No. 16-20472

In the United States Court of Appeals for the Fifth Circuit

LIBERTY MUTUAL INSURANCE COMPANY,
Plaintiff-Appellee,

v.

SERVISAIR, L.L.C., NOW KNOWN AS SWISSPORT SA, L.L.C.; SERVISAIR USA, INCORPORATED; SERVISAIR FUEL SERVICES, L.L.C., NOW KNOWN AS SWISSPORT SA FUEL SERVICES, L.L.C.; TRISTAR ACQUISITION CORPORATION,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division
Civil Action No. 4:14-cv-03667

BRIEF OF APPELLEE LIBERTY MUTUAL INSURANCE COMPANY

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Defendants/Appellants

1. Servisair, L.L.C., now known as Swissport SA, L.L.C.;
2. Servisair USA, Incorporated;
3. Servisair Fuel Services, L.L.C., now known as Swissport SA Fuel Services, L.L.C.;
4. Tristar Acquisition Corporation

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STATEMENT REGARDING ORAL ARGUMENT

Because this appeal involves the application of well-established principles of contract interpretation, oral argument is unnecessary to aid the Court's decisional process.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rule

Other Authorities

No. 16-20472

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BRIEF OF APPELLEE LIBERTY MUTUAL INSURANCE COMPANY

TO THE HONORABLE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT:

This appeal concerns the interpretation of premium-calculation provisions in a workers' compensation insurance policy. Servisair is an aviation services company employing thousands of workers across 22 states. With the assistance of retained, professional insurance brokers,

Servisair negotiated and contracted for worker's compensation coverage with Liberty Mutual. Although an estimate of Servisair's premiums was calculated at the policy's inception, the policy provided in unambiguous terms that the "final premium" amount would be determined after the policy period ended, using Servisair's "actual, not the estimated, premium basis [payroll] and the proper classifications and rates that lawfully apply to the business and work covered by this policy." ROA.440.

Under this formula, and based on Servisair's records of its payroll in each state and work classification, Servisair owes over $3.6 million in additional premiums. The additional premiums are owed as a result of the undisputed fact that Servisair's actual payroll was higher than estimated for non-clerical (more expensive) payroll classes, and lower for the clerical classes.

Despite the clear terms of the policy, Servisair has refused to pay the additional premiums owed. Instead, Servisair seeks to avoid its contractual responsibility by arguing that (1) the policy is ambiguous, or (2) the policy's premium provisions should not be enforced as written because they are the product of a "mutual mistake."

As the district court correctly recognized, neither of Servisair's contentions has merit. First, there is nothing "ambiguous" about the policy's premium-calculation provisions. To the contrary, the policy spells out carefully and in considerable detail the precise formula for determining the premium amount owed, as well as the process to be followed in making the calculations.

Second, the policy's premium provisions are not the product of any "mutual mistake." As the policy language makes clear, the parties distinguished the estimate of premium made at the outset of the policy from the "final premium," which they agreed would be calculated after the policy period ended based on Servisair's actual, not estimated, payroll. Because divergences between Servisair's estimated premium and final premium were expressly anticipated in the policy, they provide no support for Servisair's "mutual mistake" assertion.

Servisair, a sophisticated consumer of insurance, should be held to the plain terms of its policy with Liberty Mutual, and the district court's judgment should be affirmed.

ISSUES PRESENTED

1. Did the district court correctly conclude that Liberty Mutual was entitled to summary judgment on its breach-of-contract claim against Servisair?
2. Did the district court correctly conclude that Liberty Mutual was entitled to summary judgment on Servisair's affirmative defense of mutual mistake?

STATEMENT OF THE CASE

I. THE 2012-13 INSURANCE POLICY AGREEMENT BETWEEN LIBERTY MUTUAL AND SERVISAIR.

Most states require employers to provide worker's compensation benefits to employees injured on the job. ROA.188. Employers often purchase insurance to satisfy this obligation. ROA.188-89. This dispute concerns a worker's compensation insurance policy contract between Plaintiff-Appellee Liberty Mutual Insurance Company ("Liberty Mutual") and Defendants-Appellants Servisair, LLC, now known as Swissport SA, LLC; Servisair USA, Inc.; Servisair Fuel Services, LLC, now known as Swissport SA Fuel Services, LLC; and Tri-Star Acquisition Corporation. Defendants-Appellants are collectively referenced herein as "Servisair."

Servisair has been in the airport services business for decades, and has about 6,000 employees working in 22 states. ROA.705. It is an experienced consumer of worker's compensation insurance, *see* ROA.705, and retained professional insurance brokers to negotiate the terms of its policies with Liberty Mutual, ROA.382-84, 607-11, 618-25, 705.

Liberty Mutual agreed to insure Servisair for worker's compensation liability during the period June 1, 2012 through May 31, 2013, and issued the 2012-13 Policy to provide such coverage. ROA.405-578; *see also* ROA.1066. As noted by Servisair in its opening brief, Servisair Br. 10, the 2012-13 Policy is a form policy published by the National Council on Compensation Insurance ("NCCI").[1] It is undisputed that the 2012-13 Policy is a binding contract, and that

1. The NCCI is a workers compensation industry organization which provides a variety of services for insurers and nearly 40 state governments, including collecting statistical information and creating policy forms. *See* NCCI Fact Sheet, https://www.ncci.com/Articles/Pages/AU_NCCIFactSheet.aspx; *see also, e.g.*, *Dakota Trailer Mfg., Inc. v. United Fire & Cas. Co.*, 866 N.W.2d 545, 546 (S.D. 2015) ("NCCI is a rating organization that establishes statewide workers' compensation rates in South Dakota and thirty-seven other states. It gathers payroll and loss data from insurance companies and uses that information to create risk classifications (codes) and insurance rates for the codes."); *Nat'l Fire Ins. Co. v. Hous. Dev. Co.*, 827 F.2d 1475, 1479 n.1 (11th Cir. 1987) ("NCCI is the rating body licensed by the majority of states as the official rating bureau . . . The council consists of over 500 insurance companies and state funds.").

