

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT
COURT, CLARK COUNTY,
NEVADA; THE HONORABLE
ELIZABETH GONZALEZ

Respondents,

And

HAKKASAN USA, INC.,
ENDURANCE AMERICAN
SPECIALTY INSURANCE
COMPANY, and SOMPO
INTERNATIONAL HOLDINGS,
LTD.,

Real Parties in Interest.

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(Consolidated with Case No. 82833)

District Court No. : A-20-816145-B

Consolidated Appeal and Petition for Writ of Mandamus from the Eighth Judicial
District Court of State of Nevada for the County of Clark
The Honorable Elizabeth Gonzalez, District Court Judge

**RESPONDENT'S RESPONSE TO PETITIONERS' MOTION TO STRIKE
STATEMENTS FROM RESPONDENT'S ANSWERING BRIEF**

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MEMORANDUM OF POINTS & AUTHORITIES

I. Introduction

In this consolidated appeal and mandamus proceeding, Appellants and Petitioners Willis of Arizona, Inc. and Willis Towers Watson Insurance Services West, Inc. (collectively, “Willis”) seek this Court’s review of the District Court’s holding that Hakkasan’s tort claims against Willis fall outside of the scope of a Jury Waiver Clause contained in Section 1.13 of Willis’s Brokerage Terms, Conditions & Disclosures (the “T&Cs”). Below, Respondent Hakkasan USA, Inc. (“Hakkasan”) raised an alternative argument that the Jury Waiver Clause is unenforceable under Nevada law, but the District Court did not reach that issue after deciding Hakkasan’s claims were outside the scope of the clause. Nevertheless, Willis urges this Court to decide the enforceability of the Jury Wavier Clause in the first instance, based in part upon extraneous evidence that Willis never presented to the District Court. In connection to this argument, Willis has now filed a motion to strike certain statements from Hakkasan’s Answering Brief. According to Willis, documents Willis produced in discovery *after* the District Court denied Willis’s motion to strike Hakkasan’s jury demand render “misleading” and “frivolous” Hakkasan’s argument that “Willis created an impossible situation for Hakkasan by scheduling the [insurance] renewal meeting one business day before Hakkasan’s policies were set to expire” on March 29, 2019, when the T&Cs containing the Jury Waiver Clause were first provided to Hakkasan. Mot. to Strike 2, 5. Willis claims that “[t]his false narrative arguably violates NRAP 28.2(a)(2),” (*id.* at 9), which requires an attorney to certify that arguments made in a brief are not frivolous. Nev. R. App. P. 28.2(a)(2).

Willis's motion has no merit whatsoever. No statement in Hakkasan's brief is misleading at all, much less frivolous. It is undisputed that Willis did not provide the T&Cs containing the Jury Waiver Clause to Hakkasan until March 29, one business day before Hakkasan's existing insurance coverages were set to expire. Willis claims that Hakkasan's brief should have flagged emails provided in discovery that Willis contends suggests that the March 29 meeting was originally scheduled for March 21 but was postponed only at Hakkasan's request. Mot. to Strike 5. But that has no bearing on the fact that Willis waited until the eve of the renewal deadline to share the T&Cs containing the Jury Waiver Clause; Willis readily could have transmitted the T&Cs to Hakkasan any time after they were first created in February 2019. Nothing required Willis to disclose the T&Cs for the first time during the meeting, at which point Hakkasan had no time to carefully review them or any realistic chance to seek insurance through another broker. Moreover, the evidence that Willis cites consists entirely of hearsay by Willis's own employees and only suggests that Hakkasan may have asked to reschedule the meeting to March 25, not March 29. Willis provides no explanation for why the meeting ultimately took place on the eve of the renewal deadline or any reason to attribute the final meeting date to Hakkasan.

In short, nothing in Hakkasan's brief is misleading or frivolous. Willis's motion to strike should accordingly be denied.

