IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

v.

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

Respondents,

AND

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

Real Parties in Interest.

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

District Court Case No. A-20-816143-B

PETITIONERS'/APPELLANTS' REPLY BRIEF

Patrick J. Reilly, Esq.
Nevada Bar No. 6103
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
Tel: 702.382.2101
Fax: 702.382.8135
Email: preilly@bhfs.com

Edward J. Baines (admitted *pro hac vice*)
Zachary W. Berk (admitted *pro hac vice*)
SAUL EWING ARNSTEIN & LEHR LLP
500 E. Pratt Street, Suite 900
Baltimore, MD 21202-3133
Email: ted.baines@saul.com
Email: zachary.berk@saul.com

Attorneys for Petitioners/Appellants
Willis of Arizona, Inc. and Willis Towers
Watson Insurance Services West, Inc.

NRAP 26.1 DISCLOSURE STATEMENT

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

- Willis of Arizona, Inc. merged into Willis Towers Watson Insurance Services West, Inc. in December 2019 and no longer exists as a separate entity;
- Wills Towers Watson Insurance Services West, Inc. is wholly owned by Willis of Michigan, Inc.;
- Willis of Michigan, Inc. is wholly owned by Willis HRH, Inc.;
- Willis HRH, Inc. is wholly owned by Willis US Holding Company, LLC (formerly Willis US Holding Company, Inc.);
- Willis US Holding Company, LLC is wholly owned by Willis North America Inc.
- Willis North America Inc. is wholly owned by Willis Group Limited;
- Willis Group Limited is wholly owned by Trinity Acquisition plc;
- Trinity Acquisition plc is wholly owned by Willis Towers Watson UK Holdings Limited;
- Willis Towers Watson UK Holdings Limited is wholly owned by TA I Limited;
- TA I Limited is wholly owned by Willis Investment UK Holdings Limited;
- Willis Investment UK Holdings Limited is wholly owned by Willis Netherlands Holdings B.V.;

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

- Willis Towers Watson Sub Holdings Limited Company is wholly owned by Willis Towers Watson PLC.

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

DATED this 30th day of December, 2021.

/s/ Patrick J. Reilly
Patrick J. Reilly
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614

Edward J. Baines (admitted *pro hac vice*)
SAUL EWING ARNSTEIN & LEHR LLP
500 E. Pratt Street, Suite 900
Baltimore, MD 21202-3133

Zachary W. Berk (admitted *pro hac vice*)
SAUL EWING ARNSTEIN & LEHR LLP
131 Dartmouth Street, Suite 501
Boston, MA 02116

Attorneys for Willis of Arizona, Inc. and Willis Towers Watson Insurance Services West, Inc.

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PETITIONERS'/APPELLANTS' REPLY BRIEF

Petitioners and Appellants, Willis of Arizona, Inc. and Willis Towers Watson Insurance Services West, Inc. (collectively, "Willis"), by and through their counsel of record, the law firms of Brownstein Hyatt Farber Schreck, LLP and Saul Ewing Arnstein & Lehr, LLP, hereby submit this combined reply memorandum in support of Case Nos. 82833 and 82829 in accordance with this Court's Order dated May 28, 2021, and in response to Respondent's Answering Brief filed by Hakkasan USA, Inc. ("Hakkasan") on November 3, 2021.

I. STANDARD OF REVIEW

"Even in a writ petition, this court reviews de novo issues of law, such as contract and statutory interpretation." *State Dep't of Transp. v. Eighth Judicial Dist. Ct. ex rel. Cty. of Clark*, 133 Nev. 549, 553, 402 P.3d 677, 681 (2017) (citing *Int'l Game Tech., Inc. v. Second Judicial Dist. Ct.*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008); *Redrock Valley Ranch, LLC v. Washoe Cty.*, 127 Nev. 451, 460, 254 P.3d 641, 647-48 (2011) ("Contract interpretation is a question of law and, as long as no facts are in dispute, this court reviews contract issues de novo.")).

II. INTRODUCTION

Hakkasan's Answering Brief provides no support for its attempt to evade an enforceable jury waiver provision. In fact, it challenges the outer limits of credibility because Hakkasan ignores the allegations of its own Amended Complaint (the "Complaint") in the hope of avoiding the jury waiver provision in its contract with

Willis. Hakkasan also repeatedly attempts to circumvent Nevada law which holds that jury trial waivers are presumptively enforceable. And, most remarkably, Hakkasan urges this Court to create new law by holding that a contract waiver is not knowing or voluntary even when presented to the *General Counsel* of a multi-million dollar corporation and even when that General Counsel fails to object to the waiver for a full year after entering into the agreement.

Hakkasan's Answering Brief is also filled with contradictions. It now argues, for example, that its allegations of wrongdoing against Willis somehow do not "implicate" the broker-insured relationship between Willis and Hakkasan, and thus do not "implicate" the jury trial waiver in the T&Cs. Yet the Complaint on which its lawsuit is based rests solely on that relationship. The Complaint makes repeated allegations of such a relationship, the duties purportedly stemming from that relationship, and the alleged breach of the duties arising from the relationship. Hakkasan's factual allegations, its legal theories, and even the basis for subject matter jurisdiction and venue are all inextricably intertwined with the broker-insured relationship between Willis and Hakkasan. One would never know this from reading Hakkasan's Opening Brief, which attempts to spin a dramatically different lawsuit than the one that it actually pleaded in the hope that no one would review its Complaint.

