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

ON APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, CASE NO. CV20-01375
THE HONORABLE BARRY BRESLOW, DISTRICT JUDGE

APPELLANTS' OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

1. Appellant SR Construction, Inc. is a private corporation.
2. SR Construction, Inc. is represented by The Allison Law Firm Chtd. The attorneys at The Allison Law Firm Chtd. directly working on this appeal are Noah G. Allison, Esq. and Heather Caliguire Fleming, Esq. The other attorneys at The Allison Law Firm Chtd. are Michelle L. Allison, Esq. and Kelly Burton, Esq.

Dated this 11th day of August, 2021.

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JURISDICTIONAL STATEMENT

This is an appeal of an order in the Second Judicial District Court denying SR Construction, Inc.'s ("Appellant" or "SR") Motion to Compel Arbitration and Stay the Proceedings, filed on October 7, 2020. The District Court verbally denied the Motion at a hearing on January 14, 2021, ordered the parties to a settlement conference, and stayed entry of the ruling until after the settlement conference. On April 13, 2021, after the failed settlement conference, the District Court lifted the stay and entered the Order denying the Motion. SR filed a notice of appeal on April 13, 2021.

The Supreme Court of Nevada has jurisdiction over this matter pursuant to NRAP 4(a)(1) and NRS 38.247(1)(a). NRS 38.247(1)(a) allows an interlocutory appeal from an order denying a motion to compel arbitration.

ROUTING STATEMENT

This appeal does not fall within any of the categories listed for cases exclusively retained by the Nevada Supreme Court under NRAP 17(a). This appeal also does not fall within the original jurisdiction of the Court of Appeals pursuant to NRAP 17(b).

This appeal should be routed to the Nevada Supreme Court pursuant to NRAP 17 for two reasons. First, this appeal addresses a question of public policy that the Court of Appeals has rarely considered, i.e. whether a district court judge can refuse to enforce an arbitration clause existent in a valid contract, contrary to Nevada law and public policy favoring the enforcement of contractual arbitration requirements. *Tallman v. Eighth Jud. Dist. Ct.*, 131 NAO 71, 359 P.3d 113, 119 (Nev. 2015) ("As a matter of public policy, Nevada courts encourage arbitration and liberally construe arbitration clauses in favor of granting arbitration"). Second, this appeal involves a contract dispute exceeding $100,000, well beyond the $75,000 threshold for presumptively routing contract dispute cases to the Nevada Court of Appeals under NRAP 17(b)(6).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Did the District Court err when it concluded with no analysis that the dispute between SR and Peek Bros. did not involve an issue of fact or law requiring arbitration under the GMP Contract?

(2) Can Peek Bros. escape arbitration by leaving UHS out of its complaint and alleging the circumstances of the disputed change order were entirely based on misconduct by SR?

(3) Can the GMP Contract between SR and UHS obligate UHS to pay for the change order disputed between SR and Peek Bros. and thereby raise an issue of fact or law that must be arbitrated under the GMP Contract?

I. STATEMENT OF THE CASE AND COURSE OF PROCEEDINGS

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. Respondent Peek Brothers Construction, Inc. ("Respondent" or "Peek Bros.") was the earthwork subcontractor.

Peek Bros. ("Respondent" or "Peek Bros.") filed suit against SR on September 2, 2020. JA001-8. The lawsuit concerns disputed change orders sought by Peek Bros. JA001-8. SR accepted service on September 16, 2020. JA 009-10.

SR filed a Demand for Arbitration with the American Arbitration Association ("AAA") naming Peek Bros. and UHS as respondents on September 11, 2020. JA0264-269. On October 6, 2020, AAA distributed a letter to SR, Peek Bros. and UHS advising them that it would stay the arbitration proceedings pending the outcome of the motion to compel arbitration. JA0276-277. The AAA proceeding remains stayed.

On October 7, 2020, SR filed its Motion to Compel Arbitration and Stay the Proceedings. JA0011-277. Peek Bros. filed an opposition on October 28, 2020. JA0278-466. SR filed its reply brief on November 9, 2020. JA0467-473.

The hearing on SR's motion to compel arbitration occurred on January 14, 2021. JA1038-82. From the bench, the District Court denied SR's motion, ordered

the parties to a settlement conference, and ordered the case stayed until after the settlement conference. JA1076-77.

