IN THE SUPREME COURT OF THE STATE OF NEVADA

MAIDE, L.L.C. D/B/A GENTLE SPRING CARE HOME; SOKHENA K. HUCH; MIKI N. TON,

Appellants,

v.

CORINNE R. DILEO AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF THOMAS DILEO; THOMAS DILEO, JR., AS STATUTORY HEIR TO THOMAS DILEO; AND CINDY DILEO, AS STATUTORY HEIR TO THOMAS DILEO,

Respondents,

Supreme Court No.: 81804

District Court No.: A-19-797533-C

APPELLANTS' REPLY BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. Appellant, MAIDE, LLC, is a domestic limited liability corporation. Appellant SOKHENA "KENNY" HUCH is the sole managing member of MAIDE, LLC. No publicly held company or corporation owns 10% of MAIDE, LLC or has any ownership interest in it.

2. The undersigned counsel of record for Appellants are the only attorneys who have appeared on their behalf in this matter, both before this court and in the district court. Attorney John M. Orr, Esq., appeared for MAIDE SOKHENA HUCH, MIKI TON, AND MAIDE, LLC in the proceedings before the district court.

These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

Dated this 8th day of July, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: */s/ John M. Orr*

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I. INTRODUCTION

Nevada law has long held that "strong public policy favors arbitration, and arbitration clauses are generally enforceable." *Gonski v. Second Judicial Dist. Court of Nev.*, 126 Nev. 551, 557, 245 P.3d 1164, 1168 (2010), reversed in part on other grounds in *United States Home Corp. v. Ballesteros Tr.*, 134 Nev. 180, 415 P.3d 32 (2018). Both the Nevada Legislature and Nevada Supreme Court support the enforcement of arbitration provisions for alternative dispute resolution. In fact, the Nevada Supreme Court noted that arbitration is favored in this state because arbitration "generally avoids the higher costs and longer time periods associated with traditional litigation." *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004), reversed in part on other grounds in *United States Home Corp. v. Ballesteros Tr.*, 134 Nev. 180, 415 P.3d 32 (2018).

Accordingly, Nevada courts have uniformly held that agreements to arbitrate are specifically enforceable, and any doubts concerning the applicability of arbitration to the subject matter of the disputes are to be resolved in favor of arbitration. *See Silverman v. Fireman's Fund Ins. Co.*, 96 Nev. 30 (1980); *see also Exber, Inc. v. Sletten Const. Co.*, 92 Nev. 721 (1976). Indeed, when there is an agreement to arbitrate, there is a presumption of arbitrability. *See, Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990).

Respondents ("The DiLeos") now attempt to skirt those time-honored

concepts of law and policy by arguing that the instant arbitration agreement ("the Agreement") runs afoul of NRS 597.995's "specific authorization" requirement. The DiLeos argue for the first time in Respondents' Answering Brief that the Agreement is unconscionable. Now, the DiLeos having opened the door with their untimely arguments, Appellants ("Maide") counter that the Federal Arbitration Act ("FAA") preempts NRS 597.995 and thus, the statute does not apply in this matter. That means that, consequently, the statute's "specific authorization" requirement also does not apply here because that provision singles out and disfavors arbitration by imposing a requirement for arbitration that does not apply to any other contractual provisions. Further, the Agreement is neither procedurally nor substantively unconscionable.

Finally, even if NRS 597.995 pertained here, the Agreement would remain valid because it complies with the statute under either a strict- or substantial-compliance standard. Therefore, Maide respectfully requests this Court reverse and remand this matter and instruct the district court to enforce the Agreement.

II. LEGAL ARGUMENT

A. Legal Standard

The Supreme Court of Nevada reviews the denial of a motion to compel arbitration de novo. *Clark Co. Public Employees v. Pearson*, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990). Any "doubts regarding the propriety of arbitration are

resolved in favor of requiring arbitration. *Id.* at 591, 798 P.2d at 138.

B. The Arbitration Agreement is Valid and Enforceable

1. FAA Preempts NRS 597.995

The DiLeos assert that NRS 597.995(1) requires that an arbitration agreement include a specific authorization signed by and agreed to by the person against whom enforcement is sought. RAB 16. In support thereof, the DiLeos cite the unpublished case *Fat Hat, LLC v. DiTerlizzi*, No. 68479, 2016 Nev. Unpub. LEXIS 762, at *2, 385 P.3d 580, (Nev. Sept. 21, 2016). RAB 13. The DiLeos, in relying on *Fat Hat*, ignored the supreme court's observation that because "Fat Hat ma[de] no argument that the Federal Arbitration Act, 9 U.S.C. § 1, et seq. applies . . . [w]e therefore do not address NRS 597.995's validity or application under the FAA." *Fat Hat.*, at *3 fn 1. Here, the same failure has occurred. The DiLeos insist this Court nullify the Agreement under NRS 597.995's specific authorization requirement and raise the issue of unconscionability all the while ignoring that the FAA supersedes and preempts the state statute.