Servisair agreed to pay premiums to Liberty Mutual for the coverage provided under the Policy. ROA.645, 1068.

The formula and terms for calculating the premiums owed by Servisair were provided in Part Five of the Policy. Subsection A of Part 5 states that premium for the Policy "will be determined by our manuals of rules, rates, rating plans and classifications." ROA.439. Subsection B explains that the specific rate and premium basis for Servisair's business and work classifications is shown in "Item 4 of the Information Page." ROA.439. Item 4, entitled the "Premium–Extension of Information Page," sets forth in turn the precise formula agreed to by the parties for the calculation of Servisair's premium for each of the states in which it operates. *See* ROA.449-66. Significantly, as the district court noted, ROA.1070, the "Premium–Extension of Information Page" makes clear that the "premium basis," under the terms of the Policy, is payroll. ROA.449-66. The "Premium–Extension of Information Page" goes on to provide that, under the formula, premiums will be calculated based on the payroll for each state and work classification code, which is multiplied by a basic rate, experience modification factors, and the scheduled rating percentages agreed to by

the parties. ROA.449-66. Thus, for example, the "Premium–Extension of Information Page" expressly details the experience modification and schedule ratings for California, ROA.449-50, Illinois, ROA.452, Nevada, ROA.455, and the other states in which Servisair operates, *see generally* ROA.449-66.

The above-described formula for calculating premiums was negotiated and agreed to when the policy incepted. ROA.439-40, 449-66, 1070. An "estimated premium" was calculated based on Servisair's estimate of its payroll, by state and classification code, for the upcoming policy year. The "final premium" owed, however, was not determined until after the policy period ended, and this calculation was based on Servisair's actual payroll for the then-ended policy year. In subsection "E" of Part Five, entitled "Final Premium," the Policy explains the roles of estimated versus actual payroll in the determination of the final premium amount:

> The premium shown on the ["Premium–Extension of Information"] page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the

> balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy.

ROA.440. Thus, although premiums owed were initially *estimated* based on Servisair's *estimated* payroll for the policy period (June 1, 2012 through May 31, 2013), including amounts and work classifications, the parties agreed that the *final* premium would be based on the "actual" payroll, proper classifications, and rates, as determined by an audit of Servisair's payroll. ROA.440 (Subsection "G" of Part Five explains that information developed by an audit of Servisair's records "will be used to determine final premium").

In short, the Policy provided, in express detail, the formula to be applied in order to both estimate and determine the final premium amount owed. The only difference between the estimated premium and the final premium calculation was substitution of the estimated payroll amount listed for each state and the work classification codes with "actual payroll" that Servisair's records showed after the policy ended. The rates, including the agreed schedule rating, and other elements of

the calculation did not change and could not be adjusted absent a separate agreement by the parties.[2]

II. LIBERTY MUTUAL FILES SUIT AGAINST SERVISAIR TO RECOVER FINAL PREMIUM AMOUNTS OWED UNDER THE 2012-13 POLICY.

After the 2012-13 Policy ended, and well within the three-year timeframe established for determining final premium, ROA.440, Liberty Mutual audited Servisair's records to determine the final premium, ROA.210-13, 584.[3] Servisair's records showed its actual payroll amounts for each employee by work state and applicable class codes. ROA.303-08. Based on this payroll information and the rates for

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2. Servisair notes that the schedule debits in California were decreased (lowering premium) after the issuance of the Policy. Servisair Br. 9-10. This is correct, but Servisair omits that both parties specifically negotiated and agreed to this reduction as an accommodation by Liberty Mutual to partially offset an increase in Servisair's premiums that was caused by an increase in its California experience modifier that was published *during* the policy period. ROA.1062. This specific mid-policy amendment to the contract, made by mutual agreement, does not support Servisair's contention that Liberty Mutual was permitted or required to unilaterally modify the agreed-upon scheduled rating (debits or credits). It was not.

3. Servisair suggests that Liberty Mutual's payroll audit was untimely. Servisair Br. 12. This complaint is meritless. It is undisputed that the audit was conducted well within the three-year time frame contemplated by the Policy. *See* ROA.440 (Subsection "G" of Part Five explains that the audit may be conducted "during the policy period and within three years after the policy period ends"). Further, the record shows that the minimal delays in completing the audit were caused by Servisair, not Liberty Mutual. ROA.302-03. Finally, Servisair's own risk manager testified that she did not have any complaints with the timing of Liberty Mutual's audit of the 2012-13 Policy. ROA.214. Thus, Servisair's complaint about the timing of the 2012-13 payroll audit is disingenuous, out-of-step with the language of the Policy, and contradicted by its own witness.

each work state and class code applicable to Servisair's business, Liberty Mutual calculated that Servisair owed additional premiums, assessments, and taxes in the amount of $3,641,962. ROA.191, 275-96. The accuracy of the audited, actual payroll information, which was derived from Servisair's own records, is not in dispute. ROA.214-15.

Servisair's actual payroll differed significantly from the estimated payroll that Servisair estimated and provided to Liberty Mutual prior to the inception of the Policy. In this regard, it is undisputed that the actual payroll reflected more exposure in more expensive class codes and lower payroll amounts in the less expensive class codes. ROA.312-62, 366-73; *see also* ROA.714-15. This discrepancy resulted in a "final premium" calculation that was higher than the premium estimated at the outset of the Policy. ROA.191.

Servisair has acknowledged that the "actual payroll" data, including the coding of classifications, was provided by its Payroll Department, ROA.688, and that the discrepancy between the estimated

and actual payroll was the result of actions by its employees, ROA.714-15.[4]

After calculating the final premium, Liberty Mutual billed Servisair for $3,641,962, the additional premiums owed under the Policy. ROA.27, 275-96; *see also* ROA.632-34 (counsel for Liberty Mutual's request for payment). Servisair has refused to pay any of the amounts owed. ROA.14, 27, 223-25. To recover these amounts, Liberty Mutual filed suit, alleging that Servisair's failure to pay the additional premiums owed for the 2012-13 Policy is a breach of contract. ROA.99-111.[5]

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4. In its response to Liberty Mutual's summary-judgment motion, and again in its opening brief, Servisair states that "it would appear that at some point a Servisair employee transposed columns in a spreadsheet and incorrectly included millions of dollars of payroll that should have been attributed to other employee classifications to [clerical worker classifications]." ROA.714; Servisair Br. 15.