Moreover, Hakkasan fails to provide any plausible justification for the contradiction between the District Court's decision to order this case to mediation in

reliance upon the T&Cs' dispute resolution provision and its later refusal, without explanation, to strike the jury demand or, alternatively, compel arbitration pursuant to the same dispute resolution provision in the same contract. Either deliberately or by neglect, Hakkasan does not address the basic question of how the same provision could be enforced on one motion, and denied the next, or how such an inconsistent adjudication does not constitute error by the District Court. Rather, Hakkasan blindly speculates that the District Court chose to order mediation under its inherent powers.

Hakkasan recognizes the tenuousness of its position by pleading that an evidentiary hearing is needed to determine whether the jury trial waiver in the T&Cs was "knowing" and "voluntary." An evidentiary hearing, however, is clearly not needed because Hakkasan's General Counsel agreed to enter into the contract containing the jury waiver provision. To order an evidentiary hearing under these circumstances would lead to the absurd precedent that evidentiary hearings are necessary even when the General Counsel of a sophisticated multi-million dollar company agrees to the jury waiver provision by not objecting to it for a full year after entering into the agreement, and only after litigation has commenced.

Accordingly, Willis urges this Court to direct the District Court to enforce the jury trial waiver in the T&Cs.

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III. ARGUMENT

A. The T&Cs and Their Dispute Resolution Provision Are Not Limited to Willis's Procurement of Insurance for Hakkasan in 2019.

In an attempt to evade the jury waiver provision, Hakkasan argues that the T&Cs should be read so narrowly that the Dispute Resolution provision only applies to "claims 'arising out of or in connection with' Willis's 2019 purchase of insurance on behalf of Hakkasan." (Answering Brief at 16.) This argument fails because there in nothing in the T&Cs that restricts their scope to such a narrow application.

The T&Cs govern the entirety of Willis's relationship with Hakkasan as its insurance broker. The introductory sentence of the T&Cs makes this clear. That sentence states: "Your decision to purchase insurance coverages, products, and/or services through Willis Towers Watson is subject to the following terms and conditions." VI at 130. This language alerts Willis's clients, in this case Hakkasan, that they are expressing their assent to the T&Cs by making a "**decision** to purchase insurance coverages, products, and/or services through Willis." VI at 130 (emphasis supplied). In other words, the T&Cs provide that by choosing to do business with Willis, and engaging Willis as its insurance broker, the client is acknowledging that its relationship with Willis will be governed by the T&Cs.[1]

[1] The fact that the T&Cs govern the entirety of Willis's relationship with Hakkasan is further substantiated by the fact that the Proposal, which covers a wide range of information, including identifying the Willis "Service Team and Claim Contact Information" for Hakkasan's account and Hakkasan's "Risk Control & Claims Advocacy" contacts, states that "This proposal is presented in conjunction with the

The T&Cs do not state, as Hakkasan contends, that they are restricted to Willis's involvement in procuring insurance, never mind Willis's efforts to procure insurance in any specific year (e.g., 2019). Not only are those limitations nowhere in the document and contrary to the plain meaning of the introductory sentence discussed above, such a narrow reading of the T&Cs' applicability would render many provisions in the document superfluous or nonsensical. *See Vegas United Inv. Series 105, Inc. v. Celtic Bank Corp.*, 135 Nev. 456, 459, 453 P.3d 1229, 1231–32 (2019) (stating that "'[c]ontractual provisions should be harmonized whenever possible,' . . . and no provision should be rendered meaningless"). For example, section 2.7 of the T&Cs provides that Willis "will inform you of the reporting requirements for claims, including whether claims should be reported and method of reporting to be used, if applicable." VI at 135, § 2.7. If the T&Cs only applied to the purchase of insurance, why would the "Brokerage Terms and Conditions" section of the document contain a general representation that Willis will provide advice regarding claims? Similarly, why would section 2.17 discuss the "orderly transition of matters to you or to a new insurance broker" following a "termination of the agreement" and disclaim responsibility for "[c]laims and premium or other adjustments [that] may arise after our relationship ends" if Willis's only responsibility under the T&Cs was to purchase insurance?

[T&Cs] for US Property & Casualty Retail accounts which is enclosed." VI at 77, 86.

In light of the fact that the T&Cs set forth the terms governing the entirety of Willis's relationship with Hakkasan, the broad scope of the Dispute Resolution provision is undeniable. The Dispute Resolution clause itself explicitly provides that it applies to "any disputes arising out of or in connection with the services provided under these [T&Cs]." Accordingly, the T&Cs govern all of the insurance brokerage services provided by Willis to its client—hence the name "Brokerage Terms, Conditions & Disclosures"—including insurance procurement, insurance renewals, and claims-handling services, and is no way limited to Willis's purchase of insurance for Hakkasan in 2019.

B. The Dispute Resolution Provision is Not Restricted to Claims that Require Interpretation of Provisions of the T&Cs.

Hakkasan also argues that this case falls outside the scope of the T&Cs' Dispute Resolution provision because they have asserted tort claims that do not require interpretation of any of the provisions of the T&Cs. (*See, e.g.*, Answering Brief at 16.) Putting aside the transparency of Hakkasan's legal strategy of intentionally omitting a breach of contract cause of action to circumvent the binding jury trial waiver, the jury waiver still applies. The cases relied upon by Hakkasan contain materially different language from the T&Cs' Dispute Resolution provision (i.e., the cases cited involve dispute resolution language that, by the express terms, actually require contract interpretation) or are otherwise easily distinguishable.

