IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIS OF ARIZONA, INC. and WILLIS TOWERS WATSON INSURANCE SERVICES WEST, INC., Appellants, vs. HAKKASAN USA, INC., Respondent.	Supreme Court No. : 82829 (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 Judge

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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 Nevada Rule of Civil Procedure 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.

- ***Aabar Investments PJS***

DATED this 3rd day of November, 2021

/s/ James E. Whitmire
James E. Whitmire

JURISDICTIONAL STATEMENT

This Court does not have appellate jurisdiction to decide the appeal noticed by Willis of Arizona, Inc. and Willis Towers Watson Insurance Services West, Inc. (collectively, "Willis") in Case No. 82829 because the District Court did not enter an appealable order. *See* Nev. R. App. P. 3A(b). Willis relies on Nevada Revised Statutes 38.247(1)(a), which permits an appeal from "[a]n order denying a motion to compel arbitration." The District Court, however, did not enter an order denying a motion to compel arbitration. *See* Petitioner's Appendix, Volume II ("P. App'x II") at 286. Accordingly, and as explained in greater detail below and in a concurrently filed motion to dismiss, the appeal should be dismissed.

This Court has original jurisdiction over Willis's petition for a writ of mandamus in Case No. 82833 under Nevada Revised Statutes 34.160.

ROUTING STATEMENT

This consolidated appeal and petition for writ of mandamus are properly routed to the Supreme Court under Nevada Rule of Appellate Procedure 17(a)(9), as this case originated in business court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Case No. 82833:

1. Did the District Court commit a manifest abuse of discretion or clear error by concluding that Hakkasan's tort claims are not encompassed by a contractual jury trial waiver clause?
2. On mandamus review, should this Court address whether the jury trial waiver clause is enforceable under Nevada law, an issue that the District Court has not yet reached?
3. Would it be a manifest abuse of discretion or clear error to conclude that jury trial waiver clause is not enforceable under Nevada law?

Case No. 82829:

4. Does this Court have jurisdiction over Willis's appeal from the District Court's order?

5. If the Court does have jurisdiction to hear Willis's appeal, did the District Court properly find that that Hakkasan's tort claims are not encompassed by the particular language of a contractual jury-waiver clause and its fallback arbitration clause?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitutional and Statutory Authorities

Rules and Regulations

Additional Authorities

STATEMENT OF THE CASE

Respondent Hakkasan USA, Inc. ("Hakkasan") filed a complaint against, among other defendants, its former insurance broker, Willis, for civil conspiracy, constructive fraud, negligence, and intentional interference with contractual relations. Respondent's Appendix, Volume II ("R. App'x II") at 89–119. Hakkasan's complaint demands a trial by jury. *Id.* at 119. Willis moved to strike that demand. Petitioner's Appendix, Volume I ("P. App'x I") at 61–70. Willis contended that Hakkasan's claims fell within a jury trial waiver clause in a purported contract between the parties (the "Jury Waiver Clause"). *Id.* at 65–68. Willis further argued that, under the terms of the contract, if the Jury Waiver Clause were held unenforceable, the parties would be required to arbitrate the claims. *Id.* at 68. On that basis Willis sought, in the alternative, an order compelling arbitration. *Id.*

The District Court denied Willis's motion to strike Hakkasan's jury demand, holding that Hakkasan's claims do not fall within the scope of the Jury Waiver Clause. P. App'x II at 286. The District Court accordingly did not reach the question of whether the waiver was unenforceable, and it therefore did not rule on Willis's alternative request to compel arbitration. *Id.*

Willis has filed a petition for mandamus in Case No. 82833 seeking an order directing the District Court to strike Hakkasan's demand for a jury trial. It has also filed a direct appeal in Case No. 82829, invoking Nevada Revised Statutes 38.247(1)(a), which permits interlocutory appeals from orders denying motions to compel arbitration, although no such order was entered below.

STATEMENT OF FACTS

A. Willis Procures Insurance for Hakkasan in 2019

Hakkasan is a Las Vegas-based hospitality company that operates a collection of dining, nightlife, and daylife brands at thirty-seven venues across the

globe. P. App'x II at 145. In the United States, Hakkasan's business portfolio includes Hakkasan Nightclub, Wet Republic Pool, and Level Up at the MGM Grand Hotel and Casino; Omnia Nightclub at Caesars Palace; Jewel Nightclub and Liquid Pool at Aria Resort and Casino; Searsucker in Las Vegas and San Diego; Herringbone in Santa Monica, La Jolla, and Waikiki; and Hakkasan's namesake restaurant in Las Vegas and Miami. *Id.*

From 2014 to 2020, Hakkasan engaged Willis, an insurance broker, to procure insurance policies on Hakkasan's behalf. *Id.* at 164. During that period, Hakkasan repeatedly asked Willis to provide renewal information well in advance of the deadlines for renewing its policies so that Hakkasan could make informed decisions about its insurance coverage. *Id.* at 165. Willis largely ignored those requests and often did not provide Hakkasan with details about insurance options until days before the renewal deadlines. *Id.* Willis's consistent eleventh hour provision of vital insurance information to Hakkasan would force Hakkasan to make critical insurance decisions based solely on Willis's representations and would leave limited time for Hakkasan to weigh its options. *Id.*

Around January 2019, with its existing policies set to expire on April 1 of that year, Hakkasan again expressed concern to Willis about receiving dense proposal documents too close to the renewal deadline. *Id.* Hakkasan asked Willis to provide a proposal with sufficient time before the deadline to allow Hakkasan to meaningfully evaluate its coverage options. *Id.* Prior to the eve of the April 1 deadline, Willis met with Hakkasan at least once around January 31. *Id.* To Hakkasan's disappointment, however, Willis provided no new substantive information about Hakkasan's renewal options at that meeting. *Id.* at 165, 260. On March 6, Willis and Hakkasan had another meeting to discuss the polices due for renewal on April 1. P. App'x II at 265–66. 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.[1]

Not until a meeting on March 29, 2019—just one business day before Hakkasan's policies were set to expire—did Willis give Hakkasan a formal proposal outlining renewal options for Hakkasan (the "Proposal"). *Id.* at 164–65. The Proposal consisted of fifty-five pages outlining the terms of Hakkasan's expiring insurance coverages and comparing them to the terms on which those coverages could be renewed, either with Hakkasan's existing insurance carriers or with new carriers. P. App'x I at 75–129. Slipped behind the Proposal was a separate, unsigned form document entitled "Brokerage Terms, Conditions & Disclosures" (the "T&Cs"). *Id.* at 130–138. Apart from a brief reference to those T&Cs on page 12 of the Proposal, the Proposal did not call attention to the substance of the T&Cs, and Willis did not alert Hakkasan at the meeting to their inclusion. *Id.* at 86; P. App'x II at 165–66. Indeed, Hakkasan never reviewed the

[1] Willis asserts that it began communicating with Hakkasan about its insurance renewals for the 2019–20 term as early as January 2, 2019. Pet. 11; Br. 6. That is not accurate. The "initial overview on coverages, loss scenarios, pricing, etc." that Willis transmitted to Hakkasan on January 2, 2019 had nothing to do with renewing Hakkasan's existing insurance policies. P. App'x II at 248. Rather, that email was in response to Hakkasan's request for Willis to explore a new line of coverage for "Loss of Attraction" that was independent of Hakkasan's other coverages. The January 4 meeting between Willis and Hakkasan likewise concerned the exploration of new coverage, not the renewal of Hakkasan's coverages on April 1, 2019. *Id.* at 251. Hakkasan's comment that Willis's work on exploring Loss of Attraction coverage was a "great start" had nothing to do with Willis's work on preparing a proposal for the upcoming April 1 renewal deadline. *Id.* at 253, 255. To the contrary, Hakkasan was already concerned that Willis was not going to transmit its renewal proposal sufficiently in advance of Hakkasan's renewal deadline, in light of Willis's previous failures to do so. *Id.* at 165.

T&Cs on March 29 and did not realize they were included with the Proposal. P. App'x II at 166.

The T&Cs comprise roughly seventy paragraphs that, according to the document's preamble, govern "[y]our decision to purchase insurance coverages, products, and/or services through Willis Towers Watson." P. App'x I at 130. They state that they "set out the complete and exclusive statement of agreement and understanding between the parties . . . with respect to your purchase of insurance." *Id.* at 132. The document contains no field for Hakkasan to assent to the T&Cs or even to acknowledge receiving them. *Id.* at 130–138.

The version of the T&Cs presented with the Proposal on March 29—the "2019 February 14" version—had never been presented to Hakkasan in connection with an insurance proposal before. P. App'x II at 166–67. At no point during Hakkasan's rushed renewal meeting with Willis on March 29, 2021 did Willis mention—let alone negotiate—any provision of the T&Cs.[2] *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 I at 132–33; P. App'x II at 165–66. The Jury Waiver Clause was 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 II at 165–67. Hakkasan never reviewed, acknowledged, or signed the T&Cs. *Id.* at 166.