A review of Servisair's estimated and actual payrolls shows that the clerical and non-clerical payroll amounts were not "transposed." *Compare* ROA.288-96 *with* ROA.449-66. Nonetheless, the reason for the classification differences is immaterial to the calculation of the "final premium" that is owed, which the policy clearly contemplates will be different from the "estimated premium," and will result in either a refund or additional amounts owed. ROA.440.

5. In its First Amended Complaint, Liberty Mutual added a claim concerning a workers' compensation insurance policy issued to Servisair for the period June 1, 2013 through May 31, 2014 (the "2013-14 Policy"). ROA.99-112. After the district court had granted summary judgment in favor of Liberty Mutual on its 2012-13 Policy contract claim, Liberty Mutual later stipulated to the dismissal of its claim on the 2013-14 Policy. ROA.1150-53.

III. THE DISTRICT COURT GRANTS SUMMARY JUDGMENT IN FAVOR OF LIBERTY MUTUAL.

In response to Liberty Mutual's complaint, Servisair filed an Answer as well as a Counterclaim. ROA.24-39. Servisair argued that it owed no additional premiums on the 2012-13 Policy because the "composite rate" for premiums charged on its previous workers' compensation insurance policy with Liberty Mutual (the "2011-12 Policy") should have been carried over to the 2012-13 Policy. *See* ROA.24-39; *see also* ROA.1068.[6]

Liberty Mutual filed a summary-judgment motion, demonstrating that the parties did not agree to carry over the "composite rate" of the 2011-2012 Policy. *See* ROA.161-85. Liberty Mutual explained that the terms of the 2012-13 Policy unequivocally stated that premiums were based on "actual" payroll and "proper classifications and rates that lawfully apply" to Servisair's business and work performed, rather than

6. Under the terms of the earlier 2011-12 Policy, Servisair's final premium was based on a single "composite rate" of $5.68 per $100 of its payroll, rather than different rates for payroll in each state and class code. ROA.187-90. Servisair suggests in its opening brief that the 2012-13 Policy was "renewed as expiring." Servisair Br. 4. This is a puzzling assertion. Not only does the undisputed evidence show that neither Servisair nor its broker ever discussed renewing the 2012-13 Policy with a "composite rate" agreement, *see, e.g.*, ROA.190, 397-99, 609-10, 612-13, but Servisair abandoned in the district court its position that such a provision was included in the parties' agreement, ROA.1068-69. *See also infra* n.7.

on a "composite rate." *See, e.g.*, ROA.171-72. Accordingly, Liberty Mutual showed that it was entitled to summary judgment on its breach of contract count as well as Servisair's affirmative defenses of negligent misrepresentation, estoppel, and mutual mistake, each of which was based on arguments that a "composite rate" should apply.

Executing a complete about-face, Servisair's response to Liberty Mutual's summary-judgment motion abandoned its "composite rate" affirmative-defense theory.[7] As the district court observed, ROA.1068, Servisair departed from the "composite rate" arguments asserted in its Answer, and its answers to interrogatories, *see* ROA.24-39, 685-86, and "put[] forth entirely different arguments in its defense" against Liberty Mutual's summary judgment, ROA.1068.

First, Servisair contended that the 2012-13 Policy is ambiguous. Servisair further maintained that, because the Policy is ambiguous, Servisair could properly introduce extrinsic evidence that created a fact issue regarding how premiums should have been calculated under the Policy and how much it owes Liberty Mutual, if anything. ROA.1068-

7. As the district court noted, Servisair voluntarily withdrew its negligent misrepresentation and estoppel defenses, which were both based on the "composite rate" defense. ROA.1068. Servisair also abandoned its pleaded "mutual mistake" defense, and instead offered a new theory to avoid summary judgment: that there was an alleged "mistake" regarding the payroll estimate. ROA.1068-69.

69. Servisair also argued that the Policy should not be enforced as written because the parties purportedly made a different mutual mistake: the estimated payroll reflected more "clerical" payroll (less expensive) and less non-clerical payroll (more expensive), which resulted in a lower "estimated premium." ROA.1069.

The district court rejected Servisair's arguments. The court first held that the Policy's provisions are not ambiguous, explaining that Item 4 (the "Premium–Extension of Information Page") sets forth a "schedule rating" for each state and makes clear that "premium basis" is payroll. ROA.1070. The court further concluded that the scheduled rates were set at the time of entering the policy and were not changed when Liberty Mutual calculated the final premium. ROA.1070.

The court dismissed Servisair's attempt to support its ambiguity argument with testimony that, in proposing schedule rating amounts, Liberty Mutual's underwriter considered Servisair's loss history. The court reasoned that "Liberty Mutual's internal motives in setting the schedule rating cannot create an ambiguity in the plain language of the contract." ROA.1070. The court went on to explain that, "[w]hatever

Liberty Mutual's motive, the schedule ratings were clearly stated in the policy." ROA.1071.

The court also rejected Servisair's last-minute mutual mistake argument. Acknowledging that there was no dispute that Servisair's *estimated* payroll figures were inaccurate, the court pointed out that such inaccuracy was expressly contemplated by the Policy. "The policy expressly states that the estimate will not be used to calculate the premium; thus it is clear the parties understood that the estimate might not be accurate, and the actual premium might be higher or lower." ROA.1072. The court further observed that the risk of an inaccurate estimate was placed on Servisair, which made sense because "Servisair was in the best position to accurately code and estimate its own payroll." ROA.1072. Under the circumstances, and concluding that there was no evidence that the different estimate was material to Liberty Mutual or the parties' bargain, the court held that Servisair could not meet its burden to prove its mutual mistake affirmative defense. ROA.1072-73 (explaining that "the policy was drafted with the evident purpose of rendering any estimated premium immaterial to the bargain").

