IN THE SUPREME COURT OF THE STATE OF NEVADA

MMAWC, LLC, a Nevada limited liability company; BRUCE DEIFIK, an individual; and NANCY AND BRUCE DEIFIK FAMILY PARTNERSHIP LLLP, a Colorado limited liability partnership,

Appellants

v.

ZION WOOD OBI WAN TRUST and SHAWN WRIGHT as trustee of ZION WOOD OBI WAN TRUST; WSOF GLOBAL, LLC, a Wyoming limited liability company,

Respondents.

APPEAL No. 75596

Eighth Judicial District Court
Case No. A-17-764118-C

APPELLANTS' REPLY BRIEF

Attorney For Appellants:
Maximiliano D. Couvillier III, Esq.
Nevada Bar No. 7661
KENNEDY & COUVILLIER, PLLC
3271 E. Twain Ave.
Las Vegas, NV 89120
Tel: (702) 605-3440
Fax: (702) 625-6367
mcouvillier@kclawnv.com

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kclawnv.com

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kcdawnv.com

APPELLANTS' NRAP 26.1 DISCLOSURE

The undersigned counsel of record for Appellants/Defendants MMAWC, LLC, Bruce Deifik and the Nancy And Bruce Deifik Family Partnership LLLP certifies that:

MMAWC, LLC is a private Nevada limited liability corporation registered to do business in Nevada. To our knowledge, there are no publicly held companies that own 10% or more of common stock of MMAWC, LLC and that no publicly held company owns any interest in MMAWC, LLC.

The Nancy And Bruce Deifik Family Partnership LLLP is a private Colorado family partnership that does not do transact business in Nevada within NRS Chapter 86. To our knowledge, there are no publicly held companies that own 10% or more of common stock of the Nancy And Bruce Deifik Family Partnership LLLP and that no publicly held company owns any interest in the Nancy And Bruce Deifik Family Partnership LLLP.

//

//

//

//

//

MMAWC, LLC, Bruce Deifik and the Nancy And Bruce Deifik Family Partnership LLLP have been represented in this appeal and the underlying matter by the following attorneys and law firms:

BLACK & LOBELLO
Maximiliano D. Couvillier III, Esq. NSB 7661
10777 W. Twain Ave., Ste. 300
Las Vegas, Nevada 89135
and
KENNEDY & COUVILLIER, PLLC
Maximiliano D. Couvillier III, Esq. NSB 7661
3271 E. Warm Springs Rd.
Las Vegas, NV 89120

Respectfully Submitted this 13th of November 2018.

KENNEDY & COUVILLIER, PLLC

/s/ Maximiliano D. Couvillier III, Esq.
Maximiliano D. Couvillier III, Esq. NSB 7661

Attorneys for Appellants MMAWC, LLC, Bruce Deifik and The Nancy And Bruce Deifik Family Partnership LLLP

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kclawnv.com

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kclawnv.com

TABLE OF CONTENTS

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kcdawnv.com

TABLE OF AUTHORITIES

Cases

//

//

Statutes

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kclawnv.com

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kclawnv.com

SUMMARY OF ARGUMENT

Respondents concede that respondent WSOF Global, LLC ("Global") is subject to the Arbitration Provision[1] and therefore, should be compelled to arbitrate its claims. That said, all Respondents are subject to the Arbitration Provision because it is incorporated by referenced to the Settlement Agreement, to which all Respondents are parties. Furthermore, all Respondents expressly benefitted from the Licensing Agreement, which contains the Arbitration Provision and thus, bound to the Arbitration Provision. And finally, all Respondents asserted claims under the Licensing Agreement. Respondents cannot accept the benefits of the Licensing Agreement and assert claims under the Licensing Agreement but at the same time avoid the Arbitration Provision of the Licensing Agreement.

