IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

v.

HAKKASAN USA, INC.,

Respondent.

Supreme Court Case No.: 82829

(consolidated with Case No. 82833)

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

Appeal from Eighth Judicial District Court, State of Nevada, County of Clark
The Honorable Elizabeth Gonzalez, District Judge

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

- Willis of Arizona, Inc. merged into Willis Towers Watson Insurance Services West, Inc. in December 2019;
- Wills Towers Watson Insurance Services West, Inc. is wholly owned by Willis of Michigan, Inc.;
- Willis of Michigan, Inc. is wholly owned by Willis HRH, Inc.;
- Willis HRH, Inc. is wholly owned by Willis US Holding Company, LLC (formerly Willis US Holding Company, Inc.);
- Willis US Holding Company, LLC is wholly owned by Willis North America Inc.
- Willis North America Inc. is wholly owned by Willis Group Limited;
- Willis Group Limited is wholly owned by Trinity Acquisition plc;
- Trinity Acquisition plc is wholly owned by Willis Towers Watson UK Holdings Limited;
- Willis Towers Watson UK Holdings Limited is wholly owned by TA I Limited;
- TA I Limited is wholly owned by Willis Investment UK Holdings Limited;
- Willis Investment UK Holdings Limited is wholly owned by Willis Netherlands Holdings B.V.;

- Willis Netherlands Holdings B.V. is wholly owned by Willis Towers Watson Sub Holdings Unlimited Company; and
- Willis Towers Watson Sub Holdings Limited Company is wholly owned by Willis Towers Watson PLC.

The following law firms whose partners or associates have appeared for the Appellants in the case (including proceedings in the district court) and are expected to appear in this court: (1) Brownstein Hyatt Farber Schreck, LLP; and (2) Saul Ewing Arnstein & Lehr LLP.

DATED this 3rd day of September, 2021.

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JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction over this matter pursuant to NRS 38.247(1)(a) because this is an appeal of an order denying a motion to compel arbitration. This appeal is timely in accordance with NRAP 4(a)(1) because notice of entry of the order appealed from was entered on April 14, 2021, and a notice of appeal was filed within 30 days, on April 23, 2021.

ROUTING STATEMENT

This matter is presumptively retained by this Court pursuant to NRAP 17(a)(9) because the lower court matter is a business court case.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the lower court err, as a matter of law, by concluding that Plaintiff/Appellee Hakkasan USA, Inc.'s ("Hakkasan") claims against Defendants/Appellants Willis of Arizona, Inc. and Willis Towers Watson Insurance Services West, Inc. (collectively, "Willis") were not governed by the dispute resolution provision in Willis's "Brokerage Terms, Conditions & Disclosures" (the "T&Cs"), which provides for the arbitration of disputes between the parties if the T&Cs' jury-waiver clause is unenforceable?[1]

[1] Willis previously filed a Petition for Writ of Mandamus (the "Petition") with this Court on April 23, 2021, requesting that the Court issue a writ of mandamus

STATEMENT OF THE CASE

This appeal and Docket No. 82833 arise out of the same order in the same lower court case interpreting the same dispute resolution provision. Willis is an independent insurance broker. It is not an insurance company. It assists clients like Hakkasan with purchasing insurance from various third-party insurance companies. In the underlying action, Hakkasan alleges it "contracted with Willis to provide [insurance] brokerage and claims-handling services" and that Willis engaged in conduct that was, among other things, "in breach of contract" by allegedly notifying Hakkasan's insurer, prematurely, of an impending COVID-19-related insurance claim. Hakkasan further asserts that Willis's alleged unauthorized communication with the insurer about Hakkasan's insurance claim allowed the insurer to issue an endorsement to Hakkasan's property insurance policy for the purpose of reducing the limits of insurance for Hakkasan's claim from the full policy limits of $350,000,000 per occurrence to a sublimit of $1,500,000. Hakkasan has demanded

directing the lower court to strike Hakkasan's demand for jury trial in accordance with the same dispute resolution provision in the T&Cs that is at issue in this appeal. *See* Docket No. 82833. While Willis maintains, as set forth in detail in the Petition, that Hakkasan's jury demand should be stricken pursuant to the T&Cs, it filed this appeal in accordance with NRS 38.247(1)(a) because the T&Cs mandate that any disputes between the parties be settled through arbitration if the jury-waiver provision is not enforceable. By Order dated May 28, 2021, this Court consolidated this appeal, Docket No. 82829, with the case in which Willis filed its Petition, Docket No. 82833, noted that an answer to the Petition "may assist this court in resolving the petition," directed Willis to file an opening brief in this case, and set a schedule for Hakkasan to respond by filing a "combined answering brief in Docket No. 82829 and, on behalf of respondents, an answer, including authorities, against issuance of the requested writ in Docket No. 82833."

a jury trial in the lower court action.

The claims asserted by Hakkasan against Willis are governed by Willis's "Brokerage Terms, Conditions & Disclosures" (the "T&Cs"), which set forth the terms governing Willis's relationship with Hakkasan. The T&Cs were provided to Hakkasan in connection with a document entitled "Insurance Proposal Prepared for Hakkasan USA, Inc." (the "Proposal"), which was prepared by Willis for purposes of assisting Hakkasan with its insurance renewals for the 2019-20 policy year. The T&Cs are referenced in the Proposal's Table of Contents and the Proposal expressly provides that "This proposal is presented in conjunction with the [T&Cs] for US Property & Casualty Retail Accounts which is enclosed." The introductory sentence of the T&Cs, just below the document's heading, states that "Your decision to purchase insurance coverages, products, and/or services through Willis Towers Watson is subject to the following terms and conditions."

