

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

SR CONSTRUCTION, Inc. A NEVADA
DOMESTIC CORPORATION,
Appellant,
vs.
PEEK BROTHERS CONSTRUCTION, INC.,
A NEVADA DOMESTIC CORPORATION,
Respondent.

No. 82786

Electronically Filed
May 11 2021 02:39 p.m.

Elizabeth A. Brown
Clerk of Supreme Court
DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Second Department 8
County Washoe Judge Honorable Barry L. Breslow
District Ct. Case No. CV20-01375

2. Attorney filing this docketing statement:

Attorney Noah G. Allison Telephone (702) 933-4444
Firm The Allison Law Firm Chtd.
Address 3191 E. Warm Springs Rd.
Las Vegas, NV 89120

Client(s) SR Construction, Inc.

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Nathan J. Aman, Emilee N. Hammond Telephone 775-227-2280
Firm Viloria Oliphant Oster & Aman, LLP
Address 327 California Ave.
Reno, NV 89509

Client(s) Peek Brothers Construction, Inc.

Attorney _____ Telephone _____
Firm _____
Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|---|--|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input checked="" type="checkbox"/> Other disposition (specify): <u>Denial of Motion to Compel Arbitration</u> |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

N/A

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

N/A

8. Nature of the action. Briefly describe the nature of the action and the result below:

This case concerns a construction dispute on the Northern Nevada Sierra Medical Center construction project in Reno, Nevada. SR Construction, Inc. ("SR") is the general contractor and Peek Brothers Construction ("Peek Bros.") is the earthwork subcontractor. Non-party Sparks Family Medical Center, Inc. c/o Universal Health Services of Delaware ("UHS") is the owner. The dispute is over change orders sought by Peek Bros. and contested by SR and UHS. It is SR's position that because the Prime Contract requires arbitration be utilized as the method for binding dispute resolution with respect to claims seeking relief arising out of the terms of the contract and because the Master Subcontract Agreement between SR and Peek Bros. requires arbitration when the dispute involves the Prime Contract, the dispute between SR and Peek Bros. should be arbitrated. Peek Bros. disagrees. On October 7, 2020 SR filed a motion to compel arbitration and stay litigation. This motion was denied on April 13, 2021.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

1) Whether the District Court judge erred when it denied SR Construction, Inc.'s Motion to Compel Arbitration.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☐ N/A

☐ Yes

☒ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☒ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: This appeal concerns whether the District Court judge can refuse to enforce an arbitration clause in a valid contract, contrary to Nevada law and public policy in favor of enforcing arbitration clauses. "As a matter of public policy, Nevada courts encourage arbitration and liberally construe arbitration clauses in favor of granting arbitration." Tallman v. Eighth Jud. Dist. Ct., 131 NAO 71, 359 P.3d 113, 119 (Nev. 2015).

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This appeal is not presumptively retained by the Court of Appeals. SR requests the appeal should be routed to the Nevada Supreme Court because it concerns a question of public policy that the Court of Appeals has rarely ruled on.

14. Trial. If this action proceeded to trial, how many days did the trial last? N/A

Was it a bench or jury trial? N/A

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?
No

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from April 14, 2021

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served April 14, 2021

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing N/A

☐ NRCP 52(b) Date of filing N/A

☐ NRCP 59 Date of filing N/A

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ___, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion N/A

(c) Date written notice of entry of order resolving tolling motion was served N/A

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed April 13, 2021

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)(1)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|---|---------------------------------------|
| <input type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input checked="" type="checkbox"/> Other (specify) <u>NRS 38.247(1)(a)</u> | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:
NRS 38.247(1)(a) allows an appeal to be taken from an order denying a motion to compel arbitration.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

SR Construction, Inc. and Peek Brothers Construction, Inc.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

N/A

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Peek Brothers Construction, Inc., Plaintiff: Breach of Contract; Attorneys' Fees Pursuant to Subcontract Agreement; Unjust Enrichment; Violation of NRS 624
SR Construction, Inc., Defendant: Contends SR provided an unsubstantiated change order and denies that the amount is owed and seeks arbitration of the dispute.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☐ Yes

☒ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

claims pending below: Peek Brothers Construction, Inc., Plaintiff: Breach of Contract; Attorneys' Fees Pursuant to Subcontract Agreement; Unjust Enrichment; Violation of NRS 624

(b) Specify the parties remaining below:

Remaining parties: Peek Brothers Construction, Inc. and SR Construction, Inc.

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☒ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☒ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

An order denying a motion to compel arbitration is directly appealable. See NRS 38.247(1)(a).

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

SR Construction, Inc.

Name of appellant

Noah G. Allison

Name of counsel of record

May 11, 2021

Date



Signature of counsel of record

Nevada, Clark

State and county where signed

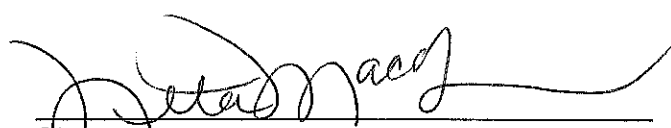
CERTIFICATE OF SERVICE

I certify that on the 11th day of May, 2021, I served a copy of this completed docketing statement upon all counsel of record:

- ☐ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Nathan J. Aman, Esq.
Emilee N. Hammond, Esq.
Viloria Oliphant Oster & Aman, LLP
327 California Ave.
Reno, NV 89509

Dated this 11th day of May, 2021



Signature

\$1425
Nathan J. Aman, Esq.
Nevada Bar No. 8354
Emilee N. Hammond, Esq.
Nevada Bar No. 14626
VILORIA, OLIPHANT,
OSTER & AMAN L.L.P.
327 California Ave.
Reno, Nevada 89509
(775) 284-8888
Attorneys for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

PEEK BROTHERS CONSTRUCTION,
INC., a Nevada Domestic Corporation.

Plaintiff,

Case No.:

Dept. No.:

vs.

SR CONSTRUCTION, INC., a Nevada
Domestic Corporation; DOE Defendants 1 -
10.

Defendants.

COMPLAINT

[ARBITRATION EXEMPTION REQUESTED]

COMES NOW, Plaintiff PEEK BROTHERS CONSTRUCTION, INC., by and through
its counsel of record, the law firm of Viloría, Oliphant, Oster & Aman L.L.P. and hereby
complains, asserts, and alleges the following against the above-named Defendants:

PARTIES

1. Plaintiff PEEK BROTHERS CONSTRUCTION, INC. ("Peek Brothers") is a
Nevada Domestic Corporation.

2. Defendant SR CONSTRUCTION, INC. ("SR Construction") is a Nevada
Domestic Corporation.

1 3. The true identities of DOE Defendants 1-10 are presently unknown; however,
2 Plaintiff will move to amend this Complaint upon learning the true identities of DOE
3 Defendants 1 – 10 based on their liability for the damages alleged herein.

4 **JURISDICTION AND VENUE**

5 4. This Court has jurisdiction over this matter because the amount in controversy
6 exceeds \$15,000.00.

7 5. Venue in Washoe County is proper pursuant to NRS 13.010(1) because the
8 contract that serves as the basis for this action is to be performed in Washoe County.

9 6. This suit is exempted from Nevada's Arbitration Program pursuant to NAR 3(A)
10 because Plaintiff has incurred damages in excess of \$50,000.

11 **FACTUAL BACKGROUND**

12 7. On October 8, 2019, Peek Brothers entered into a Master Subcontractor
13 Agreement ("Subcontract") with SR Construction, and subsequent Work Order on January 8,
14 2020 ("Work Order") (collectively, "Subcontract"), in which Peek Brothers agreed to perform
15 earthwork related to the construction of the Northern Nevada Sierra Medical Center ("Project").

16 8. Included in Peek Brothers' scope of work on the Project was site mass grading,
17 sub and base grade for the building pad and footing excavation ("Scope of Work").

18 9. In consideration for Peek Brothers' performance, SR Construction agreed to pay
19 Peek Brothers the sum of Three Million Sixty-Two Thousand and No/100 Dollars
20 (\$3,062,000.00), pursuant to the Subcontract for the Project.

21 10. SR Construction agreed to make monthly payments to Peek Brothers for
22 invoiced work.

23 11. In preparing its bid for the Project, Peek Brothers' bid price—and Subcontract
24 price—for the sub and base grade for the building pad assumed the utilization of extra material
25 from excavation of the building footings and plumbing trenches ("Spoils") to backfill the
26 building footings and bring the building pad to subgrade elevation. In other words, Peek
27 Brothers would use the dirt it had dug up in the process of creating trenches and footings to
28 build up the footings and building pad.

12. However, Fred Kravetz ("Mr. Kravetz") with SR Construction, instead directed Peek Brothers to import approximately 150,000 square feet of material ("material" or "structural fill") to bring the building pad to subgrade elevation *prior* to Peek Brothers digging up the trenches and footings.

13. In so doing, SR Construction, through Mr. Kravetz, initiated a change to the means and methods by which Peek Brothers' Scope of Work was to be performed.

14. Peek Brothers informed Mr. Kravetz on numerous occasions that it was unnecessary to import material because the Spoils would have otherwise been used to bring the building pad to subgrade elevation.

15. Peek Brothers further informed Mr. Kravetz that importation of material and the eventual removal of excess material from the footings would result in additional cost to SR Construction.

16. The decision by Mr. Kravetz required Peek Brothers to stockpile the Spoils on site after excavating the building footings and plumbing trenches, rather than use the Spoils to bring the building pad to subgrade elevation.

17. SR Construction did not require or request Peek Brothers submit a change order prior to importing the material and backfilling the building pad, nor did SR Construction amend the Work Order, attached to the Subcontract as Exhibit A, in writing.

18. Instead, SR Construction ordered Peek Brothers to complete the additional work without complying with the Subcontract.

19. It is understood that it was common practice for SR Construction to deviate from its agreements with subcontractors on the Project by orally demanding work or services which were not included in said subcontractors' scope of work.

20. In accordance with Mr. Kravetz's demand, Peek Brothers purchased and had to truck in the material, and the earthwork to bring the building pad to subgrade elevation was performed on April 9, 2020 through April 13, 2020.

21. Subsequent to bringing the building pad to subgrade elevation, the building footings and plumbing trenches were dug and the Spoils were stockpiled on site.

22. On April 16, 2020, Peek Brothers submitted Change Order #13, reflecting the cost of labor and equipment to move the excess material from the footings from the building pad in the amount of \$4,268.23, which was necessary because the excess material was no longer needed to bring the building pad to subgrade elevation.

23. On May 18, 2020, SR Construction sent Peek Brothers a Notice of Reduction of Scope & 48 Hour Notice to Cure, in which SR Construction unilaterally removed the scope of work from the Subcontract described as "Under slab Plumbing Trench and Backfill."

24. On May 21, 2020, Peek Brothers submitted Change Order #17, reflecting the cost of labor and equipment to import the fill onto the building pad to bring the building pad to subgrade elevation.

25. On June 4, 2020, Peek Brothers submitted a revised change order for the material imported and the work performed to bring the building pad to subgrade elevation, referred to as Change Order #17-R1, in the amount of \$137,497.50.

26. Change Order #13 and Change Order #17-R1 were submitted to SR Construction in the same manner and in the same form as all previous change orders had been submitted.

27. Subsequent to Peek Brothers' performance of the importation of structural fill and backfilling of the building pad, SR Construction unilaterally removed the scope of work from the Subcontract described as "Sub and Base Grade."

28. Peek Brothers has provided SR Construction with all invoices for the work performed.

29. SR Construction failed to either accept Change Order #13 or respond accordingly within thirty (30) days after the date that Change Order #13 was submitted by Peek Brothers to SR Construction pursuant to NRS 624.626(1)(e).

30. SR Construction has failed to accept Change Order #17-R1 despite work performed and substantial costs incurred by Peek Brothers which was done pursuant to the order of Mr. Kravitz of SR Construction.

31. Peek Brothers complied with NRS 624.626 in submitting Change Order #13 and Change Order #17-R1 to SR Construction.

VILORIA,
OLIPHANT,
OSTER &
AMAN L.L.P.

ATTORNEYS AND
COUNSELORS AT LAW
Office: (775) 284-8888 Fax: (775) 284-3838
P. O. Box 62 ~ RENO, NEVADA 89504
327 CALIFORNIA AVENUE ~ RENO, NEVADA 89509

FIRST CLAIM FOR RELIEF
(Breach of Contract)

34. Peek Brothers and SR Construction entered into a valid Subcontract Agreement under which Peek Brothers agreed to perform certain work in exchange for timely payment therefor.

36. At the express order of SR Construction, Peek Brothers imported structural fill, rather than utilize the Spoils (from excavation of the building footings and plumbing trenches), to backfill the building footings and bring the building pad to subgrade elevation.

38. The importation of structural fill resulted in excess cost to Peek Brothers in the amount of \$137,497.50 not contemplated by the Subcontract, as set forth in Change Order #17-R1.

40. SR Construction breached the Subcontract by failing to comply with the Change Order process and/or amending the Work Order, as required by the Subcontract, to include the importation and eventual removal of material to and from the building pad.

42. SR Construction failed to timely pay Peek Brothers' invoices pursuant to the Subcontract Invoice Procedures described in SR Construction's Accounting Practices.

43. As a result of SR Construction's breach, Peek Brothers has been damaged in an amount in excess of Fifteen Thousand and No/100 Dollars (\$15,000.00).

44. Peek Brothers was forced to seek legal services to prosecute these claims and should be awarded their reasonable attorneys' fees.

SECOND CLAIM FOR RELIEF
(Attorneys' Fees Pursuant to Subcontract Agreement)

45. Plaintiffs incorporate by reference Paragraphs 1-44 of this Complaint as if set forth fully herein.

46. Pursuant to Exhibit D, Subsection V of the Subcontract, in the event that either contractor or subcontract institute a suit in court against the other party in connection with any dispute or matter arising under the Subcontract, the prevailing party is entitled to recover reasonable attorneys' fees.

47. Peek Brothers has been forced to initiate the instant suit as a result of SR Construction's failure to pay for work performed by Peek Brothers at the direction of SR Construction.

48. The instant suit arises under the Subcontract, as it pertains to Peek Brothers performance thereunder.

49. Accordingly, Peek Brothers has been forced to seek legal services to prosecute its claims and is entitled to reasonable attorneys' fees pursuant to the Subcontract.

THIRD CLAIM FOR RELIEF
(Unjust Enrichment)

50. Plaintiffs incorporate by reference Paragraphs 1-49 of this Complaint as if set forth fully herein.

51. Peek Brothers has conferred a benefit upon SR Construction by importing structural fill at SR Construction's order and utilizing the imported material to bring the building pad to subgrade elevation.

1 52. SR Construction has appreciated and retained such benefit despite refusal to
2 compensate Peek Brothers for the cost of the work performed.

3 53. It would be unjust and inequitable to permit SR Construction to retain the benefit
4 of the above-described work.

5 54. As a result of SR Construction's unjust enrichment, Peek Brothers has been
6 damaged in an amount in excess of Fifteen Thousand and No/100 Dollars (\$15,000.00).

7 55. Peek Brothers was forced to seek legal services to prosecute these claims and
8 should be awarded their reasonable attorney fees.

9 **FOURTH CLAIM FOR RELIEF**
10 **(Violation of NRS 624)**

11 56. Plaintiffs incorporate by reference Paragraphs 1-55 of this Complaint as if set
12 forth fully herein.

13 57. On April 16, 2020, Peek Brothers submitted Change Order #13 to SR
14 Construction in the amount of \$4,268.23,

15 58. SR Construction failed to accept Change Order #13 or give written notice to
16 Peek Brothers of any purported reason why Change Order #13 is unreasonable.

17 59. SR Construction's failure to respond to Change Order #13 is a violation of NRS
18 624.626(1)(e).

19 60. Accordingly, Peek Brothers is entitled to payment of the amount sought in
20 Change Order #13 pursuant to NRS 624.626(3).

21 61. Peek Brothers has been forced to seek legal services to prosecute this claim and
22 should be awarded its reasonable attorneys' fees.

23 WHEREFORE, Peek Brothers prays for relief against SR Construction as follows:

- 24 1. For judgment in excess of \$15,000 on Peek Brothers' First, Second, and Third
25 Claims for Relief;
26 2. For judgment in the amount of \$4,268.23 on Peek Brothers' Fourth Claim for
27 Relief;
28 3. For attorneys' fees, costs and interest pursuant to NRS 624.626(6);

- 1 4. For attorneys' fees, costs and interest as allowed by law and/or equity; and
2 5. For such further relief the Court may deem just and proper.

3 **AFFIRMATION**

4 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding
5 document does not contain the social security number of any person.

6 **DATED** this 2nd day of September, 2020.

7 VILORIA, OLIPHANT,
8 OSTER & AMAN L.L.P.

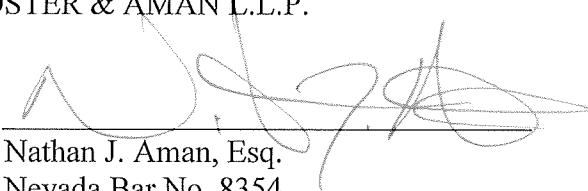
9
10 By: 
11 Nathan J. Aman, Esq.
12 Nevada Bar No. 8354
13 Emilee N. Hammond, Esq.
14 Nevada Bar No. 14626
15 327 California Ave.
16 Reno, Nevada 89509
17 (775) 284-8888
18 Attorneys for Plaintiff
19
20
21
22
23
24
25
26
27
28

EXHIBIT “1”

EXHIBIT “1”

\$1425
Nathan J. Aman, Esq.
Nevada Bar No. 8354
Emilee N. Hammond, Esq.
Nevada Bar No. 14626
VILORIA, OLIPHANT,
OSTER & AMAN L.L.P.
327 California Ave.
Reno, Nevada 89509
(775) 284-8888
Attorneys for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

PEEK BROTHERS CONSTRUCTION,
INC., a Nevada Domestic Corporation.