Respondents' remaining efforts to walk-away from the Arbitration Provision they jointly negotiated and drafted are artificial. Briefly summarizing here the additional reply arguments below: First, Respondents claim that the Federal Arbitration Act 9 U.S.C. §1 et seq. ("FFA") somehow does not trump NRS 597.995 because, they claim, NRS 597.995 also voids contracts for contract-defenses of fraud, duress or unconscionability. This argument is unreasonable because: (a) Respondents did not assert any

[1] *See Respondents' Answering Brief at p. 10-11.*

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kclawnv.com

contract-defenses of fraud, duress or unconscionability; and (b) it is belied by the clear language of NRS 597.995, which says nothing about voiding a contract based on fraud, duress, unconscionability or any other such contract defense and only provides for the voidance of an arbitration clause. *See NRS 597.995.*

Second, settled law and the express language of the jointly drafted Licensing Agreement also belies Respondents' strained argument that interstate and foreign commerce are somehow not involved. Third, Respondents mischaracterize the parties' negotiations [which demonstrate Respondents' and its counsel's role in negotiating and drafting the Arbitration Provision] as "parol evidence," when negotiations were not offered to vary the terms of the Arbitration Provision.

Finally, Respondents sheepishly claim that neither they nor their counsel where aware of NRS 597.995 at the time their attorney jointly drafted the Arbitration Provision, but yet swiftly looked for, "found" and trumpeted NRS 597.995 to disavow the Arbitration Provision the minute Appellants tried to enforce it. Respondents' purported recent discovery of NRS 597.995, however, does not change the fact that Respondents specifically authorized the Arbitration Provision and are estopped from disavowing it. Specifically, Respondents do not dispute that - aided with

counsel - they negotiated, jointly drafted and specifically approved the Arbitration Provision during such collaborative process.

ARGUMENT

I. The Arbitration Clause Applies to All Claims By The Respondents

A. Respondents Concede The Arbitration Provision Applies To Global And Its Claims

Respondents concede that respondent Global is governed by the Arbitration Provision and its claims are subject to arbitration. *See Respondents Opening Brief at p. 10*. Thus, at the very minimum, the Court's March 13, 2018 Order ("03/13/18 Order") should be remanded and Global compelled to arbitrate its claims. However, the remaining claims by the other Respondents, Zion and its trustee, Shawn Wright ("Wright"), are also subject to arbitration. And all Respondents should be compelled to arbitrate their claims.

B. The Arbitration Provision Also Applies To Respondents Zion And Its Trustee, Wright, And Their Remaining Claims

The Arbitration Provision applies to Respondent Zion and its trustee Wright even though they are not technically signatories to the Licensing

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kclawnv.com

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kcdawnv.com

Agreement[2] because:

(1) the Licensing Agreement, including the Arbitration Provision, are incorporated into the Settlement Agreement, to which such Respondents are parties;

(2) Zion trustee Wright expressly benefited from the Licensing Agreement; and

(3) Such Respondents asserted claims for breach of the Licensing Agreement against defendants who are not parties to the Licensing Agreement.

(1) The Arbitration Provision Is Incorporated Into The Settlement Agreement

As this Court and other authorities recognize, non-signatories (like Respondents Zion and its trustee Wright) may be bound to an arbitration agreement by ordinary contract principles, including incorporation by reference.

> In particular, a nonsignatory may be bound to an arbitration agreement if so dictated by the ordinary principles of contract and agency. Accordingly, various courts have adopted theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel.

[2] Respondent Wright signed the Licensing Agreement on behalf of Respondent Zion. *See AA115.*

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kcdawnv.com

Truck Ins. Exch. v. Palmer J. Swanson, Inc., 124 Nev. 629, 634–35, 189 P.3d 656, 660 (2008)(internal quotations and citations omitted). *See also Simms v. Navient Sols., Inc*., 157 F. Supp. 3d 870, 878 (D. Nev. 2016)(same); *Letizia v. Prudential Bache Securities, Inc*., 802 F.2d 1185 (9th Cir.1986)(same); *Comer v. Micor, Inc*., 436 F.3d 1098, 1101 (9th Cir. 2006)(same); *Smith v. Multi-Fin. Sec. Corp.*, 171 P.3d 1267, 1272 (Colo. App. 2007)("Courts have bound nonsignatories to arbitration agreements under principles of agency, incorporation by reference, veil-piercing, assumption or implied conduct, estoppel, successor in interest, and third-party beneficiary.").