Section 1.13 of the T&Cs—which appears roughly in the middle of the T&Cs under the heading "Dispute Resolution"—provides that "[t]he parties agree to work in good faith to resolve any disputes arising out of or in connection with

[2] When Willis presented a renewal proposal to Hakkasan in advance of its previous April 1, 2018 renewal deadline, it did not attach any version of its terms and conditions. P. App'x II at 167.

the services provided under these Terms, Conditions & Disclosures," *i.e.*, Willis's procurement of insurance on Hakkasan's behalf. P. App'x I at 132. Section 1.13 further provides that if the parties cannot resolve a dispute through mediation, "the parties agree that their legal dispute will be resolved without a jury trial and agree not to request or demand a jury trial." *Id.* at 133. In addition, the T&Cs provide that "[t]o the extent the foregoing jury trial waiver is not enforceable under the governing law, except as provided below, any dispute arising out of or in connection with these Terms, Conditions & Disclosures which the parties are unable to resolve between themselves or through mediation as provided above, will be resolved by binding arbitration . . . ." *Id.* 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. *Id.* at 132–33. And the heading of Section 1.13 does not refer to jury trials or alert the reader that the clause is waiving rights. *Id.* at 132.

By presenting the Proposal for the first time just one business day before Hakkasan's insurance policies were due to expire, Willis left Hakkasan no reasonable choice but to renew its various policies through Willis. P. App'x II at 165. Willis undoubtedly understood that Hakkasan could not afford to let its insurance coverages for its $350 million business portfolio lapse.[3] *Id.* Faced with that business reality, 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. Willis later memorialized Hakkasan's renewal decisions by checking off boxes on a one-page document entitled "Order to Bind" and emailing it to Hakkasan, although this document was not sent to Hakkasan until after coverage

[3] A lapse of coverage would have also resulted in Hakkasan losing $75 million in general liability coverage for its business operations. P. App'x I at 116–121.

was bound. *Id.* at 166. Hakkasan signed the Order to Bind on April 3. *Id.* at 166. It made no mention of any related T&Cs, and Hakkasan never signed or acknowledged the T&Cs appended separately to the earlier Proposal. P. App'x I at 130–38, 140; P. App'x II at 166.[4]

B. Willis Conspires with Endurance in 2020 to Secretly Backdate an Endorsement on Hakkasan's Insurance Policy

One of the insurance policies that Willis procured for Hakkasan in 2019 was a Commercial Property Surplus Lines insurance policy (the "Policy") issued by Defendants Endurance American Specialty Insurance Company and Endurance Services Ltd. (collectively, "Endurance"). R. App'x II at 95. The Policy had a $350 million per occurrence limit. *Id.* Its one-year term began on April 1, 2019. *Id.*

As relevant here, the Policy included "Special Time Element Cancellation Coverage." *Id.* at 96. That coverage encompassed "the cancellation of, and/or inability to accept bookings or reservations for accommodation, receive

[4] As stated in a sworn declaration submitted below, Hakkasan did not make a final decision to bind coverage until the meeting with Willis to discuss the Proposal presented on March 29, 2019. P. App'x II at 166. Willis suggests that Hakkasan actually decided to purchase the policy at issue in this case on March 6, following a meeting with Willis, in light of an email from Willis employee Chuck Halsey, which reads: "Client says move it; we need to see what Sompo does with the primary GL…..let's talk tomorrow." P. App'x II at 269. Not only does this email communication constitute unreliable hearsay—which Willis is offering for the truth of its assertion that Hakkasan decided to purchase the Sompo policy at an earlier date—it is unsupported by a sworn declaration from Mr. Halsey, and should thus be disregarded. But in any event, if Hakkasan had chosen the Policy on March 6, as Willis suggests, that would conclusively establish that Hakkasan did so weeks before Willis even included the T&Cs with the Proposal. And to the extent there is a factual dispute about the date of Hakkasan's decision and the enforceability of the T&Cs under these circumstances, it would not be amenable to resolution on appeal or mandamus review. *See* p. 33, *infra*.

admissions, and/or interference with the business at any insured location" as a result of "contagious or infectious disease" or the "outbreak of a contagious and/or infectious disease" within five miles of any insured location. *Id.* The Policy did not include a sublimit for Special Time Element Cancellation Coverage, making that coverage subject to the general $350 million per occurrence limit under the Policy. *Id.* at 97.

By February 2020, Hakkasan was suffering substantial business interruptions and financial losses due to the emergence of the COVID-19 pandemic and related government-mandated closures and restrictions. *Id.* at 98–99. Hakkasan inquired with Willis about Hakkasan's ability to recover its COVID-related business interruption losses under the Policy. *Id.* at 99. Willis internally concluded that Hakkasan was entitled to the full $350 million per occurrence limit under the Policy's plain language. *Id.* But without notifying Hakkasan, Willis informed Endurance that Hakkasan was experiencing business interruption losses and alerted Endurance to the Policy's lack of any sublimit for Special Time Element Cancellation Coverage. *Id.* In an unlawful effort to protect Endurance, with which Willis had a long-standing commercial relationship, Willis conspired with Endurance to write a fraudulent, backdated endorsement on the Policy with an effective date of April 1, 2019. *Id.* at 100. This endorsement (the "Endorsement") purported to limit Hakkasan's Special Time Element Cancellation Coverage to $1.5 million per occurrence, and thus attempted to retroactively reduce Hakkasan's coverage by over 99%. *Id.* On March 9, 2020, Endurance issued the Endorsement. *Id.* Then, without Hakkasan's knowledge, or much less consent, and knowing a claim under the Policy's Special Time Element Cancellation coverage was imminent, Willis purported to accept the Endorsement, which, if valid, would have deprived Hakkasan of hundreds of millions of dollars in critical insurance coverage. *Id.*

Four days later, Hakkasan told Willis to submit a claim to Endurance for its COVID-related business interruption losses. *Id.* Although Endurance confirmed receiving the claim on March 16, Endurance did not provide Hakkasan with its coverage position for months, even though it had all information necessary to do so. *Id.* at 101. While Hakkasan awaited Endurance's coverage position, Willis proposed that Hakkasan should "settle" its Claim with Endurance for $1.5 million—the amount of the sublimit under the backdated Endorsement. *Id.* Unaware at the time of that illegitimate endorsement, Hakkasan rejected Willis's proposal, given that its covered losses far exceeded $1.5 million and that it was entitled to up to $350 million per occurrence. *Id.*

On May 22, 2020, Hakkasan finally learned what Willis and Endurance had done. *Id.* at 102. Endurance sent Hakkasan a letter stating that Hakkasan was entitled to only $1.5 million for its business interruption losses, citing the backdated Endorsement. *Id.* This was the first time Hakkasan learned of the Endorsement, and soon thereafter it demanded an explanation from Willis. *Id.* at 102–03. Willis did not disclose the Endorsement itself to Hakkasan until May 26, in response to Hakkasan's demands. *Id.* at 103. Hakkasan pressed Willis for an explanation as to why it had purported to accept the Endorsement without informing Hakkasan, and obtaining Hakkasan's consent, and stunningly, Willis admitted that one of its employees had been "trying to protect" Endurance. *Id.* Relying on the fraudulent Endorsement that it issued with Willis's assistance, Endurance has refused to pay Hakkasan any more than $1.5 million for its Claim, even though Hakkasan's claimed losses far exceed that amount. *Id.*

C. Hakkasan Sues Willis and Endurance

Hakkasan sued Willis in the Eighth Judicial District Court in Clark County, Nevada for civil conspiracy, constructive fraud, negligence, and intentional interference with contractual relations. *Id.* at 89–119. The complaint was later

amended to add Endurance Services Ltd. as a defendant. *Id.* at 93. The complaint demands a jury trial. *Id.* at 119.

Willis moved to dismiss Hakkasan's claims. Respondent's Appendix Volume I ("R. App'x I") at 1–17. Willis's motion to dismiss contended, *inter alia*, that Section 1.13 of the T&Cs required Hakkasan to submit its claims to mediation before pursuing litigation, and accordingly, Hakkasan's claims against Willis had to be dismissed. *Id.* at 9–10. The District Court denied that motion in its entirety. P. App'x I at 2. But consistent with its own procedures, which give the District Court discretion to direct parties to mediation,[5] the District Court instructed the parties to engage in mediation. *Id.* The District Court's mediation order did not mention the T&Cs, much less suggest that the District Court agreed with Willis that the T&Cs required mediation, which would have been inconsistent with its denial of Willis's motion to dismiss. *Id.*

Willis then moved to strike Hakkasan's demand for a jury trial or, in the alternative, to compel arbitration. *Id.* at 61–70. Willis principally argued that Hakkasan had waived its constitutional right to have its tort claims against Willis tried before a jury by operation of the Jury Waiver Clause contained in Section 1.13 of the T&Cs. *Id.* 65–68. Willis alternatively argued that if the District Court held that waiver unenforceable, Hakkasan's claims should be compelled to arbitration. *Id.* at 68. That argument rested on a provision of the T&Cs stating: "To the extent the foregoing jury trial waiver is not enforceable under the governing law, . . . any dispute arising out of or in connection with these [T&Cs] . . . will be resolved by binding arbitration . . . ." *Id.* at 133. Willis raised no other

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[5] Department XI, Judge Elizabeth Gonzalez, Policies and Procedures: General Matters and Civil Cases, "Settlement" (p. 4), *available at* http://www.clarkcountycourts.us/departments/judicial/civil-criminal-divison/department-xi/.

ground upon which Hakkasan's claims could be compelled to arbitration, and it expressly made its request to compel arbitration contingent on a ruling that "the [T&Cs'] jury waiver provision is not enforceable." *Id.* at 68.