Based on these holdings, the court ruled that Liberty Mutual was entitled to summary judgment on its breach-of-contract claim for the 2012-2013 Policy and on Servisair's affirmative defense of mutual mistake. ROA.1073. Thereafter, Liberty Mutual stipulated to the dismissal of its claim on the 2013-14 Policy, and the court entered a final judgment that Servisair breached the 2012-13 Policy and that Liberty Mutual recover $3,641,962 in actual damages from Servisair. ROA.1158-60. This appeal followed. ROA.1280-81.[8]

SUMMARY OF THE ARGUMENT

This case turns on the application of three familiar principles of contract interpretation under controlling Texas law.[9] First, consistent with the state's strong commitment to freedom of contract, Texas law holds contracting parties—particularly sophisticated business entities—to the precise, unambiguous terms of their written agreement. Second, when a contract is unambiguous, its terms may not be varied by extrinsic evidence. Finally, courts will not alter or rewrite

8. The Court also awarded $340,741.87 in prejudgment interest, plus post-judgment interest. ROA. 1159. The district court later awarded attorney's fees and costs, which Servisair has not separately appealed.

9. Texas substantive law applies where, as here, the Court's jurisdiction is based on diversity of citizenship. *Thompson v. Bank of Am., N.A.*, 783 F.3d 1022, 1025 (5th Cir. 2015). Neither party disputes Texas law applies.

unambiguous contract language simply because the complaining party, or for that matter the court itself, dislikes the consequences of enforcing the agreement's terms as written.

Liberty Mutual filed a breach-of-contract action challenging Servisair's refusal to pay the final premium owed under the terms of the 2012-13 Policy. Under Part 5 of the Policy, the "final premium" that Servisair owed was determined after the policy period ended, based on an audit of actual, rather than estimated, payroll and the work classifications of Servisair's employees. As the district court's decision acknowledged, the record is clear on two critical points: (1) the Policy's terms and formula for the "final premium" calculations are unambiguous; and (2) Liberty Mutual adhered to the formula in determining that Servisair owed an additional $3,641,962 in final premium.

Nonetheless, Servisair has refused to pay the final premium mandated by the Policy. Servisair argues that the Policy's premium provisions are ambiguous and confusing, despite the undisputed fact that the 2012-13 Policy is an NCCI form workers' compensation policy that is used throughout the country. Servisair's suggestions of

ambiguity were properly rejected below because they ignore the plain language of the Policy describing precisely, and in detail, the formula agreed-to by the parties for premium calculations. Notably, Servisair has not attempted to offer any alternative contract interpretation, much less any proof that Liberty Mutual's calculation of the final premium departed from the agreed-to formula in the Policy.

Aware of the deficiencies in its ambiguity theory, but determined to avoid its premium obligations, Servisair also attempted to introduce extrinsic evidence to create ambiguity, specifically an "expert report" on insurance industry customs and practices. Confirming that the Policy language is unambiguous, the district court properly disallowed Servisair's attempt to introduce extraneous evidence "to alter the express terms of the policy." ROA.1071.

Finally, Servisair also asserted the affirmative defense of "mutual mistake." According to Servisair, because the estimated payroll information used for the estimated premium, and provided by Servisair to Liberty Mutual, inaccurately reflected the clerical and non-clerical payroll amounts, the parties had a mistaken understanding regarding the "final premium" provisions that precludes their enforcement.

Again, Servisair's argument is untethered to the Policy's unambiguous terms, which make clear that the premium "estimate" is exactly that, "a prediction of a future fact known to be uncertain." ROA.1072. Indeed, as the district court correctly explained, "[t]he policy expressly states that the estimate *will not* be used to calculate the premium." ROA.1072 (emphasis added). The "final premium" provision, therefore, not only expects a difference between estimated and actual payroll, it explains how this difference will affect the final premiums owed: there will be either a refund or additional amount owed. ROA.440. Thus, as with its other arguments, Servisair's "mutual mistake" contention cannot survive scrutiny in light of the Policy's unambiguous provisions on premium calculation.

In sum, the district court's decision granting summary judgment in favor of Liberty Mutual involved the straightforward application of longstanding principles of contract interpretation. The court properly held Servisair—a sophisticated business entity and consumer of workers' compensation insurance—to the precise, unambiguous terms of its written agreement with Liberty Mutual. And because the Policy

is unambiguous, the court also rejected Servisair's attempt to vary its terms through extrinsic evidence.

The Court should affirm.

STANDARD OF REVIEW

The Court reviews the district court's grant of summary judgment de novo, applying the same standards as the district court. *Hagen v. Aetna Ins. Co.*, 808 F.3d 1022, 1026 (5th Cir. 2015). Summary judgment is appropriate if the record evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Robinson v. Orient Marine Co.*, 505 F.3d 364, 366 (5th Cir. 2007); FED. R. CIV. P. 56(a). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment. *See Brown v. City of Houston*, 337 F.3d 539, 541 (5th Cir. 2003). Reasonable inferences are to be drawn in favor of the non-moving party. *Robinson*, 505 F.3d at 366.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY ENFORCED THE UNAMBIGUOUS LANGUAGE OF THE 2012-13 POLICY.

A. As With Any Other Contract, the Unambiguous Provisions of an Insurance Policy Are Enforced as Written.

Under Texas law, insurance policies are interpreted using the same rules of construction applicable to contracts generally. *Tesoro Ref. & Mktg. Co., L.L.C. v. Nat'l Union Fire Ins. Co.*, 833 F.3d 470, 474 (5th Cir. 2016); *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003). The "primary objective" is "to ascertain and give effect to the parties' intent as expressed by the words they chose to effectuate their agreement." *In re Deepwater Horizon*, 470 S.W.3d 452, 464 (Tex. 2015). This fundamental interpretive principle effectuates the "strong public policy in favor of preserving the freedom of contract," *Fairfield Ins. Co. v. Stephens Martin Paving, L.P.*, 246 S.W.3d 653, 664 (Tex. 2008), which allows parties to "prescribe particular remedies or impose[] particular obligations" as they choose. *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 648-49 (Tex. 2007).