Plaintiff,

Case No.:

Dept. No.:

vs.

SR CONSTRUCTION, INC., a Nevada
Domestic Corporation; DOE Defendants 1 -
10.

Defendants.

COMPLAINT

[ARBITRATION EXEMPTION REQUESTED]

COMES NOW, Plaintiff PEEK BROTHERS CONSTRUCTION, INC., by and through
its counsel of record, the law firm of Viloria, Oliphant, Oster & Aman L.L.P. and hereby
complains, asserts, and alleges the following against the above-named Defendants:

PARTIES

1. Plaintiff PEEK BROTHERS CONSTRUCTION, INC. ("Peek Brothers") is a
Nevada Domestic Corporation.

2. Defendant SR CONSTRUCTION, INC. ("SR Construction") is a Nevada
Domestic Corporation.

1 3. The true identities of DOE Defendants 1-10 are presently unknown; however,
2 Plaintiff will move to amend this Complaint upon learning the true identities of DOE
3 Defendants 1 – 10 based on their liability for the damages alleged herein.

4 **JURISDICTION AND VENUE**

5 4. This Court has jurisdiction over this matter because the amount in controversy
6 exceeds \$15,000.00.

7 5. Venue in Washoe County is proper pursuant to NRS 13.010(1) because the
8 contract that serves as the basis for this action is to be performed in Washoe County.

9 6. This suit is exempted from Nevada's Arbitration Program pursuant to NAR 3(A)
10 because Plaintiff has incurred damages in excess of \$50,000.

11 **FACTUAL BACKGROUND**

12 7. On October 8, 2019, Peek Brothers entered into a Master Subcontractor
13 Agreement ("Subcontract") with SR Construction, and subsequent Work Order on January 8,
14 2020 ("Work Order") (collectively, "Subcontract"), in which Peek Brothers agreed to perform
15 earthwork related to the construction of the Northern Nevada Sierra Medical Center ("Project").

16 8. Included in Peek Brothers' scope of work on the Project was site mass grading,
17 sub and base grade for the building pad and footing excavation ("Scope of Work").

18 9. In consideration for Peek Brothers' performance, SR Construction agreed to pay
19 Peek Brothers the sum of Three Million Sixty-Two Thousand and No/100 Dollars
20 (\$3,062,000.00), pursuant to the Subcontract for the Project.

21 10. SR Construction agreed to make monthly payments to Peek Brothers for
22 invoiced work.

23 11. In preparing its bid for the Project, Peek Brothers' bid price—and Subcontract
24 price—for the sub and base grade for the building pad assumed the utilization of extra material
25 from excavation of the building footings and plumbing trenches ("Spoils") to backfill the
26 building footings and bring the building pad to subgrade elevation. In other words, Peek
27 Brothers would use the dirt it had dug up in the process of creating trenches and footings to
28 build up the footings and building pad.

12. However, Fred Kravetz ("Mr. Kravetz") with SR Construction, instead directed Peek Brothers to import approximately 150,000 square feet of material ("material" or "structural fill") to bring the building pad to subgrade elevation *prior* to Peek Brothers digging up the trenches and footings.

13. In so doing, SR Construction, through Mr. Kravetz, initiated a change to the means and methods by which Peek Brothers' Scope of Work was to be performed.

14. Peek Brothers informed Mr. Kravetz on numerous occasions that it was unnecessary to import material because the Spoils would have otherwise been used to bring the building pad to subgrade elevation.

15. Peek Brothers further informed Mr. Kravetz that importation of material and the eventual removal of excess material from the footings would result in additional cost to SR Construction.

16. The decision by Mr. Kravetz required Peek Brothers to stockpile the Spoils on site after excavating the building footings and plumbing trenches, rather than use the Spoils to bring the building pad to subgrade elevation.

17. SR Construction did not require or request Peek Brothers submit a change order prior to importing the material and backfilling the building pad, nor did SR Construction amend the Work Order, attached to the Subcontract as Exhibit A, in writing.

18. Instead, SR Construction ordered Peek Brothers to complete the additional work without complying with the Subcontract.

19. It is understood that it was common practice for SR Construction to deviate from its agreements with subcontractors on the Project by orally demanding work or services which were not included in said subcontractors' scope of work.

20. In accordance with Mr. Kravetz's demand, Peek Brothers purchased and had to truck in the material, and the earthwork to bring the building pad to subgrade elevation was performed on April 9, 2020 through April 13, 2020.

21. Subsequent to bringing the building pad to subgrade elevation, the building footings and plumbing trenches were dug and the Spoils were stockpiled on site.

22. On April 16, 2020, Peek Brothers submitted Change Order #13, reflecting the cost of labor and equipment to move the excess material from the footings from the building pad in the amount of \$4,268.23, which was necessary because the excess material was no longer needed to bring the building pad to subgrade elevation.

23. On May 18, 2020, SR Construction sent Peek Brothers a Notice of Reduction of Scope & 48 Hour Notice to Cure, in which SR Construction unilaterally removed the scope of work from the Subcontract described as "Under slab Plumbing Trench and Backfill."

24. On May 21, 2020, Peek Brothers submitted Change Order #17, reflecting the cost of labor and equipment to import the fill onto the building pad to bring the building pad to subgrade elevation.

25. On June 4, 2020, Peek Brothers submitted a revised change order for the material imported and the work performed to bring the building pad to subgrade elevation, referred to as Change Order #17-R1, in the amount of \$137,497.50.

26. Change Order #13 and Change Order #17-R1 were submitted to SR Construction in the same manner and in the same form as all previous change orders had been submitted.

27. Subsequent to Peek Brothers' performance of the importation of structural fill and backfilling of the building pad, SR Construction unilaterally removed the scope of work from the Subcontract described as "Sub and Base Grade."

28. Peek Brothers has provided SR Construction with all invoices for the work performed.

29. SR Construction failed to either accept Change Order #13 or respond accordingly within thirty (30) days after the date that Change Order #13 was submitted by Peek Brothers to SR Construction pursuant to NRS 624.626(1)(e).

30. SR Construction has failed to accept Change Order #17-R1 despite work performed and substantial costs incurred by Peek Brothers which was done pursuant to the order of Mr. Kravitz of SR Construction.

31. Peek Brothers complied with NRS 624.626 in submitting Change Order #13 and Change Order #17-R1 to SR Construction.

VILORIA,
OLIPHANT,
OSTER &
AMAN L.L.P.

ATTORNEYS AND
COUNSELORS AT LAW
Office: (775) 284-8888 Fax: (775) 284-3838
P. O. Box 62 ~ RENO, NEVADA 89504
327 CALIFORNIA AVENUE ~ RENO, NEVADA 89509

FIRST CLAIM FOR RELIEF
(Breach of Contract)

34. Peek Brothers and SR Construction entered into a valid Subcontract Agreement under which Peek Brothers agreed to perform certain work in exchange for timely payment therefor.

36. At the express order of SR Construction, Peek Brothers imported structural fill, rather than utilize the Spoils (from excavation of the building footings and plumbing trenches), to backfill the building footings and bring the building pad to subgrade elevation.

38. The importation of structural fill resulted in excess cost to Peek Brothers in the amount of \$137,497.50 not contemplated by the Subcontract, as set forth in Change Order #17-R1.

40. SR Construction breached the Subcontract by failing to comply with the Change Order process and/or amending the Work Order, as required by the Subcontract, to include the importation and eventual removal of material to and from the building pad.

42. SR Construction failed to timely pay Peek Brothers' invoices pursuant to the Subcontract Invoice Procedures described in SR Construction's Accounting Practices.

43. As a result of SR Construction's breach, Peek Brothers has been damaged in an amount in excess of Fifteen Thousand and No/100 Dollars (\$15,000.00).

44. Peek Brothers was forced to seek legal services to prosecute these claims and should be awarded their reasonable attorneys' fees.

SECOND CLAIM FOR RELIEF
(Attorneys' Fees Pursuant to Subcontract Agreement)

45. Plaintiffs incorporate by reference Paragraphs 1-44 of this Complaint as if set forth fully herein.

46. Pursuant to Exhibit D, Subsection V of the Subcontract, in the event that either contractor or subcontract institute a suit in court against the other party in connection with any dispute or matter arising under the Subcontract, the prevailing party is entitled to recover reasonable attorneys' fees.

47. Peek Brothers has been forced to initiate the instant suit as a result of SR Construction's failure to pay for work performed by Peek Brothers at the direction of SR Construction.

48. The instant suit arises under the Subcontract, as it pertains to Peek Brothers performance thereunder.

49. Accordingly, Peek Brothers has been forced to seek legal services to prosecute its claims and is entitled to reasonable attorneys' fees pursuant to the Subcontract.

THIRD CLAIM FOR RELIEF
(Unjust Enrichment)

50. Plaintiffs incorporate by reference Paragraphs 1-49 of this Complaint as if set forth fully herein.

51. Peek Brothers has conferred a benefit upon SR Construction by importing structural fill at SR Construction's order and utilizing the imported material to bring the building pad to subgrade elevation.

1 52. SR Construction has appreciated and retained such benefit despite refusal to
2 compensate Peek Brothers for the cost of the work performed.

3 53. It would be unjust and inequitable to permit SR Construction to retain the benefit
4 of the above-described work.

5 54. As a result of SR Construction's unjust enrichment, Peek Brothers has been
6 damaged in an amount in excess of Fifteen Thousand and No/100 Dollars (\$15,000.00).

7 55. Peek Brothers was forced to seek legal services to prosecute these claims and
8 should be awarded their reasonable attorney fees.

9 **FOURTH CLAIM FOR RELIEF**
10 **(Violation of NRS 624)**

11 56. Plaintiffs incorporate by reference Paragraphs 1-55 of this Complaint as if set
12 forth fully herein.

13 57. On April 16, 2020, Peek Brothers submitted Change Order #13 to SR
14 Construction in the amount of \$4,268.23,

15 58. SR Construction failed to accept Change Order #13 or give written notice to
16 Peek Brothers of any purported reason why Change Order #13 is unreasonable.

17 59. SR Construction's failure to respond to Change Order #13 is a violation of NRS
18 624.626(1)(e).

19 60. Accordingly, Peek Brothers is entitled to payment of the amount sought in
20 Change Order #13 pursuant to NRS 624.626(3).

21 61. Peek Brothers has been forced to seek legal services to prosecute this claim and
22 should be awarded its reasonable attorneys' fees.

23 WHEREFORE, Peek Brothers prays for relief against SR Construction as follows:

- 24 1. For judgment in excess of \$15,000 on Peek Brothers' First, Second, and Third
25 Claims for Relief;
26 2. For judgment in the amount of \$4,268.23 on Peek Brothers' Fourth Claim for
27 Relief;
28 3. For attorneys' fees, costs and interest pursuant to NRS 624.626(6);

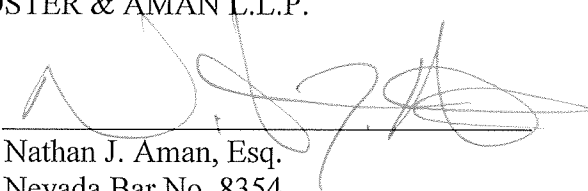
- 1 4. For attorneys' fees, costs and interest as allowed by law and/or equity; and
2 5. For such further relief the Court may deem just and proper.

3 **AFFIRMATION**

4 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding
5 document does not contain the social security number of any person.

6 **DATED** this 2nd day of September, 2020.

7 VILORIA, OLIPHANT,
8 OSTER & AMAN L.L.P.

9
10 By: 
11 Nathan J. Aman, Esq.
12 Nevada Bar No. 8354
13 Emilee N. Hammond, Esq.
14 Nevada Bar No. 14626
15 327 California Ave.
16 Reno, Nevada 89509
17 (775) 284-8888
18 Attorneys for Plaintiff
19
20
21
22
23
24
25
26
27
28

MCOM
THE ALLISON LAW FIRM CHTD.
Noah G. Allison (Bar #6202)
3191 East Warm Springs Road
Las Vegas, Nevada 89120-3147
Tel (702) 933-4444
Fax (702) 933-4445
noah@allisonnevada.com
Attorneys for SR Construction, Inc.

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF WASHOE, STATE OF NEVADA

PEEK BROTHERS CONSTRUCTION,
INC., a Nevada Domestic corporation,

Case No.: CV20-01375

Plaintiff,

Dept. No.: 8

vs.

**MOTION TO COMPEL ARBITRATION
AND STAY LITIGATION**

SR CONSTRUCTION, INC., a Nevada
Domestic Corporation; DOE Defendants 1 -
10.

Defendants.

Defendant SR Construction, Inc. ("SR") by and through its attorneys, The Allison Law Firm Chtd., moves this Court for an order compelling Plaintiff Peek Brothers Construction ("Peek Bros.") to arbitrate the construction dispute that is the subject of this lawsuit. SR further moves for an order staying this case pending the outcome of the arbitration.

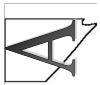
This Motion is made and based upon NRS 38.221, the following Points and Authorities attached to this Motion, the exhibits attached hereto, the papers and pleadings on file with the Court, and any argument of counsel at the time set for hearing on this matter.

//

//

//

//





LIST OF EXHIBITS

- Exhibit 1: Affidavit of Noah G. Allison in Support of Motion to Compel Arbitration and Stay Litigation.
- Exhibit 2: September 2, 2020 Complaint.
- Exhibit 3: May 6, 2020 Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price between UHS and SR (“Prime Contract”).
- Exhibit 4: October 8, 2019 Master Subcontract Agreement between SR and Peek Bros (“MSA”).
- Exhibit 5: January 8, 2020 Work Order Addendum to Master Subcontract Agreement (“Work Order”).
- Exhibit 6: July 23, 2020 Memo from UHS re: Peek Brothers Dispute.
- Exhibit 7: Demand for Arbitration filed September 11, 2020.
- Exhibit 8: September 25, 2020 Letter from Emilee Hammond to Kristin Schlack.
- Exhibit 9: October 5, 2020 Letter from Noah Allison to Kristin Schlack.
- Exhibit 10: October 6, 2020 Letter from Kristin Schlack.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This case concerns a construction dispute on the Northern Nevada Sierra Medical Center construction project in Reno, Nevada (“Project”). Sparks Family Medical Center, Inc. c/o Universal Health Services of Delaware (“UHS”) is the owner. SR is the general contractor. Peek Bros. is the earthwork subcontractor.

The dispute is over change orders sought by Peek Bros. and contested by SR and UHS. Exhibit 2, ¶¶ 7-32. The Prime Contract requires that arbitration be utilized as the method for binding dispute resolution with respect to claims seeking relief arising out of the terms of the contract. Exhibit 3, AIA A201 § 15.4. The MSA requires Peek Bros. and SR to utilize arbitration when the dispute between SR

1 and Peek Bros. involves issues of fact or law that SR is required to arbitrate under the terms of the
2 Prime Contract. Exhibit 4, Exhibit D ¶ W.

3 Because any payment made to Peek Bros. on the disputed change orders ultimately will come
4 from UHS, and because UHS disputes the change orders, UHS has directed SR to initiate dispute
5 resolution per the terms of the Prime Contract. Exhibit 4. UHS has further stated “SR Construction
6 shall not settle or otherwise authorize payment of all or any portion of the disputed change request
7 under the terms of the Prime Contract without written authorization from UHS.” Exhibit 4.

8 For this reason, the claims made in this case involve issues of law and fact that SR and Peek
9 Bros. must arbitrate under the terms of the Prime Contract. Accordingly, this Court should compel
10 Peek Bros. to engage in the arbitration process it agreed to when it signed the MSA and stay this matter
11 until the arbitration is concluded.

12 II.

13 BACKGROUND

14 A. The MSA.

15 This Court will note that the MSA does not relate to a particular project, but rather represents the
16 general terms of the relationship between SR and Peek Bros. Exhibit 4, p. 1. As explained in the MSA,
17 subsequent work orders defining the scope, price and specific terms and conditions on a project are
18 incorporated by reference. Exhibit 4, pp. 1-2. For this reason, the dispute resolution section of the
19 MSA was carefully written in a way to bind SR and Peek Bros. to whatever dispute resolution
20 requirements may exist between SR and an owner on a future project:

21 **W. DISPUTE RESOLUTION – ARBITRATION** – (a) Contractor and
22 Subcontractor shall not be obligated to resolve disputes arising under this
23 Subcontract by arbitration, unless: (i) the prime contract has an arbitration
24 requirement; and (ii) a particular dispute between the Contractor and
25 Subcontractor involves issues of fact or law which the Contractor is required to
26 arbitrate under the terms of the prime contract. In the event that arbitration is
27 required under the terms of this Provision, the same arbitrator(s) utilized to
28 resolve the dispute between any Owner and Contractor shall be utilized to resolve
the dispute under this Provision; (b) In the event that the Contractor and any
Owner or others arbitrate matters relating to this Subcontract, the Subcontractor
shall be required, at the request of the Contractor, to prepare and present the
Contractor’s case at Subcontractor’s expense to the extent the proceedings relate
to this Subcontract; (c) Should the Contractor enter into arbitration with any
Owner or others with regard to issues relating to this Agreement, the

Subcontractor shall be bound by the result of the arbitration to the same degree as the Contractor.

Exhibit 4, Exhibit D ¶ W. Disputes arising under the MSA and any work order must be arbitrated if the prime contract has an arbitration clause and the dispute involves issues that SR must arbitrate under the terms of the prime contract. Exhibit 4, Exhibit D ¶ W(a). Disputes arising when there is no arbitration clause in the prime contract or the issues do not require SR to arbitrate under the terms of the prime contract may be litigated. Exhibit 4, Exhibit D ¶ W(a).

B. The Work Order.

The Work Order, signed by Peek Bros. and SR on January 8, 2020, tied the MSA directly to the Project. Exhibit 5, p. 1 (“The terms and obligations of the above-referenced Master Subcontract Agreement are fully incorporated by reference as though fully set forth herein.”) If ever there was a time for Peek Bros. to distance itself from the arbitration requirement in the MSA with respect to the Project, it was before it signed the Work Order.