The District Court denied the request to strike the jury demand and did not rule on the alternative request to compel arbitration. P. App'x II at 285–86. The District Court held 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." *Id.* at 286. Accordingly, the District Court held, the Jury Waiver Clause did not apply to Hakkasan's claims and its jury demand was therefore permissible. *Id.* The District Court accordingly had no occasion to address whether the clause was enforceable. After observing that Willis sought to compel arbitration only "if the jury waiver provision is not enforceable under Nevada law," the District Court declined to rule on the motion to compel arbitration. *Id.*

D. Willis Files a Petition for a Writ of Mandamus and Notices an Appeal

Willis has filed a petition for a writ of mandamus in this Court challenging the District Court's denial of Willis's motion to strike Hakkasan's jury demand (Case No. 82833). The petition seeks an order "directing the district court to strike Hakkasan's jury demand as to its claims against Willis." Mandamus Pet. ("Pet.") 10. The petition asks this Court not only to reverse the District Court's ruling on the scope of the Jury Waiver Clause, but also to decide in the first instance that the waiver clause is enforceable—an issue that the District Court had no occasion to reach. Pet. 30–34.

Willis separately noticed a direct appeal from the District Court's order denying Willis's motion to strike Hakkasan's jury demand (Case No. 82829). As

noted above, Willis's cited jurisdictional basis for the appeal is Nevada Revised Statutes 38.247(1)(a), which permits an appeal from "[a]n order denying a motion to compel arbitration." Willis's requested relief in the appeal is expressly contingent on the outcome of the mandamus proceeding: Willis requests that "if this Court holds, in connection with [the mandamus petition], that the [T&Cs'] 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." Appellants' Opening Br. ("Br.") 29.

This Court consolidated these proceedings. Doc. No. 21-15351.

SUMMARY OF ARGUMENT

I. This Court should deny Willis's petition for mandamus in Case No. 82833 because the District Court did not commit a manifest abuse of discretion or clear error in declining to strike Hakkasan's demand for a jury trial.

A. The District Court did not err—much less clearly err or abuse its discretion—in holding that Hakkasan's tort claims against Willis fall outside the scope of the T&Cs' Jury Waiver Clause. By the T&Cs' terms, the waiver applies only to claims arising out of or in connection with Hakkasan's "purchase of insurance" through Willis—a transaction that was completed on March 29, 2019. Hakkasan's claims for civil conspiracy, constructive fraud, negligence, and intentional interference with contractual relations, however, all relate to Willis's distinct, subsequent misconduct in conspiring with Endurance to create the fraudulent Endorsement in 2020. Those claims do not depend on Willis's role in procuring insurance for Hakkasan in 2019, nor do they require a court to construe or apply the T&Cs. For that reason, and particularly in light of the constitutionally grounded requirement to construe jury trial waivers narrowly, the District Court correctly held that Hakkasan's tort claims are not subject to the Jury Waiver Clause in the T&Cs.

Willis's contrary argument relies largely on inapposite arbitration cases that construe phrases like "in connection with" and "related to" expansively. But those cases rest on the well-settled presumption in favor of arbitration under the Federal Arbitration Act, which requires a broad reading of such nexus language. In this case, however, the applicable presumption *against* the waiver of constitutional rights demands a narrow reading of the Jury Waiver Clause. Willis also contends that the T&Cs govern other services that more closely relate to Hakkasan's suit, such as insurance renewals and claims handling, but those arguments misunderstand the substance of Hakkasan's claims and misstate the scope of the T&Cs. Finally, Willis's contention that the District Court's order was inconsistent with its earlier order directing the parties to mediation is clearly wrong, because the earlier order did not purport to interpret the T&Cs.

B. Should this Court conclude that Hakkasan's claims fall within the scope of the Jury Waiver Clause, it should remand to the District Court to decide in the first instance whether the clause is enforceable. That question may turn on unresolved factual questions, including whether the T&Cs constitute a binding contract to which Hakkasan actually assented. And there is no sound basis to conclude that the District Court manifestly abused its discretion or committed clear error with respect to an issue that it did not decide and had no need to reach.

C. If this Court elects to rule on the Jury Waiver Clause's enforceability, it should hold that the Jury Waiver Clause is unenforceable because Hakkasan did not knowingly, voluntarily, and intentionally waive its constitutional right to a jury trial. The parties never negotiated—or even discussed—the T&Cs or any waiver of Hakkasan's rights. Further, Willis had never included the Jury Waiver Clause in any prior version of the T&Cs, and failed to draw Hakkasan's attention to that material addition during the renewal meeting on March 29, 2019. The clause is buried inconspicuously within nearly 70 paragraphs of 9-point, single-spaced text,

and it is not emphasized in any way. Willis, moreover, placed Hakkasan in a gravely compromised bargaining position by waiting until just one business day before Hakkasan's existing policies were set to expire to present a complete renewal proposal, forcing Hakkasan to procure insurance through Willis on the adhesive terms that it presented. Hakkasan's counsel—who was required to quickly select Hakkasan's insurance coverages in reliance on Willis's representations on the eve of the renewal deadline—never even saw the T&Cs before coverages were bound, and did not sign or assent to the T&Cs at any time. Under these circumstances, Nevada law is clear that the Jury Waiver Clause cannot be enforced.

II. **A.** This Court should dismiss the appeal in No. 82829 for lack of jurisdiction, as there is no appealable order below. Willis relies on Nevada Revised Statutes 38.247(1)(a), which permits an appeal from an order denying a motion to compel arbitration, but the District Court never issued such an order. Willis sought to compel arbitration only if the District Court concluded that the Jury Waiver Clause was unenforceable. But as noted above, the District Court did not reach that question. The District Court accordingly had no basis to address the contingent motion to compel arbitration.

B. If this Court construes the District Court's order to have denied a motion to compel arbitration and reaches the merits of the appeal, the appropriate disposition would depend on the outcome of the mandamus proceedings. If this Court finds that Hakkasan's claims are outside the scope of the Jury Waiver Clause, the order should be affirmed because Hakkasan's tort claims therefore also fall outside of the fallback arbitration clause of the T&Cs. Hakkasan does not dispute, however, that if the Court finds that Hakkasan's claims are within the scope of the Jury Waiver Clause and also finds in the first instance that the Jury

Waiver Clause is unenforceable, then Hakkasan's claims would also fall within the scope of the T&Cs' fallback arbitration clause.

ARGUMENT

I. This Court Should Deny Willis's Mandamus Petition Because the District Court Did Not Commit a Manifest Abuse of Discretion or Clear Error in Declining to Strike Hakkasan's Jury Demand

This Court should deny the mandamus petition challenging the District Court's order declining to strike Hakkasan's jury demand. "[M]andamus is an extraordinary remedy, reserved for extraordinary causes." *GGP, Inc. v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 437 P.3d 178, 2019 WL 1349858 (Nev. Sup. Ct. 2019) (unpublished disposition) (denying writ petition challenging denial of motion to strike jury demand). Under Nevada Revised Statutes 34.160, a writ of mandamus may issue only "to control a manifest abuse or arbitrary or capricious exercise of discretion." *State Off. of Att'y Gen. v. Just. Ct. of Las Vegas Twp.*, 133 Nev. 78, 80 (2017). "An arbitrary or capricious exercise of discretion is one 'founded on prejudice or preference rather than on reason,' or 'contrary to the evidence or established rules of law.'" *State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 931–32 (2011) (citing BLACK'S LAW DICTIONARY 119, 239 (9th ed. 2009)). Mandamus is reserved to correct "a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *State Off. of Att'y Gen.*, 133 Nev. at 80; *see also State ex rel. Conklin v. Buckingham*, 58 Nev. 450 (1938) ("Mandamus will not issue unless a clear legal right to the relief sought is shown.").

Willis's mandamus petition does not meet these demanding standards. The District Court did not err at all—much less clearly err or manifestly abuse its discretion—in ruling that Hakkasan's tort claims do not "aris[e] out of or in connection with" the services provided under the T&Cs and so do not fall within

the scope of the Jury Waiver Clause. The only service provided under the T&Cs is Willis's purchase of insurance for Hakkasan in 2019. Hakkasan's claims do not concern that transaction. Willis's contrary arguments misunderstand the legal standards governing jury trial waivers and misconstrue the scope of the T&Cs. And although Willis also seeks a further ruling from this Court on the enforceability of the Jury Waiver Clause, mandamus is not appropriate on that issue because the District Court did not reach it.

A. The District Court Correctly Ruled That Hakkasan's Tort Claims Fall Outside the Scope of the T&Cs' Jury Waiver Clause

1. *The Text of the Jury Waiver Clause Does Not Encompass Hakkasan's Tort Claims*

The District Court did not clearly err or manifestly abuse its discretion in holding that Hakkasan's claims fall outside of the Jury Waiver Clause of the T&Cs. *See State Off. of Att'y Gen.*, 133 Nev. at 80. To the contrary, the District Court correctly construed the contract language in light of the presumption against waiver of constitutional rights and the particular misconduct that Hakkasan alleges.

