

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

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

5                   Appellants,

6                   vs.

7 HAKKASAN USA, INC.,

8                   Respondent.  
9

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

District Court No.      Electronically Filed  
A-20-816145-B  
Nov 03 2021 06:41 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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11 Consolidated Appeal and Petition for Writ of Mandamus from the Eighth Judicial  
12 District Court of State of Nevada for the County of Clark

13                   The Honorable Elizabeth Gonzalez, District Judge

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

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## **TABLE OF CONTENTS**

### **Page**

I.	Introduction.....	1
II.	Background.....	1
III.	Argument .....	3
IV.	Conclusion .....	5

**TABLE OF AUTHORITIES**

**Page**

**Cases**

<i>Allstate Ins. Co. v. Thorpe</i> , 123 Nev. 565 (2007) .....	5
<i>Apple, Inc. v. Samsung Elecs. Co.</i> , No. 11-CV-01846-LHK, 2013 WL 5693759 (N.D. Cal. Oct. 15, 2013) .....	4
<i>John Graves Propane of Ariz., Inc. v. Thompson</i> , 126 Nev. 727, 367 P.3d 787 (2010) .....	4
<i>Karcher Firestopping v. Meadow Valley Contractors, Inc.</i> , 125 Nev. 111 (2009) .....	3

**Statutory Authorities**

Nevada Revised Statutes 38.247(1)(a) .....	3
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1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. Introduction**

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

11 **II. Background**

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

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

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

8 In opposition to Willis’s Motion, Hakkasan argued that (1) Hakkasan’s tort  
9 claims against Willis were outside the scope of the Jury Waiver Clause, as the  
10 T&Cs exclusively govern Willis’s ***purchase*** of insurance on Hakkasan’s behalf,  
11 and Hakkasan’s claims arise from Willis’s participation in a fraudulent scheme that  
12 occurred ***months after*** Willis had procured insurance for Hakkasan, (2) the  
13 unsigned T&Cs’ nondescript Jury Waiver Clause was unenforceable because  
14 Hakkasan did not knowingly, voluntarily, and intentionally assent to it, and (3)  
15 even if the Jury Waiver Clause is unenforceable, Hakkasan’s claims should not be  
16 compelled to arbitration because they are outside the scope of the T&Cs.  
17 Petitioners’ Appendix in Case 82833, Volume II (“P. App’x II”) at 141–160.

18 On March 25, 2021, the District Court denied Willis’s Motion, holding that  
19 “Hakkasan’s present claims against Willis for civil conspiracy, constructive fraud,  
20 negligence, and intentional interference with contractual relations are outside the  
21 scope of the Dispute Resolution clause in Section 1.13 of the T&Cs.” *Id.* at 286.  
22 Because the District Court held that the purported Jury Waiver Clause did not  
23 apply to Hakkasan’s present claims against Willis, it had no occasion to address  
24 whether the clause was unenforceable as a matter of law, and indeed, the District  
25 Court made no ruling as to that clause’s enforceability. *Id.* Recognizing that  
26 Willis’s alternative argument to compel arbitration was expressly contingent on a  
27  
28

1 finding that the Jury Waiver Clause was unenforceable,<sup>2</sup> the District Court had no  
2 basis to rule on Willis's request to compel Hakkasan's claims to arbitration. For  
3 these reasons, the District Court ultimately denied Willis's Motion to strike  
4 Hakkasan's jury demand and did not address Willis's alternative request to compel  
5 Hakkasan's claims to arbitration. *Id.*

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

### 12 **III. Argument**

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

20 Willis cited Nevada Revised Statutes 38.247(1)(a) as the sole basis for this  
21 Court's jurisdiction to entertain Willis' appeal in Case No. 82829. Br. 1.  
22 However, the District Court did *not* enter an order denying a motion to compel  
23 arbitration below. P. App'x II at 284–86. As the District Court recognized, Willis'  
24 alternative argument that Hakkasan's claims should be compelled to arbitration  
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26 <sup>2</sup> The Court observed: "Willis further contends that Hakkasan's claims against  
27 Willis in this case should be compelled to arbitration in accordance with the T&Cs  
28 if the jury waiver provision is not enforceable under Nevada law." *Id.*

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

17       It should not be inferred that the District Court ruled *sub silentio* on the  
18 enforceability of the Jury Waiver Clause or the arbitrability of Hakksan's claims,  
19 given that it was not necessary for the District Court to decide either of those issues  
20 in order to dispose of Willis' Motion after ruling that Hakksan's claims were  
21 outside the scope of the Jury Waiver Clause. *See Apple, Inc. v. Samsung Elecs.*  
22 *Co.*, No. 11-CV-01846-LHK, 2013 WL 5693759, at \*3–4 (N.D. Cal. Oct. 15,  
23 2013) (declining to infer that magistrate judge made implicit ruling *sub silentio* on  
24 issue that was unnecessary for magistrate judge to decide). It was within the  
25 District Court's sound discretion not to address either of those issues after ruling  
26 that Hakksan's claims were outside the scope of the Jury Waiver Clause, and  
27 absent any explicit language to the contrary, that is the most reasonable reading of  
28

1 the District Court's Order. *See Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 570  
2 (2007) ("[A] judgment's legal effect must be determined by construing the  
3 judgment as a whole, and that, in the case of ambiguity, the interpretation that  
4 renders the judgment more reasonable and conclusive and brings the judgment into  
5 harmony with the facts and law of the case will be employed.").

6 **IV. Conclusion**

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



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

2  
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**CERTIFICATE OF SERVICE**

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

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

James E. Whitmire