C. The Prime Contract.

SR and UHS signed the Prime Contract on July 21, 2019. The Prime Contract is a typical “cost-plus” arrangement with a guaranteed maximum price (“GMP”). In a cost-plus contract, the owner is required to pay the general contractor for the cost of the work plus a fee on the project subject to the general contractor’s GMP. Exhibit 3, AIA A133 § 5.1-5.2. The cost of the work is defined as the general contractor’s substantiated reimbursable costs paid for its labor, *subcontractors*, materials, equipment, taxes, permit fees, *legal costs*, *arbitration costs*, insurance costs, and other items up to the GMP. Exhibit 3, AIA A133 § 6.1-6.7 (Emphasis supplied). Thus, if the cost of Peek Bros.’ work is \$1,000,000.00, UHS is obligated to pay SR for it, subject to the GMP. And if the cost of Peek Bros.’ work is increased to \$1,250,000.00 by change orders, UHS is obligated to pay SR for that as well. A subcontract change order is money out of UHS’s pocket; it obviously cares a great deal as to whether the change is legitimate.

The Prime Contract defines the manner in which “Claims” are decided. Here, SR and UHS agreed that arbitration pursuant to Section 15.4 of AIA Document A201-2017 shall be the method of binding dispute resolution. Exhibit 3, AIA A133, § 9.2. Section 15.4 of A201-2017 provides:

Arbitration shall be utilized as the method for binding dispute resolution in the Agreement, any Claim subject to, but not resolved by, mediation shall be subject

to arbitration which, unless the parties mutually agree otherwise, shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Agreement. The Arbitration shall be conducted in the place where the Project is located, unless another location is mutually agreed upon. A demand for arbitration shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the arbitration. The party filing notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

Exhibit 3, AIA A201 § 15.4.1. The award rendered by the arbitrator shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction. Exhibit 3, AIA A201 § 15.4.3. The converse is not true. A judgment rendered by a court in the absence of arbitration that is not waived is **not** binding. Such is the contractual agreement of the parties to this dispute.

D. UHS Rejected the Disputed Change Orders and Directed SR to Initiate Dispute Resolution Under the Prime Contract.

On July 23, 2020, after SR apprised UHS of the change orders Peek Bros. was asserting, UHS took the position the change orders lacked merit. Mr. Applegate of UHS wrote:

Also, as I understand it, there was no real necessary change in their work plan as the construction documents and subcontract agreement call for Peek Brothers to deliver a certified building pad at elevation 43 and complete a rough graded site at the proper subgrade elevation as indicated on the grading/site improvement drawings. Additionally, I understand that we now have additional fill that will now need to be hauled away from the site (6,000 CY) as it was not truly necessary in the current scope of work that is subsumed under their subcontract, and Peek Brothers are requesting a change order for this extra work.

Exhibit 5. Because the requested change required extra money to be paid out of UHS's pocket for work that was outside the scope of the contracted work, UHS rejected the change order, directed SR to initiate dispute resolution, and further instructed that "SR Construction shall not settle or otherwise authorize payment of all or any portion of the disputed change request under the terms of the Prime Contract without written authorization from UHS." Exhibit 5.

E. Peek Bros. Files an Action in this Court.

Peek Bros. filed its complaint against SR on September 2, 2020. Exhibit 2. The allegations concern additive change orders incurred on the Project that SR and, by extension, UHS must pay. Exhibit 2.

//

F. SR Files a Demand for Arbitration with AAA.

SR filed a Demand for Arbitration on September 11, 2020. Exhibit 6. The arbitration demand named two respondents: Peek Bros. *and* UHS. Both are indispensable to the complete resolution of the dispute. Exhibit 6. The arbitrator must examine the merit of Peek Bros.' change orders and any legitimate setoffs, as well as whether the change orders, if meritorious to any degree, are reimbursable costs that UHS must pay to SR.

On September 25, 2020, counsel for Peek Bros. submitted a letter to AAA objecting to its jurisdiction over the dispute. Exhibit 7. On October 5, 2020, counsel for SR submitted a response letter to AAA advising it that SR will file a motion to compel arbitration with this Court and agreeing to stay the arbitration proceedings while the motion to compel is under consideration. Exhibit 8. On October 6, 2020, AAA sent a letter advising it will stay the arbitration pending the outcome of the motion to compel arbitration. Exhibit 9.

III.

ARGUMENT

A. Governing Authority and Legal Standards.

The Nevada Legislature enacted the Uniform Arbitration Act ("Act") to govern the enforcement of arbitration agreements. NRS 38.219 provides:

1. An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except as otherwise provided in NRS 597.995 or upon a ground that exists at law or in equity for the revocation of a contract.
2. The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
3. An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.
4. If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitral proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

NRS 38.221(1) provides:

1. On a motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

1 (a) If the refusing party does not appear or does not oppose the motion, the court
2 shall order the parties to arbitrate; and

3 (b) If the refusing party opposes the motion, the court shall proceed summarily to
4 decide the issue and order the parties to arbitrate unless it finds that there is no
enforceable agreement to arbitrate.

5 NRS 338.221(7) provides:

6 7. If the court orders arbitration, the court on just terms shall stay any judicial
7 proceeding that involves a claim subject to the arbitration. If a claim subject to the
arbitration is severable, the court may limit the stay to that claim.

8 Orders to proceed with arbitration are not appealable and the parties must proceed with
9 arbitration. *Clark County v. Empire Elec., Inc.*, 96 Nev. 18, 604 P.2d 352 (1980). Orders denying a
10 motion to compel arbitration are directly appealable. *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 96 P.3d
11 1159, 1162 (2004).

12 There is a strong public policy in favor of contractual provisions requiring arbitration in Nevada.
13 *Phillips v. Parker*, 106 Nev. 415, 416-17, 794 P.2d 716, 717-18. Once an arbitrable issue has been
14 found to exist, all doubts concerning the arbitrability of the subject matter of a dispute are to be resolved
15 in favor of arbitration. *Exber, Inc. v. Sletten Constr. Co.*, 92 Nev. 721, 729, 558 P.2d 517, 522 (1976).
16 Courts must not deprive parties of the benefits of arbitration for which they have bargained – speed in
17 the resolution of the dispute, and the employment of the specialized knowledge and competence of the
18 arbitrator. *Id.*, citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557-58 (1964).

19 **B. The Arbitration Agreements in the Prime Contract and the MSA Together Bind SR, UHS**
20 **and Peek Bros. to Proceed with Arbitration.**

21 The basic allegations in Peek Bros.’ Complaint are that it is entitled to receive payment for
22 change orders from SR for extra work, materials and equipment it furnished to the Project. Exhibit 2.
23 SR and UHS take the position that Peek Bros. is not entitled to payment for the change orders pursuant
24 to the terms and conditions of the MSA and Work Order. Exhibit 5; Exhibit 6.

25 The Prime Contract requires UHS to reimburse SR for all “[p]ayments made by the Construction
26 Manager [SR] to Subcontractors [Peek Bros.] *in accordance with the requirements of the subcontracts.*”
27 Exhibit 3, AIA A133 § 6.3 (emphasis supplied). SR has informed UHS that the change orders sought
28 by Peek Bros. are not valid and not in accordance with the terms of the MSA and Work Order. Exhibit



5. In response, UHS has directed SR to initiate arbitration and has further advised it will not pay SR for the disputed extras. Exhibit 5. SR will be in an impossible situation unless the Court compels arbitration. SR cannot force UHS into this litigation yet UHS holds the purse strings and will only release them if the matter is decided by arbitration.

It is not a close call here. Even if this Court completely disregarded its obligation to liberally construe the arbitration agreement in the MSA in favor of arbitration¹, the intertwined rights and obligations of UHS, SR and Peek Bros. undeniably raise issues of fact or law that must be arbitrated pursuant to the Prime Contract. It makes sense under every conceivable public policy and judicial doctrine for this Court to send the parties to the forum they all contracted to be in and have the rights and obligations of SR, UHS and Peek Bros. decided by a seasoned neutral construction professional. Doing so will conserve judicial resources. Doing so will prevent inconsistent decisions.² Doing so will save the parties time and money. Most important, doing so honors the contractual agreements of the parties.

C. The Court Should Stay This Matter Pending the Outcome of the Arbitration.

This Court has the power to stay this proceeding until the arbitration is concluded. NRS 338.221(7). It makes sense to enter a stay and SR requests the Court do so. SR is willing to provide regular status checks to the Court regarding the arbitration if the Court desires.

//

//

//

//

//

//

¹ *Exeber* at 522, citing *New Pueblo Constructors, Inc. v. Lake Patagonia Recreation Ass'n*, 467 P.2d 88 (Ariz App. 1970).

² Imagine what could happen to SR if this Court refused to compel arbitration. SR and Peek Bros. would take this matter to trial, SR and UHS simultaneously could take this matter to arbitration. There would be two discovery tracks. The exact same issues would be decided at two different times and perhaps with opposite rulings. Then, adding insult to injury, the AAA decision would have no binding effect on Peek Bros. and the Court's judgment would have no binding effect on UHS.

III.

CONCLUSION

Based on the foregoing, the Court should enter an order compelling Peek Bros. to participate in arbitration and stay this matter pending the arbitration's outcome.

DATED this 7th day of October, 2020.

THE ALLISON LAW FIRM CHTD.

By: 

Noah G. Allison (Bar #6202)
3191 East Warm Springs Road
Las Vegas, Nevada 89120-3147
Attorneys for SR Construction, Inc.

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 7th day of October, 2020.

THE ALLISON LAW FIRM CHTD.

By: 

Noah G. Allison (Bar #6202)
3191 East Warm Springs Road
Las Vegas, Nevada 89120-3147
Attorneys for SR Construction, Inc.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of THE ALLISON LAW FIRM CHTD., and that on October 7th, 2020, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which served the following parties electronically:

Nathan J. Aman, Esq.
Emilee N. Hammond, Esq.
Viloria, Oliphant, Oster & Aman, LLP
327 California Ave.
Reno, Nevada 89509
Attorney for Peek Brothers Construction, Inc.

/s/ Nita MacFawn

Employee of The Allison Law Firm Chtd.

INDEX OF EXHIBITS

<u>Exhibit #</u>	<u>Description</u>	<u># of Pages</u>
Exhibit 1	Affidavit of Noah G. Allison in Support of Motion to Compel Arbitration and Stay Litigation	2
Exhibit 2	September 2, 2020 Complaint	8
Exhibit 3	May 6, 2020 Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price between UHS and SR ("Prime Contract")	89
Exhibit 4	October 8, 2019 Master Subcontract Agreement between SR and Peek Bros ("MSA")	80
Exhibit 5	January 8, 2020 Work Order Addendum to Master Subcontract Agreement ("Work Order")	55
Exhibit 6	July 23, 2020 Memo from UHS re: Peek Brothers Dispute	1
Exhibit 7	Demand for Arbitration filed September 11, 2020	5
Exhibit 8	September 25, 2020 Letter from Emilee Hammond to Kristin Schlack	3
Exhibit 9	October 5, 2020 Letter from Noah Allison to Kristin Schlack	1
Exhibit 10	October 6, 2020 Letter from Kristin Schlack	1

2645
Nathan J. Aman, Esq.
Nevada Bar No. 8354
Emilee N. Hammond, Esq.
Nevada Bar No. 14626
VILORIA, OLIPHANT,
OSTER & AMAN L.L.P.
327 California Ave.
Reno, Nevada 89509
(775) 284-8888
Attorneys for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

PEEK BROTHERS CONSTRUCTION,
INC., a Nevada Domestic Corporation.

Plaintiff,

Case No.: CV20-01375

Dept. No.: 8

vs.

SR CONSTRUCTION, INC., a Nevada
Domestic Corporation; DOE Defendants 1 -
10.

Defendants.

PLAINTIFF'S OPPOSITION TO DEFENDANT SR CONSTRUCTION, INC.'S
MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

COMES NOW, Plaintiff PEEK BROTHERS CONSTRUCTION, INC. ("Peek
Brothers"), by and through its counsel of record, the law firm of Viloría, Oliphant, Oster &
Aman L.L.P, and hereby opposes Defendant's Motion to Compel Arbitration and Stay
Litigation.

This Opposition is based on the following memorandum of points and authorities, any
exhibits attached thereto, any oral argument this Court wishes to entertain, and all other papers
and pleadings on file before this Court of utility in rendering a just decision.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This matter only involves a misguided mistake made by a general contractor who ordered its subcontractor to do redundant and unnecessary work. This litigation has nothing to do with the owner, who has no responsibility for the general contractor's unilateral mistake.

Peek Brothers Construction, Inc. ("Peek Brothers") is a subcontractor who was hired to perform earthwork related to the construction of the Northern Nevada Sierra Medical Center ("Project"). The prime contractor on the Project, SR Construction, Inc. ("SR Construction"), is the party with whom Peek Brothers contracted to perform the work. During the course of construction on the Project, SR Construction made a unilateral demand to change the means and methods by which Peek Brothers performed its work. This change necessitated additional labor and material and, accordingly, increased the cost of Peek Brothers' work on the Project. Despite making this demand with full knowledge of the increase in cost, SR Construction has failed to pay Peek Brothers for the additional work performed, requiring Peek Brothers to file the instant action in district court.

SR Construction now seeks to arbitrate this dispute based upon the fact that the owner of the Project, Sparks Family Medical Center, Inc. c/o Universal Health Services of Delaware ("UHS" or "Owner"), refuses to pay for SR Construction's mistake. SR Construction is thus attempting to bind Peek Brothers to a contract that it did not enter into, namely the Prime Contract between SR Construction and UHS, and force Peek Brothers to arbitrate a dispute that is not subject to arbitration under the terms of the Subcontract Agreement. Not only does Peek Brothers' dispute have nothing to do with UHS, this dispute does not involve "issues of fact or law" that requires arbitration pursuant to the terms of the Prime Contract, as discussed further.

At its core, this litigation is predicated upon a bad decision by SR Construction. The simple fact that UHS is responsible for payment to SR Construction for its contracted work does not and cannot serve as a basis for circumventing contractual privity, ignoring the express language of the operative agreements, and subjecting a subcontractor to an arbitration provision

1 between an owner of a construction project and its prime contractor. While SR Construction
2 heavily relies upon its theory that UHS is ultimately responsible for any payment made to Peek
3 Brothers, this argument is a red herring. Based upon the facts as alleged in its Complaint, Peek
4 Brothers' dispute has nothing to do with UHS, and UHS is not responsible to pay for SR
5 Construction's mistakes. Regardless, that is an issue between UHS and SR Construction and
6 should have no bearing on the instant litigation.

7 Peek Brothers has no desire to be caught up in the morass of arbitration with the
8 American Arbitration Association ("AAA"), which is cumbersome, devoid of rules, and often
9 more expensive than litigation. More importantly, Peek Brothers did not agree to binding
10 arbitration with the AAA, and must be allowed to litigate its claims against SR Construction in
11 District Court. Accordingly, Peek Brothers respectfully requests this Court reject SR
12 Construction's attempt to shield itself from its erroneous decision, and find that Peek Brothers'
13 claims against SR Construction do not fall within the narrow exception to the general rule
14 expressly stated in the Subcontract, and find that SR Construction and Peek Brothers are *not*
15 required to resolve disputes arising thereunder through arbitration.

16 II. FACTUAL BACKGROUND

17 On October 8, 2019, Peek Brothers entered into a Master Subcontract Agreement
18 ("Subcontract") with SR Construction, Inc. ("SR Construction"), and subsequent Work Order on
19 January 8, 2020 ("Work Order"), in which Peek Brothers agreed to perform earthwork related to
20 the Project. See Master Subcontract Agreement, attached hereto as **Exhibit 1**. SR Construction
21 is the prime contractor ("Contractor") on the Project, and UHS is the owner of the Project.

22 Included in Peek Brothers' scope of work on the Project was site mass grading, sub and
23 base grade for the building pad, and footing excavation ("Scope of Work"). In consideration for
24 Peek Brothers' performance, SR Construction agreed to pay Peek Brothers the sum of Three
25 Million Sixty-Two Thousand and No/100 Dollars (\$3,062,000.00), pursuant to the Subcontract
26 for the Project. This bid price assumed the utilization of extra material from excavation of the
27 building footings and plumbing trenches ("spoils") to backfill the building footings and bring
28

1 the building pad to subgrade elevation. In other words, Peek Brothers would use the dirt it had
2 dug up in the process of creating trenches and footings to build up the footings and building
3 pad.

4 However, Fred Kravetz ("Mr. Kravetz") with SR Construction instead directed Peek
5 Brothers to *import* approximately 150,000 square feet of material ("material" or "structural fill")
6 to bring the building pad to subgrade elevation *prior* to Peek Brothers digging up the trenches
7 and footings. Peek Brothers informed Mr. Kravetz that this was entirely unnecessary and that
8 the importation of the material and eventual removal of excess material dug up from the
9 footings would result in additional cost to SR Construction. In addition, Peek Brothers would
10 be required to stockpile the spoils on site after excavating the building footings and plumbing
11 trenches, rather than use said spoils to bring the building pad to elevation. Thus, not only did
12 this decision by Mr. Kravetz constitute a change to the means and methods by which Peek
13 Brothers' Scope of Work was to be performed, but it also necessarily resulted in additional costs
14 to be borne by SR Construction. Those increased costs are solely the result of SR
15 Construction's ill-advised demand for extra work.

16 In accordance with Mr. Kravetz demand, Peek Brothers purchased the additional
17 material and had the material trucked in to the Project site. Peek Brothers performed the
18 earthwork to bring the building pad to subgrade elevation between April 9, 2020 and April 13,
19 2020. Subsequently, the building footings and plumbing trenches were dug, and the spoils were
20 stockpiled on site.