The T&Cs contain a mandatory "Dispute Resolution" provision that provides:

> The parties agree to work in good faith to resolve any disputes arising out of or in connection with the services provided under these Terms, Conditions & Disclosures. If a dispute cannot be resolved it will be submitted to non-binding mediation to be conducted by Judicial Arbitration and Mediation Services (JAMS) before either party pursues other remedies hereunder. If the mediation does not resolve the dispute and a party or both parties wish to pursue other remedies, **the parties agree that their legal dispute will be resolved without a jury trial and agree not to request or demand a jury trial**. To the fullest extent permitted by applicable law, the parties hereby

> irrevocably waive any right they may have to demand a jury trial.

(Emphasis added.)

The Dispute Resolution provision in the T&Cs further provides:

> **To the extent the foregoing jury trial waiver is not enforceable** under the governing law, . . . **any dispute arising out of or in connection with [the T&Cs]** which the parties are unable to resolve between themselves or through mediation as provided above, **will be resolved by binding arbitration in the state** . . . , or other mutually agreed location, before a panel of three arbitrators in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Under these circumstances, the arbitration proceeding will be the sole and exclusive means for resolving any dispute between the parties[.]

(Emphasis added.) Given the foregoing contract language, and as is explained in detail in Willis's previously-filed (and pending) Petition for a Writ of Mandamus (*see* Docket No. 82833), Hakkasan is not entitled to a jury trial. Instead, its claims should be heard through a bench trial. However, assuming *arguendo* that the jury trial waiver was somehow deemed not enforceable by this Court, Willis is entitled to have Hakkasan's claims heard in arbitration in Nevada. Either way, Hakkasan agreed it would forego a jury trial under all circumstances.

Hakkasan filed an Amended Complaint and Demand for Jury Trial on September 28, 2020, which alleges, among other things, that Willis is liable for civil conspiracy, constructive fraud, negligence, and intentional interference with

contractual relations as a result of Willis's purported unauthorized communications with the insurer about Hakkasan's COVID-19-related insurance claim. On February 11, 2021, Willis filed its Motion To Strike Plaintiff's Jury Demand As To Its Claims Against The Willis Defendants Or, In The Alternative, To Compel Arbitration (the "Motion to Strike"). After briefing was completed, the lower court did not hold a hearing and entered a minute order, without oral argument, denying the Motion to Strike, stating that "[i]ssues related to the proposal are distinct with those which remain at issue in this matter." Subsequently, the lower court executed an Order denying the Motion to Strike and holding that "Hakkasan's present claims against Willis for civil conspiracy, constructive fraud, negligence, and intentional interference with contractual relations are outside the scope of the Dispute Resolution clause in Section 1.13 of the T&Cs." For the same reason, the lower court refused to compel arbitration between Hakkasan and Willis. The lower court's determination that Hakkasan's claim arose outside the scope of the Dispute Resolution directly contradicts a prior order by the court that enforced the very same Dispute Resolution provision by ordering Willis and Hakkasan to mediation before litigation could proceed. The case is currently in the discovery phase.

STATEMENT OF FACTS

A. Background Of Hakkasan's Relationship With Willis And The Procurement Of Hakkasan's 2019-20 Property Insurance Policy

Hakkasan is associated with the Hakkasan Group, a worldwide hospitality

company that operates a collection of restaurant, nightlife, and daylife brands, including seven high-end establishments located in Las Vegas, Nevada, where Hakkasan is based. Appellants' Appendix[2] – Volume I ("VI") at 4, ¶ 1, 10, ¶¶ 40-41.[3] For the past several years, Hakkasan "contracted with Willis to provide [insurance] brokerage and claims-handling services in relation to [Hakkasan's 2019-20 commercial property insurance policy], among numerous other insurance policies procured by Willis for Hakkasan[.]" VI at 12, ¶ 54. *See also* VI at 4, ¶ 4 (Hakkasan engaged Willis "in respect to negotiating the terms of the Policy, preparing insurance proposals for the Policy and other competing options, procuring the Policy, and facilitating and advising about claims under the Policy"). Willis is not an insurance company. It is an independent insurance broker. Willis helps clients like Hakkasan find insurance from various third-party insurance companies.

Willis began communicating with Hakkasan about its 2019-20 insurance renewals no later than early January 2019 for the policy period that was set to expire as of April 1, 2019. By way of limited example:

- On January 2, 2019, Willis sent Hakkasan's General Counsel, Brandon Roos, and its Risk Manager, Veronica Stiles, an email asking them to "take a look at this initial overview on coverages, loss scenarios, pricing, etc."

[2] Appellants' Appendix was filed with this Court on April 30, 2021, in Case No. 82833.