The two Nevada cases cited by Hakkasan that involve the interpretation of jury waiver provisions are actually supportive of Willis's position in this appeal. Specifically, in both *Phoenix Leasing Inc. v. Sure Broad., Inc.*, 843 F. Supp. 1379 (D. Nev. 1994) and *Hard Rock Hotel, Inc. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 133 Nev. 1019 (2017) (unpublished), the jury waiver provisions at issue were found to be enforceable.[2] That being said, these cases have little in common with the issues pending before this Court. In *Phoenix Leasing*, the court applied federal law, not Nevada law, concerning the question of the validity of the subject jury waiver provision. 843 F. Supp. at 1384. In direct contrast to Nevada law, which holds that jury waiver provisions are "presumptively valid," *see Lowe Enters. Residential Partners, L.P. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 118 Nev. 92, 100, 40 P.3d 405, 410 (2002), the federal standard applied in *Phoenix Leasing* places the burden on the party seeking to enforce the jury waiver to demonstrate that there was voluntary and informed consent to the provision. *Id.*, 843 F. Supp. at 1384.

In addition, the language of the jury waiver provision in *Phoenix Leasing* was materially different than that contained in the T&Cs. There, the provision read that the

[2] The jury waiver provision in *Phoenix Leasing* was upheld because it was "not buried in fine print," the defendant "was not a novice but was in fact experienced, professional and sophisticated in business dealings," the parties "had substantially similar bargaining power," and "[n]othing indicate[d] that Defendant had no opportunity to negotiate this provision[.]" 843 F. Supp. at 1384-85. The court also noted that an unenforceable jury waiver provision is one that is characterized by "surprise" because, for instance, it is "hidden in a prolix agreement." *Id.* at 1387.

borrower in the subject loan transaction "waives its right to trial by jury in any action brought on or with respect to this [loan] agreement . . . ." *Id.* at 1383. The court held that "[a]n action brought 'on the loan agreements' would be any claim seeking to enforce a right created by the loan documents[.]" *Id.* at 1388. The court further held that "[t]he phrase 'with respect to' means with reference to, relating to, or pertaining to." *Id.* Accordingly, the court concluded that "[i]f determination of an action would require reference to, or if the action relates to or pertains to the loan documents covered by the waiver, then such action is 'with respect to' the loan documents and the jury waiver provision applies." *Id.*

Unlike in *Phoenix Leasing*, the jury waiver language in the T&Cs is not restricted to claims "brought on" the T&Cs or "with respect to" the T&Cs, but, rather, extends to "*any disputes arising out of or in connection with the services provided under*" the T&Cs (emphasis supplied). Not only is the "arising out of" and "in connection with" language far broader than the language in the *Phoenix Leasing* provision, it is also not tied directly to the T&Cs (i.e., the terms of the agreement); instead, it is tied to the "services provided under" the T&Cs, which expands the scope of the provision to claims that arise outside of the four corners of the T&Cs.

In the *Hard Rock* case, the jury waiver provision at issue applied to claims "arising out of" or "relating to" the parties' agreement. 133 Nev. at *1. Thus, this Court held that the plaintiff's tort claims, alleging that the defendant misrepresented the profitability of a night club to reduce a termination fee owed under the parties'

agreement, were subject to the jury waiver provision given that they could not be resolved without reference to the agreement. *Id.* This Court did not opine in *Hard Rock* as to whether the subject language would have extended to claims that did not require interpretation of the agreement. In any event, the jury waiver language in the T&Cs, which, again, is not specifically tied to the agreement and encompasses services provided in connection with the T&Cs, is much broader and forecloses any notion that Hakkasan can plead around a jury waiver by omitting a breach of contract claim from its pleading.

This Court also held in *Hard Rock* that nonsignatories to the subject agreement could enforce the jury waiver provision. 133 Nev. at *1. This is notable for two reasons. First, the holding directs that jury waiver provisions are not enforced as sparingly as Hakkasan claims. Second, this Court relied on case law involving arbitration provisions in reaching this conclusion, which is something Hakkasan argues is improper when considering the enforceability of jury waiver provisions.[3] (*See* Answering Brief at 21.)

[3] The arbitration-related case law cited in Willis's Petition for Writ of Mandamus and Appellant's Opening Brief is instructive because those cases interpret the scope of the same or similar language found in the T&Cs' jury waiver provision. Just because that language appears in connection with an arbitration clause, does not mean that it holds any different meaning. Moreover, despite Hakkasan's suggestion that there is a stark difference in the enforceability of arbitration vis-à-vis jury waiver provisions, Hakkasan conveniently ignores the fact that jury waiver provisions are presumptively valid under Nevada law. *See Lowe Enterprises*, 118 Nev. at 100, 40 P.3d at 410.

The other cases cited by Hakkasan are similarly distinguishable. In *Mall, Inc. v. Robbins*, 412 So.2d 1197, 1200 (Ala. 1982), the Supreme Court of Alabama held that public policy considerations, not the actual language of the jury waiver provision at issue, limited the scope of a jury waiver provision to "controversies directly related to and arising out of the terms and provisions of the overall agreement[.]" That is simply not the law in Nevada, where jury waiver provisions are "presumptively valid." *Lowe Enterprises*, 118 Nev. at 100, 40 P.3d at 410.

Notably, there were three dissenting justices in *Mall* who disagreed with the majority decision because "[t]he only rationale given [for the majority's decision was] 'public policy grounds.'" 412 So.2d at 1202. The dissenting justices also noted that the policy decision in the case was "apparently limited to the facts in this case[.]" *Id.* Indeed, subsequent to *Mall*, the Alabama Supreme Court found, in *Ex Parte AIG Baker Orange Beach Wharf, LLC v. Coastal Couture, LLC*, 49 So.3d 1198, 1201-02 (Ala. 2010), that a jury waiver "provision applying to claims 'arising out of or relating to' a contract . . . has a broader application than a provision that refers only to claims 'arising from' the agreement[.]" (Citations and internal quotations omitted.) The Alabama Supreme Court then concluded in *Ex Parte AIG* that the jury waiver at issue applied "to disputes arising out of or in any way pertaining or relating to the relationship of the parties[.]" *Id.* at 1201. Ultimately, the *Mall* case provides no

guidance whatsoever as to how the scope of jury waiver language should be interpreted.[4]