(a) Standard of Review

The threshold issue is whether the FAA preempts NRS 597.995, which this Court reviews de novo. *MMAWC v. Zion Wood Obi Wan Tr.*, 135 Nev. 275, 277, 448 P.3d 568, 570 (2019) (internal quotations omitted). This Court also reviews questions of statutory construction de novo. *Id.*

(b) The FAA preempts NRS 597.995's Specific Authorization Requirement

In arguing that the specific authorization requirement invalidates the Agreement, the DiLeos ignored current case law. They failed to cite *MMAWC v. Zion Wood Obi Wan Trust*, decided years after *Fat Hat*, which determined that the FAA preempts NRS 597.995's specific authorization requirement.

In *MMAWC*, the Nevada Supreme Court was tasked with evaluating whether the district court had improperly refused to enforce an arbitration provision on grounds that the provision had failed to include any specific authorization under NRS 597.995. 135 Nev. at 277, 448 P.3d at 570. The *MMAWC* Court held that "[b]ecause NRS 597.995 conditions the enforceability of arbitration provisions on a special requirement not generally applicable to other contract provisions, it singles out arbitration provisions as suspect and violates the FAA." This Court held that the FAA preempts NRS 597.995 in cases where it applies, and that the district court therefore erred by applying the statute to void the arbitration provision. *Id*. at 278, 448 P.3d at 575 (citing *Ballesteros*, 134 Nev. at 188, 415 P.3d at 40).

(c) The FAA Applies Here

The Agreement falls within the protections of the FAA, and the DiLeos' attempt to invoke NRS 597.995's limiting provisions directly violates federal and state law.

A written arbitration provision in a contract "involving commerce . . . shall

be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "State and federal courts must enforce the [FAA] . . . with respect to all arbitration agreements covered by that statute." *Marmet Heath Care Ctr., Inc. v. Brown*, 565 U.S. 530, 530–31 (2012). Thus, the FAA preempts state laws in all cases where the federal statute applies. The Nevada Supreme Court identified two categories of "FAA-preempted state laws . . . ." *Ballesteros*, 134 Nev. 180, 189, 415 P.3d 32, 40. "First, the FAA preempts state laws that outright prohibit arbitration of a specific claim . . . Second, FAA preemption arises when a 'doctrine normally thought to be generally applicable, such as . . . unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.'" *Id.* (internal quotations omitted).

The *Ballesteros* Court interpreted an arbitration agreement contained within a housing community's Covenants, Conditions, and Restrictions (CC&Rs), a document not facially a contract. *Id*. at 180, 415 P.3d at 34. After concluding that the CC&Rs properly included an arbitration agreement, the Court applied the "commerce-in-fact test" as "signal[ing] the broadest permissible exercise of Congress' Commerce Clause power." *Id*. at 187, 415 P.3d at 38. The Court declared that, hence, "it is perfectly clear that the FAA encompasses a wider range of transactions than those actually 'in commerce'—that is, within the flow of interstate commerce." *Id*. at 187, 415 P.3d at 38–39.

That conclusion harmonizes with a United States Supreme Court case in which the Court was asked to rule on a West Virginia law prohibiting arbitration clauses in nursing home contracts. *Marmet*, 565 U.S. at 531. In determining that the FAA applies to arbitration clauses in nursing home contracts, the Court assumed that such contracts involve commerce and ruled that the FAA's text does not exempt or except personal injury or wrongful death suits arising under any nursing home agreement containing an arbitration clause. *Id.* at 532–533. Similarly, the Eleventh Circuit held that a party cannot avoid the FAA's applicability to arbitration clauses which involve torts versus contract disputes. *See, McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.* 741 F.2d 342, 344 (11th Cir. 1984); *see also Estate of Margarette E. Eckstein v. Life Care Ctrs of Am., Inc.*, 623 F.Supp.2d 1235, 1240–41 (EDWA 2009); *Valley View Health Care, Inc. v. Chapman*, 992 F. Supp. 2d 1016 (EDCA 2014).

Here, the contract between Mr. DiLeo and Maide clearly "involved commerce." Gentle Spring provided Mr. DiLeo services including room, food service, laundry service, cleaning, and bedside care for minor temporary illnesses, for which he paid a monthly fee. 1App. 00081–83. Thus, employing the broad definition of "involving commerce" as articulated by this Court in *Ballesteros*, the FAA applies here, thereby superseding NRS 597.995's "specific authority" language. Therefore, unless this Court deems that any grounds exist for revocation,

the Agreement is valid and enforceable.

2. The Agreement is Neither Procedurally nor Substantively Unconscionable

The DiLeos raise only one possible ground for revocation of the Agreement. They argue that the Agreement is both procedurally and substantively unconscionable. RAB 40. Nothing could be further from the truth. The DiLeos essentially argue even though Ms. DiLeo signed the Agreement of her own free will and without coercion or fraud, the Court should invalidate the Agreement because they now do not feel like abiding with it. RAB 28. Such an unwarranted bait-and-switch must not be allowed to stand.