[3] Willis recites herein the allegations set forth in Hakkasan's Amended Complaint solely for the purposes of this brief. Nothing herein is intended to be, nor should be construed as, an admission as to the veracity of any of Hakkasan's allegations in the Amended Complaint.

and they then had a meeting two days later on January 4, 2019 (Appellants' Appendix – Volume II ("VII") at 242, ¶ 3, 247-51);

- On January 14, 2019, Willis sent Hakkasan various coverage recommendations for the upcoming policy year and Attorney Roos responded: "This is a great start and really appreciate all of the work that went into this project from the Willis team and Veronica!" (VII at 243, ¶ 4, 252-56);

- Chuck Halsey, an Executive Vice President with Willis, met with Attorney Roos and Ms. Stiles for breakfast on January 30, 2019 (VII at 243, ¶ 5, 257-58);

- On January 31, 2019, Attorney Roos and Ms. Stiles attended an in-person meeting with a team of five Willis employees for an "April 1, 2019 Renewal Strategy Meeting" (VII at 243, ¶ 6, 259-60);

- On February 1, 2019, Willis sent Hakkasan information on its "year over year premiums" (VII at 243, ¶ 7, 261-63);

- On March 6, 2019, Willis sent Hakkasan a document entitled "Hakkasan Insurance Renewals 4/1/19 Overview" and Mr. Halsey again met with the Hakkasan team that day (VII at 243, ¶ 8, 264-67);

- Immediately following Mr. Halsey's March 6, 2019 meeting with Hakkasan, he reported back to the Willis team that Hakkasan had decided to move its property insurance policy from Travelers Property Casualty Co. of America ("Travelers") to Sompo International Holdings, Ltd. for the April 1, 2019 renewal (VII at 243, ¶ 9, 268-69).

After months of extensive planning, Willis and Hakkasan held an in-person meeting on March 29, 2019 to finalize Hakkasan's 2019-20 insurance renewals.[4] VII

[4] Such meetings are often held shortly before the date existing policies are set to expire because, by the nature of the insurance industry, final decisions about insurance typically need to be made quickly—insurers' quotes are usually only valid for short periods of time because they are dependent upon changing facts and market conditions. VII at 244, ¶ 11.

at 243, ¶ 10. During that meeting, Willis provided Hakkasan's representatives, including Attorney Roos, with a document entitled "Insurance Proposal Prepared for Hakkasan USA, Inc." (the "Proposal"). *See* VI at 73, ¶ 2; VII at 243, ¶ 10; *see also* VI at 75-138. A copy of the Proposal was also emailed to Hakkasan on March 29, 2019 after the meeting concluded. VII at 243, ¶ 10. Among other things, the Proposal reflected Hakkasan's options with regard to the decision it needed to make as to whether to renew its property coverage with Travelers or bind the property coverage with Sompo International ("Sompo").[5] VI at 91-98.

In addition to the details concerning Hakkasan's coverage options, the Proposal included Willis's "Brokerage Terms, Conditions & Disclosures" (the "T&Cs"), which were attached thereto as "Appendix A" and set forth the terms governing Willis's relationship with Hakkasan. VI at 76, 130-38. The T&Cs are referenced in the Proposal's Table of Contents and the Proposal expressly provides that "This proposal is presented in conjunction with the Brokerage Terms, Conditions & Disclosures for US Property & Casualty Retail Accounts which is

[5] Hakkasan's Amended Complaint refers to defendant Sompo International Holdings, Ltd. ("SIH") as its insurer, however, the lower court entered an order on July 13, 2021 granting SIH's motion to dismiss for lack of personal jurisdiction and instructing Hakkasan to file an amended complaint within thirty (30) days omitting any claims against SIH. SIH and defendant Endurance American Specialty Insurance Company ("Endurance") argued that "Sompo International" is merely a trade name that is utilized by Endurance, which is a U.S. subsidiary of SIH, a Bermuda holding company that does not write insurance or adjust claims in Nevada or any other state. Because the parties' communications and the Amended Complaint refer to the insurer, Endurance, by the trade name "Sompo," Willis refers to the insurer as "Sompo" herein.

enclosed." VI at 86. The introductory sentence of the T&Cs, just below the document's heading, states that "***Your decision to purchase insurance coverages, products, and/or services through Willis Towers Watson is subject to the following terms and conditions.***" VI at 130 (emphasis added).

The T&Cs contain, among other things, a mandatory "Dispute Resolution" provision that, in part, provides:

> The parties agree to work in good faith to resolve **any disputes arising out of or in connection with the services provided under these Terms, Conditions & Disclosures.** If a dispute cannot be resolved it will be submitted to non-binding mediation to be conducted by Judicial Arbitration and Mediation Services (JAMS) before either party pursues other remedies hereunder. If the mediation does not resolve the dispute and a party or both parties wish to pursue other remedies, **the parties agree that their legal dispute will be resolved without a jury trial and agree not to request or demand a jury trial**. To the fullest extent permitted by applicable law, **the parties hereby irrevocably waive any right they may have to demand a jury trial**.

VI at 132, § 1.13 (emphasis added). The Dispute Resolution provision further provides that:

> **To the extent the foregoing jury trial waiver is not enforceable under the governing law**, . . . **any dispute arising out of or in connection with [the T&Cs]** which the parties are unable to resolve between themselves or through mediation as provided above, **will be resolved by binding arbitration** in the state . . . , or other mutually agreed location, before a panel of three arbitrators in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Under these

> circumstances, the arbitration proceeding will be the sole and exclusive means for resolving any dispute between the parties[.]

Id. (emphasis added).

The T&Cs, in conjunction with the Proposal, also address the many services provided by Willis as Hakkasan's insurance broker, including claims handling, procurement, and renewal services. Important to the issue before this Court is that with regard to claims handling, for example, Appendix B to the Proposal is a document entitled "Claims Information" that describes Willis's unique "Claims Advocacy Center," provides contact information for the Claims Center, identifies the types of claims to be reported to Willis's Claims Center (including property claims), and identifies the types of claims that should be reported directly to the insurance carrier. VI at 129. Further, page 3 of the Proposal identifies Hakkasan's "Service Team and Claim Contact Information" and provides contact information to Hakkasan for the two individuals—Christine Lawson and John Ritter—in Willis's "Risk Control & Claims Advocacy" department assigned to Hakkasan's account. VI at 77.