> THE COURT: All right. We're back on the record. Two things. First thing: Motion to compel arbitration is denied. 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 opposition, and plaintiff shall prepare a short order, three pages or less, consistent with its argument today, the Court's observations and questions, and its briefing, run it by defense counsel as to form only, consistent with our local rules on how much time they get, and 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.
>
> Number two, as important as number one. The Court exercises its discretion under Nevada Supreme Court Rule 252 and Second Judicial District Court Rule 6, I'm staying this case, this litigation, other than the entry of this order, for 90 days. No Answer is required; no dispositive motion is required; no discovery; no nothing. On or before April 30, parties are ordered to a settlement conference with a neutral of their choosing; presumably somebody with construction background, but doesn't have to be. If counsel cannot agree on a neutral after good-faith efforts, let the Court know by e-mail that you're at an impasse even at that level, and I'll appoint someone from my large Rolodex of qualified neutrals, the cost of the event to be shared equally, unless you're able to convince one of my colleagues or a colleague in another judicial branch to preside over your settlement conference, and move forward with a settlement conference. I'm going to set now a status hearing for 90 days or so from now and see where everything stands. If you're unable to resolve it after a settlement conference, I

> don't need to know why, I don't need to know who was the stick in the mud, or which side or who -- "They offered nothing." I don't care. We're just going to go from that point forward rules of engagement; how much time do you need for discovery? We'll do it -- we'll have a concierge judge for purposes 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.

JA1075-77.

The District Court also questioned the economy of arbitration in its remarks:

> 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.

JA1077-78.

The settlement conference occurred on March 31, 2021 and did not result in a resolution of the dispute. JA1086. On April 13, 2021, the District Court entered a written order denying SR's Motion to Compel Arbitration. JA0474-76. The Order contained no analysis, but concluded:

> Based on the foregoing, the Court finds that the dispute between Peek Brothers and SR Construction does not involve issues 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.

JA0476. SR filed its notice of appeal pursuant to NRS 38.247(1)(a) on April 13, 2021. JA0477-79.

II. STATEMENT OF RELEVANT FACTS

A. The Master Subcontract Agreement.

SR and Peek Bros. entered into a Master Subcontract Agreement ("MSA") on October 8, 2019. JA-125-205. The MSA does not arise from a particular construction project, but instead defined the relationship between SR and Peek Bros. on all construction projects where they would work together, essentially placing Peek Bros. on a roster of subcontractors that SR routinely employs. JA0126. When SR engaged Peek Bros. on a project, it would issue a work order defining the scope, price, and specific terms and conditions of the project. JA0126-27. The work orders would incorporate the MSA by reference. JA0126-27.

The dispute resolution section of the MSA binds SR and Peek Bros. to whatever dispute resolution requirements might exist between SR and an owner on a future project:

> **W. DISPUTE RESOLUTION – ARBITRATION** – (a) 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 the Contractor and Subcontractor involves issues of fact or law which the Contractor is required to arbitrate under the terms of the prime contract [...] (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.

JA0159-60. To summarize, disputes between SR and Peek Bros. must be arbitrated when the prime contract between SR and the owner has an arbitration requirement and the dispute involves issues that SR must arbitrate under the terms of the prime contract. When there is no arbitration requirement between SR and the owner, there is no obligation to arbitrate. When the dispute does not involve issues of fact or law that SR must arbitrate with the owner, there is no obligation to arbitrate. When the contract between SR and an owner has an arbitration requirement, and the contract requires the owner to pay for subcontractor change orders, and the owner hotly disputes the validity of a subcontractor change order, then there absolutely is an obligation to arbitrate.

B. The GMP Contract.

SR and UHS executed AIA Document A133 – 209 "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" on May 6, 2020 ("GMP Contract"). JA0036. The GMP Contract is a cost-plus arrangement with a guaranteed maximum price ("GMP"). JA0046. Reimbursable costs "necessarily incurred" by SR up to the GMP are payable by UHS. JA0046. Reimbursable costs include payments made by SR to subcontractors in accordance with the requirements of the subcontracts. JA0047.

For example, if Peek Bros. is entitled under its subcontract to receive $1,000,000 for its work on the Project, the GMP Contract obligates UHS to pay that amount to SR, subject to the GMP. If Peek Bros.' is entitled to a $250,000 change order under its subcontract for additional work, thereby increasing its subcontract to $1,250,000, UHS must pay SR that amount subject to the GMP. For this reason, provided the GMP has not already been exceeded, UHS has a direct interest in the legitimacy of subcontract change orders.