II. Background

As explained in Hakkasan's Answering Brief, after Hakkasan first engaged Willis as its insurance broker in 2014, Willis consistently waited until the eve of Hakkasan's policy renewal deadlines to present voluminous proposal documents

that Hakkasan had to rely upon to make its insurance procurement decisions. Petitioner’s Appendix, Volume II (“P. App’x II”) at 164–65. Months before Hakkasan’s existing policies were set to expire on April 1, 2019, Hakkasan expressed concern to Willis about this practice and requested that Willis provide the information necessary for Hakkasan to evaluate its renewal options sufficiently in advance of that deadline. *Id.* Unfortunately, Willis did not provide its proposal for the 2019–20 policy term (the “Proposal”) until *one business day* before the April 1, 2019 renewal deadline.¹ *Id.* at 164–65. Tucked behind the fifty-five page Proposal was a form document entitled “Brokerage Terms, Conditions & Disclosures” that included about seventy single-spaced paragraphs of text. Petitioner’s Appendix, Volume I (“P. App’x I”) at 130–38. Willis did not alert Hakkasan to the inclusion of the T&Cs during the March 29 meeting, and Hakkasan never reviewed them or was even aware they were included with the Proposal.² P. App’x II at 166.

Of critical significance, the version of the T&Cs presented with the Proposal on March 29—the “2019 February 14” version—had *never* been presented to

¹ In response to Hakkasan’s admonition, Willis met with Hakkasan at least once around January 31 to have a high-level “Renewal Strategy Meeting.” P. App’x II at 165. However, to Hakkasan’s disappointment, Willis provided no new substantive information about Hakkasan’s renewal options during that meeting. *Id.* at 165, 260. On March 6, Willis and Hakkasan had another meeting to discuss the policies due for renewal on April 1. *Id.* at 265–67. But as the agenda for that meeting shows, Willis had failed to secure quotations from many insurers and had deemed some of the quotations that it had obtained unacceptable, leaving Hakkasan unable to make informed procurement decisions less than one month before the deadline. *Id.* at 266–67.

² Willis did not include a copy of its T&Cs with every renewal proposal it presented to Hakkasan. For example, Willis did not attach any version of the T&Cs to its proposal for the preceding 2018–19 policy term. P. App’x II at 167.

Hakkasan in connection with an insurance proposal before. P. App'x II at 166–67. And at no point during the March 29 renewal meeting did Willis mention, let alone negotiate, these updated provisions of the T&Cs. *Id.* at 165–66. Nor did Willis indicate in any manner to Hakkasan that there was a new clause in the T&Cs which for the first time during the parties' five-year relationship purported to waive Hakkasan's constitutional right to a jury trial. P. App'x II at 165–66. The Jury Waiver Clause is buried deep within this version of the T&Cs and was absent from every prior version of the T&Cs that Willis had provided to Hakkasan in preceding years. P. App'x I at 132–33; P. App'x II at 165–67. The Jury Waiver Clause is not underlined, capitalized, boldfaced, highlighted, italicized, or set aside from the rest of the text of the T&Cs in any way. P. App'x I at 132–33. The heading of Section 1.13 (where the Jury Waiver Clause is located) does not refer to jury trials or alert the reader that the clause purports to waive constitutional rights. *Id.* at 132. No officer of Hakkasan ever reviewed, acknowledged, or signed the T&Cs, and Mr. Brandon Roos, who attended the March 29 renewal meeting on behalf of Hakkasan, was not even aware that the Jury Waiver Clause existed during that meeting. P. App'x II at 166.

By presenting the Proposal for the first time one business day before Hakkasan's insurance coverage was set to lapse over its \$350 million business portfolio, Willis left Hakkasan no reasonable choice but to renew its various policies through Willis. *Id.* at 165. As a result, Hakkasan orally instructed Willis at the end of the March 29 meeting to bind coverage under several policies that Willis had presented. *Id.* at 165–66. After coverage was bound, Willis memorialized Hakkasan's renewal decisions by checking off boxes on a one-page document

entitled “Order to Bind,” which Hakkasan signed on April 3 at Willis’s request. *Id.* at 166. This Order to Bind form—the only renewal document Hakkasan actually signed in connection with the March 29 meeting—made no reference to the T&Cs or the Jury Waiver Clause. P. App’x I at 140; P. App’x II at 166.