Several sections of the T&Cs also address Willis's claims handling and renewal services. For instance, Section 2.1 of the T&Cs, in part, states:

> **<u>You must provide us</u> with complete and accurate information regarding your loss experience, risk exposures, and changes in analysis or scope of your risk exposures and any other information reasonably**

> **requested by us or insurers**. It is important that you advise us of any changes in your business operations that may affect our services or your insurance coverages. Therefore, **all information which is material to your coverage requirements or which might influence insurers in deciding to accept your business, finalizing the terms to apply and/or the cost of cover, or deciding to pay a claim, must be disclosed**. Failure to make full disclosure of material facts might potentially allow insurers to avoid liability for a particular claim or to void the policy. This **duty of disclosure applies equally at renewal** or modification of your existing coverage and upon placement of new lines of coverage.

VI at 134 (emphasis added). Section 2.7 of the T&Cs provides that "[Willis] will inform [Hakkasan] of the reporting requirements for claims, including where claims should be reported and the method of reporting to be used, if applicable." VI at 135. Section 2.17 concerns Willis's obligations upon termination of the parties' agreement and, in part, provides: "Claims and premium or other adjustments may arise after our relationship ends, and we have no responsibility to handle these things after our relationship ends. Such items are normally handled by the insurance broker serving you at the time the claim or adjustment arises." VI at 136.

Ultimately, on April 3, 2019, five days after receiving the T&Cs, Hakkasan's General Counsel, Attorney Roos, executed Willis's "Order to Bind" form, which was included with the Proposal, thereby instructing Willis to bind Hakkasan's property coverage with Sompo as had been previously indicated in early March 2019. VI at 73, ¶ 3, 139-40; *see also id.* at 4, ¶ 4.

Pursuant to the Order to Bind, Hakkasan purchased a $350,000,000 per occurrence Commercial Property Surplus Lines insurance policy from Sompo, covering the policy period of April 1, 2019 to April 1, 2020 (the "Policy"). VI at 4, ¶ 3, 8, ¶ 35. Hakkasan paid Sompo a premium of $325,000 to obtain the Policy. VI at 8, ¶ 33. Among other things, Hakkasan's Policy insures against losses related to (1) "'contagious or infectious disease (including decontamination and clean-up costs)' and/or 'outbreak of a contagious and/or infectious disease' within five miles of any insured location[,]" and (2) the "'closing of the whole or part of the premises of the Insured either by the Insured or by order of a Public Authority consequent upon the existence or threat of hazardous conditions either actual or suspected to an insured locations . . .'" VI at 4, ¶ 5. Both the quote and the binder—which were prepared by Sompo and provided to Hakkasan in connection with Hakkasan's property insurance—specifically provided that Sompo's insurance policy would contain a $1,500,000 sublimit for virus-related claims. However, when the Policy was issued by Sompo, it did not contain the $1,500,000 sublimit.

B. Hakkasan Notifies Willis Of COVID-19 Related Losses During Willis's Efforts To Procure Hakkasan's 2020-21 Property Insurance Policy

As a result of the COVID-19 pandemic and the government responses thereto, Hakkasan alleges it began sustaining business income losses in February 2020 and that it "had to close its venues to the public across its entire portfolio and cancel

significant banquet events and refund ticket sales." VI at 11, ¶¶ 50-51. Around that time, in late-February 2020, while Willis was working on the renewal of Hakkasan's property policy with Sompo for the 2020-21 policy year, Hakkasan "notified Willis that it expected to suffer covered losses and was preparing to submit a claim under the Policy." VI at 12, ¶ 55; VII at 244, ¶ 12. Willis informed Hakkasan in early March 2020 that it had to disclose the impact of COVID-19 on Hakkasan's ongoing business operations to Sompo's underwriter in connection with Willis's efforts to renew Hakkasan's property policy. VII at 244, ¶ 12. Willis then notified Sompo's underwriter of the impact of COVID-19 on Hakkasan's ongoing business operations. *Id.* Willis needed to provide this information or it otherwise would have jeopardized both Hakkasan's 2020-21 property coverage and the claim by failing to disclose such relevant information. *Id.* Indeed, Sompo could have voided the 2020-21 policy if it learned that Hakkasan had undisclosed circumstances causing business operation losses that preexisted a new policy. *Id.* Ultimately, "[a]fter receiving its financial results for February 2020, Hakkasan instructed Willis to formally tender" its claim to Sompo. VI at 12, ¶ 56; *see also id.* at 5, ¶ 7.

Willis proceeded with its efforts to assist Hakkasan with its insurance renewals throughout March 2020. On March 17, 2020, in connection with Hakkasan's 2020-21 auto and general liability insurance renewals, Willis again emailed Attorney Roos and Ms. Stiles a copy of Willis's T&Cs, which contained the

same jury waiver/arbitration provision that was present in the version provided to Hakkasan a year earlier in connection with the 2019-20 policy year. VII at 244, ¶ 13, 270-80. Willis also sent a letter to Attorney Roos concerning Hakkasan's 2020-21 property insurance renewal on March 30, 2020, which stated that "This proposal is presented in conjunction with the [T&Cs] for US Property & Casualty Retail Accounts which was previously sent to you." VII at 244, ¶ 13, 281-83.