The GMP Contract requires arbitration with AAA as the method of binding dispute resolution:

> 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.

JA0109. An arbitration award is final and may be entered in any court with jurisdiction. *Id.* The converse is not true. A judgment rendered by a court absent arbitration is not binding on UHS. SR has not waived arbitration. Neither has UHS.

C. The Work Order.

SR issued a Work Order Addendum to Master Subcontract Agreement ("Work Order") to Peek Bros. for the Project on December 8, 2019. JA0207. The Work Order tied the MSA directly to the Project, stating that "[t]he terms and obligations of the above-referenced Master Subcontract Agreement are fully incorporated by reference as though fully set forth herein." JA0207. It must be noted that the GMP Contract was still months away, but Peek Bros. did not take the opportunity to distance itself from whatever arbitration requirement the future GMP Contract might have.

The Work Order set a price of $3,062,000 and required Peek Bros. to provide "all labor, material, equipment, hoisting, tools and supervision required to furnish and install the Core and Shell Civil Work in accordance with all documents shown..." JA0207, JA0221. The scope of work included, but was not limited to, providing mass grading for the site, sub and base grading for the building pad, excavating footings, excavating, compacting and backfilling footings and grade beams, providing sanitary sewer, fire and domestic water, and providing other services to prepare the pad for the Project. JA0221-24. The scope of work further included line items for mobilization, traffic control, construction water, SWPPP, dewatering allowance, mass grading, footing excavation, sub & base grade for building pad, sanitary sewer, fire and domestic water, NV Energy/AT&T, site

communications, underslab plumbing trench & backfill, underslab electrical & telecom trench & backfill, site lighting trench & backfill, WQ-basins grading, miscellaneous logistics, and parking lot site lighting & light pole bases. JA0224-25.

D. Peek Bros.' Disputed Change Order Request.

On or about May 21, 2020 Peek Bros. submitted Change Order #17 for the cost of labor and equipment to import additional fill to the Project site to bring the pad to subgrade elevation. JA0281. Peek Bros. revised Change Order #17 on June 4, 2020 to reflect an addition of $137,497.50. JA0281. SR disputed the change order request and advised UHS that the requested change order lacked merit. UHS agreed with SR's position and issued a memorandum to SR on July 23, 2020 rejecting the change order:

> It is my understanding that they [Peek Bros.] are asserting that they are owed payment for bringing additional import material (6,000 CY) to the site...which, as I understand it, represents a change to their understood work plan of bringing the building pad to an elevation of 42 and then using soils from the footing/grade-beam and utility trenches to eventually reach subgrade.
>
> 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...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 contract and Peek Brothers are requesting a change order for this extra work.

JA0263. UHS further directed SR not to pay the change order and to seek dispute resolution under the GMP Contract:

> UHS is rejecting this change order, and we are directing SR Construction to initiate dispute resolution on the matter. SR Construction shall not settle or otherwise authorize payment of all or any portion of the disputed change order request under the terms of the Prime Contract without written authorization from UHS. It is our expectation that SR Construction will keep UHS fully apprised of any further settlement discussions and/or dispute resolution proceedings until such time that a resolution has been reached. UHS reserves all rights on this matter.

Id.

III. SUMMARY OF THE ARGUMENT

SR's argument begins with a respectful critique of the District Court's order denying SR's motion to compel arbitration. Beyond the fact the District Court reached the wrong conclusion, there are two serious problems with the District Court's ruling. The first problem is that the ruling is devoid of analysis. The District Court nakedly concluded the dispute between SR and Peek Bros. did not involve issues of law or fact that required SR to arbitrate under the GMP Contract, but it cited no facts or law in support of its conclusion. The second problem involves the repeated and lengthy comments from the bench during oral argument that arbitration was not a good idea in this dispute because of the amount in dispute. This Court cannot overlook the comments because they exhibit an improper mindset by the District Court when it decided whether to compel arbitration.

SR next shines a spotlight on Peek Bros.' attempt to artfully plead itself out of an arbitration requirement by omitting UHS from its pleading and alleging with no facts that the owner has nothing to do with the disputed change order. This Court does not respond kindly to gamesmanship in pleading, especially when it is guaranteed that SR's first pleading, if required, will be to bring UHS into the lawsuit.