This Court's decision in *Tuxedo Int'l Inc. v. Rosenberg*, 127 Nev. 11, 251 P.3d 690 (2011), is also not relevant to the issue presented in this case. That case concerned the test for determining the scope of forum selection clauses and, specifically, whether to apply them to tort claims.[5] 127 Nev. at 12, 251 P.3d at 690-91. This Court adopted a hybrid test that required the district court to "first focus on 'the intention of the parties reflected in the wording of particular clauses and the facts of the case' . . . to determine whether related tort claims were meant to be included within the clause's control." 127 Nev. at 25, 251 P.3d at 699. Only if the "intent of the parties cannot be discerned from the language of the agreement, . . . [then] the next step is to determine whether resolution of the tort-based claims pleaded by the plaintiff relates to the interpretation of the contract[.]" *Id.* Here, the intent of the T&Cs' jury waiver provision to encompass disputes arising in the context of Willis's and Hakkasan's

[4] Hakkasan also cites to an unpublished decision from the United States District Court for the Southern District of Alabama, *Vision Bank v. Algernon Land Co., LLC*, Civil Action No. 10-00172-N, 2010 WL 3803277 (S.D. Ala. Sept. 23, 2010), as being instructive in this case. The jury waiver provision at issue in *Vision Bank*, however, was much narrower than the provision in the T&Cs and only applied to claims "arising out of, or based upon, this guaranty." *Id.* at *2.

[5] Hakkasan does not follow its own suggestion that cases interpreting the scope of provisions other than jury waiver provisions (e.g., arbitration provisions) are not instructive with regard to the scope of the jury waiver language in the T&Cs. Otherwise, Hakkasan would not cite to *Tuxedo* and several other cases that involve the interpretation of forum selection clauses.

business relationship is evident from the plain language of the Dispute Resolution provision. And, notably, Hakkasan does **not** contend that the language of the T&Cs is ambiguous.

Hakkasan cites two additional cases interpreting the scope of forum selection clauses that have no relevance to the case at hand. In *E & J Gallo Winery v. Encana Energy Servs., Inc.*, 388 F. Supp. 2d 1148 (E.D. Cal. 2005), the court's decision does not even reference the language of the forum selection clause that was at issue. Moreover, the plaintiff's claims in that case, which alleged a vast antitrust conspiracy among natural gas producers and distributers to drive up the price of natural gas in California, were so distant from the subject matter of the plaintiff's sales contract with one of its natural gas suppliers (i.e., the allegations of wrongdoing did not arise in the context of the relationship of the parties to the contract) that the court found "even [under] the most expansive application of forum selection interpretations" the plaintiff's allegations "bear no significant relationship to the agreement[.]" *Id.* at 1162-63. In *In re Orange, S.A.*, 818 F.3d 956, 962 (9th Cir. 2016), the forum selection clause at issue was narrower than the jury waiver provision in the T&Cs as it applied to disputes "arising out of or relating to the Agreement[.]" In addition, that case applied California law and involved claims of fraud and hacking that occurred *after* the parties explored a business relationship pursuant to a non-disclosure agreement that included the forum selection clause. *Id.*

Simply put, Hakkasan fails to identify a single case supporting its position where the language at issue was as broad as the language set forth in the T&Cs' jury waiver provision. Hakkasan cannot escape the broad language of the T&Cs and the binding Nevada case law holding that contracts must be enforced as written, giving full meaning to all of its provisions. *See Vegas United*, 135 Nev. at 459, 453 P.3d at 1231–32.

C. Despite Hakkasan's Efforts to Slant the Allegations **in the Complaint, it is Undeniable that its Claims Arise in Connection with the Services Performed by Willis as Hakkasan's Insurance Broker.**

Hakkasan argues its allegations against Willis fall outside the scope of the T&Cs' jury waiver provision because they do not relate to services provided by Willis as Hakkasan's insurance broker. (Answering Brief at 26.) Hakkasan further claims that, to the extent Willis characterizes the allegations in the Complaint as relating to Willis's insurance broker services, it "misconceives what Hakkasan alleges." *Id.* Hakkasan then describes the crux of the allegations in the Complaint as asserting that "Willis shared . . . information [about Hakkasan's COVID-19 business losses with Endurance] 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." *Id.*

Hakkasan's argument is belied by its own Complaint. In Paragraph 14, 26, and 27, Hakkasan alleges as follows:

> Willis's and Sompo's conduct **is in breach of contract**, **in violation of applicable insurance statutes and standards of care**, is contrary to the duty of good faith and fair dealing owed to Hakkasan, and constitutes a civil conspiracy, fraud, and the intentional interference with contractual relations.
>
> This Court possesses subject matter jurisdiction over this matter in respect to Defendant Willis because Clark County, Nevada is the judicial district **in which Willis's brokerage and claims handling services were performed** for the benefit of a Nevada-based organization.
>
> Venue in Clark County is appropriate under NRS 13.010 in respect to Defendant Willis because Clark County, Nevada is the judicial district **in which Willis's brokerage and claims handling services were contracted to be performed** and were performed for the benefit of a Nevada-based organization.

VI at 6-8, ¶¶ 14, 26 and 27 (emphasis added). These three paragraphs show that Hakkasan is contradicting itself by trying to now argue that its claims are not founded on its broker relationship with Willis. Hakkasan cannot have it both ways. It cannot allege claims in its Complaint that are based on its broker relationship with Willis but now argue that such claims are not based on its broker relationship—all in an attempt to avoid the jury waiver provision. Paragraphs 26 and 27 are particularly damning, as Hakkasan invokes this Court's subject matter jurisdiction against Willis and demands venue in the Eighth Judicial District Court on the "brokerage and claims handling services" Willis provided for Hakkasan. *Id*. This begs the obvious question—why is the parties' contractual broker relationship good enough to establish subject matter

jurisdiction against Willis and venue in Clark County, but not good enough to bind the parties to a contractual jury trial waiver?

