

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 WILLIS OF ARIZONA, INC. and
3 WILLIS TOWERS WATSON
4 INSURANCE SERVICES WEST,
INC.,

5 Appellants,

6 vs.

7 HAKKASAN USA, INC.,

8 Respondent.
9

Supreme Court No. : 82829
(Consolidated with Case No. 82833)

District Court No. **Electronically Filed**
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 Elizabeth A. Brown
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11 Consolidated Appeal and Petition for Writ of Mandamus from the Eighth Judicial
12 District Court of State of Nevada for the County of Clark

13 The Honorable Elizabeth Gonzalez, District Judge

14 **RESPONDENT’S MOTION TO DISMISS APPEAL**

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1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. Introduction**

3 As explained in the Answering Brief filed concurrently herewith by
4 Respondent Hakkasan USA, Inc. (“Hakkasan”) in this consolidated proceeding,
5 this Court does not have jurisdiction to decide the appeal noticed by Willis of
6 Arizona, Inc. and Willis Towers Watson Insurance Services West, Inc.
7 (collectively, “Willis”) in Case No. 82829 because the District Court did not enter
8 an order denying a motion to compel arbitration below, and there is no final order
9 from which this appeal may be properly taken. Therefore, Willis’s appeal in Case
10 No. 82829 should be dismissed for lack of appellate jurisdiction.¹

11 **II. Background**

12 On February 11, 2021, Willis filed a Motion to Strike Hakkasan’s Jury
13 Demand as to Its Claims Against the Willis Defendants Or, in the Alternative, to
14 Compel Arbitration (the “Motion”). Petitioners’ Appendix in Case 82833, Volume
15 I (“P. App’x I”) at 61–70. Willis’s primary argument in the Motion was that
16 Hakkasan had waived its constitutional right to have its tort claims against Willis
17 tried before a jury in light of an inconspicuous clause buried within an un-signed
18 document entitled “Brokerage Terms, Conditions & Disclosures” (the “T&Cs”),
19 which was attached to the back of an insurance proposal transmitted to Hakkasan
20 that governs the “purchase [of] insurance coverages, products, and/or services”
21 through Willis. *Id.* at 130. Willis argued that Hakkasan’s claims should be
22 compelled to arbitration *only if* the District Court found that the purported jury
23 waiver clause within the T&Cs (the “Jury Waiver Clause”) was unenforceable,
24 citing a clause in the T&Cs that reads: “To the extent the foregoing jury trial

25 _____
26 ¹ Notwithstanding this Court’s want of jurisdiction to decide Willis’s appeal in
27 Case No. 82829, this Court does have original jurisdiction to decide Willis’s
28 petition for writ of mandamus in Case No. 82833.

1 waiver is not enforceable under the governing law, . . . any dispute arising out of or
2 in connection with these Terms, Conditions & Disclosures . . . will be resolved by
3 binding arbitration” *Id.* at 133 § 1.13. Willis raised no other ground upon
4 which Hakkasan’s claims could be compelled to arbitration, and it expressly
5 limited its request to compel arbitration by “assuming *arguendo* that the [T&Cs’]
6 jury waiver provision is not enforceable” *Id.* at 68. Willis likewise so limits
7 its argument on appeal. Br. 4, 19, 27.

8 In opposition to Willis’s Motion, Hakkasan argued that (1) Hakkasan’s tort
9 claims against Willis were outside the scope of the Jury Waiver Clause, as the
10 T&Cs exclusively govern Willis’s *purchase* of insurance on Hakkasan’s behalf,
11 and Hakkasan’s claims arise from Willis’s participation in a fraudulent scheme that
12 occurred *months after* Willis had procured insurance for Hakkasan, (2) the
13 unsigned T&Cs’ nondescript Jury Waiver Clause was unenforceable because
14 Hakkasan did not knowingly, voluntarily, and intentionally assent to it, and (3)
15 even if the Jury Waiver Clause is unenforceable, Hakkasan’s claims should not be
16 compelled to arbitration because they are outside the scope of the T&Cs.

17 Petitioners’ Appendix in Case 82833, Volume II (“P. App’x II”) at 141–160.

18 On March 25, 2021, the District Court denied Willis’s Motion, holding that
19 “Hakkasan’s present claims against Willis for civil conspiracy, constructive fraud,
20 negligence, and intentional interference with contractual relations are outside the
21 scope of the Dispute Resolution clause in Section 1.13 of the T&Cs.” *Id.* at 286.
22 Because the District Court held that the purported Jury Waiver Clause did not
23 apply to Hakkasan’s present claims against Willis, it had no occasion to address
24 whether the clause was unenforceable as a matter of law, and indeed, the District
25 Court made no ruling as to that clause’s enforceability. *Id.* Recognizing that
26 Willis’s alternative argument to compel arbitration was expressly contingent on a
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1 finding that the Jury Waiver Clause was unenforceable,² the District Court had no
2 basis to rule on Willis’s request to compel Hakkasan’s claims to arbitration. For
3 these reasons, the District Court ultimately denied Willis’s Motion to strike
4 Hakkasan’s jury demand and did not address Willis’s alternative request to compel
5 Hakkasan’s claims to arbitration. *Id.*

6 On April 23, 2021, Willis noticed its appeal from the District Court’s order
7 denying Willis’s Motion in Case No. 82829 and petitioned this Court for a writ of
8 mandamus directing the District Court to strike Hakkasan’s jury demand in Case
9 No. 82833. On May 5, 2021, Willis moved to consolidate Case Nos. 82829 and
10 82833 for all further proceedings, and on May 28, 2021, this Court granted Willis’s
11 motion and set a consolidated briefing schedule.