The Nevada Constitution guarantees that "[t]he right of a trial by Jury shall be secured to all and remain inviolate forever; but a Jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law . . . ." Art. I, § 3. To protect the fundamental right to a jury trial, "jury waivers are to be narrowly construed and any ambiguity is to be decided against the waiver." *Phoenix Leasing Inc. v. Sure Broad., Inc.*, 843 F. Supp. 1379, 1388 (D. Nev. 1994); *see Hard Rock Hotel, Inc. v. Eighth Judicial District Court*, 133 Nev. 1019, 2017 WL 881877, at *1 (2017) (unpublished disposition) (citing *Phoenix Landing* when construing jury waiver clause); *see also Mall, Inc. v. Robbins*, 412 So. 2d 1197, 1200 (Ala. 1982) (a party's right to a jury trial must be strictly construed and limited only "to those controversies directly related to and arising out of the terms

and provisions of the overall agreement containing the jury waiver provisions."). In applying that that principle of narrow construction, this Court has explained that "tort claims" will be held to "'aris[e] out of'" or "'relat[e] to'" a contract when "those claims cannot be resolved without reference to" the contract. *Hard Rock Hotel*, 2017 WL 881877, at *1 (citing *Phoenix Leasing*, 843 F. Supp. at 1388). Even where a jury waiver clause purports to cover "any matters whatsoever arising out of or in any way connected with" a particular agreement, it will not apply where the agreement has "no application to the relief sought" and where the claims are "independent and outside of" the agreement. *Mall*, 412 So. 2d at 1200; *see also Vision Bank v. Algernon Land Co., LLC*, No. CIV.A.10-00172-N, 2010 WL 3803277, at *4 (S.D. Ala. Sept. 23, 2010) (explaining that a jury clause covering claims "arising out of, or based upon" an agreement did not apply to claims that did "'not require a reference to, or a construction of,'" the agreement).

That settled legal framework resolves this mandamus petition. The Jury Waiver Clause on its face is narrow: It does ***not*** cover all disputes related to the T&Cs, but only "disputes arising out of or in connection with the ***services provided*** under" the T&Cs. P. App'x I at 132 § 1.13 (emphasis added). The T&Cs themselves specify the "services provided" by stating that they "set out the complete and exclusive statement of agreement and understanding between the parties . . . with respect to your ***purchase of insurance***." *Id.* § 1.11. Other than the purchase of insurance, the T&Cs do not impose other obligations on Willis to provide services to Hakkasan, such as claims handling services. *Id.* 130–138. Accordingly, only claims "arising out of or in connection with" Willis's 2019 purchase of insurance on behalf of Hakkasan—*i.e.*, claims that "cannot be resolved without reference" to that transaction—are encompassed by the Jury Waiver Clause. *See Hard Rock Hotel*, 2017 WL 881877, at *1; *Phoenix Leasing*, 843 F. Supp. at 1388.

Hakkasan's tort claims do not meet that standard. Those claims do not depend on Willis's purchase of the Policy on Hakkasan's behalf in 2019.[6] Rather, the claims allege a series of unlawful actions that Willis carried out to undermine Hakkasan's rights almost a ***year after*** that transaction was complete. Establishing Willis's liability for those actions will not require analyzing Willis's efforts to procure insurance for Hakkasan in 2019. Put another way, it would make no difference for this lawsuit whether Willis or some other broker had secured Hakkasan's coverage in 2019. Willis's torts all relate to distinct, subsequent misconduct that it committed in 2020 by conspiring with Endurance to fraudulently add a backdated endorsement to the Policy in an attempt to preserve and enhance its commercial relationship with Endurance. They can therefore readily be resolved without reference to Willis's 2019 procurement of insurance under the T&Cs, and they are "independent and outside of" the T&Cs. *Mall* 412 So. 2d at 1200.

Nor do Hakkasan's claims require a court to construe, apply, or enforce any term of the T&Cs. In the related context of forum-selection clauses, this Court has explained that where it is unclear from the text of a clause whether it applies to the facts of a particular case, a court must "determine whether resolution of the . . . claims pleaded by the plaintiff relates to the interpretation of the contract." *Tuxedo Int'l Inc. v. Rosenberg*, 127 Nev. 11, 25 (2011). Further, the clause may apply if "the plaintiff's cause of action directly concerns the formation or enforcement of the contract containing the . . . clause, or . . . the plaintiff could have brought a parallel breach of contract claim and yet did not." *Id.* (citations omitted).

[6] Contrary to Willis suggestion (Pet. 27, Br. 24), Hakkasan does ***not*** allege any contract claims against Willis, and Hakkasan does not plead that the T&Cs are the basis for any cause of action against Willis.

Consistent with *Tuxedo International's* analysis, courts often resolve the scope of dispute resolution clauses by determining "whether the court must resort to the terms of the agreement to resolve the claims" at issue. *See, e.g., E. & J. Gallo Winery v. Encana Energy Servs., Inc.*, 388 F. Supp. 2d 1148, 1162 (E.D. Cal. 2005); *see also In re Orange, S.A.*, 818 F.3d 956, 962 (9th Cir. 2016) (holding that claims were outside the scope of forum selection clause because "[n]othing in the claims required the district court to interpret, let alone reference, the [contract containing the forum selection clause] to issue a ruling on [plaintiff's] claims."). Under that approach, as well, Hakkasan's tort claims do not fall within the Jury Waiver Clause.

Gallo Winery is instructive. In that case, a California winery sued natural gas producers for conspiring to avoid price competition among each other and for engaging in sham "wash" trades of natural gas to artificially inflate the price of natural gas in California. 388 F. Supp. 2d at 1155. The natural gas producers moved to transfer venue on the basis of a forum selection clause within a contract between the parties for the sale of natural gas. *Id.* The Court held that "even [under] the most expansive application of forum selection interpretations," the winery's claims for antitrust violations, unfair business practices, unjust enrichment, and constructive trust "bear no significant relationship to the [natural gas purchase] agreement between [the winery] and Defendants containing the forum selection clause." *Id.* at 1163. The winery's claims neither arose from nor were connected to Defendants' sale of natural gas to the winery, as "Defendants [were] alleged to have passed on to [the winery] prices that were illegally inflated as a result of collusive and anti-competitive behavior that occurred entirely outside the scope of the simple gas supply Agreement." *Id.* at 1162–63.

The analysis is even clearer here, where the Jury Waiver Clause, unlike a forum-selection clause, must be narrowly construed. *Phoenix Leasing*, 843 F.

Supp. at 1388. The collusive, unlawful behavior alleged in Hakkasan's complaint does not depend on the meaning or application of any term of the T&Cs, does not assert a violation of a legal duty established by the T&Cs, and does not otherwise make any reference to the T&Cs. Rather, Hakkasan's tort claims against Willis are predicated upon a series of egregious actions that Willis carried out to undermine Hakkasan's rights almost a ***year after*** Willis purchased insurance for Hakkasan. Just as the *Gallo Winery* plaintiff's claim concerned subsequent wrongdoing separate from any transaction governed by the contract containing the dispute resolution clause, so does the wrongdoing Hakkasan alleges: namely, Willis's collusion with Endurance to create an illegitimate, backdated Endorsement, which purported to retroactively limit Hakkasan's Special Time Element Cancellation Coverage to $1.5 million per occurrence. Willis's scheme "occurred entirely outside the scope of the simple [insurance procurement] [a]greement" between Hakkasan and Willis purportedly governed by the T&Cs. *Gallo Winery*, 388 F. Supp. 2d at 1163.

In short, because none of Hakkasan's claims have to do with Willis's purchase of insurance in 2019 or otherwise rest on the provisions of the T&Cs, they are outside the scope of the Jury Waiver Clause. *See Orange*, 818 F.3d at 962 (holding on mandamus review that claims were outside scope of dispute resolution clause where they "did not require analyzing" and "bore no relation to" the contract containing the clause). The mere fact that Hakkasan's claims "implicate [the parties'] overall business relationship" (Pet. 26) is insufficient to bring those claims within the scope of the Jury Waiver Clause. *See Gallo Winery*, 388 F. Supp. 2d at 1162.

Hakkasan's claims also do not "directly concern[] the formation or enforcement of the contract containing the . . . clause," and thus Hakkasan's claims could not be pled as "parallel breach of contract claim[s]" under the T&Cs.

Tuxedo Int'l, 127 Nev. at 18–19. That is because Hakkasan's tort claims are predicated on Willis's breaches of independent duties of care owed to Hakkasan—not any contractual obligation contained within the text of the T&Cs. Hakkasan does not allege that Willis breached the T&Cs.

Against this reading of the Jury Waiver Clause in light of the narrow-construction canon, Willis offers three arguments: (1) similar nexus language is interpreted broadly when it appears in *arbitration* provisions; (2) the T&Cs supposedly provide for other services beyond the procurement of insurance, such as claims handling, that are closer to Hakkasan's tort claims; and (3) the District Court's ruling was purportedly inconsistent with its prior order directing the parties to mediate their dispute. None of those arguments has merit.