Moreover, paragraphs 14, 26, and 27 are hardly the only places in the Complaint where Hakkasan rests its case against Willis upon Willis's role as insurance broker to Hakkasan. In fact, the entirety of Hakkasan's claims against Willis are predicated upon the broker-insured relationship and the alleged breach of duties thereon. For example, the Complaint alleges that Hakkasan "contracted with Willis to provide brokerage and claims-handling service in relation to the Policy[.]" VI at 12, ¶ 54. Hakkasan also alleges that it engaged Willis "in respect to negotiating the terms of the Policy, preparing insurance proposals for the Policy and other competing options, procuring the Policy, and facilitating and advising about claims under the Policy." VI at 4, ¶ 4. Hakkasan further alleges that "Willis acted as Hakkasan's agent in connection with the Policy[.]" VI at 12, ¶ 54.

It was in this context (Willis providing brokerage and claims-handling services and acting as Hakkasan's agent in connection with the Policy) that the alleged improper communications between Willis and Sompo supposedly occurred.[6] Specifically, the Complaint asserts that "[i]n February 2020, Hakkasan notified Willis

[6] While Hakkasan refers to its property insurer as "Endurance" in the Answering Brief, for purposes of consistency with Willis's prior briefing and for the reasons stated at footnote 5 on page 8 of Appellant's Opening Brief, Willis refers to the insurer as "Sompo" herein.

that it expected to suffer covered losses and was preparing to submit a claim under the Policy." VI at 12, ¶ 55. Hakkasan further alleges that Willis analyzed Hakkasan's coverage under the Policy once Hakkasan inquired about potentially making a claim. VI at 12, ¶ 57. Then, according to the Complaint, Willis "violate[d] the duties owed to Hakkasan" by informing Sompo without Hakkasan's approval that Hakkasan was preparing to submit a claim "for which there was no stated sublimit in the Policy." VI at 12, ¶ 58. Willis's alleged unauthorized communication with Sompo about Hakkasan's insurance claim then purportedly enabled Sompo to "issue a backdated 'General Change Endorsement' purporting to add a . . . sublimit of $1,500,000 to the Policy[.]" VI at 12-13, ¶ 60. Days later, and without knowing of the Endorsement, Hakkasan instructed Willis to submit the claim to Sompo. VI at 13, ¶¶ 66, 71. Again, all of these allegations arise from conduct relating to the claim services Willis was providing to Hakkasan.

It is also undisputed in the record that, at the same time Willis was discussing the anticipated COVID-19-related business interruption claim with Hakkasan, Willis was in the process of assisting Hakkasan with its 2020 insurance renewals, including the renewal of its property insurance with Sompo. VII at 244, ¶ 12. As a result, "Willis informed Hakkasan in early March 2020 that it had to disclose the impact of COVID-19 on Hakkasan's ongoing business operation to Sompo's underwriter" to avoid jeopardizing Hakkasan's claim and the 2020-21 property coverage and thereafter

Willis did inform Sompo's underwriter of said impact. *Id.* This is yet a further reason why Hakkasan's claims fall within its broker relationship with Willis.

Moreover, Hakkasan's legal theories of recovery against Willis are based solely upon Willis' role as insurance broker to Hakkasan. In Paragraph 137 of the Sixth Claim for Relief (Civil Conspiracy), Hakkasan alleges that Willis, "as its insurance broker, has a confidential relationship with Hakkasan" and then ties the alleged breach of that duty to its theory of recovery. VI at 22 ¶ 137. In the Seventh Claim for Relief (Constructive Fraud) and Eighth Claim for Relief (Negligence), Hakkasan similarly alleges an insurance broker "owes a duty to its client," owes a "special duty of reasonable care in communicating an insurance policy's terms" and has "a relationship of confidence with their policyholder clients." *See* VI 24 at ¶¶ 151-152 and 27 ¶¶ 174-175. Here too, Hakkasan bases the alleged breach of those duties on its claim of liability.

In sum, Hakkasan cannot sweep the allegations in its Complaint under the rug to evade an enforceable jury waiver provision. Hakkasan's Complaint is based entirely on its broker relationship with Willis. It cannot magically change or simply ignore those allegations by now arguing that its claims are not based on that relationship. As much as Hakkasan clearly wants a jury to decide its claims against Willis, it is undeniable that the T&Cs' broad jury waiver provision applies to the claims at issue here. In considering the allegations in the Complaint and whether they fall within the scope of the jury waiver provision, this Court must consider Hakkasan's allegations

as stated, as well as the context of alleged misconduct to determine whether they "aris[e] out of or in connection with the services provided" by Willis as Hakkasan's insurance broker. *See* 61A AM. JUR. 2d Pleading § 75 (stating that "the whole complaint must be considered and not its disconnected parts; each part must be given the meaning that it derives from the context wherein it appears. All of the allegations must be construed together, and it is not proper to segregate the allegations from one another"); *see also Szymborski v. Ormat Techs., Inc.*, 776 F. Supp. 2d 1191, 1196 (D. Nev. 2011) (recognizing that "a court must also consider the complaint in its entirety").