SR finally tackles the heart of the appeal by embracing the *de novo* standard of review the law calls for. The determination of whether the dispute over Peek Bros.' change order raises issues of fact or law that must be arbitrated lies in the interpretation of the unambiguous and time-tested AIA GMP Contract. If Peek Bros. has a legitimate change order, then most likely UHS must pay for it. As such, the dispute must be arbitrated under the GMP Contract.

IV. STANDARD OF REVIEW

There are two potential standards of review in this appeal. A district court is owed deference in determining whether an arbitration requirement *exists* in a contract. *Truck Ins. Exch. v. Swanson*, 124 Nev. 629, 632, 189 P.3d 656, 659 (2008) (2008), *quoting May v. Anderson*, 121 Nev. 668, 672-73, 119 P.3d 1254, 1257 (2005). The *construction* of the contractual provisions that support or refute the arbitration requirement is reviewed *de novo*. *Clark County Pub. Employees Ass'n v. Pearson*, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990) ("[w]hether a dispute is arbitrable is essentially a question of construction of a contract. Thus, the reviewing

court is obligated to make its own independent determination on the issue, and should not defer to the district court's determination.")

Here, there is no dispute between SR and Peek Bros. that an arbitration requirement exists between them. The conflict arises over the *construction* of the pertinent contracts. SR asserts the GMP Contract obligates UHS to reimburse SR for all payments made to Peek Bros. in accordance with the requirements of the MSA and Work Order and therefore the disputed change order involves issues of fact and law that SR must arbitrate under the terms of the GMP Contract. JA0046, JA0109, JA0159-60. This Court must review the GMP Contract and MSA *de novo* and then properly construct the contracts. The obligation to arbitrate or not arbitrate will flow from this Court's independent legal analysis.

No deference is owed to the District Court for its ruling. It baldly decided "the dispute between Peek Brothers and SR Construction does not involve issues of fact or law that must be arbitrated pursuant to the prime contract because the dispute does not involve UHS," but failed to explain *why* in its Order. JA0474-76. Although SR extensively argued in its moving papers (JA0017-18, JA0468-72) and at oral argument (JA1043-52) about the importance of UHS's obligations in the GMP Contract, no legal analysis of the contracts exists in the District Court's Order. JA0474-76. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm

conviction that a mistake has been committed." *Unionamerica Mortg. & Equity Tr. v. McDonald*, 97 Nev. 210, 211-12, 626 P.2d 1272, 1273 (1981) (*internal citations omitted*). A conclusion devoid of legal analysis or factual support is the essence of a "clearly erroneous" ruling and is entitled to no deference.

V. ARGUMENT

A. The District Court Disregarded this Court's Presumption in Favor of Arbitration.

It is difficult to contend with a court with a mindset that arbitration is a bad idea when the amount in dispute falls within a certain range and the subject dispute is within that range. Yet that improper judicial mindset is what SR faced in this case. This Court repeatedly and consistently has held that arbitration clauses should be enforced whenever possible. When a contract contains an arbitration clause, as the MSA does here, there is "a presumption of arbitrability." *Int'l Ass'n of Firefighters, Local #1285 v. City of Las Vegas,* 112 Nev. 1319, 929 P.3d 954 (1996); *see also MMAWC v. Zion Wood Obi Wan Trust*, 448 P.3d 568, 571 (Nev. 2019) (holding that any statute that disfavors arbitration is preempted by the Federal Arbitration Act.); *Direct Grading & Paving, LLC v. Eighth Judicial District Court*, 137 Nev. Adv. Op. 31 (July 9, 2021) (holding there is "a strong preference in favor of arbitration and upholding arbitration clauses."); *Tallman v. Eighth Jud. Dist. Ct.*, 131 NAO 71, 359 P.3d 113, 119 (Nev. 2015)("As a matter of public policy, Nevada courts encourage

arbitration and liberally construe arbitration clauses in favor of granting arbitration."); *Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 717 (1990)(holding that there is a "presumption of arbitrability" when a contract contains an agreement to arbitrate and that "arbitration clauses are to be construed liberally in favor of arbitration.") Unless it can be stated with "positive assurance" that the arbitration clause in a contract does not cover the dispute, then arbitration is mandated. *Clark County Pub. Employees Ass'n*, 106 Nev. at 590, 798 P.2d 138, *citing Int'l Ass'n of Firefighters*, 112 Nev. at 1323.