2. *Willis's Arguments That the Jury Waiver Clause Covers Hakkasan's Tort Claims Misunderstand the Law and the Record*

(a) Willis Inaptly Relies on Cases Construing Arbitration Clauses

In its almost exclusive reliance on arbitration cases, Willis misapprehends the governing legal standards. It is well-settled that in construing an arbitration clause, courts must apply a strong presumption in favor of arbitration. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). Under that presumption, once it is determined that a contract contains an arbitration clause, any doubts about the scope of that clause must be resolved in favor of arbitration. *Id.* Arbitration clauses must, in other words, be construed broadly. *See id.* But as explained above, precisely the opposite presumption applies to jury waiver clauses: they must be construed narrowly. *See* pp. 18–19, *supra*.

Accordingly, Willis's cited authorities are almost entirely inapposite, because most of them construed the scope of an arbitration clause,[7] and none of them addressed the scope of *a jury waiver clause*. *See Orange*, 818 F.3d at 962 (explaining that the broad construction of arbitration clauses should not also apply to other kinds of dispute resolution clauses, such as forum-selection clauses). Even if some of those cases considered similar nexus language (*i.e.*, "arising out of or in connection with"), their holdings rested on an arbitration-specific presumption totally at odds with the narrow-construction principle that applies to the waiver of constitutional rights. *See Phoenix Leasing*, 843 F. Supp. at 1388; *Mall*, 412 So. 2d at 1200. Moreover, several of Willis's cited arbitration cases concern international commerce, where the presumption in favor of arbitration is strongest, in sharp contrast to the presumption *against* a domestic company's waiver of its constitutionally guaranteed right to a jury trial.[8]

Even putting aside that basic and fatal distinction between this case and Willis's cited authorities, they each involved materially different contract language or factual contexts (or both). For example, this Court's unpublished decision in *In re Kent & Jane Whipple Tr.*, 133 Nev. 1033, 2017 WL 2813974 (2017), addressed an arbitration clause covering *any* "disagreement at any time" between two trustees, regardless of the nature of the dispute or the acts performed by the

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[7] *Sho-Oja v. Sprint Corp.*, No. CV138575JFWMANX, 2014 WL 12561584, at *4 (C.D. Cal. Jan. 16, 2014); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 719 (9th Cir. 1999); *Kindred v. Second Jud. Dist. Ct. ex rel. Cty. of Washoe*, 116 Nev. 405, 411, 996 P.2d 903, 907 (2000); *Watson Wyatt & Co. v. SBC Holdings, Inc.*, 513 F.3d 646, 650 (6th Cir. 2008).

[8] *Pennzoil Expl. & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1065 (5th Cir. 1998); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 847 (2d Cir. 1987); *Vermont Pure Holdings, Ltd. v. Descartes Sys. Grp., Inc.*, 140 F. Supp. 2d 331, 333 (D. Vt. 2001).

trustees. *Id.* at *3. The Jury Waiver Clause here is far narrower, tethered as it is to a specific transaction, *i.e.*, Willis's procurement of insurance on Hakkasan's behalf. *Kindred*, 116 Nev. at 411, also involved arbitration clauses that broadly embraced "any dispute, claim or controversy that may arise between me and my firm" and "any controversy or dispute arising between you and [employer] in any respect to this agreement or your employment." The Dispute Resolution clause here does not broadly apply to "any dispute" that may arise between Willis and Hakkasan. P. App'x I at 132–33.

Willis's other authorities are similarly irrelevant. In *Sho-Oja v. Sprint Corp.*, for example, a mobile telephone consumer sued her carrier explicitly ***for breach of contract*** after the carrier allegedly disclosed her call history to her husband without her consent. 2014 WL 12561584, at *1. Because the underlying contract included an arbitration clause covering "any claims or controversies against each other related in any way to our Services or the Agreement," the Court found that the consumer's claims clearly fell within the scope of the agreement. *Id.* at *4. Here, Hakkasan does not allege that Willis breached the T&Cs, which govern Hakkasan's "purchase of insurance" through Willis. P. App'x I at 132. Rather, Hakkasan alleges that, long after Willis purchased insurance for Hakkasan, it secretly colluded with Endurance in an attempt to retroactively deprive Hakkasan of the full benefits that Hakkasan had bargained for under the Policy. R. App'x II. at 109–16. Hakkasan's claims do ***not*** arise out of, and are ***not*** connected to, the T&Cs; any entity that would have conspired with Endurance in this way, regardless of whether it had any previous contractual relationship with Hakkasan, would have similarly been liable in tort for this misconduct. Because Hakkasan's claims do not require the interpretation of the terms of the T&Cs or either party's performance under the T&Cs, they do not arise under, and are not connected to, the T&Cs and are beyond the scope of the Dispute Resolution clause.

For similar reasons, *Simula*, 175 F.3d 716, and *Phillips v. Parker*, 106 Nev. 415 (1990), are not relevant here. In *Simula*, the Court found that "[i]f [defendant] had fully complied with the contract, as interpreted by [plaintiff], there would be no tort claims." 175 F.3d at 725. Here, in contrast, Willis's performance under the T&Cs by procuring the Policy for Hakkasan does not impact its liability for conspiring with Endurance to concoct the Endorsement—an activity which the T&Cs never contemplated. Likewise, the plaintiff in *Phillips* had to rely on a written agreement containing an arbitration clause to establish ownership in a company. 106 Nev. at 416. But Hakkasan's claims are not "dependent upon the terms of" the T&Cs and it need not rely on them to establish its standing or to prove any element of its claims. *Cf. id.*

The remaining cases that Willis cites lie far afield from the facts of this case. In *Pennzoil Expl. & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d at 1069, the Court found that the plaintiff's claims, which were predicated on a letter agreement that preceded another agreement that contained an arbitration clause, related to the subsequent agreement because the agreements "by their terms, plainly show[ed] their interrelation." Here, there is no written agreement predicating Hakkasan's claims, let alone one connected to or preceding the T&Cs. And in *Genesco*, 815 F.2d at 849, *Vermont Pure*, 140 F. Supp. 2d at 333, 336, and *Watson Wyatt*, 513 F.3d at 648, 650–51, the claims of each plaintiff were based on allegations that certain goods or services did not meet the standards or prices in a sales or service agreement that included an arbitration clause. Here, Hakkasan does not allege that Willis failed to perform under the T&Cs; it alleges independent breaches of duties of care that occurred long after the procurement transaction itself.

(b) Even if Relevant, the Arbitration Cases Would Not Support Willis's Argument

Even if Willis's arbitration cases were relevant here, they would not support Willis's argument. Willis incorrectly suggests that a clause purporting to cover disputes "arising out of or in connection with" a particular transaction automatically covers "all manner of disputes between the parties." Br. 20. But even where a ***broadly-read arbitration clause*** purports to cover disputes "arising out of or in connection with" a contract, its scope is not limitless, and it may not be construed to cover disputes that do not have "a significant relationship to the contract" or "their origin or genesis in the contract." *Simula*, 175 F.3d at 721; *see also Watson Wyatt*, 513 F.3d at 649 (explaining that while "[t]he FAA manifests 'a liberal federal policy favoring arbitration agreements', [t]his policy . . .is not so broad that it compels the arbitration of issues not within the scope of the parties' arbitration agreement"). That is because "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T*, 475 U.S. at 648; *In re Zappos.com, Inc., Customer Data Sec. Breach Litig.*, 893 F. Supp. 2d 1058, 1062 (D. Nev. 2012) .

For that reason, courts have explained that "when reviewing whether a dispute is sufficiently related to a contract containing a broadly drafted arbitration agreement so as to be covered under the scope of that agreement, there must be 'some legal and logical nexus between the source of the dispute and the arbitration provision at issue.'" *Capitol Chevrolet & Imports, Inc. v. Payne*, 876 So. 2d 1106, 1109 (Ala. 2003); *see also Locklear Auto. Grp., Inc. v. Hubbard*, 252 So. 3d 67, 92 (Ala. 2017) (explaining that a broad arbitration clause still must be "tied to" the contract or transaction governed by the clause). Absent such a nexus, even a broad arbitration clause does not extend to a dispute.

In *Capitol Chevrolet*, for example, a car buyer signed an agreement accompanying a sales contract which broadly required arbitration of "all claims, demands, disputes or controversies of every kind or nature between [the buyer and the seller] arising from, concerning or relating to any of the negotiations involved in the sale, lease, or financing of the vehicle, . . . or any other aspects of the vehicle and its sale, lease, or financing." 876 So. 2d at 1107. The buyer later sued the seller for fraud and conversion, alleging that about one month after she purchased the car, the seller had lied to her about having a buyer for the car, and in reliance on that misrepresentation, the buyer had relinquished the car to the seller and stopped making payments on the car. *Id.* at 1107–08. The buyer further alleged that the seller's employee converted the car for his personal use and her credit was damaged. *Id.* at 1108. The Court denied the seller's motion to compel the buyer's claims to arbitration, explaining that "[w]hile the present action does, in some sense, 'aris[e] from . . . any of the negotiations involved in the sale . . . of the vehicle' . . . a fair reading of the arbitration agreement . . . leads to the conclusion that the agreement covers only disputes that more closely relate to the *initial* purchase and financing . . ., and the negotiations and sale of other services incident to the *initial* sale . . . ." *Id.* at 1109. Because the Court found that the buyer's claims concerned "alleged subsequent tortious conduct" unrelated to the initial car sale, they fell outside the scope of the arbitration clause. *Id.* at 1110.