21 On April 16, 2020, Peek Brothers submitted Change Order #13, reflecting the cost of
22 labor and equipment to move the excess material from the footings from the building pad in the
23 amount of \$4,268.23, which was necessary because the excess material was no longer needed to
24 bring the building pad to subgrade elevation. In addition, on May 21, 2020, Peek Brothers
25 submitted Change Order #17, reflecting the cost of labor and equipment to import the fill onto
26 the building pad to bring the building pad to subgrade elevation. Change Order #17 was revised
27 on June 4, 2020 to reflect an amount of \$137,497.50 for the material imported and the work
28

1 performed, referred to as Change Order #17-R1. Change Order #13 and Change Order #17-R1
2 (collectively, "Change Orders") were submitted to SR Construction in the manner and in the
3 same form as all previous change orders had been submitted, without issue, and in compliance
4 with NRS 624.626. Moreover, Peek Brothers has provided SR Construction with invoices for
5 the work performed.

6 SR Construction has failed to accept the Change Orders¹ despite performance and
7 substantial costs incurred by Peek Brothers, and in spite of the fact that said work was
8 performed at the express direction of SR Construction. Accordingly, Peek Brothers filed a
9 Complaint against SR Construction for Breach of Contract, Attorneys' Fees, Unjust Enrichment,
10 and a Violation of NRS Chapter 624.

11 III. LEGAL ARGUMENT

12 Under Section 38.219 of the Nevada Revised Statutes, "[a]n agreement contained in a
13 record to submit to arbitration any existing or subsequently controversy arising between the
14 parties to the agreement is valid, enforceable and irrevocable except as otherwise provided in
15 NRS 597.995 or upon a ground that exists at law or in equity for the revision of a contract."
16 NRS 38.219. In Nevada, the district court has the authority to determine whether an agreement
17 to arbitrate exists or a controversy is subject to an arbitration agreement. See NRS 38.221; NRS
18 38.219(2); Philips v. Parker, 106 Nev. 415, 417, 794 P.2d 716 (1990). There must be an
19 agreement to arbitrate for there to be a presumption of arbitrability. Philips, 106 Nev. at 417,
20 794 P.2d at 716.

21 Moreover, "arbitrability is usually a question of contractual construction," which is, in
22 turn, a question of law for the court's determination. State ex rel. Masto v. Second Judicial Dist.
23 Court ex rel. County of Washoe, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009) (citing Kennedy &
24 Mitchell, Inc. v. Anadarko Prod. Co., 243 Kan. 130, 754 P.2d 803, 805-06 (1988)).

25 ///

26 ///

27 _____
28 ¹ SR Construction also failed to timely respond to Change Order #13, which is a direct violation of NRS
624.626(1)(e).

A. The Dispute Between Peek Brothers and SR Construction is Not Subject to Arbitration.

Exhibit D, § W of the Subcontract contains a "Dispute Resolution" provision, which provides as follows:

Contractor and Subcontractor shall **not** be obligated to resolve disputes arising under this Subcontract by arbitration, unless: (i) the prime contract has an arbitration requirement; **and** (ii) a particular dispute between Contractor and Subcontractor **involves issues of fact or law which the Contractor is required to arbitrate under the terms of the prime contract.**

Exhibit 1, Exhibit D, § W (emphasis added). SR Construction maintains that the aforementioned "dispute resolution" section of the Subcontract "was carefully written in a way to bind SR [Construction] and Peek [Brothers] to whatever dispute resolution requirements may exist between SR [Construction] and an owner on a future project." Motion, p. 3. Quite the contrary, the dispute resolution provision makes clear that SR Construction and Peek Brothers are *not* required to arbitrate unless certain conditions are met. Thus, arbitration is the exception, not the rule. Consequently, based on the express terms of the Subcontract, Peek Brothers and SR Construction are not obligated to resolve disputes under the Subcontract *unless* the prime contract both includes an arbitration requirement *and* the dispute between Peek Brothers and SR Construction involves issues of fact or law that the prime contract requires SR Construction to arbitrate.

The parties and this Court must therefore look to the express terms of the prime contract to determine whether the aforementioned conditions precedent to arbitration exist. The prime contract, entered into between SR Construction and UHS, is comprised of two separate documents: AIA Document A133 – 2009, attached hereto as **Exhibit 2**, and AIA Document A201 – 2017, attached hereto as **Exhibit 3** (collectively, "Prime Contract"). Upon review of the relevant provisions of the Prime Contract, the Prime Contract requires that "any Claim between the **Owner** and **Construction Manager** shall be resolved in accordance with the provisions set forth in this Article 9 and Article 15 of A201 – 2017." **Exhibit 2**, § 9.2 (emphasis added). Notably, this does not encompass disputes between the construction manager (i.e., SR

1 Construction) and its subcontractors. Article 15 of A201 – 2017 goes on to provide, in relevant
2 part, as follows:

3 [A]rbitration shall be utilized as the method for binding dispute resolution in the
4 Agreement, any Claim subject to, but not resolved by, mediation shall be subject
5 to arbitration which...shall be administered by the American Arbitration
6 Association in accordance with its Construction Industry Arbitration Rules in
effect on the date of this Agreement.

7 **Exhibit 3, § 15.4.1.** The "Agreement" referenced therein is the Prime Contract, which Peek
8 Brothers emphasizes was entered into only by UHS and SR Construction. It does *not* refer to
9 the Subcontract.

10 *i. The Dispute Between Peek Brothers and SR Construction Does Not*
11 *Involve Issues of Fact or Law that Must Be Arbitrated Pursuant to the*
12 *Prime Contract.*

13 Notably, the Prime Contract does not include any language whatsoever regarding "issues
14 of fact or law" which require SR Construction to arbitrate disputes with its subcontractors.
15 Ignoring this glaring omission, SR Construction has apparently taken the position that because
16 UHS is obligated to pay SR Construction for its work on the Project, and because UHS has
17 "directed SR [Construction] to initiate" arbitration against Peek Brothers, somehow this satisfies
18 the requirements of the Subcontract's "Dispute Resolution" provision. See Motion, p. 3.
19 However, these two facts absolutely do not establish that the dispute between SR Construction
20 and Peek Brothers involves issues of fact or law that SR Construction is required to arbitrate
21 *under the Prime Contract.*² The Prime Contract requires only that disputes between UHS and
22 SR Construction be arbitrated and does not include criteria under which SR Construction must
23 arbitrate with its subcontractors. Moreover, the Subcontract itself does not have a standalone
24 dispute resolution provision that requires arbitration pursuant to *its* terms. Thus, neither the
25 Prime Contract nor the Subcontract provide any basis for arbitration of the instant dispute.

26 ² Again, Peek Brothers emphasizes that these "issues of fact or law" must be those which the Prime Contract require
27 be arbitrated, yet SR Construction almost exclusively refers to provisions of the Subcontract to support its argument.
28 The terms of the Subcontract do not—and cannot based upon its express terms—serve as the basis for SR
Construction's demand to arbitrate.

1 SR Construction's argument—that disputes involving payment for work performed by
2 subcontractors must be arbitrated because UHS is responsible for payment to SR
3 Construction—leads to the absurd and contrary conclusion that *all* disputes between SR
4 Construction and its subcontractors be arbitrated despite exceedingly clear language to the
5 contrary because UHS will always be, albeit indirectly, paying for the work performed.³ This
6 convenient interpretation of the arbitration provision lets SR Construction "off the hook" for the
7 demands it places upon its subcontractors, who are contractually obligated to perform the work
8 and furnish the materials that SR Construction requires. Further, this interpretation apparently
9 allows SR Construction to violate change order statutes simply because UHS may or may not be
10 responsible for payment of those change orders. If SR Construction demands its subcontractors
11 perform additional work that will incur additional expense, SR Construction is liable for
12 payment therefore. If UHS refuses to pay for said additional work, SR Construction may seek
13 recourse *against UHS*, or vice versa, through arbitration pursuant to the Prime Contract. This is
14 separate and apart from any dispute with Peek Brothers.

15 *ii. The Dispute Between Peek Brothers and SR Construction Does Not*
16 *Involve UHS.*

17 It is important to note that while the Prime Contract allows a contractor to include as
18 parties to an arbitration "Subcontractors to Contractor that Contractor deems relevant to the
19 matter in dispute," this assumes that there actually is a dispute between SR Construction and
20 UHS—the only parties to the Prime Contract. Despite including UHS as a "respondent" on an
21 attached page to its Demand for Arbitration, SR Construction has absolutely and unequivocally
22 failed to bring a claim or allege a dispute against UHS. See Demand for Arbitration, attached
23 hereto as **Exhibit 4**. In describing the nature of its dispute, SR Construction clearly alleges that
24 "Peek [Brothers] seeks payment for alleged changes to its scope of work. SR [Construction]
25 disputes the change orders sought by Peek [Brothers]. UHS...also rejects [Peek Brothers']
26

27 ³ The Subcontract is clear that SR Construction and Peek Brothers are *not* required to arbitrate unless the
28 aforementioned conditions precedent are met.

1 change orders..." SR Construction therefore admits that no dispute exists between SR
2 Construction and UHS, as they appear to be in agreement as to Peek Brothers' change orders.
3 SR Construction then states that it "seeks a backcharge from Peek [Brothers] for additional costs
4 incurred as a result of Peek [Brothers] refusing to perform work it was contracted to perform."⁴

5 Again, nowhere does SR Construction allege any dispute with UHS pursuant to the
6 Prime Contract. Rather, UHS was apparently included as a "respondent" solely as a misguided
7 attempt to force Peek Brothers into arbitrating a dispute that is not subject to the arbitration
8 provision. Peek Brothers reiterates that SR Construction, not UHS, contracted with Peek
9 Brothers to perform earthwork on the Project. UHS and Peek Brothers have no contractual
10 relationship with one another whatsoever.⁵ What's more, SR Construction, not UHS, demanded
11 Peek Brothers import structural fill to bring the building pad to subgrade elevation rather than
12 utilize the spoils from the excavation of the building footings *despite being told that it was*
13 *unnecessary and would result in additional expense*. Therefore, Peek Brothers' claim is against
14 SR Construction and SR Construction alone, and its dispute does not involve any issues of law
15 or fact which require arbitration pursuant to the Prime Contract. To force Peek Brothers to
16 arbitrate a dispute based upon a contract to which it is not a party and which clearly does not
17 govern its dispute is contrary to both the express terms of the Subcontract and the Prime
18 Contract, as well as longstanding principles of contract law. SR Construction cannot hide
19 behind UHS's purse strings to absolve itself of its mistake and prevent Peek Brothers from
20 properly filing suit against it in district court.

21 Accordingly, SR Construction's Motion should be denied in its entirety.

22 ///

23 ///

24
25 ⁴ SR Construction's apparent claim for a "backcharge" was submitted with no explanation and no documentation.
26 Like Peek Brothers' claim against SR Construction, any claim SR Construction has with Peek Brothers is pursuant to
27 the Subcontract and absolutely does not involve "issues of fact or law" requiring arbitration pursuant to the Prime
28 Contract.

⁵ SR Construction is clearly attempting to circumvent the fact that there is no privity of contract between UHS and
Peek Brothers.

1 **IV. CONCLUSION**

2 Based on the foregoing, Peek Brothers respectfully requests this Court deny SR
3 Construction's Motion to Compel Arbitration and Stay Litigation and enter an order finding that
4 Peek Brothers' claims against SR Construction are not subject to arbitration.

5 **AFFIRMATION**

6 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding
7 document does not contain the social security number of any person.

8 **DATED** this 28th day of October, 2020.

9
10 VILORIA, OLIPHANT,
11 OSTER & AMAN L.L.P.

12 By: 

13 Nathan J. Aman, Esq.
14 Nevada Bar No. 8354
15 Emilee N. Hammond, Esq.
16 Nevada Bar No. 14626
17 327 California Ave.
18 Reno, Nevada 89509
19 (775) 284-8888
20 Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of VILORIA,
OLIPHANT, OSTER & AMAN L.L.P., and that on the date shown below, I caused service of a
true and correct copy of the attached:

OPPOSITION TO MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

to be completed by:

X electronic service upon electronically filing the within document with the Second
Judicial District Court addressed to:

The Allison Law Firm Chtd.
Noah G. Allison
3191 East Warm Springs Road
Las Vegas, Nevada 89120
Attorneys for Defendants

DATED this 28th day of October, 2020

By: 

INDEX OF EXHIBITS

<u>Exhibit</u>	<u>Description</u>	<u>Number of pages (exclusive of tabs)</u>
1	Master Subcontract Agreement	80
2	AIA Document A133 – 2009	32
3	AIA Document A201 – 2017	57
4	Demand for Arbitration	4

THE ALLISON LAW FIRM CHTD.
Noah G. Allison (Bar #6202)
3191 East Warm Springs Road
Las Vegas, Nevada 89120-3147
Tel (702) 933-4444
Fax (702) 933-4445
noah@allisonnevada.com
Attorneys for SR Construction, Inc.

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF WASHOE, STATE OF NEVADA

PEEK BROTHERS CONSTRUCTION,
INC., a Nevada Domestic corporation,

Case No.: CV20-01375

Plaintiff,

Dept. No.: 8

vs.

SR CONSTRUCTION, INC., a Nevada
Domestic Corporation; DOE Defendants 1 -
10.

**REPLY IN SUPPORT OF MOTION TO
COMPEL ARBITRATION AND STAY
LITIGATION**

Defendants.

COMES NOW Defendant SR Construction, Inc. ("SR") by and through its counsel of record, Noah G. Allison of the Allison Law Firm Chtd., and herein submits its Reply in Support of Motion to Compel Arbitration. This Reply is made and based on the following Points and Authorities, the exhibits attached hereto, the pleadings on file herein, and any oral argument to be made before this Court.

POINTS AND AUTHORITIES

I.

INTRODUCTION

Peek Bros. wasted the majority of its Opposition on arguments about why it thinks it is entitled to a change order. A motion to compel arbitration is neither the time nor the place for advocating the merits of this dispute. SR and Peek Bros will present their cases to the arbitrator at a future date. At that time, the facts will be supported by documentary evidence, eye-witness testimony, and expert opinion





testimony. SR expects to prove that Peek Bros miscalculated the amount of material it should have imported onto the Project site, failed to deliver the building pad at the stipulated elevation prior to the excavation of footings and trenches, and failed to follow the minimum standards of care required of earthwork subcontractors in Northern Nevada. It is SR's position that the change order sought by Peek Bros. is the result of Peek Bros' miscalculation. Neither SR nor UHS have any interest in accepting a change order premised on Peek Bros' incompetence.

The purpose of this Reply is to provide the proper legal argument for this Motion by reinforcing core contractual concepts that no amount of white noise from Peek Bros can surmount. The crux of this Motion is to enforce the contractual agreements of the parties and arbitrate the disputed change order sought by Peek Bros. The MSA requires SR and Peek Bros. to resolve disputes by arbitration if the prime contract has an arbitration requirement and if the dispute involves issues of fact or law that SR must arbitrate under the terms of the prime contract. Motion to Compel Arbitration, Exhibit 4, Exhibit D ¶ W.

To rule properly on SR's Motion, this Court must recognize the difference between a cost-plus prime contract with a guaranteed maximum price (GMP) and a lump-sum prime contract. On a cost-plus GMP project, disputed change orders sought by subcontractors always involve issues of fact or law that the prime contractor must arbitrate under the terms of the prime contract (assuming the prime contract has an arbitration requirement) because they affect what the owner pays for the project. On a lump-sum project, depending on the circumstances, disputed subcontract change orders sometimes involve issues of fact or law that the prime contractor must arbitrate under the prime contract because they *may* affect what the owner pays for the project. This project is governed by a cost-plus GMP prime contract with an arbitration provision. Motion to Compel Arbitration, Exhibit 3. For this reason, this dispute must be arbitrated.

II.

ARGUMENT

A. The Contingency in a Cost-Plus GMP Prime Contract Is Returned to the Owner.

Subcontract change orders directly impact the price of the work on construction projects governed by a cost-plus GMP prime contract. The following example illustrates why.

A cost-plus prime contract with a GMP of \$330,000 is divided into a schedule of values ("SOV")



for billing and budget purposes. For example:

01	General Conditions	\$100,000
02	Sitework	\$50,000
03	Steel	\$20,000
05	Concrete	\$30,000
08	Framing	\$40,000
10	Contingency	\$60,000
11	Overhead and Profit (10%)	\$30,000

GMP		\$330,000

The Sitework line item of \$50,000 would be the amount of the earthwork subcontract, the Concrete line item of \$30,000 would be the amount of the concrete subcontract, and so on.

When there is a subcontract change order, if there is no corresponding prime contract change order increasing the GMP, the change order amount is pulled from the contingency line item. A \$30,000 change order to the Sitework subcontractor would change the SOV thus:

01	General Conditions	\$100,000
02	Sitework	\$80,000 (+\$30,000)
03	Steel	\$20,000
05	Concrete	\$30,000
08	Framing	\$40,000
10	Contingency	\$20,000 (-\$30,000)
11	Overhead and Profit (10%)	\$30,000

GMP		\$330,000

At the end of the project, the actual cost of the work is reconciled across the SOV. The overall variance is applied against Contingency:

01	General Conditions	\$100,000	\$100,000
02	Sitework	\$50,000	\$80,000
03	Steel	\$20,000	\$20,000
05	Concrete	\$30,000	\$30,000
08	Framing	\$40,000	\$40,000
10	Contingency	\$50,000	\$20,000
11	Overhead and Profit (10%)	\$30,000	\$27,000

GMP		\$330,000	ACTUAL PRICE \$297,000

The \$20,000 left in the Contingency line is not charged to the owner because a cost-plus contract only requires the owner to pay for the actual cost of the work plus the general contractor's fee. Above, the



owner pays \$297,000 for the project even though it had a GMP of \$330,000.