Despite the fact that Willis unquestionably did not present the T&Cs containing the Jury Waiver Clause to Hakkasan until March 29, Willis has moved this Court to “strike references set forth in the Answering Brief suggesting that Willis waited until the last minute to provide Hakkasan with [the T&Cs].” Mot. to Strike 1. Willis claims that documents Willis produced after the motion to strike Hakkasan’s jury demand was briefed in the District Court establish that “the [March 29] meeting was originally scheduled to take place more than a week earlier,” on March 21, but “it had to be rescheduled at Hakkasan’s request.” *Id.* at 2 (emphasis omitted). Willis argues that Hakkasan’s characterization of Willis’s conduct “arguably violates NRAP 28.2(a)(2)” by setting forth a “misleading” or “frivolous position.” *Id.*

III. Argument

This Court should deny Willis’s motion. Rule 28.2(a)(2) of the Nevada Rules of Appellate Procedure provides that a brief must contain a certificate signed by counsel of record providing “[a] representation that to the best of the attorney’s knowledge, information and belief, the brief is not frivolous” Hakkasan’s representation that Willis waited until March 29 to present the T&Cs containing the Jury Waiver Clause is not frivolous. Rather, it is entirely accurate and indisputable. At most, Willis’s motion raises an argument for drawing a more charitable inference

about Willis's *intent* in waiting until March 29 to disclose the T&Cs—although even that limited argument is exceptionally weak.

Willis does *not* contest that it provided the Proposal and the separately appended T&Cs on the last business day before Hakkasan's existing policies were set to expire. Nor does Willis contest that the "2019 February 14" version of the T&Cs slipped behind the Proposal for the 2019–20 term had a new clause that had never been included in any prior version of the T&Cs provided to Hakkasan, purporting for the first time in the parties' years-long business relationship to waive Hakkasan's right to a jury trial. And Willis does not dispute that neither Hakkasan nor Willis mentioned, flagged, discussed, or negotiated the Jury Waiver Clause or any other provision of the T&Cs.

Instead, Willis claims that Hakkasan's assertions about Willis's delay in presenting the T&Cs are "misleading" and "frivolous" because Willis did not "intentionally" delay in providing the Proposal and the T&Cs to Hakkasan. Mot. to Strike 1. Rather, Willis argues, it had originally scheduled the meeting eight days earlier, on March 21, and Hakkasan then allegedly postponed the meeting. That argument is flawed in multiple respects and should be rejected.

As a threshold matter, Willis's argument relies on unreliable hearsay. The evidence that it cites consists solely of communications by Willis's own employees claiming that Hakkasan asked for the meeting to be rescheduled. Mot. to Strike Ex. A. Willis provides no sound basis to credit that sort of evidence. Moreover, that evidence was not presented to the District Court when it ruled on Willis's motion to strike Hakkasan's jury demand—despite the fact that these documents were already in Willis's possession, custody, and control. Thus, it is not part of the appellate

record. Willis cites no legal basis for this Court to consider extra-record evidence to resolve a contested factual question in the first instance, and contrary to Willis's invitation, this Court has consistently held that doing so is improper. *E.g. Liu v. Christopher Homes, LLC*, 130 Nev. 147, 156, (2014) (“[The Supreme Court of Nevada] do[es] not resolve this factual issue that the district court did not reach, as doing so would require [the Supreme Court] to inappropriately weigh the evidence and resolve questions of fact for the first time on appeal.”); *Zugel by Zugel v. Miller*, 99 Nev. 100, 101 (1983) (“[The Supreme Court of Nevada] is not a fact-finding tribunal; that function is best performed by the district court.”); *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 604 (1981) (“[A]n appellate court is not an appropriate forum in which to resolve disputed questions of fact.”).

Moreover, even if fully credited, Willis's extraneous evidence does not demonstrate that Hakkasan postponed the meeting to March 29, the eve of the renewal deadline. Rather, the communications attached to Willis's motion indicate that the meeting was initially rescheduled for March 25, not March 29, which would have given Hakkasan significantly more time before the renewal deadline to review the Proposal and the T&Cs.³ Nothing cited by Willis provides any explanation as to why the meeting was ultimately moved to March 29, and Willis's own declarant, Mr. Charles Halsey, does not attribute that further postponement to Hakkasan. Mot. to Strike Ex. A, Halsey Decl. ¶ 4. Willis's cited evidence certainly does not indicate

³ See Mot. Ex. A, WTW_0060786 (“We are rescheduling for Monday at the same time.”), WTW_0055041 (“We are rescheduling the meeting for Monday at the same time.”), WTW_0032614 (“Our meeting had to be moved to Monday.”).

that Hakkasan asked for the meeting to be scheduled one business day before the renewal deadline.