When a contract uses unambiguous language, courts will construe it as a matter of law and enforce it as written. *Texas v. Am. Tobacco Co.*, 463 F.3d 399, 407 (5th Cir. 2006) (applying Texas law); *see also El*

Paso Field Servs., L.P. v. MasTec N. Am., Inc., 389 S.W.3d 802, 811 (Tex. 2012) ("We have an obligation to construe a contract by the language contained in the document."). And where, as in this case, the agreement at issue involves sophisticated business entities, it is all the more important that the words chosen by the parties are enforced as written. *E.g.*, *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011). In this regard, the record is clear that Servisair is a large company with thousands of employees, that it is a sophisticated consumer regarding workers' compensation insurance, and that it was represented by professional insurance brokers during the negotiation of the 2012-13 Policy. ROA.382-84, 607-11, 618-25, 705. Thus, like Liberty Mutual, Servisair should be held to the unambiguous terms of the bargain it made in the 2012-13 Policy.

B. The District Court Correctly Granted Summary Judgment on Liberty Mutual's Breach-of-Contract Claim, Enforcing the Unambiguous Terms of the 2012-13 Policy.

1. The premium calculation terms of the 2012-13 Policy are unambiguous.

The premiums for a typical "guaranteed cost" worker's compensation policy, such as the policy here, are based on employee remuneration (payroll) and rates applicable to the various types of work

("class codes") that those employees perform. ROA.188-89; *see also Wausau Underwriters Ins. Co. v. Danfoss, LLC*, No. 2:14-CV-14420, 2015 WL 6456569, at *2 (S.D. Fla. Oct. 26, 2015) ("The worker's compensation policies are 'guaranteed cost' policies, meaning that their premiums are calculated based upon the insured's actual payroll at the end of the policy period, as affected by certain employee classifications and experience modification factors, rather than the losses or claims activity during the policy period.").[10] After the policy expires, the insurer uses the employer's records to determine the actual payroll paid to employees for each state and class code, and that payroll is then used to determine the final premium amount. ROA.189.

10. The International Risk Management Institute likewise defines a "guaranteed cost" policy as follows:

> Premiums charged on a prospective basis without adjustment for loss experience during the policy period. A rate is agreed on at the inception of the policy and is multiplied by the appropriate exposure base (e.g., sales, payroll, number of vehicles, or square footage) to yield the premium. With respect to auditable lines of coverage (e.g., workers compensation and general liability), only a change in the exposure base during the policy period will cause the premium to vary. In other words, if the actual exposure base at the end of the policy period is more or less than the estimate used at policy inception, the premium will be adjusted accordingly. Loss experience during the policy period does not affect the premium for that period.

See https://www.irmi.com/online/insurance-glossary/terms/g/guaranteed-cost.aspx.

It is undisputed that the 2012-13 Policy was just such a "guaranteed cost" policy.[11] As particularly relevant here, the Policy spells out in substantial detail precisely how Servisair's premium will be calculated, including the premium basis (actual payroll) and the rates that apply for each state and work classification. *See supra* Statement of the Case, Part I. Part Five of the Policy makes clear that Servisair's final premiums were calculated based on (1) Servisair's "actual" payroll as determined by an audit of Servisair's payroll records after the policy term ended, and (2) "proper classifications and rates that lawfully apply" to Servisair's business and the work performed. *See id.*; *see also* ROA.439-40, 449-66. The "Premium–Extension of Information Page" goes on to detail that, under the formula, premiums will be calculated based on the payroll for each state and work classification code, which is multiplied by a basic rate, experience modification factors, and the scheduled rating percentages agreed to by

11. Servisair complains that the Policy is ambiguous because it does not define "guaranteed cost." Servisair Br. 27-28. Not so. "Guaranteed cost" is a shorthand term commonly used to describe the type of policy issued to Servisair. This shorthand label for the 2012-13 Policy does not bear on the question in this case: whether the Policy's plain terms describe how premiums would be calculated.

the parties. ROA.449-66.[12] Thus, the only difference between the estimated premium and the final premium calculation was the payroll amount listed by state and work classification codes. The scheduled rating and other elements of the calculation did not change, nor did the policy provide that they would be changed.

Put simply, the plain language of the Policy provided the detailed formula for the calculation of Servisair's premium. The calculation of "final premium" involved a straightforward process that used Servisair's "actual" as opposed to "estimated" payroll information, which was in turn plugged into the preexisting formula set out in the Policy. The district court correctly concluded that the Policy's "final premium" calculation provisions at issue are not ambiguous, and enforced those provisions as written. ROA.1069-71.

12. Servisair asserts that the "final premium basis includes more than just the payroll allocation and codes." Servisair Br. 39. Servisair is mistaken. As the Policy's "Premium–Extension of Information Page" makes clear, the "premium basis" is payroll. *E.g.*, ROA.449-66 (the column captioned "Premium Basis," states that the premium basis is "Payroll – Unless otherwise indicated"). Servisair incorrectly conflates the Policy's "premium basis" with the rates/factors to which the premium basis/payroll is applied.

2. Servisair's refusal to pay the final premium breached its obligations under the Policy.

Notwithstanding the unambiguous terms of the Policy, Servisair has refused to pay the final premiums owed, leading to Liberty Mutual's breach-of-contract action. In order to prove its breach-of-contract claim, Liberty Mutual was required to establish: (1) the existence of a valid contract; (2) performance of its obligations; (3) failure to perform by Servisair; and (4) damages. *Lawyers Title Ins. Corp. v. Doubletree Partners, L.P.*, 739 F.3d 848, 858 (5th Cir. 2014) (applying Texas law). There is no dispute that the 2012-13 Policy formed a binding contract and that Liberty Mutual performed its obligations under the Policy. ROA.1068. The only dispute is whether Servisair breached the Policy by failing to pay the full amount of the premium owed, causing damages to Liberty Mutual.