> While a contract cannot bind parties to arbitrate disputes they have not agreed to arbitrate, [i]t does not follow ... that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision…. Rather, a party can agree to submit to arbitration by means other than personally signing a contract containing an arbitration clause.

Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416 (4th Cir. 2000)(internal quotations and citation omitted).

Here Section 2 of the Settlement Agreement [also jointly drafted and negotiated by Respondents] provides that all Respondents agree to and affirm that the Licensing Agreement is "incorporated" into the Settlement

Agreement, to which all Respondents are parties:

> **The 10/15/12 Hesser License shall be reaffirmed and remain in full force and effect as of the date of this Agreement, as amended by the execution of the Amendment to Consulting and Master Licensing Agreement** in the form attached hereto and **incorporated herein** as Exhibit B. **The license is a material part of settlement on behalf of Hesser** and **Wright** and is not subject to any modification, cancellation, assignment, pledge, lien, or encumbrance by WSOF or any of its creditors and shall survive any restructure, sale, receivership or bankruptcy of WSOF.

AA Vol. 1 at AA047 (¶2.1)(emphasis added).

It is also notable that Respondents, and their related entities, elected to identify as a singular entity and then further represent that Hesser and Wright can personally take action on agreements of the entities they control, including Global and Zion. *AA048* (§2.2). Thus, in Section 2.2 of the Settlement Agreement, Respondents jointly drafted a designation lumping together all parties controlled by Hesser and Wright, including Global and Zion, as the singular entity "Hesser/Wright Parties":

> Wright, Hesser, M. Hesser, Tropyx, Bamboo, Zion, Global I, Global II, Royal LLC, Royal Nevada, Royal NV Corp., Royal Trust and/or Royal Properties (such parties, and all entities and natural persons in any way affiliated with or controlled by such parties, are referred to herein collectively as the "Hesser/Wright Parties.")

AA047-AA048.

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kcdawnv.com

Thus, for the purposes of the tethered settlement documents, Respondents manifestly expressed a unity of interest, influence and identification that also sufficiently binds them all to the Arbitration Provision. Certainly, the record and such representations further supports binding them to the Arbitration Provision as alter egos. *Truck Ins. Exch*., 124 Nev. at 634–35, 189 P.3d at 660 (nonsignatory may be bound to an arbitration agreement as an alter ego); *Lorenz v. Beltio*, Ltd., 114 Nev. 795, 807, 963 P.2d 488, 496 (1998)(elements of alter ego are influence, unity of interest and adherence to the separate entity fiction would promote injustice).

(2) Respondents Zion and its Trustee Wright Benefited From The Licensing Agreement

There is more than incorporation and unity of interest, however, to bind Respondent Zion and its trustee Wright to the Arbitration Provision. Those Respondents are also bound to the Arbitration Provision of the Licensing Agreement because they unquestionably derived a direct benefit from the Licensing Agreement. The Settlement Agreement resolved claims involving Zion and Wright (*AA044-45*). And the Settlement Agreement and the resolution of the claims involving Zion and Wright would not have occurred without the benefit of the Licensing Agreement.

//

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kclawnv.com

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kcdawnv.com

As Respondents expressly stated in the jointly drafted Settlement Agreement, the "license [Agreement] was a material part of settlement on behalf of Hesser and Wright." *AA Vol. 1 at AA047 (¶2.1)*. Moreover, Respondents allege that they all performed under the Licensing Agreement and are all entitled to its benefits. *AA016 at ¶120* ("The Plaintiffs have been injured in an amount in excess of $10,000 as a direct and proximate cause of the actions of Defendants, Plaintiffs have performed all obligations due and owing under the Licensing Agreement."). Respondents cannot have it both ways. They cannot disavow the Arbitration Provision in the Licensing Agreement and on the other hand have realized the admitted benefits of the Licensing Agreement, and continue to try to benefit from the Licensing Agreement by asserting claims arising from the Licensing Agreement. *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 267 (5th Cir.2004)(non-signatory who obtained benefit from contract with arbitration provision was bound to arbitration via equitable estoppel).