"Nevada law requires both procedural and substantive unconscionability to invalidate a contract as unconscionable." *Ballesteros*, 134 Nev. at 190, 415 P.3d at 40. "Because Nevada has long recognized a public 'interest in protecting the freedom of persons to contract' . . . [p]arties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy." *Holcomb Condo. Homeowners' Ass'n v. Stewart Venture, Ltd. Liab. Co.*, 129 Nev. 181, 187–88, 300 P.3d 124, 128–29 (2013). If procedural unconscionability is great, less evidence of substantive unconscionability is required to establish a contract is unenforceable. *Burch v. Second Judicial Dist. Court of State ex rel. County of Washoe*, 118 Nev. 438, 442–44, 49 P.3d 647, 650–

51 (2002).

Here, the DiLeos fail to assert any argument or present any set of facts evidencing either procedural or substantive unconscionability to invalidate the Agreement, as required by Nevada law.

(a) Procedural Unconscionability

The DiLeos claim that the Agreement was procedurally unconscionable because: (1) it did not advise Ms. DiLeo that she was waiving the constitutional right to a jury trial; (2) it is an adhesion contract where the parties had unequal bargaining power; (3) its careless drafting renders the provision confusing; and (4) Maide failed to provide Ms. DiLeo with a copy of the governing arbitration rules. RAB 42. DiLeo's arguments fail to demonstrate that the Agreement is fatally unconscionable.

First, this Court has ruled that "the FAA preempts laws that invalidate an arbitration agreement as unconscionable for failing to provide for judicially monitored discovery, not heeding the Federal Rules of Evidence, or *not affording a right to jury trial*." *Ballesteros*, 134 Nev. at 189–190, 415 P.3d at 40 (emphasis added) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011)). What is more, "[n]early all arbitration agreements forgo some procedural protections, such as the right to a trial by jury or court-monitored discovery." *Id.* at 191, 415 P.3d at 42. Indeed, "public policy favors such waivers in the arbitration

setting because arbitration provides a quicker and less costly means for settling disputes." *Id.* Ultimately, "although the rule that an abrogation of other legal rights makes a clause procedurally unconscionable arguably applies to any contractual clause, '[i]n practice, of course, the rule would have a disproportionate impact on arbitration agreements.'" *Id*. at 191–92, 415 P.3d at 42 (quoting *Concepcion*, 563 U.S. at 342.)

Second, as amply demonstrated, the Agreement is subject to the protection of the FAA. Notwithstanding this fact, the DiLeos ignore current, binding authority as cited above and instead cite to *D.R. Horton, Inc. v. Green*, specifically overruled by *Ballesteros* in part, to support their position that the Agreement is procedurally unconscionable on grounds that the parties had unequal bargaining power.

> To the extent our holdings in *D.R. Horton* and *Gonski* regarding the unconscionability of arbitration agreements disfavor arbitration in cases controlled by the FAA, they are overruled because they do not establish rules that 'exist at law or in equity for the revocation of any contract.' Rather, the procedural unconscionability rules established in those cases either apply only to arbitration agreements or, in practice, have a disproportionate effect on arbitration agreements.

Id. at 192, 415 P.3d at 42. Thus, the DiLeos cite to inapposite case authority, fatally undermining all of their arguments. However, even if *D.R. Horton* were not overruled here, that case's ultimate decision and the Court's reasoning support that the subject Agreement is enforceable. The *D.R. Horton* Court evaluated a

mandatory arbitration provision contained in a new home purchase agreement from a builder. *Id.* at 551, 96 P.3d at 1160. The buyer claimed that "he only read the first page of the document. He indicated that he did not read the second page because 'it was all fine print' and Horton's agent told him that it was a standard contract." *Id.* at 552, 96 P.3d at 1161.

The District Court determined that the arbitration clause was unenforceable because the homebuyers had no realistic bargaining opportunity; that is, the agreement was an adhesion contract. *Id.* at 554, 96 P.3d at 1163. The Supreme Court disagreed and reversed that finding. In fact, the Court held and the record demonstrated that it was possible to negotiate for deletion of the arbitration provision. *Id.* The District Court also concluded that the provision was procedurally deficient because the clause was in fine print and indistinguishable from many other contractual provisions, and thus its significance was downplayed. *Id.*

Here, none of the concerns discussed by the Supreme Court in *D. R. Horton* are present. First, the Agreement conspicuously set forth the arbitration provision on a separate page, with a signature line directly below the provision. It certainly was not hidden in fine print. Also, the DiLeos do not offer any evidence that the Agreement was an adhesion contract that failed to afford Ms. DiLeo an opportunity to bargain. Indeed, they claim that the Agreement was presented to Ms. DiLeo as a condition of residency, but they do not quote a single word from the contract

supporting that claim. They cannot because no such language exists. IApp. 00082–86. Nor do they offer evidence, even in the form of a self-serving declaration from Ms. DiLeo, that Maide did not allow her the opportunity to modify any of the terms. Thus, the Agreement is not an unenforceable adhesion contract.

