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, Appellees,	Supreme Court No.: 81804

APPELLANTS' RESPONSE TO APPELLEES' MOTION TO STRIKE APPELLANTS' REPLY BRIEF ARGUMENT REGARDING THE FEDERAL ARBITRATION ACT

Appellants, MAIDE, L.L.C. D/B/A GENTLE SPRING CARE HOME; SOKHENA K. HUCH; and MIKI N. TON by and through their attorneys of record, LEWIS BRISBOIS BISGAARD & SMITH LLP, file their Opposition to Appellees' Motion to Strike Appellants' Reply Brief Argument Regarding the Federal Arbitration Act. This Response is made and based upon the papers and pleadings on file herein, the following Memorandum of Points and Authorities, and any oral argument allowed by the Court during a hearing of this matter.

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POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants move this Court to exercise its discretion and prerogative and consider the applicability of the Federal Arbitration Act ("FAA") because this case raises issues of public importance as its relates to NRS 597.995's requirement that arbitration agreements' contain a specific authorization. Furthermore, justice requires consideration of Defendants' FAA argument because this argument was raised in response to Plaintiffs' arguments regarding unconscionability that were raised for the first time in their Answering Brief. This Court has held that although an issues is waived if not raised in a reply brief, it is the court's "prerogative to consider issues a party raises in its reply brief, and we will address those issues if consideration of them is in the interests of justice." *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011). Plaintiffs' argument that justice does not require consideration of Defendants' FAA argument because it lacks evidentiary support misconstrues the record and the relevant law governing the FAA. As set forth below, Maide, LLC's commercial business is "within commerce" as that phrase has been interpreted by this Court. As a result, the FAA governs the subject arbitration agreement (the "Agreement") and preempts NRS 597.995.

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II. LEGAL ARGUMENT

A. Justice Requires the Court Consideration of Defendants' FAA Arguments

Plaintiffs assert that this Court should not consider Defendants' FAA arguments because they were not raised in the lower court or in the Opening Brief. Whether an argument was raised in the lower court or in a party's opening brief, however, is not the end of the inquiry. This Court may exercise its discretion and prerogative and consider arguments raised for the first time in reply brief in the interest of justice. *Id.*

In this case, justice requires the consideration of Defendants' FAA arguments because those arguments were raised in response to Plaintiffs' unconscionability arguments that were never raised in the district court and raised for the first time in their Answering Brief. Plaintiffs' unconscionability arguments directly implicate the FAA. As outlined in Defendants' Reply Brief, 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.'" *United States Home Corp. v. Ballesteros Tr.*, 134 Nev. 180, 189, 415 P.3d 32, 40 (2018). (internal quotations omitted). Plaintiffs did just that in their Answering Brief. Not only did Plaintiffs assert unconscionability as an affirmative defense to the Agreement for the first time, but they also construed the doctrine of unconscionability in such a way as to disfavor arbitration. From this

perspective, it is ironic that Plaintiffs criticize Defendants' FAA argument being raised for the first time in the Reply brief because it was Plaintiffs' brand new arguments in their Answering Brief that precipitated Defendants' FAA argument.

B. The Record Reflects that the Subject Arbitration Agreement Implicates Interstate Commerce

Plaintiffs incorrectly assert that the record is devoid of any evidence that the subject arbitration agreement implicates interstate commerce. Plaintiffs argue that the Agreement does not invoke interstate commerce because the Agreement only relates to grievances and disputes at Defendants residential group home in Clark County, Nevada. This argument misconstrues the law governing the FAA. The mere fact the Agreement does not involve interstate parties is not the end of the inquiry when considering whether the FAA applies. This Court, when assessing whether the FAA governs an arbitration agreement, has held that the reach of the FAA is broad and it applies even to contracts that merely "affect" commerce. *Id.* at 186, 415 P.3d at 38. This Court has further held that "[e]ven contracts evidencing intrastate economic activities are governed by the FAA if the activities, when viewed in the aggregate, "substantially affect interstate commerce." *Id.* (citing *United States v. Lopez*, 514 U.S. 549, 556, (1995)). This Court has 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 "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.

In this case, there is evidence in the record that the subject Agreement is in the flow of commerce or affects commerce. 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.

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II. CONCLUSION

Based on the foregoing, justice requires the consideration of Defendants' FAA arguments because those arguments were necessitated by Plaintiffs' brand new arguments relative to unconscionability that were rasied for the first time in their Answering Brief. Moreover, the record clearly demonstrates that the subject Agreement involves commerce and is, therefore, governed by the FAA.

Dated this 3rd day of August, 2021.

LEWIS BRISBOIS BISGAARD & SMITH LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2021, the foregoing APPELLANTS' RESPONSE TO APPELLEES' MOTION TO STRIKE APPELLANTS' REPLY BRIEF ARGUMENT REGARDING THE FEDERAL ARBITRATION ACT was filed electronically with the Nevada Supreme Court. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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