The District Court demonstrated its disregard for this Court's strong preference for arbitration when it lectured the parties about why arbitrations over amounts between $50,000 and $250,000 are a bad idea:

> 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.

JA1077-78. Indeed, the District Court spent far more time giving its views on the merits of arbitration than it did explaining why the disputed change order did not involve issues of law or fact that SR must arbitrate under the GMP Contract. *Compare* JA1075 lines 18-21 to JA1077 line 20 – JA1078 line 6. The District Court also remarked during SR's counsel's argument:

> There's a whole body of law – not law – there's a whole bunch of legal notes, law school notes, papers by neutrals, litigants' counsel who have said that that's a noble idea gone astray over the last 25 years because of time and expense, savings that hasn't really borne out of particularly these very complex, heavy-lift, three-arbitrator, JAMS arbitrations in San Francisco with people from around the country and the world. It costs just as much, takes just as long. But it's a noble idea, and the judiciary, by and large, seems to review these in a way to encourage this. So that's the law, and I generally accept that as guiding this Court's principle, if it's a close call.

JA1043. Respectfully, despite its lukewarm statement to the contrary, the record reflects, by the District Court's affirmative statements and by its neglect of the analysis that mattered, the District Court did not rule from the mindset and the established legal precedent that there is a strong presumption in favor of enforcing arbitration provisions in contracts.

B. Peek Bros. Cannot Artfully Plead Itself Out of Arbitration.

After Peek Bros. became aware that UHS had instructed SR to reject its change order and initiate dispute resolution pursuant to the GMP Contract, it raced to district court and filed an action against SR *only*. JA0001. Then, in its papers opposing SR's motion to compel arbitration, Peek Bros. led its introduction with:

> 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.

JA0279. So claims Peek Bros. at the dawn of the case with no discovery and no established facts. SR respectfully asserts otherwise and looks forward to meeting

Peek Bros. and UHS in arbitration to develop the facts and determine the source of the "misguided mistakes" made on the Project.

The idiom "too clever by half" comes to mind regarding Peek Bros.' strategy. The omission of UHS in its opening pleading does not unwrite the requirements in the GMP Contract and it does not fabricate a dispute that does not involve issues of fact and law that must be arbitrated under the GMP Contract.

This Court frowns upon attempts to erase contractual obligations through artful pleading. *Tuxedo Int'l Inc. v. Rosenberg*, 127 Nev. 11, 15, 251 P.3d 690, 693 (2011) ("forum selection clauses should not be rendered meaningless by allowing parties to disingenuously back out of their contractual obligations through attempts at artful pleading"). By thinking it can sidestep arbitration and recharacterize the dispute simply by leaving UHS out of its complaint, Peek Bros.' attempt at artful pleading resembles a broken Jackson Pollock painting. Ignoring UHS does not nullify the reimbursement requirements of the GMP Contract, nor does it erase the fact SR named Peek Bros. *and* UHS in the AAA proceeding now on hold.

In the unthinkable event this Court affirms the District Court's order denying arbitration, the following scenario assuredly will ensue:

- SR will answer Peek Bros.' complaint and it will assert a third-party action against UHS and demand a jury trial.

- UHS will move for an order compelling arbitration. The District Court will then have to decide whether to deny the motion, which will lead to an appeal by UHS that UHS will win, or grant the motion, and send UHS and SR off to arbitrate the legitimacy of the same disputed change order.
- After discovery and depositions allowed by the AAA arbitrator, and an arbitration proceeding, he or she will decide the legitimacy of the change order.
- After discovery and depositions allowed by the District Court, and a jury trial, the District Court will determine the legitimacy of the change order.
- Peek Bros. will not be bound to the AAA's decision.
- UHS will not be bound to the District Court's decision.
- Reams of appeals will ensue.

If the parties are lucky, the case will be over before 2030. Paraphrasing Laurel's lament to Hardy: "Here's another nice mess you've gotten us into."

In the hopeful event this Court reverses the District Court in this appeal, the following scenario will ensue:

- Peek Bros. and UHS will respond to SR's arbitration demand and an arbitrator will be selected.

- After a single round of discovery and depositions, SR, Peek Bros. and UHS will convene for an arbitration proceeding and the arbitrator will render a decision binding upon all parties.