(3) Respondents Assert Claims For Breach Of The Licensing Agreement By Defendants Who Were Not Parties To That Agreement

In more double-speak from Respondents, they boldly argue in their Opening Brief that the claims arising from the Settlement Agreement are separate and distinct from the claims concerning the Licensing Agreement

[which contains that Arbitration Provision]. *See Respondents' Opening Brief at p. 13*. Yet, that is not what Respondents actually allege in their Complaint, which is the record from which they cannot escape through misleading arguments. The record manifests that Respondents' intertwined and tethered their claims for breach of the Settlement Agreement to the Licensing Agreement. To be sure, the record further manifests that all Respondents sued for breach of the Licensing Agreement and that they sued defendants who are not parties to the Licensing Agreement for breach of the Licensing Agreement.

At Paragraph 111 of their Complaint, Respondents allege that: (1) a breach of the Licensing Agreement constitutes a breach of the Settlement Agreement; and (2) other defendants, who are not parties to the Licensing Agreement, breached the Licensing Agreement:

> **The Settlement Defendants** beached the Settlement Agreement as to WSOF Global by **breaching the terms of the Licensing Agreement** and diluting all economic value from the Licensing Agreement.

See Complaint AA015-AA016 at ¶¶110-111 (emphasis added). Respondents further assert that all "Settlement Defendants," including those who are not parties to the Licensing Agreement, also breached the implied covenant of good faith and fair dealing in the Licensing Agreement. *AA016 at ¶¶116-*

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kclawnv.com

120.

The "Settlement Defendants" that Respondents refer to and assert claims for breach of the Licensing Agreement and related implied covenant of good faith and fair dealing are identified as MMAWC, Bruce Deifik ("Deifik"), the Nancy and Bruce Deifik Family Partnership LLLP ("DFP"), MMAX Investment Partners, Inc. dba Professional Fighters League ("PFL") and Carlos Silva ("Silva"). *AA015 (lines 21-22).* **Neither Deifik, DFP, PFL nor Silva are parties to the Licensing Agreement.** *See AA105 & AA115.*

Respondents cannot assert claims [including claims against non-parties] under the Licensing Agreement, but simultaneously disavow the agreement's Arbitration Provision. The doctrine of equitable estoppel prevents Respondents from taking such inconsistent positions. In reversing the trial court's denial to enforce an arbitration provision against a non-party, the Fifth Circuit observed in *Bailey*:

> The doctrine of estoppel prevents a party from 'having it both ways'…. Yet this is precisely what Miriah Phinizee is attempting to do here: suing based upon one part of a transaction that she says grants her rights while simultaneously attempting to avoid other parts of the same transaction that she views as a burden—namely, the arbitration agreement. We find that the doctrine of equitable estoppel acts to prevent her from taking such inconsistent positions. Accordingly, we

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kclawnv.com

> REVERSE the district court's denial of WM Finance and the Insurer Appellants' motion to compel Miriah Phinizee to arbitrate her claim.

Id. 364 F.3d at 267 (citations omitted).

II. The Record Of The Parties' Negotiations And Joint Drafting Of the Arbitration Provision Is Not Parol Evidence But Proper Evidence That Respondents Specifically Authorized Arbitration And That Respondents Are Estopped From Disavowing Arbitration

Simply put, the parol evidence does not apply here because the parties' negotiations and joint drafting process are not being offered to change or vary contract terms, or because there is an ambiguity with the Licensing Agreement. The parol evidence rule precludes the admission of extrinsic evidence to change or vary the terms of a written agreement. *In re Cay Clubs*, 130 Nev. 920, 936, 340 P.3d 563, 574 (2014). The language of the Licensing Agreement and its Arbitration Provision are not at issue. There are no claims of vagueness or ambiguities with that agreement.[3] And there is no extrinsic evidence being offered to vary or change the terms of the Licensing Agreement or Arbitration Provision.