Hakkasan subsequently renewed its insurance policies for the 2020-21 policy year through Willis. VII at 245, ¶ 14. At no point after Hakkasan received a copy of Willis's T&Cs in March 2019—or after they were provided again in March 2020—did Attorney Roos or anyone from Hakkasan object to the jury waiver/arbitration clause. *Id.*

C. Hakkasan's Claims Against Willis In The Amended Complaint

Hakkasan's relationship with Willis was unquestionably contract-based. Its claims against Willis in this case relate to the circumstances pursuant to which Willis provided notice to Sompo of the impact of COVID-19 on Hakkasan's ongoing business operations during the insurance renewal period. Contrary to the sworn Declaration submitted by Willis, Hakkasan's Amended Complaint, which is not verified, alleges that "[o]ut of concern for the business relationship between Willis and Sompo, and without notifying Hakkasan or obtaining approval from Hakkasan to violate the duties owed to Hakkasan, Willis contacted Sompo to inform Sompo of

the impending Claim for which there was no stated sublimit in the Policy." VI at 12, ¶ 58. Then, according to Hakkasan, "Sompo conspired with Willis in an attempt to issue a back-dated endorsement to the Policy (the "Endorsement") *after* Hakkasan's losses began and after Hakkasan had already notified Willis of its losses and its Claim." VI at 5, ¶ 9. Hakkasan further claims that "[t]he backdated endorsement—submitted to Willis without Hakkasan's knowledge or consent—purported to reduce the limits of insurance for the Claim from the full Policy limits of $350,000,000 per occurrence to a sublimit of $1,500,000." VI at 5, ¶ 10.

Hakkasan also alleges that "Sompo and Willis further conspired to fraudulently conceal the circumstances upon which the backdated endorsement was created in order to induce Hakkasan to accept a lower limit and settlement than it would otherwise be entitled under the Policy." VI at 5, ¶ 11. Specifically, Hakkasan claims that Sompo sent the Endorsement to Willis on March 9, 2020 and that "Willis did not tell Hakkasan about the Endorsement, but proceeded to purport to 'accept' the Endorsement on Hakkasan's behalf without Hakkasan's knowledge or consent." VI at 13, ¶ 62, ¶ 66. Hakkasan further alleges that "Willis did so knowing that Hakkasan had a pending claim and would never agree to a retroactive modification of the Policy to its detriment." VI at 13, ¶ 67. Hakkasan asserts that Willis then submitted Hakkasan's claim to Sompo on March 16, 2020, and proceeded to attempt to facilitate a settlement for Hakkasan with Sompo for the $1,500,000 "purported

'limit' of coverage under the Endorsement." VI at 13, ¶ 71, 14, ¶ 77. Hakkasan, however, did not settle its claim with Sompo and Willis subsequently disclosed the Endorsement to Hakkasan on May 26, 2020. VI at 16, ¶ 92.

Despite the contract-based relationship between the parties, Hakkasan's Amended Complaint asserts four tort-based Claims for Relief against Willis for its purported failure to notify Hakkasan of the "backdated" Endorsement and unsuccessful attempt to get Hakkasan to settle its claim with Sompo. Specifically, Hakkasan asserts that Willis is liable for civil conspiracy, constructive fraud, negligence, and intentional interference with contractual relations. VI at 22-29.

D. Relevant Procedural History

Hakkasan filed its original Complaint in this case on June 5, 2020. One month later, on July 7, 2020, Willis filed a motion to dismiss arguing, among other things, that the Complaint should be dismissed as to Willis because Hakkasan failed to initiate mediation through JAMS prior to commencing litigation as required by the T&Cs' dispute resolution provision. After a hearing on Willis's motion to dismiss, **and applying the T&Cs' dispute resolution provision to the present dispute**, the district court compelled Hakkasan and Willis "to mediation before JAMS in the next sixty day period from the date of this Order before any further proceedings occur with respect to the Willis Defendants[.]" VI at 2. Mediation then took place on November 3, 2020, no resolution was reached, and Willis filed its Answer to

Plaintiff's Amended Complaint and Response to Demand for Jury Trial (the "Answer") on December 16, 2020. *See* VI at 33. Willis asserted in its Answer the following Affirmative Defense: "Plaintiff's demand for a jury trial as to its claims against Willis must be denied and stricken because Plaintiff waived its right to a jury under the Brokerage Terms, Conditions & Disclosures that govern Plaintiff's relationship with Willis." VI at 58.

On February 11, 2021, Willis filed its Motion To Strike Plaintiff's Jury Demand As To Its Claims Against The Willis Defendants Or, In The Alternative, To Compel Arbitration (the "Motion to Strike"). *See* VI at 61. After the parties' briefing on the Motion to Strike was completed, the lower court chose not to hold a hearing and entered a minute order denying the Motion to Strike stating that "[i]ssues related to the proposal are distinct with those which remain at issue in this matter." Subsequently, on March 25, 2021, the lower court executed an Order denying the Motion to Strike holding that "Hakkasan's present claims against Willis for civil conspiracy, constructive fraud, negligence, and intentional interference with contractual relations are outside the scope of the Dispute Resolution clause in Section 1.13 of the T&Cs." VII at 286.

On April 23, 2021, Willis filed a Petition for Writ of Mandamus requesting that this Court issue a writ of mandamus directing the lower court to strike Hakkasan's jury demand with regard to the claims against Willis. Willis also filed a

notice of appeal on April 23, 2021, given that the lower court's Order denying the Motion to Strike also served to deny Willis's request to compel arbitration. Willis then moved to consolidate the Petition for Writ of Mandamus proceeding (Docket No. 82833) with this appeal (Docket No. 82829) and, by Order dated May 28, 2021, this Court consolidated the two matters and noted that "an answer may assist this court in resolving the petition." The Court further directed Willis to file an opening brief in this case and set a schedule for Hakkasan to respond by filing a "combined answering brief in Docket No. 82829 and, on behalf of respondents, an answer, including authorities, against issuance of the requested writ in Docket No. 82833."