As the district court correctly concluded, ROA.1065-73, the record establishes that Servisair breached its obligation to pay the final premium owed, and that its refusal to do so caused actual damages to Liberty Mutual in the amount of $3,641,962. To begin with, and as explained herein, the Policy language provides in unambiguous terms that "final premium" would be calculated after the policy term ended

through an audit of Servisair's records, and that the amount of final premium would be based on (1) Servisair's "actual" payroll, and (2) "proper classifications and rates that lawfully apply" to Servisair's business and the work performed. *See supra* Part I.B.1; Statement of Facts, Part I; *see also* ROA.439-40, 449-66.

It is undisputed that, after the 2012-13 Policy ended, Liberty Mutual audited Servisair's payroll records to determine the final premium, ROA.210-13, 584. It is also undisputed that, based on Servisair's actual payroll information, and the rates for each work state and class code applicable to Servisair's business, Liberty Mutual calculated that Servisair owed additional premiums, assessments, and taxes in the amount of $3,641,962. ROA.191, 275-96. Servisair has not challenged the accuracy of the audited, actual payroll information, which was derived from Servisair's own records. ROA.214-15.

In light of this conclusive record, and because Liberty Mutual accurately calculated final premium in compliance with the terms of the Policy based on Servisair's payroll information, Servisair was obligated under the Policy to remit the final premium amount of $3,641,962. The district court correctly held that Servisair's refusal to meet this

obligation breached the parties' contract, causing actual damages in the amount of premiums owed to Liberty Mutual. ROA.1065-73.

C. SERVISAIR'S ATTEMPT TO CREATE AMBIGUITY IN THE POLICY, INCLUDING THROUGH THE INTRODUCTION OF EXTRINSIC EVIDENCE, WAS PROPERLY REJECTED.

1. Contrary to Servisair's contentions, testimony concerning the parties' internal motives cannot create ambiguity in the Policy.

Attempting to evade the plain terms of the Policy regarding premium calculation, Servisair contends that the Policy is "ambiguous" and that "the method by which premiums are to be set is far more complicated than Liberty Mutual contends." Servisair Br. 5. Citing evidence outside the four corners of the Policy, including the testimony of an underwriter involved in negotiating the terms of the policy, *see* Servisair Br. 6-9, Servisair suggests that "the premium was set by Liberty Mutual after its analysis of Servisair's loss history, and its own estimate of the premium it believed was necessary to cover the likely future losses and provide Liberty Mutual a profit." Servisair Br. 6.

The answer to Servisair's argument regarding Liberty Mutual's internal motives during the policy negotiation process is: so what? As the district court correctly observed, "Liberty Mutual's internal motives

for setting the schedule rating cannot create an ambiguity in the plain language of the contract." ROA.1070. What matters is whether, regardless of Liberty Mutual's (or Servisair's) subjective internal motivations or analysis, the Policy unambiguously set forth their agreement as to how premiums would be calculated. Notwithstanding its repeated mantra of "ambiguity," Servisair has not and cannot refute that the Policy describes in unequivocal terms and in substantial detail precisely how premiums were to be calculated. *See supra* Part I.B.1; Statement of Facts, Part I; *see also* ROA.439-40, 449-66.

In this regard, courts have consistently admonished that an insurance policy provision is ambiguous only if it is subject to more than one reasonable interpretation. *U.S. Metals v. Liberty Mut. Grp., Inc.*, 490 S.W.3d 20, 24 (Tex. 2015) (citing *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 458 (Tex. 1997)). Notably, Servisair fails to offer *any* alternative interpretation of the Policy's premium-calculation provisions, much less a "reasonable" alternate construction that could create ambiguity. *See generally* Servisair Br.[13]

13. For example, Servisair suggests that somehow subsection A of Part Five, which states that premium for the Policy "will be determined by our manuals of rules, rates, rating plans and classifications," ROA.439, is "inconsistent" with subsection E, which describes the calculation of final premium, ROA.440. *See* Servisair Br. 26

Servisair's inability to conjure an alternative construction of the Policy is unsurprising. As Servisair has recognized, Servisair Br. 10, the Policy is an NCCI form worker's compensation policy used across the country. Servisair has failed to cite a single case in which the policy has been found to be ambiguous, and Liberty Mutual is unaware of any such decision. To the contrary, in those cases construing the same form premium provisions at issue here, courts have found no difficulty in understanding how premiums are calculated. *See, e.g.*, *Liberty Mut. Ins. Co. v. Harvey Gerstman Assocs., Inc.*, No. CV 11-4825 (SJF)(ETB), 2012 WL 5289606, at *4 (E.D.N.Y. Sept. 13, 2012) (construing Part Five of the form policy, the court held that "[t]he plain meaning of the contract is clear on its face–Liberty had the right to make adjustments to employee classifications at the conclusion of the policy period based on the Gerstman Affiliates' actual, rather than estimated, exposures, and the Gerstman Affiliates had the obligation to pay any additional monies owed following Liberty's calculation of the final premium");

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n.5. But Servisair fails to even articulate the nature of the alleged "inconsistency," much less provide any proof it exists. Again, Servisair's failure to support a misguided theory is unsurprising. Nothing in Liberty Mutual's "manuals and rating plans"—which generally are published and maintained by state regulators and the NCCI—is "inconsistent" with the "Final Premium" provision in the Policy. In fact, the record shows that the 2012-13 Policy follows and is in complete compliance with these manuals. ROA.1061-62.

Travelers Ins. Co. v. Paolino Material & Supply, 903 F.Supp. 865, 867-68 (E.D. Pa. 1995) (construing the "final premium" and "audit" provisions, the court confirmed that "by the terms of the contract" the estimated premium was "merely an estimate," and that "actual final premium would be determined only after an audit"). Thus, Servisair's strained ambiguity theory cannot be reconciled with either the language of the policy or existing precedent construing its terms.

Finally, the record is clear that both Liberty Mutual and Servisair were bound by the Policy's premium-calculation formula. The "Premium–Extension of Information Page" of the Policy dictated the formula for calculation of final premium, a process that involved substituting Servisair's actual, rather than estimated, payroll and work classification information for the estimates used at the inception of the Policy. ROA.439-40, 449-66; *see also supra* Statement of Facts, Part I. Liberty Mutual had no "discretion" to change the agreed-to formula for premium calculation, and there is no allegation, much less any proof, that Liberty Mutual attempted to change the formula when it calculated final premium.