The record below (*AA159-AA197)* showing that Respondents and their counsel jointly drafted the Licensing Agreement – and its Arbitration Provision – was not offered to, and does not, change, vary or try to explain

[3] The ambiguity lies with NRS 597.995. *See infra.*

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kclawnv.com

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kclawnv.com

the meaning of any term of the Licensing Agreement, including the Arbitration Provision. Therefore, such record is not barred by the parol evidence rule.

The record is important to demonstrate that Respondents are estopped from denying that they specifically agreed to the Arbitration Provision that they jointly drafted. The record, which Respondents do not dispute, establishes that Respondents:

(a) jointly negotiated the Arbitration Provision (with aid of counsel);

(b) jointly drafted the Arbitration Provision (with aid of counsel);

(c) did not express any objection to the Arbitration Provision during the joint drafting process;

(d) did not assert non-compliance with NRS 597.995 during the joint drafting process; and

(e) specifically authorized the Arbitration Provision during the joint drafting process.

Respondents also disclaim any suggestion that they did not intend to comply with the Arbitration Provision when they jointly drafted the Licensing Agreement. *See Respondents' Ans. Brief at p. 17.* In other

words, Respondents admit that they specifically agreed to, and intended to comply with, the Arbitration Provision at the time the parties were jointly drafting the Licensing Agreement. *Id.* MMAWC relied on, and was induced by, Respondents' conduct.

But now that they have commenced litigation, Respondents suddenly do not want to comply with the Arbitration Provision because, they claim, it does not comport with NRS 597.995; which they cleverly found while looking for ways to, after-the-fact, disavow arbitration and oppose MMAWC's motion to compel arbitration.

The undisputed record of the joint drafting process was not offered to vary or change the Arbitration Provision. The undisputed record here establishes equitable estoppel, demonstrates Respondents' unreasonable position and exposes some very substantive problems with NRS 597.995 (*e.g.,* may be used as a sword to void arbitration by a party who, with aid of counsel, jointly drafted the arbitration provision and does not dispute that it intended to comply with said provision at the time it was jointly drafting said provision). Certainly, the undisputed record is proper to equitably estop Respondents from disavowing the Arbitration Provision. *See Terrible v. Terrible,* 91 Nev. 279, 283, 534 P.2d 919, 921 (1975)("The doctrine of equitable estoppel will not permit a party to repudiate acts done or positions

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kclawnv.com

taken or assumed by him when there has been reliance thereon and prejudice would result to the other party."); *Washington Mut. Fin. Grp., LLC*, 364 F.3d at 268 ("[T]he doctrine of estoppel prevents a party from having it both ways.") *Truck Ins. Exch.*, 124 Nev. at 634–35, 189 P.3d at 660 (nonparties may be bound to an arbitration provision through estoppel).

III. NRS 597.995 Is Vague And Respondents Do Not, And Cannot, Identify Any Language In The Statute That Provides Specific Means Of Compliance

In its opening brief, MMAWC showed that NRS 597.995 does not provide any specific means or directives for compliance. Respondents do not, and cannot, identify any language in NRS 597.995 that sets forth how one complies with the statute or what it means to provide "specific authorization." NRS 597.995 states in full:

> **NRS 597.995 Limitations on agreements which include provision requiring arbitration of disputes arising between parties**.
>
> 1. Except as otherwise provided in subsection 3, an agreement which includes a provision which requires a person to submit to arbitration any dispute arising between the parties to the agreement must include specific authorization for the provision which indicates that the person has affirmatively agreed to the provision.
>
> 2. If an agreement includes a provision which requires a person to submit to arbitration any dispute arising between the parties to the agreement and the agreement fails to include the specific authorization required pursuant to subsection 1, the provision is void and

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kcdawnv.com

> unenforceable.
>
> 3. The provisions of this section do not apply to an agreement that is a collective bargaining agreement. As used in this subsection, "collective bargaining" has the meaning ascribed to it in NRS 288.033.

Id.