If the \$30,000 change order to the Sitework subcontractor posited above lacked merit, then the actual price charged to the owner would have been \$33,000 less (\$30,000 change order plus 10% OHP): \$264,000. Consequently, the merit (or lack of merit) of a subcontract change order on a cost-plus GMP contract almost always¹ will impact what the owner pays for the project and therefore involve issues of fact or law that the prime contractor must arbitrate pursuant to the prime contract. *This is especially true when the owner disputes the subcontractor's change order*, as UHS has in this case. Motion to Compel Arbitration, Exhibit 6.

B. The Contingency in a Lump-Sum Contract Belongs to the General Contractor.

On a lump-sum prime contract, it is possible to have disputed subcontract change orders that do not impact the price the owner must pay for the project. We can use the same SOV as above on a lump-sum prime contract with the same \$30,000 change order to the Sitework subcontractor. Once again, we assume there is no corresponding prime contract change order from the general contractor to the owner increasing the lump sum price:

01	General Conditions	\$100,000
02	Sitework	\$50,000
03	Steel	\$20,000
05	Concrete	\$30,000
08	Framing	\$40,000
10	Contingency	\$50,000
11	Overhead and Profit (10%)	\$30,000

LUMP SUM PRICE		\$330,000

The subcontract change order is similarly taken from Contingency:

01	General Conditions	\$100,000		\$100,000
02	Sitework	\$50,000	(+\$30,000)	\$55,000

¹ The undersigned can imagine only two scenarios where a disputed subcontract change order on a cost-plus GMP prime contract would not involve issues of law or fact that must be arbitrated under the prime contract. The first would be a trade damage dispute between two subcontractors that by necessity must pass through the general contractor but would not result in any additional cost to the owner. The second would be a disputed subcontract change order with no corresponding change order seeking to increase the GMP arising after the GMP has been exceeded (all additional project costs would be the responsibility of the general contractor). Both scenarios are rare and neither is applicable to this dispute.



03	Steel	\$20,000		\$20,000
05	Concrete	\$30,000		\$30,000
08	Framing	\$40,000		\$40,000
10	Contingency	\$50,000	(-\$30,000)	\$20,000
11	Overhead and Profit (10%)	\$30,000		\$30,000

LUMP SUM PRICE		\$330,000		\$330,000

Here, the general contractor keeps the contingency because the owner agreed to pay a lump sum price of \$330,000 regardless of the actual cost of the work. The \$30,000 change order to the Sitework subcontractor affected the general contractor only – the merit of the change order meant the difference between the general contractor retaining \$50,000 in Contingency or retaining \$20,000 in Contingency. The change order was meaningless to the owner. In this example, the legitimacy of the Sitework subcontractor’s change order does not involve issues of fact or law that the prime contractor must arbitrate pursuant to the prime contract.

C. The Dispute Resolution Provision of the MSA Is Liberally Designed to Address Varying Prime Contract Models.

As stated in SR’s Motion, the MSA does not relate to a particular project. The MSA’s Dispute Resolution provision is intended to properly manage the different dispute resolution models that may arise on future projects under varying prime contracts. Motion to Compel Arbitration, Exhibit 4, Exhibit

D ¶ W. There are four basic dispute resolution models:

- Model 1: Cost-plus GMP prime contract with arbitration requirement;
- Model 2: Cost-plus GMP prime contract without arbitration requirement;
- Model 3: Lump-sum prime contract with arbitration requirement; and
- Model 4: Lump-sum prime contract without arbitration requirement.

The MSA’s Dispute Resolution provision produces different results depending on the prime contract model. The MSA mandates arbitration between SR and Peek Bros when two conditions are met: (1) the prime contract has an arbitration requirement; and (2) the dispute between SR and Peek Bros involves issues of fact or law that SR must arbitrate. Motion to Compel Arbitration, Exhibit 4, Exhibit D

¶ W. As explained in Section A *supra*, Model 1 *almost always* will result in SR and Peek Bros arbitrating disputed change orders. Model 2 *never* will result in SR and Peek Bros arbitrating. As explained in



Section B *supra*, Model 3 *sometimes*² will result in SR and Peek Bros arbitrating disputed change orders. Model 4 *never* will result in SR and Peek Bros. arbitrating.

This is a “Model 1” Project. It involves a cost-plus GMP prime contract with an arbitration requirement. Motion to Compel Arbitration, Exhibit 3, AIA A133 § 9.2. Moreover, the owner has directly challenged Peek Bros’ change order and it has directed SR to proceed with arbitration under the terms of the prime contract. Motion to Compel Arbitration, Exhibit 6. For the reasons explained herein, there is absolutely no question that this dispute *must* be arbitrated pursuant to the MSA.

III.

CONCLUSION

Based on the foregoing, SR respectfully requests this Court enter an order compelling Peek Bros to participate in arbitration and staying this matter pending the arbitration’s outcome.

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 9th day of November, 2020.

THE ALLISON LAW FIRM CHTD.

By: /s/ Noah G. Allison

Noah G. Allison (Bar #6202)
3191 East Warm Springs Road
Las Vegas, Nevada 89120-3147
Attorneys for SR Construction, Inc.

² Arbitrability will turn on whether or not the general contractor attempts to “pass through” the subcontractor’s change order to the owner with an additive change order of its own. If the general contractor makes the attempt and the owner challenges the change order, then the subcontractor will be bound to arbitrate. If the general contractor makes no attempt to “pass through” the disputed change order, then there is no arbitration requirement.



CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of THE ALLISON LAW FIRM CHTD., and that on November 9th, 2020, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which served the following parties electronically:

Nathan J. Aman, Esq.
Emilee N. Hammond, Esq.
Viloria, Oliphant, Oster & Aman, LLP
327 California Ave.
Reno, Nevada 89509
Attorney for Peek Brothers Construction, Inc.

/s/ Nita MacFawn

Employee of The Allison Law Firm Chtd.

2840
Nathan J. Aman, Esq.
Nevada Bar No. 8354
Emilee N. Hammond, Esq.
Nevada Bar No. 14626
VILORIA, OLIPHANT,
OSTER & AMAN L.L.P.
327 California Ave.
Reno, Nevada 89509
(775) 284-8888
Attorneys for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

PEEK BROTHERS CONSTRUCTION,
INC., a Nevada Domestic Corporation.

Case No.: CV20-01375

Plaintiff,

Dept. No.: 8

vs.

SR CONSTRUCTION, INC., a Nevada
Domestic Corporation; DOE Defendants 1 -
10.

Defendants.

ORDER DENYING DEFENDANT'S
MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

Before the Court is a fully-briefed and submitted *Motion to Compel Arbitration and Stay Litigation* ("Motion") filed on October 7, 2020 by Defendant SR CONSTRUCTION, INC. ("SR Construction") by and through its counsel of record, The Allison Law Firm Chtd. The Court issued an *Order Setting Hearing* on December 17, 2020 requesting oral argument on the *Motion*. The Court heard oral arguments from the parties on January 14, 2021.

Accordingly, after consideration of the papers and pleadings on file in this case, the oral argument presented by the parties, and the applicable law, the Court sets forth its written Order as follows.

~~Proposed~~ Order Denying Motion to Compel Arbitration and Stay Litigation

1 **I. FACTUAL BACKGROUND**

2 This litigation arises out of a Master Subcontract Agreement ("Subcontract") entered
3 into between SR Construction and PEEK BROTHERS CONSTRUCTION, INC. ("Peek
4 Brothers") in which Peek Brothers agreed to perform earthwork related to the construction of
5 the Northern Nevada Medical Center ("Project"). SR Construction is the prime contractor
6 ("Contractor") on the Project, and Sparks Family Medical Center, Inc. c/o Universal Health
7 Services of Delaware ("UHS") is the owner of the Project.

8 During construction of the Project, a dispute arose between Peek Brothers and SR
9 Construction, which is the subject of the underlying Complaint. In the Complaint, Peek
10 Brothers alleges SR Construction directed Peek Brothers to import approximately 150,000
11 square feet of material ("material" or "structural fill") to bring the building pad to subgrade
12 elevation prior to Peek Brothers digging up the trenches and footings on the Project site. When
13 bidding the Project, Peek Brothers assumed it would use the material dug up from the trenches
14 and footings to bring said building pad to subgrade elevation. Peek Brothers maintains that,
15 despite importing the material and performing the work as directed by SR Construction, SR
16 Construction now refuses to pay the excess cost related to said work.

17 Accordingly, Peek Brothers filed a Complaint against SR Construction on September 2,
18 2020 for Breach of Contract, Attorneys' Fees, Unjust Enrichment, and Violation of NRS
19 Chapter 624. SR Construction now seeks an order of this Court compelling Peek Brothers to
20 arbitrate its claims pursuant to an arbitration provision contained under Exhibit D, § W of the
21 Subcontract.

22 **II. STANDARD OF REVIEW AND APPLICABLE LAW**

23 In Nevada, the district court has the authority to determine whether an agreement to
24 arbitrate exists or a controversy is subject to an arbitration agreement. See NRS 38.221; NRS
25 38.219(2); Philips v. Parker, 106 Nev. 415, 417, 794 P.2d 716 (1990). There must be an
26 agreement to arbitrate for there to be a presumption of arbitrability. Philips, 106 Nev. at 417,
27 794 P.2d at 716. Moreover, "arbitrability is usually a question of contractual construction,"
28

1 which is, in turn, a question of law for the court's determination. State ex rel. Masto v. Second
2 Judicial Dist. Court ex rel. County of Washoe, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009)
3 (citing Kennedy & Mitchell, Inc. v. Anadarko Prod. Co., 243 Kan. 130, 754 P.2d 803, 805-06
4 (1988)).

5 Exhibit D, § W of the Subcontract contains a "Dispute Resolution" provision, which
6 provides as follows:

7 Contractor and Subcontractor shall **not** be obligated to resolve disputes arising
8 under this Subcontract by arbitration, unless: (i) the prime contract has an
9 arbitration requirement; **and** (ii) a particular dispute between Contractor and
10 Subcontractor **involves issues of fact or law which the Contractor is required**
11 **to arbitrate under the terms of the prime contract.**


12 Subcontract, Exhibit D, § W (emphasis added). Further, the prime contract only provides that
13 claims between the owner and the prime contractor shall be subject to binding arbitration. See
14 AIA Document A133 – 2009, § 9.2 and AIA Document A201 – 2017, § 15.4.1.

15 Based on the foregoing, the Court finds that the dispute between Peek Brothers and SR
16 Construction does not involve issues of fact or law that must be arbitrated pursuant to the prime
17 contract because the dispute does *not* involve UHS. Therefore, the arbitration provision
18 contained in Exhibit D, § W of the Subcontract does not apply, and Peek Brothers is not
19 obligated to resolve the instant dispute by way of arbitration. As such, SR Construction's
20 request to compel Peek Brothers to submit its claims to the American Arbitration Association
21 ("AAA") should be denied.

22 Accordingly, and good cause appearing,

23 **IT IS HEREBY ORDERED** the *Motion to Compel Arbitration and Stay Litigation* is
24 **DENIED.**

25 **DATED** this 13 day of ~~January~~
26 April, 2021.

27 
28 BARRY L. BRESLOW
District Judge

1 2540
Nathan J. Aman, Esq.
2 Nevada Bar No. 8354
Emilee N. Hammond, Esq.
3 Nevada Bar No. 14626
4 VILORIA, OLIPHANT,
OSTER & AMAN L.L.P.
5 327 California Ave.
Reno, Nevada 89509
6 (775) 284-8888
7 Attorneys for Plaintiff

8
9 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
10 **IN AND FOR THE COUNTY OF WASHOE**

11 PEEK BROTHERS CONSTRUCTION,
INC., a Nevada Domestic Corporation.
12
13 Plaintiff,

Case No.: CV20-01375

Dept. No.: 8

14 vs.

NOTICE OF ENTRY OF ORDER

15 SR CONSTRUCTION, INC., a Nevada
Domestic Corporation; DOE Defendants 1 -
16 10.

17 Defendants.

18
19 PLEASE TAKE NOTICE that an Order Denying Defendant's Motion to Compel
20 Arbitration and Stay Litigation was entered on April 13, 2021 in the above-captioned matter. A
21 copy of said Order is attached hereto as Exhibit "1".

22 ///

23 ///

24 ///

25

26

27

28

VILORIA,
OLIPHANT,
OSTER &
AMAN L.L.P.

ATTORNEYS AND
COUNSELORS AT LAW
Office: (775) 284-8888 Fax: (775) 284-3838
P. O. BOX 62 ~ RENO, NEVADA 89504
327 CALIFORNIA AVENUE ~ RENO, NEVADA 89509

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 14th day of April, 2021.

VILORIA, OLIPHANT,
OSTER & AMAN L.L.P.

By: 

Nathan J. Aman, Esq.
Nevada Bar No. 8354
Emilee N. Hammond, Esq.
Nevada Bar No. 14626
327 California Ave.
Reno, Nevada 89509
(775) 284-8888
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of VILORIA,
OLIPHANT, OSTER & AMAN L.L.P., and that on the date shown below, I caused service of a
true and correct copy of the attached:

NOTICE OF ENTRY OF ORDER

to be completed by:

X electronic service upon electronically filing the within document with the Second
Judicial District Court addressed to:

The Allison Law Firm Chtd.
Noah G. Allison
3191 East Warm Springs Road
Las Vegas, Nevada 89120
Attorneys for Defendants

DATED this 14th day of April, 2021

By: 

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INDEX OF EXHIBITS

<u>Exhibit</u>	<u>Description</u>	<u>Number of Pages (exclusive of tabs)</u>
1	Order Denying Defendant's Motion to Compel Arbitration and Stay Litigation	3

FILED
Electronically
CV20-01375
2021-04-14 11:33:07 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 8394443

EXHIBIT “1”

EXHIBIT “1”

2840
Nathan J. Aman, Esq.
Nevada Bar No. 8354
Emilee N. Hammond, Esq.
Nevada Bar No. 14626
VILORIA, OLIPHANT,
OSTER & AMAN L.L.P.
327 California Ave.
Reno, Nevada 89509
(775) 284-8888
Attorneys for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

PEEK BROTHERS CONSTRUCTION,
INC., a Nevada Domestic Corporation.

Case No.: CV20-01375

Plaintiff,

Dept. No.: 8

vs.

SR CONSTRUCTION, INC., a Nevada
Domestic Corporation; DOE Defendants 1 -
10.

Defendants.

ORDER DENYING DEFENDANT'S
MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

Before the Court is a fully-briefed and submitted *Motion to Compel Arbitration and Stay Litigation* ("Motion") filed on October 7, 2020 by Defendant SR CONSTRUCTION, INC. ("SR Construction") by and through its counsel of record, The Allison Law Firm Chtd. The Court issued an *Order Setting Hearing* on December 17, 2020 requesting oral argument on the *Motion*. The Court heard oral arguments from the parties on January 14, 2021.

Accordingly, after consideration of the papers and pleadings on file in this case, the oral argument presented by the parties, and the applicable law, the Court sets forth its written Order as follows.

1 **I. FACTUAL BACKGROUND**

2 This litigation arises out of a Master Subcontract Agreement ("Subcontract") entered
3 into between SR Construction and PEEK BROTHERS CONSTRUCTION, INC. ("Peek
4 Brothers") in which Peek Brothers agreed to perform earthwork related to the construction of
5 the Northern Nevada Medical Center ("Project"). SR Construction is the prime contractor
6 ("Contractor") on the Project, and Sparks Family Medical Center, Inc. c/o Universal Health
7 Services of Delaware ("UHS") is the owner of the Project.

8 During construction of the Project, a dispute arose between Peek Brothers and SR
9 Construction, which is the subject of the underlying Complaint. In the Complaint, Peek
10 Brothers alleges SR Construction directed Peek Brothers to import approximately 150,000
11 square feet of material ("material" or "structural fill") to bring the building pad to subgrade
12 elevation prior to Peek Brothers digging up the trenches and footings on the Project site. When
13 bidding the Project, Peek Brothers assumed it would use the material dug up from the trenches
14 and footings to bring said building pad to subgrade elevation. Peek Brothers maintains that,
15 despite importing the material and performing the work as directed by SR Construction, SR
16 Construction now refuses to pay the excess cost related to said work.

17 Accordingly, Peek Brothers filed a Complaint against SR Construction on September 2,
18 2020 for Breach of Contract, Attorneys' Fees, Unjust Enrichment, and Violation of NRS
19 Chapter 624. SR Construction now seeks an order of this Court compelling Peek Brothers to
20 arbitrate its claims pursuant to an arbitration provision contained under Exhibit D, § W of the
21 Subcontract.

22 **II. STANDARD OF REVIEW AND APPLICABLE LAW**

23 In Nevada, the district court has the authority to determine whether an agreement to
24 arbitrate exists or a controversy is subject to an arbitration agreement. See NRS 38.221; NRS
25 38.219(2); Philips v. Parker, 106 Nev. 415, 417, 794 P.2d 716 (1990). There must be an
26 agreement to arbitrate for there to be a presumption of arbitrability. Philips, 106 Nev. at 417,
27 794 P.2d at 716. Moreover, "arbitrability is usually a question of contractual construction,"
28

1 which is, in turn, a question of law for the court's determination. State ex rel. Masto v. Second
2 Judicial Dist. Court ex rel. County of Washoe, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009)
3 (citing Kennedy & Mitchell, Inc. v. Anadarko Prod. Co., 243 Kan. 130, 754 P.2d 803, 805-06
4 (1988)).

5 Exhibit D, § W of the Subcontract contains a "Dispute Resolution" provision, which
6 provides as follows:

7 Contractor and Subcontractor shall **not** be obligated to resolve disputes arising
8 under this Subcontract by arbitration, unless: (i) the prime contract has an
9 arbitration requirement; **and** (ii) a particular dispute between Contractor and
10 Subcontractor **involves issues of fact or law which the Contractor is required**
11 **to arbitrate under the terms of the prime contract.**


12 Subcontract, Exhibit D, § W (emphasis added). Further, the prime contract only provides that
13 claims between the owner and the prime contractor shall be subject to binding arbitration. See
14 AIA Document A133 – 2009, § 9.2 and AIA Document A201 – 2017, § 15.4.1.

