLM Equip. Co.* 386 F.3d 581, 599 (4th Cir. 2004) (South Carolina law) (the implied covenant cannot bar a party from doing what "the contract expressly give[s] him the right to do"); *Bevis v. Terrace View Partners, LP*, 33 Cal. App. 5th 230, 252 (Cal. Ct. App. 2019) ("[The] covenant . . . cannot contradict the express terms of a contract."); *Nine Twenty, LLC v. Bank of the Ozarks*, 786 S.E.2d 555, 558 (Ga. Ct. App. 2016) (the implied covenant cannot bar a party from doing what "the contract expressly give[s] him the right to do"); *Ahearn v. Mayo Clinic*, 180 So. 3d 165, 170 (Fla. Dist. Ct. App. 2015) (the implied covenant is not "a source of breach when all other [contract] terms have been performed"); *Blondell v. Littlepage*, 991 A.2d 80, 90 (Md. 2010) ("[The covenant simply] requires that one party to a contract not frustrate the other party's performance."); *Shoney's LLC v. MAC E., LLC*, 27 So. 3d 1216, 1221 (Ala. 2009) (the implied covenant cannot bar a party from doing what "the contract expressly give[s] him the right to do").

In many jurisdictions, in fact, "where parties have addressed an issue in the contract, no occasion to divine their intent or supply implied terms arises." *Taylor Equip., Inc. v. John Deere Co.*, 98 F.3d 1028, 1032 (8th Cir. 1996). This tenet aligns with the core of this Court's holdings: "Even where the contract is silent, an interpreting court cannot use an implied covenant to re-write the agreement between the parties, and should be most chary about implying a contractual

protection when the contract could easily have been drafted to expressly provide for it." *Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition LLC*, 202 A.3d 482, 507 (Del. 2019) (cleaned up); *accord Nemec*, 991 A.2d at 1126. This Court has held the right things. Now it needs only to ensure that lower courts are following its precedent.

The Court should clarify that implied-covenant counterfactuals are dangerous when overused as they were here. Hypotheticals should be employed, if ever, only in the narrowest of circumstances and with great care. Only then can "wielding the implied covenant" remain the "cautious enterprise" it is supposed to be. *Lonergan*, 5 A.3d at 1018.

CONCLUSION

The Court of Chancery's judgment should be reversed.

Respectfully submitted,

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