There is nothing in the statute that articulates, provides or even suggests what the "specific authorization for the provision which indicates that the person has affirmatively agreed to the provision" looks like, states, or where it is located within the contract or arbitration provision.

The passage of *Fat Hat, LLC v. DiTerlizzi* that Respondents rely on at pages 17-18 of their Answering Brief is similarly bereft of any guidance of clear and unequivocal means of compliance:

> However, the contracts for respondents DiTerlizzi, Klus, Monica, and Kirtz did not contain the "specific authorization" for the arbitration provision in their respective contracts that NRS 597.995 demands. Though the arbitration provision immediately preceded the signature line on the last page for all the contracts, that was a general signature line indicating consent to all the terms of the contract. Thus, those signatures do not qualify as specific authorizations for the arbitration provision. Although Kirtz initialed at the bottom of the page with the arbitration provision, she initialed at the bottom of every page; thus, her initials fail to demonstrate that she affirmatively agreed to the arbitration provision. Because Fat Hat's contracts with respondents DiTerlizzi, Klus, Monica, and Kirtz failed to include the specific authorization

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kcdawnv.com

> NRS 597.995 requires, the arbitration provisions in those four contracts are void and unenforceable, and we affirm the district court's order denying arbitration as to them. Respondents Hebert and Mihaylova, on the other hand, signed.

Fat Hat, LLC v. DiTerlizzi, 385 P.3d 580, 2016 WL 5800335 (Nev. September 21, 2016).

There is nothing in that passage that discusses the clear means of compliance with NRS 597.995. That passage only summarizes what the 3-member panel found did *not* to comply with NRS 597.995 within the facts of that case, and, respectfully, without explanation as to why such actions were non-compliant.[4]

[4] For example, in *Fat Hat* initialing every page was held not to comply with NRS 597.995. But, respectfully, initials may constitute authorization, and the initials at every page of an agreement may manifest specific authorization to all of the provisions within that page. *See e.g., Berman v. Rubin,* 138 Ga. App. 849, 854, 227 S.E.2d 802, 806 (1976)("Appellant Berman admits that an initial draft of the agreement was unsatisfactory to him, that the draft was changed, that he read the changes, that he initialed each and every page, and that he placed his signature on the final page. There are few rules of law more fundamental than that which requires a party to read what he signs and to be bound thereby.") Moreover, NRS 597.995 does not provide that the arbitration provision must be the only contract term that is "specifically authorized" to the exclusion of other terms not being "specifically authorized" or that other pages cannot be initialed. Importantly, the right to contract is a property right that is protected by the Due-Process clause of the Constitution (Const. art. 2, § 25) and, again, a statute is vague and unenforceable when it lacks specific means for compliance (*Silvar v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006)).

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kclawnv.com

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kcdawnv.com

In MMAWC's Opening Brief, it addressed the further finding in *Fat Hat* that printing a name and address in the blank spaces of the arbitration provision somehow constituted "specific authorization" per NRS 597.995(1) under the specific facts of that case. *Id.* 2016 WL 5800335 at *2. But again, there is nothing in NRS 597.995 that provides that printing names and address within an arbitration provision constitutes a "specific authorization for the provision which indicates that the person has affirmatively agreed to the provision." NRS 597.995(1). Moreover, *Fat Hat* is an unpublished, non-binding, non-precedent disposition that was only provided in fairness to the district court and Court. Thus, there is no authoritative guidance as to what it means to provide a "specific authorization for the provision which indicates that the person has affirmatively agreed to the provision" under NRS 597.995(1). More importantly, the facts of this case expose some significant issues and unintended consequences of NRS 597.995, where a party who drafts an arbitration provision can later disavow the provision under the statue. Clearly, that is not what NRS 597.995 intended.

IV. NRS 597.995 Applies Only To Arbitration Clauses And Therefore Clearly Preempted By The FFA

Respondents argue that the FFA does not preempt NRS 597.995 because NRS 597.995 somehow applies to contract defenses of unconscionability or duress. *See Respondents' Opening Brief at p. 18.*

Respondents are wrong. NRS 597.995 applies only to arbitration provisions. There is no language in NRS 597.995 that says failure to provide a "specific authorization for the provision which indicates that the person has affirmatively agreed to the provision" - whatever that may be – somehow makes the agreement unconscionable or constitutes "duress." There is no language in NRS 597.995 that even mentions or suggests "unconscionability", "duress" or any other equitable or legal contract defenses. NRS 597.995 only deals with arbitration.