The case will be over around the end of 2022.

C. The GMP Contract Unambiguously Requires UHS to Reimburse SR for All Amounts SR Must Pay to Peek Bros. for the Proper Performance of Its Work.

As explained in the Standard of Review section IV *supra*, the heart of this appeal and the focus of this Court's analysis lies in the interpretation of the GMP Contract. The construction of the GMP Contract answers the key question of whether the dispute between the SR and Peek Bros. involves issues of fact or law which SR must arbitrate under the terms of the GMP Contract. If the terms of the GMP Contract arguably require UHS to bear financial responsibility for the change order sought by Peek Bros., then this Court *must* conclude that the dispute involves issues of fact or law that must be arbitrated.

This Court should interpret the GMP Contract with great confidence that its terms are unambiguous and well-understood in the construction industry. The GMP Contract is a standard AIA cost-plus-fee agreement with a guaranteed maximum price. JA0036. Black's Law Dictionary defines a cost-plus contract as:

> One which fixes the amount to be paid the contractor on a basis, generally, of the cost of the material and labor, plus an agreed

> percentage thereof as profits. Such contracts are used when costs of production or construction are unknown or difficult to ascertain in advance.

Black's Law Dictionary 346 (6th ed. 1990); *see also Green v. Henderson*, 66 Nev. 314, 315, 208 P.2d 1058, 1058 (1949) (differentiating between a cost-plus contract and a lump sum contract). The American Institute of Architects (AIA) is a professional organization founded in 1857, which consists of over 94,000 members, and has been publishing standard form contracts for use within the construction industry since 1888. *Gables Constr., Inc. v. Red Coats, Inc.*, 468 Md. 632, 637, 228 A.3d 736, 739 n.1 (Md. App. 2019). AIA contracts span all fifty states and have been tested and examined in courts across the United States.

When the terms of a contract are clear and unambiguous, the duty of the court is to apply the language as written to the facts of the case and decide the case accordingly. *King Res., Inc. v. Oliver*, 313 Mont. 17, 23, 59 P.3d 1172, 1177 (2002). In the absence of ambiguity or other factual complexities, contract interpretation presents a question of law for *de novo* review before this Court. *Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 309, 310 P.3d 364, 366 (2013). Modern courts consult trade usage and custom not only to determine the meaning of an ambiguous provision, by also to determine whether a contract provision is ambiguous in the first place. *Id.* at 309, 310 P.3d at 367. This is because contact interpretation strives to discern and give effect to the parties' intended meaning and word in a contract derive

meaning from usage and context. *Id.* The fact the GMP Contract is a standard AIA contract customarily used in the construction industry gives this Court a step up in determining whether any of the operative provisions are ambiguous.

We begin the analysis with § 5.1 of the GMP Contract:

> For the Construction Manager's [SR's] performance of the Work as described in Section 2.3, the Owner [UHS] shall pay the Construction Manager the Contract Sum in current funds. The Contract Sum is the Cost of Work as defined in Section 6.1.1 plus the Construction Manager's Fee.

JA0045. There is nothing ambiguous, illegal, or uncertain about this standard AIA provision. UHS agrees to pay SR for the "Cost of Work" on the Project plus SR's fee.

The term "Cost of Work" is defined in § 6.1.1:

> The term Cost of the Work shall mean costs necessarily incurred by the Construction Manager in the proper performance of the Work. Such costs shall be at rates not higher than the standard paid at the place of the Project except with the prior consent of the Owner. The Cost of the Work shall include only the items set forth in Sections 6.1 through 6.7.

JA0046. There is nothing ambiguous in this section either, but it is important to note that "Cost of Work" is qualified as costs "necessarily" incurred in the proper performance of the Work. This qualification indicates that UHS has the right to challenge costs submitted by SR that are not "necessarily" incurred in the proper performance of the Work.

§ 6.3 identifies the following reimbursable Cost of Work:

> Payments made by the Construction Manager to Subcontractors [e.g. Peek Bros.] in accordance with the requirements of the subcontracts.

JA0047. Nothing ambiguous here. But again, only payments made by SR to Peek Bros. "in accordance with the requirements of the subcontract" are reimbursable by UHS to SR.