D. Nothing in the Record Supports Hakkasan's Contention that the District Court Ordered this Case to Mediation Based on Anything Other than the T&Cs' Dispute Resolution Provision

In accordance with the Dispute Resolution in the T&Cs, the District Court ordered that Hakkasan and Willis engage in early mediation (which they did in November 2020). Remarkably, Hakkasan contends that the District Court did not order the mediation based on the T&Cs, but rather that "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[.]" (Answering Brief at 29.) There is simply nothing in the record that suggests that the District Court ordered the parties to mediation pursuant to its "inherent discretion." The District Court never mentioned its inherent discretion when it ordered the parties to engage in mediation during the motion to dismiss hearing, nor did it reference such discretion in

any way in the order denying Willis's motion to dismiss. *See* VI at 2. To the contrary, the District Court ordered the parties to mediate "before JAMS" as is expressly required by the Dispute Resolution provision in the T&Cs. *See* VI at 2, 132-33. The District Court did not order mediation *sua sponte*, but rather in response to a noticed motion brought by Willis seeking enforcement of the T&Cs. The fact that the District Court did not dismiss the case as requested by Willis is by no means dispositive, especially given that Hakkasan argued that the court had "discretion to stay proceedings to allow for mediation, where required" rather than dismiss the case, which is exactly what the District Court did for a period of sixty days. *See* VI at 2.

In any event, the point here is that the District Court enforced the T&Cs when the T&Cs required mediation, but refused to enforce the T&Cs when tasked with either striking the jury demand or compelling arbitration. The District Court also gave no explanation for this inconsistent application of the T&Cs nor its inherently contradictory rulings. Nowhere is there a better example of error in the lower court record.

E. This Court Can Order the District Court to Strike Hakkasan's Jury Demand Based on the Evidence in the Appellate Record.

Hakkasan urges this Court to remand the case to the District Court to make findings of fact as to whether the jury waiver was entered into knowingly, voluntarily, and intentionally if it finds that Hakkasan's allegations against Willis fall within the scope of the T&Cs' Dispute Resolution provision. (Answering Brief at 30.) A remand

is simply not necessary where, as here, the jury waiver provision is ***presumptively valid***, *see Lowe Enters.*, 118 Nev. at 100, 40 P.3d at 410, and the undisputed facts cannot as a matter of law rebut that presumption and lead to the conclusion that Hakkasan's agreement to the jury waiver provision was anything other than knowing, voluntary, and intentional. *See Matter of Estate of Scheide*, 136 Nev. Adv. Op. 84, 478 P.3d 851, 855 (2020) (explaining that "[w]hen the material facts of a case are undisputed, the effects of the application of a legal doctrine to those facts are a question of law that this court reviews de novo") (citing *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428, 245 P.3d 535, 538 (2010)).

Specifically, this Court can conclude as a matter of law, based on the undisputed record, that Hakkasan entered into the jury waiver provision knowingly, voluntarily, and intentionally. It is undisputed that Hakkasan was represented by its ***General Counsel***, Brandon Roos, in all of its dealings with Willis. VII at 164, ¶¶ 4-5. It is further undisputed that Willis provided the T&Cs to Hakkasan and Mr. Roos during a March 29, 2019 meeting and again by email that same day. VII at 164-65, ¶¶ 6-7, 243-44, ¶ 10. Mr. Roos then signed an "Order to Bind" five days later, on April 3, 2019, which documented Hakkasan's assent to the purchase of the Sompo property policy and thus to the T&Cs. VI at 73, ¶ 3, 140; VII at 166, ¶ 13. In addition, despite claiming complete ignorance of the T&Cs in March 2019 because "Willis concluded the meeting without any mention of the T&Cs" (*see* VII at 165-66, ¶ 12), Mr. Roos admittedly knew that it was Willis's standard practice to transmit its "Terms and

Conditions" document in connection with the final renewal meeting each year.[7] VII at 166-67, ¶¶ 15-20. Tellingly, Mr. Roos never complained about the T&Cs in the year that followed, and only claimed surprise for the first time when litigation commenced in 2020.

Under no circumstances could a court find that a multimillion dollar business operation, such as Hakkasan, which was being represented by its General Counsel who received a nine-page terms and conditions agreement (as the company had received in numerous prior years), was somehow ignorant of, and therefore not bound to, the provisions of those terms and conditions. In fact, it would be difficult to find a circumstance where a party receiving an agreement with a jury waiver provision could be more sophisticated in business and legal matters than here with Hakkasan and Mr. Roos, the General Counsel of a large international company. If the T&Cs and their

[7] Hakkasan's assertion that "Willis did not disclose to Hakkasan that it had included the T&Cs behind the Proposal" is disingenuous. *See* Answering Brief at 32. The Proposal expressly references the T&Cs in multiple places, including being listed as "Appendix A" in the Table of Contents (*see* VI at 76) and where it is highlighted via a bolded and underlined heading below which states that "This proposal is presented in conjunction with the [T&Cs] for US Property & Casualty Retail Accounts which is enclosed" (*see* VI at 86). Similarly, and as is set forth in Willis's motion to strike filed herewith, Hakkasan's repeated suggestion that "Willis waited until the eve of Hakkasan's policy renewal deadline to present the Proposal to Hakkasan" (*see* Answering Brief at 35; *see also id.* at 36 (claiming "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")) is severely misleading given that the meeting was postponed from March 21, 2019 to March 29, 2019 at Hakkasan's request.

jury waiver provision were not binding on Hakkasan in this case, then it would be virtually impossible to enforce a jury waiver provision against anyone under any circumstances. Accordingly, this Court can find as a matter of law, based on the undisputed record, that there was no discrepancy in bargaining power between Willis and Hakkasan, that Hakkasan's counsel had an opportunity to review the T&Cs, and that Hakkasan had one year afterward to complain of the T&Cs but failed to do so, such that the jury waiver provision was entered into knowingly, voluntarily, and intentionally.[8]