Even so, a court may permit the enforcement of adhesion contracts where there is plain and clear notification of the terms and an understanding consent and if it falls within the reasonable expectations of the weaker party. *Obstetrics and Gynecologists William G. Wixted, M.D., Patrick M. Flanagan, M.D., William F. Robinson, M.D. Ltd. v. Pepper*, 101 Nev. 105, 107–08, 693 P.2d 1259, 1260–61 (1985); *See also Las Vegas Metro. Police Dep't v. Coregis Ins. Co*., 127 Nev. 548, 558, 256 P.3d 958, 964 (2011; *Benchmark Ins. Co. v. Sparks*, 127 Nev. 407, 412, 254 P.3d 617, 621 (2011).

Third, The DiLeos cite an unpublished Nevada Supreme Court case, *Henderson v. Watson*, No. 64545, 2015 Nev. Unpub. LEXIS 525 (Nev. Apr. 29, 2015) for the principle that an arbitration provision is procedurally unconscionable if a Defendant fails to provide the plaintiff with a copy of the governing rules. RAB 49. That case has no persuasive value. Indeed, this Court "cautions" Nevada counsel that "pursuant to NRAP 36(c)(3), parties can only cite to unpublished dispositions as persuasive authority if they were 'issued by the Supreme Court on or after January 1, 2016.'" *Las Vegas Dev. Grp., LLC v. Blaha*, 134 Nev. 252, 256

n. 6, 416 P.3d 233, 236 n. 6 (2018). Their improper citation to *Watson* constitutes the DiLeos' sole support for this claim, thus this Court need not consider it. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n. 38, 130 P.3d 1280, 1288 n. 38 (2006).

Finally, the DiLeos claim that the Agreement was "riddled with multiple typos and omissions that render the agreement confusing." RAB 48. In support, they cite *FQ Men's Club v. Doe*, No. 79265, 2020 Nev. Unpub. LEXIS 864, *7, 471 P.3d 753 (Sep. 17, 2020). Crucially, in analyzing the arbitration agreement in dispute, the Court noted "[i]n addition to misspelled words . . . the omission of *essential* words and phrases rendered certain provisions confusing." *Id*. at *6 (emphasis added). Furthermore, the purportedly "careless" drafting of the agreement in *Men's Club* was only one among the many considerations that led the Court to invalidate that agreement as procedurally unconscionable.

Here, none of the "typos and omissions" are essential to understanding the content of the Agreement. The Agreement contained the name of a sister facility because Maide "at times uses intake paperwork interchangeably because each facility is owned and operated by Maide." IApp. 00095. In addition, no grammatical errors present in the Agreement seriously suggest that it is somehow illegitimate, the DiLeos' grasping at straws notwithstanding.

In summation, the DiLeos utterly fail to demonstrate that the Agreement is

procedurally unconscionable. All bases on which they attempt to found this argument are invalid. Therefore, because both procedural and substantive unconscionability must exist to invalidate an arbitration agreement, this claim does not survive, and the Agreement is enforceable. *Ballesteros*, 134 Nev. at 192, 415 P.3d at 42.

(b) Substantive Unconscionability

Like in *Ballesteros*, because no procedural unconscionability is at play here, it is unnecessary to discuss substantive unconscionability. However, from an excess of caution, Maide demonstrates below that substantive unconscionability is likewise absent.

DiLeo claims that the Agreement is substantively unconscionable for three reasons: because 1) Maide had the unilateral and exclusive right to select the rules governing arbitration; 2) the governing rules require the parties to split arbitration fees; and 3) the rules mandate the arbitration proceedings and award remain confidential. RAB pp. 51–56. DiLeo claims wrongly on all three counts.

As a preliminary observation, as noted above, no evidence exists that Ms. DiLeo objected to any provision of the Resident Agreement or the Agreement at issue here. The DiLeos do not claim that she requested or even suggested changes to any of the Agreements' language. Moreover, if Ms. DiLeo had a concern about any part of the arbitration provision, there was nothing stopping her from

requesting that the Agreement be amended to eliminate it. Of course, she never testified nor submitted any affidavit or other evidence to demonstrate that she had any concern, or if she did, what she did about it, and for good reason—she had none.

First, the DiLeos argue the Agreement is substantively unconscionable because it requires the arbitration to be conducted in accordance with the American Health Lawyers Association (AHLA) alternative dispute resolution program, rules she had no part in selecting. RAB p. 51. This argument is divorced from the law regarding substantive unconscionability. Substantive unconscionability focuses on the terms of the contract itself, and whether it is one-sided. *Gonski*, 126 Nev. at 559–60, 245 P.3d at 1170. In considering substantive unconscionability, courts look for terms that are "oppressive." *Id.* The DiLeos offer no explanation as to why the AHLA's alternative dispute resolution program is oppressive or one-sided. Moreover, Ms. DiLeo did not object to the rules as proffered in the Agreement.