The truth is, Servisair's post-hoc displeasure with the amount of final premium owed resulted from its own actions regarding its payroll information, rather than any alleged Policy ambiguity. As Servisair acknowledged below, its final premium number for the 2012-13 Policy was substantially larger than the estimated premium because the estimated payroll information it provided at the inception of the Policy was substantially different from the actual payroll used to calculate the final premium amount. Specifically, it is undisputed that Servisair's actual payroll reflected more exposure in more expensive class codes and lower payroll amounts in the less expensive class codes. ROA.312-62, 366-73; *see also* ROA.714-15. It is also undisputed that Servisair's payroll data used to estimate premium at the inception of the Policy, including the coding of classifications, was provided by its Payroll Department, ROA.688, and that the discrepancy was generated by Servisair's employees, ROA.714-15 ("it would appear that at some point a Servisair employee transposed columns in a spreadsheet and incorrectly included millions of dollars of payroll that should have been attributed to other employee classifications to [clerical worker classifications]"). ROA.714.

The district court aptly summarized the genuine crux of Servisair's complaint:

> Servisair does not contend that Liberty Mutual did not apply 'proper classifications and rates that lawfully apply to the business and work covered by this policy,' or that those rates were undisclosed to Servisair. Servisair's complaint in essence is that the application of the disclosed schedule ratings to actual, as opposed to the erroneously estimated, premium basis resulted in a higher than expected schedule debit . . .

ROA.1070. As the lower court recognized, Servisair's after-the-fact regrets do not arise from the disclosed, unambiguous formula for premium calculation, but instead from the fact that the application of the agreed-to formula resulted in a higher final premium than Servisair expected. But this complaint fails to identify any ambiguity in the Policy, and likewise provides no legitimate reason for Servisair to refuse to meet its obligation to pay the final premium owed.

2. The district court correctly held that Servisair's extraneous evidence could not be introduced to contradict or otherwise rewrite the plain terms of the Policy.

In support of its effort to create ambiguity concerning the Policy, Servisair offered below an "expert report" of Robert Gaddis. ROA.1011-1033. As Servisair confirms in its opening brief, Gaddis' report was

offered to discuss industry custom and practice for determining premiums for "large accounts" such as Servisair, and to bolster Servisair's argument that there is ambiguity in the premium calculation provisions in the Policy. Servisair Br. 23-25.

As demonstrated herein, however, the terms of the 2012-13 Policy, including the premium calculation provisions, are unambiguous. *See supra* Part I.A-B; Statement of Facts, Part I. Thus, the district court correctly concluded that extraneous evidence, including custom and practice evidence, cannot be introduced to contradict or rewrite the plain terms of the Policy, as suggested by Servisair. ROA.1071 ("Because the policy is not ambiguous, the opinion of Servisair's expert regarding industry custom and practice for determining premiums for 'large accounts' is not admissible to alter the express terms of the policy.") (citing *Horn v. State Farm Lloyds*, 703 F.3d 735, 738 (5th Cir. 2012)).

The district court's decision applies the well-established principle that an unambiguous contract will be enforced as written and parol evidence cannot be considered for the purpose of creating an ambiguity or to give the agreement "a meaning different from that which its

language imports." *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008). As explained by this Court, applying Texas law: "Courts interpreting unambiguous contracts are confined to the four corners of the document, and cannot look to extrinsic evidence to create an ambiguity." *Am. Tobacco Co.*, 463 F.3d at 407 (citing *Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 732–33 (Tex. 1982)). Only where the agreement is ambiguous may a court consider extraneous evidence to determine the meaning of the agreement. *Am. Tobacco Co.*, 463 F.3d at 407; *see also Haden*, 266 S.W.3d at 450-51. As particularly relevant here, extraneous evidence of supposed standard practice in the industry cannot be used to vary or contradict the terms of an unambiguous contract. *E.g.*, *Dynegy Midstream Servs., Ltd. P'ship v. Apache Corp.*, 294 S.W.3d 164, 169-70 (Tex. 2009).

For these reasons, Servisair's extraneous evidence of industry custom and practice cannot be considered in an attempt to contradict or vary the terms of the 2012-13 Policy, and was properly rejected by the district court.

II. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON SERVISAIR'S AFFIRMATIVE DEFENSE OF MUTUAL MISTAKE.

Beyond its ambiguity arguments, Servisair also attempted to evade its obligations under the 2012-13 Policy by asserting the affirmative defense of mutual mistake. *See, e.g.*, ROA.723-26; Servisair Br. 31-41. The district court correctly concluded that "[t]he parties did not make a 'mutual mistake,'" ROA.1071, and that Servisair therefore could not establish this defense, ROA.1071-73.

A mutual mistake occurs when the parties to an agreement have a common intention, but their written agreement fails to reflect that intention due to a mistake by both parties in writing the agreement. *City of the Colony v. N. Tex. Mun. Water Dist.*, 272 S.W.3d 699, 735 (Tex. App.—Fort Worth 2008, pet. dism'd). The elements of mutual mistake are thus (1) a mistake of fact, (2) held mutually by the parties, and (3) which materially affects the agreed-upon exchange. *Id.* Courts have consistently made clear that the doctrine of mutual mistake must not routinely be available to avoid the results of an unhappy bargain. *Williams v. Glash*, 789 S.W.2d 261, 265 (Tex. 1990); *see also City of the Colony*, 272 S.W.3d at 735; *LasikPlus of Tex., P.C. v. Mattioli*, 418 S.W.3d 210, 221 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

"Parties should be able to rely on the finality of freely bargained agreements." *City of the Colony*, 272 S.W.3d at 735 (citing *Glash*, 789 S.W.2d at 265).