More importantly, Respondents only sought to void the Arbitration Provision because it did not comport with NRS 597.995. *See AA118-AA119.* Respondents never raised or argued that the Licensing Agreement and the Arbitration Provision therein - which they jointly drafted - was unconscionable or that they executed the Licensing Agreement under fraud or "duress." On the contrary, Respondents unquestionably take the position that the Licensing Agreement is valid and enforceable and assert that, among other things:

(i) MMAWC and other defendants, who are not parties to the Licensing Agreement, breached the Licensing Agreement (*see e.g., AA016 at ¶111*); and

(ii) MMAWC and other defendants, who are not parties to the

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kclawnv.com

Licensing Agreement, breached the implied covenant of good faith and fair dealing of the Licensing Agreement (*see AA016 at ¶¶116-120)*.

V. Interstate And Foreign Commerce Are Most Certainly Involved Here

In their final concocted argument, Respondents claim that the Licensing Agreement does not involve the Commerce Clause because (a) Section 1.2 of the agreement purportedly excludes the United States and thus, interstate commerce; and (b) the Licensing Agreement is not with a foreign party and thus, not involve foreign commerce. *See Respondents Opening Brief at p. 19.* Respondents arguments are misplaced and misrepresent the language of the Licensing Agreement. The primary purposes of the Licensing Agreement provided for MMAWC to engage in interstate commerce and Global to engage in foreign commerce. *AA105-AA115.* And thus, the FAA's preemption is triggered here by *either* interstate or foreign commerce. *9 U.S.C. § 1* ("'commerce,' as herein defined, means commerce among several States or with foreign nations….").

Section 1.2 of the Licensing Agreement does not "exclude the United States and its territories from its reach" or "takes the action out of the United States"[5] as Respondents represent. Section 1.2 provides that MMAWC would retain the rights to use the intellectual property at issue within South,

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kcdawnv.com

Central and North America (including the U.S. of course) and that Global would retain the rights to use the same intellectual property in any other part of the world. *AA Vol. 1 at AA106 (§1.2).*

There is no dispute that Congress can and does regulate the intellectual property rights provided in the Licensing Agreement as for example with copyrights (17 U.S.C. §101 *et seq*.) and trademarks (15 U.S.C. §§ 1051 *et seq*.). The FAA expressly applies to contracts evidencing any transaction/s involving commerce. *See* 9 U.S.C. § 2. As this Court has observed, the transactions involving the commerce and the Commerce Clause broad and far-reaching:

> The word involving in the FAA is broad and functionally equivalent to the word affecting for purposes of determining the FAA's reach….A transaction affects or involves interstate commerce if Congress could regulate the transaction through the Commerce Clause…. Even contracts evidencing intrastate economic activities are governed by the FAA if the activities, when viewed in the aggregate, substantially affect interstate commerce…What this means in the context of arbitration is that [s]o long as commerce is involved, the FAA applies.

U.S. Home Corp. v. Michael Ballesteros Tr., 134 Nev. Adv. Op. 25, 415 P.3d 32, 38 (2018)(internal quotations and citations omitted)(finding commerce clause applied arbitration provision of the CC&R's of a Southern

[5] *See Respondents Opening Brief at p. 19.*

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kcdawnv.com

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kcdawnv.com

Nevada community because the "transactions underlying the CC&Rs' —the construction and sale of multiple homes by out-of-state contractors using out-of-state supplies and suppliers—affect interstate commerce, meaning the FAA controls arbitration.") *See also Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964)(a restaurant which only did business in one location in Birmingham, Alabama substantially affected interstate commerce because such local restaurant served interstate travelers and the food it received moved through interstate commerce). Respondents' representations are also illogical. If the Licensing Agreement "takes the action out of the United States," as Respondents claim, then their entire complaint should be dismissed for improper venue. More importantly, Respondents' argument is irrelevant because the FAA's preemption also applies when foreign commerce is involved (*see* 9 U.S.C. §1).