Second, the DiLeos improperly rely upon *D.R. Horton* to advance a concocted theory that the Agreement is substantively unconscionable because DiLeo "may be required to split fees if the arbitration hearing lasts more than three (3) days." RAB p. 53–54. In *D.R. Horton*, the agreement contained a provision that provided that "[a]ll other fees and expenses s*hall be divided equally between Buyer and Seller.*" The Supreme Court of Nevada, citing *Ting v. AT&T*, 319 F.3d 1126,

1149 (9th Cir. 2003), stated that a provision requiring parties to equally split arbitration costs was substantively unconscionable. The *D.R. Horton* Court highlighted the Ninth Circuit's holding in *Ting* wherein it noted that "where an arbitration agreement is concerned, the agreement is unconscionable unless the arbitration remedy contains a modicum of bilaterality." *D.R. Horton*, 120 Nev. at 558, 96 P.3d at 1165 (citing *Ting*, 319 F.3d at 1149). When discussing the fee-splitting provision that AT&T used in *Ting*, the Ninth Circuit stated that "the scheme is unconscionable because it imposes on some consumers costs greater than those a complainant would bear if he or she would file the same complaint in court." *Id.* The *D.R. Horton* Court also held that the fee-splitting provision by itself was concerning because high arbitration costs could preclude a litigant from vindicating their rights in the arbitral forum. "Ordinary consumers may not always have the financial means to pursue their legal remedies, and significant arbitration costs greatly increase that danger." *Id.*

Here, *D.R. Horton* does not apply for two reasons. First, the AHLA's alternate dispute resolution rules do not require the parties to equally split costs.[1] In fact, AHLA's rules specifically exempt consumers, such as Ms. DiLeo, from paying a filing fee to initiate arbitration,[2] state that Maide would be required to

[1] Available at https://www.americanhealthlaw.org/getmedia/fd876c19-8c1c-406e-8263-aa916c9a39f3/20_DRS-Consumer.pdf.

[2] *Id*. at Section 2.3.

advance any deposits for the arbitration proceedings,[3] and require that fees are to be paid by Maide, not the DiLeos.[4] The DiLeos do not incur any costs to access the arbitration forum to vindicate their rights.

In addition, the *Ting* and *D.R. Horton* courts focused on arbitration agreements between consumers and merchants and employees and employers. *D.R. Horton* involved home purchasers suing property developers in a construction defect case. *Ting* involved a class action law suit against AT&T, alleging that AT&T's Consumer Services Agreement violates California's Consumer Legal Remedies Act and that state's Unfair Practices Act.

Here, the DiLeos will not personally bear the costs of the arbitration unless: (1) the DiLeos volunteered to pay, (2) the arbitrator determined the DiLeos' claim was frivolous, or (3) if the hearing lasts more than 3 days (in which case the arbitrator *may* allocate costs and fees accordingly). Had the DiLeos initiated arbitration as Ms. DiLeo agreed per the Agreement, they would have saved money by not filing in court, thereby placing the monetary onus on Maide. The Agreement does not preclude the DiLeos from seeking relief, and the AHLA rules do not require the DiLeos to pay any costs to initiate arbitration. Overall, the Agreement does not generally require the DiLeos "to bear any type of expenses [that they]

[3] *Id*. at Section 5.3.

[4] *Id*. at Section 7.6.

would not be required to bear if he or she were free to bring the action in court." *Ting*, 319 F.3d at 1151.

Third, the governing rules do not mandate confidentiality. The DiLeos employ a disingenuous reading of *Ting* to claim that the rules burden them with confidentiality. However, the *Ting* Court was tasked with evaluating an arbitration agreement that *itself* contained a confidentiality provision. *Ting*, 319 F.3d at 1151–52. Here, the Agreement does not mention confidentiality of arbitration proceedings or the results, let alone require it. DiLeo's *Ting* analysis is misplaced at best.

What is more, DiLeo conflates the confidentiality provision in *Ting* with the AHLA rules. But even if the comparison were remotely apt, the rules do not mandate the arbitration proceeding and award remain confidential as DiLeo argues. Rather, the rules require "the *Administrator and the arbitrator* to maintain the confidential nature of the arbitration proceeding and any award . . . ."[5] The rules do not impose a gag order on the parties.

The DiLeos provide this Court with neither analysis nor evidence to demonstrate how this Agreement, or any of the conditions under which it was executed, was oppressive or one-sided. Nor do their remaining substantive unconscionability arguments hold water. Accordingly, because neither procedural

[5] *Id*. at Section 7.10 (emphasis added).

nor substantive unconscionability exist here, the Agreement is valid and enforceable.

