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, Respondents.	**Supreme Court No.:** 82786 (Appeal of Second Judicial District Court case no. CV20-01375) **APPELLANT'S REPLY IN SUPPORT OF ITS MOTION FOR STAY OF THE PROCEEDINGS** **Emergency Motion Under NRAP 27(e)**

COMES NOW Appellant SR Construction, Inc.'s ("SR") and hereby files its Reply Memorandum in Support of Its Motion for Stay of Proceedings.

A. No Deference is Owed to the District Court's Denial of SR's NRCP 62 Motion to Stay.

Appellant SR Construction, Inc.'s ("SR") Motion to Stay[1] is an *independent* request brought under NRAP 8 to this Court to stay district court proceedings during the pendency of an appeal. An NRAP 8 motion to stay is *not* an appeal of the District Court's denial of an NRCP 62 motion to stay. This Court does not owe deference to the district court's ruling.

[1] SR incorporates all exhibits to its Motion to Stay (Document 21-15675) herein by reference and cites to them as if incorporated herein.

B. Peek Bros.' Satisfaction with Judge Breslow Does Not Give SR What It Bargained For.

The platitudes Respondent Peek Brothers Construction, Inc. ("Peek Bros.") heap upon the district court judge as an outstanding jurist ideal for the disposition of this dispute completely miss the mark. *See* Response at pp. 5-6. SR did not choose Judge Breslow. Peek Bros. did not choose Judge Breslow. The random selection process in the Second Judicial District Court chose Judge Breslow. That random selection process is completely different from private arbitration[2] and it drives home SR's point that litigation in the Second Judicial District Court before a randomly-selected judge is *not* what it bargained for.

Additionally, Peek Bros.' assertion that a fact-finder with experience in breach of contract matters versus one with construction expertise is the best for resolving this dispute is purely a matter of opinion. *Id.* Peek Bros. unnecessarily hauled thousands of cubic yards of material onto a construction site and now wants

[2] Under the "Regular Track Procedures" of the AAA Construction rules, the parties have the ability to choose arbitrators from AAA's panel of arbitrators, and the arbitrator controls the discovery process. *Construction Industry Arbitration Rules and Mediation Procedures*, AMERICAN ARBITRATION ASSOCIATION, 9, *available at* https://www.adr.org/sites/default/files/ConstructionRules-Web.pdf. The arbitrator "determine[s] the admissibility, relevance, and materiality of the evidence offered" and "may reject evidence deemed...cumulative, unreliable, unnecessary, or of slight value compared to the time and expense involved." *Id.* at p. 28. AAA has a "National Construction Panel" to choose from, that includes arbitrators with experience in the construction industry. Practice Areas: Construction, Real Estate and Environmental, AMERICAN ARBITRATION ASSOCIATION, https://www.adr.org/construction.

a change order for it. *See* Exhibit 5 to the Motion. SR thus believes that an arbitrator who understands earthwork contracting and how an earthwork contractor determines quantities for import/export to the site is ideal for the resolution of this dispute.

C. A Generalized Assertion Of "Fading Memories" Is Not an Irreparable Harm That Overcomes *Mikohn*.

There has been zero showing of irreparable harm by Peek Bros, but rather a bunch of "what-ifs." If the "fading memories" argument posited by Peek Bros. and the district court is deemed "irreparable harm," then every denial of every stay of every appeal of an order denying a motion to compel arbitration should be sustained, and *Mikohn* thereby nullified. The fading memories "harm" equally applies to both parties insofar as witness testimony is concerned. *See* Response at pp. 6-7. Bear in mind that the statute of limitations on a breach of contract cause of action in Nevada is *six years*. NRS 11.190(1)(b). Who mourns for faded memories and absent witnesses when an action is brought five years and eleven months after the events surrounding the breach? As to the integrity of the documents, SR understands its preservation obligation under Nevada Law and the penalties that apply when documents are not preserved after notice of a dispute. There will be no "lost" or "disposed" documents on SR's side of the fence. Peek Bros. has the same obligation and is subject to the same penalties for failure to preserve evidence.

D. SR Should Win Its Appeal.[3]

SR stands 100% behind its assertion that the dispute over the validity of Peek Bros.' change order is subject to arbitration pursuant to the valid and enforceable arbitration provisions in the MSA between SR and Peek Bros. and the prime contract between SR and UHS. See Exhibits 2 and 4 to the Motion. Payments made by SR to subcontractors in accordance with the requirements of the subcontracts are costs that must be reimbursed by UHS up to the guaranteed maximum price. Exhibit 4 to the Motion at, § 6.3. This includes valid change orders. SR agrees with UHS's assertion that Peek Bros.' change orders lack merit, but if the arbitrator finds the change orders have merit, SR named UHS in the demand for arbitration to ensure UHS will reimburse SR for the cost of the change order. *See* Exhibit 6 to the Motion.

Footnote 4 in Peek Bros.' Response to SR's Motion to Stay illustrates everything wrong with the way Peek Bros. argued against arbitration. Response, p. 9 n.4. Peek Bros. argued "UHS has no responsibility to pay for the Change Orders at issue, as they were incurred as a result of the negligent direction of an SRC employee." *Id.* Peek Bros. fails to recognize its assertion is a mere allegation that

[3] The *Mikohn* Court held that when a case is in an early stage, i.e. before the Court has the full appellate record to review, it is too early to make a determination as to the success on the merits, and that requiring the appellant to "be forced to spend money and time preparing for trial, thus potentially losing the benefits of arbitration" was unfair and stay was warranted. 120 Nev. 248, 254, 89 P.3d 36, 40 (2004).

will be fleshed out in arbitration. It defies logic to assert an allegation that first must be proven in an arbitration as the basis for denying arbitration.

Finally, Peek Bros.' argument that this Court must defer to the district court's findings requires clarification. A lower court's finding that a contract to arbitrate exists requires deferential review. *May v. Anderson*, 119 P.3d 1254, 1257 (Nev. 2005). A lower court's interpretation of the arbitration clause to determine arbitrability is subject to de novo review. *Id.* Here, the district court did not dispute the *existence* of the arbitration provisions between SR and Peek Bros. The district court instead *interpreted* the provisions to determine the dispute was not arbitrable. This Court need not defer to the district court's interpretation of the operative arbitration provisions.

CONCLUSION

Based on the foregoing, SR requests that this Court stay the proceedings until the conclusion of the appeal.

Dated this 21st day of June, 2021.

THE ALLISON LAW FIRM CHTD.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of The Allison Law Firm Chtd. and that on this date the foregoing **APPELLANT'S REPLY IN SUPPORT OF ITS MOTION FOR STAY OF THE PROCEEDINGS (Emergency Motion Under NRAP 27(e))** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

NATHAN J. AMAN, ESQ.
EMILY N. HAMMOND, ESQ.

DATED this 22nd of June, 2021.

An employee of The Allison Law Firm Chtd.