SUMMARY OF THE ARGUMENT

The lower court erred by concluding that Hakkasan's claims against Willis in this case are "outside the scope of the Dispute Resolution clause" set forth in the T&Cs, which requires disputes between Hakkasan and Willis to be resolved without a jury or, if the jury-waiver provision is unenforceable under Nevada law, to be compelled to arbitration. The T&Cs' Dispute Resolution provision applies to disputes "arising out of or in connection with the services provided under [the T&Cs][.]" VI at 132, § 1.13. As courts have repeatedly found, dispute resolution provisions that use "arising out of or in connection with" language are extremely broad and generally cover any dispute that so much as "touches upon" the parties' relationship.

Here, there is no doubt that Hakkasan's claims against Willis constitute a dispute "arising out of or in connection with the services provided" under the T&Cs. Hakkasan's Amended Complaint alleges that it "contracted with Willis to provide [insurance] brokerage and claims-handling services" and that Willis engaged in conduct that was, among other things, "in breach of contract" by allegedly notifying Hakkasan's insurer, prematurely, of an impending COVID-19-related insurance claim. Given the broad Dispute Resolution provision in the T&Cs, which operates to govern the entirety of the parties' relationship, the claims asserted by Hakkasan against Willis are clearly within the scope of that provision and must be compelled to arbitration assuming *arguendo* that this Court somehow finds that the jury waiver requirement is unenforceable under Nevada law in connection with Willis's Petition for a Writ of Mandamus. The lower court's order to the contrary is not only devoid of analysis or rationale, it is also directly at odds with the lower court's prior order in this case compelling the parties to mediation by applying the same Dispute Resolution provision in the T&Cs.

ARGUMENT

A. Hakkasan's Claims Against Willis Arise Out Of Or In Connection With The Services Provided By Willis Under The T&Cs

"Whether a dispute arising under a contract is arbitrable is a matter of contract interpretation, which is a question of law that [is] review[ed] de novo." *State ex rel. Masto v. Second Judicial Dist. Court ex rel. Cnty. of Washoe*, 125 Nev. 37, 44, 199

P.3d 828, 832 (2009); *see also Redrock Valley Ranch, LLC v. Washoe Cnty.*, 127 Nev. 451, 460, 254 P.3d 641, 647-48 (2011) ("Contract interpretation is a question of law and, as long as no facts are in dispute, this court reviews contract issues de novo."). The lower court's conclusion that Hakkasan's allegations against Willis are "outside the scope" of the T&Cs' dispute resolution provision is erroneous in light of the plain language of the contract, Hakkasan's allegations, the undisputed evidence submitted by the parties in connection with the Motion to Strike, and the lower court's previous application of the **same contract provision** when compelling the parties to mediate their dispute.

The dispute resolution provision in the T&Cs, which contains both the jury-waiver provision and the agreement to arbitrate in the event the jury-waiver is found unenforceable, states that it applies to disputes "arising out of or in connection with the services provided under [the T&Cs][.]" VI at 132, § 1.13. Similar "arising out of" and "in connection with" language is frequently found in arbitration provisions and is "interpreted broadly to encompass all manner of disputes between the parties." *Sho-Oja v. Sprint Corp.*, CV 13-8575-JFW, 2004 WL 12561584, at *3 (C.D. Cal. Jan. 16, 2014) (citing *Pennzoil Expl. and Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067-68 (5th Cir. 1998) (holding that arbitration clauses requiring the arbitration of all disputes "arising out of" and "in connection with or relating to" an agreement are broad and "embrace all disputes between the parties having a

significant relationship to the contract regardless of the label attached to the dispute"); *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 846 (2d Cir. 1987) (holding that if a plaintiff's allegations "touch matters" covered by a broad dispute resolution provision applying to all claims that arose under or related to the subject agreement, then those claims fell within the scope of the dispute resolution provision); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 722-25 (9th Cir. 1999) (construing a similar arbitration provision to require arbitration of antitrust claims, Lanham Act claims, defamation claims, and misappropriation of trade secrets claims because they all touched upon the contract or related to the underlying contract in some way); *see also Matter of Kent & Jane Whipple Tr.*, 133 Nev. 1033, 399 P.3d 332 (2017) (citing the Ninth Circuit's decision in *Simula, Inc.* with approval); *Kindred v. Second Judicial Dist. Ct. ex rel. Cnty. of Washoe*, 116 Nev. 405, 411, 996 P.2d 903, 907 (2000) (holding language providing that "any controversy or dispute arising between you and [the company] in any respect to this agreement or your employment by [the company] shall be submitted for arbitration" was "broad" and "appears to include all employment related claims"). Indeed, the term "connected to" has been found to be synonymous with "related to," which is "defined simply as 'connected by reason of an established or discoverable relation[.]'" *Vermont Pure Holdings, Ltd. v. Descartes Sys. Grp., Inc.*, 140 F. Supp. 2d 331, 334-35 (D. Vt. 2001) (quoting *Coregis Ins. Co. v. American Health Found.*, 241 F.3d 123, 128 (2d

Cir. 2001)); *see also Jackson v. Lajaunie*, 270 So.2d 859, 864 (La. 1972) (holding that "'in connection with' is a broader term than 'arising out of'").