3. The Agreement Complies with NRS 597.995

Maide has amply demonstrated that the FAA preempts NRS 597.995 and that there are no grounds for revocation, thereby confirming that the Agreement is valid and enforceable. But even if the Agreement were not subject to the FAA, it should be enforced because it complies with NRS 597.995. The DiLeos engage in a tortured interpretation of NRS 597.995, straining to impose a "strict compliance" standard. RAB 20–25. But even granting the premise of those five pages of logical gymnastics, the DiLeos do not demonstrate that the Agreement fails under that standard. In addition, they cite the statute's legislative history to argue that a strict application of the statute is wanted here. RAB 25–26. However, the statements cited do not support their argument. Further, the DiLeos claim that Corinne DiLeo did not have actual notice of the contents of the Agreement because she apparently failed to read any of the documents she was signing on behalf of Mr. DiLeo, and thus, she would suffer severe prejudice if this Court enforced the Agreement. RAB 27. Finally, The DiLeos argue that the Agreement lacked specific authorization under NRS 597.995.

Ultimately, none of those arguments supports invalidating the Agreement. Fatally for the DiLeos, the FAA preempts NRS 597.995, but even failing that, the

Agreement complies with NRS 597.995's "specific authorization" provision.

(a) Strict Compliance

NRS § 597.995(1) provides that an arbitration agreement "must include specific authorization for the provision which indicates that the person has affirmatively agreed to the provision." In *Fat Hat, LLC v. DiTerlizzi*, this Court evaluated contracts in the "specific authorization" context and based its conclusion in part on the location of the arbitration agreement within the contract and the proximity of the signature line to the provision. This Court invalidated four employment contracts where

> 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.

Fat Hat, 2016 Nev. Unpub. LEXIS 762, at *4. The invalid agreements contained multiple pages with numerous separate paragraphs. Each paragraph was in fine print. IIApp. 00227–53. Further, the signature block at the conclusion of the agreement applied to the whole agreement. *Id.* The *Fat Hat* Court held the two remaining arbitration agreements complied with NRS 597.995(1) because "[i]n addition to a signature line at the end of the contracts, both Hebert and Mihaylova

were required to fill in their names and addresses in the blank spaces of the provision, explicitly stating that the agreement to arbitrate was effective." *Id.* at *4–*5.

Here, Ms. DiLeo initially signed a Resident Agreement that contained five pages with a single signature block on page "five" that applied to the whole agreement. IApp. 00082–86. She also signed a "Resident Agreement Addendum" that contained the subject arbitration clause ("the Agreement"). *Id.* at 93. The Agreement contained its own signature line, and, just like the two valid arbitration clauses in *Fat Hat*, Mrs. DiLeo was required to fill in her name, date, and her signature. Moreover, the Agreement contained a bolded heading that reads "Grievance and Arbitration." *Id.* While the invalid agreements in *Fat Hat* were several pages in length in all fine print, the Agreement here is on a single page, lacks any fine print, and contains its own signature block. In no way can the arbitration provision logically be seen to conceal its contents by burying them in fine print or within multiple paragraphs of other, only peripherally related provisions.

The DiLeos assert that the two valid arbitration agreements in *Fat Hat* succeeded because they included both a general signature at the end of the entire contract as well as "specific authorization in that '[the plaintiffs] were required to fill in their names and addresses in the blank spaces of the [arbitration] provision,

explicitly stating that the agreement to arbitrate was effective.'" RAB 34. Amicus curiae Nevada Justice Association ("NJA")—an organization whose avowed goal is to "ensure that Nevadans' access to the courts is not diminished[,]"[6]—argues similarly that

> there must be *some separate written item* specific[ally] authoriz[ing] the provision, in addition to the overall signature indicating consent to all the terms of the contract. Thus, unless the mandatory arbitration provision is the sole provision of the entire agreement, there must be one signature for the overall agreement and one signature (or other item of writing) for the mandatory arbitration provision.

Amicus Brief 9 (internal quotation omitted) (emphasis added). The DiLeos and NJA unintentionally prove Maide's argument. Here, the Agreement appears on its own page, the content of which discusses only a resident's right to lodge grievances about services rendered by staff or other personnel—services laid out in detail *in the Resident Agreement*—and arbitration of any grievances. That separate page, with its specific reference to arbitration and dedicated signature line, is precisely the "separate written item" NJA references and serves as the analog to the valid specific authorization provided by requiring the *Fat Hat* Plaintiffs to sign in the blank spaces of the arbitration provision.

[6] https://www.nevadajustice.org/?pg=Public#What%20Does%20NJA%20Do?, last viewed July 6, 2021.