Similar to the car buyer in *Capitol Chevrolet* who alleged that the seller had deceived her into relinquishing her car a month after she had bought it from the seller, Hakkasan alleges that nearly a year after Willis procured the Policy for Hakkasan, Willis conspired with Endurance to fabricate the illegitimate, backdated Endorsement in order to undermine Hakkasan's rights under the Policy and to protect Willis's business relationship with Endurance. R. App'x II at 99–100. Willis's subsequent tortious conduct lacks a "legal and logical nexus" to Willis's

initial purchase of the Policy for Hakkasan, which was completed nearly a year before Willis's misconduct took place. *See Capitol Chevrolet*, 876 So. 2d at 1109. Accordingly, even if Section 1.13 of the T&Cs were construed as an arbitration clause, Hakkasan's claims would not be covered. *See id.* at 1110.

(c) Willis's Argument About Other Services Mischaracterizes Both Hakkasan's Complaint and the Text of the T&Cs

Willis contends that the T&Cs govern more than just the procurement of insurance, and it argues that Hakkasan's tort claims arise out of, or are connected with, those other services. That argument misunderstands the allegations of the complaint and misconstrues the scope of the T&Cs.

For example, Willis contends that its alleged collusion with Endurance to create the fraudulent endorsement falls under the scope of the "renewal" services contemplated by the T&Cs, arguing that Willis was "obligated to . . . disclose the impact of COVID-19 on Hakkasan's ongoing business operations" to Endurance. Pet. 26. Willis's argument misconceives what Hakkasan alleges. Hakkasan does not allege that Willis informed Endurance about Hakkasan's COVID-19 business interruption losses so that Endurance could take that information into account when proposing the terms on which Hakkasan could renew its property coverages for the 2020–21 policy term. Rather, Hakkasan alleges that Willis shared that information in order to enable Endurance to retroactively alter the terms of the existing Policy before Hakkasan submitted its claim and to prevent Hakkasan from recovering the full value of its business interruption losses. R. App'x II at 99–100. Willis's ultimate goal was not to keep Endurance informed of Hakkasan's exposure for renewal purposes, but to preserve its lucrative business relationship with Endurance to the detriment of Hakkasan. *Id.* at 99. That alleged misconduct

was far outside of the bounds of Willis's renewal services. *See Capitol Chevrolet*, 876 So. 2d at 1110; *cf. Gallo Winery*, 388 F. Supp. 2d at 1162–63.

Willis likewise errs in arguing that the T&Cs govern "claims handling" services that relate to the allegations in Hakkasan's complaint. Pet. 27. The T&Cs do not define or govern Willis's obligations to Hakkasan with regard to "claims handling," a term that is not mentioned in the T&Cs. That much is obvious from the T&Cs' preamble, which states that the T&Cs govern Hakkasan's "decision to ***purchase*** insurance coverages, products, and/or services ***through*** Willis . . . ." P. App'x I at 130 (emphasis added). "Claims handling" is not a service purchased ***through*** Willis (*i.e.*, a service purchased by Willis from a third party), but rather a service performed by Willis itself subject to separate duties of care.

Although Willis cites a number of provisions of the T&Cs, none of those establishes any "claims handling" obligation. Section 2.1 merely outlines Hakkasan's obligation to provide "complete and accurate information" to Willis. P. App'x I at 134. Section 2.7 defers describing any substantive "claims handling" procedures and does not indicate whether Willis, an insurance company, or some other entity will provide claims-handling services; it merely provides that Willis "will inform you of the reporting requirements for claims, including where claims should be reported and the method of reporting to be used," at some point in the future. *Id.* at 135. Section 2.17 similarly does not define or describe Willis's claims handling obligations; it merely disclaims any such obligations after the parties' relationship ends. *Id.* at 136.

Ultimately, as the T&Cs make clear, the 2019 Proposal was not an offer to procure "claims handling" services on Hakkasan's behalf, but an offer to procure *insurance* on Hakkasan's behalf. *See id.* at 130, 132. While the Proposal makes some passing references to Willis's "Claims Advocacy Center" and persons who work in it, the T&Cs do not impose any obligations on Willis with respect to

"handling" a client's claims and do not even define whether Willis or some other entity will ultimately be responsible for that function. To the extent that Willis provided claims handling services after the procurement of insurance was complete, Willis's legal obligations concerning those services are governed outside of the T&Cs. Because the T&Cs impose no claims-handling obligations on Willis, they certainly do not define the scope of any such obligations in a way that could implicate Hakkasan's tort claims.

In any event, by colluding with Endurance to issue the Endorsement before Hakkasan even decided to tender its Claim, Willis was not providing any legitimate "claims handling" service, but was actively attempting to frustrate Hakkasan's ability to recover up to the full limits of the Policy before Hakkasan's claim was even submitted. Even if the T&Cs explicitly imposed a claims-handling obligation on Willis (which they do not), adjudicating the allegation that Willis and Endurance conspired to fraudulently cap Hakkasan's existing coverage would not depend on or make reference to that obligation. Whatever justification Willis may devise for its conspiracy to secretly backdate a sublimit on Hakkasan's policy, that conduct bears no relation to claims handling.

(d) The District Court's Order Denying Willis's Motion to Dismiss is Not Inconsistent With its Order Denying Willis's Motion to Strike Hakkasan's Jury Demand

Finally, Willis argues that the District Court's construction of the Jury Waiver Clause "directly contradicted" its previous order denying Willis's motion to dismiss but directing the parties to mediate the dispute. Pet. 29. That argument simply misunderstands the dismissal order. That order did not mention—let alone construe the scope of—the Dispute Resolution provision of the T&Cs. P. App'x I at 1–2. And the District Court's disposition makes clear that it ***rejected*** Willis's interpretation of that provision: Willis had argued that under the terms of the

T&Cs, Hakkasan's claims "should be dismissed" outright because the parties had not engaged in mediation. R. App'x I at 9. But the District Court denied the motion in full, declining to dismiss the claims under the mediation clause of the T&Cs. P. App'x I at 2.

In light of that disposition, the District Court's instruction that the parties engage in mediation is best understood as an exercise of the District Court's inherent discretion to encourage alternative dispute resolution, unrelated to the T&Cs. That is consistent with the District Court's Policies and Procedures for General Matters and Civil Cases, which provide that the District Court "may refer a matter to a private mediator with the parties bearing the cost thereof" in order to facilitate settlement.[9] Construed as a discretionary mediation referral, the order denying Willis's motion to dismiss is in no way inconsistent with the later order denying Willis's motion to strike Hakkasan's jury demand.[10]

* * *

In sum, the District Court correctly held that Hakkasan's tort claims against Willis are outside of the scope of the T&Cs' Jury Waiver Clause. Without anything approaching a clear error or a manifest abuse of discretion on the part of the District Court, this Court should deny Willis's petition for mandamus relief.

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[9] http://www.clarkcountycourts.us/departments/judicial/civil-criminal-divison/department-xi/.

[10] Even if the District Court relied on the mediation provision in Section 1.13 of the T&Cs, that would have been erroneous for the reasons described herein, and this Court should not extend that error to the much more serious matter of whether Hakkasan may exercise its constitutional right to try its claims to a jury.

B. This Court Should Not Decide the Enforceability of the Jury-Trial Waiver in the First Instance on Mandamus Review

Should this Court conclude that the District Court committed a manifest abuse of discretion or clear error in construing the scope of the Jury Waiver Clause, it should remand to the District Court to decide in the first instance whether the Jury Waiver Clause is enforceable. The District Court could not have manifestly abused its discretion or committed clear error on an issue that it has not addressed. *See Johnson v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 134 Nev. 964, 2018 WL 3025917, at *1 (2018) (unpublished disposition) (denying petition and declining to address on mandamus review a legal issue that the district court did not reach); *Yellow Cab of Reno, Inc. v. Second Jud. Dist. Ct. of State ex rel. Cty. of Washoe*, 127 Nev. 583, 592 (2011) (same). As this Court has explained, where a district court's order does "not explicitly address [a] legal issue raised in [a] petition," this Court "cannot determine whether the district considered the issue presented, making it difficult . . . to say that a writ of mandamus should be issued." *Johnson*, 2018 WL 3025917, at *1. The inadvisability of premature mandamus relief is even clearer here, where it is plain that the District Court did not consider the enforceability question. Moreover, the enforceability of the Jury Waiver Clause may turn on factual disputes between the parties, such as those related to what was said during renewal discussions in 2019, that the District Court has yet to resolve. In this circumstance, the proper course would be to remand the issue to the District Court to address the enforceability question in the first instance.

C. Hakkasan Did Not Knowingly, Voluntarily, and Intentionally Waive Its Constitutional Right to Try Its Claims Against Willis to a Jury

If this Court reaches the enforceability question, it should hold that it would not be a manifest abuse of discretion or clear error for the District Court to

conclude that Hakkasan did not knowingly, voluntarily, and intentionally assent to the Jury Waiver Clause. According to the sworn declaration that Hakkasan submitted in the District Court, Willis and Hakkasan never discussed—let alone negotiated—the T&Cs or the Jury Waiver Clause, which Willis had included in a large packet of material provided to Hakkasan just one business day before Hakkasan's insurance policies were to expire. P. App'x II at 165–66. Hakkasan was not asked to review or sign these terms prior to or even after binding coverage. *Id.* at 166. Moreover, given Willis's delay in presenting the Proposal, even if Willis had alerted Hakkasan to the Jury Waiver Clause, which had never been included in any prior version of the T&Cs, Hakkasan would have had no practical choice but to proceed with renewal on Willis's adhesive terms, given that it could not reasonably have allowed hundreds of millions of dollars in insurance coverage to lapse overnight. *Id.* at 165. Thus, even if Hakkasan's instant claims fell within the scope of the Jury Waiver Clause—which, as explained in Section I.A., *supra*, they do not—the clause still would not be enforceable under bedrock constitutional principles.