[8] Hakkasan cites several cases to support its claim that the jury waiver cannot be enforced because it supposedly was not aware of the provision. (*See* Answering Brief at 33.) While only an "opportunity to review the agreement" containing the jury waiver provision, and not actual knowledge, is a consideration as to enforceability under Nevada law (*see Lowe Enters.*, 118 Nev. at 101, 40 P.3d at 410-11), the cases cited by Hakkasan are inapposite and bear absolutely no resemblance to the facts and/or law at issue here. *See Zi Beauty, Inc. v. General Growth Properties, Inc.*, No. A-16-744558-B, at p. 3 (Nev. D. Ct. Mar. 15, 2018) (an unpublished District Court Order declining to enforce a jury waiver provision for several reasons, including because the jury waiver "sentence is found at the end of a non-descript paragraph with no heading on page 26 of a 31-page lease. Each full page in the lease contains approximately 80 single-spaced lines of small font text."); *Lenoir v. Fred's Stores of Tennessee, Inc.*, No. 1:15CV214-SA-DAS, 2016 WL 3265451, at *2 (N.D. Miss. June 14, 2016) (declining to enforce a jury waiver provision where there was a "gross disparity in bargaining power" between a pharmacy technician employee and her "large corporate entity" employer and where the provision at issue was "laid out unilaterally in an employee handbook" that the plaintiff signed months after her employment started); *Dreiling v. Peugeot Motors of Am., Inc.*, 539 F. Supp. 402, 403 (D. Colo. 1982) (finding jury waiver provision invalid by applying an entirely different legal standard—that "courts will indulge every reasonable presumption against waiver"—than the "presumptively valid" standard applicable in Nevada).

Moreover, this Court can also conclude as a matter of law that the T&Cs' jury waiver provision was adequately conspicuous. The jury waiver language was not buried in fine print or hidden somewhere in a prolix agreement; it was exactly where one would expect it to be, under the bolded "Dispute Resolution" heading in the nine-page T&Cs (immediately following the mandatory mediation provision that was enforced by the District Court), and was set forth in double-spaced text that was in the same size font as the rest of the document.[9] *See* VI at 130-38. It would not have taken

[9] Hakkasan cites several cases to support its argument that Willis's jury waiver language is not conspicuous enough to be enforceable. However, those cases, all of which found the subject jury waiver provisions *enforceable*, were decided on several factors, did not articulate any requirement as to how jury waiver provisions must be presented, and, in most instances, did not involve jury waiver language that appeared in a materially-different way than it is set forth in the T&Cs. *See Club Vista Fin. Services, L.L.C. v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 128 Nev. 889, 381 P.3d 602 (2012) (finding jury waiver enforceable due to a multitude of factors, including the location and font of the jury waiver language and because the party challenging the waiver was a "sophisticated businessman . . .[who] was represented by counsel and had substantial bargaining power"); *Casey v. Third Judicial Dist. Court*, 281 P.3d 1160 (2009) (finding jury waiver enforceable due to several factors, including the conspicuousness of the language, which was "not buried in the agreement" and was in bolded font that was "the same size as the font found in the rest of the document," and the party's "substantial bargaining power"); *Malan Realty Invs., Inc. v. Harris*, 953 S.W.2d 624, 627-28 (Mo. 1997) (holding jury waiver provision enforceable where it was "was not buried in the lease," the "print size of the waiver provision was the same size as that found throughout the lease," there was no evidence of a bargaining disadvantage, and the signatory was represented by counsel); *Fuoroli v. Westgate Planet Hollywood Las Vegas, LLC*, No. 2:10-CV-2191 JCM GWF, 2014 WL 131668, at *4 (D. Nev. Jan. 14, 2014) (holding jury waiver to be enforceable where it was not "'buried in the text' of a voluminous document" and the related heading, which was in bold typeface, would have been readily noticeable upon skimming the document).

an attorney of Mr. Roos's caliber, or any attorney for that matter, more than a minute or two to locate the Dispute Resolution provision and the jury waiver language if he were genuinely interested in reading it. Ultimately, Mr. Roos did not object to the jury waiver provision because he either was not concerned with it or he did not bother to read the T&Cs.[10] Neither reason is a valid basis to argue that a jury waiver provision was not entered into knowingly, voluntarily, and internationally.[11]

F. This Court Has Jurisdiction Over Willis's Appeal Under the Plain Language of NRS 38.247(1)(a).

Hakkasan contends that this Court does not have "jurisdiction over this appeal

[10] Mr. Roos's lack of concern with the jury waiver provision is further illustrated by the fact that he never questioned it when the same jury waiver provision was included in the T&Cs furnished by Willis the following year in March 2020. *See* VII at 244-45, ¶¶ 10, 13-14. Moreover, it is not "inexplicable" that Willis would point out that Hakkasan did not object to the T&Cs provided by Willis in 2020. (*See* Answering Brief at 32.) To the contrary, Hakkasan simply lacks credibility when it suggests that Mr. Roos would have objected to the jury waiver provision if he had had more time to read it in 2019. (*See* Answering Brief at 31.)