The DiLeos also assert that NRS 597.995's "notice implications were clearly articulated in the statute's legislative history" and then go on to quote statements made in Assembly committee hearings. RAB 25–26. One of those two cited statements is by *NJA's own lobbyist*, not by any legislator. RAB 26. Moreover, the statements bemoan arbitration clauses that are "not often prominently displayed and are sometimes buried within the fine print of an agreement, or what we call the "boilerplate provisions" of a contract" and appear only in "the small print that might appear in the middle of a multipage contract." RAB 26–27. The DiLeos' questionable representations of "legislative history" aside, the cited passages support Maide's arguments rather than contradict them by describing the exact kind of provisions that this Court proscribed in *Fat Hat*, which are not found in the subject Agreement.

The DiLeos further set forth a nonsensical argument that the arbitration provision in the "Resident Agreement Addendum" is itself "a wholly separate contract from the Admission Agreement," which somehow means that the arbitration provision applies only to "the rights and responsibilities associated with Resident 'Grievances' . . . ." RAB 34–36. Even a cursory review reveals that the instant Agreement is clearly labeled "Resident Agreement *Addendum*," meaning that it is an addendum to the Resident Agreement and hence, that the arbitration provision applies to the Resident Agreement.

As previously explained, the signature line for the Addendum is an inch below the arbitration clause. This is unlike the *Fat Hat* agreement that contained multiple paragraphs of provisions related to the nature and duration or work, payment, and a number of other unrelated provisions. IIApp. 00239–47.

For all the foregoing reasons, the Agreement complies with NRS 597.995 and is, therefore, valid and enforceable.

(b) Abuse of Discretion

The DiLeos argue that the District Court's decision "deserves deference and should not be disturbed absent an abuse of discretion."[7] RAB 38. They then attempt to justify the district court's "application of NRS 597.995 to the facts surrounding the Grievance and Arbitration Agreement . . . ." *Id.* However, the DiLeos employ the incorrect legal standard. "Whether a dispute arising under a contract is arbitrable is a matter of contract interpretation, which is a question of law that we review de novo." *State ex rel. Masto v. Second Judicial Dist. Court of State*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009) (citing *Pearson*, 106 Nev. at 590,

[7] The DiLeos cite *International Fidelity Insurance Company v. State*, 122 Nev. 39, 42, 126 P.3d 1133, 1135 (2006) for the proposition that this Court should not disturb a court's factual findings unless they are clearly erroneous and not based on substantial evidence. RAB 38. However, that case specifically concludes that "if the district court's findings are supported by substantial evidence, then the district court has generally not abused its discretion *in ruling on a bail bond matter*." *Id*. (emphasis added). The DiLeos do not offer cogent argument or relevant authority to support that principle regarding a court's analysis or interpretation of arbitration agreements, thus this Court need not consider that claim. *Edwards,* 122 Nev. at 330 n. 38, 130 P.3d at 1288 n. 38 (2006).

798 P.2d at 137). Thus, this Court does not defer to the district court's findings.

Even so, the DiLeos' argument still fails because the district court misinterpreted the Agreement in concluding that it did not "have a separate signature block or initial section for Plaintiffs to affirmatively agree to said provision." IIApp. 00281. As explained in detail above, the Agreement is on a separate page specifically dedicated to the arbitration provision and has a separate signature block directly below that provision. For these reasons, the Court erred as a matter of law in determining that the Addendum did not comply with NRS 597.995(1).

(c) Substantial Compliance

Even if the Agreement did not strictly comply with NRS 597.995, it substantially complied. To assess whether substantial compliance applies, Nevada courts "examine whether the purpose of the statute or rule can be adequately served in a manner other than by technical compliance with the statutory or rule language." *Levya v. Nat'l Default Servicing Corp.*, 127 Nev.470, 476, 255 P.3d 1275, 1278 (2011). Substantial compliance may be sufficient "to avoid harsh, unfair or absurd consequences." *Leven v. Frey*, 123 Nev. 399, 407, 168 P.3d 712, 717 (2007). This Court has also held that when the purpose of a statute is to give notice to a party, the doctrine of substantial compliance applies if the party receives actual notice and is not prejudiced. *See id.* ("The purpose of NRS

108.227(1) is to notify the property owner of the lien; therefore, substantial compliance with the requirements of the statute will suffice if the owner receives actual notice and is not prejudiced."); *see also, Hardy Cos., Inc. v. SNMARK, LLC*, 126 Nev. 528, 536, 245 P.3d 1149, 1155 (2010); *Rose, LLC v. Treasure Island, LLC*, 135 Nev. 145, 149, 445 P.3d 860, 865 (Ct. App. 2019) (holding that even where strict compliance with contractual notice requirements is required, if actual notice is received, failure to formally comply becomes immaterial).

Here, the district court's ruling resulted in a harsh, unfair, and absurd consequence. Maide has been deprived of the benefit of their bargain simply because the Resident Agreement Addendum contained two paragraphs rather than one. The intent of the Agreement was clear—that Mr. DiLeo could lodge grievances regarding the services Gentle Spring provided him and that those grievances would be resolved through arbitration.