The decision by the United States Court of Appeals for the Sixth Circuit in *Watson Wyatt & Co. v. SBC Holdings, Inc.*, 513 F.3d 646 (6th Cir. 2008), is particularly instructive with regard to the language contained in the T&Cs. There, the defendant provided actuarial and consulting services to the plaintiff for several years before sending the plaintiff a letter "to formalize the terms and conditions of its engagement." *Id.* at 648. The defendant's terms and conditions document contained a dispute resolution provision that required arbitration of "any dispute or claim arising from or in connection with this agreement or the services provided by [the defendant][.]" *Id.* In considering the scope of the dispute resolution provision, not only did the Sixth Circuit conclude that it was "broadly written," it found that the "or services provided" language required a finding that the provision applied retroactively and described it as "a type of umbrella agreement governing the parties overall relationship." *Id.* at 650, 652.

Here, there is no doubt that Hakkasan's claims against Willis "aris[e] out of or in connection with the services provided under [the T&Cs][.]" As a general matter, the dispute resolution provision in the T&Cs is exceptionally broad given the "in connection with the services provided" language. As such, like in *Watson Wyatt*, the T&Cs' dispute resolution provision is a "type of umbrella agreement governing

the parties overall relationship" and applies to any claims that "touch matters" related to the services Willis provided to Hakkasan, regardless of how those services are characterized. There is no doubt that Hakkasan's allegations against Willis—which suggest that Willis breached duties owed to Hakkasan as its insurance broker by conspiring with the insurer to issue an Endorsement to Hakkasan's Policy—implicate their overall business relationship and touch matters connected to Willis's services under the T&Cs. Accordingly, the T&Cs' broad dispute resolution provision, and its jury-waiver and fallback arbitration requirements, are applicable to Hakkasan's claims against Willis in this case.

Even taking an extremely narrow view of the T&Cs' dispute resolution provision and focusing only on Willis's alleged unauthorized communications with Sompo, Hakkasan's claims would still be subject to the terms of the dispute resolution clause. Willis's communications with Sompo in early March 2020 regarding the impact of COVID-19 on Hakkasan's ongoing business operations fell squarely within the scope of Willis's performance of services covered by the T&Cs:

- First, Willis's communications with Hakkasan fell squarely within the scope of Willis's procurement (or renewal) services for the 2020-21 policy year. At the time of the subject communications, Hakkasan's property insurance policy was set to expire in a few weeks, on March 31, 2020, and Willis was working on placing Hakkasan's property insurance policy for the next policy year. In the course of those efforts, Willis was obligated to, and thus did following discussion with Hakkasan, disclose the impact of COVID-19 on Hakkasan's ongoing business operations to Sompo. *See* VII at 244, ¶ 12. Insurance procurement and renewal services are clearly services provided by Willis in connection with the T&Cs. *See generally*

VI at 130-38.

- Second, Willis's communications with Sompo about the impact of COVID-19 on Hakkasan's business were unquestionably part of Willis's claims handling services. Such services were clearly within the scope of the T&Cs. As noted previously, the Proposal and the T&Cs repeatedly reference Willis's claims handling services and even assigned two individuals in Willis's "Risk Control & Claims Advocacy" department to Hakkasan's account. VI at 77, 129, 134, § 2.1, 135, §2.7, 136, § 2.17.

If there were any doubt about whether the T&Cs covered Willis's procurement, renewal, and/or claims handling services, the Court need look no farther than Hakkasan's own allegations in the Amended Complaint. Specifically, Hakkasan acknowledges that it "**contracted** with Willis to provide [insurance] brokerage and **claims-handling services** in relation to [Hakkasan's 2019-20 commercial property insurance policy], among numerous other insurance policies procured by Willis for Hakkasan[.]" VI at 12, ¶ 54 (emphasis added). Hakkasan also alleges that it engaged Willis "in respect to negotiating the terms of the Policy, preparing insurance proposals for the Policy and other competing options, **procuring the Policy**, and **facilitating and advising about claims under the Policy**." VI at 4, ¶ 4 (emphasis added). Accordingly, whether Willis's communications with Sompo in March 2020 related to its procurement, renewal, and/or claims handling efforts, Hakkasan's claims arising out of those communications are connected to the services provided by Willis under the T&Cs.

Hakkasan argued to the lower court that its claims against Willis are not

subject to the dispute resolution provision in the T&Cs because the provision is narrowly tailored to disputes arising out of Hakkasan's act of purchasing insurance through Willis and because its claims "can be resolved independently without reference to Willis's Proposal or the T&Cs." VII at 152. This is an obvious mischaracterization of the dispute resolution clause. The dispute resolution clause is in no way limited to "Willis's purchase of insurance on Hakkasan's behalf"; it applies broadly, as noted previously, by its express terms to disputes "arising out of or in connection with the services provided under [the T&Cs][.]" And the absence of such a limiting clause demonstrates that the parties did not agree to one. *See State v. Javier C.*, 128 Nev. 536, 541, 289 P.3d 1194, 1197 (2012) (recognizing that "Nevada follows the maxim 'expressio unius est exclusio alterius,' the expression of one thing is the exclusion of another").