This Court has held that a contractual provision waiving a party's right to a trial by jury may be enforced only if it is entered into "knowingly, voluntarily and intentionally." *Lowe Enterprises Residential Partners, L.P. v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 118 Nev. 92, 100 (2002); *see also Malan Realty Invs., Inc. v. Harris*, 953 S.W.2d 624, 627 (Mo. 1997) ("The fundamental nature of a due process right to a jury trial demands that it be protected from an unknowing and involuntary waiver."). "The factors to consider in determining whether a contractual waiver of the right to jury trial was entered into knowingly and voluntarily include: (1) the parties' negotiations concerning the waiver provision, if any, (2) the conspicuousness of the provision, (3) the relative bargaining power of the parties and (4) whether the waiving party's counsel had an opportunity to

review the agreement." *Lowe*, 118 Nev. at 101. All these factors demonstrate that the Jury Waiver Clause is unenforceable.

First, Willis did not disclose to Hakkasan that it had included T&Cs behind the Proposal, and thus the parties could not have "negotiated" any terms. P. App'x II at 165–66. Hakkasan never signed, initialed, or acknowledged any part of the T&Cs, including the Jury Waiver Clause, which are written in generic terms without any reference to Hakkasan. *Id.* at 166.[11] When Hakkasan orally selected its insurance coverages for the 2019–20 term on March 29, 2019, it was not aware of the Jury Waiver Clause Willis had tucked away in the third sentence of Section 1.13 of the T&Cs. *Id.* Nor did Hakkasan have any reason to suspect that a jury waiver clause was included within the T&Cs, because Willis had never before presented a version of the T&Cs that purported to waive Hakkasan's right to a jury trial. *Id.* The only document that Hakkasan signed in connection with renewing its insurance policies—the Order to Bind—was presented to Hakkasan for signature at a later date unaccompanied by the T&Cs, did not make any reference to the T&Cs, and was executed after coverage was already bound. *Id.*

Willis does not dispute these critical facts. Instead, Willis inexplicably points to the fact that the Jury Waiver Clause was included in a ***subsequent*** version of the T&Cs that was attached to a proposal Willis presented to Hakkasan for the 2020–21 term on March 17, 2020. Pet. 18. But whether Hakkasan discussed the T&Cs with Willis at any point after March 29, 2019, and whether any subsequent version of the T&Cs included a similar clause, is irrelevant to the question of whether Hakkasan knowingly, voluntarily, and intentionally assented to the Jury

[11] For that reason, it is doubtful that the T&Cs even bind Hakkasan. *See Zappos*, 893 F. Supp. 2d at 1066 (under Nevada law, "a party cannot assent to terms of which it has no knowledge or constructive notice"). However, the enforceability question here can be resolved on narrower grounds.

Waiver Clause included for the first time in the T&Cs attached to the Proposal for the 2019–20 policy term. In the absence of any evidence that Hakkasan was even aware of the new Jury Waiver Clause that Willis unilaterally imposed without negotiation on March 29, 2019, this Court cannot conclude that Hakkasan knowingly, voluntarily, and intentionally waived its right to a jury trial. *See Zi Beauty, Inc. v. General Growth Properties*, No. A-16-744558-B, Order Denying Defs.' Mot. to Bifurcate Trial and Partially Stay Disc. and Mot. to Strike Jury Demand on Order Shortening Time, at 3 (Nev. D. Ct. Mar. 15, 2018), *denying pet. for writ of mandamus*, *GGP*, 2019 WL 1349858, at *1 (holding that a jury trial waiver was unenforceable where it "was never the subject of discussion or negotiation between Plaintiffs and Defendants and Plaintiff was unaware of the provision until being served with the Motion to Strike Jury Demand"); *Lenoir v. Fred's Stores of Tenn., Inc.*, No. 1:15CV214-SA-DAS, 2016 WL 3265451, at *2 (N.D. Miss. June 14, 2016) (holding that jury trial waiver was unenforceable where terms "were laid out unilaterally" by one party); *Dreiling v. Peugeot Motors of Am., Inc.*, 539 F. Supp. 402, 403 (D. Colo. 1982) (holding that jury trial waiver on a standardized form drafted by one party was unenforceable where there was no evidence "the waiver provision was a bargained for term of the contract, was mentioned during negotiations, or was even brought to the plaintiffs' attention").

Second, the Jury Waiver Clause in Section 1.13 of the T&Cs is inconspicuous. The 55-page Proposal references the T&Cs only once briefly on page 12, and ***nowhere*** states that by purchasing insurance through Willis, Hakkasan would be waiving its right to a jury trial. P. App'x I at 86. And the provision is hidden at the end of the twenty-fifth paragraph of the T&Cs (which include nearly seventy paragraphs of text) and is not underlined, highlighted, boldfaced, italicized, capitalized, or emphasized in any way. *Id.* at 133. Rather, the clause is camouflaged in a thicket of 9-point, single-spaced text. *Id.* Further,

the heading of Section 1.13, simply titled "Dispute Resolution," provides no hint that the T&Cs contain a jury trial waiver inserted for the first time in the parties' long-standing relationship. *Id.* at 132.

The T&Cs are thus a paradigmatic example of a form that submerges a jury trial waiver clause in a sea of fine print. The clause here bears no resemblance to conspicuous waiver clauses that Nevada courts have enforced in other cases, where the clauses were bolded, in upper case letters, prefaced by a heading clearly identifying the waiver,[12] or in some cases located directly above a signature line. *See Club Vista Fin. Servs., L.L.C. v. Eighth Jud. Dist. Ct.*, 128 Nev. 889, 2012 WL 642746, at *2 (2012) (unpublished disposition) (holding that a jury waiver clause in "bold and uppercase letters, directly above the signature line, located in a concise agreement, and titled "'WAIVER OF JURY TRIAL'" was sufficiently conspicuous to be enforceable); *Casey v. Third Jud. Dist. Ct.*, 281 P.3d 1160, 2009 WL 3188939, at *2 (Nev. 2009) (unpublished disposition) (finding that a jury waiver clause that was "properly titled as such, . . . not buried in the . . . Agreement, and . . . bolded and the same size as the font found in the rest of the document" was conspicuous); *Malan*, 953 S.W.2d at 627 (finding that a jury waiver clause that was "not buried in the [agreement] [and] was prominently displayed as the only and last paragraph on the last page immediately above the signature lines" was conspicuous); *Mall*, 412 So. 2d at 1199 (finding that a jury waiver clause clearly labeled "Waiver of Trial by Jury: Tenant Not To Counterclaim" was conspicuous); *Fuoroli v. Westgate Planet Hollywood Las Vegas, LLC*, No. 2:10-CV-2191 JCM GWF, 2014 WL 131668, at *4 (D. Nev. Jan.

[12] The simple heading "Dispute Resolution" does not indicate that a contract includes a jury waiver clause, and Willis cites no authority to the contrary.

14, 2014) (holding that jury waiver clause clearly titled "Waiver of Jury" on a two-page document was sufficiently conspicuous).

Because the Jury Waiver Clause here lacks any of these characteristics, it is not readily noticeable and could easily be overlooked. *Cf. Fuoroli*, 2014 WL 131668, at *4. That is insufficient to deprive Hakkasan of its constitutional right. *See Zi Beauty*, No. a-16-744558-B, at 3 (holding that an un-highlighted jury waiver clause at the end of a non-descript paragraph was unenforceable); *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977) (holding that a jury waiver provision "literally buried in the eleventh paragraph of a fine print, sixteen clause agreement" was unenforceable); *Dreiling*, 539 F. Supp. at 403 ("A constitutional guarantee so fundamental as the right to jury trial cannot be waived unknowingly by mere insertion of a waiver provision on the twentieth page of a twenty-two page standardized form contract.").

Third, by waiting to present the Proposal to Hakkasan until just one business day before Hakkasan's existing insurance policies were due to expire—despite Hakkasan's explicit instruction that Willis ***not*** present voluminous proposal documents on the eve of the renewal deadline—Willis left Hakkasan no choice but to bind coverage (even if it had been aware of the T&Cs). P. App'x II at 165. Willis argues that this context should be ignored because Hakkasan is a large commercial enterprise of equal stature to Willis, an established insurance broker. Pet. at 31–32. But there can be real disparities in bargaining power even between sophisticated parties. *See, e.g.*, *Shell Oil Co. v. Marinello*, 63 N.J. 402, 408–09 (1973) (finding disparity in bargaining power between commercial parties where one party could "for all practical purposes . . . dictate its own terms" and the other party had "everything to lose" if it rejected the dominant party's terms).