[11] The cases cited by Hakkasan finding jury waiver provisions unenforceable (*see* Answering Brief at 35) are also easily distinguishable. *See Zi Beauty,* No. A-16-744558-B, at p. 3 (unpublished District Court Order declining to enforce jury waiver where the jury waiver "sentence is found at the end of a non-descript paragraph with no heading on page 26 of a 31-page lease. Each full page in the lease contains approximately 80 single-spaced lines of small font text"); *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977) (applying a different standard—a "presumption exists against [jury] waiver"—than the "presumptively valid" standard applicable in Nevada and finding jury waiver unenforceable where it was presented to a "layman" who had a "gross inequality in bargaining power" in a clause that was "set deeply and inconspicuously in the contract"); *Dreiling*, 539 F. Supp. at 403 (applying different legal standard—that "courts will indulge every reasonable presumption against waiver"—than the "presumptively valid" standard applicable in Nevada).

because the district court did not enter an order denying a motion to compel arbitration." (Answering Brief at 38.) Hakkasan reasons that because the District Court denied the "Motion to Strike Plaintiff's Jury Demand as to its Claims Against the Willis Defendants or, in the Alternative, to Compel Arbitration" (the "Motion") on the ground that claims in this case are outside the scope of the T&Cs' Dispute Resolution provision, the District Court did not actually deny Willis's request to compel arbitration. *Id.* Hakkasan's argument simply "loses the forest through the trees." NRS 38.274 plainly states that "1. An appeal may be taken from: (a) An order denying a motion to compel arbitration[.]" Willis filed the Motion requesting, in part, that the District Court compel arbitration, and the Motion was denied. The reasoning cited by the District Court does not change the fact that the District Court's March 21, 2021 Order (*see* VII at 284-86) denied Willis's motion to compel arbitration. Because the appeal in Case No. 82829 fits squarely within the plain language of NRS 38.274(1)(a), it is appropriately before this Court.

CONCLUSION

For the foregoing reasons, and those set forth in Willis's Petition for Writ of Mandamus and Appellant's Opening Brief, this Court should issue a writ of mandamus directing the District Court to strike Hakkasan's demand for jury trial as it pertains to Hakkasan's claims against Willis. In the alternative, if this Court finds that Hakkasan's claims against Willis are subject to the Dispute Resolution provision in the T&Cs, but that the jury waiver provision is unenforceable under Nevada law, this

Court should reverse the District Court's order on the Motion and compel Hakkasan's claims against Willis to arbitration in Nevada, before a panel of three arbitrators, in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

DATED this 30th day of December, 2021.

/s/ Patrick J. Reilly

Patrick J. Reilly
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614

Edward J. Baines (admitted *pro hac vice*)
SAUL EWING ARNSTEIN & LEHR LLP
500 E. Pratt Street, Suite 900
Baltimore, MD 21202-3133

Zachary W. Berk (admitted *pro hac vice*)
SAUL EWING ARNSTEIN & LEHR LLP
131 Dartmouth Street, Suite 501
Boston, MA 02116

Attorneys for Willis of Arizona, Inc. and Willis Towers Watson Insurance Services West, Inc.

CERTIFICATE OF COMPLIANCE—NRAP 21(e)

1. I hereby certify that this Reply Memorandum complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14 point font in Times New Roman type style.

2. I further certify that this Petition complies with the page – or type – volume limitations of NRP32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 5,637 words.

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

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

DATED this 30th day of December, 2021.

/s/ Patrick J. Reilly
Patrick J. Reilly
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614

Edward J. Baines (admitted *pro hac vice*)
SAUL EWING ARNSTEIN & LEHR LLP
500 E. Pratt Street, Suite 900
Baltimore, MD 21202-3133

Zachary W. Berk (admitted *pro hac vice*)
SAUL EWING ARNSTEIN & LEHR LLP
131 Dartmouth Street, Suite 501
Boston, MA 02116

Attorneys for Willis of Arizona, Inc. and Willis Towers Watson Insurance Services West, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing **PETITIONERS'/APPELLANTS' REPLY BRIEF** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System on the 30th day of December, 2021, to the addresses shown below:

Danielle L. Gilmore, Esquire
Quinn Emanuel Urquhart & Sullivan, LLP
865 S. Figueroa Street, 10th Floor
Los Angeles, CA 90017
(213) 443-3000 (office)
daniellegilmore@quinnemanuel.com

Allison Huebert, Esquire
Athena Dalton, Esquire
Quinn, Emanuel Urquhart & Sullivan, LLP
191 N. Wacker Drive, Suite 2700
Chicago, IL 60606
(312) 705-7400 (office)
allisonhuebert@quinnemanuel.com
athenadalton@quinnemanuel.com

James E. Whitmire, Esquire
Santoro Whitmire
10100 W. Charleston Boulevard, Suite 250
Las Vegas, NV 89135
(702) 948-8771 (office)
jwhitmire@santoronevada.com

Counsel for Plaintiff Hakkasan USA, Inc.

Amy M. Samberg, Esquire
Clyde & Co.
400 East Van Buren Street, Suite 440
Phoenix, AZ 85004
(480) 746-4580 (office)
Amy.Samberg@clydeco.us

Dylan P. Todd, Esquire
Clyde & Co.
2200 Paseo Verde Parkway, Suite 280
Henderson, NV 89052
(702) 827-1510 (office)
dylan.todd@clydeco.us

Heidi H. Raschke, Esquire
Carlton Fields, P.A.
4221 W. Boy Scout Boulevard, Suite 1000
Tampa, FL 33607
(813) 229-4271 (office)
hraschke@carltonfields.com

Steven J. Brodie, Esquire
Carlton Fields, P.A.
100 Southeast 2nd Street, Suite 4200
Miami, FL 33131
(305) 539-7302 (office)
sbrodie@carltonfields.com

Amanda D. Proctor, Esquire
Carlton Fields, P.A.
One Atlantic Center
1201 W. Peachtree Street, N.W.,
Suite 3000
Atlanta, GA 30309
(404) 815-3392 (office)
aproctor@carltonfields.com

Counsel for Defendants Endurance American Specialty Insurance Company and Sompo International Holdings, Ltd.

/s/ *Paula Kay*
An employee of Brownstein Hyatt Farber Schreck, LLP