Additionally, the T&Cs' dispute resolution provision does not apply solely to claims that require interpretation of the T&Cs' terms. While courts have found that dispute resolution provisions solely covering claims "arising out of" an agreement may only apply to claims requiring interpretation of the subject contract, *see, e.g.*, *Tracer Rsch. Corp. v. Nat'l Env't Servs. Co.*, 42 F.3d 1292 (9th Cir. 1994) (holding that "an arbitration clause that covered disputes 'arising under' an agreement, but omitted reference to claims 'relating to' an agreement, covered only those disputes 'relating to the interpretation and performance of the contract itself'"), the provision

at issue here is not so limited. The T&Cs' dispute resolution provision also encompasses disputes arising "in connection with the services provided under" the T&Cs, which, as discussed above, is language with broader application. *See Watson Wyatt & Co.*, 513 F.3d at 650, 652 (finding that "or services provided" language indicates "a type of umbrella agreement governing the parties' overall relationship").

In making its decision, the lower court undertook no such analysis. The total sum of the lower court's decision amounted to a bare conclusion that the jury waiver did not fall within the scope of Hakkasan's claims. *See* VII at 284-86. There was no explanation and no legal analysis.

And, significantly, the lower court's decision **directly contradicted its previous order** in which it had applied the same T&Cs to govern the entirety of the Hakkasan/Willis relationship in order to compel mediation between the parties. *See* VI at 2. **The inconsistency between these two orders is fundamental and cannot be reconciled.** If the T&Cs did not apply to Hakkasan's claims, why did the lower court compel mediation in the first place? Under what legal authority could the lower court have compelled mediation if the T&Cs did not apply? The T&Cs either apply to this dispute or they do not; they cannot be enforced arbitrarily or in piecemeal fashion.

Ultimately, it is clear that Hakkasan's claims in this case fall within the scope of the T&Cs' dispute resolution provision. The lower court recognized as much

when it compelled mediation based upon the exact same provision in the exact same document. As a result, this Court should either issue a writ of mandamus in Docket No. 82833 directing the district court to strike Hakkasan's jury demand as to its claims against Willis as is required by the T&Cs' dispute resolution provision or, if the jury waiver provision is found to be unenforceable under Nevada law, reverse the district court's decision on the Motion to Strike and compel Hakkasan's claims against Willis to arbitration.

B. If The T&Cs' Jury Waiver Provision Is Unenforceable Under Nevada Law, Then Hakkasan's Claims Against Willis Should Be Compelled To Arbitration

Nevada law recognizes that jury waiver provisions are presumptively valid and enforceable and therefore the jury waiver should be enforced. However, even assuming *arguendo* that this Court finds, upon considering Willis's Petition for Writ of Mandamus in Docket No. 82833, that Hakkasan's claims against Willis are subject to the T&Cs but the jury waiver provision is unenforceable, then this Court should compel Hakkasan's dispute with Willis to arbitration. The T&Cs unambiguously provide that "any dispute arising out of or in connection with [the T&Cs] which the parties are unable to resolve between themselves or through mediation as provided above, will be resolved by binding arbitration" if the "jury trial waiver is not enforceable under the governing law[.]" VI at 132, § 1.13.

In Nevada, "[t]here is a strong public policy favoring contractual provisions requiring arbitration as a dispute resolution mechanism." *Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990). Pursuant to the Uniform Arbitration Act, "an agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except . . . upon a ground that exists at law or in equity for revocation of a contract."[6] NRS 38.219(1). Accordingly, "[c]ourts are not to deprive the parties of the benefits of arbitration they have bargained for, and arbitration clauses are to be construed liberally in favor of arbitration." *Phillips*, 106 Nev. at 417, 794 P.2d at 718 (citing *Exber, Inc. v. Sletten Constr. Co.*, 92 Nev. 721, 730, 558 P.2d 517, 522 (1976)).

Here, because the T&Cs unequivocally provide for the arbitration of any disputes between Hakkasan and Willis if the jury waiver is unenforceable, should this Court find that Hakkasan's claims against Willis are governed by the T&Cs, but that the jury waiver provision is unenforceable under Nevada law, Hakkasan's claims against Willis should be compelled to arbitration.

[6] While NRS 38.219(1) contains another exception to the enforceability of arbitration provisions as provided for by NRS 597.995, that statute has been found to be preempted by the Federal Arbitration Act. *See MMAWC v. Zion Wood Obi Wan Trust*, 448 P.3d 568, 571 (Nev. 2019) (holding that "the FAA preempts NRS 597.995").

CONCLUSION

For the foregoing reasons, this Court should find that Hakkasan's claims against Willis in this case fall within the scope of the T&Cs' Dispute Resolution provision. Accordingly, if this Court holds, in connection with Docket No. 82833, that the Dispute Resolution provision's jury waiver requirement is unenforceable under Nevada law, then the Court should reverse the lower court's order on the Motion to Strike and compel Hakkasan's claims against Willis to arbitration in Nevada, before a panel of three arbitrators, in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

DATED this 3rd day of September, 2021.

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CERTIFICATION OF COMPLIANCE WITH NRAP 28.2

1. I hereby certify that Appellants' Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font in Times New Roman typeface.

2. I further certify that Appellants' Opening Brief complies with the page- or type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is Proportionately spaced, has a typeface of 14 points or more, and contains 6,711 words.

3. Finally, I hereby certify that I have read Appellants' Opening Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions

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in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 3rd day of September, 2021.

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CERTIFICATE OF SERVICE

Pursuant to Nevada Rule of Appellate Procedure 25(b), I certify that I am an employee of BROWNSTEIN HYATT FARBER SCHRECK, LLP, and that the foregoing **APPELLANTS' OPENING BRIEF** was served by submitting electronically for filing and/or service with Supreme Court of Nevada's EFlex Filing system and serving all parties with an email address on record, as indicated below, pursuant to Rule 8 of the N.E.F.C.R. on the 3rd day of September, 2021, to the addresses shown below:

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