15 Based on the foregoing, the Court finds that the dispute between Peek Brothers and SR
16 Construction does not involve issues of fact or law that must be arbitrated pursuant to the prime
17 contract because the dispute does *not* involve UHS. Therefore, the arbitration provision
18 contained in Exhibit D, § W of the Subcontract does not apply, and Peek Brothers is not
19 obligated to resolve the instant dispute by way of arbitration. As such, SR Construction's
20 request to compel Peek Brothers to submit its claims to the American Arbitration Association
21 ("AAA") should be denied.

22 Accordingly, and good cause appearing,

23 **IT IS HEREBY ORDERED** the *Motion to Compel Arbitration and Stay Litigation* is
24 DENIED.

25 **DATED** this 13 day of ~~January~~
26 April, 2021.

27 
28 BARRY L. BRESLOW
District Judge

THE ALLISON LAW FIRM CHTD.
Noah G. Allison (Bar #6202)
Heather Caliguire Fleming (Bar #14492)
3191 East Warm Springs Road
Las Vegas, Nevada 89120-3147
Tel (702) 933-4444
Fax (702) 933-4445
noah@allisonnevada.com
Attorneys for SR Construction, Inc.

**IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF WASHOE, STATE OF NEVADA**

PEEK BROTHERS CONSTRUCTION,
INC., a Nevada Domestic corporation,

Case No.: CV20-01375

Plaintiff,

Dept. No.: 8

vs.

SR CONSTRUCTION, INC., a Nevada
Domestic Corporation; DOE Defendants 1 -
10.

**MOTION TO STAY PROCEEDINGS
PENDING APPEAL ON ORDER
SHORTENING TIME**

Defendants.

COMES NOW Defendant SR Construction, Inc. ("SR") by and through its counsel of record, Noah G. Allison of the Allison Law Firm Chtd., and herein submits its Motion to Stay Proceedings Pending Appeal on Order Shortening Time. The Order Shortening Time was verbally approved by the Court at the Status Check on April 13, 2021. This Motion is made and based on the following Points and Authorities, the exhibits attached hereto, the pleadings on file herein, and any oral argument to be made before this Court. Proposed Order Shortening Time is attached hereto as Exhibit 8.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This dispute involves the construction of the Northern Nevada Sierra Medical Center in Reno, Nevada (the "Project"). Plaintiff Peek Brothers Construction, Inc. ("Peek Bros."), the earthwork subcontractor, seeks over \$140,000.00 in change orders. SR, the general contractor, and Sparks Family

THE ALLISON LAW FIRM CHTD.
3191 E. Warm Springs Road
Las Vegas, Nevada 89120-3147





1 Medical Center, Inc. c/o Universal Health Services of Delaware (“UHS”), the owner, dispute the validity
2 of the change orders.

3 UHS directed SR to demand arbitration of the disputed change orders in accordance with the
4 dispute resolution procedures set forth in the Prime Contract. SR demanded arbitration and named Peek
5 Bros. and UHS as respondents. SR’s basis for demanding arbitration against Peek Bros. was the
6 arbitration provision set forth in the Master Subcontract Agreement between SR and Peek Bros.

7 Peek Bros. initiated this action in contravention of the bargained-for method of dispute resolution
8 in the Master Subcontract Agreement. SR therefore moved to compel arbitration. This Court denied
9 SR’s motion for non-specified reasons set forth in Peek Bros.’ opposition and ordered the parties to
10 engage in a settlement conference. After the settlement conference proved unsuccessful, the Court issued
11 a written order denying the motion to compel arbitration. That same day, SR filed an interlocutory notice
12 of appeal of the Court’s denial of its motion to compel arbitration pursuant to NRS 38.247(1)(a).

13 SR now seeks a stay of this litigation pursuant to NRCP 62(d) and *Mikohn Gaming Corp. v.*
14 *McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

15 II.

16 FACTS

17 A. The Master Subcontract Agreement

18 SR and Peek Bros. entered into a Master Subcontract Agreement on October 8, 2019 (“MSA”).
19 See Mater Subcontract Agreement attached hereto as Exhibit 1. The MSA does not relate to a particular
20 project, but instead represents the general terms of the relationship between SR and Peek Bros. *Id.* at pp.
21 1. As explained in the MSA, any subsequent work orders defining the scope, price and specific terms
22 and conditions on any project are to be incorporated by reference into the MSA. *Id.* at pp. 1-2. SR
23 carefully and specifically bargained for the arbitration provision contained within the MSA, which
24 mandates arbitration if:

25 (i) the prime contract has an arbitration requirement, and (ii) a particular dispute between
26 the Contractor and Subcontractor [SR and Peek Bros.] involves issues of fact or law which
27 the Contractor [SR] is required to arbitrate under the terms of the prime contract. *Id.* at
28 Exhibit D ¶ W.



Disputes arising when there is no arbitration clause in the prime contract, or if the issues do not require SR to arbitrate under the terms of the prime contract may be litigated. *Id.* at Exhibit D ¶W(a).

Peek Bros. and SR signed a Work Order on January 8, 2020. The Work Order tied the MSA directly to the Project stating: “[t]he terms and obligations of the above-referenced Master Subcontract Agreement are fully incorporated by reference as though fully set forth herein.” *See* Work Order, attached hereto as Exhibit 2 at p. 1. Peek Bros. signed the Work Order and made no effort to distance itself from the arbitration requirement in the MSA. *Id.*

B. The Prime Contract and the Disputed Change Order

SR and UHS entered into the Prime Contract on July 21, 2019. The Prime Contract is a “cost-plus” arrangement with a guaranteed maximum price (“GMP”). In this type of agreement, UHS must pay SR for the cost of the work plus a fee subject to SR’s GMP. The cost of work includes SR’s the charges of SR’s subcontractors. *See* Prime Contract, attached hereto as Exhibit 3, AIA A133 §§ 6.1-6.7. The Prime Contract obligates UHS to pay SR for the cost of Peek Bros.’ work, including Peek Bros.’ change orders, subject to the GMP.

Peek Bros. has requested change orders in excess of \$140,000.00. If the change orders are approved, the Prime Contract obligates UHS to pay for them subject to the GMP. SR rejected the change orders and informed UHS that they lacked merit. On July 23, 2020, UHS adopted SR’s position that the requested change orders lacked merit and thus directed SR to initiate dispute resolution per the Prime Contract. UHS Letter to Initiate Dispute Resolution, dated July 23, 2020, attached hereto as Exhibit 4. The legitimacy of Peek Bros.’ requested change orders present a question of fact that SR must arbitrate under the Prime Contract, per the MSA.

C. Procedural History

Peek Bros. filed suit against SR on September 2, 2020. SR accepted service on September 16, 2020. On October 7, 2020, SR filed a motion to compel arbitration and stay the proceedings. Peek Bros. filed an opposition on October 28, 2020. SR filed its Reply Brief on November 9, 2020.

The hearing on SR’s motion to compel arbitration occurred on January 14, 2021. After oral argument from counsel for SR and Peek Bros., the Court ruled as follows:

///



1 THE COURT: All right. We're back on the record. Two things. First thing: Motion to
2 compel arbitration is denied. The Court specifically finds that the dispute which underlies
3 the Complaint here does not involve an issue of fact or law which the contractor is required
4 to arbitrate under the terms of the prime contract. The Court adopts the analysis of the
5 opposition, and plaintiff shall prepare a short order, three pages or less, consistent with its
6 argument today, the Court's observations and questions, and its briefing, run it by defense
7 counsel as to form only, consistent with our local rules on how much time they get, and
8 then submit an order hopefully that defendant agrees as to form -- certainly not as to
substance; they've been arguing passionately against it -- and submit it to the Court for
review and entry. Submit it by e-mail to my judicial assistant, both in Word form and PDF.
In the event parties cannot agree that the form proposed by plaintiff accurately reflects
what the Court has just said, defendant shall contemporaneously, with plaintiffs submitting
the proposed order in Word and PDF, submit its proposed order in PDF and Word as well,
and then the Court will merge or sign one or the other. That's number one.

9
10 Number two, as important as number one. The Court exercises its discretion under
11 Nevada Supreme Court Rule 252 and Second Judicial District Court Rule 6, I'm staying
12 this case, this litigation, other than the entry of this order, for 90 days. No Answer is
13 required; no dispositive motion is required; no discovery; no nothing. On or before April
14 30, parties are ordered to a settlement conference with a neutral of their choosing;
15 presumably somebody with construction background, but doesn't have to be. If counsel
16 cannot agree on a neutral after good-faith efforts, let the Court know by e-mail that you're
17 at an impasse even at that level, and I'll appoint someone from my large Rolodex of
18 qualified neutrals, the cost of the event to be shared equally, unless you're able to convince
19 one of my colleagues or a colleague in another judicial branch to preside over your
20 settlement conference, and move forward with a settlement conference. I'm going to set
21 now a status hearing for 90 days or so from now and see where everything stands. If you're
22 unable to resolve it after a settlement conference, I don't need to know why, I don't need
23 to know who was the stick in the mud, or which side or who -- "They offered nothing." I
24 don't care. We're just going to go from that point forward rules of engagement; how much
25 time do you need for discovery? We'll do it -- we'll have a concierge judge for purposes
26 of streamlining the proceedings here; understanding that each side has a different view
factually of what happened and legally of what the facts that can be proven as applied to
the law, what kind of result. I get that. I want to have everyone bear in mind -- and I'm
sure they do -- that this Court's experience is, our system works really well for \$50,000-
or-below claims because of the mandatory Supreme Court Arbitration Program. And our
system works reasonably well for claims, you know, if you add another zero and above.
But the middle, the 50 to 250, sometimes the cost of the process can eat up the amount
that's being argued, even if there's a fee-shifting provision to the prevailer. But, you know,
I'm not trying to condescend here. Everyone knows that. So I don't need to know if you're
unsuccessful. I just need to know you tried in good faith, and you couldn't do it. Then we
will talk about what happens next the next time I see you. So, you know, 90 days, even in
the pandemic world, should be enough time to get this settlement done, settlement
conference done, like I said, by April 30. The case is stayed for 90 days. I'll set a status
hearing for, I guess, early May. And then game on.

27 See Hearing Transcript, attached hereto as Exhibit 5 at pages 38:15 - 41:15.

28 ///



The settlement conference took place on March 31, 2021. The settlement conference did not succeed. On April 13, 2021, this Court entered the written order denying SR's motion to compel arbitration. *See* Order Denying Defendant's Motion to Compel Arbitration and Stay Litigation, attached hereto as Exhibit 6. Immediately thereafter, on April 13, 2021, SR filed a Notice of Appeal pursuant to NRS 38.247(1)(a).

III.

LEGAL ARGUMENT

A. *Mikohn Gaming Corp. v. McCrea* Provides the Proper Stay Analysis of an Appeal From an Order Denying a Motion to Compel Arbitration.

In *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 89 P.3d 36 (2004), the Nevada Supreme Court issued a published opinion of its order granting a stay of district court proceedings pending resolution of an appeal from a district court order denying a motion to compel arbitration. The *Mikohn* Court first recited the four factors for generally determining a stay pending disposition of an appeal: (1) whether the object of the appeal will be defeated if the stay is denied; (2) whether the appellant will suffer irreparable or serious injury if the stay is denied; (3) whether the respondent will suffer irreparable or serious injury if the stay is granted; and (4) whether the appellant is likely to prevail on the merits of the appeal. *Mikohn* at 251, 89 P.3d at 38, *citing Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). The *Mikohn* Court then reviewed the factors through the lens of "arbitration's unique policies and purposes and the interlocutory nature of the appeal." *Id.*

The *Mikohn* Court concluded the first stay factor (whether the object of the appeal will be defeated if the stay is denied) "takes on added significance and generally warrants a stay of trial court proceedings pending resolution of the appeal." *Id.* *Mikohn* Gaming, the appellant, argued that allowing the district court to continue while its appeal was pending would render the arbitration clause meaningless, and any victory on appeal would be hollow. *Id.* at 252, 89 P.3d at 39. *McCrea*, the respondent, argued that if the appeal was successful, the claims currently under the district court could be sent to arbitration at that time. *Id.* The *Mikohn* Court rejected *McCrea*'s argument holding:

Adopting *McCrea*'s definition of the object of this appeal would ignore arbitrations purposes and benefits. The benefits of arbitration would likely be lost or eroded if it were



necessary for an appellant to simultaneously or sequentially proceed in both judicial and arbitral forums. *Id.*

The *Mikohn* Court further observed that the fact the Legislature provided for an interlocutory appeal of an order denying a motion to compel arbitration was an implicit recognition that an appellant who is forced to defend an action in district court pending appeal loses arbitration's monetary and timesaving benefits. *Id.* at 252-53, 89 P.3d at 39.

The *Mikohn* Court also concluded that the third stay factor (whether the respondent will suffer irreparable or serious harm if the stay is granted) "will not play a significant role in the decision whether to issue a stay." *Id.* at 253, 89 P.3d at 39. A mere delay in pursuing discovery and litigation does not constitute irreparable harm. *Id.*

The *Mikohn* Court, however, did not make granting a stay automatic. It recognized that the general rule that a stay should be granted could be abused and therefore cautioned that "if the appeal appears frivolous or if the appellant apparently filed the stay motion purely for dilatory purposes, the court should deny the stay." *Id.*

B. There Has Been No Determination That SR's Motion to Compel Arbitration Was Frivolous or Brought for Dilatory Purposes.

It is undisputed that there is an arbitration clause in the MSA. Exhibit 1 at Exhibit D ¶W(a). It is undisputed that there is an arbitration clause in the Prime Contract. Exhibit 3 at Article 9. It also is undisputed that UHS rejected Peek Bros. change order requests and directed SR to initiate dispute resolution procedures. Exhibit 4. It is further undisputed that SR initiated arbitration proceedings within the American Arbitration Association within a week of Peek Bros. bringing this action. *See Demand for Arbitration*, attached hereto as Exhibit 7. Finally, SR promptly brought its motion to compel arbitration and exhaustively briefed its points and verbally argued them to this Court.

A claim is "frivolous" if a proponent can present no rational argument based upon the evidence or law in support of that claim. Black's Law Dictionary 668 (6th ed. 1990). At no time, and nowhere does the record reveal it, did this Court state or suggest that SR's motion to compel arbitration was frivolous or irrational or completely lacking in support.

///



1 A purpose is “dilatory” if it intends to cause delay or to gain time or to put off a decision. Black’s
2 Law Dictionary 456 (6th ed. 1990). There is nothing in the record suggesting SR acted with a dilatory
3 purpose. SR initiated arbitration with AAA within a week of Peek Bros. bringing its action. SR filed its
4 motion to compel arbitration at the earliest possible stage of the litigation. SR did not delay the briefing
5 or the hearing of the motion to compel arbitration. SR immediately, *within minutes of the issuance of the*
6 *Court’s order denying the motion to compel arbitration*, filed its appeal. SR has filed this Motion to Stay
7 within ten days of the issuance of the order denying arbitration.

8 Unless the appeal is frivolous or the stay motion is brought purely for dilatory purposes, the
9 *Mikohn* case **mandates** a stay pending the outcome of the appeal. *Mikohn* at 253, 89 P.3d at 39. There
10 is no evidence of frivolousness or dilatory motives and there have been no such findings. This Court
11 therefore should grant SR’s Motion to Stay Proceedings Pending Appeal.

12 IV.

13 CONCLUSION

14 Based on the foregoing, this Court should stay this litigation until the Nevada Supreme Court
15 decides SR’s appeal of this Court’s order denying its motion to compel arbitration.

16 AFFIRMATION

17 Pursuant to NRS 239B.030

18 The undersigned does hereby affirm that the preceding document does not contain the social
19 security number of any person.

20 DATED this 21st day of April, 2021.

21 THE ALLISON LAW FIRM CHTD.

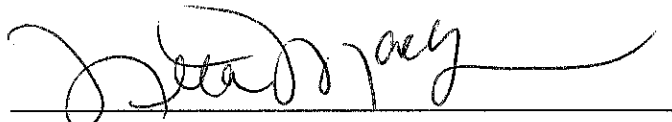
22 By:

23 Noah G. Allison (Bar #6202)
24 Heather Caliguire Fleming (Bar #14492)
25 3191 East Warm Springs Road
26 Las Vegas, Nevada 89120-3147
27 Attorneys for SR Construction, Inc.
28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of THE ALLISON LAW FIRM CHTD., and that on April 22nd, 2021, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which served the following parties electronically:

Nathan J. Aman, Esq.
Emilee N. Hammond, Esq.
Viloria, Oliphant, Oster & Aman, LLP
327 California Ave.
Reno, Nevada 89509
Attorney for Peek Brothers Construction, Inc.



Employee of The Allison Law Firm Chtd.

THE ALLISON LAW FIRM CHTD.
3191 E. Warm Springs Road
Las Vegas, Nevada 89120-3147





INDEX OF EXHIBITS

<u>Exhibit #</u>	<u>Description</u>	<u># of Pages</u>
Exhibit 1	October 8, 2019 Master Subcontract Agreement between SR and Peek Bros (“MSA”)	80
Exhibit 2	January 8, 2020 Work Order Addendum to Master Subcontract Agreement (“Work Order”)	55
Exhibit 3	May 6, 2020 Standard Form of Agreement Between Owner and Construction Manager as Constructor where the basis of payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price between UHS and SR (“Prime Contract”)	89
Exhibit 4	July 23, 2020 Memo from UHS re: Peek Brothers Dispute.	1
Exhibit 5	January 14, 2021 Transcript of Proceedings of Hearing on Motion to Compel Arbitration and Stay Litigation	46
Exhibit 6	Order Denying Motion to Compel Arbitration and Stay Litigation	3
Exhibit 7	Demand for Arbitration filed September 11, 2020	5
Exhibit 8	[Proposed] Order Shortening Time	1

2645
Nathan J. Aman, Esq.
Nevada Bar No. 8354
Emilee N. Hammond, Esq.
Nevada Bar No. 14626
VILORIA, OLIPHANT,
OSTER & AMAN L.L.P.
327 California Ave.
Reno, Nevada 89509
(775) 284-8888
Attorneys for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

PEEK BROTHERS CONSTRUCTION,
INC., a Nevada Domestic Corporation.