Here, Willis waited until the eve of Hakkasan's policy renewal deadline to present the Proposal to Hakkasan, while unilaterally imposing ***new terms and***

conditions on Hakkasan, including the Jury Waiver Clause. P. App'x II at 165. Rejecting Willis's Proposal would have resulted in a lapse of Hakkasan's coverage of over $350 million in property coverage and $75 million in general liability coverage. *Id*. No reasonable business would have entertained such a major lapse of coverage, even for a short period of time, and Willis exploited Hakkasan's diminished leverage by imposing a long list of one-sided terms and conditions at the eleventh hour of the renewal process, knowing that Hakkasan would be compelled to accept them, likely without reviewing them closely or at all given the insufficient amount of time to do so. Making this Hobson's Choice was not a knowing, voluntary, and intentional relinquishment of Hakkasan's right to a jury trial. *See Nat'l Equip. Rental*, 565 F.2d at 258 (jury waiver unenforceable against a party who "did not have any choice but to accept the . . . contract as written if he was to get badly needed funds"); *Lenoir*, 2016 WL 3265451, at *2 (jury waiver unenforceable against a party who "was left with the unsavory decision of either agreeing to the employer's terms post hoc or facing possible termination"); *Dreiling*, 539 F. Supp. at 403 (jury waiver unenforceable where there was no evidence "plaintiffs had any choice other than to accept the contract as written").

Fourth, because Willis had presented the Proposal so close to the April 1, 2019 renewal deadline, Hakkasan's counsel, Brandon Roos, did not have an adequate opportunity to review the T&Cs. P. App'x II at 165–66. As a consequence of the urgency that Willis created, Mr. Roos was compelled to quickly assess and select Hakkasan's insurance coverages on the same day Willis presented the Proposal, and in the course of doing so, he was directed by Willis to review only a small subset of the materials in the Proposal. *Id.* at 165–66. During the March 29 meeting, Willis presented Mr. Roos with Hakkasan's potential coverage options, but Willis never once referred to the T&Cs or suggested that Mr. Roos review them, despite the fact that the T&Cs included a jury trial waiver

clause that had never been part of any prior version of the T&Cs. *Id.* at 165–66. Unlike other cases where such clauses have been enforced, this is not a case where counsel specifically advised a party to waive its right to a jury trial,[13] nor is it one where counsel had ample time to "carefully review[]" a contract and request revisions before it was executed. *E.g.*, *In re Reggie Packing Co., Inc.*, 671 F. Supp. 571, 574 (N.D. Ill. 1987). Because Willis never alerted Mr. Roos to the inclusion of the terms, his involvement in selecting Hakkasan's insurance coverages does not indicate that Hakkasan knowingly, voluntarily, or intentionally waived its right to try its claims against Willis to a jury.

In sum, the evidence overwhelmingly demonstrates that Hakkasan did not validly waive its constitutional right to have its instant claims against Willis tried to a jury. But to the extent that this Court concludes that material factual issues remain in dispute, that would be an appropriate basis to remand the issue to the District Court to resolve the enforceability question in the first instance.

II. This Court Should Dismiss Willis's Appeal for Lack of Jurisdiction or, in the Alternative, Affirm

A. This Court Lacks Jurisdiction Over the Appeal in Case No. 82829

This Court does not have jurisdiction to consider the appeal in Case No. 82829 because the District Court has not entered an appealable order under Nevada Rule of Appellate Procedure 3A(b) or any other applicable rule or statute. The jurisdictional statement in Willis's opening brief cites Nevada Revised Statutes 38.247(1)(a), which authorizes an interlocutory appeal from an order denying a motion to compel arbitration. Br. 1. That provision, however, does not confer

[13] *See Lowe*, 118 Nev. at 94 (enforcing jury waiver clause where party waived right to jury trial "WITH AND UPON THE ADVICE OF COMPETENT COUNSEL").

appellate jurisdiction over this appeal because the District Court did not enter an order denying a motion to compel arbitration.

The particular arguments that Willis advanced below make clear why the District Court did not rule on its alternative motion to compel arbitration. Willis's motion to strike Hakkasan's jury demand argued that Hakkasan's tort claims fall within the Jury Waiver Clause and that the clause is enforceable under Nevada law. P. App'x I at 65–68. The District Court denied the motion on the ground that Hakkasan's claims fall outside the scope of the clause, but that ruling is not immediately appealable, as Willis appears to acknowledge. Pet. 6. Willis also anticipated that the District Court might rule that the waiver is unenforceable. P. App'x I at 68. In that case, Willis argued, the District Court should compel arbitration, because the T&Cs provide that "[t]o 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] . . . will be resolved by binding arbitration." P. App'x I at 68; *id.* at 133 § 1.13.

But because the District Court held that the Jury Waiver Clause does not encompass Hakkasan's tort claims, it did not need to decide whether the Jury Waiver Clause is unenforceable, and it made no such ruling. P. App'x II at 286. For that reason, the District Court had no occasion or basis to rule on Willis's request to compel arbitration—which was expressly contingent on a finding of unenforceability—and thus issued no order denying arbitration. *Id.* In essence, the request to compel arbitration was rendered moot by the ground on which the District Court resolved Willis's motion to strike Hakkasan's jury demand.

Accordingly, Willis has identified no order from which this appeal may be properly taken, and so this Court lacks jurisdiction over the appeal. The Court should therefore dismiss the appeal.

B. If the Court Concludes That It Has Jurisdiction Over this Appeal, It Should Affirm Because the District Court Correctly Denied Willis's Motion to Strike Hakkasan's Jury Demand

If this Court construes the District Court's order to have denied a motion to compel arbitration and therefore reaches the merits of the appeal, the appropriate disposition would depend on the outcome of the mandamus proceeding. First, if this Court leaves in place the District Court's ruling that Hakkasan's tort claims fall outside of the Jury Waiver Clause, then, like the District Court, it would have no occasion to reach the enforceability question or Willis's request to compel arbitration. Second, if the Court concludes in the mandamus proceeding that the claims fall within the waiver *and* that the waiver is enforceable, and if the Court further concludes that it has jurisdiction to hear Willis's appeal, then this Court should affirm the District Court's order because there would be no basis under the contract in that circumstance to compel arbitration. Third, if the Court remands to the District Court to decide the enforceability question in the first instance, then the Court should vacate the putative denial of the motion to compel arbitration and remand this appeal for further consideration. But, if the Court determines in the mandamus proceeding *both* that the claims fall within the scope of the jury-trial waiver *and* that the waiver is unenforceable, Hakkasan does not dispute that the claims would also be within the scope of the T&Cs' fallback arbitration clause.

As explained in Section I.A., *supra*, the scope of the Jury Waiver Clause should be construed narrowly in order to safeguard Hakkasan's constitutional right to try its claims to a jury. *See Phoenix Leasing*, 843 F. Supp. at 1388; *Mall*, 412 So. 2d at 1200. Section 1.13's fallback arbitration clause, which comes into play only "to the extent the foregoing jury waiver is not enforceable," evidently is intended to encompass the same scope of disputes governed by the Jury Waiver Clause. P. App'x I at 133. Thus, for the reasons explained above, because

Hakkasan's claims are outside the scope of the Jury Waiver Clause, they must also be outside the scope of the fallback arbitration clause.

In sum, even if this Court determines that it does have jurisdiction to hear Willis's appeal, the order of the District Court should be affirmed based upon a determination that Hakkasan's claims are outside the scope of Section 1.13 of the T&Cs.

CONCLUSION

For the aforementioned reasons, this Court should deny the petition for a writ of mandamus in Case No. 82833, and this Court should dismiss the appeal in Case No. 82829 for lack of jurisdiction or, in the alternative, affirm the District Court's order.

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

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CONSTITUTIONAL AND STATUTORY AUTHORITIES

Nevada Constitution, Art. I § 3:

The right of trial by Jury shall be secured to all and remain inviolate forever; but a Jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law; and in civil cases, if three fourths of the Jurors agree upon a verdict it shall stand and have the same force and effect as a verdict by the whole Jury, Provided, the Legislature by a law passed by a two thirds vote of all the members elected to each branch thereof may require a unanimous verdict notwithstanding this Provision.

Nevada Revised Statutes 38.247(1)(a):

1. An appeal may be taken from: . . . (a) An order denying a motion to compel arbitration . . . .

Nevada Revised Statutes 34.160

The writ may be issued by the Supreme Court, the Court of Appeals, a district court or a judge of the district court, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is unlawfully precluded by such inferior tribunal, corporation, board or person. When issued by a district court or a judge of the district court it shall be made returnable before the district court.

CERTIFICATION OF COMPLIANCE WITH NRAP 28.2

I hereby make the following certification in accordance with Nevada Rule of Appellate Procedure 28.2:

1. I am an attorney of record for Respondent Hakkasan USA, Inc. and an active member of the State Bar of Nevada;

2. I have read this brief;

3. To the best of my knowledge, information, and belief, this brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

4. This brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the briefs regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found;

5. This brief complies with the formatting requirements of Rule 32(a)(4)–(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font in Times New Roman typeface.

6. This brief complies with the type-volume limitations stated in Rule 32(a)(7), excluding the parts of the brief exempted under Rule 32(a)(7)(C), because it is proportionally spaced, has a typeface of 14 points or more, and contains 13,611 words.

DATED this 3rd day of November, 2021

/s/ James E. Whitmire
James E. Whitmire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 3rd day of November, 2021, a true and correct copy of Respondent's Answering Brief 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