Finally, 5.2.1 of the GMP Contract caps the total amount UHS must pay SR for the Cost of Work:

> The Construction Manager guarantees that the Contract Sum shall not exceed the Guaranteed Maximum Price set forth in the Guaranteed Maximum Price Amendment, as it is amended from time to time. To the extent the Cost of Work exceeds the Guaranteed Maximum Price, the Construction Manager shall bear such costs in excess of the Guaranteed Maximum Price without reimbursement or additional compensation from the Owner.

JA0046. This provision is important because it draws the line where UHS's obligation to pay for the Cost of Work stops and where SR's obligation starts. If the GMP is exceeded for reasons unrelated to the disputed change order with Peek Bros., then SR must bear the cost of payments owed to Peek Bros. in accordance with the requirements of the subcontract. In such an event, it could be fairly argued that the dispute between the SR and Peek Bros. would *not* involve issues of fact or law that SR must arbitrate under the terms of the GMP Contract. This is because UHS would have no "skin" in the dispute.

The premise of the dispute between SR and Peek Bros. is straightforward. Peek Bros. asserts it is entitled to a change order. SR contends the change order

lacks merit. In other words, SR and UHS contend the change order sought by Peek Bros. is not a cost "necessarily incurred. . . in the proper performance of the Work." JA0046. Further, payment of the requested change order would not be in accordance with the requirements of the MSA and Work Order. JA0047.

SR accepted a relationship of trust and confidence between itself and UHS in § 3.1.1 of the General Conditions of the GMP Contract:

> The Contractor accepts the relationship of trust and confidence established between the Contractor and the Owner by the Agreement and the Conditions of the Contract. The Contractor covenants with the Owner to furnish its best skill and judgment and to cooperate in furthering the interests of the Owner, to furnish efficient business administration and superintendence, to use its best effort to furnish at all times an adequate supply of skilled workers and materials, and to perform the Work in the best way and in the most expeditious and economical manner consistent with the interests and expectations of the Owner.

JA0081. What this provision means is that when SR receives a change order request from one of its subcontractors that lacks merit, it cannot simply pass it on to UHS for payment, but instead must bring the issue to UHS's attention.

This is precisely how SR handled the meritless change order sought by Peek Bros. SR brought it to UHS's attention, UHS reviewed the change order, concurred with SR's assessment, and then directed SR in writing to reject it and initiate dispute resolution pursuant to the GMP Agreement. JA0263. The resolution should have been simple and straightforward.

SR complied with UHS's directive. It initiated arbitration with AAA per the GMP Contract and named Peek Bros. *and UHS* as respondents. JA0265-67. UHS is indispensable as a party to the arbitration proceeding even when SR and UHS are wholly aligned on the illegitimacy of Peek Bros.' change order. In the event an arbitrator determines the change order has merit and was "necessarily incurred by the Construction Manager in the proper performance of the Work," then SR must have a mechanism to compel UHS to reimburse the cost of the change order to SR. JA0046. For this reason, the dispute between the SR and Peek Bros. involves issues of fact or law which SR must arbitrate under the terms of the GMP Contract.

VI. CONCLUSION

This Court should reverse the District Court's order denying SR's motion to compel arbitration with instructions to grant SR's motion. The GMP Contract contains unambiguous language that requires UHS to pay for the change order if it is deemed a cost necessarily incurred by SR in the proper performance of its work. As such, the dispute raises issues of law and fact that must be arbitrated under the GMP Contract. Peek Bros.' attempt at gymnastics with its pleadings does not alter the terms of the contracts. SR looks forward to a reasoned and supported *de novo* decision from this Court, a Court that has favors and liberally enforces contractual

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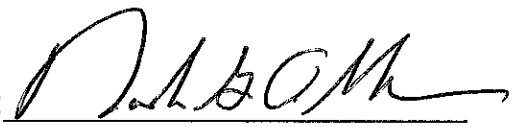
arbitration requirements.

Dated this 11th day of August, 2021.

By: 

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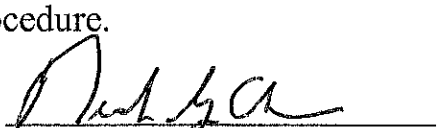
CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman Type Style.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, using the computation guidelines in NRAP 32(a)(7)(C), it contains 5,813 words.

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

Dated: August 11, 2021



Noah G. Allison

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 OPENING BRIEF** 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 11th of August, 2021.

An employee of The Allison Law Firm Chtd.