Further, the DiLeos have failed to demonstrate with any evidence that Ms. DiLeo lacked "actual notice" of the Agreement. RAB 28. Indeed, by their own definition, she did receive actual notice. *Id*. ("Notice given directly to, or received personally by, a party.") They do not even claim that she was confused by the Agreement or otherwise failed to specifically authorize it. Instead, the DiLeos admitted, as they must, that Ms. DiLeo indeed received the Agreement and signed it—she simply failed to read it. They claim that "*her expected testimony is* that she

did not have specific knowledge of the Any Dispute Provision and that she blankly signed the entire Grievance and Arbitration Agreement among the papers it was bundled with." RAB 28 (emphasis added). Ms. DiLeo could easily have provided to this Court an affidavit or declaration to that effect. Tellingly, she did not.

To provide proper notice, it was incumbent on Maide to provide documents setting forth the terms of Mr. DiLeo's residence and the services provided, including that any disputes would be subject to arbitration, for Ms. DiLeo to review and sign. Maide fulfilled that obligation, thus, Ms. DiLeo received actual notice. What is more, Ms. DiLeo represented that she had read and agreed to all provisions of the contract in affixing her signature to the pertinent documents. Maide must not be punished now that the DiLeos are trying to have their cake and eat it too by claiming that Ms. DiLeo did not have actual notice based on her own failure to read a contract she signed. *Campanelli v. Conservas Altamira. S.A.*, 86 Nev. 838, 841, 477 P.2d 870, 872 (1970) ("when a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations"); *see also, Farmers Ins. Exch. v. Neal*, 119 Nev. 62, 65, 64 P.3d 472, 473 (2003) (holding that an insurance agreement is a contract and it is "the responsibility of the insured to read the insuring agreement and attach the plain meaning to the provisions

therein"); *FQ Men's Club v. Doe*, No. 79265, 2020 Nev. Unpub. LEXIS 864, *7, 471 P.3d 753 (Sep. 17, 2020) ("[T]he law will not excuse a party's own negligence by failing to review a contract before signing it (citing 1 Richard A. Lord, Williston on Contracts § 4:19 (4th ed. 2007) (detailing that a person cannot avoid the enforcement of a contract by failing to read it unless "a reasonable excuse appears.")))

Moreover, the DiLeos will suffer no prejudice if this Court orders enforcement of the Agreement. Arbitration is not prejudicial per se. The DiLeos will have a full and fair opportunity to conduct discovery, present evidence, examine witnesses, be heard by a neutral arbitrator, and obtain any appropriate relief during arbitration. If anything, Maide is prejudiced by the Estate's avoidance of the Agreement to the extent they are being robbed of the benefit of their bargain. While Maide honored their obligations under the contract to provide group home services to Mr. DiLeo, the DiLeos have stripped Maide of their contractual right to the more efficient, inexpensive arbitration process.

In the end, the DiLeos would upend Nevada's longstanding presumption of arbitrability in favor of a tortured and hide-bound interpretation of NRS 597.995. That interpretation would deprive Maide of the benefit of the bargain they made with Ms. DiLeo that the parties would arbitrate any grievances arising from the services provided to Mr. DiLeo as enumerated in the Resident Agreement. Maide

complied with NRS 597.995, whether by a strict- or substantial-compliance standard. Therefore, they respectfully request this Court enforce the Agreement in this matter.

C. Maide Does not Argue on Appeal That Cindy DiLeo and Thomas DiLeo, Jr. are Bound to the Agreement

The DiLeos engage in a lengthy discussion intended to demonstrate that Mr. DiLeo's children, Cindy and Thomas, are not subject to the Agreement. RAB 56–61. It is not clear why they went to that trouble because Maide does not argue that issue on appeal. Instead, the DiLeo heirs' case was stayed while the dispute is pending arbitration.

III. CONCLUSION

Here, the FAA governs the Agreement and thus, it preempts NRS 597.995. Moreover, the DiLeos do not establish that the Agreement is unconscionable. Even if the FAA did not preempt the statute, the District Court erred as a matter of law in finding that the subject arbitration Agreement does not comply with NRS 597.995(1). It further abused its discretion by not finding that the Agreement substantially complies with this same statute. Maide, therefore, respectfully requests this Court reverse the District Court's order denying its motion to compel arbitration and direct the Estate's claims to binding arbitration and to stay the Heir's claims pursuant to NRS 38.241(7).

Dated this 8th day of July, 2021.

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CERTIFICATE OF COMPLIANCE

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 imposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record be supported by reference to the page or transcript or appendix where the matter relied upon is found. In addition, I certify that this brief satisfied NRAP 32 with an approximate word count of 6,585 words, using 14-point, Times New Roman font. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirement of the Nevada Rules of Appellate Procedure.

Dated this 8th day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2021, I served the foregoing APPELLANTS' REPLY BRIEF upon the following parties by placing a true and correct copy thereof in the United States Mail in Las Vegas, Nevada with first class postage fully prepaid:

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