Case No.: CV20-01375

Plaintiff,

Dept. No.: 8

vs.

SR CONSTRUCTION, INC., a Nevada
Domestic Corporation; DOE Defendants 1 -
10.

Defendants.

PLAINTIFF'S OPPOSITION TO DEFENDANT SR CONSTRUCTION, INC.'S
MOTION TO STAY PROCEEDINGS PENDING APPEAL
ON ORDER SHORTENING TIME

COMES NOW, Plaintiff PEEK BROTHERS CONSTRUCTION, INC. ("Peek Brothers"), by and through its counsel of record, the law firm of Viloria, Oliphant, Oster & Aman L.L.P, and hereby opposes Defendant's Motion to Stay Proceedings Pending Appeal on Order Shortening Time ("Motion to Stay").

This Opposition is based on the following memorandum of points and authorities, any exhibits attached thereto, any oral argument this Court wishes to entertain, and all other papers and pleadings on file before this Court of utility in rendering a just decision.

ATTORNEYS AND
COUNSELORS AT LAW
Office: (775) 284-8888 Fax: (775) 284-3838
P.O. BOX 62 ~ RENO, NEVADA 89504
327 CALIFORNIA AVENUE ~ RENO, NEVADA 89509

VILORIA,
OLIPHANT,
OSTER &
AMAN L.L.P.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

SR Construction seeks a stay from this Court pending the outcome of its appeal to the Nevada Supreme Court of the Court's Order Denying Motion to Compel Arbitration and Stay Litigation ("Order"). Despite thorough questioning and discussion of the parties' respective positions during oral argument and a written order clearly delineating the basis for denial of SR Construction's Motion to Compel Arbitration and Stay Litigation ("Motion to Compel"), SR Construction now claims that this Court denied its Motion to Compel for "non-specified reasons." However, the Court was exceedingly clear that, because this dispute does not involve issues of fact or law that require arbitration pursuant to the prime contract and does not involve the owner of the Project, UHS, the arbitration provision *does not apply*. Once again, arbitration under the Subcontract is the exception, not the rule, and the Court's decision to deny SR Construction's Motion to Compel is supported by both Nevada law and the express language of the agreements in this case.

Peek Brothers absolutely did not agree—in the Subcontract or otherwise—to arbitrate a dispute that does not involve UHS with the American Arbitration Association ("AAA"). Because it is extremely unlikely that SR Construction will prevail in its appeal, Peek Brothers should not continue to be deprived of its right to properly prosecute its legitimate claims before this Court. Additionally, the initial discovery process is generally the same in arbitration and litigation – the same basic information will be exchanged. Consequently, any stay is merely a delay tactic to prevent this matter from moving forward.

As such, Peek Brothers respectfully requests the Court deny SR Construction's Motion to Stay and allow this case to proceed during the pendency of the appeal.

II. FACTUAL AND PROCEDURAL BACKGROUND

Because Peek Brothers extensively laid out the facts of this case in its Opposition to Motion to Stay, Peek Brothers incorporates those facts by reference herein and merely summarizes those facts for the sake of judicial economy. The crux of this case is SR

1 Construction's express directive to Peek Brothers to import structural fill to the Project site
2 rather than utilize the material excavated from the building footings and plumbing trenches
3 ("spoils") to backfill those footings and build up the building pad. Despite performance and
4 substantial costs incurred by Peek Brothers, SR Construction refused to accept two Change
5 Orders for the additional material and labor that Peek Brothers expended in order to comply
6 with SR Construction's demands. Accordingly, Peek Brothers filed a Complaint against SR
7 Construction for Breach of Contract, Attorneys' Fees, Unjust Enrichment, and a Violation of
8 NRS Chapter 624.

9 After counsel for SR Construction accepted service of the summons and Complaint, SR
10 Construction filed a Demand for Arbitration with the American Arbitration Association
11 ("AAA") on September 11, 2020. SR Construction then filed a Motion to Compel Arbitration
12 and Stay Litigation ("Motion to Compel") on October 7, 2020, requesting this Court compel
13 Peek Brothers to arbitrate its dispute based upon the fact that the owner of the Project, Sparks
14 Family Medical Center, Inc. c/o Universal Health Services of Delaware ("UHS" or "Owner"),
15 refuses to pay for SR Construction's mistake. Peek Brothers vehemently opposed the Motion to
16 Compel, and maintained that the instant dispute does not involves issues of fact or law that SR
17 Construction is required to arbitrate pursuant to its Prime Contract with UHS. See Plaintiff's
18 Opposition to Defendant SR Construction, Inc.'s Motion to Compel Arbitration and Stay
19 Litigation ("Opposition to Motion to Compel"), generally.

20 The Court entered an Order Setting Hearing on December 17, 2020, and the parties
21 appeared before this Court on January 14, 2020 to argue the merits of the Motion to Compel.
22 Throughout the hearing, the Court engaged in thorough and substantial questioning of counsel
23 during the parties' respective arguments and entered an oral ruling denying the Motion to
24 Compel. See January 14, 2021 Transcript of Proceedings of Hearing on Motion to Compel
25 Arbitration and Stay Litigation, attached hereto as **Exhibit 1**. The Court "specifically [found]
26 that the dispute which underlies the Complaint here does not involve an issue of fact or law
27 which the contractor is required to arbitrate under the terms of the prime contract." **Exhibit 1**,
28

p. 38, lns. 18-22. In addition, the Court expressly adopted the analysis outlined in Peek Brothers' Opposition to Motion to Compel and directed Peek Brothers to prepare an order "consistent with its argument today, the Court's observations and questions, and its briefing." Id. at lns. 22-24; p. 39, ln. 1. The Court entered said Order Denying Defendant's Motion to Compel Arbitration and Stay Litigation ("Order") on April 13, 2021.¹

That same day, prior to entry of the Order, the Court held a status hearing in which the Court discussed the outcome of the settlement conference and lifted its temporary stay of this case. Immediately thereafter, SR Construction filed its Notice of Appeal with the Nevada Supreme Court, seeking review of this Court's denial of its Motion to Compel. SR Construction now seeks a stay with this Court pending the outcome of its appeal.

III. LEGAL ARGUMENT

Section 38.247 of the Nevada Rules of Civil Procedure ("NRC") permits a party to appeal a district court's order denying a motion to compel arbitration. NRC 38.247(1)(a). Should a party appeal such an order, that party may request that all proceedings be stayed pending appeal. Pursuant to Rule 8 of the Nevada Rules of Appellate Procedure ("NRAP"), that party must generally move for a stay in the District Court before seeking relief in the Supreme Court or the Court of Appeals. Should a party seek relief in the Supreme Court or the Court of Appeals, Rule 8(c) enumerates four factors that the court will consider in deciding whether to issue a stay:

(1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits of the appeal or writ petition.

NRAP 8(c).

¹ At the January 14, 2021 hearing, the Court exercised its discretion to stay the litigation for ninety days, including entry of the Order, pending the outcome of a settlement conference between the parties. See Exhibit 1, pp. 39-42. That settlement conference was held on March 31, 2021. The settlement conference was ultimately unsuccessful and the Court entered the Order thereafter. Consequently, there has already been a stay issued in this case, and an additional stay would further delay Peek Brothers' ability to effectively and expediently prosecute its claims.

1 In Mikohn Gaming Corp. v. McCrea, 120 Nev. 248, 250, 89 P.3d 36, 37 (2004), the
2 Nevada Supreme Court addressed a petitioner's motion for a stay pursuant to NRAP 8(a)(2)
3 after the petitioner appealed a district court order denying a motion to compel arbitration. The
4 court analyzed the factors outlined under NRAP 8(c), noting that the "the first stay factor—
5 whether the object of the appeal will be defeated if the stay is denied—takes on added
6 significance and generally warrants a stay of lower court proceedings" when the order appealed
7 from is an order refusing to compel arbitration. Id. Thus, "absent a strong showing that the
8 appeal lacks merit or that irreparable harm will result if a stay is granted," the Nevada Supreme
9 Court opined that "a stay should issue to avoid defeating the object of the appeal." Id., 120 Nev.
10 at 251-52, 89 P.3d at 38. However, the Nevada Supreme Court also made clear that a stay is not
11 automatic, and that the other factors must also be considered. Id., 120 Nev. at 253, 89 P.3d at
12 39.

13
14 **A. NRAP 8(c) Enumerates Factors the Supreme Court—Not the District
Court—Must Consider**

15 SR Construction relies entirely upon the Nevada Supreme Court's decision in Mikohn in
16 arguing that a stay is warranted in this case. SR Construction's reliance, however, is misguided,
17 as both the express language of NRAP 8(c) and the Supreme Court's opinion in Mikohn make
18 clear that the factors outlined therein are factors the Supreme Court—not the District Court—
19 must consider. See NRAP 8(c) ("In deciding whether to issue a stay or injunction, the **Supreme**
20 **Court or Court of Appeals** will generally consider the following factors...") (Emphasis
21 added); see also Mikohn, 120 Nev. at 251, 89 P.3d at 38 ("[I]n determining whether to issue a
22 stay pending disposition of an appeal, **this** court considers the following factors...") (Emphasis
23 added). Thus, this Court is not bound by the decision in Mikohn is determining whether a stay
24 is warranted and may consider *any* factors that it deems appropriate to its analysis. However, to
25 the extent this Court finds the Mikohn factors persuasive, Peek Brothers addresses the Mikohn
26 decision as it relates to the facts of this case below.

27 ///

B. Mikohn Does Not Mandate a Stay Where the Appeal is Not Frivolous or Brought for Dilatory Purposes

SR Construction maintains, without actually applying the Mikohn factors to the facts of this case, that because its Motion to Compel is not frivolous or brought for dilatory purposes, this Court *must* grant the instant Motion to Stay. See Motion to Stay, p. 7 ("Unless the appeal is frivolous or the stay motion is brought purely for dilatory purposes, the *Mikohn* case *mandates* a stay pending the outcome of the appeal"). Once again, this is an erroneous interpretation of the Supreme Court's decision. The Mikohn decision explicitly states that, in light of the significance of the first stay factor, a stay should be granted "absent a strong showing that the appeal *lacks merit* or that *irreparable harm will result*." Id., 120 Nev. at 251-52, 89 P.3d at 38 (emphasis added).

In analyzing the fourth NRAP factor—likelihood of success on the merits—the Supreme Court recognized that "the party opposing the stay motion can defeat the motion by making a strong showing that appellate relief is unattainable." Id., 120 Nev. at 253, 89 P.3d at 40. The Supreme Court goes on to state that, "in particular, if the appeal appears frivolous or if the appellant apparently filed the stay motion purely for dilatory purposes, the court should deny the stay." Id. Quite contrary to SR Construction's representations, Supreme Court absolutely did not state that unless an appeal is frivolous or the stay is brought for dilatory purposes, a stay is *mandated*. The existence of those conditions merely weighs heavily in favor of a finding that the appeal lacks merit.

Accordingly, the Nevada Supreme Court—or this Court—need not find that SR Construction's appeal is "frivolous" or "brought for dilatory purposes" in order to deny SR Construction's Motion to Stay. Rather, this Court should deny the Motion to Stay because its denial of the Motion to Compel is *not* clearly erroneous, was based on substantial evidence, and SR Construction is unlikely to prevail on the merits of its appeal.

///

///

///

C. SR Construction is Not Likely to Prevail on the Merits of Its Appeal.

Under Section 38.219 of the Nevada Revised Statutes, "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except as otherwise provided in NRS 597.995 or upon a ground that exists at law or in equity for the revision of a contract." NRS 38.219. In Nevada, the district court has the authority to determine whether an agreement to arbitrate exists or a controversy is subject to an arbitration agreement. See NRS 38.221; NRS 38.219(2); Philips v. Parker, 106 Nev. 415, 417, 794 P.2d 716 (1990). There must be an agreement to arbitrate for there to be a presumption of arbitrability. Philips, 106 Nev. at 417, 794 P.2d at 716. "Nevada courts resolve all doubts concerning the arbitrability of the subject matter of a dispute in favor of arbitration." Int'l Assoc. Firefighters v. City of Las Vegas, 104 Nev. 615, 618, 764 P.2d 478, 480 (1988). However, "[i]f the court finds that there is no enforceable agreement, it may not...order the parties to arbitrate." NRS 38.221(3); see also AT&T Technologies, Inc. v. Communication Workers of America, 475 U.S. 643, 648 (1986) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit") (internal citations and quotations omitted). "This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." AT&T Technologies, 475 U.S. at 648-49.

"The question of whether an agreement to arbitrate 'exists is one of fact, requiring [the Supreme Court] to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence.'" Truck Ins. Exchange v. Palmer J. Swanson, Inc., 124 Nev. 629, 633, 189 P.3d 656, 659 (2008) (quoting May v. Anderson, 121 Nev. 668, 672-73, 119 P.3d 1254, 1257 (2005)). Substantial evidence is "that which a reasonable mind might accept as adequate to support a conclusion." McClanahan v. Raley's Inc., 117 Nev. 921, 924, 34 P.3d 573, 576 (2001) (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (internal quotations omitted)).

i. ***The Dispute Between Peek Brothers and SR Construction Does Not Involve UHS and Does Not Require Arbitration Pursuant to the Prime Contract.***

This Court is well aware of the arguments raised by Peek Brothers in its Opposition to Motion to Compel and presented during oral argument. Thus, Peek Brothers incorporates those arguments herein and reiterates such arguments only as relevant to the instant Motion to Stay.

Exhibit D, § W of the Master Subcontract Agreement ("Subcontract"), attached hereto as **Exhibit 2**, contains a "Dispute Resolution" provision, which provides as follows:

Contractor and Subcontractor shall **not** be obligated to resolve disputes arising under this Subcontract by arbitration, unless: (i) the prime contract has an arbitration requirement; **and** (ii) a particular dispute between Contractor and Subcontractor **involves issues of fact or law which the Contractor is required to arbitrate under the terms of the prime contract.**

Exhibit 2, Exhibit D, § W (emphasis added). This provision makes exceedingly clear that SR Construction and Peek Brothers are *not* required to arbitrate unless certain conditions are met. Arbitration is the exception, not the rule. Consequently, based on the express terms of the Subcontract, Peek Brothers and SR Construction are not obligated to resolve disputes under the Subcontract *unless* the prime contract both includes an arbitration requirement *and* the dispute between Peek Brothers and SR Construction involves issues of fact or law that the prime contract requires SR Construction to arbitrate.

In this case, the Prime Contract, which is comprised of AIA Document A133 – 2009, attached hereto as **Exhibit 3**, and AIA Document A201 – 2017, attached hereto as **Exhibit 4**, does provide for arbitration of disputes but only between UHS and SR Construction. It does not include any language whatsoever regarding "issues of fact or law" which require SR Construction to arbitrate disputes with its *subcontractors*. Therefore, the dispute between Peek Brothers and SR Construction is not subject to arbitration.

As noted both in Peek Brothers' Opposition to Motion to Compel and by this Court during oral argument, SR Construction's argument—that disputes involving payment for work performed by subcontractors must be arbitrated because UHS is responsible for payment to SR Construction—leads to the absurd and contrary conclusion that *all* disputes between SR

1 Construction and its subcontractors be arbitrated. Had this truly been the result intended, SR
2 Construction could have and should have included an arbitration provision in the Subcontract
3 that required arbitration of *all* disputes.

4 In addition, while the Prime Contract allows a contractor to include as parties to an
5 arbitration "Subcontractors to Contractor that Contractor deems relevant to the matter in
6 dispute," this assumes that there actually is a dispute between SR Construction and UHS—the
7 only parties to the Prime Contract. Despite including UHS as a "respondent" on an attached
8 page to its Demand for Arbitration, SR Construction has absolutely and unequivocally failed to
9 bring a claim against or allege a dispute with UHS. See Demand for Arbitration, attached
10 hereto as **Exhibit 5**. Rather, UHS was apparently included as a "respondent" solely as a
11 misguided attempt to force Peek Brothers into arbitrating a dispute that is not subject to the
12 arbitration provision.

13 Accordingly, the instant dispute does not involve UHS, is not required to be arbitrated
14 pursuant to the terms of the Subcontract *or* the Prime Contract, and may be properly litigated in
15 district court.

16
17 *ii. This Court's Decision was Not Clearly Erroneous and Was
Based on Substantial Evidence.*

18 Based on the foregoing substantial evidence, the Court adopted the arguments raised in
19 Peek Brothers' Opposition to Motion to Compel and explicitly found as follows:

20 [T]he Court finds that the dispute between Peek Brothers and SR Construction
21 does not involve issues of fact or law that must be arbitrated pursuant to the prime
22 contract because the dispute does *not* involve UHS. Therefore, the arbitration
23 provision contained in Exhibit D, § W of the Subcontract does not apply, and
24 Peek Brothers is not obligated to resolve the instant dispute by way of arbitration.
As such, SR Construction's request to compel Peek Brothers to submit its claims
to the American Arbitration Association ("AAA") should be denied.

25 Order, p. 3.

26 Because "the question of whether an agreement to arbitrate 'exists is one of fact,' the
27 Nevada Supreme Court will "defer to the district court's findings unless they are clearly
28 erroneous or not based on substantial evidence.'" Truck Ins. Exchange v. Palmer J. Swanson,

1 Inc., 124 Nev. 629, 633, 189 P.3d 656, 659 (2008) (quoting May v. Anderson, 121 Nev. 668,
2 672-73, 119 P.3d 1254, 1257 (2005)). Here, the Court's decision was *not* clearly erroneous, is
3 supported by the express terms of the agreements at issue and Nevada law, and was made after
4 thorough briefing of the issues and questioning of counsel for the parties during oral argument.