12 **III. Argument**

13 “This court has jurisdiction to consider an appeal only when the appeal is
14 authorized by statute or court rule.” *Karcher Firestopping v. Meadow Valley*
15 *Contractors, Inc.*, 125 Nev. 111, 113 (2009). Without a statutory basis for this
16 Court’s appellate jurisdiction, an appeal must be dismissed. *Id.* at 117. “In
17 Nevada, appeals from arbitration orders are governed by statute, specifically NRS
18 38.247(1).” *Id.* Nevada Revised Statutes 38.247(1)(a) provides that “[a]n appeal
19 may be taken from [] [a]n order denying a motion to compel arbitration.”

20 Willis cited Nevada Revised Statutes 38.247(1)(a) as the sole basis for this
21 Court’s jurisdiction to entertain Willis’ appeal in Case No. 82829. Br. 1.
22 However, the District Court did *not* enter an order denying a motion to compel
23 arbitration below. P. App’x II at 284–86. As the District Court recognized, Willis’
24 alternative argument that Hakkasan’s claims should be compelled to arbitration

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26 ² The Court observed: “Willis further contends that Hakkasan’s claims against
27 Willis in this case should be compelled to arbitration in accordance with the T&Cs
28 if the jury waiver provision is not enforceable under Nevada law.” *Id.*

1 was expressly contingent upon a predicate finding that the Jury Waiver Clause was
2 unenforceable as a matter of law. *Id.* at 286. While the District Court found that
3 Hakkasan’s claims were outside the scope of the Jury Waiver Clause, it did not
4 make any findings as to the enforceability of the Jury Waiver Clause, and indeed, it
5 did not have to rule on the Jury Waiver Clause’s enforceability to dispose of
6 Willis’ Motion. *Id.* Because the District Court did not rule on the enforceability of
7 the Jury Waiver Clause, it had no basis to rule on the arbitrability of Hakkasan’s
8 claims, as the *sole* basis Willis advanced for compelling Hakkasan’s claims to
9 arbitration was the T&Cs’ fallback arbitration clause. P. App’x I at 68. Because
10 the District Court did not deny Willis’ alternative motion to compel Hakkasan’s
11 claims to arbitration, which was wholly dependent on a finding that the clause was
12 unenforceable, the District Court’s Order neither granted nor denied a motion to
13 compel arbitration, and it is not appealable under Nevada Revised Statutes
14 38.247(1)(a). *See John Graves Propane of Ariz., Inc. v. Thompson*, 126 Nev. 727,
15 367 P.3d 787 (2010) (rejecting appellant’s characterization of district court’s order
16 below and dismissing appeal).

17 It should not be inferred that the District Court ruled *sub silentio* on the
18 enforceability of the Jury Waiver Clause or the arbitrability of Hakkasan’s claims,
19 given that it was not necessary for the District Court to decide either of those issues
20 in order to dispose of Willis’ Motion after ruling that Hakkasan’s claims were
21 outside the scope of the Jury Waiver Clause. *See Apple, Inc. v. Samsung Elecs.*
22 *Co.*, No. 11-CV-01846-LHK, 2013 WL 5693759, at *3–4 (N.D. Cal. Oct. 15,
23 2013) (declining to infer that magistrate judge made implicit ruling *sub silentio* on
24 issue that was unnecessary for magistrate judge to decide). It was within the
25 District Court’s sound discretion not to address either of those issues after ruling
26 that Hakkasan’s claims were outside the scope of the Jury Waiver Clause, and
27 absent any explicit language to the contrary, that is the most reasonable reading of
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1 the District Court’s Order. *See Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 570
2 (2007) (“[A] judgment’s legal effect must be determined by construing the
3 judgment as a whole, and that, in the case of ambiguity, the interpretation that
4 renders the judgment more reasonable and conclusive and brings the judgment into
5 harmony with the facts and law of the case will be employed.”).

6 **IV. Conclusion**

7 For the foregoing reasons, Willis’s appeal in Case No. 82829 should be
8 dismissed.

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1 DATED this 3rd day of November in the year 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 3rd day of November, 2021, a true and correct copy of Respondent’s Motion to Dismiss Appeal was filed with the Clerk of Court using the Supreme Court of the State of Nevada’s Eflex Filing system and served electronically to counsel for all parties with an email address on record.

DATED this 3rd day of November, 2021 /s/ James E. Whitmire

James E. Whitmire

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