Even if there were any convincing evidence indicating that Hakkasan had asked for the meeting to be rescheduled for March 29, that would not render Hakkasan's truthful representations about when Willis provided the Proposal and the T&Cs misleading, much less frivolous. Willis's argument at most suggests a more charitable (if deeply implausible) interpretation of Willis's intent in furnishing the T&Cs so close to the deadline. But Willis's supposed intentions do not change reality: Hakkasan did not receive the Proposal or the T&Cs until the last business day before the April 1, 2019 renewal deadline, even though Willis contends it was prepared to present the Proposal as early as March 21 (Mot. to Strike 7; *id.* Ex. A, WTW_0032615), and the version of the T&Cs containing the new Jury Waiver Clause had been available as early as February 14—*over six weeks* before the March 29 meeting. P. App'x I at 130–38. Despite Willis's purported intention “to send our proposal documents sooner” (Mot. to Strike Ex. A, WTW_0005103), as Hakkasan had previously instructed (P. App'x II at 165), Willis ultimately failed to provide the Proposal and the T&Cs until the eleventh hour of the renewal process, thereby depriving Hakkasan of a meaningful opportunity to evaluate its insurance options and severely compromising Hakkasan's bargaining power by making it necessary for Hakkasan to renew its policies through Willis in order to avoid a disastrous lapse in coverage. P. App'x II at 165.

Further, Willis's story that it did not purposefully wait to provide the T&Cs to Hakkasan until the eve of the renewal deadline is simply not plausible. There was no reason that Willis had to wait until the March 29 meeting to furnish the T&Cs

that contained such a significant change from prior versions. Even indulging Willis's unsupported suggestion that Hakkasan requested that Willis postpone the renewal meeting until March 29, that would not have hindered Willis's ability to share the Proposal—or at least the T&Cs—in advance of the meeting. Indeed, on March 26, Willis's Senior Client Manager, Ms. Kristin Garcia, expressly contemplated transmitting the documents in advance of the meeting, but Willis ultimately failed to do so. Mot. to Strike Ex. A, WTW_0005103 (“Our meeting is now this Friday, but we are trying to send our proposal documents sooner.”). It would have been simple for Willis to have sent the T&Cs to Hakkasan well before the March 29 meeting, even if the Proposal was still being prepared, given that the T&Cs were finalized many weeks earlier, on February 14. P. App’x I at 130–38. Indeed, Willis had an opportunity to present the new T&Cs to Hakkasan on March 6, when Willis and Hakkasan met to have a broad “overview” discussion of Hakkasan’s renewal plan. P. App’x II at 265–66. Nevertheless, Willis elected to quietly slip the T&Cs behind the Proposal on the eve of Hakkasan’s renewal deadline, without ever mentioning that they contained a new provision purporting to waive Hakkasan’s constitutional right to a jury trial.

In sum, Hakkasan accurately describes Willis’s conduct in its Answering Brief, and Hakkasan’s assertion that Willis waited until one business day before the April 1, 2019 renewal deadline to furnish the Proposal and the T&Cs to Hakkasan—despite having numerous opportunities to do so earlier—is well-supported by the record, as is the common-sense conclusion that Willis’s delay in transmitting those documents severely compromised Hakkasan’s bargaining position. Willis’s motion at most raises a tenuous, immaterial argument that Willis’s conduct was

unintentional. In any event, that contention provides no basis to strike portions of Hakkasan's Answering Brief as "frivolous." Thus, Hakkasan's Answering Brief and accompanying attorney certification comply with Rule 28.2, and Willis's motion to strike statements from Hakkasan's Answering Brief should be denied.

IV. Conclusion

For the foregoing reasons, this Court should deny Willis's Motion to Strike Statements from Respondent's Answering Brief.

DATED this 20th day of January in the year 2022.

SANTORO WHITMIRE

By

/s/ James E. Whitmire

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 20th day of January, 2022, a true and correct copy of **RESPONDENT’S RESPONSE TO PETITIONERS’ MOTION TO STRIKE STATEMENTS FROM RESPONDENT’S ANSWERING BRIEF** was served by electronically filing with the Clerk of the Supreme Court using the EFlex system and served upon the persons/parties in the matter and identified on such system.

/s/ James E. Whitmire

James E. Whitmire