5 As such, it is extremely unlikely that SR Construction will succeed on the merits of its
6 appeal, and this Court should deny SR Construction's Motion to Stay. See Mikohn, 120 Nev. at
7 253, 89 P.3d at 40 ("[T]he party opposing the stay motion can defeat the motion by making a
8 strong showing that appellate relief is unattainable").

9
10 **D. Contrary to the Rationale Outlined in Mikohn, the Object of the**
11 **Appeal will Not be Defeated if this Court Declines to Stay the**
12 **Litigation Pending Appeal.**

13 Not only is SR Construction unlikely to prevail in its appeal, Peek Brothers submits that
14 the first NRAP 8 factor actually weighs in favor of denying SR Construction's Motion to Stay.
15 The Supreme Court decided Mikohn almost exactly seventeen years ago in 2004. While the
16 undersigned counsel is unaware of how the AAA functioned at that time and whether it truly
17 was a less costly, more efficient alternative to litigation, the same certainly cannot be said today.
18 Arbitration with the AAA is currently cumbersome, devoid of rules, and is often more
19 expensive than litigation. Thus, the rationale espoused in Mikohn – namely that "[a]rbitration,
20 as an alternative dispute resolution mechanism, is generally designed to avoid the higher costs
21 and longer time periods associated with traditional litigation" – no longer holds water. Mikohn,
22 120 Nev. at 252, 89 P.3d at 39. Based on the undersigned's experience, there are no longer
23 "monetary and timesaving benefits" to proceeding with AAA rather than the courts.²

24 With that being said, the AAA rules – just like the Nevada Rules of Civil Procedure –
25 provide for the amendment of claims and counterclaims, the early exchange of documents in

26 ² The foregoing position must be evaluated based on experience, as every case is different and there is no case law
27 to support either position. However, there are numerous articles that discuss the increased cost of Arbitration versus
28 litigation. For example this Washington Post news item cites to a study by the nonprofit advocacy organization
Public Citizen, entitled Second Thoughts About Arbitration: It Can Be More Expensive Than Litigation in Contract
Disputes. <https://www.washingtonpost.com/archive/realestate/2002/05/18/second-thoughts-about-arbitration-it-can-be-more-expensive-than-litigation-in-contract-disputes/2fbdf4df-a90a-484a-8ffe-c5bfcd255838/>

1 discovery, participation at hearings, and the submission of dispositive motions to the arbitrator.
2 Given that this case is at its inception, the object of SR Construction's appeal would not be
3 defeated because the parties will simply proceed along the same procedural path as they would
4 if they were proceeding under the AAA arbitration without the expense of a AAA arbitrator
5 who bills at an hourly rate. In the event this litigation continues and SR Construction prevails
6 on appeal, the parties can simply utilize the documents and evidence they obtained in discovery
7 in the arbitration proceedings and will not be required to duplicate their efforts. If anything, the
8 parties will realize a cost savings by not having to pay an arbitrator for any hearings related to
9 the discovery in this case.

10 **IV. CONCLUSION**

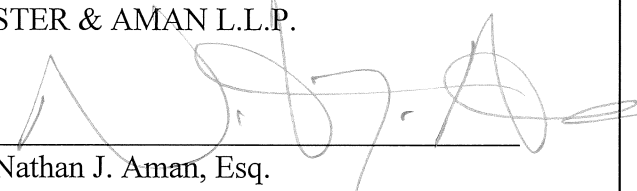
11 Based on the foregoing, Peek Brothers respectfully requests this Court deny SR
12 Construction's Motion to Stay Proceedings Pending Appeal on Shortened Time and allow this
13 litigation to proceed during the pendency of SR Construction's appeal.

14 **AFFIRMATION**

15 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding
16 document does not contain the social security number of any person.

17 **DATED** this 29th day of April, 2021.

18
19 VILORIA, OLIPHANT,
OSTER & AMAN L.L.P.

20
21 By: 
22 Nathan J. Aman, Esq.
23 Nevada Bar No. 8354
24 Emilee N. Hammond, Esq.
25 Nevada Bar No. 14626
26 327 California Ave.
27 Reno, Nevada 89509
28 (775) 284-8888
Attorneys for Plaintiff

VILORIA,
OLIPHANT,
OSTER &
AMAN L.L.P.

ATTORNEYS AND
COUNSELORS AT LAW
Office: (775) 284-8888 Fax: (775) 284-3838
P.O. Box 62 ~ RENO, NEVADA 89504
327 CALIFORNIA AVENUE ~ RENO, NEVADA 89509

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of VILORIA,
OLIPHANT, OSTER & AMAN L.L.P., and that on the date shown below, I caused service of a
true and correct copy of the attached:

PLAINTIFF'S OPPOSITION TO DEFENDANT SR CONSTRUCTION, INC.'S
MOTION TO STAY PROCEEDINGS PENDING APPEAL
ON ORDER SHORTENING TIME

to be completed by:

X

electronic service upon electronically filing the within document with the Second
Judicial District Court addressed to:

The Allison Law Firm Chtd.
Noah G. Allison
3191 East Warm Springs Road
Las Vegas, Nevada 89120
Attorneys for Defendants

DATED this 29 day of April, 2021

By: 

INDEX OF EXHIBITS

<u>Exhibit</u>	<u>Description</u>	<u>Number of pages (exclusive of tabs)</u>
1	January 14, 2021 Transcript of Proceedings of Hearing on Motion to Compel Arbitration and Stay Litigation	46
2	Master Subcontract Agreement	80
3	AIA Document A133 – 2009	32
4	AIA Document A201 – 2017	57
5	Demand for Arbitration	4

THE ALLISON LAW FIRM CHTD.
Noah G. Allison (Bar #6202)
Heather Caliguire Fleming (Bar #14492)
3191 East Warm Springs Road
Las Vegas, Nevada 89120-3147
Tel (702) 933-4444
Fax (702) 933-4445
noah@allisonnevada.com
Attorneys for SR Construction, Inc.

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF WASHOE, STATE OF NEVADA

PEEK BROTHERS CONSTRUCTION,
INC., a Nevada Domestic corporation,

Case No.: CV20-01375

Plaintiff,

Dept. No.: 8

vs.

SR CONSTRUCTION, INC., a Nevada
Domestic Corporation; DOE Defendants 1 -
10.

**SUPPLEMENT TO MOTION TO STAY
PROCEEDINGS PENDING APPEAL ON
ORDER SHORTENING TIME**

Defendants.

COMES NOW Defendant SR Construction, Inc. ("SR") by and through its counsel of record,
Noah G. Allison of the Allison Law Firm Chtd., and herein submits its Supplement to its Motion to Stay
Proceedings Pending Appeal on Order Shortening Time.

On April 28, 2021, the parties appeared before a settlement judge on the order of the Nevada
Supreme Court. Based on that appearance, the settlement judge recommended removal from the
settlement program. On April 29, 2021, the Nevada Supreme Court issued an order removing the case
from the settlement program and reinstating briefing. *See* Order Removing from Settlement Program and
Reinstating Briefing, attached hereto as Exhibit 1. The appeal is moving forward with all possible speed.
These events are further evidence that the appeal was not brought for improper purposes, such as to delay
the proceedings. Based on this, a stay is necessary so that the status quo is preserved until the Nevada
Supreme Court issues a decision on SR's appeal.





AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 29th day of April, 2021.

THE ALLISON LAW FIRM CHTD.

By: /s/ Heather Caliguire Fleming
Noah G. Allison (Bar #6202)
Heather Caliguire Fleming (Bar #14492)
3191 East Warm Springs Road
Las Vegas, Nevada 89120-3147
Attorneys for SR Construction, Inc.



CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of THE ALLISON LAW FIRM CHTD., and that on April 29th, 2021, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which served the following parties electronically:

Nathan J. Aman, Esq.
Emilee N. Hammond, Esq.
VILORIA, OLIPHANT, OSTER & AMAN, LLP
327 California Ave.
Reno, Nevada 89509
Attorneys for Peek Brothers Construction, Inc.

/s/ Nita MacFawn
Employee of The Allison Law Firm Chtd.



INDEX OF EXHIBITS

<u>Exhibit #</u>	<u>Description</u>	<u># of Pages</u>
Exhibit 1	Nevada Supreme Court Order Removing from Settlement Program and Reinstating Briefing	2

EXHIBIT “1”

IN THE SUPREME COURT OF THE STATE OF NEVADA

SR CONSTRUCTION, INC., A NEVADA
DOMESTIC CORPORATION,

Appellant,

vs.

PEEK BROTHERS CONSTRUCTION,
INC., A NEVADA DOMESTIC
CORPORATION,

Respondent.

No. 82786

FILED

APR 29 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER REMOVING FROM SETTLEMENT PROGRAM
AND REINSTATING BRIEFING*

Pursuant to the recommendation of the settlement judge, this appeal is removed from the settlement program. See NRAP 16. Accordingly, we reinstate the deadlines for requesting transcripts and filing briefs.

Appellant shall have 14 days from the date of this order to file and serve a transcript request form. If no transcript is to be requested, appellant shall file and serve a certificate to that effect within the same time period. See NRAP 9(a). Further, appellant shall have 90 days from the date of this order to file and serve the opening brief and appendix. In preparing and assembling the appendix, counsel shall strictly comply with the provisions of NRAP 30. Thereafter, briefing shall proceed in accordance with NRAP 31(a)(1).

It is so ORDERED.

1. J. J. J., C.J.

cc: Debbie Leonard, Settlement Judge
Allison Law Firm, Chtd.
Viloria, Oliphant, Oster & Aman L.L.P.

THE ALLISON LAW FIRM CHTD.
Noah G. Allison (Bar #6202)
Heather Caliguire Fleming (Bar #14492)
3191 East Warm Springs Road
Las Vegas, Nevada 89120-3147
Tel (702) 933-4444
Fax (702) 933-4445
noah@allisonnevada.com
heather@allisonnevada.com
Attorneys for SR Construction, Inc.

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF WASHOE, STATE OF NEVADA

PEEK BROTHERS CONSTRUCTION,
INC., a Nevada Domestic corporation,

Case No.: CV20-01375

Plaintiff,

Dept. No.: 8

vs.

SR CONSTRUCTION, INC., a Nevada
Domestic Corporation; DOE Defendants 1 -
10.

**REPLY IN SUPPORT OF MOTION TO
STAY PROCEEDINGS PENDING APPEAL
ON ORDER SHORTENING TIME**

Defendants.

Defendant SR Construction, Inc. ("SR"), by and through its counsel of record Noah G. Allison of the Allison Law Firm Chtd., herein submits its Reply in Support of Motion to Stay Proceedings Pending Appeal on Order Shortening Time. This Reply is made and based on the following Points and Authorities, the exhibits attached hereto, the pleadings on file herein, and any oral argument to be made before this Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Peek Bros. Construction, Inc. ("Peek Bros.") had no basis to oppose SR's argument that its appeal was frivolous and thus articulated no such argument in its opposition. Peek Bros. also had no basis to





oppose SR's demonstration that it was not seeking a stay for dilatory purposes and therefore offered no opposition. Peek Bros. instead criticized the merit of SR's appeal. Peek Bros. also criticized the *Mikohn* Court's oft-repeated observation that bargained-for arbitration is something courts should encourage rather than invade, impede, or usurp. SR's Reply responds to Peek Bros. criticisms and stands 100% behind *Mikohn* as the standard for granting a stay on an appeal of an order denying arbitration.

II.

ARGUMENT

A. The Court's Ruling is Devoid of Analysis.

Peek Bros. asserted the Court was "exceedingly clear" that the dispute between SR and Peek Bros. does not involve non-party owner Sparks Family Medical Center, Inc. c/o Universal Health Services of Delaware ("UHS"). Opposition, 8:11-14. Let us examine the two documents that the appellate court will examine when reviewing the clarity of the Court's order: the hearing transcript and the filed Order.

The hearing transcript reflects the following ruling from the Court:

The Court specifically finds that the dispute which underlies the Complaint here does not involve an issue of fact or law which the contractor is required to arbitrate under the terms of the prime contract.

The Court adopts the analysis of the [Peek Bros.] opposition. . .

See Hearing Transcript, 38:18-22. The rest of the Court's ruling involved setting a mandatory settlement conference and a statement about the merit of arbitration when the amount in dispute fell into certain ranges. See Hearing Transcript, 39:14 - 41:15.

The Order provides:

Based on the foregoing, the Court finds the dispute between Peek Brothers and SR Construction does not involve issue of fact or law that must be arbitrated pursuant to the prime contract because the dispute does not involve UHS. Therefore, the arbitration provision contained in Exhibit D, § W of the Subcontract does not apply, and Peek Brothers is not obligated to resolve the instant dispute by way of arbitration.

See Order Denying Defendant's Motion to Compel Arbitration and Stay Litigation, 3:14-18.

The problem with the Court's statement in the transcript and written order is that it draws its conclusion from no stated facts and no analysis. The absence of factual findings and analysis subjects the Court's order to remand for clarification at a minimum or, most likely, an outright reversal with



instructions. *See Adesa Nev., LLC v. Afra Contr. Co.*, 131 Nev. 1246 (2015 Unpublished). *Why* does the dispute not involve UHS? *What facts* support the Court’s conclusion? *How* does the dispute not involve UHS when SR demonstrated that UHS has to pay for subcontractor change orders? *How* does the dispute not involve UHS when UHS directed SR in writing to deny the subject change order and initiate dispute resolution? *How* does the dispute not involve UHS when UHS is named in the arbitration proceeding initiated by SR? All of these points were raised in the briefing and the arguments, but the Court analyzed none of them in its order.

B. The Court’s Only Analysis Improperly Addressed the Efficiency of Arbitration.

Instead of making analyzing the validity of the arbitration provision, the Court analyzed the *economy* of arbitration:

I want to have everyone bear in mind -- and I'm sure they do -- that this Court's experience is, our system works really well for \$50,000-or-below claims because of the mandatory Supreme Court Arbitration Program. And our system works reasonably well for claims, you know, if you add another zero and above. But the middle, the 50 to 250, sometimes the cost of the process can eat up the amount that's being argued, even if there's a fee-shifting provision to the prevailer. But, you know, I'm not trying to condescend here. Everyone knows that.

See Hearing Transcript, 40:20 – 41:6. A reasonable litigant would draw the inference from the Court’s statement above that its view on the economy of arbitration governed its denial of the motion to compel arbitration. The inference is even stronger when the other stated reason is a conclusion devoid of analysis. NRS 38.219(2) directs a court to “decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.” The law does not allow a court to decide if arbitration would be economical.

Peek Bros. doubled down on the Court’s concern over the economy of arbitration in its opposition when it advised that “[b]ased on the undersigned’s experience, there are no longer ‘monetary and timesaving benefits’ to proceeding with AAA rather than the courts.” *Opposition*, 10:21-22. Support for counsel’s proposition was a Washington Post article. *Opposition*, 10, n.2. Neither this Court nor the appellate court should allow one lawyer’s experience and a Washington Post article overturn the holdings in *Mikohn* and a host of other Nevada cases finding that arbitration is a timesaving and economical method of alternate dispute resolution, and that arbitration provisions should be liberally construed in favor of



arbitration.

C. The Irony Is that the Court's Denial of SR's Motion to Compel Arbitration to Save the Parties from Expenses and Delays Has Caused the Parties to Incur Significant Expenses and Delays.

The Court held a hearing on SR's Motion to Compel Arbitration on January 14, 2021 where it verbally denied SR's motion and ordered the parties to a settlement conference. The settlement conference occurred on March 31, 2021 and failed to result in a settlement. The written order was issued on April 13, 2021. SR filed its notice of appeal the same day. The appeal settlement conference judge took pity on the parties and exempted them from the Supreme Court settlement program. SR is now diligently pursuing its appeal. With luck, the appeal will be decided in the fourth quarter of 2021.

Since January 14, 2021, SR has incurred the following expenses it would not have incurred if the Court compelled arbitration:

- Time and expense locating and scheduling the settlement conference;
- Time and expense briefing for the settlement conference;
- Time and expense attending the settlement conference;
- Time and expense filing a notice of appeal; and
- Time and expense seeking a motion to stay litigation pending the outcome of the appeal.

Looking forward, SR anticipates additional expenses it would not have occurred had the Court compelled arbitration:

- Time and expense of filing a motion to stay with the Supreme Court (if necessary);
- Time and expense of preparing an opening appeal brief;
- Time and expense of preparing a reply appeal brief; and
- Time and expense of oral argument (if ordered).

Respectfully, from SR's perspective, the litigation track record of this dispute – where SR has not even filed an answer yet – is far from a model of speed, efficiency, and economy. The Court's statement at the hearing that it did not anticipate a jury trial in a civil case moving forward until 2023 is still ringing in SR ears. *See Hearing Transcript, 34:3-4.* Arbitration sounds better and better and SR is determined to fight for what it bargained for.



1 IV.

2 CONCLUSION

3 Based on the foregoing, pursuant to *Mikohn v. McCrea*, this Court should grant a stay while SR's
4 appeal is pending.

5 AFFIRMATION

6 Pursuant to NRS 239B.030

7 The undersigned does hereby affirm that the preceding document does not contain the social
8 security number of any person.

9 DATED this 6th day of May, 2021.

10 THE ALLISON LAW FIRM CHTD.

11
12 By: /s/ Noah G. Allison
13 Noah G. Allison (Bar #6202)
14 Heather Caliguire Fleming (Bar #14492)
15 3191 East Warm Springs Road
16 Las Vegas, Nevada 89120-3147
17 Attorneys for SR Construction, Inc.



CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of THE ALLISON LAW FIRM CHTD., and that on May 6th, 2021, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which served the following parties electronically:

Nathan J. Aman, Esq.
Emilee N. Hammond, Esq.
Viloria, Oliphant, Oster & Aman, LLP
327 California Ave.
Reno, Nevada 89509
Attorney for Peek Brothers Construction, Inc.

/s/ Nita MacFawn

Employee of The Allison Law Firm Chtd.