

**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.:

Electronically Filed  
Oct 12 2021 04:03 p.m.  
A-19-797533C  
Elizabeth A. Brown  
Clerk of Supreme Court

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**APPELLANTS' SUPPLEMENTAL 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 12<sup>th</sup> day of October, 2021.

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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”) argue that the instant arbitration agreement

(“the Agreement”) runs afoul of NRS 597.995’s “specific authorization” requirement. 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.

## **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 FAA Applies to this Case**

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 evaluated 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.” *Id.* 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 (11<sup>th</sup> 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).

The First Circuit Court of Appeals has emphasized that the “operative jurisdictional words” in Section 2 of the FAA are “involving commerce.” *Waithaka v. Amazon.com, Inc.*, 966 F. 3d 10, 23–24 (1st. Cir. 2020) (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001)). The first circuit outlined that this phrase, “involving commerce,” is distinct and broader from the term of art “in commerce,” which refers to only persons or activities within the flow of interstate commerce.” *Id.* at 24. Thus, the mere fact an activity or person is crossing state lines is not the central question in whether the FAA applies. The jurisdictional question is whether the subject matter of a dispute “involves commerce.” This language broadens the sweep of the FAA to beyond the regulation of commercial goods traveling in interstate commerce. *See U.S. v. Cummings*, 281 F.3d 1046, 1048 (9th Cir. 2002).

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. Providing these services requires Maide to purchase goods within the flow within commerce and are

shipped across state lines. Maide also conducts transactions across state lines insofar as it accepts payment from family members in other states. Maide also accepts residents who are Nevada Medicaid beneficiaries, which is subsidized by the federal government. Thus, employing the broad definition of “involving commerce” as articulated by this Court in *Ballesteros*, the FAA applies here and supersedes NRS 597.995’s “specific authority” language. Therefore, unless this Court deems that any grounds exist for revocation, the Agreement is valid and enforceable.

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## II. CONCLUSION

Here, the FAA governs the Agreement and thus, it preempts NRS 597.995. 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 12<sup>th</sup> day of October, 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 1,558 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 12<sup>th</sup> day of October, 2021.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on this 12<sup>th</sup> day of October, 2021, I served the foregoing APPELLANTS' SUPPLEMENTAL 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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