The remedy typically associated with the "mutual mistake" defense is reformation of the contract: "The underlying objective of reformation is to correct a mutual mistake made in *preparing* a written instrument so that the instrument truly reflects the *original* agreement of the parties." *Cherokee Water Co. v. Forderhause*, 741 S.W.2d 377, 379 (Tex. 1987) (emphasis in original). A party seeking reformation faces a "rather stringent requirement" of proving entitlement to relief. *Estes v. Republic Nat'l Bank*, 462 S.W.2d 273, 275 (Tex. 1970). Reformation is not available to change a written contract unless the party seeking reformation provides "clear, exact, and satisfactory evidence" that he is entitled to it. *Estes*, 462 S.W.2d at 275, *see also Hardy v. Bennefield*, 368 S.W.3d 643, 648 (Tex. App.—Tyler 2012, no pet.) (same). Likewise, a court cannot use the equitable remedy of reformation to create a contract that the court considers should have been made but was not. *Bear Ranch LLC v. HeartBrand Beef, Inc.*, No.

6:12-CV-00014, 2013 WL 6190253, at *3 (S.D. Tex. 2013) (applying Texas law).

Here, Servisair contends that the "mutual mistake" defense applies because both Servisair and Liberty Mutual "mistakenly believed" that the payroll figures provided by Servisair, and used to estimate the premiums for the 2012-13 Policy, were accurate.[14] Servisair Br. 31. But as the district court explained, "the payroll estimate was clearly a prediction of a future fact known to be uncertain, *i.e.*, an estimate." ROA.1072. Indeed, the Policy states plainly that the estimated payroll *will not* be used to calculate the final premium, demonstrating the parties' mutual understanding that the final premium might be higher or lower than the estimate. ROA.440 (Subsection E of Part Five states that, "The premium shown on the ["Premium–Extension of Information"] page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium

14. As noted herein, Servisair first asserted this theory *after* Liberty Mutual showed that summary judgment was proper on Servisair's "composite rate" theory. *See supra* n.7; Statement of Facts, Part III.

basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy.").

Nonetheless, Servisair repeatedly urges that, had it known that the payroll figures it provided were inaccurate and that the result would be a substantially higher final premium than the estimated premium, it would not have entered the policy contract. *E.g.*, Servisair Br. 32. But Servisair's post hoc unhappiness with the bargain it made cannot support its attempt to rewrite the insurance contract. *See LasikPlus*, 418 S.W.3d at 221. The Policy anticipated differences between the estimated and actual payroll information, and it is undisputed that the differences here resulted from errors made by Servisair, not Liberty Mutual. *See, e.g.*, ROA.714-15; *see also* ROA.1072 ("the [payroll] error was made by Servisair, not by Liberty Mutual").[15]

Further, there is no evidence that the inaccuracies in the payroll estimate were material to Liberty Mutual. This is unsurprising, given

15. In its opening brief, Servisair (for the first time) appears to suggest that somehow Liberty Mutual is also responsible for the inaccurate information about Servisair's payroll. Servisair Br. 39-41. This novel, nonsensical suggestion is directly contradicted by the record, particularly Servisair's admissions below that its payroll data, including the coding of classifications, was provided by its Payroll Department, ROA.688, and that the discrepancy involved errors committed by its employees, ROA.714-15.

that the "Final Premium" provision clearly states that the premiums are based on "the actual, not the estimated" payroll. Moreover, as the district court explained, "[t]he risk of an inaccurate estimate was placed squarely on the shoulders of Servisair, not Liberty Mutual, and rightly so, since Servisair was in the best position to accurately code and estimate its payroll." ROA.1072.

Finally, Servisair's argument proves too much, particularly given that Servisair impliedly acknowledges, as it must, that Liberty Mutual properly applied the premium-calculation formula required by the Policy. Taken to its logical conclusion, Servisair's construction of the Policy would render the premium obligations negotiated and agreed-to by the parties entirely illusory.

The reason is straightforward. Servisair plainly accepts that *some* amount of divergence between the premium estimate and the final premium under the Policy is acceptable, and would not affect the enforceability of the Policy. But in Servisair's view, when a premium estimate diverges too greatly from the final premium, *i.e.*, the estimate is *too inaccurate*, a "mutual mistake" has occurred and the insurance policy contract falls apart. If this were correct, how much divergence

between the premium estimate and final premium creates a "mutual mistake" and therefore an unenforceable contract? Put another way, how inaccurate is "too inaccurate" regarding the premium estimate? If the premium estimate is $500,000 lower than the final premium, is that "too inaccurate" and the Policy is rendered unenforceable? What about $200,000 lower—is that "too inaccurate"? And what if the estimated premium is, say, $800,000 *higher* than the final premium. Can Liberty Mutual, in turn, unilaterally announce that therefore the estimate diverged too greatly from the final premium, invoke a King's X of "mutual mistake," and overturn the plain language of the policy?

If accepted, Servisair's self-serving interpretation of the Policy implicates all of these hypotheticals, and means that, as a practical matter, the Policy's premium provisions are not binding or enforceable *unless* both parties agree after-the-fact that the final premium calculation is "close enough" to the estimated premium. This bizarre construction of the Policy cannot be reconciled with its plain language and longstanding principles of contract interpretation.

In sum, Servisair's strained theory of "mutual mistake" is entirely untethered to both the plain language of the 2012-13 Policy, as well as

longstanding Texas law that unambiguous contracts are enforced as written. Likewise, Servisair fails to recognize that the "mutual mistake" doctrine is not a unilateral "escape hatch" for a party that decides, after the fact, that it reached an unhappy bargain. Rather, as aptly explained by a Texas court:

> [P]arties to [a] contract are considered masters of their own choices. They are entitled to select what terms and provisions to include in a contract before executing it. And, in so choosing, each is entitled to rely upon the words selected to demarcate their respective obligations and rights. In short, the parties strike the deal they choose to strike and, thus, voluntarily bind themselves in the manner they choose. And, that is why parties are bound by their agreement as written.

Cross Timbers Oil Co. v. Exxon Corp., 22 S.W.3d 24, 26 (Tex. App.—Amarillo 2000, no pet.). Consistent with these well-established contract principles, Servisair should be held to the terms of the 2012-13 Policy.

CONCLUSION

The Court should affirm the district court's judgment.

Respectfully submitted,

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