And, foreign commerce includes the activities of US companies abroad and is not limited only to regulating contracts between US companies and foreign entities. "When the Constitution speaks of foreign commerce, it is not referring only to attempts to regulate the conduct of foreign companies; it is also referring to attempts to restrict the actions of American companies overseas." *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 68 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*,

530 U.S. 363, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000).

The record here unquestionably demonstrates the existence of foreign commerce, particularly Respondents' Complaint:

> [¶56]: "Over the following several months after settlement, GLOBAL executed agreements for media content sharing rights from several MMA organizations from all over the world on six continents based on the WSOF license branding.
>
> [¶57]. "GLOBAL's rights consist of over 100 international events per year, at a cost to produce of tens of millions of dollars, which dwarf the mere 8-10 events per year organized by DEFENDANTS."
>
> [¶100]: "GLOBAL has MMA event content all over the world including from Philippines, Japan, China, Australia, Malaysia, Italy, Spain, UK, Sweden, South Africa, and more."
>
> [¶101]: "GLOBAL had entered the China market…."
>
> [¶105]: "DEFENDANTS further unilaterally refused to allow GLOBAL its contractual rights to use the PFL name, and PFL has attempted to abandon its own contractual obligations in breach of the Settlement Agreement."
>
> [¶106]: "Due to DEFEDNANTS oppressive actions, the [China] partnership is now at risk of loss."

AA0010 and AA014-15.

The issues here clearly involve interstate and foreign commerce and therefore, the FAA preempts NRS 597.995.

//

//

//

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kcdawnv.com

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court, vacate the 03/13/18 Order and direct the District Court to compel arbitration of Respondents' claims, as Respondents expressly agreed to via the Arbitration Provision they jointly negotiated and drafted.

KENNEDY & COUVILLIER, PLLC

*/s/ Maximiliano D. Couvillier III, Esq.*_
Maximiliano D. Couvillier III, Esq.
Nevada Bar No. 7661
mcouvillier@kclawnv.com

Attorneys for Appellants MMAWC, LLC, Bruce Deifik and the Nancy And Bruce Deifik Family Partnership LLLP

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kclawnv.com

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kcdawnv.com

CERTIFICATE OF COMPLIANCE
PURSUANT TO NRAP 32

1. I hereby certify that this Appellants' Reply Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word, 2016 Edition, Times New Roman in 14-point font.

2. I further certify that this combined answering/opening brief complies with the page or type-volume limitations of NRAP 32(a)(7)(ii), excluding the parts exempted by NRAP 32(a)(7)(C), because:

It is proportionately spaced, has a typeface of 14 points or more and contains approximately 4,597 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for an improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 23(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: November 13, 2018.

KENNEDY & COUVILLIER, PLLC

/s/ Maximiliano D. Couvillier III
Maximiliano D. Couvillier III, Esq.
Nevada Bar No. 7661
mcouvillier@kclawnv.com

Attorneys for Appellants MMAWC, LLC, Bruce Deifik and the Nancy And Bruce Deifik Family Partnership LLLP

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kclawnv.com

CERTIFICATE OF SERVICE

I certify that on November 13, 2018, I served a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF** upon all counsel of record by depositing the same in the US Mail, correct postage pre-paid, to the following at their last known address:

Byron Thomas, Esq. (Bar 8906)
3275 S. Jones Blvd., Ste. 104
Las Vegas, NV 89146
Byronthomaslaw@gmail.com

Attorney of Record for Respondents

/s/ Maximiliano D. Couvillier III
An Employee of Kennedy & Couvillier, PLLC

KENNEDY & COUVILLIER, PLLC
3271 E. Warm Springs Rd. ◆ Las Vegas, NV 89120
Ph. (702) 605-3440 ◆ FAX: (702) 625-6367
www.kclawnv.com